**IN THE SUPERIOR COURT OF \_\_\_\_\_\_\_\_\_\_\_\_\_ COUNTY**

**STATE OF GEORGIA**

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**STATE OF GEORGIA CLERK NO:**

**vs.**

**[DEFENDANT]**

**MOTION IN LIMINE TO EXCLUDE EVIDENCE IN VIOLATION OF**

**O.C.G.A. § 24-4-412 (“RAPE SHIELD STATUE”)**

 Comes now, the State of Georgia, by and through the District Attorney and the undersigned Assistant District Attorney, and hereby moves to exclude evidence in violation of O.C.G.A § 24-4-412 (also referred to as Georgia’s “Rape Shield Statute”) during the trial in the above-referenced indictment. In support of this motion, the State would show the following:

I.

 The State anticipates that the defendant will attempt to introduce evidence of another outcry of sexual assault made by the victim, [INSERT NAME], against a third party. This outcry occurred when the victim was a young child, approximately X years of age. [INSERT BRIEF ACCOUNT OF OTHER ALLEGATION]

 [INSERT BRIEF RECITATION OF FACTS FOR CRIMES ALLEGED IN INDICTMENT].

II.

 Any evidence concerning the allegation involving [OTHER PERSON] should be deemed inadmissible pursuant to O.C.G.A. §24-4-412. The statue provides in pertinent part that, “In any prosecution for…aggravated child molestation or child molestation in violation of Code Section 16-6-4…evidence relating to the past sexual behavior of the complaining witness shall not be admissible, either as direct evidence or on cross-examination of the complaining witness or other witnesses, except as provided in this Code section.” O.C.G.A. §24-4-412(b) outlines the exception to this statute, stating that, “evidence relating to the past sexual behavior of the complaining witness may be introduced if the court, following the procedure described in subsection (c) of this Codesection, finds that the past sexual behavior directly involved the participation of the accused and finds that the evidence expected to be introduced supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of in the prosecution.”

 [IF VICTIM UNDER AGE OF CONSENT], she could not have consented to the sexual behavior as a matter of law. Therefore, the statutory exception in O.C.G.A. §24-4-412 cannot apply to the instant case.

III.

 Courts have created non-statutory exceptions to the Rape Shield Statute. In *Johns v. State*, 253 Ga. App. 207(3) (2001), the court held that evidence that the victim previously accused someone other than the defendant of sexual misconduct is admissible under certain limited circumstances, including: (1) to show that someone other than the defendant caused the victim's injuries[[1]](#footnote-1); (2) to show that the victim lacks credibility if the victim's prior allegations were ***false***; and (3) to show other possible causes for the victim's symptoms. As there are no injuries or symptoms present in the instant case, the only remaining argument would be that of prior false allegation. While it is true that the Rape Shield Statute does not prohibit testimony regarding prior false allegations of child molestation made by the child victim, *Osborne v. State*, 291 Ga. App. 711(2) (2008); *Benton v. State*, 265 Ga. 648(5) (1995), before such evidence may be admitted, the court must make a threshold determination outside the presence of the jury that a *reasonable probability* of falsity exists.

 A “reasonable probability” is a probability sufficient to undermine confidence in the outcome. *Strickland v. State*, 205 Ga. App. 473 (1992). The **defendant has the burden of proof** in coming forward with evidence sufficient to establish a “reasonable probability of falsity.” *Williams v. State*, 266 Ga. App. 578, 580(1) (2004). The mere denial by the person who was allegedly accused falsely, without more, will generally not suffice, for “the fact that an accused states that the accusation against him is false is hardly evidence sufficient to raise a reasonable probability of falsity.” *Williams v. State*, 266 Ga. App. 578(1) (2004); *Kelley v. State*, 233 Ga. App. 244(5) (1998). The fact that the person previously accused has never been prosecuted is insufficient to establish the reasonable probability of falsity. *Williams v. State*, 266 Ga. App. 578, 581 (2004)*.* Even a child’s recantation of a prior allegation of sexual abuse does not in itself establish a reasonable probability of falsity. *Clements v. State*, 279 Ga. App. 773(2) (2006). A trial court’s ruling upon the admissibility of such evidence will not be overturned absent an abuse of discretion. *Eley v. State*, 266 Ga. App. 45(1) (2004).

 In the instant case, the State does not anticipate that the defendant will be able to provide any evidence that the prior accusation was false, let alone evidence to establish a reasonable probability sufficient to undermine confidence in the outcome. Therefore, any evidence regarding the allegation against Reggie should not be deemed permissible pursuant to this argument.

IV.

 The defense should also not be permitted to admit the evidence to insinuate that another person committed the crimes against the victim. Generally, an accused may introduce evidence tending to show that another person committed the crime with which he is charged. This evidence must be shown to be inconsistent with his own guilt and must raise a reasonable inference or presumption as to his own innocence. It must directly connect the other person with the crime. Evidence which can have no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. *Hanson v. State*, 263 Ga. App. 45, 47 (2003); *Croom v. State*, 217 Ga. App. 596, 599 (1995). Additionally, such evidence will not be permitted merely to suggest that the child victim might be confused as to the identity of the perpetrator. *Wilt v. State*, 265 Ga. App. 158(3) (2004); *Blackwell v. State*, 229 Ga. App. 452, 454 (1997).

 **WHEREFORE**, the State hereby requests that the Court enter an order in limine preventing the defense from introducing any evidence of alleged sexual abuse against the victim by Reggie, the outcry by the victim, and any evidence that would reasonably stem from those allegations, at the trial in the above-referenced indictment.

 Respectfully submitted, this the \_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_.

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 Assistant District Attorney

[NOTE: COURTS IN GEORGIA HAVE HELD THAT PRIOR ALLEGATIONS MAY BE ADMISSIBLE TO SHOW ANOTHER EXPLANATION FOR A PSYCHOLOGICAL OR BEHAVIORAL CONDITION, SUCH AS CHILD ABUSE ACCOMODATION SYNDROME. BE CAREFUL NOT TO DISCUSS POSSIBLE ISSUES AT TRIAL IF YOU WISH TO KEEP THE PRIOR ALLEGATION OUT]

1. An accused will not be prevented from showing that medical evidence of sexual activity might be due to the victim’s sexual activity with a boyfriend rather than with the accused. *Tidwell v. State*, 306 Ga. App. 307, 311 (2010)(accepting defendant’s argument that the child victim’s sexual relationship with her boyfriend gave an alternate explanation for her damaged hymen, an injury that the prosecution attributed to the defendant’s molestation). [↑](#footnote-ref-1)