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RETURN RECEIPT REQUESTED

Honorable Greg Abbott
Office of the Attorney General
Attn: Open Records Division
Post Office Box 12548
Austin, Texas 78711-2548

Dear General Abbott:

As the County Attorney for Montgomery County, Texas, I respectfully request that your office render an Opinion on two issues:

(1) Would the application of the current language of Section 54.02(j)(2)(A) of the Texas Family Code to a criminal offense that occurred in 1998 violate the ex post facto clause of the United States and Texas Constitutions where the respondent could not have been certified as an adult under the provisions of § 54.02 that existed at the time of the offense?

(2) Would an adult prosecution for the offense of murder be authorized under current law if the deadly conduct occurred when the perpetrator was a juvenile in 1998, but the death of the victim did not occur until 2011, at which time the perpetrator was an adult?

Attached is a Brief in Memorandum with regard to this matter.

Sincerely,

MONTGOMERY COUNTY
ATTORNEY'S OFFICE

By: David K. Walker
David K. Walker,
County Attorney

DKW/aw
Enclosure



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OPEN RECORDS DIVISION

BRIEF IN MEMORANDUM REGARDING EX POST FACTO ANALYSIS FOR § 54.02(j)(2)(A) OF THE TEXAS FAMILY CODE

Background:

The Montgomery County Attorney's Office is seeking the discretionary transfer of a murder charge against a 27-year-old respondent for an offense that occurred while the respondent was 13 years old. The respondent is alleged to have burned the victim on June 28, 1998, and the victim died on April 29, 2011, from cancer induced by those burns. The Montgomery County Attorney's Office believes that it now has probable cause to prosecute this offense based in part on new information provided by the victim shortly before his death. Our office has been in contact with the Montgomery County District Attorney's Office, and they are in agreement that we should proceed with the discretionary transfer to district court, if possible.

Issue 1

Legal Arguments Relevant to a Juvenile Prosecution

Section 54.02(j)(2)(A) of the Family Code currently provides for the transfer of a person 18 years of age or older to the appropriate district court if the person "was 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." Tex. Fam. Code Ann. § 54.02(j)(2)(A) (Vernon Supp. 2012).

It is clear that the preceding language was intended to authorize prosecutions under the scenario presented in this case. When the Legislature enacted the current provision, Act of June 19, 1999, 76TH Leg., R.S., Ch. 1477, § 8, 1999 Tex. Sess. Law Serv., it explicitly stated that "[t]he change in law made by Section 8 of this Act applies to discretionary transfer proceedings in which the discretionary transfer petition or motion was filed on after [sic] the effective date of this Act." Act of June 19, 1999, 76TH Leg., R.S., Ch. 1477, § 39(d), 1999 Tex. Sess. Law Serv. The discretionary transfer petition in this case would be filed after the effective date of the act, so the current language should be applicable, and the respondent would be subject to sentencing as an adult, including imprisonment for life or for any term of not more than 99 years or less than 5 years. Act of June 19, 1993, 76TH Leg., R.S., Ch. 900, § 1.01, 1993 Tex. Sess. Law Serv. (amending Tex. Penal Code § 12.32).

However, the State notes that, like the current version, the text of § 54.02(a)(2)(A) in 1998 provided for discretionary transfer of a child under 18 years of age to a district court only if the juvenile was "14 years of age or older at the time he is alleged to have committed ... a felony of the first degree." Act of May 31, 1995, 74th Leg., R.S., Ch. 262, §34, 1995 Tex. Sess. Law Serv.; Tex. Fam. Code Ann. § 54.02(a)(2)(A) (Vernon Supp. 2012). Similarly, the transfer of a person 18 years of age or older under the language of § 54.02(j)(2)(A) as it existed in 1998 applied only to individuals who were "14 years of age or older and under 17 years of age at the time he is alleged

to have committed ... a felony of the first degree.” Act of May 31, 1995, 74th Leg., R.S., Ch. 262, §34, 1995 Tex. Sess. Law Serv. As such, under the provisions of § 54.02 as they existed at the time of the offense, the respondent could not have been transferred to district court under any circumstances. The greatest dispositional outcome he could have faced was a determinate sentence of up to 40 years, beginning with commitment in the Texas Youth Commission followed by a possible transfer to either the institutional division or the pardons and paroles division of the Texas Department of Criminal Justice. Tex. Fam. Code § 54.04(d)(3)(A) (West 1998).

Because the respondent was ineligible to be transferred to district court at the time he is alleged to have committed the offense, we anticipate the respondent will argue that application of the current law violates the *ex post facto* clause of both the United States and Texas Constitutions.¹ After extensively researching that issue, the State has been unable to locate any Texas law addressing an *ex post facto* challenge to § 54.02(j)(2)(A); nor have we found a case from either the Fifth Circuit or the Supreme Court of the United States that is directly on point for this matter.

The most relevant authority of which the State is aware is United States v. Juvenile Male, 819 F.2d 468 (4th Cir. 1987). In that case, the defendant had been charged with three murders that occurred on August 24, 1981, when the defendant was 15 years old. *Id.* at 469. At that time the Juvenile Delinquency Act did not allow the government to prosecute an individual as an adult for a crime committed at age 15, and the defendant could have been incarcerated only until he reached the age of 21. *Id.* (citing 18 U.S.C. §§ 5032, 5037 (1982)). The government did not charge the defendant with the crimes until July 8, 1986, and three days later moved for transfer of the defendant to district court for trial as an adult pursuant to a 1984 amendment to the Juvenile Delinquency Act. *Id.* at 469-70. The 1984 amendment provided that individuals who commit certain crimes – including murder – at age 15 may be prosecuted as adults. *Id.* at 469 (citing 18 U.S.C. § 5032 (Supp. II 1984)).

The Fourth Circuit ruled that

retroactive application of the 1984 amendment runs afoul of [the United States Supreme Court’s ex post facto formulations]. The amendment plainly imposes a “greater,” “more burdensome” and “more onerous” punishment than the law in effect in 1981, since it exposes defendant to a much more severe sentence. Had defendant been adjudged delinquent under the law in effect at the time of the offense, he would have been sentenced to at most six years of treatment, probably in the form of incarceration. If, by contrast, he were convicted and sentenced as an adult under the 1984 amendment to the Juvenile Delinquency Act, he could be sentenced to at least three terms of life imprisonment.

Id. at 470.

¹ The United States and Texas Constitutions prohibit *ex post facto* laws. See U.S. Const. art. I, § 9; Tex. Const. art I, § 16. A state may enact no law “that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed.” State v. Noble, 171 Ariz. 171, 173 (1992) (quoting Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798)); Grimes v. State, 807 S.W.2d 582, 583–84 (Tex. Crim. App. 1991). See generally United States v. Ward, 448 U.S. 242, 248–49, *reh’g den.*, 448 U.S. 916 (1980) (discussing federal *ex post facto* analysis).

The court observed that, while it was “*true that Congress referred to the [1984] amendments on prosecution of juveniles as ‘procedural,’ as applied to the defendant it “would have the undisputed effect of increasing the applicable punishment. However Congress may have labeled it, this change can only be characterized as substantive.”* *Id.* at 471.

The 1984 amendment is “procedural” only in the most superficial, formal sense, in that it authorizes the government to move to “transfer” the juvenile to the district court for trial as an adult.” Such a “transfer” is no mere change in venue . . . ; it is instead a means by which to impose on certain juveniles the harsher sentences applicable to adults.

Id.

At least one other federal appellate court has found the Fourth Circuit’s analysis persuasive. See United States v. Baker, 10 F.3d 1374, 1394-95 (9th Cir. 1993) (holding that application of the post-1984 amended version of § 5032 to an offense committed in 1983 violated the Ex Post Facto Clause). Faced with similar factual scenarios, several state courts have also reached the same conclusion as the Fourth Circuit in United States v. Juvenile Male.

In Massachusetts v. Fuller, 657 N.E.2d 1251, 1255-57 (Mass. 1995), the Massachusetts Supreme Judicial Court held that a statutory amendment establishing a minimum sentence of 15 years and maximum of 20 years for a juvenile adjudicated delinquent by reason of having committed first-degree murder did not apply to the appellant, who had committed murder before the effective date of that amendment. The court concluded that retroactive application of the amendment would violate the *ex post facto* provisions of the U.S. Constitution and the Massachusetts Declaration of Rights because, under the prior statute, the appellant could only have been incarcerated until he reached age 21, and the amendment thus operated to his detriment, despite the appellant’s own argument to the contrary.

The Oklahoma Court of Criminal Appeals addressed a related issue in J.M.R. v. Moore, 610 P.2d 811 (Okla. Crim. App. 1980). In J.M.R., the certification statute in effect at the time of the offense placed the burden on the prosecution to prove by substantial evidence that the juvenile was not amenable to rehabilitation within the juvenile system. *Id.* at 813. By the time the appellant was charged with the offense three years later, a “reverse certification” statute had been enacted requiring juveniles between 16 and 18 years of age to prove that they should be processed through the juvenile system and that they can be rehabilitated. *Id.* at 812-14. The appellant argued that application of the new reverse certification law which was not in effect at the time of the crime was an *ex post facto* violation. *Id.* at 812.

The Oklahoma Court of Criminal Appeals held:

Certification and reverse certification are not purely procedural matters. The outcome affects substantive rights of the juvenile. Once certified, that youth can be tried, convicted, and punished as an adult.

... The fact that it is ostensibly procedural does not prevent its classification as ex post facto so long as a substantial protection was thereby denied the accused ... [T]he situation of this petitioner has been altered to her disadvantage.

Id. at 814.

Similarly, an Arizona appellate court found that the retrospective application of the State's Proposition 102, which changed the transfer mechanism from discretionary to automatic for the appellant, was forbidden under the *ex post facto* clause of the federal and state constitutions because it would have deprived the appellant of eligibility to be retained in the juvenile court and to receive the lesser punitive consequences applicable there. Saucedo v. Superior Court In and For County of La Paz, 946 P.2d 908, 909, 911-12 (Ariz. Ct. App. Div. 1, 1997). The Court held that

[b]y depriving Petitioner of eligibility for prosecution as a juvenile, it would substantially alter his range of punishment, depriving him of eligibility for probation and raising his potential length of confinement from a maximum of two and one-half years in a juvenile setting to a minimum of thirteen years in a prison for adults. This retrospective impact is punitive, not regulatory, and clearly forbidden under the ex post facto clause.

Id. at 911.

An analogous situation was addressed by a Michigan appellate court in Michigan v. Reed, Nos. 297053 & 298427, 2011 WL 5064294, at *1 (Mich. Ct. App. Oct. 25, 2011) (not designated for publication). At the time the appellant committed the offenses at issue on appeal, Michigan law required the trial court to conduct a hearing to determine whether to sentence the 16-year-old as a juvenile or an adult. *Id.* at *2. Subsequently, the law was amended to require that juveniles convicted of certain offenses, including first-degree felony murder, be sentenced as adults. *Id.*

In addressing the appellant's claims, the appellate court observed that

[s]tatutory amendments concerning criminal sentences or punishment are not retroactive, and applying the current version of [the applicable law] to defendant would violate his protections against ex post facto laws. Thus, if the circuit court was obliged to reexamine defendant's felony murder sentence, as defendant contends, it would have been required to apply the version of [the law] in effect at the time that defendant committed the offense.

Id. (citations omitted).

Although not an explicit *ex post facto* analysis, an Oregon appellate court found that the state's 1995 statutory amendments permitting the juvenile court to exercise jurisdiction over youth offenders until age 25, instead of the previous limit of age 21, did not apply retroactively because those amendments were "substantive" in nature. State ex rel. Juv. Dept. of Multnomah County v. Nicholls, 87 P.3d 680, 682, 686 (Or. Ct. App. 2004). The court reached that conclusion, in part, because "the only thing accomplished by these amendments is that juvenile court jurisdiction – and thus the interference with a youth offender's liberty interests – extends for a greater period of time" and because "to apply them to youth offenders who committed delinquent acts before the 1995 changes took effect would raise a serious constitutional question as to whether the legislature may do so consistently with the *ex post facto* provisions of either the state or federal constitutions." *Id.* at 687.

Finally, as far back as 1924, the Louisiana Supreme Court held that "*the jurisdiction of the juvenile court is to be tested by the age of the child at the time of the commission of the offense and not by his age at the time of the trial.*" State v. Malone, 100 So. 788, 790 (La. 1924). In that case, the appellant had committed an offense less than one month before turning 17 years old, and the state filed charges in district court six months after he turned 17. *Id.* at 789. The court noted that under Louisiana law:

what, in an adult, would be a crime and punishable as such, yet when done by a juvenile is a mere delinquency and punishable not as in the case of an adult, but in the manner above pointed out.

But that which was not a crime when done, cannot afterwards become a crime by the mere lapse of time, any more than it can be made a crime by ex post facto legislation.

Hence the same act which constituted mere delinquency when done, cannot ripen into a crime merely because the child has since become a man.

It follows therefore that there was no crime committed of which the district court had jurisdiction.

Id. (emphasis in original).

The court went on to hold that the appellant:

having violated a law of this state when under 17 years of age, thereby became a delinquent child and subject to commitment by the juvenile court until his majority or complete reformation.

The accidental arrival of the seventeenth anniversary of his birthday before his trial no more operated to deprive that court of jurisdiction over him than it operated to magnify his offense and subject him to the jurisdiction of the district court.

Id. at 789-90 (emphasis in original).

All of the above cases seem to dictate the same conclusion: that the current language of § 54.02(j)(2)(A) cannot be applied to conduct occurring prior to January 1, 1999, because such application would subject the respondent to a greater punishment than was previously available.

The only case the State has been able to locate that would tend to support application of the current version of § 54.02(j)(2)(A) to pre-1999 conduct is Utah v. Schofield, 63 P.3d 667 (Utah 2002). In Schofield, the appellant argued that the applicable version of Utah's juvenile court jurisdiction statute was that which was in effect at the time of the offense. *Id.* at 69 n.2. The Utah Supreme Court disagreed, concluding that "*the operative issue for determination of jurisdiction of the juvenile court is the age of the offender at commencement of criminal proceedings,*" not at the time of the offense. *Id.* at 69 n.2. Although the court rejected Schofield's assertion "*that prosecuting him in the district court for crimes he is alleged to have committed as a juvenile is an ex post facto application of the law,*" the court also noted that because "*the 1994 and 1996 versions*

of the statutes are substantively identical, the [jurisdiction] analysis remains the same" under both. Id. at 69 n.2. Thus, the court's cursory *ex post facto* review is little more than dicta.

Because Texas courts would not be bound by any of the cases discussed above, the Montgomery County Attorney's Office requests an opinion as to whether application of the current version of § 54.02(j)(2)(A) to an offense that occurred prior to its enactment, as explicitly authorized by the Legislature, is lawful under the Constitutions of the United States and the State of Texas.

Issue 2

Legal Argument Relevant to an Adult Prosecution

The only other avenue the State has considered would be to argue that a key element of the murder – the victim's death – did not occur until 2011, and therefore the perpetrator may be charged as an adult based on his age in 2011. However, when amending § 54.02 of the Family Code, the Legislature stated, "Conduct violating a penal law of the state occurs on or after the effective date of this Act if every element of the violation occurs on or after that date." Act of June 19, 1999, 76th Leg., R.S., ch. 1477, § 39(a), 1999 Tex. Sess. Law Serv. (emphasis added). Other statutes relevant to criminal prosecution contain equally restrictive language. See, e.g., Act of 1983, 68th Leg., ch. 977, § 13, p. 5321 Tex. Sess. Law Serv. (For purposes of newly enacted statute of limitations for felony offenses, "an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.") (emphasis added).

Furthermore, at least one state supreme court has held that:

when it becomes necessary to choose between the time the fatal blow is struck or the time of death for some special purpose, such as ... to determine if a certain punishment is barred by the Ex post facto clause, the choice should be dictated by the nature of the inquiry. Perkins, Criminal Law (2d ed. 1969). Therefore, ... for purposes of the prohibition against Ex post facto legislation, we hold that the date(s) of the murderous acts rather than the date of death is the date the murder was committed.

North Carolina v. Detter, 260 S.E.2d 567, 590 (N.C. 1979).

The Montgomery County Attorney's Office requests that an opinion be rendered as to whether the perpetrator in this case can be tried as an adult based on the victim's death in 2011, at which time the perpetrator was an adult.

CONCLUSION:

1. The present discretionary transfer of a murder charge against a 27 year old respondent for an offense that occurred while the respondent was 13 years old is permissible under the provisions of Section 54.02(j)(2)(A), Texas Family Code, as presently written.
2. The date of the offense may be alleged to be in 2011, since the penal act (murder) was not completed until the victim died in 2011.