UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1244

September Term, 2011

BRAD K. EDMONDS

v.

STATE OF MARYLAND

Kehoe,
Hotten,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: August 6, 2013

Exhibit - 1

Convicted by a jury in the Circuit Court for Montgomery County of first degree burglary, possession of burglar's tools, theft, and breaking and entering a motor vehicle—rogue and vagabond, and sentenced to imprisonment for thirty-three years,[1] Brad K. Edmonds, presents two questions, which we have re-phrased:[2]

1. Should his conviction for possession of burglar's tools merge into his conviction for first degree burglary and should his conviction for breaking and entering into a motor vehicle—rogue and vagabond merge into theft?

2. Was the evidence presented at trial legally sufficient to support a conviction for possession of burglar's tools?

We conclude that Edmond's conviction for breaking and entering a motor vehicle should merge into his conviction for stealing items from that automobile. We otherwise affirm the convictions.

FACTS AND PROCEEDINGS

Edmonds was apprehended of the crimes of which he was convicted as the result of inter-jurisdictional cooperation between police departments. Prior to the events giving rise to the present case, Edmonds had been suspected by the Prince William County and Fairfax

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[1]Edmonds was sentenced to 20 years for first degree burglary; 3 years for possession of burglar's tools; 8 years for theft; 2 years for breaking and entering a motor vehicle, rogue and vagabond, each to run consecutively.

[2]The original questions presented are:

1. Did the trial court err in failing to merge Appellant's convictions?

2. Was the evidence legally insufficient to support Appellant's conviction for possession of burglar's tools?

County police departments in a series of burglaries. As part of their on-going investigation, these agencies covertly placed a GPS monitor on his automobile. In the early hours of November 17, 2010, the Virginia police realized that the vehicle was being driven into Montgomery County. They alerted the Montgomery County Police Department. None of this information was presented to the jury. What follows is a summary of the evidence, viewed in the light most favorable to the State as the prevailing party.

At some point between midnight and 1 AM on November 17, 2010, members of the Montgomery County Police Department's Special Assignment Team conducted surveillance on a dark blue Oldsmobile vehicle in the vicinity of Lake Potomac Drive. The Special Assignment Team is a plain-clothes unit tasked with conducting surveillance on street crimes. Officers Lisa Killen, Ruben Rosario, and Brian Tupa followed the Oldsmobile until it entered the neighborhood on Lake Potomac Drive. They observed Edmonds, dressed in black and wearing a black mask and gloves, exit his vehicle around 1:00 AM. Killen dropped off Rosario and Tupa so that they could continue surveillance on foot. Rosario and Tupa both followed Edmonds covertly, utilizing night vision equipment. The officers were about thirty to forty feet from Edmonds when observing him. It had rained earlier in the night and there was no foot or vehicle traffic in the area at the time. The two officers saw Edmonds walk onto the driveway of 11740 Lake Potomac Drive, they then heard glass shattering, and observed Edmonds reach into a silver car and remove something from that vehicle. Then, Edmonds reached into a maroon vehicle and removed something from that vehicle. Edmonds

proceeded into the backyard of 11740 Lake Potomac Drive. The officers lost sight of Edmonds, and then inspected the damage Edmonds had made to the cars.

Rosario and Tupa then proceeded to 11720 Lake Potomac Drive where they discovered Edmonds's car parked behind the residence. The two waited in a wooded area, about thirty to forty feet from the car; Edmonds arrived at the car a few minutes later. Edmonds opened the trunk and placed items inside, including some of the clothing he was wearing at the time. He then removed his mask, and placed it behind the driver's seat. Using night vision equipment, Tupa saw Edmonds's face as he removed his mask. Edmonds then drove away from the scene in his car.

Rosario and Tupa discovered a purse with its contents spilled out on the ground to the side of 11720 Lake Potomac Drive The purse belonged to Marina Fasolyak of 11711 Lake Potomac Drive The officers notified the homeowners at 11740 Lake Potomac Drive that the cars in their driveway had been broken into. Officer Rosario discovered another purse with its contents strewn about the backyard of 11740 Lake Potomac Drive which belonged to the homeowners there. The officers explored the area around 11711 Lake Potomac Drive and discovered a wet shoe print on dry concrete near the back door of the residence. In addition, there were pry marks on the back door of that residence. There were also some wet leaves inside the house, near the back door.

Robert Clipper of 11621 Lake Potomac Drive testified that his blue Ford Mustang was broken into on November 17, and a culinary set was taken from the vehicle. The set is valued

at $600-$700. There were several items belonging to Carmen Caballero taken from the two cars parked in front of 11740 Lake Potomac Drive, including a purse, a wedding ring, iPod, electronic games; these items are valued at $5,300.

Edmonds was apprehended later that night without incident by Montgomery County Officers John Gallagher and Scott Wyne. Edmonds was wearing dark jeans, a dark shirt, and dark jacket at the time he was apprehended. Edmonds's vehicle was searched; a ski mask was recovered behind the driver's seat, and a screwdriver, wet gloves, Maglite-type flashlights, and plyers were recovered from the trunk.

DISCUSSION

I. Merger

Edmonds contends that the circuit court erred (1) by not merging his conviction for possession of burglar's tools into his conviction for first-degree burglary; and (2) by not merging his rogue and vagabond conviction into his theft conviction. Edmonds concedes that his convictions do not merge under the required evidence test. *See Christian v. State*, 405 Md. 306, 321 (2008) (stating that under Federal principles of double jeopardy and Maryland merger law, the primary test for determining the identity of offenses is the required evidence test which prohibits separate sentences for each offense only where one offense requires proof of a fact the other does not). Edmonds rests his argument on the application of the rule of lenity and principles of fundamental fairness.

Initially, the State contends that the issue of merger was not raised at trial so it is not preserved for review. The State is certainly correct that the issue was not raised. The issue of merger arose at sentencing only once:

The Court:	Let me ask counsel, do counsel believe that any of these convictions merge for sentencing? My initial read was no but I always like to get the advice, what counsels' beliefs are.
[Defense Counsel]:	I don't believe they do, Judge.
[Prosecutor]:	I would agree, Your Honor, they are separate victims, separate incidents.
The Court:	Okay, all right . . . .

This exchange notwithstanding, appellant may raise the issue of merger on appeal. This is because an illegal sentence can be challenged at any time. *See Lamb v. State*, 93 Md. App. 422, 427 (1992) ("Although the appellant made no timely objection to the nonmerger of convictions at the time of sentencing, it is clear that the issue of nonmerger is reviewable by an appellate court even absent preservation of the issue by appellant."); *see also Washington v. State*, 190 Md. App. 168, 171-72 (2010).

As to the merits of Edmonds's arguments, the State suggests that the rule of lenity and principles of fundamental fairness are not applicable to this case. Specifically, the State argues that Edmonds failed to establish any ambiguity between the "lesser" offenses and the "greater" offenses, as required by the rule of lenity, and that fundamental fairness analysis is limited to situations where the statutory rule of lenity does not apply.

The rule of lenity is a rule of statutory construction and applies to situations where there is doubt regarding whether the legislature intended that there be multiple punishments for the same criminal transaction. "It amounts to an alternative basis for merger in cases where the required evidence test is not satisfied, and is applied to resolve ambiguity as to whether the legislature intended multiple punishments for the same act or transaction." *Marlin v. State*, 192 Md. App. 134, 167, *cert. denied*, 410 U.S. 339 (2010). This rule provides that, in cases of doubt or ambiguity as to whether the legislature intended that there be multiple punishments for the same act or transaction, courts shall give the defendant the benefit of the doubt, and hold that the two crimes merge. *McGrath v. State*, 356 Md. 20, 24-25 (1999) (citing *Miles v. State*, 349 Md. 215, 221 (1996)). The rule of lenity is neither absolute nor exclusive, and it applies only to statutory crimes. *In re Gloria H.*, 410 Md. 562, 582 (2009) (citation omitted).

As Judge (now Chief Judge) Barbera recently explained:

> Fundamental fairness is one of the most basic considerations in all our decisions in meting out punishment for a crime. In deciding whether fundamental fairness requires merger, we have looked to whether the two crimes are part and parcel of one another, such that one crime is an integral component of the other. This inquiry is fact-driven because it depends on considering the circumstances surrounding a defendant's convictions, not solely the mere elements of the crimes.
>
> Rare are the circumstances in which fundamental fairness requires merger of separate convictions or sentences.

Carroll v. State, 428 Md. 679, 694-95 (2012) (internal citations, quotation marks, bracketing, footnotes and ellipses omitted).

We now turn to the parties's contentions.

A. Merger of the Conviction for Possession of Burglar's Tools Into the Conviction for First Degree Burglary.

Appellant contends that his conviction for possession of burglar's tools must merge into his conviction for first degree burglary. First degree burglary is defined as:

> (a) *Prohibited.* - A person may not break and enter the dwelling of another with the intent to commit theft or a crime of violence.

Md. Code (2002), § 6-202 of the Criminal Law Article ("CL").

CL § 6-205, Burglary in the fourth degree, reads in pertinent part:

> (a) *Prohibited—Breaking and entering dwelling*—A person may not break and enter the dwelling of another.
>
> (b) *Prohibited—Breaking and entering storehouse*—A person may not break and enter the storehouse of another.
>
> (c) *Prohibited—Being in or on dwelling, storehouse, or environs*— A person, with the intent to commit theft, may not be in or on:
> (1) the dwelling or storehouse of another; or
> (2) a yard, garden, or other area belonging to the dwelling or storehouse of another.
>
> (d) *Prohibited—Possession of burglar's tool*—A person may not possess a burglar's tool with the intent to use or allow the use of the burglar's tool in the commission of a violation of this subtitle.

Appellant was convicted of violating CL § 6-205(d). He argues that this conviction should be merged into first degree burglary under the rule of lenity because CL § 6-205(d) criminalizes the possession of burglar's tools before an actual burglary is attempted or

consummated. In our view, the rule of lenity offers no support to appellant's argument because we perceive no statutory ambiguity.

In drafting § 6-201 *et seq.* of the Criminal Law Article, the General Assembly established three degrees of burglary, which are differentiated from one another by, among other things, the specific intent of the defendant. *Compare* CL § 6-202 (the elements of first degree burglary are breaking and entering into a dwelling with the intent to commit theft or a crime of violence); CL § 6-203 (the elements of second degree burglary are breaking and entering into a store house with the intent to commit theft, a crime of violence, or second degree arson); *and* CL § 6-204 (the elements of third degree burglary are breaking and entering into a dwelling with the intent to commit a crime). CL § 6-205 sets out four separate offenses, two of which are general intent crimes, *i.e.*, § 6-205 (a) (breaking and entering a dwelling) and (b) (breaking an entering a storehouse). On the other hand, § 6-205(c) and (d) establish specific intent crimes. Specifically, § 6-205(d) criminalizes the possession of burglars' tools with the intent to violate any other provision of Article 6 Subtitle 2. In order for the rule of lenity to apply there must be an ambiguity in the statute and we discern none here. One can be guilty of burglary in the first degree without using burglar's tools just as one can violate § 6-205(d) without committing, or intending to commit, first degree burglary. The two statutes, when read both in isolation and in the context of Subtitle 2 as a whole, are succinct, to the point, and clear. As such, the rule of lenity is inapposite to this case. We will

now consider appellant's contention that considerations of fundamental fairness impel us to merge the two convictions.

Appellant's fundamental fairness argument rests primarily on *Dabney v. State*, 159 Md. App. 225, 251-52 (2004), in which this Court held that there was no such crime as "attempted fourth degree burglary," the crime of which Dabney was convicted. Because the fundamental fairness analysis is "fact-driven because it depends on considering the circumstances surrounding a defendant's convictions, not solely the mere elements of the crimes," *Carroll*, 428 Md. at 695, we begin with the facts in that case.

For reasons not explained in the record, Dabney was subject to the same kind of surveillance as was appellant in this case. His progress in the early hours of the morning in question from his apartment to a residential neighborhood in Hunt Valley was covertly tracked by several unmarked Baltimore County police vehicles. When Dabney exited from his vehicle, his movements were filmed by detectives using thermal imaging cameras. The intent of the officers was clearly to catch Dabney in the act of burglarizing a home. The officers filmed Dabney "casing" a particular home and approaching it in a furtive manner. However, as he stood on the porch of the house, apparently about to break into it, a passing car, and perhaps some sixth sense, caused him to abandon the idea, return to his car and return home without incident. He was arrested about one month later and charged with, and convicted of, attempted fourth degree burglary. *Id.* at 229-32.

Writing for the Court, Judge Moylan explained that the resolution of Dabney's cases called upon the Court to establish the relationship "between the venerable common law misdemeanor of attempt and the far younger statutory misdemeanor of burglary in the fourth degree . . . ." *Id.* at 235. He continued:

> Fourth-degree burglary is an umbrella statute, embracing no less than four subvarieties of now criminal behavior. What is true of some of those subvarieties, moreover, is not true of others. The first two, for instance, are mere general intent crimes, whereas the latter two are specific intent crimes. The first two are recent statutory inventions, whereas the latter two were already venerable at the time of Blackstone and Hale. It is a miscellaneous collection, with its common denominator or organizing principle being that the various offenses share, if nothing else, the same level of appropriate punishment . . . .

Id. (citation omitted).

After reviewing the development of the law of attempt and the thirteen distinct offenses that were lumped together as "roguery and vagabonage" at common law, Judge Moylan explained that CL § 6-205 (c) and (d) were codifications of two aspects of that common law crime and that those crimes were "crimes in the nature of an attempt." *Id.* at 251-52 (citing Wayne R. LaFave and Austin W. Scott, Jr., SUBSTANTIVE CRIMINAL LAW § 6.2, 20-21 (1986)), and that:

> A fourth-degree burglary of subvariety (c) might well be deemed "conduct . . . which has been made criminal because it is . . . a step toward the doing of harm."
>
> We are satisfied that subvariety (c) of fourth-degree burglary (and subvariety (d) for that matter) is a crime in the nature of an attempt. Its *actus reus* of being on the property belonging to the dwelling of another has no criminal significance in its own right absent the *mens rea* of an intent to

commit theft. The requirement of that *mens rea* makes the defendant's presence at that location a substantial step in attempting a theft.

* * * *

We hold that the rogue and vagabond subvariety of fourth-degree burglary that was the target of the attempt in this case was itself a crime in the nature of an attempt. We further hold that there is no such cognizable crime as an attempt to commit a crime in the nature of an attempt. The appellant, therefore, was convicted of a non-existent crime, and the conviction must be reversed.

Id. at 252-53.

In our view, there are significant differences between *Dabney* and the present case. Dabney never committed a burglary and was charged with attempted fourth degree burglary, which, as we held, is not a crime. We are not confronted, as we were in *Dabney*, with conduct which, although suspicious, was not criminal. Edmonds committed a burglary and, hours later, was arrested in possession of wet gloves, pliers, and a screwdriver. It had been raining when Edmonds broke into the automobiles and the houses on Lake Potomac Drive. The jury logically could have inferred that he had used those implements to commit those crimes and could also have reasonably concluded that he retained possession of those items with the intent of using them again to break into other dwellings or storehouses. In applying the fundamental fairness test, we conclude that Edmond's possession of burglar's tools with an intent to use them in the future is not "part and parcel," *Carroll*, 428 Md. at 695, of the first-degree burglary that he had committed hours before. We conclude that considerations

of fundamental fairness do not mandate the merger of these two convictions under the facts of this case.

B. Merger of the Breaking and Entering the Motor Vehicle Conviction and the Theft Conviction.

Edmonds was convicted of breaking and entering a motor vehicle owned by Carmen Caballero and the theft of items from it. He argues that the breaking and entering conviction should merge with the theft conviction. CL § 6-206 reads in pertinent part:

> **§ 6-206. Breaking and entering motor vehicle—Rogue and vagabond.**
>
> (a) *Prohibited—Possession of burglar's tool*—A person may not possess a burglar's tool with the intent to use or allow the use of the burglar's tool in the commission of a crime involving the breaking and entering of a motor vehicle.
>
> (b) *Prohibited—Presence in another's vehicle*— A person may not be in or on the motor vehicle of another with the intent to commit theft of the motor vehicle or property that is in or on the motor vehicle.
>
> * * * *

Of the two types of criminal conduct proscribed by § 6-206, the jury was instructed only as to § 6-206(b). Under the facts of this case, we conclude that Edmond's presence within Ms. Caballero's vehicle with an intent to steal was "part and parcel" of his theft of items from it. *See Marquardt v. State,* 164 Md. App. 95, 152 (2005) (When the malicious destruction of property is "clearly incidental" to the breaking and entering of a dwelling, the malicious destruction conviction should merge into conviction for burglary in the fourth degree.). Accordingly, we hold that conviction of violating CL § 6-206(b) should merge into the theft conviction.

II. Sufficiency of the Evidence

Edmonds's second contention is that the evidence before the jury was insufficient to convict him of possession of burglar's tools. This issue is also not preserved for our review. In Edmonds's motion for judgment of acquittal on this count, he argued that no burglar's tools were found on his person. To this Court, Edmonds presents a distinctly different argument, i.e., that there was evidence showing that he had an intent to steal at the time he was apprehended, and that intent to steal is an integral part of the definition of possession of burglar's tools. This issue is not preserved because Edmonds's motion for judgment of acquittal was made on a different ground. *Starr v. State*, 405 Md. 293, 302-3 (2008); *Accord Anthony v. State* 117 Md. App. 119, 126 (1997).

Edmonds urges us to consider this issue despite its lack of preservation based on *Testerman v. State*, 170 Md. App. 324 (2006), *cert. dismissed as improvidently granted* 399 Md. 340 (2007). In *Testerman*, we ruled that Edmonds may, in limited circumstances, raise the issue of ineffective assistance of counsel on direct appeal to this Court in arguing that an issue which should have been preserved was not preserved for appeal. *Id.* at 334. However, Maryland courts have consistently held that challenges to counsel's trial performance are best addressed pursuant to the collateral procedures afforded by the Maryland Post-Conviction Procedure Act. *See* Md. Code Ann. (2001 & 2008 Repl. Vol.), §§ 7-101 *et seq.* of the Criminal Procedure Article; *See Mosley v. State*, 378 Md. 548, 559-561 (2003) (explaining

that the proper approach to the resolution of ineffective assistance of counsel claims is through the statutory post-conviction process).

In *Testerman*, defense counsel failed to raise the issue that switching seats with another passenger in a vehicle did not constitute "eluding" a police officer. *Id.* at 341. We ruled that this failure constituted ineffective assistance of counsel and chose to review the issue, despite its lack of preservation. *Id.* at 343-44. This case is different from *Testerman*. In *Testerman*, defense counsel failed to state with any degree of particularity the grounds upon which its motion for judgment of acquittal was based, thus precluding appeal on sufficiency grounds. *Id.* at 342; *Anthony*, 117 Md. App. at 126. Here, defense counsel stated the grounds upon which his motion was based. The record gives us no basis to determine defense counsel's reasoning or strategy for framing the motion for judgment of acquittal as he did. The matter is best addressed in a post conviction proceeding. We decline to review this issue because it was not properly preserved. *Anthony*, 117 Md. App. at 126.

THE SENTENCE FOR VIOLATING CRIMINAL LAW ARTICLE § 6-206 BREAKING AND ENTERING MOTOR VEHICLE—ROGUE AND VAGABOND IS VACATED.

THE JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY ARE OTHERWISE AFFIRMED.

COSTS TO BE ALLOCATED AS FOLLOWS: 1/3 BY MONTGOMERY COUNTY; 2/3 BY APPELLANT.

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

BRAD K. EDMONDS, *Petitioner,*	)	
vs.	)	**Case No. 117335C**
STATE OF MARYLAND, *Respondent.*	)	

MEMORANDUM OPINION

The Petitioner, Brad K. Edmonds, by and through his attorney, Matthew Lynn, Assistant Public Defender, Collateral Review Division, filed a Petition for Post-Conviction Relief on December 19, 2013 pursuant to Md. Crim. Code Ann. § 7-101, et. seq. and Maryland Rules 4-401 through 4-408. The State filed an answer on March 31, 2014. The Honorable Judge David A. Boynton held arguments for Petitioner's Post-Conviction Relief on May 8, 2014.

BACKGROUND

I. Factual History

The charges underlying the convictions in this case arise from a warrantless placement and subsequent tracking of a global positioning device or "GPS" on the Petitioner's vehicle. Prior to the events that initiated the present case, the Prince William County and Fairfax County police departments had suspected the Petitioner in a series of burglaries. Through inter-jurisdictional cooperation, these departments placed a GPS tracking device on the Petitioner's automobile without obtaining a search warrant.

Exhibit-2

In the early hours of November 17, 2010, the Virginia police realized the vehicle was entering Montgomery County, Maryland and alerted the Montgomery County police department. At some point between midnight and 1:00 A.M., members of the Montgomery County Police Department's Special Assignment Team conducted surveillance on a dark blue Oldsmobile vehicle in the vicinity of Lake Potomac Drive. The officers observed the Petitioner, dressed in dark clothing and wearing a black mask and gloves, exit his vehicle. Two of the officers followed the Petitioner on foot using night vision equipment and saw him walk onto the driveway of 11740 Lake Potomac Drive. It had rained that night and there was no foot or vehicle traffic in the area at that time. The officers heard glass shattering and watched the Petitioner reach into a silver car and remove something from the vehicle. The Petitioner then reached into a maroon vehicle and removed something from it. The Petitioner proceeded into the backyard of 11740 Lake Potomac Drive, at which point the officers lost sight of him.

The officers regained sight of the Petitioner at his car that was parked behind the residence of 11720 Lake Potomac Drive. They waited in a wooded area and observed the Petitioner open the trunk to place items inside, including some of the clothing he was wearing at the time. Before departing, the Petitioner removed his mask and placed it behind the driver's seat, at which time an officer was able to identify him as Brad Edmonds.

The officers then discovered a purse with its contents spilled out on the ground to the side of 11720 Lake Potomac Drive, as well as another purse with its contents strewn about the backyard of 11740 Lake Potomac Drive belonging to

the homeowners there. The officers explored the area around 11711 Lake Potomac Drive and discovered a wet shoe print on dry concrete near the back door of the residence, pry marks on the back door of that residence as well as wet leaves inside the house, and near the back door. Additional testimony also established that a vehicle was broken into at 11621 Lake Potomac Drive.

The Petitioner was apprehended later that night without incident by Montgomery County police officers. He was wearing dark clothing at the time. His vehicle was searched and a ski mask was recovered from behind the driver's seat, in addition to a screwdriver, wet gloves, Maglite-type flashlights and plyers found in the trunk.

II. Procedural History

On December 17, 2010 the Petitioner was charged with two counts of first degree burglary, fourth degree burglary, possession of burglary tools, theft under $10,000, rogue and vagabond, and theft under $1,000.

At a jury trial before the Honorable Judge Rubin on March 22, 2011, the Petitioner was found guilty of first degree burglary, possession of burglar tools, theft under $10,000, breaking and entering a motor vehicle, and rogue and vagabond. The Petitioner was at this time acquitted of counts six and seven. Prior to the trial, the first-degree burglary charge in count 2 was severed. Ronald Gottlieb, Esq. represented the Petitioner at the trial.

On July 25, 2011, Judge Rubin sentenced the Petitioner to a term of 20 years for first- degree burglary; a term of 3 years for possession of burglar tools; a

term of 8 years for theft; a term of 2 years for breaking and entering a motor vehicle – rogue and vagabond; all terms to be served consecutively.

The Petitioner noted a timely appeal to the Court of Special Appeals, who concluded that the Petitioner's conviction for breaking and entering a motor vehicle – rogue and vagabond should merge into his conviction for theft, but otherwise affirmed the Petitioner's convictions.

On November 30, 2012, the Petitioner, acting pro se, sought relief pursuant to the Maryland Uniform Post Conviction Procedure Act, Md. Code Ann., Crim. Proc. Art. § 7-101 et. seq., raising a number of complaints, all related to the fact that he was originally apprehended for the crimes of which he stands convicted as a result of a GPS monitor that was placed on his vehicle by law enforcement authorities of Virginia without a warrant. The placement of this device allowed the Virginia authorities to subsequently alert Montgomery County Police Department when Edmonds entered Montgomery County on November 17, 2010.

In supplements filed on January 4, 2013, May 31, 2013, and January 6, 2014, the Petitioner alleges the police conduct ran afoul of the Fourth Amendment when they placed a GPS tracker on the Petitioner's vehicle constituting a search without a warrant. In addition, on December 26, 2013, in a Petition for Post Conviction Relief, Counsel for Petitioner alleged that trial counsel rendered ineffective assistance by failing to file a pre-trial motion to suppress any and all evidence obtained as a result of the GPS tracker on the Petitioner's vehicle and to

argue such a motion at a suppression hearing, thereby failing to preserve the issue for appellate review.

On May 8, 2014 a hearing was held before the honorable David A. Boynton.

STANDARD OF REVIEW

Strickland v. Washington is the benchmark for assessing claims of ineffective assistance of counsel. In order to prevail under *Strickland*, the Petitioner must satisfy a two-prong test. *Strickland v. Washington.* 466 U.S. 668 (1984). The Petitioner must show that (1) counsel's performance was deficient; *and* (2) but for counsel's unreasonable representation, there was a substantial possibility that the result of the proceedings would have been different. *Id.* at 687-89, 694; *Bowers v. State,* 320 Md. 416, 426-27 (Md. 1990) (emphasis added). As seen in *Strickland*, Maryland case law recognizes that the petitioner bears the burden to show deficient performance and prejudice. *Bowers*, 320 Md. 416, 424.

However, bald allegations that counsel's deficient performance had "some conceivable effect" on the outcome of the case are not sufficient bases for post-conviction relief. *Strickland*, 466 U.S. at 693; *Duff v. Warden*, 234 Md. 646, 648 (Md. 1965). Instead, the Petitioner has the heavy burden to show that counsel's professional judgment fell below the prevailing objective standards of reasonableness. *Strickland*, 466 U.S. at 688. Accordingly, the Petitioner must overcome the strong presumption that counsel rendered adequate assistance and exercised actions that might be considered "sound trial strategy." *Id.* at 689.

Moreover, judicial scrutiny of counsel's performance must be highly deferential. *Id.*; *Oken v. State*, 343 Md. 256, 283 (Md. 1996). In *Oken,* the

Maryland Court of Appeals noted that "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Oken*, 343 Md. at 283-84 (quoting *Strickland*, 466 U.S. at 689). *Strickland* notes that strategic decisions "made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" and, further, that decisions made after "less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. The Court of Appeals has held the question of whether to call a witness is one example of a strategic decision left to counsel and afforded defense counsel "great deference ... grounded in a strategy that advances the client's interests." *State v. Borchardt*, 396 Md. 586, 614 (Md. 2007); *see also Cirincione v. State*, 705 A.2d 96, 106 (Md. Ct. Spec. App. 1998) (holding that there is no "hard and fast rule that a decision not to call supplementary experts will necessarily be an inferior decision"). Therefore, this Court must assess counsel's conduct in light of the totality of the circumstances that existed at the time of trial.

Lastly, a reviewing court need not examine both prongs set forth in *Strickland* if the Petitioner has not satisfied one of the two. *Walker v. State*, 868 A.2d 898 (Md. Ct. Spec. App. 2005). In *Strickland*, the Court held that the lower court could choose which prong to initially tackle and did not need to first determine whether counsel's performance was deficient. 466 U.S. at 697. The Court stated that "the object of an ineffectiveness claim is not to grade counsel's

performance," so if a claim can be disposed of because it lacks sufficient prejudice "*which we expect will often be*...," then the court is permitted, if not encouraged, to address the prejudice claim first. *Id.* (emphasis added). Nevertheless, this Court will address both prongs.

ALLEGATIONS OF ERROR

The Petitioner claims that trial counsel's failure to file and argue a pre-trial motion to suppress any and all evidence obtained as a result of the warrantless placement and continuous tracking of a GPS on Petitioner's automobile on November 17, 2010 constituted ineffective assistance of counsel and resulted in a failure to preserve this issue for appellate review. The Petitioner raises this argument in light of court rulings on this matter in the District of Columbia in *United States v. Maynard* and a Supreme Court decision in *United States v. Jones*, as well as State appellate court rulings on this issue in Washington and New York. In *Maynard*, decided August 6, 2010, the United States Court of Appeals found that a warrantless GPS placed on the Defendant's car for 24 hours a day, over the course of one month was a search. *United States v. Maynard*, 615 F.3d 544, 555 (D.C. Cir. 2010) *aff'd in part sub nom. United States v. Jones*, 132 S. Ct. 945 (2012). The court held this search was not reasonable and violated the Defendant's rights under the Fourth Amendment. *Maynard,* 615 F.3d at 560.

The United States Supreme Court then heard arguments on November 8, 2011 in Maynard's co-defendant's case for the warrantless placement of the GPS device. *Jones*, 132 S. Ct. at 945. In 2004, Antoine Jones was suspected of trafficking narcotics in the District of Columbia and a judge issued a warrant

authorizing the Government's installation of a GPS within 10 days of the application. *Id.* at 947. FBI agents installed a GPS device after the 10-day limitation yet continued to monitor the movements of the vehicle. *Id.* Using this data, the Government obtained a multiple count indictment charging Jones and several alleged co-conspirators, including the co-defendant, Maynard. *Id.* Jones filed a motion to suppress evidence obtained through the warrantless GPS device prior to the trial. *Id.* The District Court partially granted the motion but held that data obtained by the GPS while the Jones' vehicle was traveling on public roadways "...has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 947; (quoting *United States v. Knotts*, 460 U.S. 276, 281 (1983)).

In March 2007, a grand jury returned another indictment charging Jones and others with the same conspiracy. *Jones,* 132 S. Ct. at 947. The jury returned a guilty verdict and Jones received a life sentence. *Id.* at 949. The United States Court of Appeals reversed the conviction stating the data obtained from a GPS device without a warrant violated the Fourth Amendment. *United States v. Jones*, 625 F. 3d 766 (2010). The Supreme Court granted certiorari and issued its opinion on January 23, 2012 and in affirming the District of Columbia Circuit Court of Appeals ruling in *Jones*, and *Maynard*, found the evidence obtained from the Government's use of the warrantless GPS device violated the Fourth Amendment. *Jones,* 132 S. Ct. at 954.

In applying the two prong test established in *Strickland*, the Petitioner relies on the decisions of *Maynard* and *Jones*, and of the highest State Courts in

Washington and New York, as well as the reporting of such favorable rulings in the Washington Post and the reporting of the New York Court ruling in the New York Times to prove his trial counsel's representation was deficient. [1] *See Maynard*, 615 F.3d 544; *Jones*, 132 S. Ct. 945; *see also People v. Weaver* 12 N.Y. 4d 433 (2009) (finding that constant tracking of an automobile could not have been realistically achieved through any other means other than a GPS device, and that such tracking constituted a violation of the State's Constitution against unreasonable searches and seizures). Claiming the facts of these cases are similar to the present case, the Petitioner argues it was necessary for trial counsel to file and argue the motion to suppress the evidence arising from the warrantless attachment and monitoring of the location of the Petitioner's vehicle, in order to preserve the issue for appellate review by the Court of Special Appeals. Because of this, the Petitioner was also denied the right to file a petition for writ of certiorari for consideration by the Court of Appeals and claims this satisfies the second prejudice prong set forth in *Strickland.*

The State counters that the Petitioner is not entitled to post conviction relief because although *Jones* is binding law with regard to warrants required to searches, he cannot establish ineffective assistance of counsel under the recent opinion of *Kelly v. State*, decided December 23, 2013. 436 Md. 406 (2013). In *Kelly,* the Petitioner filed pretrial motions to suppress any and all evidence obtained as part of a warrantless GPS tracking device placed on his car. At the trial level, these motions were denied and the Petitioner was convicted of various

[1] The August 6, 2010 ruling was printed in the August 7, 2010 edition of the Washington Post and it followed a May 11, 2009 ruling by the New York State of Appeals on the very same issue.

charges arising out of his cases. *Id.* at 410. While the appeal was pending in the Court of Special Appeals, the Supreme Court of the United States decided *United States v. Jones*. Despite the Supreme Court's ruling in *United States v. Jones*, the Court of Special Appeals in *Kelly* denied motions to suppress evidence obtained as a result of a GPS tracker placed on the Petitioner's vehicle without a warrant. *See Kelly,* 208 Md. App. 218 (2012). The Court of Appeals in Maryland affirmed the Court of Special Appeals judgments and sustained the search based on the rationale of *Davis v. United States*, wherein the Supreme Court held the exclusionary rule does not apply if a search is conducted in good faith reliance on binding precedent. *Kelly*, 436 Md. at 411; *United States v. Davis*, 131 S. Ct. 2419, 2423-24 (2011); *see also Briscoe v. State,* 422 Md. 384, 391 (2011). The Court of Appeals in Kelly stated,

> binding appellate precedent in Maryland, namely [United States v.] Knotts, [406 U.S. 276 (1983),] authorized the GPS tracking of a vehicle on public roads. The Howard County detectives acted in objectively reasonable reliance on that authority when they conducted their GPS tracking of [Kelly's] vehicle, and the Davis good-faith exception to the exclusionary rule applies.

Kelly, 436 Md. at 426. The court in *Kelly* made a distinction between applying *Jones* retrospectively and applying case law pre *Jones*. *Id.* at 423.

Though the police conduct may have run afoul of the Fourth Amendment in that it constituted a search without a warrant, at the time of the search the exclusionary rule did not apply. Consequently, even if trial counsel had moved to suppress the evidence at issue, it was not suppressible under extant law. While the Supreme Court did hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements

constituted a search, it did not make this judgment until January 23, 2012. *Jones,* 132 S. Ct. at 949. Since Maryland courts follow case law precedent established by the Supreme Court, at the time the GPS tracker was installed, *United States v. Knotts* established the Fourth Amendment law that permitted the tracking of a vehicle by means of a mechanical device on public roadways. *Kelly,* 436 Md. at 425. At the time the Virginia police attached the GPS tracker, this law was binding in Maryland. *Id.*

The Petitioner asks the court to vacate its convictions and sentences and to remand this matter for retrial so that he may have the right to file a pre-trial motion to suppress any and all evidence obtained from the warrantless placement and subsequent tracking of the GPS device on his vehicle in November of 2010. However, in applying the *Strickland* standard of review to the present case, the first prong of deficient counsel cannot be met. Review of ineffective assistance of counsel is highly deferential to counsel's strategic choices. The Petitioner must prove that counsel's professional judgment fell below the prevailing objective of a reasonable standard. *Strickland*, 466 U.S. at 688. In this case, counsel followed binding precedent and did not file a motion to suppress because under extant law, there was no suppressible evidence. While it may be true that if a motion was filed the issue could have been reserved for appellate review, the first prong of the *Strickland* test is not satisfied. Because both prongs must be proven in order to established ineffective assistance of counsel, this court cannot grant the petition for Post-Conviction relief.

CONCLUSION

For the foregoing reasons, the Petition for Post-Conviction Relief is hereby **DENIED**.

Judge David A. Boynton
Circuit Court for
Montgomery County Maryland

8/15/14
Date

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

BRAD K. EDMONDS, *Petitioner,*	)	
vs.	)	**Case No. 117335C**
STATE OF MARYLAND, *Respondent.*	)	

ORDER

Upon consideration of the Petition for Post-Conviction Relief, the State of Maryland's opposition thereto, argument presented by both parties at a Post-Conviction Hearing, and for the reasons set forth in the accompanying Opinion, it is this 15th day of August, 2014 hereby

ORDERED, that Petition for Post-Conviction Relief be, and hereby is, **DENIED.**

ENTERED

AUG 18 2014

Clerk of the Circuit Court
Montgomery County, Md.

David A. Boynton, Judge
Circuit Court for
Montgomery County, Maryland

8/15/14
Date

UNREPORTED

IN THE
COURT OF SPECIAL APPEALS
OF MARYLAND

Application for Leave to Appeal

No. 1514

September Term, 2014

Post-Conviction

BRAD K. EDMONDS

v.

STATE OF MARYLAND

Krauser, C. J.,
Meredith,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

PER CURIAM

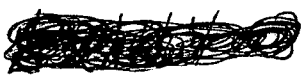
Filed: July 7, 2015

Exhibit-3

The application of Brad K. Edmonds for leave to appeal from a denial of petition for post-conviction relief, having been read and considered, is denied.

APPLICATION FOR LEAVE TO APPEAL DENIED.

ANY COSTS TO BE PAID BY APPLICANT.



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

BRAD K. EDMONDS, # 370076	*	
Petitioner,	*	
v	*	**Civil Case No.: GJH-15-2130**
RICHARD DOVEY,[1] ***et al.***	*	
Respondent.	*	

* * * * * * * * * * * * *

ORDER

For reasons articulated in the foregoing Memorandum Opinion, it is this 26th day of June, 2018, by the United States District Court for the District of Maryland, hereby **ORDERED** that:

1. The Clerk **SHALL MODIFY** the docket to substitute the name of Richard Dovey as the Respondent Warden;
2. The Petition for writ of habeas corpus **IS DENIED** and **DISMISSED WITH PREJUDICE**;
3. The Clerk **SHALL CLOSE** this case;
4. The court **DECLINES** to issue a Certificate of Appealability; and
5. The Clerk **SHALL MAIL** a copy of this Order and the foregoing Memorandum Opinion to Brad Edmonds and to counsel for Respondents.

/s/
GEORGE J. HAZEL
United States District Judge

[1] Edmonds is currently housed at the Maryland Correctional Training Center in Hagerstown. The docket shall be modified to substitute the name of Richard Dovey as the proper Warden Respondent.

Exhibit - 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

BRAD K. EDMONDS, # 370076	*	
Petitioner,	*	
v	*	**Civil Case No.: GJH-15-2130**
RICHARD DOVEY,[1] ***et al.***	*	
Respondents.	*	

* * * * * * * * * * * * *

MEMORANDUM OPINION

Brad Edmonds seeks habeas corpus relief pursuant to 28 U.S.C. § 2254, attacking, on Sixth Amendment grounds, the constitutionality of his 2011 convictions in the Circuit Court for Montgomery County.[2] ECF No. 1. Respondents' Answer was filed on November 18, 2015. ECF No. 14. Edmonds has filed replies,[3] along with a motion for immediate decision, release from custody, and a request for an evidentiary hearing. ECF Nos. 16, 20, 22, 25, 26, 27, & 29-31. In light of Edmonds' numerous supplemental petitions, Respondents were directed to respond to his Fourth Amendment claim involving the legality of the GPS device placed on his vehicle. ECF No. 32. Respondents filed a supplemental answer and Edmonds filed replies. ECF Nos. 34-36, & 41. This matter has been fully briefed. Upon review, the Court finds no need for an evidentiary hearing. *See* Rule 8(a), *Rules Governing Section 2254 Cases in the United States District Courts* and Local Rule 105.6 (D. Md. 2016); *see also Fisher v. Lee*, 215 F.3d 438, 455 (4th Cir. 2000)

[1] Edmonds is currently housed at the Maryland Correctional Training Center in Hagerstown. The docket shall be modified to substitute the name of Richard Dovey as the proper Warden Respondent.
[2] Prior to the filing of Respondents' answer, Edmonds filed three separate supplemental petitions containing additional legal arguments in support of his Fourth and Sixth Amendment arguments. ECF Nos. 2, 7, & 9.
[3] In addition to his replies, Edmonds has filed several supplemental documents, containing alleged copies of his self-represented filings in his state post-conviction proceeding, a trial transcript filed in state court, as well as a statement of probable cause. All documents have been examined by the Court. *See* ECF Nos. 17, 18, 21, & 23.

(petitioner not entitled to a hearing under 28 U.S.C. § 2254(e)(2)). For reasons to follow, Edmond's Petition of habeas corpus is denied.

I. BACKGROUND

On March 21 and 22, 2011, Edmonds was tried by a jury in the Circuit Court for Montgomery County. ECF Nos. 1–5. He was convicted of first-degree burglary, possession of burglar's tools, theft, breaking and entering a motor vehicle, and rogue and vagabond. The Court of Special Appeals of Maryland summarized the facts revealed at trial as follows:

> Prior to the events giving rise to the present case, Edmonds had been suspected by the Prince William County and Fairfax County police departments in a series of burglaries. As part of their on-going investigation, these agencies covertly placed a GPS monitor on his automobile. In the early hours of November 17, 2010, the Virginia police realized that the vehicle was being driven into Montgomery County. They alerted the Montgomery County Police Department. . . .
>
> At some point between midnight and 1 AM on November 17, 2010, members of the Montgomery County Police Department's Special Assignment Team conducted surveillance on a dark blue Oldsmobile vehicle in the vicinity of Lake Potomac Drive. . . . They observed Edmonds, dressed in black and wearing a black mask and gloves, exit his vehicle around 1:00 AM. . . . The officers were about thirty to forty feet from Edmonds when observing him. . . . The two officers saw Edmonds walk onto the driveway of 11740 Lake Potomac Drive, they then heard glass shattering, and observed Edmonds reach into a silver car and remove something from that vehicle. Then, Edmonds reached into a maroon vehicle and removed something from that vehicle. Edmonds proceeded into the backyard of 11740 Lake Potomac Drive. The officers lost sight of Edmonds, and then inspected the damage Edmonds had made to the cars.
>
> [The two officers] then proceeded to 11720 Lake Potomac Drive where they discovered Edmonds's car parked behind the residence. The two waited in a wooded area, about thirty to forty feet from the car; Edmonds arrived at the car a few minutes later. Edmonds opened the trunk and placed items inside, including some of the clothing he was wearing at the time. He then removed his mask, and placed it behind the driver's seat. Using night vision equipment, [one officer] saw Edmonds's face as he removed his mask. Edmonds then drove away from the scene in his car. . . .
>
> Edmonds was apprehended later that night without incident . . . . Edmonds was wearing dark jeans, a dark shirt, and dark jacket at the time he was

> apprehended. Edmonds's vehicle was searched; a ski mask was recovered behind the driver's seat, and a screwdriver, wet gloves, Maglite-type flashlights, and plyers were recovered from the trunk.

ECF No. 14-9 at 2–5.[4]

Trial commenced on March 21, 2011. After discussion with Judge Rubin regarding severance of a criminal count and the suppression of evidence related to the stop of Edmonds' car, counsel proceeded to opening statement. ECF No. 14-2 at 5–26. The jury then heard testimony from members of the Rockville Special Assignment Team (SAT), which performs covert surveillance on street crimes, and citizens whose automobiles and property were broken into. *Id.* at 27–137.

At the close of the State's case, Defense counsel Ronald Gottlieb moved for acquittal on each count based on the sufficiency of the evidence. The requests were denied by Judge Rubin. *Id.* at 82-88. The State rested its case. The defense produced no witnesses. After listening to instructions and closing arguments the jury found Edmonds guilty of first-degree burglary, possession of burglary tools, theft over $1,000.00 to under $10,000.00, and rogue and vagabond. He was acquitted of other counts of rogue and vagabond and of theft under $1,000.00. *Id.* at 136-140.

At a July 5, 2011 hearing, Edmonds moved for a new trial, alleging that he was not provided full discovery and that evidence was planted by police. The motion was denied by Judge Rubin who proceeded to sentencing. Edmonds was sentenced to a term of twenty years incarceration as to the burglary charge, a consecutive three years as to the possession of burglar's tools charge, an eight-year term as to the theft charge, to be served consecutive to the burglary and possession charges, and a two-year sentence as to the rogue and vagabond charge,

[4] All citations to the docket reference the electronic pagination.

consecutive to the previous three charges. A cumulative 33 years was imposed on Edmonds. ECF No. 14-5.

Represented by counsel, Edmonds raised the following claims before the Court of Special Appeals of Maryland:

I. The trial court erred in failing to merge Edmonds's convictions on possession of burglary tools into first-degree burglary and the rogue and vagabond conviction into theft; and

II. The evidence was legally insufficient to support Edmonds's conviction of possession of burglar's tools.

ECF No. 14-6.

On or about September 19, 2012, Edmonds filed a self-represented supplemental brief raising several issues, primarily attacking the police's placement of a global positioning system ("GPS") locator on his vehicle. He additionally contended that the Montgomery County Police Department used information from the GPS unit, evidence was illegally seized by police officers, and all of Edmonds' sentences and convictions were illegal due to the insufficiency of the evidence. ECF No. 14-8. The Court of Special Appeals did not accept this supplemental brief, as Edmonds was represented by counsel on direct appeal.

On November 30, 2012, while his direct appeal was pending, Edmonds filed a self-represented post-conviction petition in the circuit court. The petition was supplemented by counsel and by Edmonds. ECF No. 14-10. A hearing on the petition was held on May 8, 2014. As supplemented and litigated, Edmonds argued that his trial counsel, Ronald Gottlieb, was ineffective for failing to file a pre-trial motion to suppress evidence that was based on the government's unlawful placement of the GPS locator on his vehicle. ECF No. 14-11. On August 18, 2014, Circuit Court Judge David Boynton denied post-conviction relief. ECF No. 14-11.

Edmond's application for leave to appeal the post-conviction ruling was summarily denied by the Court of Special Appeals of Maryland on July 7, 2015. ECF No. 14-12; ECF No. 14-13.

In the instant Petition, Edmonds argues that his trial counsel was ineffective for failing to file a motion to suppress evidence based on the government's illegal placement of a GPS locator on his vehicle. ECF No. 1. In Supplemental Petitions, Edmonds raises a Fourth Amendment claim regarding the installation of a GPS locator device on his vehicle by Fairfax County, Virginia police. See ECF Nos. 16, 18, 20, 25–27, & 29.

II. STANDARD OF REVIEW

An application for writ of habeas corpus may be granted only for violations of the Constitution or laws of the United States. 28 U.S.C. § 2254(a). The federal habeas statute at 28 U.S.C. § 2254 sets forth a "highly deferential standard for evaluating state-court rulings." *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997); *see also Bell v. Cone*, 543 U.S. 447 (2005). The standard is "difficult to meet," and requires courts to give state-court decisions the benefit of the doubt. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks and citations omitted); *see also White v Woodall,* 134 S.Ct 1697, 1702 (2014), quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (state prisoner must show state court ruling on claim presented in federal court was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement."); *Virginia v. LeBlanc*, 137 S.Ct. 1726, 1728 (2017).

A federal court may not grant a writ of habeas corpus unless the state's adjudication on the merits: 1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States"; or 2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the

evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state adjudication is contrary to clearly established federal law under § 2254(d)(1) where the state court 1) "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or 2) "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Supreme Court]." *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

Under the "unreasonable application" analysis under § 2254(d)(1), a "state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington*, 562 U.S. 86, 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). "Rather, that application must be objectively unreasonable." *Id.* Thus, "an unreasonable application of federal law is different from an incorrect application of federal law." *Id.* at 785 (internal quotation marks omitted). Further under § 2254(d)(2), "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S.290, 301 (2010). "[E]ven if reasonable minds reviewing the record might disagree about the finding in question," a federal habeas court may not conclude that the state court decision was based on an unreasonable determination of the facts. *Id.* "[A] federal habeas court may not issue the writ simply because [it] concludes in its independent judgment that the relevant state-court decision applied established federal law erroneously or incorrectly." *Renico v. Lett,* 599 U.S 766, 773 (2010).

The habeas statute provides that "a determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). "Where

the state court conducted an evidentiary hearing and explained its reasoning with some care, it should be particularly difficult to establish clear and convincing evidence of error on the state court's part." *Sharpe v. Bell*, 593 F.3d 372, 378 (4th Cir. 2010). This is especially true where state courts have "resolved issues like witness credibility, which are 'factual determinations' for purposes of Section 2254(e)(1)." *Id.* at 379.

III. DISCUSSION

A. Procedural Default

A petitioner's claim may be procedurally defaulted where he has failed to present a claim to the highest state court with jurisdiction to hear it, whether it be by failing to raise the claim in post-conviction proceedings or on direct appeal, or by failing timely to note an appeal. *See Coleman v. Thompson*, 501 U. S. 722, 749–50 (1991) (failure to note timely appeal); *Murray v. Carrier*, 477 U.S. 478, 489–91 (1986) (failure to raise claim on direct appeal); *Murch v. Mottram*, 409 U.S. 41, 46 (1972) (failure to raise claim during post-conviction); *Bradley v. Davis*, 551 F. Supp. 479, 481 (D. Md. 1982) (failure to seek leave to appeal denial of post- conviction relief). A procedural default also may occur where a state court declines "to consider the merits [of a claim] on the basis of an adequate and independent state procedural rule." *Yeatts v. Angelone*, 166 F.3d 255, 260 (4th Cir. 1999). As the United States Court of Appeals for the Fourth Circuit has explained:

> If a state court clearly and expressly bases its dismissal of a habeas petitioner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, the habeas petitioner has procedurally defaulted his federal habeas claim. *See Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991). A procedural default also occurs when a habeas petitioner fails to exhaust available state remedies and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Id.* at 735 n.1.

Breard v. Pruett, 134 F.3d 615, 619 (4th Cir. 1998).

If a procedural default has occurred, a federal court may not address the merits of a state prisoner's habeas claim unless the petitioner can show (1) both cause for the default and prejudice that would result from failing to consider the claim on the merits; or (2) that failure to consider the claim on the merits would result in a miscarriage of justice, *i.e.* the conviction of one who is actually innocent.[5] *See Murray*, 477 U.S. at 495–96; *Breard*, 134 F.3d at 620. "Cause" consists of "some objective factor external to the defense [that] impeded counsel's efforts to raise the claim in state court at the appropriate time." *Breard,* 134 F.3d at 620 (quoting *Murray*, 477 U.S. at 488) (alteration in original). Even where a petitioner fails to show cause and prejudice for a procedural default, a court must still consider whether it should reach the merits of a petitioner's claims in order to prevent a fundamental miscarriage of justice. *See Schlup v. Delo*, 513 U. S. 298, 314 (1995). A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer "available" to him. *See* 28 U.S.C. § 2254(b); *Engle v. Isaac*, 456 U.S. 107, 125–126, n. 28 (1982).

To the extent that Edmonds is raising a Fourth Amendment challenge to his convictions based upon the use of the GPS locator placed on his vehicle without a warrant, this claim is procedurally defaulted. Edmonds did not present a direct Fourth Amendment challenge to the GPS tracking device of his car at trial or on direct appeal; rather, it was raised in terms of a Sixth Amendment ineffective assistance of counsel claim on post-conviction review. His failure to

[5] Habeas petitioners may use an actual innocence claim to excuse the procedural default of a separate constitutional claim upon which they request habeas relief. *See Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("[When] a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."). Petitioners who wish to use a claim of actual innocence as a gateway to raising an otherwise defaulted constitutional claim must demonstrate by a preponderance of the evidence that a reasonable juror could not have convicted the petitioner in light of the new evidence. *See Buckner v. Polk*, 453 F.3d 195, 199-200 (4th Cir. 2006).

litigate an individual Fourth Amendment claim renders the ground procedurally defaulted. Even were the court to examine the claim, however, it would find it to be without merit.

The law concerning Fourth Amendment claims in federal habeas corpus proceedings is well established. "[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that the evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Stone v. Powell*, 428 U.S. 465, 494 (1976) (footnotes omitted). In applying *Stone*, the Fourth Circuit has concluded that:

> [A] district court, when faced with allegations presenting Fourth Amendment claims, should, under the rule in *Stone v. Powell, supra*, first inquire as to whether or not the petitioner was afforded an opportunity to raise his Fourth Amendment claims under the then existing state practice. This may be determined, at least in this Circuit, from the relevant state statutes, the applicable state court decisions, and from judicial notice of state practice by the district court. Second,...when the district court has made the 'opportunity' inquiry, it need not inquire further into the merits of the petitioner's case, when applying *Stone v. Powell, supra*, unless the prisoner alleges something to indicate that his opportunity for a full and fair litigation of his Fourth Amendment claim or claims was in some way impaired.

Doleman v. Muncy, 579 F.2d 1258, 1265 (4th Cir. 1978).

Edmonds clearly had a full and fair opportunity to litigate the legality of the warrantless search at trial and on direct appeal in the Maryland courts. He was not impaired from challenging the legality of the GPS device placement on his Oldsmobile. There was an adequate process available to him, including suppression motions, a related hearing, and the State's appellate process. The fact that he did not take advantage of those opportunities is of no moment. Again,

the process was available to him. Thus, under *Stone*, his Fourth Amendment claim is barred from consideration here.[6]

B. Ineffective Assistance of Counsel

When a petitioner alleges a claim of ineffective assistance of counsel, he must show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The second prong requires the court to consider whether there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A strong presumption of adequacy attaches to counsel's conduct, so strong in fact that a petitioner alleging ineffective assistance of counsel must show that the proceeding was rendered fundamentally unfair by counsel's affirmative omissions or errors. *Id.* at 696. Although "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," it is equally true that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690–91. Where circumstances are such that counsel should conduct further investigation to determine "whether the best strategy instead would be to jettison [a chosen] argument so as to focus on other, more promising issues," failure to conduct further investigation can amount to constitutionally deficient assistance. *See Rompilla v. Beard*, 545 U.S. 374, 395 (2005) (O'Connor, J., concurring).

Whether retained or appointed, defense attorneys do not have infinite amounts of money and time with which to substantially investigate and pursue all plausible lines of defense, nor is

[6] In his post-conviction ruling, Judge Boynton intimated that a Fourth Amendment claim regarding law enforcement's use of a GPS would not survive in light of prevailing Supreme Court precedent at the time which "permitted the tracking of a vehicle by means of a mechanical device on public roadways." ECF No. 14-11 at 11

such conduct realistic or constitutionally mandated. *See Washington v. Watkins*, 655 F.2d 1346, 1356 (5th Cir. 1981) ("counsel for a criminal defendant is not required to pursue every path until it bears fruit or until all conceivable hope withers.") (citation omitted). The fact that counsel could have conducted a more thorough investigation that might have borne fruit does not establish that the attorney's performance was outside the wide range of reasonably effective assistance. *See Burger v. Kemp*, 483 U.S. 776, 794–95 (1987). Counsel should be strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment; the burden to show that counsel's performance was deficient rests squarely on the defendant. *See Burt v. Titlow*, 571 U.S. 12, 22–23 (2013).

Absent clear and convincing evidence to the contrary, a claim that counsel's decision was premised on trial strategy cannot be disturbed. *See Evans v. Thompson*, 881 F.2d 117, 125 (4th Cir. 1989). A defendant must overcome the "'strong presumption' that counsel's strategy and tactics fall 'within the wide range of reasonable professional assistance.'" *Burch v. Corcoran*, 273 F.3d 577, 588 (4th Cir. 2001) (quoting *Strickland*, 466 U.S. at 689). "There is a strong presumption that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect." *Harrington*, 562 U.S. at 109 (internal quotation marks and citation omitted). "The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Id.* at 105 (internal citations omitted). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.*

A showing of prejudice requires that 1) counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable, and 2) there was a reasonable probability that, but

for counsel's unprofessional errors, the result of the proceedings would have been different. *See Strickland*, 466 U.S. at 687, 694. "The benchmark [of an ineffective assistance claim] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. A determination need not be made concerning the attorney's performance if it is clear that no prejudice would have resulted had the attorney been deficient. *Strickland*, 466 U.S. at 697. Using this framework, Edmonds' claim of ineffective assistance of counsel will be considered.

The gravamen of Edmonds' claim is that his trial attorney was ineffective for failing to move to suppress evidence obtained through a warrantless placement of a GPS system on his vehicle in light of the Supreme Court's decision in *United States v. Jones*, 565 U.S. 400 (2012), which held that evidence obtained from the Government's use of a warrantless GPS device violated the Fourth Amendment. The state post-conviction court rejected this claim finding:

> Though the police conduct may have run afoul of the Fourth Amendment in that it constituted a search without a warrant, at the time of the search the exclusionary rule did not apply. Consequently, even if trial counsel had moved to suppress the evidence at issue, it was not suppressible under extant law. While the Supreme Court did hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements constituted a search, it did not make this judgment until January 23, 2012. *Jones*, 132 S. Ct. at 949. Since Maryland courts follow case law precedent established by the Supreme Court, at the time the GPS tracker was installed, *United States v. Knotts* established the Fourth Amendment law that permitted the tracking of a vehicle by means of a mechanical device on public roadways. *Kelly*, 436 Md. at 425. At the time the Virginia police attached the GPS tracker, this law was binding in Maryland. *Id.*

> The Petitioner asks the court to vacate its convictions and sentences and to remand this matter for retrial so that he may have the right to file a pre-trial motion to suppress any and all evidence obtained from the warrantless placement and subsequent tracking of the GPS device on his vehicle in November of 2010. However, in applying the *Strickland* standard of review to the present case, the first prong of deficient counsel cannot be met. Review of ineffective assistance of counsel is highly deferential to counsel's strategic choices. The Petitioner must prove that counsel's professional judgment fell below the prevailing objective of a reasonable standard. *Strickland*, 466 U.S. at 688. In this case, counsel followed binding precedent and did not file a motion to suppress because under extant law, there was no suppressible evidence. While it may be true that if a motion was filed the issue could have been preserved for appellate review, the first prong of the *Strickland* test is not satisfied. Because both prongs must be proven in order to established [sic] ineffective assistance of counsel, this court cannot grant the petition for Post-Conviction relief.

ECF No. 14-11 at 7–11.

Judge Boynton reasonably examined the law regarding the tracking of vehicles that existed at the time of the GPS device placement and the search of Edmonds' car. Further, his analysis regarding Edmonds' failure to show that his attorney's performance was deficient constitutes a reasonable application of Supreme Court law under *Strickland*. The state court's determination survives scrutiny under § 2254(d). The Court finds no basis to overturn Judge Boynton's decision.

IV. CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. § 2255, the court is required to issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A certificate of appealability is a "jurisdictional prerequisite" to an appeal from the court's earlier order. *United States v. Hadden*, 475 F.3d 652, 659 (4th Cir. 2007). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the court denies petitioner's motion on its merits, a petitioner satisfies this standard by demonstrating that reasonable jurists would find the

court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). Because reasonable jurists would not find Edmonds's claim debatable, no certificate of appealability will issue. Denial of a Certificate of Appealability in the district court does not preclude Edmonds from requesting Certificate of Appealability from the appellate court.

V. CONCLUSION

For the reasons stated herein, the court will deny and dismiss the petition with prejudice, and will not issue a Certificate of Appealability. A separate Order follows.

Date: June 26, 2018

/s/
GEORGE J. HAZEL
United States District Judge

FILED: August 9, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-290

In re: BRAD EDMONDS

Movant

ORDER

Movant has filed a motion under 28 U.S.C. § 2244 for an order authorizing the district court to consider a second or successive application for relief under 28 U.S.C. § 2254.

The court denies the motion.

Entered at the direction of Senior Judge Hamilton with the concurrence of Judge Keenan and Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

Exhibit - 5X

Brad Edmonds #370076/1524250
M.C.T.C
18800 Roxbury RD
Hagerstown MD 21746

criminal case no. 117335C

Dece 2, 2019

References To: Jurisdiction, and important info in this letter.

Dear clerk,

Showing this court how the writ in this Petition will be a aid of the courts appellate jurisdiction, and of the courts discretionary powers, and why relief cannot be obtained in any other form or from any other court. If this court review my questions presented, statement of the case proceeding, specific legal issues claims, and the lower courts opinions. Will see I have no state nor federal remedies available to get my case heard on these constitutionally violations claims in any other form or from any other court, but this court the Supreme Court of the united States. And more important its a conflict between the lower courts and the supreme court and the issue need to be resolved. So this court should have jurisdiction on many levels, and its power to accept my pro se, writ of habeas corpus 28 U.S.C. 2241 fore review. Because the record speak for its self, that I can not get relief from any other court but this court because I exhaust all my state and federal remedies. And the record show also the fourth cir, deprive me of due process when its evidence and beyond of many constitutionally violation in my case.

cc:

(continued).

This Petition applies to rule 20.1. no other court to get relief, but this court. And regarding showing how this writ will be in aid of this court's appellate jurisdiction. Petition showing that the outcome of decision from 9 supreme court Justices will be different from the lower courts decision on all levels that im entitled to relief when this court review my claims regarding this GPS tracking, ineffective claims, collusion claims, retroactively claims, false and misleading testimony, and other issues raised in my Petition, the reason why this court should grant the Petition on many levels for relief. Also I showed that my GPS issues is greater then Jones GPS tracking, because Jones was not the own of his car, but his wife was. And this court said it was a violation of his fourth amendment rights and he was not the own. And if this is the case I no- its a violation of my fourth amendment rights because I am the own of my car. Also my numbers of pages in my Petition start at opinions below. And I also mailed a copy of the corrected Petition to be served on the opposing counsel, the attorney General.

Thank you for your time and attention regarding these issues.

Very truly yours
Brad Edmond

continued.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

November 20, 2019

Brad Edmonds
370076 / 1524250
M.C.T.C.
18800 Roxbury Road
Hagerstown, MD 21746

RE: In Re Edmonds

Dear Mr. Edmonds:

The above-entitled petition for an extraordinary writ of prohibition was received on November 19, 2019. The papers are returned for the following reason(s):

The petition does not show how the writ will be in aid of the Court's appellate jurisdiction, what exceptional circumstances warrant the exercise of the Court's discretionary powers, and why adequate relief cannot be obtained in any other form or from any other court. Rule 20.1.

The petition exceeds the limit of 40 pages allowed. Rule 33.2(b).

The petition does not follow the form prescribed by Rule 14 as required by Rule 20.2 in that it does not contain a statement of the case.

A copy of the rules of this Court are enclosed.

A copy of the corrected petition must be served on opposing counsel.

Sincerely,
Scott S. Harris, Clerk
By: COPY
Clara Houghteling
(202) 479-5955

Enclosures

Additional material from this filing is available in the Clerk's Office.