APPLICATION FOR CANDIDATE FOR SUPREME COURT JUSTICE

Date of application: October 7, 2025

Position applied for: Associate Justice of the Vermont Supreme Court

GENERAL

1. Name: Christina E. Nolan

2. Mailing address: [redacted]

   Business address: Sheehey Furlong & Behm P.C.

   Email address: [redacted]

3. Date of birth (required): [redacted]

4a. Are you a Vermont resident (see 4 V.S.A. § 602(c)(1))? ☑ Yes ☐ No

4b. Town of primary residence: Burlington

5. Telephone nos. Home: [redacted] Business: [redacted] Cell: [redacted]

6a. Years practicing law (minimum 10 years, per 4 V.S.A. § 602(c)(1)): 21
Years practicing law in Vermont (minimum 5 years, per 4 V.S.A. § 602(c)(1)): 15

6b. Have you practiced law, or held judicial office, in Vermont for at least five years immediately preceding this application (see 4 V.S.A. § 602(c)(1))? ☑ Yes ☐ No

6c. If the answer to b. above is NO, are you seeking an exception to the five-year requirement in 4 V.S.A. § 602(c)(1)? If so, please explain the basis for seeking this exception. Note: The Board may make exceptions to the five-year requirement for absences from practice for reasons including family, military, academic, or medical leave.

EDUCATION

7. List colleges and law schools, dates attended, and degrees or credits received:

Boston College Law School (2001-2004), Juris Doctor
University of Vermont (1997-2001), Bachelor of Arts

8. Academic honors at the college or law school level, if any:

Boston College Law School: Magna cum laude; Order of the Coif; Boston College Law Review member
University of Vermont: Summa cum laude; Departmental Honors; Outstanding Political Science and History Major; Dean's List; Academic Excellence Scholarship; Scholar Athlete Award

9. If you clerked for admission to the bar instead of attending law school, please state the dates and for whom you clerked.

PROFESSIONAL ADMISSIONS

10a. List all courts (including state bar admissions) and administrative bodies having special admission requirements in which you are presently admitted or have previously been admitted to practice, giving the date of admission in each case.

Massachusetts 2004
Vermont 2017
United States District Court, District of Vermont, 2010
United States Court of Appeals, Second Circuit, 2010

10b. Has your license to practice in any jurisdiction been suspended, revoked, or limited at any time. If so, please provide the date(s) and circumstances that led to such action.

No.

EMPLOYMENT HISTORY

11. Please list below, or include an attached resume or curriculum vitae that lists all legal jobs you have held since being admitted to the bar, including name and location of the employing or contracting entity(ies), dates of employment, and title(s).

Please see attached resume.

12. Please list below, or include an attached resume or curriculum vitae that lists the name and location of employing or contracting entity(ies), dates of employment, and title(s) held for any other full-time employment since graduation.

Please see attached resume.

LEGAL EMPLOYMENT AND EXPERIENCE

13. Please describe your professional experience in each of the following legal arenas: family, civil, criminal, probate, juvenile, municipal, environmental or other. Include a description of any legal specialties you possess.

Since graduating law school in 2004, my practice has covered a mix of civil and criminal litigation. Since 2021, I have served as a partner in the Litigation Department at Sheehey Furlong & Behm in Burlington. Before that, I served as United States Attorney for the District of Vermont from 2017 to 2021, with the unanimous consent of the United States Senate for my nomination, and following the recommendation of Senator Patrick Leahy and Governor Phil Scott that the President appoint me to the position. As U.S. Attorney, I supervised the Office's Criminal and Civil Divisions, including the latter's affirmative and defensive civil cases, its civil rights work, and its community outreach. My legal experience since graduating law school is described in detail in my attached resume.

On the civil side, as U.S. Attorney, I actively managed the Office's civil docket, including its defense of lawsuits against the United States; its affirmative civil investigations and actions handled by its Affirmative Civil Enforcement Unit (ACE); and its bankruptcy and debt collection matters handled by its Financial Litigation Unit (FLU). During my tenure, ACE regularly made national news for its series of pathbreaking investigations and cases against electronic health records companies under the federal false claims and antikickback statutes, resulting in multi-million dollar settlements. I was proud to announce the first-of-its-kind criminal and civil settlements against Purdue Pharma for its violation of the antikickback statute arising from its deceptive marketing of oxycodone via electronic health records prompts to doctors. I received daily briefings and made daily decisions regarding regarding the full range of matters handled by the U.S. Attorney's Office. As a practitioner, I have handled a wide array of large-scale internal investigations for organizational clients, including banks and hospitals, and a variety of complex civil litigation on behalf of plaintiffs and defendants in federal court and Vermont Superior Court. My civil practice has run the gamut of subject matter disputes, from internal investigations, to commercial litigation, to healthcare litigation, to employment litigation, to complaints and defense under the state and federal false claims acts, to trusts and estates litigation, to professional regulatory work, to administrative proceedings, to family court issues involving relief from abuse, anti-stalking and CHINS litigation. This work across civil practice areas has spanned across my career, from my time at the large market corporate firm, Goodwin, in Boston, to my present role as a partner at Sheehey Furlong & Behm in Burlington, which I have held since 2021. As a Sheehey partner, I've appeared regularly in the Civil, Family, and Probate Divisions of the Superior Court, including in certain juvenile proceedings. As a litigator at Goodwin, my practice included environmental and regulatory litigation.

On the criminal side, as a partner at Sheehey, I work as a criminal defense attorney, regularly appearing in Vermont Superior Court Criminal Division and in federal court. In addition to retained work, I serve on the federal Criminal Justice Act panel, and regularly take federal court-appointed defense work through that assignment. Earlier in my career, while employed as a litigation associate at Goodwin in Boston, I handled federal criminal defense work, including playing a key role in the defense of a high level pharmaceutical executive charged with securities fraud. At Goodwin, I also devoted significant time to pro bono post-conviction litigation work I sought out through the firm's partnership with The Innocence Project. I have spent a total of twelve years serving as a prosecutor at the state and federal levels. From 2017-2021, I served as U.S. Attorney for Vermont, and personally handled several criminal cases, alongside my substantial and varied administrative responsibilities as head of Vermont law enforcement. Highlights of my work in that role are set forth in my resume. Before that, from 2010-2017, I served as a line Assistant United States Attorney in the Criminal Division of the Vermont U.S. Attorney's Office. In that role, I prosecuted the spectrum of federal crimes and spearheaded criminal investigations in areas such as child exploitation, human trafficking, gun and violent crime, large scale drug trafficking, money laundering, fraud and financial crime, and more. Earlier, I twice served as an Assistant District Attorney in the Middlesex County District Attorney's Office, assigned to Lowell, Massachusetts. I first served for six months as an extern "special" ADA employed by Goodwin and assigned to the DA's Office, and later left the firm to work as a full time ADA on a pro bono basis. I worked without compensation because, at the time, the DA's Office lacked sufficient funds to pay new hires, though I understood when I was hired that those funds would be forthcoming. I served in that unpaid role until I accepted an offer to work as a prosecutor at the U.S. Attorney's Office in Vermont in 2010. See Attached Pages.

14. During the past ten years (or if you are a judge, before you became a judge) what percentage of your work experience involved litigation, including motions, hearings, appellate arguments, administrative hearings, trials, and other contested hearings? Please briefly describe the role you played.

During my time as a practicing attorney over the last ten years, and setting aside my significant additional leadership, administrative, and public policy responsibilities as U.S. Attorney, virtually all of my time as a practicing attorney has been as a litigator. My practice has regularly involved all phases of litigation, including investigation and pre-suit negotiation, motion and evidentiary hearings, jury trials, sentencings, and appeals. I have also handled a variety of administrative and regulatory proceedings and hearings in the state regulatory and Title IX contexts, among others. As a prosecutor, I appeared in court on an almost daily basis for all types of contested hearings in criminal cases, such as arraignments, bail and pre-trial evidentiary hearings, trials, sentencing hearings, and violations of probation and supervised release proceedings. I have mirror image experience as a defense attorney in Vermont Superior Court and in federal Court, including through my court appointed federal criminal defense work. As an Assistant U.S. Attorney, I handled all aspects of appeals before the U.S. Court of Appeals for the Second Circuit, including brief drafting and oral argument. As a partner at Sheehey, I've handled countless contested hearings in Family, Probate, and Civil Divisions and am serving as a settlement and discovery master in one case. My responsibilities as U.S. Attorney included not only handling individual cases, but programmatic, administrative, and public policy work, as set forth in detail in my resume.

15. During the past ten years what percentage of your work experience has involved each of the following:

a. family matters 20 %
b. juvenile matters 10 %
c. civil matters 50 %
d. criminal matters 50 %
e. probate 10 %
f. administrative 15 %
g. municipal N/A %
h. environmental N/A %
i. other 20 %

16. Please estimate how many evidentiary hearings, including trials, you have participated in as a lawyer or a judge and briefly describe your role(s).

I have served as lead counsel for plaintiffs, civil and criminal defendants, and as a prosecutor in countless cases over the last 21 years as a practicing attorney. During many of those years, I was in court on a daily, or near daily, basis. I have handled at least hundreds of evidentiary hearings and trials. I have tried at least a dozen cases to conclusion before a jury. I have also had dozens of bench trials. I have handled numerous appeals as lead counsel. I have represented clients in contested hearings in family court, including juvenile matters; probate matters; and in administrative and regulatory settings, among other contexts.

17. Estimate the percentage of your total court time spent in each of the above courts over the last ten years.

a.	criminal	65 %
b.	family	20 %
c.	civil	35 %
d.	probate	10 %
e.	federal trial	63 %
f.	federal appellate	2 %
g.	Vermont Supreme Court	%
h.	administrative body	5 %
i.	environmental court	%
j.	other court	%

18. Please describe your professional experience in each of the following areas:

a. academics, including teaching, presentations, seminars

As U.S. Attorney and as a partner at Sheehey, I have given presentations, keynote speeches, and/or played a featured role at the following events: Women in Leadership event at Flynn Center, Burlington; U.S. Attorney's Office (USAO) Law Enforcement Award Ceremonies; Vermont Peace Officer's Memorial Ceremonies; Advanced Narcotics Course, National Advocacy Center; Vermont Crime Victim's Rights Week; Vermont Bar Association CLE courses on Civil Practice and Human Trafficking; Governor's Conference on School Safety; Vermont Convention on Elder Financial Crime; USAO International Law Enforcement Conferences; See Attached Pages.

b. management, including business, law firm, human relations, or other

As U.S Attorney, I coordinated and led a variety of criminal justice and public policy initiatives in collaboration with partners across the spectrum, including politicians, judges, treatment and recovery providers, community stakeholders, educators, and law enforcement partners. Examples are set forth in my attached resume. I served as Vermont's top law enforcement official, managed an office of at least 56 people in all aspects of daily operations and strategic planning, and oversaw a budget of $7 million. I also served as the office's spokesperson and regularly interacted with national and local media. Having held the role during the pandemic and other periods of unrest and uncertainty, I have substantial experience in managing and leading through crisis. See Attached Pages.

c. mediation, arbitration, or other dispute resolution

Over the last two years, I have served as Special Settlement and Discovery Master in the federal antitrust case Blue Cross and Blue Shield of Vermont et al v. Teva Pharmaceutical Industries, Ltd. et al. 5:22-cv-00159-gwc. My duties have included conducting formal and informal mediations and negotiations; attending hearings and in-depth research regarding parties' positions and relevant law; informally advising and updating Judge Crawford; serving as informal procedural and logistical liaison between the parties and the bench. I also issue discovery motions recommendations to the Court.

I have participated in numerous mediations on behalf of clients covering a range of subject matters as a private practitioner. The negotiation of plea and settlement agreements has been a centerpiece of my practice for 21 years.

d. writing, including articles, journals, books, etc.

Coauthor of "Navigating Parallel Proceedings," NEW YORK LAW JOURNAL (July 2006).

Since graduating law school, a great deal of my practice has been devoted to legal writing at the trial and appellate court levels.

19. If not otherwise described above, please describe why you have sufficient trial or other comparable experience that ensures knowledge of the Vermont Rules of Evidence and courtroom procedure.

JUDICIAL EXPERIENCE

20. Have you ever held judicial office? If so, please state your position, the name of the court(s) and dates of your service.

20a. For current judges: Have you ever sat as an Acting Supreme Court Justice? If so, how many times? Please include citations to any and all written opinions you authored as an Acting Supreme Court Justice.

21. Have you ever served as an Acting Judge or Acting Magistrate in the Vermont court system? If so, please state the courts to which you have been assigned, approximate dates and the approximate number of assignments.

22. Have you ever served as an arbitrator, hearing officer, administrative law judge, or other administrative decision maker? If so, please describe the service and the approximate number of assignments.

About two years ago, Judge Geoffrey Crawford appointed me to serve as Special Settlement Master in the federal antitrust case, Blue Cross and Blue Shield of Vermont et al v. Teva Pharmaceutical Industries, Ltd. et al. 5:22-cv-00159-gwc. Judge Crawford subsequently also made me Special Discovery Master in that case. My duties have included conducting formal and informal mediations and negotiations; attending hearings and in-depth research regarding parties' positions and relevant law; informally advising and updating Judge Crawford; serving as informal procedural and logistical liaison between the parties and the bench. I also issue recommendations on disputed discovery motions.

23. Please state any quasi-judicial boards or commissions on which you have served, including the name(s) of the agency(ies) for which you served, the position(s) held, the issues under your jurisdiction, and the dates of such service.

24. Calculating all of your judicial or quasi-judicial experience, approximately how many times have you:
    a. prepared a written decision on a contested matter _____
    b. issued an oral decision on a contested matter _____
    c. handled motions or other contested proceedings _____
    d. conducted an evidentiary hearing or proceeding _____

PUBLICATIONS

25. If you have published any books or articles not identified in response to previous questions, please list them, giving titles, citations, and dates.

PROFESSIONAL, CIVIL AND PUBLIC SERVICE

26. If you have experience as a member of any administrative, legislative, judicial, or regulatory boards, commissions, study committees, or agencies, or any private, corporate or non-profit boards, please list them, giving names and dates served.

Non-profit boards: Jenna's Promise, Johnson, VT (2024-Present); Mater Christi School, Burlington, VT (2024-Present).

Members of the following additional Commissions, Committees, and Councils over the years: United States Magistrate Judge Merit Selection Panel (2020); United States District Court Advisory Committee (November 2017-Present); Governor’s Substance Misuse Prevention Council (2019-2021); Governor's Emergency Preparedness Advisory Council (2017-2021); Vermont Commission On The Well-Being In The Legal Profession (Appointed in January 2018 by the Vermont Supreme Court and charged with preparing action plan to promote healthy and sustainable work habits and work-life balance in Vermont’s legal community).

27. If you have served as an appointed or elected official in any local, county, state, or federal government position, please provide details and dates.

United States Attorney, District of Vermont, 2017-2021

28. Please list all Bar associations and professional societies of which you are a member, give the titles and dates of any office which you may have held in such groups, and identify committees in which you were active.

Member, National Association of Former United States Attorneys
Member, Vermont Bar Association

29. List any honors, prizes or awards you have received, including the name of the award, the organization granting it, and the date of the award.

Rice Memorial High School, Athletic Hall of Fame (2007)
New England Narcotic Enforcement Officers' Association, Outstanding Contribution (2014, 2016)
See also my answer to question 8.

30. Please list all other non-profit, community service, or other organizations, of which you have been a board member during the past ten years, including the titles and dates of any offices which you have held in each such organization, and/or any other significant volunteer experience.

Board Member, Board of Director's, Jenna's Promise, a non-profit recovery treatment center, Johnson, VT (2024-present)
Board Member, Board of Director's, Mater Christi School, Burlington, VT (2024-present)
Judge, Boys and Girls Club of Vermont's 2021 Youth of the Year Announcement and Celebration

POTENTIAL CONFLICTS

31. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service to the Court? If so, please explain.

No.

32. Do you have any personal or professional relationship(s) which might present conflicts of interest in the position you are seeking? If so, please explain.

No.

33. Identify the categories of litigation and financial arrangements that are most likely to present potential conflicts of interest if you are appointed to the position for which you are applying. Include any deferred income arrangements, stock options, uncompleted contracts, and other future benefits which you expect to derive from current or prior professional relationships.

None.

34. Explain how you will resolve any potential conflict of interest including those identified in questions 32 and 33 above.

I am unaware of any. If a conflict were to arise, I would resolve it with an eye toward avoidance not only of actual impropriety, which goes without saying, but of the appearance of impropriety. I would eschew even the appearance of conflict of interest or bias and always err on the side of upholding and preserving the integrity of the Vermont judiciary. I would consult the ethical rules and, as appropriate, with my colleagues on the Vermont Supreme Court and with Vermont Bar Counsel and the resources of his office.

MISCELLANEOUS

35. Have you ever been convicted by federal, state or other law enforcement authorities for a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, please give details. Do not include traffic violations, unless it also included a jail sentence. Do not include expunged or sealed convictions. *Please be advised that the Judicial Nominating Board conducts a criminal background check on every applicant.*

    No. See attached Additional Disclosure.

36. Have you ever had a civil judgment against you? If so, please provide details about the case and its disposition. Please also state whether you have ever defaulted on a judgment and under what circumstances.

    No.

37. Have you or your professional liability insurance carrier ever settled a claim against you for professional malpractice? If so, please give particulars, including the amounts paid.

    No.

38. Have you ever been disciplined for a breach of ethics or unprofessional conduct by any court, administrative agency, bar association, professional group, Judicial Conduct Board, or Professional Conduct or Responsibility Board in any jurisdiction? If so, please provide details.

No.

39. Are all your taxes paid? (federal, state and local) current (i.e., filed and paid) as of the date of this application? If not, are you on an approved payment plan?

Yes.

40. Has a tax lien or other collection procedure (including receipt of balance due notices) ever been instituted against you by any federal, state, or local tax authority? If so, please explain and describe the outcome.

No.

41. Have you ever been the subject of any audit or investigation for federal, state or local taxes? If so, give full details.

No.

42. Have you ever declared bankruptcy? If so, give details.

No.

JUDICIAL OFFICE QUESTIONS

43. Why do you want to hold the judicial position for which you are applying?

The position of Associate Justice represents an extraordinary opportunity to continue in my calling to public service and service to Vermonters. A born and raised Vermonter, who grew up on a dirt road in Westford the oldest of four children of a stay at home mother-turned-music teacher and carpenter father, I know what a privilege it is to be a Vermonter and to reside in our beautiful state. As a child I was always drawn to civic life; Marselus Parsons and the WCAX 6 PM local news broadcast were a regular feature in my household, and for better or worse, I was watching at a very young age. I remember the Vermont Supreme Court featured and I learned at a formative time its critical role as a bulwark of rights and arbiter of the most pressing questions facing Vermonters. Growing up, I viewed Vermont Supreme Court Justices as guardians of liberty, and of the singularly special Vermont way of life. It would the highest honor and privilege to join in that mission at this stage of my career.

Having left Vermont for a brief time to pursue a law degree and an early legal career in Boston, it was with great excitement and a sense of purpose to make a real difference for my home state that I returned to Vermont to continue down the path of public service as a prosecutor that I had begun as an Assistant District Attorney in Middlesex County, Massachusetts. I have spent most of my legal career practicing here, with deep experience as a prosecutor, defense attorney, and civil litigant. Now at age 45, I believe I could draw from my extensive experience promoting justice in the courtroom and working with clients from all backgrounds to be an effective and steady hand for the Court for many years into the future. Simply put, this is an incomparable opportunity to continue my life's calling to public service: a chance to step into the shoes of an esteemed Justice to take his place in ensuring that the rule of law and essential freedoms are upheld and preserved in Vermont and for Vermonters for generations to come. If selected, I would approach the job every day with the gravity of the opportunity in mind, and with the energy, passion, integrity, and humility that it so demands.

The job also centers around legal writing and analysis, one of my favorite aspects of the profession of law, and an aspect of my career I have especially enjoyed. In academia, my favorite courses always involved the Supreme Court and constitutional law, and I gave serious thought to becoming an academic before I got bitten by the courtroom and public service bugs. The academic side of my practice is one I have paid special attention to improving, honing, and refining over the course of my career, and I would welcome the opportunity to have legal writing become more of a centerpiece of my legal work, as it was during my law clerkship and during my time as a line Assistant U.S. Attorney, where I had a healthy docket of trial and appellate briefing and oral argument. My passion for legal writing derives, at least in large part, from my interest in effective communication, and I believe effective communication is accessible communication that can be understood by all Vermonters. The words we use now have never mattered more and I believe that, if I were so fortunate as to be appointed, I would be a Justice that can communicate decisions -- which are inevitably elating to some and disappointing to others -- in an accessible, clear, and thoughtful matter. Relatedly, I would be eager to assist in building internal consensus among Justices, particularly for the Court's weightiest decisions, because messages conveyed with unity are often the most effective and well received. I believe my depth of experience in both verbal and written communication and in regularly convening stakeholders around common objectives, especially during my tenure as U.S. Attorney, will serve the Court's interests in effective communication, consensus building, and careful balancing of competing interests.

44. Please describe a legal case or experience that has a special significance in shaping you as a lawyer or as a judge, as a person, or both, and explain why.

While serving as an Assistant U.S. Attorney, I prosecuted a young Vermont man named Justin Goulet for federal drug and firearm trafficking crimes he committed arising from his very serious addiction to opioids. Mr. Goulet, who had no prior criminal record, immediately pled guilty and accepted responsibility for his crimes. He even spent time in jail due to violations of release conditions committed during his battle to reclaim the sobriety he lost when he became addicted to prescribed oxycodone following a sports injury. I had occasions to meet Mr. Goulet during the course of his case and to come to know the incredible man he is sober. He won the battle for his sobriety and his freedom. He is married with a young son he treasures and he has six years of sobriety. He and I are close friends to this day. When I was U.S. Attorney, which was after Mr. Goulet's conviction and sentencing, he and I collaborated to make a short movie, Face of Recovery, about his life and recovery from addiction. See https://www.youtube.com/watch?v=mcOlsAGAbuQ&feature=youtu.be. See Attached Pages.

45. Please describe a personal experience that you believe will influence your ability to serve as a successful justice and explain why?

I am a gay woman and the most important thing in my life is my family. Nothing in my life makes me prouder than my . twenty-year relationship with my partner Jill and my contributions to helping to raise my two stepchildren, who I consider my own children. It has not always been easy to be openly gay, even here in Vermont. I grew up before civil unions. The headwinds have been sometimes subtle, but always strong, throughout life. I think the experience growing up and living as someone who has felt different, and living as a minority, has helped to give me some insight as a lawyer and as a person into the perspectives and needs of those most vulnerable among us, and particularly those vulnerable to discrimination. I hope and believe this aspect of my background will help me to better understand the perspectives of litigants of diverse background. The experience of living as LGBTQ is part of the reason I feel I have had the courage my whole life to stand up for what I believe is right; I believe that core inner strength will ensure my resolve as an Associate Justice to support and defend the Constitution, the rule of law, and the integrity of our judiciary.

46. Please describe your experiences working with diverse populations.

As explained above, I have lived my whole life as a minority, and hope that aspect of my background will enrich the bench and bring new and important insights into the myriad and profound issues it faces. My work as a prosecutor and as a defense attorney have brought me into contact with many individuals from diverse backgrounds. As a defense attorney practicing in state and federal courts, I regularly represent BIPOC clients who come from all socioeconomic backgrounds. My work regularly involves representation of individuals with substance use disorder and other mental health challenges. My earliest experience working with diverse populations as a defense attorney was at Goodwin, where as a young associate, I was assigned to be principal counsel and point of contact to a young African American male client who had been convicted in Boston of first degree murder and was seeking habeas relief. I developed an excellent rapport with him, grew to know him well, and talked to him at least once a week. See Attached Pages.

47. What do you see as the primary issues facing the judiciary today? What would you propose to address or resolve the issues you've identified?

I see the primary issue facing the judiciary as the need to preserve and defend judicial independence from the threats of overreach of political branches and political partisans and ideologues. It is by design and for salutary reason that judges do not arrive to the Vermont judiciary after a grueling political campaign and with a "D" or an "R" next to their names. In the same vein, a judge must be impervious to the pressures of their counterpart arms of government, or risk an erosion of the separation of powers and with it the rule of law and our core freedoms. Judges take an oath to the Constitution, not to a political agenda, and the foundational obligation of the judiciary is to fiercely preserve its own independence from the whims and winds of political agendas and political leaders. I would address this existential challenge first and foremost through leading by example and setting a tone of independence and unassailable integrity from the top down. If institutional challenges to independence arise, I would help lead any response with unwavering resolve; of course, I would also reach decisions in each case solely on the law and the facts and deliberations with other Justices, without regard to impermissible considerations or political cross currents. See Attached Pages.

48. Please describe any administrative and managerial experience that would make you a successful Supreme Court justice.

I have gained extensive managerial and administrative experience through my role as U.S. Attorney and through my current work as a partner at Sheehey. Over my career, I have demonstrated an ability to convene stakeholders from diverse backgrounds and perspectives around common goals and initiatives and to achieve success through collaboration. As U.S. Attorney, I managed a staff of at least 56 people and a budget of $7 million. I made administrative decisions every day, ranging from smaller decisions such as purchasing office equipment, to major decisions about hiring and disciplinary action and staffing of key leadership roles in the office. I navigated the shoals of the COVID pandemic for the U.S. Attorney's Office and for law enforcement throughout the state, making fast-paced crisis management decisions and setting pandemic policy from scratch. My decisions on pandemic strategy and logistics set the tone for counterpart agency responses throughout Vermont. See Attached Pages.

49. Reflecting on your career to date, which individual has had the most profound impact on your work and why?

It is very difficult to select one individual, because I have been blessed with an abundance of mentors who have taught me indelible lessons and quite literally changed the course of my life for the better. These include so many role model members of the bar and state and federal benches here in Vermont. In terms of who has most impacted my work as a litigator, Judge Lynn Rooney of the Massachusetts Superior Court comes to mind. My first experiences in the courtroom were as an Assistant District Attorney, prosecuting cases before Judge Rooney. My first jury trial happened to be before her, and it did not go well for me, ending in a directed defense verdict. I and my colleagues in the District Attorney's Office had the highest respect for Judge Rooney, who had a reputation as a tough and skillful prosecutor in that Office before becoming a Judge -- which only of course magnified the sting of the directed defense verdict. See Attached Pages.

50. What makes you well qualified to hold the position you are seeking?

I believe my qualifications could be grouped into three categories: authenticity of candidacy; skill set and depth of relevant experience; and leadership track record. First, I am a born and raised Vermonter with extended family residing here and deep ties to the state. My application arises from my desire to continue to serve the State, the Constitutions, and the people of Vermont. I left the State for a short time to obtain a law degree and start a career in "big law" criminal and civil litigation where the salary was excellent; to this day, the most I have ever earned. While I learned a lot at Goodwin, it lacked enough mission oriented work and it was not for me in the long run. I left Goodwin to gain courtroom experience as an uncompensated state prosecutor in Massachusetts for six months, before returning to Vermont to become a federal prosecutor and work in public service here in Vermont for the next decade-plus, culminating in my tenure as U.S. Attorney. Having returned from that post to criminal defense and civil litigation work at a big Vermont firm, the Justice position would represent the capstone to a life's calling in public service and service to Vermonters. It would be my privilege and honor, and a personal fulfillment of the highest order, to be able to finish my legal career in service to the Vermonters of today and of generations to come. Second, in my twenty-plus years as a litigator and in the trial and appellate courtrooms, I developed strong skill sets in legal writing and analysis and in advocacy from all perspectives in the courtroom. I believe this prepares me to be a well-rounded, thoughtful, and fair Justice. I have gained experience with people of diverse color, religion, sexual orientation, gender identity, and socioeconomic background as a prosecutor and as a defense attorney, including in court-appointed criminal defense work and pro bono work. My extensive background before juries and in the courtroom will give me excellent insight into issues that arise on appeal. Moreover, as discussed above, it was fortunate that a judge entrusted me to serve as long-term mediator and discovery master in a complex civil antitrust case, giving me another opportunity to hone interpersonal skills and make recommendations to the judge regarding discovery orders on challenging issues. This has given me some window into the challenges of resolving complex and nuanced issues raised by highly capable lawyers. Third, my history of leadership and success leading organizations will make me an effective and collegial member of the highly respected team of Justices already leading the judiciary. I have extensive experience dealing with internal daily operations, personnel and Human Resources issues, and organizational finance and budget. Likewise, as U.S. Attorney, I handled media and public relations; community and stakeholder coalition building; and strategic planning. Having led law enforcement and the U.S. Attorney's Office through COVID and other turbulent times, I'm confident that I could be a steady hand and steely spine for the judiciary, come what may.

51. Please attach two representative writing samples appropriate for the position for which you are applying. One should be a maximum of 10 pages. The other can be up to 25 pages. Both should be largely your own work product.

52a. In the space below, please explain why you selected these writing samples.

1. The argument section of my brief in the Second Circuit Appeal, United States v. Van Mead. I selected this piece as an example of my appellate advocacy from the time frame of the middle of my career as an Assistant U.S. Attorney. The subject matter involved a complex legal issue of first impression. I have attached the Second Circuit's decision, a well reasoned order that ultimately did not go the government's way. The brief excerpt exemplifies my capabilities in legal research, writing, and analysis.
2. My sentencing memorandum in United States v. Alvarez. This is a pleading I recently wrote as a defense attorney for for a court-appointed client, a young, low-level drug offender with no prior criminal history, who witnessed a horrific double homicide. The brief demonstrates my sense of justice, humanity and empathy, all important qualities for a Justice, and my ability to connect with and understand those who come from diverse and underprivileged backgrounds. I have also included the memorandum to show my ability to be fair and open in evaluating every case. Attached Pages.

53. List the names, addresses, e-mail addresses, and phone numbers of four references who know you professionally. Please include at least two professional adversaries. Please describe how each named reference knows you. *Please be advised that Judicial Nominating Board rules permit Board members to contact non-references for additional information about applicants.*

Reference 1

Gregory Waples, Esq. Attorney Waples served as a criminal Assistant U.S. Attorney in Vermont for 34 years. Of those 34 years, he was first appointed Senior Trial Counsel and then Chief of Appeals for 20 years. He recently retired and has been an adversary in several federal criminal cases. We were fellow prosecutors in the U.S. Attorney's Office Criminal Division for seven years until I was appointed U.S. Attorney and became his supervisor.
Contact information: [redacted].

Reference 2

Judge William K. Sessions III. Judge Sessions is a senior federal district court judge in Vermont. I have been appearing before him for 15 years. He has observed me the courtroom countless times, including when I first chaired jury trials as a prosecutor and in countless motions to suppress, contested sentencings, and other evidentiary hearings. As U.S. Attorney, I met with him regularly to discuss administrative matters relating to the courthouse and to solicit his feedback regarding the U.S. Attorney's Office. Contact information: Judge Sessions has asked that emails and phone calls be directed to his Judicial Assistant Elizabeth Evelti, [redacted].

Reference 3

Magistrate Judge Kevin J. Doyle. Judge Doyle has served as Vermont's United States Magistrate Judge since 2021. Before that, he served as First Assistant U.S. Attorney at the U.S. Attorney's Office and as a federal prosecutor in that Office. The First Assistant is the chief deputy in the U.S. Attorney's Office, and in that position Judge Doyle assisted me in all aspects of my role as U.S. Attorney, and observed my leadership, managerial, and administrative skills on a daily basis. My job as a defense attorney involves appearances before the Magistrate Judge. Attached Pages.

Reference 4

Eric Miller, Esq. Attorney Miller serves as General Counsel at UVM Medical Center. He is a former U.S. Attorney for Vermont, criminal defense attorney, and civil litigator. He and I were adversaries when I served as a federal prosecutor and he served as a federal criminal defense attorney. In that role, he became aware of my reputation within the defense bar. Attorney Miller has also supervised me and observed me in the courtroom, because his tenure as U.S. Attorney overlapped with my time as a line assistant in the Office.
Contact information: [redacted]

AFFIDAVIT

Christina E. Nolan, being first duly sworn, deposes and says that all of the information I have provided in this Application is true.

Christina E. Nolan
Signature of Candidate

STATE OF VERMONT COUNTY, SS

At Burlington, in said County, Chittenden personally appeared and subscribed and swore to the truth of the above before me this 7th day of October, 2025.

Donna Marie Sims
Notary Public Donna Marie Sims
My commission expires: 1/31/2027
Commission: 0007292

WAIVER

I hereby waive my right to privacy as it relates to the Judicial Nominating Board for any information I have provided herein, including the right of the Board to freely communicate with any names listed on my reference sheet with the understanding that any information will be held in confidence by the Board. I also understand and agree that if my name is forwarded to the Governor's office it will be accompanied by this full application.

Dated: 10/7/25

Christina E. Nolan
Signature of Candidate

CHRISTINA E. NOLAN

[redacted]

EXPERIENCE

SHEEHEY FURLONG & BEHM P.C., BURLINGTON, VT
Director and Shareholder, Litigation Department, April 2021-Present

- Member of firm's White Collar Defense and Government Enforcement Practice and its Internal Investigations Practice.
- Handle complex civil litigation, internal investigations, and serious felony criminal defense.
- Member of the Federal Criminal Justice Act panel

UNITED STATES ATTORNEY'S OFFICE, DISTRICT OF VERMONT, BURLINGTON, VT
United States Attorney, November 2017-2021

- Chief federal law enforcement officer, responsible for managing office of 56 people, and overseeing all federal criminal and civil matters in Vermont.
- Gained extensive experience in crisis management, statewide strategic planning, leading and crafting initiatives amongst law enforcement partners and community stakeholders, hiring decisions, and personnel management.
- Served on the Attorney General's Advisory Committee, as chair of its Controlled Substances Subcommittee, and on its Domestic Violence Working Group.
- Restructured office, secured three new AUSA positions and two new litigation support positions, and created new management positions, taking the organization through a period of historic growth and transformation.
- Served on the Governor's Opioid Coordination and Emergency Preparedness Advisory Councils.
- Testified before the U.S. Senate Judiciary Committee regarding proposed fentanyl legislation.
- Actively managed nationally recognized False Claims Act and Affirmative Civil Enforcement practice.
- Coordinated Attorney General's Initiative for U.S. Attorney's Offices nationwide to combat sexual harassment in housing during the COVID-19 pandemic.
- Implemented national Executive Order on Safe Policing at the request of the Attorney General.
- Other noteworthy initiatives included creating the *Face of Recovery* drug prevention documentary and conducting community/school screenings with film subject; establishing an annual Law Enforcement Awards Ceremony; establishing an annual International Law Enforcement Conference; strengthening partnerships with Canadian law enforcement; sponsoring the opening of a recovery house for women recovering from addiction or trauma in partnership with nonprofits, recovery service providers, and law enforcement stakeholders; and directing drug enforcement "surges" across the state.
- Delivered keynote speeches and panel presentations on a range of topics, including leadership; opioid enforcement, prevention, and treatment; domestic violence; human trafficking; elder justice; violent crime; school safety; the Federal Fair Housing Act; crime victims' rights; and international law enforcement collaboration.
- Managed cases of national note, including *United States v. Purdue Pharma, L.P.*; *United States v. Ariel Quiros, et. al.*; and *United States v. Brian Folks*.

Assistant United States Attorney, Criminal Division, Spring 2010-November 2017
Investigated and prosecuted federal crimes, including drug trafficking, child exploitation, money laundering, firearms offenses, and violent crime. First chaired jury trials, each resulting in conviction, and argued multiple times before the Second Circuit Court of Appeals. Served on the office's opioid prosecution group and as its Violent Crime Coordinator. Member of AUSA hiring committee.

DISTRICT ATTORNEY'S OFFICE, MIDDLESEX COUNTY, MA
Special Assistant District Attorney, Fall 2008-Spring 2009 and Fall 2009-Spring 2010
Served as Special ADA during 6-month externship through Goodwin Procter; returned as full-time, uncompensated ADA. Had responsibility for all stages of litigation, including trials.

GOODWIN PROCTER LLP, BOSTON, MA
Litigation Associate, Fall 2005-Fall 2009; Summer Associate, Summer 2003
Major practice areas were white collar criminal defense and government investigations. Practice covered criminal defense, complex civil litigation, internal investigations, defense of government enforcement actions, and *pro bono* work. Performed managerial role on criminal securities fraud case in New Jersey federal court. Member of Hiring Committee.

THE HONORABLE F. DENNIS SAYLOR, IV, UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS
Law Clerk, Fall 2004-Fall 2005

EDUCATION

BOSTON COLLEGE LAW SCHOOL, NEWTON, MA
Juris Doctor, May 2004, magna cum laude
Honors and Activities: *Boston College Law Review*, Senior Editor; Order of the Coif.

UNIVERSITY OF VERMONT, BURLINGTON, VT
Bachelor of Arts in Political Science & History, May 2001, summa cum laude
GPA 3.91/4.00; Class Rank 7/797
Honors and Activities: Departmental Honors; Outstanding Political Science and History Major; Dean's List; History and Political Theory Essay Prizes; Academic Excellence Scholarship; Outstanding Scholar-Athlete Award; Varsity Track & Field; Varsity Cross-Country.

Board Memberships: Jenna's Promise, a recovery treatment center in Northern Vermont; Mater Christi School (2024).
Other Professional Activities: Member of the United States Magistrate Judge Merit Selection Panel (2020), Member of the United States District Court Advisory Committee (November 2017-2021), Member of the Governor's Substance Misuse Prevention Council (2019-2021).
Court Admissions and Bar Association: Vermont, Massachusetts, United States District Court (Vermont), Second Circuit Court of Appeals, Vermont Bar Association.
Professional Awards: New England Narcotic Enforcement Officers' Association, Outstanding Contribution (2014, 2016).
Publication: Coauthor of "Navigating Parallel Proceedings," NEW YORK LAW JOURNAL (July 2006).
Interests: Reading, cooking, music, film, hot yoga, following the National Football League and English Premier League.

Christina E. Nolan

Associate Justice Application Attached Pages

Question 13 answer continued

One of the foundational experiences of my legal career – and one on which I will always look back with great fondness – was my tenure as law clerk to The Honorable F. Dennis Saylor IV, a federal trial judge in Massachusetts. My year clerking for Judge Saylor helped to hone my legal writing and research skills across a variety of types of motion practice.

I have handled several appeals before the United States Court of Appeals for the Second Circuit, including multiple oral arguments before the Circuit.

Lastly, over the last two years, at the order of United States District Judge Geoffrey Crawford and with the consent of the parties, I have served as special discovery and settlement master in the federal antitrust case Blue Cross and Blue Shield of Vermont et al v. Teva Pharmaceutical Industries, Lt., 5:22-cv-00159-gwc. In that role, I serve as the parties' mediator and liaison to the Court, and I hear and make written recommendations to Judge Crawford concerning their discovery disputes.

Question 18(a) answer continued

"Violent Crime and the Opioid Crisis" at the Justice Department's Project Safe Neighborhood Conference; the nationally broadcast annual Justice Department Opioid Conference; United States District Court, District of Vermont, seminar on domestic violence prosecution; and the Vermont Highway Safety Alliance and AAA Seminar on Being Effective in the Courtroom. As U.S. Attorney, I also hosted a roundtable for community leaders about the Federal Fair Housing Act.

Question 18(b) answer continued

I made final hiring decisions as U.S. Attorney, one of my most important obligations, and served on the U.S. Attorney's Office hiring committee as an Assistant U.S. Attorney. As a partner in one of Burlington's largest law firms, I am actively involved in all aspects of firm management, including oversight of firm financial health, administrative and personnel management, and hiring decisions. Likewise, earlier in my career, at Goodwin, I served on the firm's hiring committee.

Question 44 answer continued

We screened this film together during my U.S. Attorney tenure at schools, community centers, recovery centers, and before any audience who would listen. At events, we promoted Mr. Goulet's story as one of prevention and deterrence, but also as one of hope in an addiction crisis that often feels hopeless.

The experience shaped me profoundly as a professional. As an Assistant U.S. Attorney, it reinforced the solemn job of a prosecutor to do justice and seek accountability for every individual; not merely to rack up convictions or to pursue the harshest possible punishment. Now, as a defense attorney, it reminds me every day of the gravity and importance of my job to defend those who are embroiled in the worst time of their lives, who are up against the power of the government, many of whom have no resources to speak of and are grappling with mental health issues. Overarchingly, his story reminds all of us in the Vermont legal community that we are entrusted with positions from which we can, and do, deeply change and affect the lives of real people and that we must therefore approach our jobs with the extraordinary focus, care, and sense of justice they require. In part because of my experience with Mr. Goulet, I believe that each of the lives we touch has boundless capacity for growth and change. It would be my hope that, if selected, I could help promote throughout our legal community that important component of our thinking about the most difficult disputes that come before us.

As a person, I have been enriched by Mr. Goulet's case in more ways than I can count and probably at greater length than would be acceptable to try to describe here. Hopefully it will suffice to say that, through the case, and in the most unlikely of circumstances, I gained in Mr. Goulet a trusted friend, someone who has become so close to me that he calls me his sister, someone I have learned from and drawn inspiration from, and someone who I know will always be there to support me.

Question 46 answer continued

One of my most treasured experiences as a prosecutor over the years has been my work with crime victims and witnesses and advocacy to vindicate survivors' rights and interests. This work has continued into my plaintiffs' litigation docket today in private practice, where I have represented numerous victims in criminal and civil contexts, including in discrimination-based lawsuits. These survivors and witnesses have had diversity of race, gender, gender identity, sexual orientation, and age.

In retrospect, I see the importance of serving as a prosecutor not only in federal court in Vermont, but also in the very different demographic of Lowell, Massachusetts, where I served as an Assistant District Attorney for a year. A historic and working class "mill city," Lowell is known for its diverse populations including its southeast Asian communities, and sadly and more recently for a notable rise in violence and gang activity. The fast-paced high-volume state court setting brought me into regular contact with people of diversity, including victims and witnesses of all kinds of crime, in high-stress, high-stakes crisis situations.

As U.S. Attorney for Vermont, one of my most important jobs was outreach to minority communities and groups especially vulnerable to hate and other violent crime. For example, in my first days on the job, I visited the Vermont Imam and his mosque in Winooski; during the meeting, I discussed the scope of federal hate crimes laws and protections and he and his wife served me and my team a traditional lunch. The U.S. Attorney's Office subsequently gave an evening presentation on federal hate crimes statutes at the mosque at an event hosted by the Imam for his entire community. As U.S. Attorney, I prioritized work to enforce federal antidiscrimination laws. I was proud to bring the first federal criminal hate crime charge in the

history of the state against an individual who threatened a Hispanic family in central Vermont. I also brought civil rights actions on behalf of vulnerable populations and spearheaded a national initiative to protect those sexually harassed and discriminated against in housing during the pandemic.

Question 47 answer continued

Another primary issue facing any institution is the need to recruit and retain candidates of diverse backgrounds at all levels of the judiciary and its offices. My work throughout my career on hiring committees and in management and leadership roles has taught me the importance of outreach and a proactive approach to diversifying organizations.

A third and more granular issue may be any lingering backlog associated with pandemic operations. Although concrete ideas would have to await further study, I believe my experience leading the U.S. Attorney's Office and Vermont law enforcement could translate to ideas about how to gain possible efficiencies, whether it be through reorganization of dockets and assignments or other strategies.

Question 48 answer continued

As U.S. Attorney, I was the spokesperson and public information officer for the U.S. Attorney's Office and for Vermont law enforcement. Moreover, on a daily basis, my job involved forming and fostering collaboration and partnership with other law enforcement agencies, treatment and prevention communities, educators, politicians, and other community leaders.

My leadership responsibilities continue as a partner at Sheehey. I regularly help my partners make decisions involving personnel, strategic planning, budget, and the financial affairs of the firm.

I believe these experiences in leading and collaborating with others will serve me well as an Associate Justice.

Question 49 answer continued

After the trial, and for the rest of my year as a prosecutor appearing before her, Judge Rooney took the time to mentor me after each evidentiary hearing, giving me pointers, and in fact telling me that she believed I might have potential if I continued to work hard and gain experience. This offer to meet after hearings was a standing offer she made to every attorney who appeared before her, and I give myself some credit for recognizing not only now, but then, that it was an extraordinary gift of her time. By no means was I the only one who took her up on it. In short meetings, she conveyed big lessons, about believing in yourself and not only learning from your mistakes and setbacks but drawing some motivation from them, and smaller but practical ones, about effective lines of examination and proper evidentiary foundations. As a Justice, I would strive to emulate the generous manner by which she wears the robe.

Question 53, Reference 3, answer continued

Judge Doyle and I also tried a case to a jury together when were both working as line Assistant U.S. Attorneys and he has observed my courtroom abilities over the years.
Contact Information: [redacted]

Christina E. Nolan

Associate Justice Application Additional Disclosure

Question 35 Additional Disclosure

Last summer, without realizing it, I had my personal safety firearm in my work bag one morning when I traveled from Burlington to Windham County for a criminal hearing. As a result, when I arrived, I accidentally carried it into the courthouse check-in area, where security officers immediately located it during the scanning process. I am making this disclosure because, although the matter was sealed and should not have been reported publicly, one or more outlets received leaked information and published inaccurate statements that should be corrected.

After the incident, the matter was referred to Windham County State's Attorney Steve Brown. During the process, I learned from SA Brown about the restorative justice pre-charge diversion program available through the Vermont court system and told SA Brown I wanted to be referred to the program (called Interaction). He agreed that it would be appropriate for me to complete Interaction as part of a resolution. After I successfully completed the program, SA Brown declined to bring charges against me and sealed the matter. I understood from the program documents I signed upon entry that a person's participation in the program was to be treated as confidential.

The program benefitted me in ways I could not have anticipated. The reparative board sessions – conducted by a diverse panel of highly empathetic and intuitive professionals – invited you to think about your mistake, who it harmed, and how recurrence could be prevented. The participant is given homework assignments around these themes and asked to present to the board at sessions. The method reminded me a little of law school inasmuch as the panel has a Socratic style that ensures that all information about root cause and appropriate remediation comes from the applicant herself. Suffice it to say, I learned a lot of important things about myself that will make me a better person and lawyer in the future. I am deeply grateful for the experience and for the relationships I formed with the Interaction panel. Indeed, I would be happy to find opportunities to promote the work of the panel and the alternative justice options provided by our courts.

The Interaction panel provided me with options for gun safety courses in the event I elected to take one on my own time. Although I have completed such courses over the years, it had been a while, and I elected to take one. I successfully completed the gun safety course in September.

Ironically, or perhaps fortuitously, this regrettable experience has afforded me a deeper understanding of our state court system and those who go through it. It was rewarding to say the least to have an opportunity to work with a board of professionals, who gave me great insight and helped me grow as a person, while also learning more about this restorative justice pathway offered by our state courts for the appropriate candidates. Prevention, treatment and

rehabilitation, and education options are the first and preferred resort for appropriate offenders, and I am encouraged and inspired to have learned more about the dynamic and forward-thinking programming available through the Vermont judiciary.

ARGUMENT

The District Court Correctly Held That Mead's Conviction Under A New York Statutory Rape Law Categorically Constitutes A Crime Of Violence Within The Meaning Of U.S.S.G. §§ 2K2.1(a)(2) And 4B1.2.

Mead complains that Judge Sessions wrongly concluded that his New York criminal sexual acts conviction was a crime of violence for purposes of U.S.S.G. §§ 2K2.1(a)(2) and 4B1.2. He argues that *Daye* does not control because it involved the definition of "violent felony" under the ACCA, rather than the term "crime of violence" under the career offender and firearms guidelines. He further contends that, even if *Daye* governs, it is distinguishable because it involved a statutory rape law that covered conduct different from that criminalized by the New York statute. He further criticizes *Daye* as contrary to Supreme Court and sister circuit precedent, and insists that the residual clause of the career offender guidelines is unconstitutionally vague. As set forth below, Mead's arguments lack merit.

A. Standard Of Review

This Court reviews *de novo* a determination that a prior offense is a crime of violence under Section 4B1.2. *E.g.*, *United v. Gamez*, 577 F.3d 394, 397 (2d Cir. 2009); *United States v. Rubenstein*, 403 F.3d 93, 99 (2d Cir. 2005).

B. Legal Framework

1. The Relevant Guidelines And Statutes

Firearms defendants are assigned base offense level of 24 if they have two prior felony convictions "of either a crime of violence or a controlled substance offense." U.S.S.G. § 2K2.1(a)(2). The guideline defines "crime of violence" by cross-referencing Section 4B1.2, the definition found in the career offender guideline. Under Section 4B1.2(a), the term "crime of violence" means:

> [A]ny offense under federal or state law, that –
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another,[5] or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives,[6] or otherwise involves conduct that presents a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2(a)(1)-(2). The commentary to the guideline provides:

> 'Crime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included as 'crimes of violence' if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives . . . or, by its nature, presented a serious potential risk of physical injury to another.

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[5] This brief refers to this prong of Section 4B1.2 and the ACCA as the "physical force element clause."

[6] This brief refers to the crimes listed just before the residual clause of Section 4B1.2 and the ACCA as "exemplar crimes."

The commentary further provides: "'[c]rime of violence' does not include the offense of unlawful possession of a firearm by a felon . . . ." *Id.*, cmt n.1.

The ACCA defines a violent felony as:

> any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –
>
> > (i) has as an element the use, attempted use, or threatened use of force against the person of another; or
> > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

18 U.S.C. § 924(e)(2)(B).

Mead sustained a conviction under a New York law prohibiting criminal sexual acts in the third degree. That statute provides:

> A person is guilty of a criminal sexual act in the third degree when . . . [b]eing twenty-one years old or more, he or she engages in oral sexual conduct or anal sexual conduct with a person less than seventeen years old.

N.Y. Penal Law § 130.40(2). The statute defines "oral sexual conduct" as "conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina." It defines "anal sexual conduct" as "conduct between persons consisting of contact between the penis and anus." *Id.* § 130.00(2)(a), (b). Persons under the age of seventeen are incapable of consent under New York law. *Id.* § 130.05-3(a).

2. The Categorical Approach

The parties agree that, if Mead's criminal sexual acts conviction is to qualify as a crime of violence, it must be under Section 4B1.2(a)'s residual clause, because the New York statute does not have as an element the use of physical force and statutory rape is not an exemplar crime. SA 4. In determining whether a prior conviction falls under the residual clause, the sentencing court employs a "categorical approach." *See Descamps v. United States*, 133 S.Ct. 2276, 2281 (2013) (courts must use categorical approach to determine whether a prior conviction is a violent felony under the ACCA); *James v. United States*, 550 U.S. 192, 201-02 (2007). This approach examines the "offense generically . . . in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay*, 553 U.S. at 141.

In this inquiry, the court decides whether "as a categorical matter, [the offense] presents a serious potential risk of physical injury to another," *Sykes v. United States*, 131 S.Ct. 2267, 2273 (2011), focusing on the "conduct encompassed by the elements of the offense, in the ordinary case," *James*, 550 U.S. at 208. The crime must also be qualitatively similar to the exemplar crimes. *See Sykes*, 131 S.Ct. at 2275 ("ACCA limits the residual clause to crimes 'typically committed by those whom one normally labels armed career criminals,' that is, crimes that 'show an increased likelihood that the offender is the kind of person who might

deliberately point the gun and pull the trigger'") (quoting *Begay*, 553 U.S. at 146); *Daye*, 571 F.3d at 234 ("all that is required is that a crime, in a fashion similar to burglary, arson, extortion, or crimes involving the use of explosives, '*typically* involve purposeful, violent, and aggressive conduct.'") (quoting *Begay*, 553 U.S. at 145-46) (emphasis supplied in *Daye*).

3. The Court's Decision In *Daye*

In *Daye*, this Court held that a conviction for sexual assault of a minor, in violation of 13 V.S.A § 3252(3) (1986), categorically constitutes a violent felony under the ACCA. At the time of Daye's conviction, the Vermont statute provided, in pertinent part:

> A person who engages in a sexual act with another person and . . .
>
> (3) The other person is under the age of 16, except where the persons are married to each other and the sexual act is consensual;
> shall be [punished].

13 V.S.A § 3252(3) (1986) (since amended). The term "sexual act" is defined as "conduct . . . consisting of contact between the penis and the vulva, the penis and the anus, the mouth and the penis, the mouth and the vulva, or any intrusion, however slight, by any part of a person's body or any object into the genital or anal opening of another." *Id.* § 3252(1). The version of 13 V.S.A § 3252(3) at issue in

Daye did not require a minimum age for the perpetrator or an age gap between victim and perpetrator.[7]

The Court's analysis in *Daye* centered specifically on whether violations of the statute fell within the ACCA's residual clause. *See* 18 U.S.C. § 924(e)(2)(B)(ii) (covering crimes that are "burglary, arson, or extortion, [crimes that] involve[] use of explosives, *or [crimes that] otherwise involve[] conduct that presents a serious potential risk of physical injury to another*") (emphasis added); *see Daye*, 571 F.3d at 230. In deciding the issue, the Court summarized the relevant legal test: "[A]ll that is required is that a crime, in a fashion similar to burglary, arson, extortion, or crimes involving the use of explosives, '*typically* involve[s] purposeful, violent, and aggressive conduct.'" *Daye*, 571 F.3d at 234 (quoting *Begay* 553 U.S. at 145-46; relying on *Begay* and *James*, 550 U.S. at 208) (emphasis supplied by *Daye*).

In concluding that violations of 13 V.S.A § 3252(3) categorically satisfy the standard, *Daye* explained that the statute, by its terms, "involves deliberate and affirmative conduct - namely, an intentional sexual act with a person who is, in fact, under the age of consent." 571 F.3d at 234. Such conduct, the panel further reasoned, "creates a substantial likelihood of forceful, violent, and aggressive

[7] A 2005 amendment added, among other things, an exemption for consensual sexual acts between a person under the age of nineteen and a child who is at least fifteen. *Id.* § 3252(c)(2); *Daye*, 571 F.3d at 230 n.5.

behavior on the part of the perpetrator because a child has essentially no ability to deter an adult from using such force to coerce . . . a sexual act." *Id.*; *see also id.* at 230-31 ("'[c]rimes involving indecent sexual contact with a child 'typically occur in close quarters, and are generally perpetrated by an adult upon a victim who is not only smaller, weaker, and less experienced, but also generally susceptible to acceding to the coercive power of adult authority figures.'") (quoting *United States v. Cadieux*, 500 F.3d 37, 45 (1st Cir. 2007)). This Court had "no doubt" that this crime typically involves conduct that is at least as intentionally aggressive and violent as the typical burglary. 571 F.3d at 234. Indeed, the Court concluded that crimes involving sexual contact with a minor are more likely to entail such conduct than the ordinary burglary, given the unique susceptibility of minors to coercion by adults into sexual acts. *Id.*

4. *Daye* Governs The Issue Raised On Appeal.

Mead urges the Court to decide his appeal without reference to *Daye*. App. Br. at 8. He argues that *Daye* is not controlling because, while it held that a statutory rape offense categorically constitutes a violent felony for purposes of ACCA's residual clause, it did not address the scope of the residual clause of Section 4B1.2. *Id.* He maintains that, unlike the ACCA's residual clause, the residual clause of the career offender guideline does not cover statutory rape. *Id.*

Mead's sole support for his theory that the two nearly identical provisions should be interpreted differently is the language of U.S.S.G. § 2L1.2(b)(1)(A)(ii), which enhances sentences for deported aliens previously convicted of a crime of violence. *Id.* 14-15. In particular, he notes that Section 2L1.2(b)(1)(A)(ii) expressly includes statutory rape in its list of offenses qualifying as crimes of violence. *Id.* 15.[1] Invoking the statutory construction canon *expressio unis est exclusion alterius* ("the express mention of one thing excludes all others"), he contends that Section 2L1.2's express mention of statutory rape shows that the drafters did not consider statutory rape a crime of violence for purposes of Section 4B1.2, because it does not appear in its list of qualifying crimes. *Id.*

Mead cites no case law in support of his argument. *See id.* 14-16. That is because it is at loggerheads with this Court's precedent. In *United States v. Brown*, 514 F.3d 256 (2d Cir. 2008), the Second Circuit squarely rejected the argument that the ACCA residual clause has a meaning different from the Section 4B1.2

[1] Section 2L1.2 defines "crime of violence" as:

> any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

U.S.S.G. § 2L1.2, cmt n.1(B)(iii).

residual clause. *Brown* explained the justification for "analytical cross-referencing" between the two provisions:

> [the practice] rests not only on the fact that the residual clauses of the two provisions are identical, but also on the recognition that the inquiry into whether a particular type of conduct has the potential to present a serious risk of physical injury to another person focuses on the nature of the conduct. The inherent nature of the conduct is not dependent on the location of the provision prescribing punishment for that conduct. And where the language of two such provisions is identical, we cannot conclude that those provisions have disparate applicability to a type of conduct that inherently involves the risk specified in both provisions.

Id. at 268 (holding that third degree burglary of a building is covered by the residual clause of Section 4B1.2(a)(2), which lists only "burglary of a dwelling" as an exemplar crime, because the Circuit had already held that that crime was covered by the ACCA's residual clause). Indeed, this Court has repeatedly instructed courts "analyzing the definition of 'crime of violence' to look to cases examining the statutory definition of 'violent felony,' as found in . . . [the] ACCA[], because the operative language of U.S.S.G. § 4B1.2(a)(2) and the statute is identical." *United States v. Gray*, 535 F.3d 128, 130 (2d Cir. 2008); *United States v. Walker*, 595 F.3d 441, 444 n.1 (2d Cir. 2010) (courts should be guided by precedent interpreting ACCA's residual clause because it is "identical in all relevant respects" to the residual clause of Section 4B1.2(a)(2)). The Court should, therefore, decline Mead's invitation to ignore *Daye* because it is an ACCA case.

The case law aside, Mead's statutory construction argument is fatally flawed. To begin, Section 4B1.2's list of qualifying crimes is illustrative, not exclusionary. *See* U.S.S.G. § 4B1.2, cmt. n.1 ("'Crime of violence' *includes* . . ."; "*Other offenses are included* as 'crimes of violence' . . .") (emphasis added). As such, Mead's reliance on the interpretive maxim *expressio unis est exclusio alterius* is inapt. Indeed, the expansive wording of the guideline commentary cuts exactly the opposite way, indicating that the drafters meant for "crimes of violence" to cover offenses other than those enumerated. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002) (rejecting party's reliance on *expressio unis est exclusio alterius* where statute used the term "may include," observing that, "[f]ar from supporting the [party's] position, the expansive phrasing of 'may include' points directly away from the sort of exclusive specification he claims."). Moreover, if the authors of the guideline meant to exclude statutory rape, they would have said so in the exclusionary paragraph, which lists offenses not included in the definition of crime of violence (statutory rape not among them). U.S.S.G. § 4B1.2, cmt. n.1.

Perhaps more importantly, as Judge Sessions observed, "Section 2L1.2 is an imperfect foil for Section 4B1.2 because it does not have the residual clause at all." SA 8. Apart from naming statutory rape and other specific crimes, Section 2L1.2 contains only the equivalent of the physical force element clause. *See* U.S.S.G. §

2L1.2 cmt. n.1(B)(iii) (covering "any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another"). The absence of a residual provision from Section 2L1.2 explains why the drafters thought it necessary to specify exactly what types of offenses qualified for the crime of violence enhancement under that guideline, while omitting such specification from Section 4B1.2, which has the broadly-worded residual clause. *See James*, 550 U.S. at 198 (noting that ACCA's physical force element clause "lacks a broad residual provision, thus making it necessary to specify exactly what types of offenses . . . are covered by its language"; rejecting argument that because attempt offenses are explicitly contemplated in the statutory language of 18 U.S.C. § 924(e)(2)(B)(i), they were intended to be excluded by omission from the residual clause of Section 924(e)(2)(B)(ii)).

Finally, Mead offers no reason why the drafters of the Guidelines would have defined "crime of violence" to include statutory rape for purposes of the sentencing enhancement for deported aliens, but not for other offenders, such as those convicted of firearms offenses. To adopt such an interpretation would lead to absurd, inequitable results, in violation of fundamental principles of statutory construction. *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543

(1940) (Court will not construe a statute in a manner that leads to absurd or futile results).

Examination of the evolution of Section 2L1.2's definition of "crime of violence" confirms that the Sentencing Commission did not intend such a nonsensical result. On the contrary, the drafting process indicates that the Commission intended "crime of violence" in Section 2L1.2 to encompass the same crimes covered by Section 4B1.2.

Prior to the 2001 amendment to Section 2L1.2, the term "crime of violence" was defined by reference to Section 4B1.2. U.S.S.G. §§ 2L1.2, cmt. n.1, 4B1.2, cmt n.1 (2000). In subsequent iterations, the Commission listed specific offenses falling within Section 2L1.2's definition of crime of violence to provide guidance to courts, attorneys, and probation officers struggling to determine its scope. These changes were clarifying, not substantive. In the first amendment, the Commission deleted the cross reference to Section 4B1.2, and gave Section 2L1.2's commentary its own definition of "crime of violence." U.S.S.G. § 2L1.2, cmt. n.1(B)(ii)(2001) (adding "sexual abuse of a minor" as a parenthetical explanation of "forcible sex offenses"). In explaining the reason for the changes, the Commission did not specifically reference the crime of violence definition, but did generally note that "[t]his amendment makes a number of other minor changes to .

. . provide definitions for terms used in the guideline." U.S.S.G., App C., Vol. II, at 219.

In 2003, the Commission amended Section 2L1.2 to include "statutory rape" as an enumerated offense in the definition of crime of violence. It also removed "sexual abuse of a minor" from the parenthetical example of a forcible sex offense and added it to the enumerated list. U.S.S.G. § 2L1.2 cmt. n.1(B)(ii) (2003). The Commission explained:

> the amendment adds commentary that clarifies the meaning of the term 'crime of violence' . . . the previous definition often led to confusion over whether the specified offenses listed in the definition, particularly sexual abuse of a minor and residential burglary, also had to include as an element of the offense 'the use, attempted use, or threatened use of physical force against the person of another.' The amended version makes clear that the enumerated offenses are always classified as 'crimes of violence,' . . . ."

U.S.S.G., App C., Vol II, at 401-02.

In 2008, the Commission made its most recent changes to the Section 2L1.2 definition of crime of violence. U.S.S.G. § 2L1.2 cmt n.1(B)(iii) (2008) (adding parenthetical after forcible sex offenses). It explained that this amendment reflected input from judges, attorneys, and probation officers, and was meant to "clarif[y] the scope of the term 'forcible sex offense' . . . ." U.S.S.G., App. C., Vol III, at 302 ("The amendment makes clear that forcible sex offenses, like all offenses enumerated in Application Note 1(B)(iii) are always classified as crimes of violence, regardless of whether the prior offense expressly has as an element the

use, attempted use, or threatened use of physical force against the person of another.") (internal quotation marks omitted).

The overarching point is that differences in the definition of crime of violence in Section 2L1.2 and Section 4B1.2 are not substantive, but rather, the product of the Commission's efforts to clarify the scope of the former (which initially cross-referenced Section 4B1.2). The Commission's addition of statutory rape to the enumerated crimes in Section 2L1.2 is further proof that Section 4B1.2 covers that crime. Mead's assertion to the contrary results from, among other things, a failure to examine the evolution of Section 2L1.2's definition of crime of violence.

In sum, Mead's claim that *Daye* should not guide the Court's interpretation of Section 4B1.2's residual clause should be rejected as contrary to this Circuit's teaching, longstanding canons of statutory construction, and the intent of the Commission.

5. Under This Court's Controlling Decision In *Daye*, Statutory Rape Offenses Such As Mead's Are Crimes Of Violence, And No Decision Of The Supreme Court Or The Courts Of Appeal Changes That Conclusion.

The New York law under which Mead was convicted is, for all relevant purposes, the same as the Vermont law analyzed in *Daye*. The New York statute, by its terms, "involves deliberate and affirmative conduct – namely, an intentional sexual act with a person who is, in fact under the age of consent." See N.Y. Penal

Law § 130.40 (2005); *Daye* 571 F.3d at 234. The New York law defines the prohibited sexual conduct in a manner consistent with the definition set forth in 13 V.S.A § 3252. *Compare* N.Y. Penal Law § 130.00(2)(a), (b) *with* 13 V.S.A § 3252(1). Moreover, unlike the latter, which imposed no minimum age requirement for the defendant, *see Daye*, 571 F.3d at 230 n.5, the New York law requires a four-year age difference between perpetrator and victim. N.Y. Penal Law § 130.40(2).

Thus, as in *Daye*, this Court should have "no doubt" that Mead's crime typically involves conduct that is at least as intentionally aggressive and violent as the average burglary. 571 F.3d at 234; *see also id*. at 231 (conviction under Vermont statutory rape law "clearly qualifies" as a violent felony, because it involved "the infliction of a sexual act upon a child by an adult"). Just as that conclusion compelled a finding in *Daye* that statutory rape is categorically a violent felony under the ACCA residual clause, it demands a finding that Mead's statutory rape offense is categorically a crime of violence under Section 4B1.2. *See id.* at 231.

In an effort to avoid that conclusion, Mead insists that *Daye* is distinguishable because it involved a Vermont statute criminalizing sexual acts with persons age 15 and under, whereas the New York law prohibits sexual acts with persons age 16 and under. *See* App. Br. at 21-22 (arguing, without citation to

authority, that "the average 17 year old is substantially more mature than the average 16 year old" and "because [Mead's] offense will cover conduct involving a nearly 17 year old who gives factual (but not legal) consent, it cannot be said that this covered conduct satisfies the criteria in § 4B1.2 . . . ."). This is a distinction without a difference under *Daye*. *See* 571 F.3d at 231-32. The decision did not hinge on precisely where the legislature set the age of consent for purposes of defining "minor," but rather, on the nature of the proscribed conduct – namely, sexual acts involving those who are legally unable to consent. *See id.* (basing decision on "the risk of injury traceable to the fact that the violation of statutes criminalizing sexual contact with victims who, for reasons of physical or emotional immaturity, *are deemed legally unable to consent* '*inherently involves a substantial risk* that physical force may be used in the course of committing the offense'") (some emphasis added); *id.* at 234 (holding that violations of 13 V.S.A § 3252 are categorically crimes of violence because the statute, "[b]y its terms . . . involves deliberate and affirmative conduct - namely, an intentional sexual act with a person who is, in fact, *under the age of consent*.") (emphasis added); *see also*, *Brown*, 514 F.3d at 268 ("the inquiry into whether a particular type of conduct has the potential to present a serious risk of physical injury to another person focuses on the nature of the conduct"). In other words, because *Daye* relied on the victim's legal

inability to consent, and not on how the legislature defined the age of consent, Mead's effort to eschew its holding must fail.

Further, in focusing on the narrow subset of cases in which a victim under the New York law could, theoretically, be close to age seventeen, Mead forgets the relevant legal test. The issue, in deciding whether an offense is categorically a crime of violence, is whether "the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious risk of injury to another." *James*, 550 U.S. at 208 (emphasis added). Thus, the hypothetical "unusual cases in which even a prototypically violent crime might not present a genuine risk of injury" do not preclude a finding that an offense is categorically a crime of violence. *Id.*

Moreover, if anything, the New York statute is more likely than the Vermont law, in the ordinary case, to target "[t]he infliction of a sexual act upon a child by an adult," *Daye*, 571 F.3d at 230, because it applies only where the perpetrator is "twenty-one years or more." N.Y. Penal Law § 130.40(2); SA 13 ("In that way, [the New York law] is arguably even more targeted to '[t]he infliction of a sexual act upon a child by an adult,' *Daye*, 571 F.3d at 230, than the Vermont statute construed in *Daye*"). By contrast, the Vermont statute required no minimum age for the perpetrator, and by its terms, could have applied to a teenage defendant having sexual intercourse with a consenting partner of the same age. 13 V.S.A § 3252(3); *Daye*, 571 F.3d at 229 n.5, 230 n.7 (acknowledging this possibility and

noting that statute was amended in 2005 to exempt consensual sexual acts between a person under 19 and another older than 15). The age disparity requirement in the New York law enhances the "likelihood of forceful, violent, and aggressive behavior on the part of the perpetrator." *See Daye*, 571 F.3d at 232, 234 (noting inherent risk of physical force given comparative weakness of the minor victim and minor victim's inability to deter aggressive behavior). Thus, the justification for concluding that Mead's statute of conviction is categorically a crime of violence is, if anything, stronger than for the statutory rape law analyzed in *Daye*.

6. *Begay* Does Not Preclude A Finding That Statutory Rape Categorically Qualifies As A Crime Of Violence.

Mead also contends that the Supreme Court's decision in *Begay*, the year before *Daye*, somehow prevents courts from finding that any strict liability offense – including statutory rape – is a crime of violence. App. Br. at 8, 11, 19-20. This argument is baseless. In handing down *Daye*, this Court was well aware of *Begay*, which held that driving under the influence of alcohol is not a violent felony under the ACCA's residual clause. 553 U.S. at 144-45. As the *Daye* Court noted: "*Begay* refined the analytical framework employed to determine whether a prior conviction constitutes an ACCA predicate, indicating that a particular crime does not necessarily constitute a violent felony simply because it presents a serious potential risk of physical injury to another comparable to that posed by the exemplar crimes . . . ." 571 F.3d at 232 (citing *Begay*, 553 U.S. at 141-43). *Daye*

explained that, after *Begay*, "the crime must also be roughly similar, in kind as well as in degree of risk posed, to the listed crimes, specifically burglary, arson, extortion, and crimes involving the use of explosives." *Id.* (citing *Begay*, 553 U.S. at 142-43).

The Supreme Court in *Begay* concluded that DUI is not a violent felony because it differs from the listed crimes in that it does not "typically involve purposeful, violent, and aggressive conduct . . . . such that it makes more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim." 553 U.S. at 144-45 (internal quotation marks omitted). By way of further explanation, the Court noted that DUI statutes, like "crimes that impose strict liability," allow conviction for "conduct [that] need not be purposeful or deliberate" – which makes them different from burglary and arson. *Id.* at 145. The Court provided examples of other offenses it did not believe Congress intended to fall within the ACCA's enhanced penalty, "far removed as they are from the deliberate kind of behavior associated with violent criminal use of firearms": reckless polluters; individuals who negligently introduce pollutants into the sewer system; individuals who recklessly tamper with consumer products; and seamen whose inattention to duty causes serious accidents. *Id.* at 146-47.

In deciding *Daye*, this Court was acutely cognizant of *Begay* – and specifically its language about strict liability crimes. *See* 571 F.3d at 233-34 ("the

statute under which Daye was convicted . . . . admittedly imposed strict liability with regard to the age of the victim"). But *Daye* properly did not read *Begay* as establishing a sweeping rule against finding that strict liability offenses constitute crimes of violence. *See Begay*, 553 U.S. at 148 (holding only that "New Mexico's crime of 'driving under the influence' falls outside the scope of the Armed Career Criminal Act's clause (ii) 'violent felony' definition"). Rather, as this Court observed, the dispositive part of *Begay* is its conclusion that, to constitute a predicate offense, the crime must "in a fashion similar to burglary, arson, extortion, or crimes involving the use of explosives, 'typically involve[] purposeful, violent, and aggressive conduct.'" *Daye*, 571 F.3d at 233-34 (quoting *Begay*, 553 U.S. at 144-45). *Daye* concluded that "[a]n intentional sexual act with a person who is, in fact, under the age of consent" satisfies that standard. *Id.* at 234.

In reaching that decision, *Daye* specifically distinguished statutory rape from DUI. It noted that the former "requires affirmative conduct by the defendant (namely, sexual intercourse with a protected individual) that uniformly occurs in circumstances presenting the risk that force will intentionally be applied," while the latter involves no intentional and affirmative conduct, "substantially decreasing the risk that force would be applied intentionally . . . ." *Id.* at 233. The intentional and purposeful sexual conduct inherent in statutory rape likewise distinguishes it in kind and degree of risk from the other crimes that *Begay* deemed unworthy of

Armed Career Criminal status, such as offenses involving pollution or negligent boat operation. *See id.*; 553 U.S. at 146-47.

In sum, Mead's claim that *Begay* prevents a finding that strict liability offenses (such as statutory rape) are crimes of violence stems from his misapprehension of that holding. As the *Daye* Court recognized, the strict liability element of the crime of DUI – though mentioned by *Begay* in contrasting that offense to the exemplar crimes – was not dispositive of whether it constituted a violent felony. Rather, the central issue was whether the predicate offense "typically involve[d] purposeful, violent, and aggressive conduct" making it "more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim." *Begay*, 553 U.S. at 144-45 (internal quotation marks omitted). Because statutory rape typically involves such conduct, this Court correctly held that it qualifies as a violent felony under the ACCA, *Daye*, 571 F.3d 225, and should likewise hold that Mead's statutory rape conviction (for criminal sexual acts under New York law) constitutes a crime of violence within the meaning of Section 4B1.2.

7. Out-Of-Circuit Decisions Do Not Govern This Appeal, And Mead, In Any Event, Glosses Over Important Distinctions, Omits Mention Of Circuit Cases Supporting *Daye*, And Eschews Discussion Of *Daye's* Consideration And Rejection Of The Reasoning Of Contrary Decisions.

As part of his effort to marginalize *Daye*, Mead claims that it is contrary to the decisions of the Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits, which, he asserts, have all held that statutory rape is not a crime of violence or a violent felony. App. Br. at 24-32 (collecting cases). Mead, however, ignores or overlooks important distinctions between those authorities and *Daye* and fails to acknowledge other appellate decisions that support *Daye*. In any event, *Daye* recognized and rejected the reasoning of contrary decisions, and it is the dispositive precedent in the Second Circuit.

Daye explicitly "recognize[d] that some of our sister Circuits have suggested that where, as here, a statute encompasses not only forcible assault but also sexual contact to which a child professes to consent, even if not legally able to do so, the crime thereby defined creates a serious risk of physical injury only where the victim is particularly young." 571 F.3d at 231 (citing Sixth and Seventh Circuit cases). It nonetheless disagreed with the premises from which those decisions flowed, namely, that (1) risk of injury to minors is eliminated where sexual contact is purportedly consensual and (2) that the potential risks flowing from statutory rape are limited to direct physical consequences. *Id.* at 231-32. As *Daye* put it:

> Even assuming, as these cases implicitly do, that only injury arising from the sexual act itself may be considered when determining whether the commission of the crime will typically involve a serious risk of physical injury, young teens such as those within the compass of Vermont's statute not infrequently face such risk from even purportedly consensual contact . . . . More importantly, the potential risks of serious physical injury flowing from violations of Vermont's sexual assault statute are not limited to the direct physical consequences of sexual contact. We must also consider the risk of injury traceable to the fact that the violation of statutes criminalizing sexual contact with victims who, for reasons of physical or emotional immaturity, are deemed legally unable to consent '*inherently* involves a substantial risk that physical force may be used in the course of committing the offense.'

Id. (quoting *Chery v. Ashcroft*, 347 F.3d 404, 408 (2d Cir. 2003) (emphasis in original) and citing *United States v. Sacko*, 247 F.3d 21, 23-24 (1st Cir. 2011) and *United States v. Shannon*, 110 F.3d 382, 387-88 (7th Cir. 1997) (en banc)).

Daye also rejected the argument, pressed by Mead, that post-*Begay* decisions of the Fourth Circuit in *United States v. Thornton*, 554 F.3d 443 (4th Cir. 2009) and the Tenth Circuit in *United States v. Dennis*, 551 F.3d 986 (10th Cir. 2008), reached a contrary holding. 571 F.3d at 235 & n.10. *Thornton* determined that a Virginia law prohibiting "carnally know[ing], *without the use of force*, a child" age 13 or 14 was not a violent felony for purposes of the ACCA. *Id.* at 235 (quoting *Thornton*, 554 F.3d at 444-49 & n. 2) (emphasis added). As *Daye* explained, unlike Vermont's statutory rape law, the Virginia statute's inclusion of lack of force as an element of the crime eliminated the possibility that a typical

instance of the crime would involve violent and aggressive conduct such that it categorically qualified as a violent felony under the ACCA. *Id.*[8]

Daye likewise found the Tenth Circuit's decision in *Dennis* to be unpersuasive because it presented an indecent liberties statute that criminalized conduct – *e.g.*, the provision of pornography to a minor – that does not categorically present a serious risk of physical harm. *See id.*; *Dennis*, 571 F.3d at 990 & n.1. The Vermont statute, by contrast, covered only conduct that is typically purposeful, violent, and aggressive, and therefore categorically constitutes a violent felony. *Daye*, 571 F.3d at 235.

Daye acknowledged that its result "may be in tension" with some cases from other circuits, particularly the Ninth Circuit's decision in *United States v. Christensen*, 559 F.3d 1092 (9th Cir. 2009) (conviction under statutory rape law forbidding sexual intercourse between a person age fourteen or fifteen and another person at least forty-eight months older). *See Daye*, 571 F.3d at 231, 235 & n.10. Ultimately, however, this Court deemed the reasoning of *Christensen* – *i.e.*, the offense at issue "d[id] not *necessarily* involve either 'violent' or 'aggressive' conduct," 559 F.3d at 1095 (emphasis added) – to be unpersuasive. *Daye*, 571

[8] For the same reason, Mead's reliance on *United States v. McDonald*, 592 F.3d 808 (7th Cir. 2010) is misplaced. As that decision recognized, the Wisconsin statute at issue "is effectively the same as the Virginia statute at issue in *Thornton*," because lack of force is an element of the offense. *See id*. at 815 n.3. *McDonald* is, therefore, also readily distinguishable from *Daye*.

F.3d at 235 n.10 (comparing *Begay*, 553 U.S. at 144-45, which noted that the exemplar crimes "all *typically* involve purposeful, 'violent,' and 'aggressive' conduct") (emphasis added).

In short, when this Court decided *Daye*, it was well-aware of conflicting precedent from sister circuits. This did not change its decision then, nor should it now.[9]

Moreover, though Mead does not mention it, at least three circuits have reached conclusions consistent with – if not identical to – *Daye's*. *See Daye* 571 F.3d at 235 (noting that "the present case is more akin to [*United States v.*] *Williams*, [529 F.3d 1 (1st Cir. 2008)], another post-*Begay* case, in which the First Circuit concluded that a conviction under 18 U.S.C. § 2423(a) for knowingly transporting a minor with intent that the minor engage in prostitution constitutes a violent felony, both because "illicit sexual activity between an adult and a minor (at least a minor below a certain age) poses a significant risk that force will be used

[9] None of the post-*Daye* decisions cited by Mead change the analysis, *see United States v. Harris*, 608 F.3d 122 (11th Cir. 2010); *United States v. Wynn*, 579 F.3d 567 (6th Cir. 2009). *Harris* relied on *Thornton* and *Christensen*, the reasoning of which *Daye* expressly rejected. 608 F.3d at 132; *Daye*, 571 F.3d at 235 & n.10. *Wynn* held that a generic conviction under Ohio's sexual battery statute does not categorically constitute a crime of violence, but the Ohio law covered a much broader swath of conduct than the Vermont statute at issue in *Daye*, including some *consensual sexual acts between adults* (*e.g.*, a woman and her 21-year-old stepson). *Wynn*, 579 F.3d at 574 ("Such a consensual sexual act between adults would not be violent and aggressive by nature, and thus would not be a 'crime of violence' under the *Begay* test.").

in the consummation of the crime" and because an offender's behavior in exposing children to such encounters, even if not itself directly violent, is nevertheless purposeful, violent, and aggressive under the reasoning of *Begay*. *See* 529 F.3d at 5, 7-8").[10] *See also United States v. Scudder*, 648 F.3d 630, 633 (8th Cir. 2011) (violation of law prohibiting a person 16 or older from sexual contact with person age 12 or older, but younger than 16, is categorically a violent felony under the residual clause; likening the law to statutory rape, which the circuit had already held "categorically . . . present[s] a serious potential risk of physical injury to

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[10] *Williams* relied on a number of pre-*Begay* decisions which held that offenses involving statutory rape or sexual contact with a minor fall within the residual clause:

> In this circuit, it is common ground that most "indecent sexual contact crimes *perpetrated by adults* against children categorically present a serious potential risk of physical injury." *United States v. Cadieux*, 500 F.3d 37, 45 (1st Cir. 2007) (emphasis in original); *see, e.g., Eirby*, 515 F.3d at 38 (applying principle to a fourteen-or fifteen-year-old girl); *United States v. Sherwood*, 156 F.3d 219, 221 (1st Cir.1998) (applying principle to molestation of a child under age thirteen); *United States v. Meader*, 118 F.3d 876, 884 (1st Cir.1997) (applying principle to statutory rape of a girl under fourteen); *see also [United States v.] Richards*, 456 F.3d [260,] 264 [1st Cir. 2006)] (reasoning in same vein in violent felony case); *United States v. Sacko*, 247 F.3d 21, 22 (1st Cir.2001) (same).

529 F.3d at 5.

another because this type of contact between parties of differing physical and emotional maturity carries a substantial risk that physical force . . . may be used in the course of committing the offense.") (quoting *United States v. Mincks*, 409 F.3d 898, 900 (8th Cir. 2005)); *United States v. Curtis*, 481 F.3d 836, 838-39 (D.C. Cir. 2007) (promoting prostitution of a minor is a crime of violence, even though statute does not have use of force element, due to risk of physical harm from customers and pimps, and the "likelihood that the perpetrator will use physical force to ensure the child's compliance"; relying on *Meader*, 118 F.3d 876, 885 (1st Cir. 1997), which held that statutory rape of a child under age 14 was a crime of violence for purposes of the residual clause).[11]

8. The Residual Clause Is Not Unconstitutionally Vague.

Relying solely on the dissenting opinion in *Sykes v. United States*, Mead argues that the residual clause is unconstitutionally vague. *See* 131 S.Ct. at 2284 (Scalia, J., dissenting) (citing Supreme Court's "repeated inability to craft a principled test out of the text," urging the Court to "admit that ACCA's residual provision is a drafting failure and declare it void for vagueness"). A majority of the Supreme Court has, however, repeatedly rejected that argument. *Id.* at 2277

[11] This issue appears unresolved in the Third Circuit. Some district courts in that Circuit have agreed with *Daye*. *See, e.g., United States v. Rondon-Herrera*, 666 F. Supp. 2d 468, 469, 4722, 476 (E.D. Pa. 2009) (holding that statutory sexual assault is categorically a crime of violence, finding that statutory rape is inherently violent and noting that the statute of conviction is "of a piece" with the statute in *Daye*; court expressly disagreed with *Christensen* and *Thornton*).

("the residual clause . . . . states an intelligible principle and provides guidance that allows a person to conform his or her conduct to the law . . . although this approach may at times be more difficult for courts to implement, it is within congressional power to enact") (internal quotations omitted); *see also James* 550 U.S. at 210 ("While ACCA requires judges to make sometimes difficult evaluations of the risks posed by different offenses, we are not persuaded by Justice SCALIA's suggestion—which was not pressed by James or his *amici*—that the residual provision is unconstitutionally vague.").

In light of *Sykes* and *James*, the circuits have uniformly rebuffed requests to declare the residual clause void for vagueness. *See United States v. Jones*, 689 F.3d 696, 700 (7th Cir. 2012) (*Sykes* and *James* "are direct and because Justice Scalia so thoroughly developed the argument, we are reluctant to treat the Court's responsive statements as mere dicta. Indeed, they are not dicta in the traditional sense."); *United States v. Mobley*, 687 F.3d 625, 632 (4th Cir. 2012) ("the Supreme Court has already determined that the residual clause falls within congressional power to enact and constitutes an intelligible principle [that] provides guidance that allows a person to conform his or her conduct to law") (internal quotations omitted); *United States v. Gore*, 636 F.3d 728, 742 (5th Cir. 2011); *United States v. Taylor*, 696 F.3d 628, 633 (6th Cir. 2012); *United States v. Hart*, 674 F.3d 33, 41 n.3 (1st Cir. 2012); *United States v. Cowan*, 696 F.3d 706, 708 (8th Cir. 2012);

United States v. Gandy, 710 F.3d 1234, 1239 (11th Cir. 2013) (collecting cases). This Court should follow suit.

CONCLUSION

The judgment of the district court should be affirmed.

Dated at Burlington, in the District of Vermont, this 15th day of July, 2013.

Respectfully submitted,

UNITED STATES OF AMERICA

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**Case No. 2:24-cr-39**
	)	
ESTEVAN ALVAREZ,	)	
Defendant.	)	

SENTENCING MEMORANDUM AND MOTION FOR DOWNWARD DEPARTURE

Estevan Alvarez, through his attorneys, Sheehey Furlong & Behm P.C., respectfully submits this sentencing memorandum for the Court's consideration at his March 11, 2025 sentencing hearing. For the reasons set forth below, and those we expect to present at the sentencing hearing, Mr. Alvarez respectfully requests that the Court sentence him to time-served, to be followed by a period of supervised release involving any length and conditions the Court sees fit to impose.

I. Introduction

Mr. Alvarez fully recognizes that a noncustodial sentence would be extraordinary in light of his offense. Nonetheless, we respectfully submit that Mr. Alvarez is the rare defendant who presents the trifecta of circumstances warranting a time-served sentencing in the District of Vermont: (1) Mr. Alvarez has a good job and is excelling at work; (2) he has a stable residence; and (3) since his arraignment in May 2024, he has not had a single violation of his release conditions. Of particular note, he has not used drugs for over a year, as his consistently negative drug tests reflect.

Given these factors—together with Mr. Alvarez's spotless prior criminal record; his youth; his strong ties to Vermont; his support network; and his acceptance of responsibility—we

respectfully urge the Court to sentence Mr. Alvarez to time-served, to be followed by a period of supervised release.

II. Background on Offense and Mr. Alvarez

As a preliminary matter, Mr. Alvarez notes his lack of objection to the PSR and his appreciation for the good work of U.S. Probation Officer Hansell. The PSR accurately summarizes the offense.

Mr. Alvarez, age 26, is a lifelong Vermonter, who has resided in Vermont since he was an infant. Not long after the harrowing events of November 12, 2023, PSR ¶¶ 6-7, Mr. Alvarez and his longtime partner, Allissa Gilbert, moved to Middlebury to escape the Burlington drug culture and all of its negative influences, temptations, and dangers. Before making that important life change, Mr. Alvarez had always lived in Chittenden County.

Mr. Alvarez knows no greater support than his mother, Carrie McCloe. PSR ¶ 32. They enjoy a very close relationship, which the undersigned has observed throughout representation of Mr. Alvarez.

Ms. McCloe has always done her best for Mr. Alvarez, but his childhood was not easy. He has never met or had contact with his father, who abandoned him and his mother shortly after his birth. Ms. McCloe raised Mr. Alvarez and his two sisters on her own, and without any support or any financial resources to speak of.

Throughout Mr. Alvarez's childhood, men would come and go from his mother's life; these men were often individuals with criminal records who abused her and Mr. Alvarez. As a young boy, he witnessed boyfriends slap and punch his mother in front of him. At times, these individuals physically abused Mr. Alvarez. *Id.* ¶¶ 32-35. In her moving letter of support, Ms.

McCloe shares her perspective on the emotional and psychological toll these dynamics took on Mr. Alvarez as a child:

> I think his struggle was partly due to his constant want and mostly need, for a father figure. I didn't have a revolving door when it came to men, and when in a relationship, it was long-term, but my children witnessed a couple of relationships. Some verbally/mentally/emotionally abusive. Estevan took to any man very quickly no matter what role they played in my life. He just wanted a Dad!

Exhibit A (McCloe Letter).

Mr. Alvarez also lacked parental supervision at times, because his mother not only struggled in abusive relationships, but worked long hours to make ends meet and support three children on her own. She writes:

> I've always said that if there was one of my children's lives that I would change, that it would be Estevan[']s. I say that because, I think it's easier to raise a daughter without their father, than a son without theirs. Every child deserves both parents. We're dealt the cards we[']re dealt. As a single mom, I, as most, did the best with all that was thrown my way as a single mother. Estevan, from birth, was simply perfect to me! He slept through the night as a newborn, crawled, talked and walked before others his age. He struggled with a speech impediment/studder that started almost as soon as he could talk. . . . Growing up Estevan enjoyed some sports, which I rarely attended, if at all. It[']s something that makes me cry just talking about it.

Id.

Unsurprisingly, Mr. Alvarez, who attended Winooski public schools, always struggled academically and found it difficult to complete homework assignments. He did not complete high school, dropping out in eleventh grade, and moved out of his mother's house as soon as he could to avoid being a burden on her. PSR ¶ 35.

Perhaps also unsurprising given his lack of parental supervision and the childhood trauma he suffered at home, Mr. Alvarez turned to drug and alcohol abuse at a young age. Mr. Alvarez's substance use became more severe as he entered his twenties; by the time of the underlying offense in late 2023, he was deeply addicted to powder and crack cocaine, smoking as much as 3-5 grams

per day. So grave was his addiction by that time that he was regularly suffering nose bleeds and respiratory issues, and—eventually and tragically—he turned to dealing small amounts of crack to fund his own personal use. The drug use rendered him skeletal in every sense of the word—he was forty pounds lighter than he is today—a shell of the man he has since become.

In the throes of his vicious addiction, Mr. Alvarez allowed narcotics suppliers to operate from his Burlington rental apartment for about three months in late 2023. In exchange, he and his partner, Ms. Gilbert, received small amounts of crack for personal use to feed their drug habits. On November 12, 2023, Mr. Alvarez and Ms. Gilbert witnessed a horror beyond any they could have imagined. One of their drug suppliers fatally shot two drug associates in front of them in their apartment bedroom. One victim of the double homicide was a longtime Vermont-based friend of Mr. Alvarez and Ms. Gilbert, and they have grieved his death in its aftermath.

Mr. Alvarez fully accepts responsibility for his crime, one tragically common among Vermonters with substance use disorder: housing those who deal dangerous drugs to feed personal addiction. But without question, Mr. Alvarez did not foresee the murders, nor did he intend for them to happen. A 24-year-old addict at the time, he did not see it coming. The horror he witnessed, the worst kind of byproduct of the drug trade, will forever be etched in his memory.

In the aftermath of that horror and the ensuing federal charges against him, Mr. Alvarez found himself at *the* pivotal fork in the road of his life. In the wake of watching a friend die in front of him, he could have devolved further into the vicious addiction cycle, as so many do following trauma. But he did not. He chose the other path. He turned his life around in a remarkable way, and started living to his true potential, and in the honest, hardworking, and kind manner that reflects who he is at his core.

After the horrific events of November 12, 2023, Mr. Alvarez and Ms. Gilbert left Burlington and rented an apartment in Middlebury. They maintain that stable residence to this day and, because of their steady employment, can afford rent and maintain sufficient funds to support themselves into the future. Following arraignment, Mr. Alvarez successfully completed six weeks of intensive outpatient treatment at Howard Center. He joined AA and attends meetings to this day, when his work schedule allows. The undersigned and many others have observed him proudly carry and display his AA chip commemorating his one year of sobriety.

Mr. Alvarez fully recognizes that his relationship with his supervising Probation Officer, USPO Farris, has been a critical component of his recovery and overall success. He likes and greatly respects PO Farris and he eagerly embraces their relationship, the honesty it requires, and the invaluable resources it presents. Mr. Alvarez has not once violated any condition of release—no positive drug tests and not even so much as a technical or "process" violation, such as failure to communicate or attend meetings with his PO.

In addition to his strong relationship with his mother, Mr. Alvarez loves Ms. Gilbert very much and they are devoted to one another. They have been together for about three years, and they are a force for stability and good in each other's lives. Perhaps most important, they are partners in sobriety, and each is a pillar of support for the other in their commitment, as a couple, to lead sober, productive lives. *See* Exhibit A (Gilbert Letter). Mr. Alvarez and Ms. Gilbert have worked together to develop a "toolkit" of techniques and practices to maintain and grow a sober lifestyle. As Ms. Gilbert explains in her letter of support:

> [Estevan] is supportive of my sobriety as he maintains his own as well. Getting to know Estevan through sobriety has completely changed my view on him. Since the tragedy of losing a close friend, everyday he shows he wants to be a better person and continues to be/become a better person.[] We've gained many healthy habits like going to the gym together, going to aa and building a life that we can be proud of. I am extremely grateful for the hard work and effort he has put into being

> a better person. Estevan went from not caring about paying bills/ rent on time because all of the money he had went to drugs. Now, he always pays his bills on time and is working on building his credit. He is also enrolled in Vermont Adult Learning . . . to get his GED. We are very supportive of each other's education and furthering it so we can each have more opportunities in life. I believe Estevan understands and takes responsibility for the crimes he committed whether it was knowingly or unintentional while being a drug user. Everyday he is committed to staying sober and leading a different life.

Id.

Estevan has also made incredible strides in his employment. His work ethic and leadership qualities were subsumed beneath his drug addiction, but they have shown through in sobriety. He and Ms. Gilbert obtained employment at Nino's Pizza in Middlebury in late 2023, after they moved away from Burlington. The business sits in the center of town on the traffic circle. Mr. Alvarez started at Nino's as a prep cook and has since been promoted to General Manager. A recent ad in the Addison Independent featured "pie-ologist" Mr. Alvarez prominently as the face of Nino's, and touted "Estevan's vegetarian creation," a pesto-based pie with various vegetarian ingredients. *See* Exhibit B (copy of the ad, which has also been turned into a business flyer).

Carolyn Anderson, the owner of Nino's, and Joshua Kafumbe, one of Mr. Alvarez's coworkers, have provided letters of support that beautifully describe his professional growth and the positive impact he has had on his coworkers and his community. Exhibit A (Anderson and Kafumbe letters). Those letters also show that Mr. Alvarez has gone the extra mile to promote and ensure a substance-free work environment. Ms. Anderson—who, as an employer, makes a point to "lower the typical barriers to employment" and to "onboard people living with various disabilities and recovering from problems they are distancing themselves from," Exhibit A (Anderson letter)—writes, in part:

> Nino's is a community. Estevan is in the center of it. He was instrumental in creating a safe substance-free workspace. At great risk, he brought to my attention the peril the business was in at the hands of my business partner who was drunk

> and drinking daily on site. Estevan was unwilling to continue to work in a space that jeopardized his sobriety and mental health. We worked together with staff and the court to remove this partner and turn the business around. . . .
>
> Estevan holds high standards and works shoulder to shoulder with each person, to ensure he understands them, their gifts, and their challenges. For instance, he noticed a young employee sleeping in their car before work. He approached them and created an earlier shift arrangement and made sure they ate a meal right away. In a time where businesses are begging for help, we maintain a waitlist for people wanting to work at Nino's. Quite frankly, we are overstaffed. I believe this is largely due to the community Estevan has built and word of mouth about his leadership. Estevan has made Nino's a great place to work.
>
> Estevan is now the face of Nino's. It is an open kitchen. He interacts with every customer and is on a first name basis with many. They ask for him. He handles conflict with compassion and an easy demeanor. He solves thorny problems with grace. He learns from his stumbles and missteps and owns them publicly, with humility. He continues to grow and thrive.

Id.

In other words, Estevan's dedication to his own recovery and employment has enriched and helped to cultivate a whole community. He has helped to create a warm, welcoming, and substance-free "third space" in Middlebury. And he is making conscientious efforts every day to positively change the lives of others. His efforts are making a difference, as Mr. Kafumbe explains:

> Over the past few months, I've gotten to know him really well, and he has become a role model in my life. Since I started working at Nino's pizzeria, he has pushed me to do my best work even when I am struggling. He even set aside time from his day to come work with me personally so that I could improve and maximize my potential.

Id. (Kafumbe letter).

His stellar employment record aside, Mr. Alvarez is living a very well-rounded and pro-social life. He has rededicated himself to his education and is working toward his GED through programming at Vermont Adult Learning. Exhibit A (McCloe and Gilbert Letters). He and Ms. Gilbert have many healthy interests and hobbies. They exercise regularly and enjoy a wide variety of outdoor activities, such as fishing and hiking. They are "foodies," who love to

cook; they hosted Ms. McCloe for Thanksgiving last year, and apparently, reasonably-priced king crab from Costco was a centerpiece of the menu. A young man of many interests, Mr. Alvarez has a lifelong love of cats. He currently owns, and adores, a rescue named Mazie, *see* Exhibit C (photo), and his own body art includes a cat likeness for this reason, PSR ¶ 37.

Mr. Alvarez is also an extraordinarily gifted creative. He has a longstanding interest in fashion and clothing design and had some success in that field before his life cratered under the weight of addiction. Exhibit A (McCloe letter), PSR ¶ 52. He continues his creative pursuits to this day. Some examples of his unique form of art are attached. Exhibit D (photos of handbags Mr. Alvarez made from recycled jeans).

III. The Statutory Sentencing Considerations Warrant A Time-Served Sentence.[1]

As stated at the outset, we humbly submit that Mr. Alvarez has earned his freedom by achieving the trifecta of (1) sobriety (without even one relapse), (2) a steady job, and (3) a stable residence. These three pillars of Mr. Alvarez's post-arraignment record demonstrate that, despite the gravity of his crime, he is no longer a threat to himself or to society. Instead, he has become a positive force in his community, and he is deep in the process of becoming the dynamic, kind, creative person he always was. It is our hope that, after considering Mr. Alvarez's track record against the statutory sentencing factor, the Court will conclude that a non-custodial sentence involving strict oversight by the USPO is appropriate and will best serve Mr. Alvarez as he maintains sobriety and contributes to his community.

[1] To the extent necessary, Mr. Alvarez moves for a downward departure based on his extraordinary rehabilitation relative to the baseline set at the time of the underlying offense, which coincided with the worst of his addiction and the unlawful lengths he went to feed it. *See United States v. Bryson*, 163 F.3d 742, 746 (2d Cir. 1998) ("The Sentencing Guidelines provide a framework applicable to a 'heartland' of typical cases embodying the conduct that a given guideline describes. A sentencing court dealing with an 'atypical' case, therefore, need not be rigidly constrained by the proscriptions of the Guidelines. . . . The Guidelines do not enumerate all of the factors that may individually or collectively render a case 'atypical.' . . . This Court has held that a sentencing judge may exercise discretion and depart from the applicable guideline range in light of a defendant's efforts toward rehabilitation, *provided those efforts are extraordinary.*" (emphasis added)).

A. The Seriousness Of The Offense

Mr. Alvarez cannot understate the seriousness of his offense. He recognizes that housing dangerous drug dealers is wrong, and he sees with sober eyes and in hindsight the full range of horrible outcomes that can result from enabling drug trafficking—even if, as in this case, those consequences were wholly unintended by him. While the double murder was not caused by Mr. Alvarez in the proximate sense, he understands that he gave a base of operations to the individuals who committed those horrors. He also understands that his involvement in selling small quantities of drugs harmed others and the Burlington community.

Despite the gravity of Mr. Alvarez's offense, several mitigating factors should influence the Court's sentencing decision. First, Mr. Alvarez's offense was relatively short-lived, spanning three months in late 2023. Second, as discussed, the offense was not the result of clear-headed thinking but rather the byproduct of a vicious and relentless addiction. And Mr. Alvarez's childhood provides the Court essential context about the circumstances and events that set Mr. Alvarez on a path to addiction and, later, tragedy. Mr. Alvarez is not a young man who grew up with privilege, stability, or resources. His mother loves him dearly, but his childhood was marked by abuse, trauma, neglect, and the deep disappointment of not receiving love from those who should have been father figures. It is not surprising that Mr. Alvarez fell prey to bad influence and used drugs to cope. As the use steadily increased, his addiction worsened, his life deteriorated, and he sought refuge in drug use and unlawful conduct to support the addiction.

Witnessing the death of Anthony Smith, a friend who also happened to supply him drugs, was a kind of reckoning for Mr. Alvarez. He has had to grapple with the grief that comes with the loss of a friend and his own trauma from witnessing it from a mere few feet away. It is a consequence of his misconduct that will haunt him, and he will always have to live with it.

B. Specific And General Deterrence And Other Statutory Considerations

Notwithstanding his unequivocal acknowledgement of the grave nature of his offense, this is the very unusual case in which a non-custodial sentence, with a sustained period of rigorous supervision, will satisfy the statutory sentencing factors. We believe that—not just through talk (which can come easily and conveniently at sentencing), but through his actions—Mr. Alvarez has demonstrated that he accepts responsibility and no longer poses a threat to the community.

Quite the opposite, in fact. Since his arraignment about a year ago, Mr. Alvarez has proven his unwavering commitment to personal growth and his own recovery. He has faithfully abided by every condition this Court has set. Despite his history of severe addiction, he has not used drugs once, not so much as one positive marijuana test, let alone a positive for heavy drugs. He has played his part in cultivating a trusting relationship with PO Farris, and he looks forward to continuing that reciprocal and honest collaboration, as he knows that the USPO is an invaluable resource to him in every facet of his recovery and his future. Moreover, he successfully completed IOP; he proudly carries and dons his AA coins; and he attends meetings.

Mr. Alvarez is not merely "treading water;" he is taking proactive steps to safeguard his own sobriety and make the community better. Rather than stand by and watch Ms. Anderson's business partner intoxicated on the job, he took the necessary measures to promote a sober environment in his place of work by reporting his superior to Ms. Anderson. It was a brave thing to do and a sign of how far he has come.

In other words, Mr. Alvarez, unlike so many who come into the building for sentencing, is not just hearing the Court orders and going through the motions—he is listening and he is acting accordingly. As a result, he has developed his own abiding internal motivation. There is no

substitute for that kind of personal growth and development. A sober Estevan Alvarez is unlikely to reoffend. He is likely to respect the law, himself, and those around him going forward.

Mr. Alvarez's long-term sobriety is not the only force for stability in his life. His steady employment—which saw him enter as a prep cook and work his way up to General Manger—and his stable, long-term residence are major contributors. He is proud of his job. And, while no one can tell the future for certain, Ms. Anderson's firsthand observations are as good a barometer as any of his commitment and likelihood of future success:

> Estevan is now the face of Nino's. It is an open kitchen. He interacts with every customer and is on a first name basis with many. They ask for him. He handles conflict with compassion and an easy demeanor. He solves thorny problems with grace. **He learns from his stumbles and missteps and owns them publicly, with humility. He continues to grow and thrive.**

Exhibit A (Anderson Letter (emphasis added)).

We hope that the Court will see reason to put this same faith in Mr. Alvarez and his future. He has given the Court every reason to believe he will continue to be a force for good in the community and for others, no matter where life takes him, whether he continues to work at Nino's, whether he decides to pursue his artistry and creative endeavors, or whether his redoubled commitment to his own education takes him in a different direction.

His relationship will also be an asset to him. As Ms. Gilbert has described, she and Mr. Alvarez provide one another mutual support and motivation in their recovery. They are influencing one another in the right direction, not the wrong one. His newfound physical health—his appearance at this sentencing, some 40 pounds heavier, will stand in stark contrast to his gaunt, frail post-offense countenance—and his well-rounded, active lifestyle will help to buttress the strides he has already made.

There are several other circumstances that auger strongly in favor of a non-custodial sentence. Mr. Alvarez comes before the Court for sentencing as a young man with no prior

criminal record of any kind. He has never been on the wrong side of the law before, and he has given the Court every reason to believe it will never see him at a sentencing again. He is a lifelong Vermonter, with ties to this State and a support network that are stronger than this Court often sees. It is probably at least in part for these reasons that the government declined to seek his post-plea incarceration and gave him the opportunity to walk into Court on his own volition for arraignment, rather than having him arrested, as it does for the vast majority of those charged with drug trafficking felonies. These steps are unusual for the prosecution and, while we would not presume to speak for it, we hope they are a signal that it has at least some measure of faith in him. Mr. Alvarez is grateful to the prosecutors for granting him these extraordinary opportunities, and he does not intend to disappoint anyone who will be in the courtroom at his sentencing or in the life he leads thereafter.

We hope this unique constellation of mitigating circumstances will give the Court sufficient comfort to find that Mr. Alvarez poses no threat to the community going forward, and that, in fact, he will continue to enrich the community and those around him, working with PO Farris under strictly enforced conditions of supervised release. Of course, Mr. Alvarez would welcome any condition of supervised release this Court sees fit to impose, including but not limited to a curfew, a GPS bracelet, any other restriction on his movement, and any requirement related to education, employment, mental health counseling or other form of treatment.

In sum, federal drug trafficking cases in which a defendant is able to earn their freedom are few and far between. We respectfully submit that this is one of them.

IV. Conclusion

In pleading for mercy for Mr. Alvarez, Ms. Anderson wrote:

> Please know, incarcerating Estevan would be akin to taking a beautiful, lush and blooming plant and sticking it in a closet. The most beneficial sentence for Estevan

> and this community, would be to permit him to continue to serve through leading by example. He makes a positive difference in the lives he touches.

Exhibit A.

To be clear, Estevan will accept and respect whatever punishment this Court metes out at sentencing. Whatever the outcome, Mr. Alvarez is committed to his future and to sustaining the new life he has built for himself. We only hope to convince the Court to see it the way Ms. Anderson so eloquently put it.

Dated at Burlington, Vermont this 3rd day of March, 2025.

ESTEVAN ALVAREZ

By: */s/ Christina E. Nolan*

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773 F.3d 429
United States Court of Appeals,
Second Circuit.

UNITED STATES of America, Appellee,
v.
Terry VAN MEAD, Defendant–Appellant.

No. 12–4054–cr.
|
Argued: Dec. 4, 2013.
|
Decided: Dec. 8, 2014.

Synopsis

Background: Defendant pleaded guilty in the United States District Court for the District of Vermont, William K. Sessions III, J., 2012 WL 3192670, to charges of failing to register as a sex offender in violation of the Sex Offender Registration and Notification Act, and of possession of stolen firearms. Defendant appealed his sentence.

[Holding:] The Court of Appeals, Debra Ann Livingston, Circuit Judge, held that defendant's prior conviction for statutory rape under New York law categorically was not "crime of violence" within meaning of career offender sentencing guideline.

Sentence vacated and remanded.

West Headnotes (7)

[1] **Sentencing and Punishment** Particular offenses

Defendant's prior conviction for statutory rape under New York law categorically was not "crime of violence" within meaning of career offender sentencing guideline, although statute had requisite age difference between victim and perpetrator. U.S.S.G. § 4B1.2, 18 U.S.C.A.; N.Y.McKinney's Penal Law § 130.40–2.

[2] **Criminal Law** Review De Novo

De novo review applies to a district court's determination as to whether a prior offense was a "crime of violence" within the meaning of the career offender sentencing guideline. U.S.S.G. § 4B1.2, 18 U.S.C.A.

4 Cases that cite this headnote

[3] **Sentencing and Punishment** Violent or Nonviolent Character of Offense

When interpreting the reach of the residual clause for the career offender sentencing guideline, a categorical approach is employed with an eye to case law interpreting an identical clause in the Armed Career Criminal Act (ACCA) that defines "violent felony"; the categorical approach requires a court to consider an offense in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion. 18 U.S.C.A. § 924(e)(2)(B); U.S.S.G. § 4B1.2(a)(2), 18 U.S.C.A.

4 Cases that cite this headnote

[4] **Sentencing and Punishment** Violent or Nonviolent Character of Offense

Under the categorical approach to determining whether a prior conviction is a "crime of violence" under the residual clause of career offender sentencing guideline, every conceivable factual offense covered by a statute need not necessarily present a serious potential risk of injury before the offense can be deemed a violent felony, or, as it were, a crime of violence; instead, the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another. U.S.S.G. § 4B1.2(a)(2), 18 U.S.C.A.

8 Cases that cite this headnote

[5] **Sentencing and Punishment** Violent or Nonviolent Character of Offense

To be deemed a "violent felony" under the residual clause of career offender sentencing guideline, an offense lacking a stringent mens rea requirement must not only involve conduct presenting a serious potential risk of physical injury to another but also must be roughly similar to the exemplar crimes by typically consisting of purposeful, violent, and aggressive conduct such that commission of the offense makes it more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim. U.S.S.G. § 4B1.2, 18 U.S.C.A.

1 Case that cites this headnote

[6] **Sentencing and Punishment** Offenses Usable for Enhancement

The Armed Career Criminal Act (ACCA) and, by extension, the residual clause of the career offender sentencing guideline, reach offenses commonly characterized as strict liability offenses in appropriate circumstances, regardless of the absence of a stringent mens rea requirement as to particular elements. 18 U.S.C.A. § 924(e)(2)(B); U.S.S.G. § 4B1.2(a)(2), 18 U.S.C.A.

[7] **Constitutional Law** Sentencing and punishment in general

Sentencing and Punishment Validity of statute or regulatory provision

Residual clause of career offender sentencing guideline was not unconstitutionally vague. U.S.C.A. Const.Amend. 5; U.S.S.G. § 4B1.2(a)(2), 18 U.S.C.A.

3 Cases that cite this headnote

Attorneys and Law Firms

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Christina E. Nolan (Gregory L. Waples, on the brief), Assistant United States Attorneys, for Tristram J. Coffin, United States Attorney, District of Vermont, Burlington, VT, for Appellee.

Before: LIVINGSTON and LOHIER, Circuit Judges; STEIN, District Judge. *

Opinion

DEBRA ANN LIVINGSTON, Circuit Judge:

Defendant Terry Van Mead ("Mead") appeals from a judgment of the United States District Court for the District of Vermont (Sessions, *J.*), sentencing him to 130 months' imprisonment following his guilty plea to one count of failing to register as a sex offender in violation of the Sex Offender Registration and Notification Act, 18 U.S.C. § 2250(a), and one count of possession of stolen firearms pursuant to 18 U.S.C. §§ 922(j), 924(a)(2). On appeal, Mead argues that the district court erred in calculating his sentence under the United States Sentencing Guidelines ("Guidelines" or "U.S.S.G."). Specifically, Mead contends that the district court incorrectly applied the enhancement in U.S.S.G. § 2K2.1, which sets a base offense level of 24 for defendants who have committed certain firearms offenses after "sustaining at least two felony convictions of ... a crime of violence," as that term is defined in U.S.S.G. § 4B1.2. Mead asserts that, contrary to the district court's ruling, his conviction for statutory rape under New York Penal Law ("N.Y.P.L.") § 130.40–2 was not a "crime of violence." Because we conclude that the conduct prohibited by N.Y.P.L. § 130.40–2 is not categorically a "crime of violence" under § 4B1.2, we vacate the judgment and remand for resentencing.

BACKGROUND

The facts on appeal are not in dispute. In 2006, Mead was convicted of violating N.Y.P.L. § 130.40–2, which provides that "[a] person is guilty of criminal sexual act in the third degree when ... [b]eing twenty-one years old or more, he or she engages in oral sexual conduct or anal sexual conduct with a person less than seventeen years old." Mead, then thirty years old, had engaged in repeated sexual encounters with a fifteen-year-old girl. The conviction required Mead to register as a sex offender ***431** both prior to his release from prison and upon moving to another state, and to notify authorities if his address changed, conditions with which Mead initially complied. However, in June 2010, Mead was arrested in Vermont for assaulting his former girlfriend and sentenced to another term of imprisonment. Upon his release from prison in August 2010, Mead continued to reside in Vermont without notifying New York authorities of his change of address or registering as a sex offender in Vermont.

Following multiple additional confrontations with authorities, Mead was again arrested in Vermont in October 2010 for the instant offense conduct. At the time of his arrest, Mead was driving a stolen car carrying numerous firearms, hunting gear, a gaming system, and games, all of which had been reported stolen from two Vermont homes earlier that day. One of those firearms was found fully loaded and "jammed between the front driver and passenger seats with the barrel down and handle up." In addition, officers found in Mead's wallet cash and a check made out to Mead that investigators traced to a local sporting goods store that had purchased ten firearms from Mead that day. Those firearms had also been reported stolen from the same two homes.

In August 2011, a federal grand jury indicted Mead for failing to register as a sex offender, possessing stolen firearms, and possessing firearms as a felon. Mead pled guilty to the first two counts, and the government dismissed the third. Following Mead's plea, a probation officer submitted a Presentence Report ("PSR") to the district court recommending a sentencing range of 130 to 162 months, based on a final offense level of 27 and a criminal history category of VI. Pertinently, in calculating Mead's final offense level, the PSR asserted that two of Mead's prior convictions —including a 1996 conviction for attempted burglary in New York and the 2006 conviction for statutory rape— were for "crimes of violence" under § 2K2.1, as defined by § 4B1.2. Accordingly, the PSR stated that Mead's base offense level was 24, which, after the application of firearms enhancements and a reduction for acceptance of responsibility, resulted in a final offense level of 27.

Mead objected to the PSR's characterization of his statutory rape conviction as a conviction for a "crime of violence" under § 2K2.1 and § 4B1.2.[1] Following argument, the district court rejected Mead's objection and adopted the PSR's recommendation. In so ruling, the district court largely relied on *United States v. Daye,* 571 F.3d 225 (2d Cir.2009), in which this Court held that violation of a Vermont law prohibiting sexual contact with a minor aged fifteen or younger constituted a "violent felony" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B). *See United States v. Mead,* No. 2:11–CR–87 (WKS), 2012 WL 3192670, at *2–5 (D.Vt. Aug. 2, 2012) (discussing *United States v. Daye,* 571 F.3d at 230–34). Noting the "identical" phrasing of the residual clauses of § 4B1.2 and the ACCA, the district court first determined that the provisions should be read coextensively. *Id.* at *3 (internal quotation marks omitted). The district court then compared N.Y.P.L. § 130.40–2 and the Vermont law and, finding that they reached similar conduct, read *Daye* to require a finding that violation of N.Y.P.L. § 130.40–2 constituted a "crime of violence" under § 2K2.1 and § 4B1.2. *Id.* at *4–5. In light of its ruling, the district court set Mead's base offense level at 24—resulting in an ***432** advisory sentencing range of 130 to 162 months—and sentenced Mead to 130 months' imprisonment, to be served in two consecutive sixty-five month terms. Mead appealed.

DISCUSSION

[1] **[2]** Mead argues on appeal that violation of N.Y.P.L. § 130.40–2 does not constitute a "crime of violence" under § 4B1.2, and that the district court's finding to the contrary resulted in the application of an inflated base offense level. We review *de novo* a district court's determination as to whether a prior offense was a "crime of violence" under the Guidelines. *See United States v. Savage,* 542 F.3d 959, 964 (2d Cir.2008).

Section 2K2.1 requires that defendants who have committed certain firearms offenses receive a base offense

level of 24 "if the defendant committed any part of the [firearms] offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 2K2.1(a)(2). Section 2K2.1 defines "crime of violence" by reference to § 4B1.2(a), which states:

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Section 4B1.2(a)(1) is referred to as the "physical force clause." The first half of § 4B1.2(a)(2) contains the "exemplar crimes," and the second half the "residual clause."[2]

N.Y.P.L. § 130.40–2 prohibits a person aged twenty-one or older from engaging in oral or anal sexual conduct with a minor aged sixteen or younger. Because the law lacks a physical force element, it cannot be deemed a "crime of violence" under § 4B1.2(a)(1)'s "physical force" clause. Similarly, because the law does not concern any of the exemplar crimes, it cannot be deemed a "crime of violence" under § 4B1.2(a)(2)'s list of "exemplar crimes." Instead, violation of N.Y.P.L. § 130.40–2 may be deemed a "crime of violence" only under § 4B1.2(a)(2)'s "residual clause," which reaches crimes that "otherwise involve[ ] conduct that presents a serious potential risk of physical injury to another."

[3] **[4]** In interpreting the reach of § 4B1.2(a)(2)'s residual clause, we employ a categorical approach, with an eye to case law interpreting an identical clause in the ACCA that defines "violent felony." *See* *United States v. Gray,* 535 F.3d 128, 130 (2d Cir.2008) (looking to ACCA precedent to interpret § 4B1.2 due to the provisions' "identical" operative language); *Taylor v. United States,* 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (requiring "categorical" approach to interpreting ACCA). The categorical approach requires a court to consider an offense "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay v. United States,* 553 U.S. 137, 141, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008) (citing *Taylor,* 495 U.S. at 602, 110 S.Ct. 2143). Under this approach, "every conceivable factual offense ***433** covered by a statute ... [need not] necessarily present a serious potential risk of injury before the offense can be deemed a violent felony," or, as it were, a crime of violence. *James v. United States,* 550 U.S. 192, 208, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007). Instead, "the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *Id.*

[5] **[6]** In applying the categorical approach, the Supreme Court has distinguished between offenses that have "a stringent *mens rea* requirement," demanding that a defendant act knowingly, intentionally, or the like as to the core element or elements of the offense, and those offenses commonly characterized as sounding in strict liability, negligence, or recklessness. *See* *Sykes v. United States,* —— U.S. ——, 131 S.Ct. 2267, 2275–76, 180 L.Ed.2d 60 (2011). For the former, an offense must pose a risk "similar in degree" to its "closest analog" among the exemplar crimes to qualify as a "violent felony" under the residual clause. *Id.* at 2273 (deeming vehicular flight to be a "violent felony" because it poses a risk similar to that of burglary or arson). By contrast, a strict liability, negligence, or recklessness offense must be similar *in kind* and pose a risk similar in degree to qualify as a "violent felony" under the residual clause. *Begay,* 553 U.S. at 145, 128 S.Ct. 1581; *see* *Sykes,* 131 S.Ct. at 2275–76 (limiting *Begay* to strict liability, negligence, and recklessness offenses). That is, to be deemed a "violent felony," an offense lacking a stringent *mens rea* requirement must not only "involve[ ] conduct presenting a serious potential risk of physical injury to another" but must also be "roughly similar" to the exemplar crimes by typically consisting of "purposeful, violent, and aggressive conduct" such that commission of the offense makes it "more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim." *Begay,* 553 U.S. at 143, 145, 128 S.Ct. 1581 (holding that driving under the influence

is not a "violent felony" because the offense conduct is not "purposeful, violent, and aggressive"). [3]

Against essentially this landscape, we held that violation of a Vermont law that imposed strict liability for sexual contact with any minor under the age of sixteen constituted a "violent felony" under the ACCA. [4] *Daye,* 571 F.3d at 234 (discussing 13 Vt. Stat. Ann. § 3252(3) (1986) (since amended)). First, we found that sexual contact with a child—the crime contemplated by Vermont's law—posed a "serious potential risk of injury to another." *Id.* at 230. In so ruling, we cited multiple circuit court opinions detailing the risk of injury to young victims of sexual crimes, *id.* at 230–31 (quoting, *inter alia,* *United States v. Cadieux,* 500 F.3d 37, 45 (1st Cir.2007) ***434** ("[C]rimes involving indecent sexual contact with a *child* typically occur in close quarters, and are generally perpetrated by an adult upon a victim who is not only smaller, weaker, and less experienced, but is also generally susceptible to acceding to the coercive power of adult authority figures.") (emphasis added and internal quotation marks omitted)), while distinguishing opinions that noted the reduced risk to older teens on the ground that Vermont's statute "applie[d] only to children and young teens," defined in the law as those under sixteen. *See* *id.* at 231 (citing *United States v. Sawyers,* 409 F.3d 732, 742 (6th Cir.2005) and *United States v. Thomas,* 159 F.3d 296, 299–300 (7th Cir.1998), which discussed the reduced risk sexual contact posed to sixteen-year-olds as compared to young children). We also noted that sexual contact with minors who are deemed legally unable to consent "for reasons of physical or emotional immaturity ... inherently involves a substantial risk that physical force may be used in the course of committing the offense." *Id.* at 232 (internal quotation marks and emphasis omitted).

We next concluded that violation of the Vermont law required "purposeful, violent, and aggressive" conduct. We deemed the violation to be purposeful in the ordinary case on the ground that engaging in sexual contact with a child aged fifteen or younger necessitated "deliberate and affirmative conduct," and we deemed such conduct violent and aggressive on the ground that it "create[d] a substantial likelihood of forceful, violent, and aggressive behavior ... because a child has essentially no ability to deter an adult from using ... force to coerce the child into a sexual act." *Id.* at 233–34. This likely use of force assured us that, "[a]t a minimum, ... a typical instance of this crime will involve conduct that is at least as intentionally aggressive and violent as a typical instance of burglary." *Id.* at 234. In reaching this conclusion, we distinguished a Tenth Circuit opinion that came to a contrary result on the ground that, *inter alia,* the law at issue there "criminalized conduct involving substantially older victims." *Id.* at 235 (discussing *United States v. Dennis,* 551 F.3d 986, 990 (10th Cir.2008) (holding that violation of law criminalizing "indecent liberties" with a person under the age of eighteen was not a violent felony)).

Like the Vermont law at issue in *Daye,* N.Y.P.L. § 130.40–2 imposes strict liability with regard to the age of the victim, and is therefore subject to *Begay*'s requirement that the prohibited conduct be similar in kind and in degree of risk to § 4B1.2's exemplar crimes in order to be deemed a "crime of violence." *See* *People v. Newton,* 8 N.Y.3d 460, 464, 835 N.Y.S.2d 546, 867 N.E.2d 397, 399 (2007) (holding that a violation of § 130.40–2 is a strict liability offense). But unlike the Vermont law in *Daye,* N.Y.P.L. § 130.40–2's focus is not on *all* children from infancy to age fifteen, but principally on those minors who are fifteen and (pertinently) sixteen years old. [5] Under New York's statutory scheme, oral or anal sexual conduct with a child under the age of eleven (or under the age of thirteen, if the perpetrator is eighteen or older) constitutes the most serious grade of New York's "criminal sexual act" offense involving children, and is a Class B felony. *Id.* § 130.50. Such contact with a child under the age of fifteen (provided the perpetrator is at least eighteen) is a Class ***435** D felony, a less serious grade. *Id.* § 130.45. Finally, section 130.40–2, the provision at issue here, extends to minors who are fifteen and sixteen (provided the perpetrator is at least twenty-one), and bears the lowest grade of criminal liability, constituting a Class E felony. *Id.* § 130.40–2. Thus, while offenders who engage in sexual contact with children and with young teens may also be charged pursuant to § 130.40–2, this provision, in the context of the larger statutory scheme, focuses on fifteen- and sixteen-year-old minors, as sexual conduct involving younger victims can be charged as one of the higher-graded offenses.

It is understandable that the district court viewed our decision in *Daye* as controlling. But we deem the differences between the Vermont provision at issue in *Daye* and the provision

before us now to be material for purposes of § 2K2.1 and § 4B1.2. As an initial matter, courts considering the intersection of statutory rape laws and the ACCA or § 4B1.2 have routinely noted the difficulty presented by the "categorical" approach in this context. Statutory rape laws frequently encompass a wide range of behavior, potentially criminalizing some conduct "in respect to which the offender need not have had any criminal intent at all," *Begay,* 553 U.S. at 145, 128 S.Ct. 1581, but also reaching conduct —such as sexual contact with a toddler—that is invariably purposeful, violent, and aggressive. It is therefore difficult to determine what kind of conduct and degree of risk is present in the "ordinary" case, because it is difficult to determine what constitutes an "ordinary" case under such statutes. *See James,* 550 U.S. at 208, 127 S.Ct. 1586 (noting that "proper inquiry" focuses on "the conduct encompassed by the elements of the offense, in the ordinary case"). Accordingly, courts deciding whether violation of a statutory rape law is "categorically" violent have often looked, *inter alia,* to the age of the protected minors to assess the typical character of the prohibited conduct, reasoning that laws penalizing sexual contact with young children will in the "ordinary" case present a risk of injury, whereas laws criminalizing such conduct with older, more mature minors may not. *Compare, e.g.,* *Sawyers,* 409 F.3d at 741–42 (holding that violation of Tennessee's statutory rape law, covering victims aged thirteen to seventeen, did not present a categorical risk of physical injury because, *inter alia,* "more mature victims"—that is, older teens—were included in the statute), *with* *United States v. Howard,* 754 F.3d 608, 610 (8th Cir.2014) (holding violation of prohibition on sexual contact with a child "of a tender age (younger than fourteen years)" to be a violent felony but citing cases in which conviction for sexual abuse under statutes involving victims aged at least fourteen did not qualify).

As the Fourth Circuit recently recognized in *United States v. Rangel–Castaneda,* 709 F.3d 373, 377 (4th Cir.2013), "the age of consent is central to the conception of statutory rape in every jurisdiction," but that age is not everywhere the same. Indeed, in interpreting U.S.S.G. § 2L1.2, which governs sentencing enhancements in illegal reentry cases, that court observed that the disagreement among states as to the age at which a minor is legally capable of consenting to sexual relations "engenders dramatically different crimes" from one jurisdiction to the next. *Id.* "In other words, conduct that is perfectly legal for some people could subject many others in neighboring states to years upon years in federal prison." *Id.* Surveying state and federal statutes, however, the court found that "a robust majority of American jurisdictions—the federal government, thirty-two states, and the District of Columbia —ha[ve] set the general age of consent precisely ***436** at sixteen years old." *Id.* at 377–78. The Model Penal Code and Black's Law Dictionary similarly recognize sixteen as "the default age of consent." *Id.* at 378. In light of this consensus, and citing the need for "some degree of uniformity in applying the ... Guidelines across the nation," the court held that sixteen was the "generic" age of consent for purposes of § 2L1.2.[6] *Id.* at 375, 378; *accord* *United States v. Rodriguez–Guzman,* 506 F.3d 738, 745–46 (9th Cir.2007). Similarly, the Seventh Circuit, in holding that violation of a law prohibiting sexual conduct with persons aged thirteen to sixteen was not categorically a violent crime, noted that "in a majority of states [sixteen] is the age of consent" and therefore "it is difficult to maintain on a priori grounds that sex is physically dangerous to [sixteen]-year-old girls." *Thomas,* 159 F.3d at 299.

Such reasoning sufficiently distinguishes the statute at bar, N.Y.P.L. § 130.40–2, from the broader Vermont law in *Daye* that we are unable to conclude that violation of the New York law would, in the "ordinary" case, pose a "serious potential risk of physical injury to another" and require "purposeful, violent, and aggressive" conduct. The Vermont law in *Daye* criminalized sexual contact with *any* minor aged fifteen or younger, *see* 13 Vt. Stat. Ann. § 3252(3) (1986), and constituted Vermont's primary prohibition on sexual contact with children. The focus of § 130.40–2, by contrast, is not the universe of all children potentially victimized by adults, but fifteen- or sixteen-year-olds, specifically. In addition, N.Y.P.L. § 130.40–2 is structured as the least serious in a series of separate, escalating crimes penalizing sexual contact with minors. *See* *Sykes,* 131 S.Ct. at 2276 (suggesting that the existence of graded offenses in a statutory scheme may be relevant to the question whether prohibited conduct constitutes a violent felony for ACCA purposes); *id.* at 2293 (Kagan, *J.,* dissenting) (advocating that "a State's decision to divide a generic form of conduct ... into separate, escalating crimes may make a difference under ACCA"); *cf.* *Descamps v. United States,* —— U.S. ——,

133 S.Ct. 2276, 2283, 186 L.Ed.2d 438 (2013) (permitting consideration of whether violation of one subset of a "divisible" statute that "creates several different ... crimes" constitutes a violent crime under the ACCA). Considering the structure of New York's statutory scheme as a whole, and given that consensual sexual contact with sixteen-year-olds (who constitute a major portion of those minors protected by N.Y.P.L. § 130.40–2) would be lawful in many American jurisdictions, we are hard-pressed to conclude that the conduct at issue would necessarily, in the "ordinary" case, pose a serious potential risk of physical injury to another or be generally purposeful, violent, and aggressive in character. *See* *Sykes,* 131 S.Ct. at 2279 (noting that "[c]ommon experience and statistical evidence" may be used to support intuition that offense does—or does not—rise to the level of "violent felony").

This remains so, moreover, despite the presence in New York's law of a requisite age difference between the victim and perpetrator—a provision so common in statutory rape laws that many of our sister ***437** circuits have declined even to mention such provisions when analyzing statutory rape statutes for purposes of § 4B1.2 or the ACCA. *See, e.g.,* *United States v. Christensen,* 559 F.3d 1092, 1093–95 (9th Cir.2009) (concluding that violation of Wash. Rev.Code § 9A.44.079, criminalizing sexual intercourse with a fourteen- or fifteen-year old child, was not categorically a violent felony, without any discussion of the statutory forty-eight-month age gap); *United States v. Thornton,* 554 F.3d 443, 445 n. 2 (4th Cir.2009) (holding that defendant's conviction under Va.Code § 18.2–63, which prohibits sexual contact with a thirteen- or fourteen-year old child, did not constitute a "violent felony," but declining to mention that the same statute would have graded defendant's conduct as a misdemeanor in the event of an age gap of less than three years). The government alludes to this requirement and argues that "the justification for concluding that Mead's statute of conviction is categorically a crime of violence is, if anything, stronger than for the statutory rape law analyzed in *Daye.*" But we are unpersuaded by this reasoning, considered in light of the counsel of cases from our sister circuits, the interest in "some degree of uniformity in applying the ... Guidelines across the nation," *see* *Rangel–Castaneda,* 709 F.3d at 375, and the absence of any sufficiently compelling argument as to why this age differential is enough to establish, categorically, that N.Y.P.L. § 130.40–2 is a "crime of violence" pursuant to § 4B1.2, given the differences between the New York provision and the Vermont law in *Daye.*

This reluctance is reinforced by the fact that N.Y.P.L. § 130.40–2's narrow focus on older children and its inclusion of sixteen-year-olds—who have reached the typical age of consent—among its protected class renders immaterial here many of the factors that supported our ruling in *Daye.* For instance, in determining that violation of the Vermont law posed a "serious potential risk of physical injury" to minors, *Daye* relied in large part on circuit opinions discussing the risk that sexual contact posed to children and young teens. However, those rulings are of limited use where, as here, we must consider the risk to older teens. *Daye* additionally relied on the legal inability of children to consent to sexual contact, noting that such legal incapacity reflected the children's "physical [and] emotional immaturity" and supported the intuition that violation of the Vermont law would "inherently involve[ ] a substantial risk that physical force may be used." 571 F.3d at 232 (emphasis and internal quotation mark omitted). But many of the minors protected by N.Y.P.L. § 130.40–2 *are* deemed capable of consent in a majority of jurisdictions, rendering *Daye*'s reliance on legal incapacity inapt here.

[7] Thus, lacking any substantial basis on which to conclude that violation of N.Y.P.L. § 130.40–2 categorically poses "a serious potential risk of physical injury to another" and involves "purposeful, violent, and aggressive conduct," we decline to extend our holding in *Daye* to encompass this provision. This conclusion does not minimize either the seriousness of the risks associated with sexual relations between adults and older teens or the gravity of Mead's own violation of N.Y.P.L. § 130.40–2. We conclude only that, for purposes of the particular statutory provision before us, a conviction pursuant to N.Y.P.L. § 130.40–2 falls outside the scope of § 4B1.2 as § 130.40–2 is not categorically a "crime of violence" pursuant to that Guidelines provision. *See* *Descamps,* 133 S.Ct. at 2282 (holding that violation of broad burglary statute is not categorically a violent crime because "[i]n sweeping so ***438** widely, the state law goes beyond the normal, 'generic' definition of burglary"). [7]

CONCLUSION

For the foregoing reasons, we **VACATE** the judgment of the district court and **REMAND** for resentencing.

All Citations

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Footnotes

* The Honorable Sidney H. Stein, United States District Judge for the Southern District of New York, sitting by designation.

1 Mead also challenged the categorization of his conviction for attempted burglary as being for a "crime of violence," an argument he does not renew on appeal.

2 An application note to § 4B1.2 contains additional interpretive material not at issue in this case. *See* U.S.S.G. § 4B1.2 app. n.1.

3 Given this distinction, we reject Mead's argument that § 4B1.2 does not reach strict liability offenses. *Sykes* limited *Begay*' s "purposeful, violent, and aggressive" approach to strict liability, negligence, and recklessness crimes, strongly implying that such crimes may qualify as predicate offenses under the ACCA and § 4B1.2. *See* *Sykes,* 131 S.Ct. at 2277 (Thomas, *J.,* concurring) (criticizing majority for maintaining "purposeful, violent, and aggressive" test for strict liability crimes). We conclude, as in *Daye,* that the ACCA—and, by extension, § 4B1.2—reaches offenses commonly characterized as strict liability offenses in appropriate circumstances, regardless of the absence of a stringent *mens rea* requirement as to particular elements. *See* *Daye,* at 571 F.3d at 233–34 (applying ACCA to Vermont statutory rape law because of the "deliberate and affirmative conduct" at issue).

4 Though we issued *Daye* prior to the publication of *Sykes,* that *Sykes* limited *Begay* to strict liability, negligence, and recklessness offenses has no effect on our ruling there.

5 The all-inclusive Vermont statutory scheme addressed in *Daye* has since been amended to create a staggered scheme that accounts for age of the victim, age of the perpetrator, and, in the case of fifteen-year-old victims, the presence or absence of consent. *See* 13 Vt. Stat. Ann. § 3252; 13 Vt. Stat. Ann. § 3253.

6 While we find the Fourth Circuit's analysis of § 2L1.2 instructive insofar as it surveys ages of consent across the country, we decline Mead's invitation to give § 2L1.2's commentary interpretive weight in analyzing § 4B1.2, in no small part because § 2L1.2 and § 4B1.2 are structured differently, phrased differently, and concern penalties for different types of crimes. *See, e.g., United States v. Folkes,* 622 F.3d 152, 157 (2d Cir.2010) (distinguishing § 2L1.2 and § 4B1.2); *United States v. Wynn,* 579 F.3d 567, 574–75 (6th Cir.2009) (same); *United States v. Houston,* 364 F.3d 243, 247 n. 5 (5th Cir.2004) (same).

7 Finally, we reject Mead's argument that § 4B1.2(a)(2)'s residual clause is unconstitutionally vague, noting that this argument has been implicitly repudiated by the Supreme Court on more than one occasion. *See, e.g.,*

Sykes, 131 S.Ct. at 2277 (observing that ACCA's identical residual clause "states an intelligible principle and provides guidance that allows a person to conform his or her conduct to the law") (internal quotation mark omitted). *See also* *United States v. Martin,* 753 F.3d 485, 494 n. 3 (4th Cir.2014) (citing *Sykes* in rejecting vagueness attack on § 4B1.2(a)(2)); *United States v. Spencer,* 724 F.3d 1133, 1145–46 (9th Cir.2013) (same); *United States v. Cowan,* 696 F.3d 706, 708 (8th Cir.2012) (same).