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21-4301

Xavier Milton Earquhart
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APPENDIX A

FILED: September 16, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4301
(5:17-cr-00134-BR-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

XAVIER MILTON EARQUHART, a/k/a Xavier Smart, a/k/a Xavier Akpan Smart, a/k/a Xzavier Erquhart, a/k/a Xzayvier Ernhart, a/k/a David Imrich, a/k/a Kevin Liols, a/k/a Michael Powell, a/k/a Melvin Hailstones, a/k/a Rety Humos, a/k/a Milton Monn

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 21-4301

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

XAVIER MILTON EARQUHART, a/k/a Xavier Smart, a/k/a Xavier Akpan Smart, a/k/a Xzavier Erquhart, a/k/a Xzayvier Ernhart, a/k/a David Imrich, a/k/a Kevin Liols, a/k/a Michael Powell, a/k/a Melvin Hailstones, a/k/a Rety Humos, a/k/a Milton Monn,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, Senior District Judge. (5:17-cr-00134-BR-1)

Submitted: August 24, 2022

Decided: September 16, 2022

Before MOTZ, DIAZ, and THACKER , Circuit Judges.

Affirmed by unpublished per curiam opinion.

Xavier Milton Earquhart, Appellant Pro Se. David A. Bragdon, Assistant United States Attorney, Kristine L. Fritz, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Xavier Milton Earquhart was convicted by a jury of bank fraud, in violation of 18 U.S.C. § 1344, engaging in monetary transactions involving criminally derived property, in violation of 18 U.S.C. § 1957, and aggravated identity theft, in violation of 18 U.S.C. § 1028A, (a)(1). He was originally sentenced to 384 months' imprisonment. Earquhart appealed, asserting two claims. First, Earquhart argued that his removal from his sentencing hearing violated his rights to due process. Second, he claimed that the two-level enhancement he received for deriving more than \$1 million in gross receipts from one or more financial institutions was improperly applied. *See U.S. Sentencing Guidelines Manual* ("USSG") § 2B1.1(b)(16)(A) (2016).

We agreed with Earquhart's second argument, vacated his sentence, and remanded to the district court for resentencing without the enhancement pursuant to § 2B1.1(b)(16)(A). *See United States v. Earquhart*, 795 F. App'x 885 (4th Cir. 2019) (No. 18-4471) (argued but unpublished). Because Earquhart would be resentenced, we did not address the challenge to his absence from his original sentencing hearing.*

On remand, the revised presentence report removed the two-level enhancement under USSG § 2B1.1(b)(16)(A) as well as a two-level enhancement for holding a leadership role in the offense, USSG § 3B1.1(c). Earquhart's revised total offense level

* In a separate appeal, Earquhart appealed the final order of forfeiture. We affirmed in part and dismissed in part. *See United States v. Earquhart*, 776 F. App'x 802 (4th Cir. 2019) (Nos. 19-4106/4336).

was 38. With a criminal history category of III, his advisory Guidelines range was reduced to 292 to 365 months' imprisonment. On June 14, 2021, the district court resentenced Earquhart to 316 months' imprisonment. Earquhart appeals and is proceeding pro se.

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. Susi*, 674 F.3d 278, 283 (4th Cir. 2012). "[T]o the extent that the mandate of the appellate court instructs or permits reconsideration of sentencing issues on remand, the district court may consider the issue *de novo*, entertaining relevant evidence on that issue that it could have heard at the first hearing." *Id.* (internal quotation marks omitted). "But the mandate rule forecloses litigation of issues foregone on appeal or otherwise waived, for example because they were not raised in the district court." *United States v. Pileggi*, 703 F.3d 675, 679 (4th Cir. 2013) (cleaned up). Earquhart raised no challenges to his conviction or sentence in his first appeal except for the two-level enhancement under USSG § 2B1.1(b)(16)(A) and his absence from the original sentencing hearing. And, with respect to forfeiture issues, we noted, in *United States v. Earquhart*, 834 F. App'x 21 (4th Cir. 2021) (No. 20-4347), "Earquhart already litigated these issues and we concluded that Earquhart lacked standing."

To the extent that Earquhart's claims could be construed as a broad challenge to the substantive reasonableness of his amended sentence, he fails to overcome the presumption of reasonableness accorded his within-Guidelines sentence. *See United States v. Louthian*,

756 F.3d 295, 306 (4th Cir. 2014) (“[A]ny sentence that is within or below a properly calculated Guidelines range is presumptively reasonable”).

Therefore, we affirm the judgment. We grant Earquhart’s motion to exceed the page limitations on his informal brief, but we deny his motion to file a DVD. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4301, US v. Xavier Earquhart
5:17-cr-00134-BR-1

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: The time to file a petition for writ of certiorari runs from the date of entry of the judgment sought to be reviewed, and not from the date of issuance of the mandate. If a petition for rehearing is timely filed in the court of appeals, the time to file the petition for writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. See Rule 13 of the Rules of the Supreme Court of the United States; www.supremecourt.gov.

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).