

REVAMPING THE PHANTOM PROTECTIONS FOR THE VULNERABLE ELDERLY: SECTION 3A1.1(b), NEW HOPE FOR OLD VICTIMS

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As the baby boom generation begins to gray, an increasing number of seniors fall prey to those depraved criminals who seek to exploit the elderly segment of our society. Recognizing this plight, Congress has sought to afford greater protection to the elderly by amending the Vulnerable Victim Sentence Enhancement of the United States Sentencing Guidelines. Despite the plain meaning of the amended guidelines, a myriad of courts have both misconstrued and misapplied the Sentencing Guidelines to the detriment of elderly victims. In his note, Mr. Murch analyzes the factors influencing elder victimization and discusses the role the Sentencing Guidelines play in combating such victimization. Mr. Murch further observes how the judiciary has neglected to apply the Sentencing Guidelines coherently and consistently. In an attempt to resolve this seeming inconsistency, the author embraces a literal interpretation of both § 3A1.1(b) and the amended Comments of the Sentencing Guidelines, resulting in the creation of a two-pronged test to determine whether a criminal's sentence should be enhanced.

I. Introduction

"[You] took advantage of people that were vulnerable, took advantage of the least strong in our society. I watched these people come in here and testify and you took their money, people that were widowing, people living on a pension and you took their money"¹

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1. United States v. Smith, 39 F.3d 119, 123 (6th Cir. 1994) (quoting presentence report of the district court).

The defendant in *United States v. Smith*² had used names pirated from a customer list of promotional health and safety items to effectuate a scam against these customers, many of whom were elderly.³ The defendant falsely notified these customers that they had won an award, telling them that to receive the prize they needed to simply send a check for taxes and promotional fees to the defendant's company.⁴ On the day of her arrest, the defendant had accumulated \$129,280 from her scheme and had told witnesses that she intended to go to Mexico.⁵

After recognizing the defendant's victimization of the elderly, the trial judge in *Smith* applied the § 3A1.1(b) "vulnerable victim" sentence enhancement of the United States Sentencing Guidelines.⁶ The vulnerable victim sentence enhancement seeks to punish more severely criminals who victimize "unusually vulnerable" persons such as the elderly.⁷ The appellate court in *Smith*, however, overturned the trial court's decision, noting that applying the sentence enhancement would be antithetical to the plain meaning interpretation of § 3A1.1(b) as well as to the goals underlying the enhancement.⁸ As a result, the criminal defendant eluded the intended "extra dollop of punishment,"⁹ thereby emasculating the deterrent value of preventing similar crimes and the heinous victimization of the elderly.

The anguish of many of today's elders¹⁰ is twofold: (1) an increasing number of elders are disproportionately falling prey to the broad spectrum of criminal activity,¹¹ and (2) the criminals who victimize these individuals are able to escape the full punishment intended by the legislature.¹² The United States Sentencing Commission has addressed the problem of the increased victimization of the elderly by creating and continually refining sentencing guideline

2. 39 F.3d 119 (6th Cir. 1994).

3. *See id.*

4. The new companies to which the defendant had the payments sent were American Clearinghouse and United Marketing. Smith used false Social Security numbers to open bank accounts for both companies. *See id.* at 120-21.

5. *See id.* at 121.

6. *See* U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 (1992).

7. *See, e.g.,* *United States v. Moree*, 897 F.2d 1329, 1335 (5th Cir. 1990).

8. *See Smith*, 39 F.3d at 119.

9. *United States v. Newman*, 965 F.2d 206, 212 (7th Cir. 1992).

10. The "elderly" includes all persons aged 65 and over.

11. *See* 142 CONG. REC. H4468 (daily ed. May 7, 1996) (statement of Rep. Buyer).

12. *See* 142 CONG. REC. H4469 (daily ed. May 7, 1996) (statement of Rep. Hyde).

§ 3A1.1(b).¹³ The Commission's ultimate aim is to discourage criminals from knowingly victimizing the elderly by increasing the punishment imposed upon such criminals for such deviant criminal behavior.¹⁴

Regrettably, many seniors today must suffer through another tragedy. The judiciary frequently misapplies § 3A1.1(b), allowing the seniors' antagonists to evade the wrath of § 3A1.1(b).¹⁵ These criminal defendants have been able to obviate the intended reach of the legislation due to common misinterpretations of § 3A1.1(b)'s predecessor, § 3A1.1, and its former corresponding Comments.¹⁶ Since the vulnerable victim enhancement of § 3A1.1 was passed in 1987,¹⁷ the courts have grappled with several ambiguities, including whether a defendant's knowledge that he or she was victimizing a vulnerable victim is enough to merit application of § 3A1.1 or whether the prosecution must show that the victim was targeted *because of* his or her vulnerability.¹⁸ Not only has § 3A1.1(b) failed to articulate clearly the motivational requirement of the defendant, but the guideline remains cryptic as to who constitutes an "unusually vulnerable victim" so as to trigger the application of the § 3A1.1(b) sentence enhancement.¹⁹ Although some courts have held that simply being elderly is enough (per se vulnerability),²⁰ several courts require a showing of some additional "particular susceptibility" beyond that of mere membership in a protected class.²¹

The courts that have wrestled with these ambiguities have conservatively construed the language of the § 3A1.1(b) guideline and its Comments.²² Unfortunately, the Comments, prior to the 1995 Amendments, only confused the courts as to the true intent of § 3A1.1(b),

13. See 142 CONG. REC. H4469 (daily ed. May 7, 1996) (statement of Rep. Conyers).

14. See John Garry, Note, "Why Me?": Application and Misapplication of § 3A1.1, the "Vulnerable Victim" Enhancement of the Federal Sentencing Guidelines, 79 CORNELL L. REV. 143, 155 (1993).

15. See U.S. SENTENCING GUIDELINES MANUAL app. c at 430 (1995).

16. See *id.*

17. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 historical notes (1992).

18. See, e.g., *United States v. Smith*, 39 F.3d 119, 123 (6th Cir. 1994).

19. Compare *United States v. Lee*, 973 F.2d 832 (10th Cir. 1992) (being "elderly" was not enough to constitute "unusually vulnerable" to justify application of the sentence enhancement), with *United States v. Yount*, 960 F.2d 955 (11th Cir. 1992) (theft from "elderly" account holders was enough to merit application of the "vulnerable victim" sentence enhancement).

20. See *Yount*, 960 F.2d at 957.

21. See Garry, *supra* note 14, at 180 n.196.

22. See, e.g., *Smith*, 39 F.3d at 123.

rather than enlightening these judicial bodies.²³ Most courts have erroneously held that it is necessary for the victim to have been targeted *because* of his vulnerability²⁴ and have frequently cited the Comments as the basis for their interpretation.²⁵ The courts have uniformly applied this misinterpretation,²⁶ resulting in inadequate safeguards for the elderly. Prompted by the inadequate protections for the elderly, Congress called for a review of the guidelines.²⁷ As a result, the Sentencing Guidelines Committee amended the Comments in 1995 in order to clarify the proper interpretation of § 3A1.1(b).²⁸ Although the 1995 amendment directly resolves the debate concerning the issue of whether knowledge or targeting is required,²⁹ the amendment also indirectly clarifies another issue, suggesting that an elderly person's status as a per se "vulnerable victim" may be enough to merit application of the § 3A1.1(b) sentence enhancement.³⁰

This note begins by studying the need for additional protections for the elderly as provided through the underlying deterrence of the § 3A1.1(b) sentence enhancement. The inquiry empirically compares the frequency and the severity of the victimization of the elderly to various types of criminal activity found within the population at large. Factors influencing such victimization, including the behavioral patterns of the elderly, are also considered. With the backdrop of the elderly's plight established, this note will delineate the role and goals of the Sentencing Guidelines generally, as well as § 3A1.1(b) specifically. This note will then statistically compare the rate of elderly victimization from the years preceding the Act with the years following the Act in order to determine if § 3A1.1(b) is, in fact, realizing its intended goals. Finally, this note will discuss possibilities for greater efficacy of § 3A1.1(b) by identifying the proper interpretation

23. See, e.g., *id.*

24. See *id.*; see also *United States v. Sutherland*, 955 F.2d 25, 26 (7th Cir. 1992); *United States v. Long*, 935 F.2d 1207, 1210 (11th Cir. 1991); *United States v. Smith*, 930 F.2d 1450, 1455 (10th Cir. 1991); *United States v. Cree*, 915 F.2d 352, 354 (8th Cir. 1990).

25. See, e.g., *Smith*, 39 F.3d at 124. The court quotes the Comments in their entirety as part of its discussion concerning whether it must be shown that defendant simply knew or was motivated and therefore targeted the victim due to an "unusual vulnerability." *Id.*; see also *Cree*, 915 F.2d at 354.

26. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 (1992).

27. See 142 CONG. REC. H4470 (daily ed. May 7, 1996) (statement of Rep. Conyers).

28. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 historical notes (1995).

29. See *United States v. Feldman*, 83 F.3d 9, 16 (1st Cir. 1996).

30. See, e.g., *United States v. Gill*, 99 F.3d 484, 487 (1st Cir. 1996).

of the section in light of the recently amended Comments. The true interpretation can be found through a plain meaning reading of the guideline and the Comments, which reveal that if the elderly as a class are unusually vulnerable to criminal behavior, and the criminal knows or should have known of the vulnerability due to age, then application of the § 3A1.1(b) sentence enhancement is appropriate. This note concludes with a recommendation as to the precise test to be utilized and illustrates how that test is to be applied.

II. The Historical Backdrop for Section 3A1.1(b)

A. Why the Elderly Need Additional Protections

“[F]rom 1985 to 1991, there was a 90% increase in personal crimes committed against senior citizens; that is, from 627,318 to 1.1 million.”³¹ Clearly, the problem of victimization of the elderly warrants the creation of an innovative sentence enhancement such as § 3A1.1(b), which increases the sentences for defendants who “knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that the victim was otherwise particularly susceptible to the criminal conduct.”³² Moreover, the circumstances that necessitate the development of such an enhancement do not consist simply of a greater frequency of the victimization of the elderly as opposed to the general population. The need for § 3A1.1(b) is even more imperative because the elderly frequently suffer far greater injuries than the average younger victim.³³ These disturbing aspects of the victimization of the elderly justify the § 3A1.1(b) sentence enhancement. Not only do the statistics support § 3A1.1(b) as a means to protect the elderly through its deterrent value, but the courts also acknowledge that the guideline serves to further punish the criminals of greater moral depravity who perpetrate such crimes.³⁴

31. 142 CONG. REC. H4468 (daily ed. May 7, 1996) (statement of Rep. Buyer).

32. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) (1995).

33. See U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY: ELDERLY CRIME VICTIMS, SELECTED FINDINGS FROM BUREAU OF JUSTICE STATISTICS 2 (1994).

34. See *United States v. Moree*, 897 F.2d 1329, 1335 (5th Cir. 1990).

1. A STATISTICAL COMPARISON OF THE NATURE AND FREQUENCY OF THE VICTIMIZATION OF THE ELDERLY

Comparing elderly victimization to that of the general population reveals that the elderly not only are more frequently victimized than the general population,³⁵ but also that once they are victimized, they often suffer greater harm.³⁶

a. Fraud and Telemarketing Scams The elderly are unquestionably and increasingly the most severely victimized segment of the population by crimes of fraud. "It is likely that senior citizens account for at least half of the \$60 billion annual loss due to fraud."³⁷ Worse yet, the elderly are targeted by 78% of the companies³⁸ engaging in the \$40 billion industry of telemarketing fraud.³⁹ In fact, 42% of elders received twenty or more telemarketing calls during the past six-month period.⁴⁰

Elders are more susceptible to fraud due to common characteristics which criminals find easy to exploit.⁴¹ Although the consensus has been that elders are victimized as a consequence of their loneliness,⁴² the American Association of Retired Persons (AARP) has recently conducted a large-scale study as a part of its Telemarketing Fraud Project,⁴³ which has revolutionized perceptions regarding the

35. See RONE T. BACHMAN, *ELDERLY VICTIMS*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 1 (1992).

36. See STEVEN D. DILLINGHAM, *ELDERLY VICTIMS*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 1 (1992).

37. *Consumer Fraud Prevention Act, 1996: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 1996 WL 188732 (F.D.C.H.) (statement of John F. Barker, Vice President, National Consumers League, and Director, National Fraud Information Center).

38. See *Telemarketing Fraud, 1996, Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 1996 WL 193802 (F.D.C.H.) (statement of Charles L. Owens, Chief, Financial Crimes Section). Owens revealed that significant information concerning the victimization of the elderly was gathered in the FBI operation known as "Senior Sentinel." See *id.*

39. See *id.*

40. See AMERICAN ASS'N OF RETIRED PERSONS, *AARP'S TELEMARKETING FRAUD PROJECT, A CONSUMER RESEARCH SUMMARY: RESEARCH TO MESSAGE, MEDIA INFORMATION KIT FROM PUBLIC RELATIONS DEPARTMENT 1* (1997) [hereinafter *AARP'S TELEMARKETING FRAUD PROJECT*].

41. See AMERICAN ASS'N OF RETIRED PERSONS, *FRAUDULENT TELEMARKETERS ARE CRIMINALS. DON'T FALL FOR A TELEPHONE LINE, MEDIA INFORMATION KIT FROM PUBLIC RELATIONS DEPARTMENT 1* (1997) [hereinafter *FRAUDULENT TELEMARKETERS ARE CRIMINALS*].

42. See 142 CONG. REC. H11129 (daily ed. Sept. 25, 1996) (statement of Rep. McCollum).

43. The American Association of Retired Persons' Telemarketing Fraud Project consisted of four studies designed to "understand the victims and what makes

stereotypical elder victim.⁴⁴ Surprisingly, the survey revealed that only 28% of older fraud victims live alone.⁴⁵ Moreover, 80% "have family living nearby and nearly all (96%) have friends living nearby."⁴⁶ Therefore, the likely victim to fraud is no longer viewed as a lonely stranger, but in reality may be a parent, grandparent, or elderly friend next door. Furthermore, these elderly victims are relatively well informed, well educated, and active in their communities.⁴⁷

The common thread among the elderly that fraudulent telemarketers exploit consists of the explosive combination of the elderly's greater tendency to trust strangers coupled with a general misconception among the elderly community concerning the nature of telephone fraud.⁴⁸ Less than five percent of elders (persons aged fifty years and over) view deceitful telemarketers as "hardened" criminals.⁴⁹ Furthermore, many elders have trouble detecting when fraud is happening.⁵⁰ Even though they are "wary of telemarketers . . . [they] often won't hang up on them because they think it would be rude."⁵¹ AARP's study also revealed that elders are more likely to trust the criminal who is about to rip them off and then blame themselves for falling for the salesperson's pitch.⁵² Incredibly, even if elders have been victimized previously in a telemarketing scam, they feel overconfident that they can detect an illegitimate call next time.⁵³ Once victimized, the elderly are less likely to report their victimization due to pressures from the fraudulent persons or out of personal shame or fear.⁵⁴ Embarrassment is a weapon for these telefrauds, and they freely exploit it. Some fraudulent telemarketers even threaten older victims that control over their credit cards and bank accounts

them particularly vulnerable to fraudulent telemarketers." AARP's TELEMARKETING FRAUD PROJECT, *supra* note 40, at 1.

44. See FRAUDULENT TELEMARKETERS ARE CRIMINALS, *supra* note 41, at 1.

45. See *id.*

46. *Id.*

47. See *id.*

48. See *id.*

49. See *id.*

50. See AARP's TELEMARKETING FRAUD PROJECT, *supra* note 40, at 2. "More than two-thirds (68%) say most people (like them) would find it hard to spot a situation where someone is selling worthless products or services or trying to trick them into spending their money for nothing in return." *Id.* (citing an AMERICAN ASS'N OF RETIRED PERSONS ("AARP") SURVEY 1996, at 17-18.)

51. FRAUDULENT TELEMARKETERS ARE CRIMINALS, *supra* note 41, at 1.

52. See *id.*

53. See *id.*

54. 142 CONG. REC. H11129 (daily ed. Sept. 25, 1996) (statement of Rep. McCollum).

will be taken away from them by their children if they tell anyone how they have lost money.⁵⁵ Humiliation and the fear of losing independence keep these elderly victims vulnerable to scam artists.⁵⁶ The magnitude of the rampant and increasing victimization of the elderly through fraud mandates the greater protections that § 3A1.1(b) is designed to provide for “those individuals who might clearly have lost their way, well-intended, wanting to be kind, generous in spirit, and yet being preyed upon by those with sinister ideas.”⁵⁷

b. Crimes of Violence, Theft, and Household Crimes While the significance of elder victimization is clear through the overwhelming frequency and disproportionate targeting of the elderly as seen in the above cases, the seriousness of elder victimization in other categories of crime is concealed in the frequency statistics. Surprisingly, the National Crime Victimization Survey (NCVS)⁵⁸ of the Bureau of Justice Statistics (BJS) reveals that the elderly (persons aged sixty-five or older) are less likely than members of the general population to become the victims of a violent crime, personal theft, or household crime.⁵⁹ However, the survey statistics reveal that the elderly, when victimized, suffer far more significant injuries than younger victims.⁶⁰ For example, elderly victims of violent crimes are nearly twice as likely as younger victims to suffer a serious injury (such as broken bones or loss of teeth).⁶¹ Furthermore, once victimized, nearly half of elderly victims require medical treatment from a hospital, as opposed to one-quarter of younger victims.⁶²

Although the statistics may suggest that the elderly are not targeted more frequently than members of the general population to violent crimes, the widespread resistance of the elderly in reporting

55. *See id.*

56. *See id.*

57. *Id.* at H11130.

58. The National Crime Victimization Survey (NCVS) of the Bureau of Justice Statistics (BJS) is conducted semiannually by interviewing a large sampling of approximately 100,000 people concerning the “violent crimes of rape, robbery, and assault; personal theft; and the household crimes of burglary, household larceny, and motor vehicle theft.” U.S. DEP’T OF JUSTICE, *supra* note 33, at 2.

59. *See* BACHMAN, *supra* note 35, at 1. “For example, persons age 65 or older comprise about 14% of persons aged 12 or older in this sample but less than 2% of all victimizations.” *Id.*

60. *See* U.S. DEP’T OF JUSTICE, *supra* note 33, at 2.

61. *See id.* Of persons aged 65 or older, nine percent suffered serious injuries as opposed to five percent of younger victims. *See id.*

62. *See id.*

crimes against them may skew these results.⁶³ For example, “[t]housands of nursing home residents are robbed or raped, even killed every year but only one in 14 crimes is ever reported.”⁶⁴ Furthermore, the elderly victimization statistics may be artificially deflated because the elderly behave differently from the other age groups due to the “fear-victimization paradox.”⁶⁵ The “fear-victimization paradox” asserts that the fear of crime among the elderly may cause them to “stay home where they are less likely to be the victims of crime. Thus, elders may be less victimized as a consequence of their fear.”⁶⁶

As the elderly population continues to increase, the magnitude of elderly victimization will become an ever-greater national problem. Elders currently constitute approximately twelve and a half percent of the American population.⁶⁷ This figure is expected to climb to eighteen percent by the year 2000.⁶⁸ Although the increase in rates of victimization of the elderly alone is disconcerting, the magnitude of the problem is further exacerbated by the increase in the elder population. The inexorable result is that a greater percentage of elderly individuals are being victimized at an alarmingly increasing rate. The number of elder victims is certain to grow dramatically if measures such as § 3A1.1(b) are not effectively employed to thwart criminal conduct.

B. The Sentencing Guidelines

1. THE GOALS, OPERATION, AND ORIGIN OF THE SENTENCING GUIDELINES

The deviance associated with the victimization of a vulnerable victim, such as an elderly person, necessitates a more stringent punishment than for crimes committed against a member of the public at large. As the courts have recognized, predators who target the vulnerable “demonstrate an extra measure of moral depravity.”⁶⁹ Historically, a judge could increase the sentence of a criminal through a simple exercise of the broad judicial authority once available to the

63. See Tracy L. Kramer, *Section 784.08 of the Florida Statutes: A Necessary Tool to Combat Elder Abuse and Victimization*, 19 NOVA L. REV. 735, 757 (1995).

64. Sandy Rovner, *Learning Street Smarts*, WASH. POST, Nov. 4, 1994, at F5 (citing LOUIS R. MIZELL JR., *STREET SENSE FOR SENIORS* (Berkeley 1994)).

65. Kramer, *supra* note 63, at 757.

66. *Id.*

67. See Richard A. Starnes, Note, *Consumer Fraud and the Elderly: The Need for a Uniform System Enforcement and Increased Civil and Criminal Penalties*, 4 ELDER L.J. 201, 202 (1996).

68. See *id.* at 202.

69. *United States v. Moree*, 897 F.2d 1329, 1335 (5th Cir. 1990).

judiciary.⁷⁰ Although this discretionary sentencing allowed flexibility for judges, it also resulted in wide disparities in actual sentences for virtually identical crimes.⁷¹ Prompted by such inequalities in sentencing,⁷² Congress passed the Sentencing Reform Act of 1984 (SRA),⁷³ which provided for the creation of the United States Sentencing Commission (Commission), an independent agency in the judicial branch.⁷⁴ The Commission, in turn, created the Federal Sentencing Guidelines (Guidelines) which are designed "to reduce unjustified disparities and to reach towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice."⁷⁵

Congress promulgated the Guidelines in a tabular form to allow judges to identify the sentencing "guideline range" applicable to a defendant.⁷⁶ Once the judge has taken the offense level of the conduct and the defendant's criminal history into account, the judge may then adjust the sentence, considering such factors as the harm to the victim or the defendant's role in the offense.⁷⁷ It is at this stage that the Commission provides for a sentence enhancement for the victimization of the elderly through § 3A1.1(b).⁷⁸ If § 3A1.1(b) applies, the offense level (on the vertical axis) may be increased two levels.⁷⁹ Once this enhancement is applied, the judge has an appropriate "guideline range" which has been derived through a particularized inquiry of the crime, victim, and criminal. For example, consider a hypothetical in which a criminal who has previously been sentenced to a fourteen-month prison term is found guilty of aggravated assault of an unusually vulnerable victim. According to § 2A2.2, the base offense level for aggravated assault is fifteen on the horizontal axis.⁸⁰ Because the criminal had previously been sentenced to fourteen months in prison,

70. See Garry, *supra* note 14, at 144.

71. See *id.*

72. See U.S. SENTENCING GUIDELINES MANUAL introduction at 2 (1995).

73. See David Liebsohn et al., *Twenty-Fifth Annual Review of Criminal Procedure: IV. Sentencing: Sentencing Guidelines*, 84 GEO. L.J. 1261, 1261 n.2134 (1996).

74. See *id.*

75. *Koon v. United States* and *M. Powell v. United States*, 116 S. Ct. 2035, 2053 (1996).

76. See Liebsohn, *supra* note 73, at 1262. The vertical axis is to be matched with the offense level of the criminal's conduct, which provides the base offense level, while the horizontal axis allows for an enhancement according to the criminal history of the defendant. See *id.*

77. See *id.*

78. See *id.* at 1262.

79. See *id.*

80. See U.S. SENTENCING GUIDELINES MANUAL § 2A2.2 historical notes (1995).

§ 4A1.1(a) dictates that three points should be added to the “criminal history” vertical axis.⁸¹ If no other sections applied, the guideline range would be from twenty-one to twenty-seven months.⁸² If the judge applied the § 3A1.1(b) “vulnerable victim” sentence enhancement, then the offense level on the horizontal axis would increase by two levels.⁸³ The application of this enhancement would result in a new guideline range of twenty-seven to thirty-three months, meaning that the criminal could spend an additional six months to one year in jail as a result of the enhancement.

2. SECTION 3A1.1(b) AND ITS COMMENTS: THEN AND NOW

As previously mentioned, the Guidelines have been fortified with an additional sentence enhancement to be applied against those who victimize the “unusually vulnerable” through the 1987 inclusion of § 3A1.1, now § 3A1.1(b). Section 3A1.1(b) dictates that: “If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that the victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels.”⁸⁴ A two-level increase can mean an enhancement ranging from two months to seventy-eight months, depending on the base sentencing range.⁸⁵

Prior to November 1995, the Commentary Application Notes read as follows:

1. This adjustment applies to offenses where an unusually vulnerable victim is made a target of criminal activity by the defendant. The adjustment would apply, for example, in a fraud case where the defendant marketed an ineffective cancer cure or in a robbery where the defendant selected a handicapped victim. But it would not apply in a case where the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile. Similarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller’s position in a bank.
2. Do not apply this adjustment if the offense guideline specifically incorporates this factor.⁸⁶

81. *See id.* § 4A1.1(a).

82. *See id.*

83. *See id.* § 3A1.1(b).

84. 18 U.S.C. § 3A1.1(b) (1994).

85. *See Garry, supra* note 14, at 153.

86. *See U.S. SENTENCING GUIDELINES MANUAL* § 3A1.1 commentary (1994).

In November of 1995, the amendments to § 3A1.1 became effective.⁸⁷ These amendments resulted in the deletion of the former "Vulnerable Victim" § 3A1.1 and insertion of a replacement guideline addressing both "Hate Crime Motivation or Vulnerable Victim."⁸⁸ The sentencing language concerning "vulnerable victims" from former § 3A1.1 was reinserted in § 3A1.1(b) verbatim.⁸⁹ However, significant changes were made in the accompanying Commentary.⁹⁰

The Commentary's Application Notes, which are relevant to the discussion of § 3A1.1(b) as it applies to enhanced sentencing for victimizing the elderly, state as follows:

2. 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. The adjustment would apply, for example, in a fraud case where the defendant marketed an ineffective cancer cure or in a robbery where the defendant selected a handicapped victim. But it would not apply in a case where the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile. Similarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank.

Do not apply subsection (b) if the offense guideline specifically incorporates this factor. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age. . . .

4. If the enhancement from subsection (b) applies and the defendant's criminal history includes a prior sentence for an offense that involved the selection of a vulnerable victim, an upward departure may be warranted.⁹¹

This new Commentary section provides new insight, both directly and indirectly to the proper application of § 3A1.1(b).

87. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 historical notes (1995).

88. See *id.*

89. See *id.*

90. See *id.* Compare U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 commentary (1994), with U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 commentary (1996) (deleting targeting language and clarifying age as a factor for vulnerability).

91. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 commentary (1996) (emphasis added).

C. The Efficacy of Section 3A1.1(b) as Revealed Through Pre- and Post-Section 3A1.1(b) Statistical Comparisons of Elderly Victimization

A sentencing guideline such as § 3A1.1(b) is unlikely to be successful in fulfilling its goal of deterring vulnerable victimization if the courts misapply or underapply the guideline. The underapplication of the enhancement diminishes the desired deterrent effect that such an enhancement may evoke if properly applied. It is difficult to determine through general statistical studies the impact of former § 3A1.1 in deterring the victimization of the elderly. Although countless factors influence victimization rates of the elderly, such statistics may hold some value in the analysis of determining the impact of § 3A1.1 on the victimization rates of the elderly. These statistics reveal that the victimization rates of the elderly by violent crimes, personal theft, and household crimes over the past twenty years have declined.⁹² The passage of § 3A1.1 did not noticeably impact the slope or rate of this decline.⁹³ In fact, since 1987 the victimization of the elderly by violent crime has both decreased and then increased, returning nearly to its 1987 level.⁹⁴ The frequency of the victimization of the elderly by fraud, such as telemarketing fraud, has been rising dramatically, coinciding with the growth of telefraud generally.⁹⁵

The failure to decrease the rates of victimization of the elderly may result from the inconsistent enforcement of § 3A1.1(b) by the courts, or perhaps the § 3A1.1(b) sentence enhancement does not impose an adequately severe sentence increase to deter effectively elder victimization. The latter view is shared by many groups and is reflected in several bills that are currently in the legislative pipeline which may ultimately allow for enhancement of up to eight levels for elder victimization.⁹⁶ The former view, that the lack of a reduction in

92. See BACHMAN, *supra* note 35, at 2.

93. See *id.*

94. See *id.*

95. See AARP'S TELEMARKETING FRAUD PROJECT, *supra* note 40, at 1. Comprehensive longitudinal studies do not exist to provide insightful statistics for growth of victimization of the elderly to telefraud. The first comprehensive surveys of this type have been conducted *post* 1994 by AARP. See *id.*

96. See 142 CONG. REC. H11129 (daily ed. Sept. 25, 1996) (statement of Rep. McCollum concerning The Telemarketing Fraud Punishment And Prevention Act of 1996, as proposed as H.R. 1499). Representative McCollum described the proposed bill amendments as directing the "U.S. Sentencing Commission to amend the sentencing guidelines to increase sentences for telemarketing fraud offenses The increase shall be . . . at least 8 levels if the defendant is found to have targeted persons over the age of 55." *Id.*

the elder victimization rates is a result of inconsistent enforcement, is embraced by the Commission itself and has precipitated the recent changes in the Commentary.⁹⁷

Courts can reduce the victimization rates of the elderly in all categories of crime if § 3A1.1(b) is applied as intended. These rates will likely improve due to the recent amendments to the Commentary.⁹⁸ Although a superficial reading of the Comments resolves only one of the interpretive problems the courts have encountered, an in-depth analysis of the Comments indicates that another of the significant problems in the interpretation of § 3A1.1(b) also has been resolved. Although *stare decisis* may have previously discouraged most courts from reconsidering whether being “elderly” alone was sufficient to merit application of § 3A1.1(b), perhaps the new commentary will compel the courts to reinterpret § 3A1.1(b), forcing the judiciary to keep an open mind as to this issue.⁹⁹ Just as the recently amended Commentary explicitly resolves whether a defendant must target his or her victim because of their vulnerability, the plain language of the Comments also clarifies the Sentencing Commission’s intent to make the age of the victim alone sufficient to justify the application of the enhancement.¹⁰⁰

III. Analysis of Section 3A1.1(b) and Comments

The history of § 3A1.1 has been marred with confusion over the proper interpretation of the allegedly ambiguous sentence enhancement. As mentioned, the issue of whether a defendant must actually intend to target a vulnerable victim, as alluded to in the former Comments, has proved particularly vexing.¹⁰¹ The majority of the courts had conservatively interpreted the targeting language of the guideline,¹⁰² resulting in a gross underapplication of the enhancement and minimizing the deterrent value of the Guidelines.

Another unduly conservative interpretation of § 3A1.1(b) espoused by various courts is that the age of the victim alone does not

97. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 historical notes (1996).

98. See *infra* Part III, which discusses the amended comments and their impact on recent court decisions.

99. See, e.g., *United States v. Gill*, 99 F.3d 484 (1st Cir. 1996).

100. See *id.*

101. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 historical notes (1996).

102. See, e.g., *United States v. Smith*, 39 F.3d 119, 123 (6th Cir. 1994).

justify application of the guideline.¹⁰³ However, a thorough reading of the guideline and its attendant Comments, as well as a review of case law, reveals that a plain meaning reading is most appropriate. A plain meaning approach would prevent the tenuous qualifications added by some courts based on fear of over-application.

The majority of the circuits developed some variation of a two-prong test to determine whether to apply § 3A1.1(b).¹⁰⁴ The test required that “[i]n order to apply the § 3A1.1(b) enhancement, the district court must find both 1) that a victim of the defendant’s crime was unusually vulnerable in some way, and 2) that the defendant *targeted* that victim because of this vulnerability.”¹⁰⁵ Although both elements of this test have been misapplied by the courts, the amended Comments should remove any remaining ambiguity.

A. The 1995 Amendment Clarifies That Only Knowledge of Victimization of the Elderly Is Required

The controversy regarding whether the defendant must have been motivated to select the victim due to some vulnerable trait or whether the defendant needs only mere knowledge of the vulnerability has been resolved through the amended Comments to § 3A1.1(b). The language of the previous Comments that created much of the ambiguity stated: “This adjustment applies to offenses where an unusually vulnerable victim is made a *target* of criminal activity by the defendant.”¹⁰⁶ This language was removed and replaced with language which simply reiterates the language of the guideline itself, stating: “Subsection (b) applies to offenses involving an unusually vulnerable victim in which the defendant *knows or should have known* of the victims’s unusual vulnerability.”¹⁰⁷ This language demonstrates

103. See *United States v. Lee*, 973 F.2d 832, 835 (10th Cir. 1992) (holding that membership in a class, such as the elderly, is insufficient to merit application of the § 3A1.1 sentence enhancement); *United States v. Smith*, 930 F.2d 1450, 1455 (10th Cir. 1991); see also Garry, *supra* note 14, at 180 n.196.

104. See *United States v. Cree*, 915 F.2d 352, 353-54 (8th Cir. 1990); *Lee*, 973 F.2d at 833-34; *United States v. Smith*, 39 F.3d 119, 123-24 (6th Cir. 1994); *United States v. Singh*, 54 F.3d 1182, 1191 (4th Cir. 1995); *United States v. Leonard*, 61 F.3d 1181, 1188 (5th Cir. 1995); *United States v. Page and United States v. McKnight*, 69 F.3d 482, 488-89 (11th Cir. 1995); *United States v. Feldman*, 83 F.3d 9, 15-16 (1st Cir. 1996); *United States v. Jackson*, 95 F.3d 500, 507 (7th Cir. 1996).

105. *Jackson*, 95 F.3d at 507 (emphasis added) (citing *Singh*, 54 F.3d at 1191; *United States v. White*, 903 F.2d 457, 463 (7th Cir. 1990)).

106. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 commentary (1992) (emphasis added).

107. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 commentary (1995) (emphasis added).

that § 3A1.1(b) should be applied far more liberally than it has been previously.

The First Circuit has already commented on how the amended Comments will affect its interpretation of § 3A1.1(b). As the First Circuit Court of Appeals stated in dicta in *United States v. Feldman*,¹⁰⁸ “in future cases this provision, not our statements in *Rowe*, will govern.”¹⁰⁹ As a result, the First Circuit has been one of the first courts to recognize that the circuit’s former targeting requirement is inconsistent with the new interpretation set out in the Comments of § 3A1.1(b). Moreover, the Court noted that a showing of intent to victimize the unusually vulnerable is unnecessary.¹¹⁰

The amendments, therefore, have laid to rest the confusion concerning the ambiguity of the requirement of targeting or knowledge. Knowledge is all that is required in the plain language of the guideline.¹¹¹ These amendments not only have dispelled much confusion, but also have offered a wealth of insight into the proper interpretation of other vague elements of § 3A1.1(b).

B. Meeting the “Unusually Vulnerable Victim” Element

Congress recognized that prior to 1995, § 3A1.1 and its Comments did not adequately protect the elderly from violent crimes. As a result, Congress required the Committee to review the Guidelines to ensure “sufficient and stringent punishment”¹¹² for those convicted of violent crimes¹¹³ against the elderly.¹¹⁴ Furthermore, Congress also directed “the Commission to review, and if necessary, amend the sentencing guidelines to ensure that victim related adjustments for fraud

108. 83 F.3d 9 (1st Cir. 1996).

109. *Id.* at 16.

110. *See id.*

111. *See* U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) (1995).

112. 142 CONG. REC. H4469 (daily ed. May 7, 1996) (statement of Rep. Conyers). Through the crime bill, Congress suggested the Guidelines be changed to realize the following objectives: “One, increasingly severe punishment commensurate with the degree of physical harm caused to the elderly victim; two, an enhanced punishment based upon the vulnerability of the victim; and, three, enhanced punishment for a subsequent conviction for a crime of violence against an elderly victim.” *Id.*

113. *See* 142 CONG. REC. H4474 (daily ed. May 7, 1996) (statement of Rep. La-tourette that a proposed amendment would include crimes of “assault, homicide, rape and—perhaps most important of all to our Nation’s seniors—adds the crime of robbery to the Federal definition of violent crime”).

114. *See* 142 CONG. REC. H4469 (daily ed. May 7, 1996) (statement of Rep. Conyers).

offenses against older victims are adequate.”¹¹⁵ In response to these calls for stronger guidelines,¹¹⁶ the Commission “clarified the commentary of the vulnerable-victim guideline to broaden it[s] applicability.”¹¹⁷

In response to the suggestions in the 1994 crime bill, the “Sentencing Commission conducted the analysis as instructed . . . [and] additionally amended the guidelines to better address the desired objectives.”¹¹⁸ The Commission effectuated its changes through a clarification of the Comments.¹¹⁹ The goals of the Commission, as suggested by Congress, were realized through the existing language of § 3A1.1.¹²⁰ Interestingly, it has not been the language of § 3A1.1 that has inadequately protected the elderly, but the overly conservative interpretation adopted by several courts.¹²¹

The Commission conceded that “it noted some inconsistency in the application of § 3A1.1” in regard to the targeting requirement and asserted that the changes made to the Commentary would “clarify application.”¹²² Similarly, the amendments to the Comments indicate that sufficiency of age alone meets the “vulnerable victim” requirement and thereby justifies applying the enhancement.¹²³ Three arguments support the reading that age alone justifies application of the § 3A1.1(b) enhancement: the plain language of the § 3A1.1(b) guideline, the plain language of the Comments, and an analysis of the prior § 3A1.1(b) case law.

1. THE PLAIN LANGUAGE OF THE GUIDELINE

A myriad of lessons can be learned from the courts excessively constrained interpretations of the targeting language in the pre-1995 Comments. The plain language of the guideline did not require targeting, but simply mandated that the defendant “knew or should

115. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 historical notes (1995).

116. Both of these requests were made in the Violent Crime Control and Law Enforcement Act of 1994. The suggestion in regard to violent crimes was placed in Section 240002, while the concern of legitimate protections for the elderly was placed in Section 250003. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 historical notes (1995).

117. 142 CONG. REC. H4469 (daily ed. May 7, 1996) (statement of Rep. Conyers).

118. *Id.*

119. *See id.*

120. *See id.*

121. *See* U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 app. c at 430.

122. *Id.*

123. *Id.*

have known” of the victim’s vulnerability.¹²⁴ Similarly, the language only requires that the victim show that he was “unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct.”¹²⁵ The plain language does not require a showing of age in conjunction with any other factor. As the Eighth Circuit suggested in *United States v. Stover*,¹²⁶ age is an expressly enumerated type of victim vulnerability.¹²⁷ In *United States v. Castellanos*,¹²⁸ the Ninth Circuit provided a particularly lucid and insightful discussion of § 3A1.1(b), observing that the plain language of the guideline suggests that per se vulnerability due to age was intended.¹²⁹

It is unclear precisely why the Commission chose to employ the separate concepts of “unusually vulnerable” and “particularly susceptible,” except to hint that characteristics of age, physical condition, or mental condition may per se render a victim worthy of the special protection of this section, whereas other circumstances might warrant such protection depending upon the nature of the particular criminal conduct.¹³⁰ The Ninth Circuit reasons that the guidelines intend that being elderly may be enough to per se render a victim worthy of the special § 3A1.1(b) protections.¹³¹ When would age be enough to render a victim per se “unusually vulnerable?” *Castellanos* suggests a low standard to meet the “unusually vulnerable” requirement.¹³²

Not only does the *Castellanos* court state that age may per se render a victim unusually vulnerable, the court also resolves disputes regarding § 3A1.1(b)’s “particularly susceptible” language. In its search for what would satisfy § 3A1.1(b)’s “particularly susceptible” element, the *Castellanos* court stated that “[i]t is clear, however, both from the Application Note and the case law that a victim-related adjustment may be supported by the more generalized finding that the members of a targeted group share a particular susceptibility.”¹³³ As the Eleventh Circuit posited, the “‘vulnerable victim’ adjustment ‘fo-

124. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 commentary (1992).

125. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) (1995) (emphasis added).

126. 93 F.3d 1379 (8th Cir. 1996).

127. See *id.* at 1386.

128. 81 F.3d 108 (9th Cir. 1996).

129. See *id.* at 110.

130. See *id.*

131. See *id.*

132. See *id.*

133. *Id.*

cuses chiefly on the conduct of the defendant.’”¹³⁴ Therefore, once it has been shown that the victim is an elder, the proper inquiry should then turn to a generalized finding that an elder is unusually vulnerable to the specific type of criminal activity to which the elder was subjected.

Statistical research undeniably demonstrates that the elderly as a class are unusually vulnerable to many types of criminal behavior, ranging from telefraud¹³⁵ to violent crimes.¹³⁶ Because the elderly are more vulnerable to such crimes than the public at large, the elder is per se vulnerable for these types of crimes, and application of the enhancement is therefore justified (if the knowledge element is also satisfied). An interpretation of the “unusually vulnerable” requirement which permits per se vulnerability remains true to the plain meaning interpretation. Furthermore, this plain meaning interpretation enables consistent application by the courts, unlike previously inconsistent rulings. Although many courts hold that age is not enough to merit application of § 3A1.1(b),¹³⁷ some courts have held, contrary to the common-law rule, that age alone can justify application § 3A1.1(b). For example, in *United States v. Depew*¹³⁸ a boy was to be selected and murdered in a “snuff” film.¹³⁹ The crime was halted in the conspiracy stage before a particular victim had been chosen.¹⁴⁰ The only victim-related factor known in *Depew* was the intended age of the victim, yet the appellate court held that the enhancement was proper.¹⁴¹ No particularized assessment of other characteristics of the victim were evaluated because none existed. The court merely recognized that a boy of twelve years of age (a member of a specific age group) would “certainly be ‘unusually vulnerable,’ if he fell into the hands of the appellant.”¹⁴² This approach properly focused on the moral depravity of criminals who target “vulnerable victims” due to their age. The inquiry should not require more than generalizations of the elderly to the particular criminal behavior as revealed in a case-by-case inquiry. Because the purpose of the sentencing enhancement is to deter certain

134. *United States v. Page*, 69 F.3d 482, 488 (11th Cir. 1995) (quoting *United States v. Long*, 935 F.2d 1207, 1210 (11th Cir. 1991)).

135. See *supra* notes 37-57 and accompanying text.

136. See *supra* notes 58-68 and accompanying text.

137. See *United States v. Smith*, 39 F.3d 119, 123 (6th Cir. 1994).

138. 932 F.2d 324 (4th Cir. 1991).

139. See *id.* at 326.

140. See *id.*

141. See *id.* at 330.

142. *Id.*

criminal behavior, actual harm need not be suffered by a “vulnerable victim” for the court to apply § 3A1.1(b)’s sentence enhancement.¹⁴³ For example, in *United States v. Yount*,¹⁴⁴ the defendant who had embezzled money from trust accounts belonging to the elderly and infirm warranted vulnerable victim enhancement even though the bank reimbursed the victims so that the latter did not suffer harm.¹⁴⁵ Similarly, in *United States v. Salemi*,¹⁴⁶ the Eleventh Circuit held that a six-month-old baby was a vulnerable victim to kidnapping even though the baby was not harmed.¹⁴⁷ Thus, courts may apply § 3A1.1(b)’s sentence enhancement even though the vulnerable victim has not suffered actual harm.

2. THE PLAIN MEANING INTERPRETATION OF THE AMENDED COMMENTS

a. Comment Shows Age Is Enough, Without Other Factors of Vulnerability The language of the Comments illuminates the Committee’s intent that age alone is sufficient to merit application of the § 3A1.1(b) enhancement. The amended Comment Application Note 2 states: “Do not apply subsection (b) if the offense guideline specifically incorporates this factor. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age.”¹⁴⁸ This statement suggests that if the offense guideline does not incorporate the factor, such as the age of the victim, then age of the victim alone would be sufficient for application. Otherwise, the age of the victim alone would never be sufficient to merit application of the § 3A1.1(b) enhancement, and the language of the Comment would be rendered moot because there would always be reasons unrelated to age that would have to be shown. As the First Circuit correctly stated, “all words and provisions of statutes are intended to

143. See Garry, *supra* note 14, at 155 (citing *United States v. Long*, 935 F.2d 1207 (11th Cir. 1991), and *United States v. Roberson*, 872 F.2d 597, 609 (5th Cir.), *cert. denied*, 493 U.S. 861 (1989)) (“holding sentence of defendant convicted of fraud was proper [sic] enhanced where defendant used dead companion’s credit card after burning his corpse, and noting that ‘whether a corpse may suffer harm is irrelevant’ because section 3A1.1 does not require harm”); see also *United States v. Page*, 69 F.3d 482, 489 n.6 (11th Cir. 1995) (“[T]he focus is not on the harm actually suffered by the ‘vulnerable victim.’”).

144. 960 F.2d 955 (11th Cir. 1992).

145. See *id.* at 958.

146. 26 F.3d 1084 (11th Cir. 1994).

147. See *id.* at 1088.

148. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 commentary (1995).

have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous.”¹⁴⁹ Furthermore, “this principle is fully applicable to the sentencing guidelines, which, although they are not statutes, are to be construed in much the same fashion.”¹⁵⁰ Moreover, “commentary in the Guidelines Manual that interprets or explains a guideline is authoritative.”¹⁵¹

b. Comments Show Class Determinations of Vulnerability Sufficient to Merit Application The § 3A1.1(b) guideline Comments make clear that “class” determinations are permissible by stipulating that the adjustment would apply to someone who sold a specious cure for cancer. Numerous cases have upheld upward adjustments based on group determinations.¹⁵² Even in a one-victim case, a single “class” characteristic could be so powerful a proof of vulnerability as to settle the issue without more.¹⁵³ Indeed, the guideline commentary suggests it would be enough to show that an armed robbery victim was confined to a wheelchair.¹⁵⁴ In truth, many inferences about an individual rest on an implicit generalization about a class.¹⁵⁵

The First Circuit has concluded, based on an insightful analysis of the Guidelines’ Comments, that per se vulnerability is appropriate. In *United States v. Gill*,¹⁵⁶ the court found that inferences based on class characteristics can constitute the “unusual vulnerability” required for § 3A1.1 to apply.¹⁵⁷ The *Gill* court held it was reasonable for the sentencing judge to conclude that patients in a community mental health

149. *Lamore v. Ives*, 977 F.2d 713, 716-17 (1st Cir. 1992) (quoting *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir. 1985)).

150. *United States v. DeLuca*, 17 F.3d 6, 10 (1st Cir. 1994); see also *United States v. Shaw*, 979 F.2d 41, 45 (5th Cir. 1992); *United States v. McGann*, 960 F.2d 846, 847 (9th Cir. 1992); *United States v. Castellanos*, 904 F.2d 1490, 1497 (11th Cir. 1990).

151. *DeLuca*, 17 F.3d at 10 (quoting *Stinson v. United States*, 508 U.S. 36 (1993)); see also *United States v. Zapata*, 1 F.3d 46, 47 (1st Cir. 1993).

152. See *United States v. Gill*, 99 F.3d 484, 487 (1st Cir. 1996) (citing *United States v. Malone*, 78 F.3d 518, 522-23 (11th Cir. 1996) (cab drivers); *United States v. Echevarria*, 33 F.3d 175, 180-81 (2d Cir. 1994) (medical patients); *United States v. McDermott*, 29 F.3d 404, 411 (8th Cir. 1994) (black teenagers); *United States v. Peters*, 962 F.2d 1410, 1417-18 (9th Cir. 1992) (people with poor credit histories); *United States v. Bachynsky*, 949 F.2d 722, 735 (5th Cir. 1991) (medical patients)).

153. See *Gill*, 99 F.3d at 487.

154. See *id.*

155. See *id.*

156. 99 F.3d 484 (1st Cir. 1996).

157. See *id.* at 487.

center are per se vulnerable to fraud.¹⁵⁸ The court relied on “general knowledge that, in the typical situation, at least a fair number of patients at a community mental health center are commonly under significant emotional distress. . . . and so [are] unusually vulnerable to . . . fraud.”¹⁵⁹ That court held that as a class, those suffering from the mental condition (another enumerated vulnerability) of “significant emotional distress” are per se vulnerable to fraud, and therefore application of the enhancement was merited.¹⁶⁰ Just as a judge could reasonably conclude, based on general knowledge, that mental health patients as a class are per se vulnerable to fraud, a sentencing judge could similarly conclude that the elderly as a class are unusually vulnerable to many types of crimes.¹⁶¹ General knowledge, as well as the numerous empirical studies detailed in part II.A., support the conclusion that the elderly as a class are per se vulnerable in many situations.

3. RECONCILING THE PRIOR SECTION 3A1.1(b) CASE LAW WITH AMENDED COMMENTS

Several frequently cited holdings that denounce per se victim vulnerability due to age should hold no precedential value under the new guideline interpretations. One such case is *United States v. Long*,¹⁶² which held that enhancing a defendant’s sentence solely based on the victim’s membership in an arguably vulnerable class does not comport with the purposes of § 3A1.1.¹⁶³ Furthermore, the court held that “because the ‘Vulnerable Victim’ adjustment ‘focuses chiefly on the conduct of the defendant,’ [it] . . . should be applied only where ‘the defendant selects the victim’ due to the victim’s perceived susceptibility to the offense.”¹⁶⁴ The amendments have clearly

158. *See id.*

159. *Id.*

160. *See id.*

161. For an example of a case where class generalizations were sufficient to merit § 3A1.1 application, see *United States v. Malone*, 78 F.3d 518 (11th Cir. 1996), in which the court stated that cab drivers are not “by virtue of their vocation . . . to be classed as ‘vulnerable victims,’ for purposes of sentence enhancement under § 3A1.1(b), if they are carjacked.” *Id.* at 522. This is because “cab drivers” are not an expressly enumerated vulnerable group as are those “unusually vulnerable” due to age (the elderly), and therefore their “particular susceptibility” must be determined on a case-by-case basis. However, in *Malone* the court goes on to find that vulnerability to carjacking based on generalizations of class membership of “cab drivers” was appropriate in that case. *See id.* at 522.

162. 935 F.2d 1207 (11th Cir. 1991).

163. *See id.* at 1210.

164. *Id.*

removed the targeting requirement from consideration of the § 3A1.1(b) enhancement and have shown what *is* necessary to justify application. The fact that the enhancement focuses on the conduct of the defendant is still valid, but this is not inconsistent with the aforementioned approach permitting per se vulnerability of the elderly if the particular behavior by that defendant so commands it.

Furthermore, some courts also have held that “the applicability of the ‘vulnerable victim’ sentence enhancement must be determined on a case-by-case basis . . . and is appropriate only where the defendant targets the victim based on the latter’s ‘unique characteristics’ that make the victim more vulnerable or susceptible to the crime at issue than other potential victims of that crime.”¹⁶⁵ Again, this is in harmony with the above approach because vulnerability is also determined on a case-by-case basis. In addition, per se vulnerability based on the generalization that the elderly are more vulnerable to particular crimes than other potential victims is consonant with this view. Thus, a finding of per se vulnerability when the victim is unusually vulnerable both because of age and because the elder would likely be more vulnerable to such a crime than a member of the public at large is warranted, especially when the criminal would be showing that “extra measure of criminal depravity which § 3A1.1 intends to more severely punish.”¹⁶⁶

IV. Recommendations

Having established that the Committee and Congress desired a more stringent interpretation of § 3A1.1(b), the question then becomes: What do the courts do now? The proper test to employ in future cases when an elder is a victim is simply the prior test, with adjustments as suggested through the amendments. The former test required “1) that a victim of the defendant’s crime was unusually vulnerable in some way, and 2) that the defendant targeted that victim because of this vulnerability.”¹⁶⁷ Instead of the former two-part in-

165. *Malone*, 78 F.3d at 521 (citing *United States v. Long*, 935 F.2d 1207, 1210 (11th Cir. 1991), and *United States v. Morrill*, 984 F.2d 1136, 1137 (11th Cir. 1993) (en banc) (*Morrill II*)).

166. *United States v. Moree*, 897 F.2d 1329, 1335 (5th Cir. 1990).

167. *United States v. Jackson*, 95 F.3d 500, 507 (7th Cir. 1996) (citing *United States v. White*, 903 F.2d 457, 463 (7th Cir. 1990) (quoting *United States v. Mejin-Orosco*, 868 F.2d 807, 809 (5th Cir. 1989)); *United States v. Singh*, 54 F.3d 1182, 1191 (4th Cir. 1995)).

quiry, the proper test should now ask: (1) are the elderly as a class unusually vulnerable to the criminal activity and (2) did the defendant criminal know or should have known of the unusual vulnerability?

In regard to the first element, the "unusually vulnerable" requirement is easily met by an elder, because age is an enumerated vulnerability.¹⁶⁸ Once a victim has been determined to be an elder (persons aged sixty-five or over),¹⁶⁹ no additional particularized determinations of susceptibility to the crime from the perspective of the victim need to be made. The test then analyzes the nature of the criminal behavior to determine if elders as a class are unusually vulnerable to the particular type of criminal behavior by which they were victimized. Of course, the elderly are unusually vulnerable as a class to most types of crimes, ranging from violent crimes to fraud.¹⁷⁰ This unusual vulnerability is why the guideline was enacted.

Even though a victim may not be "elderly" (sixty-five years of age), this does not necessarily mean that he or she is not unusually vulnerable due to age, and therefore not protected by the § 3A1.1(b) sentence enhancement. For example, if a victim is fifty-five years of age, this victim falls within an age bracket which is the most victimized segment of the population to telefraud, and a sentencing judge

168. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) (1995).

169. As previously discussed, the statistical evidence suggests that 65 is an appropriate age to merit application, due to the increased victimization suffered by this age group to crimes of all types. In addition, there is persuasive evidence that Congress and the Sentencing Commission intend that the age of 65 (and over) is sufficient to merit application of § 3A1.1(b). In the Violent Crime Control and Law Enforcement Act of 1994, Congress pushed for amendments to provide greater protections for the elderly, with the elderly being defined in § 240002 as including individuals aged 65 and over. In response to this concern, the Commission clarified in the Historical Notes to the 1995 Amendments to § 3A1.1(b) that this group was already adequately protected by the current language of § 3A1.1(b). Instead, the Commission simply reworded the Commentary to clarify that "this amendment strengthens the Commentary to § 3A1.1 in one area by expressly providing a basis for an upward departure if both the current offense and a prior offense involved a vulnerable victim (including an elderly victim), regardless of the type of offense." U.S. SENTENCING GUIDELINES MANUAL app. c at 429. As a result, this change was designed to ensure that "the guidelines provide sufficient and stringent punishment for those convicted of the crime of violence against an elderly victim." 142 CONG. REC. H4469 (daily ed. May 7, 1996) (statement of Rep. Conyers). Therefore, if the crime bill desired that the guidelines sufficiently protect the elderly (persons aged 65 and over), and the Commission stated that § 3A1.1(b) does in fact meet this goal, then it follows that § 3A1.1(b) protects persons aged 65 and over.

170. See *supra* Part II.A.

would be acting appropriately if she concluded that the victim was unusually vulnerable due to age.¹⁷¹

For the second element, the test now simply replaces the targeting language from the former comments with language from the guideline itself. To satisfy the second element, the prosecution must show that the defendant knowingly ("know or should have known") victimized an unusually vulnerable victim. This element would not be satisfied, as the guidelines suggest, if a mass mailing happened to victimize some elders. It would not justify application if the criminal did not or should not have known that the criminal was going to victimize a *vulnerable* victim, for it is victimization of the vulnerable that this guideline is designed to prevent. The enhancement can only be effective as a deterrent to protect the vulnerable if the criminal realizes that the individual he is about to victimize is a vulnerable victim, and then knowing this or because of this, he victimizes him anyway. This behavior is the type of criminal conduct that the enhancement was designed to prevent.

Following are several examples of application of the § 3A1.1(b) test to determine enhancement applicability. The first example provides a case that passes both elements of the § 3A1.1(b) test. A teenager assaults and batters an eighty-year-old woman in her home. To apply the first element, consider whether an elder would be unusually vulnerable to the particular criminal behavior demonstrated through a case-by-case inquiry. In this case, the appropriate inquiry would be whether elders as a class are unusually vulnerable to assault and battery. Statistics and common knowledge suggest that an elderly woman would be unusually vulnerable to such crimes. Once vulnerability has been established, the court must inquire as to whether the criminal knew or should have known of this vulnerability due to age. Most certainly in an assault and battery, the age and requisite vulnerability of a victim is roughly determinable. Therefore, this example would justify application of § 3A1.1(b), because the criminal would have demonstrated an extra measure of criminal depravity. This is just the type of deviant behavior that the guideline seeks to

171. The reasonableness of applying the § 3A1.1(b) sentence enhancement to protect all citizens aged 55 and over from fraud, based on generalizations of class membership in the age group 55 and over, is buttressed through Congress's determination in the Senior Citizens Against Marketing Scams Act to protect citizens 55 and over. See 18 U.S.C. § 2326 (1994).

punish more severely, as well as to deter, and just the type of victim the guideline was designed to protect.

However, the § 3A1.1(b) sentence enhancement would not apply in a case where the defendant sold fraudulent securities by mail to the general public, and one of the victims happened to be senile. Had the victim been elderly, the question would be whether the elderly are any more vulnerable as a class to securities fraud than the general public? In general, the answer is "yes" because many seniors must survive on their savings and investments, whereas a citizen at large can continue to work for his or her sustenance. Therefore, although this victim would probably meet the unusually vulnerable element, the defendant would not and should not have been expected to have the requisite knowledge of the victim's vulnerability because the defendant did not know the victim's age, and therefore the knowledge element is not met. Because both elements need to be satisfied for enhancement to apply, the § 3A1.1(b) enhancement would not apply to this defendant. It is difficult to conceive of a crime to which the elderly would not be unusually vulnerable. In most cases, if the victim is elderly, the "unusually vulnerable" element will be met. Where elderly victims are concerned, the focus for determination of application of § 3A1.1(b) will likely hinge upon the criminal defendant's knowledge of the unusual vulnerability of the victim. The newly clarified test for § 3A1.1(b) will provide the protections for the elderly that Congress and the Commission have intended and allow the broader application encouraged by the Commission (as understood through the amendments).

V. Conclusion

The elderly are the most frequently victimized segment of the population regarding certain crimes, and they also often suffer more harm as a result of their victimization. In order to deter and more severely punish those defendants who knowingly victimize the unusually vulnerable, the Sentencing Guidelines have promulgated § 3A1.1(b), the vulnerable victim sentence enhancement. As a result of misinterpretations of the guidelines' requirements, which resulted in underapplication of the enhancement, Congress suggested that the Commission further strengthen the protections for the elderly. In response, the Commission expanded the applicability of the guideline by clarifying when the guideline should be applied through amend-

ments to the Comments. These revised Comments explain that the defendant need not specifically target unusually vulnerable victims to qualify for the sentencing enhancement. Instead, the defendant must only know or should have known that his or her victim(s) were unusually vulnerable. The revised Comments also reveal that unusual vulnerability based on generalizations of the elderly as a class is sufficient to justify application of the enhancement. Application of the sentence enhancement in accordance with these revised Comments is necessary to ensure that the elderly will finally receive the desperately needed protections which § 3A1.1(b) was designed to provide.