IN THE SUPREME COURT OF FLORIDA

JAMES V. CROSBY, JR., ETC.

Petitioner,

v.

FSC CASE NO. SC03-137
1DCA CASE NO. 1DO1-3205

JOHNNY BOLDEN,

Respondent.
_____/

PETITIONER'S MERITS BRIEF

_____

On Review from the District Court
of Appeal, First District,
State of Florida

_____

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

CHAPTER LAWS

FLORIDA ADMINISTRATIVE CODE RULE

COURT RULES

OTHER SOURCES

STATEMENT OF THE CASE AND FACTS[1]

Respondent Bolden committed aggravated battery in violation of section 784.045, a second-degree felony; possession of a short-barreled shotgun in violation of section 790.221, a second-degree felony; felonious possession of a firearm in violation of section 790.23, a second-degree felony; and aggravated assault in violation of section 784.021, a third-degree felony on December 21, 1992 involving two victims. (R. 45-49) He pled guilty on April 27, 1993 and was sentenced on each offense to prison for 10 years, less 127 days of jail credit. (R. 50-62) The sentences for aggravated battery, possession of a short-barreled shotgun, and aggravated assault were imposed as habitual felony offender sentences pursuant to section 775.084(4)(a). (R. 51, 53, 57) As to the three habitual felony offender sentences, a three-year firearm minimum mandatory term was imposed pursuant to section 775.087(2) for the aggravated battery and aggravated assault offenses, and a five-year minimum term was imposed for

[1]The petitioner will be referred to as the Florida Department of Corrections or as the "Department"; the respondent, Johnny Bolden, will be referred to by his last name; and the Florida Parole Commission will be referred to as the "Commission" or "FPC." The record on appeal will be referred to by the symbol "R," followed by the appropriate page numbers.

possession of a short barreled shotgun. (R. 51, 53, 57)[2]

The Department received custody of Respondent Bolden on May 11, 1993. (R. 39) Although the sentences ran concurrently, they did not end at the same time due to the differences in the applicable gain-time law on each sentence. No basic gain-time, only incentive gain-time (up to 20 days/month) was authorized on the habitual felony offender sentences, and no gain-time of any sort was authorized on two of the habitual offender sentences (aggravated assault/battery) until the 3-year firearm minimum mandatory term was served. On the other hand, both basic (10 days/month applied in a lump sum up front) and incentive gain-time (up to 20 days/month) were authorized on the sentence for felonious possession of a firearm, and incentive gain time (up to 20 days/month) was authorized on the shotgun sentence during the 5-year minimum mandatory term. (R. 40)[3]

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[2]Respondent Bolden also committed two misdemeanors for which he was sentenced to time served (R. 58-61), which have no relevance to the present litigation.

[3]See § 775.084(4)(e), Fla. Stat. (1991) ("A defendant sentenced under this section shall not be eligible for gain-time granted by the Department of Corrections except that the department may grant up to 20 days of incentive gain-time each month as provided for in s. 944.275(4)(b)"); § 775.087(2)(a), Fla. Stat. (1991) ("Any person who is convicted of ... aggravated assault, aggravated battery ... and who had in his possession a 'firearm,' ... shall be sentenced to a minimum term of imprisonment of 3 calendar years. *** [A]djudication

Respondent Bolden was subject to conditional release supervision on the three habitual felony offender sentences, which did not end at the same time. The shotgun sentence ended before the aggravated assault/battery sentences, the reason being that Bolden was eligible to receive incentive gain time while serving the 5-year minimum mandatory term on the shotgun sentence but not while serving the 3-year firearm minimum mandatory terms on the aggravated assault/battery sentences. (R. 40-41)

The shotgun sentence commenced to run on April 27, 1993 and ended on April 25, 1999 and was comprised of the following: TIME SERVED 2316 days [127 days of jail credit + 2189 days of prison time served] **+** 1334 days of GAIN TIME, WHICH IS TIME NOT SERVED for a grand total of 3650 days (10-year sentence). (R. 41)

Had this been Bolden's only sentence, he would have been released on April 25, 1999 into the conditional release

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of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall the defendant be eligible for parole or statutory gain-time under s. 944.275, prior to serving such minimum sentence"); § 790.221(2), Fla. Stat. (1991) ("Upon conviction thereof [for possession of short-barreled shotgun] he shall be sentenced to a mandatory minimum term of imprisonment of 5 years"; no provision restricting award of gain time); § 944.275(4)and (6), Fla. Stat. (1991; 2002) (sets out various types and rates of gain time that are authorized).

program under the control of the Florida Parole Commission for a period of time equal to the amount of gain time that was awarded, 1334 days. Bolden, however, still had to complete the aggravated assault/battery sentences before he could be released to supervision.

The aggravated assault/battery sentences both ended on March 27, 2000 and were comprised of the following: TIME SERVED 2653 days [127 days of jail credit + 2526 days of prison time served] **+** 997 days of GAIN TIME, WHICH IS TIME NOT SERVED for a grand total of 3650 days (10-year sentence). (R. 40) While Bolden was completing the aggravated assault/battery sentences, his conditional release supervision on the shotgun sentence was tolled 337 days (from April 25, 1999 to March 27, 2000). (R. 40-41)[4]

Bolden was released to supervision under the custody of the Florida Parole Commission on March 27, 2000. (R. 41) At this time, Bolden had 1334 days to serve on supervision on the shotgun sentence and 997 days to serve on supervision for the aggravated assault/battery sentences. (R. 40-41)

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[4]The fourth 10-year sentence for felonious possession of a firearm is not relevant to this litigation. That sentence ended the earliest through the accumulation of the greatest amount of gain time and without conditional release supervision to follow.

Bolden did not complete his supervision, which was revoked after he had been under supervision for 236 days, effective November 18, 2000, with 1 day of credit granted by the Commission. (R. 71-72) Bolden, therefore, was returned to prison to continue serving his sentences where they had ended.

The calculation of his new release date began with the date the sentence was originally imposed, and the period of time from that date forward when he was not in service of the prison term was accounted for in the calculation. Otherwise, by default this time would have become prison time served. The calculation on both sentences included a toll time of 236 days (less 1 day of FPC credit) for time spent at liberty under supervision, and the calculation on the shotgun sentence included an additional toll time of 337 days to account for the time Bolden remained incarcerated to serve the aggravated assault/battery sentences after the prison term on the shotgun sentence had ended through the accumulation of gain-time. The previously awarded gain-time on both sentences was also forfeited pursuant to section 944.28(1), Florida Statutes (1991-2002).

The structure of his sentences are shown as follows:

Shotgun Sentence		**Assault/Battery Sentences**	
Date/Sentence	April 27, 1993	Date/Sentence	April 27, 1993
10 years	+ 3650 days	10 years	+3650 days
Jail Credit	- 127 days	Jail Credit	- 127 days
Gain Time	- **1334 days**	Gain Time	- **997 days**
Initial		Initial	
End Date	April 25, 1999	End Date	March 27, 2000

Time on Cond. Rel. Sup. (3-27-00 - 11-18-00)	+ 236 days	Time on Cond. Rel. Sup. (3-27-00 - 11-18-00)	+ 236 day
FPC Credit	- 1 days	FPC Credit	- 1 day
GT Forfeited	+ 1334 days	GT Forfeited	+ 997 days
Time Served in Prison on other Sentences (4-25-99 to 3-27-00)	+ 337 days	----------	
GT earned since return to prison as violator	- 124 days	GT earned since return to prison as violator	- 124 days
End Date	**March 11, 2004**	End Date	**April 9, 2003**

Bolden's new tentative release date may also be calculated in the following manner:

Shotgun Sentence. November 18, 2000 (revocation date) + 1334 days (time not actually served) - 1 day (FPC credit) - 124 days (gain time awarded since return to prison) = **March 11, 2004**.

Assault/Battery Sentences. November 18, 2000 (revocation date) + 997 days (time not actually served) - 1 day (FPC credit) - 124 days (gain time awarded since return to prison = **April 9, 2003**.

Petitioner Bolden filed in Leon County Circuit Court Case

No. 2001 CA 142 a mandamus petition in which he contended that the time he was under supervision was 236 days, but that the Department had erroneously calculated it to be 573 days (236 + 337 = 573 days). (R. 1-20) The Department responded that the 337 days represented the time Bolden remained in prison on other sentences after the shotgun sentence had ended and argued that all the time Bolden was not in service of the shotgun sentence had to be accounted for in establishing his new tentative release date. (R. 23-72) Bolden replied that he served both prison time and supervision time simultaneously, and further that under no circumstances could the Department confine him in prison more than 10 years. (R. 73-78)

The Leon County Circuit Court agreed with the Department and denied the mandamus petition, relying in part on Evans v. Singletary, 737 So.2d 505 (Fla. 1999). (R. 79-83) The First DCA conducted certiorari review of the Circuit Court's order denying Bolden's mandamus petition. The First DCA first published an opinion in this case on August 2, 2002, but on January 8, 2003, that opinion was withdrawn and replaced with a new one. (A. 1-11) The Court granted the certiorari petition and concluded that the conditional release supervision could not be tolled on Bolden's shotgun sentence while he completed the prison terms on the aggravated

assault/battery sentences, and that no tolling time could be accounted for in calculating Bolden's new release date upon his return to prison as a conditional release violator. (A. 10) By implication, the Court further concluded that Bolden was entitled to 337 days of credit on his shotgun sentence to account for the time he remained incarcerated after the shotgun sentence ended until his release to supervision. (A. 10)

Recognizing the effect of its decision on the "Department's sentencing procedures and the Florida Parole Commission's supervision of those subject to conditional release," the First DCA certified the following question as one of great public importance:

> WHEN AN INMATE WHO IS SERVING SEVERAL RELATED SENTENCES SUBJECT TO CONDITIONAL RELEASE SUPERVISION FOR MULTIPLE CRIMES OCCURRING IN THE SAME CRIMINAL EPISODE HAS VIOLATED CONDITIONAL RELEASE SUPERVISION, SHOULD THE DEPARTMENT OF CORRECTIONS IN CALCULATING THE NEW RELEASE DATE, CONSIDER TIME SERVED FOLLOWING THE EXPIRATION OF THE INCARCERATIVE PORTION OF ONE SENTENCE, WHILE AWAITING EXPIRATION OF THE INCARCERATIVE PORTIONS OF THE OTHER RELATED SENTENCES, AS TOLLED, PURSUANT TO EVANS v. SINGLETARY, 737 SO.2D 505 (FLA. 1999), AND, IF SO, SHOULD THE DEPARTMENT ADD SUCH TOLLED TIME ONTO THE SENTENCE IN CALCULATING THE NEW RELEASE DATE? (A. 10-11)

SUMMARY OF THE ARGUMENT

Respondent Bolden received four concurrent sentences, each of which was viewed individually to determine whether he was subject to conditional release supervision, the length of the supervision, and the amount of gain-time subject to forfeiture upon revocation of supervision. Bolden was subject to conditional release supervision on three of the sentences (shotgun, aggravated assault, and aggravated battery sentences). The length of the supervision on each sentence was equal to the amount of gain-time that was applied to the sentence, and that same amount of gain-time was forfeited upon Bolden's return to prison as a supervision violator. The new release date also was extended on each sentence to account for the number of days Bolden was not in service of the prison term on the sentence.

Two tolling periods were involved in this process. The first was the tolling of the period of supervision until the incarceration portion of all the sentences was served. The second was the tolling of the period of incarceration on each sentence from the date each sentence conditionally ended through the accumulation of gain-time until supervision was revoked.

Pursuant to the conditional release supervision statute

and Evans, supervision commences when the inmate is released from custody, which is the date the inmate reaches the overall tentative release date, *not* from the date one of the sentences ends earlier than the overall tentative release date. Supervision, therefore, necessarily is tolled on a sentence that ends before the overall tentative release date is reached. Otherwise, the period of supervision to be served at liberty is reduced or eliminated entirely.

Upon reaching the ending date of a concurrent sentence through the accumulation of gain-time, the prison term conditionally has been served. From that point forward, the Department no longer has custody over the inmate on that sentence and cannot regain custody unless, and until, the Commission or the sentencing court revokes the supervision and returns the inmate to prison as a supervision violator. Between these two dates, the Department has no authority to grant the inmate credit for prison time (equal to the amount of time spent in prison serving other sentences or the amount of time spent out of prison under supervision). Prison time, therefore, necessarily is tolled on a sentence after it conditionally ends until the inmate returns to prison as a supervision violator. Otherwise, the period of supervision *and* the period of incarceration to be served as a violator is

reduced or eliminated entirely. This is so because a sentence is comprised of time served and time not served (gain-time), and the decrease or increase of one automatically decreases or increases the other.

Both types of tolling periods were the longest on Bolden's shotgun sentence because it ended first, and from the date the sentence conditionally ended until Bolden was actually released from prison, neither supervision nor prison time was running. If supervision had been running in prison, it would have reduced his supervision at liberty by 337 days, and if prison time had been running in prison while he served the other sentences, it would have reduced by 337 days his period of supervision at liberty *and* his period of incarceration as a supervision violator.

To avoid granting Bolden unauthorized prison credit upon his return to prison as a supervision violator on the shotgun sentence, the Department had to extend his new tentative release date on that sentence by 573 days (337 days for time spent in prison solely on the other sentences and 236 days for time spent at liberty under supervision), less the 1 day of supervision credit granted by the Commission.

The First DCA held that supervision on the shotgun sentence began in prison, and that upon revocation of

supervision, the Department could not extend Bolden's new release date to account for the time he remained in prison to serve the other sentences after his shotgun sentence conditionally ended through the accumulation of gain-time. In other words, neither Bolden's supervision period nor his period of incarceration could be tolled during this time frame. These holdings are impossible to reconcile because an inmate cannot serve supervision and prison time simultaneously on the *same* sentence.

The First DCA based its holdings on the proposition that the Department needs express legislative authority to **toll** both the running of supervision and the running of prison time. Respectfully, just the opposite is true. The Department needs express legislative authority for supervision to **begin running** before release from custody and for prison time to **continue running** after the sentence has conditionally ended. No such authority exists. Supervision begins upon release from custody, and prison time restarts upon revocation of supervision.

Approval of the First DCA's decision will undermine legislative intent as manifested in both the gain-time and conditional release statutes by reducing or eliminating on a sentence the amount of time an inmate must spend under

conditional release supervision, and the amount of time the inmate must spend incarcerated as a supervision violator. In addition, requiring the Department and the Commission to base tolling decisions on whether multiple concurrent sentences were imposed for related or unrelated offenses is an impossible task.

CERTIFIED QUESTION

> WHEN AN INMATE WHO IS SERVING SEVERAL RELATED SENTENCES SUBJECT TO CONDITIONAL RELEASE SUPERVISION FOR MULTIPLE CRIMES OCCURRING IN THE SAME CRIMINAL EPISODE HAS VIOLATED CONDITIONAL RELEASE SUPERVISION, SHOULD THE DEPARTMENT OF CORRECTIONS IN CALCULATING THE NEW RELEASE DATE, CONSIDER TIME SERVED FOLLOWING THE EXPIRATION OF THE INCARCERATIVE PORTION OF ONE SENTENCE, WHILE AWAITING EXPIRATION OF THE INCARCERATIVE PORTIONS OF THE OTHER RELATED SENTENCES, AS TOLLED, PURSUANT TO EVANS v. SINGLETARY, 737 SO.2D 505 (FLA. 1999), AND, IF SO, SHOULD THE DEPARTMENT ADD SUCH TOLLED TIME ONTO THE SENTENCE IN CALCULATING THE NEW RELEASE DATE?

The answer to the certified question is a resounding "Yes." The First DCA in this case held that when an inmate is serving concurrent conditional release eligible sentences imposed for related crimes committed in the same incident, conditional release supervision cannot be tolled on any of the sentences that may end before the last sentence ends, and (except for the tolling of the prison term during supervision outside the prison) that no tolling can be accounted for in calculating a new release date upon the inmate's return to prison as a conditional release supervision violator.

The First DCA construed Evans, supra, to hold that conditional release supervision could be tolled on a supervision sentence that ends before a nonsupervision sentence only where both sentences are imposed for unrelated offenses and run concurrently. The First DCA concluded that

except for the Evans scenario, the Department has no judicial authority or any statutory authority to toll conditional release supervision. It further concluded that the Department has no statutory or judicial authority whatever to extend an inmate's release date to account for the time the inmate remained in prison after a supervision sentence ended until all the other sentences were served and the overall tentative release date was reached.

The First DCA's opinion affects how the ending dates on sentences are calculated before the inmate is released to conditional release supervision, the amount of time the inmate is to serve under supervision, how the ending dates on sentences are calculated upon the inmate's return to prison as a supervision violator, and how the inmate's new tentative release date is determined.

PRELIMINARY STATEMENT

Each prison sentence has its own ending date, which is calculated based on factors unique to it: Date sentence was imposed; length of sentence imposed; special provisions imposed, such as minimum mandatory terms; presentencing credit granted by the sentencing court, such as credit for time spent in jail awaiting disposition of the case under § 921.161, Fla. Stat., credit for prison time served and gain-time awarded

under State v. Green, 547 So.2d 925 (Fla. 1989), Tripp v. State, 622 So.2d 941 (Fla. 1993), and § 921.0017, Fla. Stat.; rate and amount of gain-time applied under § 944.275(4), Fla. Stat.; credit for time spent under executive supervision upon revocation of supervision, which is granted by the Commission;[5] and forfeiture of gain time under § 944.28, Fla. Stat.

This Court repeatedly has recognized the uniqueness of each sentence. Parole Com'n v. Cooper, 701 So.2d 543 (Fla. 1997); Pressley v. Singletary, 724 So.2d 97 (Fla. 1997); and Evans, 737 So.2d at 508 (The conclusion that tolling of conditional release supervision is proper "is still in accord with both *Cooper* and *Pressley* because the concern in those cases was that each sentence had to be viewed individually for purposes of eligibility for Conditional Release, the length of supervision, and any resulting gain-time forfeiture").

A prison sentence is served by incarceration, not at

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[5]See e.g., Schell v. Wainwright, 322 So.2d 897 (Fla. 1975) (Commission has statutory discretion to grant parole credit on prison term); Coleman v. Wainwright, 323 So.2d 581, 582 (Fla. 1975) (no constitutional right to parole credit on prison term); Gay v. Singletary, 700 So.2d 1220 (Fla. 1997) (Commission has statutory authority to deny or grant control release credit on prison term); Rivera v. Singletary, 707 So.2d 326 (Fla. 1998) (same, but as to conditional release credit); Thomas v. Moore, 797 So.2d 1196 (Fla. 2001) (same, but as to vacation of control release after revocation of probation).

liberty, and it ends when the sentence has been served either day for day in prison or through the accumulation of gain time. On the date the inmate's last sentence ends, he or she will be released from prison. Since this date may be earlier than the length of the sentence imposed, a tentative release date (TRD) is established to project the earlier release date through the accumulation of gain-time.

The computation begins with the date the sentence commences to run, which is the date the sentence is imposed. § 944.275(2) and 921.161(1), Fla. Stat. A maximum release date is established first based on the following formula: date sentence imposed + prison term imposed (converted into days) minus judicial credit for presentence time served. § 944.275(2)(a), Fla. Stat. The TRD then is established based on the following formula: maximum release date minus award of gain time plus forfeiture of gain time. § 944.275(3)(a), Fla. Stat.

Although each sentence has its own ending date (calculated in the same manner as is the ending date on the TRD sentence), there is only one overall TRD, which is determined by the sentence or sentences which end last. Generally it is the longest sentence imposed, Winkler v. Moore, 831 So.2d 63, 71 (Fla. 2002), but due to the variations

in the gain-time earned on each sentence and the date of imposition, it may be a shorter sentence or a sentence of the same length.

The time served incarcerated and the gain-time earned both work to reduce the number of days that are left to be served on a sentence, but neither reduces the length of the sentence itself. Time served and gain time earned work together but in opposite directions, so to speak. Each day served in custody on a sentence after a sentence is imposed moves the inmate one day closer to the release date, whereas each day of gain time applied moves the tentative release date that number of days closer to the present. When the tentative release date is the same as the calendar date, the inmate is released from custody. In other words, time served applies to the front end of the sentence, while gain time applies to the back end. Upon the sentence ending, the term of imprisonment imposed will be comprised of time served and time not served (gain-time).

How the Department calculates an ending date on a sentence is independent of how the sentence is to be served. A sentence may be served alone, or concurrently with one or more sentences, or consecutively to one or more sentences.

If the sentence runs concurrently with another sentence,

this merely means that it is traveling with the other sentence. While the sentences are running concurrently, a day served in prison on one is a day served in prison on the other, but the gain-time earned may vary significantly, for example, from 0 days up to 25 days of incentive gain-time monthly. The sentences continue to run concurrently as long as both remain active, and a sentence remains active until it has ended through the accumulation of gain time or, if no gain time is authorized, through service of the sentence in prison day for day.

Consecutive sentences, on the other hand, are served one after the other, and both prison time served and gain-time earned remain unique to each sentence. However, because the retention of earned gain-time is conditioned on continuing good behavior until the last sentence is served and the release date is reached, it may be necessary to forfeit earned gain-time on a sentence that has reached its ending point in the consecutive chain. An exception is made for inmates who offended between July 1, 1978 and June 16, 1983. Orosz v. Singletary, 693 So.2d 538 (Fla. 1997)

What happens when one sentence ends before another sentence ends is elaborated on in Brooks v. State, 762 So.2d 1011, 1013 n 3 (Fla. 5th DCA 2000) involving concurrent

sentences, one subject to probation and the other to parole supervision:

> Being released by the Department of Corrections in this case does not mean that Brooks was physically released from custody since he continued serving an unrelated sentence after the expiration of the incarcerative portion of his sentence. It simply means that the Department of Corrections constructively released him from the incarcerative portion of that sentence.

I. CONTRARY TO THE FIRST DCA'S HOLDING, RESPONDENT BOLDEN'S CONDITIONAL RELEASE SUPERVISION ON THE SHOTGUN SENTENCE WAS PROPERLY TOLLED UNTIL HE SERVED THE AGGRAVATED ASSAULT/BATTERY SENTENCES AND REACHED HIS OVERALL TENTATIVE RELEASE DATE.

Conditional release supervision is a **post-prison** program for inmates who need additional supervision after completing the incarcerative portion of their sentences through the accumulation of gain time. Mayes v. Moore, 827 So.2d 967, 972 (Fla. 2002); § 947.1405, Fla. Stat.; § 944.291(2), Fla. Stat. Neither the sentencing court nor the Department has any authority over the conditional release program; rather, it is a statutory program implemented solely by the Florida Parole Commission. Mayes v. Moore, 827 So.2d at 971; Gay v. Singletary, 700 So.2d 1220, 1221 (Fla. 1997); Rivera v. Singletary, 707 So.2d 326, 326 (Fla. 1998). The Department

actually supervises the inmate, but it is on behalf of the Commission. The length of the inmate's supervision is equal to the gain-time earned on the sentence. Duncan v. Moore, 754 So.2d 708, 710-711 (Fla. 2000).

Section 947.1405(2), Florida Statutes (Supp. 1992) provides in relevant part:

> **Any inmate** who is convicted of a crime committed on or after October 1, 1988, which crime is contained in category 1, category 2, category 3, or category 4 of Rule 3.701 and Rule 3.988, Florida Rules of Criminal Procedure, and who has served at least one prior felony commitment at a state or federal correctional institution or is sentenced as a habitual or violent habitual offender pursuant to s. 775.084 **shall, upon reaching the tentative release date** or provisional release date, whichever is earlier, as established by the Department of Corrections, **be released under supervision** subject to specified terms and conditions, including payment of the cost of supervision pursuant to s. 948.09. (emphasis supplied)

Conditional release supervision is **mandated** for the worst of criminals--for example, murderers, sexual offenders, robbers, and those who commit other violent personal crimes against their victims. Rules 3.701 and 3.988, Fla.R.Crm.P. These offenders are too great of a threat to society to be set free without supervision.

While generally there are rehabilitative aspects of prison life, they cannot substitute for supervision in the community. It is one thing for an inmate to remain

productive, drug free, alcohol free, non-violent, and law abiding while under constant and pervasive supervision and another thing for the inmate to do so while living in the community. There the inmate is expected to meet financial, family, and social obligations, while dealing with the same frustrations, influences, and temptations that got him into trouble in the first place. Duncan v. Moore, 754 So.2d at 710 ("This supervision should help these former inmates in bridging the gap between prison and the outside world. To encourage releasees to comply with the terms and conditions of supervision, the program provides that if the releasee fails to do so, the releasee will be returned to prison and his gain time will be forfeited").

From its plain and express language, the conditional release statute requires supervision to begin upon the date the inmate reaches his or her tentative release date. This is "the date projected for the prisoner's release from custody by virtue of gain-time granted or forfeited pursuant to s. 944.275(3)(a)." § 947.005(6), Fla. Stat. (1991). Since an inmate cannot be released from custody until his last sentence has been served, Winkler. 831 So.2d at 71, the Department, pursuant to section 944.275(3), calculates an overall tentative release date based on the sentence which ends last.

Given its purpose, there can be only one such date, even though the inmate may have other sentences to serve which will end earlier due to their unique characteristics.

The conditional release statute further provides that upon reaching the tentative release date, the inmate shall "be **released** under supervision subject to specified terms and conditions, including payment of the cost of supervision pursuant to s. 948.09." In a prison setting, there is little doubt as to the meaning of the word "release." It means "to set free, as from confinement," and it is a synonym for "free." Webster's New World College Dictionary, 1210 (4th ed. 2000).

The sentence in which the word "released" appears in the conditional release statute supports this construction. When the inmate is "released," it is to supervision, and he is expected to comply with certain terms and conditions, such as payment of his supervision. These conditions obviously do not come into play until the inmate is physically released from custody.

The legislature thus has clearly indicated when supervision commences, without any exceptions for specific fact patterns. In other words, supervision commences upon the inmate's physical release from prison, not while the inmate is

still in prison, nor after the inmate has been at liberty for awhile. If a sentence ends through the accumulation of gain-time before all the sentences are served, the supervision portion necessarily will be tolled until the inmate's physical release from custody.

Evans is consistent with the Department's interpretation of the conditional release statute. There this Court held that the Commission could toll the period of supervision on the supervision sentence until the nonsupervision sentence was served. Its holding was based on the purpose of the Conditional Release Program Act (supervision of more at-risk offenders after their release from prison); the absurdity of allowing post-prison supervision to be served in prison in view of its purpose; and the windfall to the inmate resulting from service of supervision while imprisoned.

This Court in Evans also relied on two cases approving tolling of judicial supervision (probation and community control) while a nonsupervision sentence was served: State v. Savage, 589 So.2d 1016 (Fla. 5th DCA 1991) (probationary term was tolled on concurrent sentences while defendant served straight incarceration on an unrelated consecutive sentence) and Bradley v. State, 721 So.2d 775 (Fla. 5th DCA 1998) (judicial supervision tolled on sentence that apparently ran

concurrently with an unrelated straight sentence). See also, Brooks v. State, supra (probation supervision tolled on one sentence while defendant completed unrelated prison term on another sentence subject to parole).

According to the First DCA, Bolden's supervision on the shotgun sentence commenced running when it ended through the accumulation of gain-time, rather than when he was actually released from prison. Why the First DCA reached this result is unclear from the opinion, but without an answer, it is difficult to adequately discuss the case. The First DCA focuses its attention on determining whether any law exists to stop the supervision from running until physical release from prison.

The First DCA concludes that section 947.1405(2) does not authorize the tolling of Bolden's supervision. (A. 9-10) The Court finds "no statutory support for the Department's calculation." It points out that section 947.141(4), Fla. Stat. (1991) (revocation of conditional release) "makes no mention of tolling or adding supervision time into the new release date." As to section 947.1405(2), Fla. Stat. (1991) (conditional release supervision), the Court observes that the statute "simply states that the inmate will be released under supervision 'upon reaching the tentative release date or

provisional release date'" and notes that the 1997 amendment found in section 947.1405(2)(c) was not in effect then. This provision provides that if an inmate has one supervision sentence to serve, all of the sentences being served are subject to supervision. The First DCA interprets this Court's Pressley decision as construing all these provisions to mean that for offenses committed after the 1997 amendment, supervision may be transferred by the Commission "to the end of the overall sentence." (A. 9-10) The Department respectfully disagrees with the First DCA's conclusion that no statutory authority exists to toll.

While there is no express statutory authority to toll, there is implicit authority to toll. The conditional release supervision statute provides a specific date when supervision begins, and that is the date upon which the inmate is physically released from custody. If supervision does not begin until the inmate is actually released, then supervision on a sentence that ends before this date necessarily is tolled.

Although not entirely clear, it appears that the First DCA views the 1997 amendment to the conditional release statute as authorizing tolling of supervision for offenses committed after its effective date. (A. 9-10) If so,

respectfully the First DCA has misconstrued this amendment.

Section 947.1405(2) was amended in 1997 by adding the following sentence, "Such supervision shall be applicable to all sentences within the overall term of sentences if the inmate's overall term of sentences includes one or more conditional release eligible sentences as provided herein." Ch. 97-308, § 1 at 5516, Laws of Fla. The amendment applies only to sentences imposed for offenses committed on or after October 1, 1997, and it is not relevant in this case due to Bolden's offense date.

The amendment did not alter the time when supervision begins. Conditional release supervision has always started only upon an inmate's release from prison, initially upon reaching his or her tentative release date and later, after provisional credits went into effect, upon reaching the earlier of the two release dates. See § 947.1405(2), Fla. Stat. (1988-2002). The amendment expanded the class of sentences on which the inmate was subject to supervision. It simply operates as follows: If at least one sentence in an inmate's bundle of sentences is a conditional release covered sentence, then all the sentences in the bundle committed after October 1, 1997 are treated as conditional release covered sentences.

For example, suppose an inmate has previously been committed to prison and he is at some time later committed to the Department to serve two sentences, with one being a category 4 offense and the other a category 5 offense. If the offenses were committed before the 1997 amendment, the inmate would be subject to supervision on only the sentence imposed for the category 4 offense. If the offenses were committed after the 1997 amendment, the sentence imposed for the category 5 offense also would be subject to supervision by virtue of having been imposed within the overall term of sentences.

In its discussion of the 1997 amendment, the First DCA also appears to have concluded that after 1997, a supervision is to be transferred to the end of the overall sentence. It relied on a comment made by this Court in Pressley regarding the transfer of "supervision to the end of the overall sentence for offenses committed after the 1997 amendment."(A. 9-10) This Court in dicta briefly discussed the 1997 amendment in Cooper, at 45, and Pressley at 97-98, but not in Evans. Technically, supervision is not transferred from one sentence to another, either before or after the 1997 amendment, but rather, as was explained by this Court in Evans at 508-509, a supervision sentence itself is used to determine the length of

supervision, and the supervision period on that sentence is tolled until the inmate is released from prison after serving all his sentences.

In addition to the lack of statutory authority to toll, the First DCA also concludes that Evans does not authorize tolling of Bolden's supervision. (A. 10) The First DCA recognizes that Evans does authorize tolling, but as it reads the opinion, that authority does not include tolling under Bolden's circumstances. The apparent reason is that the two probation opinions cited in Evans are based on an exception to the "general rule" that probation begins immediately upon release from incarceration. The First DCA states:

> In upholding the Department's actions, the court cited with approval *Sate v. Savage*, 589 So.2d 1016 (Fla. 5th DCA 1991), and *Bradley v. State*, 721 So.2d 775 (Fla. 5th DCA 1998), as authority for tolling the supervision period while the inmate remained in prison on unrelated, uncovered offenses.
> ****
> *Evans* extends the reasoning in *Savage* to conditional-release supervision, as opposed to probation, but like *Savage* and *Bradley*, it also involves unrelated sentences; a 15-year sentence for a cocaine offense committed in 1988 and a seven-year sentence for manslaughter committed in 1992. In the instant case, Bolden is serving concurrent sentences on *related* crimes; therefore, it cannot be said that he "decided to incur new prison time as a result of a separate and distinct offense," *Savage*, 589 So2d at 1018, thereby justifying a deviation from the general rule that the supervisory portion of a split sentence should immediately follow the incarcerative portion of that sentence." (A. 6-8)

The Department respectfully disagrees with the First DCA's overall conclusion.

Savage held that probation supervision is tolled on one sentence while another sentence is served for a subsequently committed offense because the delay is due to the inmate's own misconduct. Savage was followed in Bradley without much discussion. These probation cases were factually convenient for this Court in Evans, and the reasoning supporting their holdings could be adopted without embracing general probationary rules.

Nothing was said in Evans about any general rules; the focus was elsewhere. This Court reasoned that it would defy common sense to serve supervision in prison; it would make no sense to require inmates who needed supervision to serve it in prison; and a defendant should not benefit from his own misconduct.

This Court in Evans did not discuss the conditional release statute in terms of whether both constructive and actual release were covered. It in fact has not yet done so. In three of its major supervision cases, Cooper, Pressley, and Evans, related issues were addressed, but not this precise issue. In Cooper, this Court interpreted the conditional release statute to apply only to supervision sentences and

commented that the statute speaks to the release date on supervision sentences but not on non-supervision sentences. Cooper, 701 So.2d at 545. Pressley essentially reaffirmed Cooper, and Evans, of course, reaffirmed the individuality of each sentence and dealt with the tolling issue.

The First DCA also distinguished Evans on the ground that the release date was later on the nonsupervision sentence than it was on the supervision sentence, and that without tolling, Inmate Evans would have obtained his freedom without serving supervision. This would be true only if Inmate Evans' supervision sentence could have been served day for day in prison before the non-supervision sentence ended. The opinion does not disclose this fact.

By contrast, according to the First DCA, Bolden could not have received a windfall of conditional freedom because all three of his sentences were supervision sentences. While Bolden's windfall would not result in his immediate freedom, it would bring him 337 days closer to unconditional freedom by reducing the amount of time to be served on supervision to 997 days (as opposed to 1334 days). The First DCA's approach overlooks the uniqueness of each supervision sentence.

Finally, the First DCA concludes that Savage, Bradley, and Brooks do not support tolling conditional release

supervision, and it distinguishes these cases on the same ground that it distinguishes Evans. The Department respectfully disagrees and relies on its prior analysis.

The Department recognizes that these cases involve the general principle that "the supervisory portion of a split sentence should immediately follow the incarcerative portion of that sentence," which the First DCA mentions twice in its opinion. (A. 6-8) This rule is codified in section 948.01(6), Fla. Stat. (2002) ("The period of probation or community control shall commence immediately upon the release of the defendant from incarceration, whether by parole or gain-time allowances"). It, however, does not take precedence over the conditional release statute, and the Legislature's intent that conditional release supervision begin upon the inmate's physical release from custody. Lincoln v. Florida Parole Commission, 643 So.2d 668, 669, 671 (Fla. 1st DCA 1994) ("no statute should be construed so as to defeat the intention of the Legislature").

II. CONTRARY TO THE HOLDING IN BOLDEN, A CONDITIONAL RELEASE VIOLATOR'S SENTENCE MUST BE TOLLED FOR ANY TIME SPENT IN PRISON SERVING A LONGER CONCURRENT OR CONSECUTIVE SENTENCE, AFTER CONDITIONAL COMPLETION OF A SHORTER CONCURRENT SENTENCE.

Bolden accepts that an inmate's release date must be extended for the time spent out of prison on conditional release supervision. Bolden however, holds that where related sentences are imposed, the Department lacks authority to add days to a release date to account for the time spent in prison serving a longer concurrent sentence, after conditional completion of a shorter concurrent sentence. Thus, even though the shotgun sentence conditionally expired on April 25, 1999, and the next 337 days Bolden spent in prison until his release on March 27, 2000, was to conditionally satisfy other sentences, Bolden holds that these 337 days must be applied to the shotgun sentence. The Department lacks authority to apply this credit, applying this credit interferes with the Conditional Release Program Act, and it is against public policy.

Most administrative agencies are creatures of statute and have only such powers as the statutes confer. See, Fiat Motors of N. America v. Calvin, 356 So.2d 908, 909 (Fla. 1st DCA 1978). The statute that instructs the Department generally on how to structure a release date does not authorize the Department to credit a sentence for time not served on a sentence. That section, entitled "gain-time" provides for the establishment of a "maximum release date," which is arrived at

by beginning with the date of the sentence, adding the term of the sentence and then deducting time lawfully credited. "In establishing [the maximum release date], the department shall reduce the total time to be served by any time lawfully credited." See § 944.275(2)(a), Fla. Stat. (1983)-(2002). Time lawfully credited can include credit a sentencing court awards for jail time credit under § 921.161, time served and gaintime under State v. Green, 547 So.2d 925 (Fla. 1989) or Tripp v. State, 622 So.2d 941 (Fla. 1993), and time served under § 921.0017. It can also include credit awarded by the Florida Parole Commission under § 947.1405. However, none of these sources provide authority for the Department to apply credit to a conditional release violator for time spent in prison serving other sentences. That time is not court ordered pre-sentence jail credit or probation violation credit and as the Commission awarded a credit of only one day while on supervision, the source of the credit cannot be lawfully ordered credit by the Parole Commission.

Section 944.275 also authorizes the Department to apply gain-time to a sentence in order to establish a tentative release date. See, § 944.275(3)(a), Fla. Stat. (1983)-(2002). The 337 days does not represent gain-time. Thus, that subsection also fails to provide authority to apply

credit for the 337 days Bolden spent in prison serving other sentences. Section 944.275 simply does not authorize the Department to transfer credit for time served in prison on a longer concurrent or consecutive sentence and apply that time to a shorter sentence which had already been conditionally satisfied.

Further, while the Commission's statutes allow DOC to reduce the time a violator is to serve upon violation with newly earned gain-time, it does not provide authority to reduce the time an inmate is to serve as a violator by time spent in prison before release serving other sentences.

> Whenever a conditional release is revoked by the commission and the releasee is ordered by the commission to be returned to prison, the releasee, by reason of his misconduct, may be deemed to have forfeited all gain-time or commutation of time for good conduct, as provided for by law, earned up to the date of his conditional release. This subsection does not deprive the prisoner of his right to gain-time or commutation of time for good conduct, as provided by law, for the date on which he is returned to prison.
> § 947.141(4), Fla. Stat. (1991).

Inmate Bolden was not in service of the shotgun sentence after the prison term on it had ended through the accumulation of gain-time; nor was he in custody in service of this sentence or the aggravated assault/battery sentences after his release to conditional release supervision. To avoid treating this time as prison time, the release dates (not length of

sentences) had to be extended accordingly. The release dates on the shotgun sentence and aggravated assault/battery sentences were extended 236 days (less 1 day FPC credit) to account for the time Bolden spent at liberty under supervision. The release date on the shotgun sentence was extended another 337 days to account for the time Bolden was not in service of that sentence but was in service of the aggravated assault/battery sentences.

The First DCA correctly acknowledged the Department's duty to extend the release date on the shotgun sentence as it related to the time Bolden was not in service of the prison term while he was actually at liberty. It, however, incorrectly refused to allow the Department to extend the release date for the remainder of the time that Bolden was not in service of the prison term on the shotgun sentence. The First DCA concludes that there is no statutory authority to add "the tolled supervision" period to the sentence calculation. Respectfully, the converse is true. In order for the DOC to apply credit for time when an inmate was not in service of a conditionally expired sentence, which is accounted for by tolling, the legislature must have provided authority. No such authority exists.

It is important to remember that the Department has no

authority to confine an inmate on a concurrent sentence on which the prison portion has ended. If the inmate is not released immediately, it is because he or she is being held in confinement solely to serve other sentences. Cf. Keene v. Cochran 146 So.2d 364 (Fla. 1962) (petitioner is entitled to be released from void sentences and sentence which have been satisfied, but must be detained by corrections to serve remainder of other lawfully imposed sentences).

Not only is tolling necessary on the shotgun sentence to avoid applying credit for time served solely on other sentences, if the Department did not toll, it would undermine the Conditional Release Program Act. In order to encourage offenders to comply with the terms and conditions of supervision, the Legislature provided authority for the forfeiture of gaintime upon revocation of conditional release.

> Whenever a conditional release is revoked by the commission and the releasee is ordered by the commission to be returned to prison, the releasee, by reason of his misconduct, may be deemed to have forfeited all gain-time or commutation of time for good conduct, as provided for by law, earned up to the date of his conditional release.
>
> See § 947.141(4), Fla. Stat. (1991).

At the same time the Conditional Release Act was made effective, the forfeiture provision was also incorporated into § 944.28(1).

> If a prisoner is convicted of escape, or if . . . conditional release as described in chapter 947, . . . is revoked, the department may, without notice or hearing, declare a forfeiture of all gain-time earned according to the provisions of law by such prisoner prior such escape or his release under . . . conditional release . . .

See, Ch. 88-122, § 9, Laws of Florida, p. 538. The forfeiture provision has been implemented by rule, providing for the mandatory forfeiture of all gaintime earned before release, upon revocation of conditional release supervision. See Fla. Admin. Code R. 33-601.104(1)(a)3. Consistent with these statutes and the administrative rule, this court has noted in a series of cases that, upon revocation of conditional release, an offender returns to prison to finish serving the releasee's original sentence or sentences by the forfeiture of all the gaintime earned before release. See Duncan v. Moore, 754 So.2d 708 (Fla. 2000) (conditional release violator returns to prison to finish his or her sentence equal to the amount of gain time awarded before release to supervision); Mayes v. Moore, 827 So.2d 967 (Fla. 2002) (it is not unforeseeable that all gaintime, including overcrowding gaintime, earned before release to conditional release, is subject to forfeiture upon revocation of conditional release); Evans v. Singletary 737 So.2d 505 (Fla. 1999) (determining length of supervision based on sentence subject to supervision

and not on longer concurrent sentence which did not qualify for supervision and forfeiting the gaintime earned on sentence subject to supervision is consistent with conditional release act); Dowdy v. Singletary, 704 So.2d 1052 (Fla. 1998) (control and conditional releasee's sentences are not complete upon release; based upon legislative changes, revocation of conditional release is a circumstance for which gaintime is subject to forfeiture).

However, applying credit for time served solely on a longer concurrent or a consecutive sentence, will result in an inmate returning to prison as a conditional release violator to serve less than all the gaintime earned before release. In Bolden's case, he should return to prison to serve 997 days on the assault/battery sentences and 1334 days on the shotgun sentence because this is the amount of gaintime earned on these sentences before reaching the tentative release date. However, Bolden reduces or offsets the forfeiture of the gaintime earned on the shotgun sentence by prison credit served on the other sentences.[6] An argument that Bolden does not provide for the forfeiture of less than all the

[6] Bolden earned 1334 days of gaintime on the shotgun sentence, reducing that by the prison credit served between 4/25/99 to 3/27/00 on the other sentences, results in Bolden returning to prison to serve only 997 days.

gaintime earned before release, and that it simply provides that the Department may not toll for time spent in prison serving longer concurrent sentences, elevates form over substance. If the gaintime an offender earned before release is reduced by time spent in prison on other sentences, the offender does not return to prison to serve all the gaintime earned before release to prison. This is clearly contrary to the Conditional Release Program Act and § 944.28(1).

While it is an oversimplification of the decision, the Bolden court finds, in part, that because neither the Department's statutes nor the Conditional Release Act contain the word "tolling," tolling the shotgun sentence while in prison is not authorized. The legislature need not have included the word "tolling" because it provided for this in other ways – that is, directing the Department as to what credit may be applied to a sentence (and this credit does not include time served solely on other prison sentences after conditional completion of a shorter sentence)and by providing for the forfeiture all gaintime earned before release.

Clearly, the Department's statutes should not be read to undercut the statutes the Parole Commission implements. Where statutes operate on the same subject, courts should construe them so as to preserve the force of both. See, Mann v.

Goodyear Tire & Rubber Co., 300 So.2d 666 (Fla. 1974.) In the past, offenders attempted to construe DOC's statutes to undercut the Conditional Release Act, arguing that because the Department's statutes did not provide for extending a release date during the time an offender was on control release supervision, the Department had no authority to toll or extend a release date for this period of time. This Court rejected the argument, reasoning as follows:

> The Florida Parole Commission considered whether Gay should be granted credit for time spent on Control Release but ultimately denied such credit. The Department of Corrections then recalculated Gay's release date. In so doing, **the Department did not credit Gay for time spent under supervision but rather included that period of time as time spent out of custody**. *See* § 944.275(2)(c), Fla. Stat. (1995).[7]****
>
> First, Gay argues that the Department of Corrections does not have authority to deny him credit for the time he spent on Control Release because section 944.275, which provides how the Department is to determine inmate release dates, does not address deduction of credit when Control Release is revoked. That section only mentions the exclusion of time spent out of prison from the release date calculation when an inmate is returned to custody after escaping or violating parole. *See* § 944.275(2)(c). Thus, Gay maintains that, under the

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[7]This section provides: "When an escaped prisoner or a parole violator is returned to the custody of the department, the maximum sentence expiration date in effect when the escape occurred or the parole was effective shall be extended by the amount of time the prisoner was not in custody plus the time imposed in any new sentence or sentences, but reduced by any lawful credits."

> doctrine of *inclusio unius est exclusio alterius,* the Department lacks authority to deny him credit. We conclude, however, that the resolution of this case depends not on section 944.275, but rather on section 947.146. Section 944.275(2)(c) is merely instructive as to how the Department of Corrections is to determine inmate release dates. Under section 947.146(1), it is the Parole Commission, as the Control Release Authority, that administers the Control Release program. Therefore, logically it should be the Parole Commission that determines credit for time spent under that program. If the legislature had intended that this important decision be determined by *another* agency, such as the Department of Corrections, the legislature surely would have made that intent clear. Therefore, we conclude that the Department of Corrections cannot grant credit for time spent under Control Release supervision unless the Parole Commission instructs it to do so. ****
>
> Accordingly, because it was within the Parole Commission's authority to deny Gay credit for time spent on Control Release and the Department of Corrections properly refused to include such credit in recalculating Gay's release date, we deny the petition. *Id.*, at 1221-1223.

Gay was extended to conditional release supervision in Rivera v. Singletary 707 So.2d 326 (Fla. 1998).

Thus, the fact that § 944.275 does not explicitly provide for extending a release date after a sentence has been conditionally satisfied is not dispositive. Where an offender is subject to conditional release supervision, the DOC's statutes must be read in conjunction with the Conditional Release Program Act. In order to avoid diminishing and in some cases, nullifying the penalty for violation of

supervision, it is necessary to extend a release date for any time not served on a sentence, including the tolled supervision time. In Bolden's case, if the Department does not extend his release date for the time he was in prison serving longer concurrent sentences after conditional satisfaction of his shotgun sentence, it diminishes the penalty for violation of conditional release supervision. In other cases, such as where a much longer concurrent sentence or a consecutive sentence was imposed, it would nullify the penalty altogether.

Furthermore, the First DCA is taking inconsistent positions with regard to the time after April 25, 1999. On one hand, the First DCA indicates that supervision on the shotgun sentence may not be tolled until release. The effect of this must be that as of April 25, 1999, the petitioner began conditional release supervision on the shotgun sentence while in prison. On the other hand, the First DCA also indicates that Bolden must receive prison credit for the time after April 25, 1999 until May 27, 2000, because he was in prison at that time, albeit, serving other sentences. If supervision began on the shotgun sentence when that sentence was conditionally satisfied in April of 1999, the Parole Commission, not the DOC, has the discretion to award credit

for that time. See, Rivera, supra. The Department itself cannot, and does not, grant the returning supervision violator any credit on the prison term for time not served on it. This is true whether judicial or executive supervision is violated. See, Wilson v. State, 603 So.2d 93 (Fla. 5th DCA 1992) (credit for time served on incarcerative portion of probationary split sentence is a judicial task, not departmental task); see also, Rivera supra (credit for time served on conditional supervision is within Commission's discretion, not department's). On the other hand, if Bolden was serving the shotgun sentence after April 25, 1999, which is the effect of failing to toll, Bolden could not have been on supervision. An offender cannot simultaneously serve conditional release supervision and prison time on the same sentence. These two states are mutually exclusive. Despite this, the effect of the First DCA's decision is that Bolden was simultaneously serving the shotgun sentence and on supervision for the shotgun offense, as of April 25, 1999. This inconsistency is avoided when the First DCA's opinion is rejected. As noted earlier, Bolden was not serving the shotgun sentence or on supervision as of April 25, 1999. He had conditionally satisfied the sentence and supervision was tolled until release from prison.

Not only is applying credit for time served on other sentences after conditional completion of the shotgun sentence unauthorized and serves to undercut the Conditional Release Act, it is against public policy. The reason why Bolden was not released and able to begin supervision when he conditionally completed the shotgun sentence in April of 1999 is because he chose to commit crimes that subjected him to a firearm mandatory term under § 775.087(2). Diminishing the penalty for violation of conditional release on the shotgun sentence because the offender committed crimes that warranted longer sentences, is surely contrary to public policy. It is tantamount to allowing the violator to establish a line of credit for a future violation of conditional release. In Silvester v. State, 794 So.2d 683 (Fla. 4th DCA 2001), the principle was applied to deny credit for time served on vacated convictions against a sentence imposed for a new crime. The principle is no less applicable because the new misbehavior constitutes a violation of supervision, rather than a crime. Further, the case for denying the credit is even stronger here. In Silvester, the time served on the vacated sentences is time that the defendant should not have served at all. This time is commonly referred to as "dead time." See Davis v. Attorney Gen., 432 F.2d 777, 778 (5th Cir.

1970); Henley v. Johnson, 885 F.2d 790 (11th Cir. 1989). There is, perhaps, some equitable argument that can be made for granting credit for dead time. At bar, the time Bolden served after April 25, 1999 was not dead time or time that he should not have served. It is time he was legally required to serve because of the seriousness of two of the crimes he committed. Granting this credit is not merely unsupported by equity, it is contrary to public policy. There is no statutory authority or equitable principle supporting reducing the penalty for violation of conditional release supervision with time that an inmate served solely on a longer concurrent sentence or a consecutive sentence, whether imposed for a related or unrelated offense, before release to supervision.

III. THE IMPACT OF THE FIRST DCA'S OPINION ON HOW SENTENCES ARE EXECUTED BOTH IN PRISON AND ON SUPERVISION IS POTENTIALLY FAR REACHING.

1. When a prison sentence is served piecemeal, there always will be a period of time when the prison term is not being served. If credit is given for this gap, this means the inmate will not fully serve the prison term. On the other hand, if credit is not given for the gap, this means that the time it takes to fully serve the prison term from the date it was originally imposed may, and frequently does, extend beyond

the actual length of the prison term itself. Such an unavoidable consequence is justified because the gap in serving the prison term is due to the inmate's own misconduct.

The gap may occur while the inmate is still in prison or at liberty. A gap occurring in prison results from a supervision sentence ending through the accumulation of gain time before all the other sentences have been served. The gap will continue until the inmate returns to prison as a supervision violator. A gap occurring outside prison results from the Department releasing the inmate to supervision or from the inmate escaping. The prison term will not commence to run again on the supervision sentence until the inmate returns to prison as a supervision violator. An escapee's prison term will not commence to run again until his or her capture and incarceration. Hopping v. State, 650 So.2d 1087, 1088 (Fla. 3rd DCA 1995) ("When a prisoner escapes his sentence is tolled, upon recapture that sentence restarts").

When the gap occurs in prison, the inmate is incarcerated for a longer period of time than was actually served on the supervision sentence that ended through the accumulation of gain-time. The length of the additional period of incarceration is equal to the number of days the inmate has to remain in prison solely to serve other sentences. The time

period could be long enough to equal or exceed the prison time remaining to be served on the supervision sentence that has ended in the event the inmate returns to prison as a supervision violator.

Bolden received three concurrent 10-year sentences, and he will never serve day for day in prison more than 10 years on each sentence. This does not mean, however, that Bolden will walk out the prison gate just as soon as he has served day for day a total of 10 years in prison. Each of Bolden's supervision sentences were unique, which meant that he had to remain in prison to serve the remainder of the prison terms on the aggravated assault/battery sentences after the shotgun sentence ended through the accumulation of gain-time. He, therefore, spent 337 days incarcerated which could not be applied to the shotgun sentence, and when he returned to prison as a supervision violator due to his own misconduct, his release date on the shotgun sentence had to be extended by those 337 days.

What happened to Bolden is the same as what happened to the offenders in Evans (Evans had to wait until a nonsupervision prison sentence was served before commencing the conditional release supervision on the sentence that had ended through the accumulation of gain-time); Savage (Savage had to wait until a consecutive 2 1/2-year straight prison

sentence was served before he commenced probation supervision on his probationary split sentences that had ended through the accumulation of gain-time); and Bradley (Bradley apparently was serving a straight prison sentence concurrently with a straight judicial supervision sentence, and the supervision sentence could not commence until the prison sentence ended). Bolden's circumstance are also the same as what happens to all other inmates who must wait to serve supervision on one sentence while serving a prison term on another sentence.

The First DCA held that the tolling period cannot be accounted for upon the inmate's return to prison as a supervision violator, even under an Evans scenario. What this means is that the executive supervision on a sentence, regardless of whether the sentence is being served concurrently or consecutively, may never be served at all, or only partially served.[8]

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[8] If an inmate is under judicial supervision, the inmate returns to prison with a **new sentence**, and the calculation of the new release date begins on the date the new sentence is imposed. Under this method, any time (either in or out of prison) prior to the new sentencing date that the inmate was not serving the old prison term is naturally taken into account and does not appear in the calculation of the new release date. By contrast, if the inmate is under executive supervision, he or she returns to prison on the **old sentence**, and the calculation of the new release date begins on the date the old sentence was imposed. Under this method, if the Department does not extend the new release date by the time the inmate was not serving the prison term, it necessarily will be granting the inmate prison credit for time not

2. Based on the First DCA's decision, the Department and the Commission have been given the impossible task of distinguishing between "related" and "unrelated" offenses to determine when tolling of supervision is appropriate. The First DCA acknowledged that tolling of supervision was proper when the offenses underlying the sentences are *unrelated* but concluded that tolling of supervision is unauthorized when the offenses are *related*.

Each sentence would have to be reviewed manually to make this determination whenever one of the active sentences was subject to supervision. Both agencies would need to know how much of the supervision, if any, was to be served at liberty and how much of it in prison as a supervision violator. (The same amount of gain-time that is awarded on the sentence is the same amount that is served on supervision and the same amount that is served as a supervision violator.) The Commission also would need to know whether "in-prison supervision" could be revoked and, if so, under what circumstances.

The task is made even harder because the term "related" is itself vague and undefined. The First DCA concluded that Bolden's offenses were related where they all were committed

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actually served in prison on the sentence.

on the same day and involved two victims, an unidentified firearm, and a short-barreled shotgun. Although the First DCA is probably correct, it is doubtful that the Department or the Commission could get away with relying solely on the charging document to make this determination. The crimes could have been committed in different episodes on the same day, and if so, treating the offenses as related would result in the inmate receiving an unjustified windfall.

CONCLUSION

The Department respectfully requests this Honorable Count to reverse the First DCA and uphold the mandamus court in this case.

Respectfully submitted,

_____
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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing initial merits brief was furnished by U.S. mail to **DEBORAH B. MARKS**, Esquire, 999 Brickell Bay Drive, Suite 1809, Miami, Florida 33131-2933, attorney for Johnny Bolden, and to **BRADLEY R. BISCHOFF,** Assistant General Counsel, Florida Parole Commission, 2601 Blair Stone Road, Building C, Tallahassee, Florida 32399-2450 this 3rd day of March 2003.

_____

Carolyn J. Mosley
Assistant General Counsel
for Department of
Corrections (Appellee)

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____

Carolyn J. Mosley

IN THE SUPREME COURT OF FLORIDA

JAMES V. CROSBY, JR., ETC.

Petitioner,

FSC CASE NO. SC03-137
v. 1DCA CASE NO. 1DO1-3205

JOHNNY BOLDEN,

Respondent.
_____/

PETITIONER'S INDEX TO APPENDIX