

# NO. 09-0659

---

IN THE SUPREME COURT OF TEXAS

---

**IN THE MATTER OF B.D.S.D.**

---

On Appeal from the Court of Appeals  
For the Fourteenth Appellate District of Texas, Houston, Texas  
No. 14-07-01079-CV

---

**MOTION FOR REHEARING**

---

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

Ann E. Johnson  
State Bar No. 24032595  
JOHNSON LAW FIRM P.C.  
5000 Caroline  
Houston, Texas 77004  
(713) 523-5000  
(713) 523-8307 (fax)

**ATTORNEYS FOR PETITIONER,  
B.D.S.D.**

## INDEX OF AUTHORITIES

### Cases

<i>In re Gault</i> , 387 U.S. 1 (1967) .....	1, 2, 3
<i>In re Winship</i> , 397 U.S. 358 (1970) .....	1, 2, 3
<i>In the Matter of B.D.S.D.</i> , 289 S.W.3d 889 (Tex. App.—Houston [14th Dist.] 2009) .....	2
<i>In the Matter of B.W.</i> , 274 S.W.3d 179 (Tex. App.—Houston [1st Dist.] 2008, pet. granted).....	2
<i>Kent v. United States</i> , 383 U.S. 541 (1966) .....	1
<i>L.G.R. v. State</i> , 724 S.W.2d 775 (Tex. 1987).....	1
<i>Lassiter v. Dep’t of Social Servs. of Durham County</i> , 452 U.S. 18 (1981) .....	3
<i>United States v. Solerno</i> , 481 U.S. 739 (1987) .....	2

### Statutes

TEX. FAM. CODE § 261.001.....	4
TEX. FAM. CODE § 261.101.....	4
TEX. FAM. CODE § 261.103.....	4
TEX. FAM. CODE § 261.301.....	4
TEX. PENAL CODE § 43.06 .....	4

### Other Authorities

House Comm. on Human Services, Bill Analysis, Tex. C.S.H.B. 4009, 81 <sup>st</sup> Leg., R.S. (2009) .....	4
---	---

**POINT RELIED ON FOR REHEARING**

If left uncorrected, the appellate court's opinion will be used by prosecutors and courts to deny alleged juvenile offenders the full scope of protections to which they are entitled under the Constitution's Due Process Clause.

# NO. 09-0659

---

IN THE SUPREME COURT OF TEXAS

---

**IN THE MATTER OF B.D.S.D.**

---

On Appeal from the Court of Appeals  
For the Fourteenth Appellate District of Texas, Houston, Texas  
No. 14-07-01079-CV

---

## **MOTION FOR REHEARING**

---

TO THE HONORABLE SUPREME COURT OF TEXAS:

It is important to the jurisprudence of this State that this Court correct the lower court's erroneous conclusion that the Due Process Clause of the United States Constitution provides juveniles with only specific and limited procedural protections. The lower court's decision conflicts with the United States Supreme Court's and this Court's previous holdings that a juvenile proceeding resulting in a potential adjudication must apply "the essentials of due process and fair treatment." *In re Gault*, 387 U.S. 1, 30-31 (1967) (quoting *Kent v. United States*, 383 U.S. 541, 555 (1966)); *In re Winship*, 397 U.S. 358, 359 (1970); *see also 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.”) The Due Process Clause provides both substantive and procedural protections. *United States v. Solerno*, 481 U.S. 739, 746 (1987). “[I]t would be extraordinary if our Constitution did not require the procedural regularity *and the exercise of care implied in the phrase ‘due process.’* Under our Constitution, the condition of being a [child] does not justify a kangaroo court.” *Gault*, 387 U.S. at 27-28 (emphasis added).

The lower court, in reliance on the First Court of Appeals’ decision in *In the Matter of B.W.*, erroneously limited the due-process protections available to Petitioner solely to the specific procedural issues raised in *Gault* and *Winship*. The court stated that, “[u]nlike the juveniles in *In re Gault* and *In re Winship*, appellant does not allege, nor does the record reflect, that she was denied any of the applicable procedural safeguards that due process requires for adjudicating a juvenile.” *In the Matter of B.D.S.D.*, 289 S.W.3d 889, 899 (Tex. App.—Houston [14th Dist.] 2009) (citing *In the Matter of B.W.*, 274 S.W.3d 179, 184 (Tex. App.—Houston [1st Dist.] 2008, pet. granted), and noting that *B.W.* “distinguish[es] *In re Gault* and *In re Winship* as to a similar argument with similar facts”). The United States Supreme Court did not intend to limit the application of due process to only those procedures. The Court expressly stated in *Gault*: “We do not in this opinion consider the impact of these constitutional provisions [the Fourteenth Amendment and the Bill of Rights] upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile ‘delinquents.’” *Gault*, 387 U.S. at 13. The Court could have simply extended to juveniles the right against self-incrimination through the Fifth Amendment and the right

to counsel and confrontation through the Sixth Amendment. Instead, the Court broadly pronounced that any juvenile court adjudication “must measure up to the essentials of due process and fair treatment.” *Id.* at 30-31. Petitioner’s case presents the scenario that the United States Supreme Court envisioned when it extended an adult’s constitutional protections to juveniles through the flexible vehicle of due process: “[T]he Due Process Clause has a role to play. The problem is to ascertain the precise impact of the due process requirement upon such proceedings.” *Id.* at 13-14. *See also 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.”)

The lower court’s opinion ignored this promise of *Gault* by failing to address the intertwining effect of applicable Family and Penal Code provisions in determining if the State’s adjudication of Petitioner, a sixteen-year-old child, afforded her the essentials of due process and fair treatment. First, unlike the situations in *Gault* and *Winship*, there is no applicable procedural safeguard afforded to adults to be extended to juveniles. Petitioner’s complaint is that the State failed to extend a safeguard that Texas law uniquely affords *children* engaged in the very conduct at issue, *i.e.*, “child abuse.” Second, the court of appeals failed to recognize or address any of the interests at stake to determine whether “due process and fair treatment” were denied as a result of the State’s complete failure to conduct a statutorily required investigation into the circumstances behind the very conduct alleged. Such an investigation could potentially trigger

immunity from prosecution for the same conduct adjudicated here—immunity that Petitioner had no means of claiming for herself. *See* TEX. PENAL CODE § 43.06.

Petitioner was a child runaway discovered on the streets by an undercover officer when she agreed to sex for a fee with an adult. (CR 10; 1 RR Pet. Ex. 2 (Probation Report)) This fact pattern alone constitutes suspicion of child abuse under the Family Code. *See* TEX. FAM. CODE § 261.001(1)(E), (G) (defining “abuse” to include “sexual conduct harmful to a child’s mental, emotional, or physical welfare” and “compelling or encouraging the child to engage in sexual conduct as defined by Section 43.01, Penal Code”). Persons with knowledge of these facts are required to “immediately make a report,” *id.* § 261.101(a), and provide that report to “any local or state law enforcement agency” or other group specified by statute. *Id.* § 261.103(a). Law enforcement or the appropriate agency “*shall* make a prompt and thorough investigation of a report of child abuse.” *Id.* § 261.301(a) (emphasis added). “The primary purpose of the investigation shall be the protection of the child.” *Id.* § 261.301(d). The investigating authority “*shall* determine: (1) the nature, extent, and cause of the abuse or neglect; (2) the identity of the person responsible for the abuse or neglect; . . . (4) an evaluation of the parents or persons responsible for the care of the child; . . . (6) the relationship of the child to the persons responsible for the care, custody, or welfare of the child; and (7) all other pertinent data.” *Id.* § 261.301(e). No such investigation was conducted and no such determinations were made. Rather, the State blatantly refused to conduct any investigation and insisted it had no obligation to do so. (3 RR 11)

Human trafficking of children is a national crisis and Houston is the hub. *See* House Comm. on Human Services, Bill Analysis, Tex. C.S.H.B. 4009, 81st Leg., R.S. (2009). These are lost children. Regular citizens—teachers, doctors, neighbors, etc.—are frequently unable to report this type of abuse because these children are being harbored from the law-abiding society. It takes undercover officers to infiltrate this exploitative world in order to find them. It violates traditional notions of due process and fairness to suggest that a child is only entitled to an investigation if a report is made *to* law enforcement, but not if the information is obtained directly *by* law enforcement. The age of the child and the known facts control, not the method in which these facts are discovered.

### **PRAYER**

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

Respectfully submitted,

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

Ann E. Johnson

State Bar No. 24032595  
JOHNSON LAW FIRM P.C.  
5000 Caroline  
Houston, Texas 77004  
(713) 523-5000  
(713) 523-8307 (fax)

**ATTORNEYS FOR PETITIONER,  
B.D.S.D.**

**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 31st day of March, 2010.

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

*Counsel for the State of Texas*

/s/Michael Choyke  
Michael Choyke