IN THE

SUPREME COURT OF FLORIDA

CARLOS CROMARTIE, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC09-1868 District Court Case No. 1D07-352

INITIAL BRIEF OF PETITIONER

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

Counsel for Petitioner **CROMARTIE**

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C. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS.

The issue in this case concerns whether a sentencing error that results in the denial of a defendant's constitutional due process rights amounts to fundamental error. Although this brief will provide a brief background of the procedural posture of the case, the brief will focus on this sentencing issue (i.e., the facts from the trial are not relevant to the issue before the Court).

Carlos Cromartie (hereinafter "Petitioner Cromartie") was charged in Leon County, Florida, with trafficking in cocaine (count 1)[1] and sale or possession of cocaine with intent to sell within 1000 feet of a church (count 2).[2] (R-2).[3] Count 1 allegedly occurred on March 4, 2005, and count 2 allegedly occurred on February 24, 2005.

[1] *See* § 893.135, Fla. Stat.

[2] *See* § 893.13(1)(e)1., Fla. Stat.

[3] References to the pleadings portion of the First District Court of Appeal record (case number 1D07-352) will be made by the designation "R" followed by the appropriate page number. References to the trial transcript will be made by the designation "T" followed by the appropriate page number. References to the jury selection transcript will be made by the designation "JS" followed by the appropriate page number. References to the sentencing transcript will be made by the designation "S" followed by the appropriate page number. References to the resentencing transcript will be made by the designation "RS" followed by the appropriate page number.

Petitioner Cromartie was represented at trial by Barbara K. Hobbs, Esquire. The State was represented by Assistant State Attorney Jon Fuchs. The Honorable Kathleen Dekker presided over the trial.

The trial jury was selected on October 9, 2006 (JS-1), and the trial was conducted on October 13, 2006. (T-1). At the conclusion of the trial, the jury found Petitioner Cromartie guilty as charged for both offenses. (R-74-75; T-86).

Petitioner Cromartie was originally sentenced on December 18, 2006. (S-1). On the Criminal Punishment Code scoresheet, the lowest permissible sentence was 7.83 years' imprisonment. (R-82). The trial court sentenced Petitioner Cromartie to eight years' imprisonment for both counts, with the sentences to run concurrently (which was essentially the lowest permissible sentence on the scoresheet – the sentence was increased by .17 years). (S-23; R-80). A timely notice of appeal was filed on January 16, 2007. (R-89).

Petitioner Cromartie subsequently filed a motion to correct sentencing error pursuant to Florida Rule of Criminal Procedure 3.800(b). (R-108). In the motion, Petitioner Cromartie explained that the State improperly scored count 1 (trafficking) as a level 8 offense (instead of a level 7 offense) on the Criminal Punishment Code scoresheet. The trial court granted the rule 3.800(b) motion and the case was set for a resentencing hearing. (R-146). A corrected Criminal

Punishment Code scoresheet was prepared and on the corrected scoresheet, the lowest permissible sentence was 6.16 years' imprisonment. (RS-2).

The resentencing hearing was held on November 14, 2007. (RS-1). At the resentencing hearing, the parties agreed that the lowest permissible sentence on the scoresheet was 73.95 months or 6.16 years. (RS-2). Undersigned counsel requested that the trial court sentence Petitioner Cromartie consistent with the approach/formula used at the original sentencing hearing (i.e., add .17 to the lowest permissible sentence on the scoresheet, resulting in a sentence of 6.33 years' imprisonment). (RS-3). The trial court declined undersigned counsel's request and – over objection – sentenced Petitioner Cromartie to seven years' imprisonment for both counts, with the sentences to run concurrently. (RS-10; R-147). The trial court explained that its policy in these situations is to always "round up" to the next year (i.e., from 6.16 to 7). (RS-6).[4]

[4] The trial court explained that "I usually round up" and "if [the minimum sentence on the scoresheet is] in the ballpark, I round up." (RS-6). The trial court added, "I round off in years" and "I always round up." (RS-7). Finally, the trial court stated:

> But I'm telling you in the real world whether you give somebody nine years or ten years just doesn't matter, you know. It just doesn't. And to have – that's an argument over minutia.

(RS-8).

Petitioner Cromartie later filed a second rule 3.800(b) motion arguing that the trial court's "round up" policy is arbitrary and consequently a denial of constitutional due process principles.[5] (R-166). The trial court denied the second rule 3.800(b) motion. (R-171).

On direct appeal, the First District Court of Appeal agreed that the trial court's "round up" policy was improper, but the district court held that this issue was not preserved for appeal because there was no contemporaneous objection and the issue could not be properly raised in a rule 3.800(b) motion:

> 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). Thus, the First District held that the error in Petitioner Cromartie's case did not amount to fundamental error.

[5] *See* U.S. Const. amend. XIV; art. I, § 9, Fla. Const.

Petitioner Cromartie subsequently sought review in this Court, arguing that the First District's opinion conflicts with decisions from this Court and other district courts concerning whether a sentencing error that violates constitutional due process principles amounts to fundamental error. On July 7, 2010, the Court accepted jurisdiction.

D. SUMMARY OF ARGUMENT.

In its decision below, the First District Court of Appeal agreed that the trial court's "round up" policy violated constitutional due process principles. Yet, the district court refused to grant relief because Petitioner Cromartie did not contemporaneously object to the error. Petitioner Cromartie submits that a sentencing error that results in the denial of a defendant's constitutional due process rights amounts to fundamental error that can be raised for the first time on appeal. Alternatively, Petitioner Cromartie submits that he properly preserved his claim of error pursuant to his Florida Rule of Criminal Procedure 3.800(b) motion.

E. ARGUMENT AND CITATIONS OF AUTHORITY.

A sentencing error that violates constitutional due process principles amounts to fundamental error.

1. Standard of Review.

Petitioner Cromartie submits that the issue in this case is a pure question of law and therefore the standard of review is *de novo*. *See D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003) ("The standard of review for the pure questions of law before us is *de novo*.").

2. Argument.

The issue in this case concerns whether a sentencing error that results in the denial of a defendant's constitutional due process rights[6] amounts to fundamental error. In its decision below, the First District Court of Appeal agreed that the trial court's "round up" policy violated constitutional due process principles:

> 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.

[6] *See* U.S. Const. amend. XIV; art. I, § 9, Fla. Const.

Cromartie v. State, 16 So. 3d 882, 882-83 (Fla. 1st DCA 2009). *See also United States v. Fisher*, 502 F.3d 293, 306 (3d Cir. 2007) ("[S]entences based upon arbitrary or impermissible considerations . . . offend [] due process principles . . . .").[7] Nevertheless, the First District denied relief, finding that this issue was not preserved for appeal because there was no contemporaneous objection and concluding that the issue could not be properly raised in a Florida Rule of Criminal Procedure 3.800(b) motion:

> 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, 16 So. 3d at 883. Petitioner Cromartie submits that, contrary to the First District's holding, if a sentencing error results in a violation of a defendant's constitutional due process rights, then the error is fundamental and can be considered on appeal despite the failure of counsel to contemporaneously object to the error.

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[7] Pursuant to the trial court's "round up" policy, defendants with different scoresheet totals were given the same sentence, even though one defendant's scoresheet total was much less than another defendant's scoresheet total (i.e., a defendant with a scoresheet total of 6.1 received a seven-year sentence, and a defendant with a scoresheet total of 6.9 or 7 also received a seven-year sentence). For those whose sentences were "rounded up the most" (i.e., from .1 to the next year), this arbitrary policy resulted in a portion of the sentence (as much as 10.8 months) being based on chance and luck. This was especially true in the context of resentencing hearings (as in the instant case), where the trial court's "round up" amount at the resentencing hearing was greater than the "round up" amount utilized at the original sentencing hearing.

In *Jackson v. State*, 983 So. 2d 562, 574 (Fla. 2008), the Court recognized that: (1) where there is no contemporaneous objection during a sentencing hearing and (2) where the error does not qualify as a "sentencing error" that can be raised in a rule 3.800(b) motion, the error can still be considered and remedied on appeal if the error is fundamental. Notably, the Court stated that "for an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review *and equivalent to a denial of due process*." *Jackson*, 983 So. 2d at 575 (quoting *Hopkins v. State*, 632 So. 2d 1372, 1374 (Fla. 1994)) (emphasis added).

Florida district courts have also concluded that sentencing errors that result in a violation of a defendant's constitutional due process rights are fundamental and can be considered on appeal despite the failure of counsel to contemporaneously object to the error. For example, in *Hannum v. State*, 13 So. 3d 132, 135-36 (Fla. 2d DCA 2009), the trial court improperly considered certain factors when imposing the defendant's sentence (i.e., the trial court considered the fact that the defendant maintained his innocence and refused to take responsibility for his actions). Notably, as in Petitioner Cromartie's case, the defendant in *Hannum* attempted to preserve his sentencing claim by filing a rule 3.800(b)

motion. The Second District Court of Appeal held that pursuant to this Court's opinion in *Jackson*, the issue could not be preserved pursuant to rule 3.800(b):

> Initially, we must point out that rule 3.800(b)(2) is not the proper mechanism for preserving for appeal the issue of whether the court improperly considered certain factors in imposing sentence. *See Jackson v. State*, 983 So. 2d 562 (Fla. 2008); *Brown v. State*, 994 So. 2d 480, 481 (Fla. 1st DCA 2008). Rule 3.800(b)(2) was not intended to correct any errors that occur during the sentencing process. *Jackson*, 983 So. 2d at 572. Instead, rule 3.800(b)(2) "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." *Id.* at 574. Any error in the court's consideration of certain factors in imposing sentence is an error in the sentencing process, not an error in the sentencing order. *See Brown*, 994 So. 2d at 481. Therefore, the court erred in ruling on the merits of Hannum's rule 3.800(b)(2) motion, and its order is a nullity.

Hannum, 13 So. 3d at 135 (footnote omitted). However, after concluding that the issue was not preserved, the Second District proceeded to consider whether the trial court erred and, if so, whether the error amounted to fundamental error:

> This determination does not end our inquiry into the propriety of the court's consideration of certain factors in imposing sentence, however. *Such an error in the reasoning of the judge is cognizable on direct appeal if it is fundamental*. [*Brown*, 994 So. 2d at 481] (citing *Jackson*, 983 So. 2d at 574). "'[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process.'" *Hopkins v. State*, 632 So. 2d 1372, 1374 (Fla. 1994) (alteration in original) (quoting *State v. Johnson*, 616 So. 2d 1, 3 (Fla. 1993)). *We must therefore consider whether the trial court's comments at sentencing were so erroneous as to be equivalent to a denial of due process*.

Id. (emphasis added). The Second District ultimately concluded that the trial court erred and that the error amounted to fundamental error:

> It is impermissible for a trial court to consider a defendant's assertions of his innocence and refusal to admit guilt in imposing sentence. *See Bracero v. State*, 10 So. 3d 664, 665-666 (Fla. 2d DCA 2009); *Ritter v. State*, 885 So. 2d 413, 414 (Fla. 1st DCA 2004). In this case, Hannum maintained his innocence throughout sentencing and the trial court twice remarked that it was troubled by Hannum's failure to take responsibility for his actions. The more Hannum asserted his innocence, the more frustrated the court became, eventually remarking that "the longer [Hannum] talks, perhaps the worst [sic] it's getting." The court even told defense counsel it would be best if Hannum did not make any more statements.
>
> Moreover, the court also improperly considered the truthfulness of Hannum's testimony at trial. *See City of Daytona Beach v. Del Percio*, 476 So. 2d 197, 205 (Fla. 1985); *Eltaher v. State*, 777 So. 2d 1203, 1205 (Fla. 4th DCA 2001). A court may not rely on a defendant's lack of truthfulness in imposing sentence because it "would create a catch-22 – the defendant may not be punished for his exercise of the right to trial but may be punished for his lack of candor during the trial." *Del Percio*, 476 So. 2d at 205.
>
> The trial court's improper consideration of the fact that Hannum maintained his innocence in his testimony at trial and at sentencing and refused to take responsibility for his actions *was equivalent to a denial of due process*. *See Bracero*, 10 So. 3d at 665-666. Although the court offered additional reasons to justify its sentence in ruling on Hannum's rule 3.800(b)(2) motion, the court's order on the motion is a nullity. Regardless, the court's original statements at sentencing were not ambiguous in any manner and expressly addressed these improper factors. *Accordingly, the trial court committed fundamental error in imposing sentence*. We therefore reverse Hannum's sentence and remand for resentencing before a different judge. *See id.*

Id. at 135-36 (emphasis added) (alterations in the original). Hence, in *Hannum*, because the error resulted in a denial of due process, the Second District concluded that the error amounted to fundamental error.[8]

In the decision below, the First District held that the trial court's "round up" policy resulted in "a denial of due process." *Cromartie*, 16 So. 3d at 883. However, the district court held that the error did not amount to fundamental error. Pursuant to this Court's holdings in *Jackson* and *Hopkins* and the Second District's holding in *Hannum*, the First District should have found that the error in this case was fundamental in light of the fact that the First District concluded that the error resulted in a denial of Petitioner Cromartie's constitutional due process rights. Accordingly, the decision below should be quashed. Petitioner Cromartie submits that he is entitled to a new sentencing hearing.

Finally, Petitioner Cromartie submits that the error in this case was properly preserved for appellate review (either by contemporaneous objection or by the filing of a rule 3.800(b) motion). Petitioner Cromartie acknowledges that in *Jackson*, the Court stated that rule 3.800(b) "was never intended to allow a defendant (or defense counsel) to sit silent in the face of a procedural error in the

[8] Petitioner Cromartie notes that in a case decided after his case, the First District has applied *Hannum* to conclude that a sentencing error that results in a denial of a defendant's due process rights amounts to fundamental error. *See Nawaz v. State*, 28 So. 3d 122 (Fla. 1st DCA 2010).

sentencing process and then, if unhappy with the result, file a motion under rule 3.800(b)." *Jackson*, 983 So. 2d at 573. Clearly, in the instant case, undersigned counsel did not "sit silent in the face of a procedural error in the sentencing process." At the resentencing hearing, undersigned counsel requested that the trial court sentence Petitioner Cromartie consistent with the approach/formula used at the original sentencing hearing (i.e., add .2 to the lowest permissible sentence on the scoresheet, resulting in a sentence of 6.3 years' imprisonment). (RS-3). The trial court declined undersigned counsel's request and sentenced Petitioner Cromartie to seven years' imprisonment, based on its policy of "rounding up" to the next non-"decimal fraction" numeral. (RS-10; R-147). Undersigned counsel immediately objected, asserting that the trial court's formula for the resentencing hearing should be the same as the formula that was used at the original sentencing hearing:

> MR. UFFERMAN: . . . [Y]ou went above [the lowest permissible sentence on the sentencing scoresheet] .2 last time. So again for the record my argument is that it should be .2 again this time.
>
> THE COURT: You've made your argument.

(RS-10).[9]

[9] Petitioner Cromartie submits that undersigned counsel's argument/objection at the resentencing hearing was sufficient, by itself, to preserve the instant claim for appellate review.

Moreover, at the conclusion of the resentencing hearing (and after undersigned counsel had a further opportunity to research the issue), undersigned counsel supplemented his objection with the argument contained in the rule 3.800(b) motion (i.e., not only should the trial court have followed the same procedure from the first sentencing hearing, but the trial court's policy of "rounding up" is arbitrary and a violation of constitutional due process principles). (R-166). Thus, the trial court had the opportunity to address Petitioner Cromartie's due process claim and correct the error (although the trial court chose instead to deny the claim). (R-171). Petitioner Cromartie submits that the procedure followed in this case is consistent with the purpose of rule 3.800(b). *See Amendments to Fla. Rules of Criminal Procedure 3.111(e) & 3.800 & Fla. Rules of Appellate Procedure 9.020(h), 9.140, & 9.600*, 761 So. 2d 1015, 1018 (Fla. 1999) ("Trial courts thus have the opportunity to address and correct sentencing errors, which might eliminate the need for an appeal in many cases and also reduce the number of postconviction motions related to sentencing and appeals therefrom.").

Although Petitioner Cromartie did not use the "magic words" "due process" during the resentencing hearing, Petitioner Cromartie clearly objected to the trial court's procedure. And when undersigned counsel had an opportunity to further research the issue and discover cases indicating that the trial court's procedure

amounted to a violation of constitutional due process rights, undersigned counsel filed a rule 3.800(b) motion, thereby affording the trial court with an opportunity to correct the error.[10] In light of this record, Petitioner Cromartie submits that the sentencing error was sufficiently preserved for appellate review

[10] Petitioner Cromartie submits that a constitutional due process claim challenging a trial judge's arbitrary round-up policy can be preserved for appeal pursuant to rule 3.800(b).

F. CONCLUSION.

Petitioner Cromartie requests the Court to quash the decision below and remand this case for a new sentencing hearing.

G. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Office of the Attorney General
PL01, The Capitol
Tallahassee, Florida 32399-1050

by U.S. mail delivery this 1st day of September, 2010.

Respectfully submitted,

/s/ Michael Ufferman

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

Counsel for Petitioner **CROMARTIE**

xc: Carlos Cromartie

H. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Initial Brief of Petitioner complies with the type-font limitation.

/s/ Michael Ufferman
MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

Counsel for Petitioner **CROMARTIE**