

26-5752

Docket No. _____

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ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2025

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ROBERT JASON BURDICK

Petitioner,

Versus

TAUREAN JAMES, WARDEN,

Respondent.

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CORRECTED PETITION

On Petition For Writ of Certiorari

To the United States District Court for the Middle District of Tennessee
and, the United States Court of Appeals For the Sixth Circuit

USCA-6-24-5980

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Robert Jason Burdick #454219

[Petitioner/Pro Se]

Turney Center Industrial Complex

1499 R.W. Moore Memorial Hwy.

Only, TN 37140-4050

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QUESTIONS PRESENTED

- I. Is a court considering an ineffective assistance of counsel claim, which is predicated entirely upon a Fourth Amendment violation, specifically required to conduct an analysis on the underlying constitutional violation before determining either the deficiency or prejudice prongs of the *Strickland* analysis?

LIST OF PARTIES AND RELATED CASES TO THE PROCEEDING

Robert Burdick is the Petitioner here and was the Appellant below.

Taurean James, Warden, is the Respondent here and was the Appellee/Respondent below, having been substituted for Guy R. Bousch.

- *Burdick v. Bousch*, (6th Cir.) No. 24-5980, 2025 WL 3142128 (COA denied and Order entered May 30, 2025.) (Unpublished) (Doc. No. 13-2).
- *Burdick v. Bousch*, (6th Cir.) No. 24-5980 (Panel R'hrq denied) (Order entered Feb. 18, 2026) (Unpublished) (Doc. No. 20-1).
- *Robert Jason Burdick v. Martin Frink, Warden*, No. 3:21-cv-00602, 2024 WL 4293894 (M.D. Tenn.), (Mem. Opinion issued and Judgment entered, Sept. 25, 2024), (Doc. Nos. 23, 24).
- *Burdick v. State*, No. M2020-00141-CCA-R3-PC, 2021 WL 2499313 (Tenn. Crim. App.) Denial of Post-Conviction Relief aff'd. (Opinion issued June 18, 2021) *No perm. App. filed*.
- *State v. Burdick*, No. M2011-01299-CCA-R3-CD, 2012 WL 2151489 (Tenn. Crim. App.) Conviction and Sentence Aff'd, (Direct Appeal-Opinion issued June 18, 2021.) *Perm. App. denied* (Tenn. Sept. 18, 2012).

There are no additional proceedings in any court that are directly related to this case.

CORPORATE DISCLOSURE STATEMENT

Robert Jason Burdick is an individual, and
Taurean James, Warden, is an official of the State of
Tennessee.

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JURISDICTION

The Judgment Order (Unpublished) of the United States Court of Appeals for the Sixth Circuit, denying a COA, from the denial of the petition for writ of habeas corpus was entered on May 30, 2025, *Burdick v. Bousch*, COA No. 24-5980 (Doc. No. 13-2). The Order appears in **(Appendix-A)**. The Order denying Panel Rehearing, (Unpublished) was entered No. 24-5980 (Feb. 18, 2026). *Burdick v. Bousch*, No. 24-5980 (Doc. No. 20-1). The Order appears in **(Appendix-B)**. The Memorandum Opinion and Order denying the petition for Writ of Habeas Corpus was entered on Mar 24, 2025. *Robert Jason Burdick v. Martin Frink, Warden*, No. 3:21-cv-00602, 2024 WL 4293894 (Unpublished) (Sept. 25, 2024) (Doc. No. 23). The Order appears in **(Appendix-C)**.

The Petitioner would submit that this Petition for Writ of Certiorari is ¹timely filed if, within the ninety day period permitted by Supreme Court Rule 13.1, from the entry of the final order denying panel rehearing referenced above. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and Supreme Court Rule 14.

¹ This is the "Corrected" petition for writ of certiorari. The original was filed by the Clerk on May 1, 2026

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

6th Amendment

The Sixth Amendment provides that: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the **assistance of counsel** for his defense.

4th Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

14th Amendment

States in relevant part: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes

The relevant provisions of Tennessee criminal codes, including Tenn. Code. Ann. § 39-13-606, are reproduced at App. 86.

OPINIONS BELOW

- Order, United States Court of Appeals for the Sixth Circuit, *Burdick v. Bousch*, (6th Cir.) (COA denied) No. 24-5980, 2025 WL 3142128 (May 30, 2025) (Doc. No. 13-2). Represented at (Appendix-A)
- Order, United States Court of Appeals for the Sixth Circuit, *Burdick v. Bousch*, (6th Cir.) (Panel R'hrgr denied) No. 24-5980 (Feb. 18, 2026) Doc. No. 20-1). Represented at (Appendix-B)
- Memorandum Opinion, & Order United States District Court for the Middle District of Tennessee, *Robert Jason Burdick v. Martin Frink, Warden*, No. 3:21-cv-00602, 2024 WL 4293894 (M.D. Tenn. Sept. 25, 2024), (Doc. No. 23). Represented at (Appendix-C)
- Opinion, Tennessee Court of Criminal Appeals, at Nashville, *Burdick v. State*, No. M2020-00141-CCA-R3-PC, 2021 WL 2499313 (Tenn. Crim. App. June 18, 2021) *No perm. App. filed*. Represented at (Appendix-D)
- Opinion, Tennessee Court of Criminal Appeals, at Nashville, *State v. Burdick*, No. M2011-01299-CCA-R3-CD, 2012 WL 2151489 (Tenn. Crim. App. June 13, 2012) *Perm. App. denied* (Tenn. Sept. 18, 2012). Represented at (Appendix-E)

STATEMENT OF THE CASE

Trial: On November 1, 1999, E.M. (the victim) was awakened in her bedroom sometime after 1:30 a.m., by an intruder while her parents were asleep upstairs on the second floor of their townhouse. The intruder allegedly wore a knit ski mask, gloves, and held a gun to E.M.'s head. The intruder allegedly covered E.M.'s mouth and said to her, "don't say a word, be quiet or I'll kill you." She recalled that the intruder had "incredibly blue" eyes. *State v. Burdick*, No. M2011-01299-CCA-R3-CD, 2012 WL 2151489 (Tenn. Crim. App. June 13, 2012) (**Appendix-E, at 76.**)

The intruder allegedly escorted E.M. at gun point out of her bedroom and through the kitchen and out through the sliding glass door and onto the patio. From here, the intruder guided E.M. through a wooden gate that separated E.M.'s patio from her neighbor's patio. From there, E.M. was guided by the intruder past some "detached" garages and into a garage at the farthest end from her home. E.M. recalled that it was cold and raining and she was only wearing panties and a T-shirt. (**Appendix-E, at 76.**)

Although, the intruder attempted to cover E.M.'s eyes with duct tape, the tape would not stick because E.M.'s hair and face were wet. The intruder told E.M. to "take off her clothes" and she complied. The intruder laid down a rug and told E.M. to lay down on it. The intruder sat down beside her and forced his hands between her legs, fondled her vagina, and then put his fingers inside. The attacker then "climbed on top" of E.M., forced her legs apart and put his penis inside her. (**Appendix-E, at 76.**) E.M. said that she asked the attacker if she could leave. She said he got off of her and stood up. She pled with him, saying "Please, I won't look at you; can I please put my clothes back on and go?" After she asked again, the attacker said, "yes." E.M. said she put her clothes back on, walked passed the attacker, and left, not knowing whether he was going to kill her. (**Appendix-E, at 76.**)

E.M. said that as she rounded the outside of the garage, she could not hear the attacker behind her, so she started running out of fear he was going to shoot her in the back. E.M. ran home, entering her yard through her back gate and going into her house through the sliding door. E.M. estimated it took her twenty seconds to get from the garage back to her home. She said she ran upstairs to her parents' bedroom and screamed that she had just been raped. (**Appendix-E, at 76.**)

At the emergency room, E.M. gave doctors her clothing, and they performed a rape kit on her. E.M. then changed into new clothing and went to her home where she met with her parents and Detective Tommy Campsey. E.M. testified that she gave the Brentwood Police Department several interviews in an attempt to identify her attacker. She said, at one point, she mentioned to police that, when she noticed her attacker had blue eyes, she wondered if it was her boyfriend. She said, however, as soon as she returned to her house after the rape, her father called her boyfriend's parents, and her boyfriend was at his house with his parents. **(Appendix-E, at 77.)**

On cross-examination, E.M. agreed that she had previously said that the attacker told her that, "[Y]our dad doesn't know that I'm here." She also said she had described her attacker as being 5'9" tall. E.M. conceded that she had previously told police officers that she suspected her boyfriend was her attacker because he also had blue eyes and because the kisses of her boyfriend and her attacker were similar. Further, she acknowledged she had told officers that the attacker became "mad and frustrated" in a manner similar to her boyfriend. E.M. agreed that the entire attack took between seven and eight minutes. E.M. said she "did not see a gun" during the rape, and, because she did not hear the gun being placed on the ground, she "assumed" her attacker put the gun in his pocket. **(Appendix-E, at 77.)**

Dr. Kristina McCain, the attending physician who performed the rape kit on E.M., testified that, on November 2, 1999, she treated E.M. She said she obtained samples from EM., following the protocols dictated by the rape kit. Dr. McCain testified that, during her examination, she used a fluorescent light to examine E.M.'s body, in an effort to find secretions. The doctor identified some such secretions on E.M.'s labia, and she took a swab of them to be tested. On cross-examination, she agreed that the victim's vaginal swab was "negative" for the presence of sperm. **(Appendix-E, at 77.)**

Captain Campsey testified that investigators continued to follow leads in this case from 1999 until at least 2008. The captain described the investigation, which included a suspect named Brandon Holmes. He said law enforcement concentrated on Holmes but discovered he was homeless and living in a mission in Memphis without access to transportation. The captain was

"satisfied" that Holmes did not commit this rape. Captain Campsey testified that, in April 2008, the Defendant's name arose as a suspect in E.M.'s rape. As part of the investigation, officers obtained and executed a search warrant of the Defendant's home. Including, for his DNA. (Appendix-E, at 78.)

Detective Wiser said on May 1, 2008, he obtained a search warrant to take a buccal swab from the Defendant. The detective sent the swab, which involved Q-tips swabbed on the inside of the Defendant's cheek, to the TBI laboratory for analysis. The parties stipulated that the TBI laboratory analyzed the buccal swab and determined the Defendant's DNA profile. (Appendix-E, at 78.)

Dr. Qadriyyah Debnam, the forensic scientist at the TBI laboratory who analyzed evidence in this case, testified that she did not find any DNA on the area rug submitted by law enforcement. The doctor did, however, find sperm and skin cells on E.M.'s panties, which she processed for DNA in 1999, when they were submitted. In 2008, after law enforcement submitted the oral swab from the Defendant and the TBI created his DNA profile, the doctor compared the Defendant's DNA with the DNA found on the panties. She determined that the DNA profile found on the panties matched the Defendant's DNA sample taken from the oral swab. The doctor testified that the probability of an unrelated individual having the same DNA exceeded the current world population. Dr. Debnam testified that she analyzed the rape kit performed on E.M. at the hospital, and she found the presence of sperm but was unable to create a DNA profile from that sperm. Based upon this evidence, the jury convicted the Petitioner of aggravated rape and especially aggravated kidnapping and sentenced him to twenty-five years in prison. (Appendix-E, at 78.)

Post-Conviction Relief:

The Petitioner filed a series of petitions seeking Post-Conviction Relief. The two Williamson County cases (Counts 9-10 and 12-14) were consolidated for a single hearing and again on appeal. *Burdick v. State*, No. M2020-00141-CCA-R3-PC, 2021 WL 2499313 (Tenn. Crim. App. June 18, 2021) (Appendix-D, at 64.) During the evidentiary hearing for Post-Conviction Relief, the Petitioner testified that during the course of the proceedings he learned that a GPS monitoring device was attached to his vehicle without a warrant. (Appendix-D, at 65.) Despite the fact that the

Petitioner requested his trial counsel to file a motion to suppress evidence obtained directly and/or indirectly from the warrantless GPS device and the fruits thereof based upon Fourth Amendment grounds, trial counsel failed to do so. **(Appendix-D, at 65.)** Petitioner testified that trial counsel merely stated, "it's legal. They can do this." **(Appendix-D, at 65.)** On cross-examination, the Petitioner agreed that no "direct" evidence from the GPS data was used against him at trial, but the [buccal swab DNA] collected from him [after] the warrantless placement of the GPS device on his vehicle [was] used against him at trial. The Petitioner testified that this was the only evidence used to obtain a conviction and, that this evidence constitutes fruit-of-the-poisonous tree. Petitioner testified that this is evidence gathered [after] the warrantless GPS device was attached to his vehicle, and [after] his arrest. But the arrest itself, was only made possible by the [direct] monitoring of the GPS device revealing his exact location on the interstate. **(Appendix-D, at 65.)**

Captain David O'Neil of the Brentwood Police Department became involved in the investigation involving the "Wooded Rapist" attacks in 1999. On April 27, 2008, however, Captain O'Neil testified that, the Petitioner was developed as a suspect. O'Neil and his partner were part of a "surveillance" team that was following the Petitioner around. **(Appendix-D, at 65.)** The next day on April 28, 2008, O'Neil and his partner watched the Petitioner at his place of business and followed him visually to Tee Gee's Restaurant in LaVergne, TN. After the Petitioner left the restaurant, O'Neil and his partner went inside the restaurant and collected the eating utensils used by the ²Petitioner for the purpose of submitting those items to the TBI Crime Lab for DNA testing.

The next day, however, on Tuesday April 29, 2008, those eating utensils were submitted to the TBI for DNA testing and, O'Neil surreptitiously attached a GPS device to the undercarriage of the Petitioner's vehicle without a warrant. **(Appendix-D, at 65.)** This warrantless attachment was before the Supreme Court's decision in *United States v. Jones*, 565 U.S. 400, 132 S.Ct. at 948-954 (2012) (holding that the warrantless attachment of a GPS device to a target's vehicle and, use of that device to monitor the vehicle's movements constitutes a search under the Fourth Amendment.) **(Appendix-D, at 65.)**

² The Petitioner had dinner with his roommate (another male); although, the opinion of the Tennessee Court of Criminal Appeals does not reveal this fact.

O'Neil stated that they did not gain any incriminating information from the device itself and were really just trying to protect the public until they could arrest the Petitioner. (Appendix-D, at 66.) O'Neil stated that they wanted to maintain the Petitioner's location when visual surveillance was lost. (Appendix-D, at 66.)

³Trial Counsel testified that she and the Petitioner discussed the GPS issue being placed on his vehicle. She recalled that *United States v. Jones, supra*, was "in the pipeline" and "on her radar." (Appendix-D, at 66.) Counsel stated that she spoke with Captain O'Neil and another detective, as well as reviewed discovery, before advising the Petitioner that she would not file a motion to suppress based on *Jones*. Counsel explained that, it was her opinion that there was no legal basis to proceed with such a motion because "the ⁴DNA had been obtained [prior] to the GPS device being attached to Petitioner's vehicle and no evidence had been obtained as a result of the GPS device." (Appendix-D, at 66-67, 70.) On cross-examination, counsel stated that, "there was not a strategic reason for not filing a motion to suppress pursuant to *Jones*, other than there wasn't any evidence to suppress." (Appendix-D, at 67, 70.)

The Petitioner further argued in state court that, while his case was in the appellate pipeline, the U.S. Supreme Court decided *Jones*, 565 U.S. 400 (2012), holding that the attachment of a GPS device to a defendant's vehicle constituted a search within the meaning of the Fourth Amendment; thus, necessitating a warrant. Again, the Petitioner argued that his trial counsel were constitutionally deficient in failing to challenge the warrantless search and unreasonable seizure of his person and subsequent evidence obtained from his person, particularly the [buccal swab DNA] collected from him [after] the warrantless placement of the GPS device on his vehicle, as fruit of the poisonous tree. (Appendix-D, at 65, 70.)

The Post-Conviction trial court failed to conduct any Fourth Amendment analysis, failed to determine whether the

³ This attorney was [not] the attorney representing the Petitioner during the trial, sentencing or appeal of this case.

⁴ This assessment by counsel was egregiously incorrect. Although, the eating utensils had been "collected" prior to attaching the GPS device to Petitioner's vehicle, that evidence was only submitted to the TBI lab for DNA testing the same day the GPS device was attached to the vehicle. Further, The results were returned on May 1, 2008, the same day the Petitioner was arrested, which was made possible solely because of the GPS monitoring device. Most importantly, that DNA evidence was [not] used against the Petitioner at trial or otherwise. (Appendix-D, at 70-71.)

warrantless attachment of the GPS device on Petitioner's vehicle and subsequent use of that device to monitor the vehicle's movements constituted a search for Fourth Amendment purposes. Further, the trial court failed to determine whether that search was unreasonable under the Fourth Amendment. Finally, the trial court failed to conduct the 6th Amendment *Strickland* analysis in light of, the underlying Fourth Amendment claim. Instead, the trial court determined that "[t]here was not an ethical basis for counsel to file a motion to suppress based on the warrantless GPS tracker because there was no legal or factual connection between the GPS tracker and the DNA evidence ... therefore, the Petitioner has failed to show that counsel's performance fell below the standard required for criminal defense attorneys." (**Appendix-D, at 71.**)

The Tennessee Court of Criminal Appeals made the following incorrect determination that, "[t]he Petitioner's argument disregards the fact that no information or evidence was gathered as a result of the tracking device. The police had already obtained the Petitioner's DNA from the utensils that he had used at a restaurant before the device was installed on his vehicle, and the DNA on those items matched the DNA collected of the unknown suspect in multiple rapes in Williamson and Davidson Counties. Evidence of the Petitioner's DNA was not fruit of the poisonous tree as police had already obtained the sample before attaching the device to his vehicle." The state court thus determined that, neither trial nor appellate counsel rendered deficient performance by failing to raise a frivolous claim and, Petitioner has not established prejudice because none of the evidence used to secure his conviction arose from the tracking device. (**Appendix-D, at 71.**) None of the evidence from the eating utensils were ever used against the Petitioner; thus, the police did not already have Petitioner's DNA before the device was installed on his vehicle. The only evidence used against the Petitioner was the DNA buccal swab evidence obtained from his person [after] the GPS device was attached to his vehicle. His exact location and his subsequent stop and arrest was made possible solely because of the GPS device. It was for this reason that the DNA oral swabs were taken and used at trial to obtain all of his convictions.

Federal Habeas Corpus:

The Petitioner timely filed a federal petition for writ of habeas corpus in the U.S. District Court for the middle district of Tennessee. *Robert Jason Burdick v. Martin Frink, Warden*, No. 3:21-cv-00602, 2024 WL 4293894 (M.D. Tenn. Sept. 25, 2024) (**Appendix-C at, 15.**) The district court recognized Petitioner's claim in state court as: "Trial counsel were ineffective for failing to challenge law enforcement's placement of a GPS tracking device on his vehicle." (**Appendix-C at, 19, 22.**)

The district court recognized that, according to Captain O'Neil he placed a GPS tracker to the Petitioner's vehicle without a warrant, on Tuesday, April 29, 2008, the day after the eating utensils were collected from Tee Gee's restaurant. (**Appendix-C at, 20-21.**) The district court recognized that, according to Captain O'Neil the TBI confirmed that the DNA matched the unknown suspect in multiple rapes in Williamson and Davidson Counties. The court further recognized that, according to Captain O'Neil the ⁵Nashville Police Department used that information as "probable cause" to obtain the buccal swabs from the Petitioner upon his arrest on May 1, 2008. (**Appendix-C at, 20, 38.**)

The district court recognized that the Petitioner's ineffective assistance of counsel claim centered on "law enforcement's placement of the GPS tracking device on his vehicle without a warrant while monitoring his every move for a period of three (3) days constituted an unreasonable search," and that his subsequent arrest and buccal swab for DNA evidence is, the fruit of that unreasonable search. (**Appendix-C at, 37.**)

Based upon these facts, the district court, without conducting *any* Fourth Amendment analysis determined that: "[e]ven if the warrantless placement of the GPS device could reasonably have been argued to be unlawful, counsel could not reasonably have believed that a motion to suppress the post-arrest DNA evidence would have succeeded, because that later evidence (obtained via buccal swab) was not the fruit of the GPS data; rather, as found

⁵ As seen on Foot Note 6, of the district court's memorandum opinion (Appx-C at 38), Captain O'Neil testified that the Nashville Police Department used the DNA match from the eating utensils to obtain "probable cause" for the search warrant used to obtain the buccal swab DNA used at trial. However, review of the search warrant clearly reflects this testimony is false. Nowhere in the search warrant affidavit do police mention the DNA previously obtained from these utensils, a previous "match" to the Petitioner or, the use of a GPS tracker in the probable cause section of this warrant. See (Supplemental Technical Record -M2020-00141-CCA-R3-PC Vol. 1, pp. 41-47) ("Supp. T.R Vol. 1").

by the TCCA, it was the fruit of the match between DNA left by the John Doe rape suspect and the DNA Petitioner left on his restaurant utensils which was collected and submitted for analysis after law enforcement visually tracked Petitioner to the restaurant, without the use of GPS data” (citing *United States v. Kelly*, No. 17-5110, 2017 WL 7310402, at *2 (6th Cir. Nov. 14, 2017) (rejecting argument based on allegedly unlawful search of defendant’s workplace, ‘because no contraband was found at [his] workplace, and thus the search of his workplace had no effect on his conviction’) (citing, e.g., *United States v. Smith*, No. 13-5258 (6th Cir. Apr. 30, 2014) (order) (finding defendant’s argument that the district court erred in denying his pretrial motion to suppress the fruits of an allegedly illegal search to be moot because no evidence from the search was used at trial)). (**Appendix-C at, 37-38.**)

Finally, the district court’s determination was that: “[T]he record supports the TCCA’s finding that the buccal-swab DNA evidence ultimately used against Petitioner at trial was secured because of his DNA identification using a previously collected sample. At a minimum, the record supports the finding that the DNA evidence was not secured as a result of illegal monitoring of his location. But even if the opposite were true, and law enforcements use of ill-gotten location data allowed (by domino effect) for the collection of DNA evidence, it is not likely that the nexus between the means used to locate Petitioner and the DNA evidence obtained from him two days later would have been found close enough to warrant exclusion of the DNA evidence as fruit of the poisonous tree. *See United States v. Williams*, 615 F.3d 657, 668-69 (6th Cir. 2010) (noting that “[t]he Supreme Court has explained...that not all evidence must be suppressed simply because it would not have come to light but for the illegal actions of police”; rather, courts must inquire whether connection between illegality and evidence is attenuated by lack of temporal proximity, presence of intervening circumstances, and lack of purposeful or flagrant police misconduct) (citations omitted)); *see also United States v. Chavez-Chavez*, No. 07CR1408 WQH, 2008 WL 1847229, at *8 (S.D. Cal. Apr. 22, 2008) (stating that “[t]he nexus between the original illegality and the specific evidence subject to challenge must be a close one[.]...[i]t is not sufficient to demonstrate taint that ... an illegal search uncovers the alleged perpetrator’s identity and therefore directs [law enforcement’s] attention to [him]”). Thus, it is clear that Petitioner was not prejudiced as a result of the unchallenged use of GPS monitoring

without a warrant. Therefore, habeas corpus relief was denied. (Appendix-C at, 38-39.)

**United States Court of Appeals
Certificate of Appealability:**

After denial of a Certificate of Appealability ("COA") by the district court, the Petitioner filed application for COA to the 6th Circuit Court of Appeals. In his application for COA, the Petitioner sought a COA on the same ineffective assistance of counsel claim regarding the failure to seek suppression of evidence as fruits of the illegal GPS monitoring, and appellate counsel should have raised the issue on direct appeal, among others. *Burdick v. Bousch*, (6th Cir.) (COA denied) No. 24-5980, 2025 WL 3142128 (May 30, 2025) (Appendix-A at, 2, 5.)

The Sixth Circuit Court of Appeals, Justice White recognized that the Petitioner took issue with the fact that, both the TCCA and the district court "failed to recognize that the mere installment of the GPS device on [his] vehicle without a warrant, constituted a search for [Fourth] Amendment purposes" and that the warrantless search was unreasonable. (Appendix-A at, 6.) Justice White determined that, "But that misstates the record." (Appendix-A at, 6.)

Justice White reasoned that, "The district court expressly found that 'even if the warrantless placement of the GPS device could reasonably have been argued to be unlawful, counsel could not reasonably have believed that a motion to suppress the post-arrest DNA evidence would have succeeded,' because the DNA evidence that was used against Burdick at trial "was not fruit of the GPS data." (Appendix-A at, 6.) Justice White, thus concluded that, "the district court properly analyzed this claim through the lens of *Strickland*, which requires Burdick to prove that counsel acted unreasonably and that he was prejudiced. *Strickland*, 466 U.S. at 688, 694. (Appendix-A at, 6.)

Justice White opined that, "even if the placement of the GPS device constituted an unreasonable search in violation of the Fourth Amendment, to obtain habeas corpus relief on his ineffective-assistance claim, Burdick still had to show that the DNA evidence used to convict him would have been excluded from trial if counsel had filed a motion to suppress. And "[e]vidence 'will not be excluded ... unless the illegality is at least the 'but for'

cause of the discovery of the evidence,' unless that is 'the challenged evidence is in some sense the product of illegal government activity.'" *United States v. Clariot*, 655 F.3d 550, 553 (6th Cir. 2011) (quoting *Segura v. United States*, 468 U.S. 796, 815 (1984)). (**Appendix-A at, 6.**)

Panel Rehearing:

The Petitioner whole-heartedly disagrees with this reasoning. For that reason, the Petitioner sought a Panel Rehearing. *Burdick v. Bousch*, (6th Cir.) (Panel R'hrgr denied) No. 24-5980 (Feb. 18, 2026) (**Appendix-B at, 13.**) The panel rehearing requested review because of, a Circuit split as to whether, "a reasonableness determination should be made regarding the use of a GPS device ⁶*without a warrant* to monitor a target's movements under the Fourth Amendment. Additionally, review was requested to answer the question regarding "whether trial counsel's deficient performance and resulting prejudice can adequately or meaningfully be determined without first determining the reasonableness question stated above?" See (*Petition for Panel Rehearing, Doc. No. 19 at, 3-4.*)

The Petitioner pointed out that (1) both the district court and a panel of the Court of Appeals, failed to make *any* determination whether the government's warrantless installment of the GPS device violated the Fourth Amendment. (2) Neither the district court nor the Court of Appeals determined whether the government's warrantless use of the GPS tracking device itself was reasonable. The Petitioner explained that, a panel rehearing was necessary in order to make those determinations since, an affirmative answer would necessarily dictate whether trial counsel's failure to seek suppression on 4th Amendment grounds was constitutionally deficient. (**Doc. No. 19 at, 3-4.**) The Petitioner argued that the eating utensils collected from Tee Gee's restaurant the day prior to the GPS device being installed on Petitioner's vehicle is, irrelevant to the outcome of this case. (**Doc. No. 19 at, 4.**) This is because, it was not significant enough to use against the Petitioner at trial, nor was it significant enough

⁶ The Supreme Court left open the question of, whether a warrant is required before attaching a GPS device to a target's vehicle and its continued use to monitor the movements thereof. *United States v. Jones*, 565 U.S. 400, 132 S.Ct. at 948-954 (2012).

to justify a warrant. Otherwise, law enforcement would have used it for those purposes. Rather, that evidence was not used at all. Petitioner further argued that a warrantless installment of the GPS device to Petitioner's vehicle was illegal under Tennessee law at the time it was installed (citing Tenn. Code Ann. § 39-13-606(b)(1) "It shall not be a violation if the installing, concealing or placing of an electronic tracking device in or on a motor vehicle is by, or at the direction of, a law enforcement officer in furtherance of a criminal investigation *and* is carried out in accordance with *state and federal law*." (Doc. No. 19 at, 4-5.)

Turning to the warrantless installment of the GPS device and its use to monitor the movements of Petitioner's vehicle, the Petitioner pointed out that the GPS device was installed simply in furtherance of a criminal investigation. Thus, it was used as an investigative tool until an arrest could be made. Because no DNA results had yet been returned from the TBI lab, law enforcements installment of the GPS device on the vehicle at that point lacked the necessary probable cause determination and the warrant requirement. (Doc. No. 19 at, 5.) Therefore, Captain O'Neil's conduct was illegal and not carried out in accordance with **State and Federal law**.

Petitioner argued that, these facts alone render the use of the GPS device constitutionally unreasonable under the Fourth Amendment 4th to the U.S. Constitution, *United States v. Jones*, 565 U.S. 400 (2012). However, neither the State or district court's, nor the 6th Circuit Court of Appeals conducted such an analysis or made these specific findings before determining the ineffective assistance of counsel claim. (Doc. No. 19 at, 5-6.) Secondly, neither the lower courts, nor the previous panel of the Court endeavored to determine first and foremost whether the *warrantless installment of the GPS device on the Appellant's vehicle, and the government's use of that device to "monitor the Appellant's movements," violated the Fourth Amendment*. (T.R. Vol. 6. Pg. 609); (Appendix-D at, 73); (Appendix-C at, 37-40). (Appendix-A at, 5-6.)

The Petitioner argued that, without making critical determinations as to, (1) whether the **warrantless installment** of the GPS device and use thereof to **monitor** the Petitioner's

movements **constituted a search** in violation of the 4th Amendment to the U.S. Constitution and, (2) whether the governments **use** of the GPS device was **reasonable**;... The question *whether trial or appellate counsel were constitutionally deficient* could not adequately be answered. Thus, the question whether the state courts determination of this claim was objectively unreasonable could not be assessed in any meaningful way. **(Doc. No. 19 at, 7.)** The lower courts' determination then, are all in conflict with this Court's decision in *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

The Circuit Court of Appeals denied the Petitioner's request for panel rehearing in an Order entered February 18, 2026. **(Appendix-B at, 13.)**

REASONS FOR GRANTING THE PETITION

The Petitioner respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered on May 30, 2025, denying request for COA and, the district court's determination that the Tennessee state court's resolution of the claims presented are neither contrary to nor, an unreasonable application of clearly established federal law as established by the Supreme Court. This Honorable Court should grant certiorari review. The Petitioner respectfully disagrees with the lower court's resolution of the habeas corpus petition and, the reasons for denying the COA.

First, with regard to the Ineffective Assistance of Trial Counsel claim involving the warrantless attachment of a GPS device to the Petitioner's vehicle, the Petitioner asserts that none of the lower courts analyzed the "underlying constitutional claim" pursuant to the Fourth Amendment as this Court required in *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). This failure prevented those reviewing courts from properly evaluating the deficiency or prejudice prongs of the *Strickland* analysis; thus, an unfair assessment of his 6th Amendment right to a fair trial and to the effective assistance of counsel which is, Due Process of Law pursuant to the 14th Amendment.

Secondly, because the gravamen of the Fourth Amendment claim is that the complainant's legitimate expectation of privacy has been violated by an illegal search or seizure *Katz v. United States*, 389 U.S. 347 (1967), in order to prevail, the complainant [need only] prove that the search or seizure was [illegal] and that it violated his reasonable expectation of privacy in the item or place at issue. *See e.g., Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980).

In the Petitioner's case, no reviewing court has ever made the requisite determination as to whether the warrantless installment of the GPS tracker device on the Petitioner's vehicle, and its subsequent use to monitor the vehicle's movements (A) constituted a search under the Fourth Amendment; (B) whether such a search was a violation of the Fourth Amendment; and (C) whether that search was unreasonable under the circumstances of this case???. This Court has already answered question (A), in the affirmative. *United States v. Jones*, 565 U.S. 400 (2012).

To be sure, in ruling on this issue, the post-conviction court found that there was not an ethical basis for counsel to file a motion to suppress based on the GPS tracking device “because there was in fact no legal or factual connection between the GPS tracking and the DNA evidence... Consequently, ... the Petitioner has failed to show that [counsel’s] performance fell below the standard required for criminal defense attorneys.” (**Appendix-D, at 71.**)

It is undisputed in this case that the government *illegally* placed a GPS device on the Petitioner’s vehicle (without a warrant), and monitored his movements for a period of three days. This, the Petitioner has argued, was illegal under both State and Federal law. (citing Tenn. Code Ann. § 39-13-606(b)(1); and *United States v. Jones*, 565 U.S. 400 (2012)). The Petitioner has argued and shown that this illegal search violated the Petitioner’s legitimate expectation of privacy; thus, his protection under the Fourth Amendment. The Petitioner has argued and shown that this search was conducted without a warrant; thus, was unreasonable for Fourth Amendment purposes. Further, the Petitioner has argued and shown that, while no [direct] evidence was gathered [from] the GPS data, it is the indirect DNA “[buccal swab] evidence” gathered upon his arrest which was only made possible by the GPS data providing his exact location which is the poison fruit of this illegal search. This DNA evidence is the only evidence the State had against the Petitioner and the only evidence used at trial against him. Had Counsel moved to suppress this evidence as fruit of the poisonous tree, there is a reasonable probability that this specific DNA buccal swab evidence would have been excluded; thus, a reasonable probability that the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).

Finally, neither the State courts nor the federal courts reviewing this claim ever conducted the two-step analysis pursuant to this Court’s precedent in *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). Under *Kimmelman*, *supra*, this Court explained that, when trial counsel’s failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. *Kimmelman*, at, 375. Here, however, no Fourth Amendment analysis was ever

conducted, *Kimmelman, supra*, has never been cited or relied upon by any reviewing court and, the Petitioner's arguments have fell on deaf ears. For these reasons then, this Honorable Court should grant certiorari review and conduct the proper analysis with directions for the lower courts in the future.

PETITION FOR WRIT OF CERTIORARI

The Right to the Assistance of Counsel is the right to the effective assistance of competent counsel *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, [10], 25 L.Ed.2d 763 (1970). This right is guaranteed to the states through the Fourteenth Amendment *Duncan v. Louisiana*, 391 U.S. 145, 148-150, 88 S.Ct. 1444, 20 L.Ed.2d 491(1968).

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures *U.S. Const. Amend. IV*. A warrantless search or seizure is presumptively unreasonable, and any evidence discovered is subject to suppression. (*Id.*) This amendment prohibits searches and seizures that are unreasonable, even though lawful in other respects, and the question of reasonableness must be decided on the facts and circumstances of each case. *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931). Under the Fourth Amendment, a warrantless search is "per se unreasonable" unless, an exception applies. *United States v. Jenkins*, 92 F.3d 430, 436 (6th Cir. 1996) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

The Petitioner contends that, in this case it is undisputed that law enforcement officers placed a GPS device on his vehicle on April 29, 2008 [without a warrant] and used that tracking device as an investigative tool to monitor his movements for three days. (**Appendix-A at, 6**); (**Appendix-D at, 71.**) It is also undisputed that, on May 1, 2008 law enforcement tracked the Petitioner's vehicle on Interstate-24 using the GPS monitor, stopped him and effected an arrest; thus, seizing him [after] placing the warrantless device on his vehicle. Upon taking the Petitioner to jail, the police took a [buccal swab] of his cheek; thus, collecting Petitioner's DNA. Although, this DNA collection was pursuant to a search warrant of his home, vehicles, and DNA, etc., the Petitioner asserts that this subsequent search warrant was not sufficiently attenuated

to purge the taint of the illegal search from the warrantless GPS tracker. *Segura v. United States*, 468 U.S. 796, 815 (1984); *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). Moreover, it is undisputed that this post-arrest buccal swab DNA evidence is indeed, the DNA evidence used against the Petitioner at trial. It is also undisputed that this DNA evidence is the [only] evidence presented against the Petitioner at trial. **(Appendix-E at, 76-78); (Appendix-D at, 65-66); (Appendix-C at, 37-38, and 38-39.)** Therefore, it is undisputed that law enforcement installed a GPS device on the Petitioner's vehicle (without a warrant) and used that device to monitor his movements for three days. Police then, effected an arrest on the third day and collected a second DNA sample which was the sole evidence used at trial identifying him as the perpetrator or, at the very least placing him at the scene of the crime. It is this evidence that secured a conviction for the State of Tennessee. The attachment and use of the GPS device to monitor Petitioner's movement constitute a search under the Fourth Amendment. This search and subsequent seizure of his person and his effects (DNA), is unreasonable under the Fourth Amendment. *United States v. Jones*, 565 U.S. 400 (2012).

Based upon this unreasonable search and seizure, the seizure of his person and effects constitute fruit of the poisonous tree. Because the subsequent search and seizure of the post-arrest DNA was not sufficiently attenuated from the initial illegality, the DNA buccal swab evidence would have been suppressed had trial counsel properly sought to suppress that evidence based upon the foregoing. *Segura v. United States*, 468 U.S. 796, 815 (1984). The post-arrest DNA was indeed excludable evidence; without which, there was not sufficient evidence to convict the Petitioner beyond a reasonable doubt. Therefore, trial counsel's failure to file a motion to suppress this post-arrest DNA evidence was constitutionally deficient performance which absolutely prejudiced the outcome of this trial.

The Petitioner contends that, no Tennessee reviewing court ever conducted any Fourth Amendment analysis regarding the factual allegations supporting his Sixth Amendment ineffective assistance of trial counsel claim. Further, no federal court reviewing the State courts determinations likewise, have ever conducted any analysis of the underlying claim supporting the ineffective assistance of counsel claim. The Supreme Court, however, in *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) has previously held that, While defense counsel's failure to make

a timely suppression motion is the primary manifestation of incompetence and source of prejudice advanced by respondent, the two claims are nonetheless distinct, both in nature and in the requisite elements of proof. 477 U.S. at 374. The Court further held that, “[I]n order to prevail, the defendant must show both that counsel’s representation fell below an objective standard of reasonableness, *Strickland*, 466 U.S. at 668, and there exists a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Id.* at 466 U.S. 694. “*Where defense counsel’s failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness*, the defendant must also prove that his Fourth Amendment claim is meritorious and that *there is a reasonable probability that the verdict would have been different absent the excludable evidence* in order to demonstrate actual prejudice.” *Kimmelman v. Morrison*, 477 U.S. 365 at 375. (Emphasis added.)

Therefore, when the primary manifestation of incompetence and source of prejudice advanced by the Petitioner is counsel’s failure to litigate a Fourth Amendment claim, the reviewing court must conduct a proper Fourth Amendment analysis and determine first, whether a Fourth Amendment violation occurred *Kimmelman v. Morrison*, 477 U.S. 365 at 375. In order to prevail on this accusation, the Petitioner [need only] prove that the search or seizure was [illegal] and that it violated his reasonable expectation of privacy in the item or place at issue. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980). No reviewing court has ever conducted such an analysis, but merely reviewed the claim solely under the lens of *Strickland v. Washington*, 466 U.S. 668 (1984). See e.g. (Appendix A at, 6) (quoting Justice *White’s* analysis.)

The Petitioner asserts that Tennessee courts only recently adopted the Supreme Court’s standard announced in *Kimmelman*, and establishing the burden of proof required when a Fourth Amendment claim is the primary manifestation of the Sixth Amendment ineffective assistance claim. To be sure, the Tennessee Supreme Court decided *Phillips v. State*, 647 S.W.3d 389 (Tenn. June 10, 2022), just one year [after] the Petitioner’s appeal as of right from the denial of Post-Conviction Relief. In that case the Tennessee Supreme Court was asked to *clarify* the appropriate burden of proof and legal standard to be applied when a criminal defendant claims ineffective assistance of counsel based on trial counsel’s failure to move to suppress evidence on Fourth Amendment grounds. *Phillips*, had urged the Court to

adopt the U.S. Supreme Court's test in *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). The Court held that: "[W]e agree with the parties that *Kimmelman* defines the appropriate standard for prejudice under the circumstances and should be utilized by Tennessee courts moving forward. It also concluded that, "[t]o establish prejudice with this type of claim, the petitioner must prove that his 'Fourth Amendment claim is meritorious' and that there is a reasonable probability that the verdict would have been different absent the excludable evidence" (citing *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); thus, adopting the *Kimmelman* test. *Phillips v. State*, 647 S.W.3d at, 393-394. The Court further held, "Although this Court has recognized *Kimmelman*, we have yet to apply it in this context. As a result, *only some* of Tennessee's intermediate appellate courts have applied *Kimmelman*, while others have applied a *nearly* identical analysis articulated by the court of criminal appeals in *Cecil*. (*Id.* at 402.) (Emphasis added.) The standard in *Cecil*, is:

In order to show prejudice, petitioner must show by clear and convincing evidence that (1) a motion to suppress would have been granted and (2) there was a reasonable probability that the proceedings would have concluded differently if counsel had performed as suggested. In essence, the petitioner should incorporate a motion to suppress within the proof presented at the post-conviction hearing.

Phillips v. State, 647 S.W.3d at, 403 (quoting *Cecil v. State*, 2011 WL 4012436 at *8 (Tenn. Crim. App. 2011).

Phillips, urged the Court to end reliance on *Cecil*, specifically taking issue with the fact that, *Cecil* includes the legal standard "clear and convincing" within the statement of the standard (Citing *Cecil*, 2011 WL 4012436 at *8) ("In order to show prejudice, Petitioner must show by clear and convincing evidence that ..." (emphasis added)). *Phillips* argued that "this imposes an improper burden on petitioners to prove prejudice by *clear and convincing* evidence rather than prove the factual *allegations* in support of the claim by clear and convincing evidence, as is required by the statute. (*Id.* at 403.) *Cecil v. State*, 2011 WL 4012436 at *8 (Tenn. Crim. App. 2011). While the Court found that, "*this is not the first time we have dealt with this type of alleged error* regarding the lower court's recitation of the standard in post-conviction cases," (citations omitted) (*Id.* at 403),

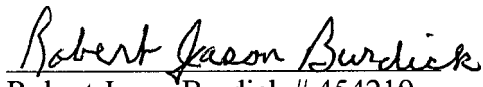
the Court ultimately disagreed with *Phillips* that *Cecil* was *bad law*. The court nevertheless concluded that "regardless, moving forward, Tennessee Courts should utilize the test [directly] from *Kimmelman* to assess whether a petitioner has carried his or her burden to prove prejudice in this context." (Id. at 403-404.)

Based upon these facts and foregoing authorities then, the Petitioner before this Honorable Court contends that, it was not until one year [after] the Petitioner's appeal from the denial of his post-conviction relief proceedings that the test in *Kimmelman, supra*, began to be used by Tennessee courts. For these reasons then, the Petitioner asserts that no Tennessee court ever bothered to conduct a proper and meaningful Fourth Amendment analysis of his underlying constitutional claim before, analyzing his primary claim of ineffective assistance of counsel under the sole lens of *Strickland v. Washington*, 466 U.S. 668 (1984). Indeed, no federal court has conducted such a Fourth Amendment analysis either relying instead, upon the State court's determination of the claim. Therefore, this Court should grant certiorari review and address the question presented by the Petitioner here.

CONCLUSION

The Petitioner prays this Court will grant certiorari review to reach the question presented in order to prevent a fundamental injustice from continuing; and appoint counsel to represent the Petitioner in this Court moving forward.

Respectfully,



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