

Nos. 08-1466, 08-1608, 08-1616, & 08-1617

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

DAREK HAYNES,  
*Defendant-Appellant.*

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Appeal from the United States District Court for the  
Northern District of Illinois, Eastern Division  
Case No. 05 CR 70-3  
The Honorable Ronald A. Guzmán

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**BRIEF OF DEFENDANT-APPELLANT DAREK HAYNES**

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**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 08-1466

Short Caption: United States v. Darek Haynes (consolidated with 08-1608, 08-1616, & 08-1617)

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Darek Anthony Haynes  
\_\_\_\_\_  
\_\_\_\_\_

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Gerald Joseph Collins (new information)  
Joan A. Hill-McClain  
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(3) If the party or amicus is a corporation:

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Attorney's Signature: \_\_\_\_\_ Date: December 19, 2008

Attorney's Printed Name: Katherine E. Agonis

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(d). Yes X No \_\_\_\_.

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Attorney's Signature: \_\_\_\_\_ Date: December 19, 2008

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## **JURISDICTIONAL STATEMENT**

The United States District Court for the Northern District of Illinois, Eastern Division, had jurisdiction over this action under 18 U.S.C. § 3231 because it alleged offenses against the laws of the United States, specifically 21 U.S.C. §§ 841 and 846, and 18 U.S.C. §§ 1962(d) and 924(c).

The United States Court of Appeals for the Seventh Circuit has jurisdiction over this action under 28 U.S.C. § 1291 because it is an appeal from a final decision of the district court. The district court entered judgment on January 3, 2008, and there was no motion for alteration of the judgment. The Defendant-Appellant filed a timely notice of appeal on January 16, 2008.

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether the district court erred in concluding that Defendant Haynes was not entitled to a downward adjustment under U.S.S.G. § 3B1.2(b) for having a minor role in the conspiracy, where it did not compare Haynes's role in the conspiracy to that of the average member?
2. Whether the district court erred in applying a four-level upward adjustment under U.S.S.G. § 3B1.5(2)(B) for Haynes's use of body armor, where it did not resolve Haynes's argument that only a two-level adjustment should apply?
3. Whether the district court committed plain error by imposing a consecutive five-year sentence for Haynes's firearm conviction, where the plain language of 18 U.S.C. § 924(c)(1)(A) exempts a defendant who is already subject to a second, higher minimum sentence under another provision of law?

## STATEMENT OF THE CASE

Defendant Darek Haynes, a former Chicago police officer, pleaded guilty to charges of racketeering, drug conspiracy, and possession of a firearm during and in relation to a crime of violence. The convictions stemmed from a string of “rip-offs” orchestrated by Broderick Jones and Corey Flagg, during which Haynes and his co-defendants robbed or attempted to rob drug dealers of drugs or cash. In this appeal, Haynes challenges the prison sentence imposed by the district court.

On May 26, 2005, a Special Grand Jury returned a nine-count indictment against Haynes, Broderick Jones, Corey Flagg, Eural Black, Joseph Wilson, James Walker, Joel Montgomery, Stanley Driver, Jr., Brent Terry, and Erik Johnson. R.126-1<sup>1</sup>. Haynes was charged with conspiracy to possess with intent to distribute and to distribute controlled substances, 21 U.S.C. §§ 841(a)(1) and 846. (Count One), and possessing a firearm during and in relation to a drug-trafficking crime, 18 U.S.C. § 924(c)(1)(A) (Count Four). *Id.* Haynes as well as Jones, Flagg, Black, and Johnson were members of the Chicago Police Department during the time period covered by the indictment. *Id.* at 1-2. Haynes entered a plea of not guilty to the charges. R.135-1.

A superseding, 19-count indictment was returned on June 1, 2006, against Haynes, Jones, Black, Wilson, Walker, Driver, and Terry. R.251-1. The new Count One charged the defendants with conspiring to participate in a corrupt enterprise in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.

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<sup>1</sup> Material in the Appendix bound with this brief is cited as A\_\_. Other record material is cited by docket sheet number as R.\_\_.

§ 1962(d)—the “enterprise” being the Chicago Police Department. *Id.* at 1-6. The predicate acts charged included robbery and extortion, 18 U.S.C. § 1951, attempt and conspiracy to distribute controlled substances and to possess controlled substances with the intent to distribute, 21 U.S.C. § 846, and distribution of controlled substances and possession with intent to distribute controlled substances, 21 U.S.C. § 841(a)(1). *Id.* at 4. Count Two charged Haynes and the others with conspiring to possess with intent to distribute and to distribute controlled substances, 21 U.S.C. §§ 841(a)(1) and 846. *Id.* at 7-12. Counts Nine and Thirteen charged Haynes with possession of a firearm during and in relation to a drug trafficking offense and crime of violence, 18 U.S.C. § 924(c)(1)(A). *Id.* at 23, 27. Haynes was charged in only four of the remaining 15 counts, for conspiring and attempting to commit and committing robbery and extortion in violation of 18 U.S.C. § 1951 (Counts Three and Eight), and attempting to possess with intent to distribute a controlled substance in violation of 21 U.S.C. § 846 (Counts Seven and Twelve). *Id.* at 8, 13-17, 21-22, 26. Haynes initially pleaded not guilty to all counts. R.254-1.

On August 22, 2006, in accordance with a written plea agreement with the government, Haynes withdrew his not-guilty plea and pleaded guilty to Counts One, Two, and Nine of the superseding indictment. R.272-1, R.278-1. In the plea agreement Haynes reserved the right to challenge certain sentencing factors, and to appeal his sentence. R.278-1 at 12, 14, 17, 20. Before sentencing, Haynes’s retained

attorney orally moved to withdraw. R.338. Haynes then moved *pro se* for the appointment of counsel, R.376-1, and the court granted the motion, R.385.

On January 3, 2008, the district court sentenced Haynes to a total of 228 months' imprisonment: 168 months for Counts One and Two, and a consecutive 60 months for Count Nine. A2. Haynes timely appealed. R.488. On March 17, 2008, this Court consolidated his appeal with those of Broderick Jones, Brent Terry, and Eural Black.

### **STATEMENT OF FACTS**

Darek Haynes was a police officer in the Chicago Police Department's Seventh District, located on Chicago's south side; he was a patrol officer often assigned to tactical units, which focus on investigating narcotics- and gang-related crimes. R.251-1 at 1-2; R.278-1 at 5. The government charged that in 2003 and 2004, Haynes participated in actual or attempted rip-offs of drug dealers organized by fellow Chicago police officers Broderick Jones<sup>2</sup> or Corey Flagg through their contacts with informants in the community. R.278-1 at 4-5. At least two additional police officers and five other individuals participated in the rip-offs, which included vehicle stops and home invasions. R.126-1 at 1-2, R.251-1 at 2-3, 5.

#### **A. Haynes's Participation**

Haynes's plea agreement outlines his participation in four incidents, only one of which actually involved the theft of drugs or money. R.278-1. First, in 2003, Haynes accompanied Flagg to a location near a carwash at the corner of 77<sup>th</sup> Street

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<sup>2</sup> In August 2003, Jones was stripped of his badge and gun and placed on restricted duty, which did not involve field work. R.251-1 at 3.

and Vincennes Avenue in Chicago. Flagg had learned from “Corky,” one of his informants (and a drug dealer) that a drug deal was planned between Corky’s brother and another individual. *Id.* at 5. Haynes and another officer conducted a stop of Corky’s brother’s vehicle and recovered a half-kilogram of cocaine. Haynes handed the cocaine over to Flagg, who gave it to Corky to sell. *Id.* at 5-6; PSR at 13. Flagg also took \$7000 from the trunk of the car driven by the other party to the intended drug deal. R.278-1 at 6. Flagg later divided up the money, giving \$500<sup>3</sup> to Haynes. R.278-1, R.436-1 at 4.

The second incident, also in 2003, was intended to be a robbery of a drug dealer at his residence. Once again, Flagg organized the deal based on information from Corky. R.278-1 at 6. Haynes and another officer accompanied Flagg to the residence, where they expected two individuals to arrive with drugs to sell to a third man who was waiting there. *Id.* But the two drug dealers left the scene when their intended buyer did not answer their telephone call, and as a result no deal occurred. *Id.* No money or drugs were stolen. *Id.*

The third incident in which Haynes participated occurred on July 21, 2004, when Haynes and Flagg were recruited by Broderick Jones to participate in a rip-off that Jones planned with Joseph Wilson. R.278-1 at 6-7. Wilson told Jones that he ordered “multiple” kilograms of cocaine from drug dealers whom he arranged to meet at a carwash near 85<sup>th</sup> Street and Ashland Avenue in Chicago. *Id.* at 7. Unbeknownst to Wilson and Jones, one of their contacts was not a drug dealer but a

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<sup>3</sup> The government has never disputed the \$500 amount, which Haynes referenced in his sentencing memorandum. R.436-1 at 4.

confidential informant assisting undercover police officers. *Id.* When the purported dealers arrived at the carwash, they refused to show the drugs until they saw the buy money, and they eventually departed. *Id.* at 8. At Jones's direction, Haynes and Flagg then stopped two cars that they believed to be carrying drugs; one of these was driven by an undercover police officer who identified himself to Haynes. *Id.* at 8-9. Haynes and Flagg, who were not on duty, were outfitted with their police-issued badges and guns, and they rode in Flagg's police car. *Id.* at 7. No money or drugs were recovered during this incident, although Jones revived his attempts to rob the same purported drug dealers later that day with fellow police officers Erik Johnson and Eural Black, and without Haynes. *Id.* at 9.

Finally, on September 8, 2004, Jones arranged a robbery of a residence in Chicago. R.278-1 at 9-10. The apartment was occupied by co-defendant Joel Montgomery's brother, Jerry, whom Joel Montgomery had been unsuccessfully soliciting for money. *Id.*; R.436-1 Exh. A. Jones believed Jerry Montgomery to be a major drug dealer. R.278-1 at 9. Joel Montgomery told Jones that his brother had "three books"—meaning three kilograms—of cocaine and a large amount of cash. *Id.* at 10. Jones relayed to Flagg and Haynes that drugs and cash could be found at Jerry Montgomery's residence. *Id.* Using slang, Jones told Haynes that three kilograms and \$50,000 would be in the apartment. *Id.* Haynes, who was not on duty, went to the residence with Flagg in Flagg's unmarked police car, and Jones trailed behind in Haynes's car. *Id.* at 10-11. Haynes wore his police-issued bulletproof vest and badge. *Id.* at 11. At the apartment building, Flagg and Haynes

were thwarted by a neighbor who questioned their presence there. *Id.* Haynes, who had talked to the neighbor on the first floor while Flagg attempted to break into the second-floor apartment, ultimately left the scene. *Id.* at 11-12. Flagg, meanwhile, called his sergeant to the building in order to make his presence there appear legitimate. *Id.* at 11. The police (legitimately) recovered almost a kilogram of cocaine from the residence, but no member of the conspiracy recovered any drugs or cash as a result of the attempted break-in. *Id.*; PSR at 14.

Based on his participation in the rip-off and three failed attempts described above, Haynes pleaded guilty to Counts One, Two, and Nine of the superseding indictment. R. 272-1. In his plea agreement, Haynes reserved the right to contest several sentencing factors. R.278-1 at 12-14. He specifically reserved his right to appeal his sentence. *Id.* at 20.

### **B. Sentencing Proceedings**

After Haynes pleaded guilty, his retained attorney withdrew, and he sought the appointment of new counsel. R.338, R.376-1. Nearly ten months after the guilty plea, on June 13, 2007, the district court appointed an attorney to represent Haynes at sentencing. R.385.

The probation office prepared a presentence report in which the officer recommended that Haynes be held responsible for 8.5 kilograms of cocaine for sentencing purposes, leading to a base offense level of 32 under the 2006 United States Sentencing Guidelines. PSR at 17. For purposes of sentencing, the racketeering and drug-conspiracy counts were grouped together under U.S.S.G.

§ 3D1.2. *Id.* at 15. The officer further recommended upward adjustments for physically restraining a victim, U.S.S.G. § 3A1.3 (two levels), abusing a position of public trust, U.S.S.G. § 3B1.3 (two levels), and using body armor during a drug trafficking offense, U.S.S.G. § 3B1.5(2)(B) (four levels). *Id.* at 18-20. The officer also recommended a downward adjustment totaling three levels under U.S.S.G. § 3E1.1 for timely acceptance of responsibility. *Id.* at 31.

Haynes filed written objections to the presentence report. R.436-1. As relevant here, he contended that he was entitled to a two-level downward adjustment under U.S.S.G. § 3B1.2(b) because his role in the offense was minor compared to other members of the conspiracy. A8. He argued that, in contrast to other co-defendants, he was “merely a follower who did what he was told” and that he never kept or sold any drugs or received proceeds from drug sales. A8-A9. In particular, Haynes pointed out that the government sought huge forfeiture amounts from his co-defendants but none from him. *Id.* Haynes also argued that he should not receive the four-level body-armor enhancement because his wearing of a bulletproof vest was incidental to his status as a police officer and was not related to the offense in any way. A7-A8.

In reply, the government argued that Haynes did not deserve a downward adjustment for a minor role because, it said, he was a police officer and a “regular” participant. R.460 at 9-10. The government also argued that Haynes’s wearing the bulletproof vest as a uniform was still “active employment” of body armor, triggering the upward adjustment. *Id.* at 7-8.

At the sentencing hearing on January 3, 2008, the district court addressed Haynes's objections in turn. Haynes emphasized that he deserved a "minor participant" reduction because the guidelines specifically call for a "comparison to other people," and Haynes's role did not approach that of his cohorts. A11-A12. Haynes argued that he was not involved in any organizing, planning, or strategizing, and he was not "essential" to the conspiracy because he brought no special skills or unique characteristics without which the conspiracy could not have proceeded. *Id.* However, the court decided that Haynes did not merit the downward adjustment because he was a police officer who otherwise would not have been asked to participate in the conspiracy and whose status as a police officer facilitated the offenses. A13-A14. Instead of comparing Haynes's role to his co-defendants', the district court concluded that, as a police officer, Haynes was by definition "necessary." *Id.*

The district court turned to the body-armor enhancement and rejected Haynes's argument that his wearing of the bulletproof vest in order to look like a legitimate officer was not "use" of the armor for purposes of U.S.S.G. § 3B1.5(2). A14. The court concluded that Haynes likely intended to use the bulletproof vest to identify himself as a police officer, but that there was "nothing here under these circumstances to indicate that it was not being used" for protection as well. *Id.* Counsel for Haynes also requested that, to the extent the court concluded that there was "use" of body armor, it apply the two-level adjustment for offenses "involv[ing] the use of body armor," U.S.S.G. § 3B1.5(2)(A), instead of the four-level increase in

U.S.S.G. § 3B1.5(2)(B). A13. Without addressing the substantive argument that there was no clear distinction between the two-level and four-level body-armor enhancements, the district court simply remarked that it is common for a defense attorney to be confused by the sentencing guidelines and that counsel's argument was not "helpful." A13.

In light of its rulings on the various adjustments, the court calculated an adjusted offense level of 38, from which it subtracted three levels for acceptance of responsibility. A15. The resulting total offense level for Counts One and Two was 35, which, in combination with Haynes's criminal history category, Category I, yielded an advisory guidelines range of 168-210 months. *Id.* The court also determined that, apart from the sentencing guidelines, Haynes was subject to two statutory minimum terms. The finding that the drug quantity exceeded five kilograms triggered a mandatory ten-year sentence under 21 U.S.C. §§ 841(b)(1)(A)(ii)(II) and 846. A16. The court also applied a five-year consecutive sentence under 18 U.S.C. § 924(c)(1)(A)(i) for Haynes's conviction on the firearm charge. A19. Ultimately, the district court sentenced Haynes to 228 months' imprisonment: 168 months on Counts One and Two and a consecutive 60 months on Count Nine. A2.

## SUMMARY OF THE ARGUMENT

The district court erred in concluding that Haynes, as a police officer, was ineligible for a minor-role adjustment under U.S.S.G. § 3B1.2(b).<sup>4</sup> In applying the adjustment, a sentencing court must compare the defendant to the average member of the conspiracy to determine whether he is less culpable. In this case, however, the district court bypassed the comparison and decided that Haynes was ineligible for the adjustment simply by nature of being a police officer. Nothing in the law suggests that in a conspiracy among police officers, no single officer can ever be less culpable than the others. The very point of the guideline is to define a defendant's role relative to other members of the particular conspiracy. To refuse the adjustment without even engaging in that comparison is error. The error here was particularly detrimental to Haynes, who would have received a two-level reduction in his base offense level along with any minor-role adjustment, pursuant to U.S.S.G. § 2D1.1(a)(3).

The district court likewise did not address an important aspect of Haynes's challenge to the four-level increase under U.S.S.G. § 3B1.5(2)(B). Hayes argued that the conduct supporting a two-level upward adjustment under U.S.S.G. § 3B1.5(2)(A) was indistinguishable from that allowing the four-level increase, and that the court therefore should only apply the two-level increase to account for Haynes's wearing of a bulletproof vest to identify himself as a police officer. Rather than take seriously the notion that it could apply the two-level adjustment, the district court

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<sup>4</sup>The guidelines and statute on which Mr. Haynes bases this appeal are reproduced in the Statutory Addendum (SA) bound with this brief.

glossed over the argument that the two adjustments overlap. The court therefore did not meet its obligation, recently reaffirmed by the Supreme Court of the United States, to explain its reasoning for rejecting a defendant's plausible argument in favor of a lower sentence.

Finally, the district court committed plain error by imposing a mandatory consecutive sentence of five years under 18 U.S.C. § 924(c)(1)(A)(i). A plain reading of 18 U.S.C. § 924(c)(1)(A) establishes that the minimum penalties prescribed therein are inapplicable to a defendant who already is subject to a higher mandatory minimum under any other provision of law. Haynes, who was subject to a mandatory minimum sentence of ten years under 21 U.S.C. § 841(b)(1)(A)(ii)(II), therefore is exempt from the five-year minimum penalty in 18 U.S.C. § 924(c)(1)(A)(i).

### **STANDARD OF REVIEW**

Issues I and II. With respect to Haynes's challenges to the calculation of his sentencing guidelines range, this Court will review the legal questions, including the correct application of the advisory guidelines, *de novo*. *United States v. Hollins*, 498 F.3d 622, 629 (7th Cir. 2007). The district court's findings of fact are reviewed for clear error. *Id.*

Issue III. Because it was not raised in the district court, Haynes's challenge to the imposition of consecutive sentences will be reviewed for plain error. See *United States v. Olano*, 507 U.S. 725, 731-32 (1993).

## ARGUMENT

Haynes must be resentenced, first, because the district court committed two errors in applying the sentencing guidelines. See *United States v. Katalinic*, 510 F.3d 744, 748 (7th Cir. 2007) (“Because the district court misapplied the sentencing guidelines in calculating the guidelines range, we must remand the case for resentencing”); *United States v. Acosta*, 474 F.3d 999, 1003 (7th Cir. 2007). This is true even under an advisory guidelines regime because proper calculation of the guideline range remains a required first step in crafting a sentence. See *United States v. Garrett*, 528 F.3d 525, 527 (7th Cir. 2008) (“When sentencing a defendant, the first step is to calculate the Guidelines range correctly, and a mistake in that calculation warrants resentencing.”). Resentencing is also required to correct the court’s plain error in requiring consecutive sentences, which unlawfully increased Haynes’s minimum exposure. See *United States v. Jaimes-Jaimes*, 406 F.3d 845, 850-51 (7th Cir. 2005) (resentencing required to correct plain error in sentencing).

### **I. The District Court Incorrectly Applied The Minor-Role Guideline.**

The district court may grant a two-level downward adjustment to a defendant’s offense level if the defendant was a “minor participant” in the criminal activity. U.S.S.G. § 3B1.2(b). The adjustment for a mitigating role applies to a defendant who is “substantially less culpable than the average participant,” and the minor-role adjustment in particular applies where the defendant is “less culpable than most other participants, but whose role could not be described as minimal.” U.S.S.G. § 3B1.2 cmt. nn.3(A) & 5; *United States v. Gonzalez*, 534 F.3d 613, 616 (7th Cir. 2008). In evaluating whether to apply the adjustment, the district court must

compare the defendant to the average member of the conspiracy. See *Gonzalez*, 534 F.3d at 616. The adjustment is still available where, as here, the defendant was held responsible only for the conduct in which he personally was involved. See *United States v. Panaigua-Verdugo*, 537 F.3d 722, 725 (7th Cir. 2008); *United States v. Rodriguez-Cardenas*, 362 F.3d 958, 960-61 (7th Cir. 2004).

In the district court Haynes argued that he was less culpable than the average member of the conspiracy because he was “merely a follower who did what he was told” and because his “proceeds” from the criminal activity were minimal in comparison to the haul taken by his co-defendants. A8. Haynes pointed out that the government did not seek forfeiture of ill-gotten gains from him, as it did from Black (\$6,000), Flagg (\$25,000), Johnson (\$6,000), Jones (\$134,000), Terry (\$75,000), and Wilson (\$165,000). A8-A9. Haynes argued that the \$500 he received as payment directly reflects the extent of his involvement compared to other conspirators. A8. In addition, as counsel argued at the sentencing hearing, Haynes was not “involved in the same level of scheming” or “involved in setting up opportunities.” A12. Emphasizing that “[t]he minor role reduction is supposed to look at all the members of the conspiracy and . . . analyze their comparable roles in the offense,” counsel urged the court to find that Haynes’s role relative to the other conspirators was minor. *Id.* at 11-12.

Notwithstanding Haynes’s arguments, the district court did not engage in the required comparison between Haynes and the other members of the conspiracy. The entirety of the court’s analysis follows:

With respect to the minor role, minor participant, I don't find that argument to be persuasive.

His participation was obviously necessary as a police officer. These things could not have been done or would have been much more difficult to do and much more dangerous were the participants not police officers, In fact, had he not been a police officer, the chances are he would not have been asked to participate. I think that is clear. And I cannot envision where the use of the authority and the power vested in a police officer in the commission of a crime is going to be deemed to be minor.

A13-A14. In short, the district court concluded that Haynes necessarily was not a minor participant in the conspiracy because he was a police officer. This approach is erroneous for several reasons.

First, the district court's analysis reflects none of the "fact-specific" comparison among defendants that this Court and the guideline itself requires. The official commentary explains that deciding whether to apply a minor-role reduction "involves a determination that is heavily dependent upon the facts of the particular case." U.S.S.G. § 3B1.2 cmt. n.3(C). Likewise, this Court has instructed that the district court must engage in "a fact-intensive inquiry," *United States v. McGee*, 408 F.3d 966, 987 (7th Cir. 2005), which examines "each codefendant's total role in the criminal offense," *United States v. Mendoza*, 457 F.3d 726, 729 (7th Cir. 2006). Indeed, it is only because of the very fact-specific inquiry that a district court's decision on the minor-role adjustment typically is afforded deference. See *Panaigua-Verdugo*, 537 F.3d at 724 (explaining that reversal is rare "given that the district court is in the best position to evaluate a particular defendant's role in a criminal scheme"). When the district court does not conduct the fact-intensive comparison, no such deference is due.

Here, the district court referred collectively to the “participants” in the conspiracy but in no way delineated their relative involvement. Instead, the court focused on Haynes’s status as a police officer, which has no obvious relevance to his role in the offense compared to others. Haynes was one of five officers in a conspiracy that also included a number of laymen. There was never a circumstance in which Haynes was the *only* officer present during a rip-off. To suggest, as the district court did, that a police officer cannot have a “minor role” in a crime is to ignore the nature of this particular conspiracy.

Second, the court’s reasoning implies impermissible double-counting. The court’s emphasis on Haynes’s “use of the authority and the power vested in a police officer” invokes the adjustment for abuse of a position of trust, U.S.S.G. § 3B1.3, which the court also applied to Haynes and which he does not challenge here. That adjustment applies when “abuse of the position of trust significantly facilitated the commission of the offense,” *United States v. Bailey*, 227 F.3d 792, 801 (7th Cir. 2000).<sup>5</sup> The abuse-of-trust and minor-role guidelines are not premised on the same conduct, so ordinarily there would not be impermissible overlap between them. *Cf. United States v. Hankton*, 432 F.3d 779, 795 (7th Cir. 2005). But double-counting also occurs when the district court bases two separate adjustments on the same behavior—where it draws “twice from the same well.” *United States v. Kopshever*, 6 F.3d 121, 1223-24 (7th Cir. 1993) (holding that district court improperly imposed upward departure for inflicting serious psychological injury where it had already

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<sup>5</sup> This Court has held that police officers occupy a position of public trust. *Bailey*, 227 F.3d at 801.

applied “vulnerable victim” adjustment for same reason). Here the district court penalized Haynes twice for being a police officer when it denied the minor-role reduction for the very same reason it had already increased Haynes’s sentence under U.S.S.G. § 3B1.3. This violates the spirit, if not the letter, of the ban on double-counting.

Third, to the extent the district court hinted that Haynes was “necessary” to the conspiracy, the point is belied by any fair reading of the record. To be sure, a defendant who is an “essential component” of a conspiracy is not eligible for a minor-role reduction. See *United States v. McKee*, 389 F.3d 697, 700 (7th Cir. 2004). But Haynes cannot fairly be described as “essential.” The essential members would have identified drug dealers to target, obtained information about when and where rip-offs could be accomplished, and furnished supplies such as police cars. Haynes did none of these. His PSR reflects only that he “assisted” the “primary” actors in a few discrete incidents. PSR at 12. He participated in one actual and three attempted rip-offs, obtaining a total of .5 kilograms of cocaine, which he immediately turned over to other members of the conspiracy, and \$500 in cash, which he did not steal but received as “payment.” Indeed, the paltry sum Haynes was paid strongly suggests that even Haynes’s co-conspirators viewed his role as minor. See *United States v. Cunningham*, 429 F.3d 673, 677 (7th Cir. 2005) (Defendant’s “meager . . . earnings” suggest “a role that obviously both the informant and [the co-defendant] thought trivial.”). The conspiracy would have gone

on without Haynes's participation, as it did in the numerous rip-offs in which he had no involvement. He simply cannot be characterized as an essential component.

The guidelines specifically provide for mitigating-role adjustments so that each individual's contribution to the criminal enterprise is weighted separately. By refusing to weigh Haynes's culpability at all, the district court incorrectly interpreted the guidelines. This misinterpretation requires resentencing.

## **II. The District Court Erroneously Applied A Four-Level Adjustment For Haynes's Use Of Body Armor Without Resolving The Argument That A Two-Level Increase Should Apply Instead.**

In another procedural error at sentencing, the district court did not explain why it imposed an upward adjustment of four, rather than two, levels for Haynes's use of body armor. It is well settled by now that, after arriving at a sentence, a district court must "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall v. United States*, 128 S. Ct. 586, 597 (2007); see *Rita v. United States*, 127 S. Ct. 2456, 2468 (2007). Ordinarily the explanation need not be lengthy or particularly detailed, but "[w]here the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence, . . . the judge will normally go further and explain why he has rejected those arguments." *Rita*, 127 S. Ct. at 2468.

At the sentencing hearing, Haynes requested that, to the extent the district court found that Haynes "used" body armor during one of his offenses, it apply the two-level increase from U.S.S.G. § 3B1.5(2)(A) rather than the four-level increase of U.S.S.G. § 3B1.5(2)(B). A13. The former applies when "the offense involved the use of body armor," and the latter when "the defendant used body armor during the

commission of the offense, in preparation for the offense, or in an attempt to avoid apprehension for the offense.” See U.S.S.G. § 3B1.5(2). Counsel pointed out that the distinction between the two sections was not clear,<sup>6</sup> but that a four-level increase was “huge” given that Haynes had worn a bulletproof vest only to identify himself as a police officer and not to obtain a tactical advantage over drug dealers or legitimate law enforcement officers. A12-A13.

The district court barely addressed Haynes’s argument. Instead, it noted blithely that many criminal defense attorneys are confused by the guidelines and that the argument that the two adjustments are indistinguishable was not “helpful.” A13. The court then applied the four-level adjustment, concluding that Haynes’s employment of the bulletproof vest, irrespective of his intent, amounted to “use” within the meaning of the guideline. A14.

Haynes does not contend on appeal that the factual conclusion that the body armor was “used” is clearly erroneous. However, that conclusion does not speak to Haynes’s argument that only the two-level adjustment should apply. *Both* subsections of U.S.S.G. § 3B1.5(2) require “use” of body armor, and so, as Haynes argued, they “virtually look the same.” A13. For U.S.S.G. § 3B1.5(2)(A) to apply, the offense must “involve[ ] the use of body armor.” To trigger U.S.S.G. § 3B1.5(2)(B), the defendant must “use[ ] body armor” during or in preparation for

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<sup>6</sup> No published federal decision addresses the distinction between U.S.S.G. § 3B1.5(2)(A) and (B). Of the two unpublished appellate decisions that address the enhancement at all (one of which was issued after Haynes’s sentencing in January 2008), neither mentions the two-level increase or explains the difference between U.S.S.G. § 3B1.5(2)(A) and (B). See *United States v. Chambers*, No. 07-6087, 2008 WL 622807, at \*4 (10th Cir. Mar. 3, 2008); *United States v. Douglas*, Nos. 05-6397 & 05-6458, 2007 WL 1892084, at \*5 (6th Cir. June 29, 2007).

the offense or in order to avoid apprehension. It is not clear from the guideline itself or the official commentary what behavior is encapsulated by U.S.S.G. § 3B1.5(2)(B) that warrants more severe punishment.<sup>7</sup> As counsel pointed out, the two-level adjustment could just have easily applied as the four-level. Absent any published decisions, or meaningful commentary from the Sentencing Commission explaining the distinction, Haynes’s argument could hardly have been more extensive.

District courts are not permitted to simply skip over plausible arguments raised by a defendant in support of a shorter sentence. *United States v. Schroeder*, 536 F.3d 746, 755 (7th Cir. 2008); *Cunningham*, 429 F.3d at 679. Thus, in *Schroeder*, resentencing was required for a defendant whose argument about his family circumstance was “brushed . . . aside” by the district court. 536 F.3d at 756. The sentencing court “was required to consider Schroeder’s . . . argument and provide an adequate analysis of how much weight, if any, it should command.” *Id.* Haynes’s request for an increase of two levels instead of four was not a “frivolous argument[ ] for leniency,” *id.* at 755, or a contention “clearly without merit,” *Cunningham*, 429 F.3d at 678, but an argument based on the language of the

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<sup>7</sup> Legislative history is similarly unilluminating. As part of the James Guelff and Chris McCurley Body Armor Act of 2002, Congress directed the United States Sentencing Commission to “review and amend the Federal sentencing guidelines and the policy statements of the Commission, as appropriate, to provide an appropriate sentencing enhancement for any crime of violence . . . or drug trafficking crime . . . *in which the defendant used body armor.*” 21st Century Department of Justice Appropriation Authorization Act, Pub. L. No. 107-273, § 11009(d)(1), 116 Stat. 1758, 1820 (2002) (emphasis added). Nothing in the bill or the legislative history refers to a need to enhance punishments for offenses “involv[ing] the use of body armor,” U.S.S.G. 3B.15(2)(A), or explains how such an adjustment might differ from one punishing the defendant’s use of body armor. See *id.*; H. R. Rep. No. 107-193(I) § 4 (2001). Notably, however, the legislative history reflects the “sense of Congress” that the sentencing adjustment should be at least *two* levels, not four. H. R. Rep. No. 107-193(I) § 4(b).

sentencing guidelines, which clearly provide for a two-level adjustment when the crime “involve[s] the use of body armor.” U.S.S.G. § 3B1.5(2)(A). Thus the district court was required to address this argument.

The district court’s failure to address the argument about the vagaries of U.S.S.G. § 3B1.5(2) affects not only Haynes but defendants as a whole. As the Supreme Court has explained, “[b]y articulating reasons, even if brief, the sentencing judge not only assures reviewing courts (and the public) that the sentencing process is a reasoned process but also helps that process evolve.” *Rita*, 127 S. Ct. at 2469. Here, neither this Court nor the public can discern the reasoning underlying the district court’s application of the four-level increase under U.S.S.G. § 3B1.5(2)(B) instead of the two-level adjustment. The district court’s silence is felt particularly acutely in a case such as this one, where case law addressing the challenged guideline is unusually sparse. Thus, in addition to simply giving short shrift to Haynes’s individual argument, the district court did not fulfill its function of contributing to the evolution of the sentencing process.

Finally, the district court’s application of the four-level adjustment in the face of an ambiguity in U.S.S.G. § 3B1.5(2) runs contrary to the rule of lenity, which “requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.” *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality op.). Although neither § 3B1.5(2)(A) nor § 3B1.5(2)(B) is ambiguous in isolation, they become so when read together. The “use” required for one to apply is nowhere distinguished from the “use” that triggers the other. There is a “fundamental

principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed.” *Santos*, 128 S. Ct. at 2025. The district court violated that principle in choosing a higher, four-level adjustment when a two-level increase appears to punish the same conduct.

### **III. The District Court Plainly Erred By Imposing A Mandatory Consecutive Sentence For The 18 U.S.C. § 924(c)(1)(A) Conviction.**

The district court erroneously imposed a consecutive minimum five-year sentence for Haynes’s conviction under 18 U.S.C. § 924(c)(1)(A) because he was already subject to a ten-year mandatory minimum under 21 U.S.C. § 841(b)(1)(A)(ii)(II). According to the plain language of 18 U.S.C. § 924(c)(1)(A), a person who uses or carries a firearm during and in relation to any crime of violence or drug trafficking crime, or who possesses a firearm in furtherance of any such crime, is subject to mandatory minimum consecutive sentence “[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law.” 18 U.S.C. § 924(c)(1)(A) (emphasis added). The “except” clause, if given its plain meaning, provides that the consecutive mandatory minimum sentence applies only where the defendant is not already subject to a higher mandatory minimum under “any other provision of law.” Thus the five-year mandatory minimum in 18 U.S.C. § 924(c)(1)(A)(i) does not apply to Haynes.

Whether the “except” clause exempts defendants such as Haynes from the mandatory minimum sentences in 18 U.S.C. § 924(c) is an issue of first impression in this Court. In the most recent appellate decision addressing this issue, the

Second Circuit held earlier this year that a consecutive minimum ten-year sentence under 18 U.S.C. § 924(c)(1)(A)(iii) was inapplicable to a defendant who was subject to a higher 15-year minimum sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e). *United States v. Whitley*, 529 F.3d 150, *reh'g denied*, 540 F.3d 87 (2d Cir. 2008). In arriving at its interpretation of the “except” clause, the court rejected the government’s arguments that exempting a defendant from the minimum sentences set forth in 18 U.S.C. § 924(c) runs contrary to the text, design, and purpose of that statute and would produce “illogical and distorted” outcomes. See *id.* at 153-56.

First, the *Whitley* court noted that the government’s textual argument depended on implying words into the statute: the government had argued that the “except” clause applies only when “some other statutory provision requires a higher minimum *consecutive* sentence for a *firearm* offense.” *Id.* at 153. The Second Circuit declined to add the words “consecutive” or “firearm” where they do not appear in the “except” clause, and instead gave literal meaning to the words in the statute. Second, the court rejected the argument, based on *United States v. Alaniz*, 235 F.3d 386 (8th Cir. 2000), that the “except” clause was necessary simply to “link the remaining prefatory language in (c)(1)(A) to each sentence length set forth in subdivisions (c)(1)(B) and (c)(1)(C).” *Id.* at 153-54 (quoting *Alaniz*, 235 F.3d at 389). The Second Circuit explained, “[W]e fail to see any grammatical problem at all, and neither the Eighth Circuit or the Government has identified any problem that would result in the absence of the ‘except’ clause.” *Id.* at 154. Moreover, the court

noted, the phrase “any other provision of law” suggests that the “except” clause was not designed simply to refer to other sections of 18 U.S.C. § 924. See *id.*

Third, the Second Circuit rejected the argument that a literal reading of the “except” clause would be inconsistent with Congress’s purpose in amending 18 U.S.C. § 924(c) in 1998, when it changed the statute to foreclose the Supreme Court’s holding that “active employment” of the firearm was required to trigger the five-year minimum consecutive sentence in 18 U.S.C. § 924(c)(1)(A). *Id.* at 154-55; see *Bailey v. United States*, 516 U.S. 137, 143 (1995). Although the *Whitley* court acknowledged that “a congressional purpose was to enhance firearms penalties,” it held that Congress, consistent with that purpose, could have made “a reasoned judgment that where a defendant is exposed to two minimum sentences, some of which were increased by the 1998 amended version, only the higher minimum should apply.” 529 F.3d at 155. Indeed, the court called this approach “eminently sound.” *Id.*

Fourth, the Second Circuit rejected the government’s argument that enforcing the literal meaning of 18 U.S.C. § 924(c) could lead to illogical results. 529 F.3d at 155. The government had suggested, for example, that a total minimum sentence of 12 years would apply to a defendant who was convicted of possessing 500 grams of cocaine, triggering a five-year minimum, see 21 U.S.C. § 841(b)(1)(B), and who brandished a firearm, triggering the seven-year mandatory consecutive sentence of 18 U.S.C. § 924(c)(1)(A)(ii). Meanwhile, a similar defendant whose drug amount exceeded five kilograms of cocaine would have a total minimum

sentence of only ten years, because the ten-year minimum for the drug charge would wipe out the seven-year minimum for brandishing a firearm. 529 F.3d at 155. The Second Circuit recognized the facial appeal of the government’s argument but ultimately found it illusory because “no court would be required to sentence the five-kilogram defendant to only the ten-year minimum.” *Id.* The sentencing court could exercise its considerable discretion and increase the sentence above the minimum because of the brandishing. *Id.*

Finally, the Second Circuit was unpersuaded by case law from other circuits that have declined to give the “except” clause its literal meaning. The court determined that other courts had relied unjustifiably on the Eighth Circuit’s unexplained determination in *Alaniz* that a literal reading would somehow render the statute “grammatically and conceptually incomplete.” *Id.* at 157 (citing *United States v. Studifin*, 240 F.3d 415, 422-23 (4th Cir. 2001); *United States v. Jolivette*, 257 F.3d 581, 587 (6th Cir. 2001); *United States v. Collins*, No. 06-30009, 2006 WL 2921225, at \*1-2 (5th Cir. Oct. 12, 2006); *United States v. Baldwin*, No. 00-1630, 2002 WL 726485, at \*2-3 (6th Cir. Apr. 23, 2002)). Moreover, the other courts had to imply words into the statute to achieve their results. *Whitley*, 529 F.3d at 153. For instance, the Eighth and Fifth Circuits limited the application of the “except” clause to cases in which the second, higher minimum was for another *firearm* offense. See *Alaniz*, 235 F.3d at 389; *Collins*, 2006 WL 2921225, at \*2. And the Fourth, Sixth, and Eighth Circuits all read the “except” clause to exempt minimum sentence requirements only where another law provides a longer minimum

*consecutive sentence*. See *Studifin*, 240 F.3d at 423; *Alaniz*, 235 F.3d at 389; *Baldwin*, 2002 WL 726485, at \*3. The Second Circuit concluded, however, that there was no justification for adding words to the statute to the detriment of criminal defendants, and it therefore held that the “except” clause must be given its literal meaning. *Whitley*, 529 F.3d at 157-58.

This Court should join the Second Circuit in applying the language of 18 U.S.C. § 924(c) literally to preclude the application of its mandatory minimum sentences where the defendant is subject to a higher minimum under “any other provision of law.” Due to the district court’s drug quantity determination, Haynes was subject to a ten-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A)(ii)(II). Applying the plain meaning of the “except” clause, he cannot also be subject to a mandatory minimum consecutive five-year sentence for possessing a firearm.

True, this Court must review Haynes’s argument under the plain-error standard because he did not object to the consecutive sentences in the district court.<sup>8</sup> See *United States v. Olano*, 507 U.S. 725, 731-32 (1993). But the plain-error standard was no obstacle in *Whitley*. See 529 F.3d at 152 n.1. And here the requirements of plain-error review are met. The error is “plain” because the text of the statute directed the appropriate outcome. See *United States v. Julian*, 427 F.3d 471, 482 (7th Cir. 2005) (error is plain if it is “an obvious mistake in retrospect”). The error affects Haynes’s substantial rights because, but for the error, his mandatory minimum prison sentence would have been five years shorter. See *id.*

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<sup>8</sup> The Second Circuit decided *Whitley* nearly six months after Haynes was sentenced.

(Substantial rights affected where error “exposed [defendant] to a longer sentence.”) For the same reason, a failure to correct the error would seriously affect “the fairness, integrity or public reputation of judicial proceedings” because Haynes was unlawfully subjected to an excessive prison sentence. See *United States v. Garrett*, 528 F.3d 525, 529-30 (7th Cir. 2008) (plain error in calculating guideline range required correction).

This Court repeatedly has emphasized the importance of giving statutes their plain meaning. *E.g.*, *United States v. Berkos*, 543 F.3d 392, 396 (7th Cir. 2008) (“Statutory interpretation begins with the plain language of the statute. . . . Absent clearly expressed Congressional intent to the contrary, the plain language should be conclusive.”); *United States v. Farr*, 419 F.3d 621, 625 (7th Cir. 2005) (“We may not overlook the statute’s plain language to further what may be a broader statutory purpose.”). The Court should apply that maxim once again in this case and hold that under the “except” clause of 18 U.S.C. § 924(c), Haynes was not subject to a five-year minimum sentence for possessing a firearm because he already was subject to a higher mandatory minimum under another provision of law.

## CONCLUSION

For the reasons set forth in this brief, this Court should vacate the judgment of the district court and remand this case for resentencing.

Dated: December 19, 2008

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for Defendant-Appellant Darek Haynes certifies that the foregoing brief:

(i) complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 7345 words including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).; and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type styles requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 SP3 in 12-point Century Schoolbook.

Dated: December 19, 2008

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Katherine E. Agonis

## **STATUTORY ADDENDUM**

## **STATUTORY ADDENDUM**

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18 U.S.C. § 924. Penalties

\* \* \*

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall--

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including

any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term “drug trafficking crime” means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term “crime of violence” means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term “brandish” means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

## **APPENDIX**

## **CIRCUIT RULE 30(a) & 30(b) APPENDIX**

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**CIRCUIT RULE 30(d) STATEMENT**

The undersigned counsel hereby certifies pursuant to Circuit Rule 30(d) that all materials required by Circuit Rules 30(a) and 30(b) are included in the appendix.

Dated: December 19, 2008

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Katherine E. Agonis

**CIRCUIT RULE 31(e) CERTIFICATION**

Pursuant to Circuit Rule 31(e), the undersigned counsel for Defendant-Appellant Darek Haynes certifies that she has filed electronically, pursuant to Circuit Rule 31(e), a copy of the foregoing Brief in native PDF format and all of the appendix items that are available in non-scanned PDF format.

Dated: December 19, 2008

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Katherine E. Agonis

## CERTIFICATE OF SERVICE

The undersigned, an attorney for Defendant-Appellant Darek Haynes, hereby certifies that on December 19, 2008, I caused two hard copies of the foregoing Brief and Appendix of Defendant-Appellant Darek Haynes, together with a digital version, to be served upon the counsel listed below by first class U.S. Mail, postage prepaid.

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