No. _____

In the
Supreme Court of the United States

DAVID JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Federal Rule of Evidence 1006 prohibits parties from submitting into evidence "summary" exhibits that are argumentative or pedagogical. The Sixth Circuit, however, allows parties to submit argumentative, interpretive "summaries" that do not comply with Rule 1006 under Rule 611(a) instead, which allows a court to "exercise reasonable control over the mode and order of examining witnesses and presenting evidence." The Sixth Circuit's approach allows parties to use Rule 611(a) to end-run the limitations imposed by Rule 1006, permitting interpretive, pedagogical presentations—containing expert annotations, argumentative labels, and visual depictions designed to translate data into a theory of guilt—to be admitted into evidence and taken to the jury room.

The circuits are split on whether this is permitted. Several circuits—the First, Second, Fourth, and Tenth—agree with the Sixth Circuit. The Fifth, Seventh, Eighth, and Ninth Circuits, on the other hand, do not allow these types of materials to be admitted into evidence and reviewed by the jury during deliberations.

The question presented is:

Whether an expert's interpretive, pedagogical exhibit may be admitted into evidence under Rule 611(a) and reviewed by the jury during deliberations even when it does not comply with Federal Rule of Evidence 1006 and would otherwise be excluded as a demonstrative or illustrative aid that may not be provided to the jury.

Parties to the Proceedings

The parties to the proceedings in the court whose judgment is sought to be reviewed are:

Plaintiff-Appellee: United States of America

Defendant-Appellant: David Johnson

Related Proceedings

The proceedings directly related to this petition are as follows:

1. Sixth Circuit:

United States v. David Johnson, No. 24-3885.

2. U.S. District Court for the Northern District of Ohio:

United States v. David Johnson, No. 1:20-cr-00682-1 (N.D. Ohio).

United States v. David Johnson, No. 1:15-cr-277 (N.D. Ohio).

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Opinions Below

The Sixth Circuit Court of Appeals' opinion affirming Johnson's conviction is unpublished but is attached at Pet. App. 1a-31a.

The district court's criminal judgment is unpublished but is attached at Pet. App. 32a-39a.

Jurisdiction

The Sixth Circuit Court of Appeals' decision and opinion was entered on January 2, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

Federal Rule of Evidence 611(a) provides:

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

Federal Rule of Evidence 1006 provides:

(a) Summaries of Voluminous Materials Admissible as Evidence. The court may admit as evidence a summary, chart, or calculation offered to prove the content of voluminous admissible writings, recordings, or photographs that cannot be conveniently examined in court, whether or not they have been introduced into evidence.

(b) Procedures. The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

(c) Illustrative Aids Not Covered. A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 107.

Introduction

This case presents an important question about the boundaries between (1) evidence that may be admitted for the jury's consideration during deliberations and (2) pedagogical materials that should remain outside the jury room. The Sixth Circuit has developed a doctrine of "secondary-evidence summaries" that permits the admission into evidence under Federal Rule of Evidence 611(a) of materials that do not comply with Federal Rule of Evidence 1006 but are "more than mere pedagogical devices." Pet. App. 5a-6a. Under this doctrine, interpretive, graphical presentations may be admitted into evidence and taken to the jury room, even though they are argumentative and fall outside Rule 1006's strictures.

Several circuits—the First, Second, Fourth, and Tenth—take a similar approach. Several other circuits, by contrast—the Fifth, Seventh, Eighth, and Ninth—do not permit these types of materials to be admitted into evidence and reviewed by the jury during deliberations.

This case illustrates the danger of the Sixth Circuit's approach. Petitioner David Johnson was tried twice for the same armed robbery charges. At his first trial, the district court excluded FBI Special Agent Jacob Kunkle's PowerPoint presentation, which graphically depicted the government's interpretation of cell phone and Google location data, on the ground that it was the court's "general policy . . . [not] to admit expert's reports." Pet. App. 12a. During deliberations, the jury specifically requested Agent Kunkle's PowerPoint. Pet. App. 13a. Because the document had not been admitted into evidence, the district court denied the request. The jury subsequently deadlocked.

At Johnson's second trial, the district court changed course and admitted portions of the same PowerPoint presentation as a "secondary-evidence summary" under Federal Rule of Evidence 611(a). Pet. App. 20a. The PowerPoint went to the jury room during deliberations, and Johnson was convicted on all counts.

This Court should grant certiorari to clarify the boundaries between admissible Rule 1006 summaries and illustrative aids that may be used under Rule 611(a) but may not be taken to the jury room. The question presented is of substantial importance to the fair administration of criminal trials, and the stark facts of this case—where the first jury deadlocked without the PowerPoint and the second jury convicted with it—illustrate the consequences of the Sixth Circuit's approach.

Statement of the Case

A. Johnson is indicted.

After several armed robberies occurred in the Cleveland, Ohio area in late 2019 and early 2020, officers zeroed in on David Johnson as their prime suspect. Johnson was arrested on January 29, 2020 and subsequently was indicted on October 22, 2020. Pet. App. 4a.

Johnson's indictment charged him with four counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a); four counts of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii); and one count of possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Pet. App.4a-5a.

One of the robberies allegedly involving Johnson was prosecuted in state court rather than in federal court. On December 6, 2021, Johnson was convicted in

state court on various charges related to the robbery offense, and he was sentenced to a minimum of 47 years in state prison. Pet. App. 5a.

B. The First Trial: the district court excludes Agent Kunkle's PowerPoint, and the jury deadlocks after requesting it.

Johnson's federal case proceeded to trial in September 2023. At trial, the government introduced the expert testimony of FBI Special Agent Jacob Kunkle. Agent Kunkle testified about his analysis of Johnson's telephone records and Google location data and the implications of that data with respect to Johnson's location at the time of the robberies. Pet. App. 12a.

As a visual guide during his testimony, Agent Kunkle referred to a PowerPoint presentation that he had prepared. The PowerPoint visually depicted Agent Kunkle's interpretation of the data by plotting various coordinates on a map, showing the alleged location of Johnson's phone at various times relative to the robbery locations. Pet. App. 40a-51a. The presentation included interpretive annotations, including the location and labeling of the robberies, a labeled transaction by a stolen credit card, directional arrows indicating the chronological direction of telephone record data, and a Google Maps backdrop upon which all of the visualized location data was superimposed. Pet. App. 40a-51a.

The government attempted to admit the PowerPoint presentation into evidence. Pet. App. 12a. The district court refused, reasoning that its general policy was not to admit experts' reports. Pet. App. 12a. The court recognized that admitting a "written summary" of an expert opinion would lend more credence to the expert's testimony than to that of other witnesses. Pet. C.A. Br. 5.

During the jury's deliberations, the jury sent a note to the court asking for Agent Kunkle's PowerPoint. Pet. App. 13a. Because the presentation had not been admitted into evidence, the district court instructed the jury that it could not be provided and that the jury was required to rely on its recollection of Agent Kunkle's testimony. Pet. App. 13a.

The jury ultimately could not reach a verdict. The district court declared a mistrial. Pet. App. 13a.

C. The Second Trial: Portions of Agent Kunkle's report are admitted into evidence, and Johnson is convicted.

Before Johnson's second trial, the government moved in limine to admit pages 9 through 20 of Agent Kunkle's PowerPoint report as Exhibit 64A under Federal Rule of Evidence 1006. Pet. App. 13a. Johnson opposed the motion, pointing out that the report was not a summary of records but was instead a visual depiction of the government's interpretation of those records. The district court granted the government's motion to admit Exhibit 64. Pet. App. 13a.

At trial, the government offered various witnesses in support of its case, including several of the robbery victims, who testified that they were robbed by someone whose identity was hidden by a mask.

Agent Kunkle also testified that cell tower and Google location data placed Johnson's phone near the scene of several of the robberies. The majority of Agent Kunkle's testimony consisted of his page-by-page explanation of Exhibit 64 for the jury. Over Johnson's objection, the district court formally admitted pages 9 through 20 of Agent Kunkle's PowerPoint report as Exhibit 64A. Pet. App. 13a.

At the conclusion of the trial, the jury convicted Johnson on all nine counts in the indictment. Pet. App. 13a. The district court subsequently imposed a 446-month sentence, as well as a consecutive six-month term on Johnson for contempt. Pet. App. 14a.

D. The Sixth Circuit affirms Johnson's conviction and sentence.

Johnson timely appealed to the Sixth Circuit, arguing in relevant part that the district court erred in admitting portions of Agent Kunkle's PowerPoint presentation into evidence. He contended that the PowerPoint was not a true summary under Rule 1006 but rather an illustrative aid that should not have been admitted into evidence for the jury to review during deliberations. Pet. App. 17a.

The Sixth Circuit affirmed. The court acknowledged that Rule 1006 permits admission of summaries of voluminous evidence and that such evidence "is subject to several conditions." Pet. App. 18a. But the court relied on its precedents in *United States v. Bray*, 139 F.3d 1104 (6th Cir. 1998), and *United States v. Kerley*, 784 F.3d 327 (6th Cir. 2015), which "permit the admission of secondary-evidence summaries into evidence without the need to invoke Rule 1006." Pet. App. 18a.

The court explained that secondary-evidence summaries "are not prepared entirely in compliance with Rule 1006 and yet are more than mere pedagogical devices designed to simplify and clarify other evidence in the case." Pet. App. 18a. Unlike summaries admitted under Rule 1006, secondary-evidence summaries "are always admitted in addition to the evidence they summarize" because, in the trial court's judgment, "such summaries so accurately and reliably

summarize complex or difficult evidence that is received in the case as to materially assist the jurors in better understanding the evidence." Pet. App. 18a.

The Sixth Circuit acknowledged that Agent Kunkle's presentation "contains some pedagogical information that is outside the scope of the underlying telephone and Google account records," including: "(1) the location and labeling of the robberies; (2) the location and labeling of a transaction by a credit card that was stolen in a prior robbery on slide 12; (3) an arrow detailing the chronological direction of telephone record data in relation to a map on slide 13; and (4) the Google Maps backdrop against which all of the visualized location data was superimposed." Pet. App. 18a-19a. Nevertheless, the court held that "[s]econdary-evidence summaries . . . may be somewhat pedagogical in nature inasmuch as the district court still determines that the summary 'so accurately and reliably summarize[s] complex or difficult evidence that is received in the case as to materially assist the jurors in better understanding the evidence.'" Pet. App. 19a.

The Sixth Circuit concluded that "the court did not abuse its discretion in admitting the presentation as a secondary-evidence summary" because the underlying telephone and Google Account records were "accurately and reliably represent[ed]" on the presentation and the jury was instructed that the slides "were not independent evidence." Pet. App. 19a. Although the secondary-evidence rule announced in *Bray* relied on Rule 611(a), the panel did not explain how the language of Rule 611(a) permitted the admission of argumentative exhibits that did not comply with Rule 1006.

This petition timely follows.

Reasons for Granting the Petition

I. The Sixth Circuit's analysis conflicts with other circuits.

The Sixth Circuit's approach allows argumentative summaries prepared under Rule 611(a) to be admitted into evidence and given to the jury even though they do not qualify for admission under Rule 1006: "[I]n appropriate circumstances not only may such pedagogical-device summaries be used as illustrative aids in the presentation of the evidence, but they may also be admitted into evidence even though not within the specific scope of Rule 1006." *Bray*, 139 F.3d at 1111–12.

The First, Second, Fourth, and Tenth Circuits appear to agree with the Sixth Circuit on this point. *See United States v. Simmons*, 11 F.4th 239, 262 n.12 (4th Cir. 2021); *United States v. McElroy*, 587 F.3d 73, 81–82 (1st Cir. 2009); *Conford v. United States*, 336 F.2d 285, 288 (10th Cir. 1964). Like the Sixth Circuit, those circuits allow the admission of Rule 611(a) summaries into evidence even though they "typically are used as pedagogical devices to clarify and simplify complex testimony or other information and evidence or to assist counsel in the presentation of argument to the court or jury." *McElroy*, 587 F.3d at 81–82. The Second Circuit takes a similar approach, "allow[ing] the jury to have the charts in the jury room during its deliberations, so long as the judge properly instructs the jury that it is not to consider the charts as evidence." *United States v. Casamento*, 887 F.2d 1141, 1151 (2d Cir. 1989) (internal citation omitted).

The Fifth, Seventh, Eighth, and Ninth Circuits, however, have taken the opposite approach. The Fifth Circuit, for example, ruled that a Rule 611(a) summary

is a "pedagogical aid" that "summarize[s] evidence that ha[s] already been presented" and "should not [be] admitted as an exhibit or taken to the jury room." *United States v. Buck*, 324 F.3d 786, 790–91 (5th Cir. 2003); *see also United States v. Harms*, 442 F.3d 367, 375–76 (5th Cir. 2006) (same).

The Eighth Circuit similarly rejects an analysis that would allow the government to end-run Rule 1006 under Rule 611(a): "The government cannot sidestep Rule 1006 merely by smuggling an argumentative summary of voluminous records into a hybrid exhibit and seeking admission of the exhibit under the banner of Rule 611(a). Accordingly, although the district court was within its discretion to allow Agent Fields to use Exhibit 1000 during his testimony, the court erred by admitting the exhibit into evidence and allowing the jury to use the exhibit during deliberations." *United States v. Hawkins*, 796 F.3d 843, 866 (8th Cir. 2015).

The Ninth Circuit, likewise, has held that "[c]harts and summaries as evidence are governed by Federal Rule of Evidence 1006" but, "[i]n contrast, charts or summaries of testimony or documents already admitted into evidence are merely pedagogical devices, and are not evidence themselves." *United States v. Wood*, 943 F.2d 1048, 1053 (9th Cir. 1991). Those sorts of pedagogical devices "should be used only as a testimonial aid, and should not be admitted into evidence or otherwise be used by the jury during deliberations." *Id.*

The Seventh Circuit has followed *Wood*, holding that pedagogical devices are demonstrative exhibits and "should not go to the jury during deliberation, at least not without consent of all parties. We would not allow a lawyer to accompany

the jury into the deliberation room to help the jurors best view and understand the evidence in the light most favorable to her client. The same goes for objects or documents used only as demonstrative exhibits during trial." *Baugh ex rel. Baugh v. Cuprum S.A. de C.V.*, 730 F.3d 701, 708 (7th Cir. 2013); *see also United States v. White*, 737 F.3d 1121, 1136 (7th Cir. 2013) (same).

The Third and Tenth Circuits do not appear to have expressly weighed in on the issue but have issued decisions leaning in the same direction taken by the latter group of circuits. *See United States v. Wadley*, No. 19-2931, 2022 WL 1011693, at *4 (3d Cir. Apr. 5, 2022) (approving use of Rule 611(a) charts at trial where they were not admitted into evidence); *United States v. Irvin*, 682 F.3d 1254, 1262–63 (10th Cir. 2012) (summary exhibit not admissible under Rule 611(a) where the underlying evidence was inadmissible hearsay).

The split between the circuits on this issue is particularly problematic because the Federal Rules of Evidence are meant to establish uniform standards for the admission of evidence in federal courts nationwide. *See* Fed. R. Evid. 102 (rules "should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination"). The divergence between the circuits on this issue undermines this goal.

II. The Sixth Circuit's approach creates a dangerous end-run around Rule 1006.

As evidenced in this case, the Sixth Circuit's approach allows a party to end-run the limitations of Rule 1006 and admit argumentative summaries under the

guise of Rule 611(a). Rule 611(a)'s remit—which allows the court to "exercise reasonable control over the mode and order of examining witnesses and presenting evidence"—should not be permitted to swallow Rule 1006's limitations on the admission of summary exhibits. *Hawkins*, 796 F.3d at 866.

A. Rule 1006 Establishes Clear Requirements for Admitting Summaries of Voluminous Evidence

Federal Rule of Evidence 1006 permits the admission of summaries of voluminous evidence under carefully circumscribed conditions. The Rule provides that "[t]he proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." Fed. R. Evid. 1006(a). But a summary admitted under Rule 1006 "must be accurate and nonprejudicial." *Gomez v. Great Lakes Steel Div., Nat'l Steel Corp.*, 803 F.2d 250, 257 (6th Cir. 1986). The information on the summary "may not be 'embellished by or annotated with the conclusions of or inferences drawn by the proponent, whether in the form of labels, captions, highlighting techniques, or otherwise.'" *Bray*, 139 F.3d at 1110.

"Courts must be cautious with Rule 1006 charts." *United States v. Spalding*, 894 F.3d 173, 185–86 (5th Cir. 2018). "[B]ecause summaries are elevated under Rule 1006 to the position of evidence, . . . care must be taken to omit argumentative matter in their preparation lest the jury believe that such matter is itself evidence of the assertion it makes." *Id.* (quotation marks omitted).

This prohibition on embellishment and annotation is critical because, "[o]nce a Rule 1006 summary is admitted, it may go to the jury room, like any other

exhibit." *Bray*, 139 F.3d at 1110. "[A] summary containing elements of argumentation could very well be the functional equivalent of a mini-summation by the [document's] proponent every time the jurors look at it during their deliberations, particularly when the jurors cannot also review the underlying documents." *Id.* No court would "allow a lawyer to accompany the jury into the deliberation room to help the jurors best view and understand the evidence in the light most favorable to her client." *Baugh*, 730 F.3d at 708. The same goes for summaries that are argumentative, rather than dispassionate.

Rule 1006 requires that summaries prove "the content of" the underlying voluminous writings—not the proponent's interpretation of that content. A document that translates raw data into visual form, adds interpretive labels or annotations, or presents the proponent's theory is not an objective "summary" of the underlying data; it is a pedagogical tool designed to help the jury better understand the proponent's argument. That is not evidence; it is argument.

B. The Sixth Circuit's Approach Circumvents Rule 1006's Safeguards.

The Sixth Circuit's approach end-runs the safeguards embedded in Rule 1006. As the panel opinion acknowledged, its approach to Rule 611(a) allows materials that are "somewhat pedagogical in nature" to be admitted into evidence and assessed by the jury during deliberations. (Pet. App. 7a.) But pedagogical materials—materials designed to help the jury understand a party's argument or theory—are precisely what should *not* go to the jury room. Pedagogical materials translate the proponent's interpretation of the evidence into a visual format that the

jury will review repeatedly during deliberations, giving the proponent an unfair advantage. It gives "the government an additional opportunity to present its case in a tidy package" that causes an "imprimatur problem." *United States v. Flores-De-Jesus*, 569 F.3d 8, 18–19 (1st Cir. 2009). Allowing those materials to go with the jury into deliberations permits the jury to rest their verdict on the parties' arguments instead of the admissible evidence. *Baugh*, 730 F.3d at 708.

Courts are not ignorant of the prejudice caused by the introduction of these arguments as evidence. But several of them have approved the practice anyway "so long as the judge properly instructs the jury that it is not to consider the charts as evidence." *Casamento*, 887 F.2d at 1151. Those courts have required that trial courts "ensure the jury is not relying on that chart as 'independent' evidence but rather is taking a close look at the evidence upon which that chart is based." *United States v. Johnson*, 54 F.3d 1150, 1159 (4th Cir. 1995).

That safeguard is illusory when, as the government acknowledged here, the underlying data is "unintelligible" to lay jurors. Gov't C.A. Br. 21. If the underlying data is unintelligible, then the jury has no practical ability to test the accuracy of the government's interpretive summary against that data. The jury is forced to rely on the interpretive summary itself—which is precisely what should not happen when a summary is admitted into evidence under any rule except for Rule 1006. There is a categorical distinction between admissible summaries of evidence and inadmissible materials designed to help the jury understand a party's argument. The Sixth Circuit's hybrid approach impermissibly blurs the line between them.

III. This case is an excellent vehicle for resolving the issues presented.

This case presents an ideal vehicle to address the question presented for several reasons.

First, the question is squarely presented and was thoroughly litigated below. Johnson objected to the admission of Agent Kunkle's PowerPoint presentation at trial. He raised the issue on appeal, arguing that the PowerPoint was an illustrative aid that should not have been admitted into evidence. The Sixth Circuit squarely addressed the issue and affirmed under its secondary-evidence summary doctrine. Pet. App. 19a-20a.

Second, the factual record demonstrates the practical impact of the secondary-evidence summary doctrine with unusual clarity. The same PowerPoint presentation was at issue in two trials of the same defendant. In the first trial, the district court excluded the presentation and the jury deadlocked—after specifically requesting the PowerPoint during deliberations. In the second trial, the district court admitted the presentation and the jury convicted. Pet. App. 13a. Given the salience that the jury in the first trial placed upon the absence of the presentation, it is difficult to contend that its admission in the second trial made no difference to the outcome. The admission of the PowerPoint in the second trial meant that the second jury had what the first jury did not: namely, "the functional equivalent of a mini-summation by the [document's] proponent every time the jurors look at it during their deliberations." *Bray*, 139 F.3d at 1110.

Third, the question presented has broad significance beyond this case. Cell phone location data is now ubiquitous in criminal prosecutions. Law enforcement

agencies routinely obtain cell tower records and GPS data, which often comprise thousands of pages of technical information. The government frequently seeks to introduce expert presentations that translate this data into visual form, such as maps showing the defendant's alleged location at relevant times.

If the Sixth Circuit's approach is not upended, prosecutors in like-minded circuits will have a powerful tool to introduce interpretive, argumentative presentations into evidence in virtually every case involving cell phone location data. If the Sixth Circuit's rule carries the day, then it is hard to see why this sort of report would not be admissible in any case in which a defendant carries a cell phone. Far from being "unusual" for courts to admit so-called summaries which are not actually compliant with Rule 1006, it would be routine. *Bray*, 139 F.3d at 1112.

Conclusion

The Court should grant the petition.

Respectfully submitted,

Dated: April 6, 2026

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Re: Case Nos. 24-3885/24-3886, *USA v. David Johnson*
Originating Case No. 1:20-cr-00682-1

Dear Counsel,

The Court issued the enclosed opinion today in these cases.

Enclosed are the court's unpublished opinion and judgment, entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Mr. Christian Capece

Enclosures

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION
File Name: 26a0001n.06

Nos. 24-3885/3886

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 02, 2026
KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAVID JOHNSON, Defendant-Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO OPINION

Before: CLAY, KETHLEDGE, and LARSEN, Circuit Judges.

CLAY, Circuit Judge. Defendant David Johnson was sentenced to 446 months in prison after he was found guilty of four counts of robbery affecting commerce, four counts of using, carrying, and brandishing a firearm during and in relation to a crime of violence, and one count of felon in possession of a firearm, in violation of 18 U.S.C. § 1951, 18 U.S.C. § 924(c), and 18 U.S.C. §§ 922(g)(1) and 924(a)(2) respectively. Defendant was also sentenced to 24 months' imprisonment for violating of the terms of his supervised release and a cumulative 24 months' imprisonment for various summary criminal contempt findings by the district court. Defendant now appeals the admission of the government expert's PowerPoint presentation summarizing telephone record and Google account geolocation data at his second trial, the district court's summary criminal contempt findings against him, and the constitutionality of § 924(c)(1)(D)(ii)'s mandate that the district court run his § 924(c) convictions consecutive to his separate state sentence.

For the reasons set forth below, we **AFFIRM** the judgment of the district court and the October 2, 2024 criminal contempt order and **DISMISS** Defendant's appeal of the district court's August 29, 2022 and April 11, 2023 criminal contempt orders.

I. BACKGROUND

A. Factual Background

Four different Ohio gas stations or small businesses were robbed between late 2019 and early 2020. The first robbery occurred on November 27, 2019, when an individual entered a Sunoco gas station in Euclid, Ohio and pointed a stainless semi-automatic pistol at the clerk. The individual demanded money from the clerk and, after receiving money from the clerk, quickly fled the scene on foot.

The next robbery occurred on January 18, 2020 at a BP gas station in Parkman, Ohio. An employee was taking out the garbage when an individual grabbed the employee by his hoodie and dragged him into the gas station while pointing a firearm at him. The individual ordered the employee, a customer, and another employee behind the counter of the gas station and demanded money from the cash register while still pointing the firearm at them. Once the individual received the money, he ordered the three to lie on the ground, shoved the customer to the ground, and departed the gas station.

That same day, a third robbery occurred at a Dollar General store in Chardon Township, Ohio. An individual wore a mask and gloves, and brandished a silver-colored handgun at a clerk. The individual directed the clerk to the cash register and safe to take money from them. Then, the individual left the scene.

Finally, a fourth robbery occurred on January 25, 2020 at a Gas Mart in Euclid, Ohio. individual entered through the front door, pointed a firearm at two employees, and demanded

money from them. The individual grabbed one of the employees by the back of his shirt and forced him at gunpoint to the store's cash register. After forcing the employee to hand over the money in the register, the individual also forced the employee to give him the money in the store's safe. Thereafter, the individual fled the store.

Following a cross federal and state agency investigation, Defendant David Johnson was identified as the suspected robber of all four armed robberies. Federal law enforcement was familiar with Defendant because he was on supervised release for a separate conviction in the Northern District of Ohio. Local law enforcement eventually found and arrested Defendant at his residence. During the arrest, officers seized two cell phones. After searching his residence, officers found several articles of clothing and a firearm that matched those identified in the surveillance camera footage that captured the robberies. Law enforcement officers also searched Defendant's public Instagram account. From this social media review, officers determined Defendant matched the physical description of the suspects in each robbery, as determined from witness testimony and surveillance camera footage. The officers also found Instagram posts of Defendant wearing clothing that matched that worn by the suspects.

Federal law enforcement officers also obtained search warrants for Defendant's associated Google account. The Global Positioning System information of Defendant's phone, which was logged into that Google account, tied his phone to approximately the time and place of the robberies.

B. Procedural History

On October 22, 2020, a federal grand jury returned an indictment against Defendant. The indictment charged Defendant with four counts of robbery affecting commerce, four counts of using, carrying, and brandishing a firearm during and in relation to a crime of violence, and one

count of felon in possession of a firearm, in violation of 18 U.S.C. § 1951, 18 U.S.C. § 924(c), and 18 U.S.C. §§ 922(g)(1) and 924(a)(2) respectively.

Defendant maintained his innocence and elected to proceed to trial. His trial date, however, was beset with delay. The district court faced a backlog of scheduled trials following the end of COVID-19 related restrictions on in-person activities. Consequently, the court estimated a trial date "sometime in 2022." May 11, 2021 Pretrial Conference Tr., R. 160, PageID #3041.

Defendant also faced separate state charges for unrelated robberies. On September 9, 2021, the district court subsequently postponed the setting of Defendant's trial date until the resolution of Defendant's state trial. The district court also noted that "[Defendant's] trial isn't going to happen for a long time" due to the complexities of Defendant's case and the glut of trials the court had scheduled for the remainder of 2021. Sept. 9, 2021 Pretrial Conference Tr., R. 130, PageID #2714. As a result, the district court offered to reassign Defendant's case to a different judge to speed up his trial date. Defendant declined these offers. Defendant's state trial did not resolve until December 6, 2021, when he received a 47 year sentence for his unrelated state robbery charges.

1. Defendant's Behavior at Pretrial Proceedings

The district court held a virtual pretrial conference on May 5, 2022 to set Defendant's trial date. The conference did not go smoothly. Defendant, apparently incredulous at the court's delay in setting his trial date and the prospect of serving time in addition to his 47 year state sentence, repeatedly and rudely interrupted the district court judge as the judge attempted to discuss Defendant's state sentence with the government. The district court admonished Defendant for his outbursts and threatened to add "six months for contempt" if Defendant "mouth[ed] off again and interrupt[ed]" the court. May 5, 2022 Pretrial Conference Tr., R. 29, PageID #203. That warning

was effective for about a minute and thirty seconds, after which Defendant again interrupted the district court to complain about a partially conveyed plea agreement and his due process rights. A tit-for-tat exchange between the district court and Defendant followed:

> THE COURT: Mr. Johnson, any more -- any more outbursts from you, it's six months' contempt. I don't –
>
> THE DEFENDANT: You can give me 160, I don't care.
>
> THE COURT: Okay. You got six months, okay?
>
> THE DEFENDANT: All right.
>
> THE COURT: You've got six months, it's tacked on.
>
> THE DEFENDANT: Okay, sir. For me asking about what my lawyer supposed to do, I got six months? All right. Add another six months.
>
> THE COURT: Okay. You got it, that's twelve.
>
> THE DEFENDANT: Or add another six months, 18 months.
>
> THE COURT: Okay. You got it, 18 months.
>
> THE DEFENDANT: What's next?
>
> THE COURT: It's up to you what's next. You've got another 18.
>
> THE DEFENDANT: Is that how the Government go? You just giving me six months asking about, inquiring about things. That's you, sir. I'm going to be okay.
>
> THE COURT: No, you asked. You asked.
>
> THE DEFENDANT: I'm going to be okay, man.
>
> THE COURT: All right. It's 18 months. Okay. Now, what -- what was the plea offer, Ms. Kane? We'll put it on the record now.

Id. at PageID #204–05.

After the government's attorney elaborated on the status of plea negotiations between the government and Defendant, Defendant again interrupted the district court:

> THE DEFENDANT: I know it already. We did this already. We did all this already, Polster. I'm out here for nothing. Just set the date for the trial and get me on back to my cell.
>
> THE COURT: All right. That's another – that's another six months.
>
> THE DEFENDANT: Thirty-eight years. Man, I'm facing 38 years. We did this already, man.
>
> THE COURT: That's another six months.
>
> THE DEFENDANT: Just set the date and get me back. That's it.
>
> THE COURT: You just got another six months, sir.
>
> THE DEFENDANT: Why we going back and forth, man?
>
> THE COURT: Sir, if you keep going we won't need a trial.
>
> THE DEFENDANT: Just set a date and let me go on about my business.
>
> THE COURT: If you keep going, we won't need a trial. Okay? So you've got another six months for mouthing off. I wasn't speaking to you.
>
> THE DEFENDANT: I'm going to get a trial regardless. I got to have my day in court, man.

Id. at PageID #206–207.

After discussing with the government attorney about the mandatory minimum sentence Defendant faced, the district court attempted to convey to Defendant how a plea agreement could result in some charges being dropped and some part of his sentence running concurrent to his state conviction. This discussion, however, led to a third squall between the district court and Defendant:

> THE COURT: Mr. Johnson, you already have two years of contempt. You want to keep –
>
> THE DEFENDANT: I know but, sir, I'm serving that on your end. I'm questioning about what's going on, so you gave me two years for asking questions about what's going on in my case.
>
> THE COURT: No, you got two years for interrupting me, for preventing me from making a record. And if you keep doing it, I'll keep adding sentences, six months.
>
> THE DEFENDANT: Add it, more and more, sir. Do your thing, sir. Whatever makes you comfortable, so you can sleep at night, do it.
>
> THE COURT: Mr. Schwartz, Mr. Schwartz, am I correct that if you -- if Mr. Johnson authorized you to do so, you would engage in discussions with Ms. Kane and see what specifically you could negotiate, is that right?
>
> THE DEFENDANT: There's no specific deal, man. Why you talking about negotiating?
>
> THE COURT: Mr. Johnson, you want another six months?
>
> THE DEFENDANT: Add it up. Do your thing, sir.
>
> THE COURT: All right.
>
> THE DEFENDANT: Do your thing.
>
> THE COURT: All right. You've got another six months, Mr. Johnson.
>
> THE DEFENDANT: Okay. Add some more. Add some more.
>
> THE COURT: Another six? Okay. Thirty-six. Keep going, sir. I'll keep going as long as you want.
>
> THE DEFENDANT: Keep going.
>
> THE COURT: All right. Forty-two. You think I'm kidding? You're messing with the wrong Judge, sir.
>
> THE DEFENDANT: No, you're messing with the wrong power of attorney.

Id. at PageID #215–17.

By the end of the May 5, 2022 pretrial conference, Defendant racked up 7 six-month contempt sentences for a total of 42 months imprisonment. The court did not, however, memorialize the contempt sentences in a written order following this conference.

On August 29, 2022, the district court held a virtual motion hearing on defense counsel's motion to withdraw. After giving Defendant permission to speak on the matter, the court interjected to question Defendant's assertion that he was not aware of his attorney's representation of him. This led to another back-and-forth exchange between the court and Defendant wherein the court warned Defendant that he could yet again hold him in contempt. After further admonishment to Defendant from the district court and the courtroom deputy, the district court made good on its threat:

> THE COURT: Stop interrupting me. You do it again, it's six months in contempt in prison tacked on, all right?
>
> THE DEFENDANT: Already gave me –
>
> THE COURT: I warned you two times.
>
> THE DEFENDANT: I mean, I'm trying to do this all –
>
> THE COURT: Mr. Johnson, I'm not – you're not speaking any more. I am.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Mr. Schwartz, all right, this is the problem, sir. You have known for -- the record is clear you have known at least -- at least –
>
> THE DEFENDANT: At least –
>
> THE COURT: Mr. Johnson, I wasn't speaking to you. I'm speaking to Mr. Schwartz. One more time and it's six months.
>
> COURTROOM DEPUTY: Your Honor, I can mute his audio if –
>
> THE COURT: No, don't mute him. If he interrupts, he knows it's a six-month prison sentence on top of anything else. Mr. Schwartz, you have known since at least September of 2021 maybe or –

> THE DEFENDANT: No. I'm –
>
> THE COURT: That's six months contempt, Mr. Johnson. You've interrupted me for the fourth time, so that's a six-month contempt sentence.

Mot. Hr'g Tr., R. 28, PageID #182–83.

This time, the district court memorialized its finding of contempt against Defendant in a written order that was entered onto the docket. This order only reflected the court's intent to impose a six month contempt finding on Defendant following the August 29, 2022 hearing.

On September 22, 2022, Defendant moved for a competency evaluation pursuant to 18 U.S.C. § 4241. The district court granted the motion the next day and postponed Defendant's trial date pending the results of the evaluation. The evaluation report was submitted to the district court at some point in February 2023, and the report found Defendant to be competent but "opposition defian[t]." March 2, 2023 Status Conference Tr., R. 151, PageID #2821. The court then set Defendant's trial for September 11, 2023.

The district court held a pretrial conference on April 11, 2023. The court attempted to discuss defense counsel's most recent motion to withdraw, but the discussion resulted in two more contempt findings against Defendant:

> The COURT: . . . Now, it doesn't make sense for you to go to trial with a lawyer where the relationship has broken down. The trial's not for six months. So I'm going to permit Mr. Schwartz to withdraw and his firm to withdraw. Now, you hired -- you never asked –
>
> THE DEFENDANT: Hold on. Time out. Time out.
>
> THE COURT: You never asked me to appoint a lawyer for you.
>
> THE DEFENDANT: Sir, you just admitted it that the firm stay on, now you're saying you're going to do another motion off?
>
> THE COURT: No. I –

> THE DEFENDANT: You made a mistake last time. You made a mistake last time. We had one of these hearings last time, you made a mistake. So now you –
>
> THE COURT: Well, I did, and I also said that if you weren't paying them –
>
> THE DEFENDANT: Who?
>
> THE COURT: If you were not paying your lawyer –
>
> THE DEFENDANT: He got his money, he's not working for me, and it's not the man that my fiancée went to go hire. She'll go on the stand and say she about to be a doctor in July. She can't wait to get on the stand and say she went to go get... (Unclear speech; clarification requested by court reporter.)
>
> THE COURT: Sir.
>
> THE DEFENDANT: I'm just tired of this. This is frustrating. So she going to –
>
> THE COURT: Frustrating for me, and you're going to – (Unreportable/indiscernible crosstalk.)
>
> THE DEFENDANT: She went to hire Joseph Patituce.
>
> THE COURT: Sir, I'm warning you.
>
> THE DEFENDANT: It's okay. (Unreportable/indiscernible crosstalk.)
>
> THE DEFENDANT: Used to work for –
>
> THE COURT: I'm holding you in contempt.
>
> THE DEFENDANT: Yes, sir. Do your thing. Give me a month.
>
> THE COURT: All right. Six months. Another six months, okay? You don't seem to care. It's another six months.
>
> THE DEFENDANT: Because you don't care, sir. It's going to come through your courtroom, not -- I don't mind. I'm going to pay all the money I need to pay after this one. You all can't get –
>
> THE COURT: Do you want me to appoint a lawyer for you?
>
> THE DEFENDANT: I don't want appointed nothing.

April 11, 2023 Pretrial Conference Tr., R. 46, PageID #351–54.

The district court continued to ask Defendant whether he wanted the court to appoint him a lawyer or whether he intended to hire a different lawyer. Defendant refused to answer the court. The district court ordered Defendant to answer his question and threatened to hold him in contempt yet again if he refused. Defendant stayed silent, so the court found him in contempt yet again and appointed Defendant an attorney.

Following the April 11, 2023 pretrial conference, the district court again memorialized its findings of contempt against Defendant in a written order that was entered into the docket. The order explained that it initially imposed a six month contempt penalty against Defendant due to his "disruptive behavior in the courtroom." Contempt of Court Order, R. 39, PageID # 319. Then it issued another six month contempt penalty against Defendant because the court "ordered the defendant to advise the Court on whether or not he plans to retain counsel or proceed *pro se*" and "[t]he defendant refused to answer the Court's question[.]" *Id.* In total, the written order reflected a cumulative 12 month contempt sentence for Defendant's behavior at the April 11, 2023 pretrial conference.

2. Defendant's First Trial Results in a Mistrial

Defendant's case proceeded to trial on September 11, 2023. At trial, the government introduced the expert witness testimony of FBI Special Agent Jacob Kunkle. Agent Kunkle testified as to his analysis of Defendant's telephone record and Google location data and resulting implications with respect to Defendant's location at the time of the robberies. As a visual guide, Agent Kunkle referred to a PowerPoint presentation he prepared while he answered questions about his analysis on direct examination. The government attempted to admit the presentation as evidence, but the district court refused based on its "general policy . . . to [not] admit expert's reports." Trial Tr., R. 73, PageID #1094.

During deliberations, the jury requested that Agent Kunkle's PowerPoint presentation be provided to them. The district court told the jury that the presentation was not admitted as evidence, thus the jury was instructed to rely on their recollection of Agent Kunkle's testimony. The jury ultimately could not reach a verdict, and the district court subsequently declared a mistrial. Consequently, the district court set a new trial date for January 29, 2024.

3. Defendant's Convictions at His Second Trial

Prior to Defendant's second trial, the government moved to admit certain portions of Agent Kunkle's PowerPoint presentation as evidence under Federal Rule of Evidence 1006. The government averred that the presentation summarized "voluminous cell tower and Google/Gmail location data," which contained "technical information not readily understandable to the lay reader." Mot. in Limine, R. 94, PageID #1375–77. Defendant opposed the government's request, arguing that the presentation was not a summary of raw data but "an expert's interpretation of the data." Defendant's Reply ISO Response in Opposition to Government Mot. in Limine, R. 97, PageID #1423–25. The district court agreed with the government and conditionally admitted the excerpted presentation as a secondary-evidence summary.

Defendant proceeded to his second trial on January 29, 2024. At trial, Agent Kunkle again testified as to his analysis of Defendant's telephone and Google account location data and what that implied about Defendant's approximate locations during the robberies. Agent Kunkle used his PowerPoint presentation as a visual guide during his testimony. The district court formally admitted slides 9 through 20 of Agent Kunkle's PowerPoint presentation, over Defendant's objections and with certain redactions, as a summary exhibit under Rule 1006. The court also admitted the underlying records and then gave a jury instruction regarding the PowerPoint presentation. The jury ultimately convicted Defendant on all nine counts.

4. Defendant's Behavior at Sentencing

Following trial, the United States probation department prepared a presentence report ("PSR"). It calculated Defendant's total offense level for Counts 1, 3, 5, 7, and 9 at 26. It also found that each of Defendant's four 18 U.S.C. § 924(c)(1)(A) counts had a statutory term of seven years to run consecutive to each other and any sentence on the other counts. Thus, with a criminal history category of V, Defendant's proposed Guidelines range was 110 to 137 months for Counts 1, 3, 5, 7, and 9 plus 336 months for counts 2, 4, 6, and 8.

The district court sentenced Defendant on October 1, 2024. It initially calculated Defendant's Guidelines range in accordance with the PSR. But the court also noted that Defendant was on supervised release at the time of the offenses and his subsequent convictions were likely violations of that supervised release. After hearing argument on the 8 U.S.C. § 3553(a) factors, the district court sentenced Defendant to a within Guidelines range sentence of 110 months for Counts 1, 3, 5, 7, and 9, the statutory minimum of 336 months for Counts 2, 4, 6, 8, and an additional 24 months for violating the terms of his supervised release to run concurrent with his state sentence. The court ran Defendant's § 924(c) sentences consecutive to each other and to Defendant's state court sentence.

During the sentencing hearing, Defendant repeatedly interrupted and interjected while the court was speaking to Defendant's attorney. After the first interruption, the court warned Defendant that any further interruptions or outbursts would result in a six-month contempt sentence. This admonishment was initially effective, but Defendant eventually interrupted the government's attorney while she was speaking to the court about Defendant's sentence for his Hobbs Act robberies. The district court levied a six-month contempt sentence following Defendant's interruption.

Defendant's next outbursts occurred while the district court was speaking to Defendant's attorney about the plea deals that were offered to him and how they related to arguments on running his sentence concurrently or consecutively to his state sentence:

> THE COURT: Ms. Serrat, I'm going to have to correct you here. The record reflects that on numerous occasions Mr. Johnson was offered a plea agreement, a plea deal by the government –
>
> THE DEFENDANT: For what?
>
> THE COURT: -- in which his federal sentence would have run completely or substantially concurrent to that state sentence.
>
> THE DEFENDANT: I wouldn't have had it first.
>
> THE COURT: All right? Mr. Johnson –
>
> THE DEFENDANT: I won't have it –
>
> THE COURT: This was explained to Mr. Johnson.
>
> THE DEFENDANT: You haven't came to me –
>
> (Overlapping speakers.)
>
> THE COURT: Mr. Johnson, I'm not speaking to you.
>
> THE DEFENDANT: I don't want to release her, for real.
>
> THE COURT: The next outburst is another six months. (The defendant and counsel spoke off the record.)
>
> THE COURT: I don't care how many I give you. Okay?
>
> THE DEFENDANT: Me neither.
>
> THE COURT: I told Mr. Johnson that if he was convicted he should not assume that any sentence I gave would be concurrent, and I explained these mandatory minimums that he was facing.
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: So the record is very clear that Mr. Johnson had an opportunity –
>
> THE DEFENDANT: (Overlapping speakers.)

> THE COURT: All right, that's another six months.
>
> THE DEFENDANT: (Overlapping speakers.)
>
> THE COURT: All right? That's a second six months.
>
> THE DEFENDANT: (Unintelligible.)
>
> VOICE FROM GALLERY: David, shut up.
>
> THE COURT: Do you want to keep going? I'll put on as many as you want.
>
> THE DEFENDANT: I hear you. I hear you.
>
> THE COURT: The record is very clear that Mr. Johnson had a choice. He exercised his rights to go to trial, and that was fine, and he did, but he did it with his eyes open. And in any event, and for that matter, Miss Serrat, suppose he had gone first. All right? The trial, he would have been convicted had he gone first.
>
> THE DEFENDANT: I had a hung jury at first.
>
> THE COURT: All right. You did have a hung jury, and you were tried again and convicted.
>
> THE DEFENDANT: 140 minutes later.
>
> THE COURT: He was convicted, so he would have his sentence -- (Overlapping speakers.) (The defendant and counsel spoke off the record.)
>
> THE DEFENDANT: I'm a mental patient. I really want to release you. Can I do that?
>
> VOICE FROM GALLERY: No, you can't. Shut up.
>
> THE DEFENDANT: I hear you.

Sentencing Hr'g Tr., R. 158, PageID # 2928–30.

The rest of the hearing proceeded without incident. In total, the district court initially issued three six month contempt sentences against Defendant for interrupting the hearing. However, at the close of the hearing, the district court instead imposed two six month contempt

findings. In a subsequent written contempt order, the court further decreased the contempt finding to a single six month term of custody to run consecutive to the Defendant's 446 month sentence.

Defendant's appeal then followed.

II. DISCUSSION

A. Standard of Review

We review a district court's evidentiary rulings for abuse of discretion. *United States v. Churn*, 800 F.3d 768, 774–75 (6th Cir. 2015). "If evidence was erroneously admitted, we ask whether the admission was harmless error or requires reversal of a conviction." *Id.* at 775. We also review a district court's exercise of its summary contempt power for abuse of discretion. *United States v. Kimble*, 305 F.3d 480, 485 (6th Cir. 2002). A district court abuses its discretion if we are left with a "definite and firm conviction that the trial court committed a clear error of judgment." *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989).

We review constitutional challenges to sentences *de novo*. *United States v. Layne*, 324 F.3d 464, 471 (6th Cir. 2003). Constitutional challenges raised for the first time on appeal are reviewed for plain error. *United States v. Hochschild*, 442 F.3d 974, 977 (6th Cir. 2006). To establish plain error, a defendant must show "(1) that an error occurred in the district court; (2) that the error was plain, i.e., obvious or clear; (3) that the error affected defendant's substantial rights; and (4) that this adverse impact seriously affected the fairness, integrity or public reputation of the judicial proceedings." *United States v. Koeberlein*, 161 F.3d 946, 949 (6th Cir. 1998).

B. Analysis

1. Agent Kunkle's PowerPoint Presentation Admitted as Summary Evidence

Defendant claims that the district court committed reversible error by admitting the excerpted slides of Agent Kunkle's PowerPoint presentation as summary evidence under FRE

1006. The government contends that the excerpted presentation was properly admitted under FRE 1006 or, in the alternative, as a secondary-evidence summary.

Federal Rule of Evidence 1006 permits a district court to admit as evidence "a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." Fed. R. Evid. 1006 (effective until Nov. 30, 2024); s*ee United States v. Bray*, 139 F.3d 1104, 1112 (6th Cir. 1998). Such evidence is subject to several conditions. *Bray*, 139 F.3d at 1109–11 (detailing five necessary conditions for summary evidence to be admitted under FRE 1006).

Our precedents in *Bray* and *United States v. Kerley*, 784 F.3d 327, 341 (6th Cir. 2015), however, permit the admission of secondary-evidence summaries into evidence without the need to invoke Rule 1006. Such summaries "are not prepared entirely in compliance with Rule 1006 and yet are more than mere pedagogical devices designed to simplify and clarify other evidence in the case." *Bray*, 139 F.3d at 1112. Unlike summaries admitted under Rule 1006, secondary-evidence summaries are always admitted in addition to the evidence they summarize "because in the judgment of the trial court such summaries so accurately and reliably summarize complex or difficult evidence that is received in the case as to materially assist the jurors in better understanding the evidence." *Id.* We noted in *Bray* that this type of evidence is admitted in "*unusual* instance[s]" and should be accompanied with a jury instruction "that the summary is not independent evidence of its subject matter, and is only as valid and reliable as the underlying evidence it summarizes." *Id.*

Against this backdrop, Agent Kunkle's excerpted presentation was properly admitted as a secondary-evidence summary. To be sure, the presentation contains some pedagogical information that is outside the scope of the underlying telephone and Google account records:

(1) the location and labeling of the robberies; (2) the location and labeling of a transaction by a credit card that was stolen in a prior robbery on slide 12; (3) an arrow detailing the chronological direction of telephone record data in relation to a map on slide 13; and (4) the Google Maps backdrop against which all of the visualized location data was superimposed. Secondary-evidence summaries, however, may be somewhat pedagogical in nature inasmuch as the district court still determines that the summary "so accurately and reliably summarize[s] complex or difficult evidence that is received in the case as to materially assist the jurors in better understanding the evidence." *Bray*, 139 F.3d at 1112. Importantly, in the instant case, Defendant makes no argument that the cell towers' locations, the approximate locations of Defendant's cell phone number at particular times, or the approximate location of Defendant's Google account at particular times—i.e. the core information to be gained from the telephone and Google account records—were inaccurately portrayed in the slides. Nor does Defendant claim that the additional pedagogical information on the slides made the summary inaccurate or unreliable. Instead, Defendant contends that we should construe *Bray*'s discussion of secondary-evidence summaries as dicta. We decline to ignore our precedent: to the extent *Bray*'s introduction of secondary-evidence summaries was dicta, our decision in *Kerley* explicitly adopted *Bray*'s approach. *See Kerley*, 784 F.3d at 341. Because the district court properly found the excerpted presentation to accurately and reliably represent the underlying telephone and Google Account records, which were also admitted as evidence, and the district court sufficiently instructed the jury that the slides were not independent evidence of the records it summarized and that the slides were only as valid and reliable as those records, we find that the court did not abuse its discretion in admitting the presentation as a secondary-evidence summary. Since we hold that Agent Kunkle's excerpted presentation was

properly admitted as a secondary-evidence summary, we need not decide whether it was also properly admitted under FRE 1006.

2. The District Court's Summary Criminal Contempt Orders

Courts have inherent authority to punish for contempt. *Ex parte Terry*, 128 U.S. 289, 302–03 (1888). Criminal contempt is defined by statute as "[m]isbehavior of any person in [the court's] presence or so near thereto as to obstruct the administration of justice;" "[m]isbehavior of any of [the court's] officers in their official transactions;" or "[d]isobedience or resistance to [the court's] lawful writ, process, order, rule, decree, or command." 18 U.S.C § 401.

There is an "unwisdom of vesting the judiciary with completely untrammeled power to punish contempt." *Bloom v. Illinois*, 391 U.S. 194, 207 (1968). So a court must use one of two procedures set forth under Federal Rule of Criminal Procedure 42 to find someone in criminal contempt. Rule 42(a) enables a district court to punish "[a]ny person who commits criminal contempt . . . after prosecution on notice" and sets forth the process by which a district court may do so. Fed R. Crim. P. 42(a)(1)–(3). Rule 42(b) allows a district court to "summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies." Fed. R. Crim. P. 42(b); *see also* 18 U.S.C. § 401. Such a finding must be supported by a contempt order that "recite[s] the facts, [is] signed by the judge, and [is] filed with the clerk." Fed. R. Crim. Proc. 42(b).

In addition to these procedural requirements, we further require the following four substantive requirements to be met to sustain a summary contempt finding: "(1) the conduct must constitute misbehavior under 18 U.S.C. § 401(1); (2) the misbehavior must amount to an obstruction of the administration of justice; (3) the conduct must occur in the court's presence; and (4) there must be a form of intent to obstruct." *In re Chandler*, 906 F.2d 248, 249 (6th Cir. 1990).

Against this backdrop, only three written contempt orders cumulating in 24 total months of imprisonment are before this Court on appeal. Those three orders were entered on August 29, 2022, April 11, 2023, and October 2, 2024 for one six month term, two six month terms, and one six month term of custody respectively.

a. *The Timeliness of Defendant's Appeal*

The government first raises a threshold inquiry to Defendant's appeal. According to the government, a criminal contempt order is final and appealable under our precedents and is subject to a 14-day time limit for criminal case appeals the moment the contempt order is entered onto the district court docket. *See* Fed. R. App. P. 4(b)(1)(A)(i). Thus, the government argues that Defendant's October 10, 2024 notice of appeal was untimely as to the district court's August 29, 2022 and April 11, 2023 contempt orders.

The government appears to be correct. Rule 4(b)(1)(A)(i) mandates that "a defendant's notice of appeal must be filed in the district court within 14 days after . . . the entry of either the judgment or the order being appealed." Fed. R. App. P. 4(b)(1)(A)(i). This rule is a claims-processing rule, which may be waived by the government but must be enforced where, as in the instant case, the government raises the issue of timeliness. *See United States v. Payton*, 979 F.3d 388, 390 (6th Cir. 2020). We have previously held that "[a]n order adjudging one guilty of criminal contempt is final and appealable." *In re Mfrs. Trading Corp.*, 194 F.2d 948, 955 (6th Cir. 1952). It therefore stands to reason that Defendant only had fourteen days after August 29, 2022 and April 23, 2023 to appeal those written criminal contempt orders.

Defendant disagrees, arguing that the "or" in Rule 4(b)(1)(A)(i)'s "entry of either the judgment or the order being appealed" means that the statutory 14-day timeline to file a notice of appeal for any final order is renewed when the underlying judgment is entered on the district

court's docket. This is a rather novel claim, particularly in light of our precedent's acknowledgement that criminal contempt orders are final and therefore immediately appealable. *See In re Mrfs. Trading Corp.*, 194 F.2d at 955. The logical conclusion, as Defendant admits, is that he should have two opportunities to appeal his final criminal contempt orders.

Defendant's interpretation is incorrect. Rule 4(b)(1)(A)(i) uses the definite article "the" when referring to "the judgment or the order being appealed." Fed. R. App. P. 4(b)(1)(A)(i). Use of the definite article implies particularity. *See Slack Techs., LLC v. Pirani*, 598 U.S. 759, 767 (2023). Thus, a defendant's notice of appeal must identify the specific judgment or order he or she intends to appeal. Defendant's notice of appeal refers to, among others, the judgment of Defendant's underlying convictions and the three criminal contempt orders. But the judgment and the orders are distinct. Indeed, the judgment of the underlying convictions makes no reference to the prior criminal contempt orders. This is one indication that this final judgment was not the "judgment" for the contempt orders.

Instead, the contempt orders themselves were judgments. "As a matter of custom and usage, . . . a judgment in a criminal case 'includes both the adjudication of guilt and the sentence.'" *King v. Morgan*, 807 F.3d 154, 157–58 (6th Cir. 2015) (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993)); *see also Massengale v. United States*, 278 F.2d 344, 345 (6th Cir. 1960) ("Final judgment in a criminal case means sentence."). Each contempt order found Defendant guilty of contempt and imposed a specific term of incarceration. Thus, they were final judgments, and Defendant had 14 days to appeal them from their entry on the district court's docket. *See* Fed. R. App. P. 4(b)(1)(A)(i). Accordingly, Defendant's appeals of the district court's August 29, 2022 and April 23, 2023 criminal contempt orders are untimely. Because the government has properly invoked the claims-processing rule, we dismiss these appeals.

b. *Defendant's Challenges to the District Court's Criminal Contempt Orders*

Defendant raises three challenges to the district court's remaining criminal contempt order. None are availing.

First, Defendant contends that the district court erred in holding him in summary contempt through Rule 42(b)'s procedures as opposed to through Rule 42(a)'s notice and trial process for contempt. According to Defendant, a court must first find that an "immediate response" is needed to invoke Rule 42(b)'s summary contempt procedures as opposed to Rule 42(a)'s notice and trial procedures. Defendant claims that such an "immediate response" only exists for disruptions occurring during an ongoing trial. For support for this proposition, Defendant cites to the Supreme Court's decisions in *Harris v. United* States, 382 U.S. 162 (1965) and *United States v. Wilson*, 421 U.S. 309 (1975).

Defendant is mistaken: *Harris* and *Wilson* did not create such a bright-line rule. *Harris* involved a witness who was found summarily in contempt for refusing to testify during a grand jury proceeding and again before the district court after being granted immunity. 382 U.S. at 163. The *Harris* Court disapproved of the district court's use of its summary contempt powers because the witness' refusal to testify "was [not] such an open, serious threat to orderly procedure that instant and summary punishment, as distinguished from due and deliberate procedures, was necessary." *Id.* at 165 (citation omitted). The witness' actions did not affront "the dignity of the court," present a disturbance, or involve "insolent tactics." *Id.* The *Wilson* Court, however, did extol the need for trials to proceed as scheduled, as opposed to the grand jury proceedings in *Harris*. 421 U.S. at 318–19. Nonetheless, the Supreme Court still did not make the notice and trial procedure found in the current Rule 42(a) mandatory for disturbances occurring in non-trial

proceedings. *Id.* at 319 ("Where time is not of the essence, however, the provisions of [the old] Rule 42(b) may be more appropriate to deal with contemptuous conduct.").

While the type of proceeding is not dispositive, certain prudential considerations guide our review as to whether the district court abused its discretion when it invoked its summary contempt powers at Defendant's sentencing hearing. First, we should be mindful of "the principle that only 'the least possible power adequate to the end proposed' should be used in contempt cases." *Id.* (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231, 5 L.Ed. 242 (1821)). Second, Due Process normally accords one charged with contempt "notice and a fair hearing." *In re Oliver*, 333 U.S. 257, 276 (1948). Summary contempt is a "narrow exception" to this expectation and "includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent demoralization of the court's authority before the public." *Id.* at 275 (citation modified). Third, as previously discussed, "[w]here time is not of the essence," Rule 42(a)'s notice and trial procedures may be more appropriate. *Wilson*, 421 U.S. at 319. *But see Sacher v. United States*, 343 U.S. 1, 11 (1952) ("[I]f [the trial court] believes the exigencies of trial require that [it] defer judgment until [the trial's] completion [it] may do so without extinguishing [its summary contempt] power."). Finally, when confronted with disruptive defendants, "trial judges . . . must be given sufficient discretion to meet the circumstances of each case." *United States v. Donaldson*, 110 F. App'x 603, 609 (6th Cir. 2004) (quoting *Illinois v. Allen*, 397 U.S. 337, 343 (1970)).

Defendant's repeated outbursts at his sentencing hearing and the disruption that followed justify the district court's use of its summary contempt power. Defendant repeatedly interrupted his attorney, the government's attorney, and the district court throughout the hearing. The bulk of

Defendant's interruptions came after the district court warned Defendant that it would sentence him to six-months' custody for contempt if he disrupted the proceedings any further. The interruptions even spurred someone from the public gallery to twice tell Defendant to "shut up." Sentencing Hr'g Tr., R. 158, PageID #2930. The record makes clear that Defendant's unsolicited and repeated interruptions were egregious, entirely occurred before the district court, undercut the authority of the district court in the eyes of the public, and demonstrated Defendant's intent to obstruct the sentencing hearing. *See In re Chandler*, 906 F.2d at 249. Thus, we cannot say that the district court abused its discretion when it summarily found Defendant in criminal contempt and sentenced him to a single six-month term of custody.

Defendant next claims that the district court erred in cumulatively sentencing him to more than six-months imprisonment for contempt without a jury trial. The thrust of Defendant's argument has been neutered, however, since we only have authority to consider the district court's October 2, 2024 six-month term of custody. Defendant's Sixth Amendment right to a jury trial only applies to sentences exceeding six months for criminal contempt. *See Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) ("[S]entences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof."); *see also Bloom*, 391 U.S. at 210–11. Accordingly, the district court did not err when it summarily sentenced Defendant to six months' custody for criminal contempt.

Regardless of the claims-processing rule, Defendant's argument would still have no purchase. As Defendant recognizes in his briefing, Supreme Court precedent allows for multiple summary criminal contempt sentences to cumulatively exceed the six-month limit so long as "each contempt [is] dealt with as a discrete and separate matter at a different point during the [proceeding]." *Codispoti v. Pennsylvania*, 418 U.S. 506, 515 (1974). Defendant claims that the

district court's memorialization and entry of the contempt orders, which reduced the sentences to six month per offense, demonstrates that *Codispoti*'s rule does not apply. This argument is not persuasive. The district court was required to memorialize its findings pursuant to Rule 42(b) and did so immediately after each hearing. The district court did not delay in entering the contempt orders, so we decline to conclude that "there [was] no overriding necessity for instant action to preserve order and no justification for dispensing with the ordinary rudiments of due process." *Id.* at 515.

Finally, Defendant avers that his contempt sentences were procedurally unreasonable because the district court did not consider the 18 U.S.C. § 3553(a) factors when it summarily found Defendant in criminal contempt. But Defendant did not raise this argument in the court below. So, plain error review applies. *See United States v. Sears*, 32 F.4th 569, 573 (6th Cir. 2022) "The sentencing guidelines do not apply to contempt convictions carrying sentences of six months or less." *United States v. Martin*, 251 F. App'x 979, 983 (6th Cir. 2007) (citing U.S.S.G. § 1B1.9 & cmt. n.1). The district court did not plainly err by failing to consider the § 3553(a) factors.

Accordingly, we affirm the district court's October 2, 2024 six-month criminal contempt sentence and dismiss Defendant's appeals of his August 29, 2022 and April 11, 2023 contempt convictions.

3. The Constitutionality of 18 U.S.C. § 924(c)(1)(D)(ii)'s Mandate That Defendant's Sentences Under This Statute Must Run Consecutive to Defendant's Existing State Sentence

Title 18 U.S.C. § 924(c)(1)(D)(ii) mandates that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person." "[A]ny other term of imprisonment" includes sentences imposed in state court. *United States v. Gonzales*, 520 U.S. 1, 11 (1997).

Defendant raises two constitutional as-applied challenges to his convictions under § 924(c)(1)(D)(ii). Defendant argues that § 924(c)(1)(D)(ii) arbitrarily treats him differently than individuals who are sentenced in federal court before a state sentence has been imposed on them, thereby violating the Due Process and Equal Protection Clauses of the Fifth Amendment. Defendant failed to raise this argument before the district court so plain error review applies. *See Hochschild*, 442 F.3d at 977. Defendant also contends that § 924(c)(1)(D)(ii) mandates an arbitrary punishment in violation of the Eighth Amendment's prohibition on cruel and unusual punishments by requiring the district court to run his § 924(c)(1)(D)(ii) convictions consecutive to his state sentence. Neither argument has merit.

a. *Fifth Amendment Equal Protection/Due Process Clause*

"[A] person who *has* been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, . . . so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment." *Chapman v. United States*, 500 U.S. 453, 465 (1991). "[A]n argument based on equal protection essentially duplicates an argument based on due process." *Id.* "In the absence of a suspect classification based on race or other forbidden grounds, a legislative distinction . . . requires only a rational basis to survive a challenge that the classification violates the substantive component of the Due Process Clause of the Fifth Amendment." *United States v. Dunham*, 295 F.3d 605, 610–11 (6th Cir. 2002). "The rational basis justifying a statute against an equal protection claim need not be stated in the statute or in its legislative history; it is sufficient that a court can conceive of a reasonable justification for the statutory distinction." *Id.* at 611 (quoting *Est. of Kunze v. Comm'r of Internal Revenue*, 233 F.3d 948, 954 (7th Cir. 2000)).

Title 18 U.S.C. § 924(c)(1)(D)(ii)'s mandate passes rational basis review. We agree with our sister circuits that "[d]iscouraging and preventing the use of firearms in the commission of crimes of violence constitutes a legitimate state purpose." *United States v. Khan*, 461 F.3d 477, 495 (4th Cir. 2006); *c.f. United States v. Thomas*, 77 F.3d 989, 992 (7th Cir. 1996) ("Congress could rationally have decided that the use or carrying of a firearm during or in relation to a crime of violence warranted a minimum term of imprisonment in addition to any other term of imprisonment imposed on the defendant."). The mandate's threat of a sentence under the statute that will always be served consecutive to any existing state or federal sentence offers additional deterrence to others from engaging in behavior in violation of § 924(c). Thus, we find that the mandate is rationally related to a legitimate state purpose.

Defendant seems to argue that the statute is irrational *as applied to him*, because it was mere happenstance that his state trial, and conviction, preceded the federal. But "a classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993) (citation modified). It was rational for Congress to treat the date of conviction as the trigger for imposing an increased sentence, without inquiring whether, under the circumstances of each trial, a different order of proceedings would have been possible. *Cf. Williams v. Meyer*, 254 F. App'x 459, 463 (6th Cir. 2007) (deeming "rational" a state's distinction between those "who have been convicted and those who have not"). We therefore decline to find that the district court violated Defendant's Fifth Amendment Due Process or Equal Protection rights, let alone committed plain error, when it ran Defendant's § 924(c) sentences consecutive to his state sentence.

b. *Eighth Amendment "Cruel and Unusual Punishment" Clause*

The Eighth Amendment proscribes "cruel and unusual punishments." U.S. Const. amend. VIII. Defendant does not argue that his sentence violates the Eighth Amendment because it was grossly disproportionate to the crimes for which he was convicted. Such an argument would fail since our precedents have never found § 924(c)(1)(D)(ii)'s consecutive sentence mandate to be unconstitutional for imposing a "grossly disproportionate" penalty. *See United States v. Watkins*, 509 F.3d 277, 282 (6th Cir. 2007); *United States v. McDonel*, 362 F. App'x 523, 530 (6th Cir. 2010). Rather, Defendant argues that § 924(c)(1)(D)(ii)'s mandate violates the Eighth Amendment because its dissimilar treatment of those sentenced before and those sentenced after a state sentence was levied against them is an arbitrary distinction "so totally without penological justification that it results in the gratuitous infliction of suffering." *See Gregg v. Georgia*, 428 U.S. 153, 183 (1976).[1] This argument is typically raised in challenges to conditions of confinement or a prisoner's treatment while confined. *See Rhodes v. Chapman*, 452 U.S. 337, 345–47 (1981). Defendant, however, novelly extends this argument to the sentencing context.

Defendant's novel argument stands on infirm grounds. He cites to no authority which establishes his proposed Eighth Amendment challenge to his § 924(c) sentences. Even if we credited the existence of Defendant's argument, we could not find that § 924(c)(1)(D)(ii)'s mandate was so "without penological justification" that it violates the Eighth Amendment. *Gregg*, 428 U.S. at 183. As our discussion above on Defendant's Fifth Amendment Due Process argument demonstrates, the mandate is not arbitrary because the threat of a mandatory consecutive sentence

[1] Defendant cites to *Quintanilla v. Bryson*, 730 F. App'x 738, 747 (11th Cir. 2018) for the proposition that the Eighth Amendment prohibits arbitrary punishment in the sentencing context. However, *Quintanilla* itself involved a plaintiff-prisoner's challenges to his conditions of confinement and how certain components of his confinement were arbitrary and without penological justification. *Id.* *Quintanilla* cites to *Gregg* for the proposition that the plaintiff-prisoner's "[a]rbitrary placement in the conditions described . . . surely constitutes 'the gratuitous infliction of suffering' in violation of the Eighth Amendment." *Id.* (quoting *Gregg*, 428 U.S. at 183).

more strongly deters individuals from using firearms in the commission of crimes of violence, and it was rational for Congress to treat the date of conviction as the trigger for imposing an increased sentence. Accordingly, we decline to find that the mandatory running of Defendant's § 924(c) sentences consecutive to his state law sentence violated his Eighth Amendment right against cruel and unusual punishments.

III. CONCLUSION

For the reasons set forth above, we **AFFIRM** the district court's judgment and October 2, 2024 contempt order. We dismiss Defendant's appeals of the district court's August 29, 2022 and April 11, 2023 contempt orders.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 24-3885/3886

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAVID C. JOHNSON,

Defendant - Appellant.

FILED
Jan 02, 2026
KELLY L. STEPHENS, Clerk

Before: CLAY, KETHLEDGE, and LARSEN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's judgments of October 2, 2024 are AFFIRMED. IT IS FURTHER ORDERED that the appeal of the district court's orders of August 29, 2022 and April 11, 2023 is DISMISSED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA

v.

DAVID JOHNSON

JUDGMENT IN A CRIMINAL CASE

Case Number: **1:20-CR-00682-DAP(1)**
USM Number: **61215-060**
Marisa L. Serrat
Defendant's Attorney

THE DEFENDANT:

☐	pleaded guilty to count(s)	
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☒	was found guilty on counts after a plea of not guilty	**1 through 9 of the Indictment**

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	Offense Ended	Count
18 U.S.C. § 1951(a) - Interference With Commerce By Robbery	11/27/2019	1
18 U.S.C. § 924(c)(1)(A)(ii) - Use, Carry and Brandish Firearm During and In Relation To Crime Of Violence	11/27/2019	2
18 U.S.C. § 1951(a) - Interference With Commerce By Robbery	01/18/2020	3
18 U.S.C. § 924(c)(1)(A)(ii) - Use, Carry and Brandish Firearm During and In Relation To Crime Of Violence	01/18/2020	4
18 U.S.C. § 1951(a) - Interference With Commerce By Robbery	01/18/2020	5
18 U.S.C. § 924(c)(1)(A)(ii) - Use, Carry and Brandish Firearm During and in Relation to Crime of Violence	1/18/2020	6
18 U.S.C. § 1951(a) - Interference With Commerce By Robbery	1/25/2020	7
18 U.S.C. § 924(c)(1)(A)(ii) - Use, Carry and Brandish Firearm During and in Relation to Crime of Violence	1/25/2020	8
18 U.S.C. §§ 922(g)(1) and 924(a)(2) - Felon in Possession of Firearm	1/27/2020	9

The defendant is sentenced as provided in pages 2 through 8 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) ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must 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 must notify the court and United States attorney of material changes in economic circumstances.

October 1, 2024
Date of Imposition of Judgment

s/Dan Aaron Polster
Signature of Judge

Dan Aaron Polster United States District Judge
Name and Title of Judge

October 2, 2024
Date

DEFENDANT: DAVID JOHNSON
CASE NUMBER: 1:20-CR-00682-DAP(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

446 months (110 months as to counts 1, 3, 5, 7 and 9, concurren with each other and the sentence imposed by Lake County Court of Common Pleast; 84 months as to Counts 2, 4, 6 and 8, consecutive to each other and to the setence imposed by Lake County Court of Common Pleas). Defendant to receive credit for time served in federal custody.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ 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 ☐ a.m. ☐ p.m. on

☐ 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 delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DAVID JOHNSON
CASE NUMBER: 1:20-CR-00682-DAP(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : **three (3) years. Terms to run concurrently.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must 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 you pose a low risk of future substance abuse. (*check if applicable*)
4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.)
   as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: DAVID JOHNSON
CASE NUMBER: 1:20-CR-00682-DAP(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change. If not in compliance with the condition of supervision requiring full-time occupation, you may be directed to perform up to 20 hours of community service per week until employed, as approved or directed by the pretrial services and probation officer.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. As directed by the probation officer, you shall notify third parties who may be impacted by the nature of the conduct underlying your current or prior offense(s) of conviction and/or shall permit the probation officer to make such notifications, and/or confirm your compliance with this requirement.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: DAVID JOHNSON
CASE NUMBER: 1:20-CR-00682-DAP(1)

SPECIAL CONDITIONS OF SUPERVISION

Restitution

The defendant must pay the following restitution:
$585.00 to Parkman BP Gas Station and $629.00 to Dollar General

Restitution should be paid through the Clerk of the U.S. District Court. Restitution is due and payable immediately.

The defendant must pay 25% of defendant's gross income per month, through the Federal Bureau of Prisons Inmate Financial Responsibility Program. If a restitution balance remains upon release from imprisonment, payment is to commence no later than 60 days following release from imprisonment to a term of supervised release in monthly payments of at least a minimum of 10% of defendant's gross monthly income during the term of supervised release and thereafter as prescribed by law.

Notwithstanding establishment of a payment schedule, nothing shall prohibit the United States from executing or levying upon property of the defendant discovered before and after the date of this Judgment.

Substance Abuse Treatment and Testing

The defendant shall participate in an approved program of substance abuse testing and/or outpatient or inpatient substance abuse treatment as directed by their supervising officer; and abide by the rules of the treatment program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). The defendant shall not obstruct or attempt to obstruct or tamper, in any fashion, with the efficiency and accuracy of any prohibited substance testing.

Mental Health Treatment

You must undergo a mental health evaluation and/or participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).

Search / Seizure

The defendant shall submit his or her person, property, house, residence, vehicle, papers, [computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media,] or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

DEFENDANT: DAVID JOHNSON
CASE NUMBER: 1:20-CR-00682-DAP(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments page.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$900.00	$1,214.00	$.00	$.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. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Parkman BP Gas Station $585.0
501 Westlake Blvd.
Houston BX 77079

Dollar General $629.00
100 Mission Ridge
Goodlettsville, Tennessee 37072

☐ 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 the schedule of payments page 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:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22
*** 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: DAVID JOHNSON
CASE NUMBER: 1:20-CR-00682-DAP(1)

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 payments of $ _____ due immediately, balance due

☐ not later than , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F 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 20 *(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 ☒ Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of $900.00 for Counts 1, 2, 3, 4, 5, 6, 7, 8 and 9 , which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during 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
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ 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:
Taurus, Model PT 24/7 G2C .40 caliber semi-automatic pistol, bearing serial number: SEU91771.
The investigative agency will destroy the firearm on behalf of the United States.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

DEFENDANT: DAVID JOHNSON
CASE NUMBER: 1:20-CR-00682-DAP(1)

DENIAL OF FEDERAL BENEFITS

(For Offenses Committed On or After November 18, 1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862

IT IS ORDERED that the defendant shall be:

☐ ineligible for all federal benefits for a period of

☐ ineligible for the following federal benefits for a period of

(specify benefit(s))

OR

☐ Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

FOR DRUG POSSESSORS PURSUANT TO 21 U.S.C. § 862(b)

IT IS ORDERED that the defendant shall:

☐ be ineligible for all federal benefits for a period of

☐ be ineligible for the following federal benefits for a period of

(specify benefit(s))

☐ successfully complete a drug testing and treatment program.

☐ perform community service, as specified in the probation and supervised release portion of this judgment.

IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

Pursuant to 21 U.S.C. § 862(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility. The clerk is responsible for sending a copy of this page and the first page of this judgment to:

U.S. Department of Justice, Office of Justice Programs, Washington, DC 20531

On November 27, 2019, between 4:00 AM and 6:00 AM, T-Mobile cell phone (216) 394-7088 did not utilize any cell sites.

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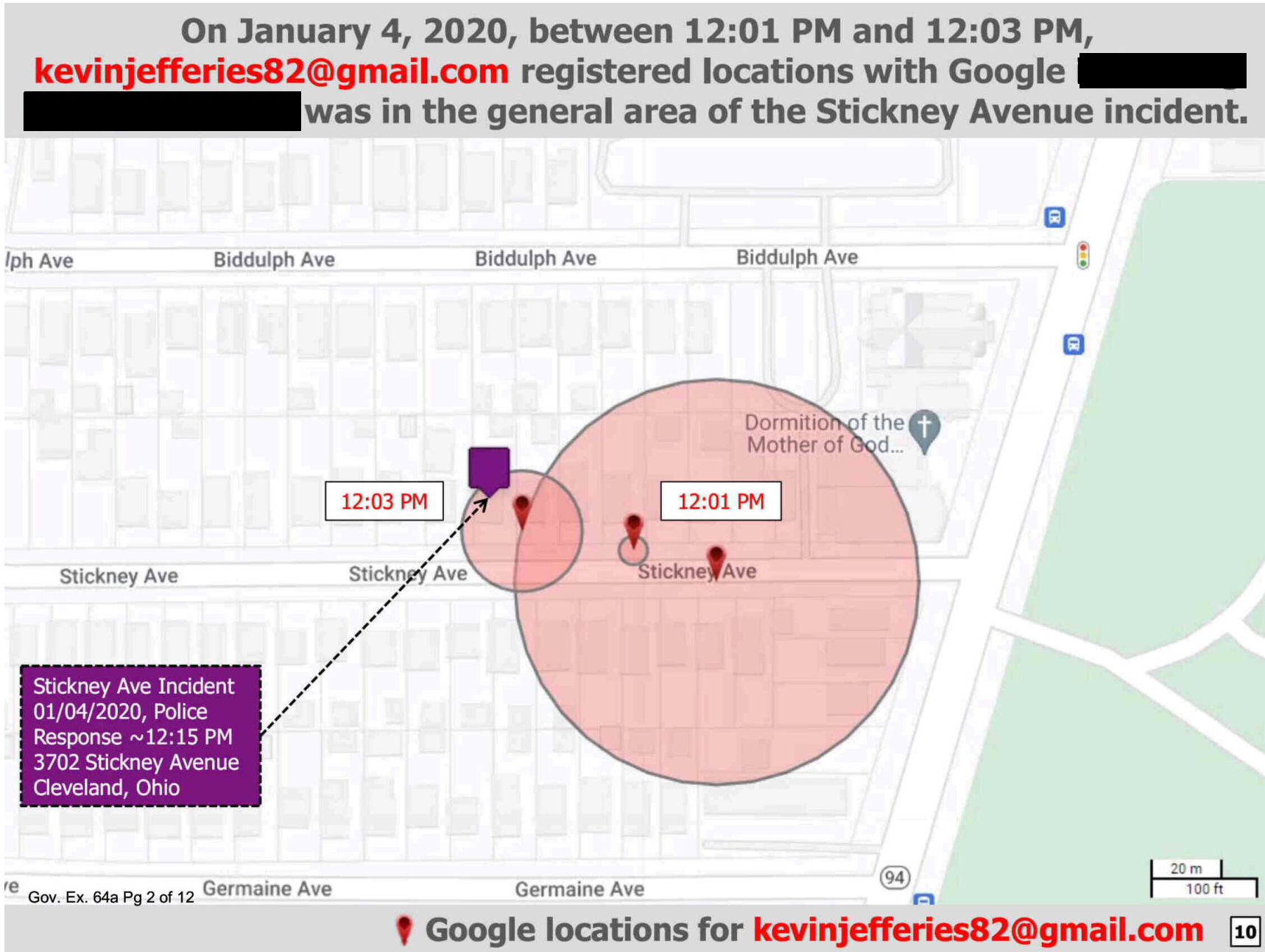
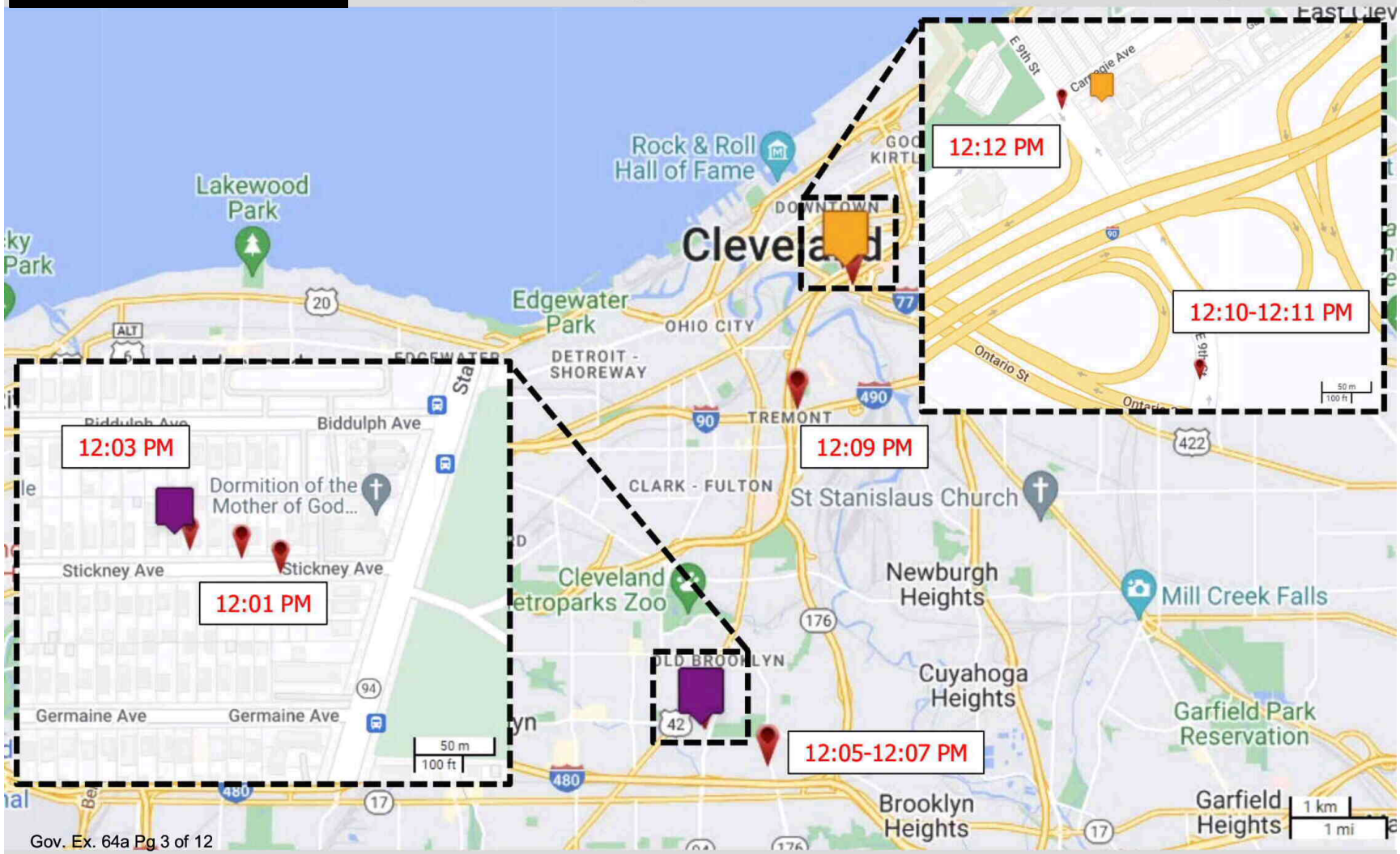
● T-Mobile Network

9



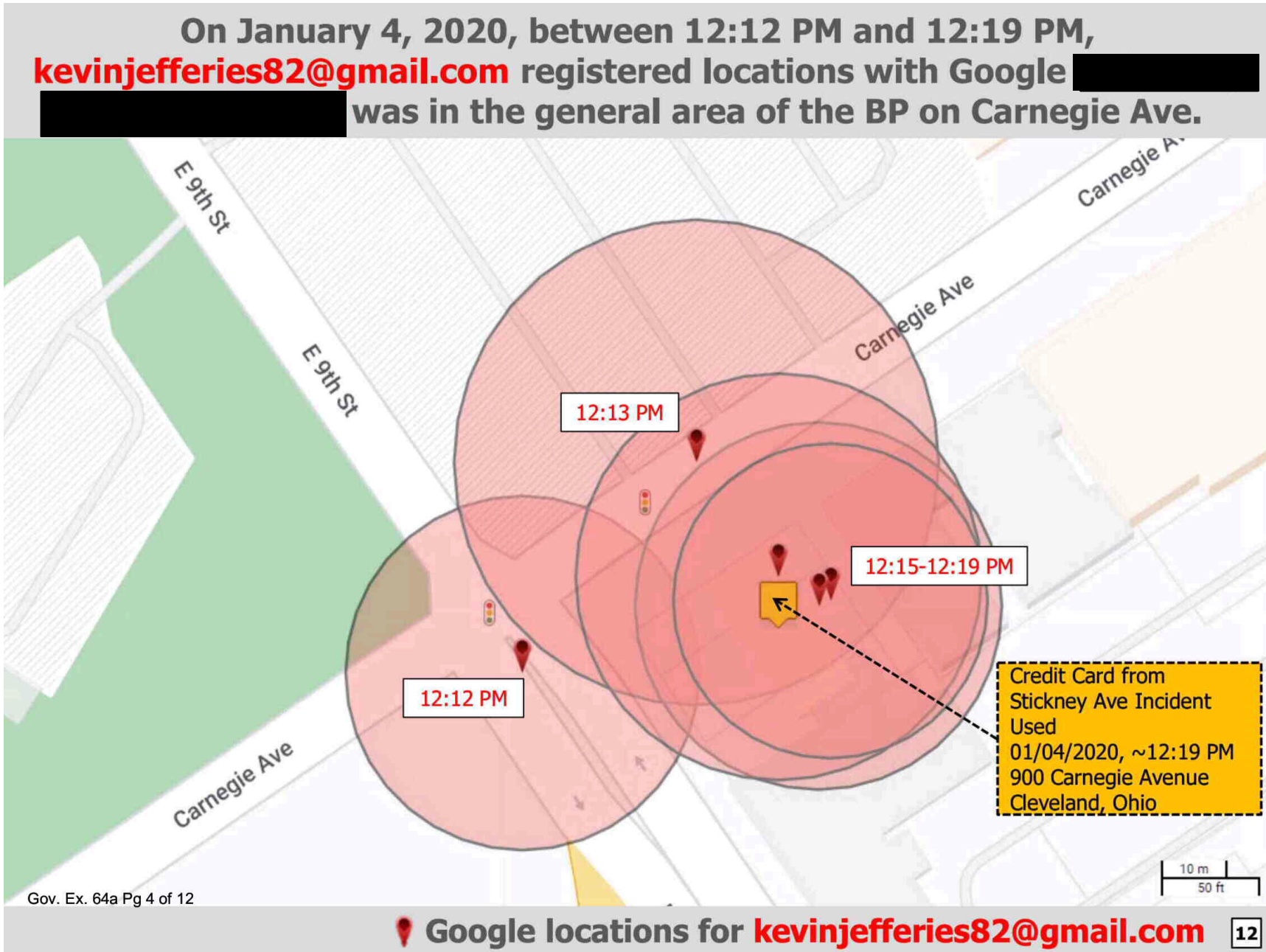
Gov. Ex. 64a Pg 2 of 12

On January 4, 2020, between 12:01 PM and 12:12 PM, kevinjefferies82@gmail.com registered locations with Google [redacted] traveled to the general area of the BP on Carnegie Ave.

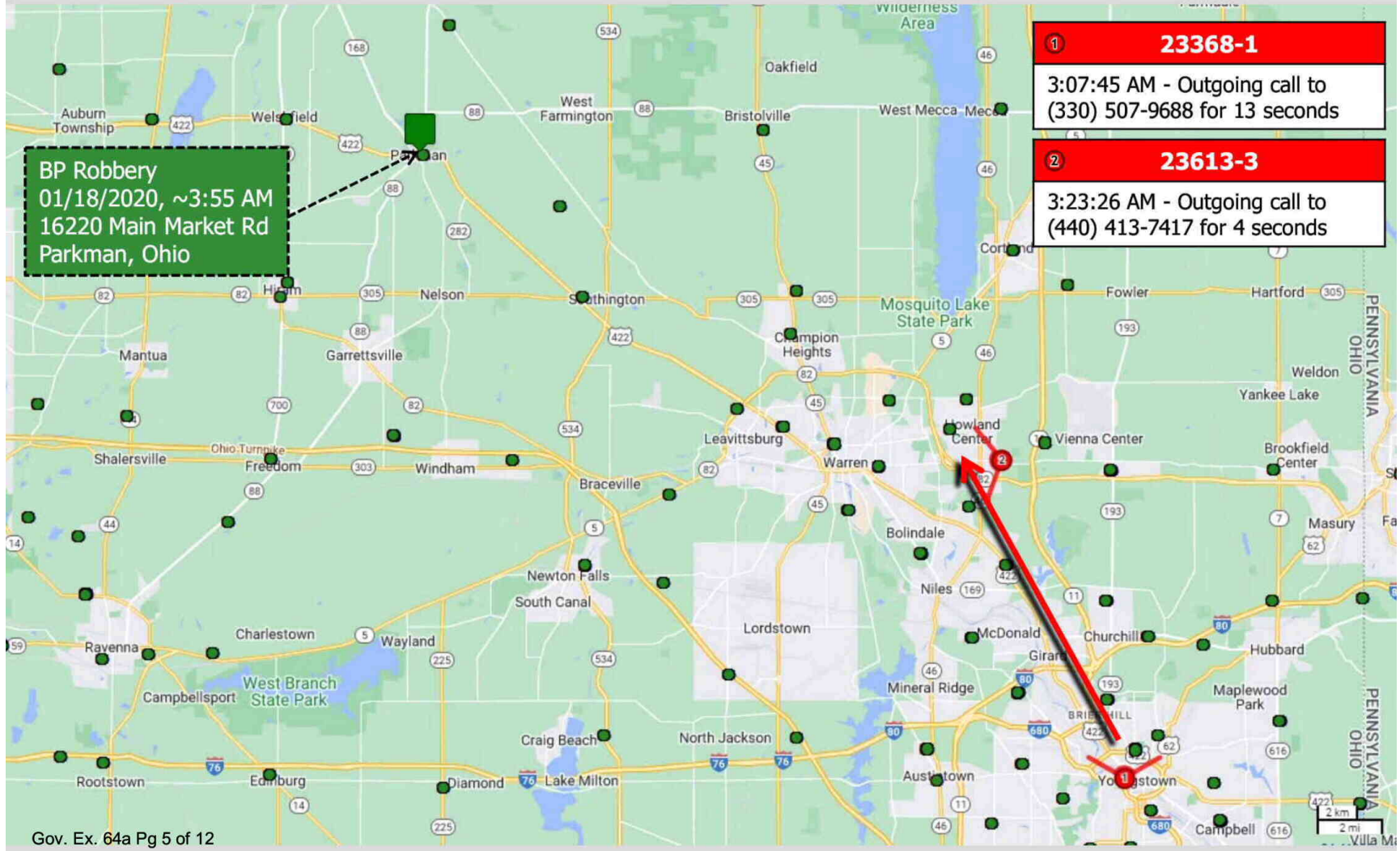


Gov. Ex. 64a Pg 3 of 12

Google locations for kevinjefferies82@gmail.com 11


On January 4, 2020, between 12:12 PM and 12:19 PM,
kevinjefferies82@gmail.com registered locations with Google [redacted]
was in the general area of the BP on Carnegie Ave.
E 9th St
E 9th St
Carnegie Ave
Carnegie Ave
Carnegie Ave
12:13 PM
12:15-12:19 PM
12:12 PM
Credit Card from
Stickney Ave Incident
Used
01/04/2020, ~12:19 PM
900 Carnegie Avenue
Cleveland, Ohio
10 m
50 ft
Gov. Ex. 64a Pg 4 of 12
Google locations for kevinjefferies82@gmail.com
12

On January 18, 2020, between 3:00 AM and 5:00 AM, T-Mobile cell phone (216) 394-7088 utilized cell sites indicating it traveled northwest from Youngstown, Ohio.



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● T-Mobile Network

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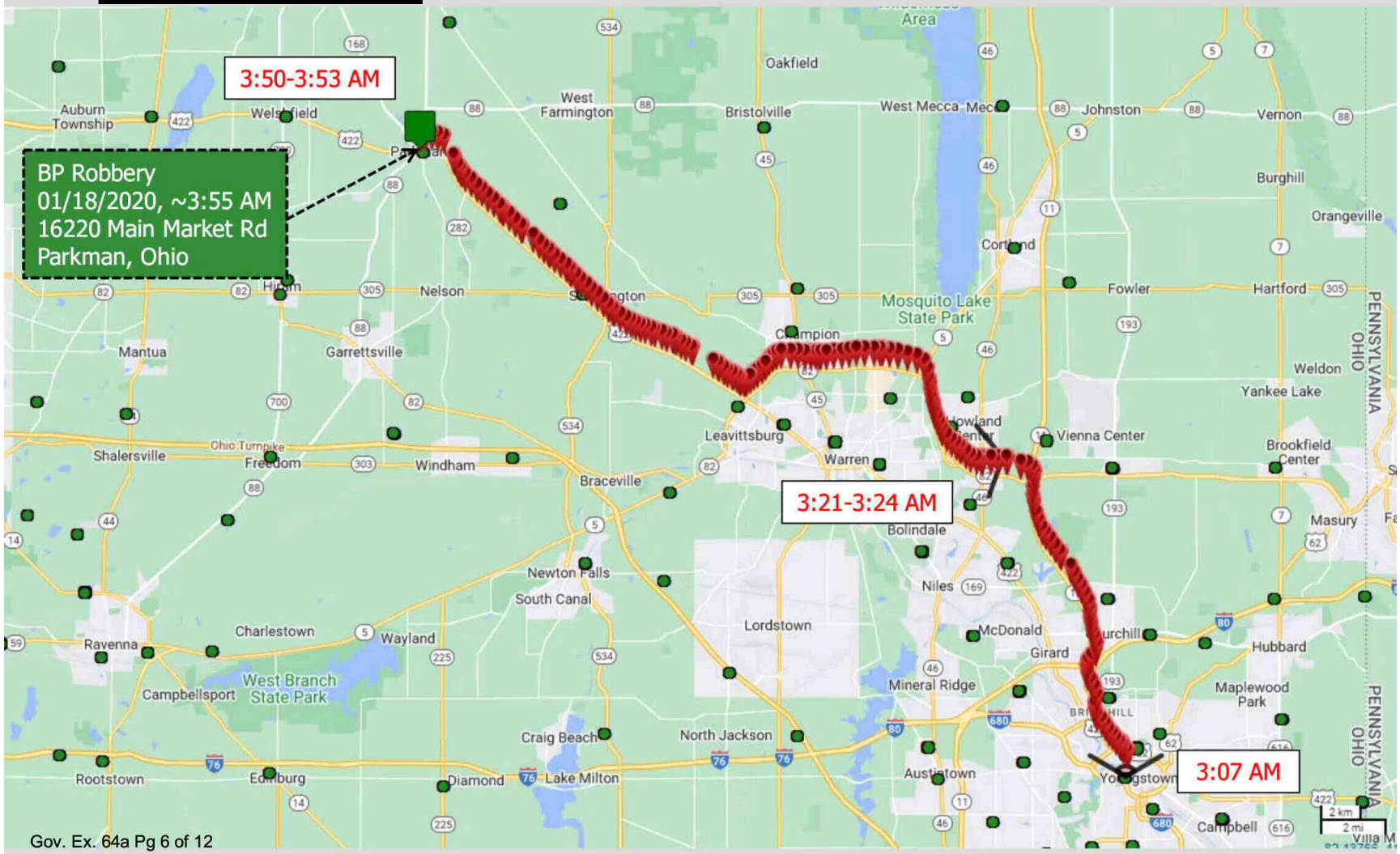
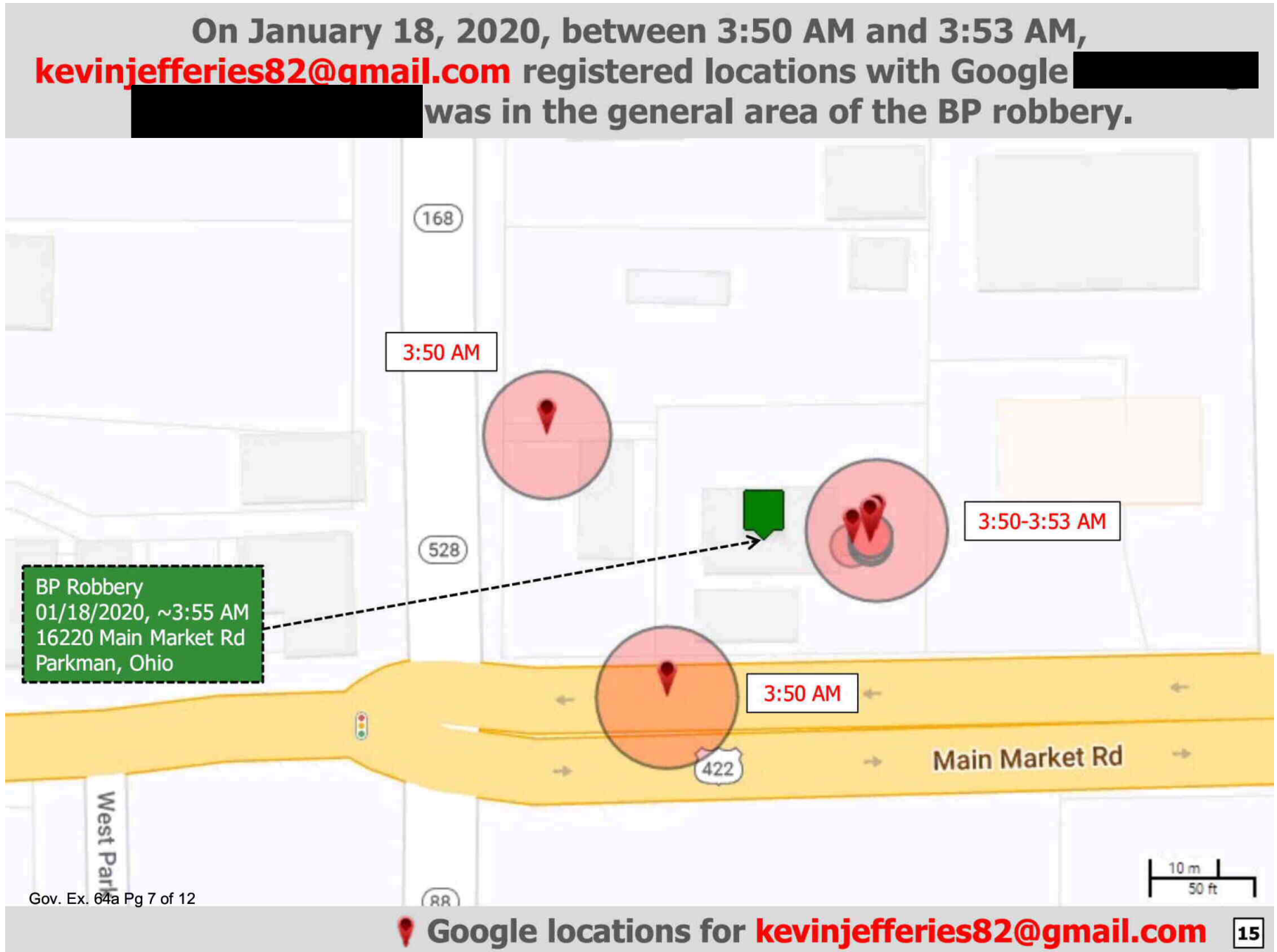
On January 18, 2020, between 3:07 AM and 3:53 AM, kevinjefferies82@gmail.com registered locations with Google [redacted] traveled to the general area of the BP robbery.

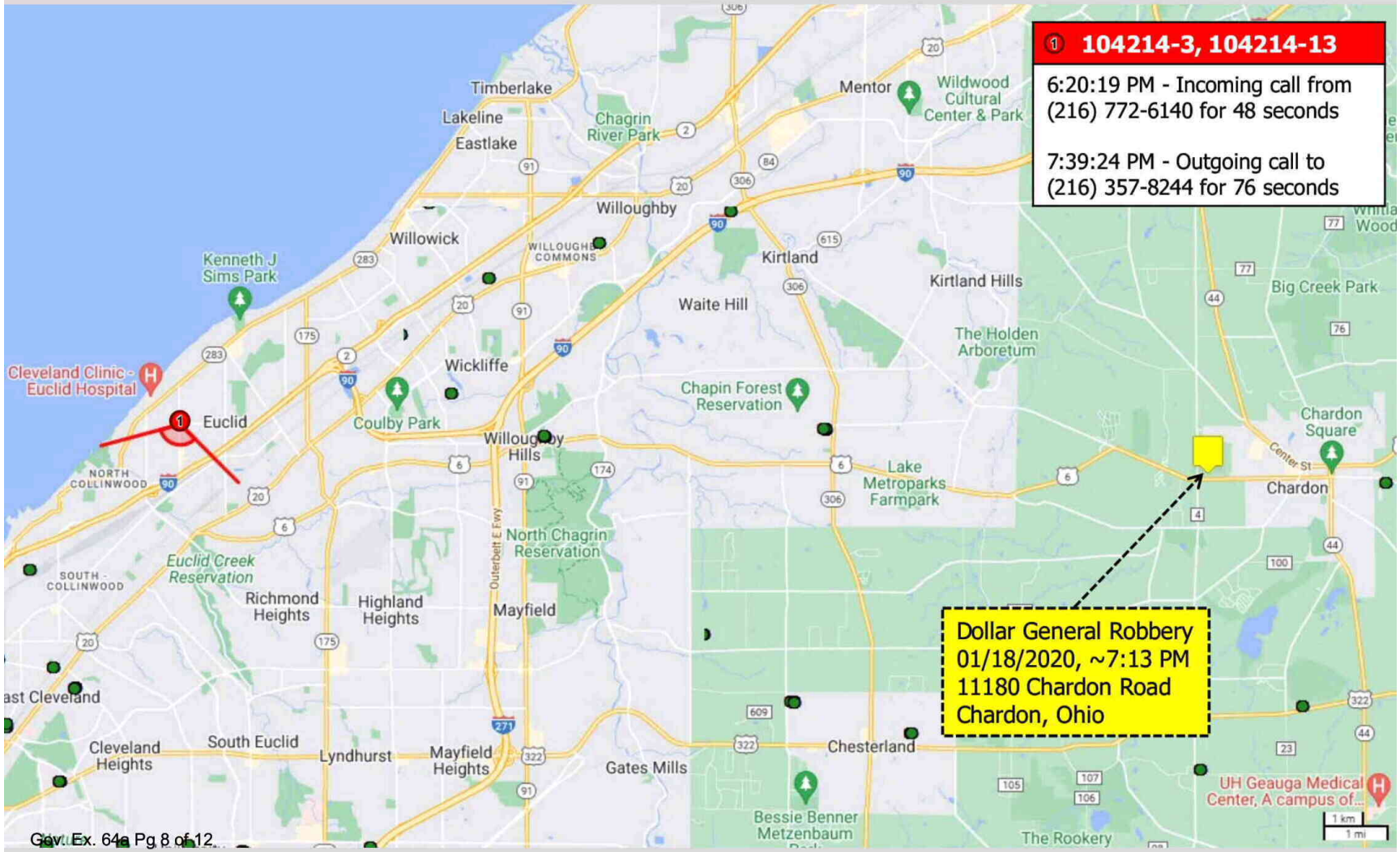


Gov. Ex. 64a Pg 6 of 12

● T-Mobile Network 📍 Google locations for kevinjefferies82@gmail.com 14


On January 18, 2020, between 3:50 AM and 3:53 AM,
kevinjefferies82@gmail.com registered locations with Google [redacted] was in the general area of the BP robbery.
168
3:50 AM
3:50-3:53 AM
528
BP Robbery
01/18/2020, ~3:55 AM
16220 Main Market Rd
Parkman, Ohio
3:50 AM
422
Main Market Rd
West Park
88
10 m
50 ft
Gov. Ex. 64a Pg 7 of 12
Google locations for kevinjefferies82@gmail.com
15

On January 18, 2020, between 6:20 PM and 7:39 PM, T-Mobile cell phone (216) 394-7088 utilized a cell site in Euclid, Ohio.



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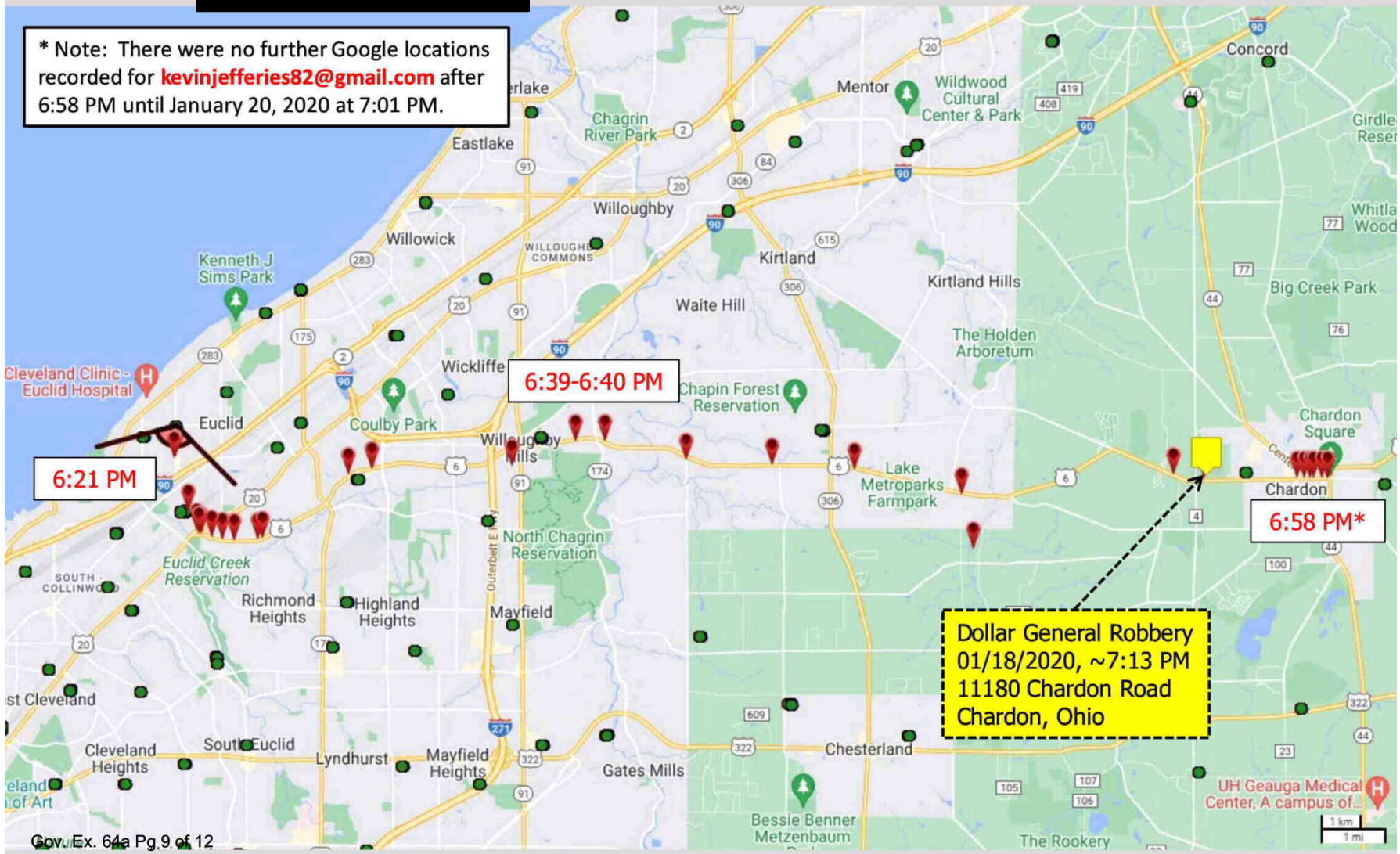
● T-Mobile Network

16

On January 18, 2020, between 6:21 PM and 6:58 PM, kevinjefferies82@gmail.com registered locations with Google [redacted] traveled to the Chardon, Ohio area.



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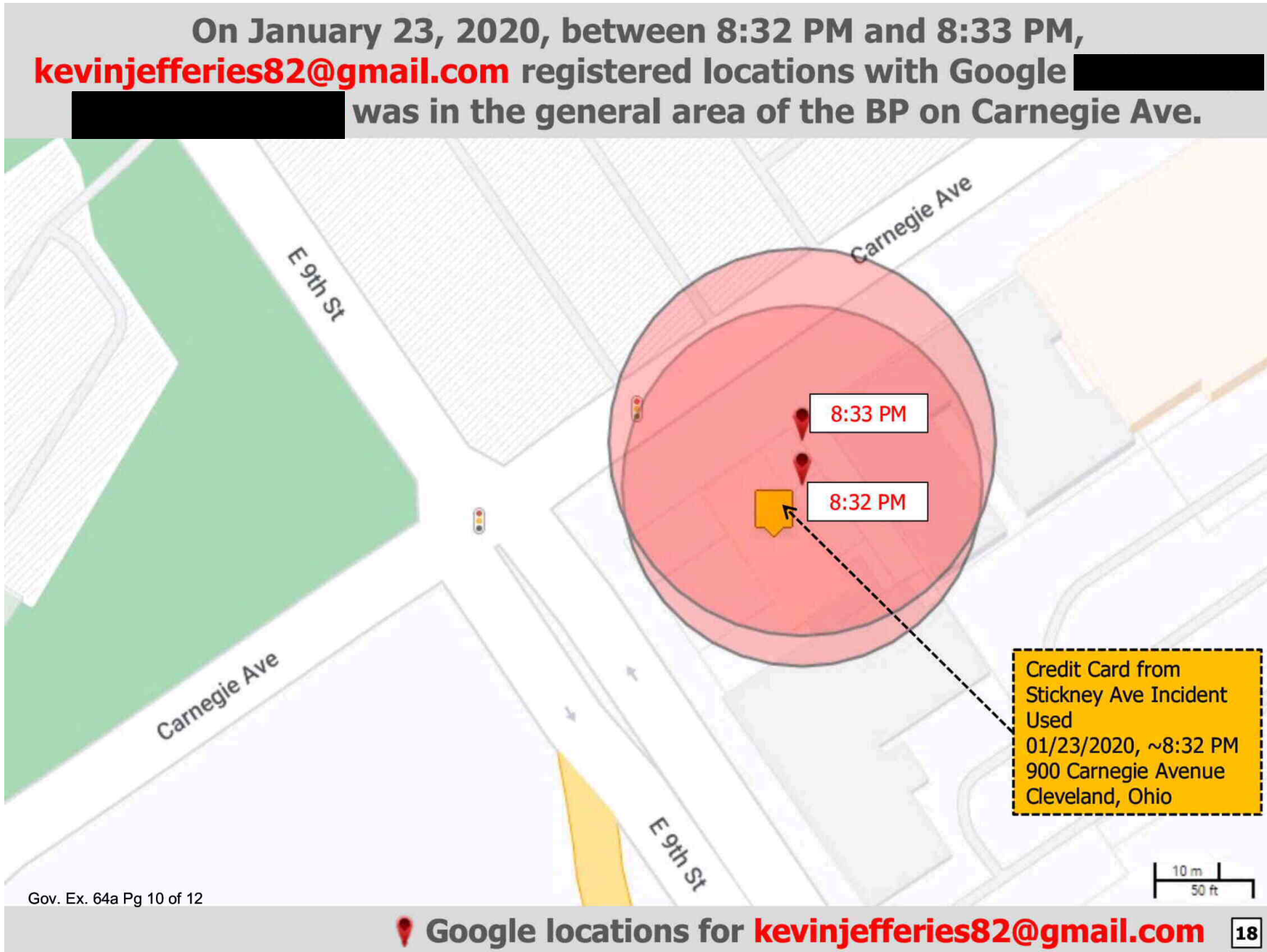
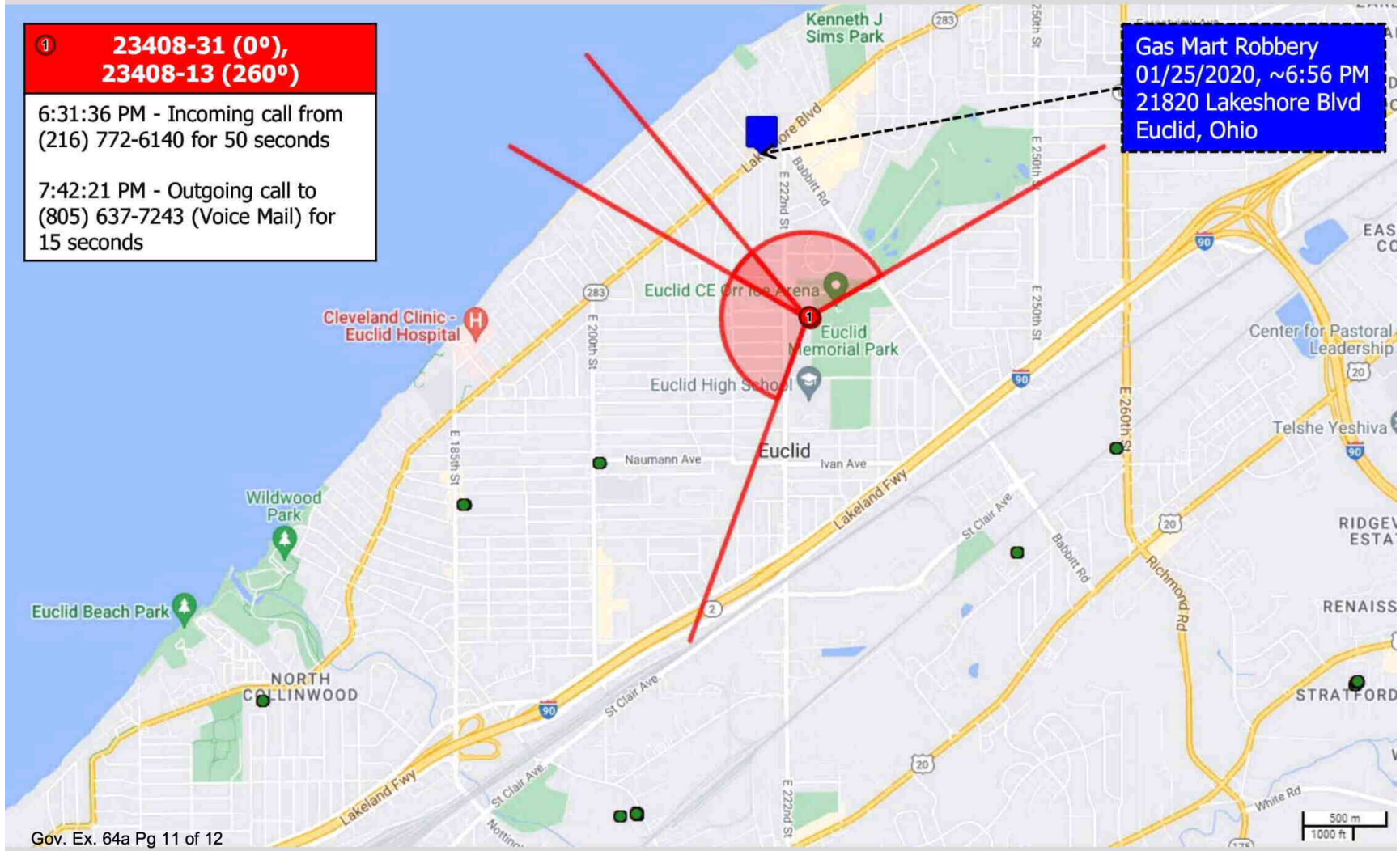
● T-Mobile Network 📍 Google locations for kevinjefferies82@gmail.com 17


On January 23, 2020, between 8:32 PM and 8:33 PM,
kevinjefferies82@gmail.com registered locations with Google [redacted]
[redacted] was in the general area of the BP on Carnegie Ave.
E 9th St
Carnegie Ave
8:33 PM
8:32 PM
Credit Card from
Stickney Ave Incident
Used
01/23/2020, ~8:32 PM
900 Carnegie Avenue
Cleveland, Ohio
Carnegie Ave
E 9th St
10 m
50 ft
Gov. Ex. 64a Pg 10 of 12
Google locations for kevinjefferies82@gmail.com
18

On January 25, 2020, between 6:31 PM and 7:42 PM, T-Mobile cell phone (216) 394-7088 utilized a cell site in Euclid, Ohio indicating it was in the general area of the Gas Mart.



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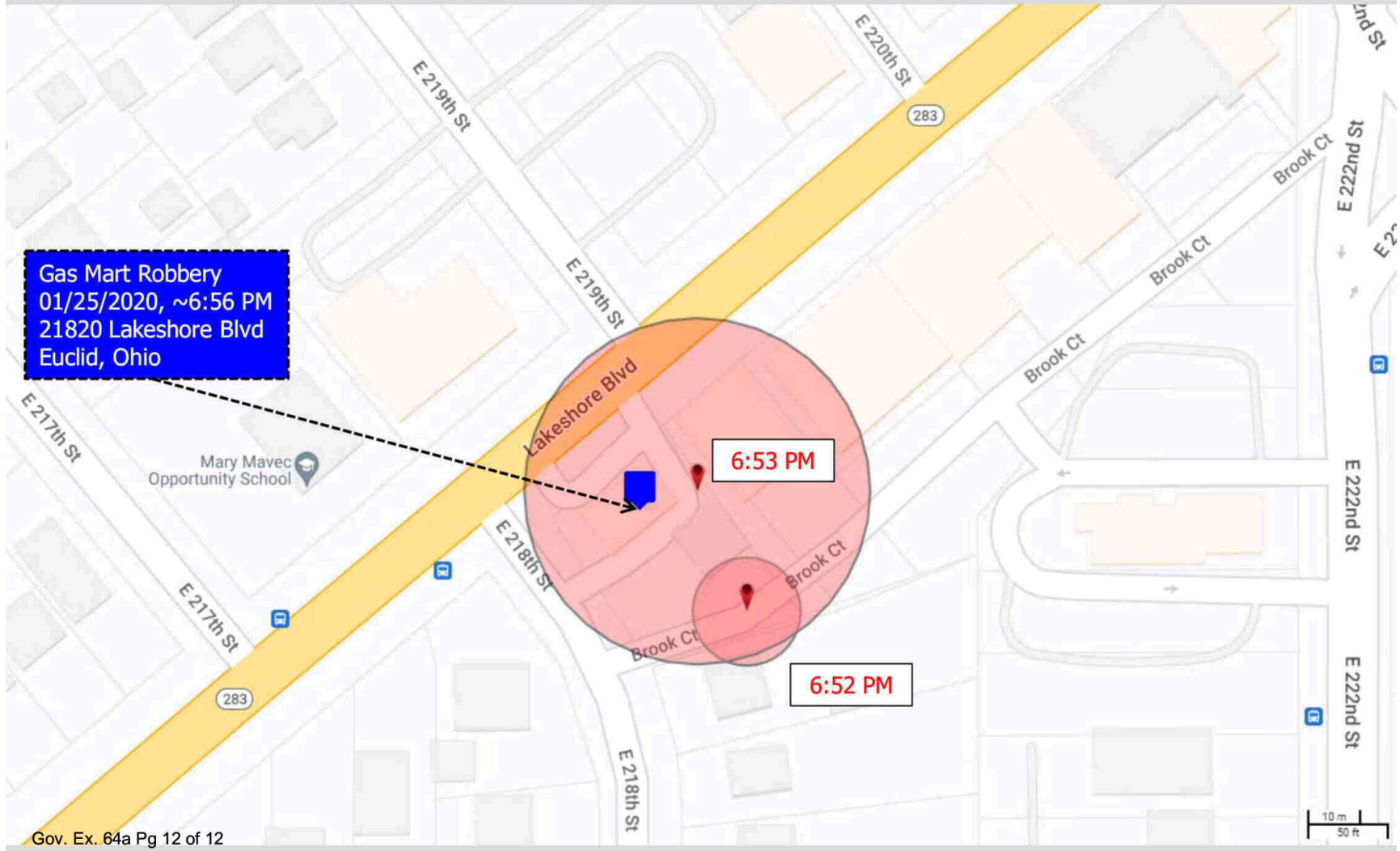
● T-Mobile Network

19

On January 25, 2020, between 6:52 PM and 6:53 PM, kevinjefferies82@gmail.com registered locations with Google [redacted] was in the general area of the Gas Mart robbery.



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Google locations for kevinjefferies82@gmail.com 20