NO. _____

In the Supreme Court of the United States

BING CHARLES W. KEARNEY, JR.;
AND INTERESTED PARTIES:
TONYA NUHFER-KEARNEY; CHARLES WESLEY KEARNEY, III;
CLAYTON WHITMAN KEARNEY; AND BRYAN G. KEARNEY,

Petitioners,

v.

TRAVELERS CASUALTY AND
SURETY COMPANY OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The possibility for federal appellate courts to abuse the "right for the wrong reason" rule, as the rule was promulgated by this Court in *Helvering v. Growran*, 302 U.S. 238 (1937) and *Jaffke v. Dunham*, 352 U.S. 280 (1957), creates the real danger that appellants are denied due process of law under the 5th Amendment. To remove the possibility of rogue rulings under the guise of the "right for the wrong reason" doctrine, this Court should prohibit the federal appellate court from, *sua sponte*, deciding cases on factually laden bases never litigated or passed on as a matter of fact or law in the lower court. The Questions Presented are:

1. Does the guarantee of due process under Amendment V to the Constitution require this Court to enumerate strictures to the rule and provide guidance and instruction to the courts of appeal in the application of the rule to prevent such constitutional violations?

2. Additionally, or in the alternative, should the United States Supreme Court certify to the Florida Supreme Court the federal court's interpretation of § 77.07, Florida Statutes, when the federal appellate court adopted a construction of the statute contrary to that in Florida jurisprudence and of which there is no controlling precedent of the Supreme Court of Florida, as permitted and encouraged by Florida Rules of Appellate Procedure 9.030(C)?[1]

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[1] Florida Rule 9.030 Jurisdiction of Courts

(a) Jurisdiction of Supreme Court of Florida.

(2) Discretionary Jurisdiction.

(C) Questions of law certified by the Supreme Court of the United States or a United States court of appeals that are determinative of the cause of action and for which there is no controlling precedent of the Supreme Court of Florida.

PARTIES TO THE PROCEEDINGS

Petitioners

- Bing Charles W. Kearney, Jr.

Interested Parties:

- Tonya Nuhfer-Kearney
- Charles Wesley Kearney, III
- Clayton Whitman Kearney
- Bryan G. Kearney

Respondents

- Travelers Casualty and Surety Company of America

There were other parties in the original district court proceedings and appellate court proceedings who have no interest in the outcome of this Petition and thus are not parties to it. The Petitioners are unaware of any corporation or other entity, other than the parties in this case, who have any interest in this petition.

This is a post-judgment case where Travelers is seeking to execute its judgment against Bing Charles W. Kearney only. These prior parties are not involved in the execution of judgment or garnishment proceedings against Kearney, and have no interest in the garnishment of Kearney's accounts. The Interested Parties, who were made parties during the post-judgment execution proceedings, have an interest in the outcome of this Petition and are named as Petitioners in this Petition.

RULE 29.6 STATEMENT

All Petitioners are individual people.

LIST OF PROCEEDINGS BELOW

The proceedings in the federal trial and appellate courts identified below are directly related to the above captioned case in this Court.

Kearney Construction Company, LLC, v. Travelers Casualty and Surety Company of America, Case No. 8:09-cv-1850-T-30TBM (M.D. Fla.). On October 28, 2011, the United States District Court for the Middle District of Florida entered a judgment, stipulated to by the parties, in favor of Travelers Casualty and Surety Company of America, and against Bing Charles W. Kearney, Jr. and others, jointly and severally, in the amount of $3,750,000.00. As part of the stipulated judgment, the parties entered into a three-year forbearance.

Travelers Casualty and Surety Company of America thereafter initiated post-judgment proceedings in aid of execution of its judgment against Bing Charles W. Kearney, Jr. On April 8, 2018, the District Court entered an Order granting Travelers Casualty and Surety Company of America's Motion for Summary Judgment in Garnishment Overruling Exemption and Joint Account. On June 29, 2018, the Clerk entered a Final Judgment of Garnishment in favor of Travelers Casualty and Surety Company of America.

Bing Charles W. Kearney, Jr. and Interested Parties, Tonya Nuhfer-Kearney, Charles Wesley Kearney, III, Clayton Whitman Kearney, and Bryan G. Kearney v. Travelers Casualty and Surety Company of America, Case No. 18-13143 (consolidated with Case No. 18-13145) (11th Cir.). The Eleventh Circuit issued an opinion in the case on November 13, 2019, affirming the District Court Judgment. The Eleventh Circuit

denied the Petitioners' combined Petition for Panel Rehearing on January 23, 2020.

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The unpublished opinion of the Eleventh Circuit Court of Appeals is reported at 795 Fed. Appx. 671. (App.1a). The Judgment entered by the District Court on June 28, 2011, was not reported in the Federal Supplemental Reporter. The opinion of the District Court granting final summary judgment in garnishment is not reported in the Federal Supplemental Reporter but is available at 2017 WL 4244390. (App.26a). The opinion of the District Court directing the Clerk of Court to enter a Final Judgment of Garnishment in favor of Travelers Casualty & Surety Company of America was not reported in the Federal Supplemental Reporter but is available at 2018 WL 3635092. (App.11a, 13a).

JURISDICTION

The Judgment of the Court of Appeals was entered on November 13, 2019. (App.1a). A timely Petition for Panel Rehearing was denied on January 23, 2020. (App.65a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 10(a) of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. V

> No person shall [. . .] be deprived of life, liberty, or property, without due process of law [. . .].

INTRODUCTION AND STATEMENT OF THE CASE

On October 27, 2011, the U.S. District Court for the Middle District of Florida, Tampa Division, granted an agreed motion for entry of final judgment in favor of the Respondent, Travelers Casualty and Surety Company of America, ("Travelers") and against the Petitioner, Bing Kearney and others, jointly and severally, in the amount of $3,750,000.00. The parties entered into a three-year forbearance agreement. The following day, October 28, 2011, the Clerk of Court entered the Judgment.

In aid of execution of its Judgment, Travelers filed its Ex-Parte Motion for Issuance of Post-Judgment Writ of Garnishment and moved the Clerk of Court to issue a post-judgment writ of garnishment to the garnishee, USAmeriBank. The District Court granted Travelers' Motion for Writ of Garnishment and the Clerk of Court issued the Writ of Garnishment to USAmeriBank. USAmeriBank then filed the Garnishee's Answer to Writ of Garnishment stating that it was indebted to Bing Kearney in the total amount of $1,158,037.38. Such amount was comprised of various deposit accounts ("Deposit Accounts") co-owned by the Petitioners, Tonya Nuhfer-Kearney, Charles Wesley Kearney, III, Clayton Whitman Kearney, and Bryan G. Kearney (collectively referred to as the "Interested Parties") and Bing Kearney, and one traditional individual IRS qualified and exempt retirement account (the "-1122 IRA Account") in the amount of $457,843.81 owned solely by Bing Kearney.

This Petition for Writ of Certiorari derives from the District Court post-judgment proceedings in which Travelers garnished all of the USAmeriBank accounts owned by Bing Kearney and the Interested Parties.

A. Statement of the Case of Bing Kearney

Bing Kearney filed an Amended Claim of Exemption directed to the various USAmeriBank accounts, including the -1122 IRA Account claiming, *inter alia*, an exemption from garnishment pertaining to retirement or profit-sharing benefits or pension money. Travelers objected and moved to strike the Amended Claim of Exemption, which the District Court denied. Upon agreement of the parties, in lieu of an evidentiary hearing on the pending motions to dissolve the writ of garnishment and claims of exemptions, the District Court permitted the parties to submit motions for summary judgment relating to the writ of garnishment.[1]

Bing Kearney and Travelers then submitted cross-motions for summary judgment.[2] The cross-motions for summary judgment pertaining to the USAmeriBank -1122 IRA Account raised two main issues: (1) whether the funds were properly rolled over to an IRA account within the sixty-day period provided by Section 408 of the Internal Revenue Code or otherwise

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[1] The same agreement to forego an evidentiary hearing and proceed directly to motions for summary judgment applied to the Interested Parties as further addressed in this Petition for Writ of Certiorari.

[2] This Petition for Writ of Certiorari will address both the issues pertaining to the garnishment of the USAmeriBank -1122 traditional individual retirement account and the garnishment of the Interested Parties' Deposit Accounts.

qualified for a waiver of the sixty-day rollover period;[3] and (2) whether or not the funds lost their exempt status on the basis of Mr. Kearney's pledge of collateral in his security agreement with Moose Investments. [*See* Report and Recommendation of Magistrate Judge, App.29a].[4] It is significant to note at this point that at no time during the District Court proceedings or the appellate proceedings was the issue that the USAmeriBank -1122 IRA Account was not an IRS qualified and exempt IRA account ever raised, nor did Travelers ever contest or assert that the USAmeriBank -1122 IRA Account was not an IRS qualified and exempt IRA account.

On summary judgment, Mr. Kearney argued that the funds held in the USAmeriBank -1122 IRA Account were exempt from garnishment pursuant to Florida Statute 221.21(2) and the applicable provisions of the Internal Revenue Code. By its cross-motion for summary judgment, Travelers argued that Mr. Kearney pledged the USAmeriBank -1122 IRA Account as security to Moose Investments of Tampa, LLC, pursuant to a Promissory Note and Security Agreement, in which he pledged all accounts or rights to payments as collateral. Travelers asserted that the

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[3] The issue of the of whether the -1122 Account funds were properly rolled over to an IRA account within the sixty-day period was never reached or ruled upon by the District Court and is not relevant to this Petition for Writ of Certiorari.

[4] The significant District Court rulings relevant to this Petition for Writ of Certiorari were made by way of Report and Recommendation by the Magistrate Judge, which were then adopted by the District Court. References in this Petition to the District Court rulings will include both the Report and Recommendation and the corresponding District Court's Order.

pledge of the account as collateral caused the account to lose its tax-exempt status and thus lose its exempt status from garnishment. Mr. Kearney responded that he did not pledge or intend to pledge his tax-exempt IRA funds to Moose Investments.

The Magistrate Judge then recommended that Mr. Kearney's motion for summary judgment be denied and that Travelers' motion for summary judgment be granted. The Magistrate Judge wrote:

> By my consideration, for the reasons explained above, no genuine issue of material fact exists as to whether the "IRA" funds currently found in Account-1122 were encompassed and pledged by virtue of Mr. Kearney's Security Agreement with Moose. Because Mr. Kearney pledged such funds, they lost their tax-exempt status and do not fall within the protections of Florida's retirement funds exemption statute. (Emphasis added).

[*See* Report and Recommendation of Magistrate Judge, App.29a].[5] As the underlined language establishes, even the District Court found that the IRA funds were tax exempt beforehand, and that such exemption was subsequently "lost" as a result of the pledge to Moose Investments.

On January 23, 2018, the Magistrate Judge issued his Report and Recommendation on Travelers' Motion for Final Judgment in Garnishment as to the US-AmeriBank -1122 IRA Account. The Magistrate Judge

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[5] The District Court adopted the Report and Recommendation and granted Travelers' motion for summary judgment on the USAmeriBank -1122 IRA Account.

recommended, *inter alia* that Travelers' Motion for Final Judgment in Garnishment as to the IRA Account be granted and that Final Judgment of Garnishment in favor of Travelers be issued for the USAmeriBank -1122 IRA Account. [*See* Report and Recommendation of Magistrate Judge, App.19a]. The District Court adopted the Report and Recommendation and on June 29, 2018, the Clerk entered a Final Judgment of Garnishment in favor of Travelers and against the garnishee, USAmeriBank [App.11a].

Mr. Kearney thereafter timely appealed the Final Judgment in Garnishment to the Eleventh Circuit Court of Appeals.

On appeal, pertaining to the USAmeriBank -1122 IRA Account, the sole issue presented was whether the District Court committed reversible error in determining that Mr. Kearney pledged his personal IRA account as security for the Moose Investments line of credit, thereby disqualifying the personal IRA account funds from exemption under section 222.21 of the Florida Statutes. Again, the issue of whether the USAmeriBank -1122 IRA Account was an IRS qualified and exempt IRA account was never raised or challenged by the court or any party, and it remained a qualified IRA through garnishment. Moreover, in its Answer Brief, pertaining to the USAmeriBank -1122 IRA Account, Travelers only argued that Mr. Kearney pledged his IRA to Moose Investments as security for a line of credit, and, therefore the IRA lost its exempt status as to creditors pursuant to section 222.21 of the Florida Statutes. Again, Travelers never raised or challenged that the USAmeriBank -1122 IRA Account was not an IRS qualified and exempt IRA account before such alleged pledge.

On appeal Mr. Kearney argued that even if the court found that the USAmeriBank -1122 IRA Account had been pledged as security to Moose Investments, the IRA was still protected from garnishment by sections 222.21(2)(a)1 and (2) of the Florida Statutes because it had never been determined that the IRA did not qualify as exempt from taxation. In other words, Mr. Kearney asserted that the "unless" clauses of the statute saved his exemption. Sections 222.21(2)(a)1 and (2) provide that when an IRA plan has been pre-approved or determined to be exempt by the Internal Revenue Service, then, if the plan is maintained in accordance with its governing instrument, it is exempt from creditors' claims, unless the plan has subsequently been determined not to be exempt from taxation.[6]

At oral argument the appellate court for the first time, *sua sponte*, raised the issue that there was no evidence in the appellate record that Mr. Kearney had established that the USAmeriBank -1122 IRA Account had been determined to be a "pre-approved" IRA by the Internal Revenue Service. That issue had never been raised before by any of the parties in any of the District Court proceedings nor on appeal. Notwithstanding, the District Court record was replete with evidence that the USAmeriBank -1122 IRA Account was an IRS qualified and exempt IRA account. However, given that the issue had never been raised,

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[6] The Florida Bar Real Property Probate and Trust section (RPPTL) has expressed concern and called the outcome of Mr. Kearney's case troubling. The Asset Protection Committee of the RPPTL has expressed an interest in filing an amicus curiae brief with the Court. The American Bar Association and other jurisdictions could be invited to join in filing amicus curiae briefs as well.

challenged, or questioned by any party or the District Court, and was not an issue on appeal, such record evidence was not included in the appellate record on appeal.

On November 13, 2019, the Eleventh Circuit Court of Appeals issued its unpublished Per Curiam Opinion affirming the Judgment of the District Court. As to the issue of the USAmeriBank -1122 IRA Account, the Panel affirmed that Mr. Kearney had pledged the USAmeriBank -1122 IRA Account as collateral for the line of credit to Moose Investments. The Panel thereafter wrote that because there was no appellate record to establish that the USAmeriBank -1122 IRA Account had been determined to be a "pre-approved" IRA by the Internal Revenue Service, an issue which had never before been raised in the case, the provisions of sections 222.21(2)(a)(1) and 222.21(2)(a)(2) of the Florida Statutes did not apply to establish the IRA was exempt from garnishment. In essence, Mr. Kearney lost the appeal because record evidence in the District Court pertaining to an issue never raised or challenged by any party or in any court proceeding had not been made part of the appellate court record.

Mr. Kearney filed a Petition for Panel Rehearing asserting that the Panel overlooked and failed to consider relevant evidence in the District Court record which established that Mr. Kearney's USAmeriBank -1122 IRA Account was in fact pre-approved and determined by the Internal Revenue Service to be exempt from garnishment by a judgment creditor. Multiple specific District Court filings, including court orders, motions and sworn affidavits were referenced in the Petition for Panel Rehearing with direct reference to the District Court docket entry where the various

District Court filings were contained in the District Court record. Notwithstanding, a travesty of justice and denial of due process was taking place. The Eleventh Circuit Court of Appeals summarily denied Mr. Kearney's Petition for Panel Rehearing without comment or explanation. Thus, the improper and illegal garnishment of Mr. Kearney's personal IRA account was finalized.

Mr. Kearney asserts that if the appellate court desired to determine the appeal on grounds never raised before, it was under a duty to provide notice to the parties, allow the parties to be heard on such grounds, and certainly had to consider the District Court filings that challenged such new grounds. Had the Eleventh Circuit provided Mr. Kearney with such fundamental aspects of due process before it implemented the "right for the wrong reason" doctrine, it would have been clear to all that the USAmeriBank -1122 IRA Account was pre-approved and determined by the Internal Revenue Service to be exempt from garnishment by a judgment creditor, and the appellate court would have had to find that the IRA was exempt from garnishment pursuant to sections 222.21 (2)(a)1 and (2) of the Florida Statutes, notwithstanding that the court found that Mr. Kearney had pledged the IRA.

The appellate court's rogue application of the "right for the wrong reason" rule has resulted in fundamental unfairness and served to deny Mr. Kearney basic due process of law in the taking of his personal property. Had Mr. Kearney been served notice that the appellate court would affirm the judgment for a reason that was never litigated, and thus not supported in the appellate record, he could have easily

established the necessary appellate court record from the District Court record below. Not having been given that opportunity, Mr. Kearney was in essence "sandbagged" by the appellate court and denied due process of law.

The "right for the wrong reason" rule was intended to promote appellate efficiency when the record before the court establishes a sound, independent basis for affirmance, notwithstanding the basis relied upon by the district court. However, the rule was never intended to be applied when evidence in the record, if considered by the appellate court, would have resulted in a different outcome as in Mr. Kearney's case. The federal appellate court "right for the wrong reason" rule is recognized and applied (and sometimes misapplied) in every Federal Circuit Court in the United States. Guidance and instruction from this Court on the constitutional limits of the rule is required to ensure that when an appellate court applies the rule, it does so in a manner consistent with the original purpose of the doctrine and consistent with due process of law. As the rule currently exists, and as evident in the case at bar, appellate courts can and may apply the rule in a rouge fashion in order to arrive at a predetermined conclusion, rather than at a conclusion that meets with the hallmark of fundamental fairness. Clarity, guidance, and limitations from this Court on this issue is necessary.

B. Statement of the Case of the Interested Parties

The Interested Parties were never really active parties in Travelers' garnishment proceedings against Mr. Kearney. The Interested Parties were never judgment debtors of Travelers. Travelers only holds a judg-

ment against Mr. Kearney—not the Interested Parties. Travelers' writ of garnishment only pertained to property owned by Mr. Kearney, and service of process of the garnishment pleadings and documents were only served on Mr. Kearney—not the Interested Parties. It was not until USAmeriBank served its Answer to the Writ of Garnishment on Mr. Kearney that the Interested Parties were, for the first time, identified as co-owning the Deposit Accounts with Mr. Kearney. Throughout the entire case, the Interested Parties contested that Travelers was entitled to garnish their ownership interests in the USAmeriBank Deposit Accounts.

The Interested Parties contested Travelers' attempted garnishment of their ownership portion-their "proportionate share" – of the Deposit Accounts from the very start. The Interested Parties asserted that they owned 100% of the Deposit Accounts, and Travelers never contested that the Interested Parties owned a proportionate share of the funds. Rather, Travelers argued that Mr. Kearney also owned a share of the Deposit Accounts, logically concluding that the Interested Parties owned the remaining share of the funds. In support of their claim to the Deposit Accounts, the Interested Parties filed a Motion to Dissolve the Second Writ of Garnishment (Dkt. #597). They filed a Motion for Summary Judgment seeking "partial summary judgment in their favor determining that the USAmeriBank Deposit Accounts were not subject to garnishment by Travelers (Dkt. #634). They filed their Objection to the Magistrate Judge's Report and Recommendation which determined that the Deposit Accounts were subject to garnishment (Dkt. #718). They filed their Motions (and then Renewed

Motions) to Release Funds (Dkt. #'s 852-55 and 903-06). They filed their Objection to Magistrate Judge's Report and Recommendation which recommended that a final judgment of garnishment be entered (Dkt. #902). Finally, they filed their Motion for Reconsideration or Clarification of the Court's Order denying their Motions (and Renewed Motions) to Release Funds as Moot (Dkt. #913).

It is significant to note that the Magistrate Judge found, and the District Court adopted, that each Deposit Account was held as a joint tenancy with rights of survivorship, and that if property is held as a joint tenancy with right of survivorship, a creditor of one of the joint tenants may attach only the joint tenant's portion of the property to recover that joint tenant's individual debt. *See* Report and Recommendation (Dkt. #711) citing the Florida Supreme Court case of *Beal Bank, SSB v. Almand and Associates*, 780 So.2d 45 (Fla. 2001).

Notwithstanding all of the efforts of the Interested Parties to prevent Travelers from garnishing their ownership share of the USAmeriBank Deposit Accounts, the appellate court went far beyond the appeal briefs and appeal issues submitted by the parties and ruled that the Interested Parties did not preserve their "proportionate share" argument for appeal because they did not make that specific argument in their motion to dissolve writ of garnishment or in their motion for summary judgment. It is also significant to note that throughout the District Court and appellate court proceedings Travelers has never contended that the Interested Parties did not have an ownership interest in the Deposit Accounts. Moreover, Travelers never raised the issue in its appeal brief

that the Interested Parties did not possess even a "proportionate share" of the Deposit Accounts. Again, the appellate court went far beyond the appeal briefs and issues presented on appeal in the misapplication of the "right for the wrong reason" rule to find that the Interested Parties, despite arguing 100% ownership of the Deposit Accounts, somehow also failed to preserve their "proportionate share" argument for appeal. In other words, the appellate court found that the Interested Parties were required to argue that, in the event they did not own all of the funds, they owned their respective proportionate share of the funds.

The appellate court's misapplication of the "right for the wrong reason" rule has again resulted in fundamental unfairness and served to deny the Interested Parties basic due process of law in the taking of their personal property. Again, clarity, guidance and limitations from this Court on the application and misapplication of the "right for the wrong reason" rule is required to ensure that appellate courts are prevented from straying far from the original intent of the doctrine and instead ensure that litigants are provided proper fundamental fairness consistent with due process of law.

The "right for the wrong reason" rule was intended to promote appellate efficiency only when the record before the appellate court establishes a sound independent basis for affirmance, notwithstanding the basis relied upon by the district court. In this case, the appellate court applied its own, unique interpretation of § 77.07, Florida Statutes, as the basis of its application of the "right for the wrong reason" rule and affirmance of the Judgment. Such an action by the appellate court went far beyond this Court's intended

application and purpose of the rule. Additionally, or in the alternative to granting this Petition for Writ of Certiorari, the Interested Parties petition the Court to certify the question to the Florida Supreme Court on the application of § 77.07, Florida Statutes, related to the nature and extent of the objection a party with an interest in garnished property must make to maintain their objection to the garnishment of property.

REASONS FOR GRANTING THE PETITION

I. THE POSSIBILITY FOR FEDERAL APPELLATE COURTS TO ABUSE THE "RIGHT FOR THE WRONG REASON" RULE CREATES THE REAL DANGER THAT APPELLANTS ARE DENIED DUE PROCESS OF LAW UNDER THE 5TH AMENDMENT. TO REMOVE THE POSSIBILITY OF ROGUE RULINGS UNDER THE GUISE OF THE "RIGHT FOR THE WRONG REASON" DOCTRINE, THIS COURT SHOULD PROHIBIT THE FEDERAL APPELLATE COURT FROM, *SUA SPONTE*, DECIDING CASES ON FACTUALLY LADEN BASES NEVER LITIGATED OR PASSED ON AS A MATTER OF FACT OR LAW IN THE LOWER COURT.

This case presents an issue which goes to the essence of the appellate process and the fairness and constitutional legitimacy of the judicial process. Does an appellate court's unbridled discretion in the application of the "right for the wrong reason" rule permit the appellate court to go beyond the intended purpose and intention of the rule in seeking affirmances? This case warrants review by this Court because of legitimate concerns about the Circuit Court of Appeals'

cloaking fundamentally unfair outcomes under the guise of the "right for the wrong reason" rule promulgated by this Court in *Helvering v. Growran*, 302 U.S. 238 (1937) and *Jaffke v. Dunham*, 352 U.S. (1957) ("In review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."). The inherent vagueness, uncertainty, and nonuniformity in the application of the rule risks the depravation of due process of law to all litigants. Clarity, guidance and limitations from this Court on the application and misapplication of the rule is required based on due process of law protections, fundamental fairness, the limited role of the courts in the administration of justice, and the impression that the court, by misapplication of the rule, has become part of the adversarial process, and not a neutral judicial arbitrator.

The general rule is "that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106 (1976). This rule, like every other rule, has exceptions, *e.g.*, where the proper resolution is beyond any doubt or "injustice might otherwise result." *Id.*, citing *Turner v. City of Memphis*, 369 U.S. 350 (1962); and *Hormel v. Helvering*, 312 U.S. 552 (1941). Through the misapplication of the "right for the wrong reason" rule the appellate courts have incrementality and systematically strayed afar from adherence to the "general rule" resulting in the real threat of the denial of due process to litigants.

This Court has held the decision whether to depart from the general rule is a matter of the discretion of the federal appellate court. That discretion is not unlimited, but this Court has not stated a "general

principle to contain appellate courts' discretion." *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). This is a compelling case for the need for this Court to state a general principle to control appellate courts application (and sometimes misapplication) of the "right for the wrong reason" doctrine.

This Court's "right for the wrong reason" principal is recognized and applied (and sometimes misapplied) in all of the circuit courts of appeal in the federal judiciary. Because there are no guidelines for its application, conflicts between the application (and sometimes misapplication) of the doctrine and the due process of law guarantees to civil litigators have resulted.

The Petitioners contend that although an appellate court's discretion may be limited by other considerations, depending on the many different contexts that a case may present, due process of law is always a constitutional minimum limiting every appellate court in the exercise of its discretion. Simply stated, the "right for the wrong reason" doctrine does not create an exception to the requirement of due process.

This Court has not used the label of due process to limit the discretion of an appellate court to depart from the general rule. However, the Court has described the reasons for reversing a circuit court for departing from the general rule with language virtually identical to that used to describe due process. In *Singleton v. Wulff*, 428 U.S. 106 (1976), this Court reversed the Eighth Circuit for deciding an issue never litigated in the trial court and explained the general rule as follows:

> In *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 721, 83 L.Ed. 1037 (1941), the Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . (and) in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but it is only because petitioner has had no opportunity to present whatever legal arguments he may have in defense of the statute.

Simply because an appellate court may affirm a trial court's judgment, if legally correct, should not or ever excuse or relieve the appellee from the responsibility to present all its arguments in the trial court. There is no sound, self-sustaining rationale why an appellee should be unjustly rewarded for failing to raise all its arguments in the trial court, while the appellant is restricted to its arguments raised below. The appellate court's expansion and misapplication of the "right for the wrong reason" rule in the present case has not served but failed to protect basic, fundamental constitutional rights.

The court is an instrument of society for the administration of justice and its primary purpose is to administer justice. Fundamentally, administering justice includes the recognition that the basic due process guarantee of the U.S. Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. The 'core' of due

process is the right to notice and an opportunity to be heard. Because it is a violation of the due process guarantee under the U.S. Constitution to fail to provide a party fair notice as well as to fail to give a party an opportunity to be heard, application of the "right for the wrong reason" doctrine should never be permitted to overcome these fundamental, constitutionally-imbedded rights. The law is well established by this Court that "[i]t is essential . . . that litigants . . . not be surprised on appeal by final decisions there of issues which they have had no opportunity to introduce evidence. *Singleton v. Wulff*, *Supra*. Rules of practice and procedure are devised to promote the ends of justice, not to defeat them . . . . Orderly rules of procedure do not require sacrifice of the rules of fundamental justice. *Hormel v. Helvering*, 312 U.S. at 557. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. *Mapp v. Ohio*, 367 U.S. 643 (1961).

The application of the "right for the wrong reason" doctrine constitutes a dereliction of duty by an appellate court if, in the process, a party's due process rights are violated. Appellate efficiency or pragmatism should never take precedence over the search for truth, justice, and fundamental constitutional rights. It is important to be mindful that the "right for the wrong reason" doctrine would not even be applied, but for the fact that there was something wrong with the trial court's judgment.

In addition to the federal judiciary, many state jurisdictions have adopted some form of the "right for the wrong reason" doctrine. Those jurisdictions are instructive and highly persuasive, as many require the appellee to have presented its arguments in the

trial court before being permitted to raise them on appeal. Those jurisdictions provide, as should the federal judiciary, basic protections to preclude an appellate court from exceeding the bounds of fairness and/or violating a party's constitutional rights when applying the "right for the wrong reason" doctrine.[7] In Oregon, for example, the courts hold that:

> [w]e may affirm a trial court ruling, even though the court's legal reasoning for the ruling was erroneous, if (1) the facts in the record are sufficient to support a proffered alternative basis; (2) the trial court's ruling is consistent with the view of the evidence under the alternative basis; and (3) the record is materially the same as would have been developed had the prevailing party raised the alternative basis for affirmance below. *State v. Rodriguez-Castillo*, 210 Or. App. 279 (Or. Ct. App. 2007).

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[7] The Commonwealth of Virginia provides that "[t]he rule does not always apply. It may not be used if the correct reason for affirming the trial court was not raised in any manner at trial. In addition, the proper application of this rule does not include those cases where, because the trial court has rejected the right reason or confined its decision to a specific ground, further factual resolution is needed before the right reason may be assigned to support the trial court's decision." *Harris v. Virginia*, 576 S.E.2d 228 (Va. Ct. App. 2003).

Similarly, the Commonwealth of Kentucky provides that "[a] party in whose favor a right decision was made for the wrong reason cannot on appeal rely on the right reason for that right decision unless that party informed the trial judge of the right reason at the time the judge made the right decision for the wrong reason." *Morgan v. Kentucky*, No. 2000-SC-0689, 2003 WL 1193083 at *11 (Ky. Jan. 23, 2003).

The Oregon courts further require that the record be adequately developed and evident and that no prejudice can be shown to establish the predicates for application of the "right for the wrong reason" rule. *State v. Stephens*, 56 P.3d 950 (Or. Ct. App. 2002). Similarly, New Mexico provides that "an appellate court may affirm a district court ruling on a ground not relied upon by the district court, but will not do so if reliance on the new ground would be unfair to appellant." *Meiboom v. Watson*, 994 P.2d 1154 (N.M. 2000). Thus, New Mexico has expressly recognized fairness as an integral part of this appellate doctrine.

Legal precedent should never be used to institutionalize or justify error. What happened to the Petitioners in this case and countless other similarly situated litigants was nothing short of judicial ambush. The dictates of constitutional due process, fundamental fairness—the very root of our judicial system—and the inequity which has resulted from the expansion and misapplication of the "right for the wrong reason" doctrine necessitates that this common law doctrine be revisited and clarified by this Court. When arguments for affirmance are raised for the first time at oral argument, the appellants lose the opportunity to address them except in the fleeting moments of their oral argument. The "right for the wrong reason" rule should not be given free rein by the appellate courts. The doctrine should be clarified by this Court so that appellate courts may properly apply the doctrine within constitutionally sanctioned limits of fundamental fairness to all parties on appeal. Just as appellate rules ensure fairness by providing litigants with a level playing field, so should the common law "right for the wrong reason" doctrine. Public necessity demands,

in the ongoing evolution of common law principals, that the "right for the wrong reason" doctrine be revisited and addressed by this Court. At a bare minimum, the appellate courts should not, *sua sponte*, without prior notice to the parties on appeal, be permitted to apply the "right for the wrong reason" rule because the appellate court is not part of the adversarial process, but rather is expected to be a neutral judicial arbiter. Because an adjudication of issues neither presented by the pleadings nor litigated by the parties denies fundamental due process, such application of the doctrine should not be permitted. While an appellate court may recognize, *sua sponte*, that grounds for affirmance may exist notwithstanding the arguments raised below or on appeal, the appellate court should rightfully confine itself to the arguments actually presented, only unless doing so would result in manifest injustice. The "right for the wrong reason" rule should never be permitted to be applied when evidence in the record, if considered by the appellate court, would result in a different outcome. Guidance and instruction from this Court on the application and misapplication of the rule is required to ensure that when an appellate court applies the rule the litigants are served with notice and an opportunity to be heard, and thus provided due process of law.

CONCLUSION

This Court should grant certiorari and issue an opinion setting forth guidance and instruction which provides basic protections to preclude an appellate court from exceeding the bounds of fairness and/or violating a party's constitutional rights when applying the "right for the wrong reason" doctrine. Additionally, or in the alternative, the Interested Parties petition the Court to certify the question to the Supreme Court of Florida on the appellate court's interpretation of § 77.07, Florida Statutes, related to the nature and extent of the objection a party with an interest in garnished property must make to maintain their objection to the garnishment of property, of which there is no controlling precedent of the Supreme Court of Florida.

Respectfully submitted,

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