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 REPLY BRIEF

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DEFENDANT-APPELLANT'S REPLY BRIEF

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I. BY THE TRIAL ATTORNEY'S OWN ADMISSION AND ACCORDING TO CONTEMPORANEOUS RECORDS, HE DID NOT KEEP MR. McDOUGALD WELL-INFORMED OF THE VIOLENT HABITUAL FELON CHARGE AND MANDATORY LIFE-WITHOT-PAROLE PUNISHMENT.

a. The trial attorney's testimony and contemporaneous records show that the attorney never told Mr. McDougald about the risk of a mandatory life-without-parole sentence, and that the trial attorney gave incomplete, garbled information on the morning of trial.

Contrary to the findings below and the State's arguments, the competent evidence did not establish that Mr. McDougald was well-informed when he went to trial. (R p 348, Finding of fact # 24); (State's Br. p 13). According to the trial attorney's contemporaneous time sheet, between 25 April 2001 and the start of trial on 1 October 2001, the trial attorney did not

visit Mr. McDougald in custody, write to him, or call him. (R p 92). The trial attorney also testified at the evidentiary hearing that the first time he talked about the violent habitual felon indictment with Mr. McDougald was in a rushed interaction on the morning of trial on 1 October 2001. Mr. McDougald did not understand what he was saying. (MAR T p 20–21, 27–28). In the trial attorney's words, the lack of communication "deprived" Mr. McDougald of "the opportunity to . . . have meaningful thought" about the status charge and set him up for "trial by ambush." (MAR T pp 20, 22). As Mr. McDougald told the trial court on 1 October 2001: "I really don't know what's going on." (Trial T p 8).

The trial attorney testified at the evidentiary hearing on the motion for appropriate relief (MAR) that time slips are not always an exhaustive description of work done on a case, but that was an aside to the gist of his testimony. (MAR T p 26). His main point was that he had not kept his client reasonably informed, leading to Mr. McDougald's confusion and frustration on the morning of trial. (MAR T pp 19–22). The attorney and the client's statements from 2001 show a lack of communication, which caused Mr. McDougald not to understand his case. The trial court erred in finding otherwise. (R pp 348–49, Findings of fact ## 24–27).

The State's emphasis on the finding that Mr. McDougald was in court with his attorney for administrative sessions on 18 May 2001 and 25 June

2001 is misplaced. (State's Br. pp 13–14); (R pp 112, 234, 346, Findings of fact ## 5–9). The underlying documents do not show how many other cases and clients the trial attorney had on the calendar those days and what else the trial attorney was doing on them. The attorney's timesheet does not refer to meeting Mr. McDougald during those sessions, and only records fifteen minutes in court on 25 June 2001. (R p 92). Mr. McDougald "came up [to Harnett County]" in late June, but Mr. McDougald did not say whether he spoke with his attorney then or what they discussed. (Trial T pp 4, 7).[1] The evidence before the court below did not justify an inference that Mr. McDougald and his attorney talked about the case to any meaningful degree in May or June 2001. (R p 92, 112, 234); (Trial T p 4, 7).

The competent evidence also does not establish that Mr. McDougald knew that he was subject to *mandatory* life without parole. The trial attorney's timesheet does not show that he explained that the punishment was mandatory. (R p 92). Mr. McDougald's own statement to the trial court on 1 October 2001 shows that he thought he might get life without parole, but the possibility of life without parole is not the same as a mandatory punishment of life without parole. (Trial T p 4). The trial attorney admitted

[1] Mr. McDougald referred to June 26. Whether the exact court date was June 26 or 25 is not material. (Trial T p 7).

that he failed to convey clearly that the punishment was mandatory. (MAR T p 21). Thus, finding that Mr. McDougald knew that he faced a mandatory punishment of life without parole was an error. (R pp 348–49, Findings of fact ## 24–27).

b. Giving a client incomplete, garbled information on the morning of trial is unreasonable.

The competent evidence did not support the conclusion that the trial attorney acted reasonably. Reasonable attorneys have a duty to keep their clients from being ambushed at trial. *See Strickland v. Washington*, 466 U.S. 668, 688, 80 L. Ed. 2d 674, 694 (1984); *Hill v. Lockhart*, 474 U.S. 52, 57, 88 L. Ed. 2d 203, 209 (1985); *see also* Ingrid Eagly, George Fisher, & Ronald Tyler, *Criminal Practice: A Handbook for New Advocates* 106–08 (2021) (explaining all of the information that competent criminal defense attorneys must convey to clients about plea negotiations and the risks of going to trial). By Mr. Key's own admission—corroborated by his time sheet and Mr. McDougald's 2001 comments—he failed to do that. (MAR T p 20); (R p 92); (Trial T p 4).

The court below and the State treat the May and June 2001 administrative sessions of court as evidence that Mr. McDougald knew of and understood the violent habitual felon indictment, and that his attorney took reasonable measures to keep him informed. (R pp 349–51, Finding of fact # 33, Conclusion of law # 7); (State's Br. pp 14, 16). Trying to explain a violent

habitual felon indictment and the sentence of mandatory life without parole to a client during a brief administrative session fails basic competency standards for criminal defense attorneys. As one treatise says, "The client should be given adequate time to think about the decision [to accept or reject a plea]." Anthony G. Amsterdam & Randy Hertz, *Trial Manual 6 for the Defense of Criminal Cases* § 15.14 (6th ed. 2016). How much time is adequate depends on the nature of the charges, and more serious charges require more time. *Id.* As veteran attorney Michael Howell said at the evidentiary hearing on the MAR, "[F]or a very serious case, it takes the client some time to process the facts of the case against them as well as sentencing." (MAR T p 46). One would not expect an attorney and client to have a meaningful discussion about the possibility of life without parole during a fifteen-minute administrative session. (MAR T pp 49–50). The administrative proceedings in the summer of 2001 do not support the conclusion that the trial attorney communicated with his client as a reasonable attorney would. (R pp 349–51, Finding of fact # 33, Conclusion of law # 7).

Likewise, evidence that the trial attorney and Mr. McDougald discussed a possible life sentence on the morning of trial does not support the conclusion that the trial attorney acted reasonably. (R pp 349–51, Finding of fact # 33, Conclusion of law ## 7). Mr. McDougald's comments to the trial court on the morning of trial show a man who was scared and confused

because his trial attorney had not done a competent job of keeping him updated. (Trial T p 4). The trial attorney agreed. (MAR T pp 19–20). The trial attorney said that his communications with Mr. McDougald on the morning of trial were rushed, did not convey that Mr. McDougald faced mandatory life without parole, and were so deficient that they subjected his client to "trial by ambush." (MAR T pp 19–20).

The expectation that a lay person can easily and quickly understand the violent habitual felon statute and the mandatory punishment is contrary to the Sixth Amendment, which requires that an accused person have effective counsel so that he does not have to be his own lawyer: "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Gideon v. Wainwright*, 372 U.S. 335, 344, 9 L. Ed. 2d 799, 805 (1963); *see* (State's Br. p 18). It is not fair to expect lay people to understand complex legal ideas easily or quickly: "Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Powell v. Alabama*, 287 U.S. 45, 69, 77 L. Ed. 158, 170 (1932). That expectation is inconsistent with a lawyer's duty to communicate promptly with his client. *See* Rules of Pro. Conduct r. 1.4 (N.C. State Bar 2014) ("A lawyer shall . . . promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required" and "keep the client reasonably informed about the

status of the matter."). As the trial attorney explained at the evidentiary hearing, he should have communicated with Mr. McDougald sooner, more often, and more clearly than he did in 2001 because his 2001 actions left Mr. McDougald "upset[,]" "frustrated[,]" and "surprised" on the morning of trial. (MAR T pp 16–18, 19, 21).

Because of contemporaneous evidence and sworn testimony that the trial attorney went months without updating Mr. McDougald before trial and then gave him incomplete and garbled information on the morning of trial, it was error to conclude that Mr. McDougald's trial attorney acted reasonably. (R pp 348–51, Findings of fact # 27, # 33, Conclusions of law # 7, # 10, # 14); *see Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694; *Hill*, 474 U.S. at 57, 88 L. Ed. 2d at 209.

II. MR. McDOUGALD USED CONTEMPORANEOUS RECORDS AND CREDIBLE TESTIMONY TO PROVE THAT HIS ATTORNEY'S ERRORS PREJUDICED HIS CASE, AND MR. McDOUGALD DID NOT HAVE TO TAKE THE STAND TO SHOW PREJUDICE.

The fact that Mr. McDougald did not testify at the evidentiary hearing does not matter. (State's Br. pp 19–22). Neither this Court nor the North Carolina Supreme Court requires the convicted person to testify to show prejudice from unreasonable advice on a plea deal. Similarly, the United States Supreme Court and the Fourth Circuit do not require such testimony. *See Lafler v. Cooper*, 566 U.S. 156, 164, 182 L. Ed. 2d 398, 407 (2012)

(describing prejudice standard with no requirement of a convicted person testifying). Instead, the Supreme Court has told courts to judge claims of ineffective assistance of counsel based on contemporaneous evidence as much as possible. *See Strickland v. Washington*, 466 U.S. 668, 689, 80 L. Ed. 2d 674, 694 (1984). *State v. Howard*, 247 N.C. App. 193, 211, 783 S.E.2d 786, 798 (2016) was about whether a trial court should hold an evidentiary hearing on a newly discovered evidence claim, not about the requirements for proving bad advice on a plea deal. Accordingly, Mr. McDougald had no burden to testify.

Mr. McDougald offered contemporaneous evidence in the form of the trial transcript and the trial attorney's time sheet. The trial transcript indicates that Mr. McDougald was scared and confused because his lawyer had communicated so poorly with him. (Trial T p 4). The trial attorney's time sheet indicates that he went months without seeing his client and spent less than a full working week on a trial that determined the rest of his client's life. (R p 92). That evidence, along with the expert testimony provided by Mr. Howell and the testimony offered by the trial attorney, proved that the trial attorney's errors prejudiced Mr. McDougald. (MAR T pp 19–22, 49–53); *see Lafler*, 566 U.S. at 164, 182 L. Ed. 2d at 407.

Contrary to any argument that a convicted person must testify to prove that his attorney prejudiced him with bad advice about a plea, the Fourth

Circuit has held that a person who never testified at an evidentiary hearing nonetheless used contemporaneous documents and affidavits to prove prejudice during plea negotiations. *See United States v. Murillo*, 927 F.3d 808, 817–18 (4th Cir. 2019). There, a convicted person alleged that his trial attorney incorrectly told him that he faced the possibility and not the certainty of deportation if he took a plea. *Id.* at 819. The Fourth Circuit considered the case "from the perspective of a reasonable person in [the accused person's] position." *Id.* at 817. Because a reasonable person would have declined a plea to avoid the certainty of deportation, and the attorney's bad advice on the risk of deportation was what made Mr. Murillo decline a plea, the attorney's error prejudiced Mr. Murillo. *Id.* at 819.

Mr. McDougald urges this Court to consider his case from a reasonable person's perspective—he could turn down a plea offer to a term of years and go to trial, or he could accept a plea and avoid a mandatory life-without-parole sentence. The trial transcript and the trial attorney's timesheet show that Mr. McDougald was scared and lacked sufficient knowledge to consider the plea offer. (Trial T p 4); (R p 92). However, if he had received the effective assistance of counsel, it would have been reasonable for him to take the plea, and he would have. (MAR T pp 32, 45–46). It was error to conclude otherwise. (R p 350–51, Finding of fact # 34, Conclusions of law # 8, # 9, # 10, # 12, # 14)); *see Lafler*, 566 U.S. at 164, 182 L. Ed. 2d at 407.

III. *GRAHAM* AND *MILER* APPLY, REGARDLESS OF OTHER CASES ON RECIDIVIST STATUTES.

Neither the United States Supreme Court, the North Carolina Supreme Court, nor this Court have resolved an Eighth Amendment challenge to a mandatory sentence of life without parole for a recidivist charge that depends on juvenile conduct. The answer cannot ignore the sea change in the treatment of juvenile conduct that began with *Roper v. Simmons*, 543 U.S. 551, 161 L. Ed. 2d 1 (2005), and continued with *Graham v. Florida*, 560 U.S. 48, 176 L. Ed. 2d 825 (2010), and *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012). Cases that do not consider special issues with juvenile conduct, in part because they predate even *Roper*'s prohibition on the death penalty for juvenile conduct and its underlying recognition of what makes juvenile conduct distinctive, do not control here.[2] *See Roper*, 543 U.S. at 569–70, 161 L. Ed. 2d at 21–22.

Likewise, *State v. Vardiman*, 146 N.C. App. 381, 552 S.E.2d 697 (2001), predates *Roper*. *Vardiman* involved a sentence of thirty months for habitual driving while impaired and no discussion of juvenile conduct. *Id.* at 382, 552

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[2] *Nichols v. United States*, 511 U.S. 738, 740, 128 L. Ed. 2d 745, 750 (1994) (considering whether uncounseled misdemeanor conviction counts toward recidivist status); *Rummel v. Estelle*, 445 U.S. 263, 267, 63 L. Ed. 2d 382, 387 (1980) (considering recidivist statute with no concern for the age of a person when committing prior offenses).

S.E.2d at 698. *Vardiman* does not control this case.

In addition to citing cases that do not consider juveniles' distinctive characteristics, the State also cites cases about recidivist statutes that lack salient features of North Carolina's violent habitual felon law. For example, although other courts have upheld sentences of terms of years or life with parole, both of these punishments are profoundly different from life without parole.[3] *See Graham*, 560 U.S. at 69–70, 176 L. Ed. 2d at 842. In *United States v. Rodriquez*, 553 U.S. 377, 382, 170 L. Ed. 2d 719, 726 (2008), the Supreme Court interpreted a federal statute without considering any constitutional challenges. In *Gryger v. Burke*, 334 U.S. 728, 731, 92 L. Ed. 1683, 1687 (1948), the Supreme Court treated a sentence as discretionary, which makes it distinguishable from a mandatory sentence. *See Miller*, 567 U.S. at 475, 183 L. Ed. 2d at 421. Cases that do not account for the uniqueness of life without parole or mandatory sentences do not control Mr. McDougald's case.

This Court has the ability and duty to decide as a matter of first impression for North Carolina appellate courts what the Eighth Amendment,

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[3] *Nichols*, 511 U.S. at 740, 128 L. Ed. 2d at 750 (term of years); *Rummel*, 445 U.S. at 267, 63 L. Ed. 2d at 387 (life with parole); *United States v. Hunter*, 735 F.3d 172, 174–76 (4th Cir. 2013) (term of years); *United States v. Orona*, 724 F.3d 1297, 1300 (10th Cir. 2013) (term of years); *United States v. Hoffman*, 710 F.3d 1228, 1231 (11th Cir. 2013) (term of years).

Graham, and *Miller* mean for Mr. McDougald. As *Graham* held, the Eighth Amendment protects a person from life without parole for non-homicide conduct as a juvenile. *See Graham*, 560 U.S. at 74, 176 L. Ed. 2d at 845. As *Miller* held, the Eighth Amendment also protects a person from a mandatory forfeiture of the rest of his life because of conduct that was the product of his childhood environment that he could not control. *Miller*, 567 U.S. at 471–72, 183 L. Ed. 2d at 418–19. If Mr. McDougald had not had a non-homicide conviction as a child, the State could not have charged him with violent habitual felon sentence as it did and pursued a mandatory life-without-parole sentence. (R p 52).

Other state courts have upheld mandatory sentences of life without parole for recidivist charges that include prior juvenile conduct. *See, e.g.*, *McDuffey v. State*, 286 So. 3d 364, 367 n.4 (Fla. Dist. Ct. App. 2019) (collecting other state courts' decisions). Those decisions say that recidivist statutes punish the most recent offense, not prior offenses. *See, e.g.*, *id.* at 367 (citing *Rodriquez*, 553 U.S. at 386, 170 L. Ed. 2d at 719). If the State cannot obtain a life-without-parole sentence without alleging juvenile conduct, however, then the person's juvenile conduct is still contributing to his sentence. So long as that is the case, the Eighth Amendment's special rules for juvenile conduct should apply. Those rules require that this Court vacate Mr. McDougald's conviction and sentence for violent habitual felon status.

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.

IV. THE PROPORTIONALITY CASES CITED BY THE STATE ARE DISTINGUISHABLE.

Neither *Rummel v. Estelle*, 445 U.S. 263, 63 L. Ed. 2d 382 (1980), nor *Ewing v. California*, 538 U.S. 11, 155 L. Ed. 2d 108 (2010) (plurality opinion), are grounds for validating Mr. McDougald's sentence. The punishments at issue included parole eligibility, which makes the sentences fundamentally different than Mr. McDougald's sentence, which does not. *See Graham v. Florida*, 560 U.S. 48, 69–70, 176 L. Ed. 2d 825, 842 (2010); *Ewing*, 538 U.S. at 20, 155 L. Ed. 2d at 116 (noting that "Ewing was sentenced under the three strikes law to 25 years to life."); *Rummel*, 445 U.S. at 267, 63 L. Ed. 2d at 387 (noting that the sentence included parole).

Likewise, this Court's opinion in *State v. Mason*, 126 N.C. App. 318, 484 S.E.2d 818 (1997) does not bar relief. In that case, the State relied on Mr. Mason's prior convictions for adult conduct including voluntary manslaughter. *Id.*, 484 S.E.2d at 819. This Court denied a facial challenge. *Id.*, 484 S.E.2d at 820. In contrast, Mr. McDougald is not asking this Court to invalidate all violent habitual felon sentences. He is asking this Court to find that his sentence is disproportionate. The Eighth Amendment prohibits disproportionate sentences, regardless of whether they are capital. *See*

Montgomery v. Louisiana, 577 U.S. 190, 206, 193 L. Ed. 2d 599, 618 (2016) ("Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence."). *State v. Green*, 348 N.C. 588, 609, 502 S.E.2d 819, 832 (1998), recognized that those disproportionate sentences will be "exceedingly rare" but did not say that they will never happen.[4] Mr. McDougald's sentence—of life in prison based on non-homicide juvenile conduct—is one of those exceedingly rare cases.

The case that *Mason* relied on, *State v. Todd*, 313 N.C. 110, 111, 326 S.E.2d 249, 250 (1985), was about habitual felon status and a punishment of life with parole. *Todd* does not insulate Mr. McDougald's sentence from a general proportionality challenge any more than *Mason* does. *See Montgomery*, 577 U.S. at 206, 193 L. Ed. 2d at 618.

In 2001, the State offered Mr. McDougald a plea deal to approximately thirteen years. (MAR T p 14). After turning it down because of his attorney's unreasonable errors as described above, Mr. McDougald has now spent more

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[4] *Green* cites *Harmelin v. Michigan*, 501 U.S. 957, 115 L. Ed. 2d 836 (1991), for the proposition "that outside of the capital context, there is no general proportionality principle inherent in the prohibition against cruel and unusual punishment." 348 N.C. at 609, 502 S.E.2d at 831–32. Since *Harmelin*, the Supreme Court has affirmed that the Eighth Amendment requires proportionality between a sentence and a crime. *See Montgomery*, 577 U.S. at 206, 193 L. Ed. 2d at 618. In any event, Mr. McDougald alleges that his sentence is grossly disproportionate. (Def. Br. p 34).

than two decades in prison. The disparity between the plea deal that the State offered and the sentence that Mr. McDougald received after his attorney's errors is another indication of the injustice of his sentence. *See Lafler v. Cooper*, 566 U.S. 156, 165, 182 L. Ed. 2d 398, 408 (2012). Mr. McDougald prays that this Court protect his Eighth Amendment rights, as well as his Sixth Amendment rights, and vacate his sentence.

CONCLUSION

For the reasons and authorities herein and in his brief, Mr. McDougald renews his prayer that this Court vacate the order denying his motion for appropriate relief.

Respectfully submitted, this the 13th day of December, 2021.

By Electronic Submission:

Christopher J. Heaney
Attorney for Defendant-Appellant
116 Donmoor Court
Garner, NC 27529
(206) 580-3486
State Bar No. 46095
chris.heaney@heaneylawoffice.onmicrosoft.com

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

I hereby certify that Defendant-Appellant'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 3,750 words as indicated by the word-processing program used to prepare the brief.

This the 13th day of December, 2021.

By Electronic Submission:

Christopher J. Heaney
Attorney for Defendant-Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Defendant-Appellant's Reply 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 Reply Brief has been duly served pursuant to Rule 26 by electronic means on the following attorneys:

Nicholas R. Sanders
Counsel for the State
nsanders@ncdoj.gov

Marsha L. Levick
Aryn Williams-Vann
Katrina L. Goodjoint
Riya Saha Shah
John R. Mills
Counsel for Amicus Curiae Juvenile Law Center
mlevick@jlc.org
awilliams-vann@jlc.org
kgoodjoint@jlc.org
rshah@jlc.org
j.mills@phillipsblack.org

This the 13th day of December, 2021.

By Electronic Submission:

Christopher J. Heaney
Attorney for Defendant-Appellant
116 Donmoor Court
Garner, NC 27529
(206) 580-3486
State Bar No. 46095
chris.heaney@heaneylawoffice.onmicrosoft.com