

26-5753
Docket No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2025

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ORIGINAL

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-6-25-5398

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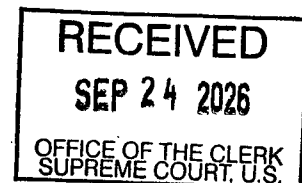
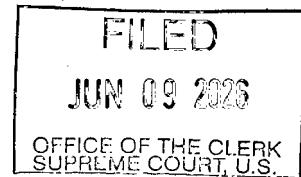
Robert Jason Burdick #454219

[Petitioner/Pro Se]

Turney Center Industrial Complex

1499 R.W. Moore Memorial Hwy.

Only, TN 37140-4050



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?
- II. The lower Courts determination of, the sufficiency of the evidence to support the convictions for Rape based on *force or coercion* amounts to an unreasonable application of federal law?

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*, No. 25-5398 (6th Cir.) (COA denied and Order entered November 21, 2025.) (Unpublished) (Doc. No. 14-2.)
- *Burdick v. Bousch*, No. 25-5398 (6th Cir.) (Panel R'hrng denied) Order entered March 16, 2026.) (Doc. No. 21-2
- *Burdick v. Frink*, No. 3:22-cv-00031, 2025 WL 899957 (M.D. Tenn.), (Mem. Opinion issued and Judgment entered, March 24, 2025.)
- *Robert Burdick v. State of Tennessee*, No. M2020-00141-CCA-R3-PC, 2021 WL 2499313 (Tenn. Crim. App.) Denial of Post-Conviction Relief affirmed, (opinion issued June 18, 2021) *No perm. App.* filed.
- *State of Tennessee v. Robert Burdick*, No. M2012-01071-CCA-R3-CD, 2013 WL 2642313 (Tenn. Crim. App.) Direct Appeal (Opinion issued June 11, 2013 and Perm. App. denied by Tennessee Supreme Court November 13, 2013.)

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 (not published) 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 November 21, 2025. *Burdick v. Bousch*, No. 25-5398, 2025 WL 4704196 (Doc. No. 14-2) (Unpublished Order). The Order appears in (Appendix-A). The Order denying Panel Rehearing, was entered on Mar. 16, 2026. *Burdick v. Bousch*, No. 25-5398 (Doc. No. 21-2) (Unpublished Order). 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. 3:22-cv-00031, 2025 WL 899957 (Mar 24, 2025) (Doc. No. 18) (Unpublished). 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 deemed "filed" by the Clerk on

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. §§ 39-13-305, 503 and 606, are reproduced at App. 88-91.

OPINIONS BELOW

- Order, United States Court of Appeals for the Sixth Circuit, *Burdick v. Bousch*, (6th Cir.) (COA denied) No. 25-5398, 2025 WL 4704196 (Nov. 21, 2025) (Doc. No. 14-2). Represented at (Appendix-A)
- Order, United States Court of Appeals for the Sixth Circuit, *Burdick v. Bousch*, (6th Cir.) (Panel R'hrgr denied) No. No. 25-5398 (Mar. 16, 2026) Doc. No. 21-2). 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. 3:22-cv-00031, 2024 WL 899957 (M.D. Tenn. Mar. 24, 2025), (Doc. Nos. 18, 19). 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. M2012-01071-CCA-R3-CD, 2013 WL 2642313 (Tenn. Crim. App. June 11, 2013) *Perm. App. denied* (Tenn. Nov. 13, 2013). Represented at (Appendix-E)

STATEMENT OF THE CASE

Trial:

*1 A Williamson County Circuit Court Jury convicted the appellant, **Robert Jason Burdick** of rape, aggravated kidnapping, and aggravated burglary. *State v. Burdick*, M2012-01071-CCA-R3-CD, 2013 WL 2642313 (Tenn. Crim. App. 2012), hereafter ("Appendix-E at, 76.")

At trial, the victim, KA,¹ testified that in November 2004, she was living on Williamsburg Road in Brentwood. On the night of November 3, her eleven-year-old daughter fell asleep around 9:00 or 9:30 p.m., and her husband went to bed shortly thereafter. The victim stayed in the great room, which she also referred to as the "green room." and fell asleep on the couch while watching television. The victim had not locked the French doors in the green room, which led outside, and the blinds on the windows were not completely closed. The victim woke when she felt someone wearing fingerless wool gloves place a hand over her eyes. The perpetrator told the victim, "Shush, don't say anything." (Id. at, 76).

The victim said the perpetrator told her to get up and go to the doors to the deck. The victim, who was wearing only a white or cream-colored nightgown, complied with the perpetrator's order. She tried to be calm and looked straight forward in an attempt to not seem "confrontational." The perpetrator led her to the door and onto the deck: she did not walk out of the house voluntarily. The victim told the perpetrator, "I just want my family to be safe." She testified, "I don't particularly remember [if the perpetrator made] a response, 'They will be.' perhaps, but I can't remember." (Id. at, 76-77).

The victim said that the perpetrator guided her down the steps of the deck and told her to walk toward the trees by the "creek line" at the eastern edge of the property. The location was "pretty remote from the house, from the driveway, [and] from the next house." The evening was dark and overcast, and the ground was wet from rain. The victim urinated on herself while walking. Eventually, the perpetrator pushed her to the ground, face first; covered her eyes with duct tape; and ordered her to undress. After she removed her nightgown, he told her to lie down, and she complied. The victim heard the perpetrator unzip his pants. When the victim was "half upright," the perpetrator pulled her head

toward his pants and directed her hands toward his penis; he was not wearing a condom. The perpetrator ordered her to perform fellatio and told her, "Don't f[* * *] it up; you know what to do." She thought he was implying that he would react with violence if she tried to hurt him. (Id. at, 77).

*2 The victim said that after three or four minutes, the perpetrator removed his penis from her mouth. She heard him adjust the zipper on his pants, open a condom packet, and put on the condom. He leaned over her and rubbed, stroked, and kissed her breasts. From the contact, she discerned that he was wearing a wool ski mask that had an opening for his mouth. The victim lay flat on the ground, the perpetrator got on top of her, and he penetrated her vagina with his penis after using his saliva for lubrication. During intercourse, the perpetrator asked the victim to kiss him, and he kissed her breasts and put his tongue in her mouth. She was afraid and believed she had to cooperate or "the whole situation could spiral out of control." (Id. at, 77)

The victim said that she went up the stairs and, once she was inside the house, locked the door and closed the blinds. She looked in on her daughter, who was still sleeping. She made sure the rest of the doors in the house were locked then went to her bedroom. Her husband woke, and she told him that she had been raped. The victim and her husband went to the den because she felt safer in a room that was "not so open [and was] in the middle of the house. The victim told her husband the details of the incident, and he called the police. The victim smoked a cigarette to calm herself but did not shower, wash, change clothes, brush her teeth, use the bathroom, or drink water. She stated that she "wanted to make sure everything was preserved, conserved, and nothing disturbed." (Id. at, 77).

The victim said that the police and paramedics responded to her house immediately. The paramedics took her, still wearing her nightgown, to the Williamson County Medical Center. When she arrived, the hospital staff had her stand on a plastic sheet on the floor and disrobe. They combed her hair, examined her body, and took photographs of her injuries and the mud and debris on her body. The staff performed a rape kit, collecting swabs from her mouth, the skin of her breast, and her vaginal region. While at the hospital, the victim told Detective Adrian Breedlove about the incident. The victim said that she did not know the appellant prior to the rape. (Id. at, 77).

*3 The victim's husband said that prior to the night of the rape, he had installed "motion sensing lights" under the deck. After the rape, he checked the lights and found that the light bulbs had been unscrewed. (Id. at, 78)

Al Dean Ketner testified that on November 4, 2004, he spent the night with his girlfriend, who lived next door to the victim. Around 1:00 or 1:30 a.m., he took his dog, a Boston Terrier, on a walk without a leash. Ketner said that the dog was normally quiet, but while they were outside, she began barking. The dog was "very agitated, [and] alarmed." Ketner looked around and saw a female on the ground and a male standing over her. Initially, Ketner thought the victim was outside with her husband. Ketner tried to call his dog back, but she continued to bark. Ketner saw the victim stand and hurriedly walk to her deck. Ketner and his dog returned to his girlfriend's house. (Id. at, 74).

Ketner said that the next morning, he saw the police at the victim's house. He decided that the man he saw the previous evening must not have been the victim's husband. Accordingly, he went next door and told the detectives what he had seen. (Id. at, 78).

Lieutenant Campsey appointed Detective Wood to be the lead investigator. Detective Wood said that no fingerprints of any evidentiary value were found at the scene. Detective Wood noticed that the lights underneath the deck were loose, as if the bulbs "had been unscrewed just to the point to where they wouldn't light up." Detective Wood found cigarette butts in the back yard, and testing revealed the DNA of an unknown person. Detective Wood said that after the TBI crime laboratory tested the swabs taken from the victim. A DNA profile of the perpetrator was found. However, at that time a match could not be made. Subsequently, in April 2008, the appellant was developed as a suspect, and a DNA sample was taken from him. (Id. at, 78).

*4 At the conclusion of Detective Wood's testimony, the parties entered the following stipulation:

[T]he Tennessee Bureau of Investigation conducted its DNA comparison using a DNA sample obtained from the [appellant]. Following the taking of the sample in May of 2008, all proper procedures were followed to assure the

integrity of the sample prior to the analysis by the Tennessee Bureau of Investigation.

The State rested its case-in-chief, and the appellant elected not to put on proof. The jury found the appellant guilty of rape, aggravated kidnapping, and aggravated burglary. The trial court sentenced the appellant to twelve years for the rape conviction, twelve years for the aggravated kidnapping conviction, and six years for the aggravated burglary conviction. The court ordered the sentences to be served consecutively for a total effective sentence of thirty years. (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 of Tennessee*, 2021 WL 2499313 (Tenn. Crim. App. 2021), hereafter "Appendix D, at 66."

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. (Id. at 67.) 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. (Id. at 67.) Petitioner testified that trial counsel merely stated, "it's legal. They can do this." (Id. at 67.)

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. (Id. at 67.) 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. (Id. at 71.)

Captain David O'Neil of the Brentwood Police Department became involved in the investigation involving the "Wooded

Rapist” attacks in 1999. (Id. at 67.) 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. (Id. at 68.) 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. (Id. at 68.)

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. (Id. at 68.) 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. (Id. at 71.)

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. (Id. at 68.) O’Neil stated that they wanted to maintain the Petitioner’s location when visual surveillance was lost. (Id. at 68.)

Trial 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.” (Id. at 68.) 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 ³DNA had been obtained [prior] to the GPS device being attached

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.

³ 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.)

to Petitioner's vehicle and no evidence had been obtained as a result of the GPS device." (Id. at 68, 71.) 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." (Id. at 71.)

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. (Id. at 67.)

The Post-Conviction trial court failed to conduct any Fourth Amendment analysis, failed to determine whether the 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 as mandated by the Supreme Court in *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). 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." (Id. at 71.)

The Tennessee Court of Criminal Appeals failed to conduct an appropriate Fourth Amendment analysis based upon the Supreme Court's mandate in *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). (Id. at 71-72.) Further, it 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. (Id. at 72.) 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. 3:22-cv-00031 (M.D.Tenn. Mar 24, 2025) (Doc. No. 18), hereafter "Appendix-C" at, 15, 17. The district court recognized Petitioner's claim in state court as: "Trial and Appellate counsel were ineffective for failing to challenge law enforcement's placement of a GPS tracking device on his vehicle." (Appendix-C at, 24, 40).

The district court considered evidence 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. (Id. at, 22.) The district court considered 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 considered that, according to Captain O'Neil the ⁴Nashville Police Department used that information as "probable

⁴ 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 May 1, 2008 search warrant clearly reflects that this testimony is false. Nowhere in the search warrant do

cause” to obtain the buccal swabs from the Petitioner upon his arrest on May 1, 2008. (Id. at, 22, 42.)

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. (Id. at, 41.)

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 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, 42-43.)

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

police mention the DNA previously obtained from the utensils, a previous “match” to the Petitioner, 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”).

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, 42-43.)

With respect to the sufficiency of the convicting evidence claim, the district court recognized that the State of Tennessee specifically charged the Petitioner with the [vaginal] rape of the victim. (Appendix-C at, 32.) The district court further recognized the elements of the offense of Rape, pursuant to Tenn. Code Ann. § 39-13-503(a)(1), requiring force [or] coercion, to accomplish the act. The district court likewise recognized the definition of [sexual penetration under State law. (Id. at 32.)

The district court properly considered the TCCA’s reiteration of the evidence presented in state court, which described the facts in sequential order from start to finish. (Id. at 33). The district court further recognized the Petitioner’s argument that the State failed to prove that the vaginal rape of the victim was accomplished by the use of force or coercion. (Id.) The Petitioner pointed out that, there’s no testimony that he used a gun or “threatened” the victim verbally or otherwise during the [vaginal] rape of the victim. There’s no testimony to suggest that the victim’s mouth was covered; or, that she was threatened “not to summon help.” Finally, there was no testimony that the

perpetrator threatened to cause bodily harm to the victim or the victim's family if, she did not submit to the vaginal rape. (Id.) The Petitioner argued that, it could be said, under the circumstances of this case that the victim "voluntarily" left the house with the perpetrator and willingly engaged in the [vaginal] part of the sexual activity simply because [she] [thought] it would be safer and she did not want to wake her daughter ... didn't want her to see it. (Id.) The record evidence clearly supports these facts.

Indeed, the Petitioner based his entire argument on the fact that three alleged events took place, each one a criminal act; only two of which the Petitioner was charged, e.g., vaginal rape and kidnapping. The Petitioner was not charged with the oral rape. This is where the problem with the elements of the vaginal rape get cloudy. The kidnapping of the victim occurs first and is a "continuing offense," which continues through to the second event which is the oral rape. This is the point when the victim testified that the perpetrator "unzipped his pants and guided her head toward his penis stating, "Don't [f***] it up. You know what to do." Fellatio is performed briefly, then the victim testified she was directed to disrobe and lie of the ground which she did. In the meantime, the kidnapping is still continuing as the victim's liberty is still restrained. Then, the victim testifies that the third sequential event begins which is, the [vaginal] rape. The Petitioner is charged with this crime. The kidnapping is still continuing, but there's no testimony from the victim that the perpetrator is threatening her or her family with violence, harming her, holding a weapon on her, using threatening or coercive language, etc. Instead, for this particular crime we are met with silence. (Id. at 33, 4.) In fact, the evidence reveals the following evidence: "The victim lay flat on the ground, the perpetrator got on top of her, and he penetrated her vagina with his penis after using his saliva for lubrication. During intercourse, the perpetrator ⁵[asked] her to kiss him, and he kissed her breasts and put his tongue in her mouth. She was afraid and believed she had to cooperate or the 'whole thing could spiral out of control.'" (Id. at 18.)

When the dog started barking, the perpetrator stop the vaginal rape, said, "Shush," and told the victim to get dressed. Once dressed, the perpetrator "walked the victim back toward her house, still with tape over her eyes. When she almost "tripped," the perpetrator "steadied her" so as to prevent her from falling to

⁵ Notice the victim testified the perpetrator [asked], rather than demanded or threatened her to comply.

the ground. At the bottom of the steps to her deck, the perpetrator removed the tape from her eyes and asked her to wait five minutes before calling the police. (Id. at 18, 33.) The kidnapping ended at this point as, the victim's liberty was no longer restrained. However, the first instance where the victim gave testimony supporting fear and [perceived] threats are at the beginning of the kidnapping and at the beginning of the [oral] rape, an offense that the Petitioner was not tried for. Yet, the jury heard evidence of the oral rape. (Id.)

Based upon these circumstances and events, very little activity took place during the entire episode in which the [vaginal] rape occurred. To the extent that the vaginal rape required proof beyond a reasonable doubt of the essential elements of force [and] coercion versus [or] coercion, since that is indeed what the indictment for Count 12 required; the State failed to produce any proof whatsoever. Those essential elements, however, were proven at different stages over the course of the whole episode from the beginning of the kidnapping in the victim's home to the [oral] rape. But does not carry over to the final event consisting of the [vaginal] rape. Thus, the State failed to carry its burden of proof. To this extent then, is the support for the Petitioner entire evidentiary argument that force or coercion were not proven beyond a reasonable doubt regarding the vaginal rape.

The district court determined that the Petitioner's argument "is specious." (Id. at 33.) The court determined that, "using duct tape to cover a sexual assault victim's eyes alone can cause *bodily harm*." (Id. at 33) ⁶(Citing *State v. Burdick*, No. M2009-02085-CCA-R3-CD, 2012 WL 1366359, at *5 (Tenn. Crim. App. Apr. 18, 2012) (finding evidence sufficient to support aggravated rape conviction where use of duct tape on victim's eyes and wrists established aggravating factor of "bodily injury"). The court further points out that, the victim testified that "[t]here was implied violence" in the "tone of Petitioner's command to her, [prior] to the vaginal rape, of 'don't f**k it up.'" (Id. at 36.) The jury obviously credited this testimony, as it was their providence to do. The evidence easily supports the finding that K.A. was responding to what she perceived as a 'threat of...force or violence to be performed immediately or in the future'...The claim that

⁶ This is not the same criminal case, but another case (Williamson County Counts 9-10), not associated with the current case at all. Further, the "bodily injury" in that case was a "sentencing factor" not an essential element of simple Rape, as is the case here.

such evidence is insufficient to support Petitioner's rape conviction is entirely without merit." (Id. at 33-34.)

The district court's determination absolutely proves the Petitioner's point of contention. The State used evidence involving the [other] crimes involved at different sequential points to fictitiously establish the essential elements necessary for the crime involving the vaginal rape; a crime completely lacking in the essential elements of force [and] coercion. This type of elements association is prohibited under the principles of due process and the Supreme Court's holding in *Jackson v. Virginia*, and *In re Winship*, that sufficient evidence to support each and every element essential to the offense [tried] must stand on its own.

Regarding the aggravated kidnapping offense, the Petitioner argued that the evidence was insufficient and the TCCA's harmless-error analysis was infirm. While, neither the TCCA nor the district court bothered to consider the fact that, under Tennessee law kidnapping is a "continuous offense," both courts did recognize that the jury was [not] informed that they had to consider whether the State proved beyond a reasonable doubt that the "substantial-interference element of aggravated kidnapping could not be essentially incidental to an accompanying felony such as rape. (Id. at 37.) The district court determined that the TCCA's determination is not contrary to or an unreasonable application of clearly established federal law. (Id. 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. *Burdick v. Bousch*, No. 25-5398 (Doc. No. 14-2), hereafter ("Appendix-A.") 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. (Appendix-A at, 3, 7-8.) The Petitioner also sought a COA on the sufficiency of the convicting evidence (Id. at 4-7.)

The Sixth Circuit Court of Appeals, Justice White, simply determined that, "This claim does not deserve encouragement to proceed further.

Justice White reasoned that, Defense counsel testified ... that she investigated the GPS issue but did not move to suppress the DNA evidence because neither that evidence nor any other evidence admitted at trial was obtained as a result of the GPS device." (Appendix-A at, 8.)

Justice White opined that, "the affidavit in support of the search warrant that authorized the collection of DNA evidence did not mention the GPS device or any other evidence obtained through that device. But Burdick did not otherwise identify any GPS evidence that was admitted independently at trial." (Id.)

With regard to the sufficiency of the evidence claim, Justice White properly identified the *Jackson* standard of review and determined that, in habeas proceeding, the review of a sufficiency of the evidence claim is doubly deferential finding that, "deference is owed to the trier-of-fact's verdict, as contemplated by *Jackson*; Second, deference should be given to the state appellate court's consideration of that verdict as dictated by AEDPA." (Id. at 4-5)

Justice White reiterated that the evidence presented by the State was that the Petitioner broke into the victim's home, covered her eyes, "told her to be quiet," before leading her "outside away from the house to a wooded area," covering her eyes with duct tape, telling her to "disrobe." Burdick also warned the victim, after "order[ing] her to perform fellatio," "[d]on't f[***] it up; you know what to do." The victim reasonably believed that Burdick "was implying that he would react with violence if she tried to hurt him." (Id. at 5) Justice White made the determination that, "This evidence blatantly contradicts Burdick's claim that "[t]he jury heard no testimony from the victim to explain why she was afraid" and that "[t]here was no testimony to suggest that [he] did anything to cause fear, either physically or verbally." Any reasonable individual awoken by a stranger in her home in the middle of the night and ordered to stay quiet by a perpetrator who covered her eyes and led her out of her home would have *feared force or violence* if she did not comply. Reasonable jurists could not debate the district court's conclusion that the state court reasonably determined that the State proved the element of *coercion*. (Id. at 5.) (Emphasis added.)

Therefore, Justice White considered mostly the events that took place [prior] to the vaginal rape the Petitioner was actually tried for such as, the events surrounding the aggravated kidnapping and the [oral] rape. It is these events Justice White identified in order to determine that the State courts and the district court's conclusion that the State proved the element of coercion. Justice White did not even consider the essential element of [force], but did find that [fear] was present. Yet, fear is not an element of rape. The acts committed during the perpetration of other independent crimes cannot form the essential elements of another crime in order to prove guilt beyond a reasonable doubt according to the dictates of due process principles.

Panel Rehearing:

The Petitioner whole-heartedly disagrees with this reasoning. For that reason, the Petitioner sought a Panel Rehearing. *Burdick v. Bousch*, No. 25-5398 Mar. 16, 2026 (Doc. No. 21-2), hereafter "(Appendix-B at, 14.)" 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 ⁷*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. 18 at, 18-19.)

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. 18 at, 18-19.) The

⁷ 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).

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. 18 at, 20.) This is because, it was not significant enough to use against the Petitioner at trial, nor was it significant enough 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. 18 at, 20.)

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. 18 at, 21.) 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. 18 at, 21.) 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, 71-72); (Appendix-C at, 28-29). (Appendix-A at, 7-8.)

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. 18 at, 22, 25). The lower courts' determination then, are all in conflict with this Court's decision in *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

With respect to the Sufficiency of the Evidence claim, Part A—The Petitioner put forth the same argument, but explained that the essential elements of *force [and] coercion* required for the vaginal rape were not supplied by the testimony of the victim regarding the act of that rape or, the circumstances surrounding it. Rather, the Jury was left with mere speculation or conjecture as, those elements were supplied by the kidnapping and oral rape (a charge the Petitioner was not tried upon.) (Doc. No. 18 at, 7-9; 11-12). Because the State failed to put forth any evidence whatsoever regarding the [act] of force and coercion on the part of the Petitioner, those essential elements were not met and the lower court's determination runs contrary to the Supreme Court's decisions in *Jackson v. Virginia*; *In Re Winship*, and amounts to an objectively unreasonable application of those cases. (Id. at 13.)

As for part (B), the kidnapping charge and the sufficiency of the evidence for that crime, the Petitioner argued that both, his Sixth and Fourteenth Amendment rights to a fair trial and due process of law were violated when the trial court failed to inform the jury that they had to find that the Petitioner *substantially interfered with the victim's liberty* require the jury to consider whether that substantial interference was essentially incidental to the rape offense. (Id. at 16-18.) The Petitioner explained how the jury in this case failed to even determine whether that critical key element of the kidnapping offense was proven by the State beyond a reasonable doubt. (Id. at 17-18.) The Petitioner also argued again that none of the lower courts applied the long-standing principle in Tennessee that the crime of *Kidnapping* is, a continuing crime, which continues for the duration of the removal or confinement. *State v. Legg*, 9 S.W.3d 111, 117 (Tenn. 1999) ("an

act of *removal or confinement* does not end merely upon the initial restraint, and a defendant *continues* to commit the crime *at every moment the victim's liberty is taken.*") Thus, the kidnapping in this case could have been considered as occurring *incidental to* the rape offense, had the jury had an opportunity to consider it. (Id. at 17.)

The Circuit Court of Appeals denied the Petitioner's request for Panel Rehearing. (Appendix-B at, 15.)

REASONS FOR GRANTING THE PETITION

- A. 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 November 21, 2025, denying request for COA and affirming 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 6th Circuit's 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).

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.

- B. The Petitioner contends that the lower Court's determination that the evidence is sufficient runs afoul of the principles of due process; thus, is objectively unreasonable in light of clearly established federal law. The Petitioner contends that the State of Tennessee failed to establish the essential elements of [force] or [coercion] necessary for a guilty verdict for the offense of rape. Rather, these essential elements were established based upon uncharged crime involving an [oral] rape that the Petitioner was never indicted for. Therefore, the evidence of the vaginal rape requiring proof beyond a reasonable doubt that it was committed through the use of [force] or [coercion], is legally insufficient and violates due process of law.

Indeed, in *In re Winship*, 397 U.S. 358 (1970), this Court held, "lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the *crime charged*." (Id. at 364.) (Emphasis added.)

In the present case, the Petitioner was not so protected as, *every fact* necessary to constitute the *crime charged* was not proven and certainly not *beyond a reasonable doubt*. Instead, the facts necessary to constitute the [vaginal rape] crime was supplied by the kidnapping crime and the fellatio [oral rape], which was not a crime charged. Those facts were: (1) Using duct tape to cover the victim's eyes; (2) Leading the victim out of her home to a wooded area; (3) telling the victim to disrobe; and, (4) "there was *implied* violence" in the "tone of the perpetrator's voice when he told the victim "Don't F*** it up. You know what to do." (Appendix-C at, 33-34).

All of these facts, however, are related to the commission of crimes [o]ther than, the vaginal rape the Petitioner was tried and convicted for. See (FACTS, Section III at, Appendix-C, pg. 17-18.) The covering of the victim's eyes occurred in her home during the commission of the kidnapping. Telling the victim to "Shush," occurred during the same event as the covering of the eyes. Leading the victim out of her home and to a wooded area on her property is, obviously attributed to the kidnapping which is a continuing offense. Once the victim and perpetrator reached the "wooded area," the victim was pushed down, told to disrobe and, the perpetrator unzipped his pants and said, "Don't f**k it up. You know what to do." These facts are attributed to both, the

kidnapping (restraint), and the [oral rape], the Petitioner was not charged or tried for. It was this "tone of voice" that the courts have found "implied violence," if she tried to hurt him. Finally, once the perpetrator withdrew his penis from the victim's mouth, he put on a condom, the victim laid on the ground and the perpetrator penetrated her vagina after using his saliva for lubrication. During intercourse, the perpetrator [asked] the victim to kiss him and he put his tongue in her mouth and rubbed, kissed her breasts. At this point the dog started barking and the vaginal rape ended. At no point during the "vaginal rape" do we have any facts supporting the essential elements of force [and] coercion. The facts from the other events are attributed to other crimes and not the vaginal rape. (Appendix-C, at, 17-18). *Compare* (Appendix-C at, 33-34). *See also* (Appendix-E at, 76-77); *Compare* (Appendix-E at, 83-84.)

Again, in *Jackson v. Virginia*, 443 U.S. 307, 314 (1979), this Court held in relevant part: "It is axiomatic that a conviction upon a *charge not made* or a *charge not tried* constitutes a denial of due process. *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed.2d 644; *Presnell v. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207. These standards no more than reflect a broader premise that has never been doubted in our constitutional system: that a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend. (Citations omitted). A meaningful opportunity to defend, if not the right to a trial itself, presumes as well that a total want of evidence to support a *charge* will conclude that case in favor of the accused. Accordingly, we held in the *Thompson*, case that a conviction based upon a record wholly devoid or any relevant evidence of a crucial element of the *offense charged* is constitutionally infirm. *See also Vachon v. New Hampshire*, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666; *Adderley v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149; *Gregory v. Chicago*, 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134; *Douglas v. Buder*, 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed.2d 52. The "no evidence" doctrine of *Thompson v. Louisville*, thus secures to an accused the most elemental of due process rights: freedom from a wholly arbitrary deprivation of liberty."

In the present case, the evidence presented at trial by the State of Tennessee, consisted of evidence that the Petitioner [orally] and **vaginally raped** the victim. The State chose, however, to only charge the Petitioner with the **vaginal** rape. Yet, the jury heard

evidence from the victim and the ⁸State's attorney that the Petitioner [forced] the victim to perform [oral] sex upon him, before committing the **vaginal** rape. During this **vaginal** rape, however, the victim testified that the Petitioner never said a word to her other than, to [ask] if she would kiss him. Therefore, based upon this evidence then, the essential elements of [force] **[and]** [coercion] used by the jury, the State and the reviewing courts came predominately from the uncharged crime of [oral rape] and the charged crime of aggravated kidnapping; but, not at all from the charged offense of vaginal rape. This conviction then, at least in part, is based upon a charge not tried and violates the notice provision of due process of law. *Jackson v. Virginia*, 443 U.S. 307 (1979) (citing *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed.2d 644; *Presnell v. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207).

⁸ The Petitioner did not testify in his own defense and the defense presented no witnesses.

PETITION FOR WRIT OF CERTIORARI

- A. 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, 7-8); (Appendix-D at, 67-68.) 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, 79); (Appendix-D at, 68-71); (Appendix-C at, 41-43) 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 never 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, 7-8) (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.

- B. In *In re Winship*, 397 U.S. 358 (1970), this Court held, "lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the *crime charged*." (Id. at 364.) (Emphasis added.) And, in *Jackson v. Virginia*, 443 U.S. 307, 314 (1979), this Court held in relevant part: "It is axiomatic that a conviction upon a *charge not made* or a *charge not tried* constitutes a denial of due process. *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed.2d 644; *Presnell v. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207.

Likewise, in *Thompson v. Louisville*, this Court held that, "[a] conviction based upon a record wholly devoid, of any relevant evidence of a crucial element of the *offense charged* is constitutionally infirm. See also *Vachon v. New Hampshire*, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666; *Adderley v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149; *Gregory v. Chicago*, 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134; *Douglas v. Buder*, 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed.2d 52. The 'no evidence' doctrine of *Thompson v. Louisville*, thus secures to an accused the most elemental of due process rights: freedom from a wholly arbitrary deprivation of liberty."

The Petitioner contends that the lower Court's determination that the evidence is sufficient runs afoul of the principles of due process; thus, is objectively unreasonable in light of clearly established federal law. The Petitioner contends that the State of

Tennessee failed to establish the essential elements of [force] or [coercion] necessary for a guilty verdict for the offense of rape. Rather, these essential elements were established based upon uncharged crime involving an [oral] rape that the Petitioner was never indicted for. Therefore, the evidence of the vaginal rape requiring proof beyond a reasonable doubt that it was committed through the use of [force] or [coercion], is legally insufficient and violates due process of law.

In the present case, the Petitioner was not so protected as, *every fact* necessary to constitute the *crime charged* was not proven and certainly not *beyond a reasonable doubt*. Instead, the facts necessary to constitute the [vaginal rape] crime was supplied by the kidnapping crime and the fellatio [oral rape], which was not a crime charged. Those facts were: (1) Using duct tape to cover the victim's eyes; (2) Leading the victim out of her home to a wooded area; (3) telling the victim to disrobe; and, (4) "there was *implied violence*" in the "tone of the perpetrator's voice when he told the victim "Don't F*** it up. You know what to do." (Appendix C at, 33-34).

All of these facts, however, are related to the commission of crimes [o]ther than, the vaginal rape the Petitioner was tried and convicted for. See (FACTS, Section III at, Appendix C, pg. 17-18.) The covering of the victim's eyes occurred in her home during the commission of the kidnapping. Telling the victim to "Shush," occurred during the same event as the covering of the eyes. Leading the victim out of her home and to a wooded area on her property is, obviously attributed to the kidnapping which is a continuing offense. Once the victim and perpetrator reached the "wooded area," the victim was pushed down, told to disrobe and, the perpetrator unzipped his pants and said, "Don't f**k it up. You know what to do." These facts are attributed to both, the kidnapping (restraint), and the [oral rape], the Petitioner was not charged or tried for. It was this "tone of voice" that the courts have found "implied violence," if she tried to hurt him. Finally, once the perpetrator withdrew his penis from the victim's mouth, he put on a condom, the victim laid on the ground and the perpetrator penetrated her vagina after using his saliva for lubrication. During intercourse, the perpetrator [asked] the victim to kiss him and he put his tongue in her mouth and rubbed, kissed her breasts. At this point the dog started barking and the vaginal rape ended. At no point during the "vaginal rape" do we have any facts supporting the essential elements of force [and] coercion.

The facts from the other events are attributed to other crimes and not the vaginal rape. (Appendix-C, at, 17-18). *Compare* (Appendix-C at, 33-34). *See also* (Appendix-E at, 76-77); *Compare* (Appendix-E at, 83-84.)

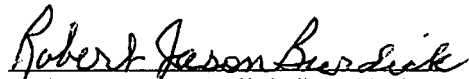
In the present case, the evidence presented at trial by the State of Tennessee, consisted of evidence that the Petitioner [orally] and **vaginally raped** the victim. The State chose, however, to only charge the Petitioner with the **vaginal** rape. Yet, the jury heard evidence from the victim and the ⁹State's attorney that the Petitioner [forced] the victim to perform [oral] sex upon him, before committing the **vaginal** rape. During this **vaginal** rape, however, the victim testified that the Petitioner never said a word to her other than, to [ask] if she would kiss him. Therefore, based upon this evidence then, the essential elements of [force] [and] [coercion] used by the jury, the State and the reviewing courts came predominately from the uncharged crime of [oral rape] and the charged crime of aggravated kidnapping; but, not at all from the charged offense of vaginal rape. This conviction then, at least in part, is based upon a charge not tried and violates the notice provision of due process of law. *Jackson v. Virginia*, 443 U.S. 307 (1979); and allows to stand a conviction which is [not] made upon proof beyond a reasonable doubt of *every fact* necessary to constitute the actual *crime charged*. Thus, contrary to this Court's holding in *In re Winship*, 397 U.S. 358, 364. Without this Court's intervention a constitutionally prohibited conviction will be allowed to stand. This Court should grant certiorari review to correct this injustice.

⁹ The Petitioner did not testify in his own defense and the defense presented no witnesses.

CONCLUSION

The Petitioner prays this Court will grant certiorari review to reach the questions 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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