

IN THE SUPREME COURT OF THE STATE OF FLORIDA

FSC CASE NO. SC05-514
FIFTH DCA CASE NO.: 5D03-2658

FRANKLIN NOOE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

_____ /

AMENDED
BRIEF ON MERITS

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PREFACE

The Rape Crisis Center of Volusia County will be referred to as, "Center", the Florida Department of Health will be referred to as "Department", reference to the District Court of Appeal, Fifth District, State of Florida in Nooe v. State, 892 So.2d 1135 (Fla.App. 5 District 2005) will be referred to as Nooe (p #). The appellant will be referred to as "Nooe". Exhibits introduced into evidence by the State were not done chronologically sequential, but will be referred to by the page number and where it appears in the record, as (ROA p #). Some of the exhibits are on the same page, though different documents, so they will be identified, where needed, as exhibit ("a", "b", "c" ROA p#)

STATEMENT OF CASE AND FACTS

In February 1994, Franklin Nooe was hired as the executive director of the Volusia County Rape Crisis Center.(ROA 235) In April 1997, Nancy Linehan with the Florida Department of Health learned that the Federal Government had monies available to the State of Florida for rape prevention seminars (ROA 81). She got the word out to the state's non-profit agencies so that they could fill out request proposals for the money, and through her office.(ROA 82,83) She heard from Nooe, on behalf of the Center, and they began negotiations for the Center's contract in April 1997.(ROA 85) Though the state's fiscal year is July through June, the first contract between the Department and the Center was for 15 months, April 1997 through June 30, 1998.(ROA 96-114) Contracts negotiations were in advance of the upcoming fiscal year, where the Center would propose to reach, via presentations, a certain number of people, referred to as "units", and to be paid per attendee/unit.(ROA 82,96-114) The initial attendee payment was \$7.15.(ROA 86) As the year progressed and it appeared that the Center could not meet the proposed number of attendees, the contract would be renegotiated so the funds could be used elsewhere.

Every year, in advance, Nancy Linehan would negotiate with Nooe; however, beforehand she would have to have negotiated with the Federal Government so she would know if she had funds

available, and how much.(ROA 100) From April 1997 through July 2001, Nancy Linehan and Franklin Nooe negotiated five separate contracts.(ROA 90) Again, the pre-fiscal year contract was a starting a point, as negotiations and renegotiations continued throughout each fiscal year.(ROA 90-93) Signing a contract with the Department did not result in the Center receiving a lump sum amount of money for that fiscal year.(ROA 125) Payment to a Center occurred only by submitting an invoice to the Department, a simple, single page document that included the name of the provider, here - Volusia County Rape Crisis Center, the date the presentation occurred, the contract year number they were operating under, the physical location of the presentation, the number of attendees, number of sessions, and the rate per attendee.(ROA 106) The invoice, when it came into the Department, would be reviewed, verified, and then payment sent to the Center per the number of attendees. (ROA 85) During the five separate contract years, the per attendee rate went from \$7.15, to \$8.75, per attendee.(ROA 116,110) At trial and through Nancy Linehan, 49 invoices were introduced into evidence which had been marked as "false".(ROA 115-163)(ROA 239) Nancy Linehan stated that she and her staff would do monitoring visits to watch, listen to, and critique presentations Nooe would put on through the various contract years. (ROA 95,116,126,127) The prosecutor said, which Nancy Linehan agreed with, "...[S]ome of

the forms (invoices) that you were relying on they're not good".(sic) (ROA 99)(emphasis added)

The separately submitted invoices, sent by the Center over the five separate contract years, that were marked as "false", were as follows:

INVOICES

1. Bethune Cookman College presentation on January 10, 2001, 175 attendees.(ROA 115)
2. Euclid Learning Center presentation on August 21, 2000, 64 attendees.(ROA 116)
3. Riverview Learning Center presentation on August 15, 2000, 78 attendees.(ROA 117)
4. Embry Riddle University presentation on August 29, 2000, and August 30, 2000, for a combined total of 360 attendees.(ROA 118)
5. Bethune Cookman Fraternity Orientation on August 25, 2000, 215 attendees.(ROA 119)
6. Bethune Cookman College Freshman Orientation on August 21, 2000, two separate sessions for a total of 470 attendees.(ROA 120)
7. Galaxy Middle School presentation on February 1998, 338 attendees.(ROA 121)
8. Bethune Cookman College presentation on February 27, 1998, 227 attendees.(ROA 122)
9. Bethune Cookman College presentation on February 28, 1998, 167 attendees.(ROA 123)
10. New Smyrna Beach Middle School presentation on March 8, 1998, 147 attendees.(ROA 124)
11. Deltona Middle School presentation on March 11, 1998, 179 attendees.(ROA 125)

12. Mainland High School presentation on March 27, 1998, 209 attendees.(ROA 126)
13. Deltona High School presentation on March 12, 1998, 181 attendees.(ROA 127)
14. Seabreeze High School presentation on April 7, 1998, 115 attendees.(ROA 128)
15. Mainland High School presentation on April 9, 1998, 33 attendees.(ROA 129)
16. Atlantic High School presentation on April 22, 1998, 66 attendees.(ROA 130)
17. Spruce Creek High School presentation on April 29, 1998, 239 attendees.(ROA 131)
18. Embry Riddle College presentation on May 1, 1998, 290 attendees.(ROA 132)
19. Buddy Taylor Middle School presentation on May 8, 1998, 212 attendees.(ROA 133)
20. Indian Trail Middle School presentation on May 19, 1998, 268 attendees.(ROA 134)
21. Flagler Palm Coast High School presentation on May 21, 1998, 417 attendees.(ROA 135)
22. Teen Parent West presentation on June 9, 1998, 18 attendees.(ROA 136)
23. Embry Riddle University Freshman Orientation presentation on August 19, 1998, 300 attendees.(ROA 137)
24. Bethune Cookman College presentation on September 8, 1998, September 10, 1998, combined attendees 502.(ROA 138)
25. City Island Library presentation on September 14, 1998, 38 attendees.(ROA 139)
26. Riverview Learning Center presentation on October 13, 1998, 119 attendees.(ROA 140)

27. Riverview Learning Center presentation on November 16, 1998, 12 attendees.(ROA 141)
28. Bethune Cookman College presentation on November 23, 1998, 389 attendees.(ROA 142)
29. Riverview Learning Center presentation on December 12, 1998, 118 attendees.(ROA 143)
30. Galaxy Middle School presentation on December 15, 1998, 330 attendees.(ROA 144)
31. Campbell Middle School presentation on January 27, 1999, three sessions 91 attendees total.(ROA 154)
32. Campbell Middle School presentation on February 17, 1999, two sessions total attendees 118.(ROA 146)
33. Galaxy Middle School presentation on February 20, 1999, 279 attendees.(ROA 147)
34. Embry Riddle University presentation on March 23, 1999, 147 attendees.(ROA 148)
35. Riverview Learning Center presentation on April 7, 1999, 161 attendees.(ROA 149)
36. Euclid Learning Center presentation on April 20, 1999, 37 attendees.(ROA 150)
37. Daytona Beach Community College presentations on May 24, 1999; May 25, 1999; May 26, 1999; May 27, 1999, 518 total attendees.(ROA 151)
38. Riverview Learning Center presentation on May 22, 1999, 41 attendees.(ROA 152)
39. Riverview Learning Center presentation on August 31, 1999, 64 attendees.(ROA 153)
40. Euclid Learning Center presentation on September 1, 1999, 34 attendees.(ROA 154)

41. Galaxy Middle School presentation on September 7, 1999, 317 attendees.(ROA 155)
42. New Smyrna Beach High School presentation on September 10, 1999, 336 attendees.(ROA 156)
43. Deland Middle School presentation on September 22, 1999, 298 attendees.(ROA 157)
44. Euclid Learning Center presentation on September 24, 1999, 39 attendees.(ROA 158)
45. Riverview Learning Center presentation on September 29, 1999, 57 attendees.(ROA 159)
46. Euclid Learning Center presentation on November 8, 1999, 37 attendees.(ROA 160)
47. Riverview Learning Center presentation on November 12, 1999, 59 attendees.(ROA 161)
48. Galaxy Middle School presentation on February 9, 1999, 325 attendees.(ROA 162)
49. Riverview Learning Center presentation on December 14, 1999, 61 attendees.(ROA 163)

Nancy Linehan was asked to aggregate all of the foregoing invoices, which were all submitted for pay at different times, upon different contract years, and her total was \$70,125.65, though that was paid in increments, only by way of the invoice, sent by the Center to the Department.

The state next presented the testimony of State Attorney Investigator Randy Webb, who testified about what assistant executive director Michelle Jones, and executive director Franklin Noe had previously told him. That testimony involved state's exhibits 70-80, a total of 11 checks written to Suzanne

Line Nooe, out of the Center's checking account, for health insurance payment for Nooe's family. The checks were all written out by Jones, and as follows:

1. Check Number 6041 dated January 5, 1999, payable to Suzanne Line Nooe for \$167.00 signed by Nooe and Rape Center Board Member Kathleen Pruett.(ROA 171)
2. Check Number 6131 dated February 10, 1999, to Suzanne Line Nooe for \$212.00 signed by Nooe and Rape Crisis Board Member Roger Campbell.(ROA 172)
3. Check Number 6324 dated May 28, 1999, to Suzanne Line Nooe for \$212.00 signed by Nooe.(ROA 173)
4. Check Number 6436 dated July 22, 1999, to Suzanne Line Nooe for \$424.00 signed by Nooe and Board Member Roger Campbell.(ROA 174)
5. Check Number 6691 dated February 15, 1999, to Suzanne Line Nooe for \$242.00 signed by Nooe.(ROA 175)
6. Check Number 6854 dated March 31, 2000, to Suzanne Line Nooe for \$356.16, signed by Nooe.(ROA 176)
7. check number 6927 dated May 8, 2000, to Suzanne Line Nooe for \$356.16, signed by Nooe.(ROA 177)
8. Check Number 7104 dated August 22, 2000, to Suzanne Line Nooe for \$356.14 signed by Nooe.(ROA 178)
9. Check Number 7286 dated December 12, 2000, to Sue Line Nooe for \$356.72 signed by Nooe.(ROA 179)

10. Check Number 7496 dated April 16, 2001 to Suzanne Line Nooe for \$335.88, signed by Nooe.(ROA 180)
11. Check Number 7690 dated August 9, 2001, to Suzanne Line Nooe for \$335.88, signed by Nooe and board member Campbell.(ROA 191)

At the time of the trial Suzanne Line Nooe was Nooe's ex-wife. Michelle Jones testified that when she began working at the Center, checks were written to pay Nooe's health insurance and she continued with that practice, wrote them out, had Nooe, and sometimes a board member, sign them.(ROA 267,268)

In its opinion, the Fifth District noted that the aggregate of those 11 checks \$3,535.94 for "insurance", which Nooe's employment package included, but that the board president never told Nooe could be paid out of the Center's checking account.(Nooe at 1141) Those 11 checks were not only aggregated with one another, but also with the 49 invoices.

Again, through State Attorney Investigator Webb, and Assistant Executive Director Jones, 18 checks written on the Center's checking account which were determined to have been written out by Jones, payable to the Internal Revenue Service, and for back taxes owed Jones' husband. Jones testified that she approached Nooe about her need for a raise because her duties had increased, responsibilities increased, and her time on the job had also increased.(ROA 264,265,266) With Nooe's agreement to her increased salary, she wrote those checks

directly to the Internal Revenue Service to pay her husband's back indebtedness - that was how she dispersed her raise. Neither Nooe, nor sometimes the cosigning board members on the check, knew that this is how she was collecting her raise.(ROA 265)

Those check checks are as follows:

1. Check number 7436 dated March 12, 2001, to the Internal Revenue Service in the amount of \$485.00 marked for Jones' husband's 1998 "1040" tax indebtedness, signed by Nooe.(ROA 164 "a")
2. Check number 7538 dated May 1, 2001, to the Internal Revenue Service in the amount of \$200.00 marked for Jones' husband's 1998 "1040" tax indebtedness, signed by Nooe.(ROA 164 "b")
3. Check number 7620 dated June 15, 2001, to the Internal Revenue Service in the amount of \$200.00 marked for Jones' husband's "1040" tax indebtedness, signed by Nooe.(ROA 164 "c")
4. Check number 7053 dated July 24, 2000, to the Internal Revenue Service in the amount of \$800.00 marked for Jones' husband's 1997 "1040" tax indebtedness, signed by Nooe.(ROA 165 "a")
5. Check Number 7137 dated September 30, 2000, to the Internal Revenue Service in the amount of \$200.00 marked for Jones' husband's 1997 "1040" tax indebtedness, signed by Nooe.(ROA 165 "b")
6. Check Number 7308 dated December 28, 2000, to the Internal Revenue Service in the amount of \$695.00 marked for Jones'

husband's 1997 "1040" tax indebtedness, signed by Nooe.(ROA 165 "c")

7. Check number 6810 dated February 25, 2000 to the Internal Revenue Service in the amount of \$250.00 marked for Jones' husband's tax indebtedness, signed by Nooe.(ROA 166 "a")
8. Check number 6930 dated May 8, 2000, to the Internal Revenue Service in the amount of \$225.00 marked for Jones' husband's 1997 "1040" tax indebtedness, signed by Nooe.(ROA 166 "b")
9. Check number 6903 dated April 27, 2000, to the Internal Revenue Service in the amount of \$400.00 marked for Jones' husband's 1997 "1040" tax indebtedness, signed by Nooe.(ROA 166 "c")
10. Check Number 6494 dated August 27, 1999, to the Internal Revenue Services in the amount of \$150.00 marked for Jones' husband's 1996 "1040" tax indebtedness cosigned by Nooe and Board Member Kathleen Pruett.(ROA 167 "a")
11. Check Number 6543 dated September 19, 1999 to the Internal Revenue Services in the amount of \$475.00 marked for Jones' husband's 1996 "1040" tax indebtedness signed by Nooe.(ROA 167 "b")
12. Check Number 6628 dated September 16, 1999, to the Internal Revenue Services in the amount of \$500.00 marked for Jones' husband's 1997 "1040" tax indebtedness signed by Nooe.(ROA 167 "c")
13. Check Number 6096 dated January 29, 1999, to the Internal Revenue Service in the amount of \$150.00 marked for Jones' husband's 1996 "1040" tax indebtedness, cosigned by Nooe and Board Member Kathleen Pruett.(ROA 168 "a")
14. Check Number 6148 dated February 26, 1999, to the Internal Revenue Service in the

amount of \$250.00 marked for Jones' husband's 1996 "1040" tax indebtedness, cosigned by Nooe and Board Member Kathleen Pruett.(ROA 168 "b")

15. Check Number 6193 dated March 26, 1999 payable to the Internal Revenue Service for \$250.00 for Jones' husband's 1996 "1040" tax indebtedness, cosigned by Nooe and board member Pruett.(ROA 168 "c")
16. Check Number 6253 dated April 20, 1999, to the Internal Revenue Services in the amount of \$225.00 marked for Jones' husband's 1996 "1040" tax indebtedness, signed by Nooe.(ROA 169 "a")
17. Check Number 6322 dated May 24, 1999 to the Internal Revenue Services in the amount of \$150.00 marked for Jones' husband's 1996 "1040" tax indebtedness, signed by Nooe.(ROA 169 "b")
18. Check Number 6423 dated July 15, 1999, to the Internal Revenue Services in the amount of \$225.00 marked for Jones' husband's 1996 "1040" tax indebtedness, cosigned by Nooe and Board Member Roger Campbell.(ROA 169 "c")

Jones acknowledged that board members would sign checks without question, that she would write the checks out, and ask Nooe to sign them as well.(ROA 260-263,265) These 18 checks were aggregated with one another, with the 11 "insurance" checks, and with the 49 invoices. The total of these 18 checks was \$5,830.00.

During her employment Jones' asked Nooe, and received his permission to, borrow money from the Center, one time \$3,000.00

as a down payment for a car, and a second time for \$1,500.00 for educational expenses.(ROA 295,296)

The two "loans", requested by Jones, written out by Jones, were made at different times and were written on the Center's checking account to Jones. These two "loans" were aggregated to a sum of \$4,500.00, then combined with the Jones' "back taxes" checks, the "insurance checks" and the 49 invoices. Though misnamed a "loan" by the Fifth District Court of Appeal, they were described as Jones' personal expenses, approved by Nooe, and aggregated in the total.(Nooe @ 1141)

Finally, the center had credit and/or credit cards from Office Max, Office Depot, Home Depot, and Wal-Mart for which Nooe was an authorized user.(ROA 230,263,296) Receipts of purchases by Nooe via credits cards issued to the Center are the content of the record from pages 220-263. As evidenced by the various receipts, purchases were made on different dates, times, locations, and stores. In its opinion, the Fifth District found that based upon Nooe's admission, and other testimony, that Nooe charged personal expenses on Center's credit cards, though modestly around \$2,500.00.(Nooe @ 1141)

Those separate credit cards charges were aggregated to around \$2,500.00, combined with the aggregated "loans" to Jones, the aggregated "back taxes" via the raise to Jones, which she stated she dispersed to the Internal Revenue Service via 18

separate checks and pay her husband's back "1040" tax indebtedness for the tax years of 1996, 1997, 1998, which was aggregated with the combined figure for the 11 checks for "insurance" for Nooe's health insurance, which were combined with the 49 aggregated invoices, to reach the total sum of \$86,491.59. (Nooe @ 1141)

The Fifth District court also stated, "...[M]uch, if not all of the \$70,125.65 received from the Department was not used for its intended purpose, rape prevention education seminars." (Nooe @ 1140)

Nooe was charged by an amended information with only one count of Grand Theft over \$100,000.00, a first degree felony, and as follows:

COUNT I: IN THAT FRANKLIN W. NOOE, from on or about January 1, 1998, through and including August 31, 2001, in the County of VOLUSIA and State of Florida, did knowingly obtain or use, or endeavor to obtain or use cash or U.S. currency of a value of \$100,000.00 or more, which was the property of the FLORIDA DEPARTMENT OF HEALTH and/or THE RAPE CRISIS CENTER OF VOLUSIA COUNTY, INC., or any other person not the defendant(s), with the intent to permanently or temporarily deprive the FLORIDA DEPARTMENT OF HEALTH and/or THE RAPE CRISIS CENTER OF VOLUSIA COUNTY, INC., or any other person not the defendant(s) of the property or benefit therefrom to appropriate the property to the use of FRANKLIN W. NOOE or to the use of any person not entitled

thereto, contrary Florida Statute
812.014(1)and (2)(a).(1 DEG FEL)

Though the Fifth District opinion whittled the combined aggregated amount down from the jury's verdict of \$100,000.00 or more, it did note that Nancy Linehan, "testified that the Department dispersed \$70,125.65 during the time period alleged in the information to the Center based upon (separate) invoices submitted by the Center through the defendant, its executive director..."(Nooe @ 1139)

The court also noted that, "the State did not adduce evidence directly tracing the entire \$70,125.65 into the defendant's own pockets, in a prosecution under Section 812.014, the State needed only show that the defendant obtained the property of the Department with the intent to temporarily or permanently deprive that entity of its right the property."(Nooe @ 1140)

Nooe, in his appeal at the Fifth District Court of Appeal cited State v. Diaz, 814 So. 2d 466 (Fla. 3rd DCA 2002) which the Fifth District found dealt with a statute of limitations issue only, and limited to its own set of facts.(Nooe @ 1141)

In Diaz, the State, in a single count information, alleged that Diaz obtained cash from Miami Dade County of \$100,000.00 or more, by submitting invoices for foliage, pursuant to a noted contract for foliage, beginning July 7, 1994, and continuing

through June 1, 1995. (Diaz @ 4467) Though asserting Diaz was a statute of limitations case, and limited to its facts, the Fifth District found solace in the "strong" dissenting opinion of Judge Cope, as he cited the same basis for which the Fifth District in Nooe determined that the monies could be aggregated, i.e., Section 812.012(9)(c), noting that the majority in Diaz had ignored that statute. (Nooe @ 1141)

Fifth District found that the State had not proven First Degree Grand Theft but rather Second Degree Grand Theft and remanded for re-sentencing. (Nooe @ 1143)

Nooe sought Discretionary Review based upon the express and direct conflict with the Third District decision in State v. Diaz, 814 So. 2d 466 (Fla. 3rd DCA 2002), the Fourth District decision in State v. Davis, 890 So. 2d 1242 (Fla. 4th DCA 2005) as well as this court's decision in Hearn v. State, 55 So. 2d 559 (Fla. 1951), as each of those cases hold that the State must charge separate counts of Grand Theft when the property is stolen at different times or places or as a result of a series of acts, separated in time, place, and circumstance. Discretionary Review was granted, and this is appeal followed.

SUMMARY OF ARGUMENT

For a single count of theft, an Information to include various times, places, different methods, and/or different victims of multiple thefts, it must be predicated upon an allegation that the thefts were part of a scheme or continuing course of conduct. Otherwise, multiple counts must be plead for each separate theft allegation.

AGRUMENT

THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL, STATE OF FLORIDA, IN NOOE V. STATE, 892 SO. 2D 1135 (FLA. APP. 5TH DCA 2005) IS IN DIRECT CONFLICT WITH THE WELL-ESTABLISHED LAW OF HEARN V. STATE, 55 SO. 2D 559 (FLA. 1951), STATE V. DIAZ, 814 SO. 2D 466 (FLA. 3RD DCA 2002), AND STATE V. DAVIS, 890 SO. 2D 1242 (FLA. 4TH DCA 2005), AND AS SUCH, MUST BE REVERSED.

This court's opinion in Hearn v. State, 559 So. 2d (Fla. 1951) acknowledged the well-established rule that "where property is stolen from the same owner, or from different owners at different times or places or as a result of a series of acts, separated in either time, place, or circumstance, one from the other, each taking is a separate and distinct offense". (Hearn @ 560) This requires the State to file separate counts, and produce separate proof as to each taking, when they are separated by time, place, and circumstance. The opinion of the Fifth District in Nooe expressly and directly conflicts with the rule of law in Hearn, as the Nooe court sanctioned a conviction for Grand Theft of less than \$100,000.00, notwithstanding that the evidence of the takings was separated in method, in time, place, and circumstance, to wit: 49 alleged fraudulent separate invoices, submitted for seminar presentations on specific dates, times, and places, each with a specific number of attendees, and each different from the other. Additionally, the Fifth

District's opinion included, along with those 49 separate and distinct invoices, 18 separate and distinct checks written on the Center's account, which were testified to as a "raise" authorized to assist the assistant executive director, Jones. Though very unorthodox, Jones asked Nooe for, and received, a raise. As the bookkeeper, she took the raise by writing 18 separate checks, over a 30 month period, i.e. January 1999 through June 2001, (ROA 164-169) to the Internal Revenue Service for an indebtedness of her husband's past due "1040" taxes for the years 1996, 1997, 1998.(ROA 164-169) Those checks were then combined with 11 checks written by Jones to Nooe's wife, Suzanne Line Nooe, for health insurance payments (an authorized benefit for Nooe in his employment package; however, he was not told to pay for that benefit through the Center's checking account, though he was never told not to).(Nooe @ 1141) Those 11 checks were written by Jones over a 32 month time frame. (ROA 171-181) That amount was also combined with the two separate "loans" Nooe authorized to Jones for a car down payment in 1998 for \$3,000.00 (ROA 235,265), and school expenses for \$1,500.00, which obviously occurred during Jones' employment, though there are no specific dates for these separate and distinct "loans" to Jones. Lastly, all of these checks, invoices, and "loans" were then combined with the aggregated credit card purchases made by Nooe, some of which were determined to be unauthorized, and in an

amount around \$2,500.00.(Nooe @ 1141) The credit card receipts are many, and cover a period of 27 months.(ROA 220-263)

A comparison of the facts and circumstances in Diaz and Nooe is as follows:

DIAZ

1. Diaz time frame, July 7, 1994, through June 1, 1995.
2. Prosecution for Grand Theft, First Degree based upon 23 alleged falsely submitted invoices for foliage pursuant to a contract by Diaz with Miami Dade County.
3. Prosecution based upon Florida Statute 812.014.
4. Florida Statute 812.012(9)(c) was in existence at that time, and stated:

"Amounts of values of separate properties involved in thefts committed pursuant to one scheme or course of conduct, whether the thefts are from the same person or several persons may be aggregated in determining the grade of offense."

NOOE

1. Single count information charging Grand Theft in the First Degree from January 1, 1998, through and including August 31, 2001.
 - (a) 49 invoices submitted over a 35 month period, over a four year period, pursuant to 4 separate contracts between the Center and the Department.
 - (b) 11 checks written over a period 32 months for "insurance".
 - (c) 18 checks written over 30 month period to Internal Review Service (a raise).

(d) 2 checks written for "loans", dates, other than the year of 1998, are unknown.

(e) Numerous credit card purchases over a number of months, and years.

2. The prosecution was pursuant to Florida Statute 812.014.

3. Florida Statute 812.012(9)(c) was the basis for aggregating all of the various incidents into a single, aggregated, one count information. (Nooe @ 1140)

The Fifth District's opinion dispensing with Diaz, misidentified Diaz as a statute of limitations case, where the majority ignored Florida Statute 812.012(9)(c). The Diaz majority rightfully determined that under section 812.014 "... a person is guilty of grand theft if he knowingly obtains or uses the property of another with the intent to temporarily or permanently deprive the other person of that right." (Diaz @ 467) The Diaz court continued, "The statute (812.014) is silent on the issue of continuing offenses, with no suggestion that the legislature intended to make grand theft a continuing offense." (Diaz @ 467) Continuing, the Diaz court succinctly stated, "[E]ach invoice was a separate taking, concluding the specific work requested on each county purchase order." (Diaz @ 467)

Clearly, the Fifth District's decision expressly and directly conflicts with the case law requiring the State to individually charge Nooe with separate counts for each alleged

taking, and particularly, where an alleged taking is through eleven (11) checks written by an assistant executive director for what was errantly perceived to be an insurance benefit, eighteen (18) separate checks written by the assistant executive director which she perceived to be a raise, two (2) loans given to the assistant executive director, and credit card purchases that were determined to be unauthorized. Had the State chosen to prosecute Nooe, utilizing the verbiage of F.S. 812.012(9)(c)), i.e., alleging one scheme or course of conduct with the regard to the forty-nine (49) invoices, then Nooe would have been placed on notice that he was being prosecuted for such a singular scheme. Supporting that position is State v. Davis, 890 So.2d 1242 (Fla. 4th DCA 2005) ("Absent an allegation in the charging document that both debts occurred as part of the same scheme or course of conduct, the undisputed facts do not constitute a prima facie case of grand theft.") The Davis case acknowledged the State's heavy reliance upon State v. Scarfo, 465 So.2d 1347 (Fla. 5th DCA 1985) which authorized a single count Information; however, distinguished it, as the Information in Scarfo charged that "Scarfo had between the 8th and 20th day of July, 1983, "pursuant to one scheme or course of conduct knowingly obtained or used..." (Scarfo at 1348).(emphasis added)

In Reyes v. State, 888 So.2d 95 (Fla. 3rd 2004) that court, countering Reyes' complaint that he should have been charged in

a single count Information, as opposed to twenty-nine counts of Grand Theft, cited Hearn v. State, 55 So.2d 559 (Fla. 1951), that when property is stolen at different times or places or as a result of a series of acts, separated in time, place, or circumstance, each taking is a separate and distinct offense. (Reyes @ 96) The Reyes court also cited State v. Diaz, 814 So. 2d 446 (Fla. 3rd DCA 2002), for its determination that each invoice was a separate and distinct taking; and therefore, each to be prosecuted separately. (Reyes @ 96)

CONCLUSION

It is clear that based upon Hearn v. State, 55 So.2d 559 (Fla. 1951), State v. Diaz, 814 So. 2d 466 (Fla. 3rd DCA 2002), Davis v. State, 890 So.2d 1242 (4th DCA 2005), State v. Scarfo, 465 So.2d 1347 (Fla. 5th DCA 1995), and Reyes v. State, 888 So.2d 95 (Fla. 3rd DCA 2002), that to have prosecuted Nooe in a single count Information for the forty-nine (49) invoices submitted over a four (4) year period, based upon four (4) separate contracts, would have required the State to have alleged that it was done under a scheme to defraud or a course of conduct to defraud, and its failure to do so is a denial of due process. Further, to have included, as well, in the single count Information, the prosecution for the eleven (11) checks for what was believed to be a health insurance benefit, eighteen (18) checks written by the assistant executive director as her way of being paid her authorized raise, i.e., in paying off her husband's income tax indebtedness from 1996, 1997 and 1998, as well as the "loans" authorized by Nooe to the assistant executive director for a down payment on a car, and a separate loan for school expenses, and for Nooe's unauthorized use of credit cards, none of which could have been combined with one another, even under a alleged common scheme, or course of conduct to defraud, as at best, the only common thread

throughout them is the obvious inept management of a non-profit organization by Nooe.

The foregoing does not at all include to the forty-nine (49) invoices that were submitted by the Center to the Department. Again, to have been successfully prosecuted under a single count Information, the State was required to allege the thefts as one scheme or course of conduct to defraud. Without that verbiage and notice, Nooe was denied due process of law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by hand delivery, to Douglas Squire, Esquire, Assistant Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Florida 32118, this 1st day of November, 2005.

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CERTIFICATE OF COMPLAINE

I HEREBY CERTIFY that this Brief on Merits complies with the font requirements of Fla.R.App.P. 9.210.

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

FSC CASE NO. SC05-514
FIFTH DCA CASE NO.: 5D03-2658

FRANKLIN NOOE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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APPENDIX TO PETITIONER'S BRIEF ON MERITS

INDEX TO APPENDIX

<u>Appendix</u>	<u>Date and Description of Document</u>
A	January 7, 2005 Opinion of the Fifth District Court of Appeal in <u>Nooe v. State</u> , Case no. 5D03-2658

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