

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA    FEB 10 2016

In re I.C., A Person Coming Under the  
Juvenile Court Law

ALAMEDA COUNTY SOCIAL  
SERVICES AGENCY,

Petitioner and Respondent,

v.

Alberto C.,

Objector and Appellant.

No. S229276

**Frank A. McGuire Clerk**

Court of Appeal Case  
No. A141143

**Deputy**

Alameda County  
Superior Court Case No.  
SJ12019578-01

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**APPELLANT, ALBERTO C.'S, REPLY BRIEF ON THE MERITS**

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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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**REPLY BRIEF ON THE MERITS  
FOR APPELLANT FATHER ALBERTO C.**

Pursuant to rule 8.520, subdivision (a)(3) of the California Rules of Court, Appellant father, Alberto C., respectfully submits this Reply to the Answer filed by the Alameda County Social Services Agency regarding the published decision in *In re I.C.* (2015) 239 Cal.App.4th 304, *reh'g denied* (Aug. 26, 2015), *review granted* October 28, 2015 (S229276) (*I.C.*). In this Reply, appellant stands by the facts and arguments advanced in his opening brief on the merits, and does not concede that any of them have been rebutted or overcome by the facts and arguments contained in respondent's answer brief. Appellant will reply more specifically as necessary.

**INTRODUCTION**

While this matter came to the attention of this Court under father's particular set of facts, this case is about far more than vindicating the erroneous jurisdictional findings made against one man and one family. This case allows this Court to ensure that the standard set forth in *In re Lucero L.* (2000) 22 Cal.4th 1227 (*Lucero L.*) for juvenile dependency cases is adhered to where the hearsay statements of a non-testifying truth

incompetent minor are the *only* evidence offered to sustain a jurisdictional finding. *Lucero L.* required trial courts and reviewing courts to review those hearsay statements to determine whether the “time, content and circumstances of the statement provide sufficient indicia of reliability” such that the child’s truthfulness was “so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility” before sustaining jurisdiction based solely on the out-of-court hearsay statements of a truth incompetent minor. (*Id.*, at p. 1249.)

*I.C.*’s majority opinion, contrasted with the forceful dissent by Justice Stewart, revealed considerable confusion among the justices as to what *Lucero L.* truly required. In response, this Court sought to address the following two questions:

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 *Lucero L.*?

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?

Respondent in its answering brief argues to dismantle the due process protections that this Court created in *Lucero L.* and *Cindy L.* (1997) 17 Cal.4th 15 (*Cindy L.*) by warning of “perpetrators” being given a “free pass” if courts “decline to receive hearsay evidence from vulnerable young victims simply because of the child’s age or lack of corroborating evidence.” (RAB<sup>1</sup> at pp. 20, 39.) Respondent’s approach is in conflict with this Court’s decision in *Lucero L.* and not only confuses admissibility of hearsay evidence with the sufficiency of hearsay evidence to establish

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<sup>1</sup> Respondent’s Answering Brief will be identified as “RAB”.

jurisdiction, but also reduces due process protections to a nonessential element to be discarded in those instances where it is most crucial.

In this case, this Court should reverse the dispositional order, including the jurisdictional findings, of the juvenile court. This Court also should reverse the judgment of the Court of Appeals, which erroneously affirmed that order and findings. Reversal is required because there is not substantial evidence to support the jurisdictional findings which were based solely on the out-of-court hearsay statements of a truth incompetent non-testifying minor. Those statements did not meet *Lucero L.*'s test instituted by this Court to protect a parent's due process rights. I.C.'s hearsay statements lacked the necessary "indicia of reliability" to ensure that her truthfulness was "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.)

#### ARGUMENT

##### **I. RESPONDENT'S STATEMENT OF FACTS MUST BE DISREGARDED BECAUSE IT IS BOTH INACCURATE AND MISLEADING.**

Despite the need for direction from this Court about a vital question of statewide importance, father must first address the inappropriate liberties respondent has taken with the facts of this case.<sup>2</sup> The mischaracterizations and omissions in respondent's Statement of Case and Facts deliberately left this Court with several mistaken, inflammatory, and unsupported impressions regarding father and his family.

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<sup>2</sup>The American Bar Association Model Rules and California Rules of Professional Responsibility warn attorneys against making "partially true but misleading statements or omissions that are the equivalent of affirmative false statements." (ABA Model Rules of Prof. Conduct, rule 4.1, comment 1; see ABA Model Rules of Prof. Conduct, rule 3.1; Cal. Prof. Rules of Conduct 5-200.)

Due to the Agency's failure to fairly and accurately report the relevant facts of the case, as set forth in detail below, father requests that this Court disregard the Agency's Statement of the Case and Facts and rely, instead, upon father's Statement of the Case and Facts. It is well established that the parties must fairly set forth all the significant facts rather than merely setting forth those beneficial to it. (See *In re S.C.* (2006) 138 Cal.App.4th 396, 402 and *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; Cal. Rules of Court, rules 8.204(a), 8.360.) Respondent has failed to do this.

*A. Respondent Insinuates that Father Was a Suspect in the July 2012 Molestation of I.C. by the Eight-Year-Old Neighbor, Oscar, that the Molestation Did Not Occur, and that Mother and Father Failed to Respond Appropriately.*

Respondent's statement of the case and facts mischaracterizes the facts surrounding the July 2012 molestation of I.C. by Oscar, the eight-year-old neighbor. In two paragraphs under the heading "July, 2012 Incident," respondent insinuates that father was a suspect in July 2012, that the molestation by Oscar may not have occurred, and that the parents were not appropriately protective of their child or cooperative with the Agency. Such statements are misleading, at best, and inaccurate, at worst.

**1. Contrary to respondent's assertion, father was not a suspect in the July 2012 incident.**

Father was not a suspect in the July 2012 molestation of I.C. by Oscar, the eight-year-old neighbor. Despite the clear evidence in the record to the contrary, at page 10 of the answering brief, respondent stated, "Police records identified Father as a person in a suspicious circumstance investigation at this time." (RAB at p. 10.) This assertion is misleading and simply wrong.

The September 2012 police report cited by respondent states that a search was done of father's name and father was listed as a "person" in the suspicious circumstance investigation conducted by Officer Kindorf in July 2012. (1CT 108.) However, a review of Officer Kindorf's police report from July 2012 (which can be found just twenty pages before the September 2012 police report) simply lists father and mother under the "Person Summary," where an officer would list the names of involved family members. (1CT 86.) After that mention of father, there is nothing in the July 2012, report that in any way implicated father in that investigation. In fact, the police report's summary narrative described the investigation as being a "report of a three year old girl who had been sexually assaulted by an eight year old boy." (1CT 86.) Father was never implicated in any way in eight-year-old Oscar's July 2012 molest of I.C. Any assertion to the contrary must be rejected.

**2. Respondent insinuates that I.C. was never molested by Oscar and that, if the molestation occurred, it did not involve more than kissing.**

Respondent further insinuates that the July 2012 molestation of I.C. by eight-year-old Oscar may not have occurred or, if it did occur, that it involved only kissing. This is misleading. It was not disputed by the juvenile court or the majority and dissenting opinions in the reviewing court that I.C. had been molested by Oscar in July 2012. (3/27/13 RT 5; *I.C.*, *supra*, 239 Cal.App.4th at pp. 316, 319, 328 (dis.opn.).)

For instance, at page 9 of the answering brief, respondent stated that I.C. "was *allegedly* molested by an eight year old neighbor" and that "I.C.'s brother, J.C., *claimed* to have witnessed the incident." (RAB at p. 9, emphasis added.) Oscar's molestation of I.C. in July 2012 was a very real and traumatic event for this family that cannot be marginalized by respondent's use of dismissive words.

Alternatively, respondent implies that if the molestation of I.C. did occur, it only involved kissing and nothing more. At page 10 of respondent's brief, respondent stated, "When interviewed by police, the neighbor admitted to kissing I.C., but knew nothing about a train, and stated that he never exposed his private part to her. The neighbor *adamantly* stated that he only kissed I.C. on the mouth and never did anything else." (RAB at p. 10; emphasis added.)

A complete reading of the evidence does not support respondent's insinuation. The July 2012 police report showed that when Detective Martinez interviewed Oscar on July 11, 2012, after first denying that anything occurred, Oscar "started crying put his head down, as if he was embarrassed, and said he kissed her." (1CT 90.) Oscar was asked about putting the train in I.C.'s vagina and he looked up and said he didn't remember. Martinez asked Oscar again what happened. Oscar stated that he didn't know about the train and said he never did anything with the train. Oscar stated that he never exposed his private parts to I.C. Oscar was "very upset and said he only kissed the victim on the mouth and never did anything else." (1CT 90.)

Oscar's denial aside, I.C. and her family were quite clear on what had happened to her. I.C. told the police officer that Oscar inserted a wooden train into her vagina. (1CT 87-88.) Mother testified that when she entered the room, the toy train was on the bed between Oscar, I.C., and J.C. (1/14/13 RT 42, 1/25/13 RT 17.) J.C. told mother and the police officer that he saw Oscar put the train inside I.C.'s vagina. (1/14/13 RT 42, 1CT 87.) The medical examination of I.C. performed that same day showed that there was trauma to I.C.'s vagina but the doctor was unsure whether Oscar had used the train or had sex with I.C. (1CT 63, 87; 1/14/13 RT 46, 1/25/13 RT 23.)

The evidence presented showed that I.C. suffered molestation by eight-year-old Oscar, which appeared to have included vaginal penetration with a toy train. Neither the juvenile court nor the Court of Appeal ever doubted this incident. (3/27/13 RT 5; *I.C.*, *supra*, 239 Cal.App.4th at pp. 316, 319, 328 (dis.opn.).)

**3. Contrary to respondent's assertion, mother and father responded appropriately after Oscar molested I.C. in July 2012.**

After the molestation of I.C. by Oscar in July, mother and father responded appropriately, seeking help from various resources and programs. Despite the evidence of the above, respondent claimed that:

Immediately following the incident, the Agency attempt to contact Mother and Father by phone, mail, and in person on multiple occasions. The Agency requested that the parents contact the Agency so that the matter could be investigated. Mother and Father failed to respond.... Mother engaged in counseling herself as a result of the July 2012 incident. However, the parents did not obtain counseling for I.C., even though they claim that she became aggressive following the occasion.

(RAB at pp. 9-10.)

Respondent's characterization is, again, simply inaccurate. The evidence showed that the social worker left messages for mother and, in return, mother and father left telephone messages for the social worker. (1CT 57; 1/14/13 RT 48-49.) In addition, mother testified that she contacted her pediatrician, the psychiatry department at Kaiser, her employee assistance program, and the social worker in her efforts to obtain counseling for I.C. (1/14/13 RT 46-47; 1/25/13 RT 11-12, 14.) Mother's testimony on this subject encompassed at least forty-six pages of transcript, which respondent reduces to one general, non-descriptive sentence. (1/14/13 RT 40-68; 1/25/13 RT 6-22, 23-25.) (RAB at p. 12.)

Mother and father were not, as respondent implies, uncooperative or unwilling to help their child after such a severe trauma.

*B. Respondent's Statement that I.C. was Diagnosed with Sexual Abuse in September 2012 After Her Allegation Against Father is Misleading.*

Throughout the proceedings, the medical examination of I.C. was deemed inconclusive by the Agency. During closing remarks, the Agency stated I.C.'s medical examination "did not clearly indicate one way or the other whether [I.C.] was sexually abused." (3/15/13 RT 49.)

In rendering its jurisdictional finding, the juvenile court did not state that I.C. had a medical diagnosis of sexual abuse. (3/27/13 RT 4-7.) Neither the majority nor dissenting opinion in *I.C.* discussed any sexual abuse diagnosis for I.C. (*I.C.*, *supra*, 239 Cal.App.4th 304.)

Despite all the evidence that the medical examination was inconclusive, respondent asserted that I.C. was diagnosed with sexual abuse. (RAB at p. 11.) Although the medical report indicated under "assessment differential diagnosis and plan" that I.C. had disclosed sexual abuse and the "discharge diagnosis" and "problem or diagnosis" section listed sexual abuse and vulvovaginitis, a medical diagnosis of sexual abuse was never asserted by the Agency or found by the juvenile court or reviewing court. (1CT 171, 173.)

Respondent's mischaracterization of the evidence at this stage is misleading to this Court and must be rejected.

*C. Any Alleged Prior Drug Use by Father Was Not Relevant to These Proceedings.*

A first amended petition was filed by the Agency on September 28, 2012, which included a subdivision (b) allegation that "father had a history of intermittent substance abuse." (1CT 46, 49.) At the culmination of the



contested jurisdictional hearing, the juvenile court dismissed the subdivision (b) allegation. (1CT 186; 3/27/13 RT 8.)

Despite this dismissal, respondent spends three paragraphs of its answering brief discussing father's alleged prior drug use. (RAB at pp. 6-7; 1CT 183, 192-195.) Furthermore, respondent fails to mention in its section "D. Decision" regarding the juvenile court's jurisdictional findings that the court did not sustain the subdivision (b) allegation regarding drug use. (RAB at pp. 15-16.)

The juvenile court dismissed the allegation relating to drug use or abuse, and accordingly, the issue was never addressed by the majority or the dissent in *I.C.* Mention of father's alleged prior drug use is specious and can have only been included by respondent as part of its effort to impugn father's character.

*D. Despite Respondent's Assertion, Father Had Consistent Visitation with I.C. for the Majority of the Proceedings.*

Father did not have regular visitation with I.C. in the few months after the petition was filed in September 2012, because of the family's upheaval, the father's wish not to "complicate matters," and his work schedule. (1CT 76; 1CT 163.) However, for the majority of the lengthy proceedings father had regular supervised visits with I.C. (1CT 163.) The Agency's April 15, 2013, disposition report stated that from November 2012, until February 2, 2013, the social worker supervised the visits between father and I.C. The visits went well, I.C. was not fearful of father, and father's interactions with I.C. "seemed appropriate." (1CT 222.) Starting in mid-February 2013, the paternal aunt supervised the visits between father and I.C. (1CT 222.) These visits occurred every Saturday and Sunday for two hours. (6/24/13 RT 8-9.) The Agency's November 4, 2013, addendum report stated that the social worker supervised several

visits between father and I.C. and I.C. “appeared comfortable in her father’s presence.” (2CT 425.)

Nevertheless, respondent has described father’s visitation as “sporadic”. (RAB at p. 11.) Such a characterization must be rejected.

*E. Contrary to Respondent’s Assertion, It Was Not Clear From the Record that I.C. Understood What “Adult Movies” Were or That She Watched “Adult Movies.”*

I.C. made several confusing and unclear statements near the conclusion of the almost forty-minute CALICO interview regarding “adult movies.”

The CALICO interviewer asked I.C.,

Q: Have you ever seen adult movies?

A: Yes.

Q: What are adult movies?

A: Rapunzel

(9/12/12 Aug RT 48-49.)

I.C. then stated that she had seen a movie with a boy and girl kissing and they needed to take off their clothes. (9/12/12 Aug RT 49.) When questioned further about these “adult movies,” I.C. talked about ghosts and someone knocking on the door. (9/12/12 Aug RT 50-53.)

Based on this evidence, the juvenile court sustained section f. of the subdivision (d-1) allegation which stated, “I.C. stated that she watched a movie where a boy kisses a girl and they were not wearing clothes.” (1CT 194.)

Despite the unclear question<sup>3</sup> by the CALICO interviewer and equally unclear answer from I.C. regarding “adult movies,” at page 9 of respondent’s answering brief, respondent asserts that “I.C. stated she had

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<sup>3</sup> The CALICO interviewer’s use of the term “adult movies” when questioning a three-year-old child is arguably of limited probative value.

seen adult movies with naked boys and girls kissing.” (RAB at p. 9.) This assertion that I.C. “had seen adult movies” was a mischaracterization and oversimplification of I.C.’s actual statements during the CALICO interview, and should be disregarded.

*F. Conclusion*

Respondent’s Statement of Case and Facts should be disregarded by this Court as it was misleading and left this Court with several mistaken, inflammatory, and unsupported impressions regarding father and his family.

**II. IN *LUCERO L.* THIS COURT ESTABLISHED THAT WHEN THE HEARSAY STATEMENTS OF A NON-TESTIFYING TRUTH INCOMPETENT MINOR ARE THE SOLE EVIDENCE TO ESTABLISH JURISDICTION, DUE PROCESS REQUIRED THAT THE COURT FIND THAT THE 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.**

*A. This Court’s Holding in Lucero L. Created a Standard to be Used by a Court to Ensure the Protection of a Parent’s Constitutional Due Process Rights When the Hearsay Statements of a Truth-Incompetent Non-Testifying Minor are the Sole Evidence to Establish Jurisdiction.*

In *Lucero L.*, 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 held that due process imposes an *additional* requirement for matters where

the child cannot qualify to testify or differentiate between truth and falsehood and the statements are the exclusive evidence available. (*Id.*, at pp. 1247-1248; emphasis added.) 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.) The child’s truthfulness must be “so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility.” (*Id.*, at p. 1249.)

The plurality and concurring opinions in *Lucero L.* were unanimous that when relying on hearsay statements, 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; (concurring by Chin, J. and joined by Baxter, J.) at p. 1252; (concurring by Kennard, J., and joined by Brown, J.) at p. 1252.) Justice Chin noted in his concurrence, “[t]he 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.))

Due process considerations require that the hearsay statements of a truth incompetent non-testifying witness be found to have an indicia of reliability in order to constitute substantial evidence.

*B. Respondent's Argument Conflates Admissibility of a Truth Incompetent Non-Testifying Minor's Hearsay Statement and the Sufficiency of That Hearsay Statement to Establish Jurisdiction.*

In *Lucero L.*, this Court acknowledged that a hearsay statement may be admitted into evidence but still may not be sufficient, by itself, to establish jurisdiction. The “admissibility and substantiality of hearsay evidence are two different issues.” (*Lucero L.*, *supra*, 22 Cal.4th at p. 1244.) This Court recognized that due process problems are inherent when a court relies too heavily on the hearsay statements of truth incompetent non-testifying minors to make jurisdictional findings. (*Id.*, at p. 1245.) *Lucero L.*'s standard of indicia of reliability and clear truthfulness sought to prevent those inherent due process problems.

Respondent is correct that, in a typical case, there are “numerous tools” available to a parent to ensure their rights are protected during a jurisdictional hearing. (RAB at p. 19.) As respondent notes, parents are “entitled to counsel, to present his/her own evidence, the opportunity to cross-examine the preparer of the report, and to subpoena and cross-examine witnesses whose statements are contained in the report or its attachments.” (RAB at p. 19.) Respondent concluded that these “protections sufficiently protect a parent’s due process rights.” (RAB at pp. 19-20.) Respondent might be correct – were this a typical case.

But here, where a jurisdictional finding is based solely on the hearsay statements of a truth incompetent non-testifying minor, a parent does *not* have the due process protections of calling and cross-examining the minor – the key witness in a case without any corroborating evidence.

The factual situation of *I.C.* is unique in that there is no corroborating evidence. Even in *Lucero L.*, there was corroborating evidence – the medical report and prior rape of half-sister, which supported

Lucero's hearsay statements. *I.C.*'s particular situation does not present itself often in the lower courts. Cases that have applied *Lucero L.* in the context of the hearsay statements of a truth incompetent non-testifying witness almost always find corroborating evidence supporting the hearsay statements. (See *In re April C.* (2005) 131 Cal.App.4th 599 [Second District 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.]; *In re B.D.* (2007) 156 Cal.App.4th 975 (*B.D.*) [the Third District found there was corroborating evidence through mother's admission of the physical abuse suffered by the child.])

This Court was clear in *Lucero L.* that due process did not require the existence of corroborating evidence. (*Lucero L., supra*, 22 Cal.4th at p. 1249.) However, where there is no corroborating evidence, this Court emphasized "the importance of juvenile court scrutiny of the statements of young children who are both legally incompetent and insulate from cross-examination." (*Ibid.*) In those specific instances, "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...'" (*Ibid.*; emphasis added.)

Respondent overlooks the *Lucero L.* mandate and seeks to create a new standard whereby a court should look at all evidence, regardless of its source or reliability, which might bear on a child's best interests. Respondent states that a "perpetrator should not be given a free pass merely because they victimized a member of society too young and vulnerable to testify, and in a way that cannot be independently corroborated." (RAB at p. 20.)

Respondent's argument misunderstands this Court's decision in *Lucero L.* and overlooks the United States Supreme Court's warning that in

juvenile dependency proceedings, “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child 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* (1982) 455 U.S. 745, 753.) Instead, respondent advocates essentially ignoring this Court’s precedent in *Lucero L.* thereby decimating any due process protections that are afforded to a parent.

Precisely because a child cannot be cross-examined, this Court in *Lucero L.* required more before those untested hearsay statements could comprise the sole evidence against a parent to establish jurisdiction. Respondent’s confusion between admissibility of hearsay evidence and the sufficiency of that evidence as the sole evidence to sustain a jurisdictional finding is highlighted by its citation to in *In re B.D., supra*, 156 Cal.App.4th 975, for its proposition that the “courts should avail itself of all evidence which might bear on the child’s best interest.” (RAB at p. 39.) In *B.D.*, the minor appealed the juvenile court’s dismissal of the section 300 petition. Minor argued that the juvenile court erred in sustaining mother’s section 355 objection to the admissibility of the statements of four witnesses. In dismissing the petition, the juvenile court found that there was no independent evidence to sustain the petition. (*Id.*, at p. 984.) Justice Cantil-Sakauye, writing the opinion for the Third District Court of Appeal, explained that mother’s objection to the four witness statements did not make the statements inadmissible but “meant that uncorroborated, the hearsay statements did not constitute substantial evidence and could not be used as the exclusive basis for finding jurisdiction under section 300.” (*Id.*, at p. 984.)

The *B.D.* court did not create an open door policy where any evidence, regardless of its source or reliability, could support a

jurisdictional finding. Respondent's reliance on *B.D.* is misplaced and inapposite to the case at hand.

Although due process may be a "flexible concept," it remains central to the constitutional protections afforded to a parent when the hearsay statements of a truth incompetent non-testifying child are the sole evidence available to establish jurisdiction. This Court in *Lucero L.* imposed a standard to be applied in those situations to ensure that the hearsay statements bear special indicia of reliability such that the child's truthfulness is clear.

Father is asking this Court to adhere to the requirements set forth in *Lucero L.* to ensure that a court finds that the time, content, and circumstances of the hearsay 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.

**III. 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**

*A. The Lucero L. Indicia of Reliability Were Not Present in I.C.*

An analysis guided by the *Lucero L.* Court's indicia of reliability – time, content and circumstances – leads to the conclusions that I.C.'s statements were unreliable, that her truthfulness was not clear, and, consequently, that her hearsay statements could not serve as the sole basis for jurisdiction. The juvenile court's dispositional orders, encompassing its



jurisdictional finding, were in error as substantial evidence did not support that finding.

Despite the recognized unclear, unbelievable, verifiably untrue and difficult to follow hearsay statements of I.C., respondent argued,

I.C.'s statements contained the sufficient indicia of reliability required by *Lucero L.* I.C.'s statements contained several, if not all, of the characteristics of reliability identified in *Cindy L.* and *Lucero L.* I.C.'s statements were spontaneous, consistent in their repetition and precocious given her age. She lacked a motive to lie. An expert witness testified that I.C. was credible, and knew the difference between the truth and a lie.

(RAB at p. 27.)

The juvenile court's analysis of the reliability of I.C.'s hearsay statements might have been sufficient if I.C.'s statements were just one piece of evidence among others that corroborated her statements. However, that was not the case.

Alternatively, if I.C. had been a testifying witness subject to cross-examination, the unreliability of the time, content and circumstances of her hearsay statements would have been readily apparent. That also did not occur.

Instead, I.C.'s unclear and confusing hearsay statements were incorrectly determined to be sufficiently reliable to serve as the sole evidence for the jurisdictional finding.

In making its jurisdictional findings, the juvenile court recognized that "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 times was very unclear, and at times very confusing about that statement that she makes concerning what she alleged her father did to her." (3/27/13 RT 2-3.) Despite recognizing these problems with I.C.'s unclear, confusing, difficult to follow and unreliable hearsay

statements, the juvenile court found those statements to be sufficient as the sole evidence to establish jurisdiction. This was in error.

*B. Contrary to Respondent's Assertion, I.C.'s Hearsay Statements Were Not "Spontaneous" and Did Not Satisfy the Timing Requirement of Lucero L.'s Indicia of Reliability.*

Respondent repeatedly terms I.C.'s statements "spontaneous" in an attempt to prove that they contained a sufficient indicia of reliability. I.C.'s statements demonstrably were not "spontaneous."

"Spontaneous" is defined as "developing or occurring without apparent external influence, force, cause, or treatment." ([www.merriam-webster.com/dictionary/spontaneous.](http://www.merriam-webster.com/dictionary/spontaneous)) I.C.'s statements could not be considered spontaneous due to the external influence of eight-year-old Oscar's sudden and negative re-entry into the family's life.

On Wednesday, September 5, 2012, at J.C.'s first day of school, the family saw Oscar, the eight-year-old neighbor who had molested I.C. in July, for the first time since the incident. (1/14/13 RT 61<sup>4</sup>.) I.C. was frightened and confused when she saw Oscar at J.C.'s school. (1/14/13 RT 66.) By Friday of that week, September 7, J.C. already had complained to his family in I.C.'s presence that Oscar had bullied him at school, "pushed him down the slide, . . . , called him a loser, and destroyed his lunch." (1/14/13 RT 59, 60.) Mother and I.C., using anatomically correct language, spoke about Oscar and the July molestation on September 8 and 9, the weekend that followed. (1/14/13 RT 66; 1/25/13 RT 38-39.) On Tuesday night, September 11, less than one week after seeing Oscar for the first time

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<sup>4</sup> Mother testified that J.C.'s school started on "Wednesday. I believe it's the 7th of September." (1/14/13 RT 61.) A review of a calendar for September 2012 showed that Wednesday was September 5.

since the July molestation, I.C. made her statements about father to mother. (1/14/13 RT 16, 17, 18.)

Ignoring the tumultuous days leading up to I.C.'s statement, respondent argued that "I.C.'s statements about the abuse were spontaneous. I.C. spontaneously disclosed the abuse to mother on the evening of September 11. The next day, I.C. spontaneously disclosed the abuse again to a preschool teacher." (RAB at p. 27.) In making its findings, the juvenile court stated that I.C.'s allegation came "out of the blue" and were spontaneous. (3/27/13 RT 4.)

A review of the timing of I.C.'s statements shows that they were not at all spontaneous. As the dissent noted in *I.C.*, "I.C.'s initial statement to her mother was not entirely 'spontaneous' in light of the family's extensive discussions about Oscar and sexual abuse in the days before she made it." (*I.C.*, *supra* 239 Cal.App.4th at p. 347 (dis. opn.).)

Contrary to the facts of *Lucero L.* where Lucero spontaneously told her half-sister about "owies" when she went to the bathroom and of her fear of showering with her father, the juvenile court's finding, and the majority opinion in *I.C.*'s affirmance of that finding, was in error as substantial evidence did not support such a finding. (*Lucero L.*, *supra*, 22 Cal.4th at p. 1232.)

*C. Contrary to Respondent's Assertion, the Content of I.C.'s Hearsay Statements Was Unclear, Confusing, and Unreliable and Did Not Satisfy the Lucero L. Indicia of Reliability*

The content of I.C.'s hearsay statements was unclear, confusing, and verifiably untrue. In a word, unreliable. Substantial evidence did not support the juvenile court's finding that the content of I.C.'s hearsay statements were reliable.

Rather, the evidence showed a little girl who wove a fantastical tale over one twenty-four hour period that did include an allegation that father put his penis on her, but also included a story of flowers, necklaces, holes in the wall, and being in bed with her adult sister and babysitter while father touched everyone's vaginas. The content of I.C.'s hearsay statements was unreliable.

I.C. made a statement to mother that "daddy put his penis on me" which she recanted the very next day, telling mother that she was "kidding." (1/14/3 RT 25.) I.C. then went to preschool and repeated that statement to her preschool teachers. She added that she went to the doctor and she was "fine," that her father was mad at her, and that he punched the wall causing a hole. (1CT 93.) Later that same day, I.C. repeated her allegation that "daddy put his penis on me" during the CALICO interview. However, as that interview progressed, I.C.'s story became even more fantastical and unreliable, as I.C. included many verifiably untrue statements.

The content of I.C.'s many hearsay statements was unreliable. Regarding I.C.'s additional statements at the preschool, mother had not taken I.C. to the doctor that day. (1/14/13 RT 15.) Mother *had* taken I.C. to the doctor after the molestation by Oscar in July but had taken I.C. to preschool the morning after her allegation against father. (1CT 63, 87.) In addition, there was no evidence to support the truthfulness of I.C.'s statement that father caused a hole in the wall. The Fremont police searched the family home and found no trace of blood or semen and no mention was made of a hole in the wall. (1CT 99.)

From the CALICO interview, the list of I.C.'s verifiably untrue statements is long. First, after promising to tell the truth, I.C. then recited a list of activities she had engaged in before the interview that were readily verifiable as unreliable. (9/12/12 Aug RT 4-6.)

Second, I.C. made a false statement that her adult sister RJ and her babysitter were in the bed with her and her father and that father touched everyone's vaginas. (9/12/12 Aug RT 32-34, 36-37.) These allegations were refuted by RJ's testimony and the babysitter's statement to the police. (3/14/13 RT 10; 1CT 97.)

Third, I.C. made the false statement that the alleged molest by father happened in the CALICO interview room. (9/12/12 Aug RT 29-32.) There was no dispute that this was a false statement.

Fourth, I.C. made the false statement that father had told the police that he would never do it again. (9/12/12 Aug RT 27) The police report did not contain any confession from father and there was no evidence to suggest that I.C. even knew whether father had spoken to the police. (1CT 97)

Despite this evidence of the confusing content of I.C.'s hearsay statements, respondent argues that I.C.'s disclosures were "consistent and repeated." (RAB at p. 27.)

I.C.'s statements were not consistent and repeated. They were confusing, difficult to follow, unbelievable, and verifiably untrue. I.C. made numerous inconsistent statements over one twenty-four period and then never made those statements again about father. In stark contrast, I.C. spoke about Oscar in the months that followed the July incident. (3/14/13 RT 13, 18, 19.)

The hearsay statements of I.C. that did not relate to the allegation that father put his penis on her were dismissed selectively by the juvenile court and the Agency as unbelievable, metaphorical, or simply fantasy. (1/25/13 RT 60, 61; 3/27/13 RT 5-6.) It is inconceivable that all of I.C.'s statements regarding father's penis were true yet every other statement she made during that twenty-four hour period that did not have any corroborating evidence was either metaphorical or simply fantasy.

In *Lucero L.*, this Court found that three-year-old Lucero had consistently informed questioners that she had been molested by her father over several months. This Court found that Lucero's "consistency over a considerable period of time reported by multiple sources" provided substantial evidence to support the juvenile court's finding of reliability. (*Lucero L., supra*, 22 Cal.4th at 1250.) In contrast, I.C.'s confusing, unclear statements over one twenty-four hour period did not constitute substantial evidence of I.C.'s reliability.

*D. Contrary to Respondent's Assertion, the Circumstances of I.C.'s Hearsay Statements Did Not Satisfy the Lucero L. Indicia of Reliability*

The circumstances surrounding I.C.'s hearsay statements did not satisfy the *Lucero L.* indicia of reliability.

Respondent argues that "I.C.'s knowledge of sexual matters was precocious given her age." (RAB at p. 28.) This argument carries no weight. Mother testified that she commonly used with I.C. the words "penis" and "vagina" to describe their "private parts." (1/25/13 RT 38-39.) I.C. was familiar with sexual matters due to Oscar's prior abuse of her and the subsequent investigation and the family's ongoing discussions about it. (*I.C., supra*, 239 Cal.App.4th at p. 347 (dis.opn.)) These anatomically correct words were used extensively over the summer as the family grappled with the molestation of I.C. by eight-year-old Oscar.

Respondent argues that the "evidence also establishes that I.C. lacked a motive to lie." (RAB at p. 28.) Father did not assert that I.C. had any motive to lie. Moreover, any discussion of any perceived "motive to lie" on I.C.'s part presupposes that I.C. understands the difference between a truth and a lie. The record was clear that I.C. did not understand that difference. (1CT 24; 9/12/12 Aug RT 4-6.)

Respondent states that there were “other factors, including Ms. Cooper’s expert witness testimony” which provided additional indicia of reliability. (RAB at p. 28.) Ms. Cooper testified that she believed that I.C. knew the difference between the truth and a lie and that *most* of I.C.’s statement in the CALICO interview regarding her father were credible. (1/25/13 RT 53.) However, Ms. Cooper’s expert testimony must be tempered by that fact that she never had any actual discussions with I.C. about her allegations against father. (1/25/13 RT 45.) I.C. never told Ms. Cooper that father molested her and Ms. Cooper never discussed the molestation by Oscar with I.C. (1/25/13 RT 45-46.) Ms. Cooper had no personal knowledge of whether I.C.’s allegations against father were credible. Ms. Cooper’s determination of I.C.’s credibility, and thus reliability, were based on I.C.’s own statements. Accordingly, the expert testimony of Ms. Cooper should be accorded little weight.

Moreover, other individuals who spoke to I.C. about her allegations found her not able to tell the difference between a truth and a lie. The emergency social worker who spoke to I.C. at the preschool on September 12 determined that I.C. could not tell the difference between a truth and a lie. (1CT 24.) The CALICO interviewer was aware at the outset of the CALICO interview that I.C. did not understand the difference between a truth and a lie given her verifiably untrue response as to what she had done that day before the interview. (9/12/12 Aug RT 4-6.) In addition, I.C. was determined to be truth incompetent. (*I.C.*, *supra*, 239 Cal.App.4th at pp. 320, 328, 340 (dis opn.).)

In *Lucero L.*, the social worker interviewed Lucero privately at home regarding her interactions with her father. (*Lucero L.*, *supra*, 22 Cal.4th at p. 1231.) Lucero spoke about how father had touched her and there was no mention of any other statements made by Lucero that brought her credibility into question. (*Id.*, at p. 1232.) This Court found that Lucero’s

language was age appropriate and “her statements had the mark of being made in her own words, without evidence of prompting.” (*Id.*, at p. 1250.)

In *I.C.*, the juvenile court found I.C.’s statements to be very unclear and very confusing. (3/27/13 RT 2-3.) The juvenile court determined that I.C.’s hearsay statements were more reliable than not but did not find that her truthfulness was clear. In fact, it found just the opposite. The juvenile court did not ensure the clear truthfulness of I.C.’s hearsay statements before determining that those same unreliable, confusing, and unclear statements were sufficient to be the sole basis of a jurisdictional finding of sexual abuse by father.

*E. Contrary to Respondent’s Assertion, Father Did Not Argue That the Juvenile Court’s Error Was In Not Specifically Articulating That I.C.’s Truthfulness Was Clear.*

Father did not argue that the trial court in *I.C.* simply failed to announce the standard of proof it would be applying. (RAB at p. 33.) Rather, father argued that the trial court failed to assess I.C.’s truthfulness and make a finding regarding her truthfulness as required by *Lucero L.* (OBM<sup>5</sup> at pp. 55-57.) As Justice Stewart stated in her dissent, a determination of I.C.’s truthfulness was “a finding that the court did not make, and which its ruling indicates it would not have made if it had directly addressed this penultimate question.” (*I.C.*, *supra*, 239 Cal.App.4th at p. 348.)

Nevertheless, respondent argues that “assuming arguendo that the trial court improperly failed to specifically articulate that I.C.’s truthfulness ‘was so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility,’ such an omission is harmless error.” (RAB at p. 33.) Respondent misses the point of father’s argument.

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<sup>5</sup> Father’s Opening Brief on the Merits will be identified as “OBM”.



Under this Court's holding in *Lucero L.*, the juvenile court must scrutinize the statements of young children who are both legally incompetent and insulated from cross-examination before their statements can be the sole basis for jurisdiction. Without cross-examination, this Court required that truthfulness of the minor must be so clear from the surrounding circumstances to ensure that due process rights of parents are protected. It is difficult to imagine that if I.C. had been able to testify that her testimony would have been so credible and reliable that cross-examination "would have been of marginal utility." Rather, based on I.C.'s confusing and unclear statements, cross-examination would have assisted the juvenile court in determining whether hearsay statements were reliable.

The juvenile court's discussion of *Lucero L.* and *Cindy L.* might have been thorough but that did not mean that the trial court properly found sufficient evidence of I.C.'s reliability to allow those statements to be the sole evidence to establish jurisdiction. As Justice Stewart pointed out in her dissent, the fact that the juvenile court found that significant evidence pointed to the *unreliability* of I.C.'s statements "demonstrates that no reasonable fact finder could conclude that I.C.'s truthfulness was clear." (*I.C.*, *supra*, 239 Cal.App.4th at p. 348.)

For the above reasons, reversal of the jurisdictional findings is required.

**IV. THE APPELLATE COURT AFFIRMED THE JUVENILE COURT’S JURISDICTIONAL FINDING WITHOUT REVIEWING THE ENTIRE RECORD FOR SUBSTANTIAL EVIDENCE OF THE MINOR’S CLEAR TRUTHFULNESS AS REQUIRED BY *LUCERO L.***

*A. Father Argued That a Jurisdictional Finding Based Solely on the Hearsay Statements of a Non-Testifying Truth Incompetent Minor Must be Reviewed Under the General Standards Governing Substantial Evidence Review and the Specific Mandate Set Forth by this Court in Lucero L.*

Father argued that a jurisdictional finding based solely on the hearsay statements of a non-testifying truth incompetent minor must be reviewed under the general standards governing substantial evidence review and the specific mandate set forth by this Court in *Lucero L.* (OBM at pp. 58-59.)

Nevertheless, respondent argues “in reality, appellant argues that *Lucero L.* requires that the appellate court review the evidence de novo to determine if there is sufficient indicia of reliability.” (RAB at p. 34.) Respondent also states that father argued that “*Lucero* mandates that the appellate court independently review the hearsay statements to determine if they contain sufficient indicia of reliability.” (RAB at p. 37.)

Father is not suggesting that a reviewing court employ a de novo standard of review. Father argued that under *Lucero L.*, when the hearsay statements of a non-testifying truth incompetent minor are the sole evidence to support jurisdiction, a reviewing court must determine whether there is substantial evidence that those hearsay statements contain indicia of reliability such that minor’s truthfulness was so clear that the test of cross-examination would be of marginal utility. (OBM at p. 60.)

As Justice Stewart pointed out in her dissent, a reviewing court’s “duty is to determine if there is substantial evidence that a minor’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.) A reviewing court is to be guided by “not only the general standards governing substantial evidence review, but also by the specific mandate set forth” by this Court in *Lucero L.* (*Id.*, at p. 341 (dis.opn.).)

The dissent drew the important distinction between a reviewing court’s duty when faced with addressing the credibility and reliability of the statements of a truth competent *testifying* witness who was subject to cross-examination versus the *Lucero L.* mandate to review the whole record for substantial evidence of the *non-testifying* truth incompetent minor’s hearsay statements that are the sole basis for a jurisdictional finding. (*I.C.*, *supra*, 249 Cal.App.4th at pp. 345-346 (dis opn.).)

Based on its conclusion in *I.C.* that “obviously, the ‘test of cross-examination’ does not refer to the minor,” the majority appeared to have misunderstood this Court’s holding in *Lucero L.* (*I.C.*, *supra*, 239 Cal.App.4th at p. 308.) As the dissenting opinion noted, the “fallacy of the majority’s view” was exposed because the theory of the hearsay rule is that “many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination.” (*Id.* at p. 342, fn.7.)

Father did not suggest a de novo standard of review, only a substantial evidence standard of review as articulated by this Court in *Lucero L.*

*B. The Court of Appeal Erred When it Failed to Conduct a Review of the Entire Record for Substantial Evidence of I.C.'s Clear Truthfulness as Required by this Court in Lucero L.*

In *I.C.*, the Court of Appeal failed to conduct a review of the entire record for substantial evidence of I.C.'s clear truthfulness as required by this Court in *Lucero L.* and instead abdicated its responsibility and “defer[red] wholesale to the court’s modest conclusion.” (*I.C.*, *supra*, 239 Cal.App.4th at p. 329 (dis.opn.).)

Respondent argues that “[t]he issue was whether there was enough evidence, not whether the lower court should have given different weight to the testimony. The evidence before the trial court was sufficient to support the juvenile court’s determination that I.C.’s statements were reliable.” (RAB at p. 36.) Respondent’s identification of I.C.’s hearsay statements as “testimony” is indicative of respondent’s misunderstanding of the factors at issue in this case. I.C. was not a testifying witness because she was incapable of separating fact from fiction. It was precisely because she was not a testifying witness that a further review of her hearsay statements was required under *Lucero L.*

The majority in *I.C.* quoted the juvenile court’s explanation of its decision in its entirety but failed to engage with the record to determine if there was substantial evidence of I.C.’s clear truthfulness and whether the reliability of her statements was established in the juvenile court. (*I.C.*, *supra*, 239 Cal.App.4th at p. 317.) Instead, the majority affirmed a decision made on an unclear record and simply concluded “[g]iven the scrupulousness with which the juvenile court evaluated the pros and cons of the hearsay statements, there is not a basis on this record for overturning the juvenile court’s jurisdictional finding.” (*Id.*, at p. 325.)

As the dissent pointed out, “[t]his is a statement of admiration for the court’s thoughtfulness . . . but not a judicial review for substantial evidence of I.C.’s clear truthfulness.” (*I.C.*, *supra*, 239 Cal.App.4th at pp. 330-331 (dis. opn.)) 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. (*Id.*, at p. 328 (dis. opn.))

The juvenile did not and could not find that I.C.’s truthfulness was clear. The dissent’s analysis of I.C.’s truthfulness in its application of the *Lucero L.* standard bears repeating in full.

Three aspects of the court’s decision most clearly demonstrate the court did not find I.C.’s truthfulness was clear. First, as indicated by the court’s citation to *Lucero L.*, it found that I.C. was truth incompetent. [fn] This is a key factor weighing against the reliability of her out-of-court statements. [citation omitted.]

Second, the court recognized that I.C. made significant statements that were inaccurate, such as when she insisted that Alberto sexually abused her in the CALICO interview room and that he also molested her, her adult half-sister RJ, her babysitter and the babysitter’s sister together in one bed. Indeed, in her CALICO interview, I.C. interwove her account with fantastical statements. Immediately after promising to tell the truth, she recounted that she had engaged in numerous activities that day—such as taking a nap with her babysitter and going to the park with her father—that could not have occurred, since her mother took her in the morning from their home to pre-school, from which I.C. was taken into custody by the police. She said she was visited by a ghost as she watched movies of naked boys kissing boys and girls kissing girls. She recounted that her father said to the police, “ ‘I promise, I won’t do it again,’ ” when there is no indication she knew of such a talk and her father consistently denied molesting her. And this is by no means an exhaustive list of I.C.’s clearly untruthful statements.

Third, the court recognized that I.C.'s account of Alberto's actions was strikingly similar to Oscar's actions in sexually abusing her just months before, and that this prior abuse was discussed at great length by the family in the weeks and even days just before I.C. made her statements about Alberto. This was certainly the case. I.C. told mother that Oscar took off her shoes, pants, socks and underwear; she said in the CALICO interview that Alberto took off her shoes, pants, shirt, socks and underwear. The children told mother and the police that Oscar kissed I.C. on the mouth; I.C. said in the CALICO interview that Alberto kissed her on her mouth. Oscar's kissing and molestation of I.C. took place at home, in the children's bedroom, on Julian's bed; I.C. said in the CALICO interview that Alberto kissed and molested her in the children's bedroom on Julian's bed (as well as elsewhere). Oscar put a train inside I.C.'s vagina; I.C. said in the CALICO interview that Alberto put a train on her. I.C. told police Oscar hurt her vagina; in the CALICO interview she pointed to her vagina and said it hurt "just a little" because of Alberto's abuse. I.C.'s mother took I.C. to the doctor after the incident with Oscar; I.C. said in the CALICO interview, "Mommy is upset and I went to the doctor."

(*I.C.*, *supra*, 239 Cal.App.4th at pp. 348-349 (dis. opn.).)

The dissent's analysis of the evidence presented to the juvenile court leads to only one conclusion – I.C.'s truthfulness was not clear and therefore, her hearsay statements were not reliable enough to be the sole evidence establishing jurisdiction.

Accordingly, the Court of Appeal erred in affirming the juvenile court's jurisdictional finding without reviewing the record for substantial evidence of I.C.'s clear truthfulness based on the time, content, and circumstances of I.C.'s hearsay statements.

*C. I.C.'s Hearsay Statements Made During the CALICO Interview Could Not be the Sole Basis for Jurisdiction Since They Were the Same Hearsay Statements of a Non-Testifying Truth Incompetent Minor Which Were Included in the Social Study Report*

I.C.'s statements made during the CALICO interview were the same hearsay statements that the Agency included in its jurisdiction/disposition report. I.C.'s statements were not made more reliable merely by being captured on videotape. Father argued that I.C.'s hearsay statements in the CALICO interview should not have been assigned greater weight by the trial court and reviewing court simply because they were contained in the CALICO interview. (OBM at p. 63.)

Respondent incorrectly states that "[a]ppellant argues that I.C.'s CALICO interview is unreliable because it occurred in the presence of closed-circuit cameras." Respondent continues that there was "no reason to believe that [I.C.] would have 'acted' for the camera at the CALICO interview." (RAB at p. 29.)

Respondent completely mischaracterizes father's argument as set forth in Argument II.B. of his opening brief on the merits. (OBM at p. 63.)

I.C.'s hearsay statements in the CALICO interview suffered from the same reliability concerns of other hearsay in that father never had an opportunity to cross-examine I.C. on her statements as I.C. was deemed truth incompetent<sup>6</sup> and did not testify. (*I.C.*, *supra*, 239 Cal.App.4th at p. 341.) Furthermore, the CALICO interviewer was not intending to question I.C. on her full story. The CALICO interviewer only sought to obtain information to support the allegation of sexual abuse. For example, I.C. stated that father put penis, a flower, and a train on her yesterday. (9/12/12

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<sup>6</sup> Truth incompetence or the inability to express oneself so as to be understood are bases for excluding witness testimony. (Cal. Evid. Code § 701.)

RT 8.) The CALICO interviewer's response, "You said Daddy put his penis on you, tell me all about that." (9/12/12 RT 8.) The CALICO interviewer did not explore all of I.C.'s statements, only those that supported the Agency's petition.

In addition, the CALICO interviewer never established that I.C. knew the difference between truth and falsehood. In fact, the CALICO interviewer proceeded with the interview even after it was apparent that I.C. did not understand the difference between the truth and a lie.

In concluding its argument, respondent stated, "[i]n any event, it is not the place of appellate courts to gauge the credibility of witness testimony." (RAB at p. 29.) As highlighted by the dissent, "it is correct that we do not second-guess a trial court's views regarding the credibility of *testifying* witnesses. . . however, I.C. was *not* a *testifying* witness; rather she was incompetent to testify precisely because she was incapable of separating fact from fiction, and her out-of-court, unchallenged statements were the only evidence that [father] sexually abused her." (*I.C.*, *supra*, 239 Cal.App.4th at p. 346 (dis.opn.); Emphasis in original.)

Father never suggested that the presence of closed circuit cameras made I.C.'s statements unreliable or that I.C. was acting for the camera. Rather, father's concern was that hearsay statements made by a truth incompetent non-testifying witness are not made more reliable simply due to their inclusion in a videotaped interview as opposed to their inclusion in a social study report. The videotape was just another source of the same uncorroborated hearsay statements made by I.C. The videotape was not testimony and should not be accorded any deference as testimony since the protection of cross-examination was non-existent.



**V. RESPONDENT'S ASSERTION THAT I.C.'S HEARSAY STATEMENTS CONTAINED MORE INDICIA OF RELIABILITY THAN THOSE IN LUCERO L. IS MISTAKEN.**

A review of the opinion in *Lucero L.* and in *I.C.* cannot lead to respondent's conclusion that I.C.'s statements contained more indicia of reliability than those in *Lucero L.* There was corroborating evidence in *Lucero L.* that supported Lucero's allegation against her father. In contrast, in *I.C.*, there were only very unclear and very confusing hearsay statements that were the sole evidence to establish jurisdiction.

Respondent is wrong in its assertion that, "it is quite certain that Lucero's statements had far fewer indicia of reliability than I.C.'s." (RAB at p. 30.) Respondent argued,

[u]nlike I.C., it appears that the video of Lucero's forensic interview was not submitted into evidence. Unlike, I.C., it was unclear whether Lucero knew the difference between a truth and a lie. Unlike I.C., Lucero had limited verbal skills and difficulty identifying relevant body parts. Lucero did not disclose her abuse to as many people as I.C.

(RAB at p. 30.)

Most notably, in making its comparison between the facts in *Lucero L.* and the facts in *I.C.*, respondent excludes crucial facts deemed relevant to this Court, namely Lucero's father's prior rape of Lucero's half-sister, the psychologist's testimony, and the medical examination.

In *Lucero L.*, a petition had been filed in 1994 alleging that Lucero's father had raped Lucero's half-sister, Maribel, and sexually molested three other half-sisters. The girls recanted and the petition was dismissed.

(*Lucero L.*, *supra*, 22 Cal.4th at pp. 1231-1232.)

Three years later, in 1997, a report was made to the child abuse hotline that Lucero's father touched Lucero on her genital area, that he drank, and that he was at home with Lucero daily while mother was at

work. Social worker Rodriguez interviewed Lucero privately on that same day and Lucero stated that father had touched her vaginal area and “made owies.” Lucero showed Rodriguez on a stick figure how her father had touched her. (*Lucero L., supra*, 22 Cal.4th at p. 1232.) Also on that same day, Rodriguez interviewed Maribel who explained that she had recanted her prior accusations against Lucero’s father under pressure from mother. (*Ibid.*) Maribel stated that Lucero told her she was afraid to shower because Lucero’s father showered with her and that father lay on top of her. (*Ibid.*)

A medical examination of Lucero revealed an anal fissure which the physician thought could be caused by either constipation or abuse. (*Lucero L., supra*, 22 Cal.4th at p. 1234.) The physician concluded that the exam was normal and neither supported nor negated a history of sexual abuse. (*Ibid.*)

At trial, Maribel testified that she had told social worker Rodriguez the truth in their July 1997 conversation. After the lunch break that Maribel spent with mother, Maribel testified that she did not remember if Lucero’s father touched her and that she had lied to the social worker. (*Lucero L., supra*, 22 Cal.4th at p. 1234.)

Social worker Rodriguez testified that Lucero told her that father had touched her. Another social worker testified that Maribel had told her one week prior to the hearing about having been previously raped by Lucero’s father. (*Lucero L., supra*, 22 Cal.4th at p. 1235.)

Lucero’s foster mother testified that six months after Lucero was detained, she observed Lucero touching her genitals. The foster mother asked Lucero who showed her that and Lucero replied that her father did. (*Lucero L., supra*, 22 Cal.4th at p. 1236.)

A psychologist testified that if Lucero's father had molested his stepdaughter, the likelihood that he would molest his natural daughter increased greatly. (*Lucero L., supra*, 22 Cal.4th at p. 1234.)

In affirming the judgment of the Court of Appeal, this Court found the question of the reliability of Lucero's hearsay statements to be "close" but concluded that the statements contained indicia of reliability, noting Lucero's consistency in her statements about her father over a several month period. (*Lucero L., supra*, 22 Cal.4th at p. 1250.)

Justice Kennard concurred with the plurality's opinion that Lucero's statements were properly admitted but disagreed that the court needed to determine whether there were sufficient indicia of reliability in those statements. (*Lucero L., supra*, 22 Cal.4th p. 1252.) Justice Kennard stated that "*other evidence*, together with Lucero's hearsay statement, amply supports the trial court's jurisdictional findings. This court need not consider whether Lucero's hearsay declaration would, standing alone, be sufficiently reliable to support that finding." (*Ibid.*; Emphasis added.)

Justice Chin, in his concurring opinion, also found "the evidence, as a whole, was sufficient to support the trial court's findings." Justice Chin stated, "I would rely on all the evidence, some of which indicates Lucero's statements are reliable and *some of which corroborates those statements.*" (*Lucero L., supra*, 22 Cal.4th p. 1254; Emphasis added.) Justice Chin, like Justice Kennard, discussed father's molestation of Maribel, the expert testimony regarding the significance of the prior molestation, and the medical evidence. (*Id.*, at pp. 1251-52, 1254.)

In stark contrast to the facts of *Lucero L.*, there was no corroborating evidence of I.C.'s statements. There had been no allegations that father molested any other children. (1CT 97; 3/14/13 RT 10.) I.C. made her allegations against father over one 24-hour period and never mentioned

father touching her again. During that 24-hour period, I.C. made fantastical statements that were verifiably untrue and recanted her claim of abuse. Furthermore, there was no support in the record that it was clear that I.C. knew the difference between the truth and a lie.

Justice Stewart in her dissent in *I.C.* stated that the indicia of reliability in *Lucero* were “far greater than any in the present case. For example, the child in *Lucero* did not make fantastical, confused or inconsistent statements, she made her accusation over months rather than hours, and there was credible evidence that father had sexually abused another daughter in the past.” (*I.C.*, *supra*, 239 Cal.App.4th at p. 349.) “If the circumstances in *Lucero L.* presented a ‘close’ call regarding *Lucero L.*’s truthfulness, the circumstances here do not come close to establishing that I.C. was clearly truthful.” (*Ibid.*)

The record was clear that the indicia of reliability regarding I.C.’s statements were far fewer than *Lucero*’s. Respondent’s assertion cannot withstand scrutiny.

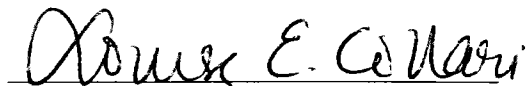
### CONCLUSION

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 as “so clear from the surrounding circumstances that the test of cross-examination would be marginal utility” as required by this Court in *Lucero L.* Substantial evidence does not support the juvenile court’s jurisdictional findings based solely on unreliable, out-of-court statements of a truth incompetent minor. Father further respectfully asserts that the Court of Appeal erred in affirming the juvenile court’s findings without reviewing the entire record for substantial evidence of the minor’s clear truthfulness.

This Court should reverse the juvenile court's dispositional order, including its jurisdictional findings. The judgment of the Court of Appeal should likewise be reversed.

Dated: January 31, 2016

Respectfully submitted,

A handwritten signature in cursive script that reads "Louise E. Collari". The signature is written in black ink and is positioned above a horizontal line.

LOUISE E. COLLARI  
Attorney for Appellant, Alberto C.

## CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.360, subdivision (b)(1), I hereby certify that appellant father's Reply Brief on the Merits dated January 31, 2016, has 10,230 words as counted by the Microsoft Word Program.

Dated: January 31, 2016

By:



LOUISE E. COLLARI

Attorney for appellant, Alberto C.

**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 February 1, 2016, I served the within APPELLANT FATHER'S REPLY 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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(via hand delivery)

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Superior Court of California  
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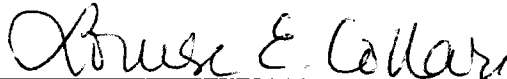
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I declare under penalty of perjury the foregoing is true and correct.  
Executed this 1st day of February, 2016, at Danville, California.



Louise E. Collari