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February 12, 2010

Via Certified Mail – RRR
7004 2890 0001 8377 6307
The Honorable Blake Hawthorne
Clerk, Supreme Court of Texas
201 West 14th Street, Room 104
Austin, Texas 78701

Re: No. 08-1044; In the Matter of B.W.; In the Supreme Court of Texas, Austin, Texas.

Dear Mr. Hawthorne:

On behalf of the Petitioner, B.W., I respectfully submit this letter to correct and clarify certain statements I made during oral argument that took place on January 20, 2010. Please forward this letter to the justices for their consideration.

I have watched the argument and I am embarrassed that I did not clearly respond to a statement made by Justice Hecht regarding the literal text of the relevant statutes during my rebuttal. I am concerned that my unclear words will adversely affect this Court's view of my client's case and the impact it will have on Petitioner and the other children who will be affected by this Court's decision. Counsel requests permission to clarify the answer to the Court.

During my rebuttal argument, Justice Hecht pointed out that the Texas statutes regarding sexual assault, Penal Code section 22.011, and aggravated sexual assault, Penal Code section 22.021, do not expressly state that a child under 14 is legally incapable of consenting to sex. I responded that the statute "specifically" says that a sexual assault on a child is without consent if the child is under 14. I should have clarified that, under these statutes, the Legislature equates sexual conduct without the other person's consent with sexual conduct with a child, through parallel subsections. See TEX. PENAL CODE §§ 22.011(a), 22.021(a)(1)¹. Moreover, there is no

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Penal Code 22.011. Sexual Assault

(a) A person commits an offense if the person:

(1) intentionally or knowingly:

(A) causes the penetration of the anus or sexual organ of another person by any means, *without that person's consent*;

(B) causes the penetration of the mouth of another person by the sexual organ of the actor, *without that person's consent*; or

(C) causes the sexual organ of another person, *without that person's consent*, to contact or penetrate ; or

(emphasis added).

(2) intentionally or knowingly:

(A) causes the penetration of the anus or sexual organ of a *child* by any means;

(B) causes the penetration of the mouth of a *child* by the sexual organ of the actor;

(C) causes the sexual organ of a *child* to contact or penetrate ...

defense whatsoever if the child is under 14. *Id.* §§ 22.011(e)(2)(A), 22.021(a)(2)(B). The only justification for treating sexual conduct with children under 14 as equivalent to non-consensual sex is that in the Legislature’s judgment, a child under 14 is legally incapable of consenting to sex.

Justice Wainwright then immediately noted that in *May v. State*, the Court of Criminal Appeals appeared to recognize that a child under 14, even though legally incapable of consenting to sex, may still engage in sexual conduct that was not involuntary or without permission. *See* 919 S.W.2d 422, 424 (Tex. Crim. App. 1996). However, the court reached this conclusion based on its attempt to apply a “literal interpretation” of a statute that made sex with children under 14 a strict-liability offense while at the same time providing a defense if the victim had previously “engaged promiscuously” in sexual conduct, with no limitation on the child’s age during the prior sexual conduct. As the Court knows, the Legislature has abolished the promiscuity defense.

I am honored and humbled to have argued before the Court and appreciate your letting me clarify these points that are important to the State’s jurisprudence.

Sincerely,

/s/ Ann Johnson

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cc: Via Certified Mail, RRR
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Penal Code 22.021. Aggravated Sexual Assault

(a) A person commits an offense:

(1) if the person:

(A) intentionally or knowingly:

- (i) causes the penetration of the anus or sexual organ of another person by any means, without that person’s consent;
- (ii) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person’s consent; or
- (iii) causes the sexual organ of another person, without that person’s consent, to contact or penetrate ... ; or (emphasis added).

(B) intentionally or knowingly:

- (i) causes the penetration of the anus or sexual organ of a child by any means;
- (ii) causes the penetration of the mouth of a child by the sexual organ of the actor;
- (iii) causes the sexual organ of a child to contact or penetrate...