

Rel: 10/05/2007

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2007-2008

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Ex parte Matthew Wayne Tubbs

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS**

(In re: Matthew Wayne Tubbs

v.

State of Alabama)

**(Jefferson Circuit Court, CC-98-6436;
Court of Criminal Appeals, CR-06-0522)**

PARKER, Justice.

Matthew Wayne Tubbs has filed a petition for a writ of certiorari seeking review of the Court of Criminals Appeals' affirmance, in an unpublished memorandum, of the Jefferson

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Circuit Court's denial of his motion for sentence reconsideration under § 13A-5-9.1, Ala. Code 1975, which supplements § 13A-5-9, Ala. Code 1975, the Habitual Felony Offender Act. We hereby suspend the provisions of Rule 39(g) and (h), Ala. R. App. P., allowing the petitioner and the respondent to file a brief and to request oral argument, and we summarily grant the writ; we reverse and remand.

On August 31, 1999, Tubbs was convicted of first-degree robbery. On September 3, 1999, the circuit court sentenced him, as a habitual offender, to imprisonment for life without the possibility of parole. See § 13A-5-9(c)(3), Ala. Code 1975. On August 25, 2006, Tubbs filed a motion for reconsideration of his sentence pursuant to § 13A-5-9.1, Ala. Code 1975, and Kirby v. State, 899 So. 2d 968 (Ala. 2004) ("the Kirby motion"). The State responded, and the circuit court then summarily denied the Kirby motion.

Tubbs appealed the denial of the Kirby motion, and the Court of Criminal Appeals affirmed the circuit court's denial in an unpublished memorandum. Tubbs v. State (No. CR-06-0522, April 20, 2007), __ So. 2d __ (Ala. Crim. App. 2007) (table). In its unpublished memorandum, the Court of Criminal Appeals reasoned that Tubbs's Kirby motion was at least the second

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motion for sentence reconsideration that Tubbs had filed and was therefore due to be denied because the circuit court did not have jurisdiction to hear such a motion. Tubbs argues that his first Kirby motion was not fully adjudicated on its merits and, thus, that he has never had a full and fair review under the statute. Tubbs alleges that the decision of the Court of Criminal Appeals conflicts with this Court's decisions in Kirby and Ex parte Seymour, 946 So. 2d 536 (Ala. 2006).

This petition presents a Kirby resentencing issue like the one presented in Ex parte Gunn, [Ms. 1051754, Sept. 14, 2007] __ So. 2d __ (Ala. 2007). In Gunn, the Court of Criminal Appeals, in an unpublished memorandum, had held, as they did in this case, that under Wells v. State, 941 So. 2d 1008 (Ala. Crim. App. 2005), the circuit court does not have jurisdiction to consider a successive Kirby resentencing motion and affirmed the circuit court's dismissal of Gunn's petition. Gunn v. State (No. CR-05-1350, August 11, 2006), __ So. 2d __ (Ala. Crim. App. 2006) (table). This Court granted certiorari review in Gunn and overruled Wells v. State to the extent that Wells created a limitation on a circuit court's jurisdiction to consider successive Kirby motions, noting that Wells

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conflicts with Kirby and Ex parte Seymour. Ex parte Gunn, __ So. 2d at __.

The Court of Criminal Appeals relied solely on Wells in affirming the circuit court's judgment in this case. Therefore, in light of our decision in Gunn, we reverse the judgment of the Court of Criminal Appeals and remand this case to that court for proceedings consistent with Gunn.

WRIT GRANTED; REVERSED AND REMANDED.

See, Lyons, Woodall, Stuart, Smith, Bolin, and Murdock, JJ., concur.

Cobb, C.J., recuses herself.