IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CASE NO. 23SC188947
	:	
DONALD JOHN TRUMP,	:	Judge: Scott McAfee
	:	
Defendant.	:	

PRESIDENT TRUMP'S REPLY TO STATE'S RESPONSE TO SUPPLEMENTAL DEFENSE EXHIBIT 38 – CSLI EVIDENCE

1. Affiant Mittelstadt is not being offered as an expert witness so neither the Court's Standing Discovery Order nor *Daubert* applies.

The State protests that the defense is somehow not entitled to present expert testimony regarding the cell site location information (CSLI) as they allege that the defense failed to comply with this Court's Standing Discovery Order that mandates prior notice to the opposing party of a party's intention to introduce expert testimony and because they claim that defense has not precleared the evidence through the process of a *Daubert* hearing. However, neither of those preconditions apply here because the CSLI information that the defense intends to introduce through the testimony of Mittelstadt is not being offered through expert testimony and Mittelstadt will not be offering *any* opinion testimony. He will be summarizing the

data that was produced by AT&T in response to the lawfully issued subpoena[1], as well as factual information that he acquired regarding cell site locations.

First: the Eleventh Circuit has held that precisely the type of evidence that Mittelstadt will offer does *not* require the testimony of an expert witness. *United States v. Ransfer*, 749 F.3d 914, 937–938 (11th Cir. 2014). In *Ransfer*, the government presented a witness from the cell phone service provider who explained how cell towers work and how evidence preserved in the company's computers can show what tower a cell phone was "pinging" at a certain time. A police detective also testified how call phones ping off towers. The *Ransfer* Court explained why the company's witness was permitted to offer testimony (that was neither "expert testimony" nor "opinion testimony") about the cell towers and location of the phones:

> Here, Dikovitsky [the company witness] explained how cell phone towers record "pings" from each cell phone number and how he mapped the cell phone tower locations for each phone call for [numerous exhibits]. Hanna does not point to any statements of opinion by Dikovitsky, and we do not find any in the record. Hanna does not contend that this testimony was beyond the witness's personal knowledge or that Dikovitsky should have been treated as an expert witness. We rely on *United States v. Hamaker*, where we held a financial expert's testimony matching billing records to payroll and accounting records were factual statements, not statements of opinion.

[1] The State's last-ditch claim on page 9 of its response that the defense obtained the cell phone records at issue illegally is patently frivolous. The records were obtained by valid subpoena issued to AT&T. As the State hopefully knows, defense counsel cannot apply for a search warrant and a subpoena does not require probable cause to be issued.

> 455 F.3d 1316, 1331–32 (11th Cir. 2006). The testimony did not require expertise because it was a summary of financial records the witness reviewed and an explanation of how the summary was calculated. *Id.* Moreover, there is no suggestion that the information presented was inaccurate or prejudicial to Hanna. Since the witness did not offer any opinions, the District Court could not have erred in admitting the testimony under Rule 701.

Id. at 937. The holding in *Ransfer* dictates the result in this case. Questions about the interpretation of the Georgia Evidence Code rely on Eleventh Circuit precedents absent any contrary authority from the Georgia appellate courts.[2] There is no contrary authority from any Georgia appellate court.

Second: There is clear authority that cell tower evidence – linking a particular phone with a particular cell tower at a particular time – can be established through the cell phone records without any witness testifying. In *United States v. Sanchez*, 586 F.3d 918 (11th Cir. 2009), the Eleventh Circuit approved the use of the business records exception to admit cell phone tower records that documented the tower nearest to the cell phone when a phone call was placed by that phone, as well as the number that was called. The government was permitted to later call a detective to

[2] "[W]e have held that, based on the preamble to the act adopting the new Evidence Code, if a rule in the new Evidence Code "is materially identical to a Federal Rule of Evidence, we look to decisions of the federal appellate courts construing and applying the Federal Rules, especially the decisions of the United States Supreme Court and the Eleventh Circuit, for guidance." *William v. Harvey*, 311 Ga. 439, 445 (2021). Moreover, the reliability of such evidence is so clear that a *Daubert* hearing would not be necessary. *See United States v. Nelson*, 533 F.Supp.3d 779, 792-793 (N.D. Cal. 2021).

testify only as a summary witness regarding what the records showed.

Georgia courts both before and after the New Evidence Code was enacted in 2013 have also approved the use of the business record exception to admit evidence of the company's records to show the location of a cell phone in relation to a cell tower. *Kilgore v. State*, 295 Ga. 729 (2014) (applying pre-2013 evidence code that was in effect at the time of trial); *Hayes v. State*, 298 Ga. 98 (2015) (applying post-2013 evidence code).

Third: The introduction of computer-generated evidence similar to CSLI has also been approved without the need for expert testimony. In a recent Fifth Circuit decision, the court held that expert testimony is not required to introduce the information obtained from a Cellebrite extraction from a cell phone. A trained technician who testifies that he operated the apparatus properly can explain what he did, and the results obtained without being able to explain how the Cellebrite extraction works. *United States v. Williams*, 83 F.4th 994 (5th Cir. 2023).

Here, Mittelstadt used CellHawk instead of Cellebrite. His testimony will mirror the testimony offered in Georgia courts and courts throughout the country: when one uses a cell phone either by texting, or calling/receiving a call, or by simply having the cell phone on so that it is constantly pinging, a cell tower nearby will receive and record the ping. This evidence simply shows the approximate location of the cell phones based on the nearby cell towers.

Mittelstadt's testimony will be precisely what he described in his affidavit. Most importantly that

> *[O]n September 11, 2021, Mr. Wade's phone left the Doraville area and arrived within the geofence located on the Dogwood address at 10:45 P.M. The phone remained there until September 12 at 3:28 A.M. at which time the phone traveled directly to towers located in East Cobb consistent with his routine pinging at his residence in that area. The phone arrived in East Cobb at approximately 4:05 A.M., and records demonstrate he sent a text at 4:20 A.M. to Ms. Willis.*

> *[O]n November 29, 2021, Mr. Wade's phone was pinging on the East Cobb towers near his residence and, following a call from Ms. Willis [more accurately, from Mr. Willis's phone] at 11:32 P.M., while the call continued, his phone left the East Cobb area just after midnight and arrived within the geofence located on the Dogwood address at 12:43 A.M on November 30, 2021. The phone remained there until 4:55 A.M.*

He will offer no opinion; he will not testify as an expert, but only as a summary witness, explaining exactly what the records show. The prosecution will surely point out that nobody knows what was happening in the house between midnight and 3:28 a.m. on September 12, or between midnight and 5:00 a.m. on November 30. Mittelstadt does not claim to know. Neither does President Trump or any other defendant in this case. Only two people know. They are certainly the ones who should testify and say exactly what was happening on those occasions, so nobody will complain about improper speculation, or improper efforts to distort the truth, or nefarious contacts with the media. All we have heard from Wade and DA Willis so

far has been that they did not have a romantic relationship until 2022. Yet it is highly significant that the State's response did not even attempt to challenge the CSLI evidence regarding September 11-12, 2021 or November 29-30, 2021.[3] The defendants' business record CSLI evidence is admissible and Mittelstadt stands ready to testify as reflected in his affidavit.

2. The CSLI evidence is admissible as "extrinsic impeachment" and substantive relevant evidence.

The State argues that introducing the CSLI evidence amounts to improper "extrinsic impeachment" evidence under O.C.G.A. § 24-6-608.[4] This is simply incorrect. It is true that Rule 608(b) limits extrinsic evidence when the primary evidence is nothing other than evidence that is offered to prove a witness's lack of credibility based on some prior bad act. The CSLI evidence is not being offered for the purpose of showing a prior "bad act" that impeached the witness's credibility. Thus, the prohibition on extrinsic evidence has no applicability here. Instead, the rule that applies is OCGA § 24-6-621, which provides in the broadest terms, that a

[3] The State's response also fails to factor in that the more extensive data for the two dates, including the CellHawk generated animated map which details every cell tower hit along the route of travel, demonstrates Wade's phone traveling to and remaining at the Dogwood address (Yearti condo) geofence during times when clubs, restaurants, and the Porsche experience are most likely not even open for business. Nor does the State chose to inform the Court that this is the same data that Fulton County District Attorney's Office routinely relies upon to obtain convictions, and thus any suggestion that this data is unreliable is disingenuous at best.

[4] The State tries to equate the CSLI evidence to the specific "bad acts" of conduct evidence the State sought to introduce to impeach Bradley. The CSLI evidence is not of the same character. It is not specific acts of conduct of Wade or DA Willis at all.

party is entitled to offer evidence that contradicts the testimony of a witness.[5] The witnesses in this case – both Wade and Willis – testified that their romantic relationship did not begin until March or April of 2022 *and* that they had never spent the night together prior to the Spring of 2022. The evidence offered by the defense to refute this testimony – the CSLI – is admissible pursuant to § 24-6-621.

The breadth of § 24-6-621 cannot be overstated. Impeachment by disproving facts testified to by a witness need not occur on cross-examination of the witness. If the witness testifies to a certain fact, the opposing party may impeach the witness simply by calling another witness who offers contrary testimony about that fact. *Martin v. State*, 205 Ga. App. 591 (1992). Impeachment may also be achieved simply through the introduction of a photograph. In *Kelley v. State*, 233 Ga. App. 244 (1998), the defendant testified that he never walked around the house nude. The opposing party was permitted to impeach this testimony by offering a nude photograph of the defendant in his house. Similarly, in *Bowen & Bowen Constr. Co. v. Fowler*, 265 Ga. App. 274, 593 S.E.2d 668 (2004), during the punitive damages phase of a trial, a construction company witness expressed remorse for his company's conduct. The plaintiff was permitted to introduce a letter written by the company threatening to sue the plaintiff for abusive litigation to impeach the

[5] The statute is concise and unambiguous: "A witness may be impeached by disproving the facts testified to by the witness."

witness.

The impeaching testimony may simply reveal that the witness's version of events is less likely to be true, as illustrated by the case of *Goodwin v. State*, 208 Ga. App. 707 (1993). The defendant was charged with aggravated assault with intent to commit rape. He offered a hospital record of the victim that revealed she had cocaine in her system. The Court of Appeals held that this impeaching evidence should have been admitted, because the evidence supported the defendant's version that the victim was the aggressor.

In short, the impeachment CSLI evidence can be introduced simply by offering the CSLI records that demonstrated that Willis and Wade spent two nights together on dates that contradicted their version of events concerning the inception of their romantic relationship *and* in contrast to their testimony that they *never* spent the night together at the Hapeville condominium. The defense does not propose that the Court compromise by simply admitting the records into evidence pursuant to § 24-6-621; the preferable method would be to allow Mittelstadt to testify and be subject to cross-examination by the State.

The CSLI evidence is also admissible as relevant substantive evidence tending to show the close interrelationship between Wade and DA Willis during a time period that DA Willis was living at the Yearti condo – April 2021 to November 30, 2021 – keeping in mind that Wade was hired on November 1, 2021 and both testified

there was no romantic relationship until 2022.

The breadth of § 24-6-621 is compatible with the basic philosophy of the evidence code which codifies the liberal definition of "relevance" as defined in OCGA § 24-4-401: "the term 'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Given the testimony of Wade and Willis that they *never* spent the night together at the Hapeville condominium, the evidence – actual record evidence, not just an opinion or speculation – that proves that while talking on the phone with DA Willis, Wade drove from near his house to a location near her condo (if not exactly *to her condo*) at midnight, where he then remained for five hours – not once but twice in two months – qualifies as relevant evidence, if not presumptive proof of the fact that they *did* spend the night together on those two occasions at the Hapeville condominium. And to be clear, presumptive proof is not required as a precondition to the introduction of evidence to prove a point; evidence is relevant pursuant to § 24-4-401 when it tends to make a fact that is of consequence more likely.[6]

The cell phone records that show they were talking on the phone and then

[6] The standard for relevant evidence is a liberal one, and such evidence is generally admissible even if it has only slight probative value. *McClain v. State*, 303 Ga. 6 (2018). Evidence tending to establish facts in issue is "relevant" and admissible, and no matter how slight its probative value, law favors admission of relevant evidence. *American Petroleum Products, Inc. v. Mom and Pop Stores, Inc.,* 231 Ga. App. 1 (1998).

ended up at a location near or at her condominium for five hours makes more than just one fact more likely than not: (1) they spent the night together on those two occasions; and (2) their romance began before Wade was hired. One more fact is also more likely true than not: (3) neither of them testified truthfully at the hearing on February 15.

WHEREFORE, President Trump respectfully requests that the Court rule the CSLI evidence is admissible, permit the defense to call Mittelstadt as a witness to testify about the CSLI and his use of the software CellHawk as reflected in his affidavit, and admit exhibits A-C attached to his affidavit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify I electronically filed the foregoing document with the Clerk of Court using Odyssey Efile Georgia electronic filing system that will send notification of such filing to all parties of record.

This 25th day of February, 2024.

/s/ Steven H. Sadow
STEVEN H. SADOW