STATE OF LOUISIANA	*	**NO. 2015-KA-1113**
VERSUS	*	**COURT OF APPEAL**
FRANCIS X. ROSS, JR.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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LOBRANO, J., CONCURS IN PART, DISSENTS IN PART, AND ASSIGNS REASONS.

I respectfully concur in the result of the majority's affirmation of Defendant's convictions. However, I dissent from the majority's finding that Defendant's sentences should be vacated for excessiveness. I find that the district court did not abuse its discretion in determining that Defendant did not meet his burden of proving that he is exceptional[1] such that he is one of the rare individuals whose circumstances warrant a downward departure. As a result, I would affirm Defendant's sentences.

Unlike some other cases this Court has recently decided,[2] in the case *sub judice*, Defendant received a full downward departure hearing. Following the hearing, the district court, considering factors found in La. C.Cr.P. art. 894.1, determined that Defendant should receive the mandatory minimum, two concurrent sentences of twenty years. Given that the district court followed the proper procedure for a downward departure hearing,[3] the issue before this Court is not

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[1] *See State v. Lindsey,* 99-3302, p. 5 (La. 10/17/00), 770 So.2d 339, 343.

[2] *See, e.g., State v. Ellis,* 2014-1170 (La. App. 4 Cir. 3/2/16), 190 So.3d 354; *State v. Dowell,* 2016-0371, (La. App. 4 Cir. 8/10/16), 198 So.3d 243.

[3] *See Ellis,* 2014-1170 at p. 39, 190 So.3d at 378; *Dowell,* 2016-0371 at p. 5, 198 So.3d at 249-50 (internal citations omitted).

whether we agree that Defendant is not exceptional, but whether the district court abused its discretion in determining that Defendant is not exceptional. *See State v. Kisack*, 2015-0083 (La. App. 4 Cir. 3/30/16), 190 So. 3d 806, 812 (stating "[a] trial judge has broad discretion when imposing a sentence and an appellate court may not set aside a sentence absent a *manifest abuse of discretion*") (emphasis added); *see also State v. Green,* 2010-0008, pp. 8-9 (La. App. 4 Cir. 11/17/10), 52 So. 3d 253, 258-59 (discussing the district court's discretion in deciding a downward departure motion filed by a multiple offender).

The majority makes a finding that Defendant "has demonstrated by clear and convincing evidence that his is a rare and exceptional case, which warrants downward departure" with no explanation as to why it finds that the district court abused its discretion in reaching the opposite conclusion. Instead, the majority focuses its analysis on whether it is *fair* to sentence an individual who has never been incarcerated to the mandatory minimum the Habitual Offender Law, La. R.S. 15:529.1, sets out for quadruple offenders. I respectfully caution the majority that sentences under the Habitual Offender Law are presumed constitutional, *State v. Johnson,* 97-1906, pp. 5-6 (La. 03/04/98), 709 So.2d 672, 675, and further, that 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. The district court acts within its discretion to depart from the mandatory minimum when it finds that a defendant is "exceptional." *State v. Lindsey,* 99-3302, p. 5 (La. 10/17/00), 770 So.2d 339, 343. To overturn a district court's determination that the mandatory minimum under the Habitual Offender Law is appropriate, when the record before this Court reveals that the district court held a proper downward departure hearing and did not reach its decision in an arbitrary manner,[4] renders

[4] *Boudreaux v. Bollinger Shipyard*, 2015-1345, p.16 (La. App. 4 Cir. 6/22/16), 197 So.3d 761, 771 (stating "[a]n abuse of discretion generally results from a conclusion reached capriciously or

sentencing discretion meaningless. Thus, I would affirm the sentences of the district court.

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in an arbitrary manner. 'Arbitrary or capricious' means the absence of a rational basis for the action taken.") (internal citations omitted).