

**No. 08-1044**

In the Supreme Court of Texas

◆  
**No. 01-07-00274-CV**

In the  
Court of Appeals  
For the  
First District of Texas  
At Houston

◆  
**IN THE MATTER OF B.W.**

◆  
**STATE'S RESPONSE TO PETITIONER'S BRIEF ON THE MERITS**

◆  
**PATRICIA R. LYKOS**  
District Attorney  
Harris County, Texas

**DAN MCCRORY**  
Assistant District Attorney  
Harris County, Texas

**JESSICA MILLIGAN**  
Assistant District Attorney  
Harris County, Texas

1201 Franklin, Suite 600  
Houston, Texas 77002  
Tel.: 713/755-5826  
FAX No.: 713/755-5809

*Counsel for Appellee*

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**TO THE HONORABLE SUPREME COURT OF TEXAS:**

**STATEMENT OF THE CASE**

The State filed a petition alleging petitioner, a juvenile, engaged in delinquent conduct by committing the misdemeanor offense of prostitution. (CR 2). Petitioner pled true to this allegation pursuant to an agreed recommendation. (RR 6; CR 32). The trial judge entered a written judgment affirmatively finding petitioner engaged in the alleged delinquent conduct and was in need of rehabilitation and then placed her on probation for 18 months in the custody of the chief juvenile probation officer. (RR 7; CR 28-32). The First Court of Appeals affirmed petitioner's adjudication on October 2, 2008. *In re B.W.*, 274 S.W.3d 179 (Tex. App.--Houston [1st Dist.] 2008, pet. filed).

**STATEMENT OF FACTS**

Petitioner was placed in the custody of Children's Protective Services (CPS) in November of 2004 for reasons unrelated to the instant offense. She ran away from her group home facility in October of 2005. (CR 8). The CPS staff was not aware of petitioner's whereabouts until she was arrested for prostitution 14 months later. (RR – Exhibit P2).

On the morning of January 12, 2007, the thirteen-year-old petitioner stood on a sidewalk and waved to an undercover police officer who drove by. The officer stopped and, after some brief preliminary conversation, petitioner offered to perform oral sex on the officer for twenty dollars. Petitioner then entered the officer's vehicle and was arrested for the offense of prostitution. (CR 7).

During a psychological screening conducted several weeks after her arrest, petitioner reported that she lived with her 32-year-old boyfriend between the time she ran away from CPS custody and her arrest. (RR – Exhibit P2, p.2). However, the person conducting the examination warned that petitioner’s reported facts should be viewed with caution because many of her statements were inconsistent with information found in her probation records. (RR – Exhibit P2, p.7).

### **SUMMARY OF THE ARGUMENT**

Ground one: Petitioner’s claim that juveniles are not subject to adjudication for the offense of prostitution is meritless because the plain language of the applicable statutes provides for such an adjudication and the application of this plain language does not lead to any absurd results.

Ground two: The nature of the State’s investigation of petitioner’s case did not deprive her of due process because the constitution does not guarantee a defendant the right to have investigators conduct a criminal investigation in any particular manner. Furthermore, even if petitioner were owed some specific type of investigation, the record is silent regarding the extent of the investigation in this case. As such, it is impossible to declare the investigation deficient.

### **ARGUMENT**

#### **REPLY TO GROUND FOR REVIEW ONE**

Petitioner contends her adjudication for the offense of prostitution is absurd because a juvenile, in certain circumstances, is incapable of providing legally-effective consent to engage in sex acts. She maintains the Texas Legislature could not have intended for the State to adjudicate juveniles delinquent under the prostitution statute since juveniles generally lack the ability to provide effective consent to sex acts in the context of the “statutory rape” statutes. *See* TEX. PEN. CODE ANN. §§ 21.11(a),

22.011(a)(2), 22.021(a)(1)(B) (Vernon 2003 & Vernon Supp. 2008) (statutory offenses involving sex crimes against minors do not require lack of victim's consent). A review of the applicable statutes reveals petitioner's adjudication neither results in an absurd result nor runs afoul of legislative intent.

Legislative intent - The plain language of the applicable statutes permits adjudication

Petitioner was adjudicated of engaging in delinquent conduct by committing the offense of prostitution. (CR 28-32). The statute proscribing this conduct is found in the Texas Penal Code. TEX. PEN. CODE ANN. § 43.02 (a)(1) (Vernon 2003) (a person commits the offense of prostitution if she knowingly agrees to engage in oral sex for a fee). The penal code offenses have been incorporated into the Texas Family Code which governs the adjudication of delinquent juveniles. TEX. FAM. CODE ANN. § 51.03(a)(1) (Vernon 2008). Specifically, the family code defines delinquent conduct for which a juvenile may be adjudicated as conduct that violates the penal code. *Id.* Therefore, it is undisputed that the plain language of the applicable statutes permits the adjudication of a juvenile for the offense of prostitution. (See petitioner's original direct appeal brief, p. 8: "Following the plain language of Family Code section 51.03, the State *technically can* proceed against a juvenile on any crime that it can bring against an adult." (italics in original)).

Despite the plain language of these statutes authorizing a juvenile's adjudication for penal code offenses, petitioner contends the legislature could not have intended to subject juveniles to adjudication for the offense of prostitution since juveniles generally cannot provide legally-effective consent to engage in sex. When attempting to discern

legislative intent, courts focus on the literal text of the applicable statute and attempt to discern the fair, objective meaning of that text. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). When the statute is clear and unambiguous, the legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from the statute. *Id.* Courts are bound to administer the law as it is written regardless of how harsh the law may seem; courts do not make law. *Lomax v. State*, 233 S.W.3d 302, 308 (Tex. Crim. App. 2007) (quoting *Rodriguez v. State*, 953 S.W.2d 342, 353 (Tex. App.--Austin 1997, pet. ref'd) (Onion, J.)). The legislature is constitutionally entitled to expect that the judiciary will faithfully follow the specific text it adopted. *Id.* Therefore, the judiciary should ordinarily give effect to the plain meaning of a statute. *Id.*

As mentioned, section 51.03(a)(1) clearly and unambiguously subjects juveniles to adjudication for all the penal code offenses, which include the offense of prostitution. The judiciary, therefore, should give effect to the legislature's expressed intent.

Moreover, regarding legislative intent, the prostitution statutes reflect that the legislature did give some consideration to the protection of minors when drafting the statutes. Namely, the legislature provided that the pimping of an adult prostitute is a Class A misdemeanor while the pimping of a child younger than 17 is a second degree felony. TEX. PEN. CODE ANN. § 43.03 (Vernon 2003); TEX. PEN. CODE ANN. § 43.05 (Vernon 2003). Therefore, within the boundaries of the prostitution statutes, the legislature expressly opted to provide greater protection for juveniles through harsher punishment for those who pimp juveniles. If the legislature had intended for its consideration of juvenile protection to be expanded to include juvenile immunity from

prosecution, it could have done so explicitly as it did with this punishment scheme. It is telling, therefore, that the prostitution statute does not provide any suggestion of a defense for juveniles who commit the offense of prostitution. *Gables Realty Ltd. P'ship v. Travis Cent. Appraisal Dist.*, 81 S.W.3d 869, 873 (Tex. App.--Austin 2002, pet. denied) (in determining legislative intent, it is presumed that words excluded from the statute are done so purposefully).

More insight into the legislative intent may be gleaned from an addition to the prostitution statute passed during the most recent legislative session. The Eighty-First Legislature added the following language to section 43.02: "It is a defense to prosecution under this section that the actor engaged in the [offense of prostitution] because the actor was the victim of [the criminal offense of human trafficking.]" Act of May 31, 2009, 81<sup>st</sup> Leg., R.S., H.B. 4009, § 8 (to be codified at TEX. PEN. CODE ANN. § 43.02(d)).<sup>1</sup> In other words, the legislature expressly excluded a particular group of individuals from prosecution under the prostitution statute. If the legislature had intended to exclude juveniles as a group from adjudication for the offense of prostitution, it could have expressly done so as it did for the group exempted by this recent legislation.

The legislature's failure to provide a defense to adjudication for juveniles in section 43.02 is particularly compelling since there is a presumption that the legislature was aware of all caselaw affecting or relating to an existing statute that it amended. *Smith v. State*, 5 S.W.3d 673, 678 (Tex. Crim. App. 1999) (citing *Grunsfeld v. State*, 843

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<sup>1</sup> This law becomes effective on September 1, 2009. Act of May 31, 2009, 81<sup>st</sup> Leg., R.S., H.B. 4009, § 12.

S.W.2d 521, 523 (Tex. Crim. App. 1992)). Therefore, it must be presumed that the legislature was aware of the First Court of Appeals' opinion in this case when it amended the prostitution statute. So if the *B.W.* opinion (which holds juveniles are subject to adjudication under the prostitution statute) were actually contrary to the legislature's intent, the legislature had the opportunity to correct the intermediate court's alleged misunderstanding of this issue when it recently amended the prostitution statute to exclude another group of individuals from prosecution under the statute. By amending the statute without any attempt to include juveniles as an exempted group, the legislature indicated that *B.W.* accurately reflects its legislative intent.

Accordingly, the plain language of the applicable statutes and the legislature's recent actions both indicate a legislative intent to subject juveniles to adjudication for the offense of prostitution.

#### Juveniles as young as petitioner may provide legally-effective consent

Petitioner's interpretation of the legislature's intent is premised entirely on the legislature's determination that juveniles are generally unable to provide legally-effective consent to engage in sex acts in the context of the "statutory rape" laws. *See* TEX. PEN. CODE ANN. §§ 22.011(a)(2), 22.021(a)(1)(B) (Vernon Supp. 2008) (statutory offenses involving sex crimes against minors do not require lack of victim's consent). Petitioner's argument assumes that this "inability to consent" concept applies beyond these particular statutes and extends to the remainder of the penal code offenses, including the offense of prostitution.

Contrary to petitioner's position, a juvenile's inability to consent is not a blanket proposition that stands constant in all circumstances and in context of all penal code statutes. In fact, the "inability to consent" concept is not a constant proposition even within the confines of the statutory rape laws from which the concept was conceived.

For example, while the statutory rape laws indicate that a person younger than 17 generally may not engage in consensual sex, these same laws provide that a child as young as 14 may have consensual sex with someone who is not more than three years older than her. TEX. PEN. CODE ANN. § 22.011(e) (Vernon Supp. 2008). Therefore, if a 14-year-old girl had consensual sexual intercourse with her 18-year-old, long-term fiancé on a particular day, she would be incapable of providing legally-effective consent in the context of this sexual conduct. But if she met a 16-year-old boy later in the day and had consensual sexual intercourse shortly after making his acquaintance, her consent would be considered legally effective in that particular context. *Id.* In essence, a juvenile's ability to provide legally-effective consent is a shifting concept, with the effectiveness of the consent depending on the circumstances of the sexual encounter.

Similarly, even a 13-year-old girl such as petitioner may provide legally-effective consent to engage in sexual intercourse if she is married to the person with whom she has sex. TEX. PEN. CODE ANN. §22.011(c)(1) (Vernon 2003) (defining "child," for statutory rape purposes, as person younger than 17 *who is not defendant's spouse*); *Johnson v. State*, 103 S.W.3d 463, 463 (Tex. App.--San Antonio 2003, no pet.) (suggesting juveniles in petitioner's age group may enter common-law marriage); *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at \*2 n.7 (Tex. App.--Austin May 22, 2008, orig.

proceeding) (not designated for publication) (Texas law allows juveniles as young as 16 to marry with parental consent and those younger than 16 to marry pursuant to a court order); *Tibbets v. State*, No. 03-01-00672-CR, 2002 WL 31386096, at \*6 (Tex. App.--Austin Oct. 24, 2002, no pet.) (not designated for publication) (juvenile under 14 may marry with a court order); *Compare* TEX. FAM. CODE ANN. § 2.102 (Vernon Supp. 2008) (juvenile aged 16 or 17 may marry with parental consent), *with* TEX. FAM. CODE ANN. § 2.103 (Vernon Supp. 2008) (juvenile – with no mention of age restriction - may marry with court order).

Therefore, a 13-year-old female may provide legally-effective consent to have sexual intercourse with her 50-year-old husband. But if she were to have an affair with a 15-year-old male, her consent would not be considered legally effective. Again, this hypothetical demonstrates that the ability of a juvenile (even one as young as 13) to provide legally-effective consent is a shifting concept. There can be no blanket assertion that a 13-year-old individual is incapable of providing legally-effective consent.

In fact, the legislature has indicated that a 13-year-old individual may provide legally-relevant consent to engage in sexual intercourse. A person convicted of sexually assaulting a child generally has a duty to register as a sex offender for the remainder of his life. TEX. CODE CRIM. PROC. ANN. art. 62.101(a) (Vernon 2006). The legislature, however, provided an exception to this lifetime-registration requirement that turns, in part, on whether the victim (13 years old or older) consented in fact to the sex act. Specifically, a defendant may petition for an exemption from sex-offender registration if, at the time of the offense, he was younger than 19 years old and his victim was at least 13

years old, and the victim consented to the sex act. TEX. CODE CRIM. PROC. ANN. art. 62.301(a),(b) (Vernon 2006); TEX. CODE CRIM. PROC. ANN. art. 42.017 (Vernon Supp. 2008). This provision illustrates once again the shifting concept of a juvenile's ability to consent. In the context of the "sexual assault of a child" statute a 13-year-old individual's consent generally carries no significance, while that same 13-year-old individual's consent becomes very relevant in the context of the terms of another statute (the sex offender registration statute).

- An opinion from the court of criminal appeals also speaks to this shifting nature of a 13-year-old juvenile's ability to provide relevant consent. In *May v. State*, the defendant was convicted of intentionally penetrating a 14-year-old girl's sexual organ. 919 S.W.2d 422, 423 (Tex. Crim. App. 1996). The defendant claimed that the trial judge erred in excluding evidence establishing that the victim had intercourse with at least seven males when she was 12 and 13 years old. He claimed this evidence was admissible and relevant to his promiscuity defense.<sup>2</sup>

The intermediate appellate court ruled that the promiscuity defense was not available under these circumstances because the defense requires that the promiscuous conduct be consensual. *Id.* The lower court reasoned that a child under the age of 14 is legally incapable of consenting to sexual conduct and, therefore, such a child cannot be promiscuous as a matter of law. *Id.* The court of criminal appeals agreed that

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<sup>2</sup> The statutory promiscuity defense was abolished in 1994, after May's commission of the offense. *May*, 919 S.W.2d at 423 n.1. It provided: "It is a defense to prosecution under [section 22.011(a)(2)] that the child was at the time of the offense fourteen years of age or older and had

promiscuity implies consensual behavior, but it reversed the lower court, explaining that the meaning of the word “consent” by a child under the age of 14 is different under the two statutes. *Id.* at 424. Applying the literal wording of the promiscuity defense, the court concluded a child under the age of 14 may provide relevant consent to engage in sex acts in the context of the statutory defense. *Id.*

These various examples all illustrate that the ability of a juvenile, even one younger than 14, to consent to a sex act is a shifting concept. Juveniles may engage in consensual sex in some circumstances and in other circumstances they may not. While a juvenile generally may not be able to consent in the context of the statutes addressing the sexual assault of children, there is no indication that the legislature intended to export this inability-to-consent concept to the remainder of the penal code statutes.

The inability-to-consent aspect of the sexual assault statutes was drafted to further the State’s reasonable interest in “protecting minor children of tender age.” *In re C.O.S.*, 961 S.W.2d 360, 364 (Tex. App.--Houston [1st Dist.] 1997, no writ); *P.G. v. State*, 616 S.W.2d 635, 640-41 (Tex. App.--San Antonio 1981, writ ref’d, n.r.e.). While the legislature obviously intended to protect juveniles who are victims of sex crimes, there is no indication of a legislative intent to apply the inability-to-consent notion to protect juvenile *offenders* who commit sexually-related offenses, such as prostitution. The inability-to-consent concept designed for the protection of children in the sexual assault statutes does not impede the adjudication of petitioner for her violation of the prostitution

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prior to the time of the offense engaged promiscuously in conduct described in that subsection.” *Id.*

statute. Therefore, petitioner's reliance on section 22.021's inability-to-consent theory to support a similar theory in the prostitution statute is misplaced.

Adjudication is proper regardless of petitioner's ability to consent

Even assuming a juvenile such as petitioner is incapable of providing legally-effective consent to engage in sex acts, petitioner's challenge to her adjudication remains meritless because her inability to give legally-effective consent for a sex act is not implicated in her commission of the offense of prostitution as that offense was charged in this case. Petitioner was not charged with engaging in a sex act; rather, she was charged with *agreeing* to engage in a sex act. (CR 2). See TEX. PEN. CODE ANN. § 43.02(a)(1) (Vernon 2003). The prohibited conduct in which she engaged consisted of the agreement, not a sex act requiring any type of consent. *Kass v. State*, 642 S.W.2d 463, 470 (Tex. Crim. App. 1981) (McCormick, J., dissenting) (in prostitution case in which the defendant was not charged with consummated act of prostitution, the act serving as the gravamen of the offense was the solicitation).

Obviously, a person may agree to engage in conduct without intending to actually engage in the conduct. Thus, when a person only agrees to engage in conduct, her legal capacity to actually engage in the conduct is not necessarily implicated. Accordingly, even assuming petitioner could not effectively consent to have sex, it did not prevent her from committing the offense of prostitution by simply agreeing to have sex. Therefore, it is not absurd for a juvenile to be unable to effectively consent to sex in the context of sex crimes against children, while allowing for the adjudication of juvenile prostitutes.

Furthermore, still assuming a juvenile cannot engage in consensual sex under any situation, such a circumstance does not preclude application of the prostitution statute to a juvenile because the statute does not limit its application to instances of prostitution involving *consensual* sexual conduct. As charged in this case, a person commits the offense of prostitution “if [s]he knowingly...agrees to engage...in sexual conduct for a fee.” TEX. PEN. CODE ANN. § 43.02(a)(1) (Vernon 2003). This statute does not differentiate between consensual and nonconsensual sexual conduct. It simply forbids a person from agreeing to engage in a sex act, consensual or otherwise, for a fee. Petitioner clearly and undisputedly agreed to engage in sexual conduct for a fee. The consensual nature of the sexual conduct is not an element of the crime. Therefore, it is not absurd to adjudicate a juvenile for the offense of prostitution in accord with the plain terms of section 51.03 of the family code and section 43.02 of the penal code.

To the contrary, it would be absurd to rule juvenile girls and boys may engage in prostitution immune from any criminal liability. If such were the case, a 13-year-old girl could engage in sex for a fee with her similarly aged male classmates and both the boys and the girl could claim that no offense occurred because none of the parties possessed the ability to engage in consensual sex due to their age. Or an older adult male who agreed to pay a 13-year-old girl for sex could claim he did not commit the offense of prostitution because the sex would not have been consensual due to the girl’s inability to supply legally-effective consent. Absolving these parties of criminal liability would be absurd.

Furthermore, any ruling suggesting there is no criminal law prohibiting juvenile prostitution would result in the absurd result of rendering juveniles more vulnerable to exploitation. If juveniles are immune from prosecution for prostitution, pimps would be encouraged to seek out juveniles to act as their prostitutes since there would be no criminal liability for the prostitute herself. And as long as the pimp remains undetected in the background, there would be no grounds for prosecution even when the juvenile prostitute is engaged in her trade in plain sight for all to see. The influence on pimps' business practices aside, such a ruling also could arguably encourage enterprising, but amoral, juveniles to engage in prostitution, and financially thrive, knowing there would be no criminal consequences. Society simply cannot stand for such an absurd result.

The problem with the approach suggested by petitioner was discussed in *Matter of C.S.*, 591 N.Y.S.2d 691 (1992), wherein the court observed that if a juvenile cannot be found delinquent for having engaged in prostitution, the practical effect is that she can commit the offense innumerable times and never be adjudicated. *Id.* at 693. The Court continued:

The ramifications of this situation [i.e., an inability to prosecute the 13-year-old prostitute due to a technicality in New York's law] are wholly unacceptable. It empowers cynical pimps to exploit children knowing that they will not be long removed from the streets because the Family Court lacks jurisdiction [to obtain a conviction]. In an age of deadly sexually transmitted diseases, this places young persons who are highly vulnerable, and most needful of protection, outside the authority of the juvenile justice system to aid them.

*Id.* The Court then concluded that this problem can be rectified by adjudicating the juvenile delinquent and confining her since such restraint would serve her best interests.

*Id.* Such confinement serves “our obligation, as a society purporting to care for the well-being of its children, to discourage to any extent possible the victimization of vulnerable young people, and to augment our ability to help them.” *Id.* at 694.

Nevertheless, petitioner suggests her adjudication in the juvenile justice system is not necessary to protect her from such exploitation on the streets because the Department of Family and Protective Services has authority to take possession of her if it is shown she is engaged in prostitution. (petitioner’s brief, p. 12). However, petitioner was placed in the custody of CPS about two years before she committed the instant offense and this arrangement did not serve her well.<sup>3</sup> (CR 8). She ran away from her CPS facility and CPS staff was not aware of her whereabouts until she was arrested 14 months later. (CR 8; RR – Exhibit P2). During this time, she engaged in the commission of criminal offenses (prostitution, assault, and drug possession), lived with and had sex with her 32-year-old boyfriend, failed to attend school, used a variety of illegal drugs, acquired several sexually transmitted diseases, and had two abortions. (RR – Exhibit P2).

In contrast to this self-destructive path petitioner traveled while under the purported custody of CPS, her adjudication allowed the trial judge to place her in the custody of the chief juvenile probation officer where she will be afforded numerous programs, including individual counseling and the use of an educational specialist, designed to benefit her in all matters of her life. (CR 28-32). These benefits conferred on petitioner as a result of her adjudication are consistent with the established purpose of the

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<sup>3</sup> CPS is a division of the Department of Family and Protective Services. *In re E.A.K.*, 192 S.W.3d 133, 137 n.1 (Tex. App.--Houston [14th Dist.] 2006, pet. denied).

juvenile system, which is to rehabilitate children rather than punish them for criminal actions. *Anthony v. State*, 954 S.W.2d 132, 135 (Tex. App.--San Antonio 1997, no pet.), *overruled on other grounds*, *Gonzales v. State*, 67 S.W.3d 910 (Tex. Crim. App. 2002).

Accordingly, adjudicating petitioner for the offense of prostitution under the plain language of the penal code and the family code is consistent with legislative intent and does not result in an absurd result. To the contrary, it would be absurd for a court to defy the legislature's plain language and to suggest juveniles should be immune from criminal consequences for committing the offense of prostitution. Furthermore, it would be absurd to return petitioner to CPS custody from which she has a propensity to run away<sup>4</sup>, as opposed to placing her in the lock-down custody of the juvenile system where she will be confined and, thereby, assured of participating in the rehabilitative programs she requires.

Petitioner's first ground for review is meritless and should be dismissed.

### **REPLY TO GROUND FOR REVIEW TWO**

Petitioner contends her adjudication for prostitution violates her due process rights because the State purportedly failed to investigate whether someone compelled her to engage in the act of prostitution. In order to understand petitioner's argument, several of the statutes relating to the various prostitution offenses must be examined.

As pled in the charging instrument in this case (CR 2), a person commits the offense of "prostitution" by knowingly agreeing to engage in sexual conduct for a fee.

TEX. PEN. CODE ANN. § 43.02(a)(1) (Vernon 2003). A person commits the offense of “compelling prostitution” if he knowingly causes by any means a person younger than 17 years to commit prostitution. TEX. PEN. CODE ANN. § 43.05(a)(2) (Vernon 2003). A party to the offense of compelling prostitution may be required to testify or furnish evidence about the offense. TEX. PEN. CODE ANN. § 43.06(a) (Vernon 2003). The party may not be prosecuted for any offense about which she is required to testify or furnish evidence. TEX. PEN. CODE ANN. § 43.06(b) (Vernon 2003).

In view of the potential immunity from prosecution provided in section 43.06(b), petitioner claims it is possible that someone may have compelled her to commit prostitution and it is further possible that if there were a compeller, she might have been able to gain immunity by testifying against her compeller. Considering these possibilities, petitioner argues the State should have investigated whether someone actually did compel her to commit prostitution.

There is no due process violation

The State’s purported failure to investigate petitioner’s case to her satisfaction does not violate her due process rights. Due process ensures a defendant receives a fair trial. *Wiseman v. State*, 223 S.W.3d 45, 49 (Tex. App.--Houston [1st Dist.] 2006, pet. ref’d). It is doubtful, however, that due process requires the State to actually generate potentially exculpatory evidence. *Gabriel v. State*, 900 S.W.2d 721, 727 (Tex. Crim. App. 1995) (Clinton, J., concurring) (citing *San Miguel v. State*, 864 S.W.2d 493 (Tex.

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<sup>4</sup> As noted by petitioner, she fell through the proverbial cracks while in CPS custody. (petitioner’s original direct appeal brief, p. 29).

Crim. App. 1993)). The police have no affirmative obligation to investigate a crime in any particular way. *Gini v. Las Vegas Metro. Police Dep't*, 40 F.3d 1041, 1045 (9th Cir. 1994). Due process does not require that the police take every conceivable step to investigate claims of innocence or the existence of some defense. *Baker v. McCollan*, 99 S.Ct. 2689, 2695 (1979). The police have no constitutional duty to perform any particular investigative test or employ any particular investigative tool. *Arizona v. Youngblood*, 109 S.Ct. 333, 338 (1988).

The principle of due process is general and requires fundamental fairness by the State in all its dealings with a criminal defendant. *Cook v. State*, 940 S.W.2d 623, 630 (Tex. Crim. App. 1996) (Baird, J., concurring and dissenting). So the State does have a duty to seek the truth in its investigation of crimes. *Id.* However, the State is unaware of any authority dictating that the police must investigate in any particular manner or, more specifically, that officers must investigate the possibility that an arrestee may have some type of available immunity from prosecution. Due process violations resulting from flawed investigations generally involve affirmative misconduct by the police, rather than investigative inaction. *See Id.* (citing *Foster v. California*, 89 S.Ct. 1127 (1969)) (eyewitness was effectively told defendant committed the crime); *Dispensa v. Lynaugh*, 847 F.2d 211, 218 (5th Cir. 1988) (defendant identified in suggestive identification procedure); *Ex parte Brandley*, 781 S.W.2d 886 (Tex. Crim. App. 1989) (egregious police misconduct in capital murder investigation); *Mooney v. Holohan*, 55 S.Ct. 340, 342 (1935) (State used perjured testimony); *Napue v. Illinois*, 79 S.Ct. 1173, 1177 (1959) (State failed to correct unsolicited perjury); *Rogers v. Richmond*, 81 S.Ct. 735 (1961)

(conviction based in part on introduction of coerced confession); *Hernandez v. Estelle*, 674 F.2d 313 (5th Cir. 1981) (State concealed identity of material witness whose testimony would benefit defendant)). Therefore, any failure by the police in this case to investigate whether someone compelled petitioner to commit prostitution did not deprive her of due process. *In re B.D.S.D.*, No. 14-07-01079-CV, 2009 WL 2385554, at \*7-8 (Tex. App.--Houston [14th Dist.] June 18, 2009, no pet. h.) (juvenile prostitute's due process rights do not require State to investigate whether someone compelled her to commit offense).

In any event, even assuming a due process complaint may be based on an investigator's failure to undertake a particular course of investigative action, any deficiency in the investigative process will amount to a due process violation only if bad faith is established and the defendant shows the missing evidence or information is material and favorable. *Pachecano v. State*, 881 S.W.2d 537, 542 (Tex. App.--Fort Worth 1994, no pet.); *Gilbert v. State*, 840 S.W.2d 138, 142 (Tex. App.--Houston [1st Dist.] 1992, no pet.); *California v. Trombetta*, 104 S.Ct. 2528, 2534 (1984). Merely showing the missing information "might have been" favorable does not establish materiality. *Pachecano*, 881 S.W.2d at 542.

There has been no showing of bad faith in the police investigation of this case. Nor has there been any showing that a more thorough investigation would have yielded anything favorable to petitioner. More specifically, there has been no showing that any type of further investigation would have revealed that anyone compelled petitioner to engage in prostitution. Petitioner merely suggests such information might have been

uncovered, which is insufficient to establish materiality.<sup>5</sup> *Id.* Accordingly, there was no due process violation.

The record does not affirmatively reflect the investigation was deficient

Assuming that due process considerations owe petitioner a particular level of police investigation, her claim of a deficient investigation is meritless because the appellate record does not reveal the extent of the police investigation. Absent any evidence indicating the scope of the investigation and the particular investigative efforts, it is impossible to declare the investigation deficient. Based on a silent record, a reviewing court will not assume a deficient investigation occurred. *Brown v. State*, 129 S.W.3d 762, 767 (Tex. App.--Houston [1st Dist.] 2004, no pet.). Appellate courts do not reverse cases based on speculation about matters not shown in the record. *Green v. State*, 912 S.W.2d 189, 192 (Tex. Crim. App. 1995).

Similarly, the record also fails to show that a more thorough investigation would have uncovered any information beneficial to petitioner. Specifically, there is no evidence that anyone actually compelled petitioner to commit prostitution. Furthermore, even assuming someone did compel petitioner to commit the offense, this fact alone would not assure her immunity. Section 43.06 provides immunity to a compelled

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<sup>5</sup> Even if the police investigation did overlook material information (i.e., a compeller's identity), petitioner's due process rights were not violated since she had an alternative means of gaining information on the identity of her compeller, if any. *Trombetta*, 104 S.Ct. at 2534 (any error in the State's failure to preserve exculpatory evidence did not rise to constitutional dimensions since defendant had alternative means of demonstrating innocence). Namely, petitioner herself was the best source of information regarding whether someone compelled her to commit prostitution. The police should not be faulted for failing to uncover information already known to petitioner.

prostitute only if she is required to furnish evidence or testify against her compeller. TEX. PEN. CODE ANN. § 43.06(a),(b) (Vernon 2003). Therefore, if her compeller pled guilty or it was simply determined petitioner's testimony was not needed in her compeller's trial, petitioner would not receive immunity. As such, there is no evidence that further investigation would have benefitted petitioner and, therefore, it cannot be said that the level of investigation deprived her of a fair trial. Petitioner was not denied due process.

Petitioner's second ground for review is meritless and should be dismissed.

**CONCLUSION**

It is respectfully submitted that all things are regular and the judgment of the court of appeals should be upheld.

**PATRICIA R. LYKOS**

District Attorney  
Harris County, Texas

**DAN McCRORY**

Assistant District Attorney  
Harris County, Texas  
1201 Franklin, Suite 600  
Houston, Texas 77002  
(713) 755-5826  
TBC No. 13489950

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing instrument has been mailed to the following addresses:

Michael Choyke  
Attorney at Law  
Three Riverway, Suite 600  
Houston, Texas 77056

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

**DAN McCRORY**

Assistant District Attorney  
Harris County, Texas  
1201 Franklin, Suite 600  
Houston, Texas 77002  
(713) 755-5826  
TBC No. 13489950

Date: 9/9/2009