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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 UNITED STATES OF AMERICA

4 v. 14 Cr. 451 (CM)

5 BOBBY CAIN,
6 Defendant. Sentence

7 -----x

8 New York, N.Y.
9 May 11, 2015
3:00 p.m.

10 Before:

11 HON. COLLEEN MCMAHON
12 District Judge

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14

15 APPEARANCES

16
17 PREET BHARARA
United States Attorney for the
Southern District of New York
18 SHAWN G. CROWLEY
Assistant United States Attorney

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20 FEDERAL DEFENDERS OF NEW YORK, INC.
Attorneys for Defendant
21 BY: SARAH BAUMGARTEL

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1 (Case called)

2 THE COURT: Good afternoon. This matter is on for
3 sentencing, docket number 14 Cr. 451, United States of America
4 v. Bobby Cain, Mr. Cain having been found guilty by plea to one
5 count of conspiracy to commit Hobbs Act robbery, a class C
6 felony, in violation of 18 United States Code section 1951.

7 This crime carries a statutory maximum penalty of 20
8 years' imprisonment, 3 years' supervised release, a fine the
9 greater of \$250,000 or twice the gross gain to the defendant or
10 loss to identifiable victims other than the defendant, and a
11 \$100 special assessment.

12 In connection with today's proceedings, I have
13 received and reviewed the pre-sentence report prepared by
14 United States Probation Officer Zondra Jackson dated April 8,
15 2015. I have a sentencing memorandum from the government dated
16 May 8, 2015. I have a sentencing memorandum from the Federal
17 Defenders on behalf of Mr. Cain. It has Exhibits A through J,
18 all of which I have considered.

19 Is there anything else I should have seen in writing
20 prior to today's proceedings from the government?

21 MS. CROWLEY: No, your Honor.

22 THE COURT: From the defendant?

23 MS. BAUMGARTEL: No.

24 THE COURT: Has the government reviewed the
25 pre-sentence report?

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1 MS. CROWLEY: We have, your Honor.

2 THE COURT: Any additions, deletions, or corrections
3 other than the government's position on the guidelines
4 calculation?

5 MS. CROWLEY: No, your Honor.

6 THE COURT: Does the government wish to be heard on
7 sentencing?

8 MS. CROWLEY: Just briefly, your Honor. If I may lay
9 out the three different guidelines that are sort of at play
10 here in order to hopefully provide clarity for the Court beyond
11 what we have already put in our submission.

12 THE COURT: Actually, four guidelines that are at play
13 here. It's 55 to 71, 63 to 78, 77 to 96, which is what it
14 would have been if Mr. Cain had not deliberately refused on
15 four separate occasions to be produced for his sentencing, or
16 the career criminal guideline.

17 MS. CROWLEY: That's correct, your Honor.

18 THE COURT: I think I'm pretty clear.

19 MS. CROWLEY: Then the government will rest on its
20 submission unless the Court has any further questions.

21 THE COURT: Thank you very much.

22 Ms. Baumgartel.

23 MS. BAUMGARTEL: Yes.

24 THE COURT: Have you reviewed the pre-sentence report
25 and gone over it with your client?

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1 MS. CROWLEY: Yes.

2 THE COURT: Obviously, you, too, take issue with the
3 probation officer's conclusion that your client is a career
4 criminal. I agree with the government that it is a close case.
5 I could make a case either way. I'm not going to sentence him
6 as a career criminal, so we can get that off the table.

7 I'll hear you on sentencing.

8 MS. BAUMGARTEL: Your Honor, I really can't imagine
9 what it would be like to have the kind of life that Bobby Cain
10 has had. I understand that he is here for a serious offense.

11 THE COURT: Quite serious.

12 MS. BAUMGARTEL: It is important to consider what the
13 life of this 20-year-old has been leading up to that. I don't
14 think any of us could probably imagine what it is like when you
15 are 7 or 8 years old to be punched in the face by your mother.

16 THE COURT: Unfortunately, I have had to imagine it
17 over the course of the last five years. Mr. Cain is just the
18 latest in a long line, long procession of young men born to
19 poor single women in the ghetto, most of them teenagers, as his
20 mother was a teenager, born to children who were unable,
21 unwilling, incapable of taking care of them.

22 I read Orlando Patterson's piece yesterday in the
23 Times, the great Harvard sociologist, the great black Harvard
24 sociologist, with great interest. I have tried to get my head
25 around this issue again and again and again. He says, and I

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1 believe him, that the first and most important thing that has
2 to happen is that this cycle of children having children,
3 children who cannot take care of youngsters having children and
4 letting them roam free, not giving them guidance, not giving
5 them structure, so that they look for it on the street, has to
6 end.

7 MS. BAUMGARTEL: Your Honor, there is something that
8 this Court can do to help that ever so slightly in the context
9 of this sentencing, and that is giving Bobby Cain a shorter
10 sentence.

11 THE COURT: I disagree.

12 MS. BAUMGARTEL: Because he already has a child.

13 THE COURT: Yes, and that's really unfortunate. He
14 certainly hasn't helped matters in the regard that Professor
15 Patterson has suggested is the single most important thing that
16 can happen. And I believe he has a murder charge pending
17 against him in the Supreme Court Bronx County.

18 MS. BAUMGARTEL: He does.

19 THE COURT: So when we are done, he is going to go and
20 get tried for murder.

21 MS. BAUMGARTEL: Yes, your Honor. He absolutely
22 denies that charge.

23 THE COURT: I hear you, and he is presumed innocent,
24 but he could be looking at spending most of the rest of his
25 adult life in prison.

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1 MS. BAUMGARTEL: Right.

2 THE COURT: It's a little late in the day.

3 MS. BAUMGARTEL: Your Honor, there are things that we
4 can control and there are things that we can't. Part of what
5 we can do as a society and the people who are in power and the
6 people who have the ability to make decisions is that we can
7 try to do something to help. We can't change the bad things
8 that Bobby Cain has done in the past and we cannot control what
9 happens in his murder case, but what your Honor can do on your
10 part is to give him some assistance and support despite the bad
11 things that he has done, and that in turn is going to help his
12 child.

13 There may be other people who have teenage
14 pregnancies, who have children as children. But I think that
15 Bobby Cain had a particularly difficult and terrible
16 experience. Not every 16-year-old who has a child abuses them
17 with violence and cruelty. You see the mother of his child is
18 very loving and not that way at all. And not everyone, whether
19 their father is absent or not, has a father who gets out of
20 prison and a month later invites them to do an armed robbery
21 with them.

22 So I think we can agree that for a 20-year-old, he has
23 had a particularly dramatic and difficult experience. I'm not
24 saying there is anything OK about what he has done, but what do
25 we to now as a society to respond to it in a positive way?

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1 We always hear from the government he hasn't learned
2 his lesson, he hasn't learned his lesson. He is going to be
3 punished. He is going to do prison time here. He is going to
4 do additional prison time in the state. The question is what
5 is going to happen after that. To the extent that your Honor
6 gives him a slightly shorter sentence, the benefit is that it
7 is going to give him a better chance actually of not becoming
8 his father.

9 I think Nicole Foster on the video was very perceptive
10 when she said the longer you give him in prison, the more
11 likely he is to become his father. That is a road he is going
12 down. The question is, how do we have some sort of meaningful
13 intervention to stop that? It is not by giving him 6 or 7
14 years in prison.

15 It is by setting him up with a social worker, by
16 sending him to the Osborne Association, by giving him drug
17 treatment, by giving him parenting classes. Maybe he won't do
18 what he should after he gets out, but at least we will have
19 done what we can to try and make this problem better rather
20 than just throwing him away. That is not the right answer and
21 that is not what the Court should do.

22 THE COURT: Isn't that what happened to him when he
23 got his juvenile adjudication, his YO? He committed this crime
24 while he was on probation.

25 MS. BAUMGARTEL: No, he didn't, your Honor. That's a

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1 mistake in the pre-sentence report.

2 THE COURT: That's a mistake?

3 MS. BAUMGARTEL: Yes.

4 THE COURT: That's a mistake? The guidelines
5 calculation is wrong?

6 MS. BAUMGARTEL: Well --

7 THE COURT: He wasn't on parole?

8 MS. BAUMGARTEL: No, he was not.

9 THE COURT: He wasn't under any kind of state
10 supervision?

11 MS. BAUMGARTEL: No. When he committed this offense,
12 no.

13 THE COURT: Does the government concede that?

14 MS. CROWLEY: Just one moment, your Honor. I'm sorry.
15 I believe that is correct, your Honor.

16 THE COURT: He has been under supervision. He has
17 been cut a break, he has been out, and he has done nothing.
18 Why wasn't he produced the four times that he wasn't produced?

19 MS. BAUMGARTEL: Your Honor, I don't know --

20 THE COURT: Let's get to it. Why did he refuse to
21 come? Why did he refuse to go and get sentenced again and
22 again and again? Why? I'd like to know. It's a matter of
23 personal responsibility. It's important to me. Why?

24 MS. BAUMGARTEL: Your Honor, I don't think he actually
25 refused each and every one of those times.

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1 THE COURT: Really?

2 MS. BAUMGARTEL: Sometimes he was sick. Sometimes
3 they called him -- I don't know what happened. He was also
4 having an issue with his state court attorney, who was refusing
5 to come and see him and tell him anything about his state court
6 case. She also refused to give me any information about the
7 case, which is a strange thing to do. So I don't know why he
8 didn't go to court each time. But frankly --

9 THE COURT: I draw the negative inference from the
10 fact that he didn't go. You want me to draw favorable
11 inferences for your client. I draw very unfavorable
12 inferences. He's acting up while in custody. He is acting up
13 and acting out.

14 MS. BAUMGARTEL: He's not really acting out in
15 custody. There were some times when he was sick. Your Honor,
16 I don't know what it is like to be moved in between state and
17 federal custody. I think it is extremely unpleasant. He is
18 going to go there and get sentenced.

19 Also, if he had gotten sentenced there, it would have
20 really messed up his time computation for the two sentences.
21 By doing that, I'm sure he has greatly antagonized to the
22 extent that the prosecutor is going to say he refused to come.
23 And I'm sure he has greatly antagonized the state judge.

24 THE COURT: He greatly antagonized me.

25 MS. BAUMGARTEL: He or she will have the opportunity

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1 to decide what they want to about that, but I don't think it is
2 a factor that should weigh in what sentence he gets for his
3 federal conviction.

4 THE COURT: Anything about the character of this man
5 is a factor that weighs in, and he is a man now and it weighs
6 with me. It weighs with me.

7 MS. BAUMGARTEL: Your Honor, a lot of people don't --

8 THE COURT: I'm not a social worker, Ms. Baumgartel.
9 I've told you that before. I'm a judge.

10 MS. BAUMGARTEL: I'm not asking the Court to be a
11 social worker. What I'm saying is that a lot of people don't
12 like dealing with unpleasant things, and it often doesn't
13 reveal anything particularly telling about their character
14 other than that they are human and they don't like dealing with
15 unpleasant things. This as 20-year-old who does not make great
16 decisions. But does that mean that he needs to be in prison
17 for 6 or 7 years? No, it doesn't.

18 Judge Rakoff was speaking about this where he said if
19 you essentially take the government's arguments, the its
20 logical conclusion, then you would lock people up and you would
21 never let them back out because they don't take seriously this
22 idea that anything less than the sentencing guidelines could
23 ever possibly be a enough.

24 We have a parsimony principle that says the court is
25 supposed to sentence him to something that is sufficient but

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1 not greater than necessary, and the guidelines is certainly
2 that in this case.

3 THE COURT: So you think. Others don't. We have a
4 right to our opinions, too, and they are legitimate and they
5 are opinions that are supported by factors. Sometimes a
6 lengthy sentence is exactly what is required for criminal
7 behavior.

8 MS. BAUMGARTEL: Your Honor, your opinion is the only
9 one that matters in this sentencing. I'm well aware of that
10 part of it. The point is, what is this accomplishing? It's
11 punishing him. It's making his life worse. It's making his
12 child's life worse.

13 THE COURT: It's protecting society from him, his
14 repeated violent outbursts.

15 MS. BAUMGARTEL: Your Honor, he hasn't really had
16 repeated violent outbursts. He has a prior misdemeanor
17 conviction for assault. He is a person who certainly --

18 THE COURT: He has a prior conviction for robbery in
19 the second degree.

20 MS. BAUMGARTEL: Yes. He was with a group of people.

21 THE COURT: I don't care whether he was with a group
22 of people or he was alone. It doesn't make any difference to
23 me if there were five people that were guilty or if there was
24 one person, just as it doesn't make any difference to me that
25 there were two people in those stores in the Bronx with guns.

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1 MS. BAUMGARTEL: There was one gun that was held by
2 his father. He was with his father, who was the person who had
3 a gun. He did not have a gun.

4 Your Honor, there is a way in which his prior case is
5 useful to think about. What happened there is that he was
6 given a period of incarceration, then he was let out, he
7 returned to his destitute home life. He was responsible for
8 taking care of his younger siblings. He continued to receive
9 absolutely no support from his parents, and he committed
10 another crime.

11 The question, is how can this be different? Part of
12 the answer is that sending people to custody for a long period
13 of time doesn't tend to make them better, it tends to make them
14 more like criminals. And that's exactly what happened to him.

15 What we are saying to the Court is not to choose to do
16 that again. Then what's going to happen is he's going to get
17 out in 6 years or 7 years and he's going to be in the exact
18 same situation as he was before. He is not going to have any
19 more life skills, he is going to have grown distant from his
20 child, he is going to have lost whatever pro-social good
21 connections he had on the outside world, and he is going to be
22 starting with nothing. He is going to do really poorly then,
23 too, probably.

24 THE COURT: What else?

25 MS. BAUMGARTEL: Your Honor, I think that's probably

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1 all I have to say. I would ask the Court to consider the fact
2 that even though he has made a lot of mistakes, he clearly has
3 the potential to contribute in a positive way. I think you see
4 that on the video when his girlfriend talks about what a good
5 father he's been. I think if he had the opportunity to be with
6 his child and to see his child, he would be a good father.
7 That's something that is important to him and that is going to
8 be important to his child.

9 For whatever it is worth, and I know your Honor is not
10 a social worker, there are a lot of studies showing that if
11 fathers are able to maintain a good relationship with their
12 children that makes it less likely they will commit crime.
13 Obviously, it didn't happen with Mr. Cain's father. But
14 something he wants to do is be different from his father, not
15 the same.

16 THE COURT: Anything else from the government?

17 MS. CROWLEY: No, your Honor. Well, actually, very
18 briefly, I think one factor that was sort of not mentioned in
19 all of this, although it was alluded to by the Court, is that
20 under the 3553(a) factors, one of the factors to consider is
21 the seriousness of the offense and that the sentence should
22 reflect the seriousness of the offense.

23 This was two armed robberies that occurred in the span
24 of a week. Although Mr. Cain did not hold the gun, he did
25 remove the property from the employees and did tell one of the

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1 employees to go to the back of the store and get the rest of
2 the property. Your Honor, the government asks that the Court
3 consider that, and that when you do, a sentence within the
4 stipulated guidelines range is reasonable here. Thank you.

5 THE COURT: Mr. Cain, do you have anything to say to
6 me before I sentence you?

7 THE DEFENDANT: Yes, your Honor. Thank you for giving
8 me this opportunity to speak. I spent the last 11 months
9 reflecting on my actions and the effect those actions have had
10 on the victims of my crime as well as my family. I'm truly
11 sorry for all the emotional duress that my own selfish actions
12 have caused each and every one of those people.

13 I have been told that regardless of the inability to
14 go back in time and change our actions, we still have the
15 ability to use our mistakes as learning experiences and become
16 wiser men. One of the lessons that has stuck with me the most
17 was putting myself in the shoes of everyone my crimes have
18 affected and empathizing with the victims. I hope they can
19 forgive my actions and move forward without harboring any
20 ill-will.

21 I wanted nothing more than to provide the stability
22 for my daughter and young siblings that I was never afforded in
23 my life. I was the man of the house at a very young age, and I
24 was determined to make sure my brothers and sisters had the
25 basic necessities so they could do well in school and have the

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1 opportunity to have a better life. I know first-hand how hard
2 it is to try to learn hungry, and I wasn't going to let my
3 siblings go through that. We struggled, but we found a way,
4 and together it seemed we might succeed.

5 My grandmother had always been the backbone of our
6 family. She was the one who made me believe that as long as we
7 kept our faith, things will work out. Her death was very
8 devastating to us all. My mother took it the hardest, so I
9 found myself carrying the full weight of my household, at the
10 same time becoming a new father.

11 My own father returned to the Bronx at this time, and
12 we tried to restore some form of dignity and respect to our
13 household. We cleaned the apartment from top to bottom. We
14 tried to make all the children in the house smile regardless of
15 what we didn't have.

16 I finally felt that I could let my guard down, and I
17 shared with him everything that had transpired, all I had been
18 through, in his absence. I can see now that this created a
19 perfect storm, where he wanted nothing more than to provide the
20 support he hadn't been there to give. I wanted nothing more
21 than to support my family the way I hadn't been supported, and
22 the stress and pressure of the situation led to us make the
23 irrational decision that has me before this Court today.

24 I want my daughter and my siblings to grow up proud of
25 the man I am and realize that I can achieve that by maintaining

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1 my worth ethic and becoming a productive member of my
2 community. I want this Court and everyone that I've affected
3 to know that I feel very clearly the pain my transgressions
4 have caused, and I recognize the only way to make it better is
5 to use it to become an upstanding citizen who they can all
6 respect.

7 Thank you for hearing me out again, your Honor.

8 THE COURT: Have a seat.

9 Mr. Cain, I don't know if you have ever been at the
10 other end of a gun, at the wrong end of a gun, the end that the
11 bullet comes out of. I speak for the people who saw the gun
12 that was used by you and your father. I don't care who was
13 holding it, you were both using it, the gun that was used by
14 you and your father to terrorize those people, those business
15 people, the backbone of that community, in armed robberies.

16 I have been on the other end of a gun, so I have some
17 sense of what those people must have felt like on that day, on
18 those days, when they were going about their business and two
19 men who could and should have been legitimate customers walked
20 into their premises and pulled a weapon that was capable of
21 killing them and took their property and took their peace of
22 mind, took it probably in some measure for the rest of their
23 lives. I speak for them. They are the people who matter most
24 to me today.

25 I have grappled for years, and particularly for the

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1 last four years, as Ms. Baumgartel knows very well, with the
2 fate of young men like you, the young men who were described in
3 Professor Patterson's piece in The New York Times yesterday:
4 Hypermasculinized, enamored of guns, violent, thuggish.

5 Almost all of you had terrible upbringings as a result
6 of the awful decisions made by your parents, starting with the
7 decision, which really wasn't ever much of a decision in the
8 first place but more like an afterthought, to have you at all,
9 when they were incapable or unwilling to take care of you.

10 I've heard stories, believe it or not, that are worse
11 than yours from young men your age. If it were possible, I
12 would become numb to them. It's not possible. The stories are
13 horrible. And every time they hit me like a sledgehammer.

14 What seems to happen, what seems to result, is the
15 kind of behavior that got you in trouble in the state court and
16 that has gotten you into trouble in this court: Aggressive,
17 violent, gun-toting -- whoever was carrying it, you were both
18 using it -- behavior that victimizes the good citizens of your
19 community. And there are many such.

20 The problems that lead to the kind of upbringing that
21 you had are so deeply entrenched in our society and so poorly
22 understood or addressed that I don't even begin to know how to
23 make things better, how to stop and start over again. But I
24 can make things better for the people who were in those stores
25 by putting you in jail, and I believe that is the right thing

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1 for me to do.

2 You have engaged in this kind of behavior before.

3 While I am not sentencing you as a career criminal, the fact
4 that you have engaged in this precise type of behavior before,
5 at an even younger age, and not in order to try to get along
6 with your dad but in order, I assume, to try to get along with
7 the guys in the neighborhood, makes it all the more important
8 to me to protect the community from you, because I can't
9 guarantee that if I let you go back out into the community, you
10 won't do the same thing again next week.

11 There are a lot of factors that I'm supposed to
12 consider when I decide on a sentence. One of them is what's
13 appropriate punishment for the crime you have committed. It is
14 a heinous crime, it is a violent crime, and it is a crime with
15 lasting repercussions for other human beings. Even if it was
16 \$4,000 worth of goods, not very much in the great scheme of
17 things, it is a crime with lasting repercussions for other
18 human beings.

19 Will your late friend suffer? Will your daughter
20 suffer? I'm sure they have suffered for the last 11 months
21 because you have been in custody for 11 months now. I'm sure
22 they will suffer. But I can't balance their suffering against
23 the suffering of the victims of the crime, because you are the
24 person who was responsible for seeing that they didn't suffer,
25 the people for whom you were responsible. You didn't think

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1 about them or you didn't think about them enough or you didn't
2 think about them in the right way at the right time, and it's
3 too late to think about them now.

4 Another of the factors that I am to consider in
5 sentencing is how to protect society. I am truly not convinced
6 that you are someone from whom society does not need to be
7 protected. To put it otherwise, I think you are someone from
8 whom society does need to be protected. The reasons why that
9 is true may be tragic, but society needs protection no less for
10 all that.

11 I have reviewed the pre-sentence report, and I accept
12 and adopt its description of the offense and the offense
13 conduct. The total offense level here is 29. It doesn't seem
14 to me that there is any error in the guidelines calculation.
15 The issue is on the criminal history or the offense level
16 computation. The problem here is with the probation officer's
17 use of the career criminal guideline. The government is not
18 wrong. A strong case can be made that it is appropriate. I
19 will not do it.

20 I am going to accept the government's analysis and Ms.
21 Baumgartel's analysis and rule that the probation department
22 erred in relying on the career criminal guideline. So, the
23 defendant's criminal history score is VII. Or is it VI now?

24 MS. BAUMGARTEL: Your Honor, I believe his offense
25 level is 24, because the career offender guideline does change

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1 the offense level. Our position is that he is in criminal
2 history category III. Our position is that he has 6 points.
3 The probation office found 7 points by counting the YO as an
4 adult conviction. Either way, it is a criminal history
5 category III though.

6 THE COURT: OK. The government is on board with that?

7 MS. CROWLEY: Yes, your Honor. Our position is that
8 there are 6 criminal history points.

9 THE COURT: Which is a III, because 7 is IV. It is my
10 understanding that had he gone and gotten sentenced as he
11 should have on at least one of the multiple occasions when he
12 refused to be transported, his criminal history score would in
13 fact have been VII and his guideline would have gone up
14 accordingly.

15 MS. BAUMGARTEL: Your Honor, is the government
16 representing what he would have been sentenced to?

17 THE COURT: She said the guideline would have been 77
18 to 96.

19 MS. BAUMGARTEL: I mean in state court, your Honor.

20 THE COURT: I think there was a plea agreement which,
21 if he had shown up the first time, would have given him a year.
22 By not showing up the first time, I can tell you as an old
23 state court judge, that plea agreement is out the window. He
24 has forfeited that.

25 MS. BAUMGARTEL: If that is the case, your Honor, it

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1 is another reason for this Court not to punish him for it.

2 THE COURT: I'm only punishing him for this crime.
3 I'm only punishing him for this crime. The state court judge
4 can punish him for another crime. But I'll take the
5 government's calculation that the criminal history score is 6
6 and the criminal history category is III. I believe that makes
7 it a 63 to 78 month guideline calculation, which is slightly in
8 excess of the stipulated guideline range.

9 MS. CROWLEY: That's correct, your Honor.

10 THE COURT: I accept and adopt as my findings the
11 offender characteristics set forth beginning at paragraph 59 of
12 the pre-sentence report. I have considered all of the section
13 3553(a) factors. The nature and circumstances of the offense,
14 the need to punish the defendant for a very serious offense,
15 and the need to protect society from an individual who has
16 proved himself on more than one occasion to be willing to
17 engage in this kind of behavior are the factors that impel me
18 more than any of the other factors in setting sentence.

19 Would you please stand, sir.

20 At a total offense level of 24, criminal history
21 category III, I hereby sentence you, Bobby Cain, under docket
22 number 14 Cr. 451-001, to be remanded to the custody of the
23 Attorney General of the United States and the Bureau of Prisons
24 for a term of 71 months, to be followed by a period of 3 years'
25 supervised release. Probation recommended 2 on a much longer

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1 sentence. I was disposed to give Mr. Cain a much longer
2 sentence. I think I will just maximize his supervised release
3 instead.

4 You are required to make restitution in the amount of
5 \$4,608. That's 4,208 to victim number 1 and \$400 to victim
6 number 2, which you owe jointly and severally with your
7 co-defendant Robert Cain. And you are required to pay a
8 special assessment of \$100 in court costs due and payable
9 immediately.

10 Recommendation for place of incarceration? I have a
11 feeling he is going to get writted into the state fairly
12 quickly.

13 MS. BAUMGARTEL: Your Honor, we would ask you to
14 designate him to state custody for service of his federal
15 sentence so that it is clear that his sentence begins today and
16 goes forward.

17 THE COURT: I can't designate him to state custody. I
18 don't want anything to be concurrent. I don't want there to be
19 any suggestion that he doesn't have a federal sentence and a
20 state sentence. I understand that concurrency is up to the
21 state court judge. I get that the state court judge went
22 first. You know perfectly well if I had gone second, it would
23 have been consecutive, not concurrent. So I'm not going to do
24 that.

25 MS. BAUMGARTEL: Your Honor, I don't believe he has

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1 been sentenced in the state court yet.

2 THE COURT: He hasn't. That's the problem. He should
3 have been, but he hasn't.

4 MS. BAUMGARTEL: I don't believe that they went first.

5 THE COURT: They didn't go first. That's point. My
6 bad. If they had gone first, as they should have, if your
7 client had not refused on multiple occasions to be transported,
8 and I had gone second, his sentence would be running
9 consecutive. I don't want to send any message otherwise.

10 MS. BAUMGARTEL: OK.

11 THE COURT: No recommendations for when he does his
12 federal time.

13 MS. BAUMGARTEL: Your Honor, if your Honor won't
14 recommend state custody, we will request someplace close to the
15 New York metropolitan area.

16 THE COURT: New York metropolitan area to facilitate
17 family visitation.

18 I have no idea what is going to happen to you with
19 regard to the state crime for which you are going to be
20 sentenced. You have two charges outstanding that are going to
21 get tried or pled or something. If you are very lucky, you are
22 going to be acquitted and that will be the end of it. If
23 things go badly for you, then you could be in jail for a very
24 long time. I have no way to predict what's going to happen.
25 I'm presuming you innocent on the charges on which you have not

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1 yet been tried.

2 But at some point, if you are released, when you are
3 released, whenever you are released, and that would include if
4 it's a very long time down the road because of a conviction in
5 one of those other cases, whenever you are released, you have
6 72 hours to report to the nearest United States Probation
7 Office, and you will serve 3 years under the supervision of the
8 United States probation officer.

9 During that period of time, you cannot commit another
10 federal, state, or local crime, you cannot illegally possess a
11 controlled substance, you cannot possess a firearm or a
12 destructive device. You will refrain from the unlawful use of
13 controlled substances, submitting to one drug testing within 50
14 days after your placement on supervised release and at least
15 two unscheduled drug tests thereafter as directed by your
16 probation officer.

17 You will cooperate in the collection of DNA, genetic
18 identifying material, as directed by your probation officer.
19 You will obtain and maintain legitimate and verifiable
20 employment. You can't associate with people who have been
21 convicted of crimes. That includes your father. You can't
22 associate with people who have been convicted of crimes. You
23 cannot be found in places where criminal activity is being
24 planned or carried out.

25 Your probation officer has to know at all times where

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1 you live and where you work, and you can't change those
2 addresses. I'd listen to me if I were you. And you can't
3 change those addresses at any point without the prior approval
4 of your probation officer. You need to give ten days' advance
5 notice if you are planning to move or planning to change jobs.
6 If there is an emergency or fire or gas leak or something like
7 that that requires you to vacate the premises, you have 48
8 hours to give notice to your probation officer where you can be
9 found.

10 As a special condition of your supervision, you shall
11 submit your person, your residence, your place of business,
12 your vehicle, or any other premises under your control to a
13 search without a warrant as long as your probation officer has
14 reasonable belief that contraband or evidence of a violation of
15 the conditions of your supervision may be found.

16 Any such search must of course be conducted at a
17 reasonable time and in a reasonable manner. The failure to
18 submit to search will be grounds for revocation of your
19 supervision and reincarceration. You shall inform any other
20 residents that the premises you occupy may be subject to search
21 pursuant to that condition.

22 You have to provide your probation officer with access
23 to any financial information that the probation officer
24 requests of you, and you may not incur any new credit charges,
25 that means you can't charge anything on a credit card or open

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1 additional lines of credit, without the approval of your
2 probation officer unless you are in compliance with the
3 installment payment schedule.

4 You are required to pay restitution. It is a
5 provision of your supervision that any restitution that is not
6 paid at the end of your period of incarceration must be paid as
7 a condition of your supervision. While you are incarcerated,
8 if you are engaged in a Bureau of Prisons non-UNICOR work
9 program, you will pay \$25 per quarter for your criminal
10 financial penalty. It will go first toward your \$100 court
11 cost and then toward the restitution.

12 If, however, you participate in BOP's UNICOR program
13 as a grade 1 through 4, which I would hope you would be able to
14 if you are in federal custody, because you would then get some
15 skills that would help you to get a job, you will pay 50
16 percent of your monthly UNICOR earnings toward the criminal
17 financial penalties consistent with BOP regulations at 28
18 C.F.R. section 545.11.

19 After you are released from custody, restitution will
20 be paid in monthly installments of 10 percent, not 15, 10
21 percent of your gross monthly income over the period of
22 supervision commencing 30 days after the date of the judgment
23 or the release from custody. In this case it will be the
24 release from custody because a sentence of imprisonment was
25 imposed.

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1 You are required to notify the United States Attorney
2 for this district within 30 days of any change in your mailing
3 or residence address that occurs while any portion of your
4 restitution remains unpaid.

5 The defendant has no ability to pay a fine, and I
6 recommend that no fine be imposed.

7 Ms. Baumgartel, do you need to talk to your client?

8 MS. BAUMGARTEL: Your Honor, I'm sorry. He just had a
9 brief question. Sorry.

10 THE COURT: This is not a case in which forfeiture is
11 applicable.

12 Mr. Cain, I believe that at the time you took your
13 plea, you signed and Ms. Baumgartel signed a letter of
14 agreement with the government. Do you recall that?

15 THE DEFENDANT: Yes, I do.

16 THE COURT: In that letter it said that if I sentenced
17 you to 71 months or less, you would not take an appeal from
18 your sentence or bring a lawsuit charging that the sentence was
19 illegal. Do you remember that?

20 THE DEFENDANT: Yes.

21 THE COURT: Did you have an opportunity to talk to Ms.
22 Baumgartel about what that meant before you signed the letter?

23 THE DEFENDANT: Yes.

24 THE COURT: Did she explain to you that if I sentenced
25 you to 71 months or less in prison, you would be giving up your

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1 right to take an appeal from your sentence?

2 THE DEFENDANT: Yes.

3 THE COURT: Did you sign the letter of your own free
4 will?

5 THE DEFENDANT: Yes.

6 THE COURT: I sentenced you to 71 months. It is my
7 understanding that you have given up, waived, your right to
8 take an appeal from your sentence. Is that also your
9 understanding?

10 MS. BAUMGARTEL: Your Honor, I haven't discussed with
11 him -- obviously, he can't waive ineffective assistance, and
12 there may be other issues that aren't waived.

13 THE COURT: Ms. Baumgartel, since this is the last
14 time that you will appear before me, let me say for the record
15 you have never been anything less than extraordinarily
16 effective on behalf of your clients in all the many years that
17 I have had the pleasure of locking horns with you.

18 I asked, and I need an acknowledgment, sir, did you
19 waive your right to take an appeal from a sentence of 71
20 months?

21 THE DEFENDANT: Yes.

22 THE COURT: Have a seat.

23 Anything else from the government?

24 MS. CROWLEY: Yes, your Honor. The government moves
25 to dismiss the open count in the indictment as to this

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1 defendant.

2 THE COURT: The open count is dismissed as to this
3 defendant.

4 Ms. Baumgartel?

5 MS. BAUMGARTEL: Your Honor, in addition to our prior
6 objections and corrections to the pre-sentence report, I'm
7 going to object and ask the Court to reconsider prohibiting Mr.
8 Cain from having any contact with his father, just because over
9 the course of the next 8 years or more they may want to
10 correspond.

11 THE COURT: The condition is a standard condition of
12 supervision. It falls harshly on people who have a real
13 relationship with a parent. This is, unfortunately, as you
14 have so eloquently argued, not a man who has had a real
15 relationship with his parent. Frankly, the best thing I can
16 think of that could happen to this young man is that he should
17 have nothing to do with Robert Cain, who has been of no
18 assistance and of immeasurable, immeasurable harm to this young
19 man.

20 MS. BAUMGARTEL: Nothing further from the defendant.

21 THE COURT: Thank you. These proceedings are closed.

22 (Adjourned)

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