

IN THE SUPREME COURT OF FLORIDA

ANTHONY DESHAWN GLOVER,

Petitioner,

v.

**CASE NO. SC10-254
L.T. CASE NO. 1D08-5225**

STATE OF FLORIDA,

Respondent.

**ON PETITION FOR DISCRETIONARY REVIEW
OF A DECISION OF THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA**

AMENDED PETITIONER'S BRIEF ON JURISDICTION

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

STEVEN L. SELIGER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 244597
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET
SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8537

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE</u>
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	1-2
SUMMARY OF THE ARGUMENT	3-4
ARGUMENT	4
<u>ISSUE I</u>	4
THIS COURT SHOULD ACCEPT THIS CASE TO RESOLVE INTERDISTRICT CONFLICT ON THE APPROPRIATENESS OF REQUIRING A GUIDELINES SENTENCE AFTER AN APPELLATE COURT HAS DETERMINED THE TRIAL JUDGE ERRED IN DEPARTING DOWNWARD.	
<u>ISSUE II</u>	7
THIS COURT SHOULD ACCEPT JURISDICTION IN THIS CASE TO RESOLVE A CONFLICT BETWEEN THE DECISION OF THE FIRST DISTRICT AND THIS COURT'S DECISION IN BANKS V. STATE.	
CONCLUSION	9
CERTIFICATE OF SERVICE	9
CERTIFICATE OF FONT SIZE	10
APPENDIX	1-4

TABLE OF CITATIONS

<u>CASE(S)</u>	<u>PAGE(S)</u>
<u>Banks v. State,</u> 732 So.2d 1065 (Fla. 1999)	3,4,7,8
<u>Pope v. State,</u> 561 So.2d 554 (Fla. 1990)	6
<u>Shull v. Dugger,</u> 515 So.2d 718 (Fla. 1987)	6
<u>State v. Berry,</u> 976 So.2d 645 (Fla. 3d DCA 2008)	3,5
<u>State v. Bradley Jackson,</u> 22 So.3d 817 (Fla. 1st DCA 2009)	2,6,7
<u>State v. Davis,</u> 997 So.2d 1278 (Fla. 3rd DCA 2009)	3,5
<u>State v. Owens,</u> 848 So.2d 1199 (Fla. 1st DCA 2003)	5
<u>State v. Williams,</u> 20 So.3d 419 (Fla. 3rd DCA 2009)	3,6
<u>AMENDMENTS AND CONSTITUTIONS</u>	
Article V, Section 3(b)(3), Florida Constitution	4

IN THE SUPREME COURT OF FLORIDA

ANTHONY DESHAWN GLOVER,

Petitioner,

v.

CASE NO. SC10-254

STATE OF FLORIDA,

L.T. CASE NO. 1D08-5225

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court. He was the Appellee in the First District Court of Appeal. Attached to this petition, as Appendix, is the decision of the district court. The case is reported at 34 Fla. L. Weekly D2122. Mr. Glover filed a timely notice to invoke this Court's discretionary jurisdiction on February 11, 2010.

STATEMENT OF THE CASE AND FACTS

After a non-jury trial, Mr. Glover was found in constructive possession of a firearm. (He entered a plea of no contest to a misdemeanor possession of marijuana but that conviction is not pertinent to this case.) Because he was a convicted felon, the judge found him guilty of being a convicted felon in possession of a firearm.

The sentencing guidelines called for a minimum prison sentence of 39.14 months. Instead, the judge, finding a reason to depart downward, sentenced Mr. Glover to six (6) days in jail, with credit for the six (6) days he had already served. The judge explained that Mr. Glover's constructive possession of the firearm was reasonable given that he had been threatened with bodily harm and death in the very recent past and this his "perception of danger was real and reasonable."

The State appealed this decision. The district court decided that, assuming the reason given was valid, the judge abused his discretion in deciding to depart downward. After reversing the sentencing decision by the trial judge, the district court then ordered a "remand for resentencing within the guidelines." Mr. Glover then argued on rehearing that the First District should have certified a conflict over the legal requirement that the trial judge be required to sentence within the guidelines. The First District denied the motion to certify a conflict. The First District has certified such a conflict in a case that was consolidated with Mr. Glover's case for disposition in the First District. State v. Bradley Jackson, 22 So.3d 817 (Fla. 1st DCA 2009) In this respect, the cases present the same issue for review.

SUMMARY OF THE ARGUMENT

The First District's opinion creates a conflict in two areas. First, it is inconsistent with the Third District's rule of law that permits a trial judge to impose a sentence on remand without requiring that it be within the guidelines. State v. Williams, 20 So.3d 419 (Fla. 3rd DCA 2009); State v. Davis, 997 So.2d 1278 (Fla. 3rd DCA 2009); and State v. Berry, 976 So.2d 645 (Fla. 3d DCA 2008)

In Mr. Glover's case, the judge gave what he believed was a valid legal reason to go below the guidelines in devising a punishment. The First District disagreed, not on the reason or the factual basis for the reason, but finding the judge abused his discretion in whether he should have departed. This left Mr. Glover with no opportunity to argue for any other reason to depart because the rule of law followed by First District is that a sentence within the guidelines is required.

Second, the First District's opinion is completely inconsistent with this Court's decision in Banks v. State, 732 So.2d 1065 (Fla. 1999) Banks is the case that established the two-step analysis when an appellate court is reviewing a trial court's decision to impose a decision less than the guidelines require. The First District purported not to challenge either the legal basis for the departure nor the facts supporting the departure. Yet, the First District simply substituted its judgment for the trial judge. This holding is in direct contravention of Banks, which requires appellate courts to give great deference to a trial judge's traditional

sentencing decision. It does not appear that there are any other cases, and the First District did not cite to any, that overrule a trial judge's decision on the second step of the Banks analysis.

Discretionary review is warranted in this case. This Court should resolve the conflict between the First District and Third District on what discretion a trial judge has after the appellate court has determined a downward departure sentence cannot be imposed. In addition, this Court should find the First District's decision is in conflict with this Court's holding in Banks. This Court should exercise jurisdiction pursuant to article V, section 3(b)(3), Florida Constitution.

ARGUMENT

ISSUE I

THIS COURT SHOULD ACCEPT THIS CASE TO RESOLVE INTERDISTRICT CONFLICT ON THE APPROPRIATENESS OF REQUIRING A GUIDELINES SENTENCE AFTER AN APPELLATE COURT HAS DETERMINED THE TRIAL JUDGE ERRED IN DEPARTING DOWNWARD

In Mr. Glover's case, the First District determined that the trial judge abused his discretion in departing downward from the sentencing guidelines. The remedy imposed required the trial judge to sentence Mr. Glover within the guidelines. This position is consistent with the First District's posture that a remand for

resentencing under these circumstances must be within the guidelines. State v. Owens, 848 So.2d 1199 (Fla. 1st DCA 2003).

The Third District takes a different approach. For instance, in State v. Williams, 20 So.3d 419 (Fla. 3d DCA 2009), the trial judge departed downward from the habitual offender statute without providing written or oral reasons to depart. As the remedy in that case, the Third District remanded the case back to the trial judge “to include written reasons for the departure and designations for habitual offender and prison release, . . .” The result reached in that case is consistent with the Third District’s tradition of allowing a trial judge an opportunity to cure the error of a failed downward departure reason. State v. Davis, 997 So.2d 1279 (Fla. 3d DCA 2009).

In State v. Berry, 976 So.2d 645 (Fla. 3d DCA 2008), the trial judge imposed a downward departure sentence only after the State had withdrawn its downward departure plea offer. The Third District held that the remedy for this error was to resentence within the guidelines or allow Berry to withdraw his plea. In addition, the Third District noted “the defendant suggests that there is a valid reason for downward departure. **That issue can be raised in the trial court.**” With this language, the Third District did not foreclose the possibility that the trial judge could again impose a downward departure sentence if justified by the facts and the law.

In State v. Jackson, 22 So.3d 817 (Fla. 1st DCA 2009), the First District found that the trial judge's order departing downward from the sentencing guidelines was illegal because the reason orally pronounced by the judge was proscribed by law. (Drug rehabilitation) The First District then found that when "when the initial reasons [for departure] had been reversed by an appellate court", or "when an appellate court reverses a departure sentence because there were no written reasons, the court must remand for resentencing with no possibility of departure from the guidelines." Although the First District cited two decisions of this Court in support of this rule of law, Pope v. State, 561 So.2d 554 (Fla. 1990) and Shull v. Dugger, 515 So.2d 718 (Fla. 1987), the First District acknowledged that the Third District had taken a different tact. "The Third District gave no reason for allowing the trial court a second opportunity to depart from the guidelines." The First District then went on to certify conflict with the Third District, "to the extent they conflict with this opinion."

Mr. Glover raised the same issue on a motion for rehearing but the First District declined to certify a conflict. It did not identify why it did this. However, the same conflict that exists in Mr. Jackson's case also presents itself in Mr. Glover's case. What this means is that within the geographical territory of the First District, a finding that a downward departure sentencing is legally erroneous requires resentencing within the guidelines. However, if a person lives in the

environs of Miami or Key West, a trial judge would have another opportunity to what it historically does – sentence. This case is the correct vehicle to resolve the conflict between these two districts.

ISSUE II

THIS COURT SHOULD ACCEPT JURISDICTION IN THIS CASE TO RESOLVE A CONFLICT BETWEEN THE DECISION OF THE FIRST DISTRICT AND THIS COURT’S DECISION IN BANKS V. STATE.

Banks v. State, 732 So.2d 1065 (Fla. 1999) set out a two part test for review by an appellate court to determine whether a trial judge’s reason to downward depart from the sentencing guidelines was valid. In this case, the First District assumed that the trial judge had correctly followed the first step. That is, the First District assumed that the reason given by the trial judge for departing was legally permissible and that the reason was proven at trial by a preponderance of the evidence.

The First District found that the trial judge’s decision failed the second step. “The second aspect of the decision to depart is a judgment call within the sound discretion of the court and will sustained on review absent an abuse of discretion. Discretion is abused only where no reasonable person would agree with the trial court’s decision.” While paying lip service to this standard of review, the First District violated this Court’s admonition to let the trial judge exercise his discretion in determining what the correct punishment should be. This decision by

the First District appears to be the first time an appellate court has reversed a downward departure decision by the a trial judge based on step two of Banks. The First District cited no decision in support of its opinion.

The First District further compounded the error by specifically questioning the sufficiency of the evidence in support of the trial judge's decision. This is part of the step one equation and the First District had already assumed that the trial judge had properly made these findings. Given the paucity of application of the step two analysis found in Banks, it is important to enforce a rule of law that generally allows a judge to serve their historical purpose and sentence criminal defendants without unreasonable interference from an appellate court. This case provides the right circumstance to do just that.

CONCLUSION

Based on the arguments contained in this jurisdictional brief, Mr. Glover requests this Court to accept this case for discretionary review and briefing on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail to Ms. Heather Flannigan Ross, Assistant Attorney General, The Capitol, PL-01, Tallahassee, Florida, 32399-1050 on this ____ day of February, 2010.

CERTIFICATE OF FONT SIZE

I hereby certify that this brief has been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

STEVEN L. SELIGER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 244597
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET
SUITE 401
TALLAHASSEE, FLORIDA 32301

(850) 606-8537

Seligers@leoncountyfl.gov

ATTORNEY FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

ANTHONY DESHAWN GLOVER,

Petitioner,

v.

**CASE NO. SC10-254
L.T. CASE NO. 1D08-5225**

STATE OF FLORIDA,

Respondent.

_____ /

APPENDIX

PAGE(S)

State v. Glover
34 Fla. L. Weekly D2122

1-4