NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

ERIC MALMSTROM,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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(Judgment of the First Circuit Court of Appeals, No. 19-1218, July 20, 2020).

QUESTION PRESENTED FOR REVIEW

Whether the district court abused its discretion when it failed to sua sponte order a competency evaluation. The facts of Petitioner's crime, standing alone, gave rise to a reasonable cause to believe that Petitioner may presently be suffering from mental disease or defect rendering him mentally incompetent. In the present case, Petitioner made over 300 hundred phone calls to the Swedish Embassy, and to a consular employee, to whom he had no connection, repeating random religious references, talking about an imaginary King Larrson and King Larrson's granddaughter, and threatening the employee and the citizens of Sweden with sexualized violence using a sword. Such acts plainly put the district court on notice that Petitioner might be suffering from a mental disease rendering him mentally incompetent, notwithstanding the fact that defense counsel did not raise the competency issue

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The Petitioner, Eric Malmstrom, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on July 20, 2020.

OPINION BELOW

On July 20, 2020, the Court of Appeals entered its Opinion affirming the Petitioner's conviction and sentence. Judgment is attached at Appendix 1.

JURISDICTION

On July 20, 2020, the United States Court of Appeals for the First Circuit entered its Opinion affirming Petitioner's conviction and sentence. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Amendment V:

> No person shall…be deprived of life, liberty, or property without due process of law…

STATEMENT OF THE FACTS

This is a Petition for Certiorari following a conviction after trial in docket number 19-1218, to three counts of Transmitting Threatening Interstate Communications, 18 U.S.C.§ 875(c). Petitioner was charged in a four-count indictment, returned on April 13, 2018. (D.E. at 3, No. 20). At the start of trial on August 27, 2018, the government dismissed count two of the indictment. (D.E. at 7, No. 76).

On August 27, 2018, Petitioner was convicted after trial of counts one, three and four of the indictment. (D.E. at 7, No. 86).

Introduction

On March 9, 2018, United States Secret Service Special Agents arrested Petitioner at his sister's residence in Sanford Maine. Petitioner was arrested for making threatening calls to the Swedish Embassy in Washington, D.C. (Revised Presentence Investigation Report at 3, para. 1, 4 (hereinafter "RPSR at__")). The government alleged that over a six month period, Petitioner made hundreds of calls to the embassy, many to a consular employee of the embassy, Zandra Bergstedt, whom Petitioner did not know personally, threatening violence against various actual and fictional people, including the employee, Zandra Bergstedt (RPSR at 3-4, Sealed Appendix at 3-4).

On April 13, 2018 the grand jury returned a four-count indictment charging Petitioner with Transmitting Threatening Communications. (RPSR at 3, para 2, Sealed Appendix at 3).

The Complaint

The complaint in the present case alleged that Petitioner called the Swedish Embassy hundreds of times over a period from the end of September 2017 to the beginning of March 2018. (Affidavit in Support of Criminal Complaint, 3/9/18 at 1, [hereinafter, "Affidavit at ___"]). Many of the calls were made after business hours and were logged and recorded. The complaint alleged that Petitioner threatened among other threats, "I am going to shove a knife up everyone's daughter's cunts, because they are all bitches and cunts.", "Do you know how to take a girls virginity? You shove a knife right up her cunt. I'll blow all your fucking heads off, watch.", "For all the pain you fucking Swedes caused me, I want to stab you all so fucking hard you die." (Affidavit at 2, para 7).

The government alleged that in October 2017, Petitioner began threatening an embassy employee in the consular section. The Petitioner left 166 voice messages in a one-week period while the employee was out of the office. (Affidavit at 3, para 11). The government alleged Petitioner threatened to slit the victim's throat and the throat of her "two beautiful

boys". (Affidavit at 4, para 15). "All I want to do is slit her throat and watch her blood poor out." Petitioner threatened to slit her throat and dump her body in the river outside her office" (Affidavit at 4, para 18). Petitioner did not know the victim.

The Magistrate judge reviewed the complaint and Agent Fasulo's affidavit at Petitioner's Initial Appearance. (Initial Appearance 3/12/18 at 5).

Motion Hearing

On August 12, 2018, the government filed a Motion in Limine. The government sought to introduce evidence of Petitioner placing "hundreds" of harassing and threatening phone calls to the Swedish Embassy's main line and to an individual consular employee, between September 2017 and March 2018. (D.E. at 6, No. 64, Motion in Limine, 8/12/18 at 4 [hereinafter "Motion in Limine at___"]). The government also sought to introduce evidence that Petitioner continued to call the consular employee after his arrest, placing multiple calls to the employee's voice mail from the Strafford County Correctional Facility. (Motion in Limine at 6).

On August 24, 2018, at a hearing on the Motion in Limine, the government informed the court that over 60 voice messages from Petitioner were recorded and saved by the Swedish Embassy. (Motion Hearing,

8/24/18, at 3, 4). The government sought to introduce six of those voice messages at trial. (Motion Hearing, 8/24/18 at 4, Gov't Ex. 1, at 38). The government provided the court with a transcript of the audio recordings it sought to introduce. The transcript was as follows:

> 1). Yeah, this is Eric Emmanuel Malmstrom of Vinalhaven, Maine. Continuously messing with me and causing me hate and discontent and problems is only going to agitate me and provoke me. That is why I prefer a knife or sword up your cunt.
>
> 2). Yeah, this is Eric Emmanuel Malmstrom. Is this, uh, your idea of a joke to keep continuously harassing me and threatening me? I don't appreciate that. I really don't. But I'll tell you, when I get to Sweden, Sweden's gonna run my way. Ok? You understand that? Islam?
>
> 3). …Emmanuel Malmstrom from Vinalhaven, Maine again. You done threatening me, or do I have to rip your fucking fallopian tubes out? You fucking cunt.
>
> 4.) [Words in Swedish precede voicemail message]
> Hello, uh, this is Eric Emmanuel Malmstrom from Vinalhaven, Maine. Just calling to see how the Swedish government's doing, and this is my nephew standing here, say hi Dymond. This is Dymond Malmstrom [another voice: Helllo…hi] Yeah, so we're on Vinalhaven, Maine. It's off the coast of Maine. 15 miles out from Rockland. [automated voice: To delete this message…]
>
> 5). Yeah, this is Eric Emmanuel Malmstrom. I'm in Sandford Maine, I'm going to head down to my cousin's John Freeman. That's my cousin. He's got one eye. Lost it.
> [Automated voice: March 8th, at 12:18 p.m. To delete this…]
>
> 6). This is Eric Emmanuel Malmstrom, in Sandford Maine. I just came back from my cousin's apartment, John Freeman. Know this much. I believe in Sharia law. Sharia law says that I have every right to shove a knife in King Larrson's granddaughter's fucking cunt and slit her fucking throat. And that's coming from a king.

[Automated voice: March 8th at 9:17 p.m. To delete…]
(Government's Exhibit 1)

The court asked the government if King Larrson was a current or past King of Sweden. The government responded "I don't believe it's the current king, Your honor. I frankly don't know, to be honest with you." Defense counsel responded, "I don't know if it is an actual or historic reference or if that's someone's idea of history speaking." (Motion Hearing, 8/24/18 at 6). The court also asked, "So the victim is not the granddaughter of a king?" "Does either of you know what the reference relates to?" The government responded:

> Your Honor, it's a fairly – it's a – it comes up frequently in the calls Mr. Malmstrom allegedly made. And I don't know what the genesis of it is, but he comes back to this referencing King Larsson and King Larsson's granddaughter on many occasions." (Motion Hearing, 8/24/18 at 7, Transcript of Voice Messages at 1, para 4, at 2, para. 29, at 3, para 39, at 4, para. 42, 45, at 5, para 63, Appendix at 40, 79, 80, 81, 82, 83).

The court redacted two of the voice messages, striking references to Sharia law and Islam. The court ruled the recorded voice messages were admissible as redacted. The court took no other action in relation to the voice messages. (Motion Hearing,8/24/18 at 6-8, at 39, 41).

The Trial

On September 1, 2017, the Swedish Embassy in Washington D.C. began receiving threatening telephone calls to its main number. (Trial,

8/27/18 at 130, [hereinafter "Trial at___"]). The caller identified himself as "Eric Emmanuel Malmstrom, from Vinalhaven, Maine" (Trial at 33). Beginning on October 15, 2017, the caller began making threatening calls to the direct line of a consular employee, Zandra Bergstedt. (Trial at 131). Ms. Bergstadt had never met, and in fact did not know, a Mr. Eric Malmstrom. (Trial at 47). The calls were made from a telephone number registered to Randal Farnham residing in Vinalhaven Maine. (Trial at 128, Appendix at 66). Petitioner, Erik Malmstrom resided with his sister and her husband, Virginia and Randall Farnham at their house in Vinalhaven Maine. (Trial at 58). Sometimes Ms. Bergstadt spoke to the caller directly and sometimes he would leave messages. (Trial at 34). In some of the calls the caller would threaten Ms. Bergstadt directly saying, "he would slit my cunt, that he would rape me, that he would slit my throat.' Sometimes the caller would "ramble on about things" He would speak generally about Swedish people, about a king, or about political figures in the United States. "It wouldn't make total sense to me what he would say." (Trial at 36).

At some point in the fall of 2017, as the call volume increased, agents from the State Department requested Robert Potter, a sheriff's deputy with the Knox County Sheriff's Department, assigned to Vinalhaven Island, to conduct a well-being check on Mr. Malmstrom. (Trial at 59). After the well-

being check, Ms. Bergstadt received angry messages and telephone calls in which the caller accused Ms. Bergstadt of harassing him and getting him in trouble with his sister. (Trial at 38).

In February 2018, Ms. Bergstadt went on vacation. During her absence, the caller left over a hundred voice mail messages for Ms. Bergstadt. (Trial at 39). When Ms. Bergstadt returned to work the tone of the telephone calls changed and became personal. (Trial at 39). The caller threatened her children and referenced her partner, as well as wanting to physically harm Ms. Bergstadt. "He seemed very upset that he hadn't been able to reach me during the week I was gone." (Trial at 39).

On March 5, 2018, the caller telephoned to say that he was coming to Washington DC. He stated he was taking the ferryboat at a specific time and traveling south. He stated he was going to slit Ms. Bergstadt's throat and her two children were going to watch and that he was going to dump her body in the river. (Trial at 40-41, 43-44). On March 6, 2018, the caller called from a different number, a number in Sanford Maine. At times the caller was "almost apologetic that it was going to take him longer to come to Washington then he planned." (Trial at 42). Between March 5th and March 9th, the caller made 21 calls to Ms Bergstadt from the Sanford Maine number. (Trial at 137). Because it was clear from the telephone calls that

the caller was traveling south, Ms. Bergstadt assumed the caller was in fact traveling to DC. (Trial at 44). Based on these calls, law enforcement agents in DC moved to arrest Petitioner. (108). On March 9, 2018, Petitioner Eric Malmstrom was arrested in Sanford Maine, at the house of his sister, Anita Malmstrom. (Trial at 113). Petitioner traveled to Sanford from Vinalhaven with his brother in law and sister, Randall and Virginia Farnham. (Trial at 84) The Farnham's took Petitioner to Sanford Maine because they were planning a weekend at Foxwood's Casino in Connecticut and they could not leave Petitioner alone in Vinalhaven. All three arrived at Petitioner's sister Anita's house, on March 5, 2018. The Farnham's stayed overnight and then drove to Connecticut on March 6th. (Trial at 85, 101). Petitioner stayed in Sanford Maine with his sister, Anita, while his other sister and her husband visited Foxwood's casino. The Farnham's returned to Sanford on March 9, 2019. That evening, Secret Service agents arrested Petitioner at Anita's house in Sanford. (Trial at 88, 107).

Petitioner was arrested and housed at the Stafford County Jail in Maine. (Trial at 119). In late April Ms. Bergstadt received six voicemails from an inmate at the Stafford County jail. She did not accept the calls. The inmate used Petitioner's booking number and telephone identification number to make the call. (Trial at 121).

In total the caller made 121 calls to the main number of the Swedish Embassy, and 187 calls to Ms. Bergstadt's direct line. (Trial at 130, 131). Sixty-three of the calls were recorded on voicemail. The government introduced six of these recorded calls at trial. (Trial at 62). Deputy Sheriff Robert Potter and Petitioner's brother in law, Randall Farnham, identified the voice on the recordings as Petitioner's voice. (Trial at 61, 90).

Sentencing

The court sentenced Petitioner to 27-month term of imprisonment, and three years of supervised release, with special conditions, on each of counts, one, three and four to be served concurrently. (Sentencing at 61).[1]

Appeals Court Decision

The First Circuit Court of Appeals affirmed Petitioner's sentence. The Court held; the district court did not have reasonable cause to believe that a substantial question existed concerning Petitioner's competency to stand trial. (United States v. Eric Malmstrom , Docket No. 19-1218, July 20, 2020)

[1] Petitioner was due to be released from BOP custody on February 5, 2020, at the completion of his sentence. However, Petitioner has not been released. The BOP has petitioned the Federal District Court in Minnesota for civil commitment of Petitioner under 18 U.S.C. § 4246 "Hospitalization of a Person due for release but suffering from mental disease or defect".

REASON FOR GRANTING THE WRIT

Conviction of a person legally incompetent to stand trial violates due process. The district court abused its discretion and violated Petitioner's due process rights when it failed to sua sponte order a competency evaluation. The facts of Petitioner's crime, standing alone, gave rise to a reasonable cause to believe that Petitioner may presently be suffering from mental disease or defect rendering him mentally incompetent. In the present case, Petitioner made over 300 hundred phone calls to the Swedish Embassy, and to a consular employee, to whom he had no connection, repeating random religious references, talking about an imaginary King Larrson and King Larrson's granddaughter, threatening the employee and the citizens of Sweden with sexualized violence using a sword. Such acts plainly put the district court on notice that Petitioner might be suffering from a mental disease rendering him mentally incompetent, notwithstanding the fact that defense counsel did not raise the competency issue.

Standard of Review

Petitioner alleges the district court abused its discretion by not sua sponte ordering a competency hearing. The First Circuit "reviews a district court's decision not to hold a competency hearing or order a psychiatric examination for abuse of discretion". United States v. Maryea, 704 F.3d 55, 69 (1st Circuit 2013), United States v. Sanchez-Ramirez, 570 F.3d. 75, 80 (1st Cir.2009) The First Circuit will affirm the district court's decision if there was a sufficient evidentiary basis to support its decision. Id. A

Petitioner cannot waive his right to the court's duty to sua sponte inquire into Petitioner's competency. Pate v. Robinson, 383 U.S. 375, 378, (1966) (Counsel's failure to request a hearing does not "waive" defendant's right to have the court determine his capacity to stand trial), Johnson v. Norton, 249 F.3d 20, 27 (1st Cir. 2001) (counsel's failure to request a competency hearing is irrelevant, "such a request is not germane to the present question, namely, whether the court was required to make the decision on its own.")

Argument

The conviction of a person legally incompetent to stand trial violates due process. Pate v. Robinson, 383 U.S. 375, 378, (1966). A district court must sua sponte order a competency hearing if there is reasonable cause to believe that a defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent. 18 U.S.C. § 4241(a) (emphasis added). The test for competency is whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding, and whether defendant has a rational and factual understanding of the proceedings against him. United States v. Ahrendt, 560 F.3d 69, 74 (1st Cir. 2009). "Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on

competence to stand trial are all relevant in determining whether further inquiry is required, but even one of these factors standing alone may in some circumstances, be sufficient." Drope v. Missouri, 420 U.S. 162, 180 (1975) In the present case, the facts of the crime as alleged by the government gave the court reasonable cause to believe that Petitioner may presently be suffering from a mental disease which would render him mentally incompetent. Petitioner made over 300 telephone calls to the Swedish Embassy, with over a hundred of them to a consular employee to whom he had absolutely no connection. Many of the calls threatened sexualized violence. He repeatedly referred to an imaginary King and his imaginary granddaughter, many of his calls were nonsensical, and many contained random religious references. These facts show that the crime alleged was the crime of a mentally ill person who was divorced from reality. Petitioner's irrational behavior, standing alone, provided the court with reasonable cause to believe that Petitioner may suffer from a mental illness which would render him incompetent. Pate v. Robinson, 383 U.S. at 386 (defendant's uncontradicted "history of pronounced irrational behavior" enough to mandate a hearing, despite trial court's colloquies with defendant, defendant's demeanor at trial and psychiatrist's opinion that defendant could assist in his defense), Drope v. Missouri, 420 U.S. 302

(1975) (even one factor standing alone may be sufficient to require further inquiry on the question of a defendant's competence). Therefore, the court abused its discretion when it failed to sua sponte order a psychiatric examination or a competency hearing. [2]

At the very inception of this case, the government's charge against Petitioner made it obvious that Petitioner's irrational behavior required the district court to inquire further into Petitioner's competence to stand trial. The complaint in this case alleged that over a six-month period Petitioner made hundreds of telephone calls to the Swedish Embassy. Affidavit at 1, para 5). Petitioner left voice messages threatening to "shove a knife up everyone's daughter's cunts", on the main number of the embassy. (Affidavit at 2, para 6). More importantly, Petitioner repeatedly threatened a consular employee with whom he had absolutely no prior connection. The complaint alleged that in a one-week period Petitioner left 166 voice messages on the employee's telephone. (Affidavit at 3, para 11). The complaint alleged Petitioner identified himself by his full name in each telephone call. (Affidavit at 3, para 10, Appendix at 16). Petitioner

[2] Defense counsel requested funds for a psychological evaluation after the Pretrial Service Report was prepared because Probation stated it would consider pretrial release if Petitioner was evaluated, received a diagnosis and a medical regime was established. No written or oral psychological evaluation was ever made part of the record.

threatened to slit the employee's throat and that of her children. (Affidavit at 4)

By the time of the August 24, 2018, hearing on the government's Motion in Limine, the court was aware that Petitioner had left over 60 voice messages, which had been recorded and saved by embassy officials. [3] (Conference of Counsel, 8/13/18 at 3-4). The court was aware that Petitioner frequently referenced and threatened an imaginary King Larsson and King Larrson's imaginary granddaughter. (Motion Hearing, 8/24/18 at 7). The court was also aware that Petitioner had no connection to the victim. (Motion Hearing, 8/24/18 at 7). The court also knew that Petitioner's voice messages were sprinkled with random, nonsensical religious references to Sharia law and Islam. "But I'll tell you, when I get to Sweden, Sweden is going to run my way. Ok? You understand that? Islam?" (Govt's Ex. 1). "This is Eric Emmanuel Malmstrom, in Sanford Maine. I just came back from my cousin's apartment, John Freeman. Know this much. I believe in Sharia law. Sharia law says that I have every fucking

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(Preliminary Examination and Detention Hearing, 3/15/18 at 8, Appendix at33).

[3] In its Motion in Limine the government informed the court that Defendant had made hundreds of phone calls and left many voice messages. (D.E. at 6, No. 64, Motion in Limine, 8/12/18). In the motion, the government stated it was seeking to introduce evidence of the calls. In the end the government sought to introduce six of the voice messages.

right to shove a knife in King Larrson's granddaughter's fucking cunt and slit her fucking throat. And that's coming from a king". (Gov't Ex 1)

This behavior clearly indicates Petitioner was divorced from reality. Petitioner's irrational behavior standing alone gave the district court reasonable cause to believe Petitioner might be incompetent. [4] Pate, 383 U.S. at 385 (uncontradicted testimony of defendant's "history of pronounced irrational behavior" sufficient to require court to hold a competency hearing, despite defendant's mental alertness and understanding displayed in 'colloquies' with the court.), Drope, 420 U.S. at 180 (possible factors for judge to consider are a "defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial. but even one of these factors standing alone

[4] The First Circuit sometime restates the threshold for the court to hold a sua sponte a competency hearing as "whenever evidence raises a sufficient doubt as to the competency of the accused". Johnson v. Norton, 249, F3d 20, 26 (1st Cir.2001. The statutory standard however, is "reasonable cause to believe that a defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent" 18 U.S.C. 4241(a) (emphasis added). The statutory standard makes is unnecessary to determine the "quantum of doubt" required to prompt a hearing Id. And it underlines the fact that the court needs only reasonable cause to believe that defendant **may** be suffering a mental illness that renders him incompetent, not reasonable cause to believe defendant **is** suffering from an illness that renders him incompetent.

maybe enough), Torres v. Prunty, 223 F.3d 1103 (9th Cir.2000) (court erred in failing to order competency hearing sua sponte where defendant shot three physicians and kidnapped a fourth and a nurse because he believed he was the victim of a medical conspiracy during which doctors injected him with Aids virus and falsified his medical records).

It is true that in many cases there are often "no fixed and immutable signs" which indicate the need for further inquiry and the "question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." Drope, 420 U.S. at 180, Johnson, 249 F.3d at 27. In the present case, however, there is nothing subtle or nuanced about the signs of Petitioner's mental illness. A mental illness which unquestionably gave the district court reasonable cause to believe Petitioner may not be competent. In fact, both the prosecutor and defense counsel were united in the opinion that that the crime undoubtedly showed Petitioner suffered from a mental illness. At Sentencing the prosecutor repeatedly opined "I think it is abundantly clear that mental health is an issue in this case" and "particularly when mental health is - - is shouting out at us as being an issue, as it is in this case, I think the Court has an obligation to take a look at mental health" and " the conduct in this case just strongly indicates that mental health is - - is a factor here" (Sentencing at 29, 30, 43, Appendix at

72, 73, 75). Defense counsel commented multiple times, "I think it would be a logical inference for many people to say whoever made those calls has mental illness. (Conference of Counsel, 8/13/18 at 4, Sealed Appendix at 31), "I understand why the Government thinks that mental health is at the core of this proceeding, but I don't think it has been raised in any formal way.", and "it is more likely that someone with mental illness would make the calls of the character that [are] in this case." (Conference of Counsel, 8/13/18 at 3, Appendix at 31). Thus, both the general acknowledgement of Petitioner's mental illness, and the quality of that mental illness (which showed Petitioner was not in touch with reality), made it was unreasonable for the court to not inquire further into whether Petitioner may have been suffering from a mental disease or defect rendering him mentally incompetent.

The government will argue based on defense counsel's failure to raise the competency issue, that the court is entitled to assume Petitioner was competent.[5] Although it is true that defense counsel has a "unique vantage

[5] It is true that, counsel twice stated that "So far as I am aware there's no issue with my ability to communicate with him" (Motion Hearing, 5/17/18, at 5, 13, Sealed Appendix at 25, 27). However, at a later hearing defense counsel stated, "I'm a little concerned about his level of understanding." (Motion Hearing, 8/1/18 at 24, Sealed Appendix at 29). Moreover, defense counsel repeatedly argued, "My client doesn't see himself as mentally ill and he thinks it's a bad thing." (Conference of counsel, 8/13/18 at 12, Sealed Appendix at 33) and "I

for observing whether her client is competent", United States v. Muriel-Cruz, 412 F.3d 9, 13 (1st Cir. 2005), the fact that counsel did not raise any concerns, does not relieve the court of its independent obligation to inquire into Petitioner's competency based on the overwhelming evidence of Petitioner's mental illness evinced by the facts of the crime. Congress placed an independent duty on the court to raise the issue because it is the court's duty to protect the integrity of the proceedings. This is a mandatory duty. United States v. Giron-Reyes, 234 F.3d 78, 80 (1st cir.2000) (Section 4241(a) imposes a duty on the court), Hernandez-Hernadez v. United States, 904 F.2d 758, 760 (1st Cir. 1990) (A court is required to hold a competency hearing sua sponte whenever there is reasonable cause…"), United States v. Brown, 669 F.3d 10, 17 (1st Cir. 2012) (A district court must sua sponte order a competency hearing if there is reasonable cause to believe that a defendant is mentally incompetent). The fact that defense counsel did not raise the issue does not excuse the court from sua sponte raising the issue where evidence strongly suggests Petitioner may be incompetent.[6] Drope, 429 U.S. at 173 (Defendant's irrational behavior was

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would object vigorously to any evidence of mental illness being admitted at trial against Mr. Malmstrom. (Conference of Counsel, 8/13/18, at 3, Sealed Appendix at 31)

[6] Counsel also filed three separate motions to withdraw on May 17, August 1 and December 17, 2018. Two of the motions were based on

sufficient to require further inquiry notwithstanding defendant's demeanor at trial and the stipulated opinion of the psychiatrist that defendant was competent).

The government will also argue that the district court interacted multiple times with Petitioner and nothing in those interactions made the court question Petitioner's competency.[7] It is immaterial that the court's limited interactions with Petitioner did not also flag the issue of competency because here the facts of the crime standing alone were sufficient to create a reasonable belief that Petitioner may suffer from mental illness which would render him incompetent. Pate, 383 U.S. at 385-86 (While defendant's demeanor at trial might be relevant to the ultimate decision as to [competency], it cannot be relied upon to dispense with a hearing on that very issue."), Johnson, 249 F.3d at 28 (factors favoring a finding of competency do not justify ignoring uncontroverted evidence to

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counsel's inability to communicate with his client and one based on Defendant's request that he be represented by a Muslim lawyer who practiced Islam because "…they're very devout, they do things in a certain - - to kind of ceremonial circumference way that's really unique". (Motion Hearing, 5/17/18 at 8, Sealed Appendix at 26).

[7] Although at Defendant's arraignment when the Magistrate Judge asked Defendant if he was Eric Malmstrom. Defendant replied "I would hope I am, your Honor. I'm wearing my glasses." (Arraignment, 4/25/18 at 4, Appendix at 35).

the contrary).[8] Nor was there any record of evidence to suggest that Petitioner's mental illness was under control at the time of trial. In fact, the record indicates that Petitioner was not taking any medication. United States v. Maryea, 704 F.3d 55, 71 (1st Cir. 2013) (the court stopped the proceedings and only continued them when defendant had received her medication had been treated, and the court was convinced that she was competent).

The remedy for the court's failure to inquire into Petitioner's competence is to reverse Petitioner's conviction and order a new trial. It is an insufficient remedy for this Court to remand for the limited purpose of holding a hearing on Petitioner's competence at the time of his original trial, particularly in this instance where there was no psychiatric evaluation in the record. Pate, 383 U.S at 397 (retrospectively attempting to determine defendant's competency to stand trial presents difficulties. Concurrent determination of competency and new trial discharges the court's constitutional obligation.), Drope, 420 U.S. at 183 (Petitioner's due

[8] It is important to recognize that Defendant is not challenging the court's finding of competency, which would shift the burden of proof to Defendant to present facts sufficient "to positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to his mental competence." Brown, 669 F.3d 10, 17 (1st Cir. 2012). The issue presented here is not whether he was competent, but whether he was entitled to a hearing to determine his competence. Torres v. Prunty, 229 F.3d 1103, 1106 (9th Cir.2000).

process rights not adequately protected by remanding for a determination of competence at the time of trial. Remedy is to reverse conviction and retry petitioner.), Dusky v. United States, 362 U.S. 402 (1960) (remedy is to remand the case to district court for a new hearing to ascertain defendant's present competency and for a new trial should defendant be found competent).

The court's failure to make such inquiry deprived Petitioner of his constitutional right of a fair trial. Pate, 383 U.S. at 385, Conviction of an accused person legally incompetent to stand trial violates due process. Id., United States v. Lebron, 76 F.3d 29, 31 (1st Cir. 1996), Johnson v. Norton, 249 F.3d at 26, United States v. Maryea, 704 F.3d 55, at 69 (1st Cir. 2013), United States v. Brown, 669 F.3d 10, 17 (1st Cir. 2012) and this Court should remand for a new trial.

CONCLUSION

For the above reasons, this Court should grant the Petition for a Writ of Certiorari.

Dated at Portland, Maine this 1st day of October 2020.

____/s/Jane E. Lee_____

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APPENDIX