NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

ROGER EDWARD PICARD

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition For a Writ of Certiorari
to the United States Court of Appeals for the First Circuit

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

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October 22, 2021

QUESTIONS PRESENTED

This case came before the First Circuit Court of Appeals which held that the district court did not err in finding a violation of condition of release. United States v. Picard, No. 19-1855 (1st Cir. Apr. 14, 2021). A petition for rehearing and a petition for rehearing en banc was denied by order of court dated May 25, 2021.

The questions presented are:

I. Did the First Circuit depart from this Court's decision in Rehaif v. United States, 588 U.S. ___ (2019), with respect to the presumption in favor of "scienter" and a finding of a "knowing" mens rea? Specifically, whether both the First Circuit and district court erred in finding a violation of supervised release when the defendant reported to register per the requirements of SORNA within 24 hours of release from incarceration, but reported to the wrong county Sheriff's office in rural Maine.

PARTIES TO THE PROCEEDING

Petitioner, Roger Edward Picard was the defendant-appellant below.

Respondent, United States of America was the plaintiff-appellee below.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Roger Edward Picard*, No. 19-1855, 1st Cir. 2021, (Apr. 14, 2021)(affirming violation of condition of release and lack of both procedural and substantive due process);
- *United States v. Roger Edward Picard*, No. 19-1855, 1st Cir. 2021, (May 25, 2021)(denying petition for rehearing en banc); and
- *United States v. Roger Edward Picard*, No. 1:18-cr-57- LEW, D. Me. (Aug. 16, 2019)(finding violation of condition of release).

Within the meaning of this Court's Rule 14.1(b)(iii), the following proceeding directly arising from the same trial court case is as follows:

- *United States v. Roger Edward Picard*, No. 20-2154, 1st Cir. 2021, (Sept. 8, 2021)(affirming violation of condition of release and lack of both procedural and substantive due process; and denying motion pursuant to Fed.R.Crim.P. 35); and
- *United States v. Roger Edward Picard*, No. 1:18-cr-57- LEW, D. Me. (Dec. 1, 2020)(finding violation of condition of release).

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PETITION FOR WRIT OF CERTIORARI
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FOR THE FIRST CIRCUIT

ROGER EDWARD PICARD respectfully petitions this Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the First Circuit dated April 14, 2021, and the First Circuit of Appeals Order denying rehearing en banc dated May 25, 2021.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit in

United States v. Roger Edward Picard, No. 19-1855 (1st Cir. Apr. 14, 2021) appears at Appendix A to this petition (hereinafter cited "A-1"). The First Circuit's Order denying rehearing en banc appears at Appendix B (hereinafter cited "B-1"). The opinion of the United States District Court for the District of Maine in *United States v. Roger Edward Picard*, No.: 1:18-cr-57-LEW (D. Me. Aug. 16, 2019), consisting of the oral findings of the district court at the revocation hearing, appears at Appendix C and is unpublished. (Hereinafter cited 'C-1").

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The judgment of the Court of Appeals was entered on April 14, 2021. The petition for rehearing was denied on May 25, 2021. This Petition is timely filed per the Court's March 19, 2020 order extending the time to file a petition to one hundred fifty days after denial of rehearing. *See* Supreme Court Rule 13.1; See also Order of the United States Supreme Court dated July 19, 2021, rescinding the automatic extension based on the date of the lower court order, but only if the lower court order was dated on or after July 19, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 18 U.S.C. § 3231 and the court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

Respondent brought the underlying action under the following statutes:

I. 18 U.S.C. §2250 – Failure to Register -- provides in pertinent part:

(a) In General – Whoever

(1) is required under the Sex Offender Registration and Notification Act;

(2)

(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

....

(c) Affirmative Defense. – in a prosecution for a violation of section (a) or (b), it is an affirmative defense that –

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) the individual complied as soon as such circumstances ceased to exist.

18 U.S.C. § 2250.

II. 34 U.S.C. §20913 – Registry Requirements for Sex Offenders -- provides in pertinent part

(a) In General

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration

purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial Registration

The sex offender shall initially register--

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the Registration Current

A sex offender shall, not later than 3 days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offense in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions the offender is rquired to register.

34 U.S.C. §20913

STATEMENT

1. Background of the Action

The issue before the First Circuit was whether the government was required to prove that the defendant "knowingly" failed to report pursuant to the requirements of the Sex Offender Registration and Notification Act ("SORNA"). United States v. Picard, No. 19-1855 (1st Cir. Apr. 14, 2021) (hereinafter "*Picard*").

On May 25, 2021, the First Circuit denied a petition for rehearing with suggestion for rehearing en banc filed by Roger Edward Picard. This petition asked the First Circuit to reconsider it's judgment and opinion affirming the district court's denial of Mr. Picard's appeal. At the First Circuit, Mr. Picard had argued, unsuccessfully, that his attempt to report to the Sheriff's office closest to his home and subsequent arrest for "knowingly" failing to report pursuant to SORNA – before he had a chance to avail himself of an opportunity provided to him by his probation officer of using a low-cost taxi to report to the correct, yet further distanced, Sheriff's office in rural Maine -- did not rise to the level of a violation of his SORNA reporting requirement. Id. slip op. at 5-9.

The uncontested facts are that Mr. Picard was released late in the evening on

July 12, 2019, a Friday. He reported to the closest Sheriff's office on July 13, 2019, a Saturday. That day he called his probation officer who subsequently informed him on Tuesday July 16, 2019, of a low-cost taxi service when she visited him. Mr. Picard set-up a taxi ride on July 16, 2019 for July 23, 2019. Mr. Picard was arrested on July 18, 2019, a Thursday.

At the nisi prius level Mr. Picard had argued that his reporting on a Saturday to the "wrong" Sheriff's office less than twenty-four hours after his release, obviated a finding that he "knowingly failed to report." He also argued that his following through on the probation officer's suggestion of a low-cost taxi service to drive him to the "correct" Sheriff's office also demonstrated a lack of a "knowing failure to report." Mr. Picard drew the district court's attention to the fact that on July 16, the probation officer had notified Mr. Picard of the low-cost taxi, and that Mr. Picard on that same day set-up a ride for July 23. Yet, the probation officer had him arrested for failing to report on July 18, the fourth business day after his release, but only the second business day after the probation officer notified Mr. Picard of the low-cost taxi service.

Given these facts, both the Maine District Court and the First Circuit found fault with Mr. Picard for "knowingly failing to report."

Mr. Picard is an elderly man who collects social security disability benefits

for both mental and physical limitations. He walks with a cane. Both the district court and the First Circuit were well aware of Mr. Picard's elderly status and disabilities. As such, Mr. Picard's argument could have been considered in tandem with 42 U.S.C. § 12132.

2. Proceedings in the district court that gave rise to the mens rea requirement

Before the district court defendant-appellant had made five points which he felt obviated a finding of "knowing" intent to violate the reporting requirement. These five points were: 1) that defendant on a Saturday traversed 16 miles in rural Maine in order to report to the Piscataquis County Sheriff's Department – the closest Sheriff's Department to his home; 2) that he immediately phoned his probation officer that the Piscataquis County Sheriff's Department had told him he needed to report to the Penobscot County Sheriff's Department; 3) that because the Penobscot Sheriff's Department was even further from the defendant's home, the probation officer the following Tuesday informed defendant of a low-cost taxi service which defendant immediately arranged on that Tuesday for the following Monday; 4) that defendant's mental and physical disabilities put him in a position where his ability to understand and follow through was seriously compromised; and 5) the government did not offer proof that Mr. Picard was told the correct place

to report. Counsel presented this array to the district court voicing the concern that finding of a "knowing" violation was tantamount to turning a "knowing" mental-state offense into a strict liability offense. In response the district judge stated that "this type of an offense" is "an analogue to strict liability offenses," and found defendant guilty of a violation on that basis by a preponderance of the evidence. Id. (emphasis added).

Defendant repeated the voicing of this lack of a "knowing" violation carefully citing the trial record in his Brief for Appellant before the First Circuit, as follows:

> Defense counsel argued that the SORNA registration requirements this probation officer was empowered to oversee should not be viewed as a strict liability event, but, rather, the defendant's level of understanding as to registration requirements and his valiant attempt to comply with the requirements as explained to him by this probation officer, should be factored-into whether he in fact failed to comply. Revocation Transcript at 58-61. Defense counsel argued "that by the probation officer's own testimony, she ha{d} elicited a for-cause" explanation as to his fulfillment of the registration requirements. Id. 58. The defendant is a 67 year-old man, who walks with a cane and has been receiving social security disability benefits for seventeen years, who attempted to follow through with his probation officer's conveyed instructions by walking sixteen plus miles to register

as instructed within 24 hours as instructed, but, who as the probation officer stated, went to the wrong place to register, and who, as the probation officer said, had he gone to the right place, this whole proceeding would not have occurred. Id. at 58-59. Counsel stated

> ...by the probation officer's own testimony,...he's amply demonstrated for cause,...somebody in his condition – his shape, his size, his disability – he really went above and beyond the call of duty, above and beyond what most people would do....
>
> ...someone in his position could easily be misinterpreted and misconstrued in his answers. For instance, if he says I shouldn't have to register and someone takes that as a refusal, when he could be basing it on a law that changed over ten years after he was initially convicted of an offense which gave rise to the duty to register, and even though he had previously registered in Hawaii...that he could be easily misconstrued, and that he should not be forced to be deprived of his property, and that somebody with his disabilities should be given every ability to comply because he wants to comply.
>
> The mere fact that he – he undertook an 18-mile {sic} expedition for someone in his shape and size within 24 hours shows tremendous effort.
>
> ...it's a shame – this whole proceeding...that the probation officer doesn't know him, hasn't investigated him, didn't know he had a disability, doesn't know the law, doesn't know when the law changed.

Id. at 59-60. Beyond this, counsel argued that for the probation officer to arrest the defendant after having been informed that he had called the suggested free cab, and had a ride set-up for July 23, and still arrest him on July 1[8] "doesn't seem to...[be] the appropriate way to handle things." Id. at 60-61.

The Assistant United States Attorney responded by noting that the defendant had previously registered both in Massachusetts and in Hawaii, and had served an

eighteen month sentence for failing to register, knew he had to register, but [h]e went to the wrong place on a Saturday." Id. at 61. The prosecutor felt that the probation officer "gave the defendant a chance, even provided him with an avenue for free transportation and he refused to take that." Id. at 62.

Following these arguments, the court found "by a preponderance of the evidence that the defendant...committed the violations charged." Id. The court also found that "this type of an offense" is "an analogue to strict liability offenses." Id.

3. Proceedings before the First Circuit

Judge Lynch, writing for a two-judge panel at the First Circuit, did not view defendant's argument as clearly as the district court judge had in that the district judge referenced the need to prove a particular mental state. Instead, Judge Lynch re-framed Mr. Picard's argument as a request to have his failing to report be "excused" on the basis of exigent circumstances. She erroneously based this redrawing of appellant's argument as follows:

> Picard conceded to the district court that he did not register as a sex offender within the required time, but argued that his failure to register should be excused for cause because he attempted to register at the wrong Sheriff's Department.

Id. (emphasis added). In fact, however, Mr. Picard's argument was more nuanced than Judge Lynch's superficial summation. At both the nisi prius and appellate

level, Mr. Picard had argued that his undisputed actions belied a "knowing" refusal to report. These actions included: 1) attempting to report to the Sheriff's Department closest to his house, on a Saturday, which Sheriff's office was 16 miles away; 2) immediately notifying his probation officer of his mistaken belief; and 3) his following up on his probation officer's resolution of the mistaken belief, by setting up a low-cost taxi ride to the correct Sheriff's Department. Beyond these three acts of commission, defendant-appellant had specifically drawn the attention of the First Circuit to the related circumstance that Mr. Picard's ability to understand and follow through was seriously compromised by his elderly status and his long-standing determination by the Social Security Administration that Mr. Picard suffered from both mental and physical disabilities.

Petitioner informed the First Circuit that at the district court, Mr. Picard had argued that were the district court to isolate Mr. Picard's failing to report to the appropriate Sheriff's Department, and then failing to account for his three attempts to satisfy the reporting requirement, that the district court would have engaged in conflating mens rea and actus reaus and turned a "knowing" mental state violation into a strict liability offense. Before the First Circuit, in his Brief, Mr. Picard had argued:

> The district court judge stated that this allegation concerned a strict liability offense. The gravaman of the allegation, however, is that the defendant failed to comply "as directed." The "as directed" element in the

> allegation necessarily imports into the proceeding not only the nature and quality of the subject directions, but also the defendant's understanding of them. Mens rea involves the intention or knowledge of wrongdoing, whereas actus reus involves action or conduct which is in conformity with the elements of a transgression or violation. In this case the defendant's extraordinary effort to follow directions resulted in his undertaking a trip to the Piscataquis County Sheriff's Office within 12 hours of his release from incarceration. It is not hard to conclude that the defendant's action underscored a lack of intent to commit a violation, and that, perhaps, the probation officer was not clear in her directions as to the action or conduct with which defendant needed to evidence in order to comply with her instructions. Beyond this, not only defendant's trip to Piscataquis County, but also his arrangement with the low cost transportation for July 23, one day before he was to report to the probation officer, in juxtaposition to his arrest on July 18, underscores that the fault lies not with the alleged transgressor, but with the directions.

Brief for Appellant at 34-35. Judge Lynch, however, in essence, ignored appellant's argument.

4. Proceedings following petition for rehearing and rehearing en banc:

Defendant-appellant filed a timely petition for rehearing with suggestion for rehearing en banc requesting de novo review pursuant to First Circuit precedent. See Appendix A; United States v. Wright, 812 F.2d 27, 29 (1st Cir. 2016). Mr. Picard stated

> Had the First Circuit included the compete factual record in their consideration of appellant's argument, the First Circuit would have understood appellant's argument that not only did he lack the mens rea to violate his conditions of release, but also, and more importantly, he possessed the active mens rea to comply with the reporting requirement. Appellant's reporting to the wrong location on a Saturday (not a business

day), and his arrangement to get a taxi ride pursuant to probation officer suggestion, both show a clear intent to comply with the reporting condition.

Beyond the foregoing, the First Circuit assumed facts not in evidence, namely whether this disabled individual understood the probation officer's instructions. There was a clear failure to communicate in this case. The First Circuit assumed that the party delivering the communication did so intelligibly, without any proof. This led the First Circuit to the following unsubstantiated conclusion; "Picard told Probation officers Shokman and Francis that he knew he had to register but was unwilling to do so." Id. at 8. (emphasis added). The factual record does not support the emphasized portion – "but was unwilling to do" – but, in fact supports the opposite conclusion. By reporting a great distance on a Saturday, in fact, is demonstrative evidence that Mr. Picard was willing to do so. His subsequent arrangement of a taxi ride also reinforces his willingness. The general intent to comply required by SORNA was met by appellant. See United States v. Thompson, 431 Fed. App'x 2, 3-4 (1st Cir. 2011) (unpublished) (citing United States v. Stevens, 640 F.3d 48, 51)1st Cir. 2011) (cert. granted judgment vacated on other grounds, 565 U.S. 1255 (2012)). The record before the district court, therefore, was more than sufficient to conclude that appellant had tried to report.

Moreover, the First Circuit Opinion states:

> SORNA also allows for an affirmative defense when "uncontrollable circumstances prevent[] the individual from complying," the individual did not contribute to the circumstances "in reckless disregard of the requirement to comply," and then "complied as soon as such circumstances ceased to exist." 18 U.S.C. § 2250(c). As our recitation of the facts makes clear, this affirmative defense was not available to Picard on these facts.

slip op. at 8. The uncontrollable facts in this case included the taxi company scheduling. Mr. Picard did not show a reckless disregard for insisting that the taxi company comply with the probation officer's schedule....Mr. Picard was not allowed to comply as soon as the circumstances ceased to exist, because he was not allowed to. The recitation of facts set-forth by the First Circuit are, therefore, incomplete.

Appendix A at 5-8.

Petitioner now brings this petition to ask the United States Supreme Court to find that the government needed to prove that defendant "knowingly" failed to report as required by SORNA. Petitioner argues that the First Circuit conflated mens rea and actus reus by finding that a "knowing" violation of supervised release could be found, in the district court's terms, on the basis of a strict liability "analog."

The petition for panel and en banc rehearing was denied on May 25, 2021.

REASONS FOR GRANTING THE WRIT

The First Circuit in *Picard* failed to adequately address defendant Picard's concern that a violation of supervised release had occurred for "knowing" failure to register as a sex offender where defendant tried to report less than twenty-four hours post release from incarceration – and on a Saturday -- to the wrong Sheriff's office, and where he was arrested before the expiration of two days after his probation officer suggested how Mr. Picard could satisfy the reporting requirement by utilizing a low-cost taxi.

Here, the First Circuit departed from this Court's controlling principle that a "knowing" mens rea cannot be proven on the basis of strict liability criteria.

Beyond this, the First Circuit in *Picard* has added to the confusion among the circuit courts by affirming the district court's choice of ignoring consideration of mens rea – the elderly and disabled defendant's mental state. The Court of Appeals erred in affirming this choice.

The district court conflated mens rea and actus reus.

Review is necessary to compel compliance with the standard et out in

Rehaif v. United States, 588 U.S. ___ (2019), in favor of a presumption of "scienter," in that a "knowing" mens rea must be proven on the basis of a "knowing" mens rea criteria and not a strict liability standard.

I. Review is necessary to clarify and compel compliance with the standard set out in Rehaif, in favor of a presumption of "scienter," in that a "knowing" mens rea must be proven on the basis of a "knowing" mens rea criteria and not a strict liability standard.

A The First Circuit Decision Fails to Properly Apply the Rehaif Standard As Applied To Knowingly Failing To Violate A Condition Of Release.

In Rehaif v. United States, 588 U.S. ___ (2019), this Court held that when "a criminal statute requires the Government to prove that the defendant acted knowingly...that Congress intends to require a defendant to possess a culpable mental state....normally characterized ...as a presumption in favor of "scienter"....even when Congress does not specify any scienter in the statutory text." Rehaif, slip op. at 3-4. This Court stated that "the presumption applies with equal or greater force when Congress includes a general scienter provision in the statute itself." Id. at 4 *citing* ALI, Model Penal Code § 2.02(4), p. 22 (1985). The statute at issue in Rehaif – 18 U.S.C. § 924(a)(2) – specifically mentioned the text "[w]hoever knowingly violates." Id. This Court stated that in this text the term "knowingly" modifies the verb "violates" and its direct object, which "turns on

what it means for a defendant to know that he has violated the statutory command in question." Id. Because Rehaif requires that the defendant "knew he violated the material elements...," "[s]cienter requirements advance this basic principle of criminal law by helping to 'separate those who understand the wrongful nature of their act from those who do not.'" Id. at 4-5 *citing* United States v. X-Citement Video, 513 U.S. 64, 72-73 n. 3, 115 S.Ct. 464, 130 L.Ed.2d 372. Given the statute in Rehaif, this Court stated that "[a] defendant who does not know that he is an alien 'illegally or unlawfully in the United States' does not have the guilty state of mind that the statute's language and purposes require." Id. at 7. As a consequence, "a defendant could be convicted only if he violated the prohibition on firearm possession 'knowingly." Id. at 7.

Similarly, the statute in question here states:

> (a) In General – Whoever
> (1) is required under the Sex Offender Registration and Notification Act;
> (2)
> (A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
> (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;
> shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. §2250 – Failure to Register -- (emphasis added).

The presumption of scienter should have applied in Mr. Picard's case because Congress specifically included a scienter provision in the statute itself. As in Rehaif, the term "knowingly" modifies the verb "fail" and its direct object. This basic principle of criminal law requires that Mr. Picard knew he violated his reporting requirement. Notwithstanding Judge Lynch's statement that Mr. Picard "conceded" a failure to report, Mr. Picard was in fact evincing a desire to comply with the reporting requirement. Judge Lynch's editing of the factual record is fictitious.

This Court recently revisited the question of the proper mental state needed for a conviction when the petitioner questioned at the district court whether he had evinced the requisite mens rea in Borden. Borden v. United States, No. 19-5410, 593 U.S. ___ (June 10, 2021). In Borden this Court explicated the hierarchy of mental states as follows:

> Purpose and knowledge are the most culpable levels in the criminal law's mental-state "hierarchy." United States v. Bailey, 444 U.S. 394, 404 (1980). A person acts purposefully when he "consciously desires" a particular result. *Ibid*. (internal quotation marks omitted). See, ALI, Model Penal Code § 2.02(2)(a) (1985). He acts knowingly when "he is aware that [a] result is practically certain to follow from his conduct," whatever his affirmative desire. Bailey, 444 U.S., at 404. (internal quotation marks omitted). See, ALI, Model Penal Code § 2.02(2)(b)(I). We have characterized the distinction between the two as "limited," explaining that it "has not been considered important" for many crimes. Bailey, 444 U.S., at 404. (internal quotation marks omitted). See, ALI, Model Penal Code

> comment 2 pp. 233-234 (calling the distinction "narrow" and often "inconsequential"). A person who injures another knowingly, even though not affirmatively wanting the result, still makes a deliberate choice with full awareness of consequent harm. See Bailey, 444 U.S., at 403-404.

Borden slip op. at 3. The Court then applied these definitions to the statutes in question in that "a purposeful or knowing mental state - [is] a deliberate choice of wreaking harm on another, rather than mere indifference to risk." Id. at 10, 3-13. The Court concluded that use of the word "knowing" was "not window dressing: it is the 'critical' text for deciding the level of mens rea needed." " Id. at 13 *citing* Leocal v. Ashcroft, 543 U.S. 1, 9 (2004).

The First Circuit in *Picard* neither addressed whether petitioner made a "deliberate choice" to fail to report, but ignored the critical text of "knowing" in the statute. Petitioner had argued that his efforts to report evidenced a deliberate choice to register and not fail to register. Judge Lynch at the First Circuit, however, intoned the trial judge's assessment that "knowing" in this case was merely an "analog of strict liability." Judge Lynch erroneously stated that petitioner had "conceded' failing to report, and therefore, affirmed the district court's finding of a violation. In other words, irrespective of the facts of the case, the mere act of not reporting to the correct Sheriff's Department for judge Lynch equated to a knowing violation of failing to report. Despite reframing petitioner's failure to report to the correct Sheriff's Department, Judge Lynch completely

ignored the fact that the probation officer had offered petitioner the opportunity to utilize a low-cost taxi to report to the correct Sheriff's Department and then reneged on her offer. She had him arrested before he could complete the low-cost taxi ride that the probation officer had offered. Citing an unpublished case as her sole authority, Judge Lynch held that failing to report required only general intent. Then Judge Lynch without any basis in the record or even argued by the government, stated that petitioner "was unwilling" to report. There is absolutely no support for this statement by Judge Lynch. None. It was a fictional assessment made up in Boston, not in Maine. Worse, Judge Lynch stated that any excuse that petitioner might have had was not available to him because the facts causing the inability to report, presumable ceased to exist and petitioner did not avail himself at that time to successfully report. Yet, Judge Lynch made no reference to the offered taxi ride, the arrangement by petitioner of that taxi ride, and that the probation officer's offer was reneged on by the probation officer who had petitioner arrested before the taxi ride could be consummated.

The gap in logic demonstrated in Judge Lynch's affirmance, is probably a consequence of the fact that Judge Lynch could not justify her result. Incredulously, even though petitioner pled to the allegation, Judge Lynch stated that "the record clearly supports the district court's conclusion that Picard at no

point accepted responsibility for not registering." Beyond being incorrect, Judge Lynch's assertion is a work of fiction.

B The First Circuit Decision Conflicts With The Decisions Of Other Circuits Which Recognize A Knowingly Mental State.

In the following circuits a presumption in favor of "scienter" presumably induced the reasoning that a "knowing" mens rea must be proven on the basis of a "knowing" mens rea criteria and not a strict liability standard. Other circuits have also espoused the idea that the judge has an affirmative fact-finding responsibility to determine mens rea.

1. United States v. Berrios-Centano, 250 F.3d 294 (5th Cir. 2001)

The Fifth Circuit in Berrios-Centano correctly explicates the need to assess the proper mental state in deciding whether a violation of a statute has occurred. The Fifth Circuit affirmed a statutory violation, but only after having found that the statute in question necessitated a finding of "general intent" based on an inference that the applicable statute was silent on the issue. United States v. Berrios-Centano, 250 F.3d 294, 296-297 (5th Cir. 2001). The Fifth Circuit stated that....

> By any standards, the mens rea element is "material" or essential." ....As for whether § 1326 requires general intent or strict liability, our circuit's jurisprudence indicates that general intent is the default mental standard....The Supreme Court and our prior caselaw also counsels us that

> strict liability should be prudently and cautiously attributed to criminal statutes....
> ...specific intent concerns willful and knowing engagement in criminal behavior, while general intent concerns willful and knowing acts.

United States v. Berrios-Centano, 250 F.3d 294 (5th Cir. 2001) (citations omitted).

2. Pierre v. U.S. Attorney General,879 F.3d 1241 (11th Cir. 2018)

The Eleventh Circuit in Pierre v. U.S. Attorney General, also had occasion to apply a mental state to a possible criminal violation. Pierre v. U.S. Attorney General,879 F.3d 1241 (11th Cir. 2018). The Eleventh Circuit noted that where the plain terms of a statute requires a knowing mental state this requirement means that a "defendant must have had specific intent." Id. at 1252.

C. Summation

The decisions involving differing approaches in circuit courts processes utilized by the district court impeded ascertainment of the elderly and disabled defendant's mental state.

The ultimate question is how can a court find a person knowingly failed to report, when, in fact, he not only tried to report as directed, but also, did report, just to the "wrong" Sheriff's office? The First Circuit conflated a "knowing" conflated mens rea and actus reaus of reporting.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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