

22-6393

No. \_\_\_\_\_

ORIGINAL

\_\_\_\_\_  
IN THE

SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

FILED  
DEC 05 2022

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

Xavier Milton Earquhart — PETITIONER  
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fourth Circuit Court of Appeals

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Xavier Milton Earquhart #33867-057

(Your Name)

FCC Coleman Medium, P.O. Box 1032

(Address)

Coleman, FL 33521-1032

(City, State, Zip Code)

N/A

(Phone Number)

### QUESTION(S) PRESENTED

- If subject matter jurisdiction does not affirmatively appear in the record, is the judgement valid?
- Does the court have an obligation to determine whether subject matter jurisdiction exists as a preliminary matter when a motion to dismiss for lack of jurisdiction is timely filed pursuant to Fed.R.Crim.P. 12(B)(2)?
- Where the lower courts have failed to rule on the merits of a motion to dismiss for lack of jurisdiction pursuant to Federal Rule of Criminal Procedure 12(B)(2) can defendant's conviction be affirmed by the Court of Appeals? And has the defendant been deprived of his due process under the Sixth Amendment of the United States Constitution?
- Are motions filed while the case is still pending to dismiss for lack of subject matter jurisdiction barred by the mandate rule?
- Where a defendant timely files a motion to dismiss for lack of subject matter jurisdiction and the court fails to rule on the merits of said motion and subsequently enters a judgement against the defendant after jury trial has the defendant's right to a fair trial been violated?

## LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## RELATED CASES

Eastern District of North Carolina Case Number 5:17-CR-134-BR(1)

Fourth Circuit Court of Appeals 18-4471

Fourth Circuit Court of Appeals 21-4301

## TABLE OF CONTENTS

OPINIONS BELOW .....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	3
STATEMENT OF THE CASE .....	4
REASONS FOR GRANTING THE WRIT .....	9
CONCLUSION.....	10

## INDEX TO APPENDICES

APPENDIX A Opinion of the U.S. Court of Appeals for the Fourth Circuit

APPENDIX B Docket Sheet of Eastern District of North Carolina,  
Case No. 5:17-cr-134-BR(1)

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

## TABLE OF AUTHORITIES CITED

### CASES

### PAGE NUMBER

Arbaugh v. Y&H Corporation, 546 U.S. 500, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006).....	7
Mansfield C&L M. R. Co. v. Swan, 111 U.S. 379, 382, 4 S. Ct. 510, 28 L. Ed. 462 (1884).....	7
Steel Co. v. Citizens for Better Env, 523 U.S. 83, 140 L. Ed. 2d 210, 118 S. Ct. 1003.....	8
Ex parte <u>McCardle</u> , 7 Wall 506, 19 L. Ed. 264 (1869).....	8

### STATUTES AND RULES

18 U.S.C. § 1344.....	4
18 U.S.C. § 2.....	4
18 U.S.C. § 1028A(A)(1).....	4
18 U.S.C. § 1957.....	4
Federal Rule of Criminal Procedure 12(B)(2).....	4, 7
Federal Rule of Criminal Procedure 12(D).....	4, 6, 7

### OTHER

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix   A   to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 16, 2022.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No.   A  .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No.   A  .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Sixth Amendment of the United States Constitution

Article III of the United States Constitution

18 U.S.C. § 1344

18 U.S.C. § 2

18 U.S.C. § 1028A(A)(1)

18 U.S.C. § 1957



## STATEMENT OF THE CASE

District Court lacked subject matter jurisdiction.

1) Xavier Milton Earquhart (hereinafter "Mr. Earquhart") was arrested on or about May 11, 2017 in connection with the indictment filed in Case Number 5:17-CR-134-BR(1) in the Eastern District of North Carolina (hereinafter "EDNC").

2) Said indictment named Mr. Earquhart as the alleged defendant and charged him with alleged violations of 18 U.S.C. § 1344 bank fraud, 18 U.S.C. § 2 aiding and abetting, 18 U.S.C. § 1028A(A)(1) aggravated identity theft, and 18 U.S.C. § 1957 engaging in monetary transactions involving criminally derived property. Subsequently, Mr. Earquhart was appointed counsel for representation for the alleged violations.

3) Mr. Earquhart repeatedly requested that counsel file a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed.R.Crim.P. 12(B)(2) during the pretrial phase and before arraignment. Counsel failed to file said motions on behalf of Mr. Earquhart and therefore Mr. Earquhart timely filed motions to dismiss for lack of subject matter jurisdiction pursuant to Fed.R.Crim.P. 12(B)(2).

4) In EDNC Case Number 5:17-CR-134-BR(1) at Docket Entry (hereinafter "DE") 54, 70, 104, 138, 144, 147, 173, 176, 236, 237, 238, 239, and 280 [Appendix B], Mr. Earquhart filed written and made oral motions to dismiss for lack of subject matter jurisdiction pursuant to Fed.R.Crim.P. 12(B)(2). The court failed to rule on the merits of said motions.

5) On February 22, 2018 in EDNC Case Number 5:17-CR-134-BR(1) [DE 81] a Superseding Indictment was filed wherein it alleged the same offenses set forth in [DE 1] but reduced the number of formal alleged offenses due to lack of venue to prosecute on several counts within the original indictment.

6) On or about March 26, 2018, Mr. Earquhart's arraignment proceeding was held. The court entered a plea of not guilty on Mr. Earquhart's behalf as Mr. Earquhart informed the court that he has filed motions to dismiss for lack of subject matter jurisdiction and that the court has failed to rule on the merits of said motions and therefore subject matter jurisdiction was not established on the record and he was entering a plea to the jurisdiction of the court.

7) On or about March 26, 2018, Mr. Earquhart's trial commenced for the alleged violations set forth within [DE 81]. On or about March 26, 2018, Mr. Earquhart was found guilty on all counts within the Superseding indictment. Because subject matter was not established before trial, Mr. Earquhart was deprived of his due process in violation of his Sixth Amendment constitutional right and the ability to prepare a defense against the alleged federal jurisdiction of the Eastern District of North Carolina and a fair trial.

8) On or about July 9, 2018, Mr. Earquhart's sentencing proceeding was held. Mr. Earquhart informed the court that subject matter jurisdiction had not been established on the record and that he was unaware of how judgement could be entered against him without subject matter jurisdiction being established on the record. See [DE 176].

9) Mr. Earquhart filed an appeal of the final judgment on or about July 9, 2018 to the United States Circuit Court of Appeals. Said court assigned him a Case Number of 18-4471 and appointed him counsel.

10) Mr. Earquhart requested several times for his appointed appellate counsel to inform the appellate court that the district court failed to address Mr. Earquhart's motions to dismiss for lack of subject matter jurisdiction on the merits before trial and said inaction of the court deprived Mr. Earquhart of due process of law, and if jurisdiction was established prior to trial, Mr. Earquhart may have taken a plea to reduce any term of imprisonment that may have been imposed. Counsel failed to raise said claim in Mr. Earquhart's appellate opening brief and failed to file any supplemental argument to said brief.

11) In Case Number 18-4471 for the Fourth Circuit Court of Appeals, Mr. Earquhart filed a pro se supplemental brief along with a motion for leave to file a pro se supplemental brief which contained a claim that the district court failed to enter a ruling on the merits of Mr. Earquhart's timely filed motions to dismiss for lack of subject matter jurisdiction. The Court denied Mr. Earquhart leave to file a supplemental brief, therefore the appellate court also failed to rule on the merits of Mr. Earquhart's claim that the court lacked subject matter jurisdiction.

12) On or about December 2, 2019, the Fourth Circuit Court of Appeals vacated and remanded Mr. Earquhart's case for resentencing due to an improper application of a sentencing guideline enhancement.

13) On or about June 14, 2021, Mr. Earquhart proceeding pro se was resentenced and timely filed a notice of appeal to the Fourth Circuit Court of Appeals. Said court assigned him a Case Number of 21-4301. Mr. Earquhart then moved said court to proceed pro se. The Court thereafter granted said motion on direct appeal. Mr Earquhart again at [DE ] of Fourth Circuit Case Number 21-4301 informed the court that he timely filed motions to dismiss for lack of subject matter jurisdiction before and after trial and the district court has failed to enter a ruling on the merits.

14) On or about September 16, 2022, Fourth Circuit Court of Appeals Case Number 21-4301, the Court issued an unpublished opinion that stated in part "In his 125-page informal brief, Earquhart asserts numerous challenges to his conviction, sentence, and the final order of forfeiture. We need not consider any of Earquhart's arguments. "The mandate rule governs what issues the lower court is permitted to consider on remand—it is bound to carry out the mandate of the higher court but may not reconsider issues the mandate laid to rest" United States v. Sus, 674 F.3d 278, 283 (4th Cir. 2012). Said opinion failed to rule on the merits of Mr. Earquhart's claim that the district court lacked subject matter jurisdiction, and that the courts in action violated his right to due process of law.

15) Mr. Earquhart has been indicted, superseded indicted, tried, convicted, sentenced, and resentenced under the doctrine of hypothetical jurisdiction as the district court proceeded under the assumption the court had jurisdiction under the federal constitution Article III for the purpose of deciding the merits of the case as it proceeded immediately to the merits of the case despite Mr. Earquhart's various subject matter jurisdictional objections.

16) Due to the district court failing to rule on the merits of Mr. Earquhart's motions to dismiss for lack of jurisdiction, the record is silent as to any facts that establish that the district court has subject matter jurisdiction to hear the merits of the superseding indictment and subsequently enter judgement against Mr. Earquhart.

17) Each time the district court failed to rule on the merits of the motions filed to dismiss for lack of jurisdiction, said court violated Federal Rule of Criminal Procedure 12(D) as the court failed to decide Mr. Earquhart's pretrial motions to dismiss for lack of subject matter jurisdiction before trial, the record is also

silent to any good cause found to defer ruling on said motions, and the court failed to state any essential findings on the record as factual issues were involved as the basis of the motion to dismiss for lack of subject matter jurisdiction. The court's failure to state its essential findings on the record adversely affected Mr. Earquhart's right to appeal any adverse findings made on the record regarding the subject matter of the case and subjected him to be tried, convicted, and imprisoned without subject matter jurisdiction being established on the record.

#### MEMORANDUM OF FEDERAL RULES OF CRIMINAL PROCEDURE

18) Federal Rule of Criminal Procedure 12(B)(2) provides "Motions that may be made at any time. A motion that the court lacks jurisdiction may be made at any time while the case is pending."

19) Federal Rule of Criminal procedure 12(D) provides "Ruling on a motion. The court must decide every pretrial motion before trial unless it finds good cause to deter a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record."

#### MEMORANDUM OF LAW

20) "[S]ubject-matter jurisdiction presents a question of law for resolution by the court and courts have an obligation to determine whether subject-matter jurisdiction exists as a preliminary matter." Arbaugh v. Y&H Corporation, 546 U.S. 500, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006).

21) The requirement that jurisdiction be established as a threshold matter "springs from the nature and limits of the judicial power of the United States" and is "inflexible and without exception" Mansfield, C&L. M. R. Co. v. Swan, 111 U.S. 379, 382, 4 S. Ct. 510, 28 L. Ed. 462 (1884).

22) "An approach denominated as the "doctrine of hypothetical jurisdiction under which a federal court making the assumption that the court has jurisdiction under the federal constitution Article III for the purpose of deciding the merits of a case proceeds immediately to the merits question despite jurisdictional objections"

"carries the court beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers as (1) the proposition that the court can reach a merits question when there is no jurisdiction for purposes of Article III opens the door to all sorts of generalized grievances that the Constitution leaves for resolution through the political process (2) hypothetical Judgement which comes to the same thing as an advisory opinion and (3) The reasons for allowing merits questions to be decided before statutory standing questions do not support allowing merits questions to be decided before Article III questions. Steel Co. v. Citizens for Better Env, 523 U.S. 83, 140 L. Ed. 2d 210, 118 S. Ct. 1003.

23) "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law and when it ceases to exist the only function remaining to the court is that of announcing the fact and dismissing the cause." Ex parte McCardle, 7 Wall 506, 19 L. Ed. 264 (1869).

24) Mr. Earquhart respectfully requests the court reverse all convictions of EDNC 5:17-CR-134-BR(1) case, remand with instructions to dismiss the superseding indictment with prejudice, expunge the conviction and/or dismissed charges, return all property seized, return any and all restitution, destroy his DNA profile, and that the court orders any and all other relief that the court deems just and proper.

### **REASONS FOR GRANTING THE PETITION**

Due to the district court failing to rule on the merits of Mr. Earquhart's pretrial and post trial motions to dismiss for lack of subject matter jurisdiction, the record is silent as to any facts that establish that the district court has subject matter jurisdiction to hear the merits of the superseding indictment and subsequently enter judgement against Mr. Earquhart which subjects him to a 384 month term of imprisonment.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Xavier Earguhart

Date: Dec 5<sup>th</sup> 2022