IN THE SUPREME COURT OF FLORIDA

CARLOS CROMARTIE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC09-1868

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

APPELLEE'S ANSWER BRIEF

BILL McCOLLUM
ATTORNEY GENERAL

TRISHA MEGGS PATE
TALLAHASSEE BUREAU CHIEF

THOMAS H. DUFFY
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 992-6674 (FAX)

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

Petitioner, Carlos Cromartie, was the defendant in the trial court and the appellant below; this brief will refer to Petitioner as such, Defendant, or by proper name. Respondent, the State of Florida, was the prosecution in the trial court and the appellee below; the brief will refer to Respondent as such, the prosecution, or the State.

The record on appeal consists of eight volumes, which will be referenced as the Record on Appeal and by appropriate volume, followed by any appropriate page number. "R: __" will refer to volume 1 of the record. "S: __" will refer to the transcript of the original sentencing hearing, Dec. 18, 2006. The Supplemental Records will be referenced "Supp.: __" or "2d Supp.: __" etc. The resentencing hearing on Nov. 14, 2007, will be designated: "RS: __" "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number. "PJB" will designate Petitioner's Jurisdictional Brief, followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted by a Leon County Circuit Court jury of trafficking in cocaine and sale or possession of cocaine within 1000 feet of a church. (R: 74-75; T: 186)

Petitioner's criminal punishment code scoresheet showed a lowest permissible sentence of 7.83 years of imprisonment. (R: 82) He was sentenced to two concurrent eight-year terms. (S: 23; R: 80)

At the sentencing hearing, Circuit Judge Kathleen Dekker heard character testimony from five witnesses and brief testimony from Petitioner, who broke into tears after one sentence, but who later regained his composure and asserted that the nine-year sentence the state was seeking was unjustified in view of his (in his view) relatively minimal involvement in the crime. (S: 2-15, 19-23)

Judge Dekker said the minimum amount of time to which Petitioner could be sentenced was 93.975 months, which she "round[ed] off to 94 months, that's 7.8 years. And I'll round it to 8 years." (S: 23) She continued:

> My impression is that it could easily be 10 years. And so, because you have a good family support system, I'm will to stick with the 8 years. Because shy of that, it would have easily been 10 or more.

(S: 23)

Petitioner then filed a motion to correct a sentencing error under Florida Rule of Criminal Procedure 3.800(b), arguing that the

scoresheet had erroneously considered the trafficking count as a level 8, rather than a level 7, offense. (2d Supp.: 108)

The trial court granted his motion and a new scoresheet was prepared, which showed that the lowest permissible sentence was 73.95 months, or 6.16 years. (2d Supp.: 146; RS: 2)

At Appellant's resentencing hearing, Appellant's counsel advised the trial court that at Appellant's first sentencing hearing, the trial court had indicated that, due to Appellant's strong family and support system, it had imposed a sentence at the low end of the guidelines range. (RS: 3). Appellant's counsel asked the trial court to, again, impose a sentence at the low end of the guideline range. (RS: 3). The State argued for 9 years based on the large amount of drugs Appellant had. (RS: 4). The State also advised the trial court that Appellant was warned that, if he went to trial, he'd get at least 9 years in this case. (RS: 4).

The trial court responded as follows:

> THE COURT: This is – let me give you my impression here to short circuit, perhaps, this. I mean, you're all welcome to do whatever, but this is how this plays out to me.
>
> In refreshing my memory about this, I'm looking at the transcript, knowing my philosophies and how I do, I am confident that a year difference in the scoresheet would not have made a difference to me. So in other words, if the scoresheet had said – and this is 73 point – everybody agrees it's 73.95, which I divide by 12, is 6.16 years.
>
> MR. UFFERMAN [Appellant's counsel]: That's correct.

THE COURT: Okay. Now, what – so my point is, is that there is nothing about the evidence or the sentence that I can recall or about my philosophy that I would have done anything different other than probably just say, okay. Fine. That 73.95 is okay. Now, except, I usually round up.

MR. UFFERMAN: Sure.

THE COURT: And it's because unless – and if I have a very deep concern that I would probably even go under the minimum if allowed, then I will stick with the exact number on the scoresheet. Otherwise, you know, it just – it's in the ballpark, and if it's in the ballpark, I round up, unless there's an agreement to do something else.

Now, when there's an agreement, that's different. So you'll see lots of judgments and sentences where maybe I do exactly that, but that's because there was an agreement to do that, or I stated on the record that the person should get the minimum. So employing that, my philosophy is – and I did state on the record that this could have easily been 10 years or more depending upon other circumstances. But those circumstances I didn't find to exist then. There's no reason to find they exist now, and to do anything.

So my feeling is 73.95 divided by 12 is 6.16, and I would round up to seven years, and that's what I would do. And I don't see really a big argument about doing something different, because I'm not going to – I cannot sit here in good faith and say I would have given him eight years no matter what the scoresheet said, because I really don't think that's true.

But at the same time I'm not so offended by the amount of the score that I'm going to say, or change my mind about what the facts showed, and say, oh, gee, I feel really bad for him, and I'm going to stick with 73.95 months.

MR. UFFERMAN: No, I understand –

THE COURT: I don't see that either.

MR. UFFERMAN: – your arguments, the reasoning, perfectly, Your Honor. The only thing I would ask is because you rounded up .2 last time, I would ask that you round up .2 this time.

THE COURT: No. I don't do that. I round off in years. What can I tell you? That's just my way.

MR. UFFERMAN: Because, again, consistent with what you did before, this comes out to 6.16. You round up from 7.8 to 8.0 –

THE COURT: I always round up. If it's over the years – because I never go below the minimum that I feel I'm required to. And if I – really doesn't make a difference. I mean, I know it matters to your client, every month and every day he does. But I'm telling you in the real world whether you give somebody nine years or ten years doesn't much matter, you know. It just doesn't. And to have – that's an argument over minutia.

So, you know, philosophically you have to have some approach to deal with this, and when – and so what I'm saying is 6.16 is the presumptive minimum.

MR. UFFERMAN: Correct.

THE COURT: I can't do any less than that.

MR. UFFERMAN: Correct.

THE COURT: What do I think is a fair sentence? I think seven is a fair sentence, then, given the corrected scoresheet.

MR. UFFERMAN: I understand. Again, I would ask the Court to extend mercy, and in light of the fact that it was rounded up .2 last time, I would ask the Court to only round it up .2 this time.

THE COURT: Okay. Well, I don't operate with that kind of precision. So, and in this case there's no clue that I would have, you know, as open to – that's why I wanted to look at the sentencing hearing. Because sometimes I will state for the record exactly my feelings about a sentence, especially a sentence that I don't feel comfortable with, and knowing myself, I know myself

pretty well, I could discern this right away where my mind was, so.

MR. UFFERMAN: Okay.

THE COURT: I feel very, very comfortable with that addition. So anything else you want to throw at me to change my mind about it?

MR. UFFERMAN: Of course I have my client's family here, and they would love to try to convince you, but I don't –

THE COURT: It would be all the same thing, and I accept it. I mean, I accept that he had a lot of family support and a lot of issues. So that was fine. I mean, in other words I didn't going over –

MR. UFFERMAN: No, I understand.

THE COURT: – substantially over the required minimum. And a seven not substantially over the required minimum.

MR. UFFERMAN: No. Again, the only legal argument I can make, and I'm making it for the record, is that since you went up .2 last time, you should go up .2 this time.

THE COURT: Okay.

MR. UFFERMAN: You've over overruled [sic] that objection.

THE COURT: All right.

MR. UFFERMAN: I think it's preserved for the record...

(RS: 5-9).

The trial court also entered its written judgment and sentence reflecting a 7-year sentence. (2d Supp.: 147-54). The corrected scoresheet shows that lowest permissible sentence was 73.95 months and the statutory maximum was 60 years. (5th Supp.: 172-73).

On March 3, 2008, Petitioner filed his second Rule 3.800(b)(2)

motion to correct sentencing error, raising the claim that the trial court's policy of "rounding up" the point total on the scoresheet to the next year is arbitrary and, therefore, violates the due process rights guaranteed by the state and federal constitutions. (4th Supp.: 166-70). In footnote 1, Petitioner's motion states: "At the November 14, 2007, hearing, undersigned did not make a due process claim. Out of an abundance of caution, Defendant Cromartie files the instant motion in order to preserve his constitutional claim on appeal." (4th Supp.: 168, n.1).

On March 6, 2008, the trial court denied Appellant's second Rule 3.800(b)(2) motion, stating that "[i]t is not improper for a judge to have a sentencing philosophy and to express it. The sentence was a proper exercise of discretion." (4th Supp.: 171).

Petitioner appealed the First District Court of Appeal, arguing, *inter alia*, a due process violation in what he characterized as the trial court's policy of "rounding up." On July 8, 2009, the First DCA issued a one-paragraph opinion affirming the sentence:

> We find merit in Appellant's argument that the trial judge's stated policy of mechanically rounding up a prison sentence to the nearest whole number (in this case, from 7.83 years to 8 years originally and from 6.16 years to 7 years on resentencing) without any reflection on the individual merits of a particular defendant's case is arbitrary and consequently a denial of due process. Yet we are constrained to AFFIRM as the argument was not raised contemporaneously. *See Jackson v. State*, 983 So.2d

562 (Fla.2008); *Brown v. State*, 994 So.2d 480 (Fla. 1st DCA 2008).

Cromartie v. State, 16 So. 3d 882, 882-83 (Fla. 1st DCA 2009).

Petitioner sought discretionary jurisdiction in this Court, arguing that the First DCA's opinion was in express and direct conflict with *Hannum v. State*, 13 So. 3d 132 (Fla. 2d DCA 2009). PJB at 6-9.

On July 7, 2010, this Court issued an order accepting jurisdiction and dispensing with oral argument.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction as there is no express and direct conflict of opinions between the factually driven decision below and the factually driven, and legally inapposite, decision in *Hannum*. This Court should discharge jurisdiction as improvidently granted and dismiss review.

As to the merits, the record shows that Judge Dekker did, in fact, consider individual factors in sentencing Petitioner to slightly above the lowest permissible sentence. She had heard testimony from Petitioner and his supporters in the initial sentencing and, upon resentencing, relied on those factors to sentence Petitioner somewhat lower than she would have done without having heard that testimony.

Moreover, her practice of sentencing in terms of years, rather than months and fractions thereof, which she said she does not invariably apply, is not impermissible and did not deprive Petitioner of due process.

Petitioner received all the process he was due: He had notice and opportunity to be heard and was provided counsel to argue for him. The sentence was legal, was not vindictive and was not based on constitutionally impermissible factors.

ARGUMENT

ISSUE I

WHETHER JURISDICTION WAS IMPROVIDENTLY GRANTED; IF NOT, WHETHER PETITIONER CONTEMPORANEOUSLY OBJECTED; WHETHER THE TRIAL JUDGE DEPRIVED PETITIONER OF DUE PROCESS DURING SENTENCING AND, IF SO, WHETHER THE DENIAL WAS FUNDAMENTAL ERROR. (Restated)

A. INTRODUCTION

1. Issues Raised

The ultimate issue in this case is whether a sentencing process error, as opposed to an error in the sentence itself, *see Jackson v. State*, 983 So. 2d 562, 573-74 (Fla. 2008), is *per se* fundamental error. The Court has accepted jurisdiction based on alleged express and direct conflict with *Hannum v. State*, 13 So. 3d 132 (Fla. 2d DCA 2009); to the extent conflict can be discerned between these two legally and factually dissimilar cases, it would have to arise from a belief that, irrespective of circumstances, any error in the sentencing process would be fundamental.

Before discussing that ultimate question, however, the State will take up other matters, which logically should be addressed first. First, that this Court lacks jurisdiction as there is no express and direct conflict of opinions. Second, that, contrary to Petitioner's argument, there was no contemporaneous objection *either* of the times Judge Dekker sentenced him. Third, that Judge Dekker did, in fact, consider individual factors in sentencing

Petitioner. Fourth, that the practice of "usually round[ing] up" or even "always rounding up" is not a deprivation of due process. Fifth, that even if it were a denial of due process, it would not be fundamental error.

2. The Trial Court's Ruling

Circuit Judge Kathleen Dekker granted Petitioner's initial motion to correct a sentencing error and resentenced him to seven years in prison, which was 0.84 years above the minimum permitted sentence of 6.16 years. She then denied a successive motion to correct sentencing error wherein Petitioner attempted to raise, for the first time, his due process claim.

3. The Opinion Below

The First District Court of Appeal held that what it perceived as Judge Dekker's "stated policy of mechanically rounding up a prison sentence to the nearest whole number . . . without any reflecting on the individual merits of a particular defendant's case is arbitrary and consequently a denial of due process," but held that the issue was not preserved so the trial court's ruling was not fundamental error. 16 So. 3d at 882-83.

B. JURISDICTION

1. This Court Should Dismiss For Lack of Jurisdiction

The decision below in this case is, if nothing else, a model of brevity, consisting of two sentences and two citations. The

holding is that a "stated policy of rounding up a prison sentence to the nearest whole number . . . without any reflection on the individual merits of a particular defendant's case is arbitrary and consequently a denial of due process," but one that requires a contemporaneous objection and, presumably, is not fundamental error. 16 So. 2d at 882-83.

The decision in *Hannum* does not involve a policy of rounding up a sentence to the nearest whole number. Rather, it involved a trial judge who refused to consider anything short of a prison sentence because the defendant maintained his innocence and because, in the trial judge's opinion, he did not testify truthfully at trial. 13 So. 3d at 135-36. Because it is improper to hold a defendant's refusal to admit guilt or his trial testimony against him when imposing sentence, the Second DCA held that the trial court committed fundamental error, excusing the defendant's failure to object to the sentence until his motion under Florida Rule of Criminal Procedure 3.800(b). *Id.* at 136.

The Second DCA's decision is premised on certain facts, specifically, the trial judge's decision to sentence based on the defendant's constitutionally protected decisions to demand a trial and testify in his own behalf. The First DCA's decision was premised on certain different facts, specifically, Judge Dekker's policy of imposing a sentence no lower than a term of years no

lower than the next-highest whole number, rather than the decimally expressed lowest permissible sentence from the Criminal Punishment Code sentencing scoresheet.

Factual identity between cases alleged to be in conflict is an absolute requirement, as this Court has repeatedly held. *See, e.g., Robinson v. State*, 770 So. 2d 1167, 1170 (Fla. 2000)(finding no conflict in cases involving "various factually distinguishable contexts"); *Department of Revenue v. Johnston*, 442 So. 2d 950, 951-52 (Fla. 1983).

Moreover, neither decision involves a statement of the law that conflicts with the other. The First DCA did not hold that no due process errors can be fundamental error; the Second DCA did not hold that all due process errors are fundamental errors.

The provisions of article 5, section 3(b)(3), Florida Constitutions, for accepting conflict not having been met, this Court should acknowledge that jurisdiction has been improvidently granted and dismiss this case.

C. STANDARD OF REVIEW

The ultimate issue, whether a sentencing process error, as opposed to an error in the sentence itself is *per se* fundamental error, is a question of law. Inasmuch as neither the court below nor the conflict court addressed this issue, there is no decision to review on that point, so this Court will consider it *de novo.* As

to the underlying points: Unpreserved issues are reviewed for fundamental error. § 924.051(3) Fla. Stat. If the error were preserved, the lower court's decision would be reviewed for abuse of discretion. *See, e.g., Nusspickel v. State*, 966 So. 2d 441, 444 (Fla. 2d DCA 2007); *Brown v. State*, 667 So. 2d 901, 902 (Fla. 4th DCA 1996).

D. MERITS

Petitioner argues that the trial court's sentence must be reversed because it was imposed based upon a policy wherein the judge imposed sentences that were in whole numbers of years; such a sentencing philosophy is fundamental error, he asserts. He also argues that the due process issue was preserved for appellate review. The State respectfully disagrees.

First, as noted above, jurisdiction was improvidently granted.

Second, the issue was not preserved and was, in fact, waived when Petitioner embraced the concept of rounding up to nearest whole number of years above the lowest permissible sentence.

Third, the trial court gave the defendant's crime and his background due consideration and did not sentence him automatically.

Fourth, a policy of rounding off sentences to express them in terms of years, rather than months and fractions thereof, is not a denial of due process. Defendants are not entitled to a particular

sentence under the Criminal Punishment Code, only to a sentence within a certain broad range.

Fifth, even if Judge Dekker's practice were considered a due process violation, it would not constitute fundamental error.

1. The Issue Was Not Preserved

Petitioner asserts that preserved this issue, arguing that his objection to the sentence was sufficient to preserve the due process issue, characterizing his successive Rule 3.800(b) motion as a "supplement[]," and maintaining that his successive motion was "consistent with the purpose of rule 3.800(b)." IB at 13-14.

The State respectfully disagrees. Petitioner did not contemporaneously object to the trial judge's "rounding up" approach either at the first sentencing hearing, via his first Rule 3.800(b) motion or during the resentencing hearing. Moreover, he waived any objection he might have had by embracing the rounding up approach at the resentencing. Finally, a Rule 3.800(b) motion is an inappropriate vehicle for raising a sentencing process error, such as rounding up to an even number of years when imposing a sentence at the low end of the permitted sentencing range.

Petitioner's argument that he actually did preserve the issue in his first Rule 3.800(b) motion and at the resentencing hearing is belied by the record, which shows that the second Rule 3.800(b) motion was, in fact, intended to preserve an issue that was not

raised earlier. Petitioner's motion states: "At the November 14, 2007, hearing, undersigned did not make a due process claim. Out of an abundance of caution, Defendant Cromartie files the instant motion in order to preserve his constitutional claim on appeal." (4th Supp.: 168, n.1)

After the motion was filed and denied, this Court decided *Jackson*. That opinion clarified the distinction between sentencing errors which can be raised in a Rule 3.800(b)(2) motion and errors occurring during the sentencing process (or sentencing process errors) which are still subject to the contemporaneous objection rule.

> When a sentence is erroneous, it is more efficient to address the issue in the trial court first, where it can be quickly remedied. In many circumstances, however, defendants do not have the opportunity to object or otherwise address the trial court before the sentencing order is entered. For example, where the written sentence deviates from an oral pronouncement, the defendant has no reason to object at the sentencing; only when the sentencing order issues does the defendant notice the discrepancy. Before rule 3.800(b), however, no mechanism existed for the defendant to remedy the error in the trial court. The only remedy was to appeal the sentence. The rule was designed to remedy that institutional inefficiency.
>
> In contrast, defendants do have the opportunity to object to many errors that occur during the sentencing process-for example, the introduction of evidence at sentencing. The rule was never intended to allow a defendant (or defense counsel) to sit silent in the face of a procedural error in the sentencing process and then, if unhappy with the result, file a motion under rule 3.800(b). To the contrary, such a practice undermines the goal of addressing errors at the earliest opportunity.

Jackson, 983 So. 2d at 573.

In *Jackson* the defendant attempted to raise the claim that he was denied counsel during his sentencing hearing via a Rule 3.800(b)(2) motion. *Id.* at 574. This Court held that the claim is a sentencing process error claim, not a sentencing error that is, unlike here, apparent on the face of the sentencing order:

> Thus, as written, rule 3.800(b) is not limited to correcting "illegal" sentences or errors to which the defendant had no opportunity to object. Instead, the rule may be used to correct and preserve for appeal any error in an order entered as a result of the sentencing process-that is, orders related to the sanctions imposed. A claim of denial of counsel at sentencing, however, is an error in the sentencing process, not an error in the sentencing order. Therefore, such a claim is not cognizable in a motion under rule 3.800(b) and no such motion must be filed for the appellate court to consider the issue.

Id. See, also, Brown v. State, 994 So. 2d 480, 482 (Fla. 1st DCA 2008).

In this case, Petitioner had several opportunities to raise his due process claim. He could have objected during the sentencing hearing, given Judge Dekker's statements on the record that she was rounding up. He could have raised the argument in his first Rule 3.800(b) motion, and did not. And he could have, and should have, raised the issue in the resentencing hearing.

Rather than objecting, however, Petitioner in fact, waived the argument. In the resentencing hearing Petitioner expressed both understanding of the trial court's "rounding up" policy and

agreement with the decision to "round up" his score; his sole argument was that Judge Dekker should only round up on resentencing the same amount that she rounded up in the initial sentencing. (RS: 3, 7, 8) Petitioner thus embraced the concept of rounding up, rather than expressing his belief that the policy was unconstitutional or a deprivation of due process.

Because Petitioner agreed to the trial court's "rounding up," he cannot now complain on appeal that the trial court's unobjected-to policy of "rounding up" to the next year, as it did at his initial sentencing, is arbitrary and violates due process simply because the trial court rounded up more than he requested.

2. The Sentencing Decision Was Not Arbitrary

The decision below rests, in part, on the First DCA's assumption that the trial court did not consider the record in entering her sentence and its mischaracterization of her approach as "mechanically rounding up." *Cromartie*, 16 So. 3d at 882.

To the contrary, the record shows that Judge Dekker did not make her sentencing decision mechanically. Rather, it shows she considered Petitioner's background, his family support and his involvement in the crimes in question before imposing a sentence near the low end of the range.

At the initial sentencing hearing Judge Dekker heard five witnesses present character testimony and also heard Petitioner's

explanation. (S: 2-15, 19-23) Judge Dekker noted that the minimum sentence was 93.975 months, which she "round[ed] off to 94 months, that's 7.8 years. And I'll round it to 8 years." (S: 23) She continued:

> My impression is that it could easily be 10 years. And so, because you have a good family support system, I'm will to stick with the 8 years. Because shy of that, it would have easily been 10 or more.

(S: 23) Thus, the decision to round off was not made as an abstraction but was in fact tailored to Petitioner's circumstances.

On resentencing, Judge Dekker relied on the previous hearing.

> THE COURT: This is – let me give you my impression here to short circuit, perhaps, this. I mean, you're all welcome to do whatever, but this is how this plays out to me.
>
> In refreshing my memory about this, I'm looking at the transcript, knowing my philosophies and how I do, I am confident that a year difference in the scoresheet would not have made a difference to me. So in other words, if the scoresheet had said – and this is 73 point – everybody agrees it's 73.95, which I divide by 12, is 6.16 years.
>
> MR. UFFERMAN [Appellant's counsel]: That's correct.
>
> THE COURT: Okay. Now, what – so my point is, is that there is nothing about the evidence or the sentence that I can recall or about my philosophy that I would have done anything different other than probably just say, okay. Fine. That 73.95 is okay. Now, except, I usually round up.
>
> MR. UFFERMAN: Sure.
>
> THE COURT: And it's because unless – and if I have a very deep concern that I would probably even go under the minimum if allowed, then I will stick with the exact

number on the scoresheet. Otherwise, you know, it just – it's in the ballpark, and if it's in the ballpark, I round up, unless there's an agreement to do something else. . . .

So employing that, my philosophy is – and I did state on the record that this could have easily been 10 years or more depending upon other circumstances. But those circumstances I didn't find to exist then. There's no reason to find they exist now, and to do anything.

So my feeling is 73.95 divided by 12 is 6.16, and I would round up to seven years, and that's what I would do. And I don't see really a big argument about doing something different, because I'm not going to – I cannot sit here in good faith and say I would have given him eight years no matter what the scoresheet said, because I really don't think that's true.

But at the same time I'm not so offended by the amount of the score that I'm going to say, or change my mind about what the facts showed, and say, oh, gee, I feel really bad for him, and I'm going to stick with 73.95 months.

* * *

THE COURT: I always round up. If it's over the years – because I never go below the minimum that I feel I'm required to. And if I – really doesn't make a difference. I mean, I know it matters to your client, every month and every day he does. But I'm telling you in the real world whether you give somebody nine years or ten years doesn't much matter, you know. It just doesn't. And to have – that's an argument over minutia.

So, you know, philosophically you have to have some approach to deal with this, and when – and so what I'm saying is 6.16 is the presumptive minimum.

MR. UFFERMAN: Correct.

THE COURT: I can't do any less than that.

MR. UFFERMAN: Correct.

THE COURT: What do I think is a fair sentence? I think

> seven is a fair sentence, then, given the corrected scoresheet.

(RS: 5-8).

Thus Judge Dekker made her sentencing decision to "round up" Petitioner's sentence by utilizing a corrected scoresheet and then considering all the facts and circumstances of Petitioner's case to sentence him at the low end of the permissible range. Pursuant to her sentencing philosophy, as set forth above, she explained that she generally rounds up to an even year in cases such as Petitioner's.

A reading of the record shows that the decision below rested on a misapprehension of Judge Dekker's actual practice in sentencing Petitioner. In essence what Judge Dekker expressed was a preference to deal in whole numbers, rather than in the awkward fractions, expressed decimally, that the calculations to determine the minimum sentence typically produce. As she put it, when counsel asked her to round up by .2 years, as she had done before, "I don't operate with that kind of precision." (RS: 8)

While in some instances she said she "always" rounds up (RS: 7), other times she said she "usually round[s] up" (RS: 6), and she expressly said "if I have a very deep concern that I would probably even go under the minimum if allowed, then I will stick with the exact number on the scoresheet." (RS: 6). Thus, she did not express a "mechanical" policy of rounding up. Rather, if the case is one

where the absolute minimum is required, she imposes the precise sentence from the scoresheet. In other times, however, she prefers to use whole numbers.

In this case, she found that seven years in prison, rather than slightly more than six, was an appropriate sentence, given the facts before her. She did not act arbitrarily. *United States v. Fisher*, 502 F.3d 293, 306 (3d Cir. 2007), which inapposite as argued *post*, is helpful by defining "arbitrary" via an illustration, to wit, "sentencing Yankees fans more harshly than Red Sox fans." *Id.* at 306. In contrast Judge Dekker's policy is not based on anything other than the circumstances before her. In most cases, she rounds up irrespective of who is before her, unless she belives a lower sentence is appropriate, but impossible for her to justify.

3. "Rounding Up" Is Not A Due Process Violation

The court below was incorrect in ruling that Judge Dekker had violated Petitioner's due process rights. A policy of eliminating the fractional portions of lowest permissible sentences does not deprive a defendant of due process.

a. Petitioner Received All The Process He Was Due

Both the court below and Petitioner assert that the trial court denied due process but neither points to exactly what process Petitioner was due that he was not provided. No case has ever

established that there is a due process right in a particular sentence or that a judge whose policy is to round fractional sentences up to the next-highest whole number has deprived the defendant of some constitutional right.

Defendants are entitled to some due process rights at sentencing, *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion), but they are not as extensive as those at other critical stages. *Id.; Morrissey v. Brewer*, 408 U.S. 471 (1972). In *Morrissey* the Court noted:

> Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. . . . To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

408 U.S. at 481 (quotations, citations omitted).

Through the years, the specific rights have become more clear. The due process rights that defendants enjoy at sentencing include the right to allocution, *Green v. United States*, 365 U.S. 301, 304, (1961); the right to be sentenced based on accurate information, *Townsend v. Burke*, 334 U.S. 736, 741 (1948); the right to legal counsel, *Mempa v. Rhay*, 389 U.S. 128, 137 (1967); the right to a sentence that was not retaliatory or vindictive, *North Carolina v.*

Pearce, 395 U.S. 711, 725 (1969), *overruled in part on other grounds, Alabama v. Smith*, 490 U.S. 794, 803, (1989); and the right to a sentencing proceeding that is free of improper prejudice; *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (improper to consider defendant's race, religion, or political affiliation).

In this case, Petitioner was afforded all those rights. He had two hearings wherein he was represented by counsel, could, and did, call witnesses on his behalf, and could argue for a particular sentence.

Petitioner did not allege below, nor did the court below find that the sentence is based on mistaken information or a constitutionally impermissible basis, like race, religion, sex, or national origin. Nor is there an allegation that the judge departed from the sentencing guidelines in any way. Rather, the notion appears to be that because the trial court "rounded up" Petitioner's sentence according to the judge's sentencing philosophy, the trial court's action was arbitrary and, thus, constitutes a due process violation.

Below, and here, Petitioner relied on *United States v. Fisher*, 502 F.3d 293, 306 (3d Cir. 2007), for the proposition that "sentences based upon arbitrary or impermissible considerations . . . offend [] due process principles. . . ." (I.B. at 7-8) *Fisher* is not applicable and this quote is taken out of context. The complete

quotation from *Fisher* states as follows: "[w]e agree with our concurring colleague that sentences based upon arbitrary or impermissible considerations (e.g., sentencing Yankees fans more harshly than Red Sox fans) would offend [established] due process principles . . . ." 502 F.3d at 306. This comment is dicta, not the holding of *Fisher*.

The actual issue in *Fisher* – whether "the Due Process Clause of the Fifth Amendment require[s] a district court to find facts supporting sentencing enhancements by more than a preponderance of the evidence?" *Id.* at 296 – is inapplicable here. In *Fisher*, the defendant was sentenced above the federal sentencing guidelines range, the maximum sentence being the statutory maximum prescribed by the U.S. Code. *Id.* at 305. The Second Circuit held that the facts upon which the trial court relied in finding that the sentencing enhancements applied need only be proven by a preponderance of the evidence. *Id.*

Aside from the fact that they both involve sentencing, nothing about *Fisher* and this case are similar. Here, there was no need for the trial court to justify anything regarding the sentence, inasmuch as Petitioner was sentenced just above the minimum criminal punishment code scoresheet sentence in this case and well below the statutory maximum sentence. The trial court had broad discretion to impose any sentence in that range without making any

further findings. Further, the trial court was not required to give reasons for imposing a sentence within the permissible range.

Simply put, a judge's policy, followed regularly but not invariably, of imposing sentences that are whole numbers is not a violation of due process.

4. **Any Error Was Not Fundamental**

Even assuming *arguendo* that Petitioner had established a due process error in this case, the record demonstrates that any such error does not rise to the level of fundamental error. The trial court's "rounded up" sentence was imposed upon Petitioner after the trial court fully considered the facts and circumstances of Petitioner's case, including his mitigation evidence, and was based on Petitioner's corrected scoresheet.

The trial court chose to sentence Petitioner at the very low end of the permissible range, just above the minimum score, which resulted in Petitioner's original sentence being reduced by an entire year. Accordingly, even if the trial court's "rounding up" policy could be deemed so arbitrary and disparate as to rise the level of a due process error, under the circumstances of this case, it is clear that any error in the sentencing process at the resentencing hearing cannot be said to have resulted in a fundamentally unfair sentence to Petitioner.

As this Court stated in *D'Oleo-Valdez v. State*, 531 So. 2d

1347, 1348 (Fla. 1988): “Normally, the failure to object to error, even constitutional error, results in a waiver of appellate review.” For the doctrine to be invoked, “the error must be basic to the judicial decision under review and equivalent to a denial of due process.” *State v. Johnson*, 616 So. 2d 1, 3 (Fla. 1993).

Not every alleged denial of due process, however, rises to the level of fundamental error. Indeed, the doctrine should rarely be applied, as this Court noted in *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970): “The Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly.” For the doctrine to be invoked, “the error must be basic to the judicial decision under review and equivalent to a denial of due process.” *State v. Johnson*, 616 So. 2d 1, 3 (Fla. 1993). Or, as this Court put it in *Smith v. State*, 521 So. 2d 106, 108 (Fla. 1988): “The doctrine of fundamental error should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application.”

Fundamental error is “‘error which reaches down into the validity of the trial itself to the extent that a verdict,” or, in this case, the sentence, “could not have been obtained without the . . . error.’” *Archer v. State*, 673 So. 2d 17, 20 (Fla. 1996), *cert. denied*, 519 U.S. 876 (1996)(*quoting Brown v. State*, 124 So.

2d 481, 484 (Fla. 1960)).

The record in this case amply demonstrates that the sentence imposed, which was well within the lawful range, did not depend on the trial court's policy of "rounding up." Judge Dekker said she thought seven years was "a fair sentence" under the circumstances. (RS: 8)

In the sentencing context, the doctrine of fundamental error appears to have been applied rarely, such as: when an illegal sentence has been imposed, *see, e.g., Gonzalez v. State*, 392 So. 2d 334, 335 (Fla. 3d DCA 1981); when the sentence was vindictive, *see, e.g., Mendez v. State*, 28 So. 3d 948, 951 (Fla. 2d DCA 2010) or when constitutionally impermissible factors were considered, *see, e.g., Nawaz v. State*, 28 So. 2d 122, 124-25 (Fla. 1st DCA 2010), *Hannum*, 13 So. 3d at 135.

Here, the sentence was completely legal, was not vindictive and no constitutionally impermissible factor was considered. Indeed, but for Judge Dekker's explanation at the resentencing hearing, the matter would have been unappealable.

Since passage of the Criminal Punishment Code eliminated the guidelines sentencing scheme adopted in the 1980s, judges have substantial sentencing discretion. As this Court stated in *Thompson v. State*, 990 So. 2d 482, 491 (Fla. 2008): "Except for the limited advisory role played by jurors in capital proceedings, trial judges

have virtually absolute control and exclusive discretionary authority in determining a defendant's sentence under the controlling statutory guidelines."

Under the current system, in place since 1998, the severity of the offense and the defendant's prior record are scored pursuant to set formulas to establish a lowest permissible sentence, expressed in months. §§ 921.002-921.0024, Fla. Stat. The mathematical calculations rarely produce round numbers; rather, figures such as 73.95 months, as here, are typical. Any sentence between the lowest permissible term and the statutory maximum is legal. § 921.001(1)(g), Fla. Stat. Thus as long as she stayed between 73.95 months and 60 years, Judge Dekker had unbridled discretion in deciding what term of incarceration was appropriate for Petitioner. § 775.082(3)(b), Fla. Stat. A term of 84 months (i.e., 7 years) is well within that range.

Moreover, a sentence that is less than the statutory maximum is not even appealable. Section 921.002(1)(h), Florida Statutes, plainly says: "(h) A sentence may be appealed on the basis that it departs from the Criminal Punishment Code only if the sentence is below the lowest permissible sentence or as enumerated in s. 924.06(1)." Section 924.06(1), Florida Statutes, states:

> (1) A defendant may appeal from:

> (a) A final judgment of conviction when probation has not been granted under chapter 948, except as provided in subsection (3);
>
> (b) An order granting probation under chapter 948;
>
> (c) An order revoking probation under chapter 948;
>
> (d) A sentence, on the ground that it is illegal; or
>
> (e) A sentence imposed under s. 921.0024 of the Criminal Punishment Code **which exceeds the statutory maximum** penalty provided in s. 775.082 for an offense at conviction, **or the consecutive statutory maximums for offenses at conviction**, unless otherwise provided by law.

(Emphasis provided.) *See, also, Patrizi v. State*, 31 So. 3d 229, 230-31 (Fla. 1st DCA 2010) (legal guidelines sentence is not subject to appeal by the defendant); *Patterson v. State*, 796 So. 2d 572, 574 (Fla. 2d DCA 2001)(court lacked "power to review on direct appeal" a sentence below the statutory maximum); *Peterson v. State*, 775 So. 2d 376, 378 (Fla. 4th DCA 2000)(rejecting due process challenge to section 924.06). *See, also, Koon v. United States*, 518 U.S. 81, 96 (1996) ("Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal").

There is no requirement under the Criminal Punishment Code that a sentencing court justify its decision unless the term is less than the lowest permissible sentence. Judge Dekker could simply have imposed the seven-year sentence and did not have to explain her reasoning or how she arrived at that figure. Nor would

she or a subsequent judge be required to make any findings or explain a sentence within the lawful range. This fact demonstrates that the issue here is not of sufficient magnitude to constitute fundamental error.[*]

Moreover, it is important to note that the judge's "rounding" policy only applies at the very bottom of the sentencing range, where the lowest permissible sentence is expressed in months and decimal fractions thereof. Had Judge Dekker imposed a 15-year sentence in the first instance, and reduced it to 14 upon resentencing, there would be no issue. It also is important to note that the "rounding up" approach would only apply to minimum sentences, inasmuch as the highest sentence is the statutory maximum.

Appellant attempts to demonstrate error by arguing that some defendants with different sentencing point totals might be sentenced to the same term of years. IB at 8, n.7. There is no requirement in either the state or federal constitutions, Florida Statutes, case law or equity that a defendant's sentence be matched to his or her scoresheet total. Even when the sentencing guidelines

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[*] Even though the State did not make this argument below it may raise it now. *See, e.g., Malu v. Security Nat'l Ins. Co.*, 898 So. 2d 69, 73 (Fla. 2003) *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999).

greatly restricted sentencing discretion, such a requirement did not exist.

If it were true – i.e., if a judge had to sentence a defendant with a 6.1-year minimum sentence less severely than one with a 6.9 year minimum sentence, then the Criminal Punishment Code's broad sentencing ranges would be nullified.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court either rule that jurisdiction was improvidently granted, discharge jurisdiction and dismiss the review proceeding or, in the alternative, hold that there was no mechanical rounding up, no denial of due process and/or no fundamental error.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to Michael Ufferman, Michael Ufferman Law Firm, P.A., 2022-1 Raymond Diehl Rd., Tallahassee, FL 32308 by U.S. Mail on October 26, 2010.

Respectfully submitted and served,

BILL McCOLLUM
ATTORNEY GENERAL

By: TRISHA MEGGS PATE
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 0045489

By: THOMAS H. DUFFY
Assistant Attorney General
Florida Bar No. 470325
Attorney for the State of Florida
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 Ext. 4595
(850) 922-6674 (Fax)

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing was printed in Courier New 12 point and thereby satisfies the font requirements of Florida Rule of Appellate Procedure 9.210.

Thomas H. Duffy
Attorney for the State of Florida