

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

---

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

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

DAREK HAYNES,  
*Defendant-Appellant.*

---

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

---

**REPLY BRIEF OF DEFENDANT-APPELLANT DAREK HAYNES**

---

Katherine E. Agonis  
Thomas M. Durkin  
MAYER BROWN LLP  
71 South Wacker Drive  
Chicago, Illinois 60606  
Tel.: (312) 782-0600  
Fax: (312) 701-7711  
kagonis@mayerbrown.com  
tdurkin@mayerbrown.com

*Attorneys for Defendant-Appellant Darek Haynes*

---

## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
ARGUMENT .....	1
I. The District Court Misapplied U.S.S.G. § 3B1.2(b) Because It Did Not Compare Haynes With The Other Conspirators. ....	2
A. The correct standard of review is de novo .....	2
B. The district court did not perform the comparison required by U.S.S.G. § 3B1.2(b).....	3
II. The District Court Improperly Ignored Haynes’s Argument That A Two-Level Body-Armor Enhancement Should Apply.....	7
A. The argument was not forfeited .....	7
B. The district court erred by ignoring the argument.....	8
C. The government’s arguments are non-responsive .....	9
III. Haynes Did Not Waive His Argument About Consecutive Sentences And Should Be Allowed To Preserve It For Further Review. ....	11
A. Haynes did not “affirmatively waive” the argument .....	11
B. This Court should allow Haynes to preserve his § 924(c) argument for further review .....	12
CONCLUSION.....	13

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>Rita v. United States</i> , 127 S. Ct. 2456 (2007) .....	9
<i>United States v. Abbas</i> , 560 F.3d 660 (7th Cir. 2009) .....	3
<i>United States v. Cunningham</i> , 429 F.3d 673 (7th Cir. 2005) .....	9
<i>United States v. Easter</i> , 553 F.3d 519 (7th Cir. 2009), petition for cert. filed (Mar. 26, 2009) (U.S. No. 08-9560).....	13
<i>United States v. Garrett</i> , 528 F.3d 525 (7th Cir. 2008) .....	7
<i>United States v. Gonzalez</i> , 534 F.3d 613 (7th Cir. 2008) .....	2
<i>United States v. Hollins</i> , 498 F.3d 622 (7th Cir. 2007) .....	3
<i>United States v. Hunte</i> , 196 F.3d 687 (7th Cir. 1999) .....	4, 5
<i>United States v. Irby</i> , 558 F.3d 651 (7th Cir. 2009) .....	12
<i>United States v. Jacques</i> , 345 F.3d 960 (7th Cir. 2003) .....	8
<i>United States v. Kopshever</i> , 6 F.3d 1218 (7th Cir. 1993) .....	4
<i>United States v. Lock</i> , 466 F.3d 594 (7th Cir. 2006) .....	8
<i>United States v. McGee</i> , 408 F.3d 966 (7th Cir. 2005) .....	4
<i>United States v. Mendoza</i> , 457 F.3d 726 (7th Cir. 2006) .....	6

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>United States v. Olano</i> , 507 U.S. 725 (1993) .....	11
<i>United States v. Ortiz</i> , 431 F.3d 1035 (7th Cir. 2005) .....	11
<i>United States v. Roque-Espinoza</i> , 338 F.3d 724 (7th Cir. 2003) .....	7
<i>United States v. Ross</i> , 501 F.3d 851 (7th Cir. 2007) .....	5, 10
<i>United States v. Schroeder</i> , 536 F.3d 746 (7th Cir. 2008) .....	9
<i>United States v. Spells</i> , 537 F.3d 743 (7th Cir. 2008), petition for cert. filed (Jan. 7, 2009) (U.S. No. 08-8136) .....	12
<i>United States v. Whitley</i> , 529 F.3d 150 (2d Cir. 2008) .....	11, 12
 <b>STATUTES</b>	
18 U.S.C. § 924(c) .....	2, 11, 12, 13
18 U.S.C. § 924(c)(1)(A)(i) .....	11, 13
18 U.S.C. § 924(c)(1)(A)(ii) .....	12
21 U.S.C. § 841(b)(1)(A)(ii)(II) .....	11, 13
 <b>SENTENCING GUIDELINES</b>	
U.S.S.G. § 3B1.2 .....	1
U.S.S.G. § 3B1.2(b) .....	2, 3
U.S.S.G. § 3B1.2(b) cmt. n.3(C) .....	4
U.S.S.G. § 3B1.2(b) cmt. n.5 .....	3
U.S.S.G. § 3B1.3 .....	4, 5

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
U.S.S.G. § 3B1.5.....	10
U.S.S.G. § 3B1.5(2) .....	7
U.S.S.G. § 3B1.5(2)(A) .....	1, 10
U.S.S.G. § 3B1.5(2)(B) .....	1

## ARGUMENT

The government's brief misstates, and therefore largely fails to answer, the arguments of Defendant-Appellant Darek Haynes with respect to the district court's misapplication of the sentencing guidelines. First, Haynes argues that the district court incorrectly interpreted and applied the minor-role guideline, U.S.S.G. § 3B1.2, by failing to compare Haynes to the other members of the conspiracy. The government never engages with this argument, instead maintaining as a factual matter that "Haynes played an essential role in committing all of the criminal conduct for which he was sentenced." Govt. Br. 72.<sup>1</sup> The government does not, and cannot, defend the district court's *legal* error in failing to weigh Haynes' culpability against the other conspiracy members'.

Second, the government does not respond to Haynes's argument that the district court improperly ignored a plausible argument for a lower sentence when it selected a four-level upward adjustment for the "use" of body armor instead of the two-level increase. See U.S.S.G. § 3B1.5(2)(A), (B). The government focuses almost exclusively on the rule of lenity, which Haynes invoked only as additional support for his primary contention that the district court impermissibly overlooked his argument for a two-level enhancement. The government also sets forth a textual justification for the four-level increase, although neither the government nor the district court did so at sentencing. A belated showing that the four-level increase

---

<sup>1</sup> References to the brief of the United States are in the form "Govt. Br. \_\_\_." References to Defendant-Appellant's opening brief are in the form "Haynes Br. \_\_\_." References to the appendix bound with Haynes's opening brief are in the form "A\_\_\_."

could apply does not excuse the district court's failure to consider the *also*-applicable two-level adjustment in response to Haynes's argument at sentencing.

Finally, the government unconvincingly contends that Haynes waived outright the argument that a consecutive sentence cannot be imposed for a violation of 18 U.S.C. § 924(c) when another, higher, mandatory minimum sentence also applies. There was no "affirmative waiver" (Govt. Br. 66) when Haynes simply asked that, to the extent that a consecutive sentence appeared to be a foregone conclusion, he receive five years and not the seven years the government sought. His failure to timely protest the consecutive sentence was simply a forfeiture, which entitles him to plain-error review. Nonetheless, intervening Seventh Circuit precedent now forecloses Haynes's argument. He declines to pursue it further in this Court but preserves it for further review.

**I. The District Court Misapplied U.S.S.G. § 3B1.2(b) Because It Did Not Compare Haynes With The Other Conspirators.**

Haynes argues that the district court misinterpreted the minor-participant guideline, U.S.S.G. § 3B1.2(b), by not comparing Haynes's role in the conspiracy to the roles of the other members and denying the adjustment solely because Haynes was a police officer. Haynes Br. 13-18.

**A. The correct standard of review is *de novo*.**

The government mistakenly contends that the standard of review for this issue is clear error. It is true that this Court reviews "for clear error a district court's finding of fact regarding a defendant's level of participation in an offense." *United States v. Gonzalez*, 534 F.3d 613, 616 (7th Cir. 2008). However, Haynes does

not argue that the district court committed a factual error in determining his role in the conspiracy. Instead, Haynes argues that the district court incorrectly applied the minor-role guideline *as a matter of law* because it did not compare Haynes’s level of culpability to the co-conspirators’. And it is well-settled that this Court must “review both the district court’s interpretation of the Guidelines and its application of the Guidelines to the facts *de novo*.” *United States v. Abbas*, 560 F.3d 660, 662 (7th Cir. 2009); see *United States v. Hollins*, 498 F.3d 622, 629 (7th Cir. 2007) (“[W]e review *de novo* legal questions, including the correct application of the advisory guidelines.”). This Court’s review of whether the district court incorrectly applied the minor-role guideline therefore is plenary.

**B. The district court did not perform the comparison required by U.S.S.G. § 3B1.2(b).**

As Haynes’s opening brief demonstrates, both the minor-role guideline itself and cases interpreting it require the district court to engage in a fact-specific comparison between defendants when applying the guideline. Here, however, the district court concluded solely based on Haynes’s status as a police officer that he was “necessary” to the conspiracy. A13-A14. This approach was erroneous because (1) it does not entail *any* comparison, let alone a fact-specific one; (2) it impermissibly took Haynes’s occupation into account for a second time; and (3) it led to a conclusion wholly at odds with the record.

First, the district court’s cursory analysis violated the letter of the guideline and myriad precedents of this Court because the court did not evaluate whether Haynes was “less culpable than most other participants.” U.S.S.G. § 3B1.2(b)

cmt. n.5; see *United States v. Hunte*, 196 F.3d 687, 694-95 (7th Cir. 1999) (explicitly comparing defendant to other participants in offense). This Court has remarked that whether to apply the minor-role reduction “depends on how the sentencing judge views the guilty conduct *of the other participants.*” *Hunte*, 196 F.3d at 694 (emphasis added) (comparing minor- and minimal-participant adjustments). But here, the district court mentioned the other conspirators only collectively as “the participants,” and even then did not compare Haynes’s role with theirs. A13. The failure to engage in the required comparison is a clear misapplication of the guideline. Moreover, the court’s reliance on the single fact that Haynes was a police officer is inconsistent with its duty to perform a “fact-intensive inquiry.” *United States v. McGee*, 408 F.3d 966, 987 (7th Cir. 2005); see U.S.S.G. § 3B1.2(b) cmt. n.3(C) (adjustment is “heavily dependent upon the facts of the particular case”).

Second, the district court impermissibly “drew from the same well” twice, *United States v. Kopshever*, 6 F.3d 1218, 1224 (7th Cir. 1993), when it denied Haynes the minor-role reduction for the very same reason it had increased his sentence under U.S.S.G. § 3B1.3. Haynes’s status as a police officer appropriately earned him a two-level upward adjustment for abusing a position of public trust, U.S.S.G. § 3B1.3, but his occupation had no relevance to the minor-role guideline—certainly none that the district court explained. Even if denying the minor-role reduction technically does not constitute double-counting (Haynes Br. 17), the single reason actually given by the district court did not support its imposition of a second penalty based on Haynes’s occupation. The government now attempts to shore up

the district court's reasoning by contending (for the first time) that Haynes's status as a police officer not only constitutes an abuse of trust but also "serves as an indication of the special skills he employed . . . showing he did not have a minor role." Govt. Br. 76-77. However, the district court did not give any such "special skills" rationale in denying the minor-role adjustment, and the government's after-the-fact bolstering of the court's reasoning is improper. See *United States v. Ross*, 501 F.3d 851, 854 (7th Cir. 2007) ("[W]e must insure that the sentence is appropriate based on 'the actual reasons given, not on whether the sentence could have been supported by a different rationale.'") (quoting *United States v. Wallace*, 458 F.3d 606, 609 (7th Cir. 2006), vacated on other grounds, 128 S. Ct. 586 (2008)). Moreover, "use of a special skill" is explicitly a basis for the adjustment under U.S.S.G. § 3B1.3 (already applied to Haynes), underscoring that the government, like the district court, conflates the unrelated abuse-of-trust enhancement with the minor-role adjustment.

Third, any fair reading of the record forecloses the conclusion that Haynes was "necessary" to this conspiracy. The district court relied solely on the fact that Haynes was a police officer in reaching that conclusion. A13-A14. But this was a conspiracy in which several members were corrupt police officers; the district court had no basis on which to conclude that any *particular* officer was essential based solely on that fact. Moreover, "'minor' is not necessarily synonymous with 'nonessential.'" *Hunte*, 196 F.3d at 694. Haynes admitted to attempting to participate in three botched rip-offs, and to carrying out one illicit vehicle stop

during which a small quantity of cocaine was stolen. These incidents amount to a drop in the bucket given the breadth of the conspiracy, and Haynes played only a supporting role in each. R.436-1 at 12-13; Haynes Br. 14, 17-18.

Still, the government baldly states that Haynes “communicated frequently with the other participants during the planning and commission of these four events, and had detailed knowledge of how each plot would unfold.” Govt. Br. 73. The government cites no record evidence to support such a claim, and there is none. The only sources of record evidence that the district court used in assessing Haynes’s conduct are his plea agreement and the PSR, neither of which remotely supports the contention that Haynes was even an average member. They say nothing of Haynes planning rip-offs, identifying targets, interacting with informants, obtaining supplies, or performing any essential function of the conspiracy. Indeed, the PSR states that Haynes merely “assisted” the “primary” actors in the rip-offs to which he pleaded guilty. PSR ¶¶ 401, 409, 412. Moreover, contrary to the government’s assertion (Govt. Br. 72), the applicability of the reduction does not rest solely on *Haynes’s* role in the conduct for which he was sentenced. See *United States v. Mendoza*, 457 F.3d 726, 729-30 (7th Cir. 2006) (“[A]n examination of *each codefendant’s* total role in the criminal offense provides a much more thorough insight into their responsibility as well as position in the conspiracy.”) (emphasis added). When the role of each defendant is examined, it becomes clear that Haynes was the smallest fish caught in the government’s net. Haynes Br. 14, 17-18.

The government never engages with Haynes’s argument that the district court misapplied the minor-role guideline as a legal matter. Indeed, the government’s brief repeats the district court’s error by failing to discuss Haynes’s culpability *relative to other members of the conspiracy*. By eschewing the required comparison and relying solely on Haynes’s status as a police officer to reach the erroneous conclusion that he was “necessary,” the district court erred as a matter of law. As a result, Haynes must be resentenced. See *United States v. Garrett*, 528 F.3d 525, 527 (7th Cir. 2008) (Mistake in calculating advisory guidelines range “warrants resentencing.”).

## **II. The District Court Improperly Ignored Haynes’s Argument That A Two-Level Body-Armor Enhancement Should Apply.**

Haynes also argues that the district erred in failing to respond to his argument that the district court should impose a two-level rather than a four-level upward adjustment under U.S.S.G. § 3B1.5(2) to punish the “use” of body armor in connection with the September 8, 2004, attempted rip-off. Haynes Br. 18-21.

### **A. The argument was not forfeited.**

The government contends that Haynes did not adequately preserve the argument in the district court, but in fact he developed it as much as he could given the dearth of case law on the subject and the district court’s quick dispatch of the issue. See *United States v. Roque-Espinoza*, 338 F.3d 724, 727 (7th Cir. 2003) (“underdeveloped” argument preserved for appeal where argument could be discerned). At the sentencing hearing, counsel for Haynes raised the “important point” that a four-level bump was “huge” when there was no dispute that Haynes

wore a bulletproof vest only to identify himself as a police officer while dressed in civilian clothing.<sup>2</sup> A12-A13. Counsel argued that because “the two level and four level adjustments virtually look the same,” the court should impose the two-level adjustment if it concluded that wearing a bulletproof vest for identification purposes was “use” within the meaning of the guideline. A13.

Absent any published case law to support his request, Haynes’s argument was sufficiently well-developed. Moreover, after counsel raised the issue, the district court proceeded almost immediately to ruling on the minor-role adjustment, signaling that further argument was unwelcome. *Id.* The court paused to state that it was not unusual for defense attorneys to “confess confusion” over the sentencing guidelines, but it did not address whether the two-level body-armor enhancement could apply. *Id.* Where the district court itself cut off further argument, Haynes cannot be said to have forfeited the issue by failing to develop it more. Accordingly, the issue is preserved, and plain-error review is inapplicable.

**B. The district court erred by ignoring the argument.**

As the discussion above shows, the district court did not respond in any meaningful way to Haynes’s request for a two-level adjustment instead of the four-level increase. Thus, this Court cannot properly evaluate whether the district court complied with the oft-repeated mandate to first properly calculate the guidelines

---

<sup>2</sup> Contrary to the government’s suggestion (Govt. Br. 78), raising an argument at the sentencing hearing instead of in a presentencing memorandum is not a forfeiture. This Court often judges forfeiture by examining whether an issue was raised *at* the sentencing hearing—not before it. *E.g.*, *United States v. Lock*, 466 F.3d 594, 597 n.5 (7th Cir. 2006) (no forfeiture where defendant “orally raised the claim before the sentencing court”); *United States v. Jacques*, 345 F.3d 960, 962 (7th Cir. 2003) (objection “at the sentencing hearing”).

range. *United States v. Cunningham*, 429 F.3d 673, 675 (7th Cir. 2005) (citing cases). Skipping over a defendant’s plausible arguments in favor of a shorter sentence is error. *United States v. Schroeder*, 536 F.3d 746, 755 (7th Cir. 2008); *Cunningham*, 429 F.3d at 679. Without any explanation for the four-level adjustment, this Court lacks assurances “that the sentencing process is a reasoned process.” *Rita v. United States*, 127 S. Ct. 2456, 2469 (2007). Moreover, the sentencing process cannot evolve unless district courts “articulat[e] reasons, even if brief.” *Id.* Here, the district court apparently did not even consider Haynes’s argument about the two-level adjustment, let alone provide reasons for rejecting it. Accordingly, a remand for resentencing (and not, as the government would have it, a “statement of reasons,” Govt. Br. 86) is required.

**C. The government’s arguments are non-responsive.**

Instead of responding to Haynes’s primary contention—that the district court impermissibly ignored a valid argument—the government focuses on Haynes’s single invocation of the rule of lenity.<sup>3</sup> Haynes Br. 21-22. But Haynes simply suggested that the district court’s obligation to address his argument was even more pronounced here because two adjustments could punish the same conduct, and any ambiguity should favor Haynes. The argument is additional support for the principle that the district court must not ignore plausible arguments for a lower

---

<sup>3</sup> Indeed, the government bizarrely claims that Haynes “attempts to characterize the Rule of Lenity as the cornerstone of his argument to the district court.” Govt. Br. 80. This assertion is wholly incompatible with Haynes’s actual argument, which is that the district court impermissibly ignored his request that it apply a two-level adjustment instead of the four because a “huge” (A13) four-level adjustment did not accurately reflect the role of the body armor in the offense. Haynes Br. 18-21.

sentence without explaining its rationale. The government’s counterarguments—that the rule of lenity is inapplicable to the sentencing guidelines and that U.S.S.G. § 3B1.5 is not ambiguous (Govt. Br. 81-82)—are irrelevant where Haynes does not contend that the four-level adjustment is inapplicable, but that the court erred by applying it without addressing Haynes’s argument and explaining its rationale for rejecting the also-applicable two-level increase.

The government further argues that the district court did not err because, it says, the four-level adjustment “clear[ly]” applies. Govt. Br. 81. The government now contends that the “language, structure, and application notes” of the body-armor guideline “make clear that the four-level enhancement applies where the *defendant* personally used or willfully caused the use of the body armor.” *Id.* The argument misses the mark for two reasons.

First, this explanation was not elucidated at the sentencing hearing<sup>4</sup>—the appropriate forum for explaining a sentencing decision in the first instance. The district court did not give *any* explanation for why the four-level instead of the two-level adjustment was appropriate. On appeal the government cannot fill the holes in the sentencing judge’s rationale (or supply it wholesale). See *Ross*, 501 F.3d at 854. Second, it is irrelevant whether the four-level enhancement could apply because the two-level adjustment *also* was applicable: if wearing equals “use,” the offense clearly “involved the use of body armor,” U.S.S.G. § 3B1.5(2)(A). Thus, even if the government’s interpretation of the four-level adjustment (which the district court

---

<sup>4</sup> At the sentencing hearing, the government argued that Haynes “used” the bulletproof vest within the meaning of the guideline, Sent. Tr. 28-29, but it did not offer any reply when Haynes argued that the two-level and not the four-level adjustment should apply.

itself never espoused) is correct, the district court still erred by failing to consider the two-level adjustment as well. And, where Haynes undisputedly wore the vest simply to identify himself as a police officer, applying the maximum possible adjustment was an unnecessary—or “huge”(A13)—penalty.

### **III. Haynes Did Not Waive His Argument About Consecutive Sentences And Should Be Allowed To Preserve It For Further Review.**

In his opening brief Haynes argued, relying primarily on *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008), that the district court plainly erred by applying a consecutive sentence for Haynes’s conviction under 18 U.S.C. § 924(c)(1)(A)(i) where he already was subject to a higher, ten-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A)(ii)(II). Haynes Br. 22-27.

#### **A. Haynes did not “affirmatively waive” the argument.**

As Haynes acknowledges in his opening brief (at 26-27), he forfeited the argument that the district court improperly imposed a consecutive sentence for the § 924(c) count. Forfeiture is the “failure to make the timely assertion of a right.” *United States v. Olano*, 507 U.S. 725, 733 (1993). The key distinction between waiver and forfeiture is the defendant’s intent. *United States v. Ortiz*, 431 F.3d 1035, 1038 (7th Cir. 2005) (“[W]aiver comes about intentionally whereas forfeiture occurs through neglect.”). Waiver principles are construed liberally in favor of criminal defendants. *Id.*

The government attempts to establish an “affirmative waiver” because Haynes twice referred to a “consecutive” sentence for the § 924(c) conviction. Govt. Br. 66. Both references were in Haynes’s presentencing memorandum (R.436-1 at

17, 22), which was filed at a time when the government was seeking a seven-year consecutive sentence for Haynes under 18 U.S.C. § 924(c)(1)(A)(ii). PSR ¶¶ 1379-81; Plea Agmt., R.278-1 at 17. Haynes’s focus was on obtaining the five-year rather than the seven-year mandatory sentence, and he did not raise an argument about the consecutive application of that sentence. But he “said nothing to indicate intentional relinquishment or abandonment.” *United States v. Irby*, 558 F.3d 651, 655 (7th Cir. 2009) (finding forfeiture, not waiver). The government’s contrary assertion—that Haynes “*requested*” a consecutive sentence and “got exactly what he asked for” (Govt. Br. 66-67)—is implausible on its face.

The government’s contention that Haynes affirmatively waived a challenge to the consecutive sentence is further belied by the change in the law after the sentence was imposed. The Second Circuit’s decision in *Whitley*, issued six months after Haynes was sentenced, breathed new life into an argument that had appeared to be foreclosed. The subsequent development of the law further negates the “affirmative waiver” asserted by the government. See *United States v. Spells*, 537 F.3d 743, 747-48 (7th Cir. 2008) (Forfeiture, not waiver, occurred where law changed “post-sentencing, but during a pending appeal.”), petition for cert. filed (Jan. 7, 2009) (U.S. No. 08-8136).

**B. This Court should allow Haynes to preserve his § 924(c) argument for further review.**

In a decision issued after Haynes filed his opening brief, this Court deemed frivolous for purposes of a motion to withdraw as appointed counsel the argument that a sentence for a violation of 18 U.S.C. § 924(c) cannot run consecutively with a

higher mandatory minimum sentence under “any other provision of law.” *United States v. Easter*, 553 F.3d 519, 524-25 (7th Cir. 2009), petition for cert. filed (Mar. 26, 2009) (U.S. No. 08-9560). *Easter* precludes Haynes’s argument that the district court plainly erred in giving him a consecutive five-year sentence for the § 924(c)(1)(A)(i) count where he already was subject to a 10-year mandatory minimum under 21 U.S.C. § 841(b)(1)(A)(ii)(II). Haynes Br. 22-27. Haynes therefore declines to press the argument in this Court, but in order to preserve it for further review by the Supreme Court of the United States, he does not withdraw the argument.

### CONCLUSION

The district court misapplied the minor-role guideline and ignored an important argument with respect to the body-armor guideline—both errors that require resentencing. Furthermore, Haynes did not forfeit, and preserves for further review, his argument that the imposition of a consecutive sentence for the § 924(c) count was erroneous. Accordingly, this Court should VACATE Haynes’s sentence and REMAND to the district court for re-sentencing.

Dated: May 13, 2009

Respectfully submitted,

---

Katherine E. Agonis  
Thomas M. Durkin  
MAYER BROWN LLP  
71 South Wacker Drive  
Chicago, Illinois 60606  
(312) 782-0600  
*Counsel for Defendant-Appellant Darek Haynes*

## **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 reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 3,463 words including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

---

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 an electronic copy of the foregoing Reply Brief in native PDF format.

---

Katherine E. Agonis

## CERTIFICATE OF SERVICE

The undersigned, an attorney for Defendant-Appellant Darek Haynes, hereby certifies that on May 13, 2009 she caused two hard copies of the foregoing Reply Brief 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.

Matthew B. Burke  
Office of the United States Attorney  
219 S. Dearborn St.  
Chicago, IL 60604

Allan A. Ackerman  
2000 N. Clifton Ave  
Chicago, IL 60614

Thomas L. Shriner, Jr.  
Foley & Lardner  
777 E. Wisconsin Ave. Ste. 3800  
Milwaukee, WI 53202

Marc M. Barnett  
P.O. Box 1524  
Bridgeview, IL 60455

---

Katherine E. Agonis