

Petitioner's Appendix

S.D.N.Y. – N.Y.C.
21-cr-402
Berman, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 31st day of July, two thousand twenty-three.

Present:

William J. Nardini,
Beth Robinson,
Myrna Pérez,
Circuit Judges.

United States of America,

Appellee,

v.

22-2561

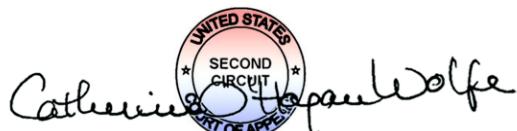
Anderson Garcia, AKA Sealed Defendant 1,

Defendant-Appellant.

The Government moves to dismiss this appeal as barred by the waiver of appellate rights contained in Appellant's plea agreement, in which Appellant agreed to waive his right to challenge a sentence within or below a stipulated guidelines range. Appellant opposes.

Upon due consideration, it is hereby ORDERED that the motion is GRANTED and the appeal is DISMISSED. The unobjected-to imprecision in the waiver colloquy does not rise to the level of plain error. *See United States v. Cook*, 722 F.3d 477, 481, 483 (2d Cir. 2013). Appellant has not demonstrated that the waiver is otherwise unenforceable. *See United States v. Gomez-Perez*, 215 F.3d 315, 319 (2d Cir. 2000); *see also United States v. Arevalo*, 628 F.3d 93, 100–01 (2d Cir. 2010); *United States v. Roitman*, 245 F.3d 124, 125–26 (2d Cir. 2001).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court


Catherine O'Hagan Wolfe



Pet. App. 001

22-2561

United States v. Garcia

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of The United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of November, two thousand twenty-three.

PRESENT:

WILLIAM J. NARDINI,
BETH ROBINSON,
MYRNA PÉREZ,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

No. 22-2561

ANDERSON GARCIA, AKA SEALED DEFENDANT 1,

Defendant-Appellant.

FOR APPELLEE:

JUN XIANG, Assistant United States Attorney (Rebecca T. Dell, *on the brief*) for Damian Williams, United States Attorney for the Southern District of New York, New York, NY.

FOR APPELLANT:

MATTHEW B. LARSEN, Assistant Federal Defender, Federal Defenders of New York, Appeals Bureau, New York, NY.

Appeal from a judgment of the United States District Court for Southern District of New York (Berman, J.).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the appeal is **DISMISSED**.

Appellant Anderson Garcia appeals from a judgment of conviction entered on September 21, 2022, following his guilty plea. We assume the parties' familiarity with the underlying facts, procedural history, and arguments on appeal, to which we refer only as necessary to explain our decision to dismiss this appeal.

On January 27, 2022, Garcia pled guilty to one count of conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951 pursuant to a written plea agreement. As part of the agreement, the parties stipulated to a Guidelines range of 140 to 175 months' imprisonment, and Garcia agreed "not [to] file a

direct appeal; nor bring a collateral challenge . . . of any sentence within or below the Stipulated Guidelines Range," App'x 17.

At the plea hearing, the district court confirmed that Garcia had read the plea agreement, discussed it with his counsel, and understood it. The court "singl[ed] out several provisions" of the agreement it wanted to emphasize:

The next such provision contains waivers of appeal. In that plea agreement, Mr. Garcia, you agree not to file a direct appeal. You also agree not to bring what's called a collateral challenge, which includes, but is not limited to, an application under Title 28, United States Code, Sections 2255 and/or 2241 -- this refers to the so-called habeas corpus provisions -- of any sentence that is within or below the stipulated guideline range as found of 140 to 175 months of incarceration.

Let me just summarize that again. This provision that I have just referred to indicates that you are going to waive certain rights you would otherwise have to appeal or to challenge your conviction if the sentence imposed on you is in fact within the stipulated guideline range of 147 to 175 months of imprisonment. Do you realize that?

Tr. 18.¹ Garcia responded: "Yes, your Honor." *Id.* The court then addressed the remaining components of the appeal waiver, confirming that Garcia "agree[d] not to appeal or bring a collateral challenge" to any term of supervised release less than or equal to the statutory maximum or any fine less than or equal to

¹ "Tr." refers to the transcript of Garcia's change-of-plea hearing, which is attached as the sole exhibit to the government's affirmation in support of its motion to dismiss the appeal, App. Ct. Dkt. 40.

\$250,000. *Id.* 18–19. Satisfied that Garcia pled guilty knowingly and voluntarily, the court accepted his plea.

The court sentenced Garcia on September 21, 2022. It observed that Garcia had bipolar disorder, anxiety, and substance abuse problems, and opined that it would be difficult for Garcia to overcome these “serious cooccurring disorders . . . without ever completing a formal outpatient treatment program.” App’x 36. The court opined that our system “doesn’t do enough . . . to try and help people incarcerated,” and that it would be “very desirable” if people “could devote their entire period of incarceration to substance abuse [treatment], education, [and] mental health treatment.” *Id.* 53–54. It further suggested that incapacity “is vital” for individuals like Garcia and “is sometimes the only thing that enables a person to accept treatment.” *Id.* 66, 68.

The court sentenced Garcia to 145 months’ imprisonment and three years’ supervised release. It also recommended “that [Garcia] be housed at a facility where he can receive appropriate drug treatment and mental health treatment.” *Id.* 81. Garcia appealed, challenging the legality of his sentence.

The government moved to dismiss the appeal, citing the appellate waiver. Garcia argued, among other things, that the waiver was void because the district

court improperly sentenced him based on his need for rehabilitation in violation of the Sentencing Reform Act, 18 U.S.C. § 3582(a), as interpreted by *Tapia v. United States*, 564 U.S. 319 (2011). The Court granted the government's motion to dismiss, and Garcia filed a motion for reconsideration. The Court granted his motion and held oral argument on September 12, 2023.

"Waivers of the right to appeal a sentence are presumptively enforceable." *United States v. Arevalo*, 628 F.3d 93, 98 (2d Cir. 2010). While "[a] violation of a fundamental right warrants voiding an appeal waiver," *United States v. Rigg*, 649 F.3d 143, 147 (2d Cir. 2011), this occurs in very limited circumstances:

[A] defendant may have a valid claim that the waiver of appellate rights is unenforceable, such as when the waiver was not made knowingly, voluntarily, and competently, when the sentence was imposed based on constitutionally impermissible factors, such as ethnic, racial or other prohibited biases, when the government breached the plea agreement, or when the sentencing court failed to enunciate any rationale for the defendant's sentence,

United States v. Gomez-Perez, 215 F.3d 315, 319 (2d Cir. 2000) (internal citations omitted). Outside of these limited circumstances, we have upheld appellate waivers "even in circumstances where the sentence was conceivably imposed in an illegal fashion or in violation of the Guidelines" as long as the ultimate sentence was within the range contemplated in the plea agreement. *Id.*

Garcia argues that a court’s failure to enunciate *any* rationale for a sentence vitiates an appeal waiver, and therefore that a court’s reliance on an *unlawful* rationale must as well. Sentencing without proffered reasons, he argues, “amount[s] to an abdication of judicial responsibility,” and so too does sentencing based on “a consideration Congress and the Supreme Court have ruled out,” App. Ct. Dkt. 62 at 2 (internal citations omitted). We disagree.

A *Tapia* error is, at bottom, a misapplication of the Sentencing Reform Act, which instructs courts to “recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation,” 18 U.S.C. § 3582(a). *See* 564 U.S. at 327. We have indeed held that “an arbitrary practice of sentencing without proffered reasons would amount to an abdication of judicial responsibility, subject to mandamus.” *United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995). But a *Tapia* error cannot be described as “sentencing *without* proffered reasons,” *id.* (emphasis added), but rather, as sentencing *with* a rationale deemed improper by Congress. A *Tapia* error therefore does not implicate a total abdication of duty, but the misapplication of a sentencing court’s duty.

This Court regularly enforces appellate waivers in the face of such errors where the ultimate sentence was within the range contemplated in the plea agreement. *See, e.g., Arevalo*, 628 F.3d at 98–100 (enforcing appellate waiver despite district court’s failure to comply with Rule 32); *Yemitan*, 70 F.3d at 747–49 (enforcing appellate waiver despite district court’s failure to provide specific reasons for imposing the sentence as required under 18 U.S.C. § 3553(c)(1)); *United States v. Rosa*, 123 F.3d 94, 101–102 (2d Cir. 1997) (enforcing appellate waiver despite casting doubt on whether defendant understood the waiver); *United States v. Buissereth*, 638 F.3d 114, 117–18 (2d Cir. 2011) (enforcing appellate waiver despite district court’s failure to rule on objections to the PSR, rule on the requests for downward departures and a variance, adopt the findings of the PSR, mention the factors set forth in 18 U.S.C. § 3553(a), or calculate a sentencing range under the Guidelines); *Sanford v. United States*, 841 F.3d 578, 580–81 (2d Cir. 2016) (enforcing appellate waiver despite that the defendant was sentenced under a Guidelines provision later ruled unconstitutional). Therefore, under the circumstances of this case, we conclude Garcia’s appellate waiver is enforceable notwithstanding the alleged *Tapia* error at sentencing.

* * *

We have considered Garcia's remaining arguments and conclude they are without merit. For the foregoing reasons, the appeal is **DISMISSED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court






U.S. Department of Justice

*United States Attorney
Southern District of New York*

*The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007*

November 17, 2021

By Email

Zawadi Baharanyi, Esq.
52 Duane Street, 10th Floor
New York, NY 10007
zawadi_baharanyi@fd.org

Re: United States v. Anderson Garcia, 21 Cr. 402 (RMB)

Dear Ms. Baharanyi:

On the understandings specified below, the Office of the United States Attorney for the Southern District of New York (“this Office”) will accept a guilty plea from Anderson Garcia (“the defendant”) to Count One of the above-referenced Indictment. Count One charges the defendant with conspiracy to commit Hobbs Act robbery, in violation of Title 18, United States Code, Section 1951, and carries a maximum term of imprisonment of 20 years; a maximum term of supervised release of three years; a maximum fine, pursuant to Title 18, United States Code, Section 3571 of the greatest of \$250,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to persons other than the defendant resulting from the offense; and a \$100 mandatory special assessment.

In consideration of the defendant’s plea to the above offense, the defendant will not be further prosecuted criminally by this Office (except for criminal tax violations, if any, as to which this Office cannot, and does not, make any agreement) for conspiring to commit Hobbs Act robbery in August 2020, it being understood that this agreement does not bar the use of such conduct as a predicate act or as the basis for a sentencing enhancement in a subsequent prosecution including, but not limited to, a prosecution pursuant to 18 U.S.C. §§ 1961 *et seq.* In addition, at the time of sentencing, the Government will move to dismiss any open Counts against the defendant. The defendant agrees that with respect to any and all dismissed charges he is not a “prevailing party” within the meaning of the “Hyde Amendment,” Section 617, P.L. 105-119 (Nov. 26, 1997), and will not file any claim under that law.

In consideration of the foregoing and pursuant to United States Sentencing Guidelines (“U.S.S.G.” or “Guidelines”) Section 6B1.4, the parties hereby stipulate to the following:

A. Offense Level

1. The November 1, 2018 edition of the Guidelines Manual is applicable to the offense charged in Count One.

2. Pursuant to U.S.S.G. § 2B3.1(a), the base offense level for Count One is 20.
3. Pursuant to U.S.S.G. § 2B3.1(b)(2)(B), because a firearm was otherwise used, six offense levels are added.
4. Pursuant to U.S.S.G. § 2B3.1(b)(3)(B), because a victim sustained serious bodily injury, four offense levels are added.
5. Pursuant to U.S.S.G. § 2B3.1(b)(6), because a controlled substance was taken or the taking of a controlled substance was an object of the offense, one offense level is added.
6. Accordingly, the total offense level for Count One is 31.
7. Assuming the defendant clearly demonstrates acceptance of responsibility, to the satisfaction of the Government, through his allocution and subsequent conduct prior to the imposition of sentence, a two-level reduction will be warranted, pursuant to U.S.S.G. § 3E1.1(a). Furthermore, assuming the defendant has accepted responsibility as described in the previous sentence, the Government will move at sentencing for an additional one-level reduction, pursuant to U.S.S.G. § 3E1.1(b), because the defendant gave timely notice of his intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

In accordance with the above, the applicable Guidelines offense level is 28.

B. Criminal History Category

Based upon the information now available to this Office (including representations by the defense), the defendant has 13 criminal history points.

1. On or about June 7, 2019, the defendant was convicted in Warren County Superior Court of unlawful taking, in violation of New Jersey Code of Criminal Justice § 2C:20-10D. On or about July 19, 2019, the defendant was sentenced to 180 days' imprisonment. Pursuant to U.S.S.G. § 4A1.1(b), two criminal history points are added.
2. On or about December 20, 2018, the defendant was convicted in Monroe County Court of Common Pleas of (i) intentional possession of a controlled substance, in violation of Pennsylvania Penal Code 35 § 780-113 §§ A16, and (ii) false identification to a law enforcement officer, in violation of Pennsylvania Penal Code 18 § 4914 § A. On or about May 8, 2019, defendant was sentenced to a term of imprisonment of 9 months to 23 months and 29 days. Pursuant to U.S.S.G. § 4A1.1(a), three criminal history points are added.

3. On or about December 15, 2017, the defendant was convicted in Bronx County Supreme Court of criminal possession of stolen property, in violation of New York Penal Law § 165.45. The date of the crime is August 14, 2017, and the arrest date is August 22, 2017. On or about January 10, 2018, the defendant was sentenced to a term of imprisonment of 364 days. Pursuant to U.S.S.G. § 4A1.1(b), two criminal history points are added.

4. On or about December 15, 2017, the defendant was convicted in Bronx County Supreme Court of false report of a stolen vehicle, in violation of New York State Vehicle Traffic Law § 0426. The date of the crime and arrest date is February 27, 2016. On or about January 10, 2018, the defendant was sentenced to a term of imprisonment of 364 days. Pursuant to U.S.S.G. § 4A1.1(b), two criminal history points are added.

5. On or about November 6, 2017, the defendant was convicted in Bronx County Criminal Court of assault in the third degree, in violation of New York Penal Law § 120.00. On or about November 6, 2017, the defendant was sentenced to a term of imprisonment of 364 days. Pursuant to U.S.S.G. § 4A1.1(b), two criminal history points are added.

6. On or about April 7, 2017, the defendant was convicted in New York County Supreme Court of robbery in the third degree, in violation of New York Penal Law § 160.05. On or about April 28, 2017, the defendant was sentenced to a term of imprisonment of 364 days. Pursuant to U.S.S.G. § 4A1.1(b), two criminal history points are added.

7. On or about February 12, 2015, the defendant was adjudicated a delinquent in Monmouth County Juvenile Domestic Relations Court of operating a motor vehicle without consent, in violation of New Jersey Code of Criminal Justice § 39:4-48. On or about February 12, 2015, the defendant was fined. Pursuant to U.S.S.G. § 4A1.2(d), zero criminal history points are added.

In accordance with the above, the defendant's Criminal History Category is VI.

C. Sentencing Range

Based upon the calculations set forth above, the defendant's stipulated Guidelines range is 140-175 months' imprisonment (the "Stipulated Guidelines Range"). In addition, after determining the defendant's ability to pay, the Court may impose a fine pursuant to U.S.S.G. § 5E1.2. At Guidelines level 28, the applicable fine range is \$25,000 to \$250,000.

The parties agree that neither a downward nor an upward departure from the Stipulated Guidelines Range set forth above is warranted. Accordingly, neither party will seek any departure or adjustment pursuant to the Guidelines that is not set forth herein. Nor will either party in any way suggest that the Probation Office or the Court consider such a departure or adjustment under the Guidelines.

The parties agree that either party may seek a sentence outside of the Stipulated Guidelines Range based upon the factors to be considered in imposing a sentence pursuant to Title 18, United States Code, Section 3553(a).

Except as provided in any written Proffer Agreement(s) that may have been entered into between this Office and the defendant, nothing in this Agreement limits the right of the parties (i) to present to the Probation Office or the Court any facts relevant to sentencing; (ii) to make any arguments regarding where within the Stipulated Guidelines Range (or such other range as the

Court may determine) the defendant should be sentenced and regarding the factors to be considered in imposing a sentence pursuant to Title 18, United States Code, Section 3553(a); (iii) to seek an appropriately adjusted Guidelines range if it is determined based upon new information that the defendant's criminal history category is different from that set forth above; and (iv) to seek an appropriately adjusted Guidelines range or mandatory minimum term of imprisonment if it is subsequently determined that the defendant qualifies as a career offender under U.S.S.G. § 4B1.1. Nothing in this Agreement limits the right of the Government to seek denial of the adjustment for acceptance of responsibility, *see* U.S.S.G. § 3E1.1, regardless of any stipulation set forth above, if the defendant fails clearly to demonstrate acceptance of responsibility, to the satisfaction of the Government, through his allocution and subsequent conduct prior to the imposition of sentence. Similarly, nothing in this Agreement limits the right of the Government to seek an enhancement for obstruction of justice, *see* U.S.S.G. § 3C1.1, regardless of any stipulation set forth above, should it be determined that the defendant has either (i) engaged in conduct, unknown to the Government at the time of the signing of this Agreement, that constitutes obstruction of justice or (ii) committed another crime after signing this Agreement.

It is understood that pursuant to U.S.S.G. § 6B1.4(d), neither the Probation Office nor the Court is bound by the above Guidelines stipulation, either as to questions of fact or as to the determination of the proper Guidelines to apply to the facts. In the event that the Probation Office or the Court contemplates any Guidelines adjustments, departures, or calculations different from those stipulated to above, or contemplates any sentence outside of the stipulated Guidelines range, the parties reserve the right to answer any inquiries and to make all appropriate arguments concerning the same.

It is understood that the sentence to be imposed upon the defendant is determined solely by the Court. It is further understood that the Guidelines are not binding on the Court. The defendant acknowledges that his entry of a guilty plea to the charged offenses authorizes the sentencing court to impose any sentence, up to and including the statutory maximum sentence. This Office cannot, and does not, make any promise or representation as to what sentence the defendant will receive. Moreover, it is understood that the defendant will have no right to withdraw his plea of guilty should the sentence imposed by the Court be outside the Guidelines range set forth above.

It is agreed (i) that the defendant will not file a direct appeal; nor bring a collateral challenge, including but not limited to an application under Title 28, United States Code, Section 2255 and/or Section 2241, of any sentence within or below the Stipulated Guidelines Range of 140 to 175 months' imprisonment, and (ii) that the Government will not appeal any sentence within or above the Stipulated Guidelines Range. This provision is binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein. Furthermore, it is agreed that any appeal as to the defendant's sentence that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) the above stipulation. The parties agree that this waiver applies regardless of whether the term of imprisonment is imposed to run consecutively to or concurrently with the undischarged portion of any other sentence of imprisonment that has been imposed on the defendant at the time of sentencing in this case. The defendant further agrees not to appeal or bring a collateral challenge of any term of supervised release that is less than or equal to the statutory maximum. The

defendant also agrees not to appeal or bring a collateral challenge of any fine that is less than or equal to \$250,000, and the Government agrees not to appeal or bring a collateral challenge of any fine that is greater than or equal to \$25,000. The defendant also agrees not to appeal or bring a collateral challenge of any special assessment that is less than or equal to \$100. Notwithstanding the foregoing, nothing in this paragraph shall be construed to be a waiver of whatever rights the defendant may have to assert claims of ineffective assistance of counsel, whether on direct appeal, collateral review, or otherwise. Rather, it is expressly agreed that the defendant reserves those rights.

The defendant hereby acknowledges that he has accepted this Agreement and decided to plead guilty because he is in fact guilty. By entering this plea of guilty, the defendant waives any and all right to withdraw his plea or to attack his conviction, either on direct appeal or collaterally, on the ground that the Government has failed to produce any discovery material, *Jencks* Act material, exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), other than information establishing the factual innocence of the defendant, or impeachment material pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), that has not already been produced as of the date of the signing of this Agreement.

The defendant recognizes that, if he is not a citizen of the United States, his guilty plea and conviction make it very likely that his removal from the United States is presumptively mandatory and that, at a minimum, he is at risk of being removed or suffering other adverse immigration consequences. If the defendant is a naturalized citizen of the United States, he recognizes that pleading guilty may have consequences with respect to the defendant's immigration status. Under federal law, an individual may be subject to denaturalization and removal if his naturalization was procured by concealment of a material fact or by willful misrepresentation, or otherwise illegally procured. The defendant acknowledges that he has discussed the possible immigration consequences (including removal or denaturalization) of his guilty plea and conviction with defense counsel. The defendant affirms that he wants to plead guilty regardless of any immigration or denaturalization consequences that may result from the guilty plea and conviction, even if those consequences include denaturalization and/or removal from the United States. The defendant understands that denaturalization and other immigration consequences are typically the subject of a separate proceeding, and the defendant understands that no one, including his attorney or the District Court, can predict with certainty the effect of the defendant's conviction on the defendant's immigration or naturalization status. It is agreed that the defendant will have no right to withdraw his guilty plea based on any actual or perceived adverse immigration consequences (including removal or denaturalization) resulting from the guilty plea and conviction. It is further agreed that the defendant will not challenge his conviction or sentence on direct appeal, or through litigation under Title 28, United States Code, Section 2255 and/or Section 2241, on the basis of any actual or perceived adverse immigration consequences (including removal or denaturalization) resulting from his guilty plea and conviction.

It is further agreed that should the conviction following the defendant's plea of guilty pursuant to this Agreement be vacated for any reason, then any prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this agreement (including any counts that the Government has agreed to dismiss at sentencing pursuant to this Agreement) may be commenced or reinstated against the defendant, notwithstanding the expiration of the statute of

limitations between the signing of this Agreement and the commencement or reinstatement of such prosecution. It is the intent of this Agreement to waive all defenses based on the statute of limitations with respect to any prosecution that is not time-barred on the date that this Agreement is signed.

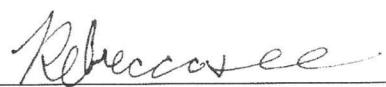
It is further understood that this Agreement does not bind any federal, state, or local prosecuting authority other than this Office.

Apart from any written Proffer Agreement(s) that may have been entered into between this Office and defendant, this Agreement supersedes any prior understandings, promises, or conditions between this Office and the defendant. No additional understandings, promises, or conditions have been entered into other than those set forth in this Agreement, and none will be entered into unless in writing and signed by all parties.

Very truly yours,

DAMIAN WILLIAMS
United States Attorney

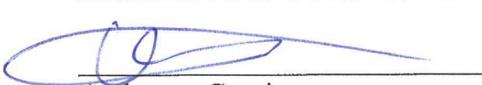
By:


Rebecca T. Dell / Jun Xiang
Assistant United States Attorneys
(212) 637-2198 / -2289

APPROVED:


Michael D. Longyear / RTD
Michael D. Longyear
Co-Chief, Narcotics Unit

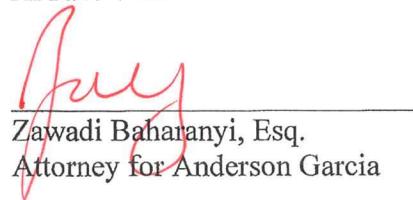
AGREED AND CONSENTED TO:


Anderson Garcia

1/5/2022

DATE

APPROVED:


Zawadi Baharanyi, Esq.
Attorney for Anderson Garcia

1/19/2022

DATE

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

21 CR 402 (RMB)

6 ANDERSON GARCIA,

7 Defendant.

Plea
(via Telephone)

8 New York, N.Y.
9 January 27, 2022
10 10:30 a.m.

11 Before:

12 HON. RICHARD M. BERMAN,

13 District Judge

14 APPEARANCES

15 DAMIAN WILLIAMS
16 BY: REBECCA DELL
17 JUN XIANG
18 Assistant United States Attorneys

19 FEDERAL DEFENDERS OF NEW YORK, INC.
20 Attorneys for Defendant
21 BY: ZAWADI S. BAHARANYI

1 (Case called)

2 THE COURT: Good morning, everybody. Good morning,
3 Mr. Garcia.

4 We are scheduled today for a guilty plea. I have
5 received what's called an advice-of-rights form which was
6 e-mailed, I think, on January 20. I just want to make sure
7 that everybody is comfortable going forward, and that is their
8 intention today, with a guilty plea, which we are doing
9 remotely and it is largely because of the lingering effects of
10 the COVID pandemic.

11 I start with defense counsel. Have you discussed with
12 Mr. Garcia proceeding remotely, so to speak, rather than in a
13 Southern District of New York courtroom?

14 MS. BAHARANYI: Good morning, your Honor. Yes, we
15 have discussed it. I know Mr. Garcia's preference has always
16 been to be able to be in person with the Court, but he
17 understands that given the current nature of this pandemic,
18 that is not possible, so he is prepared to move forward by
19 telephone today.

20 THE COURT: Mr. Garcia, is that your point of view,
21 that you would prefer to go forward today.

22 THE DEFENDANT: Yes, your Honor, that's correct.

23 THE COURT: I take it you've both gone over the
24 advice-of-rights form which we use in plea situations in which
25 describes certain of the rights that are given up by entering a

1 guilty plea, as opposed --

2 MS. BAHARANYI: Yes, your Honor, we have gone over
3 that.

4 THE COURT: Mr. Garcia, you went over that
5 advice-of-rights form with your attorney before you signed it?

6 THE DEFENDANT: Yes, correct.

7 THE COURT: If we complete this plea, which I have
8 every hope that we will do today, we will then vacate the
9 current trial date, which is on the calendar for March 1, 2022.

10 Christine, if you would swear in Mr. Garcia.

11 THE DEPUTY CLERK: Yes, Judge.

12 (Defendant sworn)

13 THE COURT: I should mention that I have also received
14 and reviewed a copy of what is a plea agreement. It's actually
15 in letter form between the government, Ms. Baharanyi, and it is
16 dated November 17, 2021. I just wanted to make sure from
17 defense counsel and Mr. Garcia that they have each gone over
18 that one with the other carefully, that is to say, the plea
19 agreement.

20 THE DEFENDANT: Yes, your Honor.

21 MS. BAHARANYI: Your Honor, yes, we have.

22 THE COURT: Ms. Baharanyi, not to belabor the point,
23 but it's clear from these preliminary discussions that
24 Mr. Garcia wishes to enter a plea of guilty today to Count One
25 of the indictment. Is my understanding correct that that's

1 what we are about to do?

2 MS. BAHARANYI: That is correct, your Honor.

3 THE COURT: Before I can accept your guilty plea,
4 Mr. Garcia, I am going to ask you a series of questions so I
5 can establish to my satisfaction that you in fact wish to plead
6 guilty and that you do so voluntarily and knowingly and because
7 you are guilty, and also to establish that you know just what
8 rights you will be giving up by pleading guilty.

9 If you don't understand any of my questions or if at
10 any time you wish to consult with your attorney, for any
11 reason, please say so and I'll give you as much time as you
12 need to consult with your attorney because it's essential to a
13 valid plea that you understand each question before you answer.
14 Is that clear with you?

15 THE DEFENDANT: Yes.

16 THE COURT: Mr. Garcia, you understand that now that
17 you are under oath that your answers to my questions must be
18 truthful and could subject you to the criminal penalties of
19 perjury or of making a false statement if you did not answer
20 truthfully. You realize that?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Mr. Garcia, please state your full name.

23 THE DEFENDANT: Anderson Garcia.

24 THE COURT: Mr. Garcia, you are how old?

25 THE DEFENDANT: I'm 23 years old.

1 THE COURT: You're a U.S. citizen?

2 THE DEFENDANT: No, your Honor.

3 THE COURT: Citizen of what country?

4 THE DEFENDANT: Dominican Republic.

5 THE COURT: How far did you go in school?

6 THE DEFENDANT: Ninth grade.

7 THE COURT: Where was that? Was that in the DR or
8 here?

9 THE DEFENDANT: In the U.S.

10 THE COURT: In what borough?

11 THE DEFENDANT: Bronx.

12 THE COURT: Are you now or have you recently been
13 under the care of a medical doctor?

14 THE DEFENDANT: Yes.

15 THE COURT: Without going into all the details, are
16 you physically able and prepared to go forward with today's
17 guilty plea, despite whatever health issues?

18 THE DEFENDANT: Yes.

19 THE COURT: I'm sorry?

20 THE DEFENDANT: I said yes.

21 THE COURT: What about a mental health physician or
22 psychiatrist? Are you under the care of a mental health
23 physician?

24 THE DEFENDANT: I'm OK.

25 THE COURT: How would you say your physical health is

1 today?

2 THE DEFENDANT: It's good.

3 THE COURT: And your mental health?

4 THE DEFENDANT: Good.

5 THE COURT: Have you ever been addicted to drugs or to
6 alcohol?

7 THE DEFENDANT: In the past.

8 THE COURT: I understand that. Have you ever been
9 hospitalized or treated for any addiction?

10 THE DEFENDANT: Not that I believe.

11 THE COURT: For example, going to a treatment center,
12 going to a doctor, or going to a hospital for purposes of
13 getting help with your addiction then.

14 THE DEFENDANT: Yeah. I was in a drug program before.

15 THE COURT: You were. OK.

16 Have you taken any drugs or medicine or pills or drunk
17 any alcoholic beverages in the past 24 hours?

18 THE DEFENDANT: No.

19 THE COURT: Anything that might cloud your mind or
20 affect your answers?

21 THE DEFENDANT: No.

22 THE COURT: You understand that what we are doing here
23 today?

24 THE DEFENDANT: Yes.

25 THE COURT: Again, I am going to ask how you feel

1 today first physically, and then I am going to ask how you feel
2 mentally. Start with physically.

3 THE DEFENDANT: I feel good.

4 THE COURT: And mentally.

5 THE DEFENDANT: I feel good too.

6 THE COURT: Here is a question for the lawyers. Do
7 either of you have any doubts or concerns as to Mr. Garcia's
8 competence to plead at this time?

9 Defense counsel.

10 MS. BAHARANYI: No, your Honor.

11 THE COURT: Government counsel.

12 MS. DELL: No, your Honor.

13 THE COURT: Based on the record today, including
14 Mr. Garcia's testimony so far, I find that he, Anderson Garcia,
15 is competent to plead.

16 Mr. Garcia, have you been given a full opportunity to
17 discuss all aspects of this case with your attorney?

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: Have you discussed with her any possible
20 defenses that you might have to the charge in the indictment to
21 which you have offered to plead guilty today?

22 THE DEFENDANT: Yes. I couldn't hear you. I'm sorry.

23 THE COURT: That's OK. Can you hear me OK?

24 THE DEFENDANT: Now I hear you.

25 THE COURT: If you don't, for any reason, just let me

1 know that you can't hear.

2 THE DEFENDANT: OK.

3 THE COURT: Are you fully satisfied with your
4 attorney's legal representation of you?

5 THE DEFENDANT: Yes.

6 THE COURT: Fully satisfied with the legal advice she
7 has given you.

8 THE DEFENDANT: Yes.

9 THE COURT: Now I am going to explain certain
10 constitutional rights that you have and ask some questions
11 about those. First of all, do you understand that you have the
12 absolute right to plead not guilty today?

13 THE DEFENDANT: Yes.

14 THE COURT: Under the Constitution and laws of the
15 United States, if you do not plead guilty, you are entitled to
16 a speedy and public trial by a jury on the charges contained in
17 the indictment. Do you realize that?

18 THE DEFENDANT: Yes.

19 THE COURT: If you decided to have a trial, at the
20 trial you would be presumed to be innocent, the government
21 would have to prove that you were guilty by competent evidence
22 and beyond a reasonable doubt before you could be found guilty,
23 and a jury would have to agree unanimously that you were guilty
24 of those charges in the indictment. You would not have to
25 prove that you were innocent. Do you understand those rights

1 that you would have if you went to trial?

2 THE DEFENDANT: Yes.

3 THE COURT: Also, if you went to trial, at the trial,
4 and at every stage of your case, you would be entitled to be
5 represented by an attorney, as you are today, and have been
6 throughout these proceedings. And if you could not afford an
7 attorney, one would be appointed at public expense to represent
8 you. Do you realize that?

9 THE DEFENDANT: Yes.

10 THE COURT: During a trial, if you decided to have
11 one, the witnesses for the government would have to come to
12 court and testify in your presence. Your attorney could
13 cross-examine the witnesses for the government, she could
14 object to evidence offered by the government, and she could
15 offer evidence and subpoena witnesses on your behalf. Do you
16 realize that?

17 THE DEFENDANT: Yes.

18 THE COURT: Also, if you decided to have a trial, at
19 the trial, although you would have the right to testify if you
20 chose to do so, you would also have the right not to testify
21 and no one, including especially the jury, could draw any
22 inference or suggestion of guilt from the fact that you did not
23 testify if that's what you chose to do. You realize that?

24 THE DEFENDANT: Yes.

25 THE COURT: Even now, this morning, as you are

1 entering the guilty plea, you still have the right to change
2 your mind and to plead not guilty and to go to trial on the
3 charges contained in the indictment. Do you realize that?

4 THE DEFENDANT: Yes.

5 THE COURT: If you do plead guilty and if I accept
6 your guilty plea, then you will be giving up your right to have
7 a trial and the other rights that I've been discussing with you
8 and there will be no trial, but I will still enter a judgment
9 of guilty against you. Do you realize that?

10 THE DEFENDANT: Yes.

11 THE COURT: I will, thereafter, sentence you on the
12 basis of your guilty plea after I have considered what's called
13 a presentence investigation report, which is prepared by the
14 probation department, and whatever submissions that I may get
15 from your counsel and from the government in connection with
16 sentencing. Do you realize that?

17 THE DEFENDANT: Yes.

18 THE COURT: Have you received a copy of the indictment
19 in this case, which contains the charges against you?

20 THE DEFENDANT: Yes, your Honor.

21 THE COURT: Have you discussed fully with your
22 attorney the charge, Count One in the indictment, to which you
23 intend to plead guilty today?

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: I asked this question before, but I am

1 going to ask it again. Are you fully satisfied with
2 Ms. Baharanyi's legal representation of you?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: Are you fully satisfied with her legal
5 advice, the legal advice that she has given you?

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: At this point I want to read Count One of
8 the indictment. It's called conspiracy to commit Hobbs Act
9 robbery. It reads:

10 In or about August 2020, in the Southern District of
11 New York and elsewhere, you, Anderson Garcia, the defendant,
12 and others known and unknown, knowingly did combine, conspire,
13 confederate, and agree together with each other to commit
14 robbery, as that term is defined in Title 18, United States
15 Code, Section 1951(b)(1). It goes on to say in Count One that
16 the defendant would and did thereby obstruct, delay, and affect
17 commerce and the movement of articles and commodities in
18 commerce, as that term is defined in Title 18, U.S. Code,
19 Section 1951(b)(3). It goes on to conclude: To wit,
20 Mr. Garcia and others conspired to rob a drug dealer in the
21 Bronx, New York.

22 I'll ask counsel first, starting with the defense, if
23 they wish to have me add anything to that summary of Count One.

24 MS. BAHARANYI: No, your Honor.

25 THE COURT: How about the government.

1 MS. DELL: No, your Honor.

2 THE COURT: Let's turn for a moment, Mr. Garcia, and
3 talk about the maximum possible penalties you could receive for
4 this Count One in the indictment. First of all, do you realize
5 that there is a maximum term of imprisonment of 20 years?

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: Do you realize that there is a maximum
8 term of supervised release which is the period following
9 incarceration during which you would be under supervision of
10 the probation department and very well likely the Court as
11 well. Do you realize the maximum term is three years of
12 supervised release?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: Do you realize that the maximum fine that
15 could be imposed in this case is the greatest of \$250,000 or
16 twice the pecuniary gain derived from the offense or twice the
17 gross pecuniary loss to others as a result of this offense? Do
18 you realize what the maximum fine that could be imposed upon
19 you is?

20 THE DEFENDANT: Yes, your Honor.

21 THE COURT: Do you know that there will be a \$100
22 special assessment in addition?

23 THE DEFENDANT: Yes.

24 THE COURT: Do you understand that a felony
25 adjudication may result in your being deprived of certain

1 rights that you might have, and those in fact could include the
2 right to possess a firearm and the right, if you are a citizen,
3 to vote, the right to hold public office, and the right to
4 serve on a jury. Do you realize that?

5 THE DEFENDANT: Yes.

6 THE COURT: Let me just ask the government, is this a
7 case that involves restitution, in your judgment?

8 MS. DELL: It may. We have to consider that.

9 THE COURT: It's a factor that may well come up in
10 sentencing. Is that what you are saying?

11 MS. DELL: Yes.

12 THE COURT: Back to you, Mr. Garcia. Do you
13 understand that I may also order that you pay restitution if it
14 is determined that there is a victim in this matter that is
15 entitled to restitution? Do you realize that?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: Do you also realize that you may be
18 required to notify any victims of your conviction? Do you
19 realize that?

20 THE DEFENDANT: Yes.

21 THE COURT: Do you understand, Mr. Garcia, that parole
22 has been abolished in the federal system, which is where we
23 are? There is no longer parole.

24 THE DEFENDANT: Yes.

25 THE COURT: I mentioned this briefly before. We are

1 going to talk now about supervised release again. Do you
2 understand that, in addition to incarceration, you will likely
3 be subject to a period of supervised release following
4 incarceration?

5 THE DEFENDANT: Yes.

6 THE COURT: Do you know that with respect to
7 supervised release there would likely be terms and conditions
8 attached. Sometimes they include therapeutic counseling,
9 sometimes they include drug rehabilitation, among other
10 factors. If you did not comply with any of those terms or
11 conditions, you could, following a hearing, be returned to
12 prison. Do you understand that?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: Do you understand that if we held a
15 hearing with regard to whether or not you complied with terms
16 and conditions of supervised release that that hearing would be
17 just before the Court and there would be no jury involved. Do
18 you realize that?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: Ms. Baharanyi, is there an implication
21 here of deportation following conviction? Does that come into
22 play in this case?

23 MS. BAHARANYI: It does, your Honor.

24 THE COURT: Mr. Garcia, because you are not a U.S.
25 citizen, do you understand that you may be subject to

1 deportation following your conviction?

2 THE DEFENDANT: Yes, your Honor.

3 THE COURT: Mr. Garcia, are you serving any other
4 sentences, either state or federal, or are you being prosecuted
5 in any other courts for any crime, any other crime?

6 THE DEFENDANT: No, your Honor.

7 THE COURT: Do you understand that when we get to
8 sentencing there are a series of factors that I will consider
9 under a statute called 18 United States Code Section 3553(a) in
10 determining what I believe is a fair and reasonable sentence?
11 Those factors include the nature and the circumstances of the
12 crime, the history and the characteristics of yourself,
13 Mr. Garcia, and the need for the sentence that I impose to
14 reflect the seriousness of the crime, to promote respect for
15 the law, to provide a just punishment, to afford adequate
16 deterrence to criminal conduct, to protect the public from
17 further crimes, and to provide you, the defendant, with needed
18 educational or vocational training, medical care, or other
19 correctional treatment in the most effective manner.

20 In doing all of that, I will look at the kinds of
21 sentences that are available, the kinds of sentence and the
22 sentencing range established under the United States Sentencing
23 Guidelines, any policy statements issued by the United States
24 Sentencing Commission that may apply. I'll also seek to avoid
25 unwarranted sentence disparities among similarly situated

1 defendants and, as we discussed briefly before, I'll consider
2 the need to provide restitution.

3 Mr. Garcia and defense counsel, have you discussed one
4 with the other the factors to be taken into consideration in
5 sentencing?

6 MS. BAHARANYI: We have, your Honor.

7 THE COURT: Mr. Garcia, you went over how sentencing
8 works in this proceeding?

9 THE DEFENDANT: Yes.

10 THE COURT: Have you discussed with counsel potential
11 sentences or how at least the Court goes about determining what
12 an appropriate sentence would be?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: Do you realize that I am not bound by any
15 estimates as to what sentence will be imposed that you and your
16 counsel may have discussed? Do you realize that?

17 THE DEFENDANT: Yes.

18 THE COURT: Do you realize that even if you don't like
19 the sentence that I impose you would not be able, for that
20 reason alone, to withdraw your guilty plea. Do you understand
21 that?

22 THE DEFENDANT: Yes.

23 THE COURT: In your plea agreement letter, which is
24 dated November 17, 2021, there is a provision that says that
25 the sentence to be imposed upon the defendant, in this case

1 Anderson Garcia, is determined solely by the Court. Do you
2 agree with that?

3 THE DEFENDANT: Yes.

4 THE COURT: Is that, counsel for the defense and the
5 government, your understanding as well?

6 MS. BAHARANYI: Yes, your Honor.

7 MS. DELL: Yes for the government.

8 THE COURT: Thank you.

9 Let me ask you this broader question or this summary
10 question, Mr. Garcia. Do you believe that you understand fully
11 the consequences of pleading guilty today?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: Has anybody threatened you or in any way
14 forced you to enter this guilty plea?

15 THE DEFENDANT: No, your Honor.

16 THE COURT: Including any attorney.

17 THE DEFENDANT: No, your Honor.

18 THE COURT: I am going to refer again to the plea
19 agreement, dated November 17, 2021. Did you go over that plea
20 agreement carefully with your attorney?

21 THE DEFENDANT: Yes.

22 THE COURT: And discuss the substance and the
23 implications of that plea agreement?

24 THE DEFENDANT: Yes.

25 THE COURT: The November 17 letter plea agreement

1 provides, among other things, that in your case what we call
2 the offense level is 28, the criminal history category is VI,
3 and the guidelines range is 140 to 175 months of incarceration.
4 Do you realize that?

5 THE DEFENDANT: Yes, your Honor.

6 THE COURT: By the way, the entire plea agreement is
7 incorporated here by reference. I'm just singling out several
8 provisions that I wanted to emphasize. The next such provision
9 contains waivers of appeal. In that plea agreement,
10 Mr. Garcia, you agree not to file a direct appeal. You also
11 agree not to bring what's called a collateral challenge, which
12 includes, but is not limited to, an application under Title 28,
13 United States Code, Sections 2255 and/or 2241 -- this refers to
14 the so-called habeas corpus provisions -- of any sentence that
15 is within or below the stipulated guideline range as found of
16 140 to 175 months of incarceration.

17 Let me just summarize that again. This provision that
18 I have just referred to indicates that you are going to waive
19 certain rights you would otherwise have to appeal or to
20 challenge your conviction if the sentence imposed on you is in
21 fact within the stipulated guideline range of 147 to 175 months
22 of imprisonment. Do you realize that?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: Do you also realize that you agree not to
25 appeal or bring a collateral challenge of any term of

1 supervised release that is less than or equal to the statutory
2 maximum? You agree with that?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: You also agree in that plea agreement not
5 to appeal or bring a collateral challenge of any fine that is
6 less than or equal to \$250,000?

7 THE DEFENDANT: Yes.

8 THE COURT: Do you also understand that that plea
9 agreement that you signed, in that agreement you agreed not to
10 challenge your conviction or sentence on direct appeal or
11 through collateral challenge on the basis of any actual or
12 perceived adverse immigration consequences, including removal
13 or denaturalization resulting from your guilty plea and
14 conviction. Do you realize that?

15 THE DEFENDANT: Yes.

16 THE COURT: There is a provision, I believe, exactly
17 this, or certainly to this effect, that the sentence to be
18 imposed upon Mr. Garcia remains within the sole discretion of
19 the Court.

20 Question for counsel is, do they each agree with that
21 provision?

22 MS. BAHARANYI: Your Honor, I do agree.

23 THE COURT: And government counsel.

24 MS. DELL: Yes. I agree.

25 THE COURT: Mr. Garcia, has anybody made any promise

1 or inducement to cause you to plead guilty today?

2 THE DEFENDANT: No, your Honor.

3 THE COURT: Has anyone made a promise to you as to
4 what sentence will be imposed in your case?

5 THE DEFENDANT: No, your Honor.

6 THE COURT: Again, have you discussed the sentencing
7 procedure that will be applied as I summarized it before in
8 your case?

9 THE DEFENDANT: Yes, your Honor.

10 THE COURT: Let's turn to government counsel and ask
11 what, in summary, the government thinks it would be able to
12 prove if this case were to go to trial instead of being
13 resolved by today's plea.

14 MS. DELL: Yes, your Honor. In order to prove the
15 defendant guilty of Count One of the indictment the government
16 would be required to prove beyond a reasonable doubt the
17 following two elements: First, the existence of the
18 conspiracy, in other words, that there was in fact an agreement
19 or understanding among the defendant and at least one other
20 person to violate the laws of the United States that make it a
21 crime to commit a robbery that affects interstate commerce;
22 second, the defendant knowingly participated in the conspiracy.

23 In addition to these two elements, the government
24 would be required to prove by a preponderance of the evidence
25 that venue is proper in the Southern District of New York.

1 THE COURT: Thank you.

2 Back to you, Mr. Garcia. Having heard what the
3 government believes it would be able to prove in your case, and
4 in light of the questions I've been asking you and the answers
5 that you have given, do you wish at this point in time to plead
6 guilty or to plead not guilty?

7 THE DEFENDANT: To plead guilty, your Honor.

8 THE COURT: Would you tell me then in your own words
9 what it is that you did that makes you believe that you are
10 guilty of conspiracy to commit a Hobbs Act robbery.

11 THE DEFENDANT: Yes, your Honor. In August 2020, I
12 agreed with other people to commit a robbery of a person that
13 deal drugs in the Bronx. We used force to take drugs from this
14 person.

15 THE COURT: In other words, by using force, you robbed
16 this person of drugs that he or she had with them?

17 THE DEFENDANT: Yes.

18 THE COURT: Did you do anything else you wanted to
19 add?

20 THE DEFENDANT: I knew what I was -- I know what I was
21 doing was wrong, and I'm very sorry to the victim.

22 THE COURT: Thank you.

23 Are you pleading guilty to this crime because you are
24 in fact guilty of it?

25 THE DEFENDANT: Yes.

1 THE COURT: Does the government counsel agree that
2 there is a sufficient factual predicate for the guilty plea
3 today?

4 MS. DELL: Yes, your Honor.

5 THE COURT: How about defense counsel?

6 MS. BAHARANYI: Yes, your Honor.

7 THE COURT: So do I agree. And it is the finding of
8 the Court in this case U.S. v. Anderson Garcia that Mr. Garcia
9 is fully competent and capable of entering an informed plea,
10 that he is aware of the nature of the charges and the
11 consequences of the plea, and that the plea of guilty is a
12 knowing and voluntary plea supported by an independent basis in
13 fact supporting each of the essential elements of Count One.
14 The plea is therefore accepted and the defendant is now
15 adjudged guilty of that offense.

16 Any reason, in counsel's opinion, I should not direct
17 that a presentence report be prepared?

18 MS. BAHARANYI: No, your Honor.

19 MS. DELL: Not on behalf of the government.

20 THE COURT: What about defense counsel?

21 MS. BAHARANYI: Your Honor, no. There is no reason
22 for a presentence report not to be prepared.

23 THE COURT: Do you wish to be present for any
24 interview in connection with that report?

25 MS. BAHARANYI: I do, your Honor. And I would also

1 make the additional request at this time that we be given a
2 private space to conduct the interview. Our understanding is
3 that at Essex that has not always been accommodated. We would
4 ask permission for me to be present and for us to be able to
5 conduct this in some form of privacy, given the nature of
6 topics that Mr. Garcia will be discussing.

7 THE COURT: Fair enough. I will make that
8 recommendation. If they don't accommodate you, do you want him
9 transferred to another facility?

10 MS. BAHARANYI: Yes, your Honor. That would be our
11 request.

12 THE COURT: Such as MCC or MDC?

13 MS. BAHARANYI: I believe the MCC is closed now, so it
14 would be the MDC.

15 THE COURT: You would opt for that if that were
16 available?

17 MS. BAHARANYI: That is correct, your Honor.

18 THE COURT: I am going to order that a presentence
19 investigation report be prepared and also direct that defense
20 counsel be present at any interview in connection with the
21 preparation of that report and that the BOP use its best
22 efforts to make sure that the interview with respect to the
23 presentence investigation report is conducted in privacy along
24 with the probation officer and defense counsel. I'll add, if
25 that is not possible, that BOP make preparation to have such an

1 interview take place in privacy at the MDC in Brooklyn. I
2 hereby order that a presentence investigation report be made.

3 Mr. Garcia, it's in your best interests to cooperate
4 with the probation department who prepare the presentence
5 report since it will be important in my decision as to what
6 your sentence will be. Please tell them whatever they ask,
7 consulting with your attorney, both the good things and the
8 not-so-good things. Because if you don't disclose something to
9 them, that is to say, to probation, and they ask about it and
10 they find out themselves what the answer is, they may say that
11 you were not being truthful with them and that might not be
12 helpful to you at sentencing.

13 You and your counsel and the government will have the
14 right and the opportunity to examine the presentence report
15 before a sentencing date and to file any objections. So I urge
16 you, Mr. Garcia, to review the presentence report carefully
17 with your attorney and discuss it with her before sentencing.
18 And if there are any mistakes in the report, please point them
19 out to your attorney so that she can point them out to me
20 before the sentencing and so that I don't proceed on the basis
21 of mistaken information.

22 This is a proposed date for sentencing: May 2, 2022
23 at 9 a.m. At that occasion defense counsel and Mr. Garcia will
24 have the opportunity to be heard.

25 If there are written sentencing submissions, as I

1 trust there will be, if they could be filed by April 16, 2022
2 from the defense and the government submission by April 23,
3 2022. April 16 for the defense, April 23 for the government.

4 MS. BAHARANYI: Your Honor, April 16 and the 23rd are
5 both Saturdays. Would the Court be amenable to filing them on
6 the 18th and the 25th?

7 THE COURT: Sure. April 18, April 25.

8 MS. BAHARANYI: Thank you, your Honor.

9 THE COURT: I think then that covers everything I was
10 intending to cover at this plea.

11 Did counsel, starting with the defense, wish to add
12 anything to today's proceeding?

13 MS. BAHARANYI: No, your Honor.

14 THE COURT: How about the government?

15 MS. DELL: No, your Honor.

16 THE COURT: Starting with the government, is the
17 government satisfied with the plea allocution?

18 MS. DELL: Yes, your Honor.

19 THE COURT: How about defense counsel?

20 MS. BAHARANYI: Yes, your Honor.

21 THE COURT: OK then. That concludes our work for
22 today. Thanks, everybody, and we can be adjourned.

23 Thanks so much.

24 (Adjourned)

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

21 CR 402 (RMB)

6 ANDERSON GARCIA,

7 Defendant.

Sentence
(via Microsoft Teams)

8 New York, N.Y.
9 September 21, 2022
10 9:00 a.m.

11 Before:

12 HON. RICHARD M. BERMAN,

13 District Judge

14 APPEARANCES

15 DAMIAN WILLIAMS

16 BY: JUN XIANG
17 REBECCA DELL
18 Assistant United States Attorneys

19 FEDERAL DEFENDERS OF NEW YORK, INC.

20 Attorneys for Defendant
21 BY: ZAWADI S. BAHARANYI

1 (Case called)

2 THE COURT: Good morning, everybody. This is Judge
3 Berman. We are on today, as you all know, for sentencing in
4 this matter.

5 I have two preliminary concerns or issues, rather.
6 One has to do with the CARES Act. By that I mean, we are
7 obviously not proceeding in a courthouse, in an SDNY courthouse
8 today, but rather we are proceeding by video and that has to do
9 in part, in substantial part with the fact of the pandemic, the
10 COVID pandemic, which has placed certain -- not restrictions,
11 but limitations on the ability to utilize the entire
12 courthouse.

13 Parenthetically, also today, there are technical
14 problems in the Moynihan courthouse unrelated I think -- I am
15 not sure -- to the CARES Act or COVID, which has limited access
16 to the building today in terms of elevators and producing
17 parties for appearances.

18 In any event, I do find that it's necessary for us to
19 go forward with this sentencing unless there is an objection,
20 which I would be happy to hear out.

21 I would ask defense counsel if they are, first of all,
22 comfortable and Mr. Garcia also in proceeding in this fashion
23 today; that is to say, by video.

24 MS. BAHARANYI: Yes, your Honor, we are comfortable
25 proceeding today by video.

1 THE COURT: Is Mr. Garcia waiving any right that he
2 may have to proceed in person?

3 MS. BAHARANYI: Your Honor, we have discussed his
4 rights to proceed in person. He does voluntarily waive those,
5 and he is prepared to proceed today by video.

6 THE COURT: Mr. Garcia, is that OK with you as well,
7 just for the record.

8 I think you have to come a little closer to the
9 microphone.

10 THE DEFENDANT: I said, yes, that's OK, your Honor.

11 THE COURT: That's great. Thank you.

12 The second is, the issue of any sentencing proceeding,
13 but this one in particular, I suppose, is the issue of
14 restitution. I did not see any proposed order or proposed
15 restitution claim or amount. There is a victim, certainly, in
16 connection with this proceeding, but no one has brought to my
17 attention whether or not restitution is required or sought or
18 what.

19 I turn to the government, first, for that issue.

20 MR. XIANG: Thank you, your Honor. I'm happy to speak
21 to that. The government has spoken with victim's counsel in
22 this case -- as the Court knows, the victim is also
23 represented -- about specifically the issue of restitution.
24 The most recent conversation on that topic was last week in
25 advance of the government's sentencing submission.

1 At that time victim's counsel advised that the victim,
2 with the assistance of counsel, was still considering the
3 issue.

4 Obviously, as the Court is aware, the victim is
5 laboring under substantial impairments. Based on counsel's
6 representation, that has limited counsel's ability to have full
7 conversations about the topic of restitution.

8 THE COURT: You are referring to physical limitations.

9 MR. XIANG: I'm referring to the fact that the victim
10 has been deemed to be mentally incompetent. That's obviously
11 impaired his ability to speak with counsel about the topic and
12 also counsel's ability to obtain, for example, medical bills,
13 things of that nature that would document the amount of
14 restitutable loss.

15 I think another issue that victim counsel raised was I
16 don't think he was -- he knew at that point what part of the
17 losses were borne out of pocket by the victim versus by
18 insurance and how that would affect the restitution analysis.
19 So the bottom line was that victim counsel wanted more time to
20 think through the issue.

21 The government understands that under the statute
22 there is a 90-day period after sentencing in which the Court
23 could order restitution. So the government would ask the
24 Court's leave to permit victim's counsel and the victim more
25 time to think through the issue, to provide appropriate

1 documentation and so forth.

2 THE COURT: Defense counsel, is that agreeable?
3 Before you answer, what would happen? Would you and defense
4 counsel get together first, if there is a restitution claim,
5 and discuss it and then present it to the Court, either jointly
6 or independently, however your discussion works out?

7 MR. XIANG: Your Honor, it would certainly be the
8 government's intent and hope that we would have a joint consent
9 proposal to provide to the Court. In the plea agreement the
10 defendant does agree to restitution, although not as to a
11 specific amount. Obviously, if the parties had some
12 disagreement as to the appropriate amount or the manner of
13 payment, we would need to tee that up for the Court.

14 Again, at this time the government doesn't have a
15 position as to a particular amount or category of payment,
16 because we are waiting on that information from victim's
17 counsel.

18 THE COURT: Defense counsel, do you want to add
19 anything?

20 MS. BAHARANYI: I think the only thing I'd add, your
21 Honor, is that one of the conditions recommended by probation
22 does seem to be relying or depending on there being some
23 restitution obligation on behalf of Mr. Garcia. So I do think
24 if ultimately 90 days out we get to a position where there is
25 no restitution that he is owed, we would seek the modification

1 of one of the conditions of supervised release. I'm not quite
2 sure how to do that. Or perhaps we could build it into the
3 Court's order of today for supervised release that the
4 condition that he can't open new lines of credit is dependent
5 upon whether there is any sort of financial obligation owed by
6 Mr. Garcia. Because absent a financial obligation, that
7 condition doesn't seem appropriate in this case.

8 THE COURT: I see.

9 When we get there, if I overlook it somehow, please
10 interrupt and flag that we should have that discussion at that
11 point.

12 MS. BAHARANYI: Absolutely.

13 THE COURT: Thank you.

14 There is a very extensive record here, sentencing
15 record, and I've been through it all, so this may take some
16 time. But here is where I come out.

17 First, I'll start by saying that, as you all know,
18 that in sentencing, following now ten-year-old or so Supreme
19 Court cases and other cases, the *Gall* case is one of them, the
20 *Kimbrough* case is another, and the *Booker* case is yet another.
21 There are other cases too, but those are some. One other case
22 I should mention is *Regalado*. That actually is the Second
23 Circuit decision from 2008.

24 The upshot of that jurisprudence is that the United
25 States Sentencing Guidelines are no longer mandatory. And what

1 we do in sentencing and what I have done, I think, in some
2 depth before we started today's proceeding is to consider and
3 review the sentencing guidelines, but, in particular, under 18,
4 United States Code, Section 3553(a), we are concerned with the
5 nature and the circumstances of the crime or offense, as well
6 as the history and characteristics of Mr. Garcia, and we
7 seek -- as sentencing courts, we seek to come up with a
8 sentence that reflects the seriousness of the crime, promotes
9 respect for the law, provides a just punishment, affords
10 adequate deterrence to criminal conduct, protects the public
11 from further crimes of the defendant, provides the defendant,
12 Mr. Garcia, with needed educational or vocational training,
13 medical care, or other correctional treatment in the most
14 effective manner.

15 And here, and I will go into it in more detail, but I
16 am going to recommend absolutely that in connection with any
17 incarceration and/or supervised release, if it were to come
18 into play in this case, I'm certainly going to recommend that
19 Mr. Garcia receive or have the opportunity to receive drug
20 counseling, number 1, and mental health counseling and
21 treatment, number 2. I will speak more about that as I go
22 along.

23 But also in sentencing we review the kinds of
24 sentences that are available, the kinds of sentence and the
25 sentencing range established under the sentencing guidelines,

1 even though, as I say at the outset, they are no longer
2 mandatory. We look at any policy statements that may have been
3 issued by the United States Sentencing Commission. We seek to
4 avoid unwarranted sentence disparities among similarly situated
5 defendants and, we touched on this briefly already, the need to
6 provide restitution.

7 We always start with the guidelines framework or
8 analysis, which, again, is not mandatory, but it is as follows.
9 Here what we call the offense level is 28. The criminal
10 history category is VI. The guideline range is 140 to 175
11 months of incarceration. I have considered the guidelines and
12 all the other factors at 18, United States Code, Section
13 3553(a), and in doing so these are just some of the highlights.
14 I promise you that I've been through everything you have
15 submitted and I probably won't, in the same detail, go through
16 every issue, but I'll try and touch on all of the important
17 ones.

18 The analysis suggests or comes up with the following:
19 On January 27, 2022, Mr. Garcia, who is a citizen of the
20 Dominican Republic, and parenthetically, as I understand it, is
21 under deportation or involved in deportation proceedings
22 simultaneous with today's proceeding, or at least running at
23 the same time, that is to say, the deportation proceedings.

24 Mr. Garcia on that date pled guilty before me to a
25 conspiracy to commit Hobbs Act robbery of an individual who is

1 said to be a drug trafficker. Mr. Garcia, at the time of the
2 crime, was 22 years old, a young adult at the time of the crime
3 that the crime took place.

4 Mr. Garcia pled guilty pursuant to a written plea
5 agreement, which was dated November 17, 2021, and in which,
6 among other provisions, was what is called a stipulated
7 guideline range of 140 to 175 months that coincides with my
8 analysis and the range that I mentioned a few minutes ago.

9 This was a particularly violent crime in that the
10 victim was pistol whipped and that he suffered some severe
11 injuries resulting; in fact, it appears from traumatic brain
12 injury that required hospitalization and surgery. The details
13 of the injury are set forth in the submissions and also in the
14 presentence report. But it is clear that that was an act of
15 violence and that the victim really did sustain serious and
16 perhaps long-term injury.

17 The victim of the offense, Mr. [REDACTED], asked his
18 attorney, Mr. Kluger, to provide a victim impact statement on
19 his behalf. And Mr. Kluger, the attorney, stated the
20 following, and this is a quote: "Quite simply, this event has
21 ruined his life." That's the attorney speaking on behalf of
22 his client, Mr. [REDACTED]. The attorney goes on to say:
23 "Mr. [REDACTED] was robbed and then, for no reason, violently
24 pistol whipped. While Mr. [REDACTED] may have been lucky to
25 survive, the injury has left him in constant pain with

1 permanent brain damage. Before the incident, family and
2 friends described Mr. [REDACTED] as cheerful, easy going, and
3 fun to be around. Now, in addition to the pain, he is
4 forgetful, irritable and in a state of constant confusion.
5 Moreover, to add insult to injury, literally, in parens, once
6 the police responded, they allegedly observed contraband in
7 plain sight, which led to Mr. [REDACTED]'s arrest and federal
8 prosecution. Now, on top of everything else, he faces a
9 mandatory minimum prison sentence. Frankly, concludes,
10 Mr. Kluger, in my opinion, given his fragile mental and
11 physical condition, it is unlikely that he will last very long
12 in prison."

13 Back to the 3553(a) analysis, Mr. Garcia is 24 years
14 old. He is single and is the father of a relative newborn who
15 was born, I believe, in July 2021, while Mr. Garcia was
16 incarcerated. As I mentioned, Mr. Garcia is a citizen of the
17 Dominican Republic. According to the presentence report, he
18 has a pending immigration case and is currently under removal
19 proceedings. The Department of Homeland Security has issued a
20 warrant for Mr. Garcia which is currently lodged as an
21 immigration detainer. In the defense submission counsel states
22 that the next immigration hearing in immigration court is
23 scheduled for December of this year.

24 Mr. Garcia has a spotty education background
25 experience, meaning that he did not get very far in school,

1 certainly not in the United States. He had a very tumultuous,
2 upbringing, I guess you would say, in life, and school was not
3 something that he was consistently able to do.

4 His parents separated before he was born.

5 Mr. Garcia's father is reportedly serving a life sentence for
6 murder in the Dominican Republic. Mr. Garcia's mother came to
7 the United States when Mr. Garcia was an infant, and she too
8 has had considerable difficulties in her life. She apparently
9 suffers, among other things, from serious mental issues. She
10 reportedly left Mr. Garcia in the Dominican Republic under the
11 care of a boyfriend or significant other. When Mr. Garcia was
12 approximately six years old, his mother brought him to the
13 United States. When Mr. Garcia was approximately nine years
14 old, his mother sent him back to the Dominican Republic
15 because, among other things, he was getting into trouble in
16 school in the United States. In the Dominican Republic
17 Mr. Garcia resided with, as I understand it, his mother's
18 husband, who was physically abusive to Mr. Garcia. Mr. Garcia
19 stayed with his stepfather for a short period of time before he
20 returned to the United States to be with his mother, who was,
21 fair to say, having a difficult time in the United States in
22 terms of supporting herself and Mr. Garcia.

23 Mr. Garcia reported to probation that he frequently
24 ran away from home and spent time in several group homes, until
25 he aged out at the age of 18. Thereafter, he lived in various

1 shelters and for a time also with various relatives and also
2 for some time, if I understand it correctly, with foster
3 parents.

4 Mr. Garcia has a very serious criminal record,
5 including multiple arrests and convictions starting from the
6 age of 15 and giving rise, as I said at the outset, to a
7 criminal history agree of VI, which is, I believe, the highest
8 level.

9 Mr. Garcia was adjudicated, among other things, a
10 juvenile delinquent for two separate offenses. He has also
11 been adjudicated a youthful offender. He has convictions for
12 the following: False report of a stolen vehicle, robbery in
13 the third degree, criminal possession of stolen property in the
14 fourth degree, assault in the third degree, possession of a
15 controlled substance, false identification to law enforcement,
16 among other things. The presentence investigation report
17 appears to be thorough and definitive on the issue of the
18 history of Mr. Garcia's arrests and convictions.

19 Some of his prior convictions also included violent
20 behavior, including intentionally crashing his motor vehicle
21 into police cars, also dragging a robbery victim around on the
22 sidewalk, and also striking a corrections officer with closed
23 fists to the officer's head.

24 Defendant, Mr. Garcia, has serious mental health
25 issues and has quite a history in that regard. He has been

1 diagnosed with, among other things, bipolar disorder, anxiety
2 disorder, and hyperactivity. He has been hospitalized several
3 times in the past for manic and suicidal episodes. He is
4 currently prescribed medication for various mental issues.

5 On top of that, Mr. Garcia has also serious
6 cooccurring substance abuse history. That includes alcohol,
7 marijuana, Xanax, and Ecstasy.

8 He has a limited employment history, consisting of
9 work, spotty work in construction, and also as a lifeguard in
10 the boroughs of New York City.

11 He received a \$3,000 stimulus check from the
12 government while incarcerated.

13 By submission, dated September 6, 2022, the defense
14 requests a sentence of 48 months of incarceration. I didn't
15 want to prejudge anything because I am going to hear from all
16 of you, and I still have an open mind. But at least on the
17 surface it seems pretty clear that a 48-month sentence is
18 unrealistic in this case, given the extensive criminal history
19 and background, including criminal history category VI. But we
20 will see and hear from all the parties assembled today on this
21 and other subjects.

22 Defense counsel states that defendant did not possess
23 a firearm during the underlying offense here and that he did
24 not hit or strike the victim at any point in the robbery, and
25 the defense asks that the Court consider that if not for the

1 firearm enhancement in this case, Mr. Garcia's guideline range
2 would drop to 84 to 105 months. I certainly am considering
3 those factors in whatever sentence I come up with.

4 The crime in question, there is no doubt, was very
5 serious and involved, as I've mentioned, a victim who received
6 a life-threatening pistol whipping to his head. Defense
7 counsel describes Mr. Garcia's home life when he was younger
8 and how the defendant did not have any consistent adult
9 positive role model. That's certainly all very true. And also
10 defense counsel describes how Mr. Garcia self-medicated with
11 drugs and alcohol.

12 Defense counsel asked the Court to take into
13 consideration the fact that the defendant, Mr. Garcia, was a
14 young adult, age 22, when he participated in the instant
15 offense, and I have certainly acknowledged that in reviewing
16 the 3553(a) factors.

17 He was only six years old when he began experiencing
18 loss, trauma, neglect, and abuse, and the defense argues that,
19 as a result of his early exposure to such loss and trauma,
20 Mr. Garcia was particularly vulnerable to negative outside
21 pressures. I don't think anybody is disputing the tumultuous
22 nature of Mr. Garcia's upbringing, nor is anybody, I don't
23 think, seriously disputing his substance abuse history,
24 cooccurring with mental health issues.

25 Defense counsel has submitted with her papers, her

1 sentencing papers, a psychological evaluation. I think it's
2 dated December 14, 2020. It perhaps was not concluded until
3 February of 2020. I am not sure of those dates. I am sure of
4 the dates, but I am not sure what the date is from the
5 psychological evaluation. In any event, it is very thorough.
6 It was prepared by Dr. Joseph Giardino. And it appears, if I'm
7 not mistaken, defense counsel will correct me if I'm wrong,
8 that it has been or will be submitted to the U.S. immigration
9 authorities, and it argues that Mr. Garcia not be deported to
10 the Dominican Republic.

11 I won't go through -- it's a lengthy and comprehensive
12 report by Dr. Giardino, but I will mention some of the
13 highlights or the points made in that report. One is that
14 Mr. Garcia's current symptoms, this is Dr. Giardino speaking,
15 one of his symptoms and impairments include the fact that
16 Mr. Garcia has suffered from manic episodes in which he feels a
17 persistently elevated or irritable mood, requires limited
18 sleep, is grandiose and has flights of ideas and experiences a
19 surge in goal-directed activity. Dr. Giardino indicated that
20 while in manic states, Mr. Garcia engage in highly risky
21 behavior, such as auto theft, provocation of fights, and
22 increased substance use. He has an extensive arrest record for
23 criminal activities related to these particular behaviors.

24 Another point made by Dr. Giardino is that Mr. Garcia,
25 at least at the time of that report, had been in a major

1 depressive episode in which his mood is down and depressed most
2 days, more days than not.

3 He presented -- and here are some technical terms,
4 psychological mental health terms -- he presented with marked
5 anhedonia, which reflects a loss of pleasure, and also marked
6 avolition, which substitutes for lack of motivation.

7 Mr. Garcia indicated to Dr. Giardino that he attempts to remain
8 largely to himself, feeling constantly irritable around other
9 people.

10 Another point made by Dr. Giardino is that, this is,
11 again, at the time of this evaluation made by Dr. Giardino,
12 Mr. Garcia had marked changes in self concept.

13 Another point is that Mr. Garcia discussed feeling
14 often empty and hopeless, and he would attempt to ward off
15 these negative feelings by excessive substance use, including
16 cannabis, Xanax, MDMA, and alcohol. Mr. Garcia indicated to
17 Dr. Giardino that he utilized all of these substances on a
18 daily basis, feeling often out of control and wanting to find a
19 way to reduce his use.

20 Another point made by Dr. Giardino is the following.
21 Again, one must consider at the time that the report was made
22 and interviews conducted. Dr. Giardino said that since in jail
23 Mr. Garcia has been less able to rely on substances and thus
24 has increasingly felt more irritable and restless.

25 Dr. Giardino also points out that Mr. Garcia at the

1 time has frequent thoughts of death and disappearing.

2 Mr. Garcia apparently discussed with Dr. Giardino how he has
3 never completed a formal outpatient treatment program for his
4 mental health or substance abuse issues. They are largely due
5 to his instability in the foster care system and recurrent
6 context in the criminal justice system.

7 In my own personal observation, this is a huge
8 problem, that is to say, it seems very, very, very difficult,
9 if not impossible, for Mr. Garcia to overcome those serious
10 cooccurring disorders, namely, drug abuse and mental health
11 issues, without ever completing a formal outpatient treatment
12 program.

13 Dr. Giardino also points out that Mr. Garcia, at least
14 was at that time, at risk for suicide. And this comes up
15 several times throughout Dr. Giardino's report, which I
16 incorporate the entire report here by reference.

17 Dr. Giardino also points out that Mr. Garcia at
18 nighttime has difficulty falling asleep. He has poor sleep,
19 contributing to chronic fatigue and low energy. He has tension
20 headaches. And his global -- this is Dr. Giardino -- global
21 cognitive functioning is troublesome -- is problematic.

22 It was clear to Dr. Giardino, in putting together this
23 report, that Mr. Garcia was in a vulnerable state, suffering
24 from numerous psychiatric impairments. He also describes that
25 Mr. Garcia began to skip school and remained out late at night

1 with friends and hung out in the streets, as it were. He
2 received multiple suspensions, was frequently in trouble for
3 fighting, and struggled immensely in early adolescence. He was
4 placed in the foster care system due to maternal abuse and
5 neglect. I am going into this background in some detail. Bear
6 with me.

7 Dr. Giardino says Mr. Garcia displays a concerning
8 pattern of impulsivity and recurrent suicidality. He has been
9 hospitalized on at least four occasions, typically due to
10 suicidal intent. His pattern continues to be problematic, and
11 he was at severe risk for suicide at the time of the meeting
12 between Mr. Garcia and Dr. Giardino.

13 Mr. Garcia suffers from bipolar 1 disorder and major
14 neurocognitive disorder in the opinion of Dr. Giardino. He
15 also met criteria for polysubstance dependence, including
16 addiction to hallucinogens, alcohol, cannabis, etc. And he
17 says he, Dr. Giardino, says that Mr. Garcia is in need of
18 intensive treatment for his dual diagnosis, likely through a
19 residential treatment program, but that certainly stands out to
20 me as well.

21 Interestingly, defense counsel also notes that
22 Mr. Garcia has access to mental health treatment while
23 incarcerated at the Essex facility, where he is today, and he
24 has been taking prescribed medication to help treat depression
25 and bipolar disorder. Defense counsel also asks that the Court

1 take into account difficult conditions of the defendant's
2 incarceration, including particularly during the pandemic, and
3 I certainly do take that into account. It's true of everybody
4 in the criminal justice system who is incarcerated pretty much.

5 Also, as I mentioned before, notwithstanding these
6 issues that we have been discussing, Mr. Garcia became a
7 father -- and I mentioned this before too -- while he has been
8 incarcerated. I don't think he has ever physically met with
9 his child, but has had frequent telephone calls with him.

10 There is a letter here from Mr. Garcia which says:
11 "This case has been a wake-up call to me. I realized that if I
12 don't get my life together now, I could spend a lot of my life
13 in prison. I don't want that. I had a son after I was locked
14 up. I have never met him; only talked to him on the phone.
15 But having a son changed my entire outlook on life. I know I
16 messed up. I promise that I want to be better. I want to be
17 better for myself and my son."

18 There are other submissions of interest submitted by
19 the defense, including a letter from defendant's mother, who
20 indicates that, to say the least, Mr. Garcia had a tough
21 childhood, but she also pointed out that he would always try
22 and help his mother out.

23 A former foster parent of Mr. Garcia, Ms. Edwards,
24 also wrote the Court on behalf of him, and she states, among
25 other things, that she believes Mr. Garcia can become a better

1 person.

2 Also, a friend of the former foster parent, Ms. Bell,
3 also wrote a letter on behalf of Mr. Garcia, stating that he
4 always returns to their houses for a good night sleep or hot
5 meal. She wrote: "He hasn't been able to break out of the
6 mold that was set for him at a very young age." Among other
7 things. I'm not reading the entire letters of anyone. But
8 they are incorporated here by reference.

9 And she says, by the way, that despite Anderson,
10 meaning, Mr. Garcia's, despite his failures "I know that he is
11 not beyond redemption." I must add my personal view is, I
12 don't think he or hardly anyone else, if anyone at all, is
13 beyond redemption.

14 A girlfriend of Mr. Garcia's also wrote a letter in
15 support of him. She advised the Court that she plans to buy a
16 house for her and Mr. Garcia and Mr. Garcia's son to live in
17 upon his release from custody and that she will assist him in
18 finding a job upon his release.

19 There is also a letter from someone described as a
20 former brother-in-law who writes on his behalf. That
21 individual states that Mr. Garcia is determined to right his
22 wrongs. By letter, dated September 14, 20202, the government
23 argues and requests a sentence of at least 168 months of
24 imprisonment. That is within the advisory of sentencing
25 guidelines range.

1 The government argues that the home invasion robbery
2 that Mr. Garcia participated in was brutal and devastating.
3 I'm quoting from the government's letter. The defendant and
4 his cohorts robbed the victim of more than marijuana and money.
5 They robbed the victim of his dignity, his health, and the
6 soundness of his mind.

7 As a result of the defendant's, Mr. Garcia's conduct,
8 the victim's life has been forever changed. The sentence
9 imposed on the defendant should reflect that reality. And I
10 have to agree that it needs very seriously to be taken into
11 account. The government also notes that for each of the
12 defendant's prior offenses, he received modest sentences. And
13 the government notes that three of the defendant's prior
14 offenses occurred while he was on some form of probation.

15 The government states that the defendant's criminal
16 history makes clear that he has received many second chances
17 and has chosen not to avail himself of those opportunities.

18 The government goes on to say that it appreciates that
19 the defendant grew up under exceptionally difficult
20 circumstances and that those circumstances deprived him of a
21 healthy upbringing.

22 The government also understands that Mr. Garcia has
23 some documented mental illness, and the government agrees that
24 the Court can and should consider the possibility of
25 rehabilitation in crafting an appropriate sentence.

1 And among other things, as I said before, I will
2 recommend that wherever he is housed in the criminal justice
3 system that he have access to drug treatment and mental health
4 treatment.

5 The government goes on to say that while the defendant
6 does not appear to have taken advantage of the many
7 opportunities for rehabilitation previously presented to him,
8 the sentence imposed should leave open the possibility that he
9 will make a better choice this time.

10 The government states that a 168-month sentence would
11 permit Mr. Garcia to be released while he is still in his
12 thirties, I am talking about his age, and fairly balances the
13 serious nature of the offense and the need to protect the
14 public from violent behavior by the defendant against the
15 mitigating factors set forth in the defense submission.

16 The government has provided two copies of reports of
17 psychological evaluations that were prepared on behalf of the
18 victim in this case in conjunction with the victim's own
19 pending criminal case. I will incorporate those by reference
20 as well.

21 I also, of course, received and reviewed the
22 presentence investigation report, which is thorough and
23 helpful. It was prepared on March 22, 2022, together with an
24 addendum, dated April 19, 2022, and the sentencing
25 recommendation approved the same date. And, again, I have

1 correspondence, dated September 6, 2022, from defense counsel
2 and, dated September 14, 2022, from the Assistant U.S.
3 Attorney.

4 My question at this point is, have Mr. Garcia and his
5 counsel had the opportunity to read and discuss the presentence
6 investigation report, as well as the addendum and sentencing
7 recommendation? Start with defense counsel.

8 MS. BAHARANYI: Thank you, your Honor. Yes, we have.
9 Mr. Garcia has a copy of the report with him at the facility.
10 We have had an opportunity to discuss it prior to today.

11 THE COURT: Mr. Garcia, you have that report and have
12 you read it and gone over it with your attorney?

13 THE DEFENDANT: Yes, correct, your Honor.

14 THE COURT: Do either of you, starting with defense
15 counsel, have any objections to the contents of the presentence
16 report?

17 MS. BAHARANYI: Your Honor, I raised one possible
18 objection earlier that I think we might address later on, it
19 seems, regarding the prohibition on new credit charges.

20 I think the only other condition that seems
21 problematic in this case and I would object to is this
22 condition that probation can search his cloud storage,
23 electronic devices. This isn't a case that involved computers.
24 This isn't a sex case. And I don't think particularly see a
25 nexus between the facts of this case and that particular

1 condition.

2 Those would be my two objections, your Honor, the new
3 credit charges and this ability for probation to search his
4 electronic devices. I don't object to the ability to search
5 his home, but just the computers, phones, cloud storage.

6 THE COURT: I am not sure -- maybe we will hear from
7 government counsel. These days, in the cases that I've been
8 getting and in sentencing, it doesn't appear to be that much of
9 a distinction between one's physical home and one's cloud
10 storage or phone or computers, but we will hear from the
11 government when we get to that point.

12 Apart from those objections, Mr. Garcia, do you have
13 any objections to the contents of the presentence report?

14 THE DEFENDANT: No, your Honor.

15 THE COURT: I will return the presentence report to
16 the probation department, which is our practice. At this time
17 I'll hear in this order, if you wish to be heard, defense
18 counsel, Mr. Garcia, and government counsel with respect to
19 sentencing.

20 MS. BAHARANYI: Thank you, your Honor.

21 Your Honor, this is certainly a tragic case. I think
22 the Court has recognized that. I think in preparation for
23 today I had the opportunity to truly dig into the victim's
24 background, Mr. [REDACTED]'s background, and compare it to
25 Mr. Garcia's. And I think it makes this case, these

1 circumstances, all the more tragic. It is striking to me how
2 many similarities there are between these two individuals.

3 THE COURT: You mean the victim and Mr. Garcia.

4 MS. BAHARANYI: Yes. Between the victim and
5 Mr. Garcia, there are a mountain of similarities, your Honor.

6 Going through the victim's own psychological report, I
7 see a long history of trauma, beginning with loss that he
8 experienced as a young child, just as Mr. Garcia experienced,
9 the loss of his brother, his protector, when he was just nine
10 years old. Both of them, again, cycling in and out of the
11 foster care system at relatively young ages. It looks like
12 around for 11 years old for Mr. Garcia and around that same
13 age, or perhaps a little bit earlier, for the victim in this
14 case.

15 Both have struggled for their entire lives, it seems,
16 with substance abuse. Both have been diagnosed with major
17 newer cognitive disorder. Both have suffered -- I think all of
18 that ties into their longstanding issues to grapple with mental
19 illness and with cognitive impairments that have been a
20 striking part of both the victim's life since he was young and
21 Mr. Garcia's, also since he was a young child, up until today.
22 Of course both have extensive experience with the criminal
23 justice system and today are facing federal charges.

24 I don't often -- in many of my cases there aren't
25 always victims, and there are stories that we must grapple

1 with. So this is somewhat of a unique case for me. It's just
2 striking to me, your Honor, just how much the victim's story,
3 the victim's history, mirrors that of Mr. Garcia's.

4 Of course the major difference here is that we are
5 looking at Mr. Garcia today at 24 years old, and the victim in
6 this case is 54. I raise this at the outset, your Honor,
7 because I do think that this case and the Court's decision
8 today will have an impact on what Mr. Garcia's life looks like
9 when he himself is 54 years old, 30 years down the line.

10 The Court's decision today I think will have a huge
11 impact on whether at that age he is still suffering from his
12 traumas, he is still grappling with his history of child abuse,
13 his history of neglect. He is still trying to get a hold of
14 his addiction and mental illness. I think the Court is in a
15 unique position to kind of break this cycle, a cycle that's
16 played out in the life of the victim and a cycle that appears
17 to be in its early stages here for Mr. Garcia.

18 What that looks like, your Honor, helping break
19 through this cycle, I don't believe is a 14-year sentence, as
20 the government has requested. And I think even looking at the
21 victim's own history provides corroboration or proof of that.
22 It's in those psychological reports that we see that the
23 victim, sadly, was sentenced to 12 years when he was a -- 12
24 years in federal prison when he was a relatively young man, and
25 now he is here, in a position that is both tragic for him and

1 also life changing in that he is facing new federal charges.
2 It does not seem that he has come out of that process, a
3 lengthy bit in federal prison, as a more complete person, but
4 rather a more broken person, and certainly now deeply affected
5 by the trauma of this offense.

6 I do think that 14 years would similarly break
7 Mr. Garcia. He is 24 years old. This crime was committed when
8 he was even younger, at 22. I think such a lengthy term of
9 imprisonment, as the guidelines call for or as the government
10 has requested, only compounds the trauma in Mr. Garcia's life.
11 It increases the risk, your Honor, of Mr. Garcia being in a
12 position 30 years later where he is still grappling with all of
13 these demons.

14 I think tragically it increases the risk that someone
15 like Mr. Garcia's son, [REDACTED], who is now a little past one years
16 old, will possibly find himself in his own father's shoes. If
17 he were to be incarcerated for 14 years, if Mr. Garcia were to
18 be incarcerated for 14 years or given a guidelines sentence,
19 that means that [REDACTED] grows up with his father in prison, just
20 like Mr. Garcia did. That means that [REDACTED] misses out on having
21 his father in his life for these formative years. And I truly
22 fear what that means for the cycle of this family and the next
23 generation of this family.

24 Your Honor, my request for a 48-month sentence is in
25 light of that history, I think in light of the desire to try

1 something different for this young man, for Mr. Garcia, to
2 break through the cycle, and to give him a sentence that
3 includes more time and more punishment, but that still allows
4 him to have a role in his child's life while his son is still a
5 child.

6 Forty-eight months would be the longest period of
7 incarceration he has ever spent in custody. It would be more
8 than twice as long as his previous longest period, which I
9 believe was 18 months, your Honor. And he has already
10 experienced punishment just waiting for this case at Essex.

11 I won't go into detail, because the Court has already
12 reviewed our submission, but your Honor understands just how
13 difficult of an experience during COVID, during the violence at
14 Essex, pretrial incarceration has been for Mr. Garcia.

15 Your Honor, part of the reason why we are even moving
16 forward in this way by video instead of in person in a
17 courtroom, as I preferred for Mr. Garcia, is that he truly is
18 eager to see a resolution to this case and eager to get out of
19 Essex and to be placed in a BOP designated facility that is
20 hopefully less violent and hopefully has more programming
21 opportunities for him.

22 Your Honor, I spent a lot of time in my sentencing
23 submission discussing his youth, discussing the impact of both
24 his childhood trauma on his own brain development and on the
25 brain development of other young adults like him. I understand

1 from the government's letter that -- the government's letter
2 seems to perhaps minimize the impact of young adulthood in
3 Mr. Garcia's case on decision making, which I do think is a
4 bold and frankly wrong position to take.

5 I think the science, and this is fairly new science,
6 but the science is showing us that it's just not adolescence,
7 but young people in their early twenties who are suffering
8 from -- who still have the biological impairments that make it
9 difficult to make rational, well-reasoned decisions. The parts
10 of their brain, the prefrontal cortex that allows them to
11 assess risk and allows them to make better decisions in their
12 lives continues to develop well into their mid twenties.

13 Part of the reason why I make this request for 48
14 months is that it would be a sentence that would have
15 Mr. Garcia coming out of prison and back into the community,
16 hopefully here in the United States, at a time where his brain,
17 your Honor, is in a better position to make better,
18 well-reasoned decisions.

19 Certainly, as the Court is aware, he has a lengthy
20 history of both trauma and mental illness. That has impacted
21 his decisions in the past. It certainly has impacted his
22 criminal history. But that is also something that's being
23 addressed now in a way that it never was when he was out in the
24 community, in a way that it was never addressed prior to this
25 offense.

1 Your Honor, prior to August 2020, he was not taking
2 medication for bipolar disorder. He was self-medicating with
3 drugs and alcohol. Instead now, since being in Essex, he has
4 been prescribed Olanzapine. He has been actually compliant
5 with his medication. Olanzapine is a medication that treats
6 both his bipolar and mood disorder, your Honor. So he has not
7 only that as a new tool for him going back into the community,
8 he has a better formed, more formed, more mature brain when he
9 goes back into the community.

10 And, hopefully, if he is here in the United States, he
11 will have our office's support as well and the support of the
12 Bronx Defenders who have been assisting him with the pending
13 immigration matter.

14 In fact it's through the Bronx Defenders that they
15 identified a mental health treatment facility and drug
16 treatment facility that provides intensive outpatient, sort of
17 dual diagnosis care to individuals, young people like
18 Mr. Garcia. It's called the Bridge Back to Life Center. It's
19 an option that we asked the Court to consider last year during
20 our bail application for Mr. Garcia and it is still one that
21 would be available to him at the end of his sentence in this
22 case, and both our office and Bronx Defenders will ensure that
23 he actually does this time when he's coming out, he does
24 connected to mental health treatment and the supports that he
25 needs to continue to make better decisions in his life going

1 forward.

2 Your Honor, I am going to wrap up shortly. I think
3 the Court understands our position regarding the circumstances
4 of this offense. This is incredibly serious conduct that
5 resulted in lasting trauma to the victim in this case.

6 I do think it's important for the Court to recognize
7 that this is not -- it was not Mr. Garcia who was the
8 individual who pistol whipped the person, the victim in this
9 case. But he takes full accountability for being there to rob
10 this victim, that is what he was there to do. He knew this was
11 a person that dealt drugs in the community, who had money.
12 This was a quick way of making some cash, and it was a
13 terribly -- it ended in a terribly tragic way that he did not
14 foresee.

15 I think for myself, perhaps for some of the other
16 individuals on this call, who are older, it probably seems
17 strange to say he didn't foresee this turning out in this way.
18 It's a robbery. It's a robbery of a drug dealer. But we are
19 also individuals who have the benefit of our experience this
20 the system, but also the benefit of brains that are more fully
21 developed and able to think through the potential consequences,
22 to think through how things could go wrong before we take
23 certain action.

24 I think because of the trauma, the mental illness that
25 Mr. Garcia was experiencing at the time, the mental illness

1 that was not treated at that time as well, your Honor, he was
2 not in a position and he did not think through just how badly,
3 just how traumatically this incident, this robbery could have
4 turned out. He is truly sorry for even part of it and for not
5 seeing how this could end so badly for the victim and for
6 himself.

7 Now, it's clear from the victim's report that he, as I
8 explained earlier, has long suffered from different health
9 ailments, different mental health issues as well. Even my
10 understanding from one of his reports is that he did experience
11 head trauma several years -- three or four years prior to this
12 robbery. Mr. Garcia did not create these initial health
13 issues, but he understands the role in the robbery and
14 exacerbating all of them, and for that he is truly sorry, and
15 you will have the opportunity to hear from Mr. Garcia more on
16 that point and his remorse very shortly, your Honor.

17 I will just end with this, your Honor. I think that
18 if Mr. Garcia were to be released in his late twenties, as we
19 have requested, and if he were to remain here in the United
20 States, he has a support system through Felicity, his partner,
21 through our office, that I think is in a better position to
22 ensure that he does not come back to this place, your Honor.

23 And he has a motivation that he did not have before,
24 and that motivation is his son [REDACTED], who, as the Court has
25 acknowledged, was born just last year, while he was still

1 incarcerated.

2 Mr. Garcia understands that any additional involvement
3 in criminal activity, even any violation of his conditions
4 would mean that his son does in fact grow up without a father.

5 It would mean that [REDACTED] is going to be in the same position
6 that Mr. Garcia was in for most of his life with an
7 incarcerated father far away, and Mr. Garcia does not want that
8 future for him.

9 I think it is significant that he is starting to make
10 the small changes that he can in the space that he is, at
11 Essex, to demonstrate his desire to change. By taking
12 medication, by sticking with his medication regimen, and
13 treating his bipolar disorder, he is making it so that he can
14 be present for his son later on upon his release.

15 As the Court hopefully saw as well, he received a
16 certification to work in the cafeteria so that he could work at
17 Essex in the cafeteria there. This is just another opportunity
18 or another way for him to remain positively or productively
19 engaged while incarcerated there at Essex. There is not a lot
20 that one can do at Essex, but he is trying his best to do it
21 all, to work on himself and to engage himself productively so
22 that he can come out better and come out ready to make a better
23 life for his son.

24 Your Honor, for these reasons, for the reasons that
25 you certainly reviewed and I have explained in our sentencing

1 submission, I am asking the Court for leniency here. I think
2 his age, I think his particular involvement in the offense, I
3 think the fact that he has a very young son at home who could
4 use a father are all reasons to grant the sentence of 48 months
5 that I have requested.

6 THE COURT: I take it you disagree with Dr. Giardino,
7 who says that in the absence of an inpatient treatment, an
8 intensive inpatient treatment -- by the way, I share that view,
9 that from my own experience -- by the way, everybody is unique,
10 of course. But Mr. Garcia's experiences are not new to me in
11 other people.

12 You point out the victim. I have hundreds of cases,
13 many of whom suffered -- this is the tricky part from the
14 cooccurring disorders of mental health and drug abuse. Very
15 difficult to overcome. I'm happy -- of course it's my
16 obligation to try and fashion a sentence that would help
17 Mr. Garcia overcome them, but I have to say -- so this
18 sentence -- this situation is unique because Mr. Garcia is
19 unique. But the factors surrounding it, sadly, are not unique.

20 Our system does not do enough of a job to be of help
21 to people at young enough ages. It doesn't do enough of a job
22 to try and help people incarcerated. If people devoted or
23 could devote their entire period of incarceration to substance
24 abuse, education, mental health treatment, if one could do all
25 that, that is, of course, a place where it would be very

1 desirable if it happened. Unfortunately, it doesn't happen
2 often enough. But these are tough sets of facts to consider.

3 I do have a question for you. You are disagreeing
4 with Dr. Giardino in the context of what treatment -- listen.
5 It could all be academic. If there is deportation, it will be
6 academic. Do you actually think that Mr. Garcia could right
7 this ship and turn things around on an outpatient basis? Just
8 one person's opinion versus somebody else's.

9 MS. BAHARANYI: Your Honor, I actually think -- I
10 probably should have been clearer. I think we are open to all
11 of the tools to right the ship for Mr. Garcia, as is
12 Mr. Garcia. And I think time will tell if we have all the
13 tools available, meaning, if he is deported or if he is allowed
14 to remain in this country. I mentioned the Bridge Back to Life
15 Center as an option because it's one that we have already made
16 contact with on his behalf. And I think that more work from
17 probation would be needed to figure out what type of placement,
18 if it were inpatient, would be appropriate for Mr. Garcia at
19 the time that he's coming out. Because, again, we are talking
20 him coming out, certainly wouldn't be today. I think all
21 parties understand that. So we would have to see what is the
22 mental state that he is in and how is he doing, even at that
23 time even with his medication. And what are the programs
24 available to him.

25 So we are not writing off, and in fact I truly value

1 Dr. Giardino's comprehensive report and opinion in this case.
2 We are willing to use every tool possible to make sure that his
3 life, Mr. Garcia's life, is changed, [REDACTED]'s life is changed,
4 and that the community is protected as well.

5 THE COURT: Mr. Garcia, if you wish to be heard, I
6 will be happy to hear from you. It would be helpful if you
7 come closer to the microphone.

8 THE DEFENDANT: Yes, your Honor. I would just like to
9 say that I apologize to the courts, to the victim, to my family
10 for making them go through everything that they are going
11 through, to myself for putting myself in that situation that I
12 am in, to my son for not being there from when he was born. I
13 would love if your Honor would let me raise my son and he can
14 be somebody better than me. I don't want him to commit the
15 same mistakes that I've been committing my whole life.

16 Thank you, your Honor.

17 THE COURT: How about the government.

18 MR. XIANG: Thank you, your Honor.

19 This has very much been a sentencing that the
20 government, Ms. Dell and I, have thought a lot about, have
21 struggled with, as it appears that the Court has as well, and,
22 as is evident from defense counsel's remarks as well, that the
23 defense has thought deeply about as well.

24 With the Court's indulgence, I would like to speak at
25 a little more length than I think I normally would at a

1 sentencing.

2 I want to start with what I think are some
3 relatively --

4 THE COURT: I am just going to interrupt you for one
5 moment about the length. You can have as much time as you
6 need. Because in point of fact, in our system, so to speak, in
7 our criminal justice system, and in the SDNY, as elsewhere, the
8 real story is, as far as the judge is concerned, in terms of
9 the criminal docket, there is always -- not always. 90 plus
10 percent, maybe 95 percent of every case is resolved with a
11 plea, as in this case. That means that really the Court
12 doesn't know a whole lot about the person, as it would be
13 impossible, and it's somewhat of a mechanical process that the
14 questions are all known in advance and the answers are always
15 yes, your Honor, yes, your Honor.

16 In reality, the sentencing is where it's at for
17 everybody. You certainly can have as much time as you need,
18 and I felt the submissions written by yourself and also by the
19 defense were and are very helpful. Just that. You have the
20 floor.

21 MR. XIANG: Thank you very much, your Honor.

22 Let me start with what I think are some relatively
23 uncontroversial first principles that I think everybody would
24 agree with, which is that a gunpoint robbery in and of itself
25 is a serious offense. Certainly a gunpoint home invasion

1 robbery in which the robbers forced themselves into someone's
2 home to commit the robbery there, that's an even more serious
3 offense.

4 If the facts in this case ended there, we would be
5 having, I think, a different sort of conversation. We would be
6 talking still about a serious offense, but the sort of offense
7 where judges in this district have sentenced somewhere between
8 eight years, nine years, ten years, have viewed that to be the
9 appropriate sort of sentence for serious offenses of that
10 nature. That's obviously not where the conduct in this case
11 stopped.

12 Those are cases, and we cited some examples of those
13 in our submission, in which there was no injury to the victims
14 whatsoever. There was threats of force, it was very serious,
15 it was gunpoint, but no actual injury. Here there is an
16 injury. Not only was it an injury, it was a serious injury.
17 Not only was it a serious injury, it was a life-threatening
18 injury.

19 We quoted excerpts from the emergency room medical
20 records from that night. Although I don't profess to know what
21 red team is and what tier 1 activation is and bedside and all
22 that stuff, I think it's a fair inference from those records
23 that, at least to the medical professionals that night who saw
24 the victim's state, that they were very concerned about the
25 nature and extent of the injuries and what that meant for his

1 life.

2 Your Honor, not only were these life-threatening
3 injuries, these have been life-altering injuries. These have
4 been life-altering injuries to a man who was assaulted in his
5 mid fifties and who, by all accounts, according to his counsel,
6 according to the professional opinions of both defense and
7 government experts engaged to assess his mental competence and
8 to have deemed him to be mentally incompetent, everybody agrees
9 that he is broken. He is a shell and fundamentally not who he
10 was before this happened and may never return to being that
11 person. That is incredibly tragic and I think that is
12 relatively unique and unusual, even among the subset of
13 gunpoint robberies, necessarily violent crimes that we are
14 talking about.

15 I very much want to acknowledge the circumstances of
16 the defendant's upbringing, his struggles with mental health
17 illness, serious mental health illness, and his substance abuse
18 challenges. I think the Court absolutely should take each of
19 those considerations into account in crafting a sentence. I
20 think any responsible and compassionate system of justice would
21 take those considerations into account, and I believe our
22 system of justice does take those things into account.

23 I very much want to echo as well your Honor's remark
24 that no one is beyond redemption. The government very much
25 agrees with that sentiment as well and said as much in its

1 sentencing submission.

2 However, it's also important today to grapple with the
3 facts as they exist, the facts as to what Mr. Garcia has done
4 in the past and how he has responded to his prior encounters
5 with the criminal justice system.

6 As your Honor noted, he is in the highest category of
7 criminal history, and he is there not simply because of fraud
8 offenses or simple drug offenses, but, in meaningful part,
9 because of prior violent offenses. And not only offenses that
10 are violent because it's a violent statute that was charged,
11 but in which his conduct was in some cases incredibly violent.
12 Beating a corrections officer who was lying on the ground
13 repeatedly in the face and head while screaming, I am going to
14 F you up, ramming a car towards a police officer, reversing and
15 then ramming the car ahead again in an incident that resulted
16 in injuries to three police officers. Multiple robberies in
17 which he was hands on with the victim, dragging the victim to
18 the ground, assaulting the victim.

19 And in each of those prior instances, many of the
20 mitigating facts that defense counsel has pointed to the Court
21 were true then. All of the facts that the defendant's
22 traumatic childhood and upbringing and the challenges he has
23 faced, which are, by the way, incredibly sad and tragic, all of
24 those were true then as to those prior violent offenses.

25 Although the government hasn't looked into those

1 transcripts, one would imagine that those factors were taken
2 into account at those sentencing and are reflected in the fact
3 that, by and large, the defendant got very, very modest
4 sentences in each of those cases.

5 While I'm sure those sentences were well intentioned
6 and appropriately took into account the mitigating factors that
7 defense counsel sets forth today, one very tragic and
8 unintended consequence of those prior lenient sentences is that
9 they failed to incapacitate Mr. Garcia, they failed to
10 rehabilitate him, and they failed to deter him from
11 participating in this home invasion gunpoint robbery that has
12 forever changed the victim's life. That is the sad reality
13 that I think we all have to confront and that it's appropriate
14 to take into account in the sentence that your Honor fashions.

15 I want to pick up on a point that your Honor made
16 before, which I think is a very important one, which is that I
17 think everyone here agrees that rehabilitation is important and
18 that an important component of Mr. Garcia's rehabilitation will
19 be substance abuse treatment and also mental health treatment.
20 In the government's view, those things are not inconsistent
21 with a meaningful incarceratory sentence.

22 As I'm sure the Court is aware, the Bureau of Prisons
23 administers the RDAP program, which is an inpatient in-custody
24 substance treatment program which, to the government's
25 understanding, is a very good program, which has good rates of

1 success. And unlike in an environment where it's up to
2 Mr. Garcia whether or not he reports to treatment, whether or
3 not he falls back to self-medicating with street drugs, while
4 in custody and while participating in an in-custody and
5 necessarily inpatient program, those factors are controlled and
6 those would seem to be a better set of circumstances for him
7 ultimately overcoming the issues that he needs to overcome.

8 I think for that reason the sentence that the
9 government recommends, which the government fully appreciates
10 is a very significant sentence, is not incompatible or
11 inconsistent with the goal of ultimately permitting Mr. Garcia
12 a path toward the redemption that your Honor mentioned and
13 toward leading a better life.

14 I want to remark briefly on two points that defense
15 counsel made. One point that she made was about cycles and
16 about breaking cycles and about the absence of good role
17 models, good parent figures in Mr. Garcia's life when he was a
18 child. The government agrees, I think every fair-minded and
19 responsible participant in the criminal justice system of
20 course would agree that as a society we have a long ways to go
21 in addressing the social forces that lead to folks experiencing
22 those types of childhoods, those types of upbringings.

23 However, as the Court has also noted, those realities
24 are not, sadly, unique to Mr. Garcia. Many folks have very,
25 very troubling childhoods and upbringings and struggle with

1 many substance issues, mental health issues. That's true
2 certainly of other defendants in this court, many of whom do
3 not commit crimes of this severity, of this degree of violence.
4 That is also true of many individuals who never enter the
5 criminal justice system, who are struggling with these things,
6 who have difficult lives as a result but do not choose or
7 respond by engaging in brutal violence against other
8 individuals.

9 On the issue of parenthood, of course, it is often the
10 case and tragically the case that when there are serious crimes
11 and therefore serious sentences, that members of the
12 defendant's family suffer as a result.

13 I will note that, based on when the defense represents
14 that Mr. Garcia's son was born, it appears that Mr. Garcia
15 fathered this child roughly around the time that he committed
16 this robbery. I don't know if it was shortly before or shortly
17 after. I think it's fair for the Court to consider whether
18 that was a responsible decision, whether either Mr. Garcia,
19 having fathered a child, chose to commit this act, or, knowing
20 that he has committed this act and has not yet been caught for
21 it, decided to become a parent. It is of course very sad for
22 Mr. Garcia's son that Mr. Garcia put himself in this position.
23 But I think it's also fair for the Court to consider the
24 decisions that Mr. Garcia made in that regard.

25 I want to end by talking about the comparison that

1 defense counsel made between Mr. Garcia and the victim here.
2 Of course there are parallels. I think both are certainly
3 individuals who have had very difficult upbringings, who have
4 perhaps, as a result of those difficult upbringings, had
5 significant encounters with the criminal justice system, with
6 our court.

7 But here is one crucial difference, which is that, to
8 the government's knowledge, at least, the victim in this case
9 never participated in a brutal act of violence in the same way
10 that Mr. Garcia has. Again, Mr. Garcia, this is not the first
11 violent case that he has participated in. So in that respect,
12 they are different and, in the government's view, significantly
13 different.

14 I'll end by saying, again, that the government
15 recognizes that a 14-year sentence or any sentence within the
16 guidelines is a very lengthy sentence, a very significant one.
17 I will note that on the government's recommendation the
18 defendant, depending on good time, etc., is going to be
19 released from jail in his mid to late thirties. He would still
20 be a very young man. He would still have a lot of life to
21 live.

22 And hopefully at that age he would have, having had
23 the opportunity to have treatment and to confront these
24 challenges while in custody, and hopefully availing himself of
25 programming while in custody to improve his education, that he

1 will come out of the incarcerated system with more judgment,
2 more maturation, and equipped to live a productive and
3 law-abiding life. Thank you, your Honor.

4 MS. BAHARANYI: Your Honor, if I may briefly.

5 THE COURT: Yes.

6 Let me first because I have a couple of comments that
7 you may want to respond to.

8 One is the victim. I have to say that I was a little
9 surprised about how much discussion by the defense about the
10 victim. Both in writing -- here I'm talking about pages 6 and
11 7 in particular of the defense letter. I am sure this wasn't
12 the intention. But it does come close or in some ways to blame
13 the victim.

14 So, on page 6, we are reminded that he is a known drug
15 dealer and that -- this is Mr. [REDACTED]. He has a reputation
16 in the community and there is reference to drug trafficking
17 apartment. And then, on page 7, it says that [REDACTED] was
18 dealing serious drugs out of his apartment and unlawfully in
19 possession of ammunition and likely guns. She goes on to say,
20 does not justify what happened to him.

21 Also picking him out as a comparator to Mr. Garcia in
22 terms of his difficult life experiences. I don't know. Could
23 be any one of a hundred or a thousand other defendants might be
24 equally or perhaps more apt. Again, I can't imagine that the
25 defense is doing that, but I just call it to your attention the

1 way I read it in part. I was a little bit -- what does that
2 have got to do with it, is really my reaction? Because in
3 point of fact, it has nothing to do with it. If you
4 pistol-whip a professor from Columbia Law School, it's
5 terrible. It's equally terrible, frankly, if you pistol-whip a
6 defenseless Mr. [REDACTED]. That's just -- again, I don't think
7 that that's what was intended, but it did come across somewhat
8 that way.

9 Then the other issue I wanted to just -- before I get
10 to hear from you again and also get to the sentence, the
11 government used the word incapacitated. That sound sometimes
12 like an awful concept, but really it shouldn't be taken that
13 way. Incapacitated means essentially that someone is in some
14 form of lockup, I guess, or can mean -- in this context it does
15 mean. I think that has two goals. One is to mitigate danger
16 to the community. Someone is locked up, there is less of a
17 chance that someone, whether it's Mr. [REDACTED] or somebody
18 else, is going to be impacted by Mr. Garcia.

19 It's not really -- I think it comes across sometimes
20 as pejorative, but it's really not. It means in one context
21 the flip side of protecting the community, danger to the
22 community. That's really very serious consideration in the
23 3553(a) analysis.

24 And then, second, it has -- incapacitated, again, has
25 a productive aspect to it. That is to say, Dr. Giardino, as I

1 mentioned before, says that very unlikely in his opinion, seems
2 to me, that anything but inpatient treatment for these
3 cooccurring disorders of drug abuse and mental health is
4 required. From the judge's point of view and also someone
5 who -- so I'm a licensed social worker as well, and I think I
6 have experience in these subjects.

7 The incapacity is sometimes the only thing that
8 enables a person to accept treatment. You got nowhere else to
9 go. If there is an appropriate treatment, drug treatment,
10 mental health treatment, I think you're more apt or inclined to
11 avail yourself of it and that is a positive. That is a
12 positive.

13 Many people, many defendants that I have, they can't
14 tolerate inpatient because they have such great issues, as
15 Mr. Garcia has, with impulsivity and can't sit still and mood
16 swings and manic episodes. But if you're incapacitated, there
17 is are more of a likelihood that you can accept and take in the
18 treatment.

19 So it's not, again, in my opinion, necessarily a bad
20 word, and that is the meaning that should be the meaning of
21 incapacitated in jail, should be an opportunity to address and
22 resolve those kinds of issues. In my own experience, I don't
23 know what percentage of the time they exist, those programs.
24 It certainly should be the focus, in my opinion, of prisons,
25 certainly not that.

1 But I'm hopeful and, as I said, I am going to
2 recommend that Mr. Garcia be housed at such a facility. The
3 same is true even during -- I have a lot of experience with
4 supervised release. And there too, in many instances, people
5 with cognitive disorders, impulsivity, manic behavior, bipolar
6 disease, can't get the person to sit still, so to speak, long
7 enough to absorb the treatment.

8 I think it's Dr. Giardino who says that first you got
9 to get the drug issue under control. I think he said it, in
10 this order, before you can really aptly, correctly, effectively
11 deal with the mental health issue. He is suggesting a form of
12 incapacity to take care of one of the cooccurring disorders
13 while -- and thus enable one to treat the other disorder. It's
14 complicated.

15 I will say one thing. I hear this over and over
16 again, and I know in Mr. Garcia's case that it's in the best of
17 intentions, and I think he means it. But many defendants or
18 persons in Mr. Garcia's position, it's very interesting how
19 it's often a new child. You hear them say, well, this is
20 really going to get my attention and I am going to do things
21 differently and I am going to be able to teach -- essentially,
22 the meaning is teach my child not to be like me.

23 These are -- only in small part are these issues or
24 these disorders disorders of intention. I think, because I
25 hear it over and over again and I believe it, that the

1 defendant or the person we are sentencing or putting on
2 supervised release or whatever, the intention, in my humble
3 opinion, cannot overcome these disorders.

4 I don't think anybody could wake up and say, you know,
5 now I have a kid, I got to get together. I got to get a job
6 and I got to turn my life around. They do. They mean that.
7 But it can't be done, in my opinion, by intention alone.

8 So I think that the incapacity, so to speak, is vital,
9 actually, and is not again, not a negative in some respects,
10 but is in fact required in order, especially since -- I also
11 thought Dr. Giardino's report was thorough in order to
12 accomplish what needs to be accomplished with someone who has
13 such severe lifelong trauma and experience.

14 Sorry for the interruption. Defense counsel, you
15 wanted to add something.

16 MS. BAHARANYI: Yes, your Honor. I think to respond
17 both to the government and your Honor's points.

18 Your Honor, the recommendation by Dr. Giardino is for
19 him to have access to a thorough comprehensive treatment in a
20 setting that is an inpatient setting and certainly at least
21 follow treatment in the community. Both of these would be
22 within the community. I do want to make that clear.

23 When we are talking about the jails and prisons or the
24 prisons that Mr. Garcia would be sentenced to or sent to, we
25 are not talking about -- as the Court is aware, we are not

1 talking about treatment facilities. Incapacitation is not
2 going to be, in Mr. Garcia's case, him being placed in a prison
3 where he is getting quality, consistent mental health
4 treatment.

5 Unfortunately, because of changes made in the '70s, we
6 are seeing more and more people sent into prisons because of
7 mental illness, and the jails are grappling with that. But,
8 unfortunately, they don't have the resources. BOP, federal
9 facilities, don't have the resources to ensure that they are
10 providing the sort of consistent, quality treatment that
11 individuals like Mr. Garcia need.

12 Incapacitation in this sense, your Honor, in this
13 context, I think, especially for the length of time that the
14 government has requested and the guidelines considered, I think
15 would do far more harm than good because this isn't a place
16 where he is going to be treating, have an opportunity to treat
17 and address in a comprehensive way and in a consistent way the
18 issues that he came into the system with.

19 Your Honor, I'm very happy that he is currently
20 medicated. I think that is certainly a benefit to him, and I
21 think your Honor has seen how he has been able to like sit
22 through these proceedings. He hasn't been agitated. He hasn't
23 been reactive. He has truly been taking all this in and
24 considering the Court's words, the government's words.

25 But he is not getting counseling at Essex. Even

1 counseling in some of these other BOP facilities is truly not
2 available and not consistently available.

3 RDAP, the program mentioned by the government, has a
4 wait list that is incredibly long, your Honor. And many of my
5 clients who wish to participate in this program instead spend
6 years languishing on wait lists to get into this program. We
7 are talking about putting him away in a facility for years of
8 his life in a place where he is not going to be able to address
9 the issues that we want him to address.

10 I think Mr. Giardino's recommendation, in a way, and I
11 hope the Court will consider, is that this is a young man who
12 does need quality services. And with those services in the
13 community, in an inpatient or outpatient setting, is going to
14 be in a position to make the changes that he wants to make.

15 So your Honor is absolutely correct. It's not just
16 about intention to be better. That's not what's going to make
17 him better. It's the resources, it's treatment, it's services.
18 That's what's been lacking in his history in a consistent way.

19 I think the government has mentioned the different
20 prior convictions and offenses of Mr. Garcia. All of those
21 happened when he was a teenager. What followed those
22 convictions and sentences, as short as they may have been, was
23 not outpatient or inpatient treatment. It was not an
24 opportunity to address the reasons why he came into the system
25 in the first place.

1 That is the problem. It's not the length of
2 sentences. It's not that they were too lenient in terms of
3 their prison sentence. It's that people weren't being creative
4 about what this young man needed next when he came out.

5 And, fortunately, as the Court is aware, that is what
6 our office is in a position to do. We work with probation to
7 come up when our clients are ready to come out to make sure
8 that they are in a position to have the services that they
9 need. Your Honor takes a hands-on role in also checking in
10 with the individuals you supervise to ensure they have the
11 services they need so that people like Mr. Garcia don't slip
12 through the cracks, as he has done in the state system when he
13 was a teenager.

14 Your Honor, I do think it's important for me to
15 address the Court's comments about my comments on the victim.
16 I want to make absolutely clear that it certainly was not my
17 intention. In fact I do not blame the victim in this.
18 Mr. Garcia certainly does not. He knows what he did. That's
19 why he pled guilty. That's why he is here. And he has
20 expressed his remorse to the victim in his own letter to the
21 Court and today.

22 The reason why I spent so much time, your Honor,
23 especially today, in speaking about the victim is, it is
24 uncommon to have two psychological reports detailing such a
25 rich history of the life of the person who was affected by the

1 crime.

2 In fact, I don't think I have ever been in this
3 position before, and I was struck. It was striking to me the
4 tragedy that befelled that victim over the years, and I think
5 my simple desire is, I don't want to see similar tragedies
6 happening to this young man in front of the Court. That is
7 what I intended to convey. I do apologize if that was not in
8 fact conveyed.

9 THE COURT: I thought that, and I appreciate you're
10 saying it.

11 MS. BAHARANYI: Your Honor, as a final point, I think
12 the Court has raised other cases involving robberies, involving
13 gunpoint robberies that have received significant sentences,
14 and I've had an opportunity to review the submissions in those
15 cases. I think what's striking to me in each of those other
16 cases, the *Smith* case cited by the Court, by the government --

17 THE COURT: I think you meant the government.

18 MS. BAHARANYI: I said the Court. I meant the
19 government in their submission. Both the *Gilmore* case, the
20 *Smith* case, the *Parker* case involved individuals, defendants
21 who were far older than Mr. Garcia at the time of their
22 criminal conduct in these cases, well into their thirties or
23 forties.

24 And I do think that that is significant here, as I
25 have explained, the combination of Mr. Garcia's youth, the

1 impact of his own trauma and mental illness on his development.
2 I think it requires us to treat him differently than these much
3 older adults who committed these crimes. I think that
4 different treatment should be and is warranted under the
5 guidelines and should be reflected in the sentence.

6 THE COURT: Mr. Garcia, did you want to add anything
7 today?

8 THE DEFENDANT: I am OK. Thanks.

9 THE COURT: I am going to adopt the findings of fact
10 in the presentence report, unless defense counsel has any
11 further objections.

12 MS. BAHARANYI: No further objections than what I have
13 raised earlier, your Honor.

14 THE COURT: We will have to raise them again as I go
15 through it.

16 Any further objections from Mr. Garcia?

17 THE DEFENDANT: No. Thank you.

18 THE COURT: How about from the government?

19 MR. XIANG: No, your Honor. Thank you.

20 THE COURT: I am going to now preface the sentence and
21 then I will impose it. In doing this, by the way, I hope it
22 comes across that I am very seriously considering the
23 cooccurring disorders of mental health and drug abuse and also
24 the severity and the violence involved in this conspiracy, and
25 also I acknowledge that Mr. Garcia was 22 at the time of the

1 crime, young adulthood.

2 I also am taking into account everything that I
3 mentioned really, but the gun enhancement, what it plays in
4 terms of the guideline range, and of course the issue of
5 pandemic, which surrounds everything we do these days.

6 I intend to impose a sentence of custody of 145
7 months. That is toward the low end of the guideline range.
8 That range is 140 to 175 months.

9 Now, supervised release, I think probation department
10 recommended against any supervision. I acknowledge that
11 Mr. Garcia may well be deported. But I am going to impose a
12 term of supervised release of three years in the event that he
13 is released from custody in the United States. If for some
14 reason if they determine he is not to be deported, it would be
15 critical to have a period of supervision, I think.

16 The supervised release would be subject to various
17 conditions, the so-called mandatory conditions that he not
18 commit another federal, state, or local crime, that he not
19 illegally possess a controlled substance, and that he refrain
20 from any unlawful use of a controlled substance. He will be
21 required to submit to one drug test within 15 days of placement
22 on supervised release, if that happens, and at least two
23 unscheduled drug tests thereafter, as may be directed by the
24 probation officer.

25 In addition, if supervised release does come into

1 play -- and, as I say it's a big if -- if it does, then there
2 also would be standard conditions on that supervision and there
3 are 12 such conditions found at pages 29 to 31 of the
4 presentence report, including, among other things, that he may
5 not own, possess, or have access to a firearm, ammunition,
6 destructive device, or dangerous weapon.

7 And then there are special conditions which the Court
8 does find are reasonably related to the factors set forth in
9 Section 3553(a)(1), (a)(2)(B), (a)(2)(c), and (a)(2)(D) and in
10 which the Court finds involved no greater deprivation of
11 liberty than is reasonably necessary for the purposes set forth
12 in Section 3553(a)(2)(B), (a)(2)(c), and (a)(2)(D), and are
13 consistent with pertinent policy statements issued by the
14 sentencing commission, pursuant to 18, United States Code,
15 Section 994(a).

16 These are, in the event that he is released from
17 custody into the community, he shall be supervised in his
18 district of residence. He will be required to report to
19 probation within 24 hours of release from custody, if that
20 should occur, release in the United States. And, in addition,
21 I am going to require that he undergo a psychiatric evaluation
22 at such time as he is released from custody into the community
23 to determine what is the best treatment or the most appropriate
24 treatment or the most available treatment, as the case may be,
25 for his both drug disorder and his mental health disorder.

1 I am going to include as a condition, and I
2 acknowledge that I would reconsider it at the time of
3 supervision. If the defense, during the supervised release,
4 raises the issue, I will certainly reconsider. But absent such
5 an application, I will require that he participate in a program
6 approved by the probation department for substance abuse,
7 inpatient, and that program shall include testing to determine
8 whether he has reverted to the use of drugs or alcohol. He
9 would be required and may be required -- not would be. He may
10 be required to contribute to the cost of services rendered as
11 by a copayment in an amount to be determined by the probation
12 officer based on such factors as ability to pay or availability
13 of third-party payment.

14 In addition, I am requiring, if there is supervised
15 release, that he participate in individual and group
16 therapeutic counseling by a licensed therapist. That too would
17 be inpatient. And he may also there be required to contribute
18 to the costs of services rendered as by a copayment in an
19 amount to be determined by the probation officer based on
20 ability to pay or availability of third-party payment.

21 Another special condition is that he shall cooperate
22 with the Department of Homeland Security Bureau of Citizenship
23 and Immigration Services in connection with any proceedings to
24 determine his status in the United States, and he is required
25 to abide by their rules, regulations, and laws. I am including

1 a search condition that covers both where he physically lives,
2 if he is released into the community, and also his electronic
3 devices. And that would be the conditions proposed by, I
4 believe it was probation.

5 As to these I note that defense counsel objects, not
6 to the search concept in terms of his physical habitation, but
7 the defense objects to the extension of search to phone and
8 electronic devices.

9 I do not intend to impose a fine. None is recommended
10 by the probation department. As to restitution, I will impose
11 restitution if -- one of two things. If both parties, that is
12 to say, the government and the defense, agree on a restitution
13 amount and payment schedule, etc. If there is disagreement, I
14 will resolve the restitution issue if it is presented to me
15 within I think the statutory period, which is 90 days.

16 I'm also requiring -- there is no forfeiture
17 requirement. There is a requirement of a \$100 special
18 assessment, which is mandatory, pursuant to 18, United States
19 Code, Section 3013.

20 Briefly, my reasons for this sentence would be that,
21 first of all, the offense level is 28, criminal history
22 category is VI. The guideline range is 140 to 175 months, as
23 agreed in the plea agreement. I am taking all the factors into
24 consideration, sentencing at the lower end of the guideline
25 range. I think this sentence is appropriate, given the very

1 seriousness and violence and injury caused by the offense and
2 the needs for punishment and deterrence but also
3 rehabilitation. I have considered the nature and circumstances
4 of the crime, as discussed during this session, and I will
5 incorporate that discussion here by reference, as well as the
6 history and characteristics of Mr. Garcia, which we have been,
7 I think, over thoroughly.

8 I would intend to impose this sentence to reflect the
9 seriousness of the crime, to promote respect for the law, and
10 provide a just punishment, to afford adequate deterrence to
11 criminal conduct, to protect the public from further crimes of
12 Mr. Garcia, and to provide him with needed educational,
13 vocational, medical care or other correctional treatment in the
14 most effective manner.

15 Here I am noting that I'm including also -- if defense
16 counsel has a specific facility in mind, I would recommend that
17 he go there, but, overall, and most importantly, I am going to
18 recommend that he go to a facility where they can treat and do
19 treat mental health disorders and drug disorders cooccurring.

20 I think that covers the waterfront. Unless defense
21 counsel wishes to add anything at this point, before I impose
22 that sentence.

23 MS. BAHARANYI: Your Honor, before you do, I just want
24 to confirm, perhaps with Mr. Garcia, that placement as close to
25 New York as possible would be preferable.

1 THE DEFENDANT: Yes.

2 MS. BAHARANYI: That would be our request, your Honor,
3 if that could be built into the judgment, that we would like
4 the BOP to designate him to a facility as close to New York
5 City as possible, where his family is located.

6 THE COURT: I am going to add, just so you know, a
7 facility that treats mental health and drug disorders. That to
8 me -- I'm happy to add as close to New York as possible. But I
9 think paramount for me is he at a place where -- for example,
10 if there were two options, one in Philadelphia and one in New
11 York -- this is hypothetical -- but the one in Philadelphia
12 treats mental disorder and drug treatment and drug disorders,
13 that means my recommendation is he go to Philadelphia. If some
14 place that's closest to New York also treats both cooccurring
15 disorders, then there is no issue.

16 MS. BAHARANYI: Understood, your Honor.

17 THE COURT: Mr. Garcia, anything you want to add?

18 THE DEFENDANT: I feel like the sentence was 140 --

19 MS. BAHARANYI: Your Honor, I'm having trouble hearing
20 him, but also I think it would be helpful if we could speak
21 prior to his final remarks. I know this is not convenient, but
22 can we be placed again in that other room?

23 THE COURT: Chelsea, can you do that?

24 THE LAW CLERK: No problem.

25 THE COURT: We are going to put defense counsel and

1 Mr. Garcia in a virtual room before he adds any comments so he
2 can have the advice of counsel.

3 (Recess)

4 MS. BAHARANYI: Thank you, your Honor, for that time.
5 Thank you for giving us a moment. I've had a chance to speak
6 now with Mr. Garcia.

7 I think our plea to the Court, your Honor, is to ask
8 the Court to consider the fact that Mr. Garcia does have this
9 young son at home that he would like to have a relationship
10 with while he's a child, and if there is any way that the Court
11 might consider a lower sentence. Given the child at home,
12 given his own mental illness and traumatic background, that is
13 our plea to your Honor before we sort of conclude and have a
14 final judgment entered in this case. He has heard all of the
15 words of the Court. He takes them seriously. I truly believe,
16 with assistance from our office, probation, and this Court,
17 things will be different for him. We just ask for a little
18 less time.

19 THE COURT: I am going to ask, if it's OK with you,
20 counsel, Mr. Garcia, if he wants to add anything to what you
21 have just said.

22 Mr. Garcia.

23 THE DEFENDANT: Yes. I'm sorry, your Honor. What I
24 was trying to say earlier was, your Honor, when you said about
25 my son and about you don't believe that somebody could change

1 overnight, I just wanted to say that the difference now, that I
2 have something to live for. Before, I was running the streets
3 and didn't have nothing to live for. Now I have a son that I
4 have to look out for and I have to live for. That's all I
5 wanted you to know.

6 THE COURT: I am glad you added that, and I appreciate
7 it. I do understand what you have to say.

8 Government, did you want to add anything?

9 MR. XIANG: No, your Honor. Thank you.

10 THE COURT: Now I am going to impose the sentence.
11 That's just what I am going to do.

12 The guideline range is 140 to 175 months of
13 incarceration. It's only advisory, not mandatory. Having
14 considered the Sentencing Reform Act of 1984, the United States
15 Sentencing Guidelines, and especially the factors at 18, United
16 States Code, Section 3553(a), it is the judgment of this Court
17 that the defendant, Anderson Garcia, be committed to the
18 custody of the Bureau of Prisons to be imprisoned for a term of
19 145 months of incarceration. The Court recommends that he be
20 housed at a facility where he can receive appropriate drug
21 treatment and mental health treatment and, secondarily, to a
22 facility near New York City.

23 If there is supervised release, that is to say, if
24 Mr. Garcia is released into the community in the United States,
25 then supervised release would come into play for three years,

1 subject to the mandatory, standard, and special conditions as
2 I've outlined.

3 I'm not imposing a fine.

4 As to restitution, I am imposing restitution, but the
5 terms of that restitution will be determined over the next 90
6 days, and particularly if the government and defense counsel
7 have the opportunity to discuss and perhaps agree on
8 restitution. But, in any event, I would ask the government to
9 notify the Court as to where things stand with respect to
10 restitution.

11 MR. XIANG: Yes, your Honor.

12 THE COURT: I am imposing a \$100 special assessment.

13 As stated before, the reasons for the sentence.
14 Sentencing is a difficult process. I hope I have done it
15 thoroughly. I certainly have done it sincerely. I have
16 sentenced within the guideline range but toward the lower end
17 of the range, taking into account all of the factors that I
18 have discussed earlier and given the seriousness, particularly,
19 of the offense and the needs for punishment, deterrence, and
20 protection of the community. I incorporate the entirety of my
21 discussion of the reasons for the sentence that I'm imposing
22 earlier in this proceeding today, incorporating that here by
23 reference.

24 Does either counsel, starting with the government,
25 know of any legal reason why this sentence should not be

1 imposed as so stated?

2 MR. XIANG: No, your Honor.

3 THE COURT: Defense counsel.

4 MS. BAHARANYI: No, your Honor.

5 THE COURT: Then I hereby order the sentence to be
6 imposed as so stated.

7 Mr. Garcia, to the extent that you have not already
8 waived your appeal rights, and now I'm talking about the plea
9 agreement, dated November 17, 2021, in which you do agree not
10 to file a direct appeal and not to bring what's called a
11 collateral challenge, including, but not limited, an
12 application under Title 28, United States Code, Sections 2255
13 and/or 2241, of any sentence that is at or below the stipulated
14 guideline range of 140 to 175 months. Of course, this sentence
15 is within that range and toward the lower end of that range.
16 You also agree that you would not challenge your conviction or
17 sentence on a direct appeal or through litigation under Title
18 28, United States Code, Sections 2255 and/or 2241 on the basis
19 of any actual or perceived adverse immigration consequences,
20 including removal or denaturalization. Removal is I think the
21 key point here resulting from your guilty plea and conviction.

22 To the extent that there are other rights that I
23 haven't considered or thought of, I notify you that you would
24 have the right to appeal. If you were unable to pay the cost
25 of an appeal based on such other rights, if they exist, then

1 you have the right to apply for leave to appeal *in forma
2 pauperis*. If you request, the Clerk of Court will prepare and
3 file a notice of appeal on your behalf immediately.

4 THE DEPUTY CLERK: Judge Furman, I'm sorry to
5 interrupt. We lost the defendant on the call when you were
6 reviewing his rights to appeal.

7 THE COURT: Are we trying to get him back? Does it
8 work that way? Or did we lose him technologically?

9 THE DEPUTY CLERK: It may have been due to the time.

10 THE COURT: You mean he was removed from the
11 proceeding, as it were, you think?

12 THE DEPUTY CLERK: Because the proceeding began at
13 9:00.

14 THE COURT: It's now 11:30. I see.

15 THE DEPUTY CLERK: Correct, Judge.

16 THE COURT: Well, what do you think? I think it's an
17 important issue. I think we need to address it, his appeal
18 rights.

19 I'll tell you what. Counsel, maybe you can confer
20 with Mr. Garcia and see what he wishes to do and then let me
21 know with respect to that issue.

22 MS. BAHARANYI: I'm happy to do that, your Honor.

23 MR. XIANG: Can I make a brief proposal, your Honor
24 were. Would it be possible to just very quickly reach out to
25 the facility to see if they can put him back on right now. If

1 he was timed out for technical reasons, maybe they could put
2 him back on and resolve it. Obviously, it would best for his
3 understanding of those rights and for the record if he heard it
4 from your Honor during the proceeding.

5 THE COURT: Do you want to try and do that or do you
6 want us to try and do that?

7 MR. XIANG: I'm happy to make calls or to have
8 chambers staff do it, whatever the Court prefers.

9 THE COURT: Christine, what do you think would be most
10 effective?

11 THE DEPUTY CLERK: I would have to defer to Chelsea on
12 that.

13 Chelsea, do you think it's better off for you to
14 attempt to get the defendant back on?

15 THE LAW CLERK: I'm trying to call right now. No one
16 is answering. Here he is.

17 THE COURT: Thank you.

18 Mr. Garcia, can you hear me?

19 THE DEFENDANT: Yes, I can hear you.

20 THE COURT: I was at the point of the sentencing where
21 I was explaining your appeal rights and the rights that you
22 have already waived in the plea agreement.

23 I was saying, and I wanted you to hear, and then I am
24 going to ask you if you understand what I'm saying, I'm saying
25 that to the extent that you have not already waived your appeal

1 rights, and now I am talking about the plea agreement, dated
2 November 17, 2021, in which you do agree not to file a direct
3 appeal.

4 You also agree in the plea agreement not to bring a
5 collateral challenge, including, but not limited to, an
6 application under Title 28, United States Code, Sections 2255
7 and/or 2241 any sentence at or below the stipulated guideline
8 range of 140 to 175 months. Of course, the sentence that I
9 have imposed is within that range. You also agree in the plea
10 agreement that you would not challenge your conviction or
11 sentence on direct appeal or through litigation under Title 28,
12 United States code, Sections 2255 and/or 2241 on the basis of
13 any actual or perceived adverse immigration consequences,
14 including removal and/or denaturalization resulting from your
15 guilty plea and conviction. Those are the rights you waived in
16 the plea agreement. To the extent that there are other rights
17 that you may have that I haven't thought of, I notify you that
18 you would have the right to appeal those other rights.

19 And if you were unable to pay the cost of an appeal,
20 you would have the right to apply for leave to appeal *in forma*
21 *pauperis*. If you request, the Clerk of Court will prepare and
22 file a notice of appeal on your behalf immediately.

23 I wanted to ask you if you are familiar with the
24 rights that you waived with respect to appeal, directly or
25 indirectly, in your plea agreement as I have just explained it?

1 THE DEFENDANT: Can you repeat that, the last part?

2 I'm sorry.

3 THE COURT: I was asking you if you understand the
4 rights to appeal that you waived in the plea agreement, number
5 1.

6 THE DEFENDANT: I understand it a little bit. I
7 understand it a little bit. I guess I can't appeal certain
8 stuff?

9 THE COURT: I'm sorry?

10 THE DEFENDANT: I said, I can't appeal certain stuff?

11 THE COURT: Yeah. You agree in the plea agreement,
12 and I'll ask defense counsel to follow up with you, you agree
13 in that plea agreement that you won't -- will not file a direct
14 appeal or a habeas appeal if I sentence you within or below the
15 stipulated guideline range. And I have sentenced you within
16 the stipulated guideline range. So those waivers of appeal
17 that you agreed to in the plea agreement do apply, number 1.
18 Do you understand that?

19 THE DEFENDANT: Yes.

20 THE COURT: Also, the plea agreement says that you
21 would not challenge your conviction or your sentence on direct
22 appeal or through Title 28, United States Code, Sections 2255
23 and/or 2241 on the basis of any actual or perceived adverse
24 immigration consequences, including removal or denaturalization
25 resulting from your guilty plea and conviction. So you also

1 agreed in the plea agreement that you would not appeal,
2 directly or indirectly through habeas litigation on the basis
3 of any actual or perceived adverse immigration consequences.
4 That's also in your plea agreement.

5 Do you understand that?

6 THE DEFENDANT: Yes, I understand.

7 I have a question, your Honor, before -- I'm sorry. I
8 understand the plea agreement I have, right. I thought I had
9 the right to have a habeas before sentencing, if I would like
10 to.

11 MS. BAHARANYI: Judge, I'm happy to speak with him
12 about that separately as well, to answer the question. Either
13 perhaps offline, unless the Court would like us to do that now.

14 THE COURT: Up to you. I want to make sure he
15 understands, and he raises these questions. That's fine. I
16 think it's best if you speak to him. Do you want to try and do
17 that right now?

18 MS. BAHARANYI: Sure. I think that might make sense,
19 especially if we can get the breakout room. That would be
20 great.

21 THE COURT: Chelsea, if you could put them back in the
22 breakout room.

23 (Recess)

24 MS. BAHARANYI: Judge Berman, thank you for that time.
25 We are processing now I think the sentence and certainly

1 Mr. Garcia is disappointed with the sentence. The question
2 that he had was not about habeas, *per se*, but a *Fatico* hearing
3 and whether a *Fatico* hearing would be possible. I think he
4 used the term habeas, but what he meant was a *Fatico* hearing.

5 THE COURT: What about it?

6 MS. BAHARANYI: Whether that was still possible at
7 this stage of the sentencing. I have talked him through that
8 and explained to him where we are with sentencing, that the
9 sentencing hearing is done, and now we are going to just
10 explain your appellate rights.

11 THE COURT: Did he understand, do you think, his
12 rights?

13 MS. BAHARANYI: I do believe so. I have explained
14 them to him. He understands that he has waived certain rights,
15 those discussed in his plea agreement, and he also understands
16 that we have an appellate team who can review if there are any
17 other issues that we didn't cover today.

18 THE COURT: Mr. Garcia, do you understand the rights
19 that you have and the rights that you have waived?

20 THE DEFENDANT: Yes, your Honor, I do understand. I
21 just wanted to put it on record that before the sentence I
22 asked the prosecutor for the *Fatico* hearing, and he denied me a
23 *Fatico* hearing. That's the question I had to ask my attorney.

24 THE COURT: I am at the point -- I only have two
25 questions left. Does the government, first of all, move to

1 dismiss any open counts, if there are any?

2 MR. XIANG: Yes, your Honor.

3 THE COURT: I grant that application. Perhaps more to
4 the point in some sense is, does government counsel wish to add
5 anything to today's proceeding?

6 MR. XIANG: Yes, your Honor, just a few brief things.

7 First, during the break I had the opportunity to
8 review the transcript of your Honor's plea allocution of
9 Mr. Garcia in which your Honor very thoroughly went through the
10 plea agreement, including the appellate waiver and the
11 immigration waiver that your Honor alluded to today. At that
12 point, as today, Mr. Garcia indicated that he understood those
13 rights and his waiver of those rights in the plea agreement. I
14 wanted to place that on the record.

15 Number 2 --

16 THE COURT: Hold on one second. You mean you are
17 referring to the transcript of the plea proceeding, and you
18 went over and reviewed that to determine whether I had
19 discussed with Mr. Garcia the rights, particularly to appeal
20 and the waivers of appeal in his plea agreement?

21 MR. XIANG: That's correct, your Honor. And he did so
22 indicate during that proceeding.

23 Number 2, I think there has been reference to the idea
24 of a *Fatico* hearing. As I understand the proceeding today,
25 there is no factual dispute between the defense and the

1 government on any facts pertinent to sentencing. I believe the
2 only objections that were placed on the record with respect to
3 the PSR were not objections as to the facts relating to the
4 offense conduct, but an objection about the search condition,
5 which obviously does not relate to the facts of what happened
6 and which would not necessitate a *Fatico* hearing. I want to do
7 place that on the record as well.

8 Finally, the government would request that the
9 transcript from today's proceeding be briefly sealed so the
10 government could redact references to the name of the victim.
11 I think that came up at various points today. Obviously, given
12 the very explicit and necessary conversation about the victim's
13 health, his mental state, etc., the government believes there
14 would be a basis simply to redact mentions of his name from
15 today's transcript.

16 THE COURT: Counsel, do you have any problem with
17 that? It would seem straightforward and reasonable.

18 MS. BAHARANYI: We don't object to redactions for the
19 public record.

20 THE COURT: I'll grant your application. If you could
21 get a hold of the court reporter so you could do that as
22 quickly as possible.

23 MR. XIANG: Yes, your Honor. Thank you.

24 THE COURT: Anything that defense counsel wishes to
25 add? You get the final say in connection with today's

1 proceeding.

2 MS. BAHARANYI: Your Honor, I'll only add that clearly
3 we have had several moments since this Court has issued its
4 ruling, several moments where I've had an opportunity to speak
5 to Mr. Garcia. I think this is certainly a scary and
6 disappointing sentence for him. I think it's most
7 disappointing because of the time it will mean away from his
8 son. We are sad, I am sad, for him. I would ask the Court to
9 reconsider, just based off of the facts here and Mr. Garcia's
10 youth, his son, and his background.

11 THE COURT: I do understand Mr. Garcia's concern.
12 This is a big day, so to speak, and an important day in his
13 life, the sentence. For that reason I have spent a lot of time
14 preparing before we started the proceeding to make sure that I
15 had read everything that was submitted and understood
16 everything that was submitted and so I could give as thorough
17 and comprehensive study as to what my sentence would be or
18 should be. I listened to everybody's concerns, in addition to
19 reviewing the written submissions.

20 I too am concerned about Mr. Garcia's well-being. But
21 given all the factors, particularly the 3553(a) factors, my
22 best intention and consideration, this is the sentence that I
23 came up with, and I stand by it. I think it's the appropriate
24 sentence.

25 I think that concludes our work for today.

1 Mr. Garcia, I sincerely wish you the best of luck
2 going forward.

3 Thanks, everybody. We are adjourned for today.

4 (Adjourned)

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**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of December, two thousand twenty-three.

United States of America,

Appellee,

v.

ORDER

Docket No: 22-2561

Anderson Garcia, AKA Sealed Defendant 1,

Defendant - Appellant.

Appellant, Anderson Garcia, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

