

A05-1707

**A05-1707**

**STATE OF MINNESOTA**

**IN SUPREME COURT**

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Richard Brian Bruestle,

Appellant-Petitioner,

vs.

State of Minnesota,

Respondent.

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**RESPONDENT'S BRIEF AND APPENDIX**

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Kyle D. White  
Attorney at Law

386 N. Wabasha Street  
Suite 1450  
St. Paul MN 55102

Telephone: (651) 227-8751

Mike Hatch  
Minnesota Attorney General  
1800 NCL Tower  
445 Minnesota St.  
St. Paul, Minnesota 55101

Susan Gaertner  
Ramsey County Attorney

By: Jeanne L. Schleh  
Assistant Ramsey County Attorney  
Atty. Reg. No. 96726  
Suite 315  
50 West Kellogg Boulevard  
St. Paul, Minnesota 55102  
Telephone: (651) 266-3093

**ATTORNEY FOR APPELLANT-  
PETITIONER**

**ATTORNEYS FOR RESPONDENT**

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUE

**Did the post-conviction court abuse its discretion in denying post-conviction relief without a hearing when appellant failed to allege facts which, if proved at an evidentiary hearing, would support his claim of ineffective assistance of counsel?**

The post-conviction court denied relief.

Apposite authority:

Sutherlin v. State, 574 N.W.2d 428 (Minn. 1998).

Wieland v. State, 457 N.W.2d 712 (Minn. 1990).

State v. Blasus, 445 N.W.2d 535 (Minn. 1989).

Strickland v. Washington, 466 U.S. 668 (1984).

Minn. R. Crim. P. 20.

## PROCEDURAL HISTORY

- December 7, 2002 Appellant murders his aunt and is arrested.
- December 9, 2002 Complaint filed charging appellant with intentional second-degree murder.
- December 10, 2002 Appellant's first appearance in Ramsey County District Court; bail set at \$500,000; public defender appointed; state's Rule 9 disclosure of investigative reports made.
- December 18, 2002 Appellant appears with counsel, Charles Clippert, who requests a Rule 20 evaluation; on the same date, public defender internal email authorizes retaining a Rule 20 expert but asks Clippert to limit expenses to initial opinion if expert cannot provide defense.
- December 19, 2003 Defense-retained psychologist Dr. R. Owen Nelson sees appellant.
- December 30, 2002 Mr. Clippert, by letter, informs county attorney's office of appellant's offer to plead guilty to murder two and waive any further Rule 20 evaluation.
- January 10, 2003 Mr. Clippert, by letter to court, requests additional language in the Rule 20 order to facilitate the court-ordered examination.
- January 30, 2003 Defense withdraws Rule 20 request; probable cause found; plea of not guilty entered.
- February 6, 2003 Case assigned to the Honorable Steven D. Wheeler, Judge of Ramsey County District Court, for trial.
- February 26, 2003 Grand jury indicts appellant on first-degree premeditated murder (two counts).
- March 5, 2003 Complaint dismissed; file merged with indictment file (Ramsey County District Court File No. K0-03-708) appellant pleads guilty before Judge Wheeler to first-degree premeditated murder, as charged in Count 1 of the indictment, and is sentenced to life in prison. Count 2 (murder 1 without possibility of parole) is dismissed.
- September 5, 2003 Kyle White files substitution of attorney in appellant's Ramsey County case and moves the court for the grand jury transcript herein.

September 9, 2003 Judge Wheeler signs grand jury transcript order.

September 19, 2003 Grand jury transcript completed.

October 2, 2003 While incarcerated at MCF-St. Cloud (Sherburne County), appellant attacks another inmate with a dangerous weapon (slash wounds to the neck).

January 26, 2004 Appellant files petition and memorandum for post-conviction relief in Ramsey County District Court, claiming ineffective assistance of Mr. Clippert for failure to raise Rule 20 defense and appends a psychological evaluation of appellant completed on October 29, 2002 (by Dr. Robert Barron) in connection with his application for Social Security disability benefits.

February 9, 2004 Mr. White, on behalf of appellant, refuses to waive attorney-client (Mr. Clippert) or medical privilege to facilitate response to petition.

February 11, 2004 Respondent files answer and memorandum in opposition.

February 13, 2004 Appellant files reply memorandum and affidavits.

March 12, 2004 Complaint filed in Sherburne County District Court (#K2-04-582) charging appellant with second-degree assault.

May 5, 2004 Appellant's first appearance in Sherburne County District Court.

May 21, 2004 Mr. White sends letter to Judge Wheeler requesting that the Ramsey County post-conviction matter be delayed until return of a Rule 20 examination he expected would be ordered in Sherburne County; this request was granted.

May 26, 2004 Mr. White files certificate of representation in Sherburne County.

June 16, 2004 Rule 20 evaluation requested in Sherburne County by Mr. White.

June 24, 2004 Rule 20 order filed in Sherburne County District Court; order directs Ramsey County Attorney's Office to disclose all information relevant to the Rule 20 evaluation.

June 28, 2004 Ramsey County forwards all reports relating to the 2002 homicide as well as Denver court and corrections records relating to 1989 robbery/assault conviction; Minnesota DOC and Hennepin County

juvenile and adult records relating to his 1979 CSC/assault conviction and 1977 St. Paul Police Department records relating to his CSC/burglary/ robbery juvenile adjudication.

- August 25, 2004 Rule 20 report by forensic psychologist Dr. Gregory Hanson filed in Sherburne County District Court.
- October 1, 2004 Order authorizing release of Rule 20 report to Ramsey County filed.
- January 20, 2005 Mr. White sends letter to Sherburne County judge waiving pretrial and indicating appellant is considering either Lothenbach stipulated trial or trial on mental illness issue only.
- January 27, 2005 Respondent forwards Sherburne County Rule 20 report to Judge Wheeler and requests the court, based on that report, to issue its order denying relief without an evidentiary hearing.
- January 31, 2005 Mr. White forwards Rule 20 report by defense-retained psychiatrist (Dr. Maureen Hackett) to Judge Wheeler and asserts any claim appellant has abandoned Rule 20 claims is inaccurate. Hackett report is dated November 23, 2004 with evaluation date June 10, 2004.
- March 4, 2005 Mr. White sends letter to Judge Wheeler asserting that the post-conviction court now has an abundance of information, including the two Rule 20 evaluations and the October 2002 psychological evaluation in connection with appellant's Social Security disability application, with which to rule and that any additional information or evidence was "unnecessary and redundant" and requesting that appellant be allowed to withdraw his plea.
- March 9, 2005 Respondent sends letter to Judge Wheeler noting that the Ramsey County post-conviction proceedings should be stayed pending the outcome in Sherburne County and that if appellant has stated a sufficient basis for an evidentiary hearing, respondent was entitled both to its own Rule 20 evaluation and to cross-examine appellant's expert.
- June 30, 2005 Judge Wheeler's order denying post-conviction relief without a hearing is filed.
- August 6, 2005 Appellant signs waiver of jury trial in Sherburne County.

August 24, 2005 Appellant files notice of appeal of Ramsey County post-conviction order.

August 25, 2005 Appellant submits Sherburne County case to court on stipulated facts (per Lothenbach).

September 20, 2005 Sherburne County Judge Hancock files findings of fact, conclusions of law and judgment finding appellant guilty of second-degree assault.

November 9, 2005 Appellant's brief mailed.

### STATEMENT OF THE CASE

Appellant was charged on December 9, 2002 in Ramsey County District Court with the second-degree murder of his aunt. He was represented from December 2002 through his plea and sentencing by Assistant Ramsey County Public Defender Charles Clippert.

On December 18, 2002, Mr. Clippert requested, and the court ordered,<sup>1</sup> a Rule 20 examination of appellant to assess both competency and whether a mental illness defense was warranted. The next day, December 19, 2002, appellant was visited in the jail by a defense-retained psychologist. (RA<sup>2</sup>-1)

After this visit but before any court-ordered evaluation had been done, in a December 30, 2002 letter to the Ramsey County Attorney's Office, Mr. Clippert indicated his client's interest in pursuing a plea bargain by pleading guilty to second-degree murder as charged and waiving any further Rule 20 claim. (A<sup>3</sup>-45) The offer was not accepted.

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<sup>1</sup> This order is Item # 4 in Ramsey County District Court file K4-02-4475 forwarded to this Court for purposes of this appeal.

<sup>2</sup> "RA" followed by a page number refers to respondent's appendix hereto.

<sup>3</sup> "A" followed by a page number refers to appellant's appendix herein.

ultimately charged in Sherburne County with second-degree assault for this offense.

(RA-3)<sup>9</sup>

On January 26, 2004, Mr. White filed a petition for post-conviction relief in Ramsey County District Court alleging ineffective assistance of counsel for failure to assert a Rule 20 mental illness defense. He requested that the plea be withdrawn or that an evidentiary hearing be granted.<sup>10</sup> He appended 9 exhibits to the petition and an additional 4 to a subsequent reply memorandum (Exhibits A through M in the district court file), 11 of which are appended to appellant's brief herein.<sup>11</sup> Specifically, the petition alleged prior counsel was deficient for failing to get a copy of the psychological evaluation of appellant conducted by Robert Barron on October 29, 2002, in connection with his application for Social Security disability benefits. This evaluation was appended to the petition and is appended to appellant's brief herein. (A-10 to 13)

Respondent filed an answer and memorandum in opposition to the petition, including two exhibits appended hereto, the 12/19/02 jailhouse log of Dr. R. Owen Nelson's visit with appellant and counsel's affidavit that appellant, through Mr. White, refused to waive his attorney-client privilege as to Mr. Clippert or his medical privilege in connection with the instant petition. (RA 1-2)

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<sup>9</sup> A copy of this complaint, as well as other records filed in Sherburne County District Court File K2-04-582 (and not otherwise incorporated into the Ramsey County file), are appended hereto pursuant to State v. Rewitzer, 617 N.W.2d 407 (Minn. 2000).

<sup>10</sup> See Petition at 12 (Item # 7 in Ramsey County District Court File K0-03-708).

<sup>11</sup> These are Exhibits A-G and I-L, appended at A-10 to 13, 28 to 29, 31 to 32 and 36 to 46.

On May 21, 2004, Mr. White sent a letter to Judge Wheeler requesting that the post-conviction proceeding in Ramsey County be stayed pending the outcome of a Rule 20 evaluation Mr. White expected to be ordered in Sherburne County.<sup>12</sup> (RA-6) On June 16, 2004, Mr. White, representing appellant on the assault charge, requested a Rule 20 evaluation in Sherburne County District Court. The Rule 20 order, filed June 24, 2004, directed the Ramsey County Attorney's Office to provide Sherburne County reports from the 2002 homicide as well as any other relevant background information on appellant, and respondent complied. (RA-10)

The Sherburne County Rule 20 evaluation was conducted by forensic psychologist Dr. Gregory Hanson, who met with appellant on July 29 and August 18, 2004. His written report, finding appellant did not have a M'Naghten defense, was filed in Sherburne County District Court on August 25, 2004. This evaluation included an extensive review of appellant's more than 30-year history (going back to age 8) of delinquent and criminal behavior as well as mental health records. These records show numerous juvenile adjudications and adult convictions for violent crimes going back to 1977, beginning with his participation at age 13 (along with an adult) of a rape and robbery of an 87-year-old woman. (RA-13 to 16, 20 to 21) By Sherburne County court order dated October 1, 2004, this report was forwarded to Ramsey County. On January 27, 2005, respondent filed the Rule 20 order and Hanson's report together with the

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<sup>12</sup> This letter, appended hereto, is Item # 16 in the Ramsey County District Court file. Appellant was charged in Sherburne County District Court by complaint filed on March 12, 2004. (RA-3)

On January 30, 2003, Mr. Clippert on the record withdrew the defense request for a Rule 20 evaluation. (T<sup>4</sup> 1/30/03 at 2) The case was assigned to the Honorable Steven D. Wheeler, Judge of Ramsey County District Court, for trial. On February 26, 2003, the Ramsey County grand jury indicted appellant on two counts of first-degree murder, and the indictment<sup>5</sup> superseded the complaint.

On March 5, 2003, appellant on the record and in by written plea petition<sup>6</sup> waived all his legal rights, including his right to assert a mental illness defense, and entered a plea of guilty to premeditated first-degree murder as charged in Count 1 of the indictment. He was sentenced to life in prison.<sup>7</sup> The record reflects that appellant was adamant about taking responsibility for his crime despite Mr. Clippert's suggestion that he had nothing to lose by going to trial. (PT<sup>8</sup> 20)

Current counsel Kyle White assumed representation of appellant on September 5, 2003 and requested that the grand jury transcript be prepared. Meanwhile, appellant, incarcerated at MCF-St. Cloud, assaulted another inmate on October 2, 2003 and was

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<sup>4</sup> "T" followed by a date and page number refers to the transcript of the indicated court hearing.

<sup>5</sup> The indictment is Item # 1 in Ramsey County District Court File K0-03-708.

<sup>6</sup> The plea petition is Item # 2 in the Ramsey County district court file.

<sup>7</sup> Under the law in effect at that time, appellant would be eligible for release after 30 years for his conviction under Minn. Stat. § 609.185 (a)(1)(Laws 2002) in Count 1. Appellant was indicted as a heinous offender in Count 2 under Minn. Stat. § 609.185 (a)(1) and Minn. Stat. § 609.106, subd. 1 and 2 (3)(Laws 2002). Conviction under Count 2 would have resulted in a sentence of life without parole.

<sup>8</sup> "PT" followed by a page number refers to the transcript of the plea and sentencing on March 5, 2003.

authorizing order in Ramsey County District Court and requested that Judge Wheeler proceed with his post-conviction order.<sup>13</sup> (RA-12 to 35)

In response, on January 31, 2005, Mr. White for the first time disclosed that the defense had retained its own expert to do a Rule 20 evaluation of his client and filed that report, dated November 23, 2004 for an evaluation done in June 2004, together with a letter in Ramsey County District Court.<sup>14</sup> (A 14-26; RA-36) On March 4, 2005, Mr. White sent a letter to Judge Wheeler asserting that the post-conviction court "now has an abundance of information," including two Rule 20 evaluations and the Social Security disability evaluation, and "[a]ny additional information or evidence would seem to be unnecessary and redundant." On that record, he reiterated his request to allow appellant to withdraw his guilty plea. He did *not* request an evidentiary hearing.<sup>15</sup> (RA-37)

Respondent, by letter dated March 9, 2005, requested that proceedings be stayed pending the outcome of the Sherburne County Rule 20 and noted that if appellant had stated a sufficient basis for an evidentiary hearing, respondent was entitled to its own Rule 20 evaluation and to cross-examine appellant's expert.<sup>16</sup> (RA-38-9)

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<sup>13</sup> The letter, order and report are Item # 15 in the Ramsey County District Court file. All three are appended hereto for the convenience of the Court.

<sup>14</sup> This letter and the Hackett report are Item # 14 in the Ramsey County District Court file. The cover letter describes the Hanson report as one "paid for by the State." However, this evaluation was the court's, not the prosecution's. Meanwhile, in the Sherburne County case, Mr. White filed a letter dated January 20, 2005, waiving pretrial and notifying the court and the prosecutor that appellant was considering two options: a stipulated fact trial to the court (Lothenbach) or a trial on mental illness only. This item from Sherburne County District Court file K2-04-582 is appended hereto at RA-40.

<sup>15</sup> This letter is Item # 13 in the Ramsey County District Court file.

<sup>16</sup> This letter is Item # 11 in the Ramsey County District Court file.

On June 30, 2005, Judge Wheeler's post-conviction order was filed summarily denying relief without a hearing. Specifically, the post-conviction court found that a defense-retained psychologist did visit appellant on December 19, 2002, that appellant, through counsel, thereafter both in writing (letter of December 30, 2002) and on the record (January 30, 2003) withdrew his request for a Rule 20 evaluation. (A-2 to 3) The order also detailed appellant's knowing and voluntary waiver of the mental illness defense and his insistence on taking responsibility for his actions despite counsel's suggestion that he had nothing to lose by going to trial. (A-3 to 4) The post-conviction court concluded that appellant's decision to enter his plea occurred after discussion of possible defenses and that, based on the court's own observations, there was no inability of appellant to understand the hearing or its consequences. (A-3 to 4, 7) Upon this record, the post-conviction court concluded that appellant failed to state a basis for an ineffective assistance of counsel claim and, further, that appellant's plea was knowing, intelligent and voluntary. (A-8)

## STATEMENT OF FACTS

Appellant lived with his aunt, L [REDACTED] M [REDACTED], at her home on Hewitt Avenue in St. Paul. On December 7, 2002, in the course of an argument with his aunt, appellant stabbed her approximately 30 times with a kitchen knife just outside the house. To make sure she was dead, he reentered the house, got a gun, came back outside and shot her 5 times. He reentered the house and was looking for additional bullets when the police arrived. He admitted he was guilty of first-degree premeditated intentional murder. (PT 14-19)

To provide context to appellant's citations to the grand jury transcript in his statement of facts (Appellant's brief at 3), the officer responding to the homicide scene and who placed appellant in the back of his squad testified that appellant said, "I hope that demon is dead. I took care of that devil. I put bullets in that devil. I didn't fire any bullets at you all....Is that bitch dead or what....I hope she's dead." (GJ<sup>17</sup> 51-2)

Further, he told the homicide investigator (who also testified before the grand jury) that during the argument, his aunt tried to call 911 twice and he stopped her. He was afraid he might have to go back to prison. She ran out the door, and he grabbed a butcher knife and followed her to the neighbor's steps where he stabbed her repeatedly. He then went back into the house to get the gun because he wanted to do the job right and shoot her. He went back to the neighbor's front steps and fired multiple shots. (GJ 61-64)

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<sup>17</sup> "GJ" followed by a page number refers to the grand jury transcript herein. This testimony came from Sgt. Mark Kempe.

Respondent objects, as set forth in respondent's separate Motion to Strike filed herein, to portions of appellant's statement of facts which are either unsupported by any citation to the record or are allegedly supported by documents appellant now appends but which were not part of the record below.<sup>18</sup>

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<sup>18</sup> Respondent also notes that the source of numerous reported assertions in appellant's statement of facts is appellant's self-report to the defense-retained psychiatrist. Further, appellant's summary of grand jury testimony describing appellant with such loaded words as "raving" and "beg[ging]" the police to shoot him, are embellishments of the actual transcript. (GJ 26, 28, 30 and 42) As to appellant's assertion (Appellant's brief at 4) that appellant was "evaluated by medical and court personnel" on December 10, 2002, this claim is not supported by citation to facts in the record. The "legal intake form" noting that appellant has "psych" problems were notes made by public defender staff's interview with appellant on the date of appellant's first appearance in Ramsey County District Court, the day the public defender was appointed to represent him and presumably provided part of the basis for Mr. Clippert's December 18, 2002 Rule 20 request. (A-31 to 32).

## ARGUMENT

**Under the facts of this case, the post-conviction court did not abuse its discretion in denying post-conviction relief without an evidentiary hearing when appellant wholly failed to allege facts which, if proved at an evidentiary hearing, would support his claim of ineffective assistance of counsel.**

### **A. Standard of review.**

A post-conviction proceeding is “a collateral attack on a judgment which carries a presumption of regularity and which, therefore, cannot be lightly set aside.” State ex rel. Gray v. Tahash, 156 N.W.2d 228, 229 (Minn. 1968). Under Minn. Stat. § 590.01, et. seq., a person convicted of a crime is entitled to relief if he can prove his conviction was obtained in violation of his rights under the Constitution or Minnesota law. The burden of proof at such a hearing rests entirely on the petitioner. Minn. Stat. § 590.01, subd. 3.

An evidentiary hearing is not required at all, however, unless the petitioner alleges facts which, if proved by a preponderance of the evidence, would entitle him to the requested relief. State v. Kelly, 535 N.W.2d 345 (Minn. 1995); Minn. Stat. § 590.04, subd. 1. The district court is not required to hold an evidentiary hearing unless there are material facts in issue which must be resolved to determine the merits of the claim. King v. State, 562 N.W.2d 791 (Minn. 1997); Krominga v. State, 311 N.W.2d 858 (Minn. 1981). A post-conviction court's decision to deny relief will not be disturbed absent an abuse of discretion. Wieland v. State, 457 N.W.2d 712, 714 (Minn. 1990).

Appellant was is not entitled to an evidentiary hearing based on mere argumentative assertions without factual support. Sutherlin v. State, 574 N.W.2d 428, 436 (Minn. 1998); Hodgson v. State, 540 N.W.2d 515 (Minn. 1995); Berg v. State, 403

N.W.2d 316 (Minn. Ct. App. 1987). He is even less entitled to relief when his claim omits, and impedes the discovery of, material facts and when he makes only generalized claims, implying specifics will be revealed or discovered if and when an evidentiary hearing takes place.

**B. Appellant failed to state facts which, if proved at an evidentiary hearing, would support his claim of ineffective assistance of counsel.**

Initially, appellant requested that his conviction be vacated and a new trial ordered or, in the alternative, that an evidentiary hearing be held or that his sentence be modified. (Petition at 7-8) Appellant's sole claim was that Mr. Clippert was constitutionally ineffective<sup>19</sup> for failure to obtain a Rule 20 evaluation of appellant and, specifically, for failure to obtain the October 2002 psychological evaluation of appellant by Dr. Robert Barron conducted in connection with appellant's application for Social Security disability benefits, as well as for aborting the court-ordered Rule 20 evaluation he requested and which was ordered on December 18, 2002. (Petition at 2-6)

The impression left both by the initial petition and in the instant appeal is that Mr. Clippert was constitutionally ineffective because he waived a Rule 20 claim without the benefit of an expert opinion. Had the decision been based on expert's assessment that appellant had no Rule 20 defense, there could be no ineffective assistance. The petition omitted any mention of the fact that the public defender's office had, in fact, retained the

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<sup>19</sup> A derivative claim is that a Rule 20 evaluation would allegedly reveal that appellant was not capable of entering a knowing, intelligent and voluntary plea (and that therefore counsel was constitutionally ineffective for failure to spot this). However, Judge Wheeler was satisfied appellant was competent (A-7), and neither of the subsequent Rule 20 examinations found him incompetent.

services of Dr. R. Owen Nelson for purposes of doing an evaluation of appellant and that, on the very morning a public defender internal email was sent (which appellant construes as evidence that a Rule 20 defense was not explored for budgetary reasons), Dr. Nelson was in the jail seeing appellant. (RA-1)

These omissions were called to the post-conviction court's attention in respondent's post-conviction answer, appending the jail record showing Dr. Nelson's visit and respondent's affidavit detailing appellant's refusal to waive attorney-client or medical privilege so that respondent could investigate and respond to his claims. Nevertheless, appellant's reply memorandum did not cure these omissions but asserted only "that those waivers would be more than likely forthcoming at a point in time when there was an evidentiary hearing..."<sup>20</sup> As had the petition, appellant's reply again failed to state facts which, if proved at an evidentiary hearing, would show that Mr. Clippert and appellant did not have the benefit of professional advice on the Rule 20 issue before it was waived. Specifically, even though an affidavit from appellant or Mr. Clippert detailing what happened between December 18 and the January 30, 2003 Rule 20 waiver and the reasons therefore could have provided some factual support or explanation for these actions, appellant provided no such affidavits with either his initial petition or (after this deficiency was pointed out in respondent's answer) in his reply brief. Appellant thus not

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<sup>20</sup> See appellant's post-conviction reply brief at 4 (Item # 10 in Ramsey County District Court File K0-03-708). Curiously, Mr. White's own affidavit, attached as Exhibit J to the reply brief, makes no such claim.

only failed to state facts which, if proved at an evidentiary hearing, would show counsel's actions from December 2002 through the time of appellant's plea and sentencing were constitutionally ineffective but also barred respondent from ascertaining those facts which could prove or disprove the claim by refusing to waive appellant's attorney-client privilege as to Mr. Clippert or his medical privilege. (RA-2) This left only generalized argumentative assertions of ineffective assistance of counsel which did not entitle appellant to a hearing. Sutherlin, supra.

Appellant also implies (Appellant's brief at 1, 6) that the public defender's office did not allow the Rule 20 to proceed because of budgetary considerations (based on a copy of an internal email appended to the petition as Exhibit D and to appellant's brief at A-41). The plain language of the email refutes the contention that Rule 20 issues were not explored for budgetary reasons. The email expressly affirms that the use of an expert *is* warranted for the case, expressly names the expert to be consulted (Owen Nelson) and cautions only that if the expert concludes he cannot help the case, to cut off the consultation at that point without incurring additional expense (e.g., of a full written report).

The reasonable inference from this email, in the context of all the other facts in the case, including documentation of Dr. Owens visit to petitioner on December 19, 2002, is not, as appellant implies, that counsel was instructed to abandon a competency evaluation and mental illness defense but that the expert evaluated appellant and concluded that he was competent and did not have a valid mental illness defense. Certainly, this email does not support a conclusion that counsel failed to explore the Rule 20 issues or that he made

a unilateral determination of petitioner's competence. But to the extent there was any ambiguity, an affidavit by Mr. Clippert would have provided the necessary context. Since none was provided, the only reasonable conclusion is that appellant did not wish to disclose to the court the very information which would demonstrate that Mr. Clippert was not acting in a vacuum but only after receiving an adverse opinion by Dr. Nelson and that, therefore, there was no basis for an ineffective assistance of counsel claim.

**C. The Barron evaluation is irrelevant to any Rule 20 claim.**

Appellant's production of psychologist Robert Barron's evaluation (A-10 to 13) does nothing to change these facts. Specifically, the Barron evaluation was never intended to, nor did it, provide any facts which demonstrated either that appellant was incompetent and therefore unable to enter a knowing, intelligent and voluntary plea or that he had a legitimate mental illness defense.

The fact that petitioner on October 29, 2002 underwent a psychological evaluation for the purpose of obtaining Social Security disability benefits is wholly immaterial to the specific issues addressed in a Rule 20 evaluation. The Barron report, based on administering an IQ test and a single clinical interview, supported appellant's Social Security disability benefit application. The report of that evaluation does not address and certainly does not in any way support a conclusion that appellant is either incompetent or that he may have a mental illness defense within the meaning of Rule 20.

Therefore, whether trial counsel knew of and sought out the report or did not is wholly immaterial to a post-conviction claim of ineffective assistance of counsel. The primary source of information for Barron's report was what appellant himself provided.

Appellant's self-report included his history of violent behavior and incarcerations which he told the examiner had been virtually continuous since age 14 ending with his recent release from the San Carlos Correctional Facility in Colorado. (A-12) Such a history does not support an inference of lack of criminal responsibility for one's crimes. In addition, the evaluation done for the purpose of obtaining financial benefit.

A report based a single interview and the uncorroborated statements of a person hoping to obtain a benefit is suspect in and of itself. In addition, Barron's provisional diagnosis of mild mental retardation is called into question by his observation that appellant's conversational ability appeared higher than his IQ test results would indicate, raising some questions regarding the accuracy of the test results and suggesting malingering. (A-11, 13)

An evaluation already suspect with regard to the purpose for which it was done is highly suspect when converted, as appellant attempts to do, to a different purpose for which it was never intended. There is absolutely nothing about the Social Security psychological report which in any way provides a factual basis for a claim of incompetency or a mental illness defense. Therefore, there is nothing here which provides a factual basis for any claim that counsel was constitutionally ineffective for failure to obtain and use this report to pursue a Rule 20 claim. The report fails to provide any basis for any post-conviction relief or any evidentiary hearing. See, Wieland, supra.

The standard of competency for standing trial, pleading guilty or waiving counsel, as interpreted in Minnesota law, is simply whether the defendant suffers from a mental illness or deficiency so severe that he "lacks sufficient ability to knowingly, voluntarily,

and intelligently waive the constitutional right to counsel, to appreciate the consequences of the decision to...appreciate the consequences of the decision...." Minn. R. Crim. P. 20.01, subd. 1. The Barron evaluation neither states nor provides a factual basis for such an opinion.<sup>21</sup> Certainly, a provisional diagnosis of mild mental retardation--particularly with a caution to rule out malingering (A-13)--is a far cry from incompetency within the meaning of Minn. R. Crim. P. 20.01.<sup>22</sup>

Nothing in the Barron report supports a claim of ineffective assistance of counsel for failure to detect appellant's alleged incompetency. The post-conviction court therefore entirely properly concluded he was not entitled to either a hearing or to any relief on this ground.

Appellant's post-conviction claim that he was ineffectively represented by Mr. Clippert for failure to raise a Rule 20 mental illness defense is equally conclusory and

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<sup>21</sup> Indeed, as to appellant's mental ability, Barron's opinion, to the extent it is relevant at all to this issue, is the opposite: He concludes appellant mentally *is* "capable of communicating, comprehending and retaining simple directions at an unskilled, competitive employment level" and the only reason he qualifies nonetheless for Social Security disability benefits in Barron's opinion is his "significant history of emotional problems and violent behaviors...." (A-13) The Hackett evaluation does not address competency at all but simply states appellant's intellectual functioning "is in the borderline intellectual functioning range." (A-17)

<sup>22</sup> Further, as Dr. Hanson noted in his evaluation even a provisional diagnosis of mental retardation is not substantiated by Barron's findings since such a diagnosis "cannot be based simply upon IQ test findings, but must also include a determination, through testing, that an individual also exhibits corresponding deficits to the same degree in adaptive function pertaining to self-care, activities of daily living, socializing, employment, etc. Mr. Bruestle has never displayed such impairment in adaptive function. He has displayed problems in functioning stemming from his considerable personality pathology and willingness to act out in a deviant and antisocial manner, but that does not equate with incapacity to function due to mental retardation." (RA-26)

without factual support. Nothing in the Barron evaluation Mr. Clippert is faulted for not discovering in any way suggests appellant meets either did not know the nature of his act or that it was wrong. Minn. R. Crim. P. 20.02. Dr. Barron's sole source for his conclusions of Bipolar II Disorder or Personality Disorder appears to be appellant's self-report that he has been variously diagnosed with Bipolar Disorder and Schizoaffective Disorder. (A-11) The bulk of his report discusses appellant's alleged and provisional diagnosis of mental retardation. (A-10 to 13) Certainly, there is nothing here that provides any support for a mental illness defense.

Similarly, the internet printout dated December 20, 2002 concerning the San Carlos Correctional Facility in Colorado (A-42), cited both in the petition below and the instant appeal, has no probative value in demonstrating ineffective assistance of counsel. It merely shows appellant was last incarcerated at a correctional facility for mentally ill prisoners. The mere fact that appellant had a history of mental illness is not in dispute and in no way suggests he had a mental illness *defense* under Minnesota law. Indeed, the fact that Mr. Clippert knew of appellant's prior incarceration at this facility merely shows why counsel took the step he did in retaining Dr. Nelson's services.

Once again, it is telling that appellant in the post-conviction proceedings below provided the court only this printout from Mr. Clippert's file but nothing further from this facility which he claims Clippert should have obtained which would support his generalized ineffective assistance of counsel claim. Neither the fact that appellant had a long history of mental illness or that he was incarcerated in a Colorado correctional facility for prisoners with mental illnesses in no way creates a presumption that he was so

mentally ill as not to know the nature of his act--particularly when considered in the context of his 30-year history of criminal convictions and juvenile adjudications for violent crimes.

**D. The reasonable inference to be drawn from appellant's failure to divulge the nature of Dr. Nelson's consultation with appellant and his counsel is that there was no legitimate Rule 20 defense and therefore no ineffective assistance of counsel.**

In addition to the irrelevancy of the Barron evaluation, appellant's omissions and nondisclosures to the post-conviction court warranted denial of post-conviction relief without a hearing. Both appellant and Mr. White knew and failed to disclose to the post-conviction court that, in fact, forensic psychologist Dr. R. Owen Nelson had been retained by the Ramsey County Public Defender's Office specifically to assess the merits of any Rule 20 claim in connection with his case. In the absence of any evidence to the contrary, the reasonable inference to be drawn is that appellant's decision to waive any Rule 20 claim was made after Dr. Nelson's interview with appellant and with the benefit of his presumably adverse opinion.

Even after respondent pointed out these omissions in its answer to the petition, attaching the jail visit record and affidavit documenting that appellant refused to waive his privilege, appellant still failed to provide any factual basis for its claim of ineffective assistance. Although affidavits of either appellant or Mr. Clippert could have shed light on what occurred between December 18, 2002 (the date the Rule 20 evaluation was requested) and January 30, 2003 (the date appellant formally withdrew his request), none was supplied. By failing to state any facts which, if proved at an evidentiary hearing, would demonstrate ineffective assistance of counsel and entitle him to the relief

requested, the petition and the reply stated conclusory allegations only. The post-conviction court correctly concluded appellant had failed to state a sufficient basis for a claim of ineffective assistance and that he was therefore not entitled to a hearing.

This conclusion is particularly appropriate in light of appellant's obvious lack of candor before the post-conviction court (failure to disclose the Nelson evaluation) and his impeding of discovery which could shed light on his claims (refusal to waive privilege to permit respondent to investigate). This lack of candor is reinforced by appellant's request to delay the post-conviction court's response until after the Sherburne County Rule 20 evaluation (by forensic psychologist Dr. Gregory Hanson) was done (RA-6), his failure to disclose the Hackett Rule 20 report until respondent on January 27, 2005 provided the Hanson report (which rejected any Rule 20 defense) to the post-conviction court and requested summary judgment against appellant and his ultimate waiver of any Rule 20 defense in the parallel Sherburne County case for which both Rule 20 reports were done.<sup>23</sup>

**E. The subsequent 2004 Sherburne County Rule 20 evaluations are insufficient to compel vacation of appellant's Ramsey County conviction.**

The court-ordered Sherburne County Rule 20 report by Dr. Gregory Hanson, filed August 25, 2004 and based on two interviews and an extremely thorough review of appellant's prior criminal and mental health records, concluded both that appellant was

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<sup>23</sup> Court records in the Sherburne County case show appellant signed a waiver of jury trial on August 6, 2005 (RA-49), agreed to submit the case as a Lothenbach stipulated trial to the court on August 25, 2005 (one day after notice of appeal was filed herein)(RA-45) and was adjudged guilty of the offense by the court in Findings of Fact, Conclusions of Law and Judgment filed September 20, 2005 (RA-46 to 48). Rewitzer, supra.

competent and that he did not have a Rule 20 defense. (RA-27 to 32) By order of that court, this report forwarded to Ramsey County. (RA-33)

Thereupon, appellant on January 31, 2005 filed the Rule 20 report of the defense-retained expert, Dr. Hackett, with the Ramsey County post-conviction court. Even in this belated disclosure, however, appellant failed to state facts which, if proved at an evidentiary hearing, would entitle him to the relief request. The Hackett report notably does *not* render an opinion on appellant's mental state on the day of the Ramsey County homicide (but only on his state on October 2, 2003). Moreover, appellant after disclosure of this report did not request an evidentiary hearing at all but, rather, that the post-conviction court summarily grant relief and vacate appellant's conviction based on the three reports. (RA 37)

Thus, even assuming the 2004 Sherburne County Rule 20 evaluations had any relevance at all to the issue of ineffective assistance of counsel in December 2002, appellant had still, as of his last communication with the post-conviction court on March 4, 2005, failed to state facts which, if proved at an evidentiary hearing, would entitle him to the relief requested. In addition, the reasonable inference from appellant's lack of candor together with his refusal to waive privilege and his attempt on March 4, 2005 to obtain summary judgment without a hearing is that he was seeking to set aside his conviction without ever disclosing the facts most directly relevant to his claim: Nelson's communications with appellant and Mr. Clippert, including his opinion and advice, and the discussions between appellant and Mr. Clippert leading up to decision to waive the

2002 Rule 20 evaluation. The reasonable inference is that had appellant waived these privileges, this evidence would have refuted the ineffective assistance of counsel claim.

The reasonable inferences from these omissions, refusals and delayed disclosure are that Mr. Clippert, an experienced criminal defense attorney, (1) had the benefit of a professional opinion, (2) consulted fully with his client and (3) had the full support of his client in the action he took and (4) that appellant prevented independent investigation that could verify this directly.

Appellant's failure to state any fact which refutes these inferences when his is the burden of proof negates any claim of entitlement to an evidentiary hearing. It has at all times been appellant's burden to allege facts which, if proved, would establish ineffective assistance of counsel such that his presumptively valid conviction could be collaterally attacked. Kelly, supra. Having consistently and repeatedly refused to provide a factual basis which, if it existed at all, was entirely in appellant's control, he was not entitled to an evidentiary hearing. To rule otherwise would open the door to collateral attacks of valid convictions based on belated Rule 20 allegations without being subject to all the requirements of that rule-- including full disclosure to the state and adverse examination by the state.

Under all of these circumstances and because the burden of proof in a collateral attack on a presumptively valid conviction is entirely on the petitioner, it cannot have been an abuse of the post-conviction court's discretion to deny relief without a hearing.

**F. Appellant is not entitled to post-conviction relief based on newly-discovered expert testimony.**

Essentially, appellant is claiming he is entitled to relief based on newly discovered expert opinion. In general, expert testimony does not constitute newly discovered evidence warranting a new trial. See, Wieland, supra (expert's opinion that defendant suffered from hyperthyroidism at time of crimes which prevented him from forming necessary specific intent insufficient in light of extensive physical and testimonial evidence at trial that he did); State v. Blasus, 445 N.W.2d 535 (Minn. 1989)(discovery of new expert opinion in favor of mental illness claim did not warrant a new trial).

There are, moreover, sound policy reasons for the general rule that the opinion of newly discovered experts is not sufficient to collaterally attack a conviction. Indeed, if it were not the rule, few convictions would be safe from precisely the kind of belated claim of ineffective assistance of counsel, based on an after-the-fact mental health assessment, seen here. Certainly, a defense-retained Rule 20 evaluation done in a different jurisdiction for a subsequent crime--especially an evaluation which is contradicted by the court-ordered evaluation in that jurisdiction--is not sufficient to compel an evidentiary hearing on ineffective assistance of counsel.

For newly discovered evidence claims, the burden is entirely on appellant to establish that the new evidence is not doubtful *and* that the evidence will probably produce a different result on retrial. Wieland, supra; Wayne v. State, 498 N.W.2d 446 (Minn. 1993). Appellant fails to satisfy either prong. Because the alleged new evidence relates to a claim of mental illness, appellant had the additional burden of stating facts

satisfying the criteria of the M'Naghten insanity test. Minn. R. Crim. P. 20.02, subd. 4 (2). Appellant wholly failed to state any facts which, if proved at an evidentiary hearing, would establish he did not know the nature of his act on December 7, 2002 or that it was wrong.

The issue is not whether, at some future time, an expert might be found who would opine that appellant could have asserted a Rule 20 defense but whether, under all the circumstances at the time the Rule 20 claim was waived, doing so was constitutionally ineffective assistance of counsel; i.e., whether appellant has stated sufficient facts which, if proved at an evidentiary hearing would overcome the strong presumption that counsel's performance fell within the wide range of reasonable professional assistance. State v. Jones, 392 N.W.2d 224, 236 (Minn. 1986). Especially when, as in this case, appellant has omitted the obvious direct evidence that would either support or conclusively disprove his generalized claim of ineffective assistance, it cannot have been an abuse of discretion for the post-conviction court to deny relief.

Finally, even if appellant had not on March 4, 2005 abandoned his request for an evidentiary hearing by demanding summary vacation of his conviction, there can be no abuse of discretion herein when in Sherburne County, the jurisdiction where the Rule 20 claim was directly raised and could have been fully litigated, appellant ultimately did waive this claim and was found guilty after a court trial on stipulated facts. (RA-45 to 49)

**G. Rompilla does not compel a different result.**

Appellant's reliance on the recent United States Supreme Court decision in Rompilla v. Beard, 125 S.Ct. 2456 (2005) is also misplaced. In that federal habeas case, the Supreme Court held it was ineffective assistance of counsel for the defense attorney, in a capital murder case, to fail to examine the defendant's prior rape conviction file when counsel knew the prosecution would rely on that case as evidence of aggravation supporting the death penalty. Specifically, the Rompilla court refers to ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-4.1(a) (3d ed. 1993),<sup>24</sup> on the defense duty to investigate, which currently reads (in pertinent part):

"Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts *to secure information in the possession of the prosecution and law enforcement authorities....*"

Rompilla turns on the highlighted language.<sup>25</sup> The Supreme Court reversed because it found it was objectively unreasonable under Strickland v. Washington, 466 U.S. 668 (1984) for the defense attorney in the sentencing phase of that death penalty case not to review case files related to Rompilla's prior convictions which it knew the prosecution intended to use as aggravating factors. Rompilla at 2465-6.

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<sup>24</sup> Appellant's brief (at 18-19) also refers to this standard but quotes the obsolete 1982 second edition.

<sup>25</sup> Appellant, on the other hand, highlights the language "and the penalty in the event of a conviction" (Appellant's brief at 18), apparently equating penalty with defense. A defense of mental illness has nothing to do with penalty for conviction.

However, Rompilla is inapposite because appellant's case does not involve either the death penalty (and the heightened standard such cases always entail) or defense failure to review either any evidence in the possession of the prosecution or law enforcement or any information the prosecution used against him in aggravation of sentence. On the contrary, appellant's case, at most, involves the difference in the opinion of experts on the existence or lack of existence of a defense in a subsequent case --a case in which appellant ultimately waived the defense. Above all, appellant has failed to state facts which would show Mr. Clippert's handling of the Rule 20 issue was constitutionally unreasonable within the meaning of Strickland because he has elected to omit entirely the details of what led up to the waiver, including the critical role of Dr. Nelson's advice.

In sum, there is a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance. State v. Jones, supra at 236. Nothing about the facts presented by appellant to the post-conviction court below makes even a colorable showing that Mr. Clippert's performance was outside the wide range of reasonable professional assistance of counsel or that absent these alleged errors of counsel the result would, with reasonable probability have been different. Strickland, supra at 694; Gates v. State, 398 N.W.2d 558, 561 (Minn. 1987); Kelly, supra. When considered in the context of evidence of Dr. Owens's visit to appellant and appellant's refusal to waive either attorney-client or medical privilege so that respondent could have direct access to evidence which would support or refute his claims, the presumption of the reasonability of counsel's conduct in this case is only heightened.

The ultimate issue in assessing a post-conviction claim of ineffective assistance of counsel is whether counsel's representation was or was not within the wide range of reasonable representation of counsel. The post-conviction court held it was. Its conclusion is solidly supported by this record and therefore was not an abuse of discretion and should be affirmed on appeal. Strickland, supra; Gates, supra; Kelly, supra. Generalized, conclusory argumentative assertions unsupported by any evidence are for good policy reasons, including the lack of candor amply demonstrated here, insufficient to support a post-conviction evidentiary hearing, much less the relief requested. Berg, supra; Hodgson, supra; Sutherlin, supra.

### CONCLUSION

For all of the foregoing reasons, respondent State of Minnesota respectfully requests that post-conviction court's order denying relief be affirmed.

Dated: December 23, 2005

Respectfully submitted,

MIKE. HATCH  
State Attorney General

SUSAN GAERTNER  
Ramsey County Attorney



By: Jeanne L. Schleh  
Attorney Reg. No. 96726  
Assistant Ramsey County Attorney  
50 West Kellogg Blvd., Suite 315  
St. Paul MN 55102  
Telephone (651) 266-3093

Attorneys for Respondent