IN THE SUPREME COURT OF FLORIDA

WALTER A. McNEIL, Secretary,
FLORIDA DEPARTMENT OF
CORRECTIONS,

Petitioner,

vs.

FSC CASE NO. SC08-2369
1DCA CASE NO. 1D08-452

EDISON CANTY,

Respondent.
_____/

PETITIONER'S MERITS BRIEF

_____

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

_____

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STATEMENT OF THE CASE AND FACTS[1]

Respondent Canty[2] committed ten crimes within a six-month period between July 1991 and February 1992 in Dade County, Florida for which he was adjudicated guilty and sentenced to prison on the same date in three different cases. He was sentenced for three third-degree felonies (one 5-year term and two enhanced 10-year terms) for committing two counts of possession of cocaine and one count of carrying a concealed firearm and seven second-degree felonies (seven 15-year terms) for committing attempted first degree murder, aggravated assault with a deadly weapon, shooting a deadly missile at a vehicle, two counts of possession of a firearm during commission of a crime, and two counts of felon in possession of firearm. Three of the sentences were habitual felony offender (HFO) sentences (two 10-year terms and one 15-year term); the remaining sentences were

[1]The petitioner will be referred to as the Florida Department of Corrections, "Department," or "DOC"; the respondent, Edison Canty, will be referred to by his last name; inmate, or offender; 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. For *illustrative purposes* the Department has included an affidavit in the appendix to this brief which provides a more comprehensive explanation of Offender Canty's sentence structure. This information will eliminate the need to present multiple hypothetical scenarios throughout the brief to explain what is being argued.

[2] He also is known as Leonard Alexander Brooks and Thomas Brown. (R. 68, 88; A. 3).

guidelines sentences. All sentences ran concurrently. He was sentenced on May 4, 1992 and received by the Department on May 27, 1992. (R. 47; A. 3)

Upon receiving custody of Canty, the Department calculated an ending date for each sentence and a tentative release date on the sentence that ended last. It applied the jail credit to the sentences, which varied from 82 days to 138 days. It also applied basic and incentive gain time to the guidelines sentences and incentive gain time to the habitual offender sentences. (A. 4)[3]

Canty was released from the Department's custody on April 27, 2002 to conditional release supervision under the jurisdiction of the Florida Parole Commission. (R. 48; A. 6) At that time, his ten sentences were comprised of the following:

[3] When Canty offended, the gain time awards included lump sum awards of basic gain time and up to 20 days per month incentive gain time. The Stop Turning Out Prisoners Act, which applies to sentences for offenses committed on or after October 1, 1995, had not yet been enacted. Comer v. Moore, 817 So.2d 784 (Fla. 2002) (upholding STOP Act against single subject rule challenge).

92-50255, II 116 jail + 696 prison + 1013 gain time = 1825 days (5 years)

91-26924, I, II 138 jail + 2491 prison + 1021 gain time = 3650 days (10 years)

91-26924, IV 138 jail + 3645 prison + 1692 gain time = 5475 days (15 years)

92-2795 III, V, VI **82 jail + 2546 prison + 2847 gain time = 5475 days (15 years)**

92-5025 I, III, IV **116 jail + 2522 prison + 2837 gain time = 5475 days (15 years)**

(R.48; A. 5-6)

The Florida Parole Commission determined that Canty was eligible for supervision on the above five high-lighted sentences: Counts I and II in Case No. 91-26924, habitual felony offender (HFO) 10-year prison term for commission of carrying a concealed firearm and possession of cocaine; Count IV in Case No. 91-26924, HFO 15-year term for commission of felon in possession of a firearm,; Count III in Case No. 92-2795, 15-year term for commission of aggravated assault with a deadly weapon; and Count I in Case No. 92-5025, 15-year term for attempted first-degree murder. (R. 48; A. 6) The length of the supervision was 2837 days (April 27, 2002 to February 1, 2010).[4] (R. 48; A. 6)

[4] It is unclear why the Commission chose 2837 days instead of 2847 days, possibly a miscalculation.

Twice in the year 2005 Respondent Canty was charged with and arrested for violating the conditions of his supervision. The Commission restored him to supervision the first time, but the second time his supervision was revoked, effective August 24, 2005 with credit for time served from April 5, 2005 to July 7, 2005. (R. 49, 92; A. 6-7) The supervision was revoked on three sentences—Count IV of 91-26924 (HFO 15-year term for commission of felon in possession of a firearm); Count III of Case No. 92-2795 (15-year term for commission of aggravated assault with a deadly weapon); and Count I of Case No. 92-5025 (15-year term for attempted first-degree murder). (R. 98; A. 7)

Upon revocation of supervision, the Department declared a forfeiture of the accrued gain time on the three sentences pursuant to section 944.28(1), Florida Statutes (1989). (R. 49; A. 7) The sentence imposed on Count III in Case No. 92-2795 determined Canty's new release date because the greatest amount of gain time had accrued on that sentence. (R. 49; A. 7) The new tentative release date was computed as follows: August 24, 2005 [date of revocation of supervision] plus 2847 days [forfeited gain time] minus 94 days [FPC credit] minus 418 days [gain time awarded since revocation date] = January 15, 2012. (A. 50)[5]

[5] This date was correct as of September 14, 2007 (date of Department's Affidavit). (R. 50)

LEON COUNTY CASE NO. 2007-CA-002312. Respondent Canty filed a petition for writ of mandamus in the Leon County Circuit Court challenging the Department's calculation of his release date upon revocation of conditional release supervision. (R. 1-30) The Department filed a response with documents (commitment papers, supervision papers, and affidavit setting out the sentence structure). (R. 42-113) Canty then filed a reply. (R. 114-128) The essence of Canty's argument was that the amount of time served was the same on all the concurrent sentences, which was 3783 days; that the amount of time remaining to be served was 1692 days, which was the least amount of gain time awarded; and that the 15-year prison terms imposed by the sentencing court would be exceeded were he required to serve any additional time. The Department disagreed, arguing, either directly or implicitly, that each sentence was unique with different amounts of time served and gain time; that the sentence with the most gain time determined the new release date; that the new release date was based on the forfeiture of 2847 days of accrued gain time which was reflected in the Department's affidavit; and that the 15-year term was not exceeded when viewed individually. The mandamus court denied the petition, reasoning as follows:

> The court finds no error concerning the forfeiture of the Plaintiff's 2847 days of previously accrued gain time upon the revocation of the Plaintiff's conditional release supervision. ****

> After the revocation of his conditional release, the Plaintiff returned to prison to serve the 2847 days of gain [time] forfeited pursuant to Section 944.28, Florida Statutes in Miami Dade County case number 92-2795. It is clear that the state "may use an unexpired Conditional Release-eligible sentence to determine the length of the supervision and then toll the running of that supervision period until the inmate has been released from prison." Evans v. Singletary, 737 So.2d 505, 507 (Fla. 1999). The court would note that Bolden v. Florida Department of Corrections, 865 So.2d 1 (Fla. 1st DCA 2003) does not afford the Plaintiff any relief. Bolden is distinguishable because it deals with sentences arising out of the same criminal episode. Therefore, it does not apply to this case. Crosby v. McNeal, 865 So.2d 617 (Fla. 5th DCA 2004); Lewis v. Crosby, 878 So.2d 444 (Fla. 1st DCA 2004). The court finds that the Plaintiff's claim that he is being forced to serve a longer prison term than was imposed by the sentencing court in Miami Dade case number 92-2795 is to be without merit. (R. 129-130)

FIRST DISTRICT COURT OF APPEAL CASE NO. 1D08-452.

Respondent Canty filed a petition for writ of certiorari to challenge the circuit court's order denying his mandamus petition. The Department responded, and Canty replied. The First District granted the petition, reasoning in relevant part as follows:

> Canty's contention is that the new release date effectively extends his sentence from 15 years to over 17 years, a period beyond the statutory limits and the authority of the Department. The Department argues that the sentence is in conformity with *Evans v. Singletary*, 757 So.2d 505 (Fla. 1999), which the Department says held that imprisonment was tolled on conditional release eligible sentences. Therein lies the problem. *Evans* held the conditional release *supervision* was tolled until release on the ineligible concurrent sentences. *Evans* did not speak to the length of incarceration after return to prison. *Evans* reasoned that one who is not released cannot be supervised as a conditional releasee, and therefore, the period of supervision is properly based on the gain

> time of the eligible sentence. The same reasoning should apply in this case. If the prisoner is still imprisoned on a concurrent sentence, it is a bit of sophistry to say the person is not imprisoned on the release eligible sentence.
>
> If our reasoning somehow reduces or eliminates conditional release in some cases, so be it. The court set the length of sentence, and the Department of Corrections does not have the authority to increase it. The trial court departed from the essential requirements of law. Its decision is, therefore, quashed and the case is remanded to the trial court for further proceedings. (A. 1-2)

The Department then filed a motion styled, "Motion to Substitute Counsel, for Certification, and to stay Issuance of Mandate." (R. Vol. 2, 4) It requested that the following question be certified to this Court as one of great public importance: "Does a concurrent sentence continue to run until the inmate is released from the Department's custody, thereby eliminating any gain time awards not affecting the inmate's actual release date?" (R. Vol. 2, 4) On December 9, 2008, the First District denied the Department's motion to stay issuance of the mandate but granted its motion to substitute counsel and for certification. It rephrased the question 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?" (R. Vol. 2, 11)[6]

[6] Offender Canty remained incarcerated after his two 10-year eligible sentences ended to serve additional sentences (both eligible and ineligible 15-year terms), and the sentence that ended last was one of the eligible sentences.

One week later, the Department filed its notice to invoke this Court's discretionary jurisdiction based on the certified question. It also filed in this Court a motion styled, "Petitioner's Motion for Stay Pending Review and to Expedite Disposition of Case." On March 2, 2009, the Department's motion was granted, and the proceedings were stayed in the First DCA and Leon County Circuit Court pending disposition of the petition for review. In addition, an expedited briefing schedule was established, oral argument was set for May 4, 2009, and counsel was appointed for Respondent Canty.

SUMMARY OF THE ARGUMENT

This case is about the structure of concurrent sentences. Pursuant to well established law, each offense has a sentence; each sentence is unique; and each sentence is *served*, with its own ending date. The structure of a *served* sentence is as follows: jail time + prison time + gain time = prison term, *unless* the sentence is a mandatory term that must be served without gain time awards.

When two or more sentences are served concurrently, they merge into a single term for the purpose of sharing prison time but remain independent as to the length of the term, jail time credit, and gain time awards. Due to the independent factors, the concurrent sentences may end at different times without necessarily affecting the actual release date. If such sentences are subject to conditional release supervision, the supervision is tolled until the offender is released from prison. The length of supervision will equal the gain time awarded on the sentence, and if the supervision is revoked, the offender will return to prison to serve the remainder of his sentence, which will be the forfeited gain time. Many factors influence this process—the law (sentencing, gain time, tolling provisions); the exercise of judicial discretion in sentencing; and the offender's behavior in prison and on supervision.

In the present case, Offender Canty served ten concurrent sentences that ended on various dates due to the differences in length of the prison term, jail

credit, and gain time awards: March 1, 1994 (one 5-year term); February 28, 1999 (two 10-year terms); March 31, 1999 (three 15-year terms); April 24, 1999 (three 15-year terms); and April 27, 2002, actual release date (one 15-year term). The structure of *all* ten sentences when *served* was as follows: jail time + prison time + gain time = prison term. Canty was subject to conditional release supervision on five of the sentences, four of which ended *before* the release date (the fifth ending on the release date). The supervision was tolled on the four sentences until the last sentence ended. Upon his release from custody, Canty's term of supervision was determined by the amount of the gain time awards. His supervision subsequently was revoked on three of the sentences. Upon his return to prison, the Department forfeited the gain time on those three sentences. Canty is currently serving that time.

The First District held in this case that Offender Canty was serving time on the eligible sentences as long as he remained incarcerated. The Court reasoned, "If the prisoner is still imprisoned on a concurrent sentence, it is a bit of sophistry to say the person is not imprisoned on the release eligible sentence." The Court further concluded that the sentences had to keep running to avoid increasing the length of the sentence set by the judge, even if it meant that the supervision would be eliminated. Finally, the Court certified the following question to this Court: 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?

The First District's decision is contrary to well-established law that requires sentences to be independent. Under the First District's construction, all sentences are running until the actual release date. A literal application of this requirement would mean that the sentences are being served day for day without any gain time awards, but that is not what was meant. Offender Canty had one 5-year term, two 10-year terms, and seven 15-year terms. Without gain time awards, he would have had to serve a full 15 years in prison, less jail credit. What it appears the First District was really saying is that gain time cannot be awarded that does not affect the actual release date. Thus, in Canty's case, he was in prison 3645 days, and 3645 days of prison time had to be applied to each concurrent sentence. That amount of prison time would have caused three of Canty's sentences to be served day for day without any gain time to be served on supervision. The Court recognized that this was a possibility when it stated, "If our reasoning somehow reduces or eliminates conditional release in some cases, so be it." As to the seven 15-year terms, that amount of prison time would have reduced but not eliminated the gain time awards: 1748 days (reduced from 2847 days); 1714 days (reduced from 2837 days); and 1692 days (no reduction, controlling sentence for actual

release). The variations in the jail credit (82, 116, and 128 days) accounted for the different amounts of adjusted gain time.

The First District's decision has effectively eliminated the tolling of conditional release supervision in contravention of well-established law from this Court. In Evans, infra, this Court held that supervision on an eligible sentence was properly tolled until the offender was released from prison on an ineligible sentence. The issue of tolling arises *only* after a sentence has been *served* through a combination of time served and gain time and has ended *before* the actual release date. If concurrent sentences continue to run until the offender has been released from custody, as held by the First District, no sentence can end early through gain time awards which is needed to trigger the tolling of supervision.

The First District distinguished Evans on the ground that Evans addressed only the tolling of supervision, not the tolling of imprisonment and not the length of incarceration upon revocation of supervision. That reasoning turns tolling of conditional release supervision on its head. The tolling of supervision never commences until a sentence has ended, at which point its structure is as follows: jail time + prison time + gain time = prison term. There is *no* other time to be served in prison. If the sentence is deemed to keep running, then for each day thereafter that the offender remains incarcerarated a day of prison time must be substituted for a day of gain time, with a corresponding reduction in the term of

supervision and term of incarceration upon revocation of supervision. To the extent the sentence is still running, the supervision cannot commence, and no reason for tolling exists. Prison credit wipes out the tolling period and converts gain time into prison time; it is the same as if there never was any tolling of supervision, only the serving of prison time.

The First District also assumed that the sentencing judge in Offender Canty's case intended for all the sentences to keep running and end at the same time. It commented, "The court set the length of sentence, and the Department of Corrections does not have the authority to increase it." That assumption is based on the judge being inadequately informed about the law. Judges, however, are presumed to know the law, including the gain time law, Eldridge, infra, and generally have broad discretion in fashioning sentences. In order for concurrent sentences to end simultaneously, the length of the term, amount of jail credit, and gain time awards need to be identical. It is up to the judge to vary the lengths of the concurrent sentences to accommodate variations in jail and gain time credits. No such efforts were taken by Offender Canty's sentencing judge, not even to offset the different amounts of jail credit. To the extent the judge is unable to make an adjustment (for example, one offense carries a mandatory day-for-day prison term), that is the product of a policy choice by the Legislature.

CERTIFIED QUESTION

DOES A CONDITIONAL RELEASE ELIGIBLE SENTENCE CONTINUE TO RUN WHILE AN INMATE REMAINS INCARCERATED ON A CONCURERNT SENTENCE FOR WHICH CONDITIONAL RELEASE IS NOT AVAILABLE?

In one hearing, Offender Canty received ten concurrent sentences in three cases for offenses committed on three different dates. Due to variations in the length of the prison terms, jail credit, and gain time awards, the sentences ended on different dates: March 1994; February, March, and April 1999; and April 27, 2002 (release date). The Florida Parole Commission determined that five of the sentences were subject to conditional release supervision. The gain time awarded on the five sentences was as follows: 1021 days (two ten year terms); **1692 days (HFO 15-year term that controlled the release date); 2837 days (15-year guidelines sentence); and 2847 days (15-year guidelines sentence)**. Offender Canty was released to supervision, the term of which was based on his gain time awards, and returned to prison as a supervision violator on the above high-lighted three sentences. The Department forfeited the gain time on those sentences, which Canty is currently serving.

The First District held in this case that Offender Canty when he was initially incarcerated was serving time on the eligible sentences as long as he remained incarcerated, and that the sentences had to keep running to avoid increasing the

length of the sentences set by the judge, even if it meant that the supervision would be eliminated. The Court certified the following question as one of great public importance: 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?

The answer to the certified question depends on how the tension is resolved between the dependent and independent characteristics of concurrent sentences. Concurrent sentences share prison time, which means they are dependent, but they also have their own length of prison term, jail credit, and gain time awards, which means they are independent. If a concurrent sentence continues to run until the release date, as the First District holds, the dependency part of the sentence prevails at the expense of the independent part. The shared prison time will substitute for gain time not affecting the release date.

The question phrased by the First District is limited to two concurrent sentences, one eligible and one ineligible for conditional release supervision. The Department believes the answer to the First District's question is the same as the answer regarding all concurrent sentences. There should only be one definition of how concurrent sentences are served. Inmates have begun raising this issue in the context of judicial supervision in addition to conditional release supervision. In the following paragraphs, the Department will address the manner of serving

sentences, conditional release supervision, and the tolling of conditional release supervision.

EXECUTION OF TERM-OF-YEAR SENTENCES

The Department executes sentences imposed by the courts. § 944.17, Fla. Stat. It has a duty to "ensure that the penalties of the criminal justice system are completely and effectively administered to the convicted criminals." § 944.023, Fla. Stat. Its duty includes taking custody of the inmate and "calculating his release date." Gay v. Singletary, 700 So.2d 1220, 1221 (Fla. 1997).

Each offense has its own sentence. See Dorfman v. State, 351 So.2d 954 (Fla. 1977) (general sentences prohibited); and Snelgrove v. State, 921 So.2d 560, 571 (Fla. 2005) ("general sentences that do not distinguish between individual counts are prohibited in Florida").

Each sentence has its own characteristics, including length of prison term; mandatory term if applicable; jail time credit;[7] other judicial credit;[8] gain-time eligibility; rate of gain time if applicable; application of the 85% rule if applicable;[9] and forfeiture of gain time for misconduct in prison or upon revocation

[7] § 921.161(1), Fla. Stat.; Gethers v. State, 838 So.2d 504 (Fla. 2003).

[8] Forbes v. Singletary, 684 So.2d 173 (Fla. 1996).

[9] § 944.275, Fla. Stat.; State v. Lancaster, 731 So.2d 1227, 1229 (Fla. 1998) ("Given the decisions of the United States Supreme Court, the key date for

of supervision.[10] Each sentence is viewed individually "for purposes of eligibility for Conditional Release, the length of supervision, and any resulting gain-time forfeiture." Evans v. Singletary, 737 So.2d 505, 508 (Fla. 1999) (supervision on eligible sentence could be tolled while offender remained incarcerated on ineligible sentence).

Each sentence has its own ending date based on characteristics unique to it. It can end in one of two ways—time served day for day or a combination of time served and gain time. Gain time, which has been in existence for over a hundred years in various forms, is a prison management tool. It reduces the prison time of inmates who comply with the prison rules, participate in productive activities, and perform outstanding deeds or services. See § 944.275(1), Fla. Stat. (1983-2008). Gain time thus is time not served on a sentence. See Eldridge v. Moore, 760 So.2d 888, 891 (Fla. 2000) ("While the award of gain time reduces an inmate's release date, just as actual time spent incarcerated, it is clearly not synonymous with actual time served. On the contrary, gain time is time *not* served. It is merely an incentive

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determination of an inmate's gain time entitlement is the date of the criminal offense"); Winkler v. Moore, 831 So.2d 63, 68 (Fla. 2002) ("[T]he appropriate 'event' for ex post facto purposes is the commission of the *offense* and the rights the offender had on the date he or she committed the offense").

[10] § 944.28, Fla. Stat.; Eldridge v. Moore, 760 so.2d 888 (Fla. 2000). The forfeiture statute includes authority to forfeit gain time upon revocation of conditional release supervision. § 944.28(1), Fla. Stat. (1988-present); Duncan, infra.

device used by the Department for purposes of encouraging good behavior both in prison and on supervision.") If a sentence is not eligible to be reduced by gain time, it will end based solely on time served. The *served* sentence will be comprised of the following: jail time + prison time = prison term. If the sentence is eligible to receive gain time, it will end based on a combination of time served and gain time. The *served* sentence will be comprised of the following: jail time + prison time + gain time = prison term.

Although each sentence has its own ending date, there is only one actual release date, which is determined by the sentence which ends last. 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 of sentence + prison term (converted into days) - judicial credit = maximum release date. § 944.275(2)(a), Fla. Stat. The initial tentative release date (TRD) then is established based on the following formula: maximum release date - lump sum award of basic gain time if applicable = initial TRD. § 944.275(3)(a), Fla. Stat. Thereafter, the TRD will change as gain time (usually incentive) is awarded for good behavior or forfeited due to disciplinary actions. When the TRD matches the calendar date, the inmate is released from custody.

A sentence can be served by itself, consecutive to other sentences, or concurrently with other sentences. The service of a *single sentence* needs no explanation. The term will end when the offender has served it day for day or through a combination of time served and gain time.

Consecutive sentences are served one after the other. Each has its own ending date determined by its unique characteristics (length, credit, and rate of gain time), but the sentences otherwise are combined to establish the maximum release date, the initial TRD, and to forfeit gain time if necessary. § 944.275(2)and(3) and 944.28, Fla. Stat. (1983-2008).[11] These two methods create no conflict with the gain time law. Whatever gain time is applied to a sentence will reduce the actual release date.

The third way a sentence is served is *concurrently with other sentences*. This method raises unique issues. Concurrent sentences necessarily lose some of their individuality. Unlike single and consecutive sentences, concurrent sentences share prison time. The same prison time satisfies multiple sentences simultaneously, an odd phenomenon but well entrenched in the criminal law. See State v. Rabedeau,

[11] There is one exception. Consecutive sentences for offenses committed between July 1, 1978 and June 16, 1983 cannot be combined due to lack of statutory authority. Orosz v. Singletary, 693 So.2d 538 (Fla. 1997), *clarified* in State v. Lancaster 687 So.2d 1299 (Fla. 1997), and *reaffirmed* in State v. Lancaster, 731 So.2d 1227, 1229-1230 (Fla. 1998).

2009 WL 196391, 34 Fla. L. Weekly S51 (Fla. 2009) ("Hence, concurrent sentences are a valid legal sentencing option rather than a legal fiction").[12] To the extent that sentences share prison time, they necessarily merge into a single sentence because there is only one prison time involved.

Despite the sharing of prison time, each concurrent sentence is still unique in terms of length of prison term, jail credit, and gain time awards. The Department, therefore, faithfully applies the gain time statute to each sentence to determine its ending date consistent with the well-established law. What happens with the application of gain time is sometimes counterintuitive. The gain time awards may cause a sentence to end, but the gain time will not affect the actual release date which is controlled by another concurrent sentence. To that extent, the gain time does not benefit the inmate. If the gain time is used to determine the length of executive supervision, or the amount of gain time to forfeit upon revocation of either executive or judicial supervision, the gain time becomes a detriment to the

[12] Rabedeau holds that the offender is entitled to credit on the VOP term on each *consecutive* sentence for time served on the original *concurrent* term. Since gain time is part of the original *served* sentence, the offender also must serve the forfeited gain time on each *consecutive* sentence. The gain time forfeiture is not apparent on VOP greater terms, but on VOP lesser terms, the offender could end up serving more time than the length of the new prison term. See Eldridge (addressing true split sentences and extending its holding to probationary split sentences). There are some differences between true split sentences and probationary split sentences affecting the amount of time to be served.

inmate without ever having benefitted him. This occurs on sentences ending before the last concurrent sentence ends.

The statute authorizing sentences to be served concurrently or consecutively and the gain time statute have been in existence for many years, but neither expressly addresses the manner in which concurrent sentences are to be executed.

Section 921.16(1), Florida Statutes (1991) provides:

> A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently.

The current version of the statute also requires sentences for multiple counts of sexual battery (Chapter 794) and murder (§ 782.04) when committed in separate criminal episodes or transactions to be served consecutively. § 921.16(1), Fla. Stat. (2008).

Section 921.16(2), Florida Statutes (1991) authorizes the courts to direct sentences to be served concurrently with sentences from other jurisdictions (federal or state). It further makes offenders serving their Florida sentences in another jurisdiction eligible for consideration for parole by the Florida Parole Commission. The Commission is directed to obtain the offender's records from the other

jurisdiction to determine the presumptive and effective parole release dates, specifically:

> Upon receiving such records, the commission shall determine these release dates based on the relevant information in that file and shall give credit toward reduction of the Florida sentence for gain-time granted by the jurisdiction where the inmate is serving the sentence.

The current version of the statute includes authority to direct a sentence to be served "concurrently with a sentence to be imposed in another jurisdiction." § 921.16(2), Fla. Stat. (2008). The current version further provides: "A county court or circuit court of this state may not direct that the sentence imposed by such court be served coterminously with a sentence imposed by another court of this state or imposed by a court of another state." § 921.16(2), Fla. Stat. (2008).[13]

The manner of serving a sentence as set forth in section 921.16 is part of the punishment because it directly "affects the length of time spent in prison." Benyard v. Wainwright, 322 So.2d 473, 475 (Fla. 1975). The general understanding of concurrent sentences appears to be that they all merge into the longest term. See Baughn v. Wainwright, 476 So.2d 692 (Fla. 1DCA 1985) ("The shorter of two

[13] This Court has not yet decided whether a *served* coterminous sentence is comprised of only time served or a combination of time served and gain time. Moore v. Pearson, 789 So.2d 316 (Fla. 2001) (coterminous sentence is a mitigated sentence); Jefferson v. Florida Parole Com'n, 982 So.2d 743 (Fla. 2DCA 2008) (coterminous sentence is comprised only of time served; thus there is no gain time to be served on conditional release supervision).

concurrent sentences is naturally subsumed within the longer, here resulting in a total term of ten years"); Simmons v. State, 10 So.2d 436, 439 (Fla. 1942) ("As has been suggested, the practical effect of two sentences running concurrently and one sentence for the higher crime would be similar").[14]

Section 944.275, Florida Statutes (1991) provides in part:

> (2)(a) The department shall establish for each prisoner sentenced to a term of years a "maximum sentence expiration date," which shall be the date when the sentence or combined sentences imposed on a prisoner will expire. In establishing this date, the department shall reduce the total time to be served by any time lawfully credited.
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> (b) When a prisoner with an established maximum sentence expiration date is sentenced to an additional term or terms without having been released from custody, the department shall extend the maximum sentence expiration date by the length of time imposed in the new sentence or sentences, less lawful credits.
> ****
> (3)(a) The department shall also establish for each prisoner sentenced to a term of years a "tentative release date" which shall be the date projected for the prisoner's release from custody by virtue of gain-time granted or forfeited as described in this section. The initial tentative release date shall be determined by deducting basic gain-time granted from the maximum sentence expiration date. Other gain-time shall be applied when granted or restored to make the tentative release date proportionately earlier; and forfeitures of gain-time, when ordered, shall be applied to make the tentative release date proportionately later.

[14] Other jurisdictions take a similar view. See People v. Ramirez, 677 N.E.2d 722 (N.Y. 1996) ("Thus, concurrent sentences represent a single punishment measured by the sentence for the highest grade offense into which all concurrent sentences merge"); In re Lafayette, 910 A.2d 807, 808 (Vt. 2006) ("When terms run concurrently, the shorter minimum terms merge in and are satisfied by serving the longest minimum and the shorter maximum terms merge in and are satisfied by discharge of the longest maximum term.")

The statute has since been amended regarding the types and amounts of gain time authorized. § 944.275(4), Fla. Stat. (2008).

The gain time statute directly addresses consecutive sentences. They are to be added together to determine the overall prison term, the maximum release date, the award of basic gain time in a lump sum, and the tentative release date. Thus, each sentence in the consecutive chain will end through time served and gain time (assuming the prison term is not a mandatory day-for-day term and the inmate does not forfeit all his gain time).

Concurrent sentences are mentioned in the context of basic gain time awards: "Portions of any sentences to be served concurrently shall be treated as a single sentence when determining basic gain–time." § 944.275(4)(a)1. This language was added to avoid duplicating the basic gain time award. The maximum release date is calculated on the overall prison term. It may be comprised of a single term, the longest sentence in a group of concurrent sentences, or multiple sentences in a consecutive chain. Under any scenario, the basic gain time cannot exceed what would be due on the overall prison term, assuming eligibility for basic gain time. For example, if the maximum release date is computed on five years

(based on either a single concurrent term or multiple consecutive terms), basic gain time cannot exceed 600 days (10 days/month x 60 months, or 5 years).[15]

Unfortunately for Respondent Canty, basic gain time was not authorized on the sentence that controlled his actual release date. He could not benefit from the basic gain time applied to the other sentences, for to do so would have defeated the prohibition to basic gain time on the controlling sentence.[16]

This Court has decided one case that implicitly holds that concurrent sentences do *not* continue to run until the actual release date but can end earlier through time served and the award of gain time. See Evans v. Singletary, 737 So.2d 505 (Fla. 1999). In Evans, this Court upheld the tolling of conditional release supervision on an eligible sentence while the offender completed his longer ineligible concurrent sentence and also upheld the forfeiture of his gain time upon revocation of supervision. The Court emphasized that "the State has shown that it determined the length of Evans' supervision period only by the gain time earned

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[15] This is a common practice. See Wilson v. Hunter, 180 F.2d 456 (10th Cir. 1950) (concurrent sentences are not aggregated for the purpose of computing monthly good time); Christy v. Hauck, 2008 WL 4836850 (D.N.J., November 3, 2008) (No. CIVA 08-1053JSB) ("Petitioner is not entitled to have his jail time credits awarded for the purposes of two different concurrent sentences aggregated into one total amount of jail time credits, same as he cannot apply his total amount of jail time credits against the longest of his concurrent sentences.")

[16] See § 775.084(4)(e), Fla. Stat. (1991) (habitual offender eligible to receive only up to 20 days monthly incentive gain time).

during the eligible manslaughter sentence and forfeited only the gain time awarded in that case." *Id.*, at 508. The accuracy of this statement depended on there having been no substitution of prison time for the tolling period.

The First District in Bolden v. Florida Department of Corrections, 865 So.2d 1 (Fla. 1DCA 2003), which involved concurrent sentences imposed at the same time for related offenses, concluded that the supervision could not be tolled, and neither could a tolling period be accounted for upon revocation of supervision. It required the Department upon revocation of supervision to increase the prison time by 337 days (tolling period) on the sentence that ended before the release date.

The First District's Bolden decision is confusing. The supervision was not tolled until the release date, but it was unclear whether the prison time was running on all concurrent sentences until the release date; or the supervision was running while the offender remained incarcerated.[17] As to whether the prison time was running, the Department had to apply 337 days to the sentence ending before the

[17] Community supervision is sometimes deemed to be running in prison. See, e.g., Stewart v. U.S., 267 F.2d 378 (10th Cir. 1959) (by releasing offender to probation, federal government relinquished sole custody over offender, who then could be arrested, prosecuted, and incarcerated by State of Utah); David v. Meadows, 881 So.2d 653 (Fla. 1DCA 2004) (conditional release supervision was served during civil commitment); Sutton v. Florida Parole Com'n, 975 So.2d 1256 (Fla. 4DCA 2008) (same). This solution should be avoided if at all possible. It is based on a legal fiction, Brumit v. Wainwright, 290 So.2d 39, 45 (Fla. 1973) (offender cannot be simultaneously at liberty and incarcerated), and legal fictions generate all sorts of implementing problems.

release date. The same thing would have happened had the prison time continued to run. As to whether the supervision was running in prison, the Court never stated that the supervision was running while the offender was still serving his sentences. Had it done so, the decision would have conflicted with the provisions of the supervision statute. The offender had not yet reached his tentative release, and he was still under the jurisdiction of the Department. The Commission was not ordered to grant credit for time spent on supervision; rather, the Department was forbidden to extend the release date by the tolling period. This was just another way of saying the prison time was still running.[18]

This Court accepted jurisdiction of Bolden but after briefing and argument dismissed the case. Crosby v. Bolden, 867 So.2d 373 (Fla. 2004). Justice Wells, who wrote Evans, dissented to the dismissal of the case in an opinion joined by Justice Pariente. He concluded that the supervision was properly tolled; the fact the offenses were related was irrelevant; and the tolling period should be treated as time served upon revocation of supervision because of the nature of concurrent sentences. *Id.*, at 376, 379-379.

[18] In David v. Meadows, 881 So.2d at 655, the Court commented, "If a defendant may complete his conditional release supervision while in prison, he should be permitted to complete it while civilly committed." To the extent the Court was referring to Bolden, the explanation that fits better with the facts is that the prison time was running, not the supervision.

Serving prison time and tolling supervision are mutually exclusive actions. Supervision follows completion of a sentence, and if prison time is being served, supervision has not been activated. A served sentence is comprised of the following: jail time + prison time + gain time = prison term. If an offender continues to earn prison time after the sentence has been served, it has to reduce the gain time. A reduction in gain time necessarily reduces the length of conditional release supervision and the confinement period upon revocation of supervision.

Bolden has since been distinguished in several cases, the significance of which is that the sentences in those cases did not continue to run until the offender's actual release date. See Bostic v. Crosby, 858 So.2d 347 (Fla. 1DCA 2003); Lewis v. Crosby, 878 So.2d 444, 446 (Fla. 1DCA 2004); Crosby v. McNeal, 865 So.2d 617, 619-620 (Fla. 5DCA 2004); and Wesley v. State, 848 So.2d 1231 (Fla. 2DCA 2003).

The Fifth District held in Crosby v. McNeal that tolling of supervision was proper, and that the tolling period did not have to be accounted for upon revocation of supervision, which is another way of saying that the concurrent sentence stopped running upon the date it ended through the award of gain time and did not commence again until the inmate was returned to prison as a supervision violator.

The Second District in Wesley v. State, reasoned, "Because the supreme court has specifically allowed such tolling, putting Mr. Wesley on conditional release for the remainder of his 1990 sentence at the time he is finally released in April 2003 from his 1999 [concurrent] sentence is not a miscalculation of his sentence." *Id.*, at 1232-1233.

The Commonwealth of Massachusetts recognizes that concurrent sentences remain distinct for the purpose of awarding good time even when the good time does not benefit the offender and becomes in effect a detriment upon revocation of supervision. See Reynolds v. Superintendent, Old Colony Correctional Ctr., 809 N.E.2d 1051 (Mass. 2004).[19] While the offender there was serving a prison sentence without good-time eligibility for possession of a firearm, he received a concurrent sentence for armed robbery on which he received good time awards. Through those awards, the robbery sentence ended before the firearm sentence ended. The offender remained incarcerated thereafter for a sufficient amount of time to have served the robbery sentence day for day plus some additional time. The offender eventually was released to parole on the firearm sentence and to probation on the robbery sentence. He returned to prison as a probation violator on the robbery sentence. He sought credit for all time previously incarcerated. His request was denied. The Court reasoned that his commitment on the robbery

[19] The briefs are also available on Westlaw.

sentence was completed when the time served and good time equaled the prison term of three years, and that thereafter he was incarcerated only on the firearm sentence. As to the time served on the firearm sentence equal to the good time awards on the robbery sentence, the Court reasoned as follows:

> Our construction does not defeat the purpose of the good time statutes of encouraging good behavior in prison. Rather, it respects the fact that separate sentences must be calculated independently. Whenever, as here, a sentence on a charge that does not qualify for good time is being served concurrently with a sentence on a separate charge that does qualify, it may turn out that good time is of no practical benefit to the prisoner. To the extent that that occurs, it is the product of the Legislature's decision to exclude sentences for certain crimes from eligibility for good time deduction. Meanwhile, as it accrues, good time is applied to any eligible sentence being served—it is not held in reserve for application with the benefit of hindsight so as to obtain maximum over-all reduction in total incarcerated time. *Id.*, at 1053.

On a closely related issue, the D.C. Circuit has rejected the argument that an offender has a right to waive good time credits resulting in early release to supervision, the term of which is partially determined by the amount of good time credits. See Woodson v. Attorney General, 990 F.2d 1344 (D.C. Cir. 1993). The Court held that the good time statute was binding on both the government and the offender and did not authorize a waiver of the credits. The offender argued that the prohibition to a waiver defeated the purpose of the credits and threatened to violate prison rules and conditions of supervision. In response, the Court reasoned and held:

> Woodson contends that the policy underlying the statutory scheme is defeated by forcing prisoners to accept their good time credits. She asserts that if she is not permitted to waive her good time credits, she will attempt to forfeit them by breaking prison rules or violating the conditions of release. *** We are neither impressed nor deterred by Woodson's threatened misconduct for we do not believe that the statutory scheme is defeated simply because it creates "perverse incentives" for one federal inmate. *** We are satisfied in the knowledge that the commutation scheme promotes rehabilitation and provides the correct incentives for good behavior for the vast majority of federal prisoners to whom it applies. *Id.*, at 1349.

CONDITIONAL RELEASE SUPERVISION[20]

The Florida Parole Commission has constitutional and statutory authority to place sentenced offenders on supervision. See art. IV, § 8, Fla. Const.; Mayes v. Moore, 827 So.2d 967, 972 (Fla. 2002). One type of supervision is known as conditional release supervision. It is a post-prison statutory 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 at 972; § 947.1405, Fla. Stat.; § 944.291(2), Fla. Stat. It is administered solely by the Commission; neither the sentencing court nor the Department has any authority over the program. Mayes v. Moore, 827 So.2d at 971; Gay v. Singletary, 700

[20] This type of supervision is under the jurisdiction of the Florida Parole Commission. The Department's role is to supervise the offenders in the community on behalf of the Commission. As was explained in Gay v. Singletary, 700 So.2d 1220, 1221 (Fla. 1997), "it is important to understand that the Department of Corrections and the Parole Commission are two distinct agencies with different powers and duties."

So.2d 1220, 1221 (Fla. 1997); Rivera v. Singletary, 707 So.2d 326, 326 (Fla. 1998). The Department supervises the inmate at the direction 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); Evans v. Singletary, 737 So.2d 505, 507 (Fla. 1999).

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. As was explained in Duncan v. Moore, 754 So.2d at 710, "[t]his supervision should help these former inmates in bridging the gap between prison and the outside world."

Section 947.1405, Florida Statutes (1991) provides:

> (2) **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,[21] 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. *** A panel of no fewer than two commissioners shall establish the terms and conditions of any such release. *** The commission shall also determine whether the terms and conditions of such release have been violated and whether such violation warrants revocation of the conditional release. (emphasis supplied)[22]
>
> ****
>
> (6) *** If the commission determines that the inmate is eligible for release under this section, the commission shall enter an order establishing the length of supervision and the conditions attendant thereto. The length of the supervision must not exceed the maximum penalty imposed by the court.

Section 947.141, Florida Statutes (1991) sets forth the procedure for determining whether violations of the release order have occurred. If a violation has occurred, the Commission is authorized to issue an order to "return the releasee to prison to serve the sentence imposed upon him, reinstate the original order granting conditional release, or enter such other order as it considers proper." §

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[21] "Tentative release date" 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). Provisional release was an overcrowding mechanism since repealed. § 944.277, Fla. Stat. (1988-1993); Gomez v. Singletary, 733 So.2d 499 (Fla. 1998); Winkler v. Moore, 831 So.2d 63 (Fla. 2002).

[22] The group of eligible offenders includes habitual felony offenders. § 775.084(4)(e), Fla. Stat. (1991); Lincoln v. Florida Parole Com'n, 643 So.2d 668 (Fla. 1DCA 1994); Deason v. Florida Dept. of Corrections, 705 So.2d 1374 (Fla. 1998).

947.141(3). The forfeiture of gain time is also authorized, for the obvious reason that without the forfeiture, there would be no additional time to serve:

> (4) 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, from the date on which he is returned to prison.

Conditional release supervision applies only to eligible sentences. Parole Com'n v. Cooper, 701 So.2d 543 (Fla. 1997) (offender improperly released to supervision based on an ineligible concurrent sentence, and since his eligible sentence was served day for day incarcerated, he was not subject to supervision, revocation of supervision, or forfeiture of gain time); Pressley v. Singletary, 724 So.2d 97 (Fla. 1997) (offender improperly released to supervision based on both concurrent eligible and ineligible sentences; error to include ineligible sentence which had the most gain time and use it to determine length of supervision, revocation of supervision, and forfeiture of gain time).[23]

[23] In 1997, the legislature made all sentences eligible by association with an eligible sentence. § 947.1405(2), Fla. Stat. (1997) ("Such supervision shall be applicable to all sentences within the overall term of sentences if an inmate's overall term of sentences includes one or more sentences that are eligible for conditional release supervision as provided herein."); Pressley, 724 So.2d at 98 (amendment applies to sentences for offenses committed after date of amendment).

TOLLING OF SUPERVISION[24]

After the method of serving concurrent sentences has been established, the next issue is the tolling of supervision. When a sentence has ended through the award of gain time before the actual release date, the issue arises as to what to do about the term of supervision. If all of the concurrent sentences continue running until the actual release date, the issue of tolling will never arise. The only gain time applied will be the gain time affecting the release date. This is the effect of the First District's decision in this case. On the other hand, if individual concurrent sentences can end through time served and gain time before the actual release date, tolling of supervision is an issue.

The tolling period is "dead time" on the eligible sentence. Tolling only occurs after the sentence has ended through time served and gain time. Were the sentence to continue running after it ended, each day of prison time applied to the sentence would have to be exchanged for a day of gain time, which in turn would reduce the supervision period and incarceration period upon revocation of supervision.

[24] The Department executes prison sentences and supervises offenders on supervision, but the jurisdiction over supervision is either the Florida Parole Commission (conditional release supervision) or the judiciary (probation and community control). The Department discusses the tolling of supervision because this event occurs while the offender is still in the Department's custody, and to that extent, it may affect the execution of sentences.

Underlying the tolling issue is the offender's common law right to fully serve his sentence without interruption unless he is responsible for the interruption. In State ex rel. Libtz v. Coleman, 5 So.2d 60 (Fla. 1941), this Court stated that "a sentence to jail is executed only when the convict has actually suffered the imprisonment unless relieved by some competent authority." It described a limitation on that rule "to the effect that the convict has a right to pay his debt to society by one continuous period of imprisonment." It then described an exception to that limitation for cases in which "the convict had agreed or acquiesced in the interruption of the sentence." *Id.*, at 30. The offender there was released from jail prior to serving her sentence.

As to *judicial supervision*, the Legislature has authorized split sentences with the condition that "[t]he period of probation or community control shall commence immediately upon the release of the defendant from incarceration, whether by parole or gain-time allowances." § 948.012 [formerly § 948. 01(8)], Fla. Stat. (2009). In Horner v. State, 617 So.2d 311 (Fla. 1993), this Court concluded that the following sentence structure satisfied the immediacy requirement of this provision: *concurrent* prison terms in Case I and Case II [ended at same time]; *consecutive* probation in Case II; *consecutive* probation in Case I; *consecutive* probation in Case III. This Court reasoned and held:

> The statute requires that the incarcerative portions of the sentencing be completed before the non-incarcerative portions begin. *** A probationary term that falls between or interrupts an incarcerative sentence or sentences is illegal. ***
> ****
> The immediacy requirement of the statute necessitates a correspondence between the incarcerative and probationary terms, and is not based upon an individual case, but upon one sentencing event. The statute defines split sentencing with regard to the sentencing that the trial court is imposing for all cases against the defendant. *** The preclusion of a time gap can reasonably be read to bar only a gap between release from incarceration on all counts and probation. We hold that when there is one sentencing that includes incarceration and either community control or probation on a variety of counts or cases, a probationary split sentence does not create gap time so long as community control or probation immediately follows incarceration.
>
> In this case, the trial court adjudicated three cases in one hearing and imposed a single split sentence. We therefore find that the trial court did not create a time gap in violation of section 948.01(8), and so approve the district court ruling. *Id.*, at 312-313.

The Horner Court had no occasion to address scenarios involving multiple sentencing hearings resulting in split sentences, which in turn created gaps between incarceration and supervision. The tolling of supervision in these cases has been upheld on the ground that the interruption of the sentence was the offender's own fault for committing crimes in different locations. See Brooks v. State, 762 So.2d 1011 (Fla. 5DCA 2000) (Brevard County probationary term of true split sentence properly tolled while offender completed concurrent unrelated Seminole County prison term on sentence subject to parole); State v. Savage, 589 So.2d 1016 (Fla. 5DCA 1991) (Brevard County probationary term of split sentence properly tolled

while offender completed consecutive Baker County prison term); Porter v. State, 585 So.2d 399 (Fla. 1DCA 1991) (Gadsden County probationary term properly tolled while inmate completed unrelated consecutive Leon County prison term); Crawley v. State, 787 So.2d 886 (Fla. 2DCA 2001) (Hillsborough youthful offender probationary term properly tolled while offender completed unrelated consecutive Hillsborough county prison term); and Bradley v. State, 721 So.2d 775 (Fla. 5DCA 1998) (term of judicial supervision-–community control and probation-–properly tolled while offender served his unrelated prison term).

The Legislature has also determined when *conditional release supervision* is to commence. Section 947.1405(2) provides that "any inmate" who has the requisite criminal history "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…." The tentative release date is defined as "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). In 1997, the statute was amended to make "all sentences within the overall term of sentences" eligible for supervision as long as one of the sentences was eligible. § 947.1405(2), Fla. Stat. (1997). The immediacy requirement of the statute is tied to the offender and his actual release date. There is no requirement that the supervision commence upon a

sentence ending before the release date. Any gap between the prison ending date and supervision commencement date is the product of the offender committing multiple offenses subject to different punishments. His manner of committing crimes does not justify altering or eliminating terms of supervision.

At the same sentencing hearing, Offender Canty received ten concurrent sentences in three cases for offenses committed on three different dates. The sentences ended at different times due to variations in the length of the prison terms, jail credit, and gain time. Any delay in supervision on an individual sentence was the product of Canty committing multiple crimes subject to different punishments. Since Canty was released to supervision upon reaching his tentative release date, the statutory immediacy requirement was satisfied.

This Court upheld the tolling of supervision in Evans v. Singletary, 737 So.2d 505 (Fla. 1999) on an eligible sentence while the offender completed his longer ineligible concurrent sentence. Offender Evans received unrelated sentences on different dates. To uphold the tolling of the supervision, the Court relied on cases holding that tolling was permissible when the delay was the offender's own fault for committing crimes in different locations. Two cases cited were Savage and Bradley, supra. While the probationary law supported the tolling of supervision, so did the conditional release supervision statute. The supervision commenced upon the offender reaching his tentative release date.

The First District in Bolden v. Florida Department of Corrections, supra held the supervision could not be tolled because the sentences were for related offenses imposed in the same sentencing proceeding. This part of Bolden is inconsistent with the conditional release supervision statute, as well as the reasoning in Horner and should be overruled. This Court accepted jurisdiction of Bolden but after briefing and argument dismissed the case. Crosby v. Bolden, supra. Justice Wells, who wrote Evans, dissented to the dismissal of the case in an opinion joined by Justice Pariente. He concluded that the supervision was properly tolled; the fact the offenses were related was irrelevant; and the tolling period should be treated as time served upon revocation of supervision because of the nature of concurrent sentences. *Id.*, at 967 So.2d at 376, 378-379.

Serving prison time and tolling supervision are mutually exclusive actions. Supervision follows the prison term. It is irrelevant until the prison term ends. When the prison term ends, it will be comprised of the following: jail time + prison time + gain time = prison term. If supervision is then tolled, the tolling period is dead time. Prison time cannot keep running without reducing the gain time award, which in turn reduces the term of supervision and term of incarceration upon

revocation of supervision. This is because the term of supervision and subsequent incarceration upon revocation of supervision cannot exceed the gain time.[25]

Bolden has been distinguished multiple times on the ground that the concurrent sentences were for unrelated offenses: Bostic v. Crosby, 858 So.2d 347 (Fla. 1DCA 2003) ("We conclude that because Bostic's sentences are for unrelated crimes, our decision in *Bolden* affords him no basis for relief"); Lewis v. Crosby, 878 So.2d 444, 446 (Fla. 1DCA 2004) ("As between the sentences imposed in the two separate cases, our decision in *Bolden* affords petitioner no relief because the sentences were imposed for two unrelated robberies"); and Crosby v. McNeal, 865 So.2d 617, 619-620 (Fla. 5DCA 2004) ("*Bolden* is distinguishable because it deals with sentences arising out of the same criminal episode.").

The Fifth District held in Crosby v. McNeal that tolling of supervision was proper, and that the tolling period did not have to be accounted for upon revocation of supervision. The Second District in Wesley v. State, supra has also approved the tolling of the supervision.

[25] Judicial supervision is different in that the term of supervision is independent of the prison term. Gain time awards do not affect the length of supervision, but they will determine the amount of gain time to be forfeited upon revocation of supervision.

CONCLUSION

The Department respectfully requests this Honorable Court to resolve the tension in the various laws which authorize sentences to run concurrently while simultaneously being reduced by gain time; the tolling of conditional release supervision based on those gain time awards; and the forfeiture of the gain time upon revocation of either executive or judicial supervision.

Respectfully submitted,

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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 overnight delivery service to **NICHOLAS A. SHANNIN, ESQUIRE,** Page, Eichenblatt, Bernbaum, & Bennett, P.A., 214 East Lucerne Circle, Orlando, Florida, 32801, attorney for Respondent, and a *courtesy* copy to **SARAH J. RUMPH, ACTING GENERAL COUNSEL**, Florida Parole Commission, 2601 Blair Stone Road, Building C, Tallahassee, Florida 32399-2450 this 26th day of March, 2009.

_____
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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

WALTER A. McNEIL, Secretary,
FLORIDA DEPARTMENT OF
CORRECTIONS,

Petitioner,

FSC CASE NO. SC08-2369
vs. 1DCA CASE NO. 1D08-452

EDISON CANTY,

Respondent.
_____/

PETITIONER'S INDEX TO APPENDIX