

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re I.C.,)	No. S229276
)	Appellate No. A141143
A Person Coming Under the)	
Juvenile Dependency Law)	Alameda Sup. Court.
)	No. SJ12019578-01
<hr/> ALAMEDA COUNTY SOCIAL SERVICES)	
AGENCY,)	
)	
Petitioner and Respondent)	
)	
)	
v.)	
ALBERTO C.,)	
)	
Objector and Appellant.)	
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**SUPREME COURT
FILED**

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Frank A. McGuire Clerk

Deputy

BRIEF OF AMICUS CURIAE CALIFORNIA APPELLATE DEFENSE COUNSEL IN SUPPORT OF APPELLANT ALBERTO C.

After the Published Decision by the Court of Appeal
First District, Division Two
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ISSUE ADDRESSED BY AMICUS

Does the out-of-court CALICO¹ interview of a truth-incompetent minor who did not testify in court, imbue her hearsay statements with the level of truth of a testifying witness in court, such that cross-examination would be of marginal utility to further establish her truthfulness, in conformity with this court's ruling in *In re Lucero L.* (2000) 22 Cal.4th 1227, (*Lucero L.*)?

The hearsay and reliability issues presented by the case on review are significant, both for the family in question, as well as all other families similarly situated who come before the dependency court

¹ CALICO is the acronym for Child Abuse Listening Interviewing and Coordination Center.

seeking a just resolution of the issues. Sexual abuse is a horrific crime to be perpetrated on a young and defenseless child, or anyone else, for that matter. But it is just as horrific for a parent to be labeled in perpetuity as the perpetrator of that monstrous crime where there is no substantial credible evidence of any wrongdoing.

Until the case of *In re I.C.* (2015) 239 Cal.App.4th 304, (reh'g denied (Aug. 26, 2015), review granted Oct. 28, 2015 (S229276) (*I.C.*)) was decided, this Court had addressed that balancing of interests in *Lucero L.* and provided some equitable tools to ensure truthfulness and reliability. The Agency was required to establish the truthfulness of the child and present an indicia of reliability of the matters alleged, especially when the charging allegations were premised on the hearsay statements of a young, truth-incompetent and non-testifying child, to such a degree that were she to testify, her cross-examination would have been virtually superfluous. (*Id.* at. 1249.)

Lucero L. was the last in a progression of cases developing the admissibility and reliability of hearsay statements of children. In *In re Cindy L.* (1997) 17 Cal.4th 15, 30, (*Cindy L.*) this court established that a child's hearsay needed corroboration in order to be relied upon and dependency courts would be aligned with other courts in requiring such assurance of reliability when faced with very young and non-testifying

children. In passing Welfare and Institutions Code section 355 (c)(1)(B), the legislature was both more expansive and restrictive of *Cindy L.* because it allowed for certain hearsay to be relied upon even if not corroborated. However, the legislature was also more restrictive in disallowing admission of hearsay for jurisdictional purposes which was the product of fraud, deceit, or undue influence. (§355 subd. (c)(1); *Lucero L., supra.*, p. 1242.) Then came *Lucero L.* and recognized that “[t]he burden of proving ‘fraud, deceit, or undue influence,’ while not easily borne under any circumstance, is especially difficult when the witness who is generally the most critical to proving such a case, the minor herself – is unavailable for cross-examination.” (*Id.* at p. 1245.) Therefore, the hearsay statements of the truth-incompetent, non-testifying child had to bear a “special indicia of reliability”, which unlike corroboration requirements, was a due process requirement. (*Id.* at pp. 1248-1249.)

It is an undisputed fact that three-year-old I.C. never testified in court in this matter. Her CALICO interview was relied upon by the trial court in determining her credibility. (*In re I.C., supra.*, 239 Cal.App.4th 304, 308.) It was central to the majority’s opinion in *I.C.*, who treated the interview as if it were “in-court testimony”, and stated that based thereupon, the trial court was justified in making *credibility*

determinations as if she was testifying in court. Moreover, it also served to provide corroborative support for the hearsay allegations of the young child. (*Id.* at p. 308-309.) On the other hand, the dissent pointed out that the CALICO interview was just another piece of hearsay, full of contradictory accounts made by a child who could not separate fact from fiction and presented both interchangeably. (*Id.* at p. 330.) It possessed no special indicia of reliability. (*Ibid.*)

CALICO-type interviews, labeled as “forensic interviews”, are used extensively in sex abuse cases, especially to bolster the allegations when there is little or no evidence other than hearsay. The Western Regional Children’s Advocacy Center which provides training for forensic interviewers inclusive of California, presents the interview as being for purposes of investigation, but that it is to be conducted in a neutral and impartial manner:

“The purpose of a forensic interview is to provide the child the opportunity to talk with a trained professional about their experience. They are often the cornerstone of the criminal aspects of the child abuse investigation. ¶¶The NCA Standard for Accreditation states that forensic interviews are to be conducted in a manner that is legally sound, of a *neutral, fact finding nature*, and are coordinated to avoid duplicative interviewing.” [Emphasis added.] (Western Regional Children’s Advocacy Center: *Western Regional CAC Director Tool Kit; Forensic Interviews*: <http://www.westernregionalcac.org/directors-toolkit/forensic-interviews/>)

Unfortunately, the reality is that such interviews are not always

conducted in an impartial manner, designed to elicit the truthfulness and reliability of the matters alleged. They are conducted to provide a prosecutorial tool to be used against an alleged perpetrator.

Considerations of obtaining the story the child really wants to tell, or establishing her truthfulness and reliability, are overridden by a desire to confirm an actionable abuse and encapsulate it in the confines of the interview. (Pangborn, K., *Identifying and Correcting Problems With Forensic Interviews of Alleged Child Sexual Abuse Victims: A Holistic Environmental Approach*; Institute for Psychological Therapies (2009) Vol. 18; [http:// www.ipt-forensics.com/ journal/volume18/j18_toc.htm.](http://www.ipt-forensics.com/journal/volume18/j18_toc.htm))

When this happens, as it did in the *I.C.* case, the report is a hearsay compilation of only part of the child's statements, where the interviewer disregards or fails to follow up on other relevant statements made by the child, and the resultant interview becomes an unreliable truthfinding tool, suffering from "confirmatory bias." (*Ibid.*) As such, irrespective of the mode in which the CALICO interview is preserved, DVD or transcripts, it cannot overcome its major systemic infirmities and cannot be relied upon to demonstrate any "indicia of reliability" as set forth herein in some detail. That is why, given the significant interests in the balance, both for the child and the parents, review for substantial evidence cannot be suspended premised on the existence

of such forensic interviews.

PROCEDURAL AND FACTUAL HISTORY

Amicus curiae adopts the Statement of the Case and Facts set forth in Appellant's Opening Brief on the Merits, (AOMB) pages 14 through 30. Amicus will not duplicate the matters stated except for brief portions of the record necessary to support the arguments advanced herein. Amicus further joins appellant's request that the Statement of Facts in Respondent's brief be disregarded due to numerous inaccurate material representations, as more fully set forth in Appellant's Reply Brief, pages 10 through 18. This is inclusive of the Respondent's significant departure from the issues this Court had asked the parties to address on review.²

² This Court asked: (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? and (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 restructured the issues to state: "First, whether the trial court properly assessed the truthfulness of I. C.'s spontaneous statements to her mother, her daycare staff, and to the CALICO interviewers regarding the molestation when it found the allegations true and took jurisdiction of the matter under Welfare and Institutions Code section 355. Second, whether the appellate court applied the correct standard of reviewing the trial court's jurisdictional findings." (RBM p. 1.) The brief then addressed the respondent's restructured issues.

- A. The events leading to I.C.'s CALICO interview on September 12, took place over a period of several months, starting with I.C.'s sexual abuse on July 2, 2012, by Oscar, an 8-year-old neighbor, and culminating in I.C.'s September 12, 2012, allegations of sex abuse by her father which were similar to the abuse that she suffered at the hands of Oscar and were made just days after Oscar reentered the family's environment.**

On July 2, 2012, I.C. was sexually abused by Oscar, an 8-year-old neighborhood boy. He assaulted her in her home, while they were playing in her brother's room on his bed, with her brother present. Oscar used either his penis or a red toy train, or both in his assault of her vagina. Although Oscar denied sexually abusing I.C., I.C.'s brother, J.C., saw part of the incident. A medical examiner corroborated trauma to I.C.'s vagina. A police report was made of the incident. (Appellant's Brief On the Merits, (ABOM) pp. 14-15.) Mother could find no therapist willing to work with such a young child, however, the family discussed the incident with I.C. in sexually accurate terms, in trying to bring her a level of comfort. (*Id.* at p. 16.) From the time she showed the toy train to the examining physician in July, Mother carried the toy train Oscar had used to assault I.C. in a plastic bag in her car. (*Id.* at p. 23.)

Two months later, On September 5, Oscar reentered in the life of the family when I.C. saw him at J.C.'s school, on the first day of

school. By Friday, September 7, J.C. came home from school and told his family that Oscar, who attended his school, had assaulted him, called him names, and destroyed his lunch. The resurfacing of Oscar traumatized I.C., leaving her frightened and confused. In trying to allay her fears, her mother talked to her about it throughout the weekend.

(September 8 and 9.) (ABOM p. 16.)

I.C. normally attended pre-school on Tuesdays and Thursdays, from morning to approximately 3:00 p.m. Father cared for the child on Monday, Wednesdays and Fridays, from morning until he left for work at 5:00 p.m. to 12:30 a.m. A baby sitter came in the afternoons and cared for I.C. and her brother until mother arrived from work at 6:30 p.m. (ABOM p. 22.) I.C. attended school as usual on Tuesday, September 11. There was no report of any sexual abuse to her teachers that day. However, that evening, I.C. told her mother that her father "put his penis on her". Mother tried to question I.C. but testified that "it didn't seem like it all went together and made very much sense." In the morning of Wednesday, September 12, mother again asked I.C. about the sex abuse by father. I.C. responded she was only kidding. (*Id.* at p.17.) In an abundance of caution, mother took I.C. to school that day even though it was not her regular school day. (*Ibid.*)

On Wednesday, September 12, I.C. made several statements to

teachers about being sexually abused by her father, about mother having taken her to the doctor due to the abuse but she was fine, and father having punched holes in the walls of the home out of anger. (ABOM p. 17.) This triggered a response from law enforcement and social services who came to school to question her. The emergency social worker determined I.C. could not tell the difference between truth and a lie. (*Ibid.*) I.C. was thereafter taken for the CALICO interview. (*Ibid.*)

The CALICO interviewer asked I.C. if she promised to tell the truth, and the child responded: "yep". When asked if she would tell any lies, I.C. responded: "nope". Immediately thereafter, when asked to recount the events of the day, I.C. told an indistinguishable amalgamation of fanciful and imaginative experiences she alleged having engaged in that very day prior to the interview. She said that she had watched a movie, took a nap with her babysitter, went to the store with her mother, went to San Francisco, went to the park with her father, went to school, played at home. The only confirmed truthful statement was that she attended preschool on that day. (ABOM pp. 17-18.) She also said that she told her teacher that yesterday [September 11], daddy put "penis on her", a train and a flower. She said her father had sexually molested her in the CALICO reception room on the bean

bag, in her brother's bed with RJ (her adult half sister), her babysitter (Bianca), and Bianca's sister. Her father wanted to do the same "bad things to them – the train, the train, the train and a flower and penis." Throughout the interview she alternated in stating father put a train on her, a flower, a necklace, and/or his penis. I.C. said she called her mother and a police officer due to father's abuse. RJ told her that father would be going to jail forever. Father told the police he would not do it again (although there is no evidence that the police conducted their interview of father in her presence.) (ABOM p.18.) There were numerous other inconsistencies and inaccurate representations which I.C. made during the CALICO forensic interview, set forth in greater detail in the ABOM. RJ testified that I.C.'s claimed events never happened. (*Id.* at pp. 17-19.)

- B. The admissibility of the CALICO interview in I.C. is not at issue, but its reliability is, because the majority's opinion declared it demonstrated I.C.'s truthfulness as a witness and thus provided the needed indicia of reliability which *Lucero L.* declared would render any further challenge by cross-examination virtually superfluous.**

The admissibility of the CALICO interview is not at issue nor the determining factor. As with any other hearsay in social study reports prepared by the agency, in this case was admissible pursuant to *In re Malinda S.* (990) 51 Cal. 3d 368, 377, because the declarants were

subject to be called as witnesses and cross-examined by opponents. (*Malinda S.*) Trial counsel's strategy in choosing not to object to the admission of the CALICO interview is of no relevance to its effect on establishing the *truthfulness* of the hearsay statements contained therein. Allowing the recording to be introduced into evidence actually served to expose in graphic detail the manner in which the interview was conducted and the methodology used to elicit the answers from I.C. Otherwise those details might have been masked by the translation of the CALICO video into "words" which were reported in the social study reports, and would have been admitted under *Malinda S.* at any rate.

ARGUMENT

- I. **THE OUT-OF-COURT CALICO INTERVIEW OF A TRUTH-INCOMPETENT, NON-TESTIFYING THREE-YEAR-OLD, CONDUCTED BY ENTITIES ALIGNED IN INTEREST TO PROSECUTORIAL AGENCIES, IS NOT THE EQUIVALENT OF TESTIMONIAL EVIDENCE IN COURT SUBJECT TO THE RIGORS OF CROSS EXAMINATION, FAILS AS RELIABLE EVIDENCE WHERE THE DECLARANT'S TRUTHFULNESS IS NOT ESTABLISHED, AND THE MATTERS ELICITED ARE THE PRODUCT OF BIASED AND FLAWED INTERVIEWING METHODOLOGY.**
 - A. **"Forensic" is more than an adjective to be applied to interview endeavors by interested parties affiliated in interest to the prosecutorial, with no evidence of having implemented unbiased scientific protocols for fact gathering.**

We have socially been conditioned through prior use of the term and extensive media coverage and televisions programs dedicated to "forensics", to associate the word "forensic" with applied scientific methodology which is used to explain other evidence, i.e. the causes of an injury, causes of traffic accidents, DNA profiling and identification, and the like. In line with our common experiences, an internet search for the word "forensic" on Google produces the following definition:

"[O]f, relating to, or denoting the application of scientific methods and techniques to the investigation of crime. (e.g. 'forensic evidence'" or 'of or relating to courts of law.'" or as "scientific tests or techniques used in connection with the detection of crime." (Definition of Forensic: https://www.google.com/search?q=google&gws_rd=ssl#q=definition+of+forensic.)

Central to any mode of "forensic" scientific investigation and its legal acceptance in a court of law is the impartiality and scrupulousness with which it is conducted. Therefore, most people would scarcely accept the investigative results conducted by the tobacco industry or entities affiliated in interest with it, proclaiming lack of identifiable health risks to cigarette smokers, even if labeled the product of "forensic" testing. Likewise, decades of litigation have made us skeptical of the reliability of studies advanced by interested parties which absolve industries using asbestos products from the health problems resulting from exposure to them. It is not the *label*

which controls the reliability of the results obtained, it is *the impartiality and scientific methodology involved* in producing those results.

Scientific methodology, to be given weight as “forensically” reliable, must survive over time and produce trustworthy results when standard testing is consistently applied. (See *People v. Barney* (1992) 8 Cal.App.4th 798, 810-811 [DNA results improperly admitted when proponent failed to demonstrate proper scientific methods used were reliable, and properly used in the subject case in obtaining the results proffered].) Over time, the forensic science used to interpret DNA profiling has resulted in trustworthy results. It has become a scientific tool which has exonerated some persons erroneously convicted by faulty evidence, while it has helped convict others. Notably, DNA results speak in terms of probability of occurrence and percentages, not absolutes. DNA results make no conclusive legal determinations, but provide the statistics upon which legal adjudicators make legal findings. (https://en.wikipedia.org/wiki/DNA_profiling.) Nevertheless, even if the methodology employed is already accepted, it remains open to defense challenge whether the scientific methodology was correctly applied in a particular case. (*People v. Venegas* (1998) 18 Cal.4th 47, 93 [prosecution’s failure to demonstrate the proper methodology was used in the specific case deprived the court of having substantial

evidence upon which to base a conclusion, and the trial court abused its discretion in not excluding the flawed statistical evidence.] When the questionable results of a flawed scientific methodology are the only evidence relied upon to sustain the charging allegation, without which evidence that judgment would not have likely been sustained, its admission has been declared to be prejudicial, requiring reversal of the judgment premised on it. (*Id.* at p.94.)

Those who have to defend against the results of a child “forensic interview” in dependency courts face numerous due process disadvantages: (1) they are deprived of conducting their own test on the evidence because there is psychological data suggesting that multiple interviews contaminate the child’s memory, especially for a young child; (2) the parents are not included in the interview process, even as outside observers, and have no input in the DVD produced or the manner in which it is obtained; (3) the declarant is a child who is truth-incompetent and too young to testify in court; and (4) the hearsay in the “forensic interview” becomes its own “corroboration” of the child’s hearsay allegations, even though the DVD cannot be “cross-examined”. Therefore, before such interviews can be elevated to a status akin to courtroom testimony and determinative of the truthfulness of the child being questioned, or of providing “the indicia of

reliability” of the very hearsay statements made by the child, which are the only evidence produced by the agency, such interviews must demonstrate consistent and unbiased application of scientific principles designed to elicit truthful facts. In addition, the proponents must also demonstrate that in a particular case, that methodology was impartially applied and not with any preconceived bias toward the prosecutorial position. The end result obtained, to be of legal value, must be shown to be reliable, as with any other scientific methodology.

B. Prominent providers of “forensic interviews” have designated guidelines for *best practices*, published by the U.S. Department of Justice, Office of the Juvenile Justice and Delinquency Prevention.

Professionals who work in the field of “forensic interviewing” recognize that the current sexual abuse interviewing techniques, although a marked improvement from those used in the McMartin case³, need further improvement, standardization, oversight, and continuous review in order to ensure accurate results. (Newlin et. al.,

³ Although the article makes reference to the elements of the McMartin School debacle, it does not identify it by name, merely calling it a “high profile case regarding daycare providers alleged to have sexually abused multiple children. (*Best Practices* at p. 3) (See Eberle, *The Abuse of Innocence* [a book about the McMartin case which ruined countless lives of teachers, parents and many of the children. The McMartin videotaped interviews subsequently exposed the unprofessional interview methods which had been used on the children and upon which convictions were sustained.].)

Child Forensic Interviewing: Best Practices (September 2015)

OJJDP.)(*Best Practices*.) *Best Practices* is published by the U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention. (OJJDP.) *Best Practices* presents the first in a corroborative effort by professionals from nationally recognized forensic interview training programs who summarize the current knowledge and suggest application of best practices in the field. (*Id.* at p. 12.) *Best Practices* designates the forensic interview to be “a sensitive and legally sound mechanism for gathering factual information regarding allegations of abuse or exposure to violence” when “conducted by a competently trained, *neutral professional* utilizing research and practice-informed techniques as part of a larger investigative process.” [Emphasis added.] (*Id.* at p. 3.)

Best Practices recognizes that the age of the child is a significant factor in determining memory, as is her culture and her developmental background. (*Best Practices* at p. 3-4.) When children have re-experienced trauma, it may interfere with their ability to tell their story, and sometimes their memories of events reported may become impaired or distorted. (*Id.* at p. 5.) Current research discloses that new “triggering events” such as a school experience or discussion

of the subject matter may trigger disclosures. (*Id.* at pp. 5-6.) *Best Practices* recommends that the “forensic interview” be conducted as soon after the initial disclosure as possible in order to obtain the most accurate version of events. (*Id.* at p. 6.)

Best Practices cautions that interview techniques which invite “make believe or pretending” are inappropriate for legal investigations because they produce unreliable results. (*Best Practices* at p. 3.) During such interviews “[m]aterials that encourage play or fantasy are uniformly discouraged, as is any interpretation by the interviewer of the child’s use of media or other products.” (*Id.* at p. 6.) *Best Practices* sees the role of the forensic interviewer as encouraging “the most accurate, complete, and candid information from a child.” (*Id.* at p. 6.) In order to ensure the most accurate reporting, it emphasizes that the criteria for truth versus lies be firmly established with the child *prior* to conducting the interview process. (*Id.* at p. 8.) It also recommends the interviewer instruct the child to “[o]nly talk about things that really happened.” (*Ibid.*)

Another professional article on the subject states that either immediately after the initial rapport building stage of the interview, or in conjunction to it, the interviewer conduct *the competency testing stage*. The first step is to determine the child’s ability to answer

questions as to “Who, Where, When, What, and How.” Step two is to assess the child's ability to differentiate between telling the truth and telling a lie. Step three explains the ground rules for truthfulness by asking the child to promise to tell only the truth, and informing her that other answers such as “I don't know” or “I don't understand” are acceptable. (Cheung, M., *Utilization of Questioning Techniques in Forensic Child Sexual Abuse Interviews* (Journal of Brief Therapy (2003), Vol 3, No.1, page 2.) http://www.uh.edu/socialwork/_docs/cwep/QuestioningTechniquesForensic.pdf) (*Questioning Techniques*.)

Best Practices likewise recognizes those preliminary steps which are shared by all good interviews:

- *The initial phase* of rapport-building, comprised of age-appropriate introduction of the process, a discussion of the importance of telling the truth, and some practice examples to ensure the child can meaningfully engage in the process.
- *The substantive phase* which usually includes a narrative description of events by the child, followed by detail-seeking clarifications by the interviewer, inclusive of testing for alternative hypotheses for the issues alleged, when appropriate.
- *The closure phase* which transitions the child back to normal events and nonsubstantive topics, allowing for questions, discussions of safety and educational messages. (*Best Practices* at p. 7.)

Best Practices affirms that it is critical to the integrity of the interview in determining the reliability of the child's statements for the

interviewer to explore through careful questioning other viable “alternative hypotheses” for the child’s allegations. This requires allowing the child an opportunity to explain any apparent contradictory information, especially when it relates to relevant details such as the suspect’s identity or the specific acts committed. (*Best Practices* at p. 10.) This is an important part of the interview aimed at garnering all relevant information and reducing the number of times children need to be questioned on the subject. There is concern that multiple questioning contaminates the child’s memory of the incident being investigated. Research as well as clinical experience has shown that multiple duplicative interviews about an alleged abuse are damaging to a young child and the child’s testimony will become less reliable and legally defensible. (*Id.* at p. 11.) To elucidate memory contamination, a North Carolina Children’s Services Practice bulletin cites the example given by a prominent psychologist who has conducted more than 3,000 forensic child interviews:

“If I am the first person to talk to a child about an event, that event is like a design on the bottom of swimming pool filled with clear water—it is easy to read. But each conversation this child has with someone about the alleged abuse clouds the water. If he has talked with his principal, parents, a police officer, etc., it can be very hard or impossible to discern the design at the bottom of the pool.” (Jordan Institute for Families: *Children’s Services Practice Notes: What is Forensic Interviewing*” (2002); North Carolina Division of Social Services and Family and

Children's Resource Program; Vol.8, No. 1; http://www.practicenotes.org/vol8_no1/what_is.htm.)

C. The CALICO interview conducted of I.C. was not an impartial interview and it failed to meet numerous safeguards set forth in *Best Practices* and other professional designed to elicit truthfulness and accuracy in the information gathered, critical to demonstrating the required indicia of reliability.

(1) CALICO's declared mission statement is to provide corroboration for social services and law enforcement for prosecutorial purposes and *presuppose the abuse has occurred*.

The CALICO interview in I.C. was conducted by an agency which was aligned in interest with social services, and who presents on its website: "CALICO achieves justice and healing for abused children" (CALICO: About Us; <http://www.calicocenter.org/about>.) It presumes ab initio the child questioned was abused. Its mission statement declares CALICO provides corroboration of the abuse experienced by a child, which benefits social services, law enforcement, and the district attorney, in enabling these agencies to prosecute. (CALICO; OUR ROLE; http://www.calicocenter.org/our_role.)

CALICO presents its "forensic interview" process as follows:

"The interview is preserved through audio and video recordings, with multi-disciplinary team members observing in an adjacent room. The team, typically comprised of a detective, child welfare worker, prosecutor, and interviewer, *meet before and after the interview to discuss the case and decide on appropriate, coordinated action*. . . . [Emphasis added.] (CALICO: Our

Services: forensic Interviews; <http://www.wheelmedia.com/web-design-portfolio/calico/our-services/forensic-interviews.htm>.)

CALICO's process involves various prosecutorial members meeting and deciding ahead of the interview what will be elicited during the interview. As was the case with I.C., the child has no advocate or even a support person during the interview process. The parents are not included in the process, even as outside observers along with other "team members observing the incident," even though their presence would not be known or influence the child's statements and therefore would have no bearing on the truthfulness of the matters the child related in the interview room. Since such interviews predate any accusatory pleadings, and the rights of the parents to their children are at a Constitutional high, the systematic exclusion of parents from the process does not appear to serve any legally justifiable reason. Also, parents, as any other interested parties, may be able to provide the interviewer with areas for questioning which may otherwise remain unexplored. If the intent of the "forensic interview" is to gather truthful facts and present "an indicia of reliability," there appears to be no justification for excluding significant information providers from the investigative process.

CALICO defines its function as providing the missing

corroboration where there is otherwise none. That intent would be laudable if CALICO interviews were impartial and focused on truthfinding. Assisting children who have been abused to bring their causes to justice by providing an accurate depiction of the events of their abuse is in line with the *Best Practices* guidelines. But that is not CALICO's declared mission. It is to provide corroboration of the abuse experienced by a child, to enable social services, law enforcement, and the district attorney to prosecute. (CALICO; OUR ROLE; http://www.calicocenter.org/our_role.)

Whereas other forensic methodologies such as medical examinations are neutral and their findings are not predetermined and can be relied upon to exclude as well as include sexual abuse, CALICO makes no claim to such impartiality. As presented in *Identifying and Correcting Problems With Forensic Interviews of Alleged Child Sexual Abuse Victims*, problems with such interviews begin when the interviewers' agenda is to use the video in lieu of the child's testimony. "It is hard to cross-examine a DVD." In essence, the CALICO procedure is akin to telling the person conducting a DNA sampling that the identity of the perpetrator of a crime is the defendant, and then pursue only the markers which will yield that result. Such biased procedures would never survive in other courts, and there is no

reason why they should in dependency courts.

- (2) I.C.'s CALICO interview suffered from numerous shortcomings to be considered a "forensic scientific" tool because it failed to ensure I.C.'s truthfulness or that she even knew what the concept entailed, and failed to provide any reliable indicia of reliability to support I.C.'s otherwise unsupported hearsay allegations.**

I.C.'s CALICO interview disregarded significant safeguards the proponents of *Best Practices* set forth to ensure reliability and truthfulness.

First disregarded safeguard: By the time she was subjected to the CALICO interview, I.C. had already been questioned and spoken to by numerous people in the brief 24 hours since her disclosures between the evening of September 11 and September 12 – her mother, her brother, teachers, law enforcement, and the emergency worker. Although she obviously made some statements "spontaneously," the follow-up questions which produced additional information were clearly not. Unfortunately, the follow-up questions and resultant information were not properly segregated, and therefore, it is impossible to determine from the reporting what statements I.C. may have made on her own, from those she made in response to questioning. Compounding the issue, the child was then transported

to the CALICO interview in order to discuss the very disclosures which had triggered such response in her school setting.

Although the questioning by multiple parties might have accounted for the confusing tale I.C. presented at the CALICO interview, her “forensic interviewer” made no attempts to address and untangle the numerous interwoven claims she made, some clearly fantastic and untrue. Although “spontaneity” is one of the considerations as to the reliability of the child’s hearsay statements, *her mental state is another.* (Cindy L., *supra*, 17 Cal.4th at p. 29.)

Second disregarded safeguard: As *Best Practices* indicates, establishing the ability to tell the truth and a commitment from the child that she will do so, in age appropriate language, is the first step in the forensic interview process. (*Best Practices* at p. 8.) Clearly, if the CALICO advertised procedure was followed, the interviewer already knew what the emergency social worker had determined – that I.C. was found to be truth-incompetent just *hours prior* the CALICO interview, when she met with the social worker and law enforcement. Yet the CALICO interviewer took no measures to ascertain the child’s ability to distinguish between truth, lie, or even fantasy, by going through examples in time tested methods used with young children. This required using concrete examples and testing the child’s

understanding by ensuring she could distinguish illustrative examples of the truth or a lie, and fact from imagination. (See *Questioning Techniques* for samples of questions normally used by interviewers toward meeting those objectives, pp. 8-10.)

The CALICO interviewer took no measures to determine I.C.'s understanding of truth or lie, and never instructed I.C. to talk only of things that had actually happened. The interviewer was satisfied with I.C.'s one word answers that she would tell the truth ("yep) and no lies ("nope"), and forged ahead with the interview. Unfortunately, that oversight was forcefully revealed when with her very next statements, I.C. showed she could not separate truth from untruth and reality from fantasy. The only ascertainable truth in the litany of "activities" she presented having experienced on the day of the CALICO interview was that she had indeed attended pre-school that day. (AOMB p. 18; *I.C. dissent*, p. 330.) Whereas I.C. might have presented as a very imaginative child during the CALICO interview, her ability to separate fact from fiction was an unaddressed concern. The interviewer never followed-up on I.C.'s amalgamated statements, even with knowledge some were clearly untrue. The interviewer established no foundation of truthfulness against which I.C.'s statements could be compared and evaluated, negating any claim to "indicia of reliability."

Third disregarded safeguard: I.C.'s sexual abuse by Oscar occurred in July. Unfortunately, no "forensic examination" was initiated by either social services or law enforcement in July, *even though I.C. had medically confirmed signs of vaginal trauma. Best Practices* states that the forensic interview should be conducted *as soon after the abuse as possible*, because time distorts a young child's perception and memory. (*Id.* at p. 5.) By the time the CALICO interview was conducted in September, not only had two months passed, *but there was an intervening traumatic trigger* involving Oscar.

Fourth disregarded safeguard: By September 11, 2012, I.C. experienced the intervening traumatic event of Oscar resurfacing and again forcefully interjecting himself into the life of her family. J.C. said that Oscar assaulted him at school on Friday, called him names and destroyed his lunch. He reported his experience when he came home, in I.C.'s presence and this caused I.C. fear and distress. It resulted in weekend discussions, which preceded by a mere two days I.C.'s subsequent allegations that her father abused her in a manner similar to Oscar – by red train, penis, etc. (AOMB p. 16.) *Best Practices* states that traumatic events sometimes trigger disclosures of abuse, but the disclosures may be distorted and may not always be accurate. Such disclosures require careful follow-up inquiry. (*Id.* at p. 5.)

A fact well known to the interviewers because they had the benefit of speaking to the social workers before the interview started, was the abuse I.C. experienced at the hands of Oscar. There is no evidence that the CALICO interview ever delved into that abuse with I.C., no questioning as to how she felt about his recent reappearance in the family's life, his assault on her brother, and any correlative relationship this might have had on her own feelings and subsequent disclosure of sexual conduct by her father in a manner reminiscent of that of Oscar. Unlike the *Best Practices* recommendation of follow-up of such matters, the CALICO interviewer failed entirely in attempting to explore other *reasonable alternative hypothesis* for I.C.'s September 12 disclosures as to her father. Reasonable minds would likely agree that a three-year-old child's sexual assault at the hands of Oscar just two months prior might have had some bearing on I.C.'s mental state and the nature of her disclosures on September 12, after Oscar resurfaced and attacked her brother.

Fifth disregarded safeguard: Although I.C. clearly made untrue and fanciful statements interwoven with those of claimed abuse by her father, inclusive of his having assaulted her on the CALICO premises, group sexual abuse or attempted sexual abuse, including her older sister, babysitter, and the sitter's sister, the forensic interviewer made

no efforts to have I.C. separate and explain her fantastical claims. In conformity with CALICO's declared mission statement, the interviewer chose to single-mindedly pursue only the sex abuse allegations as to father, rather than solicit the most accurate and truthful version of events. (*Best Practices*, at p. 6.)

- (3) **DVD's of forensic interviews which lack any identifiable application of forensic scientific standards, which make no effort to solicit truth and separate fact from fiction, and whose only focus is providing a prosecutorial tool, fail to establish any indicia of reliability solely because they are the medium used to store the amalgamated hearsay statements of a truth incompetent child.**

In this case, the pursuit of the CALICO interviewer of only sexual allegations against the father without any follow-up on numerous erroneous, untrue, and improbable statements of I.C. delivered concomitantly, without any inquiry whatsoever into the pertinent recent sexual abuse of I.C. by Oscar, and without any verification that I.C. could discern truth from fantasy, casts significant doubt on the ability of the CALICO "forensic interview" to elicit or preserve truthfulness. It exemplifies some of the criticisms leveled at such interviews, that they focus on prosecutorial objectives rather than truth-finding, and therefore fall short of being scientifically reliable tools.

II. THE I.C. MAJORITY'S PREMISE THAT NO APPELLATE

REVIEW WAS NEEDED BECAUSE THE CALICO INTERVIEW AND ITS TRANSLATION INTO “WORDS” IN AGENCY REPORTS SERVED TO PROVIDE THE SUBSTANTIAL EVIDENCE NEEDED BY THE TRIAL COURT, VITIATES ANY PROTECTIONS OFFERED BY *LUCERO L.* OF DETERMINING TRUTH AND RELIABILITY OF THE ALLEGATIONS OF A TRUTH INCOMPETENT, NON-TESTIFYING CHILD, AND LEAVES BOTH THE BENCH AND THE BAR WITHOUT ANY LEGAL DIRECTIVES ON HOW TO PROCEED.

The CALICO interview conducted in this case presented nothing more than another layer of hearsay, with no *indicia of reliability* as to what was true and what was not. The mere fact that the hearsay was recorded failed to provide any assurance of the truthfulness *Lucero L.* stated would be of such caliber as to render cross-examination of the non-testifying declarant of marginal utility. The fact that I.C.’s statements were then translated into the social study reports did not make the repetition of hearsay in differing mediums the litmus test of reliability, as the majority suggested. (*In re I.C., supra*, at pp.308-309.)

The mere recording of I.C.’s statements in a DVD format cannot transform the hearsay allegations into truth. I.C. made many hearsay statements, some fantastic, some identifiably false. The majority opinion in *I.C.* has failed to identify what objective legal standards remain to assist the Bench and the Bar to differentiate which of the hearsay statements of a truth incompetent, non-testifying minor, bear the *indicia of reliability* which *Lucero L.* and other cases have required.

Are we at liberty to pick and choose which statements we want to believe and which we want to discard as unreliable? Must we suspend reason and accept all hearsay if it is repeated in differing mediums, i.e. oral, recorded, written? The majority opinion has failed to identify *how* an interview such as the CALICO can “provide the indicia of reliability” as to any of I.C.’s statements, given the lack of objective methodology to ascertain which of I.C.’s statements are reliable and true, and which are fiction. The majority then adds yet another layer of confusion when it decides to forego appellate review of the record for substantial evidence supporting the trial court’s findings, and defers to the trial court’s rulings on sexual abuse because the judicial officer honestly grappled with the decision and did his best. (*I.C.*, *supra.*, at pp. 324-325.)

When neither truthfulness nor the indicia of reliability exists and appellate review is denied, the potential for harm to families and legal error is great. It allows sex abuse to be sustained in an evidentiary vacuum without any identifiable legal standards and criteria. Past history in California has shown the depths of human destruction such problematic endeavors can bring to bear (i.e. McMartin experience (See Footnote 3, *supra.*))

CONCLUSION:


There must be some objective means devised to protect families from being ripped apart without legal justification, just as there must be means to protect abused children who need the protection of the State. Both are opposite sides of the same coin – justice. Greater oversight by courts is needed in the initial stages of the investigative process, so that allegations of sex abuse do not acquire a life of their own, and the investigations conducted with preconceived goals do not become their own self-fulfilling prophecies. Perhaps a first step in the process is for the social services agencies or law enforcement to apply to the court for permission to conduct “forensic interviews”, based on a presentation of probable cause. This would prevent invasive medical procedures or psychological interviews on children without the oversight of the court. Young children such as I.C. should have the benefit of a friend or trusted person to accompany them through the traumatic ordeals they face in the investigative process. And parents should be given the opportunity to attend the investigative process, even if not allowed to directly participate, to the extent it is reasonable and they are willing to engage.

When interviews such as CALICO become more transparent, they will also become more responsible, more standardized, and more reliable. The overreaching social goal is being able to identify children

truly abused from those who are not. The legislative defined goal for dependency is protecting abused children. It serves no one, child or parent, to perpetuate infirm proceedings and then shield them from review. Oversight provides checks and balances and induces systems to become more efficient.

Amicus joins in requesting that this Court vacate the sex-abuse jurisdictional findings in this case and reverse and/or depublish the opinion in *In re I.C.* (2015) 239 Cal.App.4th 304. On the other hand, if this court intends to depart from the *Lucero L.* standards of truthfulness and reliability for young hearsay declarants who are truth incompetent and/or unable to testify in court, amicus respectfully requests that this Court provide some guidelines for identifying and relying on the hearsay statements of such declarants.

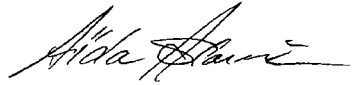
Respectfully submitted,
California Appellate Defense Counsel

by 
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CERTIFICATE OF WORD COUNT

Counsel for amicus hereby certifies that this brief consists of approximately 7,142 words, according to the word count of the computer word-processing program (exclusive of tables, proof of service, and this certificate).

March 8, 2016



Aida Aslanian

PROOF OF SERVICE

I, the undersigned, declare that I am over the age of eighteen years, employed in the County of Ventura, State of California, and not a party to the within action. My business address is 2419 E. Harbor Blvd., #139, Ventura, Ca 93001. On the date executed below, I served the interested parties in said action with: BRIEF OF AMICUS CURIAE CALIFORNIA APPELLATE DEFENSE COUNSEL IN SUPPORT OF APPELLANT ALBERTO C., by placing a true copy the document in a sealed envelope with postage fully prepaid, in the United States mail, addressed as follows or service by TrueFiling:

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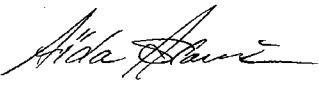
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at Ventura, California, on March 8, 2016.

/s/ 
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