No. 21-286 JUDICIAL DISTRICT ELEVEN (A)

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA,	)	
	)	
v.	)	From Harnett County
	)	
WILLIAM McDOUGALD	)	
	)	

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DEFENDANT-APPELLANT'S BRIEF

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DEFENDANT-APPELLANT'S BRIEF

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ISSUES PRESENTED

I. DID THE COURT BELOW ERR IN CONCLUDING THAT THE TRIAL ATTORNEY ACTED REASONABLY AND WITHOUT PREJUDICE WHEN THE ATTORNEY FAILED TO INFORM MR. McDOUGALD THAT HE WAS SUBJECT TO MANDATORY LIFE WITHOUT PAROLE?

II. DID THE COURT BELOW ERR IN UPHOLDING A MANDATORY LIFE WITHOUT PAROLE SENTENCE THAT RELIES ON JUVENILE CONDUCT?

III. DID THE COURT BELOW ERR IN CONCLUDING THAT MR. McDOUGALD'S SENTENCE IS NOT DISPROPORTIONATE?

STATEMENT OF THE CASE

A Harnett County grand jury indicted Mr. William McDougald on 10 April 2001 for first-degree burglary, second-degree kidnapping, and assault on a female. (R p 96). A grand jury approved on 14 May 2001 a superseding indictment for first-degree burglary, second-degree kidnapping, and assault on a female. (R p 97). A grand jury also indicted Mr. McDougald on 14 May 2001 for violent habitual felon status based on prior convictions for felonies committed as a sixteen-year-old and nineteen-year-old. (R p 52). He pleaded not guilty to all charges. On 2 October 2001, a jury acquitted him of burglary; the jury found him guilty of second-degree kidnapping, misdemeanor breaking or entering, and assault on a female. (R p 111). The trial court continued the matter until it a jury could hear the violent habitual felon charge. On 14 November 2001, a jury found Mr. McDougald guilty of violent habitual felon status. (VHF T p 20).[1] On the same day, the trial court imposed the mandatory sentence of life without parole. (R Pp 53–54). Mr. McDougald appealed. This Court found no error on 20 May 2008. *See* (R p 50: *State v. McDougald*, 190 N.C. App. 675, 661 S.E.2d 789 (2008) (unpublished)).

[1] References to (VHF T p _) refer to the transcript of the trial on the violent habitual felon status. References to (Trial T p _) refer to the transcript of the trial on the substantive felonies. References to (MAR T p _) refer to the transcript of the evidentiary hearing on the MAR.

Mr. McDougald filed a motion for appropriate relief (MAR) on 26 June 2017 and an amendment on 22 May 2018. (R pp 4, 64). The State filed an answer on 20 January 2019. (R p 142). Mr. McDougald filed a reply and exhibits on 2 August 2019. (R p 301). The court below held an evidentiary hearing on 9 August 2019 and denied the MAR on 25 November 2019. (R p 345).

Through counsel, Mr. McDougald filed a petition for writ of certiorari on 20 November 2020. The State responded on 14 December 2020. This Court allowed the petition on 6 January 2021. (R p 353). Judge Gilchrist completed appellate entries on 13 January 2021. (R p 355). The Appellate Defender appointed undersigned counsel on 23 January 2021. (R p 356). On 1 March 2021, the court below granted a thirty-day extension for serving the proposed record on appeal. (R p 357). On 4 June 2021, this Court granted a thirty-day extension for filing this brief.

GROUNDS FOR APPELLATE REVIEW

Mr. McDougald appeals pursuant to N.C.G.S. § 15A-1444(f) and N.C.G.S. § 15A-1422(c)(3) from the order denying the MAR. N.C. R. App. P. 21(a)(1).

STATEMENT OF THE FACTS

Officers arrested Mr. McDougald for second-degree kidnapping, a class E felony, on 3 February 2001. (R p 86). Mr. McDougald had prior convictions:

- On 16 May 1984, when he was sixteen years old and in the ninth grade, he had been convicted of second-degree kidnapping, a class E felony. (R pp 38–41).
- On 1 February 1988, when he was nineteen years old, he had been convicted of robbery with a dangerous weapon, a class D felony; second-degree sexual offense, a class D felony; and two counts of common law robbery, then a class H felony. (R pp 42–49).

On February 5, 2001, after the arrest for second-degree kidnapping, the trial court appointed Mark Key to represent Mr. McDougald. (R p 88). Mr. Key had graduated from law school in Maryland in 1995 and practiced insurance defense for two years. (MAR T p 8). He opened a solo practice in Harnett County in 1997 and handled "domestic work, personal injury work, criminal work, felonies and misdemeanors." (MAR T pp 8–9). Prior to his appointment to Mr. McDougald's case, Mr. Key had not represented anyone else subject to life without parole. (MAR T p 9).

Mr. Key's Actions Before Trial

Mr. Key first visited Mr. McDougald in jail on 6 February 2001, for one hour. (R p 92). During the visit, according to Mr. Key, "there was no conversation about any violent habitual felon." (MAR T p 11). Mr. Key later testified that after the 6 February meeting, a prosecutor mentioned "indicting [Mr. McDougald] as a violent habitual felon." (MAR T p 11).

Mr. Key visited Mr. McDougald on 14 February 2001 for thirty minutes and tried to explain a possible recidivist sentencing enhancement. (R pp 92–93). Mr. McDougald did not know that habitual felon status and violent habitual felon status were different. (R p 93). The chart below summarizes the difference between the two.

	Habitual Felon Status	**Violent Habitual Felon Status**
Can be applied to	Any felony	Only class A through E felonies
Results	Increases the felony class of a new offense to a class C felony	Mandatory life without parole
Sentencing exposure	44–263 months (3 years and 8 months to 21 years and 11 months)	Mandatory life without parole
Prior convictions required for status	3 felonies of any class, each of which must have offense dates and conviction dates that happened after the preceding felonies	2 class A through E felonies, the second of which must have an offense date and conviction date that happened after the first predicate felony

See N.C.G.S. §§ 14-7.1 to 14-7.6 (habitual felon status), 14-7.7 to 14-7.12 (violent habitual felon status). The provisions and sentencing ranges for habitual felon status are given for an offense committed on 2 February 2001, prior to the Justice Reinvestment Act. *See* N.C. Sess. Law 2011-192 § 3(d).

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 the mandatory punishment was life without parole. (R p 93); (MAR T p 27).

On 10 April 2001, a grand jury indicted Mr. McDougald for first-degree burglary, second-degree kidnapping, and assault on a female. (R p 96).

Mr. Key visited Mr. McDougald on 25 April 2001 for thirty minutes. (R p 92). Mr. Key told Mr. McDougald that the prosecutor was offering a plea deal in which Mr. McDougald would serve a sentence of approximately twelve to thirteen years. Mr. Key did not explain or mention the mandatory punishment of life without parole for violent habitual felon status. Not knowing that he faced a mandatory life without parole sentence, Mr. McDougald declined a plea offer that would have allowed him to be released by approximately 2014. (R pp 93–94); (MAR T p 27).

Mr. Key tried to meet Mr. McDougald on 27 April 2001 but could not because he had been transferred to Craven Correctional Institution for pretrial detention. (R p 92); (MAR T p 15). Mr. Key's timesheet does not show another attempt to visit Mr. McDougald until the day of sentencing. His

timesheet does not show that he sent a letter to Mr. McDougald during the entire representation. (R p 92).

The State obtained a superseding indictment for the substantive offenses and an indictment for violent habitual felon status on 14 May 2001. (R pp 52, 97). 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 the State did not serve it until 1 October 2001. (R pp 86–87).

On 16 May 2001, there was an administrative court session. According to an 18 May 2001 scheduling order, Mr. McDougald "was present in court represented by counsel Mark Key." (R p 234). Mr. Key billed for fifteen minutes on the case that day. There is no separate entry for visiting Mr. McDougald. (R p 92).

Sometime in June 2001, Mr. McDougald was brought back to Central Prison. (R p 104). Mr. Key's timesheet does not show a visit to Central Prison after the transfer. (R p 92).

On 25 June 2001, during an administrative session, the court joined the substantive and status charges. (R p 110).[2] Mr. Key billed fifteen minutes for

[2] 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 other order in the file. (R pp 92, 110, 115). The exact hearing date is not material.

the session. There is no record of Mr. Key visiting his client in the jail that day, although Mr. McDougald was brought to the courthouse. (R pp 92, 107).

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. (R p 101). As Mr. Key explained at the evidentiary hearing on the MAR, "[T]hey woke him up early in the morning to come straight to Harnett County" where he "[got] hit with this news [of being served with a violent habitual felon indictment]." (MAR T p 21); *see also* (R pp 101, 105). Before court, Mr. Key "explained to [Mr. McDougald] that he had been indicted as a [violent] habitual felon and he'd have to go to trial immediately." (MAR T p 17).

Mr. Key told Mr. McDougald for the first time on 1 October 2001—the day of the trial—that there was a potential punishment of life without parole for violent habitual felon status. (MAR T pp 20, 27). Mr. Key testified during the hearing on the MAR that he had allowed Mr. McDougald to undergo "trial by ambush." (MAR T p 20). Mr. Key also testified that the State might have agreed to the plea offer to thirteen years even on the morning of trial. (MAR T pp 13–14, 32).

Mr. Key was "not sure [that he] told [Mr. McDougald] it was a mandatory life imprisonment without possibility of parole." (MAR T p 21). Mr. Key did not "think [Mr. McDougald] understood that." (MAR T p 21). As

Mr. Key testified during the 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 trial's outcome. (MAR T p 20). Mr. Key thought that Mr. McDougald "was unsure of what that meant" and that what he conveyed to Mr. McDougald "might [have sounded like] gibberish." (MAR T pp 20–21).

When proceedings began on 1 October, Mr. Key told the trial court "that [Mr. McDougald] would like to represent himself." (R p 101). The court asked Mr. McDougald whether he understood the maximum punishments for the substantive charges. 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. (R p 103).

When the Court asked Mr. McDougald why he 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 time 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.

(R p 104).

The court appointed Mr. Key as standby counsel, allowed Mr. McDougald to represent himself, and began jury selection. (R pp 105–06). After the court denied what it construed as Mr. McDougald's motion for a continuance, Mr. McDougald 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." (R p 108). Mr. Key resumed representing Mr. McDougald. (R p 109).

At the trial, the State offered evidence that on 2 February 2001, 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 came back alone a few minutes later, 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 house, struck Ms. Howes 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. (R p 50: *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 him guilty of misdemeanor breaking or entering, second-degree kidnapping, and assault on a female. The Court continued the violent habitual felon charge. (Trial T pp 126–27).

On 4 October 2001, Mr. Key filed a motion to dismiss the violent habitual felon charge because it was served the day of the trial and therefore violated Mr. McDougald's due process rights. (R pp 92, 112). The next day, there was a hearing on the motion. The Court denied it. (R pp 115–16). 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. (R pp 53–54). Mr. Key had spent a total of 32.75 hours on the case. (R p 92).

Appellate Proceedings

Mr. McDougald promptly entered notice of appeal, but the appeal remained pending for years. (R p 122). On 11 June 2007, while the appeal was pending, Mr. McDougald filed a *pro se* motion in the trial court 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 trial court denied the motion. (R pp 55–58). On 20 May 2008, this Court held that there was sufficient evidence to support the charge for second-degree kidnapping. Mr. McDougald did not make any Eighth Amendment arguments on direct appeal. (R p 50: *McDougald*, 190 N.C. App. 675, 661 S.E.2d 789).

Mr. McDougald filed a *pro se* federal habeas petition. The federal trial

court denied the sufficiency claim and explicitly declined to reach any other issue. (R pp 60–61: *McDougald v. Keller*, No. 5:09-HC-2134-D, 2011 WL 677272, at *3–4 (E.D.N.C. 15 Feb. 2011)).

Postconviction Proceedings

In a motion for appropriate relief (MAR) and an amendment, Mr. McDougald alleged that:

1. He received ineffective assistance of counsel during plea negotiations, contrary to the Sixth Amendment;
2. The State relied on juvenile conduct for a mandatory life without parole sentence, contrary to the Eighth Amendment; and
3. The State imposed a disproportionate sentence, contrary to the Eighth Amendment.[3]

The court below held an evidentiary hearing on 9 August 2019. (MAR T p 1). Mr. Key testified. (MAR T p 8). Attorney Michael G. Howell also testified about Mr. Key's performance based on Mr. Howell's experience representing clients facing the death penalty and life without parole in North Carolina since 2000. (R pp 317–18); (MAR T pp 37–39). Mr. Howell testified that Mr.

[3] In an amendment to the MAR, Mr. McDougald claimed that his appellate counsel was ineffective for failing to argue that the trial counsel was ineffective. (R p 78). However, Mr. McDougald later abandoned the claim that the appellate counsel was ineffective because the appellate record was insufficient to develop fully the claim. (MAR T p 66).

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. (R pp 41–42, 48).

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. (R p 345, Finding of fact # 3). The court found that Mr. McDougald "was informed well before October 1, 2001 that he faced a violent habitual felon enhancement" and "was informed that he was subject to a sentence of life without parole." (R p 348, Findings of fact # 24 and # 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." (R p 348, Finding of fact # 25).

The court below concluded that Mr. McDougald failed to prove that Mr. Key's performance "was objectively unreasonable or deficient" or prejudicial. (R pp 350–51, Conclusions of law # 7–8).

With respect to the Eighth Amendment, the court accepted as true the facts in the pleadings about Mr. McDougald's childhood. (R p 350, Finding of fact # 35). It concluded that Mr. McDougald's sentence "was not imposed for

conduct committed before [he] was eighteen years of age." (R p 350, Conclusion of law # 2). The court also concluded that the sentence "did not violate the constitutional prohibitions against mandatory sentences of life without parole for juveniles." (R p 350, Conclusion of law # 2). Finally, the court concluded that the sentence "is not grossly disproportionate to the conduct punished." (R p 350, Conclusion of law # 4).

ARGUMENT

I. THE COURT BELOW ERRED IN CONCLUDING THAT THE TRIAL ATTORNEY ACTED REASONABLY AND WITHOUT PREJUDICE WHEN THE ATTORNEY FAILED TO INFORM MR. McDOUGALD THAT HE WAS SUBJECT TO MANDATORY LIFE WITHOUT PAROLE.

a. Standard of review.

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).

b. The court below abused its discretion in making findings of fact that were contrary to the trial attorney's sworn testimony, the attorney's contemporaneous timesheet, and the trial transcript.

On the morning of 1 October 2001, Mr. McDougald was at risk of mandatory life without parole if he were convicted of violent habitual felon status. His attorney had not visited him since April or sent him any letters, even after the violent habitual felon indictment in May. (R p 92). Mr. Key told Mr. McDougald that he "may be sentenced to life in prison without the possibility of parole" for the first time on the morning of 1 October. (MAR T pp 19–20). Mr. Key admitted that his statement to his client "might [have sounded like] gibberish" and that he had allowed Mr. McDougald to undergo "trial by ambush." (MAR T pp 20–21).

The court below abused its discretion in finding, contrary to the trial attorney's testimony, his contemporaneous timesheet, Mr. McDougald's affidavit, and the trial transcript, that Mr. McDougald "was informed well before October 1, 2001 that he faced a violent habitual felon enhancement" and that he knew on the morning of trial "that he faced a sentence of life without parole." (R pp 348, Findings of fact # 24, # 26)[4]; *see Wilkins*, 131 N.C. App. at 223, 506 S.E.2d at 276. Findings of fact # 25 and # 27 are similarly an

[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." (R p 348).

abuse of discretion in disregarding evidence that Mr. McDougald was not informed about the risk of a mandatory life without parole sentence if he went to trial. (R p 348, Findings of fact # 25, # 27); *see Wilkins*, 131 N.C. App. at 223, 506 S.E.2d at 276.

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

The court below also erred in concluding that Mr. Key acted reasonably. (R pp 348–51, Findings of facts # 27, # 33, Conclusions of law # 7, # 10, # 14). As Mr. McDougald's attorney, Mr. Key had a duty under the Sixth Amendment to give him reasonable advice about pleas. *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. Mr. Key had a duty to explain issues that could determine his client's decision to take or reject a plea. *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); (R p 140: *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), 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.")).

As shown below, in this 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. (R pp 348–51, Findings of fact # 27, # 33, Conclusions of law # 7, # 10, # 14.). In each of these instances, a reasonable attorney would have explained to Mr. McDougald that he was subject to a mandatory life without parole sentence because of the violent habitual felon charge, that the State was willing to let him take a plea, that the plea would let him serve

approximately thirteen years instead of life without parole and thereby save him decades in prison, and that he should consider carefully the benefits of taking a plea. For a timeline, see the Appendix.

1. 25 April 2001 Meeting About Plea Offer

Regarding the 25 April 2001 meeting, Mr. Howell testified that a reasonable attorney advising Mr. McDougald about a plea offer of approximately thirteen years would have advised him "[t]o seriously consider the plea offer" because of "the evidence against him" and the risk of a "mandatory life sentence" from the violent habitual felon charge that the prosecutor had forecast in February. (MAR T pp 11, 45). To ensure that the client was not confused about the difference between habitual felon status and violent felon status, as Mr. McDougald was, the attorney should have explained that the two statutes are different, and that violent habitual felon status has a 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 the mandatory punishment for violent habitual felon status both orally and in writing to reinforce the message and help Mr. McDougald process the information. *See id.*; (MAR T pp 16–18, 45–47).

Instead, Mr. Key failed to explain the violent habitual felon status clearly enough that Mr. McDougald understood it and knew that it was different than habitual felon status, failed to tell him about the mandatory punishment of life without parole and contrast it to a plea to approximately thirteen years, and failed to provide information about the charge, the punishment, and the plea offer in writing. (R pp 93–93); (MAR T pp 19–21).

2. 14 May 2001 Violent Habitual Felon Indictment

Both Mr. Howell and Mr. Key testified that after the State obtained a violent habitual felon indictment, a reasonable attorney would have informed Mr. McDougald promptly. (MAR T pp 16–18, 48); *see Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694. A reasonable attorney would have both visited and written to explain the new indictment and its most significant implication, the mandatory life sentence. The attorney also would have talked and written about the benefit of a plea to a thirteen-year minimum sentence in light of the potential for a mandatory sentence of life without parole if Mr. McDougald went to trial and were convicted. (MAR pp 16–18, 46, 48).

Instead, Mr. Key continued to fail to explain the recidivist charge and the relative benefits of a plea and to provide information both orally and in writing. (R pp 93–94); (MAR T pp 19–21).

3. Between 14 May 2001 and 1 October 2001

After the violent habitual felon indictment, a reasonable attorney

would have continued to visit and write Mr. McDougald to ensure that Mr. McDougald had the necessary information and that he understood the information well enough to rationally evaluate the State's plea offer. (MAR T pp 16–18, 46, 48); *see Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694.

Even if the client were not interested in pleading initially, a reasonable attorney would not have rested after one visit. Instead, as Mr. Howell said, the attorney would "[g]o see [the client] a lot. Be persistent." (R p 45). If necessary, an attorney should have provided a written explanation of the State's evidence and asked the client to sign a document refusing a plea, if that were the client's informed wish. (MAR T pp 45–46). A reasonable attorney should have helped his client weigh a definite release from prison in his forties and dying in prison, perhaps decades later. *See* Abbe Smith, *"I Ain't Takin' No Plea": The Challenges in Counseling Young People Facing Serious Time*, 60 Rutgers L. Rev. 11, 13 (2007) ("[W]hen there is no question that going to trial will be ruinous, and the client does not understand this, it is incumbent upon the lawyer to get through to the client.").

Between 25 April 2001 and the morning of trial on 1 October 2001, Mr. Key did not visit or write his client a single time to discuss the plea offer and the mandatory punishment for violent habitual felon status. (R p 92). Mr. Key admitted his failure to visit or write Mr. McDougald "deprived [him] of [the] opportunity to think about" the status charge. (MAR T p 22).

Mr. Key did not rectify the situation on May 16 or June 25, days on which Mr. McDougald may have been in court with Mr. Key. (R pp 92, 110, 115–16, 234). On both days, Mr. Key's timesheet showed entries for fifteen minutes for court and nothing else. (R p 92). 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 during the administrative session. A reasonable attorney also 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.

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 the plea deal that the State had offered. As both Mr. Key and Mr. Howell explained, reasonable attorneys ensure that their clients understand the punishments they are facing. (MAR T pp 20–22, 45); *see also Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694; Smith, *"I Ain't Takin' No Plea": The Challenges in Counseling Young People Facing Serious Time*, at 13.

As Mr. Key testified, saying that the judge "may" give life without

parole did not convey that the punishment was mandatory. (MAR T pp 20–21). Someone could understand "may" to mean at least two different things. (MAR T pp 20–21). 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 the status, he would receive a sentence of life without parole. But a second understanding is that if Mr. McDougald were convicted of the 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 in sentencing. Both interpretations would be plausible to a layperson, but only the first one is accurate. N.C.G.S. § 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. *See Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694; Smith*, "I Ain't Takin' No Plea": The Challenges in Counseling Young People Facing Serious Time*, at 13.

Mr. McDougald's confusion over the meaning of "may" is understandable. "May" commonly indicates that a person can do something, not that a person must do something. *See 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, not that a judge *must* impose life without parole. (R p 104). Mr. McDougald's interpretation of Mr. Key's statement was also consistent with this Court's typical understanding of "may." *See In re Hardy*, 294 N.C. at 97, 240 S.E.2d at 372. It is unfair and unreasonable to expect a person who has been woken up early in the morning, has been taken to court unexpectedly, and has not had a sit-down meeting with his lawyer for months to understand a confusing statement about an unfamiliar law that imposes a life sentence. (R p 104); (MAR T p 21); *see Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694.

Mr. Howell testified that a reasonable attorney would have had to be much clearer to explain a mandatory punishment. The attorney would need to say explicitly that "if you're found guilty of kidnapping or burglary, [the punishment is] that you will get a life sentence without parole. . . . it's automatic. Judge has no discretion." (MAR T p 44). Anything less clear than this leaves a client thinking that he could get a term of years instead of life without parole, as Mr. McDougald believed. (R p 94); (MAR T pp 21, 44).

Mr. Key's actions after the jury verdict on second-degree kidnapping further demonstrate his unreasonableness. He filed a motion challenging the violent habitual felon charge on 4 October 2001. (R p 112). If he believed that there was a viable argument for dismissing the charge, he should have filed

his motion before the trial on the substantive felonies. *See State v. Gleason*, 273 N.C. App. 483, 486, 848 S.E.2d 301, 304 (2020) (holding that trial counsel was deficient for failing to object to a lack of notice of an aggravating factor). Instead, he made a futile, last-minute effort to attack a charge that he should have understood and explained to his client during pretrial plea negotiations. *See Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694*; Padilla*, 559 U.S. at 369, 176 L. Ed. 2d at 296; (R pp 140–41: Performance Guidelines at 2, 12).

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

To show prejudice, Mr. McDougald

> must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler, 566 U.S. at 164, 182 L. Ed. 2d at 407.

Both the written documentation and the testimony at the hearing on the MAR showed that in April, months before trial, the State offered Mr. McDougald a plea deal to an approximately thirteen-year minimum sentence. (R pp 92–93); (MAR T pp 11, 13–14, 32). 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. *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. Furthermore, there is no evidence that the State ever withdrew the plea offer. Mr. Key testified that the State might have accepted it even on the morning of trial. (R p 93); (MAR T pp 13–14, 32). It would have been reasonable for the court to accept a plea to avoid the expense and time of a trial, even after jury selection started. *See Lafler*, 566 U.S. at 170, 182 L. Ed. 2d at 411 (noting "the reality that criminal justice today is for the most part a system of pleas, not a system of trials").

Both Mr. Key's testimony and Mr. McDougald's affidavit show that if Mr. McDougald had understood violent habitual felon status and its mandatory punishment, he would have taken a plea to thirteen years. (R pp 93–95); (MAR T p 32 (Mr. Key: "I think that he may have changed his mind if he truly understood the impact of [the] violent habitual felon indictment.")). Similarly, Mr. Howell testified that a client who declines a plea offer initially will reconsider if the attorney provides more information and more time to process it outside of court. (MAR T pp 45–46). If Mr. Key had communicated with his client as he would now, then Mr. McDougald would have considered

the State's evidence of the substantive felonies and of his prior convictions. He would have known that going to trial would have been very risky. He also would have weighed a minimum sentence of approximately thirteen years against a mandatory sentence of life without parole. As a thirty-three-year old, the mandatory sentence would amount to many decades in prison. He would have pleaded guilty and accepted a minimum sentence of approximately thirteen years before trial or, if necessary, on the morning of trial. (R pp 93–95); (MAR T pp 32, 45–46).

Mr. McDougald's unwillingness to take a plea after his attorney's failure to act reasonably does not predict how he would have acted if his attorney had acted reasonably. Accordingly, the finding that Mr. McDougald did not "express a desire to accept" a plea does not support the conclusion that he would have refused a plea deal had his attorney behaved reasonably. (R pp 347, 351, Finding of fact # 15, Conclusions of law # 8, # 9).

Contrary to the court below's finding, Mr. McDougald would have accepted a plea deal if he had gotten reasonable advice. (R p 350, Finding of fact # 34). The corollary conclusions of law that there was no prejudice were also wrong. (R pp 350–51, Finding of fact # 34, Conclusions of law # 8, # 9, #

10, # 12, # 14).[5] The facts established at the evidentiary hearing and in the record showed that the State offered and would have accepted a plea deal to an approximately thirteen-year minimum, that Mr. McDougald would have accepted it in or after April if he had known about the much worse possibility of life without parole, and that the court would have accepted the plea. All of those facts showed that Mr. Key's errors prejudiced Mr. McDougald. (R pp 92–95); (MAR T pp 32, 45–46); *see Lafler*, 566 U.S. at 163–64, 182 L. Ed. 2d at 407.

The proper remedy is to vacate the convictions and order the State to offer a plea with the same sentence that Mr. McDougald would have received with effective assistance of counsel. *See Lafler*, 566 U.S. at 174, 182 L. Ed. 2d at 414.

[5] Regardless of its label, finding of fact is # 34 is a legal conclusion that receives *de novo* review. *See Jackson*, 220 N.C. App. at 8, 727 S.E.2d at 329.

II. THE COURT BELOW ERRED IN UPHOLDING A MANDATORY LIFE WITHOUT PAROLE SENTENCE THAT RELIES ON JUVENILE CONDUCT.

a. Standard of review.

The standard of review is the same as in Section I above.

b. The State illegally relied on nonhomicide juvenile conduct to impose a mandatory sentence of life without parole.

The violent habitual felon sentencing enhancement has two key provisions. First, it can apply to a new class A through E felony if a person has prior convictions for two prior class A through E felonies (with different offense dates) in two different court sessions. N.C.G.S. § 14-7.7. Applied to Mr. McDougald, that requirement meant that the State *had* to rely on juvenile conduct to get a conviction. Before 2001, Mr. McDougald only had felony convictions on two court sessions: once when he was sixteen, and once when he was nineteen. (R pp 38–49, 52). The fact that he received multiple convictions in one day when he was nineteen is legally irrelevant, because only once of them could count for violent habitual felon status. N.C.G.S. § 14-7.7. Thus, the conviction for conduct when he was sixteen had to be a predicate for him to have violent habitual felon status.

The violent habitual felon statute's second key provision here is that after a conviction for any third class A through E felony (other than capital murder) and a conviction for violent habitual felon status, the trial court

must impose life without parole; there can be no mitigated, lesser sentence or parole eligibility. N.C.G.S. § 14-7.12. This regime is harsher than the habitual felon law and regular structured sentencing, both of which allow mitigated sentences. *See* N.C.G.S. §§ 14-7.6, 15A-1340.13, 15A-1340.16(a). It is also harsher than the Fair Sentencing Act, which allowed for parole eligibility even for first-degree murder. *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). Apart from postconviction proceedings, executive clemency is the only possible relief, and its "remote possibility . . . does not mitigate the harshness of the sentence." *Graham v. Florida*, 560 U.S. 48, 70, 176 L. Ed. 2d 825, 842 (2010). Thus, once Mr. McDougald was convicted of the status, the Court had to impose life without parole regardless of any of the predicate offenses' mitigating circumstances. N.C.G.S. § 14-7.12.

In contrast, the United States Supreme Court has called for courts to impose sentences that are more closely tailored to the circumstances of juvenile conduct. Beginning in 2005, the Court banned execution for juvenile conduct. *See Roper v. Simmons*, 543 U.S. 551, 578, 161 L. Ed. 2d 1, 28 (2005). Since then, the Court has held that the State cannot punish nonhomicide juvenile conduct 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). North Carolina courts similarly recognize juveniles' distinguishing characteristics. *See, e.g.*, *State v. Young*, 369 N.C. 118, 125–26, 794 S.E.2d 274, 279–80 (2016) (holding that mandatory life without parole for juvenile conduct 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. (R pp 350–51, 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. (R pp 38–49, 52). However, *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.

c. The court below erred in upholding a life without parole sentence that depended on a conviction for conduct by a sixteen-year-old living in a violent, impoverished home.

In addition to having a diminished culpability because of the nature of the crime, Mr. McDougald also has a diminished culpability for conduct as a juvenile because of his earlier developmental state and his circumstances.

See Miller, 567 U.S. at 471, 183 L. Ed. 2d at 418. Mr. McDougald showed the following facts:

- Mr. McDougald's father abused alcohol and cocaine when Mr. McDougald was a child. (R pp 28, 31).
- Mr. McDougald's father beat him, his siblings, and his mother, sometimes using a metal flashlight or an electrical cord. (R pp 25–31). Some nights, Mr. McDougald, his mother, and his siblings had to run across the fields around their home to a neighbor's house or to his grandmother's house to escape from Mr. McDougald's father. (R p 27).
- 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. (R pp 34–35).
- 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." (R p 28).
- Mr. McDougald's father sold bootleg liquor and entertained customers in the family's home. Mr. McDougald and his siblings saw people drinking and fighting regularly. (R pp 26, 32).
- The family could not rely on Mr. McDougald's father for support, and his mother had to work long hours to support the children. (R pp 27–

30). In September of 1983, within six months of Mr. McDougald's first criminal conviction, there were seven people in his family living on an annual income of $7,800 ($20,851.25 adjusted for inflation). (R p 37).[6]

The court below accepted the facts of Mr. McDougald's childhood as described above as true but concluded that they were not grounds for relief. (R p 350). The court's disregard for the context of Mr. McDougald's conviction as a sixteen-year-old is contrary to the insistence in *Graham* and its progeny that the context of juvenile conduct matters. Conduct that occurred during Mr. McDougald's childhood should not have contributed to a mandatory 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 68–69, 176 L. Ed. 2d at 841–42.

This Court has upheld the violent habitual felon statute against a facial Eighth Amendment 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). This 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 held that a violent habitual felon sentence may be predicated on juvenile nonhomicide conduct, or that a child's conduct arising from a dangerous,

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[6] Conversion using Bureau of Labor Statistics, *CPI Inflation Calculator*, http://data.bls.gov/cgi-bin/cpicalc.pl (last visited 29 June 2021).

abuse-filled environment can contribute to a violent habitual felon sentence.

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 68–69, 74, 176 L. Ed. 2d at 841–42.

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

a. Standard of review.

The standard of review is the same as in Section I above.

b. A sentence of life without parole for the substantive offense of second-degree kidnapping is disproportionate.

A sentence must "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)). In proportionality challenges, courts first ask whether a sentence and the conduct are grossly disproportionate. *See Graham v. Florida*, 560 U.S. 48, 60, 176 L. Ed. 2d 825, 836 (2010). If they are, the court may decide that the sentence is unconstitutionally excessive based

on other sentences from the same jurisdiction. *See id.*; *Solem v. Helm*, 463 U.S. 277, 292, 77 L. Ed. 2d 637, 650 (1983).

A proportional sentence reflects the nature of both the punishment and the crime. *See Kennedy*, 554 U.S. at 419, 171 L. Ed. 2d at 538. A sentence of life without parole is the second-most extreme sentence that courts can impose. The sentence "alters the remainder of [an incarcerated person's] life 'by a forfeiture that is irrevocable.'" *Miller v. Alabama*, 567 U.S. 460, 474–75, 183 L. Ed. 2d 407, 421 (2012) (quoting *Graham*, 560 U.S. at 69, 176 L. Ed. 2d at 842). Life without parole is the same as what adults receive for first-degree murder, and longer than what many adults receive for second-degree murder. *See* N.C.S.S. § 14-17. Second-degree kidnapping is a serious matter. Nonetheless, as nonhomicide crime, it lacks murder's "severity and irrevocability." *See Kennedy*, 554 U.S. at 438, 171 L. Ed. 2d at 550 (quoting *Coker v. Georgia*, 433 U.S. 584, 598, 53 L. Ed. 2d 982, 993 (1977) (plurality opinion)). Mr. McDougald is subject to a forfeiture that is irrevocable for a nonhomicide crime lacking commensurate severity and irrevocability. Therefore, Mr. McDougald's sentence of life without parole is grossly disproportionate to the offense of second-degree kidnapping. *See Graham*, 560 U.S. at 60, 176 L. Ed. 2d at 836.

If a sentence is grossly disproportionate, a court can then consider other evidence of disproportionality such as the difference between sentences

in the same jurisdiction. The difference between a sentence for second-degree kidnapping with and without violent habitual felon status—between life without parole and term of years—is objective evidence that Mr. McDougald's sentence is disproportionate. *See Solem*, 463 U.S. at 291–92, 77 L. Ed. 2d at 650. The maximum *aggravated* sentence for the class E felony of second-degree kidnapping with a prior record level IV, which Mr. McDougald would have had, was ninety-eight months (between eight and nine years). *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 served a ninety-eight-month sentence and the maximum time possible for the misdemeanors, he would have left prison by the time he was forty-two. Now he is fifty-three-years old and is still in prison. Contrary to conclusions of law # 3, # 4, # 5, # 12, and # 14, the Eighth Amendment protects Mr. McDougald from life without parole for second-degree kidnapping with violent habitual felon status when the punishment for second-degree kidnapping in almost all other cases is so much less severe. (R pp 350–51, Conclusions of law # 3, # 4, # 5, # 12, # 14); *see Solem*, 463 U.S. at 291–92, 77 L. Ed. 2d at 650.

If the Court vacates the status conviction, the other convictions will remain in place.

CONCLUSION

Mr. McDougald respectfully prays that this Court vacate the order denying his motion for appropriate relief.

If the Court grants Sixth Amendment relief, Mr. McDougald prays that the Court vacate his current convictions and sentence and then order the State to offer a plea deal with the same sentence length that he would had but for the attorney's errors.

If the Court grants Eighth Amendment relief, Mr. McDougald prays that the Court vacate the status conviction and remand for resentencing on the underlying charges.

Mr. McDougald further prays for such other relief as seems proper to the Court.

Respectfully submitted, this the 23rd day of July, 2021.

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CERTIFICATE OF COMPLIANCE WITH RULE 28(J)(2)

I hereby certify that Defendant-Appelleant's Brief is in compliance with Rule (28)(j)(2) of the North Carolina Rules of Appellate Procedure as it is printed in thirteen point Century Schoolbook font and the body of the brief, including footnotes and citations, contains no more than 8,750 words as indicated by the word-processing program used to prepare the brief.

This the 23rd day of July, 2021.

By Electronic Submission:

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Defendant-Appellant's Brief has been filed pursuant to Rule 26 by electronic means with the North Carolina Court of Appeals.

I further hereby certify that a copy of the above and foregoing Defendant-Appellant's Brief has been duly served pursuant to Rule 26 by electronic means on the following attorneys:

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No. 21-286 JUDICIAL DISTRICT ELEVEN (A)

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA,	)	
	)	
v.	)	From Harnett County
	)	
WILLIAM McDOUGALD	)	
	)	

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APPENDIX

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Acts of Ineffective Assistance of Counsel

Date	What a Reasonable Attorney Would Have Done and Mr. Key Did Not Do
25 April 2001: Meeting after the prosecutor mentioned violent habitual felon status and offered a plea	• Explain violent habitual felon status and the benefits of a plea clearly • Advise that there was a mandatory punishment of life without parole • Provide information orally and in writing (MAR T pp 16–18, 44–47)
14 May 2001: Violent habitual felon indictment	• Immediately notify Mr. McDougald in writing about the indictment, the mandatory punishment, and the benefits of a plea • Visit Mr. McDougald promptly (MAR T pp 16–18, 44–48)
14 May 2001 through 1 October 2001	• Continue writing Mr. McDougald • Visit Mr. McDougald and discuss the benefits of a plea • Ask Mr. McDougald to review and sign a document declining a plea, if that is his informed choice (MAR T pp 16–18, 44–48)
1 October 2001: The morning of trial	• Review the mandatory punishment for violent habitual felon status • Give Mr. McDougald sufficient information about the benefits of a plea before the trial • Protect Mr. McDougald from "trial by ambush" (MAR T pp 17, 20–21, 44–45)