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 REPLY BRIEF

_____

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

_____

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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?

I. Offender Canty argues that this Court either lacks jurisdiction to review this case or should refuse to review it. The Department respectfully disagrees. This Court has two grounds to support its jurisdiction—certification jurisdiction and conflict jurisdiction. In addition, sound public policy supports accepting jurisdiction in this case.

A. This Court has discretionary jurisdiction based on certification of a question of great public importance. This Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance." *See* art. V., § 3(b)(4), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(v). As was explained in Floridians For a Level Playing Field v. Floridians Against Expanded Gambling, 967 So.2d 832, 833 (Fla. 2007), this jurisdictional ground requires the district court by majority vote to decide the case, pass upon the question to be certified, and agree to the certification.

In the present case, Offender Canty contends the First District failed to pass upon the question certified. He points out that the certified question is couched in terms of a conditional release supervision *ineligible* sentence controlling the actual

release date when in his case a supervision *eligible* sentence determined his release date. Based on a review of the record, the certified question is not entirely accurate, but it is sufficiently accurate to satisfy the jurisdictional requirement. The essence of the certified question is whether a concurrent sentence continues to run until the actual release date, not whether the sentence that ended last was either supervision *eligible* or *ineligible.* If an *eligible* sentence ends prior to the release date, the supervision period and incarceration period upon revocation of supervision may be longer. The First District actually held that Offender Canty's concurrent supervision eligible sentence continued to run until the actual release date. The consequence was a reduction in his supervision time and prison time upon revocation of supervision.[1]

Offender Canty cites State v. Vazquez, 718 So.2d 755 (Fla. 1998) and Gee v. Seldman & Seidman, 653 So.2d 384 (Fla. 1995). These two cases are

[1] The Department's affidavit, which is dated September 14, 2007 and included in the record on appeal to the First District, reflects that Offender Canty received ten concurrent sentences (one 5-year sentence, two 10-year sentences, and seven 15-year sentences). From the nature of the offenses and the habitual offender classification, it was apparent that Offender Canty was eligible for conditional release supervision on five sentences pursuant to section 947.1405(2), Florida Statutes (1991) and Florida Rule of Criminal Procedure 3.701(c). These sentences were as follows: Case No. 91-26924, Counts 1,2, and 4 (two 10-year sentences and one 15-year sentence); Case No. 92-2795, Count 3 (15-year term); and Case No. 92-5025, Count I (15-year term). The supervision eligible sentences ended at different times necessitating the tolling of the supervision, while other eligible and ineligible sentences were served. The last sentence to be served was in fact an eligible sentence.

distinguishable. The Fourth District in Vazquez v. State, 700 So.2d 5 (Fla. 4DCA 1997) granted the offender on direct appeal from the judgment and sentence a new trial based on an evidentiary issue. This rendered moot the issue of the defective standard jury instruction on entrapment, but the Court addressed the issue anyway and then certified to this Court the question as to who should benefit from the new law. This Court declined to address the certified question because the Fourth District had not ruled on it and noted that the standard jury instruction had since been modified to reflect the new law. State v. Vazquez, 718 So.2d at 756. In Gee, this Court emphasized, "Because the district court specifically stated that it did not address the issue contained in the question certified to this Court, we are without jurisdiction to entertain the question." *Id.*, 653 So.2d at 385. By contrast, in the present case, the First District's certified question clearly relates to the facts in the case and its holding. Offender Canty was serving a concurrent supervision eligible sentence, which the Court held continued to run while Canty remained incarcerated on another sentence. This was the essence of the case, notwithstanding the First District's description of the controlling sentence as an ineligible sentence. As previously explained, the tolling period is the problem, not the nature of the controlling sentence.

B. In addition to certification jurisdiction, this Court also has conflict jurisdiction over Offender Canty's case. This Court "[m]ay review any decision of

a district court of appeal that *** expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." *See* art. V, § 3(b)(3), Fla. Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv). The conflict between decisions "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). One way to establish the conflict is to show that the decisions are irreconcilable. *See* Crossley v. State, 596 So.2d 447, 449 (Fla. 1992) (conflict of decisions existed where the court below "reached the opposite result on controlling facts which, if not virtually identical, more strongly dictated" the result reached by the alleged conflict case).

In the present case, the decision of the First District expressly and directly conflicts with the decision of the Fifth District Court of Appeals in Crosby v. McNeal, 865 So.2d 617 (Fla. 5DCA 2004) on the same question of law. Based on the information provided in the opinions, the McNeal case and Offender Canty's case share the following facts: the offender served concurrent sentences subject to conditional release supervision; the sentences ended on different dates through a combination of time served and gain time awards; the supervision was tolled on the sentences that ended before the actual release date; the offender was released to supervision; the supervision was subsequently revoked; the Department forfeited the accrued gain time on all the sentences; and the offender sought credit for the time he remained incarcerated between the ending date on one sentence and the

date of actual release determined by another sentence. The Fifth District in McNeal held that the offender was not entitled to prison credit for this period of time, whereas the First District in this case held just the opposite—that the offender was entitled to prison credit for this time frame. Both courts cannot be correct—one decision is wrong. Crossley, supra.

Both Courts also believed they were following Evans v. Singletary, 737 So.2d 505, 508 (Fla. 1999). The offender in Evans was released to conditional release supervision, violated it, and returned to prison upon revocation of his supervision. The Department forfeited the gain time that had accrued on the supervision eligible sentence that had ended earlier than the ineligible sentence which controlled the release date. The offender then sued the Department and the Florida Parole Commission, arguing that his supervision could not have been revoked and his gain time forfeited because his sentence had expired. The Evans Court approved the tolling of the supervision, the length of the supervision which was based on the accrued gain time on the eligible sentence, and the forfeiture of that same amount of gain time upon revocation of supervision:

> Therefore, we conclude that the revised supervision period calculated by the State (until the year 2000) was proper. *Id.*, at 507-508.
> ****
> Therefore, tolling the supervision until the inmate has been released from prison would be the most logical choice.
> ****

> Here, the State has shown that it determined the length of Evans' supervision period only by the gain time earned during the eligible manslaughter sentence and forfeited only the gain time awarded in that case. *Id.*, at 508.

The First District in this case construed Evans as not addressing the calculation of the new release date upon revocation of supervision. By contrast, the Fifth District construed Evans as addressing this issue and rejecting the argument that the offender has a right to credit for the tolling period. McNeal, 865 So.2d at 619-620. Again, both Courts cannot be correct; one misapplies Evans. *See* Robertson v. State, 829 So.2d 901 (Fla. 2002) (conflict created by misapplication of Florida Supreme Court decisions).

C. This Court should exercise its jurisdiction to review the First District's decision in this case. The decision relates to one of the most common ways that a sentence is served—concurrently with other sentences. The decision will affect a sizeable number of inmates, of which there currently are over 100,000. The law is unsettled and in conflict on this issue.

Offender Canty relies on Crosby v. Bolden, 867 So.2d 373 (Fla. 2004), but the situation has worsened since this Court declined to review Bolden on a certified question. The holding in Bolden was limited to concurrent sentences for *related* offenses. Since then, Bolden has been distinguished on that ground in the First, Second, and Fifth Districts. See Bostic v. Crosby, 858 So.2d 347 (Fla. 1DCA

2003); Crosby v. McNeal, 865 So.2d 617, 619-620 (Fla. 5DCA 2004); and Wesley v. State, 848 So.2d 1231 (Fla. 2DCA 2003). The First District in Canty has now held that concurrent sentences for *unrelated* offenses continue to run until the release date, thereby creating conflict with Bostic; McNeal; and Wesley.

II. Offender Canty contends that the Department lacks the authority to increase a sentence beyond what was imposed by the sentencing judge (A.B. 9-15), but this argument begs the question presented to this Court. The issue involves the manner in which concurrent sentences are to be served. Does a concurrent sentence end based on characteristics unique to it, or does it remain active until the actual release date? The answer will dispose of the case, for the Department will structure concurrent sentences accordingly. There is no reason to even discuss such doctrines as the separation of powers doctrine. The Department is not refusing to follow the law; the law is unclear, and the Department is simply asking for clarification from this Court.

Each offense must have its own sentence which is unique in every respect, including prison term, jail credit, gain time, and supervision requirements. A sentence can be served by itself, consecutively to other sentences, or concurrently with other sentences. If served concurrently, the prison time necessarily is shared, for there is only one time period involved. Offender Canty assumes that the sharing of prison time eliminates all the unique characteristics of each individual sentence,

except for the one that determines the actual release date. He argues specifically that at the time of his release to supervision, he had served on the 15-year term controlling his release date a total of 3783 days (138 days in jail and 3645 days in prison), and that, therefore, his length of supervision and incarceration upon revocation of supervision could only be *1692 days*. (A.B. 12-13) Canty discounts the different amounts of jail credit and gain time awarded on the other 15-year terms.[2] The Department, on the other hand, has taken into account the unique characteristics of each sentence, relying in part on section 944.275, Florida Statutes; Evans and McNeal.

Offender Canty's proposed substitution of a certified question for that of the First District does not take into account the uniqueness of each sentence. (A.B. 9-10) He asks whether the term of incarceration upon revocation of supervision can be longer than the sentence imposed. That question cannot be answered until it is first determined whether concurrent sentences merge into a single term or remain independent. If they remain independent, each sentence will be viewed

[2] Offender Canty served 3645 days in prison but received different amounts of jail credit in three cases (82 days, 116 days, and 138 days). If these two factors were taken into account, Canty would still have additional time to serve on two other sentences. As opposed to *1692 days*, he would have to serve *1714 days* (5475 – 3645 prison time – 116 jail credit) in one case and *1748 days* (5475 – 3645 prison time – 82 days jail credit) in another case. *See* Gethers v. State, 838 So2.d 504 (Fla. 2003) (no entitlement to jail credit unless offender has been arrested for specific offense).

individually to determine its ending date based on time served and gain time awards. As long as the term of incarceration upon revocation of supervision does not extend beyond the time equal to the accrued gain time, the original prison term on the *specific* sentence will not have been exceeded. By contrast, if the concurrent sentences merge, as implicitly contended by Offender Canty, the entire focus will be on the sentence that controlled the release date. It will determine the time served on the other sentences and whether any time remains to be served under conditional release supervision.

Each of Offender Canty's arguments assumes that concurrent sentences become a single term and lose their unique characteristics. He cites the state and federal constitutions, statutes, and case law for the propositions that sentencing is a judicial function, and the term of incarceration cannot exceed the sentence, either initially or upon revocation of supervision. (A.B. 9-15) The Department has no quarrel with these propositions, but they do not answer the question presented.

One of Offender Canty's arguments is that section 947.141(3), Florida Statutes, provides that upon revocation of supervision, the offender is to be returned to prison to serve the remainder of his sentence. (A.B. 12) He invokes rules of statutory construction, including the rule of lenity set forth in section 775.021(1), Florida Statutes. (A.B. 12-14) Once again, this law does not address the issue of how concurrent sentences are to be served.

Section 775.021(4)(a)and(b) make it clear that each offense is unique and must have its own conviction and punishment. Paragraph (4)(a) rejects the single transaction rule, which was a common law rule that "limited a conviction to only the most serious offense arising from a single criminal transaction." *See* Kelso v. State, 961 So.2d 277, 279 (Fla. 2007). Paragraph (4)(b) further defines a "separate offense" and rejects the rule of lenity as a tool for determining legislative intent on this issue. Paragraph (4)(a) authorizes the sentences to be served concurrently or consecutively at the judge's discretion, but it does not define what that means. Since the purpose of paragraph (4)(a) was to eliminate the single transaction rule, it is doubtful the legislature intended for concurrent sentences to be interpreted in such a way as to resurrect the very rule that was being rejected.

III. Offender Canty contends that he has a right to credit for the same amount of prison time on each sentence upon revocation of conditional release supervision. (A.B. 15-21) This right, however, depends on this Court holding that concurrent sentences continue to run as long as the offender is incarcerated. The formula for a *served* sentence is as follows: time served (jail time + prison time) + gain time = prison term, *unless* the sentence is served day for day incarcerated, in which case there will be no gain time. The gain time determines the length of conditional release supervision, as well as the period of incarceration upon revocation of supervision. If "jail time or prison time" is increased on a fully

served sentence, it automatically reduces the gain time, for the two numbers added together *must* equal the prison term; otherwise, the prison term imposed by the court has been exceeded.

Offender Canty seeks additional prison credit upon revocation of conditional release supervision. The only justification for giving him the credit would be that his concurrent sentences were still active until his release date. If this were true, he should get the credit, and he should get it upon his release to supervision. On the other hand, if his concurrent sentences ended through time served and gain time prior to his release date, he has no right to any additional prison credit. Giving an offender additional prison credit could retroactively eliminate the gain time entirely, which in turn would wipe out the supervision and the revocation of supervision.

One reason Offender Canty thinks he should get the prison credit is that his controlling sentence was an *eligible* sentence, which, according to Canty, eliminates the need for tolling of supervision to avoid the offender receiving a windfall. Offender Canty contends that due to his *eligible* controlling sentence, his case is like Bolden v. Florida Dept. of Corrections, 865 So.2d 1 (Fla. 1DCA 2003), *review dismissed*, Crosby v. Bolden, 867 So.2d 373 (Fla. 2004). (A.B. 16-19) While Offender Bolden's controlling sentence was an *eligible* sentence, Bolden's claim to fame was that the *eligible* sentences were for *related* offenses, which is

not true for Canty. Having said that, the Department does not believe that either factor is relevant to the analysis. Neither addresses the fundamental problem of how concurrent sentences are to be served; they just create artificial distinctions to justify denying or granting credit.

Offender Canty distinguishes his case from Evans v. Singletary, 737 So.2d 505 (Fla. 1999) which involved an *ineligible* controlling sentence. (A.B. 15-18) He misreads Evans to the extent he states that Offender Evans had not yet been released to supervision, and thus the Court had no occasion to address prison credit upon revocation of supervision. Offender Evans was both released to supervision and had his supervision revoked. The Evans Court affirmed the length of the supervision and the amount of the gain time forfeiture upon revocation of the supervision.

Offender Canty also relies on State v. Rabedeau, 2 So.3d 191 (Fla. 2009). (A.B. 20) The offender there received three concurrent sentences, was released to judicial supervision, and returned to prison with three consecutive sentences for the same offenses. This Court held that the offender was entitled to credit for prison time on all three consecutive sentences. What this case teaches is that whatever prison time was served on a concurrent sentence travels with that sentence for future sentencing. The Rabedeau Court, however, had no occasion to address the

issue presented here—does a concurrent sentence continue to run as long as the offender is incarcerated?

Offender Canty contends that the mere act of imposing concurrent sentences is sufficient to establish the judge's intent that the offender receive the maximum benefits from such a sentence structure. (A.B. 20-21) That will be true if this Court holds that concurrent sentences continue running as long as the offender is incarcerated. On the other hand, if the Court holds that sentences retain their unique characteristics even when being served concurrently, then it will be up to the judge to adjust the length of the various concurrent sentences to account for variations in gain time awards and jail credit, none of which was done in the present case. If such an adjustment is not possible, that will be because of policy choices by the legislature (e.g., guidelines range restrictions or minimum mandatory terms). [3]

Offender Canty accuses the Department of making illogical arguments. He states that the Department is arguing that Canty was both in prison and at liberty simultaneously which defies logic, referring to "Schrodinger's fabled cat" and Segal v. Wainwright, 304 So.2d 446, 448 (Fla. 1974) ("a man cannot be both in jail

[3] In Eldridge v. Moore, 760 So.2d 888, 892 (Fla. 2000), this Court instructed that "[t]he courts should assume that the trial court knew and understood the statutes affecting the inmate's final release date and apply the statutes as they are, without trying to determine whether the final effect was what the trial court had in mind."

and out on parole at the same time"). (A.B. 19-20) That is not the Department's argument.[4] The Department has argued that each sentence is unique with its own ending date, regardless of how it is served (alone, consecutively, or concurrently), and that the *supervision is tolled* between the date the sentence ends and the actual release date. It has identified the tolling period as *dead time* on that *specific* sentence. (I.B. 15, 22-26, 41) The tolling of supervision is not a novel concept; it in fact is well established for judicial supervision (probation and community). (I.B. 42-44)

Offender Canty further accuses the Department of exercising "unfettered discretion" and "independently fashion[ing]" sentences. (A.B. 15) The Department does no such thing. The Department follows the law. *See* § 944.275, Fla. Stat.; Evans v. Singletary, 737 So.2d 505 (Fla. 1999); Crosby v. McNeal, 865 So.2d 617, 619-620 (Fla. 5DCA 2004); Wesley v. State, 848 So.2d 1231 (Fla. 2DCA 2003); and Bostic v. Crosby, 858 So.2d 347 (Fla. 1DCA 2003). The Canty decision has created conflict.

[4] In its initial brief, the Department in fact acknowledged that supervision is sometimes deemed to be running in prison, but argued that, if at all possible, this solution should be avoided because it was based on a legal fiction, and legal fictions generate all sorts of implementing problems for the Department. (I.B., page 32 n 17)

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 reply brief of Petitioner was furnished by overnight delivery service to **NICHOLAS A. SHANNIN, ESQUIRE,** Page, Eichenblatt, Bernbaum, & Bennett, P.A., 214 East Lucerne Circle, Orlando, Florida, 32891, attorney for Respondent; and to **WILLIAM R. PONALL, ESQUIRE,** Kirkconnell, Lindsey, Snure and Yates, P.A., 1150 Louisiana Avenue, Suite 1, Winter Park, Florida, 32789, attorney for Respondent; and a *courtesy* copy by interoffice mail to **SARAH J. RUMPH, ACTING GENERAL COUNSEL**, Florida Parole Commission, 2601 Blair Stone Road, Building C, Tallahassee, Florida 32399-2450 this **13th** day of **April, 2009**.

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Counsel for Petitioner

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.

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Carolyn J. Mosley