NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2012-KA-0785**
VERSUS	*	
		COURT OF APPEAL
CARL D. HALL	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 400-281, SECTION "G"
Honorable Julian A. Parker, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Terri F. Love, Judge Madeleine M. Landrieu)

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FEBRUARY 27, 2013

AFFIRMED

Defendant, Carl D. Hall, appeals the trial court's judgment to resentence him to life imprisonment at hard labor, without benefit of parole, based on defendant's 2000 conviction for possession of cocaine and his adjudication as a third multiple offender. For the reasons that follow, we affirm the sentence.

STATEMENT OF CASE

On July 30, 1998, Defendant, Carl Hall ("Defendant"), was charged by bill of information with possession of cocaine in violation of La. R.S. 40:967(C)(2). The matter proceeded to jury trial on December 9, 1999, and at the conclusion of trial, the jury returned a verdict of guilty as charged. The trial court then sentenced Defendant to ninety days, to run concurrently with credit for time served.

In March of 2000, the State filed a multiple offender bill of information charging Defendant as a third felony offender. The bill of information alleged that in addition to his conviction for possession of cocaine on December 9, 1999, Defendant previously pled guilty to attempted armed robbery and attempted murder on July 19, 1992, and three counts of aggravated battery on November 11, 1993. Following a multiple bill hearing, on April 24, 2000, the trial court adjudicated Defendant a triple offender. On August 17, 2000, Defendant was

sentenced to life imprisonment without benefit of probation, parole, or suspension of sentence under La. R.S. 15:529.1(A)(1)(b)(ii).[1] *Id*.

As a result of the sentence imposed, Defendant orally moved to reconsider his sentence and for appeal. On April 24, 2002, this Court affirmed the conviction and multiple offender adjudication, but did not consider his excessive sentence claim because the trial court had not ruled on Defendant's motion for reconsideration of his sentence.[2] This Court did not specifically instruct the trial court to rule on Defendant's outstanding motion; and as a result, the trial court did not reconsider Defendant's sentence.[3]

In 2009, Defendant filed a motion to correct an illegal sentence and a motion to reconsider sentence. The trial court denied Defendant's motions.[4] At the hearing, counsel for Defendant orally noted his intent to appeal, however, failed to file a written motion as requested by the trial court.

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[1] At the time of the offense, La. R.S. 15:529.1(A)(1)(b)(ii) mandated a life sentence without benefits for a third felony offender when either one of the two prior felony convictions is a felony defined as a crime of violence under La. R.S. 14:2(13), as were both of Defendant's prior felony convictions. *See*, La. R.S. 14:2(B)(2),(5),(21)(listing attempted murder, aggravated battery, and attempted armed robbery as "crimes of violence"). La. R.S. 15:529.l provided in pertinent part:

> A. (1) Any person who, after having been convicted within this state of a felony ... thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows:
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> * * *
>
> (b)(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.

[2] *State v. Hall*, unpub., 2001-1471 (La. App. 4 Cir. 4/24/02), 817 So.2d 514.

[3] On May, 27, 2003, Defendant filed an application for post-conviction relief, which the trial court denied on April 1, 2005.

[4] At the hearing on the motion to reconsider, defense counsel urged the trial court to impose a lesser sentence in light of the changes made to La. R.S. 15:529.1. Before denying the motion, the district court stated:

> The sentence, as it was written on the day in question, required a mandatory life sentence. The sentence has been modified by legislature to make the sentencing range no less than twenty years, and no more than life. So even under today's law, he would still be eligible for a life sentence at the discretion of the court. However, this court applied the law as it applied on the date in question.

Thereafter, Defendant filed a *pro se* application for post-conviction relief alleging that counsel was ineffective for failing to file a written motion for an appeal. The trial court denied Defendant's *pro se* application and Defendant filed a writ application with this Court. We granted Defendant's writ application, reversed the trial court's denial of post-conviction relief, and ordered the trial court to grant Defendant an appeal of his life sentence.[5] On remand, the trial court granted Defendant an appeal.

On appeal, Defendant argued that the life sentence imposed by the trial court on August 17, 2000 and in reconsideration on June 4, 2010, was excessive, particularly in light of the amendments made to La. R.S. 15:529.1, which no longer mandate a life sentence. This Court vacated Defendant's sentence and remanded the case for resentencing in order to afford Defendant the opportunity to prove that the mandatory life sentence of hard labor for possession of cocaine as a third felony offender, under La. R.S. 15:529.1(A)(1)(b)(ii), was unconstitutionally excessive as applied to him.[6]

The State filed an application for supervisory review of this Court's ruling with the Louisiana Supreme Court. While the State's writ application was pending, the trial court held a hearing to reconsider Defendant's sentence. The trial court again sentenced Defendant to life imprisonment at hard labor without benefit of probation or parole, with credit for time served.

Thereafter, Defendant filed the present motion for appeal and the State dismissed its writ application filed with the Louisiana Supreme Court.

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[5] *State v. Hall*, unpub., 2010-0720 (La. App. 4 Cir. 6/4/10).

[6] *State v. Hall*, 2010-1516, pp. 4-5 (La. App. 4 Cir. 4/18/11), 64 So.3d 339, 342 (noting that under *State v. Dorthey*, 623 So.2d 1276 (La.1993), a trial court can consider the legislative policy behind the amendments to La. R.S. 15:529.1, find a mandatory minimum sentence under the Habitual Offender Law to be constitutionally excessive, and impose a lesser sentence).

STATEMENT OF FACT

The facts of this offense are not relevant to the adjudication of the issues before the Court.

DISCUSSION

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, Defendant argues that the trial court had no jurisdiction to resentence him while the State's writ application was pending. Defendant cites La. C.Cr.P. art. 916 and *State v. West,* 578 So.2d 1016 (La. App. 4 Cir. 1991) to support this contention. However, his reliance is misplaced as both La. C.Cr.P. art. 916 and *West* support that the trial court did in fact have jurisdiction to sentence Defendant.

La. C.Cr.P. art. 916 provides:

> The jurisdiction of the trial court is divested and that of the appellate court attaches upon the entering of the order of appeal. Thereafter, the trial court has no jurisdiction to take any action except as otherwise provided by law and to:
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> (1) Extend the return day of the appeal, the time for filing assignments of error, or the time for filing per curiam comments in accordance with Articles 844 and 919.
>
> (2) Correct an error or deficiency in the record.
>
> **(3) Correct an illegal sentence or take other appropriate action pursuant to a properly made or filed motion to reconsider sentence.**
>
> (4) Take all action concerning bail permitted by Title VIII.
>
> (5) Furnish per curiam comments.
>
> (6) Render an interlocutory order or a definitive judgment concerning a ministerial matter not in controversy on appeal.
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> (7) Impose the penalty provided by Article 844.
>
> **(8) Sentence the defendant pursuant to a conviction under the Habitual Offender Law as set forth in R.S. 15:529.1.** [Emphasis added].

La. C.Cr.P. art. 916 divests the trial court of jurisdiction only after an order of appeal has been entered. However, contrary to Defendant's position, it does not specifically divest the trial court of jurisdiction when a writ is sought with an appellate court. *See State v. Mire*, 09-922, p. 11-12 (La. App. 5 Cir. 6/29/10), 44 So. 3d 300, 306 (seeking of a writ in the appellate court does not divest the district court of jurisdiction to further act in the matter; if no stay is granted as authorized by the Uniform Rules, proceedings in the district court may continue, even despite pending writs). Moreover, as referenced hereinabove, La. C.Cr.P. art. 916 provides exceptions wherein the trial court retains even after the entering of the order of appeal.

We acknowledge that in *West*, supra, this Court found that the trial court lacked jurisdiction to sentence the defendant where the defendant's application for writ of certiorari regarding his conviction and sentence was pending before the Louisiana Supreme Court. However, the facts of the present case are distinguishable. The *West* defendant was found guilty of forcible rape and sentenced to twenty years at hard labor. In determining that the trial court lacked jurisdiction to sentence the defendant on remand, while his writ was pending before the Louisiana Supreme Court, we found that none of the exceptions set forth in La. C.Cr.P. art. 916 applied as the defendant's original sentence was within the statutory limits and thus, was not "illegal;" and the resentencing had nothing to do with the Habitual Offender Law. *West* at 1017 (*citing* La. C.Cr.P. art. 916(3), (8)).

In contrast, the present defendant case was previously adjudicated a multiple offender under La. R.S. 15:529.1. Based on that adjudication, La. C.Cr.P. art. 916(8) specifically vested jurisdiction in the trial court to sentence Defendant as a

habitual offender, despite a pending appeal. *See*, *State v. Harris*, 532 So.2d 441,442-443 (La. App. 1 Cir. 1988). As such, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER 2

In his second assignment of error, Defendant contends that the trial court erred in limiting the amount of mitigating evidence Defendant was allowed to present at the hearing.

At the resentencing hearing, Defendant called Ivan Williams ("Mr. Williams"), tenant counsel of the Fischer Housing Development, Defendant's wife, Shirlene Hall ("Mrs. Hall"), and Defendant's son, Jarmal Martin. Upon the State's objection, the trial court prohibited Mr. Williams from testifying about a specific incident involving Defendant as a young man and refused to allow Mrs. Hall to respond to defense counsel's question about what kind of husband Defendant was prior to imprisonment. The trial court also instructed defense counsel several times that evidence of Defendant's character must be limited to general reputation in the community and could not include individual acts of kindness or good deeds.

Defendant alleges that by refusing to permit the defense's character witnesses to testify about Defendant's specific acts of kindness, the trial court prevented him from establishing that a life sentence was excessive under the circumstances. The State counters that the trial court's ruling was proper because such character evidence is not admissible under the Code of Evidence.

The State properly argues that, in general, evidence of a person's character or a trait of his character is inadmissible at trial for the purpose of proving he acted in conformity therewith on a particular occasion. La. C.E. art. 404(A). Additionally, when character evidence is admissible, under the limited exceptions set forth in La. C.E. art. 404, proof of character may be made by testimony as to

general reputation only. La. C.E. art. 405(A). A character witness may not give his opinion of the defendant's character and may not discuss specific acts or his personal observations of the defendant on direct-examination. *Id*.; *see also*, *State v. Lee*, 331 So. 2d 455, 461 (La. 1975) ("character evidence is established by general reputation, not by specific acts").

However, in sentencing a defendant, trial courts are not bound to consider evidence only admissible at trial under the Rules of Evidence. *See*, *State v. Williams*, 412 So.2d 1327, 1328, n. 1 (La. 1982) (stating that in determining an appropriate sentence a trial court is not subject to the normal restrictions imposed in the guilt determination phase of the proceedings). In fact, although a previous conviction may not be allowed into evidence to prove a defendant is a bad person in the case in chief, prior criminal activity is a proper factor for a trial judge to consider at the sentencing phase under La. C.Cr.P. art. 894.1.

La. C.Cr.P. art. 894.1 provides guidelines for sentencing and lists several non-exclusive factors for a court to evaluate in determining the appropriate sentence to be imposed. These factors include the defendant's personal history (age, family ties, marital status, health, and employment record), prior criminal record, the seriousness of the offense and the likelihood of rehabilitation. La. C.Cr.P. art. 894.1(B). The article also provides for consideration of "any other relevant" aggravating or mitigating circumstances. La.C.Cr.P art. 894.1(B)(21),(33). It does not confine the trial court to consider evidence which is only admissible at trial.

Further, as noted by Defendant, it is well established that, "[t]he sources of information from which a sentencing court may draw are extensive, and traditional rules of evidence are not bars to consideration otherwise relevant information."

State v. Moss, 2008-1079, p. 27 (La. App. 4 Cir. 7/22/09), 17 So.3d 441, 457 (*quoting State v. Washington*, 414 So.2d 313, 315 (La.1982))*; see also, State v. Scoggins*, 2010-0869, p. 20 (La. App. 4 Cir. 6/17/11), 70 So.3d 145, 157. Thus, the trial judge was not required to follow the evidentiary rules in sentencing Defendant.

Nevertheless, despite the trial court's exclusion of certain testimony from defense witnesses, the record demonstrates that Defendant was able to present mitigating evidence by eliciting testimony from his wife that Defendant's criminal behavior was due to his poor upbringing and that Defendant had familial support.

The trial court, after advising Mrs. Hall to limit her testimony to Defendant's character, allowed her to testify that "[Defendant] is a loving husband [and] a good father" and that they have lots of plans for when he gets home, including purchasing a home. Mrs. Hall further stated that Defendant was previously "caught up" in the environment of the neighborhood where he grew up, but that Defendant had turned his life around. Mrs. Hall also pleaded for the trial judge to "give [Defendant] another chance to be a citizen. A good citizen and come home."

The trial court also permitted Defendant's son, Jarmal Martin, to testify, over the State's objection, about his relationship with Defendant. Jarmal stated that:

> He [Defendant] was always fun. Always was there when I needed him. Showed me how to be a man when I ... visited him, when he was incarcerated ... Showed me … how you [have] to earn respect to get respect. He always showed me to be a leader, not a follower. Stay out the crowd, be your own man. Have your own mind. And everything he said, I took heed. [I] [t]ook it to heart. Helped me get out of high school.

Additionally, as will be discussed further herein, the record reveals that the trial court reviewed two presentencing reports, prepared by the Office of Probation and Parole in 2000 and in 2011, prior to sentencing Defendant. The presentencing reports established that Defendant obtained his GED and earned several tutoring certificates while incarcerated. The presentencing reports also provided the trial court with a statement from Defendant, explaining the underlying offense, as well his social history. Defendant was not prevented from introducing mitigating evidence. We therefore conclude that Defendant was given the opportunity to prove that a life sentence was unconstitutionally excessive as to him.

Defendant also argues in this assignment of error that the trial court erred in disregarding the recent legislative changes to the Habitual Offender Law, La. R.S. 15:529.1. Under the Habitual Offender Law, if a person is convicted of a felony, then subsequently commits another felony, the punishment for the subsequent conviction may be enhanced. *See*, La. R.S. 15:529.1. The precise ranges of possible penalties are set out by the statute and depend upon the nature of the offense and the number of previous convictions.

At the time Defendant committed the instant offense, La. R.S. 15:529.1(A)(1)(b)(ii) provided a life sentence without benefit of parole, probation, or suspension of sentence for a third felony offender if the third felony or **either** of the two prior felony convictions was a crime of violence under La. R.S. 14:2(13) or a violation of the Uniform Controlled Dangerous Substances Law, punishable by more than five years. La. R.S. 15:529.l provided in pertinent part:

> A. (1) Any person who, after having been convicted within this state of a felony ... thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows:

* * *

> (b) If the third felony is such that upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life then:
>
> (i) The person shall be sentenced to imprisonment for a determinate term not less than two-thirds of the longest possible sentence for the conviction and not more than twice the longest possible sentence prescribed for a first conviction; or
>
> (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**. [Emphasis added].

Here, because both of Defendant's prior felony convictions (attempted armed robbery and attempted first degree murder in 1992, as well as his conviction of aggravated battery in 1993) constitute crimes of violence, the mandatory sentence for Defendant as triple offender under La. R.S. 15:529.1(A)(1)(b)(ii) was life imprisonment without benefits. *See*, La. R.S. 14:2(B)(2),(5),(21).[7] The trial court imposed the sentence provided for in this section when it originally

[7]La. R.S. 14:2(B) provides in relevant part:

> In this Code, "crime of violence" means an offense that has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, and that, by its very nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense or an offense that involves the possession or use of a dangerous weapon. The following enumerated offenses and attempts to commit any of them are included as "crimes of violence":
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> ***
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> (2) First degree murder
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> ***
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> (5) Aggravated battery
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> ***
>
> (21) Armed robbery

sentenced Defendant as a third felony offender in 2000, on Defendant's motion to reconsider in 2009, and on remand in 2011.

Currently, La. R.S. 15:529.1 provides that a life sentence as a third offender is mandatory only where the third offense and the two prior offenses are felonies defined as a crime of violence or constitute a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for more than ten years. *See*, La. R.S. 15:529.1(A)(3)(b). Otherwise, a third felony offender would be exposed to a sentence of not less than two-thirds of the maximum sentence and not more than twice the maximum sentence as a first offender. *See*, La. R.S. 15:529.1(A)(3)(a).

Under the current law, because Defendant's third felony offense is possession of cocaine and punishable by "imprisonment with or without hard labor for not more than five years," the maximum sentence for Defendant is ten years, or twice the maximum for a first offender. *See*, La. R.S. 15:529.l(A)(3)(a); La. R.S. 40:967(C)(2).

Although the applicable habitual offender provisions are those in effect on the date the defendant committed the underlying offense, the trial court can and should consider the amended statute and the legislative policy behind the amendments in determining whether the mandatory minimum sentence was constitutionally excessive as provided for in *State v. Dorthey*, 623 So.2d 1276 (La. 1993). In *Dorthey*, the Louisiana Supreme Court held that in certain instances a sentence less than the minimum sentence mandated by the Habitual Offender Law might be permitted where the punishment is constitutionally excessive. The Supreme Court opined that a sentence is constitutionally excessive if it "makes no measurable contribution to acceptable goals of punishment," is nothing more than

"the purposeful imposition of pain and suffering," and "is grossly out of proportion to the severity of the crime." *Id.* at 1280-1281.

As referenced herein, on Defendant's prior appeal, this Court vacated the life sentence imposed by the trial court in 2009 and remanded for resentencing in part because it found that the trial court misunderstood the current sentencing range for possession of cocaine[8] and because the trial court mistakenly believed it did not have discretion to sentence Defendant to a sentence less than life in prison.[9] The opinion also remanded the case to give Defendant a chance to prove a life sentence in light of the amendments of La. R.S. 15:529.1 was excessive under *Dorthey*. The decision stated in part:

> **The district court clearly misstated the sentencing range. La. R.S. 15:529.1(A)(1)(b)(ii) currently provides for a maximum sentence of ten years under the circumstances of this case. Also, it does not appear that the district court felt that it had the discretion to impose a sentence other than life**. It simply noted that the law in affect at the time required a mandatory life sentence. **Thus, under the reasoning in *Wilson*, we remand this case to afford appellant the opportunity to prove that the mandatory minimum sentence is unconstitutionally excessive as applied to him**. **We do not mean to suggest, however, that the Court below must necessarily impose a lesser sentence**. *Compare State v. Williams*, 2005–0176 (La. App. 4 Cir. 5/3/06),

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[8] At the June 4, 2009 hearing on the Defendant's motion to reconsider sentence, prior to denying the motion, the trial court stated:

> The sentence, as it was written on the day in question, required a mandatory life sentence. The sentence has been modified by legislature to make the sentencing range no less than twenty years, and no more than life. So even under today's law, he would still be eligible for a life sentence at the discretion of the court. However, this court applied the law as it applied on the date in question.

See also, *Hall*, 2010-1516, p. 5, 64 So.3d 339, 342.

[9] The prior record indicates that when the trial court sentenced Defendant as a multiple offender on August 17, 2000, it stated:

> Your [defense counsel's] plea doesn't fall on deaf ears; however, I believe that the law is clear I have very little if no discretion because this conviction for drugs with possession of drugs I must impose the following: I sentence Mr. Hall to the remainder of your life in the custody of the Department of Corrections with credit for time served without benefit of probation or parole or suspension of the sentence.

> 932 So.2d 693, where the defendant sought a reduction of his sentence in light of the amendments made to La. R.S. 15:529.1. This court found no abuse of the district court's discretion in imposing the mandatory life sentence, noting that the district court considered the defendant's evidence in support of a lesser sentence but chose to base its decision on the presentence investigation that showed the defendant had an extensive criminal history. [Emphasis added].

Hall, 2010-1516, pp. 5-6, 64 So. 3d 339, 342-343.

On remand, however, the trial court again seemed to question whether the current Habitual Offender Law provides a minimum sentence of forty months and the maximum of ten years for Defendant under La. R.S. 15:529.l(A)(3)(a). Nevertheless, the trial court advised that it would consider the possibility of a ten year sentence for Defendant under La. R.S. 15:529.1(A)(3)(a) as a factor in sentencing Defendant under *Dorthey*. The trial court advised:

> This court has considered Dor[]the[y] as it relates to this case and respectfully rejects it. This Court has considered the mitigating circumstances as well as all other evidence and the pre-sentence investigations and I do not find that these sentences are unconstitutionally excessive. And I want to make it clear to the Fourth Circuit and any other viewing court that I fully understand and comprehend Louisiana Revised Statute 15:529.1 as it applied then and now. But that this court feels this it is in the best interest of society and this defendant to receive the sentence as originally imposed.

Thus, the record shows that at the time of Defendant's resentencing, the trial court did in fact take into consideration the recent legislative amendments of La. R.S. 15:529.1 prior to imposing Defendant's life sentence. As such, Defendant's argument that the trial court ignored the recent amendments to the Habitual Offender Law has no merit.

ASSIGNMENT OF ERROR NUMBER 3

In his third assignment of error, Defendant contends that the trial court imposed an unconstitutionally excessive sentence. The standard for review of a claim that a mandatory sentence imposed under La. R.S. 15:529.1 is excessive is well-settled and was set forth recently by this Court on appeal in *Hall*, 2010-1516, 64 So.3d 339. The opinion 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, 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. 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. **To rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must show by clear and convincing evidence that he is exceptional, which in this context means that because of unusual circumstances he 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 cas**e. *State v. Lindsey*, 99–3256, p. 5 La.10/17/00), 770 So.2d 339, 343; Johnson, 97–1906, p. 8, 709 So.2d at 677. "Departures downward from the minimum sentence under the Habitual Offender Law should occur only in rare situations." *Id*. [Emphasis added].

Hall, 2010-1516, pp. 3-4, 64 So.3d at 341-42 (*quoting State v. Rice*, 2001–0215, pp. 5–6 (La. App. 4 Cir. 1/16/02), 807 So.2d 350, 354).

The trial judge is vested with broad discretion in sentencing because the trial judge is in the best position to assess the aggravating and mitigating circumstances present in each case. *State v. Wilson*, 2001-2815, pp. 3-4 (La. 11/22/02), 836 So. 2d 2, 4. Thus, on appellate review of sentence, the only relevant question is whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate. *State v. Cook*, 95-2784, p. 3 (La.5/31/96), 674 So.2d 957, 959 (*quoting State v. Humphrey*, 445 So.2d 1155, 1165 (La.1984)). For legal sentences imposed within the range provided by the legislature, a trial court abuses its discretion only when it contravenes the prohibition of excessive punishment in La. Const. art. I, § 20, i.e., when it imposes "punishment disproportionate to the offense." *State v. Soraparu*, 97-1027 (La. 10/13/97), 703 So. 2d 608 (*quoting State v. Sepulvado*, 367 So.2d 762, 767 (La. 1979)).

Defendant argues that a life sentence without parole is disproportionate to the crime of possession of cocaine, particularly due to the fact that the maximum penalty for the offense under the current law is ten years. *See*, La. R.S. 15:529.1(A)(3)(a). Defendant relies on *State v. Jarreau*, 2005-0355 (La. App. 4 Cir. 12/14/05), 921 So.2d 155, to support this contention.

In *Jarreau*, the defendant was convicted of possession of cocaine and adjudicated a third felony offender due to his prior felony convictions for second degree battery and possession of an unregistered firearm. Subsequently, because one of his prior felony convictions (second degree battery) was a crime of violence, the trial court sentenced the defendant to life in prison, as required under La. R.S. 15:529.1 at the time and date that the defendant committed the third offense. On appeal, the Fourth Circuit stated:

> Based on the record before us, we find that the sentence imposed upon Mr. Jarreau at the age of fifty makes no measurable contribution to acceptable goals of punishment. It appears from the face of the record that the life sentence is grossly out of proportion to the severity of the crime and the harm to society that it caused. Additionally, Mr. Jarreau would have faced a maximum of ten years in prison under the current Habitual Offender Law, and we find that on the face of the record, the sentence that he received could be shocking to the conscience when this fact is considered.

Jarreau, 2005-0355, p. 15, 921 So. 2d at 164. However, the *Jarreau* Court did not ultimately reverse the trial court on this ground alone. Instead, this Court vacated the defendant's sentence and remanded the case with orders to the trial court to order a presentence investigation and to determine whether the minimum sentence available to the defendant as a third offender would be excessive in his case. *Id*. at p. 16, 921 So.2d at 164-165.[10]

Additionally, *Jarreau* is distinguishable from the present case because Defendant's prior convictions are substantially more serious than the defendant's convictions in *Jarreau*. As noted earlier, both of Defendant's prior convictions (attempted armed robbery and attempted murder in 1992; aggravated battery in 1993) constitute crimes of violence. Also the record reveals that although he pled guilty to three counts of aggravated battery in 1993, he was initially charged with three counts of attempted murder. Further, the *Jarreau* Court did not have a presentence report and thus had no information about the defendant's propensity for violence and his amenability to rehabilitation to determine whether the sentence received by was, in fact, excessive. *Jarreau*, 2005-0355, p. 15, 921 So.2d at 164. Here, however, the trial court reviewed two pre-sentencing reports, which revealed Defendant's extensive criminal history, including an arrest for aggravated rape

when he was just ten years old. The presentence investigations also revealed that he was arrested as a juvenile for negligent injuring, criminal trespass, receiving stolen things, simple burglary, simple battery, and simple burglary of a vehicle. *Id*. As an adult, in addition to the aforementioned felony convictions and the instant offense, Defendant was arrested for criminal trespass, aggravated assault, resisting an officer, simple robbery, armed robbery, battery of a police officer, possession of stolen property in excess of $500.00, interfering with an officer, extortion, first degree murder during a crime, distribution of and possession of crack cocaine, possession of marijuana, simple assault, and for being a felon in possession of a firearm. The presentencing reports also showed that parole for Defendant's prior convictions was revoked several times as a result of his "absconding of supervision" and additional arrests. Further, both the 2000 and 2011 presentencing reports concluded that due to Defendant's prior violent offenses, he was not eligible for the supervised probation/parole program.

Defendant further claims that there are several mitigating factors, such as his strong family ties, that weigh in favor of his release or an imposition of a lesser sentence. Defendant states that the testimony of his wife and son indicates that he would return to a stable home environment. Defendant further notes that he has obtained his GED and completed programs on substance abuse and anger management in prison.

The record reflects, however, that the trial court did consider this mitigating evidence presented by Defendant and contained in the pre-sentencing report, but found the mitigating factors unpersuasive in light of Defendant's extensive

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[10] On remand, the trial court sentenced the defendant for ten years, which was subsequently affirmed by this Court in *State v. Jarreau*, 2007-1052, pp. 8-9 (La. App. 4 Cir. 3/26/08), 982 So.2d 876, 880-881.

criminal record (which included twenty three arrests, numerous crimes against a person, and two convictions for crimes of violence) and the likelihood of recidivism. In fact, the record shows that Defendant was arrested five times since his arrest for the instant offense of possession of cocaine. Three of the fives arrests involved violent offenses against a person. *Id*. The trial court also reviewed a statement of Defendant in the pre-sentencing report, but found it "disappointing" that after all these years, Defendant still had not been willing to take responsibility for the drugs he had on his person on July 14, 1998 and still blamed others for his problems. The trial court also took into account the recommendations of the probation and parole officer, Kenneth Temple, who conducted the presentence investigation. Officer Temple referenced Defendant's long history of violent offenses, which began at age ten when was arrested for aggravated rape, and a history of drug abuse which began at fifteen. The officer further concluded that Defendant had a "very limited work history, which suggests that he was supporting himself through illegal means." Additionally, the record shows that when Defendant was placed on parole for his prior felony convictions, he continued to engaged in criminal behavior and violate the terms of parole by absconding supervision. Defendant's failure to take advantage of the opportunities given him previously convinced the trial court that he was not a good candidate for supervised parole. Based on the foregoing, the trial court had an adequate factual basis for imposing a life sentence without parole for third felony offender.

Moreover, Defendant has failed to show that the mandatory life sentence set forth in La. R.S. 15: 529.1(A)(1)(b)(ii) was unconstitutionally excessive as to him. Because a life sentence for a third offender is statutorily provided for under the Habitual Offender Law and presumed constitutional, Defendant had to prove by

clear and convincing evidence that 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." *Hall*, 2010-1516, p. 3, 64 So.3d at 341 (*citing Rice*, 2001-0215, pp. 5-6, 807 So.2d at 354)); *see also, Johnson*, 97–1906, p. 8, 709 So.2d at 677. In determining whether a defendant has met this burden of proof, the trial judge must keep in mind the goals of the Habitual Offender Law, which are "to deter and punish recidivism." *Johnson*, 97-1906, p. 8, 709 So.2d at 677.

Defendant did not meet his burden on remand. Instead, the record suggests that Defendant is the type of offender that the Habitual Offender Statute intends to punish so severely. The presentencing reports reveal numerous arrests and several convictions for violent crimes. The fact that Defendant's last felony for possession of cocaine was non-violent does not qualify as an "unusual circumstance" that would support a downward departure. Further, the record shows that when Defendant was on supervised parole for his prior felonies, he failed to take advantage of this opportunity and continued to commit both violent and non-violent offenses. This behavior demonstrates a continuing disregard for the law and little chance of rehabilitation. As such, the goals of the Habitual Offender Statute, to deter and punish recidivism, are satisfied by imposing a life sentence against Defendant. Accordingly, we find that the trial court did not abuse its vast discretion in sentencing Defendant as a third felony offender to life in prison, without benefit of parole.

ASSIGNMENT OF ERROR NUMBER 4

Lastly, Defendant urges this Court to remand for resentencing before a different judge. Defendant cites *State v. Donaldson*, 98-1015 (La. App. 4 Cir. 1/6/99), 726 So.2d 1003 for authority. That case was remanded to a different section of the trial court for resentencing when the trial judge continually refused to comply with both the Fourth Circuit and the Supreme Court's orders on resentencing. The *Donaldson* Court stated, in part:

> The history of this case indicates that at the original multiple bill hearing, an illegal sentence was imposed. When the Supreme Court ordered the trial court to comply with the sentencing guidelines, the trial court did not comply. When this Court ordered the trial court to comply with State v. Husband, the court did not comply.3 Therefore, because the trial court in Section B refuses to reconsider the defendant's sentence in the terms suggested by the Supreme Court and then by this Court, the case is to be remanded to a different section of Criminal District Court when the defendant is resentenced as a multiple offender

98-1015, p. 2, 726 So.2d at 1005.

Here, although the trial court has sentenced Defendant three separate times, and the case has been before this Court several times, the issues on appeal were not all the same. The only time this Court actually considered the life sentence imposed by the trial court was in April of 2011. At that point, this Court first instructed the trial judge that he had discretion in sentencing and was not compelled to abide by the law applicable at the time of Defendant's offense, and thus was not required to sentence Defendant to life. *See*, La. R.S. 15:529.1(A)(1)(b)(ii). It further advised the trial court that, as per *Dorthey*, to consider the legislative amendment to La. R.S. 15:529.1 in resentencing Defendant. As a result, the case was remanded for rehearing in order for

Defendant to have the opportunity to prove that a life sentence in light of the legislative amendment was excessive as applied to him.

The record indicates that at most, there may have been some question as to whether the trial judge misunderstood this Court's directives and the mandatory sentencing guidelines as they related to Defendant's possession of cocaine offense and his multiple offender adjudication. Notwithstanding, however, Defendant produced no evidence to support that the trial judge intentionally failed to comply with any of this Court's orders. In fact, our review of the record reveals that the trial court actually complied with this Court's order to give Defendant the opportunity to prove that his sentence was unconstitutional as it applied to him. Accordingly, Defendant's request that this matter be reassigned to another trial judge is without merit.

CONCLUSION

Based on the foregoing reasons, the life sentence imposed by the trial court is affirmed.

AFFIRMED