Cross-Examining Children in a Productive Manner Under Georgia's Child Hearsay Law

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CROSS-EXAMINING CHILDREN IN A PRODUCTIVE MANNER UNDER GEORGIA’S CHILD HEARSAY LAW

INTRODUCTION

When a child’s out-of-court hearsay testimony incriminates a defendant, the defense attorney must know how to productively cross-examine the child and develop reliable testimony. In cases involving crimes against children, Georgia law allows a child’s out-of-court hearsay testimony as evidence as long as it is reliable and the child, even if uncommunicative, is physically available for cross-examination. To counter out-of-court testimony while dealing with a seemingly uncommunicative child on the stand, a defense attorney should learn the tools for cross-examining children effectively.

Society possesses an altruistic interest in prosecuting child abusers for the sake of children; it also maintains a considerable interest in prosecuting child abusers for utilitarian reasons. In 1988, nine percent of murder victims were children; consequently, society lost 1698 future workers. Moreover, many of the adolescents and adults who drain society with physical, mental, behavioral, and criminal problems were abused as children.

Despite the states’ significant interest in prosecuting child abuse, they face a three-fold dilemma: children are frequently the sole witness to the crime; child witnesses possess special needs; and meeting these needs can threaten the defendant’s

1. See O.C.G.A. § 24-3-16 (1995); see also infra Part I.
3. See id. at 149; see also R. Kim Oates, M.D., The Spectrum of Child Abuse 122, 132-33 (1996). “It is clear that physical abuse has long-term adverse outcomes, particularly on intellectual functioning, language and reading skills, and probably on personality development.” Oates, supra, at 122. The author also notes that sexually abused children are at an “increased risk of later criminal activity” and, as adults, a significant percentage will have “depressive symptoms, sexual disorders, anxiety, low self-esteem, a tendency to revictimization, self-destructive behavior, and drug or alcohol abuse.” Id.
4. See Whitcomb, supra note 2, at 62.

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rights at trial.⁶ Though mistrust and controversy exist over child witnesses, in the midst of the ongoing academic discussion of child witnesses, it is agreed that children can be effective witnesses, though, developmentally, they speak a different language than adults and possess special needs and vulnerabilities in the courtroom.⁷ Not enabling children to tell what they know gives criminals a virtual carte blanche to secretly victimize inarticulate children, or, on the other hand, stymies cross-examination, which might reveal that the child’s testimony was coached or fabricated. When considering the long-range effects of child abuse and the defendant’s needs, not using children’s testimony is hardly an option. The legal system has tried several methods to accommodate children’s needs and defendants’ rights: video-taped testimony, closed circuit television, the use of screens, and the child’s hearsay testimony. Defendants have objected to all of these methods, demanding instead face-to-face confrontation.⁸ Georgia accommodates

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7. See WALKER, supra note 5.
8. See NANCY WALKER PERRY & LAWRENCE S. WRIGHTSMAN, THE CHILD WITNESS 152-73 (1991). In Coy v. Iowa, the Supreme Court ruled that a defendant’s confrontation rights, the interests of society in prosecuting child-abuse, and the child’s rights were adequately protected by the use of a one-way glass between the defendant and the child-witness when there were “individualized findings that [the] particular witnesses needed special protection.” 487 U.S. 1012, 1021-22 (1988). In Maryland v. Craig, the Supreme Court balanced the defendant’s confrontation rights and the child’s interests and approved the use of closed circuit television if there was a showing that direct confrontation caused trauma to the child. See 497 U.S. 836, 855-56 (1990). Video testimony uses the child’s memory when fresh, can incorporate questions from the defense and prosecution, and can utilize a professional examiner who is better equipped to communicate with children. Cf. PERRY & WRIGHTSMAN, supra, at 11-13. However, “critics have argued that videotaping the child’s testimony at a proceeding apart from trial may threaten the defendant’s right to a public trial with a jury because the jury and the public are not physically present when the videotape is made.” INGER J. SAGATUN & LEONARD P. EDWARDS, CHILD ABUSE AND THE LEGAL SYSTEM 187 (1995) (referring to WHITCOMB, supra note 2). Furthermore, although videotape testimony using a professional examiner to ask defense and prosecution questions incorporates the right to cross-examination, the right to face-to-face confrontation with the defendant and the jury remains a problem, despite the fact that “removing the burden of face-to-face confrontation may actually lead to more accurate testimony.” JOHN E. B. MYERS, CHILD WITNESS LAW AND PRACTICE 399 (1987). The legal system also utilizes children’s out-of-court hearsay statements. See Vaughan, supra note 6, at 372. However, the use of out-of-court hearsay statements gives rise to concerns of the statements’ reliability and the ability of the defendant to cross-examine the declarant and thus expose unreliability. See SAGATUN & EDWARDS, supra, at 190.
children’s needs by allowing their out-of-court testimony, and accommodates the defendant’s rights by requiring that the child be available for cross-examination.

This Note provides a background analysis of Georgia’s child hearsay law and focuses on how to cross-examine productively. Part I focuses on Georgia’s child hearsay law and discusses the complaints leveled against it in Georgia case law and in a 1994 law review article on Georgia’s child hearsay law.\(^9\) Part II addresses the need for reliable truth-finding procedures in child abuse cases and explains the purpose of cross-examination. Part III discusses linguistic tools that can elicit reliable testimony from child witnesses. Part IV analyzes traditional rules for cross-examining child witnesses. Finally, Part V analyzes an unproductive cross-examination, and suggests ways it could have been more productive.

I. GEORGIA’S CHILD HEARSAY LAW

A. Georgia Law

“Hearsay evidence is that which does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of other persons.”\(^{10}\) Historically, concern over hearsay and a defendant’s confrontation rights began with the prosecution of Sir Walter Raleigh for treason in 1603, when the court in England barred Sir Walter Raleigh’s cross-examination of his accuser.\(^{11}\) From this historical incident came our belief that the court and the state possess a responsibility to give the accused an opportunity to cross-examine the witness who is testifying against him.\(^{12}\) Because of concerns with the defendant’s confrontation rights and the reliability of hearsay, courts generally do not admit hearsay into evidence unless its use is legally justified under hearsay exceptions.\(^{13}\) One hearsay exception is Georgia’s child hearsay statute, which reads:

A statement made by a child under the age of 14 years describing any act of sexual contact or physical abuse

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\(^9\) See Vaughan, supra note 6, at 393-400.
\(^{10}\) O.C.G.A. § 24-3-1 (1995).
\(^{12}\) See id.
\(^{13}\) See id. at 786.
performed with or on the child by another or performed with or on another in the presence of the child is admissible in evidence by the testimony of the person or persons to whom made if the child is available to testify in the proceedings and the court finds that the circumstances of the statement provide sufficient indicia of reliability.  

Thus, Georgia’s hearsay law protects defendants by requiring that children’s hearsay testimony show a reasonable indicia of reliability and by requiring that children be available for confrontation purposes. However, these statutes are criticized as being short on substance when it comes to protecting defendants’ rights.

Defendants have two complaints. First, they complain that the statute is inadequate because it does not require the court to make an explicit and prior finding of reliability before admitting out of court statements. Second, they complain that calling a

14. O.C.G.A. § 24-3-16 (1995). In Hunnicutt v. State, 194 Ga. App. 714, 391 S.E.2d 790 (1993), the court ruled that a child is “available to testify” only if he is competent under Code section 24-9-5. Code section 24-9-5(b) reads:

In all cases involving deprivation ... or in criminal cases involving child molestation, and in all other criminal cases in which a child was a victim of or a witness to any crime, any such child shall be competent to testify, and his credibility shall be determined as provided in Article 4 of this chapter.

Id. § 24-9-5(b).

15. See Vaughan, supra note 6, at 393. Georgia allows adult out-of-court statements when the adult is available for cross-examination. See PAUL S. MILICH, COURTROOM HANDBOOK ON GEORGIA EVIDENCE 127 (1996). An out-of-court statement by an adult is not deemed hearsay, and there is no statutory requirement that an adult’s out-of-court statements have an indicia of reliability. See id. However, though not statutorily required, in Morris Co. v. Dykes, the court did state that admittance of the adult's out-of-court statement was enhanced by its reliability. See 197 Ga. App. 392, 394, 398 S.E.2d 403, 405 (1990). In contrast, Georgia legislators have chosen to call a child’s out-of-court statement hearsay and require that the statement be reliable and the child be available for cross-examination. See O.C.G.A. § 24-3-16 (1995). The author is aware of no legislative history illuminating the reason for a higher standard for a child’s out-of-court statements. The reliability factors discussed in Gregg v. State, 201 Ga. App. 238, 411 S.E.2d 65 (1991), seem to point to concerns that the child may have been unduly influenced and concerns as to whether the child’s out-of-court statement is indeed the child’s testimony in light of the fact that children are more easily led than adults. It is the author’s contention that the same awareness of a child’s linguistic limitations should be considered when formulating cross-examination techniques to ensure that the child’s testimony is reliable.

16. See Vaughan, supra note 6, at 399.

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child who is on the witness stand but unresponsive “available” violates their rights to confrontation. In sum, courts admit evidence against the defendant under the Georgia Child Hearsay statute’s requirement of an available child declarant and reliable child hearsay when availability is a fiction and the finding of reliability is an afterthought.

B. An Explicit Finding of Child Hearsay Reliability Prior to Admission is Not Required

In Georgia, a child’s out-of-court statements are presumptively unreliable; the state must show the statement is reliable, and the trial judge may make an informal finding of reliability as the trial proceeds. However, defendants argue there must be a prior and explicit finding of hearsay reliability before the court can admit the statement.

The Supreme Court held in Idaho v. Wright that hearsay, such as out-of-court statements by children, which do not fall into a traditional hearsay exception, is “presumptively unreliable and inadmissible for Confrontation Clause purposes” unless there is a reliability finding. In United States v. South, a case involving the existence of a conspiracy as a preliminary question before admitting a co-conspirator’s hearsay statement, the court stated that “[t]he trial court is not required to enter express findings into the record as to the preliminary facts; it suffices that the facts are supported by evidence of record.” The question here is whether the reliability finding, as a preliminary

19. See Vaughan, supra note 6, at 399.
23. Id. at 817.
24. 28 F.3d 619 (7th Cir. 1994).
question, must be prior and explicit, or whether it may be informal.

In Minnesota, the law requires a prior and explicit finding of reliability outside the presence of the jury.\textsuperscript{26} The Minnesota Court of Appeals held that the absence of a prior and explicit reliability finding was harmless error when the record showed that the hearsay statements were reliable, but was reversible error when the record did not show reliability.\textsuperscript{27} In contrast, Georgia does not require an explicit prior finding; it allows an informal finding, and reverses if the record does not support it.\textsuperscript{28}

In \textit{Reynolds v. State},\textsuperscript{29} the defendant argued that the court should make a reliability determination of the child-accuser's hearsay statements prior to admitting them.\textsuperscript{30} The Georgia Supreme Court disagreed and affirmed the trial court's decision. The court reasoned that no error existed when the court did not make an explicit determination of reliability before admission, because the court ultimately did find the statements were reliable.\textsuperscript{31} Likewise in \textit{Gregg v. State},\textsuperscript{32} the defendant complained that the court admitted the child-accuser's hearsay absent a sufficient showing of reliability\textsuperscript{33} in a pretrial hearing.\textsuperscript{34} The Georgia Court of Appeals, relying on \textit{Reynolds},\textsuperscript{35}

\textsuperscript{26} See State v. Carver, 380 N.W.2d 821, 825 (Minn. Ct. App. 1986).
\textsuperscript{27} See id. at 826.
\textsuperscript{29} 257 Ga. 725, 363 S.E.2d 249 (1988).
\textsuperscript{30} See id. at 726, 363 S.E.2d at 250.
\textsuperscript{31} See id.
\textsuperscript{33} See id. at 239, 411 S.E.2d at 68. The court ruled that:

Indicia of reliability must spring from the circumstances of the statement . . . . The factors which the court may consider, when applicable, include but are not limited to the following: (1) the atmosphere and circumstances under which the statement was made (including the time, the place, and the people present thereat); (2) the spontaneity of the child's statement to the persons present; (3) the child's age; (4) the child's general demeanor; (5) the child's condition (physical or emotional); (6) the presence or absence of threats or promise of benefits; (7) the presence or absence of drugs or alcohol; (8) the child's general credibility; (9) the presence or absence of any coaching by parents or other third parties before or at the time of the child's statement, and the type of coaching and circumstances surrounding the same; and, the nature of the child's statement and type of language used therein; and (10) the consistency between repeated out-of-court statements by the child.

\textit{Id.} at 240-41, 411 S.E.2d at 68 (citations omitted).
\textsuperscript{34} See id. at 239, 411 S.E.2d at 67.
reiterated that an explicit finding of reliability was not a "condition precedent to the admissibility" of hearsay.

In Rolader v. State, the appellate court reversed the trial court, because the record did not support the admittance of the child's out-of-court statements with a sufficient showing of reliability. In Lagana v. State, the appellate court examined the record, and upon not finding a sufficient indicia of reliability, directed the court below to reconsider reliability based on the reliability factors enumerated in Gregg.

Georgia courts hold that a hearsay reliability finding is implicitly made by the fact that the judge admitted it. As long as the record supports a sufficient indicia of reliability, the trial court's decision will stand; if it does not, the decision is reversible. Georgia judges use their discretionary power to allow an informal finding of reliability as the trial proceeds. Georgia's judges' use of discretion has been criticized as violating the spirit of the confrontation clause. However, Georgia's policy is similar to the approach adopted in United States v.
In the case of *South*, in which the court did not require express findings as long as the record supported the informal findings.

The trial court is responsible to make sure the hearsay is reliable. Although Georgia trial courts may use discretion in admitting evidence without an explicit prior finding of reliability, it is beyond question that the record must support a finding of reliability. If a defendant suffers unfair prejudice when hearsay is admitted and later found unreliable, the solution for defendants is a reversal by appellate courts. If insubstantiality of reliability findings become a noticeable problem in Georgia courts, a prior and explicit finding of reliability is a good solution.

C. A Child's "Availability" and Confrontation Rights

In Georgia, not only must a child's hearsay be reliable, the child must also be physically available, even if uncommunicative, for cross-examination. However, defendants complain that an uncommunicative witness is not truly available.

The defendant has a constitutional right "to be confronted with the witnesses against him." The elements of confrontation are "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." Justice Scalia, in his dissent in *Maryland v. Craig*, explained that face-to-face confrontation or

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45. 28 F.3d 619 (7th Cir. 1994).
46. Id. at 625 n.2 (referring to conspirator statements).
47. See O.C.G.A. § 24-3-16 (1995).
49. See Reynolds, 257 Ga. at 725, 363 S.E.2d at 250; Lagana, 219 Ga. App. at 222, 464 S.E.2d at 627; Rolader, 202, Ga. App. at 139-40, 413 S.E.2d at 757.
50. See State v. Carver, 380 N.W.2d 821, 826 (Minn. Ct. App. 1986). In the interest of judicial economy, however, informal findings of reliability are sufficient based on the presumption that trial court judges take the necessity of reliability seriously. However, any interest in judicial economy is outweighed if trial judges do not take the necessity of reliability seriously. Any significant evidence that trial judges frequently presume reliability without any record to support it should be brought to the attention of the state legislature with a petition to change the law so as to require prior findings.
53. U.S. Const. amend. VI.
55. Id. at 860 (Scalia, J., dissenting).
physical presence is the central right of confrontation, whereas the other elements of cross-examination—observation of demeanor and oath—are "collateral rights," which together with physical presence are thought to assure reliable evidence. In Davis v. Alaska, the Supreme Court stated, in dicta, "[c]onfrontation means more than being allowed to confront the witness physically." However, this case dealt with a legal bar to the witness; the trial court had barred the defense from asking a juvenile questions about his probation status. The court did not examine whether a legally unrestricted opportunity to cross-examine an unresponsive witness upholds confrontation rights.

In Delaware v. Fensterer, the Court did address this issue, and reasoned,

[t]he Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose . . . infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.

More recently in United States v. Owens, the Supreme Court allowed a prison guard's out-of-court statement naming his attacker, because he was a hearsay declarant who was present at trial for cross-examination even though he was unable to adequately respond to the defense's questions on who his attacker was or even remember his former statement. The Court followed Fensterer and reasoned that the opportunity of unrestricted cross-examination, even if all it discloses is

56. Id. at 862.
57. See id.
59. Id. at 315.
60. See id. at 319.
62. Id. at 21-22.
64. A hearsay declarant is the person who spoke the out-of-court statement at issue.
65. See Owens, 484 U.S. at 556-60.
insufficient memory, satisfies confrontation rights. In both of these cases, the right to cross-examination existed in the opportunity to examine the witness, not in the witness' response, which may range from positive knowledge, to ignorance, to forgetfulness, to evasiveness, and perhaps to silence.

At least two state supreme courts have applied Owens and/or Fensterer in child abuse cases. Each court reached a different result. First, in Commonwealth v. Kirouac, the Supreme Judicial Court of Massachusetts held that the defendant's confrontation rights were violated when the child-witness "resisted answering nearly all questions put to her on cross-examination." The court reasoned that a limitation of cross-examination would offend the Confrontation Clause depending on the degree of limitation, as exhibited by the witness' responsiveness, which must be decided on a case by case basis. The court further reasoned that the foreclosure to cross-examination in Kirouac was greater than in Owens or in Fensterer. The court in Kirouac equated unresponsiveness to unavailability due to stroke, sudden illness, or fainting, in which case there is, literally, no witness left on the stand. The court in Kirouac placed a premium on the actual responsiveness of a witness, yet did not mention the confrontation value of the jury's observing a witness' unresponsiveness.

A second case applying Owens to a child-abuse case is Tucker v. State. In Tucker, the Supreme Court of Delaware differentiated cases in which the defendant was barred from cross-examination because of restrictions on the scope of cross-examination or physical unavailability from cases in which the

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66. See id. at 558-60.
67. See id. at 556-60; Delaware v. Fensterer, 474 U.S. 15, 20-23 (1985). However, the Supreme Court has never decided a case in which a child victim/witness is legally available for cross-examination but is completely silent. Neither has the Supreme Court addressed the issue of whether, or under what circumstances, an unresponsive child witness implicates a violation of confrontation rights versus merely showing the defense's failure to ask the child appropriate questions.
69. Id. at 272.
70. See id. at 273.
71. See id. (stating that in Owens, witness was responsive enough to say he could not explain his prior identification, and that in Fensterer, witness only had a "memory lapse on one point").
72. See id. at 273 n.5.
73. See id. at 270-73.
74. 564 A.2d 1110 (Del. 1989).
witness was present but unwilling or unable to respond.75 The Supreme Court of Delaware relied on Justice Harlan's concurring opinion in California v. Green76 in which he stated, "the Confrontation Clause of the Sixth Amendment reaches no further than to require the prosecution to produce any available witness whose declarations it seeks to use in a criminal trial."

The court in Tucker reasoned that when the state presents the witness to the defendant, with no legal bars as to the scope of cross-examination, the witness' memory, ability, or unwillingness is a matter for the jury.78 The court in Tucker was concerned with denying a defendant the right to confrontation, reflecting the same concern aroused by the prosecution of Sir Walter Raleigh for treason in 1603 when the court barred Sir Walter Raleigh's cross-examination of his accuser.79 The court and the state have a responsibility to give the accused an opportunity to cross-examine the witness against him; the court and state do not have a responsibility as to how the witness behaves.80

In Gibby v. State,81 the Georgia Court of Appeals stated "a child witness is 'available' for purposes of the Child Hearsay Statute as long as the child is physically available to appear at trial."82 Defendants complain that when the child does not respond on the witness stand, availability is hollow, and there remains no meaningful confrontation.83 The question in Georgia becomes whether physical presence is sufficient to satisfy the Confrontation Clause or whether more is required, and if more, how much more.84

Georgia does not require children to be under oath.85 A lack of

75. See id. at 1124.
76. 399 U.S. 149 (1943).
77. Tucker, 564 A.2d at 1122 (quoting Green, 399 U.S. at 174 (Harlan, J., concurring)).
78. See id. at 1123-24.
79. See Mueller & Kirkpatrick, supra note 11, at 1090-91, see also text accompanying supra notes 11-12.
80. See Mueller & Kirkpatrick, supra note 11, at 1090-91; Tucker, 564 A.2d at 1123.
82. Id. at 22, 443 S.E.2d at 855.
84. See Gibby, 213 Ga. App. at 22, 443 S.E.2d at 855.
85. See Bright, 197 Ga. App. at 784, 400 S.E.2d at 18 (holding that subsequent to passage of O.C.G.A. § 24-9-5(b) and as an "instance of necessity . . . the prerequisite administration of the oath . . . has been obviated when the child does not
oath does not seem to be a substantive issue in Georgia courts. The remaining factors of confrontation are physical presence, cross-examination, and observation of demeanor by the jury or trier of fact. Because a child on the stand, who is considered legally available, is physically present and observable by the jury, the issue becomes the meaning of cross-examination. In Bright v. State, the defendant said the victim's refusal to answer cross-examination questions denied him his constitutional right of confrontation. However, the court in Bright reasoned that unresponsiveness and evasiveness are matters of credibility that illuminate intelligence, memory, accuracy, and veracity, which is the purpose of cross-examination. A cross-examination that exposes unresponsiveness and evasiveness allows the jury to judge the child's credibility, which satisfies confrontation rights. Although Georgia's definition of availability elicits the accusation that confrontation is not meaningful, Georgia courts maintain that it is meaningful to the jury when cross-examination illuminates the child's intelligence, memory, accuracy, and veracity by the child's unresponsiveness and evasiveness. In Bright, when the child refused to answer on cross-examination, the Georgia Court of Appeals maintained that cross-examination occurs "when the witness appears to answer as well as he or she is capable of answering.

Georgia's policy on children's availability harmonizes with recent Supreme Court rulings. Both Tucker and the above mentioned Georgia cases reflect the Supreme Court's respect and reliance on the jury and the importance of the opportunity to

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88. See also Byrd v. State, 204 Ga. App. 252, 253, 419 S.E.2d 111, 112 (1992) (discussing that defendant complained that child's refusal to answer substantive questions made her legally unavailable and, thus, offended his right to confrontation;
Bright, 197 Ga. App. at 784-85, 400 S.E.2d at 19.
89. See Bright, 197 Ga. App. at 785, 400 S.E.2d at 20.
90. See Byrd, 204 Ga. App. at 253, 419 S.E.2d at 112.
91. See Vaughan, supra note 6, at 399.
92. See Byrd, 204 Ga. App. at 253, 419 S.E.2d at 112; Bright, 197 Ga. App. at 785, 400 S.E.2d at 20.
94. See Vaughan, supra note 6, at 395.
cross-examine the witness such as he or she is.96 "[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose ... infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony."97

II. RELIABLE TRUTH-FINDING AND CROSS-EXAMINATION

A. The Need for Reliable Truth-Finding

Considerations of hearsay reliability and child availability aside, defendants continue to face uncommunicative children on the stand as did the defendants in Tucker, Gibby, McGarity, Byrd, Bright, and Kirovac.98 Though defense attorneys and the legal community have the right, even obligation, to complain, object, and appeal the issues of hearsay reliability and child availability, cases are being tried, now, under the law as it stands. The child who makes an out-of-court statement is necessarily able to communicate, but this fact is perhaps unhelpful to a frustrated defense attorney who cannot elicit any meaningful communication from the child in court. Nancy Perry and Lawrence Wrightsman, authors of The Child Witness,99 pragmatically point to a solution: learning the tools of communicating with children.100 "[U]nderstanding child development may be vital to the mechanics of working with children in the legal system. Professionals need to know how to conduct successful interviews [and] to overcome communication barriers .... "101 When it comes to ascertaining truth, Perry and Wrightsman

believe that every member of the legal system must be accountable, for society is affected in many adverse ways when the truth of the matter is not uncovered.... [E]ach professional person involved should understand child

99. PERRY & WRIGHTSMAN, supra note 8.
100. See id. at 57.
101. Id.
development, and those who question children victim-witnesses should receive specialized training in the techniques appropriate to interviewing children.\textsuperscript{102}

Perry's and Wrightsman's statements turn us from "I can't cross-examine this child" to how to cross-examine this child. The cost of not uncovering the truth is intolerable, both to the defendant and to society.\textsuperscript{103} On the one hand, society is unwilling to abandon children to abuse and to pay the subsequent costs of that abuse.\textsuperscript{104} On the other hand, there is the man accused of committing a sexual assault on this child. His name has appeared on the front page of the local newspaper, as well as on all the evening news programs. . . . His professional reputation has been tarnished at least or perhaps even destroyed.\textsuperscript{105}

This comparison elucidates Perry's and Wrightsman's comment that "society is affected in many adverse ways when the truth of the matter is not uncovered," and stresses the need for all legal professionals to be committed to reliable truth-finding.\textsuperscript{106}

\textbf{B. The Objective of Cross-Examination: Reliable Truth-Finding}

In \textit{Kentucky v. Stincer},\textsuperscript{107} the Supreme Court stated: "[t]he right to cross-examination, protected by the Confrontation Clause, . . . is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial."\textsuperscript{108} Federal Rule of Evidence 611 states that one of the purposes of interrogation is that it be "effective for the ascertainment of the truth."\textsuperscript{109} Section 24-1-2 of the Georgia Code states that the object of all legal investigation is the truth.\textsuperscript{110} These directives incorporate the necessity of linguistically appropriate cross-

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\begin{thebibliography}{110}
\bibitem{102} Id. at 258.
\bibitem{103} \textit{See id.} at 2, 258.
\bibitem{104} \textit{See} \textit{Whitcomb, supra} note 2, at 149.
\bibitem{105} \textit{Perry & Wrightsman, supra} note 8, at 2.
\bibitem{106} Id. at 258. The author recognizes that the Constitution addresses concerns that sometimes supersede the search for truth, such as a citizen's right to be secure from unreasonable searches. \textit{See U.S. Const.} amend. IV. However, as discussed below, the Confrontation Clause and cross-examination are designed to promote reliable truth-finding. \textit{See infra} notes 107-16 and accompanying text.
\bibitem{107} \textit{482 U.S.} 730 (1987).
\bibitem{108} \textit{Id.} at 736.
\bibitem{109} \textit{Fed R. Evid.} 611(a)(1).
\end{thebibliography}
\end{small}
examination of children. The California Evidence Code explicitly states this necessity: "[t]he court shall . . . take special care to insure that questions are stated in a form which is appropriate to the age of the witness . . . [and may], on objection by a party, forbid the asking of a question which is in a form that is not reasonably likely to be understood by a person of the age of the witness." Wisconsin courts also recognize the importance of asking age-appropriate questions, stating, "questions put to a child so young have to be framed to fit the child's age . . . ."

Knowing how children speak and hear will enhance reliable truth-finding in cases in which a child is a witness. The discovery of the truth is not served when the witness is confused or does not understand the question. Notably, linguistic misunderstanding can happen more easily with children, and questions framed in respect of children's linguistic capabilities

111. When the child is on the stand, the jury needs to know what the child really thinks, believes, and knows, not what an adult can confuse (deliberately or accidentally) him or her into saying. The jury must judge the witness, and to judge the witness, it must accurately hear the witness.

Federal Rule of Evidence 611(a), requiring that questions effectively bring out the truth, does not allow confrontation to include confrontation with confusing questions because confusing questions would obscure discovery of the witness' knowledge and the jury's access to that knowledge. Cf. Goode & Wellborn, supra note 25, at 160 (referring to United States v. Clark, 613 F.2d 391, 406-07 (2d Cir. 1979)). Though Georgia does not use the Federal Rules of Evidence, the same principle is stated in Green v. State, 221 Ga. App. 436, 472 S.E.2d 1 (1996), holding that the right to confrontation is curtailed when confrontation inhibits reliable truth-finding. Analogous concerns are expressed in Federal Rule of Evidence 604 and O.C.G.A. § 24-9-4 (1995), which allow interpreters for those who speak foreign languages or are hearing-impaired. As stated in Hensley v. State, 228 Ga. 501, 186 S.E.2d 729 (1972) (quoting Wilson v. Frisbie, Roberts & Co., 57 Ga. 269, 273 (1876)), interpreting the Georgia's statute on interpreters, "unless such communications are to be translated by those who understand the signs and characters in which they are expressed, courts and juries would never be able to arrive at their meaning" and the "disabled would never be able to give [their] testimony."

The same principles hold true for communication with children. Child-examinations should elicit the child's knowledge. A legal victory for defense or prosecution based on confused and unreliable communication is hollow and makes a mockery of reliable truth-finding.

112. Myers, supra note 8, at 195 n.287 (quoting CAL. EVID. CODE § 765(b) (West Supp. 1987)).


114. See Myers, supra note 8, at 194. This Note only addresses the defense attorney who desires to make cross-examinations productive for reliable truth-finding, either because he believes his client is innocent or because he believes the charges are exaggerated or inaccurate. It is beyond the scope of this Note to fully discuss a cross-examination by a defense attorney who sees the purpose of cross-examination as an opportunity to confuse the witness and ultimately obscure the witness' truth.
better serve the truth-finding functions of trial.\textsuperscript{115} A cross-examination that respects children's linguistic development honors the Supreme Court directive that cross-examination "is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial."\textsuperscript{116}

III. USING LINGUISTIC TOOLS TO ENABLE CHILDREN TO TELL WHAT THEY KNOW

Although the defendant is not entitled to a cross-examination that is "effective in whatever way, and to whatever extent, the defense might wish,"\textsuperscript{117} he is still entitled to aspire to the most productive cross-examination possible. This is possible because children possess the capability of recalling and communicating past events accurately.\textsuperscript{118} Anne Graffam Walker, Ph.D., a forensic linguist who specializes in questioning children, particularly in the legal system, stresses the possibility and the necessity of understanding a child's language.\textsuperscript{119} The answer is often merely a question of the adult learning how to ask appropriate questions.\textsuperscript{120} By age three, children have a vocabulary of between 500 to 3000 words, and can identify five parts of the body.\textsuperscript{121} By age five or six, children have a vocabulary of about 14,000 words, and can identify three to four colors.\textsuperscript{122} However, though on the surface children speak adult-like language, they are far from being linguistically mature, and an understanding of children's language will assist in productive cross-examination.\textsuperscript{123}

In her Handbook on Questioning Children,\textsuperscript{124} Anne Graffam

\begin{thebibliography}{99}
\item 115. See id. at 194-95.
\item 118. See WALKER, supra note 5, at 2 (stating "[c]hildren as young as 2 and 3 can recall and report past experience accurately" (referring to C. Peterson, The Who, When and Where of Early Narratives, 17 J. CHILD LANGUAGE 433, 433-55 (1990)); and "children as young as 3 have testified competently and credibly in court" (referring to D.P.H. Jones & R.D. Krugman, Can a Three-Year-Old Child Bear Witness to Her Sexual Assault and Attempted Murder?, 10 CHILD ABUSE & NEGLECT 253, 253-58 (1986))).
\item 119. See generally WALKER, supra note 5.
\item 120. See id. at 20.
\item 121. See id. at 89.
\item 122. See id.
\item 123. See id. at 89-91.
\item 124. See id. For practitioners interested in this book, the publisher's address and
Walker discusses the factors to keep in mind when communicating with children. Some of these factors include the following: (1) children's unique individuality; (2) the fact that children have never experienced anything other than a "one-down" position with adults; (3) the fact that children live in the here and now; (4) the fact that children think far more literally than adults may realize; (5) the fact that children do far better with concrete and particular terms rather than abstract or general terms; and (6) the fact that children are unnecessarily confused by several types of linguistic complexity.

Children are unique individuals, coming from different experiences and different cultures. Children may use words in their own peculiar way, such as using "stab" to describe what something felt like to them, or using the word "jury" to mean "jewelry." The examiner should ask for clarification of a word's meaning and the examiner should use the child's terminology.

The examiner should also be sensitive to the fact that children have never known anything but a "one-down" position with adults; this dynamic colors the entire interaction between the child and the examiner. For example, it is important that a witness understand the question that he or she is trying to answer. However, children may not understand and, due to their one-down position, may find it difficult to express their lack of

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phone number are ABA Center on Children and the Law, 1800 M. Street, N.W., Washington, D.C. 20036, (202) 331-2250.
125. See id. at 9.
126. See id.
127. Id. at 14 (stating that children "vis a vis" adults know only a position of inequality and lesser power—a "one-down" position).
128. See id.
129. See id. at 39.
130. See id. at 11, 57.
131. See id. at 11-12, 30, 40.
132. See id. at 12-13.
133. See id. at 9, 18-19 (stating that meaning behind words and actions may be misinterpreted due to lack of understanding of child's culture).
134. Id. at 53.
135. See John C. Yuille et al., Interviewing Children in Sexual Abuse Cases, in CHILD VICTIMS, CHILD WITNESSES 95, 108 (Gail S. Goodman & Bette L. Bottoms eds., 1993).
137. See id.
understanding. Consequently they may give an answer to what they think the question is, thereby obscuring truth. Also, because of the one-down position, it is hard, "if not impossible," for children even as old as eleven and twelve to express verbal disagreement with an adult. This inability makes leading questions that begin with "Isn't it true that?" of little use in drawing out reliable testimony. Because of children's position in society, they are not able to "hold on, verbally, to what they know or believe to be true" when faced with these kinds of questions. In their social sphere, children know adults as the people who ask children questions to which the adults, teachers, and parents, already know the answer. When an adult suggests the answer in the question, it is the innate product of all the child's prior learning for the child to trust the adult, even to the detriment of his or her own belief. Another problem that stems from the children's one-down position is how they might deal with repetitive questions and the inherent inference that the first answer was not correct. It is wise to explain why they are being asked again.

Children live in the concrete here and now and can be confused by unexplained shifts in topics or times. To avoid confused answers and to promote reliable truth-finding, children need clear cues when the topic is being changed. Children also have difficulty understanding shifts in time within the same question. A child's answer to a question such as, "Do you remember what you said yesterday?" may be ambiguous because of the shift from present remembering to past knowledge.

138. See id.
139. See id.
140. Id. at 37.
141. See id.
142. See id.
143. Id. (emphasis omitted).
144. See Karen J. Saywitz & Lynn Snyder, Improving Children's Testimony with Preparation, in CHILD VICTIMS, CHILD WITNESSES, supra note 135, at 117, 130-31.
145. See id.
146. See WALKER, supra note 5, at 57-58, 97.
147. See id. at 97; Yuille et al., supra note 135, at 109.
148. See WALKER, supra note 5, at 39.
149. See id.
150. See id. at 40.
151. See id.
Children are very literal.\textsuperscript{152} Children may answer “no” to the question “Are you in school?” because they are not literally “in school” at that moment.\textsuperscript{153} A child may say he or she did not go to a man’s house, but later might say he or she did go to his apartment.\textsuperscript{154} To the child, a house is a house, and an apartment is not literally a house.\textsuperscript{155} If asked “what did the picture say?” the child may feel confused and become silent, because, to the child, pictures do not literally “speak.”\textsuperscript{156} Because of her literal view of responsibility, a child may answer “no” when asked if she put her mouth on the perpetrator’s penis, because, in the child’s view, the penis was put in her mouth.\textsuperscript{157} When asked if they remember something, children may answer “no” because the child doesn’t think he can “remember” if he never forgot.\textsuperscript{158} Understanding and using words in both their general and literal sense is a cognitive skill that young children below the age of six and seven cannot reasonably be expected to have.\textsuperscript{159}

The examiner should avoid general and abstract words in favor of concrete and particular words.\textsuperscript{160} For example, children do not generally comprehend adverbs such as “before” and “after” until age seven or later.\textsuperscript{161} “Did you tell your mom before dinner?” may illicit an answer that only means the child told his mom and may contain no response as to when he or she told mom.\textsuperscript{162}

Children do not acquire the skill of matching pronouns and “pointing” words to the prior or following specific nouns to which they refer until about the age of ten.\textsuperscript{163} Words like “here,” “there,” “his,” “her,” “this,” and “that” are difficult for children to understand and use correctly.\textsuperscript{164} It is advisable to simply and redundantly repeat the specific noun, even when it is within the

\begin{footnotes}
\item[152] See id. at 11, 57.
\item[153] See id. at 57.
\item[154] See id. at 11.
\item[155] See id.
\item[156] See id. at 12.
\item[157] See id. at 11-12.
\item[158] See id. at 27.
\item[159] See id. at 11 (referring to D. Elkind, The Child’s Reality (1978)).
\item[160] See id. at 30, 50-51.
\item[161] See id. at 90.
\item[162] See id. at 24.
\item[163] See id. at 22, 90.
\item[164] See id. at 22, 53-54.
\end{footnotes}
same sentence. For example, if the examiner has been talking about Billy and Billy’s room, even immediately before, rather than asking, “Did his mother go there yesterday?” the examiner should ask, “Did Billy’s mother go to Billy’s room yesterday?”

Until age ten or eleven, children have difficulty with concepts such as age, dimension, numbers, and time; these are very relative and flexible concepts for children. Rather than asking what “time” something happened, greater accuracy is obtained by asking about objective events such as, “Was the T.V. on?” “What was on T.V.?” or “Was it dark outside?” Below the age of seven, “[a]bstractions of any kind are beyond the grasp of most children...” Thus, the examiner should choose concrete, specific, literal, and simple words.

Children are confused by several types of linguistic complexity. Children cannot adequately understand passive forms until ages ten to thirteen. A child may hear a passive question such as, “Were you chased by him?” as “Did you chase him?” It is better to use simple forms of questions such as “Did Bob (specific noun) chase (action verb) you (object)?” With very young children it may even be advisable to replace “you” with the child’s name: “Did Bob chase Billy?”

Another form of questioning that is too complex for children is the “tag question.” A tag question such as, “X is true, isn’t it?” requires seven cognitive steps to process. Children do not use these types of questions themselves until around the age of

165. See id. at 23.
166. See id. at 40-43, 89-90.
167. See id. at 43.
168. Id. at 30.
169. See id. at 40, 50-51.
170. See id. at 12-13.
171. See id. at 30-31.
172. See id.
173. See id. at 23.
174. See id. at 37-38, 74.
175. Id. at 37-38 (stating that a question such as, “It’s raining, isn’t that true?” has seven cognitive steps: (1) deciding whether the statement part of the question is true; (2) connecting the tag to its full form; (3) tracking pointers and pronouns between the tag and the question; (4) knowing that positive statements go with negative tags and negative tags go with positive statements; (5) knowing that negative tags do not affect the meaning of the statement; (6) distinguishing that the tag is only the speaker’s view, and is not necessarily true; and (7) meeting or countering the speaker’s point of view).
The child's answer may refer to any or all of the seven steps that are needed to process these types of questions, making this type of question a dubious tool for reliable truth-finding. Tag questions are also susceptible to the one-down position previously discussed.

Another type of complex question that is not appropriate for children is the negative question such as, "Did you not see?" These types of questions illicit correct answers only fifty percent of the time even from college-age students. On the other hand, a straightforward, non-negative question such as, "Did you see?" will elicit a correct answer seventy to one hundred percent of the time.

Also, "Do you remember, X?" (DUR/X) questions and compound questions are too complex to realistically serve a reliable truth-finding function with children up to age twelve. For example, "Do you remember the last time you saw the knife?" contains the DUR question and the proposition "the last time you saw the knife." The child who is in a one-down position knows an answer is expected and will probably attempt an answer. If the child answers "no," does he mean he does not remember what the examiner said, that he does not remember the knife, or that he does not remember the last time he saw it? The answer is ambiguous. The problem is multiplied as propositions are added. For example, "(1) Do you remember (2) saying (3) that Jack had the knife (4) when Dan got hurt?" has four propositions the child might answer. Even simple compound questions should be avoided for the same reasons.

"Why did you..." questions such as, "Why did you wait so long to tell anybody?" are also too complex for children up to ages...
seven to ten.\textsuperscript{188} These types of questions necessitate the use of five cognitive steps to process.\textsuperscript{189} A child must be self-reflective, understand his motivations, at a time in the past, remember his reasoning, and communicate it.\textsuperscript{190} It is not reasonable to ask children this type of question.

Questions that require any kind of tracking are too complex to be fruitfully used with children.\textsuperscript{191} For example, a question such as, “Did your Mommy tell you that if you were asked if Mommy told you to say X that you were to say X really happened?” is useless on a four-year-old child, and on even older children.\textsuperscript{192}

Anne Graffam Walker quotes the following example of a not unusual question put to a five-year-old child witness during a trial: “Do you recall talking to her on the Sunday after they found—discovered something had happened to Doug and asking her, ‘Do you know Mark?’ and then saying, ‘That is who did it? Do you remember telling her that?’\textsuperscript{193} After reading the above brief review of a child’s linguistic capabilities, is it any wonder that defense attorneys sometimes find themselves faced with an unresponsive, and probably thoroughly confused, child?

A cardinal, and rather simple rule for attorneys is to simplify their language in the same way most people already tend to do in everyday life when speaking to children.\textsuperscript{194} A question should focus on one, or at the most two things, with one main thought per sentence.\textsuperscript{195} Simple, specific, concrete, and familiar nouns and verbs should be used in simple sentences, such as, “Did Bob (specific noun) hit (familiar verb) Billy (concrete object)?”\textsuperscript{196} It is good to be redundant with children, and to specifically identify nouns and objects, avoiding words like “this” and “his.”\textsuperscript{197} It is also wise, whenever there is a doubt as to whether the attorney is connecting with the child, to simply ask the child to rephrase the question he or she was just asked.\textsuperscript{198} Do not hesitate to

\textsuperscript{188} Id. at 47-48.
\textsuperscript{189} See id. at 48.
\textsuperscript{190} See id.
\textsuperscript{191} See id. at 50.
\textsuperscript{192} See id.
\textsuperscript{193} Id. at 12-13.
\textsuperscript{194} See id. at 29.
\textsuperscript{195} See id. at 12-13, 73.
\textsuperscript{196} See id. at 33-34, 51.
\textsuperscript{197} See id. at 73.
\textsuperscript{198} See id. at 47.
clarify what words mean to the child; ask the child, "What is X?" 199

"[L]awyers bear the final responsibility of enabling children to
tell what they know; . . . [i]f . . . they fail to understand that the
standard of 'common speech' among adults is not one that can be
applied to children, then the result may well be not discovery of
facts, but fostering of confusion . . . ." 200 Confusion does not
benefit the child, society, or the defendant. "It is hard to imagine
how anyone's rights could be jeopardized, or how justice could be
anything other than well served, if we apply to everyone,
including children, the principle of simplicity in speech." 201

IV. AN ANALYSIS OF TRADITIONAL CROSS-EXAMINATION
IN LIGHT OF A CHILD'S LINGUISTIC LIMITATIONS

The following are eight cross-examination techniques
recommended for use on children: (1) the "agreement technique;"
(2) the anxiety production/agreement technique; (3) the
suggestibility technique; (4) the jumping technique; (5) the
conceptual weakness technique; (6) indirection; (7) eliciting
fantasy; and (8) establishing coached or memorized
testimony. 202 The first five techniques do not promote reliable
truth finding, but the last three do.

The recommended agreement technique begins with the use of
a series of innocuous and non-threatening questions to get the
child in the habit of making agreeable responses. 203 After the
child is in the habit of agreeing, the attorney then asks a
question designed to make the child swerve from his prior
testimony. 204 For example, after the child has continually said
"yes, that's right," ask something like, "You may have thought X
happened, but it could have been a little different, couldn't
it?" 205 This question is asked in the hope that the habit of
agreement will cause the child to say "yes." 206 This type of
technique raises concerns that relate to the child's one-down

199. See id. at 95.
200. Id. at 63.
201. Id. at 64.
202. See MYERS, supra note 8, at 198-217.
203. See id. at 199-200.
204. See id.
205. See id.
206. See id.
position and the use of tag questions. As stated above, it is hard for a child to verbally disagree with an adult until age eleven or twelve, and the questions are inappropriate.\textsuperscript{207} The agreement technique combines the child's natural inhibition towards disagreeing with any adult with the intimidating authority of an attorney in a courtroom situation, and with a technique of repetitive agreement.\textsuperscript{208} This technique probably will not elicit reliable testimony.\textsuperscript{209}

Another recommended technique is the anxiety production/agreement technique.\textsuperscript{210} The attorney uses a line of questioning relating to a subject such as punishment to create anxiety in the child,\textsuperscript{211} because "on some psychological level [the child] wonders what will happen if he displeases the attorney by disagreeing."\textsuperscript{212} Like the agreement technique, this technique creates a problem with a child's one-down position. However, this technique combines several factors: (1) the child's natural inhibition towards disagreeing with any adult; (2) the intimidating authority of an attorney in a courtroom situation; (3) repetitive agreeing; and (4) the additional element of fear.\textsuperscript{213} This manner of questioning utilizes, not necessarily fear of misstating the truth, but rather a subconscious fear of disagreeing with the attorney.\textsuperscript{214} This is not a technique designed to illicit reliable testimony.\textsuperscript{215}

A third recommended technique is the suggestibility technique.\textsuperscript{216} Children who are "eager to please" can be led by "persistent [and] directed questioning" to give inaccurate testimony.\textsuperscript{217} The cross-examiner's awareness of a child's suggestibility is important in three ways: (1) to change the child's direct testimony through suggestive questioning; (2) to question the child's credibility by showing their suggestibility; and (3) to

\textsuperscript{207} See Walker, supra note 5, at 37.
\textsuperscript{208} See id. at 37-39.
\textsuperscript{209} See id.
\textsuperscript{210} Myers, supra note 8, at 200-01.
\textsuperscript{211} See id. For example, the attorney may use a series of fifteen or so questions on truth and lying with an emphasis on getting caught and getting in trouble to raise the child's anxiety level. See id.
\textsuperscript{212} See id.
\textsuperscript{213} See Walker, supra note 5, at 14; Myers, supra note 8, at 200-01.
\textsuperscript{214} See Myers, supra note 8, at 200-01.
\textsuperscript{215} See Perry & Wrightsham, supra note 8, at 154-55.
\textsuperscript{216} See Myers, supra note 8, at 203-07.
\textsuperscript{217} Id. at 204.
make the defense attorney aware of the possible prior use of coaching and to ask the child about prior use of inappropriately suggestive interviews.218 The use of (2) and (3) are addressed below under establishing coached or memorized testimony.219 However, the first use is problematic. It suggests exploiting children's suggestibility to make them change their testimony regardless of what the child really knows or believes, thus leaving the jury with testimony as to what happened that is not really the child's belief or testimony at all, but something he or she was confused into saying.220 This problem relates to a child's one-down position, as well as to an exploitation of other cognitive weaknesses.221 Exploiting suggestibility is not dependable for reliable truth-finding.

Another recommended technique is the jumping technique.222 The attorney "alters the sequence of events"223 when he is questioning the child, by asking about the end of an event, then jumping back to the middle.224 Alternatively, the attorney can jump back and forth between two different lines of questioning, which is particularly effective in confusing children between the ages of three and eleven.225 The purpose of this technique is to keep the child off balance in order to elicit inconsistent testimony.226 Because a child lives in the here and now, and because of a child's need for simple and orderly language, this technique is an inappropriate vehicle for eliciting the child's testimony and beliefs.227

Another recommended technique is the conceptual weakness technique.228 This technique recognizes a child's difficulty with relative concepts such as time, distance, size, and speed.229 If the child's direct testimony rests on any of these concepts, the

218. See id.
219. See infra notes 237-38 and accompanying text.
220. See MYERS, supra note 8, at 198-200. This can be analogized to concerns with undue influence when a testator makes a will; we want to know the will was indeed the testator's, and not the will of the influencer.
221. See WALKER, supra note 5, at 14; see also MYERS, supra note 8, at 204.
222. See MYERS, supra note 8, at 216.
223. Id.
224. See id.
225. See id.
226. See id.
227. See WALKER, supra note 5, at 39-40.
228. See MYERS, supra note 8, at 216-17.
229. See id. at 217.
child's testimony can be attacked by producing inaccurate calculations from the child.\textsuperscript{220} This technique produces error and "lead[s] the child into inaccurate estimates of time, distance, speed, and so forth."\textsuperscript{221} However, as stated above, the truth is better ascertained by avoiding abstract concepts and asking concrete questions that draw on familiar events in a child's life. Instead of asking, "What time was it?" ask "What was on T.V.?'"\textsuperscript{222}

The sixth recommended technique, indirection, simply establishes pertinent facts indirectly so that the child will not be defensive.\textsuperscript{223} For example, in a custody battle in which Johnny is feeling hostile to his father, the attorney can establish that Johnny spent quality time with his father, by having Johnny relate fishing and camping expeditions as enjoyable experiences without mentioning his father, and later connect them to his father.\textsuperscript{224} This technique does not exploit a child's linguistic weaknesses; rather it simply enables the child to tell what he knows from a perspective that will be advantageous to the father.

The seventh recommended technique, eliciting fantasy, involves demonstrating to the jury through questioning that the child has a propensity to exaggerate or fantasize.\textsuperscript{225} As long as the examiner uses simple questions that do not exploit the child's linguistic immaturity, this will produce reliable evidence that the child can exaggerate. However, re-direct examination may establish that the child fantasizes, but that the child also knows the difference between fact and fantasy.\textsuperscript{226}

The final recommended technique, establishing coached or memorized testimony, may be done through simple, direct, non-antagonistic questioning that enables a child to simply tell the jury the trial preparation process they went through.\textsuperscript{227} Using leading or other linguistically inappropriate questions to establish coaching or memorized testimony should probably be avoided so that the problem of unreliability is not compounded.\textsuperscript{228}

\textsuperscript{220} See id.
\textsuperscript{221} Id.
\textsuperscript{222} See Walker, supra note 5, at 41-43; Myers, supra note 8, at 40.
\textsuperscript{223} See Myers, supra note 8, at 201-03.
\textsuperscript{224} See id. at 203.
\textsuperscript{225} See id. at 207-08.
\textsuperscript{226} See id. at 207.
\textsuperscript{227} See id. at 209-14.
\textsuperscript{228} See supra notes 117-201 and accompanying text. When coaching is present, a
A defense attorney must zealously represent his client. However, the concern with the first five techniques is their tendency to sway a child into saying something that is not truth to the child, thus, in reality, depriving the jury of the child's testimony. In contrast, the last three techniques enable the child to simply be a witness to what he or she knows, whether it be a description of abuse, coaching, or the good times with Dad.  

V. AN ANALYSIS OF THE CROSS-EXAMINATION THAT FAILED IN COMMONWEALTH V. KIROUAC

Commonwealth v. Kirouac involved the alleged sexual abuse of a four-year-old girl, six at the time of trial, whose "testimony was crucial to the prosecution's case." There was physical evidence of a damaged hymenal membrane, the child's hearsay testimony, and very limited direct testimony by the child. Due to the unproductive cross-examination, the Massachusetts Supreme Judicial Court reversed the conviction and remanded for retrial with the instructions that defendant should move to strike direct testimony if the cross-examination was similarly unproductive and with instructions not to admit the police videotape of the child's out-of-court testimony.

The following is the portion of cross-examination recorded in the Massachusetts opinion:

[1] DEFENSE COUNSEL: "[Valerie], do you remember yesterday you talked about some things that happened to you? Do you remember that?"
THE WITNESS: "No."
[2] DEFENSE COUNSEL: "You don't remember that?"
THE WITNESS: (Witness shaking head)

239. For example, it is one thing to show that three-year-old Johnny cannot see very well by asking him in three-year-old language what X picture is, and hearing him respond that he cannot see. It is another thing entirely to use confusing techniques, such as the agreement technique, discussed above, combined with leading questions, to get him to say he cannot see the picture when he can. One is reliable truth-finding, the other is not.
241. Id. at 271-73.
242. See id.
243. See id. at 274-75.
[3] DEFENSE COUNSEL: "Do you remember talking about Dougie at all?"
THE WITNESS: (Witness shaking head)
[4] DEFENSE COUNSEL: "Is that 'No'?"
THE WITNESS: "I forgot."
[5] DEFENSE COUNSEL: "Is that 'No' or 'Yes'?"
THE WITNESS: "No."
[6] DEFENSE COUNSEL: "You didn't talk about Dougie?"
THE WITNESS: "I'm tired. I wish I could go to my nanny's."
[7] DEFENSE COUNSEL: "Do you remember saying that something happened to you, [Valerie]? Do you remember that?"
THE WITNESS: (Witness shaking head)
[8] DEFENSE COUNSEL: "You don't remember talking about that at all, [Valerie]?"
THE WITNESS: "I'm trying to get this."
[9] DEFENSE COUNSEL: "You're trying to take your panda's jacket off?"
THE WITNESS: "Yeah, because he's hot."
DEFENSE COUNSEL: "He's hot, yeah."
[VICTIM-WITNESS ASSISTANT]: "I don't think it comes off."
THE WITNESS: "Yes, it does. It came off in my bed yesterday."
[VICTIM-WITNESS ASSISTANT]: "You have to answer [defense counsel's] questions, then we can take care of panda."
[10] DEFENSE COUNSEL: "[Valerie], do you remember yesterday when you said something happened to you?"
THE WITNESS: "No."
THE WITNESS: "I'm tired."
[VICTIM-WITNESS ASSISTANT]: "You have to talk to [defense counsel] first and answer his questions, okay?"
THE WITNESS: "I want my nanna. I got two quarters."
[12] DEFENSE COUNSEL: "Do you want some more water, [Valerie]?
THE WITNESS: "It spilled on the floor."
[13] DEFENSE COUNSEL: "That's okay. Do you remember yesterday when you talked about Dougie, [Valerie]?"
THE WITNESS: "No."
[14] DEFENSE COUNSEL: "You don't remember that?"
THE WITNESS: "No."
In Georgia, this cross-examination would be considered adequate to protect the defendant's confrontation rights, and the defense attorney who desires a more productive cross-examination is responsible for its development. It is helpful to examine what went wrong in this cross-examination and what could have been done differently. Upon examining the defense attorney's choice of wording in light of a child's linguistic capabilities, there are several ways in which the cross-examination may have been doomed to fail.

Question one actually contains two questions. The first of these questions has five propositions, is a DUR/X question, asks about a non-concrete event that is phrased in a passive form, and switches between three different time frames. (1) Do you remember (present tense) (2) yesterday (past-tense) (3) you talked (past-tense) (4) about something (vague, non-concrete) (5) that happened to you (past-past-tense, vague and non-concrete, passive form). The second question is also a DUR/X question and asks the child if she remembers "that," an undefined "pointer" word. To which proposition is the child

244. Id. at 272 n.4.
246. See WALKER, supra note 5, at 73 (explaining the need for one thought per question).
247. See id. at 35-36 (stating "[c]hildren, even older school-age children, are not good" at skills required for this type of question).
248. See id. at 48 (stating that terms such as, "did anything happen?" are too vague to be useful).
249. See id. at 30-31 (stating that children do not adequately understand the passive form until age 10 to 13).
250. See id. at 39-40 (stating that unnecessary time-shifts are not appropriate with children due to their "naive status as discourse processors" and will cause ambiguous answers).
251. See id. at 22-23 (stating that children do not understand "pointers" until older than age seven for words like "that" and until about age 10 for pronouns).
responding? What does her “no” mean? At this point the child is probably confused.

This first double question is followed up with question two. Question two is a negation\(^{252}\) as well as a DUR/X question,\(^{253}\) again asking the child if she remembers “that,” an undefined “pointer” word for which the child has no immediate reference point.\(^{254}\)

The line of questioning does not improve. Questions three, seven, eight, ten, thirteen, and fifteen are similar to the first part of question one; they are DUR/X questions with multiple propositions and mixed tenses for the child to contend with, sometimes containing key terms that are vague and non-concrete as well as passive forms and negations.\(^{255}\)

Questions six, eight, eleven, and fourteen, like question two, are all negations with eleven and fourteen being identical to question two.\(^{256}\) Questions four and five are simply ambiguous because of the undefined use of a pointer to which the child has no concrete referent.\(^{257}\)

Questions nine and twelve are simpler, and the child does respond. These questions stay in one time frame, the present, and use concrete specific words with no undefined referents, there is no negation, and no use of DUR/X.\(^{258}\) Unfortunately, these were non-substantive questions.\(^{259}\)

The form of questioning chosen in this excerpt did not result in a productive cross-examination. The continued repetition of question forms that were not working probably only frustrated

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252. See id. at 31-32 (stating that negations are answered correctly about 50% of the time, and ability to process negations is not developed until around age nine).
253. See id. at 35-36 (stating “[children, even older school-age children, are not good” at the skills required for this type of question).
254. See supra note 251.
255. See WALKER, supra note 5, at 30-32, 35-36, 39-40, 48, 73; supra notes 245-51 and accompanying text.
256. See WALKER, supra note 5, at 31-32; see also supra note 251 and accompanying text.
257. See WALKER, supra note 5, at 22-23; see also supra note 250 and accompanying text.
258. See WALKER, supra note 5, at 31-32, 35-36, 39-40, 48; see also supra notes 246-47, 249, 251 and accompanying text.
259. When the defense attorney was not asking the child legally important questions but was asking her about her panda and whether she wanted some water, he reverted to simpler language, probably the type of language he normally used with a six-year-old. Notably, it was more effective. See Commonwealth v. Kirovoc, 542 N.E.2d 270, 272 n.4 (Mass. 1989).
the examiner and the child. If something is not working, it is best to go on and try something new.260 The following questions adhere to the linguistic advice in *Handbook on Questioning Children*.261 “Who is Dougie?” “Who is [prosecutor by name]?” “Did you tell [prosecutor by name] about Dougie?” and “What did you tell [prosecutor by name] about Dougie?” These questions contain one or two propositions each.262 They are simple and avoid the problems in the above line of questioning, while addressing the same issues. Though no line of questioning guarantees a positive result, when dealing with a child, simple and direct questions have a far better chance.263

CONCLUSION

Georgia citizens, concerned with the impact of child abuse on children and society, enacted laws authorizing the use of a children’s out-of-court statements in court. Aware of the possible abuse of children’s out-of-court statements, Georgia law requires that children’s out-of-court statements show reliability and requires that out-of-court child-declarants be available to testify. Though formal versus informal reliability findings for out-of-court statements have created controversy, defendants’ rights are protected by the right to appeal and reversal or remand if the trial court’s informal reliability findings are not supported by the record. Defendants have complained that cross-examination of legally available, but unresponsive, children is not sufficient to meet confrontation rights. However, Supreme Court decisions support the position that the defendant is guaranteed an opportunity of access to the witness rather than a guarantee as to the witness’ responsiveness.

The responsibility for the result of child cross-examinations belongs to defense attorneys. An understanding of children’s linguistic skills will pay off in the courtroom. Defense attorneys should use linguistic tools to facilitate effective cross-examination but decline eliciting unreliable testimony by exploiting children’s linguistic weaknesses.

260. Cf. BRIAN TRACY, THE UNIVERSAL LAWS OF SUCCESS AND ACHIEVEMENT (Nightingale Conant 1991) (stating that one definition of insanity is a continued repetition of historically unsuccessful behavior).
261. See WALKER, supra note 5.
262. See id. at 12-13, 73.
263. See id. at 19-20, 63-64.
Children are weaker than adults, both physically and linguistically. Before coming to court, someone exploited their weakness, either by abuse or by inappropriate and suggestive interviews. Any continued exploitation should be repudiated by the defense and prosecution in favor of reliable truth-finding through child-appropriate questions. When children say they have been abused and choose to take the stand, the legal system must recognize children's linguistic weaknesses, and require reliable truth-finding so that the jury may judge what is indeed the child's testimony, and not what the child can be confused into saying. Reliable truth-finding serves both the child-victim and the defendant.

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