Nos. 14-1572 & 14-1805

In the
United States Court of Appeals
for the Sixth Circuit

United States of America,

Plaintiff-Appellee,

v.

Timothy Carpenter, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Michigan
No. 12-cr-20218

Brief for the United States

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Request for Oral Argument

The United States agrees with the defendants that oral argument might assist the Court in deciding this appeal.

Jurisdictional Statement

The district court had original jurisdiction over this case under 18 U.S.C. § 3231 because the defendants were charged with federal crimes. This Court has appellate jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291 because the defendants timely appealed the district court's judgment. (R. 301: Carpenter Judgment, 1600; R. 303: Carpenter Notice of Appeal, 1612; R. 315: Sanders Judgment, 1718; R. 308: Sanders Notice of Appeal, 1639).

Introduction

Timothy Carpenter and Timothy Sanders and a band of accomplices committed a spree of armed robberies of RadioShack and T-Mobile stores over a two-year period. Carpenter led several of the robberies, and a jury convicted him of six counts of Hobbs Act robbery and five related gun counts. The jury convicted Sanders of two counts of Hobbs Act robbery.

Along with video surveillance and eyewitness evidence, the government introduced expert witness testimony based on cell-site records that the government acquired from the defendants' cellphone companies through the Stored Communications Act. Those records contained cell-site tower information, generated when the cellphones made or answered calls, from which the expert established the general vicinity of the phones during those calls. That cell-site location information placed the defendants' cellphones near four of the robberies at the time they were occurring.

The district court properly rejected the defendants' argument that the government's acquisition of the records without a warrant violated the Fourth Amendment. Under the third-party business records

doctrine, Carpenter and Sanders have no reasonable expectation of privacy in the information they conveyed to their phone companies in the ordinary course of business.

Even if this Court were to conclude otherwise, acquisition of the cell-site records would still satisfy the Fourth Amendment's general "reasonableness" standard. The government's reliance on the Stored Communications Act would also save the evidence from suppression under the exclusionary rule's good-faith exception. And any error in admitting evidence based on the cell-site records would be harmless, given the compelling evidence of the defendants' guilt.

Carpenter and Sanders also raise additional challenges to one of their respective convictions and to their overall sentences. None of these additional claims have merit.

Issues Presented

1) The Supreme Court established long ago that a defendant generally has no Fourth Amendment objection when the government obtains a third party's business records. Here, after beginning a criminal investigation of an armed robbery spree, the United States requested and received court orders under the Stored Communications Act for business records from the defendants' cellular service providers. The requested records contained cell-site location information generated by the defendants' cellphones when they made or received calls. Did the district court properly deny the defendants' motion to suppress those records?

2) Carpenter aided and abetted the robbery of a store in Ohio by planning the robbery from the Eastern District of Michigan, and then helping to fence the stolen phones in that district. Given that these accessorial acts occurred in the Eastern District of Michigan and the robbery affected commerce there, did the district court properly deny Carpenter's motion for acquittal on the Ohio crimes for lack of venue in the Eastern District of Michigan?

3) Did the district court properly exercise its discretion in managing Carpenter's effort to cross-examine a prosecution witness?

4) Does Carpenter's 116-year prison sentence for six robberies and five associated gun crimes, four of which triggered consecutive mandatory terms, constitute cruel and unusual punishment or violate the constitutional separation of powers?

5) Is Sanders's sentence procedurally and substantively reasonable?

Statement of the Case

A. Carpenter and Sanders commit a spree of armed robberies.

Half-brothers Timothy Carpenter ("Little Tim") and Timothy Sanders ("Big Tim"), with a rotating cast of accomplices, robbed at gunpoint at least seven RadioShack and T-Mobile cellphone stores over a two-year period. The robberies were cookie-cutter, with little variation. Typically the leader selected a target, assembled a handful of guys, arranged for one or more guns, arranged for two cars or vans (frequently stealing one of them), purchased laundry-style bags from a local store, and assigned roles to the accomplices. The leader and one or two others stayed in one car parked across from the store and served as lookouts, and two or three guys forming the entry team parked at the store in the getaway car. The leader called the entry team using his cellphone to indicate that the coast was clear. At that point, the entry

guys went in with guns drawn, brandished those guns to move employees and any customers to the back of the store where inventory was kept, opened locked cages, loaded the laundry bags with brand new cellphones in their original boxes, left the store within a few minutes, and escaped in the getaway car. The lookout and entry teams met up nearby, returned or disposed of the guns and stolen car, and fenced the stolen phones for cash, after which the leader paid the others according to their roles. Carpenter was the leader for most of these hits, and he and Sanders were always lookouts and never themselves entered the stores. *E.g.*, (R. 330: Trial Tr., testimony of accomplice Michael Green, 2826–2836 (first robbery), 2836–46 (second robbery), 2846–56 (third), 2857–68 and 2874–85 (fourth); R. 328: Trial Tr., testimony of accomplice Adriane Foster, 2506–2525 (fourth), 2525–35, 2549–50 (fifth), 2535–2547 (sixth), 2550–62 (seventh)).[1]

The entry team sometimes physically pushed or grabbed employees and customers when herding them inside. *E.g.*, (R. 327: Trial Tr., testimony of employee Eugene Slade, 2326 ("I was being led by the first guy with a gun pressed against me"); R. 326: Trial Tr., testimony of

[1] Five other accomplices also testified about one or more of the robberies.

employee Angela Boyce, 2276 ("They grabbed my customer around the neck like this" and "dragged her the rest of the way to the back room")). And the victims were understandably scared. *E.g.*, (R. 327: Trial Tr., testimony of Slade, 2330 ("I was . . . scared for my life" because "I saw who they were"); *id.*, testimony of employee Rasante McCullough, 2346 ("he makes me get on the ground and told me if I moved he would kill me"); R. 325: Trial Tr., testimony of employee Quianna Jeffries, 2052 ("I was scared because . . . a robbery can go any kind of way"); *id.*, testimony of employee Derek Williams, 2040 ("I didn't want to hear a gunshot")).

The government prosecuted Carpenter and Sanders for aiding and abetting some of the armed robberies. For each relevant robbery, the government charged the defendants with two corresponding counts: first, violating the Hobbs Act, 18 U.S.C. § 1951(a), by aiding and abetting a robbery affecting interstate commerce; and second, violating 18 U.S.C. § 924(c) by aiding and abetting the use or carrying of a firearm during a federal crime of violence. Carpenter was prosecuted for six of the seven hits, reflected in counts 1 (first robbery) and 2 (related gun use), counts 3–4, 7–8, 9–10, 11–12, and 13–14. Sanders was prosecuted for two of the seven hits, reflected in counts 5–6 and 7–8.

B. The government acquires cell-site location information for Carpenter's and Sanders's cellphones.

After the government apprehended four suspects midway through the robbery spree, one confessed and identified Carpenter and Sanders as accomplices. (R. 227: Opinion and Order Denying Motion to Suppress, 1217). To corroborate Carpenter's and Sanders's participation, the United States Attorney's office sought federal court orders under the Stored Communications Act, 18 U.S.C. § 2701 *et seq.*, directing various cellular service providers to disclose toll records, call-detail records, billing records, and historical cell-site location information for Carpenter's and Sanders's cellphones. The government did not seek the substantive content of any communications; it did not seek precision GPS data for the past, present, or future whereabouts of the phones; and it did not seek any information transmitted by the phones when they were idle as opposed to actively making or receiving a call.

The Stored Communications Act requires a telephone service provider to give the government non-content subscriber records in its possession if a judge finds "specific and articulable facts showing that there are reasonable grounds to believe" the records "are relevant and

material to an ongoing criminal investigation." *Id.* § 2703(c), (d). The government's applications explained the following: the cooperating defendant confessed to participating in nine different robberies of RadioShack and T-Mobile stores in Michigan and Ohio between December 2010 and March 2011; the cooperator identified 15 other accomplices (besides the three arrested with him) who participated in at least one of the other robberies; and the cooperator warned that some of them planned to rob more stores. The applications also attested that the requested data would further the FBI's investigation and "provide evidence that Timothy Sanders, Timothy Carpenter and other known and unknown individuals" had and were committing Hobbs Act robberies. One application requested information for Sanders's cellphone from four cellular service providers from December 1, 2010, to June 7, 2011. (R. 221–2: Application for Sanders, 1141–46). And two applications requested information for Carpenter's cellphone from three providers from December 1, 2010, to May 2, 2011. (R. 221–3: Application for Carpenter, 1153–57; R. 221–4: Supplemental Application for Carpenter, 1164–68 (roaming information from one carrier for the first week of March 2011)). Federal magistrate judges issued each of the requested § 2703(d) orders. (R. 221–2: Order for

Sanders, 1147–50; R. 221–3: Order for Carpenter, 1158–61; R. 221–4: Supplemental Order for Carpenter, 1169–72).

As explained by the government's expert witness, Special Agent Christopher Hess, when a cellphone makes or receives a call it uses radiowaves to signal an antenna on a cell tower. The signaled tower is usually the one closest to the phone. Each cell tower antenna typically has three 120-degree (or sometimes six 60-degree) sectors, creating three (or six) coverage areas or triangular "footprints" emanating from the tower. The size of each footprint depends on how far a tower is from its neighbor; the further away it is, the longer (and hence wider) the footprint spreads. In a dense population area such as Detroit, cell-site footprints commonly extend 0.5 miles to 2 miles. (R. 332: Trial Tr., testimony of Agent Hess, 3001–06, 3023, 3043)). Cellular service providers customarily create and maintain business records, including call-detail records containing the date, time, and duration of calls, the phone numbers involved, and which number initiated the call. (*Id*. at 3008). And "in most instances now," the companies maintain "information on the [cell-site] tower where the call originated and the tower where the call terminated." (*Id*.).

Prior to trial, Carpenter and Sanders moved to suppress the use of all cell-site location information on Fourth Amendment and statutory grounds. (R. 196: Sanders Motion to Suppress, 954; R. 214: Carpenter Joinder, 1102; R. 216: Carpenter Supplement to Joinder, 1106). The district court denied the motion. (R. 227: Opinion and Order, 1213, 1215–18). The court surveyed precedent from other circuits addressing (in part) whether cellphone users have any reasonable expectation of privacy in data created by voluntary phone use and contained in cellular service provider business records, and the court observed that no court of appeals decision has held that phone company compliance with a Stored Communications Act court order constitutes a "search" under the Fourth Amendment. The district court also invoked *United States v. Skinner*, 690 F.3d 772 (6th Cir. 2012), in which this Court held that even real-time GPS cellphone tracking provides "simply a proxy" for the user's observable location in public spaces, in which he has no legitimate expectation of privacy. (R. 227: Opinion and Order, 1216 (quoting *Skinner*, 690 F.3d at 779)). And the district court quoted *Skinner*'s admonition that "[w]hen criminals use modern technological devices to carry out criminal acts," as the defendants did here, "they can hardly complain when the police take advantage of the inherent

characteristics of those very devices to catch them." (R. 227: Opinion and Order, 1216 (quoting *Skinner*, 690 F.3d at 774)).

C. Carpenter and Sanders are tried, convicted, and sentenced.

Twenty-six government witnesses (including seven accomplices) testified at trial, describing the armed robberies' planning and execution and their effects on victims and interstate commerce. For each of the relevant counts, eyewitnesses described the roles Carpenter and Sanders played and confirmed their presence near the scenes of the crimes. Agent Hess offered testimony, based on cell-site location information, that Carpenter's cellphone was near the targeted stores during the robberies charged in counts 1–2, 3–4, 7–8, and 9–10; and that Sanders's cellphone was near the targeted stores during the robberies charged in counts 7–8. No cell-site testimony applied to the remaining three robberies (counts 5–6, 11–12, or 13–14). (R. 332: Trial Tr., testimony of Agent Hess, 3011–25).

The jury convicted Carpenter of six robbery counts (1, 3, 7, 9, 11, 13) and five gun counts (4, 8, 10, 12, 14), acquitting him only on the first gun count (2). (R. 249: Carpenter Verdict Form, 1338–1343). The jury convicted Sanders of two robbery counts (5, 7), acquitting him on the

corresponding gun counts (6, 8). (R. 247: Sanders Verdict Form, 1332–34). The district court sentenced Carpenter to a prison term of 1,395 months (116.25 years), based largely on the four mandatory, consecutive 25-year sentences for the subsequent gun charges. (R. 301: Carpenter Judgment, 1602). The court sentenced Sanders to two 171-month concurrent sentences, to be served consecutively to his undischarged state murder sentence. (R. 315: Sanders Judgment, 1719; R. 342: Sanders Sentencing Tr., 3493–98).

Summary of the Argument

Admissibility of cell-site location information: The government's acquisition of defendants' cell-site records was not a Fourth Amendment "search" because defendants have no reasonable expectation of privacy in business records created and maintained by their cellphone companies. The Fourth Amendment has long permitted the government to subpoena business records from third parties based on a showing of relevance to an ongoing investigation, where those records contain information that an individual has "voluntarily conveyed" to the third party for use "in the ordinary course of business." *United States v. Miller*, 425 U.S. 435, 442 (1976) (financial records held by bank); *Smith v. Maryland*, 442 U.S. 735 (1979) (call-detail records held by phone company). Even non-technology experts understand that to make or answer a call, a cellphone must communicate with a nearby tower in order for the cellular provider to conduct its contracted-for business of providing wireless phone service. Of course, a suspect might prefer that his cellphone not create a record of when and where he used it, but he likely feels the same way about credit-card, bank, medical, and other kinds of records that can reveal intimate details and yet are obtainable without warrants through third-party subpoenas. *See United*

States v. Davis, No. 12–12928, ___ F.3d ___, 2015 WL 2058977, at *11–16 (11th Cir. May 5, 2015) (en banc) (acquiring business records containing cell-site records is not a Fourth Amendment search); *In re Application of the United States of America for Historical Cell Site Data*, 724 F.3d 600, 608–15 (5th Cir. 2013) (same).

Moreover, even if this Court were to find that securing cell-site records constituted a "search" under the Fourth Amendment, the defendants' convictions should be affirmed for three other independent reasons. *First*, the Fourth Amendment's reasonableness standard does not require a warrant backed by probable cause in circumstances where a search intrudes only minimally on privacy interests and where the government has special law enforcement needs. Here, given the diminished expectations of privacy (at best) in third-party records and the compelling governmental interests in securing cell-site location information to advance early-stage criminal investigations, any "search" was reasonable under the Fourth Amendment. *Second*, the evidence remains admissible under the good-faith exception to the exclusionary rule, because government officials reasonably relied on and complied with the Stored Communications Act. *Third*, any error in admitting cell-site records was harmless, because that general-vicinity

information merely corroborated both surveillance videotapes and eyewitness testimony placing Carpenter and Sanders near the scenes of their respective crimes.

Venue for the Ohio robbery: Carpenter's challenge to venue in the Eastern District of Michigan for the Ohio robbery fails, for two independent reasons. *First*, Carpenter committed many accessorial acts in Michigan, both before and after the robbery: planning the crime, obtaining the gun, recruiting accomplices, and helping to fence the stolen phones. And as an aider and abettor, venue lies both where he committed accessorial acts and where the underlying crime occurred. *Second*, the Ohio crime affected commerce in the Eastern District of Michigan: the stolen phones were both fenced and resold to bona fide purchasers in that district. Because affecting interstate commerce is an element of Hobbs Act robbery, venue also lies wherever the robbery affects commerce.

Carpenter's cross-examination of Foster: The district court properly exercised its discretion in managing Carpenter's effort to cross-examine witness Adriane Foster using an FBI interview report. Contrary to Carpenter's claims, the district court correctly found that he could not invoke Federal Rule of Evidence 612 to use the report

because Foster recalled his FBI interview and therefore did not need his recollection refreshed. Nor is Carpenter correct in arguing, for the first time on appeal, that the interview report was an inconsistent prior statement under Federal Rule of Evidence 613(b). The report was written by the agent and not adopted by Foster as his own. While Carpenter could—and did—ask Foster about the interview, Rule 613(b) would not have permitted him to introduce the report itself as an inconsistent statement.

Sentencing: None of the defendants' challenges to their sentences have merit. Carpenter's long prison sentence is not cruel and unusual punishment because it is not grossly disproportionate to his six robbery and five gun convictions, and its reliance on consecutive mandatory minimum sentences does not violate separation of powers principles.

The district court appropriately applied sentencing enhancements to Sanders because an accomplice foreseeably brandished a gun and physically restrained a store customer, and the court properly considered and weighed the relevant sentencing factors before issuing a within-guidelines sentence.

Argument

I. The district court properly denied defendants' motion to suppress cell-site location information records obtained from phone companies through the Stored Communications Act.

The district court properly denied the defendants' motion to suppress, because acquiring the cell-site records was not a "search" implicating the Fourth Amendment. Even if this Court were to disagree, the Court should still affirm the defendants' convictions under the Fourth Amendment's "reasonableness" standard, the good-faith exception to the exclusionary rule, and the harmless error doctrine.

When reviewing a district court's denial of a motion to suppress, this Court views the evidence in the light most favorable to the government, reviews findings of fact for clear error, and reviews conclusions of law de novo. *United States v. Pritchett*, 749 F.3d 417, 435 (6th Cir.), *cert. denied*, 135 S. Ct. 196 (2014). This Court may also affirm the district court on any grounds supported by the record, even if the district court did not rely upon them. *Coles v. Granville*, 448 F.3d 853, 857 (6th Cir. 2006).

A. The government's acquisition of defendants' cell-site records did not constitute a Fourth Amendment "search."

Absent a physical intrusion, a Fourth Amendment search occurs only when the government violates a subjective expectation of privacy and "'society [is] willing to recognize that expectation as reasonable.'" *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (citation omitted). Whatever their subjective expectations, Carpenter and Sanders have no objectively reasonable expectations of privacy with respect to business records created, maintained, and provided to the government by third parties.

1. Defendants have no reasonable expectation of privacy in business records created by their cellphone companies and containing information voluntarily conveyed to the companies in the ordinary course of business.

The Fourth Amendment protects the right of people to be "secure in *their* . . . papers." U.S. Const. amend IV (emphasis added). But "[i]ndividuals generally lose a reasonable expectation of privacy in their information once they reveal it to third parties." *Guest v. Leis*, 255 F.3d 325, 335 (6th Cir. 2001). When people reveal information to a company which stores it in a business record, the government may obtain the

information directly from the company pursuant to a subpoena, without needing a warrant. In such circumstances, "the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant, even if a criminal prosecution is contemplated at the time of [sic] the subpoena is issued." *United States v. Miller,* 425 U.S. 435, 444 (1976); *United States v. R. Enterprises, Inc.*, 498 US 292, 297 (1991) (probable cause not required for grand jury subpoenas compelling production of business records and information related to a criminal investigation); *United States v. Phibbs*, 999 F.2d 1053, 1077 (6th Cir. 1993) (same for administrative subpoenas).

In *Miller*, for example, the Supreme Court rejected a Fourth Amendment challenge to a third-party subpoena for the defendant's bank records such as financial statements and deposit slips. 425 U.S. at 438. As the Court explained, the bank's records were "not respondent's 'private papers,'" but "business records of the banks," in which Miller could "assert neither ownership nor possession." *Id.* at 440. Because the records "contain only information voluntarily convey to the banks and exposed to their employees in the ordinary course of business," *id.* at 442, Miller's Fourth Amendment rights were not "implicated" when the government subpoenaed the records directly from the bank, *id.* at 444.

In *Smith v. Maryland*, the Supreme Court applied the third-party doctrine to telephone company records. 442 U.S. 735 (1979). Police asked a telephone company to install a pen register to record the numbers dialed from the defendant's home telephone. The Court held that Smith lacked any reasonable expectation of privacy in the numbers he called, as he conveyed that information to the telephone company voluntarily by using its phone service. *Id.* at 742–746. Because he "'exposed' that information to its equipment in the ordinary course of business," he "assumed the risk that the company would reveal to police the numbers he dialed." *Id.* at 744.

Like the bank customer in *Miller* and the phone customer in *Smith*, Carpenter and Sanders can assert neither ownership nor possession of the third-party records they seek to suppress. When a cellphone user actively makes or answers a call, his cellphone wirelessly contacts one of his phone company's cell towers so that the company can do what he paid it to do in the ordinary course of its business: connect the call and facilitate the conversation. Most phone companies create records of these connections for their own business purposes, storing the records on their own premises. Carpenter and Sanders therefore lack any reasonable expectation of privacy in these records.

Indeed, in *Guest v. Leis*, this Court applied the same reasoning to conclude that computer users have no reasonable expectation of privacy in subscriber information (including name, address, birthdate, and passwords) that the users convey to their systems operators in order to enable the operators to facilitate their internet communications. 255 F.3d at 335–36, citing *Miller*, 425 U.S. at 443; *United States v. Wheelock*, 772 F.3d 825, 828–29 (8th Cir. 2014) (applying same reasoning to uphold administrative subpoena for subscriber information to investigate child pornography distribution through peer-to-peer software); *United States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2008) ("Analogously [to *Smith*], e-mail and Internet users have no expectation of privacy in the to/from addresses of their messages or the IP addresses of the websites they visit because they should know that this information is provided to and used by Internet service providers for the specific purpose of directing the routing of information.").

In *United States v. Warshak*, this Court focused on the content side of the content/address distinction and held that a warrant is required to read the *contents* of exchanged emails. 631 F.3d 266, 282–88 (6th Cir. 2010). The Court explained that, like a post office, an internet provider is merely an intermediary with respect to the contents of

communications. The sender intends to share the contents only with another subscriber, and not with the service provider for its own business purposes. *Id*. at 285–86. This Court distinguished *Miller*, both because of the "potentially unlimited variety of 'confidential communications' at issue," *id*. at 288, and because unlike a bank, the internet provider is merely a conduit with respect to email content and "not the intended recipient of the emails." *Id*. By contrast, the bank customer in *Miller* conveyed information "so that the *bank* could put the information to use." *Id*. (emphasis added); *see Forrester*, 512 F.3d at 511 (email contents protected because "the sender presumes [it] will be read only by the intended recipient" but email and IP addresses not protected because they are intended for use by "the third-party carriers that transmit [the email] to its intended location").

So too here, cellphone users convey location information through cell-site towers "so that the [phone company] could put the information to use." *Warshak*, 631 F.3d at 288. *See Historical Cell Site Data*, 724 F.3d 600, 611 (5th Cir. 2013) ("Under [the *Miller*-*Smith*] framework, cell site information is clearly a business record."); *United States v. Davis*, 2015 WL 2058977, at *12 (en banc) (same).

The defendants and amici curiae ACLU et al. claim that cell-site location information should uniquely be exempted from the *Miller-Smith* doctrine, based on the assertion that cellphone users do not know either that their phones send cell-site information to their phone companies, or that the companies then store the information. *E.g.*, Sanders Br. at 17–18. It's true that cellphone calls connect to nearby cell towers automatically through radiowaves whenever the user makes or answers a call, and she need not do anything else manually to create the connection. But the assertion that a caller "'may well have no reason to suspect that her location was exposed to anyone,'" *id.* at 18 (citation omitted), relies on a "crabbed understanding of voluntary conveyance" within the *Miller-Smith* framework. *Historical Cell Site Data*, 724 F.3d at 613.

In *Smith*, the Supreme Court characterized the conveyance of dialing information as voluntary, not simply because callers knew they must indicate what number they wanted to reach, but because callers were assumed to know more generally how phone technology basically worked. 442 U.S. at 742–43. The Court explained that "[a]ll subscribers realize, moreover," *id.* at 742, the following:

- callers must provide phone numbers to trigger the telephone company's switching equipment;
- "pen registers and similar devices are routinely used by telephone companies" to check billing operations and detect fraud;
- callers might be "oblivious to a pen register's esoteric functions," but they "presumably have some awareness of one common use" to catch prank or obscene callers; and
- most phone books tell subscribers that the company can help "in identifying to the authorities the origin of unwelcome and troublesome calls."

Id. at 742–43. These broader sources of knowledge, rather than merely the narrow self-awareness created through fingertip dialing, led the Court to disclaim that "telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret." *Id.* at 743; *see Davis*, 2015 WL 2058977, at *11 (en banc) (*Smith* "presumed that phone users knew of uncontroverted and publicly available facts" about phone company "technologies and practices"); *Forrester*, 512 F.3d at 510 ("*Smith* based its holding that telephone users have no expectation of privacy in the numbers they dial on the users' *imputed knowledge* that their calls are completed through telephone company switching equipment.") (emphasis added).

Smith's reasoning applies equally to cellphone technology. First, while a particular cellphone user may not completely understand the

"esoteric functions" of cellular technology, he typically "understands that his cell phone must send a signal to a nearby cell tower in order to wirelessly connect his call." *Historical Cell Site Data*, 724 F.3d at 613. Cellphone users know their phone displays the strength or weakness of its signal connection to a local tower (typically by showing bars or dots on the phone itself), *id.*, and it's virtually impossible to miss advertisements from competing service providers asking "can you hear me now?" and claiming they have the most towers and hence best signal coverage across the land. Users know that they sometimes lose calls when they drive through a dead zone or enter a tunnel or elevator. Users also know that too many calls in the same location at the same time will overload local towers and interrupt service. *Id.* And users know that phone companies apply "roaming charges" for out-of-network calls that are routed to another provider's towers. *Id.* Moreover, typical users understand that common cellphone functions *other* than person-to-person phone calling require location tracking—including applications that provide maps and directions, applications that find a misplaced phone or track the whereabouts of a child's phone, and buttons that automatically dial "911" and inform the police where the phone is. Given all of this, most cellphone users understand, at least in

a general sense, that their phones must connect to a nearby cell-site tower antenna to function properly. *See Davis*, 2015 WL 2058977, at *11 (en banc) (cellphone users do not "lack facts about the functions of cell towers").

Given this reality, this Court should not ground a reasonable expectation of privacy on the dubious premise that some cellphone users have no idea that their calls connect through tower antennas. Any such premise is ephemeral at best. "Public ignorance as to the existence of cell-site-location records . . . cannot long be maintained." *In the Matter of an Application of the United States of America for an Order Authorizing the Release of Historical Cell-Site Info.*, 809 F. Supp. 2d 113, 121 (E.D.N.Y. 2011).

Nor are the defendants and amici correct in contending that cellphone users are likely unaware that their service providers collect and store historical location information, rather than discard it after each call is completed. *E.g.*, Sanders Br. 17. The Supreme Court rejected outright the very same argument in *Smith*. There, the defendant claimed he was unaware that the phone company kept records of local calls, because phone companies generally did not bill local calls separately and therefore did not need such records. *Smith*,

442 U.S. at 745. Indeed, the defendant was correct: the phone company at issue *did not* typically collect and store information about local calls—that's why the police asked the company to install a pen register to record them. *Id.* at 737. But the Court explained that this fact was irrelevant. The fortuity of whether the phone company did or did not actually record local numbers dialed "does not in our view, make any constitutional difference." *Id.* at 745. All that mattered was that the phone company "had facilities for recording and that it was free to record." *Id.* In these circumstances, the customer "assumed the risk that the information would be divulged to police." *Id.*; *see id.* (basing reasonableness of privacy expectations on whether company did, or merely could have, stored call information in a business record would "make a crazy quilt of the Fourth Amendment" dependent on corporate billing and records practices). And in any event, "the cell-phone-using public knows that communications companies make and maintain permanent records regarding cell-phone usage, as many different types of billing plans are available" which dictate that "companies must maintain the requisite data, including cell-tower information." *Historical Cell Site Data*, 724 F.3d at 613 (citation omitted); *Davis*, 2015

WL 2058977, at *11 (en banc) (cellphone users do not lack knowledge that their providers record cell tower usage). [2]

In sum, cellphone users voluntarily, even if automatically, transmit location data to cell towers when they make and receive calls so that the phone company can do its contracted job of connecting those calls—the same way that people voluntarily transmit all sorts of information to their bank when they swipe their credit card at the checkout counter in order to make a purchase, and the same way internet users transmit various forms of location and addressing information when they send emails and visit websites. Thus, cellphone users lack a reasonable expectation of privacy in any business records that their service providers choose to maintain. Government acquisition of those records is not a Fourth Amendment search. *See id*. at *13 (securing business records through § 2703(d) court order "did not constitute a search"); *Historical Cell Site Data*, 724 F.3d at 613–14 (concluding *Smith*'s analysis of pen register technology applies equally

[2] Defendants and amici do not, and could not, argue that cellphone users could reasonably assume that their cellular service providers would refuse to comply with court orders to turn over business records. The *Miller-Smith* doctrine applies "even if the information is revealed [by the customer to the company] on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Miller*, 425 U.S. at 443.

to cell-site information); *cf*. *Guest*, 255 F.3d at 335-36, 336 (computer users lack reasonable expectation of privacy in subscriber information "because they communicated it" to internet systems operators).

2. Privacy interests in general-vicinity information do not uniquely exempt third-party phone company business records from disclosure.

There is nothing special about the nature of cell-site location information that exempts it from the third-party doctrine. Carpenter Br. 30–31; Amici Br. 10–12. The government's ability to subpoena business records does not turn on the relative intrusiveness of particular kinds of records, and there is no principled basis for this Court to draw lines on this basis. And in any event, general-vicinity information inferable through cell-site records is no more intrusive than are business records containing financial, commercial, medical, and other sensitive information for which neither a warrant nor probable cause is required.

Unlike precision GPS monitoring, the type of historical cell-site location information secured here merely locates a cellphone somewhere within a relatively large coverage area adjacent to one side of a particular cell tower, and only when the phone is actively used rather

than idle. As Agent Hess explained, typically three pie-slice-shaped "footprints" extend out from each tower, with the length (and hence width) of the footprint determined by the distance to the next tower in that direction. In a congested area like Detroit, each footprint likely extends for 0.5 miles to 2 miles. (R. 332: Trial Tr., testimony of Agent Hess, 3003–06; *see id.* at 3043 (length of far edge of triangle that "connects the[ ] two spokes" would be 1.0 to 1.5 miles)). Cell-site records do not indicate where the phone is within that triangular footprint; one cannot tell either how far the phone is from the cell tower it signaled, or where it lies within the width of the footprint. For example, Agent Hess testified at various points that the best he could say is the cellphone was "somewhere within that area that could be a-half [sic] mile to a mile in distance from the tower" (*id.* at 3044), that he could not specify the phone's direction from the signaled tower within the 120-degree-angled footprint (*id.* at 3047–48), and that movement inferable from a signal shift from one cell tower to another could reflect movement of two feet or six blocks, (*id.* at 3051).

Beyond locating a cellphone somewhere within a relatively large footprint, cell-site location information does not reveal whether the phone is outside in public view or inside some enclosed space. And if the

phone happens to be indoors, cell-site data does not reveal anything about the kind of indoor space or anything that is happening in that space. Thus the general-vicinity information inferable from cell-site records does not reveal any "critical fact about the interior of [any] premises that the Government is extremely interested in knowing." *United States v. Karo*, 468 U.S. 705, 715 (1984); *see In the Matter of the Application of the United States of America for an Order Directing a Provider of Elec. Comm'n Serv. to Disclose Records to Gov't*, 620 F.3d 304, 312–13 (3d Cir. 2010) (observing the Supreme Court's "*Knotts*/*Karo* opinions make clear that the privacy interests at issue are confined to the interior of the home," and finding no evidence that historical cell-site location information "extends to that realm").[3] And even if one

[3] Amici claim, quoting an associate professor's testimony at a House subcommittee hearing, that call locations can be pinpointed to "'individual floors and rooms within buildings'" with "'precision approaching that of GPS.'" Amici Br. 6, 7. The claims in this and similar testimony or stories are not appropriate for judicial notice, as they are not "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Federal Rule of Evidence 201(b)(2); *see In re Omnicare, Inc. Sec. Litig.*, 769 F.3d 455, 466 (6th Cir. 2014) (judicial notice is appropriate only if "'the matter [is] beyond reasonable controversy . . . [because] dispensing with traditional methods of proof [should only occur] in clear cases.'") (citations omitted). In any event, these claims of precision assume the use of specialized low-power small cells, Amici Br. at 6, and there is no evidence that the cell-site records obtained in this case reflect the use of such atypical cell towers.

might somehow infer that a person made a particular cellphone call from inside her own home, such an inference pales against the certainty in *Smith* that the landline phone caller was in her home at the time.

Defendants and amici claim that even general-vicinity information can reveal a suspect's patterns of movement, from which a motivated tracker possessing detailed knowledge of the relevant geographic areas might predict his presence in various "private" places such as churches and medical offices. *E.g.*, Amici Br. 8.[4] But this is true both for conventional visual surveillance and for credit-card and other billing records that have long fallen within the third-party doctrine. Each of these investigative tools—alone or together—can similarly reveal patterns of movement, as well as a suspect's presence in interior spaces that he is seen entering or in which he makes purchases.

And no matter how precise location information might become, information concerning financial, commercial, medical, and other

[4] Of course, it helps if a suspect first discloses that he was in a particular private place at a particular time when he made a call. For example, amici claim they can infer Carpenter's churchgoing activities from the data, but only because Carpenter personally helped connect the dots. *See* Amici Br. 10. Without such assistance, cell-site location information "does not paint the 'intimate portrait of personal, social, religious, medical, and other activities and interactions'" that amici foresee. *Davis*, 2015 WL 2058977, at *15 (en banc).

aspects of personal activities contained in third-party business records can reveal much more intimate information. For example, medical records can reveal specific visits, diagnoses, and treatments; and credit-card records by themselves can reveal payments to specific providers and pharmacies and perhaps imply specific diagnoses and treatments as well. Cell-site information, by contrast, shows only that a person used her phone somewhere near a medical office or pharmacy. Yet the government needs neither probable cause nor a warrant to subpoena medical, credit-card, and other records from third-party businesses. *United States v. Phibbs*, 999 F.2d 1053, 1076–78 (6th Cir. 1993) (upholding subpoenas for third-party business records containing credit-card statements and phone records); *In re Administrative Subpoena*, 289 F.3d 843 (6th Cir. 2001) (same for patient files as well as financial records).

And while cell-site records can amass lots of general-vicinity location information over time, the same is true for more conventional third-party business records, such as those recording commercial transactions. In *Davis*, where the Eleventh Circuit upheld the acquisition of cell-site records for a 67-day period, the court correctly noted that under the third-party doctrine "reasonable expectations of

privacy under the Fourth Amendment do not turn on the quantity of non-content information [the cellular provider] collected," and "neither one day nor 67 days of such records, produced by court order, violate the Fourth Amendment." 2015 WL 2058977, at *15 (en banc). The same analysis applies here. While cell-site records can reveal patterns of physical location over time, "[t]he judicial system does not engage in monitoring or a search when it compels the production of preexisting documents from a witness." *Id.* at *16 (en banc).

The fact that cell-site records reflect "new technologies" as compared to more conventional business records, Amici Br. 27, also does not exempt the former from the *Miller-Smith* doctrine: "[t]he recent nature of cell phone location technology does not change" the rules. *Skinner*, 690 F.3d at 777; *cf. Forrester*, 512 F.3d at 511 ("The government's [electronic] surveillance of e-mail addresses also may be technologically sophisticated, but it is conceptually indistinguishable from government surveillance of [the outside of] physical mail."). For example, the Supreme Court noted in *Smith* that the switching equipment through which the phone company recorded Smith's calls replaced a human switchboard operator, who might well have remembered or written down the numbers Smith called. And the fact

that "the telephone company has decided to automate" did not dictate a "different constitutional result." *Smith*, 442 U.S. at 745. In *Skinner*, this Court cited this precise point in *Smith* in generalizing that "[l]aw enforcement tactics must be allowed to advance with technological changes, in order to prevent criminals from circumventing the justice system." 690 F.3d at 778.

Finally, if indeed there is anything special about general-vicinity information inferable from cell-site tower records, Congress may always fine-tune the Stored Communications Act to limit government's access to these records, either by requiring a more stringent showing (including probable cause), or by limiting the amount of information government can obtain for any specific investigation, or through other measures. As Justice Alito noted in his concurring opinion in *United States v. Jones*, 132 S. Ct. 945 (2012), smartphones and other new devices will continue to shape people's expectations about the privacy of their daily movements, *id.* at 963, and the public may "reconcile themselves" to some diminution of privacy "as inevitable," *id.* at 962. Rather than trying to draw an ephemeral and arbitrary line between cell-site and all other forms of third-party business records, this Court should leave the line-drawing to the legislature—as in the

comprehensive regulation of access to cell-site records through the Stored Communications Act. As Justice Alito concluded, "[i]n circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative." *Id.* at 964.

* * * * *

Carpenter, Sanders and their accomplices used their cellphones to facilitate their robbery spree, with the lookouts calling the robbers to signal when the coast looked clear. *E.g.*, (R. 327: Trial Tr., testimony of accomplice Sedric Bell-Gill, 2377–79 (counts 3–4); R. 328: Trial Tr., testimony of accomplice Adriane Foster, 2616–17 (counts 7–8); 2531–33 (counts 9–10)). "When criminals use modern technological devices to carry out criminal acts and to reduce the possibility of detection, they can hardly complain when the police take advantage of the inherent characteristics of those very devices to catch them." *Skinner*, 690 F.3d at 774.

B. Even if securing cell-site records through the Stored Communications Act constituted a "search," it met the reasonableness requirement of the Fourth Amendment.

The Constitution prohibits only "unreasonable" searches. U.S. Const. amend IV. A finding that legitimate expectations of privacy

triggered a Fourth Amendment search would merely begin rather than end the constitutional analysis. While the Fourth Amendment often requires a warrant backed by probable cause, in certain contexts a lesser showing suffices. As the Supreme Court explained in *Maryland v. King*, "the ultimate measure of the constitutionality of a governmental search is 'reasonableness,'" and a warrantless search may be reasonable in situations of "special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like." 133 S. Ct. 1958, 1969 (2013) (citation omitted); *United States v. Knights*, 534 U.S. 112, 121 (2001) ("Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term 'probable cause,' a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable.").

The intrusion on privacy interests—if any at all under the *Miller-Smith* doctrine—is minimal because cell-site location data at most provides general information about someone's whereabouts. This information could equally be obtained through visual surveillance by law enforcement or even "any member of the public," *Skinner*, 690 F.3d at 779, which is why this Court held that Skinner lacked a cognizable privacy interest "in the data emanating from his cell phone that showed

its location." *Id.* at 775. Moreover, the Stored Communications Act itself proscribes unauthorized disclosure of acquired data, 18 U.S.C. § 2707(g), and the Supreme Court "has noted often" that statutory protection against unwarranted disclosures "'generally allays . . . privacy concerns.'" *King*, 133 S. Ct. at 1980 (citations omitted).

In addition, government has "special law enforcement needs," *id.* at 1969, for using court orders to obtain cell-site records during the early stages of criminal investigations. Like subpoenas, cell-site court orders are frequently issued *before* the government can develop probable cause linking a particular suspect to a particular crime. Thus, in many cases, the government cannot justify the cell-site order with probable cause "because the very purpose of requesting the information is to ascertain whether probable cause exists." *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991). Indeed, the information is often valuable to help determine who should be eliminated as a suspect, or to identify potential victims of crime. Agent Hess testified, for example, that he personally has used cell-site location information data to locate a kidnapped child, in addition to investigating many types of serious crimes. (R. 332: Trial Tr., testimony of Agent Hess, 2999–3000).

Given the diminished expectations of privacy (at best) and compelling governmental interests in securing cell-site location information to advance early-stage criminal investigations, any "search" occurring here was reasonable under the Fourth Amendment. *See Davis*, 2015 WL 2058977, at *16–18 (en banc) (reaching this conclusion).

C. Even assuming a Fourth Amendment violation, the cell-site records remain admissible under the exclusionary rule's good-faith exception because the government reasonably relied on and complied with the Stored Communications Act.

The good-faith exception to the exclusionary rule recognizes that illegally obtained evidence should be suppressed only when the benefits of deterring future Fourth Amendment violations outweigh the "'heavy toll [exacted] on both the judicial system and society at large'" by the loss of probative evidence. *United States v. Fisher*, 745 F.3d 200, 203 (6th Cir.) (citation omitted), *cert. denied*, 135 S. Ct. 676 (2014). Police misconduct triggers exclusion only when it is "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring v. United States*, 555 U.S. 135, 144 (2009).

Given these standards, the good-faith exception applies when government officers act "in objectively reasonable reliance on a statute," unless the statute is "clearly unconstitutional." *Illinois v. Krull*, 480 U.S. 340, 349 (1987). And the district court correctly held that the government did so here, by following the procedures in § 2703(d) of the Act. (R. 227: Opinion and Order, 1216 n.1).

This Court has already found the good-faith exception applicable to very similar circumstances. In *Warshak*, the federal government secured a court order under § 2703(d) to obtain and read a suspect's stored emails. As explained earlier, the search there violated the Fourth Amendment because accessing the *contents* of private communications requires a probable cause-backed warrant, 631 F.3d at 283–88; unlike address-related information such as mailing labels, internet subscriber information, and cell-site location data, the contents of emails are not conveyed to the internet provider for its use in the ordinary course of its business. *Id.* at 288.

Nonetheless, this Court held that the exclusionary rule did not apply to the emails because "the officers relied in good faith on the SCA to obtain them." *Id.* And "given the complicated thicket of issues that we were required to navigate when passing on the constitutionality of the

SCA, it was not plain or obvious that the SCA was unconstitutional" even as applied to the contents of emails. *Id.* at 289. While *Warshak* clarified that a warrant is required to read emails, it remained neither "plain [n]or obvious" that a Stored Communications Act order was insufficient for cell-site location information.

Moreover, contrary to Carpenter's contention, Carpenter Br. 34–37, the government did not act in bad faith by submitting defective § 2703(d) applications to the courts. Rather, the government's applications well exceeded the Act's required threshold showing of "reasonable grounds to believe" that the requested records were relevant and material to an ongoing investigation. The applications spelled out that the cooperator named 15 still-at-large accomplices who had participated with him in multiple armed robberies. The applications explained that the records would "assist in identifying and locating the other individuals believed to be involved." And they connected the two defendants and their cellphones to the robberies by attesting that the records would "provide evidence that Timothy Sanders, Timothy Carpenter and other . . . individuals" committed those and perhaps other Hobbs Act robberies. (R. 221–3: Application for

Carpenter, 1155–56; R. 221–4: Supplemental Application for Carpenter, 1166–67).

This level of detail establishes "reasonable grounds" under the Act. Indeed, *Warshak* holds as much. The application described by the Court in that case contained no more detail than the ones submitted here. *See Warshak,* 631 F.3d at 291(describing affidavit without reference to the targets or their roles in the criminal activity under investigation). And yet the application in *Warshak* still satisfied § 2703(d), which after all requires a less-detailed showing than does probable cause. *Id*.

And even if this Court were to conclude, *contra Warshak*, that the application did not meet § 2703(d)'s standards, the failure to include somewhat greater detail would not reflect "'deliberate, reckless, or grossly negligent'" misconduct of the sort that would justify excluding the evidence. *Fisher*, 745 F.3d at 203 (citation omitted).

Sanders also contends that his cellphone's application failed to satisfy the statutory standard, suggesting this provides an alternative ground for suppressing the cell-site evidence. Sanders Br. 20–22. For the reasons just explained, the district court correctly rejected this argument. (R. 227: Opinion and Order, 1217–18). But in any event, a

statutory violation would at most entitle Sanders to sue for damages under 18 U.S.C. § 2707, which provides a civil cause of action under certain circumstances. His cell-site records would still be admissible at trial because "suppression is not a remedy for a violation of the Stored Communications Act." *United States v. Guerrero*, 768 F.3d 351, 358 (5th Cir. 2014) (citing cases), *cert. denied*, 135 S. Ct. 1548 (2015); *see United States v. Abdi*, 463 F.3d 547, 556 (6th Cir. 2006) ("there is no exclusionary rule generally applicable to statutory violations").

In sum: even if this Court were to find that following Stored Communications Act procedures violated the Fourth Amendment, the cell-site location information remains admissible at trial under the good-faith exception to the exclusionary rule. The Eleventh Circuit Court of Appeals reached this conclusion in similar circumstances, with even the two dissenting judges agreeing that the good-faith exception applies to government officials' reliance on § 2703(d) court orders. *Davis*, 2015 WL 2058977, at *18 n.20 (en banc majority); *id*. at *29 (Martin and Jill Pryor, JJ., dissenting).

D. Any error in admitting cell-site records was harmless.

Admission of illegally-obtained evidence does not warrant reversal if it is clear beyond a reasonable doubt that the jury would have

returned a verdict of guilty even without the evidence. *United States v. Carnes*, 309 F.3d 950, 963 (6th Cir. 2002). The cell-site records and Agent Hess's testimony merely established that, based on calls at or close to the times of the robberies, Carpenter's phone was near the crime scenes during the count 1, 3, 7, and 9 robberies, and Sanders's phone was near the crime scenes during the count 7 robbery. (R. 332: Trial Tr., testimony of Agent Hess, 3014–17 (Carpenter's cellphone connections "consistent with the geographic area that encompasses the robbery scene" for count 1); *id.* at 3019–20 (Carpenter's cellphone connected with two towers adjacent to robbery scene for count 3); *id.* at 3022 (Carpenter's cellphone connected with a tower "roughly three quarters of a mile to the south" of the robbery scene for count 7); *id.* at 3023–24 (Carpenter's cellphone connected with two towers approximately one mile apart and adjacent to robbery scene for count 9); *id.* at 3011–14 (Sanders's cellphone connected with towers "in the sector closest to the RadioShack" for count 7)).

This testimony was entirely redundant, as videotapes and numerous eyewitnesses produced uncontroverted testimony placing Carpenter and Sanders near the relevant robbery scenes. First, both Carpenter and Sanders were videotaped by interior surveillance

cameras in stores adjacent to the count 7 robbery scene in Warren, Ohio. Carpenter is visible in a nearby Family Dollar store, where the robbers purchased the laundry bags. (R. 330: Trial Tr., testimony of accomplice Green, at 2874–75 (identifying Carpenter on surveillance tape)). And both Carpenter and Sanders are visible in a Little Caesars pizza store adjacent to the RadioShack, where the gang hung out prior to the robbery. (*Id*. at 2877–79 (identifying Carpenter and Sanders on surveillance tape); *see also* R. 328: Trial Tr., testimony of accomplice Foster, 2516–17, 2613 (confirming both Carpenter and Sanders were in Warren, Ohio for the count 7 robbery)).

Second, eyewitness accomplices placed Carpenter as a lookout at the other three robbery scenes for which cell-site location information was introduced. For count 1, *see* (R. 330: Trial Tr., testimony of accomplice Green, 2827–32 (describing Carpenter's presence in the lookout car)). For count 3, *see* (*id*. at 2842–43 (describing Carpenter's presence and use of his cellphone to signal the entry team when to enter and later to warn them to deal with a customer who entered the store during the robbery)). For count 9, *see* (R. 328: Trial Tr., testimony of accomplice Foster, 2531–32 (describing Carpenter's presence and use of his cellphone to signal Foster that it was time to enter); R. 329: Trial

Tr., testimony of accomplice Timothy Jones, 2757–60 (describing Carpenter's presence and use of his cellphone to call the entry team twice and exhort them to get going)).

Finally, aiding and abetting does not even require proof that the defendants were near the robberies when they occurred, and there was abundant evidence of both defendants' participation in their respective crimes. As a result, the absence of such location evidence logically could not affect the jury's verdicts.

Because for each count the cell-site location information merely supplemented other testimony clearly establishing Carpenter's and Sanders's presence at the scenes of the crimes, and because proof of their presence is not even required for aiding and abetting convictions, this Court should uphold both defendants' convictions even were it to find a Fourth Amendment violation.

II. Carpenter's challenge to venue for the Ohio robbery lacks merit.[5]

The district court denied Carpenter's motion for acquittal for lack of venue over count 7 (RadioShack robbery in Warren, Ohio) and count 8 (using a gun during that robbery). (R. 251: Opinion and Order Denying Motions for Acquittal, 1358–59). This Court reviews that decision de novo. *United States v. Kuehne*, 547 F.3d 667, 677 (6th Cir. 2008). This Court must affirm if a rational trier of fact could have found venue to be proper based on a preponderance of the evidence, viewing that evidence in the light most favorable to the government. *Id.*

Carpenter correctly notes that venue for the robbery charge is proper in any district "'where the alleged acts took place'" or "'where interstate commerce is affected.'" Carpenter Br. 41, quoting *United States v. Davis*, 689 F.3d 179, 186 (2d Cir. 2012). Both tests are met here.

[5] While both Carpenter and Sanders challenged venue in the district court, only Carpenter raised this issue in his opening brief on appeal. Sanders has therefore waived his separate venue challenge to his conviction on count 7. *Kuhn v. Washtenaw County*, 709 F.3d 612, 624 (6th Cir. 2013).

A. Carpenter committed significant accessorial acts in the Eastern District of Michigan.

Carpenter was charged with aiding and abetting the robbery in Warren, Ohio. (R. 333: Trial Tr., jury instructions, 3193). For an aider and abettor, "[v]enue is proper where the defendant's accessorial acts were committed *or* where the underlying crime occurred." *United States v. Smith*, 198 F.3d 377, 383 (2d Cir. 1999); 21 AM. JUR. 2d *Criminal Law* § 473 (2008) ("A defendant charged with aiding and abetting can be charged where the aiding and abetting occurs, or where the principal crime is committed, or, in federal court, where the principal acted in furtherance of the substantive crime."). *See United States v. Scaife*, 749 F.2d 338, 341, 346 (6th Cir. 1984) (venue lay in Western District of Tennessee for count of aiding and abetting unlawful gun possession during robbery of store located in Arkansas, because the guns were transported from Tennessee to the robbery scene); *cf. Davis*, 689 F.3d at 187 (for Hobbs Act robbery attempt, "venue will lie in any district where a substantial step toward robbery took place").

Carpenter served as an onsite lookout for the Ohio robbery, but his participatory acts began in Michigan. First, as the district court found, the government introduced evidence establishing that "the

Warren, Ohio robbery was at least partially planned in Michigan." (R. 251: Opinion and Order Denying Motions for Acquittal, 1359).

According to trial testimony (with all references to Michigan referring to various locations within the Eastern District):

- Carpenter planned the crime from Michigan. (R. 327: Trial Tr., testimony of accomplice Bell-Gill, 2389–90; R. 328: Trial Tr., testimony of accomplice Foster, 2506–07; R. 330: Trial Tr., testimony of accomplice Green, 2858).

- Carpenter selected the target store and location from Michigan. (R. 328: Trial Tr., testimony of accomplice Foster, 2511–12).

- Carpenter arranged from Michigan for an accomplice in Ohio to provide for a gun for the robbers. (R. 328: Trial Tr., testimony of accomplice Foster, 2510–11; R. 330: Trial Tr., testimony of accomplice Green, 2860–61, 2925–27).

- Carpenter recruited most of the robbers in Michigan. (R. 328: Trial Tr., testimony of accomplice Foster, 2512).

- Carpenter drove the van carrying the robbers most of the way from Michigan to Ohio. (*Id.*, testimony of accomplice Foster, 2510).

Second, Carpenter's participatory acts continued in Michigan after the robbery took place, as the government introduced evidence establishing that "the cellular phones stolen from the store in Warren, Ohio were taken back to Michigan and re-sold in Michigan." (R. 251:

Opinion and Order Denying Motions for Acquittal, 1359).

According to trial testimony:

- Carpenter assisted in fencing some of the stolen phones at a cellphone store near Detroit. (R. 330: Trial Tr., testimony of accomplice Green, 2882–83, 2918).

- Carpenter assisted in fencing the remaining phones at a store in Hamtramck. (*Id*., testimony of accomplice Green, 2925–27, 2883–85).

Carpenter also paid at least one participant his share of the ill-gotten gains after they returned home. (R. 328: Trial Tr., testimony of accomplice Foster, 2525).

Given this evidence, especially viewed in the light most favorable to the government, a rational jury could find that venue lies in the Eastern District of Michigan where many of Carpenter's aiding and abetting activities occurred.

Because venue lies in the Eastern District of Michigan for count 7's robbery, venue also lies there for count 8's related gun offense. *United States v. Rodriguez-Moreno*, 526 U.S. 275, 282 (1999). And as noted above, Carpenter arranged from Michigan for an accomplice in Ohio to provide the gun used in the robbery.

B. The Ohio robbery affected commerce in the Eastern District of Michigan.

Venue was also appropriate because evidence showed that the Ohio robbery affected commerce in the Eastern District of Michigan. Affecting interstate commerce is an element of a Hobbs Act offense, and therefore venue "'may be laid in any jurisdiction where commerce is affected,' even if all of the conduct related to the [offense] occurred outside that jurisdiction." *United States v. O'Donnell*, 510 F.2d 1190, 1193 (6th Cir. 1975) (citation omitted); *Davis*, 689 F.3d at 186 (2d Cir. 2012). The government need show only a "realistic probability" of a "*de minim[i]s* effect on interstate commerce." *United States v. Lewis*, 797 F.2d 358, 367 (7th Cir. 1986).

As noted above, Carpenter and his accomplices brought the stolen phones back to Michigan and fenced them there. The fencing itself constitutes illegal commercial activity that took place in the Eastern District because of the Ohio robbery. *See Davis*, 689 F.3d at 188 (effect on illegal commercial activity suffices for venue). Moreover, testimony indicated that the fenced phones were then resold for profit to individual purchasers in Hamtramck and to wholesalers in the Detroit metropolitan area. (R. 329: Trial Tr., testimony of fence Hassanen

Al-Hassuni, 2676–77, 2689–90). A rational jury could infer from this testimony that the Ohio robbery affected commerce in the Eastern District of Michigan.

This Court may uphold venue on the affecting-commerce rationale even though the district court instructed the jury only on the act-location rationale. (R. 333: Trial Tr., jury instructions, 3182). Venue is not an element of the offense, *United States v. Zidell*, 323 F.3d 412, 421 (6th Cir. 2003), and failing to instruct the jury at all—let alone providing an instruction that includes one of two applicable rationales for venue—constitutes harmless error where the facts show "venue was clearly established." *United States v. Powers*, 364 F. App'x 979, 984 (6th Cir. 2010); *United States v. Cooper*, 40 F. App'x 39, 40 (6th Cir. 2002) ("Although venue is ordinarily a question of fact for the jury, when the relevant facts to determining venue are not disputed, the district court may resolve the matter as a matter of law."). *Cf. Neder v. United States*, 527 U.S. 1 (1999) (jury instruction omitting actual elements of offense can be harmless error).

III. The district court properly exercised its discretion in managing Carpenter's effort to cross-examine witness Adriane Foster.

Carpenter claims the district court wrongly interfered with each of his two different attempts to impeach accomplice witness Adriane Foster. But Carpenter voluntarily abandoned the first attempt, and he never made the second. Moreover, both claims lack merit.

Where preserved for appeal, this Court reviews for abuse of discretion both evidentiary rulings, *United States v. Marrero*, 651 F.3d 453, 471 (6th Cir. 2011), and district court limitations on the scope of defense inquiry, *United States v. Owens*, 159 F.3d 221, 227 (6th Cir. 1998).

A. The district court properly addressed Carpenter's request to refresh Foster's recollection.

Foster testified during cross-examination that Carpenter instructed the robbers how to commit the RadioShack robbery in Ohio. (R. 328: Trial Tr., 2577). Carpenter sought to refresh Foster's recollection under Federal Rule of Evidence 612, attempting to use an investigative report written by FBI Agent Vicente Ruiz. The report recounted an earlier interview in which Foster purportedly told Agent Ruiz that Sanders (and not Carpenter) instructed the robbers.

Sanders initially objected that Foster had not written or endorsed the report, apparently because he assumed that Carpenter wanted to introduce the report into evidence to impeach Foster with a supposedly prior inconsistent statement, and because (as explained below) Federal Rule of Evidence 613(b) did not permit Carpenter to use Agent Ruiz's report in that fashion. (R. 328: Trial Tr., 2578). But then Carpenter clearly stated that he wanted to use the report merely to refresh Foster's present recollection of what Foster previously told the FBI agent. (*Id.* at 2579, 2585, 2587). At that point, the government (joined by Sanders) registered the proper objection: Carpenter failed to lay a proper foundation to refresh Foster's recollection because Foster's memory was complete and needed no refreshing. (*Id.* at 2587–88).

Under Rule 612, refreshing recollection is permissible only if the questioner first establishes that the witness cannot recall the answer to a pertinent question after his recollection is "exhausted." *Rush v. Illinois Cent. R. Co.*, 399 F.3d 705, 716 (6th Cir. 2005) (citation omitted); *United States v. Holden*, 557 F.3d 698, 703 (6th Cir. 2009) (refreshing permitted if the witness "is unable to recall [the relevant facts] while on the stand").

Carpenter's efforts to show that Foster's recollection needed refreshing were ambiguous and confusing. (R. 328: Trial Tr., 2584, 2590–92 (district court describing Carpenter's questions as unclear)). But Foster's responses showed that he *did* have a present recollection of what he had previously told Agent Ruiz, and that present recollection confirmed his trial testimony that Carpenter planned the robbery. For example, when asked "Yes or no, do you remember saying something different?," Foster responded "No, because I didn't say anything different. I stated that Timothy Carpenter was the one who actually told me about it." (*Id.* at 2589; *see also id.* at 2583–84, 2586, 2594, 2597–98). When the government observed that Foster "doesn't seem to have a memory problem," the district court responded "That's right." (*Id.* at 2587). Given this conclusion, the district court properly exercised its "sound discretion," *Marrero*, 651 F.3d at 472, by steering Carpenter away from his effort to refresh, while permitting him instead to "confront [Foster] with a specific statement" about the FBI interview. (R. 328: Trial Tr., 2593; *see id.* at 2593–96 (permitting Carpenter to practice that approach outside the jury's presence and overruling Sanders's objection to it)).

B. Carpenter's claim that he should have been permitted to impeach Foster with a prior inconsistent statement is both new on appeal and meritless.

Carpenter claims that he should have been allowed to invoke Rule 613(b) to introduce Agent Ruiz's report as a prior inconsistent statement. Carpenter Br. 44–45. But Carpenter never offered the report into evidence for this purpose; rather, after some initial confusion, Carpenter clarified that he wanted to use the FBI report merely to refresh Foster's recollection. Because Carpenter never sought to introduce the report under Rule 613(b), he cannot argue here in the first instance that he should have been permitted to do so. *United States v. Reed*, 167 F.3d 984, 988 (6th Cir. 1999) (where defendant did not attempt to introduce evidence and the district court was not asked to rule on its admissibility, "there could be no error on the part of the district court for this court to notice").[6]

[6] Carpenter's purported excuse, that any effort to introduce the report would have been futile because he had to first show Foster the report and ask him if he recalled it, Carpenter Br. 44, is incorrect. *Rush*, 399 F.3d at 720 (advance presentation of a prior inconsistent statement to the witness is "unnecessary under the current version of Rule 613"); *id.* at 723 (availability for rebuttal testimony is sufficient). And in any event Carpenter did not even try this approach, so again he cannot complain here in the first instance.

Moreover, had Carpenter actually tried to introduce the FBI report under Rule 613(b), Sanders's initial (if premature) objection would have been properly sustained because Foster neither wrote the report nor adopted it as his own statement. *United States v. Valentine*, 70 F. App'x 314, 323 (6th Cir. 2003) (witness cannot be impeached by an officer's recounting of the witness's prior statement given during a police interview where the witness did not "adopt[ ] the statement as his own") (citing *United States v. Saget,* 991 F.2d 702, 710 (11th Cir. 1993)); *see Saget*, 991 F.2d at 710 ("a witness may not be impeached with a third party's characterization or interpretation of a prior oral statement unless the witness has subscribed to or otherwise adopted the statement as his own"); *United States v. Adames*, 56 F.3d 737, 744–45 (7th Cir. 1995) (same); *United States v. Almonte*, 956 F.2d 27, 29 (2d Cir. 1992) (same).

The two sister-circuit cases Carpenter cites are inapposite. Carpenter Br. 45. *United States v. Adamson* is distinguishable because the relevant statement was tape-recorded and the witness implicitly adopted it. 291 F.3d 606, 612–13 (9th Cir. 2002). And *Jankins v. TDC Management Corp., Inc.*, reflects the minority view this Circuit rejected in *Valentine*. 21 F.3d 436, 442 (D.C. Cir. 1994). *See generally* Muellar &

Kirkpatrick, 3 Federal Evidence § 699 (4th ed.) (Rule 613(b) impeachment using a third party's statement is proper only if "the witness has signed it or otherwise indicated his adoption or agreement with such statement").

C. Any error in the district court's handling of Carpenter's impeachment efforts was harmless.

An evidentiary error does not warrant reversal if it did not affect the trial's outcome. *United States v. Vasilakos,* 508 F.3d 401, 406 (6th Cir. 2007). Even were this Court to find that the district court improperly restrained Carpenter's effort to impeach Foster, the error was harmless.

First, two other accomplices also testified that Carpenter (and not Sanders) planned the Ohio robbery, bolstering Foster's credibility on this particular point. (R. 327: Trial Tr., testimony of accomplice Bell-Gill, 2389–90 (Carpenter and Green planned the Ohio robbery together); R. 330: Trial Tr., testimony of accomplice Green, 2858–62 (Carpenter was "in charge" of the Ohio robbery, and Sanders provided the van to transport the team)).

Second, Foster conceded during cross-examination that he lied during his initial interview with Agent Ruiz about other matters. (R.

328: Trial Tr., testimony of accomplice Foster, 2571–72, 2574–77). This concession undermines Carpenter's claim that demonstrating one additional inconsistency would have markedly damaged Foster's credibility in the eyes of the jury.

And third, even a hit to Foster's credibility would not likely have created reasonable doubt as to whether Carpenter aided and abetted the Ohio robbery. In addition to accomplice Green's corroborating testimony (R. 330: Trial Tr., testimony of accomplice Green, 2857–68, 2874–85), Carpenter was captured on the Family Dollar store surveillance video while helping to buy the laundry bags. (*Id.* at 2874–75 (identifying Carpenter on surveillance tape)).

IV. Carpenter's sentence does not violate the Constitution.

This Court reviews de novo constitutional challenges to criminal sentences. *United States v. Moore*, 643 F.3d 451, 454 (6th Cir. 2011).

A. Carpenter's prison term does not constitute cruel and unusual punishment.

The Eighth Amendment's ban on cruel and unusual punishment, U.S. Const. amend. VIII, prohibits prison terms that are "grossly disproportionate" to criminal conduct. *United States v. Odeneal*, 517 F.3d 406, 414 (6th Cir. 2008).

Carpenter's 1,395-month (116.25-year) prison term is not grossly disproportionate to his six robberies and five related gun crimes. Carpenter's only argument is that the guns were never fired. Carpenter Br. 51. But the district court concluded that numerous employees "[w]ere put in extreme danger and extreme harm." (R. 336: Carpenter Sentencing Tr., 3342). Indeed, the court exclaimed "I'm amazed that no one was actually shot and killed. These robberies were very violent." (*Id.* at 3343).

This Court has repeatedly upheld similar sentences for similarly egregious criminal conduct. For example, in *United States v. Watkins*, this Court rejected a proportionality challenge to a 1,772-month sentence (over 147 years) for six robberies (plus two conspiracy convictions therefor) and six § 924(c) gun violations, even though no gun was fired, no one was hurt, and the defendant had no prior criminal history. 509 F.3d 277, 282 (6th Cir. 2007). *See, e.g.*, *United States v. Clark*, 634 F.3d 874, 877–78 (6th Cir. 2011) (upholding 189-year sentence for a combination of robberies, drug crimes, and seven § 924(c) gun offenses); *United States v. Beverly*, 369 F.3d 516, 536–37 (6th Cir. 2004) (upholding 71.5-year sentence dictated primarily by mandatory minimums for four armed bank robberies); *United States v. Marks*, 209

F.3d 577, 583 (6th Cir. 2000) (upholding 186-year and 116-year sentences dictated primarily by mandatory minimums for nine and six armed robberies, respectively).

Carpenter also complains that 18 U.S.C. § 924(c) created an "arbitrary and abusive" disparity between his sentence and that of two codefendants. Carpenter Br. 46–47. But the Constitution does not require proportionality among codefendants. *Odeneal*, 517 F.3d at 414.

B. Carpenter's prison term does not violate the separation of powers.

Carpenter asserts that § 924(c)'s requirement of consecutive mandatory minimum sentences unconstitutionally delegates judicial sentencing authority to prosecutors who control charging decisions. Carpenter Br. 52–55. But he readily concedes, *id.* at 54, that this Court "flatly rejected" such an objection to mandatory minimum sentences. *United States v. Cecil*, 615 F.3d 678, 696 (6th Cir. 2010). Moreover, this Court summarily dismissed as "meritless" this objection to the imposition of seven consecutive § 924(c) sentences. *Clark*, 634 F.3d at 878; *see United States v. Ezell*, 265 F. App'x 70, 72 (3rd Cir. 2008) (rejecting separation of powers challenge to consecutive imposition of five mandatory minimum sentences for § 924(c) offenses).

V. Sanders's sentence is procedurally and substantively sound.

The district court sentenced Sanders to within-guidelines prison terms of 171 months for each of his two robbery convictions, running concurrently with each other but consecutively to his state-imposed jail term for murder. (R. 315: Sanders Judgment, 1719; R. 342: Sanders Sentencing Tr., 3493–98). Sanders contends that the district court erred in applying two sentencing enhancements and that his overall sentence is both procedurally and substantively unreasonable. He is wrong on all counts.

A. The district court did not clearly err by enhancing Sanders's sentence because an accomplice foreseeably brandished a gun and physically restrained a store customer during the robberies.

The district court imposed a 5-level enhancement under USSG § 2B3.1(b)(2)(C) for brandishing or possessing a firearm during a robbery, and a 2-level enhancement under USSG § 2B3.1(b)(4)(B) for physically restraining someone during the robbery.

For sentencing purposes, Sanders is responsible for an accomplice's acts if Sanders could reasonably foresee them. USSG § 1B1.3(a)(1)(B); *United States v. Catalan*, 499 F.3d 604, 607 (6th Cir. 2007). The district court's determinations that Sanders could

reasonably foresee these acts are "factual finding[s] reviewed for clear error." *United States v. Dupree*, 323 F.3d 480, 490 (6th Cir. 2003). And there is no error here.

1. The district court properly found reasonably foreseeable brandishing under USSG § 2B3.1(b)(2)(C).

Sanders concedes that accomplice Justin Young used a gun during both the count 5 and count 7 robberies. Sanders Br. 25; (R. 332: Trial Tr., testimony of accomplice Young, 3126—28 (admitting he entered the store with a gun)). Sanders highlights trial testimony which, if believed, suggests he did not know in advance that Young would use a gun. Sanders Br. 24–26. But Sanders "need not have actually known about the weapon, as reasonable foreseeability is an objective test." *Catalan*, 499 F.3d at 607. The question is whether a "reasonable person" in Sanders's shoes would have foreseen that a gun would be present during the commission of the offense based on the context and circumstances. *Id.*

This Court has upheld findings of reasonable foreseeability based on the circumstances of the crime, even without specific evidence of subjective knowledge or expectations. For example, in *United States v.*

Woods, this Court collected cases holding that the reasonable foreseeability of gun use during drug crimes can be inferred simply based on the nature of the crime when large drug quantities are involved. 604 F.3d 286, 291 (2010); *United States v. Kimball*, 194 F. App'x 373, 379 (6th Cir. 2006) (finding reasonable foreseeability based on the "breadth and seriousness of the offenses" committed). Here, the district court appropriately recognized that, given the planning for and circumstances of the crime, Sanders could have reasonably foreseen that an accomplice would brandish a gun. (R. 342: Sanders Sentencing Tr., 3477–80).

Moreover, specific evidence supported the district court's finding of reasonable foreseeability as to the count 7 robbery. Sanders knew, at least right afterward, that accomplice Young used a gun during the count 5 robbery on January 7, 2011. Sanders Br. 23; (R. 330: Trial Tr., testimony of accomplice Green, 2922–23 (Sanders saw the gun when the lookout and robbery teams rendezvoused after the crime)). This evidence further supports the district court's finding that Sanders could reasonably foresee Young's brandishing a gun again during the subsequent count 7 robbery on March 4, 2011. (R. 333: Trial Tr., hearing on motion for directed verdict, 3279–80 (district court

referenced "direct evidence" that Sanders saw the gun after the prior robbery)).

Sanders's acquittal for the § 924(c) gun offenses (counts 6 and 8) corresponding to these robberies is irrelevant for sentencing purposes. The enhancement in § 2B3.1(b)(2)(C) requires only reasonable foreseeability, whereas the § 924(c) offense requires actual knowledge of use. *Rosemond v. United States*, 134 S. Ct. 1240 (2014). And the enhancement requires proof only by a preponderance of evidence, whereas the § 924(c) offense requires proof beyond a reasonable doubt. *United States v. McCall*, 85 F.3d 1193, 1198 (6th Cir. 1996).

2. The district court properly found reasonably foreseeable restraining under USSG § 2B3.1(b)(4)(B).

Sanders concedes that accomplice Young also physically restrained a customer during the count 7 robbery. Sanders Br. 27; (R. 326: Trial Tr., testimony of employee Boyce, 2276 (robber grabbed customer around the neck and dragged her towards the back room)). Sanders argues only that he could not reasonably foresee this restraint. Sanders Br. 27.

Again, the district court found that the very nature of the offense dictates otherwise. (R. 342: Sanders Sentencing Tr., 3481–82). Indeed, the sentencing guidelines commentary defining "relevant conduct" provides an example in which a defendant is held to reasonably foresee an accomplice's commission of assault during a robbery simply "given the nature of the offense," even though the defendant "had not agreed to the assault and had cautioned the [accomplice] to be careful not to hurt anyone." USSG § 1B1.3, comment. (n.2 ¶ 5).

Consistent with the modus operandi for the entire robbery spree, members of the entry team were assigned roles, with someone responsible for herding all employees and customers inside the store to the back where the new cellphones were stored. (R. 328: Trial Tr., testimony of accomplice Foster, 2518; R. 330: Trial Tr., testimony of accomplice Green, 2867). Testimony suggested these roles were explained during the drive from Michigan to Ohio, with Sanders in the van. (R. 328: Trial Tr., testimony of accomplice Foster, 2508). Given this general plan of attack, it was reasonably foreseeable that the accomplice tasked with controlling and herding everyone inside would end up physically restraining someone, especially given this Court's broad definition of the term. *See United States v. Coleman*, 664 F.3d

1047, 1049–51 (6th Cir. 2012) (defining "physically restrained" broadly, without requiring either a "physical component" or a "sustained focus on the restrained person"). In this context, the district court's conclusion that Sanders could reasonably foresee some physical restraint during this armed robbery is not clearly erroneous.

B. Sanders's sentence is substantively reasonable under the circumstances.

This Court reviews sentencing decisions for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 46 (2007). And Sanders faces a rebuttable presumption that his within-guidelines sentence of 171 months was substantively reasonable. *United States v. Kamper*, 748 F.3d 728, 739–40 (6th Cir.), *cert. denied,* 135 S. Ct. 882 (2014).

The district court did not "place[ ] too much emphasis" on Sanders's extensive criminal history, just because some of his crimes were minor and committed as a teenager or young adult. Sanders Br. 28–30. The court considered this perspective, along with the government's contrary view. (R. 342: Sanders Sentencing Tr., 3485–88). Ultimately Sanders's characterization did not persuade the court, which observed that "[s]ince you were 12 years old up until your arrest for this offense, all you have done is engage in criminal activity." (*Id.* at 3493).

Sanders does not explain why the court's evaluation abused its discretion.

Sanders also objects to the district court's disapproving comment about his having many children with many different women. Sanders Br. 28–29. The court made this comment while noting Sanders fails to support those children, along with other character concerns including gambling and substance abuse. (R. 342: Sanders Sentencing Tr., at 3493–94). These are appropriately considered "characteristics of the defendant" under 18 U.S.C. § 3553(a)(1).

Sanders implies that the district court underweighted his history of child abuse, Sanders Br. 30, but he did not even mention this factor during the sentencing hearing. And a district court need not engage in a "ritualistic incantation" of every possible argument for leniency; the court need only "address[ ] the relevant § 3553(a) factors and most of the defendant's arguments for a lesser sentence." *United States v. Duane*, 533 F.3d 441, 452 (6th Cir. 2008). The district court told Sanders that it "considered your history and your characteristics" (R. 342: Sanders Sentencing Tr., 3494), which satisfied its obligation under the circumstances. *United States v. Jeter*, 721 F.3d 746, 756 (6th Cir.),

cert. denied, 134 S. Ct. 655 (2013) (court need not provide "rote listing" of every factor defendant mentions).

The fact that Sanders received a harsher sentence than did an accomplice, Sanders Br. 31, is immaterial. Disparity review under § 3553(a)(6) serves to compare sentences across the nation rather than among codefendants in any single case. *United States v. Simmons*, 501 F.3d 620, 623–24 (6th Cir. 2007). And the district court did such a comparison among codefendants anyway, finding that "[n]one of them really fit in your category in my mind." (R. 342: Sanders Sentencing Tr., 3494–95).

The district court carefully considered and gave reasonable weight to the relevant § 3553(a) factors and balanced the aggravating and mitigating circumstances, and this Court "may not reverse a district court's sentencing determination simply because we 'might reasonably have concluded that a different sentence was appropriate.'" *United States v. Rogers*, 769 F.3d 372, 384 (6th Cir. 2014) (citation omitted). Especially given the presumption that a within-guidelines sentence is substantively reasonable, *Kamper*, 748 F.3d at 739–40, the district court did not abuse its discretion.

Conclusion

This Court should affirm the district court's rulings and affirm the judgments of conviction.

Respectfully submitted,

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Certificate of Compliance with Rule 32(a)

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 13,681 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-pt. Century Schoolbook.

/s/ Evan Caminker
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Dated: May 6, 2015

Certificate of Service

I certify that on May 6, 2015, I electronically filed this brief for the United States with the Clerk of the United States Court of Appeals for the Sixth Circuit using the ECF system, which will send notification of such filing to the following attorneys for the defendants:

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Relevant District Court Documents

Appellee, the United States of America, designates as relevant the following documents available electronically in the district court's record, case number 12-cr-20218 in the Eastern District of Michigan:

Record Entry No.	Document Description	Pg ID
R. 196	Motion in Limine to suppress cell phone data	954–966
R. 214	Notice of Joinder	1102–1103
R. 216	Notice of Supplement to Notice of Joinder—Carpenter	1106–1114
R. 221	Response by USA with Exhibits	1125–1187
R. 227	Order denying motion in limine	1213–1224
R. 247	Jury Verdict Form—Sanders	1332–1334
R. 249	Jury Verdict Form	1338–1343
R. 251	Opinion & Order denying motions for acquittal	1350–1359
R. 301	Judgment—Carpenter	1600–1605
R. 303	Notice of Appeal—Carpenter	1612–1613
R. 308	Notice of Appeal—Sanders	1639–1640
R. 315	Judgment—Sanders	1718–1722
R. 325	Jury Trial Transcript of 12/05/13	2004–2155
R. 326	Jury Trial Transcript of 12/06/13	2156–2317

Record Entry No.	Document Description	Pg ID
R. 327	Jury Trial Transcript of 12/09/13	2318–2460
R. 328	Jury Trial Transcript of 12/10/13	2461–2633
R. 329	Jury Trial Transcript of 12/11/13	2634–2798
R. 330	Jury Trial Transcript of 12/12/13	2799–2961
R. 332	Jury Trial Transcript of 12/13/13	2963–3158
R. 333	Jury Trial Transcript of 12/16/13	3159–3283
R. 336	Sentencing Transcript—Carpenter 04/16/14	3331–3351
R. 342	Sentencing Transcript—Sanders 06/11/14	3474–3503