Thrice Victimized: Victims of Hurricane Katrina; Victims of Violent Crimes; and Victims of *Apprendi*, *Blakely*, and *Booker*

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INTRODUCTION

> *"Storm victims were raped and beaten, fights and fires broke out, corpses lay out in the open, and rescue helicopters and law enforcement officers were shot at as flooded-out New Orleans descended into anarchy . . . ."*[1]

On August 29, 2005, Hurricane Katrina ("Katrina") made landfall on the coast of Louisiana.[2] Cities were battered by winds reaching 127 miles per hour,[3] the streets were flooded by torrential rain, and lightning streaked across the sky. Katrina's eye was supposed to bring a period of calm in the midst of this madness. During this brief respite from Katrina's fury it was *crime*, not calm,

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1. Allen G. Breed, *Lost City: New Orleans in Anarchy as Rage, Frustration Grip Desperate Survivors*, CHI. SUN-TIMES, Sept. 2, 2005, at 11.

2. AXEL GRAUMANN ET AL., NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L CLIMATIC DATA CTR., HURRICANE KATRINA: A CLIMATOLOGICAL PERSPECTIVE, TECHNICAL REPORT 2005–01, at 2 (2005), http://www.ncdc.noaa.gov/oa/reports/tech-report-200501z.pdf.

Katrina struck Plaquemines Parish, Louisiana at 6:10 a.m. central daylight time as a Category 3 storm. *Id*. By 8:00 a.m. the hurricane was forty miles southeast of New Orleans. *Id*. Previously, Katrina made landfall between Hallandale Beach and North Miami Beach in Florida. *Id*. at 1.

3. *Id*. at 2. At its most terrifying, Katrina's winds reached 175 miles per hour. *Id*. When the hurricane was forty miles southeast of New Orleans the surrounding areas were reporting gusts of 119, 105, 100, and 86 miles per hour. *Id*.

that enveloped New Orleans.[4] Havoc reigned, the levees had yet to fail, and the worst was still to come.

Once the storm passed and the levees were breached, the real nightmare began. As the survivors[5] made their way to the Superdome and the Convention Center,[6] reports that hooligans were running rampant throughout the city—firing guns, looting, and even accosting the survivors—abounded.[7]

Across the globe people were horrified by countless images and tales of the heartless crimes committed in this desperate situation.[8] Though ultimately the most horrific stories would prove to be

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4. *See* Jim Dwyer & Christopher Drew, *Fear Exceeded Crime's Reality in New Orleans*, N.Y. TIMES, Sept. 29, 2005, at A1. Thieves ripped the doors from a pawnshop using a chain attached to their car. *Id.* Elsewhere in the city, looters poured into a local Wal-Mart after *police officers* broke in; apparently police commanders had given the officers permission to "take what they needed from the store to survive." *Id*. (further commenting that a reporter from the New Orleans Times-Picayune saw officers grabbing DVDs). Looters also pillaged "drugstores, shoe stores[,] and electronic shops" while others unsuccessfully tried to rob banks and automated teller machines. *Id*.

5. People remained in the city for a multitude of reasons: some believed they could "ride out" the storm; others said they chose to remain despite the evacuation orders to care for older residents who were intent on staying. Chris Adams et al., *New Orleans Police to Be Pulled Off Streets*, SEATTLE TIMES, Sept. 5, 2005, at A1. Still others stayed behind because they had no vehicles with which to leave. Eric Lipton et al., *Breakdowns Marked Path from Hurricane to Anarchy*, N.Y. TIMES (Late Edition), Sept. 11, 2005, at 1.

6. Director of Homeland Security for New Orleans Colonel Terry J. Ebbert had originally decreed that the Superdome would be the only shelter open to hurricane survivors. Lipton et al., *supra* note 5. Unfortunately, the Superdome and the New Orleans Convention Center became "deathtraps and symbols of the city's despair." *Id*.

7. *See generally* Anna Badkhen, *Hurricane Katrina: Relief Effort*, S.F. CHRON., Sept. 11, 2005, at A19 (stating, "Armed gangs prowled the streets, water washed bloated cadavers onto traffic islands, and the only source[s] of light at night were the huge fires that devoured structures block after block."); Cecilia M. Vega, *Law and Order in New Orleans*, S.F. CHRON., Sept. 9, 2005, at A15 (reporting that prisoners at the newly formed "New Orleans Greyhound Correctional Center" were being held on charges such as firing upon a helicopter, looting, possession of drugs or guns, and attempted murder).

8. Ann Scott Tyson, *Troops Back from Iraq Find Another War Zone*, WASH. POST, Sept. 6, 2005, at A10 (relaying the statements of national guardsmen on duty in New Orleans). Army Specialist Brian McKay stated, "The fear in the eyes of the people, the uncertainty . . . people shooting and killing over little bitty things . . . it surprised me. I didn't think it would be that bad in my own country." *Id*.; *see also* Ian Wachstein, Editorial, *Shock Waves from the Storm*, N.Y. TIMES, Sept. 7, 2005, at 24 ("Thus, when a Hurricane Katrina strikes and we find lawlessness in the form of looting, rapes, robberies and shootings . . . we suddenly realize that revolution could be just a breath away . . . ."); *cf*. Jim Moulton, Op-Ed., *The Plight of Hurricane Katrina's Victims*, COURIER J. (Louisville, Ky.), Sept. 5, 2005, at A10 ("When a band of armed outlaws sees one of its members cut in half by a volley from an Apache helicopter, they might get the message. If they shoot back, take them all out.").

exaggerations,[9] the fact remains that, in Katrina's wake, a crime wave surged through this already crippled city. New Orleans appeared to be in a virtual state of lawlessness, and the world watched in shock.

The blatant disdain for the laws and citizens of New Orleans, *for humanity itself*, inherent in these criminal acts warrants stern punishment. Ruthless crimes deserve ruthless sentences. Unfortunately, the ability for federal and state courts[10] to punish more harshly the commission of crimes against vulnerable victims has been severely undercut by the storm surge of *Apprendi v. New Jersey*,[11] *Blakely v. Washington*,[12] and *United States v. Booker*.[13] It is for this reason that national and local governments should enact statutes, in accordance with *Apprendi*, *Blakely*, and *Booker*, explicitly authorizing sentence enhancements for those who commit violent, personal crimes in the immediate wake of natural disasters such as Katrina.[14]

In Part I, this Note will (a) provide a short synopsis of federal and state sentencing guidelines, and (b) describe how the aforementioned cases have diminished the ability of federal and state courts to impose sentence enhancements on criminal defendants. Part II of this Note will (a) discuss the use of aggravating factors in imposing sentence,

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9. *See* Angela Tuck, *Katrina Blew Journalists' Skepticism Out the Window*, ATLANTA J.-CONST., Oct. 1, 2005, at A15 (stating that a few of the most disturbing stories were "the beheading of a baby, the systematic rape of white women[,] and dozens of bodies stacked up in a freezer" and expressing concern that some reports of violence may never be confirmed); Dwyer & Drew, *supra* note 4; *cf.* Donna Britt, *In Katrina's Wake, Inaccurate Rumors Sullied Victims*, WASH. POST, Sept. 30, 2005, at B1 (contending that the inaccurate reports of crime following Katrina were a product of racial and financial stereotyping that would not have occurred if those that remained in the city had been "middle-class white people").

10. For the purposes of this Note, only states that have codified the use of the vulnerable victim enhancement in sentencing are considered. The Note does not address jurisdictions in which this element is recognized solely by case law. *See infra* note 23 (cataloging states that only recognize a vulnerable victim for sentence-enhancing purposes through case precedent).

11. Apprendi v. New Jersey, 530 U.S. 466 (2000).

12. Blakely v. Washington, 542 U.S. 296 (2004).

13. United States v. Booker, 543 U.S. 220 (2005).

14. By "personal" the author intends to connote crimes against persons such as assault, robbery, rape, and murder. Crimes against property are beyond the scope of this Note, as are crimes against financial interests, such as fraud, that are perpetrated over long periods of time or occur after "order" has been restored to the scene of the natural disaster. The crux of this discussion is the victimization of *people* during and immediately after the natural disaster. See Laurie L. Levenson, *Looting or Survival?*, NAT'L L.J., Sept. 19, 2005, at 20, for a discussion of the legal implications of looting following Hurricane Katrina.

(b) explore the federal statute authorizing the use of the vulnerable victim enhancement in sentencing, (c) survey state statutes that have similarly codified the use of the vulnerable victim enhancement, and (d) synthesize the application of these statutes to summarize the characteristics necessary to classify a victim as "vulnerable." In Part III, this Note will (a) define "natural disaster" in the legal sense, (b) delve into previous judicial applications of the vulnerable victim enhancement to victims of natural disasters, and (c) address the cautionary manner with which courts approach the characterization of a class of victims as "vulnerable."

Part IV of this Note will (a) demonstrate the effect of *Apprendi*, *Blakely*, and *Booker* on the ability of courts to impose enhanced sentences and the resulting effect on victims and criminals, and (b) explain how the victims of Katrina and other natural disasters possess the characteristics necessary to classify them as vulnerable victims.

Part V will (a) propose that federal and state legislatures amend their vulnerable victim enhancements to expressly provide for victims of natural disaster in a way that constitutionally comports with the requirements set forth in *Apprendi*, *Blakely*, and *Booker*; and (b) explain why objections to the classification of victims of natural disasters as a vulnerable *class* are not sufficient to render the proposition invalid.

I. THE AUTHORITY OF FEDERAL AND STATE SENTENCING GUIDELINES HAS RECENTLY BEEN SEVERELY UNDERCUT BY THE SUPREME COURT

A. A Brief Overview of Federal and State Sentencing Guidelines

In response to "more than a decade of efforts by reformers aiming to curb broad discretion of federal judges and the corresponding disparity in sentences" Congress proposed and enacted the Sentencing Reform Act of 1984 (SRA).[15] Following its enactment, the United States Sentencing Commission (USSC) was formed. The USSC then promulgated the United States Sentencing Guidelines

15. Gary Swearingen, *Proportionality and Punishment: Double Counting Under the Federal Sentencing Guidelines*, 68 WASH. L. REV. 715, 716 (1993).

(USSG), which took effect in 1987.[16] According to the USSG, punishment; deterrence; protection of the public; and providing the defendant with "educational or vocational training, medical care, or other correctional treatment in the most effective manner . . ." are the federal government's primary reasons for imposing sentences for criminal convictions.[17] The USSG also authorizes the use of aggravating factors to enhance sentences when certain characteristics (whether of the victim, the crime, or the defendant) are present.[18]

State sentencing guidelines have been created for many of the same reasons.[19] Although state statutes regarding the purposes of sentencing may vary in their actual wording, the four purposes delineated by the federal government in the USSG are the most cited reasons for imposing sentences on convicted criminals. Another often articulated purpose of sentencing is to punish criminals with the severity that their culpability merits.[20] Every state that has devised a

16. The United States Sentencing Guidelines (USSG) took effect on November 1, 1987. 1 U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 introductory cmt. (2005) [hereinafter USSG]. The United States Sentencing Commission and the USSG effectively abolished the indeterminate sentencing scheme that was previously utilized by the federal courts. Mistretta v. United States, 488 U.S. 361, 367–68 (1989).

17. 18 U.S.C. § 3553(a)(2) (2000). This section states that it is necessary to impose a sentence on a convicted criminal for the following reasons:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . .

Id.

Other noted reasons for the enactment of the USSG are that Congress intended "to promote honesty, proportionality, and . . . uniformity in sentencing." Swearingen, *supra* note 15, at 716. One commentator believes that the "disparity and discrimination resulting from highly discretionary sentencing practices, . . . concerns over increasing crime rates[,] and powerful criticisms of the entire rehabilitative model of punishment and corrections . . ." spurred the sentencing reformation undertaken by the USSG. Douglas A. Berman, *Beyond* Blakely *and* Booker*: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 655 (2005) (footnotes omitted).

18. *See* USSG, *supra* note 16, § 3A1.1.

19. *See generally* Scott v. State, 508 So. 2d 335, 336 (Fla. 1987); State v. Joslin, 816 P.2d 1019, 1020 (Idaho Ct. App. 1991); People v. Reed, 366 N.E.2d 1137, 1140 (Ill. App. Ct. 1977); Commonwealth v. Bland, 724 N.E.2d 723, 724–25 (Mass. App. Ct. 2000); State v. Corliss, 721 A.2d 438, 444 (Vt. 1998).

20. State v. Flowers, 394 S.E.2d 296, 300 (N.C. Ct. App. 1990); *see* State v. Barts, 343 S.E.2d 828, 847 (N.C. 1986), *overruled on other grounds by* State v. Vandiver, 364 S.E.2d. 373

sentencing scheme has recognized the existence of aggravating factors and allows those factors to be used in determining criminal sentences. This Note is limited in scope to federal laws[21] and state statutes[22] that expressly authorize the use of delineated aggravating factors that support upward departures in the imposition of sentences.[23]

Since 2000 the Supreme Court has handed down three decisions that have significantly altered the nature and application of aggravating factors under the federal sentencing guidelines as well as some state sentencing guidelines. These divisive decisions were announced in *Apprendi v. New Jersey*, *Blakely v. Washington*, and *United States v. Booker*.

(N.C. 1988). North Carolina courts have articulated the following purposes of sentencing:

> [T]o impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

State v. Gaynor, 300 S.E.2d 260, 262 (N.C. Ct. App. 1983) (citation omitted). Alaska courts also consider the "circumstances of the offense and the extent to which the offense harmed the victim or endangered the public safety or order" as factors relevant to sentencing. Juneby v. State, 665 P.2d 30, 37 (Alaska Ct. App. 1983) (citation omitted).

21. *See* discussion *infra* Part II.B and accompanying notes.

22. *See* statutes cited *infra* note 48 (listing the statutes of states that have authorized the use of aggravating factors in imposing sentences for criminal defendants).

23. States that solely utilize case precedent to enhance sentences by recognizing the existence of aggravating factors are outside the scope of this Note. *See infra* note 44 (defining an aggravating factor). The following states have considered the vulnerability of a victim as an aggravating factor in case law, but have not codified the factor: Colorado, in *People v. Trujillo*, 75 P.3d 1133, 1139 (Colo. Ct. App. 2003); Delaware, in *Ward v. State*, 567 A.2d 1296, 1297 (Del. 1989); the District of Columbia, in *Henderson v. United States*, 678 A.2d 20, 21 (D.C. 1996); Illinois: *People v. Johnson*, 807 N.E.2d 1171, 1176 (Ill. App. Ct. 2004); Indiana, in *Hart v. State*, 829 N.E.2d 541, 544–45 (Ind. Ct. App. 2005); Louisiana, in *State v. Galliano*, 96-1736 (La. App. 1 Cir. 6/20/97); 696 So.2d 1043; Michigan, in *People v. Armstrong*, 536 N.W.2d 789, 794 (Mich. Ct. App. 1995); Minnesota, in *Cooper v. State*, 565 N.W.2d 27, 34 (Minn. Ct. App. 1997); Nebraska, in *State v. Hortmann*, 299 N.W.2d 187, 190 (Neb. 1980); Pennsylvania, in *Commonwealth v. Lawson*, 650 A.2d 876, 881–82 (Pa. Super. Ct. 1994); Utah, in *State v. Smith*, 909 P.2d 236, 244 (Utah 1995); and Wisconsin, in *State v. Robinson*, No. 87-0280, 1987 WL 267446, at *2 (Wis. Ct. App. Sept. 22, 1987).

B. The Judicial De-Evolution of Federal and State Sentencing Guidelines

In the past six years the Supreme Court has mandated major changes in the application and consideration of aggravating factors in enhancing sentences beyond their prescribed maximum. The current trend in this field of law began in 2000 with the Court's decision in *Apprendi v. New Jersey*.[24]

The Supreme Court in *Apprendi* held that the due process clause of the Fifth Amendment[25] and the Sixth Amendment[26] require that a *jury* must find any factor, other than a prior conviction, used to enhance a defendant's sentence over the statutory maximum beyond a reasonable doubt.[27] In *Apprendi*, the trial judge enhanced the

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24. Apprendi v. New Jersey, 530 U.S. 466 (2000).

25. The Fifth Amendment to the United States Constitution reads, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The Fifth Amendment contention in *Apprendi*, *Blakely*, and *Booker* is that a defendant is deprived of his right to due process of law if a judge has the authority to consider any factor he or she finds relevant for the purposes of sentencing. Initially, the Fifth Amendment only applied to the federal government but was made applicable to the states by the Fourteenth Amendment. *See infra* note 30.

26. The Sixth Amendment of the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation" against him. U.S. CONST. amend. VI. *Apprendi*, *Blakely*, and *Booker* assert that part of a defendant's right to be informed of the nature and cause of the accusation against him is the right to be informed of any factors that may affect any portion of the proceedings, including sentencing.

27. *Apprendi*, 530 U.S. at 490. In criminal cases the proper evidentiary standard is "beyond a reasonable doubt." *See, e.g.*, *In re* Winship, 397 U.S. 358, 362–63 (1970). Before *Apprendi*, *Blakely*, and *Booker*, it was unclear whether this standard was required in proceedings *following* criminal trials. These cases made clear that the "beyond a reasonable doubt" standard must be used in all proceedings related to criminal charges. Therefore, juries must find aggravating elements using the reasonable doubt standard instead of the preponderance of the evidence standard employed by the *Apprendi* trial judge. *Apprendi*, 530 U.S. at 476.

Charles Apprendi, Jr. pled guilty to possession of a firearm for unlawful purposes in violation of New Jersey law. *Id*. at 469–70. The maximum sentence prescribed for this offense was ten years, and an enhancement could be applied if the trial judge found by a preponderance of the evidence that the crime was committed "with a biased purpose." *Id.* at 470. Finding that the crime was committed with a biased purpose, the trial judge sentenced Apprendi to twelve years in prison. *Id*. at 471.

A series of appeals brought the case before the Supreme Court. Apprendi initially appealed to the Appellate Division of the Superior Court of New Jersey. *Id*. That court rejected Apprendi's contention that the due process clause of the Fifth Amendment required a jury to

defendant's sentence beyond the statutorily prescribed maximum after he found, by a preponderance of the evidence, that the defendant had targeted his victims because of their race.[28] Relying on questionable precedent,[29] a majority of the Court reasoned that a defendant has the right to have a jury decide every element of the case against him, including those that would cause his sentence to be inflated beyond the maximum allowed by statute, beyond a reasonable doubt by virtue of the protections embodied in the Fifth and Sixth Amendments to the United States Constitution.[30]

Blakely v. Washington[31] was the next significant case to challenge the reach of the Court's holding in *Apprendi*. At issue in *Blakely* was how the term "statutory maximum" should properly be defined for

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find beyond a reasonable doubt the existence of a biased purpose in his crime and subsequently affirmed his sentence. *Id*. Apprendi then took his appeal to the New Jersey Supreme Court. *Id*. at 472. A divided bench again affirmed the initial sentence, reasoning that an essential element to an offense is not created simply by including that element in the sentencing provisions of the criminal code. *Id*.

28. *Id.* at 470. According to New Jersey's "hate crime" law a judge could impose an enhanced sentence on a defendant who "acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation[,] or ethnicity." *Id*. at 469 (citing N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000)).

29. The precedent was deemed questionable by Justice O'Connor in her dissenting opinion:

> In its opinion, the Court marshals virtually no authority to support its extraordinary rule. Indeed it is remarkable that the Court cannot identify a *single instance*, in the over 200 years since the ratification of the Bill of Rights, that our Court has applied, as a constitutional requirement, the rule it announces today.

Id. at 525 (O'Connor, J., dissenting).

30. *Id.* at 476-77 (majority opinion). The majority reasoned:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached.

Id. at 484. The Fifth and Sixth Amendments are made applicable to the individual states by the Fourteenth Amendment. The Fourteenth Amendment states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

31. Blakely v. Washington, 542 U.S. 296 (2004).

Apprendi purposes.[32] The Court declared that "statutory maximum" means "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[33] Affirming the watershed decision in *Apprendi*,[34] the Court held Blakely's sentence invalid because the judge relied on "facts legally essential to the punishment" of the convicted defendant that a jury had not found beyond a reasonable doubt.[35]

Quizzically, in *Apprendi*[36] and *Blakely*,[37] the Court declined to comment on how these decisions would affect the constitutionality of determinate sentencing schemes like the USSG.[38] The Court came

32. *Id*. at 303. The state of Washington argued that the relevant statutory maximum for this case was the maximum sentence allowed for Class B felonies, the level of crime that Blakely was initially charged with, not the maximum sentence allowable given the facts of the case. *Id*.

Ralph Blakely admitted to a charge of second-degree kidnapping involving domestic violence and the use of a firearm. *Id*. at 298–99. In Washington second-degree kidnapping entails "intentionally abduct[ing] another person under circumstances not amounting to kidnapping in the first degree." *Id*.; *see also* WASH. REV. CODE § 9A.40.030(1) (2000 & Supp. 2006).

Finding that the defendant acted with deliberate cruelty, the trial judge sentenced Blakely to ninety months in prison. *Blakely*, 542 U.S. at 300. Under Washington law when a defendant acts with "deliberate cruelty" in the commission of a domestic violence crime, such action constitutes grounds for a departure from the sentencing guidelines. WASH. REV. CODE § 9.94A.535(2)(h)(iii) (2003). Blakely did not admit to (nor did a jury find beyond a reasonable doubt) the alleged "deliberate cruelty" enhancement that the judge later relied on when he upwardly departed from the applicable sentencing range. *Blakely*, 542 U.S. at 299. Therefore, under the state sentencing guidelines, the standard sentencing range for the facts admitted to by the defendant was between forty-nine and fifty-three months. *Id*. at 299–300. However, the state sentencing guidelines allowed a judge to upwardly depart from the established sentencing guidelines if he found "substantial and compelling reasons justifying an exceptional sentence." *Id*. at 299; *see also* WASH. REV. CODE § 9.94A.535 (2003).

33. *Blakely*, 542 U.S. at 303. Once the judge considers factors relevant to sentencing, other than a prior conviction, that were not found beyond a reasonable doubt by a jury or admitted to by the defendant he has "exceed[ed] his proper authority" under the Sixth Amendment *even if* state law allows for such a sentence based on the classification of the underlying crime itself. *Id*. at 304.

34. As quoted in *Blakely*, the holding of *Apprendi* reads: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id*. at 301.

35. *Id*. at 313.

36. Apprendi v. New Jersey, 530 U.S. 466, 497 n.21 (2000) ("The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held.").

37. *Blakely*, 542 U.S. at 305 n.9 ("The Federal Guidelines are not before us, and we express no opinion on them.").

38. According to Black's Law Dictionary a determinate sentence is "[a] sentence for a

face-to-face with that question in 2005 when the case of *United States v. Booker*[39] was fast-tracked to the Court's docket.[40]

In their appeal, the United States government asked the Court to decide whether the "*Apprendi* line of cases" rendered all or a portion of the USSG unconstitutional, since the USSG mandated that judges impose enhanced sentences based on aggravating factors that were not found by a jury.[41] Resoundingly, the Court declared that the USSG violated the Sixth Amendment by allowing judges, not juries, to determine the existence of an aggravating factor other than a prior

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fixed length of time rather than for an unspecified duration." BLACK'S LAW DICTIONARY 1394 (8th ed. 2004) [hereinafter BLACK'S]. An indeterminate sentence is defined by Black's as "[a] sentence of an unspecified duration, such as one for a term of 10 to 20 years [or a] maximum prison term that the parole board can reduce, through statutory authorization, after the inmate has served the minimum time required by law." *Id.*

39. United States v. Booker, 543 U.S. 220 (2005). Booker was convicted of possession with intent to distribute at least fifty grams of crack cocaine in violation of 21 U.S.C. § 841(a)(1). *Id.* at 227. Title 21, § 841(a)(1) of the United States Code makes it illegal to knowingly or intentionally "manufacture, distribute, or dispense, or possess with the intent to manufacture, distribute, or dispense, a controlled substance . . . ." 21 U.S.C. § 841(a)(1) (2000). The USSG mandated a sentence between 210 and 262 months in prison for this specific crime. *Booker*, 543 U.S. at 227. This range was reached by considering Booker's criminal history and the amount of drugs he possessed, as determined by the jury, in accordance with the USSG sections 2D1.1(c)(4) and 4A1.1. *Id.*

During the post-trial sentencing proceedings the judge found by a preponderance of the evidence that Booker had, in fact, possessed more cocaine than the jury had found, and that he had also obstructed justice. *Id.* These other factors increased the sentencing range to between 360 months and life imprisonment. *Id.* Ultimately, Booker received a thirty-year sentence—eight years and two months beyond the statutorily prescribed maximum sentence for the elements proven beyond a reasonable doubt to the jury. *Id.*

Booker appealed to the Court of Appeals for the Seventh Circuit. *Id.* That court held that the judge's enhancement of Booker's punishment on his personal finding of an aggravating factor was inconsistent with the Supreme Court's decisions in *Apprendi* and *Blakely* and therefore violated the Sixth Amendment. *Id.* at 227–28. The Seventh Circuit remanded the case to the district court with instructions to amend the sentence to be within the statutorily prescribed range or to hold a separate sentencing hearing before a jury. *Id.* at 228. The government petitioned the Supreme Court for a writ of certiorari. *Id.* at 229.

40. *Id.*; *see also* Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 379 (2005); Amie N. Ely, Note, *Prosecutorial Discretion as an Ethical Necessity: The Ashcroft Memorandum's Curtailment of the Prosecutor's Duty to "Seek Justice,"* 90 CORNELL L. REV. 237, 276 (2004).

41. *Booker*, 543 U.S. at 229. Justice O'Connor's dissent in *Apprendi* foreshadowed this very question. She proclaimed "perhaps the most significant impact of the Court's decision will be a practical one—its unsettling effect on sentencing conducted under current federal and state determinate-sentencing schemes. . . . [T]he Court does not say whether these schemes are constitutional, but its reasoning strongly suggests that they are not." *Apprendi*, 530 U.S. at 550–51 (O'Connor, J., dissenting).

conviction that was neither admitted by the defendant nor found beyond a reasonable doubt by a jury when that aggravating factor would enhance the defendant's sentence beyond the statutorily prescribed maximum.[42] Accordingly, the Court declared that the guidelines were no longer mandatory in application but merely advisory.[43]

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42. *Booker*, 543 U.S. at 245.

43. *Id*. (striking down 18 U.S.C. § 3553(b)(1) (Supp. 2004) and 18 U.S.C. § 3742(e) (main ed. and Supp. 2003)).

Section 3553(b)(1) was the portion of the United States Code that purportedly made the USSG mandatory in application:

> The court shall impose a sentence of the kind, and within the range . . . unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

18 U.S.C. § 3553(b)(1) (2000), *invalidated by* United States v. Booker, 543 U.S. 220 (2005).

Section 3742(e) of the Code concerned the standards of appellate review of sentences imposed under the USSG that departed from the recommended guideline range. In evaluating the sentence under § 3742(e), a reviewing court should consider whether it:

> (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; (3) is outside the applicable guideline range, and (A) the district court failed to provide the written statement of reasons required by section 3553(c); (B) the sentence departs from the applicable guideline range based on a factor that—(i) does not advance the objectives set forth in section 3553(a)(2); or (ii) is not authorized under section 3553(b); or (iii) is not justified by the facts of the case; or (C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or
>
> (4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

Id. § 3742(e), *invalidated by* United States v. Booker, 543 U.S. 220 (2005). Currently both of the above-referenced sections begin with a caution to the reader that *Booker* has held that the mandatory nature of the USSG is unconstitutional under the Sixth Amendment and therefore both of these sections must be "severed and excised." *Id*.

II. THE APPLICATION OF SENTENCE-ENHANCING FACTORS, SUCH AS A VULNERABLE VICTIM ENHANCEMENT, UNDER FEDERAL AND STATE SENTENCING GUIDELINES PRE-*APPRENDI*, *BLAKELY*, AND *BOOKER*

A. Determining Sentences in Accordance with the Goals of Punishment, Deterrence, Protection of the Public, and Rehabilitation: Aggravating and Mitigating Factors

Circumstances surrounding a crime that have the potential to increase a sentence beyond its statutorily prescribed maximum are known as "aggravating" factors.[44] Conversely, circumstances that have the potential to decrease a sentence below its statutorily prescribed minimum are known as "mitigating" factors.[45] The USSG allows judges to weigh all factors in aggravation and mitigation before imposing sentences.[46] State statutes providing for the

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44. According to Black's Law Dictionary, an aggravating circumstance is "[a] fact or situation that increases the degree of liability or culpability for a criminal act . . . [or a] fact or situation that relates to a criminal offense or defendant and that is considered by the court in imposing punishment." BLACK'S, *supra* note 38, at 259. Synonymous terms are aggravating factor, aggravating element, and aggravator. *Id.* at 260.

45. According to Black's Law Dictionary, a mitigating circumstance is:

> A fact or situation that does not justify or excuse a wrongful act or offense but that reduces the degree of culpability and thus may reduce the damages (in a civil case) or the punishment (in a criminal case) . . . [or a] fact or situation that does not bear on the question of a defendant's guilt but that is considered by the court in imposing punishment and [especially] in lessening the severity of a sentence.

Id. The Supreme Court has maintained that the right to consider the existence of mitigating circumstances cannot be diminished by legislation. Lockett v. Ohio, 438 U.S. 586, 608 (1978).

46. Ideally, the USSG is supposed to be simple to utilize. Initially, the sentencing judge must cross-reference federal statutes with the guideline sections to determine the base offense level for the crime of which the defendant has been convicted. 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, 151 (1993). This base offense level would be adjusted in light of judicial findings of aggravating or mitigating factors. *Id*. at 152. The judge would then consider other sentencing options, such as "probation, restitution, imprisonment, community confinement[,] and fines," in addition to the presence of aggravating or mitigating factors, and then impose a sentence accordingly. *Id*. Ultimately proving that aggravating factors exist, however, does not immediately require aggravation of the defendant's sentence. *See, e.g.*, Braaten v. State, 705 P.2d 1311, 1323 (Alaska Ct. App. 1985).

"Sentencing facts such as aggravating and mitigating circumstances are the articulation of traditional considerations that assist a judge in selecting from among the options of punishment . . . ." People v. Whitten, 28 Cal. Rptr. 2d 123, 125 (Cal. Ct. App. 1994) (quotation marks

consideration of aggravating and mitigating factors can require or simply allow judges to take these circumstances into consideration.

Both the federal government[47] and many state governments[48] have codified the particular vulnerability of the crime's victim as an

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omitted) (quoting People v. Hernandez, 757 P.2d 1013, 1019 (Cal. 1988)).

Concern exists over the proper and consistent judicial utilization of the guidelines. This concern is further compounded after *Apprendi*, *Blakely*, and *Booker* because of the now-advisory nature of the USSG. *See* Katie M. McVoy, Note, *"What I Have Feared Most Has Now Come to Pass":* Blakely*,* Booker*, and the Future of Sentencing*, 80 NOTRE DAME L. REV. 1613, 1629-30 (2005) (commenting that "[f]ederal judges . . . are unlikely to embrace the difficult task of computing guideline ranges when these ranges are merely suggested, not required").

47. Section 3A1.1(b)(1) of the USSG states: "If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase [the offense level] by 2 levels." USSG, *supra* note 16, § 3A1.1(b)(1).

The Commentary for this section, penned by Professor Jeffrey Standen of Willamette University and for the National Institute for Trial Advocacy (NITA), expounds upon the reasoning and application of this factor:

> The status or condition of the crime victim can provide for significant adjustments of the offense level. These adjustments are premised on the view that, all things being equal, crimes are more serious when directed toward certain victims. . . .
>
> . . . Where the victim is especially vulnerable . . . the offender is able to complete his crime and avoid detection more easily and, as a result, greater penalties are required to ensure that crime does not pay.

USSG, *supra* note 16, § 3A1.1 application n.2.

According to section 1B1.7 of the USSG:

> The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement. Finally, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. As with a policy statement, such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines.

USSG, *supra* note 16, § 1B1.7 (citation omitted).

48. Among states that statutorily recognize the existence of the vulnerable victim as a sentencing enhancing factor are: Alaska, ALASKA STAT. § 12.55.155(c)(5) (2004 & Supp. 2005) (asserting "the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill health, or extreme youth or was for any other reason substantially incapable of exercising normal physical or mental powers of resistance"); California, CAL. R. OF CT., R. 4.421(a)(3) (West 2005) (finding "[t]he victim was particularly vulnerable"); Florida, FLA. STAT. § 921.0016(3)(j) (2006) (stating "[t]he victim was especially vulnerable due to age or physical or mental disability"); Kansas, KAN. STAT. ANN. § 21-4716(c)(2)(A) (Supp. 2005) (declaring

aggravating factor in imposing sentence. A crime is deemed to be more severe, and the criminal in need of greater punishment, when the crime is committed against a victim that is more vulnerable than a "normal" victim of the same crime would be.[49]

B. The Federal Vulnerable Victim Statute: United States Sentencing Guidelines Section 3A1.1

Chapter Three, Part A, Section 3A1.1(b) ("Section 3A1.1") of the USSG[50] reads in pertinent part: "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels. . . . If [the previous subdivision applies and] the offense involved a large number of vulnerable victims, increase the offense level . . . by 2 additional levels."[51] This statute is commonly referred to as the "vulnerable victim" enhancement.[52] According to

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"[t]he victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity which was known or should have been known to the offender"); New Jersey, N.J. STAT. ANN. § 2C:44-1(a)(2) (West 2005) (stating that the statute "include[s] whether or not the defendant knew or reasonably should have known that the victim . . . was particularly vulnerable or incapable of resistance due to advanced age, ill-health, or extreme youth, or was for any other reason substantially incapable of exercising normal physical or mental power of resistance"); North Carolina, N.C. GEN. STAT. § 15A-1340.16(d)(11) (2005) (stating "[t]he victim was very young, or very old, or mentally or physically infirm, or handicapped"); Ohio, OHIO REV. CODE ANN. § 2929.12(B)(1) (West 1997 & Supp. 2005) (stating "[t]he physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim"); Tennessee, TENN. CODE ANN. § 40-35-114(5) (2003) (declaring "[a] victim of the offense was particularly vulnerable because of age or physical or mental disability . . . ."); Vermont, VT. STAT. ANN. tit. 13, § 2303(d)(4) (1998) (finding "[t]he victim of the murder was particularly weak, vulnerable or helpless"); and Washington, WASH. REV. CODE § 13.40.150(2)(i)(iii) (2004) (claiming "[t]he victim or victims were particularly vulnerable").

49. *See* United States v. Angeles-Mendoza, 407 F.3d 742, 747–48 (5th Cir. 2005); United States v. Paige, 923 F.2d 112, 113–14 (8th Cir. 1991); *see also* Jay Dyckman, Note, *Brightening the Line: Properly Identifying a Vulnerable Victim for Purposes of Section 3A1.1 of the Federal Sentencing Guidelines*, 98 COLUM. L. REV. 1960 (1998) (thoroughly examining the purpose, proper application, and historical use of the federal vulnerable victim statute); *id*. at 1985-87 (comparing the federal vulnerable victim statute to state vulnerable victim statutes).

50. Chapter Three, Part A of the USSG contains four possible adjustments for the victim-related characteristics of the crime: hate crime motivation/vulnerable victim, official victim, restraint of victim, and terrorism. USSG, *supra* note 16, § 3A1.

51. USSG, *supra* note 16, § 3A1.1(b).

52. The phrase "vulnerable victim" is contained in the title of the section. Virtually all case law and commentary on this section refers, at some point, to this statute as the vulnerable victim enhancement. *Accord* United States v. Dock, 426 F.3d 269, 272–73 (5th Cir. 2005);

the National Institute of Trial Advocacy,[53] Section 3A1.1 was enacted in the belief that crimes committed against certain victims are more serious than the same crimes committed against less vulnerable victims.[54]

Before the vulnerable victim enhancement may be applied most federal courts require the fulfillment of, at a minimum, a two-part test. First, the court imposing sentence must find that the victim was vulnerable due to an impaired capacity to detect or prevent the crime.[55] Second, the court must find that the defendant knew or should have known of the unusual vulnerability of the victim.[56] Some courts require that the vulnerability of the victim facilitate the defendant in the successful commission of the crime.[57] Yet other

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United States v. Fogg, 409 F.3d 1022, 1025 (8th Cir. 2005); *see* Dyckman, *supra* note 49, at 1971.

53. NITA "is a dedicated team of professors, judges, and practicing lawyers who believe that skilled and ethical advocacy is a critical component of legal professionalism and all systems of dispute resolution that seek justice." National Institute of Trial Advocacy, http://www.nita.org/about.htm#MISSION (last visited Sept. 29, 2006). Their mission is to "[p]romote justice through effective and ethical advocacy; [t]rain and mentor lawyers to be competent and ethical advocates in pursuit of justice; and [d]evelop and teach trial advocacy skills to support and promote the effective and fair administration of justice." *Id*.

The authors of NITA's commentary on the USSG are "partners, professors[,] and senior government officials." National Institute of Trial Advocacy, http://www.nita.org/commentaries.asp (last visited Sept. 29, 2006). They are meant to offer a practical viewpoint emphasizing successful utilization of the guidelines. *Id*.

54. USSG, *supra* note 16, § 3A1.1 application n.2. "Where the victim is especially vulnerable, for example due to age or infirmity, the offender is able to complete his crime and avoid protection more easily and, as a result, greater penalties are required to ensure that crime does not pay." *Id*.

55. *See infra* notes 63, 71, 81 and accompanying text.

56. United States v. Donnelly, 370 F.3d 87, 91 (1st Cir. 2004); *see also* United States v. Anderson, 349 F.3d 568, 572 (8th Cir. 2003); United States v. Tissnolthtos, 115 F.3d 759, 762 n.2 (10th Cir. 1997) (assessing defendant's culpability by addressing the questions of whether the victim was actually vulnerable and whether defendant knew of that vulnerability); United States v. Hershkowitz, 968 F.2d 1503, 1506 (2d Cir. 1992). Under California law, if a defendant does not object to the use of a victim's particular vulnerability at trial, that defendant has waived the objection on appeal. People v. Dancer, 53 Cal. Rptr. 2d 282, 292 (Cal. Ct. App. 1996).

57. *See, e.g.*, United States v. Zats, 298 F.3d 182, 186 (3d Cir. 2002) (requiring the fulfillment of a three-part test, including a finding that the victim's "vulnerability or susceptibility facilitated the defendant's crime in some manner"); *see also* United States v. Bolden, 325 F.3d 471, 500 (4th Cir. 2003) (asserting that the defendant must have targeted the victim due to the victim's vulnerability); United States v. Thomas, 62 F.3d 1332, 1344–45 (11th Cir. 1995); United States v. Coffman, No. 97-5219, 1998 U.S. App. LEXIS 16912, at *10 (10th Cir. July 23, 1998).

courts find the defendant's perception of the victim's vulnerability to be determinative.[58]

1. Categories of Victims Recognized by Federal Courts as Being Particularly Vulnerable

A tremendous amount of case law has been generated with respect to Section 3A1.1(b).[59] Findings of vulnerability have been based on factors such as extreme youth or old age,[60] physical or mental condition,[61] or various other factors that render the victim particularly vulnerable.[62] One theme reverberates from these decisions: the classification of a victim as vulnerable is largely fact-dependent.

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58. *E.g.*, United States v. Phillips, 287 F.3d 1053, 1057 (11th Cir. 2002); United States v. O'Brien, 50 F.3d 751, 755 (9th Cir. 1995).

59. As of February 7, 2006, 595 cases cite to, discuss, or decide issues connected with Section 3A1.1, according to a LexisNexis search for "3A1.1" in the federal court case database. Using Westlaw, the USSG Guidelines Manual recommends using the following query to retrieve cases involving Section 3A1.1: he(u.s.s.g. +2 3A1.1) % ci(fed.appx.). 2 USSG, *supra* note 16, at app. F.

60. A sampling of cases that have found a victim "vulnerable" due to youth or old age are: *United States v. Hill*, 322 F.3d 301, 307 (4th Cir. 2003); *United States v. Firment*, 296 F.3d 118, 121 (2d Cir. 2002); *United States v. Curly*, 167 F.3d 316, 320 (6th Cir. 1999); *United States v. Whatley*, 133 F.3d 601, 607 (8th Cir. 1998); *United States v. Smith*, 133 F.3d 737, 749 (10th Cir. 1997); *United States v. Johnson*, 132 F.3d 1279, 1286 (9th Cir. 1997); *United States v. Somner*, 127 F.3d 405, 406 (5th Cir. 1997); *United States v. Salemi*, 26 F.3d 1084, 1088 (11th Cir. 1994); and *United States v. Seligsohn*, 981 F.2d 1418, 1426 (3d Cir. 1992). Ralph V. Seep, Annotation, *What Constitutes Unusually "Vulnerable" Victim Under Sentencing Guideline § 3A1.1 Permitting Increase in Offense Level*, 114 A.L.R. FED. 355, 362–67 (1993 & Supp. 2005).

61. The following cases have found a victim to be "vulnerable" due to physical and/or mental capacity: *United States v. Donnelly*, 370 F.3d 87, 94 (1st Cir. 2004) (involving a victim with Tourette's syndrome); *United States v. Hill*, 322 F.3d 301, 307 (4th Cir. 2003) (concerning a victim that had suffered a stroke); *United States v. Williams*, 291 F.3d 1180, 1196 (9th Cir. 2002) (evaluating chemical dependency and childhood rape of the victim in determining vulnerability); *United States v. Moskal*, 211 F.3d 1070, 1074 (8th Cir. 2000) (involving victims of car accidents as well as other vulnerabilities); *United States v. Checora*, 175 F.3d 782, 788 (10th Cir. 1999) (finding that because the victim was intoxicated and smaller in stature than his attacker he was vulnerable); *United States v. Wright*, 160 F.3d 905, 910 (2d Cir. 1998) (depicting as victims residents of a care facility for the mentally challenged); and *United States v. Sidhu*, 130 F.3d 644, 655 (5th Cir. 1997) (regarding victims that were debilitated by pain or depression). Seep, *supra* note 60, at 362–67.

62. United States v. Bailey, 405 F.3d 102, 113 (1st Cir. 2005) (holding that a victim is more vulnerable when he is on suicide watch). Other cases have premised findings of vulnerability on a series of other factors: *United States v. Milstein*, 401 F.3d 53, 74 (2d Cir. 2005) (premising vulnerability on the existence of fertility problems); *United States v. Lambright*, 320 F.3d 517, 518 (5th Cir. 2003) (finding that the victim was vulnerable due to his

An important factor in the decision is the existence of some circumstance that decreases the victim's ability to avoid becoming a victim of the crime.[63] Setting aside extremes in age or physical infirmity, such characteristics could include: the fact that the victim was a drug user;[64] a close relationship between defendant and victim;[65] the victim's loneliness and gullibility;[66] the fact that the

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status as a prison inmate); *United States v. Medrano*, 241 F.3d 740, 745 (9th Cir. 2001) (classifying victims as vulnerable due to their inability to speak English and their unfamiliarity with banking practices); *United States v. Iannone*, 184 F.3d 214, 221 (3d Cir. 1999) (basing a finding of vulnerability on the victim's status as a veteran of the Vietnam War); *United States v. Arguedas*, 86 F.3d 1054, 1058 (11th Cir. 1996) (characterizing the victimized church as vulnerable because the defendant targeted the church believing it to be in a precarious financial situation); *United States v. Lowder*, 5 F.3d 467, 472 (10th Cir. 1993) (holding that victims' unfamiliarity with investment procedures rendered them vulnerable); and *United States v. Lallemand*, 989 F.2d 936, 939 (7th Cir. 1993) (establishing vulnerability on the fact that the victim was a married homosexual). Seep, *supra* note 60, at 367–70.

Courts have also found that the victim was not vulnerable for purposes of Section 3A1.1. *See* United States v. Shumway, 112 F.3d 1413, 1422–23 (10th Cir. 1997) (asserting that prehistoric human skeletal remains are not "vulnerable victims"); United States v. Akindele, 84 F.3d 948, 953 (7th Cir. 1996) (finding that random victims of identity theft were not vulnerable for purposes of Section 3A1.1); United States v. Fontenot, 14 F.3d 1364, 1373 (9th Cir. 1994) (stating that defendant's wife was not unusually vulnerable to the crime of murder for hire because a person contracting for murder would likely know the victim); United States v. Plaza-Garcia, 914 F.2d 345, 347 (1st Cir. 1990) (holding that, when an offense already incorporates the factor claimed to establish vulnerability, the vulnerable victim enhancement may not be predicated on that factor); United States v. Moree, 897 F.2d 1329, 1336 (5th Cir. 1990) (reasoning that the fact that the victim was on the defensive because he was under indictment did not make him unusually vulnerable to the crime).

63. *E.g.*, United States v. Rumsavich, 313 F.3d 407, 413–14 (7th Cir. 2002); United States v. Crispo, 306 F.3d 71, 83 (2d Cir. 2002); United States v. Drapeau, 110 F.3d 618, 620 (8th Cir. 1997); United States v. Sangemino, 136 F. Supp. 2d 293, 299 (S.D.N.Y. 2001).

64. *See, e.g.*, United States v. Pavao, 948 F.2d 74, 78 (1st Cir. 1991) (concluding that the victim's drug addiction, together with her young age and closeness to family, warranted a finding that the victim was "vulnerable"); *accord* United States v. Bell, 367 F.3d 452, 470–71 (5th Cir. 2004) (concluding that the victim's alcoholism was properly considered in determining whether he qualified as a vulnerable victim); *see also* United States v. Amedeo, 370 F.3d 1305, 1315 (11th Cir. 2004) (finding that the defendant used his knowledge of victim's drug problem to accomplish the crime, thus warranting classification of the victim as vulnerable).

65. United States v. Astorri, 923 F.2d 1052 (3d Cir. 1991); *accord* United States v. Gawthrop, 310 F.3d 405, 412 (6th Cir. 2002) (holding that the granddaughter-grandfather relationship is a relationship that can impart a finding of vulnerability on the victim); *see also* United States v. Archdale, 229 F.3d 861, 870 (9th Cir. 2000) (finding that defendant should have known that the victim was vulnerable because the defendant had lived with victim and her mother for many years).

66. United States v. Brown, 7 F.3d 1155, 1160 (5th Cir. 1993); *see also* United States v. Scurlock, 52 F.3d 531, 542 (5th Cir. 1995) (finding loneliness to be a sufficient characteristic to

victim was sleeping when the crime was perpetrated[67]; and a victim's inability to escape from the location where the crime was committed.[68]

C. Some States Have Embraced the Vulnerable Victim Concept

Every jurisdiction that codifies the use of aggravating factors to enhance the sentences of criminals recognizes some form of the "particularly vulnerable victim" as one of those factors.[69] In the context of state vulnerable victim statutes, "particularly" is defined as "in a special or unusual degree, to an extent greater than in other cases."[70] Similarly, "vulnerability" is defined as "defenseless, unguarded, unprotected, accessible, assailable, [or] one who is susceptible to the defendant's criminal act."[71] Some courts have extended the definition of "victim" under these statutes to businesses.[72] Though state statutes authorizing sentencing enhancements for vulnerable victims may vary in their wording, their purpose is identical to that of Section 3A1.1.[73]

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classify victim as "vulnerable" under Section 3A1.1).

67. United States v. Plenty, 335 F.3d 732, 735 (8th Cir. 2003); *accord* United States v. Wetchie, 207 F.3d 632, 633 (9th Cir. 2000).

68. United States v. Tapia, 59 F.3d 1137, 1143 (11th Cir. 1995).

69. *See supra* note 48 (listing states that have statutorily codified the vulnerable victim enhancement for use as an aggravating factor in sentencing).

70. People v. Ramos, 165 Cal. Rptr. 179, 189 n.8 (Cal. Ct. App. 1980).

71. *Id.*

72. "[A] person or entity is a 'victim' under Tenn. Code Ann. § 40-35-114(3) when that person or entity is injured, killed, had property stolen, or had property destroyed by the perpetrator of the crime." State v. Lewis, 44 S.W.3d 501, 508 (Tenn. 2001) (quotation marks and emphasis omitted) (quoting State v. Raines, 882 S.W.2d 376, 384 (Tenn. Crim. App. 1994)).

73. For example, California provides that "circumstances in aggravation include: facts relating to the crime . . . including the fact that . . . the victim was particularly vulnerable." CAL. R. OF CT., R. 4.421(a)(3). This section is entitled "Circumstances in Aggravation" and can be found in Title Four, Division IV of the California Rules of Court. This section also provides that the listed factors in aggravation can be considered in sentencing "whether or not [they are] charged or chargeable as enhancements." *Id*. at 4.421(a). On January 22, 2007, the Supreme Court found California's sentencing scheme in violation of *Apprendi* and *Booker* because it allowed a judge to "find the facts permitting an upper term sentence." Cunningham v. California, 127 S. Ct. 856, 871 (2007).

Kansas sentencing guidelines state "the following *nonexclusive* list of aggravating factors may be considered in determining whether substantial and compelling reasons for departure exist: . . . [whether t]he victim was particularly vulnerable due to age, infirmity or reduced

1. These States May Require a Test to Determine the Vulnerability of the Victim Prior to Imposing an Enhanced Sentence

Most states that recognize the vulnerability of the victim as an aggravating factor have also required the fulfillment of certain tests before the imposition of the inflated sentence.[74] While each state differs, it is widely recognized that the sentencing court must find that (1) the victim was especially vulnerable due to a certain factor; and (2) that the factor made the victim more vulnerable than other potential victims of the same crime for whom the factor did not exist.[75]

Two ways that a criminal may capitalize on the vulnerability of the victim have been characterized in case law: 1) the victim may be targeted because of a certain characteristic that leads the criminal to believe that his chances of success are far greater due to the existence of that characteristic; and 2) the defendant may exploit the particular vulnerability of the victim during the actual commission of the crime, knowing that the specific characteristic will impede the victim's ability to effectively intervene or defend herself.[76] The crux of the case law interpreting statutes that recognize the particular vulnerability of the victim as an aggravating factor is the question of whether the proffered characteristic renders the victim more vulnerable to the crime than he or she otherwise would have been.

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physical or mental capacity which was known or should have been known to the offender." KAN. STAT. ANN. § 21-4716(c)(2) (Supp. 2005) (emphasis added).

74. Some state courts have agreed, in principle if not explicitly, with the federal courts that a two-part test must be satisfied before a sentence may be enhanced under a vulnerable victim statute. *See, e.g.*, Juneby v. State, 665 P.2d 30, 32 (Alaska Ct. App. 1983); State v. Davy, 397 S.E.2d 634, 638 (N.C. Ct. App. 1990); State v. Ramires, 37 P.3d 343, 351 (Wash. Ct. App. 2002) (asserting that the "[i]mpostion of an exceptional sentence based upon particularized vulnerability requires that the victim be more vulnerable to the offense than other victims, and that the defendant knows of the vulnerability" (citing State v. Bedker, 871 P.2d 673, 681 (Wash. Ct. App. 1994))).

75. *See* State v. Hicks, 812 P.2d 893, 897 (Wash. Ct. App. 1991).

76. *See* State v. Hilbert, 549 S.E.2d 882, 884 (N.C. Ct. App. 2001); *see also* Braaten v. State, 705 P.2d 1311, 1321 (Alaska Ct. App. 1985) (quoting ALASKA STAT. § 12.55.155(c)(6) (2004 & Supp. 2005) (standing for the proposition that the victim must be "substantially incapable of exercising normal physical or mental powers of resistance" for one of the reasons enumerated by the relevant statute or a similar reason).

2. Categories of Victims Recognized by States as Being Particularly Vulnerable

There are three main categories under which a court may define a victim as vulnerable: advanced or tender age,[77] physical or mental disability,[78] and "any other reason" that renders a victim "*substantially incapable* of exercising normal physical or mental power[s] of resistance . . . ."[79] Consistent across these categories is this: the characteristic of the victim that is alleged as rendering that victim more vulnerable cannot be considered as an aggravating factor *unless* it increases the culpability of the defendant.[80] Thus, if the

77. Nelson v. State, 567 So. 2d 548, 548 (Fla. Dist. Ct. App. 1990) (finding that a victim was vulnerable both because of her advanced age and because her age compounded her mental and physical suffering); State v. Peterson, 964 P.2d 695, 698 (Kan. Ct. App. 1998) (premising vulnerability on the fact that the defendant knew the victims were elderly and therefore knew they were vulnerable due to that factor); State v. Luna, 320 N.W.2d 87, 89–90 (Minn. 1982) (asserting that a victim is vulnerable due to young age when the victim is thirteen years old and the perpetrator holds a position of trust over the child); State v. Tunell, 753 P.2d 543, 548 (Wash. Ct. App. 1988) (holding that a three-year-old victim is vulnerable by virtue of her youth).

78. "If some disability impedes a victim from fleeing, fending off attack, recovering from its effects, or otherwise avoid being victimized, such a disability is a physical infirmity." State v. Drayton, 364 S.E.2d 121, 122 (N.C. 1988) (quotation marks omitted).

State court cases that have rendered a victim vulnerable due to physical or mental disability include: *Hasslen v. State*, 667 P.2d 732, 732–33 (Alaska Ct. App. 1983) (asserting that a victim who is hit over the head and thought, by the assailant, to be unconscious is a vulnerable victim); *People v. Chacon*, 43 Cal. Rptr. 2d 434, 442 (Cal. Ct. App. 1995) (finding the victim was vulnerable for sentence-enhancing purposes because of her sex and small stature); *Berry v. State*, 511 So. 2d 1075, 1077 (Fla. Dist. Ct. App. 1987) (premising vulnerability on the fact that the victim was pregnant); *Bockting v. State*, 591 N.E.2d 576, 582 (Ind. Ct. App. 1992) (basing the characterization of the victim as vulnerable on the fact that he had a history of mental illness); *State v. Graham*, 410 N.W.2d 395, 397 (Minn. Ct. App. 1987) (holding that a victim with muscular dystrophy can be considered "vulnerable" even if his impairments are not evident when he informs his captors of his disability); and *State v. Drayton*, 364 S.E.2d 121, 122 (N.C. 1988) (reasoning that victim was vulnerable because he was rendered physically infirm by his high blood alcohol level, and the perpetrators targeted him because they knew he was under the influence).

79. N.J. STAT. ANN. § 2C:44-1(a)(2) (West 2005) (emphasis added); *see also infra* notes 82–84 (detailing circumstances other than age and physical or mental disability upon which state courts have based findings of vulnerability).

80. State v. Barts, 343 S.E.2d 828, 845 (N.C. 1986), *overruled on other grounds by* State v. Vandiver, 364 S.E.2d. 373 (N.C. 1998) (holding that the age of a victim is not an aggravating factor for the purposes of sentencing unless it compounded the blameworthiness of the defendant).

The court in *State v. Thompson*, 348 S.E.2d 798 (N.C. 1986), stated that a criminal may take advantage of the age of the victim in two different ways:

victim possesses especially vulnerable characteristics but the defendant is either unaware of them or does not seek to take advantage of them in any way during the contemplation or commission of the crime, then the defendant cannot legitimately be subjected to a sentence enhancement for preying upon a vulnerable victim. Further, the characteristic that is put forth to establish the particular vulnerability of the victim must have impeded the victim's ability to escape from the criminal conduct, to fend off the criminal, to recover from the effects of the crime, or to otherwise avoid becoming the victim of a crime.[81]

Other courts interpreting the vulnerability of a victim regardless of the victim's age or physical or mental capacity have found a multitude of factors sufficient to confer "vulnerable victim" status. These factors include: the relationship between the defendant and the

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> First, he may target the victim *because of* the victim's age, knowing that his chances of success are greater where the victim is very young or very old. Or the defendant may take advantage of the victim's age *during* the actual commission of a crime against the person of the victim, or in the victim's presence, knowing that the victim, by reason of age, is unlikely to effectively intervene or defend himself.

Id. at 800 (quotation marks omitted) (emphasis added). The reader should bear in mind that this case only refers to age because that was the only characteristic alleged as rendering the victim more vulnerable. Any characteristic that renders the victim more vulnerable could be substituted for the word "age" and the same rationale should apply (though in light of *Apprendi*, *Blakely*, and *Booker* this is no longer certain).

81. The mere existence of a mental or physical defect, or of advanced age or extreme youth is not enough, by itself, to trigger the label of "vulnerable victim" and result in a sentence enhancement. Merely relying on the personal characteristics of the victim and discounting the external characteristics of the crime has consistently been a losing argument in jurisdictions that have codified the vulnerable victim as a sentence-enhancing factor. "A court must . . . look to the specific facts and circumstances surrounding a defendant's crime to determine whether a particular enhancement factor is applicable." State v. Lewis, 44 S.W.3d 501, 506 (Tenn. 2001); *see* State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App. 1995); *see also* People v. Dancer, 53 Cal. Rptr. 2d 282, 292 (Cal. Ct. App. 1996) (declaring "particular vulnerability is determined in light of the *total milieu* in which the commission of the crime occurred" (citations and quotation marks omitted) (emphasis added)); People v. Whitten, 28 Cal. Rptr. 2d 123, 126 (Cal. Ct. App. 1994) (asserting "the scope of the information a sentencing court may consider is very broad and the factors which the trial court is directed to consider in determining aggravation or mitigation of the crime include practically everything which has a legitimate bearing on the matter in issue" (citations and quotation marks omitted)); People v. Ramos, 165 Cal. Rptr. 179, 188 (Cal. Ct. App. 1980) ("The fact that vulnerability encompasses more than age or physical traits justifies the rejection of appellant's narrow construction of the rule. . . . [T]he setting of the crime has importance in determining vulnerability.").

victim,[82] the location and status of the victim at the time of the crime,[83] and other miscellaneous factors.[84]

D. Consistent Characteristics of Vulnerable Victims Under Federal and State Sentencing Statutes

No hard and fast rule for determining whether a victim was especially vulnerable exists. What is certain is that the perceived vulnerability must make the victim less able to prevent or defend herself from being the victim of the crime or make the apparent success of the crime's perpetration seem greater. Further, the criminal must or should have reasonably been expected to know of that victim's vulnerability and assessed that vulnerability before committing the crime. Beyond these requirements, court decisions regarding the vulnerability of a victim are largely a function of analyzing the particular circumstances of the crime. Possibly because of their infrequent occurrence, the question of whether natural disaster victims possess the characteristics of a vulnerable victim has gone virtually unanswered.

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82. *See generally* William D. Bremer, Annotation, *Vulnerability of Victim as Aggravating Factor Under State Sentencing Guidelines*, 73 A.L.R.5TH 383, 537–52 (1999) (classifying as a vulnerable characteristic a relationship of trust or authority, a familial relationship, a prior marital relationship, sexual or other abuse by the defendant, a pattern of abuse and reconciliation, being nude and intimate with the defendant, a befriending of the victim or bestowing gifts on the victim).

83. *See id*. at 552–70 (classifying as potentially vulnerable characteristics that the victim was a tourist; was an immigrant/visitor from another country; was at home or in an adjoining yard; was at work; was in the hospital; was in the wrong place at the wrong time; had been removed to an unfamiliar setting away from family, and been trapped with a lessened chance of escape; had been isolated in defendant's residence; had been evacuated from their home due to flooding; was a stranded motorist; was sitting in a car; was driving a car; was riding a bicycle; was riding on a bus; was a pedestrian; or was hiking in a remote area).

84. *See id*. at 570–80 (classifying as a potentially vulnerable characteristic the fact that the victim was raised in a sheltered religious community, the crime occurred in the presence of victim's child or children, the mother failed to protect the victim, the victim was disadvantaged financially, the victim was physically restrained, the victim had his or her underwear removed, the victim was outnumbered, the victim was unarmed, the victim was not expecting the assault, the victim was stranded after the crime, the victim's husband was away on military deployment, the victim was thought to be a marijuana grower, the victim sports league was operated on trust).

III. PREVIOUS APPLICATION OF FEDERAL AND STATE VULNERABLE VICTIM ENHANCEMENTS TO VICTIMS OF NATURAL DISASTERS

A. The Legal Definition of a Natural Disaster

Defining a natural disaster does not pose much of a problem for federal and state entities. The following core factors, articulated by *American Jurisprudence*, tend to remain consistent across jurisdictions: "the phenomenon must be (1) abnormal or unusual in occurrence; (2) a force strictly of nature, with no human assistance or influence; and (3) of such severity that human prudence or precaution could not have avoided the damage thereby caused."[85] Considering the severity of natural disasters it is no wonder that they have the ability to "affect verdicts, judgments, and rulings on a large variety of legal issues."[86]

Although federal and state judges possessed the discretion prior to *Apprendi*, *Blakely*, and *Booker* to find that the circumstances surrounding a case warranted the classification of the victim as "vulnerable," no court has ever explicitly held that victims of natural disasters are "vulnerable" under vulnerable victim statutes. In fact, the only case located by the author that explicitly addressed the issue of whether a victim is "vulnerable" following a natural disaster was

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85. 6 AM. JUR. PROOF OF FACTS 3D 319, § 1 (2005) (footnotes omitted). The term "natural disaster" is generally synonymous with the terms "act of God," "force majuere," and "vis major." 1 AM. JUR. 2D *Act of God* § 2, § 4 (1964). The Second Edition of American Jurisprudence states:

> [A]n event may be considered an act of God when it is occasioned exclusively by the violence of nature. While courts have articulated varying definitions of an act of God, the crux of the definition typically is an act of nature that is the sole proximate cause of the event for which liability is sought to be disclaimed.

Id. § 1 (footnotes omitted).

86. 6 AM. JUR., *supra* note 85, § 1; *cf.* Brown v. Sandals Resorts Int'l, 284 F.3d 949 (8th Cir. 2002) (applying South Dakota law; unusually strong winds); Skandia Ins. Co. v. Star Shipping AS, 173 F. Supp. 2d 1228 (S.D. Ala. 2001) (Hurricane Georges); Blythe v. Denver & R.G. R.y. Co., 15 Colo. 333 (Colo. 1891) (windstorm); Fla. Power Corp. v. City of Tallahassee, 18 So. 2d 671 (Fla. 1944) (hurricane); Allen v. Simon, 04-4 (La. App. 3 Cir. 12/08/04); 888 So.2d 1140 (Hurricane Lili on Oct. 3, 2002); Fulgum v. Town of Cortlandt, 770 N.Y.S.2d 416 (N.Y. App. Div. 2003) (Hurricane Floyd on Sept. 17, 1999); Shelby Ins. Co. v. Northeast Structures, Inc., 767 A.2d 75 (R.I. 2001) (high winds).

one involving mail fraud perpetrated upon residents of an area recently hit by a tornado.[87]

B. Previous Application of the Federal Vulnerable Victim Enhancement to Victims of Natural Disasters

The Fourth Circuit Court of Appeals analyzed the case of *United States v. Wilson*[88] under Section 3A1.1. Wilson sent letters soliciting funds for victims of a tornado to an assortment of residents in the affected area.[89] The defendant had no personal knowledge of the individual characteristics of the people to whom he mailed the letters.[90] The court reasoned that since the defendant chose his victims at random and was completely unaware of their personal characteristics, he had not taken advantage of any particular vulnerability in contemplating or committing the crime.[91] Therefore the application of a vulnerable victim enhancement to his sentence by the trial court was erroneous.[92] According to the court: "The vulnerability that triggers § 3A1.1 must be an 'unusual' vulnerability which is present in only some victims *of that type of crime*. Otherwise, the defendant's choice of a likely victim does not show the extra measure of criminal depravity which § 3A1.1 intends to more severely punish."[93]

Subsequent case law has limited the holding in *Wilson*.[94] In *United States v. Page*[95] the Eleventh Circuit Court of Appeals

87. United States v. Wilson, 913 F.2d 136 (4th Cir. 1990).

88. *Id.*

89. *Id*. at 137.

90. *Id.* at 138.

91. *Id*. Wilson fraudulently solicited donations for victims of the tornado that had recently struck the area. *Id*.

92. *Id*. at 139. The fact that the town in which the victims resided had recently been struck by a tornado did not automatically confer upon the residents the title of "vulnerable" with respect to the crime of mail fraud. *Id*. at 138; *see also supra* note 81 and accompanying text (supporting the contention that a finding of vulnerability must be premised on more than just the existence of a characteristic that could make the victim more vulnerable).

93. *Id*. at 138 (emphasis added) (citing United States v. Moree, 897 F.2d 1329, 1335 (5th Cir. 1990)).

94. *See* United States v. Page, 69 F.3d 482, 490 n.7 (11th Cir. 1995); *see also* United States v. Holmes, 60 F.3d 1134, 1136 (4th Cir. 1995). *But see* United States v. Smith, 39 F.3d 119, 123 (6th Cir. 1994).

95. *Page*, 69 F.3d 482.

reasoned that Section 3A1.1 did not apply to the facts in *Wilson* because the defendant's scheme only "*happened* to ensnare a few particularly vulnerable victims."[96] The court in *Page* held that when the crime is purposely perpetrated against the most vulnerable victims, even if it happens to afflict some that are not as vulnerable, Section 3A1.1 applies.[97]

In *United States v. Holmes*[98] the Fourth Circuit Court of Appeals revisited their decision in *Wilson*. The court distinguished *Holmes* from *Wilson* by stating that, in *Wilson*, evidence had not been presented to support the conclusion that the "randomly selected victims" of Wilson's crime were more vulnerable than most people who would be asked to donate to victims of a natural disaster.[99] Therefore, the court concluded, Section 3A1.1 applies when the victims of a crime are purposefully chosen, either in whole or in part, because of their perceived vulnerability.[100]

Though none of the cases following *Wilson* dealt with victims of natural disasters, their holdings apply with equal force to this group of people. Essentially, *Wilson* has been limited to instances in which the victims' particular vulnerability only becomes known after the commission of the crime has commenced. As such, the requirements of Section 3A1.1 are met when a crime is perpetrated against a victim chosen for their perceived vulnerability regardless of whether the criminal was accurate in his perception. However, there is dissension

96. *Id.* at 490 (quotation marks omitted) (emphasis added).
97. *Id*. at 491–92.
98. *Holmes*, 60 F.3d 1134.
99. *Id*. at 1136 n.3.
100. *Id*. at 1136–37. Similarly, the Sixth Circuit Court of Appeals relied heavily on the commentary to Section 3A1.1 in analyzing the case of *United States v. Smith*, 39 F.3d at 123. In *Smith* the court held that the defendant's actions were analogous to the coincidentally vulnerable victim emphasized in the commentary. *Id*. at 124. That portion states:

> 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.

Id. at 123. Therefore, Section 3A1.1 applied to victims who had been *chosen* for their vulnerability but not those that were victimized and later found to be more vulnerable.

among courts regarding the characterization of a broad class of people, such as victims of natural disasters, as vulnerable.

C. Courts Have Exhibited a Hesitancy to Characterize Classes of Victims as Vulnerable

Courts are generally hesitant to confer "vulnerable victim" status on classes of people.[101] Following the rationale of *United States v. Moree*[102] most courts have declined to confer vulnerable victim status on a class of people because such a blanket classification would remove the particularized analysis of each victim who happened to belong to that class.[103] *Moree* held that a victim's vulnerability must be unusual in that only some victims of that crime possess the vulnerable characteristic.[104] For instance, bank tellers as a class are not more vulnerable to the crime of bank larceny than other victims of the same crime,[105] newlyweds as a class are not more vulnerable to the crime of extortion than other victims,[106] and South African nationals seeking permanent residence in the United States are not more vulnerable to the crime of fraud than other victims[107] *unless* it can be shown that they were particularly susceptible for a reason other than a prerequisite condition of the crime.[108] It can hardly be argued that being the victim of a natural disaster is a prerequisite of *any* crime. Accordingly, the characteristic that makes victims of a natural disaster particularly vulnerable to a crime cannot ever be one

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101. *See* United States v. Gill, 99 F.3d 484, 486–87 (1st Cir. 1996) ("Appeals courts have been rather more willing to set aside determinations of vulnerability made solely on a class basis than when the focus was on the susceptibility of a specific individual.").

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

103. *Id*. at 1335-36; *see* United States v. Sutherland, 955 F.2d 25, 27 (7th Cir. 1992); United States v. Creech, 913 F.2d 780, 782 (10th Cir. 1990); United States v. Garner, No. 92-5069, 1993 WL 24791 (4th Cir. Feb. 4, 1993). *But cf.* United States v. Yount, 960 F.2d 955, 957 (11th Cir. 1992) (asserting that the characterization of classes of victims as vulnerable is consistent with the application of Section 3A1.1).

104. *Moree*, 897 F.2d at 1335.

105. United States v. Morrill, 984 F.2d 1136 (11th Cir. 1993), *vacated*, 506 U.S. 1043 (1993).

106. *Creech*, 913 F.2d at 782.

107. United States v. Jordan, 734 F. Supp. 687, 689 (E.D. Pa. 1990).

108. *Moree*, 897 F.2d at 1335–36.

shared by "normal" victims of the crime unless the crime is only perpetrated against those that survive natural disasters.

IV. THE NATURE OF CRIMINAL SENTENCING FOLLOWING THE JUDICIAL DE-EVOLUTION OF FEDERAL AND STATE SENTENCING GUIDELINES

A. Apprendi, Blakely, and Booker Have Opened the Door for Criminals to Walk Away from the Harsh Punishments Their Crimes Deserve, and Have Deprived Victims of the Justice Warranted by the Criminal Acts They Endured

At best, *Apprendi*, *Blakely*, *Booker*, and their progeny symbolize the Supreme Court's commitment to the preservation of the Sixth Amendment right to a jury trial.[109] These cases require that if a state or the federal government authorizes the use of aggravating factors in sentencing, other than a prior conviction, the factor should be alleged in an indictment and proven beyond a reasonable doubt to a jury or admitted to by the defendant. Only then should the aggravating factor be used to enhance a criminal sentence. Legal scholars have argued that such a requirement is necessary to preserve the role of the jury as the primary fact-finder and to protect defendants against the subjectivity inherent in unilateral decision-making.

Despite this contention, *Apprendi*, *Blakely*, and *Booker* have also done a great disservice to the law and to society at large. They have virtually stripped the USSG of its usefulness and, in the process, called into question state sentencing statutes and schemes.[110] They

109. According to a LexisNexis Shepard's report, 558 cases have distinguished the holding in *Booker*, and 1439 cases have followed it, as of February 6, 2006. Bearing in mind that the Supreme Court handed down its decision on January 12, 2005, these numbers depict the vast amount of litigation caused by the case. The impact of the *Booker* decision was so profound that the USSC has devoted a portion of its main website to the issues it has created. *See* United States Sentencing Commission, http://www.ussc.gov/bf.htm (last visited Feb. 22, 2007). As of the same date, and according to another LexisNexis Shepard's report, *Apprendi* has been criticized in six cases, distinguished in 1422, and followed in 1192.

Similarly, *Blakely* has been questioned once, criticized by three cases, distinguished by 972, and followed by 760. A cursory glance at a few of these subsequent cases reveals one thing: both state and federal courts across the nation face innumerable questions regarding the proper application (and constitutionality) of their sentencing guidelines.

110. *See* Berman, *supra* note 17, at 653 ("[T]he future structure and operation of modern

sentencing systems may greatly depend on how courts and others approach the due process provisions and principles which lurk in the unexplored shadows of the Supreme Court's decisions in *Blakely* and *Booker*.").

Predictably the Supreme Court's rulings in *Blakely* and *Booker* have had a noticeable effect on state sentencing guidelines. Those that mimicked the state of Washington's sentencing statute could be called into question, as well as other statutes that failed to require that an aggravating factor other than a prior conviction be found beyond a reasonable doubt by a jury before being considered in sentencing.

Following *Apprendi*, and without waiting for *Blakely* and *Booker*, the Kansas Supreme Court declared the state's sentencing statute unconstitutional on the grounds that it violated a defendant's Sixth and Fourteenth Amendment rights. State v. Bradford, 34 P.3d 434, 447 (Kan. 2001) ("'*Apprendi* dictates our conclusion that Kansas' scheme for imposing upward departure sentences, embodied in K.S.A. 2000 Supp. 21-4716, violates the due process and jury trial rights contained in the Sixth and Fourteenth Amendments to the United States Constitution.'" (quoting State v. Gould, 23 P.3d 801 (Kan. 2001))).

Arkansas was put on alert by Justice O'Connor's reference to its sentencing statute in her *Blakely* dissent. Blakely v. Washington, 542 U.S. 296, 323 (2004) (O'Connor, J., dissenting). Spurred to action by the Court's resounding support for *Blakely* in the *Booker* decision, the Arkansas legislature passed a bill entitled "An Act to Confirm That [sic] the Sentencing Guidelines of the State of Arkansas are Entirely Voluntary . . . ." Stephanie Gosnell, Case Note, *Hurricane* Blakely *and the Calm After the Storm Found in* Booker, 58 ARK. L. REV. 449, 465 (2005). The bill was signed into law on February 18, 2005. *Id*. at 467; *see* 2005 Ark. Acts 186 (containing the text of the codified bill).

Additionally, Gosnell asserted that, despite the passage of the Act, the Arkansas sentencing scheme might not have been subject to a *Blakely* attack. According to Gosnell, this is because Arkansas courts employ bifurcated proceedings, which permit a separate jury distinct from that which convicted the defendant, to impose sentence. Gosnell, *supra*, at 467. This session law confirmed that, under Arkansas' existing sentencing scheme, judges are not required to follow the guidelines, but could if they so chose, in imposing sentence. *Id*. at 465–66.

Balking at the similarities between their sentencing guidelines and those struck down in *Blakely*, Minnesota recently amended state sentencing guidelines to require sentence-enhancing factors to be submitted to and found by a jury beyond a reasonable doubt before they may be used in sentencing. Matthew R. Kuhn, Note, *The Earthquake That Will Move Sentencing Discretion Back to the Judiciary?* Blakely v. Washington *and Sentencing Guidelines in Minnesota*, 31 WM. MITCHELL L. REV. 1507, 1522 (2005); *see* MINN. STAT. § 244.10 (2005).

Other states sentencing schemes are more vulnerable to constitutional attack. According to one commentator, Pennsylvania's sentencing statutes are prime targets for appeal under *Apprendi*, *Blakely*, and *Booker* in light of their applicable evidentiary standard and delineated finder of fact. Angelica L. Revelant, Comment, *Indeterminate Immunity: A Review of the Pennsylvania Sentencing Guidelines*, 110 PENN ST. L. REV. 187, 206 (2005) ("Nearly all provisions of the Sentencing Guidelines provide that certain enhancements are not elements and need only be found by the judge by a preponderance of the evidence.").

The state of Oregon's sentencing scheme, modeled after Washington's now-unconstitutional guidelines, faces similar challenges as well, though one commentator sees an economic benefit to overturning aggravated sentences on constitutional grounds. Jesse Wm. Barton, *The* Blakely *Dividend: Has the Supreme Court Made Us an Offer We Can't Refuse?*, 64 OR. ST. B. BULL. 15 (2004).

Indiana, as well as every other state that authorizes the state's judiciary to impose sentence enhancements for aggravating factors, has also faced indecision regarding state sentencing guidelines post-*Apprendi*, *Blakely*, and *Booker*. Joel M. Schumm, *Recent Developments in*

have effectively removed from the purposes of sentencing in the federal courts any guarantee of uniformity and deterrence for criminals contemplating especially heinous crimes. By doing so, the Court compromised the protection of the public. In this vein, *Apprendi*, *Blakely*, and *Booker* have opened the door to innumerable constitutional challenges regarding the imposition of any sentence that has taken into account any aggravating factor, and slammed it shut on justice.

In the wake of the storm surge of *Apprendi*, *Blakely*, and *Booker*, federal and state courts are up the bayou without a paddle. Without mandatory consideration of statutes protecting vulnerable victims, the distinction now lies within the discretion of judges who cower under these cases. Some will deign to chance an appeal by continuing to impose the enhancement wherever they deem appropriate and by whatever evidentiary standard they choose to employ; others will decide that such a classification and enhancement are not worth the trouble of potentially having the case remanded for re-sentencing.[111] Either way one thing is clear: victims of Hurricane Katrina who fell victim to violent crimes in her wake may be victimized once again by the whirlwind of consequences of *Apprendi, Blakely*, and *Booker* in that there is no longer any assurance that justice will be meted in proportion to the criminal acts these victims endured.

B. Victims of Natural Disasters Possess the Necessary Characteristics to Qualify as Vulnerable Victims Under Federal and State Sentencing Guidelines

Like the person with a broken leg, the person confined in an unfamiliar place, or the mother alone at home with her children, the victims of Hurricane Katrina were particularly vulnerable to crimes of assault, rape, robbery, and murder. After the storm raged and the levees failed, all of their worldly possessions and comforts were washed away. Battered and broken, like the city that contained them, these people did not possess the mental and physical fortitude to protect themselves from becoming victims of these atrocities. The

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Indiana Criminal Law and Procedure, 38 IND. L. REV. 999, 1014 (2005).

111. *See* McVoy, *supra* note 46.

mental anguish inflicted by the trauma attendant to such a disaster, coupled with physical exhaustion, hunger, and lack of "safe-harbors," made the survivors prime and easy targets for criminal activity.

Unlike "normal" victims of these crimes, the victimized survivors of Katrina were especially vulnerable to such attacks. A natural disaster precipitated the majority, if not all, of their present vulnerabilities. In some cases, a natural disaster forced them from their homes. If survivors were lucky enough to remain in their homes, all telephone communication had been interrupted by the disaster, which prevented them from calling for help if necessary. Those forced to leave their homes could fend for themselves on the streets of New Orleans or make their way to the Superdome or Convention Center, neither shelter offering much more safety than could be found on the streets. Family members were separated, tensions were at the breaking point, and no person's well-being was assured.

It is difficult to believe that criminals who choose to assault, rape, rob, or murder a person immediately following a natural disaster on the scale of Hurricane Katrina would be ignorant of the victim's increased level of vulnerability, unlike the tornado victims in *Wilson*. Consequently, the vulnerable victim enhancement must apply to criminals who commit such crimes in the immediate wake[112] of natural disasters with the *knowledge* that their victims are especially vulnerable. Following the Supreme Court's decisions in *Apprendi*, *Blakely*, and *Booker*, however, there is no guarantee for the victims in either state or federal court that this factor will be taken into consideration during sentencing.

V. FEDERAL AND STATE LEGISLATURES SHOULD AMEND THEIR SENTENCING GUIDELINES TO EXPLICITLY PROVIDE FOR THE CHARACTERIZATION OF VICTIMS OF NATURAL DISASTERS AS VULNERABLE VICTIMS

Initially, federal and state sentencing guidelines should be explicitly amended to include victims of natural disasters as particularly vulnerable victims for purposes of sentencing. This category should be limited to natural phenomena that have been

112. *See infra* note 114 and accompanying text.

categorized by the relevant government as "disasters."[113] Such a definition would restrict from consideration natural occurrences that do not have substantial ramifications on the day-to-day functioning of cities, or events that fail to deprive reasonable persons of the mental and physical fortitude necessary to protect them from becoming victims of crime. Additionally, the temporal aspect of such a classification should be limited to the time it would take a reasonable person to recover their protective faculties.[114] Incorporated into such an amendment should also be the already-present requirement that defendants know or reasonably should know of the victim's vulnerability as a natural disaster survivor.[115]

After amending federal and state vulnerable victim enhancements, these legislatures must revamp their sentencing guidelines to comport with the requirements of *Apprendi*, *Blakely*, and *Booker* so that this new amendment may be constitutionally enforced.[116] For federal and state sentencing guidelines to pass constitutional muster, the following changes must be implemented: prosecutors should be required to allege all aggravating factors they wish to be considered in sentencing in the indictment; these aggravating factors should be analyzed by a jury (which must find that each factor existed beyond a reasonable doubt) or admitted by the defendant; and, finally, when a jury finds that an aggravating factor exists, it must be considered in

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113. Natural phenomena that would feasibly be included under this definition are hurricanes, tornados, earthquakes, floods, and possibly windstorms. *See* Federal Emergency Management Agency, Declared Disasters Archive, http://www.fema.gov/news/disaster_totals_annual.fema (last visited Feb. 22, 2007) (listing, year-by-year, all federally declared natural disasters dating back to 1953).

114. The amount of time for a reasonable victim to recover should be decided by a jury as well. A reasonable person is defined by Black's Law Dictionary as:

> A hypothetical person used as a legal standard . . . ; specif[ically], a person who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and of others' interests. The reasonable person acts sensibly, does things without serious delay, and takes proper but not excessive precautions.

BLACK'S, *supra* note 38, at 1294.

115. *See* cases cited *supra* note 56 and Parts II.B, II.C.2, II.D (discussing the requirement that a defendant know of or reasonably should be expected to know of a victim's vulnerability).

116. *See* discussion *supra* Part IV.A (outlining the changes to current sentencing guidelines necessary to bring them into accordance with *Apprendi*, *Blakely*, and *Booker*); *see also* McVoy, *supra* note 46, at 1621–41 (exploring the strengths and weaknesses of multiple forms of sentencing schemes post-*Apprendi*, *Blakely*, and *Booker*).

sentencing. These requirements comply with the constitutional protections of the Fifth, Sixth, and Fourteenth Amendments, and thus with the holdings of *Apprendi*, *Blakely*, and *Booker*.[117]

A. Arguments Against the Characterization of Victims of Natural Disasters as Vulnerable Victims Fail When the Enhancement Is Submitted to a Jury to Be Found Beyond a Reasonable Doubt

Some courts have disapproved of per se classification of certain groups of victims as vulnerable because of a belief that each victim's vulnerability is precipitated by different factors. Cases that have relied on this reasoning can be distinguished from cases involving victims of natural disasters. The vast majority of the decisions mandating individualized analysis of a victim's vulnerability are premised on the principle that the particular vulnerability at issue is not the inevitable consequence of circumstances beyond the victim's control (such as the vulnerabilities caused by a natural disaster). Contrary to the circumstances of bank tellers, newlyweds, and those seeking permanent residence in the United States,[118] victims of natural disasters have *no control* over the circumstances that manufacture their particular vulnerability.

Moreover, per se classification of victims as vulnerable is authorized by Section 3A1.1.[119] Courts have held that the following classes of victims can be categorized as particularly vulnerable: the elderly,[120] dispatched cab drivers,[121] medical patients,[122] black

117. Various legal scholars disagree as to whether such requirements are actually the best way to achieve constitutionally sound sentencing guidelines. *Compare* Kuhn, *supra* note 110, at 1527–30, 1543 (discussing the viability of similar requirements by assessing Kansas' redesigned sentencing guidelines and ultimately asserting that "other states' legislatures, and possibly the United States Congress, will follow the yellow brick road to a Kansas-modeled guidelines system"), *and* Revelant, *supra* note 110, at 206–07 (stating that requiring prosecutors to allege sentence-enhancing factors in the indictment could better protect a defendant's constitutional rights), *with* Schumm, *supra* note 110, at 1023 (arguing that "[a]ny sort of fix—legislative or judicial—would create a different and complicated felony trial procedure from the filing of an information through discovery, trial, and sentencing"), *and* McVoy, *supra* note 46, at 1641 (concluding that bifurcated trials allowing a jury to find all relevant facts and a judge to use his discretion to apply those facts is the "most constitutionally firm" option).

118. *See supra* notes 103–06 (regarding the cases involving these classes of victims).

119. United States v. Gill, 99 F.3d 484, 487 (1st Cir. 1996).

120. United States v. Yount, 960 F.2d 955, 957 (11th Cir. 1992) (finding that theft from the accounts of elderly victims was sufficient to warrant a sentence enhancement based on the

teenagers,[123] and people with poor credit history.[124] Victims of natural disasters, like victims belonging to these classes, are per se vulnerable victims because the circumstances surrounding their victimization were a major factor in their vulnerability *and* their vulnerability was created by circumstances beyond their control at the time of victimization.

Further, the implementation of constitutional safeguards requiring a jury to determine beyond a reasonable doubt if the victim and the disaster meet the necessary requirements removes the fear that these cases will not be subjected to an individualized analysis of the particular victim's vulnerability.[125] If jury members find that the requisite natural disaster did not occur they may look to the other provisions of the vulnerable victim enhancement. If they find that the victim was in fact not vulnerable and that the defendant did not believe any vulnerability existed then they are at liberty to reject the enhancement. Such procedures preserve the individualized aspects of vulnerable victim enhancements while clearly sanctioning the consideration of the occurrence of a natural disaster in such an analysis.

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vulnerable victim statute).

121. United States v. Malone, 78 F.3d 518, 522–23 (11th Cir. 1996) (contending that car-jackers can victimize the driver of any car but that most drivers are not required by their job, as cab drivers are, to stop for and allow strangers into their vehicle, and this fact renders dispatched cab drivers more vulnerable than most victims of car-jackings).

122. United States v. Echevarria, 33 F.3d 175, 180 (2d Cir. 1994) (holding that people seeking medical treatment are more susceptible to the fraudulent schemes of a person pretending to be a licensed doctor than other potential victims); United States v. Bachynsky, 949 F.2d 722, 735 (5th Cir. 1991) (finding medical patients were the unsuspecting instrumentalities of a doctor's fraud and therefore vulnerable victims for purposes of sentencing).

123. United States v. McDermott, 29 F.3d 404, 411 (8th Cir. 1994) (reasoning that when the victims of civil rights violations live in a racially isolated place and are of young age they are more vulnerable than other victims of civil rights violations would be).

124. United States v. Peters, 962 F.2d 1410, 1417–18 (9th Cir. 1992) (finding that people who are believed to have poor credit histories and are solicited for credit cards are more vulnerable than other people who would receive the same solicitation).

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

CONCLUSION

"An attack upon a vulnerable victim takes something less than intestinal fortitude. In the jargon of football players, it is a cheap shot."[126] Victimizing an already vulnerable person deserves harsher punishment than would be imposed if the defendant had not capitalized on the victim's weakness in perpetrating the crime. Victims of natural disasters on the scale of Hurricane Katrina deserve concrete assurances that this particular vulnerability will be evaluated if they are criminally victimized in the wake of such events. To constitutionally accomplish this, federal and state sentencing guidelines must be amended to comport with the requirements of *Apprendi*, *Blakely*, and *Booker*.

The thought of reconstructing the United States Sentencing Guidelines as well as individual state sentencing schemes is daunting. However, both systems' guidelines must be re-evaluated, re-tooled, and re-enacted to comport with the requirements of *Apprendi*, *Blakely*, and *Booker*.[127] A few states have already undertaken this great challenge; some did not even wait for the Supreme Court's decisions in *Blakely* and *Booker* to do so.[128] To the public at large, the victims of violent crime, and the defendants who commit those crimes, the legislatures owe a duty to bring their jurisdictions in line with these cases. The longer each legislature waits to remedy the inherent defects in these statutes, the greater the number of people

126. People v. Ramos, 165 Cal. Rptr. 179, 189 n.8 (Cal. Ct. App. 1980) (citing People v. Smith, 156 Cal. Rptr. 502, 503 (Cal. Ct. App. 1979).

127. *See* Berman, *supra* note 17, at 685; Jon Wool, *Beyond* Blakely*: Implications of the* Booker *Decision for State Sentencing Systems*, 17 FED. SENT'G REP. 285 (2005); Joshua S. Geller, Comment, *A Dangerous Mix: Mandatory Sentence Enhancements and the Use of Motive*, 32 FORDHAM URB. L.J. 623, 624 (2005); Brian Haagensen II, Case Note, *Blakely v. Washington*, 31 OHIO N.U. L. REV. 287, 300 (2005); *see also* Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1741 (2005) (contending that the federal legislature may not revisit the guidelines at all in the wake of *Apprendi*, *Blakely*, and *Booker* because the "political reality" is that no section of the government truly desires an indeterminate sentencing scheme).

128. *See supra* note 110. Overall, *Apprendi, Blakely*, and *Booker* have left state sentencing guidelines in turmoil and victims without the assurance that their attackers will receive punishment commensurate with their crime.

who will not receive the justice they deserve, and the greater the number of defendants who will not receive the punishment their crimes warrant.