

APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE KNOXVILLE DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

Case Number: **3:21-CR-00125-TAV-JEM(1)**

DAVID EUGENE RUSH, JR

USM#92952-509

Nakeisha C Jackson
Defendant's Attorney

THE DEFENDANT:

- ☒ pleaded guilty to count(s): 1 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.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section and Nature of Offense	Date Violation Concluded	Count
18 U.S.C. §§ 922(g)(1)- Felon In Possession Of Firearms	01/21/2021	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and 18 U.S.C. § 3553.

- ☐ The defendant has been found not guilty on count(s).
- ☐ All remaining count(s) as to this defendant are dismissed upon motion of the United States.

IT IS ORDERED that the defendant shall 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 shall notify the court and the United States attorney of any material change in the defendant's economic circumstances.

May 24, 2023

Date of Imposition of Judgment

s/ Thomas A. Varlan

Signature of Judicial Officer

Thomas A Varlan, United States District Judge

Name & Title of Judicial Officer

May 25, 2023

Date

1a

DEFENDANT: DAVID EUGENE RUSH, JR
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IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **70 months**.

☒ The court makes the following recommendations to the Bureau of Prisons: that the defendant receive 500 hours of substance abuse treatment from the Bureau of Prisons' Institution Residential Drug Abuse Treatment Program and a mental health evaluation and any treatment deemed appropriate. It is further recommended that the defendant be designated to Manchester.

☒ 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 .

☐ 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

DEFENDANT: DAVID EUGENE RUSH, JR
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SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **three (3) years**.

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 sentencing 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 which 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.

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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 mandatory, standard, and any special 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 _____

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SPECIAL CONDITIONS OF SUPERVISION

1. You must participate in a program of testing and treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as you are released from the program by the probation officer.
2. You must participate in a program of mental health treatment, as directed by the probation officer, until such time as you are released from the program by the probation officer. You must waive all rights to confidentiality regarding mental health treatment in order to allow release of information to the supervising United States Probation Officer and to authorize open communication between the probation officer and the mental health treatment provider.
3. You must take all medication prescribed by the treatment program as directed. If deemed appropriate by the treatment provider or the probation officer, you must submit to quarterly blood tests to determine whether you are taking the medication as prescribed.
4. You must submit your person, property, house, residence, vehicle, papers, [computers (as defined in Title 18 U.S.C. § 1030(e)(1), other electronic communications or data storage devices or media,] or office, to a search conducted by a United States probation officer or designee. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.
5. You must participate in a program that addresses domestic violence, anger management, or general violence as directed by the probation officer.

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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments sheet of this judgment.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment **</u>
TOTALS	\$100.00	\$.00	\$.00	\$.00	\$.00

- ☐ The determination of restitution is deferred until *An Amended Judgment in a Criminal Case (AO245C)* 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.

- ☐ 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 under the Schedule of Payments sheet of this judgment 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:
- | | | |
|---|-------------------------------|--|
| <input type="checkbox"/> the interest requirement is waived for the | <input type="checkbox"/> fine | <input type="checkbox"/> restitution |
| <input type="checkbox"/> the interest requirement for the | <input type="checkbox"/> fine | <input type="checkbox"/> 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.

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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 \$ 100.00 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 imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to **U.S. District Court, 800 Market Street, Suite 130, Howard H. Baker, Jr. United States Courthouse, Knoxville, TN, 37902**. Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

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

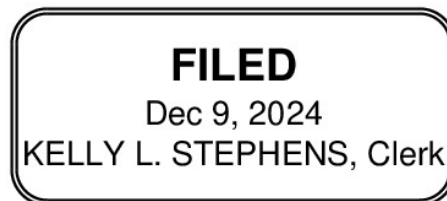
- ☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
- ☐ 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: as set forth in the Agreed Preliminary Order of Forfeiture, (doc. 28) entered on October 6, 2022.

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) JVT Assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX B

No. 23-5533

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



UNITED STATES OF AMERICA,)	
)	
Plaintiff-Appellee,)	
)	
v.)	<u>O R D E R</u>
)	
DAVID EUGENE RUSH, JR.,)	
)	
Defendant-Appellant.)	

Before: CLAY, STRANCH, and MURPHY, Circuit Judges.

David Eugene Rush Jr. appeals the district court’s judgment of conviction and sentence. The government moves to dismiss his appeal based on an appeal-waiver provision in his plea agreement. For the following reasons, we grant the government’s motion and dismiss Rush’s appeal.

Rush pleaded guilty to being a felon in possession of firearms. The district court determined that, based on his total offense level of 21 and criminal history category of V, Rush’s guidelines range of imprisonment was 70 to 87 months. The court sentenced him to 70 months in prison and three years of supervised release. A special condition of Rush’s supervised release requires him to take all medication prescribed by his mental health treatment program and, if deemed appropriate by his treatment provider or probation officer, submit to quarterly blood tests to determine whether he is taking the medication as prescribed.

On appeal, Rush argues that the district court erred by not adjusting his sentence under USSG § 5G1.3(b)(1) to account for his related state-court sentence for being a felon in possession of a firearm. Rush also argues that the district court plainly erred by imposing the special condition concerning his medication and blood testing. He specifically contends that the condition is not supported by sufficient factual findings and that the district court improperly delegated its authority to decide whether he must take blood tests.

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The government moves to dismiss Rush's appeal. In response, Rush argues that the appeal waiver is unenforceable because his plea agreement was not supported by adequate consideration. He also argues that the appeal waiver does not preclude his challenges, he did not knowingly and voluntarily agree to waive his right to raise these challenges, and enforcing the waiver would result in a miscarriage of justice.

A defendant may waive any right, including the right to appeal, in a plea agreement. *United States v. Milliron*, 984 F.3d 1188, 1192 (6th Cir. 2021); *United States v. Toth*, 668 F.3d 374, 377 (6th Cir. 2012). An appeal-waiver provision is binding and forecloses review if the defendant's claim falls within the scope of the waiver provision and the defendant knowingly and voluntarily agreed to the plea agreement and waiver. *Milliron*, 984 F.3d at 1193. We review de novo whether a defendant validly waived his appeal rights. *United States v. Detloff*, 794 F.3d 588, 592 (6th Cir. 2015).

Rush first argues that his appeal waiver is unenforceable because the plea agreement was not supported by adequate consideration. He received adequate consideration, however, given that the government agreed not to oppose a two-level reduction for acceptance of responsibility under USSG § 3E1.1(a) and to move for an additional one-level reduction under § 3E1.1(b). *See United States v. Schuhe*, 688 F. App'x 337, 339 (6th Cir. 2017) (per curiam) (concluding that a plea agreement in which the government recommended the one-level reduction under § 3E1.1(b) was supported by adequate consideration); *United States v. Winnick*, 490 F. App'x 718, 721 (6th Cir. 2012) (concluding that the government's agreement to recommend the full three-level reduction for acceptance of responsibility was sufficient consideration).

Rush next argues that the appeal waiver does not preclude his appellate challenges given the language and structure of his plea agreement. Because plea agreements are contractual in nature, we use traditional contract law principles to interpret and enforce them, construing ambiguities against the government. *United States v. Bowman*, 634 F.3d 357, 360 (6th Cir. 2011). Rush's plea agreement provides that he "will not file . . . a direct appeal of [his] conviction(s) or sentence" except he "retains the right to appeal a sentence imposed above the sentencing guideline range determined by the Court or above any mandatory minimum sentence deemed applicable by the Court, whichever is greater." The agreement further provides that Rush "waives the right to

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appeal the Court's determination as to whether [his] sentence will be consecutive or partially concurrent to any other sentence."

Rush's waiver of his right to appeal his sentence precludes his challenge to the special supervised release condition relating to his medication and blood testing. *See United States v. Ferguson*, 669 F.3d 756, 766-67 (6th Cir. 2012) (concluding that the defendant's waiver of his right to appeal his sentence precluded him from challenging his special supervised release conditions). Likewise, Rush's waiver of his right to appeal his sentence, which includes the district court's determination of whether his sentence is consecutive or partially concurrent to any other sentence, precludes his challenge under § 5G1.3(b). *See United States v. Hollins-Johnson*, 6 F.4th 682, 684 (6th Cir. 2021) (order); *United States v. Watkins*, 603 F. App'x 387, 391-92 (6th Cir. 2015). And the sole exception to the appeal-waiver provision is inapplicable because Rush's sentence did not exceed the guidelines range.

Rush next argues that he did not knowingly and voluntarily agree to waive his current challenges. A defendant's plea agreement and appeal waiver are valid if made "voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences." *Milliron*, 984 F.3d at 1193 (internal quotation marks and citations omitted). Rush signed the plea agreement, which states that he would not appeal unless his sentence exceeded the greater of the guidelines range and any mandatory minimum sentence. At the change of plea hearing, the district court did not accurately convey to Rush the precise terms of the appeal-waiver provision, as it advised him that he was waiving the right to appeal his sentence "except that [he retained] the right to appeal a sentence imposed above a sentencing guideline range or above any mandatory minimum sentence." The court then advised Rush that, by pleading guilty, he was giving up the right to appeal his sentence, and Rush affirmed that he understood.

The record shows that Rush was sufficiently aware of the appeal waiver's terms. Although the district court slightly misstated the precise terms of the waiver, it effectively advised Rush, and determined that he understood, that he was waiving the right to appeal his sentence unless it exceeded the guidelines range, as there was no applicable mandatory minimum sentence. Thus, Rush knowingly and voluntarily agreed to the appeal waiver. *See id.* at 1195.

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Finally, Rush argues that enforcing the appeal waiver would result in a miscarriage of justice. We have left open the possibility that, under limited circumstances, “such as where the sentence imposed is based on racial discrimination or is in excess of the statutory maximum,” we will review a sentence despite an otherwise valid appeal waiver. *Ferguson*, 669 F.3d at 764; *see United States v. Mathews*, 534 F. App’x 418, 425 (6th Cir. 2013) (per curiam) (noting that we have never expressly recognized such a miscarriage-of-justice exception in a published decision but have implicitly done so in several unpublished decisions). Enforcing Rush’s appeal waiver would not result in a miscarriage of justice because his argument that the district court misapplied § 5G1.3 is the sort of error envisioned by appeal waivers, *see United States v. Riggins*, 677 F. App’x 268, 271 (6th Cir. 2017); *United States v. Allen*, 635 F. App’x 311, 315-16 (6th Cir. 2016), and the special condition aimed at ensuring he complies with his mental health treatment program does not involve the same fundamental unfairness as a sentence that is based on racial discrimination or exceeds the statutory maximum.

Accordingly, we **GRANT** the government’s motion and **DISMISS** Rush’s appeal.

ENTERED BY ORDER OF THE COURT


Kelly L. Stephens, Clerk