App. No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID EUGENE RUSH, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR A WRIT OF CERTIORARI

To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Petitioner, David Eugene Rush, Jr., through counsel, respectfully requests a 60-day extension of time to file a petition for a writ of certiorari, up to and including May 8, 2025, pursuant to Supreme Court Rule 13.5 and Rule 22. On December 9, 2024, the United States Court of Appeals for the Sixth Circuit entered both an order and judgment dismissing Mr. Rush's appeal. *See* Appendix A. Absent an extension, Mr. Rush's petition for writ of certiorari would be due March 9, 2025. This application is timely filed at least ten days before that deadline, and Mr. Rush submits the following in support of his request:

1. Mr. Rush pled guilty to possessing a firearm as a felon in violation of 18 U.S.C. § 922(g)(1). The district court sentenced him to 70 months in prison and three years of supervised release. It also imposed a special condition requiring him to participate in a mental health treatment program, take all prescribed medications, and submit to quarterly blood tests if deemed necessary by his probation officer or treatment provider.

2. On appeal, Mr. Rush argued the district court erred by (1) failing to credit his sentence for time served on a related undischarged state sentence under U.S.S.G. § 5G1.3(b), and (2) imposing an unjustified special condition of supervision that improperly left the decision about mandatory blood tests to his probation officer or treatment provider.

3. The government moved to dismiss, citing the appeal waiver in his plea agreement. Mr. Rush countered that the waiver was unenforceable because it lacked adequate consideration, did not preclude his challenges, was not knowingly and voluntarily agreed to, and would result in a miscarriage of justice if enforced. The Sixth Circuit rejected his arguments and granted the government's motion to dismiss. The question presented will concern whether the appeal waiver is enforceable.

4. Good cause supports a 60-day extension. Since the lower court's judgment, undersigned counsel has handled an unusually heavy caseload, leaving insufficient time to properly prepare the petition. Accordingly, petitioner respectfully requests an order extending the deadline to file the petition for a writ

of certiorari.

Mr. Rush therefore asks this Court to extend the time to file a petition for a writ of certiorari in this appeal 60 days to and including May 8, 2025.

Respectfully submitted,

FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC.

s/ Conrad Benjamin Kahn

February 21, 2025.

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APPENDIX A

Order of the Sixth Circuit Court of Appeals Dismissing Mr. Rush's Appeal, *United States v. Rush*, No. 23-5533, (6th Cir. Dec. 9, 2024)

No. 23-5533

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	O R D E R
	)	
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.

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

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.

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