No._____

IN THE
SUPREME COURT OF THE UNITED STATES

CARL BURDICK,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under 18 U.S.C. § 3553 the District Courts are charged to consider a number of factors when crafting a sentence, with the ultimate goal of imposing a sentence that is "sufficient, but not greater than necessary" to realize the objectives at section 3553(a)(2). Among the factors a sentencing court must consider are the sentencing guidelines promulgated by the United States Sentencing Commission. § 3553(a)(4).

This Court's decision in *United States v. Booker*, 543 U.S. 220 (2005) rendered the previously mandatory sentencing guidelines advisory. Its later decision in *Rita v. United States*, 551 U.S. 338 (2007) held that District Courts may not accord the sentencing ranges recommended by the guidelines a presumption of reasonableness.

In this case, the United States Probation Office initially miscalculated petitioner's sentencing guideline imprisonment range as 168 to 210 months, a range that overlapped with the 135 to 168-month range in his plea agreement with the Government. Subsequently, Probation corrected its calculation, arriving at a guideline

imprisonment range of 235 to 293 months. It was undisputed below that the District Court, fully aware of the corrected guideline range and the pertinent facts of petitioner's case, repeatedly indicated that it would accept an agreed-upon sentence of 168 months, pursuant to Fed. R. Crim. P. 11(c)(1)(C). When no such agreement materialized, the District Court sentenced petitioner to 240 months of imprisonment.

The question presented by this case is: Whether the District Court, contrary to precedents of this Court and the United States Court of Appeals for the Second Circuit, accorded the advisory sentencing guidelines range a presumption of reasonableness?

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PETITION FOR WRIT OF CERTIORARI

Carl Burdick respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The summary order of the Second Circuit is reported at 789 Fed. Appx. 886 (2d Cir. 2019), and attached at pages 1-7 of the Appendix to

this petition. The order of the Second Circuit denying rehearing and rehearing *en banc* is attached at page 8 of the Appendix.[1]

JURISDICTION

The order denying the timely petition for rehearing and *en banc* is dated December 27, 2019. (A 8). On March 19, 2020, this Court ordered the time for filing a petitions for a writ of certiorari enlarged to 150 days from the date of orders denying timely petitions for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provision is 18 U.S.C. § 3553. (A 9).

STATEMENT

The Offense Conduct

In the spring of 2015, a 15-year-old girl living in Wayne County, New York, intending to text a friend of hers, accidentally texted Carl Burdick (Mr. Burdick). Despite the initial mistake, the two continued communicating. According to the girl, she told Mr. Burdick that she was

[1] The Appendix will be cited as "A #."

15 during these communications; according to Mr. Burdick, who was then 55, the girl initially told him she was 18, and didn't reveal her true age until two or three months had passed.

Ultimately, however, Mr. Burdick learned the girl's age and still pursued an intimate relationship with her. In June 2015, he colluded with her to deceive her parents so that she could visit him in Watertown. During the visit, Mr. Burdick took the girl to a motel, where they had sex.

About a month later, under the pretense of taking the girl and one or more of her friends on a road trip (Mr. Burdick was a trucker), he convinced the girl's parents to let her go with him to Montana. During the trip, Mr. Burdick and the girl again had sex.

Of course, Mr. Burdick's conduct was discovered. In late August, 2015, the girl's parents reported the situation to the Wayne County Sheriff's Office. State and federal authorities interviewed the girl twice and conducted a lengthy investigation.

The investigators first interrogated Mr. Burdick in late January, 2017. At that time, he admitted to receiving nude photos from the girl

and texting salaciously with her, but denied having had sex with her. Mr. Burdick's arrest on related state charges followed this interview.

The federal prosecution then commenced, and investigators again interrogated Mr. Burdick, this time while en route to his arraignment on a criminal complaint filed in the Rochester Division of the United States District Court for the Western District of New York. During the questioning, Mr. Burdick made further admissions relative to the federal accusations.

The Plea Agreement

By May of 2017, Mr. Burdick and the Government had arrived at an understanding. In exchange for Mr. Burdick waiving his right to an indictment and a trial by pleading guilty to a felony information alleging that he transported the girl across state lines with the intent to engage in criminal sexual activity with her, the Government forewent further prosecution of related child pornography related.

The plea agreement also set out agreed-upon sentencing guidelines calculations; in pertinent part, they resulted in a sentencing range of 135 to 168 months of imprisonment. The parties mutually

pledged not to advocate for a sentence outside of this range, but acknowledged that their calculations and commitments didn't bind the District Court. During the Fed. R. Crim. P. 11 colloquy, the District Court reminded Mr. Burdick of its authority to impose a sentence up to the statutory maximum.

The PSRs and Status Conferences

The initial PSR impacted the subsequent proceedings in two important ways.

First, it applied a different guideline than the plea agreement, and so found Mr. Burdick's sentencing range to be 168 to 210 months, not the 135 to 168 months agreed upon by Mr. Burdick and the Government.

Second, the PSR's criminal history section included a 2004 misdemeanor conviction for attempted endangering the welfare of a child. The PSR's account of the underlying facts nearly mirrored the admitted facts in the instant case. In substance, the PSR reported that Mr. Burdick took the 14-year-old daughter of a friend on a trip in his tractor trailer, persuading the girl's mother that he would use the time

to counsel her about recent sexual acting out, but in fact exploiting the opportunity to proposition and fondle her.

The Government responded to the PSR's guideline calculations by noting its obligation to adhere to the plea agreement. The 2004 conviction, however, became the foundation of the Government's argument that Mr. Burdick's "pattern of predatory conduct toward teenage girls" warranted a sentence of 168 months – the top end of the agreed-upon sentencing range, and the bottom end of the range found by the initial PSR.

Meanwhile, Mr. Burdick's original Assistant Federal Public Defender retired, and his successor sought and received an adjournment of sentencing. In the interregnum, a Revised PSR hit the docket. This version applied a different guideline to Mr. Burdick's offense, and consequently found Mr. Burdick's sentencing range to be 235 to 293 months. The rescheduled sentencing was converted to a status conference at new defense counsel's request.

At the October 30, 2017 status conference, Mr. Burdick's attorney told the District Court that, since inheriting Mr. Burdick's case from her retired colleague, she unsuccessfully tried to renegotiate his plea

agreement by substituting a charge to which the new guideline calculations and the ballooned sentencing range would not apply. Or, as the District Court explained it to Mr. Burdick: "Ms. Burger is tactfully saying that there might be an issue with your representation by the federal public defender's office, if somehow you were misinformed about the applicable Guidelines."

Asked for its position, the Government said that it would simply advocate for the 168-month maximum provided for by the plea agreement – a figure, it noted, that was "about five and a half years less than the minimum under the calculation by probation, so it's not as far as it potentially could be."

The District Court, with the help of the parties and Mr. Burdick, determined that, were Mr. Burdick sentenced to 168 months, he would serve a little over 12 years, emerging from prison at around age 70. Contemplating that, and knowing that Mr. Burdick was due to receive a concurrent four year sentence on pending and related state charges, the District Court turned to the Government: "Let me ask this, Mr. Rossi, the Government is not amenable to doing an 11(c)(1)(C) to 168 months?"

When the Assistant United States Attorney indicated that he thought the proposal reasonable, the District Court suggested that he see if it was "doable," with the idea in mind to review the Revised PSR and "redo the plea with sentence immediately to follow." Mr. Burdick, through his new lawyer, voiced his assent to this plan.

At the next status conference, the District Court recapped its proposal about an 11(c)(1)(C) plea: "Certainly, if the Government came back to the Court, recommended that and told the Court that it had discussed matter (sic) with the victim and the victim's family and they were on board, then that would certainly be a big consideration." However, the District Court noted, "the Government declined to do that."

Defense counsel noted that Mr. Burdick appeared to have two options: 1) move to withdraw his plea; or, 2) proceed to sentencing. In response, the District Court voiced its opinion that Mr. Burdick probably wouldn't be entitled to withdraw his plea because he'd been told during the Rule 11 colloquy that, notwithstanding his plea agreement and the sentencing recommendations of the Government and his lawyer, he was subject to the maximum penalties provided for by

law. However, the District Court gave defense counsel two weeks to discuss Mr. Burdick's options with him.

The next status conference began with the District Court appointing non-conflict counsel to represent Mr. Burdick for purposes of discussing with him the merits of a motion to withdraw his plea. The District Court then reviewed the development of the case with non-conflict counsel, who was then present, again expressing its view that a mistaken guideline calculation was unlikely to result in vacatur.

The District Court then returned to the subject of renegotiating the plea: "And what I suggested the Government…is that if the Government went back and wanted to rework it as an 11(c)(1)(C) to the high end of the Guidelines originally calculated and represented to me that they've checked with the victims, that everybody's on board with this, then I would be inclined to go along with it."

The District Court predicted, however, that "they're not going to rework it…essentially throwing it on the Court to say, to come up with a – I have to depart downward under the Guidelines or give a non-Guideline sentence." And that, said the District Court, was "unlikely": "…I see no reason right now, based on the presentence report, that

there would be a basis for a downward departure under the Guidelines or a non-Guideline sentence."

In response, the Assistant United States Attorney expressed his continued willingness to bring information that might result in an 11(c)(1)(C) agreement to his superiors, and court was adjourned to permit Mr. Burdick to confer with non-conflict counsel.

Two weeks later, non-conflict counsel told the District Court that Mr. Burdick had yet to decide whether to withdraw his plea, or go forward to sentencing with his Assistant Federal Public Defender. This prompted the District Court to turn again to 11(c)(1)(C): "…to revamp the plea agreement to an 11(c)(1)(C) with a representation to the Court that the victims had been spoken to and this was what they were on board with which would be something that I would consider."

In response, the Assistant United States Attorney sought to "clarify" that he wasn't "authorized to renegotiate a plea for a Guideline that I know now was incorrect, despite my willingness." Nevertheless, he characterized his "personal position" as "halfway between renegotiating the plea and proceeding with sentencing." He told the District Court that at sentencing he'd support a 168-month sentence:

…I've been in contact with the victim's family throughout and they have expressed to me that they want this case concluded. They want it resolved and they were very satisfied with the original plea agreement and the potential sentencing range including they knew that there was a potential that he could receive the mandatory minimum of 10 years. They were happy with that.

…and I don't see any benefit for the victim or her family of re-litigating the defendant's guilt or innocence in this case if his plea were to be vacated. And given his age, if he were sentenced to 168 months, I can tell the Court that I, as the prosecuting attorney, would be satisfied with that because I think it – I think that it meets our obligation to the victim, any potential future victims and her family. Because of his age, he'll be about 70 when he's released, if he receives 168 months and it provides us with the added guarantee that he won't be able to appeal that conviction.

So, despite the fact that I was not authorized to pursue the avenue of a new plea agreement that the Court suggested, that my, my position now, as I think it should be pursuant to *Lawlor*,[2] is that 168 months is satisfactory to the Government.

[2] *United States v. Lawlor*, 168 F.3d 633 (2d Cir. 1999).

The District Court responded:

> Here's the problem.
>
> …
>
> For the Court to get there, I would need to either depart downward under the Guidelines or come up with a non-Guideline sentence.
>
> …If your office believes that's an appropriate sentence and if the victim is on board with that and the victim and you represent that the victim believes that sentence is appropriate because the victim's family doesn't want to put her through anything, those are all legitimate reasons I can consider. But the vehicle to get there is an 11(c)(1)(C), not to say, well, we agree with probation, probation's right, we're not going to go with an 11(c)(1)(C). Because then I'm in the position of saying these are the correct Guidelines without any real basis, candidly, to depart downward, at least from what I know now.
>
> …if the Government believes 14 years is the fair sentence, then I don't quite understand – and again, I understand it's not you – why your office won't man up and say this is what we believe an appropriate sentence is for these reasons. That's why we're renegotiating this to an 11(c)(1)(C)…

After reiterating its view that there didn't appear to be adequate reasons for a within-guidelines departure, the District Court expressed

its frustration with the Government's refusal to endorse an 11(c)(1)(C) plea, at length. The case was then again adjourned for non-conflict counsel to confer with Mr. Burdick. The next status conference ended similarly inconclusively, because the Assistant United States Attorney assigned to Mr. Burdick's case wasn't available, and his stand-in wasn't sufficiently familiar with it to proceed substantively. In the course of trying to brief the substitute Assistant United States Attorney, however, the District Court once more recounted the efforts to bring about an 11(c)(1)(C) agreement and remarked, "…then I might be amenable to going along with it – didn't say definitely but…".

On February 15, 2018, the quixotic quest for an 11(c)(1)(C) agreement ended. Having been repeatedly rebuffed by the Government, Mr. Burdick elected not to withdraw his guilty plea, and to continue with the Assistant Federal Public Defender as his representative at sentencing.

Sentencing

In anticipation of sentencing, defense counsel filed a statement arguing for a sentence of 135 months, the low end of the sentencing

range anticipated by the plea agreement. She offered as reasons Mr. Burdick's remorse for his conduct and resolve not to repeat it, as well as the immiserated circumstances of his upbringing and the insuperable obstacles to personal, emotional, vocational, and financial well-being they erected. Defense counsel also pointed to a number of legal and policy considerations undermining the rationale for the bloated sentencing range calculated by the Revised PSR.

First, she noted that the victim of Mr. Burdick's offense professed herself satisfied with a sentencing range of 135 to 168 months, and argued that a sentence within that range would amount to an announcement that victims' voices matter in the criminal process.

Second, defense counsel pointed out that, according to the United States Sentencing Commission, even the agreed-upon sentencing range of 135 to 168 months exceeded the mean and median sentences typically imposed on defendants convicted of crimes like Mr. Burdick's.

Third, Mr. Burdick's attorney emphasized that the nature of the guideline applicable to Mr. Burdick's case itself counseled the rejection of its application, as a matter of policy. The guideline was, she wrote, not the product of careful empirical study, nor an expression of the

Sentencing Commission's unique institutional competence. And, she said, the guideline's efficacy at serving its professed function – to punish more severely repeat sex offenders posing great risks to the public – was questionable, given its broad applicability to just about anyone convicted of a sex offense.

Sentencing commenced on March 27, 2018. The Government, consistent with its written sentencing submission, emphasized what it called Mr. Burdick's "deceitful" behavior, stressing that he "took advantage" of the girl. It also pointed to the 2004 attempted endangering conviction, terming it "similar conduct" involving the betrayal of parents' trust and the exploitation of a minor.

Defense counsel reminded the District Court of the personal history laid out in her sentencing statement, as well as her legal and policy objections to the guideline calculations. She also stressed Mr. Burdick's age, noting that any lengthy sentence would result in his release as "a very elderly man," assuming he even survived the experience of prison and avoided civil commitment as a sexually dangerous person. Mr. Burdick followed, taking responsibility for his behavior and apologizing to the girl and her family.

The District Court started by briefly listing the maximum penalties attached to the offense, granting Mr. Burdick guideline credit for his acceptance of responsibility, and outlining the crime itself. It then turned to Mr. Burdick's criminal history, and especially the 2004 endangering conviction. Calling the PSR's description of the offense "unobjected to," the District Court proceeded to recite it verbatim. The District Court then adopted the PSR's factual allegations as its findings.

As the District Court began to compare the 2004 offense to the federal crime, defense counsel interjected. She distinguished between the 2004 allegations and the resulting misdemeanor conviction, noting that the PSR was written in such a way that it was "an accurate recitation" only of "what the claims were." Thus, the lack of an objection to regurgitated allegations wasn't intended to signal Mr. Burdick's agreement with the literal truth of the accusations themselves. She asked for an opportunity to investigate the allegations and determine whether they should be contested, since "the Court is putting great stock in this."

While the District Court disagreed with defense counsel's assessment of the statements in the PSR, calling them "akin to a deposition from the victim," it did grant an adjournment for purposes of investigation, and indicated it would give defense counsel a chance to contest the accuracy of the accusations.

When sentencing resumed about three weeks later, defense counsel informed the District Court that, after independent investigation of the 2004 claims by the Federal Public Defender's Office, Mr. Burdick did not want to lodge an objection to the factual statements in the PSR.

The District Court then imposed sentence. Noting the defense's request for a 135-month sentence, it pointed out that, given its acceptance of the Second Revised PSR's guidelines calculations, it would need a basis for a downward departure or a non-guideline sentence to get to that number. It concluded there was none.

The District Court rejected defense counsel's legal and policy arguments against the guideline calculations. Characterizing the issue as chiefly about the applicability of the guideline to Mr. Burdick's

conduct, the District Court, although recognizing that it could depart or vary, chose not to because, "I think it fits."

Continuing to the nature of the offense, its seriousness, and Mr. Burdick's history and characteristics, the District Court again rejected the appropriateness of a 135-month sentence. It stressed Mr. Burdick's exploitation of the girl and betrayal of her parents, as well as the 2004 case:

> …this offense was calculated. It involved deceit. It involved taking advantage of a child. It is indicative of someone who is morally bankrupt to engage in this kind of conduct with a 15-year-old child.

Noting that a sentence near the bottom of the guideline range in the Second Revised PSR would put Mr. Burdick behind bars until his "late 70s," by which time the District Court expressed hoped that his "predatory inclinations" for children would be "under control," the District Court imposed a 240-month sentence.

Defense counsel objected, in pertinent part, that the District Court "placed undue emphasis on the guidelines in this case and that the sentence was driven by that undue emphasis." The District Court

responded by telling Mr. Burdick, "I believe this is the appropriate sentence," in light of his predatory conduct.

Judgment entered on May 24, 2018. Mr. Burdick filed a timely notice of appeal on June 1, 2018.

The Appeal

The Second Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

On appeal, Mr. Burdick pointed out that the District Court was fully apprised of all the facts and circumstances it relied on in imposing the 240-month sentence – including the corrected final guideline range – when, over a series of hearings, it repeatedly encouraged the parties to enter into a Fed. R. Crim. P. 11(c)(1)(C) agreement to a 168-month sentence, and indicated it was prepared to accept that disposition of the case. Given the extensive record of the District Court's amenability to a 168-month resolution, Mr. Burdick argued that the District Court had indeed "placed undue emphasis" on the guideline range, according it a presumption of reasonableness in contravention of the precedents of this Court and the Second Circuit.

The Second Circuit panel (Jacobs, J., Sack, J., and Hall, J.), although acknowledging that "it appears undisputed from the record" that the District Court would have accepted an 11(c)(1)(C) agreement to a 168-month sentence when it "was well aware" of the facts underlying its rationale for the 240-month sentence it ultimately imposed, and deeming it a "fair question" why the District Court later found 168 months insufficient, nevertheless denied Mr. Burdick relief. (A 4). The panel held that the District Court did not abuse its discretion by "considering the same facts in the context of the updated guidelines range." (A 4).

On October 25, 2019, Mr. Burdick timely filed a petition for rehearing and rehearing *en banc*. By order dated December 27, 2019, the Second Circuit denied that petition. (A 8).

REASONS FOR GRANTING THE PETITION

Congress has directed District Courts to impose sentences that are "sufficient, but not greater than necessary" to further specific penological objectives. 18 U.S.C. § 3553(a)(2); *United States v. Dorvee*, 616 F.3d 174, 182 (2d Cir. 2010). ("Under § 3553(a)'s parsimony clause it is the

sentencing court's duty to impose a sentence sufficient, but not greater than necessary to comply with the specific purposes at 18 U.S.C. § 3553(a)(2).") (marks omitted, emphasis supplied)). To guide the District Courts in this endeavor, it has further mandated that they consider a list of sentencing factors. § 3553(a)(1)-(7). The sentencing guidelines are among the factors a district court must consider. § 3553(a)(4)-(5).

The guidelines are, however, advisory. *Booker*, 543 U.S. at 245; *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) ("It is now emphatically clear…that the Guidelines are guidelines – that is, they are truly advisory."). Although they remain "the starting point and the initial benchmark" and are entitled to "respectful consideration,"[3] they "are not the only consideration." *Gall v. United States*, 552 U.S. 38, 49 (2007). Rather, district courts must consider and weigh all of the § 3553(a) factors, and take into account any information bearing on them. *Pepper v. United States*, 562 U.S. 476, 490-491 (2011); *Cavera*, 550 F.3d at 189; 18 U.S.C. § 3661 ("no limitation" to be placed on information received and considered to fashion "an appropriate sentence."). The overarching demand is for the exercise of "informed and individualized judgment in

[3] *Kimbrough v. United States*, 552 U.S. 85, 101 (2007).

each case"; every offender and offense are to be treated as *sui generis*, and punishment calibrated accordingly. *Cavera*, 550 F.3d at 189.

In keeping with the individualized sentencing dictate, it is procedural error – "*strictly forbidden*" -- for a District Court to treat the guideline range as presumptively reasonable. *United States v. Pruitt*, 813 F.3d 90, 93 (2d Cir. 2016) (emphasis in original); *Nelson v. United States*, 55 U.S. 350, 352 (2009) ("The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable.") (emphasis in original); *Rita*, 551 U.S. at 351 ("[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.").

Although pointing out that the District Court listed several factors – the 2004 conviction, the age of the victim in this case, and Burdick's "predatory inclinations" – as supporting or pointing to "the higher end of the guidelines,"[4] the panel also conceded that the District Court was cognizant of those very factors over the several months during which it repeatedly exhorted the AUSA to enter into an 11(c)(1)(C) agreement to

[4] (A 4).

a 168-month sentence -- a disposition the panel further conceded the record shows the District Court was ready to accept. (A 4). The panel attempted to circumvent the implications of these twin concessions by positing that the District Court's abrupt *volte face* reflected a permissible exercise of its discretion to consider "the same facts in the context of the updated guidelines range." (A 4).

The problem is that there was no "updated" range. By the time of Burdick's first sentencing hearing, the District Court had known of the correct 235 to 293-month range for six and a half months. And by the time the District Court actually imposed sentence, over eight and half months had piled up since it was apprised of that range. Given that no new facts for the District Court to consider "in the context" of the higher range emerged or developed during the nearly three quarters of a year between the recalculation of the guidelines and Mr. Burdick's sentencing, the panel's logic points, not to a permissible exercise of discretion, but instead ineluctably to legal error.

This is not a case in which a lone utterance of the District Court, "standing alone, might be misinterpreted" as suggesting it presumed the guideline range reasonable. *United States v. Fernandez*, 441 F.3d

19, 33 (2d Cir. 2006). To the contrary, the record here is strewn with statements evidencing the District Court's belief that a "C" agreement was the only off-ramp from a guideline range to which it was otherwise bound to assign primacy. For example: "they're not going to rework it [the plea agreement]…throwing it on the Court…I have to depart downward under the Guidelines or give a non-Guideline sentence…I see no reason right now"; "For the Court to get there, I would need to either depart downward…or come up with a non-guideline sentence…I'm in the position of saying these are the correct Guidelines without any real basis…to depart downward"; and, "To get there…I would have to either depart downward…or give a non-guideline sentence…The Court does not believe that any factor…would justify a departure downward."

These statements cannot be discounted merely because the District Court voiced understanding of the advisory nature of the guidelines. (A 4). Mr. Burdick's claim is not that the District Court believed it was legally prohibited from deviating from the range; rather, it is that the District Court went beyond giving the range "respectful consideration" and treated it as the only reasonable sentence absent an exceptional justification to set it aside. *Pruitt*, 813 F.3d at 93 ("A

sentencing judge cannot choose a sentence within the applicable range simply because there is no reason not to do so."); *Cavera*, 550 F.3d at 189 ("District judges are…generally free to impose sentences outside the recommended range.").

And while the District Court's statements, *supra*, are powerful evidence that it treated the range as all but mandatory, its failure to even consider factors it regarded as justifying a "C" agreement to 168 months as equally supporting a downward departure or variance is just as compelling. *Pepper*, 562 U.S. at 489 (sentencing courts enjoy discretion to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider or the source from which it may come.") (citation omitted); *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender."). For instance: "[I]f the government came back to the Court…recommended that…and told the Court that…the victim and the victim's family…were on board…that

would…be a big consideration [in accepting a "C" plea]"; "[I]f the government…wanted to rework it as an 11(c)(1)(C)…and represented to me…that everybody's on board with this, then I would be inclined to go along with it"; "…revamp the plea agreement to an 11(c)(1)(C) with a representation to the Court that the victims had been spoken to and…were on board…would be something that I would consider."

Burdick received a sentence six years longer than the one the District Court repeatedly indicated it thought was appropriate and was prepared to impose. The record not only fails to support the panel's attribution of this discrepancy to the District Court's reevaluation of the facts in light of a revised guideline range -- it contradicts it. Indeed, the record demonstrates that the District Court presumed the range reasonable.

The summary order wrongly sanctioned the District Court's treatment of the guideline range as presumptively reasonable, in contravention of abundant precedent of this Court and the Second Circuit. *E.g.*, *Pepper*, 562 U.S. at 490-491; *Nelson*, 555 U.S. at 350-352; *Gall*, 552 U.S. at 49-50; *Kimbrough v. United States*, 552 U.S. 85, 111 (2007); *Rita*, 551 U.S. at (2007); *Pruitt*, 813 F.3d at 93; *Dorvee*, 616 F.3d

at 182-183; *Cavera*, 550 F.3d at 188-190. The petition should be granted, and the Second Circuit reversed, in order to secure adherence to that precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 20, 2020