No. JUDICIAL DISTRICT ELEVEN (A)

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA,	)	
	)	
v.	)	From Harnett County
	)	File Nos. 01 CRS 920, 4612
WILLIAM McDOUGALD	)	
	)	

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PETITION FOR WRIT OF CERTIORARI

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INDEX

TABLE OF CASES AND AUTHORITIES

Cases **Page(s)**

Constitutions and Statutes

Other Authority

Other Citations

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PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

William McDougald respectfully petitions this Court to issue its writ of certiorari pursuant to Rule 21 of the Rules of Appellate Procedure to review the order of the Honorable C. Winston Gilchrist, Senior Resident Superior Court Judge, Superior Court, Harnett County, dated 25 November 2019, denying Mr. McDougald's motion for appropriate relief (MAR). In support of this petition, Mr. McDougald shows the following:

Mr. McDougald is serving a mandatory sentence of life without parole under the violent habitual felon statute. To receive violent habitual felon status, a person must have two prior class A through E felony convictions entered on different court dates. If a person is convicted of a new class A through E felony and violent habitual felon status, the trial court must impose life without parole. In violation of the Sixth Amendment, Mr. McDougald received this sentence despite the fact that his trial

attorney did not explain the mandatory punishment soon enough or clearly enough for Mr. McDougald to take a plea to a term of years that he otherwise would have taken. Additionally, contrary to the Eighth Amendment, the State used a conviction for conduct as a sixteen year old as one of the two predicate offenses for violent habitual felon status, sentencing Mr. McDougald to life without parole based on nonhomicide juvenile conduct. Mr. McDougald asks this Court to correct the lower court's erroneous order denying relief.

FACTS

Officers arrested Mr. McDougald for second-degree kidnapping, a class E felony, on 3 February 2001. (App. p 83). Mr. McDougald had prior convictions for class A through E felonies. On 16 May 1984, when he was sixteen years old and in the ninth grade, he was convicted of second-degree kidnapping. (App. pp 35–38). On 1 February 1988, when he was nineteen years old, he was convicted of robbery with a dangerous weapon, second-degree sexual offense, and two counts of common law robbery. (App. pp 39–46).

The trial court then appointed attorney Mark Key to represent Mr. McDougald on 5 February 2001. (App. p 85). Mr. Key had graduated from law school in Maryland in 1995 and practiced insurance defense for two years. (App. p 507). He opened his own office in Harnett County in 1997 and handled "a variety of things, so it was domestic work, personal injury work, criminal work, felonies and misdemeanors." (App. pp 507–08). As of 2001, he had not represented anyone else facing life without parole. (App. p 508).

Mr. Key's Actions Before Trial

Mr. Key first visited Mr. McDougald in jail on 6 February 2001, for one hour. (App. p 89). During that visit, according to Mr. Key, "there was no conversation about any violent habitual felon." (App. p 510). Instead, Mr. Key wanted "to get to know" Mr. McDougald. (App. p 512). On 12 February, according to his timesheet, Mr. Key performed thirty minutes of research on burglary and kidnapping. He did not perform any research on the violent habitual felon statute. (App. p 89).

After the 6 February meeting, according to Mr. Key, one of the assistant district attorneys handling the case "said something about indicting him as a violent habitual felon." (App. p 510). Although the State did not indict Mr. McDougald for violent habitual felon status in February, it went on to do so in May. (App. p 49).

Mr. Key visited Mr. McDougald on 14 February 2001 for thirty minutes and tried to explain a possible violent habitual felon charge to Mr. McDougald. (App. pp 89–90). Mr. Key left Mr. McDougald with the impression that the State was pursuing the more common habitual felon charge, not the distinct violent habitual felon charge. (The State never pursued a habitual felon enhancement; Mr. McDougald did not have enough prior convictions.) Mr. McDougald did not know that habitual felon status and violent habitual felon status were different. He correctly thought that habitual felon status was punished by a term of years and did not realize that he was facing a different charge altogether. (App. p 90); N.C. Gen. Stat. § 14-7.6. Mr. Key did not explain that Mr. McDougald had two prior

convictions for class A through E felonies, as the violent habitual felon statute requires, and that there was a mandatory punishment of life without parole. (App. pp 90, 526).

On 10 April 2001, a grand jury indicted Mr. McDougald for first-degree burglary, second-degree kidnapping, and assault on a female. (App. p 93).

Mr. Key visited Mr. McDougald at Central Prison in Raleigh on 25 April 2001, for thirty minutes. (App. p 89). There is no time entry on Mr. Key's timesheet indicating that he reviewed the violent habitual felon statute before the visit. (App. p 89). Mr. Key said that the prosecutor was offering a plea deal in which Mr. McDougald would have to serve a sentence of approximately twelve to thirteen years. If Mr. McDougald had pled to first-degree burglary and second-degree kidnapping and agreed to two consecutive sentences at the top of the presumptive range with a prior record level IV, he could have received a total sentence of 163 to 215 months, the equivalent of thirteen years and seven months to seventeen years and eleven months. *See Felony Punishment Chart and Minimum/Maximum Table for Offenses Committed on or after December 1, 1995 to December 1, 2009*, N.C. Jud. Branch (29 Aug. 2018), https://www.nccourts.gov/documents/publications/punishment-grids. Mr. Key did not explain the mandatory punishment of life without parole for violent habitual felon status, which Mr. McDougald would face if he went to trial. Not knowing about that mandatory punishment for violent habitual felon status, Mr. McDougald turned down the plea offer. (App. pp 90–91, 526).

Mr. Key attempted to meet his client again on 27 April 2001, but could not because Mr. McDougald had been transferred to Craven Correctional Institution in Vanceboro, North Carolina. (App. pp 89, 514). His timesheet does not show another attempt to visit Mr. McDougald in jail or prison until the day on which the trial court sentenced him. His timesheet does not show that he sent any correspondence to Mr. McDougald during the entire representation. His timesheet does not show any research on the violent habitual felon statute until 3 October 2001, the day after the trial on the substantive felonies ended. (App. p 89).

The State obtained a superseding indictment for the substantive offenses and an indictment for violent habitual felon status on 14 May 2001. (App. pp 49, 94). The warrant for arrest on the violent habitual felon charge was issued on 14 May 2001, and listed a court date of 25 June 2001, but it was not served until 1 October 2001. (App. pp 95–96).

On 16 May 2001, there was an administrative session of court. According to an 18 May 2001 scheduling order, Mr. McDougald "was present in court represented by counsel Mark Key." (App. p 231). Mr. Key billed for fifteen minutes on the case that day. There is no separate entry for visiting the client. (App. p 89).

Sometime in June 2001, Mr. McDougald was brought back to Central Prison, where he stayed until trial. (App. p 101). Mr. Key's notes do not indicate that he visited Mr. McDougald at Central Prison; Central Prison is in Wake County, the neighboring county to Harnett County. (App. p 89); *Central Prison*, N.C. Dep't of Pub. Safety, https://www.ncdps.gov/adult-corrections/prisons/prison-

facilities/central-prison (last visited 12 Nov. 2020) (listing address).

On 25 June 2001, there was an administrative court session in which the court joined the substantive charges and the status charge. (App. p 107). Mr. Key billed fifteen minutes for the hearing. There is no record of Mr. Key visiting his client in the jail that day, although Mr. McDougald was brought to court. (App. pp 89, 104).

The Morning of Trial

The trial on the substantive felonies began on 1 October 2001, the same day that the State served the violent habitual felon indictment on Mr. McDougald. (App. p 98). As Mr. Key explained at the evidentiary hearing on the MAR, "[Mr. McDougald] woke up – they woke him up early in the morning to come straight to Harnett County. He gets hit with this news [of being served with a violent habitual felon indictment]." (App. pp 98, 102, 520). Before court began, Mr. Key visited Mr. McDougald and "explained to him that day that he had been indicted as a [violent] habitual felon and he'd have to go to trial immediately." (App. p 516).

Mr. Key told Mr. McDougald for the first time on 1 October 2001 that there was a potential punishment of life without parole for violent habitual felon status. (App. pp 519, 526). Mr. Key was "not sure [that he] told [Mr. McDougald] it was a mandatory life imprisonment without possibility of parole." (App. p 520). Mr. Key did not "think [Mr. McDougald] understood that." (App. p 520). As Mr. Key testified during the evidentiary hearing on the MAR, "I told him that he may be sentenced to life in prison without the possibility of parole, and I use the word 'may' because

obviously that's contingent" on the outcome of trial. (App. p 519). Mr. Key thought that Mr. McDougald "was unsure of what that meant" and that "what [Mr. Key was] saying might sound [like] gibberish to him." (App. pp 519–20). Because the trial judge "was rushing[,]" they did not have "an opportunity to even fully have a conversation." Instead, "[i]t was me stating it to him." (App. p 520).

When proceedings began on 1 October, Mr. Key informed the Court "that [Mr. McDougald] would like to represent himself." (App. p 98). The Court spoke with Mr. McDougald, asked him about his education, and asked him whether he understood the maximum punishments for first-degree kidnapping, first-degree burglary, and assault on a female. The Court did not advise Mr. McDougald that if he were convicted of a class A through E felony and then convicted of violent habitual felon status, there was a mandatory sentence of life without parole. (App. p 100).

When the Court asked why Mr. McDougald wanted to proceed *pro se*, he said,

> Because on several occasions he brought – he told me that the DA brought up a felony, habitual felony [*sic*] charges on me. He's been my lawyer since February, since February of 2001. I've seen him approximately four times. First time I seen him when I got down here to Superior Court; second time, third and fourth time I seen him when I was offered a plea bargain. He told me that we were getting motion of discovery. I hadn't seen him yet. I been at Central Prison for the last four months. I haven't heard from him. Then I come back here, which was today; they came to Raleigh and got me just this morning, and the first thing he tells me is we're going to trial. If you don't go to trial you can take the plea bargain for 13 years and a half, and I'm already facing my life with no parole in prison. So I feel like if I'm going to get life with no parole in prison I might as well defend myself.

(App. p 101).

After asking about the arraignment, the court then told Mr. McDougald that he could not have another appointed attorney if he fired Mr. Key. The court appointed Mr. Key as standby counsel and allowed Mr. McDougald to represent himself. (App. p 102). The court began jury selection. (App. p 103).

Mr. McDougald then said that he "didn't understand that you'd make me in charge of the whole jury selection and all that." He did not know the witnesses against him and had not contacted his own witnesses "because where I was housed at I'm not allowed to use the phone but once a year and that's Christmas." (App. p 104). The Court understood him to be asking for a continuance and denied it. *Id.* Mr. McDougald then said, "I really don't know what's going on. In that case I might as well . . . let him go back up here, because I don't know what's going on." (App. p 105). Mr. Key said that he was ready to proceed and resumed representing Mr. McDougald. (App. p 106).

At the trial, the State's evidence showed that on 2 February 2011, Mr. McDougald and three other men visited Ms. Patrice Ann Howes, who was seventeen at the time, at her cousin's home where she lived. Mr. McDougald returned alone a few minutes later, came to the laundry room door, told Ms. Howes that she should not be dating one of the other men who had visited earlier, and refused to leave. Mr. McDougald came into the laundry room, struck her on the cheek, lifted her onto a laundry machine, turned out the light, and slapped and choked her. Mr. McDougald left when Ms. Howes's family returned. (App. p 47: *State v. McDougald*, 190 N.C. App. 675, 661 S.E.2d 789 (2008) (unpublished)).

The jury acquitted Mr. McDougald of first-degree burglary. The jury found Mr. McDougald guilty of misdemeanor breaking or entering, second-degree kidnapping, and assault on a female. The Court continued the matter so it could hear evidence later on the violent habitual felon charge. (App. pp 358–59).

On 3 October 2001, for the first time, Mr. Key's time entries refer to two hours for "Legal Research-Habitial Felon" [*sic*]. (App. p 89). On 4 October 2001, he entered thirty minutes for "motion to dismiss" and filed a motion to dismiss the violent habitual felon charge because it was served the day of the trial, violating Mr. McDougald's due process rights. (App. pp 89, 109). The next day, there was a hearing on the motion to dismiss, followed by sentencing. The Court denied the motion. (App. pp 112–13).

On 2 November 2001, Mr. Key spent two hours on "preparation for a violent habitial [*sic*] felon." (App. p 89). On 14 November 2001, a jury found Mr. McDougald guilty of violent habitual felon status, and the court imposed the mandatory sentence of life without parole. (App. pp 50–51). Mr. Key had spent a total of 32.75 hours on the case. (App. p 89).

Appellate Proceedings

Mr. McDougald promptly entered notice of appeal, but the appeal remained pending for years. (App. p 119). On 11 June 2007, while the appeal was pending, Mr. McDougald filed a *pro se* motion to arrest the judgment for violent habitual felon status because the State used juvenile conduct as the basis for a violent habitual felon indictment. The Court denied the motion. (App. pp 52–55). On 20

May 2008, this Court held that there was sufficient evidence to support the charge for second-degree kidnapping. Mr. McDougald did not raise any Eighth Amendment claims on appeal. (App. p 48: *McDougald*, 190 N.C. App. 675, 661 S.E.2d 789).

Mr. McDougald filed a *pro se* federal habeas petition. The court denied the claim that there was insufficient evidence of kidnapping and explicitly declined to reach any other issue. (App. p 58: *McDougald v. Keller*, No. 5:09-HC-2134-D, 2011 WL 677272, at *3–4 (E.D.N.C. 15 Feb. 2011)).

Postconviction Proceedings

Undersigned counsel filed a MAR and motion for postconviction discovery on 26 June 2017. (App. p 1). The State provided postconviction discovery. Undersigned counsel filed an amendment to the MAR and a motion for deposition of the trial counsel on 22 May 2018. (App. p 61). The State filed an answer on 20 January 2019. (App. p 139). Undersigned counsel filed a reply on 6 March 2019 and exhibits in support of the MAR on 2 August 2019. (App. pp 437, 456).[1]

Mr. McDougald alleged the following constitutional violations that he now raises in this petition:

1. The denial of his right to the effective assistance of counsel during plea negotiations, in violation of the Sixth Amendment to the United States Constitution and the North Carolina Constitution, Article I, Sections 19 and 23;

[1] The parties filed additional motions related to scheduling, which the court below resolved. Those motions are not in dispute and are not discussed further or included in the appendix. Counsel will provide them on request.

2. The imposition of life without parole based on allegations that included juvenile conduct, in violation of the Eighth Amendment to the United States Constitution; and
3. The imposition of a disproportionate sentence in violation of the Eighth Amendment to the United States Constitution.[2]

The court below held an evidentiary hearing on the first claim, ineffective assistance of counsel, on 9 August 2019. (App. p 500). Mr. Key testified about his work on the case, providing some of the facts described above. He testified that explaining the violent habitual felon indictment to Mr. McDougald on the morning of trial on the substantive felonies "put[] him at a disadvantage" because he lost "the opportunity to . . . have meaningful thought . . . about the habitual felon part of the case." (App. pp 516, 521).

Mr. Key also testified about how he would handle the case now that he has more experience in criminal defense and has represented another fifteen or sixteen clients facing life without parole. (App. p 509). Now, Mr. Key said he would write to Mr. McDougald "immediately" after getting the violent habitual felon indictment so that "[h]e can look at it" and "question me, send me a letter, or when I go to see him, question me in detail about it." (App. p 517). Mr. Key would also show Mr. McDougald the State's plea offer in writing. (App. p 515). Giving Mr. McDougald

[2] Mr. McDougald raised an ineffective assistance of appellate counsel claim that he abandoned at the evidentiary hearing because "in light of the evidence the court heard today, without being able to conduct an evidentiary hearing, [the appellate claim at issue] could not have been raised on appeal." (App. p 565).

more information more quickly and in writing would let him "have an informed discussion [and] have an opportunity to look at it." (App. p 517).

After Mr. Key testified, attorney Michael G. Howell testified. (App. p 536). Mr. Howell has practiced criminal defense in North Carolina since 1987, has represented thousands of clients, has taken over one hundred cases to a jury trial, and has represented clients facing the death penalty and life without parole since 2000. (App. pp 472–73, 537–39). He has worked on clients charged with high-level felonies at both the Capital Defender's Officer and the Wake County Public Defender's office. Some of his clients have faced charges for violent habitual felon status. (App. pp 539–40).

Mr. Howell testified that Mr. Key's performance was "deficient" because he failed to "fully explain[] to Mr. McDougald on April 25, 2001 the full ramifications of the plea offer and the rejection of it[,]" including exposure to a mandatory life without parole sentence. (App. pp 540–41, 547).

Mr. Howell reviewed the 18 May 2001 scheduling order and Mr. Key's time sheet that showed fifteen minutes on the case that day. Mr. Howell testified that a reasonable attorney would not try to appear in an administrative session in court and explain a violent habitual felon charge in the same fifteen-minute period. (App. p 548).

Mr. Howell also reviewed the transcript of proceedings from the morning of trial. Based on his review of that transcript, Mr. Howell testified that Mr. McDougald "didn't fully appreciate what was going on" and was not sufficiently

informed to knowingly turn down a plea deal. (App. pp 550–51). He stated that explaining the sentence on the morning of trial was not sufficient because "it's complicated" and "it takes the client some time to process the facts of the case against them as well as the sentencing." (App. p 545). He further testified that rather than saying "may," a reasonable attorney also would have explained that a mandatory sentence means that a client "will get a life sentence without parole" and that "it's automatic. Judge has no discretion." (App. p 543).

On 25 November 2019, the court below denied the MAR. The court found that the State made a plea offer "of approximately thirteen and one-half years" before trial, that Mr. Key communicated it to Mr. McDougald, and that Mr. McDougald rejected it. (App. p 569, Finding of fact # 3). The court found that Mr. McDougald was in court on 18 May and 28 June 2001. (App. p 570, Findings of fact # 5, # 9).[3] The court found that Mr. McDougald "was informed well before October 1, 2001 that he faced a violent habitual felon enhancement." (App. p 572, Finding of fact # 24). The court also found that Mr. McDougald "was informed that he was subject to a sentence of life without parole." (App. p 572, Finding of fact # 25). The court found that "[t]he credible evidence does not establish [Mr. McDougald] was not informed by Mr. Key well in advance of . . . October 1, 2001, that he faced a mandatory sentence of life imprisonment without parole." (App. p 572, Finding of fact # 25).

[3] It appears that the court decided the exact date of the June 2001 hearing based on the date of the order for joinder and not Mr. Key's time sheet or the another order in the file. (App. pp 89, 107, 112). Whether the June hearing happened on June 25 or 28 is not material.

The court reviewed the transcript from the morning of trial. It found that "[t]here is no credible evidence" that Mr. McDougald expressed a desire to accept any plea offer. (App. 571, Finding of fact # 15). The court also found that on 1 October 2001, Mr. McDougald "knew that he faced a sentence of life without parole" and chose to go to trial. (App. p 572, Finding of fact # 26). The court found that

> [t]he credible evidence does not establish that [Mr. McDougald] lacked a full and informed understanding well in advance of October 1, 2001, of the impact of the violent habitual felon charge, of its potential consequences and of the consequences of rejecting the plea arrangement which had been offered by the State.

(App. p 572, Finding of fact # 27). The court also found that "[t]he credible evidence does not establish that the defense counsel failed to fully, timely and competently advise [Mr. McDougald] on these issues." (App. pp 572–73, Finding of fact # 27).

The court concluded that Mr. McDougald failed to prove that Mr. Key's performance "was objectively unreasonable or deficient." (App. p 575, Conclusion of law # 7). The court also concluded that Mr. McDougald "has failed to establish that there is a reasonable probability that but for any unprofessional error committed by Mr. Key the result of the proceeding would have been any different" or that Mr. McDougald would have accepted the plea offer. (App. p 575, Conclusion of law # 8).

With respect to the Eighth Amendment claim, the court accepted as true the facts described in the pleadings about Mr. McDougald's childhood. (App. p 574, Finding of fact # 35). It concluded that Mr. McDougald's sentence "was not imposed for conduct committed before [he] was eighteen years of age in violation of *Graham v. Florida*, 560 U.S. 48[, 176 L. Ed. 2d 825] (2010), *Miller v. Alabama*, [567 U.S. 460,

183 L. Ed. 2d 407] (2012), or *Montgomery v. Louisiana*, [577 U.S. __, 193 L. Ed. 2d 599] (2016)." (App. p 574). The court also concluded that Mr. McDougald's sentence "did not violate the constitutional prohibitions against mandatory sentences of life without parole for juveniles." (App. p 574, Conclusion of law # 2). Finally, the court found that the sentence "is not grossly disproportionate to the conduct punished." (App. p 574, Conclusion of law # 4).

REASONS WHY WRIT SHOULD ISSUE

I. THE COURT BELOW ERRED IN HOLDING THAT THE TRIAL ATTORNEY ACTED REASONABLY AND WITHOUT PREJUDICE EVEN THOUGH HE ADMITTED THAT HE DID NOT EXPLAIN THE PUNISHMENT FOR VIOLENT HABITUAL FELON STATUS UNTIL THE MORNING OF TRIAL AND THAT HIS EXPLANATION "MIGHT SOUND [LIKE] GIBBERISH."

This Court reviews orders denying MARs to determine whether the evidence supports the findings of fact, "whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982). If the findings of fact are "supported by competent evidence[,]" then they are binding on appeal and "may be disturbed only upon a showing of manifest abuse of discretion." *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998). The conclusions of law "are fully reviewable on appeal." *Id.*

A conclusion that involves applying the law to facts is treated as a conclusion of law and reviewed *de novo*, even if the MAR court labeled the conclusion as a "finding of fact." *State v. Jackson*, 220 N.C. App. 1, 8, 727 S.E.2d 322, 329 (2012).

a. The trial attorney's testimony, the trial transcript, and other evidence showed that the attorney acted unreasonably when he never gave a clear explanation of the mandatory punishment and waited until the morning of trial to give a confusing one.

On the morning of 1 October 2001, Mr. McDougald was going to trial on charges that could lead to a mandatory sentence of life without parole. His own attorney described it as "trial by ambush." (App. p 519). His attorney had not visited him since April or sent him any letters, even after the State obtained a violent

habitual felon indictment in May. (App. p 89). Although the attorney testified that he had researched the violent habitual felon statute at some point before 1 October, his timesheet does not show that he conducted any research on the issue until 3 October, after the trial on the substantive felony was over. (App. pp 89, 526). By Mr. Key's own admission, he told Mr. McDougald about life without parole for the first time on the morning of 1 October while in a rush. (App. pp 518–20). He said that Mr. McDougald "may be sentenced to life in prison without the possibility of parole." (App. p 519). Mr. Key thought that his own explanation "might sound [like] gibberish." (App. p 520).

Despite the evidence, the court below found that Mr. McDougald "was informed well before October 1, 2001 that he faced a violent habitual felon enhancement." (App. p 572, Finding of fact #24). The court also found that

> [t]he credible evidence does not establish that [Mr. McDougald] lacked a full and informed understanding well in advance of October 1, 2001, of the impact of the violent habitual felon change, of its potential consequences and of the consequences of rejecting the plea arrangement which had been offered by the State.

(App. p 572, Finding of fact # 27); *see also* (App. p 572, Finding of fact # 25 ("The credible evidence does not establish [that Mr. McDougald] was not informed by Mr. Key well in advance of the first day of his trial, October 1, 2001, that he faced a mandatory sentence of life with imprisonment without parole as a violent habitual felon.")); (App. p 572, Finding of fact # 26 (finding that on the morning of trial Mr.

McDougald "knew that he faced a sentence of life without parole")).[4]

Findings of fact # 24, # 25, # 26, and # 27 are directly contrary to Mr. Key's testimony that he did not discuss the punishment for violent habitual felon status until the morning of October 1. (App. p 519). It is also contrary to Mr. McDougald's sworn affidavit in which he said that when Mr. Key talked about a habitual enhancement, he did not understand which enhancement the State was pursuing. (App. p 90). Mr. McDougald's affidavit and the trial transcript show that, as Mr. McDougald admitted on 1 October 2001, he "really [didn't] know what's going on." (App. pp 90–91, 105). The finding is also contrary to Mr. Key's timesheet showing that he did not visit or write his client between April and October, even after the violent habitual felon indictment was issued. (App. p 89). Although there was evidence that Mr. McDougald was in court on days when the violent habitual felon charge was on the docket, to be in court for a fifteen-minute administrative session is not the same thing as having any meaningful understanding of what is happening. (App. pp 89, 107, 112–13, 231, 548–49). In findings of facts # 24, # 25, # 26, and # 27, the court below abused its discretion by disregarding the trial attorney's own testimony as supported by a sworn affidavit, a trial transcript, and the trial attorney's timesheet. (App. p 572); *see Wilkins*, 131 N.C. App. at 223, 506 S.E.2d at 276.

[4] In light of finding of fact # 27, the court below presumably meant in finding of fact # 26 that Mr. McDougald "knew that he faced a [mandatory] sentence of life without parole." (App. p 572).

b. The court below erred when it concluded that the trial attorney acted reasonably.

It was also erroneous for the court below to conclude that Mr. Key acted reasonably in his representation of Mr. McDougald in what are categorized as findings of fact # 27 and # 33 and in conclusions of law # 7, # 10, and # 14.[5] (App. pp 572–75). As Mr. McDougald's attorney, Mr. Key had a constitutional duty to advise Mr. McDougald about any plea offers as a reasonable attorney would. *See Hill v. Lockhart*, 474 U.S. 52, 57, 88 L. Ed. 2d 203, 209 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 687–88, 80 L. Ed. 2d 674, 693 (1984)); *Lafler v. Cooper*, 566 U.S. 156, 165, 182 L. Ed. 2d 398, 408 (2012); *see also* N.C. Const. art. I, §§ 19, 23. During plea negotiations, Mr. Key had to advise his client about issues that could determine the client's decision. *See Hill*, 474 U.S. at 57, 88 L. Ed. 2d at 209; *State v. Goforth*, 130 N.C. App. 603, 605, 503 S.E.2d 676, 678 (1998) (holding that trial counsel acted unreasonably by providing inaccurate information about the law); *cf. Padilla v. Kentucky*, 559 U.S. 356, 369, 176 L. Ed. 2d 284, 295–96 (2010) (holding that trial counsel was deficient for providing inaccurate information about immigration consequences of plea deal); (App. p 137: *Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level*, N.C. Comm'n on Indigent Def. Servs., 2 (12 Nov. 2004),

[5] The first sentence in finding of fact # 27 is a finding of fact. The remainder of finding of fact # 27 and all of # 33 are conclusions about whether Mr. Key acted as a reasonable attorney would. Those conclusions receive *de novo* review. *See Jackson*, 220 N.C. App. at 8, 727 S.E.2d at 329. Whether the court below labels a legal conclusion as such does not change this Court's standard of review. *See id.*

http://www.ncids.org/Rules%20&%20Procedures/Performance%20Guidelines/Trial%20Level%20Final%20Performance%20Guidelines.pdf ("Counsel has an obligation to maintain regular contact with the client and keep the client informed of the progress of the case.")).

In Mr. McDougald's case, there were four times when Mr. Key acted unreasonably and prejudicially:

1. During the 25 April 2001 meeting with Mr. McDougald;
2. On 14 May 2001, when the State indicted Mr. McDougald for violent habitual felon status;
3. Between 14 May 2001 and 1 October 2001, after the status indictment and the State's plea offer to a term of years; and
4. The morning of 1 October 2001, before the trial on the substantive felonies.

The court below erred in concluding that Mr. Key acted reasonably in each of these instances, which are discussed below in more detail. (App. pp 572–75, Findings of fact # 27, # 33, Conclusions of law # 7, # 10, # 14.).

1. <u>25 April 2001 Meeting About Plea Offer</u>

As Mr. Howell testified, a reasonable attorney advising his client in April 2001 on a plea offer to approximately thirteen years would have realized that Mr. McDougald had two prior class A through E felonies. (App. pp 542–43). Whether a reasonable attorney would have considered the possibility of a violent habitual felon charge without any prompt is irrelevant, because the prosecutor told Mr. Key about

the possibility in February. (App. p 510). Given that warning, a reasonable attorney would have explained that the State could pursue a violent habitual felon charge and that the status carried a mandatory life without parole punishment. (App. p 543). The attorney would have explained that violent habitual felon status is different than habitual felon status and carries a much more severe punishment. *See Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694 (explaining trial counsel's "particular duties to consult with the [client] on important decisions and to keep the [client] informed of important developments in the course of the prosecution").

A reasonable attorney would have explained the plea offer and violent habitual felon status both orally and in writing. As Mr. Key and Mr. Howell testified, giving clients information in writing reinforces it and helps them process it. *See Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694; (App. pp 515–17, 544–46).

2. 14 May 2001 Violent Habitual Felon Indictment

After the State obtained a violent habitual felon indictment, as both Mr. Howell and Mr. Key testified, a reasonable attorney would have informed the client of the indictment promptly. (App. pp 515–17, 547); *see Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694. The attorney would have both visited the client and written to him to explain the new indictment and the mandatory punishment. The attorney also would have talked and written about the benefit of a plea to a thirteen-year minimum sentence in light of the new indictment and the mandatory punishment. (App. pp 515–17, 545, 547).

3. Between 14 May 2001 and 1 October 2001

After the State obtained the violent habitual felon indictment, a reasonable attorney would have continued visiting and writing with Mr. McDougald as necessary to answer his questions about the indictment, the punishment for the status, and the benefits of the plea deal that the State offered. (App. p 515–17, 545, 547); *see Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694.

Even if the client were not interested in a plea deal at first, a reasonable attorney would not have rested after one visit about a plea offer. Instead, according to Mr. Howell, the attorney would "[g]o see [the client] a lot. Be persistent." (App. p 544). If necessary, an attorney would provide a written explanation of the evidence against a client and ask the client to sign a document stating that he is refusing a plea deal, if that were the client's informed wish. (App. pp 544–45).

Mr. Key did not visit his client or write to him about the plea offer and the mandatory punishment for violent habitual felon status at all between 25 April 2001 and the morning of trial on 1 October 2001. (App. p 89). Mr. Key, therefore, admitted that Mr. McDougald "was deprived of [the] opportunity to think about, have meaningful thought anyway about the habitual felon part of the case." (App. p 521); *see Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694. As a result, the trial on 1 October 2001 was, in the words of Mr. Key himself, "trial by ambush." (App. p 519).

4. The Morning of 1 October 2001

On the morning of trial, even if he not done so beforehand, a reasonable attorney would have explained the mandatory punishment for violent habitual felon

status and the benefits of a plea deal. The attorney would have explained the mandatory penalty clearly enough that Mr. McDougald would have understood it. *See Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694.

As both Mr. Key and Mr. Howell explained, reasonable attorneys explain punishments so that clients understand them. (App. pp 519–20, 544). Mr. Key testified that saying that the judge "may" give life without parole did not convey that the punishment was mandatory. (App. pp 519–20). As Mr. Key recognized in hindsight, someone could understand "may" to mean at least two different things. (App. pp 519–20). One understanding is that Mr. McDougald might or might not be convicted of a substantive felony and then of violent habitual felon status. However, if he were convicted of violent habitual felon status, he would receive a sentence of life without parole. (App. p 519). The second understanding is that if Mr. McDougald were convicted of violent habitual felon status, the judge might or might not give him life without parole. In other words, if that were the law, the judge would have had discretion regarding whether to impose a sentence of life without parole. Both interpretations would be plausible to a layperson, but only the latter is an accurate statement of the law. N.C. Gen. Stat. § 14-7.12. The difference between them is a lifetime in prison instead of years. A reasonable attorney would have ensured that his client understood the difference while he could still take a plea deal. *See Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694.

Mr. McDougald's confusion over the meaning of "may" is understandable. "May" commonly indicates that a person could do something, not that a person must

do something. *See May*, *American Heritage College Dictionary* (3d ed. 1997) ("to be allowed or permitted to"; "used to indicate a certain measure of likelihood or possibility"). North Carolina courts typically understand "may" to mean that an action is "permissive and not mandatory." *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) ("Ordinarily when the word 'may' is used in a statute, it will be construed as permissive and not mandatory."). Mr. McDougald's statement on 1 October 2001 that he was "facing" life without parole was consistent with Mr. McDougald thinking that Mr. Key meant that the judge could impose life without parole or a term of years. (App. p 101). It is unfair and unreasonable to expect a person who has been woken up early in the morning, taken to court unexpectedly, and has not had a sit-down meeting with his lawyer, nor a letter, for months, to understand his lawyer's confusing explanation of a rarely used statute. (App. pp 101, 520); *see Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694.

Mr. Howell testified that a reasonable attorney would have to be much clearer to explain a mandatory punishment to someone in Mr. McDougald's position by saying: "[I]f you're found guilty of kidnapping or burglary, [the punishment is] that you will get a life sentence without parole. There is – it's automatic. Judge has no discretion." (App. p 543). Anything less clear leaves a client thinking that a judge could impose a term of years instead of life without parole, as Mr. McDougald believed. (App. pp 91, 520). Mr. Key himself thought that his explanation might have sounded like "gibberish." (App. pp 519–20).

In neither the court session on May 16 nor the session on June 25 did Mr.

Key compensate for the lack of communication. On both days, Mr. Key's timesheet showed an entry for fifteen minutes for court and nothing else. (App. p 89). He did not testify to any other meetings with his client on those days. A reasonable attorney would not expect a client to go to an administrative session of court and understand the requirements for violent habitual felon status or the mandatory punishment. A reasonable attorney would not try to explain a mandatory punishment of life without parole in the same fifteen-minute block that he appeared in an administrative session of court. *See Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694. Trying to do so would be too much of a rush. Instead, to explain the punishment, Mr. Howell said, an attorney would make an appointment to visit his client, "sit down in the same room[,] and talk and show [the client] documents." (App. p 549).

Mr. Key's actions after the jury verdict on second-degree kidnapping further demonstrate his unreasonableness. Although Mr. Key testified that he researched the violent habitual felon statute before 1 October, he did not indicate having done so on his timesheet until 3 October 2001, when Mr. McDougald had already been convicted of a class E felony. (App. pp 89, 526). Nonetheless, he filed a motion challenging the violent habitual felon charge on 4 October 2001. (App. p 109). If Mr. Key believed that there was a viable claim and had known the significance of violent habitual felon status before October 1, he would have filed his motion before the trial on the substantive felonies. *See State v. Gleason*, 848 S.E.2d 301, 304 (N.C. Ct. App. 2020) (holding that trial counsel was deficient for failing to object to a lack

of notice of aggravating factor). Instead, he made a futile, last-minute effort to address a charge that should have been researched well before trial and taken into account during plea negotiations. *See id.; cf. Padilla*, 559 U.S. at 369, 176 L. Ed. 2d at 296; (App. pp 137–38: Performance Guidelines at 2, 12).

5. Summary of Acts of Ineffective Assistance of Counsel

For the Court's convenience, the chart on the following pages summarizes the acts of ineffective assistance of counsel:

Summary of Acts of Ineffective Assistance of Counsel			
Date	**Event**	**What a reasonable attorney would have done**	**What Mr. Key did**
25 April 2001	Attorney-client meeting after the prosecutor mentioned a violent habitual felon charge in February and made a plea offer in April to a term of years (App. pp 89–91, 510)	• Explain the concept of violent habitual felon status to Mr. McDougald clearly enough that he would understand it • Advise Mr. McDougald that there was a mandatory punishment of life without parole • Provide information about the charges, punishment, and plea offer in writing (App. pp 515–17, 543–46); *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694	• Failed to explain violent habitual felon status clearly enough that Mr. McDougald understood it • Failed to tell Mr. McDougald about the mandatory punishment of life without parole • Failed to provide information about the charges, punishment, and plea offer in writing (App. pp 90–91, 518–20)
14 May 2001	State indicted Mr. McDougald for violent habitual felon status after offering a plea to a term of years (App. pp 49, 89–90)	• Immediately notify the client in writing about the indictment and the mandatory punishment • Provide information about the plea offer and its benefits in writing (App. pp 515–17, 543–47); *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694	• Failed to write to Mr. McDougald about the indictment or the plea offer • Failed to visit Mr. McDougald • Failed to explain the mandatory punishment for the status (App. pp 89–91, 518–20)

14 May 2001 – 1 October 2001	Before trial	• Continue writing as necessary to answer the client's questions • Visit the client and discuss the benefits of a plea in light of the new indictment • Ask the client to review and sign a document summarizing the evidence in the case, the mandatory punishment for violent habitual felon status, and the plea offer (App. pp 515–17, 543–47); *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694	• Still did not advise Mr. McDougald about the indictment or plea offer • Still did not visit or call Mr. McDougald in jail or prison • Still did not explain the mandatory punishment for the status • Failed to ask the client to sign any document summarizing the evidence in the case, the mandatory punishment for violent habitual felon status, and the plea offer (App. pp 89–91, 518–20)
1 October 2001	The morning of trial on the substantive felonies	• Review the mandatory punishment for violent habitual felon status • Give Mr. McDougald sufficient information about the benefits of a plea • Talk with Mr. McDougald about taking a plea before trial started (App. pp 519–20, 543–44); *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694	• Tried to explain the punishment in a way that Mr. Key later admitted might have sounded like "gibberish" • Failed to give Mr. McDougald sufficient information about the benefits of a plea • Allowed Mr. McDougald to experience what Mr. Key later described as "trial by ambush" (App. pp 516, 519–20)

c. The court below erred in finding and concluding that the trial attorney's ill-timed and "gibberish" explanation of the mandatory punishment caused no prejudice to his client.

The testimony at the hearing on the MAR and supporting documentation show that months before trial, the State offered Mr. McDougald a plea deal to an approximately thirteen-year minimum sentence. (App. pp 89–90, 512–13). An approximately thirteen-year sentence matches the highest minimum presumptive sentences for first-degree burglary and second-degree kidnapping, both of which were charged and would have been typical parts of a plea deal. *See Felony Punishment Chart and Minimum/Maximum Table for Offenses Committed on or after December 1, 1995 to December 1, 2009*, N.C. Jud. Branch (29 Aug. 2018), https://www.nccourts.gov/documents/publications/punishment-grids. The State made the offer of approximately thirteen years, and it would have been reasonable for the court to accept it to avoid the time and expense of a trial. There is evidence that the State offered a plea deal and no evidence that the State ever took the plea off of the table. Mr. Key testified that the State may have accepted it even on the morning of trial. (App. pp 89–90, 512–13, 531). It was available as early as April, after the prosecutor had talked about a forthcoming violent habitual felon indictment. (App. pp 89, 510, 512).

Both Mr. Key's testimony and Mr. McDougald's affidavit show that if Mr. McDougald had understood the nature of violent habitual felon status, and its mandatory punishment, he would have taken a plea to thirteen years. (App. pp 90–92, 531). As Mr. Key said, "I think that he may have changed his mind if he truly

understood the impact of [the] violent habitual felon indictment." (App. p 531). Similarly, Mr. Howell testified that clients who resist plea offers initially will reconsider as the attorney provides more information and more time to process it in an appropriate setting. (App. pp 544–45). If Mr. Key had communicated with his client as he would now and as Mr. Howell described, then Mr. McDougald would have considered carefully the prospect that the State would offer evidence that he committed second-degree kidnapping and had two prior class A through E felonies. He would have known that prevailing at trial on the substantive and status offenses would not have been a viable plan. He also would have weighed a minimum sentence of approximately thirteen years against a mandatory sentence of life without parole. As the evidence showed, he would have pled guilty and accepted a minimum sentence of approximately thirteen years. He would have done so before trial or, if necessary, on the morning of trial. (App. pp 90–92, 531, 544–45).

Mr. McDougald's unwillingness to take a plea deal when his attorney acted unreasonably does not predict how he would have acted if his attorney had acted reasonably. Accordingly, the finding by the court below that Mr. McDougald did not "express a desire to accept" the State's plea offer does not support the conclusion that he would have refused a plea deal had his attorney behaved reasonably. (App. pp 571, 575, Finding of fact # 15, Conclusions of law # 8, # 9).

In light of all of the evidence that Mr. McDougald would have accepted a plea deal if only he had gotten reasonable advice, the court below abused its discretion when it found that the evidence did not show that Mr. McDougald would have

accepted a plea but for any errors by Mr. Key. (App. p 574, Finding of fact # 34); *Wilkins*, 131 N.C. App. at 223, 506 S.E.2d at 276. The corollary conclusions of law that there was no prejudice were also wrong. (App. p 574–75, Finding of fact # 34, Conclusions of law # 8, # 9, # 10, # 12, # 14).[6] The facts established at the evidentiary hearing and on the record showed that the State offered and would have accepted a plea deal to an approximately thirteen-year minimum, that Mr. McDougald would and could have accepted it in or after April, that the court would have accepted it, and that it was less severe than a life without parole sentence. All of those facts showed that Mr. Key's errors prejudiced Mr. McDougald. (App. pp 90–92, 531, 544–45); *see Lafler*, 566 U.S. at 163–64, 182 L. Ed. 2d at 407; *Hill*, 474 U.S. at 59, 88 L. Ed. 2d at 210 ("The second, or 'prejudice, requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.").

Under *Lafler*, the appropriate remedy is to vacate the convictions and order the State to offer a plea bargain that would place in Mr. McDougald in the same position that he would have been in if he received effective assistance of counsel during plea negotiations. *See Lafler*, 566 U.S. at 174, 182 L. Ed. 2d at 414. If Mr. McDougald pleads to charges without violent habitual felon status, then the Eighth Amendment issue described below becomes moot.

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[6] Finding of fact is # 34 is a legal conclusion about whether Mr. Key acted as a reasonable attorney would. It receives *de novo* review. *See Jackson*, 220 N.C. App. at 8, 727 S.E.2d at 329. Whether the court below labels a legal conclusion as such does not change this Court's standard of review. *See id.*

II. THE COURT BELOW ERRED IN CONCLUDING THAT A MANDATORY LIFE WITHOUT PAROLE PUNISHMENT THAT RELIES ON JUVENILE CONDUCT IS CONSTITUTIONAL.

The violent habitual felon statute has several provisions that are important here. It makes a person eligible for the status if he has been convicted of two prior class A through E felonies in two different court sessions. N.C. Gen. Stat. § 14-7.7. If a person is convicted of a third class A through E felony (other than capital murder) and the State obtains a conviction for violent habitual felon status, the Court must sentence him to life without parole. N.C. Gen. Stat. § 14-7.12. The statute considers an offense's legal classification, not whether an offense was violent or how violent it was. N.C. Gen. Stat. § 14-7.7. The judge has no ability to request or give a mitigated sentence, and the person convicted has no parole eligibility. N.C. Gen. Stat. § 14-7.12. The sentencing regime is even harsher than the habitual felon law and regular structured sentencing, both of which allow mitigated sentences. *See* N.C. Gen. Stat. § 14-7.6 (mandating sentencing for habitual felon status under regular structured sentencing provisions); N.C. Gen. Stat. §§ 15A-1340.13, 15A-1340.16(a) (allowing judge to consider mitigating factors and reduced sentences as part of regular structured sentencing). It is also harsher than the Fair Sentencing Act's provisions for murder, which did not keep someone from being parole eligible. *See* 1994 N.C. Laws 1st Ex. Sess. Ch. 21 § 1 (amending N.C.G.S. 14-17 as it existed under the Fair Sentencing Act to eliminate parole eligibility for murder). Unless a court grants postconviction relief, the only way to leave prison alive after being convicted as a violent habitual felon is executive clemency, "the remote possibility of

which does not mitigate the harshness of the sentence." *Graham v. Florida*, 560 U.S. 48, 70, 176 L. Ed. 2d 825, 842 (2010).

As applied to Mr. McDougald, the statute's provisions meant that the State had to rely on juvenile conduct to allege one of the two prior convictions. Prior to his conviction for second-degree kidnapping in 2001, Mr. McDougald had only been convicted of felonies on two court dates: once when he was sixteen, and once when he was nineteen. (App. pp 37–46, 49). Thus, the conviction for juvenile conduct had to be a predicate for him to have violent habitual felon status. N.C. Gen. Stat. § 14-7.7. Once Mr. McDougald was convicted of violent habitual felon status, the Court had to impose a sentence of life without parole and could not consider the mitigating circumstances of Mr. McDougald's childhood. N.C. Gen. Stat. § 14-7.12.

In contrast to the rote application of the violent habitual felon statute to Mr. McDougald's juvenile conduct, the United States Supreme Court has narrowed the ways in which states can punish juvenile conduct, beginning in 2005 when the Court decided *Roper v. Simmons*, 543 U.S. 551, 578–79, 161 L. Ed. 2d 1, 28 (2005), and banned executions for juvenile conduct. Since then, the Court held that the State cannot punish nonhomicide conduct by a juvenile with life without parole because that sentence's harshness is incommensurate with nonhomicide crimes' effects. *See Graham*, 560 U.S. at 69, 74, 176 L. Ed. 2d at 842, 845. The Court also distinguished children from adults because of children's distinctive immaturity, vulnerability to outside influences, and potential for change. *See Miller v. Alabama*, 567 U.S. 460, 471, 183 L. Ed. 2d 407, 418 (2012). This Court and the North Carolina

Supreme Court also recognize juveniles' unique nature. *See State v. Young*, 369 N.C. 118, 125–26, 794 S.E.2d 274, 279–80 (2016) (holding that Miller applied retroactively and that a mandatory sentence of life without parole for juvenile conduct violated the Eighth Amendment); *State v. Kelliher*, No. COA19-530, 2020 WL 5901213, at *14 (N.C. Ct. App. 6 Oct. 2020) (holding that consecutive sentences of life with parole eligibility after serving fifty years for juvenile conduct were *de facto* life without parole that violated the Eighth Amendment).

Contrary to conclusions of law # 2, # 5, # 12, and # 14 the application of the statute to Mr. McDougald violates the Eighth Amendment by imposing life without parole based on nonhomicide juvenile conduct. (App. pp 574–75, Conclusions of law # 2, # 5, # 12, # 14). One of the predicates had to be for his conduct as a sixteen year old in the ninth grade. (App. pp 37–46, 49). Mr. McDougald could not have gotten life without parole without consideration of juvenile conduct. *Graham* held that juvenile conduct other than murder cannot be punished with life without parole. *See Graham*, 560 U.S. at 69, 74, 176 L. Ed. 2d at 842, 845. Accordingly, the State cannot rely on Mr. McDougald's juvenile conduct to impose life without parole.

In addition to having a diminished culpability because of the nature of the crime, Mr. McDougald also had a diminished culpability as a juvenile because of his developmental state, his circumstances, and his possibility for reform. *See Miller*, 567 U.S. at 471, 183 L. Ed. 2d at 418. Mr. McDougald showed the following:

- Mr. McDougald's father abused alcohol and cocaine when Mr. McDougald was a child and died of a drug overdose when Mr. McDougald was

approximately twenty-two years old. (App. pp 25, 27–28).

- Mr. McDougald's father beat his wife and his children regularly, sometimes using objects such as a metal flashlight and electrical cords. (App. pp 22–28).
- When Mr. McDougald was in second grade, he tried to run away from school so that he would not have to go back home. The police found him and took him home, and his father beat him. (App. pp 31–32).
- When Mr. McDougald was approximately ten years old, he saw his father put a gun to his mother's face and strike her with his fist. His mother still remembers "the sad look on William's face, as if [his father] had struck him instead of me." (App. p 25).
- Mr. McDougald's father sold bootleg liquor and entertained customers in the family's rural home near Coats, North Carolina. Mr. McDougald and his siblings could see people drinking and fighting on a regular basis. (App. pp 23, 29).
- Some nights, Mr. McDougald, his mother, and his siblings had to run across the fields surrounding their home to a neighbor's house or to Mrs. Houston's mother's house to escape from Mr. McDougald's father. (App. p 24).
- The family could not rely on Mr. McDougald's father for support, and his mother had to work long hours to support the children. (App. pp 24–27). In September of 1983, within six months of Mr. McDougald's first criminal conviction, there were seven people in his family living on a single annual

income of $7,800 ($20,160.71 adjusted for inflation). (App. p 34).[7]

The court below accepted the facts of Mr. McDougald's childhood as described above as true, yet it did not conclude that they were a basis for relief. (App. p 574). The court's disregard for the context of Mr. McDougald's conviction as a sixteen year old is contrary to *Graham* and its progeny's insistence that the context of juvenile conduct matters. Conduct that occurred during Mr. McDougald's childhood should not have contributed to a sentence of life without parole. *See Miller*, 567 U.S. at 471–72, 183 L. Ed. 2d at 418–19; *Graham*, 560 U.S. at 68, 176 L. Ed. 2d at 841–42.

The North Carolina Supreme Court has upheld the violent habitual felon statute against a facial constitutional challenge, but that case does not control here. *See State v. Mason*, 126 N.C. App. 318, 318, 484 S.E.2d 818, 820 (1997). The present case depends on the facts of Mr. McDougald's childhood and the nature of his offenses compared to his punishment. No North Carolina appellate court has decided whether a violent habitual felon sentence may be predicated on juvenile nonhomicide conduct, and whether juvenile conduct occurring in the context of a dangerous, abuse-filled childhood can contribute to a violent habitual felon sentence.

Courts in other jurisdictions have considered related challenges based on *Graham* and its progeny and denied them, but the court below did not address those

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[7] Conversion using Bureau of Labor Statistics, *CPI Inflation Calculator*, http://data.bls.gov/cgi-bin/cpicalc.pl (last visited 10 Nov. 2020).

cases in its conclusions of law. Counsel respectfully refers the Court to the pleadings below for further discussion. (App. pp 450–52).

Moreover, the general principle that recidivist statutes punish new crimes, not prior crimes, *see State v. Todd*, 313 N.C. 110, 117, 326 S.E.2d 249, 253 (1985), does not justify Mr. McDougald's sentence. The State could not have imposed life without parole without alleging juvenile conduct. *Graham* and its progeny mean that the State cannot punish nonhomicide juvenile conduct with life without parole. *See Miller*, 567 U.S. at 471–72, 183 L. Ed. 2d at 418–19; *Graham*, 560 U.S. at 69, 74, 176 L. Ed. 2d at 842, 845; *State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984) (noting that North Carolina courts resolving questions of federal law must "treat[] . . . decision of the United States Supreme Court as binding").

III. THE COURT BELOW ERRED IN CONCLUDING THAT MR. MCDOUGALD'S SENTENCE IS NOT DISPROPORTIONATE.

In addition to limiting the consequences of juvenile conduct, the Eighth Amendment also demands that "that punishment for [a] crime should be graduated and proportioned to [the] offense." *Kennedy v. Louisiana*, 554 U.S. 407, 419, 171 L. Ed. 2d 525, 538 (2008) (alteration in original) (quoting *Weems v. United States*, 217 U.S. 349, 367, 54 L. Ed. 793, 798 (1910)). When considering Eighth Amendment proportionality challenges, courts first ask whether a sentence is grossly disproportionate to the conduct. *See Graham v. Florida*, 560 U.S. 48, 60, 176 L. Ed. 2d 825, 836 (2010). If it is, the court may decide that the sentence is unconstitutional by considering other sentences in the same jurisdiction. *See id.*; *Solem v. Helm*, 463 U.S. 277, 292, 77 L. Ed. 2d 637, 650 (1983).

The severity of Mr. McDougald's sentence is grossly disproportionate to the gravity of second-degree kidnapping. *See Graham*, 560 U.S. at 60, 176 L. Ed. 2d at 836. A proportional sentence takes into account the nature of both the punishment and the crime. *See Kennedy*, 554 U.S. at 419, 171 L. Ed. 2d at 538. For decades, the United States Supreme Court has found that "there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other." *Id.* at 438, 171 L. Ed. 2d at 550. The distinction is that nonhomicide crimes cannot be compared to the "severity and irrevocability" of murder. *Id.* (quoting *Coker v. Georgia*, 433 U.S. 584, 598, 53 L. Ed. 2d 982, 993 (1977) (plurality opinion)). Despite the fact that he has never committed homicide, Mr. McDougald is serving the second-most severe sentence that the State may impose for any crime, and the same sentence that other people receive for first-degree murder. Although Mr. McDougald does not mean to diminish the seriousness of the prior offenses, the effects of his convictions on victims and society do not match the permanence of a sentence of life without parole. Because the sentence here is grossly disproportionate to the offense, the Court may consider objective indicators of his sentence's disproportionality. *See Graham*, 560 U.S. at 60, 176 L. Ed. 2d at 836.

The difference between a sentence for second-degree kidnapping with violent habitual felon status and the typical sentence for second-degree kidnapping is objective evidence that it is disproportionate. *See Solem*, 463 U.S. at 292, 77 L. Ed. 2d at 650. The maximum presumptive sentence for the class E felony of second-

degree kidnapping with a prior record level IV, which Mr. McDougald would have had, was sixty-five months. Even a person with a prior record level VI who served the longest possible aggravated sentence would only serve ninety-eight months. *See Felony Punishment Chart and Minimum/Maximum Table for Offenses Committed on or after December 1, 1995 to December 1, 2009*, N.C. Jud. Branch (29 Aug. 2018), https://www.nccourts.gov/documents/publications/punishment-grids. Had Mr. McDougald received a ninety-eight month sentence and served all of it, he would have left prison when he was forty-one. The two misdemeanors of which he was convicted could have added less than a year to his sentence. Now he is fifty-two years old and is still in prison. Contrary to conclusions of law # 3, # 4, # 5, # 12, and # 14, the Eighth Amendment protects him from serving life without parole for second-degree kidnapping with violent habitual felon status while the punishment for second-degree kidnapping in almost all other cases is so much less than his current sentence. (App. pp 574–75, Conclusions of law # 3, # 4, # 5, # 12, # 14); *see Solem*, 463 U.S. at 291, 77 L. Ed. 2d at 650.

If the Court vacates the conviction for violent habitual felon status, the remaining convictions will remain in place.

CONCLUSION

Mr. McDougald respectfully prays that this Court vacate the 25 November 2019 order denying his motion for appropriate relief. If the Court vacates the order on Sixth Amendment grounds, Mr. McDougald prays that the Court vacate his current convictions and sentence and then order the State to offer a plea deal that

would put him in the same position that he would be in if his attorney had acted reasonably during plea negotiations. If the Court vacates the order on Eighth Amendment grounds, Mr. McDougald prays that the Court vacate the violent habitual felon conviction and remand for resentencing on the underlying charges. Petitioner further prays for such other relief as seems proper to the Court.

ATTACHMENTS

Attached to this petition for consideration by the Court is an appendix. The first page of the appendix contains a detailed table of contents.

Respectfully submitted this the 20th day of November, 2020.

North Carolina Prisoner Legal Services, Inc.

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VERIFICATION

I affirm, under the penalties for perjury, that the foregoing representations are true.

By Electronic Submission: 11/20/2020
Christopher J. Heaney Date

CERTIFICATE OF SERVICE

The undersigned hereby certifies he has served the following attorneys with an electronic copy of the foregoing Petition for Writ of Certiorari and the appendix by email and electronic file transfer on this day:

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This the 20th day of November, 2020.

By Electronic Submission:
Christopher J. Heaney

No. JUDICIAL DISTRICT ELEVEN (A)

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA,	)	
	)	
v.	)	From Harnett County
	)	File Nos. 01 CRS 920, 4612
WILLIAM McDOUGALD	)	
	)	

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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