

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 "D"

**Appellant's Response to Supplemental Brief of
Appellee Regarding Proposition II**

Filed September 13, 2019

D-2017-773

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA
District Court of Oklahoma County Case Number
CF-2013-0438**

RONNIE EUGENE FUSTON,

APPELLANT,

-vs-

THE STATE OF OKLAHOMA,

APPELLEE.

**FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA**

SEP 18 2019

**JOHN D. HADDEN
CLERK**

**APPELLANT'S RESPONSE TO SUPPLEMENTAL BRIEF OF
APPELLEE REGARDING PROPOSITION II**

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RONNIE EUGENE FUSTON,)	
)	
Appellant,)	APPELLATE CASE
)	NO. D-2017-773
vs.)	
)	
THE STATE OF OKLAHOMA,)	District Court Case No.
)	CF-2013-438
Appellee.)	

**APPELLANT'S RESPONSE TO SUPPLEMENTAL BRIEF OF APPELLEE
REGARDING PROPOSITION II**

Appellee has filed, without objection by Appellant filing a supplemental brief relating to the Fourth Amendment issue raised in Proposition II of Appellant's brief in chief challenging the admission of historic cell tower records that were obtained by the Oklahoma County District Attorney's Office without a warrant but by use of a court order sought pursuant to 18 U.S.C. § 2703. Appellee's supplemental brief focuses on non-binding cases from other jurisdictions where various lower courts have upheld the use of such unlawfully obtained evidence under the good faith reliance on a statute exception articulated by the United States Supreme Court in *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1978).

It bears noting that the prosecutors in this case never offered a justification for the warrantless seizure of the cell tower records arguing in its written response to the motion to suppress only that no court has held that a warrant is necessary. (O.R. 573-574) At the motion hearing where Judge Elliott denied the motion to suppress the prosecutors again said nothing about the good faith

exception. In fact, Judge Elliott denied the motion without any ruling on the facts or the law. (O.R. 8/16/16 Tr. 18) The actual court order is not even in this record. The State on appeal has failed to address entirely the fact that the good faith argument was waived by the prosecutor's failure to assert it or at the very least admit a copy of the order it now claims was relied on in good faith. The State bears the burden of proof to show that warrantless searches and seizures do not violate the Constitution. It is hard to see a way for the State to carry that burden in this case with no order in the record, no testimony about how the order was obtained or what the articulable facts averred and no argument at the district court relating to this issue.

The good faith exception theory advanced by the State ignores a critical element of that exception to the warrant requirement. Under *Krull* the reliance has to be objectively reasonable. *Krull*, 480 U.S. at 355, 107 S.Ct. at 1170. 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.”

Because Oklahoma has a state statute that requires a finding of probable cause before law enforcement can obtain historic cell tower records, the Oklahoma District Attorney’s Office’s reliance on the less demanding federal statute was unreasonable. The Oklahoma Attorney General’s Office has recognized that “While a state law may not be less restrictive than the federal act, it may be more restrictive and therefore more protective of individual privacy.” *Question Submitted By The Honorable John Nance*, 2000 OK AG 45, ¶ 7. (citation omitted.) Here, state law requirements for law enforcement to seize electronic stored communications is more protective than the federal statute.

Because of the applicable state law provision the federal cases Appellee supplements her argument with are unpersuasive on this issue. Additionally, the Oklahoma Court of Criminal Appeals recently upheld the warrantless seizure of cell tower records by federal officials relying on the federal statute in *Poore v. State*, Case No. F-2017-67 (Not For Publication)(September 12, 2019)(Slip Op. at 34-35)(Attachment A). Therefore, any of the supplemental cases wherein a federal court held that federal law enforcement’s reliance on the Stored Communications Act are superfluous to the argument of whether the State can

establish that the Oklahoma County District Attorney's Office's reliance on the federal statute was objectively reasonable.

It appears that none of the state cases relied on by Appellee address state law enforcement's reliance on the federal statute despite applicable state statutes. As such, they are also of no avail to Appellee. In *State v. Snowden*, ___ N.E.3d___, 2019 WL 3381801, the Court of Appeals of Ohio applied the good faith reliance on binding precedent exception to the *Carpenter* violation. There is no discussion in *Snowden* about good faith reliance on a state statute or whether there was an applicable state statute. *People v. Edwards*, 97 N.Y.S.3d 418, 422-423 (N.Y. Sup.Ct. 2019) applies the good faith reliance on a statute exception but the issue of the effect of a more demanding state statute is not raised or addressed. Finally, the State's reliance on *Zanders v. State*, 118 N.E.3d 736, 744-745 (Ind. 2019) is misplaced. In *Zanders*, law enforcement obtained historical cell tower information from the carrier through an "Emergency Request Form." *Id.* at 739-740. The Supreme Court of Indiana did not decide whether either the exigent circumstances exception applied or the good faith exception because it found the admission of the historic cell tower information harmless. *Id.* at 743. *Zanders* did not involve state law enforcement obtaining a court order under the federal statute.

On the record before the Court the State cannot carry its burden is showing a good faith reliance on a federal statute justified the warrantless search and seizure of Mr. Fuston's historic cell tower records.

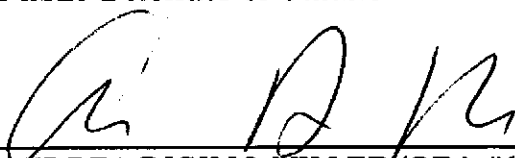
CONCLUSION

Based on the above and foregoing arguments and authorities, as well as those contained in Mr. Fuston's Brief In Chief and Reply Brief, Appellant asks this court to grant him a new trial, modify his sentence, or any other relief the Court deems necessary to meet the ends of justice.

Respectfully submitted,

ROBERT A. RAVITZ
Public Defender of Oklahoma County

By:

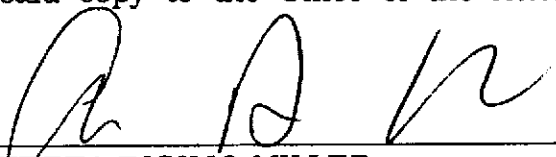


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CERTIFICATE OF SERVICE

This is to certify that on the date of filing of this instrument, a true and correct copy of the same was delivered to the Clerk of the Court of Criminal Appeals with instructions to deliver said copy to the Office of the Attorney General.



ANDREA DIGILIO MILLER