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Double Counting: The Appropriate Application of the Vulnerable Victim Enhancement for Child Sex Offenders

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I. INTRODUCTION

What is the appropriate punishment for those who commit unimaginable crimes? Can the sentence for an individual who records himself sexually abusing a three-year old girl ever be too harsh? While such acts should indeed be duly punished, it is important to restrain judicial discretion in imposing criminal sentences. To that effect, safeguards exist to prevent the unjust double sentencing of criminals for the same offense.[1] However, these safeguards fail when statutorily ambiguous language allows judges to impose an additional sentence based on a factor of a crime that has already been accounted for in the underlying base sentence.[2]

The interpretation of an ambiguous statute was the central issue before the United States Court of Appeals for Fourth Circuit, which had to decide whether the district court appropriately applied the vulnerable victim sentencing enhancement in addition to applying a sentencing enhancement for crimes committed against victims under the age of twelve years old.[3] In *United States v. Dowell*, a case involving the production and transportation of child pornography, the Fourth Circuit held that the district court erroneously applied the vulnerable victim enhancement because the victim's age had already been accounted for in the victim under twelve years old enhancement.[4] The Fourth Circuit departed from the Fifth and Ninth Circuits, which had upheld the application of the vulnerable victim enhancement in child pornography cases, creating a circuit split.[5]

This Comment argues the Fourth Circuit correctly held that the vulnerable victim enhancement should not be applied when the underlying offense has already accounted for the victims' age. Part II explains the Sentencing Guidelines Manual and the vulnerable victim enhancement.[6] Part II also presents the competing arguments of the Fourth Circuit and the Fifth and Ninth Circuits.[7] Part III of this Comment argues that the district

1. *See generally* U.S. SENTENCING GUIDELINES MANUAL § 1A3 (U.S. SENTENCING COMM'N 2014).

2. *See generally* Theresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 397 (1991) (illustrating the initial Congressional goals of sentencing reform and the general authority granted to the Sentencing Commission).

3. *See* United States v. Dowell, 771 F.3d 162, 171 (4th Cir. 2014).

4. *See id.* at 174.

5. *Accord* United States v. Jenkins, 712 F.3d 209, 214 (5th Cir. 2013); United States v. Wright, 373 F.3d 935, 943 (9th Cir. 2004) (focusing on the fact that a very young child is developmentally and psychologically different than an older minor child).

6. *See infra* Parts II.A - I.C.

7. *See infra* Part II.D.

court in *Dowell* erred in finding that a young child's cognitive underdevelopment is sufficiently distinct from young age.[8] Part III also argues that the Fourth Circuit correctly held that factors like the cognitive and psychological development of a three-year old are intimately linked with age itself; Part III also presents case law from sister circuits to support the Fourth Circuit.[9] Finally, Part III concludes by arguing that the district court in *Dowell* could have alternatively applied the vulnerable victim enhancement because the victims were vulnerable, not due to their age, but because they were left without parental supervision and were assaulted multiple times in their own residence.[10]

II. BACKGROUND

A. Understanding the U.S. Sentencing Guidelines Manual

The U.S. Sentencing Guidelines Manual sets out a uniform sentencing policy for defendants based on the relationship between the offense conduct and the defendant's criminal history. The Manual provides several victim-related upward enhancements for categories such as hate crime motivation, vulnerable victims, and serious human rights offenses, which can increase a defendant's sentence.[11] The Sentencing Commission provides further guidance by releasing Official Commentary to the Guidelines Manual.[12] The U.S. Supreme Court has ruled that the Commentary in the Guidelines Manual, which interprets or explains a guideline, is authoritative unless it violates the U.S. Constitution, is inconsistent with, or is a plainly erroneous reading of, that guideline.[13] Thus, the Commentary serves as more than a mere guideline for interpretation and actually operates as binding law.[14]

B. Understanding the Vulnerable Victim Enhancement

The Guidelines Manual states that the defendant's sentence will increase

8. *See infra* Part III.B.

9. *See infra* Part III.B.1.

10. *See infra* Part III.C.

11. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 2X5.2, 3A1 (U.S. SENTENCING COMM'N 2014); *see generally* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992) (discussing the negative ramifications of the Sentencing Guidelines and its effects on a judge's ability to impose sentences).

12. *See generally* 28 U.S.C. § 994(p) (2014) (submitting to Congress amendments, policy statements, and official commentary to the Sentencing Guidelines).

13. *See* Stinson v. United States, 508 U.S. 36, 38 (1993).

14. *See id.*

if the defendant knew or should have known that a victim of the offense was a vulnerable victim.[15] The Guidelines Manual defines a vulnerable victim as a person who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.[16] The Commentary instructs that the vulnerable victim enhancement should not be applied if the factor that makes the person a vulnerable victim is already incorporated in the offense guideline.[17] It explains that if the underlying offense guideline provides a separate enhancement for the age of the victim, the vulnerable victim enhancement would not be applied unless the victim was unusually vulnerable for reasons unrelated to age.[18] Because age is often a factor upon which the vulnerability is founded, the issue of double counting often presents itself when courts attempt to apply both the vulnerable victim enhancement and the victim under twelve enhancement, which can be applied to offenses against victims under the age of twelve years old.

C. The Differing Applications of the Vulnerable Victim Enhancements by the Fourth, Fifth, and Ninth Circuits

1. The Fourth Circuit

In *United States v. Dowell*, Dowell was staying at the victim's residence in Virginia when he recorded several videos of himself sexually abusing a three-year old girl ("Minor A") and a five-year old girl ("Minor B").[19] Dowell pleaded guilty to twelve counts production of child pornography.[20] Dowell appealed the Pre-Sentence Report ("PSR") recommendation that he should receive both a vulnerable victim enhancement and victim under twelve enhancement.[21] He argued that because the age of the victims was already accounted for by the application of the victim under twelve enhancement, the additional application of the vulnerable victim enhancement could not be applied.[22] Because the victims' ages were accounted for in the victim under twelve enhancement, Dowell argued that

15. *See* U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1) (U.S. SENTENCING COMM'N 2014).

16. *See id.* at cmt. n.2 (providing examples of a vulnerable victim in a fraud case in which a defendant who markets an ineffective cancer cure or in a robbery in which a defendant selects a handicapped victim).

17. *See id.*

18. *See id.; see also* United States v. Jenkins, 712 F.3d 209, 212-13 (5th Cir. 2013).

19. *See* United States v. Dowell, 771 F.3d 162, 164-65 (4th Cir. 2014).

20. *See id.* at 165.

21. *See id.* at 166.

22. *See id.*

the victims could not be found 'vulnerable' for purposes of the vulnerable victim enhancement simply because his victims were considerably younger than twelve years of age.[23] Rejecting Dowell's arguments, the district court applied the vulnerable victim enhancement with respect to Minor A based on concerns over her cognitive and psychological development, which are unique to a three-year old child.[24] Relying on Fifth and Ninth Circuit precedent, the district court found that though these developmental concerns were related to her age, the court explained that because these vulnerabilities could exist independently of age it indicated a vulnerability beyond age per se.[25]

On appeal, the Fourth Circuit rejected the district court's reasoning and found that the district court's ultimate reason for applying the vulnerable victim enhancement relied on age-related factors.[26] The cognitive delays and psychological vulnerabilities of Minor A were solely due to her young age and therefore the finding of vulnerability was not sufficiently separate from her age.[27] The Fourth Circuit's holding created a circuit split in the application of the vulnerable victim enhancement.[28]

2. The Fifth Circuit

In *United States v. Jenkins*, Jenkins was charged with possessing child pornography, including that of infants and toddlers.[29] Jenkins pleaded guilty, and the PSR recommended both the victim under twelve and vulnerable victim enhancements.[30] Though the PSR noted the age of the victims ranged from toddlers to early teenagers, the report characterized the young and small victims as vulnerable because they were unable to resist or object, which made them particularly susceptible to abuse and

23. See *id.*

24. *See id.*

25. *See id; see also* United States v. Jenkins, 712 F.3d 209, 213-14 (5th Cir. 2013) (using the example of an infant's inability to walk as an example of a vulnerability that is related to, but still distinct from, extreme young age); United States v. Wright, 373 F.3d 935, 943 (9th Cir. 2004) (suggesting that the characteristics of being an infant are correlated with age but warrant a separate vulnerability because they can exist independently of age).

26. *See Dowell*, 771 F.3d at 174 (finding unpersuasive the district court's argument that the particular cognitive and moral vulnerabilities as related to age but unaccounted for by the victim under twelve enhancement).

27. *See id.*

28. *Compare id.* (declining to apply the vulnerable victim enhancement), *with Jenkins*, 712 F.3d at 214, *and Wright*, 373 F.3d at 943 (applying the vulnerable victim enhancement).

29. *See Jenkins*, 712 F.3d at 211.

30. *See id.*

exploitation.[31] Jenkins objected to the vulnerable victim enhancement, arguing that because any child pornography offense would seemingly involve a vulnerable victim, the specific offense enhancement already addressed the age factor.[32] The district court rejected Jenkins' argument and held that the two enhancements accounted for distinct vulnerabilities.[33]

The Fifth Circuit found no logical reason why an enhancement for a victim under the age of twelve should bar the application of the vulnerable victim enhancement when the victim is especially vulnerable compared to most children under twelve.[34] For example, the court noted that some children under twelve, such as infants, are unable to walk due to extreme young age, while other children under twelve may be unable to walk due to paralysis.[35] The court dismissed Jenkins' argument, which presupposed that the vulnerable victim enhancement based on inability to walk would be applied to paralyzed children under twelve, but not to infants.[36] The Court distinguished that though an infant's inability to walk is "related to age," it is not fully accounted for by the victim under twelve enhancement.[37] In this way, the relevance of age in categorizing a victim as both under twelve and especially vulnerable is not mutually exclusive.

3. The Ninth Circuit

In *United States v. Wright*, defendants James Wright and Tracey Wright were convicted for the production of child pornography of their 11-month old son and other children.[38] The district court applied both the victim under twelve and vulnerable victim enhancements.[39] The district court reasoned that the victims were vulnerable due to their extremely young age and small physical size.[40] These factors demonstrated why the

31. *See id.*

32. *See id.* at 211-12.

33. *See id.* at 214 (agreeing with the Ninth Circuit's interpretation that while a factor may be related to age, it is not fully accounted for by the victim under twelve enhancement).

34. *See id.*

35. *See id.* at 213.

36. *See id.* at 213-14.

37. *See id.* (noting the inconsistency of how the vulnerable victim enhancement commentary would bar a court from applying the enhancement where the victim is vulnerable from extreme old age).

38. *See* United States v. Wright, 373 F.3d 935, 937 (9th Cir. 2004).

39. *See id.*

40. *See id.* at 942 (relying on similar factors of extremely young age and size in applying the vulnerable victim enhancement to Tracey's sentence as well).

vulnerability of the child was distinct from age itself.[41] On appeal to the Ninth Circuit, the defendants argued that the factors of extreme youth and small physical size were impermissible because both related to age, which had already been accounted for by the victim under twelve enhancement.[42] The Ninth Circuit explained that the victim under twelve enhancement did not fully account for the especially vulnerable infancy and toddler stages of childhood.[43] The Ninth Circuit concluded that although the characteristics of infancy and toddlerhood correlate with age, they can exist independently of age, and thus are not the same as merely not having attained the age of twelve years old.[44]

D. Uncontested Examples of the Application of the Vulnerable Victim Enhancement from Other Circuits

The application of the vulnerable victim enhancement by other circuit courts provides examples of appropriate characteristics that indicate a vulnerability.[45] The common thread is the finding of vulnerability based on a factor that is completely separate and distinct from the underlying offense.[46] Thus, conditions that make a three-year old more vulnerable than an eleven-year old can support the application of the vulnerable victim enhancement.[47] For example, in *United States v. Grubbs*, the Fourth Circuit upheld the vulnerable victim enhancement because the defendant lured his victims by giving them higher grades and gifts and enticing them with the promise of scholarships.[48] Similarly, in *United States v. Irving*, the Second Circuit applied the vulnerable victim enhancement because the victims were homeless, impoverished, and without parental or other appropriate guidance.[49]

In *United States v. Willoughby*, the Sixth Circuit held that a sixteen-year old girl was vulnerable because she was a homeless runaway with a history

41. *See id.*

42. *See id.*

43. *See id.* at 943 (concluding then that there is no "double-counting of age in considering infancy or the toddler stage as an additional vulnerability").

44. *See id*.

45. *See* United States v. Willoughby, 742 F.3d 229, 241 (6th Cir. 2014); United States v. Irving, 554 F.3d 64, 75 (2d Cir. 2009); United States v. Grubbs, 585 F.3d 793, 805-06 (4th Cir. 2009); United States v. Gawthrop, 310 F.3d 405, 412 (6th Cir. 2002).

46. *See Willoughby*, 742 F.3d at 241; *Irving*, 554 F.3d at 75; *Grubbs*, 585 F.3d at 805-06; *Gawthrop*, 310 F.3d at 412.

47. United States v. Dowell, 771 F.3d 162, 174 (4th Cir. 2014).

48. *See Grubbs*, 585 F.3d at 806.

49. *See Irving*, 554 F.3d at 75.

of abuse and neglect.[50] In *United States v. Gawthrop,* the Sixth Circuit affirmed the enhancement for a defendant's three-year old granddaughter on the basis of a familial relationship, not age.[51] In *United States v. Snyder*, the Seventh Circuit applied the enhancement for a victim based on his history of past molestation, rather than his age.[52] In *United States v. Wetchie*, the Ninth Circuit found a way to distinguish the potential overlapping factor of age by finding that an eleven-year old victim qualified for the enhancement because the assault occurred while she was asleep.[53] Finally, in *United States v. Archdale*, the Ninth Circuit applied the enhancement to a twelve-year old child who vulnerable because she was cognitively delayed.[54]

III. ANALYSIS

A. The District Court in Dowell Erred in Concluding a Young Child's Cognitive Underdevelopment is Sufficiently Distinct from Young Age

In making its decision, the district court in *United States v. Dowell* erroneously relied on the previous holdings of *United States v. Wright* and *United States v. Jenkins*, which held that the characteristics of being an infant, while related to age, could exist independently of age; and thus, not wholly accounted for by age itself.[55] The district court explained that

50. *See Willoughby*, 742 F.3d at 241 (noting that this case does not add to the particular circuit split discussed in this Comment because vulnerability due to age was not at issue).

51. *See Gawthrop*, 310 F.3d at 412. *But see* United States v. Wright, 373 F.3d 935, 943 (9th Cir. 2004) (applying the vulnerable victim enhancement on the basis of the victim's vulnerable characteristics based on the infancy and toddler stages of childhood rather than on the basis that the eleven-month old victim was also the defendants' son).

52. *See* United States v. Snyder, 189 F.3d 640, 649-50 (7th Cir. 1999) (emphasizing the appropriateness of the vulnerable victim enhancement because the defendant sexually assaulted the victim knowing that the victim had been molested in the past).

53. *See* United States v. Wetchie, 207 F.3d 632, 634 n.3 (9th Cir. 2000) (agreeing that age could not be considered in the vulnerable victim calculation because it was already incorporated in the underlying offense); *see also* United States v. Ramos, 739 F.3d 250, 252-53 (5th Cir. 2014) (declining to apply the vulnerable victim enhancement to a group of young boys whose vulnerability was based on the sadistic conduct of the defendant, which was already accounted for as the basis for the sadistic-conduct enhancement).

54. *See* United States v. Archdale, 229 F.3d 861, 869 n.5 (9th Cir. 2002) (stating that age could not be considered, despite the victim not being under twelve years old, because the underlying offense still took her age into account).

55. *See* United States v. Dowell, 771 F.3d 162, 171 (4th Cir. 2014) ("At

Minor A, the three-year old girl, was clearly vulnerable because her cognitive abilities did not allow her to appreciate what was happening to her – she was unable to comprehend the sequence of abuse that was inflicted on her.[56] The court focused on the cognitive development, or rather lack thereof, of Minor A as evidenced by the progression of abuse in this case.[57] The court explained that Minor A, due to her cognitive state, thought Dowell was just playing with her as she giggled and laughed along at his conduct.[58] Minor A's behavior demonstrates the particular psychological vulnerability of Minor A, as opposed to Minor B, who was two years older.[59]

The court pointed out that the victim under twelve enhancement does not adequately cover all situations in which the victim is a minor child.[60] For instance, because the victim under twelve enhancement leaves gaps in sentencing coverage, the additional application of the vulnerable victim enhancement is not proscribed *per* se and is in fact necessary in certain situations.[61] One such situation is evidenced by the stark difference in the abuse inflicted on Minor A and Minor B, as shown by the differences in their reactions to the abuse.[62]

Aside from cognitive development, there are other situations in which the vulnerable victim enhancement may be appropriately compounded with the victim under twelve enhancement.[63] For instance, a victim may be especially vulnerable due to his inability to walk, thereby placing him at greater risk for assault.[64] But determining whether the vulnerable victim enhancement applies must be analyzed on a case-by-case basis in light of the underlying offense. Thus, if the underlying offense accounts for young age, such as a child pornography related offense, a victim who is unable to

sentencing, the district court relied on recent case law from two of our sister courts . . . ."); *see also* United States v. Jenkins, 712 F.3d 209, 214 (5th Cir. 2013); *Wright*, 373 F.3d at 943.

56. *See Dowell*, 771 F.3d at 174 (reaching this conclusion after watching the video evidence of Dowell's abuse on Minor A).

57. *See id.*

58. *See id.* at 173 (explaining further that over the course of several months of abuse, Minor A went from telling the defendant "no" to requesting such conduct).

59. *See id.* at 174.

60. *See id.* at 173 (explaining that the victim under twelve enhancement treats both Minor A and Minor B as the same since they are both under twelve years old, but misses the particular psychological harm inflicted on Minor A).

61. *See id.*

62. *See id.*

63. *See* United States v. Ramos, 739 F.3d 250, 252-53 (5th Cir. 2014).

64. *See id.* at 252.

walk may be categorized as a vulnerable victim only if his inability to walk is due to a non-age related reason.[65] For instance, the enhancement would be acceptable if the victim's inability to walk was due to paralysis or a physical deformity.[66] Conversely, if the victim was unable to walk due to infancy or young age, the vulnerable victim enhancement would be impermissible double counting.[67]

The *Dowell* court assigned Minor A the vulnerable victim status because she was much more psychologically susceptible to accepting and welcoming sexual abuse than an older child would have been.[68] Thus, it was not Minor A's age that necessitated the vulnerable victim enhancement, but rather her reaction to the abuse based on her level of cognitive development.[69] Because the vulnerable victim enhancement statute can only be applied in situations where the victim is vulnerable for reasons other than age, the court attempted to carve out a factual distinction between age and cognitive development.[70] However, the problem with the court's reasoning is that the basis of Minor A's underdeveloped psychological and cognitive abilities solely related to her young age.[71] Though underdeveloped cognitive faculties are not always caused by young age, Minor A's particular stage of cognitive development was due entirely to her age.[72] Based on the court's finding of vulnerability of Dowell's victim based on her cognitive and psychological development, which was solely attributable to her age, the Fourth Circuit correctly categorized the vulnerable victim enhancement to Dowell's sentence as impermissible double counting.[73]

1. The Fourth Circuit's Holding is Supported by the Findings of its Sister Circuits

Though the Fourth Circuit in *Dowell* rejected the district court's application of the vulnerable victim enhancement, the district applied the

65. *See Ramos*, 739 F.3d at 252.

66. *See id.*

67. *See id.*

68. *See* United States v. Dowell, 771 F.3d 162, 173-74 (justifying why Minor A's reactions to the abuse warrant her vulnerable victim status).

69. *See id.* at 173.

70. *See id.* at 174 (relying on the precedent of the Fifth and Ninth Circuit Courts of Appeals, though ultimately being rejected on appeal by the Fourth Circuit).

71. *See id.* at 175.

72. *See id.; see also* United States v. Ramos, 739 F.3d 250, 253 (5th Cir. 2014) (holding that the factor that makes a person a vulnerable victim should be analyzed in light of whether that factor is incorporated into the offense guideline).

73. *See Dowell*, 771 F.3d at 174.

correct legal standard – simply to the wrong facts.[74] The finding that Minor A was especially vulnerable due to her underdeveloped cognitive faculties was not inherently incorrect because the vulnerable victim enhancement *may* be predicated on a finding of cognitive impairment, as long as such impairment exists independently of age.[75] In *Archdale*, the court found that a victim was especially vulnerable because she was cognitively delayed, had borderline intelligence, and participated in special education classes.[76] In fact, the vulnerable victim enhancement statute expressly enumerates "mental condition" as an example of factors upon which to predicate a victim's vulnerability.[77] Thus, the district court in *Dowell* was not wholly incorrect in finding that Minor A *could* be particularly vulnerable due to her cognitive and psychological underdevelopment.[78]

The district court's reasoning in determining that Minor A was vulnerable is distinguished from the *Archdale* holding in that Minor A's underdeveloped cognitive faculties were a result of her age.[79] The victim in *Archdale*, on the other hand, was twelve years old, but the underlying offense was for abusive sexual contact rather than an age related offense like child abuse or child pornography.[80] Thus, the cognitive underdevelopment of the *Archdale* victim was an appropriate basis upon which to apply the vulnerable victim enhancement.[81]

Additionally, the mental condition of the victim in *Archdale* was not due to the fact that she was young and had not reached an age where cognitive faculties would be fully developed.[82] Rather, the *Archdale* victim was cognitively delayed, had borderline intelligence, and participated in special education classes.[83] Though the qualities of mental impairment that make a victim vulnerable are not less significant depending on the reason for the mental impairment, the vulnerable victim enhancement was not intended to

74. *See id.*

75. *See generally* United States v. Archdale, 229 F.3d 861, 869 n.5 (9th Cir. 2002).

76. *See id.* at 869.

77. *See* U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1) cmt. n.2 (U.S. SENTENCING COMM'N 2014).

78. *See Dowell*, 771 F.3d at 174 (stating that Minor A's cognitive abilities did not allow her to appreciate what was being done to her and was more psychologically susceptible to accepting abuse than an older child would be).

79. *See id.*

80. *See Archdale*, 229 F.3d at 864.

81. *See id.* (convicting Archdale of one count of sexual abuse of a minor and one count of engaging in abusive sexual contact with a minor).

82. *See id.* at 869.

83. *See id.* (affirming the finding by the district court judge that the victim was unusually vulnerable due to her mental condition).

apply to situations where the underlying offense had already fully incorporated the vulnerability.[84] The focus here is not necessarily on what makes the victim particularly vulnerable, but rather on the inherent unfairness in faulting a defendant twice for the same crime.[85]

The application of the vulnerable victim enhancement is not per se precluded by the fact that a defendant engaged in the sexual assault of a minor.[86] In *United States v. Wetchie*, the Ninth Circuit predicated an application of the vulnerable victim enhancement based on the fact that the victim was asleep during her sexual assault.[87] The court determined that the physical condition of her being asleep rendered her unable to resist the defendant's physical advances and unable to express any objection or cry out.[88] The district court in *Dowell* noted a similar finding, basing the vulnerability of the three-year-old victim on the fact that she was unaware of what was being done to her; and therefore, welcomed the abuse rather than resist it.[89] Thus, the characteristics of a victim's diminished capacity to resist and call for help can support the application of the vulnerable victim enhancement.[90]

However, the district court's error is not in determining that Minor A had particular vulnerabilities; rather, the error stemmed from the fact that the particular vulnerability was entirely due to the victim's young age.[91] In *Dowell*, the victim's diminished capacity and inability to resist her abuse resulted from the fact that she was three-years-old.[92] In *Wetchie*, the victim's inability to resist and call for help was not due to her age, but because she was asleep and unaware of her abuse.[93] The language in the vulnerable victim enhancement statute supports the latter argument, not the former.[94] For example, it would be incorrect to treat as equal a victim's

84. *See* U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1) cmt. n.2 (U.S. SENTENCING COMM'N 2014).

85. *See id; see also* Freed, *supra* note 11, at 1681.

86. *See generally* United States v. Wetchie, 207 F.3d 632, 635 (9th Cir. 2000) (noting that victims who are particularly vulnerable are in need of greater societal protection).

87. *See id.*

88. *See id.*

89. *See* United States v. Dowell, 771 F.3d 162, 174 (4th Cir. 2014).

90. *See* U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1) cmt. n.2 (U.S. SENTENCING COMM'N 2014) (referencing mental and physical conditions as examples of vulnerabilities).

91. *See Dowell*, 771 F.3d at 174.

92. *See generally id.*

93. *See Wetchie*, 207 F.3d at 635.

94. *See* U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1) cmt. n.2 (U.S.

inability to walk regardless of whether it is due to paralysis or infancy.[95] Thus, a court must account for the context of the characteristic upon which it predicates a finding of vulnerability.[96]

Another example that illustrates the distinction between a permissible and impermissible factor of vulnerability can be found in the Fifth Circuit's holding in *Ramos*.[97] In *United States v. Ramos*, the Fifth Circuit declined to apply the vulnerable victim enhancement in addition to a sadistic-conduct enhancement.[98] The court found that the sadistic-conduct enhancement covered the vulnerability of bondage to which the group of victims was subjected.[99] The court found that the eight-year old victims could not be classified as vulnerable based on their age, and that the vulnerability finding could only be based on the bondage they were subjected to during their abuse.[100] Unlike the *Dowell* court, the court here correctly declined to apply the vulnerable victim enhancement.[101] The *Ramos* court rejected the government's argument that the penetration of some children by adult males constituted a distinct enough harm from the bondage harm as to necessitate the vulnerable victim enhancement.[102]

This argument is reminiscent of the district court's reasoning in *Dowell*, in which it explained that the victim under twelve enhancement was too broad and did not account for the distinct harm caused by sexual assault on a child as young as three years old.[103] Just as the eight-year-old victims in *Ramos* had no separate vulnerability aside from the bondage factor, the three-year-old victim in *Dowell* had no separate vulnerability that was not

SENTENCING COMM'N 2014).

95. *See* United States v. Jenkins, 712 F.3d 209, 213-14 (5th Cir. 2013).

96. *See id*. at 214 (finding that inability to walk is a vulnerability regardless of the cause of that disability). *But see Wetchie*, 207 F.3d at 635 (predicating the vulnerability on the fact that the victim was asleep because the underlying offense already accounted for her young age).

97. *See* United States v. Ramos, 739 F.3d 250, 253 (5th Cir. 2014).

98. *See id.*

99. *See id.* (determining that the eight- to ten-year old victims did not have an age-related vulnerability as compared to the other pre-pubescent victims, but that only the bondage left these victims more vulnerable than the other victims).

100. *See id.*

101. *Compare Ramos*, 739 F.3d at 253, *with* United States v. Dowell, 771 F.3d 162, 174 (4th Cir. 2014).

102. *See Ramos*, 739 F.3d at 253 (directing the inquiry focus instead on the factor that makes the person a vulnerable victim and whether this was already incorporated in the offense guideline).

103. *See Dowell*, 771 F.3d at 173 (pointing out that the stark differences in reaction by the three year old victim and the five year old victim explain why the victim under twelve enhancement "paints with too broad a brush").

already accounted for by the age factor.[104] It was the underdeveloped cognitive faculties and psychological susceptibility that led the district court in *Dowell* to find a vulnerability, but this was too intimately linked to Minor A's age to allow for a permissible application of the enhancement.[105]

The Fourth Circuit's holding that the vulnerable victim enhancement was inappropriate is supported by the case law of its sister circuits.[106] The key point of analysis in the aforementioned cases turns on the fact that the factor leading to a finding of vulnerability is wholly separate and distinct from the basis of the underlying offense.[107] The Ninth Circuit in *Archdale* correctly predicated a finding of vulnerability on the *Archdale* victim's cognitive impairment.[108] The characteristics relevant in *Archdale* were that the victim had borderline intelligence and participated in special education classes – factors completely independent of the fact that she was a minor.[109]

Similarly, the *Wetchie* court allowed the vulnerable victim enhancement because the victim's incapacitation and inability to resist and call for help were due to her being asleep, not because of factors relating to her young age.[110] The *Ramos* court supported this reasoning by holding that the *Ramos* victims had no separate vulnerability aside from the bondage factor, which had already been taken into account.[111] These cases emphasize the need for courts to take in the context, cause, or source of the vulnerable factors to ensure that they do not stem from the same factors already accounted for by the underlying offense.[112]

B. The Fourth Circuit Could Have Found a Vulnerability on an Alternate Basis

The Fourth Circuit in *Dowell* could have successfully applied the vulnerable victim enhancement under the theory that Minor A was vulnerable, not due to her cognitive faculties, but because Dowell lived in the same residence as the victims.[113] A co-habitual relationship renders a

104. *Compare Dowell*, 771 F.3d at 174, *with Ramos*, 739 F.3d at 253.

105. *See Dowell*, 771 F.3d at 175.

106. *See* United States v. Archdale, 229 F.3d 861, 869 (9th Cir. 2002); United States v. Wetchie, 207 F.3d 632, 635 (9th Cir. 2000); *Ramos*, 739 F.3d at 253.

107. *See Wetchie*, 207 F.3d at 635.

108. *See Archdale*, 229 F.3d at 869.

109. *See id.*

110. *See Wetchie*, 207 F.3d at 635.

111. *See Ramos*, 739 F.3d at 253.

112. *See Archdale*, 229 F.3d at 869; *see also Wetchie*, 207 F.3d at 635; *Ramos*, 739 F.3d at 253.

113. *See generally* United States v. Gawthrop, 310 F.3d 405, 412 (6th Cir. 2012) (predicating the vulnerable victim enhancement on victim's familial relationship to the

victim particularly susceptible to abuse because the victim is physically more easily accessible to the abuser and presents an opportunity for an abuser to nurture a relationship of trust of which he could take advantage.[114] In *Gawthrop*, the Sixth Circuit held that defendant's grandfather-granddaughter relationship to the victim fell within the range of relationships upon which a finding of victim vulnerability could be predicated.[115] This holding, which was based on similar reasoning as the Fourth Circuit, stated that the finding of vulnerability must be based on a factor other than that which had already been accounted for in the underlying offense.[116]

Similarly to how the Sixth Circuit based its finding on the familial relationship between a grandfather and granddaughter, the Fourth Circuit in *Dowell* could have explored the unique vulnerability of the victims due to their close proximity and exposure to the defendant.[117] The fact that Dowell lived in the same house as the victims during the time of their abuse made the victims particularly susceptible to abuse.[118] A co-habitual relationship poses the same vulnerabilities as a familial relationship, but would not constitute impermissible double counting because the cohabitation factor is in no way accounted for by the underlying offense, which only accounts for the young age of the victims.[119]

The commentary to the Sentencing Guidelines accords broad judicial discretion by allowing for a finding of vulnerability based on conditions that make the victim particularly susceptible to the criminal conduct.[120] In *United States v. Grubbs*, the Fourth Circuit predicated a finding of vulnerability based on the fact that Grubbs awarded his victims with higher

defendant since age had already been taken into account under the underlying offense guideline).

114. *See id.; see also* United States v. Archdale, 229 F.3d 861, 870 (9th Cir. 2002) (noting that because of the abuser's length of association with the victim and his proximity to her through their co-habitation, the abuser should have known the victim was unusually vulnerable to his abuse).

115. *See Gawthrop*, 310 F.3d at 412.

116. *See id.*

117. *See id.*

118. *See* United States v. Dowell, 771 162, 164-65 (4th Cir. 2014) (indicating that Dowell engaged in the sexual abuse of the victims during his stay at the residence where the victims also lived).

119. *See Gawthrop*, 310 F.3d at 413 (relying on a completely separate factor for the basis of victim vulnerability in order to circumvent the issue of impermissible double counting).

120. *See* U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1) cmt. n.2 (U.S. SENTENCING COMM'N 2014).

grades, gave them gifts, and guaranteed them the receipt of scholarships.[121] The underlying offense in *Grubbs* relied on both the age of the victims and the victims being in Grubbs' care.[122] The court avoided predicating the vulnerable victim enhancement on these prohibited factors and so instead relied on the unique position of power Grubbs had over the victims.[123]

Much like how the victims in *Grubbs* were particularly susceptible to abuse due to the nature of Grubbs' relationship to his victims, the Fourth Circuit in *Dowell* could have focused its findings on the fact that Dowell's victims were similarly susceptible to Dowell's abuses due to their close proximity in the same residence.[124] The Fourth Circuit thus could have avoided the murky reasoning of the district court by focusing Dowell's co-habitual relationship to the victims.[125] And though the factual findings did not indicate whether Dowell had some other element of trust over the victims, such factual inquiries may be necessary when the underlying offense is based on the young age of the victims.[126]

Courts should base the finding of vulnerability not based on the depravity of the defendant's conduct, but on the particular characteristics of the victim in each case.[127] For instance, the vulnerable victim enhancement statute requires only two findings: the victim must be particularly vulnerable and the defendant should have had knowledge of the victim's vulnerability.[128] In *United States v. Willoughby*, the Sixth Circuit upheld the application of the vulnerable victim enhancement for a victim, not because the minor victim was unduly influenced and preyed upon by the defendant, but because her status as a homeless, destitute runaway rendered her particularly susceptible to abuse.[129] Similarly, the court in *United States v. Irving* focused on whether the minor victims were "unusually"

121. *See* United States v. Grubbs, 585 F.3d 793, 806 (4th Cir. 2009).

122. *See id.* at 805.

123. *See id.* at 806 (noting that Grubbs bribed the victims with gifts and money in order to earn their trust and place himself in a position of power over the boys).

124. *Compare* United States v. Dowell, 771 F.3d 162, 164-65 (4th Cir. 2014), *with Grubbs*, 585 F.3d at 806.

125. *See Dowell*, 771 F.3d at 164-65.

126. *See id.*

127. *See generally* United States v. Willoughby, 742 F.3d 229, 241 (6th Cir. 2014) (finding the victim vulnerable due to her status as a homeless runaway); *see also* U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1) (U.S. SENTENCING COMM'N 2014) (focusing the statutory analysis on the characteristics of the victim with no mention of any standards in regards to the type of criminal conduct by the defendant).

128. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1) cmt. n.2 (U.S. SENTENCING COMM'N 2014).

129. *See Willoughby*, 742 F.3d at 241.

vulnerable rather than on the egregiousness of the defendant traveling all the way to Mexico and Honduras to target young children.[130] There, the court held that the unusual vulnerability stemmed from the fact that the victims were street urchins who were homeless and without parental guidance, which made them vulnerable independently of their ages.[131]

As seen in the victims in *Irving* and *Willoughby*, similar vulnerable characteristics rendered the victim in *Dowell* particularly susceptible to abuse.[132] For instance, the vulnerabilities of the victims in *Willoughby* and *Irving* stemmed from their homelessness and lack of parental guidance, which is similar to Minor A's cohabitation with the defendant in *Dowell*.[133] The fact that Dowell was able to record several videos of himself abusing Minors A and B indicates that he spent time with them alone without the supervision of the victims' parents.[134] It is this factor that rendered the victims in *Dowell* unusually vulnerable, independently of their ages and the cognitive and psychological developments that are related to their young ages.[135] Additionally, just as how the homeless status of the victims in *Willoughby* contributed to their susceptibility and how the lack of parental guidance of the victims in *Irving* presented the defendant with the opportunity to sexually abuse the victims, the presumed lack of the victims' parental guidance in *Dowell* and the victims' particular susceptibility due to their cohabitation with the defendant similarly contributed to the vulnerability of Dowell's victims.[136]

Additionally, in *United States v. Snyder*, the Seventh Circuit applied a vulnerable victim enhancement to Snyder's child pornography conviction premising the enhancement on the victim's history of molestation.[137] In predicating the victim's vulnerability on the fact that he had been sexually

130. *See* United States v. Irving, 554 F.3d 64, 75 (2d Cir. 2009).

131. *See id.* ("[T]he victims were especially vulnerable because anybody who comes along and offers the promise of a free meal has a special attraction to people in that economic and social circumstance.").

132. *See* United States v. Dowell, 771 F.3d 162, 164-65 (4th Cir. 2014) (recalling that Dowell resided in the same residence as the victims, but not clarifying the exact nature of, or reasons for, Dowell's habitation at the house).

133. *See id.* at 165.

134. *See id.*

135. *See id.* at 174; *see also Irving*, 554 F.3d at 75.

136. *Compare* United States v. Willoughby, 742 F.3d 229, 241 (6th Cir. 2014) *and Irving*, 554 F.3d at 75, *with Dowell*, 771 F.3d at 165 (inferring from the vague facts presented that the victim's parents were not present during the multiple incidents of abuse).

137. *See* United States v. Snyder, 189 F.3d 640, 649 (7th Cir. 1999) (justifying the vulnerable victim enhancement on the fact that the vulnerability was based on Doe's history of past sexual abuse rather than any age related factors).

abused three years earlier, the court focused on Snyder's knowledge of that past abuse in determining whether to apply the vulnerable victim sentencing enhancement.[138] Though the *Snyder* victim had been raped three years before Snyder sexually abused the victim, the Seventh Circuit did not emphasize how far in the past the abuse had to occur in order to satisfy the vulnerability finding.[139] In the same vein, the *Dowell* court could have based a finding of vulnerability on the fact that Minors A and B had also been molested in the past.[140] Dowell started recording himself abusing Minors A and B in late 2010, and continued to do so until early 2011, producing several videos over the course of that time.[141] There, the past abuse would be that which occurred in 2010, making the victims increasingly more susceptible and vulnerable throughout the months until early 2011.[142]

Additionally, in *Snyder*, the defendant was not responsible for the past rape of the victim, as it was three years prior to Snyder's acquaintance with the victim; in *Dowell*, the same defendant committed both the past and subsequent abuses.[143] Though the Seventh Circuit did not discuss the implication of the *Snyder* victim's two different abusers, the Fourth Circuit could have a reasonable argument in finding Minors A and B vulnerable as a result of Dowell's knowing and repeated abuses against them.[144]

IV. CONCLUSION

In declining to apply the vulnerable victim enhancement to an underlying offense of child pornography and sexual abuse of a minor, the Fourth Circuit created a circuit split against the Fifth and Ninth Circuits.[145] However, as evidenced by the discussion above, the Fourth Circuit correctly interpreted the enhancement and did not err in holding that the

138. *See id.*

139. *See id*. at 643, 649.

140. *See Dowell*, 771 F.3d at 165 (recalling that Dowell recorded several videos of himself sexually assaulting Minors A and B).

141. *See id.* at 164-65 (inferring that the production of multiple video recordings presupposes multiple instances of abuse).

142. *See id.*

143. *Compare Snyder*, 189 F.3d at 643, 649, *with Dowell*, 771 F.3d at 165.

144. *Compare Snyder*, 189 F.3d at 649, *with Dowell*, 771 F.3d at 165 (applying the vulnerable victim enhancement in *Snyder* based on the fact that Snyder knew the victim was abused in the past but failing to pursue this avenue in *Dowell*). *But see* United States v. Jenkins, 712 F.3d 209, 213 (5th Cir. 2013) (finding that Jenkins' victim was their 11-month old son but failing to analyze whether the vulnerability could be predicated on this familial relationship rather than the victim's age).

145. *See Dowell*, 771 F.3d at 174 (4th Cir. 2014).

district court had impermissibly applied the enhancement. Although the Fourth Circuit did not analyze whether the vulnerable victim enhancement could have been predicated on characteristics such as the victim's cohabitation with Dowell or that they were left without parental guidance, such findings could have supported an appropriate application of the enhancement.