

Case No. 20-6444

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IN THE SUPREME COURT OF THE UNITED STATES

RONNIE EUGENE FUSTON,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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**CAPITAL CASE  
QUESTION PRESENTED**

**Whether the Oklahoma Court of Criminal Appeals was required to consider a state statute that applies only to live wiretaps in addressing Petitioner's claim that law enforcement improperly accessed his historic cell-site location information?**

Respondent respectfully urges this Court to deny the petition for writ of certiorari to review the Order and Judgment of the Oklahoma Court of Criminal Appeals entered on March 5, 2020. *See Fuston v. State*, 470 P.3d 306 (Okla. Crim. App. 2020).

### **STATEMENT OF THE CASE**

Petitioner is currently incarcerated pursuant to a Judgment and Sentence rendered in the District Court of Oklahoma County, State of Oklahoma, Case No. CF-2013-438. In 2017, Petitioner was tried by jury for one count of first degree malice murder and one count of possession of a firearm after former juvenile adjudication. A bill of particulars was filed alleging two statutory aggravating circumstances: (1) Petitioner created a great risk of death to more than one person and (2) the existence of a probability that Petitioner would commit criminal acts of violence that would constitute a continuing threat to society. *See Okla. Stat. tit. 21, § 701.12*. The jury found Petitioner guilty as charged, found the existence of both aggravating circumstances, and recommended a sentence of death. Petitioner was sentenced accordingly.<sup>1</sup>

The Oklahoma Court of Criminal Appeals (“OCCA”) affirmed Petitioner’s convictions and sentences in a published opinion on March 5, 2020. *See Fuston v. State*, 470 P.3d 306 (Okla. Crim. App. 2020). The OCCA denied Petitioner’s rehearing petition on June 12, 2020. Order Denying Rehearing and Directing Issuance of

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<sup>1</sup> Petitioner was also sentenced to ten years imprisonment for possession of a firearm after former juvenile adjudication.

Mandate dated June 12, 2020, OCCA No. D-2017-773. Petitioner filed an application for state post-conviction relief on August 29, 2019, which was denied by the OCCA on June 18, 2020. Opinion Denying Application for Post-Conviction Relief, Motion for Evidentiary Hearing, and Motion for Discovery dated June 18, 2020, OCCA No. PCD-2017-806.

On November 27, 2020, Petitioner's petition for a writ of certiorari was placed on this Court's docket.

### **STATEMENT OF FACTS**

The OCCA set forth the relevant facts on direct appeal:

Appellant was convicted of shooting and killing Michael Rhodes (the decedent) on October 20, 2012, as the decedent and his three (3) year old daughter sat on the couch in their Oklahoma City home. The crime was the result of an ongoing dispute between the decedent's niece, Brittany Dillard, and a group of girls associated with the 107 Hoover Crips street gang.

Prior to the shooting, the decedent and his wife opened up their home to seven (7) of his great nephews and nieces, who had been in the custody of the Department of Human Services. One of those nieces, Ms. Dillard, had been asked to leave the Rhodes' home because of behavior problems, but shortly before October 20, she was allowed to return. At the time of the shooting, Dillard was in a relationship with Terrell Howard, a Crips member. On October 19, 2012, Dillard became involved in a verbal altercation over the telephone with several women who answered her call to Howard's cell phone. These women, members of a subset of the 107 Hoovers known as the "Dulxw Girls", included Atiana Jordan (whose gang name was "Lady Bucky") and Taneecia Pennon (whose gang name was "Lady Get One"). They escalated the altercation by repeatedly calling Dillard on her cell phone, threatening her and her baby, and offering to fight Dillard. The women drove by the Rhodes' home more than once. An anxious Dillard called Chris

O'Neal, the father of her baby, and a member of the Bloods street gang. O'Neal drove to the Rhodes' home and fired gunshots at the Dulxw women. Jordan and Pennon called Dillard about the shooting and returned to the Rhodes' home, throwing rocks at the house and breaking two windows.

Returning home to find the broken windows, and concerned by what Dillard had told them, the Rhodes called the Department of Human Services and had the foster children picked up for their own safety. Dillard left the residence, to stay with O'Neal's mother, and Mrs. Rhodes and her daughter left the residence for the night.

Sometime late on the 19<sup>th</sup> or early on [the] 20<sup>th</sup> of October, the tires on the Rhodes' car parked in their driveway were slashed. The police were called and investigated the situation. Mrs. Rhodes spoke with Dillard about the situation and learned that Dillard continued to get phone calls and Facebook messages from the Dulxw women. Mrs. Rhodes also received numerous phone calls on her home phone from the Dulxw women. She repeatedly told them that Dillard was not at their home and the women should not come back to the house.

The evening of October 20, Mrs. Rhodes went out to dinner with a friend while the decedent stayed home with their daughter and nineteen (19) year old son, Jalon. The decedent was on the couch with his sleeping daughter while his son was upstairs playing videogames. He was just about to fall asleep when the front door burst open and Appellant and his companions entered the house firing weapons.

A few hours earlier, Jordan and Pennon called Appellant, a close friend and fellow member of the Hoover Crips. Despite the fact Appellant lived in Enid, the Dulxw women asked him to come to Oklahoma City because of their conflict with Dillard. Appellant, accompanied by Brian Butler, drove to Pennon's Oklahoma City apartment. Appellant, Butler, Jordan, Pennon, Howard, and another "young guy" drove in two (2) cars to south Oklahoma City to "rob some Mexicans." When that effort did not prove fruitful, the group drove to the Rhodes' home looking for

Dillard. As they drove, Appellant communicated with Pennon, who was in a different car. The two cars stopped at a church near the Rhodes' residence and all but Butler got out and talked. The group then got back in the two cars and drove near the Rhodes' residence, parking down the street near a stop sign. Appellant told the "youngster" to get in the driver's seat of his car while Butler waited in the passenger seat. Appellant, Pennon, Howard, and Jordan walked up to the residence. Gunshots rang out and Appellant and Jordan ran back to the car. Initially reluctant to get into the car, Jordan was pulled into the car by Appellant, telling him "they were supposed to kill everybody in the house."

Upon hearing the gunshots, Jalon ran downstairs to find the front door open, his sister crying, and his father falling off the couch. Jalon sat his father up and called 911. The decedent had been shot three (3) times. The fatal shot entered his left shoulder before striking his aorta and both lungs. His blood sprayed on his young daughter, but she had not been struck by the gunfire. She later told police that the "monsters hurt my daddy."

After leaving the Rhodes' home, Appellant and his companions dropped Jordan off at her home then went to the home of Butler's cousin. There, Appellant washed his hands in gasoline and told Butler that he fired four (4) shots, and that "the dude was getting up or reaching for something." Appellant routinely carried a .45 caliber Taurus handgun. He had this weapon with him after the murder at the home of Butler's cousin and when he returned to Enid.

Appellant and Butler drove back to Enid during the early morning hours of October 20. During that time, Appellant changed his cell phone number. When Butler told him the murder would come back to "haunt" him, Appellant became angry and said he was tired of people telling him what to do and how to live his life. In the days and weeks that followed the murder, Appellant told Butler that "the dude" had died but the "girl", presumably Dillard, would not testify because they were going to "handle it on the streets."



After his arrest, Appellant denied being near the Rhodes' home at the time of the murder but his cell phone records placed him in the area. Other evidence established his relationship with Jordan and Pennon. A phone call from Appellant while in jail to his cousin Treylon Haley led police to the murder weapon—a .45 caliber Taurus.

*Fuston*, 470 P.3d at 313-14 (paragraph numbers omitted).

### **REASONS FOR DENYING THE WRIT**

Although not exhaustive, Rule 10 of this Court's rules sets forth examples of grounds for granting a petition for writ of certiorari. These include a conflict among the United States courts of appeals, a conflict between a United States court of appeals and a state court of last resort, a conflict between state courts of last resort, an opinion by a state court or United States court of appeals that decides an important federal question in a way that conflicts with relevant decisions of this Court, and an opinion by a state court or United States court of appeals that decides an important federal question that should be settled by this Court. SUP. CT. R. 10. Petitioner cannot make any of these showings. Rather, Petitioner's question presented is based solely on his misreading of state law. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10. Petitioner's attempt to invalidate the State's use of historic cell-site location information by resort to a state statute that governs live wiretaps is unworthy of this Court's review.

**PETITIONER’S CLAIM THAT THE OCCA SHOULD HAVE CONSIDERED A STATE STATUTE THAT GOVERNS LIVE WIRETAPS IN RESOLVING HIS CLAIM THAT THE STATE IMPROPERLY ACCESSED HIS HISTORIC CELL-SITE LOCATION INFORMATION IS UNWORTHY OF THIS COURT’S REVIEW.**

**A. Background of Petitioner’s Claim.**

James Liles, a civilian crime analyst with the Oklahoma City Police Department, analyzed cell-site location information (“CSLI”) for Petitioner’s phone and a phone used by two of his accomplices (referred to as “the government phone”) (Tr. VI 1437-54; Tr. VII 1584). Petitioner objected to Mr. Liles’ testimony because the CSLI was obtained pursuant to a federal statute, 18 U.S.C. § 2703(d), which required a showing of reasonable grounds to believe telecommunications records are relevant and material to an ongoing criminal investigation (O.R. III 533-40; Tr. VII 1555). The objection was overruled and Mr. Liles was permitted to testify that the government phone was near the Rhodes’ home when the house was vandalized on the day before the murder (Tr. VII 1555, 1587-91). Mr. Liles further determined that, on the night of the murder, Petitioner’s phone was traveling concurrently with the government phone and both phones were in the vicinity of the Rhodes’ home at 11:42 p.m., the time of the 911 call regarding the murder (Tr. VII 1585, 1598-1603).

After Petitioner’s conviction, but before his direct appeal, this Court held that law enforcement must typically obtain a search warrant based on probable cause before accessing historic CSLI. *Carpenter v. United States*, 138 S. Ct. 2206 (2018). Petitioner relied upon *Carpenter* to challenge Mr. Liles’ testimony in his direct

appeal. Brief for and on Behalf of Ronnie Eugene Fuston, Appellant dated Nov. 2, 2018, OCCA No. D-2017-773 (“DA Br.”) at 44-49. In his brief, Petitioner admitted that the State complied with section 2703 and that the court made the requisite findings before granting access to his CSLI. DA Br. at 48.

The OCCA first held that Petitioner failed to show that he had a reasonable expectation of privacy in the records of the government phone. *Fuston*, 470 P.3d at 319. Although Petitioner appears to rely upon the records of the government phone in his petition, he does not acknowledge—much less challenge—the OCCA’s determination that *Carpenter* does not apply to those records. Accordingly, this Court’s review should be limited to the CSLI from Petitioner’s phone. *See Rakas v. Illinois*, 439 U.S. 128, 134 (1978) (“A person who is aggrieved by an illegal search and seizure only through introduction of damaging evidence secured by a search of a third person’s premises or property has not had any of his Fourth Amendment rights violated.”).

As to Petitioner’s phone, the OCCA held that, because the CSLI from Petitioner’s phone was obtained before *Carpenter*, the officers acted in good faith reliance on section 2703.<sup>2</sup> *Fuston*, 470 P.3d at 319-20; *see Illinois v. Krull*, 480 U.S. 340, 347-55 (1987) (evidence obtained in violation of the Fourth Amendment need not be suppressed if the police acquired the evidence in good faith reliance upon a statute

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<sup>2</sup> Petitioner notes that the OCCA applied an abuse of discretion standard, but fails to explain the significance of that fact. Pet. at 8. Petitioner does not argue the standard used by the OCCA was inappropriate much less provide support for any such argument.

which is later determined to be unconstitutional). Petitioner does not question that the good faith exception can be applied to violations of *Carpenter*. Rather, he claims only that the good faith exception cannot apply in Oklahoma because to hold otherwise would allow law enforcement to circumvent a state statute that requires probable cause. Pet. at 10-15. Petitioner is mistaken.

**B. This Court should Deny Certiorari Review Because Petitioner’s Claim is Based Entirely on a Misreading of State Law.**

The entire premise of the petition is that Oklahoma has a statute, Okla. Stat. tit. 13, § 176.9, which requires the use of a warrant to obtain CSLI. This is not so. Section 176.9 requires a judge to find probable cause before authorizing the “interception of a wire, oral or electronic communication[.]” CSLI does not fall within any of these categories.

“Wire communication’ means any aural transfer made in whole or part through the use of facilities for the transmission of communications by the aid of wire, cable, or like connection . . . .” Okla. Stat. tit. 13, § 176.2(14). “Oral communication’ means any communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstance justifying such expectation.” Okla. Stat. tit. 13, § 176.2(12). “Electronic communication’ means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system”. Okla. Stat. tit. 13, § 176.2(7). Tracking devices are specifically excluded from the definition of “electronic communication.” Okla. Stat. tit. 13, § 176.2(7)(c).

Most importantly, however, “[i]ntercept’ means the aural acquisition[, or “obtaining knowledge of a communication through the sense of hearing which is contemporaneous with the communication”], of the contents of any wire, oral or electronic communication through the use of any electronic, mechanical or other device.” Okla. Stat. tit. 13, § 176.2(2), (9). And “[c]ontents’, when used with respect to any wire, oral or electronic communication, includes any information concerning the substance, purport or meaning of that communication.” Okla. Stat. tit. 13, § 176.2(6).

As its title indicates, the Security of Communications Act is designed to protect the privacy of wire, oral, and electronic communications as defined by section 176.2. The Act permits the State to intercept—that is, obtain contemporaneously through hearing—such communications with a warrant for specified offenses. Okla. Stat. tit. 13, § 176.7. The section Petitioner relies on, section 176.9, merely specifies how such a warrant is to be obtained. The Security of Communications Act has no application to the acquisition of historic CSLI. Petitioner’s meritless petition should be denied.

**C. Petitioner’s Asserted Conflict between State Courts of Last Resort is Nonexistent.**

Petitioner argues that the OCCA’s decision “departs from all other state courts’ application of the good faith exception in jurisdictions that require probable cause for a court order.” Pet. at 9 (bold removed). Yet, Petitioner fails to cite even a single case from any court refusing to apply the good faith exception because a state statute

requires a finding of probable cause before law enforcement obtain historic CSLI.<sup>3</sup> Petitioner merely asserts that seven other states have statutes requiring a finding of probable cause for historic CSLI. Pet. at 14-15. Petitioner does not cite a single case from any of those states regarding whether the good faith exception does, or does not, apply. Pet. at 14-15. Petitioner has not shown a conflict between state courts of last resort.

Further, setting aside the fallacy of Petitioner's reliance upon a live wiretapping statute in this context, this Court should permit more courts to address Petitioner's question before weighing in. *See California v. Carney*, 471 U.S. 386, 400-01 & n.11 (1985) (Stevens, J., dissenting) (discussing the importance of allowing lower courts "to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law"). Petitioner has failed to present a compelling question for this Court's review. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons.").

## CONCLUSION

The Petition for Certiorari should be denied.

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<sup>3</sup> Indeed, Petitioner cites only a single case in which any court has refused to apply the good faith exception, and that was because the state has chosen not to recognize that exception writ large. Pet. at 14 (citing *State v. Brown*, 202 A.3d 1003 (Conn. 2019)).

Respectfully submitted,

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