No. ________

IN THE

Supreme Court of the United States

BRIAN KELSEY,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Kent Wicker
Counsel of Record
WICKER/BRAMMELL PLLC
323 West Main Street, 11th Floor
Louisville, Kentucky 40202
(502) 780-6185
kent@wickerbrammell.com

Counsel for Petitioner

November 26, 2024

QUESTION PRESENTED

Under this Court's precedent and that of several circuit courts, an error of criminal law is preserved for appellate review if it was "brought to the court's attention." *Holguin-Hernandez v. United States*, 589 U.S. 169, 174 (2020).

Here, counsel brought the error to the court's attention by saying, "Your Honor, I think the government's come pretty close to violating the plea agreement. It sure sounds like they're advocating for those two points, and they can't do that." The district court responded, "Well, I asked him what he thought." Counsel replied, "I understand, Your Honor. But if you ask him to violate the plea agreement, it doesn't mean he doesn't violate the plea agreement."

The Sixth Circuit panel split. The majority denied that the error of violating the plea agreement by advocating for a prohibited two-point enhancement was preserved. Therefore, it applied plain error review instead of *de novo* review, affirmed Mr. Kelsey's prison sentence, and denied him his requested remedy to revoke his guilty plea and go to trial.

The highly important question that affects nearly every case that arises on appellate review is:

1. What must one say to preserve an error for appellate review?

A related, important question on which the Sixth Circuit split with the Tenth, Eleventh, and D.C. Circuits is:

2. Does *Holguin-Hernandez* apply in cases other than those involving the substantive reasonableness of a criminal sentence?

PARTIES TO THE PROCEEDING

Petitioner, Defendant-Appellant below, is Brian Kelsey.

Respondent, Plaintiff-Appellee below, is the United States of America.

RULE 29.6 STATEMENT

As Petitioner is a natural person, no corporate disclosure is required under Rule 29.6.

RELATED PROCEEDINGS

United States District Court (M.D. Tenn.):

- *United States v. Brian Kelsey*, No. 3:21-cr-00264-01, Judgment (August 16, 2023) (reproduced at App., *infra*, 19a-31a)
- *United States v. Brian Kelsey*, No. 3:21-cr-00264-01, Order Amending Judgment (August 22, 2023) (reproduced at App., *infra*, 32a-33a)

United States Court of Appeals (6th Cir.):

- *United States v. Brian Kelsey*, No. 23-5755/5756, Opinion (July 8, 2024) (reproduced at App., *infra*, 1a-18a)
- *United States v. Brian Kelsey*, No. 23-5755/5756, Order denying petition for rehearing en banc (August 28, 2024) (reproduced at App., *infra*, 34a)

TABLE OF CONTENTS

QUESTION PRESENTED....................................i

PARTIES TO THE PROCEEDING........................... ii

RULE 29.6 STATEMENT.. ii

RELATED PROCEEDINGS...................................... ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

INTRODUCTION... 1

OPINIONS BELOW... 3

JURISDICTION 3

COURT RULES INVOLVED 4

STATEMENT OF THE CASE.................................. 5

REASONS FOR GRANTING THE PETITION....... 15

I. The Sixth Circuit majority agreed with the Second and Tenth Circuits and conflicted with the Third, Fourth, Fifth, Seventh, and D.C. Circuits by improperly requiring Mr. Kelsey to do more than *Holguin-Hernandez* requires..... 15

A. The Sixth Circuit majority improperly required counsel to use specific words, agreeing with the Second Circuit and conflicting with the Third, Fourth, Fifth, Seventh, and D.C. Circuit courts and *Holguin-Hernandez*. 15

B. The Sixth Circuit majority improperly required Mr. Kelsey to request relief, conflicting with *Holguin-Hernandez*, the plain text of Rule 51, and precedent from other circuits.. 20

C. The Sixth Circuit majority improperly required Mr. Kelsey's objection to be lengthy, agreeing with earlier Tenth Circuit decisions but conflicting with both *Holguin-Hernandez* and other circuits.. 22

D. The Sixth Circuit majority's failure to credit the district court's rejection of the objection conflicted with decisions from other circuit courts.. 24

E. The Sixth Circuit majority's failure to credit counsel's reply to the district court response also conflicted with decisions from other circuit courts.. 27

II. This Court should decide the open question of whether *Holguin-Hernandez* applies to errors other than a sentence's reasonableness.......... 28

A. The Sixth Circuit majority decision conflicts with the Tenth, Eleventh, and D.C. circuits on whether *Holguin-Hernandez* applies beyond the preservation of the issue of a sentence's reasonableness.. 28

B. Justice Alito's concurrence in *Holguin-Hernandez*, joined by Justice Gorsuch, pointed out that this Court left questions open for future cases such as this one.. 29

III. This case is a good vehicle to decide the circuit conflicts and questions remaining about what one must say to preserve an error for appellate review. 30

CONCLUSION 32

APPENDIX

APPENDIX A: Opinion of the United States Court of Appeals for the Sixth Circuit 1a

APPENDIX B: Judgment of the United States District Court for the Middle District of Tennessee 19a

APPENDIX C: Order Amending Judgment of the United States District Court for the Middle District of Tennessee 32a

APPENDIX D: Order Denying Rehearing of the United States Court of Appeals for the Sixth Circuit.. 34a

APPENDIX E: Plea Agreement.............................. 35a

APPENDIX F: Sentencing Hearing Transcript Excerpt 54a

TABLE OF AUTHORITIES

Cases

Evalt v. United States, 359 F.2d 534 (9th Cir. 1966). 2
Exxon Corp. v. Amoco Oil Col., 875 F.2d 1085 (4th Cir. 1989).. 18
Holguin-Hernandez v. United States, 589 U.S. 169 (2020)...................i, iii-iv, 2, 14-17, 20-23, 27-30, 32
In re Rumsey Land Co., 944 F.3d 1259 (10th Cir. 2019).. 23
Nat'l Republican Senatorial Comm. v. Fed. Election Comm'n, No. 24-3051, 2024 WL 4052976 (6th Cir. Sept. 5, 2024) (*en banc*). 10, 32
Puckett v. United States, 566 U.S. 129 (2009) ... 13, 32
Santobello v. New York, 404 U.S. 257 (1971) 31
United States v. Abney, 957 F.3d 241 (D.C. Cir. 2020) 28-29
United States v. Bostic, 371 F.3d 865 (6th Cir. 2004) 29
United States v. Brannan, 74 F.3d 448 (3d Cir. 1996) 18
United States v. Castillo, 430 F.3d 230 (5th Cir. 2005).. 17
United States v. Cates, 73 F.4th 795 (10th Cir. 2023) 28
United States v. Cohen, 170 F. App'x 725, (2d Cir. 2006)... 17
United States v. Estevez Antonio, 311 F. App'x 679 (4th Cir. 2009).. 18-19
United States v. Fitch, 282 F.3d 364 (6th Cir. 2002) 13, 31
United States v. Flores-Martinez, 677 F.3d 699 (5th Cir. 2012)... 18
United States v. Fosher, 568 F.2d 207 (1st Cir. 1978) 23

United States v. Freeman, 357 F.2d 606 (2d Cir. 1966) 26
United States v. Gantt, 679 F.3d 1240 (10th Cir. 2012) 23
United States v. Gbenedio, 95 F.4th 1319 (11th Cir. 2024) 23
United States v. Grissom, 525 F.3d 691 (9th Cir. 2008) 24, 26
United States v. Johnson, 267 F.3d 376 (5th Cir. 2001) 18
United States v. Johnson, 822 F. App'x 258 (5th Cir. 2020) 18
United States v. LeBlanc, 612 F.2d 1012 (6th Cir. 1980) 28
United States v. Mandell, 905 F.2d 970 (6th Cir. 1990) 31
United States v. Melendez, 55 F.3d 130 (3d Cir. 1995) 17
United States v. Miller, 900 F.3d 509 (7th Cir. 2018) 26
United States v. Ortiz, 431 F.3d 1035 (7th Cir. 2005) 27
United States v. Pirovolos, 844 F.2d 415 (7th Cir. 1988) 17
United States v. Pizarro, 817 F. App'x 806 (11th Cir. 2020) 28
United States v. Rivera, 365 F.3d 213 (3d Cir. 2004) 18
United States v. Rivera, 682 F.3d 1223 (9th Cir. 2012) 27
United States v. Tate, 630 F.3d 194 (D.C. Cir. 2011) 17, 27
United States v. Walker, 449 F.2d 1171 (D.C. Cir. 1971) 26

United States v. Williams, 561 F.2d 859 (D.C. Cir. 1977) 17, 22
U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd., 582 F.3d 1131 (10th Cir. 2009) 23

Court Rules

Fed. R. Crim. Proc. 51 .... iv, 4, 17-18, 20-22, 30
Fed. R. Crim. Proc. 52 .... 2, 4, 15, 18, 20, 30

Other Authorities

Merriam-Webster.com Dictionary, "Sure." 19
Moore's Fed. Prac. 3d § 51.03 18
Wright, *Federal Practice and Procedure*: Criminal § 842 (1969) 17

INTRODUCTION

The question presented by this case is very important because it affects nearly every case that arises on appellate review: What must one say to preserve an error for appellate review?

The standard of review comprises the first section of law in virtually every appellate opinion. But many courts of appeals have struggled to determine the correct standard of review, reading the cold transcript of a dynamic exchange in the courtroom, especially in cases involving criminal sentences. At sentencing hearings, counsel is in constant dialogue with the district court, and district courts use a plethora of statements to analyze and dismiss counsels' arguments, which are usually widely divergent between the sentence requested by the defendant versus that requested by the government.

Utilizing the correct standard of review is exceptionally important because it is often dispositive of the outcome, as it was in this case. Here, the circuit court majority found that the objection was not adequate and held that the government's breach of the plea agreement did not survive plain error review. But it noted that if it had applied *de novo* review, as did the concurring opinion, it likely would have ruled for Mr. Kelsey, as he had the better argument on whether the government breached the agreement.

The Sixth Circuit decision finding that no objection was raised is out of the mainstream and conflicts with decisions from the Third, Fourth, Fifth, Seventh, and D.C. Circuits.

It also conflicts with the Ninth Circuit's proclamation that when the existence of an objection is a close

call, the court should side with the defendant: "when we must choose between fairness to the trial judge and fairness to the defendant, in a matter as crucial to the result as this appears to us to be, we must choose fairness to the defendant, who is the one whose liberty is at stake." *Evalt v. United States*, 359 F.2d 534, 545 (9th Cir. 1966).

This Court attempted to clarify the law in the unanimous decision of *Holguin-Hernandez v. United States*, 589 U.S. 169 (2020). There, the Court stated that to determine whether an error is preserved for appellate review, "[t]he question is simply whether the claimed error was 'brought to the court's attention.'" *Id.* at 174 (quoting Fed. R. Crim. Proc. 52(b)). The Sixth Circuit decision conflicts with *Holguin-Hernandez* because it improperly adds to the simple standard set by this Court.

Holguin-Hernandez left several questions unanswered regarding its reach. Justice Alito, joined by Justice Gorsuch, concurred in the decision to reiterate that the opinion did not decide what is sufficient to preserve several types of claims that arise from sentencing hearings other than the substantive-reasonableness argument at issue in the case. *Id*. at 176 (Alito, J., concurring).

The decision in this case also conflicts with decisions from the Tenth, Eleventh, and D.C. circuits on how *Holguin-Hernandez* applies practically to the preservation of other errors arising in criminal cases.

The Court should take this case to resolve the conflict and answer the questions left open by Justices Alito and Gorsuch.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is available at *United States v. Kelsey*, No. 23-5755/5756, 2024 WL 3326022, 2024 U.S. App. LEXIS 16847 (6th Cir. July 8, 2024) and is reproduced at App., *infra*, 1a-18a.

The unreported judgment of the United States District Court for the Middle District of Tennessee is reproduced at App., *infra*, 19a-31a.

The unreported order amending judgment of the United States District Court for the Middle District of Tennessee is reproduced at App., *infra*, 32a-33a.

The unreported order denying petition for rehearing *en banc* of the United States Court of Appeals for the Sixth Circuit is reproduced at App., *infra*, 34a.

JURISDICTION

The court of appeals issued its opinion and judgment on July 8, 2024. App., *infra*, 1a-18a. The court of appeals denied Petitioner's timely petition for panel and *en banc* rehearing on August 28, 2024. App., *infra*, 34a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

COURT RULES INVOLVED

Federal Rule of Criminal Procedure 51 provides:

Rule 51. Preserving Claimed Error

(a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.

(b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

Federal Rule of Criminal Procedure 52 provides:

Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

This appeal involves the government's breach of a plea agreement regarding campaign finance charges and whether Mr. Kelsey can rescind the agreement and go to trial, all of which hinges on whether his counsel objected adequately to the breach.

Brian Kelsey was a practicing civil attorney who served as a Tennessee State Representative from 2004 to 2009 and a State Senator from 2009 to 2022. In 2016, he ran for Congress and finished the Republican primary election in fourth place. (R.139, PageID #831.)

A year later, two activist groups, Campaign Legal Center and Democracy 21, filed a complaint with the Federal Election Commission ("FEC") against him and the American Conservative Union ("ACU"), alleging that they coordinated campaign expenditures. Coordination allegations are a common occurrence in modern campaigns. *Id*. at 832; R.148 at 1-14. They are usually dismissed for lack of evidence of coordination, and those that survive are handled with a civil fine from the FEC. (R.139, PageID #838.) In this case, the FEC ultimately took no action. But the groups also sent a letter to the Department of Justice ("DOJ"). The department opened an investigation and interviewed several witnesses, but it brought no charges.

In spring 2021, just after a change in administrations and five years after the election, DOJ revived the dormant investigation. (R.98-5 at 10.) It gave immunity to a discredited former state representative in re-

turn for his testimony against Mr. Kelsey.[1] (R.139, PageID #849.) Then DOJ pressured Mr. Kelsey and his wife for testimony against the ACU executive director.

At issue was a donation Mr. Kelsey made on the advice of counsel. (R.131-2, PageID #763-64.) While running for Congress, he donated roughly $105,000 that had accrued in his state Senate reelection account to a state political action committee ("PAC"), the Standard Club PAC, which supported conservative state candidates like himself. (R.139, PageID #832.) When he donated the funds, he told Joshua Smith, who ran the state PAC, that he could spend the funds "however you want." *Id.* at 833. He contemporaneously memorialized this statement, which had been blessed by his campaign finance counsel. (R.131-2, PageID #771.) And he never spoke to Mr. Smith again until after the election. (R.146, PageID #1002-03.) Rep. Durham and his wife were present when the donation was made. *Id.* at 1003.

A few days later, Mr. Smith donated $60,000 to a federal PAC run by Andrew Miller, the Citizens 4 Ethics in Government PAC ("C4EG"). *Id.* at 1004. But Mr. Miller returned the check. *Id.* Next, Mr. Smith donated $30,000 to the ACU. *Id.* at 1006. A few days later, he donated $30,000 to C4EG, and Mr. Miller kept the funds. *Id.* Finally, he donated another $7,000

---

[1] Jeremy Durham had been expelled from the Tennessee House of Representatives in fall 2016 for serial sexual harassment and was facing serious allegations of federal crimes for 300 state campaign finance violations, including spending campaign funds on personal goods and services. (R.139, PageID #848.)

to C4EG. *Id.* at 1007. C4EG explored running independent expenditure ads against Mr. Kelsey's opponents. *Id.* at 1006. But it ultimately decided to send $36,000 to ACU. (R.139, PageID #834.) Another group, the Judicial Crisis Network, sent $25,000 to ACU. (R.146, PageID #1007.) And ACU, which had publicly endorsed Mr. Kelsey over a month earlier and had been exploring running independent expenditure ads on his behalf, reported to the FEC that it spent $80,000 in radio and internet ads in favor of Mr. Kelsey's congressional campaign. (R.139, PageID #834.)

All these political donations and expenditures were reported on the internet, (R.146, PageID #1008-09), and are legal, absent some sort of communications from Mr. Kelsey giving others direction on what to do with them or how to run ads on his behalf, (R.131-2, PageID #767-68).

In 2021, Mr. Durham originally told the DOJ that Mr. Kelsey had been "careful with his words and tried to be careful not to direct him" regarding the campaign funds when they talked frequently on the phone as legislative colleagues and friends. (R.146, PageID #1006.) He told the DOJ that Mr. Kelsey had even told Mr. Durham "not to contact him." *Id.* But by DOJ's third interview of Mr. Durham, they had prepared a statement for him, which he dutifully read to the grand jury, which stated that Mr. Kelsey did "explicitly direct" him on what to do with the money.[2] (R.148

---

[2] Importantly, Mr. Durham's statement did *not* establish that Mr. Kelsey coordinated campaign expenditures with ACU, to which he pleaded guilty, (R.146, PageID #1009-10), or that Mr. Kelsey made Mr. Durham his agent to do so, (R.148 at 6-7).

at 50.)

After Mr. Durham's grand jury testimony implicated himself, Mr. Miller, Mr. Smith, and Mr. Kelsey in a conspiracy to defraud the FEC, the DOJ also gave immunity to a tarnished Mr. Miller in return for his testimony against Mr. Kelsey.[3] (R.139, PageID #850.) He, too, read a statement to the grand jury, instead of answering questions.

In October 2021, the DOJ admitted that it had lost over 2,700 documents that Mr. Kelsey had produced three and a half years earlier, including Mr. Kelsey's exculpatory statement to Mr. Smith. (R.103, PageID #422-23.) Undeterred, just days later, armed with grand jury statements from two discredited characters, the DOJ indicted Mr. Kelsey and Mr. Smith. (R.1, PageID #1-13.) The District Court for the Middle District of Tennessee had original jurisdiction under 18 U.S.C. § 3231. After a year of inaction and delays by Mr. Kelsey's former counsel, Mr. Smith pleaded guilty in return for probation and agreeing also to testify against Mr. Kelsey. (R.139, PageID #850-51.)

Mr. Kelsey intended to fully litigate his case, including by filing a motion to dismiss and, if that were not successful, by going to trial. Pressures mounted, however, when Mr. Kelsey's wife gave birth to twins on September 10, 2022. With a three-year-old child already in the home, Mr. Kelsey and his wife got very

---

[3] Mr. Miller was allegedly involved in multiple campaign finance violations involving Mr. Durham and others and had paid $7,750,000 to resolve a civil fraud case the DOJ had brought against him for allegedly intentionally overcharging TRICARE for pharmacy services. *Id.* at 849.

little sleep for months. In addition, Mr. Kelsey had learned that his father was dying from pancreatic cancer, entering hospice care in August 2022. (R.93, PageID #297-98.)

Facing DOJ threats to seek a six-and-a-half to eight-year imprisonment term if he went to trial and being advised of a realistic chance of probation if not, Mr. Kelsey pleaded guilty to two counts, coordinating campaign expenditures and conspiracy to defraud the FEC. App. 37a. In his plea agreement with the DOJ, Mr. Kelsey agreed that while the donations had taken place at Mr. Durham's "explicit direction," they had occurred only at his "implicit direction." App. 42a-43a.

He immediately regretted his decision to plead guilty and, just five days later, asked his counsel to file a motion to withdraw his guilty plea. (R.130 at 1, 3.)

After being rebuffed by one of his attorneys, he eventually convinced another to file the motion to withdraw three months later. But the delay played a part in the district court's denial of the motion. (R.119, PageID #677.) The district court also relied on the first attorney's false, or at least incomplete, testimony against him that he first heard of Mr. Kelsey's desire to withdraw his plea three months after it was entered rather than only five days afterward, making the exercise appear nothing more than a last-minute effort to avoid sentencing. (R.119 at PageID #656, 683.)

Mr. Kelsey also attached to his motion to withdraw a proposed motion to dismiss, which another law firm and he had drafted and which detailed why the actions alleged in the indictment, even if true, did not constitute a crime. (R.93-1, PageID #305-34.) For one

thing, a federal statute gives immunity to anyone relying on FEC advisory opinions, and multiple FEC advisory opinions had ruled that a state candidate for federal office cannot coordinate with himself by using his state funds in a federal race. *Id*. at 311-16. For another thing, the statutes utilized to invoke the judge-made rule against campaign coordination violated Mr. Kelsey's right to exercise free speech in the political arena. Therefore, they are unconstitutional facially and as applied to him. *Id*. at 330-33. The Sixth Circuit recently ruled *en banc* in another case that, based on current case law, this Court is likely to agree with that argument. *Nat'l Republican Senatorial Comm. v. Fed. Election Comm'n*, No. 24-3051, 2024 WL 4052976 (6th Cir. Sept. 5, 2024) (*en banc*).[4]

But the district court did not agree: "his contention that the Federal Election Commission's interpretations of statute are binding upon an Article III court is dubious at best." (R.119, PageID #682.) Also importantly, it found that Mr. Kelsey "was not truthful when he told the Court that he was, in fact, guilty," meaning that Mr. Kelsey was innocent of the crimes to which he pleaded guilty. (R.157, PageID #1150.)

Nonetheless, it kept the plea agreement in place.

---

[4] In the alternative, Mr. Kelsey asks this Court to hold this Petition, grant the *NRSC v. FEC* petition, which is due next week, rule for the petitioners, and then grant, vacate, and remand this case in light of that one. Mr. Kelsey is presently on release because the district court granted him release pending appeal, and the Sixth Circuit granted him a stay of its mandate pending consideration of this Petition, subject to a pending motion for reconsideration by the DOJ.

Two provisions of the plea agreement are relevant to this case. First, in paragraph 9(a), the parties agreed to recommend certain enhancements for the calculation of the offense level under the Sentencing Guidelines but that "no additional upward or downward adjustments are *appropriate*." App. 3a, 46a (emphasis added). Second, in paragraph 9(c), the parties acknowledged that the purpose of a Federal Rule of Criminal Procedure 11(c)(1)(B) Agreement is to limit what the government can advocate for but that the court would determine the final offense level and guidelines range. Thus, the agreement stated, "In the event that the Probation Office or the Court contemplates any U.S.S.G. adjustments, departures, or calculations different from those recommended above, the parties reserve the right to answer any inquiries and to make all *appropriate* arguments concerning the same." App. 3a, 16a-17a, 46a-47a (emphasis added). Under the agreement, a recommendation for the enhancement at issue on appeal, obstruction of justice, was *not* "appropriate." App. 3a, 45a-46a.

After the court denied Mr. Kelsey's motion to withdraw, the Probation Office issued a revised presentence report ("PSR") revoking the three points for acceptance of responsibility it had calculated in its original draft and adding two levels to the offense level for obstruction of justice, App. 5a, because, in pleading guilty, Mr. Kelsey had "misrepresented to the Court that he was guilty of a crime that he did not commit," (R.167, PageID #1348).

Three times, the government admitted that, under paragraph 9(a), it could *not* advocate for the obstruction of justice enhancement. First, in response to an inquiry from the probation office, regarding the re-

vised PSR, it said, "the Government will not advocate for the Obstruction of Justice enhancement." App. 5a. Second, in its Position on the PSR, it said, "per the agreement's terms, the government does not advocate for the application of the obstruction enhancement." (R.135, PageID #795.) But then it hedged and invited the court to ask it a question: "if at the sentencing hearing the Court requests the government's assessment . . . , the government will provide its assessment." *Id*. Third, at sentencing, the district court asked, "Anything you want to say on the objection to the -- to the obstruction of justice?" DOJ began its response, "[T]he government defers to the Court on [the enhancement's] application." App. 6a, 57a.

But the government quickly contradicted itself, arguing that certain statements by Mr. Kelsey at his plea withdrawal hearing "were perjurious and support application of the two-level enhancement." App. 6a, 58a. Immediately, defense counsel was, in the government's words, "springing up." (COA Doc. 18 at 30.) Defense counsel raised the following objection:

> MR. LITTLE: Your Honor, I think the government's come pretty close to violating the plea agreement. It sure sounds like they're advocating for those two points, and they can't do that.
>
> THE COURT: Well, I asked him what he thought.
>
> MR. LITTLE: I understand, Your Honor. But if you ask him to violate the plea agreement, it doesn't mean he doesn't violate the plea agreement.

App. 59a, 7a.

The district court went on to apply the two-point enhancement, and it relied on the Guidelines range to sentence Mr. Kelsey to 21 months' imprisonment. App. 7a.

On appeal, the Sixth Circuit panel split. The majority opinion found that Mr. "Kelsey's counsel failed to object adequately." App. 9a. Therefore, it applied plain error review. *Id.* The concurring opinion found that Mr. Kelsey's counsel "brought to the court's attention both his objection . . . and the grounds for that objection." App. 15a. Therefore, it applied *de novo* review. App. 16a.

That difference was conclusive. The majority found that, while Mr. Kelsey had the better argument regarding the meaning of the plea agreement, the agreement was at least somewhat ambiguous: "Both parties appear to recognize that there is at least some uncertainty about the government's obligations under Kelsey's agreement, even if Kelsey has the better reading of the agreement." App. 15a. Under *de novo* review, "any potential ambiguity in the plea agreement would be [read] in Kelsey's favor." App. 14a. (citing *United States v. Fitch*, 282 F.3d 364, 367 (6th Cir. 2002)). But under plain error review, the court construed the potential ambiguity against Mr. Kelsey, concluding that he failed to prove that the error was "'clear or obvious'" App. 14a-15a (quoting *Puckett v. United States*, 566 U.S. 129, 135 (2009)).

Thus, the court of appeals affirmed Mr. Kelsey's imprisonment, rather than giving him the chance to show his innocence at trial, because his counsel said that the government had "come pretty close" to violating the plea agreement instead of that it violated the plea agreement.

The majority's decision conflicted with decisions from the Third, Fourth, Fifth, Seventh, and D.C. Circuits on whether any particular language must be used to lodge an objection. It also conflicted with this Court's decision in *Holguin-Hernandez*. And it conflicted with decisions from the Tenth, Eleventh, and D.C. Circuits on how far this Court's holding in *Holguin-Hernandez* reached. In a concurring opinion in *Holguin-Hernandez*, Justice Alito, joined by Justice Gorsuch, noted that the decision left three related questions undecided. 589 U.S. at 175-77 (Alito, J., concurring).

Mr. Kelsey files this petition for writ of certiorari asking the Court to take this case to resolve the conflicts and determine the answers to these important questions.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit majority agreed with the Second and Tenth Circuits and conflicted with the Third, Fourth, Fifth, Seventh, and D.C. Circuits by improperly requiring Mr. Kelsey to do more than *Holguin-Hernandez* requires.

To determine whether an error in a criminal case is preserved under *Holguin-Hernandez*, "The question is simply whether the claimed error was 'brought to the court's attention.'" 589 U.S. at 174 (quoting Fed. R. Crim. Proc. 52(b)). The Sixth Circuit majority panel opinion improperly added to the plain meaning of this clear standard in various ways. In so doing, it also conflicted with opinions from several other circuit courts of appeals.

A. The Sixth Circuit majority improperly required counsel to use specific words, agreeing with the Second Circuit and conflicting with the Third, Fourth, Fifth, Seventh, and D.C. Circuit courts and *Holguin-Hernandez.*

Three times, the court mentioned that "counsel never stated that the government actually breached the agreement." App. 11a; *see also* App. 10a (counsel "never said that the government breached the agreement"); *Id*. (counsel did "not [state] that the government had in fact breached the plea agreement"). While the court mentioned *Holguin-Hernandez*'s statement that an objecting party need not use any "particular

language," App. 9a, in practice, that is exactly what it required.

It emphasized counsel's words that the government had "*come pretty close*" to violating the plea agreement. App. 10a (emphasis in original). And it used those three words to reach the incredible conclusion that counsel's words meant the exact opposite of what he said—that the government did *not* violate the plea agreement. App. 8a-12a.

But it was not necessary to say the exact phrase, "the government breached the agreement" for counsel to "bring to the court's attention" the issue whether the government breached the agreement. Counsel used a myriad of other words to bring the issue to the court's attention. Most prominently, he said "they can't do that." App. 9a. It was undisputed that everyone understood that "they" meant "the prosecutors" and "that" meant "advocate for the obstruction of justice enhancement." And all parties understood that defense counsel believed "they" could not do "that" for a specific reason: because it would "violat[e] the plea agreement," a phrase which he used three times. *Id.* So the combination of all 59 words of the exchange made clear to the district court, as the concurring opinion explained, that "Kelsey brought to the court's attention both his objection . . . and the grounds for that objection." App. 15a.

The concurring opinion correctly identified the objection—"that the government 'violated the plea agreement'" *Id.* (quoting trial counsel). It did so because it followed this Court's directive that an objecting party need not "use any particular language." *Holguin-Hernandez*, 589 U.S. at 174. The majority opinion conflicted with this Court's directive.

The majority opinion also conflicts with the Third, Fourth, Fifth, Seventh, and D.C. Circuits. Even before *Holguin-Hernandez*, these circuit courts did not require objecting parties to use particular language to adequately lodge an objection.

The Third, Fifth, Seventh, and D.C. Circuits have all adopted a standard from Wright & Miller's *Federal Practice and Procedure* that, in deciding the adequacy of an objection, courts should look to "substance" over "form." *United States v. Tate*, 630 F.3d 194, 198 (D.C. Cir. 2011); *United States v. Castillo*, 430 F.3d 230, 243 (5th Cir. 2005); *United States v. Melendez*, 55 F.3d 130, 133 (3d Cir. 1995); *United States v. Pirovolos*, 844 F.2d 415, 424 n.8 (7th Cir. 1988); *United States v. Williams*, 561 F.2d 859, 863 (D.C. Cir. 1977). In *Williams*, the D.C. Circuit said of Rule 51, "We ought not apply this rule in a ritualistic fashion. Where, as here, the problem has been brought to the attention of the court, and the court has indicated in no uncertain terms what its views are, to require a further objection would exalt form over substance." 561 F.2d at 863 (quoting Wright, *Federal Practice and Procedure*: Criminal § 842 (1969)). Because the present case required that the objection be made in a particular form, instead of looking to the substance of it, the Sixth Circuit decision conflicts with this established line of cases from other circuit courts.

The Sixth Circuit joins the Second Circuit in failing to adopt the admonition not to exalt substance over form. *See United States v. Cohen*, 170 F. App'x 725, 726 (2d Cir. 2006). In *Cohen*, the Second Circuit ruled that defense counsel only "tepidly argued against the inclusion of [a] recording . . . , but clearly did not object. His mild protestation was neither an

objection nor an error that was 'brought to the court's attention.'" *Id.* (quoting Fed. R. Crim. P. 52(b)). Whether arguing tepidly or forcefully, arguing against a court's ruling brings the substance of the court's error to its attention.

The majority opinion below and the Second Circuit also conflict with a line of circuit court cases that do "not require recitation of magic words." *United States v. Brannan*, 74 F.3d 448, 452 (3d Cir. 1996). As the Fifth Circuit said, "We have held that an objection to the violation of a constitutional right is not inadequate merely because of the failure to use 'the magic words, "I object."'" *United States v. Flores-Martinez*, 677 F.3d 699, 710 n.6 (5th Cir. 2012) (quoting *United States v. Johnson*, 267 F.3d 376, 380 (5th Cir. 2001)); *see also United States v. Johnson*, 822 F. App'x 258, 262 n.2 (5th Cir. 2020).

Finally, the Sixth Circuit majority and the Second Circuit conflict with a line of cases from the Third and Fourth Circuits that have adopted language found in Moore's Federal Practice: "Compliance with Rule 51 does not require 'surgical precision.'" *United States v. Rivera*, 365 F.3d 213, 214 (3d Cir. 2004) (quoting Moore's Fed. Prac. 3d § 51.03). But here, the Sixth Circuit did require surgical precision by mandating that an exact phrase be used: "the government breached the agreement." App. 10a. By contrast, in *Rivera*, although counsel did not preserve his claim "expertly," he did so "adequately." 365 F.3d at 214.

The Fourth Circuit agrees with the Third Circuit, regarding Rule 51: "'the Rule does not require surgical precision to preserve error.'" *United States v. Estevez Antonio*, 311 F. App'x 679, 681 (4th Cir. 2009) (quoting *Exxon Corp. v. Amoco Oil Col.*, 875 F.2d 1085, 1090

(4th Cir. 1989)). In *Estevez Antonio*, the Fourth Circuit did not require a specific phrase to be used to preserve the objection; rather, it considered counsel's words "taken together." 311 F. App'x 679, 682 (4th Cir. 2009). It pieced together two separate arguments to form the objection. *Id*. But here, the Sixth Circuit did not take counsel's words together. Critically, it omitted any analysis of counsel's pivotal second sentence: "It *sure* sounds like they're advocating for those two points, and *they can't do that*." App. 7a, 59a (emphases added). Any "ambivalen[ce]," as the Sixth Circuit put it, App. 10a, about whether the government had breached the plea agreement in counsel's first sentence of the objection was removed in the second sentence by use of the word "sure," which, when used in place of "surely," "connotes strong affirmation [and] is used when the speaker or writer expects to be agreed with." *Merriam-Webster.com Dictionary*, "Sure."[5] The majority opinion skipped past this important part of the objection and provided no analysis of why it was not enough to bring the error to the court's attention. That omission conflicts with the Fourth Circuit's decision to analyze the words of the objection as a whole. It also conflicts with the Third and Fourth Circuits' obviation of the need to use "surgical precision"; the Third and Fifth Circuits' denigration of "magic words"; and the admonition from the Third, Fifth, Seventh, and D.C. Circuits not to "exalt substance over form."

---

[5] *Available at* https://www.merriam-webster.com/dictionary/sure (retrieved Nov. 21, 2024).

B. The Sixth Circuit majority improperly required Mr. Kelsey to request relief, conflicting with *Holguin-Hernandez*, the plain text of Rule 51, and precedent from other circuits.

Federal Rules of Criminal Procedure 51 and 52 control which standard of review applies in criminal cases—*de novo* or plain error. Rule 51 explains when to apply *de novo* review, requiring a defendant to inform the court of either “the action the party wishes the court to take” or “the party’s objection to the court’s action and the grounds for that objection.” Rule 52 explains when to apply plain error review, *i.e.*, when *not* to apply *de novo* review, which is when an issue was “not brought to the court’s attention.”

In *Holguin-Hern*andez, this Court explained that Rules 51 and 52 work in tandem, and the simpler analysis is to determine whether Rule 52’s plain error review applies: “The question is simply whether the claimed error was ‘brought to the court’s attention.’” 589 U.S. at 174 (quoting Fed. R. Crim. Proc. 52(b)).

To determine whether an error was brought to the court’s attention under Rule 52, this Court looked back to Rule 51: “Errors [must be] brought to the court’s attention in one of these two ways”: “a party may . . . ‘inform[] the court . . . of [1] the action the party wishes the court to take, or [2] the party’s objection to the court’s action and the grounds for that objection,’” *Holguin-Hernandez*, 589 U.S. at 170-71 (quoting Fed. R. Crim. Proc. 51(b)). On a plain reading of the text of Rule 51, a party is required to fulfill one of these two requirements but not both. Here, Mr. Kelsey’s counsel conceded that he did not do the former:

he did not make a motion or ask the court to impose a remedy.

But in analyzing whether he accomplished the latter—stated an objection and its grounds—the Sixth Circuit majority improperly considered whether he did the former. App. 11a. It stated that "counsel never requested any relief from the district judge and never raised what he thought should happen in light of the government's purported breach." *Id.* By requiring counsel to request relief, the court improperly added to the standard set forth by *Holguin-Hernandez*. In essence, it required the defendant to meet *both* of Rule 51's requirements, instead of just one.

By contrast, the concurring opinion stated the correct proposition of law: "A criminal defendant preserves a claimed error by 'informing the court' of either the action he 'wishes the court to take' or his 'objection to the court's action and the grounds for that objection.'" App. 15a (quoting Fed. R. Crim. P. 51(b)). Because it utilized the correct proposition of law, it reached the correct conclusion: "Kelsey brought to the court's attention both his objection—that the government 'violated the plea agreement'—and the grounds for that objection—that 'it sure sounds like they're advocating for those two points, and they can't do that.'" App. 15a. Unlike the majority opinion, the concurrence made no mention of whether Mr. Kelsey's counsel also requested relief from the error brought to the district court's attention, because there was no need to. This burden the majority added to the defendant was not only unnecessary but also contrary to binding precedent from this Court in *Holguin-Hernandez*.

It also conflicted with decisions from other circuit courts. For example, the D.C. Circuit quoted the disjunctive "or" found in Rule 51 and conceded that an error was preserved when defense counsel "clearly articulated the objectionable characteristics of th[e] evidence" even though he did not also make known "the action which he desires the court to take." *Williams*, 561 F.2d at 862-63.

This Court should resolve the conflict and take this case to clarify that, to preserve an error for appellate review, criminal defense counsel must fulfill one of the requirements of Rule 51(b) but not both.

C. The Sixth Circuit majority improperly required Mr. Kelsey's objection to be lengthy, agreeing with earlier Tenth Circuit decisions but conflicting with both *Holguin-Hernandez* and other circuits.

Another burden the court added to the *Holguin-Hernandez* standard is that the objection be lengthy. Twice, the court mentioned that the objection was deficient because it occurred in only a "brief exchange." App. 11a, 12a. Another time, it calls counsel's remarks "too abbreviated." App. 10a. But *Holguin-Hernandez* does not require that an objection be lengthy. As long as the error is "brought to the court's attention," it does not matter how long the objection is. A proper objection and grounds can be stated in as few as two words, for example: "Objection. Hearsay." In this case, the exchange encompassed 59 words.

This extended exchange more than "brought" the error "to the court's attention." As the concurring opinion correctly stated, counsel stated the "objection—

that the government 'violated the plea agreement'—and the grounds for that objection—that 'it sure sounds like they're advocating for those two points, and they can't do that,'" App. 15a. (Kethledge, J., concurring) (quoting trial counsel). There is no required word quota necessary to fulfill the rule. The concurring opinion correctly omitted any mention of the length of the objection.

By mentioning the length of the interaction at all, in contravention to this Court's silence on length or brevity in *Holguin-Hernandez*, the Sixth Circuit majority placed another improper burden on this Court's standard.

It also conflicted with decisions from other circuit courts, which made no mention of any potential problems with a "brief exchange." *See, e.g., United States v. Gbenedio*, 95 F.4th 1319, 1334 (11th Cir. 2024); *United States v. Fosher*, 568 F.2d 207, 210 (1st Cir. 1978).

The majority opinion joined only the Tenth Circuit, which, at least prior to *Holguin-Hernandez*, analyzed the length of an objection for whether it preserved the error for appellate review. *See, e.g., U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd.*, 582 F.3d 1131, 1142 (10th Cir. 2009) (a "party does not preserve an issue merely . . . by making a fleeting contention before the district court."); *In re Rumsey Land Co.*, 944 F.3d 1259, 1271 (10th Cir. 2019) ("We also do not address arguments raised in the [d]istrict [c]ourt in a perfunctory and underdeveloped manner."); *United States v. Gantt*, 679 F.3d 1240, 1248 (10th Cir. 2012) ("An unelaborated snippet cannot preserve an issue for appeal.").

This Court should take the case to resolve the conflict and state unequivocally that, to preserve an error for appellate review, an objection need not be lengthy.

D. The Sixth Circuit majority's failure to credit the district court's rejection of the objection conflicted with decisions from other circuit courts.

The Sixth Circuit's holding that Mr. Kelsey's counsel did not allow the district court "to correct any potential improprieties," App. 11a, and that his words constituted a "total failure to prompt the district court to make necessary findings," *id.*, conflicted with the decision of the Ninth Circuit in *United States v. Grissom*, 525 F.3d 691 (9th Cir. 2008). There, the Ninth Circuit looked to the district court's response to establish that the objection had been properly lodged. *Id*. at 695.

Here, in response to counsel's objection, specifically that "it sure sounds like they're advocating for those two points, and they can't do that," the district court dismissed the issue by responding, "Well, I asked him what he thought." App. 16a. The district court's response revealed three things: (1) the court understood the objection; (2) the court disagreed with the objection; and (3) the court provided its grounds for rejecting the objection.

The concurring opinion agreed and affirmed that "here the district court clearly understood the basis for this objection and addressed it." App. 15a-16a.

The majority opinion did not completely disagree, admitting that "perhaps the district court could be seen as overruling the notion that the government had

breached on the basis that the government could respond." App. 11a. But then it tried to explain away this obvious conclusion by characterizing the district court's statement as "nothing more than an off-hand reaction to counsel remarking on the government's conduct." *Id.*

This reading of the transcript is beyond strained and conflicts with how other circuits treat judicial responses to objections. The Sixth Circuit majority provided no reason to support its conclusion that the court was making an "off-hand reaction." *Id*. Nor did it acknowledge that a court's reaction to an objection carries legal weight—whether "off-hand" or not. There was notably no citation to this line-drawing, which will sow chaos in future cases if left unchecked.

Perhaps most glaring, the opinion provided no alternative explanation for what the district court's words might have meant. That is because there is no explanation for what the court meant *other* than the obvious: it understood the issue but thought the government did not breach the plea agreement because it had asked it a question. This was the same reason the government had invited the court to ask a question in its Position on the PSR. (R.135, PageID #795). And it is the same reason the government argued on appeal: it did not breach because "it could answer the inquiry." (COA Doc. 18 at 42.) It is also the same reason the concurrence found persuasive. App. 17a-18a. The context belies any grand coincidence. Because the court understood and ruled on the objection, there was no justification for applying the deferential "plain error" standard.

Doing so directly conflicted with *Grissom*. There, the Ninth Circuit held, "Despite the seeming facial inadequacy of the objection, we agree with the government that where the district court indicates that it understands the basis for the objection and that further argument is not desired, and the record reflects this understanding, a general objection may suffice to preserve an issue for appeal." *Grissom*, 525 F.3d at 695.

To be sure, the district court's response would have been clearer if it had stated, "Objection overruled because I asked the government its position." But that was not Mr. Kelsey's responsibility: "the basic responsibility for making a proper . . . ruling [to an objection] must lie with the trial judge." *United States v. Walker*, 449 F.2d 1171, 1175 (D.C. Cir. 1971). And a judge need not identify an objection as such to reject it, as long as "the colloquy with counsel . . . sufficiently enlightened the court as to the point being raised." *United States v. Freeman*, 357 F.2d 606, 613 (2d Cir. 1966). When a court's response reveals that it understood the issue raised by the defendant, as it did here, "the purpose of the contemporaneous objection rule was fulfilled," despite the judge not ruling on a formal objection "because the judge had an opportunity to consider and resolve this contested issue immediately." *United States v. Miller*, 900 F.3d 509, 513 (7th Cir. 2018).

The Sixth Circuit's dismissal of the trial court's response conflicted with all these other circuit court decisions.

E. The Sixth Circuit majority's failure to credit counsel's reply to the district court response also conflicted with decisions from other circuit courts.

Counsel went above and beyond the requirements of *Holguin-Hernandez* by disagreeing with the district court's rejection of his objection. He protested, "[I]f you ask him to violate the plea agreement, it doesn't mean he doesn't violate the plea agreement." App. 7a. He was not "required to point out possible errors in the decision after it had already been made," *United States v. Rivera*, 682 F.3d 1223, 1234 (9th Cir. 2012), but he did just that.

The Sixth Circuit conflicted with this Ninth Circuit decision by discounting counsel's reply to the district court. The majority opinion acknowledged that "counsel was more specific after the district court responded," App. 10a, but it still demanded magic words: "counsel still never said that the government breached the agreement," *id*.

This extra onus conflicted with clearly established precedents in other circuits that "'the defendant is not required to interpose a further objection to the adequacy of the district court's findings after the district court has ruled.'" *Tate*, 630 F.3d at 198 (quoting *United States v. Ortiz*, 431 F.3d 1035, 1039 (7th Cir. 2005)).

II. This Court should decide the open question of whether *Holguin-Hernandez* applies to errors other than a sentence's reasonableness.

A. The Sixth Circuit majority decision conflicts with the Tenth, Eleventh, and D.C. circuits on whether *Holguin-Hernandez* applies beyond the preservation of the issue of a sentence's reasonableness.

The Sixth Circuit decision conflicts with at least three other circuit court decisions which applied *Holguin-Hernandez* to cases that did not involve the issue of whether the sentence was substantively unreasonable. *See United States v. Cates*, 73 F.4th 795, 809 (10th Cir. 2023); *United States v. Abney*, 957 F.3d 241, 248 (D.C. Cir. 2020); *United States v. Pizarro*, 817 F. App'x 806, 809-10 (11th Cir. 2020). All three cases quoted the *Holguin-Hernandez* standard that, to be preserved, an error must only be "brought to the court's attention." The Tenth Circuit applied the standard to a discovery issue in *Cates*. The Eleventh Circuit applied it to an obstruction of justice enhancement in *Pizarro*. And the D.C. Circuit applied it to the right to allocute in *Abney*.

The Sixth Circuit majority mentioned the standard but, in practice, it improperly limited the holding of *Holguin-Hernandez* to cases in which defendants challenged the reasonableness of their sentence. The majority improperly relied upon precedent that is questionable after the Supreme Court's ruling in *Holguin-Hernandez*. Saying that the objection was "too abbreviated and sufficiently ambivalent," citing *United States v. LeBlanc*, 612 F.2d 1012, 1014 (6th Cir. 1980),

or that it was "not specific," citing *United States v. Bostic*, 371 F.3d 865, 871 (6th Cir. 2004), is not reconcilable with this Court's ruling that no specific words are required and that the error need only be "brought to the court's attention."

Even more clearly, the majority opinion conflicted with *Abney*. There, the defendant asked only, "May I say something?" 957 F.3d at 245. Yet the D.C. Circuit Court found that very *abbreviated* and *non-specific* question adequate to preserve the error of not being able to allocute. *Id*. at 247-49. This clearly represents a different understanding of what it means to bring an error to the court's attention, and the deep circuit conflict begs for clarification from this Court.

B. Justice Alito's concurrence in *Holguin-Hernandez*, joined by Justice Gorsuch, pointed out that this Court left questions open for future cases such as this one.

Justice Alito's concurring opinion, joined by Justice Gorsuch, identified questions remaining after *Holguin-Hernandez* about "what is sufficient to preserve a claim" other than that the sentence was substantively unreasonable. 589 U.S. at 176 (Alito, J., concurring). Specifically, the justice mentioned three issues *not* decided by the unanimous decision:

> *First*, we do not decide "what is sufficient to preserve a claim that a trial court used improper *procedures* in arriving at its chosen sentence." . . .
>
> *Second*, we do not decide what is sufficient to preserve any "particular" substantive-reasonableness argument. . . .

> *Third*, we do not decide whether this petitioner properly preserved his particular substantive-reasonableness arguments . . . .

Id.

But Justices Alito and Gorsuch did not comment on the how widely to apply the statement in *Holguin-Hernandez* about the intentions of the drafters of Rule 51: "The rulemakers, in promulgating Rule 51, . . . chose not to require an objecting party to use any particular language . . . . The question is simply whether the claimed error was 'brought to the court's attention.'" *Id*. at 174 (quoting Rule 52(b)).

III. This case is a good vehicle to decide the circuit conflicts and questions remaining about what one must say to preserve an error for appellate review.

This case is a good vehicle to decide what one must say to preserve an error for appellate review for three reasons.

First, the facts are undisputed. The transcript of the sentencing hearing fully encapsulates what defense counsel said to lodge his objection. Therefore, the questions remaining for this Court are all questions of law. As the appellate court correctly acknowledged, "There is no dispute about what defense counsel said, only whether it was a sufficient objection." App. 8a.

Second, Mr. Kelsey presented—and the circuit court expressly decided—the question of whether his counsel objected "adequately." App. 8a-12a. In his opening brief below, Mr. Kelsey stated succinctly that his counsel had objected to the plea breach and that,

therefore, *de novo* review applied. (COA Doc. 14 at 25.) In its response brief, the government argued that he did not object and that, therefore, plain error review applied. (COA Doc. 18 at 31-36.) And in his reply brief, Mr. Kelsey explained why each of the government's reasons for plain error review was wrong. (COA Doc. 24 at 25-36.)

Third, unfortunately for Mr. Kelsey, the answer to the question of which standard of review applied was dispositive. Counsel's failure to object prevented Mr. Kelsey from obtaining the relief from the breach that he was entitled to receive: recission of the plea agreement. *See Santobello v. New York*, 404 U.S. 257, 267 (1971) (Douglas, J., concurring); *United States v. Mandell*, 905 F.2d 970, 974-75 (6th Cir. 1990). That is, after all, the relief he had sought in his motion to withdraw.

But because the court of appeals failed to recognize counsel's objection, it analyzed the plea breach under plain error review rather than *de novo* review. That difference was conclusive. The Sixth Circuit majority found that, while Mr. Kelsey had the better argument regarding the meaning of the plea agreement, the agreement was at least somewhat ambiguous: "Both parties appear to recognize that there is at least some uncertainty about the government's obligations under Kelsey's agreement, even if Kelsey has the better reading of the agreement." App. 15a. Under *de novo* review, "any potential ambiguity in the plea agreement would be [read] in Kelsey's favor." App. 14a (citing *United States v. Fitch*, 282 F.3d 364, 367 (6th Cir. 2002)). But under plain error review, the court construed the potential ambiguity against Mr. Kelsey, concluding that he failed to prove that the error was

"'clear or obvious'" App. 14a-15a (quoting *Puckett v. United States*, 566 U.S. 129, 135 (2009)).

Therefore, the questions presented in this case are dispositive and will determine whether Mr. Kelsey faces imprisonment or a new trial.

CONCLUSION

The majority opinion in this case decided the question of what one must say to preserve an error for appellate review in conflict with the decisions of several other circuit courts and with this Court's decision in *Holguin-Hernandez*. For the reasons stated above, this Court should grant the petition for writ of certiorari to resolve the differences and clarify the answer to the question.

In the alternative, this Court should hold this case and order the Sixth Circuit's stay of its mandate to remain in place, pending a decision on the forthcoming petition for certiorari from *National Republican Senatorial Committee v. FEC*, 2024 WL 4052976.

Respectfully submitted,

Kent Wicker
Counsel of Record
WICKER/BRAMMELL PLLC
323 West Main Street, 11th Floor
Louisville, Kentucky 40202
(502) 780-6185
kent@wickerbrammell.com

Counsel for Petitioner

November 26, 2024

APPENDIX A

[**FILED** Jul 08, 2024 KELLY L. STEPHENS, Clerk]

NOT RECOMMENDED FOR PUBLICATION
File Name: 24a0292n.06

Nos. 23-5755/5756

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRIAN KELSEY,
Defendant-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE MIDDLE
DISTRICT OF TENNESSEE

OPINION

Before: SILER, MOORE, and KETHLEDGE, Circuit Judges.

MOORE, J., delivered the opinion of the court in which SILER, J., joined. KETHLEDGE, J. (pp. 13–15), delivered a separate opinion concurring in the judgment.

KAREN NELSON MOORE, Circuit Judge. Brian Kelsey agreed to plead guilty to certain federal crimes in exchange for the government agreeing to recommend only certain sentencing enhancements to the district court. After Kelsey appeared to perjure himself while seeking to withdraw his guilty plea, however, the government suggested during the sentencing hearing that the facts and law supported application of another enhancement. Regardless of whether this conduct constituted a breach of the plea agreement, Kelsey's counsel failed to object to any purported breach. Because Kelsey cannot show plain error, we AFFIRM the district court's judgment.

I. BACKGROUND

1. The Indictment and Plea Agreement

On October 22, 2021, Kelsey was indicted on five counts related to an alleged conspiracy to violate federal campaign-finance laws. *See generally* R.1 (Indictment at 1–12) (Page ID #1–12). Per Kelsey's plea agreement, at a high level, Kelsey, who at the relevant time was a Tennessee state senator running for a seat in the United States House of Representatives, conspired with several individuals to move money from his state senate campaign committee through various political action committees for the benefit of Kelsey's federal campaign committee. *See* R. 73 (Plea Agreement ¶ 7) (Page ID #209–14).

On November 22, 2022, Kelsey and the government entered into a negotiated plea agreement. *Id.* ¶ 3 (Page ID #208). Kelsey agreed to plead guilty to all five counts of the indictment and to give up certain constitutional rights in exchange for certain promises. *Id.*

The parties agreed that they would recommend to the sentencing court that Kelsey's base-offense level was eight; that it should be increased by six levels due to the value of the illegal transactions; that it should be increased by two levels because Kelsey was an "organizer, leader, manager, or supervisor"; and that it should be increased by two levels "because the defendant abused a position of public or private trust in a manner that significantly facilitated the commission or concealment of the offense." *Id.* ¶ 9(a)(i)–(iv) (Page ID #215). The agreement also contemplates that a reduction of up to three levels would be warranted for acceptance of responsibility. *Id.* ¶ 9(a)(v) (Page ID #215–16). Beyond these adjustments, the agreement states that "the United States and defendant agree to recommend to the Court . . . that no additional upward or downward adjustments are appropriate." *Id.* ¶ 9(a)(vi) (Page ID #215–16).

Certain other provisions are relevant. The agreement explains that the guidelines range and offense level contemplated by the agreement are not binding on the district court or probation office, and "that the Court ultimately determines the facts and law relevant to sentencing, that the Court's determinations govern the final guidelines calculations, and that the Court determines both the final offense level and the final guidelines range." *Id.* ¶ 9(c) (Page ID #216). That same paragraph also states that "[i]n the event that the Probation Office or the Court contemplates any U.S.S.G. adjustments, departures, or calculations different from those recommended above, the parties reserve the right to answer any inquiries and to make all appropriate arguments concerning the same." *Id.*

Consistent with the agreement, Kelsey pleaded guilty before the district court on November 22, 2022.

R. 83 (Plea Tr.) (Page ID #245–67). During the plea colloquy, Kelsey admitted that he engaged in the behavior detailed in the factual basis section of the plea agreement. *Id.* at 9:12–20 (Page ID #253). After the court's explanation of various provisions of the agreement, Kelsey pleaded guilty and the court accepted the plea. *Id.* at 19:14–20:5 (Page ID #263–64).

2. **The Motion to Withdraw the Guilty Plea**

On March 17, 2023, however, Kelsey moved to withdraw his guilty plea. R. 93 (Mot. to Withdraw) (Page ID #285–302). In his motion, Kelsey claimed that he pleaded guilty to conduct that did not constitute a crime—*i.e.*, that he was legally innocent. *Id.* at 6–11 (Page ID #290–95). The district court then held a lengthy hearing on the motion to withdraw. R. 119 (Mot. Hearing Tr.) (Page ID #483–698). Kelsey's position at the hearing appeared broader than his prior assertions of legal innocence. In particular, Kelsey claimed that he did not engage in the conduct described in the factual basis section of his plea agreement, despite admitting at the change-of-plea hearing that he had. *Id.* at 109:2–25 (Page ID #591); *see also id.* at 113:24–114:1 (Page ID #595–96) ("I'm factually innocent, and I shouldn't have said I was guilty."); *id.* at 123:4–5 (Page ID #605) ("I 100 percent did not commit these things that I'm accused of."). The district court denied the motion. *Id.* at 209:16–19 (Page ID #691).

3. **The Sentencing Hearing**

After the hearing on Kelsey's plea-withdrawal motion but prior to sentencing, the probation office filed

a revised presentence report. R. 167 (PSR) (Page ID #1323–53). The revised PSR reflects much of the parties' plea agreement, *see, e.g.*, *id.* ¶ 8 (Page ID #1328), but it also recommends an upward adjustment for obstruction of justice based on Kelsey's statements during his change-of-plea hearing, *id.* ¶ 47 (Page ID #1334). Specifically, the PSR explains that Kelsey "stated, multiple times, that he lied, under oath, at his Change of Plea hearing, when he indicated that he was guilty." *Id.* With this new two-level enhancement applied and no reduction for acceptance of responsibility, Kelsey's total-offense level was twenty. *Id.* ¶¶ 59, 63 (Page ID #1335–36). Kelsey objected to the enhancement. *Id.* at Addendum, Obj. #2 (Page ID #1347–48). The government, on the other hand, stated that it had no objections and that because "the plea agreement includes language that no additional upward or downward adjustments are appropriate . . . the Government will not advocate for the Obstruction of Justice enhancement." *Id.* at Addendum, Gov't Obj. (Page ID #1347).

On August 11, 2023, the district court held the sentencing hearing. R. 157 (Sent'g Tr.) (Page ID #1133–1252). Kelsey's counsel argued against application of the obstruction-of-justice enhancement, contending that Kelsey's statements did not constitute perjury. *See, e.g.*, *id.* at 10:3– 24 (Page ID #1142). After Kelsey's initial arguments, the court asked the government "[a]nything you want to say on the objection to the – to the obstruction of justice?" *Id* at 11:19–20 (Page ID #1143). The government answered yes, and gave the following statement:

> As the Court is, of course, aware, that enhancement was not contemplated in the plea

agreement between the parties, which, of course, was entered into before Mr. Kelsey moved to withdraw his plea. Therefore, the government defers to the Court on its application.

However, consistent with the terms of the plea agreement, it appears that the Probation Office and the Court is inquiring with respect to the propriety of that two- level enhancement.

We would note that in Application Note 4B of Sentencing Guidelines Section 3C1.1, committing, suborning, or attempting perjury, including during the course of a proceeding, if it's conducted in front of the Court on matters related to the conviction, that that two-level enhancement can apply.

As, of course, this Court is aware, when Mr. Kelsey testified before this Court at the hearing to withdraw his plea, he repeatedly admitted that he lied at his change of plea hearing when he said he was guilty. Subsequent to that, while on the stand he also emphatically and repeatedly stated that he did not commit the acts set forth in the factual basis supporting his pleas, despite his earlier sworn statement that he had.

As the Court ruled at the plea withdrawal hearing, the Court can rely on the statement of facts that was entered as true, and there, the defendant's statements, including, but not limited to, "I 100 percent did not commit these things that I'm accused of," on page 119 of the withdrawal transcript, were perjurious and support application of the two-level enhancement.

Id. at 11:22–13:1 (Page ID #1143–45).

After this exchange, the court asked Kelsey's counsel for the final word on the objection. Defense counsel then stated that "I think the government's come pretty close to violating the plea agreement. It sure sounds like they're advocating for those two points, and they can't do that." *Id.* at 13:5–8 (Page ID #1145). The court noted that the government responded only after it "asked [counsel] what he thought." *Id.* at 13:9 (Page ID #1145). Defense counsel then noted that "if you ask him to violate the plea agreement, it doesn't mean he doesn't violate the plea agreement." *Id.* at 13:10–12 (Page ID #1145). After hearing further from the defense, the district court applied the enhancement. The court clarified that it could impose the enhancement notwithstanding the plea agreement. *Id.* at 16:6–11 (Page ID #1148); *see also id.* at 16:17–21 (Page ID #1148). The court then calculated Kelsey's total-offense level as twenty—eighteen levels as contemplated by the plea agreement plus the two-level enhancement—and found that the guidelines range was 33 to 41 months. *Id.* at 23:1–5 (Page ID #1155). The court sentenced Kelsey to 21 months' imprisonment. *Id.* at 116:6–9 (Page ID #1248). After imposing its sentence, the court inquired whether defense counsel had any objections, to which counsel replied "[t]he only additional objection is the two points for obstruction." *Id.* at 117:13–17 (Page ID #1249).

II. DISCUSSION

A. Standard of Review

Ordinarily, we review de novo the issue of whether a plea agreement was breached. *See, e.g.*, *United States v. Warren*, 8 F.4th 444, 448 (6th Cir. 2021). But

if a defendant fails to object adequately to an alleged breach, we must review for plain error. *See, e.g.*, *Puckett v. United States*, 556 U.S. 129, 134–35 (2009). Under plain-error review, the party claiming error must show (1) that there was an error; (2) that was "clear or obvious, rather than subject to reasonable dispute"; (3) that "affected the appellant's substantial rights," *i.e.*, "that it 'affected the outcome of the district court proceedings'"; and (4) that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 135 (quoting *United States v. Olano*, 507 U.S. 725, 734, 736 (1993)). In the plea-breach context, a defendant may fail to show prejudice if "he obtained the benefits contemplated by the deal anyway (*e.g.*, the sentence that the prosecutor promised to request) or because he likely would not have obtained those benefits in any event." *Id.* at 141–42. And the second prong of the review—clear or obvious error—"will often have some 'bite' in plea-agreement cases" because "[n]ot all breaches will be clear or obvious" given that plea agreements are creatures of contract. *Id.* at 143.

B. Plain-Error Review Applies Because Kelsey Failed to Object

The government argues that Kelsey did not object adequately to the alleged breach of the plea agreement at the sentencing hearing, and that plain-error review thus applies. Kelsey claims that defense counsel's comments following the government's opining on the obstruction-of-justice enhancement were a sufficient objection of breach and adequately apprised the court of the issue. There is no dispute about what defense counsel said, only whether it was a sufficient objection.

Counsel stated that "I think the government's come pretty close to violating the plea agreement. It sure sounds like they're advocating for those two points, and they can't do that," R. 157 (Sent'g Tr. at 13:5–8) (Page ID #1145), and also that "if you ask him to violate the plea agreement, it doesn't mean he doesn't violate the plea agreement," *id.* at 13:10–12 (Page ID #1145).

Under Federal Rule of Criminal Procedure 51(b), "[a] party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action that the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." An objecting party need not "use any particular language." *Holguin-Hernandez v. United States*, 589 U.S. 169, 174 (2020). Instead, "[t]he question is simply whether the claimed error was 'brought to the court's attention.'" *Id.* (quoting Fed. R. Crim. P. 52(b)); *see also United States v. Humphrey*, 287 F.3d 422, 445 (6th Cir. 2002) (party preserved *Apprendi* issue because the "substance of his objection to the drug quantity determination, combined with his objection to the standard of evidence to be used, [was] sufficient to notify the district court of the basis for the objection"), *overruled on other grounds by United States v. Leachman*, 309 F.3d 377 (6th Cir. 2002). If an objection "*actually* apprised" the district court of the issue—that is, if the district court recognizes the objection notwithstanding counsel's actions—the issue is sufficiently preserved, as well. *United States v. Prater*, 766 F.3d 501, 507 (6th Cir. 2014).

Kelsey's counsel failed to object adequately to any purported breach in this case. Accordingly, plain-error review applies. To start, Kelsey's counsel appears to

concede that he never lodged a formal objection. And though an objection may nonetheless be adequate in the absence of any formulaic presentation or invocation of specific words, counsel's remarks were too abbreviated and sufficiently ambivalent about the government's conduct to register as an objection. *See, e.g.*, *United States v. LeBlanc*, 612 F.2d 1012, 1014 (6th Cir. 1980) ("[C]ourts have held that error is not preserved for appellate review when appellant's objection was too loosely formulated and imprecise to apprise the trial court of the legal grounds for his complaint." (internal quotation marks and citation omitted)). That is, counsel's ostensible objection was not specific and did not inform the district court of the grounds for objecting. *See, e.g.*, *United States v. Bostic*, 371 F.3d 865, 871 (6th Cir. 2004) ("A party must object with that reasonable degree of specificity which would have adequately apprised the trial court of the true basis for his objection." (internal quotation marks and citation omitted)). Counsel stated that "the government's *come pretty close* to violating the plea agreement," not that the government had in fact breached the plea agreement. R. 157 (Sent'g Tr. at 13:5–8) (Page ID #1145) (emphasis added).

Although counsel was more specific after the district court responded, counsel still never said that the government breached the agreement, only that the court's asking the government to violate the agreement could still result in a breach. *Id.* at 13:10–12 (Page ID #1145). It goes without saying that if the district court never registered that Kelsey's counsel was in fact claiming a breach, then the district court would not have realized that counsel was suggesting that the district court prompted the government to violate the agreement by asking the government a question. In

this sense, counsel's vague remarks hardly gave the district court the ability to assess the breach issue or to correct any potential improprieties. *See, e.g.*, *Bostic*, 371 F.3d at 871 ("A specific objection provides the district court with an opportunity to address the error in the first instance and allows this court to engage in more meaningful review."). This latter point is particularly acute here: in the context of a brief exchange in which Kelsey's counsel never stated that the government actually breached the agreement, counsel never requested any relief from the district judge and never raised what he thought should happen in light of the government's purported breach. Counsel's lack of follow-up here—specifically, the total failure to prompt the district court to make necessary findings or to request any relief—suggests that counsel himself did not believe that he was lodging an objection.

It is true that counsel did not need to raise the objection in any particular way or use any specific words. Appellant Reply at 19. But with statements as vague and noncommittal as the ones counsel made, the onus falls on Kelsey to show that the district court nonetheless recognized an objection. The district court responded to counsel's initial remark by explaining that it solicited the government's opinion. R. 157 (Sent'g Tr. at 13:9) (Page ID #1145). To the extent that the government's briefing in part mirrors that response—that the government was allowed to give its views at the request of the court—perhaps the district court could be seen as overruling the notion that the government had breached on the basis that the government could respond. Appellant Reply at 21–22. Still, the district court's statement appears nothing more than an offhand reaction to counsel remarking on the government's conduct before the district court moved on to

other issues. Both counsel's and the district court's terse treatment of the issue—one brief exchange during an otherwise lengthy sentencing hearing—further corroborates that both counsel and the district court did not appear to treat counsel's remarks as an objection. Because Kelsey failed to object and the district court did not treat any remarks as an objection, plain-error review applies.

C. Kelsey Cannot Show Plain Error

Kelsey never argued in his briefing that he could satisfy plain-error review, but instead contended that plain-error review simply does not apply. At oral argument, counsel conceded that Kelsey would be unable to show plain error should that standard of review apply. Because Kelsey cannot show prejudice and has failed to show a clear or obvious error, we agree that Kelsey fails at multiple steps of the plain-error analysis.

Even if the government breached, Kelsey cannot show prejudice to his substantial rights. At a minimum, Kelsey has not explained to us how he was prejudiced, even if the government failed to perform to his liking. Despite the government's statements at the sentencing hearing, Kelsey received a below-guidelines sentence of 21 months' imprisonment even factoring in the obstruction-of-justice enhancement. Importantly, Kelsey's sentence also falls below the guidelines contemplated by his plea agreement. With a total-offense level of 18 in the absence of the obstruction-of-justice enhancement, Kelsey's guidelines range was 27 to 33 months' imprisonment. Notwithstanding the government's conduct, then, Kelsey received the key benefit of the plea agreement—a sentence not only

within the range contemplated by the parties, but *below* it—so it is unclear how any breach prejudiced Kelsey. *See United States v. Keller*, 665 F.3d 711, 715 (6th Cir. 2011) (defendant failed to show prejudice under plain-error review because defendant could not show that "he did not receive the benefits contemplated by the deal, even though he did not receive them via the performance he expected of the Government" (internal quotation marks omitted)); *see also Puckett*, 556 U.S. at 141–42 ("The defendant whose plea agreement has been broken by the Government will not always be able to show prejudice, either because he obtained the benefits contemplated by the deal anyway (*e.g.*, the sentence that the prosecutor promised to request) or because he likely would not have obtained those benefits in any event.").

Of course, there may be circumstances when a defendant could show prejudice notwithstanding a sentence below an agreement's contemplated guidelines, if, for example, they could show that they would have nonetheless received an even lower sentence. But under plain-error review, making that showing falls to Kelsey. *See Keller*, 665 F.3d at 715 ("[I]t is [the defendant's] burden to show that the court *was swayed* by the breach."). By the same token, under *Puckett* Kelsey needed to show that the district court would not have imposed the obstruction-of-justice enhancement regardless of the government's breach. Yet the district court was clearly interested in applying the enhancement in light of Kelsey's perjury. In this sense, Kelsey faces a doubly difficult circumstance under plain-error review: not only did he receive the benefits of the plea agreement, but also he cannot show—or at a mini-

mum, has not attempted to show—that the government's statements during the sentencing hearing motivated imposing the enhancement.

Finally, regardless of our take on the language of the plea agreement, both parties recognize that certain provisions may not so easily coexist. For example, even if the government's conduct was prohibited by paragraph 9(a) of the agreement, the parties devote significant briefing to the issue of whether paragraph 9(c) allowed the government to answer the district court's question in the manner it did. To reject the government's reliance on paragraph 9(c), Kelsey spends thirteen pages of his opening brief explaining why our precedent concerning the government's duty of candor does not excuse its purported breach; that the government's response was not an "appropriate argument[]"; that the government's interpretation does not accord with Rule 11(c)(1)(B); that the government's interpretation renders key parts of the agreement illusory and creates unnecessary conflicts; and that the government's position is at odds with its prior interpretations of the same language. Appellant Br. at 23–36. To be clear, ordinarily any potential ambiguity in the plea agreement would be in Kelsey's favor, whether introduced by the agreement's language or by conflict among provisions. *See, e.g.*, *United States v. Fitch*, 282 F.3d 364, 367 (6th Cir. 2002) ("Ambiguities in a plea agreement must be construed against the government."). Under plain-error review, however, Kelsey must prove that the breach was "clear or obvious." *Puckett*, 556 U.S. at 143. As the Court explained, this inquiry "will often have some 'bite' in plea-agreement cases" because "[p]lea agreements are not always models of draftsmanship, so the scope of the Government's commitments will on occasion be open to doubt." *Id.*

Both parties appear to recognize that there is at least some uncertainty about the government's obligations under Kelsey's agreement, even if Kelsey has the better reading of the agreement. Under plain-error review, that uncertainty means that any possible breach was not so clear or obvious that the district court should have taken action in the absence of an objection.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

KETHLEDGE, Circuit Judge, concurring in the judgment. I agree with the panel that we should affirm the district court's judgment. I write separately to explain why Kelsey preserved his objection and why the government did not breach its obligations under the plea agreement.

A criminal defendant preserves a claimed error by "informing the court" of either the action he "wishes the court to take" or his "objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). An objecting party need not make a "formal 'exception[]'" or use any "particular language." *Holguin-Hernandez v. United States*, 589 U.S. 169, 174 (2020). To preserve an objection, rather, the defendant need only bring it "to the court's attention." *Id.* Here, Kelsey brought to the court's attention both his objection—that the government "violated the plea agreement"—and the grounds for that objection—that "it sure sounds like they're advocating for those two points, and they can't do that." And here the district court

"clearly understood the basis for this objection and addressed it." *United States v. Prater*, 766 F.3d 501, 507 (6th Cir. 2014) (quotation marks omitted). Once Kelsey objected, the district court replied: "Well, I asked [the government] what he thought." Kelsey thus preserved his claimed error, so we should review the supposed breach de novo.

We interpret plea agreements using "traditional principles of contract law" and construe ambiguities against the government. *United States v. Warren*, 8 F.4th 444, 448 (6th Cir. 2021). The Agreement's relevant provision stated as follows:

> Defendant is aware that any estimate of the offense level or guidelines range that defendant may have received from defendant's counsel, the United States, or the Probation Office is a prediction, not a promise, and is not binding on the Probation Office or the Court. Defendant understands that the Probation Office will conduct its own investigation and make its own recommendations, that the Court ultimately determines the facts and law relevant to sentencing, that the Court's determinations govern the final guidelines calculations, and that the Court determines both the final offense level and the final guidelines range. Accordingly, the validity of this agreement is not contingent upon the Probation Officer's or the Court's concurrence with the above calculations. In the event that the Probation Office or the Court contemplates any U.S.S.G. adjustments, departures, or calculations different from those recommended above, the parties reserve the right

> to answer any inquiries and to make all appropriate arguments concerning the same. Defendant further acknowledges that if the Court does not accept the guidelines calculations of the parties, defendant will have no right to withdraw his guilty plea.

Here, the probation office recommended an enhancement under § 3C1.1 for obstruction of justice. Thus, under this provision, the next question is whether the district court "inquir[ed]" about that enhancement. The court did that when—after hearing argument from Kelsey regarding the enhancement—the court asked the government whether it had "anything" it "want[ed] to say on the objection to . . . the obstruction of justice" enhancement. And later in the hearing—after Kelsey complained about the government's response regarding that enhancement—the district court said that "well, I asked him what he thought."

That leaves the question whether the government's response to the court's inquiry was an "appropriate argument[] concerning the same." Kelsey says it was not because the government crossed the line into "advocacy" in favor of the enhancement. But "arguments" are by their nature advocative. *See, e.g.*, *Argue*, The American Heritage Dictionary 98 (3d ed. 1992) (defining "argue" as "1. To put forth reasons for or against; debate" and "2. To attempt to prove by reason; maintain or contend").

The government's response was "appropriate" as well. For one thing, the government's response was truthful and accurate: in this appeal, Kelsey disputes neither that he committed perjury at his plea-withdrawal hearing nor that the obstruction enhancement

was applicable. Finally, the government did not even request (expressly at least) that the district court apply the enhancement.

The government's response was an appropriate argument regarding an enhancement as to which the court had specifically inquired. Indeed, the government could hardly have responded otherwise to the court's inquiry. The argument about which Kelsey now complains was therefore permissible under the plea agreement's plain terms. I would affirm the district court's judgment on that ground.

APPENDIX B

[Filed Aug. 16, 2023]

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1

United States District Court
Middle District of Tennessee

UNITED STATES OF AMERICA

v.

Brian Kelsey

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:21CR00264-01
USM Number: 72146-509

J. Alex Little and Zachary C. Lawson
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) One and Five of the Indictment

☐ pleaded nolo contendere to count(s) ____________ which was accepted by the court.

☐ was found guilty on count(s) ______________________ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section
18 U.S.C. § 371

Nature of Offense
Conspiracy to Defraud the United States

Offense Ended	**Count**
10/13/2016	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ______________

☑ Count(s) 2, 3, 4 ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

8/11/2023
Date of Imposition of Judgment

s/ Waverly D. Crenshaw, Jr.
Signature of Judge

Waverly D. Crenshaw, Jr., Chief U.S. Chief District Judge
Name and Title of Judge

8/16/2023
Date

AO 245B (Rev. 09/19) Judgment in Criminal Case
Sheet 2 — Imprisonment

Judgment — Page 2 of 8

DEFENDANT: Brian Kelsey
CASE NUMBER: 3:21CR00264-01

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Cts. 1 and 5: 21 months, per count, concurrent

☑ The court makes the following recommendations to the Bureau of Prisons:
Placement near Morgantown, West Virginia

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:
☐ at _________ ☐ a.m. ☐ p.m. on _______________.
☐ as notified by the United States Marshal.

☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☑ before 2 p.m. on 10/20/2023.
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on ___________ to ___________ at ___________, with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By ___________________________
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 09/19) Judgment in a Criminal Case Sheet 3 — Supervised Release

Judgment — Page 3 of 8

DEFENDANT: Brian Kelsey
CASE NUMBER: 3:21CR00264-01

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Cts. 1 and 5: 3 years, per count, concurrent

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 3A — Supervised Release

Judgment — Page 4 of 8

DEFENDANT: Brian Kelsey
CASE NUMBER: 3:21CR00264-01

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with

that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see Overview of Probation and Supervised Release Conditions, available at: www.uscourts.gov.

Defendant's Signature _______________ Date ________

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 3D — Supervised Release

Judgment — Page 5 of 8

DEFENDANT: Brian Kelsey
CASE NUMBER: 3:21CR00264-01

SPECIAL CONDITIONS OF SUPERVISION

1. You shall furnish all financial records, including, without limitation, earnings records and tax returns, to the United States Probation Office upon request.
2. You shall not incur new debt or open additional lines of credit without prior approval of the United States Probation Office until all monetary sanctions are paid.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 4D — Probation

Judgment — Page 6 of 8

DEFENDANT: Brian Kelsey
CASE NUMBER: 3:21CR00264-01

SPECIAL CONDITIONS OF SUPERVISION

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

Judgment — Page 7 of 8

DEFENDANT: Brian Kelsey
CASE NUMBER: 3:21CR00264-01

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	**Restitution**	**Fine**
TOTALS	$ 200.00	$	$

AVAA Assessment*	**JVTA Assessment****
$	$

☐ The determination of restitution is deferred until __. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee **Total Loss*****

Restitution Ordered **Priority or Percentage**

TOTALS $ 0.00 $ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _________

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
☐ the interest requirement is waived for the
☐ fine ☐ restitution.
☐ the interest requirement for the
☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

Judgment — Page 8 of 8

DEFENDANT: Brian Kelsey
CASE NUMBER: 3:21CR00264-01

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of $ ______ due immediately, balance due

☐ not later than ______________ , or

☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below); or

B ☑ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal ______ (*e.g., weekly, monthly, quarterly*) installments of $ _____ over a period of _____ (*e.g., months or years*), to commence ______ (*e.g., 30 or 60 days*) after the date of this judgment; or

D ☐ Payment in equal ______ (*e.g., weekly, monthly, quarterly*) installments of $ _____ over a period of _____ (*e.g., months or years*), to commence ______ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within ______ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number
Defendant and Co-Defendant Names *(including defendant number)*

Total Amount Joint and Several Amount

Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX C

[Filed Aug. 22, 2023]

United States District Court
Middle District of Tennessee
Nashville Division

UNITED STATES OF AMERICA

v.

BRIAN KELSEY

No: 3:21CR00264-01

ORDER AMENDING JUDGMENT

When entering the Judgment in this case on August 16, 2023, the Court neglected to select for printing page 2 of the Judgment that simply listed Defendant's second count of conviction, specifically his Count Five conviction for Aiding and Abetting the Acceptance of Excessive Contributions. Attached hereto is that omitted page and it is incorporated into the Judgment by reference. In all other respects, the August 16, 2023 Judgment remains in full force and effect.

The Clerk of the Court shall forward a copy of this Order Amending Judgment to the Bureau of Prison for placement in Defendant's file.

IT IS SO ORDERED.

s/ Waverly D. Crenshaw, Jr.
WAVERLY D. CRENSHAW, JR.
CHIEF UNITED STATES DISTRICT JUDGE

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1A

Judgment — Page __ of 8

DEFENDANT: Brian Kelsey
CASE NUMBER: 3:21CR00264-01

ADDITIONAL COUNTS OF CONVICTION

Title & Section
52 U.S.C. §§ 30116(a)(1)(A), 30116(a)(7)(B)(i) 30116(f) 30109(d)(1)(A)(i)

Nature of Offense
Aiding and Abetting the Acceptance of Excessive Contributions

Offense Ended	**Count**
7/31/2016	5

APPENDIX D

[**FILED** Aug 28, 2024 KELLY L. STEPHENS, Clerk]

Nos. 23-5755/5756

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRIAN KELSEY,
Defendant-Appellant.

ORDER

BEFORE: SILER, MOORE, and KETHLEDGE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

APPENDIX E

[Filed Nov. 22, 2022]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA

v.

BRIAN KELSEY

No: 3:21CR00264-01

Chief Judge Crenshaw

PLEA AGREEMENT

The United States of America, through Mark H. Wildasin, United States Attorney for the Middle District of Tennessee, Assistant United States Attorney Amanda J. Klopf, Corey R. Amundson, Chief of the Public Integrity Section of the United States Department of Justice, Trial Attorney John P. Taddei, Reagan Fondren, First Assistant United States Attorney for the Western District of Tennessee, and Assistant United States Attorney David Pritchard (collectively, "United States" or "government"), and defendant, Brian Kelsey, through defendant's counsel, Paul Bruno, David Rivera, and Jerry Martin, pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure, have entered into an agreement, the terms and conditions of which are as follows:

Charges and Penalties in This Case

1. Defendant acknowledges that he has been charged in the Indictment in this case with the following:

a. Count One — Conspiracy to defraud the United States, in violation of Title 18, United States Code, Section 371. The offense carries the following maximum penalties: five years of imprisonment, three years of supervised release, a fine of $250,000, and a special assessment of $100.
b. Count Two — Aiding and abetting the solicitation, receipt, direction, transfer, and spending of $25,000 and more of soft money in connection with a federal election, in violation of Title 52, United States Code, Sections 30125(e)(1)(A) and 30109(d)(1)(A)(i), and Title 18, United States Code, Section 2. The offense carries the following maximum penalties: five years of imprisonment, three years of supervised release, a fine of $250,000, and a special assessment of $100.
c. Count Three —Aiding and abetting the spending of $25,000 and more of soft money from a State officeholder in connection with a federal election, in violation of Title 52, United States Code, Sections 30125(f)(1), 30101(20)(A)(iii), and 30109(d)(1)(A)(i), and Title 18, United States Code, Section 2. The offense carries the following maximum penalties: five years of imprisonment, three years of supervised release, a fine of $250,000, and a special assessment of $100.
d. Count Four — Aiding and abetting the making of excessive contributions, in violation of Title 52, United States Code, Sections 30116(a)(1)(A),

30116(a)(7)(B)(i), and 30109(d)(1)(A)(i), and Title 18, United States Code, Section 2. The offense carries the following maximum penalties: five years of imprisonment, three years of supervised release, a fine of $250,000, and a special assessment of $100.

e. Count Five — Aiding and abetting the acceptance of excessive contributions, in violation of Title 52, United States Code, Sections 30116(a)(1)(A), 30116(a)(7)(B)(i), 30116(f), and 30109(d)(1)(A)(i), and Title 18, United States Code, Section 2. The offense carries the following maximum penalties: five years of imprisonment, three years of supervised release, a fine of $250,000, and a special assessment of $100.

2. Defendant has read the charges against him contained in the Indictment. Those charges have been fully explained to him by his attorney. Defendant fully understands the nature and elements of the crimes with which he has been charged.

Charges to Which Defendant is Pleading Guilty

3. By this Plea Agreement, defendant agrees to enter a voluntary plea of guilty to Counts One and Five of the Indictment. After sentence has been imposed on the counts to which defendant pleads guilty as agreed herein, the government will move to dismiss the remaining counts of the Indictment.

Acknowledgements and Waivers Regarding Plea of Guilty

Nature of Plea Agreement

4. This Plea Agreement is entirely voluntary and represents the entire agreement between the United States Attorney for the Middle District of Tennessee, the Public Integrity Section of the United States Department of Justice, the United States Attorney for the Western District of Tennessee, and defendant regarding defendant's criminal liability in case 3:21-cr-00264.

5. Defendant understands that by pleading guilty he surrenders certain trial rights, including the following:

a. If defendant persisted in a plea of not guilty to the charges against him, he would have the right to a public and speedy trial. Defendant has a right to a jury trial, and the trial would be by a judge rather than a jury only if defendant, the government, and the Court all agreed to have no jury.

b. If the trial were a jury trial, the jury would be composed of twelve laypersons selected at random. Defendant and his attorney would have a say in who the jurors would be by removing prospective jurors for cause, or without cause by exercising so-called peremptory challenges. The jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that defendant is presumed innocent; that the government bears the burden of proving defendant guilty of the charges beyond a reasonable doubt;

and that it must consider each count of the Indictment against defendant separately.

c. If the trial were held by the judge without a jury, the judge would find the facts and determine, after hearing all the evidence, whether or not the judge was persuaded of defendant's guilt beyond a reasonable doubt.

d. At a trial, whether by a jury or a judge, the government would be required to present its witnesses and other evidence against defendant. Defendant would be able to confront those government witnesses and his attorney would be able to cross-examine them. In turn, defendant could present witnesses and other evidence on his own behalf. If the witnesses for defendant would not appear voluntarily, he could require their attendance through the subpoena power of the Court.

e. At a trial, defendant would have a privilege against self-incrimination so that he could testify or decline to testify, and no inference of guilt could be drawn from his refusal to testify.

6. Defendant understands that by pleading guilty he is waiving all of the trial rights set forth in the prior paragraph. Defendant's attorney has explained those rights to him, and the consequences of his waiver of those rights.

Factual Basis

7. Defendant will plead guilty because he is in fact guilty of the charges contained in Counts One and Five of the Indictment. In pleading guilty, defendant admits the following facts and that those facts establish his guilt beyond a reasonable doubt:

a. Defendant BRIAN KELSEY was a practicing attorney and member of the Tennessee Senate, representing District 31, which includes parts of Shelby County, Tennessee. In 2016, KELSEY unsuccessfully ran for an open seat to represent Tennessee's 8th Congressional District in the U.S. House of Representatives.
b. Federal Committee 1 was KELSEY's authorized federal campaign committee.
c. State Committee 1 was KELSEY's Tennessee State Senate campaign committee.
d. JOSHUA SMITH was the owner and operator of Social Club 1, a members-only social club in Nashville, Tennessee. In or around 2016, KELSEY was a member of Social Club 1. SMITH also controlled PAC 1, a Tennessee-registered political action committee.
e. Unindicted Coconspirator 1 ("UCC 1") was a Tennessee businessman and prominent political fundraiser and contributor. UCC 1 controlled PAC 2, a federal independent expenditure-only committee.
f. Unindicted Coconspirator 2 ("UCC 2") was a practicing attorney and member of the Tennessee House of Representatives from in or around January 2013 to in or around September 2016, when he was expelled by a vote of the House.
g. Political Organization 1 was a nonprofit corporation that hosted an annual political conference, published ratings on Members of Congress and State politicians, and issued political endorsements.
h. Individual 1 was the Director of Government Affairs for Political Organization 1 and a member of Political Organization 1's senior management

team from in or around late 2015 until in or around March 2017. In that role, Individual 1 managed Political Organization 1's political expenditures during the 2015-16 federal election cycle. Individual 1 and KELSEY became engaged in or around July 2017 and married in or around January 2018.

i. Individual 2 was a member of Political Organization 1's senior management team. He worked with Individual 1 on aspects of Political Organization 1's political activities, including political expenditures.

j. Individual 3 was a practicing attorney with ties to Political Organization 2, a nonprofit corporation that publicly advocated on legal and judicial issues.

k. Individual 4 was a longtime financial supporter of KELSEY's political career.

l. On or about February 1, 2016, KELSEY announced his candidacy to represent Tennessee's 8th Congressional District in the U.S. House of Representatives.

m. On or about July 11, 2016, KELSEY, SMITH, UCC 2, and UCC 2's spouse attended a private dinner at Social Club 1. During the dinner, KELSEY gave SMITH a check transferring $106,341.66 from State Committee 1 to PAC 1. When KELSEY gave SMITH the check, KELSEY recited a rehearsed statement about SMITH using the money from KELSEY's State Campaign account however he wanted. SMITH caused that check to be deposited into a bank account associated with PAC 1.

n. On or about July 13, 2016, SMITH wrote a $56,000 check from PAC 1 to PAC 2.

o. On or about July 13, 2016, SMITH voided the $56,000 check and replaced it with a $60,000 check from PAC 1 to PAC 2, which SMITH gave to UCC 1.
p. On or about July 15, 2016, UCC 1 returned the $60,000 check, and SMITH, at KELSEY's implicit and UCC 2's explicit direction, replaced it with a different check transferring $30,000 from PAC 1 to PAC 2. The purpose of this transfer was to provide funds for federal election activity to benefit KELSEY's federal political campaign to represent Tennessee's 8th Congressional District in the U.S. House of Representatives.
q. On or about July 13, 2016, Individual 1 emailed SMITH, and copied Individual 2, thanking SMITH for speaking with them and attaching a Political Organization 1 contribution form.
r. On or about July 14, 2016, Individual 1 again emailed SMITH about contributing to Political Organization 1.
s. On or about July 15, 2016, UCC 2 met SMITH to finalize the contribution to Political Organization 1.
t. On or about July 15, 2016, SMITH, at KELSEY's implicit and UCC 2's explicit direction, transferred $30,000 from PAC 1 to Political Organization 1. The purpose of this transfer was to provide funds for federal election activity to benefit KELSEY's federal political campaign to represent Tennessee's 8th Congressional District in the U.S. House of Representatives.
u. On or about July 15, 2016, KELSEY emailed Individual 1 with the subject line "TN Major Votes for 2016 — Scoring." The email contained a list

of important legislative votes in the State Senate that year, and links to a website that reflected how State Senators voted.

v. On or about July 20, 2016, SMITH, at KELSEY's implicit and UCC 2's explicit direction, wrote a check transferring $7,000 from PAC 1 to PAC 2. The purpose of this transfer was to provide funds for federal election activity to benefit KELSEY's federal political campaign to represent Tennessee's 8th Congressional District in the U.S. House of Representatives.

w. On or about July 20, 2016, Political Organization 2 transferred $25,000 to Political Organization 1 via wire.

x. On or about July 20, 2016, UCC 2 communicated with KELSEY, Individual 2, and UCC 1 multiple times via phone.

y. On or about July 20, 2016, UCC 2 emailed UCC 1 suggesting that PAC 2 could contribute $29,800 to Political Organization 1 to support KELSEY's campaign.

z. On or about July 21, 2016, UCC 2 and UCC 1 exchanged emails about what to do with additional funds that SMITH would be contributing to PAC 2.

aa. On or about July 21, 2016, UCC 1, at KELSEY's implicit and UCC 2's explicit direction, caused PAC 2 to transfer $36,000 to Political Organization 1.

bb. On or about July 21, 2016, UCC 2 and Individual 2 communicated multiple times via phone.

cc. In total, KELSEY caused approximately $91,000 to be transferred to Political Committee 1. The purpose of these transfers was to provide funds for federal election activity to benefit

KELSEY's federal political campaign to represent Tennessee's 8th Congressional District in the U.S. House of Representatives.

dd. Political Organization 1 reported to the Federal Election Commission ("FEC") that, on or about July 20, 2016, it made a $30,000 independent expenditure for the purpose of a "radio media buy" to support KELSEY in the 2016 primary election when, in truth and in fact, the expenditure was coordinated by KELSEY's agents and was not independent.

ee. Political Organization 1 reported to the FEC that, on or about July 22, 2016, it made a $19,480 independent expenditure for the purpose of "radio media buy" to support KELSEY in the 2016 primary election when, in truth and in fact, the expenditure was coordinated by KELSEY's agents and was not independent.

ff. Political Organization 1 reported to the FEC that, on or about July 26, 2016, it made a $30,520 independent expenditure for the purpose of "radio/digital media" to support KELSEY in the 2016 primary election when, in truth and in fact, the expenditure was coordinated by KELSEY's agents and was not independent.

gg. At all times, KELSEY acted willfully, with knowledge that some part of his course of conduct was unlawful and with the intent to do something the law forbids, and not by mistake or accident.

This statement of facts is provided to assist the Court in determining whether a factual basis exists for defendant's plea of guilty. The statement of facts does not contain each and every fact known to defendant and to the United States concerning defendant's

and/or others' involvement in the offense conduct and other matters.

Sentencing Guidelines Calculations

8. The parties understand that the Court will take account of the United States Sentencing Guidelines (hereinafter "U.S.S.G."), together with the other sentencing factors set forth at 18 U.S.C. § 3553(a), and will consider the U.S.S.G. advisory sentencing range in imposing defendant's sentence. The parties agree that the U.S.S.G. to be considered in this case are those effective November 1, 2021.

9. For purposes of determining the U.S.S.G. advisory sentencing range, the United States and defendant agree to recommend to the Court, pursuant to Rule 11(c)(1)(B), the following:

a. Offense Level Calculations.

i. The base offense level for the count of conviction is 8, pursuant to U.S.S.G. § 2C1.8(a).

ii. The offense level is increased by 6 levels for illegal transactions with a value more than $40,000, but less than $95,001, pursuant to U.S.S.G. §§ 2C1.8(b)(1) and 2B1.1(b)(1)(D).

iii. The offense level is increased by 2 levels because the defendant was an organizer, leader, manager, or supervisor of a criminal activity other than described in § 3B1.1(a) or (b), pursuant to U.S.S.G. § 3B1.1(c).

iv. The offense level is increased by 2 levels because the defendant abused a position of public or private trust in a manner that significantly facilitated the commission or concealment of the offense, pursuant to U.S.S.G. § 3B1.3.

v. Assuming defendant clearly demonstrates acceptance of responsibility, to the satisfaction of the government, through his allocution and subsequent conduct prior to the imposition of sentence, a 2-level reduction will be warranted, pursuant to U.S.S.G. § 3E1.1(a). If the offense level of 16 or greater, assuming defendant accepts responsibility as described in the previous sentence, the United States will move for an additional one-level reduction pursuant to U.S.S.G § 3E1.1(b), because defendant will have given timely notice of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the Court to allocate their resources efficiently.

vi. The parties agree that no additional upward or downward adjustments are appropriate.

b. Criminal History Category.

i. The parties have no agreement as to defendant's criminal history.

c. Defendant is aware that any estimate of the offense level or guidelines range that defendant may have received from defendant's counsel, the United States, or the Probation Office is a prediction, not a promise, and is not binding on the Probation Office or the Court. Defendant understands that the Probation Office will conduct its own investigation and make its own recommendations, that the Court ultimately determines the facts and law relevant to sentencing, that the Court's determinations govern the final guidelines calculations, and that the Court determines both the final offense level and the final guidelines range. Accordingly, the validity of this agreement is not contingent upon the Probation Officer's or the Court's concurrence with the above calculations. In the event that

the Probation Office or the Court contemplates any U.S.S.G. adjustments, departures, or calculations different from those recommended above, the parties reserve the right to answer any inquiries and to make all appropriate arguments concerning the same. Defendant further acknowledges that if the Court does not accept the guidelines calculations of the parties, defendant will have no right to withdraw his guilty plea.

Agreements Relating to Sentencing

10. Each party is free to recommend whatever sentence it feels appropriate.

11. It is understood by the parties that the Court is neither a parry to nor bound by this Plea Agreement and, after consideration of the U.S.S.G., may impose the maximum penalties as set forth above. Defendant further acknowledges that if the Court does not accept the sentencing recommendation of the parties, defendant will have no right to withdraw his guilty plea. Similarly, defendant understands that any recommendation by the Court related to location of imprisonment is not binding on the Bureau of Prisons.

12. Defendant agrees to pay the special assessment of $200 at the time of sentencing to the Clerk of the U.S. District Court.

Presentence Investigation Report/
Post-Sentence Supervision

13. Defendant understands that the government, in its submission to the Probation Office as part of the Pre-Sentence Report and at sentencing, shall fully apprise the District Court and the United States Proba-

tion Office of the nature, scope, and extent of defendant's conduct regarding the charges against him, as well as any related matters. The government will make known all matters in aggravation and mitigation relevant to the issue of sentencing.

14. Defendant agrees to execute truthfully and completely a Financial Statement (with supporting documentation) prior to sentencing, to be provided to and shared among the Court, the United States Probation Office, and the government regarding all details of his financial circumstances, including his recent income tax returns as specified by the Probation Officer. Defendant understands that providing false or incomplete information, or refusing to provide this information, may be used as a basis for denial of a reduction for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1 and enhancement of his sentence for obstruction of justice under U.S.S.G. § 3C1.1, and may be prosecuted as a violation of Title 18, United States Code, Section 1001, or as a contempt of the Court.

15. This Plea Agreement concerns criminal liability only. Except as expressly set forth in this Plea Agreement, nothing herein shall constitute a limitation, waiver, or release by the United States or any of its agencies of any administrative or judicial civil claim, demand, or cause of action it may have against defendant or any other person or entity. The obligations of this Plea Agreement are limited to the United States Attorney's Offices for the Middle and Western Districts of Tennessee and the Public Integrity Section of the United States Department of Justice and cannot bind any other federal, state, or local prosecuting, administrative, or regulatory authorities, except as expressly set forth in this Plea Agreement.

16. Defendant understands that nothing in this Plea Agreement shall limit the Internal Revenue Service (IRS) in its collection of any taxes, interest, or penalties from defendant and his spouse or defendant's partnership or corporations.

Entry of Guilty Plea

17. The parties jointly request that the Court accept the defendant's pleas of guilty as set forth in this agreement and enter an order reflecting the acceptance of the plea while reserving acceptance of this plea agreement until receipt of the pre-sentence report and sentencing.

Waiver of Appellate Rights

18. Regarding the issue of guilt, defendant hereby waives all (i) rights to appeal any issue bearing on the determination of whether he is guilty of the crime(s) to which he is agreeing to plead guilty; and (ii) trial rights that might have been available if he exercised his right to go to trial. Regarding sentencing, defendant is aware that 18 U.S.C. § 3742 generally affords a defendant the right to appeal the sentence imposed. Acknowledging this, defendant knowingly waives the right to appeal any sentence within or below the court-determined guidelines range. Defendant also knowingly waives the right to challenge the sentence imposed in any motion pursuant to 18 U.S.C. § 3582(c)(2) and in any collateral attack, including, but not limited to, a motion brought pursuant to 28 U.S.C. § 2255 and/or § 2241. However, no waiver of the right to appeal, or to challenge the adjudication of guilt or the sentence imposed in any collateral attack, shall apply

to a claim of involuntariness, prosecutorial misconduct, or ineffective assistance of counsel. Likewise, the government waives the right to appeal any sentence within or above the court-determined guidelines range.

Other Terms

19. Defendant agrees to cooperate with the United States in collecting any unpaid fine for which defendant is liable, including providing financial statements and supporting records as requested by the United States. Defendant further agrees that any monetary penalties imposed by the Court will be subject to immediate enforcement as provided for in 18 U.S.C. § 3613, and submitted to the Treasury Offset Programs so that any federal payment or transfer of returned property the defendant receives may be offset and applied to federal debts but will not affect the periodic payment schedule.

20. Defendant agrees to cooperate with the IRS in any tax examination or audit of defendant and his spouse and defendant's partnerships or corporations that directly or indirectly relates to or arises out of the course of conduct defendant has acknowledged in this Plea Agreement, by transmitting to the IRS original records or copies thereof, and any additional books and records that the IRS may request. Nothing in this paragraph precludes defendant from asserting any legal or factual defense to taxes, interest, and penalties that may be assessed by the IRS.

21. Should defendant engage in additional criminal activity after he has pled guilty but prior to sentencing, defendant shall be considered to have breached

this Plea Agreement, and the government at its option may void this Plea Agreement.

Conclusion

22. Defendant understands that the Indictment and this Plea Agreement have been or will be filed with the Court, will become matters of public record, and may be disclosed to any person.

23. Defendant understands that his compliance with each part of this Plea Agreement extends until such time as he is sentenced, and failure to abide by any term of the Plea Agreement is a violation of the Plea Agreement. Defendant further understands that in the event he violates this Plea Agreement, the government, at its option, may move to vacate the Plea Agreement, rendering it null and void, and thereafter prosecute defendant not subject to any of the limits set forth in this Plea Agreement, or may require defendant's specific performance of this Plea Agreement. Defendant understands and agrees that in the event that the Court permits defendant to withdraw from this Plea Agreement, or defendant breaches any of its terms and the government elects to void the Plea Agreement and prosecute defendant, any prosecutions that are not time-barred by the applicable statute of limitations on the date of the signing of this Plea Agreement may be commenced against defendant in accordance with this paragraph, notwithstanding the expiration of the statute of limitations between the signing of this Plea Agreement and the commencement of such prosecutions.

24. Defendant and his attorney acknowledge that no threats have been made to cause defendant to plead guilty.

25. No promises, agreements, or conditions have been entered into other than those set forth in this Plea Agreement, and none will be entered into unless memorialized in writing and signed by all of the parties listed below.

26. Defendant's Signature: I hereby agree that I have consulted with my attorney and fully understand all rights with respect to the pending Indictment. Further, I fully understand all rights with respect to the provisions of the Sentencing Guidelines that may apply in my case. I have read this Plea Agreement and carefully reviewed every part of it with my attorney. I understand this Plea Agreement, and I voluntarily agree to it.

Date: 11/22/22 s/ Brian Kelsey
BRIAN KELSEY
Defendant

27. Defense Counsel Signature: I am counsel for defendant in this case. I have fully explained to defendant his rights with respect to the pending Indictment. Further, I have reviewed the provisions of the Sentencing Guidelines and Policy Statements, and I have fully explained to defendant the provisions of those guidelines that may apply in this case. I have reviewed carefully every part of this Plea Agreement with defendant. To my knowledge, defendant's decision to enter into this Plea Agreement is an informed and voluntary one.

Date: 11/22/22 s/ Paul Bruno
PAUL BRUNO

s/ David Rivera
DAVID RIVERA

s/ Jerry Martin
JERRY MARTIN

Respectfully submitted,

MARK H. WILDASIN United States Attorney Middle District of Tennessee	COREY R. AMUNDSON Chief Public Integrity Section
By: s/ Amanda J. Klopf AMANDA J. KLOPF Assistant U.S. Attorney	By: s/ John P. Taddei JOHN P. TADDEI Trial Attorney
/s/ Brent Hannafan BRENT HANNAFAN Criminal Chief	

REAGAN FONDREN
Attorney for the United States, Acting under Authority Conferred by 28 U.S.C. § 515
Western District of Tennessee

By: s/ David Pritchard
DAVID PRITCHARD
Assistant U.S. Attorney
Western District of Tennessee

APPENDIX F

[Filed Aug. 21, 2023]

1

1 IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
2 NASHVILLE DIVISION

3 UNITED STATES OF AMERICA,

4 Plaintiff,

Case No.
5 v. 3:21-cr-00264-1

6 BRIAN KELSEY, Chief Judge Crenshaw

7 Defendant.

8

- -

9 BEFORE THE HONORABLE

10 CHIEF DISTRICT JUDGE
WAVERLY D. CRENSHAW, JR.

11

TRANSCRIPT OF PROCEEDINGS

12

August 11, 2023

13 -

14

15

16

17

18 APPEARANCES ON THE FOLLOWING PAGE

19

20

21

22
PREPARED BY:
23 LISE S. MATTHEWS, RMR, CRR, CRC
Official Court Reporter
24 719 Church Street, Suite 2300
Nashville, TN 37203
25 lise_matthews@tnmd.uscourts.gov

2

1 For the Plaintiff: Amanda J. Klopf
U. S. Attorney's Office (Nashville)
2 Middle District of Tennessee
719 Church Street
3 Suite 3300
Nashville, Tennessee 37203
4
David Pritchard
5 Assistant United States Attorney
167 North Main Street
6 Suite 800
Memphis, Tennessee 38103
7
John P. Taddei
8 U.S. Department of Justice

Public Integrity Section
9 1301 New York Ave. NW
10th Floor
10 Washington, D.C. 20530
11
For the Defendant: J. Alex Little
12 Zachary C. Lawson
Burr & Forman, LLP (Nashville Office)
13 222 Second Avenue South
Suite 2000
14 Nashville, Tennessee 37201

15

16

17

18

19

20

21

22

23

24

25

***

11

19 THE COURT: All right. Anything you want to say

20 on the objection to the--to the obstruction of justice?

21 MR. TADDEI: Yes, Your Honor.

22 As the Court is, of course, aware, that

23 enhancement was not contemplated in the plea agreement

24 between the parties, which, of course, was entered into

25 before Mr. Kelsey moved to withdraw his plea. Therefore, the

12

1 government defers to the Court on its application.

2 However, consistent with the terms of the plea

3 agreement, it appears the Probation Office and the Court is

4 inquiring with respect to the propriety of that two-level

5 enhancement.

6 We would note that in Application Note 4B of

7 Sentencing Guidelines Section 3C1.1, committing, suborning,

8 or attempting to suborn perjury, including during the course

9 of a proceeding, if it's conducted in front of the Court on

10 matters related to the conviction, that that two-level
11 enhancement can apply.

12 As, of course, this Court is aware, when

13 Mr. Kelsey testified before this Court at the hearing to
14 withdraw his plea, he repeatedly admitted that he lied at his
15 change of plea hearing when he said he was guilty.

16 Subsequent to that, while on the stand he also emphatically
17 and repeatedly stated that he did not commit the acts set
18 forth in the factual basis supporting his pleas, despite his
19 earlier sworn statement that he had.

20 As the Court ruled at the plea withdrawal hearing,

21 the Court can rely on the statement of facts that was entered
22 as true, and, therefore, the defendant's statements,

23 including, but not limited to, "I 100 percent did not commit
24 these things that I'm accused of," on page 119 of the

25 withdrawal transcript, were perjurious and support

13

1 application of the two-level enhancement.

2 THE COURT: All right.

3 So, Mr. Little, I'm going to give you the last

4 word on your objection.

5 MR. LITTLE: Your Honor, I think the government's
6 come pretty close to violating the plea agreement. It sure
7 sounds like they're advocating for those two points, and they
8 can't do that.

9 THE COURT: Well, I asked him what he thought.

10 MR. LITTLE: I understand, Your Honor. But if you

11 ask him to violate the plea agreement, it doesn't mean he
12 doesn't violate the plea agreement.

***