No. 07-6433

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

ADAM GAGNIER,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

PROOF BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that the Court can resolve this case on the briefs and that oral argument is not necessary.

TABLE OF CONTENTS

PAGE

STATEMENT REGARDING ORAL ARGUMENT

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUES. 2

STATEMENT OF THE CASE. 2

STATEMENT OF FACTS. 4

1. Charged Conduct. 4

a. Conspiracy To Violate Civil Rights. 4

b. Insurance Fraud. 5

2. Other Relevant Pre-Arrest Conduct. 6

a. Additional Mail Fraud. 6

b. Additional Civil Rights Violations 7

3. Gagnier's Guilty Plea.. 9

4. More Fraudulent Conduct After Gagnier's Guilty Plea. 10

5. The Resentencing Of Gagnier.. 11

6. Travel Restriction. 14

SUMMARY OF ARGUMENT.. 15

TABLE OF CONTENTS (continued): **PAGE**

ARGUMENT. 18

I APPELLANT'S ARGUMENTS ONE, TWO AND THREE (BR. 24-47) ARE WAIVED. 18

A. Background 19

B. New Issues Raised In This Appeal Are Waived. 21

II THE DISTRICT COURT PROPERLY APPLIED A SIX-LEVEL, RATHER THAN A FOUR-LEVEL, ENHANCEMENT UNDER SECTION 2B1.1(b)(1) OF THE SENTENCING GUIDELINES IN CALCULATING THE GUIDELINES OFFENSE LEVEL FOR THE MAIL FRAUD COUNT. 23

A. Appellant's Argument Turns On Whether The February 2005 Fraud Involving Gagnier And Officer Fetter Was "Relevant Conduct" Under Guidelines § 1B1.3(a)(2). 23

B. Standard Of Review. 25

C. The District Court Correctly Concluded That The February 2005 Fraud Was "Relevant Conduct" Under Guidelines § 1B1.3(a)(2). 26

1. The Uncharged February 2005 Fraud Is Part Of The Same"Common Scheme Or Plan" As The Three Incidents Of Fraud That Occurred In May, June And July 2005. 26

2. The February 2005 Mail Fraud Is Part Of The Same "Course Of Conduct" As The Three Incidents Of Mail Fraud That Occurred In May, June And July 2005. . . 31

TABLE OF CONTENTS (continued): **PAGE**

III THE DISTRICT COURT CORRECTLY APPLIED A TWO-LEVEL ENHANCEMENT UNDER U.S.S.G. § 2B1.1(b)(12)(B) IN CALCULATING GAGNIER'S GUIDELINES OFFENSE LEVEL. 35

A. The District Court Correctly Considered The February 2005 Incident As Relevant Conduct In Applying § 2B1.1(b)(12)(B). 35

B. Gagnier's Alternative Argument Concerning § 2B1.1(b)(12)(B) Is Meritless. 36

1. Standard Of Review. 36

2. The Plain Language Of The Guidelines Requires A Two-Level Enhancement In Gagnier's Offense Level. . 36

IV THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING A TRAVEL RESTRICTION AS A CONDITION OF GAGNIER'S SUPERVISED RELEASE. 39

A. Standard Of Review. 39

B. Legal Framework. 40

C. Gagnier's Argument Ignores The Central Reason For The Court-Imposed Travel Restriction On His Supervised Release. 41

V GAGNIER'S SENTENCE IS REASONABLE. 47

A. Legal Framework And Standard Of Review. 47

B. Gagnier's Argument Is Founded Upon An Incorrect Premise 48

TABLE OF CONTENTS (continued): **PAGE**

C. Gagnier's Sentence Is Procedurally Reasonable. 49

D. Gagnier's Sentence Is Substantively Reasonable 53

CONCLUSION

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

APPELLEE'S CROSS-DESIGNATION OF APPENDIX CONTENTS

TABLE OF AUTHORITIES

CASES: **PAGE**

Gall v. *United States*, 128 S. Ct. 586 (2007). 47, 54-55

Maydak v. *Warden, Allegheny County Jail*, 156 F. Appx. 515, (3d Cir. 2005). 45

Sandwich Chef of Texas, Inc. v. *Reliance Nat. Indem. Ins. Co.*, 319 F.3d 205 (5th Cir. 2003). 27

United States v. *Adesida*, 129 F.3d 846 (6th Cir. 1997).. 22

United States v. *Alexander*, 509 F.3d 253 (6th Cir. 2007). 39-40, 46

United States v. *Booker*, 543 U.S. 220 (2005). 47-48

United States v. *Brogdon*, 503 F.3d 555 (6th Cir. 2007). 41, 46

United States v. *Davis*, 170 F.3d 617 (6th Cir. 1999).. 32

United States v. *Feldman*, 151 Fed. Appx. 521 (9th Cir. 2005).. 43

United States v. *Gagnier*, No. 06-6016 (6th Cir., filed Mar. 6, 2007). 3, 19-21

United States v. *Hill*, 79 F.3d 1477 (6th Cir. 1996). 25, 33

United States v. *Hill*, 381 F.3d 560 (6th Cir. 2004). 38

United States v. *Jacquinot*, 258 F.3d 423 (5th Cir. 2001). 37

United States v. *Maken*, 510 F.3d 654 (6th Cir. 2007).. . . . . 25, 31

United States v. *McDaniel*, 398 F.3d 540 (6th Cir. 2005). 29-30

CASES (continued): **PAGE**

United States v. *McKinley*, 227 F.3d 716 (6th Cir. 2000). 21-22

United States v. *Miggins*, 302 F.3d 384 (6th Cir. 2002)
cert. denied, 537 U.S. 1130 (2003). 36-37

United States v. *Mitchell*, 232 Fed. Appx. 513 (6th Cir. 2007). 22

United States v. *Moored*, 997 F.2d 139 (6th Cir. 1993). 34

United States v. *Orlando*, 363 F.3d 596 (6th Cir. 2004). 25

United States v. *Ossa-Gallegos*, 491 F.3d 537 (6th Cir. 2007). 44

United States v. *Peterson*, 101 F.3d 375 (5th Cir. 1996). 34

United States v. *Phillips*, 516 F.3d 479 (6th Cir. 2008). 25-26, 28-33

United States v. *Phinazee*, 515 F.3d 511 (6th Cir. 2008). 47, 53

United States v. *Reaume*, 338 F.3d 577 (6th Cir. 2003). 25

United States v. *Ritter*, 118 F.3d 502 (6th Cir. 1997). 39

United States v. *Shafer*, 199 F.3d 826 (6th Cir. 1999). 25

United States v. *Tate*, 516 F.3d 459 (6th Cir. 2008). 55

United States v. *Vowell*, 516 F.3d 503 (6th Cir. 2008). 47-49, 53-56

United States v. *Weber*, 451 F.3d 552 (9th Cir. 2006). 41

STATUTES:

18 U.S.C. 241 .. . . . . 2, 9

STATUTES (continued): **PAGE**

18 U.S.C. 1341. . . . . 2, 9

18 U.S.C. 3231 1

18 U.S.C. 3553(a). 11, 13, 18, 40, 47-55

18 U.S.C. 3553(a)(1). 40, 52

18 U.S.C. 3553(a)(2). 39, 40

18 U.S.C. 3553(a)(2)(A). 50-51

18 U.S.C. 3553(a)(2)(C). 51

18 U.S.C. 3563(b)(13). 40

18 U.S.C. 3563(b)(14). 40

18 U.S.C. 3583(d). 40

18 U.S.C. 3583(d)(1). 40

18 U.S.C. 3583(d)(2). 40-41

18 U.S.C. 3742 1

18 U.S.C. 3742(e). 25

28 U.S.C. 1291. 1

FEDERAL SENTENCING GUIDELINES:

U.S.S.G. 1B1.1, application note 1(H). 24

U.S.S.G. 1B1.3 (a)(1)(A). 29, 38

GUIDELINES (continued): **PAGE**

U.S.S.G. 1B1.3 (a)(1)(B).. 29

U.S.S.G. 1B1.3 (a)(2). 16, 23, 24, 26

U.S.S.G. 1B1.3, application note 9(A). 26, 28, 30

U.S.S.G. 1B1.3, application note 9(B). 31, 34

U.S.S.G. 2B1.1 (b)(1)(C).. 23

U.S.S.G. 2B1.1 (b)(1)(D). 18, 22, 23, 36

U.S.S.G. 2B1.1 (b)(12)(B).. . . . . 16, 18, 35-36

U.S.S.G. 2B3.1 (b)(2)(A). 38

U.S.S.G. 2D1.1 (b)(1), application note 3.. 38

U.S.S.G. 5K2.0. . . . . *passim*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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PROOF BRIEF FOR THE UNITED STATES AS APPELLEE

This is Adam Gagnier's second appeal in this case. This Court decided his initial appeal on June 6, 2007. (R. 45, 6/6/07 Order, Apx. __). A panel consisting of Judges Martin, Clay, and McKeague vacated Gagnier's initial sentence and remanded the case to the district court for resentencing. This second appeal comes to the Court after the district court's resentencing of Gagnier.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231. This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742. The district court entered

final judgment on November 30, 2007. (R. 61, Redacted Judgment, Apx. __).[1] Gagnier filed a timely notice of appeal on December 4, 2007. (R. 62, Notice of Appeal, Apx. __).

STATEMENT OF ISSUES

1. Whether Gagnier's arguments one, two and three (Br. 24-47) are waived.

2. Whether the district court erred in concluding that Gagnier's offense resulted in a loss exceeding $30,000, thus justifying a six-level enhancement under Section 2B1.1(b)(1)(D) of the Sentencing Guidelines.

3. Whether the district court erred in applying a two-level enhancement for possession of a firearm under Guidelines § 2B1.1(b)(12)(B).

4. Whether the district court abused its discretion by imposing a travel restriction as a condition of Gagnier's supervised release.

5. Whether Gagnier's sentence is reasonable.

STATEMENT OF THE CASE

On December 14, 2005, defendant Adam Gagnier, a former Memphis police officer, pleaded guilty to a two-count information charging him with conspiracy to violate civil rights under 18 U.S.C. 241 and mail fraud under 18 U.S.C. 1341. (R. 1, Information, Apx. __). On July 13, 2006, the district court sentenced Gagnier to

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[1] This brief uses the following abbreviations: "R. __" for the district court docket number of documents filed in the district court; "Br. __" for the page number of appellant's opening brief; "PSR __" for the page number of the Presentence Investigation Report.

71 months' imprisonment and three years' supervised release and ordered him to pay $11,759.61 in restitution and a $200 special assessment. (R. 41, 7/13/06 Tr. 41, Apx. __). The court also prohibited Gagnier from traveling outside the United States during his supervised release. (R. 41, 7/13/06 Tr. 42, Apx. __).

Gagnier appealed his sentence to this Court and filed his opening brief as appellant in March 2007. See Proof Brief of Defendant/Appellant Adam Gagnier, *United States* v. *Gagnier*, No. 06-6016 (6th Cir., filed Mar. 6, 2007). At the request of the United States, this Court issued an order on June 6, 2007, vacating the district court's judgment and remanding the case for resentencing. See pp. 20-21, *infra*.

On November 28 and 29, 2007, the district court held a resentencing hearing. After hearing testimony and ruling on objections, the court resentenced Gagnier to 71 months' imprisonment and three years' supervised release and ordered him to pay $2,600 in restitution and a $200 special assessment. (R. 68, 11/29/07 Tr. 146, 150, Apx. __, __). Except for the amount of restitution,[2] the sentence on remand was identical to the one imposed in 2006. (Compare R. 21, Redacted Judgment, Apx. __ with R. 61, Redacted Judgment, Apx. __). The court

[2] The court decreased the restitution amount on resentencing. The original amount of restitution included a $9,159.61 loss suffered by Geico Insurance Company as a result of Gagnier's fraudulent report in April 2005 that his car had been stolen. (PSR 4, 17, Apx. __, __). Before resentencing, the United States conceded that it was unaware of this insurance fraud prior to Gagnier's proffer statement. (R. 53, Response To Defendant's Objections To Presentence Report at 4 n.1, Apx. __). Gagnier's restitution payment was accordingly reduced.

again barred Gagnier from traveling outside the United States during his supervised release. (R. 61, Redacted Judgment, Apx. __).

STATEMENT OF FACTS

Adam Gagnier is a former Memphis police officer who regularly abused the power entrusted to him. Gagnier used his position as a police officer to conspire to violate individuals' civil rights, to extort and steal money from innocent citizens, and to commit fraud.

1. Charged Conduct

a. Conspiracy To Violate Civil Rights

Gagnier and his partner, Officer James Fetter, were participants in a conspiracy to deprive individuals of their constitutional rights to be free from unreasonable searches and seizures and not to be deprived of property without due process of law. (R. 1, Information, Apx. __). The object of the conspiracy was to stop individuals and steal or extort cash from them for Gagnier's and Fetter's personal profit. (R. 1, Information, Apx. __). Gagnier and Fetter used their police authority, uniforms, vehicle, and badges to carry out this conspiracy. (R. 1, Information, Apx. __).

On February 25, 2004, Laquan Neal was driving with his girlfriend, LaToya Greer, when Gagnier and Fetter pulled them over. (PSR 3, Apx. __).[3] Gagnier and Fetter removed Neal and Greer from their car and searched it. (R. 1,

[3] The PSR is under seal.

Information, Apx. __). They seized $2,600 from Greer. (PSR 3, Apx. __). When Neal and Greer requested a receipt for the money, they were threatened with arrest. (PSR 3, Apx. __). Gagnier and Fetter did not report or turn in the confiscated money, as is required by police procedure. (PSR 3, Apx. __). Instead, they "divided the money between themselves for their own personal profit." (R. 1, Information, Apx. __).

b. Insurance Fraud

In June 2005, Gagnier filed a fraudulent insurance claim for losses from an alleged burglary of his residence. (PSR 5, Apx. __). Because of Gagnier's employment as a Memphis police officer, he had access to blank offense reports. (R. 1, Information, Apx. __). Gagnier used this access to report, falsely, that his residence was burglarized on June 20, 2005. (R. 1, Information, Apx. __; PSR 5, Apx. __). Gagnier made it appear that another officer in the Memphis Police Department authored the report. (PSR 5, Apx. __). Gagnier also created false receipts for the property he claimed had been stolen. (R. 1, Information, Apx. __). Gagnier used the false police report and receipts to file his insurance claim. (PSR 5, Apx. __). The insurance company settled the claim with a payment of $6,541.95. (PSR 5, Apx. __). The insurer later contacted the Memphis Police Department and discovered that the burglary report Gagnier had submitted to substantiate his claim was fraudulent. (PSR 5, Apx. __). The officer alleged to

have prepared the report had, in fact, not written it and had no knowledge of a burglary at Gagnier's residence. (PSR 5, Apx. __).

2. Other Relevant Pre-Arrest Conduct

a. Additional Mail Fraud

On February 6, 2005, Gagnier and Officer Fetter went to Overton Park to stage an on-duty shooting of Fetter as part of a scheme to submit a fraudulent workers' compensation claim. Gagnier was heavily involved in the incident. He helped Fetter plan the shooting by consulting with him about the angle of the shot and ways to make the shooting look authentic. (PSR 4, Apx. __; R. 68, 11/29/07 Tr. 66, Apx. __). Gagnier also provided Fetter with the gun, which he had recovered during his police duties but had not reported. (R. 67, 11/28/07 Tr. 35-36, Apx. __-__; R. 68, 11/29/07 Tr. 66, Apx. __). At the park, Fetter "tore his shirt and rolled around in the mud to simulate being in a fight." (PSR 4, Apx. __). Gagnier was present when the shot was fired and may have actually pulled the trigger (although that point remains in dispute). (PSR 4, Apx. __). After the shot was fired, Gagnier left the park with the gun and gave it to another officer to hold. (R. 67, 11/28/07 Tr. 37, Apx. __; PSR 4, Apx. __). Gagnier later asked that officer to dispose of the gun. (R. 67, 11/28/07 Tr. 37-38, Apx. __-__). When she refused, Gagnier took the gun from her. (R. 67, 11/28/07 Tr. 38, Apx. __). This incident formed the basis for a fraudulent workers' compensation insurance claim.

(PSR 4, Apx. __). The claim and benefit checks were transmitted through the mail and resulted in a loss of $19,191.88. (PSR 4, Apx. __).

In May 2005, Gagnier filed a claim for losses he alleged had occurred during a burglary of his residence on May 9, 2005. (PSR 5, Apx. __). In fact, no such burglary took place. (PSR 5, Apx. __). This fraudulent claim resulted in a payment from Gagnier's insurance company of $4,476. (PSR 5, Apx. __). As in the charged conduct that occurred in June 2005, see pp. 5-6, *supra*, Gagnier submitted a fraudulent offense report and fraudulent receipts for allegedly stolen property. (PSR 5, Apx. __).

In July 2005, Gagnier filed another fraudulent burglary claim alleging $7,689 in losses. (PSR 5, Apx. __). Gagnier again used a fraudulent offense report and fraudulent receipts to substantiate his claim. (PSR 5, Apx. __). This time the insurance company refused to pay the claim. (PSR 5, Apx. __).

b. Additional Civil Rights Violations

Gagnier violated individuals' civil rights on multiple occasions. He committed a number of these violations with Officer Jennifer Vickery. Gagnier explained to Vickery how he and Fetter took cash from people during traffic stops. (PSR 6, Apx. __). Vickery then agreed to participate in the same scheme and split the money they took with Gagnier. (PSR 6, Apx. __).

On July 3, 2004, Gagnier and Vickery stopped a car driven by Terrance Edwards. (PSR 5, Apx. __). Gagnier planted cocaine in Edwards' car in order to

justify the arrest and seized $6,700 in cash that Edwards had with him because he had just tried to use it to buy a car. (R. 68, 11/29/07 Tr. 82-85, Apx. __-__; PSR 5-6, Apx. __-__). Gagnier did not turn in the money he seized. (PSR 6, Apx. __). Edwards was charged with felony drug possession. (PSR 5, Apx. __; R. 68, 11/29/07 Tr. 84-85, Apx. __-__). Gagnier testified as a witness against Edwards and claimed that he found no money in Edwards' car. (PSR 6, Apx. __). Gagnier and Vickery later admitted that they took the money and split it between themselves. (PSR 5, Apx. __).

Officer Vickery admitted that she and Gagnier also used their authority as police officers to fleece others. (PSR 6, Apx. __). During one incident, Gagnier and Vickery stopped a driver, and then Gagnier put enough drugs in the man's vehicle to charge him with a felony, arrested him, and took $800 without reporting it. (PSR 6, Apx. __). Vickery described another incident in which she and Gagnier stopped a driver who had marijuana and approximately $700 or $800 in cash. (PSR 6, Apx. __). The officers let the driver know that if they kept the money the driver would not be arrested. (PSR 6, Apx. __). The officers took the money and did not report it. (PSR 6, Apx. __). Vickery also admitted that she and Gagnier took things of value from individuals they arrested, including a digital camera and a DVD player. (PSR 6, Apx. __). Vickery further stated that Gagnier sometimes took bags of marijuana from individuals without reporting them. (PSR

7, Apx. __). He later used them as "drop drugs" – *i.e.*, drugs that Gagnier would plant on an individual's person or property during a search. (PSR 7, Apx. __).

In May 2005, Gagnier pulled over Leah Fetter, James Fetter's estranged wife, and her companion, Herbert Adcock. (PSR 7, Apx. __). Gagnier planted powdered and crack cocaine and marijuana in the vehicle and in Leah Fetter's purse. (PSR 7, Apx. __). Gagnier arrested Leah Fetter and Adcock, and they were charged with felonies for allegedly possessing controlled substances. (PSR 7, Apx. __). After the arrest, a juvenile court gave James Fetter emergency custody of his children, who were previously in the custody of their mother, Leah Fetter. (PSR 7, Apx. __). The charges against Leah Fetter and Adcock were eventually dropped. (PSR 7, Apx. __). Leah Fetter regained custody of her children after several months. (R. 68, 11/29/07 Tr. 107-108, Apx. __-__).

3. Gagnier's Guilty Plea

On December 14, 2005, Gagnier accepted a plea agreement and pleaded guilty to conspiracy to violate civil rights under 18 U.S.C. 241 and to mail fraud under 18 U.S.C. 1341. (R. 40, Change of Plea Hearing, Apx. __).

Two days later, the district court ordered Gagnier released on his personal recognizance pending sentencing. (R. 6, Order, Apx. __). As conditions of this release, the court required that Gagnier "not commit any offense in violation of federal, state, or local law" and that he "immediately advise the court, defense

counsel and the U.S. attorney in writing before any change in address and telephone number." (R. 5, Order Setting Conditions of Release, Apx. __).

4. More Fraudulent Conduct After Gagnier's Guilty Plea

After Gagnier was released pending his sentencing hearing, he committed fraud again. (R. 67, 11/28/07 Tr. 25-26, Apx. __-__; R. 68, 11/29/07 Tr. 105-106, Apx. __-__). He moved to Canada without informing the court or prosecutor, as was required. (R. 67, 11/28/07 Tr. 25-26, Apx. __-__; R.5, Order Setting Conditions of Release, Apx. __). The federal prosecutor in Memphis later received a phone call from the Edmonton (Canada) Police Department conducting a background check on Gagnier. (R. 68, 11/29/07 Tr. 105, Apx. __). The prosecutor learned that Gagnier had applied for a job as an Edmonton police officer using false documents. (R. 68, 11/29/07 Tr. 105, Apx. __). Gagnier forged a letter from the Memphis Police Department's Internal Affairs Bureau saying he had a clean record. (R. 67, 11/28/07 Tr. 25, Apx. __; R. 68, 11/29/07 Tr. 105-106, Apx. __-__). He also provided to the Edmonton Police Department a false fingerprint card purporting to be an FBI determination that he had no criminal record. (R. 67, 11/28/07 Tr. 25-26; R. 68, 11/29/07 Tr. 106, Apx. __).

In May 2006, the district court granted the government's sealed motion to revoke Gagnier's bond because he had violated conditions of his release. (R. 68, 11/29/07 Tr. 105, Apx. __). Federal authorities arrested Gagnier for violating those conditions when he returned to the Western District of Tennessee voluntarily

to give testimony. (R. 68, 11/29/07 Tr. 105, Apx. __). When confronted, Gagnier admitted he had forged the letter to the Edmonton Police Department. (R. 68, 11/29/07 Tr. 108, Apx. __).

5. The Resentencing Of Gagnier

After this Court vacated Gagnier's original sentence, see pp. 20-21, *infra*, the district court held a resentencing hearing on November 28 and 29, 2007. (R. 67 & 68, Apx. __ -__). During the hearing, the court considered the advisory Sentencing Guidelines, adopted the calculation of the Guidelines offense level contained in the Presentence Investigation Report (PSR), heard witness testimony, and then analyzed the sentencing factors set forth in 18 U.S.C. 3553(a) before imposing sentence. (R. 67, 11/28/07 Tr. 6-20, Apx. __-__; R. 68, 11/29/07 Tr. 60-75, Apx. __).

The district court concluded that "the calculations in the [PSR were] correct." (R. 68, 11/29/07 Tr. 74, Apx. __). The PSR calculated Gagnier's total offense level as 20, which carries a Guidelines imprisonment range of 33 to 41 months. (PSR 9-10, 16, Apx. __-__, __). Included within the PSR's calculation were the two Guidelines enhancements that Gagnier now challenges on appeal. (PSR 9-10, Apx. __-__). The PSR increased the mail-fraud offense level by: (1) six levels pursuant to Guidelines § 2B1.1(b)(1)(D) because the losses from Gagnier's fraud were between $30,000 and $70,000; and (2) two levels under Guidelines § 2B1.1(b)(12)(B) for possession of a dangerous weapon in connection

with the offense. (PSR 9, Apx. __). The district court explained the basis for the PSR's calculation at the hearing, including the challenged enhancements. (R. 67, 11/28/07 Tr. 7-9, Apx. __-__). The court then heard Gagnier's objections to the PSR. (R. 67, 11/28/07 Tr. 9-27, Apx. __-__). After stating that she was "aware that we still have to address the 3553 factors," the district judge discussed and overruled Gagnier's objections to the PSR's Guidelines calculation. (R. 68, 11/29/07 Tr. 60-75, Apx. __-__).

The court then considered statements of the victims. Terrance Edwards testified that he was arrested for felony drug crimes in July 2004 because Gagnier planted powdered and crack cocaine in his car and that Gagnier stole his life savings of $6,700 out of his car's locked console. (R. 68, 11/29/07 Tr. 83-84, 87, Apx. __-__, __). Edwards said he had $6,700 with him because he had just tried to use it to buy a car. (R. 68, 11/29/07 Tr. 82, Apx. __). This claim was corroborated by a Memphis police officer who spoke with the man whose car Edwards tried to buy. (R. 68, 11/29/07 Tr. 97, Apx. __). Edwards testified that, as a result of his arrest, authorities sold his car, he had to pay bond and hire a lawyer, and he lost his job as a counselor for individuals with mental retardation. (R. 68, 11/29/07 Tr. 85-86, Apx. __-__). He testified that he has been unemployed since the arrest in 2004 and that several potential employers told him he was not hired because of his arrest record. (R. 68, 11/29/07 Tr. 86-87, Apx. __-__).

The court also considered and credited letters from other victims. Leah Fetter described the horror of being arrested and having her children taken from her and wrote that she suffers from anxiety and depression. (R. 68, 11/29/07 Tr. 134, Apx. __). Herbert Adcock wrote of the fear instilled in him by the arrest when Gagnier put the handcuffs on tight and warned Adcock that he would be "abused in prison by five black men." (R. 68, 11/29/07 Tr. 134-135, Apx. __-__). Both Adcock and his wife Tracy wrote about the painful public humiliation they endured over reports of his arrest and possession of a large quantity of cocaine and of their stressful attempts to spare their children that humiliation. (R. 68, 11/29/07 Tr. 135, Apx. __).

Finally, the court considered the factors listed in 18 U.S.C. 3553(a) to determine whether "the advisory guideline range is appropriate" or whether the court should instead "impose a sentence that varies from that guideline range." (R. 68, 11/29/07 Tr. 136, Apx. __). See pp. 49-53, *infra* (discussing in detail the court's consideration of the Section 3553(a) factors).

The court concluded "that the guidelines do not fully take into account * * * the real seriousness of the harm that [Gagnier] caused to the victims." (R. 68, 11/29/07 Tr. 144, Apx. __). Therefore, the court sentenced Gagnier to 71 months' imprisonment because of "the serious nature of the offense," "strong likelihood of recidivism," and "strong need to protect the public from [Gagnier's] actions going forward." (R. 68, 11/29/07 Tr. 145, Apx. __).

6. Travel Restriction

The district court also imposed a travel restriction prohibiting Gagnier from leaving the United States during his supervised release. (R. 61, Redacted Judgment, Apx. __). The court denied Gagnier's request to serve his supervised release in Canada, "without prejudice to [re]visiting that [issue] when we are close to that time." (R. 68, 11/29/07 Tr. 152, Apx. __).

The sentencing hearing and PSR revealed a number of facts relevant to the travel restriction. As previously noted, Gagnier had violated the terms of his pre-sentence release by absconding to Canada and making a fraudulent attempt while there to get a job as a police officer. See pp. 10-11, *supra*. The PSR states that Gagnier reported having "immigrated to Canada." (PSR 12, Apx. __). Gagnier's wife and family live in Canada, and his wife is a Canadian citizen. (PSR 12, Apx. __). The record establishes that Gagnier is now a Canadian citizen as well. At the sentencing hearing, Gagnier stated that he had asked his wife "about renouncing [his] U.S. citizenship" but found out that he had "in effect renounced [his] U.S. citizenship by moving to Canada and getting [his] citizenship up there." (R. 68, 11/29/07 Tr. 128, Apx. __).

Gagnier also admitted that he looked into obtaining a "treaty transfer" to Canada because he believed "that if [he] did get a treaty transfer, there * * * would be a possibility for supervised release [in lieu of jail time] because Canadian law is different." (R. 68, 11/29/07 Tr. 129-131, Apx. __-__). Gagnier represented,

however, that he was no longer seeking a treaty transfer. (R. 68, 11/29/07 Tr. 130, Apx. __). Concerning these representations, the court noted that "there's a serious dispute about whether [Gagnier is] being fully truthful now or whether or not [he is] trying to manipulate the system." (R. 68, 11/29/07 Tr. 143, Apx. __).

Regarding Gagnier's request to serve his supervised release in Canada, government counsel expressed concern about how an arrangement between the countries would be worked out and about the need for extradition should Gagnier violate the conditions of his release. (R. 68, 11/29/07 Tr. 151-152, Apx. __-__). Government counsel also raised concerns that the request may be "an attempt to avoid the jurisdiction of [the district court] and the law of this country." (R. 68, 11/29/07 Tr. 152, Apx. __).

The court stated that it would recommend that Gagnier be allowed to serve his sentence in Seattle, Washington. (R. 68, 11/29/07 Tr. 152, Apx. __). The United States did not oppose Gagnier's request to be imprisoned in Seattle, so that he could be closer to his family. (R. 68, 11/29/07 Tr. 150-151, Apx. __-__).

SUMMARY OF ARGUMENT

This Court should affirm Gagnier's sentence.

1. Gagnier has waived his challenges to the enhancements of his offense level under Guidelines §§ 2B1.1(b)(1)(D) and 2B1.1(b)(12)(B) and the travel restriction on his supervised release (Br. 24-47). He failed to raise any of these issues in his initial appeal. The facts relevant to these arguments have not changed

in any material way since that previous appeal. Accordingly, under the law of this circuit, these arguments are deemed waived.

2. Even if Gagnier had not waived the issue, his challenge to the six-level enhancement under Guidelines § 2B1.1(b)(1)(D) is meritless. In applying § 2B1.1(b)(1), the court correctly included the $19,191.88 loss from the February 2005 mail fraud because that incident was relevant conduct under Guidelines § 1B1.3(a)(2). The February 2005 mail fraud was relevant conduct both because it was part of the same "common scheme or plan" and because it was part of the same "course of conduct" as incidents of mail fraud that occurred in May, June and July 2005. See U.S.S.G. § 1B1.3(a)(2).

The February 2005 incident was part of the same "common scheme or plan" as the three other instances of mail fraud principally because Gagnier employed the same *modus operandi* in all four incidents – *i.e.*, he used his status as a police officer to fake crimes that formed the basis of fraudulent claims for compensation. Additionally, the four incidents are tied together by common purposes and similar victims.

The February 2005 mail fraud was also part of the same "course of conduct" as the other three mail fraud incidents because the four incidents were similar and occurred in the same six-month period.

3. Gagnier also challenges the two-level enhancement in his offense level under Guidelines § 2B1.1(b)(12)(B). Even if Gagnier had not waived the

argument, it is meritless and should be rejected. He contends that the enhancement applies only where a dangerous weapon poses a threat to victims of the offense. That argument is wholly unsupported and contradicts the plain language of the Guidelines provision. Guidelines § 2B1.1(b)(12)(B) applies if the offense involved "possession" of a firearm "in connection with the offense." The undisputed facts establish that Gagnier possessed a gun in connection with the February 2005 fraud. Consequently, the two-level enhancement was proper.

4. Gagnier challenges the requirement that he remain in the United States during his supervised release. Even if he had not waived the issue, the Court should reject his argument because it is meritless.

The court's findings – especially the fact that Gagnier absconded to Canada to commit more criminal fraud during his release pending sentencing – justify imposition of the travel restriction. Gagnier's strong likelihood of recidivism creates a need for careful monitoring by the probation officer that may be difficult or impossible if Gagnier is in Canada. Moreover, the travel restriction is also justified by the potential difficulty of extraditing Gagnier should he violate the conditions of his release and by record evidence indicating that he may be trying to use his Canadian citizenship to escape punishment. In light of these concerns, the district court did not abuse its broad discretion by imposing the travel restriction.

5. Gagnier's 71-month sentence is reasonable. Gagnier grounds his argument on his claim that the district court made a § 5K2.0 departure under the Guidelines rather than a variance from the Guidelines range under 18 U.S.C. 3553(a). This Court has recently made clear that the distinction between § 5K2.0 departures and Section 3553(a) variances is immaterial because the same test for reasonableness applies to both. In any event, the record establishes that the district court's above-Guidelines-range sentence was a variance based on the Section 3553(a) factors, not a § 5K2.0 departure.

The sentence is both procedurally and substantively reasonable. The district court considered the advisory Guidelines range, extensively discussed and reasonably weighed the Section 3553(a) factors, and explained the reasons for the sentence imposed. Accordingly, this Court should affirm the sentence.

ARGUMENT

I

APPELLANT'S ARGUMENTS ONE, TWO AND THREE (BR. 24-47) ARE WAIVED

In this appeal, Gagnier argues that the district court: (1) erroneously applied a six-level enhancement to his mail-fraud offense level under U.S.S.G. § 2B1.1(b)(1)(D); (2) erroneously applied a two-level enhancement to his mail-fraud offense level under U.S.S.G. § 2B1.1(b)(12)(B); and (3) erroneously imposed a travel restriction that prevents Gagnier from leaving the United States during his

supervised release. Br. 3 (issues 1-3). These issues were not raised in Gagnier's initial appeal. See Proof Brief of Defendant/Appellant Adam Gagnier, *United States* v. *Gagnier*, No. 06-6016 (6th Cir. Mar. 6, 2007). Because Gagnier could have raised these issues in his initial appeal but did not, they are deemed waived in this subsequent appeal.

A. Background

Gagnier was first sentenced on July 13, 2006. (R. 41, 7/13/06 Tr., Apx. __). At that sentencing hearing, the district court adopted the PSR's calculation of Gagnier's Guidelines offense level. (R. 41, 7/13/06 Tr. 16, Apx. __; PSR 9-10, 16, Apx. __-__, __). The PSR calculated his offense level as 20, which corresponds to an imprisonment range of 33 to 41 months. (R. 41, 7/13/06 Tr. 9-11, Apx. __-__; PSR 10, Apx. __). The PSR's calculation included a six-level enhancement of the mail-fraud offense level under § 2B1.1(b)(1)(D) and a two-level enhancement under § 2B1.1(b)(12)(B). (R. 41, 7/13/06 Tr. 10, Apx. __). The court explained the calculation, including these two enhancements, and then asked Gagnier's attorney whether he had "any objections to the calculations contained in the report." (R. 41, 7/13/06 Tr. 11, Apx. __). Gagnier's attorney did not object to either the § 2B1.1(b)(1)(D) or § 2B1.1(b)(12)(B) enhancement. (R. 41, 7/13/06 Tr. 11-12, Apx. __-__). The court ultimately imposed a sentence of 71 months' imprisonment and three years' supervised release. (R. 41, 7/13/06 Tr. 40, Apx. __-__). The court also imposed a travel restriction requiring Gagnier to stay

in the United States during his supervised release. (R. 41, 7/13/06 Tr. 42, Apx. __). Gagnier did not object to this restriction. (R. 41, 7/13/06 Tr. 42-43, Apx. __-__).

Gagnier appealed his sentence to this Court and filed his opening brief as appellant in March 2007. See Proof Brief of Defendant/Appellant Adam Gagnier, *United States* v. *Gagnier*, No. 06-6016 (6th Cir. Mar. 6, 2007). Gagnier's brief – filed by the same attorney representing him now – did not object to the §§ 2B1.1(b)(1)(D) and 2B1.1(b)(12)(B) enhancements or to the travel restriction. *Ibid.* Indeed, Gagnier's first appellate brief did not raise any objection to the calculation of his Guidelines offense level. *Ibid.* Instead, the brief argued (1) that the district court failed to verify that Gagnier and his counsel had read and discussed the PSR as required by Federal Rule of Criminal Procedure 32(i)(1)(A); and (2) that the district court erroneously departed from the Guidelines sentencing range.[4] *Id.* at 3.

On April 13, 2007, the United States moved this Court to vacate Gagnier's sentence and remand for resentencing, conceding that the record did not establish that the district court had complied with the requirements of Rule 32(i)(1)(A)

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[4] As part of this second issue, Gagnier argued that the court failed to give him notice of potential grounds for departure pursuant to Federal Rule of Criminal Procedure 32(h) and further suggested that the court may have improperly considered material protected by the proffer agreement. See Proof Brief of Defendant/Appellant Adam Gagnier at 25-27, 36-37, *United States* v. *Gagnier*, No. 06-6016 (6th Cir. Mar. 6, 2007). These issues are not raised in this appeal.

during Gagnier's initial sentencing. See United States' Motion to Vacate Sentence and Remand for Resentencing, *United States* v. *Gagnier*, No. 06-6016 (6th Cir.). On June 6, 2007, this Court granted the government's motion, vacated the district court's judgment, and remanded the case for resentencing. (R. 45, 6/6/07 Order, Apx. __).

The district court held a resentencing hearing on November 28 and 29, 2007. As in the initial sentencing hearing, the court adopted the PSR's calculation of Gagnier's offense level. And then, except for a reduction in the amount of restitution, the court reimposed the same sentence it had issued in the first sentencing, including the same conditions on Gagnier's supervised release. See pp. 3-4 & n.2, *supra*.

In December 2007, Gagnier again appealed his sentence. (See R. 62, Notice of Appeal, Apx. __). As explained above, he now raises issues (Br. 24-47) that he failed to raise in his first appeal.

B. New Issues Raised In This Appeal Are Waived

This Court has repeatedly held that issues are deemed waived in a second appeal following remand if they could have been raised in the initial appeal but were not. See *United States* v. *McKinley*, 227 F.3d 716, 718 (6th Cir.) ("While [in a general remand] the district court may entertain any issues it feels are relevant to the overall sentencing decision * * *, this does not give the parties license to re-assert issues that they should have raised during an earlier appeal."), cert.

denied, 531 U.S. 1028 (2000); *United States* v. *Adesida*, 129 F.3d 846, 850 (6th Cir. 1997) ("A party who could have sought review of an issue or a ruling during a prior appeal is deemed to have waived the right to challenge that decision thereafter."), cert. denied, 523 U.S. 1112 (1998).

This Court has applied this rule where appellants attempt to assert new sentencing arguments in a second appeal after a remand for resentencing. See, *e.g.*, *McKinley*, 227 F.3d at 718. More recently, in *United States* v. *Mitchell*, 232 Fed. Appx. 513 (6th Cir. 2007), the appellant argued in his second appeal that the district court had incorrectly applied a sentencing enhancement under § 2K2.1(b)(5) of the Sentencing Guidelines. The appellant had "objected to the imposition of the * * * enhancement at [his] first sentencing hearing," but had not challenged it in his first appeal. *Id.* at 516-517. This Court ruled, citing *McKinley* and *Adesida*, that the argument was waived because the appellant "could have raised his objection to the district court's application of the § 2K2.1(b)(5) enhancement * * * in his first appeal." *Id.* at 517.

This rule applies here. The facts relevant to the first three issues Gagnier raises in his second appeal (Br. 24-47) have not changed in any material way since his first appeal. As explained, the district court granted the same six-level enhancement under Guidelines § 2B1.1(b)(1)(D) and the same two-level enhancement under Guidelines § 2B1.1(b)(12)(B) and imposed the same travel condition on Gagnier's supervised release in both the initial sentencing and the

resentencing. See pp. 19-21, *supra*. The three issues raised at pages 24-47 of Gagnier's brief therefore could have been raised in his initial appeal but were not. Accordingly, these issues are waived, and this Court should not address them on the merits.

II

THE DISTRICT COURT PROPERLY APPLIED A SIX-LEVEL, RATHER THAN A FOUR-LEVEL, ENHANCEMENT UNDER SECTION 2B1.1(b)(1) OF THE SENTENCING GUIDELINES IN CALCULATING THE GUIDELINES OFFENSE LEVEL FOR THE MAIL FRAUD COUNT

(RESPONSE TO GAGNIER'S ARGUMENT 1, WHICH IS WAIVED)

Gagnier argues (Br. 24-34) that the district court erred in applying a six-level enhancement under Guidelines § 2B1.1(b)(1)(D) in calculating his Guidelines offense level for the mail fraud count. As previously explained, Gagnier has waived this argument by failing to raise it in his initial appeal. See pp. 18-23, *supra*. In any event, his argument is meritless.

A. Appellant's Argument Turns On Whether The February 2005 Fraud Involving Gagnier And Officer Fetter Was "Relevant Conduct" Under Guidelines § 1B1.3(a)(2)

The Sentencing Guidelines provide that a defendant's offense level for mail fraud should be increased by six levels if the amount of loss from the offense exceeds $30,000. U.S.S.G. § 2B1.1(b)(1)(D). If the amount of loss was less than $30,000, but more than $10,000, the appropriate enhancement is four levels. U.S.S.G. § 2B1.1(b)(1)(C).

The district court calculated the total loss as $37,898.83 (R. 68, 11/29/07 Tr. 67, Apx. __), and thus applied the six-level enhancement under § 2B1.1(b)(1)(D). The court included the following amounts in the calculation: (1) a $6,541.95 loss attributable to the June 2005 insurance fraud, the offense of conviction; (2) $4,476 from the May 2005 insurance fraud, an uncharged offense; (3) $7,689 from the July 2005 insurance fraud, also an uncharged offense; and (4) the $19,191.88 loss attributable to the uncharged February 2005 fraud involving Gagnier and Officer James Fetter (discussed at pp. 6-7, *supra*). (R. 68, 11/29/07 Tr. 67, Apx. __).

Under the Sentencing Guidelines, "the offense" for which a defendant can be sentenced includes "the offense of conviction and all relevant conduct under [Guidelines] § 1B1.3." U.S.S.G. § 1B1.1, application note 1(H). The district court found that the February 2005 fraud qualified as "relevant conduct" under § 1B1.3(a)(2), and thus should be included in calculating the amount of loss. (R. 68, 11/29/07 Tr. 65-69, Apx. __-__).

Gagnier contends that the February 2005 fraud is not "relevant conduct" under Guidelines § 1B1.3(a)(2), and consequently, should not have been included in calculating the amount of loss under § 2B1.1(b)(1). He does not dispute (see Br. 31) that the two, uncharged incidents of fraud that occurred in May 2005 and July 2005 were relevant conduct. Without the amount from the February 2005 fraud, the total loss from Gagnier's fraud offenses would be $18,706.95, an

amount that would trigger an enhancement of only four levels under § 2B1.1(b)(1)(C).

As explained below, Gagnier's argument is meritless because the February 2005 fraud is relevant conduct under § 1B1.3(a)(2) and thus was properly included in calculating the total loss.

B. Standard Of Review

"When reviewing a district court's sentencing decisions, this court will disturb the underlying factual findings only if they are clearly erroneous." *United States* v. *Hill*, 79 F.3d 1477, 1481 (6th Cir.), cert. denied, 519 U.S. 858 (1996). This Court "must 'give due deference to the district court's application of the guidelines to the facts.'" *Ibid.* (citing 18 U.S.C. 3742(e)).

This Court has recognized that "there are inconsistent opinions in this circuit regarding the proper standard of review in cases where a district court has determined that certain activity qualifies as 'relevant conduct' under § 1B1.3(a)(2)." *United States* v. *Shafer*, 199 F.3d 826, 830 (6th Cir. 1999). The inconsistency has continued after *Shafer*. Compare, *e.g.*, *United States* v. *Phillips*, 516 F.3d 479, 483 (6th Cir. 2008) (stating that the standard of review is *de novo*), and *United States* v. *Maken*, 510 F.3d 654, 656-657 (6th Cir. 2007) (same), with *United States* v. *Orlando*, 363 F.3d 596, 600-601 (6th Cir. 2004) (stating that the standard of review is clear error) and *United States* v. *Reaume*, 338 F.3d 577, 584 (6th Cir. 2003) (same), cert. denied, 540 U.S. 1166 (2004). In any event, because

the district court did not err, Gagnier's argument fails under either standard of review.

C. The District Court Correctly Concluded That The February 2005 Fraud Was "Relevant Conduct" Under Guidelines § 1B1.3(a)(2)

In determining the amount of loss under § 2B1.1(b)(1), "relevant conduct" includes "all acts and omissions * * * that were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). An act is properly considered "relevant conduct" for purposes of determining the loss amount if it qualifies under *either* standard – *i.e.*, *either* as part of the same "common scheme or plan" *or* as part of the "same course of conduct" as the offense of conviction. See *Phillips*, 516 F.3d at 483.

1. The Uncharged February 2005 Fraud Is Part Of The Same "Common Scheme Or Plan" As The Three Incidents Of Fraud That Occurred In May, June And July 2005

The uncharged incident of mail fraud that occurred in February 2005 was properly included as "relevant conduct" because it was part of the same "common scheme or plan" as the three other instances of mail fraud: the charged conduct, which occurred in June 2005, and two uncharged incidents of fraud that took place in May and July 2005. "For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*." *Phillips*, 516 F.3d at 483 (citing U.S.S.G. § 1B1.3, application note 9(A)). The February 2005 mail fraud is connected to the other

incidents of mail fraud by a common *modus operandi*, a common purpose, and common victims.

Gagnier's *modus operandi* in the February 2005 mail fraud was similar to his *modus operandi* in the mail fraud incidents that occurred in May, June and July 2005. In February 2005, Gagnier and his partner, Officer Fetter, staged an on-duty shooting of Fetter in order obtain workers' compensation benefits. Gagnier used his police access and training to perpetrate the fraud. He provided a gun that he obtained during his official duties. He also used his professional knowledge and experience to consult with Fetter about the angle of the shot and ways to make the shooting look authentic. This incident provided the basis for a $19,191.88 fraudulent workers' compensation insurance claim.[5] See pp. 6-7, *supra*.

In the May, June and July 2005 incidents of mail fraud, Gagnier staged burglaries of his residence. He again used his police officer status to commit the insurance fraud. This time Gagnier used his access to blank offense reports and knowledge of how police write such reports. He created a fraudulent "offense report stating a burglary had occurred at his residence." He also created false receipts for the property he reported stolen. He then used the false offense report and false receipts to file fraudulent insurance claims. See pp. 5-7, *supra*.

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[5] See *Sandwich Chef of Texas, Inc.* v. *Reliance Nat. Indem. Ins. Co.*, 319 F.3d 205, 213 (5th Cir.) (describing workers' compensation as a "type of insurance"), cert. denied, 54 U.S. 819 (2003).

Thus, in each of the four incidents, Gagnier used his police officer status to stage a crime that formed the basis for a fraudulent claim for compensation by the alleged crime victim. As the district court found, "each [of the four mail fraud incidents] involved the filing of false reports of crimes." (R. 68, 11/29/07 Tr. 68, Apx. __). This common *modus operandi* provides a substantial connection between the February 2005 mail fraud incident and the instances of mail fraud that occurred in May, June and July 2005. Gagnier's argument simply ignores the similar *modus operandi* in the four incidents. This factor alone supports the district court's determination that all four incidents were part of a "common scheme or plan." See *Phillips*, 516 F.3d at 483 ("For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least *one common factor*") (citing U.S.S.G. § 1B1.3, application note 9(A)) (emphasis added).

Gagnier argues, however, that he had only limited involvement in the February 2005 mail fraud. Br. 32-34. He claims – without citation to record evidence – that he did not personally use the mail in the February 2005 fraud (Br. 32-33) and that he did not share in the proceeds of the fraudulent scheme (Br. 34). Even if true, Gagnier's assertions do not undermine the district court's determination that the February 2005 incident is relevant conduct. Because Gagnier aided and abetted Officer Fetter and jointly participated with him in the criminal scheme, Gagnier is legally responsible for Fetter's use of the mail to

collect the workers' compensation money. Guidelines § 1B1.3 includes as "relevant conduct" acts that are "aided, abetted, counseled, commanded, induced, procured, or willfully caused" and "in the case of jointly undertaken criminal activity * * *, *all reasonably foreseeable acts and omissions of others* in furtherance of the jointly undertaken criminal activity." U.S.S.G. § 1B1.3(a)(1)(A) & (B) (emphasis added); see also *id.* § 1B1.3(a)(2) (cross-referencing § 1B1.3(a)(1)(A) & (B)). Thus, Gagnier need not personally have performed each act that formed a part of the fraudulent scheme in order for that fraud to qualify as relevant conduct.

Other factors also show the substantial connection between the February 2005 mail fraud and the later incidents. Each incident had a "common purpose": to fraudulently obtain compensation for harms allegedly suffered as a result of staged crimes. As the district court found, the four acts of mail fraud were "each * * * done with a purpose of defrauding insurance entities or worker's compensation claims." (R. 68, 11/29/07 Tr. 68, Apx. __). See *Phillips*, 516 F.3d at 485 (upholding inclusion of a prior illegal gun-possession incident as relevant conduct in part because the defendant's purpose – self defense – was the same in both the uncharged and charged incidents). Finally, the four incidents involved similar types of victims. Each instance of fraud involved an entity (either an insurance company or a worker's compensation fund) that reimburses individuals for losses or harms that they suffer as a result of accidents or criminal activity. See *United*

States v. *McDaniel*, 398 F.3d 540, 553 (6th Cir. 2005) (considering "financial institutions in the Grand Rapids, Michigan area" as the same victims for purposes of determining whether acts were "relevant conduct" under § 1B1.3). These factors provide additional support for the determination that the four incidents of mail fraud were part of the same "common scheme or plan." See U.S.S.G. § 1B1.3, commentary note 9(A).

Gagnier claims (Br. 33-34) that the purpose of the February 2005 mail fraud was different from the other incidents because he was assisting Fetter's attempt to obtain money rather than obtaining it for himself. Gagnier asserts that "he did not attempt to share in the proceeds of the [February 2005] fraud." Br. 34. He provides no record support (and we are not aware of any) for this contention. But even if accurate, the assertion is not legally significant. The purpose to defraud insurers was common in all four incidents, even if the beneficiary of the fraud changed.

In any event, the February 2005 mail fraud need only be "substantially connected" to the other incidents of fraud "by at least one common factor." See *Phillips*, 516 F.3d at 483 (citing U.S.S.G. § 1B1.3, application note 9(A)). Thus, even if this Court determines that the fraud incidents did not have a common purpose, the presence of a similar *modus operandi* and similar victims supports the district court's finding that the four incidents were part of a "common scheme or plan."

2. The February 2005 Mail Fraud Is Part Of The Same "Course Of Conduct" As The Three Incidents Of Mail Fraud That Occurred In May, June And July 2005

The February 2005 mail fraud was also properly included as "relevant conduct" because it was part of the same "course of conduct" as the other three incidents. "Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." *Phillips*, 516 F.3d at 483 (citing U.S.S.G. § 1B1.3, application note 9(B)).

In determining whether offenses constitute the "same course of conduct" this Court considers "the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses." *Maken*, 510 F.3d at 657 (citing U.S.S.G. § 1B1.3, application note 9(B)). Each of these factors strongly supports the district court's finding that the February 2005 mail fraud was part of the "same course of conduct" as the incidents of mail fraud that occurred in May, June and July 2005.

First, as previously explained, all four incidents are highly similar. See pp. 26-30, *supra*. In determining whether conduct is sufficiently similar to qualify as the "same course of conduct," this Court will consider the same factors that are relevant in deciding whether incidents are part of a "common scheme or plan." *Phillips*, 516 F.3d at 485 & n.5. As explained (pp. 26-28, *supra*), the central

similarity between the four incidents of mail fraud was the *modus operandi – i.e.*, Gagnier's use of his police officer status, access, and training to stage crimes that form the basis of fraudulent claims for compensation. See *United States* v. *Davis*, 170 F.3d 617, 622 (6th Cir.) (relying heavily on the existence of a "similar *modus operandi*" in concluding that incidents were relevant conduct), cert. denied, 528 U.S. 861 (1999). The incidents also had a common purpose (see pp. 29-30, *supra*), a factor that strongly supports a finding that they were part of a "common scheme or plan." See *Phillips*, 516 F.3d at 485 & n.5. (emphasizing incidents' "common purpose" in concluding that they were part of the "same course of conduct"). And, as explained, all four incidents involved similar victims. See pp. 29-30, *supra*.

The other two factors – the "regularity" (or repetition) of the conduct and the "time interval between the offenses" – also support the conclusion that the February 2005 mail fraud was part of the same "course of conduct" as the incidents that occurred in May, June and July 2005. The "regularity" factor is supportive because the February 2005 incident was one of *four* similar incidents. The "time interval" factor provides further support because all four of these incidents occurred within a six-month period, which the district court correctly found was "a relatively short span of time." (R. 68, 11/29/07 Tr. 67, Apx. __).

This Court's decision in *Phillips* refutes Gagnier's assertion (Br. 32) that the February 2005 fraud was too "temporally remote" from the other three incidents.

The time interval in Gagnier's case was much shorter than in *Phillips*, where this Court held that three incidents of illegal possession of firearms were part of the "same course of conduct" even though they were spread out over a four-year period and even though the non-charged incidents took place about two years before and two years after the offense for which the defendant was convicted. 516 F.3d at 485.

The regularity and temporal proximity of Gagnier's fraudulent conduct distinguish the present case from *United States* v. *Hill*, 79 F.3d 1477 (6th Cir. 1996), on which Gagnier relies heavily. See Br. 27-28, 32. In *Hill*, the Court rejected the argument that a single drug transaction that occurred 19 months prior to the charged offense was "relevant conduct" under § 1B1.3(a)(2). 79 F.3d at 1484. In contrast to Gagnier's case, the "temporal proximity" of the incidents in *Hill* was "extremely weak," and, as there was only one prior offense, "[r]egularity [was] completely absent." *Ibid*; see also *Phillips*, 516 F.3d at 484 ("[T]he degree of regularity is stronger here than in *Hill*, where the sole other offense considered 'relevant conduct' was an isolated drug transaction nineteen months prior to the offense of conviction."). Consequently, this Court concluded in *Hill* that "the government was required to compensate for the weakness of the temporal and regularity factors by presenting substantially stronger proof of similarity." 79 F.3d at 1484. Requiring a heightened showing of similarity in *Hill* was consistent with the "sliding scale approach" that this Court uses in determining whether offenses

are part of the same course of conduct. *Phillips*, 516 F.3d at 483 (citing U.S.S.G. § 1B1.3, application note 9(B)). When one of the relevant factors – similarity, regularity, or temporal proximity – "is absent, a stronger presence of at least one of the other factors is required." *Ibid.* But where, as in Gagnier's case, regularity and temporal proximity are present, no heightened showing of similarity is required.[6]

For these reasons, this Court should uphold the district court's inclusion of the February 2005 mail fraud as "relevant conduct" under § 1B1.3(a)(2). Accordingly, the district court correctly included the $19,191.88 loss that resulted from that fraud in calculating the total loss for purposes of § 2B1.1(b)(1).

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[6] Gagnier's reliance (Br. 29) on *United States* v. *Moored*, 997 F.2d 139 (6th Cir. 1993), is also misplaced. In *Moored*, because "no actual loss resulted from the offense of conviction," the district court based an eight-level enhancement solely on defendant's (apparently legal) $325,000 debt to a small college. 997 F.2d at 143. The precise basis for the Court's decision in *Moored* is unclear and for that reason alone it does not support Gagnier's argument. This Court suggested in *Moored* that the $325,000 debt could not reasonably be characterized as a loss for purposes of sentencing. See *id.* at 144 ("[W]e find that the district court committed clear error by including the amount of the 'loss' to Jordan College in the computation of Defendant's total offense level.") (internal quotation marks in the original). Further, while the *Moored* opinion is not explicit on this point, the apparent lack of criminality of the debt likely played a key role in the reversal. See, *e.g.*, *United States* v. *Peterson*, 101 F.3d 375, 385 (5th Cir. 1996) ("For conduct to be considered 'relevant conduct' for the purpose of establishing ones offense level that conduct must be criminal."), cert. denied, 520 U.S. 1161 (1997). Here the February 2005 fraud involved loss and was criminal. *Moored* is thus inapplicable.

III

THE DISTRICT COURT CORRECTLY APPLIED A TWO-LEVEL ENHANCEMENT UNDER U.S.S.G. § 2B1.1(b)(12)(B) IN CALCULATING GAGNIER'S GUIDELINES OFFENSE LEVEL

(RESPONSE TO GAGNIER'S ARGUMENT 2, WHICH IS WAIVED)

Gagnier argues (Br. 35-38) that the district court incorrectly applied a two-level increase for possession of a dangerous weapon under U.S.S.G. § 2B1.1(b)(12)(B). The court based this enhancement on Gagnier's possession of a gun during the February 2005 incident, during which Gagnier's partner, Officer Fetter, was shot – either by Gagnier or Fetter – as part of a scheme to file a fraudulent workers' compensation claim. (R. 68, 11/29/07 Tr. 70-72, Apx. __-__). As previously explained, Gagnier waived his challenge to the two-level enhancement by failing to raise the issue in his previous appeal. See pp. 18-23, *supra*. In any event, this Court should reject Gagnier's argument because it is meritless.

A. The District Court Correctly Considered The February 2005 Incident As Relevant Conduct In Applying § 2B1.1(b)(12)(B)

Gagnier first argues (Br. 35-36) that the February 2005 incident is not "relevant conduct" under Guidelines § 1B1.3(a)(2), and thus the incident could not provide the basis for the enhancement under § 2B1.1(b)(12)(B). This argument is meritless for the reasons explained in Argument II of this brief. See pp. 23-34, *supra*.

B. Gagnier's Alternative Argument Concerning § 2B1.1(b)(12)(B) Is Meritless

Gagnier argues that, even if the February 2005 mail fraud was properly considered as relevant conduct, the § 2B1.1(b)(12)(B) enhancement should not have been applied. This alternative argument also lacks merit.

1. Standard Of Review

A district court's factual findings under Guidelines § 2B1.1(b)(12)(B) are reviewed for clear error. *United States* v. *Miggins*, 302 F.3d 384, 390 (6th Cir. 2002), cert. denied, 537 U.S. 1130 (2003).[7] "A district court's legal conclusions regarding the application of the sentencing guidelines are reviewed *de novo*." *Ibid*.

2. The Plain Language Of The Guidelines Requires A Two-Level Enhancement In Gagnier's Offense Level

The Sentencing Guidelines require a two-level increase in the offense level "[i]f the offense involved * * * possession of a dangerous weapon (including a firearm) in connection with the offense." U.S.S.G. § 2B1.1(b)(12)(B). Here the record establishes – and Gagnier does not dispute (see Br. 36) – that Gagnier possessed a firearm during the February 2005 incident. (See PSR 4, Apx. __; R. 67, 11/28/07 Tr. 35-38, Apx. __-__; R. 68, 11/29/07 Tr. 66-67, Apx. __-__).

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[7] This Court has not explicitly addressed the standard of review for Guidelines § 2B1.1(b)(12)(B). However, Guidelines § 2D1.1(b)(1), the provision at issue in *Miggins*, is very similar to § 2B1.1(b)(12)(B). Accordingly, this Court should apply the same standard of review to § 2B1.1(b)(12)(B) as it does to § 2D1.1(b)(1).

Gagnier's possession of the firearm was in connection with the offense. The firearm was central to the fraud because it was used to cause the gunshot wound that formed the basis of the fraudulent workers' compensation claim. (PSR 4, Apx. __). Gagnier brought the gun to the park, carried it away from the scene after the shooting, and may actually have fired the shot himself (although this latter point is in dispute). (R. 67, 11/28/07 Tr. 35-37, Apx. __-__; see also PSR 4, Apx. __ (noting that Fetter claimed Gagnier actually fired the shot)). Accordingly, the plain language of § 2B1.1(b)(12)(B) applies to Gagnier's conduct.

Gagnier argues, however, that the enhancement should not apply unless the firearm possession results in "increased danger" to victims of the offense. Br. 36, 38. Nothing in the language of § 2B1.1(b)(12)(B) or the Sentencing Commission's commentary supports such a limitation on the scope of the enhancement.

In applying an analogous Guidelines provision, § 2D1.1(b)(1), this Court and other circuits focus on whether there was possession related to the offense, rather than whether the firearm possession endangered offense victims. See, *e.g.*, *Miggins*, 302 F.3d at 390-391 (stating that the enhancement applies when the defendant possessed a firearm – either actually or constructively – during the offense and such possession was in connection with the offense); *United States* v. *Jacquinot*, 258 F.3d 423, 430-431 (5th Cir. 2001) (applying a two-level increase for possession of firearms where the guns were unloaded in the defendant's truck

during the drug offense), cert denied, 534 U.S. 1116 (2002). See also U.S.S.G. § 2D1.1(b)(1), application note 3 ("The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.").

Gagnier asserts (Br. 37-38) that this Court's decision in *United States* v. *Hill*, 381 F.3d 560 (6th Cir. 2004), supports his argument. It does not. *Hill* involved a provision of the Sentencing Guidelines authorizing an enhancement in the offense level "[i]f a firearm was discharged" during a robbery. U.S.S.G. § 2B3.1(b)(2)(A). This Court held that the enhancement did not apply to a robber's offense level where a security guard shot the robber twice and the robber did not possess a weapon. *Hill*, 381 F.3d at 561-563. This Court ruled that the robber could not, under the language of the Guidelines, be held responsible for the discharge of the security guard's firearm unless the robber "willfully caused" the discharge. *Id.* 562-563 (citing U.S.S.G. § 1B1.3(a)(1)(A)). *Hill* has no application here. Gagnier possessed the gun himself and – even assuming Fetter also possessed it – Gagnier aided, abetted, induced, procured and willfully caused Fetter's possession of the gun. (PSR 4, Apx. __; see also U.S.S.G. § 1B1.3(a)(1)(A)).

In any event, Gagnier ignores the inherent danger created by his possession of the firearm during the February 2005 incident. Firing a gun in a public park at another person or at oneself is an extremely dangerous activity that could cause

harm to innocent bystanders, who might accidentally be struck by flying bullets. Thus, even if a showing of danger were necessary, the requirement would be satisfied here.

In sum, there is simply no support for Gagnier's claim that the § 2B1.1(b)(12)(B) increase applies only when the firearm possession endangers the victims of the offense. Accordingly, this Court should uphold the district court's straightforward application of the Guideline's plain language.

IV

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING A TRAVEL RESTRICTION AS A CONDITION OF GAGNIER'S SUPERVISED RELEASE

(RESPONSE TO GAGNIER'S ARGUMENT 3, WHICH IS WAIVED)

Gagnier argues (Br. 39-47) that the district court erred in imposing a travel restriction as a condition of his supervised release. As previously discussed, Gagnier waived this argument by failing to raise it in his first appeal. See pp. 18-23, *supra*. In any event, the district court did not abuse its broad discretion in imposing the travel restriction.

A. Standard Of Review

This Court "review[s] a court's imposition of a supervised-release condition for abuse of discretion." *United States* v. *Alexander*, 509 F.3d 253, 256 (6th Cir. 2007). A district court has "broad discretion to impose appropriate conditions of supervised release." *United States* v. *Ritter*, 118 F.3d 502, 506 (6th Cir. 1997).

B. Legal Framework

In addition to specific, enumerated conditions that the district court must impose as part of supervised release, 18 U.S.C. 3583(d) provides that "[t]he court may order, as a further condition of supervised release * * * any other condition it considers to be appropriate." Congress has explicitly authorized certain discretionary conditions, including the requirements that the defendant "reside in a specified place or area, or refrain from residing in a specified place or area" and that the defendant "remain within the jurisdiction of the court unless granted permission to leave by the court or a probation officer." 18 U.S.C. 3563(b)(13) & (14); see also 18 U.S.C. 3583(d) (cross-referencing several provisions, including Sections 3563(b)(13) & (14), as permissible conditions of supervised release).

"A condition of supervised release must: (1) be 'reasonably related,' to 'the nature and circumstances of the offense and the history and characteristics of the defendant' and to the need to provide deterrence, to protect the public and to rehabilitate the defendant; (2) 'involve[ ] no greater deprivation of liberty than is reasonably necessary' for deterring criminal conduct, protecting the public and rehabilitating the defendant; and (3) be consistent with policy statements issued by the Sentencing Commission." *Alexander*, 509 F.3d at 256 (citing 18 U.S.C. 3583(d)(1), (2) & (3) and 18 U.S.C. 3553(a)(1) & (2)). "This Court has repeatedly held that 'a sentencing court's failure to expressly explain its reasons for exacting a particular special condition of supervised release will be deemed harmless error

if the supporting reasons are evident on the overall record, and the subject special condition is related to the dual major purposes of probation, namely rehabilitation of the offender and enhancement of public safety.'" *United States* v. *Brogdon*, 503 F.3d 555, 564 (6th Cir. 2007) (citing cases), cert. denied, 128 S. Ct. 1291 (2008).

C. Gagnier's Argument Ignores The Central Reason For The Court-Imposed Travel Restriction On His Supervised Release

At the outset, we note that Gagnier has misstated the scope of the travel restriction imposed by the district court. He incorrectly asserts (Br. 42) that the condition forbids him "from leaving the jurisdiction of the supervising district." In fact, the travel restriction contained in the district court's judgment merely states that "[t]he defendant shall not travel outside of the United States of America during time of Supervised Release." (R. 61, Redacted Judgment at 4, Apx. __). And the district court imposed this restriction "without prejudice" to Gagnier's seeking modification of the restriction when the time draws nearer for him to leave prison. (R. 68, 11/29/07 Tr. 152, Apx. __).

Gagnier argues (Br. 42-47) that the travel condition violates 18 U.S.C. 3583(d)(2) because it effects a "greater deprivation of liberty than is reasonably necessary."[8] Specifically, he claims (Br. 42-44) that the district court failed to

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[8] This Court has not held that the government bears the burden of proof on this issue. See Br. 42 (citing *United States* v. *Weber*, 451 F.3d 552 (9th Cir. 2006)). Rather than discussing which party bears the burden of proof, this Court has simply looked at whether imposition of the condition is supported either by the court's findings or the record as a whole. See, *e.g.*, *Brogdon*, 503 F.3d at 564.

(continued...)

make the required factual findings to support the travel restriction. The argument is meritless.

Gagnier's arguments ignore the central reason the restriction was imposed – namely, Gagnier's previous violations of the conditions of his release. As previously explained, Gagnier was released prior to his sentencing. See pp. 10-11, *supra*. As conditions of this release, the district court required that Gagnier "not commit any violation of federal, state, or local law" and that he "immediately advise the court, defense counsel and the U.S. attorney in writing before any change in address and telephone number." (R. 5, Order Setting Conditions of Release, Apx. __). As the district court found, Gagnier blatantly violated these conditions by absconding to Canada "without permission" and committing "additional criminal acts" – *i.e.*, attempting to fraudulently obtain a job as an Edmonton police officer. (R. 68, 11/29/07 Tr. 73, 143, Apx. __, __).

The findings of the district court, as well as other record evidence, amply support the travel restriction. The court found "a strong likelihood of recidivism" in this case. (R. 68, 11/29/07 Tr. 145, Apx. __). The court concluded specifically that Gagnier's "first instinct is to violate the law," and therefore "there's a strong

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[8](...continued)
However, even if the government bears the burden of proof, it is satisfied here by the evidence of Gagnier's flight to Canada and fraudulent application for a police officer position while there.

need to protect the public from [Gagnier's] actions going forward." (R. 68, 11/29/07 Tr. 145, Apx. __).

Given this "strong likelihood of recidivism," a need exists in this case for careful monitoring of Gagnier during the period of his supervised release. It may be difficult or impossible for a United States probation officer to monitor Gagnier closely if he is in Canada. See *United States* v. *Feldman*, 151 Fed. Appx. 521, 523 (9th Cir. 2005) (district court did not abuse its discretion in imposing travel restrictions on defendant's supervised release where defendant previously failed to return from Spain for trial and had not made the "court aware of any federal administrative system in Spain with either the power or the training to provide the functions of a United States probation officer"). The government expressed this concern at the sentencing hearing, stating that "[Gagnier] needs to be * * * supervised by the United States probation office under their rules." (R. 68, 11/29/07 Tr. 151, Apx. __).

Gagnier complains (Br. 46) that the government did not introduce evidence that it would be unable to supervise him in Canada. But the government cannot be faulted for failing to introduce such evidence because Gagnier never objected to the travel restriction until the very end of the second (and final) day of his resentencing hearing. (Compare R. 68, 11/29/07 Tr. 151, Apx. __ with R. 41, 7/13/06 Tr. 42-43, Apx. __-__ and R. 50, Gagnier's Position Regarding Presentence Report, Apx. __). Government counsel responded that he was

unaware of any agreements with Canada that allow the United States Probation Office to supervise a convicted felon residing there. (R. 68, 11/29/07 Tr. 151, Apx. __). Gagnier's counsel did not represent at the hearing – nor does he on appeal – that such an agreement exists.

Gagnier claims to find support in *United States* v. *Ossa-Gallegos*, 491 F.3d 537 (6th Cir. 2007), for his contention that "the government may enforce the terms of supervised release if the defendant does not live in the United States." Br. 46. In fact, *Ossa-Gallegos* does not support this proposition. *Ossa-Gallegos* dealt with "the narrow question of whether the practice of tolling a period of supervised release for a deported offender is authorized by the sentencing statutes," and concluded that it is not. 491 F.3d at 538-539. *Ossa-Gallegos* never asserted that the government would be able to effectively monitor compliance with and enforce conditions of supervised release after a defendant had left this country. Rather, *Ossa-Gallegos* merely observed that *a defendant* would not be forced into violation of any mandatory condition of supervised release merely because he had been deported. *Id.* at 542-543.

The travel restriction is also justified by the potential difficulty of extraditing Gagnier if he violates the conditions of his release. The district court credited government counsel's concern about this potential need to go through cumbersome extradition proceedings if Gagnier violated the terms of his supervised release while in Canada. (R. 68, 11/29/07 Tr. 152, Apx. __); see

Maydak v. *Warden, Allegheny County Jail*, 156 Fed. Appx. 515, 516 (3d Cir. 2005) (defendant who was arrested in Canada after violating conditions of his supervised release "was surrendered by Canada after lengthy extradition proceedings" that were not completed until more than two years after his arrest). The concern about extradition is particularly justified here because Gagnier previously violated the conditions of his pre-sentence release and has demonstrated a propensity to violate the law. Indeed, the government narrowly avoided having to extradite Gagnier when he went to Canada during his release pending sentencing. Government counsel filed a sealed motion to revoke Gagnier's bond and then arrested him when he came back to the jurisdiction voluntarily to give testimony.

Finally, the record indicates that Gagnier may wish to use his Canadian citizenship to escape punishment. Gagnier admitted that he had looked into obtaining a "treaty transfer" because he believed it might allow him to avoid jail time. (R. 68, 11/29/07 Tr. 129-131, Apx. __-__). While Gagnier said he was no longer pursuing this option, the admission provided strong justification for the court's concern about whether he was "trying to manipulate the system." (R. 68, 11/29/07 Tr. 143, Apx. __).

Accordingly, the district court did not abuse its broad discretion by imposing the travel restriction. Moreover, even if the district court had not "expressly explain[ed] its reasons" for imposing the condition, any error would be

harmless because "supporting reasons are evident on the overall record." See *Brogdon*, 503 F.3d at 564.

Gagnier contends, however, that this Court's decision in *Alexander* supports his attack on the travel restriction. Br. 44-46. He is mistaken. To the contrary, *Alexander* supports the travel restriction imposed here by the district court. In both cases, the defendant violated an initial, less restrictive, condition of release and, as a result, the district court imposed a more stringent condition. 509 F.3d at 256-258. As in *Alexander*, the travel restriction here imposes no "greater deprivation of liberty than is reasonably necessary" to prevent recidivism and protect the public. See *id.* at 256-257. Indeed, the travel restriction here is far less restrictive than the one upheld in *Alexander*. In that case, the defendant was required to live in Grand Rapids, Michigan, for the first 12 months of his supervised release. *Id.* at 256. By contrast, Gagnier is permitted to live anywhere in the United States during his supervised release. (R. 61, Judgment at 4, Apx. __).

V

GAGNIER'S SENTENCE IS REASONABLE

(RESPONSE TO GAGNIER'S ARGUMENT 4)

Gagnier argues (Br. 48-55) that his sentence is unreasonable. The argument is meritless.

A. Legal Framework And Standard Of Review

As a result of the Supreme Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), this Court reviews "for 'reasonableness' each sentence imposed by a district court." *United States* v. *Vowell*, 516 F.3d 503, 509 (6th Cir. 2008). This Court's "reasonableness review is two-fold, requiring that a sentence be both procedurally and substantively reasonable." *United States* v. *Phinazee*, 515 F.3d 511, 514 (6th Cir. 2008).

This Court "review[s] the reasonableness of a sentence using the abuse-of-discretion standard of review." *Gall* v. *United States*, 128 S. Ct. 586, 594 (2007). No presumption of unreasonableness applies to a sentence outside the Guidelines range. *Id.* at 597. Rather, this Court "may consider the extent of the deviation, but must give due deference to the district court's decision that the [18 U.S.C.] 3553(a) factors, on a whole, justify the extent of the variance." *Ibid.* Indeed, "[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Ibid.*

B. Gagnier's Argument Is Founded Upon An Incorrect Premise

Central to Gagnier's argument is his assertion that the district court arrived at his sentence by making a "departure" pursuant to Guidelines § 5K2.0 rather than a "variance" from the Guidelines range. See Br. 50-54. Gagnier claims that the "departure" was insufficiently linked to the structure of the Guidelines because it was "disproportionately high" compared to "[G]uidelines increases for aggravating circumstances." Br. 54. This argument is meritless.

Gagnier's argument is foreclosed by this Court's decision in *Vowell*. In *Vowell*, one of the defendants argued that her above-Guidelines sentence should be analyzed as a § 5K2.0 departure rather than a Section 3553(a) variance. 516 F.3d at 513. This Court's analysis showed that the issue was immaterial and made clear that the same standard applies to § 5K2.0 departures as to variances from the Guidelines: "because the same test for reasonableness applies to both departures and variances, * * * we must determine whether [the defendant's] sentence is procedurally and substantively reasonable." *Ibid.* Accordingly, regardless of whether the district court made a § 5K2.0 departure or a Section 3553(a) variance, this Court should simply apply its post-*Gall* reasonableness review. That standard does not require that the sentence be linked to the structure of the Guidelines. Compare *Vowell*, 516 F.3d at 509-514 (discussing in detail and applying the post-*Booker* reasonableness standard without requiring the sentences to be linked to the structure of the Guidelines) with Br. 52-53 (citing pre-*Booker* Sixth Circuit cases

for the proposition that a departure must be linked to the structure of the Guidelines).

In any event, the district court based its above-Guidelines-range sentence on the factors in Section 3553(a). After noting that she had "gone through the calculations and established the guideline range," the district judge stated that "the guidelines are advisory" and "the court does have the power to impose a sentence that varies from [the] guideline range." (R. 68, 11/29/07 Tr. 136, Apx. __). The court proceeded to analyze the Section 3553(a) factors. (R. 68, 11/29/07 Tr. 136-144, Apx. __-__). The court never cited or referred to § 5K2.0, and though the judge did once utter the word "departure" (R. 68, 11/29/07 Tr. 145, Apx. __), the record viewed as a whole makes clear that this was a variance based on the Section 3553(a) factors. See *Vowell*, 516 F.3d at 511 ("[B]ecause the district court relied on § 3553(a) to enhance Vowell's sentence, we are dealing with a variance and not a departure.").

C. Gagnier's Sentence Is Procedurally Reasonable

A sentence will be upheld as procedurally reasonable where "the district court discussed the § 3553(a) factors, explained their importance, and considered the advisory Guidelines range." *Vowell*, 516 F.3d at 511. However, this court does "not require a rote recitation of § 3553(a) factors." *Ibid.* (citation omitted). As explained above, p. 11-12, *supra*, the district court first determined the advisory Guidelines range. Then after discussing in detail the Section 3553(a)

sentencing factors, the court decided to impose an above-Guidelines sentence because it found "that the guidelines do not fully take into account the real seriousness of the harm that [Gagnier] caused." (R. 68, 11/29/07 Tr. 144, Apx. __).

The district court thoroughly weighed the Section 3553(a) factors. (See R. 68, 11/29/07 Tr. 136-144, Apx. __-__). Gagnier's brief makes no effort to contend with this careful weighing of the sentencing factors. See Br. 48-55.

The court first considered "the seriousness of the offense," 18 U.S.C. 3553(a)(2)(A). (R. 68, 11/29/07 Tr. 136, Apx. __). The court found that "[t]here's no question but that these were very serious offenses that affected people's lives in a way that will forever change who they are." (R. 68, 11/29/07 Tr. 136, Apx. __). In addition, the court found that Gagnier placed himself "above the law" and "decided that [victim Terrance] Edwards was not somebody who deserved to have the law evenly and equally applied to him." (R. 68, 11/29/07 Tr. 138, Apx. __). The court noted that Gagnier "caused prosecutors to rely on [his] actions and prosecute a case that was false." (R. 68, 11/29/07 Tr. 138, Apx. __). Further, Gagnier's actions "put other officers at risk" and caused "people to hold [other officers] in less esteem and respect." (R. 68, 11/29/07 Tr. 136-138, 144, Apx. __-__, __).

The court also cited the impact of Gagnier's offenses on particular victims. (R. 68, 11/29/07 Tr. 134-138, Apx. __-__). Specifically, the court considered:

- Leah Fetter's statement that she has "suffered anxiety and depression" and her description of "the horror of having her children taken from her, [and] the horror of being arrested";
- Bert Adcock's statement about "the fear that was instilled in him by Officer Gagnier" when Gagnier arrested him and told him he "would be abused in prison";
- Adcock's humiliation as a result of the publicity surrounding his arrest;
- Adcock's wife's discussion of the embarrassment and disruption to her family's life that resulted from Gagnier's arrest of her husband;
- The effect of Gagnier's offenses on the Fetter and Adcock children; and
- Edward's statement that he lost his job, his life savings, and has not been able to find work because of his arrest.

(R. 68, 11/29/07 Tr. 134-138, Apx. __-__).

The district court also took into account the need "to provide just punishment for the offense," 18 U.S.C. 3553(a)(2)(A). Specifically, the court cited the "need to punish [Gagnier]" for his actions "under 3553" and stated "that there is a need for serious punishment through a significant term of imprisonment." (R. 68, 11/29/07 Tr. 142, 145, Apx. __, __).

In addition, the court considered the "need to protect the public." (R. 68, 11/29/07 Tr. 142, Apx. __); see 18 U.S.C. 3553(a)(2)(C). Regarding this factor, the court stated:

> And so it seems to me that this is a part of who you are. And I believe that you pose a real threat to the community if you are released. I don't believe that you're reformed at this time, I don't believe that you are prepared to conform your conduct to that of a law-abiding citizen, so I believe that there is a serious risk of danger to the community if in fact there is not a substantial sentence.

(R. 68, 11/29/07 Tr. 141-142, Apx. __-__). The court noted that although, as a police officer, Gagnier was "sworn to protect the public," he "violated that trust and abused the public." (R. 68, 11/29/07 Tr. 142, Apx. __). Further, Gagnier "targeted" and "victimized" individuals who did nothing wrong. (R. 68, 11/29/07 Tr. 142, Apx. __). The court found that Gagnier is not "reformed" and is therefore not "ready to be back out on the streets" and "to be reunited with [his] family." (R. 68, 11/29/07 Tr. 141-142, Apx. __-__). The court further found that Gagnier is a likely recidivist based, in part, "on the fact * * * that [Gagnier] continued to engage in criminal activity once [he] entered [his] plea, * * * falsified and forged documents, [and] made misrepresentations." (R. 68, 11/29/07 Tr. 143, Apx. __). The court concluded that Gagnier poses "a strong likelihood of recidivism" and that "when at liberty," his "first instinct is to violate the law." (R. 68, 11/29/07 Tr. 145, Apx. __).

In the category of "history and characteristics of the defendant," 18 U.S.C. 3553(a)(1), the court noted "that Gagnier continued to engage in criminal activity once [he] entered [his] plea" – a reference to Gagnier's decision to abscond to Canada during his pre-sentence release and, while there, to commit fraud in an attempt to obtain a job as an Edmonton police officer. (R. 68, 11/29/07 Tr. 143,

Apx. __). In addition, the court considered Gagnier's failure to appreciate the seriousness of his offense and his refusal to take responsibility for his actions. Specifically, the court referred to Gagnier's claim that "the system has let me down" and that "justice demands" a lenient sentence. (R. 68, 11/29/07 Tr. 140-141, Apx. __-__). The court noted that while Gagnier claimed to "rue the day that [he] ever joined up with Mr. Fetter[,] * * * [he] invited officer Vickery into th[e] same type of conduct." (R. 68, 11/29/07 Tr. 141, Apx. __). Finally, the court found that Gagnier's "statements of remorse ran[g] hollow * * * because [he has] not made any efforts to pay any of the restitution that is owed." (R. 68, 11/29/07 Tr. 146, Apx. __).

The district court's thorough analysis of the sentencing factors confirms the procedural reasonableness of Gagnier's sentence. Here, as in *Vowell*, "the district court discussed the § 3553(a) factors, explained their importance, and considered the advisory Guidelines range." 516 F.3d at 511.

D. Gagnier's Sentence Is Substantively Reasonable

Gagnier claims (Br. 55), without elaboration, that the district court's above-Guidelines sentence "was substantively unreasonable." This conclusory assertion is insufficient to preserve this issue for appellate review. As this Court has held, "issues adverted to on appeal in a perfunctory manner unaccompanied by some effort at developed argument are deemed waived." *Phinazee*, 515 F.3d at 520 (citation omitted). Accordingly, the Court should not address this argument.

In any event, Gagnier's sentence is substantively reasonable. "For a sentence to be substantively reasonable, it must be proportionate to the seriousness of the circumstances of the offense and offender, and 'sufficient but not greater than necessary, to comply with the purposes' of § 3553(a)." *Vowell*, 516 F.3d at 512 (citations omitted). This Court will uphold a sentence as substantively reasonable where "the district court did not arbitrarily choose a sentence, but chose a sentence it considered sufficient but not greater than necessary to comply with the purposes of § 3553(a)." *Ibid.*

Although an appellate court "may consider the extent of the deviation" from the Guidelines range in assessing a sentence's substantive reasonableness, the Supreme Court has "reject[ed] the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." *Gall*, 128 S. Ct. at 595. Such a "rigid mathematical formulation" is "inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions – whether inside or outside the Guidelines range." *Id.* at 596.

Gagnier's sentence of 71 months, which is approximately 73% above the top of the Guidelines range (41 months), is substantively reasonable under the analysis set forth in *Gall* and *Vowell*. The extent of the variance here is significantly more modest than the one upheld in *Vowell*. In that case, this Court affirmed a sentence of 65 years that was "242% beyond the top of the Guidelines

range." 516 F.3d at 511. Although characterizing the extent of that deviation as "an extraordinary variance," this Court recognized that *Gall* prohibited it from applying a "presumption of unreasonableness" to the sentence. *Id*. at 511-512.

In considering the substantive reasonableness of the sentence imposed in *Vowell*, this Court focused on the district court's statements concerning the seriousness of the offense and its conclusion that the defendant would "not conform his conduct to societal norms and is a substantial threat to the community." 516 F.3d at 512. This Court concluded in *Vowell* that "[w]e cannot ask more of a district court, in terms of weighing the § 3553(a) factors and explaining the reasons for its sentence, than the district court did in [that] case." *Ibid.*

The same conclusion is warranted here where the district court thoroughly and reasonably weighed the Section 3553(a) factors. As recounted in detail by the court (see pp. 49-53, *supra*), Gagnier's crimes were extremely serious. They were committed by a police officer who callously violated the very laws he was sworn to uphold and, in doing so, profoundly harmed many innocent people. These factors amply justify the extent of the variance in this case, particularly when considered in light of the court's finding that Gagnier is a likely recidivist who poses a "serious risk of danger to the community if in fact there is not a substantial sentence." (R. 68, 11/29/07 Tr. 142, 145, Apx. __). See *United States* v. *Tate*, 516 F.3d 459, 471 (6th Cir. 2008) (concern about high risk of recidivism and a

concomitant need to protect the public justified a district court's above-Guidelines sentence). Gagnier's continued criminal conduct and disregard for his conditions of release even after he pleaded guilty justified the court's conclusion that violation of the law is indeed Gagnier's "first instinct." (See R. 68, 11/29/07 Tr. 145, Apx. __).

Here, as in *Vowell*, "the district court selected a punishment that it believed fit [defendant's] crimes, and provided sufficient reasons to justify it." 516 F.3d at 512. Accordingly, Gagnier's sentence is substantively reasonable and should be affirmed.

CONCLUSION

This Court should affirm Gagnier's sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 12.0 and contains 13,526 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Dated: June 18, 2008

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2008, two copies of the foregoing PROOF BRIEF FOR THE UNITED STATES AS APPELLEE were served by first-class mail, postage prepaid, on the following counsel of record:

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APPELLEE'S CROSS-DESIGNATION OF APPENDIX CONTENTS

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Pursuant to Sixth Circuit Rules 28(d) and 30(b), appellee United States of America designates the following items to be contained in the Joint Appendix, which do not appear in appellant's designation:

Description	Date	Record No.
Order Setting Conditions Of Release	12/16/2005	5
Order On Guilty Plea	12/16/2005	6
Redacted Judgment	7/28/2006	21
Hearing Transcript (12/14/2005), all pages	12/5/2006	40
Hearing Transcript (7/13/2006), all pages	12/5/2006	41
Redacted Judgment	11/29/2007	61