Rel: 07/08/2016

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2015-2016

CR-15-0273

Kevin Brent Hall

v.

State of Alabama

Appeal from Houston Circuit Court
(CC-91-294.61)

PER CURIAM.

Kevin Brent Hall appeals the circuit court's summary dismissal of his Rule 32, Ala. R. Crim. P., petition for postconviction relief. We affirm.

Facts and Procedural History

In February 1991, Hall was indicted by a Houston County grand jury for unlawful distribution of a controlled substance, see § 13A-12-211, Ala. Code 1975. The indictment alleged that, on December 2, 1990, Hall "did unlawfully sell, furnish, give away, manufacture, deliver, or distribute a controlled substance, to-wit: cocaine." (C. 21.) Thereafter, on March 10, 1992, Hall, pursuant to a negotiated plea agreement, pleaded guilty to the lesser-included offense of unlawful possession of a controlled substance, see § 13A-12-212, Ala. Code 1975, and, in accordance with that agreement, was sentenced to 10 years' imprisonment.

Over 23 years later, Hall, on April 25, 2015, filed his first Rule 32 petition challenging his guilty-plea conviction and sentence. In that petition, Hall alleged, among other things, that his sentence was "illegal" because, he said, the circuit court failed to impose on him a $1,000 fine under the Demand Reduction Assessment Act, see § 13A-12-281, Ala. Code 1975. The circuit court summarily dismissed Hall's petition, and Hall appealed that decision to this Court. See Hall v. State (No. CR-14-1279, Oct. 9. 2015) ___ So. 3d ___ (Ala. Crim. App. 2015) (table).

In that appeal, a three-member panel of this Court issued an unpublished memorandum affirming the circuit court's decision[1] and finding, in part:

> "As for Hall's second claim--that his sentence was illegal because, he said, the trial court failed to impose the mandatory $1000 fine under the Demand Reduction Assessment Act, see § 13A-12-281, Ala. Code 1975--Hall alleged in his petition and attachments the following facts: that he was arrested on December 4, 1990, for the unlawful distribution of a controlled substance, that he was indicted for the unlawful distribution of a controlled substance on March 1, 1991, that he was arraigned on April 10, 1991, that he pleaded guilty to the lesser-included offense of unlawful possession of a controlled substance on March 12, 1992, and that the trial court failed to impose the $1000 fine pursuant to § 13A-12-281.
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> "It is well settled that the fine in § 13A-12-281 is 'mandatory and jurisdictional, and [that] the failure to impose [it] renders a sentence illegal.' Siercks v. State, 154 So. 3d 1085, 1094 (Ala. Crim. App. 2013). However, it is also well settled that '"[a] defendant's sentence is determined by the law in effect at the time of the commission of the offense."' Moore v. State, 40 So. 3d 750, 753 (Ala. Crim. App. 2009). See also Minnifield v. State, 941 So. 2d 1000, 1001 (Ala. Crim. App. 2005) ('It is well settled that the law in effect at the time of the commission of the offense controls the prosecution.'). Section 13A-12-281 was enacted during the 1990 Legislative Session. Hall alleged in his petition and attachments the date he was

[1]Rule 16(d), Ala. R. App. P., provides, in part, that "[t]he courts of appeals may sit in ... panels. ... Every ... panel shall be constituted by at least a majority of the membership of each court of appeals."

> arrested for the crime, but he failed to allege the date he committed the crime. Unless Hall committed his crime after the effective date of § 13A-12-281, that statute would not be applicable to him. Because Hall failed to allege the date he committed the crime, he failed to plead sufficient facts indicating that § 13A-12-281 was applicable to him and that, therefore, his sentence was illegal."

Hall v. State (No. CR-14-1279, Oct. 9. 2015) ___ So. 3d ___ (Ala. Crim. App. 2015) (table) (emphasis added).

On October 21, 2015, Hall filed his second Rule 32 petition challenging his 1992 guilty-plea conviction and sentence. In that petition, Hall again alleged that his 10-year sentence was "illegal" because, he said, the circuit court failed to impose on him the demand-reduction assessment. Additionally, relying on this Court's critique of his first petition, Hall added to his second petition those facts this Court, in its unpublished memorandum, noted that Hall had failed to plead in his first petition.

Specifically, Hall alleged that the Demand Reduction Assessment Act became effective on April 24, 1990, and that he committed the offense of unlawful distribution of a controlled substance after the effective date of that Act--specifically, on December 2, 1990. (C. 16.) Additionally, Hall alleged that, in February 1991, he was indicted for unlawful

distribution of a controlled substance and that, on March 10, 1992, he "was offered a 'plea deal,' plead[ed] guilty [and] thereafter adjudge[d] guilty/sentenced to (10) years imprisonment for 'unlawful possession of a control [sic] substance.'" (C. 17.) Hall further alleged that, "[b]efore entering the plea of guilt, the trial judge never informed [him] of [and] never imposed the 'mandatory fine' of $1,000 required by the 'demand reduction assessment act.'" (C. 17.)

On November 2, 2015, the State filed a motion to dismiss Hall's petition, alleging that Hall's claim was precluded under Rule 32.2(a), Ala. R. Crim. P., because it was "either raised at trial or could have been, but [was] not raised at trial" or it was "either raised on appeal or could have been, but [was] not raised on appeal"; that Hall's claim was successive under Rule 32.2(b), Ala. R. Crim. P.; that Hall's claim was insufficiently pleaded; and that Hall "was granted parole in this case in 1996, and thus, there is no relief the Court could grant in this case." (C. 31.)

Thereafter, the circuit court issued an order summarily dismissing Hall's petition, and Hall filed a timely notice of appeal.

Standard of Review

When reviewing a circuit court's summary dismissal of a postconviction petition "'[t]he standard of review this Court uses ... is whether the [circuit] court abused its discretion.'" Lee v. State, 44 So. 3d 1145, 1149 (Ala. Crim. App. 2009) (quoting Hunt v. State, 940 So. 2d 1041, 1049 (Ala. Crim. App. 2005)). If, however, the circuit court bases its determination on a "'cold trial record,'" we apply a de novo standard of review. Ex parte Hinton, 172 So. 3d 348, 353 (Ala. 2012). Moreover, subject to certain exceptions that are not applicable in this case, see, e.g., Ex parte Clemons, 55 So. 3d 348 (Ala. 2007), "when reviewing a circuit court's rulings made in a postconviction petition, we may affirm a ruling if it is correct for any reason." Bush v. State, 92 So. 3d 121, 134 (Ala. Crim. App. 2009).

Furthermore, a circuit court may summarily dismiss a Rule 32 petition pursuant to Rule 32.7(d), Ala. R. Crim. P.,

> "[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, the court may either dismiss the petition or grant leave to file an amended petition."

See also Hannon v. State, 861 So. 2d 426, 427 (Ala. Crim. App. 2003); Cogman v. State, 852 So. 2d 191, 193 (Ala. Crim. App. 2002); Tatum v. State, 607 So. 2d 383, 384 (Ala. Crim. App. 1992).

Discussion

On appeal, Hall contends that the circuit court erred when it summarily dismissed his second Rule 32 petition because, he says, "it was shown that the trial court failed to impose a mandatory fine as required by § 13A-12-281, Ala. Code 1975." (Hall's brief, p. 6 (emphasis in original).) According to Hall, the circuit court's failure to impose on him the demand-reduction assessment is a "jurisdictional" claim; is not subject to the grounds of preclusion set forth in Rule 32.2, Ala. R. Crim. P.; and, if true, entitles him to relief.

To support his claim, Hall relies on this Court's recent decision in Siercks v. State, 154 So. 3d 1085, 1094 (Ala. Crim. App. 2013), in which we explained that "[t]he fine[] in §§ 13A-12-281 ... [is] not waivable. [It is] mandatory and jurisdictional, and the failure to impose [it] renders a sentence illegal"--a holding this Court has since applied to

an appeal from the summary dismissal of a Rule 32 petition to sua sponte remand a case to a circuit court for that court to impose a demand-reduction assessment, see Hawk v. State, 171 So. 3d 96 (Ala. Crim. App. 2014). Upon further examination of the holding in Siercks, however, we are convinced that the holding in Siercks--and, in turn, the holding in Hawk--is premised on logic that is in conflict with caselaw from both this Court and the Alabama Supreme Court.

In Siercks, this Court, on direct appeal from Siercks's conviction for unlawful possession of a controlled substance, affirmed Siercks's conviction but sua sponte recognized that, "[a]t the sentencing hearing, and in its sentencing order, the trial court stated that all fines associated with Siercks's conviction were waived on the basis of Siercks's indigency." 154 So. 3d at 1094. We concluded that, because the circuit court waived the demand-reduction assessment, Siercks's case had to be remanded to the circuit court for that court to impose the assessment. The following is the totality of our analysis for reaching that conclusion:

> "Section 13A-12-281 (the Demand Reduction Assessment Act) mandates that every person convicted of a violation of any offense defined in §§ 13A-12-202, -203, -204, -211, -212, -213, -215, or

> -231, Ala. Code 1975, 'shall be assessed for each such offense an additional penalty fixed at $1,000 for first offenders and $2,000 for second and subsequent offenders.' (Emphasis added.) ... The fine[] in §[] 13A-12-281 ... [is] not waivable. [It is] mandatory and jurisdictional, and the failure to impose [it] renders a sentence illegal. 'Matters concerning unauthorized sentences are jurisdictional,' Hunt v. State, 659 So. 2d 998, 999 (Ala. Crim. App. 1994), and we may take notice of an illegal sentence at any time. See, e.g., Pender v. State, 740 So. 2d 482, 484 (Ala. Crim. App. 1999)."

154 So. 3d at 1094.

It appears that our holding in Siercks is premised on the following logic: The imposition of the demand-reduction assessment is "mandatory," see Pierson v. State, 677 So. 2d 246, 247 (Ala. 1995) ("We hold that the provisions of the Demand Reduction Assessment Act are mandatory."), and cannot be waived; thus, it necessarily follows that the failure to impose the demand-reduction assessment results in an illegal sentence--a jurisdictional claim that can be raised at any time. This post hoc, ergo propter hoc logic, however, is correct only if all statutes or rules that are written in "mandatory" terms also implicate the jurisdiction of the circuit court. The Alabama Supreme Court, however, has repeatedly rejected such a notion.

Specifically, in Ex parte Clemons, 55 So. 3d 348 (Ala. 2007), the Alabama Supreme Court addressed this Court's holding in Davis v. State, 9 So. 3d 514 (Ala. Crim. App. 2006), in which we described the grounds of preclusion in Rule 32.2, Ala. R. Crim. P., as "mandatory" but acted as if the grounds of preclusion were "jurisdictional." The Supreme Court explained:

> "We begin by noting that the Court of Criminal Appeals in Davis never characterized the Rule 32.2(a) procedural bars as jurisdictional. Instead, it described them as 'mandatory' but treated them as jurisdictional, holding that they may be applied sua sponte. In support of this conclusion, the Court of Criminal Appeals quoted State v. Osborne, 329 Mont. 95, 98, 124 P.3d 1085, 1087 (2005), which in turn quoted Peña v. State, 323 Mont. 347, 361, 100 P.3d 154, 163 (2004), and noted that '"'the statutory rules which circumscribe the postconviction process are jurisdictional in nature.'"' Davis, 9 So. 3d at 533 (emphasis added). After noting its ability to 'sua sponte apply the limitations provision contained in Rule 32.2(c) ... because it is a mandatory provision,' the Court of Criminal Appeals then concluded that the Rule 32.2(a) procedural bars are likewise mandatory. Although the Court of Criminal Appeals characterized the procedural bars of Rule 32.2(a) as mandatory, its holding in Davis eliminates any meaningful distinction between a mandatory rule of preclusion and one that is jurisdictional."

55 So. 3d at 352 (some emphasis added). The Alabama Supreme Court explained that the grounds of preclusion set forth in

Rule 32.2, Ala. R. Crim. P., although written in "mandatory" terms, are not "jurisdictional" because, the Court said, "those procedural bars ... may ... be waived" by the State. 55 So. 3d at 356. To put it another way, statutes 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.[2]

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 at 352-53, Hall's claim is "nonjurisdictional" and subject to the grounds of preclusion set forth in Rule 32.2,

[2]The State may, of course, waive other issues that do not implicate the jurisdiction of the circuit court. For example, when an incarcerated inmate files a petition for a writ of habeas corpus in the wrong venue, the State may waive any objection to the improper venue by not raising the issue in a timely manner. See Ex parte Culbreth, 966 So. 2d 910 (Ala. 2006) (finding that § 15-21-6, Ala. Code 1975, addresses the venue in which a petition for a writ of habeas corpus may be filed and does not implicate the jurisdiction of the circuit court; thus, the State waived its improper-venue objection by failing to timely raise the issue in the circuit court).

Ala. R. Crim. P. To the extent that Siercks and Hawk hold otherwise, those decisions are overruled.

Accordingly, the circuit court did not err when it summarily dismissed Hall's claim because that claim could have been raised, but was not, either at trial or on appeal. See Rule 32.2(a)(3) and (5), Ala. R. Crim. P.[3]

Based on the foregoing reasons, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and Burke, J., concur. Joiner, J., concurs specially, with opinion. Kellum, J., dissents, with opinion, which Welch, J., joins.

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[3]Even if we were inclined to interpret Hall's claim as "jurisdictional," his claim was insufficiently pleaded. See Hyde v. State, 950 So. 2d 344, 356-57 (Ala. Crim. App. 2006). Here, Hall alleged in his second Rule 32 petition facts establishing that the demand-reduction assessment could, in fact, have applied to his guilty-plea conviction for unlawful possession of a controlled substance. As set out above, however, "[t]he State may elect to forgo the application of mandatory fines and other enhancements--including application of the Habitual Felony Offender Act. If so, this Court may not order the trial court to impose these fines. See, e.g., Ex parte Johnson, 669 So. 2d 205 (Ala. 1995)." Durr, 29 So. 3d at 922 n.1. Although he alleged that his guilty plea was the result of a negotiated plea agreement with the State, Hall did not allege any facts demonstrating that the State did not waive the application of the demand-reduction assessment when it negotiated, and he accepted, a plea agreement.

JOINER, Judge, concurring specially.

I concur in this Court's judgment affirming the circuit court's summary dismissal of Kevin Brent Hall's Rule 32, Ala. R. Crim. P., petition for postconviction relief. I write specially to explain my basis for doing so as well as to address certain aspects of the dissenting opinion.

Stated simply, the Court's decision today overrules our recent decisions in Siercks v. State, 154 So. 3d 1085 (Ala. Crim. App. 2013), and Hawk v. State, 171 So. 3d 96 (Ala. Crim. App. 2014), only to the extent that those decisions hold that a circuit court's failure to impose a fine pursuant to the Demand Reduction Assessment Act, see § 13A-12-281, Ala. Code 1975, is a "jurisdictional" claim in the context of a Rule 32 proceeding.[4]

As this Court's opinion explains, Hall's Rule 32 petition challenged his 1992 guilty-plea conviction for unlawful possession of a controlled substance, see § 13A-12-212, Ala. Code 1975, and his resulting sentence of 10 years' imprisonment. In his petition, which was filed nearly 24

[4]To be clear, this Court has not overruled Siercks with regard to claims on direct appeal alleging that the circuit court failed to impose a demand-reduction assessment.

years after his 10-year sentence was imposed, Hall alleged that his 10-year sentence was "illegal" because, he said, the circuit court failed to impose on him a $1,000 fine under the Demand Reduction Assessment Act. According to Hall, because the circuit court in 1992 failed to impose the demand-reduction Assessment, he was entitled to the postconviction "relief" of being resentenced by the circuit court so that court could impose on him the demand-reduction assessment.

Under the text of Rule 32, resolution of Hall's claim is not complicated. First, it simply is not "relief" to obtain the "remedy" of an additional fine. See Rule 32.1, Ala. R. Crim. P. ("Subject to the limitations of Rule 32.2, any defendant who has been convicted of a criminal offense may institute a proceeding in the court of original conviction to secure appropriate relief ...." (emphasis added)). Further, however, Rule 32, Ala. R. Crim. P., provides only six limited categories under which a "defendant who has been convicted of a criminal offense" may seek postconviction relief. Of these six categories, only two are potentially at issue in this case. Specifically, with regard to claims challenging a sentence, Rule 32.1--titled "Scope of Remedy"--provides the

following possible avenues under which a petitioner may seek postconviction relief:

> (1) "(b) The court was without jurisdiction to render judgment or to impose sentence."
>
> (2) "(c) The sentence imposed exceeds the maximum authorized by law or is otherwise not authorized by law."

Rule 32.1(b) and (c), Ala. R. Crim. P. (emphasis added). Thus, Hall's claim could be either a Rule 32.1(b) claim alleging that the circuit court did not have jurisdiction to impose a sentence or a Rule 32.1(c) claim alleging that the sentence imposed is, in some way, not authorized by law.

Although both categories of claims involve a circuit court's sentencing error, each category is treated differently under Rule 32. Indeed, 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).
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> "(b) Successive Petitions. 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 or (2) the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice.
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> "(c) Limitations Period. Subject to the further provisions hereinafter set out in this section, the court shall not entertain any petition for relief from a conviction or sentence on the grounds specified in Rule 32.1(a) and (f), unless the petition is filed: (1) In the case of a conviction appealed to the Court of Criminal Appeals, within one (1) year after the issuance of the certificate of judgment by the Court of Criminal Appeals under Rule 41, Ala. R. App. P.; or (2) in the case of a conviction not appealed to the Court of Criminal Appeals, within one (1) year after the time for filing an appeal lapses ...."

Rule 32.2, Ala. R. Crim. P. (emphasis added). Thus, claims under Rule 32.1(b) are not subject to any of the limitations

set forth in Rule 32.2, but claims under Rule 32.1(c) are subject to the limitations set forth in Rule 32.2(a) and Rule 32.2(b).

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)."). Therefore, Hall's claim is a Rule 32.1(c) claim alleging that his sentence is, in some way, unauthorized.

Because Hall's claim falls under Rule 32.1(c), and he could have, but did not, raise his demand-reduction-assessment claim either at trial or on appeal, and because the State asserted Rule 32.2(a) as an affirmative defense in its motion

to dismiss Hall's petition, the circuit court properly dismissed Hall's claim under Rule 32.2(a).

Thus, under a plain reading of the text of Rule 32, the resolution of Hall's claim is straightforward. Our caselaw interpreting illegal-sentence claims under Rule 32--as exemplified in Siercks and Hawk--has muddied the waters, however, and made resolution of a claim like Hall's less clear than it should be. Indeed, as explained in this Court's opinion, under the principle articulated in Siercks, which was extended to Rule 32 proceedings in Hawk, Hall would be entitled to the "relief" he seeks. Those cases, however, incorrectly concluded that the demand-reduction assessment is "jurisdictional" because it is "mandatory."[5] 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

[5]Judge Kellum, in her dissenting opinion, says that the holding in Siercks was not based on the fact that the demand-reduction assessment was written in mandatory terms. Siercks unequivocally states, however, that the demand-reduction assessment "mandates that every person convicted of [certain drug offenses] 'shall be assessed ... $1,000 for first offenders and $2,000 for second and subsequent offenders.' (Emphasis added.) ... The fines in §§ 13A-12-281 and 36-18-7(a) are not waivable. They are mandatory and jurisdictional, and the failure to impose them renders a sentence illegal." 154 So. 3d at 1094 (some emphasis added).

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."[6] 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

[6]As explained more thoroughly below, at root, my critique of this Court's jurisprudence is that our use of the term "jurisdictional" is not consistent with the language of Rule 32 or the concept of subject-matter jurisdiction the Alabama Supreme Court delineated in Ex parte Seymour, 946 So. 2d 536 (Ala. 2006). In short, I am arguing that there is a difference in Rule 32.1(b) and Rule 32.1(c). Rather than randomly ignoring it, our caselaw should reflect that difference.

v. State, 879 So. 2d 1218 (Ala. Crim. App. 2003). Generally, I think that 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 the imposition of an "unauthorized" sentence implicates the subject-matter jurisdiction of the circuit court. I read those earlier cases as establishing 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.

After the Supreme Court decided Ex parte Brannon, our Court extended the not-subject-to-waiver-and-preservation rule articulated in that case to an unauthorized-sentence claim in a Rule 32 petition. Specifically, in Ferguson v. State, 565 So. 2d 1172 (Ala. Crim. App. 1990), this Court, relying on several cases that predate Rule 32,[7] addressed a Rule 32 petition alleging that the sentence imposed exceeded the maximum authorized by law--in other words, a claim under Rule 32.1(c)--and held:

> "The sentence imposed following conviction of a crime must conform to the statute and cannot exceed the term prescribed by law. Howard v. State, 390 So. 2d 32 (Ala. Cr. App. 1980); Opinion of the Clerk No. 4, 347 So. 2d 524 (Ala. 1977). When the court imposes sentence in excess of that authorized by statute, it exceeds its jurisdiction, and the sentence is consequently void. Ex parte McKivett, 55 Ala. 236 (1876); City of Birmingham v. Perry, 41 Ala. App. 173, 125 So. 2d 279 (1960); 21 Am. Jur. 2d

[7]"Rule 32 was first adopted by the Alabama Supreme Court as Rule 20, Temporary Rules of Criminal Procedure, on January 20, 1987, with an effective date of April 1, 1987." Hugh Maddox, Alabama Rules of Criminal Procedure, § 32.0 (5th ed. 2011).

> Criminal Law § 537 (1981). See also Ex parte Brannon, 547 So. 2d 68 (Ala. 1989)."

565 So. 2d at 1173 (emphasis added).

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.

By using the not-subject-to-waiver-and-preservation rule in the context of Rule 32 proceedings, this Court has, "for over two decades," ___ So. 3d at ___ (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, [Ms. CR-13-0357, July 10, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015), cert. denied (No. 1141148, Nov. 13, 2015) ___ So. 3d ___ (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. ___ So. 3d at ___. This Court concluded, however, that the "statute of limitations in a 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.
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> "'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, ___ So. 3d at ___ (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. As Hulsey recognized, a statute-of-limitations claim in a Rule 32 proceeding presumably would not be "jurisdictional" (i.e., a claim under Rule 32.1(b)) and thus would be subject to preclusion under Rule 32.2. Hulsey, ___ So. 3d at ___ ("If Hulsey had been convicted of second-degree unlawful manufacture of a controlled substance based on the third indictment, which was a timely indictment, Ex parte Seymour arguably would permit that conviction to survive a Rule 32, Ala. R. Crim. P., postconviction challenge to the circuit court's subject-matter jurisdiction over the case.").

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.[8]

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

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[8]The dissenting opinion cites Ex parte Batey, 958 So. 2d 339 (Ala. 2006), in support of the argument that, after Seymour, a challenge to an illegal sentence remains a "jurisdictional" defect. The dissenting opinion then extrapolates from a footnote in Batey the proposition that a circuit court's imposition of a demand-reduction assessment in excess of the statutory requirement would be a "jurisdictional" defect under Rule 32. This case, however, does not require us to decide whether a claim alleging that a circuit court exceeded its authority by imposing a demand-reduction assessment in excess of the statutory maximum is a "jurisdictional" defect; rather, this case requires this Court to determine whether a claim alleging that a circuit court's failure to exercise its authority under the Demand Reduction Assessment Act is a "jurisdictional" defect.

This distinction, although nuanced, is important. Indeed, as explained below, requiring a circuit court to recognize the failure to impose a demand-reduction assessment as a "jurisdictional" defect results in that court having to grant a Rule 32 petitioner "relief" in the form of receiving additional and harsher punishment.

preservation and waiver on direct appeal. Likewise, an unauthorized-sentence claim under Rule 32.1(c) is not "jurisdictional" because it does not impact the subject-matter jurisdiction of the circuit court to impose a sentence.

The dissenting opinion "question[s] whether the majority's holding today conflicts with the Alabama Supreme Court's opinion in Pierson v. State, 677 So. 2d 246 (Ala. 1995)." ___ So. 3d at ___ (Kellum, J., dissenting). In doing so, however, the dissenting opinion is doing what this Court[9] has erroneously done for several years: equating a claim that is not subject to waiver on direct appeal with a claim that is

[9]I have authored or voted in support of many of those decisions. To that charge, I plead: "None but a fool is always right."

"jurisdictional" in a Rule 32 proceeding.[10] Specifically, the dissenting opinion explains:

> "In Pierson, the defendant was convicted of the unlawful distribution of a controlled substance and was sentenced to 12 years' imprisonment. The trial court did not impose the fine in § 13A-12-281, and the State did not object or otherwise raise in the trial court any issue relating to the fine. Therefore, under the general rules of preservation and waiver, the State waived imposition of the fine. See, e.g., Ex parte Coulliette, 857 So. 2d 793, 794 (Ala. 2003) (noting that the rules of preservation and waiver restrict appellate review to questions and issues properly and timely raised at the trial level); and Ex parte Knox, [Ms. 1131207, June 26, 2015] ___ So. 3d ___ (Ala. 2015) (applying the rules of preservation and waiver to the State). Nonetheless, when the defendant appealed her conviction and sentence, the State argued for the first time in this Court that the fine in § 13A-12-281 was mandatory and that the trial court had erred in not imposing it, and the State requested that this Court remand the case for imposition of the fine. This Court first noted that the State had not raised any issue relating to the fine at the trial level and then held that § 13A-12-281, although

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[10]In a footnote, the dissenting opinion asserts that the Court's decision "implicitly overrules" 51 cases. Notably, however, not a single one of those cases involves a Rule 32 proceeding; they all involve this Court's review of sentences on direct appeal. The Court's decision today does not hold that the Demand Reduction Assessment is subject to the ordinary rules of preservation and wavier for purposes of direct appeal; rather, the Court's decision holds that a claim alleging that the circuit court failed to impose a Demand Reduction Assessment is a nonjurisdictional claim for purposes of Rule 32. Thus, the report of the overruling of those 51 decisions is greatly exaggerated.

> written in mandatory terms, was permissive. Pierson v. State, 677 So. 2d 242 (Ala. Crim. App. 1994). We declined the State's request to remand the cause for imposition of the fine, and we affirmed the trial court's judgment.
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> "The State sought certiorari review, and the Alabama Supreme Court concluded that this Court had erred in holding that § 13A-12-281 was permissive and it held 'that the provisions of the Demand Reduction Assessment Act are mandatory.' Pierson, 677 So. 2d at 247. However, instead of affirming this Court's judgment on the ground that the State had waived application of the fine in § 13A-12-281 by not raising the issue at the trial level, the Supreme Court reversed this Court's judgment and directed this Court to remand the case for imposition of the fine. At no point in its opinion in Pierson did the Alabama Supreme Court use the term 'jurisdictional' or state that the failure to impose the fine in § 13A-12-281 rendered the defendant's sentence illegal. Nor did the Supreme Court state at any point in its opinion that the failure to impose the fine was nothing more than an exception to preservation that could be raised for the first time on appeal but was not jurisdictional. The Supreme Court simply did not explain in its opinion why it was ordering imposition of the fine when the issue had been waived by the State. Therefore, because I cannot say with any degree of certainty whether Pierson stands for the proposition that the fine in § 13A-12-281 is jurisdictional and not waivable by the State, as this Court has interpreted that opinion for over two decades, or for the proposition that the failure to impose the fine is nothing more than an exception to preservation, I must question whether the majority's holding today conflicts with Pierson."

___ So. 3d at ___ (Kellum, J., dissenting) (emphasis added; footnote omitted). In other words, although Pierson was a

case on direct appeal--not a Rule 32--and, as the dissenting opinion recognizes, does not mention the word "jurisdictional," the dissenting opinion reads Pierson as holding that, because the Alabama Supreme Court determined that the language of the Demand Reduction Assessment Act is mandatory and did not expressly state whether the failure to impose the demand-reduction assessment implicated the subject-matter jurisdiction of the circuit court or whether the failure to impose a demand-reduction assessment is simply not subject to the ordinary rules of preservation and waiver on direct appeal, the failure to impose a demand-reduction assessment is a "jurisdictional" claim for purposes of Rule 32.

When it reads Pierson this broadly, the dissenting opinion finds a subject-matter-jurisdiction defect to exist by implication. This broad reading suffers from the same logical fallacy as Siercks and Hawk: post hoc, ergo propter hoc. Simply because a statute is written in mandatory terms does not mean that the failure to follow that statute is a defect in the proceeding that implicates subject-matter jurisdiction.

Additionally, the rule that "[m]atters concerning unauthorized sentences are jurisdictional" is inconsistent with the text of Rule 32. Indeed, as explained above, claims challenging a sentence under Rule 32 fall under the purview of either Rule 32.1(b) or Rule 32.1(c). Holding that, in a Rule 32 proceeding, "[m]atters concerning unauthorized sentences are jurisdictional" ignores the text of Rule 32.1 and puts all unauthorized-sentence claims under the purview of both Rule 32.1(b) and Rule 32.1(c), thus eliminating any meaningful distinction between claims arising under Rule 32.1(b) and claims arising under Rule 32.1(c).

Although eliminating this distinction may seem trivial, improperly classifying a claim under Rule 32.1 greatly impacts how that claim is treated. As explained above, the text of Rule 32.1 clearly contemplates different treatment for claims alleging that a circuit court has no jurisdiction to impose a sentence and claims alleging that a circuit court imposed an unauthorized sentence. Specifically, although claims under Rule 32.1(b) (no jurisdiction) are not subject to any of the limitations set forth in Rule 32.2, claims under Rule 32.1(c) (unauthorized sentence) are subject to the limitations set

forth in Rule 32.2(a) and Rule 32.2(b). Thus, construing unauthorized-sentence claims as being "jurisdictional" allows those claims, in contravention of the text of Rule 32, to circumvent the grounds of preclusion set forth in Rule 32.2.

Because sentencing claims brought under Rule 32.1(c) are subject to preclusion and sentencing claims brought under Rule 32.1(b) are not, we should not ignore the text of Rule 32 and apply a not-subject-to-waiver-on-direct-appeal rule to a Rule 32 proceeding that eliminates any meaningful distinction between Rule 32.1(b) and Rule 32.1(c); rather, this Court should properly move toward categorizing sentencing claims as being either "jurisdictional" (Rule 32.1(b)) or "unauthorized" (Rule 32.1(c)).

Continuing to apply to Rule 32 proceedings the rule that all "[m]atters concerning unauthorized sentences are jurisdictional" creates absurd sentencing-claim scenarios that are deemed "jurisdictional," that entitle a petitioner to "relief," and that are not subject to the grounds of preclusion set forth in Rule 32.2. This case is an example of such an absurd scenario.

Specifically, as set out above, Hall has alleged that his sentence was "illegal" because the circuit court failed to impose on him a $1,000 demand-reduction assessment. To "cure" this error, Hall contends that he is entitled to the postconviction "relief" of being resentenced by the circuit court so that court could impose on him the demand-reduction assessment. In other words, Hall seeks to use Rule 32 to receive additional punishment from the circuit court. This is nonsense.[11]

It is not difficult to imagine other ridiculous scenarios. For example, imagine a Rule 32 petitioner who alleges that he was sentenced to 10 years' imprisonment for a conviction for a Class C felony. Imagine further that he claims that his 10-year sentence is "illegal" because, he says, he has three prior felony offenses for purposes of the Habitual Felony Offender Act ("the HFOA"); that the State invoked the HFOA and properly proved all three prior felony

[11]The dissenting opinion would remand this case to the circuit court to allow Hall an opportunity to prove his claim. If he proves his claim, the dissenting opinion says, the circuit court should impose on Hall the additional punishment he requests. This position, however, converts Rule 32 from a mechanism by which a defendant can obtain "relief" to a mechanism by which additional punishment can be imposed.

offenses at his sentencing hearing; and that the circuit court, although acknowledging the existence of the three prior felony offenses, did not sentence him under the HFOA. Because, he says, his sentence is "unauthorized" under the HFOA, and because "[m]atters concerning unauthorized sentences are jurisdictional," the circuit court must "grant" him postconviction "relief" and resentence him to a harsher sentence under the HFOA--up to, and including, life imprisonment. This simply is not "relief."

Like the writ of habeas corpus, Rule 32 exists as a possible key to "unlock the prison doors," see Barton v. City of Bessemer, 27 Ala. App. 413, 417-18, 173 So. 621, 625 (1936) (opinion on rehearing), rev'd on other grounds, 234 Ala. 20, 173 So. 626 (1937), not as a means to subject petitioners to additional or harsher punishment. In my opinion, the Court's decision today takes a necessary step toward correcting a longstanding error in our caselaw.

KELLUM, Judge, dissenting.

I cannot agree to overrule Siercks v. State, 154 So. 2d 1085 (Ala. Crim. App. 2013), and Hawk v. State, 171 So. 3d 96 (Ala. Crim. App. 2014).

The holding in Siercks, an opinion that I authored, and subsequently in Hawk was not based on the fact that § 13A-12-281, Ala. Code 1975, is written in mandatory terms[12] but (1) on the fact that § 13A-12-281 is a sentencing statute and it is well settled law that the imposition of a sentence outside the applicable statutory range of punishment, including the applicable statutory fine range, renders a sentence illegal, which is a jurisdictional defect, see generally Warwick v. State, 843 So. 2d 832, 834 (Ala. Crim. App. 2002) ("A trial court does not have jurisdiction to impose a sentence not provided for by statute."); see also Jackson v. State, 127 So. 3d 1251, 1257 (Ala. Crim. App. 2010) (holding that the failure to impose the fine in § 13A-12-231(13), Ala. Code 1975, renders a sentence illegal); and (2) on the more than two decades of caselaw from this Court treating the fine in § 13A-

[12]This Court held in Siercks that § 13A-12-281 was both mandatory and jurisdictional, not that § 13A-12-281 was jurisdictional because it was mandatory.

12-281 as a part of a criminal sentence so that the failure to impose the fine or the improper imposition of the fine renders a sentence illegal, constituting a jurisdictional defect.[13]

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[13]Although the majority today expressly overrules only Siercks and Hawk, it also is implicitly overruling the following cases, in which this Court treated the fine in § 13A-12-281 as jurisdictional either by sua sponte taking notice of the trial court's failure to impose the fine in § 13A-12-281 or of the trial court's improper imposition of the fine in § 13A-12-281, or by being alerted to the trial court's failure to impose the fine in § 13A-12-281 by the State, and remanding for the imposition, correction, or setting aside of the fine regardless of whether the issue of the fine had been raised by the State or by the defendant at the trial level: Sistrunk v. State, 109 So. 3d 205 (Ala. Crim. App. 2012); Hinkle v. State, 86 So. 3d 441 (Ala. Crim. App. 2011); Matthews v. State, 74 So. 3d 478 (Ala. Crim. App. 2011); Holloway v. State, 995 So. 2d 180 (Ala. Crim. App. 2008); Hollaway v. State, 979 So. 2d 839 (Ala. Crim. App. 2007) overruled on other grounds, Wells v. State, 93 So. 3d 155 (Ala. Crim. App. 2011); S.T.E. v. State, 954 So. 2d 604 (Ala. Crim. App. 2006); O'Callaghan v. State, 945 So. 2d 467 (Ala. Crim. App. 2006); Tinker v. State, 932 So. 2d 168 (Ala. Crim. App. 2005); Freeman v. State, 839 So. 2d 681 (Ala. Crim. App. 2002); Phelps v. State, 878 So. 2d 1202 (Ala. Crim. App. 2002); Kirkland v. State, 850 So. 2d 1259 (Ala. Crim. App. 2002); Poole v. State, 846 So. 2d 370 (Ala. Crim. App. 2001), overruled on other grounds, Ex parte Lightfoot, 152 So. 2d 445 (Ala. 2013); Spooney v. State, 844 So. 2d 615 (Ala. Crim. App. 2001); Harris v. State, 826 So. 2d 897 (Ala. Crim. App. 2000); Williams v. State, 794 So. 2d 441 (Ala. Crim. App. 2000); Ricketson v. State, 766 So. 2d 981 (Ala. Crim. App. 2000); Wooden v. State, 822 So. 2d 455 (Ala. Crim. App. 2000); Myrick v. State, 787 So. 2d 713 (Ala. Crim. App. 2000); Lewis v. State, 794 So. 2d 1241 (Ala. Crim. App. 2000); Bonner v. State, 835 So. 2d 234 (Ala. Crim. App. 2000); Stanberry v. State, 813 So. 2d 932 (Ala. Crim. App. 2000); Laster v. State, 747 So. 2d 359 (Ala. Crim. App. 1999); Davis v. State, 760 So.

Moreover, the majority's reliance on Ex parte Johnson, 669 So. 2d 205 (Ala. 1995), is misplaced because that case involved §§ 13A-12-250 and 13A-12-270, Ala. Code 1975, not § 13A-12-281.

2d 64 (Ala. Crim. App. 1999); Douglas v. State, 740 So. 2d 485 (Ala. Crim. App. 1999); Perry v. State, 741 So. 2d 467 (Ala. Crim. App. 1999); Forte v. State, 747 So. 2d 925 (Ala. Crim. App. 1999); Robinson v. State, 747 So. 2d 348 (Ala. Crim. App. 1999); Nix v. State, 747 So. 2d 351 (Ala. Crim. App. 1999); Glanton v. State, 748 So. 2d 224 (Ala. Crim. App. 1999); Arrington v. State, 757 So. 2d 484 (Ala. Crim. App. 1999); Wild v. State, 761 So. 2d 261 (Ala. Crim. App. 1999); McCart v. State, 765 So. 2d 21 (Ala. Crim. App. 1999); Pace v. State, 766 So. 2d 201 (Ala. Crim. App. 1999);Prince v. State, 736 So. 2d 1144 (Ala. Crim. App. 1999); Harris v. State, 741 So. 2d 1112 (Ala. Crim. App. 1999); Smith v. State, 766 So. 2d 185 (Ala. Crim. App. 1999); Palmer v. State, 745 So. 2d 920 (Ala. Crim. App. 1999); Garner v. State, 781 So. 2d 249 (Ala. Crim. App. 1998), aff'd in relevant part, rev'd on other grounds, 781 So. 2d 253 (Ala. 2000); Baxter v. State, 723 So. 2d 810 (Ala. Crim. App. 1998); Snell v. State, 715 So. 2d 920 (Ala. Crim. App. 1998); May v. State, 729 So. 2d 362 (Ala. Crim. App. 1998); Brown v. State, 712 So. 2d 1112 (Ala. Crim. App. 1997); Williams v. State, 706 So. 2d 821 (Ala. Crim. App. 1997); Woods v. State, 695 So. 2d 636 (Ala. Crim. App. 1996); Burks v. State, 689 So. 2d 997 (Ala. Crim. App. 1996); Clay v. State, 687 So. 2d 1245 (Ala. Crim. App. 1996); Ford v. State, 687 So. 2d 1258 (Ala. Crim. App. 1996); Webb v. State, 677 So. 2d 812 (Ala. Crim. App. 1995); Howell v. State, 677 So. 2d 806 (Ala. Crim. App. 1995); Miller v. State, 673 So. 2d 819 (Ala. Crim. App. 1995); and Hinton v. State, 673 So. 2d 817 (Ala. Crim. App. 1995). I also point out that in recent years this Court has opted to remand cases for the imposition of the fine in § 13A-12-281 by unpublished order and has done so in dozens, if not hundreds, of additional cases. See, e.g., Hinkle, supra at 444 (noting that the case had previously been remanded twice for imposition of the fine in § 13A-12-281, Ala. Code 1975, as well as the fine in § 36-18-7(a), Ala. Code 1975).

In his dissenting opinion in Steele v. State, 16 So. 3d 816 (Ala. Crim. App. 2008), Judge Shaw, now an Associate Justice on the Alabama Supreme Court, aptly explained:

> "Although Bradley Neal Steele pleaded guilty in this case to trafficking in marijuana, a violation of § 13A-12-231(1), Ala. Code 1975, pursuant to a plea agreement with the State, the mandatory fines in § 13A-12-281, Ala. Code 1975, and § 36-18-7(a), Ala. Code 1975, were not part of that agreement and were not imposed as part of his sentence. Ex parte Johnson, 669 So. 2d 205 (Ala. 1995), and Scott v. State, 742 So. 2d 799 (Ala. Crim. App. 1998), relied on by the majority in reaching its conclusion that this case should not be remanded for the imposition of the mandatory fines,[14] deal solely with the specific enforcement of a valid plea agreement calling for a legal sentence. In both of those

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[14]I recognize that the majority in this case does not rely on Scott v. State, 742 So. 2d 799 (Ala. Crim. App. 1998). Rather, the majority relies on Ex parte Johnson, 669 So. 2d 205 (Ala. 1995), and on a single passing sentence in a footnote in Durr v. State, 29 So. 3d 922 (Ala. Crim. App. 2009), an opinion I also authored for the Court, in which I cited Ex parte Johnson for the broad proposition that "the State may elect to forgo the application of mandatory fines and other enhancements -- including application of the Habitual Felony Offender Act." 29 So. 3d at 922 n.1. Upon further review of the opinion in Ex parte Johnson, however, it is abundantly clear that my inclusion of mandatory fines in my statement in Durr was an overly broad interpretation of Ex parte Johnson, a case in which the waivability of only the enhancements in §§ 13A-12-250 and 13A-12-270, Ala. Code 1975, was before the Alabama Supreme Court. The Court did not have before it in Ex parte Johnson any issue relating to any fines, including the fine in § 13A-12-281. In any event, the sentence in Durr was entirely dicta and, therefore, has no precedential value.

cases, the enhancements that were not part of the plea agreements -- §§ 13A-12-250 and 13A-12-270, Ala. Code 1975, in Ex parte Johnson, and § 13A-5-9, Ala. Code 1975 (the Habitual Felony Offender Act ('HFOA')), in Scott -- are not self-executing enhancements. The HFOA must be invoked before it is legally applicable to a sentence, see, e.g., Ex parte Williams, 510 So. 2d 135, 136 (Ala. 1987) ('[I]n order to sentence a criminal defendant under the Habitual Felony Offender Act, the Act must be invoked prior to the defendant's original sentencing.'), and the State must not only assert, but must properly prove the enhancements in §§ 13A-12-250 and 13A-12-270 before they are legally applicable to a sentence, see, e.g., White v. State, 4 So. 3d 1208 (Ala. Crim. App. 2008) (refusing to remand for imposition of the sentence enhancements in §§ 13A-12-250 and 13A-12-270 where, although the enhancements were charged in the indictment, the State did not include any facts in the factual basis for the pleas to support imposition of the enhancements). In Ex parte Johnson and Scott, the enhancements in §§ 13A-12-250 and 13A-12-270 and the HFOA were not included by the State in the plea agreements and, thus, were waived by the State and were not applicable to the sentences in those cases.[1]

"However, the fines in § 13A-12-281, Ala. Code 1975, and § 36-18-7(a), Ala. Code 1975, are self-executing, i.e., the State does not have to assert them before they are legally applicable to a sentence, and they have been treated by this Court as not only mandatory, but also jurisdictional, rendering a sentence illegal if they are not imposed. The Alabama Supreme Court did not hold in Ex parte Johnson, and this Court did not hold in Scott, that a defendant is entitled to specific enforcement of a plea agreement calling for an illegal sentence. Indeed, it appears that that particular issue has never been specifically addressed by the Alabama Supreme Court. However, this Court has held that '[a] trial court cannot

accept a plea agreement that calls for an illegal sentence.' Calloway v. State, 860 So. 2d 900, 906 (Ala. Crim. App. 2002) (opinion on return to remand and on second application for rehearing). See Moore v. State, 871 So. 2d 106 (Ala. Crim. App. 2003), and Austin v. State, 864 So. 2d 1115 (Ala. Crim. App. 2003). See also State v. Cortner, 893 So. 2d 1264, 1273 (Ala. Crim. App. 2004) ('[W]e cannot uphold [a trial court's] decision to order the specific performance of what is clearly an illegal agreement.'), and Warren v. State, 706 So. 2d 1316, 1317 n.3 (Ala. Crim. App. 1997) ('[A] defendant cannot consent to a sentence that is beyond the authority of the court.'). Although there is a split in authority in other jurisdictions as to whether specific performance of a plea agreement is the proper remedy for a defendant who pleads guilty pursuant to an agreement that calls for an illegal sentence, see, e.g., People v. Caban, 318 Ill.App.3d 1082, 743 N.E.2d 600, 252 Ill.Dec. 732 (2001), and State v. Parker, 334 Md. 576, 640 A.2d 1104 (1994), and the cases cited therein, it appears to me that the remedy in Alabama in a case in which the plea agreement is invalid because it calls for an illegal sentence is not specific performance, but to allow the defendant to withdraw his or her plea.

"Because the fines in § 13A-12-281 and § 36-18-7(a) are mandatory and jurisdictional, the sentence in this case is illegal, and this Court must take notice of that and remand the case for imposition of the fines. By not doing so -- and instead holding that Steele is entitled to specific enforcement of the plea agreement -- the majority is implicitly holding [in the present case, explicitly holding] that the failure to impose the fines in § 13A-12-281 and § 36-18-7(a) does not render a sentence illegal, i.e., that the fines are not jurisdictional and, thus, that this Court cannot, from this point forward, take notice of the failure of a trial court to impose them in any case. I cannot agree with that holding in light of this

> Court's previous treatment of the fines as jurisdictional. This Court should be consistent in its treatment of the fines. The fines are either jurisdictional or they are not. This Court has consistently treated the fines as jurisdictional in the past; thus, they must be treated as jurisdictional in this case. I would remand this case to the trial court for it to impose the fines and then to allow Steele an opportunity to withdraw his plea if he so chooses. Therefore, I respectfully dissent.
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> "_____
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> "[1]Of course, once the HFOA is invoked and it is clear from the record that the defendant has one or more prior convictions, the HFOA then becomes jurisdictional and this Court must take notice of the trial court's failure to apply it. See, e.g., Ingram v. State, 878 So. 2d 1208 (Ala. Crim. App. 2003) (where State gave notice of intent to invoke the HFOA and the record established that the defendant had at least five prior felony convictions, remand was required for trial court to resentence defendant under the HFOA). Likewise, once the State provides notice and properly proves the enhancements in §§ 13A-12-250 and 13A-12-270, they also become jurisdictional and this Court must take notice of the trial court's failure to apply them. See, e.g., Phelps v. State, 878 So. 2d 1202 (Ala. Crim. App. 2002) (once the State gave notice of its intent to seek enhancement under § 13A-12-250, Ala. Code 1975, and presented evidence of the applicability of the enhancement, remand was required for trial court to impose the enhancement)."

I agree with Judge Shaw's dissent in Steele.

I also question whether the majority's holding today conflicts with the Alabama Supreme Court's opinion in Pierson

v. State, 677 So. 2d 246 (Ala. 1995), which appears to have been the opinion that prompted this Court to treat the fine in § 13A-12-281 as a jurisdictional part of a criminal sentence. In Pierson, the defendant was convicted of the unlawful distribution of a controlled substance and was sentenced to 12 years' imprisonment. The trial court did not impose the fine in § 13A-12-281, and the State did not object or otherwise raise in the trial court any issue relating to the fine. Therefore, under the general rules of preservation and waiver, the State waived imposition of the fine. See, e.g., Ex parte Coulliette, 857 So. 2d 793, 794 (Ala. 2003) (noting that the rules of preservation and waiver restrict appellate review to questions and issues properly and timely raised at the trial level); and Ex parte Knox, [Ms. 1131207, June 26, 2015] ___ So. 3d ___ (Ala. 2015) (applying the rules of preservation and waiver to the State). Nonetheless, when the defendant appealed her conviction and sentence, the State argued for the first time in this Court that the fine in § 13A-12-281 was mandatory and that the trial court had erred in not imposing it, and the State requested that this Court remand the case for imposition of the fine. This Court first noted that the

State had not raised any issue relating to the fine at the trial level and then held that § 13A-12-281, although written in mandatory terms, was permissive. Pierson v. State, 677 So. 2d 242 (Ala. Crim. App. 1994). We declined the State's request to remand the cause for imposition of the fine, and we affirmed the trial court's judgment.

The State sought certiorari review, and the Alabama Supreme Court concluded that this Court had erred in holding that § 13A-12-281 was permissive and held "that the provisions of the Demand Reduction Assessment Act are mandatory." Pierson, 677 So. 2d at 247. However, instead of affirming this Court's judgment on the ground that the State had waived application of the fine in § 13A-12-281 by not raising the issue at the trial level, the Supreme Court reversed this Court's judgment and directed this Court to remand the case for imposition of the fine. At no point in its opinion in Pierson did the Alabama Supreme Court use the term "jurisdictional" or state that the failure to impose the fine in § 13A-12-281 rendered the defendant's sentence illegal. Nor did the Supreme Court state at any point in its opinion that the failure to impose the fine was nothing more than an

exception to preservation that could be raised for the first time on appeal but was not jurisdictional. The Supreme Court simply did not explain in its opinion why it was ordering imposition of the fine when the issue had been waived by the State. Therefore, because I cannot say with any degree of certainty whether Pierson stands for the proposition that the fine in § 13A-12-281 is jurisdictional and not waivable by the State, as this Court has interpreted that opinion for over two decades, or for the proposition that the failure to impose the fine is nothing more than an exception to preservation,[15] I must question whether the majority's holding today conflicts with Pierson.

In any event, since Pierson, the Alabama Supreme Court "has held that '"a challenge to an illegal sentence is

[15]Of note, however, is the fact that the Supreme Court's opinion in Pierson was released only a month after the Court's opinion in Ex parte Johnson, supra, in which the Court held that the sentencing enhancements in §§ 13A-12-250 and 13A-12-270 were waivable by the State. When it decided Pierson, then, the Supreme Court was keenly aware of the State's ability to waive the applicability of certain sentencing statutes, but it chose in Pierson to order imposition of the fine in § 13A-12-281 despite the State's waiver, which suggests to me that, contrary to the majority's holding today, the State cannot waive application of the fine in § 13A-12-281.

jurisdictional and can be raised at any time."'" Ex parte Jarrett, 89 So. 3d 730, 732 (Ala. 2011) (quoting Ex parte Batey, 958 So. 2d 339, 341 (Ala. 2006), quoting in turn Ginn v. State, 894 So. 2d 793, 796 (Ala. Crim. App. 2004)). That Court has specifically stated that "'a trial court does not have [subject-matter] jurisdiction to impose a sentence not provided for by statute.'" Ex parte Butler, 972 So. 2d 821, 825 (Ala. 2007) (quoting Hollis v. State, 845 So. 2d 5, 6 (Ala. Crim. App. 2002)). See also Ex parte Trawick, 972 So. 2d 782, 783 (Ala. 2007) ("Trawick's claim that his sentence is illegal under the HFOA presents a jurisdictional claim."). Although Judge Joiner in his special concurrence criticizes this Court's caselaw holding that a challenge to a sentence outside the applicable statutory range of punishment, i.e., to an illegal or unauthorized sentence,[16] is a jurisdictional claim under Rule 32.1(b), Ala. R. Crim. P., the propriety of this Court's caselaw is irrelevant because the Alabama Supreme Court has held the same. "This Court is bound by the

[16]An unauthorized sentence and an illegal sentence are synonymous. See Black's Law Dictionary 864, 1771 (10th ed. 2014) (defining "illegal" as "[f]orbidden by law" or "unlawful" and, in turn, defining "unlawful," in relevant part, as "[n]ot authorized by law").

decisions of the Alabama Supreme Court and has no authority to set aside those decisions." Wiggins v. State, [Ms. CR-08-1165, May 2, 2014] ___ So. 3d ___, ___ (Ala. Crim. App. 2014). See also § 12-3-16, Ala. Code 1975.

Judge Joiner also appears to question whether the caselaw holding that a challenge to an illegal sentence is jurisdictional survived the Alabama Supreme Court's decision in Ex parte Seymour, 946 So. 2d 536 (Ala. 2006). It has. In addition to the fact that all the above Supreme Court cases holding that an illegal-sentence claim is jurisdictional were issued after that Court's opinion in Ex parte Seymour, in Ex parte Batey, the Alabama Supreme Court specifically rejected the notion that Ex parte Seymour impacted the caselaw holding that a sentence outside the applicable statutory range of punishment is a jurisdictional defect, explaining:

> "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[, Ala. R. Crim. P.,] 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. Similarly, the Demand Reduction Assessment Act is a provision of the Alabama Code that specifically vests a court with the authority to enhance a sentence for certain convictions with an additional fine between $1,000 and $2,000; therefore, the court does not have the authority to impose a fine that exceeds the scope of that Act, i.e., to impose a fine less than $1,000 or more than $2,000, and a court would exceed its jurisdiction in doing so.

In this case, Kevin Brent Hall pleaded sufficient facts in his Rule 32, Ala. R. Crim. P., petition for postconviction relief indicating that the sentence imposed for his 1992 guilty-plea conviction for unlawful possession of a controlled substance was outside the applicable statutory range of punishment and, therefore, was illegal because the trial court did not impose the fine in § 13A-12-281. "It is well settled that a facially valid challenge to the legality of a sentence

presents a jurisdictional issue that can be raised at any time and that is not subject to the procedural bars of Rule 32.2, Ala. R. Crim. P." Brand v. State, 93 So. 3d 985, 994 (Ala. Crim. App. 2011). I would remand this case for the circuit court to give Hall an opportunity to prove the facts alleged in his petition and, if Hall proves by a preponderance of the evidence that the fine in § 13A-12-281 was not imposed, to grant Hall's Rule 32 petition for postconviction relief and to impose the fine in § 13A-12-281.[17] Therefore, I respectfully dissent.

Welch, J., concurs.

[17]Because the 10-year incarceration portion of Hall's sentence, which Hall does not challenge in his petition, was legal, it may not be changed. See Wood v. State, 602 So. 2d 1195 (Ala. Crim. App. 1992).