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Notes

The Girl Who Cried Wolf: Missouri's New Approach to Evidence of Prior False Allegations

*State v. Long*¹

I. INTRODUCTION

After a trial by jury, Jeffrey D. Long was convicted of forcibly raping and sodomizing Debbie Flower.² The Missouri Supreme Court reversed the conviction because the exclusion of evidence that Flower had falsely accused another person of making threats and assaulting her deprived Long of a full opportunity to present his defense.³

Previously, Missouri's rules of evidence dictated that, although a witness could be cross-examined about having made false allegations against persons other than the defendant, extrinsic evidence of such conduct was not admissible.⁴ The Missouri Supreme Court changed that rule by a 4-3 decision in *State v. Long*.⁵ Now, in some cases, a criminal defendant in Missouri can admit evidence to show that the prosecuting witness knowingly made prior false allegations.⁶

Many jurisdictions have considered this issue and have developed varying approaches for admitting evidence of prior false allegations. The dissent in *Long* argued that the majority's approach is overly broad and noted that Missouri's approach is broad compared to other states.⁷

The majority was justified in changing the rule to allow the admission of such evidence. However, the new rule will undoubtedly cause confusion and delay in trials, and it would be much improved if trial courts had more specific substantive and procedural guidance for its implementation.

1. *State v. Long*, 140 S.W.3d 27 (Mo. 2004) (en banc).

2. *Id.* at 29, 32.

3. *Id.* at 32.

4. *Id.* at 30.

5. *Id.* at 31.

6. *Id.*

7. *Id.* at 33-35 (Limbaugh, J., dissenting).

II. FACTS AND HOLDING

The State's evidence as to the events underlying *State v. Long* is as follows: On April 20, 2001, Chris Manning invited Debbie Flower to a "party."⁸ Flower rode with Manning and Jeffrey Long to a liquor store, where they purchased vodka, and then to Long's apartment.⁹ Once at the apartment, all three began drinking.¹⁰ Flower testified at trial that she only had "a little bit" of vodka because she was taking prescription psychoactive drugs at the time.¹¹ Flower attempted to leave later that evening after Long began playing a pornographic videotape on the television.¹² When she attempted to leave, Long attacked her.¹³ Long threw Flower on the floor, removed nearly all of her clothing, and proceeded to anally penetrate her.¹⁴ Flower attempted to resist but was unsuccessful.¹⁵ Next, Long attempted to have oral sex with Flower at which point she tried to bite his penis.¹⁶ In response, Long struck Flower and knocked her unconscious.¹⁷ When she regained consciousness, both Long and Manning continued to sodomize her.¹⁸

Eventually, Long and Manning finished assaulting Flower and threw her and her clothes out of the apartment into the hallway.¹⁹ She remained there until the next morning because she was afraid and in pain.²⁰ In the morning, she walked to a nearby grocery store where a security guard called a taxi for her.²¹ She then went home and bathed.²²

Flower went to the hospital two days after the attack because she was still bleeding from her rectum and was severely beaten over her entire body.²³ The bruises on her arms, legs, head, shoulders, jaw and fingers were consistent with being held down by her assailants as she described.²⁴ She had abra-

8. *State v. Long*, No. WD 61050, 2003 WL 21738867, at *1 (Mo. Ct. App. July 29, 2003).

9. *Id.*

10. *Long*, 140 S.W.3d at 29.

11. *Long*, 2003 WL 21738867, at *1.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *State v. Long*, 140 S.W.3d 27, 35 (Mo. 2004) (en banc) (Limbaugh, J., dissenting).

24. *Id.* at 36 (Limbaugh, J., dissenting).

sions to her labia and inflammation to her vaginal area.²⁵ The examination of her rectum revealed extensive bruising, swelling and abrasions inside and around the rectum.²⁶ Flower was in so much pain from the injuries to her rectum that she “could barely sit down.”²⁷

A few days after the attack she reported the incident to the police.²⁸ Though Flower’s medical examination revealed substantial physical evidence that she had been assaulted, a police search of Long’s apartment recovered no evidence indicating that the assault had taken place there.²⁹

At trial, Long admitted to consensual sexual activity with Flower but claimed that Flower purposefully caused the injuries in order to make her accusations of rape more believable, and that he was not surprised she “had bruises or a bump on her head . . . she was so violent and hysterical.”³⁰ To bolster his claim and rebut Flower’s allegations, Long sought to introduce the testimony of three witnesses regarding prior false accusations made by Flower.³¹ The witnesses testified outside the presence of the jury “via offers of proof.”³²

The first witness, Timothy Wilson, testified that Flower falsely accused him of hitting her on the head with a rock.³³ He also testified that on a separate occasion Flower told police “he had threatened her with harm,” which was also false.³⁴

The second offer of proof was from a police detective, Officer Cummings.³⁵ The detective testified that Flower told Cummings that Wilson had threatened Flower with harm but that Flower later called the detective and said that Wilson was not the man who threatened her.³⁶

The third witness, Sharrie Clark, the neighborhood property manager, testified that Flower called her and accused Wilson of sexually assaulting her by luring her from her home while he was dressed as a security guard.³⁷ Clark testified that Flower called two weeks later and recanted her story.³⁸

25. *Id.* (Limbaugh, J., dissenting).

26. *Id.* (Limbaugh, J., dissenting).

27. *Id.* (Limbaugh, J., dissenting).

28. *Id.* at 29.

29. *Id.*

30. *Id.* at 35 (Limbaugh, J., dissenting); *State v. Long*, No. WD 61050, 2003 WL 21738867, at *10 (Mo. Ct. App. July 29, 2003).

31. *Long*, 140 S.W.3d at 29-30.

32. *Id.* at 29.

33. *Id.*

34. *Id.*

35. *Id.* at 30; *Long*, No. WD 61050, 2003 WL 21738867, at *6.

36. *Long*, 140 S.W.3d at 30.

37. *Id.*

38. *Id.*

The trial court excluded each of these offers of proof from evidence, explaining that the testimony “was irrelevant and not proper character evidence.”³⁹ Long’s attorney did not cross-examine Flower regarding these alleged prior false allegations.⁴⁰ Though the trial court excluded evidence about Flower’s specific acts of misconduct, Long introduced “testimony that [Flower’s] reputation for truth and veracity was very poor, and defense counsel’s focus on closing argument was the victim’s inconsistent stories and behaviors.”⁴¹ Long was convicted of one count of forcible rape and one count of forcible sodomy.⁴²

Long appealed his conviction to the Western District of the Missouri Court of Appeals.⁴³ In one of his seven points of appeal,⁴⁴ Long argued that the trial court should have allowed him to admit the three witness’s testimony to show that Flower had accused another man of sexually assaulting her, physically assaulting her, and threatening her on three different occasions.⁴⁵ Long contended that the trial court abused its discretion when it excluded this evidence.⁴⁶ The appellate court disagreed, finding that Long’s claims fell “squarely within” its prior holdings that “a complaining witness in a sex offense [case] may be impeached by evidence that her general reputation for truth or veracity is bad, but not by acts of specific conduct.”⁴⁷ Thus, the appellate court found that “[t]he trial court did not abuse its discretion in excluding the testimony of Wilson, Clark, and Cummings regarding the alleged prior false claims of rape.”⁴⁸

Long appealed to the Missouri Supreme Court.⁴⁹ Once again, Long argued that the trial court abused its discretion when it excluded the three witness’s testimony, because their testimony was key to his defense that

39. *Id.*

40. *Id.*

41. *Id.* at 35 (Limbaugh, J., dissenting).

42. *Id.* at 29.

43. *State v. Long*, No. WD 61050, 2003 WL 21738867, at *1 (Mo. Ct. App. July 29, 2003).

44. *Id.* at *2. Of the seven points Long contended on appeal in the appellate court, only one is relevant. Each of the other six points of appeal was denied by the appellate court, and, as they are not relevant to the prior false accusation issue, they are beyond the scope of this Note. *See id.* at *2-12.

45. *Id.* at *6.

46. *Id.*

47. *Id.* at *7. The appellate court was referring to the use of reputation witnesses to impeach the witness’s character; *see* ROGER C. PARK ET AL., *EVIDENCE LAW: A STUDENT’S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS* 442-43 (1998). These reputation witnesses are limited to the general reputation of the complaining witness in the community; they are not allowed to discuss specific acts of conduct by the complaining witness. *Id.*

48. *Long*, 2003 WL 21738867 at *7.

49. *Id.* at *1.

Flower's accusation against him was false.⁵⁰ The state argued that "the proffered testimony was inadmissible as an improper attempt to prove the victim's untruthfulness with extrinsic evidence of specific acts of misconduct."⁵¹

In its analysis, the court discussed the then-current rule in Missouri regarding prior false allegations.⁵² Previously, Missouri treated prior false allegations the same way as other acts of misconduct related to credibility: a party could attack the credibility of a witness by cross-examining the witness as to specific acts of misconduct relating to credibility, but the party could not admit extrinsic evidence of the acts of misconduct.⁵³ After a party asked the witness about prior false allegations during cross-examination, the party was held to the answer given by the witness, and could not bring other evidence to contradict the witness's denial or explanation.⁵⁴ The court noted that while the purpose of this rule was to avoid "mini-trials on collateral issues," in some cases the "rule excluding extrinsic evidence of *prior false allegations* fails to serve this purpose by shielding the fact-finder not from collateral issues, but from a central issue in [a] case."⁵⁵ When the credibility of a witness is a crucial item in controversy, the rule against admission of extrinsic evidence must yield to the defendant's constitutional right to present a full defense.⁵⁶

The court found that the then-current Missouri rule prohibiting extrinsic evidence of prior false allegations did not strike the appropriate balance between the defendant's right to present a full defense and the policy of avoiding mini-trials on collateral issues.⁵⁷ Therefore, the court held that "a criminal defendant in Missouri may, in some cases, introduce extrinsic evidence of prior false allegations."⁵⁸ The court expressly did not limit the new rule to sexual assault or rape cases.⁵⁹

50. *State v. Long*, 140 S.W.3d 27, 30 (Mo. 2004) (en banc). Long asserted other points on appeals, but the Supreme Court expressly did not consider them because it granted a new trial based on the point considered. *Id.* at n.2.

51. *Id.* at 30.

52. *See id.* at 30-31.

53. *Id.* at 30.

54. *Id.* (citing *Rousan v. State*, 48 S.W.3d 576, 590 (Mo. 2001) (en banc)).

55. *Id.* (emphasis added).

56. *Id.* at 30-31 (citing MO. CONST. art. 1, § 18(a)). Article I, Section 18(a) of the Missouri Constitution states:

That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county.

57. *Long*, 140 S.W.3d at 31.

58. *Id.*

59. *Id.*

In order for extrinsic evidence of prior false allegations to be admissible, there must be a “showing of legal relevance in which the trial court must balance the probative value of the knowingly made prior false allegation with the potential prejudice.”⁶⁰ As a foundational requirement for admissibility, the defendant must establish by a preponderance of the evidence that the “prosecuting witness previously made *knowingly false* allegations.”⁶¹ The court held, based on the newly adopted standard of admissibility, that the exclusion of the evidence of prior false allegations was prejudicial to Long and, thus, reversed the verdict and remanded the case for a new trial.⁶²

III. LEGAL BACKGROUND

A. The General Rule

Impeachment is “the process of adducing evidence for the purpose of impairing or destroying a witness’s credibility or rendering questionable the truth of his or her particular testimony.”⁶³ There are five principle methods of impeachment: “(1) bias or interest, (2) sensory or mental defects, (3) character for untruthfulness, which includes impeachment by reputation, opinion, prior convictions, and *prior untruthful acts*, (4) specific contradiction, and (5) prior inconsistent statements (self-contradiction).”⁶⁴

The method of impeachment involved in *State v. Long* is character for untruthfulness or, more specifically, prior untruthful acts. Long attempted to convince the jury that Flower was lying by impeaching Flower’s character for untruthfulness through evidence of prior untruthful acts. The impeaching evidence of prior untruthful acts that Long sought to introduce was the testimony from the three witnesses regarding Flower’s prior false allegations.

“Depending on the method, impeaching evidence may be elicited on cross-examination or through other witnesses, which is known as *extrinsic evidence*.”⁶⁵ The evidence Long sought to introduce was extrinsic evidence because it was through other witnesses. A party may use extrinsic evidence to impeach a witness only if the method of impeachment is not *collateral*.⁶⁶ “Collateral” describes a situation in which “the fact in dispute is of no material significance in the case or is not pertinent to the issues as developed.”⁶⁷ The collateral/non-collateral distinction is a conclusory label and “[i]t would

60. *Id.*

61. *Id.* at 32 (emphasis added).

62. *Id.*

63. John C. O’Brien, *Missouri Law of Evidence* § 5-1 (3d ed. 1996).

64. PAUL C. Giannelli, *Understanding Evidence*, § 22.01(B) (2003) (emphasis added).

65. *Id.* § 22.01(C).

66. *Id.*

67. *State v. Williams*, 849 S.W.2d 575, 578 (Mo. Ct. App. 1993).

be better to avoid the word collateral and ask if extrinsic evidence is allowed.”⁶⁸

Some methods of impeachment, such as bias and sensory defects, are not considered collateral, so extrinsic evidence is allowed.⁶⁹ In a murder trial, for example, if an eye-witness testifies that she saw the defendant kill the victim, the defendant can call another witness to testify that the eye-witness’s vision is poor, and that she would not be able to see what she claims. The defendant is not limited to asking the eye-witness about her vision on cross-examination.

Other methods of impeachment, such as evidence of prior untruthful acts not resulting in conviction are considered collateral and may not be proved by extrinsic evidence.⁷⁰ For example, if a witness lied about his educational background on his resume, the lie is a prior untruthful act, and whether the party lied on his resume is a collateral issue. If the court permits,⁷¹ the party may ask the witness on cross-examination whether he lied on his resume, but the party is must “take the witness answer” if the witness denies that the resume was untruthful.⁷² The party may not call witnesses or

68. GIANNELLI, *supra* note 64, § 22.01(C).

69. *See* PARK, *supra* note 47, at 432-33. For example, extrinsic evidence may be used to show that the witness is biased or prejudiced against a party, or that a witness was impaired at the time he observed an event. *Id.*

70. GIANNELLI, *supra* note 64, § 22.01(C); *see* State v. Raines, 118 S.W.3d 205, 212 (Mo. Ct. App. 2003).

71. At English common law, counsel had the ability to conduct practically limitless inquiry during cross-examination into all of a witness’s associations and personal history, including specific instances of misconduct, in order to impeach a witness. KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 41 (John W. Strong ed., 5th ed West 1999); *see also* 3A WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 986 (James E. Chadbourne rev., 1970). The current approach taken by jurisdictions in this country is to limit cross-examination impeachment of character to acts which have a significant relation to the witness’s credibility. BROUN, *supra*. This is consistent with the approach taken by the Federal Rules of Evidence. FED. R. EVID. 608(b). This rule provides that:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’s character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness’s character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Id. For a listing of states that follow the federal rule of evidence, *see* State v. Guenther, 854 A.2d 308, 321 (N.J. 2004).

72. PARK, *supra* note 47, at 460; *see* BROUN, *supra* note 71, § 41.

73. Hoffman v. Graber, 153 S.W.2d 817, 820 (Mo. Ct. App. 1941) (*per curiam*).

admit college transcripts or other documents into evidence to prove that the witness lied about his educational background on his resume.

The main reason courts exclude extrinsic evidence of specific acts of misconduct is to prevent the confusion of issues and the waste of time that would occur if the court had to conduct a mini-trial on the merits of each collateral issue raised on cross-examination.⁷³ Another reason for the exclusion of extrinsic evidence of prior acts of misconduct is based on the notion that, when testifying in a trial, a witness cannot be expected to be prepared to disprove every alleged act of his life.⁷⁴

However, when the prior untruthful act is a prior false allegation, and the entire case turns on whether a particular witness is to be believed, the rule prohibiting extrinsic evidence of prior false allegations should be relaxed (i.e. the evidence impeaching the credibility of the witness should not be considered "collateral").⁷⁵ Some courts have found the credibility of the complaining witness is especially probative in sexual assault cases.⁷⁶

B. Approaches to Extrinsic Evidence of Prior False Allegations

Courts across the country have considered the extent to which a defendant may impeach the credibility of the prosecuting witness by showing that the witness made a prior false accusation.⁷⁷ When it comes to the admissibility of extrinsic evidence of prior false allegations to impeach a witness, courts differ on whether to have an exception to the general bar on admissibility, the basis for the exception, the circumstances under which the courts will consider applying the exception, and the foundational requirements of admissibility. Other issues frequently arise in these cases as well.

First, not all courts have an exception to the rule against admitting extrinsic evidence of prior false allegations. Some courts do not treat evidence of prior false allegations differently than evidence of other prior untruthful acts. That is, they allow inquiry about prior false accusations on cross-examination for the purpose of impeachment, but still do not admit extrinsic

74. 3A WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 979 (James E. Chadbourne rev., 1970).

75. See *Commonwealth v. Bohannon*, 378 N.E.2d 987, 991 (Mass. 1978).

76. *Miller v. State*, 779 P.2d 87, 89 (Nev. 1989); see *State v. Chamley*, 568 N.W.2d 607, 615 (S.D. 1997) ("credibility of the [complaining] witness[] is of paramount importance"); *Clinebell v. Commonwealth*, 368 S.E.2d 263, 265 (Va. 1988) ("In sex offense cases . . . the weight of authority recognizes more liberal rules concerning impeachment of complaining witnesses.") But see *Lopez v. State*, 18 S.W.3d 220, 224 (Tex. Crim. App. 2000), *rev'd*, 86 S.W.3d 228 (Tex. Crim. App. 2002) ("Credibility of the witnesses is no more important in sex offenses than in any other case.").

77. *State v. Guenther*, 854 A.2d 308, 320-21 (N.J. 2004).

evidence of the allegations to impeach character for untruthfulness.⁷⁸ This was Missouri's approach prior to *State v. Long*.⁷⁹ Many courts, however, have created an exception to the general rule that extrinsic evidence of false accusations may not be used to impeach character for truthfulness.⁸⁰

Second, where an exception exists, courts differ in their bases for creating the exception. Some courts have carved an exception out of their rules of evidence.⁸¹ Other courts have found that under some circumstances, the Confrontation Clause of the United States Constitution or a provision in their state's constitution requires a criminal defendant be allowed to use this kind of impeachment, despite the prohibition against such evidence in their rules of evidence or common law.⁸²

78. *Id.* at 321-22 (stating that Maine, Maryland, New Mexico, Ohio, Tennessee, Vermont, and Wisconsin disallow extrinsic evidence but follow the federal rule, while Massachusetts and Oregon follow a "common law rule" that bars impeachment through cross examination as to specific acts of conduct, but allows an exception for prior false allegations, while still not allowing extrinsic evidence for the impeachment).

79. *See State v. Long*, 140 S.W.3d 27, 30 (Mo. 2004) (en banc); *State v. Williams*, 492 S.W.2d 1, 4 (Mo. Ct. App. 1973); *Rousan v. State*, 48 S.W.3d 576, 590 (Mo. 2001) (en banc).

80. *Guenther*, 854 A.2d at 320-21.

81. *See, e.g., People v. Hurlburt*, 333 P.2d 82, 84-85, 87-88 (Cal. Dist. Ct. App. 1959); *State v. Anderson*, 686 P.2d 193, 199 (Mont. 1984); *Miller*, 779 P.2d at 89-90; *State v. Gordon*, 770 A.2d 702, 705 (N.H. 2001); *Guenther*, 854 A.2d at 320. But see *Lopez*, 18 S.W.3d at 225 (declining to create a "per se exception" to Rule 608(b) for prior false accusations).

82. *See, e.g., State v. Walton*, 715 N.E.2d 824, 827 (Ind. 1999) ("the evidentiary rule preventing evidence of specific acts of untruthfulness must yield to the defendant's Sixth Amendment right of confrontation and right to present a full defense"); *State v. Baker*, 679 N.W.2d 7, 12 (Iowa 2004) (potential embarrassment about previous sexual experience is outweighed by probative value of clearly relevant evidence, especially when the "countervailing right of a defendant to present a defense to a criminal charge is at stake"); *Commonwealth v. Bohannon*, 378 N.E.2d 987, 990-91 (Mass. 1978); *State v. Caswell*, 320 N.W.2d 417, 419 (Minn. 1982); *Clinebell v. Commonwealth*, 368 S.E.2d 263, 266 (Va. 1988) ("Cross-examination is an absolute right guaranteed to a defendant by the confrontation clause of the Sixth Amendment . . . [c]onsequently, in a sex crime case, the complaining witness may be cross-examined about prior false accusations").

83. *See, e.g., Morgan v. State*, 54 P.3d 332, 333 (Alaska Ct. App. 2002); *Walton*, 715 N.E.2d at 827; *State v. Barber*, 766 P.2d 1288, 1290 (Kan. Ct. App. 1978) (per curiam); *Miller*, 779 P.2d at 90; *Clinebell*, 368 S.E.2d at 266.

84. *See People v. Mascarenas*, 21 Cal. App. 3d 660, 669 (Cal. Ct. App. 1971) (In a criminal prosecution of furnishing narcotics to a minor, evidence that the minor desired to be a narcotics agent and had falsely accused another of selling drugs to him was analogous to sexual misconduct cases and, thus, required the admissibility of the evidence); *State v. Izzi*, 348 A.2d 371, 372-73 (R.I. 1975) (In a criminal prosecution for assault and battery, the trial court abused its discretion in excluding evidence that

Third, just as the bases for creating an exception vary among jurisdictions, the circumstances under which courts will consider using the exception vary as well. Some courts will only consider admitting extrinsic evidence of prior false allegations in cases where the defendant is charged with *sexual misconduct*,⁸³ while other courts have applied the exception in cases involving other types of crimes.⁸⁴ Also, while the exception is generally understood to apply only to prior false accusations made by the complaining witness, at least one court takes this further and will only consider applying an exception if the credibility of the complaining witness is the central issue in the case.⁸⁵

In addition to or instead of absolute requirements, some courts have provided trial courts with factors to consider in determining whether the circumstances make the applicability of an exception appropriate. Many courts include the similarity of the charged offense to the prior accusation as a factor.⁸⁶ Other factors may include the proximity in time of the prior accusation and the current accusation, the logical relevance of the specific extrinsic evidence to the guilt or acquittal of the defendant, and the dangers of unfair prejudice, confusion of the issues, and delay.⁸⁷

Fourth, there are foundational requirements for the admission of extrinsic evidence for some methods of impeachment.⁸⁸ Generally, as a prerequisite to admitting extrinsic evidence through witnesses other than the defendant, the cross-examiner must first question the witness about the prior accusa-

the complaining witness had accused attendants in a mental hospital where he was a patient of causing him injuries which were in fact self-inflicted); *see also Guenther*, 854 A.2d at 323 (“We see no reason why prior false accusation evidence should be limited to cases in which the witness is the victim of a sexual crime.”)

85. *See Guenther*, 854 A.2d at 321-23, 324.

86. *See Morgan*, 54 P.3d at 333; *Walton*, 715 N.E.2d at 828 (citing *Stewart v. State*, 531 N.E.2d 1146, 1149 (Ind. 1988)); *People v. Mikula*, 269 N.W.2d 195, 198-99 (Mich. Ct. App. 1978) (per curiam); *State v. Mazurek*, 922 P.2d 474, 479 (Mont. 1996); *Anderson*, 686 P.2d at 200 (evidence of “similar sexual offenses”); *Gordon*, 770 A.2d at 705 (“probity and similarity”); *State v. Nab*, 421 P.2d 388, 390 (Or. 1966); *State v. Boiter*, 396 S.E.2d 364, 365 (S.C. 1990) (“the trial court shall consider the factual similarity between prior and present allegations to determine relevancy”); *Lopez*, 18 S.W.3d at 226.

87. *See, e.g., Guenther*, 854 A.2d at 324; *Bryant v. State*, 1999 WL 507300, at *2 (Del. June 2, 1999) (listing factors to consider as “(1) whether the testimony of the witness being impeached is crucial; (2) the logical relevance of the specific impeachment evidence to the question at bar; (3) the danger of unfair prejudice, confusion of issues, and undue delay; and (4) whether the evidence is cumulative”).

88. *Giannelli*, *supra* note 64, § 22.01(C).

tion.⁸⁹ Some states also expressly require that the prosecuting witness first deny making the statement or deny that the statement was false before the extrinsic evidence may be admitted.⁹⁰

The inquiry during cross-examination is not the only foundational requirement. In addition, the defendant normally must show at least that (1) the prior accusation was factually untrue and (2) that the complaining witness knew it was factually untrue.⁹¹ The defendant usually establishes these foundational requirements in a hearing outside the presence of the jury.⁹²

The defendant's foundational burden of proof varies across jurisdictions.⁹³ Some states require that the defendant show the knowing falsity of the prior accusations by clear and convincing evidence.⁹⁴ Similarly, some states require that the prior allegations be "demonstrably false."⁹⁵ Some states fol-

89. *Id.*

90. *See, e.g.,* State v. Barber, 766 P.2d 1288, 1290 (Kan. Ct. App. 1989); People v. Mikula, 269 N.W.2d 195, 198-199 (Mich. Ct. App. 1978) (per curiam).

91. *See* Booker v. State, 976 S.W.2d 918, 919-920 (Ark. 1998) (Evidence of prior police report for rape inadmissible to impeach prosecuting witness because defendant did not present any proof that the allegation was false); State v. Kelley, 643 A.2d 854, 857 (Conn. 1994); State v. Kringstad, 353 N.W.2d 302, 311 (N.D. 1984); *see* Roundtree v. United States, 581 A.2d 315, 325 n.25 (D.C. 1990) (citing cases in which the testimony has been excluded because the defendant did not sufficiently establish that the prior allegation was false).

92. *See, e.g.,* State v. Anderson, 686 P.2d 193, 200 (Mont. 1984).

93. *See* Morgan v. State, 54 P.3d 332, 336-39 (Alaska Ct. App. 2002) (discussing the foundational burdens of proof in different states).

94. *See* State v. Gordon, 770 A.2d 702, 705 (N.H. 2001).

95. State v. Schwartzmiller, 685 P.2d 830, 833 (Idaho 1984); State v. Walton, 715 N.E.2d 824, 828 (Ind. 1999); *Anderson*, 686 P.2d at 200 (citing Little v. State, 413 N.E.2d 639, 643 (Ind. Ct. App.)); State v. Chamley, 568 N.W.2d 607, 616 (S.D. 1997) (foundational burden is "demonstrably false"). Some courts consider "demonstrably false" and "clear and convincing" to be the same standard. *See* Gordon, 770 A.2d at 704 (citing State v. White, 765 A.2d 156 (N.H. 2001)) (defendant must show the prior allegations were demonstrably false, "which we interpret to mean clearly and convincingly untrue.").

low the more probable than not “preponderance of the evidence” standard.⁹⁶ Others have lesser standards, such as a “reasonable probability of falsity”⁹⁷ or “reasonably debatable.”⁹⁸

Finally, two other issues frequently arise in cases concerning the admissibility of extrinsic evidence of prior false allegations to impeach the complaining witness. First, impeachment is not the only grounds for admitting evidence of prior false allegations. In Missouri and elsewhere, evidence of prior false allegations has been admitted by courts for reasons other than impeachment of character for truthfulness, such as “to prove the accuser’s habit, state of mind, motive, or common scheme.”⁹⁹

The other common issue is the impact of rape shield laws on evidence of prior false allegations. Virtually all courts considering the issue have held that prior false allegations of sexual misconduct do not qualify as “prior sexual conduct” for rape shield statute purposes.¹⁰⁰ Statements about sexual activity involving the alleged victim that are *not* false, however, *are* evidence of the alleged victim’s sexual conduct, so some courts require a showing of falsity before the evidence falls outside the scope of the rape shield law.¹⁰¹

In *State v. Long*, the Missouri Supreme Court created an exception to the general rule that extrinsic evidence of false accusations may not be used to impeach character for truthfulness, stated the basis for the exception, pro-

96. *Morgan*, 54 P.3d at 339; *State v. West*, 24 P.3d 648, 656 (Haw. 2001); *State v. Mazurek*, 922 P.2d 474, 480 (Mont. 1996); *Miller v. State*, 779 P.2d 87, 90 (Nev. 1989).

97. *Smith v. State*, 377 S.E.2d 158, 160 (Ga. 1989); *Clinebell v. Commonwealth*, 368 S.E.2d 263, 266 (Va. 1988).

98. *See Bryant v. State*, 1999 WL 507300, at *3 (Del. June 2, 1999) (“Even where the evidence is inconclusive as to falsity, prior allegations of sexual assault may be admitted to challenge credibility.”).

99. *State v. Guenther*, 854 A.2d 308, 322 (listing cases where evidence of prior false allegations has been admitted on such grounds). As noted by the appellate court in *Long*, the Missouri Court of Appeals for the Eastern District allowed extrinsic evidence of prior accusations of sexual misconduct in two different cases to impeach the complaining witness’s testimony, but it did so on grounds of motive and bias, which are different types of impeachment outside the scope of this Note. *State v. Long*, No. WD 61050, 2003 WL 21738867, at *1 (Mo. Ct. App. July 29, 2003) (*citing State v. Montgomery*, 901 S.W.2d 955, 256-57 (Mo. Ct. App. 1995)); *State v. Lampley*, 859 S.W.2d 909, 911 (Mo. Ct. App. 1993)). *See also Phillips v. State*, 545 So. 2d 221, 223 (Ala. Crim. App. 1989) (state of mind).

100. *See, e.g., Booker v. State*, 976 S.W.2d 918, 919-20 (Ark. 1998); *People v. Grano*, 676 N.E.2d 248, 257 (Ill. Ct. App. 1996); *Walton*, 715 N.E.2d at 826-27; *State v. Baker*, 679 N.W.2d 7, 10 (Iowa 2004); *State v. Smith*, 743 So.2d 199, 202 (La. 1999); *State v. Boggs*, 588 N.E.2d 813, 817 (Ohio 1992).

101. *West*, 24 P.3d at 653-54; *State v. Quinn*, 490 S.E.2d 34, 39-40 (W. Va. 1997).

vided the circumstances under which it applies, identified the foundational requirements for admissibility, and also addressed other issues.

IV. THE INSTANT DECISION

A. *The Majority Opinion*

In *State v. Long*, the Missouri Supreme Court changed the law in Missouri regarding the admissibility of extrinsic evidence of prior false accusations of the prosecuting witness.¹⁰² The findings and holdings of the majority opinion, written by Judge Teitelman,¹⁰³ are as follows: The evidentiary rule rendering inadmissible evidence that is non-collateral and highly relevant must yield to the defendant's right to present a full defense under the Missouri Constitution.¹⁰⁴ Thus, "a criminal defendant in Missouri may, in some cases, introduce extrinsic evidence of prior false allegations."¹⁰⁵ This new rule is not limited to sexual assault cases, and the prior accusation need not necessarily be similar to the crime with which the defendant is charged.¹⁰⁶ Instead, the "fundamental requirement" of admissibility is "legal relevance," whereby the trial court weighs the probative value of the knowingly-made prior false allegation against the possible prejudice.¹⁰⁷ This analysis may include considering the similarity of the prior false allegation to the charged offense and when the witness made the prior false allegation, but trial courts "retain wide discretion" in determining the legal relevance of prior false allegations.¹⁰⁸ To lay the foundation to admit extrinsic evidence of prior false allegations, the defendant must establish that the prosecuting witness made a knowingly false prior allegation by the preponderance of the evidence.¹⁰⁹ In laying the foundation, the defendant may use "the full panoply of available evidence," including documents, witnesses and other such evidence.¹¹⁰

The court began its application of the facts to its newly established standard by addressing whether the evidence of prior accusations was relevant.¹¹¹

102. *State v. Long*, 140 S.W.3d 27, 31 (Mo. 2004) (en banc).

103. *Id.* at 29. Judges White, Wolff, and Stith concurred with the majority opinion. *Id.* at 33.

104. *Id.* at 31.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 31-32

109. *Id.* at 32.

110. *Id.*

111. *Id.*

Flower testified that Long assaulted her, and Long denied doing so.¹¹² The majority found that since no physical evidence linked Long to the assault, and no other witnesses testified that the assault occurred, the “key to Long’s conviction” was “the jury’s assessment of the relative credibility of Long and [Flower].”¹¹³ These factors enhanced the probative value of the evidence.¹¹⁴ Thus, the exclusion of the evidence prejudiced Long because “Long was deprived of a full opportunity to present his defense that the witness was fabricating the present allegations against him.”¹¹⁵

In a footnote, the court addressed the state’s argument that Long’s failure to cross-examine Flower about the prior false allegations barred him from introducing extrinsic evidence of them¹¹⁶ and acknowledged the dissent’s point that the defendant should normally first cross-examine the witness prior to introducing extrinsic evidence of prior false allegations.¹¹⁷ The court determined that Long’s failure to cross-examine Flower as to the prior false allegations did not bar Long from presenting the evidence because of the trial court’s findings that the proffered testimony was not relevant.¹¹⁸ As lack of relevance was one of the bases the trial court used to exclude the evidence, any attempt to cross-examine as to the prior false allegations would have been futile.¹¹⁹ The court stated that the defendant did not have to undertake a “useless act” in order to comply with a “technical requirement.”¹²⁰

The Court accordingly reversed the judgment and remanded the case for a new trial.¹²¹

B. The Dissent

Writing in dissent,¹²² Judge Limbaugh had three criticisms of the majority’s opinion. First, the majority’s approach to the admission of extrinsic evi-

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 32 n.7.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* (quoting *State v. Barnett*, 628 S.W.2d 917, 920 (Mo. Ct. App. 1982)).

121. *Id.* at 32.

122. Judge Benton concurred in the dissenting opinion of Judge Limbaugh. *Id.* at 33 (Limbaugh, J., dissenting). Judge Price dissented in a separate opinion. *Id.* at 36 (Price, J., dissenting). Judge Price agreed with the second and third rationales of Judge Limbaugh’s dissenting opinion, and stated that as those rationales were dispositive; “it [was] not necessary to address the appropriate circumstances in which prior false accusations may be used to impeach a witness.” *Id.* (Price, J., dissenting).

dence was overly broad, and a clearer, more narrow test was warranted.¹²³ Second, the majority ignored the “longstanding evidentiary rule that precludes the introduction of extrinsic evidence to impeach a witness . . . without first affording the witness the opportunity to affirm or deny the matter on cross examination.”¹²⁴ Finally, even if the evidence should have been admitted in this case, the “failure to do so was not prejudicial.”¹²⁵

First, Judge Limbaugh criticized “the majority’s expansive and unprecedented holding” under which there does not need to be similarity between the charged offense and the prior accusation in order for extrinsic evidence of the prior accusation to be admitted.¹²⁶ Judge Limbaugh took issue with the majority’s statement that in rape or sexual assault cases, “most states” require that the prior false accusation also involved rape or sexual assaults.¹²⁷ Judge Limbaugh asserted that this statement was inaccurate because “every state that has allowed extrinsic evidence of false allegations in sexual assault cases requires that the prior false allegation be the same or at least similar to the charged offense.”¹²⁸ Judge Limbaugh noted that the majority’s balancing approach is already achieved when the prior false allegation is the same or similar to the charged offense.¹²⁹ Requiring similarity provides a “bright line” test that Judge Limbaugh thought was easier to apply and not nearly as broad as the majority’s approach.¹³⁰

Second, Judge Limbaugh argued that the majority ignored an important procedural issue in its opinion.¹³¹ Judge Limbaugh felt that the majority ignored the “longstanding evidentiary rule” that required a witness first be given an opportunity on cross-examination to affirm or deny a matter before extrinsic evidence could be introduced to impeach her.¹³² The rule is meant to save time and judicial resources, and to prevent confusion.¹³³ Judge Limbaugh hypothesized that, in a case like this, if Long had cross-examined Flower as to whether she had made the false statements in the past, she may have admitted doing so, thereby “obviating the need for the introduction of extrinsic evidence and the attendant waste of time.”¹³⁴ Thus, Judge Limbaugh opined that the majority’s new rule that allows the admission of extrinsic evidence should not affect the requirement that the matter must first be

123. *Id.* at 33-34 (Limbaugh, J., dissenting).

124. *Id.* at 34 (Limbaugh, J., dissenting).

125. *Id.* at 35 (Limbaugh, J., dissenting).

126. *Id.* at 33 (Limbaugh, J., dissenting).

127. *Id.* (Limbaugh, J., dissenting).

128. *Id.* (Limbaugh, J., dissenting).

129. *Id.* at 34 (Limbaugh, J., dissenting).

130. *Id.* (Limbaugh, J., dissenting).

131. *Id.* (Limbaugh, J., dissenting).

132. *Id.* (Limbaugh, J., dissenting).

133. *Id.* (Limbaugh, J., dissenting).

134. *Id.* (Limbaugh, J., dissenting).

brought up on cross-examination before the evidence may be admitted.¹³⁵ In support of such a requirement, Judge Limbaugh noted that in other jurisdictions, “all [of the] appellate courts that have addressed the introduction of extrinsic evidence of a witness’s false allegations in sexual assault cases have done so only in the context of a foundational cross-examination.”¹³⁶

Finally, Judge Limbaugh contended that Long did not suffer prejudice by the exclusion of this evidence.¹³⁷ Long was able to introduce other testimony that Flower’s “reputation for truth and veracity was very poor.”¹³⁸ Judge Limbaugh also noted that Long’s attorney focused on Flower’s inconsistent stories and behavior during closing arguments.¹³⁹ The evidence that was excluded, the prior allegations, were dissimilar incidents with a different individual and were not nearly as serious as the crime with which Long was charged.¹⁴⁰ As such, evidence of the prior allegations would have added very little.¹⁴¹ Further, Judge Limbaugh believed that the majority mischaracterized this case as a “he said, she said” matter, because Flower suffered from serious injuries which were *consistent* with her account of Long’s attack.¹⁴² Rather, the injuries were *inconsistent* with Long’s testimony that the sexual activity was consensual and that Flower’s wounds were self inflicted.¹⁴³ Judge Limbaugh concluded that, due to the extensiveness and the severity of the injuries suffered by Flower, she would not have consented because no person would consent to such treatment.¹⁴⁴

V. COMMENT

The decision in *State v. Long* will effectively force trial courts to undergo a careful analysis to determine whether to admit extrinsic evidence of prior false allegations, whereas, prior to this case, the trial court could simply exclude such evidence. As *Long* expressly did not limit the new rule to crimes of sexual assault and gave no absolute requirements for admissibility, trial courts will most likely have to consider this issue frequently. Criminal defense attorneys will most likely seek to introduce extrinsic evidence of prior acts often under this new rule.

Despite the practical difficulties the new rule presents, the policy behind it is sound. In cases that turn on the credibility of a single witness, it would be

135. *Id.* (Limbaugh, J., dissenting).

136. *Id.* at 34-35 (Limbaugh, J., dissenting).

137. *Id.* at 35 (Limbaugh, J., dissenting).

138. *Id.* (Limbaugh, J., dissenting).

139. *Id.* (Limbaugh, J., dissenting).

140. *Id.* (Limbaugh, J., dissenting).

141. *Id.* (Limbaugh, J., dissenting).

142. *Id.* at 35-36 (Limbaugh, J., dissenting).

143. *Id.* at 35 (Limbaugh, J., dissenting).

144. *Id.* at 36 (Limbaugh, J., dissenting).

unfair to a defendant not to admit evidence of prior false accusations. In some cases a prior false accusation can have "special relevance,"¹⁴⁵ which justifies treating this type of evidence differently than evidence of instances of past conduct that do not involve false allegations. For example, in a rape trial, the defendant may be allowed to ask the prosecuting witness if she was fired for shoplifting store merchandise, but the defendant could not admit extrinsic evidence about the past misconduct. The rationale for excluding other evidence is persuasive; it very likely would waste time and confuse the jury if a mini-trial were conducted as to whether the witness shoplifted.

However, when the past misconduct involved a false accusation, the policies behind excluding extrinsic evidence are less persuasive. For example, in *Smith v. State*, a Georgia case, the trial court excluded extrinsic evidence from ten witnesses regarding prior false accusations.¹⁴⁶ Five of the witnesses were prepared to testify that the complaining witness had falsely accused them of sexual misconduct; a sixth witness heard that the complaining witness had accused him and she recanted in his presence; two other witnesses were present when the complaining witness recanted the accusations against other men; and a ninth witness heard the complaining witness recant allegations against other men a different time.¹⁴⁷ The defendant himself was the tenth witness, and he was prepared to testify that the complaining witness had made similar allegations against "ten or twelve" people.¹⁴⁸ The jury did not hear any of this evidence, and the defendant was sentenced to thirty years in prison after the jury found him guilty of rape, statutory rape, child molestation, and cruelty to children.¹⁴⁹ The jury may not have found the defendant to be guilty beyond a reasonable doubt if it heard testimony that the complaining witness had falsely accused up to a dozen men of sexual misconduct in the past. This type of case illustrates that preventing confusion and undue delay

145. *Morgan v. State*, 54 P.3d 332, 336 (Alaska Ct. App. 2002) (discussing instances involving sexual assault).

146. 377 S.E.2d 158, 159 (Ga. 1989).

147. *Id.*

148. *Id.*

149. *Id.* In *Smith*, the trial court found that the rape-shield law barred the admission of the evidence of the prior false allegations. *Id.* The appellate court found that evidence of prior false allegations does not qualify as evidence of past sexual behavior under the rape shield law. *Id.* at 159-60. The court next addressed the state's argument that even if the evidence were not barred by the rape shield laws, it is inadmissible because it is evidence of a specific act of misconduct, rather than general reputation. *Id.* at 160. The Court noted that the majority of jurisdictions found this rule violated the defendant's right to present a full and fair defense. *Id.* It accordingly adopted a rule that evidence of prior false allegations is admissible provided that the trial court first makes a "threshold determination" that "a reasonable probability of falsity exists" in a hearing outside the presence of the jury. *Id.* (quoting *Clinebell v. Commonwealth*, 368 S.E.2d 263, 265-66 (Va. 1988)).

are simply not a persuasive enough rationale to justify a blanket rule barring admissibility of this kind of evidence.

The Missouri Supreme Court was quite correct to adopt an approach whereby extrinsic evidence of prior false allegations may be admissible. However, the opinion could be improved in two ways: by adopting specific factors for trial courts to consider when deciding whether to admit this type of evidence and by stating the procedural requirements for admission more specifically.

A. Admissibility Factors

The balancing approach adopted by the majority does not list the factors that the Missouri Supreme Court considers important. Further, the balancing approach set forth by the majority speaks of the trial court's "wide discretion" but does not iterate that the rule should be narrowly applied. Without factors to consider or an instruction to narrowly apply the rule, trial courts may broadly interpret *Long* and admit more evidence to avoid reversal on appeal. The resulting delay and confusion is unnecessary. If the Missouri Supreme Court provided a list of factors or requirements for admissibility to guide trial courts, trial courts would be more likely to deny requests to admit extrinsic evidence without devoting as much time to the issue, and without confusing the jury.

As Judge Limbaugh noted in his dissent, other jurisdictions limit the admission of extrinsic evidence of prior false allegations to cases where the prior false allegation was similar to the charged offense.¹⁵⁰ Other jurisdictions have also given lists of factors for the trial court to consider in deciding whether to admit the evidence.¹⁵¹

Some factors the trial court should consider in deciding whether to admit extrinsic evidence of prior false allegations are aptly laid out by the Supreme Court of New Jersey in *State v. Guenther*:

- (1) whether the credibility of the victim-witness is the central issue in the case;
- (2) the similarity of the prior false criminal accusation to the crime charged;
- (3) the proximity of the prior false accusation to the allegation that is the basis of the crime charged;

150. *State v. Long*, 140 S.W.3d 27, 33 (Mo. 2004) (en banc) (Limbaugh, J., dissenting); see *supra* text accompanying note 128.

151. See *supra* notes 86-87 and accompanying text.

(4) the number of witnesses, the items of extrinsic evidence, and the amount of time required for presentation of the issue at trial; and

(5) whether the probative value of the false accusation evidence will be outweighed by undue prejudice, confusion of the issues, and waste of time.¹⁵²

The court in *Guenther* treated the first factor as an absolute requirement, meaning that extrinsic evidence is admissible only if the credibility of the victim is the central issue to the case.¹⁵³ This requirement is logical; if the credibility of the complaining witness is not the central issue of the case (i.e. other evidence corroborates the witness's story), then the defendant is much less likely to be deprived of a fair trial if denied the opportunity to present extrinsic evidence concerning credibility. The *Guenther* approach gives trial courts both an absolute requirement and specific guidance as to what factors it considers important, which prevents an overly broad approach to admitting such evidence.

Though the majority in *Long* concluded that the evidence of prior false allegations was not collateral,¹⁵⁴ this conclusion could easily be different if the trial court considers factors such as those listed in *Guenther*. First, this case was not simply a "he said, she said" matter because there was substantial physical evidence corroborating Flower's testimony that she was attacked.¹⁵⁵ As such, the first part of the *Guenther* test, credibility as the central issue, may not have been met.

Second, most of the evidence proffered by Long as to prior false accusations was dissimilar to the crime charged. Only part of the property manager's testimony involved Flower recanting a prior accusation of sexual assault.¹⁵⁶ The rest of the property manager's testimony, and all of the testimony from the other two witnesses did not involve accusations of sexual misconduct. Wilson's proffered testimony was that Flower falsely accused him of hitting her in the head with a rock and threatening her with harm.¹⁵⁷ The detective's testimony was that Flower accused Wilson of threatening Flower, but later called and said Wilson was not the man who threatened

152. *State v. Guenther*, 854 A.2d 308, 324 (N.J. 2004).

153. *Id.*

154. *Long*, 140 S.W.3d at 30-31 ("An issue is not collateral if it is a 'crucial issue directly in controversy.' Where, as in this case, a witness's credibility is a key factor in determining guilt or acquittal, excluding extrinsic evidence of the witnesses' prior false allegations deprives the fact-finder of evidence that is highly relevant to a crucial issue directly in controversy; the credibility of the witness.") (citations omitted).

155. *Id.* at 29.

156. *Id.* at 30.

157. *Id.* at 29.

her.¹⁵⁸ This testimony from the detective arguably does not even qualify as a prior false allegation, because Flower did not recant or say that she *knowingly* accused the wrong person. Further, none of the testimony involved Flower seriously injuring herself and then accusing another person of inflicting the injuries, as was Long's defense. Thus, Long's proffered evidence likely would not meet the similarity factor in *Guenther*. Further, Wilson's offer of proof may not have been especially probative, as it consisted largely of two statements Flower allegedly made to the police, not to him.¹⁵⁹ Due to the corroborating evidence and the lack of similarity to the charged offense, it is doubtful that all of the offers of proof would be admissible under the *Guenther* test.

The *Guenther* test offers the trial courts more guidance as to whether to admit extrinsic evidence of prior false allegations. Furthermore, it is more consistent with the general rule, "as cited by the majority, that bars extrinsic evidence of prior, specific acts of misconduct so [as] to conserve judicial resources by avoiding mini-trials on collateral issues."¹⁶⁰ As noted by Judge Limbaugh in his dissent, "[t]heoretically, under the majority rule, even [a] false report of a property loss to collect insurance proceeds or the willful failure to pay a tax is admissible in a sexual assault case."¹⁶¹ The balancing approach is extremely general. Without more specific guidance, trial courts may admit more evidence to avoid reversal on appeal, and this overly broad application of the exception would result in delay, confusion, and waste of judicial resources. A test such as that provided by *Guenther* would remedy this generality, narrow the trial court's application of the exception, and prevent mini-trials on collateral issues.

B. Specific Procedural Application

The majority could also have been more specific as to the procedural application for this type of evidence. The majority did not describe the procedure, it merely mentioned a hearing outside the jury, and alluded to a requirement of cross-examination.¹⁶²

In most jurisdictions that allow extrinsic evidence of prior accusations, it is required that the defendant first ask the accusing witness on cross-examination whether she made prior false allegations.¹⁶³ As explained by Judge Limbaugh, a witness may admit to making the prior accusations, "thus

158. *Id.* at 30.

159. *Id.* at 29-30.

160. *Id.* at 34 (Limbaugh, J., dissenting).

161. *Id.* (Limbaugh, J., dissenting).

162. *Id.* at 31-32.

163. *See supra* notes 90, 132-33 and accompanying text.

obviating the need for the introduction of extrinsic evidence and the attendant waste of time."¹⁶⁴ The majority did not specifically require this step.

Also, the majority alluded to a hearing outside the presence of the jury in which the defendant must convince the trial court by the preponderance of the evidence that the prior accusations were false.¹⁶⁵ If the trial court determines the defendant met his burden, whether these highly relevant prior statements were actually false should ultimately be an issue for the jury to decide. If the defendant is allowed to bring in evidence that the witness made knowingly false statements, then the state should be able to bring in extrinsic evidence to rebut the defendant's evidence. Just as the defendant is allowed to present evidence that the complaining witness made prior false allegations, the state should be allowed to present rebuttal evidence that the prior allegation was true, or that it was never made. This process was not clearly laid out by the majority, and it should have been to avoid confusion in the future.

State v. Long was cited in two Missouri opinions the first year after it was published. In *Williams v. State*, the Missouri Supreme Court clarified that its holding in *State v. Long* applied only to cases involving prior false allegations made by the complaining witness or victim, not any witness.¹⁶⁶ In *State v. Reeder*, the Eastern District of the Missouri Court of Appeals held that the holding in *State v. Long* was not retrospective in application because it dealt with the admissibility of evidence and, therefore, concerned a procedural right, not a substantive one.¹⁶⁷

164. *Long*, 140 S.W.3d at 34 (Limbaugh, J., dissenting).

165. *Id.* at 31-32.

166. *Williams v. State*, No. SC 86095, 2005 WL 1432379 at *4 (Mo. 2005) (en banc). In *Williams*, the defendant was convicted of murder and sentenced to death. *Id.* at *1. While incarcerated three weeks after the murder on unrelated charges, Williams confessed to the murder to his cellmate. *Id.* On appeal, Williams argued that his trial counsel was ineffective for not investigating several of the cellmate's family members, who would have testified that the cellmate is dishonest. *Id.* at *3. Williams alleged that the family members could have offered testimony involving prior misconduct such as domestic violence and drug abuse, and that this testimony would be admissible under *State v. Long*. *Id.* The court held that:

[T]he *Long* decision did not abrogate the rule that extrinsic evidence of prior witness misconduct is generally inadmissible. To the contrary, *Long* expressly held the rule that extrinsic evidence of prior, specific acts of misconduct is generally inadmissible and held only that a witness may be impeached with extrinsic evidence 'in some cases' where the 'prosecuting witness' has made false allegations . . . [the cellmate] was neither a victim nor a prosecuting witness. Therefore, as the motion court found, any testimony regarding [the cellmate's] prior, unrelated misconduct was not admissible to impeach his trial testimony.

Id.

167. *State v. Reeder*, No. ED 84507, 2005 WL 1513104 at *5-6 (Mo. App. Ct. 2005). In *Reeder*, the trial court excluded testimony regarding prior false allegations made by Tanya, one of the two prosecuting witnesses. *Id.* at *2. Tanya's mother, Tina

VI. CONCLUSION

In *State v. Long*, the Missouri Supreme Court adopted a new rule allowing, in some criminal cases, extrinsic evidence of prior false allegations for

Pulley, attempted to testify about incidents where Tanya called the authorities and falsely accused Pulley of physically assaulting her and using drugs. *Id.* The trial court also excluded Pulley's testimony that Tanya and her cousins often made allegations against people in positions of authority, including previous accusations of rape against several men with whom Pulley and her sister were in relationships. *Id.* Reeder argued that the trial court erred in excluding evidence of Tanya's prior false allegations, and that *State v. Long* governed the case. *Id.* at *3. The *Reeder* court held that *State v. Long* did not apply retrospectively, and therefore the trial court did not err in excluding the evidence. *Id.* at *5. The *Reeder* court cited *State v. Walker*, where the Missouri Supreme Court held that a rule handed down during the pendency of the Walker defendant's appeal, which rendered polygraph examinations inadmissible in criminal trials, applied only retrospectively. *Id.* (citing *State v. Walker*, 616 S.W.2d 48, 49 (Mo. 1981) (en banc)). In *Walker*, the Missouri Supreme Court held that if it

fails to indicate in the decision creating the new rule whether that rule is to be applied retrospectively or prospectively, then this determination hinges on whether the new rule of law is procedural or substantive If the new rule is procedural, it is given prospective application only If the new rule is substantive, it is given both retrospective and prospective application Rules of evidence are generally considered procedural in nature.

State v. Walker, 616 S.W.2d 48, 49 (Mo. 1981) (en banc) (citations omitted, emphasis added). In *Reeder*, the appellate court, when citing to *Walker*, disregarded the Supreme Court's use of the word "generally," and instead held that "rules of evidence are procedural in nature and apply prospectively." *Reeder*, No. ED 84507, 2005 WL 1513104 at *6 (citing *Walker*, 616 S.W.2d at 49). The Missouri Supreme Court did not, as the phrasing of the Court of Appeals for the Eastern District suggests, state that rules of evidence are always procedural, just that they are generally procedural. Further, the rule of evidence in *Walker* is much less significant than the rule of evidence in *Long*. In *Walker*, the rule of evidence that applied only prospectively was a rule rendering all polygraph evidence inadmissible, whereas previously it was admissible upon stipulation by both parties. *Walker*, 616 S.W.2d at 48. The Missouri Supreme Court changed the polygraph rule because polygraph tests "lack scientific support for their reliability." *State v. Biddle*, 599 S.W.2d 182, 185 (Mo. 1980) (en banc). The Supreme Court changed the rule regarding extrinsic evidence of prior false allegations in some cases because the exclusion of the evidence would violate the defendant's constitutional right to present a full defense. *Long*, 140 S.W.3d at 31. It seems inequitable to this author that *Long* is entitled to a new trial because his constitutional rights were violated, yet *Reeder* is denied a new trial because *Long* concerned a rule of evidence and is procedural in nature. *Reeder*'s trial was after *Long*'s trial. Also, unlike the facts in *Long*, in *Reeder* Tanya's prior false allegations were very similar to the ones made against *Reeder*, and there was no physical evidence corroborating Tanya's story. The holding in *Reeder* does not appear to be in line with the intent of the Supreme Court to protect the defendant's constitutional right to present a full and fair defense.

the purposes of impeaching the credibility of the witness. Because prior false allegations are particularly relevant in some cases, the Missouri Supreme Court was correct to change the blanket rule barring admissibility. However, the new rule could be improved by more specific standards for admissibility and procedure as to this type of evidence.

JENNIFER KOBOLDT BUKOWSKY

