

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT’S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: “(SUMMARY ORDER).” A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 18th day of January, two thousand and eight.

PRESENT:

HON. SONIA SOTOMAYOR,
HON. DEBRA ANN LIVINGSTON,
Circuit Judges,
HON. GREGORY W. CARMAN,*
Judge.

United States of America,

Appellee,

-v.-

No. 06-5043-cr

Lewis Lee,

Defendant-Appellant.

* The Honorable Gregory W. Carman, Judge for the United States Court of International Trade, sitting by designation.

FOR DEFENDANT-APPELLANT:

Lisa A. Peebles (Alexander Bunin, Federal Defender, Melissa A. Tuohey, *on the brief*) Federal Defenders, Syracuse, NY.

FOR APPELLEE:

Brenda Sannes, Assistant United States Attorney (Miroslav Lovric, of counsel), for Glenn T. Suddaby, United States Attorney for the Northern District of New York, Syracuse, NY.

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED, that the sentence is hereby VACATED and the matter REMANDED for resentencing in accordance with this Order.

Defendant-appellant Lewis Lee appeals from a October 30, 2006 judgment of the United States District Court for the Northern District of New York (McAvoy, *J.*), sentencing him principally to a term of 135 months' imprisonment. We assume the parties' familiarity with the facts and procedural history of the case.

On appeal, Lee claims that the district court's sentence was procedurally unreasonable insofar as it miscalculated the applicable Sentencing Guidelines range. *See United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005) ("An error in determining the applicable Guideline range . . . would be the type of procedural error that could render a sentence unreasonable under *Booker*."); *see also Gall v. United States*, 128 S. Ct. 586, 596 (2007) ("A district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range."). Specifically, Lee claims that the district court's imposition of a vulnerable victim enhancement under U.S.S.G. § 3A1.1(b)(1) was improperly based on speculative generalizations rather than particularized findings with respect to the victim.

We are concerned that the district court's findings in connection with the vulnerable victim enhancement were not adequately supported by the factual record, and that the court may have engaged in the type of class-based generalizations that we cautioned against in *United States v. McCall*, 174 F.3d 47, 49 (2d Cir. 1998). Although the Presentence Report ("PSR") adopted by the district court states that the home-schooled victim was living a "relatively simple and sheltered life," these generalized characterizations about the victim's life were not supported by specific facts which might tend to establish that she was "particularly susceptible" to the crimes at issue. *See* U.S.S.G. § 3A1.1, App. Note 2 (defining "vulnerable victim" as one "who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct" at issue); *McCall*, 174 F.3d at 51.

We are also concerned with the district court's reliance on a double-hearsay statement in the PSR concerning the victim's alleged past sexual victimization as a basis for concluding that she was particularly susceptible to the crimes Lee committed against her. To begin with, there is no record evidence to support the district court's belief that a correlation exists between past and

future sexual victimization, much less the degree to which any such correlation might extend to the types of victimizations at issue. Moreover, even assuming that a correlation between past and future sexual victimization exists, the district court failed to make a finding in this case that the alleged predicate victimization occurred. Without expressing an opinion as to what type of record support might suffice to establish a prior sexual victimization, or whether such victimization would render the victim particularly susceptible to the at-issue offense, we find in this case that the double-hearsay statement in the PSR upon which the district court relied was insufficient to support the vulnerable victim enhancement.

Because the district court did not indicate on the record whether its post-*Booker* sentence would have been the same absent the vulnerable victim enhancement, we cannot say that the district court's error in calculating the Guidelines range was harmless. Accordingly, we VACATE the district court's sentence and REMAND the matter to the district court for resentencing consistent with this Order.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: _____