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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-82,264-03 and WR-82,264-04

EX PARTE MIGUEL ANGEL NAVARRO, Applicant

On Applications for Writs of Habeas Corpus
Cause Nos. 08-DCR-050238-HC2 and 10-DCR-050236A-HC2
240th District Court, Fort Bend County

APPLICANT'S PRINCIPAL BRIEF IN SUPPORT OF APPLICATIONS FOR WRITS OF HABEAS CORPUS

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APPLICANT REQUESTS ORAL ARGUMENT

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STATEMENT OF JURISDICTION

This Court has jurisdiction to issue writs of habeas corpus. TEX. CRIM. PROC. CODE art. 4.04 § 1.

STATEMENT OF ISSUES PRESENTED

Issue One: Does the fact that the Court's landmark decision in *Moon v. State* came after Applicant's convictions were final preclude Applicant from relying on *Moon* as a basis for habeas corpus relief?

Issue Two: If Applicant may rely on *Moon*, is the underlying juvenile court's boilerplate transfer order invalid, thus entitling Applicant to writs of habeas corpus overturning his convictions and remanding his case back to the juvenile court?

STATEMENT OF THE CASE

A. Introduction

This case centers on the constitutional requirements applicable to the "transfer orders" by which juvenile courts certify juvenile offenders to be tried as adults. These transfer orders exist because minors are subject to an entirely separate set of criminal laws than adults. For a variety of reasons—many of which are grounded in science and reflect recent developments in our understanding of child psychology—we view "children [as] constitutionally different from adults." *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012). As the Supreme Court observed, "youth is more than a chronological fact," but rather "is a time of immaturity, irresponsibility, impetuousness, and recklessness." *Id.* at 2467.

The juvenile justice system is designed to account for the fundamental differences between children and adults. The Texas Juvenile Justice Code is embodies the basic notion that "children and adolescents below a certain age should be protected and rehabilitated rather than subjected to the harshness of the criminal system." *Moon v. State*, 451 S.W.3d 28, 36 (Tex. Crim. App. 2014). Juvenile courts thus have "exclusive original jurisdiction over proceedings . . . in *all* cases involving [juveniles]." TEX. FAM. CODE § 51.04(a).

Of course, the juvenile justice laws also recognize—as they must—that some juvenile offenders whose crimes are especially reprehensible deserve to be treated like adults. The Juvenile Justice Code therefore empowers juvenile courts to transfer their exclusive jurisdiction over juvenile proceedings to adult courts in certain circumstances. But as this Court has stressed, such a transfer "should be regarded as the exception, not the rule." *Id.*

The U.S. Supreme Court also has held that, considering the "tremendous consequences" of a juvenile transfer, every aspect of the transfer process must "satisfy the basic requirements of due process and fairness." *Kent v. U.S.*, 383 U.S. 541, 553 (1966). One of the most critical requirements is the written order in which the juvenile court must "state specifically [] its reasons for" authorizing the transfer. TEX. FAM. CODE § 54.02(h). The written transfer order is the only

reflection of why the juvenile court—sitting as both judge and jury—determined that a transfer was warranted.

Despite this requirement, juvenile courts across Texas for decades used boilerplate, fill-in-the-blank transfer orders that merely recited the relevant statutory criteria, but that offered no insight into the particulars of each case. *Moon* put a stop to this practice, holding that juvenile courts must "show their work" by setting forth in their written transfer orders the specific fact findings and evidence underpinning their transfer determinations.

Applicant—who was arrested when he was fifteen years and subsequently sentenced to 99 years in prison—filed this proceeding because the juvenile court's transfer order in his case fails the *Moon* test. The order cites no evidence and offers no details about Applicant's character or background, the circumstances surrounding his offenses, or the reasons why the juvenile court found him unsuitable for the juvenile justice system.

Simply put, the transfer order is legally invalid under *Moon*. It therefore never vested subject matter jurisdiction over Applicant's case in the district court that tried and convicted him. Applicant's convictions thus are void and should be vacated.

The fact that *Moon* came after Applicant's convictions were final does not preclude this relief. Applicant is attacking the convicting district court's subject

matter jurisdiction, which is a fundamental, non-waivable challenge. And because *Moon* established a new rule of law that protects a particular class of people from a particular type of penalty—*i.e.*, juvenile offenders who do not deserve adult treatment, but who nevertheless are transferred to adult court and subjected to adult punishments—*Moon* should apply retroactively.

B. Factual Background

Applicant was born on March 28, 1992. (4 C.R. at 821) For the past six years, he has been incarcerated at the Texas Department of Criminal Justice's John B. Connally Unit, a maximum security prison located in Kenedy, Texas. (3 C.R. at 563)

Applicant is serving a 99-year prison sentence for murder and a concurrent 20-year sentence for aggravated assault. (4 C.R. at 822) His convictions stem from a brawl at a high school and college student party at a private residence in Katy, Texas in December 2007. (1 C.R. at 27) Applicant was fifteen years old at the time. (2 C.R. at 294)

Applicant was arrested after the fight and charged with stabbing three older boys. (1 C.R. at 145) Tragically, one of them later died from his injuries. (3 C.R. at 563)

Because of his age, the County Court at Law No. 2 of Fort Bend County, sitting as juvenile court, had exclusive jurisdiction over Applicant's case. (4 C.R.

at 820-22) The State requested that Applicant be certified to be tried as an adult. (3 C.R. at 564) On September 28, 2008, when Applicant was sixteen, the juvenile court granted the State's request and transferred its exclusive jurisdiction over Applicant's case to the 240th District Court of Fort Bend County, pursuant to Section 54.02 of the Texas Family Code. (4 C.R. at 822)

A grand jury subsequently indicted Applicant on one count of murder and two counts of aggravated assault. (3 C.R. at 564) Applicant's case proceeded to trial, where the jury found him guilty on the murder charge and one of the assault charges. (3 C.R. at 564) On January 28, 2011, the district court entered judgment on the verdict and sentenced Applicant to 99 years. (4 C.R. at 822) Applicant subsequently was assigned to the Connally Unit, where he has lived since. (3 C.R. at 563)

Applicant was eighteen years old at the time of his convictions. He is now twenty-five. He has spent ten years—or 40% of his life—in adult jails and prisons.

C. Procedural History

These are Applicant's second applications for writs of habeas corpus. Applicant initially challenged his convictions on direct appeal, but they were affirmed. *Navarro v. State*, Nos. 01-11-00139-CR, 01-11-00140-CR, 2012 WL 3776372 (Tex. App.—Houston [1st Dist.] Apr. 17, 2013) (not designated for publication).

Applicant filed his first writ applications on April 4, 2014. (4 C.R. at 823) He argued that he had received ineffective assistance of counsel at trial based on his defense attorney's failure to object to (i) the district court's omission of a multiple assailants self-defense charge, and (ii) the unconstitutionality of the 99-year sentence under the 8th Amendment. (4 C.R. at 823-24) This Court denied the applications on November 26, 2014. *Ex parte Navarro*, Nos. WR-82,264-01, WR-82,264-02 (Tex. Crim. App. Nov. 26, 2014).

On February 5, 2015, Applicant then initiated federal court writ proceedings based on the same ineffective assistance grounds. (4 C.R. at 824) That case currently is pending in the U.S. District Court for the Southern District of Texas, where it has been stayed pending resolution of this proceeding. *Navarro v. Stephens*, No. 4:15-cv-00352 (S.D. Tex. filed Feb. 6, 2015).

Applicant filed the present applications on November 19, 2015 (the "Successor Applications"). (4 C.R. at 824-25) Applicant asserts that the transfer order by which the juvenile court certified him to be tried as an adult failed to satisfy the requirements of *Moon v. State*, in which the Court held that to effectuate a valid transfer under Family Code Section 54.02, a juvenile court must "show its work" in its written order by specifically explaining its "reasons for waiving its jurisdiction and the findings of fact that undergird those reasons." 451 S.W.3d 28, 49 (Tex. Crim. App. 2014). (4 C.R. at 825) In turn, Applicant argues that since the

transfer order is invalid under *Moon*, the district court never acquired subject matter jurisdiction over his case. (4 C.R. at 825)

On December 23, 2015, the district court reviewing the Successor Applications issued an Order Designating Issues in which it requested briefing on two questions:

> 1. Whether the current claims and issues have not been and could not have been presented previously in the applicant's original application because the factual or legal basis for the claim was unavailable on the date the applicant filed his previous application; and
>
> 2. Whether the applicant can waive error in an invalid and/or insufficient transfer order.

(4 C.R. at 825) Applicant and the State submitted multiples briefs in response to the court's order. (*See* 4 C.R. at 850-69) The court also held a hearing on July 22, 2016. (4 C.R. at 820)

On August 30, 2016, the Honorable Lee Duggan, Jr., Retired Justice, First Court of Appeals (who was assigned to consider the Successor Applications on March 30, 2016), entered an order recommending "that the Court of Appeals **grant** Applicant's writs of habeas corpus relief, overturn his two underlying convictions, and remand his cases to the juvenile court for further proceedings." (4. C.R. at 821, 849) (emphasis in original) This Court then issued its briefing order on January 25, 2017 and set the Successor Applications for submission.

SUMMARY OF THE ARGUMENT

The Court ordered briefing on two issues: (1) whether Applicant may rely on the Court's opinion in *Moon v. State*, which the Court issued after Applicant's convictions became final, and if so, (2) whether Applicant is entitled to habeas relief based on *Moon*.

With respect to issue one, Applicant is entitled to rely on *Moon* for three reasons. First, the Successor Applications satisfy the requirements of Article 11.07 of the Texas Code of Criminal Procedure, which governs the reviewability of "subsequent" writ applications. The Court therefore may consider Applicant's arguments based on *Moon* even though he did not raise them when he originally sought habeas relief on ineffective-assistance-of-counsel grounds.

Second, *Moon* established a new substantive rule of law that, under the test adopted by the U.S. Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989), applies retroactively. The Court therefore may apply *Moon* to Applicant's case even though his convictions already were final when *Moon* was decided.

Third, Applicant did not otherwise waive his right to invoke *Moon* and thereby challenge the convicting district court's subject matter jurisdiction. This is a fundamental, non-waivable challenge that Applicant may pursue here even though he did not do so during the course of his trial or on direct appeal.

With respect to issue two, the underlying juvenile court's transfer order fails to meet muster under *Moon* and therefore never effectuated a valid transfer of the juvenile court's exclusive subject matter jurisdiction over Applicant's case to the district court. The transfer order is materially indistinguishable from the transfer order at issue in *Moon* and suffers from the same fatal flaws. It largely parrots the language of the statutory findings that the court had to make to justify the transfer. But it explains none of the evidence on which those "findings" were made. The order does not explain or offer any factual support demonstrating why Applicant could not have been rehabilitated in the juvenile justice system; why he was "sophisticated and mature" enough to be treated like an adult; why his crimes were serious enough to warrant a transfer; or why his "background" indicated that adult proceedings were necessary to protect the "welfare of the community."

The *only* individualized facts that the order offers about Applicant are (i) his age, (ii) the elements of the crimes with which he was charged, and (iii) the juvenile court's determination that he "is not mentally retarded" or suffering from any mental defect. This is insufficient under *Moon*.

The State itself has recognized as much. In a recent case involving a juvenile transfer order that looks virtually identical to the one at issue here, the State expressly conceded to the Fourteenth Court of Appeals "that the juvenile court was required ***and failed*** to make the requisite findings." *Morrison v. State*,

503 S.W.3d 724, 727 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (emphasis added). The juvenile court in Applicant's case did the same. And since the transfer order is legally ineffective, the criminal district court that entered Applicant's convictions did so without ever acquiring subject matter jurisdiction over his case. Applicant's convictions therefore are void and should be overturned.

ARGUMENT

I APPLICANT MAY RELY ON THIS COURT'S OPINION IN *MOON*.

This Court decided *Moon* in December 2014, roughly three years after Applicant's convictions became final. But as the district court found in recommending that this Court grant the Successor Applications, Applicant still may obtain habeas relief based on *Moon*. (*See* 4 C.R. at 825-34, 839-40)

A. <u>The Successor Applications satisfy the requirements of Article 11.07 of the Code of Criminal Procedure.</u>

Article 11.07 governs habeas writ applications. Section 4(a) of the statute governs "subsequent applications." TEX. CODE CRIM. PRO. art. 11.07 § 4(a). It provides that "[i]f a subsequent application . . . is filed after final disposition of an initial application challenging the same conviction," a court may grant relief only if:

> (1) the current claims and issues have not been and could not have been presented previously . . . because the factual or legal basis for the claims was unavailable on the date the applicant filed the previous application; or

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.

Id. The Successor Applications satisfy both requirements.

i. The Successor Applications are proper under Section 4(a)(1).

The Successor Applications satisfy Section 4(a)(1) because they are based on *Moon*, which came six months after Applicant filed his original writ applications on April 4, 2014. (4 C.R. at 823) Indeed, by the time the Court decided *Moon*, it already had denied Applicant's original applications. *Moon* therefore was unavailable when Applicant originally sought habeas relief. And since *Moon* established a new rule of law governing juvenile certifications—a rule that Applicant could not have foreseen based on pre-*Moon* precedent—the Successor Applications are reviewable under Section 4(a)(1).

a. *Moon* established a new "legal basis."

The Successor Applications are reviewable under Section 4(a)(1) because the *Moon* decision established a previously unavailable "legal basis" regarding the validity of juvenile transfer orders in Texas. At issue in *Moon* was the Family Code's requirement that where a juvenile court decides to transfer a minor to district court, "it shall state specifically in the [transfer] order its reasons for [the] waiver." TEX. FAM. CODE § 54.02(h). Having never previously analyzed this requirement, the *Moon* Court held that in certifying a juvenile to be tried as an

adult, a juvenile court must "take pains to 'show its work,' as it were, by spreading its deliberative process on the record," and specifically including in its written transfer order the factual bases and supporting evidence underlying its ultimate conclusion. 451 S.W.3d at 49.

The Court stressed that in reviewing a juvenile certification, an appellate court "should not be made to rummage through the record for facts that the juvenile court might have found, given the evidence developed at the transfer hearing, but did not include in its written transfer order." *Id.* at 50. Indeed, under *Moon*, an appellate court may only consider "the facts that the juvenile court expressly relied upon, as required to be *explicitly set out* in the juvenile transfer order." *Id.* (emphasis added).

Moon represented a significant departure from the prior rules applicable to juvenile transfer orders in Texas. As the dissent observed, "[f]or almost forty years, the tendency among the courts of appeals ha[d] been to hold that a juvenile transfer order need not specify in detail the facts supporting the order." 451 S.W.3d at 52 (Keller, P.J.); *see also id.* at 41-42 n.54 (collecting cases).

Juvenile courts instead used bare-boned fill-in-the-blank forms that quoted the statutory findings the courts were required to make, as well as the four factors they were required to consider, but that failed to specify the facts and evidence supporting the courts' ultimate transfer determinations. The form orders typically

made "the same stock findings in every case," many of which "had no apparent relation to the ultimate question of whether the welfare of the community required criminal proceedings." Jack Carnegie, "Juvenile Justice: A Look at How One Case Changed the Certification Process," 78 TEX. B. J. 866, 867 (Dec. 2015) [hereinafter "Carnegie Article"].

The *Moon* court flatly rejected this practice, and thereby dramatically changed the landscape of juvenile certification law in Texas. *See id.* (explaining that *Moon* "rejected the use of printed form orders and required juvenile courts to 'show their work' by making individualized fact findings to allow appellate courts to determine whether the juvenile court's 'decision was in fact appropriately guided by the statutory criteria, principled, and reasonable'"); *Guerrero v. State*, 471 S.W.3d 1, 3 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (noting that the *Moon* decision "address[ed] several previously unresolved questions concerning the specificity required of the juvenile district court's transfer order and the applicable standards of review the appellate courts are to apply to the transfer order").

Moon represented such a fundamental shift in the law that it sparked the Legislature's recent amendment to the Family Code authorizing immediate interlocutory appeals of defective transfer orders. TEX. FAM. CODE

§ 56.01(c)(1)(A).[1] The Texas Supreme Court subsequently issued an order "requiring juvenile courts to inform juveniles and their attorneys of the right to appeal and specifying that the appeal is governed by the rules applicable to accelerated appeals." Order Accelerating Juvenile Certification Appeals, Misc. Docket No. 15-9156 (Tex. Aug. 28, 2015). Allowing immediate appeals of juvenile transfer orders was a major change in the law—a change spawned by *Moon*.

b. Applicant could not have "reasonably formulated" the *Moon* rule at the time of his original applications.

The State will argue that Applicant should have foreseen his current challenge to the juvenile court's transfer order when he filed his original applications based on then-existing precedent, but the State is wrong. Section 4(b) of Article 11.07 provides that "[f]or purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date . . . if the legal basis was not recognized by and could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date." The *Moon* rule satisfies this standard.

[1] Before the amendment, the statute permitted an appeal of a transfer order "only in conjunction with the appeal of a conviction of the offense for which the defendant was transferred to criminal court." *Arango v. State*, No. 01-16-00607-CR, No. 01-16-00630-CR, 2017 WL 1404370, at *2 n.3 (Tex. App.—Houston [1st Dist.] Apr. 18, 2017, no pet. h.).

Applicant could not have reasonably formulated his current challenge—*i.e.*, that the juvenile court failed to "show its work"—from any U.S. Supreme Court decision. The only Supreme Court case that addresses juvenile certifications is *Kent v. U.S.*, in which the Court held that juvenile certifications are constitutional matters. *See* 383 U.S. 541, 557 (1966) (holding that "a statement of reasons for the Juvenile Court's decision," among other requirements, is a constitutional prerequisite to a valid juvenile transfer). However, while the *Kent* opinion focuses on the same concerns about prosecuting juveniles as adults that are reflected in *Moon* (as discussed further below), *Kent* fundamentally differs from *Moon* in that the Supreme Court did not impose or articulate any rule of law akin to the "show your work" requirement.

Unlike in *Moon*, the juvenile court in *Kent* had certified the defendant to be tried as an adult without holding a hearing or even conferring with the defendant or his counsel. *Id.* at 546. The Supreme Court invalidated the transfer on the ground that the entire transfer proceeding was insufficient. And while the Court observed that the juvenile judge "must accompany its waiver order with a statement of the reasons or considerations therefor," the Court did not explain what it meant or in any way clarify the specificity required for this "statement." *Id.* at 561. Thus, while *Kent* confirmed the constitutional implications of state-law juvenile

certification proceedings, Applicant could not have reasonably formulated the "show your work" requirement from the *Kent* court's holding.

This is evidenced by the pre-*Moon* history of Texas appellate courts routinely affirming form transfer orders that offered little meaningful insight into the reasons for the juvenile judges' ultimate rulings. Some juvenile offenders even specifically invoked *Kent* to argue that the form orders were improper. But Texas courts disagreed as a matter of practice, consistently upholding conclusory transfer orders that failed to cite any specific facts or evidence. This practice persisted until *Moon*. *See, e.g.*, *Matter of T.L.C.*, 948 S.W.2d 41, 44 (Tex. App.—Houston [14th Dist.] 1997, no writ) (rejecting the argument that a form order, which merely "parrot[ed]" the statutory considerations mandated by Section 54.02(h), "[did] not state the reasons for waiver specifically enough to satisfy 54.02(f) and *Kent*," and holding that "the fact that the order 'parrots' the required statutory considerations does not render it infirm").

The pre-*Moon* history of Texas courts endorsing boilerplate transfer forms also demonstrates that Applicant could not have reasonably formulated his current claims "from a final decision of . . . a court of appellate jurisdiction of this state." TEX. CODE CRIM. PRO. art. 11.07 § 4(b). Until *Moon* imposed the "show your work" requirement, Applicant's current arguments likely would have been summarily rejected. *See, e.g.*, *Matter of T.D.*, 817 S.W.2d 771, 776-77 (Tex.

App.—Houston [1st Dist.] 1991, writ denied) (concluding that under Section 54.02, the juvenile court was not required to specify its reasons in its certification order); *In re I.B.*, 619 S.W.2d 584, 587 (Tex. App.—Amarillo 1981, no writ) ("[Section 54.02] does not preclude 'form' orders and does not require a statement of the factual reasons for waiver."); *Appeal of B.Y.*, 585 S.W.2d 349, 351 (Tex. App.—El Paso 1979, no writ) ("Reversible error is not present here by the fact that the Court's order seems to parrot the Section 54.02 list of factors the Court should consider in making a transfer . . . .").[2]

For the same reasons, Applicant could not have reasonably formulated his current claims based on the plain words of Section 54.02. Despite the "state specifically" language in Section 54.02(h), Texas courts for decades had rejected the notion that juvenile judges must include specific fact findings or evidentiary references in their written transfer orders.

ii. The Successor Applications are proper under Section 4(a)(2).

The Successor Applications also are reviewable under Article 11.07 Section 4(a)(2), which permits a subsequent writ application if a preponderance of the

[2] In the district court proceedings, the State additionally argued that Applicant should have reasonably formulated his current claims based on the underlying First Court of Appeals' decision in *Moon*. (2 C.R. at 239) However, the First Court did not impose or otherwise articulate the "show your work" requirement, nor did it confine its appellate review to the facts and evidence that the juvenile judge had expressly included in the written transfer order. *Moon v. State*, 410 S.W.3d 366, 378 (Tex. App.—Houston [1st Dist.] 2013). The First Court's decision also was not final at the time of Applicant's original writ applications since this Court had granted discretionary review in *Moon*. The State thus abandoned this argument. (2 C.R. at 412)

evidence shows that, "but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt." TEX. CRIM. PROC. CODE art. 11.07 § 4(a)(2). The jury's verdict in Applicant's criminal trial was possible only because the juvenile court certified him to be tried as an adult. But the transfer order was legally invalid, so the district court never acquired jurisdiction over Applicant's case. The transfer order thus violated Applicant's constitutional right to be tried in "a court of competition jurisdiction." *Frank v. Mangum*, 237 U.S. 309, 326 (1915); *see also Ex parte Birdwell*, 7 S.W.3d 160, 162 (Tex. Crim. App. 1999) (explaining that a defendant was "denied due process of law and due course of the law when the district court granted a new trial without jurisdiction"). The jury would not have entered a guilty verdict "[b]ut for this constitutional violation—namely, the commencement of criminal proceedings by a court without jurisdiction." *Ex parte Sledge*, 391 S.W.3d 104, 116 (Tex. Crim. App. 2013) (Alcala, J., dissenting).

B. ***Moon* should apply retroactively.**

Since the Successor Applications are reviewable under Article 11.07, the question becomes whether the holding from *Moon* applies retroactively to prior convictions in cases on collateral review. Under the retroactivity test set forth in *Teague v. Lane*, the Court should hold that it does.

i. The Court should apply *Moon* retroactively as a matter of state law.

As an initial matter, the Court should give *Moon* retroactive effect whether or not it satisfies the *Teague* test, which only controls "the retroactivity of criminal-procedure decisions from the [U.S.] Supreme Court." *Ex parte De Los Reyes*, 392 S.W.3d 675, 678 (Tex. Crim. App. 2013). While Texas courts "follow[] *Teague* as a general matter," *Teague* does not limit a state court's authority to apply new rules of law to prior state convictions, even if the rules would be deemed nonretroactive under *Teague*. *Id.* at 679; *see also Danforth v. Minn.*, 552 U.S. 264, 266 (2008) (holding that *Teague* does not constrain "the authority of state courts to give broader effect to new rules," and noting that "considerations of comity militate in favor of allowing state courts to grant habeas corpus relief to a broader class of individuals than is required by *Teague*"); *Ex parte Dean*, No. WR-79,040-02, 2016 WL 6949498, at *6 (Tex. Crim. App. Nov. 23, 2016) (Yeary, J., concurring) ("We are not constitutionally bound to follow the *Teague* formulation for determining retroactivity, . . . [and] we may 'deviate' from our general practice under appropriate circumstances.").

Given the stakes in this case, the Court should apply *Moon* retroactively regardless of *Teague*. But for the juvenile court's entry of the boilerplate transfer order, Applicant would have remained in the juvenile justice system, where he would have been subject to a maximum sentence of forty years. (2 C.R. at 142)

Instead, he was sent to adult court, where he received a 99-year sentence in a maximum security prison. If the Court determines that this should not have happened under *Moon*, the Court should grant the Successor Applications whether or not they technically qualify as retroactive under *Teague*. Excepting Applicant from the protections of *Moon*—protections that all other juvenile offenders will enjoy going forward—based solely on the timing of Applicant's convictions, would be unjust.

ii. The Court should apply *Moon* retroactively under *Teague*.

Even if the Court follows *Teague*, the Court still should grant the Successor Applications. The "show your work" requirement from *Moon* constitutes a "new rule" of "substantive" law and therefore falls within one of the exceptions to *Teague*'s general rule of nonretroactivity.[3]

a. *Moon* established a "new rule" for purposes of *Teague*.

The *Teague* analysis turns on whether the decision in issue established a "new rule." *Teague*, 489 U.S. at 301. If it did, "a defendant whose conviction is already final may not benefit from that decision in a habeas or similar proceeding," except in certain limited circumstances (discussed below). *De Los Reyes*, 392 S.W.3d at 678.

[3] A *Teague* analysis involves three steps: (1) a determination of when the defendant's convictions became final; (2) an analysis of whether the rule upon which the defendant relies is "new"; and (3) if so, an analysis of whether an exception to the general rule of nonretroactivity applies. *Teague,* 489 U.S. at 300-308. Here, Applicant's convictions were final before the Court decided *Moon*, so only the second and third steps of the *Teague* test are relevant.

A new rule is one that "breaks new ground or imposes a new obligation on the [government]." *Teague*, 489 U.S. at 301. "[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.*; *see also Butler v. McKellar*, 494 U.S. 407, 414 (1990) (holding that a decision can qualify as a "new rule" even if it is "within the 'logical compass' of [or] 'controlled' by a prior decision").

The "show your work" requirement from *Moon* is a "new rule." As detailed in Part I.A.i.a above, *Moon* was a landmark case that fundamentally changed the law of juvenile certifications in Texas. The Court's decision to invalidate the transfer order in *Moon* "broke rank" with Texas appellate courts' forty-year practice of upholding boilerplate, fill-in-the-blank forms. 451 S.W.3d at 52-53 (Keller, P.J., dissenting). And as detailed in Part I.A.i.b, the "show your work" requirement was not "dictated" by existing precedent. Again, *Kent* did not address the issue of what a written transfer order must contain to satisfy the Constitution. And Texas courts had been rejecting the argument that boilerplate forms are improper for decades. *Moon* thus qualifies as a "new rule" under *Teague*.[4]

[4] However, should the Court conclude that *Moon* is not a "new rule," Applicant still would be entitled to habeas relief because the general rule of nonretroactivity does not apply to new applications or interpretations of "old rules." *See, e.g., Yates v. Aiken*, 108 S. Ct. 534, 538 (1988) (explaining that where a decision does not represent a new rule, but rather an "application of [an] existing principle," the decision applies retroactively to cases on collateral review); *U.S. v. Johnson*, 457 U.S. 537, 549 (1982) (noting that where a later decision "merely [] applied settled precedents[,] . . . it has been a foregone conclusion that the rule of the later case applies in earlier cases"); *Lee v. Mo.*, 439 U.S. 461, 462 (1979) (explaining that where a decision does not

b. The *Moon* rule is "substantive."

Under *Teague*, a new rule applies retroactively if it is "substantive." *Teague*, 489 U.S. at 307.[5] A substantive rule is one that either "narrow[s] the scope of a criminal statute by interpreting its terms," or that puts "particular conduct or persons covered by [a] statute beyond the State's power to punish." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (citing *Bousley v. U.S.*, 523 U.S. 614, 620-21 (1998)). When a new substantive rule "controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Montgomery v. La.*, 136 S. Ct. 718, 729 (2016). "[A] court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." *Id.* at 731.

Substantive rules apply retroactively "because they necessarily carry a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him because of his status or offense." *Schriro*, 542 U.S. at 352. "Substantive rules [] set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose." *Montgomery*, 136 S. Ct. at 729-30 (2016). "[W]hen a State enforces a proscription

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announce "new standards," the considerations that have led courts to "depart from full retroactive application" do not apply).

[5] There also is an exception for certain "watershed" rules of criminal procedure, but this exception is not relevant here.

or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful." *Id.* at 730. Thus, if the precedent establishing the unconstitutionality of the proscription or penalty post-dates the conviction or sentence, it must apply retroactively. *See Bousley*, 523 U.S. at 621 (explaining that it would be "inconsistent with the doctrinal underpinnings of habeas review to preclude [a] petitioner from relying" on a later decision that narrowed an applicable statute in support of the petitioner's habeas claim).

A prime example of a new substantive rule that applies retroactively is the U.S. Supreme Court's holding in *Miller v. Alabama* that mandatory life-without-parole sentences for minors are unconstitutional under the Eighth Amendment. 132 S. Ct. at 2469-73. Stressing that "children are constitutionally different from adults," the *Miller* Court explained that a life-without-parole sentence is appropriate only for the rarest of juveniles and should be an "uncommon" occurrence, and that a sentencing court therefore must distinguish "between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 2464, 2469. The Court emphasized that "youth matters" in determining proper sentences for minors, and that laws that fail to adequately "take defendants' youthfulness into account" necessarily are "flawed." *Id.* at 2465-66.

The *Miller* Court thus held that before a court may sentence a juvenile to life without parole, it first must carefully examine the juvenile's individual characteristics and circumstances, as well as the myriad psychological, intellectual, emotional, and behavioral differences between adults and children. *Id.* Such an examination "is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." *Montgomery*, 136 S. Ct. at 735; *see also id.* at 733 (explaining that under *Miller*, a sentencing judge must consider each defendant's individual circumstances, while also "tak[ing] into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison'") (quoting *Miller*, 132 S. Ct. at 2469)).

As this Court held in *Ex parte Maxwell* (and as the U.S. Supreme Court subsequently confirmed in *Montgomery v. Louisiana*), *Miller* is a substantive rule because it precludes the government from imposing a life-without-parole sentence on a minor absent a determination that such a severe punishment truly is warranted, based on "all of the evidence" about the minor and the circumstances of his or her offense. *Ex parte Maxwell*, 424 S.W.3d 66, 75-76 (Tex. Crim. App. 2014). In other words, *Miller* is substantive because it "places juveniles subject to mandatory 'life without parole' statutes beyond the State's power to punish," and thereby "alters the range of outcomes of a criminal proceeding." *Id.* at 74.

The "show your work" requirement from *Moon* is a "substantive" rule for the same reasons as *Miller*. Both cases protect the same "class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery*, 136 S. Ct. at 734. Both cases thus recognize that some juveniles truly deserve adult punishment. But they make clear that most juveniles should be treated like children, and they require courts to take steps to ensure as much. *Miller* requires that states take steps to ensure that life-without-parole sentences are given to only the rarest of juvenile offenders whose conduct "reflects irreparable corruption." 132 S. Ct. at 2469. Stressing that juvenile certifications "should be [] the exception, not the rule," the *Moon* Court similarly requires that juvenile courts make transfer determinations based on the specific facts and evidence of each case, so that only the most dangerous and corrupt children get certified. 451 S.W.3d at 36.

Miller and *Moon* both protect juvenile defendants based on the same underlying principles regarding the fundamental differences between children and adults. The *Miller* Court explained that in light of these differences, the law must provide enhanced protections for minors that account for their lesser "capacity" to distinguish between right and wrong and appreciate the consequences of their actions, and that application of harsh penalties to juvenile offenders should occur only in exceptional circumstances. 132 S. Ct. at 2469. The *Moon* Court espoused

the same views, reasoning that "whenever feasible, children and adolescents below a certain age should be protected and rehabilitated rather than subjected to the harshness of the criminal system." 451 S.W.3d at 36; *see also id.* (emphasizing that "the goals of the criminal justice system and the juvenile-justice system [are] fundamentally different," and "describing the former as more 'retributive' than its 'rehabilitative' juvenile counterpart"); TEX. FAM. CODE § 51.01(2) (explaining that one of the Juvenile Justice Code's central purposes is to "remove, where appropriate, the taint of criminality from children committing certain unlawful acts").

Both *Miller* and *Moon* also protect juvenile defendants from particular types of punishment that are simply too severe for the vast majority of minors. The *Miller* Court targeted mandatory life-without-parole sentences. The *Moon* Court targeted "the waiver of juvenile-court jurisdiction," which exposes juvenile offenders to the penalties of the adult system and thus "means the loss of [their] protected status" as children. 451 S.W.3d at 36. Of course, sentencing a juvenile to life without parole is not the equivalent of transferring a juvenile to adult court. But the extreme nature of the particular penalty addressed in *Miller* does not mean that *Moon* is not substantive. On the contrary, *Moon*, just like *Miller*, places a defined group of individuals—*i.e.*, juvenile offenders who have not undergone

appropriate individualized assessments—beyond "the State's power to punish." *Schriro*, 542 U.S. at 352.

Critically, *Miller* did not categorically ban *all* life-without-parole sentences for minors. It only banned such sentences where the government has not conducted a meaningful examination of the defendant's specific circumstances. *Moon* likewise did not categorically ban transferring juveniles to adult court and subjecting them to adult penalties. Instead, it categorically banned doing so where the juvenile court—which sits as both judge and jury in the transfer proceedings—fails to demonstrate that it conducted a thorough assessment of the transferred defendant's specific circumstances. The "show your work" requirement ensures that this assessment in fact takes place.

Thus, *Moon* is substantive even though it does not categorically ban juvenile certifications altogether. In *Montgomery*, the state argued that *Miller* is not substantive because it did not categorically bar life-without-parole sentences and only mandates "that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." 136 S. Ct. at 734. The *Montgomery* Court disagreed, explaining that while *Miller* does not prohibit life-without-parole sentences entirely, it does prohibit them absent the proper careful consideration of each individual

defendant's characteristics. *Id.* The *Moon* rule operates in the same way and serves the same purpose.

The fact that *Moon*, like *Miller*, established a "procedural component" to effectuate its substantive holding is irrelevant. *Montgomery*, 136 S. Ct. at 734; *see also id.* at 734-35 (distinguishing between procedural *requirements* that are "necessary to implement a substantive guarantee," and procedural *rules*, which "regulate[] the manner of determining the defendant's culpability"). The procedural component in *Miller* is the requirement that a sentencing judge "consider a juvenile offender's youth and attendant characteristics before determining that life without parole is the proportionate sentence." *Id. Moon* requires the same consideration from a juvenile court, as specifically set forth in the written transfer order, before determining that a juvenile offender deserves adult treatment. This requirement tracks the *Miller* Court's emphasis on the need for comprehensive, case-specific assessments. Naturally, a juvenile judge cannot prepare a proper transfer order without first examining a particular juvenile's characteristics and the circumstances surrounding his or her offenses.[6]

C. Applicant did not otherwise waive his right to rely on *Moon*.

In the proceedings below, the State argued that Applicant waived his current

[6] *Moon* also is substantive because it effectively narrowed the scope of Section 54.02 by imposing the rigorous "show your work" requirement. *See Schriro*, 542 U.S. at 351-52 (explaining that a rule that "narrow[s] the scope of a criminal statute by interpreting its terms" is substantive under *Teague*).

habeas claims by failing to challenge the juvenile court's transfer order during his trial or on direct appeal. But as the district court found, no such waiver occurred. (4 C.R. at 830-34, 840)

i. The Successor Applications raise a non-waivable challenge to the convicting district court's subject matter jurisdiction.

The juvenile court's transfer order was invalid under *Moon* and therefore could not have operated to transfer subject-matter jurisdiction over Applicant's case to the district court. As such, the district court that tried and convicted Application never acquired subject-matter jurisdiction over his case—which means his convictions are void.

The Successor Applications thus challenge the district court's subject-matter jurisdiction. Under settled Texas law, this is a fundamental challenge that "cannot be waived, and can be raised at any time." *Alfonso v. Skadden*, 251 S.W.3d 52, 55 (Tex. 2008); *see also U.S. v. Cotton*, 535 U.S. 625, 630 (2002) ("[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived."); *Puente v. State*, 71 S.W.3d 340, 342 (Tex. Crim. App. 2002) ("[A] total lack of subject-matter jurisdiction cannot be waived."); *Garcia v. Dial*, 596 S.W.2d 524, 526 (Tex. Crim. App. [Panel Op.] 1980) (emphasizing that even the defendant's consent cannot remedy a lack of subject-matter jurisdiction); *Bell v. State*, --- S.W.3d ---, 2017 WL 1067892, at *1 (Tex. Crim. App. Mar. 22, 2017) ("Jurisdiction is an absolute, systemic requirement that operates independent of

preservation of error requirements. Appellate courts must review jurisdiction regardless of whether it is raised by the parties.").

The law also is settled that a judgment can never be final where the issuing court lacks subject-matter jurisdiction. Such a judgment automatically is void. *See State ex rel. Latty v. Owens*, 907 S.W.2d 484, 485 (Tex. 1995) (stating that a judgment is "void" when "the court rendering the judgment had no jurisdiction over the parties or subject matter"); *Nix v. State*, 65 S.W.3d 664, 668 (Tex. Crim. App. 2001) ("A void judgment is a 'nullity' and can be attacked at any time."); *Matter of M.K.*, --- S.W.3d ---, 2017 WL 281036, at *8 (Tex. App.—Fort Worth Jan. 23, 2017, no pet. h.) ("When a court lacks subject matter jurisdiction over a proceeding, any orders it renders in that proceeding are void."). That Applicant did not challenge the validity of the juvenile court's transfer order on direct appeal therefore does not preclude his requested relief. *See Ex parte Moss*, 446 S.W.3d 786, 788 (Tex. Crim. App. 2014) (stressing that "lack of jurisdiction" cannot "be forfeited on habeas due to lack of action"); *Ex parte McCain*, 67 S.W.3d 204, 207 (Tex. Crim. App. 2002) (noting that habeas corpus is available for relief "from jurisdictional defects").

The State will argue that juvenile transfer orders do not convey subject matter jurisdiction, but settled Texas law is to the contrary. The Juvenile Justice Code bestows upon juvenile courts the "exclusive original jurisdiction over

proceedings . . . in all cases involving the delinquent conduct or conduct indicating a need for supervision engaged in by a person who was a child within the meaning of this title at the time the person engaged in the conduct." TEX. FAM. CODE § 51.04(a). Texas courts have made clear that this "exclusive original jurisdiction" is one of subject matter jurisdiction. *See Matter of M.K.*, 2017 WL 281036, at *8 (holding that because the defendant was not a "child" under the juvenile justice laws when the State requested certification, "the juvenile court lacked subject matter jurisdiction to conduct the waiver and transfer proceeding and to render the amended waiver and transfer order that is the subject of this appeal," and in turn, that the "amended [] transfer order is void"); *Matter of C.B.*, No. 03-14-00028-CV, 2015 WL 4448835, at *2 (Tex. App.—Austin July 15, 2015, no pet.) (holding that under Section 51.04(a), the juvenile court "had subject-matter jurisdiction to conduct the release or transfer hearing"); *Matter of J.W.*, No. 01-11-01067-CV, 2012 WL 5295301, at *3-*4 (Tex. App.—Houston [1st Dist.] Oct. 25, 2012, no pet.) (discussing the Juvenile Justice Code's exclusive grant of subject matter jurisdiction over juvenile defendants to juvenile courts); *Duncan v. Tex. Dep't of Pub. Safety*, 6 S.W.3d 756, 758 (Tex. App.—Tyler 1999, no pet.) ("Subject matter jurisdiction relates to the portion of the judicial power assigned to a tribunal, that is, the type of controversies which it is authorized to consider and determine . . . by the constitution and by statutes enacted pursuant to it."); *Moon*, 451 S.W.3d at 38

n.32 (quoting the definition of "original jurisdiction" under Black's Law Dictionary as "[a] court's power to hear and decide a matter before any other court can review the matter," and the definition of "exclusive jurisdiction" as "[a] court's power to adjudicate an action or class of actions to the exclusion of all other courts").

Texas courts also have made clear that this exclusive jurisdiction may pass to a district court *only* pursuant to a valid transfer order under Section 54.02. Otherwise, a district court never acquires subject matter jurisdiction, and any judgments or convictions it enters are void. As the *Moon* court put it, "[t]he juvenile court has either validly waived its exclusive jurisdiction, thereby conferring jurisdiction on the criminal courts, or it has not." 451 S.W.3d at 52 n.90; *see also Guerrero*, 471 S.W.3d at 4 (vacating a criminal conviction after concluding that the district court never acquired subject-matter jurisdiction because the underlying juvenile court's transfer order was invalid under *Moon*); *Arango*, 2017 WL 1404370, at *1 (holding that "the juvenile court's transfer order does not pass muster under *Moon*" and therefore "failed to vest jurisdiction in the district court"); *Ex parte Waggoner*, 61 S.W.3d 429, 431-32 (Tex. Crim. App. 2001) ("In the absence of a transfer [under Section 54.02], . . . the district court never acquired jurisdiction over applicant . . . and any resulting conviction was void."); *Cordary v. State*, 596 S.W.2d 889, 891 (Tex. Crim. App. 1980) (voiding a district court

conviction after noting that absent a valid transfer from the juvenile court, the appellant "was never made subject to the jurisdiction of the district court," which therefore "did not have jurisdiction to accept her plea of guilty"); *Kuol v. State*, 482 S.W.3d 623, 628 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (holding that because neither Section 54.02 nor any other provision of the Family Code permits "transferring a child to a county court," the juvenile defendant's prior convictions were "void because the county court at law [that entered them] lacked subject matter jurisdiction" to do so).

And while the Legislature has enacted laws that allow for a juvenile defendant to waive the juvenile court's exclusive subject matter jurisdiction in certain limited circumstances, none apply here. Section 51.09 of the Family Code, for instance, provides that "any right granted to a child by this title or by the constitution or laws of this state or the United States may be waived in proceedings under this title if . . . the waiver is made by the child and the attorney for the child . . . in writing or in court proceedings that are recorded." Applicant made no such waiver.[7] The State also will point to Article 4.18 of the Criminal Procedure Code, which requires certain defendants being tried in district court despite being under

[7] Section 51.09 also does not preclude the Successor Applications because it expressly does not apply where "a contrary intent clearly appears elsewhere in this title." And Chapter 56 of the Family Code, which governs appeals of defective transfer orders, provides that "[t]his section does not limit a child's right to obtain a writ of habeas corpus." TEX. FAM. CODE § 56.01(o).

the age of eighteen to file a motion with the district court contesting its jurisdiction. But as explained below, Article 4.18 is inapplicable to this case.[8]

ii. Article 4.18 of the Criminal Procedure Code does not bar the Successor Applications.

The State also argued below that Applicant waived his current claims by failing to comply with Article 4.18 of the Code of Criminal Procedure. (4 C.R. at 833) Article 4.18 sets forth one of the methods by which a juvenile defendant being prosecuted in district court may challenge the district court's jurisdiction. The statute requires the defendant to file a written motion in the district court, which Applicant never did.

Article 4.18, however, has no bearing on this case. By its plain terms, the statute only applies to:

> A claim that a district court or criminal district court does not have jurisdiction over a person because jurisdiction is exclusively in the

[8] Article 11.07 is another statute that effectively allows for a waiver of subject matter jurisdiction (*i.e.*, where a subsequent writ application raises a jurisdictional challenge that was available at the time of the defendant's original application). However, while this Court upheld Article 11.07 in *Sledge*, that case did not involve a jurisdictional claim. And as the Court later stressed in *Moss*, there is a crucial difference between a claim involving constitutional rights that can be forfeited on habeas corpus due to lack of action and a claim based upon lack of jurisdiction, which cannot be forfeited. 446 S.W.3d at 788; *see also Ex parte McCain*, 67 S.W.3d at 207 (stating that the "Great Writ . . . is available for relief from jurisdictional defects and violations of constitutional and fundamental right"); *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993) ("[A] number of requirements and prohibitions . . . are essentially independent of the litigants' wishes . . . and cannot [] be waived or forfeited by the parties. The clearest cases of nonwaivable, nonforfeitable systemic requirements are laws affecting the jurisdiction of the courts."). Given the Texas Constitution's mandate that "[t]he writ of habeas corpus is a writ of right, and shall never be suspended," Article 11.07 arguably is invalid. The Court need not address this issue, though, as the Successor Applications satisfy the requirements of Article 11.07.

> juvenile court and that the juvenile court could not waive jurisdiction under Section 8.07(a), Penal Code, or did not waive jurisdiction under Section 8.07(b), Penal Code.

TEX. CODE CRIM. PRO. art. 4.18 § (a). Section 8.07(a) of the Penal Code addresses prosecutions for offenses committed by a person aged fourteen or younger. Section 8.07(b) addresses prosecutions for offenses committed by a person aged sixteen or younger where a juvenile court has not certified the defendant to be tried as an adult pursuant to Family Code Section 54.02.

The statute thus is inapplicable here. Applicant was fifteen years old at the time of his offenses. (4 C.R. at 821) And the juvenile court in his underlying case *did* certify him to be tried as an adult (albeit with an invalid transfer order). In other words, Applicant does not contend that the juvenile court either *could not* or *did not* waive its jurisdiction over his case under Section 8.07(a) or (b) of the Penal Code. Rather, Applicant contends that the juvenile court, in waiving its jurisdiction, did so in an unconstitutional manner.

Subsection (g) of the statute specifically memorializes the statute's inapplicability to claims like Applicant's. Subsection (g) provides that Article 4.18 "does not apply to a claim of defect or error in a discretionary transfer proceeding in juvenile court," and that "[a] defendant may appeal a defect or error only as provided by Chapter 56, Family Code." TEX. CODE CRIM. PRO. art. 4.18 § (g).

Thus, Chapter 56, and not Article 4.18, controls the standard process for challenging and appealing defective transfer orders.[9]

Moreover, Chapter 56 expressly provides that it "does not limit a child's right to obtain a writ of habeas corpus." TEX. FAM. CODE § 56.01(o). This statute reflects the fundamental tenet contained in our State Constitution that "[t]he writ of habeas corpus is a writ of right, and shall never be suspended." TEX. CONST. art. I § 12. Indeed, as this Court has observed, if Article 4.18 were applied to "prevent consideration of [a] claim on habeas corpus, . . . the statute might be unconstitutional in [that] context[]." *Rushing v. State*, 85 S.W.3d 283, 286 (Tex. Crim. App. 2002). Article 4.18 therefore does not preclude Applicant's claims based on *Moon*. *See Ex parte Sledge*, 391 S.W.3d at 108 ("It is . . . axiomatic in our case law that review of jurisdictional claims are cognizable in post-conviction habeas corpus proceedings . . . without regard to ordinary notions of procedural default—essentially because it is simply not optional with the parties to agree to confer subject matter jurisdiction on a convicting court where that jurisdiction is lacking."); *id.* at 115 n.4 (Alcala, J., dissenting) (stressing that although the Legislature may curtail the right *to appeal* jurisdictional challenges, it "may not

[9] The State argued below that a prior version of Article 4.18 was in effect at the time of Applicant's convictions. (3 C.R. at 491) However, the only difference in the prior version is that in subsection (g), it referred to Article 44.47, which previously controlled a juvenile defendant's right to appeal a transfer order. Following *Moon*, the Legislature repealed Article 44.47 in 2015 and replaced it with Chapter 56.

withhold the right of habeas corpus"); *Ex parte Watson*, 601 S.W.2d 350, 352 (Tex. Crim. App. 1980) (emphasizing the "well-established" rule that habeas corpus proceedings always are available "to review jurisdictional defects" that render a conviction "void for want of jurisdiction").

In reality, Article 4.18—titled "Claim of Underage"—was enacted to prevent juvenile offenders from manipulating the system by concealing their true ages until after being tried in district court. The statute was the Legislature's response to *Bannister v. State*, in which a defendant "played the game of courts and won" by entering a guilty plea in district court only to later reveal that she was just fifteen years old. 552 S.W.2d 124, 125 (Tex. Crim. App. 1977). The *Bannister* Court held that despite her fraudulent conduct, her guilty plea was void since the "district court simply did not acquire jurisdiction over her case." *Id.* at 130; *see also Light v. State*, 993 S.W.2d 740, 747-48 (Tex. App.—Austin 1999), *vacated and remanded on other grounds*, 15 S.W.3d 104 (Tex. Crim. App. 2000) ("It is obvious that article 4.18 was added to the Code of Criminal Procedure to overcome the holding in *Bannister v. State*."); 29 TEX. PRAC., JUVENILE LAW & PRAC. § 23:14 (3d ed.) ("Article 4.18 . . . essentially says that if a juvenile is tried in an adult court, the juvenile cannot wait until after the trial to inform the judge that he is underage and has not been certified to stand trial as an adult."). Here, Applicant never concealed his age or otherwise "played the game of courts."

II APPLICANT IS ENTITLED TO HABEAS RELIEF BASED ON *MOON*.

Turning to the merits of Applicant's claims, the district court concluded that the juvenile court's transfer order—which fails to cite any of the *evidence* underlying the juvenile court's decision to certify Applicant—fails to meet muster under *Moon* and thus is invalid. (4 C.R. at 834-40) And since the transfer order is invalid, the district court never acquired subject matter jurisdiction over Applicant's case. (4 C.R. at 839) Applicant's convictions therefore are void and should be overturned.

A. The juvenile court's transfer order is invalid.

Because the juvenile court failed to "show its work" in its written transfer order, the order is invalid under *Moon*. To effectuate a valid transfer, *Moon* unambiguously requires that a juvenile court "show its work" by "spreading its deliberative process on the record, thereby providing a sure-footed and definite basis from which an appellate court can determine its decision was in fact appropriately guided by the statutory criteria." 451 S.W.3d at 49.

This requirement is critical because the written order is the only record reflecting why the juvenile court—siting as both judge and jury at the transfer hearing—concluded that the transferred juvenile should be treated as an adult and subjected to adult penalties. In conjunction with the transfer hearing and other requirements of the certification process (per *Kent* and Section 54.02), the written

order serves to ensure that only those rarest of juvenile offenders who truly deserve adult treatment get transferred to the adult system.

The written order can fulfill this purpose only if it expressly discusses the specific facts and evidence underpinning the court's decision to waive jurisdiction. Section 54.02(h) thus requires that "[i]f the juvenile court waives jurisdiction, it shall state specifically in the order its reasons for waiver." For forty years, Texas courts took this requirement for granted, consistently holding that boilerplate form orders were satisfactory as long as they at least included the ultimate statutory findings necessary to justify a transfer. The Court in *Moon* put a stop to this, holding "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." 451 S.W.3d at 49 (emphasis added). As the Court explained:

> Th[e] purpose [of Section 54.02(h)] is not well served by a transfer order so lacking in specifics that the appellate court is forced to speculate as to the juvenile court's reasons for finding transfer to be appropriate or the facts the juvenile court found to substantiate those reasons. Section 54.02(h) requires the juvenile court to do the heavy lifting in this process if it expects its discretionary judgment to be ratified on appeal. By the same token, the juvenile court that shows its work should rarely be reversed.

Id.

The Court further stressed that an appellate court reviewing a transfer order "should not be made to rummage through the record for facts that the juvenile court might have found, given the evidence developed at the transfer hearing, but

did not include in its written transfer order." *Id.* at 50. In turn, the Court held that a reviewing appellate court may only consider "the facts that the juvenile court expressly relied upon, as required to be ***explicitly set out*** in the juvenile transfer order." *Id.* (emphasis added).

Thus, to be valid under *Moon*, a transfer order must include the specific facts and evidence on which the juvenile judge relied in finding that "because of the seriousness of the alleged offense or the background of the child the welfare of the community requires criminal proceedings." TEX. FAM. CODE § 54.02(a)(3). "Put differently, the transfer order must specify which facts the juvenile court relied upon in making its decision." *Arango*, 2017 WL 1404370, at *3.

Moreover, the juvenile court's findings should expressly encompass specific facts and evidence bearing on the factors that the court is required to consider under Section 54.02(f). Those factors include:

> (1) whether the alleged offense was against person or property;
>
> (2) the child's sophistication and maturity;
>
> (3) the child's record and previous history; and
>
> (4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.

TEX. FAM. CODE § 54.02(f). The juvenile court need not find that every factor favors a transfer. *Moon*, 451 S.W.3d at 41. But for the ones it finds that do, the

written order must expressly cite the facts supporting the court's conclusion. *Id.* at 49-50; *see also In re J.G.S.*, No. 03-16-00556-CV, 2017 WL 672460, at *5, *3-*5 (Tex. App.—Austin Feb. 17, 2017, no pet. h.) (mem. op.) (vacating a transfer order that "provide[d] no case-specific information underpinning [the juvenile court's] conclusion," and explaining that the order "essentially recites the statutory language setting forth the criteria applicable to a transfer determination, but [] fails to provide the case-specific findings of fact necessary to permit a reviewing court to determine whether the court properly applied that criteria as required under *Moon*"); *Matter of R.X.W.*, No. 12-16-00197-CV, 2016 WL 6996592, at *3 and n.1 (Tex. App.—Tyler Nov. 30, 2016, no pet.) (mem. op.) (vacating a transfer order after stressing that it was "deficient even if the findings [therein] were supported by legally and factually sufficient evidence").

The juvenile court's transfer order in Applicant's case states that all these factors supported a transfer, but it does not explain or cite the evidence showing why. With respect to the third factor under 54.02(f), for instance, the order states that "[t]he Court also considered the child's age, the record of the child, and the previous history of the child." (2 C.R. at 370) The order offers zero additional detail regarding Applicant's "record" or "previous history," and it gives no indication of how Applicant's background affected the court's analysis.

The transfer order addresses the fourth factor under 54.02(f) by simply parroting the statutory language. The order recites that:

- "the likelihood of rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court is not a viable alternative in this case"
- "because of the seriousness of the offenses, the welfare of the community requires criminal proceedings instead of juvenile proceedings, which will also aid in the protection of the public"
- "[t]he offenses were so serious to the community that transfer to a district court with criminal jurisdiction must be granted"
- "[t]he age and circumstances of this child indicate that the likelihood of rehabilitation by the use of procedures, services, and facilities currently available to the juvenile court is not a viable option in this case"
- "[b]ecause of the seriousness of the offenses alleged and the background of the child, the welfare of the community requires criminal proceedings"

(2 C.R. at 369-70) Such conclusory, duplicative statements are inadequate. And while Applicant's order notes "that a diagnostic study and psychological evaluation . . . [were] obtained and ordered by the Court" (as required by TEX. FAM. CODE § 54.02(d)) (2 C.R. at 366), virtually identical language appears in the *Moon* order, which states that "the Court had ordered and obtained a diagnostic study, social evaluation, a full investigation of the child, his circumstances, and the circumstances of the alleged offense." (2 C.R. at 362) But just like the *Moon* order, Applicant's order says nothing of what these evaluations revealed about Applicant's mental capacity, social skills, personal background, propensity for engaging in criminal conduct, or any other aspect of his character relevant to the

54.02(f) factors. The juvenile court should have explained the results of the evaluations and how they contributed to its ruling.

Ultimately, the fact that Applicant's transfer order is several pages longer than the order in *Moon* is all that distinguishes them. Despite the extra words, Applicant's order—just like the order in *Moon*—does not cite any of the evidence or testimony that was presented during the transfer hearing.

The State itself has conceded in another case that a juvenile transfer order indistinguishable from Applicant's was deficient under *Moon*. At issue in the case was the adequacy of a transfer order entered by a juvenile court in Fort Bend County—the same court that entered Applicant's order. *See* Waiver of Jurisdiction and Order of Transfer, *Matter of Morrison*, No. 12-CJV-017003 (Co. Ct. at Law No. 1, Fort Bend County, Tex. June 12, 2012) (attached hereto as Exhibit 1). Holding that "the juvenile court did not make requisite statutory findings to waive its jurisdiction and transfer the case to district court," the Fourteenth Court of Appeals invalidated the transfer order and vacated the defendant's convictions. *Morrison*, 503 S.W.3d at 725. In reaching its holding, the court explained that "[t]he State does not dispute that the juvenile court was required ***and failed*** to make the requisite findings." *Id.* at 727 (emphasis added).

Although the State has not made this same concession here, it has acknowledged that there are only two differences between the orders from *Moon*

and this case. (*See* 2 C.R. at 243-44, 246-47) These differences are immaterial and only demonstrate why Applicant's order is constitutionally deficient.

The first difference is that Applicant's order contains the following paragraph on the second 54.02(f) factor—*i.e.*, "the child's sophistication and maturity"—which does not appear in the *Moon* order:

> The Court finds the following by a preponderance of the evidence: (a) the child is not mentally retarded; (b) the child does not as a result of mental disease or defect lack the capacity to understand the proceedings in juvenile court or to assist in his own defense, and in fact, the child does so understand and has assisted in his defense; (c) the child is not mentally ill; (d) the child does not as a result of mental disease or defect lack substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of society; and (e) the child knows the difference between right and wrong.

(2 C.R. at 368) These are conclusory statements, offered without any evidentiary support. They tell us nothing about Applicant individually, other than that he had the mental capabilities of a typical fifteen-year-old boy.

To satisfy *Moon*, the juvenile court was required to set forth the specific *facts* that it relied on in formulating these findings. Since it failed to do so, a reviewing court would have to "rummage through the record" for "facts that the juvenile court *might have* found . . . but did not include in its written transfer order." *Moon*, 451 S.W.3d at 50. This is precisely what *Moon* prohibits.

Notably, the *Moon* order contains language very similar to the quoted passage above. It provides that the juvenile defendant in *Moon* was "of sufficient

sophistication and maturity to have intelligently, knowingly and voluntarily waived all constitutional rights . . . [and] to have aided in the preparation of his defense and to be responsible for his conduct." (2 C.R. at 362-63) But the order did not specify the underlying facts, so the Court found the order invalid. Applicant's order suffers from the exact same shortcoming.

The second difference from the *Moon* order is that Applicant's order contains slightly more detail regarding his offenses. The juvenile court noted in the order that there was probable cause to believe that Applicant had "intentionally and knowingly cause[d] the death of an individual . . . by stabbing [that individual] with a knife"; "intentionally, knowingly, and recklessly cause[d] bodily injury to [a second individual] . . . [with] a deadly weapon, to wit: a knife"; and "intentionally, knowingly, and recklessly cause[d] bodily injury to [a third individual] . . . [with] a deadly weapon, to wit: a knife." (2 C.R. at 367-68) The order further states that:

> (a) The felony offenses were committed in an aggressive and premeditated manner.
>
> (b) The child's conduct was willful and violent.
>
> (c) The offenses were of an aggravated character.

(2 C.R. at 369) The order, though, does not specify any evidence bearing on these "findings." A reviewing court would have to "rummage through the record" to determine if they are supported by the facts.

In reality, these "findings" merely are recitations of the elements of the crimes with which Applicant was charged.[10] *Moon* clearly requires more. *See Matter of S.G.R.*, No. 01-16-00015-CV, 2016 WL 3223675, at *3 (Tex. App.—Houston [1st Dist.] June 9, 2016, no pet.) ("[T]he Court of Criminal Appeals has distinguished between generic findings relating to 'the category of crime alleged' and findings concerning 'the specifics of the particular offense.'") (citing *Moon*, 451 S.W.3d at 48).

B. Post-*Moon* precedent confirms that the juvenile court's transfer order is invalid.

Cases interpreting and applying *Moon* exemplify the level of factual and evidentiary specificity that a juvenile court must include in its written order to effectuate a valid transfer. These cases demonstrate that the transfer order from Applicant's case is utterly deficient. Although the order states that all of the 54.02(f) factors favored a transfer, it fails to sufficiently cite the evidence supporting any of the four.

[10] *See* TEX. PENAL CODE § 19.02 ("A person commits an offense [of first degree murder] if he: (1) intentionally or knowingly causes the death of an individual . . . [without being] under the immediate influence of sudden passion arising from an adequate cause."); *id.* § 22.02 ("A person commits an offense [of second degree aggravated assault] if the person commits assault as defined in Sec. 22.01 and the person: (1) causes serious bodily injury to another . . . or (2) uses or exhibits a deadly weapon during the commission of the assault.").

i. Factor 1: Whether the alleged offense was against person or property

On the first factor, the juvenile judge was required to do more than simply recite the basic elements of Applicant's offenses and identify the victims. The court was not required to discuss every piece of relevant evidence presented at Applicant's transfer hearing. But it at least needed to give enough detail about the offenses to demonstrate that they truly warranted adult punishment.

The transfer order that the First Court of Appeals upheld in *Matter of S.G.R.*, 496 S.W.3d 235 (Tex. App.—Houston [1st Dist.] 2016, no pet.), illustrates the requisite level of specificity. The order discusses where, why, and how the defendant committed the alleged offenses; the number and severity of the victim's injuries; and the defendant's "recorded statement to a police officer that he participated in the murder . . . [and had] hit the complainant multiple times with [a] machete." Order to Waive Jurisdiction at 2, *Matter of S.G.R.*, No. 2014-05875J (315th Dist. Ct., Harris County, Tex. Dec. 17, 2015). (3 C.R. at 613) The First Court explained that the facts set forth in the transfer order showed "that the circumstances of this particular murder were especially egregious and agitated," which clearly supported the juvenile court's ultimate transfer determination. 496 S.W.3d at 240-41.

Transfer orders that other courts have upheld since *Moon* contain similarly detailed explanations of the circumstances surrounding the defendants' offenses

and why they militated in favor of transfer. *See, e.g.*, *Matter of C.M.M.*, No. 14-16-00427-CV, 2016 WL 6603743, at *11 (Tex. App.—Houston [14th Dist.] Nov. 8, 2016, pet. denied) ("The trial court's order details the nature and circumstances of [the victim]'s death. It noted the electrical cord around her neck, the large number of stab wounds on her body, and the significant amount of blood . . . . The court also cited evidence from [] recorded statements to police that appellant threatened, at least twice, to kill his mother and the baby."); *In re K.J.*, 493 S.W.3d 140, 143-45 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (discussing how the defendant had been identified and what evidence established probable cause for his guilt, including statements that the defendant and his victims had made to the police after the incident); Order to Waive Jurisdiction at 2, *Matter of D.B.*, No. 2015-04361J (314th Dist. Ct., Harris County, Tex. May 23, 2016) (attached hereto as Exhibit 2) ("The Respondent and his co-actors ran up to the Complainant in a coordinated plan to murder and rob him. . . . The Complainant was shot in the head and dying inside his vehicle when the Respondent opened the door [] and aided his accomplice in stealing from the Complainant."); Order to Waive Jurisdiction at 6, *Matter of J.G.*, No. 2012-00331J (314th Dist. Ct., Harris County, Tex. Dec. 2, 2015) (3 C.R. at 631) ("The Court also finds compelling that after the offense

occurred the Respondent attempted to evade police in a motor vehicle and that the Respondent lost control of the vehicle and ended the pursuit in an accident.").[11]

By contrast, Applicant's transfer order merely identifies the victims and the dates of his offenses, and notes that he acted intentionally and used a knife. One could only guess as to where or why the crimes occurred, what Applicant was thinking at the time, whether the circumstances justified the use of force, or whether Applicant even disputed his guilt. Such evidence may have been presented during Applicant's transfer hearing. But under *Moon*, the juvenile judge was required to specify that evidence in its written order.

ii. Factor 2: The child's sophistication and maturity

Turning to the second factor under 54.02(f), the unsupported statements in Applicant's transfer order about him not being mentally retarded or ill insufficient. The transfer order from the *S.G.R.* case, for instance, discusses a doctor's

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[11] This was the second transfer order issued in the *J.G.* case. The Fourteenth Court of Appeals invalidated the first order, which was substantively indistinguishable from Applicant's. *See Guerrero v. State*, No. 14-13-00101-CR, 2014 WL 7345987 (Tex. App.—Houston [14th Dist.] Dec. 23, 2014, no pet. h.). The defendant was remanded and then recertified. In the second transfer order, the juvenile judge corrected the prior deficiencies by including an Appendix with five pages of detailed fact findings. (3 C.R. at 629-35) The contrast between the two orders illustrates the meaning of *Moon*.

The same sequence of events took place *In Matter of H.Y.*, No. 01-16-00501-CV, 2016 WL 7104009 (Tex. App.—Houston [1st Dist.] Dec. 6, 2016, pet. filed). The First Court of Appeals vacated the juvenile court's original transfer order "because it did not include the findings required by the Juvenile Justice Code for transfer pursuant to section 54.02(a). *Id.* at *1. The court later upheld the second transfer order that the juvenile court entered on remand, which included a five-page Appendix that set forth the facts supporting the transfer determination in close detail. Order to Waive Jurisdiction at 3-8, *Matter of H.Y.*, No. 2013-01505J (314th Dist. Ct., Harris County, Tex. June 6, 2016) (attached hereto as Exhibit 3).

observations regarding the defendant's dangerousness, cognitive capabilities, risk indicators, and above-average "overall score on the Sophistication-Maturity scale." (3 C.R. at 614) By specifically referencing these observations in the order, the juvenile court had "shown its work."

Similarly, the order from *Matter of A.C.* references several findings from the "Certification Evaluation" that a doctor had prepared in advance of the transfer hearing, including the doctor's assessments that the defendant "has a high level of criminal sophistication and dangerousness in comparison to most individuals his age"; "is not one to be easily influenced by negative peers because he does not follow their lead"; and "was found to be in the 98th percentile for overall risk for dangerousness and the high range for violent and aggressive tendencies, psychopathic features, and planned and extensive criminality." Order to Waive Jurisdiction at 3-4, *Matter of A.C.*, No. 2015-02097J (315th Dist. Ct., Harris County, Tex. Oct. 13, 2015) (3 C.R. at 620-21); *see also* Order to Waive Jurisdiction at 6, *Matter of J.G.* (3 C.R. at 631) (noting the results of the court-ordered psychological evaluation, including "that the Respondent's true [] level of intellectual-based sophistication cannot be adequately measured based on the tests performed due to the fact that [he] is bilingual and his primary language is Spanish"); *In re K.J.*, 493 S.W.3d at 144 (emphasizing a doctor's testimony that the defendant "was in the middle range in comparison to most individuals his age . . .

[and] exhibits an average level of intellectually based sophistication and an average level of criminal sophistication," and that he had numerous "risk factors that are associated with reoffending," including "Attention-Deficit/hyperactivity difficulties [and] a history of nonviolent offending"); *Matter of E.Y.*, No. 14-16-00475-CV, 2016 WL 7108407, at *9-*10 (Tex. App.—Houston [14th Dist.] Dec. 6, 2016, no pet.) (affirming a transfer order that set forth twenty-three specific fact findings regarding the defendant's sophistication and maturity). The order in Applicant's case offers no such detail.

iii. Factor 3: The child's record and previous history

With respect to the third 54.02(f) factor, Applicant's transfer order merely states that "[t]he Court also considered the child's age, the record of the child, and the previous history of the child." (3 C.R. at 596) The order says nothing about what Applicant's record and previous history revealed about his character or chances for reoffending. This is inadequate under *Moon*. *See, e.g.*, Order to Waive Jurisdiction at 3-4, *Matter of S.G.R.* (3 C.R. at 614-15) (noting that the defendant had "sold marijuana approximately three times [and] smoked marijuana 'mostly everyday afterschool'"; that he was "associated with the MS-13 criminal street gang"; and that "[w]eapons, including knives and a box cutter, were recovered from concealed locations in the Respondent's bedroom"); Order to Waive Jurisdiction at 4, *Matter of A.C.* (3 C.R. at 621) (reciting numerous facts about the

defendant's criminal record, such as the number of times he had been arrested or referred to the juvenile justice system; the number of fights he had been in throughout his life; his membership in the criminal street gang, the Early Boys; and his "two disciplinary write-ups while detained at the Harris County Juvenile Detention Center, including violations for a 'physical altercation' and 'disrespecting staff'"); Order to Waive Jurisdiction at 7-9, *Matter of J.G.* (3 C.R. at 631-33) (outlining the defendant's prior arrests in chronological order, discussing the defendant's probation record, and mentioning his admission "to being affiliated at one point in his life in a criminal gang"); *In re K.J.*, 493 S.W.3d at 144-45 (detailing the defendant's prior arrests, and observing that the defendant "was not compliant on his probation," and that "[i]n addition to being charged with three aggravated robbery charges, he violated his court ordered curfew, admitted to using marijuana while on probation, and failed to attend the Reality Oriented Physical Experience System program as directed his probation officer").

iv. Factor 4: The prospects of adequate protection of the public and the likelihood of the rehabilitation of the child

Finally, the only support offered in Applicant's transfer order for the fourth 54.02(f) factor are the conclusory statements quoted above regarding the purported seriousness of Applicant's offenses and the need for adult proceedings. The post-*Moon* transfer orders again make clear that this is deficient. *See, e.g., id.* at 145 (quoting the defendant's mother's testimony "that while on probation, [he] brought

a gun into her home and discharged the weapon"; that he "would leave for days while under her supervision and she did not know his whereabouts"; and "that she was frustrated with his noncompliance and negative behavior"); Order to Waive Jurisdiction at 4, *Matter of A.C.* (3 C.R. at 621) (explaining that "efforts of the Harris County Juvenile Probation Department to rehabilitate the Respondent for past criminal behavior have been unsuccessful," and that "the Respondent has exhibited a failure to engage in rehabilitation while previously under the Court's supervision"); Ex. 2, Order to Waive Jurisdiction at 3, *Matter of D.B.* ("The Court also finds significant that . . . Dr. Uche Chibueze found that his pervasive history of violating the rights of others and his entrenched involvement with his gang are mitigating factors that impact his ability to benefit from treatment.").

The State no doubt will point to other post-*Moon* cases in which courts upheld transfer orders similar to Applicant's, such as *Gentry v. State*, Nos. 01-14-00335-CR and 01-14-00336-CR, 2016 WL 269985 (Tex. App.—Houston [1st Dist.] Jan. 21, 2016, pet. ref'd), and *Rodriguez v. State*, 478 S.W.3d 783 (Tex. App.—San Antonio 2015, pet. ref'd). The transfer orders in these cases recite the 54.02(f) factors and the courts' associated conclusions but set forth no supporting facts or evidence. Indeed, as the State has expressly acknowledged, "[t]he orders affirmed in *Rodriguez* and *Gentry* do not recount the evidence adduced at the [certification] hearing, but the courts of appeals looked to the appellate record to

determine that the findings in the order were supported by the record." (3 C.R. at 491) The State argued to the district court below that "[a] similar review should apply in this case." (3 C.R. at 491) That is precisely what *Moon* prohibits. *See Matter of R.X.W.*, 2016 WL 6996592, at *3 ("The State argues that this case is significantly different from *Moon* because the juvenile court had substantial evidence upon which to base its decision to waive jurisdiction. Therefore, the State invites us to review the record to evaluate that evidence. However, we are limited to the facts expressly relied upon by the juvenile court and decline to review the entire record.").

Notably, the order from *Gentry*—which came from a juvenile court in Fort Bend County—looks almost exactly the same as Applicant's. Approving its use essentially would permit juvenile judges to substitute the boilerplate order from *Moon* with another. By granting the Successor Applications, the Court could confirm once and for all that *Moon*—and the Constitution—require more.

PRAYER FOR RELIEF

Because the juvenile court in Applicant's underlying case did not "show its work" in its written transfer order, the order was invalid under *Moon* and thus legally ineffective. The district court that tried and convicted Applicant therefore never acquired subject matter jurisdiction over his case—which means that Applicant's convictions are void. Applicant respectfully requests that the Court

grant the Successor Applications and issue writs of habeas corpus overturning his convictions and remanding his case back to the juvenile court for further proceedings.

Dated: May 25, 2017

Respectfully submitted,

/s/ Clayton N. Matheson

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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2017, I electronically filed the foregoing document using the Court's electronic filing system.

/s/ Clayton N. Matheson
Clayton N. Matheson

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document uses 14-point font, and that, according to the software that was used to create this computer-generated document, it has a word count of 14,468 words.

/s/ Clayton N. Matheson
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