APPENDIX A

In the

United States Court of Appeals

For the Eleventh Circuit

No. 21-11365

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID SHANE PAQUETTE,
a.k.a. David Shane Watson,
a.k.a. Phillip Connell,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

D.C. Docket No. 8:19-cr-00264-WFJ-TGW-1

Before: WILSON, BRANCH, and BRASHER, Circuit Judges.

BY THE COURT:

David Shane Paquette appeals the five-year term of supervised release and the condition restricting his contact with minors imposed as part of his sentence for his conviction for failing to register as a sex offender in violation of 18 U.S.C. § 2250(a). On appeal, Paquette argues that the district court erroneously concluded it lacked the discretion not to impose supervised release and challenged the associated restriction on his contact with minors, namely his three-and-a-half year-old daughter, as more restrictive than necessary. Paquette also contends that the district court unconstitutionally delegated its judicial responsibility by giving the probation office the discretion to decide whether, and to what extent, to enforce the restriction on his contact with minors.

But Paquette originally pleaded guilty pursuant to an appeal waiver, in which he expressly waived his right to challenge his sentence. Accordingly, the government subsequently moved to partially dismiss the appeal based on the sentence-appeal waiver in Paquette's plea agreement and now seeks to stay briefing on the delegation issue pending the resolution of its motion to dismiss.[1]

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[1] The government notes that it is not moving to dismiss Paquette's challenge on appeal to the district court's delegation of its judicial responsibility to the probation office.

Paquette asks us to construe narrowly the plea agreement's use of the term "sentence," applying it only to the term of imprisonment, thereby placing his challenges to the term and a condition of his supervised release beyond the reach of his appeal waiver. Alternatively, Paquette contends that applying the appeal waiver to his challenges would result in a "miscarriage of justice." Finally, Paquette argues that the appeal waiver lacks valid consideration. After review, we conclude that the appeal waiver is enforceable and applicable here; that, under our precedent, the plea agreement's use of the term "sentence" encompasses the entire judgment imposed by the district court; and that Paquette's first two challenges on appeal do not fit within any of the bargained for exceptions to the appeal waiver or implicate any due process concerns. Therefore, we grant the government's motion to dismiss those portions of his appeal.

I. BACKGROUND

In late 2017, after previously pleading guilty to a Michigan sexual misconduct misdemeanor in 2005, which required him to register as a sex offender for the next 25 years, David Shane Paquette cut off his ankle monitor and absconded to Florida. He also failed to update his sex offender registration to reflect his new residence. In January 2019, Paquette, at that time a passenger in a vehicle stopped by the Hillsborough County Sheriff's Office, gave police officers a false identity before fleeing and leading them on a dangerous foot chase across I-75, culminating in his arrest. That June, a grand jury indicted Paquette for traveling in interstate

commerce and knowingly failing to update his registration as a sex offender, in violation of 18 U.S.C. § 2250(a).

Pursuant to a written plea agreement, the United States agreed not to press further charges and, with limited caveats, to recommend either a two- or three-level downward adjustment for acceptance of responsibility. In exchange, Paquette pleaded guilty, agreed to comply with the terms of the Sex Offender Registration and Notification Act, and waived his right to appeal his sentence

> on any ground, including the ground that the Court erred in determining the applicable guidelines range . . . except (a) the ground that the sentence exceeds the defendant's applicable guidelines range as determined by the Court pursuant to the United States Sentencing Guidelines; (b) the ground that the sentence exceeds the statutory maximum penalty; or (c) the ground that the sentence violates the Eighth Amendment to the Constitution . . . .

The district court subsequently sentenced Paquette to 33 months in prison to be followed by five years of supervised release and imposed various conditions of supervised release, including a special condition providing that "[a]t the reasonable discretion of the probation office, [Paquette] may be required to have no direct contact with minors . . . without the written approval of the probation officer." Notwithstanding his appeal waiver, Paquette appealed, challenging

his five-year term of supervised release, and the government filed the instant motion to dismiss shortly thereafter.

II. ANALYSIS

A. Standard of Review

We consider the validity of a sentence appeal waiver *de novo*. *United States v. Johnson*, 541 F.3d 1064, 1066 (11th Cir. 2008).

B. Paquette's appeal waiver was knowing and voluntary

We will enforce a valid appeal waiver if it is made knowingly and voluntarily. *United States v. Bushert*, 997 F.2d 1343, 1351 (11th Cir. 1993). Paquette does not dispute that he entered the plea knowingly or voluntarily, and the record reflects that he understood the significance of his appeal waiver.

C. Paquette's plea agreement is supported by valid consideration, and is therefore valid

We now turn to Paquette's consideration challenge, which, if successful, would obviate the need to reach the government's remaining arguments in favor of its motion to dismiss. To that end, this Court interprets plea agreements according to traditional contractual principles. *United States v. Rubbo*, 396 F.3d 1330, 1334 (11th Cir. 2005). As a result, a plea agreement lacking consideration fails like any other contract. *See Pier 1 Cruise Exports v. Revelex Corp.*, 929 F.3d 1334, 1347 (11th Cir. 2019). Consideration generally exists where a promisee performs, or refrains from performing,

any lawful action he is not otherwise legally obliged to do, without regard to the benefit conferred, or not conferred, unto the promisor. *See e.g., Dorman v. Publix-Saenger Sparks Theatres*, 184 So. 886, 889 (Fla. 1938).

Here, the government's promise to recommend a two- or three-level reduction for acceptance of responsibility qualifies as consideration under Florida law. Paquette argues that the government's promise was valueless and illusory because he was likely entitled to the reduction, either way. But contract law forecloses that argument. Unlike an illusory promise, *i.e.*, a pledge to do something that a party cannot do, in this case the United States agreed to bind itself to a course of action within its capacity: it agreed to recommend a reduction for acceptance of responsibility, subject to inapplicable exceptions. *Cf. Briseño v. Henderson*, 998 F.3d 1014, 1028 (9th Cir. 2021) (describing an illusory promise as "essentially agree[ing] to do something . . . [the promisor] lacks the power to do."). The government's agreement to recommend a downward reduction constitutes consideration, even if it provided only marginal benefits to Paquette.

D. Paquette's sentence appeal waiver encompasses his term of supervised release and associated conditions in addition to his term of imprisonment.

We now turn to, and reject, his argument about the plea agreement's use of the term "sentence." We interpret the language of a plea agreement according to its plain and ordinary meaning. *United States v. Boyd*, 975 F.3d 1185, 1190 (11th Cir. 2020). When

the parties dispute the ordinary meaning of a term, we apply "an objective standard and eschew[] both a hyper-technical reading of the written agreement and a rigidly literal approach in the construction of the language." *Id.* (quotation omitted). And, in general, lenity and contractual principles obligate us to construe ambiguities in plea agreements against the government. *Id.* But in the plea agreement context, we have held that "sentence" ordinarily means "[t]he judgment that a court formally pronounces after finding a criminal defendant guilty." *United States v. Hardman*, 778 F.3d 896, 901 (11th Cir. 2014) (quoting Black's Law Dictionary 1569 (10th ed. 2014)). We have also recently held that an appeal waiver with exceptions identical to those at stake here barred an appeal from the imposition of a condition of supervised release. *See United States v. Cordero*, 7 F.4th 1058, 1067 & n.10 (11th Cir. 2021). Thus, our precedent requires us to construe the plea agreement's use of the term "sentence" to refer to the entire judgment, including the terms of Paquette's supervised release. *Hardman*, 778 F.3d at 901; *Cordero*, 7 F. 4th at 1067 & n.10. Paquette's claim that this interpretation creates surplusage in the agreement cannot introduce ambiguity where we have held that none exists.

With that in mind, we must determine whether Paquette's sentence-appeal waiver forecloses the relevant issues on appeal. Paquette waived his right to challenge his sentence on all grounds

> except (a) the ground that the sentence exceeds the defendant's applicable guidelines range as determined by the Court pursuant to the United States

> Sentencing Guidelines; (b) the ground that the sentence exceeds the statutory maximum penalty; or (c) the ground that the sentence violates the Eighth Amendment to the Constitution.

Paquette's challenges—that the district court imposed supervised release because it erroneously concluded that it had no choice in the matter and that the no contact with minors condition was disproportionately harsh—fall outside of these carve-outs, and, therefore, are covered by the appellate waiver.

E. Paquette's appeal waiver does not violate the Due Process Clause

We now turn to his argument that enforcing the appeal waiver would result in a miscarriage of justice. Of course, although an appeal waiver may bar a challenge to "even blatant error[,]" *United States v. Grinard-Henry*, 399 F.3d 1294, 1296–98 (11th Cir. 2005), "an effective waiver is not an absolute bar to appellate review" in each case, *United States v. Johnson*, 541 F.3d 1064, 1068 (11th Cir. 2008). For instance, a race-based sentence or one requiring "public flogging" may constitute "extreme circumstances" violating the Fifth Amendment's Due Process Clause, thereby justifying appellate review despite the applicability of an enforceable sentence-appeal waiver. *Id.* But Paquette has not shown that

enforcing his waiver would result in a "miscarriage of justice,"[2] or that it would otherwise constitute an extraordinary circumstance contravening the Due Process Clause. Although he insists that a district court's "mistaken" belief that it needed to impose a particular sentence fits the bill, if the district court committed such an error, it would be a "blatant error" which is nonetheless waivable. *Grinard-Henry*, 339 F.3d at 1298.

Finally, we disagree with Paquette that the imposition of a restriction on his contact with minors constitutes an "extreme circumstance" violating the Fifth Amendment simply because it interferes with a "constitutional liberty interest," *i.e.*, the relationship between parent and child. Had the district court sentenced Paquette to jail for the maximum term authorized by statute, it would have interfered with his relationship between him and his daughter, all the same. The Due Process Clause does not guarantee that a person will not "be deprived of life, liberty, or property[,]" but that he shall not "be deprived of life, liberty, or property without due process of law . . . ." U.S. Const., amend. V. The Due Process Clause does not act as a blanket prohibition on *all* punishment.

Because Paquette's claims concerning the district court's imposition of a term of supervised release and a restriction on contact

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[2] We note that we have never embraced the miscarriage of justice exception to sentence appeal waivers, unlike the Third Circuit. *See, e.g., United States v. Khattak*, 273 F.3d 557, 563 (3rd Cir. 2001). We decline to start here.

with minors do not fall within any of the agreed-upon exceptions to the valid sentence-appeal waiver, we hold that the waiver forecloses that portion of his appeal.

III. CONCLUSION

We GRANT the government's partial motion to dismiss this appeal, and dismiss the portion of Paquette's appeal challenging the imposition of those terms.

We also GRANT the Government's motion to stay briefing on Paquette's non-delegation challenge. The government shall have thirty (30) days from the date of this order to file its response brief on that issue.

APPENDIX B

2022 WL 3453115
Only the Westlaw citation is currently available.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
David Shane PAQUETTE, a.k.a. David Shane Watson, a.k.a. Phillip Connell, Defendant-Appellant.

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Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 8:19-cr-00264-WFJ-TGW-1

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Before WILLIAM PRYOR, Chief Judge, JORDAN and NEWSOM, Circuit Judges.

Opinion

PER CURIAM:

***1** David Paquette appeals the judgment in his criminal case that imposed a special condition limiting contact with minors as a term of his sentence for failing to register as a sex offender. 18 U.S.C. § 2250(a). Paquette challenged his sentence to supervised release on three grounds, two of which we previously concluded are barred by the appeal waiver in his written plea agreement. In his remaining ground for relief, Paquette argues, for the first time, that a special condition of his supervised release that leaves to "the discretion of the probation office ... [whether he] may be required to have no direct contact with minors (under the age of 18) without the written approval of the probation officer" constituted an improper delegation of judicial authority. As the government concedes, the district court plainly erred in delegating the implementation of a condition of supervised release to a probation officer. *See* *United States v. Nash*, 438 F.3d 1302, 1306 (11th Cir. 2006). We vacate the special condition and remand for further proceedings.

Because Paquette challenges the condition of his supervised release for the first time on appeal, our review is for plain error. *See* *id.* at 1304. To constitute plain error, the district court must have made an error that was plain and that affects Paquette's substantial rights. *Id.* When plain error occurs, we may reverse if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

To determine whether the district court improperly delegated its sentencing authority, we draw a distinction between the delegation "of a ministerial act or support service" and "the ultimate responsibility" of imposing the sentence. *Id.* at 1304–05. The district court may not delegate the ultimate responsibility of deciding whether to impose a condition of supervised release. *Id.* at 1305. But the district court may delegate the ministerial function of how, when, and where the defendant must comply with the condition. *Id.*

In *Nash*, we concluded that the district court plainly erred by delegating a judicial function to a probation officer. The district court imposed as a condition of supervised release that, "[a]s deemed necessary by the Probation Officer, the defendant shall participate in mental health counseling, which may include inpatient treatment." *Id.* at 1304. We concluded that condition was an improper delegation of authority because the probation officer instead of the district court decided whether Nash was required to participate in mental health counseling. *Id.* at 1306.

As in *Nash*, the district court plainly erred in Paquette's case. The district court erred by delegating to Paquette's probation officer ultimate authority to determine whether Paquette could have direct contact with minors. *See id.* Because the decision whether to impose a special condition of supervised release is a judicial function, the error was plain. *See id.* The error affected Paquette's substantial rights because, without the error, the district court, rather than the probation officer, would have decided the extent of Paquette's interaction with minors. *See* *United States v. Heath*, 419 F.3d 1312, 1314–16 (11th Cir. 2005). And the improper delegation of a judicial function is an error that seriously affects the fairness, integrity,

or public reputation of judicial proceedings. *Id.* at 1316. We vacate the special condition of supervised release and remand for the district court to decide whether to impose the special condition.

***2 VACATED** and **REMANDED.**

All Citations

Not Reported in Fed. Rptr., 2022 WL 3453115