

No. 16-0468

IN THE SUPREME COURT OF TEXAS

IN THE MATTER OF J.G.,
Petitioner

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL.....ii

TABLE OF CONTENTS.....iii

INDEX OF AUTHORITIES v

STATEMENT OF THE CASE 1

STATEMENT OF JURISDICTION 2

ISSUES PRESENTED 3

STATEMENT OF FACTS..... 4

 1. J.G.’s first juvenile court transfer hearing ended with a boilerplate order that waived juvenile jurisdiction without individualized findings..... 5

 2. J.G.’s first adult proceeding ended with a sentence of eight years in adult prison..... 5

 3. J.G. received no education or other services in the Harris County Jail or TDCJ, even while he was still under age 18 5

 4. After J.G. got out of prison, he was a hard-working, law-abiding young man.... 6

 5. After the remand, the juvenile court ordered J.G. back to adult court as if he were a violent criminal who posed a danger to the community 7

SUMMARY OF THE ARGUMENT 8

ARGUMENT..... 9

INTRODUCTION: The basics of juvenile court jurisdiction and procedure 10

 A. Texas juvenile courts have original, exclusive jurisdiction over every case in which an alleged offense is committed by someone under age 18 10

 B. A juvenile court has jurisdiction to select from a wide variety of options

for disposition of a child’s case	10
C. A juvenile court’s jurisdiction over a person who is 18 or older is limited to two options: waiver of jurisdiction, or dismissal	11
ISSUE ONE: 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	12
A. Standard of review	12
B. When a transfer is vacated on appeal due to insufficient evidence, and the respondent is 18 or older, the juvenile court’s jurisdiction on remand is limited to one option: dismissal of the case	12
C. Without the benefit of the Court of Criminal Appeals’ opinion in <i>Moore</i> , the court of appeals in this case erroneously concluded that Tex. Fam. Code § 54.02 permitted the State to seek a second transfer.....	14
ISSUE TWO: 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	16
A. Standard of review	16
B. Section 54.02(j) requires the State to prove five factors by a preponderance of the evidence before a juvenile court may waive its exclusive, original jurisdiction over a person who is over 18 years old.....	16
C. Third Factor: The court of appeals erred when it found no abuse of discretion in the juvenile court’s determination that the State exercised due diligence	18
1. Even if vacatur were the same thing as reversal, the State’s evidence of due diligence was still insufficient, and the transfer order it drafted for the juvenile court did not meet the requirements of <i>Moon</i>	19
2. An appellate opinion that did not issue until J.G. was 19 could not have impacted the State’s ability to proceed in juvenile court before he turned 18.....	20
3. The court of appeals erroneously held that the evidence was legally and factually sufficient on the issue of due diligence	21

D. Fourth Factor: Contrary to the court of appeals’ assertion, the State did not prove that no adjudication of the alleged offense has occurred	23
1. “Adjudication” means a judgment	23
2. The statutory language itself proves that the Legislature intended “adjudication” to refer to adult court judgments as well as juvenile court adjudications	25
E. Fifth Factor: The court of appeals erred when it concluded that the law of parties applied to the juvenile court’s determination of probable cause that J.G. “committed” aggravated robbery within the meaning of Section 54.02(j)	26
ISSUE THREE: 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	29
A. Standard of review	29
B. Tex. Fam. Code § 54.02(j) is fundamentally unfair because it tips the scales in the State’s favor on remand if the State loses its first appeal. This violates the Constitutional guarantees of due process and equal protection	29
C. Both the juvenile and society suffer harm from the unconstitutional treatment of persons like J.G. who win their appeals in adult court only to find themselves back in juvenile court.....	30
D. The court of appeals’ conclusion that, as applied to J.G., Section 54.02(j) does not amount to double jeopardy was based on a demonstrably incorrect premise: that the reversal of the first transfer order was not due to insufficient evidence.....	31
E. The court of appeals erred in holding that because the transfer decision is not an adjudication or a conviction, Section 54.02(j) is not an <i>ex post facto</i> law as applied to J.G.....	33
F. The juvenile court considered only J.G.’s prior juvenile record and evaluations, ignoring the mitigating evidence in J.G.’s favor. This led the court of appeals to conclude, erroneously, that Section 54.02(j) did not result in cruel and unusual punishment for J.G.....	35
G. The second transfer violated J.G.’s right to equal protection.....	36

ISSUE FOUR: 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) 39

A. Standard of review 39

B. Section 54.02(j) does not allow the juvenile court to mix and match the factors it considers in certification proceedings for persons 18 and older..... 39

C. The juvenile court purported to consider all the factors for transfer of persons under 18, even though J.G. was 20 years old at the time of the recertification proceedings, in violation of Section 54.02(j)’s plain language..... 40

D. The court of appeals failed to review both the factual and legal sufficiency of the State’s evidence, as *Moon v. State* expressly requires..... 40

E. The court of appeals denied J.G. his right to due process by denying him meaningful review of the evidence 42

PRAYER 43

CERTIFICATE OF SERVICE 44

CERTIFICATE OF COMPLIANCE 45

APPENDIX: Judgment in Cause No. 1491104 in the 338th District Court

INDEX OF AUTHORITIES

Cases

<i>Boddie v. Connecticut</i> , 401 U.S. 371, 379 (1971).....	29
<i>Breed v. Jones</i> , 421 U.S. 519 (1975)	25
<i>Burks v. United States</i> , 437 U.S. 1 (1978).....	31
<i>Bonie v. City of Columbia</i> , 378 U.S. 347 (1964).....	33
<i>Carmell v. Texas</i> , 529 U.S. 513 (2000).....	33
<i>City of Rockwell v. Hughes</i> , 246 S.W.3d 621 (Tex. 2008)	12
<i>Dow Chem. Co. v. Francis</i> , 46 S.W.3d 237 (Tex. 2001).....	41
<i>Ex parte Denton</i> , 399 S.W.3d 540 (Tex. Crim. App. 2012)	31
<i>Graham v. Florida</i> , 560 U.S. 58 (2010)	35
<i>Griffin v. Illinois</i> , 351 U.S. 12 (1956).....	42
<i>Hoang v. State</i> , 872 S.W.2d 694 (Tex. Crim. App. 1993).....	32
<i>In re K.B.H.</i> , 913 S.W.2d 684 (Tex. App. – Texarkana 1995, no pet.).....	16
<i>In re N.J.A.</i> , 997 S.W.2d 554 (Tex. 1999).....	11, 17, 19
<i>In the Matter of A.F.</i> , 895 S.W.2d 481 (Tex. App. -- Austin, no writ).....	27
<i>In the Matter of J.G.</i> , 495 S.W.3d 354 (Tex. App. -- Houston [1 st Dist.] App. 2016, no pet. history).....	4, 14, 18, 41
<i>[J.G.] v. State</i> , 471 S.W.3d 1 (Tex. App. – Houston [14 th Dist.] 2014, no pet.).....	4, 5, 14, 20, 24, 31
<i>Kent v. United States</i> , 383 U.S. 541 (1966).....	9, 22, 42

<i>Langs v. State</i> , 183 S.W.3d 680 (Tex. Crim. App. 2006).....	31
<i>Matter of J.C.C.</i> , 952 S.W.2d 47 (Tex. App. — San Antonio 1997, no writ)	19
<i>McNew v. State</i> , 608 S.W.2d 166 (Tex. Crim. App. 1978)	23
<i>Miller v. Alabama</i> , 567 U.S. 460 (2012)	35
<i>Montgomery v. Louisiana</i> , ___ U.S. ___, 136 S.Ct. 718 (2016)	35, 36
<i>Moon v. State</i> , 451 S.W.3d 28 (Tex. Crim. App. 2014)	passim
<i>Moon v. State</i> , 451 S.W.3d 28 n. 90 (Tex. Crim. App. 2014).....	12
<i>Moore v. State</i> , ___ S.W.3d ___, No. PD-1534-14, 2017 WL 510567 (Feb. 8, 2017) (op. on State’s motion for reh’g).....	8, 11-15, 19, 32, 36
<i>Moore v. State</i> , 446 S.W.3d 47 (Tex. App. -- Houston [1 st Dist.] 2014, aff’d).....	13
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	35
<i>Trevino v. Thaler</i> , 133 S.Ct. 1911 (2013).....	42
<i>U.S. v. Lovasco</i> , 431 U.S. 783 (1977).....	30

Statutes

Tex. Code Crim. Proc. art. 1.10	31
Tex. Code Crim. Proc. art. 42.12 § 5.....	24
Tex. Code Crim. Proc. art. 44.47 (repealed).....	19
Tex. Fam. Code § 51.02(2).	10
Tex. Fam. Code § 51.04(a).....	10
Tex. Fam. Code § 53.03.....	10

Tex. Fam. Code § 54.02	9, 10, 14, 36, 38
Tex. Fam. Code § 54.02(a)	8, 25, 37, 39, 41
Tex. Fam. Code § 54.02(d)	4
Tex. Fam. Code § 54.02(f)	22, 37, 39
Tex. Fam. Code § 54.02(h)	22
Tex. Fam. Code § 54.02(j)	passim
Tex. Fam. Code § 54.02(j)(3)	23, 26
Tex. Fam. Code § 54.02(j)(4)(B)	21
Tex. Fam. Code § 54.02(j)(4) (Vernon 1987)	18
Tex. Gov't Code § 411.171	24
Tex. Penal Code § 6.01(a)	27
Tex. Penal Code § 7.02(a)(2)	28
TEX. PENAL CODE § 7.02(a)(2)	28
TEX. PENAL CODE § 29.03(a)	28
1995 Tex. Sess. Law Serv. Ch. 262 (HB327)	18

Rules

Tex. R. App. Proc. 43.2	19
Tex. R. App. Proc. 44.2	39

Other Authorities

Black's Law Dictionary 39 (5th Ed. 1979)	23
--	----

Robert O. Dawson, Texas Juvenile Law, 8 th ed	27
.....	

Constitutional Provisions

Tex. Constit. art. I § 13	36
Tex. Const. art. 1, § 14	31
Tex. Constit. art. 1 § 19.....	42
U.S. Const. amend. V.....	31, 42
U.S. Const. amend. VIII.....	36
U.S. Const. amend. XIV	31, 42

STATEMENT OF THE CASE

- Nature of the case:** This is an accelerated appeal from a juvenile court order waiving jurisdiction and transferring the case to criminal district court. TEX. FAM. CODE ANN. § 56.01(c)(1)(A), (h) (Vernon Supp. 2015).
- Trial judge:** Hon. John Phillips
- Trial court and county:** 314th Juvenile District Court, Harris County
- Disposition by trial court:** The court waived its exclusive, original juvenile jurisdiction, and transferred the case to the Harris County Criminal District Court.
- Parties in the court of appeals:**
- Appellant:** J.G.
- Appellee:** State of Texas
- Court of Appeals District:** First Court of Appeals, Houston
- Participating justices:** Chief Justice Sherry Radack, Justice Laura Carter Higley, Justice Evelyn Keyes (author)
- Citation:** *In the Matter of J.G.*, 495 S.W.3d 354 (Tex. App. – Houston [1st Dist.] May 5, 2016).
- Disposition by appeals court:** The court of appeals affirmed, holding that: 1) the statute under which the juvenile judge waived jurisdiction was constitutional as applied to J.G.; and 2) the judge did not abuse his discretion because the evidence was sufficient to support the waiver and transfer. No motions for rehearing or en banc reconsideration were filed.

STATEMENT OF JURISDICTION

The Court has jurisdiction over this case under TEX. GOVT. CODE §§ 22.001(a) (3) and (6). First, the case involves the construction of TEX. FAM. CODE § 54.02(j), a section of the Juvenile Justice Code that governs juvenile court decisions to waive jurisdiction and transfer certain cases to adult criminal court. Second, this is the first case to reach this Court since the Legislature authorized accelerated interlocutory appeals from juvenile court waivers of jurisdiction. It presents important questions of constitutional law concerning how juvenile courts decide to transfer to criminal court persons accused of committing offenses as juveniles. These questions, which are bound to recur with more frequency now that interlocutory appeal is permitted by the Juvenile Justice Code, need to be answered by this Court.

ISSUES PRESENTED

ISSUE ONE: 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.

ISSUE TWO: 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.

ISSUE THREE: 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.

ISSUE FOUR: 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

This is the second time J.G. has been transferred from juvenile court to criminal district court for an aggravated robbery that occurred when he was 16 years old. The original transfer and adult conviction were vacated in light of *Moon v. State*, 451 S.W.3d 28 (Tex. Crim. App. 2014). See *[J.G.] v. State*, 471 S.W.3d 1 (Tex. App. – Houston[14th Dist.] 2014, no pet.). Now, J.G. is 20 years old.

The First Court of Appeals correctly stated the nature of this case, except:

- Before the juvenile court hearing on the State’s second motion to waive jurisdiction, the judge ordered the juvenile probation department to re-evaluate J.G. and prepare an updated evaluation for the court. The juvenile code *requires* a court to order a complete psychiatric and psychological evaluation before the court considers waiving its jurisdiction over a child under age 18. TEX. FAM. CODE § 54.02(d). There is no such requirement when a court considers waiving juvenile jurisdiction over persons who are 18 and older. On remand, however, the judge in his discretion ordered new evaluations, and J.G. voluntarily participated in the assessment process.

The updated evaluation presented a very different, and much more positive, picture of J.G. than the evaluation performed when he was a 16-year-old. See 5 RR at Exhibit 2, Probation Report. The court of appeals did not even mention the updated evaluation in its opinion, except to note that the juvenile court “ordered a new round of psychological and intellectual evaluations of appellant.” *In Matter of J.G.*, 495 S.W.3d 354 (Tex. App. – Houston [1st Dist.] 2016, no pet. hist.).

1. **J.G.'s first juvenile court transfer hearing ended with a boilerplate order that waived juvenile jurisdiction without individualized findings.**

The State alleged that J.G. committed the offense of aggravated robbery when he was 16 years old, even though the evidence showed that he was merely the driver for an adult male who robbed a man at gunpoint (2 RR at 26). After a hearing, the juvenile court found probable cause to believe that J.G. had committed the offense. Using the form order that was standard in the Harris County juvenile courts at the time, the judge filled in the blanks to waive the court's jurisdiction over the case, and ordered J.G. transferred to criminal court (CR at 44).

2. **J. G.'s first adult proceeding ended with a sentence of eight years in adult prison.**

After the first transfer order was entered in 2012, J.G.'s case was assigned to the 338th District Court of Harris County. At his first setting with a court-appointed lawyer, J.G. pleaded guilty to aggravated robbery. The criminal judge assessed punishment of eight years to serve in TDCJ.

J.G. appealed, and the Fourteenth Court of Appeals vacated his conviction for lack of subject matter jurisdiction in the adult court, in accordance with *Moon*. See [J.G.], 471 S.W.3d at 1.

3. **J.G. received no education or other services in the Harris County Jail or TDCJ, even while he was still under age 18.**

J.G.'s time in the Harris County Jail included months in solitary confinement, because until he turned 18, he was too young to be placed in the jail's general population. The jail simply cannot house juveniles in safe conditions. In particular, it does not comply with the federal Prison Rape Elimination Act of 2003. The jail provided no education for him, even though he had not yet completed high school.

J.G. served the balance of his time in TDCJ. He signed up on a waitlist to enroll in a prison GED class, but an opening never became available. When he inquired about attending Alcoholics Anonymous meetings, he was told that his prison job in the kitchen conflicted with the meeting time. *See* 5 RR at Ex. 2, Certification Evaluation, Respondent's Response to Rehabilitation Efforts).¹ No other services were offered to him.

4. After J.G. got out of prison, he was a hard-working, law-abiding young man.

Once J.G. was freed on bond after his first case was vacated, he started work immediately in his father's construction business. Soon, he found his own job as a house painter. He worked full time, 5-6 days a week, and his income helped support his mother and sister. Further, he committed no offenses, stayed away from gangs, attended Alcoholics Anonymous meetings, and was taking steps to return to school to earn a GED (5 RR at Exhibit 2, Psychological Evaluation at p. 12). He also volunteered to

¹ The exhibits from the juvenile court are not Bates numbered, so it is not possible to give the Court pinpoint citations to the record.

participate in the ReVision program, which provides long-term mentoring, education, and life-skills training for youths in the Harris County juvenile justice system (5 RR at Ex. 2, Psychiatric Evaluation – CERT at p. 8).

5. **After the remand, the juvenile court ordered J.G. back to adult court as if he were a violent criminal who posed a danger to the community.**

At the recertification hearing, J.G.'s counsel argued that further prosecution in adult court and further imprisonment would not serve the interests of the community, the justice system, or J.G. (2 RR at 70). In the updated evaluation report, the juvenile court had ample information about J.G.'s successful release back into the community. In addition, the defense offered J.G.'s pen packet from TDCJ into evidence. It showed that J.G. had zero disciplinary issues while in TDCJ.

Ultimately, however, the judge adopted the State's Findings of Fact and Conclusions of Law, which focused on the original certification evaluation from 2012, when J.G. was 16 years old and first faced transfer to adult court. Written in 2012, it revealed a troubled youth with a string of minor juvenile offenses such as trespassing and possessing marijuana on school grounds, who did poorly on juvenile probation when he was returned to his family and troubled neighborhood. After the juvenile judge entered his order waiving jurisdiction, J.G. returned to adult criminal court.

SUMMARY OF THE ARGUMENT

A juvenile court may waive its exclusive jurisdiction in two circumstances:

- 1) When there is probable cause to believe that a “child” (generally, a respondent under age 18) has committed one of the felony offenses listed in the statute (*See* TEX. FAM. CODE § 54.02(a)); or
- 2) When there is probable cause to believe that a “person” (a respondent who is 18 or older) committed an offense while he was under age 18 (TEX. FAM. CODE § 54.02(j)).

After *Moore v. State*, __ S.W.3d __, 2017 WL 510567 (Tex. Crim. App. 2017), the law is now settled that in the latter case, the State gets only one chance to prove its case for transfer to criminal court. In this case, J.G. raises the same question in the former context: whether the Constitution permits the State to try more than once to prove that a respondent should be transferred to adult court. This question was left open in *Moon* because it had not been raised by the parties. *See Moon*, 451 S.W.3d at 52, n. 90.

Once the State has failed to prove that a person should be transferred from juvenile to criminal court, the State is not entitled to a do-over. A person should not have to face a second hearing at which the State gets another chance to prove that he should be subject to an adult trial and punishment. As *Moore* instructs, the correct remedy when the State does not satisfy its burden of proof is to vacate the criminal court judgment and dismiss the case for want of jurisdiction. *Id.*

The difference between *Moore* and J.G.’s case is that Moore was already over 18 years old at the time of his transfer hearing. J.G. was still a “child,” as defined by the Family Code, when his first transfer hearing was held. By the time of the second hearing,

however, he had reached age 18. There is no constitutionally sound justification for the appellate courts to bar re-certification of the respondent in *Moore* but permit it for J.G. In fact, there is even less.

Further, the juvenile court proceedings on remand were fundamentally unfair. That is because Sect. 54.02 changes the rules in the State's favor if a person manages to win reversal of a transfer order. In the meantime, as the indigent juvenile sits in the county's adult jail, he loses the rehabilitative and educational opportunities of the juvenile probation system. Section 54.02 violates a defendant's rights to due process and equal protection, and the ban against double jeopardy, as applied to J.G. and others who have wrongfully served adult prison sentences and then are returned to juvenile court, but who can no longer receive juvenile services. Section 54.02(j) also amounts to an ex post facto law and, finally, results in cruel and unusual punishment.

Even if Section 54.02(j) were constitutional in J.G.'s case, the Court still should grant this petition to correct the lower court's erroneous review of the sufficiency of the State's evidence at the re-certification hearing. The court failed to review whether the evidence was both legally and factually sufficient to support the juvenile judge's findings, as *Moon* requires.

ARGUMENT

“It is clear beyond dispute that the waiver of jurisdiction is a ‘critically important’ action determining vitally important statutory rights of the juvenile.” *Kent v. United States*, 383 U.S. 541, 557 (1966).

INTRODUCTION: The basics of juvenile court jurisdiction and procedure

For the Court’s convenience, Petitioner provides this summary of the Juvenile Justice Code provisions relevant to this appeal. The Juvenile Justice Code is part of the Texas Family Code.

A. Texas juvenile courts have original, exclusive jurisdiction over every case in which an alleged offense is committed by someone under age 18.

Not all respondents in juvenile court are, in fact, juveniles. This is because it is the respondent’s age *at the time of the offense* that governs juvenile court jurisdiction. *See* Tex. Fam. Code § 51.04(a).

If the respondent commits an offense while he is under age 18, but he turns 18 before the State begins legal proceedings, the matter still must begin in the juvenile court. The Family Code treats each class of respondent differently, and even uses different terms for them. Someone who is under age 18 is a “child.” Someone who is 18 or older is a “person.” *See* Tex. Fam. Code § 51.02(2).

B. A juvenile court has jurisdiction to select from a wide variety of options for disposition of a child’s case.

The Legislature has provided the juvenile courts with a wide range of options for handling children in the juvenile justice system. The least punitive option is deferred prosecution: effectively a six-month probation period that, if successful, ends without commencement of any prosecution. *See* Tex. Fam. Code § 53.03. The most serious option, of course, is waiver of jurisdiction and transfer to adult criminal court. *See* Tex. Fam. Code § 54.02. Even within this most serious option, there are significant

differences in the procedure for waiving jurisdiction over a child and waiving jurisdiction over a person. *Id.*

C . A juvenile court’s jurisdiction over a person who is 18 or older is limited to two options: waiver of jurisdiction, or dismissal.

A juvenile court’s jurisdiction over a person who has turned 18 is limited to the power to decide whether: 1) he should be transferred to adult court; or 2) his case should be dismissed. *See In Re N.J.A.*, 997 S.W.3d 554, 556 (Tex. 1999). In *N.J.A.*, this Court held that a juvenile court’s jurisdiction does not include the authority to adjudicate a person who has reached 18 by the time of her trial in juvenile court. The court said: “We believe that the juvenile court does not lose exclusive original jurisdiction when a juvenile turns eighteen. We believe and hold that the juvenile court maintains jurisdiction, but that *such jurisdiction is limited to transferring the case under section 54.02(j) if all criteria are satisfied or to dismissing the case*, and does not include the power to adjudicate a juvenile who is eighteen years old or older.” These jurisdictional limits apply to certification decisions, as well as adjudications. If the State does not satisfy its burden of proof for transfer, then the juvenile court has no jurisdiction to transfer, and can only dismiss the case. *See Moore v. State*, ___ S.W.3d ___, No. PD-1534-14, 2017 WL 510567 *2 (Feb. 8, 2017) (op. on State’s motion for reh’g).

ISSUE ONE: 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.

A. Standard of review

Questions of statutory construction are reviewed *de novo*. This Court uses definitions prescribed by the Legislature and any technical or particular meaning the words have acquired. Otherwise, the Court construes the statute's words according to their plain and common meaning, unless a contrary intention is apparent from the context, or unless such a construction leads to absurd results. *City of Rockwell v. Hughes*, 246 S.W.3d 621, 625-6 (Tex. 2008).

B. When a transfer is vacated on appeal due to insufficient evidence, and the respondent is 18 or older, the juvenile court's jurisdiction on remand is limited to one option: dismissal of the case.

In *Moore v. State*, *supra*, the Court of Criminal Appeals answered a question left open after its opinion in *Moon v. State*: what is the scope of a juvenile court's jurisdiction after a certification case is remanded for insufficient evidence? In a footnote, the Court expressly noted that it was not deciding that issue. *See Moon v. State*, 451 S.W.3d 28 n. 90 (Tex. Crim. App. 2014). It affirmed the court of appeals' disposition of the case and thereby answered that question – the juvenile court's jurisdiction is limited to dismissal. *Moore*, 2017 WL 510567 *4. If the certification of a person 18 or older is vacated on appeal due to insufficient evidence, the person cannot be subjected to a second transfer hearing in juvenile court. At that point, the juvenile court's only option is to dismiss the case. *Id.*

In *Moore*, the defendant was accused of committing an offense when he was 16 years old, like J.G. However, the State did not get around to filing charges against him until after he was 18. The juvenile court waived its jurisdiction under Tex. Fam. Code § 54.0(j) and transferred the case to adult court, where the defendant was placed on deferred adjudication, and later adjudicated guilty. He appealed.

The First Court of Appeals held that because the State did not satisfy its burden to prove that it exercised due diligence in bringing the case, the juvenile court lacked jurisdiction to transfer it. The court vacated the adult court's judgment, holding that the juvenile court lacked jurisdiction to transfer the case and dismissed the case for lack of jurisdiction. The Court of Criminal Appeals affirmed, saying, "The State's failure to meet [its] burden left the juvenile court with *no option other than to dismiss the case* and the juvenile court erred by not doing so." *Id.* at *4.

The message is clear: when the State does not meet its burden of proof on the factors for motions to transfer, the juvenile court must dismiss. The State is not entitled to a second chance to provide sufficient evidence, and the reviewing courts in *Moore* did not give it that chance. The court of appeals said: "We therefore hold that the juvenile court lacked jurisdiction to transfer the case to a criminal district court and, as a result, the criminal district court never acquired jurisdiction. ... We vacate the trial court's judgment and dismiss the case for lack of jurisdiction." *Moore v. State*, 446 S.W.3d 47, 52 (Tex. App. -- Houston [1st Dist.] 2014, *aff'd*).

C. Without the benefit of the Court of Criminal Appeals' opinion in *Moore*, the court of appeals in this case erroneously concluded that Tex. Fam. Code § 54.02 permitted the State to seek a second transfer.

The First Court of Appeals handed down its opinion in this case in May, 2016. The first *Moore* opinion did not issue from the Court of Criminal Appeals until October, 2016. Without that guidance, the court of appeals held that the juvenile court did not abuse its discretion when it waived its jurisdiction over J.G. after remand and entered a second order transferring him to adult court. *See J.G. II*, 495 S.W.3d at 374. It disregarded *Moon's* lengthy analysis regarding legal and factual insufficiency, and concluded that the reversal of J.G.'s first certification order was not due to insufficient evidence. Instead, the court said, it was solely due to trial error. *Id.* at 365-6.

This conclusion is directly contradicted by the record. The transfer orders in *Moon* and in J.G.'s first case were identical. *Moon* affirmed the vacatur and dismissal of Moon's adult conviction due to insufficient evidence to support the transfer order. Accordingly, in J.G.'s first case, the Fourteenth Court of Appeals also vacated the adult conviction and remanded to the juvenile court, quoting *Moon*: "the juvenile court's waiver of jurisdiction 'based on this particular reason fortified only by this fact' constitutes an abuse of discretion." *J.G. I*, 471 S.W.3d at 4, quoting *Moon*, 451 S.W.3d at 50.

The Court of Criminal Appeals announced in *Moon* that review of the sufficiency of the evidence is limited to the facts recited in the transfer order. It concluded:

Because the juvenile court made no case-specific findings of fact with respect to the seriousness of the offense, we agree with the court of appeals that **the evidence fails** to support this as a valid reason for waiving juvenile-court jurisdiction. Even had the juvenile court cited the appellant's background as an alternative basis to justify his transfer, **the court of appeals was correct** to measure the sufficiency of the evidence to support this reason against the findings of fact made in the transfer order *52 itself and **to conclude that the evidence was insufficient to support those findings**. We affirm the judgment of the court of appeals.

Moon, 451 S.W.3d at 51 (emphasis added). It necessarily follows that *J.G.I.*, too, was an insufficient-evidence decision. The court of appeals erred to conclude otherwise.

When the State does not prove all five factors required by Section 54.02(j), the juvenile court lacks jurisdiction to transfer a person to criminal court. *See Moore v. State*, 46 S.W.3d 47, 52 (Tex. App. – Houston [1st Dist.] 2014, *aff'd*). There is no exception to this rule in the Juvenile Justice Code, the Government Code, or the Texas Constitution.

TEX. FAM. CODE § 54.02(j) does not distinguish between a person who is charged for the first time after he or she reaches adulthood, like the appellant in *Moore*, and a person – like J.G. – who first was accused when he was still a child. Re-certification cases like J.G.'s, then, necessarily are subject to the same limitations as first-time transfer cases. To clarify the meaning of Section 54.02(j), this Court should reverse the court of appeals and adopt *Moore's* construction of the statute to transfer proceedings on remand. This Court should hold that when a case is vacated due to insufficient evidence under *Moon*, the juvenile court's jurisdiction on remand is limited to the power to dismiss the case.

ISSUE TWO: 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.

The State did not prove all the factors required for J.G. to be transferred from juvenile to adult court under Section 54.02(j). The court of appeals erred when it held that the State did satisfy its burden of proof on each element.

A. Standard of review

An appellate court reviews a juvenile court’s decision to transfer a case to adult court under an abuse of discretion standard. *See Moon*, 410 S.W.3d at 370. The legal and factual sufficiency of the evidence are among the relevant factors in determining an abuse of discretion. *Id.*, citing *In re K.B.H.*, 913 S.W.2d 684, 688 (Tex. App. – Texarkana 1995, no pet.).

B. Section 54.02(j) requires the state to prove five factors by a preponderance of the evidence before a juvenile court may waive its exclusive, original jurisdiction over a person who is over 18 years old.

The statute provides that a juvenile court may waive its exclusive original jurisdiction and transfer a person to the appropriate district court or criminal district court for criminal proceedings if:

- (1) the person is 18 years of age or older;
- (2) the person was:
 -
 - (B) 14 years of age or older and under 17 years of age at the time the person is alleged to have committed an aggravated controlled substance felony or

a felony of the first degree other than an offense under [Section 19.02, Penal Code](#); ...

- (3) no adjudication concerning the alleged offense has been made or no adjudication hearing concerning the offense has been conducted;
- (4) the juvenile court finds from a preponderance of the evidence that:
 - (A) for a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person; or
 - (B) after due diligence of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person because:
 - (i) the state did not have probable cause to proceed in juvenile court and new evidence has been found since the 18th birthday of the person;
 - (ii) the person could not be found; or
 - (iii) a previous transfer order was reversed by an appellate court or set aside by a district court; and
- (5) the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged.

Tex. Fam. Code § 54.02(j). These five factors are mandatory; if the State fails to prove even one factor, the juvenile court is required to dismiss. *See N.J.A.*, 997 S.W.2d at 556-7: “If the person is over age eighteen, and section 54.02(j)’s criteria are not satisfied, the juvenile court’s only other option is to dismiss the case.” In J.G.’s case, the State did not meet its burden on the third, fourth, and fifth mandatory elements of Section 54.02(j). First, the State did not prove that it exercised due diligence before J.G.’s 18th birthday. Second, the State did not prove that there was not an adjudication of this offense. Third, the State did not show probable cause that J.G. “committed” the alleged

offense.

C. Third factor: The court of appeals erred when it found no abuse of discretion in the juvenile court's determination that the State exercised due diligence.

In the 1987 version of the Juvenile Justice Code, Section 54.02(j)(4) provided only two ways for the State to prove that it exercised due diligence: 1) the State did not have probable cause before the person's 18 birthday, and new evidence was discovered since the person turned 18; or 2) the person could not be found. *See* Tex. Fam. Code § 54.02(j)(4) (Vernon 1987). Then, in 1995, the Legislature undertook a major re-writing of the Juvenile Justice Code. The new version of Section 54.02(j)(4) added one additional way for the State to show due diligence: if “a previous transfer order was reversed by an appellate court or set aside by a district court. *See* 1995 Tex. Sess. Law Serv. Ch. 262 (HB327).

In J.G.'s case, the State argued after remand that because the previous transfer order was reversed by an appellate court and it did not unduly delay seeking recertification after remand, subsection (j)(4)(B)(iii) was satisfied. The court of appeals agreed. *See J.G. II* at *12. This was incorrect as a matter of law – the previous transfer order in J.G.'s case was *not reversed* by the appellate court. By the express terms of the judgment, the appellate court *vacated and dismissed* J.G.'s adult conviction. A judgment that vacates and dismisses is not the same as a judgment that reverses and renders, or reverses and remands. *See* Tex. R. App. Proc. 43.2.

At the time of J.G.'s first transfer order, it was not possible for the order "[to be] reversed by an appellate court or set aside by a district court." This is because, under the applicable version of the Juvenile Justice Code, challenges to waivers of jurisdiction could only be raised on appeal of the adult conviction following a transfer order. Tex. Code Crim. Proc. art. 44.47 (repealed). In such appeals, the transfer order that led to the adult adjudication is not reversed, it is either affirmed or vacated, as in *N.G.A., Moon* and *Moore*.

- 1. Even if vacatur were the same thing as reversal, the State's evidence of due diligence was still insufficient, and the transfer order it drafted for the juvenile court did not meet the requirements of *Moon*.**

With due diligence, the state could have sought an adjudication in juvenile court rather than a transfer to adult court originally. *See Matter of J.C.C.*, 952 S.W.2d 47 (Tex.App. —San Antonio 1997, no writ). At the time of the alleged offense, January 11, 2012, J.G. was 16. It took less than 1 week for the state to file a delinquency petition against him. At that point, nothing was stopping the state from proceeding in juvenile court long before J.G. turned 18. Instead, the state pursued certification, and the juvenile judge waived jurisdiction on July 18, 2012, less than one month after J.G. turned 17 (CR at 44). He was promptly transferred from juvenile detention to the Harris County Jail.

At J.G.'s second certification hearing, the State presented no evidence remotely suggesting that with it could not have proceeded in juvenile court on a regular

delinquency petition, without seeking certification, the first time around. The state's only argument was that the appeal overturning the first adult case made it impracticable to proceed after due diligence. However, the record is clear: *before* J.G. turned 18, there was no reason why juvenile proceedings were impracticable. *See* SX 1-8.

2. An appellate opinion that did not issue until J.G. was 19 could not have impacted the State's ability to proceed in juvenile court before he was 18.

Further, the vacatur of the first transfer order did not prevent the State from proceeding in juvenile court before J.G. was 18. The opinion in *J.G. I* was not handed down until after J.G. turned 18. An event that had not taken place before J.G. was 18 could not possibly have had any impact on the State's ability to proceed in juvenile court before J.G. turned 18.

The state's proposed conclusion of law, adopted by the juvenile court, says:

Because the appellate courts reversed the previous transfer order **on a date after** the Respondent turned eighteen (18) years old, after due diligence of the State it was not practicable to proceed in juvenile court **before the 18th birthday** of the respondent.

Conclusion of Law 5 (citation omitted, emphasis added). This conclusion (reviewable *de novo*) does not comport with the language of the statute. It would make sense to say that "Because the appellate courts reversed the previous transfer order on a date after the Respondent turned eighteen (18) years old, after due diligence of the State it *is no longer practicable* to proceed in juvenile court...", but that is not what the statute says. Section 54.02(j)(4)(B), is written completely in past tense: the state must prove that

“after due diligence of the state it *was not practicable* to proceed in juvenile court *before the 18th birthday* of the person.” § 54.02(j)(4)(B)(iii). This necessarily limits the inquiry to the state of affairs that existed *before* the person’s 18th birthday.² Thus, this language requires that the reversal take place before the juvenile’s 18th birthday, not after. The court of appeals did not address this statutory language when reaching its conclusion that the juvenile court correctly held that the State exercised due diligence.

3. The court of appeals erroneously held that the evidence was legally and factually sufficient on the issue of due diligence

At J.G.’s recertification hearing, the prosecutor argued, without any authority, that “due diligence” simply means not deliberately delaying proceedings:

I think that when you have a case in which a – in which a juvenile’s adult sentence is reversed on appeal, as long as the State has proceeded in an orderly fashion and not prolonged the case through me, through its own – in other words, I think the due diligence issue, Judge, is really the classic, we sit on a case for years, we know we have enough evidence to file it but we want to go ahead and get it over because we would like to gain some sort of unfair advantage against the defense.

(2 RR at 77). Even as low as the bar is for transfer to adult court under Section 54.02(j), it is certainly higher than this.

² The other two subparts of Section 54.02(j)(4)(B) also address the state of the case before the juvenile turns 18: “the state did not have probable cause to proceed in juvenile court” before the juvenile turned 18 or “the person could not be found” before he or she turned 18. *See* Tex. Fam. Code § 54.02(j)(4)(B)(i), (ii).

At the first certification hearing, the State had the burden to prove the appropriateness of waiver by a preponderance of the evidence, and to offer evidence regarding the non-exclusive factors that the statute required the Court to consider.

It had a duty to take no shortcuts by relying on the juvenile court's use of the waiver form that then was standard in Harris County to gloss over the state's insufficient evidentiary showing. That was not due diligence.

The State also failed to use due diligence in drafting the first certification order, a boilerplate form that was patently inadequate to support certification. For nearly a half-century, the law in this country has been clear that an order waiving juvenile court jurisdiction must "set forth the basis for the order with sufficient specificity to permit meaningful review." *See Kent v. United States*, 383 U.S. 541, 560-1 (1966). This requirement is expressly included in the Juvenile Justice Code. *See* Tex. Fam. Code 54.02(h). In *Moon*, the Court of Criminal Appeals held that the boilerplate transfer order used in Harris County juvenile courts failed to satisfy this requirement. *Moon*, 451 S.W.3d at 50.

If the State had exercised due diligence in either its manner of proceeding against J.G. originally, or in its preparation of a transfer order that satisfied the longstanding requirements of specificity and individualized consideration of the evidence, it would not have seen J.G.'s transfer vacated on the appeal of his adult conviction. The court of appeals erred when it concluded that the State used due diligence.

D. Fourth Factor: Contrary to the court of appeals’ assertion, the State did not prove that no adjudication of the alleged offense has occurred.

The State has argued, and the court of appeals has agreed, that subsection 54.02(j)(3) means the State only has to prove that no *juvenile court* adjudication has been made. In other words, according to the State, the judgment against J.G. in Cause No. 1354948 in the 338th District Court, which resulted in a conviction for aggravated robbery, and a prison sentence that J.G. actually served for almost three years, was not an “adjudication.” This is a most novel construction of the word, one that is not supported by either traditional legal nomenclature or by the language of Section 54.02 itself.

1. “Adjudication” means a judgment.

It is undisputed that J.G. was convicted and punished for the offense of aggravated robbery. As a matter of law, that was an adjudication of the offense for purposes of Section 54.02(j)(3). *See McNew v. State*, 608 S.W.2d 166, 171-2 (Tex. Crim. App. 1978) (holding that “conviction” always and necessarily involves “adjudication of guilt” regardless of context).

Black’s Law Dictionary broadly defines “adjudication” as “the formal giving or pronouncing a judgment or decree in a cause...”. Black’s Law Dictionary 39 (5th Ed. 1979). Certainly, “adjudication” is not used only in the juvenile context. Adult criminal court judges may, in some circumstances, place a defendant on “deferred adjudication” of the charges against him, and if he does not comply with the conditions of the

deferred adjudication, the State may proceed with an adjudication of guilt. *See* Tex. Code Crim. Proc. art. 42.12 § 5. Further, the Government Code section governing handgun licensing includes the following definition: “4) **‘Convicted’ means an adjudication of guilt** or, except as provided in Section 411.1711, an order of deferred adjudication entered against a person by a court of competent jurisdiction ...” Tex. Gov’t Code § 411.171 (emphasis added).

In J.G.’s case, the State’s evidence and the juvenile court’s fact findings establish that there was an “adjudication concerning the alleged offense.” *See* SX 5, SX 9. The juvenile court specifically found:

(9) The Court finds that the Respondent pled guilty to this Aggravated Robbery offense on February 12, 2013 in the 338th District Court of Harris County, Texas in cause number 1354948 and was sentenced to 8 years TDCJID on February 12, 2013.

(CR at 44, Finding of Fact No. 8).

That adjudication ultimately was vacated and dismissed by the Fourteenth Court of Appeals. *See J.G. I*, 471 S.W.3d at 4. The vacatur, however, does not change the fact that there was an adjudication concerning the same alleged offense for which J.G. has been recertified.

2. The statutory language itself proves that the Legislature intended “adjudication” to refer to adult court judgments as well as juvenile court adjudications.

According to the Juvenile Justice Code, a child may be transferred to adult court if there has been no adjudication *hearing* for the alleged offense. In contrast, Section

54.02(j) permits transfers if there has not been “an adjudication” or “an adjudication hearing.” Compare TEX. FAM. CODE § 54.02(a) and TEX. FAM. CODE § 54.02(j):

Tex. Fam. Code § 54.02(a)	Tex. Fam. Code § 54.02(j)
“The juvenile court may waive its exclusive original jurisdiction and transfer a child ... for criminal proceedings if: ...	“The juvenile court may waive its exclusive original jurisdiction and transfer a person ... for criminal proceedings if: ...
(2)(A)(con’t) and no adjudication hearing has been conducted concerning that offense...”	(3) no adjudication concerning the alleged offense has been made or no adjudication hearing concerning the offense has been made.”

The language in subsection (a) reflects the holding in *Breed v. Jones*, 421 U.S. 519 (1975), which found a double jeopardy violation when a juvenile was adjudicated delinquent for an offense and then transferred to adult court. *Breed* said jeopardy attached at the adjudication hearing, so Subsection (a) acknowledges the double jeopardy issue and says that a child cannot be transferred to adult court if he has been through an adjudication hearing. Subsection (j) applies the same double-jeopardy principle in cases involving persons over 18, but recognizes that they might have been adjudicated in adult court instead of in juvenile court. It effectively bars transfer in either circumstance.

If the court of appeals’ interpretation of the law is correct, 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: the adult trial and conviction would not constitute an “adjudication” for purposes of § 54.02(j)(3). The court of appeals’ construction

clearly creates a potential double jeopardy problem. This Court should reject that interpretation of the statute's plain language.

E. Fifth Factor: The court of appeals erred when it concluded that the law of parties applied to the juvenile court's determination of probable cause that J.G. "committed" aggravated robbery within the meaning of Section 54.02(j).

Section 54.02(j) requires the juvenile court to find probable cause that a respondent *committed* the offense alleged before it can waive jurisdiction and transfer the respondent to adult court. There is a legal distinction between one who *commits* an offense and one who is *criminally responsible* as a party. This distinction is crucial in J.G.'s case because it is undisputed that he was not the gunman in the alleged aggravated robbery; he was only the driver for a 21-year-old who actually committed the offense (2 RR at 27).

In the Juvenile Justice Code, the distinction between the principal actor and someone who is merely a party is an important one. A juvenile court or jury cannot make a finding that a juvenile used or displayed a deadly weapon during an offense unless it finds that he was the actual party using the weapon. *See In the Matter of A.F.*, 895 S.W.2d 481, 486 (Tex. App. – Austin 1995, no writ). "For a determinate sentence ..., parole eligibility rules for ... cases in which a deadly weapon finding was made were changed [in 1993]. Under these rules, such an offender must serve one-half of the sentence without good conduct credit, or 30 years, whichever is less, but in no event less than two calendar years, to become eligible for parole." This controls how soon a

juvenile serving a determinate sentence will be eligible for parole. See for an offense in Section 54.02(i). *See* Robert O. Dawson, *Texas Juvenile Law*, 8th ed., p. 611 (internal citation omitted).

Tex. Fam. Code § 54.02(j) does not authorize a juvenile judge to transfer a person who may be “criminally responsible” – that is, a person who is a party and not the principal actor. Rather, the judge must find that there is probable cause that the person *committed* the alleged offense, according to the statute’s plain language. If the Legislature had intended otherwise, it would have included criminal responsibility for an offense in Section 54.02(i). *See* Dawson, p. 588: “The Code of Criminal Procedure includes the situation in which, although the defendant did not personally use a deadly weapon, he or she was a party to the offense and ‘knew that a deadly weapon would be used or exhibited’ during the offense or immediate flight therefrom. ... *However, no similar amendment was made in the Family Code* deadly weapon provision.” (emphasis added).

The Family Code does not define the word “committed,” but the Penal Code does: “A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession. Tex. Penal Code § 6.01(a). In contrast, under the law of parties, a person is *criminally responsible* for an offense committed by the conduct of another if “acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.” Tex. Penal Code § 7.02(a)(2)(emphasis added). According to Tex. Penal Code

§ 29.03(a), a person *commits* the offense of aggravated robbery “if he *commits* robbery ... and he: (1) causes serious bodily injury to another; [or] (2) uses or exhibits a deadly weapon” By definition, then, J.G. did not commit the alleged offense; at most, he was criminally responsible under the law of parties.

Because J.G. was guilty, if at all, only as a party to the aggravated robbery, he could not be found to have “committed” the offense, as required by the Juvenile Justice Code. The juvenile court and the court of appeals failed to recognize the distinction between the juvenile law’s language and that in the Penal Code. The court of appeals erred when it held that the State “presented sufficient evidence that probable cause existed that appellant, under the law of parties, committed the alleged aggravated robbery.” *J.G. II* at *14. It should be reversed.

ISSUE THREE: 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.

A. Standard of review

A statute may be held unconstitutional as applied when it operates to deprive an individual of a protected right, although its general validity is beyond question. *See Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). The general validity of Section 54.02(j) is not at issue here. Rather, the issue is its constitutionality as applied.

B. Tex. Fam. Code § 54.02(j) is fundamentally unfair because it tips the scales in the State’s favor on remand if the State loses its first appeal. This violates the Constitutional guarantees of due process and equal protection.

J.G.'s updated psychological evaluation described him as "a young adult who has gained some level of insight since he was last in the jurisdiction of the Harris County Juvenile Probation Department. He has demonstrated an ability to conduct himself as a pro-social individual by procuring employment and refraining from substance abuse. ..." (5 RR at Ex. 2, Probation Report; Psychological Evaluation p. 12).

TEX. FAM. CODE § 54.02(j) makes such considerations utterly irrelevant. Once the juvenile court finds that the accused fits the statute's age parameters, the only remaining factors for the judge to consider are procedural (whether there has been an adjudication, whether the state used due diligence, etc.). The judge also must determine whether there is probable cause to believe the defendant committed the offense. *Id.*

Currently, a person who was wrongfully denied the benefits of the juvenile justice system has a hollow victory upon reversal, because he almost certainly will be re-certified if the State requests it. He gets a procedure that looks like a hearing, but does not actually provide any meaningful due process. All the growth and rehabilitation he has accomplished will not shift the balance even slightly in his favor.

When applied to persons like J.G., whose cases have been vacated and remanded, Section 54.02(j) is rigged. The current practice of recertifying persons whose original transfer orders were vacated violates "fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." *See U.S. v. Lovasco*, 431 U.S. 783, 790 (1977)(internal quotation marks and citations omitted).

C. Both the juvenile and society suffer harm from the unconstitutional treatment of persons like J.G. who win their appeals in adult court only to find themselves back in juvenile court.

By the time a case is vacated or reversed and remanded back to juvenile court, the defendant has been deprived of all the educational and psychosocial programs that would have been available to him in the juvenile justice system. He can never regain those opportunities.

The community, too, loses the benefit of rehabilitation and education of an at-risk youth. Virtually all young people will be released back into the community at some point in the future. If all they have learned during their crucial late-teens/early 20s has come behind the bars of adult prisons, from adult offenders, the community is at risk, as well.

D. The court of appeals' conclusion that, as applied to J.G., Sect. 54.02(j) does not amount to double jeopardy was based on a demonstrably incorrect premise: that the reversal of the first transfer order was not due to insufficient evidence.

The Double Jeopardy clause of the Fifth Amendment prohibits more than multiple trials of a criminal defendant for a single offense; it also prevents multiple punishments for the same offense. U.S. Const. amend. V. *See Langs v. State*, 183 S.W.3d 680, 685 (Tex. Crim. App. 2006): "There are three distinct types of double jeopardy claims: (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." This protection is extended to the states through U.S. Const. amend.

XIV. *See Ex parte Denton*, 399 S.W.3d 540, 546 (Tex. Crim. App. 2012). Further, the Texas Constitution includes protection against double jeopardy. *See* Tex. Const. art. 1, § 14. *See, also*, Tex. Code Crim. Proc. art. 1.10.

When a conviction is overturned due to insufficient evidence, double jeopardy principles prohibit a second trial for the same offense. *See Burks v. United States*, 437 U.S. 1, 11 (1978): “The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”

As discussed in Issue One, Section C, above, the first transfer order in J.G.’s case was vacated expressly because the evidence was insufficient. The Fourteenth Court of Appeals, which reviewed the first order, considered that the transfer order form in J.G.’s case was identical to the form in *Moon v. State*. It then relied on the controlling precedent of the Court of Criminal Appeals’ opinion, quoting *Moon* to announce its finding that “the juvenile court’s waiver of jurisdiction ‘based on this particular reason fortified only by this fact’ constitutes an abuse of discretion.” *J.G. I*, 471 S.W.3d at 4, quoting *Moon*, 451 S.W.3d at 50.

In *Moore*, once the court of appeals found the State’s evidence in support of its motion for the juvenile court to waive jurisdiction, it did not remand. Instead, it held that the court’s only option was to dismiss. *Moore*, 446 S.W.3d at 52. The Court of Criminal Appeals affirmed the lower court’s judgment. *Moore*, 2017 WL 510567 *4. This result seems to impliedly overrule *Hoang v. State*, a 1993 habeas corpus action in which

the Court of Criminal Appeals found no double jeopardy bar to a second juvenile certification hearing and transfer to adult court. *See Hoang v. State*, 872 S.W.2d 694 (Tex. Crim. App. 1993). In *Hoang*, the juvenile defendant was prosecuted in adult court without a juvenile court waiver of jurisdiction. The court found the original judgments void, since the adult court did not acquire jurisdiction from the juvenile court. It then concluded that the void judgments did not bar a second prosecution. The court expressly did not consider whether Hoang was subject to multiple punishments in violation of the Double Jeopardy Clause, because he had not yet been retried. *Id.* at *699.

In contrast, J.G. has, in fact, received multiple punishments. After the transfer that is the subject of this appeal, he accepted a plea bargain with the State and was sentenced to serve six years in prison. Petitioner asks the Court to take judicial notice of the judgment in Cause No. 1491104 in the 338th District Court of Harris County, Texas, entered on September 21, 2016 (attached to this brief as Appendix). Unlike the defendant in *Hoang*, multiple punishment is not a mere possibility for J.G. It is a reality, as he presently sits in a TDCJ cell awaiting this Court's ruling. His right to be free from double jeopardy has, in fact, been violated. This Court should vacate the second transfer order due to its unconstitutionality on double jeopardy grounds.

E. The court of appeals erred in holding that because the transfer decision is not an adjudication or a conviction, Sect. 54.02(j) is not an *ex post facto* law as applied to J.G.

Section 54.02(j) provides for certification without the same substantive and procedural requirements that are imposed on the State by Sections 54.02(a) and (f). It changes the rules after the fact in a way that materially changes the State's substantive burden to certify and then convict a child, and subjects the child to adult criminal penalties to which he would not have been subject under the applicable law when the alleged crime was committed. For these reasons, Section 54.02(j) is an *ex post facto* law. See *Carmell v Texas*, 529 U.S. 513, 530 (2000) (law is invalid as an *ex post facto* law where it “alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.”) The state's failure or inability to meet one set of rules does not permit it to substitute a new set of rules on remand. Cf. *Bowie v. City of Columbia*, 378 U.S. 347, 353-354 (1964) (applying Due Process Clause to *ex post facto* judicial decisions).

Section 54.02(j) has an *ex post facto* effect because it changes the punishment – and the punishment process – for the same offense. It does so by making it impossible for J.G. to receive juvenile rehabilitation. He was denied that opportunity the first time due to the State's failure to offer sufficient evidence to support transfer to adult court. He has been denied that opportunity again simply because he continued to get older as his case made its way through the adult trial and appellate courts. This was through no fault of his own.

The facial constitutionality of Section 54.02(j) is not at issue here. It may or may not be facially valid for, say, accused persons who voluntarily flee the state and are not

apprehended until they are over age 18. Clearly, though, the statute's unconstitutional effect on J.G. is solely the State's doing. All J.G. did was assert the invalidity of the original certification. In the meantime, until the adult court system finally agreed with him, he lost the benefit of all the services and educational opportunities the juvenile justice system would have provided. He is in a worse position now than he was at the time he is alleged to have participated in the robbery.

F. The juvenile court considered only J.G.'s prior juvenile record and reports, ignoring the mitigating evidence in J.G.'s favor. This led the court of appeals to conclude, erroneously, that Section 54.02(j) did not result in a cruel and unusual punishment for J.G.

In a line of cases culminating in last year's decision in *Montgomery v. Louisiana*, ___ U.S. ___, 136 S.Ct. 718 (2016), the U.S. Supreme Court has emphasized the need for state penal statutes to recognize the differences between children and adults. *See, also, Miller v. Alabama*, 567 U.S. 460 (2012) (mandatory life without parole in juvenile homicide cases unconstitutional); *Graham v. Florida*, 560 U.S. 58 (2010) (mandatory life without parole in juvenile non-homicide cases unconstitutional); *Roper v. Simmons*, 543 U.S. 551 (2005) (capital punishment for persons under 18 when crimes committed unconstitutional). In *Montgomery*, the Court observed that the traditional justifications for punishment weigh differently in juvenile cases. Although *Montgomery* concerned juvenile sentences of life without parole, its discussion of punishment rationales is equally instructive for other cases involving punishment of juveniles as adults, such as J.G.'s. The Court pointed out:

- (1) Retribution relates to an offender's blameworthiness, so the case for retribution is not as strong with a minor.
- (2) Deterrence, too, is an insufficient rationale because the same characteristics that render juveniles less culpable than adults – their immaturity, recklessness, and impetuosity – make them less likely to consider potential punishment.
- (3) Incapacitation is less important than for adults because ordinary adolescent development diminishes the likelihood that a juvenile offender forever will be a danger to society. Finally,

- (4) Rehabilitation is not a satisfactory rationale, because adult punishment forswears the opportunities for rehabilitation that are available and mandated in the juvenile justice system.

Montgomery, 2016 WL 280758 at *12.

As applied to J.G., Section 54.02(j) violates the Eighth Amendment as construed by *Montgomery* and the precedents upon which it is based, because it deprived him of his liberty interest in being treated differently when he was a child and gave the juvenile court on remand no opportunity to weigh the purposes of punishment when that court had to decide whether to transfer him a second time to adult court. It results in a system of unlawful punishment under U.S. Const. amend. VIII and Tex. Const. art. I sect. 13.

G. The second transfer violated J.G.'s right to equal protection.

In no other context is the State allowed to try a second time to marshal enough evidence to satisfy a burden of proof it failed to satisfy in a previous proceeding. Yet that is exactly what has happened in this case and others. In *Moore*, though, the Court of Criminal Appeals affirmed an intermediate court's disposition that prevented the State from trying to certify a defendant a second time. The only distinction between *Moore* and J.G. is that *Moore* was already over 18 when he was first subject to a juvenile court waiver of jurisdiction; J.G. was still a child. Equal protection requires J.G. be treated same even though was under 18.

Further, Section 54.02 violates equal protection because it sets out entirely different factors for the courts to consider, depending on whether the State is asking

for a waiver of jurisdiction over a child or over a person. In either instance, the State has the burden of proof to show that a respondent should be transferred from juvenile court to adult criminal court. When considering waiver of jurisdiction for either a child, the juvenile court is to consider personal factors of the child such as his sophistication and maturity and his previous record. It also must consider public safety and the likelihood of rehabilitation using juvenile court resources. *See* Tex. Fam. Code § 54.02(a),(f). The law provides no similar consideration for a person who is 18 or older. *Compare* Tex. Fam. Code § 54.02(j):

For children under age 18, factors based on individualized considerations. See Sect. 54.02(a),(f):	For persons 18 and over, factors based on state action. See Sect. 54.02(j):
<p>... (3) the court determines there is probable cause to believe:</p> <ul style="list-style-type: none"> (a) the juvenile committed the offense alleged; and (b) because of the seriousness of the offense alleged or the background of the juvenile, the welfare of the community requires criminal proceedings. <p>TEX. FAM. CODE § 54.02(a).</p> <p>In making the determination required by Subsection (a) of this section, the court shall consider, among other matters:</p> <ul style="list-style-type: none"> (1) whether the alleged offense was against person or property, with greater 	<p>... (4) the juvenile court finds from a preponderance of the evidence that:</p> <ul style="list-style-type: none"> (A) for a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person; or (B) after due diligence of the state it was not practicable to proceed in the juvenile court before the 18th birthday of the person because: <ul style="list-style-type: none"> (i) the state did not have probable cause to proceed in juvenile court and new evidence has been found

<p>weight in favor of transfer given to offenses against the person;</p> <p>(2) the sophistication and maturity of the child;</p> <p>(3) the record and previous history of the child; and</p> <p>(4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of the procedures, services, and facilities currently available to the juvenile court.</p> <p>TEX. FAM. CODE § 54.02(f).</p>	<p>since the 18th birthday of the person;</p> <p>(ii) the person could not be found; or</p> <p>(iii) a previous transfer order was reversed by an appellate court or set aside by a district court; and</p> <p>(5) the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged.</p>
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This disparate treatment is harmful to defendants such as J.G., who lose the benefits of education and rehabilitation programs in the juvenile justice system once the court waives its jurisdiction. On remand, they are denied the opportunity to demonstrate that they should not face a second adult prosecution, even if, like J.G., they have a record of improvement and rehabilitation, making them positive contributors to society rather than drains on the state’s budget. As applied to these defendants, Section 54.02 is clearly unconstitutional due to its denial of equal protection under the law. The court of appeals erred when it concluded that the juvenile court’s purported consideration of all statutory factors cured this constitutional problem. This Court should vacate the second transfer order on equal protection grounds.

ISSUE FOUR: 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).

A. Standard of review

In criminal cases, if the record shows constitutional error that is subject to harmless-error review, an appellate court must reverse unless it determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. *See* Tex. R. App. Proc. 44.2. While this rule does not expressly apply to appeals of juvenile transfer orders or adjudications, given the number of adult constitutional protections extended to juveniles in those circumstances, it is the most appropriate standard of review for the constitutional issues raised here.

B. Section 54.02(j) does not allow the juvenile court to mix and match the factors it considers in certification proceedings for persons 18 and older.

The certification statute gives a juvenile court judge some flexibility in considering whether to transfer a child under age 18 to adult court. Section 54.02(f) lists several factors that the court must consider, “among other matters.” The requirement is only that the court *consider* the specified factors, not that it must find each of them before it can order a transfer.

In contrast, the factors to be considered for transfer of persons 18 and older are mandatory and are limited. Section 54.02(j) allows the court to waive its jurisdiction only if it finds all five factors to be present, and it makes no provision for the court to consider “other matters,” as Section 54.02(f) does.

C. The juvenile court purported to consider all the factors for transfer of persons under 18, even though J.G. was 20 years old at the time of the recertification proceedings., in violation of to Section 54.02(j)'s plain language.

The juvenile judge expressly went beyond consideration of the Section 54.02(j) factors to consider the subjective factors under subsections (a) and (f). However, the findings and conclusions in this case read as if J.G. had been frozen in time as a troubled 16-year-old. The judge did not consider the updated certification evaluation, even though the judge himself ordered it, and even though it was performed by the same mental health experts who conducted the 2012 evaluation that the judge gave such weight. Nothing in the record explains this failure to weigh all the evidence. There are no findings that the judge did not find the new evaluations credible, for example. The record is silent.

Despite the evidence to the contrary, the judge found that J.G. had not been rehabilitated, and that “it [was] not in the best interest of society, the justice system, and the community that the Court exercise any discretion, if such discretion exists, to dismiss this case.” Neither the order waiving jurisdiction nor the findings and conclusions pointed to *any* evidence that supported these determinations.

D. The court of appeals failed to review both the factual and legal sufficiency of the State's evidence, as *Moon v. State* expressly requires.

The court of appeals failed to conduct any factual sufficiency review of the evidence, though *Moon* expressly requires both legal and factual sufficiency review of the evidence presented at a juvenile certification hearing. *See Moon*, 451 S.W. 3d at 45-

6. 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, particularly, the original evaluation conducted when J.G. was 16 years old.

When conducting a review for factual sufficiency, a court of appeals must examine, consider, and weigh all of the evidence that supports or contradicts the fact-finder's determination. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). The First Court of Appeals failed to do this when reviewing J.G.'s recertification.

The appellate court acknowledged that the juvenile court considered the Sect. 54.02(a) and (f) factors as well as the Sect. 54.02(j) factors. The court concluded that this solved the due process and equal protection issues before it: "In this case, therefore, the juvenile court essentially considered *all* of the relevant statutory factors for waiver of jurisdiction that the Legislature has specifically enumerated in section 54.02, despite the age-based distinction between subsections (a) and (f) and subsection (j). We therefore conclude that section 54.02(j), as applied to appellant in this case, did not deprive appellant of due process and equal protection." *J.G. II*, Op. at *9.

This is not a review of the evidence. It is merely an observation about what the juvenile court considered. It neither evaluates all the evidence in a neutral light to determine its factual sufficiency, nor evaluates all the evidence in the light most favorable to the juvenile court to determine its legal sufficiency. It does not review the due process and equal protection issues raised by J.G. in light of the juvenile court's consideration of factors it was not authorized by statute to consider.

E. The court of appeals denied J.G. his right to due process by denying him meaningful review of the evidence.

“Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not “assume” that there are adequate reasons. . . . Accordingly, we hold that it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor. . . . [T]he statement . . . must set forth the basis for the order with sufficient specificity to permit meaningful review.” *Kent*, 383 U.S. at 561.

If a state grants a right to appeal, the process of appellate review must be consistent with the requirements of due process, due course of law, and equal protection. *See Griffin v. Illinois*, 351 U.S. 12, 18 (1956). *See, also*, U.S. Const. amends. V, XIV; Tex. Const. art. 1 § 19. Above all, appellate review must be meaningful. “[A] distinction between (1) a State that denies permission to raise [a] claim on direct appeal and (2) a State that in theory grants permission but, *as a matter of procedural design and systemic operation*, denies a meaningful opportunity to do so is a distinction without a difference.” *Trevino v. Thaler*, 133 S.Ct. 1911, 1921 (2013) (emphasis added) (discussing Texas’ procedures for reviewing claims of ineffective assistance of counsel in criminal cases).

As a result of Section 54.02(j)'s "procedural design and systemic operation" in cases such as J.G.'s, the statute violates the constitutional guarantees of due process, due course of law and equal protection.

Further, by merely noting that the juvenile court considered certain factors, without reviewing whether: 1) the statute permitted the court to consider them; and 2) whether the evidence to support those factors was legally and factually sufficient, the court of appeals failed to provide meaningful review of the court's decision to waive its jurisdiction and transfer J.G. to adult criminal court a second time.

PRAYER

Petitioner respectfully requests that the Court grant his petition, reverse the court of appeals and dismiss this cause with prejudice. Alternatively, Petitioner requests the Court to reverse and remand to the court of appeals to conduct a factual sufficiency review.

Respectfully submitted,

Alexander Bunin
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Harris County Texas

/s/ Cheri Duncan

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CERTIFICATE OF SERVICE

I certify that a copy of Appellant's Motion to Extend Time to File Petition was served on the following by electronic delivery through the state's efilix system on May 2, 2017:

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Cheri Duncan

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Rule 9.2, TEX. R. APP. PROC. It was prepared on a computer using 14-point Garamond type. The sections pertinent to the rule contain 10,533 words.

/s/ Cheri Duncan

Cheri Duncan



THE STATE OF TEXAS

§ IN THE 338TH DISTRICT

v.

§
§
§
§
§
§
§

COURT

GUERRERO, JORGE

§ HARRIS COUNTY, TEXAS

STATE ID No.: TX08431026

JUDGMENT OF CONVICTION BY COURT—WAIVER OF JURY TRIAL

Judge Presiding: **HON. BROCK THOMAS** Date Judgment Entered: **09/21/2016**

Attorney for State: **JE'RELL ROGERS** Attorney for Defendant: **BOURLIOT, FRANCES YOUNG**

Offense for which Defendant Convicted:
AGG ROBBERY-DEADLY WPN

Charging Instrument: **INDICTMENT** Statute for Offense: **N/A**

Date of Offense: **01/11/2012**

Degree of Offense: **1ST DEGREE FELONY** Plea to Offense: **GUILTY** Findings on Deadly Weapon: **YES, A FIREARM**

Terms of Plea Bargain: **6 YEARS TDC**

Plea to 1st Enhancement Paragraph: **N/A** Plea to 2nd Enhancement/Habitual Paragraph: **N/A**

Findings on 1st Enhancement Paragraph: **N/A** Findings on 2nd Enhancement/Habitual Paragraph: **N/A**

Date Sentence Imposed: **09/21/2016** Date Sentence to Commence: **09/21/2016**

Punishment and Place of Confinement: **6 YEARS INSTITUTIONAL DIVISION, TDCJ**

THIS SENTENCE SHALL RUN CONCURRENTLY.

SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR N/A .

Fine: **\$ N/A** Court Costs: **\$ As Assessed** Restitution: **\$ N/A** Restitution Payable to: VICTIM (see below) AGENCY/AGENT (see below)

Sex Offender Registration Requirements do not apply to the Defendant. TEX. CODE CRIM. PROC. chapter 62

The age of the victim at the time of the offense was **N/A** .

If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.

From **01/12/2012** to **07/23/2012**

From **11/19/2014** to **03/31/2015**

From **07/24/2012** to **09/21/2012**

From **04/01/2015** to **04/19/2015**

From **01/11/2013** to **11/18/2014**

From **02/20/2016** to **09/21/2016**

Time Credited:

If Defendant is to serve sentence in county jail or is given credit toward fine and costs, enter days credited below.

N/A DAYS NOTES: **N/A**

All pertinent information, names and assessments indicated above are incorporated into the language of the judgment below by reference.

This cause was called for trial in **Harris County, Texas**. The State appeared by her District Attorney.

Counsel / Waiver of Counsel (select one)

Defendant appeared in person with Counsel.

Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

Both parties announced ready for trial. Defendant waived the right of trial by jury and entered the plea indicated above. The Court then admonished Defendant as required by law. It appeared to the Court that Defendant was mentally competent to stand trial, made the plea freely and

RECORDER'S MEMORANDUM
This instrument is of poor quality
at the time of imaging

voluntarily, and was aware of the consequences of this plea. The Court received the plea and entered it of record. Having heard the evidence submitted, the Court found Defendant guilty of the offense indicated above. In the presence of Defendant, the Court pronounced sentence against Defendant.

The Court FINDS Defendant committed the above offense and **ORDERS, ADJUDGES AND DECREES** that Defendant is **GUILTY** of the above offense. The Court FINDS the Presentence Investigation, if so ordered, was done according to the applicable provisions of TEX. CODE CRIM. PROC. art. 42.12 § 9.

The Court **ORDERS** Defendant punished as indicated above. The Court **ORDERS** Defendant to pay all fines, court costs, and restitution as indicated above.

Punishment Options (select one)

Confinement in State Jail or Institutional Division. The Court **ORDERS** the authorized agent of the State of Texas or the Sheriff of this County to take, safely convey, and deliver Defendant to the **Director, Institutional Division, TDCJ**. The Court **ORDERS** Defendant to be confined for the period and in the manner indicated above. The Court **ORDERS** Defendant remanded to the custody of the Sheriff of this county until the Sheriff can obey the directions of this sentence. The Court **ORDERS** that upon release from confinement, Defendant proceed immediately to the **Harris County District Clerk's office**. Once there, the Court **ORDERS** Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

County Jail—Confinement / Confinement in Lieu of Payment. The Court **ORDERS** Defendant immediately committed to the custody of the **Sheriff of Harris County, Texas** on the date the sentence is to commence. Defendant shall be confined in the **Harris County Jail** for the period indicated above. The Court **ORDERS** that upon release from confinement, Defendant shall proceed immediately to the **Harris County District Clerk's office**. Once there, the Court **ORDERS** Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

Fine Only Payment. The punishment assessed against Defendant is for a **FINE ONLY**. The Court **ORDERS** Defendant to proceed immediately to the **Office of the Harris County District Clerk**. Once there, the Court **ORDERS** Defendant to pay or make arrangements to pay all fines and court costs as ordered by the Court in this cause.

Execution / Suspension of Sentence (select one)

The Court **ORDERS** Defendant's sentence **EXECUTED**.

The Court **ORDERS** Defendant's sentence of confinement **SUSPENDED**. The Court **ORDERS** Defendant placed on community supervision for the adjudged period (above) so long as Defendant abides by and does not violate the terms and conditions of community supervision. The order setting forth the terms and conditions of community supervision is incorporated into this judgment by reference.

The Court **ORDERS** that Defendant is given credit noted above on this sentence for the time spent incarcerated. The Court further **ORDERS** that if the defendant is convicted of two or more offenses in a single criminal action, that each cost or fee amount must be assessed using the highest category of offense. Tex. Code Crim. P. art. 102.073.

Furthermore, the following special findings or orders apply:

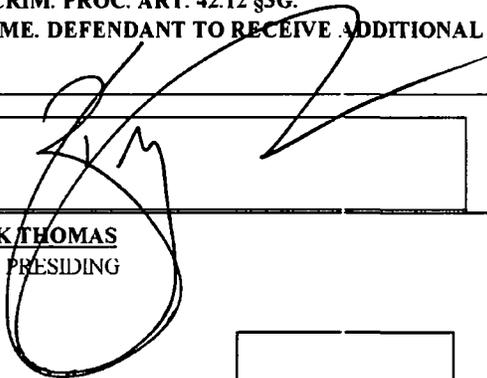
APPEAL WAIVED. NO PERMISSION TO APPEAL GRANTED.

DEADLY WEAPON.

THE COURT FINDS DEFENDANT USED OR EXHIBITED A DEADLY WEAPON, NAMELY, A FIREARM, DURING THE COMMISSION OF A FELONY OFFENSE OR DURING IMMEDIATE FLIGHT THEREFROM OR WAS A PARTY TO THE OFFENSE AND KNEW THAT A DEADLY WEAPON WOULD BE USED OR EXHIBITED. TEX. CODE CRIM. PROC. ART. 42.12 §3G.

DEFENDANT TO RECEIVE ADDITIONAL CREDIT FORM JUVENILE TIME. DEFENDANT TO RECEIVE ADDITIONAL CREDIT FROM TDC. CAUSE# 135494801010

Signed and entered on 09/21/2016



BROCK THOMAS
JUDGE PRESIDING

Notice of Appeal Filed: _____
Mandate Received: _____ Type of Mandate: _____
After Mandate Received, Sentence to Begin Date is: _____
Jail Credit: _____
Def. Received on at AM PM
By: Deputy Sheriff of Harris County



Right Thumbprint

Clerk: J BOBB
Case Number: 149110401010
Defendant: **GUERRERO, JORGE**

FIN (CAS 20.10): EN/KR04: LCBT: LCBU: EN/KR18:



I, Chris Daniel, District Clerk of Harris County, Texas certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date. Witness my official hand and seal of office this May 2, 2017

Certified Document Number: 72010723 Total Pages: 2

Chris Daniel, DISTRICT CLERK
HARRIS COUNTY, TEXAS

In accordance with Texas Government Code 406.013 electronically transmitted authenticated documents are valid. If there is a question regarding the validity of this document and or seal please e-mail support@hcdistrictclerk.com