No. SC-2024-0672

In the SUPREME COURT of ALABAMA

EX PARTE ALTONIO SPENCER

(In re: Altonio Spencer, Petitioner

v. State of Alabama, Respondent)

On Writ of Certiorari to

the Court of Criminal Appeals of Alabama

(CR-2022-1213)

On Appeal From the Circuit Court of

Mobile County

(CC-18-288)

BRIEF OF PETITIONER

***ORAL ARGUMENT REQUESTED**

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested in this matter. The Court granted Altonio Spencer's Petition for Writ of Certiorari on an issue of first impression, whether terms from § 13A-8-52, Ala. Code 1975, which are directly contrary to terms from the HFOA, § 13A-5-9, Ala. Code 1975, can be applied to an HFOA sentence. This case also involves the imposition of a life without parole sentence on a then 25-year-old defendant. Oral argument could assist the Court in reaching its decision on this issue of first impression.

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STATEMENT OF THE CASE

Altonio Spencer challenges the affirmance of his sentence of life imprisonment, without the possibility of parole, by the Court of Criminal Appeals of Alabama, for his conviction for pharmacy robbery.

Mr. Spencer was indicted for first-degree robbery and pharmacy robbery. (C. 17, 21.) Jury selection and trial took place from April 11 to April 14, 2022. (R. 2-3.) Mr. Spencer was convicted of first-degree robbery and pharmacy robbery. (C. 109; R. 571.)

The trial court sentenced Mr. Spencer to life imprisonment, without the possibility of parole, for pharmacy robbery, and 240 months in prison for first-degree robbery. (C. 126; R. 593.) Mr. Spencer timely appealed. (C. 126, 137-40; R. 594-95.)

On June 28, 2024, Criminal Appeals issued an opinion affirming in part and reversing in part. Criminal Appeals vacated Mr. Spencer's first-degree robbery conviction, on double jeopardy grounds, and affirmed Mr. Spencer's conviction and sentence for pharmacy robbery. On August 9, 2024, Criminal Appeals issued a memorandum decision on return from remand affirming Mr. Spencer's conviction and sentence for pharmacy robbery.

Mr. Spencer sought certiorari review. On February 14, 2025, this Court partially granted review on Mr. Spencer's challenge to his life without parole sentence for pharmacy robbery.

STATEMENT OF THE ISSUE

I. Did Criminal Appeals err in affirming Mr. Spencer's sentence for pharmacy robbery, when the trial court did not properly apply the HFOA in imposing that sentence?

STATEMENT OF THE FACTS

Mr. Spencer was convicted, after a jury trial, of first-degree robbery and pharmacy robbery. (C. 109; R. 571.)[1]

On October 13, 2022, the trial court held a sentencing hearing. (R. 575.) The State had previously filed a notice of intent to proceed under Alabama's Habitual Felony Offender Act ("HFOA"). (C. 95.) The State alleged that Mr. Spencer had previously been convicted of first-degree receiving stolen property, second-degree assault, unlawfully breaking and entering a motor vehicle, and being a certain person forbidden to possess a pistol. (C. 95.) Mr. Spencer did not dispute his conviction history.

[1] Because the Court only granted certiorari review on Mr. Spencer's challenge to his pharmacy robbery sentence, this Statement of Facts will be limited to that issue.

The trial court stated, near the outset of the sentencing hearing, "at lease with regard to CC-18-288 based on Mr. Spencer's prior convictions the only sentence the Court can impose is life without the possibility of parole." (R. 581.) The trial court referred to the pharmacy robbery sentence as a "mandatory sentence". (R. 582.) The State asserted, based on Mr. Spencer's prior convictions, none of which were class-A felonies, that the only legal sentence for pharmacy robbery was life without parole. (R. 585-86.)

The trial court imposed that sentence:

> "I don't have the leeway to give you any leniency on that case. I'm required by law, given your past history, to impose a sentence of life in prison without the possibility of parole. That is my decision but it is not something that I have any control over. The law mandates that sentence and I am compelled by law to impose that sentence and follow the law. I'm sorry."

(R. 593.) The trial court memorialized its decision in a sentencing order. (C. 126.)

STANDARD OF REVIEW

Pure questions of law, like the proper application of the HFOA to Mr. Spencer's pharmacy robbery sentence, are reviewed de novo. See Alabama Republican Party v. McGinley, 893 So. 2d 337, 342 (Ala. 2004) (citing BT Sec. Corp. v. W.R. Huff Asset Mgmt. Co., 891 So. 2d 310 (Ala. 2004)).

SUMMARY OF THE ARGUMENT

Criminal Appeals erred in affirming Mr. Spencer's life without parole sentence for pharmacy robbery, imposed based on the trial court's erroneous hybrid application of contrary terms in the HFOA and the pharmacy robbery penalty statute.

Because Mr. Spencer was convicted of a class-A felony, after having previously been convicted of three or more felonies, none of which were class-A, the trial court was required to sentence Mr. Spencer, in its discretion, and consistent with the plain language of the HFOA, to either life imprisonment, with the possibility of parole, or life without parole. The trial court, and Criminal Appeals, wrongfully believed that, because the pharmacy robbery penalty statute provided that a term of years imposed under that statute would not allow parole

eligibility, that Mr. Spencer was subject to a mandatory life without parole sentence under the HFOA.

The terms of the HFOA are predominant and superseded any contrary language in the pharmacy robbery penalty statute. This Court should reverse Criminal Appeals' opinion to the extent that it affirmed Mr. Spencer's pharmacy robbery sentence, with instructions that this case be remanded to the trial court for resentencing on that conviction.

ARGUMENT

I. Criminal Appeals erred in finding that the trial court properly applied the HFOA in sentencing Mr. Spencer for pharmacy robbery.

The HFOA, § 13A-5-9, Ala. Code 1975, required the trial court, in its discretion, to sentence Mr. Spencer to either life imprisonment, with the possibility of parole, or life without parole, for his pharmacy robbery conviction. The State conceded to Criminal Appeals that Mr. Spencer was entitled to a remand to have the trial court properly apply the HFOA and decide, in its discretion, whether to sentence Mr. Spencer to life, with the possibility of parole, or life without parole.

The trial court's failure to properly apply the HFOA, believing the only legal sentence that it could impose was life without parole,

prejudiced Mr. Spencer, requiring reversal of Criminal Appeals' opinion, to the extent that it affirmed Mr. Spencer's pharmacy robbery sentence, with instructions that this case be remanded to the trial court for resentencing. (C. 126; R. 575-94.)

A. Passage and amendment of the HFOA and the pharmacy robbery penalty statute.

The HFOA was first passed on May 16, 1977, and took effect one year after its adoption. See Act 607, § 1235, Acts of Alabama 1977, p. 812. The HFOA was part of an omnibus criminal law bill which included a section providing that "[a]ll laws or parts of laws which conflict with this act are hereby repealed." Act 607, § 9902, Acts of Alabama 1977, p. 812.

The HFOA was first amended on July 30, 1979, effective January 1980. In relevant part, the 1980 amendment provided that, if a defendant had previously been convicted of three felonies and was subsequently convicted of a class-A felony, "he must be punished by imprisonment for life without parole." Act 79-664, § 1235(c)(3), Acts of Alabama 1979, p. 1163.

The pharmacy robbery penalty statute, § 13A-8-52, Ala. Code 1975, was approved on May 4, 1982. See Act 82-434, § 6, Acts of

Alabama 1982, p. 684. Section 13A-8-52(a), Ala. Code 1975, which has not since been amended, provides: "Upon conviction of the criminal offense of 'pharmacy robbery' as defined in Section 13A-8-51(2), the offender shall be imprisoned at hard labor for not less than 10 years nor more than 99 years and shall be ineligible for consideration for parole, probation or suspension of sentence." Section 13A-8-52(a), Ala. Code 1975.[2]

The HFOA was again amended, effective May 25, 2000. The 2000 amendment changed the potential punishments that a defendant could receive for a class-A felony after having previously been convicted of three or more felonies, none of which were class-A. Section 13A-5-9(c)(3), Ala. Code 1975 now read: "On conviction of a Class A felony, where the defendant has no prior convictions for any Class A felony, he or she must be punished by imprisonment for life or life without the possibility of parole, in the discretion of the trial court." (Emphasis added.) The HFOA was amended, effective January 30, 2016, in ways

[2] The pharmacy robbery penalty statute has a recidivist provision in § 13A-8-52(b), Ala. Code 1975, applicable after a second or subsequent conviction for pharmacy robbery. Mr. Spencer did not have a prior conviction for pharmacy robbery.

that are not relevant to this appeal, other than the fact that § 13A-5-9(c)(3) did not change.

As such, the last expression of legislative intent on the potential punishment for a class-A felony, after a defendant has previously been convicted of three or more felonies, none of which were class-A, was the 2000 amendment to the HFOA (and readoption in the 2016 amendment). See Turner v. State, 429 So. 2d 645, 648 (Ala. Crim. App. 1982) ("Even if these two statutes could somehow be construed as being inconsistent or in conflict, Section 13A-5-9, being the last expression of the will of the legislature, would control.") (citations omitted).

B. The HFOA applies to pharmacy robbery convictions.

In Shepard v. State, 539 So. 2d 449, 450 (Ala. Crim. App. 1988), Criminal Appeals reasoned that, because Shepard had prior felony convictions, none of which were for pharmacy robbery, he had to be sentenced under the HFOA for his pharmacy robbery conviction: "Because he has no prior convictions under this article, this subsection was inapplicable and the appellant had to be sentenced under the Habitual Felony Offender Act. Section 13A-5-1, Code of Alabama (1975)." Per Shepard, pharmacy robbery is treated as a class-A felony.

Criminal Appeals confirmed the applicability of the HFOA in Hannah v. State, 627 So. 2d 1090, 1093 (Ala. Crim. App. 1992):

> "If any of the appellant's prior convictions were for pharmacy robbery, he should have been sentenced under § 13A-8-52(b), Code of Alabama 1975. On the other hand, if none of the appellant's prior convictions were for pharmacy robbery, the trial court must apply the enhancement provisions of § 13A-5-9, Code of Alabama 1975."

Because Mr. Spencer had prior felony convictions, none of which were for pharmacy robbery, the HFOA applied to his pharmacy robbery sentence.

C. The terms of the HFOA superseded conflicting terms in the pharmacy robbery penalty statute.

Criminal Appeals countenanced a hybrid application of contrary terms in § 13A-8-52(a) and § 13A-5-9(c)(3):

> "[T]he trial court correctly recognized that a sentence of life imprisonment under the HFOA would effectively be a sentence of life imprisonment without the possibility of parole because no person who is convicted of pharmacy robbery is eligible for parole. Therefore, the trial court did not 'improperly sentence' Spencer for his pharmacy-robbery conviction."

Spencer v. State, [Ms. CR-2022-1213, June 28, 2024] ___ So. 3d ___, ___, 2024 WL 3213193 at 9 (Ala. Crim. App. 2024).

In State v. Thomas, 611 So. 2d 472 (Ala. Crim. App. 1992), Criminal Appeals found that the HFOA implicitly repealed § 15-22-27.2, Ala. Code 1975, to the extent that § 15-22-27.2 conflicted with the terms of the HFOA. Thomas pled guilty to attempted murder and was sentenced, pursuant to the HFOA, to life imprisonment. But, because Thomas had previously been convicted of a class-A felony, under § 15-22-27.2, he was not eligible for parole, and therefore his plea sentence was effectively life without parole. Criminal Appeals agreed with the circuit court, who had granted Thomas postconviction relief from his sentence, based on the circuit court's finding that the terms of HFOA, which had been adopted after § 15-22-27.2, superseded the terms of § 15-22-27.2: "The Habitual Felony Offender Act has implicitly repealed § 15-22-27.2, and that section has no application to the appellant's sentence of life imprisonment." Thomas, 611 So. 2d at 475. Criminal Appeals applied a similar rationale, in Goldsmith v. Alabama Board of Pardons and Paroles, 724 So. 2d 80 (Ala. Crim. App. 1998), to find that the HFOA implicitly repealed § 15-22-27.1, Ala. Code 1975, to the extent that it conflicted with the HFOA.

In Moore v. State, 739 So. 2d 536 (Ala. Crim. App. 1998), Criminal Appeals held that the HFOA did not conflict with the terms of § 15-22-27.1, as applied to Moore's 17-year sentence, because Moore was sentenced to a term of years, rather than life imprisonment. Criminal Appeals did not presume that the legislature intended to require parole consideration for a sentence of a term of years, imposed pursuant to the HFOA, as it did for a life sentence imposed pursuant to the HFOA:

> "Whereas the very purpose of § 15-22-27.1 is to deny parole eligibility upon the commission of certain offenses, the HFOA mentions the subject of parole eligibility only in § 13A-5-9(c)(3), Ala. Code 1975, requiring 'imprisonment for life without parole' upon a conviction of a Class A felony after already having three prior felony convictions. It can be inferred from this language that the ordinary sentence of 'life' under the HFOA requires parole consideration, because had the legislature desired to bar parole consideration in those situations it would have referred to 'life without parole' as it did in § 13A-5-9(c)(3). However, we cannot presume that the legislature intended the same conclusion when referring in the HFOA to a sentence for a term of years.... Therefore, while the HFOA requires a certain sentencing range, other statutes may affect a defendant's punishment, so long as they do not alter the range set out in the HFOA."

Moore, 739 So. 2d at 538 (emphasis added).

Consistent with Moore, Criminal Appeals has explained that, unlike removing parole eligibility for a sentence of a term of years,

removing parole eligibility from a life sentence increases a maximum sentence:

> "A sentence of a term of years is fundamentally different than a sentence of life imprisonment. Ineligibility for parole under § 15-22-27.3 when the maximum sentence a defendant could receive is a term of years will not have the effect of increasing that maximum sentence, as is the case when the maximum sentence a defendant could receive is life imprisonment."

McCary v. State, 93 So. 3d 1002, 1007 (Ala. Crim. App. 2011).

The terms of § 13A-8-52(a) and § 13A-5-9(c)(3) were in direct conflict, as applied to Mr. Spencer's pharmacy robbery sentence. Section 13A-8-52(a) required a term of between 10 and 99 years in prison, while § 13A-5-9(c)(3) required a sentence of life or life without parole. Further, § 13A-8-52(a) provided that a term of years imposed under that subsection would not be parole eligible, while § 13A-5-9(c)(3) required the trial court, in its discretion, to consider whether to allow for parole eligibility for Mr. Spencer's life sentence.

The trial court could not apply a hybrid version of § 13A-8-52(a) and § 13A-5-9(c)(3) without changing the terms of both statutes and increasing the maximum mandatory sentence that could be imposed under either statute. The trial court did not properly apply § 13A-8-

52(a), because a life sentence exceeded the maximum possible term that could be imposed under that subsection. Section 13A-8-52(a) cannot be read to contemplate the denial of parole for a sentence that cannot be imposed under that statute. This is especially the case when considering that the pharmacy robbery penalty statute contemplates a situation where life without parole must be imposed, upon conviction for a second or subsequent pharmacy robbery, in § 13A-8-52(b). And, the trial court did not properly apply § 13A-5-9(c)(3), because the HFOA required the trial court to exercise discretion in determining whether to sentence Mr. Spencer to life imprisonment, with the possibility of parole, or life without parole. The trial court did not do so, believing that life without parole was a mandatory sentence.

In this situation, the HFOA, and specifically the terms in the 2000 amendment (readopted in 2016), supersedes contrary terms in the pharmacy robbery penalty statute. The trial court was required to sentence Mr. Spencer to either life, with the possibility of parole, or life without parole, for his pharmacy robbery conviction. Criminal Appeals erred to reversal in affirming the trial court's erroneous hybrid application of contrary terms in § 13A-8-52(a) and § 13A-5-9(c)(3).

D. The plain language of the HFOA required the trial court to exercise discretion in sentencing Mr. Spencer for pharmacy robbery.

This Court has often explained its role in enforcing statutes that are plain and unambiguous:

> "When the language of a statute is plain and unambiguous ... courts must enforce the statute as written by giving the words of the statute their ordinary plain meaning-they must interpret that language to mean exactly what it says and thus give effect to the apparent intent of the Legislature."

Ex parte T.B., 698 So. 2d 127, 130 (Ala. 1997)). "If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect." IMED Corp. v. Systems Engineering Associates Corp., 602 So. 2d 344, 346 (Ala. 1992) (citation omitted).

A defendant can only receive a mandatory life without parole sentence, pursuant to the HFOA, if they are convicted of a class-A felony after having been convicted of three or more felonies, at least one of which is a class-A. See § 13A-5-9(c)(4), Ala. Code 1975. A defendant can only receive a mandatory life without parole sentence under the pharmacy robbery penalty statute if they have previously been convicted of pharmacy robbery. See § 13A-8-52(b). Because Mr. Spencer

had no prior convictions for pharmacy robbery or a class-A felony, he did not satisfy the requirements for either statute.

Section 13A-5-9(c)(3) is plain and unambiguous. If a defendant, like Mr. Spencer, is convicted of a class-A felony, after having been convicted of three or more prior felonies, none of which are class-A, he must be sentenced to either life imprisonment, with the possibility of parole, or life without parole, in the trial court's discretion. Further, a proper application of the HFOA is mandatory if not waived. See McGuire v. State, 359 So. 3d 1144, 1154 (Ala. Crim. App. 2021) ("[T]he HFOA is written in 'mandatory' terms, but it is mandatory only if the State proves the existence of the prior convictions beyond a reasonable doubt and the State does not waive the application the HFOA.").

The trial court did not exercise the discretion required by the HFOA and Criminal Appeals erred in affirming that decision. This Court should interpret and apply § 13A-5-9(c)(3) as written. Criminal Appeals' affirmance of Mr. Spencer's life without parole sentence, for pharmacy robbery, should be reversed with instructions that this case be remanded to the trial court for a proper application of § 13A-5-9(c)(3), in resentencing Mr. Spencer for pharmacy robbery.

E. The trial court's failure to properly apply the HFOA prejudiced Mr. Spencer.

Though life without parole would be a legal sentence if the HFOA were properly applied to Mr. Spencer's pharmacy robbery conviction, Mr. Spencer was prejudiced by the trial court's failure to properly apply the HFOA.

Both this Court and Criminal Appeals have analyzed a circuit court's mistaken belief that they were cabined to a harsher sentence than required by law through the lens of fundamental fairness. This Court agreed with a dissenting Criminal Appeals judge who reasoned that a potentially erroneous application of the HFOA, in which the circuit court appeared to consider a youthful offender adjudication in sentencing a defendant to ten years in prison for a third-degree burglary, was reversible error, despite the ten-year sentence being permissible under a proper application of the HFOA: "We agree … with the dissent filed by Judge Bowen, who wrote: 'Merely because the defendant could have been sentenced to ten years does not mean he would have been if the trial judge had not considered the youthful offender conviction. Harmless error cannot be based on such

possibilities.' " Ex parte Thomas, 435 So. 2d 1324, 1326 (Ala. 1982) (citation omitted) (emphasis in Judge Bowen's dissenting opinion).

Criminal Appeals applied Ex parte Thomas in Pickens v. State, 475 So. 2d 637 (Ala. Crim. App. 1985). In Pickens, a circuit court again improperly considered youthful offender adjudications in sentencing Pickens, under the HFOA, to life imprisonment for his first-degree assault conviction. Though life imprisonment was a permissible sentence under a proper application of the HFOA, it was not the only sentence that the circuit could have imposed, and the circuit court's failure to properly apply the HFOA was reversible error: "The State contends that since the appellant's life sentence was within the allowable range of punishment, his sentence should stand. We cannot agree with this argument." Id. at 640. Criminal Appeals explained that "the trial judge stated that he 'must' sentence the appellant to life imprisonment because he had three or more prior felony convictions" and that "[o]ur finding that the trial judge should have only considered the appellant's two prior federal felony convictions leads us to the conclusion that the trial judge was not required to sentence the appellant to life imprisonment." Id. (emphasis in original).

Criminal Appeals applied similar reasoning in remanding a life sentence imposed for first-degree escape, based on an erroneous application of the HFOA, where one of the defendant's prior felony convictions had been vacated. See McClintock v. State, 773 So. 2d 1057, 1059 (Ala. Crim. App. 2000); see also Robinson v. State, 549 So. 2d 136, 138 (Ala. Crim. App. 1988) ("Following the holding in [Ex parte] McCree[, 554 So. 2d 336 (Ala. 1988)], to allow the appellant to be sentenced under the trial court's belief that he had to impose a ten-year sentence, violates the appellant's rights to due process.").

Finally, in Ex parte Swearingen, 837 So. 2d 246 (Ala. 2001), this Court applied Ex parte Thomas, Pickens, and McClintock to reverse a life sentence imposed under the HFOA for Swearingen's second-degree burglary conviction. The circuit court had applied a version of the HFOA that was no longer valid: "[T]he trial court sentenced Swearingen under a version of the HFOA that was no longer effective. The record clearly indicates that the trial court believed that a life sentence was mandatory … when, in fact, a broad range of possible sentences was available." Id. at 248. The Court again rejected arguments that Swearingen's life sentence could be affirmed because it was permissible

under a proper application of the HFOA: "The trial court quite clearly expressed its view, albeit erroneous, that such a sentence was mandatory.... Fundamental fairness requires that Swearingen receive a new sentencing hearing to establish with certainty that the trial court exercised the discretion allowed under the amended HFOA." Id. at 249.

Though the trial court could impose life without parole for Mr. Spencer's pharmacy robbery conviction, under a proper application of the HFOA, it was not the only sentence that could be imposed. The trial court could impose life, with the possibility of parole, and it's mistaken belief that it was limited to life without parole prejudiced Mr. Spencer. Consistent with Ex parte Thomas, Pickens, McClintock, and Swearingen, Mr. Spencer's life without parole sentence for pharmacy robbery should be reversed with instructions that this case be remanded to the trial court for resentencing, consistent with the plain language of the HFOA.

CONCLUSION

For the above reasons, Criminal Appeals' opinion, to the extent that it affirmed Mr. Spencer's pharmacy robbery sentence, should be reversed with instructions that this case be remanded to the trial court for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word limitation set forth in Rule 28(j)(1), Ala. R. App. P., and by extension Rule 39(g)(1), Ala. R. App. P. According to the word count function of Microsoft Word, this brief contains 3,793 words from the Statement of the Case through the Conclusion. I further certify that this brief complies with the font requirements of Rule 32(a)(7), Ala. R. App. P. This brief was prepared in the Century Schoolbook font using 14-point type. See Rule 32(d), Ala. R. App. P.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on the Honorable Steven Marshall by attaching a pdf format copy of the same to electronic mail sent to the Office of the Attorney General at the following email address on February 26, 2025:

docketroom@alabamaag.gov

I hereby certify that I will serve 2 copies of the foregoing on the Supreme Court of Alabama by mailing a copy of the same, addressed as follows, on February 26, 2025:

Megan B. Rhodebeck
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/s/ Christopher S. Youngpeter
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Appendix

List of Adverse Rulings Relevant to Allegations of Error

Record Page Number	Summary
C. 126	Trial court's sentencing order.
R. 593	Trial court's pronouncement of sentence.