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Supreme Court of Texas.

In the matter of B.W.

No. 08-1044.

January 20, 2010.

Oral Argument

Appearances: Michael A. Choyke, Wright Brown & Close, Houston, TX, for petitioner.

Annette E. Johnson, Johnson Law Firm, P.C., Bellaire, TX, for petitioner.

Daniel C. McCrory, Harris County District Attorney's Office, Austin, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett, Justice Eva Guzman.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 08-1044, in the matter of B.W.

MARSHALL: May it please the Court, Mr. Michael Choyke and Ms. Anne Johnson will present argument for the Petitioner. The Petitioner has reserved five minutes for rebuttal. Mr. Choyke will open with the first 8 minutes; Ms. Johnson will present the rebuttal.

ORAL ARGUMENT OF MICHAEL A. CHOYKE ON BEHALF OF THE PETITIONER

ATTORNEY MICHAEL A. CHOYKE: May it please the Court, good morning. The Petitioner in this case, B.W., was 13 years old when she was spotted trying to sell herself for money on the streets of Houston. She was first spotted by an undercover police officer and subsequently she was adjudicated as a juvenile for prostitution. In my time before the Court I plan to show how the Legislature did not and could not have intended for children under 14 to be charged and adjudicated for prostitution. My colleague, Anne Johnson will explain how the State's failure to conduct any investigation into B.W.'s

potential abuser violated her right to due process. While these two issues are distinct, they are bound together by one fundamental question, which is how should the State respond when it first encounters a child engaging in the sex trade? Because the State chose to view B.W. solely as an offender and pursue her prosecution, it was blinded to the realization that the Legislature never intended for children under 14 to have the offense of prostitution applied to them.

JUSTICE HARRIET O'NEILL: At what point in the process was it realized that she was 13? Because I think she presented herself as 19; isn't that right?

ATTORNEY MICHAEL A. CHOYKE: That's correct, Your Honor. It was very shortly after that she was booked into the adult system as a prostitute and they ran a birth date check and determined that her birth date was -- put her at the age of 13 at the time, and so they immediately dismissed the files, the file at that point and refilled in the juvenile system.

JUSTICE HARRIET O'NEILL: But that's generally when they find that out, when they bring them in?

ATTORNEY MICHAEL A. CHOYKE: That is my understanding, yes, Your Honor. This Court has repeatedly held, including at least two times within the year alone, that even seemingly plain language of a statute is not to be considered as legislative intent if it leads to absurd results. This Court's recent decision in *City of Waco vs. Lopez* I think is instructive on that. That's a case where the Court considered two statutes, the Commission of Human Rights Act and the Whistleblower Act, both which seemed on their face to apply to a worker's retaliatory discharge claim, and yet the Court concluded that the Legislature intended the CHRA to provide the exclusive remedy for such a claim.

JUSTICE DAVID M. MEDINA: If you read the literal language of the statute here, it seems to give the State authority to do what it did, and perhaps it is an absurd result. What is your response to the State's position that this is a way for it to protect children that are subject to this type of, this horrible act?

ATTORNEY MICHAEL A. CHOYKE: Well, Your Honor, the basic answer to that is that the ends don't justify a nonconstitutional means, and the fact that they believe that the -- the current system that's in place provides protections for children. The State, when they encounter somebody who is on the streets and obviously which falls within the Family Code's definition of child abuse, has the authority to take her into custody and to provide her with treatment, and to instead brand her as a prostitute and to put her into the essentially the criminal system despite it's label of civil system, is what *Gault* and *Winship* and the United States Supreme Court's decisions have said this Court should not do. Instead the Court should find a solution that doesn't allow, doesn't require them to do what the Legislature has said it shouldn't do. And the Legislature in enacting Chapter 22, the Sexual Assault Statutes, has very clearly laid out the fact that a child under the age of 14 is legally incapable of consenting to sex.

JUSTICE EVA GUZMAN: Is consent an element, if you will, of the adjudication of the delinquent conduct?

ATTORNEY MICHAEL A. CHOYKE: I believe it is. The Prostitution Statute speaks in terms of agreeing to engage in sexual conduct. I can determine no

distinction between agreeing to engage in sex and consenting to sex. You cannot agree to engage in a nonconsensual act, and so therefore when the Legislature considered age of consent within the Sexual Assault Statutes, they clearly set forth the idea that a child under the age of 14 cannot legally consent to sex, they cannot legally agree to sex. And that's what B.W. was charged with in this case.

JUSTICE DAVID M. MEDINA: How many other cases are there like this, if you know, coming out of like Harris County or other parts of the state? This just seems to be unusual.

ATTORNEY MICHAEL A. CHOYKE: Well, there is one coming out of Harris County because it's before the Court right now. We filed a Petition for Review In re BSD, which is pending before the Court right now. I'm not aware of the scope of the issue throughout the State of Texas, but it's clearly one where this Court needs to provide guidance to avoid other Courts following the lead of the Harris County District Attorney's Office, if they choose to do so. If this Court were to decide that the State's action in pursuing the child as an offender rather than providing her the protection that she's entitled to, I think other District Attorney's offices are going to follow that lead and are going to take the easier path of pursuing prosecutions against these individuals.

JUSTICE EVA GUZMAN: Is an adjudication as a juvenile that the child engaged in this conduct, does that necessarily foreclose getting the child the help that's necessary? In fact, isn't it that the Juvenile Courts often take a very active role in making sure that the children are redirected?

ATTORNEY MICHAEL A. CHOYKE: I don't have any doubt, Your Honor, that the Juvenile Courts takes steps to try to provide that assistance. The problem comes with you're treating the child as an offender, you're stigmatizing her with the offense of prostitution, which doesn't go away as soon as their charge is over. That's something that's going to stay with them for the rest of their life, and I think the U.S. Supreme Court has instructed us in Gault in Winship that you should not look to these -- you should not use the criminal system or the quasi criminal juvenile system as a means to effect this relief for the child.

CHIEF JUSTICE WALLACE B. JEFFERSON: I understand -- go ahead, Justice.

JUSTICE EVA GUZMAN: No, no, go ahead, Chief.

CHIEF JUSTICE WALLACE B. JEFFERSON: I understand your statutory argument, but the State says let's consider an adult who is engaged in the sex trade and is working with minors and telling them, "If you will do this for me for money, don't worry about it, you can't be prosecuted because you're a minor and the law won't let you be convicted or charged in a juvenile proceeding for that sort of conduct," and that tends to facilitate the sex trade in minors? And shouldn't we be concerned as a policy matter whether a ruling in your favor might increase the incidents of this sort of horrible activity?

ATTORNEY MICHAEL A. CHOYKE: Well, I think the Legislature has more than adequately covered that. First off, by making the punishment for promotion of prostitution with a child far more severe than it is for promotion of prostitution with an adult. Furthermore, it's easier to prove compelling prostitution when the subject of the act is a child, because there you only have to prove that they cause by any means the child to perform prostitution.

CHIEF JUSTICE WALLACE B. JEFFERSON: Right. But what's the disincentive to the child? Right now if a child thinks, "Okay, if I'm caught, I can be convicted and sent away." If that is in her mind or his mind, then they are less likely to agree to perform these sorts of acts, but if they believe and if the law holds that they can't be held accountable, then what's to stop them? I mean I'm talking about the incentive in terms of the child.

ATTORNEY MICHAEL A. CHOYKE: Well, I think, Your Honor, that the presumption underlying that question is that a child under 14 is legally capable of consenting to sex, and I think the Legislature has addressed that issue and has said that a child under the age of 14 cannot legally consent to sex. And so to hold that a child would be capable of making that sort of decision process would be contrary to the legislative intent as set out in Chapter 22.

JUSTICE HARRIET O'NEILL: To follow up on that, let me ask you, what if the child had been 16? What if the child was 16?

ATTORNEY MICHAEL A. CHOYKE: Yes. If the child had been 16, then I think this absurd result argument would not apply, but then you still have the due process issue which comes into play. And with the Court's permission, I'd like to hand the podium over to my colleague, Anne Johnson, and she's going to address the due process issue.

CHIEF JUSTICE WALLACE B. JEFFERSON: Let me first ask, Justice Guzman, did you have a question?

JUSTICE EVA GUZMAN: It's been answered, thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you. Ms. Johnson.

ATTORNEY ANNE E. JOHNSON: May it please the Court, it is an honor to represent B.W. in the significant impact her case will have on all children who are suffering from sexual exploitation. Chief Justice Jefferson, as you asked, this concern that pimps would be causing young children to commit prostitution to provide for a supply and a demand that's out there in Texas. The problem is this is already happening and it's happening all too often. The issue is this concern and violation of due process because as the studies show, the reality is there's a pimp that drives up and drops B.W. off on the corner on January 11th, and then that pimp is planning to come back and return and collect their prostitutes and their cash and go on about their business. The idea that by incarcerating B.W., shackling her at the ankles and the hands and confining her to a cell has cured this evil is ridiculous, because the reality is we've done nothing more but create a vacuum by which this pimp will go out and find another child to fill that void. We are doing nothing to stop the supply and the demand. The Texas --

JUSTICE PHIL JOHNSON: This child, wasn't she in the system before and she ran away and disappeared for a couple of years?

ATTORNEY ANNE E. JOHNSON: You're absolutely correct.

JUSTICE PHIL JOHNSON: So I mean we may have to go after the perpetrator some other way, but that kind of begs the question, what do we do about a child who says, "I'm not going to stay here. I'm running away, I'm crawling out the window at night"? That also is a problem that has to be dealt with; is it not?

ATTORNEY ANNE E. JOHNSON: It is, Your Honor, and there are two answers to that question. And the first, as the psychologist report recognized, and we all will recognize, this is a troubled child. But in the same that a child that gets sick and has a fever and a runny nose and has a severe cough, we don't get upset that the cough is getting worse and say, "Well, forget this child," we recognize we must step in and provide more relief. The fact that B.W. and her case in CPS wasn't treated properly and they didn't provide her the right protections, does not excuse the fact that we now criminalize this child under --

JUSTICE DAVID M. MEDINA: What are the right protections? What are the right protections for a child like this? Because no child in their right mind is going to participate in this type of activity.

ATTORNEY ANNE E. JOHNSON: That's correct. And, Your Honor, this child is part of an underground world in which we need law enforcement officers to discover them because they are living in a world where they are being told to watch out for the police. And what normally a child would be taught at a young age, that when you see an officer in blue, you run to them, but these children are part of a world where they're being told, "Don't run to them, and don't be out in the public where those of us could see them and report the abuse."

JUSTICE EVA GUZMAN: Don't the major police departments have sort of these juvenile divisions, devoting a large of their time to resolving the issues with juveniles in certain segments without resorting to adjudications under the Juvenile Code?

ATTORNEY ANNE E. JOHNSON: Your Honor, there does seem to be evidence that other counties are handling this differently, but as this Court knows from this case, that's not the way it was handled here. When this child was picked up by HPD undercover officer on January 11th, she essentially was placed on the prosecution train where they were seeking to catch and prosecute adult prostitutes, but despite their discovery that one of the passengers on the train was a 13-year-old mentally deficient child with undeniable evidence of sexual exploitation, no one to this day has pulled the emergency stop cord to say, "Wait, we're supposed to be handling this differently." The first issue, as co-counsel, Mr. Choyke explained is that she can't even get on this train because there's an age requirement and she doesn't even fit, but even she did, the Family Code requires that she immediately be taken off the train, Justice O'Neill, at the minute they discovery that she's a child, and they put her on a protection train where she is treated within the Family Court system that requires that law enforcement conduct an investigation into the allegations of child abuse, which this child has by definition statutorily-defined evidence of child abuse.

JUSTICE PAUL W. GREEN: Well, I'm not quite understanding this due process argument, because if she is arrested the same as she was in this case, is it your contention that she should then be released because then there's no crime, she's not age of consent, and so she doesn't go into the system, but due process somehow requires the State to then try to find this pimp as somehow satisfying her due process rights? Is that it, am I getting this wrong?

ATTORNEY ANNE E. JOHNSON: You're correct, and there are two answers. One is when the child is discovered and she's 13 and she cannot legally consent to sex, then the Family Code kicks in and the requirements under 26.104 allow

for law enforcement to immediately take possession of the child in recognizing that she's being subjected to sexual abuse. We're not saying that these children are left to just roam the streets and leave them alone.

JUSTICE PAUL W. GREEN: But her argument would be, "Well, I've committed no crime."

ATTORNEY ANNE E. JOHNSON: Well, this is not --

JUSTICE PAUL W. GREEN: "I think I'm being subjected to abuse, but I've committed no crime," and so she should be compelled to be placed into custody because of this alleged abuse against her?

ATTORNEY ANNE E. JOHNSON: There are two separate answers. One is she should not be charged with a crime under the Penal Code, she should be brought into the Family Court system through the provision of the Family Code that allows law enforcement to pick her up, so we can all be satisfied she's not remaining on the street. The due process claim is the fact that they didn't follow that procedure out of the Family Code, they brought her in under Section 43.02 and criminalized her within the juvenile justice system.

JUSTICE EVA GUZMAN: Let me ask you about the Family Code though. Chapter 261, are there any specific provisions that require that the police officers, the State to investigate this compulsion of prostitution? Can you point to anything in the Family Code that supports that argument?

ATTORNEY ANNE E. JOHNSON: Yes, Your Honor. Section 261.301 requires an investigation. Under Section D --

JUSTICE EVA GUZMAN: And specifically the compulsion of prostitution?

ATTORNEY ANNE E. JOHNSON: Not specifically --

JUSTICE EVA GUZMAN: Okay.

ATTORNEY ANNE E. JOHNSON: -- 43.05, but specifically the conduct that 43.02 tells us the child was committing, which was child abuse. Under Section 8, "The Department and law enforcement shall conduct an investigation." If they conduct that investigation, as required by law under the Family Code, and they discovered that the child has been caused by any means under Section 43.05 of the Penal Code, to commit the act, then she is immune from prosecution under 43.06. And it is for these reasons that we ask that this Court reverse and remand back to the trial court for an appropriate disposition.

JUSTICE HARRIET O'NEILL: Just a quick question. The due process violation, is it twofold? Are you claiming, one, it's the failure to investigate; and two is the failure to put her into the child protection system? Is there another portal she could have been put through that would have put her into foster care and returned her to Court supervision?

ATTORNEY ANNE E. JOHNSON: Yes, Your Honor. And Chief Justice Jefferson, I see that my time has expired.

CHIEF JUSTICE WALLACE B. JEFFERSON: You may answer that, and then Justice Wainwright has a question as well.

ATTORNEY ANNE E. JOHNSON: Thank you, Your Honor. Yes, Judge, the Family Code, this provision of Section 261.301, as previously stated, allows for the investigation, and there is the ability under the Family Code to immediately take the child in and provide her protection through that family vehicle of the protection train.

JUSTICE HARRIET O'NEILL: And I guess the reason I ask that question is the argument has been made that, you know, by keeping her in the juvenile justice system she will have counseling and protections, but that protection is already there in the Family Code?

ATTORNEY ANNE E. JOHNSON: Correct. Not only is that protection already there, but the Texas Legislature recently recognized in its legislative history that what we say we're doing of protection is not only in criminalizing, we're not giving them the services we say we are, and they're falling right back under the thumb of the pimp once released from the juvenile justice system.

JUSTICE DALE WAINWRIGHT: So to make sure I understand, to summarize your position, and correct me if this is not accurate. You're arguing that the Due Process Clause of the U.S. Constitution requires that the police take B.W. to obtain treatment under the Family Code through the juvenile justice system, and the Due Process Clause precludes prosecution of her for prostitution?

ATTORNEY ANNE E. JOHNSON: The answer again is if she is under the age of 14, then they may not prosecute.

JUSTICE DALE WAINWRIGHT: Which she is.

ATTORNEY ANNE E. JOHNSON: Which she is. And yes, due process still applies to all these other children suffering the sexual exploitation, that if the State does not conduct that investigation as required in the Family Code and treat them first on the protection train, then if they just merely let this prosecution keep going without considering the fact that the child may be compelled --

JUSTICE DALE WAINWRIGHT: Okay, let me rephrase it. In this case --

ATTORNEY ANNE E. JOHNSON: Yes, sir.

JUSTICE DALE WAINWRIGHT: -- your argument is that under the facts, all the facts of this case involving B.W., the Due Process Clause required the police to take her for treatment through the Family Code provisions and precludes prosecution of her under the Penal Code?

ATTORNEY ANNE E. JOHNSON: Yes, for both reasons, of the absurd result and her age, and the violation to comply with the investigation that may have led to the immunity from this prosecution. Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Ms. Johnson. The Court is ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. Dan McCrory will present argument for the Respondent.

JUSTICE DAVID M. MEDINA: Mr. McCrory, why is the prosecution of this child not an absurd result?

ORAL ARGUMENT OF DANIEL C. MCCRORY ON BEHALF OF THE RESPONDENT

ATTORNEY DANIEL C. MCCRORY: Why is it not an absurd result? Well, as you said earlier, Justice Medina, the plain language of the applicable statutes in this case do indicate that the Legislature did and intended for juveniles to be adjudicated for the offense of prostitution. And of course, the plain language comes from the two main statutes, the Adjudication Statute which is 51.03 in the Family Code, and then of course the Prostitution Statute, 43.02 in the Penal Code. Reading those two statutes in combination, the plain language of those statutes indicates that there was a legislative intent to -

JUSTICE HARRIET O'NEILL: Well, but the offense itself contains an element of agreement, and if the Legislature has said under 14 you can't agree, you can't legally consent --

ATTORNEY DANIEL C. MCCRORY: Correct.

JUSTICE HARRIET O'NEILL: -- then there's no offense.

ATTORNEY DANIEL C. MCCRORY: And that's the same thing I believe you were asking, Justice Medina, and I'm sorry it took me so long to get to an answer, but I wanted to give you a little backdrop about the plain language. Since this is a case of statutory construction, and in cases of statutory construction we are required first and foremost to follow the plain language of the statutes. But with all that said, why is this not an absurd result? The defendant's argument that it is an absurd result to prosecute or to adjudicate juveniles for the offense of prostitution all resides in the Aggravated Sexual Assault Statute, 22.021 of the Penal Code. And the defense argument is that that statute states that a juvenile under the age of 14 cannot consent to sex. However, and I disagree that that's actually what 22.021 says. Again, this is a statutory construction case, and the rules of statutory construction direct us to focus on the literal text of the statute. So applying the rules of construction to the statute upon which the defendant is relying, the Petitioner, the Aggravated Sexual Assault Statute, 22.021, if you look at the literal text of that statute, nowhere in that statute does it say that a child under the age of 14 cannot consent to sex. What it does say is that the consent of a child under the age of 14 is not relevant, does not serve as a defense for a sexual assault offender, but --

JUSTICE DAVID M. MEDINA: How does this interact or how is this different from a statutory rape situation, where an adult male has sexual relations with a girl under the age of 18 or 17 or whatever those numbers are? How is that any different?

ATTORNEY DANIEL C. MCCRORY: When you say, "How does this differ," do you mean "this" being the Prostitution Statute or?

JUSTICE DAVID M. MEDINA: Right. I mean because from what I understand, a female can't consent to sex under the age of 17 with a male over the age of -

ATTORNEY DANIEL C. MCCRORY: Well, again that goes back, I think that's the misperception here is when people say, "A juvenile cannot consent." Again returning to the literal language of what you call the Statutory Rape Statute, which is 22.01, 22.021, again nowhere does that statute say that juvenile cannot consent to sex. What the statute says is that a juvenile's

consent is not relevant to the defense of an adult offender, an adult sexual assault offender, but it does not say that a juvenile --

JUSTICE NATHAN L. HECHT: The May case does.

ATTORNEY DANIEL C. McCRORY: Well, I think the May case, which was cited by both parties, actually demonstrates what I'm maybe making a poor attempt of explaining. In May --

JUSTICE NATHAN L. HECHT: But it does say you can't legally consent.

ATTORNEY DANIEL C. McCRORY: Yes, sir, it does say that. It quote says that a juvenile under the age of 14 cannot consent to sex, and then it goes on to explain that statement. If you read like the next several sentences, I believe, I can't swear to it, but somewhere in that opinion it goes on to explain that the juvenile cannot consent -- let me back up. I think it's all contextual whether a juvenile can consent or not.

JUSTICE EVA GUZMAN: So a juvenile could agree, but it is legally ineffective? Any [inaudible] --

ATTORNEY DANIEL C. McCRORY: Correct. I mean we all know that juveniles in fact can consent to sex. You know, we know that 13-year-old children unfortunately nowadays are consenting to sex. And what May says --

JUSTICE NATHAN L. HECHT: But I understand that May sort of says that because they allow a promiscuity defense, before you couldn't do that. But I mean there's consent and there's consent. I mean at some point the law says, well, you may consent, a minor may consent to buy a car, but we're not going to let him consent because he doesn't know what he's doing.

ATTORNEY DANIEL C. McCRORY: We won't give it legal effect.

JUSTICE NATHAN L. HECHT: Well, not only that, but even though he may shake his head up and down and write his signature, he still doesn't know what he's doing.

ATTORNEY DANIEL C. McCRORY: Oh, because he lacks the faculties or maturity.

JUSTICE NATHAN L. HECHT: It's consent, but it's not really consent. I mean it's not the kind of consent that the law expects you to be bound by, and isn't that what 22.021 is saying? That, oh, yes, maybe you can consent in the sense that you say yes, but you're not consenting because you don't know what the "yes" means?

ATTORNEY DANIEL C. McCRORY: Actually, no, sir, I don't think May necessarily stands for that proposition. I think May actually demonstrates the point I'm again maybe poorly attempting to make is that I believe a juvenile under the age of 14, her ability to consent to sex depends on the circumstances, and I point to May for that proposition. In May, as we've already discussed, it says that a child cannot consent to sex under the age of 14 in the context of 22.021. In other words, in the context of a sexual offender's defense, it cannot serve as a defense. But that opinion goes on to determine or to examine whether in the context of the promiscuity defense a 13-year-old girl can engage in consensual sex, because the May opinion does say that promiscuity does contemplate consensual sex.

JUSTICE DAVID M. MEDINA: Well, you're [inaudible] it seems to be in a difficult situation. You find these young ladies or men that are being abused. Is there a policy reason to seek prosecution of these children? Other than what we've read in the briefs, which, you know, that can go some other way as well.

ATTORNEY DANIEL C. McCRORY: Yeah, and let me just say this isn't the kind of case that anybody on either side takes any pleasure in. You know, this isn't like a murder case where a prosecutor at the end of the day can feel good about removing a murderer from the streets, from the community. There's no winner on either side in this kind of case, as we've all said, it's a tragic situation. As far as how our office treats it --

JUSTICE DAVID M. MEDINA: I mean you said you look into the totality of circumstances. I mean this is a horrible situation.

ATTORNEY DANIEL C. McCRORY: Right.

JUSTICE DAVID M. MEDINA: She already had a couple abortions before this.

ATTORNEY DANIEL C. McCRORY: Yeah. Well, according to her self report. But, yeah, and I think there's something called prosecutorial discretion. I don't know how familiar -- you know, I know the judges across the hall are familiar with that and I imagine you all probably are too, but prosecutorial discretion is a pretty powerful concept. It's what gives prosecutors the discretion to charge people or decide what to charge them with. I mean it's so powerful that even capital murder cases, you know, we have discretion whether to seek the death penalty or to seek a life. You know, life and death decisions. In one county a prosecutor might seek death in a capital case, and in another --

JUSTICE HARRIET O'NEILL: But why in the world would we want to intake a 13-year-old through the door of juvenile justice as opposed to the door of child protection? I don't understand that.

ATTORNEY DANIEL C. McCRORY: Well, I think this case illustrates that, Judge. As one of Your Honors has already observed, when this girl was out, you know, being a 13-year-old prostitute on a morning, she was already in the custody of CPS at that time for an unrelated event.

JUSTICE HARRIET O'NEILL: Well, she had run away, and there's no -- I mean you talk about discretion, clearly the decision could have been made to find the perpetrator, to find the pimp, so to speak, because she made it clear she was living with a 32-year-old boyfriend. An attempt could have been made to find that person and prosecute him instead, and she could have been put back into the care of CPS, where she would have gotten counseling and not a record. Why in the world would a prosecutor want to put her through the criminal, sort of quasi criminal system?

ATTORNEY DANIEL C. McCRORY: Well, I mean I can't tell you what went through the mind of the person that was actually screening this case, but what I can tell you is, again, as far as, as best I know, there were two options, two main options here. One was to do what you just suggested, put her back in the CPS program; the other one to adjudicate her and have her enter the juvenile justice system.

JUSTICE EVA GUZMAN: Statistically is there any difference in the deterrence

rate between juveniles that are adjudicated for the offenses they actually commit versus juveniles where decisions are made not to adjudicate them and they are put back into a different process, a CPS process?

ATTORNEY DANIEL C. McCRORY: I wish I could answer that, but no, ma'am, I don't have any knowledge of any statistics.

JUSTICE EVA GUZMAN: Okay.

ATTORNEY DANIEL C. McCRORY: But again going back to what you're asking, given those two options, again it goes to prosecutorial discretion. We already know what happened when this juvenile was in the custody of CPS. She was on the streets being a prostitute. The other op...

JUSTICE HARRIET O'NEILL: I mean I hear you, but kids run away and they can be brought back to the system, so it doesn't strike me that a run-away from CPS automatically then is forever put into the juvenile justice system as a result.

ATTORNEY DANIEL C. McCRORY: Well, I think there can be cases, and this may be one of them, where if you have a person, a juvenile who is prone to run away, who has already demonstrated that she's prone to running away, that between those two alternatives, CPS and the juvenile justice system, the juvenile justice system --

JUSTICE HARRIET O'NEILL: There are methods of dealing with that in the child protection system as well. There are more secure facilities and that can be evaluated. But can you tell me, has anybody ever looked to see who this alleged boyfriend is?

ATTORNEY DANIEL C. McCRORY: The record is silent about that, I can't tell you.

JUSTICE HARRIET O'NEILL: Do you find that disturbing?

ATTORNEY DANIEL C. McCRORY: That the record is silent? I mean it's --

JUSTICE HARRIET O'NEILL: Yes.

ATTORNEY DANIEL C. McCRORY: Ma'am, yes, ma'am. I mean I would be -- as I said earlier, this is not the kind of case that anybody takes pleasure in. Ideally any time you find a 13-year-old girl prostituting herself, it ought to be investigated. I'm not saying there's a due process right to that, but I mean obviously everybody in society, they want -- you know, in all crimes, we want to catch the big fish. You know, in drug cases, you know we might be arresting a lot of street-level people, but we want the big fish. You know, it's the same in this case, you know, we would want, prefer to have the big fish, the pimp.

JUSTICE NATHAN L. HECHT: In this case, if the minor had been apprehended in a sexual act that she had solicited, then I guess the State's position is that she might be guilty of delinquent conduct because of prostitution and the man would be guilty of essentially rape; is that correct?

ATTORNEY DANIEL C. McCRORY: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: Is there another situation where you can be guilty

of rape when the woman is a prostitute and has essentially given consent?

ATTORNEY DANIEL C. McCORRY: Are you talking about an adult situation --

JUSTICE NATHAN L. HECHT: Yes.

ATTORNEY DANIEL C. McCORRY: -- where the prostitute is an adult?

JUSTICE NATHAN L. HECHT: Any other situation other than statutory rape?

ATTORNEY DANIEL C. McCORRY: Is there any time where the -- I don't believe so. Now, you do --

JUSTICE NATHAN L. HECHT: That seems to me the -- and there's a question about absurdity in the case, and it seems to me the one that troubles me the most is the one that there's this very odd situation that it's going to be legally rape no matter what --

ATTORNEY DANIEL C. McCORRY: Yes.

JUSTICE NATHAN L. HECHT: -- because the child is a minor, and yet she's going to also be adjudicated a prostitute?

ATTORNEY DANIEL C. McCORRY: She's simultaneously an offender and a victim arising pretty much --

JUSTICE NATHAN L. HECHT: And I'm wondering if there's any other --

ATTORNEY DANIEL C. McCORRY: -- out of the same act or continuing act.

JUSTICE NATHAN L. HECHT: Right. And is there any other situation like that?

ATTORNEY DANIEL C. McCORRY: No. Well, not that I know of. And I've given consideration to your observation, and I mean that does seem absurd, doesn't it?

JUSTICE NATHAN L. HECHT: Yeah, it does.

ATTORNEY DANIEL C. McCORRY: And the reason we get to that absurd situation is because what the -- to find that a juvenile can't consent, you have to engage in a legal fiction because the juvenile is in fact consenting. It's just a --

JUSTICE DALE WAINWRIGHT: At a certain age.

ATTORNEY DANIEL C. McCORRY: Correct.

JUSTICE HARRIET O'NEILL: Well, but the whole construct is a legal fiction when it says that a child under 14 can't consent. That's the statute [inaudible] --

ATTORNEY DANIEL C. McCORRY: It is a legal fiction because I mean juveniles, you know, 13-year-olds in our society they are consenting to sex I mean in fact. You know, take the legal jargon out of it, but they're --

JUSTICE HARRIET O'NEILL: Well, I mean we're here over the legal fiction; we're here over that protection that's afforded legally.

ATTORNEY DANIEL C. McCRORY: Pardon me?

JUSTICE HARRIET O'NEILL: We're here over the protection that the statute affords, so to say it's a legal fiction, well, it's one that the Legislature has created, so it's not like --

ATTORNEY DANIEL C. McCRORY: Well, again and that goes back to assuming that juveniles cannot consent. I don't want to regurgitate my argument from several moments ago, but as I said, if you read the literal language of 22.021 it actually does not say that, that juveniles can't consent. It's just that it's irrelevant in the context of a sexual offender's defense. But again --

JUSTICE DALE WAINWRIGHT: So to understand your statutory interpretation argument. The inability to consent in a strict liability crime, like statutory rape, you don't think that applies to this prostitution or applies outside the statutory rape context?

ATTORNEY DANIEL C. McCRORY: Yes, sir, that correctly states my position. And the reason is, that's my position that in the context of a sexual assault offender's defense, the adult who is raping a child, the juvenile under the age of 14, her consent has no relevance.

JUSTICE DALE WAINWRIGHT: So you're saying the Legislature did not intend broadly to say juveniles can never consent --

ATTORNEY DANIEL C. McCRORY: Exactly.

JUSTICE DALE WAINWRIGHT: -- in a criminal context.

ATTORNEY DANIEL C. McCRORY: That's the crux. I don't think they meant --

JUSTICE DALE WAINWRIGHT: That's it's limited to the statutory rape context?

ATTORNEY DANIEL C. McCRORY: Correct. I don't think that the Legislature intended to export this inability-to-consent concept out of 22.021 and apply it in toto to the remainder of the Penal Code provisions. And again that goes back to our discussion I believe of the May case. Again, that's the case where it says juveniles cannot consent, under the age of 14 cannot consent in the context of the offenders, the adult offender's defense. But then it went on to examine whether juveniles could consent in the context of the promiscuity defense, and it found that promiscuity does require consensual sex acts --

CHIEF JUSTICE WALLACE B. JEFFERSON: What's the low age for conviction? Could an eight --

ATTORNEY DANIEL C. McCRORY: Ten.

JUSTICE DALE WAINWRIGHT: Ten.

CHIEF JUSTICE WALLACE B. JEFFERSON: A ten year old?

ATTORNEY DANIEL C. McCRORY: Yes, sir.

CHIEF JUSTICE WALLACE B. JEFFERSON: So you could prosecute a 10-year-old like you did this 13-year old for prostitution?

ATTORNEY DANIEL C. McCRORY: We could. You know, and again it all goes back to prosecutorial discretion. Just anecdotally, you know, I know we get some cases where, you know, the police call up and the child has run away from home maybe for a day or two and has engaged in some conduct similar to this, and you know, we send them back home. You know, we don't get the police involved in every case.

JUSTICE DAVID M. MEDINA: So what happens in a situation like this if the State prevails? Are there going to be all these operations to go round up children under 14 and try them for these type of activities? I mean how does the State benefit from you prevailing?

ATTORNEY DANIEL C. McCRORY: Well, if we prevail in this case, and I'm not saying that we ought to adjudicate every juvenile who engages in prostitution, just the ones whose best interests are served by that. And like I said, in a case like B.W., who seems to run away from CPS custody, the only way we can ensure that she's not out on the street engaging in acts of prostitution is if she's in a lock-down facility of the juvenile justice system. I don't think that can be ensured through the CPS.

JUSTICE DAVID M. MEDINA: Well, Coolhand Luke kept running away and they kept locking him up and they eventually just shot him. I mean, you know, and that's what you're saying, just keep locking them up, and if they get out, you know find some other means to --

ATTORNEY DANIEL C. McCRORY: Well, and I'm not saying we just lock her up. You know, a person like B.W. obviously is in dire need of programs. You know, we need programs to address the problems that are causing this behavior, these underlying problems, whatever they are. Whether they be homelessness, poverty, domestic violence, whatever it is. Services are what are important to this girl, and she gets those services within the juvenile justice system. And by virtue of the fact that the juvenile justice system provides lock-down facilities, we ensure that she is actually attending those instead of running away and finding herself back on the street. I'm not saying the juvenile justice system is the best alternative for every juvenile prostitute that gets picked up off the street. You know, all we're -- I think --

JUSTICE NATHAN L. HECHT: Go ahead.

ATTORNEY DANIEL C. McCRORY: All I think is -- I don't think our issue today is whether the best thing, I think the issue today is whether what the State did in this case was permissible.

JUSTICE NATHAN L. HECHT: And on that subject, if we take May as what it says even though maybe it didn't mean it, that a minor can't consent, someone less than 14 cannot consent and say that legally that's what the statute says, they can't consent. Then the Chief Justice asked earlier, wouldn't that cause a problem because it provides no disincentive to a 13-year-old not to engage in this conduct? And the answer was, "Well, but there are enhanced penalties for the person that puts them in that position." What other problems do you see with law enforcement if a child under the age of 14 can't consent?

ATTORNEY DANIEL C. McCRORY: Well, quickly to answer that question, that there's already a disincentive for pimps not to engage in this conduct because compelling prostitution is a whatever degree felony, second degree I believe. But the answer to that position is that that position assumes that

the pimp gets caught. The only way he's going to get prosecuted or, you know, suffer those consequences is if he gets caught. But even if he doesn't get caught, he suffers a setback if his juvenile prostitute is removed from the street as opposed to, you know, just getting her nonadjudicated and finding herself falling back under his control. So, yeah, I think it would be ridiculous to hold that juveniles can go out on the street and commit the offense of prostitution, whether it be with a pimp or not, and not be subject to adjudication.

JUSTICE EVA GUZMAN: Well, given the child sex trade and everything that that entails in terms of the detrimental effects on children in society as a whole, this notion of a child consenting to anything under those circumstances is absurd.

ATTORNEY DANIEL C. McCRORY: Consenting to sex under those --

JUSTICE EVA GUZMAN: Under the control of a --

ATTORNEY DANIEL C. McCRORY: Consenting to sex in the context of a prostitution offer? You know, I guess I respectfully disagree, Your Honor. As my point has been made using May, I think when a person under the age of 14 may consent varies on the circumstances and --

JUSTICE EVA GUZMAN: Is there a difference between a child who is the victim of this organized trading in children versus a child who is simply misguided and maybe is out on the street for two days, when we look at whether that child can consent?

ATTORNEY DANIEL C. McCRORY: Is there a difference in whether those two children can both consent?

JUSTICE EVA GUZMAN: How we should approach that.

ATTORNEY DANIEL C. McCRORY: Well, how we should approach it certainly. Yeah, it should be approached differently. If you have somebody, if you have a juvenile who is under the control of a pimp, yeah, I think it's important to remove her from that influence, and the only way to do that may be to use the juvenile justice system. Because as we've said, this defendant -- or I'm sorry, this juvenile was already under the supervision of CPS at the time she was out doing all this stuff. Whereas, yeah, if it's a girl that's just, you know, being rebellious and she runs away from home and she's out two nights and finds herself doing things, then, yeah, we may examine that differently and realize that there's not some evil force out there that's behind her that we need to protect her from. She needs to get back home with her parents, maybe take advantage of the CPS services and the juvenile justice system doesn't need to get involved.

JUSTICE HARRIET O'NEILL: That really puts at a disadvantage someone who can't go back to their parents, or somebody who may have a mental deficiency. I mean that seems like a skewed way to view the problem.

ATTORNEY DANIEL C. McCRORY: Well, if that's the best way -- I mean I understand everybody is different and everybody has their own problems, and they may have mental problems or a bad family home and they don't have the support.

JUSTICE HARRIET O'NEILL: So we throw them into the juvenile facility?

ATTORNEY DANIEL C. McCRORY: Well, we say, "Throw them into the juvenile facility" as though it's -- you know, again we've got to remember, it's not the adult system. The purpose of the juvenile system is to rehabilitate and to remove the --

JUSTICE HARRIET O'NEILL: But it does give her a record, and this is a crime of moral turpitude, from what I understand.

ATTORNEY DANIEL C. McCRORY: That's correct.

JUSTICE HARRIET O'NEILL: So she can never be a lawyer, she can never -- I mean it's a significant impact on a child's life for something that somebody is obviously exploiting them under the age of 13. It's just --

ATTORNEY DANIEL C. McCRORY: Well, I don't know if you can say someone is obviously exploiting them. I mean I'm not going to be ridiculous and say --

JUSTICE HARRIET O'NEILL: Assume with me, if you will, that she was exploited. It does have a significant lifetime impact.

ATTORNEY DANIEL C. McCRORY: That's true.

JUSTICE HARRIET O'NEILL: Her record does.

ATTORNEY DANIEL C. McCRORY: But, you know, and I would imagine though that most juveniles who are engaged in whatever crimes, whether prostitution -- aside from prostitution, murder, robbery, you know, they probably are doing those things because they lack certain things at home or lack certain mental faculties, just like you described for the juvenile prostitute, and nevertheless, those people, those juveniles, they pay the consequences for their conduct.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel.

ATTORNEY DANIEL C. McCRORY: Thank you, Your Honors.

JUSTICE DON R. WILLETT: This may be more a co-counsel question, so forgive me, but aside from absurdity, what is the best sort of textual basis or argument as to why the Penal Code and the Family Code say a person under 14 cannot be prosecuted for prostitution?

REBUTTAL ARGUMENT OF ANNETTE E. JOHNSON ON BEHALF OF PETITIONER

ATTORNEY ANNE E. JOHNSON: As to why it says that? Justice Willett, the Penal Code specifically requires under Chapter 22 that a child under 14 cannot consent to sex. The May Court has recognized that.

JUSTICE NATHAN L. HECHT: Well, it doesn't really say that. It doesn't really say that.

ATTORNEY ANNE E. JOHNSON: The child can say, "I consent." The child can say, "I'm doing this because I love my boyfriend."

JUSTICE NATHAN L. HECHT: But I mean the statute doesn't say that.

ATTORNEY ANNE E. JOHNSON: That statute says it's without consent if the child is under the age of 14. That's specifically what the statute says. May recognizes that as have a line of cases. As in Wagoner, the Court --

JUSTICE DALE WAINWRIGHT: Actually, let's talk about May. May says, that's the Court of Criminal Appeals case for 1996, "It is true that a child under 14 cannot legally consent to sex because Subsection A(2) is a strict liability offense not requiring proof that the victim did not consent." As you know, that dealt with the promiscuity defense which was I believe abolished in 1994. But then May says, "The child's prior agreement to participate in sexual activity before age 14 was not legally consensual does not mean that it was involuntary or without permission." So May doesn't strike a broad approach that says consent is impossible for a 14-year-old across the board. May recognizes, at least in the Court of Criminal Appeals' opinion, that the conduct was still not involuntary or without permission.

ATTORNEY ANNE E. JOHNSON: Yes, Your Honor. The Court recognized that the child can say "I'm consenting," but that has no legal effect as far as a defense for the person that has sexually assaulted her.

JUSTICE DALE WAINWRIGHT: Or promiscuity.

ATTORNEY ANNE E. JOHNSON: Well, that promiscuity defense has been, as the Court recognized, repealed, and there's been a line of cases that have come since this time recognizing the significance of May and the fact that it continues to stand for the position that children under 14 cannot legally consent to sex. What may be more applicable here is Wagoner, where the Court recognized in a case of compelling prostitution, as we're dealing with in this case, it doesn't matter if the child is a willing participant, she cannot consent legally to the form of being held responsible, and the culpable party is the pimp that is exploiting her or causing her to commit the crime. Part of the problem with the State's response is they're saying, "I can't say that she's exploited." Justice O'Neil, that's the problem. This is a question that cannot go unanswered. The Family Law requires that when we discover a child under a suspicion of child abuse, and this one is not a suspicion, we know it, it's confirmed, and the fact that they didn't follow up with the investigation simply under some theory that the Family Code requires when a report is made to law enforcement, you shall investigate.

JUSTICE PAUL W. GREEN: What if there is no pimp? What if she's just doing this on her own?

ATTORNEY ANNE E. JOHNSON: Again we get back to under the age 14, she can't consent, she needs to be put into the Family Services area where she can receive the proper services, and she needs them. If a child is over the age of 14, again there's a separate consideration. And Petitioner would caution with this idea that there's a magic line at 14. Due process requires that we analyze this fact pattern under both the Family Code and the Penal Code. And even the Penal Code recognizes that a child over 14, there is still consideration of whether or not there is consent, and that's based on this Romeo and Juliet type of idea of being within three years. The Family Code specifically mandates that a child under 18 is a child, and an allegation of sexual exploitation calls for an investigation into the adult's around the circumstance, and that never happened here.

CHIEF JUSTICE WALLACE B. JEFFERSON: Where is B.W. right now? The judge put her under the custody of a juvenile probation officer. What does that mean?

ATTORNEY ANNE E. JOHNSON: Your Honor, she was placed in the custody of the chief juvenile probation officer under her probation. Answering the question of where she is now would require me to go outside the record, if the Court would allow me to answer that question.

CHIEF JUSTICE WALLACE B. JEFFERSON: You may.

ATTORNEY ANNE E. JOHNSON: I understand that she is civilly committed due to her mental retardation. This was a child that desperately needed our help at that time, and the idea that she didn't get it then, and as Mr. McCrory says, "Well, we made a mistake and somebody missed it in the screening process." The problem is is that train of prosecution never stops. It is still moving down the line. This is not an area of prosecutorial discretion. Someone had to have the ability and the strength to stand up and stop it, and that is why this Court must draw the line and recognize that a child, when you come into the system, must be investigated and protected and not prosecuted. The Petitioner prays this Court will restore that promise that the State is here to protect our children.

JUSTICE DALE WAINWRIGHT: Do you think the Legislature should have written the statutes differently?

CHIEF JUSTICE WALLACE B. JEFFERSON: Chief Justice Jefferson, I see my time has expired. Your honor, the --

JUSTICE DALE WAINWRIGHT: That expressly direct that children under 14 be handled under the Family Code as opposed to the Penal Code? That would have made it crystal clear, wouldn't it, if they had said something that was unambiguous about that?

ATTORNEY ANNE E. JOHNSON: Your Honor, the issue as Mr. Choyke explained, was that we've got this blanket adoption of the Penal Code into the juvenile system, and the Legislature couldn't anticipate that they would drag in 43.02, but not contemplate Chapter 22. The law is good law, it's not being enforced. The law is that children cannot consent under this age, and the law is the minute we discover a child in need of our protection, we immediately get them to the proper services. It is for these reasons we ask this Court reverse and remand for an appropriate disposition.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Ms. Johnson. The cause is submitted and the Court will take a brief recess.

[End of proceedings.]

In the matter of B.W.
2010 WL 412054 (Tex.) (Oral Argument)

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