REL: July 9, 2021

Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-19-0726

Donald Bishop

v.

State of Alabama

Appeal from Pickens Circuit Court
(CC-08-11.66)

KELLUM, Judge.[1]

Donald Bishop appeals the circuit court's summary dismissal of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim.

[1]This case was originally assigned to another judge on this Court. It was reassigned to Judge Kellum on May 19, 2021.

P., in which he attacked his 2009 guilty-plea conviction for first-degree sodomy of a victim less than 12 years old and his resulting sentence of 30 years' imprisonment. This Court affirmed Bishop's conviction and sentence on direct appeal in an unpublished memorandum issued on June 24, 2011. Bishop v. State (No. CR-10-0560), 107 So. 3d 236 (Ala. Crim. App. 2011) (table).[2] This Court issued a certificate of judgment on July 13, 2011.

On March 23, 2020, Bishop filed this, his seventh, Rule 32 petition.[3]

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[2]This Court may take judicial notice of its own records, and we do so in this case. See Nettles v. State, 731 So. 2d 626, 629 (Ala. Crim. App. 1998), and Hull v. State, 607 So. 2d 369, 371 n.1 (Ala. Crim. App. 1992).

[3]Bishop filed his first petition in 2010, raising numerous claims and requesting an out-of-time appeal from his conviction and sentence. The circuit court summarily dismissed all the claims in the petition with the exception of Bishop's request for an out-of-time appeal, which the circuit court granted. Bishop did not appeal the circuit court's partial dismissal of his first petition. Bishop also did not appeal the circuit court's summary dismissal of his third petition. This Court affirmed the circuit court's summary dismissals of Bishop's second, fourth, fifth, and sixth petitions. Bishop v. State (No. CR-11-1550), 155 So. 3d 1128 (Ala. Crim. App. 2012) (table); Bishop v. State (No. CR-16-0069), 242 So. 3d 260 (Ala. Crim. App. 2017) (table); Bishop v. State (No. CR-16-1154), 268 So. 3d 632 (Ala. Crim. App. 2017) (table); and Bishop v. State 302 So. 3d 284 (Ala. Crim. App. 2019) (table).

In the petition, Bishop alleged: (1) that the trial court did not sentence him in accordance with his plea agreement with the State and that, therefore, he was entitled to withdraw his guilty plea; (2) that his sentence was illegal because, he said, it did not include a period of post-release supervision as required by § 13A-5-6(c), Ala. Code 1975; (3) that he was denied counsel at a critical stage of the proceedings because, he said, his trial counsel did not object when the trial court did not sentence him in accordance with the plea agreement; and (4) that his guilty plea was involuntary because, he said, he was not informed that he would not receive good-time or be eligible for parole on his sentence.

The State filed an answer to Bishop's petition on April 9, 2020, arguing that his claims were precluded by Rules 32.2(a)(3), (a)(5), (b) and/or (c), Ala. R. Crim. P. That same day, Bishop filed a motion to amend his petition, in which he reasserted claims (1) and (2), as set out above. On April 14, 2020, the circuit court summarily dismissed Bishop's petition on the grounds asserted by the State, and on April 16, 2020, the circuit court denied Bishop's motion to amend. On April 29, 2020, Bishop

filed a postjudgment motion to reconsider, which the circuit court denied the same day. Bishop timely filed a notice of appeal.

I.

Bishop contends, as he did in his postjudgment motion, that he was denied due process when, he says, the State did not serve him with a copy of its answer to the petition.

In Ex parte MacEwan, 860 So. 2d 896 (Ala. 2002), the Alabama Supreme Court held that the petitioner's right to due process was violated when neither the petitioner nor her counsel was served with the State's response to the Rule 32 petition. The Court explained:

> "One of MacEwan's claims in her Rule 32 petition is that the State did not serve a copy of its motion to dismiss the Rule 32 petition on MacEwan's Rule 32 counsel. The trial judge considered the State's motion to dismiss and summarily dismissed the Rule 32 petition without affording MacEwan an evidentiary hearing. MacEwan contends that the trial court erred in summarily dismissing her petition because, she says, her Rule 32 counsel's correct name and address were 'clearly listed on the [Rule 32] petition' at the place where counsel had signed the petition, and counsel could have been served, but was not.
>
> "A failure on the part of the State in this case to serve its motion to dismiss on counsel for MacEwan in her Rule 32 proceeding is significant because attached to the motion to

> dismiss was an affidavit by MacEwan's trial counsel defending his effectiveness in conducting her defense. The summary dismissal of MacEwan's petition deprived her of an opportunity to cross-examine her trial counsel regarding the assertions he makes in the affidavit, the substance of which may have prompted the trial judge to dismiss the petition.
>
> "We cannot say with full confidence that the State's failure to serve its motion to dismiss (with the attached affidavit) on MacEwan's Rule 32 counsel did not prejudice MacEwan, because the trial judge neglected to enter a written order stating his reasons for summarily dismissing the petition. While such a written order is not required in a Rule 32 proceeding, it is sound judicial practice, particularly given the facts presented in this case. See Bowers v. State, 709 So. 2d 494, 495 (Ala. Crim. App. 1995). Therefore, in order to allow the trial court to properly inquire into the merits of MacEwan's ineffective-assistance-of-counsel claim, we reverse the judgment of the Court of Criminal Appeals and remand the case for that court to remand it for the trial court to hold an evidentiary hearing."

860 So. 2d at 897-98.

Similarly, in Abdeldayem v. State, 988 So. 2d 608 (Ala. Crim. App. 2007), this Court held that the petitioner's right to due process was violated when the State's response to the Rule 32 petition was not served on the petitioner's counsel in accordance with Rule 34.4, Ala. R. Crim. P., and we reversed the circuit court's summary dismissal of the Rule 32 petition, noting:

"We recognize that, unlike in Ex parte MacEwan, in this case the State did not file an affidavit with its response, and this Court has held that, in some instances, there may be no prejudice when a Rule 32 petitioner is not notified of the State's response. See, e.g., Madison v. State, [999 So. 2d 561] (Ala. Crim. App. 2006). However, we cannot say that that is the case here. Although the record contains only the Rule 32 form with no attachment containing Abdeldayem's specific allegations, counsel alleges in his motion to remand/motion to correct the record, and the State's response to Abdeldayem's petition suggests, that there was, in fact, an attachment to the form that was, for whatever reason, not properly filed. Had Abdeldayem's counsel been properly notified of the court's order directing the State to respond, of the State's response, or of the court's order denying Abdeldayem's petition, he may have been able to rectify the apparent error in the filing of the attachment at the circuit court level, and we have no way of knowing what the circuit court would have done had it been informed of the apparent filing error either in a reply to the State's response or in a motion to reconsider. In addition, the circuit court denied Abdeldayem's petition on the grounds asserted by the State in its response, including the ground that Abdeldayem's petition was barred by Rule 32.2(a)(5), Ala. R. Crim. P., because his claims could have been, but were not, raised and addressed on appeal. However, Abdeldayem's counsel attached to his motion to remand/motion to correct the record, a copy of the attachment that was supposed to have been filed with the Rule 32 form. The attachment reflects that Abdeldayem raised claims of ineffective assistance of counsel, and our records reflect that Abdeldayem was represented by the same counsel at trial and on appeal. In addition, this is Abdeldayem's first Rule 32 petition, and his petition was timely filed. Therefore, Abdeldayem's ineffective-assistance-of-counsel allegations would not be barred by Rule 32.2(a)(5), Ala. R. Crim. P. See, e.g., Murray v.

> State, 922 So. 2d 961 (Ala. Crim. App. 2005) (claims of ineffective assistance of counsel may be raised for the first time in a timely filed Rule 32 petition). Had Abdeldayem's Rule 32 counsel been properly served with the State's response, he would have had the opportunity to meet his burden under Rule 32.3, Ala. R. Crim. P., of disproving by a preponderance of the evidence the existence of the procedural bar asserted by the State."

988 So. 2d at 614 (footnote omitted).

This case is factually distinguishable from both Ex parte MacEwan and Abdeldayem. Here, there was no affidavit attached to the State's answer as was the case in Ex parte MacEwan, and there were no filing errors as was the case in Abdeldayem. Although the State did assert preclusion grounds in its answer and the circuit court applied those preclusions in dismissing Bishop's petition, in this case, unlike in Abdeldayem, Bishop received notice of the circuit court's order, was aware of the preclusion grounds, and filed a postjudgment motion challenging the application of those preclusion grounds. In addition, the record indicates that the circuit court summarily dismissed Bishop's petition only five days after the State filed its answer. As a result, even if Bishop had received a copy the State's answer, he would not have had time to file a

reply, and, indeed, "Rule 32 does not require a circuit court to permit a Rule 32 petitioner to file a response to the State's answer or motion to dismiss." Mashburn v. State, 148 So. 3d 1094, 1114 (Ala. Crim. App. 2013). Therefore, after thoroughly reviewing the record, we conclude that, even if the State did not serve Bishop with a copy of its answer, that error was harmless in this case. See, e.g., Jenkins v. State, 105 So. 3d 1234, 1244- 45 (Ala. Crim. App. 2011), aff'd in part, 105 So. 3d 1250 (Ala. 2012); and Madison v. State, 999 So. 2d 561, 567 (Ala. Crim. App. 2006).

II.

Bishop also contends that, even if he had received a copy of the State's answer, that answer violated his right to due process and the Alabama Supreme Court's holding in Ex parte Rice, 565 So. 2d 606 (Ala. 1990), because, he says, the State asserted only a "broad Rule 32.2 allegation," without alleging specific grounds of preclusion. (Bishop's brief, p. 13.) Bishop did not raise this issue in the circuit court, and it is well settled that the "[t]he general rules of preservation apply to Rule 32 proceedings." Boyd v. State, 913 So. 2d 1113, 1123 (Ala. Crim. App. 2003). However, if Bishop did not receive a copy of the State's answer as he

argues, see Part I of this opinion, it would have been impossible for Bishop to have raised this issue in the circuit court. Therefore, out of an abundance of caution, we address it.

In Ex parte Rice, 565 So. 2d at 607, the State, in its response to the petition, asserted "that the petition should be denied 'on grounds of preclusion as provided in Rule 20.2,' " Ala. R. Crim. P. Temp., now Rule 32.2, Ala. R. Crim. P. The Alabama Supreme Court held that the petitioner had been denied due process by the State's failure to allege a specific ground of preclusion in its response. The Court explained:

> "[T]he State is required to plead the ground or grounds of preclusion that it believes apply to the petitioner's case, thereby giving the petitioner the notice he needs to attempt to formulate arguments and present evidence to 'disprove [the] existence [of those grounds] by a preponderance of the evidence.' Temp. Rule 20.3, Ala. R. Crim. P. [now Rule 32.3, Ala. R. Crim. P.] A general allegation that merely refers the petitioner and the trial court to the Rule does not provide the type of notice necessary to satisfy the requirements of due process and does not meet the burden of pleading assigned to the State by Rule 20.3."

565 So. 2d at 608.

Here, unlike in Ex parte Rice, the State identified in its answer the specific preclusions it believed applied to Bishop's claims. As noted above,

the State asserted that Bishop's claims were precluded by Rules 32.2(a)(3), (a)(5), (b), and/or (c). Therefore, the State complied with Ex parte Rice.

III.

Bishop contends that the circuit court erred in denying his motion to amend his petition, which, he says, was timely filed before the circuit court summarily dismissed his petition.

As noted above, Bishop filed his motion to amend on April 9, 2020, five days before the circuit court summarily dismissed his petition on April 14, 2020. "Amendments to pleadings may be permitted at any stage of the proceedings prior to the entry of judgment," Rule 32.7(b), Ala. R. Crim. P., and "[l]eave to amend shall be freely granted." Rule 32.7(d), Ala. R. Crim. P. However, "the denial of a motion to amend a postconviction petition may be harmless depending on the issue or issues raised in the proposed amendment." Wynn v. State, 246 So. 3d 163, 171 (Ala. Crim. App. 2016). Generally, this Court has held that the refusal to accept an amendment is harmless when the claim or claims raised in the amendment would not entitle the petitioner to relief. See, e.g., Spain v. State, [Ms. CR-19-0708, October 16, 2020] ___ So. 3d ___, ___ (Ala. Crim.

App. 2020); Wynn, 246 So. 3d at 171; and Wilson v. State, 911 So. 2d 40, 46 (Ala. Crim. App. 2005). Although that is not the case here, see Part IV.B. of this opinion, Bishop did not assert in his motion to amend any new claims for relief or any additional factual allegations in support of his previously raised claims. Rather, as noted above, Bishop did nothing more than reiterate two of the claims he had raised in his original petition. Therefore, any error in the circuit court's denying Bishop's motion to amend his petition was harmless.

IV.

Bishop also reasserts on appeal two of the claims he raised in his petition -- claims (1) and (2), as set out above. Because Bishop does not mention in his brief on appeal claims (3) and (4), as set out above, those claims are deemed abandoned and will not be considered by this Court. See, e.g., Ferguson v. State, 13 So. 3d 418, 436 (Ala. Crim. App. 2008) ("[C]laims presented in a Rule 32 petition but not argued in brief are deemed abandoned."), and Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995) ("We will not review issues not listed and argued in brief.").

A.

Claim (1), as set out above -- that the trial court did not sentence Bishop in accordance with his plea agreement with the State and that, therefore, he is entitled to withdraw his guilty plea -- is not jurisdictional and, therefore, is subject to preclusion. See, e.g., Tucker v. State, 956 So. 2d 1170, 1171 (Ala. Crim. App. 2006), and Goetzman v. State, 844 So. 2d 1289, 1290-91 (Ala. Crim. App. 2002) (both recognizing that a postconviction claim that the petitioner was not sentenced in accordance with a plea agreement with the State is not jurisdictional). Specifically, this claim is, as the circuit court found, time-barred by Rule 32.2(c) because Bishop filed his petition almost nine years after his conviction and sentence became final. Therefore, summary dismissal of this claim was proper. See Rule 32.7(d), Ala. R. Crim. P. (authorizing the circuit court to summarily dismiss a petitioner's Rule 32 petition "[i]f the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings ....").

B.

Claim (2), as set out above -- that Bishop's sentence was illegal because, he said, it did not include a period of post-release supervision as required by § 13A-5-6(c), Ala. Code 1975 -- is jurisdictional and is not precluded.[4] See, e.g., Ex parte McGowan, [Ms. 1190090, April 30, 2021] ___ So. 3d ___, ___ (Ala. 2021) ("A sentence unauthorized by statute exceeds the jurisdiction of the trial court and is void."). See also Williams v. State, 203 So. 3d 888, 893 (Ala. Crim. App. 2015) ("[A] facially valid challenge to the legality of a sentence presents a jurisdictional issue that can be raised at any time and is not subject to the procedural bars of Rule 32.2., Ala. R. Crim. P."). It is also meritorious.

At the time of Bishop's offense,[5] § 13A-5-6, Ala. Code 1975, provided,

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[4]Although jurisdictional claims that have been raised in a previous petition and decided on the merits are precluded by Rule 32.2(b), see Ex parte Trawick, 972 So. 2d 782, 784 (Ala. 2007), it does not appear that Bishop raised this claim in any of his previous petitions.

[5]" 'As a general rule, a criminal offender must be sentenced pursuant to the statute in effect at the time of the commission of the offense, at least in the absence of an expression of intent by the legislature to make the new statute applicable to previously committed crimes.' " Zimmerman v. State, 838 So. 2d 404, 405 n.1 (Ala. Crim. App. 2001) (quoting 24 C.J.S. Criminal Law § 1462 (1989)).

in relevant part:

> "(a) Sentences for felonies shall be for a definite term of imprisonment, which imprisonment includes hard labor, within the following limitations:
>
> > "(1) For a Class A felony, for life or not more than 99 years or less than 10 years.
> >
> > "....
> >
> > "(4) For a ... Class A felony criminal sex offense involving a child as defined in Section 15-20-21(5), [Ala. Code 1975,] not less than 20 years.
> >
> > "....
>
> "(c) In addition to any penalties heretofore or hereafter provided by law, in all cases ... where an offender is convicted of a Class A felony criminal sex offense involving a child as defined in Section 15–20–21(5), and is sentenced to a county jail or the Alabama Department of Corrections, the sentencing judge shall impose an additional penalty of not less than 10 years of post-release supervision to be served upon the defendant's release from incarceration."

Because Bishop was convicted of a Class A felony sex offense involving a child, there is no doubt that he falls within the scope of § 13A-5-6(c).

The authorized sentencing range for a Class A felony sex offense involving a child is not less than 20 years, § 13A-5-6(a)(4), nor more than 99 years or life in prison, § 13A-5-6(a)(1), and not less than 10 years of

post-release supervision, § 13A-5-6(c). The failure to impose a term of post-release supervision as required by § 13A-5-6(c) is similar to the failure to impose a term of probation as part of a split sentence under § 15A-18-8, Ala. Code 1975, which renders a sentence illegal. See, e.g., Ingram v. State, 878 So. 2d 1208, 1215 (Ala. Crim. App. 2003) (holding that a split sentence that does not include a period of probation following the confinement portion of the sentence is illegal); and Madden v. State, 864 So. 2d 395, 398 (Ala. Crim. App. 2002) ("[A] trial court can split a sentence only if the defendant is placed on probation for a definite period following the confinement portion of the split sentence.").

The State argues, however, that Bishop's sentence is legal because the trial court indicated in its sentencing order that the Alabama Sex Offender Registration and Community Notification Act ("ASORCNA"), § 15-20A-1 et seq., Ala. Code 1975, applies to him. According to the State, the legislature, in adopting ASORCNA, "found that registration and notification requirements for convicted sex offenders are essential because '[f]requent in-person registration maintains constant contact between sex offenders and law enforcement, providing law enforcement with priceless

tools to aid them in their investigations including obtaining information for identifying, monitoring, and tracking sex offenders.' " (State's brief, p. 16 (quoting § 15-20A-2(1), Ala. Code 1975).) Thus, the State contends, because the trial court indicated that ASORCNA applied to Bishop, "Section 13A-5-6(c) is satisfied in effect even if not by order." (State's brief, p. 16.) We disagree.

Section 15-20A-20(d), Ala. Code 1975, provides:

> "Any person convicted of a Class A felony criminal sex offense involving a child as defined in Section 15-20A-4, upon release from incarceration, shall be subject to electronic monitoring supervised by the Board of Pardons and Paroles, as provided in subsection (a), for a period of no less than 10 years from the date of the offender's release. This requirement shall be imposed by the sentencing court as a part of the offender's sentence in accord with subsection (c) of Section 13A-5-6."[6]

It is clear, based on the legislature's specific reference in § 15-20A-20(d) to § 13A-5-6(c), that the post-release supervision referred to in §

[6]Although ASORCNA was not adopted until 2011, § 15-20A-3(a), Ala. Code 1975, provides: "This chapter is applicable to every adult sex offender convicted of a sex offense as defined in Section 15-20A-5, without regard to when his or her crime or crimes were committed or his or her duty to register arose." In any event, § 15-20A-20(d) is substantively identical to its predecessor, § 15-20-26.1(d), Ala. Code 1975 (repealed), which was adopted in 2005.

13A-5-6(c) is electronic monitoring as found in § 15-20A-20(d). However, the plain language of both § 13A-5-6(c) and § 15-20A-20(d) make it clear that the period of post-release supervision is part of the offender's sentence and must be imposed by the trial court. In addition, the length of the post-release supervision period required by § 13A-5-6(c) is discretionary, i.e., not less than 10 years. See, e.g., Lane v. State, 66 So. 3d 824, 829-30 (Ala. 2010) (holding that where § 13A-5-9(b)(3), Ala. Code 1975, required a sentence of life or "any term not less than 99 years," a term in excess of 99 years was authorized). Thus, in sentencing a sex offender like Bishop, a trial court has discretion to determine the appropriate length of the post-release supervision period, as long as that period is not less than 10 years, just as it has discretion to determine the appropriate length of the prison term, as long as that term is within the authorized statutory range. A mere statement that ASORCNA applies does not reflect an exercise of that discretion and does not satisfy the trial court's duty to impose a sentence in compliance with the law. See, e.g., Shivener v. State, 958 So. 2d 913, 916 (Ala. Crim. App. 2006) ("A trial court has not only the power but the duty to sentence [a defendant] as

required by law." (citations omitted)).

The dissent would hold that §15-20A-20(d) gives the Alabama Board of Pardons and Paroles the authority, independently of any order by the trial court, to impose post-release supervision on sex offenders like Bishop and to determine the appropriate length of the supervision period. In reaching this conclusion, the dissent relies on § 15-20A-20(b), Ala. Code 1975, which, it says, "authorizes the Board to make two determinations: (1) whether a sex offender should be electronically monitored and, if so, (2) for how long." ___ So. 3d at ___. Section 15-20A-20(b) provides:

> "The Board of Pardons and Paroles or a court may require, as a condition of release on parole, probation, community corrections, court referral officer supervision, pretrial release, or any other community-based punishment option, that any person charged or convicted of a sex offense be subject to electronic monitoring as provided in subsection (a)."

According to the dissent, because this section "gives the Board discretion to decide how long electronic monitoring should last for 'any' sex offender ... it is not unreasonable that the legislature would give the Board some discretion to determine how long monitoring should last for a sex offender under § 15-20A-20(d)." ___ So. 3d at ___.

However, by its plain language, § 15-20A-20(b) only authorizes the Board to place a sex offender on electronic monitoring as a condition of parole, probation, community corrections, court-referral officer supervision, pretrial release, or any other community-based punishment option. It does not authorize the Board, once an offender is placed on parole, probation, community corrections, etc., to determine how long that term will be, as that determination will have already been made by the trial court when it imposed sentence, or in the case of pretrial release, will be determined by how long it takes for the offender to be tried. For example, if a sex offender is sentenced to 10 years' imprisonment and is paroled after serving 8 years in prison, § 15-20A-20(b) authorizes the Board to place the offender on electronic monitoring for the 2 years the offender will have to serve on parole to complete his or her 10-year sentence. Nothing in § 15-20A-20(b) authorizes the Board to increase the offender's sentence beyond the 10 years imposed by the trial court, i.e., to place the offender on electronic monitoring for, say, 20 years. Rather, § 15-20A-20(b) authorizes the Board to place the offender on electronic monitoring only for a term that has already been determined by the trial

court when imposing sentence. Similarly, although § 15-20A-20(d) requires the Board to place sex offenders like Bishop on electronic monitoring for the duration of the post-release supervision period ordered by the trial court, it does not authorize the Board to impose that portion of the offender's sentence of its own accord or to determine the appropriate length of the post-release supervision period.

Therefore, Bishop is correct that his sentence is illegal because it includes a prison term but does not include a term of post-release supervision.[7] Of course, the prison term imposed in this case -- 30 years -- is legal under § 13A-5-6(a)(1) and (4) and cannot be changed. See, e.g., Ingram, supra; Austin v. State, 864 So. 2d 1115, 1117-19 (Ala. Crim. App. 2003); and Moore v. State, 871 So. 2d 106, 108-10 (Ala. Crim. App. 2003). Rather, to correct the illegality in Bishop's sentence, the trial court need only impose a term of not less than 10 years' post-release supervision as

[7]In his brief on appeal, Bishop also argues for the first time that his sentence was illegal because, he says, the trial court sentenced him as a habitual felony offender when, he says, he had no prior felony convictions. However, the record from Bishop's direct appeal refutes Bishop's claim and shows that he was not sentenced as a habitual felony offender.

required by § 13A-5-6(c). In this regard, we note that neither the imposition of the original illegal sentence nor the correcting of that illegal sentence would entitle Bishop to withdraw his guilty plea, as he appeared to argue in his petition. Contrary to Bishop's allegation, the record from his direct appeal affirmatively reflects that he did not plead guilty pursuant to a plea agreement with the State; thus, there was no breach of an agreement when he was originally sentenced nor will there be if the trial court now corrects the illegality in the sentence and imposes a term of post-release supervision. In addition, the record from Bishop's direct appeal reflects, and Bishop admits, that he was informed during the guilty-plea colloquy that he would be subject to a term of post-release supervision of not less than 10 years.

V.

Based on the foregoing, we affirm the circuit court's summary dismissal of the claims in Bishop's petition challenging his conviction, we reverse the circuit court's summary dismissal of Bishop's illegal-sentence claim, and we remand this cause for the circuit court to grant Bishop's Rule 32 petition as to his sentence, and to then conduct a resentencing

hearing, at which Bishop is entitled to be present and represented by counsel, to correct the illegality in Bishop's sentence by imposing a term of not less than 10 years' post-release supervision as required by § 13A-5-6(c). If Bishop wants to appeal his resentencing, he must file a new notice of appeal. See, e.g., Ex parte Walker, 152 So. 3d 1247 (Ala. 2014). No return to remand need be filed.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Windom, P.J., and Mitchell, Special Judge,* concur; Cole and Minor, JJ., concur in part and dissent in part, with opinions. McCool, J., recuses himself.

*Associate Justice Jay Mitchell was appointed on September 8, 2020, to be a Special Judge in regard to this appeal. See § 12-3-17, Ala. Code 1975.

COLE, Judge, concurring in part and dissenting in part.

I concur with Parts I, II, III, and IV.A. of the opinion; however, I respectfully dissent from the majority's decision to reverse the circuit court's dismissal of Bishop's illegal-sentence claim in Part IV.B. of the opinion.

MINOR, Judge, concurring in part and dissenting in part.

I concur in all parts of the opinion except Part IV.B; as to that part, I respectfully dissent.

In Part IV.B. of its opinion, the Court holds that Donald Bishop's claim that his "sentence was illegal because ... it did not include a period of post-release supervision as required by § 13A-5-6(c), Ala. Code 1975[,] is jurisdictional and is not precluded. ... It is also meritorious." ___ So. 3d at ___. The Court reasons that under the version of § 13A-5-6, Ala. Code 1975, that was in effect at the time of Bishop's offense, the sentencing court had to expressly impose "not less than 10 year of post-release supervision to be served upon the defendant's release from incarceration." The Court analogizes the trial court's failure to impose a definite term of post-release supervision to a failure to impose a definite term of probation as a part of a split sentence under § 15-18-8, Ala. Code 1975. The Court thus concludes that "Bishop is correct that his sentence is illegal because it includes a prison term but does not include a term of post-release supervision." ___ So. 3d at ___. I disagree.

I.

First, although the circuit court's sentencing order does not specifically cite § 13A-5-6(c), Ala. Code 1975 (Record in CR-10-0560, C. 165-66), the sentencing order states that the "Community Notification and Registration of Sex Offenders applies."[8] (Id.) This Court rejects the State's

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[8]The circuit court told Bishop at his guilty-plea proceeding that, if he were ever paroled, he would be subject to at least 10 years of post-release supervision:

> "THE COURT: Do you understand that sodomy 1st degree is a class A felony?
>
> "[BISHOP]: Right.
>
> "THE COURT: Now, normally, for a class A felony, the range of punishment is not less than 10 and not more than life or 99 years; but understand, in your situation, there is an enhanced punishment for a felony criminal sex offense involving a child. Provide for the enhancement of a punishment of a class A or B felony. This is an A. For a class A felony criminal sex offense, not less than 20 years. So, the range of punishment in this case that you're pleading guilty to, and the range of punishment will be, not less than 20 years and not more than life or 99 years imprisonment in the state penitentiary. Do you understand that?
>
> "[BISHOP]: Yes, sir.
>
> "THE COURT: All right. Also, the statutes require that

argument that the sentencing court's express application of the Alabama Sex Offender Registration and Community Notification Act ("ASORCNA"), § 15-20A-1 et seq., Ala. Code 1975, was sufficient to comply with the post-release-supervision requirement in former § 13A-5-6(c). The Court reasons:

"It is clear, based on the legislature's specific reference in §

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the sentencing Judge shall impose an additional penalty of not less than ten years of post-release supervision, which would be parole in this case. Do you understand that?

"[BISHOP]: Right.

"[BISHOP'S ATTORNEY]: Not probation.

"THE COURT: Not probation, parole. The law requires that if you plead guilty to this, that I have to order at least 10 years of post-release supervision, which in this situation would be a parole if you are paroled.

"[BISHOP]: Okay.

"THE COURT: Now, I'm not saying you're going to be paroled. That's up to the Parole Board. Do you understand that?

"[BISHOP]: Yes, sir."

(Record in CR-10-0560 R. 20-21 (emphasis added).)

> 15-20A-20(d) to § 13A-5-6(c), that the post-release supervision referred to in § 13A-5-6(c) is electronic monitoring as found in § 15-20A-20(d). However, the plain language of both § 13A-5-6(c) and § 15-20A-20(d) make it clear that the period of post-release supervision is part of the offender's sentence and must be imposed by the trial court. In addition, the length of the postrelease supervision period required by § 13A-5-6(c) is discretionary, i.e., not less than 10 years. See, e.g., Lane v. State, 66 So. 3d 824, 829-30 (Ala. 2010) (holding that where § 13A-5-9(b)(3), Ala. Code 1975, required a sentence of life or 'any term not less than 99 years,' a term in excess of 99 years was authorized). Thus, in sentencing a sex offender like Bishop, a trial court has discretion to determine the appropriate length of the postrelease supervision period, as long as that period is not less than 10 years, just as it has discretion to determine the appropriate length of the prison term, as long as that term is within the authorized statutory range. A mere statement that ASORCNA applies does not reflect an exercise of that discretion and does not satisfy the trial court's duty to impose a sentence in compliance with the law."

___ So. 3d at ___. Unlike the Court, I agree with the State's argument that the registration and supervision requirements in ASORCNA satisfy the post-release-supervision requirement of § 13A-5-6(c).

> "In determining the meaning of a statute, this Court looks to the plain meaning of the words as written by the legislature. As we have said:
>
> > " ' "Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court

> is bound to interpret that language to mean exactly what it says. 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." '
>
> "Blue Cross & Blue Shield v. Nielsen, 714 So. 2d 293, 296 (Ala. 1998)(quoting IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992)); see also Tuscaloosa County Comm'n v. Deputy Sheriffs' Ass'n, 589 So. 2d 687, 689 (Ala. 1991); Coastal States Gas Transmission Co. v. Alabama Pub. Serv. Comm'n, 524 So. 2d 357, 360 (Ala. 1988); Alabama Farm Bureau Mut. Cas. Ins. Co. v. City of Hartselle, 460 So. 2d 1219, 1223 (Ala. 1984); Dumas Bros. Mfg. Co. v. Southern Guar. Ins. Co., 431 So. 2d 534, 536 (Ala. 1983); Town of Loxley v. Rosinton Water, Sewer, & Fire Protection Auth., Inc., 376 So. 2d 705, 708 (Ala. 1979). It is true that when looking at a statute we might sometimes think that the ramifications of the words are inefficient or unusual. However, it is our job to say what the law is, not to say what it should be. Therefore, only if there is no rational way to interpret the words as stated will we look beyond those words to determine legislative intent. To apply a different policy would turn this Court into a legislative body, and doing that, of course, would be utterly inconsistent with the doctrine of separation of powers. See Ex parte T.B., 698 So. 2d 127, 130 (Ala. 1997)."

DeKalb Cnty. LP Gas Co. v. Suburban Gas, Inc., 729 So. 2d 270, 275-76 (Ala. 1998).

> "To discern the legislative intent, the Court must first look to the language of the statute. If, giving the statutory language its plain and ordinary meaning, we conclude that the language is unambiguous, there is no room for judicial construction. Ex

> parte Waddail, 827 So. 2d 789, 794 (Ala. 2001). If a literal construction would produce an absurd and unjust result that is clearly inconsistent with the purpose and policy of the statute, such a construction is to be avoided. Ex parte Meeks, 682 So. 2d 423 (Ala.1996).
>
> > " 'There is also authority for the rule that uncertainty as to the meaning of a statute may arise from the fact that giving a literal interpretation to the words would lead to such unreasonable, unjust, impracticable, or absurd consequences as to compel a conviction that they could not have been intended by the legislature.'
>
> "73 Am. Jur. 2d Statutes § 114 (2001) (footnotes omitted)."

City of Bessemer v. McClain, 957 So. 2d 1061, 1074-75 (Ala. 2006) (emphasis added).

Subsection 13A-5-6(c) does not define what supervision it requires, other than that it must be "post-release" and "not less than 10 years." Black's Law Dictionary defines "postrelease supervision" as "a part of a criminal sentence whereby a felon serving a determinate sentence is required to undergo a specified period of police monitoring after the completion of a prison term." Black's Law Dictonary 1413 (11th ed. 2019).

The legislature has also defined "post-release supervision" in the Alabama Sentencing Reform Act of 2003, and that definition resembles

the definition from Black's Law Dictionary. Section 12-25-32(2)d., Ala. Code 1975, defines "post-release supervision" as "[a] mandatory period of supervision following sentences of active incarceration as defined in [§ 12-25-32(2)a.]" Section 12-25-32(2)a., Ala. Code 1975, defines "[a]ctive incarceration" as "[a] sentence ... that requires an offender to serve a sentence of imprisonment." I read § 13A-5-6(c) as requiring the trial court to ensure that Bishop is supervised or monitored for at least 10 years after his release.

As noted, § 13A-5-6(c) does not impose specific requirements for that supervision—other than it must last for at least 10 years. Thus, it is a general requirement that certain felons be supervised after release. For the reasons below, I would hold that the statement in the sentencing court's order—that the "Community Notification and Registration of Sex Offenders applies"—satisfies the supervision requirement in § 13A-5-6(c).

Section 15-20A-1, Ala. Code 1975, establishes ASORCNA as the successor to the Community Notification Act, former § 15-20-1, and to the registration requirements for sex offenders, former § 13A-11-200. In § 15-20A-2(1), Ala. Code 1975, the Alabama Legislature found that registration

and notification requirements for convicted sex offenders are essential because "[f]requent in-person registration maintains constant contact between sex offenders and law enforcement, providing law enforcement with priceless tools to aid them in their investigations including obtaining information for identifying, monitoring, and tracking sex offenders" (emphasis added). ASORCNA provides specific supervision and registration requirements for sex offenders like Bishop. See, e.g., § 15-20A-10, Ala. Code 1975. As an adult sex offender, Bishop is "subject to [ASORCNA] for life." § 15-20A-3(b), Ala. Code 1975. Cf. § 15-20-3(a), Ala. Code 1975 ("This chapter is applicable to every adult sex offender convicted of a sex offense as defined in Section 15-20A-5, without regard to when his or her crime or crimes were committed or his or her duty to register arose.").

ASORCNA also specifically imposes a period of at least 10 years of electronic monitoring on Bishop if he is released. Subsection 15-20A-20(d), Ala. Code 1975, provides that Bishop, as a "person convicted of a Class A felony sex offense involving a child as defined in Section 15-20A-4, [Ala. Code 1975,] upon release from incarceration, shall be subject to electronic

monitoring supervised by the Board of Pardons and Paroles ... for a period of no less than 10 years from the date of [his] release."[9] (Emphasis added.) Thus, upon his release, Bishop "shall be subject" to at least 10 years of electronic monitoring under ASORCNA.

Subsection 15-20A-20(d) also provides: "This requirement shall be imposed by the sentencing court as a part of the sex offender's sentence in accordance with subsection (c) of Section 13A-5-6." Bishop has not argued that, to comply with § 13A-5-6(c), the sentencing court had to specifically impose 10 years of electronic monitoring under § 15-20A-20(d). Yet the Court makes that argument for Bishop. In doing so, the Court ignores other provisions of Title 15, Chapter 20A, such as its retroactivity provision in § 15-20A-3 and its provision in § 15-20A-20(b) granting authority to the Board of Pardons and Paroles to decide how long an offender should be monitored electronically.

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[9]Subsection 15-20A-20(d) replaced former § 15-20-26.1(d), Ala. Code 1975, which was in effect when Bishop committed the offense and pleaded guilty. Former § 15-20-26.1 imposed the same requirement on the Alabama Board of Pardons and Paroles to subject Bishop to electronic monitoring for at least 10 years from the date he is released from prison.

In § 15-20A-20(b), Ala. Code 1975, the legislature authorizes the Board to make two determinations: (1) whether a sex offender should be monitored electronically and, if so, (2) for how long. That subsection gives the Board the discretion to

> "require, as a condition of release on parole, probation, community corrections, court referral officer supervision, pretrial release, or any other community-based punishment option, that any person charged or convicted of a sex offense be subject to electronic monitoring as provided in subsection (a)."

(Emphasis added.)

In § 15-20A-20(d)—which addresses more serious sex offenders like Bishop—the legislature limits the Board's discretion for "[a]ny person convicted of a Class A felony sex offense involving a child as defined in Section 15-20A-4." Thus, the Board must subject such a person to electronic monitoring and must do so for at least 10 years. Given that the legislature gives the Board discretion to decide how long electronic monitoring should last for "any" sex offender under § 15-20A-20(b), it is not unreasonable that the legislature would give the Board some discretion to determine how long monitoring should last for a sex offender under § 15-20A-20(d). And it also is not unreasonable that the legislature

would limit that discretion by requiring the Board to electronically monitor such an offender for at least 10 years.

Through their elected representatives, the people of Alabama have adopted strict provisions for sentencing sex offenders. Those provisions are stricter for sex offenders like Bishop who have been convicted of crimes against children. In § 15-20A-2(5), Ala. Code 1975, the legislature found:

> "Sex offenders, due to the nature of their offenses, have a reduced expectation of privacy. In balancing the sex offender's rights, and the interest of public safety, the Legislature finds that releasing certain information to the public furthers the primary governmental interest of protecting vulnerable populations, particularly children. Employment and residence restrictions, together with monitoring and tracking, also further that interest. The Legislature declares that its intent in imposing certain registration, notification, monitoring, and tracking requirements on sex offenders is not to punish sex offenders but to protect the public and, most importantly, promote child safety."

(Emphasis added.) The legislature, no doubt to show its stated commitment to protecting the public and to promoting child safety, made the provisions of Title 15, Chapter 20A, retroactive. See § 15-20A-3(a), Ala. Code 1975 ("This chapter is applicable to every adult sex offender

convicted of a sex offense as defined in Section 15-20A-5, [Ala. Code 1975,] without regard to when his or her crime or crimes were committed or his or her duty to register arose."). That chapter includes the provisions for electronic monitoring.

Given that the provisions of Title 15, Chapter 20A, are retroactive, it makes sense that the legislature would require the Board to electronically monitor those offenders who fall under § 15-20A-20(d). It also makes sense that the legislature would give the Board limited discretion to decide how long that monitoring should last—as long as it is at least 10 years.

The Court's reading of § 15-20A-20(d), however, means that the Board need not electronically monitor a sex offender like Bishop, who committed his offenses before the effective date of Title 15, Chapter 20A, because the sentencing court has no jurisdiction to impose electronic-monitoring requirements. Thus, under the Court's reading of § 15-20A-20(d), the Board need not[10] monitor the most serious kinds of sex

[10]Presumably the Board could decide to monitor such an offender under its authority in § 15-20A-20(b)—but, under the Court's reading of

offenders—those who have committed crimes against children—if those offenders were sentenced before the effective date of § 15-20A-20, Ala. Code 1975.[11]

Besides undermining the legislature's stated commitment to protecting the public and promoting child safety, the Court's decision today renders § 15-20A-20(d) prospective, not retroactive, and thus contradicts § 15-20A-3, Ala. Code 1975. The Court's decision thus leaves the door open for the most serious sex offenders—those who committed crimes against children—to escape electronic monitoring if they committed their offenses before the effective date of ASCORNA and the Board declines to exercise its discretionary authority under § 15-20A-

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§ 15-20A-20(d), the Board need not do so.

[11]In S.R.A. v. State, 292 So. 3d 1108 (Ala. Crim. App. 2019), a plurality of this Court rejected a petitioner's claim that his sentence was illegal because the sentencing court had not imposed a period of post-release supervision under § 13A-5-6(c), Ala. Code 1975. The plurality held that the claim had no merit because the petitioner had committed the offenses before the effective date of § 13A-5-6(c). 292 So. 3d at 1112-13. In so holding, the plurality considered the claim as the petitioner there argued it. This Court was not asked to consider the provisions of ASORCNA that are dispositive here; thus, S.R.A. is not controlling of this case.

20(b). This result is absurd, and it frustrates the legislature's stated goal of protecting the public from sex offenders like Bishop. Cf. City of Bessemer, 957 So. 2d at 1075 ("If a literal construction would produce an absurd and unjust result that is clearly inconsistent with the purpose and policy of the statute, such a construction is to be avoided. Ex parte Meeks, 682 So. 2d 423 (Ala. 1996).").

A reasonable reading of § 15-20A-20(d)—one that does not lead to an absurd result—is that, regardless whether the sentencing court imposes the electronic-monitoring requirement, § 15-20A-20(d) independently requires the Board of Pardons and Paroles to electronically monitor Bishop for at least 10 years after his release. It is not unreasonable that the legislature, to promote the stated purposes of ASORCNA, would include, along with imposing a duty on the Board, an extra provision requiring the circuit court to impose electronic monitoring of at least 10 years for sex offenders like Bishop. But based on the language of § 15-20A-20(d) and the statutory scheme as a whole, it makes sense to read § 15-20A-20(d) as imposing an independent duty on the Board to require electronic monitoring for at least 10 years even if the sentencing court

fails to impose such a requirement.[12] Thus, in Bishop's case, any error in the trial court's failure to expressly impose that requirement is harmless.

In sum, I would hold that the registration and monitoring requirements under ASORCNA satisfy the requirement in § 13A-5-6(c) that Bishop be monitored for at least 10 years after his release and that Bishop is due no relief on his claim challenging his sentence.

II.

I also disagree with the Court's conclusion that Bishop's claim is a "jurisdictional" one that gives him a right to "relief."

First, the Court cites Ex parte McGowan, [Ms. 1190090, April 30, 2021] ___ So. 3d ___, ___ (Ala. 2021), for its holding that " '[a] sentence unauthorized by statute exceeds the jurisdiction of the trial court and is void.' " ___ So. 3d at ___. Whatever the merits of that holding,[13] the claim

[12]The better practice would be for the sentencing court to include in an applicable sentencing order that the offender will be subject to "not less than 10 years of post-release supervision to be served upon [his or her] release from incarceration."

[13]I concurred in the decision in McGowan v. State, [Ms. CR-18-0173, July 12, 2019] ___ So. 3d ___ (Ala. Crim. App. 2019), which the Alabama Supreme Court reversed in Ex parte McGowan. As I discuss below in Part III, I think Ex parte McGowan is distinguishable from this case. I also

in McGowan arose from the revocation of a split sentence—not, as here, in a proceeding under Rule 32, Ala. R. Crim. P. In McGowan, the State began the proceedings that led to the Alabama Supreme Court holding that the circuit court lacked jurisdiction to impose the sentence it imposed.

Here, however, Bishop launched the proceedings by filing a petition under Rule 32. "Rule 32 ... provides a procedural vehicle for a defendant to collaterally attack the proceedings that led to his conviction or sentence." Waters v. State, 155 So. 3d 311, 316 (Ala. Crim. App. 2013). Cf. Rule 32.4, Ala. R. Crim. P. ("A proceeding under [Rule 32] displaces all post-trial remedies except post-trial motions under Rule 24[, Ala. R. Crim. P.,] and appeal."). If a petitioner proves he has a right to relief, Rule 32

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think it was incorrectly decided, and I urge the Alabama Supreme Court to reconsider it or limit its application to the type of sentencing error at issue in it.

The Court also cites Williams v. State, 203 So. 3d 888, 893 (Ala. Crim. App. 2015) ("[A] facially valid challenge to the legality of a sentence presents a jurisdictional issue that can be raised at any time and is not subject to the procedural bars of Rule 32.2., Ala. R. Crim. P."). For reasons stated below in Part III, I question whether Williams is controlling.

"authorizes the circuit court to, in essence, reopen the proceedings that led to the petitioner's conviction and sentence." Waters, 155 So. 3d at 316. "[T]he proceedings are reopened at the point necessary for the circuit court to address the particular problem in that case." Id.

The postconviction procedure under Rule 32 exists so that "any defendant who has been convicted of a criminal offense may institute a proceeding in the court of original conviction to secure appropriate relief." Rule 32.1, Ala. R. Crim. P. (emphasis added). In Bishop's petition, he sought the "relief" of more supervision. Put simply, more supervision is not relief. Thus, even if the trial court did not, in fact, comply with § 13A-5-6(c), Bishop's claim is not cognizable under Rule 32 because it does not seek relief.

As I have noted elsewhere:

> " '[I]t simply is not "relief" to obtain the "remedy" of ' a harsher sentence or additional punishment. Hall v. State, 223 So. 3d 977, 983 (Ala. Crim. App. 2016) (Joiner, J., concurring specially). 'Relief' is '[t]he redress or benefit, esp. equitable in nature (such as an injunction or specific performance), that a party asks of a court.--Also termed remedy.'[6] Black's Law Dictionary 1482 (10th ed. 2014). 'Remedy' is '[t]he means of enforcing a right or preventing or redressing a wrong.'[7] Id. at 1485. ' "A remedy is anything a court can do for a litigant who

> has been wronged or is about to be wronged." ' Id. at 1485 (quoting Douglas Laycock, Modern American Remedies 1 (4th ed. 2010)).
>
> "_____
>
> "[6]'Relief' is also defined, in relevant part, as 'a removal or lightening of something oppressive, painful, or distressing.' Merriam-Webster's Collegiate Dictionary 988 (10th ed. 1997).
>
> "[7]'Remedy' is also defined as 'the legal means to recover a right or to prevent or obtain redress for a wrong.' Merriam-Webster's Collegiate Dictionary 989 (10th ed. 1997)."

Washington v. State, [Ms. CR-17-1201, Aug. 16, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019) (Minor, J., concurring specially). Thus, because Bishop is seeking more supervision—and because more supervision is not relief—the circuit court did not err in dismissing Bishop's claim that his sentence is illegal.

III.

As noted above, this Court, citing Ex parte McGowan, supra, accepts Bishop's argument that his challenge to his sentence is a challenge to the jurisdiction of the circuit court under Rule 32.1(b), Ala. R. Crim. P. But Bishop's sentencing error is distinguishable from the sentencing error in McGowan.

In McGowan, the circuit court sentenced McGowan to 15 years' imprisonment for each of his convictions. The court split those sentences, however, ordering McGowan to serve 5 years in prison followed by 2 years' supervised probation for each conviction. The Alabama Supreme Court, recognizing that § 15-18-8 did not authorize a split sentence of more than 3 years on a 15-year base sentence, held that the sentencing error was jurisdictional.

Thus, in McGowan, the circuit court imposed more punishment than it should have—i.e., it imposed a split sentence that exceeded the maximum allowed. As discussed below, Alabama law has uniformly held that a sentence that exceeds the maximum authorized by law is a nonwaivable defect.

The sentencing error in Bishop's case—assuming there was one— is not the same kind of error.[14] Bishop's argument assumes that the circuit

[14]The sentencing error in Bishop's case is more analogous to the error in Williams, supra. In Williams, the circuit court originally imposed, under a plea agreement, a 2-year split on a 20-year sentence. Williams served the split portion of his sentence, and while on probation he committed a new offense. The circuit court then revoked his probation, and Williams began serving the balance of his 20-year sentence. Eleven

court had jurisdiction to impose the 30-year sentence it did and that it also had jurisdiction to impose a period of post-release supervision but did not. Thus, Bishop is not, in fact, alleging that the circuit court was

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years after he pleaded guilty, Williams filed a Rule 32 petition alleging that the original 2-year split was illegal and that he had to be resentenced. This Court agreed.

A recent decision of this Court questions the underlying assumption of Williams to the extent it holds that a petitioner may use a Rule 32 petition solely to get a longer sentence. See Washington v. State, [Ms. CR-17-1201, Aug. 16, 2019] ___ So. 3d ___ (Ala. Crim. App. 2019). In Washington, the petitioner received 20-year sentences, which the circuit court split to 1 year. The one-year splits were shorter than the three-year minimum under § 15-18-8, Ala. Code 1975. Washington, almost nine years after he had completed the split portions of his sentences, filed a Rule 32 petition arguing for the "relief" of a longer split portion of his sentence.

In affirming the judgment denying Washington's petition, this Court relied in part on this Court's decision in McGowan, supra, because, while he was on probation, Washington murdered someone and the circuit court revoked Washington's probation. That part of this Court's analysis relying on McGowan appears to be no longer be valid after the Supreme Court's decision in Ex parte McGowan. But this Court's opinion in Washington—and the views I expressed in my special writing joined by Judge Cole in that case—also suggests that after Hall v. State, 223 So. 3d 977 (Ala. Crim. App. 2016), a petitioner may not use a Rule 32 petition to get the "relief" of a longer sentence.

Washington's petition for a writ of certiorari has been pending before the Alabama Supreme Court since October 30, 2019.

"without jurisdiction ... to impose sentence." Rule 32.1(b), Ala. R. Crim. P. Nor is Bishop alleging that "[t]he sentence imposed exceeds the maximum authorized by law." Rule 32.1(c), Ala. R. Crim. P. (emphasis added). Rather, Bishop is arguing that the circuit court should have exercised its jurisdiction to impose more supervision. He argues that without the added post-release supervision, his sentence is "not authorized by law"—a claim that would arise under Rule 32.1(c), Ala. R. Crim. P.

In Hall v. State, 223 So. 3d 977, 982 (Ala. Crim. App. 2016), cert. denied 223 So. 3d 977 (Ala. 2016), this Court held that a claim that a sentencing court failed to impose the drug-demand-reduction assessment under § 13A-12-281, Ala. Code 1975, is not a jurisdictional claim under Rule 32, Ala. R. Crim. P. This Court noted that the assessment had been described as both "mandatory" and "jurisdictional" in Siercks v. State, 154 So. 3d 1085, 1094 (Ala. Crim. App. 2013), and other cases. This Court in Hall overruled those cases because they deviated from Alabama law. This Court disavowed as unsupported the conclusory holding in Siercks that the assessment could not be waived. This Court stated:

"[S]tatutes or rules that are written in 'mandatory' terms but

that are capable of being waived are not 'jurisdictional.'

"In its analysis, Siercks resolves the 'waiver' question by stating, without any authority, that the demand-reduction assessment is, quite simply, 'not waivable.' 154 So.3d at 1094. That position, however, is inconsistent with this Court's position in Durr v. State, 29 So. 3d 922 (Ala. Crim. App. 2009), and the Alabama Supreme Court's holding in Ex parte Johnson, 669 So. 2d 205 (Ala. 1995). Both Durr and Johnson explain that, in negotiating a plea agreement, the State may waive 'the application of any mandatory fines and other enhancements--including the Habitual Felony Offender Act'—and, if such fines or enhancements are waived in a plea agreement, 'this Court may not order the trial court to impose th[o]se fines.' Durr, 29 So. 3d at 922 n.1 (emphasis added) (citing Ex parte Johnson, 669 So. 2d 205 (Ala. 1995)). Logically, if the State is capable of waiving a mandatory fine in a plea agreement and, if waived, this Court has no power to order the circuit court to impose the mandatory fine, the circuit court's failure to impose such a fine cannot be a jurisdictional defect. Quite simply, the State has no authority to waive a matter that implicates the jurisdiction of the circuit court.

"Because the demand-reduction assessment is a 'mandatory' fine that is capable of being waived, and this Court has long-held that waivable issues are not jurisdictional, see, e.g., Fortner v. State, 825 So. 2d 876, 880 (Ala. Crim. App. 2001) ('All of Fortner's claims are waivable, and claims that can be waived are nonjurisdictional.'); see also Ex parte Clemons, 55 So. 3d [348,] 352–53 [(Ala. 2007)], Hall's claim is 'nonjurisdictional' and subject to the grounds of preclusion set forth in Rule 32.2, Ala. R. Crim. P."

Hall, 223 So. 3d at 981-82.

Hall is not directly dispositive of this case because neither this Court nor the Alabama Supreme Court has held that the State could, as a part of a plea agreement or otherwise, waive the post-release supervision requirement of § 13A-5-6(c). Certain principles in Judge Joiner's special writing in Hall are helpful on this issue, however. After noting that "it simply is not 'relief' to obtain the 'remedy' of an additional fine," Judge Joiner examined the text of Rule 32.1 and the "six limited categories under which a 'defendant who has been convicted of a criminal offense' may seek postconviction relief." 223 So. 3d at 983. Hall's claim, Judge Joiner reasoned, must arise under Rule 32.1(b) or Rule 32.1(c).

Rule 32.1(b) and Rule 32.1(c) describe three types of claims challenging a sentence:

(1) A claim that the court that imposed the sentence was "without jurisdiction to" do so (Rule 32.1(b));

(2) A claim that "[t]he sentence imposed exceeds the maximum authorized by law" (Rule 32.1(c)); or

(3) A claim that "[t]he sentence imposed ... is otherwise not authorized by law" (Rule 32.1(c)).

Judge Joiner reasoned that Hall's claim, like Bishop's claim, did not allege

that the sentence "exceeds the maximum authorized by law," nor did the claim challenge the "jurisdiction" of the circuit court. Instead, Hall's claim conceded that the court had jurisdiction to impose a sentence:

> "Here, the claim in Hall's Rule 32 petition, although couched in jurisdictional terms, does not truly implicate the jurisdiction of the circuit court. Indeed, Hall did not allege that the circuit court had no power or authority to impose a demand-reduction assessment; rather, Hall's claim is premised on his allegation that the circuit court had both the power and the authority to impose a demand-reduction assessment but did not do so. In other words, Hall's claim concedes that the circuit court had jurisdiction to impose a sentence. See Ex parte Seymour, 946 So. 2d 536, 538 (Ala. 2006) ('Jurisdiction is "[a] court's power to decide a case or issue a decree." Black's Law Dictionary 867 (8th ed. 2004).')."

223 So. 3d at 984 (Joiner, J., concurring specially). Thus, Hall's claim was "a Rule 32.1(c) claim alleging that his sentence is, in some way, unauthorized." Id. Under Judge Joiner's analysis, because Hall's claim did not challenge the jurisdiction of the sentencing court, the claim was precluded. Id.

In his special writing, Judge Joiner also discussed how this Court has often mistakenly characterized any postconviction challenge to a sentence as a "jurisdictional" claim under Rule 32—regardless of the

substance of the claim. This mischaracterization, as Judge Joiner explained, ignores the text of Rule 32 and misapplies caselaw that predates the Alabama Supreme Court's creation of Rule 32.

As for the text of Rule 32, the preclusionary grounds in Rule 32.2(a) do not apply to a "jurisdictional" claim arising under Rule 32.1(b):

> "As Rule 32.1 explains, the grounds for relief are '[s]ubject to the limitations of Rule 32.2,' which limitations provide, in relevant part:
>
> > " '(a) Preclusion of Grounds. A petitioner will not be given relief under this rule based upon any ground:
> >
> > " '....
> >
> > " '(3) Which could have been but was not raised at trial, unless the ground for relief arises under Rule 32.1(b); or
> >
> > " '....
> >
> > " '(5) Which could have been but was not raised on appeal, unless the ground for relief arises under Rule 32.1(b).' "

Hall, 223 So. 3d at 983 (Joiner, J., concurring specially). Likewise, the ban on successive petitions in Rule 32.2(b) does not apply to "jurisdictional"

claims arising under Rule 32.1(b). See Rule 32.2(b), Ala. R. Crim. P. ("If a petitioner has previously filed a petition that challenges any judgment, all subsequent petitions by that petitioner challenging any judgment arising out of that same trial or guilty-plea proceeding shall be treated as successive petitions under this rule. The court shall not grant relief on a successive petition on the same or similar grounds on behalf of the same petitioner. A successive petition on different grounds shall be denied unless (1) the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence ...." (emphasis added)). In Judge Joiner's view, then, some challenges to the legality of a sentence are not jurisdictional claims under Rule 32.

Despite this distinction, however, cases from this Court have repeatedly characterized any challenge to a sentence as a "jurisdictional" claim under Rule 32. Those cases include Siercks, supra, and Hawk v. State, 171 So. 3d 96 (Ala. Crim. App. 2014), which described as "jurisdictional" claims alleging that the "mandatory" drug-demand-reduction fine had not been imposed.

"Those cases, however, incorrectly concluded that the demand-

> reduction assessment is 'jurisdictional' because it is 'mandatory.' See Ex parte Johnson, 669 So. 2d 205 (Ala. 1995); Durr v. State, 29 So. 3d 922 (Ala. Crim. App. 2009). Although not addressed in this Court's opinion, Hawk extended this rule of law from Siercks—which involved review of a sentence on direct appeal—to a Rule 32 postconviction proceeding and held that a circuit court's failure to impose a demand-reduction assessment is a 'jurisdictional' claim under Rule 32 because ' "[m]atters concerning unauthorized sentences are jurisdictional." Hunt v. State, 659 So. 2d 998, 999 (Ala. Crim. App. 1994).' Hawk, 171 So. 3d at 100 (quoting Siercks, 154 So. 3d at 1094)) (emphasis added)."
>
> "This rule of law—that 'unauthorized sentences are jurisdictional'—has been, at best, inconsistently used by this Court. Thus, many claims under Rule 32.1(c) have been erroneously described as 'jurisdictional.' See, e.g., Hawk, supra; Watson v. State, 164 So. 3d 622 (Ala. Crim. App. 2014); Jones v. State, 104 So. 3d 296 (Ala. Crim. App. 2012); Skinner v. State, 987 So. 2d 1172 (Ala. Crim. App. 2006); and Simmons v. State, 879 So. 2d 1218 (Ala. Crim. App. 2003)."

223 So. 3d at 984-85 (Joiner, J., concurring specially). Generally,

> "those decisions that refer to an 'unauthorized' or 'illegal' sentence as 'jurisdictional' do so based on language in cases (1) that predate Rule 32 and (2) that do not actually hold that ... [every] 'unauthorized' sentence implicates the subject-matter jurisdiction of the circuit court. ..."

223 So. 3d at 985 (Joiner, J., concurring specially). Read correctly,

> "those earlier cases ... establish[] only that an unauthorized-sentence claim is not subject to the ordinary rules of preservation and waiver on direct appeal (and therefore may

be raised for the first time on direct appeal).

"In Ex parte Brannon, 547 So. 2d 68, 68 (Ala. 1989), a case on direct appeal from Brannon's guilty plea to possession of a controlled substance, Justice Maddox, writing for a unanimous Alabama Supreme Court, explained that, 'when a sentence is clearly illegal or is clearly not authorized by statute, the defendant does not need to object at the trial level in order to preserve the issue for appellate review. See Bartone v. United States, 375 U.S. 52, 84 S. Ct. 21, 11 L. Ed. 2d 11 (1963).' (Emphasis added.) In other words, when a circuit court imposes an 'unauthorized' sentence, a claim challenging that sentence may be raised for the first time on direct appeal without an objection having been raised in the circuit court.

"....

"Thereafter, our Court continued to apply the not-subject-to-waiver-and-preservation rule to unauthorized-sentence claims in Rule 32 petitions to find those claims to be 'jurisdictional.' In J.N.J. v. State, 690 So. 2d 519, 520-21 (Ala. Crim. App. 1996), we explained:

> " 'An illegal sentence may be challenged at any time. "The holding in [Ex parte Brannon, 547 So. 2d 68 (Ala. 1989),] appears to equate an invalid sentence with a 'jurisdictional' defect, cf. Rule 16.2(d), A. R. Crim. P. Temp. ('The lack of subject matter jurisdiction ... may be raised ... at any time')." Falkner v. State, 586 So. 2d 39, 47-48 (Ala. Cr. App. 1991); Hunt v. State, 659 So. 2d 998 (Ala. Cr. App. 1994) ("Matters concerning unauthorized sentences are jurisdictional and, therefore, can be reviewed even if they have not been preserved.").'

"(Emphasis added.) In Calloway v. State, 860 So. 2d 900, 902 (Ala. Crim. App. 2002), this Court found that a claim alleging that a sentence exceeded the maximum authorized by law was a 'jurisdictional' claim under Rule 32 because ' "[m]atters concerning unauthorized sentences are jurisdictional," Hunt v. State, 659 So. 2d 998, 999 (Ala. Crim. App. 1994),' and may be reviewed at any time.[15]

"By using the not-subject-to-waiver-and-preservation rule in the context of Rule 32 proceedings, this Court has, 'for over two decades,' 223 So. 3d at 995 (Kellum, J., dissenting), failed to recognize that there is a difference between a claim on direct appeal that does not have to be preserved for appellate review and a claim in a Rule 32 proceeding that implicates the subject-matter jurisdiction of the circuit court. We recently recognized this distinction in Hulsey v. State, 196 So. 3d 342, 346 (Ala. Crim. App. 2015), cert. denied (No. 1141148, Nov. 13, 2015) 196 So. 3d 342 (Ala. 2015).

"In Hulsey, this Court, on direct appeal from Hulsey's conviction, addressed Hulsey's claim that his indictment was not brought within the statutory limitations period. The State, in its brief in that appeal, contended that Hulsey's statute-of-limitations claim had not been preserved for appellate review because, the State said, Hulsey failed to object to his indictment at trial. 196 So. 3d at 346. This Court concluded, however, that the 'statute of limitations in a

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[15]As discussed below, the Alabama Supreme Court has stated that a sentence that exceeds the maximum authorized by law—a claim cognizable as a Rule 32.1(c) claim—is a claim that a court "exceed[ed] its jurisdiction." See Ex parte Batey, 958 So. 2d 339, 342 n.2 (Ala. 2006). But the Alabama Supreme Court has never recognized a claim like Bishop's as jurisdictional.

criminal case is an issue that is not subject to the ordinary rules regarding preservation and waiver' and 'may be raised for the first time on appeal.' Id.

"The State, in its application for rehearing, argued that the Alabama Supreme Court, in Ex parte Seymour, 946 So. 2d 536 (Ala. 2006), overruled cases in which we held that the statute of limitations is not subject to the ordinary rules of preservation and waiver. This Court rejected the State's argument, finding:

> " 'Ex parte Seymour[, 946 So. 2d 536 (Ala. 2006),] and subsequent decisions have clarified that an indictment that fails to charge an essential element of an offense is not "void" in the sense of affecting the subject-matter jurisdiction of the circuit court. In Ex parte Seymour, the Alabama Supreme Court stated:
>
> > " ' "Jurisdiction is '[a] court's power to decide a case or issue a decree.' Black's Law Dictionary 867 (8th ed. 2004). Subject-matter jurisdiction concerns a court's power to decide certain types of cases .... That power is derived from the Alabama Constitution and the Alabama Code .... In deciding whether Seymour's claim properly challenges the trial court's subject-matter jurisdiction, we ask only whether the trial court had the constitutional and statutory authority to try the offense with which Seymour was charged and as to which he has filed his petition for certiorari review.

> "'"Under the Alabama Constitution, a circuit court 'shall exercise general jurisdiction in all cases except as may be otherwise provided by law.' Amend. No. 328, § 6.04(b), Ala. Const. 1901. The Alabama Code provides that '[t]he circuit court shall have exclusive original jurisdiction of all felony prosecutions ....' § 12–11–30, Ala. Code 1975. The offense of shooting into an occupied dwelling is a Class B felony. § 13A–11–61(b), Ala. Code 1975. As a result, the State's prosecution of Seymour for that offense was within the circuit court's subject-matter jurisdiction, and a defect in the indictment could not divest the circuit court of its power to hear the case.
>
> "'"The United States Supreme Court has long held that 'defects in an indictment do not deprive a court of its power to adjudicate a case.' [United States v.] Cotton, 535 U.S. [625] at 630, 122 S. Ct. 1781 [152 L. Ed. 2d 860 (2002)]...."'

"946 So. 2d at 538.

> "'Thus, Ex parte Seymour stands for the proposition that a defective indictment may nevertheless invoke the subject-matter jurisdiction of the circuit court, and, if the particular defect is not objected to in a timely manner, the defect will

> be waived and will not provide a basis for setting aside the conviction based on that indictment.
>
> " 'Even after Ex parte Seymour, however, this Court and the Alabama Supreme Court have continued to refer to statutes of limitations as a "jurisdictional" matter. In Ex parte Ward, 46 So. 3d 888 (Ala. 2007), the Alabama Supreme Court noted that this Court had "conflated statutes of limitations with procedural limitations periods such as the one in Rule 32.2(c)[, Ala. R. Crim. P.]" The Alabama Supreme Court in Ex parte Ward clearly distinguished procedural limitations periods from statutory limitations periods on criminal prosecution. Procedural limitations are affirmative defenses subject to the ordinary rules regarding waiver. Statutory limitations periods in a criminal prosecution, however, are "jurisdictional"—not in the sense of affecting the subject-matter jurisdiction of the circuit court but in the sense of not being subject to the ordinary rules of preservation and waiver.'

"Hulsey, 196 So. 3d at 354-55 (some emphasis added; footnote omitted). In other words, although a statute-of-limitations claim on direct appeal has been described as 'jurisdictional,' it is 'jurisdictional' only in the sense of not being subject to the ordinary rules of preservation and waiver on direct appeal. ... Thus, simply because a claim is not subject to the ordinary rules of preservation and waiver on direct appeal does not mean that same claim is 'jurisdictional' for purposes of Rule 32."

"Similarly, although a claim on direct appeal that the circuit court imposed an unauthorized sentence has been

> described as 'jurisdictional' in some cases—particularly before Ex parte Seymour—such a claim is more properly characterized as not being subject to the ordinary rules of preservation and waiver on direct appeal."

223 So. 3d at 985-87 (Joiner, J., concurring specially).

Based on the above, not every claim purporting to challenge the legality of a sentence is "jurisdictional" under Rule 32. After Ex parte Seymour, 946 So. 2d 536 (Ala. 2006), a petitioner asserting a jurisdictional sentencing claim must allege facts showing that the court that imposed the challenged sentence did not have the subject-matter jurisdiction to do so. Most often, a petitioner alleging such a claim will plead facts showing that the sentence exceeds the maximum authorized by law or that the sentence was imposed under an inapplicable statute.

Since it decided Seymour, the Alabama Supreme Court has provided some guidance about what constitutes a jurisdictional sentencing claim under Rule 32. In Ex parte Batey, 958 So. 2d 339 (Ala. 2006), decided a few months after Seymour, the Alabama Supreme Court stated:

> "A challenge to an illegal sentence, however, is a jurisdictional matter that can be raised at any time. Ginn [v. State], 894 So. 2d [793,] at 796 [(Ala. Crim. App. 2004)]. See also Ex parte Chambers, 522 So. 2d 313 (Ala. 1987) (holding

> that a defendant was not procedurally barred from arguing that a trial court applied an illegal sentence when it enhanced his sentence for a felony drug conviction under the HFOA [Habitual Felony Offender Act] even though the HFOA did not apply to drug offenses); Ex parte Brannon, [547 So. 2d 68 (Ala. 1989)](applying the holding in Chambers); City of Birmingham v. Perry, 41 Ala. App. 173, 175, 125 So. 2d 279, 282 (1960) (holding that it was 'apparent on the face of the proceedings' that a trial court had 'exceeded its power and jurisdiction in assessing punishment at hard labor instead of imprisonment as provided by statute'); Rogers v. State, 728 So. 2d 690, 691 (Ala. Crim. App. 1998) (holding that the trial court erred by not considering the defendant's argument that his sentence exceeded the statutory limit and stating: 'an allegedly illegal sentence may be challenged at any time, because if the sentence is illegal, the sentence exceeds the jurisdiction of the trial court and is void'); J.N.J. v. State, 690 So. 2d 519, 521 (Ala. Crim. App. 1996) ('The 5–year probationary period included as part of the appellant's sentence exceeds that allowed by the Youthful Offender Act.'); and Carter v. State, 853 So. 2d 1040 (Ala. Crim. App. 2002) (holding that the allegation that a trial court used a misdemeanor conviction instead of a felony conviction to enhance a sentence under the HFOA is a claim that the sentence is illegal and is therefore not procedurally barred)."

958 So. 2d at 341-42. Each example cited above in Batey involved a challenge to a sentence that either exceeded the maximum authorized by law or that was imposed under a statute that the petitioner contended should not apply. In a footnote, the Court stated:

> "This Court recently narrowed the scope of the jurisdictional

> exception to Rule 32 in Ex parte Seymour, 946 So. 2d 536 (Ala. 2006), overruling a line of cases that had held that a defect in an indictment is a jurisdictional matter that is not procedurally barred. In Seymour, we held that a defective indictment does not deprive the trial court of jurisdiction to hear the case, and that, therefore, a claim that an indictment is defective is not exempt from the Rule 32 bar. An illegal sentence, however, differs from a defective indictment. As we explained in Seymour, 'a trial court derives its jurisdiction from the Alabama Constitution and the Alabama Code.' 946 So. 2d at 538. The HFOA [Habitual Felony Offender Act], which is a provision of the Alabama Code, specifically vests a court with the authority to enhance a sentence; therefore, the court does not have the authority to impose a sentence that exceeds the scope of the HFOA. In doing so the court would be exceeding its jurisdiction."

958 So. 2d at 342 n.2 (emphasis added). Batey thus recognized as "jurisdictional" a claim alleging that a sentence exceeds the maximum authorized by law or a claim alleging that a sentence was imposed under an inapplicable statute (which is a variant of an excessive-sentence claim). Batey says nothing about the failure of a sentencing court to exercise its authority to impose punishment. Batey did not involve a sentence like that in Bishop's case—a sentence in which the sentencing court could have imposed more supervision but allegedly did not.

In Ex parte Trawick, 972 So. 2d 782 (Ala. 2007), the Alabama

Supreme Court cited, as examples of jurisdictional sentencing claims, Ex parte Robey, 920 So. 2d 1069, 1071-72 (Ala. 2004) (multiple punishments for the same offense exceed the maximum authorized by law), and Ex parte Sanders, 792 So. 2d 1087, 1091 (Ala. 2001) (a claim alleging that "a sentence [that] is excessive ... is a jurisdictional issue"). The sentences in those cases, like that in Batey, allegedly exceeded the maximum authorized by law. They were not sentences in which the court could have imposed more supervision but did not.

In Ex parte Butler, 972 So. 2d 821 (Ala. 2007), the Alabama Supreme Court quoted Hollis v. State, 845 So. 2d 5 (Ala. Crim. App. 2002), for the proposition that " 'a trial court does not have [subject-matter] jurisdiction to impose a sentence not provided for by statute.' " Butler, 972 So. 2d at 825 (quoting Hollis, 845 So. 2d at 6). That statement in Butler was made in response to the State's argument (not the petitioner's argument) that the statute did not authorize the sentence at issue. The Alabama Supreme Court held that the applicable statute authorized the sentence in Butler.

Hollis, cited in Butler, involved a petitioner's claim that the circuit

court exceeded its authority when it imposed more prison time on the split portions of his sentences after he had served the split portions of those sentences. This Court held that the circuit court lacked that authority. Thus, like Batey, Hollis involved sentences that were allegedly excessive. Neither Hollis nor Butler involved a claim like Bishop's that the sentencing court should have imposed more punishment.

In Ex parte Jarrett, 89 So. 3d 730, 731-33 (Ala. 2011), the Alabama Supreme Court relied on Batey to hold that a petitioner had alleged a jurisdictional claim under Rule 32. The petitioner in Jarrett asserted that his sentence was too long because, he said, one of the convictions used to enhance his sentence as a habitual felon was a misdemeanor, not a felony. Thus, like Batey, Jarrett involved a claim that the sentence imposed was too long—not that the circuit court should have imposed a longer sentence or more punishment.

The above cases show that, since Seymour, the Alabama Supreme Court has never recognized as "jurisdictional" a claim like Bishop's that the sentencing court did not impose enough punishment. Rather, the Court has recognized as jurisdictional only those claims alleging that a

sentence exceeds the maximum authorized by law or, as a variant of an excessive-sentence claims, claims that a sentence was imposed under an inapplicable statute. Thus, the Alabama Supreme Court has recognized as jurisdictional only those sentencing claims that fall under the first part of Rule 32.1(c), Ala. R. Crim. P.—claims alleging that "[t]he sentence imposed exceeds the maximum authorized by law."

Bishop's claim arises under the second part of Rule 32.1(c)—that the sentence is "otherwise not authorized by law." As shown above, the Alabama Supreme Court has never recognized such as a claim as implicating the circuit court's jurisdiction. And that claim, as noted, concedes that the circuit court had jurisdiction. Thus, because Bishop's claim is not a jurisdictional claim under Rule 32, it is subject to the preclusionary grounds of Rule 32.2, and the circuit court did not abuse its discretion in summarily dismissing it.