
No. _____

In the
SUPREME COURT OF THE UNITED STATES

CHARLEY JOE, JR., Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to
the United States Court of Appeals for the Tenth Circuit

Petition for Writ of Certiorari

STEPHEN P. MCCUE
Federal Defender

G. Devon M. Fooks
Assistant Federal Defender
Counsel of Record
Office of the Federal Defender
District of New Mexico
111 Lomas Blvd., NW, Suite 501
Albuquerque, N.M. 87102

Telephone: (505) 346-2489
Facsimile: (505) 346-2494
E-mail: devon_fooks@fd.org

Questions Presented

Section 3A1.1(b) of the Sentencing Guidelines provides for a two-level increase where, “the defendant knew or should have known that a victim of the offense was a vulnerable victim.” The application note defines a vulnerable victim as an individual “who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.”

- I. Does the defendant have to exploit the victim’s unusual vulnerability in some way for the vulnerable victim enhancement to apply as held by the Second, Third, and Eleventh Circuits or is it sufficient that a victim just happens to have an unusual vulnerability as held by the First and Eighth Circuits?
- II. Must the vulnerability be unusual compared to the general population, as suggested by the Eleventh and Second Circuits, to other individuals with the same characteristics, as held by the First, Eighth, and Tenth Circuits, or to typical victims of the crime as held by the Ninth Circuit?
- III. Is the vulnerable victim enhancement unconstitutionally vague under the Eighth Amendment?

Table of Contents

Questions Presented.....	i
Table of Authorities.....	iii
Opinions Below.....	6
Pertinent United States Sentencing Guidelines.....	7
Introduction	8
Factual Background	9
District Court Proceedings.....	11
Tenth Circuit Decision	12
Reasons for Granting the Writ	13
A. The current application of the vulnerable victim adjustment undermines the purpose of the guidelines as it creates disparate sentences for similar crimes committed by similar defendants.....	13
B. The need for a relationship between the victim’s vulnerability and the crime likewise varies between circuits allowing for disparate sentences for similar conduct.	18
C. Charley Joe’s case provides this Court with the opportunity to clarify the application of the vulnerable victim enhancement.....	23
D. The Eighth Amendment’s vagueness doctrine should extend to Sentencing Guidelines.	23
Conclusion.....	25
Appendix:	
United States v. Joe Jr., Tenth Circuit’s Order (August 22, 2019)	1a
United States v. Joe Jr., U.S. District Court’s Memorandum Opinion and Order (April 25, 2018)	9a

Table of Authorities

Cases

<i>Beckles v. United States</i> , 137 S. Ct. 886 (2017)	22, 23
<i>Espinosa v. Florida</i> , 505 U.S. 1079 (1992)	24
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	23
<i>Gall v. United States</i> , 552 U.S. 38 (2007)	13
<i>Jacobellis v. State of Ohio</i> , 378 U.S. 184 (1964)	24
<i>Maynard v. Cartwright</i> , 486 U.S. 356 (1988)	23
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989)	12
<i>Peugh v. United States</i> , 569 U.S. 530 (2013)	13
<i>Rita v. United States</i> , 551 U.S. 338 (2007)	12
<i>United States v. Anderson</i> , 349 F.3d 568 (8th Cir. 2003)	15
<i>United States v. Beasley</i> , 481 F. App'x 142 (5th Cir. 2012)	8
<i>United States v. Beyer</i> , 878 F.3d 610 (8th Cir. 2017)	8, 17, 18
<i>United States v. Boulton</i> , 905 F.2d 1137 (8th Cir. 1990)	20
<i>United States v. Box</i> , 50 F.3d 345 (5th Cir. 1995)	21
<i>United States v. Castaneda</i> , 239 F.3d 978 (9th Cir.2001)	14
<i>United States v. Chang Ru Meng Backman</i> , 817 F.3d 662 (9th Cir. 2016)	14
<i>United States v. Coll</i> , 762 F. App'x 56 (2d Cir. 2019)	19
<i>United States v. Cooper</i> , 926 F.3d 718 (11th Cir. 2019)	15

<i>United States v. Depew</i> , 932 F.2d 324 (1991)	7
<i>United States v. Donnelly</i> , 370 F.3d 87 (1st Cir. 2004).....	17
<i>United States v. Dupre</i> , 462 F.3d 131 (2d Cir. 2006)	21
<i>United States v. Feldman</i> , 83 F.3d 9 (1st Cir. 1996).....	8, 16
<i>United States v. Firment</i> , 296 F.3d 118 (2d Cir. 2002)	16
<i>United States v. Iannone</i> , 184 F.3d 214 (3d Cir. 1999)	17, 20
<i>United States v. James</i> , 139 F.3d 709 (9th Cir. 1998)	18
<i>United States v. Joe</i> , 2019 WL 3956431 (No. 18-2072 10th Cir. Aug. 22, 2019)	12
<i>United States v. Kerley</i> , 544 F.3d 172 (2d Cir. 2008)	7
<i>United States v. Kimber</i> , 777 F.3d 553 (2d Cir. 2015)	18
<i>United States v. Lallemand</i> , 989 F.2d 936 (7th Cir. 1993).....	21
<i>United States v. Lee</i> , 973 F.2d 832 (10th Cir.1992)	17
<i>United States v. Lewis</i> , 842 F.3d 467 (7th Cir. 2016)	8
<i>United States v. Luca</i> , 183 F.3d 1018 (9th Cir. 1999).....	20
<i>United States v. Nielsen</i> , 694 F.3d 1032 (9th Cir. 2012).....	7
<i>United States v. Pierre</i> , 825 F.3d 1183 (11th Cir. 2016)	16
<i>United States v. Roberson</i> , 872 F.2d 597 (5th Cir. 1989).....	7
<i>United States v. Scott</i> , 529 F.3d 1290 (10th Cir. 2008).....	12
<i>United States v. Seward</i> , 272 F.3d 831 (7th Cir. 2001)	7
<i>United States v. Smith</i> , 930 F.2d 1450 (10th Cir. 1991).....	15
<i>United States v. Urbina-Robles</i> , 817 F.3d 838 (1st Cir. 2016).....	18

United States v. White, 903 F.2d 457 (7th Cir. 1990) 19

United States v. Zats, 298 F.3d 182 (3d Cir. 2002) 7

Statutes

28 U.S.C. § 1254(1) 6

United States Sentencing Guidelines

U.S.S.G §3A1.1 (1987) 13

U.S.S.G. 3A1.1(b)(1) (2000) passim

U.S.S.G. 3A1.1, comment.(n2)..... 6, 13

In the
SUPREME COURT OF THE UNITED STATES

CHARLEY JOE, JR., Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Petition for Writ of Certiorari

Charley Joe, Jr. petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in his case.

Opinions Below

The Tenth Circuit’s decision in *United States v. Charley Joe, Jr.*, Case No. 18-2072, was not published.¹ The district court’s memorandum opinion rejecting Mr. Joe’s contention that the vulnerable victim enhancement should not apply to him was not published.²

Statement of Jurisdiction

On August 22, 2019, the Tenth Circuit affirmed the district court’s

¹ App. 1a-7a. “App.” refers to the attached appendix.

² App. 9a

decision to apply the vulnerable victim enhancement under the sentencing guidelines to Charley Joe's sentence. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Pertinent United States Sentencing Guidelines

U.S.S.G. 3A1.1(b)(1) provides:

the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels.

U.S.S.G. 3A1.1, comment.(n2) provides:

For purposes of subsection (b), “vulnerable victim” means a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct); and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.

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 in which the defendant marketed an ineffective cancer cure or in a robbery in which the defendant selected a handicapped victim. But it would not apply in a case in which 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 factor that makes the person a vulnerable victim is incorporated in the offense guideline. 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.

Introduction

Neither the wording of the vulnerable victim guideline nor the examples in the application note have changed substantively since its inception. Despite this consistency, the circuits apply this guideline inconsistently.

The Fifth Circuit upheld a corpse as a vulnerable victim. *See United States v. Roberson*, 872 F.2d 597, 609 (5th Cir. 1989). The Seventh Circuit didn't believe corpses could be vulnerable victims. *United States v. Seward*, 272 F.3d 831, 840 (7th Cir. 2001). The Fourth Circuit held that in a plan to make a sex-snuff film the imaginary 12-year-old victim was a vulnerable victim. *United States v. Depew*, 932 F.2d 324, 330 (1991). The Ninth Circuit held an actual 12-year-old who participated in "bondage and sadomasochistic activity" was not. *United States v. Nielsen*, 694 F.3d 1032, 1034 (9th Cir. 2012).

Some circuits interpret the guideline to mean it only applies if the unique vulnerability of the victims increased the likelihood of the success of the crime. *See United States v. Kerley*, 544 F.3d 172, 180 (2d Cir. 2008); *United States v. Zats*, 298 F.3d 182, 186 (3d Cir. 2002). Still other circuits require no nexus between the crime and the vulnerability

of the victim. *United States v. Beyer*, 878 F.3d 610, 615 (8th Cir. 2017), *cert. denied*, 139 S. Ct. 283 (2018). Sometimes membership in a class is deemed a sufficient vulnerability for enhancement. *See e.g. United States v. Beasley*, 481 F. App'x 142, 144 (5th Cir. 2012). But in other circuits, membership in a class is insufficient and the court must make an individualized determination whether a victim is unusually vulnerable. *United States v. Feldman*, 83 F.3d 9, 15 (1st Cir. 1996); *United States v. Lewis*, 842 F.3d 467 (7th Cir. 2016).

This Court should grant this petition to clarify the circumstances in which this enhancement applies.

Factual Background

Lula Jackson owned land with small house without electricity and a traditional hogan on it on the Navajo Nation. She allowed Jonathan Joe and Charley Joe, her elderly brothers, to live on it. They shared the kitchen and bathroom of the house, but Charley slept in the hogan.

Charley is an alcoholic; he began drinking at age twelve and continued to drink heavily every day. Charley's feet are deformed due to injuries; they cause him pain and to walk with a limp. He could not hold a job and relied on disability payments.

Jonathan was born with cerebral palsy that paralyzed his left side. He did not require help to live independently; nor did he require a walker or cane to get around.

Jonathan became possessive of Ms. Jackson's land and threatened her life over the property. Jonathan tried to force Charley off the land, resulting in frequent fights between the brothers. In his quest to oust his brother, Jonathan burned Charley's clothes and hid Charley's identification. In December 2015, Jonathan hit Charley in the head with a 2-by-4 board requiring eighteen-stiches to close the gash.

In September 2016, a neighbor found Jonathan Joe dead in the house. The autopsy revealed Jonathan died of multiple chop wounds. Police found a bloody axe next to the door of Jonathan's home. Charley was not there. Another neighbor revealed that early in the morning the day before, she drove Charley into Shiprock.

When Charley surfaced, he was drunk and had a black eye. Charley revealed that he had been sitting on the couch, drinking, when Jonathan started ranting about the property being his and again tried to remove Charley from it. Jonathan hit Charley in the eyes, nose, and mouth as he sat on the couch. Charley stood up and hit Jonathan back.

They struggled and Charley grabbed the axe that Jonathan kept by the door. He recalled hitting Jonathan and being terrified by the amount of blood. He believed Jonathan was dead and ran away.

District Court Proceedings

Charley pled to a count of involuntary manslaughter. In calculating his guideline range, probation applied the vulnerable victim enhancement under U.S.S.G. § 3A1.1(b). Charley argued that the enhancement should not apply for two main reasons; first, Jonathan was not actually a vulnerable victim as contemplated by Section 3A1.1(b) because after living with his disability for 63 years, he was not hampered by it. Further, Charley himself was crippled and drunk. Second, he argued that Jonathan's vulnerability was incidental and unrelated to the crime.

The district court found that although not everyone with cerebral palsy would be uniquely vulnerable, Jonathan's cerebral palsy made him uniquely vulnerable due to its manifestation as partial paralysis. The court did not distinguish Jonathan from others with hemiparesis, so presumably all victims with hemiparesis would be vulnerable victims. The court explained because the majority of the wounds

occurred on the left side, Jonathan’s hemiparesis made him uniquely vulnerable. The court also found, “People with the victim’s level of paralysis are not the usual targets of homicide.” Dist. Ct. Memo. Op., 14a.

The court explained that while the Second and the Eleventh Circuits require that the victim be selected because of the vulnerability, the Tenth Circuit did not. Further, the court explained that in its view any such requirement “contravene[d] the Guideline’s text.” Dist. Ct. Memo. Op., 15a. Thus, the court made no finding that Charley selected Jonathan as a victim of homicide due to his vulnerability. It concluded that although Jonathan’s vulnerability was mere happenstance, it contributed to the success of the crime, and the vulnerable victim enhancement should apply.

Tenth Circuit Decision

The Tenth Circuit Court of Appeals affirmed Charley’s U.S.S.G. § 3A1.1(b) enhancement, explaining that the only thing required is a victim’s particular susceptibility to the criminal conduct. “The theory behind the vulnerable victim enhancement is that conduct against the particular victim ... is more blameworthy than the conduct of other

offenders and thus deserves greater punishment.” *United States v. Joe*, 2019 WL 3956431 at *2 (No. 18-2072 10th Cir. Aug. 22, 2019) (*quoting United States v. Scott*, 529 F.3d 1290, 1300 (10th Cir. 2008)). The Court also rejected Mr. Joe’s contention that “his physical characteristics proscribe application of the vulnerable victim enhancement.” *Joe*, 2019 WL 3956431 at *2 (No. 18-2072 10th Cir. Aug. 22, 2019).

Reasons for Granting the Writ

A. The current application of the vulnerable victim adjustment undermines the purpose of the guidelines as it creates disparate sentences for similar crimes committed by similar defendants.

Congress established the U.S. Sentencing Commission in 1984 to address “[f]undamental and widespread dissatisfaction” with discretionary sentencing. *Mistretta v. United States*, 488 U.S. 361, 365–366 (1989). “Congress sought to diminish unwarranted sentencing disparity. It sought a Guidelines system that would bring about greater fairness in sentencing through increased uniformity.” *Rita v. United States*, 551 U.S. 338, 354 (2007). Although the Guidelines are no longer mandatory, the Guidelines form “the starting point and the initial benchmark” for all sentencing proceedings. *Gall v. United States*, 552

U.S. 38, 49 (2007). Federal courts understand that they “must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.” *Peugh v. United States*, 569 U.S. 530, 541 (2013) (*quoting Gall*, 552 U.S. at 50, n. 6) (emphasis omitted). The Guidelines form “the framework for sentencing” and “anchor ... the district court’s discretion.” *Id.*, at 542; 549. The application of a guideline should be uniform across courts, but the application of the vulnerable victim guideline is haphazard.

When originally enacted, the two-level vulnerable victim adjustment applied, “If the defendant knew or should have known that the victim of the offense was unusually vulnerable due to age, physical or mental condition, or that the victim was particularly susceptible to the criminal conduct[.]” U.S.S.G §3A1.1 (1987). It now states, “If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels.” U.S.S.G. § 3A1.1(b)(1) (2000). The application note still defines a vulnerable victim as it did in 1987, a person, “who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.” U.S.S.G. 3A1.1, comment.(n2). “The theory behind the

vulnerable victim enhancement is that conduct against the particular victim or group of victims is more blameworthy than the conduct of other offenders and thus deserves greater punishment.” *United States v. Castaneda*, 239 F.3d 978, 980 (9th Cir.2001). But the culpability of the defendant varies; a defendant who targets vulnerable victims is more culpable than one who exploits an unusual vulnerability. Both are more culpable than the defendant who commits a crime against an unusually vulnerable victim but does not exploit the vulnerability. These distinctions have gotten lost as circuits grapple with how to define unusual vulnerability.

The Ninth Circuit interprets the current definition to mean that, “Vulnerability is *not* measured against the general population.” *United States v. Chang Ru Meng Backman*, 817 F.3d 662, 670 (9th Cir. 2016) (emphasis in original). Rather, the victim must be compared to the “typical victim of the offense of conviction.” *Id.* (internal quotation omitted). The Ninth Circuit determined that “poverty, lack of financial resources, and inability to otherwise find a job or to return to one’s country are typical characteristics of victims of forced prostitution rings.” *United States v. Castaneda*, 239 F.3d 978, 983 (9th Cir. 2001).

The Eleventh Circuit took the opposite approach: it appeared to compare victims of sex trafficking to the general population in applying the vulnerable victim enhancement. It explained the victims “had difficulty speaking English, had no other jobs, family, or friends in the United States, and had no affordable place to stay besides Cooper’s apartment.” *United States v. Cooper*, 926 F.3d 718, 740 (11th Cir. 2019). As these listed characteristics align with what the Ninth Circuit determined the characteristics of a typical victim of sex trafficking, the *Cooper* Court could not be comparing the victim to the typical victim.

The Eight Circuit cautions against blindly applying vulnerable victim status due to membership in a class. “As a group, older persons are more experienced investors, so it would be clear error to impose a § 3A1.1(b)(1) increase simply because some of the victims of a widespread investment scam were elderly.” *United States v. Anderson*, 349 F.3d 568, 572 (8th Cir. 2003). Other circuits concur, “The label ‘elderly,’ like the label ‘young,’ is too vague, standing alone, to provide the basis for a finding of unusual victim vulnerability.” *United States v. Smith*, 930 F.2d 1450, 1455 (10th Cir. 1991). Rather, the application of Section “3A1.1 to enhance a defendant’s punishment for the exploitation of a

vulnerable victim under § 3A1.1 requires analysis of the victim’s personal or individual vulnerability.” *Id.* See also, *United States v. Feldman*, 83 F.3d 9, 15 (1st Cir. 1996) (“in order to warrant a finding of unusual vulnerability, there must be some evidence, above and beyond mere membership in a large class”).

In other circuits, mere membership of a class suffices to apply the vulnerable victim enhancement. The Second Circuit applied Section 3A1.1(b) where the victims of a telemarketing scheme were “persons who had been [previously] victimized by other telemarketing scams.” *United States v. Firment*, 296 F.3d 118, 119 (2d Cir. 2002). See also, *United States v. Pierre*, 825 F.3d 1183, 1196 (11th Cir. 2016) (“the appellants specifically targeted inmates based on their perceived vulnerability to the tax refund fraud offense.”).

Here, the district court distinguished Jonathan Joe from others with cerebral palsy but not from others with hemiparesis. This essentially removed Jonathan from one class but not the other. Although the district court found that Jonathan Joe was not the typical victim of homicide, the Government had presented no evidence on the

typical homicide victim. The individualized finding did not clarify how or why Jonathan Joe was unusually vulnerable.

B. The need for a relationship between the victim’s vulnerability and the crime likewise varies between circuits allowing for disparate sentences for similar conduct.

The circuits are also split over what role the victim’s vulnerability must play in the crime. The Third and Tenth Circuits require “a nexus between the victim’s vulnerability and the crime’s ultimate success.” *See United States v. Iannone*, 184 F.3d 214, 220 (3d Cir. 1999); *see also, United States v. Lee*, 973 F.2d 832, 834 (10th Cir.1992). But the Eighth Circuit explicitly rejected such a requirement. *See Beyer*, 878 F.3d at 614.

The First Circuit held, “[t]he nexus requirement is based on the general limitation that a sentencing court base its finding of unusual vulnerability on individualized findings of particular susceptibility, rather than on the victim’s membership in a large class.” *United States v. Donnelly*, 370 F.3d 87, 93 (1st Cir. 2004). This only amplifies the problem of determining what makes the victim’s vulnerability unusual – is it compared to the general population, others with the same characteristics, or the typical victim of the crime? Comparing a victim of

a crime to the general population, there will always be something that makes him more vulnerable - from being an alcoholic, *Beyer*, 878 F.3d at 614, to waiting for treatment at a hospital's emergency room. *United States v. Kimber*, 777 F.3d 553, 564 (2d Cir. 2015).

The Ninth Circuit allows the vulnerable victim enhancement even if the unusual vulnerability is incidental, if the defendant exploits it. *United States v. James*, 139 F.3d 709, 714–15 (9th Cir. 1998) (applying vulnerable victim enhancement where bank teller's "pregnancy created a potential vulnerability which James acknowledged and exploited"). Yet other circuits apply it when a victim is unusually vulnerable but the defendant does not capitalize on it. See e.g. *United States v. Urbina-Robles*, 817 F.3d 838, 841 (1st Cir. 2016) (applying vulnerable victim enhancement where burglars broke into a house where a 12-year-old boy lived but did not know a child lived there).

The defendant can know of the victim's unusual vulnerability and target the victim because of it; the defendant can discover the victim's vulnerability in the course of the crime and exploit it; or the victim's unusual vulnerability can be incidental and unrelated to the crime. Even where the defendant does not exploit the victim's vulnerability,

because the victim is unusually vulnerable it can still be said that the unusual vulnerability facilitated the crime – as the district court found here. This Court should clarify how the role the victim’s unusual vulnerability plays in the crime to apply the vulnerable victim enhancement.

The lack of a clear requirement of a nexus between the crime and the victim’s vulnerability allows for disparate punishments where a defendant acts in imperfect self-defense. If a victim with an unusual vulnerability provokes a fight, the defendant may end up with a greater punishment because of the vulnerable victim enhancement even where the defendant did not exploit the vulnerability as here. *See also, United States v. Coll*, 762 F. App’x 56, 62 (2d Cir. 2019) (“even if Spear had been the ‘initial aggressor’ in his altercation with Coll, Spear was vulnerable when Coll assaulted him.”)

The victim’s characteristics are often compared to the defendant’s in determining if the victim is unusually vulnerable. But ultimately, this reflects a judgment of the culpability of the defendant – did he exploit the victim’s vulnerability. *See e.g. United States v. White*, 903 F.2d 457, 463 (7th Cir. 1990) (upholding vulnerable victim

enhancement where defendant kidnapped a gas station attendant in his sixties with health problems); *United States v. Boulton*, 905 F.2d 1137, 1139 (8th Cir. 1990) (looking to the victim's age, his physical stature compared to that of the defendant, and his prior exposure to the defendant and his associates in applying the vulnerable victim enhancement). Accordingly, the defendant's abilities should be compared to the victim's. As the Ninth Circuit suggested, "an older man who was a commando in his youth, skilled in all forms of martial arts, might be quite capable of defending himself against a younger, though less-skilled assailant." *United States v. Luca*, 183 F.3d 1018, 1026 n.6 (9th Cir. 1999).

Every successful swindler exploits their victims by gaining their confidence – hence "confidence man" or "con man." Should the con-man who takes advantage of a veteran's belief that "people who share combat are brothers-in-arms and can be believed" by fostering a friendship based on "their supposed shared combat experiences" deserve a vulnerable victim enhancement? *See Iannone*, 184 F.3d at 220-222 (applying the vulnerable victim enhancement in such a case). Should the con-man who targets evangelical Christians claiming his plan will

cause the “redistribution of wealth from the wicked to God’s people” and whose communications were “imbued with religious elements” deserve the vulnerable victim enhancement? *See United States v. Dupre*, 462 F.3d 131, 144 (2d Cir. 2006) (refusing to apply Section 3A1.1(b) to a swindle aimed at Evangelical Christians). The scams share the same elements – the swindler took advantage of the victim’s beliefs to facilitate the fraud.

There seems to be no rhyme nor reason as to when the various circuits apply the vulnerable victim enhancement. The exact same criminal act, blackmailing a man who engaged in a homosexual tryst, resulted in a vulnerable victim enhancement in the Seventh Circuit but not in the Fifth. *Compare United States v. Lallemand*, 989 F.2d 936, 939 (7th Cir. 1993) (holding vulnerable victim enhancement applied to married man who had a homosexual tryst), *with United States v. Box*, 50 F.3d 345, 359 (5th Cir. 1995) (holding homosexuality simply made the extortion possible not subject to vulnerable victim). This Court should grant this petition for certioari to clarify the application of the enhancement so that it is applied consistently to avoid disparate sentencing.

C. Charley Joe’s case provides this Court with the opportunity to clarify the application of the vulnerable victim enhancement.

Jonathan Joe’s hemiparesis was not the cause of Charley’s attack. There is no evidence that Charley actually exploited Jonathan’s hemiparesis. This case provides an ideal opportunity to answer the question of when to apply the vulnerable victim enhancement. Should the enhancement apply when the defendant exploits the victim’s unusual vulnerability in some way even if the existence of the vulnerability is incidental and unrelated to the crime? Or is it enough that the victim merely have an unusual vulnerability? Given the deficiencies of both Jonathan and Charley Joe and the circumstances of the crime, this case allows the Court to establish rules in which to evaluate the vulnerable victim guideline.

D. The Eighth Amendment’s vagueness doctrine should extend to Sentencing Guidelines.

In *Beckles v. United States*, 137 S. Ct. 886 (2017), this Court held the Sentencing Guidelines are not subject to a due process void for vagueness challenge. But Justice Kennedy cautioned, “cases may arise in which the formulation of a sentencing provision leads to a sentence,

or a pattern of sentencing, challenged as so arbitrary that it implicates constitutional concerns.” *Id.* at 897.

Although to date, the Eighth Amendment doctrine of vagueness has applied only to aggravating factors in capital cases, there is no reason the doctrine cannot apply to the Guidelines. Eighth Amendment vagueness challenges “characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty.” This lack of clarity “leaves them and appellate courts with the kind of open-ended discretion which was held invalid.” *Maynard v. Cartwright*, 486 U.S. 356, 361–62 (1988) (*citing Furman v. Georgia*, 408 U.S. 238, (1972).) This echoes Mr. Joe’s contention here. The vulnerable victim enhancement fails to adequately inform the district courts what they must find to impose the enhancement. Instead, courts are left with unfettered discretion, allowing application in an “arbitrary and capricious manner; [with] no principled means provided to distinguish those that received the penalty from those that did not.” *Maynard*, 486 U.S. at 362.

Eighth Amendment vagueness challenges already apply to advisory determinations. In Florida, the jury must consider the

aggravating and mitigating circumstances and give the judge its recommendation. While the judge “must give ‘great weight’ to the jury’s recommendation,” it is not bound by jury’s recommendation. *Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992). The Eighth Amendment vagueness doctrine could address the problem created by the inconsistent application of the vulnerable victim guideline. This Court should extend the Eighth Amendment Vagueness doctrine to the Sentencing Guidelines.

Conclusion

The way in which courts currently apply the vulnerable victim enhancement boils down to: “I know it when I see it.” As Justice Stewart acknowledged in articulating this standard for obscenity, it is not any type of intelligible standard. *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). This Court should grant this petition to clarify how to determine whether someone is an unusually vulnerable victim, when the enhancement under the Guidelines applies, and if the Eight Amendment Vagueness doctrine applies to the Sentencing Guidelines.

Respectfully submitted,

DATED: November 20, 2019

s/ G. Devon M. Fooks
G. Devon M. Fooks
Assistant Federal Defender
Counsel of Record
Office of the Federal Defender
District of New Mexico
111 Lomas Blvd., NW, Suite 501
Albuquerque, N.M. 87102

Telephone: (505) 346-2489
Facsimile: (505) 346-2494
E-mail: devon_fooks@fd.org