No. _____

In The
Supreme Court of the United States

MARTIN VILLALON,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition For Writ Of Certiorari To The Indiana Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the principles set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, apply to juvenile court waiver decisions that have the practical effect of exposing juveniles to punishment above the maximum punishment available in juvenile court.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTORY PROVISIONS

RULES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The order of the Indiana Supreme Court denying transfer, Pet. App. 34-35, is reported at 963 N.E.2d 1120 (Table). The opinion of the Indiana Court of Appeals, Pet. App. 1-21, is reported at 956 N.E.2d 697. The order of the Indiana Court of Appeals denying rehearing, Pet. App. 32-33, is unreported. The order of the juvenile court waiving jurisdiction, Pet. App. 22-25, is unreported. The judgment of the adult court, Pet. App. 26-31, is unreported.

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JURISDICTION

On February 14, 2012, the Indiana Supreme Court entered judgment by denying transfer from the decision of the Indiana Court of Appeals. Pet. App. 34-35. Petitioner did not seek rehearing. This petition has been filed within 90 days of the Indiana Supreme Court's judgment and is timely. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

The Fourteenth Amendment § 1 to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Section 31-30-2-1(a) of the Indiana Code provides, in pertinent part: "the juvenile court's jurisdiction over a delinquent child or a child in need of services and over the child's parent, guardian, or custodian continues until: (1) the child becomes twenty-one (21) years of age."

Section 31-37-19-9 of the Indiana Code states, in pertinent part:

> (a) This section applies if a child is a delinquent child under I.C. 31-37-1.
>
> (b) After a juvenile court makes a determination under I.C. 11-8-8-5, the juvenile court may, in addition to an order under section 6 of this chapter, and if the child:
>
> (1) is at least thirteen (13) years of age and less than sixteen (16) years of age; and
>
> (2) committed an act that, if committed by an adult, would be:
>
> (A) murder (I.C. 35-42-1-1) . . .
>
> order wardship of the child to the department of correction for a fixed period that is not longer than the date the child becomes eighteen (18) years of age, subject to I.C. 11-10-2-10.

> (c) Notwithstanding I.C. 11-10-2-5, the department of correction may not reduce the period ordered under this section.

Section 31-30-3-4 of the Indiana Code states:

> Upon motion of the prosecuting attorney and after full investigation and hearing, the juvenile court shall waive jurisdiction if it finds that: (1) the child is charged with an act that would be murder if committed by an adult; (2) there is probable cause to believe that the child has committed the act; and (3) the child was at least ten (10) years of age when the act charged was allegedly committed; unless it would be in the best interests of the child and of the safety and welfare of the community for the child to remain within the juvenile justice system.

Section 31-50-2-3 of the Indiana Code provides, in pertinent part:

> (a) A person who commits murder shall be imprisoned for a fixed term of between forty-five (45) and sixty-five (65) years, with the advisory sentence being fifty-five (55) years. In addition, the person may be fined not more than ten thousand dollars ($10,000).

STATEMENT OF THE CASE

Because he was 15 years old at the time of the offense, petitioner was subject to adjudication in Indiana's juvenile justice system, which could retain

jurisdiction over him until he reached the age of 21. That punishment ceiling, however, was pierced as a result of a juvenile court waiver hearing in which a magistrate made certain factual findings allowing petitioner's case to be transferred to adult court where petitioner faced a sentence of 45 to 65 years imprisonment.

Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), and its progeny, require a State to prove facts triggering a sentencing increase beyond a reasonable doubt to a jury. Notwithstanding the fact that juveniles possess due process rights under the United States Constitution, *Application of Gault*, 387 U.S. 1 (1967), the Indiana Court of Appeals refused to interpose the *Apprendi* rule on juvenile transfer hearings. The court of appeals reached this conclusion in spite of its acknowledgement that a judge-issued transfer decision has the "practical" effect of exposing the juvenile to punishment in excess of that available in juvenile court. Pet. App. 8-9.

Accepting that juveniles have the right to due process, and that due process requires jury findings on facts risking increased punishment, it necessarily follows that juvenile waiver hearing facts must be made by a jury under a reasonable doubt standard. This much is evident from the intersection of this Court's juvenile due process and *Apprendi* cases, albeit not so construed by the Indiana Court of Appeals. Not only does the ruling below deviate from this Court's cases, it also conflicts with the Massachusetts Supreme Judicial Court's decision in *Commonwealth*

v. Quincy Q., 434 Mass. 859, 864-65, 753 N.E.2d 781, 788-89 (2001), *overruled on other grounds, Commonwealth v. King*, 445 Mass. 217, 248, 834 N.E.2d 1175, 1201 n. 28 (2005), as well as the views of dissenting state supreme court judges in *State v. Andrews*, 329 S.W.3d 369, 389-95 (Mo. 2010) (*en banc*) (Denvir Stith, J., dissenting), *cert. denied*, 131 S.Ct. 3070 (2011), and *State v. Rudy B.,* 149 N.M. 22, 36-42, 243 P.3d 726, 740-46 (2010) (Chavez, J., dissenting), *cert. denied,* 131 S.Ct. 2098 (April 18, 2011). In light of the prevalence of adult prosecutions of juvenile offenders in this country, the issue here recurs, necessitating guidance from this Court.

I. PROCEEDINGS BELOW.

A. Facts Surrounding the Offense.

Around 4:49 p.m. on August 22, 2008, an emergency dispatcher in Hammond, Indiana broadcast a "shots fired" announcement. Pet. C.A. Br. 7. Fire and police personnel arrived at a residence, where they discovered John Shoulders, age 15, lying in an outside back porch area. *Id*. The victim had been shot multiple times and was clinically deceased. *Id*. Police did not then apprehend any suspects.

In early September 2008, Hammond police conducted custodial interrogations of two gang associates/members, who each claimed that petitioner and Prevaun McDaniel had earlier admitted involvement in the shooting. *Id*. at 9-12. Police arrested petitioner, then age 15. He made no statements. No physical

evidence connecting petitioner to the crime was recovered. DNA recovered from the victim did not match petitioner. *Id*. at 8.

At trial, the State called no actual eyewitnesses to the shooting. State witnesses, however, placed petitioner and McDaniel in the company of the victim shortly before the shooting. State's C.A. Br. 3-4. The State theorized that petitioner had shot the victim because he mistakenly believed the victim to be a gang member. Pet. App. 1.

B. Juvenile Court Proceedings.

Following petitioner's arrest, the State filed a petition for delinquency in the Indiana Lake County Superior Court's Juvenile Division, but also moved to waive juvenile court jurisdiction under I.C. § 31-30-3-4, thereby subjecting petitioner to increased penalties for murder if convicted, I.C. § 35-50-2-3(a). Pet. App. 3.

A magistrate presided over the waiver hearing in juvenile court. No jury trial was statutorily available or otherwise offered. At the hearing, the State called a police officer as a summary witness and submitted reports of investigative interviews. Pet. Supp. C.A. Br. 2-3. The State also called a probation officer, through whom a Waiver Summary was introduced. *Id*. at 3. The summary claimed that petitioner had no psychological needs and recommended transfer to adult court based on the nature of the offense. *Id*. at 11-12.

Petitioner's waiver hearing evidence showed that he had been diagnosed communication/learning disorders and had an IQ score of 71. Pet. App. 18. Petitioner had no prior history of violent behavior or delinquency adjudications. Petitioner had one prior juvenile court system contact – a truancy matter for which petitioner successfully completed an informal adjustment. See *id*. at 11. Petitioner also had strong family and community support. Pet. Supp. C.A. Br. 3-4 & 6-7. His stepfather testified as a witness. In addition, petitioner offered a series of letters attesting to his good character. *Id*. at 6-7.

Petitioner also introduced a Forensic Evaluation Juvenile Waiver to Criminal Court compiled by Dr. Gary M. Durak, Ph.D. Pet. Supp. C.A. Br. 3-5; C.A. Supp. App. 22-40. Dr. Durak interviewed petitioner and found him to be cooperative, motivated and willing to engage in treatment. *Id*. Dr. Durak examined various risk factors in detail and determined that none would contribute to petitioner continuing to endanger the community. *Id*. Based on the results of psychological tests, Dr. Durak opined that petitioner could be rehabilitated if he remained in the juvenile justice system. *Id*.

At the conclusion of the waiver hearing, the magistrate did not make any factual findings. The magistrate later entered a written order, waiving juvenile court jurisdiction. Pet. App. 22-23. A superior court judge adopted this order. *Id*. at 24. The magistrate's order tracked statutory language and did not make any specific findings. See *id*. at 23. Noting that a

waiver order "must not merely recite statutory language[,]" *Gerrick v. State*, 451 N.E.2d 327, 329 (Ind. 1983), the Indiana Court of Appeals ultimately described the order as "perfunctory."[1] Pet. App. 9.

C. Adult Court Proceedings.

In the adult trial court, petitioner filed a motion to dismiss. Pet. App. 3; I C.A. App. 22-24. Citing *Quincy Q.*, petitioner argued that *Apprendi* applied to the juvenile court waiver hearings. I C.A. App. 22-24. The adult court heard oral arguments on the motion, took it under advisement, C.A. Supp. App. 87-97, and summarily denied it in a docket entry dated July 23, 2009. C.A. Supp. App. 12-13. Based on the intervening New Mexico appellate decision in *Rudy B.*, petitioner filed a motion for reconsideration. Pet. App. 3; I C.A. App. 27. The trial court heard oral arguments on that motion, C.A. Supp. App. 101-06, and denied it, stating:

> All right. At this time – well, I'm going to deny your motion, Mr. Vanes [defense counsel]. I think the Indiana law on waiver for murder cases is clear. I think if the Supreme Court had wanted a jury trial on this matter,

[1] On appeal, petitioner challenged the adequacy of the juvenile court's waiver order. In spite of its perfunctory nature, the court of appeals upheld the waiver decision, finding it to be supported by evidence in the record. Pet. App. 9-12.

> they would have specified that would be the case.

Id. at 107; see also *id*. at 12.

Petitioner and McDaniel were both charged with murder in adult court. Pet. C.A. Br. 2. They underwent separate jury trials, with petitioner going to trial first. *Id*. A jury found petitioner guilty. (The verdict form did not specify whether petitioner was a principal or an accessory. II C.A. App. 353.) Another jury acquitted McDaniel in a trial held after petitioner's sentencing. Pet. C.A. Br. 2.

At sentencing, the court aggravated petitioner's sentence to 60 years imprisonment based on perceived "gruesome and heinous" circumstances of the offense. Pet. App. 27-28.

In a motion to correct errors, C.A. App. 168-185, petitioner again argued that his federal constitutional rights were violated because a jury had not found the facts beyond a reasonable doubt underlying the juvenile court transfer decision. *Id*. at 176-77. The trial court adhered to its earlier rulings and denied relief. II C.A. App. 221; Pet. C.A. Br. 16.

D. Indiana Court of Appeals Decision.

Petitioner filed a timely notice of appeal to the Indiana Court of Appeals. In his appellate court brief, petitioner raised a federal constitutional challenge to the failure to accord a reasonable doubt-governed jury trial to the juvenile court waiver decision. Pet. C.A.

Br. 15-19. The State responded to this issue on the merits. See State's C.A. Br. 10-16.

The Indiana Court of Appeals reviewed the federal constitutional issue *de novo*. Pet. App. 4. It attached a strong presumption of constitutionality to the waiver statute and rejected petitioner's challenge. *Id*.

The Indiana Court of Appeals discussed this Court's decisions in *Apprendi* and *Oregon v. Ice*, 555 U.S. 160 (2009). Pet. App. 5-7. The court of appeals further noted that this Court had held that the Sixth Amendment right to a jury trial does not apply to juvenile delinquency proceedings. *Id*. at 7 (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971)).

Turning to a recent pronouncement of the New Mexico Supreme Court, the Indiana Court of Appeals stated that the *Apprendi* line of cases had arisen in the "adult criminal context," and that this Court had accorded States "wider latitude in adopting particular trial and sentencing procedures for juveniles – including whether to have a jury trial at all." Pet. App. 7-8 (citing *Rudy B*., 149 N.M. 22, 243 P.3d 726). The court relied on *Rudy B*.'s attachment of significance to *Ice*'s reliance on "principles of federalism and state sovereignty in determining whether to apply *Apprendi*." *Id*. at 8.

Looking to Indiana's statutory scheme, the Indiana Court of Appeals noted that "[m]aking findings of best interests has been entrusted, since the enactment of the statutory scheme, to the juvenile court

judge, and not a jury." *Id*. at 8. The court of appeals nevertheless did not dispute that, "[a]s a practical matter, a child who is alleged to have committed a delinquent act and is not retained in the juvenile justice system but is waived into adult court will (if found guilty) face harsher consequences for his or her conduct." *Id*. at 8-9. Relying on *Ice*, the court found against petitioner:

> *Ice* makes clear that not all judicial fact-finding ultimately resulting in an increased term of incarceration invades the province of the jury. As previously observed, Villalon provides no argument as to how our juvenile waiver statute might be understood to encroach upon the jury's traditional domain. Furthermore, the waiver statute does not set forth the elements of an offense, does not provide for a determination of guilt or innocence, and is not directed to consequences after adjudication of guilt. It does not provide a sentencing enhancement correlated with the State's proof of a particular fact. Accordingly, we conclude that the statute does not implicate the core concerns of *Apprendi*. We will not, as urged by Villalon, declare it to be unconstitutional upon that basis.

Id. at 9.

The Indiana Court of Appeals denied rehearing. *Id*. at 34. Petitioner thereafter filed a petition for transfer in the Indiana Supreme Court in which he asserted that the Due Process Clause in the United States Constitution rendered the juvenile court waiver

decision subject to *Apprendi*. The State filed a response addressing this issue on the merits. The Indiana Supreme Court denied transfer. *Id*. at 32-33.

II. DUE PROCESS RIGHTS INFORMING THIS PETITION.

This case provides this Court with an opportunity to conjoin two due process rights: 1) a juvenile's Fourteenth Amendment right to due process; and 2) the due process right to have a jury determine beyond a reasonable doubt facts authorizing a sentence above a statutory ceiling. To provide perspective, we review this Court's cases in those areas.

A. Due Process Rights Of Juveniles.

In the early 19th Century, juveniles over the age of 7 in this country were tried for criminal offenses in adult court. See Robert E. Shepard, Jr., *The Juvenile Court At 100 Years: A Look Back*, Vol. VI, No. 2, *Juvenile Justice* (1999); Julian Mack, *The Child, The Clinic, And The Court* 310 (1925). In 1899, Illinois created the first separate juvenile court. 1899 Ill. Laws 132 *et seq.* Juvenile court systems subsequently "spread to every State in the Union, the District of Columbia, and Puerto Rico." *Gault*, 387 U.S. at 14.

This is not to say that juvenile courts adjudicate all crimes allegedly committed by minors. Every State allows for prosecution of juveniles in adult court under certain circumstances. See OJJDP, *Trying Juveniles as Adults: An Analysis of State Transfer*

Laws and Reporting, 2 (September 2011); U.S. General Accounting Office, *Report to Congressional Requesters, Juvenile Justice: Juveniles Processed in Criminal Court and Case Dispositions* 1 (August 1995); see also *Breed v. Jones*, 421 U.S. 519, 535 (1975). The "most common" mechanism for transfer of a criminal case from juvenile to adult court is a judicial waiver. U.S. Dept. of Justice Office of Juvenile Justice and Delinquency Prevention ("OJJDP"), *Juvenile Justice Reform Initiatives in the States 1994-1996* (October 1997); see also *Gonzalez v. Tafoya,* 515 F.3d 1097, 1116 (10th Cir.), *cert. denied,* 555 U.S. 890 (October 6, 2008) ("forty-five states and the District of Columbia have enacted statutes allowing judges to transfer juveniles to adult court after making specified findings").[2]

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[2] The OJJDP recently summarized the types of judicial waivers:

> There are three broad categories for judicial waiver: discretionary, presumptive, and mandatory. Nearly all states (45) have discretionary judicial waiver provisions, in which juvenile court judges have discretion to waive jurisdiction over individual juveniles to clear the way for criminal court prosecutions. These laws authorize, but do not require, transfer in cases meeting threshold requirements for waiver. Some states (15) have presumptive waiver laws, which designate a category of cases in which waiver to criminal court is presumed to be appropriate. In such cases, if a juvenile who meets the age, offense, or other statutory criteria that trigger the presumption fails to make an adequate argument against transfer, the juvenile court must send the case to criminal court. Other states

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Kent v. United States, 383 U.S. 541 (1996), considered procedural requirements for juvenile court waiver hearings. In *Kent*, the juvenile court did not hold a hearing or consider psychiatric evidence presented by a juvenile (charged with rape and other offenses) prior to ordering him transferred to adult court. The *Kent* juvenile judge entered a summary order, reciting that a "full investigation" had been conducted. After imposition of a prison sentence, the case reached this Court, which found the waiver order "invalid." *Id*. at 551. While the Court agreed that a juvenile court enjoys considerable latitude in transfer decisions, it deemed the latitude fettered: a juvenile court does not have "license for arbitrary procedure" in handling the "critically important" waiver decision. *Id*. at 553. This Court deemed it "inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed" in the absence of a hearing, counsel or issuance of a statement of reasons. *Id*. at 554. The Court observed that a minor situated like the petitioner "receives the worst of both worlds: . . . he gets neither the protections accorded to adults nor

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> (15) provide for mandatory waiver in cases that meet certain age, offense, or prior record criteria. Proceedings against juveniles subject to mandatory waiver are initiated in juvenile court, but the court's only role is to confirm that the statutory requirements for mandatory waiver are met. Once it has done so, it must send the case to criminal court.

OJJDP, *Delinquency Cases Waived to Criminal Court 2008*, 1 (December 2011).

the solicitous care and regenerative treatment postulated for children." *Id*. at 556. The *Kent* Court stated:

> The net, therefore, is that petitioner – then a boy of 16 – was, by statute, entitled to certain procedures and benefits as a consequence of his statutory right to the "exclusive" jurisdiction of the Juvenile Court. In these circumstances, considering particularly that decision as to waiver of jurisdiction and transfer of the matter to the District Court was potentially as important to petitioner as the difference between five years' confinement and a death sentence, we conclude that, as a condition to a valid waiver order, petitioner as entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision. We believe that this result is required by the statute, read in the context of constitutional principles relating to due process and the assistance of counsel.

Id. at 557.

The *Kent* Court outlined the basic requirements for a waiver hearing, including an informal hearing at a meaningful time in which the minor is entitled to counsel, who has access to relevant records,

and a sufficient statement of reasons by the judge. This Court concluded:

> We do not mean by this to indicate that the hearing to be held must conform with all of the requirements of a criminal trial, or even of the usual administrative hearing, but we do hold that the hearing must measure up to the essentials of due process and fair treatment.

Id. at 562.

The next term, this Court in *Gault* held that the Due Process Clause applies to juvenile court adjudicatory hearings. The *Gault* Court emphasized: "Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise." 387 U.S. at 20. *Gault* rejected the idea that juvenile justice system benefits "offset the disadvantages of denial of the substance of normal due process." *Id*. at 21. This Court held that the rights to notice, counsel and confrontation, as well as the privilege against self-incrimination, applied at a juvenile court adjudicatory hearing.

On three occasions between 1970 and 1975, this Court further considered questions surrounding juveniles' constitutional rights.[3] First, *In Re Winship*,

[3] Recent cases addressing juvenile justice issues have addressed the Eighth Amendment's ban on cruel and unusual punishments. See *Graham v. Florida*, 130 S.Ct. 2011 (2010) (juvenile

(Continued on following page)

397 U.S. 358, 368 (1970), held that the Due Process Clause encompasses a requirement that guilt be proved beyond a reasonable doubt in juvenile cases. As in *Gault*, the *Winship* Court spurned the notion that juvenile justice system benefits permitted a juvenile to face the "possibility of institutional confinement on proof insufficient to convict . . . an adult." *Id*. at 367.

Second, *McKeiver* considered "the narrow but precise issue" of whether due process "assures the right to trial by jury in the *adjudicative* phase of a state juvenile court delinquency proceeding." *Id*. at 530 (emphasis added). The Court answered this question in the negative. While paying homage to the right to a jury trial, the plurality could not conclude that a "jury is a necessary component of accurate factfinding." *Id*. at 542. Recognizing that juvenile court judges had fallen short of idealistic hopes of early juvenile court proponents, the plurality nevertheless feared that jury trials would "put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding," and inject delay, formality, clamor and publicity into the juvenile justice system. *Id*. at 546.

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could not be sentenced to life without parole for non-homicide offense); *Roper v. Simmons*, 543 U.S. 551 (2005) (person under the age of 18 at the time of a capital crime could not be sentenced to death). On March 20, 2012, this Court heard oral arguments in two cases raising juvenile sentencing issues. See *Jackson v. Hobbs*, No. 10-9647 (U.S.); *Miller v. Alabama*, No. 10-9646 (U.S.). As of the date of this filing, the opinions in *Hobbs* and *Miller* have not issued.

Third, in a unanimous opinion, this Court in *Breed* held that jeopardy attaches at a juvenile court adjudicatory proceeding. 421 U.S. at 528-41. Thus, once a juvenile has been adjudicated delinquent for having committed a criminal offense in juvenile court, he cannot be prosecuted for that same offense in adult court. While the *Breed* Court endorsed reluctance to tax the juvenile court system with requirements that could upset the unique functions of juvenile justice, it did not find the suggested burdens significant enough to dispense with juveniles' double jeopardy rights. *Id*. at 535-36.

B. *Apprendi* and its Progeny.

For the past decade-plus, this Court has embarked down another due process path. In *Apprendi*, this Court held that the combination of the due process and jury trial rights in the United States Constitution requires that any fact, other than a prior conviction, increasing the penalty for an offense beyond the prescribed statutory maximum be submitted to a jury and proved beyond a reasonable doubt. 530 U.S. at 490. *Apprendi* emphasized that substance must prevail over form in applying the required analysis. *Id*. at 494; see also *Ice,* 555 U.S. at 173-74 (Scalia, J., dissenting) (jury trial guarantee "turns upon the practical penal consequences attached to the fact, and not to its formal definition as an element of the crime") (citing *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)).

Ring v. Arizona, 536 U.S. 584 (2002), addressed *Apprendi*'s application to Arizona's death penalty sentencing scheme. The *Ring* defendant faced a judge-determined sentence of life imprisonment or death based on the existence or non-existence of "aggravators." Ring successfully asserted in this Court that a jury, not a judge, should make the pertinent factual findings under a reasonable doubt standard. Again emphasizing that effect must prevail over form, *id*. at 602, the *Ring* Court rejected the State's argument that the jury's verdict authorized the death sentence.

In *Blakely v. Washington*, 542 U.S. 296 (2004), this Court held that *Apprendi* was violated where the defendant received a maximum sentence within the statutory range based on facts not found by a jury. The *Blakely* Court recognized that *Apprendi* reflects "longstanding tenets of common-law criminal jurisprudence," including that a jury should confirm "the truth of every accusation against a defendant." *Id*. at 301-02. *Blakely* reasoned that "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to punishment, and the judge exceeds his proper authority." *Id*. at 304.

The *Blakely* Court expounded that the jury trial "right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure . . . meant to ensure . . . control in the judiciary." *Id*. at 306. The *Blakely* Court eschewed leaving the decision of *when* a jury trial is required to the judiciary: "We think that claim not plausible at

all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." *Id*. at 308. *Blakely* concluded:

> The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to the unanimous suffrage of twelve of his equals and neighbours, 4 Blackstone, Commentaries, at 343, rather than a lone employee of the State.

542 U.S. at 313-14.

Blakely foreshadowed the result in *United States v. Booker,* 543 U.S. 220 (2005). Justice Stevens' majority opinion stressed that, regardless of the label employed, any factual finding that has the effect of increasing a sentence must be proven to a jury beyond a reasonable doubt or admitted by the defendant. *Id*. at 242. The defendant's sentence in *Booker* was constitutionally unacceptable because the jury's verdict alone did not authorize it – the judge only acquired authority to enhance the sentence beyond that authorized by the verdict by finding additional facts made relevant by the United States Sentencing Guidelines. That the requirement of jury trial could be burdensome did not deter the *Booker* Court:

> We recognize, as we did in *Jones, Apprendi*, and *Blakely*, that in some cases jury fact-finding may impair the most expedient and

> efficient sentencing of defendants. But the interest in fairness and reliability protected by the right to a jury trial – a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment – has always outweighed the interest in concluding trials swiftly.

Id. at 243-44.

Two years later, in *Cunningham v. California*, 549 U.S. 270 (2007), this Court held that California's Determinate Sentencing Law did not comport with *Apprendi* because it exposed the defendant to an elevated "upper term sentence" based on judicial factual findings about aggravating circumstances surplus to the elements of the convicted offense.

In *Ice*, the defendant challenged the imposition of consecutive sentences under *Apprendi*, arguing that a judge, rather than a jury, found the facts supporting the consecutive sentences. This Court disagreed. It found informative lack of historical jury involvement in consecutive versus concurrent sentencing questions. 555 U.S. at 170. The *Ice* Court did not believe its decision encroached the jury's role as a bulwark between the accused and the State. *Id*. at 169-72. This Court also construed its holding as consistent with the practice of granting the States authority to administer criminal justice. *Id*.

REASONS FOR GRANTING THE PETITION

The Indiana Court of Appeals ruled that *Apprendi* does not apply to juvenile court waiver decisions. Pet. App. 4-9. The court of appeals arrived at this determination even though it acknowledged that the juvenile court's waiver order, "as a practical matter," exposed petitioner to increased punishment in the event of a conviction in adult court. *Id*. at 8-9. The court of appeals' decision cannot be reconciled with *Apprendi*, which emphasized that "the relevant inquiry is one not of form, but of effect," 530 U.S. at 494. Juveniles do not lose constitutional rights at the courthouse steps. *Gault*, 387 U.S. at 14 ("neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"); *Haley v. Ohio*, 332 U.S. 596 (1948) ("[n]either man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law"). There is no principled reason why the *Apprendi* rule should be *excluded* from a juvenile's due process rights.

The decision below also conflicts with the Massachusetts Supreme Judicial Court's ruling in *Quincy Q.*, 434 Mass. at 788-89, 753 N.E.2d at 864-65. In addition, two recent cases from state courts of last resort, in which the courts ruled that *Apprendi* does not apply to juvenile transfer hearings, have been over dissents. See *Andrews*, 329 S.W.3d at 389-95 (Denvir Stith, J., dissenting); *Rudy B.,* 149 N.M. at 36-42, 243 P.3d at 740-46 (Chavez, J., dissenting).

This petition presents a recurring issue of national significance given that every State has a mechanism to transfer juvenile cases to adult court, where the possible punishment exceeds that allowed by the juvenile justice system. OJJDP, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting* ("*Trying Juveniles as Adults*"), 2 (September 2011). This Court thus should grant review to ensure uniform national application of *Apprendi* to juvenile court waiver decisions.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S *APPRENDI* LINE OF CASES.

Grant of certiorari is warranted because the Indiana Court of Appeals "has decided an important question of federal law that has not been, but should be, settled by this Court, [and] has decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. Sup. Ct. R. 10(c). The decision below conflicts with this Court's decisions in *Apprendi*, *Ring, Blakely, Booker* and *Cunningham,* and fails to lend currency to the due process rights of juveniles.

The reasons offered by the court below for spurning petitioner's contention that a jury should have found the facts relating to the waiver decision do not withstand scrutiny. The Indiana Court of Appeals relied on the fact that transfer decisions traditionally have been the domain of juvenile court judges. Pet. App. 8. Petitioner does not deny this, but notes that

this case does not involve the question of whether a jury trial is required at the juvenile court *adjudication* stage. See *McKeiver*, 403 U.S. 528; see also *Gonzalez,* 515 F.3d at 1110 ("the mere fact that juveniles may not have a federal constitutional right to a jury trial in delinquency proceedings . . . does not seem sufficient to distinguish *Apprendi* when the findings at issue authorize an *adult* sentence. Mr. Gonzales observes that this distinction appears to sanction 'a constitutional no man's land' . . . in which a youth could be denied both the benefits of the juvenile system (*i.e.,* limited sentences and an emphasis on rehabilitation) and the Sixth Amendment right to a jury trial afforded to adult offenders") (emphasis original).

Whatever the merits of the perception that juvenile court judges have not always lived up to the ideals envisioned by the creators of America's juvenile justice systems, *McKeiver*, 403 U.S. at 546, this Court's *Apprendi* jurisprudence makes clear that factual findings potentially increasing punishment must be made by a *jury* operating under a reasonable doubt standard, rather than being entrusted to the predilections of an individual judicial officer. See *Blakely*, 542 U.S. at 313-14; cf. *Crawford v. Washington*, 541 U.S. 36, 60-68 (2004) (allowing judges to employ "malleable," "vague," "manipulable" and "amorphous" test is neither the best way to determine reliability nor the method required by the Confrontation Clause). This is so, even if the jury requirement is potentially burdensome. See *Booker,* 543 U.S. at 243-44.

The Indiana Court of Appeals' analysis begs the question. As this Court pointed out in *Apprendi*, the common law did not distinguish between sentencing factors and offense elements. 530 U.S. at 478. Under *Apprendi*, the analysis must center on the practical effect of found facts – do they expose a person to increased punishment? – as opposed to the manner in which courts have historically acted. See *Booker,* 543 U.S. at 242; *Ring*, 536 U.S. at 602; *Apprendi*, 530 U.S. at 494. The controlling question is whether the potential consequence of a factual finding is an enhanced sentence. Contrary to the court of appeals' holding, that obviously is the case with respect to juvenile court waiver decisions.

The Indiana Court of Appeals' reliance upon the tradition of juvenile court judges making transfer decisions amounts to a distinction without a difference. The crucial question is not the *identity* of the official entering an order, but rather what body – a judge or jury – finds the facts authorizing the order. See *Blakely*, 542 U.S. at 301-08 & 313-14. Notably, what the court of appeals said about judicial tradition in the context of juvenile transfer would also apply to modern sentencing practices before *Apprendi* and *Booker*, *i.e.,* judges had discretion to find and up a sentence based on aggravating facts. That tradition, however, did not prevent this Court from fashioning the *Apprendi* rule, and applying it to various state and federal sentencing schemes. The *Apprendi* rule, however, would evaporate if the court of appeals' reasoning here is carried to its logical conclusion.

This Court's decision in *Ice* does not foreclose *Apprendi*'s application to juvenile court waiver hearings. *Ice* was not a juvenile transfer case, and did not address or even mention enhanced juvenile penalties. Rather, the *Ice* defendant faced sentencing "for multiple offenses different in character or committed at different times," as opposed to increased statutory maximum penalties for a single offense. 555 U.S. at 167. *Ice* did not deviate from the rule that if a factual finding potentially increases a sentence, it constitutes an "element" of the offense subject to jury findings. In fact, the jury in *Ice* did find the facts upon which the sentence ultimately was based. That the trial judge imposed consecutive terms did not result in a sentence increase beyond what the jury's verdict authorized. The consecutive sentencing decision "merely altered . . . administration," of the sentence, *i.e.,* how it was served. Jenny E. Carroll, *Rethinking the Constitutional Criminal Procedure of Juvenile Transfer Hearings:* Apprendi*, Adult Punishment, and Adult Process,* 61 Hastings L. J. 175, 206 (2009). "In contrast, the facts which would support a decision to transfer a juvenile to the adult court system do more than determine the manner in which the juvenile will serve his or her sentence upon conviction. The determination of these facts alters the sentence itself, increasing its nature, length, and collateral consequences." *Id*.

In contrast to *Ice*, this case does not implicate a consecutive sentence question. Rather, the factual findings at issue here were offense-specific, as Indiana's

juvenile waiver statute is triggered when the minor is alleged to have committed a specific offense (here, a murder). Cf. *Andrews*, 329 S.W.3d at 394 (Denvir Stith, J., dissenting); *Rudy B.,* 149 N.M. at 39-40, 243 P.3d at 743-44 (Chavez, J., dissenting). In light of this, and given that petitioner faced (and received) punishment far beyond what Indiana law permits for juveniles as a consequence of the juvenile court's waiver findings, juvenile waiver facts are not exempt from *Apprendi*. See *id.*

The Indiana Court of Appeals' reliance on the fact that a transfer decision is not an adjudication of guilt as a reason to reject application of *Apprendi* also does not comport with this Court's cases. Again, the critical question under *Apprendi* does "not hinge on whether the hearing involves a determination of guilt, but on what effect the determination of the factors would have on the defendant's sentence." Carroll, *supra*, at 208; see also *Gonzalez,* 515 F.3d at 1110 ("Mr. Gonzales's arguments have support in some of the language in *Apprendi* itself: there is no dispute that the amenability and commitment findings authorized the judge to impose a maximum adult sentence considerably longer than if he had sentenced Mr. Gonzales as a juvenile.").

Furthermore, the types of facts typically at issue in a juvenile court transfer proceeding (*e.g.,* the juvenile's bests interests and community safety and welfare) do not fall outside the purview of kinds of facts covered by the *Apprendi* rule. In fact, "factors governing juvenile transfer decisions are remarkably

similar" to types of factors found appropriate for jury consideration in *Ring, Blakely, Booker* and *Cunningham*. Carroll, *supra,* at 206-08.

It also bears noting that the Due Process Clause protects against *risk*. As stated by this Court in *Winship*:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.

397 U.S. at 363. Exposure to potential conviction consequences is what triggers procedural safeguards. Cf. *Breed*, 421 U.S. at 528-29 (juvenile is placed in jeopardy "at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years"). This is no less true in the *Apprendi* context. For example, as opposed to the guilty verdict or sentence pronouncement, this Court in *Cunningham* relied on the judge's factual findings under a preponderance standard as the catalyst for *Apprendi*. See 549 U.S. at 279-80; see also Carroll, *supra*, 202.

In addition, the focus of this Court's *Apprendi* cases has not been on the *timing* of the proceeding, but rather the practical effect of the finding. Timing (*e.g.,* that transfer hearings typically occur before an adult court trial) is, at best, a red herring. It cannot be credibly argued that the factual findings precipitating enhanced sentencing eligibility in *Apprendi*, *Cunningham* and *Blakely* were contingent on timing. *Id*. If that were the case, all that need be done to escape due process requirements would be to hold eligibility hearings before trial. *Id*. In a related vein, the State would be hard-pressed to maintain that *Apprendi* would be inapplicable if the facts relating to transfer were found *after* a guilty verdict. *Id*. That the transfer hearing facts were found before the guilty verdict consequently does not render the *Apprendi* rule inapplicable.

Lastly, this case presents an appropriate vehicle for resolving the issue of whether *Apprendi* applies to juvenile court waiver hearings. The underlying facts are straightforward and fully developed in the record. The State made no claims of waiver or forfeiture in the courts below. The Indiana Court of Appeals squarely addressed the issue on the merits, Pet. App. 4-9, and the Indiana Supreme Court was provided with the opportunity to consider the issue, but after review of the court of appeals' opinion, the appellate briefs and the record, denied transfer. *Id*. at 34-35.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE SPLIT IN AUTHORITY OVER WHETHER *APPRENDI* APPLIES TO JUVENILE JURISDICTION WAIVERS.

This Court's review is warranted because the lower court's ruling "conflicts with the decision of another state court of last resort." U.S. Sup. Ct. R. 10(b). As the Tenth Circuit has noted, "reasonable minds have differed" on the issue of whether *Apprendi* applies to juvenile transfer hearings. *Gonzalez*, 515 F.3d at 1111. The Massachusetts Supreme Judicial Court has ruled that once the legislature enacts a law providing for a maximum youth punishment, "any facts, including the requirements for youthful status, that would increase the penalty for such juveniles must be proved to a jury beyond a reasonable doubt." *Quincy Q.*, 434 Mass. at 865, 753 N.E.2d at 789. This position has also derived the support of dissenting opinions in the New Mexico Supreme Court, *Rudy B.,* 149 N.M. at 36-42, 243 P.3d at 740-46 (Chavez, J., dissenting), and the Missouri Supreme Court, *Andrews*, 329 S.W.3d at 864-65 (Denvir Stith, J., dissenting), as well as academic literature. See Carroll, *supra*; Daniel M. Vannella, Note, *Let the Jury Do the Waive: How* Apprendi v. New Jersey *Applies to Juvenile Transfer Proceedings,* 48 Wm. & Mary L. Rev. 723, 751-70 (2006).

In *State v. Rudy B.*, 147 N.M. 45, 216 P.3d 810 (N.M.App. 2009), the New Mexico Appellate Court held that juvenile transfer proceedings are subject to *Apprendi*. In a 3-2 decision, the New Mexico Supreme

Court reversed. 149 N.M. 22, 243 P.3d 726. In so doing, the New Mexico Supreme Court observed that "[i]f the Supreme Court had stopped at *Cunningham*, it would be hard-pressed to disagree with the appellate court's conclusion that judge-made amenability decisions violate *Apprendi*." 243 P.3d at 732. The court, however, believed that *Ice* had changed things.[4] But see *Southern Union Co. v. United States,* No. 11-94, Brief For The Chamber Of Commerce Of The United States Of America And The National Association Of Criminal Defense Lawyers As *Amici Curiae* In Support Of Petitioner, at 9-10 (U.S.) (arguing that *Rudy B.* and *Andrews* "misread" *Ice* as having created a "sea change" in *Apprendi* jurisprudence). As an added feature, this case provides the Court with an opportunity to clarify any confusion resulting from *Ice*.

It is true that the majority of State courts, the United States Court of Appeals for the Ninth and Tenth Circuits, certain United States District Courts and some scholars have sided in favor of not requiring juries to find beyond a reasonable juvenile court waiver facts. See, *e.g., Gonzalez,* 515 F.3d 1109-17; *United States v. Miguel*, 338 F.3d 995, 1004 (9th Cir. 2003); *United States v. Juvenile*, 228 F.3d 987, 990

[4] While the New Mexico Supreme Court found that the context and purpose of New Mexico's transfer statute insulated it from *Apprendi*, it deemed it "prudent to submit offense-specific factors . . . to the jury during trial perhaps by way of special interrogatories." 243 P.3d at 735.

(9th Cir. 2000); *Morales v. United States,* 2010 WL 3431650, *6-9 (S.D.N.Y. 2010); *Hegney v. Vail,* 2008 WL 4766816, *11 (W.D.Wash. 2008), *aff'd,* 357 Fed. Appx. 1 (9th Cir. 2009); *Bucio v. Sutherland,* 674 F.Supp.2d 882, 901 (S.D. Ohio 2009); *State v. Kalmakoff*, 122 P.3d 224, 227 & n.29 (Alaska App. 2005); *State v. Rodriguez*, 205 Ariz. 392, 71 P.3d 919, 928 (Ariz.App. 2003); *Kirkland v. State*, 67 So.3d 1147 (Fla.App. 2011); *People v. Beltran*, 327 Ill.App.3d 685, 765 N.E.2d 1071 (2002); *State v. Jones*, 273 Kan. 756, 47 P.3d 783, 793-98 (2002); *Caldwell v. Commonwealth*, 133 S.W.3d 445, 452-53 (Ky. 2004); *In re Welfare of J.C.P.*, 716 N.W.2d 664, 667-70 (Minn.App. 2006); *Andrews*, 329 S.W.3d 369; *Rudy B.*, 149 N.M. 22, 243 P.3d 726; *State v. Lopez*, 196 S.W.3d 872, 875-76 (Tex.App. 2006); *In re Hegney*, 138 Wash.App. 511, 158 P.3d 1193, 1200-01 (2007); see Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentencing Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 Wake Forest L. Rev. 1111, 1221-27 (2003); Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 Colum. L. Rev. 1082, 1121 (2005). These cases and commentary show that the issue here has sufficiently percolated in the lower courts to warrant this Court's review at this time. That the majority of cases have gone against petitioner's argument is of no moment since lower courts may be awaiting cue from this Court before applying *Apprendi* to juvenile court transfer hearings. See *Jones*, 47 P.3d at 795 (noting hesitance to attach new

rights to juvenile justice system absent "a clear mandate from" this Court).

It is unacceptable that some juveniles in this nation have the right, as a matter of federal constitutional law, to have a jury determine whether their case warrants transfer to adult court, where they undeniably face penalties in excess of those permitted in juvenile court, while other juveniles in States such as Indiana must entrust the decision whether to waive juvenile court jurisdiction to a "lone employee of the State." *Blakely*, 542 U.S. at 313-14.[5] This Court's review is necessary to resolve the judicial conflicts and ensure uniform national application of *Apprendi*.

III. THIS CASE PRESENTS A RECURRING AND IMPORTANT QUESTION ABOUT THE CONSTITUTIONAL RIGHTS OF JUVENILES.

In recent years, responses to public concern about juvenile crime have resulted in the expansion of transfer laws "to make it easier to transfer, waive, refer, remand, or certify . . . juvenile offenders from the juvenile court to the criminal court for trial and sentencing." Richard E. Redding, *The Effects of Adjudicating and Sentencing Juveniles as Adults: Research and Policy Implications,* Vol. I, No. 2, Youth

[5] It is too late in the day to maintain that dispositions meted out by juvenile courts do not amount to "punishment." See *Breed*, 421 U.S. at 529; *Gault*, 387 at 27.

Violence and Juvenile Justice 128 (April 2003); see also *Trying Juveniles as Adults*, at 2 ("Transfer laws are not new, but legislative changes in recent decades have greatly expanded their scope. As a result, the transfer 'exception' has become a far more prominent feature of the nations response to youthful offending."). Because "all states have transfer laws that allow or require criminal prosecution of some young offenders, even though they fall on the juvenile side of the jurisdictional age line," *id.,* the issue presented in this case potentially arises any time the prosecution seeks transfer of a juvenile's criminal case to adult court.[6] The recurring nature of the issue is also evident from the series of cases cited *supra* § II, addressing whether juveniles have a right to a jury trial subject to proof beyond a reasonable doubt at a transfer hearing.

Equally clear is this Court's commitment to the proposition that a jury must be the body that authorizes an offender's exposure to increased punishment by finding facts beyond a reasonable doubt. The foundation for *Apprendi* arose in *Jones v. United States,* 526 U.S. 227 (1999). After *Jones*, this Court has not hesitated to apply the identified legal principle to a variety of situations. See *Cunningham*, 549

[6] The OJJDP reports that national data collection regarding transfer is fragmentary for a variety of reasons. *Trying Juveniles as Adults*. The OJJDP reached a rough estimate that "as many as 247,000 offenders younger than 18 . . . [were] referred to the criminal courts in 2007." *Id*. at 21.

U.S. 270 (California's determinate sentencing law permitting a judge to choose between three sentences for an offense); *Booker,* 543 U.S. 220 (mandatory nature of United States Sentencing Guidelines); *Blakely*, 542 U.S. 296 (Washington's sentencing laws providing for graduated sentences within statutory range of punishment); *Ring*, 536 U.S. 584 (Arizona's death penalty scheme allowing a judge to impose capital punishment based on aggravating circumstances not considered by a jury); *Apprendi*, 530 U.S. 466 (New Jersey statute permitting an enhanced sentence if the judge found by a preponderance of the evidence the presence of an aggravating factor that did not constitute an essential element of the convicted offense). And as of this writing, another case involving an *Apprendi* issue – whether it applies to fines imposed in criminal cases – is pending before this Court. *Southern Union Co. v. United States,* No. 11-94 (U.S.) (oral arguments held on March 19, 2012).

Given the national prevalence of juvenile transfer statutes, the issue in this petition is important and recurs. By granting this petition, this Court would provide meaningful guidance about *Apprendi*'s role when a State seeks to subject a juvenile to punishment in excess of that permitted in juvenile court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

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IN THE
COURT OF APPEALS OF INDIANA

MARTIN A. VILLALON, JR.,)
)
Appellant-Defendant,)
)
vs.) No. 45A03-1010-CR-544
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Ross Boswell, Judge
Cause No. 45G03-0904-MR-2

August 30, 2011

OPINION – FOR PUBLICATION

BAILEY, Judge.

Case Summary

Martin A. Villalon, Jr. ("Villalon") appeals his conviction and sentence for Murder, a felony.[1] We affirm.

Issues

Villalon presents six issues for review:

I. Whether Indiana's juvenile waiver statute is unconstitutional because it deprives juveniles of a Sixth Amendment right to have a jury determine facts supporting enhanced punishment for an offense;

II. Whether the jurisdictional waiver to adult court was supported by sufficient findings having evidentiary support;

III. Whether Villalon was denied effective assistance of counsel for failure to present an alibi defense;

IV. Whether the trial court abused its discretion by excluding as an exhibit a printout of a social networking page belonging to a prosecution witness;

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[1] Ind. Code § 35-42-1-1.

V. Whether Villalon was deprived of his Sixth Amendment right to a jury trial because alternate jurors were instructed that they were permitted to discuss evidence during recesses, consistent with Indiana Jury Rule 20(a)(8); and

VI. Whether the sixty-year sentence is a product of an abuse of the trial court's discretion or is inappropriate.

Facts and Procedural History

The evidence most favorable to the verdict reveals that, on August 22, 2008, fifteen-year-old Villalon chased down fifteen-year-old John Shoulders ("Shoulders") and fatally shot him because Villalon mistakenly believed that Shoulders was a Vice Lord gang member.

On April 15, 2009, the State filed a petition alleging that Villalon was a juvenile delinquent because he had knowingly or intentionally killed Shoulders. Contemporaneously, the State requested waiver of jurisdiction from the juvenile court to a court having jurisdiction if the act had been committed by an adult. Following a hearing, the juvenile court waived jurisdiction to criminal court. Villalon was charged with murder. He moved to dismiss the murder charge, alleging that he was entitled under the United States Constitution to have a jury determine the facts underlying the waiver of jurisdiction decision. The motion to dismiss was denied. His motion to reconsider was likewise denied.

Villalon was brought to trial before a jury and was convicted as charged. On July 26, 2010, the trial court sentenced Villalon to sixty years imprisonment. Villalon filed a motion to correct error, which was denied. He now appeals.

Discussion and Decision

I. Constitutionality of Waiver of Jurisdiction Statute

Villalon sought dismissal of the murder charge against him, contending that Indiana's juvenile waiver statute is constitutionally infirm. The trial court disagreed. Villalon now argues that, because his trial in adult court, as opposed to his retention in the juvenile justice system, greatly increased his punishment, he was entitled to have a jury determination of facts supporting the enhancement.

Whether a statute is constitutional on its face presents a question of law, for which de novo review is appropriate. *State v. Moss-Dwyer,* 686 N.E.2d 109, 110 (Ind. 1997). We begin with the presumption of constitutional validity, and thus the party challenging the statute labors under a heavy burden to show that the statute is unconstitutional. *Id.* at 112.

Indiana Code Section 31-30-3-4 provides:

Upon motion of the prosecuting attorney and after full investigation and hearing, the juvenile court shall waive jurisdiction if it finds that:

> (1) the child is charged with an act that would be murder if committed by an adult;
>
> (2) there is probable cause to believe that the child has committed the act; and
>
> (3) the child was at least ten (10) years of age when the act charged was allegedly committed;
>
> unless it would be in the best interests of the child and of the safety and welfare of the community for the child to remain within the juvenile justice system.

Villalon claims that the forgoing statute deprived him of his rights under the Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment.[2] He relies upon *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), which set forth the general rule that, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury."

In *Apprendi*, the defendant had fired bullets into the home of an African-American family and had pled guilty to a weapons possession charge. *Id.* at 469-70. The trial court, finding by a preponderance of the evidence that the shooting had been racially motivated, increased Apprendi's sentence pursuant to New

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[2] The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]"

Jersey's hate crimes statute. Apprendi appealed, contending that "the Due Process Clause of the United States Constitution requires that the finding of bias upon which his hate crime sentence was based must be proved to a jury beyond a reasonable doubt." *Id.* at 471. The United States Supreme Court agreed that the Sixth and Fourteenth Amendments required that a jury must make the determination of racial motivation. *Id.* at 490. Such fact was the "functional equivalent" of an element of a greater offense. *Id.* at 494.

More recently, in *Oregon v. Ice,* 555 U.S. 160, 129 S.Ct. 711, 714 (2009), the United States Supreme Court declined to extend the *Apprendi* rule in the context of consecutive versus concurrent sentencing. The Court decided that the Sixth Amendment does not preclude states from assigning to judges, rather than to juries, the task of finding facts necessary to impose consecutive, rather than concurrent, sentences for multiple offenses. *Id.* In reaching its decision, the Court looked to "the scope of the constitutional jury right informed by the historical role of the jury at common law" and disagreed with the defendant's suggestion that "the federal constitutional right attaches to every contemporary state-law 'entitlement' to predicate findings." *Id.* at 718. In addition to the historical role of the jury, the Court also was mindful of state sovereignty, including "the authority of States over the administration of their criminal justice systems." *Id.*

The Court observed, "The historical record demonstrates that the jury played no role in the decision to impose sentences consecutively or concurrently. Rather, the choice rested exclusively with the judge." *Id.* at 717. Because the decision to impose consecutive or concurrent sentences was not within the jury's historical function, and because of the principles of federalism, legislative reforms regarding multiple sentences did not "implicate the core concerns that prompted [the] decision in *Apprendi.*" *Id.* at 718. "*Apprendi*'s core concern [is] a legislative attempt to 'remove from the [province of the] jury' the determination of facts that warrant punishment for a specific statutory offense." *Id.* at 718 (quoting *Apprendi*, 530 U.S. at 490). Ultimately, the Court reiterated: "The jury trial right is best honored through a 'principled rationale' that applies the rule of the *Apprendi* cases 'within the central sphere of their concern.'" *Id.* at 719 (quoting *Cunningham v. California*, 549 U.S. 270, 295 (2007)). The Court thus declined to extend *Apprendi* to an area of criminal sentencing – concurrent or consecutive sentencing – in which the jury had traditionally played no role.

The Sixth Amendment right to a jury trial does not apply to juvenile delinquency proceedings. *See McKeiver v. Pennsylvania,* 403 U.S. 528, 545 (1971). The New Mexico Supreme Court recently observed in *State v. Rudy B.*:

> [T]he findings in the *Apprendi* line of cases uniformly occurred in the *adult* criminal context[.] . . . The Supreme Court has traditionally given states wider latitude in adopting particular trial and sentencing procedures for juveniles – including whether to have a jury trial at all. . . . Given that *Ice* expressly instructs us to consider principles of federalism and state sovereignty in determining whether to apply *Apprendi,* we find this distinction particularly significant.

243 P.3d 726, 735 (2010) (emphasis in original), *cert. denied*, 131 S. Ct. 2098 (2011).

The waiver statute here at issue incorporates a presumption that a child of age ten or older alleged to have committed an act that would be murder if committed by an adult will be tried in adult court. Ind. Code § 31-30-3-4. The child is provided with the opportunity to present evidence to the juvenile court that it would be in the best interests of the child and of the community to have the child remain within the juvenile justice system. Making findings of best interests has been entrusted, since the enactment of the statutory scheme, to the juvenile court judge, and not a jury. Villalon does not contend that the statute removed from the jury a task with which it had historically been entrusted.

As a practical matter, a child who is alleged to have committed a delinquent act and is not retained in the juvenile justice system but is waived into adult court will (if found guilty) face harsher consequences

for his or her conduct. Nonetheless, *Ice* makes clear that not all judicial fact-finding ultimately resulting in an increased term of incarceration invades the province of the jury. As previously observed, Villalon provides no argument as to how our juvenile waiver statute might be understood to encroach upon the jury's traditional domain. Furthermore, the waiver statute does not set forth the elements of an offense, does not provide for a determination of guilt or innocence, and is not directed to consequences *after* adjudication of guilt. It does not provide a sentencing enhancement correlated with the State's proof of a particular fact. Accordingly, we conclude that the statute does not implicate the core concerns of *Apprendi*. We will not, as urged by Villalon, declare it to be unconstitutional upon that basis.

II. Sufficiency of Waiver Findings

Villalon next argues that the juvenile court made inadequate findings to support his waiver to adult court. The juvenile court entered perfunctory findings, specifically:

The child is charged with an act that would be murder if committed by an adult.

(a) There is probable cause to believe that the child has committed the act.

(b) The child was ten (10) years of age or older when the act charged was allegedly committed and

> (c) The Court finds that it would not be in the best interests of the child and of the safety and welfare of the community for the child to remain within the juvenile justice system.

(App.11.) The waiver order "must not merely recite statutory language." *Gerrick v. State*, 451 N.E.2d 327, 329 (Ind. 1983). Factual support and reasons for a waiver must appear in *either* the face of the waiver order or in the record of the waiver hearing. *Id.* at 329-30 (emphasis added). Accordingly, "[t]he absence from the waiver order of the particular facts justifying waiver does not necessarily invalidate the waiver." *Vance v. State*, 640 N.E.2d 51, 57 (Ind. 1994).

Where there is adequate factual support in the record, it is within the juvenile court's province to weigh the effects of retaining or waiving jurisdiction, and to determine which alternative is the more desirable. *Id.* We do not reweigh the evidence or judge the credibility of witnesses. *K.M. v. State*, 804 N.E.2d 305, 308 (Ind. Ct. App. 2004), *trans. denied.* The juvenile court's decision to waive jurisdiction will not be disturbed absent an abuse of discretion. *Vance,* 640 N.E.2d at 57.

The waiver hearing record contains evidence that Villalon was over ten years of age. Also, the State presented ample evidence to establish probable cause, including evidence that Villalon had threatened Shoulders and later confessed to four people that he had killed Shoulders. Villalon does not challenge the adequacy of factual support for these statutory

prerequisites for waiver. Rather, Villilon [sic] focuses upon the best-interests/community safety and welfare evidence. He argues that his lack of a criminal record and his minor juvenile history (limited to truancy and property damage) leads solely to the conclusion that he should have been retained in the juvenile justice system.

The burden to present evidence that waiver is not in the best interests of the juvenile or of the safety and welfare of the community remains at all times upon the juvenile seeking to avoid waiver. *Hagan v. State*, 682 N.E.2d 1292, 1295 (Ind. Ct. App. 1996). As to Villalon's best interests, the waiver summary indicates that the committee of probation officers considered alternative placements but concluded that the juvenile system did not have appropriate options for rehabilitating Villalon and further noted that he did not have identified psychological or mental health issues that would benefit from treatment in the juvenile system.

As for the safety and welfare of the community, there is conflicting evidence. Although Villalon had very limited juvenile history, he reported involvement "with gang activity sometime between the age of 14 years to 15 years." (Supp. App. At 29.) He also reported that the members pressured him to sell marijuana. He tried alcohol at age fifteen and first used marijuana in the sixth grade. (Supp. App. at 29.) After consideration of a forensic evaluation by Dr. Gary Durak, the probation department recommended that Villalon

be waived to adult court "due to the heinous nature of the offense." (St. Ex .21, pg. 5.)

The nature of the offense was described by Officer Ezequiel Hinojosa as the State elicited evidence of probable cause at the waiver hearing. Officer Hinojosa testified that he had information suggesting that Villalon and a companion had pursued Shoulders and demanded that he throw down a particular gang sign. When Shoulders declined to do so and tried to flee on his bicycle, he was shot four times, with two bullets exiting his body.

In light of the foregoing, we cannot conclude that the statutory requirements for waiver were unmet. We find no abuse of discretion in the waiver decision.

III. Assistance of Counsel

Villalon filed a motion to correct error, alleging that he was denied the effective assistance of trial counsel for counsel's failure to present an alibi defense. After a hearing at which Villalon submitted numerous affidavits regarding his attendance at a family birthday party on the date Shoulders was killed, the motion to correct error was denied. Villalon contends that the denial of his motion was an abuse of discretion because the State did not submit evidence to contradict his alibi witnesses.

To demonstrate ineffectiveness of counsel, a defendant must establish the two components set forth in *Strickland v. Washington*, 466 U.S. 668

(1984). "First, a defendant must show that counsel's performance was deficient." *Id.* at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed to the defendant by the Sixth Amendment." *Id.* "Second, a defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial," that is, a trial where the result is reliable. *Id.* To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.*

Further, we "strongly presume" that counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002). Counsel is to be afforded considerable discretion in the choice of strategy and tactics. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *cert. denied,* 537 U.S. 839 (2002). In addition, counsel's conduct is assessed upon facts known at the time and not through hindsight. *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997), *cert. denied*, 523 U.S. 1079 (1998).

Villalon produced affidavits from numerous individuals (predominantly but not exclusively family members), each averring that he or she had been

present with Villalon at his home and as part of a family birthday celebration on August 22, 2008, including the time of Shoulders' murder.[3] Some affiants reported Villalon arriving home at 3:15 to 3:30 p.m. A classmate averred that, at 4:15, he had heard Villalon's mother instruct him to get ready for the birthday celebration. Villalon's stepfather and aunt averred that they had been with Villalon continuously from approximately 3:30 p.m. until the late evening hours. Villalon's grandmother averred that Villalon and his mother had arrived at the grandmother's house to pick her up at approximately 4:45 to 5:00 p.m. According to Villalon, some or all of these persons were known to trial counsel and had been available to testify at trial, yet counsel had informed Villalon and his parents that "the defense would not be presenting any alibi evidence." (App.174.)

The failure to present an alibi defense is not necessarily ineffective assistance of counsel. *D.D.K. v. State*, 750 N.E.2d 885, 890 (Ind. Ct. App. 2001). At the hearing upon the motion to correct error, trial counsel was not called to testify. As such, no record has been developed as to trial counsel's strategy or reasons underlying his decision not to offer an alibi defense. We decline to speculate. *See Whitener v. State*, 696 N.E.2d 40, 42 (Ind. 1998) ("We will not

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[3] Evidence at trial had disclosed that Shoulders placed a cell phone call at 4:32 p.m., a construction worker heard shots at approximately 4:45 p.m., and a 9-1-1 call reporting gunfire was placed at 4:49 p.m.

lightly speculate as to what may or may not have been an advantageous trial strategy as counsel should be given deference in choosing a trial strategy which, at the time and under the circumstances, seems best.")

As previously observed, counsel is presumed to have rendered adequate assistance. *Timberlake*, 753 N.E.2d at 603. The State is not required to establish counsel's proficiency. Villalon has not overcome the presumption of adequacy.

IV. Exclusion of Evidence

The State called Becky Clemens ("Clemens") as a prosecution witness. Clemens testified that Villalon stopped at her house on August 22, 2008, and asked for Shoulders. According to Clemens' testimony, when Clemens asked why Villalon was looking for Shoulders, Villalon responded that Shoulders was "going to get his ass beat on the G" and this was because "he's claiming Vice Lord." (Tr. 112.)

Both the prosecution and the defense explored Clemens' former connections to gang members.[4] However, the trial court excluded Villalon's proffered exhibit, a printout from Clemens' My Space account, which contained some reference to Spanish Gangster Disciples.

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[4] Clemens testified that she no longer associated with gang members, after one young man was killed at her residence.

We review a trial court's determination of admissibility of evidence for an abuse of discretion and will reverse only where the decision is clearly against the logic and effect of the facts and circumstances present. *Smith v. State*, 754 N.E.2d 502, 504 (Ind. 2001). Evidence of bias, prejudice, or ulterior motives, on the part of a witness, is relevant at trial because it may discredit the witness or affect the weight given to the witness's testimony. *Kirk v. State*, 797 N.E.2d 837, 840 (Ind. Ct. App. 2003), *trans. denied.*

Clemens testified that she had previously had boys living in her house who were members of the Spanish Gangster Disciples. She was shown a copy of her My Space page, and admitted to its accuracy. She also admitted that she had, on My Space, described her mood as "loved by all G's." (Tr. 143.) To Clemens, "g's" meant "gangsters." (Tr. 143.) Arguing for admission of the My Space page, Villalon's counsel stated:

> she indicated some, basically, connections by people living in her house to certain gangsters, but this makes it much more clear that she is a gangster mother at heart.

(Tr. 548.) Thus, Villalon did not contend that additional relevant information was contained within the exhibit, only that it would have made a more visible impression upon the jurors.

The State contends that the printed My Space page would have been merely cumulative of evidence already admitted and thus its exclusion did not prejudice Villalon's substantial rights. *See Sylvester v.*

State, 698 N.E.2d 1126, 1130 (Ind. 1998) (holding that, when wrongfully excluded evidence is merely cumulative of other evidence presented, its exclusion is harmless error). We agree with the State. Villalon was able to elicit Clemens' admissions that she had previously closely associated with gang members. She verified the accuracy of her My Space page including the references that might indicate a bias toward gangsters or, more particularly, Spanish Gangster Disciples. The exclusion of cumulative evidence is at most harmless error.

V. Alternate Juror Participation in Discussions

Villalon requested that the alternate jurors be instructed not to participate in pre-deliberation jury panel discussions. Instead, the trial court instructed the jury consistent with the language of Indiana Jury Rule 20(a)(8), which provides that jurors, including alternates, are permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence. Villalon argues that discussions are equivalent to deliberations and therefore he was denied his right to a jury trial under the Sixth Amendment to the United States Constitution.

This Court has, on two occasions, rejected this same challenge to Jury Rule 20. *See Rice v. State*, 916 N.E.2d 962, 965-66 (Ind. Ct. App. 2009); *Weatherspoon v. State,* 912 N.E.2d 437, 439-41 (Ind.

Ct. App. 2009), *trans. denied.* As the *Weatherspoon* panel observed:

> Our Supreme Court has unambiguously made a distinction between discussions and deliberations. We are not at liberty to rewrite the rules promulgated by our Supreme Court.

Id. at 441. Accordingly, we find no error, constitutional or otherwise, in the trial court's implementation of Jury Rule 20.

VI. Sentencing

Upon conviction of Murder, Villalon faced a sentencing range of forty-five years to sixty-five years, with the advisory sentence being fifty-five years. *See* Ind. Code § 35-50-2-3. Accordingly, his sixty-year sentence is five years greater than the advisory. Villalon presents two sentencing challenges, first arguing that the trial court abused its discretion in the consideration of aggravating and mitigating circumstances, and second arguing that his sentence is inappropriate.

Aggravating and Mitigating Circumstances.

Villalon alleges that the trial court failed to give due weight to his youth, lack of criminal history, and low I.Q. score (71 points). "So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion." *Anglemyer v. State*, 868

N.E.2d 482, 490 (Ind. 2007), *clarified on other grounds*, 875 N.E.2d 218 (Ind. 2007). This includes the finding of an aggravating circumstance and the omission to find a proffered mitigating circumstance. *Id.* at 490-91. When imposing a sentence for a felony, the trial court must enter "a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence." *Id.* at 491.

The trial court's reasons must be supported by the record and must not be improper as a matter of law. *Id.* However, a trial court's sentencing order may no longer be challenged as reflecting an improper weighing of sentencing factors. *Id.* A trial court abuses its discretion if its reasons and circumstances for imposing a particular sentence are clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Hollin v. State*, 877 N.E.2d 462, 464 (Ind. 2007). Here, the trial court recognized Villalon's youth, lack of criminal history, and "level of cognitive functioning as indicated by the psychological reports" as mitigating circumstances. (Sent. Tr. 157.) To the extent that Villalon urges reweighing of the mitigating circumstances, the argument is unavailable to him. *Anglemyer,* 868 N.E.2d at 491.

Villalon also challenges the trial court's consideration of the heinousness of the crime as an aggravating circumstance. The trial court noted that Villalon had sought out his victim, chased him down and then

shot him. A trial court may properly consider the manner in which the crime was committed in reaching its sentencing determination. *Anglemyer,* 868 N.E.2d at 492. Villalon has demonstrated no abuse of discretion.

Appropriateness of Sentence.

Under Indiana Appellate Rule 7(B), this "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." In performing our review, we assess "the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). A defendant "'must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.'" *Anglemyer*, 868 N.E.2d at 494 (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

As for the nature of the offense, Villalon hunted for his victim, inquiring of Clements as to Shoulders' whereabouts and proclaiming that he would be beaten "on the g" because he was "claiming Vice Lord." (Tr. 112-13.) Villalon pursued Shoulders and fired four shots into his neck and back. Three of these shots – which pierced his heart and lungs and severed his spinal cord – were fatal shots. It was a senseless crime; not only was it a gang-related execution,

but it was also a product of misinformation. Afterward, Villalon displayed his gun and boasted to gang members and associates that he had "popped" Shoulders. (Tr. 211.)

As to the character of the offender, Villalon has some history of juvenile offenses. He was not known to be a gang member, but associated with gang members. He had previously been persuaded by gang members to engage in illegal activities. He was willing to conceal evidence of his crime, stating to his companions that he would hide the gun on a nearby street.

In sum, there is nothing in the nature of the offense or the character of the offender to persuade us that the sixty-year sentence is inappropriate.

Conclusion

Villalon was not denied his Sixth Amendment right to a jury trial. He has not established that his waiver to adult court lacked evidentiary support for the statutory prerequisites. He has failed to demonstrate ineffectiveness of trial counsel or reversible error in the admission of evidence or the conduct of the trial. Finally, Villalon's sixty-year sentence is not inappropriate.

Affirmed.

FRIEDLANDER, J., and BROWN, J., concur.

STATE OF INDIANA	)	**IN THE LAKE**
	)	**SUPERIOR COURT,**
	) SS:	**JUVENILE DIVISION**
	)	**CAUSE NUMBER:**
COUNTY OF LAKE	)	45D060809JD001672

DATE: April 13, 2009

IN THE MATTER OF:

Martin Anthony Villalon, JR (54306)

ORDER ON PETITION TO WAIVE JURISDICTION

The Court made a full investigation and held a complete hearing on the State's request to waive jurisdiction and, upon the conclusion of all of the evidence and argument, makes the following findings:

1. AGE: The Respondent was 15 years of age when the act was allegedly committed, his date of birth being [omitted], and was therefore between the ages of 10 and 18 years old at the time of the charged offense.

2. JURISDICTION: The Respondent is subject to the jurisdiction of the Lake Superior Court, Juvenile Division, by virtue of Petition alleging Delinquency, which was filed on the 2nd day of October, 2008.

3. SPECIFIC FINDINGS OF FACT:

The child is charged with an act that would be murder if committed by an adult.

(a) There is probable cause to believe that the child has committed the act.

(b) The child was ten (10) years of age or older when the act charge [sic] was allegedly committed and

(c) The Court finds that it would not be in the best interests of the child and of the safety and welfare of the community for the child to remain within the juvenile justice system.

IT IS THEREFORE, ORDERED AND ADJUDGED that juvenile jurisdiction over this cause be and the same hereby is waived to a Court that would have jurisdiction had the act been committed by an adult, and said waiver being granted for the offense charged, and any lesser offenses included therein (Copy of Delinquency Petition attached and marked as EXHIBIT NO. 1).

IT IS THEREFORE, ORDERED AND ADJUDGED that, said child is ordered held in the Juvenile Center, to be remanded to the custody of the Sheriff of Lake County, Indiana. Upon child being remanded to the Sheriff of Lake County, child is to be held with no bond being set and the child is not to be released until a hearing before the Court having Adult Jurisdiction.

Case is ordered closed.

SUPPLEMENTAL IV-E FINDINGS:

The Department of Child Services, and/or the Probation Department shall be responsible for the placement and care of the child[ren]. This in no way relieves the DCS or the Probation Department of the obligation to have Court approval regarding physical custody, any change in placement, visitation with parents, relatives, or other individuals, or medical care and treatment of the child[ren]. The efforts made by the DCS and/or the Probation Department to prevent or eliminate the need for removal of the child(ren) were reasonable under the circumstances; and/or reasonable efforts to prevent removal of the child were not required because of the emergency nature of the situation. If removed, it is in the child(ren)'s best interest to be removed from the home as it would be contrary to the safety, health and welfare of the child(ren) to remain in the home. The statements of reasonable efforts as set forth in the pleadings and papers of the DCS, Probation and/or all other service providers filed herein are incorporated by reference.

ALL OF WHICH IS ORDERED THIS 13th day of April, 2009.

APPROVED &
ORDERED BY:

/s/ Mary Beth Bonaventura 4/13/2009
Judge, Lake Superior Court,
Juvenile Division

RECOMMENDED BY:

/s/ Charlotte Ann Peller
Magistrate, Lake Superior Court,
Juvenile Division

Prosecutor
Attorney Vanes
Robert Bennett
Dan Arendas
Judge Vasquez
Dave Moore
Criminal Clerk's Office
Lake County Sheriff

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STATE OF INDIANA	)	SUPERIOR COURT OF
	)	LAKE COUNTY
	) ss:	CRIMINAL DIVISION
	)	CROWN POINT, INDIANA
COUNTY OF LAKE	)	CASE 45G03-0904-MR-00002

STATE OF INDIANA,	)
Plaintiff,	)
v.	)
MARTIN ANTHONY VILLALON,	)
Defendant.	)

ORDER

07-26-10 The State of Indiana appears by Deputy Prosecuting Attorneys Joseph Curosh. The defendant appears in person with Attorneys Thomas Vanes, Marc Martin, Curtis Vosti and James Foster.

Hearing held on defendant's previously filed Request for Enlargement of Time, Petition Concerning Filing Issues, and Request for Relief Regarding Jury Irregularities, State's Response and defendant's Reply to State's Response. Evidence presented. Arguments of counsel heard. Defendant's Request for Enlargement of Time, Petition Concerning Filing Issues and Request for Relief Regarding Jury Irregularities is denied.

The defendant having been found guilty by jury on April 6, 2010, the Court now enters

judgment for the crime of Murder, and cause being submitted for sentencing, evidence is presented and arguments are heard.

The parties having reviewed the pre-sentence investigation report, the Court now accepts the pre-sentence investigation report as amended.

MITIGATING CIRCUMSTANCE

1. The defendant's youthful age.
2. The defendant's lack of prior criminal history.
3. The defendant's level of cognitive functioning as indicated by the psychological report presented for review.

AGGRAVATING CIRCUMSTANCE

1. The nature and circumstances of the crime. The way in which the victim was sought after by being chased and then gunned down in the alley. The Court finds these to be gruesome and heinous.

After considering the above factors, the Court finds that the aggravating circumstance outweighs the mitigating circumstances now **sentences the defendant to sixty (60) years in the Indiana**

Department of Correction for no less than the earliest release date and for no more than the maximum release date.

Pursuant to IC 35-38-1-5(b), the court notes that it currently costs an average of $53.96 per day to house an adult inmate at the Indiana Department of Correction. The defendant's sentence calls for an executed term of imprisonment of 21,900 days. Accordingly, the estimated total cost to incarcerate the defendant for this term of imprisonment is $1,201,419.40. This estimated costs [sic] **does not include reductions which will result if the defendant is eligible to receive credit for time served in confinement prior to conviction prior to conviction** [sic]**, credit time earned to date or in the future, or any other credits against the sentence. The estimated cost also does not reflect any future changes in the cost of incarceration.**

Court costs are imposed, however, the defendant is found indigent and shall not be imprisoned for failure to pay these costs.

The Court reads Criminal Rule 11 regarding the defendant's right to appeal or to file a motion to correct errors of the Court's judgment of sentence under Criminal Rule 11. The Court for the record notes that the

defendant is represented by Appellate counsel in this matter.

The defendant is remanded to the hands of the Lake County Sheriff for execution of judgment of the Court. State files Motion for Sanctions which the Court now sets for hearing on August 19, 2010, at 8:45 a.m. and the defendant's presence is not required. Defendant to file its response by August 16, 2010. Cause ordered disposed. (Diane C. Iannessi reporting.)

SO ORDERED:

/s/ Diane Ross Boswell
DIANE ROSS BOSWELL,
Judge Room III (lcm/27)

STATE v. M. VILLALON
CASE 45G03-0904-MR-00002
07-26-10 SENTENCING ORDER
PAGE 2

STATE OF INDIANA)		SUPERIOR COURT OF
)	SS:	LAKE COUNTY
		CRIMINAL DIVISION
COUNTY OF LAKE)		CROWN POINT, INDIANA

STATE OF INDIANA,	)	
Plaintiff	)	
	)	
vs.	)	CAUSE 45G03-
	)	0904-MR-00002
MARTIN ANTHONY VILLALON, JR.,	)	
	)	
	)	
Defendant	)	

ORDER

07-26-10 The Court ***sua sponte*** issues a credit day order for the defendant that was not included during the sentencing hearing. The Court finds as of July 26, 2010, the defendant is to receive credit for six hundred seventy-six (676) days spent in confinement as a result of this charge, plus six hundred seventy-six (676) days of good time credit as provided by law for a total of 1352 days credit.

These credit days include time spent in confinement at the Lake County Juvenile Center prior to the defendant being waived over to the Lake County Jail for this matter. ***The Lake County Clerk is ordered to put the number of credit days in the defendant's Abstract of Judgment. The Lake County Clerk is further ordered to notify the parties.***

SO ORDERED:

/s/ Diane Ross Boswell
DIANE ROSS BOSWELL,
Judge Room III (lcm/28)

From: dispositions@courts.state.in.us
Subject: **45A03-1010-CR-00544 – Notice of Issuance of Order or Opinion**
Date: November 21, 2011 2:50:48 PM CST
Bcc: marc@marcmartinlaw.com
Reply-To: dispositions@courts.state.in.us

NOTICE: DO NOT RESPOND TO THIS E-MAIL – MESSAGES SENT TO THIS ADDRESS WILL NOT RECEIVE A REPLY. QUESTIONS CONCERNING THE ATTACHED SHOULD BE DIRECTED TO THE CLERK'S OFFICE AT (317) 232-1930 OR clerk@courts.state.in.us.

CAUSE NO.: 45A03-1010-CR-00544
LOWER COURT CAUSE NO.: 45G030904MR2

VILLALON, MARTIN V. STATE OF INDIANA

YOU ARE HEREBY NOTIFIED THAT THE COURT OF APPEALS HAS ON THIS DAY, 11/21/2011, ORDERED AS FOLLOWS:

APPELLANT'S PETITION FOR REHEARING IS DENIED.

MARGRET G. ROBB, CHIEF JUDGE

ALL PANEL JUDGES CONCUR.

(ORDER REC'D 11/21/11 AT 3:30 P.M.)
ENTERED ON 11/21/11 KJ

TRANSMITTED PURSUANT TO MY AUTHORITY UNDER APPELLATE RULE 26.

SIGNED,
KEVIN S. SMITH
CLERK OF THE SUPREME COURT,
COURT OF APPEALS, AND TAX COURT
216 STATE HOUSE
200 W. WASHINGTON ST.
INDIANAPOLIS, IN 46204

From: dispositions@courts.state.in.us
Subject: **45A03-1010-CR-00544 – Notice of Issuance of Order or Opinion**
Date: February 15, 2012 10:04:48 AM CST
Bcc: marc@marcmartinlaw.com
Reply-To: dispositions@courts.state.in.us

NOTICE: DO NOT RESPOND TO THIS E-MAIL – MESSAGES SENT TO THIS ADDRESS WILL NOT RECEIVE A REPLY. QUESTIONS CONCERNING THE ATTACHED SHOULD BE DIRECTED TO THE CLERK'S OFFICE AT (317) 232-1930 OR clerk@courts.state.in.us.

CAUSE NO.: 45A03-1010-CR-00544
LOWER COURT CAUSE NO.: 45G030904MR2

VILLALON, MARTIN V. STATE OF INDIANA

YOU ARE HEREBY NOTIFIED THAT THE SUPREME COURT HAS ON THIS DAY, 02/14/2012, ORDERED AS FOLLOWS:

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED

IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER OF THE COURT HAS VOTED ON THE PETITION. EACH PARTICIPATING MEMBER HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICE'S VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER OF JURISDICTION.

RANDALL T. SHEPARD, CHIEF JUSTICE

ALL JUSTICES CONCUR.

(ORDER REC'D 02/14/12 AT 2 P.M.)
ENTERED ON 02/15/12 KJ

TRANSMITTED PURSUANT TO MY AUTHORITY UNDER APPELLATE RULE 26.

SIGNED,
KEVIN S. SMITH
CLERK OF THE SUPREME COURT,
COURT OF APPEALS, AND TAX COURT
216 STATE HOUSE
200 W. WASHINGTON ST.
INDIANAPOLIS, IN 46204