

## APPENDIX

18-1675-cr  
*United States v. Burdick*

### 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 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 11<sup>th</sup> day of October, two thousand nineteen.

PRESENT: DENNIS JACOBS,  
ROBERT D. SACK,  
PETER W. HALL,  
*Circuit Judges.*

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United States of America,

*Appellee,*

v.

No. 18-1675-cr

Carl L. Burdick,

*Defendant-Appellant.*

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For Appellant: MARTIN J. VOGELBAUM, Federal Public  
Defender's Office, Buffalo, NY

For Appellee: MONICA J. RICHARDS, Assistant United  
States Attorney, *for* James P. Kennedy, Jr.,  
United States Attorney for the Western  
District of New York, Buffalo, NY

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

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED,  
ADJUDGED, AND DECREED** that the judgment of the district court is  
**AFFIRMED.**

Defendant-Appellant Carl L. Burdick appeals the May 24, 2018 judgment of  
the United States District Court for the Western District of New York (Siragusa, J.)  
sentencing him to 240 months of imprisonment to be followed by ten years of  
supervised release and imposing several special conditions of supervision.  
Burdick pleaded guilty to transporting a minor in commerce with intent to engage  
in criminal sexual activity, in violation of 18 U.S.C. § 2423(a). The plea agreement  
stipulated that the defendant's Guidelines range would be 135 to 168 months of  
imprisonment, but the United States Probation Office ("Probation") later  
determined that the appropriate range was 235 to 293 months based upon the

application of additional sentencing enhancements. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

Burdick first challenges the procedural reasonableness of his 240-month sentence, arguing that the district court erred by placing undue weight on the elevated Guidelines range. Our review for procedural or substantive reasonableness employs "a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). A district court commits procedural error if it "(1) fails to calculate the Guidelines range; (2) is mistaken in the Guidelines calculation; (3) treats the Guidelines as mandatory; (4) does not give proper consideration to the § 3553(a) factors; (5) makes clearly erroneous factual findings; (6) does not adequately explain the sentence imposed; or (7) deviates from the Guidelines range without explanation." *United States v. Johnson*, 567 F.3d 40, 51 (2d Cir. 2009) (internal citation omitted).

After Probation informed the parties of the new Guidelines range, the district court repeatedly indicated its preference that the parties execute a new plea agreement pursuant to Fed. R. Crim. P. 11(c)(1)(C) providing for a sentence of 168 months—in the middle of the original Guidelines range noted in the plea

agreement. It appears undisputed from the record that, had the Assistant United States Attorney obtained permission to enter into a new Rule 11(c)(1)(C) agreement as the district court requested, the court would have accepted a plea agreement that required imposition of a 168-month sentence.

The parties did not reach that agreement, however, and the district court saw no reason to depart substantially from the new Guidelines range. In imposing the 240-month sentence, J. App. 180–82, the district court emphasized Burdick’s prior conviction for attempted child endangerment as well as the victim’s age in the instant case and the manner in which Burdick took advantage of her, finding that Burdick’s “predatory inclinations” warranted the chosen sentence. The district court was well aware of these facts at the time it indicated its preference that the parties enter a new plea agreement providing for a 168-month sentence, and it is a fair question why the court afterward deemed 168 months insufficient; but we cannot say that the court abused its discretion when considering the same facts in the context of the updated guidelines range. The court’s comments during sentencing made clear that it was treating the Sentencing Guidelines as advisory, and that it believed that “[t]he nature of [the] offense . . . supports or points to the higher end of the guidelines.” J. App. 181. And even

“in the absence of record evidence suggesting the contrary, we entertain a strong presumption that a sentencing judge has taken properly presented arguments into account and considered all the § 3553(a) factors in the course of imposing a sentence[.]” *United States v. Fernandez*, 443 F.3d 19, 34–35 (2d Cir. 2006), *abrogated on other grounds by Rita v. United States*, 551 U.S. 338 (2007).

Burdick also challenges the substantive reasonableness of the ten-year term of supervised release imposed by the district court. We must “set aside a district court’s *substantive* determination only in exceptional cases where the trial court’s decision ‘cannot be located within the range of permissible decisions.’” *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (*en banc*) (quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)). “We may consider ‘whether a factor relied on by a sentencing court can bear the weight assigned to it under the totality of circumstances in the case,’ but we will reverse the district court’s decision only if the sentence imposed amounts to a ‘manifest injustice or shocks the conscience.’” *United States v. Spoor*, 904 F.3d 141, 156 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 931 (2019) (first quoting *Cavera*, 550 F.3d at 191; and then quoting *Rigas*, 583 F.3d at 124) (internal ellipses and brackets omitted). This same standard of review applies to substantive reasonableness of the period of supervised release. *See*

*United States v. Leon*, 663 F.3d 552, 555 (2d Cir. 2011) (*per curiam*). The Guidelines permit imposition of up to a lifetime of supervised release for sex offenses, *see* U.S.S.G. § 5D1.2(b)(2), and the district court did not abuse its discretion in selecting a lengthy term of supervision to ensure Burdick's incapacitation.

In addition, Burdick argues, *inter alia*, that the mandatory condition of computerized voice stress analyzer (CVSA), polygraph or other such testing is unreliable, not reasonably related to the goals of sentencing, and an impermissible delegation of judicial authority to Probation. He asserts that the unreliability of CVSA testing distinguishes it from polygraph testing, which this Court has upheld as a mandatory special condition of supervised release. *See United States v. Johnson*, 446 F.3d 272 (2d Cir. 2006). The government asserts that Burdick's challenge to this special condition is unripe because of the inevitability of forthcoming technological changes and because the district court indicated that it would revisit this condition upon Burdick's release. We agree. Burdick's contention that CVSAs do not carry the same candor-promoting legitimacy as polygraphs is subject to change with advances in the technology. Similarly, we find Burdick's overbreadth and vagueness challenges to the special condition mandating his participation in Probation's Computer and Internet Monitoring

Program to be unripe. The district court retains the discretion to remedy a potential ambiguity in the language of a special condition. *See* 18 U.S.C. § 3583(e); Fed. R. Crim. P. 32.1(c). Burdick's failure to object at his initial sentencing proceeding, therefore, does not infringe on the district court's discretion to modify the condition.

We have considered Burdick's remaining arguments and find them to be without merit. Accordingly, the case is **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

The image shows a handwritten signature in black ink that reads "Catherine O'Hagan Wolfe". The signature is written over a circular official seal. The seal has a red outer ring with the words "UNITED STATES" at the top and "COURT OF APPEALS" at the bottom. Inside the ring, the words "SECOND CIRCUIT" are written in blue. There are two small blue stars on either side of the text "SECOND CIRCUIT".

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

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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 27<sup>th</sup> day of December, two thousand nineteen.

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United States of America,

Appellee,

v.

Carl L. Burdick,

Defendant - Appellant.

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**ORDER**

Docket No: 18-1675

Appellant, Carl L. Burdick, 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

A circular official seal of the United States Court of Appeals for the Second Circuit is positioned over the signature. The seal features the text "UNITED STATES" at the top, "SECOND CIRCUIT" in the center, and "COURT OF APPEALS" at the bottom, with stars on either side of the central text.



KeyCite Red Flag - Severe Negative Treatment

Unconstitutional or Preempted Recognized as Invalid [Pepper v. U.S.](#), U.S., Mar. 02, 2011

[United States Code Annotated](#)

[Title 18. Crimes and Criminal Procedure \(Refs & Annos\)](#)

[Part II. Criminal Procedure](#)

[Chapter 227. Sentences \(Refs & Annos\)](#)

[Subchapter A. General Provisions \(Refs & Annos\)](#)

18 U.S.C.A. § 3553

§ 3553. Imposition of a sentence

Effective: December 21, 2018

[Currentness](#)

**(a) Factors to be considered in imposing a sentence.**--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to [section 994\(a\)\(1\) of title 28, United States Code](#), subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [section 994\(p\) of title 28](#)); and

(ii) that, except as provided in [section 3742\(g\)](#), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to [section 994\(a\)\(3\) of title 28, United States Code](#), taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [section 994\(p\) of title 28](#));

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to [section 994\(a\)\(2\) of title 28, United States Code](#), subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [section 994\(p\) of title 28](#)); and

(B) that, except as provided in [section 3742\(g\)](#), is in effect on the date the defendant is sentenced.<sup>1</sup>

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

**(b) Application of guidelines in imposing a sentence.--**

**(1) In general.**--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind,

or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

**(2) Child crimes and sexual offenses.--**

**(A) <sup>2</sup> Sentencing.**--In sentencing a defendant convicted of an offense under [section 1201](#) involving a minor victim, an offense under [section 1591](#), or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

**(i)** the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

**(ii)** the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

**(I)** has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under [section 994\(a\) of title 28](#), taking account of any amendments to such sentencing guidelines or policy statements by Congress;

**(II)** has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

**(III)** should result in a sentence different from that described; or

**(iii)** the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed

to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

**(c) Statement of reasons for imposing a sentence.**--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under [section 994\(w\)\(1\)\(B\) of title 28](#), except to the extent that the court relies upon statements received in camera in accordance with [Federal Rule of Criminal Procedure 32](#). In the event that the court relies upon statements received in camera in accordance with [Federal Rule of Criminal Procedure 32](#) the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,<sup>3</sup> and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

**(d) Presentence procedure for an order of notice.**--Prior to imposing an order of notice pursuant to [section 3555](#), the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

**(e) Limited authority to impose a sentence below a statutory minimum.**--Upon motion of the Government, the court shall

have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to [section 994 of title 28, United States Code](#).

**(f) Limitation on applicability of statutory minimums in certain cases.**--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act ([21 U.S.C. 841, 844, 846](#)), section 1010 or 1013 of the Controlled Substances Import and Export Act ([21 U.S.C. 960, 963](#)), or [section 70503 or 70506 of title 46](#), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under [section 994 of title 28](#) without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have--

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

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Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless

the information relates to a violent offense.

**(g) Definition of violent offense.**--As used in this section, the term “violent offense” means a crime of violence, as defined in [section 16](#), that is punishable by imprisonment.

#### CREDIT(S)

(Added [Pub.L. 98-473, Title II, § 212\(a\)\(2\)](#), Oct. 12, 1984, 98 Stat. 1989; amended [Pub.L. 99-570, Title I, § 1007\(a\)](#), Oct. 27, 1986, 100 Stat. 3207-7; [Pub.L. 99-646, §§ 8\(a\), 9\(a\), 80\(a\), 81\(a\)](#), Nov. 10, 1986, 100 Stat. 3593, 3619; [Pub.L. 100-182, §§ 3, 16\(a\), 17](#), Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; [Pub.L. 100-690, Title VII, § 7102](#), Nov. 18, 1988, 102 Stat. 4416; [Pub.L. 103-322, Title VIII, § 80001\(a\), Title XXVIII, § 280001](#), Sept. 13, 1994, 108 Stat. 1985, 2095; [Pub.L. 104-294, Title VI, § 601\(b\)\(5\), \(6\), \(h\)](#), Oct. 11, 1996, 110 Stat. 3499, 3500; [Pub.L. 107-273, Div. B, Title IV, § 4002\(a\)\(8\)](#), Nov. 2, 2002, 116 Stat. 1807; [Pub.L. 108-21, Title IV, § 401\(a\), \(c\), \(j\)\(5\)](#), Apr. 30, 2003, 117 Stat. 667, 669, 673; [Pub.L. 111-174, § 4](#), May 27, 2010, 124 Stat. 1216; [Pub.L. 115-391, Title IV, § 402\(a\)](#), Dec. 21, 2018, 132 Stat. 5221.)

#### VALIDITY

<Mandatory aspect of subsec. (b)(1) of this section held unconstitutional by [United States v. Booker](#), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). >

#### [Notes of Decisions \(2764\)](#)

#### Footnotes

[1](#)

So in original. The period probably should be a semicolon.

[2](#)

So in original. No subpar. (B) has been enacted.

[3](#)

So in original. The second comma probably should not appear.

18 U.S.C.A. § 3553, 18 USCA § 3553  
Current through P.L. 116-140.

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