Suffolk Journal of Trial and Appellate Advocacy

Volume 9 | Issue 1 Article 10

1-1-2004

Targeting the Criminally Depraved Mind: The Inherent Meaning of a Vulnerable Victim under Federal Sentencing Guideline Sec. 3A1.1

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Recommended Citation
9 Suffolk J. Trial & App. Advoc. 103 (2004)

TARGETING THE CRIMINALLY DEPRAVED MIND: THE INHERENT MEANING OF A "VULNERABLE VICTIM" UNDER FEDERAL SENTENCING GUIDELINE §3A1.1

I. INTRODUCTION

"An extra dose of punishment removes the criminal's incentive to facilitate his crime by selecting victims against whom he actually will enjoy a high probability of success."[1]

United States Sentencing Guideline (U.S.S.G.) §3A1.1 sets forth enhanced punishments for defendants who target unusually vulnerable victims.[2] Factors determining unusual vulnerability include age, physical or mental handicap, or an increased susceptibility to criminal conduct.[3] For example, after cross burnings occurred in rural areas of the country, the Sixth and Eighth Circuits found that racial isolation significantly increased the chances of being intimidated by violent acts.[4] Similarly, the Second Circuit pointed to the unusual vulnerability of a prisoner beaten by a security officer while in police custody as a justifiable reason for an increased sentence.[5] The Third Circuit upheld a sentence increase for a carjacker who also raped a twelve-year-old girl and noted her young age made her particularly vulnerable.[6] In an effort to deter criminals from choosing

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[1] United States v. Zats, 298 F.3d 182, 188 (3d Cir. 2002).

[2] U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1) (2001). The guideline states "If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase [the sentence] by two levels." *Id.*

[3] *See* United States v. O'Brien, 50 F.3d 751, 756-57 (9th Cir. 1995) (indicating medical conditions of falsely insured patients qualified as "unusual vulnerability"); United States v. McDermott, 29 F.3d 404, 411 (8th Cir. 1994) (declaring factors influencing sentencing enhancement included age, physical handicap, racial isolation of victims); United States v. Rocha, 916 F.2d 219, 244 (5th Cir. 1990) (noting young age of kidnapping victim helped with intimidation tactics); United States v. White, 903 F.2d 457, 463 (7th Cir. 1990) (pointing to advanced age of gas station attendant as reason for choice of victim).

[4] *See McDermott*, 29 F.3d at 411 (explaining that having so few minorities within rural geographic area increased likelihood for racially motivated criminal acts); United States v. Salyer, 893 F.2d 113, 117 (6th Cir. 1989) (stipulating isolation of black family in white community contributed to victim vulnerability).

[5] *See* United States v. Hershkowitz, 968 F.2d 1503, 1506 (2d Cir. 1992) (considering detainee within control of prison guard a vulnerable victim).

[6] *See* United States v. Cruz, 106 F.3d 1134, 1136, 1139 (3d Cir. 1997) (concluding sentencing enhancement applies because defendant should have recognized vulnerability of

"easy" targets for their crimes, U.S.S.G. §3A1.1 increased punishment for criminal behavior that illustrated depraved intent.[7]

In particular, Federal Sentencing Guideline §3A1.1(b)(1) allows a two level penalty increase if the government proves that a defendant deliberately targeted a vulnerable victim.[8] While the federal circuit courts seemed to agree on the characteristics of a vulnerable victim, the courts were still unclear on how to apply the targeting language of the guidelines.[9] Prior to November 1, 1995, the commentary to U.S.S.G. §3A1.1 declared that a sentence increase applied only when a criminal purposefully targeted a vulnerable victim.[10] After November 1, 1995, the amended commentary to the sentencing guideline advised that a defendant must merely have knowledge about a victim's unusual vulnerability.[11] Given this criteria, the federal circuit courts still wavered in their analysis and intermingled the narrower concept of "targeting" a victim with the broader standard of already "knowing" about victim vulnerability.[12] This note explores how the amended commentary to Federal Sentencing Guideline 3A1.1, aimed at clarifying the definition of "targeting," only heightens the confusion surrounding the proper application of the sentencing guideline.[13]

Part II of this note discusses the history of Federal Sentencing Guideline U.S.S.G. 3A1.1(b) and the evolution of penalty increases for criminals choosing vulnerable victims.[14] Part III evaluates the judicial

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young girl).

[7] *See* United States v. Feldman, 83 F.3d 9, 16-17 (1st Cir. 1996) (explaining sentencing enhancement applies even if victim vulnerability only partial reason for targeting); United States v. Cree, 915 F.2d 352, 354 (8th Cir. 1990) (asserting vulnerability of victim connected to criminal purpose). *But see* United States v. Paige, 923 F.2d 112, 113-14 (8th Cir. 1991) (commenting victims chosen for money order fraud not unusually vulnerable); United States v. Moree, 897 F.2d 1329, 1335 (5th Cir. 1990) (maintaining lack of "unusual" victim vulnerability makes sentencing enhancement improper).

[8] *See Zats*, 298 F.3d at 188 (declaring increased punishment diminishes criminal incentive to target vulnerable victims).

[9] *Compare* United States v. Phillips, 287 F.3d 1053, 1057 (11th Cir. 2002) (pointing to defendant admission of targeting small rural bank with diminished police presence for robbery), *and* United States v. Boult, 905 F.2d 1137, 1139 (8th Cir. 1990) (commenting defendant knew and chose victim as "easy target"), *with O'Brien*, 50 F.3d at 755-56 (declining to follow First Circuit "target" requirement but instead indicating defendant "should have known" victim vulnerability), *and Hershkowitz*, 968 F.2d at 1506 (declaring sentence enhancement of defendant proper even absent proof he "specifically sought out" victim).

[10] *See* U.S. SENTENCING GUIDELINES MANUAL Appendix C (2001). The commentary, retracted on November 1, 1995, originally stated as follows: " 1. This adjustment applies to offenses where an unusually vulnerable victim is made a *target* of criminal activity by the defendant." (emphasis added) *Id.*

[11] *See* U.S.S.G. §3A1.1, Application Note 2 (November 1, 2001). Note 2 states, in part, "Subsection (b) applies to offenses involving an unusually vulnerable victim in which the defendant knows or should have known of the victim's unusual vulnerability." *Id.*

[12] *See supra* note 9 and accompanying text.

[13] *See infra* notes 31-62 and accompanying text.

[14] *See infra* notes 12-32 and accompanying text.

inconsistencies surrounding the term "target" in the pre-1995 commentary and the impact of the replacement language "knew, or should have known" for purposes of defining victim vulnerability.[15] Part IV analyzes the sentencing guidelines and argues that the term "knew, or should have known" creates an ambiguous standard for judicial review, emphasizing the criminal's depraved intentions rather than the characteristics of the victim.[16] Part V concludes that the amended commentary to sentencing guideline §3A1.1 failed to create a more objective standard of review and produces inconsistent punishments for similarly situated defendants.

II. HISTORY OF THE FEDERAL SENTENCING GUIDELINES

Concerned by a lack of uniformity in judicial sentencing, Congress created and authorized the United States Sentencing Commission to establish the Federal Sentencing Guidelines to promote consistency in criminal sentencing.[17] The former sentencing system allowed judges broad authority to implement sentences based on personal theories and underlying bias.[18] This bias resulted in disparate outcomes because judges did not have to explain or justify the reasoning behind each sentence.[19]

Under previous sentencing laws, judges chose from a wide range of penalties that often resulted in disparate punishments for similar criminal acts.[20] This was due in part to a historical move from retribution to reha-

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[15] *See infra* notes 32-48 and accompanying text.

[16] *See infra* notes 49-63 and accompanying text.

[17] *See* Karin Bornstein, *5K2.0 Departures For 5H Individual Characteristics: A Backdoor Out of The Federal Sentencing Guidelines (hereinafter Backdoor Out of The Federal Sentencing Guidelines)*, 24 COLUM. HUM. RTS. L. REV. 135 (1993) (noting one of two women convicted for embezzlement received only probation because she had children); Kathryn A. Walton, *The Federal Sentencing Guidelines: Miracle Cure For Sentencing Disparity (Caution: Apply Only As Directed) (hereinafter Miracle Cure)*, 79 KY. L.J. 385, 389 (1991) (emphasizing task of U.S. Sentencing Commission to create uniform, honest and proportionate sentencing guidelines).

[18] *Miracle Cure, supra* note 17, at 395.

[19] *Id.* at 396.

[20] *See* Jay Dyckman, *Brightening the Line: Properly Identifying a Vulnerable Victim For Purposes of Section 3A1.1 of the Federal Sentencing Guidelines (hereinafter "Brightening the Line")*, 98 COLUM. L. REV. 1960, 1961-62 (1998) (discussing ramifications of broad judicial discretion in sentencing criminals); *See Backdoor Out of the Federal Sentencing Guidelines, supra* note 17, at 138 (contending judicial discretion in sentencing supported rehabilitative theory by promoting individualized sentencing); Gary Swearingen, *Proportionality and Punishment: Double Counting Under the Federal Sentencing Guidelines (hereinafter Double Counting Under Federal Sentencing Guidelines)*, 68 WASH. L. REV. 715, 716-17 (1993) (affirming federal judges implemented own sentencing rationales when determining punishments); *See* Theresa Walker Karle and Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis (hereinafter Are Guidelines Meeting Congressional Goals?)*, 40 EMORY L.J., 393, 395-96 (1991) (identifying factor such as racial background which often influenced

bilitation, whereby Congress created a wide penalty range under which judges could hand down a sentence.[21] A parole board would subsequently review a defendant's length of time in prison and adjust it according to what they believed would be an appropriate length of time for rehabilitative purposes.[22] In response to public pressure for reform, Congress mandated a more uniform system of punishment and proportionality in federal sentencing.[23] Congress addressed this issue by passing the Sentencing Reform Act of 1984.[24]

The Sentencing Reform Act of 1984 resulted in the creation of the United States Sentencing Commission, authorized by Congress to assess current sentencing practices in order to codify sentencing guidelines.[25] Congress ultimately sought to enhance uniformity and ensure that similarly situated defendants received similar punishments for the same crime.[26] Additionally, the Sentencing Guideline provided judges with a means to enhance criminal punishment based on particularly disturbing crimes.[27]

Of particular concern to Congress were crimes involving the most vulnerable members of society.[28] Legislators considered "vulnerable" indi-

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judicial disparities in sentencing).

[21] *See Brightening the Line*, *supra* note 20, at 1963 (pointing to empirical studies showing a link between inconsistent sentencing with judicial bias); *See Are Guidelines Meeting Congressional Goals?*, *supra* note 20, at 396 (commenting that review of judicial sentencing focused primarily on whether punishment stayed within statutory limits).

[22] *See Brightening the Line, supra* note 20 at 1963 (indicating public dissatisfaction with leniency in criminal punishments); *See Backdoor Out of the Federal Sentencing Guidelines, supra* note 12, at 138-39 (noting "dishonesty" of sentencing when defendants become paroled instead of serving time); *See Are Guidelines Meeting Congressional Goals?*, *supra* note 20, at 396 (maintaining indeterminate sentencing resulted from ability of judges to intersperse own personal theories with punishment).

[23] *See Miracle Cure*, *supra* note 12, at 389-90 (commenting that previous sentencing process allowed broader judicial discretion).

[24] *See Brightening the Line*, *supra* note 20, at 1963-64 (summarizing intention of Congress in creating reform act for correcting problems with judicial discretion in sentencing); *See Backdoor Out of the Federal Sentencing Guidelines*, *supra* note 17, at 140 (detailing Sentencing Reform Act as means for Congress to implement more predictable sentencing mandates).

[25] *See Backdoor Out of the Federal Sentencing Guidelines*, *supra* note 17, at 141 (illustrating Sentencing Commission developed guidelines that demonstrated mixed philosophies of punishment); *See Brightening the Line*, *supra* note 20, at 1964 (acknowledging creation of United States Sentencing Commission under Sentencing Reform Act of 1984); *See Are Guidelines Meeting Congressional Goals?*, *supra* note 20, at 397 (commenting Sentencing Commission responsible for creating guidelines for federal sentencing).

[26] *See Backdoor Out of the Federal Sentencing Guidelines*, *supra* note 17, at 141 (noting Congressional intent to implement fairness in sentencing for defendants with similar criminal conduct).

[27] *See id.* at 144 (noting greater ability of judges to increase rather than decrease sentences under Guidelines).

[28] *See Brightening the Line*, *supra* note 20, at 1975 (reiterating circuit court affirmation that crimes against vulnerable victims due to age, physical handicap or mental condi-

viduals as those in need of heightened societal protection against criminally depraved acts.[29] To protect those especially vulnerable, the Sentencing Commission implemented a guideline aimed at criminals who specifically targeted vulnerable victims.[30]

The vulnerable victim provision contained in Section 3A1.1(b)(1) of the Sentencing Guidelines attempted to put criminals on notice that a greater punishment existed for those who preyed upon those least able to defend themselves.[31] Prior to 1995, the explanatory commentary to section 3A1.1 noted a defendant must specifically "target" a perceived vulnerable victim.[32] Due to varying judicial interpretations of the term "target," the sentencing commission amended the commentary and advised that perpetrators need only "know" the vulnerable status of their victims before committing the crime.[33] The sentencing enhancement, in conjunction with the overall sentencing guidelines, increased the length of a defendant's punishment for targeting a vulnerable victim.[34] In the absence of such targeting, however, federal courts often could not lengthen a defendant's sentence.[35]

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tion illustrate depravity worthy of greater punishment).

[29] *See id.* at 1978 (pointing to loneliness of victim as a vulnerable trait which justified sentencing increase).

[30] *See id.* at 1983 (suggesting some courts require presence of a particularly unusual vulnerability in order to increase sentence).

[31] *See Zats*, 298 F.3d at 188 (declaring objective of increased punishment deters criminals from choosing vulnerable victims); *Salyer*, 893 F.2d at 116-17 (clarifying susceptibility as increased probability of being victim of threatening act). *But see Moree*, 897 F.2d at 1336 (alleging vulnerability itself not enough to reach conclusion that victim unusually vulnerable); United States v. Wilson, 913 F.2d 136, 138 (4th Cir. 1990) (noting fraudulent tornado insurance intended for general population falls outside of vulnerable victim criteria).

[32] *See supra* note 10 and accompanying text.

[33] *See id.* The reason for the amendment by the sentencing commission is as follows: "[The] Commission . . . noted inconsistency in the application of § 3A1.1 regarding whether this [sentencing] adjustment required proof that the defendant had 'targeted the victim on account of the victim's vulnerability'." *Id.*

[34] *See Feldman*, 83 F.3d at 16-17 (affirming upward adjustment of sentence because defendant targeted elderly couple in poor health).

[35] *See* United States v. Gieger, 190 F.3d 661, 665 (5th Cir. 1999) (acknowledging that United States government lacks vulnerable victim status for fear of categorizing all victims as potentially vulnerable); *Paige*, 923 F.2d at 112, 114 (reasoning false money orders scheme not geared toward any particular vulnerable victim); United States v. Callaway, 943 F.2d 29, 31 (8th Cir. 1991) (concluding illegal use of social security checks not due to vulnerability of handicapped granddaughter); United States v. Smith, 930 F.2d 1450, 1455-56 (10th Cir. 1991) (stating that elderly status of victim not unusual enough for vulnerable victim status); United States v. Creech, 913 F.2d 780, 782 (10th Cir. 1990) (noting victims' membership in class of newlyweds not "unusual" enough to justify vulnerability status).

III. COMMENTARY TO FEDERAL SENTENCING GUIDELINE 3A1.1: WHAT DOES TARGETING ACTUALLY MEAN?

A. *Pre-1995 Commentary: "Targeting" A Vulnerable Victim*

The vulnerable victim statute underwent many revisions to modify the scope and intent of the sentencing provisions.[36] The original explanatory commentary to the guideline noted that a criminal must specifically "target" a victim for vulnerability, which included age, physical or mental handicap, or increased susceptibility to criminal conduct.[37] Courts, however, interpreted the word "target" differently.[38] The courts were split over the "target" criteria, some emphasizing the defendant "knew" about the victim's vulnerability, while others emphasizing the defendant "should have known."[39] In an attempt to resolve the conflicting judicial outcomes, the Sentencing Commission amended the commentary to the vulnerable victim statute and removed the term "target" from its explanatory commentary.[40]

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[36] *See generally* U.S. SENTENCING GUIDELINES MANUAL Appendix C (November 11, 2001) (citing all amendments to the vulnerable victim sentencing guideline from 1987 through 2001). The commentary underwent amendments beginning November 1, 1989. For example, the first amendment changed the language from "any offense where the victim's vulnerability played any part in the defendant's decision to commit the offense" to "offenses where an unusually vulnerable victim is made a target of criminal activity by the defendant." Amendment, November 1, 1989. This language evolved to include one "...who is unusually vulnerable due to age, physical or mental condition, or who is otherwise susceptible to the criminal conduct." Amendment, November 1, 1998.

[37] *See Feldman*, 83 F.3d at 16 (discussing possibility of correlation between special vulnerabilities of elderly victim coupled with targeting requirement); *Rocha*, 916 F.2d at 245 (maintaining young age of kidnap victim illustrated deliberate targeting based on vulnerability); *White*, 903 F.3d at 463 (pointing to element of targeting reflected in older age of victim).

[38] *Compare Boult*, 905 F.2d at 1139 (affirming district court decision that defendant targeted vulnerable victim due to decreased mental capacity), *and Cree*, 915 F.2d at 354 (contending defendant lacked intention to specifically target victim), *with O'Brien*, 50 F.3d at 755 (contesting First Circuit decision requiring only that defendant "should have known" vulnerable status of victim), *and Salyer*, 893 F.2d at 116 (interspersing element of targeting with idea that defendant "should have known" about vulnerability of victim).

[39] *Compare O'Brien*, 50 F.3d at 755 (reiterating idea that target requirement of commentary wholly inconsistent with "should have known" requirements of guideline) *and Hershkowitz*, 968 F.2d at 1506 (reasoning vulnerable victim status not contingent on targeting victim) *with* United States v. Rowe, 999 F.2d 14, 16-18 (1st Cir. 1993) (rejecting idea small businesses targeted because of unusual vulnerability) *and Moree*, 897 F.2d at 1335 (5th Cir. 1990) (deciding sentencing enhancement inapplicable if no unusual vulnerability exists).

[40] *See* U.S. SENTENCING GUIDELINES MANUAL Appendix C , Amendment 521 at 430 (1995) (indicating change in language of commentary due to circuit court confusion over "targeting" requirement).

B. *Post-1995 Commentary: "Should Have Known" Victim's Vulnerable Status*

In its amended commentary to the vulnerable victim guideline, the U.S. Sentencing Commission advised that a criminal only "should have known" about the victim's vulnerable status.[41] The amendment clarified the plain language of the sentencing guideline by requiring that a criminal only needs to "know" the vulnerable status of the victim without specifically targeting a victim before the commission of the crime.[42] Again the courts inconsistently interpreted this new application of the sentencing guidelines.[43] Despite the absence of the targeting language, the courts continued to intermingle the concepts of "targeting" the victim with the new language of "should have known," making the distinction in rationales more difficult to discern.[44]

C. *The Effects Of Pre- And Post- 1995 Commentary On The Definition Of "Vulnerable Victim"*

The commentary to the vulnerable victim sentencing provision affected the ways in which various circuit courts applied a penalty enhancement.[45] For example, using the pre-1995 commentary, the Fifth Circuit interpreted "target" to mean that the victim must possess an "unusual" vulnerability.[46] Similarly, the Sixth, Seventh, and Eighth Circuits declared

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[41] *See id.* (commenting that enhancement now applies to offenses where defendant "knows, or should have known" of the victim's unusual vulnerability).

[42] *See Zats*, 298 F.3d at 189 (suggesting that knowledge of victim vulnerability determines sentencing enhancement); United States v. Burgos, 137 F.3d 841, 843 (5th Cir. 1998) (pointing to changes in commentary that no longer required targeting of vulnerable victim); United States v. Gill, 99 F.3d 484, 488 (1st Cir. 1996) (contrasting objective standard of "should have known" against subjective "targeting" requirement).

[43] *Compare Zats*, 298 F.3d at 188-89 (disagreeing with assertion that defendant not aware of victim vulnerability because some victims told him so), *and Cruz*, 106 F.3d at 1139 (stating enhancement applies when car jacker "should have known" vulnerability of 12 year old victim) *with Phillips*, 287 F.3d at 1057-58 (emphasizing targeting victim with "unique characteristics" as prerequisite for vulnerability enhancement) *and* United States v. Stover, 93 F.3d 1379, 1386-87 (8th Cir. 1996) (noting analysis of vulnerability centered around how susceptible or "unusually vulnerable" traits of intended victims).

[44] *See supra* note 37 and accompanying text.

[45] *See Double Counting Under Federal Sentencing Guidelines*, *supra* note 20, at 720-21 (identifying criteria used to analyze sentencing guidelines which includes plain language of statute, legislative intent or policy motivations); *See Miracle Cure, supra* note 17, at 399 (observing that sentencing guidelines created uniformity but also susceptible to unpredictability).

[46] *See Rocha*, 916 F.2d at 244-45 (finding young age of victim made him more likely to believe threats of kidnappers). *But see Moree*, 897 F.3d at 1335-36 (reasoning that victim did not illustrate "unusual" vulnerability but targeted due to separate incident).

"target" required such "unusual" vulnerabilities as age and physical or mental condition.[47]

After the 1995 amendment to the commentary, the Third Circuit held that the new term "should have known" applied in the instance where the criminal defrauded clients by collecting debts on their behalf and pocketing the proceeds.[48] The Fifth Circuit determined the criminal did "know" the vulnerable victim status for purposes of vulnerable victim targeting.[49] Another court suggested that "should have known" applied to an entire class of psychological patients.[50] In contrast, a recent Eleventh Circuit decision continued to use the "target" analysis and stressed the unusual vulnerability criteria.[51]

Additionally, the First, Third and Eighth Circuits analyzed the language distinction in the pre- and post- 1995 commentary in order to explain the judicial reasoning surrounding the vulnerable victim debate.[52] Overall, the post-1995 commentary language "should have known" helped justify increased sentencing for criminally depraved conduct, even when such conduct was not motivated by the vulnerable status of the victim.[53]

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[47] *See McDermott*, 29 F.3d at 411 (pointing to factors of young age coupled with race as reasons for unusual vulnerability of victims); *Boult*, 905 F.2d at 1139 (opining victim unusually vulnerable due to mental condition along with advanced age); *White*, 903 F.2d at 463 (maintaining vulnerability of victim obvious from respiratory problems which made victim unable to avoid attack); *Salyer*, 893 F.2d at 117 (vulnerability stemmed from particular susceptibility of victim due to race). *But see Callaway*, 943 F.2d at 31 (concluding no proof victim was targeted because of unusual vulnerability such as young age or handicap); *Paige*, 923 F.2d at 113-14 (asserting victims displayed no "unusual" vulnerability requiring a sentencing enhancement); *Cree*, 915 F.2d at 354 (indicating victim neither target nor "unusual" for purposes of victim vulnerability).

[48] *See Zats*, 298 F.3d at 188-89 (stressing sentencing guidelines no longer require targeting but only knowing vulnerable status of victim).

[49] *See Burgos*, 137 F.3d at 843-44 (explaining circuit only used "target" parameter to show defendant should have known about victim vulnerability).

[50] *See Gill*, 99 F.3d at 486-87 (permitting vulnerable status to include class of persons if defendant knew about shared trait).

[51] *See Phillips*, 287 F.3d at 1057-58 (citing bank teller victims as possessing unusual vulnerability subjecting them to criminal targeting).

[52] *See Zats*, 298 F.3d at 188-90 (noting distinctions in commentary language after 1995 amendment); *Cruz*, 106 F.2d at 1137-38 (comparing former targeting requirement to defendant's knowledge about vulnerability of victim); *Feldman*, 83 F.3d at 16 (examining removal of "target" from commentary while defendant still in custody); *Stover*, 93 F.3d at 1383-85 (summarizing changes to commentary guideline within context of ex post facto concerns).

[53] *See Brightening the Line*, *supra* note 20, at 1972 (noting that motivation of defendant irrelevant for purposes of "should have known" analysis).

IV. ANALYSIS

The amended commentary undermines the goal of sentencing uniformity because it does not create a specific standard of review.[54] Instead, the post-1995 commentary language "should have known" gives federal trial courts broad discretion in applying the sentencing guidelines.[55] The post-1995 commentary emphasizes reasonable knowledge over criminal motive.[56] Though the courts seek to punish those criminals illustrating an extra measure of depravity, the new commentary serves to lower the standard of review for depravity while ensuring more criminals fall under the depraved category.[57] The pre-1995 commentary, in contrast, more effectively narrows judicial analysis by pointing to "targeting" as a necessary criminal intent.[58] The "targeting" language of the commentary introduced a definitive characteristic necessary to prove criminal depravity.[59] In comparison, the vagueness of the post-1995 commentary "should have known" allowed courts to guarantee increased penalties for a larger number of defendants.[60]

The courts mistakenly view "should have known" as a more objective standard than the "targeting" requirement.[61] If a criminal "knew, or should have known" the vulnerability of a victim, the sentencing could increase two levels in spite of actual criminal intent.[62] The burden shifts from the prosecution proving the depravity of the criminal to the defendant illustrating a lack of knowledge about a victim's vulnerable status.[63] Ideally, the commentary should have explained the guideline use of the term "target" by defining it as "possessing specific knowledge about a victim's vulnerability and using this knowledge to engage in criminal behavior towards such victim," thus making the criminal accountable for deliberate, pre-meditated acts."[64] In its application, however, the term "should have known" –a more ambiguous threshold- often becomes interchangeable with the concept of intentionally "targeting" the victim.[65]

Neither the pre- nor post- 1995 commentary on its own creates an effective solution.[66] A legitimate starting point for more effective judicial

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[54] *See supra* notes 13, 16, 21-23, 41 and accompanying text.
[55] *See supra* notes 19-21 and accompanying text.
[56] *See supra* note 33 and accompanying text.
[57] *See supra* notes 6, 25 and accompanying text.
[58] *See supra* note 28 and accompanying text.
[59] *See supra* note 34 and accompanying text.
[60] *See supra* notes 6, 20, 23, 29 and accompanying text.
[61] *See supra* notes 5, 9, 27 and accompanying text.
[62] *See supra* notes 37-38, 48 and accompanying text.
[63] *See supra* note 8, 35 and accompanying text.
[64] *See supra* note 39 and accompanying text.
[65] *See supra* note 8 and accompanying text.
[66] *See supra* notes 34-35, 39 and accompanying text.

review would be to expand the "targeting" requirements to include specific knowledge of victim vulnerability, and further explain the necessity of holding defendants accountable for criminally depraved behavior.[67] The federal circuit courts could then review the guideline solely for legislative intent.[68]

V. CONCLUSION

While the amended post-1995 commentary attempted to clarify standards of judicial review, it instead created greater ambiguity by expanding judicial review. Because the courts often came to different conclusions with the "target" guideline, the "should have known" amended commentary also resulted in broad interpretations and inconsistent outcomes. The commentary must narrow its scope while still focusing on punishing the criminally depraved. In doing so, courts can uphold the legislative intent of the statute to mandate uniform sentencing for similarly situated defendants and simultaneously appear tough on crime. Otherwise, personal bias and subjective judicial intent will continue to permeate the sentencing process.

Madeline Yanford

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[67] *See supra* note 43 and accompanying text.
[68] *See supra* note 47 and accompanying text.