IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re I.C., A Person Coming Under the Juvenile Court Law	No. S229276
ALAMEDA COUNTY SOCIAL SERVICES AGENCY, Petitioner and Respondent, v. Alberto C., Objector and Appellant.	Court of Appeal Case No. A141143 Alameda County Superior Court Case No. SJ12019578-01

APPELLANT, ALBERTO C.'S, OPENING BRIEF ON THE MERITS

After the Published Decision by the Court of Appeal
First District, Division Two
Filed August 6, 2015

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Under Appointment By the
Supreme Court of California Under the
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ALAMEDA COUNTY SOCIAL SERVICES AGENCY, Petitioner and Respondent, v. Alberto C., Objector and Appellant.	Court of Appeal Case No. A141143 Alameda County Superior Court Case No. SJ12019578-01

OPENING BRIEF ON THE MERITS FOR APPELLANT FATHER ALBERTO C.

QUESTIONS PRESENTED

1) Did the juvenile court err by failing to determine whether the truthfulness of the minor as a hearsay declarant was "so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility" as required by *In re Lucero L.* (2000) 22 Cal.4th 1227?

2) Did the Court of Appeal err by affirming the trial court's jurisdictional finding without reviewing the entire record for substantial evidence of the minor's clear truthfulness?

INTRODUCTION

At issue in this case is whether the trial court's jurisdictional finding that appellant father Alberto C. had sexually abused his daughter, and the Court of Appeal's subsequent affirmance of that finding, correctly applied the standard set forth by this Court in *In re Lucero L., supra,* 22 Cal.4th 1227 (*Lucero L.*).

This Court in *Lucero L.* required that the clear truthfulness and reliability of the hearsay statements of a truth incompetent non-testifying young child be established before allowing that hearsay statement to be the sole basis for a jurisdictional finding. It is father's contention that not only was the *Lucero L.* mandate incorrectly implemented by both the juvenile court and Court of Appeal, but that the majority's decision in *In re I.C.* (2015) 239 Cal.App.4th 304, reh'g denied (Aug. 26, 2015), review granted Oct. 28, 2015 (S229276) (*I.C.*) must be overturned as it eviscerates the due process protections previously provided by this Court to a parent who is placed in the difficult position of refuting an uncorroborated allegation of sexual abuse of his or her own child. *I.C.* also creates binding appellate precedent directly contradicting *Lucero L.*, thus leading to confusion among lower courts.

In *Lucero L.,* this Court established that the hearsay statements of a truth incompetent non-testifying minor may not be relied on exclusively to establish jurisdiction in dependency proceedings unless the court finds that the "time, content and circumstances of the statement provide sufficient indicia of reliability." (*Lucero L., supra,* 22 Cal.4th at p. 1248.) The *Lucero L.* court emphasized,

> The importance of juvenile court scrutiny of the statements of young children who are both legally incompetent and insulated from cross-examination. At least in the case of a truth incompetent minor, the court may rely exclusively on these out-of-court statements only 'if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility...' (*Idaho v. Wright* (1990) 497 U.S. 805, 820.)

(*Lucero L., supra,* 22 Cal.4th at 1249.)

The "test of cross-examination" referenced in *Lucero L.* required that for a juvenile court to assert jurisdiction over a dependent minor based solely on out-of-court hearsay statements, the court must be convinced that

the declarant - the minor – is so clearly telling the truth that, were the minor able to testify, the juvenile court could not imagine that cross-examination would be useful whatsoever to determine the hearsay statement's reliability.

Despite this clear mandate, in the case at bar, the majority opinion by the First District Court of Appeal, Division Two, adopted a "novel application" of the *Lucero L.* standard which was premised on the incorrect assertion that "obviously, the 'test of cross-examination' does not refer to the minor." (*I.C., supra,* 239 Cal.App.4th at p. 308.) As Justice Stewart pointed out in the dissent, the *I.C.* majority "precipitously acquiesced in a trial court's determination of a hearsay declarant's credibility without further review" given the majority's belief in the "scrupulousness with which the juvenile court evaluated the pros and cons of the hearsay statements." (*Id.*, at pp. 325, 346 (dis. opn.).) The "scrupulousness" of a juvenile court's review of the evidence presented to it was not the standard set forth by this Court in *Lucero L.* Allowing the *I.C.* majority's "novel application" to stand undermines what this Court in *Lucero L.* stated was constitutionally required to establish jurisdiction based solely on out-of-court statements of a non-testifying truth incompetent minor.

In contrast, in this case, the juvenile court relied solely on the admittedly unclear, confused, uncorroborated, and unchallenged hearsay statements of a non-testifying truth incompetent three-year-old child to label her father as a child molester, and to break the family apart. The First District Court of Appeal, Division Two, then essentially rubberstamped the juvenile court's decision when it declined to review the record for substantial evidence of the child's clear truthfulness. (*I.C., supra*, 239 Cal.App.4th 304.)

Juvenile dependency courts are charged with the difficult task of maintaining the delicate balance between the state's interest in protecting children from abuse and a parent's "fundamental liberty interest" in the

"care, custody, and management" of their children. (See *Maryland v. Craig* (1990) 497 U.S. 836, 852; *Santosky v. Kramer* (1982) 455 U.S. 744, 753.) Recognizing the dangers inherent in that balancing act, the due process clause of the Fourteenth Amendment guarantees that, "the fundamental liberty interest of natural parents . . . does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state." (*Santosky v. Kramer, supra*, 455 U.S. 745, 753.)

Allegations of sexual abuse of a child by a parent highlight the tension between, on the one hand, protecting a child from abuse that is often hidden from the view of others and, on the other hand, ensuring that a parent's due process rights are protected so that a parent is not unjustly deprived of his or her liberty interests in raising his or her child and that a parent is not falsely labeled a child molester with all the vilification and humiliation such a label brings. Accordingly, when allegations of sexual abuse of a child by his or her parent made, the need for reliable findings by the juvenile court is crucial.

Ensuring that the hearsay evidence used to support a jurisdictional finding is sufficiently constitutionally reliable was the intent of this Court in *Lucero L.* Without the assurance of any corroborating evidence, it is essential that the courts are able to guarantee the trustworthiness of those unsupported hearsay statements before labeling a parent as a child molester and breaking a family apart. The correct and consistent application of the standard proscribed by this Court in *Lucero L.* is essential to protect the child, the parents, and the state from the effects of an unsupported jurisdictional finding with its far reaching and long lasting consequences.

STATEMENT OF THE CASE AND FACTS

A. The Juvenile Court Proceedings

Father appealed from the juvenile court's jurisdictional and dispositional findings entered on March 27, 2013. These findings were based on a Welfare and Institutions Code[1] section 300 petition filed on September 14, 2012, pursuant to subdivision (d).[2] (2CT 498.)

1. Events which preceded the filing of the section 300 petition

a. July 2012 molestation of I.C. by Oscar, the neighbor

In 2012, then three-year-old I.C. lived with her mother, her father, and her five-year-old brother, J.C. Her parents had a stable marriage, participated in social activities and were active members of their community. Mother and father were both employed, with father having been employed with the same employer for over 23 years. Neither parent had any criminal arrests or convictions in Alameda County, or any prior child welfare history. (1CT 57, 65; Supp CT 523, 563, 567; 7/10/13 RT 20, 21; 11/14/13 RT 110.)

On July 2, 2012, mother discovered that an eight-year-old neighbor, Oscar, had molested I.C. during a play date. I.C., her five-year-old brother,

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[1] All further statutory references are to the Welfare and Institutions Code, unless specified otherwise.

[2] Section 300, subdivision (d) states as follows: Any child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court: (d) The child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code, by his or her parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse. (§ 300, subd. (d).)

J.C., and Oscar were playing in I.C. and J.C.'s bedroom. Mother went to check on the children and found the bedroom door closed. When mother opened the door, she saw a blanket over the bunk bed and when mother entered, the children "moved really fast." (1/14/13 RT 41, 1/25/13 RT 16, 17.) I.C. was in the back corner of the bed, Oscar was in the middle and J.C. was at the side of the bunk bed. (1/25/13 RT 17.) Mother asked what they were doing and I.C. said they were kissing, J.C. began to cry, and Oscar said they weren't doing anything. (1/14/13 RT 41; 1/25/13 RT 18.) Mother asked J.C. what was happening and J.C. said that Oscar was kissing I.C and "he put a train in her." (1/14/13 RT 42.) Mother noticed that a wooden train was on the bed in between the children. (1/14/13 RT 42, 1/25/13 RT 17.) Mother "freaked out" and told Oscar to get out of the house. (1/14/13 RT 42.) After Oscar left, J.C. told mother that Oscar was laying on top of I.C. and kissing her and said "we're going to fuck." (1CT 87-88.)

An officer with the Fremont Police Department responded to the home and interviewed mother, I.C. and J.C. (1CT 86.) I.C. told the officer that Oscar asked her to remove her shoes, socks, pants and underwear, inserted a wooden train into her vagina, and kissed her on the mouth. When asked if she was hurt, I.C. told the officer that her vagina hurt. (1CT 87-88.) J.C. told the officer that Oscar told him to "look away several times." (1CT 87.) J.C. stated that he looked away "most of the time" but he looked and saw Oscar put a train inside I.C.'s vagina. (1CT 87.)

After speaking to police, mother took I.C. to Kaiser Hospital in Fremont for a medical examination. (1CT 63, 87.) The doctor examined I.C. and told mother that he could not tell whether Oscar had used the train or if he had sex with I.C. (1/14/13 RT 46.) Mother testified that the doctor stated that "he could see there was trauma but the hymen was intact." (1/25/13 RT 23.)

Mother attempted to obtain counseling for I.C. after the incident but was unsuccessful as she had difficulty finding a counselor who could work with such a young child. (1/14/13 RT 46.) Mother, herself, entered therapy due to her distress over the incident. (1CT 150.)

For the next few months, the family avoided any contact with Oscar, but had many conversations about what had happened. (1/14/13 RT 30, 46, 49 56, 57; 1/25/13 RT 27, 30, 38-39.) The family used correct anatomical terminology, including vagina and penis, when discussing the incident with I.C. (1/14/13 RT30, 56, 57; 1/25/13 RT 27, 30, 38-39.) During these family discussions, I.C. spoke freely in front of father who tried to comfort I.C. and give advice. (1/14/13 RT 57.)

I.C. and the family did not see Oscar for the remainder of the summer until J.C. started school on September 7, 2012. (1 CT 24, 57; 1/14/13 RT 59, 60, 67.) During that first week of school, J.C. told mother in front of I.C. that Oscar pushed him down the slide at school, followed him into the lunchroom, called him a "loser" and destroyed his lunch. (1CT 24, 57; 1/14/13 RT 59, 60, 67.) I.C. was frightened and confused that Oscar was going to the same school as J.C., so mother talked to her about it "all weekend." (1/14/13 RT 66.)

b. I.C.'s Statements on September 11, 2012

On September 11, 2012, four days after seeing Oscar for the first time since the molestation, I.C. told mother as she was going to bed that "daddy put his penis on me." J.C. was in the room and corrected I.C. saying, "No, that's what Oscar did." (1/14/13 RT 16-18, 22, 24, 32.) I.C. told mother it happened on the lower bunk bed but did not say when father did these things nor did she mention anything about being hurt or that she was afraid of father. (1/14/13 RT 20, 22, 24, 32, 36.) Mother tried to learn more from I.C. but her story "didn't seem like it all went together and made very much sense." (1/14/13 RT 23.)

The next morning, September 12, mother asked I.C. about her statement the night before and I.C. said "I was just kidding." (1/14/13 RT 25.) Mother decided it was best to take I.C. to preschool, even though it was not her regular day, since "she told me something within the last 12 hours that was rather alarming." (1/14/13 RT 15, 16, 25, 26.) Mother woke father before she left and told him what I.C. had said. Father responded, "that's crazy." (1/14/13 RT 28.)

Later that same day, I.C. told a preschool worker that her father was mad at her and hit the wall causing a hole in the wall. (1CT 93.) I.C. then further stated "Daddy took his penis and put it on me. Mommy is upset and I went to the doctor. I am fine." (1CT 93.) Both the Fremont police and a social worker responded to the school. (1CT 92.) The emergency social worker who first interviewed I.C. at the preschool reported that I.C. "was not able to tell the difference between telling a truth and telling a lie." (1CT 24.)

Mother was called and I.C. was taken to the police station. (1CT 92.) I.C. and J.C. were transported to the Child Abuse Listening and Interviewing and Coordination Center (CALICO) facility to be interviewed. (1CT 93.) At the beginning of the interview, I.C. was asked, "Do you promise that you will tell me the truth"? I.C. responded, "Yep." The interviewer asked "Are you going to tell me any lies"? I.C. responded, "Nope." The interviewer proceeded to ask I.C. what she had done that day, before the interview. (9/12/12 Aug[3] RT 4-6.) I.C. told the interviewer that before coming to the interview she had watched a movie, took a nap with her babysitter, went to the store with her mother, went to the park with her father, went to school, played at home and went to San Francisco. (9/12/12

[3] "Aug RT" will refer to the additional reporter's transcript that was provided in response to father's motion to transcribe the CALICO DVDs.

Aug RT 4-6.) None of these statements, except for the fact that she had gone to preschool, were accurate. (1CT 92, 93, 105; 1/14/13 RT 15, 16, 25, 26.) The interviewer did not question I.C.'s version of the day's events but proceeded with her questions.

I.C. told the interviewer that she had told Miss Karen at preschool that "daddy put penis on me"... "then put train on me, then he put a flower on me yesterday" and he "put a necklace on" her. (9/12/12 Aug RT 8.) I.C. stated that this happened on her brother's bed but also on the bed in the CALICO interview room and on a bean bag. (9/12/12 Aug RT 29-32.) I.C. stated that father took off her shoes, pants, shirt, underwear and socks and that father did not have any clothes on and he kissed her. (9/12/12 Aug RT 10.) I.C. stated that she told her father to stop five times and that he can't touch her vagina but he did not listen to her and "it did not feel good." (9/12/12 Aug RT 11-12.) I.C. stated that this had occurred the day before when mother was at work and J.C. was at school. (9/12/12 Aug RT 18-19.) I.C. stated that she ran away to her house and the car after it happened and she was by herself. (9/12/12 Aug RT 24-25.) I.C. said that "daddy was not here and was somewhere else" when this happened. (9/12/12/ Aug RT 25.) I.C. said that she called her "mom and the police officer." (9/12/12 Aug RT 16.) I.C. said that when she told mother, mother said "daddy was going to be in so much trouble" and that RJ, her adult sister, told her that father was going to jail forever. (9/12/12 Aug RT 27, 55.) I.C. said that father told the police that he promised he would not do it again.[4] (9/12/12 Aug RT 27.)

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[4] The Fremont police report stated that father cooperated with the police officers when he was interviewed on September 12, 2012. (1CT 97.) Nothing in the record indicated that I.C. knew of such a conversation between father and police and, in any event, father consistently denied molesting her.

During the interview I.C. stated that a train was a penis and that the train was red. (9/12/12 Aug RT 21.) I.C. also stated that she had seen father touch RJ and put his penis and train on her as well. (9/12/12 Aug RT 32-34.) I.C. stated this happened on J.C.'s bed and "everybody" was in the bed including RJ, herself, her father, her babysitter and the babysitter's sister. (9/12/12 Aug RT 36-37.)

At the end of the interview, I.C. was asked if she had seen any "adult movies." I.C. responded that she watched "Rapunzel" on television, that a ghost had put the movie on, and that she heard a knocking at the door and thought it was a ghost. (9/12/12 Aug RT 48-49, 51-53.)

After the CALICO interview, I.C. was transported to Children's Hospital for a sexual assault exam. (1CT 105.) The Sexual Assault Response Team (SART) report did not note any visible trauma to I.C. but provided a diagnosis of vulvovaginitis. (1CT 105, 168, 173.)

On September 12, the police also conducted a search of the family home. The family's babysitter, Bianca, was at the house and was interviewed by the police. Bianca indicated that she had been working with the family for six months. She was not aware of anything inappropriate at the house and stated that father had never done or said anything inappropriate to her. (1CT 97.) During the police search of the residence, an alternate light source was used in the children's bedroom to search for the presence of suspected semen or other biological fluids. None were found. (1CT 99, 103.) No biological evidence was found in the hamper or next to the washer/dryer. (1CT 103.) The police report made no mention of any holes found in the interior walls of the home. (1CT 99.)

That same day, Fremont police officers contacted father at his place of employment. Father was cooperative and agreed to come to Fremont to talk to a detective. (1CT 97, 98.) Father also agreed to a search of his car, which did not contain any "illegal items or contraband." (1CT 97.)

2. The Section 300 Petition

On September 14, 2012, the Alameda County Social Services Agency (hereinafter "the Agency") filed a petition pursuant to section 300, subdivisions (d) and (j) on behalf of minors I.C. and J.C., who were born in January 2009, and November 2006, respectively. (1CT 1.) The petition generally alleged that I.C. had been sexually abused by father, that mother had failed to adequately protect her from the sexual abuse, and that mother knew or should reasonably have known that the child was in danger of sexual abuse. (1CT 4.) The petition alleged under subdivision (j) that J.C. was at risk due to the alleged abuse of I.C. (1CT 5.)

Specifically, under subdivision (d) the petition alleged the following: (d-1) 1) that on more than one occasion, I.C. spontaneously stated that "Daddy put his penis on me"; 2) that I.C. had pointed to her vaginal area and complained that it hurt; 3) that I.C. stated that father put foreign objects in her vagina, including a flower, a train and that it did not feel good; 4) that I.C. stated that father will take off her clothes and his clothes and lay on bed with her and kiss her on the mouth; 5) that father kissed her vagina when she was in her brother's bed; and 6) that I.C. stated that she watched a movie where a boy kisses a girl and they were not wearing clothes; (d-2) that mother failed to protect I.C., in that I.C. told mother yet father continued to reside in the home; and (d-3) mother did not believe that father sexually molested I.C. (1CT 4.)

At the September 17, 2012, detention hearing, counsel for father requested that the children be returned to mother. Father was willing to be out of the home immediately and agreed to a temporary restraining order to ensure his removal from the home.[5] (9/17/12 RT 4-5, 9.) The juvenile court

[5] A temporary restraining order was issued by the juvenile court against father on October 2, 2012, which was scheduled to expire on December 3, 2012. (1CT 140, 142-145.)

stated that it was not inclined to release the children and instead would give the social worker discretion to release the children to mother after the Agency's investigation was complete. (9/17/12 RT 12.) Counsel for father then asked that J.C. at least be placed with mother so he could start school. (9/17/12 RT 15.) The juvenile court similarly denied father's request. (9/17/12 RT 15.) The juvenile court found that a prima facie showing had been made that the children were described by section 300 and the children were detained in foster care. (1CT 9.)

A first amended petition was filed by the Agency on September 28, 2012, which added a section 300, subdivision (b) allegation that father had a history of intermittent substance abuse.[6] (1CT 46, 49.)

On September 29, 2012, the social worker exercised her discretion to return the children to mother with the requirement that father remain out of the home.[7] (1CT 61.)

3. Jurisdiction and contested hearing

The Agency's October 2, 2012, jurisdiction and disposition report recommended that the children be declared dependents of the court, that the children be placed with mother with family maintenance services, and that father remain out of the home with child welfare services. (1CT 54.) The matter was under investigation by the Fremont Police Department but no criminal charges were ever filed against father. (1CT 65.)

Father began supervised visits with the children in November 2012. (1CT 150.) The children were "very happy" to see their father and I.C. asked the social worker if her father could return home. (1CT 163.)

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[6] The subdivision (b) count was later dismissed by the court after the contested hearing. (1CT 186; 3/27/13 RT 8.)

[7] The children remained in mother's care, with father out of the home for the next seventeen months, up to and including when the appeal was filed in February 2014. (2CT 498.)

At the December 3, 2012, contested jurisdictional hearing, the DVD recordings of the CALICO interviews of minors, I.C. and J.C., were viewed in the courtroom by the court and all counsel. (1CT 157.) The Agency's jurisdiction/ disposition report dated October 2, 2012, and addendum reports dated November 26, 2012, and January 14, 2013, were admitted into evidence. (1CT 157; 1/14/13 RT 4.) The wooden train was admitted as Father's Exhibit A. (1CT 178.)

The court heard testimony from mother, social worker Sylvina Cooper, and father's older daughter, twenty-one-year old RJ.[8] (1CT 176, 179, 182.) I.C. did not testify. No objections were made by father's trial counsel to the admission of I.C.'s hearsay statements contained within the Agency's various reports, as well as within the CAILICO videotape, which were all admitted into evidence.

a. Mother's testimony

Mother testified that at the time of the detention, I.C. had been attending preschool on Tuesdays and Thursdays from morning until approximately 3 pm. (1/14/13 RT 10, 25.) Mother's work hours were typically 7:30 am to 6:30 pm Monday through Friday. (1/14/13 RT 7.) Father worked the 5 pm to 12:30 am shift as a custodian with Able Building Maintenance. (1/14/13 RT 8.) On Mondays, Wednesdays and Fridays, father was in charge of I.C. during the day. He would take J.C. to school and then go to the park with I.C. (1/14/13 RT 25, 26.) Bianca, the family's babysitter and the girlfriend of mother's stepson, would come to the house in the afternoon to care for the children and then father would leave for work. (1/14/13 RT 11, 69.)

[8] RJ is I.C.'s adult sibling who is named Aryerine but is known to the family as "RJ". (3/14/13 RT 9.)

Mother testified that after the July 2012, incident with Oscar, she carried the wooden train that had been on the bed with her in a plastic bag and kept it in the trunk of her car. (1/13/12 RT 54.) Mother testified that she showed the train to the doctor and took it to the emergency room in July. Mother had not had the train in front to the children since the July incident because she "didn't want to remind them." (1/13/12 RT 55.) Father did not have access to the train during that time. (1/13/12 RT 55.)

b. Testimony of Agency social worker, Sylvina Cooper

Agency social worker Sylvina Cooper, whom the parties stipulated was an expert in risk assessment for child abuse and child sexual abuse, was assigned to the family in September 2012. (1/25/13 RT 41, 44.) Cooper testified that the children returned to the home of mother with father out of the home in mid-October 2012[9] and there had been no safety incidents since that time. (1/25/13 RT 47, 48.)

Copper testified that she believed that "most of the statements I.C made are credible" and that "most of what she said her father did to her is credible." (1/25/13 RT 53.) Cooper believed that I.C. knew the difference between the truth and a lie. (1/25/13 RT 53.) Cooper testified that I.C. reported to mother, the day care center, the emergency child welfare worker, Alma Villa, and the CALICO interviewer that she was sexually molested by father. (1/25/13 RT 57.) Cooper believed that I.C. was consistent in telling the same story to each person. (1/25/13 RT 58.) Cooper testified that I.C. gave a "very detailed description of what she said that her father did to her." (1/25/13 RT 66, 67.)

[9] The Agency's October 17, 2012, jurisdiction and disposition report stated that the social worker had exercised her discretion on or about September 29, 2012. (1CT 61.)

When questioned regarding I.C.'s statements during the CALICO interview that some molestation occurred in the bed in the CALICO interview room, Cooper testified that it was not unusual for a three-year-old child to get time and space confused. (1/25/13 RT 59.) Cooper believed that I.C. was using a metaphor when she talked about father using a toy train. (1/25/13 RT 60.) Cooper testified that some of I.C.'s statements were made at the end of a thirty minute interview so I.C. was "getting tired" and that it was "not unusual for a child that age to begin to fantasize about movies, pictures, flowers." (1/25/13 RT 60, 61.)

Cooper also testified that it was possible that I.C. seeing the neighbor Oscar at school in September triggered I.C.'s statements or that discussions in the home regarding the July incident could have an impact on the September allegations against father. (1/25/13 RT 64, 76.)

c. Testimony of father's adult daughter, Aryerine C. "RJ"

Father's twenty-one year-old daughter RJ testified that she looked after I.C. and J.C. in January 2013 for three days when mother had to go out of town. (3/14/13 RT 13.) RJ testified that I.C. "kept touching herself down there" and told RJ it was because Oscar hurt her. (3/14/13 RT 13, 18, 19.) I.C. did not mention any molestation by father to RJ.

When questioned regarding I.C.'s statements in the CALICO interview, RJ testified that she had never been in bed with father, I.C., and the babysitter, and that father had never inappropriately touched everyone's vaginas. (3/14/13 RT 10.) RJ never had any concern that father was inappropriate with I.C. and she had never seen father touch I.C. in an inappropriate way. (3/14/13 RT 10, 11, 15.) I.C. also never made allegations against father to her nor had she stated that she was afraid of father. (3/14/13 RT 14, 15.)

d. Juvenile court's decision on jurisdiction

On March 27, 2013, the juvenile court made its jurisdictional findings. Prior to rendering its decision the juvenile court acknowledged "this is a very difficult case because the evidence comes from a three-year old child who, at times, was very clear in her statement about what happened, and at other time was very unclear, and at times very confusing about the statements that she makes concerning what she alleged her father did to her." (3/27/13 RT 2-3.) The juvenile court recognized that "essentially, all the court has to go on in this case is the hearsay statement of a three-year-old minor." (3/27/13 RT 3.)

After citing to *In re Cindy L.* (1997) 17 Cal.4th 15 (*Cindy L.*) and *Lucero L., supra*, 22 Cal.4th 1227, the juvenile court discussed evidence that it thought suggested that I.C.'s statements were both reliable and unreliable, but found that the "evidence that supports reliability [is] more compelling." (3/27/13 RT 6.)

Based solely on I.C.'s hearsay statements, the juvenile court sustained the allegations and found the (d-1) and (d-3) allegations of the petition to be true by a preponderance of the evidence. (3/27/13 RT 7-8, 17.) The juvenile court did not sustain the subdivisions (d-2), (b), or (j) allegations. (1CT 186; 3/27/13 RT 8.) The subdivision (j) allegation involving I.C.'s five-year-old brother, J.C. was dismissed from the petition and J.C. was not made a dependent as it was found that J.C. was not at substantial risk of abuse.[10] (1CT 186; 3/27/13 RT 9.) The matter was continued for a contested disposition. (1CT 187.)

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[10] Under section 300, subdivision (j), the court must find that the child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions. The court shall consider the circumstances surrounding the abuse or neglect of the sibling, the age and

A second amended petition conforming to the juvenile court's decision was filed by the Agency on April 8, 2013. (1CT 192.)

4. Disposition

A lengthy contested dispositional hearing was held over a nine month period from May 13, 2013, to January 22, 2014. (2CT 296, 469.) The Agency continued to recommend father remain out of the home because "none of the issues have been adequately addressed", the social worker could not ensure that mother was able to protect I.C. since mother did not believe that father molested I.C., and because father had taken care of I.C. in the past. (5/13/13 RT 17, 18.) Mother and father were both requesting that father be allowed to return to the family home. (1CT 218; 1/16/14 RT 43, 67.)

The Agency's jurisdiction/disposition report dated October 2, 2012, addendum report dated November 26, 2012, addendum report dated January 14, 2013, and disposition report dated April 15, 2013, were admitted into evidence. (2CT 296; 5/13/13 RT 1-5.) The psychological evaluation of father prepared by Drs. Lask and Meyers and the psychosexual evaluation of father by Dr. Rachyll Dempsey were admitted into evidence. The CALICO DVDs of I.C. and J.C. were entered into evidence and the court took judicial notice of the prior testimony from social worker Sylvina Cooper, mother, and Aryerine C. (2CT 296; 5/13/13 RT 5-6, 15) There was additional testimony from social worker Sylvina Cooper, mother, and paternal aunt, Elsa C. Father's experts, Dr. Terry Meyers, Dr. Mauricio Lask, and Dr. Rachyll Dempsey testified and the

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gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child. (§ 300, subd. (j).)

Agency had Dr. Brian Abbott testify on its behalf. Several articles provided by father and the Agency were also admitted into evidence.[11]

A psychological evaluation of father prepared by Dr. Meyers found "no indicators in the current evaluation to suggest that [father] would pose a danger to anyone, and especially not his children. He has no history of violence or sexual acting out. In addition, there are no themes in his testing of a sexual or aggressive nature or pre-occupation." (Supp CT 523.) A psychosexual evaluation prepared by Dr. Depmsey concluded that father was at a very low risk for recidivism as he had a stable job, stable support system, no history of criminal behavior, no violent or previous sexual offending behavior, no current substance abuse problems, and good recreation use and leisure time. (Supp CT 563, 5567; 11/4/13 RT 86.)

The Agency's expert, Dr. Brian Abbott, never met or interviewed father or I.C. before making his evaluation of father. (8/20/13 RT 63; 12/20/13 RT 76.) Dr. Abbott testified that the indicators of danger he saw from reading the reports were that the court made a finding of sex abuse but that father's age would indicate a risk mitigation factor. (8/20/13 RT 97.) Dr. Abbott did not believe that the assessments done of father by Dr.

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[11] Hanson, The Accuracy of Recidivism Risk Assessment for Sexual Offenders: A Meta-Analysis (2007) (Father's Exhibit G; Supp CT 569); Litwack, Actuarial versus Clinical Assessment of Dangerousness, (2001) 7 Pyschology, Public Policy & Law 409 (Father's Exhibit H; Supp CT 612); Bonta & Andrews, Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation (2007) (Father's Exhibit I; Supp CT 648); American Psychological Association Ethical Principle of Psychologists and Code of Conduct (2010) (Petitioner's Exhibit 2; Supp CT 680); Hanson & Morton-Bourgon, The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies (2009) Psychological Assessment (Petitioner's Exhibit 3; Supp CT 697); Abbott, Throwing the Baby Out With the Bath Water; Is it Time for Clinical Judgment to Supplement Actuarial Risk Assessment? (2011) 21 J. Am. Acad. Psychiatry Laws 1 (Petitioner's Exhibit 4; Supp CT 719)

Meyers and Dr. Dempsey were reliable methods to measure father's risk of recidivism. (8/20/13 RT 62; 12/20/13 RT 21-23.)

The social worker acknowledged that I.C. continued to enjoy regular supervised visits with her father outside of the family home. (1CT 222; 5/13/13 RT 32, 33; 6/24/13 RT 11.) The paternal aunt, who supervised the visits, testified that I.C. was always happy to see father and ran to him and hugged him. (6/24/13 RT 11.) When I.C. left the visits she would say "come on dad, let's go home." (6/24/13 RT 12.) I.C. had never missed a visit or stated that she did not want to attend a visit. (6/24/13 RT 13.) I.C. was not fearful of father and "appeared comfortable in her father's presence." She was happy to see her father, and father's interactions with I.C. were appropriate. (1CT 222, 2CT 425; 5/13/13 RT 51.)

Mother testified that she wanted father to be allowed home and did not think father being in the home would expose I.C. to any danger. (10/21/13 RT 80.) Mother stated that even though she did not believe the allegation against father she had created a safety plan. (10/21/13 RT 80.) As part of the safety plan, mother stated that she moved I.C. into full time day care which is available from 6:30 in the morning until 6:30 at night. Mother also changed jobs to a more flexible job so that she could work from home if her daughter were sick. (10/21/13 RT 80, 88, 120.) Mother stated that the only commitment she had outside of the home was church on Sundays. (10/21/13 RT 121.) I.C. accompanied mother on any errands that she did. (10/21/13 RT 121.) Mother testified that father played soccer on Saturdays from 8 a.m. to 3 p.m. so Sunday was the only day they were all together as a family. (10/21/13 RT 125.) Mother testified that if father were to come home that there would be no time that I.C. would be left with him alone. (10/21/13 RT 124.)

Mother explained that she had a cousin who resided in Marin and a neighbor who would be able to help mother with child care if necessary.

(10/21/13 RT 80, 88, 111.) In addition, sometimes her sister-in-law, who lived in the same neighborhood, will look after I.C. if she needs help. (10/21/13 RT 122.) Mother stated that her sister-in-law, Elsa, was available any time that she called. (10/21/13 RT 123.)

During her testimony, Agency social worker Cooper acknowledged that mother had followed all of the Agency's requirements with regard to I.C. having contact with father. (5/13/13 RT 31.) However, Cooper felt that mother was a safety issue because she would not adequately supervise father and I.C. "emotionally." (5/13/13 RT 46, 47.) At the time of the contested hearing, social worker Cooper had not discussed a safety plan with mother. (5/13/13 RT 27.) Cooper testified that if the court ordered father to return to the home, the social worker would request a safety plan where there would be a third party monitoring father and child at all times. (5/13/13 RT 49.)

On February 5, 2014, seventeen months after I.C. was detained, the court found by clear and convincing evidence that I.C. was at risk if father returned home. The court indicated that it gave "very little weight" to father's experts due to the testimony of the Agency's expert that the assessments performed by father's experts were unreliable. (2/5/14 RT 22.) The court indicated that two factors it considered were that mother did not believe there had been any sexual abuse of I.C. by father and therefore was unable to protect I.C. and that the court did not believe that mother's safety plan was feasible. (2/5/14 RT 22-23.) The court ordered I.C. to reside in the home of mother with family maintenance services and that father remain out of the home. The Agency was given discretion to offer informal child welfare services to father. (2CT 485.)

The court stated that it had found by a preponderance of evidence that the allegations of the section 300 petition were true under subdivision (d) so it took jurisdiction. However, it acknowledged that "if there had

been a different standard or different burden of proof in this case as to jurisdiction, the court may have made different findings." (2/5/14 RT 20.)

On February 26, 2014, father filed a timely notice of appeal of the juvenile court's jurisdictional and dispositional findings. (2CT 498.)

In a published opinion, a majority of the Court of Appeal, First District, Division Two, affirmed the juvenile court's jurisdictional and dispositional findings and orders. (*I.C., supra,* 239 Cal.App.4th 304.) A forceful dissent by Justice Stewart concluded that the jurisdictional findings should have been reversed as a review of the entire record did not reveal substantial evidence of I.C.'s clear truthfulness. (*Id.,* at p. 328, 349-350 (dis. opn.).)

Father filed a petition for rehearing which was denied by the Court of Appeal on August 26, 2015. Justice Stewart would have granted the petition for rehearing.

Father filed a Petition for Review to this Court which was granted on October 28, 2015.

ARGUMENT

I. THE JUVENILE COURT ERRED WHEN IT FAILED TO DETERMINE WHETHER THE TRUTHFULNESS OF THE MINOR AS A HEARSAY DECLARANT WAS "SO CLEAR FROM THE SURROUNDING CIRCUMSTANCES THAT THE TEST OF CROSS-EXAMINATION WOULD BE OF MARGINAL UTILITY" AS REQUIRED BY *IN RE LUCERO L.* (2000) 22 CAL.4TH 1227

A. Introduction

Juvenile dependency laws were created to provide maximum safety and protection for children who are being abused while preserving and strengthening family ties whenever possible. (§§ 202, subd. (a), 300.2.)

Dependency proceedings are initiated by the state's filing of a petition pursuant to section 300 setting forth allegations of abuse under one or more of the enumerated subdivisions. (§ 300.) At the jurisdictional hearing, the court makes factual determinations about whether a child has been abused or neglected as defined in section 300, subdivisions (a) through (j). It is at this hearing that the interests of the child, state and parent in fact-finding are equally shared. The findings made at the jurisdictional hearing chart the future course of the family. A "not true" finding on all counts will result in the court not assuming jurisdiction over the child and dismissing the section 300 petition, thus ending the case. (§ 356.) A "true" finding will cause the court to assume jurisdiction over the child, may lead to the removal of child, and can ultimately end in termination of parental rights. (§§ 358, 366.26.)

Dependency proceedings are not meant to punish the parent but only to protect the child. (*In re B.D.* (2007) 156 Cal.App.4th 975.) (*B.D.*) However, the adversarial nature of the proceedings cannot be overlooked as the social worker is charged with presenting evidence that a parent has abused his or her child. (See *In re Guardianship of Ann S.* (2009) 45 Cal.4th 1110; *Meyers v. Contra Costa County Dept. of Social Services* (9th Cir. 1987) 812 F.2d 1154, 1157; *In re Emilye A.* (1992) 9 Cal.App.4th 1609, 1709.)

To establish jurisdiction over a child, the state only needs to prove the allegations of the petition are true by a preponderance of the evidence.[12] (§ 355, subd. (a); Cal. Rules of Court, rule 5.534(d), 5.684(f).) The social worker's report, with its collection of hearsay statements, is the state's primary tool to sustain the section 300 petition. (*In re Malinda S.* (1990) 51

[12] Preponderance of the evidence is the lowest standard available requiring only enough evidence to make it more likely than not that the fact that the state seeks to prove is true.

Cal.3d 368.) (*Malinda S.*) The low standard of proof, coupled with the use of the social worker's report as evidence of the alleged abuse, allows the juvenile court to easily assume jurisdiction.

However, a court's decision to assume jurisdiction over a child greatly influences subsequent court actions. (Fine, *Where Have All the Children Gone? Due Process and Judicial Criteria for Removing Children From Their Parents' Homes in California*, (1992) 21 Sw.U. L.Rev. 125, 130-137.) Findings made in dependency proceedings have serious and long-term consequences for the child, the parent, and the family. In addition to the possibility of removal and termination of parental rights, depending on the jurisdictional findings made, a parent may be placed on the Child Abuse Central Index (CACI) where he or she will remain until they reach the age of 100. (Cal. Pen. Code §11169, subd. (f).) Information contained on the CACI is "available to a broad range of third parties for a variety of purposes," including employment, licenses, volunteer opportunities, and child custody. (*Humphries v. County of Los Angeles* (9th Cir. 2009) 545 F.3d 1170, 1177-1178; Cal.Pen Code § 11167.5, subd. (b).)

In cases involving allegations of sexual abuse by a father against his daughter, courts have recognized that such a jurisdictional finding carries more "social opprobrium" than almost any other act. (*Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1728, 1752 ["Few crimes carry as much (or as much deserved) social opprobrium as child molestation. Most people would rather be accused of bank robbery."].) (*Blanca P.*)

Accordingly the,

> hearing on a contested petition alleging sexual abuse is . . . extraordinarily important. It is not the sort of thing to be rushed, or taken routinely. Allegations of child molestation are *serious*, they merit more than a rubber stamp. With the exception of death penalty cases, it is hard to imagine an area of law where there is greater need for reliable findings by the

> trier of fact. The consequences of being wrong – on either side – are too great.

(*Blanca P., supra*, 45 Cal.App.4th 1738, 1754.)

Few would deny the egregious nature of sexual abuse against one's own child. These most vulnerable members of society require special protection. However, it is equally essential that "dependency proceedings must comport with due process to ensure that parents and children will not be deprived of their relationship with one another and to ensure parents are not unfairly stigmatized." (Cohn, *In re Malinda S. and its Progeny: Are Child Protection Measures in California Dependency Hearings Impermissibly Infringing on Parental Rights?* (1995) 16 J. Juv.L. 53, 68 (Cohn).) The standards set forth by this Court and the Legislature over the years have worked to strike that delicate balance between protecting children and guarding against unjustly depriving a parent of his or her interests in raising his or her child.

B. Hearsay Evidence is Generally Inadmissible, Except Under Specific and Limited Exceptions

To further elaborate and discuss the above line of cases, it is first necessary to understand the nature of hearsay evidence. California Evidence Code section 1200 provides that (a) Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (b) Except as provided by law, hearsay evidence is inadmissible. (Cal. Evid. Code § 1200, subd. (a) and (b).) Hearsay evidence is said to be "unreliable" because the statement might be distorted or misinterpreted by the witness relating it in court, the hearsay statement is not made under oath, the person who made the statement cannot be observed by the judge or jury to evaluate his/her credibility and the adverse party has not had the

opportunity to cross-examine the person who made them. (See *Englebretson v. Industrial Acc. Com.* (1915) 170 C.793, 798.)

Under our legal system, hearsay evidence has traditionally not been allowed to be admitted unless it falls into a class of statements previously found by case law or set by statute to be inherently reliable, i.e., excited utterance, dying declaration. (Cal. Evid. Code §§ 1240, 1242.)

Over the years, exceptions have been created by the Courts and the Legislature to allow hearsay evidence to be admitted in juvenile dependency proceedings with certain safeguards. (§ 355, subd. (b); see also *Malinda S., supra*, 51 Cal.3d 368, 382-383, *Lucero L., supra*, 22 Cal.4th 1227.) In child sexual abuse cases, juvenile courts are often faced with problems of proof due to the lack of physical evidence of sexual activity, the nature of the contact, the lack of corroborating eyewitnesses, the reluctance of family members to testify, the victim's retraction of the story, and the lack of credibility of some victims due to limited verbal and cognitive abilities. (*In re Carmen O.* (1994) 28 Cal.App.4th 908, 918-919.) (*Carmen O.*) Due to these considerations, this Court determined that hearsay evidence should be allowed so as not to prevent the child's story from being heard. (*Cindy L., supra*, 17 Cal.4th at p. 28.) Nevertheless, this Court in *Cindy L.*, found that even if hearsay evidence is deemed necessary, an exception to the hearsay rule is not valid unless the class of hearsay evidence proposed for admission is inherently reliable. (*Cindy L., supra*, 17 Cal.4th at p. 28.)

C. A Hearsay Statement May Be Admitted Into Evidence But May Still Not Be Sufficient, By Itself, To Establish Jurisdiction

"The admissibility and substantiality of hearsay evidence are different issues." (*Gregory v. State Bd. of Control* (1999) 73 Cal.App.4th 584, 597.)(*Lucero L., supra*, 22 Cal.4th 1244.) A hearsay statement may be

admitted into evidence but still may not be sufficient, by itself, to establish jurisdiction.

In the context of dependency proceedings, it has been established that the hearsay declaration of a child contained in a social study may be constitutionally admitted. (*Malinda S., supra*, 51 Cal.3d 368.) However, *Malinda S.* recognized the due process problems inherent in relying too heavily on the hearsay statements of incompetent minors to make jurisdictional findings when there has been no opportunity for cross-examining the minor.

As *Lucero L.* pointed out,

> As this court has long recognized, '[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence.' There must be substantial evidence to support such a ... ruling, and hearsay, unless specially permitted by statute, is not competent evidence to that end. [Citations omitted.] Except in those instances recognized by statute where the reliability of hearsay is established, hearsay evidence alone 'is insufficient to satisfy the requirement of due process of law, and mere uncorroborated hearsay does not constitute substantial evidence. [Citations omitted.]'

(*Lucero L., supra*, 22 Cal.4th at 1244-1245.)

As seen in the majority's analysis in *I.C.*, the important distinction between admissibility and substantiality of the hearsay is often forgotten, ignored, or side stepped by the court. (*I.C., supra*, 239 Cal.App.4th 304.) A careful review of the hearsay statement admitted into evidence is required before it can be deemed substantial evidence to support a jurisdictional finding.

In cases such as this where evidence presented to the juvenile court consists of out-of-court statements made by a young child who is not available for cross-examination, maintaining the fairness of the dependency system requires that jurisdictional findings based on the young child's

hearsay statements possess sufficient reliability to preserve a parent's due process rights. The following exceptions to the hearsay rule were created to maintain that delicate balance.

D. Over the Last Twenty-Five Years, the Courts and the Legislature Have Created Various Exceptions to the Hearsay Rule to Allow Hearsay Evidence to Be Admitted in Juvenile Dependency Hearings

1. Introduction

From the 1990 *Malinda S.* decision to the 2000 *Lucero L.* opinion, this Court and the Legislature have carved out specific exceptions to the general rule excluding the out-of-court statements of witnesses in dependency proceedings out of concern that hearsay evidence is often the only evidence available in child abuse and neglect cases.

As discussed in more detail below, in 1990, in *Malinda S.*, this Court established a social study hearsay exception that allowed the hearsay statements contained in a social study report to be admissible and to be the basis for a jurisdictional finding as long as the preparer of the report, the Agency social worker, was available for cross-examination. (*Malinda S., supra*, 51 Cal.3d 368.)

In 1994, the Fourth District Court of Appeal, Division One established a child dependency hearsay exception in *Carmen O., supra*, 28 Cal.App.4th 908, that allowed, under certain conditions, admission of out-of-court statements by alleged child victims of sexual abuse at jurisdictional hearings. (*Id.*)

In response to the *Malinda S.* decision, the Legislature amended section 355 of the Welfare and Institutions Code in 1996 to create a hearsay exception applicable to dependency proceedings for uncorroborated out-of-court statements of a child under 12 that are contained in a social study,

unless a party objecting to their admission establishes the statements were procured by fraud, deceit or undue influence. (§ 355, subds. (a), (c)(1)(B).)

In 1997, in *Cindy L., supra*, 17 Cal.4th 15, this Court determined that the child dependency hearsay exception was validly created but needed to be clarified and augmented in order to better safeguard the reliability of a child's hearsay statements introduced in a dependency proceeding. (*Id.*, at p. 28.) As a result, to protect against the possibility of fabrication, this Court in *Cindy L.* required that the hearsay statement of the minor contain particularized indicia of reliability, and that there be either corroboration or the minor be available for cross-examination, to guard against the possibility of fabrication. (*Id.*, at p. 34.) The decision in *Cindy L.* did not address the new amendments to section 355.

Finally, in 2000, this Court in *Lucero L.*, in light of the new hearsay exception in section 355, held that where a child cannot testify because of truth incompetence and her hearsay statements contained in a social study are uncorroborated, these statements are admissible, but may not be the sole support for a jurisdictional finding unless they and their surrounding circumstances so clearly demonstrate the child's truthfulness that "the test of cross examination would be of marginal utility." (*Lucero L., supra*, 22 Cal.4th at p. 1249.)

These specific exceptions have created a "special body of law that grapples with the tension between our paramount concerns with a child's welfare and a parent's due process rights in dependency proceedings." (*I.C, supra,* 239 Cal.App.4th at p. 341 (dis.opn.).)

a. Creation of the Social Study Hearsay Exception in *Malinda S.*

In 1990, the Court in *Malinda S.*, created a social study exception to the hearsay rule. The *Malinda S.* court concluded that a social study fits within the class of 'legally admissible' evidence on which a court can rely

in a jurisdiction hearing even though the social study is hearsay and contains multiple levels of hearsay. (*Malinda S., supra*, 51 Cal.3d at p. 384.)

Social services agencies rely on social study reports prepared by social workers to present their cases in dependency courts. [13] These reports generally consist of observations and statements derived from the alleged child victim, the victim's relatives, and the accused. The social study reports are designed to facilitate a finding of jurisdiction and are often the heart of an agency's case against a parent. (Cohn, *supra*, 16 J.Juv.L.53 at pp. 54, 70.) The statements contained in the social study reports are hearsay, double hearsay, and often triple hearsay as the statements were made to the social worker or to a third party who conveyed the information to the social worker. (Cohn, *supra*, 16 J. Juv.L. at pp.54, 55.) It has been recognized that generally, "the majority of witnesses whose statements are contained in the social study will not help the parent's case if called to testify." (Seiser & Kumli on California Juvenile Court Practice and Procedure, (2015) §2.110[12][c].) The "impact of social study reports in these proceedings and the hearsay statements contained therein cannot be understated." (Cohn, *supra,* 16 J. Juv.L. at p. 59.)

Responding to the question of whether social study reports are "legally admissible in a civil case" within the meaning of section 355,[14] in

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[13] Welfare and Institutions Code section 281 provides that "[t]he probation officer shall upon order of any court in any matter involving the custody, status, or welfare of a minor or minors, make an investigation of appropriate facts and circumstances and prepare and file with the court written reports and written recommendations in reference to such matters. The court is authorized to receive and consider the reports and recommendations of the probation officer in determining any such matter. (§ 281.)

[14] Section 355 provides, in part, (a) [a]t the jurisdictional hearing, the court shall first consider only the question whether the minor is a person

1990, this Court established the "social study exception" to the hearsay rule in *Malinda S., supra,* 51 Cal.3d 368. The *Malinda S.* court found that so long as each party receives a copy of the social study report, is given an opportunity to cross examine the preparer of the report, is given the opportunity to subpoena and examine the persons whose statements are contained the report, and is permitted to introduce evidence by way of rebuttal, no constitutional due process violation exists. (*Malinda S., supra,* 51 Cal.3d at p. 382-385.) The *Malinda S.* court stated that social study reports "are prepared by disinterested parties in the regular course of their professional duties" and thus possess the requisite "reliability and trustworthiness" to exempt them from the hearsay rule. (*Id.*, at pp. 377-381.)

The practical effect for parents is that, based on the *Malinda S.* hearsay exception, the social study report itself can provide an adequate basis for jurisdictional findings as long as the social worker is available for cross-examination. The burden then falls on the parent to present evidence to refute what is found in the social study report. (Cohn, *supra,* 16 J. Juv.L. at p. 70.)

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described by Section 300. Any legally admissible evidence that is relevant to the circumstances or acts that are alleged to bring the minor within the jurisdiction of the juvenile court is admissible and may be received in evidence. Proof by a preponderance of evidence must be adduced to support a finding that the minor is a person described by Section 300. . . .

(b) A social study prepared by the petitioning agency, and hearsay evidence contained in it, is admissible and constitutes competent evidence upon which a finding of jurisdiction pursuant to Section 300 may be based, to the extent allowed by subdivisions (c) and (d). (§ 355, subds. (a) and (b).)

The special evidentiary rules for dependency hearings framed by this Court in *Malinda S.* continued to change and expand with the subsequent decisions in *Carmen O.*, *Cindy L.*, and *Lucero*.

b. Creation of the "Child Dependency Hearsay Exception" in *Carmen O.*

In 1994, the Fourth District Court of Appeal, Division One in *Carmen O.*, *supra,* 28 Cal.App.4th 908, opened the door to a child dependency hearsay exception. In the underlying trial court proceedings, a social study report was prepared containing the minor Carmen's various statements to different family members regarding alleged sexual abuse by her father. (*Id.*, at p. 912.) The social study report containing Carmen's hearsay statements was received into evidence by the trial court and the trial court found Carmen incompetent to testify. The trial court found jurisdiction over Carmen and her brother and removed the children from father's care. (*Ibid.*) Father appealed, contending that Carmen's statements should not have been admissible because of the juvenile court finding of Carmen's incompetence and that it was error to admit Carmen's hearsay statements through the testimony of her sister, mother and grandmother. (*Id.*, at p. 911.)

On appeal, the Fourth District, Division One, in upholding the juvenile court's jurisdictional findings, stated that "this court believes the time has now come, and this case is ripe for, a recognition of what we will call a "child dependency hearsay exception." (*Carmen O.*, *supra,* 28 Cal.App.4th at p. 921.) The court qualified its ruling saying that this newly created rule encompassed only "out-of-court statement of very young children for the truth of the content of the statement, given the existence of factors which show reliability." (*Id.*, at p. 922.)

The *Carmen O.* court found that Carmen's hearsay statements "fit the general outlines of the test of reliability typically required for use of a

'residual' hearsay application." (*Carmen O., supra*, 28 Cal.App.4th at p. 921.) The reliability factors discussed by the court were the "age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, the reliability of the assertion, and the reliability of the child witness." (*Carmen O., supra*, 28 Cal.App.4th at p. 919.)

The creation of the child dependency hearsay exception now made it easier to introduce the out-of-court statements of very young children for the truth of the content of the statement, given the existence of various factors of reliability. (*Carmen O., supra*, 28 Cal.App.4th at p. 922.)

c. *Cindy L.* Upheld the Child Dependency Hearsay Exception and Added the Requirement That a Child's Hearsay Statements Must Possess Indicia of Reliability Plus Corroboration Before Being Admitted at a Jurisdictional Hearing

This Court first addressed the child dependency hearsay exception created by *Carmen O.* in *Cindy L.* This Court in *Cindy L.* "more fully developed [the exception] to provide specific due process protections for parents in child dependency hearings." (*Cindy L., supra*, 17 Cal.4th at p. 18.)

In 1997, the *Cindy L.* Court was called upon to determine whether the "child dependency hearsay exception" was applicable when the court determines that a child is not competent to testify because he or she is unable to understand the duty to tell the truth or does not possess the ability to distinguish between truth and falsity. (*Cindy L., supra*, 17 Cal.4th at p. 18.)

During naptime at her preschool the four-year-old minor, Cindy, touched her vagina underneath her underwear. The preschool teacher told Cindy to stop, to which Cindy replied "well my father always touches me

right there." (*Cindy L., supra*, 17 Cal.4th at p. 19.) Cindy was interviewed by various individuals over several different days and repeated the same allegations. (*Id.*, at p. 20.) Additionally, there was evidence from the doctor who examined the minor finding that he did not "visualize a hymen" which was consistent with the reported history of sexual abuse. (*Id.*, at p. 35.) The trial court applied the child dependency exception enumerated in *Carmen O.* to find Carmen's statements admissible and to sustain the petition. The Court of Appeal affirmed, concluding that the juvenile court had not erred in applying the child dependency exception. (*Id.*, at p. 21.)

On appeal to this Court, the first issue to be addressed was whether the child dependency exception introduced in *Carmen O.* was validly created. (*Cindy L., supra*, 17 Cal.4th at pp. 18, 21.) This Court noted that given the realities of child dependency proceedings and the fact that some children will be too young or too intimidated to testify, that the

> categorical exclusion of child hearsay, or admission only if the hearsay fits within traditional yet narrow categories such as the 'spontaneous utterance' exception will often mean the exclusion of significant, reliable evidence required for the juvenile court to assert its jurisdiction over the child and to ultimately protect him or her from an abusive family relationship.

(*Id.*, at p. 28.)

As a result, this Court found that the creation of a child dependency exception in sexual abuse cases was well-founded but, "that the exception should be more fully developed to provide specific due process protections of parents in child dependency hearings." (*Cindy L., supra*, 17 Cal.4th at p. 18.) To that end, this Court in *Cindy L.* set forth three conditions for admitting the out-of-court statements of children in jurisdictional hearings. First, the court must find that the time, content and circumstances of the statement provide sufficient indicia of reliability. Second, a child must either be available for cross-examination or there must be evidence of child

sexual abuse that corroborates the statement made by the child. Third, other interested parties must have adequate notice of the public agency's intention to introduce the hearsay statement so as to contest it. (*Id.*, at p. 29.)

This Court in *Cindy L.* provided a non-exhaustive list of factors that the United States Supreme Court had cited in *Idaho v. Wright, supra,* 497 U.S. 805, 821-822, as relevant to the reliability of hearsay statements made by child witnesses in sexual abuse cases. The list included (1) spontaneity and consistent repetition; (2) the mental state of the declarant; (3) use of terminology unexpected of a child of a similar age; and (4) lack of motive to fabricate. (*Cindy L., supra,* 17 Cal.4th at pp. 29-30.) Noting that, despite efforts to solidify the various indicia of reliability, the indicia had been described as "sufficiently ambiguous as to be 'easily manipulable,'" this Court in *Cindy L.* required corroboration if the hearsay declarant is unavailable for cross-examination. (*Id.* at p. 30, quoting, *Should We Believe the People Who Believe the Children? The Need for A New Sexual Abuse Tender Years Hearsay Exception Statute* (Winter 1995) 32 Harv. J. on Legis. 207, 238-239.)

This Court in *Cindy L.* recognized that allowing the child dependency hearsay exception also required some due process protections for parents. Accordingly, this Court in *Cindy L.* found that independent corroboration[15] was an "additional safeguard against the possibility of

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[15] California Evidence Code section 1370, in part, provides that the circumstances that would indicate the trustworthiness of a hearsay statement include (b)(3) [w]hether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section. (Cal. Evid. Code § 1370, subd. (b)(3).) Corroborative evidence was defined as "evidence . . . which would support a logical and reasonable inference' that the act of abuse described in the hearsay statement occurred." (*Cindy L., supra,* 17 Cal.4th at p. 35.) Corroborating evidence is

fabrication by very young witnesses whose out-of-court statements are insulated from the rigors of cross-examination." (*Cindy L., supra*, 17 Cal.4th at p. 34.)

d. The Legislature Responds to Due Process Concerns Raised by the Rulings in *Malinda S.* by Amending Section 355 to Provide That Hearsay Evidence by Itself Is Not Sufficient To Establish Jurisdiction Subject to Various Exceptions

In response to the due process concerns raised by the ruling in *Malinda S.*, Senate Bill 86 was introduced to the Legislature in 1995 and adopted as amended in 1996. Senate Bill 86 added language to section 355 which would have the effect of at least partially overruling this Court's decision in *Malinda S.* Senate Bill 86 attempted to address the procedural due problems of the social study exception by giving parents a more meaningful opportunity to refute child abuse allegations by either requiring the hearsay declarant to be available for cross examination or requiring other admissible supporting evidence to be adduced in order for the court to make a jurisdictional finding. (Cohn, *supra*, 16 J. Juv.L. 53 at p. 72.; Seiser, *supra*, § 2.110[12][b].) The goal of Senate Bill 86 was that "parties to dependency actions would be afforded the same procedural and due process protections that are required in other legal actions which affect the individual rights of citizens." (Legis., Analyst, Enrolled Bill Rep., Sen. Bill No. 86 (12995-1996 Reg. Sess.) May 9, 1995, p. 5.)

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defined as "Evidence that differs from but strengthens or confirms what other evidence shows (esp. that which needs support)." (Black's Law Dictionary (10th ed. 2014).)

The amendments to Section 355 were the result of lengthy legislative consideration and compromise. The Enrolled Bill Report recommending the Governor sign the bill that became section 355 aptly describes the bill as,

> a measured response to the problem of hearsay testimony in Section 300 jurisdictional hearings. On the one hand, juvenile court proceedings, particularly in abuse and neglect cases, are supposed to be informal and to place the best interests of the child ahead of inflexible and ritualistic adherence to ordinary, adversarial trial court procedures. On the other hand, there is widespread belief that hearsay evidence is unreliable and excessive court reliance on the multiple hearsay statements contained in social study reports can lead to injustices. This bill takes a middle road, preserving informality and allowing social studies to serve as the basis to declare a child a ward of the court while placing reasonable limitations on the use of hearsay evidence when there are reasons to doubt the reliability of the statements in the social study.

(Legis. Analyst, Enrolled Bill Rep., Sen. Bill No. 86 (1995-1996 Reg. Sess.) Apr. 25, 1996, p. 1.)

Senate Bill 86 was amended several times and ultimately adopted by the Legislature in its present form. The changes brought to section 355 by Senate Bill 86 affected those cases in which a party to the proceedings raises a timely objection to the admission of specific evidence which is contained in a social study. In such cases, the specific hearsay evidence "shall not be sufficient by itself to support a jurisdictional findings unless the social services agencies establishes that at least one enumerated exception applied." (§ 355, subd. (c)(1).) The exceptions included that "the person who made the hearsay statement is a child under the age of 12 who is the subject of the jurisdictional hearing. Such statements are inadmissible, however, if the party objecting establishes that the child's statement is unreliable because it was the product of fraud, deceit or undue influence." (§ 355, subd. (c)(1)(B).)

Senate Bill 86 amended the language in section 355 to partially codify and partially modify this Court's decision in *Malinda S.* Section 355, subdivision (c) made "clear that only certain types of hearsay are sufficient to support a jurisdictional finding." (*Lucero L., supra*, 22 Cal.4th at p. 1242.)

e. This Court in *Lucero L.* Further Refined the Use of Hearsay Statements of a Truth Incompetent Non-Testifying Witness as the Sole Basis for Establishing Jurisdiction by Removing *Cindy L.'s* Corroboration Requirement But Required That the Time, Content and Circumstances of the Hearsay Statement Provide Sufficient Indicia of Reliability Such That the Test of Cross Examination Would Be of Marginal Utility

i. Introduction

In 2000, this Court in *Lucero L.* further refined what was required before a court could base a jurisdictional finding solely on the hearsay statement of a truth incompetent non-testifying witness.[16] In *Lucero L.* this Court was asked to consider whether "the hearsay statements contained in a social study of a minor who is the subject of a section 300 hearing, and who is deemed to be incompetent as a witness because of an inability at the time of testimony to understand the obligation to tell the truth and/or distinguish between truth and falsehood may be admitted and relied on under section

[16] "Truth incompetence or the inability to express oneself so as to be understood are bases for excluding witness testimony. Pursuant to Evidence Code section 701, a person is disqualified from testifying if it is shown by a preponderance of the evidence that the witness is "(1) [i]ncapable of expressing himself or herself concerning the matter so as to be understood . . . or (2) [i]ncapable of understanding the duty of a witness to tell the truth." (*I.C., supra*, 239 Cal.App.4th at p. 341, fn. 5 (dis. opn.); see also *Cindy L., supra*, 17 Cal.4th at p. 31-32.)

355 if such statements fail to measure up to the standard of reliability prescribed in *Cindy L.*" (*Lucero L, supra*, 22 Cal.4th 1227 at p. 1231.)

After reviewing the child dependency exception and due process concerns involving the use of hearsay, this Court held that "except in those instances recognized by statute where the reliability of hearsay is established, hearsay evidence alone is insufficient to satisfy the requirement of due process of law, and mere uncorroborated hearsay does not constitute substantial evidence." (*Lucero L., supra*, 22 Cal. 4th at pp. 1244-1245.) This Court in *Lucero L.* held that due process imposes an *additional* requirement for cases where the child cannot qualify to testify or differentiate between truth and falsehood and the statements are the exclusive evidence. (*Id.*, at pp. 1247-1248.) This Court concluded that "the out-of-court statements of a child who is subject to a jurisdictional hearing and who is disqualified as a witness because of the lack of capacity to distinguish between truth and falsehood at the time of testifying may not be relied on exclusively unless the court finds that the 'time, content and circumstances' of the statement provide sufficient indicia of reliability." (*Id.*, at pp. 1247-1248.) It was essential that sufficient indicia of reliability exist to ensure that the child's "truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility." (*Id.*, at p. 1249.)

Without such indicia of reliability and without such assurance of clear truthfulness, relying on hearsay evidence would not meet constitutional due process requirements.

ii. Cross-examination has historically been the critical means by which a witness's credibility is assessed

This Court in *Lucero L.* was cognizant of the due process problems created by the use of a very young truth incompetent child's hearsay

statements to establish jurisdiction as the "use of such evidence against a parent denies the parent – and the court – a critical means by which historically we assess a witness's credibility: cross-examination." (*I.C., supra,* 239 Cal.App.4th at p. 341 (dis. opn.); *Lucero L., supra*, 22 Cal.4th 1227.)

Cross–examination is central to the American legal system. It has been described as the "greatest legal engine ever invented for the discovery of the truth." (*California v. Green* (1970) 399 U.S. 149, 158.) "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested, [allowing the cross-examiner] . . . to delve into the witness' story to test the witness' perceptions and memory . . . [and] to impeach, i.e., discredit, the witness." (*Davis v. Alaska* (1974) 415 U.S. 308, 316.) "The basic theory is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross-examination." (*Buchanan v. Nye* (1954) 128 Cal.App.2d 582, 585.)

As a result, this Court in *Lucero L.* created a safeguard to ensure the trustworthiness of a minor's hearsay statement when the minor was not available for cross-examination.

> *iii.* *When a minor is not available for cross-examination,* Lucero L. *held that due process requires that 'time, content and circumstances' of the statement provide sufficient indicia of reliability to "ensure that the child's "truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility."*

This Court in *Lucero L.* recognized that because cross-examination is so crucial to the due process protections enforced by the Fourteenth

Amendment and Article 1 of the California Constitution, if cross-examination is removed from the equation, there must be some dependable way to ensure the reliability and truthfulness of the out-of-court statements of a non-testifying truth incompetent young child that form the basis for a jurisdictional finding.

This Court in *Lucero L.* applied the four-part test under California and federal law used to determine what process is due when the government deprives a person of life, liberty or property.[17] The flexible balancing standard considers: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any of additional or substitute procedural safeguards; 3) the dignity interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official; and 4) the Government's interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. (*Lucero L,, supra,* 22 Cal.4th at p. 335.)

Applying these factors here, this Court in *Lucero L.* stated that the private interest at stake was the parent's important liberty interest in maintain custody of his child as enumerated in *Santosky v. Kramer, supra,* 455 U.S. 745. Secondly, the risk of erroneous deprivation was great because those opposing the government in a section 300 hearing are critically deprived of the right to cross examination. This risk is further increased when the hearsay declarant is legally incompetent to testify due to inability to distinguish between truth and falsehood, which not only makes

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[17] The test was discussed by the United States Supreme Court in *Matthews v. Eldridge* (1976) 424 U.S. 319.

the declarant unavailable for cross examination but detracts from his/her reliability. Finally, the vital governmental interests in preventing child abuse and the interest in producing an accurate and just resolution of dependency proceedings are at stake. (*Lucero L., supra*, 22 Cal.4th at pp. 1247-1248.)

Although section 355 created a statutory exception to the hearsay rule for minor under age 12, the court thought it "not apparent ... why sole reliance on such hearsay statements would not raise the same due process problems as with other hearsay." (*Lucero L., supra*, 22 Cal.4th at p. 1245.) Nor did the court believe that,

> due process is necessarily protected by placing the burden on those opposing the government to prove that the minor's statements were 'the product of fraud, deceit, or undue influence', as section 355, subdivision (c)(1)(B) provides, in order to keep the statements from being admitted. This court recognized that the burden of proving 'fraud, deceit, or undue influence' while not easily borne under any circumstance, is especially difficult when the witness who is generally most critical to proving such a case is unavailable for cross-examination.

(*Ibid.*)

Inclusion of hearsay statements in a social study does not cure the due process problems inherent in solely relying on the out-of-court statements of a minor unavailable for cross-examination. (*Ibid.*)

iv. *The* Lucero L. *Plurality and the Concurring Opinions recognized that simply because a hearsay statement might be admitted into evidence did not infuse that statement by itself with the necessary trustworthiness and reliability to be the sole basis for a jurisdictional finding*

The *Lucero L.* plurality and the concurring opinions recognized the difference between evidence that might be admitted at a hearing versus evidence that will be relied upon as the basis of a jurisdictional finding. The many plurality opinions in *Lucero L.* differed in emphasis on whether the hearsay statements were admissible under the previously established child hearsay exception created in *Carmen O.* and as accepted in *Cindy L.*, or under the newly enacted section 355(c)(1)(B) statute.

However, when addressing whether the hearsay statements of a truth incompetent minor could constitute competent evidence, the plurality in *Lucero* was unanimous that the "indicia of reliability" was a critical due process safeguard for determining the truthfulness and reliability of an otherwise truth incompetent child who could not be tested by cross examination. (*Lucero L., supra*, 22 Cal.4th 1227 (plurality opinion Mosk J., joined by George, J and Werdegar, J.) at pp. 1246-128; (concurred by Chin, J. and joined by Baxter, J.) at p. 1252; (concurred by Kennard, J., and joined by Brown, J.) at p. 1252.)

In his concurring opinion, Justice Kennard indicated that the hearsay statement of a truth incompetent not-testifying minor cannot be the sole basis for a jurisdictional finding unless they show special indicia of reliability. (*Lucero L, supra,* 22 Cal.4th 1227, 1250-1251 (conc. opn. of Kennard, J.).) Justice Kennard pointed out that because there was "significant other evidence" produced by the County in that case, it was

unnecessary to determine if Lucero's hearsay statement possessed sufficient indicia of reliability. (*Id.,* at p. 1252 (conc.opn. of Kennard, J.).)

Justice Chin, concurring, agreed that the child's "hearsay statements in the social study were admissible and that unreliable and uncorroborated hearsay, alone, would be insufficient to sustain a jurisdictional finding." (*Lucero L., supra,* 22 Cal.4th at 1252 (conc. opn. of Chin, J.).) Justice Chin stated, "The plurality is also correct that holding the evidence admissible does not mean that it will always support a jurisdictional finding. I do not doubt that evidence, whether hearsay or not, that is unreliable and uncorroborated cannot satisfy the preponderance-of-the-evidence standard. It might also violate due process to base a finding on unreliable and uncorroborated evidence." (*Id.,* at p. 1253 (conc. opn. of Chin, J.).)

This Court in *Lucero L.* recognized that although *Malinda S.* allowed admission of reported hearsay statements in social study reports, those reported statements did not necessarily possess any particular guaranties of reliability because they were included in the social study report. (*Lucero L., supra,* 22 Cal.4th at p. 1240.) The plurality in *Lucero L.* sought to address the problem of sole reliance on hearsay statements of a truth incompetent non-testifying young child. The Court in *Lucero L.* required that there be the necessary indicia of reliability that provided a substitute for corroboration and cross examination which are the usual "safeguards against the possibility that the child is merely fabricating the statements." (*Id.*, at p. 1246.)

v. Conclusion

This Court in *Lucero L.* was clear in its goal to preserve the due process rights of parents while protecting the most vulnerable members of society. Requiring that the time, content and circumstance of the hearsay statement provide sufficient indicia of reliability sought to assuage those concerns. The indicia of reliability are meant to ensure that the child's

"truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility." (*Lucero L, supra,* 22 Cal.4th at p. 1249.)

Without the ability to cross-examine a witness, which has been the bedrock of our legal system, safeguards must be in place and consistently and correctly applied to ensure that a parent's due process rights are maintained. The juvenile court's failure to apply the *Lucero L.* mandate resulted in a miscarriage of justice for a family. The Court of Appeal's published affirmance of that miscarriage of justice by applying what it itself recognized as a "novel application" of *Lucero L.* expanded the impact of this mistake.

f. In *I.C.*, The Juvenile Court Failed to Apply the *Lucero L.* Test of Clear Truthfulness to the Hearsay Statements of the Minor, Resulting in A Jurisdictional Finding Based Solely on the Unreliable, Confused Statements of a Three-Year-Old Non-Testifying Truth Incompetent Minor

The *Lucero L.* mandate requiring particularized indicia of reliability establishing the clear truthfulness of the minor was put to the test in *I.C.*, *supra*, 239 Cal.App.4th 304. The juvenile court specifically found many of I.C.'s hearsay statements to be confusing and unclear. Nevertheless, the juvenile court relied solely on these unreliable hearsay of a truth incompetent[18] non-testifying minor to make its jurisdictional findings. (3/27/13 RT 2-3, 6.) In doing so, the juvenile court ignored this Court's holding in *Lucero L.*

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[18] As pointed out by Justice Stewart in her dissent, there was "nothing in the record indicting that the juvenile court expressly found I.C. to be truth incompetent. Nonetheless, its citation to *Lucero L.* indicates that it found this to be true." (*I.C., supra*, 239 Cal.App.4th at p. 348, fn. 14 (dis.opn.).)

All of the other evidence presented to the court did not support the allegation of sexual abuse by father, in fact just the opposite. The police search of the home did not find any signs of bodily fluids, including semen, on the children's beds, the bed linens, or in the laundry hamper. (1CT 99, 103.) Father was cooperative with the police and agreed to the police searching his car, which did not contain any illegal items or contraband. (1CT 97.) A medical examination of I.C. did not indicate any signs of trauma. (1CT 105.) There was no prior child welfare history involving the family. The adult sibling and babysitter both testified that father had never behaved inappropriately with them, they had never seen him behave inappropriately with I.C., and I.C. had never told them that father behaved inappropriately. (1CT 97; 3/14/13 RT 10.) I.C.'s statements on September 11, 2012, were strikingly similar to her description of the documented molestation she had recently suffered at the hands of the eight-year-old neighbor only two months prior. (1CT 87-88; 9/12/12 Aug RT 10.)

To date, the published cases that have applied *Lucero L.* in the context of the hearsay statements of a non-testifying, truth incompetent minor have found corroborating evidence to bolster the hearsay statements. In fact, corroborating evidence was even discussed by this Court in *Lucero L.* to strengthen the reliability of the minor Lucero's hearsay statement as noted in its reliance on an older sibling's statement that father had showered with her and engaged in inappropriate sexualized behavior with the sibling. (*Lucero L., supra*, 22 Cal.4th at p. 1250.) In *In re April C.* (2005) 131 Cal.App.4th 599, the Second District Court of Appeal affirmed the juvenile court's findings based on the minor's hearsay statements regarding the alleged abuse and the corroborating evidence that the minor had a healing anal tear. (*Id.*, at p. 612.) In *B.D., supra,* 156 Cal.App.4th 975, the Third District Court of Appeal found that the trial court erred in dismissing the petition because even though the hearsay statements of the

witness were not to be admitted pursuant to section 355, there was corroborating evidence through mother's admission of the physical abuse suffered by the child. (*Id.*, at p. 978.)

The presence of corroborating evidence, in effect, has in other cases limited the urgency for the juvenile courts of ensuring the clear truthfulness or reliability of the out-of-court statements of a non-testifying, truth incompetent minor. In this case, the majority attempted to find "some corroboration" in the minor's alleged fear of being left alone with father. (*I.C., supra*, 239 Cal.App.4th at p. 323, fn.8.) However, as pointed out in the dissent and set forth in the record, mother expressly testified that I.C. was not afraid of father. (*I.C., supra*, 239 Cal.App.4th at p. 329, fn.2 (dis. opn.); 1/14/13 RT 24, 36.) Furthermore, as the dissent noted, the "portion of mother's testimony that the majority relied upon ultimately rests of what I.C. told mother about father's abuse. The majority does not explain how a truth incompetent hearsay declarant can corroborate her own statements." (*I.C., supra*, 239 Cal.App.4th at p. 329, fn.2 (dis. opn.).)

Here, the *only* evidence to support the allegations of the section 300 petition were the hearsay statements of a non-testifying, truth incompetent three-year-old. The juvenile court recognized that "essentially, all the court has to go on in this case is the hearsay statement of a three-year old minor." (3/27/13 RT 3.) I.C.'s hearsay statements were contained within various social study reports, as well as within the CALICO videotape, which was admitted into evidence. Prior to rendering its decision the juvenile court acknowledged "this is a very difficult case because the evidence comes from a three-year old child who, at times, was very clear in her statement about what happened, and at other time was very unclear, and at times very confusing about the statements that she makes concerning what she alleged her father did to her." (3/27/13 RT 2-3.) After citing *Cindy L., supra*, 17 Cal.4th 15, and *Lucero L., supra*, 22 Cal.4th 1227, the court discussed

evidence that it thought suggested I.C.'s statements were both reliable and unreliable, but found that "the evidence that supports reliability [is] more compelling." (3/27/13 RT 6.) Accordingly, the court sustained the allegations and found the (d-1) and (d-3) allegations of the petition to be true by a preponderance of the evidence. (3/27/13 RT 7-8, 17.)

Contrary to the *Lucero L.* mandate, the juvenile court did not determine whether the truthfulness of I.C. as a hearsay declarant was "so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility." Instead, the juvenile court stated that this was a "very difficult case" with "supporting evidence on both sides." (3/27/13 RT 6.) As the dissent pointed out in *I.C.*, the juvenile court's finding that significant evidence pointed to the unreliability of I.C.'s statements should have resulted in the majority reversing the jurisdictional findings. (*I.C., supra*, 239 Cal.App.4th at p. 347 (dis. opn.).)

The juvenile court's weighing of the evidence was essentially a determination that I.C.'s hearsay statements were reliable by a preponderance of the evidence, a "broad and relatively lenient" standard of proof. (*I.C., supra*, 239 Cal.App.4th at p. 345 (dis. opn.).) The Court in *Lucero L.*, however, makes clear that more is required before the juvenile court may base jurisdictional findings solely on uncorroborated hearsay statements by a young, truth incompetent non-testifying minor such as I.C. When faced with that circumstance, a trial court must find from the statements made and from the surrounding circumstances that the minor's truthfulness is so clear that cross-examination would be of little use. (*Lucero L., supra*, 22 Cal.4th at p. 1249.)

The juvenile court acknowledged that significant aspects of I.C.'s hearsay statements about father were the product of confusion, projections and/or imagination and were therefore unreliable. (3/27/13 RT 2-6.) In fact, the juvenile court's findings demonstrated that no reasonable fact

finder could conclude that I.C.'s truthfulness was clear, as required by this Court in *Lucero L.* Accordingly, I.C.'s very confusing and very unclear out-of-court statements do not withstand the required scrutiny of *Lucero L.* when those statements were the sole evidence upon which to base jurisdiction and do not pass constitutional muster.

In this case, the only evidence to support the section 300, subdivision (d) jurisdictional allegation were the hearsay statements of I.C. There was no medical evidence, no forensic evidence, no statements of other family members, no allegations of similar acts committed by father on other children. There was nothing but one 24-hour period with hearsay statements from the I.C. that were confused, verifiably untrue, and similar to the molestation she had suffered at the hands of an eight-year-old neighbor only a few months before the allegations were made against father, and only a few days after that same boy abruptly and disruptively re-entered the family's life. In such a case, this Court in *Lucero L.* was clear that there must be corroborating evidence or the court must find that the time, content and circumstances of the statement provide sufficient indicia of reliability before those hearsay statements can be the sole evidence to support a jurisdictional finding. (*Lucero L., supra*, 22 Cal.4th at p. 1246.) Under no circumstances could a court determine, as *Lucero L.* requires, the truthfulness of I.C.'s allegations of sexual abuse. The juvenile court erred in sustaining the jurisdictional allegations of the section 300 petition. Its findings, as well as the subsequent dispositional orders based on those erroneous jurisdictional findings, must be reversed.

This Court and the Legislature have made additions and changes to the law over the years in an effort to ensure the safety of children who have been abused while also ensuring parents are afforded due process protections. With the frequent introduction of hearsay statements in dependency proceedings, it is imperative that the due process rights of

parents are protected. A course correction is necessary now to ensure adherence to the requirements of *Lucero L.* when hearsay statements of a truth incompetent non-testifying child are the sole basis for a finding of jurisdiction under section 300.

II. THE COURT OF APPEAL ERRED WHEN IT AFFIRMED THE TRIAL COURT'S JURISDICTIONAL FINDING WITHOUT REVIEWING THE ENTIRE RECORD FOR SUBSTANTIAL EVIDENCE OF THE MINOR'S CLEAR TRUTHFULNESS

A. When the Hearsay Statements of a Truth Incompetent, Non-Testifying Minor Are the Sole Basis for Jurisdiction, a Court of Appeal's Failure to Review the Entire Record For Substantial Evidence of the Minor's Clear Truthfulness As Required Under the Mandate of Lucero L. *Results in a Violation of a Parent's Due Process Protections*

Jurisdictional findings are reviewed for substantial evidence. (*In re James R.* (2009) 176 Cal.App.4th 129, 134-135.) The term 'substantial evidence' means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion; it is evidence which is reasonable in nature, credible and of solid value." (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1433.) Although substantial evidence may consist of inferences, such inferences must be 'a product of logic and reason' and 'must rest on evidence' [citation]; *inferences that are the result of mere speculation or conjecture cannot support a finding* [citations]." (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393-1394, italics in original.)

As explained in *People v. Johnson* (1980) 26 Cal.3d 557, the reviewing court does not limit its review to the evidence favorable to the respondent. (*Id.* at p. 577.) The Court described its "'task as twofold: First, we must resolve the issue in the light of the whole record . . . and may not

limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is substantial; it is not enough for the respondent simply to point to 'some' evidence supporting a finding, for 'not every surface conflict of evidence remains substantial in the light of other facts.'" (*Ibid.*, citing *People v. Bassett* (1968) 69 Cal.2d 122, 138, fn. and emphasis omitted.)

A formulation of the substantial evidence rule which stresses the importance of isolated evidence supporting the judgment risks misleading the court into abdicating its duty to appraise the whole record. As Chief Justice Traynor explained,

> the 'seemingly sensible' substantial evidence rule may be distorted in this fashion, to take 'some strange twists.' Occasionally an appellate court affirms the trier of fact on isolated evidence torn from the context of the whole record. Such a court leaps from an acceptable premise, that a trier of fact could reasonably believe the isolated evidence, to the dubious conclusion that the trier of fact reasonably rejected everything that controverted the isolated evidence. Had the appellate court examined the whole record, it might have found that a reasonable trier of fact could not have made the finding in issue. One of the very purposes of review is to uncover such irrational findings and thus preclude the risk of affirming a finding that should be disaffirmed as a matter of law.

(Traynor, *The Riddle of Harmless Error* (1970) p. 27 (footnotes omitted.).)

Where the hearsay statements of a child who cannot qualify to testify or differentiate between truth and falsehood is the sole evidence to establish jurisdiction, this Court in *Lucero L.* provided a roadmap that must be carefully adhered to by the reviewing courts. *Lucero L.*, and its predecessor *Cindy L.*, specifically created a "special body of law that grapples with the tension between our paramount concerns with a child's welfare and a

parent's due process rights in dependency proceedings." (*I.C., supra*, 239 Cal.App.4th at p. 341.) In assessing the sufficiency of such hearsay evidence to establish jurisdiction, the reviewing courts are to be guided "not only by the general standards governing substantial evidence review, but also by the specific mandate set forth" by this Court in *Lucero L.* (*I.C., supra*, 239 Cal.App.4th at p. 341(dis. opn.).)

This Court in *Lucero L.* explained that "the out-of-court statements of a child who is subject to a jurisdictional hearing and who is disqualified as a witness because of the lack of capacity to distinguish between truth and falsehood at the time of testifying may not be relied on exclusively unless the court finds that the 'time, content and circumstances' of the statement provide sufficient indicia of reliability." (*Lucero L., supra*, 22 Cal.4th at pp. 1247-1248.) Sufficient indicia of reliability must exist to ensure that the child's "truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility." (*Id.*, at p. 1249.)

This Court in *Lucero L.* stated that "except in those instances recognized by statute where the reliability of hearsay is established, hearsay evidence alone is insufficient to satisfy the requirement of due process of law, and mere uncorroborated hearsay does not constitute substantial evidence." (*Lucero L., supra*, 22 Cal. 4th at pp. 1244-1245.) *Lucero L.* held that due process imposes an additional requirement for cases where the child cannot qualify to testify or differentiate between truth and falsehood and the statements are the exclusive evidence. (*Id.*, at pp. 1247-1248.)

Despite *Lucero L.*'s clear mandate to assess the whole record for substantial evidence of a child's clear truthfulness, the majority in *I.C.* "precipitously acquiesced in a trial court's determination of a hearsay declarant's credibility without further review." (*I.C., supra*, 239 Cal.App.4th at p. 346 (dis.opn.).) Evidencing its misinterpretation of *Lucero L.*, the *I.C.* majority incorrectly stated, "[t]he issue here is not

whether we think I.C.'s statements bear sufficient indicia of reliability to satisfy *Lucero*, but whether substantial evidence supports the juvenile court's finding that they did." (*Id.*, at p. 324.) Instead, in explaining its role on review, the majority stated "our limited powers do not extend to credibility determination or reweighing the evidence." (*Id.*, at p. 322.)

The dissent correctly recognized that *Lucero L.* made clear that more is required before a court may base jurisdictional findings solely on the uncorroborated hearsay statements of a young truth incompetent non-testifying minor to protect a parent's federal and state constitutional due process rights. The court must find from the statements made and the surrounding circumstances that the minor's truthfulness is so clear that cross-examination would be of little use. The majority's view that the juvenile court's determination of credibility was "conclusive" had "no legal basis under the circumstances of this case." (*I.C., supra*, 239 Cal.App.4th at pp. 346-347 (dis. opn.).)

As a result, the majority reflexively deferred to the juvenile court's ruling without examining whether I.C.'s statements bore the necessary indicia of reliability to establish her clear truthfulness as required by this Court in *Lucero L.* (*I.C., supra*, 239 Cal.App.4th at p. 328 (dis. opn.).) The majority affirmed the juvenile court's findings even as it acknowledged that there was "no direct or tangible proof that any molestation occurred." (*I.C., supra,* 239 Cal.App.4th at p. 316.) Consequently, the majority's conclusion was neither a review nor an analysis of the presence of substantial evidence of I.C.'s clear truthfulness and whether the reliability of her statements was established in the juvenile court. In taking this approach, the majority effectively relinquished its oversight role in the process and became a "rubberstamp" of the juvenile court's findings.

As Justice Stewart pointed out in her dissent, even if the "juvenile court thoughtfully evaluated the evidence, our duty nonetheless is to

determine if there is substantial evidence that I.C.'s truthfulness was 'so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility'." (*I.C., supra*, 239 Cal.App.4th at p. 347 (dis. opn.).) Indeed the majority approach "flies in the face of extensive concerns regarding a fact finder's reliance on hearsay statements." (*Id.*, at p. 346 (dis.opn.).)

The majority gave 'conclusive effect' to the juvenile court's equivocal view of I.C.'s credibility, as if this were a routine affirmance of a trial court's determination that a *truth competent* testifying witness who was subject to cross-examination was credible." (*I.C., supra,* 239 Cal.App.4th at p. 330 (dis.opn.).) The majority's belief that it could not independently assess the juvenile court's views regarding the credibility of I.C. was based on the mistaken belief that I.C. was somehow a testifying witness. She was not. She was incompetent to testify because she was incapable of separating fact from fiction. Her unchallenged out-of-court statements were the only evidence of father's alleged sexual abuse. The dissent noted that in deferring to the juvenile court's "modest conclusion," the majority "abdicates this court's responsibility under *Lucero L.* to review the whole record for substantial evidence of I.C.'s clear truthfulness." (*Id.*, at p. 329 (dis. opn.).) I.C. made "fantastical, confused, or inconsistent statements" over a one day period. (*Id.*, at p. 349 (dis.opn.).) Her accusations were not made over months and there was no other credible evidence to support her accusations. Her statements were simply not reliable and on their own could not be the basis for jurisdiction.

The majority's reflexive affirmance of the juvenile court's erroneous decision in disregard of the *Lucero L.* mandate constitutes a "grave injustice" that contravenes our fundamental principles of due process and that forever marked a family with the stigma of a factually unsupported

finding that its father sexually abused his young daughter. (*I.C., supra,* 239 Cal.App.4th at p. 331 (dis. opn.).)

The majority's published decision in *I.C.* must be corrected. Left in place, the published decision in *I.C.* will cause more confusion and more ambiguity in the application of the hearsay laws in dependency courts. Under the Court of Appeal's approach, a reviewing court will only need to ensure that the juvenile court "scrupulously" evaluated the pros and cons of the hearsay evidence. (*I.C., supra,* 239 Cal.App.4th at p. 325.) Due process requires much more. Under *Lucero L.*, this Court held that a reviewing court must determine whether there is substantial evidence that the minor's truthfulness was so clear that the test of cross-examination would be of marginal utility. The reliability of the hearsay statements and the clear truthfulness of the minor are the protectors that allow the juvenile court to safely rely on the out-of-court statements of a truth incompetent non-testifying minor to establish jurisdiction while honoring a parent's due process protections.

B. Introduction of a Videotape Recording of the Minor's Hearsay Statements That Are Identical to Those Included In a Social Study Report Does Not Transform the Videotape Recording into Cross-Examination of the Non-Testifying Witness and Does Not By Itself Make the Hearsay Statements More Reliable

On September 12, 2012, I.C. made her allegations against father at preschool. The Agency's September 17, 2012, detention report indicated that the emergency social worker who met with I.C. at the preschool on that day stated that "minor was not able to tell the difference between telling a truth and telling a lie." (1CT 24.) I.C. was transported by the police to the CALICO facility to be interviewed. (1CT 93.) The CALICO interviewer began by asking I.C. to promise to tell the truth. I.C. agreed with a "yep."

(9/12/12 Aug RT 4.) I.C. was then asked what she had done that day before the interview. I.C., who had only been to preschool that day, responded with a litany of verifiable untruths, such as she had watched a movie, took a nap with her babysitter, went to the store with her mother, went to the park with her father, and went to San Francisco. (1CT 92, 93, 105; 1/14/13 RT 15, 16, 25, 26; 9/12/12 Aug RT 4-6.)

Many of I.C.'s statements from the CALICO interview were included in the Agency's social study report. (1CT 93-95.) The DVD of the CALICO interview was played in the courtroom for the court and all counsel. (1CT 157.)

In departing from the *Lucero L.* mandate, the *I.C.* majority stated, "the most notable feature of this opinion is the somewhat novel application of *Lucero L.*" (*I.C., supra*, 239 Cal.App.4th at p. 308.) However, in its "novel application", the majority incorrectly determined that I.C.'s statements in the CALICO interview, which were the same as those included in the social study report, met the "indicia of reliability" required under *Lucero*. The majority reasoned, "in viewing [the DVD] the juvenile court was exercising its power to judge credibility." (*Ibid.*) Under the *I.C.* majority's faulty reasoning, the hearsay statement in a recorded interview becomes its own self-fulfilling evidence and "indicia of reliability." The logical, but erroneous, conclusion of the majority's analysis is that the same hearsay statements can validate themselves simply if they are recorded in different medium. This approach effectively nullifies any due process protections for parents.

The majority deemed it "significant" that I.C.'s hearsay statement was not only found in the social study report but also in the video recording on the minor's CALICO interviews and "thus properly served as the basis for asserting the jurisdiction of the juvenile court over the minors as a dependent child." (*I.C., supra*, 239 Cal.App.4th at pp. 308-309.) The

majority assigned credibility to I.C.'s statements since the juvenile court had the opportunity to essentially view I.C.'s hearsay statements rather than just read those same statements in a report. However, in the context of a child's testimony by closed circuit television in a criminal proceeding, it has been found that "the child's credibility may also be subconsciously enhanced by the television as often the media gives an aura of credibility and authority to those it portrays." (*Hochheiser v. People* (1984) 161 Cal.App.3d 777, 788.) The *Hoccheiser* court noted, "it is quite conceivable that the credibility of a witness whose testimony is presented via closed circuit television may be enhanced by the phenomenon called status-conferral; it is recognized that the media bestows prestige and enhances the authority of an individual by legitimizing his status." (*Id.*, at p. 788.) "Television justice," in which the child fact witness testifies in a vacuum, via a medium most closely associated in a child's mind with wonder, fantasy, magic and "make believe," cannot help but affect the integrity of the child's testimony. (Ritsema, *Testimony of Children via Closed Circuit Television in Indiana: Face (to Television) to Face Confrontation* (1989) 23 Valparaiso U.L. Rev. 455, 463.)

For the majority in *I.C.*, the CALICO interview incorrectly filled that role of being more credible and therefore, more reliable.

The majority turned to *People v. Eccleston* (2001) 89 Cal.App.4th 436 (*Eccleston*), which it described as "particularly illustrative," in its discussion of the juvenile court's reliance on the videotape of the CALICO interview to establish the reliability of I.C.'s statements. (*I.C., supra*, 239 Cal.App.4th at p. 322.) However, *Eccleston* was a criminal case that discussed whether a videotaped interview of the hearsay statements of a non-testifying eight-year-old minor could be played by the jury. In *Eccleston*, the interviewer testified that the interview of the minor commenced *only after the interviewer "was convinced the victim knew the*

difference between truth and falsehood." (*Eccleston, supra,* 39 Cal.App.4th at p. 440, emph. added.)

No such assurance was made for I.C.'s interview at the CALICO facility. In fact, quite the opposite was true. The interviewer asked I.C. to promise to tell the truth. I.C. agreed with a "yep." (9/12/12 Aug RT 4.) However, with the very next question, the untruths began as I.C. recited a litany of activities that she claimed to have done before the interview which were completely not true. (9/12/12 Aug RT 4-6.) Regardless of I.C.'s failure to understand that she was not telling the truth, the interviewer proceeded to question I.C. for forty minutes. The CALICO interviewer neither challenged I.C.'s contentions nor was I.C. asked about the prior traumatic molestation by Oscar only two months prior.

The CALICO interview does not even begin to rise to the level of testimony as the CALICO interviewer was not intending to question I.C.'s story, only to obtain information to support the Agency's petition. Most importantly, the CALICO interviewer never established I.C. knew the difference between truth and falsehood. In fact, the interviewer never followed up with I.C. after I.C. told verifiable untruths immediately after promising to tell the truth. (9/12/12 Aug RT 4-6.) The CALICO interviewer was essentially working as an arm of the social services agencies to obtain evidence to support the petition against father - not to engage in any truth finding that would be a benefit to all interested parties.[19]

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[19] "Several researchers note a distinct 'confirmatory bias' on the part of interviewers, i.e., that abuse has occurred and the purpose of the interview is to get the child to admit the abuse. Bruck and Ceci (1995) observe that some interviewers blindly pursue a single hypothesis that sexual abuse has occurred and fail to explore rival hypotheses that might explain the behavior of the child. Furthermore, if the interviewer has a bias that sexual abuse has occurred, the interviewer's methods of questioning will be adversely affected and the child's response or testimony will be consistent

As this Court in *Lucero L.* noted, "[r]eliance on Lucero's statements in a social study as quoted by a peace officer, or a social worker, present the same due process problems as would reliance on the statements directly quoting her—*the fact that the statements are quoted by a social worker or police officer does not invest the statements themselves with any greater reliability in proving the truth of the matter asserted.*" (*Lucero L., supra*, 22 Cal.4th at p. 1249, fn.7, italics added.)

The majority erred in placing great significance on I.C.'s hearsay statement in the video recording. The majority's conclusion that the juvenile court exercised its power to judge credibility when it viewed the videotape misunderstood that a hearsay statement in a video recording is still the same hearsay statement that was contained in the social study report and which has not been subject to any cross-examination. The reviewing court should not have conferred heightened reliability on the videotape. Moreover, the juvenile court's viewing of the videotape did not turn into I.C. a testifying witness. The juvenile court could still not determine the credibility of I.C.'s statement through the video because I.C. was still not before the court.[20]

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with the interviewer's bias." (Adams, *Interviewing Methods and Hearsay Testimony in Suspected Child Sexual Abuse Cases: Questions of Accuracy* (1997) 9 Forensics Journal 1/2.)

[20] California Evidence Code section 780 states that the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:
(a) His demeanor while testifying and the manner in which he testifies; (b) The character of his testimony; (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies; (d) The extent of his opportunity to perceive any matter about which he testifies; (e) His character for honesty or veracity or their opposites; (f) The existence or nonexistence of a bias, interest, or other motive; (g) A statement previously made by him that is consistent with his testimony at the hearing; (h) A

The videotape does not solve the problem of the inherent unreliability of I.C.'s statements and inability to cross examine I.C. about her statements. The videotape was just another source of uncorroborated hearsay.[21] Counsel was not able to cross-examine I.C. and utilize the "greatest legal engine ever invented for the discovery of the truth." (*California v. Green, supra,* 399 U.S. 149, 158.)

This Court in *Lucero L.* recognized that "[a]dmissibility and substantiality of hearsay evidence are different issues" and therefore cannot be handled in the same manner. (*Lucero L., supra,* 239 Cal.App.4th at p. 1244.) "Mere uncorroborated hearsay or rumor does not constitute substantial evidence. There must be substantial evidence to support such a ...ruling, and hearsay, unless specifically permitted by statutes, is not competent evidence to that end." (*Id.,* at p. 1244.)

The juvenile court and the Court of Appeal's approach in *I.C.* signals a disturbing shift away from any due process protections to families in juvenile dependency proceedings towards the wholesale reliance on hearsay statements of a truth incompetent, non-testifying minor. This misguided and unsupported approach essentially follows the Agency's narrative, regardless of the clear truthfulness of the statements at issue. The *Lucero L.* mandate has not being applied in an orderly and consistent manner resulting in a weakening of the essential due process protections guaranteed to a family. Anything less than that required by *Lucero* leaves a parent and

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statement made by him that is inconsistent with any part of his testimony at the hearing; (i) The existence or nonexistence of any fact testified to by him; (j) His attitude toward the action in which he testifies or toward the giving of testimony; (k) His admission of untruthfulness.

[21] The admissibility of the CALICO interview was not challenged at the trial court level. Had the admission of the interview been challenged, it may have been excluded since it falls within no hearsay exception, including section 355. (*I.C., supra,* 238 Cal. App.4th at p. 330 (dis. opn.).)

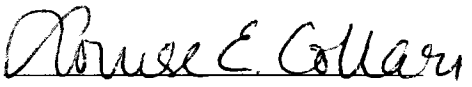
family to be forever damaged and stigmatized on the admittedly uncorroborated, confused, and unchallenged hearsay statement of a truth incompetent three-year-old child.

CONCLUSION

Based on the foregoing, father respectfully requests that this Court find that the juvenile court erred by failing to determine whether the truthfulness of the minor as a hearsay declarant was "so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility" as required by this Court in *Lucero L.* and that the Court of Appeal in *I.C.* erred by affirming the juvenile court's jurisdictional finding without reviewing the entire record for substantial evidence of the minor's clear truthfulness.

Dated: December 8, 2015

Respectfully submitted,



LOUISE E. COLLARI
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PROOF OF SERVICE BY MAIL
(CCP 1013a, 2015.5)

I declare that:

I am a resident of/employed in the county of Contra Costa, California. I am over the age of eighteen years and not a party to the within cause. My business address is 4115 Blackhawk Plaza Circle, Suite 100, Danville, CA 94506.

On December 8, 2015, I served the within APPELLANT FATHER'S OPENING BRIEF ON THE MERITS in *In re I.C., et al.*, California Supreme Court Case No. S229276 on the parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Danville, California addressed as follows:

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San Francisco, CA 94102
(via hand delivery)

Alberto C., appellant

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I declare under penalty of perjury the foregoing is true and correct. Executed this 8th day of December, 2015, at Danville, California.

Louise E. Collari