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## **Statement of the Facts and Case**

For the purpose of answering the Certified Question presented herein, the Respondent adopts the statement of facts contained in the Opinion of the First District Court of Appeal, which opinion is appended to the brief of Petitioner, Crosby.

Respondent has no material disputes with the statement of facts set forth in the Petitioner's brief, although it contains references to areas that are not truly relevant to the discrete legal issue presented in this case.

## Summary of the Argument

As *Evans v. Singletary*, 737 So. 2d 505 (Fla. 1999) did not deal with the discrete issue presented herein, the answer to the certified question must be “no.”

On a logic basis, it is inappropriate to ADD to a maximum release date time spent in jail after the first possible release date on a related sentence that is running concurrently days spent after that date but prior to the actual release date as a result of forfeiture of gain time. If the gain time did not exist, then the jail time was for that offense as well. There is no statutory or caselaw basis to create a situation where the maximum nights in jail can be enhanced by the loss of gain time due to the failure of a conditional release program. For any of the reasons so beautifully enunciated by the First District (analysis of similar cases or simply credit for time served) the decision reached by the First District was correct and other than clarifying what is meant by “related cases” so as to give comfort to the Parole Commission, the opinion should be endorsed by affirmance by this Court.

## Argument

### CERTIFIED QUESTION:

When an Inmate Who is Serving Several Related Sentences Subject to Conditional Release Supervision for Multiple Crimes Occurring in the Same Criminal Episode has Violated Conditional Release Supervision, Should the Department of Corrections, in Calculating the New Release Date, Consider Time Served Following the Expiration of the Incarcerative Portions of the Other Related Sentences, as Tolled, Pursuant to Evans v. Singletary, 737 So. 2d 505 (Fla. 1999) And, if so, Should the Department Add Such Tolled Time onto the Sentence in Calculating The New Release Date?

At the outset, Respondent states that the question as presented by the First District Court of Appeal must be considered in separate parts. The issue of whether the time served should be considered “tolled” (whether as a result of this Court’s prior opinion or otherwise) and whether if it is “tolled” it should be ADDED onto the sentence in calculating a new release date are two entirely different issues. Whether the “tolling” determination should be as a result of *Evans* is yet a third. Respondent will address each of these component issues separately, as although the easy answer would be to simply state that the answer to the question as phrased is “no” because as Petitioner admits at page 28 of his brief this precise issue was not addressed in the *Evans* case and as such the *Evans* case cannot be read to require

mandatory tolling and if there is then no tolling there can be no addition thereof, but, that would ignore the very real issue that must be dealt with.

As above stated, however, the Petitioner has admitted that *Evans* may have addressed related issues but this precise issue was not addressed. As such, on a technical level, the overall answer to the certified question must be “no.”

The core question presented by the facts of the within case is where a person is serving concurrent sentences all of which are subject to conditional-release supervision, which were scored on a single sheet (Respondent’s suggested definition of “related sentences”, *see, Tripp v. State*, 622 So. 2d 941 (Fla. 1993)) and the release date for one sentence precedes the ultimate release date, whether the inmate should be additionally penalized through increased incarceration by being required to serve over again days already spent in prison if he forfeits “gain time” by failing to meet conditional release terms after his ultimate release as a result of a legal fiction that he really wasn’t in jail at that time even though he was in the same cell he would have been in through those days had he not been good and accrued the gain time. To make the holding that the Petitioner and Amicus wish would be to discourage good behavior while in jail because had the gain time not been accrued for the incident for which the earlier release date and then lost

by violation of conditional release then the total days that the inmate would have been asked to spend in jail on that offense would be less than the suggested result of the Petitioner. Gain time is supposed to be an incentive- if it had the very real possible effect of extending jail time that purpose is not served.

*Evans* only dealt with the calculation of conditional release supervision time to be served where there was a separate sentence for an unrelated incident that was not subject to conditional release, but did not reach the question of how much time the inmate would be required to serve back in prison if the conditional release requirements were thereafter not met. There would be a significant difference in determining that issue from the issue presented in this case, however, since in this case ALL of the sentences were subject to conditional release and, accordingly, supervision would NOT run out if Mr. Bolden remained in jail after the first provisional release date on his next sentence as it would have in *Evans* where the longer sentence had no conditional release provision- in this case there would still be community watch when Mr. Bolden ultimately returned to society.

Petitioner's position actually suffers from the flaw that Petitioner ascribes to the reasoning of the First District Court of Appeal. Petitioner states that the First District erroneously held that the "supervised portion" of

the incident for which the earlier release date required started while the inmate remained in prison but since a person cannot be free and in jail at the same time that makes no sense and thus by extension of *Evans* Petitioner asks this Court to hold that the 337 days in question were in legally suspended animation for the inmate and that when he violated his conditional release and his gain time (which these 337 days would have been part of had he come out) was forfeited they should pretend that he was really out for those days and add them to the sentence for him to serve again. So, the real issue for this Court to consider, when the legal lingo is discarded, is what do we pretend was happening to Mr. Bolden during those 337 days he was kept in prison after he would have been let out on the first possible release date but before he was actually let out due to a different first possible release date for a separately sentenced but related crime. We know what factually he was doing- he was in jail based upon a single sentencing scoresheet. Do we pretend he was out in the community as a result of having been actually granted the full use of his gain time (because what actually happened with the hold back was that he didn't get to make full use of his gain time or he would have been out) and make him spend that number of days in jail again as part of the forfeiture of gain time- as is asked by the Petitioner and Amicus- or do we do something else.

Respondent does not agree that the First District simply pretended that Mr. Bolden was out on conditional release. What the First District actually refused to do was pretend that he was out and make him do those nights over. The beginning of conditional release was only part of the analysis utilized by the First District. The First District didn't agree that when "gain time" was retroactively reclassified as "gone" as a result of the forfeit that it would be equitable and justified by the currently operative statutes to not also reclassify the days he actually spent in jail as days spent in jail. They discussed credit for the time he had actually served- consistent with the concept that the purpose of giving credit for time served is to ensure that a defendant does not spend more time in jail than the term of his sentence.

*State v. Green*, 547 So. 2d 925 (Fla. 1989)

There is no question that had there been a single sentence and had Mr. Bolden been released on the first possible day of release- 337 days before he got out- and had he lost his conditional release privilege when he did that those 337 days would now be due to be served BECAUSE HE HAD NEVER BEEN IN JAIL FOR THOSE DAYS! But, the reality of the world is that he was in jail and when resentencing, whether you determine that "tolling" shouldn't be added to a sentence or whether there is a determination that it would be appropriate at the time of recalculation to consider those

days as a “credit for time served” (the alternate construction given by the First District) you reach the same conclusion- for the totality of the sentencing on these related sentences he was in jail those days and it is wrong to simply add them on to create a situation where the maximum release date for the combined sentences consists of more jailed days than the original sentence provided. With normal forfeiture the total days does not extend the total sentence, in the scenario provided by the instant case and if the wishes of the Petitioner and Amicus were granted, it would. That unjust result was appropriately rejected by the First District.

Respondent believes that the First District eloquently dealt with the basis for its opinion and Respondent cannot do more than state that the logic and justification for the result reached is more than adequately supported by the cases cited within that opinion.

Petitioner’s brief, and the brief of the Amicus, both attempt to utilize cases which are either based upon true split sentences, sentences that were unrelated and were thus not part of a total plan of incarceration, cases where there was an attempt to credit as time served time that was served in other jails for subsequently committed crimes, and cases where inmates tried to get credit for time on parole against jail time. Not one of the cases in either brief directly address the question that must be reached here. Not one provides a

statutory authority to create a situation where the maximum jail time of jailed days (not just a total of “10 years” for jail and probationary period for that certainly could take more than 10 years to accomplish if it were interrupted by a period or even multiple periods of conditional supervision that was unsuccessful and the gain time and times spent on conditional supervision were lost thereby requiring the inmate to return to prison to serve nights not before spent in jail) was enhanced. The distinguishing characteristics of the cases are clear- the cases cited are not inconsistent with the result reached by the First District in this case or with the issue created by this case. Petitioner admits that the operative statutes do not directly address the issue either. As such, despite the lengthy rhetoric, there is no direct legal basis for the conclusions reached by the Petitioner or Amicus.

In point of fact, § 944.28(1), Fla. Stat. (1999), simply states that upon revocation of conditional release all gain time is forfeited. If Mr. Bolden had not accrued gain time on that first releasable sentence, then he was logically still serving it and those days in jail were appropriately still ascribed to that sentence.

Respondent agrees with Petitioner that it is important to remember, as this Court held in *Brumit v. Wainwright*, 290 So. 2d 39 (Fla. 1973) that there are “no free men in jail.” Mr. Bolden was in jail on what has now, with

the forfeiture of gain time, become the equivalent of jailed days for that first offense. The logic and justification for the result reached by the First District is evident, and the fairness thereof manifest. The certified question should be answered in the negative, and the determination of the First District affirmed.

### **Conclusion**

For the above stated reasons, the question certified should be answered “no,” however, Respondent agrees that the definition of “related sentences” should be clarified to ensure consistent application of the guidelines.

## Certificate of Service

a true copy of the foregoing was mailed this 22nd day of May,

2003 to Carolyn Mosely, Assistant General Counsel and Judy Bone, Assistant General Counsel, Department of Corrections, 2601 Blair Stone Road, Tallahassee, Florida 32399 and to Bradley Bischoff, Assistant General Counsel, Florida Parole Commission, 2601 Blair Stone Road, Building C, Room 219, Tallahassee, Florida 32399.

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### **Typestyle statement:**

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**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC03-137**

**JAMES V. CROSBY, JR, etc.,**

**Petitioner,**

**v.**

**JOHNNY BOLDEN,**

**Respondent.**

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**ANSWER BRIEF**

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