No. _____

In The

Supreme Court of the United States

_____

October Term, 2018

JOHN THOMAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the opinion of the Seventh Circuit Court of Appeals, which failed to address Thomas's appellate argument that his Fourth Amendment rights were violated by evidence obtained from a warrantless search and seizure of historical cell phone site locations is in, and of itself, a violation of Thomas's Fourth Amendment rights established in *Carpenter v. United States*, 585 U.S. _____, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018).

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

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Petitioner, John Thomas, respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *United States v. Thomas*, 897 F.3d 807 (7th Cir. 2018) (App. A). Judgment was entered on December 20, 2016. (App. B.)

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals") was entered on July 26, 2018. No petitions for rehearing were filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

The fundamental question in this case is whether the Seventh Circuit Court of Appeals violated Thomas's Fourth Amendment rights by failing to address, on the merits, his appellate argument that the district court abused its discretion in failing to suppress historical cell site location information obtained in violation of the Fourth Amendment right against unreasonable searches and seizures as established by this Court in *Carpenter v. United States*, 585 U.S. _____,

138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018), which was decided while Thomas's appeal was pending.

A. Proceedings Below.

John Thomas was charged with Conspiracy to Commit Kidnapping ("Count 1") under 18 U.S.C. §§ 120(a)(1), (c), and (g), and two counts of Kidnapping ("Count 2" and "Count 3") under 18 U.S.C. §§ 120(a)(1) and (g). (App. 12- 16.) More specifically, the superseding indictment charged Thomas, and the members of the alleged conspiracy, with kidnapping two minor children during a home invasion, using a dangerous weapon in the course of the kidnapping, causing injury to one of the victims, and using a cell phone to relay ransom demands to the family members of the victims.

The Government also elicited expert testimony on historical cell site locations. FBI Special Agent Raschke informed the jury of his conclusions regarding Thomas's locations and movements at the relevant times. FBI Special Agent Andrew Willman gave similar testimony. The Government used this testimony to connect Thomas to the crimes.

The district court sentenced Thomas to three concurrent life sentences. Thomas filed a timely Notice of Appeal on January 2, 2017. The Seventh Circuit Court of Appeals affirmed on July 26, 2018.

B. Factual Background.

On September 26, 2016, FBI Special Agent Joseph Raschke testified as an expert on historical cell site analysis. Agent Raschke informed the jury that he had participated in the compilation, analyzation, and presentation of historical cell site

analysis "dozens of times" throughout his career. Special Agent Raschke then explained to the jury his interpretation of historical cell site location information:

> Q: Could you describe for the ladies and gentlemen of the jury what is historical cell site analysis?
>
> A: What that is, is the collection, analysis and interpretation of cellular records, the records that are maintained by the cell phone companies that detail the activity on our cell phones. When we use our cell phones, the phone companies keep track of information about the activity on those phones, including the cell towers that our phones are communicating with. I take those records and analyze those records and attempt to identity approximate areas of where a phone was at a given date and time based on activity on that phone.
>
> Q: Now – and you're kind of getting there. When it comes to criminal investigations, what kind of purpose could that analysis serve?
>
> A: The primary purpose is to make that identification for where the phone was or is approximately, and that comes into play in all kinds of investigations. I assist the FBI, as well as other federal, state, and local investigators on all types of cases. Any case where it's significant to determine the approximate location of a cell phone that's relevant to that case.

The Government then had Special Agent Raschke elucidate on what the data showed:

> Q: And I'm presuming by what you're saying, that that type of analysis can help you locate a phone in real[-]time. Is that correct?
>
> A: That's correct. The testimony I'm giving today is a historical analysis. Meaning looking back at records that happened in the past. But we also provide real time location assistance, find out where a phone is right now. Always a part of where a phone is right now is where it had been recently as well. So we incorporate both.

After officially being tendered as an expert witness, Raschke described how the functionality of cell phones intersect with cellular towers to establish historical cell site location information. Raschke stated in substance that cellular phones are designed to "always utilize the strongest, clearest signal." While environmental factors could impact the registration of phones to towers, Raschke assured the jury that the phone "constantly scans all the radio frequency information that it can read and ranks that information in terms of its best signal quality and stays camped on the signal that is the strongest and clearest." Raschke then expanded upon the environmental factors which could impact a cell phone's registration to a particular cell tower, such as the presence of multiple towers in a small vicinity and the obstruction of tall buildings found in urban centers such as Chicago. Before getting into the facts of the instant matter, Raschke did establish a distinction between the approximations that accompany historical cell site analysis and more enhanced equipment that the FBI uses to "really hone in and pinpoint where a cell phone is located almost down to a number of feet or a specific address[]."Once establishing that foundation, Raschke informed the jury about the findings in his report. Raschke had retrieved historical cell site location information for specific dates in February and March 2015. His analysis found that the MetroPCS phone that was purchased by Thomas had been in the vicinity of two Detroit residences, five hotel or motel locations that the Government's cooperating witnesses alleged that they were present at in accordance with the kidnapping scheme, and the alleged kidnapping location in Indianapolis, Indiana With the assistance of a

PowerPoint presentation, Agent Raschke walked the jury through the cell phone activity compiled from the historical cell site location analysis. This analysis yielded a summary of movements of the "ransom" phone. Indeed, Raschke found that there was "activity consistent with movement away from the Detroit area" and evidence that cell towers were hit "over in the Jackson, Michigan area and then down into Indiana, headed toward Indianapolis." Raschke continued that on February 28, 2015 at around 4:06 AM, the records indicated that there was activity within the vicinity of a Super 8 location in Indianapolis and that there was "movement back and forth." In fact, Special Agent Raschke testified that "[t]he phone is not staying stationary in one of those locations. The phone is moving." Raschke then concluded with the information from March 1, 2015 which found movement to the According to Raschke, after contact with the alleged kidnap location, there was travel back towards the Detroit, Michigan area with movements "[b]etween 6:00 and 7:00 AM, coming up through Toledo and [back] into the Detroit area…"

FBI Special Agent Andrew Willman testified that he had specialized training in recognition of online exploitation of children as well as investigation and evidence collection. After discussing his professional and educational background, Willman, with the assistance of a self-constructed PowerPoint presentation, summarized the cell site location information data that he had analyzed in relation to his investigation. Willman testified that he was able to confirm through security footage at MetroPCS that Thomas bought cellular devices from the establishment on February 27, 2017 at approximately 2:18 PM. Further, Willman opined that

Thomas purchased a "drop phone" which he explained was a designation provided when a "person is going to use that phone to commit their illegal acts or their illicit activities and then throw it away, once they're done, to dispose of evidence.

Willman subsequently testified that cell site location analysis registers the drop phone near 8341 Bingham Street on February 27 between 9:00 and 10:00 PM. Willman alleges that this location was significant and pertinent to him because it was the same address that the Government's cooperating witnesses, specifically Sandell, Al-Salehi, and Reeves, said they received their cell phones.) Willman continues to state that after the meeting between Thomas and the cooperating witnesses, the cell phone begins to travel "west in Michigan and then down past Fort Wayne and down into Indianapolis, I understand." Further, the phone was pinged to be traveling further south toward Indianapolis between 10:00 PM and 11:59 PM.

The following day, February 28, 2015, at approximately 11:00 AM, the phone begins to move between various locations and cell towers that "wrap around the kidnapping location." Notably, Willman then testifies that on February 28, 2017 between the hours of 10:30 and 11:59 PM, the MetroPCS cell site location analysis demonstrates that particular cell towers where the text messages were sent from the ransom phone, telling Thomas that Whitney Blackwell was found. Then on March 2, 2015, at approximately 12:18 AM and 1:51 AM, text messages show Sandell guiding Thomas to where they are conducting the kidnapping and Sandell registering in one of the hotel rooms that they had previously been staying in

awaiting instructions. Willman's testimony surrounding Thomas's cell site location ended with the claim that a lot of phone calls were being sent to try and contact the Thomas on March 2, 2015 but he had been arrested by noon that day and the calls were not connected.

The Government did not attempt to obtain a warrant for the historical cell site records. Thomas did not move to suppress the evidence or object to the evidence at trial.

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW, DESPITE THIS COURT'S OPINION IN *CARPENTER* AND THOMAS'S APPELLATE ARGUMENTS, RULED THAT THE ISSUE NEED NOT BE ADDRESSED ON THE MERITS BECAUSE THOMAS DID NOT FILE A MOTION TO SUPPRESS OR OBJECT TO THE EVIDENCE AT TRIAL, THEREBY AFFIRMING THE CONVICTION DESPITE THE FOURTH AMENDMENT VIOLATION.

This Court, in *Carpenter v. United States*, 585 U.S. _____, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018), ruled that the Government's obtaining historical cell phone records constitutes a search under the Fourth Amendment and "the Government must generally obtain a warrant supported by probable cause before acquiring such records." 585 U.S. _____ (218) (Slip Opinion, 1). The Court's decision in *Carpenter* was rendered after the oral arguments in this case, but prior to the Seventh Circuit's opinion. The issue was thoroughly argued in the parties' briefs. *Carpenter* was cited as additional authority to the Seventh Circuit Court of Appeals on June 22, 2018, the day on which it was decided. Despite being provided notice of *Carpenter* more than one month prior to the Seventh Circuit's opinion, the Seventh Circuit did not address the merits of Thomas's Fourth Amendment claims.

Instead, citing *United States v. Acox*, 595 F.3d 729, 732 (7th Cir. 2010), the Court ruled that it reviewed the issue under the standard of "whether the district court would have abused its discretion if it had concluded that Thomas lacked good cause" for failing to move to suppress the evidence or objecting to the evidence at trial. The Court of Appeals ruled:

> [T]hough the Supreme Court's *Carpenter* decision indicates a potential Fourth Amendment problem with the cell-site data used here, Thomas cannot raise this argument now, after failing to raise it in the district court.

897 F3d at 815. The Court then, in a footnote, stated:

> In *Carpenter*, the Supreme Court reversed the Sixth Circuit, holding that the collection of cell-site location information can be, and was in that case, 'a search within the meaning of the Fourth Amendment.' *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018). We need not look and do not address here the scope of the Court's decision in *Carpenter*. See *Id.* at 2217 n. 3.

Id., n. 2.

At the time of Thomas's trial, every federal district court in the Seventh Circuit which had decided the issue had ruled that historical cell site information was not a Fourth Amendment search. *See: United States v. Wheeler*, 169 F.Supp.3d 896, 910 (E.D. Wis. 2016); *United States v. Lang*, 78 F.Supp.3d 830, 836 (N.D. Ill. 2015); *United States v. Rogers*, 71 F.Supp.3d 745, 750 (N.D. Ill. 2014); *United States v. Benford*, 2010 U.S. Dist. LEXIS 29453, 2010 WL 1266503 (N.D. Ind. 2010). *See generally, United States v. Rosario*, 2017 U.S. Dist. LEXIS 73921, 2017 WL 2117534 (N.D. Ill. 2017). A federal district court case in the Seventh Circuit decided after Thomas's trial, from the Southern District of Indiana, similarly ruled that the acquisition of historical cell site information is not a Fourth Amendment search. *See United States v. Adkinson*, 2017 U.S. Dist. LEXIS 54104, 2017 WL 1318420 (S.D. Ind. 2017). Many of these cases were decided on the rationale of this Court's opinion in *Smith v. Maryland*, 442 U.S. 735 (1979).

United States v. Rosario, 2017 U.S. Dist. LEXIS 73921, 2017 WL 2117534 (N.D. Ill. 2017). Furthermore, the Seventh Circuit had previously sustained the admission of historical cell site records against other challenges. *See United States v. Adame*, 827 F.3d 637 (7th Cir. 2016) (Challenged under Fed. Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)); *United States v. Hill*, 818 F.3d 289 (7th Cir. 2016) (Same). Thomas respectfully submits that he had good cause to not file a motion to suppress or object to the evidence at trial in light of the prevailing law in the Seventh Circuit at the time he was tried. The district court, therefore, would have abused its discretion in ruling that Thomas had not established good cause.

The nature and amount of the testimony elicited by the Government regarding the historical cell site location is clear from the factual background stated above. The Seventh Circuit noted that: "The cell-site location information pinned Thomas and his accomplice at specific locations during the kidnapping." 897 F.3d at 815. Thomas's conviction was therefore based on unconstitutionally-seized records. The Seventh Circuit Court of Appeals should have addressed Thomas's Fourth Amendment arguments on the merits and reversed his conviction.

CONCLUSION

For the foregoing reasons, petitioner, John Thomas, respectfully requests this Court to grant this petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 17-1002

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN THOMAS,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 15-CR-74 — **Richard L. Young**, *Judge.*

ARGUED MAY 16, 2018 — DECIDED JULY 26, 2018

Before FLAUM, SYKES, and HAMILTON, *Circuit Judges.*

HAMILTON, *Circuit Judge.* Whitney "Strawberry" Blackwell stole cash and drugs from defendant-appellant John Thomas. His effort to punish her and recover his cash and drugs has landed him in federal prison with a life sentence. Thomas kidnapped Blackwell's younger brother and sister in Indiana and had them taken to Michigan and Kentucky, respectively, before law enforcement tracked them down.

Thomas raises four issues on appeal: (a) that Blackwell was allowed to offer inadmissible and prejudicial testimony for the prosecution; (b) that the district court should have excluded cell-site location information about cell phones associated with Thomas; (c) that the court erred in its Sentencing Guideline calculations; and (d) that the court erred under *Alleyne v. United States*, 570 U.S. 99 (2013), by failing to have the jury decide that the kidnapping victims were under 18 years old, which increased the mandatory minimum sentence. Thomas did not raise any of these issues in the district court.

We affirm the convictions and sentence. We first review the facts of the case and then turn to Thomas's new arguments. To summarize our conclusions: (a) the district court did not plainly err in dealing with Blackwell's testimony and her apparent inability to follow instructions about answering what she was asked and not raising certain subjects; (b) the court did not err by admitting the cell-site location evidence where Thomas did not move to suppress or even object to that evidence; (c) the court did not plainly err in its guideline calculation; and (d) the court made an *Alleyne* error regarding the ages of the kidnapping victims, but the error was harmless, calling for no remedy under the plain-error doctrine.

I. *Factual and Procedural Background*

On Thanksgiving night 2014, defendant John "Jay" Thomas met Whitney "Strawberry" Blackwell at Club Venus in Detroit where she worked as a stripper and prostitute. When Blackwell testified at trial, the prosecution asked the usually innocuous question, "What is the first thing you said to Mr. Thomas, the defendant, when you met him?" Blackwell said, "I asked him if he wanted his d*** sucked." After this

first encounter, Thomas took in Blackwell as one of his girlfriends and supported her from his drug dealing. She never worked at Club Venus again. Their short and volatile relationship erupted on Valentine's Day, 2015. Blackwell testified at trial that Thomas "beat me up" that day, apparently because she "drank all of his water," though this supposed provocation never made it before the jury. After that beating, Blackwell decided to leave Thomas.

When the "baby-sitter" whom Thomas assigned to "snitch on" Blackwell was upstairs in his bedroom, Blackwell testified, she "tiptoed around the house all sneaky like," and stole from Thomas $50,000 in cash, 2,500 OxyContin pills, and an ounce of cocaine. Blackwell loaded up her contraband, her belongings, and her young child, and she fled. She paid a friend to drive her from Detroit to Chicago. She arrived in Chicago and stayed at the home of the father of one of her children until she suspected Thomas's associates were tracking her down. According to Blackwell's trial testimony, Thomas's friends would do "whatever Jay told him to do ... [g]o out and sell drugs, shoot people, steal something." Fearing that Thomas would find her in Chicago, she left for Indianapolis, where her family lived and where she grew up. After she had left, Thomas and others tried to raid the Chicago residence where she had been staying.

Thomas and his henchmen regrouped in Detroit. They decided to expand their search to Indianapolis. Thomas dispatched four of his underlings to an Indianapolis address. Telling them, "I want my money and my drugs," Thomas promised them $45,000 if they found Blackwell and provided them with a "burner" phone and $1,000 in cash. He also provided specific instructions about Blackwell's young son: "if

you see C—, bring me C—." Thomas's henchmen went to Indianapolis and began their search for Blackwell. They obtained her family's address from local drug dealers. They staked out the home and saw Blackwell drop off her mother and leave. After alerting Thomas, he told them to wait for him. He drove from Detroit with several more confederates and asked one of his co-conspirators to buy zip ties as he prepared his next steps.

In the early hours of March 2, 2015, Thomas and his gang drove to the house. Thomas kicked in the door. He found a family friend sleeping on the floor and ordered an accomplice to restrain the man with the zip ties. Thomas and others then broke into Blackwell's mother's bedroom, where her mother slept with Blackwell's younger brother and sister. Thomas asked the mother, "Where the f*** is Strawberry? Where the f*** is my money? That b**** took my money and took my dope. You know where she at?" Blackwell's mother said she did not know where the money was. Thomas ordered one accomplice to take the brother while Thomas himself took the sister. Thomas and his henchmen drove away from the house with the brother and sister in separate vehicles. After driving back to Detroit, Thomas ordered the brother to be kept in Michigan. He told a group of his underlings to take the sister to his house in Kentucky.

Thomas directed his henchmen throughout the kidnapping. He told them to tell Blackwell's brother that he would be raped if he did not tell them where the money was. He also told them, "Get my money. ... Squeeze my money out of him." The associates followed Thomas's lead, telling the brother that he would be raped if he did not cooperate. When the brother did not respond, one of the conspirators testified,

Thomas told her "to do whatever I have to do; hurt him, cut him, beat him up, get whatever I could out of him." Thomas also told the boy on speakerphone, "I cut your sister's fingers off already and if you don't tell me where everything's at, [another person is] about to cut your fingers, too." Still getting no response from the brother, one kidnapper took a knife and actually cut the webbing of the brother's finger until "it was bleeding very bad."

After Thomas seized the children, Blackwell's mother called the police. Officers overheard several ransom calls from Thomas, and they began a manhunt in Indiana, Michigan, Ohio, and Kentucky. Officers arrested Thomas in Detroit. They traced the cell phones of his accomplices and arrested them at Thomas's house and at another address where the kidnappers kept Blackwell's brother.

While the officers conducted surveillance at the address where the brother was being held, the accomplices—feeling the pressure and unable to contact Thomas as he remained in custody—decided to abandon the plan and release the brother. They sped away from the address with the brother in the back of the car. Drunk and executing several evasive maneuvers, the driver crashed the vehicle. Officers found the brother inside the car, bound and blindfolded. The associates who held Blackwell's sister in Kentucky also gave up soon after they found themselves unable to contact Thomas. They left the sister in a restaurant in Ohio, and she took a taxi back home to Indianapolis.

A federal grand jury indicted Thomas for conspiracy to commit kidnapping and two counts of kidnapping. At trial, virtually every participant and victim testified against Thomas, including Blackwell, her mother, her mother's friend

who was zip-tied, her brother and sister, and Thomas's co-conspirators. The trial testimony contained graphic details related in sometimes colorful language.

The jury convicted Thomas on all charges. At sentencing, the judge adopted the presentence investigation report prepared by the U.S. Probation Office that applied the U.S. Sentencing Guidelines. In calculating Thomas's offense level under the guidelines, the judge determined that the offense involved vulnerable victims and the use of physical restraints. With those enhancements, Thomas's guideline calculation of an offense level 52 was literally off the chart, well above the offense level 43 for which the guideline sentence is life in prison for all six criminal history categories. Without those enhancements, the offense level would have been 48, still off the chart. The court found that the statutory mandatory minimum sentence of twenty years should apply because the kidnapping victims were minors, but that issue was not submitted to the jury. The district court sentenced Thomas to life in prison.

II. *Analysis*

A. *Evidentiary Rulings on Blackwell's Testimony*

On appeal, Thomas argues first that the district court erred under Federal Rules of Evidence 403 and 404(b) by admitting three statements from Blackwell that referred to other, uncharged allegedly criminal acts by Thomas. First, he points to Blackwell's first meeting with Thomas where, she testified, she "asked him if he wanted his d*** sucked." This, Thomas claims, created an inference that he engaged in improper sexual conduct, including prostitution. Second, Thomas objects to Blackwell's statement that one of his henchmen would do

"whatever Jay told him to do," specifically to "[g]o out and sell drugs, shoot people, steal something." Third, he points to Blackwell's statement that Thomas "beat me up on Valentine's Day," which led to her decision to leave Thomas a few days later.

The first statement drew no objections from the defense. The second and third drew objections. The prosecutor responded to the objections by offering to rephrase the question and to instruct Blackwell to tailor her answers more narrowly. The district judge sustained only the second objection, but his response to both objections was the same: he allowed the prosecution to proceed on its proposed, modified questions.

We ordinarily review a district court's evidentiary rulings on Rule 404(b) for abuse of discretion. *United States v. Curtis*, 781 F.3d 904, 907 (7th Cir. 2015). If a party never objected to the admission of evidence in the district court, we review only for plain error. *United States v. Adams*, 628 F.3d 407, 414 (7th Cir. 2010). To succeed on plain error review, Thomas must show: (1) an error that he has not intentionally waived; (2) that the error was "plain—that is to say, clear or obvious;" (3) that the error affected his substantial rights; and (4) that the error "'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016), citing *United States v. Olano*, 507 U.S. 725, 736 (1993). Where an appellant's objection was *sustained* at trial, with a prosecutor's agreement to rephrase the question, and where the appellant did not promptly ask the district court for a stronger response, we review whether it was plain error for the district court not to provide a stronger remedy on its own initiative. See Fed. R. Crim. P. 52; cf. *Adams*, 628 F.3d at 414.

On appeal, Thomas argues that the district court erred under Federal Rule of Evidence 404(b), which provides that evidence "of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). The rule is designed to prevent juries from drawing the improper inference from a prior act that the defendant has a propensity to act in a certain way and acted in that way on the particular occasion that is the subject of the trial. *United States v. Gomez*, 763 F.3d 845, 860 (7th Cir. 2014) (en banc). The rule, however, does not impose a categorical bar to evidence of other acts. If the evidence serves another purpose, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident," then the evidence may be admitted. Fed. R. Evid. 404(b)(2). Even if a piece of evidence is not barred by Rule 404(b), however, courts still must determine that the evidence meets Rule 402's requirement that the evidence be relevant and Rule 403's requirement that its "probative value" not be "substantially outweighed by ... unfair prejudice." Fed. R. Evid. 403.

In *United States v. Gomez*, sitting en banc, we laid out the two-step process mandated by the Rules. Upon objection to the introduction to other-act evidence, the proponent must show under Rule 404(b) that the evidence serves another purpose and establish that purpose "through a chain of reasoning that does not rely on the forbidden inference that the person has a certain character and acted in accordance with that character on the occasion charged in the case." 763 F.3d at 860. If the proponent can do this, the district court must then under Rule 403 "assess whether the probative value of the other-act evidence is substantially outweighed by the risk of unfair

prejudice" and "take account of the extent to which the non-propensity fact for which the evidence is offered actually is at issue in the case." *Id.*

In this case, the defense never objected to the first contested statement, though Thomas's attorney did object to the last two statements, arguing that Blackwell was "nonresponsive" and "offering much more than the answer requires." In those instances the court either sustained the objection or the prosecutor willingly rephrased the question to evade the inflammatory statement. At no time, however, did the defense ask the district court to provide a curative or limiting instruction to the jury to ignore statements made by Blackwell that might run afoul of the Rules. On appeal, Thomas argues that the district court erred by not providing a limiting jury instruction *sua sponte*.[1]

This argument runs contrary to our decision in *Gomez*, where we expressed "caution against judicial freelancing in this area" because "sua sponte limiting instructions ... may preempt a defense preference to let the evidence come in without the added emphasis of a limiting instruction." *Gomez*, 763 F.3d at 860. The district court in this case rightly heeded that caution and refrained from judicial freelancing absent specific requests from the defense. Instead, the court responded in the limited way requested, by sustaining objections to evidence when necessary but drawing no additional attention to the matter. By following our approach in *Gomez*,

[1] Thomas has not argued that the judge should have declared a mistrial *sua sponte*, and it is doubtful he could have met the high bar for plain-error review for failure to declare a mistrial. See *United States v. Tanner*, 628 F.3d 890, 898–99 (7th Cir. 2010).

the district court did not abuse its discretion, let alone commit plain error.

There is no doubt that Blackwell was a difficult witness for both lawyers and for the judge. The prosecutor prepared Blackwell to testify and warned her against mentioning other acts committed by the defendant. She highlighted for Blackwell those specific acts that should not be repeated in court, namely, instances of domestic violence, including one incident that caused her to suffer a miscarriage, as well as Thomas's violent acts against others, including breaking someone's kneecaps in a drug dispute. In addition to telling Blackwell orally not to mention these other acts, the government had her sign a letter acknowledging these instructions. Blackwell herself remembered the letter and refrained from mentioning a second time the Valentine's Day beating when defense counsel asked the risky question, what "was the deciding factor" in her decision to steal Thomas's property? Blackwell responded, "Gosh. So they made me sign this piece of paper that said I wouldn't talk about that."

Before presenting its case, the government had taken the unusual step of advising the court and defense counsel of its efforts to try to ensure that Blackwell's testimony would comply with the Federal Rules of Evidence, to say nothing of courtroom decorum. The prosecutor frankly admitted her inability to get Blackwell to comply but recounted her many efforts. Here was the prosecutor's unusual statement:

> She is not a cooperating witness. She has absolutely no agreement with the federal authorities. And on top of that, Your Honor, she is not under our control.

> The reason I say that, Your Honor, is—Ms. Blackwell is—is someone who, through my preparation of her, I have seen she doesn't mince words. She says whatever she is thinking at that moment. And I have tried, through my preparation, to admonish her on many, many, many subject matters that she is not allowed to bring out in her testimony. I have told her on numerous occasions that she is to only answer the question that either I or the defense attorney asks.
>
> Now, some of the things that Ms. Blackwell has said in her preparation that I have admonished her that she is absolutely not allowed ... to say fall into a couple different categories. The first of those categories are prior acts of domestic violence between Ms. Blackwell and the defendant. ...
>
> The reason I'm making that clear, Your Honor, is because Ms. Blackwell is certainly not under my control. I have taken as many steps as I can think of to control her before this jury. Not only have I admonished her orally but prior to her testimony, we will be presenting her with a written letter that I've signed ... and then we will ask Ms. Blackwell to sign that memorializes in writing that we have told her she is not allowed to bring up those instances.
>
> And I just wanted to put all that on the record, Judge, because I have to tell you, if I can speak plainly, I've been doing this eight or nine years.

> I've put so many different kinds of witnesses on the stand. She is a first for me. She is someone as unwieldy as it gets. So I wanted to make it absolutely clear to this Court the steps I have taken to control her.

Despite these precautions, Blackwell did not comply with the prosecutor's instructions.

The government does not choose the principal players involved in serious crimes like this, and it must make its best effort to present its evidence according to law. It is hard to imagine what else the government could have done with Blackwell. She and her relationship with Thomas were at the heart of the kidnapping case.

Blackwell's refusal to comply with warnings and instructions, and her colloquial and often obscene language, presented a serious challenge for the government to present its case without unfair prejudice to Thomas. Much of the testimony was graphic because of the nature of the events and Thomas's crimes. The government took reasonable measures to minimize the risks of unfair prejudice. Despite those efforts, Blackwell strayed a few times. When she did, the judge took appropriate action, and the defense did not ask him to do more. We do not see any error, let alone plain error. Further restrictions could have made the trial of these events too stilted and artificial—the judicial equivalent of editing a Quentin Tarantino movie to air on the Disney Channel. Federal law and the Rules of Evidence do not require that. And given the mountain of evidence against Thomas, we cannot imagine that the three incidents Thomas challenges on appeal had any effect on the ultimate verdicts.

B. *Admission of Cell Phone Location Data*

Thomas argues next that the government's collection of his cell phones' location information without a search warrant violated the Fourth Amendment. Under Federal Rule of Criminal Procedure 12(b)(3)(C), a defendant who believes the government obtained evidence by violating the Fourth Amendment's prohibition on unreasonable searches and seizures must move before trial to suppress that evidence. Under Rule 12(c)(3), a court may consider untimely motions if the defendant can show good cause. In this case, Thomas never moved to suppress the evidence, never attempted to show good cause for this failure in the district court, and did not object to admission of the evidence at trial. He argues on appeal, however, that the district court still erred in admitting the evidence. Under our precedents, this argument calls for us to answer the somewhat roundabout question: whether the district court would have abused its discretion if it had concluded that Thomas lacked good cause. See *United States v. Acox*, 595 F.3d 729, 732 (7th Cir. 2010).

The cell-site location information pinned Thomas and his accomplice at specific locations during the kidnapping. The government obtained this information pursuant to the Stored Communications Act, 18 U.S.C. § 2701 et seq., but without a search warrant. Thomas argues that the government's collection of his cell phone location information without a warrant violated the Fourth Amendment. As good cause for his failure to follow the required procedure, he cites "the legal ambiguity surrounding" the use of "historical cell-site location information." At the time of his trial, a circuit split existed on this precise issue, one we acknowledged in *United States v. Daniels*, 803 F.3d 335, 351 (7th Cir. 2015). Shortly before Thomas's trial,

the Sixth Circuit decided *United States v. Carpenter*, 819 F.3d 880, 890 (6th Cir. 2016), finding no constitutional violation in obtaining cell-site data without a warrant. The rule stated in *Carpenter* remained uncertain throughout Thomas's trial and appeal as the Supreme Court granted certiorari and later reversed *Carpenter*. See *Carpenter v. United States*, 137 S. Ct. 2211 (2017) (granting certiorari); 138 S. Ct. 2206 (2018) (reversing on merits because search warrant was required).

While Thomas certainly is correct that this legal issue remained uncertain before his trial, that uncertainty did not qualify as good cause under Rule 12 for failing to raise the issue. We have trouble seeing how a circuit split on such a high-profile issue can provide good cause for failing to raise the issue in the district court. In *Daniels*, we rejected a similar challenge to the use of cell data because the defendant failed to file the required pretrial motion. The defendant in that case could not show good cause because the "defendants knew all they needed to know in order to make the Fourth Amendment argument" before this court. *Daniels*, 803 F.3d at 352. Following *Daniels*, we find that the district court would not have abused its discretion if it had found no good cause for failing to file a timely motion. In other words, though the Supreme Court's *Carpenter* decision indicates a potential Fourth Amendment problem with the cell-site data used here, Thomas cannot raise this argument now, after failing to raise it in the district court.[2]

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[2] In *Carpenter*, the Supreme Court reversed the Sixth Circuit, holding that the collection of cell-site location information can be, and was in that case, "a search within the meaning of the Fourth Amendment." *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018). We need not and do not address here the scope of the Court's decision in *Carpenter*. See *id.* at 2217 n.3

C. *Sentencing Guideline Issues: Vulnerable Victims and Restraint of Victims*

Thomas next argues that the district court made two errors in calculating his offense level under the Sentencing Guidelines. The court found that Thomas was in criminal history category V and that his total offense level was 52, which was literally off the chart. In rare cases like this one, the offense level will exceed the maximum offense level of 43 listed on the guideline sentencing chart. When that happens, the "offense level of more than 43 is to be treated as an offense level of 43," which recommends a life sentence for all criminal history categories. U.S.S.G. § 5A cmt. 2.

The district court grouped Thomas's convictions into two groups, one for kidnapping and conspiracy to kidnap Blackwell's brother, and the other for kidnapping and conspiracy to kidnap her sister. The district court's offense calculation began with a base offense level of 32 for kidnapping under U.S.S.G. § 2A4.1 for the kidnapping of Blackwell's brother. The court added a total of eighteen points under offense level adjustments because the crime involved a demand for a ransom, use of a dangerous weapon, physical restraint of a victim, a vulnerable victim, and obstruction of justice, and because Thomas was the leader of the criminal activity. An additional two points were added to account for the separate group of counts for kidnapping Blackwell's sister. Taking the greater of the two groups and adding the multiple-count adjustment, Thomas's total offense level hit 52.

(disclaiming any decision on scope of Fourth Amendment protections for less than seven days' worth of information).

Thomas challenges on appeal the two-level enhancements for vulnerable victims under § 3A1.1 and for restraint of a victim under § 3A1.3. He did not raise either issue in the district court, so we review for plain error. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904 (2018); *Molina-Martinez v. United States*, 136 S. Ct. at 1343; *United States v. Olano*, 507 U.S. 725, 733–34, 736 (1993).

Starting with the vulnerable-victim enhancement in § 3A1.1, Thomas argues it amounted to double-counting because he was convicted of kidnapping two minors, who are deemed vulnerable victims. We do not see any error in this enhancement, let alone a plain one. The kidnapping guideline, § 2A4.1, applies generally to all kidnappings. No other offense characteristic that was applied under the Guidelines accounted for the victims' ages or vulnerability.

The restraint-of-victim enhancement of § 3A1.3 is more of a problem. Application Note 2 to § 3A1.3 instructs that this enhancement simply does not apply to offenses covered by § 2A4.1, including kidnapping. The reason is that restraint of a victim is an element of the offense and is already accounted for in the base offense level. We agree with Thomas that this was an error, but we find no plain error requiring a remand.[3]

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[3] If this issue had been raised with the district court, there might well have been grounds for a departure or a variance on this issue based on the use of the zip-ties to restrain the man who was in the house during the kidnapping of Blackwell's younger brother and sister. The court might reasonably have considered that additional restraint of a bystander as beyond the intended scope of Application Note 2. Perhaps that was the probation officer's view. The PSR applied the enhancement because the "victim was physically restrained with zip ties," but the government has not pursued this possibility on appeal.

In *Molina-Martinez*, the Supreme Court addressed plain errors in guideline calculations. The Court made clear that most guideline errors, even if not raised in the district court, will satisfy the criteria for a plain error because there is a reasonable probability of a different outcome. 136 S. Ct. at 1346. The Court there rejected a categorical rule (applied by one circuit) that a guideline error was not plain if the actual sentence imposed was within the correct range. See *id.* at 1345. More recently, in *Rosales-Mireles*, the Court applied the fourth element of the plain-error standard in a way that shows most guideline errors will require a remand. 138 S. Ct. at 1908.

Both *Molina-Martinez* and *Rosales-Mireles* frame their holdings in terms of "most" cases, and both decisions recognize that there may be circumstances where a guideline error will not affect the ultimate sentence. *Molina-Martinez*, 136 S. Ct. at 1346; *Rosales-Mireles*, 138 S. Ct. at 1909–10. In one category of those cases, the sentencing judge makes clear that the defendant's sentence simply does not depend on the resolution of a guideline issue. See, e.g., *United States v. Marks*, 864 F.3d 575, 576 (7th Cir. 2017) ("when an arcane and arbitrary issue arises under the Sentencing Guidelines, the sentencing judge should ask, 'Why should I care?'"); *United States v. Minhas*, 850 F.3d 873, 879–880 (7th Cir. 2017) ("Procedural errors do not warrant remand when we are convinced that returning the case to the district court would result in the same sentence."), citing *United States v. Abbas*, 560 F.3d 660, 667 (7th Cir. 2009).

The government's contention on appeal that the victim-restraint enhancement was available here because it applied to the conspiracy charge is not persuasive. The presentence investigation report used kidnapping as the base offense under § 2A4.1(a).

Second, a guideline error that does not actually affect the final guideline range calculated by the court falls outside the general rule of *Molina-Martinez* and *Rosales-Mireles*. Both opinions are framed in terms of whether the final "range" is correct or not, and not on whether there might be errors that do not affect the final range. See *Molina-Martinez*, 136 S. Ct. at 1345–46, 1348–49; *Rosales-Mireles*, 138 S. Ct. at 1903. In this case, a two-level error in the offense level would not have changed the final recommended guideline range. The range still would have been life in prison. The error on the restraint-of-victim adjustment therefore did not affect Thomas's substantial rights or undermine confidence in the proceedings and their final result. See *United States v. Fletcher*, 763 F.3d 711, 718 (7th Cir. 2014) (error in guideline calculation was harmless; statutory maximum would have governed under both correct and incorrect calculations, so correct guideline range would have been exactly the same); *United States v. Anderson*, 517 F.3d 953, 965–66 (7th Cir. 2008) (guideline error harmless where correct guideline range on remand would be exactly the same as range that district court calculated).

In addition, Judge Young made clear at sentencing that the life sentence he imposed was driven by his overall assessment of the sentencing factors under 18 U.S.C. § 3553(a). He considered Thomas's personal characteristics, noting that Thomas engaged in illegal activity "all his life and admits that. He has no other employment history." The judge noted in particular the terrible nature of the crime, saying, "These young children, I'm sure, were terrified. They had to be ... taken in the middle of the night by strangers, armed, threatening, to a place where they didn't have any idea where they were going or whether they would remain alive." He also noted the importance of protecting the public from Thomas's future

crimes, stating that if he were released, "these young victims will still be alive. And will they have to be constantly looking over their shoulder if the defendant is released?" There is no need to remand for resentencing on a slightly different guideline calculation that would still result in a recommended range of life in prison.

D. *The Alleyne Error on Ages of Victims*

In *Alleyne v. United States*, 570 U.S. 99 (2013), the Supreme Court held that "any fact that increases the mandatory minimum" sentence under a criminal statute is an element of the crime "that must be submitted to the jury." *Id.* at 103. The federal kidnapping statute mandates that if the victim "has not attained the age of eighteen years," the sentence "shall include imprisonment for not less than 20 years" if the offender is over eighteen and not a close relative or person with custody rights. 18 U.S.C. § 1201(g)(1). To apply the mandatory minimum, therefore, the defendant must admit or the jury must find beyond a reasonable doubt that at least one of the victims of the offense was younger than 18.

Thomas argues on appeal that the district court made an *Alleyne* error by not submitting the age issue to the jury. He is correct, but his counsel did not object to the verdict form or otherwise raise this issue in the district court. Because Thomas forfeited this argument, we will reverse the district court only if, again, he can establish plain error. See *United States v. Cotton*, 535 U.S. 625, 631 (2002); *United States v. Long*, 748 F.3d 322, 330 (7th Cir. 2014) (plain error review for forfeited *Alleyne* error); see also Fed. R. Crim. P. 52(b).

To succeed on plain error review, again, Thomas must show (1) an error that he has not intentionally waived; (2) that

the error was "plain—that is to say, clear or obvious;" (3) that the error affected his substantial rights; and (4) that the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Molina-Martinez*, 136 S. Ct. at 1343; *Olano*, 507 U.S. at 733–34, 736. In this case, the *Alleyne* error was not waived, and it was plain. Counsel on both sides just missed it at trial and sentencing. But this error also fails to satisfy the third and fourth elements of the plain-error standard. We are confident the error did not affect Thomas's substantial rights and did not undermine the fairness, integrity, or public reputation of the judicial proceedings. See *Olano*, 507 U.S. at 737 (error did not affect substantial rights because it was not prejudicial).

The only place the ages of the kidnapping victims affected the guideline range was in the two-level enhancement for vulnerable victims, which was not erroneous and did not affect the ultimate sentence. And in the face of the off-the-charts guideline recommendation for life sentence and the district judge's explanation at sentencing, we are confident that the 20-year mandatory minimum sentence was so far below the guideline recommendation of life and the actual sentence of life that it had no effect on the sentence.

In addition, *Alleyne* and *Apprendi* errors do not amount to plain error where the evidence on the issue at trial was "'overwhelming' and 'essentially uncontroverted.'" *Cotton*, 535 U.S. at 633, quoting *Johnson v. United States*, 520 U.S. 461, 470 (1997); *Long*, 748 F.3d at 329; *United States v. Kirklin*, 727 F.3d 711, 718 (7th Cir. 2013). In this case, the government presented overwhelming and uncontroverted evidence that the kidnapping victims were minors. Blackwell's brother and sister both testified at trial. During their testimony, her brother and sister

gave their ages, which were 17 and 15 on the day of testimony. Not surprisingly, the defense made no effort to contradict or undermine this testimony. No other witness gave contradictory testimony about their ages. The evidence at trial would have compelled the finding that the victims were minors, so the *Alleyne* error was not a "plain error" requiring a remand. See *Long*, 748 F.3d at 330–32 (*Alleyne* errors did not satisfy plain-error standard where there was "no real possibility" that a jury would have failed to make required findings).

The judgment of the district court is

AFFIRMED.

APPENDIX B

AO 245B(Rev. 02/16) Judgment in a Criminal Case

UNITED STATES DISTRICT COURT

Southern District of Indiana

UNITED STATES OF AMERICA

v.

JOHN THOMAS,
A/K/A "JAY"

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:15CR00074-001
USM Number: 50842-039

Kenneth L. Riggins
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s)_ which was accepted by the court.

☒ was found guilty on count(s) 1, 2, and 3 after a plea of not guilty

The defendant is adjudicated guilty of these offense(s):

Title & Section	Nature of Offense	Offense Ended	Count
18§§1201(a)(1), (c), and (g)	Conspiracy to Commit Kidnapping	3/3/2015	1
18§§1201(a)(1) and (g)	Kidnapping	3/3/2015	2
18§§1201(a)(1) and (g)	Kidnapping	3/3/2015	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

12/15/2016
Date of Imposition of Sentence:

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

12/30/2016
Date

A CERTIFIED TRUE COPY
Laura A. Briggs, Clerk
U.S. District Court
Southern District of Indiana
By Nina M. Dagle
Deputy Clerk

DEFENDANT: John Thomas, a/k/a "Jay"
CASE NUMBER: 1:15CR00074-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Life, each count, to be served concurrently.

☒ The Court makes the following recommendations to the Bureau of Prisons:
Designation to a facility as close as possible to the defendant's family in Detroit, Michigan, and treatment for his medical conditions.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant was delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

BY: _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: John Thomas, a/k/a "Jay"
CASE NUMBER: 1:15CR00074-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years, each count, to be served concurrently.**

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16913, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the conditions listed below.

CONDITIONS OF SUPERVISION

1. You shall report to the probation office in the district to which you are released within 72 hours of release from the custody of the Bureau of Prisons.

2. You shall report to the probation officer in a manner and frequency directed by the court or probation officer.

3. You shall permit a probation officer to visit you at a reasonable time at home or another place where the officer may legitimately enter by right or consent, and shall permit confiscation of any contraband observed in plain view of the probation officer.

4. You shall not knowingly leave the judicial district without the permission of the court or probation officer.

5. You shall answer truthfully the inquiries by the probation officer, subject to your 5th Amendment privilege.

6. You shall not meet, communicate, or otherwise interact with a person you know to be engaged, or planning to be engaged, in criminal activity. You shall report any contact with persons you know to be convicted felons to your probation officer within 72 hours of the contact.

7. You shall reside at a location approved by the probation officer and shall notify the probation officer at least 72 hours prior to any planned change in place or circumstances of residence or employment (including, but not limited to, changes in residence occupants, job positions, job responsibilities). When prior notification is not possible, you shall notify the probation officer within 72 hours of the change.

8. You shall not own, possess, or have access to a firearm, ammunition, destructive device or dangerous weapon.

9. You shall notify the probation officer within 72 hours of being arrested, charged, or questioned by a law enforcement officer.

10. You shall maintain lawful full time employment, unless excused by the probation officer for schooling, vocational training, or other reasons that prevent lawful employment.

11. You shall make a good faith effort to follow instructions of the probation officer necessary to ensure compliance with the conditions of supervision.

12. You shall not use or possess any controlled substances prohibited by applicable state or federal law, unless authorized to do so by a valid prescription from a licensed medical practitioner. You shall follow the prescription instructions regarding frequency and dosage.

13. You shall submit to substance abuse testing to determine if you have used a prohibited substance or to determine compliance with substance abuse treatment. Testing may include no more than 8 drug tests per month. You shall not attempt to obstruct or tamper with the testing methods.

14. You shall provide the probation officer access to any requested financial information and shall authorize the release of that information to the U.S. Attorney's Office for use in connection with the collection of any outstanding fines and/or restitution.

15. You shall submit to the search by the probation officer of your person, vehicle, office/business, residence, and property, including any computer systems and hardware or software systems, electronic devices, telephones, and Internet-enabled devices, including the data contained in any such items, whenever the probation officer has a reasonable suspicion that a violation of a condition of supervision or other unlawful conduct may have occurred or be underway involving you and that the area(s) to be searched may contain evidence of such violation or conduct. Other law enforcement may assist as necessary. You shall submit to the seizure of contraband found by the probation officer. You shall warn other occupants these locations may be subject to searches.

16. You shall pay the costs associated with the following imposed conditions of supervised release, to the extent you are financially able to pay: substance abuse testing. The probation officer shall determine your ability to pay and any schedule of payment.

I understand that I and/or the probation officer may petition the Court to modify these conditions, and the final decision to modify these terms lies with the Court. If I believe these conditions are being enforced unreasonably, I may petition the Court for relief or clarification; however, I must comply with the directions of my probation officer unless or until the Court directs otherwise. Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the condition of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed)

_____ _____
Defendant Date

_____ _____
U.S. Probation Officer/Designated Witness Date

DEFENDANT: John Thomas, a/k/a "Jay"
CASE NUMBER: 1:15CR00074-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties in accordance with the schedule of payments set forth in this judgment.

	Assessment	JVTA Assessment[1]	Fine	Restitution
TOTALS	$300.00		$5,000.00	

☐ The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss[2]	Restitution Ordered	Priority or Percentage
Totals			

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☒ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

[1] Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

[2]Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: John Thomas, a/k/a "Jay"
CASE NUMBER: 1:15CR00074-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due
☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☐ F or ☐ G below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ If this case involves other defendants, each may be held jointly and severally liable for payment of all or part of the restitution ordered herein and the Court may order such payment in the future. The victims' recovery is limited to the amount of loss, and the defendant's liability for restitution ceases if and when the victims receive full restitution.

G ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s): _____

☐ The defendant shall forfeit the defendant's interest in the following property to the United States: