IN THE SUPREME COURT OF FLORIDA

KENNETH GRANT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 99-164

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

TABLE OF CITATIONS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case with the following additions and corrections:

Petitioner was charged by information 97-14248 with the offense of sexual battery, a felony in the second degree (R 8-9). The offense to place on August 5, 1997. the victim being C. G. The petitioner was charged with placing his penis into or in union with the vagina of Ms. G. without her consent and in the process using physical force or violence not likely to cause serious bodily injury, in that he choked her causing her to submit to the sexual battery (R 8). Petitioner was served with notice of the state's intent to seek enhanced penalty pursuant to F.S. 775.084 (R 11-12). The defense filed a motion to declare section 775.082(8), Fla. Stat. (1997) (Prison Releasee Reoffender Act) to be unconstitutional or to determine that the act is not applicable to the appellant (R 13-32).

A hearing was held on November 30, 1998, the day the case was set for trial (R 90 -110). The court asked the prosecutor to relate what the case was about (R 92). The prosecutor responded that the offense occurred on August 5 or 1997 at the American Motel on 34th Street. The defendant accosted the victim as she was going to her motel room about 6 o'clock in the morning.. He put a choke hold on her and forced her into the motel room and forcibly engaged in sexual intercourse with her and then left. (R

92). The victim reported the case to the police and at the time of the "SAVE" examination, the police took evidence which included a diaper-type item that she was wearing because she was on her menstrual cycle. It was sent to the lab. (R 92). Three or four days later, the defendant returned to the motel and was pointed out ; the victim identified him and he was chased down and subdued by bystanders. (R 93). He was questioned by police and denied having sex with the victim. A blood sample was taken from the defendant with his consent. A DNA comparison from the laboratory showed a match. (R 93)

The court asked what kind of record the petitioner had. The prosecutor responded that the petitioner was convicted in June of 1994 of two residential burglaries and two grand thefts and received a sentence of 3 ½ years imprisonment (R 93-94). The prosecutor stated that the petitioner was released from prison on May 31, 1996. (R 94).

The prosecutor advised the court of the petitioner's other prior offenses, "October 21, 1991, battery on a law enforcement officer. Four months county jail. February 12, 1988, burglary, attempted. Two years DOC. February 12th, petit theft, felony, times two. Two years DOC concurrent on that. Another one February 12, 1988. Sale of Counterfeit drug. Two years DOC, which he pled. Apparently, I assume, that's to a VOP. Then April of 19981, he had a burglary to a dwelling, Z-and-a-half years Department of Corrections as well, plus twelve misdemeanors." (R

94) .

The prosecutor stated that the petitioner qualified as a prison releasee reoffender and also as a violent career criminal based upon his past burglary convictions (R 94).

The defense stated that the victim was a cocaine user and possibly a cocaine addict, that the sex was consensual in exchange for cocaine, and that the petitioner had no prior sexual offenses at all (R 95).

Petitioner acknowledged that he had been to prison "at least three times." (R 95). The court stated that it appeared that as a result of the DNA match, petitioner's absolute denial to the police had been refuted. The court asked if there had been any plea offers, the prosecutor responded there had not (R 95).

The court offered the petitioner the minimum mandatory 15 years as a prison releasee reoffender and noted that if the petitioner went to trial and was convicted, that the state would be asking for a 30 year minimum mandatory as a violent felony offender (R 95). The court stated that it would sentence the petitioner to concurrent guidelines sentences on the possession of cocaine charges which were also pending (R 96).

Defense counsel stated that in light of the fact that the petitioner was "PRR" the defense was filing a standard motion to attack the constitutionality of the statute, prior to the petitioner deciding to except the offer (R 96). The court further advised the petitioner that he also qualified as an habitual fel-

ony offender which would be a 15 year sentence, but that the court would not impose an habitual violent felony offender sentence (R 96).

After a short recess, the defense announced that it wished to argue its motion to declare section 775.082(8) unconstitutional and also to determine that the act was not applicable to him because he was not in prison at the time the act was passed and that to apply it to him would be an ex post facto violation., that the act is cruel and unusual punishment and a violation of double jeopardy because it allows and classifies habitual felony offender, habitual violent felony offenders or violent career criminals to be subject to the prison releasee reoffender act; that it violates substantive due process under the state and federal constitution and violates equal protection (R 97-98)

The defense advised the court that the ex post facto argument had been heard and rejected by the Fourth District Court of Appeals. (R 98)

The state relied on its arguments as previously presented in other cases and also asked the court to adhere to its prior rulings in other cases which were the same issues and same motion as heard in the instant case. The state also pointed out that the statute constitutional as applied to the petitioner and not a n ex post facto violation. (R 98)

The Court stated that as it had previously ruled in other cases, it would deny the motion.

The state advised the court that as to the possession of cocaine offenses under the guidelines, deleting the sexual battery offense, which is a PRR and habitual felony offender case, petitioner's range was 47.85 months to 79.85 months. (R 99)

The suggested a sentence of 5 years concurrent with the sexual battery charge and the state concurred. (R 99). Defense counsel then stated that with the understanding that the petitioner would receive the minimum years as a prison releasee concurrent with the 5 years imposed on the two possession of cocaine cases and preserving the right to appeal the constitutionality of the prison releasee reoffender act, the petitioner would enter pleas of no contest to the sexual battery and guilty to the possession of cocaine (R 99-100). a plea colloquy then followed (R 100-105). a factual basis was given for the possession of cocaine cases (not a subject of the instant appeal) (R 103-104). Defense counsel waived petitioner's right to a presentence investigation report (R 105).

A sentencing packet was presented to the court regarding the sexual battery offense. The packet included a certificate from the Department of Corrections stating that the petitioner was released from prison on May 31, 1997 (R 105). The court noted that this establishes that the petitioner that the current offense which occurred in August of 1997 was within 3 years after his release from prison and establishes that the petitioner qualified for sentencing as a prison releasee reoffender (R 105-106).

The court then stated:

> Accordingly, on the sexual battery offense, it would carry a minimum mandatory 15 year sentence, so I am imposing that 15 year sentence as a prison releasee reoffender.

(R 106)

The court then noted that another statute that applies is the habitual offender statute. The document reflects no pardons or executive clemency on any prior convictions; a certificate from the clerk of the court indicting no priors have been reversed; prior convictions for burglary and grand theft - a sentence of 3 ½ years imposed on June 6, 1994; battery of a law enforcement officer - a sentence of 120 days county jail imposed October 21, 1991; attempted burglary with a 2 year sentence imposed on February 12, 1988; two felony petty thefts with a 2 year sentence imposed on February 12, 1988; and sale of a counterfeit controlled substance - a 2 year sentence imposed February 12, 1988. (R 106-107)

The court found that the petitioner had the two prior felony convictions imposed on two separate dates and sentenced him as a habitual felony offender to 15 years for sexual battery . The court stated:

> These are not consecutive designations. These are concurrent designations.

(R 107)

The court rendered judgment and sentencing documents (R 75-79. The sentencing documents reflect 15 years imprisonment as

both a prison releasee reoffender and as a habitual felony offender (R 77-78) A notice of appeal was timely filed (R 82).

On appeal to the Second District Court of Appeals, the petitioner argued that the Prison Releasee Reoffender Act (s. 775.082(8), Fla. Stat. (1997)) was unconstitutional (issue I) because it (1) violates the single subject requirement of the state constitution (2) violates the constitutional doctrine of separation of powers (3) constitutes cruel and unusual punishment (4) is unconstitutionally vague (5) violates constitutional due process (6) violated constitutionally guaranteed equal protection of law and (7) violates the constitutional prohibition against ex post facto laws. Petitioner further argued (issue II) that the trial court's imposition of two sentences for the same offense - one as a prison releasee reoffender and the other as a habitual felony offender violates the constitutional prohibition against double jeopardy. The Second District Court of Appeals rejected the all of the constitutional arguments raised by the petitioner relying upon the analysis of other Florida district courts of appeal as to violations regarding the single subject requirement, separation of powers (in this instance, in addition to the First, Third, and Fifth Districts' finding that there was no violation of separation of powers even though it gives the prosecution exclusive authority to determine if any of the exceptions to the mandatory sentencing as set for in s. 775.082(8)(d) exist; the Second District found that there was no violation of separa-

tion of powers because the court retains the authority to determine under s. 775.082(8)(d) if any exceptions to the imposition of the mandatory sentences exist and retains the discretion not to impose the mandatory sentence if determines that a statutory exception exists), cruel and unusual punishment, vagueness, due process, equal protection, and ex post facto. The Second District also rejected the petitioner's argument that the trial court violated double jeopardy in sentencing the appellant to concurrent sentences as a prison releasee reoffender and as a habitual felony offender for the same offense.

Petitioner filed a timely notice to invoke the discretionary jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

Issue I: Respondent acknowledges that this Court has discretionary jurisdiction to review the decision of the Second District Court of Appeal in the instant case pursuant to Fla. R. App. Pro 9.030(a)(2)(A)(I) (1999) because the decision construes the constitutional validity of the Prison Releasee Reoffender Statute.

Issue II: Respondent acknowledges that this Court has discretionary jurisdiction to review the decision of the Second District Court of Appeal in the instant case pursuant to Fla. R. App. Pro. 9.030(a)(2)(A)(iv) (1999) because the decision expressly and directly conflicts with the decisions of other district courts.

ARGUMENT

ISSUE I

WHETHER THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY DECLARES A STATUTE VALID, GIVING THE FLORIDA SUPREME COURT DISCRETIONARY JURISDICTION TO REVIEW THE CASE PURSUANT TO FLA. R. API?. PRO. 3.030(a)(2)(A) (I) (1999)

The respondent acknowledges that the opinion of the Second District Court of Appeal expressly declares the Prison Releasee Reoffender Statute (s. 775.082(8), Fla. Stat. (1997) to be valid and in doing so rejected constitutional attacks on the statute based upon: (1) the single subject rule (2) violation of separation of powers *(3)* cruel and unusual punishment (4) vagueness (5) due process (6) equal protection and (7) ex post facto. This Court, therefore, has discretionary jurisdiction pursuant to Fla. R. App. Pro 3.030(a) (2) (A) (I) (1999).

Numerous cases are presently pending before this Court regarding the validity of this statute based upon the constitutional grounds raised by the petitioner. This Court has already heard oral arguments regarding these issues in this case on November 3, 1999, in the cases of McKnight v. State, 727 So.2d 314 (Fla. 3d DCA 1999), rev. granted 740 So.2d 528, and Cotton v. State, 728 So.2d 251 (Fla. 2d DCA 1998), *rev. granted 737* So.2d *551* (Fla. 1999)

ISSUE II

WHETHER THE DISTRICT COURT'S OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS FROM OTHER DISTRICT COURTS ON THE ISSUE OF WHETHER SENTENCING A DEFENDANT AS BOTH A PRISON RELEASEE REOFFENDER AND AS A HABITUAL FELONY OFFENDER VIOLATES THE PROHIBITION AGAINST GIVING THE FLORIDA SUPREME COURT DISCRETIONARY JURISDICTION PURSUANT TO FLA. R. APP. PRO. 3.030(a)(2)(A)(iv) (1999)

The respondent acknowledges that the opinion of the Second District Court of Appeal holding that it **is not a violation of** double jeopardy to ssentencea defendant as both a prison releasee reoffender and as a habitual felony offender for the same offense so long as the sentences run concurrently expressly and directly conflicts with the decision of the Fourth District in Melton v. State, 24 Fla. L. Weekly D2719 (Fla. 4th DCA December 8, 1999) relying on its analysis in Adams v. State, 24 Fla. L. Weekly D2394 (Fla. 4th DCA October 20, 1999)and with the reasoning of the Fifth District in Thomas v. State, 24 Fla. L. Weekly D2763 (Fla. 5th DCA December 10, 1999). This Court, therefore, has discretionary jurisdiction pursuant to Fla. R. App. Pro. 3.030(a)(2)(A) (iv) (1999)

CONCLUSION

Respondent respectfully requests that this Court grant review in the instant case.

Respectfully submitted,

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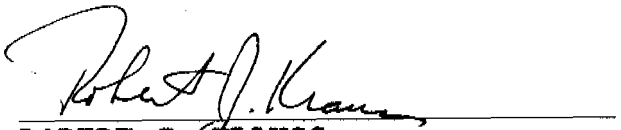

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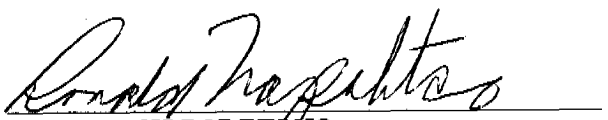

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

KENNETH GRANT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 98-04943

Opinion filed November 24, 1999.

Appeal from the Circuit Court for Pinellas County; Richard A. Luce, Judge.

James Marion Moorman, Public Defender, and Douglas S. Connor, Assistant Public Defender, Bat-tow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Ronald Napolitano, Assistant Attorney General, Tampa, for Appellee.

PARKER, Acting Chief Judge.

Kenneth Grant appeals his sentence for sexual battery, which the trial court entered pursuant to the Prison Releasee Reoffender Act (the Act), section

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775.082(8), Florida Statutes (1997). Grant alleges that the Act is unconstitutional on seven different grounds and that his sentence violates constitutional prohibitions against double jeopardy. We affirm.

SINGLE SUBJECT REQUIREMENT.

Grant argues that the provisions of the Act which deal with probation violation, arrest of violators, and forfeiture of gain time for violations of controlled release, violate the single subject requirement of Article III, Section 6, of the Florida Constitution, because they are not reasonably related to the specific mandatory punishment provision in subsection eight. However, the First, Fifth, and Fourth Districts have rejected this argument as it relates to the Act. See Durden v. State, 24 Fla. L. Weekly 02050, D2050 (Fla. 1st DCA Sept. 1, 1999); Lawton v. State, 24 Fla. L. Weekly 01940, D1940 (Fla. 5th DCA Aug. 20, 1999); Young v. State, 719 So. 2d 1010, 1011-12 (Fla. 4th DCA 1998), review denied, 727 So. 2d 915 (Fla, 1999). The Fourth District has provided the following analysis:

> The test for determining duplicity of subject "is whether or not the provisions of the bill are designed to accomplish separate and disassociated objects of legislative effort." Chapter 97-239, Laws of Florida, in addition to adding section 775.082(8), also amended sections 944.705, 947.141, 948.06, 948.01 and 958.14. The preamble to the legislation states that its purpose was to impose stricter punishment on reoffenders to protect society. Because each amended section dealt in some fashion with reoffenders, we conclude that the statute meets that test.

Young, 719 So. 2d at 1012 (citations omitted)

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SEPARATION OF POWERS.

Grant argues that the Act violates Article II, Section 3, of the Florida Constitution, also known as the separation of powers clause, in three ways: (1) it restricts the parties' ability to plea bargain by providing limited reasons for the State's departure; (2) it does not give the trial judge the authority to override a victim's wish not to punish the violator to the fullest extent of the law; and (3) it removes the judge's discretion. As to the first reason, there can be no constitutional violation because there is no constitutional right to plea bargaining. See Fairweather v. State, 505 So. 2d 653, 654 (Fla. 2d DCA 1987). See also Turner v. State, 24 Fla. L. Weekly D2074, D2075 (Fla. 1st DCA Sept. 9, 1999) (rejecting the argument that the Act violates the separation of powers clause because it restricts plea bargaining). As to reasons two and three, this court has interpreted the Act to give the trial court the discretion to determine whether a defendant qualifies as a prison releasee reoffender for purposes of sentencing under section 775.082(8). See State v. Cotton, 728 So. 2d 251, 252 (Fla. 2d DCA 1998), review granted, 737 So. 2d 551 (Fla. 1999). Furthermore, even though the Fifth, First, and Third Districts have disagreed with this interpretation, they have nonetheless upheld the constitutionality of the Act in the face of a separation of powers challenge. See Speed v. State, 732 So. 2d 17, 19-20 (Fla. 5th DCA), review granted, No. 95,706 (Fla. Sept. 16, 1999); Woods v. State, 740 So. 2d 20. 24 (Fla. 1st DCA), review granted, 740 So. 2d 529 (Fla. 1999); McKnight v. State, 727 So. 2d 314, 317 (Fla. 3d DCA), review granted, 740 So. 2d 528 (Fla. 1999).

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CRUEL AND UNUSUAL PUNISHMENT.

Article I, Section 17, of the Florida Constitution prohibits cruel and unusual punishment. Grant argues that the **Act** violates this prohibition because it allows for sentences that are disproportionate to the crime committed. However, the First District has rejected this challenge to the constitutionality of the Act. See Turner, 24 Fla. L. Weekly at D2075. "We do not find that imposition of the maximum sentence provided by statutory law constitutes cruel or unusual punishment, because there is no possibility that the Act inflicts torture or a lingering death or the infliction of unnecessary and wanton pain." Id. (citing Jones v. State, 701 So. 2d 76, 79 (Fla. 1997), cert. denied, 118 S. Ct. 1297 (1998)).

VAGUENESS.

Grant argues that the Act is unconstitutionally vague because it fails to define "sufficient evidence," "material witness," "the degree of materiality required," "extenuating circumstances," and "just prosecution." However, a defendant may not raise a vagueness challenge if the statute clearly applies to their conduct. See Woods, 740 So. 2d at 24-25 (rejecting vagueness challenge to the Act). In Woods, the defendant had been released from prison one month before he committed a robbery. Id. at 21. After a jury found him guilty, he was sentenced as a prison releasee reoffender to fifteen years in prison. Id.

In the instant case, Grant was released from the Department of Corrections on May 31, 1996, and the sexual battery occurred on August 5, 1997, just over one year later. Section 775.082(8)(a)1. defines "prison releasee reoffender" as:

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"any defendant who commits . [s]exual battery , . within 3 years of being released from a state correctional facility operated by the Department of Corrections Or a private vendor." Just as the Act clearly applied to the defendant in Woods, it clearly applies to Grant. Moreover, none of the terms Grant challenges as vague concern whether the statute applies to him. Therefore, we conclude that Grant is prohibited from raising any argument that the Act is unconstitutionally vague.

DUEPROCESS.

Grant argues that the Act violates the due process clause in several ways: (1) it invites discriminatory and arbitrary application by the state attorney; (2) it gives the state attorney the sole power to define its terms; (3) it gives the victim the power to decide that the Act will not apply to any particular defendant; (4) it allows for arbitrary determination of which defendants will qualify; and (5) it does not bear a reasonable relationship to a permissible legislative objective. Reasons one through four are rendered moot by this court's decision in Cotton that the trial court has the discretion to determine whether a defendant qualifies as a prison releasee reoffender for purposes of sentencing under section 775.082(8). See 728 **So.** 2d at 252. The First and Third Districts have expressly rejected reason five as a ground for declaring the Act unconstitutional. See Turner, 24 Fla. L. Weekly at 02075; McKnight, 727 SO. 2d at 319 ("this statute bears a rational relationship to the legislative objectives of discouraging recidivism in criminal offenders and enhancing the punishment of those who reoffend, thereby comporting with the requirements of due process").

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EQUAL PROTECTION.

Grant's equal protection argument is identical to his due process argument. For the reasons discussed above, we do not find that the Act violates the equal protection clause.

EX **POST FACTO.**

Grant argues that the Act is an unconstitutional ex post facto law in that it allows for retroactive application to include offenders who were released from prison prior to its effective date. This argument has been rejected by the Fifth and Fourth Districts. See Gray v. State, 24 Fla. L. Weekly D1610, 01610 (Fla. 5th DCA July 9, 1999); Plain v. State, 720 So. 2d 585, 586 (Fla. 4th DCA 1998), review denied, 727 So. 2d 909 (Fla. **1999).** The Fourth District provided this rationale:

> In this case, the Act increases the penalty for a crime committed after the Act, based on release from prison resulting from a conviction which occurred prior to the Act. It is no different than a defendant receiving a stiffer sentence under a habitual offender law for a crime committed after the passage of the law, where the underlying convictions giving the defendant habitual offender status occurred prior to the passage of the law. Under those circumstances habitual offender laws have been held not to constitute ex post facto law violations.

Plain, 720 So. 2d at 586 (citations omitted).

DOUBLE **JEOPARDY.**

Lastly, Grant argues that his sentence violates double jeopardy because it consists of two separate sentences as a prison releasee reoffender and as a habitual felony offender for a single offense. However, the final judgment and sentence clearly reflects that Grant received one sentence of fifteen years as a habitual felony offender

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with a minimum mandatory term of fifteen years as a prison releasee reoffender. Minimum mandatory sentences are proper as long as they run concurrently. See Jackson v. State, 659 So. 2d 1060, 1061-62 (Fla. 1995). Moreover, Moreland v. State, cited by Grant, is distinguishable because in that case the defendant actually received two alternative sentences. See 590 So. 2d 1020, 1021 (Fla. 2d DCA 1991) (defendant was sentenced to life in prison with a twenty-five year minimum mandatory as a habitual offender *or* to life under the guidelines, whichever was less). Because the minimum mandatory sentence runs concurrently to the habitual felony offender sentence, there is no error.

Affirmed.

NORTHCUTT, J., Concurs.
ALTENBERND, J., Concurs specially.

ALTENEERND, Judge, Concurring.

I concur in this opinion with two limitations. First, in light of this court's decision in State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1998), we have no need to determine whether the act would be unconstitutional as a violation of separation of powers if this court interpreted the act to give the trial judge no discretion in sentencing.

Second, I believe that the First District's reasoning in Turner V. State, 24 Fla. L. Weekly D2074 (Fla. 1 st DCA Sept. 9, 1999), concerning the issue of cruel or unusual punishment is incorrect or at least insufficient. Turner relies on language from

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a Case involving the death penalty. To determine whether Prison Reieasee Reoffender sentencing is cruel or unusual, one must perform a proportionality review. See Hale v. State, 630 So. 2d 524, 526 (Fla. 1993). Such a review is a complex process. More important, I do not believe that such a review can be conducted for this act as a whole. I believe that the review must examine each statutory offense affected by the act to determine whether the statutory sentence prescribed for that offense is unconstitutionally disproportionate. Cf. Gibson v. State, 721 So. 2d 363 (Fla. 2d DCA 1998) (life without possibility of parole not unconstitutional for penile capital sexual battery).

Mr. Grant negotiated a plea to receive a fifteen-year sentence in this case for a sexual battery that is classified as a second-degree felony. Thus, a Sentence of fifteen years has been an authorized legal sentence for this crime for many years. See § 775.082(3)(c), Fla. Stat. (1999). Although the analysis of cruel or unconstitutional punishment is an objective analysis and is not truly a case-specific analysis, I would note that Mr. Grant's own scoresheet would have allowed a lawful guidelines sentence of twenty years' imprisonment for this offense, and it appears that he was also eligible for habitual offender sentencing. In this case, Mr. Grant has not established that his sentence is cruel or unusual.

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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Ronald Napolitano, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 5th day of January, 2000.

Respectfully submitted,

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