

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 REPLY BRIEF ON THE MERITS

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The State of Texas is falling short in its obligation to protect its most vulnerable citizens—its children. This past session, the Legislature recognized Texas’ shortcomings with respect to children subjected to human trafficking and sexual exploitation when it passed House Bill 4009:

Human trafficking is a modern day form of slavery Texas has 20 percent of the market in the United States, and Houston is currently the world’s largest center for human trafficking. . . .

The Texas Response to Human Trafficking by the office of the attorney general . . . indicate[s] that domestic victims are falling through the cracks. **The vast majority of domestic victims of human trafficking are minors; approximately 70 percent fall into the sex trade. Unfortunately, most of these children are criminalized and placed with Child Protective Services with the result that the child does not receive the necessary services and often falls back under the thumb of traffickers.**

House Comm. on Human Services, Bill Analysis, Tex. C.S.H.B. 4009, 81st Leg., R.S. (2009) (emphasis added). Through the Harris County District Attorney’s Office, the State’s response to this crisis is disturbing. Upon encountering a child on the streets engaging in the sex trade, the State’s solution is “placing [the child] 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.” (State’s Brief at 15) Any other response, the State argues, would be “absurd.” (*Id.*) This Court must step in to address how children who may be victims of sexual exploitation are to be treated by the State.

I. The Legislature did not intend to permit the State to bring charges of prostitution against children who cannot legally consent to sex.

The Legislature could not have intended to apply the offense of prostitution to all children under 14 through its blanket adoption of Penal Code offenses into the Juvenile Justice Code. *See* TEX. FAM. CODE § 51.03(a). Discerning the Legislature's intent is the Court's primary objective. *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004). The State implicitly concedes (and previously acknowledged) that even apparently plain language in a statute will not be applied if it would lead to absurd consequences the Legislature could not have intended. *See State v. Colyandro*, 233 S.W.3d 870, 877 (Tex. Crim. App. 2007).

A. Petitioner's construction of Family Code section 51.03 is the only one consistent with the Legislature's intent.

The State points to the recent enactment of House Bill 4009 in support of its argument that Family Code section 51.03 was intended to incorporate prostitution offenses against all children under 14. (State's Brief at 5) According to the State, the Legislature's amendment of Penal Code section 43.02 to create a defense for certain persons (victims of human trafficking offenses) without creating a defense for juveniles is evidence of the Legislature's intent not to exempt children under 14 from the statute's reach. (*Id.*) But the Penal Code does not apply to any person younger than 15. *See* TEX. PENAL CODE § 8.07(a). Therefore, the Legislature would have no reason to adopt such an amendment. It is perfectly reasonable to

assume the Legislature believed children under 14 were already exempt from any adjudication for prostitution.

The State counters that the Legislature must be presumed to have known of the lower court's opinion when it amended the statute, and its failure to "correct the intermediate court's alleged misunderstanding" somehow indicates that the court of appeals' opinion accurately reflects the Legislature's intent. (State's Brief at 5-6) This argument is meritless. First, the relevant statute being construed is not Penal Code section 43.02, which (as shown above) applies only to persons 15 or older, but Family Code section 51.03, which generally adopts Penal Code offenses into the Juvenile Justice Code. Because the Legislature did not amend or otherwise address section 51.03, the Court cannot presume that the Legislature agreed with the court of appeals' construction. Second, any presumption based on the Legislature's failure to amend a statute is limited to statutes that have been "interpreted by a **court of last resort** or given a longstanding construction by a proper administrative officer." *Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176 (Tex. 2004) (emphasis added). Here, the court of appeals' interpretation of section 51.03 appears to have been a question of first impression. Finally, should the Court engage in a presumption that the Legislature was aware of the lower court's opinion, it should also presume the Legislature was aware that a petition for review was pending. Correcting an erroneous judgment from an intermediate court of appeals is properly the task of this Court, not the Legislature.

If anything, House Bill 4009 is further evidence of the legislative policy against “criminaliz[ing]” children in Petitioner’s position. The Legislature called for the creation of a committee to “evaluate alternatives to the juvenile justice system . . . for children who are accused of engaging in acts of prostitution.” Act of May 31, 2009, 81st Leg., R.S., § 4 (to be codified at TEX. HUM. RES. CODE § 141.056). That committee is charged with preparing a report that includes “recommendations for alternatives to the juvenile justice system for children who are accused of engaging in acts of prostitution.” *Id.* The Legislature recognized a problem with all children (including those older than 14) being “accused” of engaging in acts of prostitution. Notably, however, this act makes no reference to whether children under 14 are, in fact, subject to prosecution and adjudication.¹

B. The State’s proposed construction leads to absurd results not intended by the Legislature.

The State contends that “[t]here can be no blanket assertion that a 13-year-old individual is incapable of providing legally-effective consent.” (State’s Brief at 8) Yet that is precisely what the Court of Criminal Appeals did based on its reading of Penal Code section 22.011(a)(2). In *May v. State*, that court stated unequivocally that “it is true that a child under fourteen cannot legally consent to sex.” 919 S.W.2d 422, 424 (Tex. Crim. App. 1996). At least two courts of appeals have made similar pronouncements. *See Wells v. State*, No. 05-97-01750-CR, 1999

¹ Unfortunately, neither the creation of the committee nor the preparation of the report contemplated by House Bill 4009 is mandatory unless the Legislature makes a specific appropriation for that purpose. *See* Act of May 31, 2009, 81st Leg., R.S., § 11.

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”). By concluding that a child under 14 **can** legally consent to sex, the court of appeals’ opinion here directly conflicts with these decisions.

The State repeatedly insists that the ability of a child under 14 to provide legally effective consent to sexual conduct is a “shifting concept” under the law. (State’s Brief at 7, 8, 9, 10) As its first example, however, the State relies on a section of the sexual-assault statute (Penal Code section 22.011) that it concedes has no application to a child under 14. (*See id.* at 7) Section 22.011(e) provides an affirmative defense from a charge of sexual assault with a child if the actor was no more than three years older than the child **and the victim was at least 14**. TEX. PENAL CODE § 22.011(e). Obviously, this statute says nothing about the ability of a child younger than 14 to give legally effective consent to sex.

The State next notes that section 22.011(a)(2) does not apply if the child is married to the alleged offender. (State’s Brief at 7-8) But a child under 16 years old cannot be married without first petitioning for a court order granting permission to marry, which the court may not grant unless it finds, after a hearing, that marriage in the child’s best interest. TEX. FAM. CODE §§ 2.101, 2.103; *see id.* § 2.102 (allowing 16- and 17-year-olds to obtain marriage licenses with parental consent). The State erroneously cites a San Antonio opinion for the proposition

that “juveniles in [P]etitioner’s age group may enter common-law [*i.e.* informal] marriage.” (State’s Brief at 7 (citing *Johnson v. State*, 103 S.W.3d 463, 463 (Tex. App.—San Antonio 2003, no pet.))) To the contrary, Family Code section 2.401(c) plainly states that “[a] person under 18 years of age may not . . . be a party to an informal marriage.” TEX. FAM. CODE § 2.401(c). Thus, the marriage exception applies only in those rare instances where a court has reviewed the child’s situation and concluded that marriage is in that child’s best interest. The creation of this extremely limited exception, applicable only after judicial review, in no way supports the State’s argument that legal consent to sex for children under 14 is a “shifting concept.”

Finally, the State relies on a provision in the Code of Criminal Procedure that permits a person convicted under section 22.011 to apply for an exemption from the duty to register as a sex offender. (State’s Brief at 8-9) Under article 62.301, a sex offender may apply for a registration exemption only if the convicting court has made an affirmative finding that (1) the defendant was younger than 19 and the victim or intended victim was at least 13, and (2) the conviction was based solely on the parties’ ages at the time of the offense. TEX. CODE CRIM. PROC. art. 62.301(b); *see also id.* art. 42.017. The court then has discretion to issue an order exempting the person from the registration requirement, but only if a preponderance of the evidence shows that (1) a registered sex offender treatment provider has determined that the exemption will not threaten public safety, and (2)

the defendant's conduct did not occur without the consent of the victim "as described by Section 22.011(b), Penal Code." *Id.* art. 62.301(d).

Contrary to the State's position, this provision does not indicate a legislative intent that children under 14 may legally consent to sex. Nowhere does article 62.301 require a finding that the victim actually consented—rather, it applies in situations where the offender's conduct does not fall within the statutory examples of nonconsensual sexual conduct as set forth in Penal Code section 22.011(b). As the Court of Criminal Appeals did in *May*, the Legislature may have recognized that a child's actions may constitute "consent" for some limited purpose, but that consent has no legal effect. *See May*, 919 S.W. 2d at 424 (allowing evidence of a child's "willing participation in prior sexual conduct" for purposes of a now-defunct promiscuity defense, but concluding that the child's consent has no legal effect). And as with the marriage exception to section 22.011, the exemption to registration applies only in cases where a court has reviewed the circumstances and concluded that the exemption is appropriate. *See TEX. CODE CRIM. PROC.* art. 62.301(d).

C. Public policy strongly favors Petitioner's construction.

Petitioner wholly agrees with the State that the Legislature's decision to make children under 14 legally incapable of consenting to sex furthers a reasonable interest in "protecting minor children of tender age." (State's Brief at 10) But the State contends that this interest simply does not apply to children under 14

allegedly committing acts of prostitution because the Legislature did not intend to protect “offenders.” (*Id.*) This argument, echoed by the court of appeals, puts the proverbial cart before the horse. The State must first assume that the Legislature intended to apply the prostitution statute to a child under 14, making her an “offender,” in order to conclude that the Legislature did not intend to protect a child under 14 who is, in the State’s view, an “offender.” Furthermore, this argument flies in the face of the Legislature’s recent creation of a committee to devise alternatives to “criminalizing” children who have been accused of engaging in acts of prostitution. Act of May 31, 2009, 81st Leg., R.S., § 4.

Finally, the State argues that Petitioner’s inability to give legally effective consent to sex is not implicated in this case because “[t]he prohibited conduct in which she engaged consisted of the agreement [to engage in a sex act], not a sex act requiring consent.” (State’s Brief at 11) But the very same conduct that constitutes the offense of prostitution—an agreement to engage in sex—is precisely the conduct the Legislature has determined a child under 14 is legally incapable of doing. The issue is not, as the State appears to argue, whether Petitioner had the legal capacity to engage in a sexual act. The issue is whether a child under 14 could “knowingly . . . agree[] to engage . . . in sexual conduct” when the Legislature has determined that such a child cannot legally consent to sex. *See* TEX. PENAL CODE § 43.02(a). The State makes the bizarre argument that the prostitution 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.” (State’s Brief at 12) How can a person knowingly agree to engage in an act that the person does not (and cannot) consent to? The State’s attempt to parse some difference between knowingly engaging in an act and consenting to an act speaks volumes of the absurd result created by the court of appeals’ opinion in this case.

D. The Court should reject the State’s misguided speculation about the alleged effects of Petitioner’s construction.

The State indulges in a series of hypotheticals designed to create the impression that Petitioner’s proposed construction would lead to absurd results. The State argues that an adult male could agree to pay a 13-year-old girl for sex and then claim that no offense occurred because the girl was incapable of consenting. (State’s Brief at 12) This argument makes no sense. By offering or agreeing to engage in sex with a child (or any other person) for a fee, the adult in the State’s hypothetical has committed an offense under section 43.02. Whether the *other* party consented (or even had the ability to consent) is irrelevant. Moreover, if the adult actually engages in a sexual act with the child, the State can additionally prosecute him or her for the commission of a sexual assault. *See* TEX. PENAL CODE § 22.021. The same would be true if both parties were under 14—while their legal inability to consent would preclude them from being prosecuted for prostitution based solely on an agreement to have sex, the State could still charge either or both with an offense for the actual act, *i.e.*, sexual assault.

Following the court of appeals' lead, the State argues that prohibiting criminal prosecution for juvenile prostitution would "render[] juveniles more vulnerable to exploitation" as "pimps would be encouraged to seek out juveniles." (State's Brief at 13) As noted in Petitioner's opening brief, this argument is rooted in the comments of a single New York family court judge speculating on what he believes could happen. (*Id.* (quoting *In re C.S.*, 591 N.Y.S.2d 691, 693 (N.Y. Fam. Ct. 1992)) The State puts forth no proof whatsoever that such a result will occur. To the contrary, Petitioner showed in her brief that (1) the Family Code provides law enforcement with ample means to take a child into custody and protect him or her from potential exploitation apart from juvenile prosecution as a prostitute, and (2) the Legislature has otherwise created strong disincentives, including significantly greater penalties and an easier standard of culpability, to prevent pimps from seeking to exploit children. (*See* Pet.'s Brief at 12-13) The State's attempt to justify its statutory construction should be rejected.

The State responds by asserting that Petitioner's time in the custody of the Department of Family and Protective Services "did not serve her well." (State's Brief at 14) The State contends that Petitioner will be better off "in the lock-down custody of the juvenile system where she will be confined." (*Id.* at 15) As a factual matter, this argument is flawed because there is no evidence in the record (nor could there be any) showing whether Petitioner's treatment in the juvenile justice system has served her any better. More importantly, however, the State's approach is inconsistent with *In re Winship*, in which the United States Supreme

Court cautioned against judicial intervention for the protection of a juvenile in the form of “subjecting the child to the stigma of a finding that he violated a criminal law.” 397 U.S. 358, 367 (1970). To the extent the State asserts that the current system is flawed, the proper solution is to fix TDFPS, not to brand victims of a failed system as prostitutes and juvenile offenders. Unfortunately, the State has selected the easier path of criminalizing these children’s behavior. The Court should grant the petition and hold that this shift in focus is inconsistent with the Legislature’s intent.

II. The State denied Petitioner’s right to due process by proceeding against Petitioner without conducting any investigation.

The State’s response to Petitioner’s due-process argument consists primarily of a boilerplate discussion of the State’s obligation to investigate in a typical criminal case. (*See* State’s Brief at 16-19)² However, to determine whether the State’s investigation violated Petitioner’s right to due process and fundamental fairness, the courts must review “the totality of the circumstances.” *Ex parte Brandley*, 781 S.W.2d 886, 892 (Tex. Crim. App. 1989). To determine what constitutes “fundamental fairness” in this situation, the Court must assess the policy interests that are at stake. *See Lassiter v. Dep’t of Social Servs. of Durham County*, 452 U.S. 18, 25 (1981).

² With one exception (discussed *supra* at p. 14), none of the State’s cited cases deal with juveniles, and none deal with facts raising a suspicion of child abuse.

A. Texas law and public policy require an investigation under these facts.

In contrast to those cases cited in the State’s brief, the obligation to investigate in this case is mandated by statute and public policy. The Family Code imposes an affirmative obligation on every person to report facts that constitute cause to believe a child may be a victim of abuse. *See* TEX. FAM. CODE § 261.101. The State does not dispute Petitioner’s showing that the known facts in the record established cause to believe that someone else was causing her to prostitute herself. *See* TEX. FAM. CODE § 261.001(1) (defining “abuse” to include sexual assault and compelling or encouraging prostitution). (*See* Pet.’s Brief at 17-20 (detailing evidence in the record supporting a belief that Petitioner may have been a victim of sexual exploitation)) Yet the State conducted no investigation to determine whether Petitioner was being caused by any means to commit the acts of prostitution.

Moreover, the Legislature expressed a clear desire to pursue those who cause children to commit prostitution by (1) making it an offense to cause “by any means” a child to commit acts of prostitution and (2) providing immunity to those who testify against the person “compelling” prostitution. *See* TEX. PENAL CODE §§ 43.05, 43.06. The State alone has the power to provide immunity to victims of sexual exploitation from prosecution in return for testimony against the compellers. Petitioner and others like her have no opportunity to assert immunity—its application rests entirely in the hands of the State. In light of the complete

discretion given to the State, and in light of Texas' clear policy in favor of both investigating allegations of abuse and going after those who are promoting or compelling acts of prostitution, minimal due process and fundamental fairness require that the State conduct **some** investigation to determine whether a child is a victim of sexual exploitation or abuse before branding her an offender.

B. The State may not shift the burden to a child to prove her sexual exploitation.

The State also argues that its failure to investigate did not rise to the level of a due-process violation because “[P]etitioner herself was the best source of information regarding whether someone compelled her to commit prostitution.” (State’s Brief at 19 n.5) This argument contradicts the well-settled principle that a child younger than 17 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). The State’s improper attempt to shift the burden is consistent with its unfortunate approach of taking the easy road by treating these children as offenders rather than as victims of sexual exploitation deserving protection.

Finally, the State argues that the record is silent regarding the extent of the police investigation. (State’s Brief at 19) However, 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 that Petitioner, a 13-year-old, was living

with and having sex with a 32-year-old boyfriend and had acquired several STDs and had abortions before her arrest 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). Under these circumstances, the Court should not presume that an investigation occurred.

C. The State’s failure to investigate its discovered suspicions of child abuse is not an isolated incident.

Moreover, this case is not an isolated incident. The State cites a recent decision from the Fourteenth Court of Appeals for the proposition that a child’s due process rights “do not require [the] State to investigate whether someone compelled her.” (State’s Brief at 18 (citing *In the Matter of B.D.S.D.*, No. 14-07-01079-CV, 2009 Tex. App. LEXIS 4683, at *24 (Tex. App.—Houston [14th Dist.] June 18, 2009, pet. filed)))³ In that case, the State affirmatively stated that it had no duty to investigate whether a child was being caused by any means to engage in acts of prostitution. The Court should not rely on a faulty presumption to avoid addressing an issue whose significance extends beyond this case.

³ A petition for review in *B.D.S.D.* is currently pending before the Court under case number 09-0659.

D. The State's arbitrary decision to prosecute Petitioner without conducting an investigation violates her due-process rights.

The State acknowledges the significant discretion and power it has been granted under section 43.06 and suggests that a child who has been caused by any means to commit acts of prostitution is only entitled to immunity from prosecution if the State decides it needs that child for trial. (State's Brief at 19-20) As a factual matter, the State's position is incorrect. The immunity required under section 43.06 extends not only to children who testify at trial, but also to those "furnishing evidence." TEX. PENAL CODE § 43.06. In addition, under the State's approach, the compeller's choice whether to go to trial would control the child's fate. Rather than protect the child from an adult compeller, it puts the child at his or her mercy. More importantly, however, the State's argument waters down the protections for potential victims of abuse mandated by the Legislature. In addition to contradicting Texas law and public policy, the State's arbitrary application of its authority offends fundamental principles of liberty and justice.

By refusing to investigate and, instead, prosecuting Petitioner, the State has violated her constitutional rights. Only the State has the power to investigate and protect children from sexual abuse. Only the State has the power to invoke the immunity provisions for a victim of sexual abuse who has been caused by any means to commit acts of prostitution. The Legislature could not have envisioned a situation where the State would simply blame the child and do no investigation whatsoever into potential sexual exploitation.

The State's total failure to investigate, though troubling in and of itself, is compounded by the fact that the State's action stigmatizes the child for the rest of her life. *Cf. Holgin v. State*, 480 S.W.2d 405, 408 (Tex. Crim. App. 1972) ("It has long been the rule in this State that a conviction for prostitution involves moral turpitude"). The delinquency finding resulting from the prostitution charge can be used as an enhancement if Petitioner is ever prosecuted for another crime. *See* TEX. FAM. CODE § 51.13 (stating an adjudication may be used in certain subsequent proceedings); TEX. CODE CRIM. PROC. art. 37.07, § 3 ("[E]vidence may be offered by the state . . . of an adjudication of delinquency based on a violation by the defendant of . . . a misdemeanor punishable by confinement in jail."). If the State is not interested in following Texas law and public policy investigating how a child came to be in a position to be arrested for prostitution, thus withholding any potential immunity under 43.06, then due process requires that the State not prosecute that child.

PRAYER

Petitioner respectfully requests that the Court 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,

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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 18th day of September, 2009.

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