APPLICATION FOR CANDIDATE FOR SUPREME COURT JUSTICE

Date of application: June 13, 2025

Position applied for: Associate Justice

GENERAL

1. Name: Michael P. Drescher

2. Mailing address: [redacted]

   Business address: United States Attorney's Office, PO Box 570, Burlington, VT 05401

   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: Hinesburg

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

6a. Years practicing law (minimum 10 years, per 4 V.S.A. § 602(c)(1)): 29
Years practicing law in Vermont (minimum 5 years, per 4 V.S.A. § 602(c)(1)): 29

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:

Dartmouth College, 1983-1987, A.B. (mathematics)
Northwestern University School of Law, 1992-1995, J.D.

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

I graduated from law school cum laude and order of the coif (top 10%).

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.

Vermont, April 8, 1996
New York, July 27, 1999
United States District Court for the District of Vermont, September 20, 1996
United States Court of Appeals for the Second Circuit, November 19, 1996

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.

Between college and law school, from 1987 to 1992, I worked for Leo Burnett USA, an advertising agency in Chicago. My positions were Media Buyer-Planner, Assistant Account Executive, and Account Executive.

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.

From October 1996 to January 2002, I practiced at the law firm now known as Sheehey Furlong & Behm PC, in Burlington. A significant part of my time there involved representing utilities before the Public Service Board, including cases to set electric rates, and in cases involving certificates of public good for competitive telephone companies. That experience also included working on an appeal to the Vermont Supreme Court from a Public Service Board rate case that disallowed costs associated with the power supply contract that several Vermont utilities had entered into with Hydro-Quebec. In this context, I developed an expertise in Vermont's utility regulatory scheme as it existed at that time.

At Sheehey, most of the rest of my practice focused on civil litigation in cases involving contract disputes, property damage claims, as well as an antitrust case. I was involved in at least three jury trials, two as a "second chair," and one on my own. I argued one case before the Vermont Supreme Court.

When I joined the United States Attorney's office in January 2002, I practiced as a civil AUSA until 2009, when I moved to the criminal division. As a civil AUSA, I defended the United States in tort cases (applying Vermont tort law) involving medical malpractice and other personal injury claims, as well as in cases involving environmental challenges to federal programs (such as U.S. Fish and Wildlife's program to control sea lamprey in Lake Champlain). As a civil AUSA I also investigated and pursued affirmative fraud claims involving federal health care programs and defense contractors. As a civil AUSA I also represented the Social Security Administration in appeals from the denials of benefit claims before the District Court and the United States Court of Appeals for the Second Circuit. I tried one civil case on behalf of the United States. As a civil litigator, I developed an expertise in the rules of civil procedure, including but not limited to those relating to pleading standards, motions to dismiss and for summary judgment, as well as discovery. I also began to develop an expertise in the rules of evidence.

As a civil AUSA I litigated before the United States Court of Appeals for the Second Circuit approximately 10 times.

As a criminal AUSA, my duties included investigating and prosecuting a wide variety of criminal conduct, including: drug and gun offenses, fraud, and child exploitation. As a criminal AUSA I regularly appeared in court for hearings involving pretrial detention, suppression motions, sentencings, and supervised release violations. In this context I developed expertise in constitutional criminal procedure, as well as the rules of evidence.

As a criminal AUSA I have tried at least 6 cases before a jury, and have been involved in about 12 appeals to the United States Court of Appeals for the Second Circuit.

Most recently, as Acting United States Attorney for the District of Vermont, I assigned to myself two high profile immigration-related habeas cases, and make occasional appearances in criminal cases as well.

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 the past 10 years, 100% of my work experience has involved litigation, leading numerous prosecutions as an AUSA. During the past 10 years I have tried at least 4 jury trials. Every prosecution involves multiple hearings: an initial-appearance/detention hearing, a plea hearing, and a sentencing hearing. Many cases also involve suppression hearings and jury trials. During the past 10 years I have also been the lead attorney on about 10 appeals to the United States Court of Appeals for the Second Circuit.

Recently, I have also represented the United States in civil immigration-related habeas cases.

As the leader of the office, I also supervise the civil and criminal cases that are handled by other AUSAs, and review and approve all charging decisions.

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

a. family matters _____%
b. juvenile matters _____%
c. civil matters 5 %
d. criminal matters 95 %
e. probate _____%
f. administrative _____%
g. municipal _____%
h. environmental _____%
i. other _____%

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).

From 1996 through January 2002, when I worked at Sheehey Furlong & Behm, I was involved in three civil jury trials, two as a second chair, one as a first chair. I also litigated at least two evidentiary hearings -- one involving the State's involuntary commitment of Louis Hines, and the other involving a criminal defendant's suppression hearing.

Since joining the United States Attorney's Office, I have tried one bench trial, and at least 6 jury trials, and estimate that I have actively participated in over a hundred contested evidentiary hearings, including detention hearings, suppression hearings, supervised release violation hearings, and sentencing hearings. My role in these hearings includes questioning witnesses, introducing exhibits, and making arguments.

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

a.	criminal	95 %
b.	family	_____ %
c.	civil	5 %
d.	probate	_____ %
e.	federal trial	95 %
f.	federal appellate	5 %
g.	Vermont Supreme Court	_____ %
h.	administrative body	_____ %
i.	environmental court	_____ %
j.	other court	_____ %

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

a. academics, including teaching, presentations, seminars

None.

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

Since September 2023, when I became First Assistant United States Attorney, I have been involved in the management of the United States Attorney's Office, and have been responsible for supervising the criminal, civil, and administrative divisions of the office.

Pursuant to the Vacancy Reform Act, on January 20, 2025, I became the Acting United States Attorney for the District of Vermont. In this position, I have maintained my FAUSA duties, while also leading the office through the new administration's changes in policies.

c. mediation, arbitration, or other dispute resolution

As a civil litigator, I have participated in about 5 mediations.

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

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.

The Vermont rules of evidence and procedure are largely based on the Federal rules.

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.

No

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.

No

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.

No

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.

None

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 10 (as law clerk)
    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.

Here in Hanover (magazine), Volume 13, No 1, Spring 2008, at page 66, "Tuckerman Ravine and Pineapple Juice" (an article about my first trip to Tuckerman Ravine in New Hampshire)

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.

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.

In September 2023, the United States Attorney appointed me to be the First Assistant United States Attorney, the highest career (i.e., non-political) position in the office. By virtue of holding that position, on January 20, 2025, I became — by operation of law — the Acting United States Attorney for the District of Vermont.

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.

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.

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.

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.

When I leave the United States Attorney's Office, I may be eligible for an annuity-pension on account of my time in federal employment.

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

I will abide by Rule 2.11 of the Vermont Code of Judicial Conduct and disqualify myself from any proceeding in which my impartiality might reasonably be questioned.

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

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?

I graduated from law school 30 years ago. I have been a law clerk to a federal appeals judge. I have been an associate and a partner at a Burlington law firm. And I have represented government in both civil and criminal litigation since 2002. During my career I have been involved in well over 50 appeals (either as a law clerk, or a litigator, or as a supervisor). As a threshold matter, I believe my experience has prepared me to be an Associate Justice of the Vermont Supreme Court.

My career has taught me that everyone makes mistakes, and that our legal system is only as good as its ability to constructively and humanely account for and, where possible, correct those mistakes. I know how difficult it is to be a litigator, and that the demands of that job place stresses not only on attorneys and their clients, but their families and associates as well. I want to be an Associate Justice of the Vermont Supreme Court to ensure Vermont's legal system lives up to those ideals.

My career has also taught me about the extraordinary power of government, and the judiciary's important role in regulating that power — especially when it is wielded over an individual. I want to be an Associate Justice of the Vermont Supreme Court because I believe my experience has equipped me to perform that role in a manner that maintains the predictability and stability of our legal system, protects the individual against arbitrary government action, and also enables the political branches to make the policy judgments entrusted to them.

I also deeply appreciate the informal power judges wield, and that a critical aspect of appellate review is to ensure that all voices in litigation feel heard. I have witnessed imperiously appearing black-robed judges (at both the trial and appellate courts) patiently and respectfully listen to an inexperienced or nervous attorney or a pro se litigant, asking questions in a manner that makes clear the judges understand — and care about — the position of the party. I have learned through experience how qualitatively important such demeanor is. Because the Vermont Supreme Court is the highest court, it is especially important that its judges demonstrate this level of care and respect for the people — whether lawyers, parties, trial judges, or court staff — who are subject to its authority.

I am proud of the public service I have performed over my career. I would relish the opportunity to apply the lessons I have learned to ensure that the Vermont Supreme Court is a humane forum, a responsible check on executive power, and a symbol of good government.

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.

My first job after law school was being a law clerk to Judge Fred I. Parker, who was at that time Vermont's judge on the United States Court of Appeals for the Second Circuit. The work required preparing "bench memos" pertaining to each case. After submitting my first memo, Judge Parker's memorable feedback was that I needed to spend more time with the facts. Judge Parker impressed upon me that in litigation, the facts matter, and that it is the responsibility of the appellate judge to delve into and understand them.

Later in my career I also came to appreciate that a judge's command of the factual record demonstrates that the judge cares about the case, and the people before the court. Such attention to detail not only contributes to sound, intellectually honest decisions. It also is a major factor in whether litigants feels that they have been subjected to a fair process.

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

I have seen many criminal defendants arrive in court understandably skeptical about the fairness of our legal system. For our system to be sustainable, the court must ensure that each criminal defendant and each individual litigant is subject to, and has a meaningful opportunity to participate in, a demonstrably fair process.

That means, among other things, demonstrating respect for and consideration of their arguments, while also efficiently administering their litigation. I am acutely aware of how difficult it is for an attorney to appear in court. Some days I made persuasive arguments, and on other I failed to persuade. As an Associate Justice, I would approach each case with appreciation for those stresses on both the parties and their counsel.

46. Please describe your experiences working with diverse populations.

As an AUSA, I have interacted with victims, witnesses, and defendants that come from backgrounds far different from mine. Many are involved in a criminal prosecution because of the absence of role models, education, and economic prospects. Many have significant substance abuse problems. Many come from communities outside of Vermont. Many are people of color. To be an effective AUSA, it has been critical to understand the backgrounds of each victim, witness, and defendant, and to be able to interact with them respectfully and productively.

I have also been involved in community outreach, including for example,visiting multiple times with members of the Muslim community, including following the Burlington shooting of three young men of Palestinian descent, to listen to their concerns, and to answer questions about the criminal justice system.

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?

The political process has been increasingly divisive. Perspective-specific sources of news and other information seem to further entrench points of view. These dynamics make it especially important for the judiciary to maintain an apolitical and collegial image. The Supreme Court especially should model how people of different perspectives can work together to understand and resolve the conflicts that come before it. When there is dissent (as there should be from time to time), that dissent must be expressed respectfully.

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

As First Assistant United States Attorney, and as the Acting United States Attorney, I have learned that part of the job of leading, is simply representing the office to the rest of the world. As an Associate Justice of the Vermont Supreme Court, I would represent the Court, and the State's legal system, in everything I would do.

As a manager of public service-driven government employees, I have also learned the importance of recognizing the work of others. Sometimes such recognition occurs in hallway conversations, and sometimes in more formal communications. I would apply this experience as an Associate Justice, to recognize, where appropriate, both the quality work of court-staff as well as the performance of counsel who appear before the Court.

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

Judge Fred I. Parker, for whom I was a law clerk (nearly 30 years ago), told me that as he approached and thought about cases that came before him, he tried to identify what personal biases he might harbor that could creep into his decision making. He would then try to make sure that his decisions were not the product of those biases. I have tried to emulate Judge Parker's maturity and intellectual honesty in the conduct of my career, and would certainly continue to do so if I become an Associate Justice of the Vermont Supreme Court.

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

As mentioned in some of my previous answers, I have extensive trial and appellate experience. I have witnessed and been subject to the extraordinary power that a judge wields. Formally, that power includes the authority to make findings of fact and legal conclusions, to decide whether a criminal defendant should lose his or her liberty, to weigh competing sentencing factors, and to assess the reasonableness and constitutionality of the actions of the government. Informally, a judge’s word choice, demeanor, and docket management can signal that the court appreciates the extraordinary demands placed on litigants, victims, witnesses, attorneys, court staff, and their families. Alternatively, those informal tools of power can (purposefully or not) also demonstrate indifference, thereby imposing unnecessary practical and emotional costs on the wide range of persons affected by litigation. And, as mentioned earlier, I know how difficult it is to be a litigator, and how stressful it is for a party to be subject to the authority of a court.

For most of my career I have represented the government in court. I have witnessed and experienced courts checking the power of the executive branch. I have learned that for a court to do that credibly, it must carefully confront the issues and arguments before it, and carefully explain — with intellectual honesty — the reasons for its decisions.

I am applying to be an Associate Justice of the Vermont Supreme Court because I care deeply that our courts exercise their formal and informal powers with compassion and humility. I care deeply that a judge must be prepared not only to serve as a check against challenged executive action that is unlawful, but also to ensure that the rights of criminal defendants and individual litigants are protected. Just as important, I know that a legal system must be stable and predictable.

I believe my experiences have prepared me to contribute to the Vermont Supreme Court continuing to be a practical and compassionate contributor to good government.

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.

These pleadings are representative of my legal writing and analytical ability.

I curtailed each sample at the maximum allowed page length.

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

Owen Foster, [redacted]

Owen is a former AUSA with whom I worked.
Please note that government ethics rules prohibit me from asking anyone I supervise to be a reference. As the current head of this office, therefore, I have not asked any of my current colleagues to be a reference. I have no objection, however, to people within the office being contacted about me.

Reference 2

Nikolas ("Kolo") Kerest, [redacted]

Kolo is the former United States Attorney. I worked with him for several years within the United States Attorney's Office.

Reference 3

Brooks McArthur, Gravel & Shea, 76 St. Paul Street, 7th Floor, P.O. Box 369, Burlington, VT 05402-0369
[redacted]

Brooks and I have been litigation adversaries in several cases.

Reference 4

Lisa Shelkrot, Langrock Sperry & Wool, 210 College Street, Suite 400, Burlington, VT 05401
[redacted]

Lisa and I have been litigation adversaries in several cases.

AFFIDAVIT

Michael P. Drescher, being first duly sworn, deposes and says that all of the information I have provided in this Application is true.

Signature of Candidate

STATE OF VERMONT **CHITTENDEN** COUNTY, SS

At Burlington, in said County, Michael P. Drescher personally appeared and subscribed and swore to the truth of the above before me this 13th day of June, 20 25.

Notary Public
My commission expires: 1/31/2027

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: 6/13/25

Signature of Candidate

MICHAEL P. DRESCHER
[redacted]

UNITED STATES ATTORNEY'S OFFICE, DISTRICT OF VERMONT

Acting United States Attorney, Jan. 2025 - present
First Assistant United States Attorney Sept. 2023-Jan. 2025
Assistant United States Attorney, Criminal Division 2009-2023
Assistant United States Attorney, Civil Division 2002-2009

Managerial Duties

- Representing Office within the Vermont law enforcement community and Department of Justice leadership
- Leading office through change of presidential administration and resulting changes in DOJ priorities and human resource policies
- Reviewing and approving all charging decisions
- Monitoring well-being and morale of staff of approximately 40 attorneys, paralegals, and other legal and administrative staff
- Monitoring office expenditures to gauge compliance with budgetary limitations
- Reviewing and editing office press releases

Representative Criminal Investigations and Prosecutions

- $30 million fraud and money laundering scheme relating to the film "Birth of Innocence"
- Kickback scheme involving electronic medical record system to promote opiate prescriptions
- Dark web drug distribution ring using cryptocurrency
- Multinational cocaine importation conspiracy involving hundreds of kilograms of cocaine
- Heroin importation conspiracy involving hundreds of kilograms of heroin
- Domestic conspiracies involving distribution of oxycodone, heroin and fentanyl
- Smuggling of non-citizens into the United States (jury trial)
- Bank fraud scheme involving use of false identities and associated effort to obtain U.S. passport under false name, aggravated identity theft (jury trial)
- Online threats resulting in shutdown of South Burlington School System
- False statements to state regulators by hospital administrators relating to funding federal health care programs
- Unlawful possession of firearm involving crack cocaine distribution conspiracy (jury trial)
- Wire fraud scheme involving faked theft of truck to obtain insurance proceeds (jury trial)

Representative Civil Matters

- Defense of the United States in medical malpractice and other tort actions under the Federal Tort Claims Act
- Defense of challenges to federal agency actions, including challenge under National Environmental Policy Act to control sea lamprey infestation of Lake Champlain

- Defense of FOIA challenges brought against CIA and Department of Transportation
- Defense of Social Security Administration disability claims
- Investigation and resolution of False Claims Act violations by health care providers and defense contractors
- Defense of U.S. postal worker against traffic ticket received while delivering mail
- Initiation of program to proactively investigate ADA compliance

Appeals Before United States Court of Appeals for the Second Circuit

- As both a criminal and civil AUSA, handled wide variety of appeals involving, among other issues, challenges to statutory interpretation, evidentiary rulings, efforts to withdraw guilty plea, sentencing determinations, asylum applications, and social security benefit determinations

SHEEHEY FURLONG & BEHM PC, Burlington, VT
Partner 2000-2002; Associate 1996-2000

LAW CLERK TO THE HONORABLE FRED I. PARKER,
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,
Burlington, VT 1995-1996

NORTHWESTERN UNIVERSITY SCHOOL OF LAW, Chicago, IL
Graduated 1995; Cum Laude; Order of the Coif (Top 10%)

LEO BURNET USA (ADVERTISING), Chicago, IL
Various Client Service Positions
1987-1992

DARTMOUTH COLLEGE, Hanover, NH
Graduated 1987; Major in Mathematics

10 Page Writing Sample

Please note that to comport with the page limitations specified in the application, I have only included the first 10 pages of this motion for pre-trial detention.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	Case No. 2:21-CR-109
JOHN GRIFFIN	)	

MOTION FOR DETENTION

NOW COMES the United States of America, by and through its attorney, Nikolas P. Kerest, United States Attorney for the District of Vermont, and moves for pretrial detention of the above-named defendant pursuant to 18 U.S.C. § 3142(e) and (f).

I. Procedural History

On December 9, 2021, the Grand Jury in Burlington returned an Indictment charging the defendant John Griffin with three counts of violating 18 U.S.C. § 2422(b) by using a facility of interstate commerce to try to persuade, induce, entice and coerce minor girls to engage in illegal sexual activity. As the Indictment explains, Griffin's attempts involved meeting persons on-line who identified as sexually submissive, then seeking to persuade them to allow Griffin to train their minor daughters in sexual submission. Count Three of the Indictment specifies that from June to July 2020, Griffin interacted with one such person, a mother of a nine-year old daughter, and paid her to travel with her daughter from

Nevada to Boston. When the mother and child arrived in Boston, Griffin picked them up and drove them to his Ludlow, Vermont ski house, where the child was directed to engage in illegal sexual activity.

The FBI arrested Griffin on December 10 in New Haven, Connecticut. During Griffin's initial appearance before United States Magistrate Judge Robert Spector, Griffin did not contest the United States' motion for pre-trial detention (doc. 32-1), indicating he wished to preserve his option to litigate his pre-trial detention in the District of Vermont. Magistrate Judge Spector therefore granted the United States' motion, noting that Griffin requested a detention hearing in Vermont and specifying that the detention order was "without prejudice to reconsideration so that defense counsel may prepare a bond package for consideration in the District of Vermont at some point in the future." Doc. 32-6, at 3.

Griffin's counsel has advised that Griffin will be filing a motion for pre-trial release. The United States opposes Griffin's release and moves for his continued detention.

II. Eligibility for Detention

The defendant is eligible for detention because he is charged with a felony that involves a minor victim. 18 U.S.C. § 3142(f)(1)(E). The Grand Jury has charged Griffin with two counts of attempting to persuade, induce, entice, and

coerce minor girls to engage in illegal sexual activity by trying to persuade their parents to make them available to him for sexual training, and one count of succeeding in such an attempt by, among other means, paying for a nine-year-old girl to travel to Vermont, where she was directed to, and did, engage in criminal sexual activity.

III. Rebuttable Presumption

The United States invokes the rebuttable presumption against the defendant pursuant to 18 U.S.C. § 3142(e)(3)(E) "that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community." The presumption applies because, as noted above, the Grand Jury has returned an Indictment charging Griffin with offenses involving minor victims under 18 U.S.C. § 2422(b). *See United States v. Ghislaine Maxwell,* 527 F.Supp.3d 659, 663 (S.D.N.Y. 2021); *United States v. Robert Sylvester Kelly*, 2020WL2528922 (E.D.N.Y May 15, 2020), at *1. This presumption places the burden on Griffin to come forward with evidence to rebut it. Even if he does present evidence, the Court must consider the factors listed in § 3142(g) to assess "whether the presumptions of dangerousness and flight are rebutted." *United States v. Mercedes*, 254 F.3d 422, 436 (2d Cir. 2001).

IV. Consideration of Statutory Factors

The Court should detain the defendant because consideration of the factors listed in 18 U.S.C. § 3142(g) shows there are no conditions of release which will reasonably assure the defendant's appearance as required and ensure the safety of the community. In summary, Griffin is charged with a crime involving the sexual assault of a nine-year old child that carries a 10-year mandatory minimum sentence upon conviction. The weight of the evidence against him is substantial. The evidence includes: Griffin's communications with the mother of the nine-year old, and others, admitting his sexual interest in minor girls; visual confirmation of his involvement with the naked child; and efforts to pay-off a potential witness after the child returned to Nevada. As shown below, Griffin has tried to deceive, delete, and spend his way out of being held accountable. He is a wealthy man who will be desperate to avoid facing justice. He has history of mental illness and substance abuse and has recently consumed intoxicants. For these, and other reasons discussed below, the Court should conclude there are no conditions that will assure Griffin's continued appearance or the safety of the community.

A. Nature of the Offense

Section 3142(g)(1) directs the Court to consider "the available information concerning – (1) the nature and circumstances of the offense charged, including whether the offense . . . involves a minor victim[.]" As the Indictment explains,

John Griffin repeatedly sought to persuade, induce, entice, and coerce minor girls to be trained by him to be sexually subservient. In July 2020, Griffin paid for a mother and her nine-year-old daughter to travel from Nevada to Boston, where Griffin picked them up and drove them to his ski house in Ludlow, Vermont. Prior to the trip, Griffin advised the mother that women "are in actuality, naturally, the dirtiest sluts possible, in EVERY metric," that "a woman is a woman regardless of her age," and that it was the mother's "job, in concert with me, [to] see that" the mother's other daughter, then 13 years old, be "trained properly."

Prior to that, Griffin advised another parent that his training methods involved removing clothing, touching, spanking, and "cock worship," and that he had trained girls as young as seven years of age.

The seriousness of the charged offense is illustrated by the sentence Griffin faces if convicted – not less than 10 years of imprisonment and up to lifetime incarceration. "The deprivation of liberty imposed by imprisonment makes the penalty the best indicator of whether the legislature considered an offense to be serious." *United States v. Epstein,* 425 F.Supp.3d 306, 317 (S.D.N.Y. 2019) (internal quotation marks, ellipses, and brackets omitted). In *Epstein*, the defendant faced up to 45 years of incarceration, *id.*; here the potential sentence is life. A preliminary Sentencing Guideline analysis suggests the advisory Guideline range could be substantially greater than 10 years. Even without regard to the

potential sentence, as was the case in *Epstein*, "the crimes [Griffin] has been charged with are among the most heinous in the law principally, in the Court's view, because they involve minor girls." *Id.* (citing research indicating "recidivism rates are underestimates of the true reoffense rate of sex offenders"). *See also Maxwell,* 527 F.3d at 664 (where the charged crimes involve a minor victim, the first § 3142(g) factor weighs "strongly in favor of detention.").

B. Weight of the Evidence

The Bail Reform Act also directs the Court to consider the "weight of the evidence against" Griffin. 18 U.S.C. § 3142(g)(2). The weight of the evidence against Griffin is substantial.[1]

It includes Griffin's admission to the FBI made on September 2, 2020 that he met the 9-year-old's mother online on a sex-themed website, discerned she was "submissive" and "open-minded," and chatted with her over Kik and other platforms before paying her to travel to Boston with her daughter. He admitted to picking the mother and daughter up from Logan Airport in his Tesla and driving them to his Vermont ski house. Griffin also admitted to witnessing the child being

[1] The United States proffers the information in this Motion to inform the Court's consideration of the weight of the evidence, Griffin's history and characteristics, and the other § 3142(g) factors. *See United States v. Martir,*782 F.2d 1141, 1145 (2d Cir. 1986) (recognizing propriety of proceeding by way of proffer at detention hearing); *Epstein,* 425 F.Supp.3d at 313 (2019) ("the Government is entitled to present evidence supporting remand by way of proffer, among other means.")

employed to perform BDSM sex acts on the mother, but claimed the child's participation in sexual activity was the mother's idea and denied knowing that this activity would occur.

Griffin's denials and deflections are contradicted by the later-discovered contents of Griffin's chat communications with the girl's mother, which Griffin attempted to delete, and several other parents of minor girls. Those other communications included:

- On January 14, 2020, after discussing the involvement of a woman's minor daughter in sexual activity, the woman told Griffin that "I need to know we are both ultimately safe and not going to jail," and Griffin responded: "Ok. We won't document any of this and if we do we will store it encrypted".
- On February 21, 2020, Griffin offered $30,000 for a "mother daughter weekend or week with me." For the $30,000 offer, while explaining that he did not want to have intercourse with the daughter, Griffin was clear: "will there be SEXUALITY involved??? Of course, that's the point."
- On March 9, 2020, Griffin offered a woman $1200 for sex, and then stated: "There is a better deal to be had though... 5k if the kids are in the room."

- On June 10, 2020, when the person Griffin was chatting with admitted to him, "I'm so sick she was a baby and I was horny I took her into my bedroom layed [sic] her down on my pillow and licked her while I grinded on a pillow," Griffin's response was "You need to promise me that you will always understand what you're doing is right ok?"

Furthermore, the child described in Count Three of the Indictment has stated that while she was in Vermont, *Griffin* sexually assaulted her, and addressed her as a "little slut," "little whore," and "little bitch." The child's description of Griffin's language, is consistent with Griffin's language in chat conversations discovered by the FBI, including:

- On January 14, 2020, advising a mother of a minor daughter that "If you agree, whatever we do going forward must in some way involve your daughter. I shouldn't even call her that because technically she is just another piece of shit whore.";
- On June 10, 2020, telling the mother described above who admitted to licking her own baby daughter, that "You need to think of her as what she is[.] She's a bitch and a whore[.] Do you understand?" and "Think of her that way it will help you";

- On June 13, 2020, telling the mother involved in Count Two of the Indictment that "There is nothing you want more than to see that little bitch trained, is there"; and
- On June 14, 2020 (to the mother in Count Three, referring to her 13-year-old daughter), "You said the whore she is is already apparent?"

The evidence against Griffin also includes a video captured by a drone operated by Griffin as it returned to Griffin's Ludlow ski house shortly after 5am on July 20, 2020, showing the *completely naked* nine-year-old girl, standing immediately next to Griffin in his underwear. The mother is not seen in the video. When confronted with this video during an interview by FBI agents, Griffin's first response was merely to suggest he was not looking at the naked girl, despite that she was standing so close to him to be touching.

Evidence of Griffin's sexual interest in the daughter also includes data from Griffin's cell phone showing that during her time in Vermont, Griffin's online activity included viewing web-pages featuring pornographic videos about sex with mothers and daughters.

The evidence also consists of messaging between Griffin and another member of the girl's family after the nine-year-old and her mother returned to Nevada. The other relative sent a message to Griffin in August 2020 part of which

included: "Im good on that, u got urself in a once in a life".[2] Griffin's response included "Look, as I've told you, I didn't do anything wrong". Less than five minutes later, the relative texted that the mother was "too pilled out to remember, little one do," and "U lmk if ur feeling helpful within the hour or so." Griffin sent the relative $4,000 via Venmo a short while later.

This apparent pay-off of a potential witness is not only further evidence of wrong-doing, it is an independent reason for Griffin's detention. Indeed, making payments to a potential witness in an apparent effort to buy their silence itself justifies Griffin's pre-trial detention. *See United States v. Epstein*, 425 F.Supp.3d 306, 318 (S.D.N.Y. 2019) (discussing payments from the defendant to potential witnesses and observing "even a single incident of witness tampering has been a traditional ground for pretrial detention by the courts" (citation and internal quotation marks omitted)).

C. Griffin's History and Characteristics

Section 3142(g)(3) also directs the Court to consider Griffin's history and characteristics, including, his "character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal

[2] The message data quoted in this paragraph appear to be truncated to the first 49 or 50 characters of the actual messages sent and/or received. Forensic tools have not been able to extract the entirety of each message.

25 Page Writing Sample

Please note that to comport with the page limitations specified in the application, I have only included the first 25 pages of this publicly filed appellate brief.

The redactions pertain to information that was submitted under seal.

STATEMENT OF ISSUES PRESENTED

1. Where Macenzie Helm pleaded guilty to conspiracy to distribute more than 50 kilograms of marijuana pursuant to a written plea agreement that stated "[t]here shall be no limit on the information the United States may present to the Court and the Probation Office relevant to sentencing and the positions the United States may take regarding sentencing (except as specifically provided elsewhere in this agreement)," and where there was no limit provided elsewhere in the agreement:

   a. did the United States breach the plea agreement by arguing that Helm's relevant conduct under the Sentencing Guidelines should include 50 kilograms of cocaine which Helm had been sent to collect on the day of his arrest?; and

   b. was the United States judicially estopped from arguing that Helm's relevant conduct under the Guidelines should include 50 kilograms of cocaine?

2. Did the District Court err in concluding that Helm's relevant conduct should reflect 50 kilograms of cocaine Helm had been dispatched to pick up on the day of his arrest when Helm, knowing he was participating in a drug distribution conspiracy, travelled from New York to Vermont for the pickup, coordinated the time and place of the meeting with an undercover agent, presented proof to the undercover agent that Helm had been sent by a purchaser of cocaine, and confirmed to the undercover agent that Helm was prepared to take "all 50 pieces"?

PRELIMINARY STATEMENT

Macenzie Helm appeals from the sentence entered in the District of Vermont on September 9, 2021. Helm pleaded guilty to conspiring to distribute 50 kilograms or more of marijuana. Chief Judge Geoffrey Crawford sentenced Helm to a below-Guideline term of 36 months' imprisonment. Helm is currently incarcerated.

After an undercover DEA agent arranged with Canadian cocaine purchasers to deliver 50 kilograms of cocaine in Vermont, the purchasers sent appellant Macenzie Helm to pick up the drugs. Helm met the undercover agent and told the agent he would take "all 50 pieces" right away. Helm was arrested after he took possession of the first duffel bag containing about 10 kilograms of fake cocaine and slightly more than 500 grams of real cocaine.

After his arrest Helm denied knowing he was picking up cocaine, but admitted to having transported marijuana and money as part of the drug distribution conspiracy that sent him to Vermont for the pickup. Initially charged by indictment with conspiracy to distribute cocaine, Helm eventually pleaded guilty to a superseding information charging him with conspiracy to distribute 50 kilograms or more of marijuana. The plea agreement stated there would be no limit on information the government could provide and the positions it could take at sentencing pertaining to Helm's relevant conduct under the Sentencing Guidelines.

At the plea hearing, Helm pleaded guilty *after* the government explained it anticipated arguing at sentencing that Helm's involvement with cocaine should be considered relevant conduct. When the government argued at sentencing that Helm's relevant conduct should include the cocaine, Helm disagreed with the government's position but did not suggest the argument was foreclosed by the plea agreement. The district court, applying U.S.S.G. § 1B1.3(a)(1)(A)'s definition of relevant conduct, included 50 kilograms of cocaine in its calculation of Helm's offense level.

On appeal, Helm contends for the first time that the government breached the plea agreement by arguing that his offense level should reflect his involvement with cocaine. He further contends that the government's sentencing argument was so inconsistent with the plea agreement that the government should have been judicially estopped from arguing about Helm's offense level. Helm also appeals from the district court's inclusion of 50 kilograms of cocaine in the calculation of Helm's offense level.

As shown below, the government did not breach the plea agreement when it did what it said it would do, and Judge Crawford's guideline calculation was a sound application of U.S.S.G. § 1B1.3(a)(1)(A)'s definition of relevant conduct.

STATEMENT OF THE CASE

1. Background of the Investigation and the Arrest of Macenzie Helm.

In the summer of 2020, after the DEA seized a large quantity of cocaine in South America that was in transit to customers in Canada, an undercover DEA agent in Vermont (posing as a transporter of the cocaine) arranged with one of the purchasers to deliver 50 kilograms of the cocaine in South Burlington, Vermont on September 21, 2020. A-33; PSR ¶ 75.[1] As a means of confirming the identity of the person who would appear to take delivery, the Canadian purchaser supplied the undercover agent with a serial number from a piece of United States currency. At the pickup meeting, that person would be expected to present to the agent the actual bill bearing that serial number. A-34.

On September 21, 2020, Macenzie Helm called the undercover to confirm where they would meet. PSR ¶ 12. Helm and his co-defendant mother Michelle Helm arrived at the location as instructed, where Helm: (1) presented the bill bearing the serial number provided by the Canadian purchaser of the cocaine, A-34; and (2) agreed to take delivery of "50 pieces." PSR ¶¶ 13-14. Helm agreed "to take all 50 right away." PSR ¶ 14; A-34.

[1] Citations to the Appendix, Sealed Appendix, Supplemental Sealed Appendix, Presentence Report, and Helm's Brief are in the form A-[page number], SA-[page number], SSA-[page number], PSR [paragraph or page number], and Br. [page number], respectively.

Agents had prepared duffel bags containing mostly fake cocaine to use during this operation. One of the bags contained slightly more than 500 grams of actual cocaine, and another 10 kilograms of fake cocaine bricks. PSR ¶ 14. Helm and his mother were arrested after he took that bag from the undercover agent and placed it in the Helms' minivan. PSR ¶ 15.

In a post-arrest interview, Helm stated he and his mother were working as part of a Canadian-led drug trafficking organization. PSR ¶ 18. Helm explained that the leader of that group, a man named Arnold, contacted him two days earlier to inquire whether Helm wanted to make money by doing a pickup in Vermont. PSR ¶ 19. After checking with his mom, they agreed to make the trip to Vermont (from their upstate New York home) on behalf of the organization. PSR ¶¶ 19-20. Helm was not told what he was picking up in Vermont, but he assumed it would be marijuana or money in furtherance of the drug distribution operation. A-40; PSR ¶ 20. Helm was to contact Arnold after the pickup to coordinate further delivery of the drugs. PSR ¶ 20. Helm initially stated during his post-arrest interview that the organization imported marijuana into the United States, but explained he only picked up money for the group. PSR ¶ 21.

About a week later, Helm's paternal grandparents were abducted from their upstate New York home in retaliation for Helm's failure to deliver the cocaine. PSR ¶ 75. The grandparents were secreted into Canada where they were held for a ransom

of either 50 kilograms of cocaine or $3,500,000. PSR ¶ 75. Arnold, and others, were eventually charged in Canada in connection with this abduction. PSR ¶ 75.

In a subsequent interview, Helm continued to deny knowing he was picking up cocaine in Vermont. He did, however, admit that around August 2020, Arnold instructed him to make a stop in Pennsylvania to pick up some "bricks" of cocaine. This transaction, however, was cancelled because of money issues. PSR ¶ 35. On another occasion, Arnold told him to go to another location in Pennsylvania, where Helm tested cocaine and reported back that it was high quality. PSR ¶ 35. He also admitted to making several deliveries of marijuana for the group. PSR ¶¶ 33-34.

2. Plea Agreement and Guilty Plea to Marijuana Conspiracy

Helm and his mother were originally charged by complaint with conspiring to distribute unspecified controlled substances. A-8. A few days later, the Grand Jury returned an indictment charging them with conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. A-12.

Persisting in his claim not to have known he had been sent to pick up cocaine, in April 2021 Helm signed a plea agreement by which he agreed "to plead guilty to a Superseding Information charging him with conspiracy to distribute more than 50 kilograms of marijuana, in violation of 21 U.S.C. § 846." SA-1 (¶ 1).

The Plea Agreement provided that "[t]here shall be no limit on the information the United States may present to the Court and the Probation Office relevant to

sentencing and the position the United States may take regarding sentencing (except as specifically provided elsewhere in this agreement)." SA-2 (¶ 6). The agreement did not elsewhere impose any limit on what information the prosecution could provide the Court and Probation Office. The Plea Agreement also stated that Helm "fully understands that the Guidelines are advisory and that the Court can consider any and all information that it deems relevant to the sentencing determination." SA-3 (¶ 7).

Under the publicly filed plea agreement, "in the event that MACENZIE HELM fully and completely abides by all conditions of this agreement," the United States' obligations were (a) not to prosecute Helm for other drug crimes known to the United States to have been committed within the District of Vermont, (b) move to dismiss the Indictment at sentencing, and (c) recommend that Helm receive credit for acceptance of responsibility.[2] SA-4-5.

At the change of plea hearing Judge Crawford confirmed that Helm had read and reviewed the plea agreement with his attorney. A-23. The court also confirmed the plea agreement (including its exhibit) was the "complete understanding you have with Government" and there was no further agreement that had not been reduced to

[2] A non-public exhibit to the plea agreement, supplied to the district court at the time of Helm's guilty plea, and filed as a Sealed Supplemental Appendix with this Court, also [redacted]

writing. A-23-24. Judge Crawford verified that no one had "made a promise or an assurance to you that's not contained in the plea agreement to persuade you to accept it." A-26.

Judge Crawford also explained, and made sure Helm understood, that Helm faced a potential maximum sentence of up to 20 years (the statutory maximum), but that the sentence would "be determined in the end by a combination of advisory sentencing guidelines, possible authorized departures from those guidelines, and other statutory sentencing factors." A-28. The court confirmed Helm understood that by pleading guilty Helm was giving up his rights to be tried by a jury, and to have the United States prove beyond a reasonable doubt that Helm had conspired to distribute more than 50 kilograms of marijuana. A-32.

At the court's request, the government provided a factual basis for the plea, which read as follows:

> Were this case to go to trial, the evidence would show that as part of a DEA investigation in the spring of 2020, DEA seized a large quantity of cocaine in South America that was destined for Canada. As part of the investigation, an undercover DEA agent also communicated with Canadian purchasers of this cocaine. The communications between the undercover agent and the Canadian cocaine purchasers resulted in arranging for the delivery of 50 kilograms of cocaine to a person or person who would be taking delivery of the drugs on September 21, 2020, in South Burlington, Vermont.
>
> These communications included the Canadian purchaser providing the undercover agent with a serial number from a

> piece of United States currency with the understanding that the person who would be appearing to take delivery of the drugs would show the undercover agent the bill bearing that serial number as proof that he was affiliated with the purchasers of the drugs.
>
> At about 1:00 PM on September 21, 2020, at the agreed-upon location in South Burlington, Vermont, Macenzie and Michelle Helm arrived at that location. Macenzie Helm presented the bill bearing the serial number to the undercover agent and agreed to take delivery of "50 pieces."
>
> After Helm took possession of a duffel bag containing a quantity of cocaine, agents arrested him and Michelle Helm. After their arrests, both Helms admitted to having previously participated in a series of deliveries involving hundreds of pounds of marijuana and large quantities of money at various locations in the Northeast.
>
> They further admitted that on September 21, 2020, they understood they were continuing their involvement with this marijuana distribution conspiracy when they traveled from upstate New York to South Burlington, Vermont, to execute the above-described delivery, and at this time marijuana was a Schedule I controlled substance.

A-33-34.

After this recitation, Helm's counsel explained Helm was not admitting to knowing he was picking up cocaine on the day of his arrest, stating Helm "assumed that[] what they were picking up was marijuana because that was the history of his relationship with these people." A-35. In response to a question from Judge Crawford, the Assistant United States Attorney explained that although the Helms were arrested during a controlled delivery of cocaine, they only admitted to

understanding the objective of the conspiracy was the distribution of more than 50 kilograms of marijuana. A-35.

The AUSA further noted that the parties "may quibble with regard to whether . . . the Helms should have known of a prospect of the - - of the delivery involving some other controlled substance, but for the purposes of the factual proffer to the Court for this change of plea, as I understand it, Mr. Helm is agreeing to plead guilty to a conspiracy, the objective of which is the distribution of marijuana[.]" A-36.

A short while later defense counsel again stated "I think it might be helpful to state that my client had never dealt in cocaine before. He'd only dealt with marijuana. So that's why he had – He had refused to deal with cocaine previously. That's why his expectation was that he was dealing with marijuana." A-37. The AUSA responded: "I think the Government might disagree with [defense counsel's] characterization. I think that's an issue for sentencing." A-37. Judge Crawford responded, "Right." *Id.*

Defense counsel further expressed concern that he "didn't want to have our hands tied at sentencing where someone could say we acknowledge certain facts" and that he wanted to make sure "we can argue to the Court that in fact he thought it was marijuana, that's all he had ever done, he refused to do cocaine in the past." A-38.

After Helm confirmed the government had accurately stated his role in the conspiracy, his attorney again clarified that Helm "just thought it was marijuana, in case that should become an issue in the future." A-41. Judge Crawford said that he understood the defense's position, but that the issue "may be something in the future." A-41. Just before Helm entered his guilty plea, the AUSA again stated that "there may be disagreements at sentencing involving the scope of relevant conduct, whether cocaine should be included in relevant conduct for purposes of sentencing," and that the government agreed that Helm and his counsel had "reserved all of their arguments in that regard." A-41. Judge Crawford confirmed that was his understanding as well. A-41. A moment later, Helm formally pleaded guilty, and the district court accepted his plea. A-42.

Everyone understood there could be litigation over "whether cocaine should be included in relevant conduct for purposes of sentencing." Neither Helm, his attorney, nor the district court ever suggested it would be a breach of the plea agreement for the United States to raise the issue at sentencing. Indeed, Helm pleaded guilty *after* the AUSA stated he anticipated litigating the question at sentencing. A-41-42.

3. Sentencing

a. The Presentence Report

Helm filed two objections to the Draft PSR. PSR at 23-24 (Addendum). Following a resolution conference, Helm's only remaining objection was to the inclusion of 50 kilograms of cocaine in his relevant conduct (and therefore as an input into his Guidelines offense level). *Id.* As foreshadowed at the change of plea hearing, Helm contended that because he did not know he was to pick up cocaine, his relevant conduct should not reflect his involvement with that drug. *Id.* Helm did not contend, or suggest, that including cocaine in relevant conduct was contrary to the terms of the Plea Agreement, or that the agreement precluded argument or information about cocaine being shared with the sentencing court.

The final PSR rejected Helm's objection and included 50 kilograms of cocaine in the guideline calculation because: Helm agreed with the leader of the drug conspiracy to do a pickup in Vermont; he arranged with the undercover agent to meet for the pickup; he agreed to take all "50 pieces" when meeting with the undercover agent; and he placed a bag containing 10 kilograms of fake and more than 500 grams of real cocaine into his vehicle. PSR at 24 (Addendum). Because U.S.S.G. § 1B1.3(a)(1)(A) directs that relevant conduct reflect Helm's actions without regard to whether he could foresee the nature of the contraband he was dispatched to pick up, and, pursuant to U.S.S.G. § 2D1.1 cmt. n.5, the Guideline

calculation should include the attempted or intended quantity of drugs, the final PSR reflected 50 kilograms of cocaine in Helm's offense level calculation. PSR ¶¶ 43-44 & at 24 (Addendum).[3]

The PSR also included about 363 kilograms of marijuana in the calculation, an estimate of the quantity of marijuana Helm admitted to trafficking. PSR ¶ 44. By reference to the Guideline's Drug Conversion Tables found at U.S.S.G. § 2D1.1 cmt. n.8, the total converted drug weight was about 10,363 kilograms, of which only 363 kilograms was attributable to marijuana. After applying other adjustments for Helm's minor role in the conspiracy, his "safety valve" eligibility, and his acceptance of responsibility, the final offense level was 24. PSR ¶¶ 49-58. Combined with Helm's minimal criminal history, this offense level corresponded to an advisory Guidelines range of 51 to 63 months of imprisonment. PSR ¶ 110.

[3] Having decided that Helm's relevant conduct included 50 kilograms of cocaine pursuant to U.S.S.G. § 1B1.3(a)(1)(A) (based on Helm's actions on the day of his arrest), the PSR did not consider whether the cocaine should also be attributable to Helm pursuant to U.S.S.G. § 1B1.3(a)(1)(B), which calls for consideration of whether the conspiracy's involvement with that drug and quantity were reasonably foreseeable to Helm.

b. The Sentencing Hearing

In his Sentencing Memorandum, Helm conceded that he was introduced into the conspiracy through a person who supplied him with cocaine, and that previously he received instructions to pick up cocaine in furtherance of the conspiracy. SA-10-11. Nonetheless, Helm continued to argue that his Guideline calculation should not include cocaine. A-48-54. Helm principally contended it would be unfair for his offense level to include the cocaine while his co-conspirator mother's did not. A-48-51. (His mother had not yet been sentenced.)

As predicted during the change of plea hearing, the United States argued that Helm's relevant conduct should include the 50 kilograms of cocaine. In its initial Sentencing Memorandum, the United States argued that it was foreseeable to Helm that he could have been picking up cocaine on the day of his arrest. SA-22-23. Helm's introduction to the conspiracy was through a cocaine source. He had twice been instructed to pick up bricks of cocaine by those above him in the conspiracy. On the day of his arrest, Helm agreed with the undercover to take all "50 pieces." SA-22-23.

In a supplemental filing, however, the United States explained its initial foreseeability argument should not apply to an analysis of the defendant's actions under U.S.S.G. § 1B1.3(a)(1)(A)'s definition of relevant conduct. SA-26-27. Under this Court's decisions, Helm's asserted ignorance as to the nature and quantity of

what he was picking up did not insulate him from including the cocaine into his offense level.[4] *Id.*

At the sentencing hearing, the government acknowledged that Helm consistently denied knowing he was picking cocaine on the day of his arrest. A-51. However, there was no dispute that Helm agreed to travel to Vermont to do a pickup for the drug conspiracy; he contacted the undercover agent to arrange the meeting; he interacted with the agent upon arrival; he agreed to take all 50 pieces; he took possession of the first 10 in a duffel bag; and that bag included more than 500 grams of real cocaine and 10 kilograms of sham.

In making its drug quantity calculation, the district court accurately noted that Helm took several steps to consummate the pickup; that the pickup involved 50 kilograms of "some real, mostly fake" cocaine; and that under § 1B1.3(a)(1)(A), foreseeability was not a relevant consideration. A-54. Accordingly, because Helm committed several acts to acquire the contraband as instructed in furtherance of a drug distribution conspiracy, and because it was not disputed that he had been sent to collect 50 kilograms of cocaine, the court included that quantity in Helm's offense level calculation.

[4] The supplemental filing indicated the foreseeability analysis (applicable under U.S.S.G. § 1B1.3(a)(1)(B) in considering whether the acts of others involved in the criminal enterprise should be included in a defendant's relevant conduct) was an alternative rationale for including cocaine as relevant conduct. SA-27. The district court did not consider this alternative argument.

After making reductions for Helm's minor role in the conspiracy, his "safety valve" eligibility, as well as his acceptance of responsibility, Helm's final offense level was 24, resulting in an advisory Guideline range of 51 to 63 months. A-66-67. After considering the factors listed in 18 U.S.C. § 3553(a), the court varied downward to a 36-month prison term, to be followed by two years of supervised release. A-67-70.

At no time before the district court did Helm's counsel object that the government violated its obligations under the plea agreement by arguing that Helm's relevant conduct should include the 50 kilograms of cocaine. Indeed, neither Helm nor the court below ever expressed any reservation that the government's sentencing argument might have been prohibited by the terms of the plea agreement.

SUMMARY OF ARGUMENT

This Court should affirm Helm's sentence. Contrary to Helm's new assertions on appeal, the Government neither breached the plea agreement nor engaged in gamesmanship that should estop it from presenting relevant information and argument to the sentencing court. Helm's suggestion that a drug defendant's relevant conduct can only include quantities of the drug described in his charging document is contrary to decades of settled sentencing practice. Furthermore, before Helm pleaded guilty to a marijuana conspiracy, the AUSA repeatedly alerted the court and Helm that the prosecution would argue that Helm's relevant conduct should reflect his involvement with cocaine. Because Helm did not complain that the government's sentencing position was foreclosed by the plea agreement below, his argument is subject to plain error review on appeal. There was no error, plain or otherwise.

Applying the strict standard of U.S.S.G. § 1B1.3(a)(1)(A)'s definition of relevant conduct to the undisputed facts, the district court appropriately concluded that Helm's relevant conduct and Guideline calculation should include his involvement with 50 kilograms of cocaine.

ARGUMENT

I. The Government Neither Breached the Plea Agreement Nor Engaged In Conduct that Should Limit Information It Could Provide to the Sentencing Court.

A. Standard of Review

Because he did "not alert the district court or the government of any claim that the government had breached the plea agreement," Helm's contention that the government breached the plea agreement is subject to plain error review. *United States v. Taylor,* 961 F.3d 68, 81 n.12 (2d Cir. 2020). Nor did Helm argue below that the government had changed its position regarding his relevant conduct. *Cf. United States v. Wilson,* 920 F.3d 155, 162 (2d Cir. 2019) (objections below to government's change of sentencing position preserved breach-of-plea-agreement argument for harmless error review on appeal). *See also Puckett v. United States,* 556 U.S. 129, 133 (2009) (plain error review "does apply and in the usual fashion" when defendant fails to object to government breach of a plea agreement below); *Taylor*, 961 F.3d at 81 (claim of breach of plea agreement raised for the first time on appeal subject to plain error review).

To succeed under the plain error standard, Helm "must demonstrate: (1) error, (2) that is plain, and (3) that affects substantial rights." *Taylor,* 961 F.3d at 81 (quoting *United States v. Bleau*, 930 F.3d 35, 39 (2d Cir. 2019)). For an error to be deemed plain, it "must be clear or obvious, rather than subject to reasonable dispute."

Puckett, 556 U.S. at 135. For an error to affect substantial rights, a criminal defendant "must demonstrate that it 'affected the outcome of the district court proceedings.'" *Id.* (quoting *United States v. Olano,* 507 U.S. 725, 734 (1993)). If all three requirements are satisfied, then this Court will exercise its discretion "to rectify the forfeited error *only if* (4) the error seriously affects the fairness, integrity, or public reputation of the judicial proceeding." *Taylor,* 961 F.3d at 81 (emphasis added). "Meeting all four prongs is difficult, as it should be." *Puckett,* 556 U.S. at 135 (quotation marks and citation omitted).

When considering whether there has been a breach of a plea agreement, this Court considers "interpretations of plea agreement *de novo,* and in accordance with contract law." *Wilson,* 920 F.3d at 162 (quoting *United States v. Riera*, 298 F.3d 128, 133 (2d Cir. 2002). In making this assessment, the Court will consider "the precise terms of the plea agreement" and "the parties' behavior" to "determine what 'the reasonable understanding and expectations of the defendant [were] as to the sentence for which he had bargained.'" *Id.* at 163 (quoting *Paradiso v. United States,* 689 F.2d 28, 31 (2d Cir. 1982)).

This Court construes plea agreements "against a general background understanding of legality," presuming "that both parties to the agreement contemplated that all promises made were legal, and that the non-contracting 'party' who implements the agreement (the district judge) will act legally in executing the

agreement." *United States v. Padilla,* 186 F.3d 136, 140 (2d Cir. 1999) (quoting *United States v. Ready,* 82 F.3d 551, 558-59 (2d Cir. 1996) (superseded on other grounds)). This Court also "construe[s] plea agreements strictly against the government," and does not "hesitate to scrutinize the government's conduct to ensure that it comports with the highest standards of fairness." *Wilson,* 920 F.3d at 162 (quoting *Vaval*, 404 F.3d 144, 152 (2d Cir. 2005)).

As explained below, under any standard of review, the United States did not breach the plea agreement. Indeed, the absence of objection below not only subjects Helm to plain error review on appeal; it is also "behavior" evidencing everyone's reasonable expectation that "the scope of relevant conduct, whether cocaine should be included in relevant conduct," A-41, would be the proper subject of litigation at sentencing.

B. Helm Misconstrues the Plea Agreement.

Helm contends the "central promise in the plea agreement" was that Helm engaged in a marijuana distribution conspiracy, "and not a conspiracy to distribute cocaine." Br. 23. To be sure, pursuant to the plea agreement Helm pleaded to a conspiracy involving marijuana, and the plea agreement does not mention cocaine. But Helm's suggestion that this change in charge meant the United States "bargained away" the chance to argue about the scope of his relevant conduct at sentencing, Br. 24, is inconsistent with the plain language of the agreement itself and the well-settled

distinction between offense conduct and "relevant conduct" under the Sentencing Guidelines.

1. The Plain Text of the Plea Agreement Did Not Limit the Information or Argument that the Government Could Present.

Helm stated, under oath, he had reviewed the plea agreement with his attorney and understood it. A-23. The plea agreement itself stated that Helm had a "full opportunity to consult with his attorney about this agreement, concerning the applicability and impact of the Sentencing Guidelines (including, but not limited to, the relevant conduct provisions of Guideline Section 1B1.3)[.]" SA-6 (¶ 17).

But for exceptions not pertinent to this appeal, the plea agreement was bereft of provisions limiting the government's sentencing advocacy. Where "[n]othing in the plea agreement prevented the government from presenting" information or argument to the sentencing court, the government does not breach the plea agreement by presenting such argument and information. *United States v. Rodgers,* 101 F.3d 247, 253 (2d Cir. 1996). Similarly, in *United States v. Miller,* 993 F.2d 16, 18, 20 (2d Cir. 1993), this Court explained that where the government agreed that the defendant was free to move for a downward departure, it did not breach the plea agreement by moving for an upward departure, "in the absence of an express agreement" that would have barred such a motion.

Here, not only is there an absence of textual limitation on the government's position at sentencing, the plea agreement explicitly provided, among other items

that: the "United States specifically reserves the right to allocate at sentencing," and that there "shall be no limit on the information the United States may present to the Court and the Probation Office relevant to sentencing, and the positions the United States may take regarding sentencing (except as specifically provided elsewhere in this agreement.)" SA-2. The plea agreement also confirmed that Helm "fully understands that the Guidelines are advisory and that the Court can consider any and all information that it deems relevant to the sentencing determination." SA-3.

These provisions unambiguously show that the plea agreement contemplated no limit on the information the government could provide or the positions it could take at sentencing relating to relevant conduct. Indeed, Helm does not point to any provision within the agreement that obliged the government to limit its sentencing advocacy. (His misplaced argument about "context" is addressed below.)

Where the terms of a plea agreement are unambiguous, it will not be construed to impose a limit on government advocacy. *See United States v. Feigenbaum*, 962 F.2d 230, 234 (2d Cir. 1992) (plea agreement's provision that government would make no recommendation at sentencing would not limit government advocacy during defendant's later attempt to reduce previously imposed sentence). Because the terms of Helm's plea agreement "cannot be reasonably understood to prohibit" the Government's argument at sentencing, the Government did not breach the agreement when it argued that Helm's offense level should reflect his involvement

with cocaine. *Cf. United States v. Colon*, 220 F.3d 48, 51-52 (2d Cir. 2000) (plea agreement that limited government's advocacy at sentencing, but not on appeal, "cannot be reasonably understood to prohibit" government's appellate positions).

This case is materially distinct from those in which the government has breached an agreement by taking a position at sentencing contrary to its written promises. *See United States v. Lawlor,* 168 F.3d 633, 637 (2d Cir. 1999) (plea agreement contained stipulation that particular guideline provision would apply; at sentencing, government support for PSR's recommendation of different provision breached plea agreement); *United States v. Vaval,* 404 F.3d 144, 149-150 (2d Cir. 2005) (where government agreed to "take no position concerning where within the Guidelines range the sentence should fall," and to "make no motion for an upward departure," government's characterization of defendant's criminal history as "appalling," his apology "disingenuous," and status as a "ring leader" constituted a breach of the agreement); *United States v. Palladino,* 347 F.3d 29, 31, 34 (2d Cir. 2003) (government breached plea agreement when it argued that defendant's offense level should be 16 based on information known to the government at the time of the plea agreement, and plea agreement stated that government estimated an offense level of 10 based on information then known to the government). In this case, by contrast, the plea agreement contained no terms that limited the United States' sentencing advocacy.

2. There was Nothing About the "Context" of the Plea Agreement that Could Reasonably be Construed to Limit the Government's Sentencing Advocacy.

Helm argues that because he pleaded guilty to a superseding information charging him with conspiring to distribute marijuana, the government "was foreclosed" from arguing that his relevant conduct under the Sentencing Guidelines should include his involvement with cocaine. Br. 26. He contends "the context surrounding the plea agreement shows that it was reasonable for Helm to understand that the Government was giving up the right to argue at sentencing that he was part of the drug trafficking organization's supposed cocaine conspiracy." Br. 27. Helm imagines it would have been meaningless for him to plead to a marijuana conspiracy if his sentence might be influenced by his involvement with cocaine. Br. 28. Helm speculates that the government must have understood that "the only conceivable benefit of the change was that" the government would be precluded from arguing about cocaine at sentencing. Br. 28-29. Therefore, he contends, when the government argued that Helm's relevant conduct should include cocaine, "the central part of the plea agreement" became "empty formality that conferred no benefit on Helm." Br. 29.

These contentions ignore the substantial benefits that accrued to Helm on account of the plea agreement. First, the agreement resolved the guilt-phase of his prosecution, removing the stress and uncertainty of the pending case, as well as the

prospect of new charges carrying potential mandatory minimum sentences. *See* SA-4 (government agreed not to prosecute him for other offenses relating to drug distribution).[5] Second, by pleading guilty, Helm enjoyed a significant reduction in his offense level calculation for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1. *See* SA-5; U.S.S.G. § 3E1.1 cmt. n.1(A) ("a defendant is not required to volunteer, or affirmatively admit, relevant conduct *beyond the offense of conviction* in order to obtain" acceptance credit) (emphasis added)). Third, it was more palatable to Helm to be convicted of a marijuana offense when he claimed that was the only drug he expected to transport, and when there is a general trend toward decriminalization of that drug by various states. Arguably, a marijuana conviction carries less of a stigma than cocaine. Fourth, Helm's plea agreement included an exhibit (SSA-1, referenced by the district court at A-22, 23, 24) by which the United States agreed to [redacted] Fifth, pleading guilty subject to the plea agreement, including its exhibit, increased the likelihood that Helm would not be taken into custody upon his conviction. *See* A-43

[5] In fact, Helm faced prosecution for a possible five-year mandatory minimum charge of cocaine conspiracy based just on the 500+ grams he actually took possession of, 21 U.S.C. § 841(b)(1)(B)(ii), or a ten-year mandatory minimum conspiracy based on the 50 kilograms of cocaine he foreseeably attempted to possess. 21 U.S.C. § 841(b)(1)(A)(ii).