

No. 18-8611

*IN THE
SUPREME COURT OF THE UNITED STATES*

ELICIA BAILEY, PETITIONER

vs.

JEREMY GASAWAY, RESPONDENT

On Petitioner for Writ of Certiorari
To the Texas Court of Appeals, Third District at Austin

Petition for Rehearing

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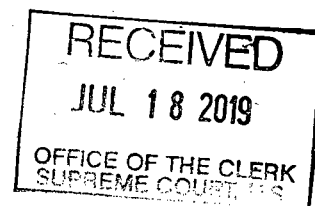


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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.1, I, Elicia Bailey, respectfully petition for rehearing of the Court's decision issued on June 3, 2019 (*Elicia Bailey v. Jeremy Gasaway*, No. 18-8611 (June 3, 2019)). I vehemently beseech the Court to grant this petition and reconsider this case. Pursuant to Supreme Court Rule 44.1, this petition for rehearing is filed within twenty-five days of this Court's decision on this case.

REASONS FOR GRANTING THE PETITION

- I. Does the application that challenges to lack of subject matter jurisdiction can be raised at any time and cannot be waived have limitations?

It has been well established in American Courts across this land that lack of subject-matter jurisdiction can be raised at any time and cannot be waived¹. It is further established that challenges to the constitutionality of statutes can also be raised for the first time on appeal when it amounts to an attack on a trial court's lack of subject matter jurisdiction.² Further, it has been well established that a person may challenge a facially unconstitutional statute for the first time on appeal³. When I filed

¹Quoting *Kontrick v. Ryan*, 540 U.S. 443 (2004) "[a] litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action." See also *Mansfield C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382. See also *Nelson v. Schlener*, 859 N.W. 2d 288 (2015) opining "defects in subject matter jurisdiction can be raised at any time and cannot be waived by the parties." See also *Pacific Nat'l Ins. Co. v. Transport Ins. Co.*, 341 F.2d 514, 516 (8th Cir.) holding "lack of subject matter jurisdiction cannot be waived by the parties or ignored by the court." See also *North Cent. F.S., Inc. v. Brown* 951 F. Supp. 1383, 1392 (N.D. Iowa 1996). See also *United States v. Cotton*, 535 U.S. 625, 631-32 (2002).

²See *United States v. Baucum*, 80 F.3d 539, 540 (D.C. Cir. 1996) opining "[i]f a challenge to the constitutionality of an underlying criminal statute always implicated subject-matter jurisdiction, then federal courts, having an obligation to address jurisdictional questions *sua sponte*, would have to assure themselves of a statutes validity as a threshold matter in any case."

³See *Karenev v. State*, 258 S.W.3d at 213 holding in part that "a defendant may raise a constitutional challenge to the facial validity of a statute for the first time on appeal."

my petition for writ of certiorari, I raised both, challenges to the facial unconstitutionality of Texas Family Code § 261.107(b)⁴ simultaneously with the trial court's lack of subject matter jurisdiction for the first time in this Court. Thus, the Court's denial waives of my challenges and does not align with well-established precedent.

- I. If Texas is the only state in U.S. jurisdiction that has enacted a law that infringes upon the fundamental right to raise one's child upon a family court finding of a criminal offense; is it not violations of the 14th Amendment's substantive due process and equal protection of the law clauses?

Article 1 § 10 of the Texas Constitution is derived from The Fifth Amendment of the United States Constitution providing that “no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury.”⁵ The standard for finding guilt, beyond a reasonable doubt, has remained the same throughout history

⁴Tex. Fam. Code § 261.107(b) states “[a] finding by a court in a suit affecting the parent-child relationship that a report made under this chapter before or during the suit was false or lacking factual foundation may be grounds for the court to modify an order providing for possession of or access to the child who was the subject of the report by restricting further access to the child by the person who made the report.”

⁵See *Harvey v. State*, 97 S.W.3d 162 (Tex. App. 2003) Harvey anonymously filed a report of child abuse on a former coworker after being terminated. After child protective services closed the case, they forwarded it to the local district attorney. This later resulted in a grand jury misdemeanor indictment against Harvey for making a false report of child abuse. After a mistrial, a “second jury found ... Harvey guilty of making a false report of child abuse and assessed the maximum sentence, confinement for one year and a \$4000 fine.” The 14th District Court of Appeals of Texas affirmed the judgment.

for criminal offenses⁶. How then is the state of Texas, only, authorized to enact a law that changes the subject matter jurisdiction of criminal offenses and the standard of guilt⁷?

Texas Family Code § 261.107(b) is unconstitutional; as it violates substantive due process and equal protection of the laws. If no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury; Is it not unconstitutional to hold a person to answer for a criminal offense in a court with limited jurisdiction over family law matters and without indictment?

While parents involved in custody disputes are held under the same law, should they file a report of abuse, others are not. There is no equality in this statute. In fact, out of the 52 U.S. states and the 5 U.S. territories, it is a criminal offense to fail to report child abuse within all borders of the U.S. 21 of the 57 do not address penalties for filing a false report, while 5 of the 57 address penalties under family

⁶See *Leland v. Oregon*, 343, U.S. 790, 802-803 (1952) stating "This notion [that the government must prove the elements of a criminal case beyond a reasonable doubt] basic in our law and rightly one of the boasts of a free society – is a requirement and safeguard of due process of law in the historic, procedural content of 'due process.'"

⁷See *Addington v. Texas*, 441, U.S. 418, 423 (1979); (quoting *In re Winship*, 397, U.S. 358, 370 (1970) Justice Harlan concurring) "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"

law. California⁸, Florida⁹, Louisiana¹⁰ and South Carolina¹¹ are the only other four states that address penalties for filing a false report under domestic law. However, none of the penalties involve or include separating the parent and the child, all penalties are civil, and that is monetary¹².

Texas is the only state that has a penalty that infringes upon the right for one to raise and have possession their children based on a finding of a criminal offense in a family law court. This is clearly a violation of the equal protection of the laws and substantive due process clauses of the 14th Amendment; as the law is only applied in Texas and it denies a person the right to be found guilty beyond a reasonable doubt before infringing upon what is considered life, liberty and/or property.

This case arose with respondent filing an affidavit alleging I filed a false report of child abuse against him. Before making a determination that the report

⁸In California Family Code, allegations of a false report of child abuse are investigated by local law enforcement and/or the local welfare services agency and results are reported to the court before a family court makes a finding that a person made a false report.

⁹In Florida Proceeding Relating to Children, a department may discontinue investigation and refer a report to the local law enforcement agency if they find during their investigation that a report was false. Local law enforcement must first find sufficient evidence for prosecution. No civil liability concerning the parent and the child is imposed.

¹⁰Under Louisiana Children's Code a civil penalty of no more than \$500 or imprisonment for no more than 6 months or both penalties may be applied to a person who is found to have filed a false report of child abuse.

¹¹Under South Carolina Children's Code, a family court may find by probable cause or conviction that a report of child abuse was false and impose monetary civil penalties for recovery of civil costs and attorney's fees.

¹²Texas Family Code § 153.013(a) If a party to a pending suit affecting the parent-child relationship makes a report alleging child abuse by another party to the suit that the reporting party knows lacks factual foundation, the court shall deem the report to be a knowingly false report. (b) Evidence of a false report of child abuse is admissible in a suit between the involved parties regarding the terms of conservatorship of a child. (c) If the court makes a finding under Subsection (a), the court shall impose a civil penalty not to exceed \$500.

was false, the trial court should have referred the case to the local law enforcement agency, since the allegation involved a criminal offense¹³. If a person, besides myself would have filed a report of abuse on respondent and that person was subsequently accused of filing a false report, their alleged criminal offense would have been tried in a criminal court and their guilt would have had to be proven beyond a reasonable doubt to support a conviction. Even if found guilty beyond a reasonable doubt in a criminal court, that person would not risk the stigma of indefinite termination of their parental rights of possession and access to their children.

See *Harvey v. State*. Today, as it pertains to her case, Harvey is a free woman who, if any children at all, has no stigma that impedes her from being an integral part of their lives and raising them. Because the report she filed did not involve a child of her own, she was not affected by section 261.107(b) of the Texas Family Code, yet, she was found guilty of filing a false report of child abuse beyond a reasonable doubt in a criminal court.

If Harvey has children, she has already been found guilty of filing a false report of child abuse, but her conviction did not affect her ability to raise and maintain possession of her children because the finding of guilt was not in a family

¹³See *Curry v. Wilson*, 853 S.W.2d, 43 (Tex. Crim. App. 1993) opining “[d]isputes which arise over the enforcement of statutes governed by the Texas Code of Criminal Procedure, and which arise as a result of or incident to a criminal prosecution, are criminal law matters.”

law court. How then is there any equality in restricting a parent's access to their own children upon a finding of guilt in a civil court but there is no such penalty for people who are found guilty in a criminal court for the same criminal offense¹⁴.

While the actions, if true and proven, are the same, the penalties are far harsher if there is a finding of guilt in a family law court as opposed to a criminal law court; as they interfere with the bonding of parent-child relationships¹⁵.

The Sixth and Fourteenth Amendments of the U.S. Constitution reiterate the mandatory requirements for due process. If a person is held to answer for a criminal offense in a family court have not that person's right to substantive due process been violated? As family courts do not have jurisdiction over matters that involve criminal offenses¹⁶ but, in this case, and as prescribed by local law, the trial court has jurisdiction over family law matters and matters of the justice court¹⁷. Should not all persons accused of committing a criminal offense, as defined as such¹⁸, be afforded

¹⁴See *In re Debs*, 158 U.S. 564 (1895) holding that "[a]n assault with intent to kill may be punished criminally, under an indictment therefor, or will support a civil action for damages, and the same is true of all other offences which cause injury to person or property."

¹⁵See *Allen v City of Sacramento*, 183 Cal. Rptr. 3d 654, 673 (Cal. Ct. App. 2015) holding "equal protection is violated if the law is applied in a manner that discriminates against a particular group."

¹⁶See *Id In re Debs* holding that "a chancellor has no criminal jurisdiction."

¹⁷Texas Government Code Sec. 25.2482(a) In addition to the jurisdiction provided by Section 25.0003 and other law, a county court at law in Williamson County has concurrent jurisdiction with the district court in family law cases and proceedings. (b) A county court at law has concurrent jurisdiction with the justice court in all criminal matters prescribed by law for justice courts. This subsection does not deny the right of appeal to a county court at law from a justice court in cases in which the right of appeal to the county court exists.

¹⁸Texas Penal Code § 37.08 (a) A person commits an offense if, with intent to deceive, he knowingly makes a false statement that is material to a criminal investigation and makes the statement to: (1) a peace officer or federal special investigator conducting the investigations; or (2) any employee of a law enforcement agency that is authorized by the agency to conduct the investigation and that the actor knows is conducting the investigation. (c) An offense under this section is a Class B misdemeanor.

due process and innocent until proven guilty beyond a reasonable doubt in a criminal court when life, liberty or property is at stake?

On multiple occasions this Court has opined that the right to raise one's child is so fundamental that interference must be proven that the parent or parents whose interests is/are at stake are unfit, at least by clear and convincing evidence¹⁹.

Before, I filed the report of sexual abuse on respondent, I was never accused or deemed to be an unfit parent. Should not clear and convincing evidence show a history of unfitness or is it plausible to assume that a person suddenly becomes an unfit parent only after they file a report of child abuse?

There are only two instances in which Tex. Fam. Code § 261.107(b) has arisen in appellate court history, one being this case, and the other being *In re A.K.M.*, No. 09-12-00464-CV (Tex. App. Feb. 27, 2014). But even in the case of *In re A.K.M.* the trial court made reasonable efforts to make contact with and interview the detectives and the child who allegedly made an outcry of abuse before making a determination of whether the report filed was false. That is, the court made its finding by at least clear and convincing evidence. In this case, the trial made no such efforts. Nor did the trial court have even a speck of evidence to

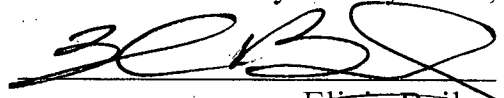
¹⁹See *Santosky v. Kramer*, 455 U.S. 745 (1982) holding '[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence. A "clear and convincing evidence" standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process.

support its finding that I filed a false report of child abuse. In fact, the evidence leaned heavily on the contrary.

Conclusion and Prayer

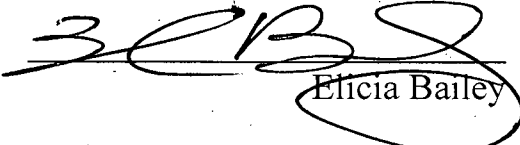
What is written on paper can defame and assassinate a person's character while being completely inaccurate. It can create the illusion or appearance that a person is someone they are not. It is systemic discrimination as Texas Family Code § 261.107(b) is. No human being should suffer the humiliation of being labeled a perjurer without the allegation, at the very least, being proven beyond a reasonable doubt in a criminal court. Further, no human being should ever suffer the stigma of losing access to their children, especially upon a finding of a guilt of a criminal offense, but in a civil court. The trial court found that the report I filed was false without evidence to support its finding. Thus, the standard used to make the finding was even lesser than that of the lowest standard, preponderance of the evidence. What is worse is that, because of erroneous findings, many child victims will remain in the custody of their abusers without protection that is due under the color of law if this law remains in effect. I, Elicia Bailey, respectfully request that this Court grant this petition for rehearing.

Respectfully Submitted on this 15th Day of July 2019,


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CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay. The grounds are limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented.



Elicia Bailey