

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

RONNIE EUGENE FUSTON,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE OKLAHOMA COURT OF CRIMINAL APPEALS**

APPENDIX "B"

Petition for Rehearing and Motion to Recall Mandate

Filed May 19, 2020

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY 19 2020

JOHN D. HADDEN
CLERK

RONNIE EUGENE FUSTON,)
)
 Appellant,)
)
 vs.)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

APPELLATE CASE
NO. D-2017-773

PETITION FOR REHEARING AND MOTION TO RECALL MANDATE

Appellant Ronnie Eugene Fuston petitions for rehearing and reconsideration of an issue raised on direct appeal but not considered by this Court in its March 5, 2020 opinion. *Fuston v. State*, 2020 OK CR 24. A petition for rehearing is appropriate where, as here, some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court. Rule 3.14(B)(1), *Rules of the Court of Criminal Appeals*, Okla. Stat. tit. 22, Ch. 18, App. Mr. Fuston petitions this Court to grant rehearing on Proposition II based on the aforementioned ground and incorporates by reference in the previous argument and authorities made in Petitioner's Brief-In-Chief, Reply Brief, and Appellant's Response to Supplemental Brief of Appellee filed on September 13, 2019.

PROPOSITION II

IN RELATION TO PROPOSITION II THE COURT'S OPINION FAILS TO CONSIDER AND DECIDE THE IMPACT OF SPECIFIC LANGUAGE IN THE APPLICABLE FEDERAL AND STATE STATUTORY LAW IN DETERMINING WHETHER THE OKLAHOMA COUNTY DISTRICT ATTORNEY'S OFFICE ACTED IN GOOD FAITH IN SECURING A COURT ORDER FOR HISTORIC CELL TOWER RECORDS.

As an initial matter the Court clearly applies an erroneous standard of review in deciding this issue. Despite the fact that the district court refused to hear argument on Mr. Fuston's motion to suppress based on the same claim decided in *Carpenter v. United States*, 138 S.Ct. 2206 (2018) the Court applies an abuse of discretion standard. (Slip op. at 22) However, the United States Supreme Court informs lower courts that the abuse of discretion standard is the wrong standard to apply when reviewing a district court's denial of a motion to suppress based on a Fourth Amendment claim. In *Ornelas v. United States*, 517 U.S. 690, 697-698, 116 S.Ct. 1657, 1662, 134 L.Ed.2d 911 (1996), Chief Justice Rehnquist, writing for the majority, stated:

We think independent appellate review of these ultimate determinations of reasonable suspicion and probable cause is consistent with the position we have taken in past cases. We have never, when reviewing a probable-cause or reasonable-suspicion determination ourselves, expressly deferred to the trial court's determination. See, e.g., *Brinegar*,¹ *supra* (rejecting District Court's conclusion that the police lacked probable cause); *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990) (conducting independent review and finding reasonable suspicion). A policy of sweeping deference would permit, "[i]n the absence of any significant difference in the facts," "the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." *Brinegar*, *supra*, at 171, 69 S.Ct., at 1308. Such

¹ *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

varied results would be inconsistent with the idea of a unitary system of law. This, if a matter-of-course, would be unacceptable.

In addition, the legal rules for probable cause and reasonable suspicion acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles. See *Miller v. Fenton*, 474 U.S. 104, 114, 106 S.Ct. 445, 451, 88 L.Ed.2d 405 (1985) (where the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law").

Finally, *de novo* review tends to unify precedent and will come closer to providing law enforcement officers with a defined "set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."

Because Mr. Fuston sought to suppress historic cell tower records that were obtained without a warrant in violation of *Carpenter*, this Court's review should have been *de novo* and not for an abuse of discretion.

Ultimately the Court decided that suppression was not necessary because law enforcement acted in good faith when a court order was obtained under the Stored Communications Act, 18 U.S.C. § 2703 despite the fact that no evidence supporting that conclusion appears in the record. (Slip op. at 23) However, the court completely overlooked and failed to address Appellant's counter argument made in response to the State's assertion of good faith.² that the good faith exception could not apply in this case because of the clear

² It bears noting that the United States Supreme Court has not specifically extended the good faith exception to *Carpenter* errors. The fact that the Sixth Circuit found that the Good Faith Exception applied when *Carpenter* was remanded does not make it applicable here. *Carpenter* is a federal case so the Sixth Circuit did not have to consider whether contradictory state statutory law defeated a claim of good faith by the government.

language of the SCA and our own state statute governing the same thing. The specific provision of the Stored Communications Act relied on to secure a court order for the historic cell tower records in this case, 18 U.S.C. § 2703 (d), states in pertinent part, “In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State.” Clearly, Congress intended that any action by state law enforcement under that provision had to comply with state law.

Okla. Stat. tit. 13, § 176.1 *et seq.* is known as the “Security of Communications Act.” Section 176.9 allows for the issuance of court orders for “wire, oral or electronic communications.” However, the state provision requires that specific information be given to the court issuing the order. Furthermore, § 176.9 (C)(1) requires that in order for an *ex parte* order to issue, the court must find “[T]here is probable cause for belief that an individual is committing, has committed or is about to commit a particular offense enumerated in Section 176.7” and “There is probable cause to believe that particular communications concerning the offense will be obtained through such interception.” If the good faith exception to the warrant requirement applies to this situation the Court must surely consider relevant state statutory provisions in determining whether law enforcement acted in good faith.

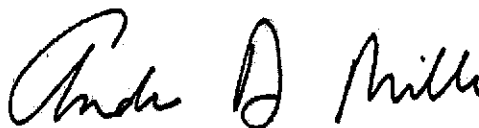
In light of the state statutory provision the State of Oklahoma could not carry its burden to show good faith. The Good Faith Exception to the Fourth Amendment warrant requirement cannot be applied mechanistically as was done in this case. Appellant respectfully submits that the Oklahoma County District

Attorney's Office should have been aware of the conflicting state statute making any reliance on the less demanding federal statute objectively unreasonable—especially given the specific language in the SCA indicating Congress did not intend the statute to be used to circumvent state statutes. A law enforcement officer cannot “be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional.” *Illinois v. Krull*, 480 U.S. 340, 355, 107 S. Ct. 1160, 1170, 94 L. Ed. 2d 364 (1987). The plain language of both statutes reveals that is exactly what happened in this case.

CONCLUSION

Based upon the above and foregoing prejudicial error supported by arguments and authority, Mr. Fuston respectfully requests the Court to grant rehearing in this case, vacate the March 5, 2020 opinion, and grant any other relief which the Court may deem necessary to meet the ends of justice.

Respectfully submitted,

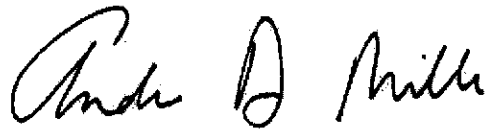


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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I certify that on the date of the filing of the above and foregoing instrument, a true and correct copy of the same was delivered to the Clerk of this Court with instructions to deliver said copy to the office of the Attorney General of the State of Oklahoma.

A handwritten signature in cursive script that reads "Andrea D. Miller". The signature is written in black ink and is positioned above a horizontal line.

ANDREA DIGILIO MILLER