

CARLSONS' corner

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Professor Ronald L. Carlson
Callaway Professor of Law
University of Georgia



Michael S. Carlson
Senior Assistant District Attorney
Atlanta Judicial Circuit

Roll Out Diogenes' Barrel Impeachment of State Witnesses with Uncharged Acts of Dishonesty in Georgia

By Ronald L. Carlson and Michael S. Carlson¹

Elwood, still new to representing the state, gingerly tapped on senior prosecutor Earl's office door.

"You need to go to court for me on a child molestation case," said Elwood, almost in a whisper.

"Sure, what day?" responded Earl, pondering the hush in Elwood's voice.

"Like, five minutes ago," Elwood muttered.

"What is it this time?" speculated Earl, reflecting on the often tempestuous relationship between Elwood and the local bench.

Elwood straightened his back to justify himself, "I filed a pre-trial motion to exclude any questions about the victim's specific acts of lying. I argued that because none of our witnesses had ever been convicted of a crime of dishonesty, it was off limits."

"Did the defense make an argument?" Earl was now wondering about how the situation had deteriorated.

Elwood panted, "They didn't have to. As soon as I stood up to support my motion, Judge Barnstable got enraged and started yelling something about the government parading a bunch of known liars through his courtroom and the defense having to sit back and take it 'on account of some technicality."

"Anything else?" Earl's elevated concern began to show in his voice.

"Well, the judge kept shouting, 'Is that what you are telling me?' and 'Is that what they call justice nowadays?' over and over," Elwood's frustration was becoming evident.

"How did you respond?" inquired Earl, now sensing why the situation had worsened.

"I guess I pushed it too far when I told the judge that this is not what I have to say, but that's what the courts that control you have say," Elwood was clearly out of sorts.

Earl's eyes widened, "What did that generate?"

Elwood still seemed stupefied, "Judge Barnstable screamed 'Where do you think you are, Russia?', shrieked that I had turned the last one of his screws for the day and ordered me to get another prosecutor to finish the hearing."

"Did he really say all that?" Earl turned as he headed to court.

Elwood looked out the window and confided, "Actually, I think he pronounced it Rush-ER"

Introduction

A legendary figure in Classical Greece was the spry philosopher and cynic, Diogenes. Denying himself many of the pleasures of life, he resided in a large clay cylindrical vessel. This place where he reflected has been referred to as "Diogenes' Barrel."

When a Georgia trial witness has previously been convicted a crime involving dishonesty, divining the outlines of witness impeachment procedure is not an intellectually daunting endeavor. But what about lying that did not result in a conviction? How does counsel go about introducing a dishonest reputation? Are there special rules for sex crimes?

As this article will demonstrate, Georgia case law in this area is complex, convoluted and, at times, often displays antagonistic Georgia decisions. Fully comprehending the precedent might require counsel to spend some concerted contemplative time in a reproduction of Diogenes' ceramic abode.

Georgia Impeachment Law: Generally

By and large, Georgia forbids "specific act impeachment" of a witness in a criminal case.¹ O.C.G.A. § 24-2-2 makes this plain.² Consistent with this code section, multiple decisions hold that previous acts of

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misconduct are out-of-bounds to impeach a witness unless those acts resulted in a criminal conviction.³

Guidelines for prior bad act impeachment were clarified in 2005, when Governor Perdue signed into law O.C.G.A. § 24-9-84.1. This measure restricts cross-examination to felonies and crimes involving dishonesty or false statement.⁴ The 2005 statute, which bears a striking resemblance to Federal Rule of Evidence 609,⁵ supplanted the previous Georgia practice that allowed impeachment via convictions for “crimes of moral turpitude.”⁶

Among the other refinements ushered in by this statutory change were general time parameters for introduction of the impeaching prior convictions. A 10-year rule was imposed. A trial court is allowed some discretion in broadening this ten year boundary.⁷ Eliminated is the former requirement that a criminal defendant “put his character at issue” prior to his being so impeached.⁸

Character for Untruthfulness

O.C.G.A. § 24-9-84 marks another area of permissible impeachment. It provides for impeaching on the basis of “bad character in the form of reputation.” This provision, which was rewritten in 2005, restricts the impeaching evidence to general character for truthfulness or untruthfulness. Specific instances of misconduct are not allowed on direct examination. Neither are individual opinions, except upon cross-examination in order to test the extent of the witness’ knowledge. In order to introduce this reputation evidence, a three part foundation is employed: (a) is the general character of the witness known?; (b) what the character is; and (c) can the witness be believed under his oath?⁹

The primary differences between the new enactment and its predecessor appear to be that the current law expressly restricts inquiries to reputation for truthfulness and untruthfulness. General moral character is deemed to be irrelevant, in favor of the truthfulness or untruthfulness standard. In addition, the current statute mandates that a criminal defendant testify and offer evidence of his truthful character before countervailing evidence is admitted.¹⁰

Although broader in scope, the statutes that preceded O.C.G.A. § 24-9-84 prescribed “a specific progression of questions to be asked when inquiring into the general reputation of a witness for impeachment purposes.”¹¹ Unless those questions were asked, evidence and jury instructions as to “bad general character” were not allowed.¹²

The proscription against impeachment via particular incidents applies no matter what the acts were or by whom they were engaged. An instructive opinion is *Gilbert v. State*. The *Gilbert* case involved allegations of a classic form of prior specific acts of dishonesty on the part of state witnesses. The defendant in *Gilbert* sought a new trial in order to be allowed to attack the witnesses, who were police officers, claiming that they were suspended for unauthorized receipt of satellite services. In denying the use to this evidence, Georgia Court of Appeals judges Johnson, Eldridge and Mikell found comfort in the oft-used rule that “specific instances of misconduct cannot be used to impeach a witness’ credibility unless the misconduct has resulted in a criminal conviction.” The court pounded home the fundamental

point: “[A]bsent criminal convictions, the purported evidence of mere suspensions from work would not even be admissible for impeachment purposes.” The defendant’s request for relief was based upon the alleged dishonest misconduct by state’s witnesses. Since such misconduct could not legally form the basis for an impeachment attack, relief was denied. The Georgia Court of Appeals also found fault with the quality of defendant’s efforts to show the misconduct as a matter of fact: “[S]he has not pointed to an affidavit or cited any other evidence proving that her allegation about the witnesses is true.” The court goes on to “assume for the sake of argument that the allegation is true,” and denies the proposed impeachment.¹³

Have the 2005 statutory enactments altered procedural methods here? The answer appears to be, “No.” While narrowing the character trait which may be asked about, the progression of character proof questions is retained in the statute. The Georgia Supreme Court has confirmed the procedure in recent case law.

In *Riggins v. State*, the court considered the application of O.C.G.A. § 24-9-84.1. The school records of a state’s witness suggested that this prosecution witness might lie or falsify in order to divert blame from himself and onto others. The *Riggins* court noted that the proper method for introducing impeachment evidence would involve: (1) questioning the impeaching witness about his or her knowledge of the character of the state’s witness; (2) have the witness explain what that character is; and (3) whether, from that character, the impeaching witness would believe the state’s witness on his oath.¹⁴ Absent a criminal conviction, evidence pertaining to the witness’s reputation for truthfulness would represent the only statutorily viable method to impeach a witness concerning his dishonesty in Georgia.¹⁵

Accordingly, Georgia law distinguishes between specific acts of dishonesty which have (admissible) and those which have not (inadmissible) been reduced to a conviction. On the other hand, a witnesses’ reputation for dishonesty can be used, providing that the proper steps are followed. As will be shown, however, the line of demarcation has become blurred by subsequent case law.

The Smith Exception – Lies Versus Lies About Sex?

Both as a matter of history and modernly, Georgia law has firmly rejected the doctrine of impeachment by individual acts of dishonesty in the witness’ past. However, in 1989 the Georgia Supreme Court developed a narrow exception.

In *Smith v. State*, the court ruled that victims in sex crime cases can be impeached concerning prior false allegations of sexual abuse. The court ruled that “evidence of prior false accusations is admissible to attack the credibility of the prosecutrix and as substantive evidence tending to prove that the instant offense did not occur.”¹⁶

What about the “rape-shield law?”¹⁷ *Smith* distinguished between evidence of *prior sexual activity* on the part of a victim and *previous false allegations* of sexual abuse. Based upon this distinction, the *Smith* court determined that Georgia’s rape-shield law would not bar the admission of victim’s prior false allegation of sexual misconduct.¹⁸

Would O.C.G.A. § 24-9-84, or its predecessor at the time, preclude admission? False allegations are “prior bad acts.” So doesn’t Georgia statutory law bar this evidence?

The *Smith* court took this issue on squarely, referencing both the Georgia statute on relevancy as well as the law on reputation impeachment. After surveying cases from other states, the court in *Smith* opined that, in this context, a defendant’s constitutional rights “regarding evidence that the prosecutrix in a sex-offense case has made prior false accusations against men other than the defendant” are paramount. When constitutional guarantees are in a play, “the evidentiary rule preventing evidence of specific acts of untruthfulness must yield to the defendant’s right of confrontation and right to present a full defense.”¹⁹

Prior to admitting the evidence, however, *Smith* directs that trial courts are to make a threshold determination outside the presence of the jury that a reasonable probability of falsity exists, as to the prior allegation. This standard is in place to “protect the prosecutrix from unfounded allegations that she has made similar allegations in the past.”²⁰

Defendants have the burden to come forward with evidence of a prior false allegation of sexual misconduct.²¹ The trial court’s determination as to whether the burden has been met follows an abuse of discretion standard.²² An accused’s allegation of prior falsity that is unsupported by other evidence is insufficient to meet the required standard.²³ A history of recantation by a victim can form the basis for admission of a prior false allegation of sexual misconduct.²⁴ So, if a current rape victim made a prior accusation against someone, then recanted, the circumstance assists the defendant in the current case.

Smith in Context

Examining Georgia appellate decisions since *Smith* shows little to indicate an intent to expand the case beyond its terms. For example, in *Postell v. State*, the Georgia Supreme Court ruled that, pursuant to *Smith*, a prior false allegation must be directed at some specific individual in order to be admissible.²⁵

Noting that instances of specific misconduct may not be used to impeach a witness absent a criminal conviction, the court in *Johns v. State* held that lying by a victim in an aggravated child molestation case was properly excluded.²⁶ Similarly, the wife of a child molestation defendant was appropriately banned from disclosing the victim’s prior alleged acts of lying and stealing in *Frazier v. State*.²⁷ Sex crime victims may not be cross-examined with other acts of dishonesty, such as stealing, according to *Duncan v. State*.²⁸

Even where evidence of lying by a victim is introduced, absent proper qualification, it will not be considered for impeachment purposes. For example, although the state withdrew its objection to evidence that a victim in a child molestation case “makes up stories when he gets into trouble,” where there was no testimony on the child’s reputation for untruthfulness or whether the witness would believe the child under oath, *Callahan v. State* affirmed the refusal to charge the jury on impeachment by bad character evidence.²⁹

In addition, courts have declined to broaden *Smith* beyond claims of a sexual nature. The target of *Smith* is past sexual fantasizing or lying by a rape victim or a child molestation victim. *Long v. State* concerned prior false allegations of physical abuse, which allegations had been made by the child victim. The child allegedly had lied previously about a physical confrontation. The issue was whether this history would be admissible in a child molestation trial. Specifically, the child in *Long* had purportedly fabricated attempts by others to strike her in the face with a belt. The *Long* court cited *Smith* but refused to apply it in order to allow impeachment in these circumstances.³⁰

Another decision helps to illustrate the point. Without mentioning *Smith*, the Court of Appeals precluded prior false allegations of physical abuse by the victim in a terroristic threats and battery prosecution. In *Shellnut v. State*, the court demonstrated its unequivocal resistance to admission of this testimony: “The false accusation about another person on an unrelated incident is not relevant.”³¹

The Goldstein Paradox

In *Goldstein v. State* the Court of Appeals reversed a child molestation conviction on the basis of ineffective assistance of counsel. This determination, in major part, resulted from defense counsel’s failure to cross-examine a witness about prior individual instances of misconduct, namely, false allegations of sexual abuse. The prior false allegations described in *Goldstein*, however, were not made by the victim. Instead, they were made by the victim’s mother, who was the first to hear of the child’s complaint and reported the molestation claim to the police.³²

The conviction in *Goldstein* was reversed for defense counsel’s failure to investigate, present and (most importantly) cross-examine the mother with the evidence of her previous and unrelated false allegations of sexual abuse. When the mother testified for the state, defense counsel, according to *Goldstein*, should have attacked her with individual instances in the past when she lied. Some of these allegations concerned occurrences while the mother was a child herself and would have happened before the seven-year-old victim in *Goldstein* was even conceived. Others emanated from more recent conversations where the mother repeated accusations she had made as a child.³³

Given the plain language of *Smith*, the cases set forth in the preceding section of this article and the operative statutory law, the *Goldstein* court’s determination that this sort of impeaching material would be admissible at all, much less the subject of an ineffective assistance of counsel claim, might be surprising to the reader. Accordingly, an exploration into the rationale behind *Goldstein* is appropriate.

Goldstein’s break from the time-honored Georgia pattern which excludes impeachment by prior specific acts may reflect the desire of some judges to broadly expand impeachment opportunities. A harbinger of this may have been visible in a special concurrence in a 1998 decision, *Wand v. State*.³⁴

In *Wand*, the court disallowed the cross-examination of the victim’s mother in a child molestation case. Relying upon *Smith*, the Court of Appeals applied traditional law to hold that “the common law rule

of relevancy generally applies to show false allegations of the victim, not the victim's mother." The *Wand* court went on to even more clearly define its position that impeachment of a victim's mother is not allowed by either the common law or *Smith*: "Showing the victim made previous false allegations is directly relevant to the question of defendant's guilt; showing the victim's mother reported those allegations does not affect the victim's credibility. The relevance of the mother's reporting is marginal."³⁵

The controlling language of *Wand*, then, would appear to be at odds with *Goldstein*. However, one of the special concurrences in *Wand* speculates as to whether *Smith* "should be cited as authority for a 'black letter' rule that only the victim's false allegations may be admissible." With this interpretation in mind, the special concurrence indicates that it would broaden the scope of allowable impeachment.³⁶ Significantly, the *Wand* special concurrence does not point to any Georgia Supreme Court opinion for its view that *Smith* is not "expressly limited" in its application. Also of interest is that while the special concurrence expresses misgivings as to whether the application of *Smith* should be narrow and limited, it strictly adheres to *Smith*'s methodology. The special concurrence holds fast to the requirement that a proffer which shows that prior allegations were false is "essential to our consideration of the issue."³⁷

The seed planted by the special concurrence in *Wand* germinated. In *the Interest of M.G.* focused closely on that language. In doing so, it determines that the credibility of the reporting witness, a grandfather of the victim in a child molestation case, could be attacked with evidence that he had previously made a false allegation of child molestation at another time and involving another child. On Confrontation Clause grounds, the *M.G.* court ruled that this mode of impeachment is admissible because he "was the first to question the victim and report the molestation."³⁸ *M.G.* was referenced authoritatively by the *Goldstein* court.³⁹

Mothers, grandfathers and others who report potential sexual abuse of minors when those minors are in their care are sometimes called "outcry witnesses."⁴⁰ What seems to be critical to the impeachment of an outcry/reporting witness is that a prior false allegation of sexual misconduct was made by such a witness and that this witness reports the current allegation to law enforcement. The witness on the stand can then be cross-examined about his or her own earlier false report. In both *Goldstein* and *M.G.*, these seem to have been the deciding factors.

However, uncertainty is injected into the picture by *Lane v. State*. In *Lane*, prohibiting the defense from inquiring of a witness as to whether the victim's mother had falsely accused that witness of child molestation in the past was proper. Central to the determination in *Lane* was the fact that the prohibited impeachment attacked the victim's mother. The *Lane* decision cites *Smith* and emphasizes that victims may be attacked, and not other parties.⁴¹

Goldstein Redux

Interpreting *Goldstein* in light of the body of case law surrounding these issues presents a quagmire. The special concurrence in *Wand*

ponders whether *Smith* represents "black letter law." Like its progeny, *M.G.* and *Goldstein*, though, the special concurrence in *Wand* contains no citation to a Georgia Supreme Court opinion in support of this contention. This is particularly remarkable when, in the *Postell* decision which predated those cases, the Georgia Supreme Court gave *Smith* a restrictive reading, albeit in a different context.

The *Goldstein* decision appears to sidestep the holding in *Wand*. Had that been followed, rather than the reasoning of the special concurrence, the result in *Goldstein* would surely have been different.⁴²

Adding to the confusion is the reluctance of courts over the years to expand *Smith*. In light of that, one wonders about the expansions advanced in *Goldstein* and a few other cases. When we compare cases like *Johns* and *Frazier*, former lying by a witness was inadmissible, even in sex crimes cases. *Long* drew a line of distinction between a child's false allegations of physical versus sexual abuse. This is not to mention *Shellnut's* strongly stated resistance to proof of prior false allegations made by a witness as a form of witness impeachment.

Effect On Ineffective – Call Joseph Heller⁴³

On an ineffective assistance of counsel claim, the general test evaluates whether a reasonable lawyer could have performed in the same manner as defense counsel acted at trial.⁴⁴ Importantly, counsel cannot be found ineffective for failing to anticipate changes in the law.⁴⁵ When examining the web of cases pertaining to the impeachment issue in *Goldstein*, the "*Catch 22*" in which both defense counsel and the trial court found themselves becomes evident.⁴⁶

Strict adherence to *Smith*, the precedent of Georgia's highest court, would preclude the impeachment of the *Goldstein* mother on unrelated allegations that were primarily made by her before the *Goldstein* victim was born. The same result would seem to come from *Wand*, which strictly applied *Smith*. Although one may be able to discern authority to impeach in a few judicial indications, decisions such as *Gilbert*, *Johns*, *Long*, *Frazier*, *Callahan*, *Lane* and *Shellnut*, on the other hand, would steer back towards disallowing the evidence altogether. That is certainly in accord with the plain language of O.C.G.A. § 24-2-2 and O.C.G.A. § 24-9-84.

So, when the precedent is so disorientated, what is counsel for either side or the bench to do? What is admissible? What is objectionable? The issues appear to be irreconcilable under the current state of the law in this area.

To compound this analytical enigma even further are the numerous professional codes and directives that admonish trial counsel to refrain from asking questions or making objections in contravention of the law.⁴⁷ How can those principles be adhered to where the appellate decisions diverge in this fashion?

Ethics and the Constitution

In an important respect, the *Goldstein* opinion makes a significant point. It marshals a disturbing number of false allegations made in

the past by the mother of the young girl. The opinion then draws the conclusion that the “mother’s prior and persistent claims of [her own] molestation could surely be expected to affect the victim’s own attitude, behavior, and outlook.”⁴⁸

Perhaps it could be argued that this supposition is sound psychology. To an advocate for change, it could militate in the direction of amending the rules. One might even advance the proposition that *Goldstein* dictates the broad allowance of impeachment of mothers in future abuse cases involving young girls.

None of that, however, is the bottom line issue in *Goldstein*. What is centrally at issue is whether defense counsel was deficient in not carrying out the credibility attack *in this specific case and in this specific manner*. When he refrained from doing so, many observers would see his conduct as consistent with established Georgia legal patterns. They would also view his approach as ethically sound.

Assuming the posture of the law to be one which bars impeachment by use of individual prior acts of falsity (a point made over and over in numerous Georgia cases), defense counsel’s conduct in *Goldstein* appears understandable. A provision of the American College of Trial Lawyers Code of Trial Conduct prevents a lawyer from attempting to get before the jury evidence which is improper.⁴⁹ The annotations to this provision make clear that it tracks Model Code EC 7-25.⁵⁰ The model code provision tells us that a lawyer “should not by subterfuge put before a jury matters which it cannot properly consider.”⁵¹ Embracing material in a leading question loaded with accusations of past dishonesty would seem to be ethically questionable. It amounts to placing before the jury “matters which it [the jury] cannot properly consider.” To conclude, asking on cross about a witness’ past specific acts of dishonesty, save for the exceptions carved out for examination of rape and child molestation victims, would seem to raise serious ethical questions.

Furthermore, Georgia Rule of Professional Conduct 3.3(a) (1) requires counsel to divulge any controlling legal authority directly adverse to the position of the client.⁵² This rule would appear to have required counsel in *Goldstein* to disclose *Smith* prior to embarking upon any impeachment of the victim’s mother. If the *Goldstein* trial court followed the language of the Georgia Supreme Court in *Smith*, reading that case as did two of the three Court of Appeals judges in *Wand*, it is difficult to envision a different result. This, again, would have been even more likely if the battery of Georgia case law precluding prior bad act impeachment had been considered persuasively. Trial counsel in *Goldstein*, then, by not impeaching the mother, would seem to have acted consistently with the overriding Georgia law on the issue and in accord with numerous professional and ethical codes.

Do constitutional considerations dictate otherwise? Certainly defendants are entitled to effectively cross-examine and to present evidence. But this does not mean that every conceivable form of witness impeachment must be allowed by a state.⁵³ States are permitted to fashion their own evidentiary rules.⁵⁴ Some follow the broad federal pattern embraced in Federal Evidence Rule 608(b), and liberally allow impeachment by prior bad acts of dishonesty. At the other end of the spectrum are jurisdictions like Georgia which exclude such evidence

almost in its entirety.⁵⁵ This school of reasoning deems the evidence worth the court’s time only if there is highly reliable proof of the act’s commission, namely, a conviction. At no point in its history has the United States Supreme Court ruled, as a constitutional mandate, that all legal systems must follow Federal Evidence Rule 608(b).⁵⁶

Conclusions and Reaching for a Lamp

Georgia statutes preclude impeaching a witness with specific acts of misconduct, absent a conviction. That includes prior lying. The Georgia Supreme Court agrees, unless it is a sex crime case and the previous lying was by the victim and about sexual misconduct. The Court of Appeals agrees, sometimes, but adds, sometimes, that outcry witnesses in sex crimes cases can be impeached about unrelated false allegations of sexual misconduct of their own. That is, of course, providing the outcry witness reported the incident at bar to authorities.

Examining the perplexing permutations facing Georgia trial counsel might cause one to react with the sort fatalistic resignation once uttered by U.S. Supreme Court Justice Robert Houghwout Jackson: “I give up. Now I realize fully what Mark Twain meant when he said, “The more you explain it, the more I don’t understand it.””⁵⁷

At the time of this writing, *Goldstein* is pending certiorari in the Georgia Supreme Court. By granting the petition and hearing the case, the Georgia Supreme Court could, once and for all, resolve the issue of whether *Smith* was or was not intended as “black letter law.” It could also resolve the apparent conflict between *Wand* and *Goldstein*. Finally, such consideration might be timely in view of the 2005 reworking of OCGA 24-9-84. Importantly, the statute continues to retain hostility to prior specific act impeachment.

Goldstein is part of a short progression of cases (including *M.G.*) that seem to represent a departure from the history of Georgia law. Constitutional principles do not clearly call for the deviation. For this reason, these decisions would appear to fall within at least one constitutional scholar’s ideologically neutral definition of “judicial activism.”⁵⁸

Social policy also supports the sort of reexamination urged here. Commentators have criticized drawing a distinction for impeachment purposes between false allegations of sexual misconduct (admissible) and prior false allegations of other criminal conduct (inadmissible).⁵⁹ Courts of other jurisdictions have explored whether prior false allegations of sexual assault are of any relevance at all and, therefore, seem to fall outside the protection of the Confrontation Clause.⁶⁰ Some have determined that the Confrontation Clause does not mandate this mode of impeachment and that constitutional analysis supports the exclusion of prior false allegation evidence in sex offense cases.⁶¹

Diogenes is said to have paced throughout the city of Athens in broad daylight, displaying a lit torch or lantern. He held this “lamp” before citizen after citizen, in an effort to illuminate their characters, or, as he put it, “looking for an honest man.”

When it comes to exploring the character of witnesses through the Georgia impeachment rules, darkness often abounds. The authors

hope that this article will not only shed some light on existing precedent but will inspire, as Diogenes did, some reflection by those who might be able to effect reforms.⁶²

Endnotes

¹ See Massey v. State, 278 Ga. App. 303, 308, 628 S.E.2d 706 (2006); Lopez v. State, 267 Ga. App. 178, 182, 598 S.E.2d 898 (2004). See also Ronald L. Carlson, Trial Handbook for Georgia Lawyers, §§ 12:5, 16:11, Thomson West Publishing (2003; 2007 Supplement). See also generally, Ronald L. Carlson and Michael S. Carlson, "Prior Bad Act Impeachment: Shielding the State's Witnesses from Improper Attack," Carlsons' Corner (a publication of the Georgia Prosecuting Attorneys' Council), The Georgia Prosecutor, Fall 2003 (published prior to 2005 Georgia Legislative Enactments).

² O.C.G.A. § 24-2-2. See also Long v. State, 241 Ga. App. 370, 372, 526 S.E.2d 875 (1999).

³ Gilbert v. State, 265 Ga. App. 76, 78, 593 S.E. 2d 25 (2003).

⁴ O.C.G.A. § 24-9-84.1.

⁵ See Federal Rule of Evidence 609.

⁶ See Al-Amin v. State, 278 Ga. 74, 84, 597 S.E.2d 332 (2004), *U.S. cert. denied*.

⁷ See O.C.G.A. § 24-9-84.1(b). See also Hinton v. State, 280 Ga. 811, 819, 631 S.E.2d 365 (2006).

⁸ O.C.G.A. § 24-9-84.1(a) (3). For statement on former law see generally Moss v. State, 275 Ga. 96, 107, n.54, 561 S.E.2d 382 (2002), *reconsideration denied*. See also Ronald L. Carlson, Trial Handbook for Georgia Lawyers, §§ 12:5, 16:11, Thomson West Publishing (2003; 2007 Supplement). See also generally, Ronald L. Carlson and Michael S. Carlson, "Confronting the Accused with His Past Convictions," Carlsons' Corner (a publication of the Georgia Prosecuting Attorneys' Council), The Georgia Prosecutor, Spring 2004 (published prior to 2005 Georgia Legislative Enactments).

⁹ O.C.G.A. § 24-9-84.

¹⁰ O.C.G.A. § 24-9-84.

¹¹ Harper v. State, 157 Ga. App. 480, 482, 278 S.E. 2d 28 (1981) *compare* Martinez v. State, 189 Ga. App. 69, 70-2, 375 S.E.2d 123 (1988).

¹² See generally Stinson v. State, 256 Ga. App. 902, 903-4, 569 S.E.2d 858 (2002), *cert denied*.

¹³ Gilbert v. State, 265 Ga. App. 76, 78, 593 S.E.2d 25 (2003).

¹⁴ Riggins v. State, 279 Ga. 407, 408-9, 614 S.E.2d 70 (2005).

¹⁵ The authors acknowledge that, in some other contexts, prior specific bad acts are admissible. One of the most notable includes rebutting a false impression left in testimony or argument, including the criminal defendant's. See O.C.G.A. § 24-9-82; Roebuck v. State, 277 Ga. 200, 205, 586 S.E.2d 651 (2003); Jones v. State, 270 Ga. App. 233, 237-

8, 606 S.E.2d 288 (2004). As this work pertains to impeachment of the testifying witness as to his or her truthfulness, those areas are not within the scope of this piece. For a survey concerning permissible areas of cross-examination under Georgia law, *please see* Ronald L. Carlson, Trial Handbook for Georgia Lawyers, Chapters 12 and 16, Thomson West Publishing (2003; 2007 Supplement). See also Ronald L. Carlson and Michael S. Carlson, "Confronting the Accused with His Past Convictions," Carlsons' Corner (a publication of the Georgia Prosecuting Attorneys' Council), The Georgia Prosecutor, Spring 2004 (published prior to 2005 Georgia Legislative Enactments).

¹⁶ Smith v. State, 259 Ga. 135, 137, 377 S.E. 2d 158 (1989), *U.S. cert. denied*.

¹⁷ O.C.G.A. § 24-2-3.

¹⁸ Smith v. State, 259 Ga. at 137.

¹⁹ Smith v. State, 259 Ga. at 137.

²⁰ Smith v. State, 259 Ga. at 137-8.

²¹ Kelley v. State, 233 Ga. App. 244, 251, 503 S.E.2d 881 (1998), *cert. denied*.

²² Eley v. State, 266 Ga. App. 45, 47, 596 S.E.2d 660 (2004).

²³ Menard v. State, 281 Ga. App. 698, 701, 637 S.E.2d 105 (2006).

²⁴ Benton v. State, 265 Ga. 648, 649-50, 461 S.E.2d 202 (1995).

²⁵ Postell v. State, 261 Ga. 842, 843, 412 S.E. 2d 831 (1992).

²⁶ Johns v. State, 253 Ga. App. 207, 209, 558 S.E. 2d 426 (2001), *cert. denied*.

²⁷ Frazier v. State, 278 Ga. App. 685, 689-90, 629 S.E. 2d 568 (2006), *overruled in part on other grounds at* Schofield v. Holsey, 2007 Ga. LEXIS 182 (2007).

²⁸ Duncan v. State, 232 Ga. App. 157, 162, 500 S.E.2d 603 (1998), *reconsideration denied*.

²⁹ Callahan v. State, 256 Ga. App. 482, 486, 568 S.E.2d 780 (2002), *cert. denied*.

³⁰ Long v. State, 241 Ga. App. 370, 372, 526 S.E. 2d 875 (1999).

³¹ Shelnutt v. State, 255 Ga. App. 157, 160, 564 S.E.2d 774 (2002).

³² Goldstein v. State, 283 Ga. App. 1, 640 S.E.2d 599 (2006).

³³ Goldstein v. State, 283 Ga. App. at 4-6.

³⁴ Wand v. State, 230 Ga. App. 460, 496 S.E. 2d 771 (1998).

³⁵ Wand v. State, 230 Ga. App. at 461-3.

³⁶ Wand, 230 Ga. App. at 466.

³⁷ Wand, 230 Ga. App. at 466.

³⁸ In the Interest of M.G., 239 Ga. App. 787, 790, 521 S.E. 2d 918 (1999).

³⁹ Goldstein v. State, 283 Ga. App. at 5-6.

⁴⁰ See generally Frankmann v. State, 281 Ga. App. 1, 2, 635 S.E.2d 272 (2006).

⁴¹ Lane v. State, 223 Ga. App. 740, 743, 479 S.E. 2d 350 (1996), *cert. denied*. The court in *Lane* places some emphasis upon the lack of evidence that the mother was not the reporting witness in reaching its conclusion.

⁴² Because the *Wand* case contains a special concurrence, the *Goldstein* court classified it as representing “physical precedent only,” presumably pursuant to Court of Appeals Rule 33 (a). See generally Ghrist v. Fricks, 219 Ga. App. 415, 420, 465 S. E. 2d 501 (1995), *cert. denied*. This, however, does not alter the fact that two of the three Court of Appeals judges considering *Wand*, did not engage in the special concurrence’s conjecture about *Smith*. In fact, the lead opinion unshakingly determines that *Smith* should not be expanded to allow impeachment of the victim’s mother concerning her credibility with questions arising matters not factually related to the incident at bar. The first concurrence (unlike the special concurrence) does not call the lead opinion or *Smith* into question on this issue.

⁴³ Joseph Heller was the author of the 1961 novel, Catch 22.

⁴⁴ Stinchcomb v. State, 280 Ga. 170, 173, 626 S.E. 2d 88 (2006).

⁴⁵ Redwine v. State, 280 Ga. 58, 62, 623 S.E.2d 485 (2005).

⁴⁶ As applicable definitions for the term “Catch 22,” Merriam-Webster Online (dictionary) provides: “a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule;” and “a situation presenting two equally undesirable alternatives.”

⁴⁷ See American College of Trial Lawyers Standard 18 (g) (“A lawyer should not attempt to get before the jury evidence which is improper.”); American College of Trial Lawyers Standard 14 (e) (“A lawyer should never...ask any question intended not legitimately to impeach...the witness.”); American Bar Association Project on Criminal Justice, Standards for the Prosecution and the Defense Function, (1970) § 7.6, p. 271 (commentary) (“The right of cross-examination is...not to bring out unhappy or discreditable things there may have been in the witnesses’ past unless they have a clear and direct bearing on the witness’ credibility in the instant case.”) (quoting “an eminent British barrister”).

⁴⁸ Goldstein v. State, 283 Ga. App. at 6. However, this assertion is not factually supported in the *Goldstein* opinion, as nowhere does the *Goldstein* court point to any empirical data establishing a connection between a mother’s prior allegations and a victim’s complaints.

⁴⁹ Am. Coll. Tr. L. Code of Trial Conduct § 18 (g).

⁵⁰ Am. Coll. Tr. L., Ann. Code of Trial Conduct § 18.17 (2005).

⁵¹ Model Code EC 7-25.

⁵² Georgia Rule of Professional Conduct 3.3.

⁵³ Where no criminal conviction is involved, general impeachment via prior bad act evidence has been the subject of several cases under Federal Rule of Evidence 608(b). Some courts allow cross-examination, others do not. Strictly forbidden is extrinsic evidence of prior bad acts. See

U.S. v. Castro, 89 F.3d 1443, 1457-8 (11th Cir. 1996), *U.S. cert. denied* (“Specific instances of prior bad acts may not be admitted through extrinsic evidence to attack a witness’s credibility.”). Additionally, federal opinions have upheld the preclusion of impeachment via purported prior acts of dishonesty. U.S. v. Tail, 459 F.3d 854, 860-1 (8th Cir. 2006) (“Admission of this evidence would have triggered mini-trials concerning allegations unrelated to [the defendant’s] case, and thus increased the danger of jury confusion and speculation.”); Ellsworth v. Warden, 333 F. 3d 1, 8 (1st Cir. 2003), *en banc* (“In this instance, a lie about toy stealing or peeping at a different time and location from the alleged sexual abuse...is classic “collateral” evidence regularly excluded in federal criminal trials.”). This has included cases involving prior false allegations of sexual misconduct. United States v. Bartlett, 856 F.2d 1071, 1087-9 (8th Cir. 1988) (“[W]e find that the evidence of the alleged prior false accusation of rape was offered solely to attack the general credibility of [the victim]. In addition, we agree with the district court that its probity in that regard is very weak. Accordingly, we hold that the district court properly refused to admit the evidence.”); Hughes v. Raines, 641 F.2d 790, 792-3 (9th Cir. 1981) (“The inference the jury would be asked to draw is that because the complaining witness made a false accusation of attempted rape on a prior occasion, her accusation in this case was false. Our rules of evidence reflect a general reluctance to draw an inference that because a person may have acted wrongfully on one occasion, he or she also acted wrongfully on the occasion at issue.”).

⁵⁴ United States v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998) (“As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused’s right to present a defense so long as they are not ‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’”).

⁵⁵ Significantly, the state of Arkansas’ “rape shield” statute contains a broad prohibition against the introduction of a victim’s prior allegations of sexual conduct against the defendant or others. A.C.A. § 16-42-101.

⁵⁶ In specific instances, some federal courts have deemed that the issue of impeachment of *victims* by use of prior false allegations rises to Sixth Amendment levels. This appears to be in very limited contexts, akin to *Smith*, and generally with the additional element of the prior false allegation being indicative of motive or bias on the victim’s part. White v. Coplan, 399 F. 3d 18, 24-7 (1st Cir. 2005) (restricting its ruling to an “extreme case” with “peculiar facts”); Redmond v. Kingston 240 F. 3d 590, 591-3 (7th Cir. 2001) (evidence of a prior “wild goose chase for a rapist merely to get her mother’s attention” demonstrated “a motive for what would otherwise be an unusual fabrication.”); Kittleson v. Dretke, 426 F. 3d 306, 321-3 (5th Cir. 2005) (prior false allegation demonstrating motive or bias).

⁵⁷ SEC v. Chenery Corp., 332 U.S. 194, 214, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947), *Jackson, J. dissenting*.

⁵⁸ Graglia, Lino A., “The Myth of a Conservative Supreme Court: The October 2000 Term,” 26 *Harv. J.L. & Pub. Pol’y* 281, 282 (2003) (“In the constitutional context...[judicial activism] can most usefully be defined as judges disallowing as unconstitutional policy choices made in the ordinary political process that the Constitution does not clearly disallow...Rulings upholding constitutionality demonstrate not activism, but restraint, a willingness to permit the policy choices made in the political process to prevail.”).

⁵⁹ Johnson, Hon. Denise R., “Prior False Allegations of Rape: Falsus in Uno, Falsus in Omnibus?,” 7 *Yale J.L. & Feminism* 243, 265 (1995) (“Although the prosecution of rape has been subject to special rules that have set it apart from other crimes like burglary or robbery, there is nothing about the crime itself that elevates the value of evidence of the victim’s propensity to make false accusations.”).

⁶⁰ Quinn v. Haynes, 234 F.3d 837, 851, n.13 (4th Cir. 2000), *U.S. cert. denied* (“We note that several courts and commentators have stated that other allegations of sexual assault, regardless of their falsity, are not particularly relevant to impeach a witness’s credibility and, therefore, have concluded that the Confrontation Clause never demands the introduction of such allegations. [cits]”).

⁶¹ Boggs v. Collins, 226 F.3d 728, 735-40 (6th Cir. 2000), *U.S. cert. denied* (“[T]he Constitution does not require that a defendant be given the opportunity to wage a general attack on credibility by pointing to individual instances of past conduct...[the] argument that credibility is crucial to this case, and that therefore any evidence bearing on that credibility must be allowed in, simply does not reflect Sixth Amendment caselaw...the Sixth Amendment only compels cross-examination if that examination aims to reveal the motive, bias or prejudice of a witness/accuser.”).

⁶² The authors appreciate the opportunity afforded by this publication to lay out the law in an important sector, then air their views regarding potential reforms. They did this recently in the *Carlsons’ Corner* article on impeachment by silence, exploring the law when a suspect remains silent in the face of an accusation. The authors similarly approached Georgia’s procedural laws pertaining to final argument in an earlier *Carlsons’ Corner* article.