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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December 8, 2021

QUESTIONS PRESENTED

This case came before the First Circuit Court of Appeals which held that the district court did not err in imposing an upward-variant sentence on a revocation of conditions of release, and did not err in divesting itself sua sponte of a properly filed motion pursuant to Fed.R.Crim.P. 35(a), simply by ignoring it. United States v. Picard, No. 20-2154 (1st Cir. Sept. 8, 2021).

The questions presented are:

I. Did the First Circuit err in denying a jurisdictionally sound motion filed pursuant to Fed.R.Crim.P. 35(a), where the district court simply ignored the motion for over 14 days and then declared the motion lacked jurisdiction because no action had been taken on that motion? Specifically, the motion as filed, was jurisdictionally proper, but the district court stated that per operation of Rule 35(a), jurisdiction was lost because the district court ignored the motion for over 14 days. Petition had argued in that motion whether both the First Circuit and district court erred in their interpretation of Rule 35(a) to the effect questioning whether the district court was within its rights to divest itself of jurisdiction.

II. Did the First Circuit err in concluding that the district court's imposition of an upwardly-variant sentence was not either procedurally or substantively unreasonable, where the district court substituted its judgment for that of a licensed psychologist concerning an assessment of the defendant's mental health? Specifically, the court ignored a psychological evaluation of defendant, substituted its own psychological assessment of defendant and then imposed the maximum possible sentence against the defendant. The defendant was a severely disabled elderly man.

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. 20-2154, 1st Cir. 2021, (Sept. 8, 2021)(affirming upwardly variant sentence on a violation of condition of release and holding that the district court did not abuse its discretion in interpreting Rule 35(a) of the Federal Rules of Criminal Procedure in a manner which allowed the district court sua sponte to divest itself of jurisdiction over a jurisdictionally properly filed motion, merely by ignoring the motion for over 14 days);
- *United States v. Roger Edward Picard*, No. 1:18-cr-57- LEW, D. Me. (Dec. 1, 2020)(imposing maximum possible sentence of 24 months on a finding of several violations of conditions of release where the advisory guideline range was 8 to 14 months).

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. 19-1855, 1st Cir. 2021, (Aug. 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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Index of Appendices

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PETITION FOR WRIT OF CERTIORARI
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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 September 8, 2021.

OPINIONS BELOW

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

United States v. Roger Edward Picard, No. 20-2154 (1st Cir. Sept. 8, 2021) appears at Appendix A to this petition (hereinafter cited "A-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. Dec. 1, 2020), consisting of the oral findings of the district court at the revocation hearing, appears at Appendix B and is unpublished. (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. Jan. 26, 2021), consisting of order denying motion filed pursuant to Fed.RCrim.P. 35(a).

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The judgment of the Court of Appeals was entered on September 8, 2021. This Petition is timely filed per the 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. Federal Rule of Criminal Procedure 35(a) – Correcting or Reducing a Sentence, provides in pertinent part:

> (a) CORRECTING CLEAR ERROR. Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

Fed.R.Crim.P. 35(a).

STATEMENT

1. Background of the Action

The issue before the First Circuit was two-fold: first, whether it was both procedurally and substantively unreasonable for the district court to impose the maximum possible sentence of 24 months on an advisory guideline sentencing range of 8-14 months, without providing an adequate explanation and where the length of the sentence was greater than necessary given the seriousness of the offense and other sentencing factors. Second, whether the district court properly evaded a timely filed motion under Fed.R.Crim.P. 35(a) by waiting for the expiration of 14 days post filing and effectively divesting itself of jurisdiction to hear the motion. The essence of the Rule 35(a) motion was that the district court

had overlooked the fact that a psychological report was based on all extant judicial branch documents, and the district court, in effect, substituted its judgment of defendant's mental health status for that of a psychologist duly licensed in the State of Maine. United States v. Picard, No. 20-2154 (1st Cir. Sept. 8, 2021) (hereinafter "*Picard II*").

On January 26, 2021, the district court had denied a motion for reconsideration filed by Roger Edward Picard. This motion had asked the district court to reconsider it's sentence in view of the fact that the defense had informed the court six weeks prior to sentencing that Donald Devine Ph.D. had been provided with copies of the defendant's 2019 Pre-sentence Report, the 2020 Revocation Report, and the 2019 Sentencing Transcript, whereas at sentencing the district court stated that Dr. Devine's report was deserving of "zero weight" because it was based on "one-party" submissions. Petitioner had argued that the basis of the district court's finding that Dr. Devine's report should be accorded "zero weight," was, therefore based on clear error.

The uncontested facts are that Mr. Picard was released from incarceration on April 18, 2020, during the height of the pandemic, to a halfway house (re-entry center) in Portland, Maine, a location more than two hours removed from his home in Garland, Maine. On April 20, 2020, the defendant was removed from the re-

entry center for not wearing a mask. Immediately upon his removal, the defendant admitted himself into the emergency room at Maine Medical Center for "shortness of breath." The next day, the defendant was denied entry into a homeless shelter and became homeless. The probation officer found a rooming house for the defendant after the defendant had contacted the probation officer for help with his medical issues and because he "did not know what to do." During the next few weeks, despite contact with him, Probation Officer Bryce Turgeon filed a Warrant or Summons for Offender Under Supervision after determining the following: 1) that because defendant had become homeless and failed to notify the Sex Offender Registry of his change of address within 3 business days he was in violation of 18 U.S.C. § 2250(a); 2) that the defendant had had contact with a person who had a minor child, and did not give probation officer Turgeon her contact information; 3) that the defendant had failed to appear for a polygraph examination; 4) that the defendant had consumed a twelve ounce can of beer after his denied admission to Maine Medical Center; and 5) that the defendant had been removed from the re-entry center.

Clinical Psychologist Donald Devine had interviewed the defendant three times, administered tests to the defendant and reviewed the documents mentioned above and in his professional opinion wherein he opined the following:

In summary, Mr. Picard is an easily engaged person whose testing suggests

> that he is forthright in presentation and may be indirectly asking for help. The test results are also consistent with a possible learning disability, this combined with limited educational opportunities and poor reading skills have made it difficult for him to feel confident in social situations. His thinking is often specific and concrete. These qualities are likely to have made it difficult for him to follow through on the expectations of his probation officer. With clearly defined, concrete instructions, and initial support Mr. Picard would likely have been able to meet the requirements of his probation. Mr. Picard's report combined with available history verify what appeared to be his good faith efforts to meet the demands of his probation officer. I do not believe there is any reason to expect that he would not meet the requirements of his probation in the future.

Devine at 3.

In the Pre-sentence Report, the probation officer had written that the defendant is a 69 year-old man, who walks with a cane and stands 5'3" tall. He suffers from heart trouble, diabetes, chronic obstructive pulmonary disease (COPD), asthma, migraines, hypertention, hypercholesterolaemia, myocardial infarction, kidney stones and possibly cancer. See PSR at ¶¶ 52-53. The defendant had his first heart procedure in 1997 and has had five stents placed since then. Id. at ¶ 53. Even though a mental health assessment was deemed necessary, a mental health assessment of the defendant concluded "[n]o mental health treatment was recommended." Id. at ¶ 55. Likewise, a substance abuse assessment in Hawaii in 2010 "determined that substance abuse treatment was unnecessary." Id. at ¶ 57. At his first revocation hearing he reported receiving social security disability benefits for seventeen years, as well as the fact that he had attempted to follow through with

his probation officer's conveyed instructions but reported to the wrong Sheriff's Office.

The PSR, Revocation Report and the sentencing transcript are replete with mitigating evidence concerning the nature of Mr. Picard's mental, physical and economically challenged circumstances.

The chronic medical conditions suffered by the defendant as outlined in his Pre-Sentence Report -- heart trouble, diabetes, chronic obstructive pulmonary disease (COPD), asthma, migraines, hypertention, hypercholesterolaemia, myocardial infarction, kidney stones and possibly cancer – are particularly troublesome during this pandemic time period. See PSR at ¶¶ 52-53. The Centers for Disease Control has recognized three of these conditions – COPD, myocardial infarction and diabetes mellitus – as increasing the risk of severe illness from the virus that cause COVID-19 for adults of any age. See https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html. (Last Updated May 13, 2021). Two other conditions – hypertension (high blood pressure), asthma -- places the defendant at increased risk of severe illness. See Id. The defendant age – 69 years old at the time of the Warrant – placed him at a higher risk category. See https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-

adults.html. (Last Updated May 14, 2021).

Given these facts, both the Maine District Court and the First Circuit found fault with Mr. Picard for knowingly failing to report, and determined that a 24 month sentence was not unreasonable even though the advisory guideline range was 8-14 months. Both the district court and the First Circuit were well aware of Mr. Picard's elderly status and disabilities.

2. Proceedings in the district court that gave rise to the district court substituting its assessment of defendant's mental state for that of a clinical psychologist duly licensed to practice psychology in the State of Maine.

At the district court, the district court judge substituted his assessment of defendant's mental state for that of a clinical psychologist duly licensed to practice psychology in the State of Maine, and decided to impose the maximum possible sentence against the defendant of 24 months as opposed to the advisory guideline range of 8 to 14 months.

At sentencing the district court had asked the prosecution to present their sentencing argument first. The Assistant United States Attorney began his summarization of the evidence against the defendant by agreeing with "the recommendation [of the probation officer] for a term of incarceration of 18 months." Final Revocation Hearing Transcript [hereinafter "TR"] at 16. This

figure, he stated, "is slightly outside of the recommended guideline range," but the government felt "a slight upward departure" was warranted "given the consistency, [of] the fact that this [proceeding] is the second supervised release violation," which arises out of the same underlying offense of conviction. Id. The government felt that there was a "troubling trajectory" showing "a disregard for the law," and an "aggressive refusal to comply with the conditions imposed by the court." Id. The government also felt that there was a personal antagonism between the defendant and probation officer. Id.

The government noted that having just been released from a revocated sentence, the defendant lasted only a short time at a residential facility in Portland. Id. at 16-17. The defendant was supposed to quarantine during "a very touchy time," but he left his room when he "was not supposed to." Id. at 17. The government felt that the defendant then refused to follow basic, concrete, instructions provided by the probation officer, which included drinking an alcoholic beverage. Id. While "[m]aybe standing alone not troubling" the prosecutor noted, but it became worse when combined with violations such as not letting "the Maine Sex Offender Registry and the Portland Police Department know exactly where he's residing." Id.

With regard to Dr. Devine's evaluation of the defendant, the prosecutor felt

that it should be accorded little weight because the doctor only interviewed the defendant three times and that there was "no indication" that the doctor had been provided with discovery in this case. Id. at 18-19.

In sum, the prosecutor felt that "probation's recommendation of 18 months" was appropriate. Id. Additionally, the prosecutor agreed with the probation officer's recommendation to terminate supervised release. Id.

The defense began by noting that the evaluator was a licensed professional in the State of Maine, and that counsel was not going to substitute his analysis for that of the professional capabilities of the doctor. Id. The defense stated that the psychologist report showed the defendant to be "a semiliterate man," who is "physically disabled, physically limited, maybe psychologically, [and] mentally limited," with no car or license who "lives in a shack in rural Maine" and who has tried to register and "follow through with" requirements. Id. at 21-22. The defense noted that the psychologist stated that the defendant could not live in a city, habituated as he was "off the grid" in Garland, Maine, because it presented "a difficult situation for him." Id. at 22. The defense stated that the defendant had explained to the probation officer that the person running the halfway house had sent him to his room saying that "if you have any questions, it's okay to come downstairs and ask them, and that's what he did, and that's when he got discharged

because he came down apparently without a mask." Id.

The defense felt that

> ...it doesn't take much to try to put one's self in the shoes of someone who's been incarcerated most of their life, to not know about computers, to not know about advances in technology, to not be able to communicate and have expectations imposed on him that would be imposed on other people that – that someone, given his position of semiliteracy and other issues..., that he cannot possibly conform with unless an imagination is employed in the...passing of those communications.

Id. at 22. The defense noted that an objective question that has not been answered is "why didn't the probation officer" knowing Mr. Picard's profile, take him to the Sex Offender Registry? Id. at 22-23. The defense stated the answer to that question was unknown and that it was "a waste of time to incarcerate this person any longer." Id. at 23.

The defense felt that the lower end of the guideline range of eight months was "more appropriate than to go above it, whether slightly or completely all the way to the maximum." Id. The defense stated that having served "five and a half months," already, "if the defendant were given the low end of the advisory guideline range, he would probably serve about [the same as] time served," which would "not be greater than necessary for this particular individual." Id. at 24-25.

Additionally, counsel mentioned that a longer sentence would assess an additional penalty against the defendant, because he would then be put into a

position where he could not pay his property taxes and his property would be subject to foreclosure. Counsel stated that the defendant had wanted to pay his property taxes in Garland, Maine, but that his recent incarceration prevented him from paying them, and "the Town of Garland didn't know where he was." Id. at 25. Counsel stated that the Town had given Mr. Picard until December 9 to pay the property taxes or the property would be foreclosed. Id. Counsel stated that a time served sentence would allow him to pay off these taxes. Id. Counsel stated that Mr. Picard could pay his taxes, "go into his shack off the grid, and...leave people alone." Id.

The district court judge began their analysis by asking defense counsel the following:

> Is it your experience with the probation office here in Maine that they are intemperate, rigid, inflexible in their approach with any of the people they supervise, up to and including people with Mr. Picard's profile?

Id.

Having adopted the revocation report in its entirety, the district court found that Dr. Devine's "analysis and conclusions are only as useful as the quality of the information given to the treater. I'm giving that letter report all the weight it deserves, and in this particular context, it deserves something approaching zero." Id. The district court stated:

> In considering the nature of the offenses and the defendant's history to arrive at a sentence that is sufficient, but not greater than necessary, to

correspond to the need for the sentence, the criteria I find most import to account for, and have accounted for, in this particular case are as follows: the seriousness of the offenses. As Mr. Lizotte pointed out, the violations, both as the basis of the first revocation and as the basis for this revocation, come very soon, within days and months, after being released from custody. Despite repeated attempts by probation to work with Mr. Picard before filing a petition, Mr. Picard's insistence on refusing to cooperate with probation or comply with his conditions persisted at length.

Another criteria I find most important to account for is to promote respect for the law, that the court will not brook the type of behavior exhibited here, to provide just punishment for the offense, to afford adequate deterrence, both specifically and generally in terms of Mr. Picard's future decision-making and for those who might appear before the court, and to protect the public from future crimes by the defendant.

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

...Based on all of these considerations, I conclude that a just and fair sentence is as follows: the defendant is committed to the custody of the United States Bureau of Prisons for a total term of 24 months, no additional term of supervised release.

Id. at 28-31.

3. Motion to Reconsider Pursuant to Fed.R.Crimp. 35(a)

The defendant filed a timely Motion to Reconsider Pursuant to Fed. R. Crim. P. 35(a), one day after the sentencing hearing and three days before he filed a notice of appeal. The basis for this motion primarily was that the district court had overlooked the fact that the Court was aware that the psychological assessment of Roger Picard relied on judicial branch material. Fifty-six days after sentencing,

and Fifty-five days after the filing of Mr. Picard's motion, the district court denied the motion by stating, in toto, as follows:

> 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.**

See Appendix C at C-1.

In his motion defendant had argued that the United States District Court for the District of Maine previously had analyzed the legal status of Rule 35(a) motions in United States v. El-Silimy as follows:

> To succeed on a Rule 35 motion, the defendant must prove "arithmetical, technical, or other clear error." Fed.R.Crim.P. 35(a). According to advisory committee notes:
>
> > The authority to correct a sentence under [Rule 35(a)] is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action....The subdivision is not intended to afford the court the opportunity...simply to change its mind about the appropriateness of the sentence. Nor should it be used to reopen issues previously resolved at the sentencing hearing through the exercise of the court's discretion with regard to the application of the sentencing guidelines.
>
> Fed.R.Crim.P. 35 (c) advisory committee notes, 1991 amendment (discussing former Rule 35(c) now Rule 35(a)). Consistent with the advisory committee's comments, the First Circuit has described Rule 35 as "a very narrow rule." United States v. Burgos-Andujar, 275 F.3d 23, 32 (1st

> Cir. 2001) (quoting advisory committee's note)....In the First Circuit, "clear error" requires "'a strong, unyielding belief that a mistake has been made.'" United States v. Bermudez, 407 F.3d 536, 542 (1st Cir. 2005) (quoting United States v. Matos, 328 F.3d 34, 40 91st Cir. 2003).

United States v. El-Silimy, 417 F.Supp. 75, 78 (D.Me. 2006).

Because the Maine District Court in El-Silimy, had stated that the defendant had the burden to prove "arithmetical, technical, or other clear error," the defendant in his motion had posited that it was clear error for the sentencing court to have concluded that Dr. Devine's report deserved something "deserving of zero weight," on the basis that Dr. Devine relied on one-party material. The district court obviously forgot that Dr. Devine's report rested on all pertinent court documents developed by the probation office and district court, as well as three interviews with the defendant and psychological testing.

4. Proceedings before the First Circuit

Before the First Circuit, petition had argued that not only was his Rule 35(a) motion timely filed, but also the district court did have jurisdiction to rule on the merits of the motion. Petitioner had argued that the case cited by the district court to support a denial of the motion – United States v. Gonzalez-Rodriguez, 777 F.3d 37, 42 (1st Cir. 2015) – did not in fact support a denial of the motion. Petitioner argued that it was error for the district court to deny his motion for re-sentencing

before a court fully aware of the facts of the case.

Petitioner had argued that in United States v. Gonzalez-Rodriguez, the First Circuit had decided an issue completely different from the issue he presented. United States v. Gonzalez-Rodriguez held that filing a Rule 35(a) motion for re-sentencing does not affect Federal Rule of Appellate Procedure 4(b)(5), which requires filing a notice of appeal of a sentence fourteen days after sentencing. United States v. Gonzalez-Rodriguez, 777 F.3d 37, 38 (1st Cir. 2015). The filing of a Rule 35(a) motion for re-sentencing does not toll appellate jurisdiction until some time after the Rule 35(a) motion is decided. Id. Petitioner had noted that 18 U.S.C. § 3582(c)(1)(B) allows a court to "modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure." 18 U.S.C. § 3582(c)(1)(B). He argued that a jurisdictional rule of Federal Appellate Procedure limiting access to a circuit court of appeals, is inapposite to a court of first instance attempting to preclude jurisdiction of an otherwise timely filed motion. He noted that the Rule 35(a) motion in his case was filed one day after entry of judgment and three days prior to a timely filed notice of appeal.

Petitioner had argued that United States v. Gonzalez-Rodriguez, therefore, did not support the district court's denial of Mr. Picard's motion. United States v.

Gonzalez-Rodriguez, 777 F.3d 37, 42 (1st Cir. 2015). He felt that the only way Gonzalez-Rodriquez could have bearing in this matter is if the First Circuit meant to state that a district court can wait more than fourteen days after the filing of a valid Rule 35(a) to decide the motion by default. In other words, the solitary circuit opinion cited by the trial court to deny the Rule 35(a) motion, could have been read to allow a district court the ability to reject an otherwise validly filed Rule 35(a) motion merely by failing to rule on it in a timely manner and at the court's discretion. This reading, however, of indirectly expressing negative abilities cannot be what the First Circuit envisioned. The cited sentence is mere dicta and not an integral part of the legal reasoning needed by the First Circuit to deny federal appellate jurisdiction in that opinion.

The First Circuit, however, affirmed defendant's sentencing challenge and the district court's handling of defendant's Rule 35(a) motion. The First Circuit wrote:

> 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 substanively reasonable where district court noted the principle 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. Mercad0-Flores, 872 F.3d 25, 28-29 (1st Cir. 2017) (Fed. R. Crim. P. 35(a) standard of review and general principles).

See Appendix B at B-1.

Petitioner now brings this petition to ask the United States Supreme Court to find that the district court and the First Circuit improperly interpreted Rule 35(a). As support, petitioner argues that the plain language in Rule 35(a) does not allow a district court to sua sponte divest itself of jurisdiction to decide a matter in controversy. Petitioner states that the case cited by the district court and the two cases cited by the First Circuit do not in fact support a district court's decision to sua sponte divest itself of jurisdiction.

REASONS FOR GRANTING THE WRIT

The First Circuit in *Picard II* improperly interpreted Federal Rule of Criminal Procedure 35(a) to permit a district court to divest itself of jurisdiction to hear a properly filed motion filed pursuant to that rule. The plain language of Rule 35(a) does not support this interpretation, and, upon close review, the legal authority cited by the First Circuit does not adequately support this interpretation. As a consequence, the First Circuit failed to adequately address defendant Picard's concern that the district court's sentence on several violations of supervised release was procedurally and substantively flawed. This is an important question of Federal law because Federal Court's should not be allowed to divest themselves sua sponte of jurisdiction to hear a mater in controversy. The specific result in this case is that the district court judge was allowed to substitute his assessment of defendant's mental health status for that of a psychologist duly licensed by the State of Maine. If the district court judge were a duly licensed psychologist, then he would become a witness in the proceeding and disqualified from hearing the matter for that reason.

Here, the First Circuit departed from this Court's controlling principle that once jurisdiction obtains, it cannot be discharged absent a decision on the merits.

Beyond this, the First Circuit in *Picard II* has added to the confusion among the circuit courts by affirming the district court's interpretation of Rule 35(a). The Court of Appeals erred in affirming this choice.

Review is necessary to compel district court's to 1) retain jurisdiction until a decision on the merits is reached, and 2) to hold that it is procedurally unreasonable for a district court to substitute their assessment of a defendant's mental health status for that of a duly licensed mental health professional

I. Review is necessary to clarify and compel compliance with the plain language of Rule 35(a) of the Federal Rules of Criminal Procedure and the underlying objective of rule 35 set forth in United States v. Ellenbogan, 390 F.2d 537, 543 (2d Cir. 1968) giving every convicted defendant a second round before the sentencing judge.

A The First Circuit Decision Fails to adhere with the plain language of Rule 35(a) of the Federal Rules of Criminal Procedure and fails to cite adequate authority to support its holding that a district court can sua sponte divest itself of jurisdiction under the present circumstances.

The plain language of Rule 35(a) of the Federal Rules of Criminal Procedure – Correcting or Reducing a Sentence -- provides as follows:

> (a) CORRECTING CLEAR ERROR. Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

Fed.R.Crim.P. 35(a).

In United States v. Shank, the Fourth Circuit stated that according to a reading of "the plain language of the [predecessor] rule – "[t]he court, acting

within 7 days after the imposition of sentence" – makes clear that the court must act within seven days of sentencing." United States v. Shank, 395 F.3d 466, 469 (4th Cir. 2005) (emphasis added). Although Shank involved the interplay between Rule 35 and Rule 4 of the Federal Rules of Appellate procedure, Shank held that a court's failure to act was "functionally equivalent to an outright denial on the merits." Id. at 469-470. Yet, reading the rule as now written with these statements from Shank in mind, belies the veracity of these assertions. Indeed, perhaps mindful that the "clear language" does not say this, the Shank court stated that "there is a certain intuitive logic to" drawing the opposite conclusion, namely, that "if a defendant timely invokes Rule 35 (i.e. within seven days), the district court is vested with jurisdiction to dispose of that motion." Id. at 468. Petitioner Picard requests that this Court review the present state of Rule 35(a), review the major justification for reading in the requirement of "must act within" fourteen days, – that Rule 35 is a rule of jurisdiction not a claims processing rule, – and review the case law, and determine that Rule 35(a) was not meant to allow a district court to divest itself of jurisdiction merely by ignoring properly filed motions. [1]

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[1] In United States v. Griffin the First Circuit held that Rule 35 is a jurisdictional rule and not a claims processing rule because a time limitation is set forth in the rule itself. United States v. Griffin, 524 F.3d 71, 84 (1st Cir. 2008). Based on Advisory Committee notes from the 1991 amendment to the Rule, the First Circuit held that any action on a Rule 35 motion, as a jurisdictional rule, must be taken within the delineated time period. Id. Because Rule 4 is a claims processing rule, it can be filed at any time. United States v. Hyman, 884 F.3d 496,

Significantly, the Fourth Circuit stated that "[b]efore the Sentencing Reform Act of 1984 became effective on November 1, 1987, Rule 35 allowed a district court to 'correct an illegal sentence at any time' and to 'correct an illegal sentence imposed in an illegal manner' within 120 days of certain triggers." Id. at 468 referring to text following Fed.R.Crim.P. 35. Petitioner argues for a return to this intuitively logical position.

If Congress had intended to have this statutory language to permit a district court to sua sponte decide to avoid hearing a properly filed motion, then the rule itself or its commentary should explicitly apprise the legal community of that proposition. The rule and commentary, however, is either silent on that interpretation, or is itself mis-interpreted, and concerns previous incarnations of the Rule. Looking at the plain language, it is possible that the First Circuit finds the word "may" in the language of the Rule to be operative in the sense that a district court "may" or "may not" address a properly filed motion, which triggers the "may not" option thereby permitting a district court to abnegate its responsibility to responsibly review the merits of a motion. Petitioner argues, instead, that the "may not" option only becomes operative if a district court analyzes a motion and gives

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498 (4th Cir. 2018).

reasoning for denying the motion. Petitioner states that the language of the rule does not suggest that the "may not" option permits a district court to ignore the motion completely. Petitioner argues that such a reading is not only intuitively logical, but also comports with the plain language of Rule 35(a).

The two cases cited by the First Circuit to allow divestiture – United States v. Marquez-Garcia and United States v. Mercado-Flores – do not support the "may not" interpretation utilized by the First Circuit. See United States v. Marquez-Garcia, 862 F.3d 143 (1st Cir. 2017); United States v. Mercado-Flores, 872 F.3d 25 (1st Cir. 2017).

In United States v. Marquez-Garcia, the First Circuit reviewed a matter where the defendant had been sentenced on an unlawful possession of a machine gun charge pursuant to 18 U.S.C. § 922(0), and while on supervised release committed a new criminal offense of being a felon in possession of a firearm pursuant 18 U.S.C. § 922(G)(1). United States v. Marquez-Garcia, supra at 144. The district court sentenced the defendant to 24 months on the violation of supervised release case consecutive to a 48-month term on the new criminal charge. Id. In so doing, the district court reviewed the sentencing factors set forth in 18 U.S.C. § 3583(e). Id. at 145. The First Circuit found a lack of procedural error in the district court's imposition of an upwardly variant sentence because the

"court's duty...requires only a coherent justification." Id. at 147. Pursuant to an abuse of discretion standard the First Circuit found a lack of substantive reasonableness because "the sentencing court articulated a plausible rationale for imposing the upwardly variant sentence." Id. The First Circuit found that commission of a felony while on supervised released "constituted hard evidence that the appellant's earlier incarceration had not taught him any lasting lessons." Id. at 148. Marquez-Garcia, therefore, involved imposition of a sentence for a new crime upon a violation of condition of release, whereas in Picard's case, the district court imposed a sentence on new violations of conditions of release upon a violation of conditions of release. The First Circuit held in *Picard II* that because the "time limit" on Picard's motion had run based on the reasoning found in Mercado-Flores, the holding in Marquez-Garcia could then support a finding that the district court in *Picard II* could deny Picard relief pursuant to Rule 35(a), even though deciding the Rule 35(a) motion on its merits would have revealed clear error in the district court's foundational facts, i.e. that the psychological report of Picard's expert provided mitigating evidence.

In United States v. Mercado-Flores, involving the Rule 35(a) aspect of Mr. Picard's case, the First Circuit decided a situation very much different from the situation Mr. Picard found himself in. United States v. Mercado-Flores, supra.

The First Circuit in Mercado-Flores vacated a sentence imposed by a district court three weeks after the initial sentencing. Id. At the initial sentencing the district court sua sponte had stated that it was going to reserve judgment on a "jurisdictional matter" within 30 days post sentencing. Id. at 27. The district court did not invoke Rule 35(a) as the basis for its action, yet the First Circuit rejected Rule 35(a) as a possible basis for the district court's authority. Because Rule 35(a) was mentioned in dicta and not properly filed in this case, the First Circuit found the rule inapposite, as the First Circuit should have found Mercado-Flores inapposite in the present case where a properly filed motion occurred.

Summation

The 1983 Amendments to Rule 35 state that "the underlying objective of rule 35, which is to "give every convicted defendant a second round before the sentencing judge, and [afford] the judge an opportunity to reconsider the sentence in the light of any further information about the defendant or the case which may have been presented to him in the interim." United States v. Ellenbogan, 390 F.2d 537, 543 (2d Cir. 1968). Mr. Picard's Rule 35(a) motion sought to give him a second round before a sentencing judge who clearly forgot that the defendant's expert's psychological report was based on all court generated documents then

extant. On appeal, Mr. Picard had argued that it was both procedurally and substantively unreasonable for the sentencing judge to ignore this report. Petitioner now argues before this Court that by ignoring this report the sentencing judge was in effect substituting his opinion of the defendant's mental health status for that of a licensed professional psychologist. As such, the sentencing judge was making himself a witness to the sentencing. Were this Court to hold that interpreting Rule 35 to permit a district court in such a circumstance to divest itself of jurisdiction, then a sentencing judge who made himself a witness to the sentencing would run counter to the underlying of the rule. For this reason, Petitioner requests this court to review the rule and determine that once jurisdiction vests must affirmatively dispose of the motion.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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INDEX OF APPENDICES