SUPREME COURT OF FLORIDA

CASE NO. SC18-0688

DEREK LANG SHINE, JR.,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL
LOWER COURT CASE NOS. 3D15-2876, 3D15-2877, 14-890, AND 14-891

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Petitioner pleaded guilty to two counts of sale of cocaine within 1,000 feet of a convenience business and two counts of unlawful use of a two-way communication device. App. at 6. Petitioner entered into a plea agreement with the State. App. at 6. The trial court sentenced Petitioner to three years of drug offender probation on all counts. App. at 6.

Within a year of his plea, Petitioner violated probation. App. at 6. The trial court revoked probation and resentenced Petitioner. App. at 6. Over the State's objection, the trial court imposed a downward departure sentence. App. at 6. The lowest permissible sentence under the Criminal Punishment Code ("CPC") was 73.65 months. App. at 7. The trial court resentenced Petitioner to 40 months of prison on all counts to run concurrently. App. at 6.

In justifying the departure, the trial court explained in a written order:

> Defendant has been granted a previous downward departure based on a valid uncoerced plea agreement . . . [and] it would be inappropriate, too harsh and contrary to the principles of graduated sanctions to now sentence the Defendant to 73.65 months imprisonment which is the lowest permissible prison sentence, absent a downward departure.

App. at 7.

In a summary three-page decision, the Third District held that "the trial court's reasoning [did] not amount to a valid legal basis for the downward

departure sentence imposed" and reversed. App. at 7. The Third District remanded the case for resentencing within the sentencing guidelines. App. at 7.

SUMMARY OF ARGUMENT

The Third District's decision does not expressly and directly conflict with *Franquiz v. State*, 682 So. 2d 536 (Fla. 1996). The two decisions do not address the same question of law, do not have the same controlling facts, and do not reach different outcomes. *Franquiz* did clarify that "a prior downward departure is sometimes a factor but never a guarantee for a subsequent downward departure". *Franquiz*, 682 So. 2d at 536. This was dicta and cannot form the basis of conflict. Even if not dicta, the Third District's decision does not conflict with *Franquiz* on this point. Consistent with *Franquiz*, the Third District found that the factors and circumstances on which the trial court relied could not justify the departure for the prior downward departure.

The Third District's decision also does not conflict with *Jackson v. State*, 64 So. 3d 90 (Fla. 2011) and other district court decisions. Like *Franquiz*, *Jackson* addressed a different question of law and involved different controlling facts. None of the district court decisions cited by Petitioner analyze the issue of remedy. Neither does the Third District's decision. None of the decisions could expressly conflict with the Third District's decision. Even if there was express conflict, further percolation in the district courts is necessary, including

actual legal analysis of the issue, which would allow the district courts to develop and refine the issue.

ARGUMENT AND CITATION TO AUTHORITIES

I. PETITIONER'S APPENDIX CONTAINS DOCUMENTS OUTSIDE THE SCOPE OF THE RELEVANT RECORD

Briefs on discretionary jurisdiction may be accompanied by "an appendix containing only a conformed copy of the decision of the district court of appeal". Fla. R. App. P. 9.120(d). The Court is confined to those facts contained within the four corners of that decision. *Wells v. State*, 132 So. 3d 1110, 1111 (Fla. 2014). In his appendix, Petitioner attaches a prior withdrawn Third District decision and an order denying Petitioner's motion for rehearing. App. at 2-4, 8-9. These documents are outside the scope of the relevant record. The Court should disregard these documents and facts in Petitioner's brief based on them.

II. THE THIRD DISTRICT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH *FRANQUIZ*

Conflict jurisdiction requires that the district court decision be irreconcilable with a decision of this Court or another district court. The decisions must have reached the opposite result on controlling facts, which if not virtually identical, more strongly dictate the result reached by the conflicting case. *Aravena v. Miami-Dade County*, 928 So. 2d 1163, 1166-67 (Fla. 2006). Conflict must be based on the same question of law. Fla. Const., art. V, §3(b)(3).

The Third District's decision and *Franquiz v. State*, 682 So. 2d 536 (Fla. 1996) do not expressly and directly conflict where both addressed different questions of law. *Franquiz* addressed "whether written reasons are required for a downward departure disposition upon revocation of probation or community control in instances in which the initial placement on probation or community control was a downward departure based upon a plea agreement". *Id.* at 537. In contrast, the Third District addressed whether the trial court's reasoning amounted to a valid legal basis for the downward departure imposed. App. at 7. The Third District did not consider whether written reasons were necessary for the departure. App. at 7. Where both decisions addressed different legal questions, both do not conflict.

Both decisions are also based on different controlling facts. In *Franquiz*, that the trial court did not file a written order in support of a downward departure. *Franquiz*, 682 So. 2d at 537. In this case, the trial court did file a written sentencing order. App. at 7. In *Franquiz*, the trial court did not provide any reason at all for the departure. *Id.* at 537. In this case, the trial court provided written reasons for the departure. App. at 7. Where both decisions involved different critical controlling facts, both do not conflict.

And both cases do not reach different outcomes. For sentences imposed after the opinion, *Franquiz* instructed courts to remand with direction that the

defendant be allowed to withdraw a plea conditioned on a departure sentence or be sentenced within the guidelines. *Id.* at 538. The Third District provided the same remedy and remanded for resentencing within the guidelines. App. at 7. For that reason as well, both do not conflict.

Franquiz did clarify that "a prior downward departure is sometimes a factor but never a guarantee for a subsequent downward departure". *Franquiz*, 682 So. 2d at 536. This was dicta and cannot form the basis of conflict. *Ciongoli v. State*, 337 So. 2d 780 (Fla. 1976). Whether a prior departure is a valid ground for a subsequent departure at a revocation sentencing is not the specific issue that the Court addressed and not within the scope of the opinion's holding.[1]

Even if not dicta, this language in *Franquiz* does not conflict with the Third District's decision on this point. *Franquiz* refused to find that an initial downward departure is always a valid reason or never a valid reason for a revocation downward departure. *Franquiz*, 682 So. 2d at 537. *Franquiz* described it as a "factor during resentencing". *Id.* at 537. *Franquiz* explained that the trial court must determine, based on all circumstances through the date

[1] *Franquiz* predates the CPC. However, this discussion in *Franquiz* is consistent with the CPC's stated principle that departures should be made "only when circumstances or factors reasonably justify the mitigation of the sentence". Fla. Stat. § 921.002(1)(f).

of the revocation sentencing, whether valid reasons exist for the departure and explain why the prior departure is a valid reason. *Id.* at 538.

In this case, the trial court relied on improper circumstances to justify the subsequent downward departure based on the prior downward departure. App. at 7. The trial court incorrectly justified the departure by explaining that "it would be inappropriate, too harsh and contrary to the principles of graduated sanctions". App. at 7. General dissatisfaction with a guideline sentence can never justify a departure. *Scott v. State*, 508 So. 2d 335, 337 (Fla. 1987). Graduated sanctions for probation violations are already considered by the sentencing guidelines and also cannot justify a departure. Fla. Stat. § 921.0024(1)(b); *State v. Sachs*, 526 So. 2d 48, 50 (Fla. 1988). Consistent with *Franquiz*, the Third District found that these circumstances could not justify the downward departure. And so, the two decisions do not conflict.

III. THE THIRD DISTRICT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH *JACKSON* OR ANY OTHER DISTRICT COURT DECISION ON REMEDY

The Third District's decision also does not expressly and directly conflict with *Jackson v. State*, 64 So. 3d 90 (Fla. 2011), *Lee v. State*, 223 So. 3d 342 (Fla. 1st DCA 2017), *State v. Pinckney*, 173 So. 3d 1139 (Fla. 2d DCA 2015), *State v. Michels*, 59 So. 3d 1163 (Fla. 4th DCA 2011), or *State v. Milici*, 219 So. 3d 117 (Fla. 5th DCA 2017).

Jackson addressed a different question of law. The issue in *Jackson* was "whether a trial court is precluded from imposing a departure sentence on remand when the original departure sentence was reversed on appeal because the trial court failed to file its written reasons for imposing the departure and the oral reason provided was determined to be invalid". *Jackson*, 64 So. 3d at 92.[2] In contrast, the Third District addressed whether the trial court's reasoning amounted to a valid legal basis for the downward departure imposed. App. at 7. The Third District did summarily reverse and remand for resentencing within the guidelines. App. at 7. However, the Third District did not analyze the legal issue of the proper remedy, cite any legal authority, or provide any discussion.

Jackson also involved different controlling facts. The trial court in *Jackson* provided oral reasons for a downward departure but failed to provide written reasons. *Id.* at 91. Critical to *Jackson* was this procedural defect in the sentencing proceedings. All of the district court decisions from which conflict arose in *Jackson* involved the failure of a trial court to provide written reasons for a downward departure. *Id.* at 91-92. The trial court in this case did enter a

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[2] This Court has characterized *Jackson* as a "**narrowly tailored decision** holding that when an appellate court reverses a downward departure sentence because the trial court **failed to provide written reasons** for imposing the departure and the **oral reason provided was determined to be invalid**, the trial court is permitted on remand to impose a downward departure when it provides a valid written reason for the departure." *Bryant v. State*, 148 So. 3d 1251, 1257 (Fla. 2014) (emphasis added).

written order. App. at 7. Also, in *Jackson*, the oral reasons for the downward departure were found to be invalid. *Id.* at 92. In contrast, in this case, the **written** reasons were found to be invalid. App. at 7. Where these critical, controlling facts in *Jackson* are absent in the Third District's decision, both do not conflict. *Supra.* at 7 n.2.

Petitioner argues that the Third District's decision also conflicts with other district court cases which cite *Jackson* and reverse and remand for resentencing where the trial court may consider another departure. *Lee*, 223 So. 3d at 360; *Milici*, 219 So. 3d at 123-24; *Pinckney*, 173 So. 3d at 1140; *Michels*, 59 So. 3d at 1166. Like the Third District's decision, none of these cases analyze the legal issue of remedy at all. All summarily provide the remedy without any discussion. For that reason alone, none could expressly conflict with the Third District's decision. *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980). Even if there was express conflict, further percolation in the district courts is necessary, including actual legal analysis of the issue, which would allow the district courts to develop and refine the issue and very likely obviate need for this Court's review.[3]

[3] *Pickney* and *Michels* do not even state whether the trial court entered a written order in support of the downward departure. *Pickney*, 173 So. 3d at 1139-40; *Michels*, 59 So. 3d at 1165-66. If the trial court in those cases failed to do so, neither case would conflict with *Jackson* or the Third District's decision.

Lastly, Petitioner essentially argues that a defendant whose downward departure sentence is reversed on appeal is entitled to seek another downward departure on new and different grounds at resentencing. Absent any procedural defects to the first sentencing, like the failure to enter a written order in support of the departure described in *Jackson*, a defendant is not entitled to a full de novo resentencing. A defendant is required to put forward all conceivable grounds up front in his motion at the first sentencing.

This Court adopted this rule in *Shull v. Dugger*, 515 So. 2d 748, 750 (Fla. 1987) [4], albeit in the context of an upward departure, by explaining:

> We see no reason for making an exception to the general rule requiring resentencing within the guidelines merely because the illegal departure was based upon only one invalid reason rather than several. We believe the better policy requires the trial court to articulate all of the reasons for departure in the original order. To hold otherwise may needlessly subject the defendant to unwarranted efforts to justify the original sentence and also might lead to absurd results. One can envision numerous resentencings as, one by one, reasons are rejected in multiple appeals. Thus, we hold that a trial court may not enunciate new reasons for a departure sentence after the reasons given for the original departure sentence have been reversed by an appellate court.

[4] Although *Shull* predates the CPC, the case is good law on this point because the CPC does not require a de novo resentencing on remand. *Cf.* Fla. R. Crim. P. 3.704(b) ("Existing case law construing the application of sentencing guidelines will continue as precedent unless in conflict with the provisions of this rule or the 1998 Criminal Punishment Code.").

Shull was concerned that a trial court would simply find a new ground to justify a previously reversed departure, giving rise to "numerous resentencings as, one by one, reasons are rejected in multiple appeals". *Id.* This concern of "after-the-fact justifications" explains why a defendant is not entitled to a full de novo resentencing, absent some procedural defect to the first sentencing hearing.

When multiple grounds support a departure, the departure is upheld even if only one ground is upheld on appeal. Fla. Stat. § 921.002(3). In exchange for this huge benefit, a defendant must be required to put forward all conceivable grounds up front in his motion. Balanced with a defendant's right to pursue a downward departure is the State's interest in finality in criminal proceedings. *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980) ("The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end."). The rule advocated by Petitioner undermines this important concern and needlessly subjects the State to multiple appeals without any end. For all the above reasons, the Court should decline jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that the foregoing document – *Respondent, the State of Florida's Brief on Jurisdiction* – has been delivered to counsel for Petitioner, Jeffrey DeSousa, Office of the Public Defender, by **e-mail** at jdesousa@pdmiami.com and appellatedefender@pdmiami.com on **June 19, 2018**.

CERTIFICATE OF COMPLIANCE

I FURTHER CERTIFY that this Jurisdictional Brief complies with the font requirements of Fla. R. App. P. 9.120(d) and Fla. R. App. P. 9.210(a)(2).

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