

ON PETITION FOR REHEARING

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4674

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MOHAMMED HAKIM UPCHURCH,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Louise W. Flanagan, District Judge. (5:19-cr-00006-FL-1)

Submitted: July 20, 2023

Decided: August 3, 2023

Before WILKINSON, GREGORY, and RUSHING, Circuit Judges.

Vacated and remanded by unpublished per curiam opinion.

ON BRIEF: G. Alan DuBois, Federal Public Defender, Andrew DeSimone, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellant. Michael F. Easley, Jr., United States Attorney, Lucy Partain Brown, Assistant United States Attorney, David A. Bragdon, 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Unpublished opinions are not binding precedent in this circuit.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:

Mohammed Hakim Upchurch appealed the district court's judgment imposed after he pled guilty, without a written plea agreement, to possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2).¹ The district court sentenced Upchurch to 60 months' imprisonment followed by 3 years of supervised release. Upchurch appealed, and we granted the Government's unopposed motion to vacate the district court's judgment and remand Upchurch's case to the district court for resentencing in light of *United States v. Rogers*, 961 F.3d 291 (4th Cir. 2020), and *United States v. Singletary*, 984 F.3d 341 (4th Cir. 2021). *United States v. Upchurch*, No. 20-4014 (4th Cir. Aug. 12, 2021) (unpublished order). The district court resentenced Upchurch to 57 months' imprisonment and 3 years of supervised release, and Upchurch then appealed the amended judgment. We vacated Upchurch's sentence and remanded for a second resentencing in accordance with *Rogers* and *Singletary*. *United States v. Upchurch*, No. 21-4674, 2023 WL 4146236 (4th Cir. June 23, 2023) (unpublished). The mandate issued forthwith. The Government has now filed a motion to recall the mandate and a petition for rehearing seeking reconsideration on the remedy only. We granted the motion to recall the mandate, *United States v. Upchurch*, No. 21-4674 (4th Cir. July 19, 2023) (unpublished).

¹ Section 924(a)(2) was amended and no longer provides the penalty for § 922(g) convictions; the new penalty provision in 18 U.S.C. § 924(a)(8) sets forth a statutory maximum sentence of 15 years' imprisonment for a § 922(g) offense. *See* Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12004(c), 136 Stat. 1313, 1329 (2022). The 15-year statutory maximum does not apply in this case, however, because Upchurch's offense was committed before the June 25, 2022, amendment to the statute.

order), grant the petition for rehearing, and we again vacate the sentence and remand for resentencing.

In the instant appeal, Upchurch argues that the district court erred by pronouncing at resentencing the special condition of supervised release that he submit to certain searches by probation or law enforcement officers upon reasonable suspicion, which differs from the written amended judgment's special condition requiring him to consent to suspicionless searches. The Government initially argued that the reasonable suspicion requirement orally imposed by the district court did not apply to searches by any probation officer in the lawful discharge of the officer's supervision functions, which matches the language in the written amended judgment. However, the Government later abandoned that argument and conceded that there was error under *Rogers* and *Singletary*. The Government's sole contention on appeal is that the error should be corrected by a limited remand to conform the written judgment to the oral pronouncement of the supervised release conditions.²

We review de novo whether the sentence imposed in the written judgment is consistent with the district court's oral pronouncement of the sentence. See *United States v. Cisson*, 33 F.4th 185, 193 (4th Cir. 2022). Based on the inconsistency between the oral pronouncement and written amended judgment, the district court did not comply with the rule that "all non-mandatory conditions of supervised release must be announced at a defendant's sentencing hearing." *Rogers*, 961 F.3d at 296 (holding that district court has a

² In its motion to recall the mandate and petition for rehearing, the Government correctly contended that our previous opinion in this appeal did not properly state its position that it had abandoned its original argument and conceded that there was error.

“duty to orally pronounce any discretionary conditions [of supervised release] included as part of a defendant’s sentence”).

Although part of the district court’s oral pronouncement of the special condition matches the written condition in the amended judgment, the district court’s reasonable suspicion requirement for searches “concerning a violation of a condition of supervised release or unlawful conduct” is absent from the amended judgment. (J.A. 80).³ Rather, the amended judgment does not require reasonable suspicion for any search of Upchurch, his location, or his belongings by a probation or law enforcement officer during Upchurch’s supervised release. *Compare* J.A. 80 *with* J.A. 90. Where, as here, the district court’s oral pronouncement is inconsistent with a discretionary condition of supervised release that is later included in the written judgment, the sentence constitutes reversible *Rogers* error, and the defendant’s sentence usually must be vacated in its entirety and the case remanded for resentencing. *See Singletary*, 984 F.3d at 346 & n.4; *cf. Cisson*, 33 F.4th at 194 n.6 (noting where government failed to offer explanation of alleged inconsistency between district court’s oral pronouncement of discretionary condition and written condition in judgment required vacating sentence and remanding for resentencing).

The Government contends that the proper remedy for the mismatched supervised release special condition is to remand for the limited purpose of conforming the written judgment to the oral pronouncement of the condition, based on our decision in *United States v. Locklear*, No. 21-4161, 2023 WL 2300394 (4th Cir. Mar. 1, 2023) (unpublished).

³ “J.A.” refers to the joint appendix.

In *Locklear*, the district court orally ordered that the defendant support his “children,” but the written judgment directed that he support his “dependent.” 2023 WL 2300394, at *1. We held that, on the facts presented in *Locklear*, a discrepancy between the use of children and dependent “c[ould] be resolved without the need for a full resentencing” and that “the remedy for a conflict of this nature is to remand to the district court ‘to correct the written judgment so that it conforms with the sentencing court’s oral pronouncements.’” *Id.* at *2 (quoting *United States v. Morse*, 344 F.2d 27, 29 n.1 (4th Cir. 1965)). We reasoned that “[t]o the extent of any conflict between the written order and the oral sentence, the latter is controlling. In such cases, the court should carry out the true intention of the sentencing judge as this may be gathered from what he said at the time of sentencing.” *Id.* (cleaned up). We further stated that, “[i]n the context of this record, which reflects no dependents other than [the defendant’s] children, the district court’s intention was clearly to require [the defendant] to support his children.” *Id.*

We conclude that *Locklear* is distinguishable from this case because here, the record is ambiguous as to the district court’s “true intention.” *See* 2023 WL 2300394, at *2. *Locklear* limited its remedy as appropriate “for a conflict of this nature.” *Id.* We stated that where “the true intention of the sentencing judge [] may be gathered from what he said at the time of sentencing,” a limited remand to effect the court’s orally stated intention is appropriate. Here, the situation is not as factually clear. The oral pronouncement was that Upchurch must submit to warrantless searches by the probation officer or law enforcement only upon reasonable suspicion of a supervised release violation or unlawful conduct, but the written judgment ordered him to submit to warrantless searches without a reasonable

suspicion requirement. This mismatch is significant because it implicates the constitutional right to be free from unreasonable searches and seizures. Further, it is not clear from the record which form of the condition the court intended, whereas in *Locklear*, the court's intention was clear, notwithstanding the slight discrepancy in wording.

Accordingly, we vacate Upchurch's sentence and remand for a second resentencing in accordance with *Rogers* and *Singletary*. In light of the conclusion of Upchurch's term of imprisonment and his current supervised release status, the mandate shall issue forthwith so the district court may proceed with resentencing without delay. 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.

VACATED AND REMANDED