NO._____

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH BLACKWELL, *Petitioner*

vs.

STATE OF GEORGIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

FRANCES C. KUO
Supreme Court Bar No. 299215
Frances C. Kuo
214 Executive Building
125 East Trinity Place
Decatur, GA 30030
Tel: (404) 378-1241
fkuo42@outlook.com

Counsel for the Petitioner
Mr. Kenneth Blackwell

QUESTION PRESENTED

This Court has not enunciated a general rule regarding what questions may be taken and resolved for the first time on appeal when a party fails to present a legal theory with sufficient clarity and specificity to the lower court prior to judgment. *See*, Singleton v. Wulff, 428 U.S. 106, 121 (1976).

Whether the Georgia Court of Appeals erred when it held that the trial court admitted Petitioner's sexual acts in Ohio as prior difficulties evidence even though the State did not squarely present this legal argument to the trial court at trial.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases: **Page:**

Federal Statutes

Statutes - Other

Other authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Kenneth Blackwell respectfully petitions for a writ of certiorari to review the judgment of the Georgia Court of Appeals.

OPINION AND ORDERS BELOW

The opinion of the Georgia Court of Appeals affirming Petitioner's judgment of conviction is published and reproduced here. Pet. App. 1a-15a. The order of the Gwinnett Superior Court denying Petitioner's motion for new trial is unpublished and reproduced here. Pet. App. 16a-26a. The order of the Georgia Court of Appeals denying Petitioner's motion for reconsideration is unpublished and reproduced here. Pet. App. 27a. The order of the Georgia Supreme Court denying Petitioner's petition for writ of certiorari is unpublished and reproduced here. Pet. App. 28a.

JURISDICTION

The Georgia Court of Appeals affirmed Petitioner's judgment of conviction on June 19, 2018. Pet. App. 1a-15a. The Supreme Court of Georgia denied Petitioner's petition for writ of certiorari on April 1, 2019. Pet. App. 28a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides:

> No State shall . . . deprive any person of life, liberty or property, without due process of law[.]

STATUTORY PROVISION INVOLVED

O.C.G.A. § 24-1-104 (a) provides:

Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court, subject to the provisions of subsection (b) of this Code section. . . . Preliminary questions shall be resolved by the preponderance of the evidence standard.

INTRODUCTION

It is a fundamental tenet of appellate review that an appellate court will not consider issues raised for the first time on appeal if the issue was not raised and ruled upon by the lower court at trial. *See*, Hormel v. Helvering, 312 U.S. 552, 556 (1941). Thus, if the State fails to raise certain factual and legal issues at trial in a timely fashion and afford the Defendant the opportunity to controvert same, it waives the right to assert these issues for the first time on appeal, including a motion for new trial hearing. *See*, Steagald v. United States, 415 U.S. 204, 209 (1981). Where, as here, the issue presented below does not involve a federal claim, the State is limited to the precise argument it made at trial. *Compare*, Yee v. City of Escondido, 503 U.S. 519, 534 (1992) (concerning federal claims, the parties are not limited to the precise arguments they made at trial).

Several federal courts have followed this general rule. *See*, McCoy v. Massachusetts Inst. of Technology, 950 F.2d 13, 22 (1st Cir. 1991) (theories not raised squarely in the district court cannot be surfaced for the first time on appeal); United States v. Harrell, 268 F.3d 141, 146 (2nd Cir. 2011) ("An issue is reviewable on appeal only if it was pressed or passed on below"); Beaudett v. City of Hampton, 775 F.2d

1274, 1278 (4th Cir. 1988) (appellate courts should not permit "fleeting questions to preserve questions on appeal"); Kensington Rock Island Ltd. Partnership v. American Eagle Historic Partners, 921 F.2d 122, 124-125 (7th Cir. 1990) ("Arguments raised in the District Court in a perfunctory and underdeveloped manner are waived on appeal[]").

This general rule is based on a litigant's due process rights and is "essential so there is [an] opportunity to present all relevant evidence" at trial and avoid surprising the opposing side. Hormel, 312 U.S. at 556. This rule applies equally in civil and criminal cases. For example, to apply a right for any reason rule retroactively on appeal deprives a nonmovant of a fair opportunity to respond to arguments never made by the movant. *See*, Wagner v. Robinson, 329 Ga. App. 169, 173-174 (2014) ("[A] grant of summary judgment must be affirmed if it is right for any reason, whether stated or unstated in the trial court's order, *so long as the movant raised the issue in the trial court and the nonmovant had a fair opportunity to respond.*") (citation omitted; emphasis in original); State v. Garcia-Rodriguez, 396 P.3d 700, 704 (Id. 2017) ("Issues not raised below will not be considered by this [C]ourt on appeal, and the parties will be held to the theory upon which the case was presented to the lower court.").

This Court has never announced a general rule, however, regarding what questions may be taken and resolved for the first time on appeal, but is cognizant that federal appellate courts frequently depart from the general rule and decide issues where "the proper resolution is beyond any doubt' or when "injustice might otherwise result." Singleton v. Wulff, 428 U.S. 106, 121 (1976).

Absent a bright-line rule, federal appellate courts have exercised their discretion to decide issues that were not raised and ruled upon at trial under certain circumstances: if the issue is a pure question of law that does not require any factual development in the lower court or where the factual record has been completely developed in the lower court, if there would be no prejudice to the opposing party in deciding the issue, if the issue is a constitutional issue, and if it is in the interests of justice. *See*, United States v. Krynicki, 689 F.2d 289, 291 I (1st Cir. 1982) (citing general rule but noting appellate court's discretion to examine issue raised for the first time on appeal where 'exceptional cases or particular circumstances' arise); Americans Disabled for Accessible Public Transp. v. Skinner, 881 F.2d 1164, 1997 III (A) 5 (3rd Cir. 1989) (noting appellate court's discretion to "hear issues not raised in the district court when prompted by exceptional

circumstances[]"); United States v. Lavabit, LLC (In re Under Seal), 749 F.3d 276, 285 II (B) (4th Cir. 2014) (Court will not "accept on appeal theories that were not raised in the district court except under unusual circumstances[]"); Nortiake Co. v. M/V Hellenic Champion, 627 F.2d 724, 732 (5th Cir. 1980) (general rule does not apply "if a miscarriage of justice" will occur); Wayne County Neighborhood Legal Services v. National Union Fire Ins. Co., 971 F.2d 1, 3 n. 2 (6th Cir. 1992) (exception allowed if "the issue presented is purely one of law and does not depend on the factual record below[]"); Ryder v. Morris, 752 F.2d 327, 332 (II) (8th Cir. 1985) (noting general rule but stating that there are exceptions to the rule, including some cases where injustice might otherwise result); Bolker v. Commissioner, 760 F.2d 1039, 1042 (I) (9th Cir. 1985) (outlining three exceptions to the general rule); United States v. Godor, 821 F.2d 1498, 1504 (11th Cir. 1987) (holding that appellate court's decision 'to consider an argument for the first time [on appeal] is left to [the court's] discretion, based on the facts of each case[]"); Roosevelt v. E.I. DuPont de Nemours & Co., 958 F.2d 416, 419 (D.C. Cir. 1992) (exceptional circumstances may include uncertainty in the state of the law, a novel important and recurring

question of federal law, to prevent miscarriage of justice or preserve the integrity of the judicial process).

In the proceedings below, the State relied on the Georgia child hearsay statute as the sole basis for admitting K.S.'s prior out-of-court statements describing Blackwell's alleged sexual acts in Georgia to her brother, her friend's mother and two police officers for the truth of the matter asserted. Pet. App. 2a-5a, 12a-13a. The State did not proffer evidence prior to trial or alert the trial court that it was seeking to admit the Ohio incidents as prior difficulties evidence and did not request a written jury instruction on prior difficulties evidence to support its theory of the case. Pet. App. 47a, 53a.

By its conduct at trial, the State waived any argument that the Ohio incidents were admissible as prior difficulties evidence following Petitioner's conviction; the trial court did not know about this theory or rule as the State contends prior to the jury's verdict. Pet. App. 47a. *See*, Gieg v. DDR, Inc., 407 F.3d 1038, 1046 n. 10 (9th Cir. 2005) (holding that appellees had waived argument not raised below); First Ala. Bank of Montgomery, N.A. v. First State Ins. Co., 899 F.2d 1045, 1060 n. 8 (11th Cir. 1990) ("[Appellant's] failure to press the arguments before the district court foreclosed its right to present it on appeal[]"); United

States v. Braunig, 553 F.2d 777, 780 (2nd Cir. 1977) ("Where a party has shifted his position on appeal and advances arguments available but not pressed below . . . and where that party has had ample opportunity to make the point in the trial court in a timely manner . . . waiver will bar raising the issue on appeal[]"); Sun Exploration & Prod. Co. v. Benton, 782 S.W.2d 35, 37 (Tex. 1987) (waiver is the "intentional conduct inconsistent with claiming that right").

Rather than rejecting the State's new legal arguments posed for the first time at the motion for new trial hearing, the trial court accepted the State's change in position and countenanced the admission of evidence describing Blackwell's sexual acts with K.S. in Ohio under the newly asserted theory of prior difficulties evidence, even though Petitioner was denied "the opportunity to be heard at a meaningful time and in a meaningful manner[]" on the issue at trial. Mathews v. Eldridge, 424 U.S. 319, 333 III (A) (1976). Pet. App. 47a, 53a.

STATEMENT OF THE CASE

A jury convicted Petitioner of aggravated child molestation, aggravated sexual battery and statutory rape. Pet. App. 1a. Petitioner appealed the denial of his motion for new trial, and the judgment of his conviction was affirmed by the Georgia Court of Appeals on June 19, 2018. Pet. App. 1a. On July 12, 2018, the Court of

Appeals denied Petitioner's motion for reconsideration. Pet. App. 27a. On April 1, 2019, the Supreme Court denied Petitioner's petition for writ of certiorari. Pet. App. 28a.

The indictment alleged that Petitioner committed the above offenses in Georgia between the dates of October 1, 2010 and May 1, 2014. Pet. App. 5a.

In 2006, Petitioner dated K.S.'s mother in Ohio when K.S. was seven years old. Pet. App. 1a-2a. K.S. testified that Petitioner started to touch her around that time and used his fingers to touch her breasts and vagina. Pet. App. 2a. When K.S. was nine or ten years old, Petitioner began having sexual intercourse with her and put toys in her vagina. Pet. App. 2a, 39a-40a .

K.S. stated that in 2010, Petitioner and her family moved to Gwinnett County, Georgia, where the sexual intercourse and touching continued and Petitioner forced her to perform oral sex on him. Pet. App. 2a. When she was approximately 15, K.S. ran away from home and went to a friend's house. She told her friend's mother about the things Petitioner had been doing to her since she was nine years old. Pet. App. 2a-3a.

At trial, the State relied upon the Child hearsay statute as the sole means to introduce K.S.'s prior out-of-court statements to Halkeia Helm, her brother, Officer Grissom and Detective Riddle and K.S.'s recorded interview with Detective Riddle. Pet. App. 2a-3a. Each of these witnesses testified about K.S.'s detailed statements

to them describing acts of sexual contact by Petitioner when K.S. lived in Ohio and Georgia. Pet. App. 3a-5a, 12a-13a. The State introduced into evidence a video recording of K.S.'s two-hour forensic interview with Detective Riddle, in which K.S. spoke about Petitioner's sexual abuse of her in Ohio. The recording was published to the jury. Pet. App. 4a-5a.

At trial, the State did not request a written jury instruction on prior difficulties evidence to support admissibility of the Ohio incidents or otherwise bring the issue to the trial court's attention. Pet. App. 47a, 53a. Consequently, the trial court did not conduct a hearing outside the presence of the jury before any witness testified about Petitioner's sexual acts with K.S. in Ohio or prior to the admission of the forensic interview. Pet. App. 47a. The trial court did not instruct the jury to consider evidence of the Ohio incidents for a limited purpose. Pet. App. 50a-51a.

At the motion for new trial hearing, Petitioner argued *inter alia* that trial counsel was ineffective by failing to move in *limine* to exclude evidence of the Ohio incidents based on lack of subject matter jurisdiction and the verdict was void *ab initio* because it could not be discerned from the jury's verdict whether it was based on evidence of Petitioner's sexual acts in Ohio or Georgia. Pet. App. 15a, 25a.

The trial court denied Petitioner's motion for new trial, finding that it "admitted statements made by K.S. describing acts of sexual conduct. Those statements were made at a time when K.S. was 15 years old and described sexual

abuse that occurred from 2006 until a few weeks before May 24, 2014. Pet. App. 16a. It further found that it admitted evidence of prior difficulties between K.S. and Blackwell and "did not commit error by admitting the prior difficulties and the admission of those acts do not undermine the Court's confidence in the jury's verdict." Pet. App. 19a. It held that trial counsel was not ineffective by failing to move in *limine* to exclude evidence of Blackwell's sexual contact with K.S. occurring in Ohio. Pet. App. 25a.

The Court of Appeals affirmed Petitioner's convictions and the denial of his motion for new trial. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

The rules requiring preservation of issues serve 'important judicial interests.' Tri-M Grp, LLC v. Sharp, 638 F.3d 406, 416 (3d Cir. 2011). For example, they promote judicial efficiency and conservation of judicial resources by respecting the work of the trial court in the first instance (Wood v. Milyard, 566 U.S. 463, 473 (2012)), protect litigants from unfair surprise, Webb v. City of Phila., 562 F.3d 256, 263 (3rd Cir. 2009), and promote finality by encouraging parties to advance all relevant arguments and by binding counsel to their strategic choices. Wheatley v. Wicomico Cty, 390 F.3d 328, 334-335 (4th Cir. 2004); Sigman Fuel Co. v. Tenn. Valley Authority, 754 F.2d 162, 164 (6th Cir. 1985). These rules apply to litigants

on both side of the table as it would be inequitable to allow either party "from getting two bites at the apple." Fleishman v. Cont'l Cas. Co., 698 F.3d 598, 608 (7th Cir. 2012). If the State's case was not tried upon a specific theory at trial, "the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court." Weil v. Herring, 175 S.E. 836, 838 (N.C. 1934).

The question of whether K.S.'s out-of-court statements about Petitioner's sexual acts in Ohio was relevant or admissible as prior difficulties evidence was a preliminary question of law. *See*, O.C.G.A. § 24-1-104 (a) (Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court[.] . . . Preliminary questions shall be resolved by the preponderance of the evidence.").

If this was the State's intended purpose for introducing the Ohio incidents and not as substantive evidence of Petitioner's guilt, the State was required to squarely present its legal arguments to the trial court. Petitioner was entitled to procedural due process, notice and an opportunity to be heard so he could present objections to the admission of the evidence as prior difficulties and introduce any evidence if he wished. Mathews, 424 U.S. at 333 III (A). "The general rule is justified as being needed to form a complete record at the trial level, in order for an appellate court to have a fully developed record when reviewing an issue." Rhett R. Dennerline, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, Indiana Law Journal, Vol. 64, Iss. 4, Article 7 (Fall 1989).

Because the State simply flew under the radar and called five witnesses to testify about Blackwell's sexual acts in Ohio, it waived any argument that the Ohio incidents was admitted as prior difficulties evidence and could not assert this belated theory at the motion for new trial hearing. Steagald, 415 U.S. at 209 (government waives its right to contest a defendant's standing when it fails to raise the issue in a timely fashion); United States v. Thompson, 710 F.2d 1500, 1504 (11th Cir. 1983) (holding that Government's failure to raise and develop an issue at the suppression hearing constituted a waiver of the issue); Howard v. Walgreen Co., 605 F.3d 1239, 1243 (III) (A) (11th Cir. 2010) (holding that failure to raise a ground in a prejudgment motion for judgment as a matter of law waives the right to present that ground in a post-judgment motion for judgment as a matter of law).

Since waived claims cannot be resurrected on appeal, the Court of Appeals erred when it failed to find that the State waived any argument characterizing evidence of the Ohio incidents as prior difficulties evidence. *See*, Kensington Rock Island, L.P., 921 F.2d at 125 (holding that because defendant did not adequately inform the district court of its argument that the earnest money deposit should cap the damages in opposition to summary judgment motion, the defendant waived the argument and could not raise it on appeal); First Ala., 899 F.2d at 1060 n. 8; Gilbert v. Medical Economics Co., 665 F.2d 305, 310 (10th Cir. 1981) (holding that while 'vilification' claim under a liberal reading encompassed a false light claim, the

plaintiff never indicated to the trial court that she was pursuing a 'false light' theory, and therefore could not argue the theory on appeal); Braunig, 553 F.2d at 780; Gieg, 407 F.3d at 1046 n. 10; Benton, 782 S.W.2d at 37.

Given the lack of a bright line rule regarding what issues can be raised on appeal when a party, here, the State, fails to squarely present the prior difficulties theory at trial with "sufficient clarity and specificity" in violation of Petitioner's due process rights (Simpson v. Carpenter, 912 F.3d 542, 565 III (A) 2 (a) (10th Cir. 2018)), a conflict among federal and state appellate courts concerning when they exercise their discretion to decide issues that were not raised and ruled upon below, and the lack of explanation by the Georgia Court of Appeals justifying a departure from the general rule in this case, this Court should grant the writ of certiorari, reverse Petitioner's conviction and remand the case to the trial court for findings consistent with this Opinion.

I. The Decision Below Deepens a Conflict Over an Appellate Court's Discretion to Decide Issues on Appeal That Were Not Raised and Ruled Upon at Trial.

There is a split among federal and state appellate courts concerning the rationales and exceptions when deciding issues on appeal which were not litigated before the lower court prior to judgment. Moreover, the terminology of these exceptions is ambiguous and lacks clarity in application.

The First, Third and Fourth Circuits exercise their discretion to consider an issue raised for the first time on appeal when exceptional, particular or unusual circumstances exist. *See*, Krynicki, 689 F.2d at 291 (I); Skinner, 881 F.2d at 1197 III (A); Lavabit, 749 F.3d at 285 (II) B. The Second Circuit applies an exception where it is "necessary to avoid manifest injustice." DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 822 (II) A (2nd Cir. 1977).

The Fifth Circuit does not apply the general rule "if a miscarriage of justice" will occur. *See*, Noritake Co., 627 F.2d at 732. Similarly, the Eighth Circuit makes an exception in some cases where injustice might otherwise result. *See*, Ryder, 752 F.2d at 332 (II).

The Sixth Circuit deviates from the general rule in "exceptional cases or particular circumstances or when the rule would produce a 'plain miscarriage of justice,' [but] only 'rarely.'" Scottsdale Ins. Co. v. Flowers, 513 F.3d 546, 552 (6th Cir. 2008). One example is when the issue presented is "purely one of law and does not depend on the factual record below." Wayne, 971 F.2d at 3.

The Seventh Circuit notes that Illinois Courts do not apply the waiver rule in a consistent way. *See*, Miranda v. Leibach, 394 F.3d 984, 993 (7th Cir. 2005). Ordinarily, appellate courts follow the general rule but will decide issues "when the issue is fully developed in the record and the judicial inquiry will not be impaired[.]" Simer v. Rios, 661 F.2d 655, 671 IV (B) n. 28 (7th Cir. 1991).

The Ninth Circuit recognizes three exceptions to the general rule: "in the exceptional case in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, when a new issue arises while appeal is pending because of a change in the law or when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." (Citations omitted.) Bolker, 760 F.2d at 1042 (II).

The Tenth Circuit adheres to the general rule, but deviates in the following unusual circumstances: "where proper resolution of the issue was beyond doubt and injustice would otherwise result, the issue was purely a question of law, the issue was purely one of law and where issue was a ground for affirming, not reversing, the trial court, and where closely related issue was raised below and appellant briefed the issue and failed to object to its consideration until petition for rehearing." *See*, Lyons, 994 F.2d at 721 (II) A.

But, another appellate decision conflicts with the holding in Lyons. *See*, Melton v. Oklahoma City, 879 F.2d 706, 718 n. 15 (10th Cir. 1989) vacated on other grounds, 928 F.2d 902 (10th Cir. 1991) (noting that issue raised for the first time on a motion for judgment notwithstanding the verdict was not properly preserved).

The Eleventh Circuit is internally conflicted and applies the general rule inconsistently. *Compare* United States v. Godor, 821 F.2d 1498, 1504 (11th Cir.

1987) (holding that appellate court's decision 'to consider an argument for the first time [on appeal] is left to [the court's] discretion, based on the facts of each case[]"); Smith v. Horner, 839 F.2d 1530, 1535-1536 (11th Cir. 1988) (circuit "has considered on appeal new theories raising purely legal questions when to ignore them would work a manifest injustice") with First Ala. Bank, 899 F.2d at 1060 n. 8 ("[Appellant's] failure to press the argument before the district court foreclosed its right to present it on appeal[]") and Adams v. James, 784 F.2d 1077, 1080 (11th Cir. 1986) ("[O]n appeal, we review the case presented to the district court rather than a better case fashioned after the district court's order.").

The D.C. Circuit finds exceptional circumstances where a Supreme Court decision intervened between the time of the district court's decision and consideration of the appeal. Roosevelt, 958 F.2d at 419 (II).

State appellate courts are split as well. In Washington, an appellate court exercises its "inherent authority to consider issues which the parties have not raised if doing so is necessary to a proper decision." Falk v. Keene Corp., 782 P.2d 974 (Wash. 1989). Other state courts affirm a trial court for a wrong reason "where any reasonable view of facts and law might support the judgment" (Phoenix v. Geyler, 697 P.2d 1073 (Ariz. 1998)) or where the right reason was "adequately presented to the trial court in support of the motion." Florida Carry, Inc. v. Thrasher, 248 So. 3d 253 (1st Dist. Ct. App. 2018). On the other hand, some state appellate courts find this

"right result wrong reason rule" inapplicable and abhorrent if it "prevented a party from properly presenting his case or prejudiced his rights." Payne v. City of Decatur, 141 So. 3d 500, 504 (Ala. 2013). *See also*, Perry v. Commonwealth, 701 S.E.2d 431, 436 (Va. 2010) (An appellate court must consider "facts in the record and whether additional factual presentation is necessary to resolve the newly advanced reason.").

In Florida, "litigants at the outset of a suit must be compelled to state their pleading with sufficient particularity for a defense to be prepared." Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A., v. Bowmar Instrument Corp., 537 So.2d 561, 563 (Fla. 1988). One Colorado appellate court has held that it "will not consider issues, arguments or theories not previously presented in trial proceedings." Flores v. Am. Pharm. Servs., Inc., 994 P.2d 455, 458 (Colo. App. 1999). A Massachusetts appellate court has held similarly. *See*, Royal Indem. Co., v. Blakely, 360 N.E.2d 864, 865 (Mass. 1977) (holding that non-jurisdictional issue that was not presented at the trial level need not be considered on appeal, particularly where the other party may be prejudiced by the failure to raise the point below).

In Guam, an appellate court exercises its discretion to hear arguments raised for the first time on appeal "when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." Guam Election Comm'n v. Responsible Choice for All Adults, 2007 Guam 20 IV (E) 4.

II. The Decision Below is Wrong.

If the earliest date in the indictment charging Petitioner with the crimes in Georgia was October 1, 2010, what was the relevance of Petitioner's alleged sexual acts with K.S. in Ohio beginning in 2006 when K.S. was seven years old? And how was it admissible? Pet. App. 5a. The State did not reveal its hand at trial regarding the purpose of the Ohio incidents, and the trial court lacked any notice of the harmful nature of the evidence. While O.C.G.A. § 24-4-404 (b) provides that no notice to Blackwell was required, that Code section conflicts with O.C.G.A. § 24-1-104 as well as procedural due process. The trial court did not have a pre-trial hearing to determine the admissibility of the Ohio incidents as prior difficulties evidence, did not consider a proffer, evidence or legal argument from the parties supporting and opposing the legal theory, and made no substantive ruling that the Ohio incidents were admissible as prior difficulties evidence prior to the State's case in chief. Pet. App. 47a.

"[O]nce [the State] cho[se] [its] argument[] [at trial], [it] may only pursue th[at] argument[]." Fleishman, 698 F.3d at 608. Given the State's conduct at trial, the prior difficulties evidence theory was foreclosed to the State following Petitioner's conviction. Pet. App. 53a. *See*, First Ala. Bank, 899 F.2d at 1060 n. 8 ("[Appellant's] failure to press the argument before the district court foreclosed its right to present it on appeal[]"); Shields Ltd. P'ship v. Bradberry, 526 S.W.3d 471,

485 (Tex. 2017) (waiver "results as a legal consequence from some act or conduct of the party against whom it operates"). To allow the State to "withhold[] secondary back-up theories at the trial court level," preventing Petitioner from "apprais[ing] frankly the claims and issues at hand [so he could] respond appropriately[]" violated Petitioner's due process rights. Honcharov v. Barr, 2019 U.S. App. LEXIS 15804 (9th Cir. 2019). *See also*, Mathews, 424 U.S. at 333 III (A) ("The essence of procedural due process is notice and an opportunity to be heard[]"); Cobb County School Dist. v. Barker, 271 Ga. 35, 37 (2) (1999) (federal and state constitution's due process right is satisfied "if a party has reasonable notice and opportunity to be heard and to present its claim or defense[]") (citations omitted).

The rule that appellate courts decide only issues that have been raised and ruled upon at trial goes "to the heart of the common law tradition and adversary system. It affords an opportunity for correction and avoidance in the trial court . . . by giv[ing] the adversary the opportunity to . . . avoid the challenged action[.]" Pfeifer v. Jones & Laughlin Steel Corp., 678 F.2d 453, 456 (3rd Cir. 1982). *Accord* Higginbotham v. Ford Motor Co., 540 F.2d 762, 768 n. 10 (5th Cir. 1976) (holding that prejudice is avoided by binding parties to facts presented and theories argued below). "To force the adverse party to defend the issue on appeal [or a motion for new trial hearing] where he could not present factual arguments would be otherwise unfair." United States v. Patrin, 575 F.2d 708, 711-713 (9th Cir. 1978). *See also*,

Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 San Diego L. Rev. 1253, 1310 (2002) ("Notice and an opportunity to be heard before deciding a case *sua sponte* makes the inequal application of waiver more fair to the litigants and increase the accuracy of the decision making process in some cases."). "[T]here is nothing more frustrating to an advocate and devastating to the appellate process for the interested litigants to not have an opportunity to present argument both as to the merits and as to whether the court should consider the forfeited issue." Tony A. Wiegand, *Raise or Lose: Appellate Discretion and Principled Decision-Making*, 17 Suffolk J. Trial and App. Advoc. (2012).

There is no reverse plain error rule for arguments not made by the State at trial when the State is not the appealing party. The plain error rule is designed to protect a defendant's "substantial liberty interests," not forfeited or waived arguments by the State. *See*, O.C.G.A. § 24-1-103 (d) ("Nothing in this Code section shall preclude a court from taking notice of plain errors affecting substantial rights although such errors were not brought to the attention of the court.").

Under these circumstances, the Georgia Court of Appeals erred in denying Petitioner's motion for new trial because the trial court's rationale was based on an erroneous legal theory. *See*, Phillips v. Harmon, 297 Ga. 356, 397 (2015) ("[A]n

appellate court cannot affirm a trial court's reasoning which is based upon an erroneous legal theory.")

III. The Question Presented is Important and this Case Presents an Ideal Vehicle for Deciding It.

The State argued for the first time at the motion for new trial hearing that Petitioner was not on trial for the Ohio incidents, but they were "prior difficulties that were admitted to show the state of the feelings between the parties." Pet. App. 47a. Prior sexual acts, however, is not the same thing as the state of feelings between the parties; it is more akin to improper propensity evidence. *See*, O.C.G.A. § 24-6-622 ("The state of a witness's feelings towards the parties and the witness's relationship to the parties may always be proved for the consideration of the jury.").

With respect to a separate claim raised by Petitioner that his constitutional right to a public trial was violated, the State argued that because Petitioner failed to object at trial to the closure of the courtroom and did not bring the matter to the trial court's attention, he waived the issue for appellate purposes. Pet. App. 44a-45a. Thus, the State understands the concept of waiver, but chooses not to apply the rule to its failure to articulate and develop the prior difficulties theory at trial.

The burden was on the State to raise all applicable legal theories supporting the admission of the Ohio incidents prior to or at trial, so the trial court can determine

the admissibility of evidence. This is particularly true if it intended to rely on this legal theory on appeal. An appellate court can only "adjudicate[] the legal arguments actually raised." Labavit, 749 F.3d at 293 (C). Because the trial court was not fairly put on notice as to the substance of the issue, there was no safeguard to prevent the jury from considering the Ohio incidents for an improper purpose, bad character evidence. See, Nelson v. Adams USA, Inc., 529 U.S. 460, 469 (2000) ("The general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts requires that the lower court be fairly put on notice as to the substance of the issue[]"); Wall v. State, 269 Ga. 506, 509 (2) (1998) (When the trial court admits evidence as prior difficulties evidence, it "should be accompanied by an instruction from the trial judge explaining the limited use to which the jury may put such evidence.").

This was a preliminary question of law regarding the admissibility of the evidence and the burden was on the State to prove its theory by a preponderance of the evidence. O.C.G.A. § 24-1-103 (a). "To properly raise an argument below, a litigant must present the argument with sufficient clarity and specificity[.]" (Citations omitted). Simpson, 912 F. 3d at 565 III (A) 2 (a).

Relevance is one consideration. And even if evidence is relevant, its admissibility is "limited by constitutional requirements or as otherwise provided by law or by other rules, as prescribed pursuant to constitutional or statutory authority,

applicable in the court in which the matter is pending." O.C.G.A. § 24-4-402. Had the State called the matter to the trial court's attention, Petitioner could have objected on relevance grounds, lack of materiality or probative value, prejudice, probative value was substantially outweighed by prejudicial effect, misleading the jury and/or lack of subject matter jurisdiction. O.C.G.A. § 24-4-403.

The admissibility of the Ohio incidents was a threshold matter and necessarily required factual development of the record and legal arguments from the parties. Federal Rule 104, upon which O.C.G.A. § 24-1-104 is based, contemplates a pre-trial hearing on preliminary questions of law so the trial court can resolve the issue prior to the State's presentation of evidence. Fed. R. of Evid. 104 (a) ("The court must decide any preliminary question about whether . . . evidence is admissible[]"); Fed. R. of Evid. 104 (c) (The court must conduct any hearing on a preliminary question so that the jury cannot hear it if: . . . (2) a defendant in a criminal case is a witness and so requests; or (3) justice so requires[]"); O.C.G.A. § 24-1-104 (c) ("Hearings on other preliminary matters shall be conducted out of the hearing of the jury when the interests of justice require or when an accused is a witness and requests a hearing outside the presence of the jury."). It was in the interests of justice to proceed in this manner.

From primacy to recency, evidence of the Ohio incidents permeated the

entire trial. Without any limitation as to how the jury could consider the Ohio incidents, the State emphasized this inflammatory evidence from its opening statement until closing argument. Pet. App. 31a-33a, 41a-42a. The trial court did not give the jury a limiting instruction prior to K.S.'s testimony. Pet. App. 34a.

The issue is not a pure question of law that can be resolved by the factual record because the factual record was undeveloped. The Georgia Court of Appeals' decision suffers from a major hiccup as it failed to explain the circumstances justifying its departure from the general rule of declining to decide issues that were not raised and ruled upon at trial. The Court's complete lack of acknowledgment of the State's waived argument concerning prior difficulties weakens its holding.

The Court of Appeals should have reversed the order denying motion for new trial and remanded the case to the trial court because the record is devoid of any evidence to support the trial court's conclusion that it admitted the Ohio incidents as prior difficulties evidence. "[J]udicial economy is served and prejudice is avoided by binding the parties to the facts and the theories argued below." Smith, 839 F. 2d at 1535-1536 (II) A, citing Higginbotham, 540 F.2d at 768 n. 10. *See also*, Flynn v. Comm'r of IRS, 269 F.3d 1046, 1065 (D.C. Cir. 2001) (because appellants did not raise the argument at the Tax Court, appellate court declines to address it now); A-1 Ambulance Serv., Inc. v. County of Monterey, 90 F.3d 333, 337-339 (9th Cir. 1996) (declining to consider legal theory that would require further development of the

factual record); MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1168 VI (D) n. 124 (7th Cir. 1983) ("It is not possible for this court to review the tax aspects of this case on the record before us. Rather than require additional briefs on an issue not fully dealt with below, we simply note the existence of the issue and leave its resolution to the proceeding on remand.").

Proper resolution of the issue was not beyond all doubt and this was not a case where "injustice might otherwise result[]" if the Court of Appeals did not affirm the trial court's judgment. Hormel, 312 U.S. at 557. On the contrary, Petitioner was prejudiced. He was "surprised [at the motion for new trial hearing] thereof of issues upon which [he] had no opportunity [at trial] to introduce evidence[,]" controvert, or assert objections based on relevance, materiality, prejudicial effect, misleading the jury, or lack of subject matter jurisdiction. U.S. v. Miller, 636 F.2d 850, 853 (1st Cir. 1980), quoting Hormel, 312 U.S. at 556. *See also*, Kimes v Stone, 84 F.3d 1121, 1126 II (9th Cir. 1996) ("The decision to consider an issue not raised below is discretionary, and such an issue should not be decided if it would prejudice the other party.").

Moreover, the error was not harmless. Viewing the evidence *de novo* as reasonable jurors would, "not from the perspective that the jury took the most pro-guilt possible view of every bit of evidence in the case[]" (Boothe v. State, 293 Ga. 285, 289-290 n. 8 (2013)), given the pervasiveness of the Ohio incidents detailing

Petitioner's sexual acts with K.S. from the tender age of seven to nine contributed to the jury's verdict. Ragan v. State, 264 Ga. 190, 192-193 (3) (1994) (in reviewing non-constitutional evidentiary error, "[t]he proper test to determine whether error is harmless is not whether there is sufficient other evidence to convict but whether it is highly probable that the error did not contribute to the judgment.").

Absent any limiting instruction from the trial court, the jury necessarily considered the Ohio incidents as substantive evidence of Petitioner's guilt of the crimes or improper propensity evidence because they were not instructed otherwise. *See*, Johnson v. State, 120 So. 3d 1100, 1119 (Ala. 2005) (Because the trial court failed to give limiting instructions concerning the use of the evidence of Johnson's bad acts to the jury, the jury "was neither informed as to what limited purposes the evidence could be considered nor informed as to what purposes the evidence could not be considered"). *Cf.* Ex Parte Minor, 780 So. 2d 796, 802 (Ala. 2000) (holding that because the trial court did not tell the jury that Minor's prior convictions could not be considered as substantive evidence that he committed the crime charged, the jury was free to consider the prior convictions for any purpose, including the probability that Minor committed the crime because he had demonstrated a prior criminal tendency).

It is highly likely that the jury convicted Petitioner based on the fact he was a bad person based on his sexual acts with K.S. from the age of 7 until 10 in Ohio,

rather than the evidence occurring in Georgia alone. Ex Parte Drinkard, 777 So. 2d 295, 296 (Ala. 2000) ("Evidence of collateral crimes is presumptively prejudicial because it could cause the jury to infer that, because the defendant has committed crimes in the past, it is more likely that he committed the particular crime[s] with which he is charged – thus, it draws the jurors' mind away from the main issue.").

The admission of the Ohio incidents had the "undue tendency to move the [jury] to decide [Petitioner's fate] on an improper basis, . . . an emotional one." (Citation omitted). Johnson, 120 So. 3d at 1113 (I). Petitioner's convictions must be reversed. Slade v. United States, 267 F.2d 834, 839-840 (5th Cir. 1959) (conviction reversed because the trial court failed to adequately distinguish between impeachment evidence and substantive evidence).

CONCLUSION

Terms such as "manifest injustice," "interests of justice" and "exceptional circumstances" are incapable of definition or uniform application, leading to inconsistent results. A bright-line rule clearly defining meaningful standards is imperative to provide necessary guidance to federal and state appellate courts to decide issues on appeal where the State waives a legal theory at trial then belatedly asserts it at the post-conviction hearing to justify the outcome.

The petition for a writ of certiorari should be granted.

This 1st day of July, 2019.

Respectfully submitted,

/s/Frances C. Kuo
Frances C. Kuo
Counsel for Petitioner, Mr. Kenneth Blackwell
214 Executive Building
125 East Trinity Place
Decatur, GA 30030
fkuo42@outlook.com
Tel: (404) 378-1241
Supreme Court Bar No. 299215