

**No. 16-0468**

**IN THE SUPREME COURT OF TEXAS**

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**IN THE MATTER OF J.G.,**  
*Petitioner*

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**REPLY BRIEF FOR PETITIONER**

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**Oral Argument Requested**

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## 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).

## ARGUMENTS IN REPLY

Petitioner has organized his reply into two sections. Section One is a distillation of the parties' arguments and the issues before the Court. Section Two contains specific responses to particular misstatements made in the State's brief.

### SECTION ONE

The State's primary argument in this case is that a juvenile court's findings on factors other than those in Tex. Fam. Code § 54.02(j) can create jurisdiction to transfer the case of a person age 18 or older to adult court. This is contrary to: 1) this Court's longstanding delimitation of juvenile court jurisdiction over persons 18 and older, in *In re N.J.A.*, 997 S.W.2d 554, 556-7 (Tex. 1999); and 2) the plain language of the Juvenile Justice Code itself. Nonetheless, the State argues to this Court, over and over again, that because the juvenile court in this case entered findings under both Section 54.02(j) and Sections 54.02(a) and (f), most of Petitioner's issues on discretionary review are without merit.

In fact, the State refers to the juvenile court's dual findings at least *nine* times in its response to Petitioner's brief. *See* State's Brief in Response at pages 4, 7, 12 (twice), 15, 21 (twice), and 22 (twice). This goes far beyond the opinion of court of appeals, which relied on the fact of dual findings to reject two of Petitioner's issues below. *See In the Matter of J.G.*, 495 S.W.3d 354, 368-9 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2016, pet. filed) (because the juvenile court considered the factors under subsections (a) and (f) as

well as subsection (j), the waiver of jurisdiction did not violate J.G.'s rights to due process and equal protection).

In *N.J.A.*, this Court held that a juvenile court maintains jurisdiction when a juvenile turns eighteen, but its jurisdiction is limited to transferring the case under Tex. Fam. Code § 54.02(j), if all criteria are satisfied, or to dismissing the case. *See N.J.A.*, 997 S.W.2d at 556. The Court further held that the State must prove all five parts of Section 54.02(j) before the juvenile court can waive its jurisdiction and transfer a person 18 or older to district court. *Id.*

Since *N.J.A.* was handed down in 1999, no court, other than the court of appeals below, has expanded the statutory language and *N.J.A.*'s holding to permit a waiver of jurisdiction if the juvenile court makes findings under both Section 54.02(j) and Sections 54.02(a) and (f), which govern waivers of jurisdiction for children under age 18. The State has given this Court no reason to depart from the rule announced in *N.J.A.*, which has withstood the test of time. Certainly, the language of Tex. Fam. Code § 54.02(j) is plain enough. Quite simply, the Legislature has not authorized the juvenile courts to waive jurisdiction over a person above 18 years old based on any factors other than those in Sect. 54.02(j).

The court of appeals effectively rewrote the Family Code to permit J.G.'s transfer based on factors other than those in Sect. 54.02(j). The State would have this Court commit the same error. Further, this is not the only way the State's arguments effectively rewrite Tex. Fam. Code § 54.02(j). The State's case – and the extent to which

it is based upon express or implied additions and deletions to Sect. 54.02(j) – is illustrated below. The State’s express or implied additions to the statute are shown in blue. The express or implied deletions are shown in red with strike-through marks. Petitioner has annotated these changes with citations to the State’s brief, for ease of reference.

**TEX. CODE CRIM. PROC. ART. 54.02(j)**  
**EDITED TO REFLECT THE STATE’S ARGUMENTS:**

(j) The 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:

(A) 10 years of age or older and under 17 years of age at the time the person is alleged to have committed a capital felony or an offense under Section 19.02, Penal Code;

(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; or

(C) 15 years of age or older and under 17 years of age at the time the person is alleged to have committed a felony of the second or third degree or a state jail felony;

(3) no ~~adjudication~~ **final conviction or acquittal** concerning the alleged offense has been made or no adjudication hearing concerning the offense has been conducted;

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*See State’s Brief at p. 20: “As stated previously, neither double jeopardy nor ex post facto apply because there has been no final conviction or acquittal in this case...” However, the statute does not speak of conviction or acquittal. Rather, Section 54.02(j)(3) requires the state to prove either “no adjudication” or “no adjudication hearing.”*

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(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 18<sup>th</sup> birthday of the person; or

(B) after due diligence of the state it was not practicable to proceed in the juvenile court before the 18<sup>th</sup> 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 18<sup>th</sup> birthday of the person;
- (ii) the person could not be found; or
- (iii) a previous transfer order was reversed **or vacated** by an appellate court or set aside by a district court; and

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*See* State’s Brief at p. 5: The State correctly quotes the relevant subsection. However, to be applicable to this case, the statute would have to be amended to add “or vacated,” because Petitioner’s adult conviction was *vacated*, not reversed.

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(5) the juvenile court determines that there is probable cause to believe that the child before the court **committed was criminally responsible for** the offense alleged; **or:**

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*See* State’s Brief at p. 18: “A party to an offense ‘is just as criminally responsible for the offense as if he had directly committed murder by his own conduct.’” (citations omitted). In fact, the statute requires a finding of probable cause that the child *committed* the offense, not merely that he was criminally responsible – as a party, for example.

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**(a) The juvenile court may waive its exclusive original jurisdiction and transfer a child to the appropriate district court or criminal district court for criminal proceedings if:**

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*See* State’s Brief at p. 12: “With regard to Section 54.02(a), the juvenile court may waive jurisdiction if ...” In its paraphrase of the statute, the State omits the phrase “and transfer a child...” which distinguishes subsection (a) from subsection (j), the applicable legal standard for J.G.

*See, also,* State’s Brief at p. 12; 21-22: (“appellate received twice the process that he was due”). Besides the novel suggestion that due process somehow can be quantified, multiplied, or divided, the State ignores the plain language of the statute, which expressly limits the juvenile court’s jurisdiction over a person age 18 or older to the authority to make findings under subsection (j) only.

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**(1) the child is alleged to have violated a penal law of the grade of felony;**

**(2) the child was:**

**(A) 14 years of age or older at the time he is alleged to have committed the offense, if the offense is a capital felony, an aggravated controlled substance**



felony, or a felony of the first degree, and no adjudication hearing has been conducted concerning that offense; or

(B) 15 years of age or older at the time the child is alleged to have committed the offense, if the offense is a felony of the second or third degree or a state jail felony, and no adjudication hearing has been conducted concerning that offense; and

(3) after a full investigation and a hearing, the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged and that because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings.

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*See* State’s Brief at p. 12: if the Legislature had, in fact, included these factors in the subsection governing waivers of jurisdiction over persons 18 and older, then the State’s argument would have merit. Under the actual statutory scheme adopted by the Legislature, however, one set of factors governs transfers of children (subsections (a) and (f)), and another set of factors governs transfers of persons (subsection (j)). These are jurisdictional. *See In re N.J.A.* 997 S.W.2d at 555-6.

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## SECTION TWO

This section addresses the most significant misstatements of law or fact in the State’s response to each section of Petitioner’s brief on the merits.

**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.**

Petitioner’s argument is based on a recent Court of Criminal Appeals case, *Moore v. State*, \_\_\_ S.W.3d \_\_\_, No. PD-1634-14 (Tex. Crim. App., Feb. 8, 2017). The State creates a straw man by arguing that “[n]owhere *in Moore* did the court hold that ‘the State gets only one chance to prove its case for transfer to criminal court.’ ” (State’s

Brief at p. 6). Petitioner agrees with this statement. However, *Moore* is important to this case, not because of its *holding*, but because of its *result*: the Court affirmed the court of appeals' dismissal of the case with prejudice. It did not remand for a second juvenile court hearing.

The State attempts to distinguish *Moore* by suggesting that the initial vacatur in Petitioner's case was not due to legally insufficient evidence, as *Moore's* was. This is a misstatement of the original opinion in this case. The original vacatur was expressly based on *Moon v. State*, 451 S.W.3d 28 (Tex. Crim. App. 2014). In *Moon*, the Court of Criminal Appeals agreed with the court of appeals that each reason for waiver cited by the juvenile court was either legally or factually insufficient *See Moon*, 451 S.W.3d at 35-6. Nothing in the original court of appeals' opinion suggested that the State's evidence against J.G. was only factually insufficient, or, more to the State's argument, that the vacatur was based only on the form of the transfer order.

The question left for this Court to decide, then, is the one presented here: whether dismissal is required when a respondent was still a child at the time of the first transfer hearing, as well as when the respondent was already 18 at the time of the first transfer hearing, as in *Moore*. The State has proffered no reason why individuals facing a second certification hearing should be treated differently depending on their age at the time of the first certification hearing.

**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.**

Waiver of jurisdiction and transfer of a juvenile respondent to adult court is the most serious disposition a juvenile court can make. This appeal asks whether the Juvenile Justice Code permits a juvenile court to impose its harshest treatment on someone who was not the main actor in an offense.

A case concerning the next most serious disposition, a determinate sentence, is instructive. *See In the Matter of A.F.*, 895 S.W.2d 481, 486 (Tex. App. -- Austin, 1995, no writ). There, the Austin Court of Appeals held that a juvenile could not be found to have committed an offense with a deadly weapon when he was only a party to the offense.

If a child must be a principal actor before a deadly weapon finding can be made as part of a determinate sentence, which is a less serious disposition, then surely the child must be a principal actor before a juvenile court can impose the most serious disposition, transfer for trial as an adult. Further, if transfers to adult court are intended only for the “worst of the worst” children, to use the common parlance, then a child who is merely a party to an offense does not meet that definition.

**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.**

The State’s double jeopardy argument begs the question of whether Petitioner has twice been placed in jeopardy of loss of liberty. The State simply asserts, without authority, that “the reversal in [J.G.] restored the case to its pretrial position, [so] there has been no final conviction or acquittal and there has been no punishment assessed.” State’s Brief at p. 11 (emphasis added). *But see [J.G.] v. State*, 471 S.W.3d 1 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2014, no pet.). Second, the State *assumes* that the juvenile court had jurisdiction to re-certify J.G. That is exactly the question this Court is being called upon to decide in Issue One.

Further, the State incorrectly asserts that *Moon* was not a sufficiency case, but rather was merely an abuse of discretion decision. This is belied by the opinion’s detailed discussion of the court of appeals’ decision it affirmed. *See Moon*, 451 S.W.3d at 35-6. The transfer orders in *Moon* and in J.G.’s first case were identical. If one included legally insufficient findings, then so did the other.

Finally, the State argues that Sect. 54.02(j) does not violate the double jeopardy or ex post facto provisions of the U.S. and Texas Constitutions because the juvenile court made findings under Sects. 54.02(a) and (f), as well as under subsection (j). For the reasons discussed in Section One above, this argument effectively rewrites the statute and ignores this Court’s longstanding precedent in *In re N.J.A.*, which the State does not even cite in its brief. It has become necessary for this Court to remind the

lower appellate courts, and the juvenile courts, that Family Code Sect. 54.02 means what it says.

**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).**

The State claims that Petitioner’s fourth issue is waived because it was not raised in the petition for review. In fact, Petitioner argued vigorously that his due process rights were violated at both the juvenile court and the appellate court stages by the courts’ reliance on the addition of findings under Subsections (a) and (f).

First, Petitioner argued that the juvenile court proceedings compounded Section 54.02(j)’s fundamentally unfairness – that is, the statute’s violation of due process as applied – because the juvenile judge did not actually weigh the Subsection (a) and (f). *See* Petition for Review at p. 14.

Second, Petitioner argued that the court of appeals also denied him his right to due process because it did not provide meaningful review of the evidence: it merely noted that the juvenile court made findings under Subsections (a) and (f). The State’s waiver argument lacks merit.

Finally, the State relies, again, on its “twice the process due” argument in response to Issue Four. For the reasons discussed in Section One above, the argument has no more merit here than in any place else the State raised it.

**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,

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**CERTIFICATE OF SERVICE**

I certify that a copy of Petitioner's Reply served on the following by electronic delivery through the state's efilng system on June 18, 2017:

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**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. It contains 3,107 words.

*/s/ Cheri Duncan*

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Cheri Duncan