IN THE SUPREME COURT OF FLORIDA

TRAVIS A. TROTTER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC02-14

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent generally agrees with Petitioner's Statement of the Case and Facts for the purposes of this appeal.

SUMMARY OF THE ARGUMENT

There was no error in using the drug trafficking multiplier on the 1994 scoresheet at the **Heggs** resentencing hearing, as neither double jeopardy nor due process concerns were implicated. The decision of the Second District Court of Appeal in **Estrada** was wrongly decided.

However, if it is determined that the trial court should not have used the drug trafficking multiplier in calculating Petitioner's 1994 scoresheet, on remand the State should have the option of proceeding to trial and seeking the maximum possible sentence upon conviction.

ARGUMENT

ISSUE

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO UTILIZE THE 1.5 DRUG TRAFFICKING MULTIPLIER UPON RESENTENCING AFTER PETITIONER'S SENTENCE WAS VACATED ON APPEAL AND THE CASE WAS REMANDED FOR A HEGGS RESENTENCING HEARING. (Restated).

A. Jurisdictional statement:

Article V §3(b)(3) of the Florida Constitution and **Florida Rule of Appellate Procedure 9.030 (a)(2)(A)(iv)** provide that this Court has jurisdiction to review a decision of a district court of appeal which announces a rule of law which expressly and directly conflicts with a decision of another district court of appeal or the Florida Supreme Court on the same question of law. In the decision under review herein, **Trotter v. State**, 801 So. 2d 1041 (Fla. 5th DCA 2001), the Fifth District Court of Appeal has certified conflict with the decision of the Second District Court of Appeal in **Estrada v. State**, 787 So. 2d 94 (Fla. 2d DCA 2001).

B. Why Petitioner was entitled to Heggs resentencing:

Petitioner was originally sentenced to 83.2 months incarceration under a 1995 scoresheet which did not include the 1.5 drug trafficking multiplier.[1] The scoresheet reflected a recommended sentence of 83.2 months incarceration - the exact sentence which was imposed. (R2: 15)

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[1]**Florida Rule of Criminal Procedure 3.702 (d)(14)** provides in relevant part, "[i]f the primary offense is drug trafficking under section 893.135, the subtotal sentence points may be multiplied, at the discretion of the sentencing court, by a factor of 1.5."

In **Heggs v. State**, 759 So. 2d 620 (Fla. 2000), this Court held that the 1995 sentencing guidelines under which Petitioner had been sentenced were unconstitutional.

When Petitioner's sentence was re-calculated under the 1994 guidelines, his sentencing range was 48.075 to 80.125 months with the drug trafficking multiplier. Without the multiplier, the range was 25.05 to 41.75 months. (SV: 50) Petitioner's original sentence of 83.2 months would fall outside the 1994 guidelines range, even with the use of the multiplier.

In **Heggs**, this Court held that "if a person's sentence imposed under the 1995 guidelines *could have been* imposed under the 1994 guidelines (without a departure), then that person shall not be entitled to relief under our decision here." [Emphasis added]. **Id.** at 627. Since Petitioner's original sentence of 83.2 months could *not* have been imposed under the 1994 guidelines without an upward departure, even with the use of the 1.5 drug trafficking multiplier, the Fifth District Court of Appeal held that a new resentencing hearing under the 1994 guidelines was warranted. *See* **Trotter v. State**, 774 So. 2d 924, 925 (Fla. 5th DCA 2001). The Fifth District also indicated in that decision that "[a]ny departure from the sentencing guidelines must be supported by written reasons existing at the time of the original sentencing. In no event shall the new sentence exceed 83.2 months incarceration." **Id.** at 925.

The trial court conducted Petitioner's **Heggs** resentencing hearing on March 5, 2001. After both sides had presented argument for and against the trial court's utilization of the 1.5 multiplier for Petitioner's trafficking offense, the trial court exercised its discretion to use the multiplier and sentenced Petitioner to a 72-month term of incarceration.

C. There was no error in using the drug trafficking multiplier on the 1994 scoresheet at the resentencing hearing:

1. Double jeopardy and due process analysis:

Petitioner argues that, because the drug trafficking multiplier was not used in his original sentencing under the 1995 guidelines, the trial court was precluded from factoring it into the 1994 guidelines upon resentencing. Petitioner relies almost exclusively on **Estrada v. State**, 787 So. 2d 94 (Fla. 2d DCA 2001), the case with which the Fifth District Court of Appeal has certified conflict in the **Trotter** decision under review.

Petitioner's reliance on **Estrada** is misplaced, and that decision is flawed. In order to fully understand Respondent's position, a review of the principles pertaining to double jeopardy and due process is necessary.

"The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: '[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.'" **Monge v. California**, 524 U.S. 721, 727 (1998)(citing U.S. Const., Amdt.

5). The Double Jeopardy Clause consists of three separate constitutional protections: 1) against a second prosecution for the same offense after acquittal; 2) against a second prosecution for the same offense after conviction; and 3) multiple punishments for the same offense. *See* **Monge**, 524 U.S. at 727-28; **North Carolina v. Pearce**, 395 U.S. 711, 717 (1969); **Goene v. State**, 577 So. 2d 1306, 1307 (Fla. 1991). The district court in **Van Buren v. State**, 500 So. 2d 732 (Fla. 2d DCA 1987) explained that:

> Historically, the pronouncement of sentence has never carried the finality that attaches to an acquittal. **United States v. DiFrancesco**, 449 U.S. 117 (1980). Double jeopardy arises only when efforts are undertaken to increase a sentence which was legal when originally imposed. **Llerena v. United States**, 508 F.2d 78 (5th Cir. 1975). There exists an obligation to correct a sentence to comply with applicable statutory provisions, even if the service of the original sentence has already begun and the sentence as corrected would be more onerous. **Llerena**.

Van Buren, 500 So. 2d at 734; *See also* **Monge**, 534 U.S. at 728 ("Historically, we have found double jeopardy protections inapplicable to sentencing proceedings [] because the determinations at issue do not place a defendant in jeopardy for an 'offense,' [] [n]or have sentence enhancements been construed as additional punishment for the previous offense; rather, they act to increase a sentence 'because of a manner in which [the defendant] committed the crime of conviction.'").

Additionally, "[t]he underlying purpose of the double

jeopardy clause is to avoid subjecting the defendant to repeated embarrassment, expense, anxiety, and insecurity." **Goene**, 577 So. 2d at 1307, *citing* **Green v. United States**, 355 U.S. 184, 187-88 (1957). "In short, the defendant at some point must be entitled to rely on the finality of the court's action." **Goene**, 577 So. 2d at 1307.

Therefore one of the determinative questions of the instant appeal is whether Petitioner had a legitimate expectation of finality in his original sentence once imposed. **Id.** at 1307-08; **DiFrancesco**, 449 U.S. at 139 (The double jeopardy clause proscribes resentencing where the defendant has developed a legitimate expectation of finality in his original sentence). Respondent argues that once Petitioner in the instant case sought to be resentenced pursuant to the 1994 guidelines, clearly he did not have any expectation of finality in his original sentence imposed in light of double jeopardy principles. *See, e.g.,* **DiFrancesco**, 499 U.S. at 133, 139; **Pennsylvania v. Goldhammer**, 474 U.S. 28, 30 (1985)(Double Jeopardy Clause does not bar resentencing on counts affirmed on appeal when a sentence of imprisonment on another count is vacated); **Goene**, 577 So. 2d at 1308-09; **Cline v. State**, 399 So. 2d 1115, 1115-16 (Fla. 5th DCA 1981)(The line of cases relied on by the defendant for the proposition that the court cannot resentence him to a longer term of incarceration after he had begun serving his sentence did not

apply, because the defendant requested the court to withdraw the sentence and impose a new one, so no double jeopardy violation); **United States v. Mixon**, 115 F.3d 900 (11th Cir. 1997)(Double Jeopardy Clause is not violated by sentencing court's *sua sponte* enhancing sentence following defendant's successful collateral attack of firearms convictions); **United States v. Watkins**, 147 F.3d 1294, 1298 (11th Cir. 1998)("When a prisoner collaterally attacks a portion of a judgment, he is reopening the entire judgment and cannot selectively craft the entire manner in which the court corrects that judgment. Because [the defendant]'s challenge nullifies any expectation of finality in his sentence, we see no double jeopardy violation"); **Greasham v. Booher**, Case No. 01-6064, 2001 WL 505983 (10th Cir. May 14, 2001)("When an initial sentence is illegal, resentencing is appropriate, even if the error was first noted in postconviction proceedings. 'Illegal sentences do not confer legitimate expectations of finality because they are subject to change'")(unpublished opinion); **United States v. Hayes**, 166 F.3d 1215 (6th Cir. 1998)("[A] defendant does not possess an expectation of finality when he challenges one count of two interrelated convictions and, in so doing, places the validity of the entire sentencing package in issue")(unpublished opinion); **United States v. Murray**, 144 F.3d 270, 275 (3d Cir. 1998)(Defendant's double jeopardy claim foreclosed by the fact that there can be no legitimate

expectation of finality in a sentence and conviction which the defendant appeals), **cert. denied**, 525 U.S. 911 (1998).

Because Petitioner did not have any legitimate expectation of finality in his original sentence, but sought to be resentenced pursuant to **Heggs**, this Court should conclude that there was no double jeopardy violation committed by the trial court when it calculated Petitioner's new scoresheet under the 1994 guidelines by utilizing the 1.5 multiplier. As explained *infra*, the trial court's imposition of a sentence *lesser* than the original sentence was not vindictive. Rather, it approximately reflected the sentence the trial court intended/perceived it was imposing but later found to be invalid in light of the 1995 guidelines being found unconstitutional.

In addition to there being no double jeopardy violation, there was no due process violation in the use of the 1.5 multiplier upon resentencing. Petitioner attempts to characterize the use of the multiplier as an increase in the severity of his sentence.

"In **North Carolina v. Pearce**, 395 U.S. 711 (1969), the Supreme Court held that a more severe sentence upon reconviction offends neither the double jeopardy nor equal protection clauses of the Constitution." **Herring v. State**, 411 So. 2d 966, 970 (Fla. 3d DCA 1982). "The only constitutional basis for attack on a second sentence after the first has been set aside is found in

the due process clause of the Constitution which is offended only if the enhancement punishes the defendant for the exercise of rights guaranteed him." **Id.** "Specifically rejected in **Pearce** is the notion that for double jeopardy purposes, the imposition of a sentence is an 'implied acquittal' of any greater sentence." **Herring**, 411 So. 2d at 970 *citing* **DiFrancesco**, 449 U.S. at 135 n. 14. "The rejection of the notion that there is some vested right in the length of a sentence necessarily includes the rejection of the notion that there is a vested right in any other part of a sentence." **Herring**, 411 So. 2d at 970. "It is now quite simply the case that a criminal sentence, once pronounced, is not accorded the constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal." **Id.**, *citing* **DiFrancesco**.

In **Laster v. State**, 564 So. 2d 536 (Fla. 5th DCA 1990), the Fifth District Court of Appeal had to consider whether the defendant's due process rights were violated during resentencing when the trial court increased the sentence:

> Since the resentencing resulted from the defendant's pursuit of his right to be sentenced according to applicable law, the principle enunciated in **North Carolina v. Pearce** must be consulted. **Blackshear v. State**, 531 So. 2d 956 (Fla. 1988); **Wemett v. State**, 547 So. 2d 955 (Fla. 1st DCA 1989). *See also* **Frazier v. State**, 540 So. 2d 228 (Fla. 5th DCA 1989); **Denholm v. State**, 477 So. 2d 34 (Fla. 5th DCA 1985).
>
> In **North Carolina v. Pearce**, the Supreme Court ruled that due process prohibits increased sentences motivated by vindictive retaliation by

> the sentencing court. To prevent vindictiveness from entering into a sentencing court's decision and to allow any fear on the part of a defendant that an increased sentence is, in fact, the product of vindictiveness, the Court fashioned a prophylactic rule that whenever a more severe sentence is imposed upon resentencing, the reason for the increase must affirmatively appear in the record. **North Carolina v. Pearce**, 89 S.Ct. 2081[.]

Laster, 564 So. 2d at 537-38; *See also* **Buchanan v. State**, 781 So. 2d 449, 450 (Fla. 5th DCA 2001); **Carlin v. State**, 648 So. 2d 261, 262 (Fla. 5th DCA 1994); **Donovan v. State**, 572 So. 2d 522, 527 (Fla. 5th DCA 1990)("Although **Pearce** held that it would be a denial of due process to impose a heavier sentence on resentencing *in order to punish* a defendant for getting his original conviction set aside, that opinion also stated that the Constitution does not absolutely bar a more severe resentencing if vindictiveness does not play a part.").

Clearly in the instant case, the imposition of the 1.5 multiplier upon resentencing was not motivated by vindictiveness. If vindictiveness was the motivation, the trial court obviously would have imposed the top of the permitted range under the 1994 guidelines (80.125 months). Instead, the court imposed a lower sentence of 72 months. Vindictiveness is therefore affirmatively refuted in the record. No due process violation has been shown in the use of the 1.5 trafficking multiplier upon resentencing.

2. The Second District's **Estrada** case was wrongly decided:

To support his position that the use of the trafficking

multiplier on remand was prohibited, Petitioner relies almost exclusively upon the decision of the Second District Court of Appeal in **Estrada**. In reaching its decision that it was error to summarily deny the defendant's motion to correct when the trial court added a discretionary multiplier that it initially declined to use, the **Estrada** court based its decision on the premises that: 1) the resentencing did not involve the correction of a scoresheet, but rather the inclusion of a discretionary multiplier, and 2) the drug multiplier was not mistakenly omitted from the original scoresheet, but rather the trial court had exercised its discretion not to impose it. The **Estrada** court also concluded that "the trial court may not, upon a defendant's motion to correct sentence, choose to add the multiplier." **Estrada**, 787 So. 2d at 97. The **Estrada** court further relied on its own decision in **Nelson v. State**, 724 So. 2d 1202 (Fla. 2d DCA 1998) for the proposition that the defendant was being sentenced for "precisely the same conduct" for which he was originally sentenced, and double jeopardy would therefore prohibit imposition of a greater sentence.

Respondent urges that the **Estrada** court failed to consider whether the defendant had a legitimate expectation of finality in his original sentence, and whether the use of the multiplier was motivated by vindictiveness on the part of the trial court. The principles of double jeopardy and due process were not fully

explored nor explained in **Estrada**. As expressed by this Court in **Goene**, there are two lessons to be drawn from the **DiFrancesco** opinion. First, the Double Jeopardy Clause bars multiple punishment (i.e., punishment in excess of that permitted by law); and second, the Double Jeopardy Clause respects a defendant's "legitimate expectations" as to the length of his sentence. *See* **Goene**, 577 So. 2d at 1308, *citing* **DiFrancesco**, 499 U.S. at 137. Moreover, as to any reliance on cases such as **Nelson**, **Navarrete v. State**, 707 So. 2d 803 (Fla. 1st DCA 1998), **Spear v. State**, 632 So. 2d 201 (Fla. 1st DCA 1994), and **Berry v. State**, 547 So. 2d 1273 (Fla. 1st DCA 1989), these are in essence cases in which the defendants began serving their imposed sentences and then they were either immediately resentenced to increased sentences and/or the sentences increased based upon a scoresheet miscalculation by the trial court.

In contrast, the instant case does not involve the trial court on its own initiative resentencing Petitioner after the original sentence was imposed because of a miscalculation of the scoresheet. Petitioner in the instant case sought re-examination of his original sentence. Hence, there are no double jeopardy concerns. The trial court's utilization of the 1.5 trafficking multiplier on remand was entirely within its discretion. The Double Jeopardy Clause did not provide Petitioner with the right to know at any specific moment in time what the exact limit of

his punishment would turn out to be. *See* **DiFrancesco**, 449 U.S. at 137. Petitioner clearly did not have any expectation of finality because he is the one who sought review of the original sentence imposed.

Petitioner claims on page 8 of his brief that the fact that the 1.5 trafficking multiplier was crossed out on Petitioner's original scoresheet is conclusive evidence that the trial court declined to impose it rather than simply overlooked it. Respondent would simply point out that the top of the scoresheet indicates that it was prepared by someone named Lancaster from *the Department of Corrections*, not the trial court. (R2: 14) Therefore it was Lancaster, not the trial court, who crossed out the 1.5 multiplier on the original scoresheet. While the notation may provide some indication of Lancaster's intent, it provides no evidence whatsoever of the trial court's intent at the original sentencing hearing.

But even assuming *arguendo* that Petitioner's argument on this point is correct and the trial court did indeed purposefully decline to impose/use the 1.5 multiplier at the original sentencing, the trial court simply did not lose its discretion to utilize the multiplier during its consideration of what sentence to impose upon remand after vacation of that sentence. To hold otherwise would usurp the trial court's discretion in sentencing. As pointed out by this Court in **Harris v. State**, 645 So. 2d 386

(Fla. 1994), "[t]he Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." **Id.** at 388 (citing **DiFrancesco**, 449 U.S. at 135); *see also* **Roberts v. State**, 644 So. 2d 81 (Fla. 1994)("Neither the rules nor the substantive law justifies a defendant receiving the largesse of a judicial error.") In the instant case, the trial court originally believed that the appropriate sentence was 83.2 months - the use of the trafficking multiplier was not necessary in order to impose that sentence. Upon resentencing after remand, the trial court clearly continued to believe that the 83.2 month sentence (or something very close to it) was still an appropriate sentence. However, it then became necessary to exercise his discretion and utilize the trafficking multiplier in order to get close to that same sentence. The trafficking multiplier is a discretionary factor. What happened in the instant case is the ultimate example of an appropriate use of discretion.

On page 8 of his brief, Petitioner points out that the **Estrada** court interpreted this Court's decision in **Roberts** to mean that a trial court is not authorized, "in correcting a sentence, to add a discretionary multiplier *that it originally declined to impose*." (Petitioner's brief p. 8, emphasis in original). In fact, both Petitioner and the Second District have erred in construing **Roberts** so narrowly. As stated by the Fourth

District Court of Appeal:

> Appellant and the state construe **Roberts** as limiting the [trial] court's authority to revise scoresheets to situations where the original scoresheet was the result of a mistake, error, or unintentional omission. However, we can find no language in **Roberts** suggesting such a narrow interpretation.

Merkt v. State, 764 So. 2d 865 (Fla. 4th DCA 2000). **Merkt** held that the trial court could assess victim injury points after revocation of community control, even though victim injury points were not scored as part of the original sentence.[2] In sum, **Roberts** does not forbid the revision of a scoresheet upon resentencing to increase the points, even in a situation where the trial court may have intentionally declined to add the points at the original sentencing hearing. Revision is authorized regardless of whether its non-use at the original sentencing

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[2]**Kingsley v. State**, 682 So. 2d 641 (Fla. 5th DCA 1996) upon which the Second District relied in **Estrada** is distinguishable from the instant case. In **Kingsley**, at the original sentencing hearing the trial court made a factual determination that victim injury was slight, and therefore only four points should be assessed. However upon resentencing after violation of probation, the new scoresheet assessed the victim's injury as severe and therefore allotted 40 points instead of four. In a footnote the Fifth District noted that nothing in the record supported the contention that kicking the victim in the legs and midsection constituted severe injury. "In fact, the evidence tends to show that the injury was slight[.]"

In contrast, in the instant case the revision of the scoresheet to include the 1.5 trafficking multiplier did not require the trial court to reverse itself on a previously-made factual finding, when no facts had really changed. The instant case merely involved the exercise of statutorily-authorized discretion, which for reasons unknown had not been exercised at the first sentencing hearing.

hearing was the result of mistake, error, intentional omission, or unintentional omission, as long as the revision is not motivated by vindictiveness on the part of the trial judge which would implicate the defendant's due process rights.

In summation, the reasoning of **Estrada** is flawed as the opinion itself is not soundly based on principles of double jeopardy or due process. First, the instant case dealt with proceedings initiated by Petitioner; therefore there was no legitimate expectation of finality in his original sentence and no double jeopardy violation. Secondly, on remand the trial court imposed a sentence *less* than Petitioner's original sentence and therefore it was *ipso facto* not vindictive. The trial court's exercise of its direction to utilize the 1.5 trafficking multiplier on remand was reasonable and was logically justified to approximately effectuate its original sentencing intentions. There simply were no double jeopardy or due process violations in the instant case. This Court should not follow the flawed reasoning of **Estrada**.

D. The nature of the relief Petitioner seeks:

However, if it is determined that the trial court should not have utilized the 1.5 multiplier in calculating Petitioner's 1994 scoresheet, Petitioner is not entitled to simply be resentenced under an amended 1994 scoresheet as he urges in his brief. On remand the State should have the option of withdrawing from the

plea agreement (in which the State agreed to recommend a specific sentence), proceeding to trial, and seeking the maximum possible sentence upon conviction:

> Recently, the Fifth District Court of Appeal decided **Waldon v. State**, 483 So. 2d 101 (Fla. 5th DCA 1986). In that case, the defendant entered into a plea agreement with the state relying on the advice of his counsel as to the proper sentence under the guidelines. The defendant was sentenced according to the plea agreement and sometime later apparently discovered that his guidelines sentence had been improperly scored. He appealed, claiming that his recommended guidelines sentence was less than that to which he had agreed. The court held that rather than appealing, the defendant should have moved to withdraw his plea or moved to vacate under Florida Rule of Criminal Procedure 3.850, apparently on the theory that the negotiations were made on the basis of a material mistake of law, and therefore the plea was invalid and the sentence illegal. *See* **Jolly v. State**, 392 So. 2d 54 (Fla. 5th DCA 1981)[3]. This certainly permits a fairer result to the state, since if the defendant withdraws his plea, arguing that he only agreed to be sentenced in accordance to the guidelines, the state would be released from its agreement to nolle prosequi other charges and to recommend the sentence imposed.

White v. State, 489 So. 2d 115 (Fla. 1st DCA 1986).

Similarly, in **Lee v. State**, 642 So. 2d 1190 (Fla. 1st DCA 1994), the defendant entered a plea to a charge of sexual battery after the state had noticed him as an habitual offender. The trial court sentenced him as such. The defendant appealed, and the First District found that sexual battery was a life felony to which an habitual offender sentence is invalid. But the court

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[3]**Jolly** holds that if a defendant is not bound by a plea agreement, neither is the State.

declined to simply remand for resentencing within the guidelines:

> Inasmuch as it appears that Lee entered a plea on the assumption that he would qualify as a habitual offender, he 'should not be permitted to renege on a portion of his agreement with impunity.' [] Rather than vacating the sentence at this level, we remand with the following directions. The trial court shall extend the state the opportunity either to (1) accept the plea with the sentence imposed without the habitual offender status, i.e., vacate only the illegal habitual offender sentence for sexual battery, while having the judgment stand, and allow Lee to be resentenced on this charge, or (2) withdraw from the plea agreement--thus vacating both of the judgments and sentences--and reinstate the original charges and proceed to trial.

Id. at 1191. *See also* **Howell v. State**, 764 So. 2d 780 (Fla. 2d DCA 2000)(Where illegal 25-year sentence resulted from a negotiated plea in which state reduced charge in exchange for agreed upon sentence of 25 years' prison, on remand trial court may resentence defendant to 15-year prison sentence only with state's agreement; if state did not agree to 15-year sentence, defendant could withdraw his plea); **Gibson v. State**, 772 So. 2d 35 (Fla. 2d DCA 2000)(State would be given option of requiring withdrawal of defendant's guilty plea and trying him on original charge or allowing judgment to stand and seeking resentencing, where state conceded that sentence imposed pursuant to plea agreement of ten years imprisonment exceeded five-year statutory maximum); **Gault v. State**, 762 So. 2d 578 (Fla. 5th DCA 2000) (Defendant seeking postconviction relief from sentence imposed as part of plea process under guidelines that were declared

unconstitutional was not entitled to an automatic resentencing pursuant to previous guidelines; instead, state had option of either taking defendant to trial on all of the original charges or accepting resentencing under the previous guidelines); *Accord* **Boatwright v. State**, 637 So. 2d 353 (Fla. 1st DCA 1994).

CONCLUSION

WHEREFORE, Respondent requests that this Court uphold the Fifth District's decision in **Trotter** that a trial court may properly utilize the 1.5 trafficking multiplier upon remand in a **Heggs** resentencing hearing despite the fact that it was not utilized at the original sentencing, as long as the use of the multiplier is not motivated by vindictiveness. In doing so, this Court should overrule the Second District's decision in **Estrada** which holds that use of the trafficking multiplier at a **Heggs** resentencing hearing is improper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail to Susan A. Fagan, Assistant Public Defender, 112 Orange Avenue, Daytona Beach, FL 32114 on this 21st day of February, 2002.

COUNSEL FOR RESPONDENT

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

COUNSEL FOR RESPONDENT