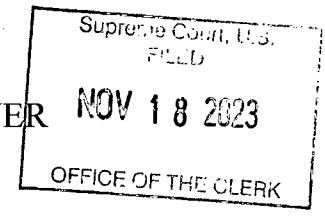
No. 23-6060

IN THE

SUPREME COURT OF THE UNITED STATES



JOHN LACEY MULKEY Pro se — PETITIONER

vs.

STATE OF GEORGIA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
COURT OF APPEALS STATE OF GEORGIA

NOTICE OF PETITION FOR WRIT OF CERTIORARI

John Lacey Mulkey, Pro se
GDC#1002660807

Calhoun State Prison
P.O. Box 249
Morgan, Georgia 39866
229-849-5000 prison main line

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QUESTION(S) PRESENTED

The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial. . . ." On its face, the Speedy Trial Clause is written with such breadth that, taken literally, it would forbid the government to delay the trial of an "accused" for any reason at all, (*Doggett v. United States*, 505 U.S. 647 (1992). The guarantees of the Sixth Amendment don't stop there.....

Georgia and Federal law has emphatically upheld the right of a defendant to present his theory of the case to the jury by calling witnesses on his behalf, see *State v. Jackson*, 269 Ga. 308 (1998)- "'The right to confrontation "(1) insures that the witness will give his statements under oath — thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; [and] (2) forces the witness to submit to cross-examination `the greatest legal engine ever invented for the discovery of truth'" *California v. Green*, 399 U.S. 149, 158 (90 Sc.D. 1930, 26 L.E.2d 489) (1970). "Confrontation aids the fact finder by allowing it to observe the demeanor of the witness and assess the witness' credibility. Id. These rights are at the very core of the concept of a fair hearing. Substantive due process requires that state infringement on fundamental rights be narrowly tailored to serve a compelling state interest. *Reno v. Flores*, 507 U.S. 292, 301-302 (113 Sc.D.. 1439, 123 L.Ed.2d 1) (1993). See also *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994)".

The question presented is:

1. **Did the Court of Appeals violate the due process right to present a defense, in holding admissible, under O.C.G.A. § 24-4-403, (Rule403) extrinsic evidence from a prior sexual assault case that was dismissed by a separate trial judge for a Sixth Amendment violation of the Speedy Trial Clause?**

RELATED CASES

Mulkey v. State of Georgia, No. S23C0581, Georgia Supreme Court denying review judgment entered August 21, 2023. [App. C]

Mulkey v. State of Georgia, No. A22A1452, Georgia Court of Appeals affirming Petitioner's conviction, judgement entered January 17, 2023. [App A]

State of Georgia v. Mulkey, No. 18CR00183, Douglas County Georgia Superior Court denying Petitioner's Motion for New Trial judgment entered March 1, 2022. [App B]

State of Georgia v. Mulkey, No. 2012-SU-CR-1468-DS, Bartow County Georgia Superior Court order granting Petitioner's Plea in Bar on Sixth Amendment Speedy Trial, judgement entered February 18, 2013. [App. E]

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix_____ to the petition and is

[ ] reported at _____; or, [ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.

The opinion of the United States district court appears at Appendix_____ to the petition and is

[ ] reported at_____; or, [ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.

[x] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[**x**] reported at Mulkey v. State, 366 Ga. App. 427 (2023); or,
[ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.

The opinion of the court Douglas County Georgia Superior Court 18CR00183 appears at Appendix_B_to the petition and is
[ ] reported at ; or, [ ] has been designated for publication but is not yet reported; or, [**x**] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was_____ .

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date_____: order denying rehearing appears at Appendix ____, and a copy of the _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including_____ (date) on_____ (date) in Application No._____ A_____ .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[x] For cases from **state courts**:

The date on which the highest state court decided my case was August 21, 2023. A copy of that decision appears at Appendix.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____(date) in Application No._____ .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5th Amendment "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

6th Amendment "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".

14th Amendment "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".

Federal Rules of Evidence

FRE 401 Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

FRE 402 Relevant evidence is admissible unless any of the following provides otherwise:

* the United States Constitution;
* a federal statute;
* these rules; or
* other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

FRE 403 The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

FRE 404(b) (b) OTHER CRIMES, WRONGS, OR ACTS.

(1) Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

State of Georgia Evidence rules

O.C.G.A. 24-4-401 As used in this chapter, the term "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

OCGA 24-4-402 All relevant evidence shall be admissible, except as 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. Evidence which is not relevant shall not be admissible.

OCGA 24-4-403 Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

OCGA 24-4-413 (a) In a criminal proceeding in which the accused is accused of an offense of sexual assault, evidence of the accused's commission of another offense of sexual assault shall be admissible and may be considered for its bearing on any matter to which it is relevant.

OCGA 24-4-414 a) In a criminal proceeding in which the accused is accused of an offense of child molestation, evidence of the accused's commission of another offense of child molestation shall be admissible and may be considered for its bearing on any matter to which it is relevant.

STATEMENT OF THE CASE

This petition presents an important issue of first impression: did OCGA § 24-4-403 (Rule 403) permit the introduction of extrinsic evidence arising from a prior indictment that was dismissed for violation of the Sixth Amendment's Speedy Trial Clause? Stated another way, after one trial judge found actual prejudice that the Petitioner was unable to fairly defend a prior sexual assault allegation against him, could a second trial judge lawfully find that the same prior allegation was defensible?

A. Factual Background.

Petitioner and Candace became romantically involved in their twenties, while Petitioner was living in Idaho, and then again later in life, around 2010. [Tr. Vol. 2 at 180-181]. In 2010, Candace had an adopted minor daughter, D.H.[1] [Tr. Vol. 2 at 179]. When the Petitioner and Candace rekindled their romantic relationship, Candace resided in Idaho and the Petitioner lived in Georgia. [Tr. Vol. 2 at 181]. The two married December 24, 2012, and their honeymoon was held at an Idaho hotel. [Tr. Vol. 2 at 181]. In 2013, the Petitioner's family relocated to Cartersville, Georgia. [Tr. Vol. 2 at 183]. In May 2014, the family moved to Douglasville. [Tr. Vol. 2 at 184].

D.H was very jealous/possessive of Candace and frequently argued with the Petitioner. [Tr. Vol. 2 at 188, 190]. Petitioner was previously accused of sexual misconduct with his biological daughter; Candace knew this. [Tr. Vol. 2 at 208]. Notwithstanding this knowledge, Candace never suspected that Petitioner acted inappropriately—she described Petitioner's relationship with D.H. as a "normal stepparent/stepchild" relationship. [Tr. Vol. 2 at 208]. In October 2015, Candace and the Petitioner separated. [Tr. Vol. 2 at 191-192].

During their separation and prior to a divorce, Candace and Petitioner maintained contact and a sexual relationship. [Tr. Vol. 2 at 209-210, 214]. Candace asked Petitioner to remain in contact with D.H. [Tr. Vol. 2 at 209]. D.H. remained in contact with the Petitioner. D.H. sent numerous messages through social media, including that she loved and missed Petitioner. [Tr. Vol. 2 at 165, 215, 217-218, 260]. D.H. also requested to visit the Petitioner. [Tr. Vol 2 at 165, 215, 217-218, 260].

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[1] D.H. was seven years old in 2012. [Tr. Vol. 2 at 234].

On December 24, 2017, Candace became "furious" after she discovered that D.H. exchanged sexually explicit messages with a boy on Snapchat. [Tr. Vol. 2 at 142-143, 194-195, 200-203]. Infuriated, Candace exclaimed that D.H. "ruined Christmas." [Tr. Vol. 2 at 204]. This was the first time that D.H. had been in "serious trouble." [Tr. Vol. 2 at 204].

Immediately thereafter, D.H. wrote a note to Candace that the Petitioner touched her in "inappropriate places." [Tr. Vol. 2 at 142-43, 194, 259-260]. Candace initially did not believe D.H.'s note and suspected that D.H. concocted a lie to get out of trouble. [Tr. Vol. 2 at 196, 204]. Two days later, Candace contacted law enforcement. [Tr. Vol. 2 at 142-143]. D.H. wrote a written statement to law enforcement and a forensic interview was performed. [Tr. Vol 2 at 24, 142-143].

According to D.H., the inappropriate contact began just after the wedding in Idaho and continued through their move back to Georgia. [Tr. Vol. 2 at 168, 235]. In Douglas County, D.H. advised that the Petitioner touched his penis to the outside of D.H.'s vagina two or three times and also touched her vagina with his hand. [Tr. Vol 2 at 166-169, 243-245].

B. Procedural Background.

On February 16, 2018, a Douglas County grand jury returned an indictment charging the Petitioner with aggravated sexual battery and child molestation. [R. at 6]. The Petitioner denied the allegations and pleaded not guilty. [R. at 31].

Prior to trial, the State noticed intent to introduce evidence under O.C.G.A. §24-4-413 and §24-4-414. [R. at 154]. The evidence the state sought to admit was a prior allegation of sexual misconduct from the Petitioner's biological daughter, S.M. [R. at 154]; see [Tr. Vol 1 at 3-17]; see [Appx. H at 3-19].

This prior allegation against S.M. resulted in a Bartow County criminal action. The Bartow case was dismissed on Petitioner's plea in bar because that court found Petitioner's constitutional right to a speedy trial was violated. [Tr. Vol 1 at 3:19-25]; see [Appx. H at 3:19-25].

Prior to the Douglas County trial, the Petitioner argued the Bartow County evidence was inadmissible at his Douglas County trial because he was unable to defend this extrinsic allegation. The Petitioner argued that he could not defend this extrinsic allegation (S.M.) due to the death and unavailability of several critical defense witnesses—the exact reason the Bartow County judge sustained his plea in bar. [Tr. Vol 1 at 5-6]; [App H at 5-6]. The trial

court admitted the Bartow evidence over objection. [Tr. Vol. 1 at 17-19]; [App. H at 17-19]. Despite trial counsel's timely request, the trial court did not provide a limiting instruction[2]. [Tr. Vol. 4 at 637].

With this extrinsic Bartow County evidence admitted, the state's theory was that the Petitioner's case was about **two victims**. Significant here, the prosecutor told the jury in its opening statement:

> "That's why we're here because **two young women** were brave enough to stand up and say this happened to me and it is not ok. **They're** going to come in here, **they're** going to tell you their stories. **They're** going to undergo cross-examination with the defendant. **They're** going to have their stories questioned . . . I expect the defense to call an expert to tell you that **they're** making all this up but **two nine-year-old little girls** knew enough to know that its bad when the defendant licks **their** finger and touches **their** vagina". [MNT Ex. 3 at 16]; [App. F at 16]. (emphasis added).

To compound the harm in the admission of the prior act evidence, the state repeatedly argued that the Petitioner's prior, Bartow County case was dismissed due to a "technicality." [Tr. Vol. 3 at 47; MNT. Ex. 3 at 33, 34, 52]; [App. G at 33, 34, 52].

At the Douglas County trial, D.H.'s credibility was paramount, as there was no direct evidence or eyewitness testimony to any supposed abuse. See [Entire Trial Transcript]. After deliberation, the jury hung on count one and convicted the Petitioner on count two. [R. at 215]; [Tr. Vol 5 at 674-680]. The trial court sentenced Petitioner to a twenty-year sentence to serve nineteen years. [R. at 216]; [Tr. Stg. at 17].

C. The Court of Appeals.

On direct appeal, Petitioner raised four enumerations of error. Significant here, enumeration one argued that the trial court erred in admitting prior extrinsic, bad act evidence concerning the Bartow County indictment that was dismissed for violation of the Speedy Trial Clause. In response, the State of Georgia argued that the Bartow County case was relevant evidence under O.C.G.A. §§ 24-4-413 & 24-4-414[3], and that the admission of this evidence under Rule 403 was not an abuse of discretion.

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[2] Petitioner also argued the denial of a requested jury instruction on the Rule 414 evidence, in the Georgia Court of Appeals. see [App. A]

[3] Georgia's new Evidence Code was modeled in large part on the Federal Rules of Evidence, "and when we consider the meaning of such provisions, we look to decisions of the federal appellate courts construing and applying the Federal Rules, especially the decisions of the United States Supreme Court and the Eleventh Circuit." citing *Chrysler Grp. LLC v. Walden, 812 S.E.2d 244 (Ga. 2018)*

On September 7, 2022, the Court of Appeals of Georgia held a special session oral argument at the Mercer University School of Law, which focused entirely on this enumeration of error.

In its A22A1452 opinion, the Court of Appeals rejected the Petitioner's enumerations of error and affirmed his conviction. Concerning enumeration one (the Bartow County evidence), the opinion held that the trial court did not abuse its discretion in admitting this extrinsic, bad act evidence under Rule 403. Under Rule 403, the opinion reasoned, the prosecutorial need for S.M.'s allegation was heightened by Petitioner's trial defense, which challenged D.H.'s credibility. Division one found that the eight years separating the S.M. and D.H. allegations was not too remote to be probative, and that the strikingly similar facts of the allegations increased the probative value of the extrinsic evidence.

The Court of Appeals failed to apply the clearly erroneous standard of review to the Bartow County trial court's finding that the delay in the Petitioner's trial caused the unavailability of critical witnesses for the defense. See generally *Miller v. State*, 288 Ga. 286 (702 SE2d 888) (2010). The Court of Appeals then rejected the Petitioner's argument that admission of the Bartow evidence was unfairly prejudicial because he could not defend those allegations. In assessing prejudice, the Court held that close scrutiny of the Petitioner's proffered defense witnesses did not reveal exculpatory evidence, but only testimony that Mulkey's relationship with S.M. was very normal.

Finally, the Court noted precedent holding that a prior acquittal is admissible under Rule 404 (b), slip op. at 11-12 (citing *State v. Atkins*, 304 Ga. 413, 419-21 (2) (b) (i) (819 SE2d 28) (2018)) and it examined a federal district court decision admitting evidence (for a limited purpose) from a case dismissed for a speedy trial clause violation. Slip Op. at 12-14 (1) (discussing *United States v. Brown*, 90 F.Supp.2d 841 (E.D. Mich. 2000). To date, Brown appears to have been the sole case to have considered a similar issue involving a prior dismissal under the Speedy Trial Clause. [App. A]

D. The Georgia Supreme Court.

The Petitioner filed a petition for a writ of certiorari in the Georgia Supreme Court asking it to review the lower courts decision, case S23C0581, which was denied on August 21, 2023. [App. C].

This petition follows.

REASONS FOR GRANTING THE PETITION

I. This Court should grant the petition to resolve a significant question of great importance over the accused's ability to defend a previously dismissed allegation due to the pre-trial delay and the loss of defense witnesses.

This important question presented is one of first impression, and the establishment of precedent is desirable because the admission of propensity evidence from a previously dismissed case (on Speedy Trial grounds where actual prejudice was found) undermines the defendant's ability to fairly defend himself.

One of the most important functions of the Sixth Amendment's Speedy Trial clause is its protection of the accused's ability to prepare a defense----this Clause recognizes that "the inability of a defendant to adequately prepare his case skews the fairness of the entire system." *Ruffin v. State,* 284 Ga. 52,65 (2) (663 SE2d 189) (2008) (quoting *Doggett v. United States,* 505 U.S. 647, 652 (1992)). "Excessive delay has a tendency to compromise the reliability of trials in ways that neither party can prove or, for that matter, identify." *Doggett, 505 U.S. at 665 (*citing *Barker v. Wingo, 407 U.S. 514 (92 SCt 2182) (1972)).* Although the concept of "prejudice" in this context is not limited to the likely effect that the pretrial delay had on the ultimate outcome of the trial, *the death and unavailability of favorable defense evidence* is a significant factor in assessing whether the defendant has any fair opportunity to defend the allegations. *Ruffin, 284 Ga. at 64 (2).*

The Sixth Amendment guarantees don't stop there.....

See also *Holmes v. South Carolina,* 547 U.S. 319 (2006)- "the Federal Constitution *guarantees criminal defendants a meaningful opportunity to present a complete defense,* whether this right is rooted directly in the Due Process Clause of the Constitution's Fourteenth Amendment or in the compulsory process or

Confrontation Clause of the Constitution's Sixth Amendment." *Crane v. Kentucky, 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636.).* (Italics added)

Here, a Bartow County Georgia Superior Court judge concluded that the State's excessive delay in a prior, 2008 case compromised Petitioner's fair ability to defend the extrinsic allegations of prior sexual misconduct, [Tr. Vol. 1 at 5-6]; see [App. D and E], which

was erroneously admitted in the Douglas County Georgia trial without regard to Rule 403's unfair prejudice analysis. [AppH at 17-19]. "[T]he major function of Rule 403 is to exclude matters of scant or cumulative probative force, dragged in by the heals for the sake of its prejudicial effect." *Brown v. State, 303 Ga. 158,162 (810 SE2d 145) (2018)* (quoting *United States v. Utter, 97 F.3d 509, 514-15 (11th Cir. 1996))*. Simply stated, the Bartow County Georgia allegations were admitted for the sake of their prejudicial effect because, in the Douglas County Georgia trial Petitioner could not defend himself due to the death and unavailability of several critical, exculpatory witnesses. See [App. D & E]. The state made this case unequivocally about convicting the Petitioner for the alleged abuse of (SM), going as far as to tell the jury in the state's opening statements the following:

> "We're going to ask you to hold the defendant accountable for what he did to these *two little girls* when *they* were helpless, when *they* couldn't fight back. We're going to ask you to find him guilty on both counts." [App. F at 18,19: 25-4]

Illustrative of the Petitioner's inability to defend the prior allegations is the cross examination of S.M., which failed to meaningfully impeach any of the material facts that S.M. recalled before the jury. [Tr. Vol. 3 at 382-398]. Similarly, trial counsel's attempt to defend these allegations during the defense case-in-chief backfired, instead *harming* the Petitioner, when witness Shaw volunteered a hearsay statement of (SM) that "God knows the truth and one day, [Petitioner] won't be able to lie."---S.M. [Tr. Vol. 3 at 512: 1-4]. Compounding this harm, the damage to the Petitioner's trial was exacerbated when the state seized upon the above hearsay statement and made it the focus of their closing argument. The state placed this quote on a power point presentation and left it up during their presentation as the backdrop in the state's closing plea to the jury (while pointing at the screen) stating the following:

> "All we are asking here from you is that you are honestly seeking the truth. He got away with it once. He got away with it once. *He got off on a technicality,*..... Do not let him get away with it again. *God knows the truth,* now you do too. Six years ago, (SM) made a hope that one day the defendant wouldn't be able to lie anymore..... [App. G at 52: 14-24]

The Georgia Court of Appeals (as well as the state and trial court) seized upon a Georgia Supreme Court's opinion in State v. Atkins[4], 304 Ga. 413, 419-21 (2) (b) (i) (819 SE2d 28) (2018) – permitting the admission of acquitted conduct under Rule 404 (b)) – to justify its holding in the Petitioner's case. Slip Op. at 1 (11). However, the Georgia Court of Appeals failed to acknowledge the fundamental distinction between a speedy trial dismissal and an acquittal—in an acquittal, the accused was necessarily able to defend himself. Conversely, in fact, where the Speedy Trial Clause is violated, the case is dismissed precisely because the defendant cannot defend the allegation. See [App. E at 4-5, ¶ 17] ("The Court finds that the Defendant has in fact been prejudiced in that his defense has been hampered by this delay[.]").

To be sure, the trial court (nor Georgia Court of Appeals) in its ruling did not cite to any evidence showing that the Petitioner's ability to defend the prior allegation somehow improved during the additional eight years between the Bartow County plea in bar and the Douglas County trial. Compounding the harm, this evidence was not admitted for a limited purpose—Rule 413 and 414 permitted the jury to consider the allegation that Petitioner could not defend for *any* purpose, including propensity.

The Court of Appeals, and for that matter the trial court, erroneously afforded no significance to the fact that the Petitioner was not allowed by the trial court to proffer[5] any testimony of witnesses outside the present of the jury. After Petitioner was scolded numerous times during his testimony by the hearsay rule, Petitioner could only state that these unavailable defense witnesses would have stated that Petitioner's relationship with S.M. was normal. Slip Op. at 14 (1). see also [Tr. Vol. 3 at 409-475] This analysis ignored the impact

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[4] In Atkins, Atkins argued under Rule 403 that Rule 404(b) extrinsic evidence was not admissibly because Atkins had been acquitted, that The Doctrine of Collateral Estoppel prevented the state from relitigating that evidence. The Georgia Supreme Court over-ruled years of precedents based on this Court's ruling in *Dowling v. United States, 493 U.S. 342 (1990), holding that a prior act that was subject to an acquittal was admissible if it met the criteria of the rules of evidence.*

[5] During the Rule 413 and 414 motion trial counsel alluded to what these witnesses had to offer and offered the court to have a copy of the Bartow County Georgia Plea hearing transcript, when trial counsel ask to respond to the states argument it was denied. [App. H at 16:25]

and necessity of circumstantial evidence in child sex cases. In these cases, there is rarely direct evidence implicating or exculpating the defendant, and so prosecutors and defense attorneys build their narrative through circumstantial evidence, asking the jury to draw inference from context. Here, much of that contextual evidence favored the Petitioner but was not available before the jury. See [App. D].

While the Bartow County speedy trial dismissal did not mandate that the prior act be excluded from the Douglas County Georgia case, that fact had to inform the trial court's Rule 403 balancing analysis. See, e.g., *State v. McPherson, 341 Ga. App. 871, 873–74 & n.8, 800 S.E.2d 389 (2017)* (citing *United States v. McGarity, 669 F.3d 1218, 1244 (V) (B), n. 32 (11th Cir. 2012)* for the proposition that evidence admitted under Rule 414 (a) must also satisfy Rule 403). Applying Rule 403, any probative value of the Bartow County Georgia extrinsic evidence was substantially outweighed by the *unfair prejudice* to Petitioner. *Cf., United States v. Brown, 90 F. Supp. 2d 841 (E.D. Mich. 2000).*

In *Brown*, the government similarly sought to admit evidence of a prior bad act under Rule 404(b) that had been previously dismissed pursuant to a constitutional speedy trial motion. The district court held that the admission of this evidence did not violate due process. However, the district court's analysis hinged on the fact that the evidence was admitted for a limited purpose under Rule 404(b) and that the jury would receive a limiting instruction. *Id. at 845.* The *Brown* court specifically noted that Rule 404(b) "limited purpose" evidence "c[ould] not serve as direct proof that the illegal acts alleged in the indictment actually occurred." *Id.*

Therein lies is the material distinction from *Brown*----O.C.G.A. §§ 24-4-413 & 24-4-414 (the trial court's legal vehicle) allowed the Bartow County Georgia evidence to be considered by the Douglas County Georgia jury for *any purpose,* including propensity, [App. H at 17], and *without* a limiting instruction. [Tr. Vol. 4 at 637-38]. Thus, the unfair prejudice from the erroneous admission of this evidence was exacerbated because the jury was not instructed that they could not use this prejudicial evidence to convict the Petitioner of the indicted offense, despite trial counsel's specific request. *Dixon v. State, 341 Ga. App. 255 (2017)* - (The trial court's limiting instruction to the jury, mitigated the risk of undue prejudice. *Brimm, supra, 608 Fed. Appx. at 800 (I) (D)* the district court gave the jury a limiting instruction that mitigated the risk of unfair prejudice. See *United States v. Zapata, 139 F. 3d 1355, 1358 (11th Cir. 1998)* (explaining that the district court's jury instruction as

to the limited purpose of the extrinsic evidence diminishes its prejudicial impact).

> "The United States Supreme Court has made it clear that State evidentiary ruling must be fundamentally fair to comport with the Due Process Clause." See e.g. *Rochin v. California, 342 U.S. 165, 168-74 (1952).*

The Georgia Court of Appeals, in its analysis failed to consider the Georgia Supreme Court holding in *Chrysler Grp. LLC v. Walden, 812 S.E.2d 244 (Ga. 2018)*- 'The statutory interaction between Rule 403 and the relevancy rules demonstrates at the outset that not all evidence that "shall" be admissible according to the Rules may always be entered in every instance; that rule (402) specifically notes that relevant evidence is only admissible if it is not subject to *constitutional requirements* or other limitations. By standardizing rules concerning both the presumptive admissibility of relevant evidence and the judicial exclusion of certain otherwise admissible evidence, *Rules 401, 402, and 403 overlay the entire Evidence Code*, and are generally applicable to all evidence that a party seeks to present." See, e.g., *State v. McPherson , 341 Ga. App. 871, 873–74 & n.8, 800 S.E.2d 389 (2017)* (citing *United States v. McGarity , 669 F.3d 1218, 1244 (V) (B), n. 32 (11th Cir. 2012)* for the proposition that evidence admitted under Rule 414 (a) must also satisfy Rule 403); cf. *Daubert v. Merrell Dow Pharmaceuticals, Inc. , 509 U.S. 579, 587, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)* (when interpreting the Federal Rules of Evidence, "Rule 402 provides the baseline").

This Court's analysis in *Dowling,* "Holding that admission of evidence must be fundamentally unfair to constitute a due process violation." it further states- "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate "fundamental fairness" very narrowly. As we observed in *Lovasco, supra, at 790:*

> "Judges are not free, in defining `due process,' to impose on law enforcement officials [their] `personal and private notions' of fairness and to `disregard the limits that bind judges in their judicial function.' *Rochin v. California, 342 U.S. 165, 170 (1952).* . . . [They] are to determine only whether the action complained of . . . violates those `fundamental conceptions of justice which lie at the base of our civil and political institutions,' *Mooney v. Holohan, 294 U.S. 103, 112 (1935)*, and which define `the community's sense of fair play and decency,' *Rochin v. California, supra, at 173.*"

Especially in light of the limiting instructions provided by the trial judge, we cannot hold that the introduction of Henry's testimony merits this kind of condemnation."

Here, in the case before this Court, the Bartow County Georgia evidence was allowed in for *any* reason, including propensity, with no jury instruction, which the Georgia Court of Appeals says is no longer required, the petitioner's trial was rendered *Fundamental Unfair.*

The Douglas County Georgia trial court did not consider Petitioner's missing witnesses or how it would affect the, fundamental fairness of the trial, under due process, in its Rule 403 analysis, but rather focused on case law that said O.C.G.A. 24-4-414, was a rule of inclusion, it "shall" be admissible, and its faulty reasoning of an acquittal verses a prejudicial dismissal. The states need for the extrinsic evidence was not so compelling that the trial court should not have considered trial counsel's Due Process argument:

"the constitutional guarantee of due process does, however, promise that an accused will be afforded a meaningful opportunity to prepare and present a defense", see *Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). "The right to compel witnesses and the right to confront and cross-examine witnesses are fundamental rights, found in the Bill of Rights. They are essential to the ability to offer a defense and are basic to our system of jurisprudence. Chambers v. Mississippi, 410 U.S. 284, 294 (93 S.Ct. 1038, 35 L.Ed.2d 297) (1973). "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense . . . This right is a fundamental element of due process of law." Washington v. Texas, supra at 19.*

CONCLUSION

The Petitioner prays the Petition for a Writ of Certiorari should be granted; that this Court set a standard for all courts to use in its Rule 403 analysis; and decide how courts should consider propensity evidence.

Respectfully submitted,

Date: November 16, 2023

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