IN THE

SUPREME COURT OF FLORIDA

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

# JURISDICTIONAL BRIEF OF THE PETITIONER

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

Carlos Cromartie (hereinafter "Petitioner Cromartie") was charged in Leon County, Florida, with trafficking in cocaine (count 1) and sale or possession of cocaine with intent to sell within 1,000 feet of a church (count 2). Petitioner Cromartie was convicted (following a jury trial) of both counts. Petitioner Cromartie was originally sentenced on December 18, 2006. On the Criminal Punishment Code scoresheet, the lowest permissible sentence was 7.83 years' imprisonment. The trial court sentenced Petitioner Cromartie to eight years' imprisonment for both counts, with the sentences to run concurrently. Petitioner Cromartie subsequently filed a motion to correct sentencing error pursuant to Florida Rule of Criminal Procedure 3.800(b)(2). In the rule 3.800(b)(2) motion, Petitioner Cromartie explained that the State improperly scored count 1 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)(2) motion and the case was set for a resentencing hearing. A corrected Criminal Punishment Code scoresheet was prepared and, on the corrected scoresheet, the lowest permissible sentence was 6.16 years' imprisonment. At the resentencing hearing, Petitioner Cromartie requested that the trial court sentence him 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). The trial court declined Petitioner Cromartie's request and sentenced Petitioner Cromartie to seven years' imprisonment for both counts, with the sentences to run concurrently. The trial court explained that its policy is to always "round up" to the next year (i.e., from 6.16 to 7). Petitioner Cromartie later filed a second rule 3.800(b)(2) motion arguing that the trial court's "round up" policy is arbitrary and consequently a denial of constitutional due process principles.[1] The trial court denied the second rule 3.800(b)(2) motion.

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)(2) 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*, 34 Fla. L. Weekly D1377, D1377 (Fla. 1st DCA July 8, 2009). Thus, the First District held that the error in Petitioner Cromartie's case did not amount

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

to fundamental error (or the First District failed to conduct a fundamental error analysis).

## D. SUMMARY OF ARGUMENT.

In the decision below, the First District Court of Appeal acknowledged that the trial court's "round up" policy resulted in a denial of Petitioner Cromartie's constitutional due process rights. However, the First District held that the error did not amount to fundamental error (or the First District failed to conduct a fundamental error analysis). In contrast, in *Hannum v. State*, 13 So. 3d 132 (Fla. 2d DCA 2009), the Second District Court of Appeal held that a sentencing error that violates constitutional due process principles amounts to fundamental error. The decision below is in conflict with *Hannum*.

## E. JURISDICTIONAL STATEMENT.

The Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal on the same point of law. *See* Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

## F. ARGUMENT AND CITATIONS OF AUTHORITY.

**The decision below expressly and directly 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.**

In the decision below, the First District Court of Appeal acknowledged that the trial court's "round up" policy resulted in a denial of Petitioner Cromartie's constitutional due process rights. *See Cromartie*, 34 Fla. L. Weekly at D1377. However, the First District held that the error did not amount to fundamental error (or the First District failed to conduct a fundamental error analysis).

In contrast, in *Hannum v. State*, 13 So. 3d 132, 135-36 (Fla. 2d DCA 2009), the Second District Court of Appeal held that a sentencing error that violates constitutional due process principles amounts to fundamental error. In *Hannum*, at the sentencing hearing, 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)(2) motion. The Second District held that pursuant to this Court's opinion in *Jackson v. State*, 983 So. 2d 562 (Fla. 2008), the issue could not be preserved pursuant to rule 3.800(b)(2):

> 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.

In the case below, the First District held that the trial court's "round up" policy resulted in a denial of due process: "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*." *Cromartie*, 34 Fla. L. Weekly at D1377. However, the First District held that the error did not amount to fundamental error (or the First District failed to conduct a fundamental error analysis). Therefore, the decision below is in conflict with *Hannum* concerning whether a sentencing error that violates constitutional due process principles amounts to fundamental error. Alternatively, the decision below is in conflict with *Hannum* concerning whether a district court must still conduct a fundamental error analysis even if a sentencing error was not properly preserved for appeal.

Accordingly, Petitioner Cromartie respectfully requests the Court to accept jurisdiction in this case resolve the conflict between the decision below and *Hannum*.

## G. CONCLUSION.

This case presents an important issue that potentially has an effect on numerous criminal cases in this state. The Court has discretionary jurisdiction to review the decision below and Petitioner Cromartie prays that the Court will exercise its discretion and consider the merits of his argument.

## H. CERTIFICATE OF SERVICE

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

Assistant Attorney General Natalie D. Kirk
PL01, The Capitol
Tallahassee, Florida 32399-1050

by U.S. mail delivery this 15th day of October, 2009.

Respectfully submitted,

/s/ Michael Ufferman
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## I. CERTIFICATE OF COMPLIANCE

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

/s/ Michael Ufferman
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