IN THE SUPREME COURT OF FLORIDA

WALTER A. MCNEIL, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS
Petitioner,

vs.

EDISON CANTY,

Respondent.
_____/

CASE NO. SC08-2369

RESPONDENT'S BRIEF ON THE MERITS

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PREFACE

This Brief is the response of the Respondent, Edison Canty, to the Petition filed by the Petitioner, Walter A. McNeil, Secretary, Florida Department of Corrections. The Petitioner shall be referred to either as the "Department of Corrections" or simply as the "Department" throughout this Brief. Similarly, the Respondent shall be referred to either as "Respondent" or "Mr. Canty." References to the opinion of the First District Court of Appeal, challenged by the Petitioner, will be designated either by citation, 995 So. 2d 998 (Fla. 1st DCA 2008), or to its record citation (R. 19-20), or as the "decision below." All other record citations will refer to the page of the appellate pleadings volume, Volume 1, supplied to the attorneys for Mr. Canty at the time of the filing of this expedited Brief as (R. ____), with the appropriate page number included. Any references to the Initial Brief of the Petitioner shall be (I.B., P. _____), with the appropriate pages included in that reference.

STATEMENT OF JURISDICTION

This Court has accepted discretionary jurisdiction for review of this case pursuant to Rule 9.030(a)(2)(A)(v), Fla. R. App. P., which permits this Court to review decisions, in its discretion, that pass upon a question certified to be of great public importance. As noted in Issue I, *infra*, however, because the question certified does not correspond to the actual issue addressed by the court below or the facts of the present case, Respondent requests that the discretionary grant of jurisdiction be withdrawn and the pending appeal dismissed.

STATEMENT OF CASE AND FACTS

For purposes of this brief, and in light of the expedited briefing scheduled established by the Court, the Respondent, Edison Canty, does not object to the Statement of the Case and the Facts included in the Department's Brief on the Merits. Mr. Canty notes, however, that the only record on appeal he has received in this case is Appellate Pleading Volume 1, provided to the undersigned attorney by the First District Court of Appeal. All citations in this Brief refer to Appellate Pleading Volume 1.[1]

The Department's Brief on the Merits includes citations to portions of the record on appeal that have not been provided to the undersigned attorneys. In light of that issue, Mr. Canty and the undersigned attorneys do not stipulate to the accuracy of any facts contained in records not in their possession. Mr. Canty reserve the right to later contest the factual accuracy of such matters.

For purposes of clarity, Mr. Canty includes the following facts:[2]

The Department revoked Mr. Canty's conditional release on Count IV of Case No. 91-26924 (Habitual Felony Offender 15-year term for commission of

[1] A Supplemental Index to the Record on Appeal was received by appellate counsel the afternoon this Brief is due. Because Respondent Canty desires the expedited briefing schedule not to be compromised, no alterations have been made as a result of the newly received Index.

[2] As noted above, all citations included in this Brief refer exclusively to Appellate Pleading Volume 1, the Record provided to undersigned counsel by the First District Court of Appeal, and therefore no additional notation of record volume is made here.

felony in possession of a firearm). A 15-year sentence for Count III of Case No. 92-2795, and Count I of Case No. 92-5025 were similarly revoked. Upon revocation, the Department, based on the gain time forfeited on Count III of Case No. 92-2795, imposed a new prison term of 2,847 days (7.8 years). (R1).

In 1992, Mr. Canty was sentenced in Dade County for ten different offenses in three different cases. All sentences were to be served concurrently, with the longest sentences being 15 years in prison. Count IV of Case No. 91-26924 (Habitual Felony Offender 15-year term for commission of felony in possession of a firearm) determined Mr. Canty's original release date from prison, because it was the 15-year sentence for which he was awarded the least amount of gain time. (R1).

Prior to serving this additional 2,847 days in prison, Mr. Canty had already served 3,783 days (138 jail + 3645 prison) (10.36 yrs) on Count IV of Case No. 91-26924. Mr. Canty's supervision was revoked as of August 24, 2005, and he was re-incarcerated. Therefore, as of this date, he has served almost an additional 4 years of incarceration, and earned additional gain time. (R1).

These facts provide the data essential to an evaluation of the propriety of the opinion reached by the unanimous panel of the First District Court of

Appeals, cited as *Canty v. McNeil*, 995 So. 2d 998 (Fla. 1st DCA 2008). To the extent that further background is believed relevant, Respondent stipulates to those further facts succinctly provided by the court below, and incorporates those facts by reference here. *Canty*, 995 So. 2d at 998-999; (R. 19-20).

SUMMARY OF ARGUMENT

This Court should dismiss this cause for lack of jurisdiction because the district court did not actually answer the certified question, and the question does not accurately reflect the issue in this case.

On the merits, the Department simply lacked the authority to unilaterally increase Mr. Canty's sentence beyond the term of imprisonment originally imposed by the sentencing judge. Mr. Canty cannot be required to serve a sentence of imprisonment which actually exceeds the sentence originally imposed by the trial judge. Pursuant to the Florida and United States Constitutions, sentencing is solely the province of the courts, not the Department of Corrections.

Finally, whether or not the applicable period of conditional release supervision is tolled to the end of the conditional release-eligible sentence with the latest release date, Mr. Canty was entitled to credit for all the time he served in prison on all of his concurrent sentences. The First District below determined that it was sophistry for the Department to argue that Mr. Canty was not imprisoned on one sentence while imprisoned on a sentence which was to run concurrently with it. That determination was accurate, and this Court

should affirm accordingly to prevent the Department from unilaterally acting to elongate the judicially-imposed sentence for Mr. Canty in this case.

ARGUMENT

I. THIS COURT SHOULD DECLINE THE REQUEST IN THIS CASE FOR LACK OF JURISDICTION BECAUSE THE DISTRICT COURT DID NOT ACTUALLY RULE ON THE QUESTION IT HAS CERTIFIED TO THE COURT.

The question certified to this Court by the district court as a question of great public importance does not accurately reflect the issue that exists in Mr. Canty's case, and was not actually ruled upon by the district court. The district court granted the Department's motion for certification, but rephrased the question that was requested by the Department. (R20, 21). The question certified by the district court was as follows:

> Does a conditional release eligible sentence continue to run while an inmate remains incarcerated **on a concurrent sentence for which conditional release is not available?**

(R21) (emphasis added).

The facts of the instant case reflect that Mr. Canty's actual release date from prison was determined by his sentence on Count IV of Case No. 91-26924 (Habitual Felony Offender 15-year term for commission of felon in possession of a firearm), because that was the 15-year sentence for which he had earned the least amount of gain time. Section 947.1405(2), Florida Statutes (1991),

explicitly provides that a defendant sentenced as a habitual felony offender is subject to conditional release.

Therefore, the question certified by the district court does not accurately reflect the issue in this case, because the sentence upon which Mr. Canty remained incarcerated was eligible for conditional release. Since the Court granted jurisdiction based on the certification of a question of great public importance that was not actually addressed by the district court, and because the question does not address the issue involved in this case, the Court should withdraw its prior grant of jurisdiction and dismiss the appeal. *See, State v. Vasquez*, 718 So. 2d 755, 756 (Fla. 1998); *Gee v. Seidman and Seidman*, 653 So. 2d 384, 385 (Fla. 1995). *See, also, Crosby v. Bolden*, 862 So. 2d 373, 373 (Fla. 2004) (withdrawing jurisdiction under similar circumstances when closer review yielded information that jurisdiction was no longer warranted).

II. THE DEPARTMENT OF CORRECTIONS LACKED THE AUTHORITY TO INCREASE MR. CANTY'S SENTENCE TO A PERIOD LONGER THAN WAS ACTUALLY IMPOSED BY THE TRIAL JUDGE.

If the Court addresses the merits of this case, the Court should change the certified question to ask whether the Department, upon revoking a defendant's conditional release, can impose a term of imprisonment which results in the defendant serving a period of incarceration on a count of conviction which is

longer than the sentence originally imposed by the trial judge. It is that question, and not the question certified by the district court, that actually addresses the main issue before this Court.

The district court's opinion, below, accurately described the key reason why the Department's calculation cannot stand. The Department lacks the authority to require an inmate to serve a prison sentence which actually exceeds the sentenced imposed by the sentencing judge. *Canty v. McNeil*, 995 So. 2d 998, 999 (Fla. 1st DCA 2008); (R19). In reaching its decision to quash the lower court's order, the district court correctly reasoned as follows:

> If our reasoning somehow reduces or eliminates conditional release in some cases, so be it. The court set the length of the sentence, and the Department of Corrections does not have the authority to increase it.

995 So. 2d at 999; (R19).

Under Article I, Section 9 of the Florida Constitution, once a defendant begins serving his sentence, the State cannot alter it unilaterally to a defendant's detriment. *Pearson v. Moore*, 767 So. 2d 1235, 1238 (Fla. 1st DCA 2000). Article I, Section 18 of the Florida Constitution provides the following: "No administrative agency shall impose a sentence of imprisonment nor shall it impose any other penalty except as provided by law." It is well established that

the Department is an administrative agency subject to that prohibition. *See e.g. Pearson*, 767 So. 2d at 1238.

Sentencing is the obligation of the courts, not the Department. *Thomas v. State*, 612 So. 2d 684 (Fla. 5th DCA 1993). This Court has explicitly held that the Department violates the separation of powers doctrine established in Article II, Section 3 of the Florida Constitution when it refuses to carry out the sentence that was imposed by the trial judge. *Moore v. Pearson*, 789 So. 2d 316, 319 (Fla. 2001). While Respondent sympathizes with the need for the Department to deal with complicated analyses of gain time, conditional release, and other such factors, it nonetheless may not violate this separation of powers and usurp the role of the judicial branch in setting the length of the sentence imposed.

Clearly, it would also constitute a violation of fundamental due process, pursuant to both Article I, Section 9 of the Florida Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution, for the Department to unilaterally change a defendant's sentence. The construction requested by the Department would transform the sentence imposed into one longer that the sentence determined by the judiciary; unconstitutionally depriving the Respondent of his due process rights while breaching the separation of powers discussed above.

Moreover, the plain language of Section 947.141(3), Florida Statutes (1991), explicitly indicates that, upon revocation of a defendant's conditional release, the Department can only return the defendant to prison to serve the sentence that was originally imposed by the trial judge. Section 947.141(3) provides that the Department "shall revoke conditional release and thereby return the releasee to prison to serve the sentence imposed upon him . . ."

When construing a statute, it is axiomatic that a court must strive to effectuate legislative intent. In order to determine that intent, this Court has held that "legislative intent is the 'polestar' of statutory interpretation, such intent is to be derived primarily from the plain language of the statute." *Cason v. Florida Dept. of Mgmt. Services*, 944 So. 2d 306, 312 (Fla. 2006). This Court has further explained that "[w]hen the statute is clear and unambiguous, courts will not look behind the statute's plan language for legislative intent or resort to rules of statutory construction to ascertain intent." *Kasischke v. State*, 991 So. 2d 803, 807 (Fla. 2008).

In the instant case, the Department revoked Mr. Canty's conditional release on Count IV of Case No. 91-26924 (Habitual Felony Offender 15-year term for commission of felony in possession of a firearm); Count III of Case No. 92-2795 (also a 15-year term); and Count I of Case No. 92-5025 (also a 15-

year term). Upon revocation, the Department, based on the gain time forfeited on Count III of Case No. 92-2795, imposed a new prison term of 2,847 days (7.8 years). Prior to serving this additional 2,847 days in prison, Mr. Canty had already served 3,783 days (138 jail + 3645 prison) (10.36 yrs) on Count IV of Case No. 91-26924. By requiring him to serve an additional 7.8 years in prison on that count, the Department is extending his sentence to over 17 years, far in excess of the 15 year sentence originally imposed by the sentencing judge.

Mr. Canty's supervision was revoked as of August 24, 2005, and he was re-incarcerated. Therefore, as of this date, he has served almost an additional 4 years of incarceration. With the addition of newly-awarded gain time, it appears that Mr. Canty should have already been released from prison, and was, in fact, so released until a stay was granted with regard to this appellate matter. It is for this reason that Mr. Canty concurs with the decision of this Court to expedite briefing and argument of this matter and further prays for an expedited decision following completion of the briefing and argument phases of this appeal.

The Department had no legal authority to independently fashion a sentence which actually exceeds the sentence originally imposed by the sentencing judge. In fact, both the aforementioned provisions of the Florida

and Unites States Constitutions, and the language of Fla. Stat. § 947.141(3) clearly prohibit the Department from increasing a defendant's prison sentence beyond the term of imprisonment originally imposed by the sentencing judge.

To the extent that § 947.141 or any other applicable statute is ambiguous as to how a defendant's prison sentence should be calculated upon revocation of conditional release, the rule of lenity requires that the ambiguity be resolved in favor of the defendant. Section 775.021(1), Florida Statutes (1991), provides that "[t]he provisions of this code and the offenses defined by other statutes shall be strictly construed most favorably to the accused." This Court has previously employed the rule of lenity to interpret the conditional release statutes in a manner favorable to an inmate. *Parole Commission v. Cooper*, 701 So. 2d 543, 544-45 (Fla. 1997). No clearer instance for application of the rule of lenity can be envisioned than one where an inmate is being compelled under an interpretation labeled by the First District Court of Appeal as "sophistry" to serve a 15 year sentence with over 17 years in prison.

Therefore, upon revocation of Mr. Canty's conditional release, the Department lacked the authority to increase Mr. Canty's prison sentence beyond the term originally imposed by the sentencing judge. Accordingly, this

Court should answer the rephrased question in the negative and approve the decision of the district court.

III. UPON REVOCATION OF HIS CONDITIONAL RELEASE, MR. CANTY WAS ENTITLED TO CREDIT FOR TIME SERVED IN PRISON ON ALL OF HIS CONCURRENT SENTENCES.

In the alternative, if this Court declines to rephrase the question certified by the district court, it should still conclude that Mr. Canty is entitled to credit for all the time served in prison on all of his concurrent sentences. As previously indicated, a contrary conclusion would allow the Department to exercise unfettered discretion and independently fashion a sentence of imprisonment which exceeds the sentence actually imposed by the sentencing judge.

The Department correctly notes that, in *Evans v. Singletary*, 737 So. 2d 505 (Fla. 1999), this Court held that the Department may use an unexpired conditional release-eligible sentence to determine the length of the supervision and then toll the running of that supervision until the defendant is actually released from prison on a concurrent sentence that was not eligible for conditional release. In *Evans*, the defendant was serving a 7-year sentence which was eligible for conditional release and a concurrent 15-year sentence which was not. The issue before the Court was simply whether the conditional

release supervision period could be tolled and served after the defendant was released on the 15-year sentence, or whether the conditional release supervision was actually served in prison.

Unlike the instant case, in *Evans*, the defendant's conditional release was not revoked. In the instant case, the district court correctly recognized that this Court's decision in *Evans* did not address the length of incarceration after a defendant's conditional release supervision is revoked and he is returned to prison. *Canty*, 995 So. 2d at 999; (R19). Additionally, unlike the situation in *Evans*, the sentence in the instant case which actually determined Mr. Canty's release date (15-year Habitual Felony Offender sentence in Case No. 92-2795) was eligible for conditional release.

Both of these important distinctions were recognized by the district court in *Bolden v. Department of Corrections*, 865 So. 2d 1 (Fla. 1st DCA 2003). In *Bolden*, the defendant was sentenced to four concurrent 10-year sentences, three of which were subject to conditional release. The offense with the latest release date, based on the permissible gain time that could be awarded to the defendant, was eligible for conditional release. After the defendant was released on conditional supervision and that supervision was revoked, a dispute arose

concerning the length of incarceration the Department could require the defendant to serve. *Bolden,* 865 So. 2d at 2-3.

On appeal, the district court held that, under the circumstances present in *Bolden*, tolling of the defendant's conditional release supervision on one release-eligible-count while the defendant continued to serve a concurrent sentence on two other release-eligible-counts was not appropriate. In support of its conclusion, the district court reasoned that the possibility of a windfall to the defendant that was present in *Evans* was not present in *Bolden*, because, unlike the sentence at issue in *Evans,* the sentence with the latest release date in *Bolden* was also eligible for conditional release. Additionally, the district court noted that there is absolutely no statutory support for tolling in the conditional release statutes. 865 So. 2d at 3-5.

Like the defendant in *Bolden,* but unlike the defendant in *Evans*, the sentence imposed on Mr. Canty with the latest release date was eligible for conditional release. Therefore, the facts of the instant case are consistent with those in *Bolden* and readily distinguishable from those found in *Evans*, and thus, tolling of the supervision period on the concurrent sentences with earlier release dates was not appropriate.

Even if this Court concludes, pursuant to *Evans*, that tolling is appropriate when the offense with the latest release date is also eligible for conditional release, a defendant, upon revocation of his conditional release, should still be given credit for all the time he served in prison on all the counts of conviction. As previously asserted, *Evans* did not address the recalculation of prison time upon revocation of a defendant's conditional release supervision. *See Bolden*, 865 So. 2d at 4.

Two Justices of this Court have previously concluded that the fact that tolling may be appropriate does not mean that a defendant is not entitled to credit for time served in prison on all his concurrent sentences upon the revocation of conditional release supervision. The Department sought discretionary review of the district court's decision in *Bolden*, and this Court initially accepted jurisdiction. This Court subsequently exercised its discretion to discharge jurisdiction and dismissed the case. *Crosby v. Bolden*, 867 So. 2d 373 (Fla. 2004).

However, Justice Wells, in an opinion in which Justice Pariente concurred, dissented from the Court's decision to discharge jurisdiction. Justice Wells, the author of this Court's opinion in *Evans*, concluded that the tolling of a defendant's conditional release supervision period until he is released from

prison is proper. Justice Wells, however, concluded that a defendant should receive credit on all his conditional-release eligible sentences for time served in prison on a conditional-release-eligible sentence with a later release date than his other concurrent sentences. Justice Wells concluded that it "is implicit in the nature of 'concurrent' sentences that time previously served on a concurrent sentence should be credited toward all other concurrent sentences." *Bolden*, 867 So. 2d at 376-79.

This Court has reached an analogous conclusion with regard to credit on a sentence for time spent in jail while supposedly "on parole." *Segal v. Wainwright*, 304 So. 2d 446 (Fla. 1974). In *Segal*, the court was faced with a situation where they were unable to determine whether a petitioner had already received credit for time spent in jail prior to the revocation of his parole. *Segal*, 304 So. 2d at 448. Addressing that issue, the court held that "Clearly, he is entitled to credit on the sentence on which he was paroled for time actually spent in jail while supposedly out on parole, *since a man cannot be both in jail and out on parole at the same time; he is either in or out*." *Id.* (emphasis added) (internal citations omitted). That the instant case involves a designation of "conditional release," for time actually served in prison as opposed to "parole" for time actually served in prison, the result is the same: the

Department is attempting to hold that Mr. Canty was both in prison and out of it simultaneously – a condition that both defies logic and, as explained above, the case law of this Court. As with Schrödinger's fabled cat, this is a logical impossibility as expressed succinctly in *Segal*, which should not be countenanced here to elongate Mr. Canty's sentence beyond the maximum sentence of 15 years.

This Court recently decided a case which provides further support for the conclusion reached by Justice Wells in *Bolden*. In *State v. Rabedeau*, 34 Fla. L. Weekly S51 (Fla. Jan. 29, 2009), the Court held that a defendant was entitled to credit for time served on his concurrent sentences in each of the three cases for which consecutive sentences were subsequently imposed after he violated probation. The Court concluded that a trial judge's decision to impose concurrent sentences is an intentional decision to permit the defendant to serve multiple sentences at the same time.

In the instant case, despite the Department's assertion to the contrary, the sentencing judge's decision to impose concurrent sentences, rather than consecutive sentences, evinced an intent to permit Mr. Canty to benefit from any potential advantage that could result from concurrent sentences. The district court properly concluded that it would be permissible if the imposition

of concurrent sentences reduces or eliminates conditional release in some cases. *Canty*, 995 So. 2d at 999; (R19).

Thus, whether or not the applicable period of conditional release supervision is tolled to the end of the conditional release-eligible sentence with the latest release date, Mr. Canty is entitled to credit for all the time he served in prison on all of his concurrent sentences. Accordingly, the Department has improperly calculated Mr. Canty's new release date. This Court should approve the decision of the district court.

CONCLUSION

This Court should dismiss this cause for lack of jurisdiction because the district court did not actually answer the certified question, and the question does not accurately reflect the issue in this case.

If the Court addresses the merits of the case, the Court should approve the decision of the district court because the Department of Corrections lacked the authority to calculate Mr. Canty's sentence in manner which results in him serving a prison sentence which exceeds the prison sentence imposed by the sentencing judge.

Mr. Canty respectfully requests that this Court resolve this matter in an expedited fashion as his liberty continues to be infringed upon with the passage

of time by the Department's construction, already determined erroneously by the First District Court of Appeal, while the pending appeal is resolved.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by FEDEX delivery to Carolyn J. Mosley, Office of General Counsel, Department of Corrections, 2601 Blair Stone Road, Tallahassee, Florida 32399, on this 6th day of April, 2009.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition is submitted in Times New Roman 14-point font and thereby complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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