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STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

John Jason McLaughlin,

Appellant.

RESPONDENT'S BRIEF AND APPENDIX

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LEGAL ISSUES

I. Does application of the *M'Naghten* standard to an adolescent defendant violate the due process clause of the Minnesota Constitution?

The trial court did not rule.

Clark v. Arizona, 126 S. Ct. 2709 (2006)
Leland v. Oregon, 343 U.S. 790 (1952)
Kahn v. Griffin, 701 N.W.2d 815 (Minn. 2005)

II. Did the trial court abuse its discretion in denying appellant's mid-trial request for a continuance?

The trial court ruled in the negative.

State v. Barnes, 713 N.W.2d 325 (Minn. 2006)

III. Did the trial court abuse its discretion in imposing permissive consecutive sentences for appellant's two murder convictions?

The trial court ruled in the negative.

State v. Warren, 592 N.W.2d 440 (Minn. 1999)
State v. Wilson, 539 N.W.2d 241 (Minn. 1995)

STATEMENT OF THE CASE

A Stearns County grand jury indicted appellant John Jason McLaughlin for bringing a gun to Rocori High School in Cold Spring, Minnesota, on September 24, 2003, and using it to kill two fellow students, S[redacted] B[redacted] and A[redacted] R[redacted], and threaten a teacher. The indictment was in six counts. Count I charged appellant with first-degree, premeditated murder in violation of Minn. Stat. § 609.185(a)(1) (2004). Counts II, III, and IV charged appellant respectively with second-degree intentional murder in violation of Minn. Stat. § 609.19, subd. 1(1) (2004), and two counts of second-degree felony murder in violation of Minn. Stat. § 609.19, subd. 2(1) (2004). Count V charged appellant with second-degree assault in violation of Minn. Stat. § 609.222, subd. 1 (2004), and Count VI charged him with possession of a dangerous weapon on school property in violation of Minn. Stat. § 609.66, subd. 1d(a) (2004).

Appellant was 15 years old at the time of the offenses. After a five-day hearing, the juvenile court certified appellant for adult prosecution pursuant to Minn. Stat. § 260B.125, subd. 1 (2004) (R.A. 1-10; Exh. 215).[1] The court found that when appellant planned and committed the murders, he was not delusional or suffering from an extreme mental illness and possessed substantial capacity for judgment and control over his actions (R.A. 5). The court of appeals affirmed, and this Court denied review. *See Matter of Welfare of J. J. M.,* 2004 WL 2521277 (Minn. Ct. App. 2004), *rev. denied* (Minn. Jan. 20, 2005) (attached).

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[1] "R.A." refers to the appendix to respondent's brief.

Shortly after this Court denied review, appellant formally raised the defense of mental illness, and the trial court ordered a Rule 20 evaluation. *See* Transcript of February 18, 2005, hearing at 3. After subsequently being found competent to stand trial, appellant waived a jury, and the matter proceeded to a bifurcated bench trial before the Honorable Michael L. Kirk.

At the conclusion of the guilt phase, Judge Kirk found appellant guilty of the first-degree premeditated murder of S[redacted] B[redacted], the second-degree intentional murder of A[redacted] R[redacted], and possession of a dangerous weapon on school property. After the mental-illness phase, Judge Kirk rejected appellant's mental-illness defense, finding that any mental impairment he may have suffered did not prevent him from knowing the nature of his acts or that they were morally wrong (R.A. 11-33).

Following a presentence investigation, Judge Kirk sentenced appellant to life imprisonment for his first-degree, premeditated murder of S[redacted] B[redacted] and to a consecutive twelve-year prison term for his second-degree felony murder of A[redacted] R[redacted]. This direct appeal followed.

STATEMENT OF FACTS

I. GUILT PHASE

Appellant was born on July 19, 1988, and grew up in Cold Spring, Minnesota, where he lived with his parents and attended public school (T. 151, 249, 338, 429, 712, 861; Exh. 171 at 2). At the time of appellant's trial, appellant's father, David McLaughlin, had been a police officer for 23 years (T. 861).

In the spring of 2003, David McLaughlin arranged for appellant to enroll in a Department of Natural Resources firearms safety program (T. 852-53, 862). Appellant was taught never to point any firearm at anything he did not intend to shoot and to identify positively not only his target but what is beyond the target (T. 856). Appellant was also taught that the range of a .22 caliber long rifle bullet was up to a mile and one half (T. 857, 859). During the class, appellant fired fifteen .22 caliber rounds from a long gun and five .22 caliber rounds from a handgun (T. 858). To impress upon the students the dangerousness of a .22 long-rifle bullet, the instructors demonstrated what happened when such a bullet struck a milk carton at distances from 25 to 50 yards (T. 859). Appellant passed the firearms-safety course, correctly answering 29 of 30 questions on the final examination (T. 854-55; Exh. 169).

Appellant also developed a familiarity with firearms at home and at a gun range. In September 2003, David McLaughlin had approximately 20 firearms at his home, including a .22 caliber Colt semi-automatic target pistol (T. 863-865). The pistol was kept inside a hidden drawer of an antique dresser located in a spare bedroom of the McLaughlin residence (T. 865-66). With the drawer closed, a person unfamiliar with the secret drawer would not notice its existence (T. 867). David McLaughlin kept ammunition for his firearms, including a quantity of .22 caliber long-rifle bullets, in a separate closet in the same spare bedroom (T. 867-68). Appellant knew where the handguns were hidden and where the ammunition was kept (T. 867-68). David McLaughlin twice took appellant to a gun range where appellant shot the .22 caliber Colt pistol and demonstrated an ability to handle it (T. 863-64).

Playing violent video games was one of appellant's leisure activities (T. 872-74, 899-904). One of the games—*Grand Theft Auto: Vice City*—teaches the player that it is better to shoot someone in the head because a person shot in the head goes down easily while a person shot somewhere else comes after the shooter (T. 901-04).

Although shy, and not one of his school's more popular students, appellant had a number of friends and acquaintances with whom he interacted socially (T. 362, 429, 431, 712-13, 715, 872, 898-900, 902). Appellant suffered from acne on his face and back (T. 870). Although appellant did not talk about his acne, his father believed he was sensitive about it (T. 870-71).

Appellant met B[redacted] K[redacted] in elementary school and developed a friendship with her over the next several years (T. 712-13). During the summer preceding their 9th grade school year, they began exchanging telephone calls and e-mails (T. 714). Appellant's e-mail address was "*sharpestshot 290*" (T. 726-27). B[redacted] also developed a relationship with S[redacted] B[redacted] (T. 715-16). She saw him socially outside of school and viewed him as a "very inspiring person" (T. 716). S[redacted], in contrast to appellant, had many friends and was one of the more popular students (T. 252, 362-63, 432, 512, 528, 716).

There came a time when appellant told B[redacted] K[redacted] that he had a girlfriend named Suki or Soki Renoko who wanted to e-mail B[redacted] and get to know her (T. 719-20). B[redacted] agreed and thereafter exchanged several e-mail messages with someone claiming to be Soki Renoko (T. 720). The e-mails were initially innocuous, but later contained awkward, personal questions that B[redacted] did not think a normal

14-year-old girl would be asking another (*Id.*). B came to suspect that Soki Ronoko did not exist, and that the e-mail messages were actually from appellant (T. 721). The spelling errors in appellant's e-mails were the same as those in the e-mails allegedly from Soki Ronoko (*Id.*). Furthermore, when appellant was on-line, Soki Ronoko was never on-line, and vice versa (*Id.*). The "Soki Ronoko" e-mails depicted appellant as a physically violent person and included tales of appellant beating up someone during a paintball competition and stabbing someone else who had done something to appellant's sister (T. 722).

N P, appellant's neighbor and friend, has known appellant all his life and S B since the 6th grade (T. 897-98, 905-06). N testified that he never saw any problems or conflict between appellant and S B except once in the hallway in middle school (T. 906). N likewise could not recall ever seeing S tease appellant or call him names (T. 907).

Appellant and S B began their freshman year at Rocori High School in September 2003 and were in the same fourth-period gym class (T. 250). S D, another ninth grader, once saw appellant and S B pushing each other during gym (T. 342-43). At the time, B was 5'11 and 121 pounds, and appellant was 5'4 and 135 pounds (T. 68, 70, 123, 988-89). This altercation appears to have been an isolated incident. S D did not see any further altercations between appellant and S and was unaware of any problems or name calling between them (T. 342-43). The fourth-period gym teacher and other members of the class likewise failed to notice any teasing, or other conflicts between appellant and S (T. 151-55, 248, 250, 252, 269,

306-07, 318, 432, 435-36, 456-57, 529). C[redacted] R[redacted], a friend of appellant, had also failed to observe any name calling, teasing, or other problems between appellant and S[redacted] in the eighth grade (T. 432).

Those who knew appellant and S[redacted] B[redacted] outside of gym class likewise failed to observe any conflict between them. Ninth grader J[redacted] M[redacted], a friend of S[redacted] B[redacted], and had a third-period driver's education class with appellant (T. 509, 512, 511, 515). M[redacted] was not aware of any teasing, name calling or other problems between appellant and S[redacted] (T. 512-13). Ninth grader N[redacted] A[redacted], a very close personal friend of S[redacted], never saw S[redacted] interact with appellant, much less tease or make fun of him (T. 737-38). Finally, B[redacted] K[redacted], who interacted socially both with appellant and S[redacted] was not aware of any conflict between them (T. 717).

Appellant also had a number of run-ins with ninth grader C[redacted] E[redacted]. C[redacted] called appellant a "fag" and "asshole," (T. 344-45, 359, 434). Appellant took offense at C[redacted]'s comments and called him names in response (T. 345, 435).

After thinking about it for a week, appellant decided on Monday, September 22, to bring a gun to school (Exh. 172 at 18). He checked security at the school and determined that it did not have metal detectors but had surveillance cameras; he checked the angles of the surveillance cameras (*Id.* at 19).

Appellant's plan was to "[s]hoot some people" because they were "[t]easing me all the time" (*Id.* at 5). While still at home on the morning of September 24, 2003, appellant took the .22-caliber Colt pistol that he previously fired from its hiding place and gathered ammunition from the nearby closet (Exh. 172 at 19).

Appellant rode the bus to school on Wednesday, September 24, and sent an e-mail message to B[redacted] K[redacted] at 7:40 a.m., using one of the school computers (T. 746-47; Exh. 157). The message subject was "Goodbye," and said:

> Befor i go to far i have to ask you not to tell anyone about this not the news cops or parents okay lets start fot the top i like you i have always liked you fome the first time i saw you until this varry day. i would have said some thing but i was too shy. But a you were the nicest person i ever met and i thank you for that. So I guess this is goodbye my love. [sic]

(T. 726). Because she had left for school before the message was sent, B[redacted] did not see it until after she returned home after the murders (T. 723).

Appellant smuggled the gun into the school in his gym bag (Exh. 172 at 5, 20). He initially put it in his school locker, but took the bag containing his gym clothes and the gun to his third-period class and placed it behind him as if to hide its contents from view (*Id.* at 6, 20; T. 518-20). Appellant asked two classmates if they had seen S[redacted] B[redacted] and C[redacted] E[redacted] (T. 515, 531-32).[2]

After his third-period class, appellant went to the locker room for gym, but did not change into his gym clothes (T. 162) Appellant took the pistol into the bathroom, "cocked it and waited for [S[redacted] B[redacted]] to come" (Exh. 172 at 7, 23). Appellant cocked it in the bathroom so that "no one would see" (*Id.* at 23). He then went back into the locker room and waited for S[redacted] (*Id.* at 7, 23).

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[2] Appellant had had a number of run-ins with ninth-grader C[redacted] E[redacted]. C[redacted] called appellant a "fag" and "asshole" (T. 344-45, 359, 434). Appellant was offended and called E[redacted] names in response (T. 345, 435). E[redacted] happened to be away from school that day for a funeral (T. 437).

S B changed into his gym clothes in the locker room and then entered the basement hallway (T. 165-66, 252). Appellant followed him, took the pistol from the duffel bag, and aimed it at S with a two-handed grip (T. 214-16, 255-56). Appellant initially fired one shot, hitting S on the left side of his back (T. 92-94, 214-16, Exh. 172 at 9-10). Appellant cleared the weapon, ejecting a round onto the basement hallway floor and inserting another round into the chamber (T. 256, 259). Staff member L H turned around after the first shot and ran upstairs, afraid for her life (T. 217).

Appellant then fired a second shot in the basement hall (T. 167, 256, 292). That bullet missed S B, who was turning to go up the stairs into the gym and struck senior A R who was coming in the opposite direction (T. 284, 292). The bullet struck A at the base of the neck (T. 77). Another student was in the immediate area of A (T. 294).

Appellant knew that one shot had hit S B, and that S was trying to escape by climbing the stairs toward the gymnasium (Exh. 172 at. 8-9). During his attempted escape, S told a couple of students that he had been shot, and went toward M J, a gym teacher seated on the bleachers in the gymnasium (T. 167, 170-72, 260-61). Appellant pursued S up the stairs into the gymnasium, confronted him, and pointed the gun at S's forehead (T. 175). According to several students, appellant held the pistol only inches away from S's face (T. 175, 311-12, 410). Appellant then fired the third shot at S, who dropped immediately to the floor (T. 175, 311-12).

M J looked up from his clipboard and saw S B lying on the floor and appellant holding the pistol (T. 366-68). As J walked toward appellant, appellant pointed the gun at him (T. 177, 370). J put up his hand and said, "No" (T. 178). With that, appellant lowered the gun and operated the slide back and forth to empty the magazine of its remaining six rounds (T. 178, 371, 373, 649-50). J grabbed the gun with one hand and appellant with the other (T. 372).

J took appellant to the principal's office, put him in the office of a school counselor, and asked a secretary to call 911 (T. 374, 558-60)). Cold Spring Police Chief Phil Jones arrived shortly after 11:38 a.m. and found S B lying on the gymnasium floor in a pool of blood (T. 581). A R was downstairs on the floor of the basement hallway also lying in a pool of blood (T. 582-83). A R' father, a paramedic, found his son lying on the basement floor with M K leaning over him (T. 609).

A R was taken to St. Cloud Hospital where he was pronounced dead at 12:54 p.m. (T. 849). S B was airlifted to St. Cloud Hospital, where surgeons immediately operated on his brain (T. 823). Over the next several days, S never regained consciousness and his condition deteriorated over the next eight to ten days (T. 825, 827-28). S was pronounced dead on October 10, 2003, at 12:59 p.m. with his family at his side (T. 779-80, 831).

Appellant was arrested and questioned by BCA Special Agent Kenneth McDonald in an interview room at the Stearns County Law Enforcement Center (T. 986-89). The interview was videotaped (T. 989-900; Exhs. 171, 172).

Agent Ken McDonald began the interview at 1:15 p.m. (Exh. 172 at 2-3). Appellant was advised of his Miranda rights and waived them (*Id.*). When Agent McDonald began the interview, he was aware that two students had been shot but unaware how seriously either had been hurt (T. 991).

During the initial portion of the interview, appellant admitted taking the gun to school to "shoot some people" because he had been teased (Exh. 172 at 5). He admitted shooting S[redacted] B[redacted] in the left side and then following him up into the gym (*Id.* at 5-6). Appellant said that he followed S[redacted] because he "just wanted to keep going" (*Id.* at 11). When asked what he meant by saying that he wanted to keep going, appellant told Agent McDonald "I wanted to shoot him again" (*Id.*). Appellant said that he had been teased "basically about my zits and stuff" (*Id.* at 14). Appellant stated that he just wanted to hurt S[redacted] and denied wanting to kill him (*Id.*).

Appellant was able to accurately point to where he had shot S[redacted] B[redacted] on the left side of his back. Appellant said, "I saw his back, his back was to me" (*Id.* at 10). He claimed that he was five or six feet from S[redacted] when he shot him in the gymnasium (*Id.* at 12). He claimed he thought he shot S[redacted] in the shoulder in the gymnasium (*Id.* at 13). He said S[redacted] "just fell down" after he shot him in the gymnasium (*Id.*). When asked if it was possible he shot more than one person, he said, "I don't think so" (*Id.* at 14). When asked if there was a way he could have shot two people and forgot about it, he replied, "If I missed, maybe" (*Id.*).

Agent McDonald then left the interview room and received additional information obtained from the crime scene (T. 991-92; Exh. 172 at 15). McDonald returned and

informed appellant that one person had died (*Id.* at 15). He informed appellant that he could be tried as an adult and readvised him of his Miranda rights; appellant again waived his rights (Id. at 15-16).

Agent McDonald then went back over some of the information to clarify the planning that went into the murder. Appellant said this had been brewing since sixth grade and that he had started thinking about bringing a gun to school the week before the murders (*Id.* at 18). Appellant said that he had decided on Monday to check the school for security devices (*Id.*). He observed the angles of the security cameras and determined that there were no metal detectors (*Id.* at 18-19). He described how he smuggled the gun into the school and said that he had planned to do the shooting in the gym class because that was the only class that he had with S[redacted] (*Id.* at 20-21). He said he cocked the pistol in the bathroom so that no one would see him and then waited for S[redacted] (*Id.* at 22). When asked about his intention, appellant said, "I was just trying to hurt him like he hurt me" (*Id.* at 23). He denied wanting to seriously injure or kill anybody (*Id.* 24). When asked what sort of damage he thought that a .22-caliber gun would do to someone, he said, "Not very much" (*Id.*).

When asked what he thought had happened to S[redacted] after he had shot him in the gym, appellant said, "I really don't know" (*Id.* at 26). When asked if he thought he had done something wrong, he replied, "Yeah" (*Id.* at 26-27).

Based on a review of S[redacted] B[redacted]'s medical records as well as the findings of his autopsy (T. 67-68). Dr. McGee testified that the autopsy findings, and S[redacted]'s CT scans and x-rays were consistent with the muzzle of the murder weapon having been between

two and twelve inches from S[redacted]'s head when it was fired, and inconsistent with appellant's claim to Agent McDonald that appellant had been five or six feet away from S[redacted] and had been trying to shoot him in the shoulder from behind (T. 67-68, 110-11, 113, 115, 141).[3]

After appellant was arrested, investigators interviewed a number of appellant's friends and acquaintances as well as friends of S[redacted] B[redacted] in an effort to confirm appellant's claim that he had been tormented by S[redacted] (T. 1012-13). Only one person, N[redacted] P[redacted], indicated that S[redacted] had teased appellant, and that teasing had primarily been in middle school (T. 1013).

II. MENTAL-ILLNESS PHASE

A. Appellant's Post-Offense Behavior

Following appellant's arrest, he was confined at the Prairie Lakes Youth Programs detention facility in Willmar, Minnesota, for approximately 17 months (T. 2252, 2269-70). Bradley Bengston, the program director, testified that with the exception of a couple of small incidents, appellant's behavior during that time period was good (T. 2252-54). Appellant did not exhibit any unusual speech or thought patterns (T. 2254).

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[3] Based on her test-firing of the murder weapon, a BCA firearms expert also testified that appellant had not been five to six feet away from S[redacted] B[redacted] when he shot S[redacted] in the head (T. 948-49). Even though the BCA expert's test-firing experiments indicated a proximity range of eighteen to thirty-six inches, she could not rule out the accuracy of eye witness testimony placing the muzzle of the gun within inches of S[redacted]'s baseball cap when the bullet was fired (T. 948). This is so because of variables the firearms expert could not control, including the variability of the ammunition, and the movement of the shooter (*Id.*).

Director Bengston never observed appellant talking to someone who was not there or acting as if he were hearing voices of someone who was not there (T. 2256).

Between November 2004 and February 2005, after undergoing the adult certification process and the related psychological assessment, appellant watched the movies *A Beautiful Mind* and *The Sixth Sense* (T. 2235-36, 2239, 2244). On the first Monday after the screening of *The Sixth Sense*, appellant wrote in his journal that he was frightened because he saw dead people hanging from the ceiling (T. 2237, 2243). Jerrod O'Neill, a Prairie Lakes counselor, reviewed the journal entry and recognized its similarity to a scene in the movie (T. 2237).[4] Appellant never wrote about seeing dead people or experiencing hallucinations in any other journal entry (T. 2238, 2244).

B. Rule 20 Examination

The court-ordered Rule 20 evaluation was performed at the Minnesota Security Hospital at St. Peter by Dr. Kelly Wilson and Dr. Michael Koch. Both testified at the mental-illness phase of appellant's trial and their written Rule 20 report was admitted into evidence (T. 2077; Exh. 180).

Prior to evaluating appellant, Dr. Wilson had performed approximately 200 combined competency/criminal-responsibility evaluations (T. 2045). Based on her interviews of appellant and extensive information gathered from others, Dr. Wilson concluded to a reasonable degree of psychological certainty that appellant was not laboring under defect of reason on September 24, 2003, such that he did not know the

[4] Prairie Lakes had a journaling protocol whereby residents wrote a daily journal entry (T. 2236-37).

nature of his acts or that they were legally or mentally wrong, and he therefore did not meet the *M'Naghten* standard entitling him to a verdict of not guilty by reason of mental illness (T. 2052-54, 2057-58; Exh. 180 at 18).[5]

Dr. Wilson believed that a plethora of evidence supported her conclusion that appellant knew the nature of his actions on the day of the murders (T. 2053-54; Exh. 180 at 17). Dr. Wilson noted the amount of planning that went into the shooting. Appellant had identified his targets, surveyed the scene, and was aware of the dangers of a loaded weapon and took steps to make sure the weapon did not discharge prematurely (*Id.*). Dr. Wilson was also struck by the fact that appellant indicated his understanding of what a loaded firearm could do by emptying the weapon after the shootings, and never claimed he did not know what he did was wrong (*Id.*).

Dr. Wilson's opinion that appellant knew the nature of what he was doing was also based on appellant's attempts to conceal his plan and activities before the shootings (T. 2054-55). Appellant took care not to let his father learn that he was taking the weapon from home, stored the weapon very carefully, and carefully planned how he would carry it and get it into the school (T. 2055).

Dr. Wilson's opinion that appellant knew what he was doing was also based on the way appellant described the offense to several evaluators (T. 2055-56). He reported to several evaluators that he intended to hurt S[redacted] B[redacted] and also mentioned during various interviews that he did not want people to see the weapon (T. 2056). He also

[5] As a result of the same evaluation, Dr. Wilson concluded that appellant was competent to stand trial (Exh. 180 at 12-14).

acknowledged that at the time, he saw people running away from him because he had a weapon and they feared for their safety (*Id.*).

Dr. Wilson also believed that a plethora of evidence supported her related conclusion to a reasonable degree of psychological certainty that appellant knew the legal and moral wrongfulness of his acts on September 24 (T. 2057-58; Exh. 180 at 17-18). Appellant told Dr. Wilson and others that before the incident, he thought that he would be charged with assault with a deadly weapon, would go jail, and would probably be taken away from his family for awhile (T. 2058-59). Dr. Wilson was also of the view that appellant had a strong moral framework instilled in him by his concerned and loving parents and that he therefore knew the difference between right and wrong (T. 2060).

Dr. Wilson interpreted appellant's e-mail to B[redacted] K[redacted] on the morning of the shooting as a demonstration that he knew what he was about to do was wrong (T. 2060-61). In that e-mail, appellant told B[redacted] not to tell anyone and, specifically, not to talk to the news media or the police (T. 2060-61). Dr. Wilson believed that such references specifically indicated his awareness of the moral wrongfulness of what he was about to do (*Id.*).

Dr. Wilson also believed that appellant's actions on September 24 were not consistent with a person in the grip of serious mental illness (T. 2062). Specifically, appellant's offenses were marked by deliberateness, organization, premeditation, slow and deliberate planning, careful selection of victims, and the demonstrated ability to follow through and execute his plan (*Id.*). This level of organization, in Dr. Wilson's experience, is not present with persons who meet the *M'Naghten* standard (T. 2062).

Dr. Wilson believed that the three best items of evidence of appellant's mental status at the time of the shootings were his own description of the offenses, his demeanor after the offenses, and the way he carried out his offenses (T. 2064). That being so, she believed that appellant's videotaped confession was crucial to determining his mental status at the time of the shooting (T. 2063). Dr. Wilson believed that appellant's demeanor in the videotaped confession and the clarity of the thinking he exhibited during that confession indicated that he was not then in the grip of mental illness (T. 2064). He knew he was sitting with a police officer (*Id.*). He knew he had to ask for a glass of water (*Id.*). His emotions were appropriate, and he reacted very appropriately to the information presented by the police officer throughout the course of the videotaped interview (*Id.*). Dr. Wilson would not expect such reactions from a person who was seriously mentally ill (*Id.*).

In addition to finding that appellant did not meet *M'Naghten,* Dr. Wilson concluded for a number of reasons that appellant was probably malingering, i.e., feigning mental illness or exaggerating symptoms of mental illness for some secondary gain (T. 2079, 2108; Exh. 180 at 9-10).

The normal onset of schizophrenia in males is within the mid to late twenties (T. 2090-91). Early-onset schizophrenia is exceedingly rare (T. 2091). Early onset patients tend to have ever increasing tendencies toward disorganized behavior and thinking: meaningless activity, poor hygiene, and confused speech and thoughts (T. 2091). Dr. Wilson found it suspicious that appellant did not exhibit any such symptoms (T. 2092-93, 2099-2100, 2122).

Appellant had been receiving antidepressants and antipsychotic medication from February 2004 until February 2005 (T. 2089). Appellant seemed to do better once he stopped taking those medications (T. 2112). This further aroused Dr. Wilson's suspicion that he was feigning his mental illness or his psychotic symptoms (*Id.*).

Dr. Wilson's suspicions of malingering were reinforced by the fact that appellant's self-reported symptoms were not credible and not consistent with genuine mental illness (T. 2102). Auditory and visual hallucinations are not consistent with genuine mental illness (T. 2103). Appellant's alleged hallucinations about spending periods of time with an imaginary person named Jake were also, in Dr. Wilson's view, not credible (T. 2103). Hallucinations experienced by those who are genuinely mentally ill are generally very unpleasant experiences (T. 2103). Dr. Wilson was also suspicious that appellant's self-reported hallucinations were not consistent over time (T. 2100-02, 2111, 2121-22).

Finally, Dr. Wilson's suspicions of malingering were further aroused by the similarity of his self-reported hallucinations to those depicted in the movie *A Beautiful Mind* (T. 2114-21). She found appellant's stories of people in the woods taking him and bringing him from town to town and his description of seeing and talking to Jake were very reminiscent of scenes from *A Beautiful Mind* (T. 2115-17).

Dr. Wilson's suspicion of appellant's malingering was also reinforced by the similarities between some of his self-reported hallucinations and the movie *The Sixth Sense* (T. 2114, 2117-18). In a particular scene from that movie, a juvenile character tells another character that he sees a dead man, woman, and child hanging, and the movie depicts, a man, a woman, and a child wearing pilgrim-like clothing (T. 2118-19).

Appellant reported a similar hallucination in which he claimed to see a dead man, woman, and child hanging and wearing pilgrim clothing (T. 2118-19).

Dr. Michael Koch is board-certified in both child and adult psychiatry and has practiced for almost 40 years (T. 1981-1983). Before encountering appellant during the court-ordered Rule 20 evaluation, Dr. Koch had encountered hundreds of people with schizophrenia, including 40 to 50 children and adolescents (T. 2030-31).

Dr. Koch interviewed appellant twice, reviewed the psychiatric evaluations of appellant performed by a number of other professionals, and saw the videotape of appellant's confession shortly after the shootings (T. 1984-86). Based on his interviews of appellant and his review of these materials, Dr. Koch diagnosed appellant as having a depressive disorder, in remission, and a probable emerging personality disorder (T. 1986-87). Dr. Koch, also concluded, as did Dr. Wilson, that appellant was probably malingering (*Id.*).

Dr. Koch was aware that others had diagnosed appellant as paranoid schizophrenic, but he ruled out that diagnosis because he did not see any evidence to support it (T. 1987, 1993). Dr. Koch was aware that appellant took antipsychotic and antidepressant medications from January 2004 until February 12, 2005 (T. 1987, 1992). When Dr. Koch interviewed appellant on February 28, 2005, and March 21, 2005, appellant reported that some of his mental symptoms had cleared up or lessened (T. 1987, 1993). In Dr. Koch's view, this was inconsistent with a diagnosis of paranoid schizophrenia (T. 1987-88).

In addition, Dr. Koch's examination of appellant led him to rule out a diagnosis of schizophrenia (T. 1988). In a case of early-onset of schizophrenia, symptoms usually get progressively worse (T. 1994). If appellant had in fact started hearing voices or suffering other psychotic symptoms in the fifth or sixth grade, Dr. Koch would have expected to see signs of impairment five years later when he examined appellant (*Id.*). When he saw appellant, however, appellant was articulate and most conversant, responsive, easy to talk to, and mostly cooperative (T. 1997). In summary, although Dr. Koch expected to see a young person with psychotic symptoms, he found none upon examining appellant (T. 1988). Appellant did not display deterioration or any sort of thought disorder that one would find in someone with schizophrenia (T. 1988). In addition to his own examination of appellant, Dr. Koch was also impressed by the fact that appellant had been closely observed by the staff at the state security hospital at St. Peter, and the staff did not see any evidence of psychotic behavior (T. 1988).

Dr. Koch's diagnosis of probable malingering was based in part on the fact that Dr. Koch did not find appellant's self-reported hallucinations believable. When Dr. Koch met appellant to interview him for the very first time, appellant turned away and began muttering (T. 1990). When asked what was happening, appellant said that he was "talking to Jake" (*Id.*). After Dr. Koch and appellant talked for awhile about appellant hearing Jake's voice, there were no further obvious hallucinatory experiences for the remainder of the two-hour interview (*Id.*). This struck Dr. Koch as strange and unusual (T. 1989, 1990). In Dr. Koch's experience, although some patients want to talk about their hallucinations and others do not, none of them suddenly turn it on and off (*Id.*).

Dr. Koch was also suspicious that appellant reported that some of his hallucinations improved while he was at St. Peter and others went away completely (T. 1988). Dr. Koch was further suspicious of malingering because some of appellant's self-reported symptoms were fantastic and not typical of persons suffering from schizophrenia (*Id.*). Three-fourths of the hallucinations experienced by persons with schizophrenia are auditory; they hear voices, frequently giving commands (*Id.*). Twenty percent of schizophrenia patients have visual hallucinations (*Id.*). A less frequent number have olfactory or tactile hallucinations (*Id.*). Appellant, by contrast, claimed to have simultaneous auditory, visual, and tactile hallucinations (T. 1989). For example, he described to Dr. Koch that he saw someone named Jake; that Jake's clothing changed color, that Jake talked to him, that he talked to Jake; that Jake pushed him, and hit him, and gave him headaches; and that he pushed Jake back (*Id.*). In Dr. Koch's training and experience, this is very unusual and not the sort of hallucination typically experienced by patients who are schizophrenic (*Id.*).

Finally, Dr. Koch was suspicious of the manner in which appellant's hallucinations changed over time. For example, with respect to his reports of seeing men in the woods, the men changed from members of a meth gang to narcotics officers (T. 1990-91). His reports of auditory hallucinations changed from a single voice, to multiple voices, to hearing music (*Id.*).

C. The State's Retained Expert

Dr. Katheryn Cranbrook, a senior clinical forensic psychologist employed by the Hennepin County criminal and juvenile court systems, was retained by the state in 2003

to evaluate appellant as a candidate for certification for trial as an adult (T. 1737; Exh. 176 at 1). After appellant raised the defense of not guilty by reason of mental illness in February 2005, the state again retained Dr. Cranbrook to evaluate appellant's mental condition at the time of the offenses and to determine whether he met the *M'Naghten* standard excusing him from criminal responsibility for the offenses (T. 1737; Exh. 176 at 1).

After interviewing appellant again, Dr. Cranbrook concluded to a reasonable degree of psychological certainty that appellant knew the nature of his acts on September 24, 2003, and understood that they were morally and legally wrong (T. 1750-51; Exh. 176 at 16-17). In reaching these conclusions, Dr. Cranbrook noted that appellant's behavior leading up to and during the offenses was well-organized, goal-directed, and the product of rational planning (T. 1750-55; Exh. 176 at 16).

The bases of Dr. Cranbrook's opinion that appellant clearly understood the nature of his acts at the time he committed them included the following:

- After the shootings, appellant repeatedly indicated that his goal had been to shoot and injure S[redacted] B[redacted] (T. 1753; Exh. 176 at 16);

- Based on his prior experience with firearms and the precautions he took to protect himself and others from injury both before and after shooting S[redacted] B[redacted], appellant knew that shooting someone with a firearm could cause harm and injury (*Id.*).

The bases of her opinion that appellant knew that his acts were both legally and morally wrong included the following:

- Both in his videotaped confession to Agent McDonald and on other occasions, appellant repeatedly indicated that he had been aware prior to the shootings that he would likely face criminal charges (*Id.*);

- In his planning and preparation, appellant intentionally concealed his actions, thus indicating his awareness that others would disapprove of and interfere with his plan (T. 1751; Exh. 176 at 16);

- Appellant has been consistently concerned about how his parents would view him, and he did not want them present during his videotaped statements on September 24 because he was concerned they would be upset or angry with him (T. 1754-55; Exh. 176 at 16); and

- In his final e-mail to B[redacted] K[redacted] appellant revealed his understanding that his actions would draw law enforcement and media attention by telling her not to inform the media or the police of the e-mail (*Id.*).

In addition, to her opinion that appellant did not meet the *M'Naghten* standard, Dr. Cranbrook also testified that appellant was not a paranoid schizophrenic on September 24, 2003 (T. 1763, 1815). The four positive symptoms of schizophrenia are delusions, hallucinations, distortions in language and thought process, and distortions in self-monitoring of behavior (T. 1777-78). The negative symptoms of schizophrenia include restrictions in range and intensity of emotional expression, restrictions in the fluency and productivity of thought and speech, and restrictions in the initiation of goal-directed behavior (T. 1778-79). Dr. Cranbrook saw no evidence of any of these positive or negative symptoms during appellant's videotaped confession to Agent McDonald shortly after the shootings on September 24, 2003 (T. 1779-80).

Dr. Cranbrook also ruled out a diagnosis that appellant was a paranoid schizophrenic at the time of the shootings because no one, including his family, had noticed any symptoms of mental illness prior to the shooting (T. 1764). Dr. Cranbrook explained that in the early stages of schizophrenia, one would expect to see a gradual withdrawal from all social relationships, including family relationships (T. 1802).

Appellant's family reported to Dr. Cranbrook, however, that appellant had actually been more engaged with his family in the summer of 2003 (*Id.*). He made dinner every night, called his father every day on his own initiative after school, and did not otherwise appear to be withdrawing from the family (*Id.*). In addition, appellant communicated socially with B[redacted] K[redacted] over the summer of 2003 (*Id.*).

Nor did Dr. Cranbrook believe that appellant was schizophrenic when she re-examined him in June 2005 (T. 1755). As Dr. Cranbrook explained, if someone suffered from a psychosis at the age of fifteen, one would expect to see severe symptoms and a significant impairment in functioning one or two years later (T. 1764). Dr. Cranbrook did not see appellant between the certification hearing in December 2003 and when she interviewed him for purposes of a *M'Naghten* evaluation on June 10, 2005 (T. 1764-65). In that approximate one and one-half year period, appellant had not only failed to deteriorate, he appeared much better (T. 1765). In June 2005 he interacted more appropriately, his facial expressions were more reactive, and he seemed more comfortable and more spontaneous (*Id.*).

Dr. Cranbrook was also struck by appellant's failure to become more symptomatic after he stopped taking the antipsychotic medications he had been using in 2004 (T. 1766-67). The common symptoms of schizophrenia include disorganized speech, empty replies, odd mannerisms, unusual behavior, and failure to maintain personal hygiene or to complete the tasks of daily living (T. 1768). Typically, such symptoms become more severe when someone suffering from schizophrenia stops taking

antipsychotic medications (T. 1766-67). Dr. Cranbrook, however, saw no such symptoms when she examined appellant on June 10, 2005 (T. 1767-68).

Dr. Cranbrook also concluded, as did Dr. Wilson and Dr. Koch, that appellant was malingering (T. 1755, 1757). One indicator of malingering was the onset and course of appellant's alleged schizophrenia (T. 1793). Appellant reported hearing voices beginning in the fifth and sixth grades, and the onset of schizophrenia at such an early age is very uncommon (*Id.*). Moreover, in schizophrenia, negative symptoms such as withdrawal from family and friends, poor hygiene, reduced speech, and failure to perform daily chores typically occur before positive symptoms such as hallucinations and delusions (*Id.*).

Another indicator was the notable discrepancy between his self-reported symptoms and what others were able to observe (T. 1794). As Dr. Cranbrook explained, many lay people have a general understanding of common positive symptoms of mental illness such as auditory or visual hallucinations (*Id.*). Negative symptoms, however, are less easy to feign because they are not only less commonly known about, but are difficult to maintain consistently (*Id.*). These difficult-to-feign negative symptoms include irrelevant speech in conversation, odd mannerisms, inappropriate behavior, inability to engage in purposeful behavior, immobile facial expressions, and an inability to display a normal range of emotion (T. 1794-95). Based on her review of records from Prairie Lakes and behavioral logs from the Minnesota Security Hospital and her conversations with staff at the Kandiyohi County jail, Dr. Cranbrook concluded that appellant did not

exhibit such negative symptoms or have any significant functional difficulties during his stays at any of those three facilities (T. 1798-1800).

During his 17-month stay at Prairie Lakes, appellant did not stand out as being different from the other residents (T. 1800). During his subsequent stay at St. Peter, appellant was generally described as playing cards, engaging in recreational activities, and participating in the evaluation (T. 1798). Appellant engaged with staff and responded to questions appropriately (T. 1799). Later, at the Kandiyohi County jail, appellant was able to complete his chores, meet the jail's behavioral expectations, and socialize with others (*Id.*).

In Dr. Cranbrook's opinion, appellant's malingering was also indicated by discrepancies in his various reports of symptoms to different people at different times and by his reporting of unusual combinations of very rare symptoms that are not usually found together (T. 1795-96). As Dr. Cranbrook explained, those who feign mental illness very frequently report many more symptoms than do people experiencing mental illness (T. 1796).

D. Appellant's Experts

Appellant presented three expert witnesses during the mental-illness phase of the trial.

Dr. James Gilbertson, who had been originally hired by the defense in 2003 to evaluate whether appellant should be certified for prosecution as an adult, testified that appellant did not meet the *M'Naghten* standard because he understood that his acts were morally wrong (T. 1714-15). Dr. Gilbertson nevertheless believed that appellant was a

paranoid schizophrenic and would not have committed the crimes but for his mental illness (T. 1717-21).

Based on his treatment of appellant from February 2004 until January 2005, Dr. Richard Lentz concluded that he suffered from schizophrenia, predominately paranoid, but did not offer any opinion as to whether appellant understood the nature of his acts on September 24, or that they were legally and morally wrong (T. 1459, 1508). Dr. Lentz did not think appellant was malingering (T. 1574, 1580).

Dr. Maureen Hackett, a forensic psychiatrist, was hired by the defense to evaluate appellant's mental state at the time of the offenses (T. 1204). Of the six experts who testified during the mental-illness phase, Dr. Hackett was the only one who testified that appellant did not know the nature of his acts or that they were wrong at the time he committed them (Exh. 209 at 23-24). Dr. Hackett believed that appellant was schizophrenic and not malingering (T. 1233, 1254-55; Exh. 209 at 12, 23-24).

E. The Trial Court's Phase-Two Findings

In concluding that appellant should not be excused from criminal liability by reason of mental illness, the court found as follows concerning appellant's mental condition:

> 3. The Court heard from a number of psychiatrists and psychologists during the second phase of the trial. The expert witnesses disagreed about the nature of [appellant's] mental impairment, if any, on September 24, 2003. Only one expert expressed an opinion that [appellant] had a mental illness that was so severe as to meet the M'Naghten standard. However, the Court does not attach weight to that opinion in light of the undisputed evidence of [appellant's] acts in September of 2003, as well as [appellant's] statement to Agent Ken McDonald immediately following the shooting.

4. Any mental impairment that [appellant] may have suffered on September 23 [sic], 2004, whether a mental illness or personality disorder, did not prevent him from knowing the nature of his acts or that they were wrong.

(R.A. 31-32).

ARGUMENT

I. APPLYING THE *M'NAGHTEN* STANDARD TO ADOLESCENT DEFENDANTS DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE MINNESOTA CONSTITUTION.

Minn. Stat. § 611.026 (2004) codifies the *M'Naghten* standard for excusing mentally ill defendants from criminal liability. *See Daniel M'Naghten's Cases,* 10 Clark and Finnelly 200, 8 Eng. Rep. 718 (H.L. 1843). Appellant claims entitlement to a new trial because the *M'Naghten* standard violates the due process clause of the Minnesota constitution as applied to adolescent defendants (App. Br. 26-31). This claim is without merit.

A. Appellant's Claim Is Procedurally Barred Because He Did Not Raise It Below, And This Court Should Not Consider It In The Interests Of Justice Because The Record Below Was Not Adequately Developed By The Parties.

In the district court, appellant raised a facial challenge to Minn. Stat. § 611.026, claiming that it is void for vagueness in violation of the federal and Minnesota constitutions.[6] In this Court, appellant no longer maintains that Minn. Stat. § 611.026 is void for vagueness. Instead, he argues that the *M'Naghten* standard is unconstitutional as applied to adolescent defendants. Although appellant's constitutional challenge in the

[6] *See* Defendant's Memorandum of Law on Constitutionality of *M'Naghten* dated July 11, 2005.

district court and his present constitutional challenge in this Court are both nominally based on "due process," they are fundamentally different. His claim below was based upon the alleged vagueness of the text of the statute codifying the *M'Naghten* standard in Minnesota; his challenge in this Court is based upon notions of fairness and certain alleged scientific facts concerning adolescent brain development. Because he did not raise the latter claim below, he has forfeited his right to have it considered on appeal. *See, e.g., State v. Schleicher*, 672 N.W.2d 550, 555 (Minn. 2003) (holding that this Court was procedurally barred from considering appellant's claim that Minn. Stat. § 611.026 is unconstitutionally vague when that claim was not raised below).

While this Court has acknowledged its willingness to consider procedurally barred claims in some cases in the interests of justice, it declined to do so in *Schleicher* "because the record below [had] not been adequately developed by the parties." 672 N.W.2d at 555 n. 10. The same holds true here. Appellant's fact-based due process argument in this appeal rests upon assertions of scientific fact about which no record whatsoever was made in the district court. None of the experts who testified below had anything to say about the physical development of appellant's brain or how *M'Naghten* or any other mental-illness standard might apply differently to juveniles. The interests of justice would not be served by considering the merits of appellant's claim in the absence of an adequate record.

B. Minnesota's Adherence To The *M'Naghten* Standard Does Not Violate The Due Process Clause Of The Fourteenth Amendment.

The constitutionality of a statute is a question of law that this Court reviews *de novo*. *State v. Tennin*, 674 N.W.2d 403, 406 (Minn. 2004). Statutes are presumed constitutional, and the challenging party must demonstrate beyond a reasonable doubt that the challenged statute is unconstitutional. (*Id.* at 419); *State v. Frazier*, 649 N.W.2d 828, 832 (Minn. 2002). Appellant has failed to meet his heavy burden of demonstrating beyond a reasonable doubt that Minn. Stat. § 611.026 violates the due process clause of the Minnesota constitution, either on its face or as applied to adolescent defendants.

Without defining the term, the Fourteenth Amendment and Article I, § 7 of the Minnesota Constitution both guarantee criminal defendants "due process." "[A] decision of the United States Supreme Court interpreting a comparable provision of the federal constitution that . . . is textually identical to a provision of [the Minnesota] constitution is of inherently persuasive, although not necessarily compelling, force." *State v. Fuller*, 374 N.W.2d 722, 727 (Minn. 1985). Accordingly, this Court's analysis of appellant's due process claim should begin with consideration of how the United States Supreme Court has disposed of federal due-process challenges to the *M'Naghten* standard.

In the seminal case of *Leland v. Oregon*, 343 U.S. 790 (1952), the United States Supreme Court held that an Oregon statute adopting the *M'Naghten* test of legal sanity in preference to the "irresistible impulse" test did not offend any concept of ordered liberty and therefore did not violate the due process clause of the federal constitution. The Court noted that knowledge of right or wrong was the exclusive test of criminal responsibility

in a majority of jurisdictions, the imperfect science of psychiatry did not compel states to eliminate the right and wrong test, the choice of a legal insanity test involved not only scientific knowledge but questions of basic policy as to the extent to which knowledge should determine responsibility, and the whole problem has evoked widespread disagreement among those who had studied it. *Id.* at 800-01 (footnotes omitted).

Decisions of this Court and other jurisdictions likewise uniformly recognize that the *M'Naghten* standard does not violate due process. *See, e.g., State v. Eubanks*, 277 Minn. 257, 263-66, 152 N.W.2d 453, 457-59 (Minn. 1967); *Crow v. Eyman*, 459 F.2d 24, 25 (9th Cir. 1972); *United States ex rel. v. Brierley*, 453 F.2d 73, 86-87 (3rd. Cir. 1971); *People v. Wolff*, 394 P.2d 959, 962-63 (Cal. 1964); *Jones v. State*, 648 P.2d 1251, 1258-59 (Okla. 1982).

Although *Leland v. Oregon* was decided more than 50 years ago, its holding that the *M'Naghten* standard satisfies due process unquestionably remains good law in light of the United States Supreme Court's recent decision in *Clark v. Arizona*, 126 S. Ct. 2709 (2006). *Clark* involved a due process challenge to a 1993 amendment to Arizona's insanity-defense statute. When the Arizona legislature first codified an insanity rule, it adopted the two-part *M'Naghten* test providing that a person is not responsible for criminal conduct if he suffered from a mental disease or defect such that he did not know the nature and quality of the act, or, if he did know, he did not know that what he was doing was wrong. Ariz. Rev. Stat. Ann. § 13-502 (West 1978). In 1993, the Arizona legislature retained the moral incapacity part but dropped the cognitive incapacity part.

Ariz. Rev. Stat. Ann. § 13-502(A) (West 2001). Clark challenged the 1993 amendment as a violation of due process. 126 S. Ct. at 2719.

In rejecting Clark's claim, the Court first noted the wide variety of insanity-defense standards currently in force throughout the United States:

- Seventeen states (including Minnesota) and the federal government have adopted a recognizable version of the *M'Naghten* test with both its cognitive incapacity and moral incapacity components.
- One state has adopted only *M'Naghten's* incapacity test.
- Ten states have adopted the moral incapacity test alone.
- Fourteen jurisdictions, inspired by the Model Penal Code, have adopted an amalgam of the irresistible-impulse (volitional incapacity) test and some variant of the moral incapacity test, the satisfaction of either being enough to excuse a defendant from criminal liability.
- Three states have combined a full *M'Naghten* test with a volitional incapacity formula.
- The State of New Hampshire alone stands by the product-of-mental-illness test.

126 S. Ct. at 2720-21 (footnotes omitted). The alternatives are multiplied further by variations in the prescribed insanity verdict, with a significant number of jurisdictions supplementing the traditional "not guilty by reason of insanity" verdict with an alternative of "guilty, but mentally ill." *Id.*. Finally, four states have no affirmative insanity defense, though one provides for a "guilty and mentally ill" verdict and allows consideration of evidence of mental illness directly on the element of *mens rea* defining the offense. *Id.* at 2721-22.

With this multiplicity of tests, the Court concluded that due process does not compel any particular formulation of legal insanity:

> With this varied background, it is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice. Indeed, the legitimacy of such choice is the more obvious when one considers the interplay of legal concepts of mental illness or deficiency required for an insanity defense, with the medical concepts of mental abnormality that influence the expert opinion testimony by psychologists and psychiatrists, commonly introduced to support or contest insanity claims. For medical definitions devised to justify treatment, like legal ones devised to excuse from conventional criminal responsibility, are subject to flux and disagreement. . . . There being such fodder for reasonable debate about what the cognate legal and medical tests should be, due process imposes no single canonical formulation of legal insanity.

Id. at 2722.

The foregoing case law indisputably demonstrates that the *M'Naghten* standard satisfies the due process clause of the Fourteenth Amendment, and appellant has failed to cite a single authority holding or suggesting otherwise.

C. Application Of The *M'Naghten* Standard To Adolescent Criminal Defendants Also Satisfies Due Process.

Recognizing the futility of any general due process challenge to the *M'Naghten* standard in light of *Clark v. Arizona* (App. Br. 31 n. 14), appellant argues more narrowly that differences in brain development between adults and adolescents render the *M'Naghten* standard unconstitutional as applied to adolescents. In making this argument, he relies on the amicus brief of the American Medical Association, *et al.,* in *Roper v. Simmons,* 543 U.S. 551 (2005) (holding that the capital punishment of persons under eighteen is cruel and unusual in violation of the Eighth Amendment). That amicus brief

cites a number studies concluding that an anatomical basis exists for adolescent behavior, that adolescent brains are not fully developed in regions related to reasoning, risk taking, and impulse control, and that adolescent brains are more active in regions related to aggression, anger, and fear. *See* Appellant's Appendix at 8-20. Appellant argues that these differences in brain development between adults and adolescents render the application of the *M'Naghten* standard to adolescents fundamentally unfair. This argument is without merit.

The scientific studies and research upon which appellant relies merely confirm an anatomical basis for what parents, teachers, and others have known about adolescents since time immemorial, namely, that adolescents are generally more aggressive, impulsive, and prone to risk-taking behavior than adults. To conclude from such general adolescent tendencies that the *M'Naghten* standard is unconstitutional as applied to adolescent defendants is a *non sequitur*. Indeed, one might speculate with equal plausibility that adolescents' immature brain development might make it easier for an adolescent defendant to meet the *M'Naghten* standard. For example, one of the studies upon which appellant relies asserts that adolescent brains are less active than adult brains in regions related to moral reasoning. Appellant's Appendix at 13-14. An adolescent defendant with an undeveloped capacity for moral reasoning would presumably have an easier time satisfying the *M'Naghten* standard.[7]

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[7] Whatever anatomical basis exists for adolescent behavior, the official journal of the American Psychology-Law Society/Division 41 of the American Psychological Association recently published a research study comparing a sample of sixteen- and seventeen-year-old
(Footnote Continued on Next Page)

Appellant asserts that adolescents "may understand their actions and know that they are wrong, but still be unable to control those behaviors because of their lack of brain development," and that this possibility requires a different insanity standard to satisfy due process (App. Br. 30). Other than this conclusory statement, appellant does not explain why a different standard is more appropriate for juveniles. Moreover, his assertion is unconvincing for two reasons. First, it overstates the science upon which appellant relies. Such studies do not claim that adolescents, because of their immature brain development, are irresistibly impelled to commit premeditated murder even though they know that such conduct is morally wrong. Second, if such an adolescent exists, he is not appellant. Not a single witness testified that appellant was irresistibly impelled to murder S[redacted] B[redacted]. Whether the *M'Naghten* standard would be constitutional as applied to some other hypothetical adolescent, it was certainly constitutional as applied to appellant.

Finally, the record does not support appellant's assertion that a "more appropriate" mental illness standard would have changed the outcome of this case (App. Br. 31). Dr. Gilbertson merely speculated that appellant *might* meet the mental illness standard in other jurisdictions, not that he necessarily would. Indeed, Dr. Gilbertson did not even

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adolescent criminal defendants and a sample of eighteen- to twenty-four-year-old adult criminal defendants. The studies findings suggested that, as a group, the adolescents did not have significant deficits in competence-related abilities due to age or immaturity. Norman Poythress *et. al*, *The Competence-Related Abilities of Adolescent Defendants in Criminal Court*, 30 Law and Human Behavior, No. 1 (Feb. 2006), published on-line April 28, 2006 at: *http:/www.springerlink.com/content/q606266603543606/fulltext.pdf.*

identify what alternative mental-illness standard appellant might satisfy. More importantly, the fact that a particular defendant does not meet the *M'Naghten* standard but would meet the mental illness standard in another jurisdiction hardly suggests that the *M'Naghten* standard offends due process.

D. The Due Process Clause Of Article 1, § 7 Of The Minnesota Constitution Calls For The Same Result.

This Court is most inclined to look to the Minnesota constitution as an independent source of personal rights when the state constitution's language is different from the language in the United States constitution, the state constitution's language guarantees a fundamental right that is not enumerated in the United States constitution, the United States Supreme Court has made a sharp or radical departure from its previous decisions and there is no persuasive reason to follow such a departure, the United States Supreme Court has retrenched on Bill of Rights issues, or federal precedent does not adequately protect basic rights and liberties. *Kahn v. Griffin*, 701 N.W.2d 828 (Minn. 2005).

In determining whether one or more of the foregoing circumstances exists, this Court looks to the following non-exclusive list of factors:

> (1) The text of the state Constitution, (2) the history of the state constitutional provision, (3) relevant state case law, (4) the text of any counterpart in the U.S. Constitution, (5) related federal precedent and relevant case law from other states that have addressed identical or substantially similar constitutional language, (6) policy considerations, including unique, distinct, or peculiar issues of state and local concern, and (7) the applicability of the foregoing factors within the context of the modern scheme of state jurisprudence.

Id. at 829.

These factors uniformly support the conclusion that the *M'Naghten* standard satisfies the Minnesota Constitution.

First, the texts of the relevant portions of the two constitutions are virtually identical. The due process clause of the Fourteenth Amendment states that "nor shall any State deprive any person of life, liberty, or property without due process of law." Article 1, § 7 of the Minnesota Constitution similarly states in pertinent part that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law."

Article I, § 7 of the Minnesota Constitution does differ from the Fourteenth Amendment by containing the additional statement that "[n]o person shall be held to answer for a criminal offense without due process of law." A 1904 amendment inserted this particular language in place of prior language providing that no person should be held to answer for a criminal offense except upon an indictment. This change does not suggest that the due process guarantee of the Minnesota constitution is generally broader than the due process guarantee of the Fourteenth Amendment. *See* Mary Jane Morrison, *The Minnesota State Constitution, A Reference Guide*, p. 65 (2002).

Second, the United States Supreme Court has not made any sharp or radical departure from its previous decisions on the constitutionality of the *M'Naghten* standard, and its consistent case law on that subject does not represent any sort of retrenchment on Bill of Rights issues. The Supreme Court's recent holding in *Clark v. Arizona* that due process did not compel any particular formulation for the insanity defense is entirely consistent with its holding in *Leland v. Oregon* more than 50 years earlier that the *M'Naghten* test satisfies due process.

Third, given the relevant Minnesota case law, related federal precedent and case law from other states, and the absence of any unique, distinct, or particular issues of state concern suggesting a contrary result, this is clearly not a case where federal precedent does not adequately protect the basic rights and liberties of Minnesota citizens. The *M'Naghten* standard was first applied in Minnesota in 1868, *State v. Rawland*, 294 Minn. 17, 35, 199 N.W.2d 774, 784 (1972) (citing *State v. Gut*, 13 Minn. 341 (1868)), and was codified in 1885. *See State v. Scott*, 41 Minn. 365, 369, 43 N.W.2d 62, 63 (1889). As recently as 1982, this Court stated that the *M'Naghten* standard was "a fair and just means of evaluating a defendant who claims the defense of mental illness." *State v. Hoffman*, 328 N.W.2d 709, 716 (Minn. 1982). Although this Court has occasionally criticized the wisdom of the *M'Naghten* standard in other cases, *e.g., Schleicher*, 672 N.W.2d at 555 n. 10, it has repeatedly rejected constitutional challenges to the *M'Naghten* standard and recognized that it is the legislature's prerogative to decide whether a different mental illness standard should be adopted for Minnesota. *See, e.g., State v. Finn*, 257 Minn. 138, 100 N.W.2d 508 (1960); *State v. Eubanks*, 277 Minn. at 263-66, 157 N.W.2d at 457-59; *State v. Mytych*, 292 Minn. at 248, 194 N.W.2d at 276; *State v. Dhaemers*, 276 Minn. 332, 150 N.W. 61 (1967); *Schleicher v. State*, 718 N.W.2d 440, 448 n. 7 (Minn. 2006). Finally, case law from other jurisdictions, both state and federal, have also upheld challenges to the constitutionality of the *M'Naghten* standard. *See, e.g., Crow*, 459 F.2d at 25; *Brierley*, 453 F.2d at 86-87; *Wolff*, 394 P.2d at 962-63; *Jones*, 648 P.2d at 1258-59.

E. This Court Should Not Impose Its Own Preferred Mental Illness Defense Standard.

Appellant characterizes the *M'Naghten* standard as "outdated" and asks this Court to replace it with the Hampshire Rule, the Durham Rule, or the Model Penal Code Rule (App. Br. 29-30). As this Court has consistently held, however, any change in the mental illness standard must come from the legislature. *See, e.g., Schleicher*, 718 N.W.2d 440, 448 n. 7 (citing *Rawland*, 294 Minn. 33, 199 N.W.2d at 783, for the proposition that "changes in the mental illness defense standard should come from the legislature, not from this court"); *State v. Finn*, 257 Minn. 138, 141-42, 100 N.W.2d 508, 511 (1960) ("But whatever the merits of these various concepts may be, if any change is to be made in this jurisdiction in the accepted standard of criminal responsibility, it must be done by the legislature").

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MID-TRIAL REQUEST FOR A CONTINUANCE.

Dr. Roger Carten had been appointed by the juvenile court to prepare and file a study concerning whether appellant should be certified for adult prosecution. *See* Affidavit of Defense Counsel Daniel Eller ("Eller Affid."), dated July 25, 2005. After appellant was certified for trial as an adult and raised the defense of not guilty by reason of mental illness, defense counsel decided that he would like to have Dr. Carten testify as a defense expert witness during the mental illness phase of the trial. *Id.* ¶ 3. Dr. Carten advised defense counsel, however, that he had already made arrangements to be out of the country during the trial, and defense counsel apparently made no effort to subpoena him to secure his attendance at trial. *Id.*

During their extensive phase II testimony, Dr. Wilson, one of the court-appointed Rule 20 examiners, and Dr. Cranbrook, the state's retained expert, each briefly testified about their concern that appellant's report of a particular unusual olfactory hallucination — smelling metal — might have resulted from a leading question by Dr. Carten (T. 1972, 2097).

After the state presented its final phase II witness on July 26, 2005, appellant moved for a continuance of undetermined length to present the testimony of Dr. Carten (T. 2273-74). Defense counsel argued that Dr. Carten's testimony was important to rebut criticisms of his methodology, an apparent reference to Dr. Olson's and Dr. Cranbrook's concerns about the origins of appellant's olfactory hallucination (T. 2275). Defense counsel also claimed that Dr. Carten's testimony was important because he was the first psychologist to clinically interview appellant and the only examining doctor in the original three certification evaluations who expressed an opinion as to whether he believed appellant when appellant told him the voices had nothing to do with what occurred. Eller Affid., ¶ 4. Finally, defense counsel claimed that Dr. Carten's testimony was important because he testified at the certification hearing that the shootings would not have occurred "but for" appellant's mental illness. *Id.*

The trial court denied appellant's request (T. 2277). The court doubted whether Dr. Carten's testimony was appropriate rebuttal and, in any event, viewed it as cumulative, repetitive, and not particularly helpful (*Id.*). Appellant claims that the trial court's failure to allow the requested continuance entitles him to a new trial (App. Br. 31-34). "The decision to grant or deny a continuance lies within the discretion

of the trial judge." *State v. Barnes*, 713 N.W.2d 325, 333 (Minn. 2006). For a number of reasons, the trial court did not abuse its discretion here.

First, the trial court was correct in doubting whether Dr. Carten's proposed testimony was a proper rebuttal. Appellant had the burden in his phase II case-in-chief of proving by a preponderance of evidence that he was mentally ill and that his mental illness caused him not to know the nature of his acts or that they were wrong. Appellant also knew from the Rule 20 report filed with the court well in advance of trial that all three of the Rule 20 examiners thought that he was malingering. Dr. Carten's "rebuttal" testimony that appellant was mentally ill and not malingering belonged in appellant's case-in-chief.

Second, the trial court's view of Dr. Carten's proposed testimony as cumulative is also borne out by the record. In his phase II case-in-chief, appellant presented three expert medical health witnesses, each of whom testified extensively about why they thought appellant was mentally ill.

Third, appellant's request for a continuance was not supported by a showing of good cause. *See Barnes*, 713 N.W.2d at 333-34 (stating that the appellate court generally gives great deference to the district court's denial of a continuance when the trial has already begun and the defendant does not demonstrate good cause for delaying his request for a continuance). When Barnes asked for a continuance after the close of the state's case two weeks into a murder trial involving numerous witnesses and complex medical testimony, and the court asked why Barnes' expert was not available, defense counsel stated that the expert apparently had "scheduling difficulties." *Id.* This Court

held that the expert's scheduling difficulties were insufficient to constitute good cause. *Id.* at 334. The circumstances surrounding the continuance request in this case are very similar. When appellant moved for a continuance after the close of the state's case more than two weeks into a murder trial involving numerous witnesses and complex mental illness testimony, appellant's counsel stated that *prior to trial* he had wanted Dr. Carten to testify in the mental illness phase of the trial, but Dr. Carten advised him that he was scheduled to work out of the country when trial was to occur. Eller Affid., ¶ 3. Upon learning *prior to trial* that Dr. Carten had a scheduling problem and was planning to leave the country, appellant should have either moved for a continuance at that time or served Dr. Carten with a subpoena to secure his attendance at trial.

Fourth, the record also supports the trial court's ruling that Dr. Carten's proposed testimony would not have been "helpful." In belatedly seeking a continuance, defense counsel claimed that Dr. Carten would testify that the shootings would not have occurred "but for" appellant's mental illness, but conspicuously failed to claim that Dr. Carten would testify that appellant satisfied the *M'Naghten* standard.

Appellant's claim that the denial of a continuance was an abuse of discretion because this was a bench trial is unconvincing. Nothing in this Court's case law suggests that a trial court in a bench trial has no discretion to refuse a mid-trial request for a continuance. Moreover, even though no jury would have been affected by the delay, the court's docket would have been affected by the delay. Finally, appellant's horrendous crimes had a deep impact on the families and friends of the murdered victims, and the students and faculty of Rocori High School as well as the community at large. The trial

court was certainly entitled to take into account the interests of all those individuals in deciding not to delay the conclusion of the trial for an indefinite period to hear from a witness whose testimony the court reasonably viewed as cumulative and unhelpful.[8]

Appellant next claims that the trial court near the beginning of trial had promised to accommodate the scheduling problems of appellant's witnesses, the trial court's "promise" provided defense counsel with "false hope" that the trial court would accommodate Dr. Carten's scheduling problems, and that the trial court reneged on its promise when it denied appellant's motion for a continuance after the state rested its case. These claims are hyperbole and not supported by the record. The brief discussion between counsel and the court about accommodating scheduling problems occurred during the state's case-in-chief when defense counsel told the court that he "assumed [the court] would be lenient as far as if we have problems getting certain people here at certain times" (T. 459). The court responded by saying that it would "accommodate [defense counsel's] schedule" and then moved on to other subjects (*Id.*). This brief exchange appears to be nothing more than an expression of the court's willingness to start later or end earlier on a particular day or perhaps take a witness out of turn. It certainly did not amount to a specific promise that the trial court would indefinitely continue the

[8] It is also significant in assessing the reasonableness of the trial court's ruling that appellant was seeking an *indefinite* adjournment. According to the affidavit submitted by defense counsel in support of a continuance motion, Dr. Carten was not expected back in the United States until August 1, 2005, and did not even know that defense counsel wanted to arrange his appearance as a witness on August 1 or as soon thereafter as possible. Because Dr. Carten had been out of the country for a period of time, it is reasonable to presume that he might have had a number of matters to attend to upon his return to the United States before appearing as a witness at appellant's trial.

trial after the state had rested. Furthermore, appellant certainly did not rely on this exchange with respect to his attempt to have Dr. Carten appear as an expert witness. Defense counsel's affidavit strongly suggests that defense counsel had abandoned any thought of having Dr. Carten appear as an expert witness when he learned prior to trial that Dr. Carten would likely be in Europe.

Appellant also claims that Dr. Carten was a necessary witness to rebut the testimony of two of the state's witnesses that Dr. Carten's leading questions may have caused appellant to begin claiming the unusual olfactory hallucination of smelling metal. It does not appear, however, that Dr. Carten could have rebutted the fact that he did in fact use a leading question about olfactory hallucinations, and while Dr. Carten may have been able to testify that the use of such leading questions was appropriate, such testimony would have been clearly collateral.

Finally, a defendant seeking a new trial because of the trial court's denial of a continuance must show that the denial "prejudiced [him] by materially affecting the outcome of the trial." *Barnes*, 713 N.W.2d at 333 (citation omitted). Appellant has not, and could not, show that the denial of the continuance prejudiced him by materially affecting the outcome of the trial. In reaching its phase II verdict, the trial court specifically found that any mental illness or personality disorder that appellant may have suffered at the time of the shootings did not prevent him from knowing the nature of his acts or that they were wrong. Dr. Carten's proposed testimony clearly would not have altered this finding.

III. THE TRIAL COURT PROPERLY EXERCISED ITS BROAD SENTENCING DISCRETION IN IMPOSING PERMISSIVE CONSECUTIVE SENTENCES FOR THE TWO HOMICIDES.

Appellant challenges the trial court's decision to impose permissive consecutive sentences for his two murder convictions (App. Br. 34-40). This claim likewise fails.

The imposition of permissive consecutive sentences pursuant to Minnesota Sentencing Guidelines II.F.2 is not a departure, and this Court will not reverse a trial court's decision to impose permissive consecutive sentences unless the trial court clearly abused its discretion. *State v. Smith*, 541 N.W.2d 584, 590 (Minn. 1996). In reviewing the trial court's exercise of its discretion to impose consecutive sentences, this Court considers whether consecutive sentences are commensurate with a defendant's culpability and not an exaggeration of a defendant's criminality, and is also guided by past sentences imposed on other offenders. *See State v. Warren*, 592 N.W.2d 440, 451 (Minn. 1999). Accordingly, this Court's case law involving the imposition of consecutive sentences for murders involving separate victims is particularly relevant.

In *Warren*, this Court *reversed* three concurrent life sentences where all three murder victims were shot at the same location within minutes of each other. *Id.* at 452. This Court reasoned as follows:

> In sentencing Warren, the trial court stated on the record that Warren did not have a criminal history, that he was young, and "that there was a degree of provocation * * * not sufficient to justify what he did, but there was a degree of provocation." The trial court evidently considered these facts to be mitigating factors. The trial court did not, at least on the record, consider any aggravating factors. However, severe aggravating factors did exist. There were three victims who were shot at close range under circumstances suggesting that they had no chance to defend themselves. Two of the victims did not die immediately after being shot the first time

> and were shot a second time -- one of them after begging for his life. All of this occurred after Warren drove at least 24 miles to obtain the murder weapon and made clear to his friends that he planned to shoot the victims. These facts, when balanced against the mitigating factors considered by the trial court, lead us to conclude that the trial court's imposition of concurrent sentences was not commensurate with Warren's culpability and understates his criminality. Further, our review of sentences imposed on other offenders with multiple convictions for first-degree murder involving more than one victim, leads us to conclude that Warren's concurrent sentences are clearly out of line with sentences imposed on other offenders.

Id. at 452; *see also State v. Ouk*, 516 N.W.2d 180, 186 (Minn. 1994) (holding that the trial court's imposition of consecutive sentences on each of the fifteen-year-old defendant's convictions, two for first-degree murder and two for attempted murder, was commensurate with his culpability and did not exaggerate his criminality); *Carpenter v. State*, 674 N.W.2d 184, 189 (Minn. 2004) (holding that a second consecutive life sentence did not unfairly exaggerate the criminality of an offender who had "checked himself into the mental health ward of a hospital, attempted suicide several times during the months proceeding the murders, and was using the prescription drug Paxil"); *State v. Thomas*, 590 N.W.2d 755, 759 (Minn. 1999) (upholding the imposition of a life sentence and a consecutive 306-month sentence for the first-degree murder of a child and second-degree murder of the child's mother); *State v. Brom*, 463 N.W.2d 758, 761, 765 (affirming trial court's decision to sentence sixteen year old to three consecutive life sentences and one concurrent sentence for killing four family members with an axe).[9]

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[9] This Court also upheld multiple consecutive life sentences in the following cases: *State v. Riley*, 568 N.W.2d 518, 520 (Minn. 1997); *State v. Miller*, 488 N.W.2d 235, 239 (Minn. 1992); *State v. Olson*, 291 N.W.2d 203, 205 (Minn. 1980); *Bangert v. State*, 282 N.W.2d 540, 543 (Minn. 1979).

The trial court here did precisely what *Warren* instructs trial courts to do; it carefully weighed the mitigating and aggravating factors related to appellant's crimes before deciding that the imposition of permissive consecutive sentences was commensurate with his culpability and did not unfairly exaggerate his criminality (S. 147-48).[10]

The trial court reasonably concluded that appellant's offenses were marked by substantial aggravating factors. Schools are institutions to which parents and society entrust children in order to educate them, nurture them, and keep them safe so they can enter the world as adults and realize their full potential. Although schools are not "zones of privacy," society certainly views them as protective zones where the occurrence of crimes of violence is particularly shocking. *See The Final Report and Findings of the Safe School Initiative: Implications for the Prevention of School Attacks in the United States*, United States Secret Service and United States Department of Education, p. 7 (Washington, D.C. 2002).

Furthermore, appellant fired multiple shots in a crowded hallway during a time between class periods when he knew there would be many students in harm's way. Placing a large number of people at risk is a well-recognized aggravating factor. *See State v. Ford*, 539 N.W.2d 214, 230 (Minn. 1995); *State v. McClay*, 310 N.W.2d 683, 685 (Minn. 1981).

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[10] "S." refers to the transcript of the sentencing hearing.

Finally, appellant committed the shootings at school, during school hours, where and when he knew other students would witness the crimes. All of the students and staff at Rocori High School, and particularly those who witnessed parts of the offenses, were severely traumatized. *See State v. Profit*, 323 N.W.2d 34, 36 (Minn. 1982) (noting that although children who witnessed assault "were not technically victims of the crime, they were victims in another sense").

Conversely, the trial court reasonably concluded that any mitigating circumstances were not sufficiently compelling to require the imposition of concurrent sentences as a matter of law. Appellant claims that his offenses were substantially mitigated because of his youth, his mental condition, and S[redacted] B[redacted]'s alleged provocation. The record, the trial court's implicit sentencing findings, and the relevant case law, however, fail to support appellant's characterizations of these mitigating factors.

This Court's case law makes clear that trial courts do have the discretion to impose permissive consecutive sentences upon juveniles convicted of murder after being tried as adults. *See Warren*, 592 N.W.2d at 452; *Ouk*, 516 N.W.2d at 186; *Brom*, 463 N.W.2d at 761. Appellant's reliance on *Roper v. Simmons* is misplaced. *Roper* held that capital punishment on persons under eighteen at the time of the offense was cruel and unusual in violation of the Eighth Amendment. 541 U.S. at 578-79. Although not central to its holding, the *Roper* court noted that a lack of maturity and an undeveloped sense of responsibility are more frequently found in juveniles than in adults and that juveniles are more susceptible to outside forces and peer pressure than adults. *Id.* at 569. Whether the imposition of the death penalty on persons under age eighteen violates the Eighth

Amendment has little if anything to do with a trial court's discretion as a matter of state law to impose permissive consecutive sentences on a defendant who committed his or her crimes before the age of eighteen. Indeed, Roper escaped the death penalty by virtue of the Supreme Court's decision but was nevertheless sentenced to life imprisonment without possibility of parole. *See State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 413 (Mo. 2003)

Appellant's argument that he is legally entitled to a mitigated sentence as a result of his mental health issues also fails to withstand scrutiny. "[O]nly extreme impairment justifies a mitigation of sentence." *State v. Wilson*, 539 N.W.2d 241, 247 (Minn. 1995) (citing *State v. Lee*, 491 N.W.2d 895, 902 (Minn. 1992)) (emphasis in original). *Lee* further noted that the "emphasis should be on 'extreme.'" 491 N.W.2d at 902. Mental illness is a mitigating factor only when it causes a "lack [of] substantial capacity for judgment when the offense was committed." Minn. Sentencing Guidelines II.D.IIa(3). The facts as found by the trial court fail to meet this exacting standard. In announcing the guilty verdict from the bench, Judge Kirk indicated that he agreed with the juvenile court judge's finding in the earlier certification proceeding that appellant was not suffering from "extreme" mental illness (T. 2411). This finding is clearly supported by the record. Appellant carefully planned the shooting for a number days, methodically carried it out, and when Agent McDonald asked him immediately afterward if he thought he had done something wrong, appellant responded, "Yeah." The credible evidence presented during the insanity phase of the trial indicated that appellant was suffering from some relatively mild symptoms at the time of the offenses and that these symptoms clearly did not

deprive him of control over his actions and played a very minor, if any, role in the commission of the offenses.[11]

Appellant's reliance on *State v. Wall*, 343 N.W.2d 22 (Minn. 1984), is misplaced. *Wall* reversed an upward departure in a case involving a defendant who suffered from paranoia and schizophrenia and who lacked substantial capacity for judgment due to mental impairment. This case involves the imposition of sentences that are not a departure. Moreover, *Wall* reiterated the principle that the clear presence of a mitigating factor does not obligate the trial court to impose a shorter term than the presumptive term.

With regard to teasing and bullying, the evidence at trial included only one student who ever reported hearing S[redacted] B[redacted] tease appellant, and even one that student could not remember the specifics of the teasing (T. 1011-13, 909, 912, 925). Furthermore, appellant initially told Dr. Cranbrook that the teasing he experienced in the sixth, seventh, and eighth grades was not significantly greater than that experienced by most students (T. 1816). He did not identify himself as one of the students who was singled out for teasing before the ninth grade (T. 1817).

Appellant's claim before this court that he was the subject of incessant and severe teasing is not based upon testimony presented at trial or at the sentencing hearing. Rather, it is based on grand jury testimony, newspaper articles cited in appellant's sentencing memorandum in the district court, and what appellant self-reported to various mental health experts who evaluated him. In deciding upon the appropriate sentence,

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[11] Contrary to appellant's claim (App. Br. 36-37), the trial court did *not* credit all of Dr. Gilbertson's findings about appellant's mental condition (T. 2411).

however, Judge Kirk was entitled to rely on the evidence received at trial and at the sentencing hearing in preference to uncross-examined grand jury testimony and the newspaper articles. Moreover, Judge Kirk was certainly entitled to be skeptical about appellant's self-serving statements during various psychiatric and psychological interviews, given the substantial evidence presented during trial that appellant was feigning or exaggerating his mental health symptoms.

CONCLUSION

Respondent respectfully requests that appellant's convictions and sentences be affirmed.

Dated: October 10, 2006

Respectfully submitted,

MIKE HATCH
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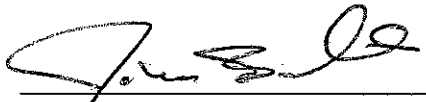

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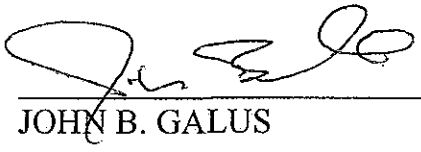
CERTIFICATE OF COMPLIANCE

WITH MINN. R. APP. P 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 13,992 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare this Brief.



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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) (with amendments effective July 1, 2007).