SUPREME COURT OF FLORIDA

CASE NO. SC18-0688

DEREK LANG SHINE, JR.,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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

APPENDIX TO RESPONDENT'S MOTION TO SUPPLEMENT RECORD ON APPEAL

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***State v. Shine*, Case No. 3D15-2876 (Fla. 3d DCA)**

CERTIFICATE OF SERVICE

I CERTIFY that the foregoing – *Appendix to Respondent's Unopposed Motion to Supplement Record on Appeal* – has been delivered to Jeffrey DeSousa [jdesousa@pdmiami.com; appellatedefender@pdmiami.com] and Shannon Hemmendinger [sah@pdmiami.com], Office of the Public Defender, by **e-mail** on **September 21, 2018**.

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THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

THE STATE OF FLORIDA,
Appellant,

CASE NO. 3D15-2876

vs.

L.T. NO. 14-890-A-K

DEREK LANG SHINE, JR.,
Appellee.
_____/

APPELLANT'S MOTION FOR REHEARING, REHEARING EN BANC, OR CLARIFICATION

Appellant, THE STATE OF FLORIDA, pursuant to Fla. R. App. P. 9.330 and Fla. R. App. P. 9.331, respectfully moves for rehearing, rehearing *en banc*, or clarification of the Court's August 23, 2017 written decision. Appellant requests rehearing or clarification only on the remedy that the Court provided in the decision.

Appellant appealed the 40-month sentence that the trial court imposed below the range under the Criminal Punishment Code ("CPC"). *State v. Shine*, 2017 WL 3611670 at *1 (Fla. 3d DCA Aug. 23, 2017); *cf.* Fla. Stat. § 924.07(1)(i); Fla. R. App. P. 9.140(c)(1)(N). This Court reversed the sentence, finding that the trial court's reason for the downward departure was not valid. *Shine*, 2017 WL 3611670 at *1. Appellant agrees with the Court's well-reasoned decision reversing the sentence.

However, in fashioning a remedy, the Court concluded:

> Consequently, we reverse and remand 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 a sentence.

Shine, 2017 WL 3611670 at *1. The Court did not cite any authority in support of this remedy. Other Third District cases conflict with this remedy. These conflicting cases provide that the appropriate remedy for this type of error is remand for imposition of a sentence within the range permitted under the CPC. *Bailey v. State*, 199 So. 3d 304, 308 (Fla. 3d DCA 2016); *State v. Diaz*, 189 So. 3d 896, 902 (Fla. 3d DCA 2016); *Fonte v. State*, 913 So. 2d 670, 673 (Fla. 3d DCA 2005); *State v. Stanton*, 781 So. 2d 1129, 1133 (Fla. 3d DCA 2001); *State v. Kasten*, 775 So. 2d 992, 993 (Fla. 3d DCA 2000).

In fact, both *State v. Pita*, 54 So. 3d 557 (Fla. 3d DCA 2011) and *State v. Salgado*, 948 So. 2d 12 (Fla. 3d DCA 2006), cited in the Court's decision, provide for that remedy. *Pita*, 54 So. 3d at 559 ("Because the bases for the imposition of the downward departure sentence relied on by the trial court were either legally invalid or unsupported by competent substantial evidence, **we reverse for imposition of a guidelines sentence, or in the alternative, the withdrawal of the defendant's plea**." (citation omitted) (emphasis added)); *Salgado*, 948 So. 2d at 18-19 ("As neither of the grounds for downward departure articulated by the trial court are supported by competent substantial evidence, and neither the record nor the trial court's order reflect

that aggravating factors were considered, we vacate the departure sentence imposed and remand for sentencing before a different judge, **where the defendant may elect to either withdraw his plea or be resentenced within the guidelines**." (emphasis added)).

Pita and *Salgado* involved sentencing judges who imposed the departure sentences pursuant to a plea agreement. Where the sentencing judge in this case did not impose the departure sentence contingent upon a plea, the only remedy is remand for imposition of a sentence within the CPC. That is the specific remedy Appellant requested in its Initial Brief. I.B. at 13 (citing *State v. Hall*, 981 So. 2d 511, 514 (Fla. 2d DCA 2008), *abrogated on other grounds by State v. Chubbuck*, 141 So. 3d 1163 (Fla. 2014)).

Under some circumstances, it is appropriate to remand a case for reconsideration of a departure sentence. For example, an appellate court may do so where the trial court failed to file written reasons when imposing an otherwise valid departure, failed to file written reasons when imposing an invalid departure, or failed to provide any reason – written or oral – for the departure. *See, e.g.*, *Jackson v. State*, 64 So. 3d 90, 91-92 (Fla. 2011); *Bryant v. State*, 148 So. 3d 1251, 1255-56 n.1 (Fla. 2014) (citing *Pease v. State*, 712 So. 2d 374, 376-77 (Fla. 1997)); *see also Jackson*, 64 So. 3d at 90 (approving

State v. Davis, 997 So. 2d 1278, 1278-79 (Fla. 3d DCA 2009)). None of these circumstances arose in this case.

In this case, there were no procedural defects in the imposition of the departure. The trial court acknowledged that it had the discretion to depart downward, provided Appellee with a full opportunity to present all grounds for a departure, and gave full consideration to those grounds under Fla. Stat. § 921.0026 by rendering a written order. *State v. Jackson*, 478 So. 2d 1054, 1055-56 (Fla. 1985) (detailing the benefits of written order requirement). The ground itself upon which the departure was based – not the manner in which the departure was imposed – was ultimately determined to be invalid on appeal. There is no reason to provide Appellee with an entirely new sentencing proceeding. *Contrast with State v. Davis*, 133 So. 3d 1101, 1107 (Fla. 3d DCA 2014) (remanding for new sentencing where the trial court relied on inadmissible evidence in imposing downward departure); *State v. Marron*, 111 So. 3d 210, 211-12 (Fla. 3d DCA 2013) (remanding for new sentencing where the trial court failed to comply with procedural requirements when imposing departure).

In fact, Fla. Stat. § 921.002 provides that a departure should be upheld on appeal when at least one circumstance or factor justifies the departure regardless of the presence of other circumstances or factors found not to justify

mitigation. Fla. Stat. § 921.002(3). This rule encourages courts to identify all factors in support of mitigation upfront at the sentencing hearing. This rule also discourages courts, after being reversed by an appellate court, from simply holding a new sentencing hearing on remand and searching for a new circumstance or factor in support of its previously reversed departure.

Shull v. Dugger, 515 So. 2d 748 (Fla. 1987) recognized this concern, albeit in the context of an upward departure under guidelines before the CPC. *Shull*, 515 So. 2d at 749-50. In precluding reconsideration of a departure sentence on remand, *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.

Other district courts of appeal cite *Shull* to conclude that the appropriate remedy after reversing a downward departure sentence is for the trial court to impose a sentence within the CPC. *State v. Imber*, 2017 WL 2180966 at *3 (Fla. 2d DCA May 17, 2017); *see also* Fla. R. Crim. P. 3.704(b) ("Existing

case law construing the application of sentencing guidelines will continue as precedent unless in conflict with the provisions of this rule or the 1998 Criminal Punishment Code."). The Third District also cited *Shull* to impose the same remedy in the context of a downward departure under guidelines before the CPC. *State v. Brown*, 545 So. 2d 446, 446 (Fla. 3d DCA 1989).

Jackson v. State, 64 So. 3d 90 (Fla. 2011) did hold that, on remand, a trial court is permitted to impose a downward departure when the trial court finds a valid basis under the CPC. *Jackson*, 64 So. 3d at 91. However, the issue before the Court was narrowly defined as:

> . . . 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 Florida Supreme Court later described *Jackson* as a "narrowly tailored decision". *Bryant*, 148 So. 3d at 1257-58. A holding of a decision cannot extend beyond the facts of the case. *Miccosukee Tribe of Indians v. Lewis Tein, P.L.*, 2017 WL 3400029 at *4 (Fla. 3d DCA Aug. 9, 2017). Thus, the holding in *Jackson* is limited to those cases where the trial court failed to enter a written order.[1]

[1] In conflict with decisions of this Court, other district courts have improperly extended the holding in *Jackson* to cases in which there was a written order.

Ultimately, the remedy in the Court's decision in this case conflicts with other cases in this district. Cases in this district provide that the appropriate remedy is remand for imposition of a sentence within the CPC. Appellant respectfully requests that the Court reconsider or clarify its decision and remand the case with that remedy. If the Court still seeks to remand for resentencing at which the trial court may again impose a downward departure, Appellant requests review of the issue *en banc* to maintain uniformity of decisions in the district.[2]

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/Jonathan Tanoos
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See, e.g., *Lee v. State*, 2017 WL 2374401 at *13 (Fla. 1st DCA June 1, 2017) (en banc); *State v. Milici*, 219 So. 3d 117, 124 (Fla. 5th DCA 2017).

[2] The State of Florida presents similar arguments in *State v. Sisco*, Case No. 3D16-2474 (Fla. 3d DCA), which is pending before this Court. Appellant will file a Notice of Similar or Related Case.

STATEMENT OF REHEARING EN BANC

I EXPRESS a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of this court and that a consideration by the full court is necessary to maintain uniformity of decisions in this court – *Bailey v. State*, 199 So. 3d 304, 308 (Fla. 3d DCA 2016); *State v. Diaz*, 189 So. 3d 896, 902 (Fla. 3d DCA 2016); *Fonte v. State*, 913 So. 2d 670, 673 (Fla. 3d DCA 2005).

CERTIFICATE OF SERVICE

I CERTIFY that the foregoing document – *Appellant's Motion for Rehearing, Rehearing En Banc, or Clarification* – has been delivered by **e-mail** to counsel for Appellant, Harvey Sepler, Esq., Office of the Public Defender, at hsepler@pdmiami.com and appellatedefender@pdmiami.com on **September 18, 2017**.

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IN THE THIRD DISTRICT COURT
OF APPEAL OF FLORIDA

THE STATE OF FLORIDA,
Appellant,

Case No. 3D15-2876
L.T. No. 14-890-A-K

v.

DEREK LANG SHINE JR.,
Appellee.
_____/

RESPONSE TO MOTION FOR REHEARING, REHEARING EN BANC, OR CLARIFICATION

The panel's decision in this case properly applied the Florida Supreme Court's holding in *Jackson* that an appellate court may not prohibit the trial court from reconsidering a new downward departure on remand when the original departure sentence is reversed. As a result, there is no error in the current remedy and correspondingly no basis for rehearing. If Shine can establish a valid basis for a downward departure on remand, he is entitled to such a sentence.

ARGUMENT

1. The State contends that this Court should command the trial court to impose a sentence under the Criminal Punishment Code (CPC) on remand, rather than consider other potentially lawful bases for a downward departure. Mot. at 1-2. But though the State acknowledges the Florida Supreme Court's holding in *Jackson v. State*, 64 So. 3d 90 (Fla. 2011), it fails to appreciate its significance.

2. In *Jackson*, the Court reversed the imposition of a downward departure sentence because the trial court did not adhere to section 921.002(1)(f)'s requirement that a departure sentence be justified by written findings. 64 So. 3d at 92-93. It then analyzed which remedy should accompany the reversal of a downward departure sentencing, observing that "[t]he CPC is silent on how a trial court must resentence a defendant when the original departure sentence is reversed on appeal." *Id.* at 92. Based on its "reading of the legislative scheme," the Court

ultimately concluded that "nothing within the CPC precludes the imposition of a downward departure sentence on resentencing following remand." *Id.* at 93. The Court therefore instructed the trial court that it could consider reimposing a downward departure at a *de novo* resentencing hearing.

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

4. The contrary rule—that a new departure sentence is impermissible on remand—applies only where the appellate court vacated an *upward* departure sentence under the old sentencing guidelines.[1] In that circumstance, reconsideration of an upward departure sentence is

[1] That rule also applies to the last remaining type of upward departure permitted under the CPC: sentences imposed pursuant to section 775.082(10) where, despite a CPC score of 22 points or fewer—which typically would compel a nonstate prison sentence—the trial court makes a finding that a nonstate prison sentence could present a danger to the public and therefore sentences the defendant to a prison term. *See Bryant v. State*, 148 So. 3d 1251, 1258 (Fla. 2014). In distinguishing *Jackson*, the Court reasoned that it was a "narrowly tailored decision" applying only to downward departures. *Id.* Where the appellate court reverses an upward departure, on the other hand, *Shull* forecloses a departure sentence on remand. *Id.* at 1258-59 (explaining that *Shull* continues to apply where "the concerns *Shull* addressed … apply in this context") (quoting *State v. Collins*, 985 So. 2d 985, 990–92 (Fla. 2008)). The State relies on *Bryant*'s "narrowly tailored decision" language in its motion (at 6) but ignores that *Jackson* was narrow only in terms of the *type* of departure sentence to which it applies, rather than the *reason* for the reversal of the departure sentence. *State v. Robinson*, 149 So. 3d 1199, 1205 n.6 (Fla. 1st DCA 2014) (Swanson, J., concurring). Whenever a downward departure sentence is reversed, *Jackson* applies regardless the reason for the reversal.

unlawful because doing so would "needlessly subject the defendant to unwarranted efforts to justify the sentence." *Shull v. Dugger*, 515 So. 2d 748, 750 (Fla. 1987). As explained by the Florida Supreme Court in *Shull*, that rule was explicitly intended to protect defendants from allowing the State multiple bites at the proverbial upward departure apple. Because remands following reversal of *downward* departures do not implicate that concern, the rule is inapplicable. *See State v. Collins*, 985 So. 2d 985, 992 (Fla. 2008) (explaining that *Shull* has no bearing where "the concerns *Shull* addressed do not apply").

5. District courts have consistently acknowledged this distinction. *See, e.g.*, *Jones v. State*, 71 So. 3d 173, 176 (Fla. 1st DCA 2011) (explaining that *Shull* applies to "*upward* departure[s]" whereas *Jackson* governs "*downward* departure[s]") (emphasis in original). In fact, the district courts unanimously apply *Jackson* to permit reconsideration of the other departure grounds on remand, demonstrating the settled nature of the remedy applied by the panel in this appeal. *See Lee v. State*, 223 So. 3d 342, 360 (Fla. 1st DCA 2017) (*en banc*) ("On remand, the trial court may again consider imposing a departure sentence if there are valid legal grounds to support the departure sentence, and those legal grounds are supported by competent, substantial evidence."); *State v. Pinckney*, 173 So. 3d 1139, 1140 (Fla. 2d DCA 2015) ("On remand, the court is free to impose another downward departure if Pinckney can establish a valid basis."); *State v. Michels*, 59 So. 3d 1163, 1166 (Fla. 4th DCA 2011) ("On remand, the trial court should be again permitted to depart if it finds a legally sufficient reason to do so."); *State v. Milici*, 219 So. 3d 117, 124 (Fla. 5th DCA 2017) ("We note that, on remand, the trial court may still impose a downward departure sentence 'if such a sentence is supported by valid grounds.'").

6. This Court itself has properly applied *Jackson* when fashioning the remedy after finding that the trial court's stated reasons for departure were insufficient. *See State v. Marron*,

111 So. 3d 210 (Fla. 3d DCA 2013). In *Marron*, the Court addressed the merits of the stated reasons for a downward departure—that the defendant cooperated with law enforcement and that he was a mere accomplice—and concluded that they were "invalid." *Id.* at 211.[2] Citing *Jackson*, it nonetheless clarified that its reversal "does not preclude the trial court from imposing a downward departure sentence, supported by valid grounds and procedurally compliant, on remand." *Id.* at 212.

7. The State cites several examples (Mot. at 2-3) of prior decisions of this Court that remanded for sentencing under the CPC, rather than explicitly permitting the trial court to reconsider imposing a downward departure. But none of those cases cited *Jackson* or paid careful attention to the question of the proper remedy; they merely assert, in a single sentence without citation to authority, that the trial judge should issue a guidelines sentence. It is likely that those panels simply did not contemplate the possibility of a proper downward departure on remand, or perhaps that they believed the language of their opinions would not constrain the trial court's ability to reach such a result. Such omissions invariably occur, which is why a judicial opinion that does not "articulate the … analysis performed" cannot bind future courts on that issue. *See Martinez v. State*, 933 So. 2d 1155, 1167 (Fla. 3d DCA 2006) (Rothenberg, J.).

8. Because the panel here complied with binding precedent from the Florida Supreme Court and from within this district itself, the original opinion should stand. In the event this Court elects to rehear the case *en banc*, it should adopt the panel opinion and recede from any contrary decisions previously issued by the Court.

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[2] The Court, in an alternative holding, also concluded that the departure sentence must be reversed because the trial court failed to prove written reasons. *Marron*, 111 So. 3d at 211.

CONCLUSION

Derek Lang Shine Jr. respectfully requests that this Court deny the State's motion for rehearing, rehearing *en banc*, or clarification.

Respectfully submitted,

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October 2, 2017

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished by email this **second** day of October 2017 to the following:

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THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

THE STATE OF FLORIDA,
Appellant,

CASE NO. 3D15-2876

vs.

L.T. NO. 14-890

DEREK LANG SHINE, JR.,
Appellee.
_____/

APPELLANT'S REPLY TO RESPONSE TO MOTION FOR REHEARING, REHEARING EN BANC, OR CLARIFICATION

Appellant, THE STATE OF FLORIDA, respectfully submits the following reply to Appellant's response to the motion for rehearing, rehearing en banc, or clarification.

In his response, Defendant first argues that *Jackson v. State*, 64 So. 3d 90 (Fla. 2011) employed broad language which forbids an appellate court from precluding a trial court from resentencing a defendant to a downward departure on remand if such a departure is supported by valid grounds. Resp. at 1-2. Defendant incorrectly relies on isolated language from *Jackson* and takes it completely out of context.

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 this Court – *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. This Court 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.

The Florida Supreme 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 these controlling facts. *See* Mot. at 6 (citing *Miccosukee Tribe of Indians v. Lewis Tein, P.L.*, 227 So. 3d 656 (Fla. 3d DCA 2017)). The holding cannot be extended to cases – like this case – in which the trial court did not fail to enter a written order.[1]

This Court's post-*Jackson* decisions in *Bailey v. State*, 199 So. 3d 304 (Fla. 3d DCA 2016), and *State v. Diaz*, 189 So. 3d 896 (Fla. 3d DCA 2016) are consistent with the express holding in *Jackson*. Neither case involved a procedural defect in the sentencing proceedings. Rather, both involved departures which were not supported by the evidence. *Bailey*, 199 So. 3d at 307-08; *Diaz*, 189 So. 3d at 901-02. Both instructed on remand for imposition of a sentence within the CPC which necessarily precluded a sentence below the CPC. *See Hearns v. State*, 54 So. 3d 500, 501-02 (Fla. 3d DCA 2010) ("'A trial court's role upon the issuance of a mandate from an appellate court

[1] The written order requirement is not trivial. *See State v. Jackson*, 478 So. 2d 1054, 1055 (Fla. 1985) ("The alternative of allowing oral pronouncements to satisfy the requirement for a written statement is fraught with disadvantages which, in our judgment, compel the written reasons." (citation omitted)).

becomes purely ministerial, and its function is limited to obeying the appellate court's order or decree.'" (citation omitted)).

Defendant further argues that the prohibition on imposing a new departure on remand only applies to upward departures – not downward departures. Resp. at 2-3. Defendant cites *Shull v. Dugger*, 515 So. 2d 748 (Fla. 1987). Resp. at 2-3. As explained in the rehearing motion, historically this Court in *State v. Brown*, 545 So. 2d 446 (Fla. 3d DCA 1989) and more recently the Second District in *Imber v. State*, 223 So. 3d 1070 (Fla. 2d DCA 2017) relied on *Shull* to reverse a downward departure sentence and remand for imposition of guidelines sentence. Mot. at 5. Defendant does not address either case.

Instead, Defendant argues that the rationale in *Shull* was to protect defendants from endless attempts at justifying an upward departure sentence. Resp. at 2-3. Defendant suggests that the same concern does not arise with downward departures. Resp. at 3. However, the concern in *Shull* was also that a trial court would simply find a new ground to justify a previously reversed departure, giving rise to "numerous resentencings as, one by one, reasons are rejected in multiple appeals". Mot. at 5 (quoting *Shull*, 515 So. 2d at 750). 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. On appeal, when multiple grounds support a downward departure, the departure is upheld when at least one ground 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 in his motion.

Balanced with a defendant's right to pursue a downward departure is the State's interest in finality in criminal proceedings. In *Witt v. State*, 387 So. 2d 922 (Fla. 1980), the Florida Supreme Court explained:

> 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.

Witt, 387 So. 2d at 925. The rule advocated by Defendant undermines this important concern and needlessly subjects the State to multiple appeals without any end.[2]

[2] Defendant cites *State v. Collins*, 985 So. 2d 985 (Fla. 2008) to argue that *Shull* does not apply where concerns in *Shull* are not implicated. In *Collins*, the defendant's sentence was reversed after finding insufficient evidence in support of a habitual offender sentence. *Collins*, 985 So. 2d at 991-92. Unlike both upward and downward departures, the decision to impose a habitual offender sentence is based only on a defendant's prior felony convictions and

Defendant also challenges the Florida Supreme Court's interpretation of *Jackson* as a "narrowly tailored decision". Resp. at 2 n.1. Defendant argues that *Jackson* was "narrowly tailored" only in terms of the type of departure rather than the reasons for the departure. The plain language of *Bryant* refutes this characterization. *Bryant* specifically described *Jackson* as follows:

> 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.

Bryant, 148 So. 3d at 1257 (citing *Jackson*, 64 So. 3d at 91). Further, though the court ultimately declined to apply to holding in *Jackson* where *Jackson* involved a downward departure – not an upward departure, *Bryant* did not otherwise broaden the holding of *Jackson* as Defendant suggests. *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002) ("Where a court encounters an express holding from this Court on a specific issue and a subsequent contrary dicta statement on the same specific issue, the court is to apply our express holding in the former decision until such time as this Court recedes from the express holding.").

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does not implicate the "after-the-fact justification" concern in *Shull*. *Collins*, 985 So. 2d at 992.

Defendant also argues that district courts "unanimously" apply *Jackson* to allow reconsideration of a downward departure sentence on remand. Mot. at 3. Defendant ignores this Court's numerous decisions and the Second District's decision in *Imber*. *Supra.* at 4.[3]

Further, to the extent that cases from other district courts conflict with this Court's own decisions, this Court is bound by its own decisions unless it reviews the issue en banc. Even if this Court reviews the issue en banc, it would have to determine why the principal of stare decisis should not apply. Defendant offers no reason why stare decisis should not apply but rather suggests that this Court's precedent supports his interpretation of *Jackson*. *Puryear*, 810 So. 2d at 904-05 (explaining that stare decisis only bends "where there has been a significant change in circumstances since the adoption of the legal rule" or "where there has been an error in legal analysis").

Defendant also argues that this Court has correctly applied *Jackson* in *State v. Marron*, 111 So. 3d 210 (Fla. 3d DCA 2013), after finding the trial court's grounds were insufficient. *Marron* actually supports the State's plain reading of *Jackson*. *Marron* reversed where the trial court "departed from its statutory obligations". *Marron*, 111 So. 3d at 211. The trial court in *Marron*

[3] *State v. Pickney*, 173 So. 3d 1139 (Fla. 2d DCA 2015), cited by Defendant, reversed after the trial court committed procedural error and relied on inadmissible evidence to justify a downward departure.

failed to file any written reasons for its decision until 27 days after the written judgment and sentence were filed and 40 days after the oral pronouncement. *Marron*, 111 So. 3d at 211. The trial court's reasons were not orally announced either. *Marron*, 111 So. 3d at 211. *Marron* remanded for imposition of a sentence that "accords with the statutory requirements". *Marron*, 111 So. 3d at 211. Citing *Jackson*, the Court instructed that the trial court could impose a new downward departure sentence. *Marron*, 111 So. 3d at 211. *Jackson* applied where the trial court had failed to file written reasons for the departure.

Lastly, Defendant argues that decisions by this Court remanding for resentencing within the CPC do so without citing authority and without addressing the proper remedy. Resp. at 4. Defendant suggests that the panels of those decisions did not contemplate the proper remedy and did not believe the language in the decisions would constrain the trial court on remand.

As to the latter, a trial court does not have the discretion to ignore an appellate court's mandate. Where this Court remanded the case for imposition of a sentence within the CPC, the trial court was obligated to impose a sentence within the sentencing guidelines. *Supra.* at 3-4. As to the former, this Court carefully considered the appropriate remedy in *Bailey* and *Diaz*, both which arose post-*Jackson*. *Supra.* at 3. Further, applying Defendant's

argument to the Court's decision in this case would leave the decision with no precedential value. Without citing any authority, the decision remanded the case for resentencing at which the trial court could impose a downward departure sentence. Mot. at 1-2. Yet, Defendant still argues that this Court's decision complied with its own binding precedent and precedent from the Florida Supreme Court. Resp. at 4.

CONCLUSION

In light of the foregoing, the Court should reconsider the remedy in its decision and remand this case for resentencing within the sentencing guidelines. Defendant was already afforded a full and fair opportunity to present all grounds in support of a downward departure at his sentencing hearing. The trial court provided Defendant meaningful review and entered a written order. Where the hearing was otherwise free from procedural defect, Defendant is not entitled to pursue new and different grounds on remand to justify a new departure sentence.

Respectfully submitted,

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ATTORNEY GENERAL

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Assistant Attorney General

CERTIFICATE OF SERVICE

I CERTIFY that the foregoing document – *Appellant, the State of Florida's Reply to Response to Motion for Rehearing, Rehearing En Banc, or Clarification* – has been delivered by **e-mail** to counsel for Appellant, Jeffrey DeSousa, Esq., Office of the Public Defender, at jdesousa@pdmiami.com and appellatedefender@pdmiami.com on **November 27, 2017**.

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IN THE THIRD DISTRICT COURT
OF APPEAL OF FLORIDA

THE STATE OF FLORIDA,
Appellant,

v.

DEREK LANG SHINE JR.,
Appellee.
_____/

Case Nos. 3D15-2876 & 3D15-2877
L.T. Nos. 14-890-A-K &
14-891-A-K

APPELLEE'S MOTION FOR REHEARING EN BANC OR CERTIFICATION OF CONFLICT

A panel of this Court originally got the remedy here right: when a district court reverses a downward departure sentence in a criminal case, the defendant must be allowed to argue new grounds for departure on remand. That result follows both from the Florida Supreme Court's decision in *Jackson v. State*, 64 So. 3d 90 (Fla. 2011), as well as decisions of this and other district courts. Yet the State successfully convinced the panel to reconsider its original decision, and the panel released a second opinion specifying that the trial court must resentence Appellee Derek Shine "within the sentencing guidelines." Thus, even if some valid ground for departure is presented on remand, the trial court will be constrained to a guidelines sentence it initially rejected as "too harsh" and "inappropriate." Shine now asks the *en banc* Court to take up the case and reinstate the original remedy, or otherwise to certify conflict with a series of Supreme Court and district court decisions.

There are several compelling reasons for empaneling the *en banc* Court. First, Florida Rule of Appellate Procedure 9.331(d)(1) authorizes the full court to hear a case when "necessary to maintain uniformity in the court's decisions." That rule applies here in spades: after reversing erroneous downward departure sentences in criminal cases, this Court has sometimes remanded for *de novo* resentencing, allowing for a new departure, while other times has confined the trial

court to sentence within the guidelines. As a result, some defendants within this district will receive full, individualized resentencing on remand, while others will not.

Second, the new panel opinion provides ample basis for discretionary review by the Florida Supreme Court because it conflicts both with *Jackson* and with decisions of every other district court, which have all cited *Jackson* when remanding for *de novo* resentencing. Though the State contends that *Jackson* is limited to downward departure reversals based on technical errors, not substantive errors, the Florida Supreme Court itself has rejected that argument.

Third, and most importantly, the second panel decision deprives Shine, and future criminal defendants, of the right to offer new, valid reasons for a departure on remand. The trial judge, most familiar with Shine and his unique set of circumstances, must be free to make the ultimate decision on an appropriate sentence.

BACKGROUND

After its review of the facts and circumstances of this criminal prosecution, the trial court sentenced Appellee Derek Shine Jr. to concurrent 40-month prison terms followed by probation. That sentence constituted a downward departure from the 73.65-month "bottom of the guidelines," which ordinarily would have represented the lowest permissible prison sentence. The State successfully appealed, and the proper remedy is now at issue.

1. Facts and Procedural History

In 2014, Derek Shine Jr. pled guilty in Monroe County to multiple counts of sale of cocaine within 1,000 feet of a convenience store and use of a communication device to facilitate a felony in case numbers 14-890-A-K and 14-891-A-K. As part of that uncoerced plea bargain, the prosecutor recommended that Shine be sentenced to three years of drug offender probation with

special conditions including six months in the county jail and that he complete the Offender Reentry Program, designed to assist persons dealing with substance abuse issues.

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

The trial court, the Honorable Mark Jones, accepted the plea bargain. The probation sentence he formulated focused on drug rehabilitation: Shine was ordered to undergo urinalysis twice weekly to detect the presence of drugs or alcohol, satisfy drug court requirements, attend Alcoholics Anonymous and Narcotics Anonymous three times weekly, and stay clear of substances. For more than half a year, Shine complied with these conditions. But in October 2015 the State alleged that Shine had violated his drug offender probation by testing positive for a synthetic cannabinoid called Spice. When an officer with the Key West Police Department went to arrest Shine for the violation, there was an altercation resulting in a further alleged violation of resisting an officer without violence.

Shine admitted to the probation violations. Prior to the second sentencing hearing, the court again received several letters from Shine's friends and family expressing their support and requesting leniency. Shine's girlfriend, Crystal Ramos, wrote that Shine turned to drug use (the synthetic cannabinoid) after learning that the couple had lost their unborn child to a miscarriage. (Shine himself would later acknowledge at the sentencing hearing that he screwed up by resorting

to drug use following a difficult month in which he learned of the miscarriage, his niece was admitted to the hospital with a serious illness, and a friend died in a fire.) Pastor Beverly Greene-Mingo also submitted a letter discussing Shine's religious life and reporting that, in her experience, Shine is "a courteous and respectful young man."

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

While defense counsel asked Judge Jones to reinstate probation and order Shine into a long-term rehab program, the prosecutor characterized Shine as violent and unrepentant and asked for a prison sentence at the bottom of the 73.65-month bottom of the guidelines.

Judge Jones sentenced Shine below the bottom of the guidelines: 40 months imprisonment followed by 40 months of drug offender probation. The court observed that Shine was given a very favorable sentence at the first sentencing because "everybody thinks that he's got potential and comes from a good family," but declined to reinstate probation this time because Shine had squandered the opportunity previously given to him. Yet Judge Jones pointed out that Shine had never been to prison and that a sentence at or above the bottom of the guidelines would be

needlessly harsh. Despite this downward departure, Shine would nonetheless serve a "very long sentence."

As grounds for the departure, Judge Jones cited the original downward departure placing Shine on probation, which was based on a valid, uncoerced plea bargain between Shine and prosecutors. (The Florida Supreme Court has previously recognized a prior departure as a valid basis for a departure following probation revocation. *See Franquiz v. State*, 682 So. 2d 536, 537 (Fla. 1996)). The judge's written findings further explained that sentencing Shine within the CPC guidelines would be "inappropriate, too harsh, and contrary to the principle of graduated sanctions." Unlike the original probationary sentence, the new probation conditions required Shine to complete a long-term, residential rehab program after his prison time.

The State appealed the departure sentences in both felony cases, generating appellate cases 3D15-2876 and 3D15-2877. The appeals were consolidated.

2. Original Panel Decision and Decision on Rehearing

A panel of this Court reversed the departure sentences, finding the trial court's stated ground to be an "[in]valid legal basis." *State v. Shine*, No. 3D15-2876, Slip Op. at *3 (Fla. 3d DCA Aug. 23, 2017) (Rothenberg, C.J., Suarez and Fernandez, JJ.). The opinion specified the following remedy: "Consequently, we reverse and remand 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 departure." *Id.* (emphasis added).

The State moved for rehearing, rehearing *en banc*, or clarification on the question of the remedy the panel had applied. Rather than permit the trial court to depart downwards based on valid reasons on remand, the State argued, the panel should have restricted the trial court to a within-range guidelines sentence. It cited decisions of this Court applying that remedy but left out

of its motion any mention of the many times this Court has reversed a downward departure on substantive grounds but specified that a new departure would be permissible on remand.

The panel reheard the case and amended the remedy paragraph as requested by the State. *State v. Shine*, Consol. Nos. 3D15-2876 & 3D15-2877, Slip Op. at *3 (Fla. 3d DCA Jan. 24, 2018). The opinion now constrains the trial court to resentence Shine within the range provided for under the CPC. *Id.* ("Consequently, we reverse and remand for resentencing within the sentencing guidelines.").

ARGUMENT

As explained below, the Florida Supreme Court has already supplied the answer to the remedy question here, and every district court has cited *Jackson* when permitting trial judges to again depart on remand. Various panels of this Court have fractured on the issue, however, warranting either *en banc* review or a certification of conflict.

I. The Florida Supreme Court and Other Districts Have All Permitted Defendants to Argue New Grounds for Departure on Remand

The proper remedy in this case is controlled by *Jackson v. State*, where the Florida Supreme Court reversed the imposition of a downward departure sentence because the trial court did not adhere to section 921.002(1)(f)'s requirement that a departure sentence be justified by written findings. 64 So. 3d 90, 92-93 (Fla. 2011). It then analyzed which remedy should accompany the reversal of a downward departure sentence, observing that "[t]he CPC is silent on how a trial court must resentence a defendant when the original departure sentence is reversed on appeal." *Id.* at 92. Based on its "reading of the legislative scheme," the Court ultimately concluded that "nothing within the CPC precludes the imposition of a downward departure sentence on resentencing following remand." *Id.* at 93. The Court therefore instructed the trial court that it could consider reimposing a downward departure at a *de novo* resentencing hearing.

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

The contrary rule—that a new departure sentence is *im*permissible on remand—applies only where the appellate court vacated an *upward* departure sentence under the old sentencing guidelines.[1] In that circumstance, reconsideration of an upward departure sentence is unlawful because doing so would "needlessly subject the defendant to unwarranted efforts to justify the sentence." *Shull v. Dugger*, 515 So. 2d 748, 750 (Fla. 1987). As explained by the Florida Supreme Court in *Shull*, the rule was intended to protect defendants from allowing the State multiple bites at the proverbial upward departure apple. Because remands following reversal of *downward* departures do not implicate that concern, it is inapplicable. *See State v. Collins*, 985 So. 2d 985, 992 (Fla. 2008) (explaining that *Shull* has no bearing where "the concerns *Shull* addressed do not apply").

The district courts have consistently acknowledged this distinction. *See, e.g.*, *Jones v. State*, 71 So. 3d 173, 176 (Fla. 1st DCA 2011) (explaining that *Shull* applies to "*upward*

[1] That rule also applies to the last remaining type of upward departure permitted under the CPC: sentences imposed pursuant to section 775.082(10) where, despite a CPC score of 22 points or fewer—which typically would compel a nonstate prison sentence—the trial court makes a finding that a nonstate prison sentence could present a danger to the public and therefore sentences the defendant to a prison term. *See Bryant v. State*, 148 So. 3d 1251, 1258 (Fla. 2014).

departure[s]" whereas *Jackson* governs "*downward* departure[s]" (emphasis in original)). In fact, they unanimously apply *Jackson* to permit reconsideration of other departure bases on remand, demonstrating the settled nature of the remedy applied by the original panel decision. *See Lee v. State*, 223 So. 3d 342, 360 (Fla. 1st DCA 2017) (*en banc*) ("On remand, the trial court may again consider imposing a departure sentence if there are valid legal grounds to support the departure sentence, and those legal grounds are supported by competent, substantial evidence."); *State v. Pinckney*, 173 So. 3d 1139, 1140 (Fla. 2d DCA 2015) ("On remand, the court is free to impose another downward departure if Pinckney can establish a valid basis."); *State v. Michels*, 59 So. 3d 1163, 1166 (Fla. 4th DCA 2011) ("On remand, the trial court should be again permitted to depart if it finds a legally sufficient reason to do so."); *State v. Milici*, 219 So. 3d 117, 124 (Fla. 5th DCA 2017) ("We note that, on remand, the trial court may still impose a downward departure sentence 'if such a sentence is supported by valid grounds.'").

In its motion for rehearing, the State attempted to distinguish *Jackson* by alleging that *Jackson* was limited to reversals due to technical or procedural errors, like the failure of a sentencing court to put mitigating factors in writing. But the Supreme Court's own subsequent decisions foreclose that argument. In *Bryant*, the Court explained that both technical and substantive errors result in the same basic problem: the "failure to provide a valid reason." *Bryant v. State*, 148 So. 3d 1251, 1258 (Fla. 2014). In the eyes of the Supreme Court, there is no meaningful difference between those two categories of errors.

The district court decisions cited above likewise prove that *Jackson* is not limited to technical/procedural reversals. In each of those decisions, the appellate court reversed the downward departure due to the insufficiency of the trial court's stated grounds—not a technical

error—yet cited *Jackson* for the proposition that the defendant could argue new grounds for a departure on remand.[2]

II. The Panel Decision Exacerbates an Intra-District Conflict

Despite *Jackson*'s guidance, this Court's own approach to the remedy has splintered in two directions. Sometimes it has permitted defendants to argue for, and trial courts to grant, a new departure on remand. Other times it has simply ordered within-range sentences. Circumstances like these are precisely the reason the appellate rules provide for *en banc* hearings: to ensure uniformity. *See* Fla. R. App. P. 9.331(d)(1) (providing that full panel of district court may hear case where "necessary to maintain uniformity in the court's decisions"). The intra-district conflict is described below.

A. This Court has often reversed a downward departure on substantive grounds but allowed a new departure on remand

We have identified at least four cases in which this Court reversed a downward departure on substantive, not technical, grounds but expressly permitted *de novo* resentencing and the possibility of a new departure. First, in *Marron v. State* the Court addressed the merits of the stated reasons for a downward departure—that the defendant cooperated with law enforcement and that he was a mere accomplice—and concluded that they were "invalid." 111 So. 3d 210, 211 (Fla. 3d DCA 2013).[3] Citing *Jackson*, it nonetheless clarified that its reversal "does not preclude the trial

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[2] Other commentators have observed that *Jackson* was a "narrowly tailored decision" only in the sense that it applied to downward—rather than upward—departures. *State v. Robinson*, 149 So. 3d 1199, 1205 n.6 (Fla. 1st DCA 2014) (Swanson, J., concurring).

[3] The Court, in an alternative holding, also concluded that the departure sentence must be reversed because the trial court failed to prove written reasons. *Marron*, 111 So. 3d at 211. The State's reply on rehearing before the panel focused solely on this procedural aspect of the *Marron* Court's holding, and ignored the Court's substantive holding: that the trial court had relied on an invalid basis for departure. Despite the substantive reversal, *de novo* resentencing was ordered.

court from imposing a downward departure sentence, supported by valid grounds and procedurally compliant, on remand." *Id.* at 212.

Second, *State v. Paulk* specified that its reversal was "without prejudice" to "revisit the issue of a downward departure on a more fully developed record." 813 So. 2d 152, 154 (Fla. 3d DCA 2002). Resentencing was necessary because one of the departure grounds listed by the trial court was "not supported by the record" and the other was not a "valid basis" to depart. *Id.* at 154, 154 n.1.

Third, the Court in *State v. Turro* rejected the State's procedural arguments in favor of reversal, but nonetheless reversed the downward departure because the evidence for the mitigating circumstance was "insufficient." 724 So. 2d 1216 (Fla. 3d DCA 1998). Rather than compel the trial court to sentence the defendant within the guidelines on remand, the Court wrote: "Our ruling is without prejudice to the trial court to revisit defendant's medical condition and the issue of downward departure on a more fully developed record." *Id.* at 1217.

And fourth, the identical panel that decided Shine's case had previously issued an opinion that complied with *Jackson*. *See State v. Johnson*, 193 So. 3d 32, 35 (Fla. 3d DCA 2016) (reversing downward departure on substantive grounds but stating: "The trial court, however, is permitted to reassess the non-statutory factors to determine whether the totality of the circumstances warrant the imposition of a downward departure sentence.") (Suarez, C.J., Rothenberg and Fernandez, JJ.). Not only did that panel permit the trial court to consider a renewed departure on remand, it observed that the trial court was "well within its discretion to do so." *Id.*

B. Other times, the Court reversed on substantive grounds while constraining the sentencing judge to a guidelines sentence

But as the State pointed out in its motion for rehearing, this Court has just as often applied the opposite remedy. *See, e.g.*, *Bailey v. State*, 199 So. 3d 304, 308 (Fla. 3d DCA 2016); *State v.*

Diaz, 189 So. 3d 896, 902 (Fla. 3d DCA 2016); *State v. Pita*, 54 So. 3d 557, 562 (Fla. 3d DCA 2011).

In each of those cases, the Court found the sentencing court's stated justification for the departure to be substantively invalid and remanded for resentencing "within the guidelines." And, in each of those cases, the Court overlooked *Jackson* and articulated no contrary authority for the remedy it applied.

III. Uniformity Is Especially Desirable in Criminal Sentencing

That intra-district conflict warrants either *en banc* review or a certification of conflict with *Jackson* and the other districts' decisions. That would be true in the face of any such conflict, but particularly where, as here, the split of authority arises in the context of criminal sentencing, an area of law where courts and commentators have repeatedly stressed the need for uniformity. *See generally* Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. Cin. L. Rev. 749, 759-63 (2006); *United States v. Booker*, 543 U.S. 220 (2005). Indeed, sentencing disparities do not go unnoticed by criminal defendants, who often compare sentences and the process by which those sentences were reached. And were Shine to inquire of his appellate lawyer, undersigned counsel could provide no good explanation for why Shine must be sentenced within-range on his remand while appellees like Shamichael Johnson, Kenneth Paulk, and Severino Marron got the benefit of full, individualized re-sentencings. Randomness and unknowability are not welcome hallmarks of a justice system.

The lack of uniformity is also confusing to trial judges, as a comparison of this Court's opinions in *Johnson* and the present case shows. In *Johnson*, the Court reversed a departure by the Honorable Mark Jones but gave the judge the option of again departing on remand. 193 So. 3d at 35. Fast forward to Shine's case, where the very same judge is now being told that he had

only a single opportunity to get the departure sentence right. In light of precedents like *Johnson*, Judge Jones would reasonably have believed that he was not required to list every conceivable basis for a departure, and might have concluded his analysis early—without delving into other potentially applicable mitigating factors—if he saw one basis that (he thought) would validly support a departure.

Finally, there is reason to believe that Judge Jones will in fact be able to articulate a valid basis for departure on remand. The State admitted in its initial brief on appeal (at 10-11) that a prior downward departure may form the basis for a departure after a probation revocation. *See Franquiz v. State*, 682 So. 2d 536, 537 (Fla. 1996). It merely contended that Judge Jones had not explained how the prior departure related to the present sentencing hearing. On remand, Judge Jones should be free to more fully enunciate the relationship between the original departure sentence and the current need to depart downwards. It also bears noting that the prosecutor made only a general objection to the second departure sentence, rather than identify the source of the error. Thus, the judge lacked notice of any perceived need to discuss the relationship to the prior departure.[4] That does not mean no valid relationship exists. Nor does it mean that no additional potential bases for departure will come to light on remand.

CONCLUSION

Derek Lang Shine Jr. respectfully requests that the *en banc* Court review this case and reinstate the remedy in the original panel decision, permitting him to seek a downward departure on remand based on any other valid ground. Alternatively, he asks the panel to certify conflict.

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[4] In moving for rehearing *en banc* solely with respect to the remedy, we do not intend to waive our prior argument that the trial court properly departed under cases like *Franquiz* and *Hamner v. State*, 816 So. 2d 810, 813 n. 8 (Fla. 5th DCA 2002). Ans. Br. 7. The panel decision did not discuss either of those decisions, which create a basis for conflict jurisdiction in the Florida Supreme Court separate from the remedy conflict.

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January 31, 2018

REQUIRED STATEMENT FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that the second panel decision is contrary to the following decisions of this Court and that consideration by the full court is necessary to maintain uniformity of decisions in this Court:

Contrary to panel decision	**Consistent with panel decision**
State v. Johnson, 193 So. 3d 32 (Fla. 3d DCA 2016) *Marron v. State*, 111 So. 3d 210 (Fla. 3d DCA 2013) *State v. Paulk*, 813 So. 2d 152 (Fla. 3d DCA 2002) *State v. Turro*, 724 So. 2d 1216 (Fla. 3d DCA 1998)	*Bailey v. State*, 199 So. 3d 304 (Fla. 3d DCA 2016) *State v. Diaz*, 189 So. 3d 896 (Fla. 3d DCA 2016) *State v. Pita*, 54 So. 3d 557 (Fla. 3d DCA 2011) *Fonte v. State*, 913 So. 2d 670 (Fla. 3d DCA 2005) *State v. Stanton*, 781 So. 2d 1129 (Fla. 3d DCA 2001)

By: /s/ Jeffrey Paul DeSousa
JEFFREY PAUL DeSOUSA
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been furnished by email this **thirty-first** day of January 2018 to the following:

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THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

THE STATE OF FLORIDA,
Appellant,

CASE NO. 3D15-2876

vs.

L.T. NO. 14-890

DEREK LANG SHINE, JR.,
Appellee.
_____/

APPELLANT'S RESPONSE IN OPPOSITION TO MOTION FOR REHEARING EN BANC AND CERTIFICATION

Appellant, THE STATE OF FLORIDA, responds in opposition to Appellee's motion for rehearing en banc and certification.

Defendant argues that there are several "compelling reasons" for the Court to review this case en banc. Mot. at 1-2. However, en banc review is an extraordinary remedy and only allowed for two very specific reasons. En banc review is allowed where (1) the case or issue is of exceptional importance; or (2) consideration is necessary to maintain uniformity in the Court's decisions. Fla. R. App. P. 9.331(d)(1), (2). Defendant ultimately only seeks review to maintain uniformity. Mot. at 13. None of the decisions from this Court cited by Defendant conflict with the decision in this case. Thus, Defendant's motion should be denied.

Defendant also requests certification of conflict with *Jackson v. State*, 64 So. 3d 90 (Fla. 2011) and other district court decisions. *Jackson* is a Florida

Supreme Court case and cannot provide the basis for conflict jurisdiction. Fla. Const., art. V, §3(b)(4). The other district court decisions do not expressly analyze *Jackson* and instead only summarily provide a remedy. Thus, this Court should not certify conflict.

Lastly, Defendant argues that *Jackson* always requires a *de novo* resentencing when an appellate court reverses a trial court's order granting a downward departure. However, *Jackson* only applies where the trial court failed to file written reasons for the departure and the oral reasons are determined to be invalid. *Jackson*, 64 So. 3d at 91, 92-93. Otherwise, if the trial court renders an order for the departure, the appellate court finds all grounds unsupported by evidence or invalid, and the sentencing is otherwise free from procedural defect, the only remedy is remand for resentencing within the guidelines. *Shull v. Dugger*, 515 So. 2d 748, 750 (Fla. 1987); *Bailey v. State*, 199 So. 3d 304 (Fla. 3d DCA 2016); *State v. Diaz*, 189 So. 3d 896 (Fla. 3d DCA 2016); *see also Imber v. State*, 223 So. 3d 1070, 1073 (Fla. 2d DCA 2017).

PROCEDURAL HISTORY

In this case, the panel of the Court reversed the trial court's order granting a downward departure. *State v. Shine*, 2018 WL 522239 at *1 (Fla. 3d DCA Jan. 24, 2018). Pursuant to a plea agreement with the State,

Defendant was initially sentenced to three years of drug offender probation. *Id.* Defendant violated probation. *Id.* The trial court revoked probation and resentenced Defendant to 40 months of prison followed by 40 months of probation for one count and a concurrent sentence of 40 months of prison followed by 12 months of probation for another count. *Id.* This new sentence was a downward departure. *Id*.

The trial court provided written reasons for the departure. *Id.* The trial court imposed the departure because the sentence was imposed pursuant to a valid uncoerced plea agreement and it was "inappropriate, too harsh, and contrary to the principles of graduated sanctions" to impose the lowest permissible sentence under the guidelines. *Id.* On appeal, this Court found that both reasons were not a valid legal basis for the departure. *Id.*

Initially, the panel of the Court remanded for resentencing at which the trial court could again impose a downward departure sentence. *State v. Shine*, 42 Fla. L. Weekly D1832, Case No. 3D15-2876 (Fla. 3d DCA Aug. 23, 2017). After the State moved for rehearing, the panel withdrew its prior decision and substituted with a new decision which only modified the remedy. *Shine*, 2018 WL 522239 at *1. The new decision remanded for resentencing within the sentencing guidelines. *Id.*

I. CERTIFICATION OF CONFLICT WITH *JACKSON* AND OTHER DISTRICT COURT DECISIONS IS NOT WARRANTED

Defendant first argues that the Court should certify conflict with *Jackson* and other district court decisions cited in his motion. Mot. at 1, 6-9, 11, 12. The Florida Supreme Court may review any order or judgment of a trial court that a district court certifies is in direct conflict with a decision of another court of appeal. Fla. Const., art. V, §3(b)(4).

A. *JACKSON*

As an initial matter, where *Jackson* is a Florida Supreme Court decision – not a district court decision, this Court cannot certify conflict with *Jackson*. Fla. Const., art. V, §3(b)(4) only applies to conflict with district court decisions. "There is no circumstance under which it would be proper for a district court of appeal to knowingly render a decision that conflicts with a supreme court decision." Philip J. Padovano, *Florida Appellate Practice*, §29:2 at 746 (2017 ed.).

Even if the Court could, the Court's decision in this case is not in direct conflict with *Jackson*. *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 this Court – *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. This Court 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. The Florida Supreme 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 supreme court recognized that the trial court's failure to file written reasons for the departure was a dispositive, controlling fact.

Resolving the conflict, the supreme 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 those controlling facts. *Miccosukee Tribe of Indians v. Lewis Tein, P.L.*, 227 So. 3d 656 (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."). The holding cannot be extended to cases – like this case – in which the trial court did not fail to render a written order.

Further, the Florida Supreme Court specifically characterized *Jackson* as a "narrowly tailored" decision. In doing so, the Court described it as a case where "the trial court failed to provide written reasons for imposing the departure." *See Bryant v. State*, 148 So. 3d 1251, 1257 (Fla. 2014) ("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)).

Defendant suggests that *Bryant*'s characterization of *Jackson* as "narrowly tailored" means that *Jackson* only applies to downward departure

sentences – not upward departure sentences. Defendant concludes that, therefore, the remedy provided in *Jackson* applies to **every** downward departure case, regardless of whether the trial court rendered a written order. This conclusion is contradictory and conflicts with the plain language of *Jackson* and *Bryant*. *Jackson* should not be construed in that manner.

This Court's post-*Jackson* decisions in *Bailey v. State*, 199 So. 3d 304 (Fla. 3d DCA 2016), and *State v. Diaz*, 189 So. 3d 896 (Fla. 3d DCA 2016) are consistent with *Bryant*'s interpretation of *Jackson*. Neither case involved a procedural defect in the sentencing proceedings. Rather, both involved departures which were not supported by the evidence. *Bailey*, 199 So. 3d at 307-08; *Diaz*, 189 So. 3d at 901-02. Both instructed on remand for imposition of a sentence within the Criminal Punishment Code ("CPC"), necessarily precluding a sentence below the CPC.

This Court's pre-*Jackson* case in *State v. Brown*, 545 So. 2d 446 (Fla. 3d DCA 1989) is also consistent with *Bryant*'s interpretation of *Jackson*. *Brown* reversed the trial court's order granting a downward departure and remanded for resentencing within the guidelines where, unlike *Jackson*, the trial court provided written reasons for the departure. *Id.* at 446. *Brown* cited *Shull v. Dugger*, 515 So. 2d 748 (Fla. 1987) which prohibited imposing a new

departure on remand after an appellate reverses an upward departure. *Shull*, 515 So. 2d at 749-50. *Shull* specifically provided:

> 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).[1]

The Second District in *Imber v. State*, 223 So. 3d 1070 (Fla. 2d DCA 2017) recently relied on *Shull* to remand for imposition of a sentence within the guidelines after reversing a downward departure. Thus, like this Court, the Second District applies *Shull*, as opposed to *Jackson*, where the trial court provided written reasons for the departure.

In an attempt to distinguish this Court's long-standing rule and the Second District's decision in *Imber*, Defendant argues that the rationale in

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

Shull was to protect defendants from endless attempts at justifying an upward departure sentence. Mot. at 7. Defendant suggests that the same concern does not arise with downward departures. Mot. at 7. However, *Shull* was also concerned that a trial court would simply find a new ground to justify a previously reversed departure, giving rise to "numerous resentencings as, one by one, reasons are rejected in multiple appeals". *Shull*, 515 So. 2d at 750. This concern of "after-the-fact justifications" arises under both upward departure and downward departure cases.

Just like upward departures, a defendant should not be afforded with endless opportunities to seek downward departures. On appeal, when multiple grounds support a downward departure, the departure is upheld when at least one ground 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 in his motion.

Ultimately, the absence of a written order was a critical, controlling fact in *Jackson* that is absent from this case. The written order requirement is not trivial. Fla. Stat. § 921.002(3); Fla. Stat. § 921.00026(1); Fla. Stat. § 921.00265(2); Fla. R. Crim. P. 3.704(d)(27); *see State v. Jackson*, 478 So. 2d 1054, 1055 (Fla. 1985) ("The alternative of allowing oral pronouncements to satisfy the requirement for a written statement is fraught with disadvantages

which, in our judgment, compel the written reasons." (citation omitted)). Where this Court's decision and *Jackson* involve different controlling facts, neither expressly conflicts.

B. OTHER DISTRICT COURT DECISIONS

Defendant also cites *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), and *State v. Michels*, 59 So. 3d 1163 (Fla. 4th DCA 2011) and requests that the Court certify conflict. Mot. at 1, 2, 7-9, 12. None of these decisions expressly analyze the remedy in the context of *Jackson* or *Shull* and therefore conflict should not be certified.

In *Milici*, the Fifth District merely concluded by citing a Fifth District decision which cited *Jackson* and stated: "We note that, on remand, the trial court may still impose a downward departure sentence 'if such a sentence is still supported by valid grounds.'" *Milici*, 219 So. 3d at 124. In *Pinckney*, the Second District also just cited *Jackson* and concluded: "On remand, the court is free to impose another downward departure if [the defendant] can establish a valid basis." *Pinckney*, 173 So. 3d at 1140. In *Lee*, the First District also cited *Jackson* and concluded: "On remand, the trial court may again consider imposing a departure sentence if there are valid legal grounds to support the departure sentence, and those legal grounds are supported by competent,

substantial evidence." *Lee*, 223 So. 3d at 360. In *Michels*, the Fourth District on rehearing corrected its decision, cited *Jackson*, and stated: "On remand, the trial court should be again permitted to depart if it finds a legally sufficient reason to do so." *Michels*, 59 So. 3d at 1166. Absent from all of these decisions is any analysis of the issue.

Where none of these decisions expressly analyze *Jackson* and *Shull*, and instead only summarily provide a remedy, this Court should not certify conflict. In fact, the parties in those cases may not have adequately raised and briefed the proper remedy.

After all, Defendant did not challenge the State's proposed remedy here until the State moved for rehearing from the original decision. A.B. at 8, 9. Defendant did not raise this challenge in his Answer Brief, even though the State requested the proper remedy in the Initial Brief. I.B. at 13. By failing to timely challenge the remedy, and only first raising a challenge in response to the State's rehearing motion, Defendant may have effectively waived the issue.

II. REHEARING EN BANC IS NOT WARRANTED WHERE THE DECISION IN THIS CASE IS UNIFORM WITH OTHER DECISIONS FROM THIS COURT

Rehearing en banc is an extraordinary proceeding. Fla. R. App. P. 9.331(d)(2). Rehearing en banc is available only on the grounds that (1) a case or issue is of exceptional importance or (2) that consideration is necessary to

maintain uniformity in the court's decisions. Fla. R. App. P. 9.331(d)(1). In his motion, Defendant only claims that en banc review in necessary to maintain uniformity. Mot. at 1-2, 13 (expressing a belief that consideration of the full court is necessary to maintain uniformity); Fla. R. App. P. 9.331(d)(2). The motion should be denied where the decision in this case is uniform with all of the other decisions cited by Defendant from this Court.

Defendant cites four cases in support of his claim of intradistrict conflict – *State v. Johnson*, 193 So. 3d 32 (Fla. 3d DCA 2016); *Marron v. State*, 111 So. 3d 210 (Fla. 3d DCA 2013); *State v. Paulk*, 813 So. 2d 152 (Fla. 3d DCA 2002); *State v. Turro*, 724 So. 2d 1216 (Fla. 3d DCA 1998). Mot. at 9-10, 13. All of these cases involved different controlling facts and do not conflict with this case.

A. *JOHNSON*

In *Johnson*, the trial court initially departed downward on statutory grounds and non-statutory grounds. *Johnson*, 193 So. 3d at 34. The trial court departed because the defendant cooperated with the State to resolve her offenses. *Id.* at 34. Cooperation may be a statutory ground. *Id.* at 34-35 (citing Fla. Stat. § 921.0026(i)). The trial court also departed because the defendant had received a previous departure, had never been to prison, and was the mother of a young child. *Id.* at 34. These were non-statutory grounds.

This Court reversed after finding that the statutory ground was not supported by the evidence. *Id.* at 34-35. However, the Court remanded for the trial court to reconsider whether the non-statutory grounds would still justify the departure. *Id.* at 35.

Johnson did not remand the case for consideration of any new grounds never raised below. *Johnson* only remanded for consideration of those non-statutory grounds already raised at the first sentencing hearing. In this case, the Court did not find that some grounds already raised were invalid, while other grounds already raised were valid. The Court found that all grounds raised were invalid. *Shine*, 2017 WL 522239 at *1. There are not any additional grounds for the trial court to reconsider on remand. This controlling fact in *Johnson* is absent in this case. Therefore, the two decisions do not conflict.

B. *MARRON*

Marron reversed where the trial court "departed from its statutory obligations". *Marron*, 111 So. 3d at 211. The trial court failed to comply with the procedural requirements of Florida law and provide written reasons for the downward departure. *Id.* at 211. The trial court also relied on grounds for the departure that were not supported by the evidence. *Id.* at 211-12. This Court reversed and remanded the case for a new sentencing hearing. *Id.* at 212.

Marron did not remand for a new sentencing hearing only because the grounds for the downward departure were not supported by evidence. After finding that the trial court did not file a written order, the Court explained that it was "obligated to vacate the sentence and remand for the imposition of a new sentence that accords with the statutory requirements". *Id.* at 211. In contrast, in this case, the trial court timely rendered a written order with all of the reasons for the departure. This Court did not find any procedural defect in the sentencing proceedings. Rather, the Court only found that the reasons for the departure were invalid. This controlling fact in *Marron* is absent in this case. Therefore, the two decisions do not conflict.

C. *PAULK*

Paulk reversed where the trial court's reasons for a downward departure were not supported by evidence. *Paulk*, 813 So. 2d at 154. The defendant pled guilty and the court offered Defendant a three-year sentence for his pending charges, even though the lowest permissible sentence under the guidelines was 89.43 months. *Id.* at 153. The trial court also granted the defendant a furlough, imposed a sentence of five years on one case and ten years on another case, and agreed to mitigate the sentences to three years if the defendant returned from furlough. *Id.* at 153. The trial court advised that the State might object to the sentence and appeal. *Id.* at 153. When the defendant

returned from furlough, the trial court imposed the three-year sentence over the State's objection. *Id.* at 153. The trial court did not file written reasons for the departure. *Id.* at 153. The trial judge only made general references to the defendant's health and work in the community. *Id.* at 154.

This Court recognized that the grounds that the trial court identified at the hearing could be valid. *Id.* at 154. However, those grounds were not supported by evidence. *Id.* at 154. The Court remanded with instructions to allow the defendant to withdraw his plea and proceed to trial or be resentenced within the guidelines. *Id.* at 154.

Citing *Pease v. State*, 712 So. 2d 374, 376 n.2 (Fla. 1997), the Court also clarified that its ruling was without prejudice to the trial court to revisit the issue of downward departure on a more fully developed record. In Footnote Two in *Pease*, the Florida Supreme Court noted that it had reversed a downward departure without prejudice for a defendant to withdraw her plea, thereby providing another opportunity to secure a downward departure. *Pease*, 712 So. 2d at 376 n.2 (citing *Jones v. State*, 639 So. 2d 28 (Fla. 1994)).

In other words, this Court offered the defendant in *Paulk* two choices: (1) withdraw his plea and go to trial or (2) be resentenced under the guidelines. *Paulk*, 813 So. 2d at 154. If the defendant withdrew the plea, proceeded to trial, was found guilty, and faced a new sentencing proceeding, the defendant

would not be precluded from asking the trial court to consider a new downward departure sentence.

In contrast, in this case, Defendant entered into an open plea from the outset. R-2876 at 98-100; R-2877 at 91-93. The written plea agreement specifically stated that no one had promised Defendant anything to admit his violation of probation. R-2876 at 99; R-2877 at 92. The agreement also stated: "I understand that the statutory maximum that the Court can impose is 71 years [Florida State Prison]." R-2876 at 99; R-2877 at 92. Defendant is not entitled to withdraw his plea. His plea was not based upon a negotiated sentence. This case cannot be remanded to provide Defendant an opportunity to withdraw from his plea. This controlling fact in *Paulk* is absent in this case. Therefore, the two decisions do not conflict.

D. *TURRO*

Lastly, *Turro* reversed the trial court's downward departure where the grounds were not supported by the evidence. *Turro*, 724 So. 2d at 1217. The lowest permissible sentence under the guidelines was six and a half years. *Id.* at 1216. The trial court in *Turro* offered – and the defendant accepted – a sentence of time served in exchange for his plea. *Id.* at 1216. Even though this amounted to a downward departure sentence, the trial court did not enter any written reasons. *Id.* at 1217. The trial court only indicated at sentencing

that it was departing downward because the defendant was "in a physical condition that he would be unable to finish or comply with any term of imprisonment given by this Court, other than what has been given here today". *Id.* at 1216-17. The only evidence that the defendant suffered any medical condition was his own statement at sentencing. *Id.* at 1217.

Even though this Court found that the trial court's failure to file a written order was not reversible error where the sentencing transcript adequately memorialized the ruling[2], the Court still reversed where there was no "meaningful medical evidence in the record" to support the departure. *Id.* at 1217. Like in *Paulk*, the Court reversed and remanded with leave for the defendant to withdraw his plea. *Id.* at 1217.

Citing *State v. Bostick*, 715 So. 2d 298 (Fla. 4th DCA 1998), the Court also clarified that its ruling was without prejudice to the trial court to revisit the downward departure. *Id.* at 1217. Like *Pease*, *Bostick* explained that where a downward departure sentence which is imposed pursuant to a negotiated plea is reversed, the defendant must be allowed to withdraw his plea or be sentenced under the guidelines. *Bostick*, 715 So. 2d at 299. *Bostick* clarified that the decision does not preclude the trial judge, following a new adjudication of guilt and resentencing, from imposing the same departure

[2] *Cf. Pease*, 712 So. 2d at 376-77.

sentence initially imposed so long as it is supported by evidence. *Bostick*, 715 So. 2d at 299.

Again, in this case, Defendant did not enter into a negotiated plea. Defendant entered into an open plea. Unlike *Turro* and *Bostick*, Defendant is not entitled to withdraw his plea on remand. This controlling fact in *Turro* and *Bostick* is absent in this case. The decisions do not conflict.

III. FINALITY REQUIRES REMAND FOR IMPOSITION OF A SENTENCE WITHIN THE GUIDELINES

Balanced with a defendant's right to pursue a downward departure is the State's interest in finality in criminal proceedings. In *Witt v. State*, 387 So. 2d 922 (Fla. 1980), the Florida Supreme Court explained:

> 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.

Witt, 387 So. 2d at 925. The rule advocated by Defendant undermines this important concern and needlessly subjects the State to multiple appeals without any end.

The rules of criminal procedure only require a defendant to raise all grounds for a downward departure up front at his sentencing hearing and

secure a ruling on those grounds. The trial court's written order ensures that the trial court carefully considers those grounds. If some grounds are upheld on appeal and others are not, the trial court's order granting the departure is still affirmed. Fla. Stat. § 921.002(3); Fla. Stat. § 921.00026(1); Fla. Stat. § 921.00265(2); Fla. R. Crim. P. 3.704(d)(27). However, if all grounds are found to be invalid on appeal, and there is otherwise no defect in the proceedings, then the only remedy is remand for resentencing within the guidelines.[3]

CONCLUSION

The State respectfully requests that the Court deny Defendant's motion for rehearing en banc where the decision in this case does not conflict with any other decision of this Court. The State further requests that the Court deny Defendant's request for certification of conflict.

Respectfully submitted,

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[3] Defendant moves for rehearing en banc only on the remedy in the panel's decision. Mot. at 12 n.4. However, at the end of the motion, Defendant also reargues the merits of the appeal. Mot. at 12. The State never moved for rehearing on the merits. Defendant did not either. This Court already reversed on the merits.

CERTIFICATE OF SERVICE

I CERTIFY that the foregoing document – *Appellant's Response in Opposition to Motion for Rehearing En Banc and Certification* – has been delivered by **e-mail** to counsel for Appellant, Jeffrey DeSousa, Office of the Public Defender, at jdesousa@pdmiami.com and appellatedefender @pdmiami.com on **February 22, 2018**.

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