Franklin Nooe v. State of Florida
Docket Number: SC05-514

THE COURT WILL CALL THE , BEFORE TAKING ITS MO RNING RECESS, WE WILL CALL THE NEXT CASE OF FRANKLIN W NO OE VERSUS STATE OF FLORIDA.

GOOD MORNING, YOUR HONORS.

CHIEF JUSTICE: LET'S MAKE SURE THAT MS. DAVIS GETS SET UP. I SEE MS. DA VIS HAS BACK-TO-BACK AGAIN. YOU WORK HAR D THERE , MS. DAVIS. YOU WANT A COUPLE OF MINUTESTO GET YOUR FI LES TO GETHER ? YOU ARE OK AY? ALL RIGHT. ,,

GOOD MORN ING. MY NAME IS MICH AEL LA MBERT AND I RE PRESENT FRA NKLIN NOOE. I REPRESENTED FOR A SHORT WHILE PREINFORMATION AND FOR A SHORT WH ILE PRETR IAL AND THEN AT THE APPELLATE LE VEL IN FRONT OF THE FI FTH DISTRICT COURT OF APPEAL AND THEN HERE ON DISCRETIONARY REVIEW.

JUSTICE: WHAT OCCURRED HERE IS OF SOME CONCERN IN REPRESENTATION, IN THAT AS I UNDERSTAND IT, YOU ALSO REPRESENTED MS. JONES.

YES . AND THERE WAS A CONFLICT BETWEEN MS. JONES AND THIS DEFENDANT, WAS THERE NOT?

THERE WAS NOT. IF THE COURT HAS READ MY AFFIDAVIT THAT WAS FILED.

JUSTICE: WHAT DO YOU M EAN BY THAT?

I FILE D AN AFFI DAVIT .

JUSTICE: I UNDERSTAND YOU FILED AN AF FIDAVIT , BU T ITSEEMS TO ME THAT MS. JONES , DID SHE TESTIF Y?

SHE DID TESTIFY. THERE WAS TO BE NO TRIAL AGAINST MR. NOOE.

JUSTICE: THERE WAS TO BE NO TRIAL AGAINST MR . NOOE .

THAT'S CO RRECT .

JUSTICE: BUT WHEN YOU S AYYOU REPRESENTED HIM PRETHE INFORMATION -- PRE-THE INFORMATION .

YES .

JUSTICE: WHEN DID YOU COME BACK IN THEN?

AT THE APPELL ATE LEVEL. I REPRESENTED HIM AT THE TRIAL AND THEN , AT THE TRIAL LEVEL AND THEN AT THE FIFTH DISTRICT COURT OF APPEAL.

JUSTICE: OKAY.

CHIEF JUSTICE: IS YOUR ARGUMENT A STATUTORY CONSTRUCTION ARGU MENT? THAT IS THAT IT

SEEM S TO ME THAT YOU , PRETTY CL EAR ALLOWS FOR AGGR AVATION. IT JUST HAD AGGRAVATION IN THE LAST CASE . ABROGATION, IN ORDER TO ALLOW FOR A HIGHER DEGREE O F THEFT T VERYY IS CLE ARLY PROVIDES THAT, SO IF WE GOT BY THE CONFLICT IS SUE , THEN WE WOULD JUST GET IN TO A FACTUAL ISSUE AS TO WHETHER THIS WAS PART OF ONE SCREAM OR COURSE OF COND UCT.

CORRECT.

CHIEF JUSTICE: BUT YOU AGREE THAT THE STATUTE V ERY CLEARLY PROVIDES FOR AGGREGATION. ONE, IF IT IS ALLE GED AND, TWO, IF IT IS PROVEN , BUT AS IN THE DIAZ CASE, IT WAS ALLEGED BUT IT WASN'T PRO VEN.

CHIEF JUSTICE: IT WAS ALLEGED.

YES, MA 'AM .

JUSTICE: IN THIS CASE IT WAS NOTAL EN D.

ABSOLUTELY NOT.

JUSTICE: AND NO ONE ARGUED THAT FACT BE FORE THE TRIAL COURT OR THE APPEL LATE COURT.

BEFORE THE APPELLATE COURT, YES, I ARGUED IT. BEFORE THE TRIAL COURT , THE TRIAL LAWYER DID NOT ARGUE IT.

JUSTICE: IN WHAT MANNER DID YOU ARGUE IT? AS I READ THE DIS TRICT COURT OPINION , THERE IS NOT HING SAID IN THERE ABOUT THE FAILURE TO ALL EGE THA T, THAT IS WHAT WE ARE TALKING ABOUT , RIGHT , THE SCHE ME OR COURSE OF CONDUCT, THER E IS NOTHI NG IN THE INFORMATION THAT SAYS THAT, AND THE O PINION D OES NOT ADDRESS THAT ISSUE .

NO. THOSE SPECIFIC WORDS , CORRECT , THAT WAS NOT ALLEGED.IT WAS ALLEGED AT THE APPELLATE LEVEL THAT THESE WERE SEPARATE SAN DIST INCT OFFENSES AND THEREFORE COULD NOT -- SEP ARATE AND DIST INCT OFFENSES AND THEREFORE COULD NOT BE AGGREGATED.

JUSTICE: BUT YOU N EVER ARGUED TO THE COURT THAT THIS INFORMATION FA ILED TO ALLEGE A SC HEME OR COURSE OF CONDUCT , CORRECT?

NO, BUT THAT IS WHAT THECOURT FOUND, THAT IT WAS , AND THE DAVIS CASE STATES THAT IT IS AN INGREDIENT OF AN INFORMATION , THAT IT MUST STATE.

JUSTICE: WELL, YOU ARE ARGUING THAT IT IS, WAS FUNDAMENTAL ERROR? BECAUSE MY CONCER N, I THINK , IS, JUST TUES DAY QU INCE IS ASKING -- JUSTICE QUINCE IS ASKING THAT , THIS INFORMATION, THE AMENDED INFORMATION AS I READ T HIS RECORD, WAS NOT CHALLE NGED ON, BY A MOTION T O DISMISS ON THAT G ROUND .

THAT IS CORRECT.

JUSTICE: AND SO UN LIKE DAVIS , WE ARE NOT DEA LI NGWITH A CHALLENGE TO AN INFORMATION. WE ARE DEALING WITH AN ISSUE THAT IS WHETHER THIS STATUTE CAN AGGREGATE THESE OFFENSES.

WE LL, IN DIAZ , THE STATUTE, THE STATE TRIED TO USE THAT STATUTE TO AGREE GAIT THOSE 24 INVOICES SUB-- TO AGGREGATE THOSE 24 INVOICES SUBMITED TO MIAMI-DADE COUNT FOY FOL

IAGE THAT WAS NOT PROV IDED .

JUSTICE: BUT WOULDN'T YOU AGREE THAT THE DIAZ CASE REALLY DE CIDES THE ISSUE O N WHETHER THERE CAN BE THE APPLICATION OF THE STATUTEOF LIMITATIONS?

THAT'S CORRECT, BUT BEFORE YOU CAN READ THAT , IF IT IS A CONTI NUING OF FENSE, THE STATUTE OF LIM ITATIONS SAYS IT CANNOT BE GIN UN TI L THE DAY AFTER THE LAST EV ENT, SO THAT IF IT IS A CONTINUING OFFENSE , THEN THEY WERE WITHIN THE STATUTE OF LIMITA TIONS .

JUSTICE: WELL , THE THIRDDISTRICT IS DOESN'T SAY T HAT ON THE FACE OF THE DIAZ OPINION , ON THE MAJORITY.

NO, BUT THE DISSENT SAYS IT AND THE FIFTH DIST RICT.

JUSTICE: BUT I N ORD ER FOR US TO HAVE CONFLICT JURISDICTION WITH DIAZ , THERE WOULD HAVE TO BE A STATEMENT IN THE MAJORITY , WHICH SAYS THAT SPECIFICALLY , WOULD THERE N OT?

WELL , I THINK I N DIAZ , PERHAPS, BUT BY U SING THE NOOE OPINION FROM THE FIFTH DISTRICT COURT OF APPEAL , THE FIFTH DISTR ICT IS SAYING THAT DIAZ IS INCORREC T, THE APPROPRIATE DECISION WAS RENDERED IN THE DISSENT BY JUSTICE POPE, WHO WENT BACK TO 812.012-9-C AND SAID I T IS A CONT INUING OFFE NSE AND THEREFORE THE STATUTE OF LIMITATIONS IS NOT IMPLICATED AND THEREFORE ALL 24 INCIDE NTS WERE PROPERLY PUT WITHIN A SINGLE COUNT INFORMATION.

JUSTICE: IF WE FIND T HAT THERE IS A CONFLI CT IN T HIS CASE, WE STA RTED THIS ARGUMENT BY YOUR AGR EEMENT WITH THE CHIEF JUSTICE THAT THE STATUTE DOES PROVIDE FOR ABROGATION OF OFFENSES . SO - - AGO REGATION OF OFFENSES - - AGREE - - AGGREGATION OF OFFENSES , A NDTHAT IS IT , AND WE DON'T HAVE STOCKS INTO WHETHERTHERE WAS ACTUAL AGGREGATIONPROVEN IN THE CASE , TO SHE CONFL ICT?

NO.I THINK IN ORDER TO S HOW A SCHEME OR COURSE OF CONDUCT , IT WOULD HAVE TO BE ILLUSTRATED BY THE FACTS .

JUSTICE: MY QUESTION I S THE ONLY CONFLICT ISSUE IF THERE IS ONE, IS WHETHER T HESTATUTE ALLOWS FOR AGGREGATION, AND IF WE HO LD THAT THE P LAIN LANG UAGE IS AS IT SUGG ESTS, WE DON 'T HAVE TO GO FURTHER AS TO WHETHER THE FACTS PROVEN I N THIS CASE AC TUALLY DEMONSTRATE AGGREGATION.

SINCE THE FIFTH DIS TRICT COURT OF APPEAL SAID THAT IT WAS PROVEN AGGREGATION, THEN THERE IS THE CONFLICT IN DIAZ, W AS THERE WAS NOT CONFLICT IN THE INFOR MATION.

JUSTICE: BUT WOULD YOU AGREE THAT YOU DIDN'T ARGUE IN THE TRIAL COURT OR EVEN IN THE D CA, THAT THE STATE FAILED TO ALLEGE THE AGGREGATION IN THE INDICTMENT? THAT IS NOT THE ISSUE HERE BECAUSE YOU DIDN'T ALLEGE THAT.

THAT'S CORRECT. THAT WAS NOT WHAT WAS ALLEGED.

JUSTICE: I AM SAYING YOU DID NOT ARGUE THAT AT THE TRIAL LEVEL THAT , THE STATE FAILED TO CLAIM THAT T HEY W OULD THEY COULD AGGREGATE THE OFFENSE .

HIS TRIAL LAWYER DID NOT ARGUE THAT, NO.

JUSTICE: SO IF THERE IS A CONFLICT ISSUE, IT IS ONLY ON WHETHER THE STATUTE PERMITS OFFENSES TO BE AGGREGATED. ISN'T THAT IT?

IF IT IS THE OPINION O F DIAZ IS IN CONFLICT WITH THE OPINION OF THE FIFTH DISTRICT AND THE F IFTHDISTRICT IN ESSENCE SAYS THAT IT IS, THE FIFTH DISTRICT SAYS THE RIGHT THERE WAS JUDGE COPE , N OTTHE MAJORITY , BUT THE MAJORITY IGNO RED THE STATUTE THAT ALLOWED A COMMON SCHEME OF COURSE OF CONDUCT.

CHIEF JUSTICE: I GUESS WHAT JUSTICE CAN TERO IS TELLING YOU OR SUGGE STING , WHICH IS I GU ESS WHERE YOU STARTED FROM , I AM NOT SURE , SINCE IT IS PRETTY CLEAR THAT THE STATUTE DOES ALLOW FOR AGO REGAYS -- AB ROGATION, THAT NO ONE - - FOR AGGREGATION, THAT NO ONE CHALLENGED IT AS BEING DEFECTIVE, THAT ONCE WE AGREE THAT THE STATUTE DOES ALLOW FOR AGGREGATION, WHEREDOES IT GET YOU IN THIS CASE?

THAT IT WAS IMPROP ERLY AGGREGATED. THERE WASN'T AN IMPROPER SCHEME OR COURSE OF CON DUCT.

CHIEF JUSTICE: AND THIS GOES BACK TO WHAT JUSTICE WELLS ASKED, IS WHERE WOULD WE COME UP WITH THAT BEING A FUNDAMENTAL ERROR, SINCE YOUADD MUTT THAT THIS IT W ASN'T BEING CHALLENGED ON THAT -- ADMIT THAT IT WASN'T BEING CHALLENGED ON THAT BA SIS , AND IT SEEMS TO ME THAT THE TRIAL COURT MA DE A DECISI ON TO CHALLENGE THIS ON WHETHER HE ACTUALLY HAD A FELONIOUS INTENT TO TAKE THIS PROPERTY, WHETHER IT WAS A T ALL, HO W CAN YOU SAY THAT THERE WOULD BE FUNDAMENTAL ERROR HERE OR IS THAT WHAT YOUR ARGUMENT IS?

IN ES SENCE THAT IS WHAT THE ARGUMENT WOULD BE , I S IS THAT THERE WAS AN IMP ROPER AN AGGREGATION OF SEP ARATE AND DISTINCTIVE E NDS .

CHIEF JUSTICE: BUT THAT GOES BACK TO WHAT WAS ARGUED IN THE FIFTH DISTRICT. WAS IT PRESENTED SI NCE IT IS A STATUTE THAT ALLOWS FOR AGGREGATION , THAT THERE WAS FUNDAMENTAL E RROR IN NOT CHARGING THAT IN THE INFORMATION.WAS THAT ARGUMENT MADE T O THE FIFTH DISTRICT?

NO, MA 'AM . THE ARGUMENT WAS MADE THAT EACH ONE OF THE EVENTS WAS A SEPARATE AND DISTINCT ACT.

CHIEF JUSTICE: WHY WOULD WE, IF IT WASN'T PRESENTED TO THE FIFTH DISTRICT, FOR THE FIRST TIME IN A CASE,WHAT KIND OF POLICY WOULD THAT BE FOR US TO SAY WE ARE GOING TO DECI DE, EVEN THOUGH IT WASN'T ARGUED IN THE TRIAL COURT, WASN'T ARGUED BEFORE THE FIFTH DISTRICT THAT, WE ARE JUST GO ING TO COME UP AND SAY IT SHO ULD BE , WE WILL REVE RSE THIS ON FUNDAMENTAL ERROR?

WELL , WHAT YOU WOULD BE SAYING THEN, IS THAT THE FIFTH DISTRICT COURT OF APPEAL IS CORRECT , THAT THE DISSENT IN DIAZ, IS CORRECT. BECAUSE IT WAS THE DISSENT IN DIAZ THAT THE FIFTH DISTRICT UTILIZED TO S AYTHAT IT IS A SEPARATE AND DISTINCT, IT IS A COMMON SCHEME AND SO - -

CHIEF JUSTICE: THAT WOULD BE APPROVING THE FIFTH DISTRICT.

IT WOULD BE APPROVING THE FIFTH DISTRICT BUT DISAPPROVING THE FOURTH DISTRICT IN DIAZ .

JUSTICE: WHAT DO WE DO, THEN, WITH THE CASE LAW T HAT TALKS ABOUT YOU YOU HAVE TO MAKE AN OBJECTION O R FILE A MOTION TO DISMISS WHAT YOU CONSIDER TO BE A DEFEC TIVE INFORMATION, AND UNLESS THERE IS A DISP UTED ISSUE ABOUT WHAT IS MISS ING IN THE INFORMATION AT TRIAL, THEN , IT IS NOT GO ING TO BE FUND AMOUNTAL ERROR.

I THINK TAKE WHAT OCCURRED WAS THAT NON E OF THAT DID OCCUR AT THE T RIALLEVEL. THE ARGUMENT IS MADE AT THE APPELLATE LEVEL THAT THESE ARE SEPARATE AND IS DISTINCT

EVENTS AND THEREFORE CANNOT BEING A REGA ITED . -- AGGREGATE ED .

JUSTICE: THAT R E ALLY DOES NOT ADDRESS WHETHER OR NOT IT SHOULD HAVE BEEN IN THE INFORMATION , WHETHER OR NOT THE SCHEME OR C OURSE OF CONDUCT LANGUAGE SHOULD HAV E BEEN IN THE INFORMATION .

BUT I F , AS DAVIS SAYS ISTHAT IT SHOULD BE IN THE INFORMATION, IT , THEN , WOULD BE FUNDAMENTAL ERROR, IF IT IS NOT INFORMATION -- A

JUSTICE: BUT ONLY IF THE ARGUMENT IS MADE , IF THAT IS DISPUTED. IF AT TRIAL THERE IS A ARGUMENT MADE THAT THIS I S A DISPUTED ISSUE AS TO WHETHER OR NOT THIS WAS A COURSE OF CONDUCT, AND WAS ANY ARGUMENT MADE AT THE T RIALLEVEL, THIS WAS NOT A COU RSE OF CONDUCTOR COMMON SCH EME?

NO. THE TRIAL LA WYER DID NOT MAKE THAT ARGUMENT AT ALL.

JUSTICE: IT WAS NOT MADE , AS FAR AS ANY MOTIONS AT THE TIME THE EVIDENCE CLOSED?

NO, SIR .

JUSTICE: O K AY, SO , THEN LET'S GET DOWN TO WHERE I SAID THAT EVERYBODY AGREES THAT NOTHING WAS FILE D WITH REGARD TO THE INFORMATIONATION. CORRECT? SO THAT IS REALLY NOT AN ISSUE HERE. NOBODY HAS EVER ARGUED THAT.

NOTHING OTHER THAN A GENERIC MOTION TO DISM ISS , IT WAS NEVER ARGUED.

JUSTICE: SO I F AT SOME POINT WE ARE TALKING ABOUT , HOW WAS TH IS, THEN , EVEN PRESERVED FOR APPEAL IN THE FIFTH DISTRICT, WITH REGARD TO WHETHER SEPARATE INVO ICES AS A M A TTER OF LAW , CAN CONSTITUTE AND CAN BE AGGREGATE ED, TO REACH THE STATUTORY AMOUNT? HOW IS THAT EVEN PRESERVED FOR THE FIFTH DISTRICT THEN?

IT WAS , AT BEST , IT WAS PRESERVED IN THE ADDEND UM TO THE MOTION FOR A NEW TRIAL .

JUSTICE: OKAY ,, S O THEN THE QUE STION BE COMES , DOES IT NOT WHETHER THAT IS SUFFICIENT PRESER VATION , EVEN OF THE ISSUE , BECAUSE AS I SEE THE FUNDAMENTAL ISSUE IT WAS NOT INFORMATIONS OR WHATEVER, BECAUSE THAT WAS NOT E VEN PART OF IT, AND YOU ARE KI NDOF MISSING, THE COURT IS CONCERNED WITH DIAZ AND WHETHER THERE IS REALLY CONFLICT WITH THAT, SO THE REAL FUNDAM ENTAL ISSUE THAT WE MUST ADDRESS IS WHETHER DIAZ AND THE HOLD ING THERE THAT YOU CANNOT AGGREGATE SEPARATE IN IS VOI CES FOR THINGS THAT YOU SA ID YOU DID AND GET MO NEY FOR, TO REACH , YOU CANNOT AGGREGATE THO SE, THAT THOSE ARE SEPARATE EVENTS, AND WHETHER THAT WAS PROPERLY PRESERVED AND WHETHER THAT IS AN EVEN AN ISSUE IN THIS CASE. I READ IT AS THAT WERE AN ISSUE THAT WAS PROPERLY PRESERVED IN SOME WAY , S O I THINK YOU REALLY NEED TO BRING THAT HOME.

NO.IT WAS NOT PRESERVE D AT T HETRIAL LEVEL AT A LL. IT WAS RAIS ED IN THE APPELLATE LEVEL BY THE ARGUMENT THAT THEY ARE SEPARATE AND DISTINCT EVENTS. THE 59 , I AM SO RRY , THE 49 INVOICES AND THEN THE 1 1 CHECKS FOR INSURA NCE .

JUSTICE: WE ARE NOTTALKING ABOUT THOSE , BECAUSE EVEN THE INVOICES , YOU ARE NOT GOING TO GET THERE WITH THESE OTHER EVENTS , IF THE INVOICES , WHAT WILL GET YOU THERE OR NOT WITH DIAZ , SO YOU ARE TALKING ABOUT ALL OF THE EDGES WHEN YOU REALLY NEED TO GO TO THE HEART, SO WAS IT THE FIFTH DISTRICT THAT IT HAD NOT BEEN PROPERLY PRESERVED, THIS ARGUMENT?

NO.

JUSTICE: SO THI S IS THEFIRST TIME IT HAS COME U P.

THAT IT WAS NOT PROP ERLY PRESERVED?

JUSTICE: YES, S IR.

YES, SIR.

JUSTICE: SO YOUR ARGUMENT HERE, THEN, THAT E ACH WAS A SEPARATE OFFENSE OR SEPARATE THEFT THAT, YOU ARE THEN SAYING THIS WAS NOT A COMMON SCHEME THAT.IS WHAT YOUR ARGUMENT , REALLY, BOILS DOWN TO, CORRECT?

YES, B ASED UPON THE HEARNCASE BY THIS COURT I N 1951 , WHICH WAS THE PREOMNIBUS THEFT STATUTE. HOWEVER , HEARN HAS SINCE BEEN RECITED IN DAVIS, AND DIAZ RECITED IN DAVIS , ASWELL, WHICH IS A 20 05 CASE, BUT THAT , A GAIN , NO W , GETTING TO EACH ONE OF THE INVOICES BEING A SEPARATE AND DISTINCT EVENT , BASED UPON AN ALLEGATION OF A COMPLETED EVENT, W E HAD A RATE CRISIS SEMI NAR , 25 PEOPLE ATTEND ED AT A RATE OF 7.15 AN UNIT. THEREFORE WE ARE O WED " X"NUMBER OF DOLLARS, AND THAT IS SUBMITTED TO THEDEPARTMENT OF HEALTH AND THE DEPARTMENT OF HEALTH VERIFIES IT , SEN DS IT TO THE RAPE CR ISIS CENTER , WHI CH IS THE DEPARTMENT OF HEALTH, AND THEN IT IS UTILIZED TO PAY SALA RIES .

JUSTICE: SO EAC H WAS A SEPARATE EVENT IS WHAT YOU ARE SAYING.

YES, MA' AM.

AND THEREFORE THERE IS N O COMMONALITY ABOUT IT.

NO. EACH, AS A MATTER OF FACT , NANCY LINE YOU MEAN , WHO WAS THE -- N ANCY LYNUM , THE DIRECTOR OF THE DEPARTMENT OF HEALTH THAT AT THE TIME ORCHESTRATED THE FIVE YEARS OF CONTRACTS WITH THE RAPE CRISIS CENTER, TEST IFIED THAT SHE WENT EVERY YEA R TO A RAPE CRISIS SEM INAR AND PARTICIPATE INDEED IT A NDSAW THAT IT WAS AC TUALLY OCCURRING , S O IF THERE WAS A COMMON SCHEME, THE COMMON SCHEME WAS INTERR UPTED BY ACTUAL PUTTING ON OF SEMINARS.

CHIEF JUSTICE: I WA NT TO REMIND YOU, YOU ARE IN YOUR REBUTTAL, AND YOU MAY WANT TO RE SERVE THE REST OF YOUR TIME.

THANK YOU .

MAY IT PLEASE THE COURT. MY NAME IS BAR BARA DAVIS , AND I BASICALLY WANT TO ADDRESS TH REE ISSUES , FIR ST OF ALL THE ISSUE OF JURISDICTION.

CHIEF JUSTICE: IT SEEMSTO ME THE STATE'S BRIEF IN THIS CASE ONLY DEALT WITH JURISDICTION.

JURISDICTION AND WAIVER,I THINK WE DEALT WITH.

CHIEF JUSTICE: READING THE BRIEF , IT SEEMED THATTHE STATE COULD HAVE MAYBE ELABORATED, IF THERE WE RE AT LEAST THOUGH T THE COURT MIGHT GET INTO THE NE XT ISSUE.

AND I AM READY TO ADDR ESS THAT, ALL THE ISSUES T O DAY . AS FAR AS JURISD ICTION , I WANT TO POINT OUT THAT THE CASES OF HEARN AND DAVIS , WHICH THEY ARE CITING FOR CONFLICT, ARE NEVER C ITEDWITHIN THE FOUR CORN ERS OF NOOE, IN THE FIFTH D CA. THE DAVIS CASE THAT THEY ARE KRIINGT AS CONFLICT ON APPEAL DAVE RENT DAVIS CASE FROM

WHAT WAS CITED IN THE FIFTH DCA. THE DIAZ CASE WAS NOT CITED.

CHIEF JUSTICE: YOU KNOW THERE IS NO R ULE THAT SA YS THE CASE ITSE LF HAS TO BE CITED FOR THERE TO BE CONFLICT.

EXAC TLY, BUT I AM SAYING THAT, IN OR DER FOR YOU TO ACCEPT JURISDICTION WITHIN THE FOUR COR NERS O F THE DECISION, THERE HAS TO BE THE, A DIFF ERENT RES ULT , BASED ON THE SAME FACTS , AND THE CASES , I JUST WANTED TO POINT THAT OUT THAT THE DAVIS THAT THE FIFTH D KRACHLT IS TALKING ABOUT IS NOT THE -- THE FIFTH DCA I S TALKING ABOUT, IS NOT T HEDAVIS THAT WE ARE TALKING ABOUT HERE .

CHIEF JUSTICE: AND YOU ARE A DIFFERENT DAVIS THAN EITHER OF THEM. ANOTHER THIRD DAVIS.

JUSTICE: AND BEYO ND THAT , LET'S GO DI RECTLY TO DIAZ. DIAZ HAD INV OICES, CORRECT? DID DIAZ HAVE INVOICES ?

YES.

JUSTICE: AND DID TH OSE INVOICES REPRESENT THAT THEYHAD DONE THINGS THAT THEY WERE SUBMITED TO A JURY THAT THEY DIDN'T DO?

DIAZ IS A STATUTE OF LIMITATIONS CASE .

JUSTICE: DID IT INCLUDE THINGS LIKE THAT T O T HIS CASE? I AM TR YING TO SEE IF THERE IS SIMILARITY OR NOT.

IT I S A DIFFERENT STATUTE. DIAZ IS A COMPLE TELY DIFFERENT STATUTE.

JUSTICE: COULD YOU ANSWER MY QUESTION, PLEASE, MA'AM . DID INVOICES OF THI NG THAT IS THEY HAD NOT DONE --

DIAZ --

JUSTICE: HAD THEY INVOICED THEM? HAD THEY INVOICED THEM FOR THINGS THEY HAD NOT DONE I N DIAZ. IS THAT THE BASIC FAC TUAL SITUATION?

YES.

JUSTICE: AND IN THE FI NAL , VERY LAST SENTENCE OF DIAZ, SAYS YOU CANNOT AGGREGATE THESE.IS THAT CORRECT?

NO. DIAZ WAS TALKING ABOUT 775.15 . NOW , DIAZ SAYS THAT THIS WAS NOT A CONTIN UING OFFENSE F ORPURPOSES OF THE STATUTE OF LIMITATIONS. THEY ARE TALKING ABOUT THE EXTENDER T O THE STATUTE OF LIMITATIONS STATUTE , WHICH SAYS THAT , IF THERE IS A LEGISLATIVE INTENT , AND IT IS A CONTINUING OFFENSE, WHICH IS DIFFERENT FROM THE 812.012 COURSE OF CONDUCT, THE STATE CAN GO BA CK AND RECAPTURE THE 22 INVOICES IN DIAZ, WHICH ARE OUTSIDE THE STATUTE OF LI MITATIONS. THAT IS NOT THE ISSUE IN OUR CASE. ALL OUR CASES, ALL OUR INVOICES ARE WITHIN THE STATUTE OF LIMITATIONS . WE ARE U NDER --

JUSTICE: WHY DID DIAZ SAY THAT THEY COULD NOT GO BACK AND CA PTURE THOSE , A ND I WILL QUOT E TO YOU. IT SAYS EACH INVOICE WAS A SEPARATE TAKING , CONCLUDING THE SPECIFIC WO RK REQUESTED IN EACH PURCHASE ORDER. SO WHEN YOU READ THAT , AND THEY YOU TAKE A LO OK , THAT , JUDGE COPED IS SAID THIS IS NOT THE R IGHT -- J U DGE COPE SAID THIS IS NOT THE RIGHT PRINCIPLE OF LAW AND THEN THE FIFTH DISTRICT HERE FOLLOWED THE PR INCIPLE OF LAW THAT THEY FOLLOWED, I S SO, AND THIS IS JUDGE COPE. RIGHT OR WRO NG

THAT IS NOT THE ISSUE. THE QUESTION IS SR WE LEAVING OUT THERE THESE FLOATING PRINCIPLES OF LAW THAT SOMEONE CAN ARGUE A NDCREATE CONF USION . WHICH ONE DO I FO LLOW? IN THE THIRD DISTRICT D O WEGET A DIFFERENT RESULT A THAN IN THE FIFTH?

NO, BECAUSE IT IS TWO DIFFERENT STATUTES. DIAZ IS TALKING ABOUT A DIFFERENT OFFENSE, WHICH I S A TERM OF ART , WHICH UNITED STATES, A CASE OUT OF THE THIRD DCA OR FOURTH , WHICH SAYS ROSEN , CONTINUING OFFENSE FOR THE PUR POSES OF STATUTE OF LIMI TATIONS , WHICH MEANS IF WE HAVE ONE OFFENSE IN SIDE OUR STATUTE OF LIMITATIONS, WE COULD GO BACK AND RECA PTURE THE 22 OFFENSES THAT WERE OUTSIDE THE STATUTE OF LIMITATIONS IN DIAZ, BECAUSE WE SAY THIS IS A TO NING OFFENSE FOR PURPOSES OF 775.15.

JUSTICE: WELL, I AM SOR RY BUT THAT IS NOT WHAT IT SAYS. IT SAYS THE STATE CONT ENDS THAT FLORIDA STATUTE 812.12901-C.

THE STATUTE --

JUSTICE: RIGHT , WHICH I S WHAT WE ARE TALKING ABOUT TODAY, ARE WE NOT?

TWO DIFFERENT THIN GS .

JUSTICE: THAT STATUTE ISA DIFFERENT STATUTE THAN WHAT WE ARE TALKING ABOUT TODAY ? 19- C IS THAT - -

JUSTICE: I S THAT THE SAME SON WE ARE TALKING ABOUT TODAY?

NO OE IS THE STATUTE. DIAZ IS 771.5.

CHIEF JUSTICE: LET ME MAKE SURE.I THINK THE THEFT STATUTE , THEY WERE BOTH CHARGED UNDER THE SAME THEFT STATUTE, WHICH ALLOWS FOR AGGREGATION OF --

YES.

CHIEF JUSTICE: THE ONLY THING, AND I AM NOT SURE YOU HAVE BEEN RESPONSIVE T O JUSTICE LEWIS'S QUESTION K YOU MAY, IN THAT BOTH C ASESTHE DEFENDANT WAS CHA RGED UNDER THE IDENTICAL STATUTE .

YES.

CHIEF JUSTICE: ALL RIGHT. SO, NOW , WHAT IT SEEMS THAT YOU ARE AT ENTING TO -- ATTEMPTING TO ARGUE IS THE BASIS OF NO CONFLICT , THE QUESTION OF THE OFFENSE BEING DONE NOT UNDER THE THEFT STATUTE AS CHARGED BUT UNDER 77 5, WHAT , I AM NOT SURE .

POINT 15.

CHIEF JUSTICE: IS THAT OF ENDECIDED IN THE THIRD -- ISTHAT EVEN CITED IN THE THIRD DISTRICT'S OPINION?

I THINK THAT IS IN THE DISSENT.

CHIEF JUSTICE: SO NOW WE GO BACK TO THE FOUR CORNERS, BOTH THE MAJ ORITY OPI NIONAND IN BOTH CASES , RELY ON 812 .0114 , WHATEVER IT I S . -- 812.014 , WHATEVER IT IS.

THIS IS A CLEAR PROBLEM WHERE THE STATE IS TR YING TO EXTEND THE STATUTE OF LIMITATION TO SAY CAPTURE ALL OF THE G RAND THEFTS OUT OF THE STATUTE OF LIMITATIONS AND STATE YOU CANNOT DO THAT .

JUSTICE: IN THE FIFTH DISTRICT, I F , TOMO RROW , SOMEONE IS CHARGED WITH TAKING MONEY UNDER A SE RIES OF INVOICES AND THE STATE MOVES TO DISMISS , SAYING IT WAS IN THE INFO RMATION , CAN SOMEONE VELI , CAN SO MEONE SAY YOU DON'T HAVE TO DO THAT IN THE FIFTH DISTRICT , OR IS IT YES, YOU DOS, IF IT IS PROPERLY CHALLENGED , AND IT IS THAT THAT IS A APPROPRIATE DE FENSE TO A CRIME, IF IT IS PROP ERLY ALLEGED , IMPROPERLY ALLEGED BUT PROPERLY ATTACKED ?

YES .

CHIEF JUSTICE: YES , T HAT YOU CAN DO THAT IN THE F IFTHDISTRICT?

THE STATE COULD CHARGE THESE AS SE PARATE OFFENSES , THE STATE COULD HAVE CHARGED ON THE SEPARATE OFFENSES O R THEY COULD USE THE AGGREGATION STATUTE TO AGGREGATE.

CHIEF JUSTICE: BUT IF SOMEONE SAID THEY DID N'T CHARGE IT AS SUCH, WOULDTHAT BE A PROPER MOTION TO DISMISS?

WELL, IT IS LIKE THE DAVIS CASE. THEY TELL YOU TO GO BACK A NDCHARGE IT AS A COMMON SCHEME OR COURSE OF CONDUCT .

CHIEF JUSTICE: I WANT TO MAKE SURE THAT JUSTICE WE LLS, BECAUSE --

JUSTICE: IT SE EMS TO M E THAT THE CONFUSION HERE LIES, AND THAT IS WHAT I WANTED TO SEE? I COULD TAKE A CRACK AT STRAIGHTENING IT OUT OR AT LEAST UNDERSTANDING IT MYSELF, AND THAT IS THAT THE MAJORITY OPINION IN DIAZ WAS DEALING WITH 812.012-10 , ACCORDING TO WHAT I READ JUDGE SCHWARTZ'S OPINION , DEALING WITH 812.035-10, WHICH THEY CAN SAY IS THAT NOTWITHSTANDING ANY OTHER PROVISION OF CRIMINAL LAW , A CIVIL A CTION FOR GRAND THEFT MAY BE COMMEN CED AT ANY T IME WITHIN FIVE YEARS AFTER THE CAUSE. THEY ARE DE ALING WITH THAT PROVISION IN DI AS - - IN DIAZ , IN THE MAJ ORITY OPINION, CORRECT?

YES.

JUSTICE: IN THIS CASE , THE AGGREGATION PROVISION IS 812.012-9-C.

YES .

JUSTICE: AND AS I UNDERSTOOD THE STATE'S POINT WAS THAT THE DIAZ MAJO RITY OPINION DID NOT DEAL WITH THE AGGREGATION PROVISION BUT, RA THER, DEA LT ONLY WITHTHE STATUTE OF LIMITATIONS .

YES, SIR.

JUSTICE: I W OULD ASSUME THAT IT WOULD BE IN THE STATE'S INTERE ST, THOUGH , THAT, IF THIS COURT DID TAKE , DECIDE THAT IT DID HAVE JURISDICTION AND QUASHED THE MAJORITY OPINION IN DIAZ, IN ORDER TO STRAIGHTEN OUT THE ISSUE AS TO THE STATUTE OF LIMITATIONS IN THIS MATT ER, WOULD IT NOT ? THAT SORT OF --

DIAZ IS IS NOT W RONG , BECAUSE UNDER , IF YOU L OOK AT 775.153, AND THAT IS WHAT DIAZ WAS INVOLVED , AND THE DISSENT TALKED ABOUT THAT. AND CITED TO THE UNITED STATES VERSUS TUCE, WHICH THERE IS A TERM OF A RTCALLED CONTINUING OFFENSE.

JUSTICE: RIGHT.

A CONTINUING OFFENSEMEANS THAT THE STATE CAN GO BACKWARD FROM THE STATUTE OF

LIMITATIONS AND RECAPTURE ALL THE OFFENSES , IF THERE WAS ONE WITHIN THE STATUTE OF LIMITATI ONS , AND THAT IS THE 771.53 , WHICH THEY CALL THE EX TENDER , WHICH SAYS - -

JUSTICE: BUT THE MAJORITY IN DIAZ DID NOT ALL OW THAT TO BE DONE .

YOU CAN'T DO THAT! IF, UN LESS THE STATUTE SAID IT IS A CONTINUING OFFENSE FOR PURPOSE OF THE STATUTE OF LIMITATIONS, LET'S SA Y WE HAVE A LONG TIME CONSPIRACY , AND IT PO PS RIGHT HERE , W E COULD GO BACK AND GET ALL OF THE AC TS WITHIN T HAT CONSPIRACY. IF CONSPIRACY IS A CONTINUING OFFENSE. WHICH IS A COMPLE TELY DIFFERENT AN IMAL FROM THE AGGREGATION STATUTE. AGGREGATION STATUTE IS ACTUALLY A DEFINITION OF VALUE IN 812.0192-C , WHICH ALLOWS AGGREGATION , WHEN Y OUSTILL HAVE YOUR THEFT , BUT UNDER THE AGGREGATIONSTATUTE, YOU CAN AGGREGATE AMOUNT OF THE V ALUE. IT SAYS YOU CAN CHARGE THEM SEPARATELY. YOU CAN AGGREGATE THE VALUES. AND THAT IS A COMP LETELY DIFFERENT THING. THEY ARE ACTUALLY CHARGED UNDER 812.014-1- A-2-B.

JUSTICE: LET ME ASK Y OUTHIS. IN ORDER TO DETER MINE UNDER DIAZ THAT THIS WAS NOT A CONTINUING OFFENSE, DO YOU HAVE TO NECESSARILY M A KE THE DETERMINATION THAT YOU CANNOT AGGREGATE THE SE, BECAUSE IT SEEMS TO ME THAT , IF YOU CAN IN FACT AGGREGATE AND YOU CAN DEMONS TRATE THAT ALL OF THESE INVOICES WERE A PART OF A COMMON SCHEME O R COURSE OF ACTION , THEN YOU HAVE IN FACT, A CONTINUING OFFENSE. IF YOU START IN JANUARY ANDYOU DECIDE YOU ARE GOING T O TAKE $1,000 A M ONTH OR , FOR TWO YEA RS , FR OM YOUR EMPLOYER, AND YOU CHARGE THAT AS A SCHEME , YOU GE T IT TOGETHER AND YOU HAVE A CONTINUING OFFENSE , AND AT THE LAST IN STANCE THAT YOU TAKE THE MO NEY , THAT THE STATUTE OF LIMITATIONS BEGINS TO R UN. ISN'T THAT TRUE ? DON'T YOU NECESSAR ILY HAVE TO MAKE A DETERM INATION AS TO WHETHER OR NOT YOU COULD AGGREGATE THESE OFFENSES, IN ORDER TO R EACH THE CONCLUSION THAT THIS WAS OR WAS NOT A CONTINUING OFFENSE?

FIRST OF ALL, YOU HAVE TO LOOK AT THE STATUTE OF LIMITATIONS, AND THIS C OURT HAS SAID THAT G RAND THEFT IS NOT A CONTINUING OFFENSE OR THE DC A IS NOT A CONTINUING OFFENSE FOR PURP OSES OF STATUTE OF LIMITATIONS . NOW , IN NO OE, WE ARE ALL WITHIN THE STATUTE OF LIMITATIONS, SO WE GO, OK AY , DOESN'T MATTER IF IT IS A CONTINUING OFFENSE BE CAUSE WE ARE NOT GOING T O TRY TO RECAPTURE THINGS OUT SIDE THE STATUTE.THEN WE LOOK AND SAY , OKAY , IS THE ONE SCHEME OR COU RSE OF CONDUCT , CAN WE AGGREGATE UNDER THE VALU E? YES , WE CAN . DIAZ'S PROBLEM IS HE WE NT, THE CASE WENT SO UT H AT THE STATUTE OF LU MENT ASIANS BECAUSE THE COURT SAID IT IS NOT A -- STATUTE OF LIMITATIONS, BECAUSE THE COURT SAID IT IS NOT A CONTINUING OFFENSE. HE DID ALL OF THESE 22 INVOICES OR HE DIDN'T DO THESE JOBS BEFORE T HESTATUTE OF LIMITATIONS CUT OFF. NOW YOU HAVE GOT ONE INSIDE. YOU CANNOT GO BACK A NDCHARGE HIM WITH ALL 22.

CHIEF JUSTICE: MS. DAVIS, THE QUES TION WITH THIS COURT, YOU ARE RA IS ING SERI OUS QUESTIONS AS TO WHETHER THERE IS CONFLICT , B UTSOMETIMES IF THER E IS APPARENT CONFLICT , THEN WE NEED TO RESO LVE SOMETHING. DOES THE FIFTH DISTRICT , WHICH CITES THE STATE V DECIDE AS, DOES IT DWURB STATE V DIAZ, OR IS THERE UNDERSTANDING OF STATE V DIAZ CONFUSED AS SOME OF US MIGHT BE , A BOUT THE DISTINCTIONS WITH STATE V DIAZ?

NO. THEY CLE ARLY STATE RIGHT HERE ON P AGE , I THINK 11 41 , IT SAYS PAGE , WITH THE BLUE , THE DEFENDANT DOES NOT ARGUE THAT ANY OF THE ILLE GAL CONDUCT CHARGED HERE OCCURRED OUTSIDE THE FIVE-YEAR STATUTE OF LIMITATIONS PERIOD . PERIOD. DIAZ IS LIMITED TO ITS FACTS, PARTICULARLY GIVEN SE CTION , THE AGGREGATIO NO. -- STATUTE, WHICH THE STATUTE OF LIMITATIONS WHICH RECOGNIZES THE SCHEME OR COURSE OF ONE CONN DUCT AND AGO RE-- COURSE OF CONDUCT AND THE AGGREGATION , AND YOU ARE TALKING ABOUT AP PLES AND ORANGES.

CHIEF JUSTICE: IT SEEMSTO ME THAT DIAZ WAS DEALING WITH A SEPARATE STATUTE OF LIMITATIONS ISSUE , BUT THAT MAYBE JU DGE COPE GOT IT R IGHT, BECAUSE WE ARE MA YBE HAVING TROUBLE UNDERSTANDING IF YOU CAN AGGREGATE IN A COURSE OF CONDUCT, WH Y THAT ISN'T, THEN , A CONTINUING OFFENSE FOR PURPOSES OF THE STATUTE OF LIMITATIONS.

WELL, SEE , THEY ARE ACKNOWLEDGING JUDGE COP E'S DISSENT BUT I DON'T THINK HEWAS , HE GOT HALFWAY THERE, BUT, THEN , HE KIND OF JU MPED THE - -

CHIEF JUSTICE: ARE YOU SAYING THAT IN THE FIFTH DISTRICT, IF THIS WAS A STATUTE OF LIMITATIONS ARGUMENT, THAT THEY WOULDNOT, THE STATE WOULD NOT BE ABLE TO RELY ON THIS C ASE , NOOE . THEY WOULD SAY THAT DIAZ IS THE CORRECT RESULT FOR STATUTE OF LIMITATIONS PURPOSES. IS THAT WHAT YOU ARE SAY ING?

DIAZ IS RIGHT. HE HAD A STATUTE OF LIMITATIONS PROBLE M.

CHIEF JUSTICE: IN THIS CASE, SOME OF THE AGGREGATION OCCURRED OUTSIDE THE STATUTE OF LIMITATIONINGS, THEN THATWOULD, AGAIN, NOT ALLOW FOR THOSE ASPECTS OF THE CR IM E TO GO FORWAR D?

EXACTLY. IF WE IN NOOE , AND THIS WAS WHY IN THE FI RST INFORMATION , IT WAS NOT CL EAR , THEY MO VED TO DIS MISS. WE AMENDED THE INFORMATION , TO MAKE I T MORE CLEAREXACTLY WHAT PERIOD OF TI ME WE ARE TALKING AB OUT . WE STAYED COMPLETELY WITHIN THE FIVE-Y EAR STATUTE OF LIMITATIONS. AND G RAND THEFT 812.035 IS FIVE YEARS, AND SO THEY NEVER CHALLENGED THAT INDICTMENT. YOU MEAN, THE INFORMATION. THEY WENT FORWAR D ON THAT AND WENT TO TRIA L, AND TH REE MONTHS AFTER THE VERDICT, THEY BROUGHT UP THE ISSUE THAT WE SHOULD HAVE ALL EGED IN THERE, A COURSE OF CONDUCT . PARODYING THE LANGUAGE OF THE VALUE. THERE IS NO STATUTE OF LIMITATION INS NOOE .

JUSTICE: SO YOU A RESAYING THAT NOOE AND DIAZ CAN BE RECONCILED .

ABSOLUTELY .

JUSTICE: IS THERE A RICO STATUTE OR CONSPIRA CY, THAT SAYS IF THERE IS A CONTINUING COURSE OF CONDUCT, THEN THE STATUTE OF LIMITATIONS BEGIN TO RUN WHEN THE LAS T ACT IN THAT CONTINUING COURSE OCCU RS?

I THINK THERE ARE , AND THAT IS THE ROSE E NCASE . -- THE RO SEN CASE. THAT WHEN I SHEPARDIZED T HEUNITED STATES VE RSUS 2- C, THE TERM OF AR T IN THE ROSEN CASE SAYS EXACTLY THAT. CONTINUING OFFENSE F ORSTATUTE OF LIMITATIONS IS COMPLETELY DIFFERENT FROM THE COURSE OF CONDUCT UNDER AGGREGATION STATU TES.NOW, THE TWO CAN CROSS OVER , LIKE IN DIAZ, BUT TO ANSWER YOUR QUESTION , I THINK R OSENDEALT WITH ORGA NIZED FRAUD.

JUSTICE: UNDER THE RICO STATUTE THE N?

PROBABLY.

JUSTICE: THERE WERE NO RICO ALLEGATION INS T HIS CASE?

NONE. BUT THE 2-C, THE UNITED STATES , 2-C THAT TALKS ABOUT CONTINUING OFFENSES ARE V ERY RARE. IT IS A VERY RARE OFFENSE WHERE THE STATE GE TS T O DISCOVER IT TODA Y AND GO BACK AND REC APTURE ALL OF THOSE, AND THAT IS COMPLETELY DIFFERENT FR OM WHAT MR . NOOE DID. THE ONLY CRI ME S FOR WHICH HE WAS CHARGED AND CONVICTED WERE WITHIN THE STATUTE OF LIMITATIONS . THE , IT WAS ALL IN ONE COURSE OF CONDUCT , AND W E DIDN'T TRY TO EX TEND BAC K. WE WEREN'T TRYING TO USE 775.15 EXTEND ER FOR DIAZ, TO GO BACK

AND RECAPTURE.

JUSTICE: I UNDERSTA ND. LET ME ASK ABOUT THE PRESERVATION ISSUE BECAUSE THERE IS STILL , I THINK , SOME SKON FUS IO N.I THINK EVERYB ODY AGR EES THAT THE DEFENDANT DID NOT FILE A MOTION TO DISMIS S IN THIS CASE , SO THAT ANY STANDARD WOULD HAVE TO BE BASED AT MO ST ON THE STANDARD FOR ACQU ITTAL , BUT DID THE DEFENDANT FILE ANYTHING, EITHER DURI NG THE TRIAL OR AFTER THE TRIAL , RAISING THE ISSUE OR THE FACT THAT THESE SHOULD NOT HAVE BEEN AGGREGATEED , THAT THEY WERE SEPARATE OFFENSES?

THREE MO NTHS AFTER THE VERDICT.THE FIRST TIME IT WAS EVER RAISED IS WHEN MR . LAMBERT CAME IN THREE MON THS AFTER , SUBSTITUTED COUNSEL AND RAISED THE ISSUE IN AN AMENDED RENE WED MOTION FOR JUDGMENT NOTWITHSTANDING THEVERDICT.THE STATE OBJECTED THAT IT WAS UNTIMELY. THE JUDGE D E NIED IT IN A MOTION, I THINK IT IS IS A ADDENDUM TO THE RENEWED MOTION.

JUSTICE: YE S.

SO SH E WENT AHE AD AND LISTENED TO THE ARGUMENT AND DENIED IT, BUT WE DID SAY , NO, IT IS NOT TIMELY .

JUSTICE: SO WHAT IS THE ISSUE , IF THERE WAS A PRESERVATION PROBLEM?

THE FIFTH DCA SAID THERE WAS A JUDGMENT OF ACQUITTAL ISSUE , THAT T HERE WAS NO SUFFICIENT EVIDENCE , AND ONE PARAGRAPH IN THERE TALKSABOUT THE SEPARATE AND DISTINCT CHARGES, THAT WE HAD NOT PROVED THEM , THAT I T GOES TO THE JUDGMENT OF ACQUITTAL, THAT THESE ARE ALL SEPARATE AND DIST INCT OFFENSES AND WE DIDN'T PROVE THEM, AS REGA RD TO T HESTATES, AND THEY AGR EED A NDKNOCKED DO WN $23,000 AND TOOK IT DOWN TO A FEL ONY

JUSTICE: THAT WAS THE I.R.S. ISSUE.

YES. BUT FIRST OF ALL THERE IS NO EXPRESS AND DI RECT CONFLICT WITH ANY OF THE OTHER CASES MUCH THE ISSUE IS CLEAR LY NOT PRESERVED, AND THIS CASE, I MEAN, THIS COURT DOE SN'TSIT HERE IT TO RE VIEW THE SUFFICIENCY OF THE EVIDENCE IN EVERY CASE , AND IN T HIS CASE THERE WAS A COURT, A SCHEME VIEWING EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE. WE CLEARLY PROVED T HAT AND THE FIFTH DECI SION SHOULD STAND.THANK YOU.

CHIEF JUSTICE: REBU TTAL .

VERY BRI EFLY. THE S TATE WOULD SAY THAT , I F I AM HIRED AS A N EMPLOYEE , AND I DECIDE WITHIN MY FIRST WEEK THAT I AM GOING TO STEAL $1 ,000 A WEEK FROM MY EMPLOYER AND I DO THIS FOR TEN YEARS, THAT THE STATE CANNOT PROSECUTE ME AT THE E ND OF THAT TEN YEARS, FOR THE FIRST FIVE AND-A-HALF YEARS O F ST EALING AND THAT IS ABSU RD, BECAUSE IT IS A CONTINUING COMMON SCHEME COURSE OF CONDUCT , AND THERE IS NO STATUTE O F LIMITATIONS, BECAUSE MY LAST THEFT WAS THE TERMINATION OR THE BEGINNING OF THE STATUTE OF LIMITATIONS. THE DAY AFTER THAT LAST THEFT WOULD REVERT BACK TO THE VERY FIRST DAY THAT I INSTITUTED THIS P LAN TO STEAL $1 ,000.

THE STATE IS NOT S AYING THAT AT ALL. ISN'T THE STATE SAYING HE RE THAT WE SIMPLY DON'T HAVE THE LIMITATIONS ISSUE? AND THAT THAT , REALLY, I S NOT AN ISSUE IN THIS CASE. THE HYPOTHETICAL OF WHETHER OR NOT THEY COULD HAVE GONE BACK AN OTHER FIVE YEARS WITH ADDITIONAL AMOU NTS , SI MPLY NOT PRESENT IN THIS CASE , AS IT WAS PRESENT IN THE DIAZ CASE.

IT WAS PRESENT IN THE DIAZ CASE , BUT FOR IT TO B E PRESENT IN THE DIAZ CASE , THE COURT

WOULD HAVE SH ALL TO HAVE DETERM INED THAT E AC H INVOICE WAS A SEPARATE AND DISTINCT EVENT, AND THAT INSTEAD WHAT THE STATE ALLEGED WAS IT WAS A CONTINUING COURSE OF CONDUCT THAT ENDED AND BEGAN ON A CERTAIN DAY AND THERE FORE WE ARE WITHIN THE STATUTE OFLIMITATIONS BECAUSE IT ISN'T CONDUCT PURSUANT TO FLOR IDA STATUTE 812.012-9-C, AND THAT IS WHAT JUDGE COPE SAID. JUDGE COPE SAID IT IS IGNORING THE LAW , AS I T EXIST AND THEN THE FIFTH DISTRICT SAID THE MAJORI TY DID IGN ORE THE LA W IN DIAZ. JUDGE SCOPE IS CORREC T THAT IT WAS A CONTINUING HE HAVE -- JUDGE COPE IS CORR EC T THAT IT WAS A CONTINUING EVENT AND THAT THE STATUTE OF LIMITATIONS WAS NOT INDICATED , BUT THEN IT GOES ON TO SAY THIS WAS NOT A STATUTE OF LIMITATIONS C ASE AND THEREFORE IT D OESN'T APPLY , BUT I T DOESN'T MAKE S ENSE BECAUSE THE ONLY WAY TO REACH A STATUTE OF LIMITATIONS CASE IS TO DETERMINE THAT EACH EVENT IS SEPARATE AND DISTINCT.

CHIEF JUSTICE: EX CEPT THAT MS. DAVIS IS SAYING AND IT SE EMS HELP FUL T O DEFENDANTS OUT THERE, THAT THERE IS A DIFFERENCE BETWEEN A COURSE OF CONDUCT AND A CONTINUING OFFENSE , AND THAT THIS THEFT STATUTEDOES NOT ALLOW FOR A CONTINUING OFFENSE F ORPURPOSES OF THE STATUTE OF LIMITATIONS.

I THINK THAT IS WHAT SHE IS SAYING AS WELL , AND THAT IS WHY WHEN I FIRST CAME U P, I SAID IF I GO TO WOR K FOR SOMEBODY AND DECIDE THAT I AM GOING TO STEAL $1, 000 A WEEK, WHAT THE STAT E OF FLORIDA IS SAYING IS THAT MY FIRST FIVE AND-A-HALF YEARS , I AM FINE. I CAN BANK ROLL THAT MON EY .

JUSTICE: I THINK WHAT T HECOURT IS HAVING A PROBLE M WITH IS IT SEEMS LIKE IT I S BACKWARDS DAY. USUALLY THE STATUTE OF LIMITATIONS IS SOMETHING THE STATE IS TRYING TO A VOID.

YES, SIR. AND I AGRE E. BUT I APPEAL ED TO GET TO T HESTATUTE OF LIMITATIONS, AND THE DIAZ COURT WOULD FIRS T HAVE TO SAY EVERY INVOICE WAS SEPARATE AND DISTINCT , CONSUMMATED UPON ITS SUBMISSION.

CHIEF JUSTICE: AT LEASTTHERE IS NO DO UBLE JEOP ARDY ARGUMENT IN THIS CASE , RI GHT ?

JUSTICE: LET 'S NOT MAKE ANY DECISIONS.

CHIEF JUSTICE: WHAT SENTENCE DID THE DEFENDANTRECEIVE IN THIS CAS E?

NO PRIOR CRIMINAL HISTORY. RECEIVED A 3 5- MONTH INCARCERATIVE SENTENCE.

CHIEF JUSTICE: HAS HE ALREADY SERVED IT?

HE HAS SERVED IT. HE IS ON A 1 5-YEAR PROBATIONARY SENTENCE WITHTHE ISSUE OF RE STITUTION STILL UNDETERMIN ED.

CHIEF JUSTICE: RESTITUTION WAS N EVER SET?

AS A MATTER OF F ACT , THE THERE HAVE BEEN THREE DIFFERENT RESTITUTION DETERMINATIONS, EVERY ONE BY A DIFFERENT COURT AND EVERYONE DIFFERENT.

CHIEF JUSTICE: WE DON'T HAVE THAT BEFORE US. THANK YOU VERY MUCH. THE COURT WILL T AK E ITS MORNING REC ESS.

MARSHAL: PLEASE RI SE.