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SUPREME COURT OF FLORIDA

CASE NO. SC18-0688

DEREK LANG SHINE, JR.,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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

RESPONDENT'S ANSWER BRIEF ON THE MERITS

PAMELA JO BONDI
ATTORNEY GENERAL

MICHAEL MERVINE, FBN 692131
Bureau Chief, Criminal Appeals

JONATHAN TANOOS, FBN 88851
Assistant Attorney General
Office of the Attorney General
1 SE 3rd Avenue, Suite 900
Miami, Florida 33131
(305) 377-5441 (tel)
(305) 377-5655 (fax)
(P): CrimAppMia@myfloridalegal.com
(S): Jonathan.Tanoos@myfloridalegal.com

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A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION

Defendant was charged with two counts of sale of cocaine within 1,000 feet of a convenience store and two counts of unlawful use of a two-way communications device. R15-2876 at 10; R15-2877 at 10. Defendant pled guilty to all counts in exchange for a significantly reduced sentence of 3 years of drug probation with special conditions including 6 months of county jail. R15-2876 at 47; R15-2877 at 39. The trial court imposed the sentences as a downward departure resulting from a legitimate, uncoerced plea. R15-2876 at 51-53; R15-2877 at 43-45.

Defendant violated the conditions of his probation. R15-2876 at 64-69, 77-81; R15-2877 at 57-62, 70-74. Defendant admitted to the violations without the benefit of an agreement with the State. R15-2876 at 98-100, 143-49; R15-2877 at 91-93, 136-42. The trial court again imposed a downward departure sentence of 40 months of prison on each count followed by 40 months of drug offender probation on the drug sales counts and 12 months of drug offender probation on the two-way device counts. R15-2876 at 132-37; R15-2877 at 125-30. The trial court relied on the prior downward departure as a non-statutory ground in support of the new departure. R15-2876 at 138-39; R15-2877 at 131-32. The trial court found that "it would be inappropriate, too harsh, and contrary

to the principle of graduated sanctions" to sentence Defendant to 73.65 months – the lowest permissible prison sentence. R15-2876 at 138; R15-2877 at 131.

The State timely appealed the order to the Third District. The Third District reversed the trial court's order finding that the reasons for the departure were not valid. Pet. App. at 4. The Third District initially remanded the case for resentencing at which the trial court could again impose a downward departure sentence. Pet. App. at 4. The State moved for rehearing and argued that the appropriate remedy was remand for resentencing within the guidelines. The Third District granted rehearing and issued a new opinion providing that remedy. Pet. App. at 7. Discretionary review of the Third District's opinion ensued.

B. STATEMENT OF THE CASE AND FACTS

Defendant was charged by information with a total of four counts in two separate cases. In one case, Defendant was charged with sale of cocaine within 1,000 feet of a convenience store, in violation of Fla. Stat. § 893.13(1)(e)(1), and unlawful use of a two-way communications device, in violation of Fla. Stat. § 934.215. R15-2876 at 10. In the other case, Defendant was charged with the same crimes for conduct which occurred on a different date. R15-2877 at 10.

Defendant entered a global negotiated plea and pled guilty to all counts. R15-2876 at 46-49; R15-2877 at 38-41. In exchange for his guilty plea, the

State agreed to a sentence of 3 years of drug probation with special conditions including 6 months of county jail. R15-2876 at 47; R15-2877 at 39.[1] The trial court imposed the significantly reduced sentence. R15-2876 at 55-60; R15-2877 at 48-53.

On the sentencing scoresheet, the trial court calculated the lowest permissible sentence as 69.15 months and imposed a downward departure sentence resulting from a legitimate, uncoerced plea bargain. R15-2876 at 51-53; R15-2877 at 43-45.

Shortly after Defendant was released on probation, the Department of Corrections filed an affidavit of violation of probation. R15-2876 at 64-69; R15-2877 at 57-62. The affidavit alleged that Defendant violated probation by testing positive for use of synthetic marijuana. R15-2876 at 64; R15-2877 at 57.

The Department filed an amended affidavit. R15-2876 at 77-81; R15-2877 at 70-74. The amended affidavit alleged that Defendant also violated probation by resisting arrest without violence. R15-2876 at 77; R15-2877 at 70. When probation officers tried to arrest Defendant for his violation, Defendant pushed the officers, tried to run, and was arrested only after the officers subdued Defendant with a taser gun. R15-2876 at 78-79; R15-2877 at 71-72.

[1] In a third case, Defendant was on probation and also admitted to violating probation as part of the global plea. R15-2876 at 46; R15-2877 at 38. The State agreed to reinstatement of probation. R15-2876 at 47; R15-2877 at 39.

Defendant admitted to violating probation without the benefit of an agreement with the State. R15-2876 at 98-100, 143-49; R15-2877 at 91-93, 136-42. Defendant acknowledged that the statutory maximum sentence that the trial court could impose was 71 years of state prison. R15-2876 at 99; R15-2877 at 92. Defendant also acknowledged that the lowest permissible sentence on the new scoresheet was 73.65 months. R15-2876 at 96, 146; R15-2877 at 89, 139.

At sentencing, the State asked for the lowest permissible sentence of 73.65 months on the drug sales counts and 60 months on the two-way device counts[2]. R15-2876 at 161-62; R15-2877 at 154-55.[3] The State explained that (1) Defendant had a lengthy prior criminal history; (2) Defendant initially lied to probation by denying that he used synthetic marijuana; (3) Defendant fled from probation officers when confronted; (4) while on probation, Defendant harassed the informant who told authorities about Defendant's crimes; and (5) the trial prosecutor had previously agreed to drug offender probation but advised Defendant that a violation of probation would result in a lengthy prison sentence. R15-2876 at 158-62; R15-2877 at 151-55.

[2] Unlawful use of a two-way communications device is a third degree felony with a statutory maximum of 5 years – or 60 months. Fla. Stat. § 934.215; Fla. Stat. § 775.082(3)(d).

[3] In the third case, the State asked for one year of county jail. R15-2876 at 161-62; R15-2877 at 154-55.

The defense asked the trial court to reinstate Defendant on probation and allow him to get long-term residential treatment for his substance abuse problems. R15-2876 at 152; R15-2877 at 145. Defendant's girlfriend had suffered a miscarriage, Defendant's niece had been hospitalized, and Defendant turned to drugs to cope. R15-2876 at 150; R15-2877 at 143. A coordinator with an offender reentry program testified that Defendant would benefit from a long-term residential treatment program. R15-2876 at 153-55; R15-2877 at 146-48. His father testified and asked that Defendant be allowed to participate in that program. R15-2876 at 156-57; R15-2877 at 149-51.

Over the State's objection, the trial court imposed a downward departure sentence. R15-2876 at 167-68, 171; R15-2877 at 160-61, 164. The trial court relied on the prior downward departure as a non-statutory ground in support of the new departure. The trial court believed that going from "basically never having been to prison to 73.65 months" would be "just too extreme". R15-2876 at 168, 171-72; R15-2877 at 161, 164-65.

The trial court sentenced Defendant to 40 months on each count with all sentences to run concurrently. R15-2876 at 110-15; R15-2877 at 103-08. The trial court imposed a consecutive 40 months of drug offender probation on the drug sale counts and 12 months of probation on the two-way device counts.

R15-2876 at 132-37; R15-2877 at 125-30.[4] The trial court also entered a written order revoking probation and a written judgment of conviction for all crimes. R15-2876 at 110, 137; R15-2877 at 103, 130.

The trial court also rendered a two-page written statement explaining the reasons for the departure. R15-2876 at 138-39; R15-2877 at 131-32. The trial court identified the prior downward departure based on the valid plea agreement as a non-statutory ground in support of a new departure. R15-2876 at 138; R15-2877 at 131. The trial court found that "it would be inappropriate, too harsh, and contrary to the principle of graduated sanctions" to sentence Defendant to 73.65 months – the lowest permissible prison sentence. R15-2876 at 138; R15-2877 at 131. The trial court concluded that a downward departure sentence would be appropriate because the sentence "incorporates both a substantial period of incarceration as well as a substantial period of supervision and substance abuse treatment". R15-2876 at 138-39; R15-2877 at 131-32.

The State timely appealed to the Third District the trial court's order granting a downward departure. R15-2876 at 91; R15-2877 at 84. On appeal, the State argued that, while the prior departure for the valid plea agreement was a factor that could be considered in imposing a downward departure, the trial

[4] In the third case, the trial court sentenced Defendant to one year with credit for time served. R15-2876 at 167; R15-2877 at 160.

court still had to consider all the circumstances and state in writing whether the departure should be imposed. IB15-2876 at 10; IB15-2877 at 10. The trial court's stated reasons were not valid. IB15-2876 at 11-13; IB15-2877 at 11-13. The State asked that the case be remanded for resentencing within the guidelines. IB15-2876 at 13; IB15-1877 at 13.

Defendant argued that the trial court supported the downward departure based on the prior uncoerced plea agreement, the nature of the violations of probation, and the need for a more specialized sentence. AB15-2876 at 7; AB15-2877 at 7. Defendant only asked that the sentences be affirmed. AB15-2876 at 8-9; AB15-2877 at 8-9.

The Third District initially reversed the trial court's order granting the downward departure. Pet. App. at 2-3. The Third District concluded that the reasons in support of the departure did not amount to a valid legal basis. Pet. App. at 3-4. The Third District remanded for "resentencing at which the trial court may again impose a downward departure sentence, but such must be a recognized legally permissible reason for such sentence". Pet. App. at 4.

The State moved for rehearing or clarification only on the remedy provided in the opinion. Citing *Shull v. Dugger*, 515 So. 2d 748 (Fla. 1987) and other Third District opinions, the State argued that the appropriate remedy was to remand the case for resentencing with the guidelines. Mot. Rhg. at 5-7. The

Third District agreed, withdrew its prior opinion, and issued a new opinion which remanded for "resentencing within the sentencing guidelines". *State v. Shine*, 2018 WL 522239 at *1 (Fla. 3d DCA Jan. 24, 2018).

Defendant moved for rehearing en banc – also only on the remedy – or for certification of conflict. The Third District denied the motion.

Defendant petitioned this Court for discretionary review of both the merits and the remedy in the Third District's opinion. The Court granted jurisdiction and briefing ensued.

STANDARD OF REVIEW

Whether a downward departure is supported by a valid legal ground is a question of law and reviewed on appeal de novo. *Banks v. State*, 732 So. 2d 1065, 1067 (Fla. 1999); *State v. Schultz*, 238 So. 3d 288, 289-90 (Fla. 4th DCA 2018). Whether the trial court applied the incorrect standard in determining whether to exercise its discretion in imposing a departure is also reviewed de novo. *Barnhill v. State*, 140 So. 3d 1055, 1060-61 (Fla. 2d DCA 2014). And whether a trial court is precluded from imposing a departure on remand when an original departure sentence is reversed is a question of law and reviewed de novo. *Jackson v. State*, 64 So. 3d 90, 92 (Fla. 2011).

SUMMARY OF ARGUMENT

The Third District's opinion correctly found that the trial court did not rely on a valid legal ground in support of the downward departure. A prior downward departure based on a valid uncoerced plea agreement cannot alone provide a valid basis for a subsequent downward departure at a revocation resentencing. *Franquiz v. State*, 682 So. 2d 536 (Fla. 1996) held that a prior departure based on a plea agreement is sometimes a factor but never a guarantee for a subsequent downward departure. *Id.* at 538. *Franquiz* instructs trial courts to consider all circumstances through the date of the revocation sentencing in determining whether valid reasons exist for a downward departure. *Id.* at 538. Consistent with this holding, a defendant must demonstrate why the prior agreement may still be relied upon to impose the subsequent departure despite the fact that he breached that agreement. The defendant must come forward with some new compelling facts which arose after the initial agreement to justify the subsequent departure based on that breached agreement.

The trial court's written order imposing the downward departure failed to do so in this case. Instead of reciting any new compelling facts to justify the new departure, the trial court simply stated that a guideline sentence would be "inappropriate, too harsh, and contrary to the principle of graduated sanctions". R15-2876 at 138; R15-2877 at 131. These reasons were inadequate to support

a departure based on a prior agreement under *Franquiz* and were otherwise improper.

The Third District's opinion also correctly remanded for resentencing within the guidelines. Neither *Jackson v. State*, 64 So. 3d 90 (Fla. 2011) nor *Glover v. State*, 75 So. 3d 238 (Fla. 2011) requires that the case be remanded for reconsideration of a new departure. Defendant concedes that *Jackson* only "dealt with a reversal based on procedural grounds – the failure to provide written reasons for a departure". I.B. at 21. Critical to the holding in *Jackson* are the trial court's failure to file written reasons and the trial court's invalid oral reason. *Jackson*, 64 So. 3d at 92. The trial court in this case filed written reasons. *Supra.* at 6-7. The written reasons were invalid. *Supra.* at 6-7. And so, *Jackson* does not apply. Defendant argues instead that *Glover* extends *Jackson* to the facts of this case. However, *Glover* does not have any precedential value. On the face of the opinion in *Glover*, there are no relevant facts, no relevant law, and no application of law to facts.

Even though the CPC is silent on the appropriate remedy, pre-CPC district court opinions remanded for resentencing within the guidelines. *Infra.* at 36-37. This case law continues as precedent under the CPC. Fla. R. Crim. P. 3.704(b). Also, the concern of "after-the-fact justifications" that this Court described in the context of upward departures also arises in downward departures. *Cf. Pope*

v. State, 561 So. 2d 554, 556 (Fla. 1990); *Shull v. Dugger*, 515 So. 2d 748, 750 (Fla. 1987). In addition to the Third District, at least one other district court has remanded for resentencing within the guidelines under the same circumstances. *State v. Imber*, 223 So. 3d 1070, 1073 (Fla. 2d DCA 2017). The CPC allows a downward departure to be upheld so long as at least one of several reasons justifies the departure. Fla. Stat. § 921.002(3). In exchange for this huge benefit, a defendant should be required to put forward all conceivable grounds up front at his sentencing.

If the trial court imposes a downward departure on one ground or several grounds – and the appellate court finds all grounds to be invalid – then the case must be remanded for resentencing within the guidelines. Where the Third District found that all grounds in the trial court's written order were invalid, the opinion correctly remanded for resentencing within the guidelines.

ARGUMENT AND CITATION TO AUTHORITIES

I. ISSUES ON APPEAL ARE PRESERVED AND THE STATE HAS THE RIGHT TO APPEAL THE DOWNWARD DEPARTURE SENTENCE

The State adequately preserved the issues raised on appeal and the State has a right to appeal Defendant's downward departure sentence. Defendant does not challenge either.

At sentencing, after the trial court imposed the downward departure sentence, the trial prosecutor stated: ". . . I object to the basis for the departure for the record." R15-2876 at 171; R15-2877 at 164. This was adequate to preserve the issue on appeal. *State v. Wiley*, 210 So. 3d 658, 660 (Fla. 2017).

Also, the State has the right to appeal a defendant's downward departure sentence. Fla. Stat. § 921.002(1)(h); Fla. Stat. § 924.07(1)(i); Fla. R. App. P. 9.140(c)(1)(N).

II. THE COURT DOES NOT HAVE JURISDICTION WHERE THE THIRD DISTRICT'S OPINION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY OTHER OPINION

Defendant petitioned the Court for discretionary review asserting that the Third District's opinion expressly and directly conflicts with opinions of this Court and other district courts. The State acknowledges that the Court granted jurisdiction. However, the State requests that the Court reconsider that decision.

Conflict jurisdiction requires that two decisions reached an opposite result on controlling facts, which if not virtually identical, more strongly dictate the result reached by the controlling case. *Aravena v. Miami-Dade Cnty.*, 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).

Defendant first argued that the Third District's opinion expressly and directly conflicted with *Franquiz v. State*, 682 So. 2d 536 (Fla. 1996). The State

reiterates that there is no conflict where both opinions address different questions of law, do not have the same controlling facts, and do not reach different outcomes.

In *Franquiz*, the Court addressed whether a trial court must provide written reasons when imposing a downward departure on revocation of probation and the initial placement on probation was a downward departure based upon a plea agreement. *Franquiz*, 682 So. 2d at 537. In this case, the Third District considered whether the trial court's order granting a downward departure asserted a valid legal basis in support of the departure. *Shine*, 2018 WL 522239 at *1. Where both address different questions of law, there is no conflict.

In *Franquiz*, the trial court did not file a written order in support of a downward departure – a critical controlling fact to the issue addressed in the case. *Franquiz*, 682 So. 2d at 537. In this case, the trial court did file a written order. *Shine*, 2018 WL 522239 at *1. In *Franquiz*, the trial court did not provide any reason at all for the departure. *Franquiz*, 682 So. 2d at 537. In this case, the trial court did provide reasons. *Shine*, 2018 WL 522239 at *1. Where both involve different controlling facts, there is no conflict.

In *Franquiz*, the Court instructed that, where a downward departure sentence is imposed without a written sentencing order, the case must be

remanded with direction that the defendant be allowed to withdraw a plea conditioned on a departure or be sentenced within the guidelines. *Franquiz*, 682 So. 2d at 538. In this case, the Third District provided the same remedy and remanded for resentencing within the guidelines. *Shine*, 2018 WL 522239 at *1. Where both do not reach different outcomes, there is no conflict.

Defendant also argued that the Third District's opinion expressly and directly conflicts with *Jackson v. State*, 64 So. 3d 90 (Fla. 2011). Like *Franquiz*, no conflict arose where both address different questions of law and involve different controlling facts.

In *Jackson*, the Court addressed whether a trial court is precluded from imposing a downward departure on remand when an original departure sentence is reversed on appeal because the trial court failed to file any written reasons and the oral reason was determined to be invalid. *Jackson*, 64 So. 3d at 92. In this case, the Third District addressed whether the trial court's written reasons were a valid legal basis for the departure imposed. *Shine*, 2018 WL 522239 at *1. Where both address different questions of law, there is no conflict.

In *Jackson*, the trial court provided oral reasons for a downward departure but failed to provide written reasons. *Jackson*, 64 So. 3d at 91. The oral reasons were found to be invalid. *Id.* at 92. Critical to the question of law addressed in *Jackson* was this procedural defect at sentencing. In this case, the trial court

provided written reasons. *Shine*, 2018 WL 522239 at *1. The **written** reasons were found to be invalid. *Id.* Where both involve different controlling facts, there is no conflict.

Defendant also argued that the Third District's opinion expressly and directly conflicts with other district court opinions on the issue of remedy. *See Lee v. State*, 223 So. 3d 342 (Fla. 1st DCA 2017); *State v. Milici*, 219 So. 3d 117 (Fla. 5th DCA 2017); *State v. Pickney*, 173 So. 3d 1139 (Fla. 2d DCA 2015); *State v. Michels*, 59 So. 3d 1163 (Fla. 4th DCA 2011).

However, like the Third District's opinion, none of these other district court opinions actually analyze the issue of the proper remedy or provide any relevant discussion. *Compare Shine*, 2018 WL 522239 at *1 *with 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. None could **expressly** conflict with the Third District's opinion on the proper remedy. *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980). Further percolation of the issue in the district courts is necessary – including actual legal analysis of the issue – to allow district courts to develop and refine the issue. This would very likely obviate the need for this Court's review. *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958) ("It was never intended that the district courts of appeal should be intermediate courts.").

III. EVEN IF THE COURT HAS JURISDICTION, THE THIRD DISTRICT CORRECTLY REVERSED THE TRIAL COURT'S ORDER ON THE MERITS

Defendant first argues that the Third District incorrectly found that the trial court's order did not provide a valid legal basis for the downward departure sentence. IB15-2876 at 11-19; IB15-2877 at 11-19. The trial court based the departure on a nonstatutory ground. R15-2876 at 138; R15-2877 at 131. The trial court specifically relied on a "previous downward departure based on a valid uncoerced plea agreement". R15-2876 at 138; R15-2877 at 131. The Third District's opinion was correct where the nonstatutory ground relied upon by the trial court was not valid and could not support a departure. And, even if it could, the trial court erred by relying on improper factors when weighing the totality of the circumstances.

The trial court resentenced Defendant after he admitted violating probation. R15-2876 at 132; R15-2877 at 125. If a defendant admits violating probation and the trial court revokes probation, the trial court must adjudicate the defendant guilty and impose any sentence which it might have originally imposed before placing the defendant on probation. Fla. Stat. § 948.06(2)(b). The trial court has the authority to impose a downward departure sentence on resentencing for a probation violation. Fla. Stat. § 921.002 ("The Criminal

Punishment Code ("CPC") shall apply to all felony offenses, except capital felonies, committed on or after October 1, 1998."); Fla. Stat. § 921.0027.

A downward departure is prohibited unless there are circumstances or factors that reasonably justify the departure. Fla. Stat. § 921.0026(1); Fla. Stat. § 921.00265(1); Fla. R. Crim. P. 3.704(d)(25), (27). Before a trial court may impose a downward departure sentence, it must follow a two-step process. *Banks v. State*, 732 So. 2d 1065, 1067 (Fla. 1999).

First, the trial court must determine whether there is a valid legal ground and adequate factual support for that ground to depart. *Banks*, 732 So. 2d at 1067. Legal grounds are found in case law and statute. *Banks*, 732 So. 2d at 1067 n.6 (citing Fla. Stat. § 921.0016 (1995), *repealed and replaced by* Fla. Stat. § 921.0026). Facts supporting the legal ground must be proven by a preponderance of the evidence. *Banks*, 732 So. 2d at 1067 n.7 (citing Fla. Stat. § 921.001 (1995), *repealed and replaced by* Fla. Stat. § 921.002(1)(f), (3)).

Second, if there is a valid legal ground and adequate factual support, then the trial court must determine whether a departure is the best sentencing option for the defendant in that particular case. *Banks*, 732 So. 2d at 1068. The trial court must weigh the totality of the circumstances, including aggravating and mitigating circumstances. *Banks*, 732 So. 2d at 1068 (citing Fla. Stat.

§921.0016(3), (4)). This second inquiry is a "judgment call" within the discretion of the trial court. *Banks*, 732 So. 2d at 1068.

The CPC provides a non-exhaustive list of mitigating circumstances under which a departure is reasonably justified. Fla. Stat. § 921.0026(2) (". . . include, but are not limited to . . ."). Defendant agrees that a previous downward departure based on a valid uncoerced plea agreement is not in that list. IB15-2876 at 12; IB15-2877 at 12. Defendant instead insists that *Franquiz v. State*, 682 So. 2d 536 (Fla. 1996) held that the previous downward departure is a nonstatutory ground which supports a departure. IB15-2876 at 12; IB15-2877 at 12. However, *Franquiz* did not clearly hold that a previous downward departure based on an uncoerced plea is always a valid legal ground in support of a departure in a probation resentencing.

Franquiz arose from two criminal cases. In *Franquiz*, the defendants both pled guilty or no contest in exchange for downward departure sentences of community control or probation. *Franquiz*, 682 So. 2d at 536-37. The defendants violated community control or probation. *Id.* at 537. The trial courts sentenced the defendants again to downward departure sentences without any written reasons for the departure. *Id.* at 537. The Court accepted jurisdiction to determine whether written reasons are required for a downward departure upon revocation of community control or probation when initial placement on

community control or probation was a downward departure based on a plea agreement. *Id.* at 537.

The Court concluded that written reasons were required. *Id.* at 537. In doing so, the Court explained that the prior downward departure is not always a valid reason for a subsequent downward departure and is not never a valid reason. *Id.* at 537. If it was always a valid reason, then written reasons would be unnecessary. *Id.* at 537. The Court clarified that "a trial court may consider the State's prior agreement for a downward departure as a **factor** during resentencing". *Id.* at 537 (emphasis added).

The Court further explained "a prior departure is **sometimes a factor** but **never a guarantee** for a subsequent downward departure by a trial court, which must explain in writing why the departure was a factor". *Id.* at 537 (emphasis added). The Court summed up its opinion by stating:

> Therefore, we hold that a trial court must determine and state in writing, based upon all the circumstances through the date of the revocation sentencing, whether valid reasons exist for a downward departure from a guideline sentence for a revocation. The written reasons should describe why the court has or has not found the State's prior agreement to a downward departure to be a valid reason for a subsequent downward departure at the revocation sentencing.

Id. at 538.

Franquiz did not conclusively hold that a prior agreement to a downward departure is an independent valid ground in support of a downward departure.

The equivocal language in the opinion appears to suggest that it may be a factor that can be considered when weighing the totality of the circumstances, including aggravating and mitigating circumstances, in step two in *Banks*. Yet, the Court did not hold that the factor alone could provide a valid legal ground to justify a departure in step one in *Banks*.

The equivocal language in *Franquiz* is a stark contrast to unequivocal language in other opinions by the Court which hold that a particular ground is an independent valid legal basis in support of a departure. *See, e.g.*, *Marcott v. State*, 650 So. 2d 977, 979 (Fla. 1995) (". . . evidence of heightened premeditation **would be a valid reason** for imposing a departure sentence.") (emphasis added); *State v. Sachs*, 526 So. 2d 48, 51 (Fla. 1988) ("Although constitutional considerations generally mean that lack of remorse cannot constitute a valid reason for an upward departure, we conclude that clear and convincing evidence of actual remorse also may **constitute a valid reason** for a downward departure.") (emphasis added); *Sanders v. State*, 510 So. 2d 296, 298 (Fla. 1987) ("We conclude, however, that this **can be a valid basis** for downward departure, although we caution that each case must be decided entirely on its own facts and circumstances.") (emphasis added); *Holland v. State*, 508 So. 2d 5, 6 (Fla. 1987) ("If the sentence is considered a departure from the guidelines, the plea bargain **constituted a valid reason** for the

departure.") (emphasis added); *Hankey v. State*, 485 So. 2d 827, 828 (Fla. 1986) ("Breach of trust may **constitute a clear and convincing reason** to justify departure.") (emphasis added).

It is also a stark contrast to the unequivocal language in *State v. Devine*, 512 So. 2d 1163 (Fla. 4th DCA 1987) and *State v. Nickerson*, 541 So. 2d 725 (Fla. 1st DCA 1989), cited by *Franquiz* with approval. *Nickerson*, 541 So. 2d at 727 (quoting *Devine*, 512 So. 2d at 1163); *Devine*, 512 So. 2d at 1164 ("There 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**.") (emphasis added)).

If this Court had wanted to hold that a prior agreement to a downward departure alone is an independent valid legal basis for a subsequent departure, it would have clearly stated so.

A prior downward departure based on a plea agreement cannot alone provide a valid basis for a subsequent downward departure at a revocation resentencing. When the parties entered into the initial agreement, both the trial prosecutor and the trial court put their trust in the defendant to comply with the terms of the agreement. After having been given a break on his sentence, a defendant violates that trust when he breaches the terms of the agreement. The burden is on the defendant to demonstrate why the prior agreement may still be

relied upon despite the fact that he breached that agreement. The defendant must come forward with some compelling facts which arose after the initial agreement to justify the subsequent departure based on that breached agreement. For that reason, *Franquiz* requires the trial court to consider all the circumstances "through the date of revocation sentencing" before imposing the new departure. *Franquiz*, 682 So. 2d at 538.

For example, in *Nickerson*, the defendant initially entered into a plea agreement in exchange for substantial assistance against a codefendant. *Nickerson*, 541 So. 2d at 726. If the defendant provided the assistance after entering the agreement but breached the agreement by failing to provide monthly reports to his probation officer or changing his residence without obtaining permission, the prior agreement may justify a subsequent departure. The substantial assistance provided to the prosecution after the agreement may provide compelling new facts that could justify the subsequent departure.

Or a defendant who enters a plea agreement in exchange for a sentence which includes some specific type of probation – like drug probation – may be required to complete specific treatment or a specific program. *See, e.g.*, Fla. Stat. § 948.038; Fla. Stat. § 948.20; Fla. Stat. § 948.30. In the context of drug probation, if a defendant completes inpatient drug treatment, remains drug free for a long period of time, and violates the terms of probation for reasons

unrelated to drug abuse, the prior agreement may justify a subsequent departure. The completion of the inpatient drug treatment and long period of sobriety provide compelling new facts that could justify the subsequent departure. Those compelling new facts must be identified and relied upon in the trial court's written order explaining the reasons for the departure. *Franquiz*, 682 So. 2d at 538.

In this case, the trial court did not rely on any new compelling facts to justify the subsequent departure in its written order. Defendant agreed to drug probation in exchange for a plea. Defendant violated drug offender probation by using drugs. Prohibition of drug use was the very purpose of the agreement and the drug probation on which the agreement was based. Fla. Stat. § 948.20(2). Instead of reciting any new facts which arose after the agreement to justify the new departure, the trial court imposed the downward departure based on the prior agreement because a guideline sentence would be "inappropriate, too harsh, and contrary to the principle of graduated sanctions". R15-2876 at 138; R15-2877 at 131. These reasons were improper, *infra.* at 24-26, and inadequate to support a departure based on the prior agreement under *Franquiz*.

In contract law, in cases of total breach, the nonbreaching party may treat the contract as void. *See, e.g.*, *Rector v. Larson's Marine, Inc.*, 479 So. 2d 783, 785 (Fla. 2d DCA 1985). By using drugs and violating the agreement,

Defendant demonstrated an inability or unwillingness to comply with the terms of the agreement. Defendant offers no reason why the trial court should have the discretion to rely on the breached and voided prior agreement alone to impose a subsequent departure without anything more.

Even if the prior agreement alone was adequate under *Franquiz*, the trial court further erred by failing to adequately consider the totality of circumstances under step two in *Banks*. *Franquiz* explained that a trial court must state in writing, based upon all the circumstances through the date of the revocation sentencing, whether valid reasons exist for a downward departure from a guideline sentence for a revocation. *Franquiz*, 682 So. 2d at 538. When considering the totality of the circumstances, the trial court should consider both aggravating and mitigating factors. *Banks*, 732 So. 2d at 1068 n.7 (citing Fla. Stat. § 921.0016(3), (4) (1995), *repealed and replaced by* Fla. Stat. § 921.0026).

In considering the totality of the circumstances, the trial court in this case considered only impermissible factors. The trial court found that "it would be inappropriate, too harsh, and contrary to the principle of graduated sanctions" to impose the lowest permissible prison sentence. R15-2876 at 138; R15-2877 at 131. The trial court also found that the departure sentence was appropriate because "it incorporate[d] both a substantial period of incarceration as well as a

substantial period of supervision and substance abuse treatment". R15-2876 at 138-39; R15-2877 at 131-32.

The trial court's belief that the recommended sentence under the sentencing guidelines is "inappropriate" or "too harsh" is never a valid reason for a departure. *Scott v. State*, 508 So. 2d 335, 337 (Fla. 1987); *Scurry v. State*, 489 So. 2d 25, 29 (Fla. 1986); *State v. Sigmen*, 115 So. 3d 1121, 1122 (Fla. 1st DCA 2013).

Also, the trial court's belief that the recommended sentence is contrary to the principle of graduated sanctions is also not a valid reason. A factor may not be already taken into account by the sentencing guidelines or otherwise prohibited or inconsistent with legislative policies. *Sachs*, 526 So. 2d at 50; *State v. Chestnut*, 718 So. 2d 312, 313-14 (Fla. 5th DCA 1998). The principle of graduated sanctions is already taken into account by the CPC. The severity of a sentence increases with the length and nature of a defendant's prior record. Fla. Stat. § 921.002(1)(d). Sentencing points are assessed for community sanction violations, including probation violations. Fla. Stat. § 921.0024(1)(b); Fla. R. Crim. P. 3.704(d)(16). At resentencing after his probation was revoked, the trial court assessed points for Defendant's probation violation. R15-2876 at 96; R15-2877 at 89. Where the CPC adopts and incorporates the principle of graduated sanctions, the trial court cannot impose a departure based on its belief

that the guideline sentence is contrary to that principle. *Hendrix v. State*, 475 So. 2d 1218, 1220 (Fla. 1985).

Lastly, the trial court's belief that the departure was appropriate where the resulting sentence incorporated both a substantial period of incarceration and substantial period of supervision and substance abuse treatment was not proper. The primary purpose of sentencing is punishment. Fla. Stat. § 921.002(1)(b). While rehabilitation is a desired goal, it is subordinate to punishment. Fla. Stat. § 921.002(1)(b). The defendant's substance abuse or addiction is not a mitigating factor under the CPC for a downward departure and may not under any circumstance justify a departure from the permissible sentencing range. Fla. Stat. § 921.0026(3).

Even if any one of the above factors was appropriate to consider under the totality of the circumstances, the trial court still applied the incorrect standard in determining whether to exercise its discretion. The trial court relied on impermissible factors, failed to consider any aggravating circumstances, and failed to weigh the totality of the circumstances, including both mitigating and aggravating factors through the date of revocation sentencing, to conclude that a departure was warranted. *Banks*, 732 So. 2d at 1068; *Franquiz*, 682 So. 2d at 538; *Barnhill v. State*, 140 So. 3d 1055, 1060-61 (Fla. 2d DCA 2014) (applying

a de novo standard of review where the trial court applied the incorrect standard in determining whether to exercise its discretion).

At the revocation sentencing, the State pointed out that Defendant had initially lied to probation officers about using synthetic marijuana, fled from probation officers when confronted about his use, and harassed the informant who told authorities about his underlying crimes. R15-2876 at 158-62; R15-2877 at 151-55. While the trial court did acknowledge at the hearing Defendant's "lifestyle issues" and "attitudinal issues", and described him as "someone who resents authority" and "has no respect for the law", none of those factors were mentioned or weighed against mitigating factors in the trial court's written order. R15-2876 at 166-67; R15-2877 at 159-60.

Franquiz requires that the trial court both determine and state **in writing**, based on all the circumstances through the date of the revocation sentencing, whether valid reasons exist for a downward departure from a guideline sentence for a revocation. *Franquiz*, 682 So. 2d at 538. *Banks* requires that the trial court weigh the totality of the circumstances, including aggravating and mitigating factors. *Banks*, 732 So. 2d at 1068. Where the trial court considered impermissible factors and failed to conduct any meaningful weighing of circumstances in its written order, the Third District correctly reversed the order.

The requirement that the trial court consider the totality of the circumstances in writing is not trivial. The requirement was initially imposed to ensure that the trial court gave the departure adequate reflection and the departure was deliberately imposed. *State v. Jackson*, 478 So. 2d 1054, 1055-56 (Fla. 1985), *abrogated on other grounds by Miller v. Florida*, 482 U.S. 423 (1987) (quoting *Boynton v. State*, 473 So. 2d 703 (Fla. 4th DCA 1985)). The requirement was also imposed to ensure that an appellate court had an adequate record to review the departure on appeal. *Jackson*, 478 So. 2d at 1055-56. Without a written order with any meaningful consideration of aggravating circumstances or weighing of circumstances, the trial court conducted inadequate review.

In fact, instead of writing its own order after reflecting on the proper aggravating and mitigating circumstances in the case, the trial court asked defense counsel to draft a proposed order. R3D15-2876 at 171; R3D15-2877 at 164. The trial court made this request, even though Defendant only asked the trial court to reinstate probation and never even moved for a downward departure to begin with.

Defendant argues that the trial court correctly relied on the prior downward departure to justify the subsequent departure, citing *Franquiz*. IB15-2876 at 12-14; IB15-2877 at 12-14. This ignores the plain language in *Franquiz*

which states that a prior departure may be a factor. *Supra*. at 19-20. *Franquiz* does not state that it may be an independent legal basis for a departure. *Franquiz* requires that the trial court consider more than the prior departure alone to justify the subsequent departure. *Supra*. at 19-20.

Defendant also argues that the trial court adequately considered the totality of the circumstances, citing the trial court's concern for Defendant's drug addiction and treatment for that addiction. IB15-2876 at 15-19; IB15-2877 at 15-19. Substance abuse or addiction is not a mitigating factor under the CPC for a downward departure and may not under any circumstance justify a departure. Fla. Stat. § 921.0026(3). Also, a departure may be justified for specialized treatment for a mental disorder only if it is unrelated to substance abuse or addiction. Fla. Stat. § 921.0026(2)(d). Defendant's reliance on the program manager's testimony is also misplaced where the trial court did not refer to that testimony in its order. *Franquiz* requires that any consideration of the totality of the circumstances be in writing. *Franquiz*, 682 So. 2d at 538.

Just because a trial court identifies and has adequate factual support for a valid legal basis in support of a departure in step one in *Banks* does not authorize the trial court then to consider impermissible sentencing factors when deciding whether it should depart under step two. When explaining what circumstances a trial court must consider in step two, *Banks* cites the non-exhaustive list of

statutory factors in subsection (3) and (4) of Fla. Stat. § 921.0016 (1995) – the predecessor statute to Fla. Stat. § 921.0026. *Banks*, 732 So. 2d at 1068 n.7. Where the trial court incorrectly considered impermissible factors in weighing the totality of the circumstances and ultimately employed the incorrect legal standard, the Third District correctly reversed the trial court's order.

IV. THE THIRD DISTRICT'S OPINION PROPERLY REMANDED THE CASE FOR RESENTENCING WITHIN THE GUIDELINES

Defendant next argues that the Third District's opinion provided the improper remedy. After finding that the trial court's order failed to provide any valid legal basis in support of a departure sentence, the Third District reversed and remanded for resentencing within the guidelines. *State v. Shine*, 2018 WL 522239 at *1 (Fla. 3d DCA Jan. 24, 2018). Defendant argues that *Jackson v. State*, 64 So. 3d 90 (Fla. 2011) and *Glover v. State*, 75 So. 3d 238 (Fla. 2011) require that the case be remanded for reconsideration of a new departure. However, neither case provides for that remedy.

A. *JACKSON* AND *GLOVER* DO NOT REQUIRE REMAND FOR RESENTENCING WHERE THE TRIAL COURT MAY AGAIN IMPOSE A DEPARTURE SENTENCE

As an initial matter, Defendant only first raised this issue before the Third District on rehearing. In the Initial Brief, the State asked the Third District to vacate the sentence and remand for resentencing within the guidelines. IB15-2876 at 13; IB15-2877 at 13 (citing *State v. Hall*, 981 So. 2d 511 (Fla. 2d DCA

2008)). In the Answer Brief, Defendant did not address the appropriate remedy if the Third District found the legal basis in support of the departure to be invalid at all. Only after the Third District granted the State's rehearing motion and remanded the case for resentencing within the guidelines did Defendant move for rehearing en banc and for certification of conflict and first raise the issue.

The purpose of rehearing en banc is to maintain uniformity in a district court's decisions – not to raise an issue on the merits for the first time. Fla. R. App. P. 9.331(a). On a motion for rehearing and certification of conflict, a party may never present issues not previously raised in the proceeding. Fla. R. App. P. 9.330(a). Defendant raised the issue below in a procedurally improper manner and waived any challenge. *Polyglycoat Corp. v. Hirsch Distribs., Inc.*, 442 So. 2d 958, 960-61 (Fla. 4th DCA 1983) (citing *O'Steen v. State*, 111 So. 725 (Fla. 1926)).

Even if the issue is not waived, Defendant's reliance on *Jackson* and *Glover* is misplaced. As already discussed in a previous section, *Jackson* addressed a different question of law and involved different controlling facts.

Jackson arose from a certified conflict between the First District's decision in *State v. Jackson*, 22 So. 3d 817 (Fla. 1st DCA 2009) and three decisions from the Third District – *State v. Williams*, 20 So. 3d 419 (Fla. 3d DCA 2009), *State v. Davis*, 997 So. 2d 1278 (Fla. 3d DCA 2009), and *State v.*

Berry, 976 So. 2d 645 (Fla. 3d DCA 2008). *Jackson*, 22 So. 3d at 818-19. In all four cases, the district courts reversed downward departure sentences where the trial court failed to file written reasons for the departure or failed to provide any reason at all. *Jackson*, 22 So. 3d at 818; *Williams*, 20 So. 3d at 420-21; *Davis*, 997 So. 2d at 1278-79; *Berry*, 976 So. 2d at 645.

The First District in *Jackson* remanded for resentencing within the sentencing guidelines. *Jackson*, 22 So. 3d at 819. The Third District in *Williams*, *Davis*, and *Berry* remanded for resentencing, leaving open the possibility that the trial court could impose a new departure sentence. *Davis*, 997 So. 2d at 1278-79; *Berry*, 976 So. 2d at 645; *Williams*, 20 So. 3d at 421. This Court characterized the conflict between these decisions as:

> . . . center[ing] on 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 (emphasis added). The Court recognized that the trial court's failure to file written reasons for the departure was a dispositive, controlling fact.

Resolving the conflict, the Court concluded that "an appellate court should not preclude a trial court from resentencing a defendant to a downward departure if such a departure is supported by valid grounds". *Jackson*, 64 So. 3d at 93. In

other words, if a departure sentence is reversed on appeal because the trial court failed to file written reasons for the departure and the oral reason is invalid, the trial court may impose a new downward departure on remand if the departure is supported by valid grounds.

Jackson's holding should be understood strictly within the context of the controlling facts of the case. *Miccosukee Tribe of Indians v. Lewis Tein, P.L.*, 227 So. 3d 656, 661 (Fla. 3d DCA 2017) ("One of the basic principles of appellate law is that the holding of a decision cannot extend beyond the facts of the case.").

This Court described *Jackson* as a "narrowly tailored" decision. *Bryant v. State*, 148 So. 3d 1251, 1257 (Fla. 2014). In doing so, the Court described it as a case where "the trial court failed to provide written reasons for imposing the departure". *Bryant*, 148 So. 3d at 1257 ("After the Legislature enacted the CPC, we issued 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." (emphasis added)).

Even Defendant agrees that "*Jackson* dealt with a reversal based on procedural grounds – the failure to provide written reasons for a departure". I.B. at 21. Defendant argues instead that the rule in *Jackson* was extended to a reversal of a downward departure on substantive grounds in *Glover*. However, contrary to what Defendant suggests, the rule in *Jackson* was not extended in *Glover* and *Glover* does not need to be overruled where *Glover* has no precedential value.

A prior opinion only has precedential value to the extent that it is possible to determine from the face of the opinion the material facts. *Shaw v. Jain*, 914 So. 2d 458, 461 (Fla. 1st DCA 2005). Also, even if material facts are the same, no decision is authority on any question not actually raised or considered. *Benson v. Norwegian Cruise Line Ltd.*, 859 So. 2d 1213, 1217 (Fla. 3d DCA 2003) (citing *State ex rel. Helseth v. Du Bose*, 128 So. 4, 6 (Fla. 1930)). On the face of the opinion in *Glover*, there are no relevant facts, no relevant law, and no application of law to facts. Further, the Court did not comment at all on the merits of the case in *Glover*, only quashed the district court's opinion, and remanded the case to the district court for reconsideration in light of *Jackson*. *Glover*, 75 So. 3d at 238.

Defendant relies on facts in the district court's opinion in *Glover*. However, this Court's opinion quashed the district court's opinion. That opinion

likewise cannot have any precedential value. Defendant does not cite any case with a general rule of appellate law which allows a party to combine a quashed district court opinion with a summary Florida Supreme Court disposition decision to create a binding precedential opinion.

Defendant also relies on the State's written response in *Glover*, points out that the State confessed error in the case, and suggests that State should be bound by that confession. I.B. at 22-23. Defendant attached a copy of the State's response in *Glover* to an appendix to the Initial Brief.

The purpose of an appendix is to allow parties to transmit portions of the record necessary to understand issues presented. Fla. R. App. P. 9.220(a). The appendix may contain the order or opinion to be reviewed and other portions of the record and other authorities. Fla. R. App. P. 9.220(b). The State's response in an unrelated case is outside the scope of the materials that may be included in an appendix.

Also, courts cannot look beyond the face of an opinion to search for facts in the record. *Shaw*, 914 So. 2d at 461. This Court's decision in *Glover* simply states that that "[the State] in its response agrees that there is no reason why this Court should not remand for reconsideration of *Jackson*". *Glover*, 75 So. 3d at 238. Defendant cites no case with a general rule of appellate law which allows a party to rely on a position by an opposing party in a brief in a prior unrelated

case and assert that the party is bound by that position in a subsequent case. In fact, the State may confess error for any number of reasons under a particular set of circumstances in a case, including reasons unrelated to the merits. Nothing can be fairly inferred by the State's position in *Glover*. The State is not bound by that position.

Lastly, Defendant argues that the holding in *Jackson* should not be limited to cases involving procedural defects where the CPC does not differentiate between downward departures unsupported by written reasons and departures unsupported by valid reasons. I.B. at 23. The legislature enacted the CPC in 1997 and the law was effective on October 1, 1998. Fla. Stat. § 921.002; Laws 1997, ch. 97-194, §4 (eff. Oct. 1, 1998). Existing case law construing the application of sentencing guidelines continues as precedent unless in conflict with the provisions of the CPC or the rule implementing the code. Fla. R. Crim. P. 3.704(b). Also, more generally, statutes must be construed with reference to the common law and courts presume that the legislature would specify any change to the common law. *Baskerville-Donovan Eng'rs, Inc. v. Pensacola Exec. House Condo. Ass'n, Inc.*, 581 So. 2d 1301, 1303 (Fla. 1991).

Before the enactment of the CPC, in cases in which none of the reasons in support of a downward departure were valid, Florida district courts remanded for resentencing within the guidelines. *See, e.g.*, *State v. Scaife*, 676 So. 2d

1035, 1036 (Fla. 5th DCA 1996); *Bissell v. State*, 605 So. 2d 878, 879 (Fla. 5th DCA 1992); *Branam v. State*, 526 So. 2d 117, 118 (Fla. 2d DCA 1988); *State v. Trotter*, 510 So. 2d 921, 921 (Fla. 1st DCA 1987); *State v. Huggins*, 502 So. 2d 482, 484 (Fla. 2d DCA 1987); *State v. Green*, 511 So. 2d 734, 735 (Fla. 2d DCA 1987); *State v. Joiner*, 498 So. 2d 1017, 1018 (Fla. 5th DCA 1986).

Even though this Court never considered the issue of the appropriate remedy under those circumstances, the district courts did and case law construing the application of the guidelines is controlling to the extent that both the CPC and the rule implementing the CPC are silent on the issue. Fla. R. Crim. P. 3.704(b).

Before the enactment of the CPC, albeit in the context of upward departures, this Court also held that the appropriate remedy where all grounds for a departure are found to be invalid is remand for resentencing within the guidelines. *Pope v. State*, 561 So. 2d 554, 556 (Fla. 1990); *Shull v. Dugger*, 515 So. 2d 748, 750 (Fla. 1987); *see also Williams v. State*, 492 So. 2d 1308, 1309 (Fla. 1986).

Contrary to what Defendant suggests, these opinions did not focus only on a concern with criminal defendants being subject to repeated efforts to justify an upward departure sentence. These opinions focused on concerns of finality more generally. *Shull* explained:

> 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.

Shull, 515 So. 2d at 750 (emphasis added).

Subsequently, *Pope* clarified and further explained this concern focused on finality:

> In *Shull* we held that, upon remand, a sentencing judge would not be permitted to provide new reasons for departure when the initial reasons had been reversed by an appellate court. **To avoid multiple appeals, multiple resentencings, and unwarranted efforts to justify an original departure**, a sentencing judge could impose only a sentence within the guidelines when resentencing a defendant on remand.

Pope, 561 So. 2d at 556 (emphasis added).

Shull and *Pope* were still concerned that trial court judges may try to circumvent a reversed downward departure sentence on appeal by simply coming up with a new reason on remand to impose the same departure. This concern of "after-the-fact justifications" arises in both upward departure and downward departure cases. Just like upward departures, a defendant should not be afforded with endless opportunities to seek downward departures.

It is no coincidence that district courts have cited both *Shull* and *Pope* in downward departure cases to remand for resentencing within the guidelines. *See, e.g.*, *State v. Imber*, 223 So. 3d 1070, 1073 (Fla. 2d DCA 2017); *State v. Geoghagan*, 27 So. 3d 111, 115-16 (Fla. 1st DCA 2009); *Byrd v. State*, 531 So. 2d 1004, 1007 (Fla. 5th DCA 1988).

Also, consistent with *Shull* and *Pope*, the CPC and prior sentencing guideline schemes have always allowed a downward departure to be upheld so long as at least one of several reasons justifies the departure. Fla. Stat. § 921.002(3) ("When multiple reasons exist to support the mitigation, the mitigation shall be upheld when at least one circumstance or factor justifies the mitigation regardless of the presence of other circumstances or factors found not to justify mitigation."); *see also* Fla. Stat. § 921.001(6) (1995). In exchange for this huge benefit, a defendant should be required to put forward all conceivable grounds up front in a motion.

Finality is important not just to criminal defendants but also to the State, to victims, and to the community. As *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980) (emphasis added) explains:

> 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. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases . . . **[A]n absence of finality casts**

a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole.

Based on *Shull*, *Pope*, the CPC, and relevant pre-CPC case law, if the trial court imposes a departure on one ground or several grounds – and the appellate court finds all grounds to be invalid – then the case must be remanded for resentencing within the guidelines. If the trial court imposes a departure based on a number of grounds – and an appellate court finds some grounds to be valid and others to be invalid – then the departure sentence will be affirmed. Fla. Stat. § 921.002(3). Only if the trial court imposed a downward departure without any written reasons and the oral reasons were determined to be invalid – or there were no reasons at all – may the appellate court remand the case for resentencing to give the defendant a full and fair hearing.[5] *See Jackson*, 64 So. 3d at 92-93; *but see State v. Schultz*, 238 So. 3d 288, 290 (Fla. 4th DCA 2018) (citing *State v. Murray*, 161 So. 3d 1287 (Fla. 4th DCA 2015)). Where a trial court has actually articulated reasons in writing that an appellate court finds to be invalid, the trial court does not get another opportunity to try to find a valid reason on remand.

[5] A departure sentence may be affirmed if the oral reasons in support of the departure are valid and the trial court inadvertently fails to enter written reasons. *See Pease v. State*, 712 So. 2d 374, 376 (Fla. 1997).

For practical reasons as well, one full and fair sentencing is all that is allowed. In this case, Defendant was initially sentenced to 40 months of prison on his probation violation on December 11, 2015. R15-2876 at 110-15; R15-2877 at 103-08. On appeal, after briefing by the parties, the Third District issued its opinion over 20 months later on August 23, 2017. Pet. App. at 2-4. Five months after that, on January 24, 2018, the Third District issued a substituted opinion on rehearing. Pet. App. at 5-7. And three months after that, on April 30, 2018, the Third District denied Defendant's rehearing en banc motion. Pet. App. at 8.

There are 14 different statutory grounds in support a downward departure and an innumerable number of nonstatutory grounds. If an appellate court were to allow a defendant to pursue new grounds in support of a departure on remand after reversing a departure sentence, this appellate process would run its course again. And if the appellate court reversed the departure sentence and remanded for reconsideration of a new departure on the second appeal, this appellate process could run its course a third time. Requiring a defendant to put forward all conceivable grounds in support of a departure up front at the first sentencing avoids this potentially endless sequence of appeals and avoids a trial court's efforts to justify a departure on remand with "after-the-fact justifications".

B. DISTRICT COURT OPINIONS ARE NOT PERSUASIVE

Defendant also relies on a number of district court opinions to argue that *Jackson* extends to cases in which the district court reverses a downward departure sentence on substantive grounds. I.B. at 26-28 (citing *State v. Lackey*, 248 So. 3d 1222 (Fla. 2d DCA 2018); *Lee v. State*, 223 So. 3d 342 (Fla. 1st DCA 2017); *State v. Milici*, 219 So. 3d 117 (Fla. 5th DCA 2017); *State v. Pinckney*, 173 So. 3d 1139 (Fla. 2d DCA 2015); *Jones v. State*, 71 So. 3d 173 (Fla. 1st DCA 2011); *State v. Michels*, 59 So. 3d 1163 (Fla. 4th DCA 2011)).

Defendant argues that all the district courts except the Third District extend *Jackson* to circumstances that arise in this case. As an initial matter, Defendant neglects to cite *State v. Imber*, 223 So. 3d 1070 (Fla. 2d DCA 2017). *Imber* reversed a downward departure sentence finding it was not based on valid grounds and remanded for resentencing within the guidelines, citing *Shull*. *Imber*, 223 So. 3d at 1073.

Instead, Defendant cites the Second District's opinion in *Lackey*. However, in *Lackey*, the trial court failed to file written findings in support of the departure. *Lackey*, 248 So. 3d at 1224 ("The circuit court provided no written findings as required under section 921.002(1)(f), Florida Statutes (2015)."). Therefore, consistent with *Jackson*, the Second District correctly remanded the case for resentencing where the trial court could consider a new departure sentence. *Id.* at 1225-26.

Also, *Pinckey* – cited by *Lackey* – and *Michels* do not mention whether the trial court entered a written order in support of the departure. To the extent that both district court opinions cite *Jackson* – in which the absence of a written order is a critical controlling fact – and remand for resentencing where the trial court could consider a new departure sentence, it is a fair assumption that the trial courts in both cases did not provide a written order.

Jones involved an upward departure – not a downward departure. *Jones*, 71 So. 3d at 176. *Jones* remanded for resentencing within the guidelines, citing *Shull*. *Id.* at 176.

And like all cases, *Milici* and *Lee* did not provide any meaningful or persuasive analysis of the issue at all. All opinions cite *Jackson* and summarily remand for resentencing where the trial court may impose a new departure sentence. *Lackey*, 248 So. 3d at 1226; *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. The parties in these cases may not have adequately raised and briefed the district courts on the proper remedy. After all, Defendant in this case did not challenge the State's proposed remedy until after the State moved rehearing from the original decision.

Lastly, all district court decisions cited by Defendant incorrectly extend *Jackson* to cases in which the trial court did actually submit a written order.

Jackson narrowly tailored the holding to cases in which the trial court failed to file written reasons for imposing a departure. *Jackson*, 64 So. 3d at 92. The conflict centered around district court opinions in which the trial court had failed to file written reasons. *Id.* at 92. The holding in *Jackson* must be understood and limited to those critical controlling facts.

C. REQUIRING A DEFENDANT TO PUT ALL CONCEIVABLE GROUNDS IN SUPPORT OF DEPARTURE UP FRONT AT SENTENCING IS CONSISTENT WITH THE CPC

Defendant further argues that remanding all cases reversing a departure sentence for a de novo resentencing is consistent with fundamental sentencing principles. I.B. at 28-33. However, Defendant ignores the bright line that *Jackson* draws between procedural errors in sentencing proceedings – like failure to render a written order in support of a departure – which deprive a defendant of a fair hearing and substantive errors which do not.

As already explained above, the written requirement for downward departures is not trivial. In explaining the importance of the written order requirement for departures, this Court described oral pronouncements of sentences are "fraught with disadvantages". *State v. Jackson*, 478 So. 2d 1054, 1055-56 (Fla. 1985), *abrogated on other grounds by Miller v. Florida*, 482 U.S. 423 (1987) (quoting *Boyton v. State*, 473 So. 2d 703 (Fla. 4th DCA 1985)). The written order requirement provides "a more precise, thoughtful, and meaningful

review which ultimately will result in the development of better law". *Id.* at 1056. The requirement ensures that the trial court identifies an appropriate ground in support a departure, ensures that there is adequate factual support for that ground, and carefully and deliberately weighs the totality of the circumstances in deciding whether it should depart.

Without a written order, an appellate court cannot guarantee that a defendant has been provided that careful and deliberate consideration. For that reason, *Jackson v. State*, 64 So. 3d 90 (Fla. 2011) provides a defendant a de novo resentencing when a trial court fails to render a written order. For that reason, as well, a defendant would be entitled to a de novo resentencing for other procedural defects in the proceeding itself, such as a trial court's use of the wrong standard of proof or the trial court's refusal to consider a downward departure at all. *See, e.g.*, *Little v. State*, 152 So. 3d 770, 772 (Fla. 5th DCA 2014).

Where a defendant is afforded an opportunity to present grounds in support of a downward departure and offered a full and fair hearing on those grounds, a defendant should be required to put forward all grounds up front at that hearing and develop the record at sentencing in support of those grounds.

Defendant was afforded that opportunity at his sentencing. Defendant failed to take advantage of that opportunity. Defendant instead only asked the

trial court to reinstate his probation. *Supra.* at 5. Defendant should not be allowed to move for a downward departure for the first time on remand.

Relying on capital cases and cases involving illegal sentences, Defendant argues that traditionally a resentencing is always a de novo proceeding. I.B. at 28-29 (citing *State v. Fleming*, 61 So. 3d 399 (Fla. 2011) (resentencing arising from a post-conviction claim under *Heggs v. State*, 759 So. 2d 620 (Fla. 2000)); *Lucas v. State*, 841 So. 2d 380 (Fla. 2003) (capital resentencing in front of jury); *Trotter v. State*, 825 So. 2d 362 (Fla. 2002) (resentencing arising from post-conviction *Heggs* claim); *Wike v. State*, 698 So. 2d 817, 821 (Fla. 1997) (capital resentencing in front of jury); *Teffeteller v. State*, 495 So. 2d 744 (Fla. 1986) (capital resentencing in front of jury); *Mann v. State*, 453 So. 2d 784 (Fla. 1984) (capital resentencing in front of jury)).

This Court has consistently said, in the context of sentencing, death is different. *Abdool v. Bondi*, 141 So. 3d 529, 546 (Fla. 2014) ("We also recognize that the death penalty 'is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.'" (citation omitted)). Also, sentencing phase proceedings in capital cases are procedurally different where sentencing is before a jury. Fla. Stat. § 921.141(1). As *Wike* explained, a new jury is empaneled at a new sentencing phase in a capital case and, for that reason, the

resentencing is treated in every respect as an entirely new proceeding. *Wike*, 698 So. 2d at 821.

In the context of an illegal sentences, this Court has explained that, once a defendant demonstrates that his sentence is illegal and he is entitled to a modification of his sentence or the imposition of a new sentence, "the full panoply of due process consideration attach[es]". *Trotter*, 825 So. 2d at 368 (quoting *State v. Scott*, 439 So. 2d 219, 220 (Fla. 1983)). An improperly imposed departure sentence is not an "illegal sentence". *Gartrell v. State*, 626 So. 2d 1364, 1365-66 (Fla. 1993). Also, on a State appeal, when the State demonstrates that the trial court should not have imposed the downward departure sentence, the defendant has not demonstrated that he entitled to any relief.

Defendant is correct that "what's good for the goose is good for the gander". I.B. at 30. However, Defendant's proposed rule does not embrace that saying. Certainly, Defendant wants the benefit of *Shull* and agrees with the need for finality in the context of upward departures. I.B. at 26 (citing *Jones*, 71 So. 3d at 176); *see also Bryant*, 148 So. 3d at 1257. Yet, Defendant does not want the same rule to apply in the context of downward departures, despite the fact that the need for finality equally applies.

State v. Collins, 985 So. 2d 985 (Fla. 2008), cited by Defendant, does not justify any different outcome. In *Collins*, the trial court imposed a habitual offender enhancement without adequate evidence. *Collins*, 988. The Court held that, on remand, the trial court could consider new evidence and still impose the enhancement. *Collins*, 985 So. 2d at 989-90. *Collins* specifically declined to follow the rule in *Shull*. *Collins*, 985 So. 2d at 990-91. In doing so, the Court explained that the same danger of "after-the-fact justifications" for previously imposed departure sentences does not exist in the context of habitual offender enhancements. *Collins*, 985 So. 2d at 991, 992 ("In contrast to the subjective (and therefore manipulable) permissible reasons for departing from the guidelines when we decided *Whitehead* [*v. State*, 498 So. 2d 863 (Fla. 1986)] and *Shull*, the decision to sentence as a habitual felony offender must be based solely on objective, mostly documentary, evidence of the defendant's prior felony convictions." (citations omitted)); *see also Bryant*, 148 So. 3d at 1259.

Unlike habitual offender enhancements, the danger of "after-the-fact justifications" described in *Shull* arises in both upward and downward departures. Requiring a defendant to present all grounds in support of a departure up front at sentencing prevents that danger, while still providing a defendant a full and fair sentencing that Defendant demands.

CONCLUSION

The State respectfully requests that the Court affirm the Third District's opinion finding that the trial court failed to provide valid grounds in support of the departure and remanding for resentencing within the guidelines.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/Jonathan Tanoos
JONATHAN TANOOS, FBN 88851
Assistant Attorney General

CERTIFICATE OF SERVICE

I CERTIFY that the foregoing document – *Respondent, the State of Florida's Answer Brief on the Merits* – has been delivered to counsel for Petitioner, Office of the Public Defender, Jeffrey DeSousa [jdesousa@pdmiami.com; appellatedefender@pdmiami.com] and Shannon Hemmendinger [sah@pdmiami.com] on **September 20, 2018**.

CERTIFICATE OF COMPLIANCE

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

/s/Jonathan Tanoos

JONATHAN TANOOS, FBN 88851
Assistant Attorney General
Office of the Attorney General
1 SE 3rd Ave., Ste. 900
Miami, FL 33131
(305) 377-5441 (tel)
(305) 377-5655 (fax)
(P): CrimAppMia@myfloridalegal.com
(S): Jonathan.Tanoos@myfloridalegal.com