Judgment rendered November 21, 2012
Application for rehearing may be filed
within the delay allowed by Art. 922,
La. C.Cr.P.

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On Remand

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No. 46,039-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

STATE OF LOUISIANA Appellee

versus

LARRY JOHN THOMPSON Appellant

* * * * *

On Remand from the
Louisiana Supreme Court

Originally Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court No. 270417

Honorable Craig O. Marcotte, Judge

* * * * *

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Before STEWART, CARAWAY, DREW, MOORE and LOLLEY, JJ.

MOORE, J., concurs and assigns written reasons.
STEWART, J., dissents and assigns written reasons.

CARAWAY, J.

This case is before us on remand from the Louisiana Supreme Court to address the issue of the excessiveness of Thompson's life sentence. See *State v. Thompson,* 11-0915 (La. 5/8/12), 93 So. 3d 553. The facts of this case concerning defendant's arrest and conviction of the crime of possession with intent to distribute a Schedule II Controlled Dangerous Substance can be found in our earlier opinion of *State v. Thompson,* 46,039 (La. App. 2d Cir. 2/23/11), 58 So. 3d 994.

Excessive Sentence

Thompson received a mandatory life sentence plus a $3,000 fine after his adjudication as a fourth felony offender. Subsequent to his sentencing, he filed a motion to reconsider the sentence on the grounds that his "actions were not violent and no one else was involved or in any danger whatsoever." The motion was denied. On appeal, he makes the sole assertion that the life sentence is excessive "for this fourth offender who was not convicted of a violent crime." Thompson argues that he received no consideration for his guilty plea and suggests that his "complaint to internal affairs" "contributed to the harsh treatment and lack of consideration of any kind."

Included within Thompson's previous felonies was one count of simple burglary of an inhabited dwelling, which carried a maximum sentence of 12 years. He had also previously been convicted of the crime of distribution of cocaine, a violation of the Uniform Controlled Dangerous

Substances Law. His final conviction was for Possession with intent to Distribute Cocaine.

The applicable provisions of La. R.S. 15:529.1(A)(1) provide:

> (c)(ii) If the fourth felony and two of the prior felonies are felonies defined as a crime of violence under R.S. 14:2(B), a sex offense as defined in R.S. 15:540 *et seq*. when the victim is under the age of eighteen at the time of the commission of the offense, or as a violation of the Uniform controlled Dangerous Substances Law punishable by imprisonment for ten years or more or of any other crime punishable by imprisonment for twelve years or more, or any combination of such crimes, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

Since the Habitual Offender Law in its entirety has been held to be constitutional, the minimum sentences it imposes upon multiple offenders are also presumed to be constitutional. *State v. Johnson,* 97-1906 (La. 3/4/98), 709 So. 2d 672. For these reasons, the Legislature's determination of an appropriate sentence should be afforded great deference by the judiciary. This does not mean, however, that the judiciary is without authority to pronounce a constitutional sentence if it determines that a mandatory minimum sentence is excessive in a particular case. However, this power should be exercised only when the court is clearly and firmly convinced that the minimum sentence is excessive. *Id.* at 676.

A sentencing judge must always start with the presumption that a mandatory minimum sentence under the Habitual Offender Law is constitutional. 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 this presumption of constitutionality. To rebut the presumption that the mandatory minimum sentence is constitutional, the

defendant must clearly and convincingly show 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. *Id*. at 676.

When determining whether the defendant has met his burden of proof by rebutting the presumption that the mandatory minimum sentence is constitutional, the trial judge must also keep in mind that the goal of the Habitual Offender Law is to punish recidivism. Thus, the defendant with multiple felony convictions is subjected to a longer sentence in light of his continuing disregard for the laws of our state. *Id*. at 676-677.

A trial judge may not rely solely upon the nonviolent nature of a crime before the court or of past crimes as evidence that justifies rebutting the presumption of constitutionality. While the classification of a defendant's instant or prior offenses as nonviolent should not be discounted, this factor has already been taken into account under the Habitual Offender Law for third and fourth offenders. *Id*. at 676.

Because the sentence imposed for the habitual offender adjudication is prescribed by statute, the trial court's compliance with La. C. Cr. P. art. 894.1 is not required. *State v. Dukes,* 46,029 (La. App. 2d Cir. 1/26/11), 57 So.3d 489, *writ denied,* 11-0443 (La. 3/2/12), 83 So. 3d 1033; *State v. Thomas,* 41,734 (La. App. 2d Cir. 1/24/07), 948 So.2d 1151, *writ denied,* 07-0401 (La. 10/12/07), 965 So.2d 396. It would be an exercise in futility for the trial court to discuss the factors enumerated in that article when the

court had no discretion in sentencing the defendant. *State v. Dukes, supra; State v. Sewell,* 35,549 (La. App. 2d Cir. 2/27/02), 811 So.2d 140, *writ denied,* 02-1098 (La. 3/21/03), 840 So.2d 535.

Moreover, upon a defendant's adjudication as a fourth felony offender who is subject to mandatory sentencing provisions, a presentence investigation report is inconsequential. *State v. Dukes, supra*.

Thompson has failed to put forth any facts or arguments which support a conclusion that he is clearly and convincingly the exceptional defendant for whom downward departure from the mandatory life sentence is required. Louisiana law clearly holds that a defendant cannot rely solely upon the nonviolent nature of his offenses to receive relief. Moreover, the fact that he received no consideration for his *Crosby* plea presents no unusual circumstance. His allegation that the imposed sentence was given in retribution for his internal affairs complaint is also unsupported by the record. Otherwise, Thompson has failed to show that because of unusual circumstances he is a victim of the legislature's failure to assign sentences that are meaningfully tailored to his culpability, the gravity of the offenses he has committed and the circumstances of this case. Therefore, Thompson's sentence is affirmed.

We note error patent on the record before us. In addition to the mandatory life sentence, the trial court imposed a $3,000 fine, the payment of court costs through the inmate banking system and 60 days of jail time for failure to pay the court costs. Although the statute of conviction, La. R.S. 40:967, authorizes a fine of up to $50,000, the statute of enhancement,

La. R.S. 15:529.1(A), does not authorize the imposition of a fine. Thus, such fine is appropriately deleted. *State v. Dickerson,* 584 So. 2d 1140 (La. 1991); *State v. Jetton,* 32,893 (La. App. 2d Cir. 4/5/00), 756 So. 2d 1206, *writ denied,* 00-1568 (La. 3/16/01), 787 So. 2d 299. Moreover, an indigent defendant may not be subjected to imprisonment because he is unable to pay a fine which is part of his sentence. *Bearden v. Georgia,* 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed. 2d 221 (1983); *State v. Monson,* 576 So. 2d 517 (La. 1991); *State v. Howard,* 44,434 (La. App. 2d Cir. 6/24/09), 15 So. 3d 344. Indigency may be discerned from the record. *State v. Howard, supra.* This court has considered it error for a trial court to impose jail time for failure to pay court costs and has amended such sentences to delete the jail time. *State v. Howard, supra; State v. Kerrigan,* 27,846 (La. App. 2d Cir. 4/3/96), 671 So. 2d 1242. The record discloses Thompson's indigency as he was represented by the Caddo Parish Public Defender Office throughout the proceedings. Accordingly, we correct the sentence to delete the $3,000 fine as well as the imposition of jail time in lieu of the payment of court costs. As amended, Thompson's conviction and sentence are affirmed.

SENTENCE AMENDED; AFFIRMED.

MOORE, J., concurs.

I respectfully concur. The supreme court has held that a defendant must show by clear and convincing evidence that he is "exceptional" if he is to receive a downward deviation from the mandatory sentence under the habitual offender law. *State v. Johnson*, 97-1906 (La. 3/4/98), 709 So. 2d 672. Because this defendant has made no such showing, the court has no alternative but to affirm the life sentence. I concur only to express concern over what societal goals will be served by imprisoning this 52-year-old nonviolent offender for the rest of his life, at a cost to society of nearly $20,000 a year. *See, e.g.*, *State v. Jackson*, 2009-2406 (La. 1/19/11), fn. 3, 55 So. 3d 767 (Knoll, J, dissenting); *State v. Cass*, 46,228 (La. App. 2 Cir. 4/13/11), 61 So. 3d 840 (Moore, J, dissenting), *writ denied*, 2011-1006 (La. 11/4/11), 75 So. 3d 922. While a severe sentence less than life would probably be acceptable in this case, I concur in the application of the habitual offender law.

STEWART, J., dissenting.

The majority determined that Thompson's sentence was not excessive, since he "failed to put forth any facts or arguments which supports a conclusion that he clearly and convincingly falls within the category for which departure from the mandatory life sentence is required." For the following reasons, I respectfully dissent.

In *State v. Dorthey*, 623 So.2d 1276, 1280-1281 (La. 1993), the Louisiana Supreme Court recognized that if a trial judge determines that the punishment mandated by the Habitual Offender law makes no measurable contribution to acceptable goals of punishment, or that the sentence amounts to nothing more that the purposeful imposition of pain and suffering and is grossly out of proportion to the severity of the crime, ***he is duty bound*** to reduce the sentence to one that would not be constitutionally excessive. (Emphasis added.)

In *State v. Johnson*, 97-1906 (La. 03/04/98), 709 So.2d 672, the Louisiana Supreme Court further qualified the Dorthey holding permitting a downward departure from a mandatory minimum sentence in the context of the Habitual Offender Law. Specifically, the court held that to rebut the presumption that the mandatory minimum sentence was constitutional, the defendant had to "clearly and convincingly" show 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.

State v. Johnson, *supra.*

When evaluating whether the defendant has met his burden, the trial court must be mindful of the goals of the Habitual Offender Law, which are to deter and punish recidivism. *State v. Wilson*, 37,555 (La. App. 2 Cir. 11/6/03), 859 So.2d 957. Further, if the trial court finds clear and convincing evidence that justifies reducing the mandatory minimum sentence, the court cannot impose whatever sentence it may feel is appropriate. *Id*. Rather, the trial court must impose the longest sentence that is not constitutionally excessive with specific reasons to explain why that sentence is the longest sentence that is not constitutionally excessive. *Id*. *Johnson* emphasized that a downward departure from the mandatory minimum of La. R.S. 15:529.1 should only occur in "rare situations." *State v. Johnson*, *supra*.

A trial judge may not rely solely upon the nonviolent nature of a crime before the court or of past crimes as evidence that justifies rebutting the presumption of constitutionality. *State v. Johnson*, *supra*. While a defendant's record of non-violent offenses may play a role in a sentencing judge's determination that a minimum sentence is too long, it cannot be the only reason, or even the major reason, for declaring such a sentence excessive. *Id.*

In the instant case, the trial judge sentenced the defendant to life imprisonment at hard labor, without the benefit of parole, probation, or suspension of sentence. Whenever a defendant is faced with a mandatory life sentence as a multiple offender, heightened scrutiny is triggered when

determining if the defendant falls within those "rare" circumstances where a downward departure is warranted. *State v. Burns, supra.*

This case is a prime example of "being in the wrong place at the wrong time." The defendant was visiting a friend in room 29 of the Levingston Motel. While en route to the motel dumpster, he was detained by the Shreveport Police Department's Special Response Team, as they attempted to execute a search warrant on rooms 31 and 37 of the Motel. Neither this defendant, nor the apartment he was visiting, were the target of the search warrant. Additionally, the defendant's truck was not parked in front of the targeted apartments. When Agent Shawn Parker asked the defendant his reason for being there and how he had gotten there, the defendant responded that he was visiting a friend and pointed to his truck in the parking lot. The defendant subsequently signed a consent form to have his vehicle searched. He then entered his truck and produced a clear plastic bag containing five individually packaged rocks of crack cocaine from the center armrest of the bench seat.

The defendant testified that he informed Agent Parker that he smoked crack. He further testified that he had a "little heart attack a while back," and that the crack cocaine "relieved some pain and takes your mind off of a lot of things." The record does not contain any testimony or evidence that the defendant was actively distributing any drugs. Although the defendant pled guilty to distribution of Schedule II CDS in his previous drug conviction, we note that he was initially billed for possession with intent to distribute a Schedule II CDS, as well. The defendant's admission to use of

crack cocaine, coupled with his previous drug conviction and other nonviolent offenses, strongly supports that theory that this is an unfortunate case of a drug-addicted man.

The defendant clearly falls within that rare category of the "atypical" defendant, where the defendant's situation is not adequately addressed by the legislature's prescribed sentence to life imprisonment without benefit of probation, parole, or suspension of sentence. That is, the legislature mandated sentence is not tailored to the culpability of this offender, the gravity of his offenses and the circumstances of this case. *State v. Wilson, supra; State v. Johnson, supra.*

The defendant's fourth habitual offender bill of information provided me with the defendant's criminal history. The four convictions prior to the instant possession with intent to distribute Schedule II, CDS, resulted in prison terms of eight years (ordered to be served concurrently), eight years (ordered to be served concurrently), four years (one year without benefits with credit for time served), and five years. These non-violent offenses and resulting sentences are not to be taken lightly. However, they do not reach a level of culpability and gravity warranting a life sentence.

I do not dispute the fact that the defendant in this case needs a period of incarceration. However, I find clear and convincing evidence that the instant case involves an atypical defendant who has fallen victim to the legislature's failure to assigned sentences that are meaningfully tailored to him. Since the trial court imposed a life sentence pursuant to La. R.S. 15:529.1, he did not comply with La. C. Cr. P. art. 894.1 when sentencing

the defendant. As a result, the record is void of any reasons for the sentence imposed, or any mitigated factor which may be present.

The defendant's life sentence is disproportionate to the harm done and definitely shocks one's sense of justice. *State v. Lobato, supra*. Therefore, I cannot conclude that this life sentence is not excessive under the constitutional standard. For these reasons, I would recommend that we vacate the life sentence imposed by the district court and remand to the trial court for re-sentencing accordingly.

Therefore, I respectfully dissent.