No. SC18-688

In the Supreme Court of Florida

DEREK LANG SHINE JR.,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

* * *

On Discretionary Review from the Third District
Court of Appeal of Florida, DCA No. 3D15-2876
Cir. Nos. 14-890-A-K & 14-891-A-K

PETITIONER'S INITIAL BRIEF ON THE MERITS

Carlos J. Martinez
Public Defender
Eleventh Judicial Circuit
1320 N.W. 14th Street
Miami, Florida 33125

Jeffrey Paul DeSousa (FBN 110951)
Shannon Hemmendinger (FBN 97947)
Assistant Public Defenders
appellatedefender@pdmiami.com
jdesousa@pdmiami.com
sah@pdmiami.com
(305) 545-1960

Counsel for Petitioner

August 1, 2018

ISSUES ON APPEAL

I. In this criminal case, the circuit court found Petitioner Derek Shine Jr. in violation of his probation and imposed a downward departure sentence. In support of that departure, the judge cited the fact that Shine had previously received a downward departure based on a valid, uncoerced plea bargain. It further explained that a guidelines sentence would not account for Shine's need for inpatient drug rehabilitation and instead would result in a punishment that was "too harsh," "inappropriate," and "contrary to the principle of graduated sanctions." The first issue on appeal is whether that departure was lawful.

II. Concluding that the departure sentence was illegal, the Third District Court of Appeal remanded for resentencing with instructions that the circuit court impose a sentence within the guidelines range. That holding precludes the possibility of a new departure on remand. The second issue on appeal is whether, assuming this Court finds that the departure was unlawful, the district court incorrectly limited the sentencing judge's discretion on remand.

TABLE OF CONTENTS

Issues on Appeal i

Table of Authorities iii

Statement of the Case and Facts 1

Summary of Argument 8

Standard of Review 10

Argument 11

I. THE DOWNWARD DEPARTURE SENTENCE WAS VALID 11

A. This Court held in *Franquiz* that a prior downward departure based on an uncoerced plea can validate future departures 11

B. The sentencing judge properly considered both the fact of the prior departure and Shine's current circumstances 14

II. EVEN IF THE DEPARTURE WERE INVALID, THE PROPER REMEDY WAS A REMAND FOR DE NOVO RESENTENCING 20

A. Interpreting the Criminal Punishment Code, this Court held in *Jackson* and *Glover* that sentencing judges should have an opportunity to consider departing on remand 20

B. With the lone exception of the Third District, district courts have unanimously applied *Jackson* in the context of substantive downward departure reversals 26

C. Permitting a new opportunity to depart downwards is consistent with fundamental sentencing principles 28

Conclusion 33

Certificate of Service 34

Certificate of Font 34

TABLE OF AUTHORITIES

Cases

Banks v. State,
732 So. 2d 1065 (Fla. 1999) 11, 12, 31

Bracero v. State,
10 So. 3d 664 (Fla. 2d DCA 2009) 31

Bryant v. State,
148 So. 3d 1251 (Fla. 2014) 25, 29

Demott v. State,
194 So. 3d 335 (Fla. 2016) 31

Franquiz v. State,
682 So. 2d 536 (Fla. 1996) ..... *passim*

Garcia v. State,
454 So. 2d 714 (Fla. 1st DCA 1984) 30

Glover v. State,
75 So. 3d 238 (Fla. 2011) 20, 21, 22, 23

Jackson v. State,
64 So. 3d 90 (Fla. 2011) 7, 10, 20, 21

Jones v. State,
71 So. 3d 173 (Fla. 1st DCA 2011) 26

Lawley v. State,
377 So. 2d 824 (Fla. 1st DCA 1979) 31

Lawson v. State,
969 So. 2d 222 (Fla. 2007) 16, 17

Lee v. State,
223 So. 3d 342 (Fla. 1st DCA 2017) 26, 27

Lucas v. State,
841 So. 2d 380 (Fla. 2003) 29

Mann v. State,
453 So. 2d 784 (Fla. 1984) 29

Pope v. State,
561 So. 2d 554 (Fla. 1990) 24

Shull v. Dugger,
515 So. 2d 748 (Fla. 1987) 24

Stano v. State,
473 So. 2d 1282 (Fla. 1985) 31

State v. Collins,
985 So. 2d 985 (Fla. 2008) 24, 30

State v. Devine,
512 So. 2d 1163 (Fla. 4th DCA 1987) 13

State v. Dixon,
217 So. 3d 1115 (Fla. 3d DCA 2017).....32

State v. Fleming,
61 So. 3d 399 (Fla. 2011) 28

State v. Glover,
25 So. 3d 38 (Fla. 1st DCA 2009)..... 21, 22

State v. Kasten,
775 So. 2d 992 (Fla. 3d DCA 2000).....18

State v. Lackey,
No. 2D16-3026, 43 Fla. L. Weekly D1224 (Fla. 2d DCA June 1, 2018) 27

State v. Michels,
59 So. 3d 1163 (Fla. 4th DCA 2011) 27

State v. Milici,
219 So. 3d 117 (Fla. 5th DCA 2017) 28

State v. Nickerson,
541 So. 2d 725 (Fla. 1st DCA 1989) 13, 14

State v. Nolasco,
542 So. 2d 1052 (Fla. 3d DCA 1989) 18, 19

State v. Pinckney,
173 So. 3d 1139 (Fla. 2d DCA 2015) 27

State v. Pita,
54 So. 3d 557 (Fla. 3d DCA 2011) 18

State v. Walker,
923 So. 2d 1262 (Fla. 1st DCA 2006) 10

Teffeteller v. State,
495 So. 2d 744 (Fla. 1986) 29

Trotter v. State,
825 So. 2d 362 (Fla. 2002) 29

United States v. Booker,
543 U.S. 220 (2005) 31

Wike v. State,
698 So. 2d 817 (Fla. 1997) 29

Wynkoop v. State,
14 So. 3d 1166 (Fla. 4th DCA 2009) 10

Statutes

§ 921.002(1)(b), Fla. Stat. (2015) 19

§ 921.002(1)(f), Fla. Stat. (2015) 12, 20

§ 921.0024(2), Fla. Stat. (2015).....11

§ 921.0026(1), Fla. Stat. (2015).....11

§ 921.0026(2), Fla. Stat. (2015).....12

Other Authorities

Sen. Staff Analysis and Economic Impact Stmt., S.B. 1522 (Apr. 2, 1998).....32

STATEMENT OF THE CASE AND FACTS

Florida circuit judges are tasked with the enormous responsibility of fashioning criminal sentences that advance the interests of the justice system while being individually tailored to the unique facts and circumstances of each offender's case. Evaluating the circumstances of Petitioner Derek Shine Jr.'s violation of probation, the circuit court exercised its discretion here to impose a downward departure sentence. In its written findings, the court predicated that departure on a recognized non-statutory mitigator: that Shine had previously received a downward departure based on a valid, uncoerced plea bargain. The judge further explained that the new departure was warranted because a sentence within the guidelines would be "inappropriate" and "too harsh," and would fail to account for Shine's demonstrated need for inpatient drug rehabilitation.

Yet, on appeal, the State of Florida convinced the Third District Court of Appeal to reverse the downward departure due to the alleged lack of a legal ground for the departure. On top of that, although the district court panel originally remanded for *de novo* resentencing with the possibility of a new downward departure, the State subsequently persuaded the panel to rehear the case and alter the remedy. Thus, the circuit court is now expressly precluded from even considering a new departure on remand—even if a valid basis exists—and must sentence Shine within the guidelines range.

Initial Plea and Downward Departure. In 2014, Derek Shine Jr. pled guilty in Monroe County to multiple counts of sale of cocaine within 1,000 feet of a convenience store and use of a communication device to facilitate a felony in case numbers 14-890-A-K and 14-891-A-K.[1] R. 10, 46-48. As part of that uncoerced plea bargain, the prosecutor recommended that Shine be sentenced to three years of drug offender probation with special conditions including six months in the county jail and completion of the Offender Reentry Program, which is designed to assist persons dealing with substance abuse issues. R. 47.

The court file reflects an outpouring of support from members of the community who wrote letters expressing their belief that Shine was a "person of good moral character," and one who was "incredibly remorseful" for the mistakes he had made. R. 42. For instance, Senior Chief Petty Officer David Robinson Jr. of the U.S. Navy attested that Shine was a good person who had "encountered a great deal of adversity" and made "bad choices," but who had a firm support system in the church and local communities. R. 43. Kathleen Costello of the Offender Reentry Program wrote that Shine was "open to receiving help" that would get him back on track. R. 45.

[1] These cases were consolidated for purposes of appeal in the Third District. Record references contained in this brief are to the record on appeal in case 3D16-2876.

The trial judge, the Honorable Mark Jones, accepted the plea bargain and issued a downward departure. The probation sentence focused on drug rehabilitation: Shine was ordered to undergo urinalysis twice weekly to detect the presence of drugs or alcohol, satisfy various drug court requirements, attend Alcoholics Anonymous and Narcotics Anonymous three times per week, and stay clear of substances. R. 57-58.

Probation Violation and Subsequent Departure. For more than half a year, Shine complied with these conditions. But in October 2015 the State alleged that Shine had violated his drug offender probation by testing positive for a synthetic cannabinoid called Spice. R. 64. When an officer with the Key West Police Department went to arrest Shine for the violation, there was an altercation resulting in a further alleged violation of resisting an officer without violence. R. 77.

Shine admitted to the probation violations. R. 98-99, 148. Prior to the second sentencing hearing, the court again received a series of letters from Shine's friends and family expressing their support and requesting leniency. Shine's girlfriend, Crystal Ramos, wrote that Shine turned to drug use (the synthetic cannabinoid) after learning that the couple had lost their unborn child to a miscarriage. R. 101. (Shine himself would later acknowledge at the sentencing hearing that he made a serious mistake by using the drug following a difficult month in which he learned of the miscarriage, his niece was admitted to the hospital with a serious illness, and he lost

a friend in a fire. R. 162, 165.) Pastor Beverly Greene-Mingo also submitted a letter discussing Shine's religious life and reporting that, in her experience, Shine had always been courteous and respectful. R. 104.

At sentencing, Judge Jones heard from several defense witnesses, including Shine's father—Deputy Derek Shine Sr.—and Kathleen Costello. Deputy Shine testified that his son continued to have the love and support of his family, who believed that their son needed a "longer drug program" in order to get clean. R. 156-57. Ms. Costello, the representative from the rehab center, testified that, in her opinion, the original drug offender probation failed because Shine lived at home instead of in a more structured rehab environment. R. 153-55. She also believed that Shine, though compliant with the requirements, had focused too much on things like getting a good job and his license, rather than on fixing his underlying issues. R. 153-54. In Ms. Costello's estimation, Shine was "capable of change" and would "benefit from a long-term residential program." R. 154-55.

Defense counsel asked Judge Jones to reinstate probation and order Shine into a long-term rehab program, whereas the prosecutor characterized Shine as violent and unrepentant and asked the court to revoke probation and sentence Shine to the bottom of the 73.65-month bottom of the guidelines reflected on Shine's Criminal Punishment Code scoresheet. R. 158-62.

Judge Jones revoked Shine's probation but imposed a downward departure sentence beneath the bottom of the guidelines: 40 months imprisonment followed by 40 months of drug offender probation. R. 167-68. The court observed that Shine was given a very favorable sentence at the initial sentencing because "everybody thinks that he's got potential and comes from a good family," but declined to reinstate probation this time because Shine had squandered the opportunity previously given to him. R. 167. Yet Judge Jones pointed out that Shine had never been to prison and that a sentence at or above the bottom of the guidelines would be needlessly harsh. R. 168. Despite this downward departure, Shine would nonetheless serve what the judge considered a "very long sentence." *Id.*

As grounds for the departure, Judge Jones cited the original downward departure placing Shine on probation, which was based on a valid, uncoerced plea bargain between Shine and prosecutors. *Id.* The judge's written findings further observed that sentencing Shine within the Code guidelines would be "inappropriate, too harsh, and contrary to the principle of graduated sanctions." R. 138. Unlike the original probationary sentence, the new probation conditions required Shine to complete a long-term, residential rehab program after his prison term, reflecting Ms. Costello's recommendation. R. 135, 169.

In full, the circuit court's written explanation for the departure sentence reads as follows:

> A non-statutory ground for downward departure has been established in these cases. Specifically, the Court finds that the Defendant has been granted a previous downward departure based on a valid uncoerced plea agreement which entailed county jail time and drug offender probation. Based on the previous downward departure, the Court finds that it would be inappropriate, too harsh, and contrary to the principle of graduated sanctions to now sentence the Defendant to 73.65 months imprisonment which is the lowest permissible prison sentence in months absent a downward departure. Rather, the Court finds a downward departure requiring the Defendant to serve forty (40) months in prison followed by forty (40) months drug offender probation on the two (2) first degree felonies and forty (40) months prison followed by twelve (12) months drug offender probation on the two (2) third degree felonies to be appropriate in these cases because said sentence incorporates both a substantial period of incarceration as well as a substantial period of supervision and substance abuse treatment.

R. 138-39.

Original Panel Decision and Rehearing. The State appealed the downward departure sentence, contending that the circuit court failed to provide sufficient reasons to sentence Shine beneath the bottom of the guidelines. A panel of the Third District reversed the departure sentence, finding the circuit court's stated grounds to be an "[in]valid legal basis." Pet. App. 4. In support of that conclusion, the court cited several of its own precedents, none of which dealt with departures predicated on prior downward departures, and omitted any reference to this Court's decision in *Franquiz v. State*, 682 So. 2d 536 (Fla. 1996).[2] The district court opinion specified the following remedy: "Consequently, we reverse and remand for resentencing at

[2] The parties debated the applicability of *Franquiz* in their briefing.

which the trial court *may again impose a downward departure sentence*, but such must be a recognized legally permissible reason for such departure." Pet. App. 4 (emphasis added).

The State moved for rehearing, rehearing en banc, or clarification on the question of the remedy the panel had applied. Rather than permit the trial court to depart downwards based on valid reasons on remand, the State argued, the panel should have confined the trial court to a within-range guidelines sentence. Shine responded by pointing to the many cases from other districts, as well as from within the Third District itself, that had cited this Court's decision in *Jackson v. State*, 64 So. 3d 90 (Fla. 2011), when remanding for *de novo* resentencing.

The panel reheard the case and amended the remedy paragraph as requested by the State. Pet. App. 7. The opinion now constrains the trial court to resentence Shine within the range provided for under the Code. *Id.* ("Consequently, we reverse and remand for resentencing within the sentencing guidelines.").

Shine moved for rehearing en banc, arguing that the panel decision was in intra-district conflict with earlier Third District decisions that remanded for *de novo* resentencing. The full court denied the motion, with one judge, Judge Robert Luck, dissenting from the denial of rehearing en banc. Shine then invoked this Court's discretionary jurisdiction and the Court accepted review.

SUMMARY OF ARGUMENT

I. The sentencing judge did precisely what this Court's precedent in *Franquiz v. State* permits: consider the fact of a prior downward departure sentence when exercising its discretion to impose a new departure upon revocation of probation. In *Franquiz*, the Court held that although a prior departure does not "guarantee" a new departure, it is a sufficient mitigating "factor" to support a subsequent departure. When electing to depart under this factor, a sentencing judge must explain in writing why it deems the original departure a "valid reason" for a below-guidelines sentence under the current facts of the case.

Applying that framework, the circuit judge here cited the fact of the prior departure as the mitigating factor that endowed the court with discretion to sentence Shine below the guidelines. It further explained that it was exercising that discretion based on two considerations. First, the departure sentence incorporated a "substantial period of supervision and substance abuse treatment," and the conditions of the new probation require Shine—in accordance with Ms. Costello's expert recommendation—to complete an inpatient drug program. Second, the sentencing judge determined that a prison term within the guidelines would be "too harsh," "inappropriate," and "contrary to the principle of graduated sanctions."

The Third District did not so much as cite *Franquiz*, let alone explain why it did not authorize this sentence. The departure should be reinstated.

II. Should this Court disagree that *Franquiz* was satisfied here, it should nonetheless quash the portion of the Third District opinion addressing the remedy. Every district besides the Third District remands for *de novo* resentencing, allowing the possibility of a new departure, when reversing a downward departure due to the substantive invalidity of the sentencing judge's written reasons. In doing so, those districts faithfully apply this Court's decision in *Jackson*. There, the Court interpreted the Criminal Punishment Code and concluded that nothing within the Code divests a circuit court of its typical discretion to depart at a resentencing hearing provided that valid reasons exist.

Though the State has contended throughout this litigation that *Jackson* is not the controlling precedent, it has previously conceded that *Jackson* compels *de novo* resentencing under these exact circumstances. In *Glover*, this Court ordered the State to show cause why its newly-released decision in *Jackson* should not govern the remedy when a district court reverses a downward departure on substantive grounds. In language equally applicable here, the State candidly admitted: "Although the reasons for the downward departure were different in each case, *Jackson* controls the issue of whether the trial court may impose a departure sentence on remand." This Court unanimously agreed, and *Glover* and *Jackson* remain the law of Florida.

Even if those binding decisions were not on the books, remand with the possibility of a new departure is the only remedy that accords with bedrock sentencing principles. First, as this Court has time and again held, resentencing is a brand new proceeding that must be conducted *de novo* absent some compelling reason to the contrary. Second, sentencing judges have traditionally enjoyed near complete discretion in matters of sentencing. And third, individualized sentencing is a goal of the Criminal Punishment Code, one that cannot be met if sentencing judges are prevented from exercising full discretion on remand. Thus, even if the downward departure in this case were somehow unlawful, the Third District erred by tying the circuit judge's hands at resentencing.

STANDARD OF REVIEW

Whether there is a valid legal ground for a downward departure sentence is a pure question of law reviewed *de novo*. *See, e.g., Wynkoop v. State*, 14 So. 3d 1166, 1171 (Fla. 4th DCA 2009) (citing *State v. Walker*, 923 So. 2d 1262, 1264 (Fla. 1st DCA 2006)). This Court has similarly held that the proper remedy in the event a downward departure is reversed on appeal is a "legal question" subject to *de novo* review. *Jackson v. State*, 64 So. 3d 90, 92 (Fla. 2011).

ARGUMENT

I. THE DOWNWARD DEPARTURE SENTENCE WAS VALID

More than two decades ago, this Court authorized sentencing judges to consider the fact that a defendant previously received a downward departure sentence when again departing at a revocation of probation hearing. That factor alone can justify a new departure so long as the sentencing court considered the contemporaneous facts and circumstances of the case when electing to exercise its discretion to impose the subsequent departure. Because that is precisely the analysis the sentencing judge conducted here, this Court should reverse the Third District and reinstate the departure sentence.

A. This Court held in *Franquiz* that a prior downward departure based on an uncoerced plea can validate future departures

A circuit judge is normally bound by the bottom of the sentencing guidelines when selecting an appropriate prison term in a criminal case. *See* § 921.0024(2), Fla. Stat. (2015); § 921.0026(1), Fla. Stat. (2015). But the Criminal Punishment Code permits circuit judges to issue a "downward departure" sentence, meaning a sentence below the bottom of the guidelines, under appropriate circumstances. § 921.0024(2); § 921.0026(1). A trial court's decision to depart is a two-part process. First, the court must determine whether it *can* depart, "i.e., whether there is a valid legal ground and adequate factual support for that ground." *Banks v. State*, 732 So. 2d 1065, 1067 (Fla. 1999). Second, the court must determine whether it

should depart, "i.e., whether departure is indeed the best sentencing option for the defendant in the pending case." *Id.* A court must explain its reasons for the departure in writing. § 921.002(1)(f), Fla. Stat. (2015).

To guide sentencing judges in the first step of this inquiry, the Criminal Punishment Code provides a list of factors that may warrant such a departure, and also permits circuit judges to consider non-statutory factors that are consistent with the aims of the Code. *See* § 921.0026(2), Fla. Stat. (2015). A body of case law has further delineated the permissible grounds for a downward departure.

As relevant to the current dispute, this Court has previously addressed "whether an initial downward departure sentence is always, never, or sometimes a reason for the trial court's subsequent downward departure in sentencing for a revocation of the initial sentence." *Franquiz v. State*, 682 So. 2d 536, 537 (Fla. 1996). Answering that question, it held that the existence of a "prior downward departure"—though not a "guarantee"—is a "factor" sufficient to authorize a subsequent downward departure. *Id.* When a sentencing judge relies on that factor, it should describe in writing its reasons for concluding that the prior departure is a "valid reason for a subsequent downward departure at the revocation sentencing." *Id.* at 538.

Franquiz specifically approved as a ground for departure the fact that prosecutors had previously agreed to a downward departure as part of a valid,

uncoerced plea bargain. *Id.* at 537 (holding that "a trial court may consider the State's prior agreement for a downward departure as a factor during resentencing"). But it clarified that a sentencing judge may not focus solely on the defendant's situation at the time of the original sentencing; a court must instead account holistically for "all the circumstances through the date of the revocation sentencing." *Id.* at 538.

In fashioning that rule, this Court relied on two district court decisions, both worth discussing here. *Id.* at 537. In *State v. Devine*, a defendant was originally sentenced to a term of community control pursuant to a plea agreement with prosecutors. 512 So. 2d 1163, 1164 (Fla. 4th DCA 1987). When the defendant violated the terms of community control, the trial court sentenced her to six years in prison, well beneath the guidelines range. *Id.* As a justification for that departure, the court cited "the previous agreement by the state to a sentence below the guidelines." *Id.* The State appealed.

The Fourth District concluded, in a holding later approved by this Court in *Franquiz*, that "[t]here is no reason why a trial court may not consider during resentencing the state's prior agreement to a sentence of probation or community control as a clear and convincing reason to mitigate." *Id.* (citation omitted).

Franquiz also approved the First District's decision in *State v. Nickerson*, 541 So. 2d 725 (Fla. 1st DCA 1989). Like the defendant in *Devine*, Mr. Nickerson

initially received a departure sentence based on a plea agreement with the State. *Id.* at 726. Upon the prosecutor's allegation that he had violated the terms of his probation, Mr. Nickerson admitted to the violations and asked the trial court to sentence him below the guidelines, to which the prosecutor objected. *Id.* Among other reasons for imposing a departure, the trial court wrote that "the guidelines from the original plea agreement precludes the Court from going up several cells on the guidelines from which the defendant pled to originally." *Id.* On appeal, the district court cited *Devine* for the proposition that a prior departure pursuant to a plea bargain *could* justify a subsequent departure, but reversed and remanded to correct the trial court's seemingly mistaken view that it was *required* to depart downwards based on the prior departure. *Id.* at 727.

In light of these decisions, a clear framework governs a judge's decision to depart based on an earlier departure.

B. The sentencing judge properly considered both the fact of the prior departure and Shine's current circumstances

The circuit court's stated justifications, arrived at within the sound exercise of its discretion, should have been sufficient to sustain the departure. In fact, the sentencing judge applied precisely the analysis this Court prescribed in *Franquiz* and in *Banks*.

First, the circuit court considered whether it *could* depart based on the presence of a mitigating factor. It wrote: "A non-statutory ground for downward

departure has been established in these cases. Specifically, the Court finds that the Defendant has been granted a previous downward departure based on a valid uncoerced plea agreement ….” R. 138. That was a lawful consideration under *Franquiz*, which held that a prior downward departure was a sufficient mitigating “factor.” 682 So. 2d at 537.

Second, the court considered whether, under the unique facts and circumstances before it, it *should* depart. On that point, the judge had to explain why the prior departure was a “valid reason for a subsequent departure” given “all the circumstances through the date of the revocation sentencing.” *Id.* at 538. In doing that calculus, the circuit court credited the expert opinion of Kathleen Costello, who testified at the probation revocation hearing that Shine was amenable to treatment but needed a more structured rehabilitation environment in order to be successful. As Ms. Costello pointed out, Shine’s treatment program had failed during the original probationary term partly because he was permitted to reside at home instead of at an inpatient facility. R. 153-55. In Ms. Costello’s opinion, Shine “would benefit from a long-term residential program.” R. 154-55.

Heeding that advice, the sentencing judge concluded that a departure was warranted to ensure Shine received a meaningful opportunity at rehabilitation. R. 138-39. Though the court properly understood that the primary purpose of criminal sentencing is “punish[ment],” R. 163, it also recognized that Shine’s

criminal behavior was a product of drug addiction. *Cf. Lawson v. State*, 969 So. 2d 222, 236 (Fla. 2007) ("[T]rial courts should always be mindful of the underlying disease of addiction and aware that at times circumstances make it difficult for the defendant to comply[.]"). In its written findings, the judge found the departure sentence "appropriate" because it included both an incarcerative element and a "substantial period of supervision and substance abuse treatment." R. 138-39. And the conditions of the new probation give effect to that view by requiring Shine to "enter and complete [a] residential program after prison." R. 135.

Moreover, the sentencing judge's concern for Shine's drug addiction problem explains how the subsequent departure was related to the original downward departure. The original departure was targeted at addressing Shine's obvious need for drug treatment: the parties agreed that Shine would plead guilty and serve a three-year period of drug offender probation requiring, among other conditions, that Shine undergo biweekly urinalysis, complete drug court, and attend Narcotics Anonymous and Alcoholics Anonymous meetings. R. 46-48, 55-60. The terms of that plea agreement were an acknowledgment of Shine's drug problem, as well as the parties' belief that an appropriate sentence should seek to *treat* those issues, not merely to incarcerate Shine.

The subsequent departure sentence acknowledged those same underlying concerns and sought to correct deficiencies in the original drug offender probation

by ratcheting up the degree of supervision Shine would receive from drug counselors; unlike the outpatient treatment Ms. Costello deemed inadequate in the circuit court's first attempt to rehabilitate Shine, the subsequent departure required Shine to check himself into inpatient treatment. *Cf. Lawson*, 969 So. 2d at 235 (observing that "flexibility of the treatment program is vital" to the success of recovering drug addicts serving probation).

As a result, Ms. Costello's testimony and the attendant circumstances of this case (*e.g.*, Shine violated drug offender probation by consuming a banned substance) provided ample competent, substantial evidence supporting the exercise of the sentencing judge's discretion.

Along with Shine's need for drug rehabilitation, the court's written findings also considered that Shine had never previously served a prison term and that sentencing him to the bottom of the guidelines would be needlessly severe. While it determined that Shine should face a "lengthy" period of incarceration, in its written findings the court explained that a sentence within the guidelines would be "inappropriate, too harsh, and contrary to the principle of graduated sanctions." R. 168, 138. The sentencing judge could properly conclude that, in light of the original departure sentence, Shine should not go from zero prison time to 73 months in prison simply because he fell off the wagon.

That reasoning echoed defense counsel's argument during the sentencing hearing that the path to recovery for people "battling substance abuse issues" is "not paved perfectly." R. 151. By sentencing Shine to a lengthy prison term that nonetheless fell short of the bottom of the guidelines, the court fashioned a sentence that was proportional to the nature of Shine's probation violation and accounted for the continued need for recovery and rehabilitation.

As these findings demonstrate, the sentencing judge did not rely exclusively on the fact of the prior departure. Though it was cognizant of that fact, the court considered the contemporary facts and circumstances of Shine's case when concluding that a departure was the appropriate sentence. Put differently, the judge did not issue this sentence because it thought a new departure was "*guarantee*[*d*]" by the previous one. *Franquiz*, 682 So. 2d at 537 (emphasis added). It imposed the departure because it believed doing so was warranted.

Unlike the sentencing judge, the district court conducted none of this analysis, failing even to cite *Franquiz*, let alone explain why that decision was inapplicable. It instead relied on several of its own prior decisions. Pet. App. 7 (citing *State v. Pita*, 54 So. 3d 557 (Fla. 3d DCA 2011); *State v. Kasten*, 775 So. 2d 992 (Fla. 3d DCA 2000); *State v. Nolasco*, 542 So. 2d 1052 (Fla. 3d DCA 1989)). But none of those decisions dealt with downward departures based on *prior* departures; rather, each reversed a downward departure predicated on an open plea entered by the

defendant without the consent of the prosecutor. *Id.* As the district court recognized in those earlier cases, only a negotiated "plea bargain" will justify an initial departure, not open pleas to which the State is not a party.

That is, if a criminal defendant pleads guilty to the court without a prearranged commitment from the prosecutor as to the length of the sentence, the trial court may not depart downward absent some other justification. But those precedents say nothing at all about the situation where, as here, the district court was not considering the legality of an *initial* departure but rather a *subsequent* departure following revocation of probation. Under *Franquiz*, the circuit court was permitted to consider the initial plea bargain and departure when electing to depart downwards at the probation revocation hearing, so long as it evaluated all the facts at the time of the revocation hearing.

At bottom, the sentencing judge did exactly what our system of justice demands: it holistically assessed both the facts of the case and the unique characteristics of this offender, keeping in mind both the primary purpose of the Criminal Punishment Code—punishment—but also the goal of rehabilitation under the proper set of circumstances. *See* § 921.002(1)(b), Fla. Stat. (2015) (calling rehabilitation a "desired goal of the criminal justice system"). This Court should reverse the Third District and reinstate the lawful downward departure.

II. EVEN IF THE DEPARTURE WERE INVALID, THE PROPER REMEDY WAS A REMAND FOR DE NOVO RESENTENCING

In the event this Court believes the departure was unlawful, however, it must also consider the proper remedy when a district court reverses a downward departure sentence. That inquiry is controlled by this Court's own precedent, the unanimous view of every district court outside the Third District, and foundational principles of Florida sentencing law. As explained below, a reviewing court cannot preclude a sentencing judge from imposing a new departure on remand if a valid ground exists to support that new departure.

A. Interpreting the Criminal Punishment Code, this Court held in *Jackson* and *Glover* that sentencing judges should have an opportunity to consider departing on remand

The proper remedy in this case is controlled by *Jackson v. State*, 64 So. 3d 90 (Fla. 2011), which laid out the broad principle that a circuit court may consider again departing downward on remand, and *Glover v. State*, 75 So. 3d 238 (Fla. 2011), which applied *Jackson* in the specific context of departure reversals based on substantive—as opposed to procedural—grounds.

In *Jackson*, this Court reversed the imposition of a downward departure sentence because the trial court did not adhere to section 921.002(1)(f)'s requirement that a departure sentence be justified by written findings, a procedural defect. *Id.* at 92-93. It then analyzed which remedy should accompany the reversal of a downward departure sentence, observing that the Criminal Punishment Code "is

silent on how a trial court must resentence a defendant when the original departure sentence is reversed on appeal." *Id.* at 92. Based on its "reading of the legislative scheme," the Court concluded that "nothing within the [Code] precludes the imposition of a downward departure sentence on resentencing following remand." *Id.* at 93. It therefore allowed the trial court to consider reimposing a downward departure at a *de novo* resentencing hearing. *Id.*

Notably, the Court did not confine that holding to cases in which the reversal was predicated on the procedural failure to provide written reasons, and instead employed broad language forbidding "an appellate court [from] preclud[ing] a trial court from resentencing a defendant to a downward departure if such a departure is supported by valid grounds." *Id.* The sole limitation *Jackson* imposed on that rule is the requirement that any new departure "comport[] with the principles and criteria prescribed by the Code." *Id.* In other words, a trial court may always consider reimposing a downward departure sentence on remand so long as there are legally valid reasons for departing.

While *Jackson* dealt with a reversal based on procedural grounds—the failure to provide written reasons for a departure—this Court later applied it in the very context at issue here: the reversal of a downward departure on substantive grounds. *See Glover*, 75 So. 3d 238. The facts of *Glover* are laid out in the First District's decision in *State v. Glover*, 25 So. 3d 38 (Fla. 1st DCA 2009). The circuit court

there sentenced Anthony Glover to a downward departure sentence for the offense of possession of a firearm by a convicted felon because it found that Glover took the firearm to a nightclub out of necessity: in the days leading up to the evening when police discovered him with the firearm, Glover and his family had allegedly been threatened by an armed man. *Id.* at 38-39. On appeal, the First District agreed with the State that, under the *Banks* test for evaluating the validity of a downward departure sentence, the circuit court abused its discretion because "[t]here was no indication [Glover] reasonably believed that danger was immediate or imminent." *Id.* at 39. As a result, there was no competent, substantial evidence to sustain the departure under those facts. *Id.* at 39 n.1. The court remanded for "resentencing within the guidelines." *Id.* at 39.

The First District's reversal of that downward departure was clearly based on a substantive error, not a procedural failure to provide reasons. When Glover appealed to this Court, the Court stayed the proceedings pending its resolution of *Jackson*. And after deciding *Jackson*, the Court ordered the State to show cause why the case should not be remanded to the district court with instructions to apply that new precedent. *See Glover*, 75 So. 3d 238. The State's response is telling: "Although the reasons for the downward departure were different in each case, *Jackson* controls the issue of whether the trial court may impose a departure sentence on remand." St.'s Resp. to Order to Show Cause, SC10-254, at *1 (filed July 8,

2011). That is, the State conceded that *Jackson* governs the remedy regardless if the departure is reversed due to a procedural or substantive defect.

A unanimous panel of this Court agreed, quashing the First District's opinion. *Glover*, 75 So. 3d 238. Together, *Jackson* and *Glover* resolve the remedy issue in this case: when a downward departure is reversed on appeal—*whatever the reason for the reversal*—the sentencing judge must have a new opportunity to depart on remand.

What a difference a few years can make. The State, both in its jurisdictional brief to this Court in the present case and in its briefs in the Third District, now seeks to walk back its earlier concession, alleging that *Jackson* is distinguishable because it addressed a reversal due to procedural reasons.

But, at the outset, even had *Glover* not already settled the matter, it would make little sense to confine *Jackson*'s holding to cases involving procedural defects. This Court answered the question in *Jackson* by interpreting the Criminal Punishment Code, which nowhere specified that a sentencing judge was precluded from again departing on remand in the event a lawful basis was available. That statutory scheme does not differentiate between downward departures unsupported by written reasons and downward departures unsupported by valid reasons; in either scenario, the Code treats the departure as illegal. Given that the statutory scheme is identical in both contexts, the remedy should be too.

Nor do the cases cited by the State support overruling *Glover*. In support of its position that the sentencing court's discretion should be eliminated on remand, the State has cited a decision addressing the proper remedy upon reversal of an *upward* departure. *See Shull v. Dugger*, 515 So. 2d 748 (Fla. 1987); *see also Pope v. State*, 561 So. 2d 554 (Fla. 1990). In that scenario, this Court has held that reconsideration of an upward departure sentence is unlawful because doing so would "needlessly subject the defendant to unwarranted efforts to justify the sentence." *Shull*, 515 So. 2d at 750.

This Court has already narrowed *Shull* and *Pope*'s applicability to scenarios in which their policy justifications are directly implicated. In the context of habitual offender sentencing, for instance, this Court refused to apply *Shull* to preclude prosecutors from again seeking a habitualized sentence on remand after an initial habitualized sentence was reversed on appeal. *State v. Collins*, 985 So. 2d 985, 992 (Fla. 2008). The Court explained that *Shull* did not apply because "the concerns *Shull* addressed do not apply." *Id.*

Applying that principle here, *Shull* and *Pope* were concerned solely with preventing criminal *defendants* from being repeatedly subjected to efforts to justify an upward departure sentence. That concern is absent when the type of departure at issue is a downward departure. If anything, every defendant welcomes an opportunity for the circuit court to again depart on remand, potentially reducing the

defendant's prison exposure. Thus, because situations involving reversals of downward departures do not implicate *Shull*'s concern for criminal defendants, it cannot possibly apply in this context.

And while the State has contended during this litigation that *Shull* should be extended to cover downward departures in order to safeguard the State's interests in finality, its concerns are exaggerated. For one thing, the criminal law has long afforded far greater due process protections to defendants than to prosecutors, in recognition of the fact that criminal defendants are individual persons who can suffer concrete harm to their liberty interests, as opposed to more generalized harms that occur to institutions like the State of Florida.

Perhaps more significantly, though the State speculates that a circuit judge might repeatedly and wantonly impose unlawful downward departure sentences, it offers no basis to conclude that Florida constitutional officers will abuse their authority in that manner. If anything, the law presumes that circuit judges will discharge their duties responsibly and with a good faith regard for the statutory requirements for issuing downward departures. *See Bryant v. State*, 148 So. 3d 1251, 2160-61 (Fla. 2014) (Canady, J., dissenting) ("[I]t should not be presumed that judges will abuse their discretion by providing … pretextual reasons for downward departures on remand."). Upon remand for *de novo* resentencing, there is every

reason to expect that judges will impose a guidelines sentence unless he or she honestly believes a mitigating factor is present.

As these considerations make abundantly clear, there is no reason to overrule *Glover* and extend *Shull*. The correct remedy in cases like Shine's is instead dictated by this Court's existing precedent.

B. With the lone exception of the Third District, district courts have unanimously applied *Jackson* in the context of substantive downward departure reversals

Consistent with Shine's understanding of the state of the law, the district courts have repeatedly acknowledged that *Jackson* governs "*downward* departure[s]," whereas *Shull* applies to "*upward* departure[s]." *E.g.*, *Jones v. State*, 71 So. 3d 173, 176 (Fla. 1st DCA 2011) (emphasis in original). In fact, with the lone exception of the Third District, the districts unanimously apply *Jackson* to permit consideration of a new downward departure after reversing the existing departure on substantive grounds. The following is a representative sampling of case law properly applying *Jackson* to downward departure reversals.

First District. In *Lee*, the First District reversed a downward departure because insufficient evidence supported the statutory mitigating factor cited by the circuit court and because each of the cited non-statutory mitigators were legally impermissible. *Lee v. State*, 223 So. 3d 342, 359-60 (Fla. 1st DCA 2017) (en banc). The court then considered the proper remedy. Citing *Jackson*, it wrote: "On remand,

the trial court may again consider imposing a departure sentence if there are valid legal grounds to support the departure sentence, and those legal grounds are supported by competent, substantial evidence." *Id.* at 360.

Second District. In *Pinckney*, the Second District found a lack of competent, substantial evidence to support a downward departure and therefore reversed the sentence. *State v. Pinckney*, 173 So. 3d 1139, 1139-40 (Fla. 2d DCA 2015). Rather than forbid the possibility of a new departure at resentencing, the Second District wrote, citing *Jackson*: "On remand, the court is free to impose another downward departure if Pinckney can establish a valid basis." *Id.* at 1140. Even more recently, the Second District cited *Jackson* when authorizing *de novo* resentencing after reversing a departure predicated on a need for restitution that was not borne out by the record. *State v. Lackey*, No. 2D16-3026, 43 Fla. L. Weekly D1224 (Fla. 2d DCA June 1, 2018).

Fourth District. The Fourth District applies the same remedy. In *State v. Michels*, it reversed a downward departure because the stated ground was not supported by the evidence. 59 So. 3d 1163, 1165 (Fla. 4th DCA 2011). The panel initially remanded for resentencing "within the guidelines." *Id.* at 1166. But on rehearing, the panel amended its opinion to conform to this Court's holding in *Jackson*: "On remand, the trial court should be again permitted to depart if it finds a legally sufficient reason to do so." *Id.*

Fifth District. Last, the Fifth District in *Milici* rejected each of the trial court's stated grounds for a downward departure as unsupported by competent, substantial evidence. *State v. Milici*, 219 So. 3d 117, 124 (Fla. 5th DCA 2017). As with the other districts, it then cited *Jackson* and held that "the trial court may still impose a downward departure sentence if such a sentence is supported by valid grounds." *Id.* (internal quotation marks omitted).

Thus, nearly all district courts have understood *Jackson*, as the State itself did in *Glover*, to bar any limitation on a sentencing judge's authority to again consider departing downwards on remand.

C. Permitting a new opportunity to depart downwards is consistent with fundamental sentencing principles

Even ignoring for the moment the mountain of authority favoring Shine's position, allowing circuit courts to again depart on remand is consistent with several fundamental sentencing precepts. First, this Court has repeatedly held that resentencing proceedings are *de novo* in nature, absent some overwhelming, countervailing interest. Second, circuit judges traditionally enjoy broad discretion in the imposition of criminal sentences. And third, fully individualized sentencing is critical to fair outcomes.

Resentencing is a *de novo* proceeding. "[T]his Court has long held that where a sentence has been reversed or vacated, the resentencings in all criminal proceedings . . . are *de novo* in nature." *State v. Fleming*, 61 So. 3d 399, 406 (Fla.

2011). In death penalty cases, "[t]he basic premise of sentencing procedure is that the sentencer is to consider all relevant evidence regarding the nature of the crime and the character of the defendant to determine appropriate punishment." *Wike v. State*, 698 So. 2d 817, 821 (Fla. 1997). The Court has therefore recognized that a resentencing must go forward "as an entirely new proceeding," *id.*, and that a resentencing is "*de novo* on all issues bearing on the proper sentence." *Teffeteller v. State*, 495 So. 2d 744, 745 (Fla. 1986).

The same rule applies in noncapital cases, where the Court has concluded that "resentencing entitles the defendant to a *de novo* sentencing hearing with the full array of due process rights." *Trotter v. State*, 825 So. 2d 362, 367-68 (Fla. 2002); *see also Bryant*, 148 So. 3d at 1260 (Canady, J., dissenting).

Given that resentencing hearings proceed on clean slate, a circuit court is not limited by the evidence originally presented. *See Lucas v. State*, 841 So. 2d 380, 387 (Fla. 2003) ("[A] resentencing court is not limited by evidence presented (or not presented) in … the original … sentencing phase."); *Mann v. State*, 453 So. 2d 784, 786 (Fla. 1984) (recognizing that where a remand directs a new sentencing proceeding, both sides may present additional evidence). When it comes to downward departure sentencing, this means that a defendant may present the sentencing judge with new evidence in support of a different mitigating factor on

remand. With the admission of new evidence, new valid bases for a downward departure may arise.

And what's good for the goose is good for the gander. In *Collins*, a criminal defendant succeeded in vacating a habitual offender sentence because the evidence at the sentencing hearing was "insufficient" to sustain the habitual offender designation. 985 So. 2d at 986. But, in keeping with the longstanding rule that "resentencing is a new proceeding," this Court permitted the State to again attempt to make its case for habitualization on remand. *Id.* at 989. Shine seeks nothing more or less than equal treatment here.

Deviating from the normal practice of *de novo* resentencing would lead to absurd results in many prosecutions. It will often be the case, for instance, that a defendant presents a circuit court with multiple potential grounds for a downward departure. Determining that one or another ground is particularly compelling, the court imposes the departure predicated on that ground alone, without the need to make factual or discretionary findings with respect to the other proffered grounds. In that circumstance, it would be unreasonable to prevent the sentencing judge from evaluating those remaining grounds on remand.

Sentencing judges enjoy broad discretion. In the same vein, it is a basic tenet of sentencing law that circuit courts possess "traditional discretion" to consider "all facts and circumstances surrounding the criminal conduct of the accused." *Garcia*

v. State, 454 So. 2d 714, 716-17 (Fla. 1st DCA 1984), *overruled on other grounds*, *Barr v. State*, 674 So. 2d 628 (Fla. 1996). That discretion spans all facets of sentencing law, including "broad discretion in imposing a sentence within a statutory range," *United States v. Booker*, 543 U.S. 220, 233 (2005), "broad discretion in determining what probation conditions to impose," *Demott v. State*, 194 So. 3d 335, 338 (Fla. 2016), "wide discretion regarding the factors it may consider when imposing a sentence," *Bracero v. State*, 10 So. 3d 664, 665 (Fla. 2d DCA 2009), and discretion to determine "what is relevant evidence at sentencing." *Stano v. State*, 473 So. 2d 1282, 1286 (Fla. 1985).

Appellate courts have similarly respected this discretion in the realm of departure sentencing. In *Banks*, this Court explained that so long as a valid mitigating factor exists, the ultimate decision to depart "is a judgment call within the sound discretion of the court." 732 So. 2d at 1068. Preempting a circuit court from even *considering* whether to depart again on remand is inconsistent with a sentencing judge's prerogative to fashion appropriate sentences limited only by the requirements of the Criminal Punishment Code.

Criminal sentencing must be individualized. Finally, the criminal justice system exhibits a longstanding preference for individualized sentences targeted to the unique facts and circumstances of each offender. *See, e.g.*, *Lawley v. State*, 377 So. 2d 824, 825 (Fla. 1st DCA 1979) (calling sentencing an "individualized

procedure"). No two offenders will ever truly be the same. Even for those who committed identical crimes, each person brought before the court for sentencing comes from a unique background, has a unique support network (or lack thereof), faces a unique set of challenges, possesses a unique capacity for change, and is uniquely morally culpable. That is why a circuit judge must apply "individualized sentencing criteria in determining the appropriate sentence." *State v. Dixon*, 217 So. 3d 1115, 1122 (Fla. 3d DCA 2017) (citation omitted).

As the Legislature itself observed when adopting the Criminal Punishment Code, the Code entrusts sentencing judges with broad discretion for the very reason that a judge is "closer to the individual facts of his or her cases." Sen. Staff Analysis and Economic Impact Stmt., S.B. 1522 (Apr. 2, 1998). And the Code allows for departure sentences precisely because the Legislature intended to reject the sort of "calculator justice" that ignores the personal characteristics of an offender. *Id.* Though the Code ensures sentencing uniformity by establishing the bottom of the guidelines and statutory maximums, it advances the objective of individualized sentencing by allowing discretion within the sentencing range and the discretion to depart in appropriate circumstances.

Revoking a sentencing judge's discretion to again depart on remand is not only arbitrary, it is antithetical to these important and longstanding features of

criminal sentencing. Even if the departure in this case were somehow illegal, remand must be for a full, *de novo* resentencing.

CONCLUSION

The sentencing judge properly considered both the fact of Shine's previous departure and his present circumstances when imposing a downward departure. We therefore respectfully request that this Court reverse the decision below and reinstate the departure sentence. Alternatively, this Court should quash the decision below with respect to the appropriate remedy. Where a district court reverses a downward departure, whatever the reason for the reversal, a sentencing judge must enjoy the discretion to depart on remand if lawful grounds exist.

Respectfully submitted,

Carlos J. Martinez
Public Defender
Eleventh Judicial Circuit
1320 N.W. 14th Street
Miami, Florida 33125

/s/ Jeffrey Paul DeSousa
Jeffrey Paul DeSousa
Shannon Hemmendinger
Assistant Public Defenders
appellatedefender@pdmiami.com
jdesousa@pdmiami.com
sah@pdmiami.com
(305) 545-1960

August 1, 2018

CERTIFICATE OF SERVICE

Undersigned counsel certifies that a copy of the foregoing has been furnished by electronic mail this **first** day of August 2018 to the following:

Jonathan Tanoos
Assistant Attorney General
Criminal Appeals Bureau
Office of the Attorney General
One S.E. Third Avenue, Suite 900
Miami, FL 33131
crimappmia@myfloridalegal.com
jonathan.tanoos@myfloridalegal.com
Counsel for Respondent

Undersigned counsel hereby designates, pursuant to Rule 2.516, the following e-mail addresses for service of all documents required to be served pursuant to Rule 2.516 in this proceeding: appellatedefender@pdmiami.com (primary e-mail address); jdesousa@pdmiami.com (secondary e-mail address).

/s/ Jeffrey Paul DeSousa
Jeffrey Paul DeSousa
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14-point proportionately spaced Times New Roman.

/s/ Jeffrey Paul DeSousa
Jeffrey Paul DeSousa
Assistant Public Defender