

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

APPENDIX

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APPENDIX A

United States Court of Appeals For the First Circuit

No. 20-2154

UNITED STATES,

Appellee,

v.

ROGER EDWARD PICARD,

Defendant - Appellant.

Before

Thompson, Kayatta and Barron,
Circuit Judges.

JUDGMENT

Entered: September 8, 2021

Defendant-appellant Roger Edward Picard challenges the sentence imposed by the district court upon revocation of his supervised release, arguing that the upward-variant sentence imposed was both procedurally and substantively unreasonable. While Picard's unpreserved procedural reasonableness challenge is reviewed for plain error, we assume favorably to Picard that review of his substantive reasonableness challenge is for an abuse of discretion. See United States v. Alejandro-Rosado, 878 F.3d 435, 439-40 (1st Cir. 2017) (standard of review and general principles). Picard also challenges the district court's denial of his December 2, 2020, Fed. R. Crim. P. 35(a) "motion for resentencing." We assume that each of Picard's challenges is properly before the court. See generally Fed. R. App. P. 3 & 4(b).

Having carefully reviewed the record and the parties' submissions on appeal, we conclude that the district court did not abuse its discretion or otherwise err in imposing a 24-month term of imprisonment or in denying the Rule 35(a) motion for lack of jurisdiction. See, e.g., United States v. Marquez-Garcia, 862 F.3d 143, 147 (1st Cir. 2017) (upholding 24-month sentence as procedurally and substantively reasonable where district court noted the principal factors upon which it relied, including the need to deter further criminal conduct by a defendant who had engaged in recidivist behavior within a year of being placed on supervision, which "combined to make manifest a gross disrespect for the conditions of his supervision and constituted hard evidence that the [defendant's] earlier incarceration had not taught him any lasting lessons");

United States v. Mercado-Flores, 872 F.3d 25, 28-29 (1st Cir. 2017) (Fed. R. Crim. P. 35(a) standard of review and general principles). The motion to expedite is denied as moot in light of the foregoing.

Affirmed. See 1st Cir. R. 27.0(c).

By the Court:

Maria R. Hamilton, Clerk

cc:

Julia M. Lipez
Andrew Kenney Lizotte
Noah Falk
William Stuart Maddox
Roger Edward Picard

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Appendix B

1

4 UNITED STATES OF AMERICA)
5)
6 VS.) CRIMINAL ACTION
7) Docket No. 1:18-cr-00057-LEW-1
8 ROGER EDWARD PICARD,) FINAL REVOCATION HEARING
9)
10 Defendant.)

11 | TRANSCRIPT OF PROCEEDINGS

12 Pursuant to notice, the above-entitled matter came on
13 for FINAL REVOCATION HEARING before the HONORABLE LANCE E.
14 WALKER, in the United States District Court, Bangor, Maine, on
15 the 1st day of December, 2020, at 10:07 a.m.

18 | APPEARANCES:

19 For the Government: Andrew K. Lizotte, Esquire
20 For the Defendant: William S. Maddox, Esquire
21 For U.S. Probation: Bryce Turgeon

25 Proceedings recorded by mechanical stenography; transcript produced by computer.

1 (All participants via Zoom; defendant present.)

2 THE CLERK: Good morning. The U.S. District Court
3 is now in session. The Honorable Lance Walker presiding.

4 THE COURT: Good morning, everyone. This is the
5 matter of United States versus Roger Picard, Case
6 No. 18-cr-57.

7 I'll have counsel introduce themselves for the record,
8 beginning with Mr. Lizotte.

9 MR. LIZOTTE: Good morning, Your Honor. Andrew
10 Lizotte for the government.

11 THE COURT: Good morning.

12 MR. MADDOX: Good morning, Your Honor. William
13 Maddox for the defendant.

14 THE COURT: Good morning. And United States
15 Probation Officer Bryce Turgeon is also joining us this
16 morning.

17 The revocation hearing this morning is being conducted
18 under the findings and authorizations of the so-called CARES
19 Act. Any persons who may have been granted remote access to
20 this proceeding are reminded of the rule prohibiting recording
21 and rebroadcasting any federal court proceedings in any
22 fashion whatsoever. Any violation of that rule will be met
23 with sanctions from the court.

24 Mr. Maddox, have you had an opportunity to discuss with
25 Mr. Picard his decision to waive his right to be physically

1 present?

2 MR. MADDOX: Yes, Your Honor, I have, and we've gone
3 over the colloquy.

4 THE COURT: All right. And based on your
5 conversation with Mr. Picard, is it your understanding that he
6 intends to waive his right to be physically present this
7 morning?

8 MR. MADDOX: Yes, Your Honor, it is.

9 THE COURT: And do you believe that any such waiver
10 by him will be a knowing and voluntary waiver of that right?

11 MR. MADDOX: Yes, Your Honor, I do.

12 THE COURT: Very good.

13 Mr. Picard, if at any time during today's hearing you'd
14 like to speak with your lawyer, please let me know and I'll
15 give you that opportunity. Do you understand?

16 THE DEFENDANT: Yes.

17 THE COURT: Do you understand that you're not
18 required to be sentenced by -- to have -- to appear for your
19 revocation hearing by video, but could instead insist on your
20 right to be physically present?

21 THE DEFENDANT: Yes, I understand.

22 THE COURT: You understand that if you decide today
23 that you've changed your mind about being physically present
24 for your revocation hearing and sentencing, you could still
25 assert that right?

1 THE DEFENDANT: Yes.

2 THE COURT: And if you decided that's what you
3 wanted to do today, I would continue today's hearing, meaning
4 I'd postpone it, Mr. Picard. I wouldn't be able to tell you
5 exactly when that would happen. We'd have to take into
6 account the current coronavirus pandemic and when it would be
7 safe for all of us to gather in the courtroom. Do you
8 understand?

9 THE DEFENDANT: Yes.

10 THE COURT: Have you discussed with your lawyer your
11 decision to appear by videoconferencing today for your
12 revocation hearing?

13 THE DEFENDANT: Yeah, we went all over this.

14 THE COURT: Is that a yes?

15 THE DEFENDANT: Yes.

16 THE COURT: All right. And did Mr. Maddox describe
17 to you your right to be physically present?

18 THE DEFENDANT: Yes.

19 THE COURT: So I understand from Mr. Maddox that
20 you've decided to waive, meaning give up, your right to be
21 physically present; is that true?

22 THE DEFENDANT: Yes.

23 THE COURT: Has any promise been made to you in
24 order to get you to give up your right to be physically
25 present?

1 THE DEFENDANT: No.

2 THE COURT: Has anyone threatened you or pressured
3 you in order to get you to give up your right to be physically
4 present?

5 THE DEFENDANT: No.

6 THE COURT: Do you understand that the fact that
7 this proceeding will be conducted by videoconference does not
8 diminish, does not lessen, its legal significance?

9 THE DEFENDANT: Yes.

10 THE COURT: Do you understand that you'll be bound
11 by what happens during today's proceeding?

12 THE DEFENDANT: Yep.

13 THE COURT: You're currently appearing by
14 videoconference, Mr. Picard, and as such, I'm not able to see
15 everything and everyone in the room with you. Is there
16 anything or anyone in the room with you exerting any influence
17 over you to get you to give up your right to be physically
18 present?

19 THE DEFENDANT: No, nobody's here.

20 THE COURT: So considering all that I've explained
21 to you, Mr. Picard, do you still wish to give up your right to
22 be physically present for today's proceeding?

23 THE DEFENDANT: Yeah, I'm giving up the right to be
24 there.

25 THE COURT: Okay. Mr. Lizotte, does the government

1 take any particular position on Mr. Picard's decision to
2 appear by video today?

3 MR. LIZOTTE: We think it's appropriate, Your Honor.
4 Thank you.

5 THE COURT: Thank you.

6 Mr. Maddox, anything to add?

7 MR. MADDOX: No, Your Honor. Thank you.

8 THE COURT: All right. I conclude that the
9 defendant has voluntarily and knowingly waived his right to be
10 physically present for today's proceeding because under the
11 CARES Act, he's consented to proceeding by videoconference
12 after consultation with counsel.

13 Mr. Picard, the overall purpose of the hearing today is
14 for me to advise you of your rights and to give you the
15 opportunity to have a hearing on the petition to revoke your
16 probation. I'm going to be asking you and your lawyer some
17 questions, and I want to be sure that you've read and
18 understand the petition to revoke your probation, your
19 supervised release, and the revocation report. If there's --
20 I want to make sure that there's nothing that interferes with
21 your ability to understand what's taking place today, and
22 overall, I want to be sure that you're afforded every right
23 that the law allows.

24 My first question, sir, is, are you taking any
25 medications?

1 THE DEFENDANT: No, I stopped taking all my
2 medication.

3 THE COURT: Are you -- are these medications that
4 are still being prescribed to you, but you're refusing to
5 take?

6 THE DEFENDANT: I'm refusing to take them.

7 THE COURT: All right. And do those med -- do --
8 your refusal to take those medications, does that impair your
9 ability to understand what's taking place today?

10 THE DEFENDANT: No, I understand what's going on.
11 It's only for heart trouble, diabetes, and I've got COPD real
12 bad of the lungs.

13 THE COURT: Okay.

14 THE DEFENDANT: Usually have a nebulizer with me,
15 but not here.

16 THE COURT: All right. Very good. In the last 24
17 hours, have you consumed any drugs?

18 THE DEFENDANT: No.

19 THE COURT: In the last 24 hours, have you consumed
20 any alcohol?

21 THE DEFENDANT: No.

22 THE COURT: Can you read and write?

23 THE DEFENDANT: Yeah.

24 THE COURT: Is there anything, Mr. Picard, that
25 might interfere with your ability to hear or understand what's

1 being said today?

2 THE DEFENDANT: No.

3 THE COURT: And do you authorize Attorney Maddox to
4 act and speak on your behalf throughout the hearing?

5 THE DEFENDANT: Yes.

6 THE COURT: All right. Mr. Maddox, have you read
7 and discussed with Mr. Picard the petition which sets forth
8 the alleged violations of supervised release?

9 MR. MADDOX: Yes, Your Honor, I have.

10 THE COURT: Did you have enough time to do that?

11 MR. MADDOX: Yes, Your Honor.

12 THE COURT: Are you satisfied that he understands
13 the -- the report?

14 MR. MADDOX: Yes, Your Honor.

15 THE COURT: Mr. Picard, have you read the revocation
16 report in its entirety?

17 THE DEFENDANT: Yeah, I -- my attorney sent me some
18 paperwork on what the story was going on.

19 THE COURT: And did you read the revocation report?

20 THE DEFENDANT: I don't remember. If I had --

21 THE COURT: Did you discuss the revocation report
22 with Mr. Maddox?

23 THE DEFENDANT: I think we talked about that. I
24 can't remember now. I've got so much stuff on my brain here,
25 processing losing my house.

1 THE COURT: Right. Well, if you haven't read the
2 revocation report, I'm not going to be able to move forward
3 today. So I can give you and Mr. Maddox an opportunity to
4 discuss it in a breakout room, if you'd like to do that?

5 THE DEFENDANT: Can't you just give me a quick
6 explanation of it?

7 THE COURT: I'm going to have the prosecutor do that
8 in just a moment, but I'm going to assume -- and, Mr. Maddox,
9 maybe you could help me -- that Mr. Picard and you have talked
10 about the revocation report.

11 MR. MADDOX: Yes, Your Honor. The paperwork that he
12 mentions that I sent to him was the revocation report, and
13 we've gone over it several times in meetings, so --

14 THE COURT: Okay.

15 MR. MADDOX: -- I may not have labeled it as the
16 revocation report, but we -- we have gone over it several
17 times.

18 THE COURT: Does that refresh your memory,
19 Mr. Picard?

20 THE DEFENDANT: Yeah, that's right.

21 THE COURT: Okay. And did you have enough time to
22 discuss the revocation report with Mr. Maddox?

23 THE DEFENDANT: Yes, I have.

24 THE COURT: And did he answer all of your questions
25 to your satisfaction?

1 THE DEFENDANT: Yeah, he did.

2 THE COURT: All right. So let me advise you of your
3 rights today, Mr. Picard. You have the right to be
4 represented by a lawyer throughout today's proceedings. Do
5 you understand?

6 THE DEFENDANT: Yes.

7 THE COURT: Do you understand that if -- you have
8 the right to a hearing to contest the charges, to present
9 evidence on your own behalf, and that includes the right to
10 subpoena witnesses to testify for you? Do you understand?

11 THE DEFENDANT: Yes.

12 THE COURT: You understand that if the prosecutor
13 called witnesses against you at a hearing, you would have the
14 right to have your lawyer confront and cross-examine, meaning
15 question, every single witness that the government called and
16 to object to witnesses and to object to any evidence that the
17 government offered. Do you understand that?

18 THE DEFENDANT: Yes.

19 THE COURT: Do you understand that you have the
20 right not to testify at the hearing, and if you do not
21 testify, that would not be held against you?

22 THE DEFENDANT: Yes, I'm going to have the lawyer do
23 all the talking.

24 THE COURT: And if you chose to testify at a
25 hearing, you would be subject to cross-examination by the

1 government. Do you understand that?

2 THE DEFENDANT: Yes.

3 THE COURT: You understand, Mr. Picard, that if you
4 admit to the charges this morning, there will be no hearing on
5 the charges and I'll find that you have committed the
6 violations and you'll be subject to sentencing?

7 THE DEFENDANT: Yes.

8 THE COURT: Thank you.

9 Mr. Lizotte, would you summarize the charges for me?

10 MR. LIZOTTE: Yes. Thank you, Your Honor. There
11 are six alleged violations of Mr. Picard's supervised release
12 that comprise the report by probation.

13 The first is the mandatory condition that he not commit a
14 federal, state, or local crime. So with that, it's alleged
15 that on June 22nd of this year, Mr. Picard again committed the
16 offense of failure to register as a sex offender under
17 Title 18 2250 by failing to notify the sex offender registry
18 of his change of address within three business days. The
19 underlying facts supporting that are in the probation report.

20 Violation No. 2 largely overlaps with that, Your Honor;
21 it's the failure to comply with the SORNA registration
22 requirements. Essentially, the same thing, failure to
23 register and update the registry with his address.

24 Condition 3 arises from Mr. Picard's unwillingness to
25 provide information about individuals with whom he was

1 associating; that was condition 12.

2 Four -- and I just want to alert the court that there has
3 been discussion of probation consenting to dismissal of
4 violation 4 with respect to special condition No. 4 -- that
5 being that he failed to submit to a polygraph test also in
6 June of 2020.

7 Violation 5 is a violation of special condition No. 7,
8 essentially arising from Mr. Picard drinking a 12-ounce beer
9 in April of this year.

10 And the last alleged violation is special condition 9,
11 that being that Mr. Picard was supposed to reside in a
12 community confinement residential facility. As alleged, he
13 only did that for several days before being kicked out for
14 noncompliance with some of the COVID-related restrictions and
15 general obstinacy while he was there.

16 THE COURT: Thank you.

17 Mr. Picard, do you understand the charges as summarized
18 just now by the prosecutor?

19 THE DEFENDANT: Where was I supposed to have been
20 kicked out of, the halfway house?

21 MR. LIZOTTE: Your Honor --

22 THE COURT: I'm sorry. I -- I didn't hear that.

23 MR. LIZOTTE: -- I -- I could answer that if you'd
24 like, Your Honor.

25 THE COURT: I didn't hear the question, first of

1 all.

2 THE DEFENDANT: What was that for, the -- the
3 halfway house I got kicked out?

4 THE COURT: Mr. Lizotte?

5 MR. LIZOTTE: Yes, on April 20 of this year, you
6 were removed from a residential facility for failing to follow
7 the rules. You were only there for several days.

8 THE COURT: All right. Mr. Picard -- thank you,
9 Mr. Lizotte.

10 Mr. Picard, do you understand the charges as summarized
11 by the prosecutor just now?

12 THE DEFENDANT: I was -- I followed the rules to
13 that halfway house. On the fourth day I was there --

14 THE COURT: Mr. Picard -- Mr. Picard, my question
15 is, do you understand the charges as summarized by Mr. Lizotte
16 just now?

17 THE DEFENDANT: I --

18 THE COURT: Not whether you -- I'm going to ask you
19 whether you dispute the charges in a moment. Do you
20 understand the charge?

21 THE DEFENDANT: I understand the charge.

22 THE COURT: Okay. Now, do you wish to have a
23 hearing on whether you committed the charges, or do you wish
24 to admit to the charges?

25 THE DEFENDANT: Dismiss it.

Q-13

1 THE COURT: I'm sorry?

2 THE DEFENDANT: I said dismiss it because it didn't
3 -- I was in that halfway house --

4 THE COURT: Mr. Picard, Mr. Picard, hold on just a
5 moment. Let me interrupt you for just a moment.

6 Mr. Maddox, I'm going to put you and Mr. Picard in a
7 breakout room for just a moment. My -- I was under the
8 impression that this morning Mr. Picard was prepared to admit
9 to the violations. It does not appear that he was prepared to
10 admit to the violations. So if that still is the status quo
11 after you confer with Mr. Picard, I'm inclined to continue
12 today's hearing. So I'm going to ask that you speak to
13 Mr. Picard for a few moments.

14 Julie, do you mind --

15 MR. MADDOX: Yes, Your Honor.

16 THE COURT: -- putting them into a sidebar?

17 THE CLERK: Not a problem, Judge.

18 THE COURT: Thank you.

19 (Mr. Maddox and defendant entered a breakout room from
20 10:20 a.m. to 10:22 a.m.)

21 THE COURT: All right. It looks like everyone is
22 back. We're back on the record.

23 Mr. Maddox, did you have an opportunity to speak with
24 your client?

25 MR. MADDOX: Yes, Your Honor, I did.

1 THE COURT: Do you believe we're prepared to
2 proceed?

3 MR. MADDOX: Yes, Your Honor, I do.

4 THE COURT: Very good.

5 Mr. Picard, do you wish to have a hearing on whether you
6 committed the charges, or do you wish to have -- do you wish
7 to admit to the charges?

8 THE DEFENDANT: All right. I'll admit to the
9 charges.

10 THE COURT: All right. And you understand that by
11 admitting to the charges, I find that you violated your
12 supervised release and you'll be subject to sentencing?

13 THE DEFENDANT: Yes.

14 THE COURT: I find that the defendant has knowingly
15 and voluntarily waived his right to a hearing and that there's
16 a sufficient factual basis for the revocations.

17 Mr. Maddox, are there any challenges to the report?

18 MR. MADDOX: No, Your Honor. Thank you.

19 THE COURT: So let me just summarize the guideline
20 range. This is a grade B violation, criminal history category
21 of III, which gives us a guideline sentencing range of 8 to 14
22 months.

23 Are there any challenges to the guideline sentencing
24 range as I've just stated it, Mr. Lizotte?

25 MR. LIZOTTE: No, Your Honor.

1 THE COURT: Mr. Maddox?

2 MR. MADDOX: No, Your Honor.

3 THE COURT: All right. Mr. Lizotte, would you like
4 to be heard on sentencing?

5 MR. LIZOTTE: Yes, Your Honor. Thank you very much.

6 Your Honor, the -- the United States concurs in the
7 recommendation for a term of incarceration of 18 months here,
8 which, as the court just noticed, is slightly outside of the
9 recommended guideline range. However, given the consistency,
10 the fact that this is the second supervised release violation,
11 and it does arise from the same exact underlying offense of
12 conviction, we do think that a slight upward departure is
13 warranted.

14 Based on the facts comprising the report, there's a
15 really troubling trajectory here that shows a disregard for
16 the law, a real aggressive refusal to comply with the
17 conditions imposed by the court, and a direct, and oftentimes
18 personal, antagonism with the probation office itself here.

19 I'd like to note that Mr. Picard was not long a free man
20 before these problems began arising. Obviously, he was
21 incarcerated for nine months on his initial supervised release
22 violation. He got out, I believe it was, April 16th and sent
23 directly to a residential reentry center.

24 To clarify, the facts that gave rise to him being removed
25 from that facility were that he was supposed to quarantine for

1 14 days, and as is contained in the report, obviously, this is
2 a very touchy time, a time where it's important to comply with
3 those quarantine obligations, and he apparently left his room.
4 He was not supposed to. There was some back and forth that's
5 detailed in the report, and as a result of that, he was no
6 longer in that facility. So he was supposed to be in there
7 for two months; he lasted just about two days.

8 And then that starts this -- this path towards where we
9 are here today, where there's a continued refusal to follow
10 basic instructions, and I would say very clear and concrete
11 instructions, provided by the probation office. It starts --
12 there's admission to drinking an alcoholic beverage. Maybe
13 standing alone not as troubling. But then it feeds into this
14 larger narrative and pattern of behavior where he ceases to
15 let the Maine Sex Offender Registry and the Portland Police
16 Department know exactly where he's residing beginning in May.
17 At least a month and a half go by. That is the essence of the
18 underlying offense of conviction here, the 2250(a) offense.
19 So what I believe, and I would submit the record shows here,
20 is just a knowing refusal to comply not just with his
21 supervised release conditions, but with the law itself.

22 And throughout that course of conduct, there's some very
23 disturbing exchanges that happened with the probation office,
24 and I'm directing the court's attention specifically to June
25 of this year. There's yelling at the probation officer that

1 Mr. Picard wanted to go back to prison and that he wished
2 Timothy McVeigh had killed more federal agents. The next day,
3 on June 12th, he says he's going to reach out to his friends
4 in the Mafia to help him with the situation. Now, these are
5 overtly threatening statements made to a federal officer. It
6 just continues the pattern of disregard, and consistent
7 disregard, for the law and the conditions of his release.

8 June 17th, he moves out of this rooming house for good.
9 He had been there for about a month and a half. He actually
10 does have means. He had several thousands dollars in a bank
11 account. So he was able to avail himself of those, if he
12 wanted, which is equally disturbing because it gives him some
13 sort of mobility throughout the community. He has no contact
14 with the registry. His probation officer tells him time and
15 again what he needs to do to comply with the law. He
16 ultimately states that he was fine with being charged with a
17 new crime and that he wanted to go back to jail. So here we
18 are again today.

19 I would note that there is a psychological evaluation
20 before the court that was filed under seal. I'd like to end
21 by saying a few things about that.

22 Obviously -- excuse me, Your Honor -- obviously, the
23 Rules of Evidence under 1101 specifically carve out, you know,
24 expert admission and the Rules of Evidence in the context of
25 this proceeding, but I would argue in any proceeding if the

1 court were to consider this evaluation as a source of
2 mitigating evidence, it should not ascribe very much weight to
3 it. As far as I can tell from the evaluation itself, the
4 entirety of the factual matter that was considered by the
5 doctor here was three interviews. There's no indication at
6 all that the back and forth, the discovery that was provided
7 by probation to Attorney Maddox and his client was considered
8 here. So you have an extremely one-sided presentation of who
9 Mr. Picard is and his possibilities for complying with
10 conditions, and I think that disconnect is really clear when
11 the court looks at the -- the summary on the final page of it.

12 Leading up to that, even the evaluator notes that there
13 -- on Mr. Picard's part, there's little to no trust in the
14 criminal justice system. He notes anger, agitation, and being
15 loud, and so it -- it's surprising that the -- the summary
16 that is before the court right now concludes with the
17 recommendation that with clearly defined and concrete
18 instructions and initial support, Mr. Picard would likely have
19 been able to meet the requirements of his probation. Of
20 course, what the record shows is that's the exact type of
21 concrete support that he'd been getting almost on a daily
22 basis from the probation officer here.

23 The fact that the conclusion is his history appeared to
24 be showing good-faith efforts to meet the demands of his
25 probation officer, again, really flies in the face of

1 everything that is before the court on the record.

2 And, *lastly*, the conclusion that the evaluator did not
3 believe there is any reason to expect that Mr. Picard would
4 not meet the requirements of his probation in the future, I
5 would simply submit that the proof is in the pudding. It's a
6 very detailed record of noncompliance, and -- and really
7 knowing and willful noncompliance, when you get down to it.

8 So with that, Your Honor, we do concur with probation's
9 recommendation of an incarcerative sentence of 18 months. I
10 would note that there's a recommendation that supervised
11 release terminate. That is somewhat unique in a sex offender
12 case. However, it's my understanding that it's simply a
13 product of the fact that it appears that Mr. Picard is unable
14 and unwilling to follow any more conditions. So this really
15 is a term of incarceration recommended as a last resort.

16 Thank you, Your Honor.

17 THE COURT: Thank you, Mr. Lizotte.

18 Mr. Maddox, would you like to be heard on sentence?

19 MR. MADDOX: Yes, Your Honor.

20 First of all, I would like to say that I don't think that
21 my knowledge and understanding of the psychiatric profession
22 and psychological profession are sufficient to transplant or
23 replace the professional opinions of someone who is a -- is a
24 licensed individual in the state of Maine, and I'm not going
25 to substitute my judgment for his.

1 I would say, however, that the concrete sentence that --
2 that Mr. Picard needs -- communicates on a concrete level
3 stems directly and in contradiction to what Mr. Lizotte said
4 from the fact that he reported, within 12 hours initially, to
5 the wrong county and then he was -- he immediately notified
6 his probation officer, and she said, well, line up a cab.
7 Here's a cab, call them. He called them, and they set it up
8 for five days in advance. So he complied with the concrete
9 instruction. And two days later, before he had an opportunity
10 to follow through on that cab ride, he was arrested. So I
11 think that instead of what Mr. Lizotte says, I think the
12 report substantiates this.

13 And in addition, quite obviously, Mr. Picard was honest
14 with the psychologist when he interviewed him. Otherwise, he
15 wouldn't have come up with -- with what he came up with, and
16 -- which does jibe with -- with the probation officer's
17 reports. So I would say that -- his history also is that he
18 had a charge 38 years ago, and he hasn't -- except for these
19 probation revocations, hasn't been charged with anything
20 since. So he actually does have a history of compliance or --
21 or nonlegal matters.

22 He -- he -- from the report, he's a semiliterate man;
23 he's indigent; he's physically disabled, physically limited,
24 maybe psychologically, mentally limited; has no car or
25 license; lives in a shack off the grid in rural Maine; and --

1 and, again, tried to register and tried to follow through with
2 the requirements.

3 The officer -- the psychologist then says that he can't
4 live in a city and that that was a difficult situation for
5 him. What Mr. Picard told me about the -- being released from
6 the halfway house was that he was sent upstairs -- and I
7 believe he stayed there four days, not two -- but he was sent
8 upstairs and he was going to stay up there, except that the
9 person who sent him upstairs said if you have any questions,
10 it's okay to come downstairs and ask them, and that's what he
11 did and that's when he got discharged because he came down
12 apparently without a mask.

13 And so it doesn't take much to try to put one's self in
14 the shoes of someone who's been incarcerated most of their
15 life, to not know about computers, to not know about advances
16 in technology, to not be able to communicate and have
17 expectations imposed on him that would be imposed on other
18 people that -- that someone, given his position of
19 semiliteracy and the other issues I've mentioned, that he
20 can't possibly conform with unless an imagination is employed
21 in the doing -- in the passing of those communications.

22 When I -- I submitted this case to the federal defender's
23 office, and they said, well, why didn't the probation officer
24 either time take him to register? And I said I don't know. I
25 -- I was asking them the same time (sic), and I never got a

1 straight answer to that. And I asked why couldn't they --
2 when he was incarcerated the first time, why couldn't they
3 register him then? And the Somerset County Jail said that
4 that's impossible, that they don't have the facility to do
5 that. So that it's not like he hasn't tried to comply with
6 the registration requirements.

7 It just seems to be a waste of time to incarcerate this
8 person any longer. It -- it seems to me that we would agree
9 with the termination of supervised release. The guide --
10 advisory guideline range is 8 to 14 months. I believe that
11 the lowest end of that is more appropriate than to go above
12 it, whether slightly or completely all the way to the maximum.

13 It's -- it just seems to me that this -- this person is
14 not -- is being judged on a -- on a one-size-fits-all kind of
15 analysis and completely ignoring the special needs and
16 requirements that -- that he presents with. And I think that
17 the -- the report by Dr. Devine is 100-percent accurate, and I
18 think that it shows that there are times when Mr. Picard
19 exaggerates in order to get attention, and -- and I'll leave
20 it at that.

21 He has additional issues which the court may or may not
22 be aware of. He has been put on a diabetic meal plan at the
23 facility, and he finds that that is a little bit upsetting to
24 him. He also had somebody at the facility who would lock him
25 in his room any opportunity they got a chance. So the other

1 inmates have not been terribly well disposed towards him while
2 he's there, and I think that that bothers him, and it doesn't
3 lawyers, but it does someone in his situation, or it may not
4 probation officers or anyone involved in the law. It's that
5 the SORNA requirement changed 16 years after the initial
6 sentence, and for someone with his personality and profile, he
7 doesn't understand about ex post facto laws, overcoming
8 ex post facto laws, how that can all -- all happen. He's more
9 concrete in that, well, this condition was imposed 16 years
10 later.

11 And he repeatedly says that when he moved from Hawaii,
12 where he had no incidents, no trouble, no charges, no
13 violations, he was told there, when he moved back -- moved to
14 Maine, that he would not have to report, and that was an
15 error, that was wrong, but to a concrete thinker, this is what
16 he remembered. And he understands now fully, in my view,
17 everything that he's being charged with and all of the
18 violations.

19 I -- I just think that at 69 years old with someone in
20 his profile that a sufficient sentence is time served. He's
21 been there for close to six months, five and a half months,
22 and if he were given the low end of the advisory guideline
23 range, he would probably serve about time served, I think,
24 maybe a little -- a month longer, and -- and that sentence
25 would not be greater than necessary for this particular

1 individual.

2 I would also say that in -- in this process -- and I
3 thought he was going to receive help in this regard, but
4 apparently not -- he knew about the taxes, and he wanted to
5 pay the taxes on his property last spring, and he wanted to go
6 through with that. Because he did not and because the Town of
7 Garland didn't know where he was, he -- the property is being
8 foreclosed. He has until December 9 to pay off that amount,
9 and I think if he's given time served, he can go do that. He
10 can go into his shack off the grid, and he will leave people
11 alone. I am -- I am certain of that because he has a history
12 of that, regardless of what Mr. Lizotte has said.

13 Thank you, Your Honor.

14 THE COURT: Thank you.

15 Mr. Maddox, I just had a couple of questions before I
16 invite Mr. Picard to allocute. Is it your experience with the
17 probation office here in Maine that they are intemperate,
18 rigid, inflexible in their approach with any of the people
19 they supervise, up to and including people with Mr. Picard's
20 profile?

21 MR. MADDOX: The answer to that, Your Honor, is that
22 the initial probation officer I had heard reports about, that
23 the answer -- from other -- from the federal defender's office
24 and others, that the answer to that question would be yes and
25 that she's no longer employed in the state of Maine, she's

1 gone to Maryland, and as the court may remember, when we were
2 in chambers, that the -- the prosecution -- Mr. Moore had
3 wanted to get the hearing done that day because she was going
4 to be leaving by the end of August.

5 With respect to other probation officers, the answer
6 would be no, that they are not rigid, they are not overly
7 demanding, but I do think that Mr. Turgeon and others have
8 been operating without the evaluation by Mr. Devine, and it's
9 very, very, very difficult, I think, to -- to learn how to
10 communicate with someone with Mr. Picard's profile. First of
11 all, it's difficult to even figure it out, to begin with, and
12 I'm not certain I have, but I -- I'm not going to substitute
13 my judgment for that of the psychologist. And so just to
14 figure it out I think would take a long time, and then to be
15 able to be creative and imaginative and try to walk in his
16 shoes, I think that's a very difficult and tall order for
17 anybody to follow.

18 THE COURT: Thank you.

19 All right. Mr. Picard, as a defendant before the court
20 for sentencing, you have the right, though not the obligation,
21 to address me if there's anything that you wish to say to me
22 at this time.

23 THE DEFENDANT: Oh, boy. I can't think of anything
24 right at the moment. My head's going around in circles right
25 now.

1 THE COURT: You're not required to say anything, but
2 if you wanted to say something before I explained my sentence,
3 I'm inviting you to do that now.

4 THE DEFENDANT: Well, the way I understand it, I'll
5 be getting too much time. I didn't refuse to register. I
6 couldn't get a ride over there. He moves me -- this last
7 parole officer moves me all the way to Portland. I live in
8 Garland. It's about a two and a half-hour drive to get to my
9 house. Puts me in a place where I've got to pay \$900 a month
10 for rent. I only make 750 a month. How do I pay rent and
11 eat? You know, and this is -- this what really got me.

12 That's all I've got to say.

13 THE COURT: Thank you, Mr. Picard.

14 All right. Anything further from the government,
15 Mr. Lizotte?

16 MR. LIZOTTE: No. Thank you, Your Honor.

17 THE COURT: Mr. Maddox, anything further from you?

18 MR. MADDOX: No. Thank you, Your Honor.

19 THE COURT: Thank you.

20 All right. I've received and reviewed the following
21 written materials in preparation for the hearing today -- the
22 petition and the revocation report. I adopt the revocation
23 report in its entirety as constituting my findings.

24 I've carefully reviewed the revocation report. I take
25 the contents of that report into account in fashioning an

1 appropriate sentence. I've also considered what I've heard
2 today from both counsel, as well as what I heard from them at
3 the presentence conference, and the allocution made by you,
4 Mr. Picard.

5 In determining sentence, I first have to consider, and
6 have considered, the sentencing range established by the
7 sentencing guidelines, and I'm also required to consider, and
8 I have considered, all other sentencing factors in accordance
9 with a federal statute.

10 The nature and the circumstance of the offenses here
11 warrant a little more discussion I think. Frankly, I agree
12 with Mr. Lizotte's presentation insofar as it characterizes
13 Mr. Picard's refusal to comply with the conditions of
14 supervised release as bordering on, if not completely
15 characterized by, a willful insistence against the court's
16 order, which was, of course, part of the original sentence.
17 Flouting of conditions of supervised release is not something
18 that I see a lot of, frankly. While I see violations of
19 conditions of supervised release, they usually come with some
20 mitigating characteristic or explanation. I find none here.

21 Supervised release conditions are, of course, primarily,
22 and ironically in this case, for the benefit of the
23 supervisee, Mr. Picard in this case, and collaterally for the
24 benefit of the public at large, and the defendant here has
25 demonstrated -- demonstrated nothing short of belligerence

1 toward those conditions, the probation officer, and this
2 court.

3 I acknowledge the report in letter form by Dr. Devine. I
4 also acknowledge, as is characteristic of such letter reports,
5 that they're only as good as the information given; the
6 analysis and conclusions are only as useful as the quality of
7 the information given to the treater. I'm giving that letter
8 report all the weight it deserves, and in this particular
9 context, it deserves something approaching zero.

10 In considering the nature of the offenses and the
11 defendant's history to arrive at a sentence that is
12 sufficient, but not greater than necessary, to correspond to
13 the need for the sentence, the criteria I find most important
14 to account for, and have accounted for, in this particular
15 case are as follows: The seriousness of the offenses. As
16 Mr. Lizotte pointed out, the violations, both as the basis of
17 the first revocation and as the basis for this revocation,
18 came very soon, within days and months, after being released
19 from custody. Despite repeated attempts by probation to work
20 with Mr. Picard before filing a petition, Mr. Picard's
21 insistence on refusing to cooperate with probation or comply
22 with his conditions persisted at length.

23 Another criteria I find most important to account for is
24 to promote respect for the law, that the court will not brook
25 the type of behavior exhibited here, to provide just

1 punishment for the offense, to afford adequate deterrence,
2 both specifically and generally in terms of Mr. Picard's
3 future decision-making and for those who might appear before
4 the court, and to protect the public from further crimes by
5 the defendant.

6 I'm going to impose a variant sentence here. It's going
7 to be an upward variant sentence based on what I view as the
8 defendant's extreme disregard for the conditions of release,
9 extreme disregard and belligerence toward those conditions and
10 every order of this court, which portends poorly for future
11 escalating criminal behavior.

12 Counsel, have I addressed each of your contentions
13 regarding sentencing, Mr. Lizotte?

14 MR. LIZOTTE: Yes, Your Honor. Thank you.

15 THE COURT: Thank you.

16 Mr. Maddox?

17 MR. MADDOX: I'm not sure. I think that -- I think
18 within the four corners of this hearing, the answer would be
19 yes.

20 THE COURT: All right. Well, the world is vexing
21 enough as it is. I can't be concerned with things beyond the
22 four corners of the hearing. That's what I'm here to preside
23 over.

24 Based on all of these considerations, I conclude that a
25 just and fair sentence is as follows: The defendant is

1 committed to the custody of the United States Bureau of
2 Prisons for a total term of 24 months, no additional term of
3 supervised release, a \$100 mandatory assessment.

4 Mr. Picard, to exercise your right to appeal your
5 conviction and this sentence, you must file with the clerk of
6 court within 14 days of today, and not thereafter, a written
7 notice of appeal. If you fail to timely file a written notice
8 of appeal, you will have given up your right to appeal this
9 sentence and conviction. If you cannot afford to file an
10 appeal, you can appeal without cost to you. On your request,
11 the clerk will immediately prepare and file a notice of appeal
12 on your behalf. Do you understand?

13 THE DEFENDANT: Yes.

14 THE COURT: The defendant is remanded to the custody
15 of the United States Marshal in execution of the sentence
16 imposed.

17 Anything further from the prosecution, Mr. Lizotte?

18 MR. LIZOTTE: No, Your Honor. Thank you.

19 THE COURT: Mr. Maddox?

20 MR. MADDOX: Your Honor, just to clarify, is -- is
21 future supervision terminated?

22 THE COURT: No term of supervised release.

23 MR. MADDOX: Okay. Thank you.

24 THE COURT: Thank you.

25 THE CLERK: Judge?

1 THE COURT: Court's in recess.

2 THE CLERK: Judge? Judge?

3 THE COURT: Yes.

4 THE CLERK: I'm sorry. I just wanted to verify
5 Count 4, Charge 4, is that dismissed?

6 THE COURT: Mr. Lizotte, you said there was some
7 discussion about dismissing Count 4. Are we, in fact,
8 dismissing Count 4?

9 MR. LIZOTTE: It's my understanding we are. If the
10 probation officer could confirm on the record, I think that
11 would be appropriate, though.

12 THE COURT: Mr. Turgeon?

13 MR. TURGEON: Yes, Your Honor, we are moving to
14 dismiss Count 4.

15 THE COURT: I take it no objection to that,
16 Mr. Maddox?

17 MR. MADDOX: No objection, Your Honor.

18 THE COURT: All right. Count 4 is dismissed. Thank
19 you, Julie.

20 Court's in recess.

21 (Proceedings concluded at 10:51 a.m.)

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CERTIFICATION

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I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

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/s/ Julie G. Edgecomb
Julie G. Edgecomb, RMR, CRR
Official Court Reporter

March 5, 2021

Date

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Q-33

Appendix C

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA)
)
)
v.)
)
ROGER EDWARD PICARD,) 1:18-CR-00057-LEW
)
Defendant)

ORDER ON RULE 35 MOTION

The matter is before the Court on Defendant's Motion to Resentence Pursuant to Rule 35(a) of the Federal Rules of Criminal Procedure (ECF No. 86). Because the Court is without jurisdiction to resentence under the Rule at this time, *see United States v. Gonzalez-Rodriguez*, 777 F.3d 37, 42 (1st Cir. 2015), the Motion is DENIED.

SO ORDERED.

Dated this 26th day of January, 2021.

/s/ Lance E. Walker
UNITED STATES DISTRICT JUDGE

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