IN THE

SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF PETITIONER

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

In its Answer Brief, the State argues (as it did in its Jurisdictional Brief) that the Court lacks jurisdiction to review this case. *See* Answer Brief at 11-13. As explained in his Jurisdictional Brief, Petitioner Cromartie continues to submit that the Court has jurisdiction to review this case because the decision below conflicts with *Hannum v. State*, 13 So. 3d 132 (Fla. 2d DCA 2009), concerning whether a sentencing error that violates constitutional due process principles amounts to fundamental error.

Next, the State asserts in its Answer Brief that "[t]he [s]entencing [d]ecision [w]as [n]ot [a]rbitrary." Answer Brief at 18. Contrary to the State's assertion, in explaining its sentencing philosophy/policy, the trial court stated:

> I always round up.[1] 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 in the real world whether you give somebody nine years or ten years doesn't matter, you know. It just doesn't. And to have – that's an argument over minutia.

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[1] The trial court added:

> I round off in years. What can I tell you? That's just my way.
>
> (RS-7).

(RS-7-8) (footnote added). Undersigned counsel submits that the trial court's reasoning cannot be described as anything other than "arbitrary." "[S]entences based upon arbitrary or impermissible considerations . . . offend [] due process principles . . ." *United States v. Fisher*, 502 F.3d 293, 306 (3d Cir. 2007). *See also* U.S. Const. amend. XIV; art. I, § 9, Fla. Const.[2] Pursuant to the trial court's "round up" policy, defendants with different scoresheet totals are given the same sentence, even though one defendant's scoresheet total is much less than another defendant's scoresheet total (i.e., a defendant with a scoresheet total of 6.1 will receive a seven-year sentence, and a

[2] The State correctly points out that judges have substantial discretion when imposing sentences pursuant to the Criminal Punishment Code. *See* Answer Brief at 28-31. However, such discretion is abused if it is based on an arbitrary policy that violates constitutional due process principles. Petitioner Cromartie agrees with the State that "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," Answer Brief at 30, but once the trial court did explain her reasoning, the reasoning could not be based on impermissible factors. There are numerous cases where Florida courts have reversed sentences because the reasoning given by the trial court to justify the sentence was impermissible (and in each of these cases, had the trial court kept silent, there would have been no error). *See, e.g.*, *Mentor v. State*, 44 So. 3d 195, 196 (Fla. 3d DCA 2010) ("A review of the sentencing hearing indicates that the trial judge impermissibly considered Mentor's protestation of innocence and lack of remorse."); *Nawaz v. State*, 28 So. 3d 122 (Fla. 1st DCA 2010) (remanding for resentencing by a different judge due to trial court's apparent consideration of defendant's national origin during sentencing); *Whitmore v. State*, 27 So. 3d 168 (Fla. 4th DCA 2010) (concluding that trial court's reliance upon defendant's continued protestation of innocence at sentencing, which the judge viewed as a lack of remorse and denial of responsibility, was an impermissible basis for imposing the maximum sentence, denied due process, and constituted fundamental error).

defendant with a scoresheet total of 6.9 or 7 will also receive a seven-year sentence). For those whose sentences are "rounded up the most" (i.e., from .1 to the next year), this arbitrary policy results in a portion of the sentence (as much as 10.8 months) being based on chance and luck.[3] And contrary to the trial court's comments, *every day* spent in prison by someone's husband, wife, son, daughter, father, mother, brother, or sister *matters*. *See, e.g.*, *Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be [unconstitutional] for the 'crime' of having a common cold."). The additional .7 of a year sentence in the instant case certainly matters to Petitioner Cromartie and his family.

Turning to the conflict between the decision below and *Hannum* (i.e., the reason the Court accepted jurisdiction in this case), Petitioner Cromartie continues to assert that a sentencing error that results in the denial of a defendant's constitutional due process rights 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

[3] This is especially true in the context of a resentencing hearing (as in the instant case), where the trial court's "round up" amount at the resentencing hearing is greater than the "round up" amount utilized at the original sentencing hearing.

> 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.

Cromartie v. State, 16 So. 3d 882, 882-83 (Fla. 1st DCA 2009). 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. For all of the reasons set forth in the Initial Brief, 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. *See Jackson v. State*, 983 So. 2d 562, 574-75 (Fla. 2008) (holding that a sentencing error is fundamental if the error amounts to a denial of due process); *Hannum*, 13 So. 3d at 135-36 (same). Pursuant to this Court's holding in *Jackson* 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, for all of the reasons set forth in his Initial Brief, Petitioner Cromartie continues to submit 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). Because the trial court had the opportunity to address Petitioner Cromartie's due process claim and correct the error, Petitioner Cromartie submits that the procedure followed in this case is consistent with the purpose of rule 3.800(b).

D. CONCLUSION.

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

E. CERTIFICATE OF SERVICE

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

Assistant Attorneys General Trisha Meggs Pate and Thomas H. Duffy
PL-01, The Capitol
Tallahassee, Florida 32399-1050

by U.S. mail delivery this 22nd day of November, 2010.

Respectfully submitted,

/s/ Michael Ufferman
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F. CERTIFICATE OF COMPLIANCE

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

/s/ Michael Ufferman
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