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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2014-2015

1130496

Ex parte John Alfred Harper

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: John Alfred Harper

v.

State of Alabama)

(Lee Circuit Court, CC-86-582; Court of Criminal Appeals, CR-12-0510)

MOORE, Chief Justice.

John Alfred Harper, an incarcerated inmate, petitioned this Court for a writ of certiorari to review the circuit court's denial of his latest motion for sentence reconsideration filed pursuant to § 13A-5-9.1, Ala. Code 1975 (repealed effective March 13, 2014, Act No. 2014-165, Ala. Acts 2014), and the Court of Criminal Appeals' affirmance of that denial. Section 13A-5-9.1 stated:

> "The provisions of Section 13A-5-9 shall be applied retroactively by the sentencing judge or, if the sentencing judge is no longer in office, by any circuit judge appointed by the presiding judge, for consideration of early parole of each nonviolent convicted offender based on evaluations performed by the Department of Corrections and approved by the Board of Pardons and Paroles and submitted to the court."

We granted Harper's petition; we reverse and remand.

I. Facts and Procedural History

On October 20, 1986, Harper was convicted of first-degree armed robbery--a Class A felony. Based upon that conviction and his prior felony convictions,[1] the Lee Circuit Court sentenced him as a habitual felony offender to what in 1986 was a mandatory sentence of life imprisonment without the

[1]Harper had been convicted of grand larceny in 1969, two counts of second-degree burglary in 1971, and second-degree burglary and grand larceny in 1972.

possibility of parole. See former § 13A-5-9(c)(3), Ala. Code 1975 (amended effective May 25, 2000), a subsection of the Habitual Felony Offender Act, § 13A-5-9, Ala. Code 1975 ("the HFOA").[2] In March 2012 Harper filed the most recent in a

[2]Before an amendment effective in 2000, subsection (c) of the HFOA read, in pertinent part:

> "(c) In all cases when it is shown that a criminal defendant has been previously convicted of any three felonies and after such convictions has committed another felony, he must be punished as follows:
>
> > "(1) On conviction of a Class C felony, he must be punished by imprisonment for life or for any term not more than 99 years but not less than 15 years.
> >
> > "(2) On conviction of a Class B felony, he must be punished for life in the penitentiary.
> >
> > "(3) On conviction of a Class A felony, he must be punished by imprisonment for life without parole."

(Emphasis added.) The HFOA was amended effective May 25, 2000; subsection (c) now reads:

> "(c) In all cases when it is shown that a criminal defendant has been previously convicted of any three felonies and after such convictions has committed another felony, he or she must be punished as follows:
>
> > "(1) On conviction of a Class C felony, he or she must be punished by

series of motions for sentence reconsideration pursuant to § 13A-5-9.1, Ala. Code 1975, and Kirby v. State, 899 So. 2d 968 (Ala. 2004)(discussing the constitutionality of § 13A-5-9.1 and the jurisdiction of circuit courts to hear motions filed pursuant to that Code section), often referred to as a "Kirby motion." The materials available for the circuit court to consider with Harper's motion included, among other things, the report from Harper's work supervisor stating that Harper

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> imprisonment for life or for any term of not more than 99 years but not less than 15 years.
>
> "(2) On conviction of a Class B felony, he or she must be punished by imprisonment for life or any term of not less than 20 years.
>
> "(3) On conviction of a Class A felony, where the defendant has no prior convictions for any Class A felony, he or she must be punished by imprisonment for life or life without the possibility of parole, in the discretion of the trial court.
>
> "(4) On conviction of a Class A felony, where the defendant has one or more prior convictions for any Class A felony, he or she must be punished by imprisonment for life without the possibility of parole."

(Emphasis added.)

is a "productive person" and a "diligent worker" who "displays a positive attitude," "is respectful of authority," "dedicates spare time to meditation and spiritual endeavors," and "encourages other inmates to self-improvement and discipline"; the fact that Harper assured the female clerk who was the object of the robbery that he was not going to hurt her, that he claims to have never touched her, and that he informed her before letting her go that he needed her to walk with him just so he could escape the crime scene; and Harper's certificates for completing, during his 28 years of imprisonment, multiple substance-abuse programs, multiple Alcoholics Anonymous programs, the Crime Bill Drug Treatment Program, multiple group-meditation programs, multiple Vipassana meditation courses, multiple sex-adjustment or sex-addicts-anonymous programs, and relapse-prevention and substance-abuse counseling. Despite this evidence of the numerous programs Harper completed during his incarceration, his courses of instruction by licensed psychologists, and his supervisor's report regarding his good work record, the circuit court denied Harper's motion on the sole ground that the underlying offense for which Harper had been sentenced was a violent

offense. The circuit court in an order dated November 13, 2012, quoted an earlier March 9, 2010, ruling on a previous Kirby motion filed by Harper:

> "'Regarding the original robbery offense [Harper] was convicted of, [Harper] concedes that he entered a local business on foot, abducted a female clerk at knifepoint and released her approximately two blocks from the store. This offense is obviously a violent offense pursuant to statutory authority and reasonable application of the meaning of "violent."'"

Harper appealed the denial of his most recent Kirby motion to the Court of Criminal Appeals, which affirmed the circuit court's order in an unpublished memorandum. Harper v. State (No. CR-12-0510, Dec. 13, 2013), ___ So. 3d ___ (Ala. Crim. App. 2013)(table). This petition, in which Harper alleged that the Court of Criminal Appeals' decision conflicts with Holt v. State, 960 So. 2d 726 (Ala. Crim. App. 2006), followed.

The circuit court's November 13, 2012, order denying Harper's motion and the Court of Criminal Appeals' unpublished memorandum affirming that denial recount incompletely the circuit court's order dated March 9, 2010, which notes Harper's concession that he "entered a local business on foot, abducted a female clerk at knifepoint and released her approximately two blocks from the store." This offense is

obviously a violent offense under the statute defining the offense and under a reasonable application of the meaning of the word "violent." However, neither the circuit court nor the Court of Criminal Appeals quoted the last sentence of the circuit court's March 9, 2010, order, which is essential to a determination in this case. The circuit court's order concludes with this sentence: "[Harper] has failed to submit any other factors which show that [Harper's] conduct in prison has not been violent." (Emphasis added.) This is a crucial omission because Harper, in his petition, asserts that the circuit court now refuses to consider his conduct during imprisonment. The last sentence of the circuit court's 2010 order ignores the relevant part of a prior order addressing Harper's failure to submit records of his conduct while in prison. In the Kirby motion before the court, Harper did exactly what the circuit court ordered him to do in 2010: He submitted evidence of his changed conduct while in prison, which both the circuit court and the Court of Criminal Appeals nevertheless refused to consider.

II. Standard of Review

Citing Kirby and Prestwood v. State, 915 So. 2d 580 (Ala. Crim. App. 2005), the State contends that "appellate courts review motions to reconsider sentences using an abuse of discretion standard." Although this Court will determine whether the circuit court has exceeded its discretion in ruling on a Kirby motion for sentence reconsideration based on the totality of the circumstances, see Holt v. State, 960 So. 2d 726, 738 (Ala. Crim. App. 2006), whether the circuit court's decision complies with a statute is a matter of law, and the decision is to be reviewed de novo where, as here, the facts are not in dispute. Christian v. Murray, 915 So. 2d 23, 25 (Ala. 2005)("Where the facts are not in dispute and we are presented with a pure question of law, ... this Court's review is de novo." (citing State v. American Tobacco Co., 772 So. 2d 417, 419 (Ala. 2000), Ex parte Graham, 702 So. 2d 1215, 1221 (Ala. 1997), and Beavers v. County of Walker, 645 So. 2d 1365, 1372 (Ala. 1994))). Therefore, we review de novo whether the circuit court's order denying Harper's Kirby motion complies with § 13A-5-9.1.

III. Analysis

Harper argues that the Court of Criminal Appeals' unpublished memorandum upholding the circuit court's order denying Harper's Kirby motion conflicts with Holt, in which that court quoted Kirby for the proposition that "whether an inmate is a 'nonviolent convicted offender' is based on the totality of the circumstances." 960 So. 2d at 738. Harper alleges that the circuit court refused to consider any of the factors or evidence he submitted to it, including his completion of rehabilitative programs and counseling courses and the facts and circumstances of his prior convictions. The State does not deny this but counters that the "instant record contained [Harper's] [Department of Corrections] records, and it cannot be presumed that the circuit court did not properly consider them." State's brief, at 5 (emphasis added). No presumption, however, is necessary: The State's position is belied by the language in the circuit court's order wrongfully asserting that a circuit court may "refuse to consider all factors presented to it by either party." Refusing to consider certain factors presented by Harper, the circuit court concluded that Harper was not a "nonviolent convicted

offender" only because he had been convicted of an offense that was statutorily defined as violent.

This Court "will presume that the circuit court properly considered and weighed each factor presented, unless the record affirmatively shows otherwise." Holt, 960 So. 2d at 738 (citing Prestwood v. State, 915 So. 2d at 583 (emphasis added)). Here the record affirmatively shows that the circuit court, although acknowledging that "[w]hether an inmate is a violent or nonviolent offender is based on the totality of the circumstances," nevertheless considered only a single circumstance: the statutory designation of Harper's underlying offense. The circuit court announced in its order that it could "refuse to consider" the very items § 13A-5-9.1 requires it to consider. See § 13A-5-9.1 ("The provisions of Section 13A-5-9 shall be applied retroactively ... for consideration of early parole of each nonviolent convicted offender based on evaluations performed by the Department of Corrections and approved by the Board of Pardons and Paroles and submitted to the court"(emphasis added)).[3]

[3]Harper's records are either certified by the Alabama Department of Corrections, signed by licensed psychologists employed by the Alabama Department of Corrections, signed by

The circuit court attributed to Holt the notion that circuit courts may "refuse to consider" factors presented to them by either party. Holt, however, held that "a circuit court is not precluded from considering, nor may it refuse to consider, all of the factors presented to it by either party." Holt, 960 So. 2d at 738. The circuit court's order, therefore, directly contradicts the holding of Holt. Moreover, the State did not present the circuit court with any evidence of misbehavior, misconduct, or violence on Harper's part while he was incarcerated; therefore, the State has waived any input as to Harper's conduct while incarcerated. Kirby, 899 So. 2d at 975 ("[I]f the [Department of Corrections] does not provide the evaluation in a timely fashion, the State will have waived any input as to the inmate's conduct while incarcerated that the sentencing judge or the presiding judge might otherwise

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the warden of the correctional facility in which Harper is imprisoned, or signed by a correctional officer employed by the Alabama Department of Corrections. The State has not argued that the Board of Pardons and Paroles did not approve these records; therefore, for the purposes of this petition for the writ of certiorari, that argument is waived. Waddell & Reed, Inc. v. United Investors Life Ins. Co., 875 So. 2d 1143, 1167 (Ala. 2003)("Issues not argued in a party's brief are waived.").

have considered in determining whether the inmate is a nonviolent offender.").[4]

Holt spoke only of what factors the circuit court may consider, i.e., what records, materials, and evidence may be submitted to the circuit court as part of the "circumstances" that must be considered in toto. Holt does not permit the circuit court to "refuse" to consider any factors; it instead requires the circuit court to consider "the totality of the circumstances," or "the totality of the information before the circuit court when it rules on the § 13A-5-9.1 motion." Holt, 960 So. 2d at 738. Holt concerned what records, materials, and evidence could be submitted to the circuit court for the purposes of a Kirby motion, not whether the circuit court was free to disregard the records, materials, and evidence already before it. Holt relied on the principle in Kirby that a "'factor in determining whether the inmate is a nonviolent offender ... should be a consideration of the inmate's conduct

[4]It appears that Harper, not the Department of Corrections, submitted the evaluations that appear in the record before us. This is permissible under § 13A-5-9.1, which refers to evaluations "submitted to the court" without limiting or restricting in any way which party may submit those evaluations.

while incarcerated, which knowledge is within the purview of the [Department of Corrections].'" Holt, 960 So. 2d at 733 (quoting Kirby, 899 So. 2d at 974 (emphasis added)).

Holt prohibits circuit courts from ruling on Kirby motions based solely on the statutory designation of the inmate's underlying offense:

> "[T]he statutory designation of an inmate's underlying offense as a 'violent offense' is certainly an important consideration in determining whether an inmate is a 'nonviolent convicted offender.' ... However, the statutory designation of an offense is not the only factor a circuit court may consider, and the fact that the inmate's underlying conviction was for an offense statutorily defined as a 'violent offense' does not preclude a court from considering other factors presented to it."

Holt, 960 So. 2d at 738. Taken in isolation, the phrase "may consider" might suggest that the circuit court has the option of not considering factors other than the statutory designation of the underlying offense, but it is clear that the Court of Criminal Appeals in Holt did not intend to authorize or validate what it characterized as "an erroneous interpretation of § 13A-5-9.1 and Kirby," namely, "that anyone convicted of an offense statutorily defined as a 'violent offense' is, as a matter of law, a 'violent offender' for the

purposes of § 13A-5-9.1, and, thus, ineligible for sentence reconsideration." Holt, 960 So. 2d at 740. See also Ex parte Gunn, 993 So. 2d 433, 434 (Ala. 2007)(noting the holding in Holt that "a trial court could not reject an application for sentence reconsideration under § 13A-5-9.1 solely on the basis that the underlying conviction was for a violent offense").

> "If the Alabama Supreme Court had construed § 13A-5-9.1 as a bright-line rule precluding any inmate who had been convicted of an offense statutorily defined as a 'violent offense' from sentence reconsideration, the Court would have instructed circuit courts to look no further than the statutory designation of the inmate's underlying offense."

Holt, 960 So. 2d at 737. The fact that one commits a violent offense or "crime of violence," as that term is defined in § 13A-11-70(2), Ala. Code 1975, does not forever prohibit one from being considered a "nonviolent convicted offender" for the purpose of § 13A-5-9.1. The plain language of § 13A-5-9.1 does not ask whether the crime the offender committed was a violent crime; rather, the statute asks whether the convicted offender is nonviolent.[5]

[5]As explained in a dissent in a similar case, Ex parte Gill, [Ms. 1130649, June 20, 2014] ___ So. 3d ___, ___ (Ala. 2014) (Moore, C.J., dissenting): "Although it is appropriate for a circuit court to consider whether the offense committed by an inmate seeking reconsideration of his or her sentence is

Whether Harper is a "nonviolent convicted offender" necessarily involves a multi-factor analysis.

> "[T]he state's trial judges have the authority under [§ 13A-5-9.1] to determine whether a defendant is a nonviolent offender and ... those judges are competent to make that determination based upon the nature of the defendant's underlying conviction, other factors brought before the judge in the record of the case, and information submitted to the judge by the [Department of Corrections] and the [Board of Pardons and Paroles] concerning the inmate's behavior while incarcerated. ... Section 13A-5-9.1 provides that the [Department of Corrections] will conduct an evaluation of the inmate's performance while incarcerated and submit its evaluation to the court so the judge can take that information into account in determining whether the inmate is eligible for reconsideration of his or her sentence."

Kirby, 899 So. 2d at 974 (emphasis added). Thus, any evaluations conducted by the Department of Corrections and submitted to the circuit court must be considered in determining an inmate's eligibility for sentence reconsideration under § 13A-5-9.1. Although the circuit court has the discretion to determine whether Harper is a "nonviolent convicted offender" for the purposes of § 13A-5-9.1, the circuit court may not "refuse to consider[] all

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statutorily defined as a 'violent offense,' this fact alone does not necessarily render an inmate a violent convicted offender."

of the factors presented to it by either party." Holt, 960 So. 2d at 738. Holt reversed the circuit court's order denying inmate William Buster Holt's Kirby motion because that denial "was based solely on the fact that Holt had been convicted of robbery in the first degree and that that crime is statutorily defined as a 'violent offense.'" Holt, 960 So. 2d at 738. Holt and Harper are thus similarly situated: their Kirby motions were both denied based solely on the statutory designation of their underlying offenses. Therefore, Harper is entitled to the same remedy that was offered Holt: a remand for the circuit court to consider his Kirby motion in light of the principles set forth in this opinion.

IV. Conclusion

Because the circuit court did not consider all the factors and evidence, including records of the Department of Corrections, that Harper presented with his Kirby motion, we conclude that the circuit court did not consider the totality of the circumstances. For the same reasons, the Court of Criminal Appeals erred in affirming the circuit court's order denying Harper's Kirby motion. We therefore reverse the Court of Criminal Appeals' judgment and direct that court to remand

the case to the circuit court for it to reconsider Harper's Kirby motion in conformity with this opinion and § 13A-5-9.1. We note in conclusion that the window for the review of Kirby motions has been closing since the repeal of § 13A-5-9.1, effective March 1, 2014. After 28 years of incarceration, Harper is faced with his last opportunity to take advantage of § 13A-5-9.1. He has done exactly what a previous court said he must do for reconsideration of his sentence as a current nonviolent convicted offender. Justice demands that he have an opportunity provided by that law for reconsideration of his sentence.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Murdock, J., concurs.

Parker and Bryan, JJ., and Lyons, Special Justice,* concur in the result.

Stuart, Bolin, Shaw, and Wise, JJ., dissent.

Main, J., recuses himself.**

*Retired Associate Justice Champ Lyons, Jr., was appointed to serve as a Special Justice in regard to this petition.

**Justice Main was a member of the Court of Criminal Appeals when that court considered this case.

BRYAN, Justice (concurring in the result).

In its judgment denying John Alfred Harper's motion filed pursuant to § 13A-5-9.1, Ala. Code 1975, and Kirby v. State, 899 So. 2d 968 (Ala. 2004), the circuit court incorrectly stated that it could refuse to consider factors presented to it. I would reverse its judgment and remand the case for the circuit court to clarify whether, in denying Harper's motion, it actually considered all the factors presented to it.

LYONS, Special Justice (concurring in the result).

John Alfred Harper had previously moved, pursuant to § 13A-5-9.1, Ala. Code 1975, for reconsideration of his sentence of life imprisonment without the possibility of parole but failed to present any evidence concerning his conduct while incarcerated. The circuit court, in denying relief in that earlier proceeding, noted that Harper had failed to offer any evidence showing that his conduct in prison was not violent. Order of March 9, 2010. In the instant proceeding Harper submitted substantial evidence to support his contention that his conduct in prison was not violent. In denying relief in this proceeding, the circuit court quoted from its earlier order in which it characterized the robbery offense that had triggered the sentence of life imprisonment without parole as "violent." The circuit court did not allude to the evidence of Harper's conduct while he was incarcerated.

In Holt v. State, 960 So. 2d 726, 738 (Ala. Crim. App. 2006), writ quashed, 960 So. 2d 740 (Ala. 2006), the Court of Criminal Appeals, citing Prestwood v. State, 915 So. 2d 580, 583 (Ala. Crim. App. 2005), observed: "[W]e will presume that the circuit court properly considered and weighed each factor

presented, unless the record affirmatively shows otherwise." The dissenting opinion, relying on this aspect of Holt, concludes that absent an affirmative showing of the circuit court's failure to consider Harper's postincarceration conduct, we must affirm.

The dissenting opinion is correct in its conclusion that the circuit court's order does not expressly state that it did not consider such evidence. However, the circuit court's order, as the dissenting opinion and main opinion both recognize, erroneously states that it had the prerogative to refuse to consider evidence submitted by Harper.

In Prestwood, the case relied upon in Holt for its rule of limited review, the defendant sought relief, pursuant to § 13A-5-9.1, from his sentence of concurrent terms of 20 years' imprisonment. The Court of Criminal Appeals affirmed the circuit court's denial of relief on the basis that § 13A-5-9.1 did not apply to a sentence other than a sentence of life imprisonment or life imprisonment without parole. In Prestwood, 915 So. 2d at 583, the Court of Criminal Appeals in dicta announced a prospective rule:

> "[T]his court's review of such orders [issued in proceedings brought pursuant to § 13A-5-9.1] will be

> limited. As long as the circuit court has jurisdiction to rule on a § 13A-5-9.1 motion; reviews any such motion that is properly filed by an inmate who is eligible for reconsideration; and, if it chooses to resentence a petitioner, imposes a sentence that is authorized by §§ 13A-5-9(c)(2) or 13A-5-9(c)(3), Ala. Code 1975, we will not second-guess that court's discretionary decision."

The heightened standard of an affirmative showing that each factor was not properly considered and weighed, not found in Prestwood, was introduced in Holt in reliance upon the above-quoted statement in dicta in Prestwood that the standard of review would be limited.

In Holt, the circuit court found that the underlying conviction of robbery in the first degree, standing alone, precluded the applicability of § 13A-5-9.1. Under those facts, the Court of Criminal Appeals reversed the judgment of the circuit court where it affirmatively appeared in the record that the circuit court had failed to consider evidence other than the nature of the underlying offense.

In this proceeding, it does not affirmatively appear that the circuit court rejected the proffered evidence of postincarceration conduct. However, as was the case in Holt, the circuit court, as previously noted, applied an incorrect standard of review, announcing, in an order silent on

postincarceration conduct and dealing solely with the nature of the underlying conviction, that it had the discretion to refuse to consider evidence presented to it.

The State, citing Williams v. State, 55 So. 3d 366, 377 (Ala. Crim. App. 2010), argues that it is well settled that "'"'[w]here the record is silent on appeal it is assumed that what ought to have been done was not only done but rightly done.'"'" (Quoting Johnson v. State, 823 So. 2d 1, 19 (Ala. Crim. App. 2001), quoting, in turn, other cases.) Here, as in Holt, the record reflects that the circuit court applied an incorrect standard; we therefore cannot presume that "what ought to have been done was not only done but rightly done."

I decline to read the rule announced in Holt as requiring an affirmative showing of the rejection of evidence. The court in Holt stated only: "[W]e will presume that the circuit court properly considered and weighed each factor presented unless the record affirmatively shows otherwise." 960 So. 2d at 738 (emphasis added). Here the record reflects that the circuit court did not properly consider and weigh each factor because it announced an improper standard by which it governed that process. Requiring an affirmative showing that the circuit

court applied its incorrect standard in a manner prejudicial to Harper is an unwarranted further contraction of the limited review announced in Holt.

The inference that the circuit court disregarded the evidence of Harper's postincarceration conduct is not susceptible to fair characterization as speculation; to the contrary, it is an entirely reasonable inference given the circuit court's failure to mention the evidence in its order denying relief. This record, therefore, affirmatively reflects the absence of proper consideration and weighing, and the circuit court's order is thus inconsistent with Holt.

STUART, Justice (dissenting)

I respectfully dissent from the conclusion in the main opinion that the record establishes affirmatively that the circuit court refused to consider the documents submitted by John Alfred Harper in support of his contention that he is a "nonviolent convicted offender" for purposes of sentence reconsideration pursuant to § 13A-5-9.1, Ala. Code 1975. Specifically, I believe that the holding that the circuit court's misstatement of the law in its discussion of the applicable law requires the conclusion that the circuit court "[r]efus[ed] to consider certain factors presented by Harper," ___ So. 3d at ___, is an assumption based on speculation that is not supported by the law or the record.

In its order the circuit court stated:

> "When reviewing a Kirby [v. State, 899 So. 2d 968 (Ala. 2004),] petition:
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> > "'[r]eading § 13A-5-9.1 in conjunction with § 13A-5-9, it is clear that a sentencing judge or presiding judge can resentence only two narrowly defined classes of habitual offenders: those who had been sentenced to life imprisonment without the possibility of parole under the mandatory provisions of the HFOA [Habitual Felony Offender Act] upon conviction of a Class A felony with no prior Class A felony convictions; and those who have been

> sentenced to life imprisonment under the mandatory provisions of the HFOA upon conviction of a Class B felony. Moreover, of those habitual offenders, the judge can resentence only those who are nonviolent offenders.'

"Ex parte Kirby, 899 So. 2d 968, 974 (Ala. 2004).

"To be eligible for sentence reconsideration under Ala. Code § 13-5-9.1 (1975),

> "'(1) the inmate was sentenced before May 25, 2000, the date the 2000 amendment to the HFOA became effective; (2) the inmate was sentenced to life imprisonment without the possibility of parole pursuant to § 13A-5-9(c)(3) and had no prior Class A felony convictions or was sentenced to life imprisonment pursuant to § 13A-5-9(c)(2), see Prestwood [v. State, 915 So. 2d 580 (Ala. Crim. App. 2005)]; and (3) the inmate is a "nonviolent convicted offender." An inmate must satisfy all three requirements before he or she is eligible for reconsideration of sentence under § 13A-5-9.1.'

"Holt v. State, 960 So. 2d 726, 734-35 (Ala. Crim. App. 2006).

"Regarding the determination of whether an inmate is a violent or nonviolent offender, Ala. Code § 13A-11-70 (1975) provides, in pertinent part:

> "'For the purpose of this division ["The Uniform Firearms Act"], the following terms shall have the respective meanings ascribed by this section:
>
> "'....

> "'(2) Crime of Violence. Any of the following crimes or an attempt to commit any of them, namely, murder, manslaughter, (except manslaughter arising out of the operation of a vehicle), rape, mayhem, assault with intent to rob, assault with intent to ravish, assault with intent to murder, robbery, burglary, kidnapping and larceny.'
>
> "The fact that crimes are listed in the aforementioned code section as violent does not bind a circuit court in determining whether an inmate is a violent or nonviolent convicted offender within the meaning of § 13A-5-9.1 but it is an important consideration in making that determination. 960 So. 2d 726. This court may consider or refuse to consider all factors presented to it by either party. Id. Whether an inmate is a violent or nonviolent offender is based on the totality of the circumstances. Id."

(Emphasis added.)

Unquestionably, the circuit court's statement that a "court may ... refuse to consider all factors presented to it by either party" is clearly a misstatement of the law. Holt v. State, 960 So. 2d 726, 738 (Ala. Crim. App. 2006), specifically states that,

> "[i]n determining whether an inmate is a 'nonviolent convicted offender' within the meaning of § 13A-5-9.1, a circuit court is not precluded from considering, nor may it refuse to consider, all of the factors presented to it by either party."

Therefore, the circuit court erred in stating that it could refuse to consider all the evidence submitted by the parties. However, this misstatement of the law does not mandate the conclusion reached by the main opinion that the circuit court did refuse to consider the evidence submitted by Harper.

The Court of Criminal Appeals set forth the requirements for determining whether an inmate is a violent or nonviolent offender in Holt, stating:

> "Of course, the statutory designation of an inmate's underlying offense as a 'violent offense' is certainly an important consideration in determining whether an inmate is a 'nonviolent convicted offender'; nothing in § 13A-5-9.1 or Kirby [v. State, 899 So. 2d 968 (Ala. 2004),] suggests otherwise. However, the statutory designation of an offense is not the only factor a circuit court may consider, and the fact that the inmate's underlying conviction was for an offense statutorily defined as a 'violent offense' does not preclude a circuit court from considering other factors presented to it, such as the facts and circumstances surrounding the underlying offense, the facts and circumstances surrounding the inmate's prior convictions, the inmate's prison record, and any 'other factors brought before the judge in the record of the case.' Kirby, 899 So. 2d at 974. In determining whether an inmate is a 'nonviolent convicted offender' within the meaning of § 13A-5-9.1, a circuit court is not precluded from considering, nor may it refuse to consider, all of the factors presented to it by either party. As Holt argued to the circuit court, and argues to this Court, and as the Alabama Supreme Court made clear in Kirby, whether an inmate is a

> 'nonviolent convicted offender' is based on the totality of the circumstances.
>
> "By totality of the circumstances, we mean the totality of the information before the circuit court when it rules on the § 13A-5-9.1 motion. A circuit court is not required to solicit additional information before ruling on such a motion. To the contrary, a circuit court may summarily deny a § 13A-5-9.1 motion without holding an evidentiary hearing or otherwise requiring the submission of additional evidence not before it as part of the pleadings, if it so chooses. Nothing in § 13A-5-9.1 or Kirby requires otherwise. In addition, in determining whether an inmate is a 'nonviolent convicted offender' within the meaning of § 13A-5-9.1, what weight to afford each factor presented to it is within the circuit court's discretion. A circuit court is not required to make specific findings of fact regarding the weight it affords each factor, and in reviewing a circuit court's determination of whether an inmate is a 'nonviolent convicted offender,' this Court will give the circuit court great deference regarding the weight it afforded the factors presented to it, and we will presume that the circuit court properly considered and weighed each factor presented, unless the record affirmatively shows otherwise. See, e.g., Prestwood [v. State], 915 So. 2d [580,] 583 [(Ala. Crim. App. 2005)](recognizing the limited appellate review of a motion filed under § 13A-5-9.1)."

960 So. 2d at 738 (emphasis added).

In light of the fact that the circuit court in its order recognized that it could consider each factor presented to it and of the law that the circuit court had discretion in determining what weight to afford each factor presented to it,

that the circuit court was not required to make specific findings of fact with regard to each factor, and that a reviewing court gives "great deference" to the circuit court with regard to the weight afforded the factors submitted, and the presumption by a reviewing court that the circuit court properly considered and weighed all the factors, I cannot conclude that the record affirmatively shows that the circuit court did not consider all the evidence presented to it. Contrary to the conclusion in the main opinion, it is just as likely that the circuit court did consider all the evidence presented to it, but, in accordance with Holt, discussed only the factor that it afforded the greatest weight and found to be determinative. It is important to recognize that the circuit court did not state in its order that it refused to consider all the evidence -- which would be an affirmative showing on the record; rather, a fair reading of the circuit court's order in light of the deference afforded the circuit court and the presumption that a circuit court will consider all the evidence presented to it establishes that the circuit court gave great weight to the violent nature of Harper's offense and little or no weight to Harper's conduct since his

incarceration. Based on the record before us, I cannot agree with the conclusion in the main opinion that the record affirmatively evidences that the circuit court's determination that Harper is not a "nonviolent convicted offender" was based solely on the statutory designation of his underlying offense.

Finally, this writing is not to be viewed as indicating that I have abandoned my belief as set forth in my dissents in Ex parte Jones, 953 So. 2d 1210, 1210 (Ala. 2006); and Holt v. State, 960 So. 2d 740, 744 (Ala. 2006). I adhere to those writings and maintain that as a matter of law a person convicted of a violent offense, as defined in § 13A-11-70, Ala. Code 1975, is a violent offender and is not eligible for sentence reconsideration, pursuant to § 13A-5-9.1, Ala. Code 1975.

For the foregoing reasons, I respectfully dissent.

Bolin and Wise, JJ., concur.