

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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UNITED STATES OF AMERICA,

Appellee

v.

ERIC DONNELLY,

Defendant-Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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BRIEF OF THE UNITED STATES AS APPELLEE

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BRIEF OF THE UNITED STATES AS APPELLEE

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**STATEMENT OF JURISDICTION**

The district court had jurisdiction pursuant to 18 U.S.C. 3231. This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742(a)(2). The judgment and sentence were entered on July 9, 2003. A timely notice of appeal was filed on July 17, 2003.

**STATEMENT OF THE ISSUE**

Whether the district court clearly erred in applying a two-level enhancement to defendant's sentence pursuant to U.S.S.G. 3A1.1(b)(1).

**STATEMENT OF THE CASE**

Appellant Eric Donnelly was a Lieutenant with the Suffolk County Sheriff's Department and worked as a supervisor at the Nashua Street Jail in Boston,

Massachusetts. In 1998 and 1999, there was an unwritten understanding among certain supervisors and officers – including Donnelly – to use unjustified, excessive force as punishment for detainees who “disrespected and/or ‘put hands’ on officers, or otherwise misbehaved.” S. App. at 15.<sup>1</sup> These officers also agreed to mislead and give false information to investigators following these assaults.

*Ibid.*

On May 15, 2001, a federal grand jury returned a 15-count Superseding Indictment charging Donnelly and several others with violating 18 U.S.C. 241 (conspiracy to violate rights); 18 U.S.C. 242 (deprivation of rights under color of law); 18 U.S.C. 2 (aiding and abetting); 18 U.S.C. 371 (conspiracy); 18 U.S.C. 1512(b)(3) (obstruction of justice); and 18 U.S.C. 1623 (perjury). App. at 99. The Superseding Indictment specifically identified four detainee/victims of excessive force at the hands of Donnelly. This appeal relates to whether the sentencing court properly enhanced Donnelly’s sentence based on its conclusion that one of Donnelly’s victims, Leonard Gibson, was unusually susceptible to these attacks.

During September and October of 1999, Leonard Gibson was in pretrial detention at the Nashua Street Jail on charges that he stole a car. S. App. at 75. Gibson has Tourette’s Syndrome, a neurological disorder that manifests itself in several ways, including: “[v]erbal outbursts, physical movements, blinking, sometimes spitting, swearing, sometimes racial slurs, jumping up and down, [and]

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<sup>1</sup> “S. App.” refers to the Sealed Appendix submitted by Appellant. “App.” refers to the Appendix submitted by Appellant.

kicking [his] feet.” *Id.* at 72. After being initially housed in the general housing unit at Nashua, Gibson was transferred to the jail’s medical unit because officials considered such a placement safer in light of his disability. *Id.* at 76-77.

On the evening of October 16, 1999, Gibson was eating his dinner and got up from the table to wash a piece of fruit without asking the unit officer, Officer Benson, for permission. *Id.* at 90. After being verbally reprimanded by Benson, Gibson returned to the table and recalled remarking, “What an attitude.” *Ibid.* Another officer on duty confronted Gibson, claiming that he had called Benson a “fat f–ck,” and ordered Gibson to return to his cell. *Id.* at 90-91. Reacting to the stress of this encounter, Gibson’s Tourette’s went “haywire.” *Id.* at 92. In attempt to lessen the physical pain of these uncontrollable Tourette’s-related movements, Gibson began to “waste a lot of energy” by shadow boxing, doing jumping jacks, and bench pressing his roll-away cot. *Ibid.* Officer Benson, responding to the commotion, told Gibson to “shut the f–ck up.” *Id.* at 93. Gibson, exasperated, responded: “You people make fun of me around here all the time and I can’t say nothing about it. F–ck you, no.” *Ibid.*

Donnelly was on duty with Officer Benson in the jail’s medical unit and was watching a baseball game on the unit’s television with other officers during this time. Upon hearing the argument between Benson and Gibson, Donnelly approached Gibson’s cell and said, “You ain’t going to talk to my f–cking [cell officers] like this,” and requested that Gibson’s cell door be opened. *Id.* at 93-94. Both Benson and Donnelly then entered the cell and beat Gibson repeatedly. *Id.* at

95-97; *id.* at 17. Gibson testified that Donnelly, while kneeling on Gibson, punched him in the ribs while Benson struck his head. *Id.* at 96. While they were hitting him, one of the attackers was overheard yelling, “[W]e will beat the Tourette’s out of you.” *Id.* at 17. As with the other incidents of this nature, Donnelly gave false and misleading statements about the incident. *Ibid.*

On March 3, 2003, Donnelly pled guilty to counts 1, 6-10, and 15 of the Superseding Indictment. During the plea colloquy, the prosecution explained that it was prepared to prove the following facts related to the assault on Leonard Gibson:

The evidence would show that on October 16, 1999 the defendant Donnelly, while on duty at the jail, entered the medical unit where a detainee Leonard Gibson \* \* \* was being housed. Leonard Gibson, who suffered from Tourette’s Syndrome, which is characterized by repeated and involuntary body movements and ticks and uncontrollable vocal sounds, often profanity. The evidence would be defendant Donnelly was actually in the unit to watch a baseball play-off game. Mr. Gibson was then thought to be swearing at defendant William Benson and was then locked in his cell. Gibson continued to make noises and verbally harass the officers from inside his cell. At one point then while the detainee Gibson was secured in his cell, the defendant Donnelly and William Benson decided to essentially teach him a lesson. They went into Gibson’s cell and each struck him several times. These strikes were an unjustified use of force and redundant to punish Gibson for his disruptive behavior. While hitting him the officers yelled something to the effect of “We’ll beat the Tourette’s out of you.” As a result of this incident Gibson suffered cuts on his head and back and pain and bruising. Later defendant Donnelly and other officers gave false and misleading statements to SID about the knowledge of the Gibson incident.

Addendum to United States’ Brief at 11-12. Upon being questioned by the court, Donnelly responded that he did not disagree with anything presented by the



prosecution. *Id.* at 13.

In the plea agreement, the parties considered the applicable sentencing guidelines to produce a Total Offense Level of 21, and the government agreed to recommend that the district court sentence Donnelly at the lower end of the applicable sentencing range. App. at 137.<sup>2</sup> The Probation Office, however, recommended that Donnelly receive an additional two-level enhancement, pursuant to U.S.S.G. 3A1.1(b), based on the vulnerability of his victims. The probation officer reasoned that, as detainees, these victims were particularly susceptible to Donnelly's assaults. S. App. at 19-22.

Donnelly objected to the enhancement, arguing that it was not envisioned in the plea agreement, and that Donnelly's victims were "no different than the typical victim in these types of crimes" – in jail, prison, or otherwise in the custody of law enforcement. *Id.* at 2-4. The government also objected to the proposed enhancement. *Id.* at 1. At sentencing, the court agreed that the custodial status of the victims alone was not sufficient to classify Donnelly's victims as "unusually vulnerable." App. at 156.

The court found, however, that Leonard Gibson was different:

Mr. Gibson had Tourette's Syndrome, and it appears to me both on the presentence report and from \* \* \* his testimony at [the trial of Officer Benson], which is consistent with what's in the presentence

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<sup>2</sup> The agreement specifically provided that "[i]n the event of an appeal from, or collateral challenge to, Defendant's sentence, the U.S. Attorney reserves his right to argue the correctness of Defendant's sentence and the manner in which the District Court determines it." App. at 138.

report, that in very large part the assault on him occurred because he had Tourette's Syndrome; that is to say, \* \* \* he is unable to control his outbursts, and because he was not able to control his outbursts, which may include swearing, the officers decided either that he was faking or that if he were not faking they had to teach him a lesson nevertheless.

*Id.* at 161. Consequently, the court concluded that "Mr. Gibson was unusually susceptible to \* \* \* being the victim of a conspiracy that had as its purpose to punish people who disrespected the officer or appeared to disrespect the officer."

*Id.* at 162. While acknowledging that the PSR did not recommend an enhancement based on Gibson's Tourette's, the court concluded that there was sufficient notice in the PSR that Gibson's Tourette's could form the basis for such an enhancement. *Id.* at 162-163. In particular, the court noted that the PSR summary of the assault on Gibson specifically stated "that the officers who beat Mr. Gibson explained as they were beating him that they were going to 'beat the Tourette's out of him.'" *Id.* at 162.<sup>3</sup>

Donnelly's counsel objected to the court's reliance on Gibson's testimony at Officer Benson's trial since he was not "privy" to it. *Id.* at 163. The court explained that it was not relying on anything that Gibson said in his trial testimony, but instead on the court's observation of Gibson's Tourette's-related behaviors. App. at 167. Nevertheless, the court suspended the proceeding to

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<sup>3</sup> In addition to the inclusion of this statement in the PSR, the government's presentation of the predicate facts during Donnelly's change of plea hearing included this statement. See App. at 179. The United States also explained that an inmate witness, Joseph Dyer, was prepared to testify to overhearing this statement. *Ibid.*

allow Donnelly's counsel the opportunity to review the transcript of Gibson's trial testimony. *Id.* at 166-167.

On the same day that the court reconvened, over a month later, Donnelly filed a written objection to the PSR's description of the assault on Gibson, claiming that Gibson's trial testimony did not refer to any statements made by his assailants. S. App. at 66-68.<sup>4</sup> Unswayed by Donnelly's untimely objection, the court imposed a two-level enhancement based on Gibson's unusual susceptibility. App. at 181. With this enhancement, Donnelly's total offense level was 23. With a Category I criminal history level, the sentencing range was 46 to 57 months. U.S.S.G., Appendix A. The court sentenced Donnelly to 46 months' incarceration. App. at 203.

Donnelly appeals the district court's two-level vulnerable victim enhancement.

### STANDARD OF REVIEW

This Court applies plenary review to "a sentencing court's legal interpretation and application of the sentencing guidelines." *United States v. Sabatino*, 943 F.2d 94, 102 (1st Cir. 1991). The facts necessary to support a sentence enhancement must be established by a preponderance of the evidence. *United States v. Bianco*, 922 F.2d 910, 913 (1st Cir. 1991). A court's factual

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<sup>4</sup> In not ruling on this objection, the court noted that because of the tardiness of the objection – coming only an hour and a half before the proceedings – neither the Probation Office nor the court was given an opportunity to consider such an objection prior to reconvening. App. at 182-183.

determination that an individual victim is vulnerable for purposes of U.S.S.G. 3A1.1 can be overturned only if it is clearly erroneous. *United States v. Pavao*, 948 F.2d 74, 78-79 (1st Cir. 1991). Sentencing claims raised for the first time on appeal are reviewed for plain error. *United States v. Connolly*, 341 F.3d 16, 31 (1st Cir. 2003).

### **SUMMARY OF ARGUMENT**

The record supports the sentencing court's imposition of a two-level "vulnerable victim" sentence enhancement pursuant to U.S.S.G. 3A1.1(b) based on the unusual susceptibility of Leonard Gibson to Donnelly's crime. First, the outbursts associated with Leonard Gibson's Tourette's are the kind of "disruptive" and "disrespectful" behavior that triggered Donnelly's assaults on detainees at the Nashua Street Jail. The court did not clearly err in finding that because Gibson was unable to control these outbursts, he had "an impaired capacity of the victim to detect or prevent the crime." *United States v. Gill*, 99 F.3d 484, 486 (1st Cir. 1996). The court also properly found that Gibson's Tourette's-based vulnerability played a significant role in Donnelly's crime.

Second, the sentencing court did not err in concluding that Donnelly knew or should have known of Gibson's particular susceptibility. Because Donnelly raises this claim for the first time on appeal, it is subject to the plain error standard. *United States v. Connolly*, 341 F.3d 16, 31 (1st Cir. 2003). This standard is met if Donnelly can establish that the record only supports the conclusion that he did not know of Gibson's susceptibility. *United States v. Olivier-Diaz*, 13 F.3d 1, 5 (1st

Cir. 1993). The unusual behaviors of someone with Tourette's such as Gibson's, however, strongly support the court's conclusion that Donnelly either knew or should have known about Gibson's condition. Furthermore, the court could reasonably conclude that Donnelly knew about Gibson's Tourette's because, during the assault, one of the assailants yelled something to the effect of, "We'll beat the Tourette's out of you." Furthermore, even if Donnelly did not make this statement and did not initially know that Gibson had Tourette's, he was made aware of Gibson's disability during the attack. Such knowledge of a victim's vulnerability, even if it is obtained while the crime is occurring, is sufficient for purposes of Section 3A1.1(b). See *United States v. Proffit*, 304 F.3d 1001, 1006 (10th Cir. 2002).

## **ARGUMENT**

### **THE DISTRICT COURT DID NOT ERR IN DETERMINING THAT GIBSON WAS PARTICULARLY SUSCEPTIBLE TO DONNELLY'S CRIME**

Section 3A1.1(b)(1) of the Sentencing Guidelines requires a court to enhance a defendant's sentence by two levels "[i]f the defendant knew or should have known that the victim of the offense was a vulnerable victim." The commentary explains that a "vulnerable victim" is someone who is "unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." U.S.S.G. 3A1.1, Application Note 2. This "vulnerable victim" guideline "is primarily concerned with the impaired capacity of the victim to detect or prevent the crime, rather than the

quantity of harm suffered by the victim.” *United States v. Fosher*, 124 F.3d 52, 55-56 (1st Cir. 1997) (citing *United States v. Gill*, 99 F.3d 484, 486 (1st Cir. 1996)). “The question is whether a particular victim was less likely to thwart the crime, rather than more likely to suffer harm if the crime is successful.” *Fosher*, 124 F.3d at 56 (quoting *United States v. Kaye*, 23 F.3d 50, 54 (2d Cir. 1994)) (internal quotation marks omitted). The record is sufficient to support the sentencing court’s determination that because of his Tourette’s Syndrome, Gibson had an impaired capacity to prevent Donnelly’s assault and that Donnelly knew of this unusual susceptibility.

A. *The Sentencing Court Could Reasonably Conclude That Gibson Was “Particularly Susceptible” To Donnelly’s Assault*

The record supports the district court’s determination that Gibson was “particularly susceptible” to Donnelly’s crime.<sup>5</sup> First, the record indicates that Leonard Gibson’s Tourette’s-related behaviors include “[v]erbal outbursts, physical movements, blinking, sometimes spitting, swearing, sometimes racial slurs, jumping up and down, [and] kicking [his] feet.” S. App. at 72. While the transcript of Gibson’s testimony during Benson’s trial does not indicate these outbursts, the court specifically noted that he observed Gibson exhibiting such

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<sup>5</sup> The sentencing court could have reasonably concluded, without making an individualized finding with regard to Gibson, that a detainee with Tourette’s would be particularly susceptible to a plan to beat detainees who are “disruptive” or “disrespectful.” See *Gill*, 99 F.3d at 487 (noting that “[i]n some cases the inference \* \* \* may be so powerful that there can be little doubt about unusual vulnerability of class members within the meaning of section 3A1.1.”).

behaviors. App. at 161-162. See *United States v. Pavao*, 948 F.2d 74, 78 (1st Cir. 1991) (recognizing that first-hand observations enable a sentencing court to make the kind of individualized determination of vulnerability needed to impose a sentencing enhancement under Section 3A1.1(b)). Gibson also explained that he suffers considerable physical pain from these behaviors and tries to minimize this pain by “wast[ing] a lot of energy.” S. App. at 92. For example, Gibson testified that when he was sent back to his cell on the evening of October 16, 1999, his Tourette’s went “haywire.” *Ibid.* In response to the “movements, twitches, [and] head bobbing” associated with this Tourette’s outburst, Gibson shadow boxed, did jumping jacks, and bench pressed his roll-away cot in his cell. *Ibid.*

Second, there can be no doubt that these behaviors are “disruptive” and at times “disrespectful” – the kind of behaviors that triggered Donnelly’s assaults. For example, Donnelly directed assaults on Kevin Akerly and William Doocey after they got into a fight with a third detainee. *Id.* at 15-16. Donnelly also assaulted Sean Milliken after he got into a fight with another correctional officer and then was disruptive after being returned to his cell. S. App. at 16. Because Gibson cannot control his Tourette’s outbursts, the sentencing court did not clearly err in concluding that Gibson – more so than other detainees – was particularly susceptible to being a victim of Donnelly’s crime. App. at 161.<sup>6</sup>

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<sup>6</sup> See [www.tsa-usa.org](http://www.tsa-usa.org) (official website for the national Tourette Syndrome Association, Inc.) (explaining that Tourette-related outbursts are “neither intentional nor purposeful”).

Donnelly goes to great lengths to argue that he assaulted Gibson only because of Gibson's "free and voluntary decision" to talk back to Officer Benson. Appellant's Brief at 32.<sup>7</sup> The record, however, does not support such an assertion. Instead, the record shows that Gibson's Tourette's-related outbursts played a large role in the events leading up to the assault. For example, Gibson testified that he experienced severe Tourette's outbursts when he was sent back to his cell and responded to the outbursts by engaging in intense physical activity. S. App. at 92-93. Donnelly similarly acknowledges that Gibson had a Tourette's-related verbal outburst during that time. Appellant's Brief at 31. In response to the Tourette's-related commotion, Officer Benson shouted to Gibson to "shut the f-ck up." S. App. at 93. After Gibson responded, indicating that he was frustrated with being made fun of because of his Tourette's, Donnelly stepped in: Donnelly reprimanded Gibson for talking back to Benson, entered the cell with Benson, and then both assaulted Gibson. *Id.* at 93-97. Thus, the court did not clearly err in finding that "in very large part, the assault on [Gibson] occurred because he had Tourette's Syndrome." App. at 161.

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<sup>7</sup> Contrary to Donnelly's assertion, Appellant's Brief at 19-20, 29-33, this Court has never held that a "nexus" between a victim's vulnerability and the defendant's crime is an additional, independent element of U.S.S.G. 3A1.1(b). Cf. *United States v. Iannone*, 184 F.3d 214, 220 (3d Cir. 1999). Instead, a sentencing court should consider the link between a victim's characteristics and the defendant's crime in analyzing whether the victim was "unusually vulnerable" or "particularly susceptible" for purposes of Section 3A1.1(b). See, e.g., *United States v. Pavao*, 948 F.2d 74, 78 (1st Cir. 1991) (approving sentencing court's reliance on "individual facts" about victim "combined with those of the crime" to make a finding of "unusual vulnerability").



Donnelly also attempts to undermine Gibson's susceptibility by highlighting Gibson's height and strength. Appellant's Brief at 23. Gibson's physical characteristics, however, are of little relevance in light of the nature of the assault and the setting in which it occurred. This was not a fight between two men in the open air. This was an assault by two guards – one of whom was a supervisor – on a detainee confined to his cell. Gibson further testified that Donnelly knelt on top of him – pinning him down on his cot – while Donnelly and Officer Benson struck him. S. App. at 96. Fighting back or attempting to escape – even if Gibson's size and strength made it possible – would certainly have had serious repercussions for Gibson. In fact, other courts of appeals have affirmed vulnerable victim enhancements in similar cases based on the custodial status of the victim in combination with the nature of the assault. See, e.g., *United States v. Herschkowitz*, 968 F.2d 1503 (2d Cir. 1992) (victim was assaulted in a detention facility, in the custody of, and surrounded by, four guards); *United States v. Lambright*, 320 F.3d 517, 519 (5th Cir. 2003) (victim assaulted by guard inside his locked cell).

Because Gibson's Tourette's made him particularly susceptible to Donnelly's crime, and this disability played a significant part in the events leading up to the assault, the sentencing court did not clearly err in finding that Gibson is a "vulnerable victim" for purposes of Section 3A1.1(b).

B. *The District Court Did Not Err In Concluding That Donnelly "Knew Or Should Have Known" Of Gibson's Susceptibility*

Donnelly claims that there was no evidence in the record that he “knew or should have known” that Gibson was particularly susceptible to his crime due to Gibson’s Tourette’s. Appellant’s Brief at 25-28. Because Donnelly did not present this argument to the sentencing court below, review of this argument is for “plain error” only. *United States v. Connolly*, 341 F.3d 16, 31 (1st Cir. 2003). In cases where the error asserted on appeal depends upon a factual finding the defendant neglected to ask the district court to make, the plain error standard is met only if the desired finding is the “only one rationally supported by the record below.” *United States v. Olivier-Diaz*, 13 F.3d 1, 5 (1st Cir. 1993); see also *United States v. Martinez-Vargas*, 321 F.3d 245, 250 (1st Cir. 2003). The record, however, strongly supports the court’s conclusion that Donnelly either knew or should have known that Gibson’s Tourette’s made him particularly susceptible to Donnelly’s crime.

First, while Donnelly correctly observes that jail detainees often curse at correctional officers, see Appellant’s Brief at 27, the verbal outbursts associated with Tourette’s are atypical. The sentencing court, having observed Gibson’s behaviors first-hand, could have reasonably concluded that Donnelly would have either known or should have known that Gibson suffered from a condition making him particularly susceptible to Donnelly’s crime.

Second, Donnelly’s knowledge of Gibson’s susceptibility is supported by the fact that during the assault one of the assailants shouted something to the effect of “We’ll beat the Tourette’s out of you.” Addendum to United States’ Brief at

11-13; see also S. App. at 8. Donnelly did not object to this statement of fact during his plea colloquy nor did he timely object to its inclusion in the PSR.<sup>8</sup> In his untimely written objection to the inclusion of this statement in PSR, Donnelly's only argument was that Gibson's testimony during the trial of Officer Benson did not refer to any statements made by his assailants. S. App. 66-68. Gibson's failure to mention the remark in his testimony, however, is of little probative value. The court could have reasonably concluded that Gibson simply did not recall what his assailants were shouting as they were beating him.

In his brief to this Court, Donnelly now claims that it was error for the court to rely on the remark to establish Donnelly's knowledge of Gibson's disability since Donnelly is not identified as having made the remark. Appellant's Brief at 28. While evidence that Donnelly made that statement would support a finding that Donnelly targeted Gibson because of his Tourette's, the court did not have to find that Donnelly targeted Gibson in order to impose the enhancement. See *United States v. Feldman*, 83 F.3d 9, 16 (1st Cir. 1996).<sup>9</sup> Regardless of which of

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<sup>8</sup> Federal Rule of Criminal Procedure 32(f)(1) provides that objections by any party to the PSR should be made within 14 days after receiving the report. Because Donnelly's second objection to the PSR was not timely, the sentencing court could accept as undisputed that portion of the PSR describing the assault on Gibson as a finding of fact. Fed. R. Crim. P. 32(i)(3)(A). While this Court in *Martinez-Vargas* noted that failing to timely object to factual assertions made in a PSR "might well constitute a waiver," it treated the lapse as a "forfeiture" subject to the plain error standard. 321 F.3d at 249-250 (citing *United States v. Olano*, 507 U.S. 725, 733-734 (1993)).

<sup>9</sup> Originally, the Sentencing Commission advised that Section 3A1.1  
(continued...)

Gibson’s assailants yelled “We’ll beat the Tourette’s out of you,” the court could reasonably have concluded that both Benson and Donnelly knew of Gibson’s condition. Furthermore, even if Donnelly did not make the remark and did not previously know that Gibson had Tourette’s, he was certainly made aware of Gibson’s condition when the remark was made. Such knowledge, even if it is obtained while the crime is in progress, satisfied the knowledge requirement of Section 3A1.1(b). See *United States v. Proffit*, 304 F.3d 1001, 1006 (10th Cir. 2002) (learning about the victim’s vulnerability “during the criminal episode” is sufficient to establish a defendant’s knowledge).

Because the record supports the court’s conclusion that Donnelly had the requisite knowledge of Gibson’s susceptibility to warrant a vulnerable victim enhancement, the court did not commit error – “plain or otherwise.” *Connolly*, 341 F.3d at 33.

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<sup>9</sup>(...continued)  
“applies to offenses where an unusually vulnerable victim is made a target of criminal activity by the defendant.” U.S.S.G. 3A1.1, comment (n.1) (Nov. 1994). In *Feldman*, this Court explained that the courts of appeals had been split on the issue of “whether the government had to prove that the defendant was motivated by the victim’s special vulnerability in order to lay a foundation for the upward adjustment, or whether the government merely had to show that the defendant targeted his victim with the knowledge (actual or constructive) that the victim was unusually vulnerable.” 83 F.3d at 16. Responding to this split, the Sentencing Commission amended the commentary make clear that “targeting” was not an essential element of proof. *Ibid.* The revised note now states that Section 3A1.1 “applies to offenses involving an unusually vulnerable victim in which the defendant knows or should have known of the victim’s unusual vulnerability.” U.S.S.G. 3A1.1, comment. (n.2) (Nov. 1995).

**CONCLUSION**

The district court's two-level "vulnerable victim" sentence enhancement pursuant to U.S.S.G. 3A1.1(b) should be affirmed.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on November 14, 2003, two copies of the United States' Brief as Appellee were served by regular mail, postage pre-paid, on the following counsel of record:

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