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 REPLY BRIEF ON THE MERITS

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I. THIS CASE PRESENTS EXPRESS AND DIRECT CONFLICT

Shine has already explained why this Court possesses conflict jurisdiction under Article V, Section 3(b)(3). Ptr.'s Jur. Br. 3-10. Because the State continues to contest jurisdiction, Ans. Br. 12-15, we add two points here. First, even apart from express and direct conflict between the decision below and this Court's decision in *Franquiz v. State*, 682 So. 2d 536 (Fla. 1996), the decision below conflicts with district court precedents referenced in the Initial Brief (at 13-14), which go totally unexplored in the State's discussion of jurisdiction.

Below, the Third District concluded that the fact of a prior departure "does not amount to a valid legal basis" justifying a subsequent departure. Pet. App. 7. In *State v. Devine*, the Fourth District held just the opposite, writing 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." 512 So. 2d 1163, 1164 (Fla. 4th DCA 1987). The First District reached the same result in *State v. Nickerson*, quoting the above language from *Devine* when explaining that the sentencing judge had the power to depart downwards based on the existence of a prior negotiated plea and departure. 514 So. 2d 725, 727 (Fla. 1st DCA 1989).

As the State itself concedes, *Devine* and *Nickerson* contained "unequivocal

language" approving the use of a prior departure as a ground to depart subsequently. Ans. Br. 21. That alone is a conflict worth addressing.

Second, "[f]urther percolation" of the remedy issue is unnecessary. Ans. Br. 15. None of the First, Second, Fourth, or Fifth Districts have experienced any difficulty interpreting or applying *Jackson*. And at least one en banc court has already unanimously applied *Jackson* when remanding for *de novo* resentencing, *see State v. Lee*, 223 So. 3d 342 (Fla. 1st DCA 2017) (en banc),[1] while another—the Third District here—has refused to empanel its en banc court to consider the issue. Kicking the can down the road to allow for additional percolation is unlikely to alter these well-entrenched views.

The State is equally incorrect in its assertion that conflict is lacking on the remedy question because "none of these other district court opinions actually analyze the issue of the proper remedy or provide any relevant discussion." Ans. Br. 15. This Court long ago explained that the word "express" in Article V, Section 3(b)(3) means "to represent in words" or "to give expression to," clarifying that "[i]t is conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review." *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980) (citation and internal quotation marks omitted). To create conflict, a district court need not expound its

[1] Even the judges in *Lee* who dissented with respect to a separate issue in the case agreed with the majority that *Jackson* governed the departure issue.

"reasons" for reaching a certain result so long as the ultimate "decision" conflicts with a decision of this Court or another district.

II. THE DOWNWARD DEPARTURE SENTENCE WAS VALID

We next address the validity of the downward departure. At the outset, it bears noting that the State makes no effort to defend the rationale adopted by the Third District to justify invalidating the departure. In fact, its brief cites none of the cases that formed the basis for the district court's ruling. *See* Pet. App. 7. Any affirmance of that merits holding must therefore come—if at all—under the Tipsy Coachman doctrine, which allows a reviewing court to affirm if the lower tribunal reached the right result for the wrong reason. *See Dade Cnty. School Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999). But as explained below, there was nothing invalid about this downward departure sentence.

A. Under *Franquiz*, a prior departure constitutes a "valid reason" for a subsequent departure

The controlling precedent on the merits of the downward departure is *Franquiz v. State*, 682 So. 2d 536 (Fla. 1996), which held that sentencing judges may predicate a downward departure on the fact of an earlier departure so long as they account holistically for the circumstances presently before the court. To explain why *Franquiz* did not compel affirmance of this departure, the State interprets that case to mean that while a prior departure can be *considered* by a sentencing judge, the prior departure is not a standalone mitigating factor sufficient to authorize a new

departure. Ans. Br. 19-20. Had this Court intended to enshrine a prior departure as a sufficient mitigating factor, the State claims, it would have used the phrase "valid reason" in its opinion. *Id.* at 20.

That argument ignores the very language of *Franquiz*, which used the exact phrase "valid reason" no fewer than six times. Indeed, this Court wrote that a "prior agreement to a downward departure [can] be a *valid reason* for a subsequent downward departure at the revocation sentencing." *Franquiz*, 682 So. 2d at 538 (emphasis added). Elsewhere in the Court's opinion it indicated that the fact of a prior departure can constitute a "factor" sufficient to justify a new departure, *id.* at 537, tracking the downward departure statute's use of the terms "factors" and "[m]itigating factors." § 921.0026(1), Fla. Stat. (2015).

Even if the language of *Franquiz* were somehow "equivocal," Ans. Br. 20, the Court explicitly "approve[d] the holdings" of *Nickerson* and *Devine*. *Franquiz*, 682 So. 2d at 537. Those holdings are as follows: "[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*." *Nickerson*, 514 So. 2d at 727 (quoting *Devine*, 512 So. 2d at 1164) (emphasis added).

Shine's reading of *Franquiz* also comports with the *Banks* framework for evaluating downward departures motions. Under *Banks*, a sentencing judge considering whether to depart must first ask whether it "*can* depart" based on the

existence of a "valid legal ground." *Banks v. State*, 732 So. 2d 1065, 1067 (Fla. 1999). Applying that step, *Franquiz* concluded that a prior departure is a "factor" allowing for a departure. 682 So. 2d at 537. Step two of the *Banks* analysis next requires a sentencing judge to consider, assuming a valid legal reason exists, whether it "*should* depart," in turn requiring an evaluation of whether a departure is "the best sentencing option for the defendant in the pending case." 732 So. 2d at 1068. Conducting that portion of the two-part test, this Court in *Franquiz* instructed sentencing judges to look at "all the circumstances through the date of the revocation sentencing" and explain in writing why the prior departure still warrants "a subsequent departure at the revocation sentencing." 682 So. 2d at 537-38.

When viewed through the lens of the framework in *Banks*, this Court's decision in *Franquiz* could mean only one thing: that a prior departure holds the door open under step one for a subsequent departure.

Likewise, our interpretation of *Franquiz* makes sense of the statutory scheme governing downward departures in a way the State's reading cannot. Along with other statutorily enumerated mitigating factors, section 921.0026 allows a downward departure where "[t]he departure results from a legitimate, uncoerced plea bargain." § 921.0026(2)(a), Fla. Stat. (2015). That plain language authorizes judges to impose a downward departure so long as it "results from" a valid plea bargain, with no express limitation preventing a judge from relying on the same plea bargain after a

probation revocation. *Franquiz*'s sole innovation was the qualification that a subsequent departure is not "guarantee[d]—meaning, is not *compelled*—by the earlier plea bargain. 682 So. 2d at 537. Rather, the trial judge possesses the discretion to reject a new departure as the circumstances may warrant. And where the sentencing judge exercises its discretion to issue the new departure, it must explain its reasons in writing so that the appellate court can review the departure for an abuse of discretion. *See id.* at 537-38.

Finally, the State assails the validity of this downward departure on the theory that a trial judge applying *Franquiz* must "rely on [] new compelling facts" to justify the subsequent departure. Ans. Br. 23. But that requirement appears nowhere within the four corners of the *Franquiz* opinion. To the contrary, *Franquiz* requires only that the sentencing judge account holistically for "all the circumstances through the date of the revocation sentencing," with no condition that the judge identify some new set of facts. 682 So. 2d at 538. It is enough that the judge assess the defendant's present circumstances and conclude, under step two of the *Banks* framework, that a departure remains appropriate.

B. The sentencing judge properly applied *Franquiz*

Having misapprehended *Franquiz*, the State mistakenly asserts that "the trial court in this case considered only impermissible factors." Ans. Br. 24. Under *Franquiz*, however, the very existence of a prior departure satisfies step one and

holds open the door for the sentencing judge to issue a new downward departure, so long as it believes within its discretion that a departure is the proper sentencing result. Here is what the trial judge in Shine's case did:

Decision to Depart	
Step One (mitigating factor)	Step Two (exercise of discretion)
"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.	• "[I]t would be inappropriate, too harsh, and contrary to the principle of graduated sanctions to now sentence the Defendant to 73.65 months imprisonment …." R. 138. • The departure sentence "incorporates … a substantial period of supervision and substance abuse treatment." R. 138-39.

It is therefore beside the point that neither the severity of an above-guidelines sentence nor the need for substance abuse treatment is an independent "mitigating factor" under step one. Ans. Br. 24-25. The sentencing judge discussed those points under *step two*, where it was required to exercise its discretion by considering "all the circumstances through the date of the revocation of sentencing." *Franquiz*, 682

So. 2d at 538. The harshness of the guidelines and Shine's need for drug treatment were undoubtedly germane to that discretionary calculus.

Step two is committed to the sole discretion of the sentencing judge, meaning it can be overturned "only where no reasonable person would agree with the trial court's decision." *Banks*, 732 So. 2d at 1068.

III. ALTERNATIVELY, REMAND MUST BE FOR *DE NOVO* RESENTENCING

A. Shine's arguments are properly before the Court

On the remedy issue, the State first contends that our arguments are "waived," a claim that has as its foundation an erroneous view of the procedural history in this case. Ans. Br. 30-31. Namely, the State writes: "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 certification of conflict and *first raise the issue*." Ans. Br. 31. A more accurate recitation of the procedural history should dispel any notion of a waiver.

At the district court level, the State raised the remedy issue in a throw-away line in its initial brief, contending in the "Conclusion" section of the brief that "[b]ased upon the arguments and authorities cited herein, the Appellant respectfully asks this Court to vacate the sentence entered below and remand this matter so that the Appellee be resentenced within the sentencing guidelines." Init. Br., *State v. Shine*, 3D15-2876, at *13 (filed Aug. 1, 2018) (citation omitted). That was the sole

mention of the remedy in the brief, whose "Argument" section was devoted to attacking the validity of the departure on the merits. Generally, "[s]uch a cursory argument is insufficient to preserve [an] issue for consideration." *Bryant v. State*, 901 So. 2d 810, 827 (Fla. 2005).

Shine's answer brief disputed the State's characterization of the departure sentence as unlawful but did not address the remedy. Am'd Ans. Br., *State v. Shine*, 3D15-2876, at *6-8 (filed Feb. 10, 2017).

In its original written opinion, the Third District reversed the downward departure but remanded "for resentencing at which the trial court may again impose a downward departure sentence." Pet. App. 4. Not content with that remedy, the State moved for rehearing and for the first time offered reasons why the trial court should thereafter be confined to an above-guidelines sentence. Mot. for Rhrg., Rhrg. En Banc, or Clarification, *State v. Shine*, 3D15-2876 (filed Sept. 18, 2017). Shine filed a response laying out his view that *Jackson v. State*, 64 So. 3d 90 (Fla. 2011), compelled *de novo* resentencing. Resp. to Mot. for Rhrg., Rhrg. En Banc, or Clarification, *State v. Shine*, 3D15-2876 (filed Oct. 2, 2017).

The Third District—now aware of the State's arguments—granted rehearing and issued a new opinion adopting the State's preferred remedy. Pet. App. 7. Shine's subsequent motion for rehearing en banc was denied. But as this history shows, Shine appropriately litigated the merits of the remedy question before the

district court took up the issue, and therefore is not procedurally barred now.

B. The decision below is incorrect

Nor is there anything unsettled about the proper remedy in the event the downward departure was invalid. The State's efforts to relitigate *Glover* notwithstanding, this Court has already concluded that a sentencing judge must be permitted to again consider departing downwards on remand from a successful State appeal. If nothing else, it is telling that the State has previously conceded—a step typically reserved for situations where adopting an adversarial stance would prove indefensible—that this issue is controlled by *Jackson*. But even assuming that it might sometimes be appropriate to eliminate judicial discretion at resentencing, this case would not fall within that rule for reasons explained below.

1. This Court, based in part on the State's earlier concession, has already decided the remedy question

It's déjà vu all over again. Except this time the State is unwilling to concede what it previously felt compelled to: that this Court's decision in *Jackson v. State*, 64 So. 3d 90 (Fla. 2011), requires *de novo* resentencing on remand after the reversal of a downward departure, regardless the reason for the reversal. *See Glover v. State*, 75 So. 3d 238 (Fla. 2011) (quashing decision of the First District eliminating the trial judge's ability to again depart downwards on remand after the departure was reversed by the district court for substantive reasons).

It is no answer to say that *Glover* lacks "precedential value." Ans. Br. 34.

Normally, an appellate opinion that fails to recite the facts of the case is non-precedential because litigants and the general public should not be forced to wade through court records to ascertain those facts, short of which the court's holding would be incomprehensible. *See Shaw v. Jain*, 914 So. 2d 458, 461 (Fla. 1st DCA 2005). *Glover* does not present that concern, however, because its facts were fully described in the First District's lengthy written opinion, which in turn was cited in this Court's opinion. Thus, the facts of the case (and the meaning of *Glover*'s holding) are accessible to anyone interested in looking.

It surely must mean something that a unanimous panel of this Court has already concluded that *Jackson* controls even when a downward departure is reversed for substantive reasons. *Glover*, 75 So. 3d 238 ("We have accordingly determined to accept jurisdiction and grant the petition for review in the present case.").

And though the State claims that this Court "did not comment at all on the merits of the case in *Glover*," three points bely that conclusion. First, *Glover* is a published opinion, not an unpublished order. Second, while the Court quashed the district court decision based in part on the State's concession that *Jackson* controlled, *Glover*, 75 So. 3d 238, an appellate court is not obligated to blindly accept a party's concessions without independently reviewing the case. Third, the Court held that it possessed jurisdiction based on "express and direct conflict" between the district

court's decision in *Glover*—which reversed a downward departure on *substantive* grounds—and decisions of the Third District that reversed on *procedural* grounds. *Id.* (citing *e.g.*, *State v. Williams*, 20 So. 3d 419 (Fla. 3d DCA 2009)). By recognizing that conflict, the Court necessarily held that there is no distinction between reversals based on substantive and procedural grounds; for conflict to exist, two or more decisions must "expressly and directly conflict[] … on *the same question of law*." *See* art. V, § 3(b)(3) (emphasis added). Put differently, *Glover* establishes that whether a departure is reversed because the stated reason is invalid or because no reason is stated at all, the proper remedy poses the "same question of law." And that common question was answered in *Jackson*.

In arguing that *Jackson* is inapplicable, the State also takes out of context a quotation from this Court's decision in *Bryant v. State*, 148 So. 3d 1251, 1257 (Fla. 2014), which described *Jackson* as a "narrowly tailored decision holding that when an appellate court reverses a downward departure sentence because the trial court failed to provide written reasons for imposing the departure …." Ans. Br. 33. But as one district judge has observed, *Bryant* was alluding to the fact that *Jackson* was "narrowly tailored" only in the sense that it applies to downward—as distinct from upward—departures, *not* in the sense that it is limited to reversals predicated on the failure to provide written reasons. *See State v. Robinson*, 149 So. 3d 1199, 1205 n.6 (Fla. 1st DCA 2014) (Swanson, J., concurring).

Given that upward departures have always been subject to the rule announced in *Shull*, which prohibits a new *upward* departure on remand, it is not surprising that *Bryant* regarded *Jackson* as confined to downward departures. *See Shull v. Dugger*, 515 So. 2d 748 (Fla. 1987).[2] Were it not narrow in this precise sense, *Jackson* would have overruled *Shull* sub silentio, a possibility *Bryant* rejected.

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

In a remarkable show of consensus, every time a district court has considered this Court's decision in *Jackson*, that court has remanded for *de novo* resentencing. No court has cited *Jackson* and still elected to remove the usual discretion on remand. By contrast, whenever the Third District has ordered a trial court to impose an above-guidelines sentence on remand it has failed to even cite *Jackson*. That dichotomy suggests that *Jackson*'s message is clear when heard.

In support of its contrary reading of *Jackson*, the State cites three decisions

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[2] The State accuses Shine of trying to have it both ways by simultaneously advocating for *de novo* resentencing here but for restricted resentencing in the context of upward departures. Ans. Br. 47 ("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."). Shine has done no such thing. Quite the opposite, we would not "presume[] that judges will abuse their discretion by providing … pretextual reasons for downward departures on remand." *Bryant*, 148 So. 3d at 1260-61 (Fla. 2014) (Canady, J., dissenting). To the extent we addressed *Shull* in the initial brief, it was only to point out that *Shull* comports with the universally accepted notion that criminal defendants receive heightened protections not enjoyed by the State. Init. Br. 24-25. If *Shull* was wrongly decided, so be it.

from districts outside the Third District. Ans. Br. 39 (citing *State v. Geoghan*, 27 So. 3d 111 (Fla. 1st DCA 2009); *State v. Imber*, 223 So. 3d 1070 (Fla. 2d DCA 2017); *Byrd v. State*, 531 So. 2d 1004 (Fla. 5th DCA 1988)). To be sure, those decisions ordered the trial judge to impose an above-guidelines sentence. Yet each of them has since been overruled.

That is because "where intradistrict conflict exists, the decision later in time overrules the former as the decisional law in the district." *R.J. Reynolds Tobacco Co. v. Marotta*, 214 So. 3d 590 (Fla. 2017). Thus, the relevant decisions are *State v. Lee*, 223 So. 3d 342 (Fla. 1st DCA 2017) (en banc), *State v. Lackey*, 248 So. 3d 1222 (Fla. 2d DCA 2018),[3] and *State v. Hollinger*, 43 Fla. L. Weekly D1913 (Fla. 5th DCA Aug. 17, 2018), all of which remanded for full-fledged resentencing and were decided *after* the cases cited by the State.

3. *De novo* resentencing is particularly appropriate here

Even if the Court were convinced that, in the abstract, a limitation on judicial

[3] A litigant has no duty to bring bad law to a tribunal's attention. *But see* Ans. Br. 43 ("Defendant neglects to cite [] *Imber*"). The State appears to suggest that *Lackey*, which overruled *Imber*, was a reversal based on the failure to provide written reasons. *Id.* at 42. A review of that opinion reveals that the district court predicated its reversal on its conclusion that "the record did not support a downward departure sentence"—a substantive error—*not* a procedural failure to provide written reasons. *Lackey*, 248 So. 3d at 1223. The district court noted the lack of written reasons but did not reverse because of it. That decision was consistent with this Court's holding in *Pease v. State*, 712 So. 2d 374, 376 (Fla. 1997), that oral reasons alone will suffice to uphold a departure if the proffered reason is valid.

discretion on remand would be appropriate in some cases, applying that rule here would be unreasonable. This is not a case where the only stated reason for a departure is invalid as a matter of law or where there are no other conceivable justifications for a departure on remand. Assuming *arguendo* that some error exists in this downward departure order, it can only be because more extensive written findings are needed. After all, every ingredient required for a departure under *Franquiz* is present in this record: (1) Shine received a prior departure based on a valid, uncoerced plea bargain, a recognized "valid reason" for a subsequent departure; and (2) ample grounds—Kathleen Costello's expert testimony—supported the trial court's discretionary decision to re-impose a departure instead of an above-guidelines sentence.

The sentencing judge laid out these considerations in sufficient detail in its written order. R. 138-39; *see supra* at p. 7. If more was nonetheless required, no principled reason precludes the judge from reconsidering the departure in light of any new guidance this Court might provide.

CONCLUSION

The Third District erroneously held both that the downward departure in this case was invalid and that the sentencing judge must impose an above-guidelines sentence on remand. Each holding should be reversed.

Respectfully submitted,

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

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