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)

REPLY BRIEF OF PETITIONER

CHRISTOPHER S. YOUNGPETER
Assistant Public Defender
Mobile County Public Defender's Office
151 Government St., 4th Floor
Mobile, AL 36602
Telephone: (251) 319-6069
Christopher.youngpeter@oids.alabama.gov

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SUMMARY OF THE ARGUMENT

This Court should reject the State's argument that the only legal sentence that Mr. Spencer could receive for pharmacy robbery was life without parole, for multiple reasons. Initially, the arguments in the Respondent's Brief are not properly before this Court. The State made a permissive concession, to the Court of Criminal Appeals, that Mr. Spencer was entitled to a remand for resentencing, for the trial court to properly exercise the discretion required by Alabama's Habitual Felony Offender Act ("HFOA"), in sentencing Mr. Spencer for pharmacy robbery. The State is stuck with that permissive concession and cannot change its merits position to this Court.

Even so, each of the State's arguments should be rejected. The State presents a faulty interpretation of the HFOA, specifically § 13A-5-9(c)(3), Ala. Code 1975, as well as § 13A-8-52(a), Ala. Code 1975, referencing canons of statutory construction that do not support its argument. The State's legislative intent argument is also practically unsound and should be rejected in favor of a straightforward application of the plain text of the HFOA.

The State's analogy to other sentencing enhancements does not support its interpretation of the HFOA and § 13A-8-52(a), but rather supports Mr. Spencer's argument that he was improperly sentenced for pharmacy robbery. And, while the State argues that Criminal Appeals has created an arbitrary distinction between life sentences and terms of years, imposed under the HFOA, any perceived arbitrariness stems from the text of the HFOA, not from Criminal Appeals' analysis of the HFOA.

Criminal Appeals' decision, to the extent that it affirmed Mr. Spencer's sentence for pharmacy robbery, should be reversed with instructions that this case be remanded for resentencing.

ARGUMENT

I. The Court should reject the State's assertion that life without parole was the only sentence that Mr. Spencer could receive for pharmacy robbery.

A. The State's arguments are not properly before this Court.

The State took the position, with Criminal Appeals, that Mr. Spencer correctly argued that he was entitled to a remand for resentencing, so that the trial court could properly apply the discretion required by the HFOA in sentencing Mr. Spencer for pharmacy robbery. The State made no substantive arguments opposing Mr. Spencer's

position. The State has changed its mind in its brief to this Court, raising, for the first time, substantive arguments in opposition to Mr. Spencer's request for a remand.

Our appellate courts do not, as a general matter, consider arguments that were not first addressed to a lower court. See Andrews v. Meritt Oil Co., Inc., 612 So. 2d 409, 410 (Ala. 1992) ("Andrews did not raise this issue in the lower court. This Court cannot consider arguments raised for the first time on appeal; rather, our review is restricted to the evidence and arguments considered by the trial court.") (citation omitted). Further, "[e]rror may not be argued before the Supreme Court for the first time." Conley v. Beaver, 437 So. 2d 1267, 1270 (Ala. 1983).

The State is in the same position, before this Court, as it was before Criminal Appeals. The issue raised by Mr. Spencer, on the interplay between the HFOA and § 13A-8-52(a), in determining the propriety of Mr. Spencer's pharmacy robbery sentence, was an issue of first impression for Criminal Appeals, and is an issue of first impression for this Court. The State was not forced to concede error, to Criminal Appeals, based on a controlling precedent from Criminal Appeals, and thereafter seek a contrary decision from this Court. The State's

concession was permissive, not mandatory, and waived any arguments not made with Criminal Appeals. See Ex parte Frith, 526 So. 2d 880, 882 (Ala. 1987) ("The statement of specific grounds of objection waives all grounds not specified, and the trial court will not be put in error on grounds not assigned at trial."). The State had the chance to raise the arguments it now raises, with Criminal Appeals, and did not do so, rather deciding to concede the correctness of Mr. Spencer's position.

The State cannot change its merits arguments between appellate courts, especially when its arguments are directly contrary to the permissive concession that it made to Criminal Appeals.[1] The arguments in the Respondent's Brief are not properly before this Court and the Court should refuse to consider them.

Mr. Spencer understands that this Court must independently analyze and decide the propriety of the legal issue that Mr. Spencer raises, and, by arguing that the Court should refuse to consider the arguments in the Respondent's Brief, Mr. Spencer is not asking the Court

[1] See generally Ex parte Smith, 377 So. 3d 510 (Ala. 2022) (Mitchell, J., concurring specially to quash writ of certiorari) (Refusing to consider an argument by the defendant, that insufficient evidence of specific intent had been presented to convict the defendant of manslaughter, because it was raised for the first time in a merits brief to this Court).

to forego an independent analysis. Mr. Spencer merely requests that this Court accept, as the State's position on the issue for which this Court granted certiorari review, the following argument from the Appellee's Brief to Criminal Appeals in CR-2022-1213:

> "Spencer, upon being convicted for pharmacy robbery, a Class A felony, was required to 'be punished by imprisonment for life or life without the possibility of parole, in the discretion of the trial court.' Ala. Code § 13A-5-9(c)(3) (emphasis added). Though the court's sentence of life without parole is technically authorized, the trial court's mistaken belief that this sentence was mandatory, (R. 593), violated Spencer's due process rights. See, e.g., Robinson v. State, 549 So. 2d 136, 138 (Ala. Crim. App. 1988)…. Thus, this cause is due to be remanded for the trial court to exercise discretion in imposing life or life without the possibility of parole."

(State's Brief to Criminal Appeals at 54) (emphasis in original) (footnote omitted).

B. Even if the State's arguments were properly before this Court, they should be rejected.

i. The State's faulty interpretation of § 13A-8-52(a) and the HFOA should be rejected.

The State argues that, if Mr. Spencer's argument is accepted, it would "read an enhancement statute to decrease penalties, and it would do so by embracing the sort of disharmonious reading of statutes that this Court has repeatedly eschewed." (Respondent's Brief at 23.) The State's argument should be rejected.

The State asserts that the Legislature attached a "special opprobrium" to pharmacy robberies. (Respondent's Brief at 15.) Though § 13A-8-52(a) does not allow for parole eligibility for the term of years imposed under that statute, the State's position is somewhat dubious when considering the fact that, upon a first conviction for a "standard" first-degree robbery, with no felony history, a defendant can receive a life sentence. See § 13A-5-6(a)(1), Ala. Code 1975.

But, even accepting the State's premise, that the Legislature considered pharmacy robberies to be "worse" than other first-degree robberies, it specifically did not extend the "special opprobrium" for a first conviction for pharmacy robbery, to life sentences. To receive a life

sentence, under the pharmacy robbery penalty statute, the defendant must have a prior pharmacy robbery conviction. See § 13A-8-52(b), Ala. Code 1975. "A court '[w]ill not ... interpret [a law] in such a way as to make it meaningless.' " Ex parte City of Montgomery, 721 So. 2d 261, 263 (Ala. Crim. App. 1998) (quoting Reserve Nat'l. Ins. Co. v. Crowell, 614 So. 2d 1005, 1010 (Ala. 1993)). To accept the State's position, that § 13A-8-52(a) contemplates a mandatory life without parole sentence for a first conviction for pharmacy robbery, would render § 13A-8-52(b) practically meaningless in determining the intent of the Legislature in adopting the pharmacy robbery penalty statute.

The State cites canons of statutory construction which it believes supports its reading of the HFOA and § 13A-8-52(a). First, the presumption against implied repeal. This Court has explained:

> "Implied repeal is essentially a question of determining the legislative intent as expressed in the statutes. Ex parte Jones, 212 Ala. 259, 260, 102 So. 234. When the provisions of two statutes are directly repugnant and cannot be reconciled, it must be presumed that the legislature intended an implied repeal, and the later statute prevails as the last expression of the legislative will. Union Central Life Insurance Co. v. State, 226 Ala. 420, 423, 147 So. 187; Fidelity & Deposit Co. of Maryland v. Farmers' Hardware Co., 223 Ala. 477, 479, 136 So. 824."

State v. Bay Towing & Dredging Co., 90 So. 2d 743, 749 (Ala. 1956).

In Ex parte Jones, 373 So. 3d 264 (Ala. 2022), the Court found an implied repeal of a statute creating a misdemeanor offense for leaving a work release program, in favor of Alabama's felony escape statutes. In so doing, the Court explained the repugnancy of the two statutes, that they provided different punishments for the same conduct:

> "Such an overlap would pose no concern if the competing statutory provisions were complementary, but the problem at the heart of this case is that the statutes at issue provide differing punishments for the same conduct; the relevant county work-release statutes purport to punish escape from a work-release program as a misdemeanor while the escape statutes deem the exact same conduct to be felonious. This direct conflict regarding the proper punishment for the same crime, coupled with the language and the legislative history of the relevant statutory provisions, suggests an intent on the part of the legislature to repeal the relevant provisions of the county work-release statutes to the extent that they provide a punishment separate and distinct from the escape statutes."

Id. at 269.

Section 13A-8-52(a) provides the punishment range for a first conviction for pharmacy robbery, 10 to 99 years in prison, and that the term of years imposed under § 13A-8-52(a) will not be parole eligible. Section 13A-5-9(c)(3) provides that, upon conviction of a class-A felony, with three or more prior qualifying felonies, none of which are class-A, the defendant must be sentenced, in the court's discretion, to either life,

with the possibility of parole, or life without parole. Section 13A-8-52(a) cannot be read to contemplate a mandatory sentence of life without parole for a first conviction for pharmacy robbery. To the contrary, the Legislature indicated, by passing the recidivist provision of the pharmacy robbery penalty statute, § 13A-8-52(b), that, to receive a mandatory life without parole sentence for pharmacy robbery, the defendant must have a prior pharmacy robbery conviction. And, to receive a mandatory life without parole sentence under the HFOA (subject to limited exceptions not relevant here), the defendant must be convicted of class-A felony, with three or more qualifying prior felonies, at least one of which was a class-A felony. See § 13A-5-9(c)(4), Ala. Code 1975. Mr. Spencer did not satisfy the terms of either § 13A-8-52(b) or § 13A-5-9(c)(4).

As such, the HFOA and § 13A-8-52(a) do not "complement" each other, when applied to the facts of this case, but rather provide directly contrary terms, on the length and parole eligibility of Mr. Spencer's pharmacy robbery sentence (i.e., the "proper punishment" for that offense), that could not both be applied to Mr. Spencer's sentence.

Mr. Spencer does not argue that the HFOA repealed § 13A-8-52(a) in its entirety. Accepting Mr. Spencer's position leaves § 13A-8-52(a) with

the same field of operation that it has had since the passage of the 2000 amendment of the HFOA. Namely, if a defendant is convicted of pharmacy robbery and § 13A-5-9(c)(3) either does not apply, or is not applied, the defendant would be subject to a sentence of between 10 and 99 years in prison, without the possibility of parole. Mr. Spencer only argues that, because there is a direct conflict in the application of both § 13A-5-9(c)(3) and § 13A-8-52(a), in this case, the terms of § 13A-5-9(c)(3) supersede the contrary terms in § 13A-8-52(a) and the HFOA must be properly applied. Under the facts of this case, the presumption against implied repeal does not support the State's reading of the HFOA and § 13A-8-52(a).

The State cites the "harmonious reading canon", citing League of Women Voters v. Renfro, 290 So. 2d 167 (Ala. 1974). The State's reading of the HFOA and § 13A-8-52(a) is only "harmonious" in the sense that it would allow the State to have its cake and eat it too, not in the legal sense. The State's reading would require the Court to change the meaning of both § 13A-8-52(a) and § 13A-5-9(c)(3), because it would require affirming a sentence prohibited by the text of § 13A-8-52(a), would ignore § 13A-8-52(b), and would prohibit the discretion required

by § 13A-5-9(c)(3). The State's reading of the HFOA and § 13A-8-52(a) is not "harmonious" and should be rejected by the Court.

Finally, the State cites the canon of construction that "specific provisions relating to specific subjects are understood as exceptions to general provisions relating to general subjects." Murphy v. City of Mobile, 504 So. 2d 243, 244 (Ala. 1987). This canon does not support the State's reading of the HFOA and § 13A-8-52(a), because the State is not asking this Court to apply § 13A-8-52(a) as an exception to a general rule created by § 13A-5-9(c)(3). The State is asking this Court to countenance a hybrid application of contrary terms in both statutes. Whether § 13A-5-9(c)(3) and § 13A-8-52(a) are considered general or specific statutes, they include directly contrary terms that cannot both be applied to Mr. Spencer's pharmacy robbery sentence.

Beyond the textual issues with the State's faulty premise, the State's legislative intent argument is practically unsound. Take, for example, a defendant with no prior felony history who is convicted of a class-C felony and receives a sentence of ten years in prison, pursuant to § 13A-5-6(a)(3), Ala. Code 1975. Further assume that the same defendant is later convicted of another class-C felony, with one prior qualifying

felony, and receives a sentence of two years in prison, pursuant to § 13A-5-9(a)(1), Ala. Code 1975. Under the State's logic, the defendant's sentence for the second class-C felony, though legal and consistent with the text of the HFOA, would violate the "intent of the legislature" in adopting the HFOA, because the second sentence was not an "increased punishment". This is not the sentencing scheme that the Legislature chose. Rather, courts use discretion to impose a sentences within the range required by the text of the HFOA, which the trial court failed to do here.

The State's argument, that, if Mr. Spencer's position is accepted, he could potentially receive a "lighter" sentence for pharmacy robbery than he would otherwise be entitled to under the HFOA, should be rejected, because it is based on the fundamentally flawed premise that directly contrary terms in § 13A-8-52(a) and § 13A-5-9(c)(3) could both be applied to Mr. Spencer's pharmacy robbery sentence. There is no windfall that would come to Mr. Spencer if this case were remanded, because he was not properly sentenced, for pharmacy robbery, in the first place. The text of § 13A-5-9(c)(3), which supersedes any directly contrary terms in § 13A-8-52(a), in this case, demands discretion, and Mr. Spencer is entitled to a

remand so that he could be sentenced to either life, with the possibility of parole, or life without parole, for his pharmacy robbery conviction.

ii. The State's analogy to other sentencing enhancements supports Mr. Spencer's argument that he was improperly sentenced.

The State asserts that a decision in Mr. Spencer's favor would lead to "bizarre results", citing § 13A-5-6(d), Ala. Code 1975:

> "For example, as noted above, an adult convicted of child sex abuse under § 13A-5-6(d) 'shall be sentenced to life imprisonment without the possibility of parole.' But under Spencer's reading of the HFOA, if that offender had a prior felony, he would not get life without parole because '[o]n conviction of a Class A felony, he or she must be punished by imprisonment for life or for any term of not more than 99 years but not less than 15 years.'

(Respondent's Brief at 17.) Section 13A-5-6(d) was adopted in June 2011, after the 2000 amendment to the HFOA. As such, § 13A-5-6(d) is the most recent expression of legislative intent on the punishment to be imposed for convictions obtained under §§ 13A-6-61, 13A-6-63, and 13A-6-65.1, Ala. Code 1975. Here, the 2000 amendment to the HFOA was adopted after the pharmacy robbery penalty statute.

Further, when viewed in its entirety, the text of § 13A-5-6(d) supports Mr. Spencer's argument that the trial court did not properly apply the HFOA in sentencing Mr. Spencer for pharmacy robbery:

> "In addition to any penalties otherwise provided by law, in all cases where an offender is convicted of a sex offense pursuant to Section 13A-6-61, 13A-6-63, or 13A-6-65.1, when the defendant was 21 years of age or older and the victim was six years of age or less at the time the offense was committed, the defendant shall be sentenced to life imprisonment without the possibility of parole."

(Emphasis added.)

" 'There is a presumption that every word, sentence, or provision was intended for some useful purpose, has some force and effect, and that some effect is to be given to each, and also that no superfluous words or provisions were used.' " Sheffield v. State, 708 So. 2d 899, 909 (Ala. Crim. App. 1997) (quoting 82 C.J.S. Statutes § 316 (1953)). By including the phrase "in addition to any penalties otherwise provided by law", the Legislature intended § 13A-5-6(d) to be applied, in its entirety, in conjunction with any other statutory punishments that applied to the conduct proscribed by § 13A-5-6(d).[2]

[2] This Court reviewed similar statutory language in Ex parte Garner, 781 So. 2d 253 (Ala. 2000). In Garner, this Court interpreted, among other statutes, § 13A-12-270, Ala. Code 1975, adopted in 1989, which reads:

There is no similar language in § 13A-8-52(a), which would require that statute to be applied, in its entirety, in conjunction with any other statutory punishments. This distinction, between § 13A-5-6(d) and § 13A-8-52(a), is relevant when considering that § 13A-8-52(a) was adopted after the original version of the HFOA and that "in enacting new legislation, [the Legislature] is presumed to know the existing law." Blue Cross & Blue Shield of Alabama, Inc. v. Nielsen, 714 So. 2d 293, 297 (Ala. 1998). If the Legislature wished for the terms of § 13A-8-52(a) to be considered in conjunction with other punishment statutes, it certainly knew how to do so, as evidenced by § 13A-5-6(d). And, if the Legislature wished to amend § 13A-8-52(a), to add complementary language, it could

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> "In addition to any penalties heretofore or hereafter provided by law for any person convicted of an unlawful sale of a controlled substance, there is hereby imposed a penalty of five years incarceration in a state corrections facility with no provision for probation if the situs of such unlawful sale was within a three-mile radius of a public housing project owned by a housing authority."

While the Court held that the circuit court was required to exercise discretion in determining whether to sentence Garner consecutively or concurrently for two convictions for unlawfully distributing a controlled substance, the Court explained that "the enhancement statutes require that different enhancements for a single offense be served consecutively". Garner, 781 So. 2d at 255-56.

have done so. But, in the 43 years since § 13A-8-52(a) was adopted, the Legislature has chosen not to amend it, and it is not the function of this Court to read additional terms into § 13A-8-52(a). See Siegelman v. Chase Manhattan Bank (USA), Nat'l Ass'n, 575 So. 2d 1041, 1045 (Ala. 1991) ("When determining legislative intent from the language used in a statute, a court may explain the language but it may not detract from or add to the statute.").

iii. Criminal Appeals did not create an arbitrary distinction between life sentences and terms of years.

The State further argues that "the line Moore and McCary draw between sentences for terms of years versus life is arbitrary and underscores the problem in the reasoning of those decisions." (Respondent's Brief at 22.) This argument should be rejected.

The State does not claim that Criminal Appeals failed to faithfully apply the text of the HFOA in State v. Thomas, 611 So. 2d 472 (Ala. Crim. App. 1992), a case in which this Court denied certiorari review, Moore v. State, 739 So. 2d 536 (Ala. Crim. App. 1998), or Goldsmith v. Alabama Bd. of Pardons and Paroles, 724 So. 2d 80 (Ala. Crim. App. 1998). The State does not argue that these cases should be overruled. Rather, it

asserts that the byproduct of Criminal Appeals' analysis in Moore, and McCary v. State, 93 So. 3d 1002 (Ala. Crim. App. 2011), is "strange results", in hypothetical cases not relevant to Mr. Spencer's. In Thomas, Moore, and Goldsmith, Criminal Appeals merely acknowledged that the HFOA could implicitly repeal older statutes prohibiting parole eligibility, to the extent that the two statutes directly conflicted, and that this may particularly be the case where the sentence imposed, pursuant to the HFOA, is life imprisonment. And, in McCary, Criminal Appeals simply recognized the fundamental difference between life sentences and terms of years.

The State may believe that the HFOA is arbitrarily written, in that it only specifically addresses parole eligibility with respect to life sentences. But, any arbitrariness, in the "structure of the statute", to the extent that it exists, stems from the text of the HFOA, not Criminal Appeals' analysis in Thomas, Moore, Goldsmith, and McCary. Any perceived arbitrariness in the text of the HFOA could be addressed by the Legislature, if it wished to do so, and does not change the outcome here.

As with its textual argument, the State wants to keep the portion of Moore that suits its argument and get rid of the rest. This Court should apply Thomas, Moore, Goldsmith, and McCary, as written, and reach the conclusion that follows from those cases, that § 13A-5-9(c)(3) supersedes any directly contrary terms in § 13A-8-52(a), and that the trial court erred in failing to exercise the discretion required by the HFOA, in sentencing Mr. Spencer for pharmacy robbery.

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,

/s/ Christopher S. Youngpeter
Christopher S. Youngpeter(YOU067)
Attorney for Petitioner
Mobile County Public Defender's Office
151 Government St, 4th Floor
Mobile, AL 36602
Telephone: (251) 319-6069
Christopher.youngpeter@oids.alabama.gov

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word limitation set forth in Rule 28(j)(1), Ala. R. App. P. According to the word count function of Microsoft Word, this brief contains 3,715 words from the Summary of the Argument 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.

/s/ Christopher S. Youngpeter
Christopher S. Youngpeter(YOU067)
Attorney for Petitioner

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 April 9, 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 April 10, 2025:

Megan B. Rhodebeck
Clerk, Alabama Supreme Court
300 Dexter Avenue
Montgomery, AL 36104

/s/ Christopher S. Youngpeter
Christopher S. Youngpeter(YOU067)
Attorney for Petitioner