

No. 16-0468

IN THE SUPREME COURT OF TEXAS

In the Matter of J.G.

Petitioner

Amicus Brief

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ISSUES PRESENTED

Did the court of appeals err in holding that the criminal court lacked jurisdiction over J.G. such that its prior judgment was void and a nullity, and therefore no adjudication of the alleged offense had been made which would have precluded re-certification of J.G. under §54.02(j) of the Family Code?

Did the court of appeals err in holding that violating the statutory standards for certification applicable to J.G. after remand by considering factors the statute did not authorize the juvenile court to consider, saves the application of §54.02(j) of the Family Code from violating J.G.'s due process rights?

Did the court of appeals err in holding that §54.02(j) is not an unconstitutional ex post facto law and was not applied unconstitutionally in this case, when the application of §54.02(j) after remand makes it easier for the State to convict J.G.?

To the Honorable Justices of the Texas Supreme Court,

This brief is tendered on behalf of Cameron Moon and the undersigned counsel. No fee has been paid or is to be paid for preparing this brief.

INTEREST OF AMICI CURIAE

Amicus curiae Cameron Moon has an interest in the present case because of certain parallels between his own case and this one.

Cameron was certified to be tried as an adult in December 2008, when he was 16 years old. At that time, the Family Code and Code of Criminal Procedure barred Cameron from an immediate appeal of his certification. Unable to afford bail, Cameron was transferred to adult jail facilities, where he was kept in solitary confinement until he turned 17 and was placed with the rest of the adult population. Cameron was later tried and sentenced to 30 years in prison. The undersigned counsel, amici here, represented Cameron in the appeal of his certification and criminal conviction on a pro bono basis. In July 2013, the First Court of Appeals held that Cameron had been wrongly certified as an adult because the State failed to introduce legally or factually sufficient evidence on certain factors the juvenile court was required to consider in order to certify Cameron as an adult under § 54.02(a) and (f) of the Family Code. *Moon v. State*, 410 S.W.3d 366 (Tex. App. -- Houston [1st Dist.] 2013), *aff'd*, 451 S.W.3d 28 (Tex. Crim. App. 2014).

In December 2014, the Court of Criminal Appeals not only affirmed the First Court's ruling that the State failed to introduce sufficient evidence, but also held that Cameron's certification order was defective for failing to include fact findings, and that certain bases for certification relied on by the juvenile court were "misguided." *Moon v. State*, 451 S.W.3d 28, 49, 50, n.87 (Tex. Crim. App. 2014). J.G.'s original certification was reversed based largely on the Court of Criminal Appeals' decision in *Moon*. See *Guerrero v. State*, 471 S.W.3d 1 (Tex. App.-Houston [14th Dist.] 2014, no pet.).

Both Cameron Moon and J.G. were subsequently recertified as adults under § 54.02(j) of the Family Code. Cameron's recertification, however, took place shortly before the effective date of the statute restoring a juvenile's right to an immediate appeal of a certification order. Thus, although he cannot appeal his § 54.02(j) certification until and unless he is convicted a second time, this Court's decision in this case could later affect Cameron.

While there are obvious parallels between the two cases, there are also important differences such that this Court should be careful not to paint with too broad a brush. For example, the reversal of Cameron's original certification under §§ 54.02(a) and (f) was based on the State's failure to present evidence. Had the juvenile court made the correct ruling based on the record evidence, Cameron would never have been certified because the State is not permitted to appeal the

denial of a certification order. *See* Tex. Fam. Code § 56.01(c)(1)(A) (appeal of § 54.02 transfer may be taken “by or on behalf of a child”). In contrast, the reversal of J.G.’s original certification under §§ 54.02(a) and (f) was not based on a failure to present evidence, but on the failure of the juvenile court’s order to include the appropriate findings supporting certification. *See Guerrero v. State*, 471 S.W.3d at 4. This difference, among others, bears on issues such as the State’s lack of diligence in connection with the original certification proceeding (which is more than simply a temporal issue) and the State’s failure to afford a juvenile the process that was due.

ARGUMENT

I. The Criminal Court Did Not Lack Jurisdiction Over J.G., and Its Adjudication Was Not Void or a Nullity.

The court of appeals correctly noted that “Section 54.02(j) also requires the juvenile court to find, before it may waive its jurisdiction, that ‘no adjudication concerning the alleged offense has been made or no adjudication hearing concerning the offense has been conducted.’ Tex. Fam. Code Ann. § 54.02(j)(3).” *In the Matter of J.G.*, 495 S.W.3d 354, 364 (Tex. App. – Houston [1st Dist.] 2016, pet. filed). It is undisputed that after the juvenile court waived jurisdiction the first time and transferred J.G. to district court, he pleaded guilty to aggravated robbery, was convicted, sentenced, and imprisoned until the juvenile court’s certification order was overturned. Given these facts, there was an “adjudication concerning

the alleged offense” as a matter of law. *McNew v. State*, 608 S.W.2d 166, 171-72 (Tex. Crim. App. 1978) (holding that “conviction” always and necessarily involves “adjudication of guilt” regardless of context); *Woods v. State*, 532 S.W.2d 608 (Tex. Crim. App. 1976) (conviction is adjudication of guilt plus assessment of punishment).

Despite these undisputed facts, the court of appeals held there was no “adjudication” that precluded certification under §54.02(j). The court’s sole basis for that ruling was its erroneous conclusion that the criminal court *never* acquired jurisdiction, and its judgment was therefore void and a nullity. *In the Matter of J.G.*, 495 S.W.3d at 373. That error, in turn, was based on the court of appeals’ failure to distinguish between the established concepts of void and voidable jurisdiction.

To be sure, in J.G.’s first appeal, the district court was ultimately divested of the jurisdiction it acquired through an erroneous transfer but, contrary to the court of appeals’ conclusion, the district court did in fact acquire jurisdiction to convict J.G. Accordingly, there was an “adjudication concerning the alleged offense” as a matter of law.

A. The district court had jurisdiction to adjudicate the alleged offense and did so.

This Court recently discussed the distinctions between void and voidable judgments:

It is well settled that a litigant may attack a void judgment directly or collaterally, but a voidable judgment may only be attacked directly. A direct attack—such as an appeal, a motion for new trial, or a bill of review—attempts to correct, amend, modify or vacate a judgment and must be brought within a definite time period after the judgment’s rendition. A void judgment, on the other hand, can be collaterally attacked at any time. A collateral attack seeks to avoid the binding effect of a judgment in order to obtain specific relief that the judgment currently impedes. After the time to bring a direct attack has expired, a litigant may only attack a judgment collaterally.

PNS Stores, Inc. v. Rivera, 379 S.W.3d 267 (Tex. 2012).¹ A judgment that is merely voidable, as opposed to void, is not and cannot be a nullity.

The Court of Criminal Appeals has identified four instances where a criminal conviction can be void, rather than merely voidable: (1) the charging instrument does not satisfy the constitutional requisites; (2) the trial court lacks subject matter jurisdiction; (3) the record does not contain evidence to support the conviction; and (4) an indigent defendant is not provided appointed counsel and did not waive his right to counsel. The court noted that while the list was not exhaustive, it was “nearly so.” *Nix v. State*, 65 S.W.3d 664, 668 (Tex. Crim. App. 2001). None of these circumstances exists here.

¹ See *In the Interest of M.L.G.J.*, No. 14–14–00800–CV, 2015 WL 1402652, * 3 (Tex. App. – Houston [14th Dist.] March 24, 2015) (“A judgment is ‘voidable’ when rendered contrary to a statute, constitutional provision or rule, *but it is not* ‘void’ for lack of jurisdiction.”) (emphasis added). See also *Hoist Liftruck Mfg., Inc. v. Carruth–Doggett, Inc. d/b/a Toyota Lift of Houston and Toyota Lift of South Texas*, No. 14–15–00139–CV, 2016 WL 157351 (Tex. App. – Houston [14th Dist.] Jan. 12, 2016) (C.J. Frost concurring) (discussing “critical distinction” between judicial order that is void *ab initio* and order that is merely voidable for procedural defects); *Sun Tec Computer, Inc. v. The Recovar Group, LLC*, No. 05–14–00257–CV, 2015 WL 5099191, * 2–4 (Tex. App. – Dallas Aug. 31, 2015) (discussing distinction between collateral attack on void judgment and direct attack on voidable judgment).

In J.G.'s case, these distinctions establish as a matter of law that his conviction was merely voidable, rather than void. It is undisputed that a juvenile court with jurisdiction over J.G. certified him through the process required by the Family Code and the juvenile court's exclusive original jurisdiction was transferred pursuant to that process. As a result, the criminal district court had jurisdiction when it accepted J.G.'s guilty plea that resulted in his conviction.² Upon post-conviction appeal, the transfer was held to have been an abuse of discretion, which only then, post-conviction, divested the criminal court of the jurisdiction it had acquired by transfer pre-conviction.

None of the authorities cited by the court below support its statement that the district court never acquired jurisdiction. In *Ex parte Waggoner*, 61 S.W.3d 429 (Tex. Crim. App. 2001), the habeas corpus applicant was sixteen years old at the time he committed a theft that was adjudicated by a district court. Unlike the situation here however, the juvenile court "never waived [its exclusive] jurisdiction over applicant or certified him as an adult. Therefore, the district court never acquired jurisdiction over applicant." *Waggoner*, 61 S.W.3d at 432.

Likewise, in *Cordary v. State*, 596 S.W.2d 889, 891 (Tex. Crim. App. 1980), unlike the situation here, the juvenile "was *never transferred* from the juvenile

² As noted above, J.G.'s conviction in criminal district court conclusively establishes an "adjudication concerning the alleged offense." See *McNew v. State*, 608 S.W.2d at 171-72; *Woods v. State*, 532 S.W.2d 608 (Tex. Crim. App. 1976).

court to the district court . . . she was *never made subject to the jurisdiction* of the district court. The court did not have jurisdiction to accept her plea of guilty; her conviction is void.” *Id.* (emphasis added).

In *Grayless v. State*, 567 S.W.2d 216, 220 (Tex. Crim. App. 1978), the juvenile court itself never acquired jurisdiction over the juvenile because he was not served with summons, and it therefore lacked jurisdiction to issue the transfer order. The juvenile’s subsequent conviction was void (rather than voidable) because “the juvenile court did not have jurisdiction over him in the proceeding in which he was certified as an adult for criminal prosecution; therefore, the order waiving jurisdiction and certifying him for criminal prosecution as an adult was void.” *Grayless*, 567 S.W.2d at 219.³

In contrast with these inapposite cases, many cases hold that where a juvenile court acquires jurisdiction and issues a certification order, the criminal district court acquires jurisdiction even if the certification order is erroneous. *State v. Rinehart*, 333 S.W.3d 154, 158-60 (Tex. Crim. App. 2011) (stating that statutory prohibition of immediate appeal of juvenile transfer order indicates “a juvenile court’s erroneous transfer order does not divest the criminal district court of jurisdiction over the case,” and holding criminal district court “clearly had subject

³ J.G.’s situation is also different from *Hoang v. State*, 872 S.W.2d 694 (Tex. Crim. App. 1993), where exclusive original jurisdiction had always remained in the juvenile court even as the defendant was tried as an adult.

matter jurisdiction and authority to” set aside indictment.); *Rodriguez v. State*, 975 S.W.2d 667, 672-73 (Tex. App. —Texarkana 1998, pet. ref’d) (error in a juvenile court’s transfer order did not prevent the adult criminal court from acquiring jurisdiction).⁴ The same principle applies to other types of discretionary orders entered by a civil court.⁵

The only way in which the district court could not have acquired jurisdiction would be if the juvenile court never waived jurisdiction at all,⁶ or somehow lacked the jurisdictional power to do so such that the certification order itself was not

⁴ *Accord Adams v. State*, 827 S.W.2d 31, 33-34 (Tex. App.—Dallas 1992) (certification order, even if erroneous, would not result in adult criminal court lacking jurisdiction such that judgment was void); *Melendez v. State*, 4 S.W.3d 437, 442 (Tex. App. – Houston [1st Dist.] 1999) (“The juvenile court had jurisdiction to transfer Melendez; the district court obtained jurisdiction to try him for murder.”); *Knoble v. State*, 903 S.W.2d 895, 896 (Tex. App.—Beaumont 1995, no pet.) (“[I]nsufficiency of the evidence in the juvenile court transfer process ... is a nonjurisdictional defect.”); *Stubblefield v. State*, 659 S.W.2d 496, 498 (Tex. App.—Fort Worth 1983, no pet.) (“Assuming, without deciding, that the denial of discovery in the [certification proceeding] was error, such an error, if any, does not rise to the level of jurisdictional error and, thus, failure to timely appeal from the order of transfer operated as a waiver of this non-jurisdictional ground of error.”).

⁵ *See, e.g., Ex parte Bowers*, 671 S.W.2d 931, 935 (Tex. App. —Amarillo 1984) (order transferring case from Grayson County to Lamb County was “unquestionably erroneous.” Nonetheless, the transfer order was not void because the Grayson County court had both personal and subject matter jurisdiction to issue it. Accordingly, the Lamb County court acquired jurisdiction to issue a contempt order and jail the relator.); *In Interest of C.S.*, 977 S.W.2d 729 (Tex. App. —Fort Worth 1998, pet. denied) (“Brown’s basic premise is that, because the Tarrant County court did not acquire jurisdiction properly, it lacked jurisdiction over the termination proceeding. We disagree. Any defect in the transfer procedure did not render void either the Dallas County court’s transfer order or the Tarrant County court’s judgment in the termination proceeding.”). *See also In re Masonite Corp.*, 997 S.W.2d 194, 198 (Tex. 1999) (“the mere fact that an action by a court . . . is contrary to a statute, constitutional provision or rule of civil or appellate procedure makes it [not void but] ‘voidable’ or erroneous.’ That the trial court’s venue transfer orders were a clear abuse of discretion does not mean that they were ‘void.’”).

⁶ *See, e.g., Ex Parte Waggoner*, 61 S.W.3d 429 (Tex. Crim. App. 2001).

merely erroneous, but void.⁷ A merely erroneous certification order by a juvenile court with jurisdiction over the juvenile is not ineffective or a nullity.

B. The statement in *Moon* that the criminal court lacked jurisdiction is both erroneous and “mere dictum.”

It is true that the First Court of Appeals in *Moon* recited that “[b]ecause the juvenile court abused its discretion in waiving its jurisdiction over Moon and certifying him for trial as an adult, the district court lacked jurisdiction over this case.” *Moon*, 410 S.W.3d at 378.⁸ But, as the cases discussed above demonstrate, that statement is not only wrong, it is self-contradictory. If, as the First Court correctly held, the juvenile court merely “abused its discretion in waiving jurisdiction,” then, as a matter of law, the district court in fact acquired jurisdiction and had jurisdictional authority to adjudicate the crime and render judgment. The district court could not have “lacked jurisdiction.”⁹ *See, e.g., State v. Rinehart*, 333 S.W.3d at 158-59; *Rodriguez v. State*, 975 S.W.2d at 672-73.

⁷ *See, e.g., Grayless v. State*, 567 S.W.2d 216, 219 (1978). *See also Melendez v. State*, 4 S.W.3d 437, 440-41 (Tex. App. – Houston [1st Dist.] 1999, no pet.) (absent satisfaction of statutory notice provisions, juvenile court is without jurisdiction to transfer juvenile to district court); *Allen v. State*, 657 S.W.2d 815, 816 (Tex. App. – Houston [1st Dist.] 1982, pet. dism’d) (failure to comply with § 54.02(b)’s petition and notice requirements deprives juvenile court of jurisdiction to consider transfer).

⁸ The court in *J.G. I*, apparently relying on the court of appeals’ dicta in *Moon*, made a similar statement, also without any analysis. 471 S.W.3d at 4.

⁹ The Court of Criminal Appeals did not adopt the First Court’s statement that the “district court lacked jurisdiction.” On the contrary, it stated that “Unless and until the transfer order is declared invalid, the criminal courts retain jurisdiction, and the juvenile court lacks jurisdiction...”. *Moon v. State*, 451 S.W.3d at 52 n. 90.

Not only is the court of appeals' statement in *Moon* that the district court lacked jurisdiction erroneous, it is *dictum* unnecessary to the judgment in the case and entitled to no precedential effect. *See, e.g., Edwards v. Kaye*, 9 S.W.3d 310, 314 (Tex. App. – Houston [14th Dist.] 1999, pet denied) (“Dictum is an observation or remark made concerning some rule, principle, or application of law suggested in a particular case, which observation or remark is not necessary to the determination of the case.”). There was never any contention in the *Moon* case that the juvenile court's transfer order was void or that the district court lacked jurisdiction. The only argument was that the juvenile court abused its discretion and erred in waiving its jurisdiction.¹⁰ Not surprisingly, the *Moon* opinion contains no analysis or authority supporting the court's “lacked jurisdiction” statement. The First Court appears simply to have assumed that because the juvenile court's certification order was erroneous, the district court never acquired jurisdiction. That incorrect assumption was in no way necessary to its ultimate ruling reversing the certification order.

C. There are substantial consequences associated with holding that a criminal court lacks jurisdiction when a transfer order is erroneous but not void.

Hundreds, perhaps thousands, of juveniles have been certified for decades pursuant to a defective form order like the one at issue in *Moon*. If all these

¹⁰ *See* briefing in *Moon v. State*, 410 S.W.3d 366 (Tex. App. -- Houston [1st Dist.] 2013).

transfer orders are not merely voidable upon a timely appeal but void *ab initio* and ineffective to confer jurisdiction on the district courts, then all of these individuals potentially erroneously certified as juveniles will be entitled to habeas corpus relief because they were convicted by jurisdictionless courts. *See Ex Parte Waggoner*, 61 S.W.3d at 431 (granting habeas relief because juvenile court never waived jurisdiction and criminal court lacked jurisdiction over 17 year-old). Thus, the “no jurisdiction” holding of the court below, if affirmed, will open the floodgates to habeas challenges.

D. The “no adjudication” requirement does not preclude all recertifications.

Section 54.02(j)(3) of the Family Code has always precluded certification if an adjudication concerning the alleged offense has been made. That section of the statute has never been amended. What did change was whether an appeal of a certification order could be taken prior to an adult adjudication, which impacts whether there will have been a “prior adjudication concerning the alleged offense” precluding recertification under § 54.02(j).

Before January 1996, Texas law permitted (but did not require) an immediate appeal of a certification order. Thus, prior to January 1996, whether recertification was allowed after reversal of a previous certification order depended on whether the appeal and reversal of the certification took place before or after conviction, *i.e.* before or after there was an adjudication of the offense.

Effective January 1, 1996, the Code of Criminal Procedure was amended to preclude the appeal of a certification order before conviction. *See* Tex. Code of Crim. Proc. § 44.47(b) (1996) (repealed). The right of immediate appeal was only restored effective September 2015. Hypothetically, if a certification order was reversed during that time period, there would have been, in most cases, a prior adjudication and § 54.02(j)(3) of the Family Code would have precluded recertification. This issue never presented itself however because, after January 1, 1996 until *Moon*, there do not appear to have been any reversals of certification orders issued pursuant to §§ 54.02(a) and (f).¹¹

Section 54.02(j)(3) would not have precluded all recertifications, however. For example, in *Grayless v. State*, 567 S.W.2d 216, 220 (Tex. Crim. App. 1978), the juvenile was not served with summons, and the juvenile court therefore lacked jurisdiction to issue the transfer order. As a result, the juvenile's subsequent conviction was void rather than merely voidable. As the court below held, in that circumstance, there would be no prior adjudication and recertification would not be precluded by the § 54.02(j)(3) "no prior adjudication" requirement. Similarly, it is not inconceivable that an appellate court could grant a mandamus vacating a

¹¹ There is no way to know whether or not the Legislature's failure to amend § 54.02(j)(3) of the Family Code when it enacted Tex. Code of Crim. Proc. § 44.47(b) was an oversight, but that is immaterial.

certification order prior to trial, in which case there would be no prior adjudication.¹²

In another case, the district court quashed the indictment and dismissed the case prior to trial because there was insufficient evidence supporting the juvenile court's transfer order. *State v. Rhinehart*, 333 S.W.3d 154 (Tex. Crim. App. 2011). Under that circumstance there was no prior adjudication precluding the State from seeking another certification order.¹³

In sum, when the Legislature enacted § 44.47(b) precluding immediate appeals, it may have narrowed the circumstances in which recertification was available, but it did not render meaningless the Family Code's reference to certification after "a previous transfer order was reversed by an appellate court or set aside by a district court." *See* Tex. Fam. Code § 54.02(j)(4)(B)(iii).

II. Section 54.02(j) of the Family Code is Unconstitutional as Applied.

As a general proposition, this Court should not address the constitutionality of a statute if the case can be decided without doing so. *Salinas v. State*, 464

¹² *See In re B.T.*, 323 S.W.3d 158 (Tex. 2010) (conditionally granting writ of mandamus and directing juvenile court to delay transfer hearing until completion of facially incomplete diagnostic study required by Family Code). There is certainly an argument to be made that keeping a child in solitary confinement 23 hours a day before the child has even been convicted constitutes irreparable harm justifying mandamus relief.

¹³ Section 54.02(j)(4)(B)(iii) of the Family Code refers to "a previous transfer order [being] set aside by a district court." Yet the statute further states that "the criminal court may not remand the child to the jurisdiction of the juvenile court." Tex. Fam. Code § 54.02(i). Thus a district court can "set aside" a previous transfer order but cannot "remand the child to the jurisdiction of the juvenile court." This suggests that to obtain a recertification in this circumstance, the State would have to refile the case in juvenile court. However, recertification in that situation would not be precluded by the "no prior adjudication" requirement.

S.W.3d 363, 366 (Tex. Crim. App. 2015). Thus, if this Court holds that J.G. was not subject to recertification under §54.02(j) because there was a prior adjudication of the alleged offense, or because § 54.02(j) was not satisfied in some other respect, it need not address the constitutional issues.

A. Applying a standard other than the one mandated by the statute cannot save the statute from violating the child’s due process rights.

Before a child turns 18, the standard for adult certification is governed by §§ 54.02(a) and (f) of the Family Code. Those provisions require the juvenile court to evaluate certain factors such as the child’s sophistication and maturity and amenability to rehabilitation in deciding whether certification is appropriate. Section §54.02(h) then requires the juvenile court to state its reasons for waiving jurisdiction and the findings of fact supporting those reasons. *See Moon v. State*, 451 S.W.3d at 49 (“Section 54.02(h) obviously contemplates that both the juvenile court’s reasons for waiving its jurisdiction and the findings of fact that undergird those reasons should appear in the transfer order.”).

Section 54.02(j), which applies to certifications when the person is 18 or older, articulates completely different certification requirements. Thus, as the statute is written, when a juvenile is erroneously certified under §§ 54.02(a) and (f), and is 18 or older when the certification is reversed and the case returned to juvenile court, the re-certification proceeding must satisfy an entirely different set

of standards. The result of this flawed process is that, due to no fault of his own, a child who was erroneously certified will never receive the benefit of the § 54.02(a) and (f) standards for certification to which he or she was originally entitled. Stated differently, the individual will have been permanently deprived of the process that was originally due to protect a child's liberty interest in access to the juvenile justice system.¹⁴

Significantly, the court below did not find that this due process deprivation was constitutionally permissible. Instead, in addressing whether J.G. was deprived of due process and equal protection, the court relied on the fact that the findings in the new certification order “not only contained facts supporting the section 54.02(j) factors, they also addressed the factors enumerated by section 54.02(a) and section 54.02(f), even though the court did not waive its jurisdiction under those subsections.” *In the Matter of J.G.*, 495 S.W.3d at 368. The court concluded that:

In this case, therefore, the juvenile court essentially considered all of the relevant statutory factors for waiver of jurisdiction that the Legislature has specifically enumerated in section 54.02, despite the age-based distinction between subsections (a) and (f) and subsection (j). We therefore conclude that section 54.02(j), as applied to appellant in this case, did not deprive appellant of due process and equal protection.

¹⁴ This is particularly true in cases like *Moon* where the state failed to introduce evidence of the factors required by §§ 54.02(a) and (f), as opposed to cases where the State may have introduced sufficient evidence but the certification order is defective. The process afforded under § 54.02(a) and (f) is designed to protect a juvenile's liberty interest in receiving the benefits of the juvenile system by ensuring that a transfer of jurisdiction occurs only in the rare and exceptional case.

Id. at 368-69. In essence, the court held that the juvenile court's impermissible consideration of the §54.02(f) factors could be used to save the §54.02(j) recertification order from unconstitutionality. Nothing in the court's opinion suggests that the recertification order would have been permissible had the juvenile court followed the statute and applied only the §54.02(j) factors.

The problem with the court of appeals' analysis is that consideration of the §54.02(f) factors on remand not only violates the statute but is beyond the juvenile court's jurisdictional power. As this Court has held, once the juvenile turns 18, the juvenile court's "jurisdiction is *limited to transferring the case under section 54.02(j) if all criteria are satisfied or to dismissing the case....* If the person is over age eighteen, and section 54.02(j)'s criteria are not satisfied, the juvenile court's only other option is to dismiss the case." *In re N.J.A.*, 997 S.W.2d 554, 556-57 (Tex. 1999) (emphasis added). If all five parts of §54.02(j) are not satisfied, or if §54.02(j) is unconstitutional, the "only other option" does not include consideration or application of §54.02(f). When §54.02(j) applies, it is an abuse of discretion and a void exercise for a court to consider §§54.02(a) and (f) and substitute those factors as a basis for certification. *See Morrison v. State*, No 14-15-00773-CR, 2016 WL 6652734 *3 (Tex. App. -- Houston [14th Dist.], November 10, 2016, pet. pending) (juvenile court erred in applying § 54.02(a) to individual who had turned 18). Thus, the juvenile court's application of the non-prescribed

factors not only failed to cure the constitutional defect, but constitutes an additional separate and independent error.

Section 54.02(a) permits the juvenile court to “waive its exclusive original jurisdiction and transfer *a child*,” *i.e.* a person under the age of 18, after considering the factors listed in §54.02(f). Section 54.02(j), in contrast, permits the juvenile court to “waive its exclusive original jurisdiction and transfer *a person*” who “is 18 years of age or older.” Perhaps unfortunately, the statute does not permit the juvenile court to consider the §54.02(f) factors when deciding whether to certify a person under §54.02(j). Indeed, by its terms, §54.02(f) applies only to certification under §54.02(a). *See* §54.02(f) (“In making the determination *required by Subsection (a) of this section*, the court shall consider...” (emphasis added)).

Thus, while the court stated that “the text of section 54.02(j) *does not mandate consideration* of the relevant factors under subsections (a) and (f),” it is more accurate to state that when considering certification under §54.02(j), the text of the statute (and the juvenile court’s limited jurisdiction) *does not permit consideration* of the relevant factors under subsections (a) and (f). Rather than curing the constitutional defect, to the extent the juvenile court relied on the §54.02(f) factors, it committed an additional independent error in the

recertification order by relying on factors that neither the statute nor its judicial power permitted it to consider.

A court cannot save §54.02(j) from unconstitutionality by considering factors that §54.02 does not permit it to consider, and §54.02(j) applied *as written* violates due process and equal protection by depriving J.G. of the statutory protections to which he was originally entitled.

B. Section 54.02(j) as applied is an unconstitutional ex post facto law.

The court erred in concluding that §54.02(j) “does not fit within any of the enumerated categories of ex post facto laws.”

- 1. The application of §54.02(j) “alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.”**

In concluding that the application of §54.02(j) did not impermissibly alter the legal rules of evidence, or require less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender, the court reasoned that:

[W]hile section 54.02(j) does involve the consideration of different statutory factors from section 54.02(a), and thus requires the consideration of different evidence when making the transfer decision, the decision to transfer appellant to the district court is not an adjudication or a “conviction” of the alleged offense.

This reasoning is flawed because it does not matter that the transfer order itself is not an adjudication or a “conviction” of the alleged offense. Anything that

alters the requirements for obtaining a conviction potentially violates the prohibition on ex post facto laws.¹⁵ See, e.g., *Carmell v. Texas*, 529 U.S. 513, 120 S.Ct. 1620 (2000) (statutory amendment allowing victim's testimony alone to support conviction if victim was under 18 violated prohibition on ex post facto laws).

The transfer order is required before there can be any adjudication or a “conviction” of the alleged offense in the district court. Altering the standards for transfer after remand to make transfer easier than it would have been originally, makes it easier for the State to achieve an adult conviction after remand than it was before remand and therefore violates the prohibition on ex post facto laws.

In order to “convict” a juvenile offender in district court the first thing the State must do is have the juvenile certified as an adult. Absent certification, a juvenile can never be “convicted,” the juvenile can only be adjudicated delinquent. As the Supreme Court has noted, the consequences of this distinction are dramatic: the “decision as to waiver of jurisdiction and transfer of the matter to the District Court is potentially as important to petitioner as the difference between five years imprisonment and a death sentence.” *Kent v. U.S.*, 383 U.S. 541, 557 (1966).

¹⁵ An order suppressing certain evidence is not an adjudication or conviction either, but a statute that changed the standards for suppression of evidence in a re-trial after remand such that previously suppressed evidence would become admissible, would clearly violate the prohibition on ex post facto laws.

Thus, certification is an essential element required to convict a juvenile as an adult. Altering the elements the State is required to prove for certification in order to ultimately achieve a conviction has the same effect as altering the burden of proof or altering some element of the crime the State is required to prove in order to achieve a conviction. Changing, in a way detrimental to the defendant, any step the State must satisfy in order to get a conviction after remand violates the prohibition on ex post facto laws.

In sum, substituting the requirements of §54.02(j) for the requirements of §§54.02(a) and (f), which originally applied to J.G., “alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender,” and violates the prohibition on ex post facto laws.

2. Substituting §54.02(j) for §§54.02(a) and (f), when §§54.02(a) and (f) originally applied to the juvenile, deprives the juvenile of a defense available at the time the act was committed.

Plainly, at the time of his first certification hearing, J.G. could argue as a defense that the State could not satisfy the requirements of §§54.02(a) and (f), and therefore he could not be subjected to the same punishments to which adults may be subjected. Applying §54.02(j) to a person who originally was protected by the requirements of §§54.02(a) and (f) deprives the individual of that defense and therefore violates the prohibition on ex post facto laws.

III. Conclusion

Amici respectfully urge this Court to hear this case and reverse the Court of Appeals.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with the rules governing the length of briefs prepared by electronic means. The brief was prepared using Microsoft Word 2013. According to the software used to prepare this brief, the total word count, including footnotes, but not including those sections excluded by rule, is 5444. The brief was prepared using “Times New Roman” 14-point font.

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