

# NO. 08-1044

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IN THE SUPREME COURT OF TEXAS

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**IN THE MATTER OF B.W.**

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On Appeal from the Court of Appeals  
For the First Appellate District of Texas, Houston, Texas  
No. 01-07-00274-CV

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**PETITION FOR REVIEW**

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Michael Choyke  
State Bar No. 00793504  
WRIGHT BROWN & CLOSE, L.L.P.  
Three Riverway, Suite 600  
Houston, TX 77056  
(713) 572-4321  
(713) 572-4320 (fax)

Ann E. Johnson  
State Bar No. 24032595  
6750 West Loop South, Suite 845  
Bellaire, Texas 77401  
(713) 301-0799  
(713) 621-0000 (fax)

**ATTORNEYS FOR PETITIONER,  
B.W.**

## IDENTITIES OF PARTIES AND COUNSEL

Pursuant to Texas Rule of Appellate Procedure 53.2, the following is a list of the names and addresses of all parties and their trial and appellate counsel:

**Petitioner:** “B.W.”<sup>1</sup>

**B.W.’s counsel on appeal:** Michael Choyke  
WRIGHT BROWN & CLOSE, L.L.P.  
Three Riverway, Suite 600  
Houston, Texas 77056

Ann E. Johnson  
6750 West Loop South, Suite 845  
Bellaire, Texas 77401

**B.W.’s counsel at trial:** Michelle Emmons Bush  
14027 Memorial, #105  
Houston, Texas 77079

**Respondent:** The State of Texas

**The State’s counsel on appeal:** Dan McCrory  
Assistant District Attorney,  
Harris County  
1201 Franklin, Suite 600  
Houston, Texas 77002

**The State’s counsel at trial:** Helen Jackson  
Terrance Windham  
Jessica L. Macklin  
Assistant District Attorneys,  
Harris County  
1201 Franklin  
Houston, Texas 77002

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<sup>1</sup> Because this appeal arises from a juvenile court proceeding, Petitioner will be identified only by an alias. *See* TEX. R. APP. P. 9.8(c).

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## STATEMENT OF THE CASE

<b>Nature of the Case:</b>	Juvenile proceeding against Petitioner, a thirteen-year-old child, for committing the offense of prostitution.
<b>Trial Court:</b>	Honorable John Phillips, 314 <sup>th</sup> Judicial District Court, Harris County, Texas
<b>Trial Court Disposition:</b>	Based on Petitioner's plea of "true" to the State's petition, the trial court found that Petitioner engaged in delinquent conduct and was in need of rehabilitation. (CR 28)(App.1) The court placed Petitioner on probation for 18 months in the custody of the Chief Juvenile Probation Officer. ( <i>Id.</i> ) The court denied Petitioner's motion for new trial but expressly granted her permission to appeal. (2d Supp. CR 2; RR 7-8)
<b>Parties in the Court of Appeals:</b>	<b>Appellant:</b> B.W. <b>Appellee:</b> The State of Texas
<b>Court of Appeals:</b>	First Court of Appeals at Houston, Texas
<b>Participating Justices:</b>	Justice Terry Jennings (author), joined by Chief Justice Sherry Radack and Justice Jane Bland
<b>Citation:</b>	2008 Tex. App. LEXIS 7342
<b>Court of Appeals Disposition:</b>	Affirmed

## STATEMENT OF JURISDICTION

The Court has jurisdiction under Government Code section 22.001(a)(2) because the court of appeals' holding that a thirteen-year old child may be found delinquent for agreeing to engage in sexual conduct for a fee conflicts with prior decisions of other courts of appeals that "[a] child under fourteen cannot legally consent to sex." See *Wells v. State*, No. 05-97-01750-CR, 1999 Tex. App. LEXIS 3202, at \*15 (Tex. App.—Dallas Apr. 29, 1999, pet. ref'd) (citing *May v. State*, 919 S.W.2d 422, 424 (Tex. Crim. App. 1996)); *Spruiell v. State*, No. 03-97-00076-CR, 1998 Tex. App. LEXIS 3217, at \*4 (Tex. App.—Austin May 29, 1998, pet. ref'd) (same).

The Court also has jurisdiction over this appeal under Government Code section 22.001(a)(3) because this case involves the construction of a statute—Family Code section 51.03—that is necessary to the determination of the case.

The Court also has jurisdiction over this appeal under Government Code section 22.001(a)(6) because the court of appeals has committed an error of law of such importance to the state's jurisprudence that it must be corrected.

## ISSUES PRESENTED

1. The Juvenile Justice Code includes a blanket adoption of all penal offenses (except traffic offenses) as “delinquent conduct” for which a child between 10 and 16 years old may be found delinquent at an adjudication hearing and subjected to punishment. Petitioner is a 13-year-old child that was found delinquent for committing the offense of prostitution, *i.e.*, knowingly offering to or agreeing to engage in sexual conduct for a fee. However, the Legislature has specifically determined, in defining the offense of aggravated sexual assault, that a child under 14 is legally incapable of consenting to any sexual contact. Did the Legislature intend to apply the offense of prostitution to a child under 14 despite its specific prohibition against giving legal effect to such a child’s consent? Does the court of appeals’ construction of the Juvenile Justice Code lead to absurd consequences that the Legislature could not have intended?
2. The Legislature determined that a person who “causes by any means” a child under 14 to commit the act of prostitution commits the offense of “compelling prostitution,” a second-degree felony. The Legislature provides that a party to the prostitution offense may be required to furnish evidence or testimony against the compeller. If so, the party required to furnish evidence or testimony is entitled to immunity from prosecution. The Legislature gives the State complete discretion over whether to seek evidence regarding a potential compeller and thus whether to grant immunity—the parties to the prostitution offense have no means to invoke immunity protection. Here, despite the fact that Petitioner was a runaway living with and reportedly having sex with an adult and otherwise met the profile of a victim of sexual exploitation, the State did not conduct any investigation into whether someone else was causing her to engage in the acts of prostitution. The State instead prosecuted Petitioner as a prostitute. Was the State’s failure to conduct any investigation a violation of Petitioner’s due process rights?

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No. 01-07-00274-CV

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**PETITION FOR REVIEW**

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TO THE HONORABLE SUPREME COURT OF TEXAS:

This petition presents an important issue of statutory construction, apparently one of first impression in Texas: Did the Legislature intend, by its blanket adoption of Penal Code offenses into the Juvenile Justice Code, to apply the offense of prostitution—an offense whose commission requires the offender to knowingly agree to or offer to engage in sexual conduct—to children under fourteen years of age, when the Legislature has otherwise specifically determined that a child of that age is legally incapable of consenting to sex? The petition also presents the question of whether such a child's due process rights are violated when the State elects to prosecute a child for prostitution without conducting any investigation into the probability that someone else may be causing her to engage

in that conduct—an investigation that could entitle the child to immunity that the child cannot otherwise claim for herself. The Court’s answers to these questions will have a significant impact on how district attorneys throughout the State of Texas will respond to children who are likely victims of sexual exploitation—whether the State will treat them as victims entitled to protection, or as offenders to be branded as prostitutes and cast into the juvenile justice system. This case warrants consideration and review by the Court.

### **STATEMENT OF FACTS**

The court of appeals correctly stated the nature of the case. Petitioner was arrested when she offered to engage in oral sex with an adult officer for \$20.00. (CR 7) After checking her criminal history, it was discovered that Petitioner was thirteen years old. (*Id.*) The case was dismissed in the adult system, but was re-filed in the juvenile system. (*Id.*)

Before trial, a State psychologist conducted a psychological screening of Petitioner. (Pet. Ex. 2 (Psychological Screening)) Petitioner related to the examiner a history of sexual and physical abuse. (*Id.* at p.3) The examiner opined that the results of Petitioner’s screening “suggested that [Petitioner] is an emotionally impoverished, discouraged, and dependent adolescent.” (*Id.* at p.7)

The examiner further noted:

[Petitioner] is preoccupied with self-doubt and perceptions of physical unattractiveness and reacts to her deep frustration and unhappiness by becoming self-punitive, self-demeaning, and hypersensitive to her shortcomings. She yearns for acceptance and

affection from others, although her hopes appear to be waning rapidly.

(*Id.*) Petitioner also told the State's psychologist that she was currently living with, and had sexual relations with, a 32-year old "boyfriend" that she identified as Steven Smith. (*Id.* at p.3)

Rather than investigate the troubling and apparent exploitation of Petitioner, the State elected to proceed against her on the charge of prostitution. (CR 2)(App. 2) Instead of undergoing a trial, Petitioner agreed to plead "true" before the Honorable John Phillips, District Judge of the 314<sup>th</sup> District Court, and went before the trial court for punishment based on an agreed recommendation. (CR 32) Following Petitioner's plea, the trial court found that Petitioner had engaged in delinquent conduct and placed her on probation for eighteen months. (CR 28-31; RR 6-7) The trial court subsequently denied Petitioner's motion for new trial and granted her permission to appeal. (2d Supp. CR 2; RR 7-8)

The First Court of Appeals affirmed the trial court's order and issued an opinion on July 31, 2008. On Petitioner's motion for rehearing, the panel vacated the July 31, 2008 judgment and issued a new opinion on rehearing and judgment on October 2, 2008. (App. 3) The court denied Petitioner's motion for en banc reconsideration.

## SUMMARY OF THE ARGUMENT

The court of appeals' construction of Family Code section 51.03 as permitting a thirteen-year-old child to be found delinquent for committing the criminal offense of prostitution is improper because the Legislature has explicitly determined in the Penal Code that a child under fourteen cannot legally consent to sex. The Court should grant review to clarify the Legislature's intent with respect to these inconsistent statutes.

Moreover, the State violated Petitioner's right to due process by treating her as an offender, rather than a victim, and refusing to investigate whether someone may have encouraged this thirteen-year-old child to commit the act of prostitution. The Court should grant review to provide much-needed guidance to district attorneys about their obligations with respect to children who are involved in sex offenses.

## ARGUMENT

**I. The Court should review the court of appeals' holding because it interprets the Juvenile Justice Code in a manner that conflicts with established law and policy and leads to absurd consequences.**

The court of appeals erroneously concluded that a thirteen-year-old child may be found delinquent for engaging in the offense of prostitution. When contrasted with the language of Penal Code section 22.021, the court's holding leads to "absurd consequences that the Legislature could not possibly have intended." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). This

Court should grant the petition for review to correct the appellate court's holding or, at a minimum, to clarify this conflict between the statutes.

**A. The Legislature could not have intended to apply the offense of prostitution to a child under fourteen because the Legislature has explicitly determined that a child under fourteen cannot legally consent to sex.**

In enacting section 22.021 of the Penal Code, the Legislature made it an offense to engage in sexual contact with a child younger than fourteen years of age—irrespective of the child's alleged consent. *See* TEX. PENAL CODE § 22.021(a). The Legislature thus made a specific policy determination that “a child under fourteen cannot legally consent to sex.” *May v. State*, 919 S.W.2d 422, 424 (Tex. Crim. App. 1996). The courts of appeals, including the court in this case, have acknowledged this reading of the Legislature's intent. (*See* App. 3, slip op. at 8 (“[A] child under the age of fourteen is incapable of granting legal consent to sexual conduct.”)) *See also* *Wells v. State*, No. 05-97-01750-CR, 1999 Tex. App. LEXIS 3202, at \*15 (Tex. App.—Dallas Apr. 29, 1999, pet. ref'd) (“A child under fourteen cannot legally consent to sex.”); *Spruiell v. State*, No. 03-97-00076-CR, 1998 Tex. App. LEXIS 3217, at \*4 (Tex. App.—Austin May 29, 1998, pet. ref'd) (“*May* expressly stated that a child under fourteen cannot legally consent to sex . . . .”).

In contrast to this specific expression of legislative policy, the court of appeals relied on the blanket definition of “delinquent conduct” as “conduct . . . that violates a penal law” in Family Code section 51.03 to conclude that the

Legislature intended to apply the offense of prostitution to a child under the age of fourteen. But the offense of prostitution can only be based on the offender's knowing offer or agreement (*i.e.*, consent) to engage in sexual conduct. *See* TEX. PENAL CODE § 43.02(a). Thus, applying the offense of prostitution to a child younger than fourteen leads to the inherently inconsistent result that a child is at the same time both legally capable and legally incapable of consenting to sex.

In determining legislative intent, the Court is guided by the principle that a specific statute will ordinarily prevail over a general statute when the two cannot be reconciled. *City of Waco v. Lopez*, 259 S.W.3d 147, 153 (Tex. 2008). While, on its face, the Legislature's blanket adoption of all penal offenses into the Juvenile Justice Code appears to include the offense of prostitution regardless of the juvenile's age, this construction cannot be reconciled with the Legislature's specific determination that children under fourteen are legally incapable of consenting to sex. *See* TEX. PENAL CODE § 22.021. To avoid this conflict, the Court should hold that, when enacting Family Code section 51.03, the Legislature did not intend to apply the offense of prostitution to children under fourteen. Because the court of appeals concluded otherwise, the Court should grant this Petition.

**B. The court of appeals' analysis is flawed and warrants review by this Court.**

The court of appeals presents several arguments in its attempt to defuse the contradictory consequences that result from its proposed statutory construction.

However, the court's analysis errs in several significant ways, and this Court should grant review to address these flaws.

First, the court of appeals notes that the Legislature excluded "traffic offense[s]" from its definition of "delinquent conduct." TEX. FAM. CODE § 51.03(a)(1). The court divines from this that the Legislature "was free to exclude [Penal Code] section 43.02 from the definition of delinquent conduct, but it did not do so." (App. 3, slip op. at 7) However, the mere fact that the Legislature *could* have used alternative language is no basis for concluding that it intentionally rejected that language. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 895 (Tex. 2000) (rejecting the argument that the Legislature intended to include punitive damages within a statutory cap on health-care damages because the statute specifically excluded certain other damages but not punitive damages). This argument is even weaker where, as here, the Legislature's exclusion covers an entire general category of offenses as opposed to a specific offense under the Penal Code. Moreover, the legislative history of section 51.03 shows that the decision to exclude traffic offenses from juvenile courts was driven primarily by efficiency concerns, not a desire to identify particular offenses that should not be applied to minors. *See* Robert O. Dawson, *Delinquent Children and Children in Need of Supervision: Draftman's Comments to Title 3 of the Texas Family Code*, 5 TEX. TECH L. REV. 509, 516 (1973-74) (noting that juvenile courts previously had jurisdiction only over offenders with habitual traffic violations and stating that "[t]raffic offenses are excluded from juvenile court jurisdiction to devote limited

resources of juvenile justice to solving more important problems of adolescent misbehavior”).

The court further asserts that the Legislature was “free to not define [Penal Code] section 43.02 as applying to any ‘person.’” (App. 3, slip op. at 7) But the Legislature would have no reason to amend this language in section 43.02 because the Penal Code does not apply to individuals younger than fifteen. *See* TEX. PENAL CODE § 8.07(a). This Court cannot read any intent into the Legislature’s failure to take a meaningless action.

Next, the court of appeals acknowledges that the public policy behind consent statutes is to protect children from sexual exploitation. Yet the court rejects the argument that its construction of the Juvenile Justice Code undermines this legislative policy because Petitioner “is an offender” and the Legislature could not have intended to “allow a child to engage in delinquent conduct without fear of adjudication.” (App. 3, slip op. at 9) Here, the court engages in circular reasoning. The court must first presuppose that Petitioner is legally capable of committing the offense of prostitution before it can conclude that the Legislature intended to adjudicate her as a delinquent for that conduct. The court impermissibly jumps to the conclusion that Petitioner is an offender without first determining whether the Legislature, in fact, intended the offense of prostitution to apply to children younger than fourteen.

The court cites *P.G. v. State*, 616 S.W.2d 635 (Tex. Civ. App.—San Antonio 1981, writ ref’d n.r.e.), for the proposition that “a sixteen-year-old child

could consent to engaging in delinquent conduct by sexually abusing another child.” (App. 3, slip op. at 9) Given that the present case involves a thirteen-year-old child, the significance of *P.G.* is unclear. See TEX. PENAL CODE § 22.021 (recognizing that the consent of a child fourteen or older may have legal effect in some circumstances). Moreover, *P.G.* involves significantly different policy concerns—concerns that arise when a child commits an offense involving *contact or exposure* with another child. Here, in contrast, Petitioner’s alleged offense consists solely of *consent*—which, because of her age, she is legally unable to give—to engage in sexual conduct *with an adult*. Petitioner’s proposed construction would not affect the State’s ability to charge a minor with assault or any other offense based on the child’s actual conduct. But because the Legislature has specifically concluded that a thirteen-year-old cannot legally consent to sex, application of the prostitution offense to Petitioner leads to an absurd result.

Finally, the court claims that Petitioner’s proposed construction of section 51.03 would actually undermine the policy behind these consent statutes and “encourag[e] the sexual exploitation of children.” (App. 3, slip op. at 9) Citing only the musings of a single New York family court judge, the court unequivocally declares that Petitioner’s construction “would ‘empower[] pimps to exploit children knowing that they will not be long removed from the streets.’” (*Id.* (quoting *In re C.S.*, 591 N.Y.S.2d 691, 693 (N.Y. Fam. Ct. 1992))) The suggestion that the State is or will be powerless to protect children from sexual exploitation by adults unless it can charge those children with an offense and

brand them as prostitutes is simply inaccurate. Section 261.101 of the Family Code requires a person to report to a law enforcement agency or the Department of Family and Protective Services if he or she has cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect. TEX. FAM. CODE § 261.101. The department or a designated agency must then conduct an investigation, during which, if determined to be necessary, the investigating agency can take appropriate steps to provide for the temporary care and protection of the child. *See id.* §§ 261.301, 261.302, 262.001-.309. In particular, section 262.104(a) provides that a law enforcement officer may take possession of a child without a court order if a person of ordinary prudence and caution would believe there is an immediate danger to the physical health or safety of the child, or that the child has been the victim of sexual abuse. *Id.* § 262.104(a)(1) & (3). Facts showing that a thirteen-year-old girl is walking the streets offering sex for money would unquestionably meet this standard. Alternatively, the law enforcement officer (or investigating agency) may seek a court order to take possession of the child to protect the child's health and safety. *See id.* § 262.001.

In addition, the suggestion that Petitioner's construction would somehow encourage or "empower" pimps to exploit children is further refuted by the much greater penalties the Legislature has provided for those who promote sex with children. Promotion of prostitution involving an adult, without the use of force, threat, or fraud, is a Class A misdemeanor, which subjects the accused to a

maximum punishment of one year in county jail and a \$4,000 fine. TEX. PENAL CODE § 43.03; *see also id.* § 12.21. When a child is involved, however, the same conduct would constitute “compelling prostitution” under section 43.05 because, when the offense involves a person younger than seventeen, the State need only show that the accused “cause[d] by any means” the child to commit the act of prostitution. *Id.* § 43.05. This offense is a second-degree felony, subjecting the accused to a maximum punishment of twenty years in the Texas Department of Corrections and a \$10,000 fine. *Id.*; *see also id.* § 12.33. The Legislature thus provides ample disincentive to those who would seek to exploit children.

In its blanket adoption of Penal Code violations as delinquent conduct, the Legislature could not have intended the inherently contradictory and insupportable result that a child who is legally incapable of consenting to sexual conduct is legally capable of offering or agreeing to sexual conduct in exchange for money. The court of appeals’ opinion provides no justification for concluding that the Legislature intended such an absurd result. Accordingly, the Court should grant the petition for review and reverse and remand the trial court’s adjudication.

**II. The adjudication of Petitioner based on a charge of prostitution without first investigating whether she was being compelled denied her due process.**

The State failed to conduct even a minimal investigation into the circumstances that might have led the State to provide Petitioner with immunity and proceed against persons who may have been exploiting her, consistent with the policies set forth by the Legislature. Instead, the State chose to prosecute

Petitioner for the offense of prostitution. Because the State alone had the obligation to conduct an investigation and the ability to provide immunity, its failure to investigate constitutes a violation of Petitioner's entitlement to due process.

Despite the hybrid civil/criminal nature of a juvenile adjudication, the Constitution requires that the proceeding measure up to "the essentials of due process and fair treatment." *In re Gault*, 387 U.S. 1, 30-31 (1967). "The juvenile is guaranteed the same constitutional rights as an adult in a criminal proceeding because a juvenile-delinquency proceeding seeks to deprive the juvenile of his liberty." *State v. C.J.F.*, 183 S.W.3d 841, 847 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). At a minimum, due process requires that the State's actions be "consistent with the fundamental principles of liberty and justice." *Shields v. Beto*, 370 F.2d 1003, 1004 (5th Cir. 1967).

Section 43.05 of the Penal Code makes it a crime if a person "knowingly . . . causes by any means a person younger than 17 years to commit prostitution." TEX. PENAL CODE § 43.05(a)(2). Thus, when the person committing the act of prostitution is a child, the State need not show that the accused used force, threats, or fraud—the standard is simply whether the accused "causes by any means" the child to commit the act of prostitution. *See Waggoner v. State*, 897 S.W.2d 510, 512 (Tex. App.—Austin 1995, no pet.). Moreover, "[t]he actual commission of the offense of prostitution is not a prerequisite to the commission of the offense of compelling prostitution." *Id.* at 513. The purpose

behind this and similar legislation across the country is “to successfully prosecute pimps and others for violations such as pandering, soliciting, or promoting prostitution.” Eva J. Klain, PROSTITUTION OF CHILDREN AND CHILD-SEX TOURISM: AN ANALYSIS OF DOMESTIC AND INTERNATIONAL RESPONSES 9-10 (Nat’l Center for Missing and Exploited Children 1999) (available online at [http://www.missingkids.com/en\\_US/publications/NC73.pdf](http://www.missingkids.com/en_US/publications/NC73.pdf)).

The Legislature further provides protection in the form of immunity to individuals engaged in activity that would constitute prostitution in exchange for evidence or testimony against those who promote or compel their conduct. *See* TEX. PENAL CODE § 43.06(b). However, the power to invoke this immunity rests entirely in the hands of the State. Section 43.06 affords no opportunity for the Petitioner to assert immunity. The State has complete discretion over who it will target. In this case, Petitioner identified by name a 32-year-old man that she said she was living with, and her psychological profile was consistent with that of an abuse victim. Yet the record indicates the State conducted no investigation at all into whether anyone was behind Petitioner’s actions.

Fundamental principles of liberty and justice require that, before proceeding against Petitioner, depriving her of liberty and stigmatizing her as a prostitute, the State should conduct some investigation into the possibility that someone was promoting or otherwise causing her “by any means” to commit acts constituting prostitution. This is especially critical where, as here, the actor is a child (and thus subject to additional protections under Texas law and public

policy) and there is evidence to support such an investigation. The State's decision to do nothing violated Petitioner's due process rights. Without this Court's guidance, district attorneys will continue to take the path of least resistance, rather than comply with their obligation to investigate potential abuse or exploitation.<sup>2</sup> For this additional reason, the Court should grant the petition for review and reverse the trial court's adjudication.

### **PRAYER**

Petitioner respectfully requests that the Court grant her petition for review, vacate the court of appeals' judgment, reverse the trial court's adjudication, and remand to the trial court for an appropriate disposition. Petitioner further requests any other relief to which she may be entitled.

Respectfully submitted,

/s/ Michael Choyke  
Michael Choyke  
State Bar No. 00793504  
WRIGHT BROWN & CLOSE, LLP  
Three Riverway, Suite 600  
Houston, Texas 77056  
(713) 572-4321  
(713) 572-4320 (fax)

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<sup>2</sup> The Fourteenth Court of Appeals recently heard oral argument in another case where the district attorney's office brought charges against a child for prostitution without conducting any investigation of potential exploitation. See *In the Matter of B.D.S.D.*, No. 14-07-01079-CV (pending in the Fourteenth Court of Appeals).

Ann E. Johnson  
State Bar No. 24032595  
6750 West Loop South, Suite 845  
Bellaire, Texas 77401  
(713) 301-0799  
(713) 621-0000 (fax)

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the above document has been served on the following by certified mail, return receipt requested, on the 21 day of January, 2009.

Dan McCrory  
Assistant District Attorney  
1201 Franklin, Suite 600  
Houston, Texas 77002

*Counsel for the State of Texas*

/s/ Michael Choyke  
Michael Choyke

## **APPENDIX**

1. Judgment/Order of the 314th District Court (redacted in accordance with TEX. R. APP. P. 9.8(c))
2. State's Petition (redacted in accordance with TEX. R. APP. P. 9.8(c))
3. Opinion and Judgment of First Court of Appeals
4. Excerpts from Relevant Statutes
  - TEXAS FAMILY CODE § 51.03
  - TEXAS PENAL CODE §§ 43.01, 43.02, 43.05, 43.06
  - TEXAS PENAL CODE § 22.021