Unconstitutionality and the Rule of Wide-Open Cross-Examination: Encroaching on the Fifth Amendment When Examining the Accused

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UNCONSTITUTIONALITY AND THE RULE OF WIDE-OPEN CROSS-EXAMINATION: ENCROACHING ON THE FIFTH AMENDMENT WHEN EXAMINING THE ACCUSED

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I. INTRODUCTION

When Georgia adopted a new evidence code on January 1, 2013, it embraced the rule on scope of cross-examination which local courts have traditionally followed. This is the wide-open rule which permits the cross-examiner to range across the entire case, no matter how limited the direct exam. Subjects foreign to the direct can be freely explored, limited only by the rule of relevancy.

A competing rule operates in a majority of states and in federal courts. On cross-examination, these courts limit the cross-examiner to the subjects covered on direct, plus credibility testing. This makes for more orderly and efficient trials, say proponents of the rule. Better this than the fragmented and scattered chaos spawned when a cross-examiner runs wild. The
wide-open rule enables and empowers the over-the-top cross-examiner, opponents of the rule argue.

Commentators have associated the majority, more limited cross-examination methodology with American jurisprudence and the wide-ranging approach with English courts. Reflecting this divide, the Supreme Court of South Dakota recognized “two principal schools of thought” when it comes to the appropriate scope of final argument, essentially branding the debate as between two distinct scholarly camps.

One hidden aspect of the rules debate is the impact of constitutional considerations. These surface most dramatically when a defendant in a criminal case takes the witness stand. In jurisdictions like Georgia, favoring the English or British rule and wide-open cross-examination, most defense attorneys stand back and watch while a prosecutor cross-examines all over the map. Absent are objections laced with Fifth Amendment overtones. This Article suggests an innovative approach based upon the Constitution. When the accused adheres to a narrow and carefully tailored approach during his direct examination, he may leave important topics untouched in his testimony. On these subjects, he has not used the direct to advantage himself, beyond those matters delved into during his direct. Accordingly, the argument contends, it is unfair to require him to address these topics on cross-examination. Indeed, to compel him to talk on heretofore-unaddressed topics violates the defendant’s privilege against forced self-incrimination.

This is particularly and most extremely the case when it comes to cross-examination into separate and distinct charges brought in a criminal indictment concerning which the

1. R. Carlson, E. Imwinkelried, J. Seaman & E. Beecher-Monas, Evidence: Teaching Materials for an Age of Science and Statutes 60-61 (7th ed. 2012) (identifying “the American view,” limiting cross-examination to the scope of the direct examination, as the majority approach and the minority favoring wide-open cross-examination as operating in accord with the “English Rule”).

defendant made no reference. While the defendant did not participate in the charging decision and faces a burden against him on a motion to sever offenses, under the British rule he may be forced to testify about charged offenses outside of his direct testimony should he elect to take the witness stand in his own defense. Commentators have referred to this as a “Hobson’s Choice,” forcing criminal defendants to choose “between Scylla of letting charges go unanswered and not testifying and the Charybdis of being cross-examined about incidents about which they did not testify.”

The constitutional problem identified here is discussed in the context of the Georgia experience because Georgia is the latest state to pass federal rules, but then to vary the cross-examination formula. A large handful of other states have done the same thing. This deviation from federal principles is an effort by dissenting states to engraft a wide-open cross-examination policy on the federal pattern. This step introduces disharmony into evidentiary practice, as will be explained in Part IV of this Article, infra. It also raises deep constitutional concerns. Because some other states have used the Georgia formula, the issues discussed hereafter have broad national significance. The analysis presented in the following pages impacts Ohio and Tennessee, for example, because they are jurisdictions, like Georgia, which have embraced unlimited cross-examination.

Part II of this Article explores the nature of the privilege against self-incrimination. Both the federal and the state patterns are explained. In Part III, the Georgia rule controlling scope of cross-examination is compared to the rule which operates in federal courts. The special situation of the accused as a witness is addressed in Part IV. Decisions from the United States Supreme Court and other high profile cases which suggest that the narrow cross-examination rule has a constitutional basis are revealed. The Article concludes with a

plea to the bench and bar to remain observant to the Constitution when the defendant appears as a witness.

II. NATURE OF THE FIFTH AMENDMENT


When the United States Constitution was proposed to the states for ratification, there was a furor over the absence of a Bill of Rights. Among other provisions, the First Congress, which responded to the complaints framed and submitted the Fifth Amendment. Along with the Sixth Amendment, these guarantees were intended to remove all obstacles to the ability of the accused to fully and fairly defend himself against criminal accusations. With the Bill of Rights attached, ratification of the Constitution of 1789 followed.

The Fifth Amendment provided robust protection to parties and witnesses in federal trials. The Amendment’s privilege against self-incrimination provides that no person in any criminal case shall be compelled to be a witness against himself. For roughly 175 years the protection of the Fifth Amendment was restricted to federal tribunals. States had their own provisions. Then in 1964 the United States Supreme Court held that the privilege contained in federal law was applicable to the states by reason of the Fourteenth Amendment.

As a result of this development, there was an explosion of cases involving state procedure which demanded interpretation. Practices followed in the states raised issues for fresh interpretation by the United States Supreme Court. In California, prosecutors had commented freely on the failure of a defendant to testify in his criminal trial. This approach had

5. Id. at 738.
6. U.S. Const. amend. V.
been outlawed in federal practice years earlier. The Court aligned state standards with federal guidelines in *Griffin v. California* and reversed the judgment below because “[t]he prosecutor made much of the failure of the petitioner to testify.”

Other cases extended the reach of the Fifth Amendment to different state practices. In New York, a member of the bar defied a subpoena for his financial records. In return, he was disbarred. The lawyer claimed that production of the records or testimony by him would have incriminated him, and he was privileged to remain silent. The United States Supreme Court agreed. The full sweep of the Fifth Amendment had been absorbed into the Fourteenth, and the Court ruled its protections extended to lawyers as well as other citizens. “[I]t should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it.”

Public employees came under the Court’s scrutiny when police in New Jersey were investigated for fixing traffic tickets. Before questioning the police, each officer was warned by the New Jersey Attorney General that refusal to answer his questions would result in removal from the force. The defendants answered the questions. Over their objections, some of the answers were used in a criminal conspiracy prosecution against the officers. The defendants were convicted, but the United States Supreme Court reversed.

10. Id. at 610.
12. Id. at 513.
13. Id. at 512-13.
14. Id. at 518-19.
15. Id. at 516.
16. Id. at 514.
18. Id.
19. Id. at 495.
20. Id.
21. Id.
Applying the Fifth Amendment as it had been construed in prior federal cases, the approach of New Jersey authorities was held to be a form of compulsion.23

While the Supreme Court was extending the constitutional privilege into corners of state processes previously untouched by federal intervention, other important interpretations evolved. What sort of communications did the Fifth Amendment cover? Did the seizure of a blood sample over a defendant’s objection compel him to be a witness against himself? The decision in Schmerber v. California24 provided answers. It scanned the scope and limits of Fifth Amendment protection.

In Schmerber, the blood of an arrestee suspected of drunk driving was withdrawn by a physician at a hospital, at the direction of a police officer.25 The sample revealed that the accused was intoxicated, and the analysis of the blood was received in evidence at Schmerber’s trial.26 He was convicted of driving under the influence, and appealed.27 Eventually his case arrived at the United States Supreme Court.28

Nothing in the process of securing blood violated the Fifth Amendment.

22. Id. at 500.
23. Garrity, 385 U.S. at 497. During the period of extension of federal safeguards into state criminal procedure, other state practices were invalidated. See Brooks v. Tennessee, 406 U.S. 605, 611-12 (1972) (holding Tennessee statute unconstitutional when it required an accused who chooses to testify to take the stand as the first defense witness). Earlier, the unfettered right of the accused to testify received a boost from the Supreme Court in Ferguson v. Georgia, 365 U.S. 570 (1961). At that time the Georgia procedure precluded the defendant from giving sworn testimony in his criminal case. Ferguson, 365 U.S. at 570. Although the accused could give an unsworn statement to the jury, the Court noted the significant potential for self-incrimination in the accused’s statement. Ferguson, 365 U.S. at 593; Clinton, supra note 4, at 760. The exclusion of counsel’s participation in making the unsworn statement unconstitutionally hindered the accused in presenting his defense. Ferguson, 365 U.S. at 593; Clinton, supra note 4, at 760.
25. Id. at 758.
26. Id. at 759.
27. Id.
28. Id.
Amendment, said the Court. Compelling an accused to provide a physical specimen is different from forcing him to talk about his crime. Compelling testimony from an accused is barred. Not prohibited is making the suspect the source of physical evidence. “[Both] federal and state courts have usually held that [the privilege of silence] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to talk, or to make a particular gesture.”

B. Recent Case Applications Enforcing the Right to Silence

The Fifth Amendment continues to be robustly applied in federal tribunals, both in its application to pretrial proceedings as well as during trials. Most are familiar with the provisions of

29. Id. at 761.
30. Schmerber, 384 U.S. at 763-64.
31. Id. at 746. While at the time of Schmerber the majority of states limited the privilege to testimonial compulsion, a few jurisdictions extended the sweep of self-incrimination protection to nontestimonial evidence. Georgia provides one example. See Aldrich v. Georgia, 137 S.E.2d 463, 464-65 (Ga. 1964) (finding truck driver’s refusal to obey order to drive truck on weight scales to check for overload was justified by privilege against self-incrimination); Calhoun v. State, 87 S.E. 893, 893 (1916) (constitutional guaranty protects one from being compelled from doing an act against his will). Prior Maryland law was in accord. Allen v. State, 39 A.2d 820, 824 (Md. 1944) (privilege justified refusal by accused to try on hat found at crime scene). Modernly, cases have moved closer to the federal pattern and away from extravagant interpretations of the privilege. For example, taking the fingerprints of the accused does not violate his privilege against self-incrimination. See Bell v. State, 597 S.E.2d 350, 353 (Ga. 2004) (“[R]equiring a defendant . . . to submit to fingerprinting does not violate a defendant's right against self-incrimination.”). Nor does requiring the accused to participate in a chemical test to determine if he had recently fired a gun. See English v. State, 216 S.E.2d 851, 853 (Ga. 1975) (“The removal of traces of substances from his hands is non-testimonial evidence.”). See also State v. Thornton, 322 S.E.2d 711, 712 (Ga. 1984) (dental impressions). The movement away from extending the privilege to physical acts and instead focusing on testimonial compulsion is traced in R. CARLSON, TRIAL HANDBOOK FOR GEORGIA LAWYERS 304-306 (2013) [hereinafter TRIAL HANDBOOK].
the *Miranda* code requiring that a suspect in custody be apprised of his or her right to remain silent.\textsuperscript{32} The rule in *Miranda* arose out of a concern that the possibility of coercion inherent in custodial interrogations unacceptably raised the risk that a suspect’s privilege against self-incrimination might be violated.\textsuperscript{33}

Fifth Amendment protection has also been a feature of Georgia case law. Admission of custodial statements was error in *Stone v. State*.\textsuperscript{34} Waiver of Stone’s Fifth Amendment rights was rendered ineffective when police failed to honor his request for counsel.\textsuperscript{35} In another case, on-the-scene questioning by police was at issue. Although officers are allowed to pose initial inquiries at a crime scene without Miranda warnings when they are seeking to ascertain the nature of the situation at hand, they may not turn the exchange into one designed to establish a particular subject’s guilt.\textsuperscript{36}

The need for trial level enforcement of the privilege against self-incrimination was made evident through federal appellate review in a 2013 case. A defendant was convicted in Texas of capital murder and sentenced to death.\textsuperscript{37} Extraordinarily extensive comments on the defendant’s refusal to testify resulted in actual prejudice, ruled the United States Court of Appeals in *Gongora v. Thaler*.\textsuperscript{38}

At trial, the prosecution portrayed Gongora either as the shooter or as a participant in a robbery in the course of which the victim died.\textsuperscript{39} Gongora elected not to testify.\textsuperscript{40} After the prosecutor called for the jury to hear from the shooter, Gongora

\begin{itemize}
  \item \textsuperscript{32}Miranda v. Arizona, 384 U.S. 436, 445 (1966).
  \item \textsuperscript{33}R. CARLSON & M. CARLSON, supra note 3, at 540 (citing U.S. v. Pettigrew, 468 F.3d 626 (10th Cir. 2006)).
  \item \textsuperscript{34}674 S.E.2d 31, 32 (Ga. Ct. App. 2009).
  \item \textsuperscript{35}Id. at 33.
  \item \textsuperscript{36}Thompson v. State, 723 S.E.2d 85, 88-89 (Ga. Ct. App. 2012).
  \item \textsuperscript{37}Gongora v. Thaler, 710 F.3d 267, 270 (2013).
  \item \textsuperscript{38}Id.
  \item \textsuperscript{39}Id.
  \item \textsuperscript{40}Id. at 273.
\end{itemize}
was convicted.\textsuperscript{41} The federal appeals court summarized the damage inflicted by the remarks:

As the district court observed, “the prosecutor remarks on Gongora’s failure to testify were numerous and blatant.” Rather than a single question or incidental statement, the prosecutor made a series of at least five comments referring to Gongora’s silence as he argued to the jury that Gongora was the shooter. In the guise of clearing up what his earlier comments meant, the prosecutor continued to make comments relating back to the fact that Gongora had not testified. The judge repeatedly cautioned the prosecutor, yet the prosecutor further highlighted the reference by persisting in his train of “who you would expect to hear from” argument. This factor weighs against a finding that the error was harmless.\textsuperscript{42}

What about the fact that the judge told the jury to disregard some of the prosecution’s comments? The appellate court described the trial judge’s curative instructions as “perfunctory and devoid of specificity.”\textsuperscript{43} The ineffectiveness of the instructions contributed to the reviewing court’s decision, which vacated Gongora’s conviction on Fifth Amendment grounds.\textsuperscript{44}

Application of the Fifth Amendment at trial continues in both federal and state courts. In fact, federal and Georgia practice have taken similar paths when it comes to forbidding a prosecutor from eliciting testimony that a defendant had invoked his right to silence after receiving Miranda warnings, which was the subject of Doyle v. Ohio.\textsuperscript{45} As recently as 2014, running afoul of this mandate has been referred to as a “Doyle violation.”\textsuperscript{46} In a 2012 decision, the Court of Appeals of South

\begin{itemize}
\item[41.] \textit{Id.} at 272.
\item[42.] \textit{Id.} at 278-79.
\item[43.] \textit{Id.} at 280.
\item[44.] \textit{Id.} at 283.
\item[46.] U.S. v. Reeves, 742 F.3d 487, 504 (11th Cir. 2014) (referring to a “Doyle violation”). See also Wallace v. State, 273 S.E.2d 143, 145-46 (Ga. 1980) (addressing whether “the state impermissibly commented on [the defendant’s] post-arrest silence in violation of Doyle v. Ohio,” referring to
\end{itemize}
Carolina reversed a defendant’s convictions for repeated Doyle violations committed by the prosecution.47

C. Georgia State Law

1. Constitutional Protection

The Georgia Constitution provides: “No person shall be compelled to give testimony tending in any manner to be self-incriminating.”48 The Georgia privilege is highly protective of defendant rights, providing broader coverage than the comparable federal provision.49 However, while Georgia supplies wide privilege protection, the law requires the passive cooperation of a suspect who is being photographed, fingerprinted, submitting to a breath test, removing a hair sample, or providing a voice exemplar.50

2. Georgia Rules of Evidence Which Protect the Right to Silence

Prior to 2013, Georgia operated under an evidence code penned by a single author. Georgia’s original code of evidence was adopted in 1863. It was written by General Thomas R. R. Cobb. Cobb’s code was advanced at a time when the Civil War was raging, and it controlled evidentiary practice in Georgia for such violation as a “Doyle violation”).

48. GA. CONST. art. I, § 1, para. 16.
   [T]he Georgia Constitution accords broader rights than the United States Constitution in that the Georgia constitutional guarantee against self-incrimination ‘protects one from being compelled to furnish evidence against himself, either in the form of oral confessions or incriminating admissions of an involuntary character, or of doing an act against his will which is incriminating in its nature.’
50. MILICH, supra note 49, at 942-43. Note the similarities to the approach taken by the United States Supreme Court in Schmerber v. California, 384 U.S. 757 (1966).
the next 150 years.\textsuperscript{51}

After struggling with the old code for many years, legislators and bar leaders became restive, and in the 1980s a movement to new rules began. It was not easy. Fully 22 years of debate and discussion was expended as the Georgia rules were shaped. Finally, a set of provisions based upon the Federal Rules of Evidence was enacted with an effective date of January 1, 2013.\textsuperscript{52}

By enacting its new evidence code, Georgia followed a long list of jurisdictions which modernized their evidence laws by adopting, in large measure, the Federal Rules of Evidence.\textsuperscript{53}

One of those federal rules is Rule 104(d), Federal Rules of Evidence. As will become apparent shortly, that rule will bear heavily upon the analysis contained in this Article.

The privilege rules embraced in chapter 5 of the new Georgia evidence code largely repeat former statutes. There is O.C.G.A. § 24-5-505, which accords witnesses and parties the right to remain silent in the face of incriminating questions.\textsuperscript{54}

The special situation of an accused person is recognized in O.C.G.A. § 24-5-506.\textsuperscript{55} The code provides that “[n]o person who is charged in any criminal proceeding with the commission of any criminal offense shall be compellable to give evidence for or against himself.”\textsuperscript{56} Another code provision that protects Fifth Amendment rights of criminal defendants appears at O.C.G.A. § 24-8-824 that states: “To make a confession admissible, it shall have been made voluntarily, without being induced by another

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{52} W. Wilson & R. Carlson, \textit{supra} note 51, at 12-13.
\item \textsuperscript{53} R. Carlson & M. Carlson, \textit{supra} note 3, at xx.
\item \textsuperscript{54} O.C.G.A. § 24-5-505 (West, Westlaw through 2014).
\item \textsuperscript{55} O.C.G.A. § 24-5-506 (West, Westlaw through 2014).
\item \textsuperscript{56} Id.
\end{itemize}
\end{footnotesize}
by the slightest hope of benefit or remotest fear of injury.\textsuperscript{57}

The foregoing provisions repeat former Georgia statutes. However, O.C.G.A. § 24-1-104(d) is new for Georgia.

Like its federal counterpart, Georgia code provision O.C.G.A. § 24-1-104 deals with preliminary matters and the function of the judge. When the court hears testimony from an accused person testifying in support of a motion to suppress, the prosecutor may not use the opportunity to expose the defendant to a thorough and sifting cross-examination on the entire case. Barred, upon objection, are questions bearing on aspects of the case which are unrelated to suppression issues. The scope of cross-examination is controlled by the subjects introduced by the accused on direct. O.C.G.A. § 24-1-104(d) provides: “The accused shall not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the proceeding.”\textsuperscript{58}

Of course, the prosecutor may test the accused with inquiries related to the voluntariness of a confession, for example, if the defendant’s pretrial testimony attacked voluntariness. To range widely over other issues in the case like those related to guilt or innocence is forbidden. This limitation upon cross-examination is designed to encourage participation by the accused in the determination of preliminary matters.\textsuperscript{59}

This pretrial rule seems in accord with the defendant’s constitutional right to silence. The defendant lays himself open to cross-examination on the subjects of his direct examination, but no further. The privilege against self-incrimination has been waived on those subjects, but no other. The practice of wide-open cross-examination has no place when a prosecutor is cross-examining the accused.

\textsuperscript{57} O.C.G.A. § 24-8-824 (West, Westlaw through 2014).
\textsuperscript{58} O.C.G.A. § 24-1-104(d) (West, Westlaw through 2014)
\textsuperscript{59} FED. R. EVID. 104(d) advisory committee’s note. Also inducing testimony from the defendant is the companion rule; that testimony by a defendant at a hearing to exclude evidence is generally not admissible at his subsequent trial to prove guilt. Simmons v. United States, 390 U.S. 377, 389-90 (1968); Culpepper v. State, 209 S.E.2d 18, 734 (Ga. Ct. App. 1974); MILICH, supra note 49, at 953.
That same reasoning would seem fully applicable when the accused appears as a trial witness. While some Georgia jurisprudence at first blush seems to cast doubt upon that conclusion, most of those cases never considered the constitutional dimensions of the controversy. In the face of a serious constitutional challenge, repetition by counsel of a simple maxim like “thorough and sifting cross-examination” appears woefully inadequate.

D. Military Patterns

In an outstanding illustration of code drafting, Military Rule of Evidence 301 spells out provisions applicable when an accused testifies in a court martial. The armed forces regulations are a model for others to follow. While in other respects the federal evidence rules are followed in military tribunals, Military Rule of Evidence 301 is special. Here is what it says when an accused testifies against criminal charges:

Rule 301. Privilege concerning compulsory self-incrimination

(c) Limited Waiver: An accused who chooses to testify as a witness waives the privilege against self-incrimination only with respect to the matters concerning which he or she testifies. If the accused is on trial for two of more offenses and on direct examination testifies about only one or some of the offenses, the accused may not be cross-examined as to guilt or innocence with respect to the other offenses unless the cross-examination is relevant to an offense concerning which the accused has testified. This waiver is subject to Mil. R. Evid. 608(b).

60. See, e.g., Williams v. State, 202 S.E.2d 433, 435 (Ga. 1973) ("[T]he defendant . . . could have made an unsworn statement without cross examination or he could have testified under oath and subjected himself to a thorough and sifting cross examination but there is no procedure permitting a defendant to testify under oath on a limited subject without subjecting himself to cross examination.").

61. MIL. R. EVID. 301.

62. Id. at (c).
III. Rules Of Cross-Examination

A. Federal Rule Drafts: Drafting Federal Evidence Rule 611(b) and the Narrow Rule of Cross-Examination

Debates marked the inclusion of the limited rule of cross-examination when the Federal Rules of Evidence were originally drafted. Proponents of the American or federal rule relied upon precedents which praised the narrow rule as "a valuable rule of practice, and one well-calculated to promote regularity and logical order in jury trials." In the run-up to the passage of the federal rules, competing drafts embraced the wide-open rule at one point in the process, and the federal rule at another point. Ultimately, the narrow or American rule was adopted by the House and carried the day with Congress. The result was Federal Rule of Evidence 611(b).

The policies underlying Congress's decision were considered in a decision from United States District Court for the Eastern District of Pennsylvania:

Rule 611(b) limits the scope of cross-examination "to the subject matter of direct examination and matters affecting  

63. Wills v. Russell, 100 U.S. 621, 626 (1879).
64. The history of the dispute and the debate over the federal rule is traced in Ronald L. Carlson, Scope of Cross-Examination and the Proposed Federal Rules, 32 FED. B.J. 244 (1973). Strong policies support the federal view, as evidenced by its enactment in a majority of states as well as its application in military trials. The Military Rules of Evidence follow the federal rules, including the provision on narrow scope of cross-examination. MIL. R. EVID. 611(b). The reasons are noted in Francis Gilligan & Frederic Lederer, The Procurement and Presentation of Evidence in Courts-Martial: Compulsory Process and Confrontation, 101 MIL. L. REV. 1, 57 (1983) ("Close adherence to a fixed standard may limit the usefulness of the cross-examination, but the dangers of undue prejudice and excessive consumption of time clearly lurk in the background"). The Military Rules of Evidence take a decisive view on the defendant's right to split his or her self-incrimination protection at trial in MIL. R. EVID. 301(c), saying the accused may not be cross-examined about issues not raised in the defendant's testimony; see supra note 62 and accompanying text.
credibility of the witness ...” Fed. R. Evid. 611(b). In enacting Rule 611, Congress endorsed the practice “that an unfolding of the facts in an orderly fashion usually will save time and promote the truth.” 28 Charles A. Wright and Victor J. Gold, Federal Practice and Procedure: Evidence § 6162, at 341 (1993) (footnote omitted). As a leading commentator has observed, “by limiting cross-examination to the subject matter of direct, subdivision (b) [of Rule 611] precludes the cross-examiner from creating diversions and digressions into different topics that may confuse or otherwise unfairly prejudice the jury.” Id. § 6165, at 393. “[A] Court has a duty to exercise its powers under Rule 611 where there is no need for the evidence offered or where the only point of an examination is to gain partisan advantage by intimidating the witness or prejudicing the jury against him.” Id. § 6162, at 343.

The rules of cross-examination apply to witnesses who are called in civil cases, as well as government witnesses in criminal cases. As to these sorts of witnesses, a jurisdiction is free to adopt its own format for scope of cross-examination. The same goes for defense witnesses other than the accused. An election to adopt a wide-open or “thorough and sifting” cross-examination is not a subject for general federal intervention. Nor is adoption of the American rule. Under it, when a defense or a government witness is examined, the cross-examination can be controlled. A recent case from the Fourth Circuit Court of Appeals demonstrates that federal courts are more than willing to restrict a party’s—even a criminal defendant’s—attempts to swing wildly during cross-examination, even going so far as to demand evidence from the

65. U.S. v. Carter, 966 F. Supp. 336, 351-52 (E.D. Pa. 1997). Under both the federal as well as the English pattern, traditional forms of credibility impeachment like bias, prior convictions or inconsistent statements can be used on cross-examination.

66. See Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (“[T]he Confrontation Clause guarantees an opportunity for effective cross-examination ... not cross-examination that is effective in whatever way, and to whatever extent the defense might wish.”); New Mexico v. Smith, 19 P.3d 254, 262-63 (N.M. 2001) (finding no constitutional deprivation in limiting cross-examination to the scope of direct testimony).
defense prior to authorizing certain subjects during cross-examination:

We have previously recognized that a defendant cannot distract the jury by introducing evidence concerning a potential defense that he never raised. Relevance, after all, must “be determined in relation to the charges and claims being tried, rather than in the context of defenses which might have been raised but were not.” If the defendant wants to present a theory or belief that might have justified his actions, then he must present evidence that he in fact relied on that theory or belief. Otherwise, a defendant could introduce evidence that would invite the jury to speculate a non-existent defense into existence.  

B. Is the Topic Reasonably Related to the Direct?

A cross-examiner under the federal rule is not strictly limited to the exact questions asked by the direct examiner. Rather, any subject opened up on direct is eligible for exploration. The test is whether the cross-examination question addresses a topic which is reasonably related to the direct.  

This may lead critics of the theory advanced in this Article to urge that the narrow scope rule can be simply evaded by use of the excuse that “this is all reasonably related to the direct.” Can an unrelated topic be readily explored by a cross-examiner under the ploy that it is “reasonably related?” It is the responsibility of the trial judge to see that disjointed topics are not injected willy-nilly into the cross-examination. The antidote for manipulation of the process is adherence to the terms and purposes of Rule 611(b), as well as appropriate judicial oversight. Insuring that the subjects introduced during cross have a nexus to the direct is a judicial responsibility.  

69. See generally U.S. v. Caracappa, 614 F.3d 30, 42-43 (2d Cir. 2010) (granting broad discretion to the trial court to determine whether issues on direct and cross are reasonably related).
C. Georgia Law and Practice

1. History of the Rule of “Thorough and Sifting Cross-Examination”

The rule assuring a thorough and sifting cross-examination has a long history in Georgia statutory law. Statutes prior to the 2013 Georgia Code of Evidence provided: “The right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against the party.”70 This statute dates back to Cobb’s Code in 1863 and was maintained in Georgia’s 2013 evidence code.71 Absent from reports about the passage of Georgia Rule 611(b) seems to be any comments reflecting Fifth Amendment considerations similar to those raised in this Article.72

They are important. In consideration of them, the Military Rules of Evidence incorporated a special evidence rule referred to earlier, Mil. R. Evid. 301(c). Why the need for that rule? Commentators answer the inquiry:

Read together, Rules 611(b), 301 and 608(b) appear to take a restrictive approach toward cross-examination of an accused. This authority allows the accused to testify about only one of several specifications, limit cross-examination to only those matters covered on direct, to take the stand concerning any issue not dealing directly with guilt or innocence and to retain the privilege against self-incrimination. The Rules appear to be intended to encourage the accused to testify

70. The 2013 law repeats this language. O.C.G.A. § 24-6-611(b) (West, Westlaw through 2014).

71. David N. Dreyer et. al., Dancing with the Big Boys: Georgia Adopts (Most of) the Federal Rules of Evidence, 63 MERCER L. REV. 1, 36-37 (2011).

without impairing the government’s ability to ask questions about the part of the case that the accused opens up.\footnote{73}

While Federal Evidence Rule 611(b) did not specifically address the extent of waiver of the Fifth Amendment, it was on the mind of the federal drafting committee. The archival notes of committee member Thomas F. Green relate to Federal Evidence Rule 611 and reflect these concerns: “At the May, 1967 meeting [of the Federal Advisory Committee on Evidence Rules] further questions were raised as to the extent of waiver by an accused who elects to testify on only one count of a multiple count indictment . . .”\footnote{74} Professor Green then provides these remarkable and perceptive comments:

The Reporter has not included in the present draft any provision relating to the extent of the waiver by an accused who testifies [at trial]. The decision of the Committee against “wide open” cross-examination greatly diminishes the need for the provision and perhaps eliminates it entirely.

The problem of the accused who wishes to testify on only one count of a multiple-count indictment appears to be as was suggested during the discussion in the first instance a problem of severance under Rule 14 of the Federal Rules of Criminal Procedure and perhaps in final analysis one of the constitutional privilege against self-incrimination.\footnote{75}

Professor Green, the author of \textit{Green’s Georgia Law of Evidence}, displayed great insight when he concluded that the question of scope of cross-examination of an accused is, in the final analysis, “one of the constitutional privilege against self-incrimination.”\footnote{76} As will be explained in Part IV of this Article,


\footnotetext[74]{Thomas Green, Federal Advisory Committee on Evidence Memorandum v.16-19, Memorandum No. 18, Second Draft, Rule 611 and Scope of Cross-Examination 25 (May 1967) (original housed in the University of Georgia Law Library).}

\footnotetext[75]{Id.}

\footnotetext[76]{Id.}
the matter of severance is not so easily handled.

Georgia’s wide-open cross-examination rule has been applied to countless cases. Ordinary witnesses in civil and criminal cases are faced with sweeping cross-examination and prosecutors in criminal cases also possess this statutory right. However, when applied against a criminal defendant who narrowly tailors his direct examination, difficult constitutional considerations emerge. These considerations appeared in a recent passage from an evidence treatise:

In a future case, a defense attorney may raise the issue. The argument would be that during the direct examination of the accused, only certain distinct counts of a charging instrument were addressed. On others, the accused did not open up the topic. Accordingly, this argument would advance that allowing prosecutorial cross-examination on subjects not addressed by the accused would abridge her/his Fifth Amendment rights. This could particularly see light in an indictment covering numerous incidents and a wide-array of dates and parties.

2. Current Applications: Georgia Evidence Decisions

There are conflicting indications in Georgia jurisprudence respecting the nature and extent of allowable cross-examination when an accused testifies. Most cases declare wide-open cross-examination, without giving any consideration to constitutional issues. A 1982 decision in this camp is summarized by one commentator: “A defendant cannot testify before the jury on the limited issue of the voluntariness of his confession and thereby restrict the state to that issue on cross-examination.”

77. See, e.g., Walker v. State, 744 S.E.2d 349, 352 (Ga. Ct. App. 2013) (finding the trial court did not err in allowing the prosecutor to conduct a thorough and sifting cross-exam of the defense’s expert witness).
78. Richardson v. State, 699 S.E.2d 595, 598 (Ga. Ct. App. 2010) (“The State, like any other party, has the right to conduct a thorough and sifting cross-examination and to pursue the specifics of a topic the defendant introduced.”) (citations omitted).
79. R. CARLSON & M. CARLSON, supra note 3, at 262
On the other hand, contrary indications have surfaced in recent decisional law. A 2012 case announces: “In Georgia, ‘a party, though introduced as a witness in his own behalf, may, upon cross-examination as to matters not voluntarily testified about on his direct examination, decline to give testimony which would tend to incriminate him.’”81 The Court of Appeals of Georgia supported the right of an accused at trial to refuse to testify about similar transaction evidence.82 “Thus, defendant’s] waiver of his Fifth Amendment rights as to the charge in this case would not have automatically resulted in a waiver of his right to remain silent in connection with the similar transaction.”83

This approach is in keeping with the modern trend allowing partial waiver of Fifth Amendment rights. Old Georgia law declared that when a defendant voluntarily takes the stand and testifies, his waiver is not partial.84 His offer of testimony “is a waiver as to all . . . relevant facts.”85

IV. THE ACCUSED AS A WITNESS

A. An Emerging Constitutional Crisis: the Accused Who Testifies Narrowly but is Cross-Examined Broadly and Without Limit

Case law and court decisions have firmly established that the accused is a competent witness on his own behalf. How regularly does this occur? The frequency of testimony by the accused in criminal cases has been the object of discussion. Clearly, the defendant’s criminal record, or lack thereof, drives

82. Id. The charge supporting the similar transaction was pending against Whitman during his trial on the main charge.
83. Id. at 413. For a similar approach, see People v. Betts, 514 N.E.2d 865 (N.Y. 1987).
84. Whitman, 729 S.E.2d at 412 (citing three prior Georgia cases).
the process in many cases.\textsuperscript{86} The nature of the offense can provide an important variable. Child sexual molestation charges often prompt defense attorneys to encourage an appearance by the accused. The impact and overtones of such an accusation are on their face so prejudicial that it demands a defendant’s response, many say.

The important issue identified in this Article may well arise in a future case where at least two distinct counts are contained in an indictment. Suppose the accused takes the stand and testifies respecting count one, which alleges a crime was committed in Atlanta by the accused on April 1, 2014. The second count alleges a similar sort of crime by the accused on June 12, 2014. The second crime involves a totally separate set of facts. In his testimony, the accused addresses only the April 1 allegation. He points out that he was overseas and not in Atlanta on April 1, so he could not be guilty. Nothing is said by him about the June allegations. Here is the way the prosecutor’s cross-examination might begin, following current law. “Mr. Defendant, for the moment let’s forget about April 1. I am going to ask you all about the June 12 incident.” At this point an objection based on constitutional grounds is sorely needed. Such an objection is rarely heard. However, in a future prosecution we can expect some perceptive defense attorney to raise it.

When that happens, a crucial collision will occur between traditional Georgia practice and the United States Constitution. Whether the objection will be successful depends mightily on the presence of prior cases which indicate that the narrow rule of cross-examination is constitutionally required. Are there


When the defendant takes the witness stand, the prosecution can vigorously cross-examine him and introduce, for impeachment, the defendant’s criminal record. In cases where these (and other) disadvantages outweigh the benefits of testifying, it may be tactically disadvantageous for a defendant to testify simply to voice a subjective, ex ante awareness of the applicable punishment.
such decisions? The next section of this Article explores the question of whether there are respected courts which have found constitutional mandates supporting the narrow rule.

Merging with the law of partial waiver of Fifth Amendment rights is a related constitutional concept, the constitutional right to present a defense.\footnote{Merging with the law of partial waiver of Fifth Amendment rights is a related constitutional concept, the constitutional right to present a defense.} Does the threat of unlimited cross-examination sometimes keep defendants off the witness stand? Combined with Fifth Amendment concerns, these doctrines raise potent constitutional questions.

B. Defendant's Right to Testify Free from Cross-Examination on Unexplored Topics: Tailoring the Direct

1. Defendant's Right to Partially Waive His Right to Silence
   a. Federal History

   Left open in the last section of this Article was a most important question. Can there be a constitutional violation when a prosecutor engages in wide-open cross-examination of the accused? The best case to commence this discussion is 
   \textit{Tucker v. United States}.\footnote{Tucker v. United States, 5 F.2d 818 (8th Cir. 1925).} On facts eerily similar to the hypothetical posed in the prior section of this Article, the defendant in a mail fraud case directed his attention to one issue in the case, the existence of a fraudulent scheme, when he gave his direct.\footnote{Tucker, 5 F.2d at 822.} He denied such a scheme existed.\footnote{Id.} When the prosecutor took over on cross-examination, he began asking about an issue foreign to the direct, albeit relevant to the case.
crime.\textsuperscript{91} There was an objection, but the trial judge required the witness to answer.\textsuperscript{92} This resulted in reversible error based on constitutional grounds.\textsuperscript{93} “In eliciting the answers to the questions propounded to Dudley Tucker with reference to [one aspect of the crime], the government made Dudley Tucker its witness, and compelled him over \textit{reasonable} and proper objection to be a witness against himself, in violation of the Fifth Amendment to the Constitution.”\textsuperscript{94}

The Tucker court added that “[i]f there is a good reason why a defendant should not be compelled to be a witness against himself, there ought to be equally good reason why, if he has testified voluntarily upon one issue, he should not be compelled to testify against his will concerning matters wholly unrelated to that issue . . .”\textsuperscript{95} Other, later cases added force to the conclusion that constitutional imperatives dictated the restrictive rule of cross-examination when the accused takes the stand. A note to \textit{United States v. Guajardo-Melendez} remarks that earlier court decisions “as well as the writings of commentators, e.g., Carlson, Cross Examination of the Accused, 52 \textit{Cornell L.Q.} 705 (1967), seem to embrace the doctrine of partial waiver of [F]ifth \{A\}mendment rights.”\textsuperscript{96} Decisions of similar nature\textsuperscript{97} prompted one commentator to conclude: “The constitutional privilege against self-incrimination and the statute of 1878 permitting the defendant to testify have been construed as

\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 824.
\textsuperscript{94} Id.
\textsuperscript{95} Id. at 822.
\textsuperscript{96} 401 F.2d 35, 38 n.5 (7th Cir. 1968).
\textsuperscript{97} See, e.g., Harrold v. Oklahoma, 169 F. 47, 51 (8th Cir. 1909) (noting the accused “waives his privilege of silence upon the subjects relative to which he testifies, but upon no other.”); Wilson v. U.S., 4 F.2d 888, 889 (8th Cir. 1925) (finding cross-examination where the defendant was required to testify to facts outside of the direct examination relating to other counts was “inexcusable upon any ground consistent with the rules that a defendant is entitled to a fair trial, and that he may not be compelled to be a witness against himself.”)
requiring a restrictive cross-examination.”

The Seventh Circuit United States Court of Appeals has asserted that when a defendant takes the stand, he waives the privilege against self-incrimination to the extent of his direct testimony. Supreme Court decisions were cited which supported the conclusion. There is even Georgia authority which seems to obliquely recognize this principle: “A defendant who testifies on his own behalf waives his privilege against self-incrimination to the extent of that testimony.” Conclusions from these case-based declarations indicate that the defendant waives the privilege of silence to the extent of topics covered in his direct testimony, but not beyond.

b. Recent Federal Case Law

In addition to the federal and United States Supreme Court cases cited in the last section of this Article, do other recent federal decisions clarify the controversy? A 2005 federal decision from Wisconsin aids this inquiry. In a battery case, the defendant claimed photographs of the crime scene would

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101. Edison v. State, 344 S.E.2d 231, 233 (Ga. 1986) (emphasis added), referenced in Milich, supra note 49, at 952. See Reedman v. State, 593 S.E.2d 33, 66 (2003) (“[T]he trial court properly informed [defendant] that a defendant who takes the stand and testifies in his own behalf waives the right to remain silent to the extent of that testimony.”). As noted elsewhere in this Article, other Georgia cases have been less attentive to the constitutional dimensions of the scope of cross-examination rules.
102. Harrold, 169 F. at 51. The line of Supreme Court cases analyzing the Fifth Amendment issue has not always been smooth and consistent. Against cases like Fitzpatrick cited above are decisions in cases like Johnson v. United States, 318 U.S. 189 (1943) and Raffel v. United States, 271 U.S. 494 (1926).
support his defense. However, the trial judge conditioned the introduction of the pictures on the defendant taking the stand. The judge further required him to testify and be cross-examined “on all aspects of the case.” The accused did not testify. The photos were never introduced. After the defendant was convicted, he claimed he was deprived of his constitutional right to present evidence. He was foreclosed from the opportunity to offer the photographs by the trial court’s requirement that he submit to an unlimited cross-examination.

The federal court addressed the issue of abridgment of Fifth Amendment rights created by the evidentiary ruling imposed during defendant’s trial. Conditioning direct testimony on the requirement of unlimited cross-examination was potentially unconstitutional, the decision concluded. Referencing United States Supreme Court, federal circuit and state authority, the court added:

The federal rule is that a defendant who takes the stand waives his privilege against self-incrimination only as to matters “reasonably related” to his direct testimony. See McGautha v. California, 402 U.S. 183, 215, 91 S. Ct. 1454, 28 L. Ed. 2d 711 (1971) (defendant who takes stand in his own behalf cannot then claim privilege against cross-examination “on matters reasonably related to the subject matter of his direct examination”) (emphasis added); Brown v. United States, 356 U.S. 148, 154-55, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958) (breadth of defendant’s waiver of privilege against self-incrimination determined by scope of relevant cross-examination). See also Neely v. Israel, 715 F. 2d 1261, 1265 (7th Cir. 1983) (declining to reach constitutionality of Wisconsin’s wide open cross rule in light of court’s conclusion that cross-examination was properly

104. Id. at *5-6.
105. Id.
106. Id.
107. Id.
108. Id.
110. Id. at *28.
111. Id.
112. Id. at *29-30.
within scope of direct). It is unclear whether this rule is rooted in the language of the Fifth Amendment or is a procedural rule that does not bind the states. See Neely v. State, 97 Wis. 2d 38, 44-45, 292 N.W.2d 859 (1980) (discussing history of federal rule).  

c. Action In Other States

An excellent decision by the Supreme Court of Kansas sheds light on the extent of the waiver accomplished when the accused ascends the witness stand. The setting was a Jackson v. Denno hearing. The accused testified on his own behalf and against the voluntariness of his confession. Instead of sticking with the voluntariness issue, the prosecutor's cross-examination ranged over various aspects of the case. Questions were asked which related to the merits of the dispute and matters of defense. Allowing such inquiries over objection was an error of constitutional dimensions. When the defendant refused to answer some of them, the defendant's testimony was stricken and he was held in contempt. The Kansas Supreme Court made short work of the state's claim that by testifying the defendant had exposed himself to a wide-open cross-examination:

At a Jackson v. Denno hearing, the issue before the trial court is whether the defendant's statement or confession was voluntary. The truthfulness of the statement is not at issue. The defendant may take the stand for the limited purpose of testifying about the events related to whether the statement was voluntarily made. Questions that go to the substance of the statements are outside the scope of a Jackson v. Denno hearing. Here, the trial court erred in ruling that [defendant] must answer questions about the events that were the bases

113. Id. at *30. The court ruled that “[e]ven assuming the trial court's error was of constitutional magnitude,” Sarauer was unable to show the error was prejudicial. Id. at *31.
115. Id.
116. Id.
117. Id. at 487.
118. Id.
119. Id.
for the crimes charged. The trial court further erred in striking all of [defendant’s] testimony because [defendant] had a valid Fifth Amendment privilege.120

Until this case, Kansas had not weighed in directly on the issue of whether a defendant could testify at a Jackson v. Denno hearing without waiving his or her Fifth Amendment rights. In deciding for the accused, the court relied upon Texas and Georgia law:

Texas is not the only state to limit cross-examination during a Jackson v. Denno hearing to determine the issue of voluntariness. While not ruling on an identical situation, the Georgia Supreme Court clearly implied that the cross-examination of the defendant during a Jackson v. Denno hearing should be limited to the issue of voluntariness. Marshall v. State, 266 Ga. 304, 305-06, 466 S.E.2d 567 (1996).121

Some may argue that the partial waiver accomplished by the accused at a Jackson v. Denno hearing, a view espoused by virtually all courts which have looked at the issue, does not carry over to trial. Yet no reasoning has been offered to support this claim. The counter-argument is that if partial waiver is good at a suppression hearing, it is also good at trial. At the suppression hearing, the accused’s direct addresses voluntariness in confession cases, and the cross-examiner is restricted to voluntariness. That is as far as the defendant has

120. Bogguess, 288 P.3d at 488.
121. Id. at 487. See State v. Lovett, 345 So. 2d 1139, 1145 (La. 1977) (finding testimony at trial by defendant against the voluntariness of his confession should be limited to the issue of voluntariness and cross-examination at trial is necessarily limited to that narrow issue). The Lovett decision did not arise out of a pretrial proceeding. The accused attacked his confession at trial. Lovett, 345 So. 2d at 1144-45. As noted, the reviewing court narrowed the scope of cross-examination of the accused at trial. Lovett, 345 So. 2d at 1144-45. The case is commented upon in Stephen H. Vogt, Note, Defendant-Witnesses, Confessions, and a Limited Scope of Cross-Examination, 38 LA. L. REV. 890, 897 (1978) (explaining the United States Supreme Court, in a constitutional case “which made the right against self-incrimination applicable to the states, also may obligre the states to follow the narrow rule of cross-examination . . .”).
waived his rights. In similar fashion, at trial the defendant has only waived his rights to subjects he testified about on direct.

Courts in states that adopted the American approach have voiced constitutional concerns related to with wide-open cross-examination, even where the issue is not particularly raised. Even adherents of the British rule appear to concede—both directly and by deviating from its strictures—that its application raises numerous concerns. While declining to resolve the issue of whether its wide-open cross-examination rule effectuated a violation of Fifth Amendment rights, for instance, the Supreme Court of Wisconsin noted that the adoption of a more restrictive scope of cross-examination by federal courts essentially obviated those concerns.

Even in wide-open states, deviations from the British rule of cross-examination abounds. The Supreme Court of Vermont, for example, held on state due process grounds, that, notwithstanding the terms of its code section, previously suppressed evidence should be unavailable to the State for impeachment purposes. The only exception would be when it is clear that the defendant has testified during direct examination in a manner contradictory to the suppressed

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122. FED. R. EVID. 104(d).
123. People v. Raffaelli, 647 P.2d 230, 233 n.7 (Colo. 1982). The Raffaelli court references J. Weinstein & M. Berger as well as R. Carlson and observes: “Cross-examination of a defendant concerning particular matters not raised by direct examination, such as the content of the defendant’s confession, may implicate the defendant’s privilege against self-incrimination. However, that privilege was not claimed here, and, therefore, we do not consider the issue in this case.” Id. (citation omitted).
124. Neely v. State, 292 N.W.2d 859, 864 (Wis. 1980) (“[T]he question of the extent of the waiver by testifying rarely arose because the rule limiting the scope of permissible cross-examination would bar questions about matters not brought out on direct without reference to whether the defendant had waived his privilege against self-incrimination by testifying.”). An earlier case from Washington directly took the position that the privilege against self-incrimination was violated when an accused was compelled to testify on cross-examination regarding a matter not touched on during the examination in chief. State v. Crowder, 205 P. 850, 852 (Wash. 1922).
evidence:
We believe, in line with our discussion above, that V.R.E. 611(b) must be limited where the prosecution seeks to impeach a criminal defendant by the use of suppressed evidence bearing directly on the crime charged. Cross-examination, normally limited under Rule 611(b) only by materiality, is hereafter restricted for prosecutors who cross-examine a criminal defendant. Only where a defendant has testified on direct examination to facts contradicted by previously suppressed evidence bearing directly on the crime charged may the prosecution use such evidence to impeach the defendant on cross-examination. With respect to collateral matters, however, where defendant testifies on direct or cross-examination to facts not bearing directly on the crime for which he or she is on trial, it remains within the discretion of the trial court whether suppressed evidence that relates only to such collateral matters, and not to the crime charged, may be admitted for impeachment purposes.126

There are some state-by-state variations within the wide-open jurisdictions. Some adopt a mixed pattern. Missouri follows the English rule, but wisely embraces the federal rule when a criminal defendant is examined.127 Kentucky favors the English rule generally, but allows the trial judge to limit cross-examination regarding matters not testified about on direct examination.128 New York courts have held that “a testifying defendant does not automatically waive the privilege against

126. Id. at 203-04: We believe this rule will achieve a fair balance between defendant's right to testify on his or her own behalf and the State's interest in preventing perjury. To permit the use of suppressed evidence to impeach testimony first brought out on cross-examination would upset this balance and impose an untenable chilling effect on defendant's right to testify . . .


self-incrimination as to questions concerning pending criminal charges unrelated to the case on trial.\textsuperscript{129} In an unpublished opinion, the California Court of Appeals, relying heavily on New York authority, remarked:

\begin{quote}
[A]llowing the prosecution to impeach a defendant testifying in his or her own behalf at trial, with unrelated pending charges "unduly prejudices defendant [both] by its potential impact on the pending criminal charge and in its actual effect on the charge being tried. It exerts an undeniable chilling effect upon a real 'choice' whether to testify in one's own behalf.\textsuperscript{130}
\end{quote}

Georgia courts have recognized that the statutory right to a thorough and sifting cross-examination is not without limits, even when it comes to criminal defendants.\textsuperscript{131}

d. **Georgia Derivations: Inconsistencies Spawned by Georgia Rule 611(b)**

Up until 2013, vintage Georgia law was premised on the proposition that there could be no "partial waiver" of the Fifth Amendment. Under most of the older cases, if the privilege was waived as to one issue, it was waived as to all.\textsuperscript{132}

The ban on partial waiver seems to have been destroyed by the 2013 adoption of O.C.G.A. § 24-1-104(d). That statute boldly declares that an accused who testifies to one issue can retain silence as to other topics.\textsuperscript{133} Cross-examination cannot breach the partial silence. True enough, the doctrine is embraced in the Georgia rules in the context of pretrial proceedings. However, logic and consistency would seem to extend the same principle to trials.

That is what federal law does. First, the accused does not, by testifying upon a preliminary matter, become subject to cross-

\textsuperscript{130} People v. Matz, 68 Cal. App. 4th 1216, 1231 (Cal. Ct. App. 1998) (citations omitted), \textit{not certified for publication}.
\textsuperscript{131} King v. State, 539 S.E.2d 783, 799 (Ga. 2000); Kolokouris v. State, 523 S.E.2d 311, 315 (Ga. 1999).
\textsuperscript{133} O.C.G.A. § 41-1-101(d) (West, Westlaw through 2014).
examination regarding guilt or innocence on the main charge. This is Federal Evidence Rule 104(d). Internal consistency is then provided by Federal Evidence Rule 611(b), which also protects the accused from unrelated cross-examination, this time at trial.

To the contrary, the new Georgia rules embrace a serious inconsistency. Georgia’s O.C.G.A. § 104(d) recognizes partial waiver of defendant’s Fifth Amendment rights. O.C.G.A. § 611(b) does not.

e. Severance

Some might opine that many of the cases covered by this Article could easily be cured by severance. They say that where an accused wishes to testify regarding one count in the charges against him but not another, simply sever the charges and have two trials. Such an observation lacks real world experience. One does not simply snap fingers and achieve severance. Cases denying severance are legion; it is very difficult to secure.134 Federal courts place the burden on criminal defendants when it comes to severing offenses.135 So do the courts of Georgia.136

134. U.S. v. Hersh, 297 F.3d 1233, 1244 (11th Cir. 2002) (noting that severance is not mandatory simply because a defendant indicates that he wishes to testify on some counts but not on others; rather, to establish that the joinder of charges kept him from testifying, an appellant must show that the charges were distinct in time place, and evidence, that there was “important” evidence that he might have offered on one set of charges but could not, and that he had a “strong need” not to testify on the other counts); U.S. v. Utley, 62 Fed. Appx. 833, 836 (10th Cir. 2003) (finding the District Court did not abuse its discretion in declining to sever defendant’s two assault charges; where the defendant only asserted that he “may wish to testify at trial as to one or more counts, but not as to all,” there was no suggestion that evidence was confusing or overlapping, and offenses were not so similar as to present risk of confusion, in that they took place on different dates at different locations, and there were different witnesses).

135. See, e.g., U.S. v. Leavitt, 878 F.2d 1329, 1340 (11th Cir. 1989) (“To establish an abuse of discretion, the appellant must demonstrate that he was unable to receive a fair trial and suffered compelling prejudice.”) (citation omitted); U.S. v. Knowles, 66 F.3d 1146, 1159 (11th Cir. 1995) (“‘Compelling prejudice’ exists where a defendant can demonstrate that without severance, he was unable to receive a fair trial, and the trial court
Even cases that have touched on the issue of severance in connection with issues raised herein provide little solace to criminal defendants. That is why the message of this Article is critical to defendants and lawyers facing multi-count indictments.

2. The Orientation of Georgia Bench and Bar: Alerting the Judicial System to Constitutional Considerations

Significant attention was paid in this Article to the questionable Georgia practice of wide-open cross-examination of the accused. Will lawyers pick up on the prospect of raising a constitutional challenge to the Georgia rule? Some may be concerned that the Georgia statute trumps their constitutional objection. This is not true. Recent United States Supreme Court jurisprudence demonstrates the ease with which constitutional considerations override conflicting local statutes. In *Davis v. Alaska*, Chief Justice Burger said that the Alaska statute which accorded confidentiality to juvenile records had to give way to the constitutional right of confrontation. The chief witness against the defendant was described as "a crucial witness for the prosecution." The witness had a juvenile record and was on probation for burglarizing two cabins. The trial court enforced the state policy of privacy of juvenile records and blocked the defense effort to expose the juvenile adjudication and the witness' probation. The Supreme Court could afford no protection from the prejudice suffered. (“When a defendant argues for severance based on the trial court's discretion, it is his burden to demonstrate that severance should be granted because of one or more discretionary concerns.”).
ruled this state action to be unconstitutional.\textsuperscript{142}

Other key cases make the same point. Mississippi trial rules excluded hearsay in the form of declarations against interest by a witness who said he killed a homicide victim, and that defendant Chambers did not do it.\textsuperscript{143} The confessions of guilt by the witness were made to third persons.\textsuperscript{144} Proof of them was rejected under the Mississippi rule that barred declarations against penal interest made by the declarant.\textsuperscript{145} The United States Supreme Court said the local rule impermissibly excluded valid evidence and amounted to a violation of due process of law.\textsuperscript{146} The conviction of defendant Chambers was reversed.\textsuperscript{147}

A different issue was presented in \textit{Melendez-Diaz v. Massachusetts}.\textsuperscript{148} The question was whether the testimony of a lab technician who runs a test is necessary when the test report is offered in evidence.\textsuperscript{149} Massachusetts procedure allowed a crime lab report as a substitute for live testimony, over a defense objection.\textsuperscript{150} This procedure was invalidated when the United States Supreme Court announced that state practice violated the confrontation clause of the United States Constitution.\textsuperscript{151}

Lurking in the shadows is a disruptive potential collision between a federally protected constitutional right and a state evidence code provision. That was certainly the case with \textit{Crawford v. Washington},\textsuperscript{152} as a state hearsay provision fell to

\begin{footnotesize}
\begin{enumerate}
\item Id. at 315.
\item Id.
\item Id. at 293.
\item Id. at 302-03.
\item Id.
\item 557 U.S. 305 (2009). The \textit{Melendez-Diaz} case was an extension of \textit{Crawford v. Washington}, 541 U.S. 36 (2004) (holding the Confrontation Clause protects defendants against state procedures which permit testimonial statements which are untested by cross-examination).
\item Melendez-Diaz, 557 U.S. at 307.
\item Id. at 308-09.
\item Id. at 329.
\item 541 U.S. 36 (2004).
\end{enumerate}
\end{footnotesize}
Sixth Amendment protections.\textsuperscript{153} By preserving wide-open cross-examination, Georgia may be inviting the same sort of conflict spawned by \textit{Crawford}. This time a state evidence provision potentially collides with Fifth Amendment concerns. Could maintaining this former code provision without serious consideration of the issues addressed in this Article lead Georgia, and states like it, into unwanted disruptions? A salient difference, of course, is that \textit{Crawford} took the bench and bar by surprise.\textsuperscript{155} The difficulties of maintaining wide-open cross-examination of the accused have been the object of longstanding scholarly comment.

IV. A MILITARY MODEL?

If a forward-looking wide-open jurisdiction elects to modify its scope of cross-examination rule to reflect Fifth Amendment values, there are options. One would be to simply adopt Federal Evidence Rule 611(b). Another would be to craft a special rule for criminal defendant examinations in the manner endorsed by the military rules. These provisions were reported in Part II, \textit{supra}. The military’s approach was ably remarked upon by three distinguished commentators.

The military drafters did attempt to address the constitutional implications of Rule 611(b) in Rule 301, a provision with no federal counterpart. Although we will not repeat our discussion of Rule 301 here, it is important to note that Rule

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154. Hon. G. Ross Anderson, Jr., \textit{Returning to Confrontation Clause Sanity; The Supreme Court (Finally) Retreats from Melendez-Diaz and Bullcoming}, FED. LAW., Mar. 2013, at 68 (characterizing \textit{Crawford} as “one of the most impractical decisions in recent criminal procedure history,” a case which is plaguing trial courts with confusion and overburdening prosecutors). \textit{See also} \textit{State v. Mizenko}, 127 P.3d 458, 474 n.7 (Mon. 2006) (“\textit{Crawford} has disrupted domestic violence prosecutions to a degree not seen in any other area”).
155. Anderson, \textit{supra} note 153, at 68 (“However, in 2004, the Supreme Court turned heel and attempted to formulate a new standard with its \textit{Crawford} decision.”).
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301(e) [now 301(c)] states that, when an accused voluntarily testifies, he waives his Fifth Amendment privilege only with respect to those matters contained in his direct examination. Government counsel may not expand the testimony into related or foundational areas. Rule 301(c) also provides that when the accused is tried for more than one offense, he may testify about only one of those charges, and thus not waive his protection against self-incrimination with respect to the others. 156

V. CONCLUSION

Court decisions dictate that the proper rule for cross-examination of accused persons is a constitutional issue and not merely a question of good trial procedure. 157 A rule of limited scope seems driven by past cases. Destroyed by careful analysis of these cases are the following myths:

1) There can be no partial waiver of Fifth Amendment rights when an accused testifies in a criminal case.

2) O.C.G.A. § 24-6-611(b) ordains wide-open cross-examination of witnesses and parties, and the constitutional rights of the accused are inferior to the Georgia statute.

With these myths destroyed, a final conclusion is needed. How should the justice system respond to the principles explored in this Article? One solution may be for legislative attention to the wide-open rule, excepting the accused from its sweep. In the preliminary stages of criminal proceedings, there is already recognition of the doctrine of partial waiver of Fifth Amendment rights. 158 Another option would be the recognition

156. S. SALTZBURY, L. SCHINASI & D. SCHLUETER, supra note 73, at § 611.02 [3][b] (2011) (emphasis in original).
158. Under O.C.G.A. § 24-1-104(d) the privilege of silence protects against wide-open cross of the accused. O.C.G.A. § 24-1-104(d) (West,
of principles explained in this Article by judicial fiat, and imposition of a new design.

The issue has national implications. In addition to Georgia, at least one-fifth of the states expose accused persons to wide-open cross-examination once they take the stand. Jurisdictions which earlier rejected the federal rule and instead placed wide-open cross-examination of the accused in their evidence codes need to review their options.