STATE OF LOUISIANA	*	**NO. 2016-KA-0259**
VERSUS	*	**COURT OF APPEAL**
WALTER JOHNSON	*	**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 conviction. However, I respectfully dissent from the majority's finding that Defendant's mandatory life sentence without the benefit of probation, parole, or suspension of sentence under La. R.S. 15:529.1(A)(4)(b) (a quadruple offender mandatory life sentence) is *per se* excessive. I would remand the case for an adequate downward departure hearing. Then, if the Defendant meets his burden of establishing that he is exceptional, I would order the district court to resentence Defendant to the longest sentence that would not be unconstitutionally excessive.

"Legislation is a solemn expression of legislative will." La. C.C. art. 2. As the solemn expression of the legislative will, if an enactment provides a solution to a particular situation, then no jurisprudence, equity, or doctrine prevails over legislation. *Duckworth v. Louisiana Farm Bureau Mut. Ins. Co*., 2011-2835, p. 12 (La. 11/2/12), 125 So.3d 1057-1064. Further, a "sentencing judge must always start with the presumption that a mandatory minimum sentence under the Habitual Offender Law is constitutional." *State v. Johnson*, 97–1906 (La.1998), 709 So.2d 672, 676 (internal citations omitted).

While the majority is correct that a sentence's legality does not ensure its constitutionality, in the face of such a clear expression of legislative will, I find it is not proper to undo the consequences of La. R.S. 15:529.1 given the record before this Court. As the majority makes clear, the record needs development, and without knowledge of what that development may reveal, I cannot determine that Defendant should receive a downward departure.

As I wrote in *State v. Ellis*, 2014-1170, p. 25 (La. App. 4 Cir. 3/2/16), 190 So.3d 354, 370, our task when reviewing sentences for excessiveness begins with a determination that the district court considered the sentencing criteria set forth in La. C.Cr.P. art. 894.1.[1] Only after a determination that the district court considered the La. C.Cr.P. art. 894.1. factors, or that the sentence is "fully supported" by the record, should we determine whether the punishment imposed violates La. Const. art. I, § 20. *Id., see also State v. Burns,* 97-1553, (La. App. 4 Cir. 11/10/98), 723 So.2d 1013, 1018 ("In reviewing a sentence for excessiveness, the appellate court must first determine whether the trial court complied with La. C.Cr.P. art. 894.1 when it imposed the sentence and then determine whether the sentence is too sever given the circumstances of the case and the defendant's background."). This ensures that due consideration is given to the record in its entirety when taking the extreme step of determining that a legislatively mandated sentence is unconstitutional. When the district court fails to hold a full and meaningful hearing on Defendant's motion for downward departure, and the record is too insufficiently developed, this Court cannot determine whether a downward departure is

[1] It should be noted that when sentencing a defendant under La. R.S. 15:529.1, consideration of the La. C.Cr.P. art. 894.1 sentencing factors is not normally required. It is the filing of a downward departure motion that triggers the consideration of these factors for a multiple offender. This distinction comes not from the text of La. C.Cr.P. art. 894.1 itself, but has been judicially adopted. *See State v. Mosby,* 2014-2704, p. 2 (La. 11/20/15), 180 So.3d 1274 (citing La. C.Cr.P. art. 894.1 when remanding a case for resentencing after a determination of excessiveness). *See also State v. Burns,* 97-1553, (La. App. 4 Cir. 11/10/98), 723 So.2d 1013, 1018; *Ellis*, 2014-1170 at p. 39, 190 So.3d at 378 (finding that after a downward departure motion, the La. C.Cr.P. art. 894.1 factors should be considered); *State v. Dowell*, 2016-0371, p. 5 (La. App. 4 Cir. 8/10/16), 198 So.3d 243, 249-250.

warranted. *State v. Dowell*, 2016-0371, p. 5 (La. App. 4 Cir. 8/10/16), 198 So.3d 243, 249-250 (citing *Ellis*, 2014-1170 at p. 37, 190 So.3d at 378).

This two part test serves a dual purpose. First, it ensures that defendants have the opportunity to present all evidence they desire this Court to consider before this Court binds itself to a determination that a sentence is excessive or not. Secondly, it ensures that society is protected from the possibility that an appellate court, operating based on a cold and incomplete record, will release or reduce the sentence of a proven recidivist without knowledge of important facts that may affect the safety of the community.

I find that the majority failed to follow the jurisprudence of this Court in *State v. Ellis* and *State v. Dowell* by determining Defendant is entitled to a downward departure based on what it admits is an incomplete record. Because this Court is unable to make a determination that the district court adequately considered the sentencing criteria set forth in La. C.Cr.P. art. 894.1 or that the sentence is fully supported by the record, I would remand the case for an adequate downward departure hearing, including a pre-sentencing investigation, and instruct the district court to consider the factors set forth in La. C.Cr.P. art. 894.1. In determining whether Defendant is "exceptional" so as to warrant a downward departure, the district court should view the evidence with due consideration for the "heightened scrutiny" required when considering whether to impose a life sentence upon Defendant. *Ellis,* 2014-1170 at p. 28, 190 So.3d at 372. If Defendant meets his burden of establishing that he is "exceptional," the district court should resentence Defendant to the "longest sentence that would not be constitutionally excessive and should state for the record its considerations in sentencing and the factual basis therefore." *Id.,* 2014-1170 at p. 39, 190 So.3d at 378.