ORIGINAL

IN THE SUPREME COURT OF FLORIDA

THOMAS KIRKENDALL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

DCA No. 99-0227
Case No. 00-351

DISCRETIONARY REVIEW OF DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Undersigned Counsel for Petitioner states that this brief is prepared in courier 12 point.

STATEMENT OF THE CASE AND FACTS

On October 9, 1997, the State Attorney of the Sixth Judicial Circuit for Pinellas County, Florida, filed an information charging the Petitioner with first degree robbery, allegedly occurring on September 27, 1997, in violation of section 812.13(2) (a), Florida Statutes (1997). On July 2, 1998, an amended information was filed reducing the charge to second degree robbery.

In October of 1997, the State filed its notice that Mr. Kirkendall qualified for sentencing as a Prison Releasee Reoffender. On July 13, 1998, Petitioner filed a motion to have the Prison Releasee Reoffender Act declared unconstitutional.

A jury trial was held and Petitioner was found to be guilty as charged. He was sentenced on the same day to a period of fifteen years incarceration as a Prison Releasee Reoffender.

On appeal, before the Second District Court of Appeal, Petitioner raised the issue of the constitutionality of section 775.082, Florida Statutes (1997). He specifically argued that the section was unconstitutional because it violates the separation of power clause of the Florida Constitution, it violates substantive due process provisions, and it is void for vagueness.

In a supplemental brief, Petitioner also raised the issue of the trial court's mistaken belief, under State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1999), rev. granted, 737 so. 2d 551 (Fla. 1999), that he had no discretion in imposing the prison releasee reoffender sanction.

On January 21, 2000, the Second District issued it opinion in

Kirkendall v. State, 25 Fla. L. Weekly (Fla. 2d DCA January 21, 2000). The court found that the trial judge had been mistaken in his belief that no discretion existed under the statute and remanded the case to the trial court for resentencing. The trial court was instructed that it could reimpose sanctions under section 775.082(8), if appropriate. The court rejected Petitioner's arguments that the statute was unconstitutional stating that it had previously upheld the validity of the statute in Grant v. State, 745 So. 2d 519 (Fla. 2d DCA 1999).

Notice to invoke this Court's discretionary jurisdiction was filed in the Second District Court of Appeal. This brief on jurisdiction follows.

SUMMARY OF THE ARGUMENT

Pursuant to Florida Rule of Appellate Procedure 9.030(2)(a)(1), this Court may accept discretionary review where a district court has found a statute to be constitutional. The decision issued by the Second District Court of Appeal has declared section 775.082(8) to be constitutional. Accordingly, this Court has discretionary jurisdiction to review the present case.

ARGUMENT

ISSUE I

THIS COURT HAS DISCRETIONARY JURISDICTION TO REVIEW THE PRESENT OPINION OF KIRKENDALL V. STATE, 25 Fla. L. Weekly D223 (FLA. 2D DCA JANUARY 21, 2000) AS THE SECOND DISTRICT COURT OF APPEAL DECISION FOUND A SECTION 775.082(8), FLORIDA STATUTES TO BE CONSTITUTIONAL.

The issue of the constitutionality of the Prison Releasee Reoffender Act has been addressed to this Court's attention in several cases including; Speed v. State, 732 So. 2d 17 (Fla 5th DCA), rev. sranted, 743 So. 2d 15 (Fla. 1999); Woods v. State, 740 so. 2d 20 (Fla. 1st DCA 1999), rev. granted, 740 So. 2d 529 (Fla. 1999), and McKnight v. State, 727 So. 2d 314 (Fla. 3d DCA), rev. granted, 740 So. 2d 528 (Fla. 1999). In each of the above cases the District Courts have found section 775.082, Florida Statutes to be valid.

Until recently, the Second District Court of Appeal had not issued a decision directly addressing the constitutionality of the Act. However, in Grant v. State, 745 so. 2d 519 (Fla. 2d DCA 1999), the Court, agreeing with the other districts, found the Act to be constitutional, rejecting the claims that the statute violated the separation of powers clause, the single subject rule, due process, equal protection, double jeopardy provisions, ex post facto provisions, and constituted cruel and unusual punishment.

In rejecting Mr. Kirkendall's constitutional attack on the Act, the court referred to Grant, and again stated its position

that the Act was constitutional.

Pursuant to Florida Rule of Appellate Procedure 9.030(2)(A)(1), this Court has discretionary jurisdiction to review a district court decision that finds a state statute to be valid. Accordingly, this Court may exercise its jurisdiction and accept the present case for review.

Petitioner also notes that a jurisdictional brief in Grant v. State, 745 so. 2d 519 (Fla. 2d DCA 1999), was filed in this Court on December 27, 1999 and is pending before the Court. In Jollie v. State, 405 so. 2d 418 (Fla. 1981), this Court held that it could exercise its discretion and accept for review cases where per curiam affirmed opinions were issued, if the opinion specifically referred to a prior case to support its ruling, and that case was pending before or had been decided by this Court. Id. at 420-421. The opinion in Petitioner's case was more than a mere affirmance as the sentence was reversed on other grounds, however, the opinion did refer to Grant, in rejecting Petitioner's constitutional attack on section 775.082(8). Thus, the logic applied in Jollie, is equally applicable in the Petitioner's case.

CONCLUSION

In light of the foregoing facts, arguments, issues and authorities, Petitioner respectfully requests that this Honorable Court accept review of the present case.

APPENDIX

1. Opinion in Kirkendall v. State, 25 Fla. L. Weekly (Fla. 2d DCA January 21, 2000).

2. Opinion in Grant v. State, 745 So. 2d 519 (Fla. 2d DCA 1999).

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

THOMAS L. KIRKENDALL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D99-227

Opinion filed January 21, 2000.

Appeal from the Circuit Court for Pinellas County; R. Timothy Peters, Judge.

James Marion Moorman, Public Defender, and Megan Olson, Assistant Public Defender, Bartow, for Appellant.

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

CASANUEVA, Judge.

Thomas L. Kirkendall contends the trial court committed two errors in imposing his sentence as a prison releasee reoffender pursuant to section 775.082(8), Florida Statutes (1997). First, Mr. Kirkendall contends that the Prison Releasee Reoffender Act is unconstitutional. Recently, in Grant v. State, 24 Fla. L. Weekly

02627 (Fla. 2d DCA Nov. 24, 1999), this court upheld the constitutionality of the reoffender act: accordingly, we affirm.

Next, Mr. Kirkendall asserts that the trial court possessed unbridled discretion in imposing his sentence. Mr. Kirkendall argues that Johns v. State, 24 Fla. L. Weekly 02080 (Fla. 2d DCA Sept. 8, 1999), extended the discretion afforded a trial court at sentencing when section 775.082(8) is involved. Without hesitation, we reject that contention.

In State v. Cotton, 728 So. 2d 251 (Fla. 2d DCA 1998), and later in Coleman v. State, 739 So. 2d 626 (Fla. 2d DCA 1999), this court identified the extent of discretion possessed by a trial court when considering whether to impose a sentence pursuant to the Prison Releasee Reoffender Act. Johns did not extend the range of discretion identified in and permitted by Cotton and Coleman. We held that a trial court erred in concluding it was without any discretion in imposing sentence pursuant to section 775.082(8). Here, the trial court concluded it was without any discretion in imposing Mr. Kirkendall's sentence. As in Johns, this sentencing error preceded our opinions in Cotton and Coleman. Johns, we reverse the sentence imposed and remand for sentencing proceedings consistent with Cotton and Coleman. Other than to consider Cotton and Coleman, nothing in this opinion should be construed by the trial court as limiting the sentencing options legally available to it.

Reversed and remanded with instructions.

ALTENBERND, A.C.J., and GREEN, J., Concur.

(Cite as: 745 So.2d 519)

24 Fla. L. Weekly D2627

Kenneth GRANT, Appellant,
v.
STATE of Florida, Appellee.
No. 98-04943.
District Court of Appeal of Florida,
Second District.
Nov. 24, 1999.

Defendant was convicted in the Circuit Court, Pinellas County, Richard A. Luce, J., of sexual battery. He appealed. The District Court of Appeal, Parker, Acting C.J., held that Prison Releasee Reoffender Act is not unconstitutional. Affirmed.
Altenbernd, J., concurred specially and filed opinion.

(Cite as: 745 So.2d 519)

Grant v. State

[1] KeyCite this headnote
110 CRIMINAL LAW
110XXIII Judgment, Sentence, and Final Commitment
110k982 Probation and Suspension of Sentence

110k982.2 k. Constitutional and statutory provisions.
Fla.App. 2 Dist.,1999.
Provisions of Prison Releasee Reoffender Act dealing with probation violation, arrest of violators, and forfeiture of gain time for violations of controlled release do not violate single-subject requirement of Florida Constitution. West's F.S.A. Const. Art. 3, § 6; West's F.S.A. § 775.082(8).

(Cite as: 745 So.2d 519)

Grant v. State
[1] KeyCite this headnote
110 CRIMINAL LAW
110XXV Habitual and Second Offenders
110XXV(A) In General
110k1201 Constitutional and Statutory Provisions

110k1201.5 k. Validity.
Fla.App. 2 Dist.,1999.
Provisions of Prison Releasee Reoffender Act dealing with probation violation, arrest of violators, and forfeiture of gain time for violations of controlled release do not violate single-subject requirement of Florida Constitution. West's F.S.A. Const. Art. 3, § 6; West's F.S.A. § 775.082(8).

(Cite as: 745 So.2d 519)

Grant v. State
[1] KeyCite this headnote
310 PRISONS
31 Ok 15 Reduction of Term of Imprisonment and Discharge for Good Conduct

31 Ok 15(2) k. Constitutional and statutory provisions.
Fla.App. 2 Dist.,1999.
Provisions of Prison Releasee Reoffender Act dealing with probation violation, arrest of violators, and forfeiture of gain time for violations of controlled release do not violate single-subject requirement of Florida Constitution. West's F.S.A. Const. Art. 3, § 6; West's F.S.A. § 775.082(8).

(Cite as: 745 So.2d 519)

Grant v. State
[2] KeyCite this headnote
92 CONSTITUTIONAL LAW
92III Distribution of Governmental Powers and Functions
92III(A) Legislative Powers and Delegation Thereof
92k51 Encroachment on Judiciary

92k52 k. In general.
Fla.App. 2 Dist.,1999.
Prison Releasee Reoffender Act does not violate separation of powers doctrine of Florida Constitution. West's F.S.A. Const. Art. 2, § 3; West's F.S.A. § 775.082(8).

(Cite as: 745 So.2d 519)

Grant v. State
[2] KeyCite this headnote
110 CRIMINAL LAW
11 OXXV Habitual and Second Offenders
11 0XXV(A) In General
11 Ok 120 1 Constitutional and Statutory Provisions

110k1201.5 k. Validity.
Fla.App. 2 Dist.,1999.
Prison Releasee Reoffender Act does not violate separation of powers doctrine of Florida Constitution. West's F.S.A. Const. Art. 2. § 3; West's F.S.A. § 775.082(8).

(Cite as: 745 So.2d 5 19)

Grant v. State
[3] KeyCite this hcadnotc
110 CRIMINAL LAW
11 OXXVI Punishment of Crime
11 Ok 12 13 Cruel or Unusual Punishment
110 k I 2 13.8 Punishment Imposed

11 Ok 1213.8(7) k. Enhanced punishment.
Fla.App. 2 Dist.,1999.
Sentence imposed under Prison Releasee Reoffender Act does not constitute cruel and unusual punishment in violation of Florida Constitution. West's F.S.A. Const. Art. 1, § 17; West's F.S.A. § 775.082(8).

(Cite as: 745 So.2d 519)

Grant v. State
[4] KeyCitc this hcadnotc
92 CONSTITUTIONAL LAW
92II Construction, Operation, and Enforcement of Constitutional Provisions
92 k4 1 Persons Entitled to Raise Constitutional Questions
92k42.2 Particular Questions or Grounds of Attack

92k42.2(1) k. In general.
Fla.App. 2 Dist.,1999.
Defendant may not raise a vagueness challenge if the statute clearly applies to his or her conduct.

(Cite as: 745 So.2d 5 19)

Grant v. State
[5] KeyCite this headnote
110 CRIMINAL LAW
1 10XXV Habitual and Second Offenders
I 1 0XXV(A) In General
11 Ok 120 1 Constitutional and Statutory Provisions

1 10k1201.5 k. Validity.
Fla.App. 2 Dist.,1999.
Defendant was precluded from raising argument that any provision of Prison Releasee Reoffender Act was unconstitutionally vague, where Act clearly applied to defendant, and none of the challenged terms concerned whether statute applied to defendant. West's F.S.A. § 775.08218).

(Cite as: 745 So.2d 519)

Grant v. State
[6] KeyCite this hcadnotc
92 CONSTITUTIONAL LAW
92XI Equal Protection of Laws
92k250 Criminal Offenses and Prosecutions
92k250.3 Punishment

92k250.3(1) k. In general.
Fla.App. 2 Dist.,1999.
Prison Releasee Reoffender Act does not violate due process clause or equal protection clause. U.S.C.A. Const.Amend. 14; West's F.S.A. § 775.082(8).

(Cite as: 745 So.2d 5 19)

Grant v. State
[6] KeyCite this headnote
92 CONSTITUTIONAL LAW
92XII Due Process of Law
92k256 Criminal Prosecutions
92k270 Judgment and Sentence

92k270(4) k. Repeated offenders; separate punishment trial.
Fla.App. 2 Dist.,1999.
Prison Releasee Reoffender Act does not violate due process clause or equal protection clause. U.S.C.A. Const.Amend. 14; West's F.S.A. § 775.082(8).

(Cite as: 745 So.2d 519)

Grant v. State
[6] KeyCite this headnote
110 CRIMINAL LAW
110XXV Habitual and Second Offenders
110XXV(A) In General
110k1201 Constitutional and Statutory Provisions

1 10k1201.5 k. Validity.
Fla.App. 2 Dist.,1999.
Prison Releasee Reoffender Act does not violate due process clause or equal protection clause. U.S.C.A. Const.Amend. 14; West's F.S.A. § 775.082(8).

(Cite as: 745 So.2d 519)

Grant v. State
[7] KeyCite this headnote
92 CONSTITUTIONAL LAW
92VIII Retrospective and Ex Post Facto Laws
92k 198 Retroactive Operation of Ex Post Facto Laws

92k203 k. Nature or extent of punishment
Fla.App. 2 Dist.,1999.
Prison Releasee Reoffender Act is not an expost facto law. U.S.C.A. Const. Art. 1, § 10, cl. I; West's F.S.A. § 775.082 (8).

(Cite as: 745 So.2d 519)

Grant v. State
[7] KeyCite this headnote
1 10 CRIMINAL LAW
11 OXXV Habitual and Second Offenders
110XXV(A) In General
11 Ok 120 1 Constitutional and Statutory Provisions

1 1 Ok I 201.1 k. In general.
Fla.App. 2 Dist.,1999.
Prison Releasee Reoffender Act is not an ex post facto law. U.S.C.A. Const. Art. 1, § 10, cl. I; Wcsl's F.S.A. § 775.082 (8).

(Cite as: 745 So.2d 519)

Grant v. State
[8] KeyCite this hcadnotc
1 35H DOUBLE JEOPARDY
1 35HII Proceedings, Offenses, Punishments? and Persons Involved or Affected
135Hk29 Sentencing Proceedings; Cumulative Punishment

135Hk30 k. Enhanced offense or punishment.
Fla.App. 2 Dist.,1999.
Double jeopardy clause was not violated by one sentence of 15 years as a habitual felony offender with minimum mandatory term of 15 years as a prison releasee reoffender. U.S.C.A. Const.Amend. 5; West's F.S.A. § 775.082(8).

(Cite as: 745 So.2d 519)

"520

(Cite as: 745 So.2d 519, *520)

James Marion Moorman, Public Defender, and Douglas S. Connor, Assistant Public Defender, Bartow, 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 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.
[1] 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 tbis argument as it relates to the Act. See Durden v. State, 24 Fla. L. Weekly D2050, D2050, 743 So.2d 77 (Fla. 1st DCA 1999); Lawton v. State, 24 Fla. L. Weekly D 1940,743

(Cite as: 745 So.2d 519, *520)

So.2d 51 (Fla. 5th DCA 1999); Young v. State, 719 So.2d 1010, loll-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 Flonda, m addition to addmg 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 pumshment on reoffenders to protect society. Because each amended section dealt m some fashion with reoffenders, we conclude that the statute meets that test.
*521

(Cite as: 745 So.2d 519, *521)

Young, 719 So.2d at 1012 (citations omitted).
SEPARATION OF POWERS.
[2] Grant argues that the Act violates Article IT, Section 3, of thc 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

(Cite as: 745 So.2d 519, *521)

So.2d 653,654 (Fla. 2d DCA 1987). See also Turner v. Stale, 24 Fla. L. Weekly D2074, D2075, 745 So.2d 351,35254 (Fla. 1 st DCA 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, 743 So.2d 15 (Fla. 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).
CRUEL AND UNUSUAL PUNISHMENT.
[3] Article I, Section 17, of thc Florida Constitution prohibits cruel and unusual punishment. Grant argues that the Act violates this prohxbition 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,

(Cite as: 745 So.2d 519, *521)

745 So.2d at 352-54. "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, 523 U.S. 1014, 118 S.Ct. 1297, 140 L.Ed.2d 335 (1998)).
VAGUENESS.
[4] Grant argues that the Act is unconstitutionally vague because it fails to define "sufficient evidence," "material witness," "the degree of materiality required," "extenuatmg 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 2 1. After a jury found him guilty, he was sentenced as a prison releasee reoffender to fifteen years in prison. Id.

[5] In the instant case, Grant was released from the Deparbnent of Corrections on May 3 1, 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: "any defendant who commits ... [s]exual battery . . . within 3 years of being released from a state correctional facility operated by

(Cite as: 745 So.2d 519, *521)

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, "522

(Cite as: 745 So.2d 519, *522)

we conclude that Grant is prohibited from raising any argument that the Act is unconstitutionally vague.

DUE PROCESS.

[6] 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 D2075, 745 So.2d at 352-54; McKnight, 727 So.2d at 3 19 ("this statute bears a rational relationship to the legislative objectives of discouraging recidivism in criminal offenders and enhancing the

(Cite as: 745 So.2d 519, *522)

punishment of those who reoffend, thereby comporting with the requirements of due process").

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.

[7] 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, D1610, 742 So.2d 805 (Fla. 5th DCA 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

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facto law violations.

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

DOUBLE JEOPARDY.

[8] 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 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 1020,102 1 (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.

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(Cite as: 745 So.2d 519, *523)

NORTHCUTT, J., Concurs.

(Cite as: 745 So.2d 519, *523)

ALTENBERND, J., Concurs specially.

ALTENBERND, 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 25 1 (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. Stale, 24 Fla. L. Weekly D2074, 745 So.2d 35 1 (Fla. 1 st DCA 1999), concerning the issue of cruel or unusual punishment is incorrect or at least insufficient. Turner relies on language from a case involving the death penalty. To determine whether Prison Releasee Reoffender sentencing is cruel or unusual, one must perform a proportionality review. See Hale v. Statc, 630 So.2d 52 1,526 (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. Statc, 72 2 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.
END OF DOCUMENT

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 23 day of February, 2000.

Respectfully submitted,

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