

NO. 08-1044

IN THE SUPREME COURT OF TEXAS

IN THE MATTER OF B.W.

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

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

- Nature of the Case:** Juvenile proceeding against Petitioner, a thirteen-year-old child, for committing the offense of prostitution.
- Trial Court:** Honorable John Phillips, 314th Judicial District Court, Harris County, Texas
- Trial Court Disposition:** 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) The court placed Petitioner on probation for 18 months in the custody of the Chief Juvenile Probation Officer. (*Id.*) The court denied Petitioner’s motion for new trial but expressly granted her permission to appeal. (2d Supp. CR 2; RR 7-8)
- Parties in the Court of Appeals:** **Appellant:** B.W.
Appellee: The State of Texas
- Court of Appeals:** First Court of Appeals at Houston, Texas
- Participating Justices:** Justice Terry Jennings (author), joined by Chief Justice Sherry Radack and Justice Jane Bland
- Citation:** 274 S.W.3d 179
- Court of Appeals Disposition:** 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. 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?

TO THE HONORABLE SUPREME COURT OF TEXAS:

PRELIMINARY STATEMENT

B.W.'s 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 equally important question of whether such a child's due process rights are violated when the State elects to prosecute the child for prostitution without conducting any investigation into the probability that someone else may be causing her to engage in that conduct. Such an investigation into facts indicating child abuse is statutorily required under the Family Code and could entitle the child to immunity under the Penal Code 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 at the hands of an adult, the State elected to proceed against Petitioner on the charge of prostitution. (CR 2) Instead of undergoing a trial, Petitioner agreed to

plead “true” before the Honorable John Phillips, District Judge of the 314th 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, 2008.² The court denied Petitioner’s motion for en banc reconsideration.

² A copy of the court of appeals’ opinion is attached under Tab 1 of the Appendix and will be cited as “Slip op. at ___.”

SUMMARY OF THE ARGUMENT

The court of appeals improperly construed Family Code section 51.03 as permitting a thirteen-year-old child to be found delinquent for committing the criminal offense of prostitution. The Legislature has explicitly determined in the Penal Code that a child under fourteen cannot legally consent to sex. The Court should grant review and reverse the trial court's adjudication.

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 State has an affirmative obligation to investigate facts that indicate child abuse such as those present in this case. Moreover, because only the State can protect a potentially exploited child through the immunity provision set forth by the Legislature, the State's failure to conduct *any* investigation denied the Petitioner the essentials of due process and fair treatment. 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.

As in every case involving the construction of a statute, the Court's primary objective is to ascertain and give effect to the Legislature's intent. *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004). In addition to considering the statute's plain language, the Court considers the objective the law seeks to obtain and the consequences of a particular construction. *Id.* (citing TEX. GOV'T CODE § 311.023(1), (5)). Even apparently plain language will not be applied if it would lead to absurd consequences the Legislature could not possibly have intended. *See State v. Colyandro*, 233 S.W.3d 870, 877 (Tex. Crim. App. 2007).

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* 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. (*See* Slip op. at 6) 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). Actual physical contact is not required—the offense is complete if the person “agrees” to engage in sexual

conduct for money. *Id.* 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 the petition and reverse.

In its response to the petition for review, the State cites other statutes in an effort to show that “juveniles may engage in consensual sex under certain circumstances.” (Resp. at 9-10) However, almost all of the statutes cited by the State have nothing at all to do with whether a child under fourteen may consent to sex. For example, the State notes that it is an affirmative defense to a charge of sexual assault that the actor was no more than three years older than the victim, *provided the victim was fourteen or older.* (*Id.* at 9 (citing TEX. PENAL CODE §

22.011(e)) This obviously has nothing to do with whether a thirteen-year-old can legally consent to sex. The State also argues that, under the statutory offense of indecency with a child, it is an affirmative defense that the actor was no more than three years older than the victim, regardless of the victim's age. (*Id.* at 10 (citing TEX. PENAL CODE § 21.11(b))) But consent (or lack thereof) is not relevant to the commission of the offense of indecency with a child. The Legislature's determination that certain sexual contact between children is not punishable under this offense in no way reflects an intent to treat such contact as consensual. Finally, the State points to the fact that children under fourteen may engage in consensual sex if they are married. (*See id.* (citing TEX. PENAL CODE § 22.011(c)(1))) However, children under sixteen must request a court order for permission to marry, which shall be granted only if the court believes marriage to be in the child's best interest. *See* TEX. FAM. CODE § 2.103. Thus, this exception to sexual assault applies only in those rare cases where a court first reviews the child's situation and concludes that marriage is in his or her best interest.

None of the statutes cited by the State conflict with the Legislature's determination that a child under fourteen is legally incapable of consenting to sex. Thus, there is no support for the State's assertion that a thirteen-year-old's legal inability to consent to sex is "a shifting concept." (Resp. at 10) To the extent these statutes create any question about the Legislature's intent, the Court should grant the petition to ascertain and give effect to that intent. *See City of Sunset Valley*, 146 S.W.3d at 642.

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." (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.’” (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.” (Slip op. at 9) The court’s reasoning here is illogical and circular: 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.” (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.” (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 contrast, taking a child off the streets without any consequence to whoever may have caused her to commit the acts merely creates a vacuum in which the person compelling children into prostitution finds another child to fill the void.

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.

[T]he first duty of justice should be the protection of our most vulnerable citizens of all – our children.

Chief Justice Wallace B. Jefferson, The State of the Judiciary in Texas, Presented to the 81st Legislature, Feb. 11, 2009

The State's prosecution of Petitioner for prostitution as a minor denied her due process under both the United States and Texas Constitutions. *See* U.S. CONST. art. XIV; TEX. CONST. art. I, § 19. First, under Texas law, the Legislature provides protection in the form of immunity to individuals who supply evidence or testimony against those who may have promoted or compelled them to commit acts that constitute prostitution. TEX. PENAL CODE § 43.06(b). However, the power to invoke this immunity rests entirely in the hands of the State. In addition, the Family Code imposes an affirmative obligation to investigate situations in which a suspicion of child abuse exists. *See, e.g.*, TEX. FAM. CODE § 261.101. 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. The State's failure to conduct even a minimal investigation into the possibility that Petitioner was being exploited before choosing to prosecute her for the offense of prostitution constitutes a violation of Petitioner's entitlement to due process.

A. Petitioner is entitled to the full protection of due process, both procedurally and substantively.

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). The Due Process Clause entitles individuals to protection against government action through both “substantive due process” and “procedural due process.” *United States v. Solerno*, 481 U.S. 739, 746 (1987). 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).

Here, the court of appeals erroneously limited the Due Process Clause’s application to those specific procedural requirements that were at issue in the United States Supreme Court’s decisions in *Gault* and *In re Winship*, 397 U.S. 358 (1970). (*See Slip op.* at 12-13) However, while the Supreme Court has acknowledged that a juvenile is not entitled to all constitutional protections of an adult, the Court has plainly stated that, in connection with a juvenile court adjudication of delinquency, the Due Process Clause requires application of “the essentials of due process and fair treatment.” *Winship*, 397 U.S. at 359; *Gault*,

387 U.S. at 30-31. This Court has held likewise. *See L.G.R. v. State*, 724 S.W.2d 775, 776 (Tex. 1987) (“[A]lthough juvenile delinquency proceedings are civil in nature, because they may result in the child being deprived of liberty, the juvenile is entitled to the essentials of due process and fair treatment.”).

Moreover, the Texas Court of Criminal Appeals has repeatedly recognized that distinctions between juvenile proceedings and adult criminal proceedings are increasingly harder to justify. That court first observed over twenty years ago that the scarcity of treatment programs, professional training, and financial resources have made the juvenile system more punitive than rehabilitative. *Lanes v. State*, 767 S.W.2d 789, 800 (Tex. Crim. App. 1989). More recently, the court noted that amendments to the Juvenile Justice Code were making the consequences to juveniles similar to those faced by adults, causing the “grim realities” of the juvenile system to become more salient. *Hidalgo v. State*, 983 S.W.2d 746, 751 (Tex. Crim. App. 1999). The court highlighted several specific legislative changes that reflected this shift:

The legislature . . . categorized certain adjudications as “final felony convictions” that can be used as enhancements for repeat offenders, removed provisions forbidding the maintenance of centralized photograph and fingerprint records, repealed laws about sealing and destruction of juvenile records, and mandated the use of . . . the evidentiary provisions of Chapter 38 of the Code of Criminal Procedure instead of their civil counterparts for judicial proceedings involving juveniles.

Id. at 751-52 (quoting *Blake v. State*, 971 S.W.2d 451, 460 n.28 (Tex. Crim. App. 1998)).

B. Children suspected of being sexually exploited cannot arbitrarily be treated as offenders.

The court of appeals summarily rejected Petitioner’s due-process challenge because she did not show that she was denied any applicable “procedural requirements.” (Slip op. at 13) Petitioner’s challenge requires a thoughtful consideration of the intertwined purposes of the Family Code and the Penal Code provisions that apply when there is cause to believe that the facts are consistent with child abuse. *See Lassiter v. Dep’t. of Social Servs. of Durham County*, 452 U.S. 18, 25 (1981) (“Applying the Due Process Clause is . . . an uncertain enterprise which must discover what ‘fundamental fairness’ consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.”). Here, the policy interests as expressed by the Legislature overwhelmingly weigh in favor of a finding that the State’s treatment of Petitioner violated her right to due process.

The record in this case affirmatively showed that Petitioner, a thirteen-year-old child, was living with and having sex with a 32-year-old boyfriend whom she identified by name. (*See Resp.* at 8) She was arrested for offering to engage in oral sex with an adult for a fee. Petitioner also had, by the time of her arrest, “acquired several sexually transmitted diseases and had two abortions.” (*Id.*) By definition, these facts constitute cause to believe that Petitioner was a victim of abuse. *See* TEX. FAM. CODE § 261.001(1) (defining “abuse” to include sexual assault and compelling or encouraging prostitution). Anyone with knowledge of

these facts would be obligated to report them “immediately” to law enforcement for investigation. *See id.* § 261.101. This reporting obligation applies “without exception” even to a person whose communications may otherwise be privileged. *Id.* § 261.101(c). Furthermore, the Family Code makes it a criminal offense not to report such facts. *Id.* § 261.109. Logically, by requiring these facts to be reported and making it a crime not to report them, the Legislature did not intend for the State to do nothing. Yet the State takes the position, supported by the court of appeals’ opinion, that it had no obligation to investigate in this case.

The State has notice of the voluminous literature on the issue of runaway children and their sexual exploitation. A study published in 1999 by the National Center for Missing and Exploited Children (NCMEC) regarding the issue of juvenile prostitution found that “[p]rostitution of children is closely tied to life on the streets” and that “up to 300,000 prostituted children may live on the streets in the United States.” Eva J. Klain, PROSTITUTION OF CHILDREN AND CHILD-SEX TOURISM: AN ANALYSIS OF DOMESTIC AND INTERNATIONAL RESPONSES (Nat’l Center for Missing & Exploited Children, 1999) at 2 (hereinafter “PROSTITUTION OF CHILDREN”). Many of those “[r]unaway children often engage in what some experts refer to as ‘survival sex,’ the performance of sexual acts in return for food or shelter.” Paul Menair, *Crimes and Offenses: Prostitution: Increase Penalties for Offenses of Pimping and Pandering of a Minor*, 18 GA. ST. U. L. REV. 32, 37 (Fall 2001).

Because the State failed to investigate, how Petitioner began prostituting herself remains unanswered. But, as the NCMEC's study notes:

Even if children first begin to prostitute for money to survive, once in prostitution they may find themselves working to support a pimp rather than themselves. Young girls are especially vulnerable to pimps who befriend them and shower them with the attention and affection (although feigned) that they did not receive at home.

PROSTITUTION OF CHILDREN at 2. Additionally, a runaway child may be the target of a pimp: "If she is a runaway he will offer her food and shelter and vaguely hint at the possibility of a job." FEMALE JUVENILE PROSTITUTION: PROBLEM AND RESPONSE (Nat'l Center for Missing & Exploited Children, 2d ed., Nov. 2002) at

1. Reviewing various case studies of juvenile prostitutes and their pimps, NCMEC examined the unique relationship that frequently develops between the child and pimp:

An interesting observation is the relationship of the juvenile to the pimp. The pimp is cast into the role of benefactor/boyfriend with the juvenile having a difficult time acknowledging that he is a pimp. . . . [S]he was aided by the positive attention of the pimp or his efforts to protect her.

Id. at 14. Pimps "look for young girls who are lonely or rebellious, with low self-esteem" and "prey disproportionately on young runaways." PROSTITUTION OF CHILDREN at 4.

The pimp may then initiate a sexual relationship with the girl, continuing to become the primary person in her life. This pretense of love lulls the girl into thinking theirs is a mutually developing relationship, making her emotionally and psychologically dependent on the pimp as a substitute for the family that abused her or turned her away.

Id. “Soon she finds herself prostituted as a condition of her love for him. The young girl, however, continues to think of the pimp as her boyfriend, and this perception of the relationship sustains the control and abuse.” *Id.* at 5. Citing numerous studies, NCMEC also found that “[g]eneral psychological and emotional problems, housing instability, substance abuse, educational and vocational failure, and major problems at home have all been cited as common precipitating factors in the lives of prostituted children.” *Id.* at 3 (footnotes omitted).

Petitioner’s circumstances are almost identical to the patterns that NCMEC warns are signs of an exploited child. However, the State never investigated where Petitioner was living while a runaway, with whom she was living, and to whom the money she was making by committing acts of prostitution was going. The State offers no evidence of a response to its own psychologist’s report that the situation with Steven Smith and Petitioner was a “concern.” (Pet. Ex. 2 (Psychological Screening) at p.7) Instead, the State prosecuted Petitioner and never inquired into why this thirteen-year-old girl was being sold on the streets at 10:30 a.m. for twenty dollars.

The State argues that its failure to investigate did not rise to the level of a due-process violation because “petitioner herself was the best source of information regarding whether someone compelled her to commit prostitution.” (Resp. at 14 n.3) This argument contradicts the well-settled principle that a child younger than seventeen who has been a victim of a sexual offense has no

obligation to inform another person of the alleged offense. *See* TEX. CODE CRIM. PROC. Art. 38.07(b). Further, there are no affirmative defenses that a child accused of prostitution can assert. *See generally* TEX. PENAL CODE §§ 43.01-.06; *see also* TEX. PENAL CODE § 2.04 (“An affirmative defense in this code is so labeled”) The State’s improper attempt to shift the burden is consistent with its approach of taking the easy road by treating these children as offenders rather than as victims of sexual exploitation deserving of protection. These are the children most in need of the State’s protection.

Nor should the State be absolved from its obligations by an allegedly silent record. Within one month of Petitioner’s arrest, the State presented, with respect to its obligation to produce exculpatory and mitigating evidence, a “response” that was blank. (CR 23) In other words, the State represented that it had no potentially exculpatory evidence, despite the information it admittedly had regarding Petitioner’s sexual history and despite the obligation under Texas law to retain records of any child-abuse investigation. *See* TEXAS DEPARTMENT OF FAMILY & PROTECTIVE SERVICES, Policy Handbook § 2282, available at http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_2281_3.jsp (detailing the documentation and retention requirements for child-abuse investigations); *see also* TEX. FAM. CODE § 261.3011 (providing that TDFPS shall develop guidelines and protocols for joint investigations with law enforcement). When dealing with allegations of child abuse, the Court should not presume that an investigation occurred.

C. The power to determine Petitioner’s fate rests solely in the hands of the State.

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.” PROSTITUTION OF CHILDREN at 9-10.

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.³ For this additional reason, the Court should grant the petition for review and reverse the trial court's adjudication.

³ Recently, the Fourteenth Court of Appeals followed the court of appeals' opinion in this case and held that no due-process violation occurred 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, 2009 Tex. App. LEXIS 4683, at *19-24 (Tex. App.—Houston [14th Dist.] June 18, 2009, no pet. h.). In that case, the State affirmatively denied that it had any duty to investigate whether a child was being compelled to commit prostitution. (*See* App. 2, a true and correct copy of an excerpt from the reporter's record in No. 14-07-01079-CV, *In the Matter of B.D.S.D.* (redacted in accordance with TEX. R. APP. P. 9.8 (c)))

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

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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 5th day of August, 2009.

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