

**No. 16-0468**  
**In the**  
**Supreme Court of Texas**

◆  
**No. 01-15-01025-CV**  
In the Court of Appeals for the First District of Texas at Houston

◆  
**No. 2012-00331J**  
In the 314<sup>th</sup> District Court of Harris County, Texas

◆  
**IN THE MATTER OF J.G.**

◆  
**STATE'S BRIEF IN RESPONSE**  
◆

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## **TO THE HONORABLE COURT OF APPEALS:**

### **STATEMENT OF THE CASE**

The appellant was alleged to have engaged in delinquent conduct on January 11, 2012, specifically, by assaulting Antonio Duran with a firearm when the appellant was 16 years old (CR – 3). The juvenile court waived its jurisdiction in the case, thus certifying the appellant to stand trial as an adult (CR – 44-45). He pled guilty to the offense as an adult; however, a court of appeals reversed the conviction, finding that the juvenile court abused its discretion in waiving jurisdiction based solely on the seriousness of the offense. *Guerrero v. State*, 471 S.W.3d 1, 4 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (citing *Moon v. State*, 451 S.W.3d 28 (Tex. Crim. App. 2014)).

On remand, the juvenile court again waived its jurisdiction in light of the factors addressed in *Moon* (CR – 58). The appellant filed notice of appeal, and the court of appeals affirmed the certification. *In Matter of J.G.*, 495 S.W.3d 354 (Tex. App.—Houston [1st Dist.] 2016, pet. filed). The appellant filed a petition for review with this Court, and this Court requested a brief; however, the petition remains pending.

**ISSUES PRESENTED (as taken from amended petition)**

1. **The Court of Criminal Appeals recently held, in *Moore v. State*, that the State is entitled to only one chance to prove that a juvenile court should transfer a person to criminal court. The COA erred by construing the statute to permit the State two chances to certify.**
2. **TEX. FAM. CODE § 54.02(j) is unconstitutional as applied in this case.**
3. **The court of appeals erred when it held that the State's evidence was sufficient and the juvenile court did not abuse its discretion when it waived jurisdiction over J.G..**

**ISSUES PRESENTED (as taken from petitioner's brief)**

1. **The court of appeals erred by construing the Texas Family Code to give the State a second chance to try J.G. in adult criminal court.**
2. **Even if the court of appeals correctly held that J.G. could be transferred to adult court a second time, the State's evidence was legally and factually insufficient to give the juvenile court jurisdiction to transfer him. The court of appeals erred when it found the evidence sufficient.**
3. **TEX. FAM. CODE § 54.02(j) is unconstitutional as applied to J.G. and other persons who are remanded back to juvenile court after their transfer orders are vacated on appeal.**
4. **Both the juvenile court and the court of appeals violated J.G.'s right to due process when they purported to consider the factors for transfer of children under TEX. FAM. CODE § 54.02(a) and (f), as well as the factors under Section 54.02(j).**



## STATEMENT OF FACTS

On January 11, 2012, Antonio Duran drove to an apartment complex on South Gessner only to find a car blocking the gate (RR. II – 7-11). He honked his horn, and the other car allowed him to pull around so that he could enter the complex (RR. II – 11).

When Duran parked his car, the appellant approached him with an adult named Rogoberto Ramos and pointed a gun at his face (RR. II – 11-12, 20). They told him, “Give me everything you have in your car. Don’t look at me until we drive away.” (RR. II – 13). Duran was not sure whether the appellant or Ramos was holding the gun; but it was a handgun, and Duran was in fear for his life (RR. II – 12-13, 15). After they took Duran’s PlayStation and Tommy Hilfiger bag, the appellant and Ramos got in their car and drove away (RR. II – 14, 20).

That same evening and about six miles from Duran’s robbery, the appellant was involved in another aggravated robbery on Hillcroft (RR. II – 16). Officer Gerard saw the robbery and attempted to stop it; but the suspects were able to flee in their vehicle (RR. II – 16-17). Gerard chased them, and they eventually crashed into an apartment complex (RR. II – 17). The appellant was driving (RR. II – 18).

Christopher Elder with the Houston Police Department was dispatched to the first aggravated robbery call (RR. II – 7-10). He talked with Duran, who gave a description of the appellant’s vehicle (RR. II – 9-10, 14-15). When Elder heard

about Gerard's case, he conducted a show-up identification procedure, and Duran identified the appellant as the robber (RR. II – 18-19). Duran's PlayStation and Tommy Hilfiger bag were inside the appellant's vehicle (RR. II – 20, 22). A gun was recovered from Ramos (RR. II – 21).

### **SUMMARY OF THE ARGUMENT**

The Texas Family Code explicitly provides for a second certification hearing, and the Court of Criminal Appeals has not preempted that statute. The statutory scheme for certification violates neither double jeopardy nor ex post facto protections. Even if a different legal standard was used on remand, the juvenile court made findings to support certification under both Section 54.02(a) and Section 54.02(j). Finally, there was probable cause to believe that the appellant committed aggravated robbery either as a principle or as a party, and the evidence was sufficient for certification.

### **RESPONSE TO APPELLANT'S FIRST ISSUES PRESENTED IN AMENDED PETITION AND IN BRIEF ON MERITS**

The appellant claims in his first issue in his amended petition and in his first issue in his brief on merits that "the State is entitled to only one chance to prove that a juvenile court should transfer a person to criminal court" under *Moore v.*

*State*, PD-1634-14, 2017 WL 510567 (Tex. Crim. App. Feb. 8, 2017). (App’nt Amend. Pet. 10) (App’nt Brf. 12-15). But *Moore* contains no such holding, and the statutes explicitly provide for recertification after a reversal on appeal.

**The Texas Family Code explicitly provides for a second certification hearing, and the Court of Criminal Appeals has not preempted that statute.**

Section 54.02(j)(4)(B)(ii) of the Texas Family Code states in part that a juvenile court may waive its exclusive original jurisdiction and transfer a person to a district court for criminal proceedings if “the juvenile court finds from a preponderance of the evidence that...after due diligence of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person because...*a previous transfer order was reversed by an appellate court or set aside by a district court.*” TEX. FAMILY CODE § 54.02(j) (West 2014) (emphasis added). Thus, the statute explicitly provides for a second chance to prove that a juvenile court should transfer a person to criminal court.

The appellant claims that after *Moore*, “the law is now settled that in the latter case [when a respondent is over the age of eighteen], the State gets only one chance to prove its case for transfer to criminal court.” (App’nt Pet. 11). But that is a misreading of *Moore*.

In *Moore*, due to the heavy case load of investigating detectives, a sexual assault complaint was not forwarded to the district attorney until almost two years after it was first reported. *Moore*, 2017 WL 510567 at \*1. Moore was sixteen at the time of the first report but had turned eighteen by the time the case was forwarded, although the detectives believed that he was still seventeen due to an error in the paperwork. *Id.* The State moved to transfer and argued that any delay caused by the detectives' caseload and their mistaken belief due to the paperwork error should not be considered when determining whether it was practicable for "the state" to proceed in juvenile court before Moore's eighteenth birthday. *Id.*

The juvenile court granted the transfer, but the court of appeals concluded that "the state" included law enforcement and prosecution and that the detectives' heavy caseload and the paperwork error were not "reasons beyond the State's control." *Id.*, 2017 WL 510567 at \*2. The Court of Criminal Appeals agreed that the plain meaning and common usage of "the state" as used in section 54.02(j)(4)(A) referred to "law enforcement and the prosecution," and affirmed. *Id.*, 2017 WL 510567 at \*3.

Nowhere in *Moore* did the court hold that "the State gets only one chance to prove its case for transfer to criminal court." Such would be inconsistent with the statutory framework, and there is no constitutional prohibition to such a subsequent transfer hearing. Therefore, the appellant's first issue in his amended petition and

his first issue in his brief lacks merit, and this Court should affirm the decision below.

**RESPONSE TO APPELLANT’S SECOND ISSUE  
PRESENTED IN AMENDED PETITION AND THIRD  
ISSUE PRESENTED IN BRIEF ON MERITS**

The appellant claims in his second issue in his amended petition and in his third issue in his brief on the merits that Section 54.02(j) of the Family Code is unconstitutional as applied to him because it “changes the rules in the State’s favor after the State loses the first round of appeals.” (App’nt Pet. 12) (App’nt Brf. 28-38). This claim lacks merit because the statutory scheme for certification violates neither double jeopardy nor ex post facto protections. Furthermore, even if a different legal standard was used on remand, the juvenile court made findings to support certification under both Section 54.02(a) and Section 54.02(j).

Section 54.02 of the Family Code deals with the waiver of a juvenile court’s jurisdiction, which effectively is a certification of the juvenile offender to stand trial as an adult defendant in a criminal court. TEX. FAMILY CODE § 54.02 (West 2014). There are two different tests for certification depending on whether the juvenile is younger than eighteen or older than seventeen at the time of the certification hearing.

If the juvenile offender is younger than eighteen, the juvenile court may waive jurisdiction if: (1) the juvenile is alleged to have committed a felony; (2) the

juvenile was at least fifteen years old at the time of the commission of the felony; (3) no adjudication hearing has been conducted concerning the offense; (4) the juvenile court finds probable cause to believe that the juvenile committed the alleged offense; and (5) that the welfare of the community requires criminal proceedings because of the seriousness of the offense or the background of the juvenile. TEX. FAMILY CODE § 54.02(a) (West 2014). In making this determination, the juvenile court must consider: (1) whether the offense was against person or property; (2) the sophistication and maturity of the juvenile; (3) the record and previous history of the juvenile; (4) the prospects of adequate protection of the public; and (5) the likelihood of the rehabilitation of the juvenile by resources available to the juvenile court. TEX. FAMILY CODE § 54.02(f) (West 2014).

If the juvenile offender is older than seventeen, the juvenile court may waive jurisdiction if: (1) the offender was at least fifteen but less than seventeen at the time of the commission of the felony; (2) no adjudication hearing has been conducted concerning the offense; (3) no adjudication has been made concerning the offense; (4) the juvenile court finds from a preponderance of the evidence that it was not practicable to proceed in juvenile court before the offender's eighteenth birthday either for a reason beyond the control of the state or because a previous transfer order was reversed by an appellate court after due diligence of the state;

and, (5) the juvenile court finds probable cause to believe that the juvenile committed the alleged offense. TEX. FAMILY CODE § 54.02(j) (West 2014).

Under an abuse of discretion standard, the appellate court defers to the trial court's factual determinations if they are supported by evidence, but reviews the trial court's legal determinations de novo. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009). Whether the statute is unconstitutional as applied is a legal question. *Stockton v. Offenbach*, 336 S.W.3d 610, 615 (Tex. 2011).

**A. The statutory scheme for certification violates neither double jeopardy nor ex post facto protections.**

Double jeopardy is the principle that a person shall not be “subject for the same offense to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V. The Texas Constitution provides similarly: “No person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction.” TEX. CONST. art. I, § 14. These prohibitions protect against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Ex parte Kopecky*, 821 S.W.2d 957, 958 (Tex. Crim. App. 1992).

An ex post facto law: (1) punishes as a crime an act previously committed which was innocent when done; (2) changes the punishment and inflicts a greater

punishment than the law attached to a criminal offense when committed; or (3) deprives a person charged with a crime of any defense available at the time the act was committed. *Rodriguez v. State*, 93 S.W.3d 60, 66 (Tex. Crim. App. 2002).

In the present case, neither double jeopardy nor ex post facto apply because there has been no final conviction or acquittal in this case, multiple punishments are not being assessed, and neither the punishments nor the defenses available have changed since the appellant committed the offense. The reversal by the court of appeals in *Guerrero* had the effect of restoring the appellant's case to the pretrial position as if no certification had ever been done. The *Guerrero* court cited *Moon* as dispositive on its way to holding that the juvenile court abused its discretion by waiving its jurisdiction based solely on the offense being one against a person. *Guerrero*, 471 S.W.3d at 4.

In *Moon*, the court of criminal appeals stated that the “availability of factual-sufficiency review is...a function of the applicable burden of proof,” that “in a juvenile transfer proceeding, the burden is on the State to produce evidence that persuades the juvenile court, by a preponderance of the evidence, that waiver of its exclusive jurisdiction is appropriate,” and that “[f]acts which must be proven by a preponderance of the evidence are ordinarily susceptible to appellate review for factual sufficiency.” *Moon*, 451 S.W.3d at 45. The court went on to hold that the “court of appeals did not err to undertake a factual-sufficiency review of the



evidence underlying the juvenile court's waiver of jurisdiction" and that the evidence was insufficient because "the juvenile court made no case-specific findings of fact with respect to the seriousness of the offense." *Moon*, 451 S.W.3d at 51.

When evidence is held to be factually insufficient as opposed to legally insufficient, the remedy is to reverse the judgment and remand for a new trial rather than to reverse the judgment and render an acquittal. *See Drichas v. State*, 175 S.W.3d 795, 799 (Tex. Crim. App. 2005) ("Reversal of the judgment and remand for a new trial is the proper remedy when a court of appeals finds that evidence is factually insufficient."). And when a new trial is ordered, any conviction from the first trial is vacated and the case is restored to the pretrial position. *Rodriguez v. State*, 470 S.W.3d 823, 828 (Tex. Crim. App. 2015) (citing TEX. R. APP. P. 21.9(b)). In fact, in *Moon* itself, the court of criminal appeals noted that after its reversal, "at least one legislatively provided alternative would seem to be for the juvenile court to conduct a new transfer hearing and enter another order transferring the appellant to the jurisdiction of the criminal court, assuming that the State can satisfy the criteria under Section 54.02(j)." *Moon*, 451 S.W.3d at 52 n.90.

In the present case, because the reversal in *Guerrero* restored the case to its pretrial position, there has been no final conviction or acquittal and there has been no punishment assessed. Therefore, neither the punishments nor the defenses

available have changed since the appellant committed the offense. Thus, the appellant's claims of violations of both double jeopardy and ex post facto lack merit.

**B. Even if a different legal standard was used on remand, the juvenile court made findings to support certification under both Section 54.02(a) and Section 54.02(j).**

The appellant complains that he was first subject to the standard for certification under Section 54.02(a) when he was sixteen years old in 2012 and that the juvenile court used the standard for certification under Section 54.02(j) when he was twenty years old in 2015. (App'nt Pet. 13-14). But the juvenile court made findings of fact to support certification under both standards (CR – 60-66) (CR Supp. – 7-13). The juvenile court was clear that those findings were being “incorporated by reference” into the certification order (CR – 60-66) (CR Supp. – 7-13). Therefore, those seven pages of additional findings had the legal effect of allowing the juvenile court to “show its work” behind the certification as required by *Moon*, 451 S.W.3d at 49.

With regard to Section 54.02(a), the juvenile court may waive jurisdiction if: (1) the juvenile is alleged to have committed a felony; (2) the juvenile was at least fifteen years old at the time of the commission of the felony; (3) no adjudication hearing has been conducted concerning that offense; (4) the juvenile court finds

probable cause to believe that the juvenile committed the alleged offense; and (5) that the welfare of the community requires criminal proceedings because of the seriousness of the offense or the background of the juvenile. TEX. FAMILY CODE § 54.02(a) (West 2014). The juvenile court's findings explicitly state that all of those requirements were satisfied (CR Supp – 7, 11).

The juvenile court addressed each of the factors required by Section 54.02(f) and made detailed findings backed up with specific facts (CR Supp – 8-10). With regard to whether the offense was against a person or property, the juvenile court found that the appellant “and his co-actor placed the Complainant in fear of death or serious bodily injury with their actions in this offense. The Court also finds compelling that after the offense occurred that the [appellant] attempted to evade police in a motor vehicle and that the [appellant] lost control of the vehicle and ended the pursuit in an accident.” (CR Supp – 8).

With regard to the sophistication and maturity of the juvenile, the juvenile court found that “the Spanish version of the Wechsler Intelligence Scale for Adults test was attempted...but it was not completed due to language difficulties that prevented accurate scoring.”(CR Supp – 8).

With regard to the record and previous history of the juvenile, the juvenile court found that the appellant possessed marijuana in 2009, trespassed in a motor

vehicle on 2010, violated probation in 2010, was affiliated with a criminal street gang, and was accused of aggravated robbery while on probation (CR Supp – 8-9).

Finally, with regard to the protection of the public and the likelihood of rehabilitation, the juvenile court found that the appellant exhibited an inability to submit to authority and an inability to benefit from probation services during numerous placements (CR Supp – 9-10). It also found that “the crime for which the [appellant] is alleged to have committed is so egregious and aggravated that this Court determines that based on the offense, the psychological evaluation and reports, his current age and his prior referral history that he cannot be amenable to this Court’s efforts to rehabilitate him.” (CR Supp – 9-10). Because these findings were incorporated into the order waiving jurisdiction, it satisfied *Moon*’s requirements that the juvenile court “show its work” under Section 54.02(a) and Section 54.02(f).

With regard to Section 54.02(j), the juvenile court may waive jurisdiction if: (1) the offender was at least fifteen but less than seventeen years old at the time of the commission of the felony; (2) no adjudication hearing has been conducted concerning that offense; (3) no adjudication has been made concerning that offense; (4) the juvenile court finds from a preponderance of the evidence that it was not practicable to proceed in juvenile court before the offender’s eighteenth birthday either for a reason beyond the control of the state or because a previous

transfer order was reversed by an appellate court after due diligence of the state; and, (5) the juvenile court finds probable cause to believe that the juvenile committed the alleged offense. TEX. FAMILY CODE § 54.02(j) (West 2014). And once again, the juvenile court's findings explicitly state that all of those requirements were satisfied (CR Supp – 4). The juvenile court incorporated the written findings, which are relevant not only to Section 54.02(a) and Section 54.02(f), but also to Section 54.02(j) and Section 51.0412. Specifically, the juvenile court entered numerous findings that the State exercised due diligence in an attempt to complete the proceeding before the appellant turned eighteen (CR Supp. – 4, 10, 11-12). Therefore, the appellant cannot complain that the standard of Section 54.02(j) was improperly changed for the standard under Section 54.02(a) because both standards were applied to him.

Finally, the appellant cites *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), for the proposition that the certification “deprived him of his liberty interest in being treated differently when he was a child...” (App’nt Brf. 36). But *Montgomery* simply held that the prohibition on mandatory life without parole for juvenile offenders was retroactive. *Id.*, 136 S.Ct. 736. While it recognized some differences between adults and children, it did not hold that a second transfer hearing after a defective transfer order constituted cruel and unusual punishment. Therefore, the appellant’s second issue in his amended petition and his third issue

in his brief on the merits should be overruled. This Court should affirm the decision below.

**RESPONSE TO APPELLANT’S THIRD ISSUE**  
**PRESENTED IN AMENDED PETITION AND SECOND**  
**ISSUE PRESENTED IN BRIEF ON MERITS**

In his third issue in his amended petition and in his second issue in his brief on the merits, the appellant argues that the evidence was insufficient to certify him under Section 54.02(j) of the Family Code because he was only a party to the offense and because there was a prior adjudication. (App’nt Pet. 18) (App’nt Brf. 16-28). This claim lacks merit because all parties to an offense may be charged with the commission of the offense. Furthermore, as stated previously, the prior adjudication was vacated and did not create a jeopardy bar.

**A. There was probable cause to believe that the appellant committed aggravated robbery either as a principle or as a party.**

The appellant argues that the State failed to show that the appellant committed the offense because “it is undisputed that J.G. was not the gunman.” (App’nt Pet. 18) (App’nt Brf. 26). But that fact was far from undisputed. Duran was not sure whether the appellant or Ramos was holding the gun; but it was a handgun, and Duran was in fear for his life (RR. II – 12-13, 15). While the

appellant's coconspirator was found in possession of a gun after the appellant's failed evasion, there was no direct evidence that the conspirator was the gunman during the Duran robbery. And the juvenile court could have believed that the appellant's leadership role as the driver made it more likely that he was the gunman during that robbery.

Even if it were undisputed that the appellant was not the gunman, there was probable cause to believe that the appellant committed the aggravated robbery. The appellant claims that there is a distinction between committing an offense and being criminally responsible for an offense. (App'nt Pet. 18-19) (App'nt Brf. 27). And indeed, Section 7.02 of the Penal Code provides that a "person is criminally responsible for an offense committed by the conduct of another..." TEX. PENAL CODE § 7.02 (West 2014). But that distinction was not made to absolve those who are merely criminally responsible; rather, it was meant to treat both parties as if they committed the offense.

A party to an offense "is just as criminally responsible for the offense as if he had directly committed murder by his own conduct." *Montalvo v. State*, 315 S.W.3d 588, 594 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *see also Derevage v. State*, 05-01-00594-CR, 2002 WL 1763527, at \*4 (Tex. App.—Dallas July 31, 2002) (not designated for publication) ("We have already concluded the evidence is legally and factually sufficient to show appellant *committed* the offense

of capital murder either as a party or conspirator.”) (emphasis added). Moreover, there is absolutely no authority suggesting that the legislature intended to maintain this supposed distinction when they drafted the Family Code and required probable cause that a juvenile “committed the offense” prior to certification. TEX. FAMILY CODE § 54.02(a) (West 2014).

The appellant cites *In re A.F.*, 895 S.W.2d 481 (Tex. App.–Austin 1995, no pet.), for the proposition that “[a] juvenile court cannot make a finding that a juvenile used a deadly weapon during an offense unless it finds that he was the actual party using the weapon.” (App’nt Pet. 19) (App’nt Brf. 26). But the court of appeals has already refuted this argument. *See J.G.*, 495 S.W.3d at 373–74. The *A.F.* court held that where there was evidence that the defendant’s co-actor, rather than the defendant himself, was the one who used or exhibited a deadly weapon during the offense, insufficient evidence supported the juvenile court’s affirmative finding in its *adjudication* order that the defendant used a deadly weapon. *See A.F.*, 895 S.W.2d at 487. That case involved the juvenile court actually adjudicating the delinquent conduct issue, as opposed to its determining whether to waive jurisdiction and transfer the defendant to the district court; furthermore, *A.F.* was charged only as a party. *Id.* Thus, there was no holding on whether the State could use the law of parties during certification proceedings. *See id.* (“The jury charge addressed appellant’s involvement in the alleged delinquent conduct only as a



party and did not provide for a finding that appellant personally used or exhibited a deadly weapon.”); *see also J.G.*, 495 S.W.3d at 373–74.

Even if the appellant’s proposed distinction did apply, the Penal Code provides that “[e]ach party to an offense may be charged with *commission* of the offense.” TEX. PENAL CODE § 7.01 (West 2014) (emphasis added). Thus, even if the appellant’s word games were persuasive regarding Section 7.02, a party to an offense does commit the offense under Section 7.01. There was sufficient evidence establishing probable cause that the appellant committed an aggravated robbery, either as a party or as a conspirator. The juvenile court did not abuse its discretion by ordering discretionary transfer under Section 54.02(a), and this Court should decline to review the appellant’s third issue in his amended petition and second issue in his brief on the merits.

**B. The appellant’s prior adjudication as an adult was vacated and did not create a jeopardy bar to a second certification.**

The appellant claims that under the court of appeals opinion, “even a conviction in adult court after a perfectly valid waiver of juvenile jurisdiction would not bar a second adult certification for the same crime...” (App’nt Brf. 25). But the appellant fails to argue how such a set of circumstances violates double jeopardy. A certification is not an adjudication.

A conviction in adult court after a perfectly valid waiver of juvenile jurisdiction would bar a subsequent adjudication in juvenile court or a second prosecution in adult court. And that was what the Supreme Court in *Breed v. Jones*, 421 U.S. 519 (1975), was attempting to prevent. Certification hearings do not invoke double jeopardy unless they place the juvenile at risk of an adjudication that the offense was committed. *See id.*, 421 U.S. at 538 n.18 (“We note that nothing decided today forecloses States from requiring, as a prerequisite to the transfer of a juvenile, substantial evidence that he committed the offense charged, so long as the showing required is not made in an adjudicatory proceeding.”).

As stated previously, neither double jeopardy nor ex post facto apply because there has been no final conviction or acquittal in this case, multiple punishments are not being assessed, and neither the punishments nor the defenses available have changed since the appellant committed the offense. *Rodriguez*, 93 S.W.3d at 66. The reversal by the court of appeals in *Guerrero* had the effect of restoring the appellant’s case to the pretrial position as if no certification had ever been done. The *Guerrero* court cited *Moon* as dispositive on its way to holding that the juvenile court abused its discretion by waiving its jurisdiction based solely on the offense being one against a person. *Guerrero*, 471 S.W.3d at 4. And the *Moon* court itself stated that “at least one legislatively provided alternative would seem to be for the juvenile court to conduct a new transfer hearing and enter

another order transferring the appellant to the jurisdiction of the criminal court, assuming that the State can satisfy the criteria under Section 54.02(j).” *Moon*, 451 S.W.3d at 52 n.90. Therefore, the appellant’s third issue in his amended petition and his second issue in his brief on the merits should be overruled.

**RESPONSE TO APPELLANT’S FOURTH ISSUE**  
**PRESENTED IN BRIEF ON MERITS**

In his fourth and final issue in his brief on the merits, the appellant argues that the lower courts violated his right to due process by assuring that he was properly certified under both of the statutory tests for certification. (App’nt Brf. 38-43). This claim should be rejected because it was not raised in the appellant’s petition. Nevertheless, because the juvenile court made findings under both Section 54.02(a) and Section 54.02(j), the appellant received twice the process that he was due, and there was no constitutional violation.

**This issue was not specifically raised in the appellant’s petition; nevertheless, the appellant received twice the process that he was due because the juvenile court certified him under both Section 54.02(a) and Section 54.02(j).**

This Court will consider an argument raised in a merits brief “so long as his brief does not ‘raise additional issues or points or change the substance of the issues or points presented in the petition...’” *Crawford v. XTO Energy, Inc.*, 509

S.W.3d 906, 910 (Tex. 2017) (citing TEX. R. APP. P. 55.2(f) (“The phrasing of the issues or points need not be identical to the statement of issues or points in the petition for review, but the brief may not raise additional issues or points or change the substance of the issues or points presented in the petition.”)). In the present case, the appellant’s fourth issue in his merits brief was not raised in the petition. While the appellant did reference due process several times in the petition, he never specifically argued that the certification under both Section 54.02(a) and Section 54.02(j) deprived him of due process (App’nt Pet. 10, 14, 16-17). Therefore, his fourth issue in his merits brief should be dismissed.

Even if the appellant can properly raise this issue on appeal, he received twice the process that he was due. As stated previously in the response to the appellant’s second issue in his amended petition and third issue in his brief on merits, the juvenile court addressed each of the factors required by Section 54.02(f) and made detailed findings backed up with specific facts (CR Supp – 8-10). Furthermore, the juvenile court’s findings explicitly stated that all of the requirements under Section 54.02(j) were satisfied (CR Supp – 4). The juvenile court entered numerous findings that the State exercised due diligence in an attempt to complete the proceeding before the appellant turned eighteen (CR Supp. – 4, 10, 11-12). Therefore, the appellant cannot complain about a lack of due process because both standards were applied to him.

The appellant claims that the court of appeals failed to conduct a proper factual sufficiency review because “Nowhere does the appellate court’s opinion weigh J.G.’s evidence – particularly, the new evaluation conducted by the probation department – against the State’s evidence...” (App’nt Brf. 41). But the appellant never argued to the court of appeals that the evidence was factually insufficient when weighed against the new evaluation.

The appellant’s brief to the court of appeals, which combined the factual and legal sufficiency analysis, argued that the evidence was insufficient because the State failed to prove that it exercised due diligence in proceeding in the juvenile court. (App’nt COA Brf. 20-33). The appellant did not specifically argue that the evidence was insufficient due to the “new evaluation.” Therefore, the court of appeals cannot be faulted for failing to address that piece of evidence in its opinion. *Cf. Sims v. State*, 99 S.W.3d 600, 601 (Tex. Crim. App. 2003) (“We granted the appellant's petition for discretionary review to determine whether the Court of Appeals properly performed the factual sufficiency review. We conclude that, because the Court of Appeals did not discuss the evidence that the appellant argued best supported his claim, the Court erred.”). The appellant’s fourth issue in his brief on the merits should be overruled and the certification affirmed.

## **CONCLUSION**

It is respectfully submitted that all things are regular. The decision by the court of appeals and the juvenile court's ruling should both be affirmed.

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**CERTIFICATE OF SERVICE AND COMPLIANCE**

This is to certify that: (a) the word count function of the computer program used to prepare this document reports that there are 3,753 words in the relevant sections; and (b) a copy of the foregoing instrument will be served by efile.txcourts.gov to:

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