

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Berkeley County

Honorable Roger M. Young, Circuit Court Judge

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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

DONTE SAMAR BROWN,

PETITIONER

APPELLATE CASE NO. 2017-000094

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BRIEF OF PETITIONER

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## **ISSUES PRESENTED**

### **1.**

The Court of Appeals erred by affirming the trial court's admission of the GPS search records for co-defendant Christopher Wilson's electronic monitoring device to coordinate calls made by Petitioner from Wilson's cell phone at the time of the robbery where there was no foundation as to the accuracy of the electronic monitoring device, the process by which the GPS data from the device is stored, and the trustworthiness of the GPS records.

### **2.**

The Court of Appeals erred in affirming the trial court's admission of the GPS records as business records, where the state failed to call a qualified witness to testify about the preparation of the GPS records as required by Rule 803(6), SCRE, and where the method and circumstances of the GPS records preparation indicated a lack of trustworthiness.

## STATEMENT OF THE CASE

On July 18, 2012, a Berkeley County Grand Jury indicted Petitioner for three counts of armed robbery, five counts of kidnapping, attempted murder, criminal conspiracy, possession of a weapon during a violent crime, and burglary, second degree. R. 739 – 762. All twelve indictments are from a single incident. R. 739 – 762. The matter proceeded to a jury trial before the Honorable Roger M. Young, Sr. on May 5, 2014. R. 1. Debra Littlejohn and David Schwacke represented Petitioner. Colleen Taylor and Mason West represented the State. R. 1.

On May 8, 2014, the jury found Petitioner guilty of each count of armed robbery and kidnapping. R. 713. Petitioner was also found guilty of burglary and criminal conspiracy. R. 713. He was found not guilty of attempted murder and possession of a weapon during a violent crime. R. 713.

Judge Young sentenced Petitioner to sixty years imprisonment. R. 722. Petitioner's convictions were affirmed by the Court of Appeals in State v. Donte Samar Brown, 2016- UP-447 (filed November 2, 2016). App. 1 – 3. Petitioner sought rehearing. App. 4 – 16. Rehearing was denied. App. 17.

Petitioner sought a writ of certiorari from this Court. This Court granted the writ in its order dated October 19, 2017.

## ARGUMENT

### I.

The Court of Appeals erred by affirming the trial court's admission of the GPS search records for co-defendant Christopher Wilson's electronic monitoring device to coordinate calls made by Petitioner from Wilson's cell phone at the time of the robbery where there was no foundation as to the accuracy of the electronic monitoring device, the process by which the GPS data from the device is stored, and the trustworthiness of the GPS records.

#### **Introduction**

This case involved an armed robbery of the Zaxby's in Goose Creek on December 23, 2011. One individual told police that Petitioner had called her from Christopher Wilson's phone on the night of the robbery. Another individual told police that she picked up Petitioner and Wilson across the street from the Zaxby's the night that it was robbed. Petitioner and Wilson were soon developed as suspects. The police requested the GPS search records and cell phone records for Wilson from the night of the robbery. At trial, the state introduced the records to show that Wilson was at the Zaxby's during the time of the robbery, and to allege that Petitioner was with him and made calls from Wilson's phone.

#### **Motion to Suppress Christopher Wilson's GPS Records**

Prior to trial, defense counsel moved to suppress the GPS records for Christopher Wilson, Petitioner's co-defendant. R. 85. The solicitor sought to introduce the records to show that Petitioner was with Wilson and making calls from Wilson's cellphone during the time of the robbery. R. 86, ll. 13-25. Counsel argued that GPS data can be obstructed by "various things" and there must be testimony of the accuracy of the GPS technology. R. 88, l. 18 – 89, l. 1.

The solicitor argued that the GPS records were kept by the South Carolina Department of Probation, Pardon, and Parole as part of their normal business documents. The department's agents had access to the server run by Omni Link, the company that runs the GPS. According to the solicitor, the department's agents regularly go to Omni Link's website to print records. R. 89, ll. 6 - 13. The solicitor also claimed that Agent Steward Powell, Wilson's probation agent and witness for the State, was trained on how to read a GPS report printout. R. 89, ll. 17-24.

Defense counsel responded that "*simply reading a report doesn't qualify someone to testify as to the accuracy of it*, which then would be . . . very prejudicial to [Petitioner]." R. 90, l. 24 - 91, l. 8. (emphasis added). Counsel explained that the GPS is run by Omni Link, which created the GPS records, stored them on their server, and produced the software that allowed the company to perform those functions. R. 92, ll. 11-13.

Over counsel's objection, the judge admitted the GPS records into evidence under the business records exception to the rule against hearsay, Rule 803(6), SCRE. The judge stated that "GPS data pulled off the server is [a] business records exception . . . and that the person who comes and testified that they're someone who regularly has access to those records can come in and testify as to . . . what that data was that got pulled off." R. 369, ll. 4-10.

### **Facts at Trial**

The state's case was highly circumstantial. On the night of December 23, 2011, Jeffrey Taylor had just ended his evening shift at the Zaxby's in Goose Creek. R. 221, l. 17 - 222, l. 11. His shift ended around 11:00 pm and he walked to his car to make some phone calls. R. 222, ll. 10-15.

While sitting in his car, Taylor saw a light flashing and heard someone say "turn around." R. 222, ll. 16-19. He turned around to see three people walking towards the Zaxby's. R. 222, ll. 20

- 23. He recognized one person as his co-worker, Ronnie, but could only see that the other two people had on black clothing. R. 222, l. 24 - 223, l. 6. One of them had a gun “poked” into Ronnie’s side and was “pulling him back towards the restaurant.” R. 223, ll. 7-20.

Taylor called 9-1-1 and stayed on the phone until the police responded to the scene. R. 223, ll. 8-16. When officers arrived, he pointed out to the police that the two men ran away into the woods behind the restaurant. R. 223, ll. 8-16. Taylor also gave a statement stating that two men went into the restaurant and later ran out the back door into the woods. R. 227, ll. 14-18. He could not identify either man.

Gerlinda Williams was the assistant manager working at the Zaxby’s on the night of December 23, 2011. R. 278, l. 21 – 279, l. 6. She was inside the manager’s office completing her paperwork when a man with a knife walked into the office and told her to lie down on the floor. R. 286, ll. 6-10. Then, a man with a gun walked into the office and told the man with the knife to go in the back of the restaurant. R. 286, ll. 11-13.

While Williams was on the floor near the office, the man with the gun searched her pockets, and he shot her in the leg. R. 280, ll. 20-21. She stated that the two men were wearing all black clothing and ski masks. R. 280, ll. 3-5. The men took about \$3,800.00 during the robbery. R. 281, ll. 19-21. Williams could not identify either man.

Sgt. Scott Clark with the Berkeley County Sheriff’s Office K-9 Unit got a call from the Goose Creek police to assist with the investigation. R. 314, ll. 9-11. The officers informed Sgt. Clark that two people were seen running across the highway into the Foxborough subdivision across from the Zaxby’s. R. 314, ll. 12-14. He started his dog at the entrance of Foxborough, which led him into the area of 318 Swamp Fox Lane. R. 314, l. 9 – 319, l. 23. He found money on the

ground. R. 314, ll. 2-23. However, neither Petitioner's nor Wilson's DNA was found on the money.

Sgt. Clark returned to the restaurant with his dog and tracked a scent at the back of the building near the dumpsters where the two men were seen running away into the woods. R. 322, l. 21 – 323, l. 3. The dog picked up a black ski mask that was sitting on a tree and more money on the ground. R. 323, ll. 3-11. Wilson's DNA was later found on the mask. R. 491, ll. 1-14.

Wendy Myers, a crime scene investigator with the Goose Creek police department, recovered a .22 caliber shell casing inside of the Zaxby's near the "employees only" area. R. 339, l. 20 – 340, l. 6. Myers also located a projectile in the back of the restaurant near the office. R. 341, l. 1 – 342, l. 9. The shell casing was sent to SLED for ballistics testing. R. 344, l. 22 – R. 345, l. 2. The casing matched the .22 caliber pistol that was later recovered from Wilson's residence. R. 480, ll. 12-23.

Petitioner's girlfriend, Marteeeka Hamilton, stated that Petitioner telephoned her from Christopher Wilson's phone around midnight on December 23, 2011. R. 378, ll. 4-12. Petitioner told her that he needed her to pick him and Wilson up from the entrance of the Foxborough subdivision. R. 379, ll. 10-20.

Cynthia Garrett told police that she had seen Petitioner cleaning a gun in her house. R. 416, ll. 22-23. She claimed that Petitioner telephoned her from Wilson's cell phone on December 23, 2011 around midnight. R. 420, ll. 11-20. He asked Garrett to pick him up, but she refused. R. 420, l. 21 – 421, l. 21. Garrett also claimed that Petitioner confessed to her that he robbed the Zaxby's with Wilson. R. 423, ll. 11-24. She said that Petitioner had new clothes, shoes, and a cell phone. R. 424, ll. 9-18. After her alleged encounter with Petitioner, Garrett went to the police. R. 426, ll. 1-3.

Based on Garrett's information and Wilson's DNA on the mask, officers executed a search warrant for 318 Swamp Fox Lane in the Foxborough subdivision, Wilson's home. R. 491, ll. 15-19. Petitioner was located inside the house, and he was detained. R. 479, l. 18 – 480, l. 11.

Officers recovered a Ruger Mark II semi-automatic .22 caliber pistol inside of a suitcase, which was found outside near the garage. R. 480, ll. 12-23. The pistol matched the shell casing recovered from the restaurant. R. 574, l. 1 – 575, l. 5. Petitioner's DNA was not a conclusive match to the DNA found on the pistol. R. 608, l. 16 – 611, l. 10.

Over defense counsel's objection, Investigator Powell used the GPS records from Wilson's electronic monitoring device to coordinate his location with the phone calls that Petitioner allegedly made from Wilson's phone to Marteeeka Hamilton and Cynthia Garrett shortly after the robbery. R. 507 – 514. According to Powell, Wilson was at the Zaxby's address and in the wooded area next to the restaurant during the time period of the robbery, 12:04 pm. R. 507 – 514.

Petitioner chose to put the State to its burden of proof and did not offer a defense. Christopher Wilson pled guilty prior to trial and did not testify against Petitioner.

### **Court of Appeals**

In a summary two paragraph opinion, the Court of Appeals (Lockemy, C.J., Konduros., and McDonald, J.J.) held that the records were properly admitted. The Court also seemed to state that even if the records were inadmissible hearsay, that the error was harmless. App. 2.

### **Discussion**

The trial judge erred by admitting the GPS records for Christopher Wilson's electronic monitoring device under the business records exception to the rule against hearsay. There was no foundation laid as to the accuracy of the electronic monitoring device, the process by which the GPS

data from the device is stored, or the trustworthiness of the GPS records. The Court of Appeals similarly erred by affirming that ruling.

The business records exception to the rule against hearsay provides that memoranda, reports, records, or data compilation, in any form, of acts, events, conditions, or diagnoses can be admissible at trial if they are (1) made at or near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) made and kept in the course of a regularly-conducted business activity; (4) identified by the custodian or qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court. Rule 803(6), SCRE

This exception to the hearsay rule does not, however, “absolve the offering party from the usual requirements of authentication.” *State v. Rich*, 293 S.C. 172, 173, 359 S.E.2d 281, 281 (1987). *See also Stevens v. Allen*, 336 S.C. 439, 520 S.E.2d 625 (Ct. App. 1999) (“Even under Rule 803(6), SCRE, a proper foundation must be laid for admittance of the evidence.”). The proponent of evidence that allegedly falls within the business records exception must still meet the authentication requirement of Rule 901, SCRE. *State v. Anderson*, 386 S.C. 120, 128-29, 687 S.E.2d 35, 39 (2009).

Under Rule 901, SCRE, “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Authentication of a process or system requires evidence that the process or system in question produces a result and *that the result produced is accurate*. Rule 901(b)(9), SCRE. (emphasis added).

In *State v. Rich*, this Court reversed Rich’s convictions for burglary, grand larceny, and failure to stop for a blue light based on erroneous “admission of fingerprint comparisons without

proper authentication.” 239 S.C. 172, 359 S.E.2d 281, 282 (1987). At trial, the state had an expert in fingerprint comparisons testify that he had matched a latent print found at the scene of the crime with an ink impression card of Rich’s fingerprints. *Id.* at 173, 359 S.E.2d at 281.

Rich objected to the admission of the inked impression card on hearsay grounds. On appeal, this Court held that the state offered “no evidence as to when and by whom the card was made and that the prints on the card were in fact those of this defendant.” *Id.* at 174, 359 S.E.2d at 282. Accordingly, this Court reversed the convictions as the expert’s match of the latent print to the unauthenticated inked impression card was central to the state’s case against Rich. *Id.*

In *State v. Anderson*, this Court applied its decision in *Rich* to the trial court’s admission of Anderson’s fingerprint entry from the Automated Fingerprint Identification System (“AFIS”) during his trial for first degree burglary. 386 S.C. 120, 127, 684 S.E.2d 35, 38 (2009). Unlike in *Rich*, the prosecution’s fingerprint expert testified about how he submitted latent prints recovered at the crime scene into the AFIS database maintained by SLED. The SLED agent in charge of maintaining AFIS testified that the database compares the latent print to ten print cards stored in its system and produces twenty to thirty possible matches. *Id.*

The SLED agent further stated that the cards stored in AFIS are generated every time someone’s fingerprinted following an arrest and have their individual identification numbers. *Id.* The AFIS entries also detail when and where the fingerprint was taken. *Id.* The fingerprint expert then testified that he identified an AFIS entry as matching the fingerprints found at the crime scene. This card belonged to Anderson. *Id.*

In affirming Anderson’s conviction, this Court held that the State had satisfied the authentication requirements of Rule 901, SCRE, in three respects. First, the State offered testimony on the “internal patterns, or other distinctive characteristics” of the Anderson’s AFIS records entry.

*Id.* at 127, 687 S.E.2d at 38. Second, the State authenticated the AFIS records by presenting “evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result” pursuant to Rule 901(b)(9), SCRE. *Id.* at 131, 687 S.E.2d. at 41.

Finally, the State had authenticated the AFIS records by proving that they were public records within the example of Rule 901(b)(7). *Id.* at 130-31, 687 S.E.2d at 40. This Court declined to rule on whether business records exception in Rule 803(6), SCRE, would have survived a hearsay challenge, finding the issue waived. *Id.* 126, 687 S.E.2d at 38. Nevertheless, this Court suggested that duly authenticated AFIS records would fall within the business records exception. *Id.* at n. 3.

While Petitioner is not aware of any South Carolina cases that directly address the foundational requirements for authenticating electronic monitoring records for admission as a business record, neighboring jurisdictions have addressed the issue.

In *Ruise v. State*, 43 So.3d 885 (Fla. Dist. Ct. App. 2010), the Florida District Court of Appeal reviewed Ruise’s revocation of his probation and resulting sentence based on GPS data from his electronic monitoring device. In May 2008, Ruise was placed on sex offender probation and was required to wear an electronic monitoring device as a condition of his supervision. *Ruise*, 43 So.3d at 886. The state filed an affidavit of violation alleging that on June 28, 2009, Ruise was “away from his approved residence,” in violation of the condition that he remain confined to his home. *Id.* The only evidence that the state presented was the GPS data from the monitoring device. *Id.*

Ruise argued that the GPS data was inadmissible hearsay and should not have been admitted as evidence. *Id.* The state, as here, argued the data was admissible under the business records exception the rule against hearsay. *Id.* The District Court of Appeal explained that “[t]he state had the burden to lay the requisite foundation for admission of the GPS data under this hearsay

exception.” *Id.* at 887. *See also Jackson v. State*, 877 So.2d 816, 816-17 (Fla. Dist. Ct. App. 2004) (“[C]omputer printouts, like business records, are admissible if the custodian or other qualified witness is available to testify as to the manner of preparation, reliability, and trustworthiness.”).

In *Ruise*, the state “presented testimony of an employee of the monitoring company who explained how the electronic monitoring system worked and how the GPS data from the offender’s monitoring device is compiled into a computer database that the probation officer can access to track the offender’s location within an 18-foot radius.” *Id.* In addition to testimony from the employee of the monitoring company, Ruise’s probation agent explained how he accessed the database and printed the reports. *Id.* The agent *also testified how he had taken Ruise to various locations to ensure that the data from the monitoring device was accurate.* *Id.* The District Court of Appeal found that the state had laid the foundation necessary for having the GPS data admitted as a business record. *Id.* at 888.

North Carolina, our sister state, has also addressed laying the proper foundation to verify authenticity and trustworthiness of GPS tracking data. In *State v. Jackson*, 748 S.E.2d 50 (N.C. Ct. App. 2013), the North Carolina Court of Appeals considered whether the state properly authenticated GPS tracking evidence.

In that case, Jackson was indicted for simple assault, sexual battery, larceny, and second-degree sexual offense. *Jackson*, 748 S.E.2d at 52. After the victim informed the police of the sexual assault and gave a description of the suspect, the police received a tip that directed them to Jackson’s residence. *Id.* at 53. Police arrived at Jackson’s residence and observed that he wore an electronic monitoring device. *Id.* After the victim identified Jackson as her assailant, Jackson was arrested. *Id.*

At trial, the state introduced evidence from Jackson's electronic monitoring device to place him at the scene of the assault. *Id.* Sgt. Dave Scheppegrell testified on behalf of the state concerning Jackson's monitoring device and the data produced by the device. *Id.* at 54. Sgt. Scheppegrell testified that "he is the supervisor of the electronic monitoring unit of the Charlotte-Mecklenburg Police Department," and "he received training from the vendors of the electronic monitoring devices used" by the police department. *Id.*

Sgt. Scheppegrell also "described the different components of the device," "testified about how the device operates using a combination of GPS signals and cell phone triangulations to track the location of the device," and explained how the "tracking data is then uploaded from the device to a secure server where it is stored." *Id.* Finally, Sgt. Schepperell explained how "he can view the data stored on the secured server via a web service and produce reports based on the data and routinely does so in the normal course of business." *Id.*

On appeal, Jackson argued that the GPS tracking data was not properly authenticated. The Court disagreed and found that Sgt. Schepperell's testimony "established a sufficient foundation of trustworthiness for the tracking evidence to be admitted as a business record." *Id.* at 56. *See also State v. Taylor*, 632 S.E.2d 218 (N.C. Ct. App. 2006) (Finding that printouts of text messages sent to and from a cell phone number assigned to victim's company-issued cell phone were properly authenticated where the strategic care specialist for the cell phone company testified as to the company's procedures for keeping records of text messages to and from customers and the manager of the cell phone business that issued the phone to victim and retrieved the messages testified how he retrieved them.).

Jurisdictions beyond the southeast have considered the foundation requirements for introducing data derived from electronic monitoring devices. *See State v. Kandutsch*, 336 Wis.2d

478, 799 N.W.2d 865 (2011) (holding that the State authenticated and laid a proper foundation for a report from defendant's home electronic monitoring unit by providing testimony describing the electronic monitoring system, how the system works, the process by which the summary reports are generated, and that the process produces an accurate result); *State v. Polanco*, 69 Conn. App. 169, 184, 797 A.2d 523, 533 (Conn. App. Ct. 2002) (Although the evidence at issue involved a map generated using data from a GPS system that was maintained on a computer, the appeals court explained that "a court is not permitted to admit a computer generated exhibit into evidence unless the proffering party also (1) presents a witness whose knowledge of computers is sufficient to enable a direct and cross-examination concerning the process used to generate the exhibit and (2) lays a foundation, through that witness, sufficient to support a finding that the process and equipment involved in generating the exhibit were adequate for that purpose.").

Upon a review of the case law, appellate courts from other states that have considered and addressed the proper foundation to verify the authenticity of electronic monitoring device data approve of testimony from witnesses with (1) knowledge of how the device works, (2) how data is derived from the device to be stored, (3) and whether the data is accurate.

Because appellate courts in South Carolina require a proper foundation of authenticity for such evidence as fingerprints, a proper foundation as to the accuracy and trustworthiness of data from electronic monitoring devices should be required as well. *See Anderson*, 386 S.C.120, 687 S.E.2d 35; *see also Rich*, 293 S.C. 172, 359 S.E.2d 281.

In this case, the state manifestly failed to establish a proper foundation for the admission of the GPS records. The State offered Agent Steward Powell as the custodian of the records. However, Powell appeared to be totally ignorant of how the GPS records were generated, stored, and transferred to the spreadsheet entered into evidence at trial.

Powell did not explain how the GPS data is stored. *Cf. Jackson*, 748 S.E.2d at 52; *see also Anderson*, 386 S.C at 130-31, 687 S.E.2d at 40. Powell did not testify whether the electronic monitoring device was working properly or whether there had ever been problems with the device. Powell did not offer his experience or training working with electronic monitoring devices, nor did he explain how the device works. Like the fingerprint card in *Rich*, Powell posited that the GPS records – from his perspective – simply appeared in the excel sheet handed to him by another agent. 239 S.C. at 174, 359 S.E.2d at 282.

Investigator Nicholas Powell, who interpreted the data, did not testify as to his experience or training in interpreting GPS data. Unlike in *Jackson* and *Anderson*, there was no testimony as to Investigator Powell's knowledge of electronic monitoring devices and how they work nor was there testimony about his familiarity with Wilson's device. *Jackson*, 748 S.E.2d at 52; *Anderson*, 386 S.C at 130-31, 687 S.E.2d at 40. He merely read from the report.

There was no preliminary showing that the GPS data introduced against Petitioner was accurate and trustworthy. There was no evidence describing the process by which the data was stored and transmitted. Even if the GPS records qualify as a business record, a doubtful proposition as will be seen *infra*, they were not properly authenticated, and therefore, should not have been admitted. Rule 901, SCRE.

Finally, the evidence against petitioner having committed the robbery in this case was far from being overwhelming, and the Court of Appeals also erred by adding a sentence stating that even if the evidence was inadmissible hearsay, that it was harmless error. Petitioner should be granted a new trial.

2.

The Court of Appeals erred in affirming the trial court's admission of the GPS records as business records, where the state failed to call a qualified witness to testify about the preparation of the GPS records as required by Rule 803(6), SCRE, and where the method and circumstances of the GPS records preparation indicated a lack of trustworthiness.

In its opinion, the Court of Appeals correctly explained that under the business records exception to the hearsay rule, "evidence is admissible if it is '[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnosis made at or near the time by or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, **all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.**'" (*emphasis added*). App. 2.

Despite the Court of Appeals' recitation of the applicable rule of evidence, the Court determined that the GPS records, as presented by the State at trial, qualified as business records. That respectfully was error. The GPS records for Petitioner's co-defendant, Christopher Wilson, should not have been admitted as a business record for at least two solid reasons. First, the State did not enter the GPS records into evidence through the testimony of the records custodian or another qualified witness. Second, the GPS records are internally inconsistent and incomplete; evidencing a fatal lack of trustworthiness.

The State offered Agent Steward Powell as the custodian of the records. As detailed above, Powell *knew almost nothing* about how the GPS tracking system worked. He did not explain how the GPS tracking device works, or how the GPS data is stored and converted from GPS coordinates

to addresses. R. 468, l. 24 – 476, l. 11. Powell did not testify as to whether the electronic monitoring device was working properly or whether there had ever been problems with the device.

*Id.*

Powell simply stated that GPS data is “recorded by a third party vendor, that (sic) supplied the software, hardware, [and] the actual ankle monitor, for the system.” R. 468, l. 24 – 469, l. 1. The only testimony he offered was that he and other agents had access to the third party’s server, Omni Link, and regularly printed records.

Moreover, Agent Powell admitted that another probation agent, Agent Gross, actually accessed the computer program to create the GPS records because Powell did not know how to use the computer. R. 471, l. 2 – 474, l. 23. Powell testimony revealed that *he had almost no knowledge of how the GPS software functioned*, “I testified to the numbers that we submitted. Those numbers, I do not know. *I'm a field agent, not a statistician or a person of science.*” R. 474, ll. 7-16. (emphasis added).

Critically, Powell could not explain how the spreadsheets of GPS records were created or what the different numbers on the spreadsheets meant, “[y]ou know, I don't see a column on there. **I don't really know what those numbers mean without a column. It could be anything, and I don't want to speculate without knowing for sure, but there's no columns on that sheet.** . . . I do not know. Like I said, I'm only trained to interpret the paperwork I'm sent, the address and the location.” R. 475, ll. 4-11 (*emphasis added*).

It was and is impossible to see how Powell could accurately “interpret the paperwork” when he did not know “what those numbers” on the spreadsheets meant. Unable to explain the GPS records, Powell was limited to mechanically repeating that he regularly used GPS records and that “[w]e stand by what our department's agents do.” R. 474, l. 7 – 476, l. 11.

In addition to failing to have a custodian of the GPS records or another qualified witness introduce the GPS records, the method surrounding the preparation of the GPS records and the formatting of the GPS records evidenced a lack of trustworthiness.

The nine pages of Excel spread sheets that constitute the State's GPS records are internally inconsistent and show clear signs of having been manipulated or edited so as to isolate and emphasize the date and times helpful to the State's case. R. 724 –733. Accordingly, the GPS records, as presented at trial, could not be in the form that they are normally kept in during the course of probation's work and were not sufficiently trustworthy so as to be admissible under the business records exception. *S.C. Nat'l Bank v. Jones*, 302 S.C. 154, 155, 394 S.E.2d 323, 324 (1990) (holding that summary statements of two accounts were not admissible as business records without inserting, attaching or otherwise introducing the monthly account statements on which they were based).

The first column on pages one and two of the GPS records is numbered one to fifty on the first page and one hundred to one hundred fifty on the second page. R. 724 – 725. GPS entries numbered fifty-one to ninety-nine were not included in the GPS records. The last entry on page one is recorded as "12/23/2011 10:58:49 PM". R. 724. The first entry on the second page starts thirty minutes later at "12/23/2011 11:29:29 PM". R. 725. The normal time interval for entries within pages one and two is approximately thirty-five seconds. More troublingly, the individual GPS entries on pages one and two have no location information, rendering them incomplete and irrelevant to determining Wilson's location.

Page three of GPS records consists of four numbered entries. R. 726. The two previous pages each contained fifty entries. As with the entries on the first two pages, page three's entries are also missing location information. At trial, these four entries – presumably removed from

the timeline by Agent Gross – represented the GPS data entries that the state claimed showed Petitioner in the vicinity of the robbery. *Id.*; R. 507 – 514. The location information related to these four entries appears to be on page seven of the GPS records. R. 730.

Pages four through seven appear to show the location information missing from pages one through three. R. 727 – 730. Curiously, considering the state alleged these were GPS records, there are no GPS coordinates on these pages. As discussed *supra*, there was no testimony as to how the GPS tracking software accurately extrapolates addresses from the GPS coordinates or whether the addresses are determined manually by the officer that generates the report. Further confusing matters, page six has nine rows of data entries containing location information, none of which corresponds with data entries found on the other pages of the GPS records. R. 729.

Attempts to understand the GPS records are further complicated by the fact that pages one and two lack any headings indicating what the data contained on the pages means. R. 724 – 725. Likewise, pages five and six lack not only column headings, but also the row numbering system found in pages one through three. R. 728 – 729.

Conversely, pages three, four, and seven have column headings, but only page three has row numbers. R. 726; R. 727; R. 730. The inconsistent - seemingly random - use of column headings and row numbers was never explained at trial. In fact, the lack of headings and consistent row numbering prevented Agent Powell, the State's qualified witness, from understanding the GPS records. R. 471, l. 2 – 476, l. 11; R. 475, ll. 4-11.

More problematically, even though pages four to seven appear to be the missing half of the GPS records found on pages one to three; the entries on these seemingly complementary pages do not match. For instance, the first line on page four records a “Max Time” of

“12/23/2011 10:00:14 PM.” R. 727. On the second line, the “Max Time” is “12/23/2011 10:00:50 PM.” *Id.*

By contrast, the first row on page one lists a date and time of “12/23/2011 10:29:30 PM” on row one and “12/23/2011 10:30:06 PM” on row two. R. 724. Thus page one and page four are not two halves of the same GPS data entries. This incompatibility occurs throughout the GPS records. In fact, the only two pages with matching halves are pages three and seven. R. 726; R. 730. Coincidentally, these pages contain the four out of sequence, isolated GPS records that the state relied on to place Petitioner at the crime scene. *Id.*; R. 507 – 514.

The final two pages of the GPS records are totally anomalous. R. 731 – 732. Page eight has no column headings, but appears to record data similar to that found on pages one through four. R. 731. Except, rather than having numbered rows, page eight’s rows all begin with “##”. *Id.* Moreover, the first date listed on page eight is “12/28/2011 02:32:19 PM”. *Id.* This is four days after the last data entry found on any other page. There is no other page in the GPS records that overlaps with the dates listed on page eight.

Page nine is equally irregular. Unlike the preceding eight pages that have either five or three columns, page nine has only two columns. R. 732. There are no headings describing the data contained in the two columns. The first column lists dates and times. The second column lists locations. The descriptions of these locations varies significantly; ranging from specific addresses (“2015 Ashley Phosphate Rd.” and “2103 Northwood Blvd.”) to streets and generic road features (“I-26”, “St. James Ave.”, and “ramp”). *Id.* Like the other pages in the GPS records, the dates and times listed in the first column do not match dates and times listed in any other page of the GPS records.

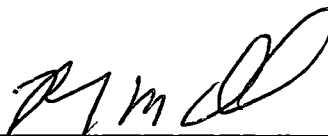
The only complete GPS records are those that the state alleged showed Wilson and Petitioner in the area of the robbery. R. 726; R. 730. Found on pages four and seven, these four GPS data entries were clearly excised from where they would normally be found in the data set. Given that the GPS records contain no other coherent data entries, these four entries - in addition to being removed from the timeline - must have also been manipulated when creating the spreadsheet.

The GPS records the state introduced at trial are incomplete and incoherent. This simply cannot be how these records are kept in the normal course of business. *State v. Rice*, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007) (holding that a business record without evidence on the manner in which it is prepared or the source of its information does not meet the requirements of the Uniform Business Record as Evidence Act or business records exception to hearsay rule.). Since the individual who compiled the records did not testify, the defense did not have a chance to cross-examine a knowledgeable witness on the inconsistencies in the GPS records.

Accordingly, the GPS records could not qualify as admissible business records under Rule 803(6), SCRE, and the Court of Appeals erred in affirming the trial court's admission. In addition, contrary to the findings of the Court of Appeals, the introduction of the GPS records could not have been harmless error because the state presented the GPS records as objective, technological proof that Petitioner was with his co-defendant at the time of the robbery.

**CONCLUSION**

By reason of the foregoing arguments, the opinion of the Court of Appeals should be reversed, and this case remanded to the Berkeley County Court of General Sessions for a new trial.



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Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of November, 2017.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Berkeley County

Honorable Roger M. Young, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

DONTE SAMAR BROWN,

PETITIONER

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CERTIFICATE OF SERVICE

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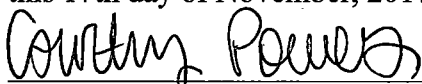
The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Donte Samar Brown, #314818, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 17th day of November, 2017.



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Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 17th day of November, 2017.

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 2, 2027.