STATE OF LOUISIANA	*	**NO. 2000-KA-1894**
VERSUS	*	**COURT OF APPEAL**
GARY P. JONES	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 410-448, SECTION "G"
Honorable Julian A. Parker, Judge

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JUDGE

JOAN BERNARD ARMSTRONG

* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Michael E. Kirby and Judge Terri F. Love)

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CONVICTION AFFIRMED.
SENTENCE VACATED
REMANDED FOR RESENTENCING.

The defendant, Gary P. Jones, was charged by bill of information on October 28, 1999, with distribution of cocaine, a violation of La. R.S. 40:967(A). At his arraignment on November 3, 1999 he pleaded not guilty. Probable cause was found and the motion to suppress the evidence was denied on November 12, 1999. A twelve-member jury found him guilty as charged after trial on April 6, 2000. The state filed a multiple bill, and after a hearing on September 22, 2000, the defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence as a third felony offender under La. R.S. 15:529.1. The defendant's motion for an appeal was granted.

At trial Sergeant Michael Glasser, who was working undercover while wearing plain clothes and driving an unmarked car, testified that about 11 p.m. on October 6, 1999, he was near the intersection of St. Ann and North Roman Streets when he observed the defendant standing on the corner. As the car approached the corner, the defendant gestured for him to stop and then walked to the passenger side where the sergeant was sitting. The

defendant said, “What do you need?” and the sergeant responded, “I’m looking for a dime.” The defendant then asked if the officer was a policeman, and the sergeant answered negatively; the defendant next asked for a ten-dollar bill and handed over his wallet as collateral. The wallet contained an LSU medical card in the name of Gary Jones. The defendant walked down North Roman Street to Orleans Avenue and turned right, and the officer lost sight of him for a few minutes. While the defendant was gone, the sergeant used the police radio to describe the defendant to his backup team. The defendant returned and again asked the sergeant if he was a policeman; when the sergeant said he was not, he received several loose pieces of a white rock substance. As the officer drove away, he alerted his backup team to the exact spot where the defendant was standing. He described the defendant as wearing a faded t-shirt, gray shorts and an ace bandage on his right leg.

Sergeant Cindy Scanlan, Officer Glasser’s partner, testified that she was driving the unmarked car on October 6, 1999, when her assignment was to drive to an area of high drug traffic. Sergeant Scanlan related the same facts as Officer Glasser. Additionally, she said that after they radioed their backup team that the transaction was completed and drove away, they returned to be sure that the right person was being arrested, and they saw

that the defendant had been detained by Officer Greenup.

Officer Randy Greenup testified that he was working as part of a "take down" team on October 6, 1999, in which Sergeants Glasser and Scanlan were serving in an undercover capacity. The officer was about one block from the undercover officers and in radio contact with them as they made their purchase. After receiving a radio message that the purchase was completed and a description of the man who sold the white substance, Officer Greenup drove into the area and arrested the defendant. While the officer was in the process of the arrest, Sergeants Scanlon and Glasser drove by, looked at the defendant and, over the radio, identified him as the man who sold them white rocks. The defendant was not in possession of any cocaine or any money when he was arrested.

The parties stipulated that the rocks purchased from the defendant were tested and proved to be crack cocaine.

Mr. Marvin Larry Cook, an investigator for the District Attorney's office, testified as to the chain of custody in handling the defendant's clothing. Mr. Cook picked up the defendant's clothing at parish prison on February 4, 2000, and transported it to the courthouse.

In his first assignment of error, the defendant argues that his sentence is excessive because his conduct and his criminal history do not merit a life

sentence. The defendant maintains that he was only a runner who went from the buyer to the distributor where he obtained the drug and then delivered it to the buyer. Furthermore, when arrested, the defendant did not have the ten-dollar bill he was given by the officers nor did he have any cocaine. Additionally, the thirty-eight year old defendant notes that his prior criminal history consists only of convictions in 1997 and 1998 for possession of cocaine.

The defendant was sentenced to life imprisonment pursuant to La. R.S. 15:529.1(A)(1)(b)(ii) which provides:

> (ii) If the third felony or either of the two prior felonies is a felony defined as a crime of violence under R.S. 14:2(13) or as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for more than five years or any other crime punishable by imprisonment for more than twelve years, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

The defendant's third conviction was for distribution of cocaine, a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for more than five years. Thus, defendant received the mandatory life sentence as a third felony habitual offender under La. R.S. 15:529.1(A)(1)(b)(ii).

In State v. Smith, 2000-0523 (La. App. 4 Cir. 12/20/00), 777 So.2d

584, this court recently considered an excessive sentence claim by a third felony offender sentenced under La. R.S. 15:529.1(A)(1)(b)(ii) and stated:

> Even though a sentence under the Habitual Offender Law is the minimum provided by that statute, the sentence may still be unconstitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, or is nothing more than the purposeful imposition of pain and suffering and is grossly out of proportion to the severity of the crime. State v. Johnson, 97-1906, pp. 6-7 (La. 3/4/98), 709 So.2d 672, 677; State v. Dorthey, 623 So.2d 1276, 1280-81 (La. 1993). However, the entire Habitual Offender Law has been held constitutional, and, thus, the minimum sentences it imposes upon habitual offenders are also presumed to be constitutional. Johnson, 97-1906, at pp. 5-6, 709 So.2d at 675; see also State v. Young, 94-1636, p. 5 (La. App. 4 Cir. 10/26/95), 663 So.2d 525, 527, writ denied, 95-3010 (La. 3/22/96), 669 So.2d 1223. There must be substantial evidence to rebut the presumption of constitutionality. State v. Francis, 96-2389, p. 7 (La. App. 4 Cir. 4/15/98), 715 So.2d 457, 461, writ denied, 98-2360 (La. 2/5/99), 737 So.2d 741.
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> Recently, the Louisiana Supreme Court in State v. Lindsey, 99-3256 (La. 10/17/00), 770 So.2d 339, mandated that the guidelines set forth in State v. Johnson, 97-1906 (La. 3/4/98), 709 So.2d 672, govern the review of mandatory minimum sentencing under an excessive sentence claim.
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> In Lindsey, the Court stated:
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>> "[a] court may only depart from the minimum sentence if it finds that there is clear and convincing evidence in the particular case before it which would rebut [the] presumption of constitutionality" and emphasized that "departures downward from the minimum sentence under the Habitual Offender Law should occur only in rare situations."
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> Id. at p. 5, 770 So.2d at 343. (quoting Johnson, 709 So.2d at 676-77).

The Court further stated that in departing from the mandatory minimum sentence, the court should examine whether the defendant has clearly and convincingly shown there are exceptional circumstances to warrant the departure:

> To rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must clearly and convincingly show that:
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> > [he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case.
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> Id., (quoting Johnson, 709 So.2d at 676 (citing State v. Young, 94-1636 at pp. 5-6 (La. App. 4 Cir. 10/26/95), 663 So.2d 525, 529 (Plotkin, J., concurrence)).
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> > [I]t is not the role of the sentencing court to question the wisdom of the Legislature in requiring enhanced punishments for multiple offenders. Instead, the sentencing court is only allowed to determine whether the particular defendant before it has proven that the mandatory minimum sentence is so excessive in his case that it violates our constitution.
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> Johnson, 709 So.2d at 677.
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> Under the Habitual Offender Law, a defendant with more than one felony conviction is treated as a recidivist who is to be punished for the instant crime in light of his continuing disregard for the law. Such a multiple offender is subjected to a longer sentence because he continues to break the law.

Smith, 2000-0523, p. 10-11, 777 So.2d at 589-590.

The defendant argues that neither his current crime of distribution of

ten dollars worth of cocaine nor his two possessions of cocaine convictions are serious enough to mandate a life sentence. The State did not submit a brief in this case, and the record is devoid of any evidence about the defendant except the fact of his prior offenses.

This court has recently considered several cases in which a fairly young defendant faced a mandatory life sentence pursuant to La. R.S. 15:529.1(A)(1)(b)(ii) or La. R.S. 15:529.1(A)(1)(c)(ii)—as third or fourth felony offenders—for distribution of a small amount of cocaine.

In State v. Burns, 97-1553 (La. App. 4 Cir. 11/10/98), p. 11, 723 So.2d 1013,1020, this court vacated the life sentence of a fourth felony habitual offender after finding that, on the facts pertaining to that defendant, it was "unable to conclude that this life sentence is not excessive under the constitutional standard." The defendant in Burns was observed by police selling one rock of crack cocaine to a third person, and when he was arrested, he was in possession of two more rocks and fifty-seven dollars. The defendant testified at trial that he was addicted to cocaine, and two of his prior convictions were for possession of cocaine. This Court looked at the fact that the defendant sold cocaine to support his habit and that—at twenty-five years old—he was young enough for rehabilitation. The defendant's strong family support system, the fact that he had never

possessed a dangerous weapon, and his non-violent history were factors contributing to the court's decision.

Similarly, in State v. Stevenson, 99-2824 (La. App. 4 Cir. 3/15/00), 757 So.2d 872, writ denied, 2000-1061 (La. 11/17/00), 773 So.2d 734, this court reversed the mandatory life sentence imposed upon a third-felony habitual offender, likening it to Burns. In Stevenson, the defendant was a thirty-eight year old mother convicted of distribution of one rock of crack cocaine, with prior convictions for felony theft and simple burglary of an inhabited dwelling. No drugs were found on her person after her arrest for distribution of the cocaine. The court noted that, like the defendant in Burns, she had no record of violent crimes, nor was there any evidence she had ever used a dangerous weapon. The court conceded that, unlike in Burns, the defendant in Stevenson did not testify that she was a drug addict, and no one testified in her behalf. However, this court noted that the trial court had ordered the defendant to report to a substance program, and inferred the possibility that she, like the defendant in Burns, was a drug addict who sold the cocaine to support her own habit. The court concluded by stating:

> In the case at bar, the life sentence imposed on this third offender may not be proportionate to the crime for which she was convicted, namely the selling of one rock of cocaine. Defendant does not have a violent history and does not appear to have significant ties to drug distributors. She may have been

> supporting a drug addiction with the transaction; she is fairly young, and she is a mother. It must be remembered that, if defendant does receive a life sentence, any hope for her rehabilitation will vanish, and "the taxpayers of the state [will have to] feed, house, and clothe [her] for life." State v. Hayes, 97-1526 (La. App. 1 Cir. 6/25/99), 739 So.2d 301, 303. On the other hand, it cannot be forgotten that defendant has had two prior chances to prove herself capable of rehabilitation and has failed. She deserves severe, but constitutional, punishment.
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> *On the record before us, we are unable to conclude either that defendant's mandatory life sentence is constitutional or that there is clear and convincing evidence to the contrary. Therefore, we vacate defendant's sentence and remand this case to the district court for a hearing at which defendant may present evidence that she is "exceptional ... a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case.*" State v. Young, 94-1636, pp. 5-6 (La. App. 4 Cir. 10/26/95), 663 So.2d 525, 528, writ denied, 95-3010 (La.3/22/96), 669 So.2d 1223 (Plotkin, J., concurring). The district court must also consider whether, in light of the evidence presented by defendant--and any countervailing evidence presented by the State--a mandatory life sentence, for this defendant, makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless and needless imposition of pain and suffering, and/or is grossly out of proportion to the severity of her crime. Lobato, supra. If defendant succeeds in carrying her burden, the district court, after carefully considering the evidence before it, shall use its great discretion to sentence her to the longest sentence that is not constitutionally excessive, i.e. to the maximum constitutional sentence. Randall, 741 So.2d at 860. (Italics added).

99-2824 at pp. 6-7, 757 So.2d at 875-76.

In Stevenson, the court found that the scant record evidence suggested that the mandatory life sentence might be unconstitutionally excessive, but

because the evidence was insufficient to resolve the issue definitively, the court vacated the sentence and remanded the case to allow the defendant the opportunity to do what she did not do at the habitual offender hearing—prove by clear and convincing evidence that the mandatory minimum sentence under the Habitual Offender Law is unconstitutionally excessive as applied to her.

More recently in State v. Briscoe, 99-1841 (La. App. 4 Cir. 1/17/01), 779 So.2d 30, this Court followed the decision in State v. Stevenson; in Briscoe a thirty-two year old defendant sentenced to life imprisonment on a drug offense presented no mitigating evidence. No one testified on this defendant's behalf as to his having any redeeming virtues, and he did not admit to being a cocaine addict. Additionally, there was no evidence that the defendant had ever been arrested for a violent crime or had ever illegally used a weapon.

In the instant case, the defendant's situation is similar to those of the defendants in Stevenson and Briscoe. The three felonies committed by the defendant in Stevenson were distribution of cocaine, felony theft and simple burglary of an inhabited dwelling; in Briscoe, the three felonies were possession with intent to distribute cocaine, possession of cocaine, and attempted possession of cocaine; in this case, the crimes are distribution of

cocaine and two convictions for possession of cocaine. Additionally, although there is no specific information about the defendant in the record, it appears that the thirty-eight year old defendant has no history of violent crime or of illegal use of a weapon, and for the first thirty-five years of his life he seems to have no criminal record.

Following Stevenson and Briscoe, we find that the record suggests that the defendant is a drug addict who might not be deserving of the minimum mandatory life sentence provided by La. R.S. 15:529.1 (A)(1)(b)(ii). However, the record we have does not provide enough evidence about him for a conclusion as to the constitutionality of the life sentence in this case. Therefore, we vacate the defendant's sentence and remand this case for a hearing at which he may attempt to show by clear and convincing evidence that the mandatory sentence is unconstitutionally excessive as applied to him.

In a second assignment of error, the defendant argues that the Habitual Offender Law is unconstitutional based on an U.S. Supreme Court decision "yet to issue" which will hold multiple offender statutes unconstitutional. Because the defendant's sentence is vacated, we decline to consider the second assignment of error.

For the foregoing reasons, we affirm the defendant's conviction. We

vacate his sentence and remand this case for resentencing.

CONVICTION AFFIRMED.
SENTENCE VACATED
REMANDED FOR RESENTENCING.