

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ANDREW FLESHMAN,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

This appeal is from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court sentenced defendant-appellant Andrew Fleshman on July 14, 2025, and issued its written judgment on July 16, 2025. JA7, JA80-86. Fleshman filed a notice of appeal through counsel on July 24, 2025 (JA87-88), and a pro se notice of appeal on July 28, 2025 (JA89). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether the district court erred by failing to pronounce the conditions of supervised release at sentencing when, after defense counsel indicated that he and his client would be "satisfied with incorporating them by reference," the court incorporated the conditions by reference.

STATEMENT OF THE CASE

In November 2023, Fleshman pleaded guilty to a one-count Information charging him with Conspiracy Against Rights, in violation of 18 U.S.C. 241. JA52-65. In his plea agreement, Fleshman admitted that in March 2022, while he was working as a correctional officer at the Southern Regional Jail in West Virginia, he conspired with other

correctional officers to physically assault a detainee at the Jail. JA60, JA63.

Specifically, Fleshman responded to another officer's call for assistance after the detainee tried to leave his assigned pod. JA63. When Fleshman arrived at the pod, officers were using force against the detainee, who was on the floor. JA63. Fleshman and his fellow officers restrained and handcuffed the detainee. JA63. Then, they escorted the detainee to other parts of the Jail—including to a room commonly used to punish inmates due to its lack of cameras—where they assaulted him, even though he was restrained, handcuffed, and posed no threat. JA63-64, JA184-185. The assault resulted in the detainee's death. JA127, JA182-183. Fleshman admitted that he and the other members of the conspiracy assaulted and injured the detainee to punish him for attempting to leave his assigned pod. JA64.

Prior to sentencing, a probation officer prepared a presentence investigation report (PSR). JA178-201. At the scheduled sentencing hearing, held on May 8, 2025, Fleshman's counsel stated that he had not reviewed the entire PSR with his client and requested "a minute" to do so. JA75. Noting that Fleshman "needs to see every point and period of

that Presentence Report,” which was not something counsel could “go through in a few minutes,” the court determined that sentencing should occur at a later date, after Fleshman had “adequate time to go through” the PSR. JA76-77. The court continued sentencing until July 14, 2025. JA6, JA77.

At the beginning of the July 14, 2025, sentencing hearing, the court asked Fleshman’s counsel whether he had read the PSR and its addendum, and counsel confirmed that “on different occasions,” he had gone through those documents with Fleshman “to make sure he understands what is going on in this case.” JA103. Fleshman confirmed the same. JA103. Then, the court inquired specifically about whether counsel had “gone over also the proposed conditions of supervised release with” Fleshman. JA103. After counsel could not confirm with certainty whether he had reviewed the proposed conditions with his client, the court took a recess to allow counsel to review the “proposed conditions of supervised release in the Presentence Report” with Fleshman. JA104.

When the hearing resumed, the district court ensured that Fleshman had reviewed the proposed conditions with his counsel and

asked whether there was any objection to the court incorporating the conditions by reference:

The court: “[Counsel], have you now had the opportunity to go over the proposed conditions of supervised release with your client?”

Counsel: “We have, Your Honor. I appreciate that. Thank you.”

The court: “The Court intends, unless the defendant wishes otherwise, to incorporate by reference all of those conditions that you went over with him into the judgment in a criminal case. I am happy to recite those one-by-one in detail in open court unless your client is satisfied with simply incorporating them by reference.”

Counsel: “We’d be satisfied with incorporating them by reference, Your Honor.”

JA105. The court then addressed the parties’ objections to the PSR. JA105-116. Fleshman’s sole objection was to application of the vulnerable victim sentencing enhancement under Section 3A1.1 of the Sentencing Guidelines; he did not object to any of the proposed conditions of supervised release. JA105-109; *see also* JA198-201 (PSR addendum noting parties’ objections).

After addressing the parties’ objections, the court “adopt[ed] the Presentence Investigation Report and the addendum.” JA116. The court

then calculated the Guidelines range (JA118-120), granted the Government's motion for a downward departure (JA120-129), and denied Fleshman's request for a downward variance (JA136-138, JA141-145). After hearing from counsel, the victim's family, and Fleshman (JA130-168), the court sentenced Fleshman to 100 months' imprisonment and three years of supervised release (JA170-171). Regarding supervised release, the court stated: "I give you three years of supervised release. And I impose all of those conditions recommended by the United States Probation Officer. And those conditions will be incorporated by reference into the judgment in a criminal case." JA170-171.

The court issued its written judgment two days later. JA80-86. Consistent with the court's oral pronouncement, the written judgment ordered Fleshman to serve three years of supervised release and delineated the conditions of supervised release, all of which were included in the PSR. *Compare* JA82-84, *with* JA192-194.

SUMMARY OF ARGUMENT

The district court fulfilled its obligation under *United States v. Rogers*, 961 F.3d 291 (4th Cir. 2020), to announce the non-mandatory conditions of supervised release at Fleshman's sentencing hearing. A

district court satisfies *Rogers* when it adopts a defendant's presentence report or incorporates the conditions of supervised release by reference. The district court did both. Accordingly, Fleshman's sentence should be affirmed.

ARGUMENT

The district court did not commit *Rogers* error, both because it incorporated the conditions of supervised release by reference and because it adopted the PSR.

A. Standard of review

The Government agrees that the appeal waiver in Fleshman's plea agreement does not bar review of his *Rogers* claim. Br. 5; *see United States v. Singletary*, 984 F.3d 341, 345 (4th Cir. 2021).

Ordinarily, this Court reviews de novo a *Rogers* claim that a district court's written judgment differs from the oral sentence. *United States v. Smith*, 117 F.4th 584, 604-605 (4th Cir. 2024), *cert. denied*, 145 S. Ct. 1340, and 146 S. Ct. 92 (2025). De novo review applies, this Court has explained, "because the defendant being sentenced lacks any notice of the *Rogers* error until the court has entered its written criminal judgment." *Id.* at 604; *see also United States v. Cisson*, 33 F.4th 185, 192 (4th Cir. 2022) (explaining that de novo review applies because "a defendant would

have *no way to know* that the court's oral pronouncement of his sentence might differ from the written judgment the court will later enter").

But Fleshman does not contend that the court's oral pronouncement of his sentence differs from the written judgment. Instead, he argues that the court failed to incorporate the presentence report's conditions of supervised release because the court's incorporation at the sentencing hearing was too vague. Br. 5. Not only did Fleshman fail to object or clarify when the court orally incorporated the conditions (JA170-171), but he expressly consented to incorporating the conditions by reference (JA105). Because Fleshman invited the purported error of which he now complains, this Court should affirm his sentence without addressing the merits of his argument. *See United States v. Mathis*, 932 F.3d 242, 257-258 (4th Cir. 2019).

At minimum, because Fleshman does not contend that the court's written judgment differs from the oral sentence and because he had notice that the court intended to incorporate the conditions by reference but did not object, plain error review should apply. *See United States v. Ramirez-Castillo*, 748 F.3d 205, 212 (4th Cir. 2014) (requiring under plain error review that "(1) an error was made; (2) the error is plain;

(3) the error affects substantial rights; and (4) the error seriously affects the fairness integrity, or public reputation of judicial proceedings”). But under any standard of review, Fleshman’s claim fails.

B. The district court expressly adopted the PSR and incorporated the conditions of supervised release by reference.

In *United States v. Rogers*, this Court held that “all non-mandatory conditions of supervised release must be announced at a defendant’s sentencing hearing.” 961 F.3d 291, 296 (4th Cir. 2020). However, rather than reciting each condition one-by-one, a “district court may incorporate by reference a condition or set of conditions [of supervised release] during a hearing.” *Singletary*, 984 F.3d at 346; *see also Rogers*, 961 F.3d at 299.

This Court has expressly approved of the incorporation or adoption of “recommendations of such conditions set forth in the defendant’s PSR.” *Smith*, 117 F.4th at 606; *cf. United States v. Bullis*, 122 F.4th 107, 118 (4th Cir. 2024) (concluding that district court committed *Rogers* error where it “neither adopted nor incorporated the recommendations in [the defendant’s] presentence report” at the sentencing hearing). A district court can therefore satisfy *Rogers* either by expressly incorporating the conditions set forth in a PSR or by adopting the PSR in full. Because the

district court did both in this case, Fleshman's sentence should be affirmed.

With regard to an express incorporation of the conditions of supervised release, *United States v. Turner* is instructive. 122 F.4th 511 (4th Cir. 2024), *cert. denied*, 145 S. Ct. 1894 (2025). In *Turner*, the district court "imposed four special conditions of supervised release, each of which was included in the sentencing recommendation provided in the [PSR] compiled by the United States Probation Office." *Id.* at 519. "At [the defendant's] sentencing hearing, the district court incorporated the conditions as set forth in the PSR, after confirming that defense counsel had reviewed them with [the defendant] and had no objection." *Ibid.* The conditions "laid out in the PSR and incorporated at" the sentencing hearing were a "match with those in [the defendant's] written judgment." *Ibid.* Accordingly, the district court "satisf[ied] the dictates of [this Court's] *Rogers* decision." *Ibid.*

The same is true here. The district court in this case "imposed [19 non-mandatory] conditions of supervised release," and it is undisputed that each condition "was included in the sentencing recommendation provided in the [PSR] compiled by the United States Probation Office."

Turner, 122 F.4th at 519; JA82-84, JA192-194. “At [Fleshman’s] sentencing hearing, the district court incorporated the conditions as set forth in the PSR,” *Turner*, 122 F.4th at 519, by expressly “impos[ing] all of those conditions [of supervised release] recommended by the United States Probation Officer” and “incorporat[ing]” those conditions “by reference into the judgment” (JA170-171). And, as in *Turner*, the court incorporated the PSR’s conditions after ensuring—and even taking a recess to further ensure—“that defense counsel had reviewed [the conditions] with [Fleshman] and had no objection.” 122 F.4th at 519; *see* JA104-109 (confirming that Fleshman and his counsel “had the opportunity to go over the proposed conditions of supervised release” in the PSR and had no objection to them). Because “the conditions laid out in the PSR and incorporated at [Fleshman’s] sentencing hearing” are a “match with those in [Fleshman’s] written judgment,” the district court “satisf[ied] the dictates of [this Court’s] *Rogers* decision.” *Turner*, 122 F.4th at 519; *compare* JA82-84, *with* JA192-194.¹

¹ Fleshman does not dispute that the conditions in the PSR match those in the judgment. The 13 “Standard Conditions” from the PSR (JA192-194 (¶¶ 64-76))—which are recommended by the Sentencing Commission at Section 5D1.3—are included in the written judgment under the “Standard Conditions of Supervision” header (JA83). The six

The district court also satisfied *Rogers* by “adopt[ing] the” PSR. JA116. In *Smith*, this Court noted that “adoption of proposed conditions of supervised release by a sentencing court — such as recommendations of such conditions set forth in the defendant’s PSR — requires those conditions to be expressly incorporated” and concluded that the district court had committed *Rogers* error because it “failed to expressly adopt the PSR’s recommended conditions of supervised release.” 117 F.4th at 606. Although the district court “stated that it had ‘read,’ ‘considered,’ and ‘resolved all objections’ to” the PSR, it “did not *expressly adopt* the PSR before orally pronouncing” the sentence. *Ibid.* (citation omitted).

Here, however, the district court did “*expressly adopt*” the PSR. *Smith*, 117 F.4th at 606. After the court resolved the parties’ objections to the PSR (which are not at issue here), it “adopt[ed] the Presentence Investigation Report and [its] addendum.” JA116; *cf. Smith*, 117 F.4th at 607 (“The problem is that the district court did not expressly incorporate the standard conditions of supervised release *by expressly adopting the*

“Additional Standard Conditions” in the PSR (JA194 (§§ 78-83))—which are outlined in Local Rule of Criminal Procedure 32.3 and apply to all criminal defendants in the Southern District of West Virginia—are included in the written judgment under the “Additional Standard Conditions of Supervision” header (JA84).

PSR or otherwise.” (emphasis added)). Accordingly, the district court’s adoption of the PSR satisfied *Rogers*.

C. The district court’s incorporation was clear.

Despite the court’s express “adopt[ion]” of the PSR (JA116) and “incorporat[ion]” of the PSR’s proposed conditions of supervised release (JA171), Fleshman contends that the court’s “ambiguous” pronouncement “failed to incorporate” any discretionary conditions.² Br. 5. His arguments are meritless.

1. First, Fleshman asserts that the district court’s incorporation of the “conditions recommended by the United States Probation Officer” (JA170-171) was too vague to incorporate the conditions in the PSR because the PSR does not contain an explicit “recommendations” section. Br. 6-8. So, according to Fleshman, “[n]o such recommended conditions exist.” Br. 6.

As an initial matter, this argument overlooks that, before the district court “impose[d] all of those conditions recommended by the

² Consistent with this Court’s recognition that a district court “need not orally pronounce mandatory conditions at sentencing,” *Rogers*, 961 F.3d at 296, Fleshman focuses only on the non-mandatory, or “discretionary” or “standard,” conditions of supervised release (Br. 4-6, 9), so the Government follows suit.

United States Probation Officer” (JA170-171), the court expressly adopted the PSR (JA116), thereby incorporating the proposed conditions of supervised release in the PSR. *See Cisson*, 33 F.4th at 193 (stating that “when a district court adopts the recommendations of a presentence report at a sentencing hearing, the report’s contents have at that point” become “part of the court’s *oral* sentence”); *cf. United States v. Chen*, No. 23-4063, 2025 WL 89071, at *3 (4th Cir. Jan. 14, 2025) (unpublished) (holding that the district court failed to incorporate conditions where it “*never expressly adopted the PSR in its entirety*, nor did it incorporate by reference the standard conditions set forth in the PSR” (emphasis added)).

Additionally, a PSR, by its very nature, contains the probation officer’s “recommendations.” *See, e.g., Cisson*, 33 F.4th at 193 (“[P]resentence reports do not have the force of law. Unless and until a district court adopts a presentence report’s *recommendations*, those *recommendations* remain just that: nonbinding *recommendations*.” (first and second emphasis added)); *Turner*, 122 F.4th at 519 (“[The district court] imposed four special conditions of supervised release, each of which was included *in the sentencing recommendation provided in the*

Presentence Investigation Report (‘PSR’) compiled by the United States Probation Office.” (emphasis added)); *Smith*, 117 F.4th at 604 (“A sentencing court is entitled to incorporate . . . the *recommendations of conditions of release that have been spelled out in the defendant’s PSR.*” (emphasis added)). Indeed, Fleshman understood as much: he objected to the PSR’s inclusion of the vulnerable victim sentencing enhancement precisely because the inclusion thereof was a “recommendation” that the district court apply the enhancement. JA98-99 (Fleshman’s sentencing memorandum, objecting to this enhancement); JA105-107 (discussing the objection at the sentencing hearing); JA187 (PSR’s inclusion of this enhancement). The court also made clear that the PSR’s conditions were the probation officer’s recommendations, as it repeatedly referred to them as the “proposed,” *i.e.*, recommended, conditions. JA103, JA104, JA105. In short, it was clear that the district court’s reference to “those conditions recommended by the United States Probation Officer” referred to the conditions in the PSR.

Further, context matters, and the context here shows that the district court’s incorporation referred to the proposed conditions in the PSR. *See United States v. Elbaz*, 52 F.4th 593, 612 (4th Cir. 2022)

(rejecting defendant’s argument that court’s incorporation of “standard and statutory conditions” was insufficiently clear because the Guidelines conditions “are the most obvious meaning in context”); *United States v. Gomez-Jimenez*, No. 21-4254, 2022 WL 17984480, at *2 (4th Cir. Dec. 29, 2022) (unpublished) (analyzing district court’s statement imposing conditions of supervised release “in context”). From beginning to end, the sentencing hearing centered around the PSR, and the court referred to the PSR throughout the hearing.

The court began the hearing by confirming that Fleshman and his counsel had reviewed the “written Presentence Investigation Report” that “the United States Probation Office has prepared.” JA102-103. The court then noted that “[t]here are proposed conditions of supervised release in the Presentence Report” and recessed court to give Fleshman time to review them with his counsel. JA104-105. When court resumed, the court confirmed that Fleshman and his counsel “had the opportunity to go over the proposed conditions of supervised release.” JA105. The court then indicated its intent “to incorporate by reference all of those conditions” into the judgment, to which Fleshman consented, and the court later did so. JA105, JA170-171.

Accordingly, context makes clear that “those conditions recommended by the United States Probation Officer” (JA170-171) were the same conditions of supervised release within the PSR that Fleshman and his counsel had just reviewed. Indeed, Fleshman’s brief offers no alternate source to which the court could have been referring.

2. Fleshman also complains that because the PSR “contains two sets of standard conditions,” it is “unclear” which set of conditions the court incorporated when referring to the conditions “recommended by the United States Probation Officer.” Br. 8; *see* JA192-194 (subsections titled “Standard Conditions” and “Additional Standard Conditions”). But the district court expressly incorporated “all” of the conditions recommended in the PSR (JA170; *accord* JA105)—meaning both “sets” of standard conditions (or all 19 conditions).

Even accepting Fleshman’s argument that the court was vague in its incorporation, his claim still fails. “[S]o long as the defendant is informed orally that a certain set of conditions will be imposed on his supervised release,” then “a later-issued written judgment that details those conditions may be construed fairly as a ‘clarification’ of an otherwise ‘vague’ oral pronouncement.” *Rogers*, 961 F.3d at 299; *see also*,

e.g., *United States v. Mathis*, 103 F.4th 193, 197 (4th Cir. 2024) (“[W]hen the oral pronouncement is ambiguous, the written judgment’s different language may serve to clarify the sentence.”). Fleshman does not dispute that he was informed orally that a set of conditions would be imposed on his supervised release. *See generally* Br.; *see also* JA103-105 (recessing court to give Fleshman time to review proposed conditions, and Fleshman confirming he did so); JA135 (counsel confirming, “Mr. Fleshman and I went over the conditions of supervised release”); JA171 (advising Fleshman to “carefully” review the conditions of supervised release “in the judgment” because a violation could result in his reincarceration). Therefore, even assuming “some ambiguity as to the contours of the oral sentence” from the district court, the subsequent written judgment detailing the conditions of supervised release (JA82-84) “clarified it because the list of discretionary conditions in the judgment mirrors” the conditions from the PSR. *United States v. Jackson*, No. 21-4037, 2023 WL 20862, at *2 (4th Cir. Jan. 3, 2023) (unpublished) (citing *Rogers*, 961 F.3d at 299).

CONCLUSION

For the foregoing reasons, this Court should affirm Fleshman's sentence.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The Government believes that oral argument is unnecessary in this case.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 3,259 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Century Schoolbook 14-point font using Microsoft Word for Microsoft 365.

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Date: February 23, 2026