IN THE SUPREME COURT OF FLORIDA

ERINEO ACENSIO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 67,888

SID J. Garage

DEC 4 1008 C

CLERK, SUBMEMB COURT

Chief Deputy Clerk

RESPONDENT'S BRIEF ON JURISDICTION

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Fla.R.App.P., 9.030(a)92)(A)(iv)

PRELIMINARY STATEMENT

This Brief refers to the STATE OF FLORIDA as "Respondent"; and to ERINCO ACENSIO as "Petitioner".

SUMMARY OF THE ARGUMENT

The Second District's decision below does not conflict with <u>State v. Bruns</u>, 429 So.2d 307 (Fla. 1983). It distinguishes the former from the latter. It otherwise conforms to the principle(s) this Honorable Court enunciated in Bruns, supra.

ARGUMENT

ISSUE

THIS COURT HAS JURISDICTION BECAUSE THE DECISION ON PETITIONER'S APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S PRIOR DECISION IN STATE v. BRUNS, 429 So.2d 307 (Fla. 1983).

The Second District distinguished Acensio v. State, 10 F.L.W. 2385 (Fla. 2nd DCA, October 18, 1985) from State v. Bruns, 429 So.2d 307 (Fla. 1983).

Petitioner's argument turns on a rejection of this distinction rather than any conflict between the two cases. [2]

While he may take the position that this distinction should not make a difference in the result, it is not a basis upon which to argue that the principles enunciated in Acensio expressly and directly conflict with those articulated in Bruns; nor is it a basis upon which to invoke this Honorable Court's discretionary jurisdiction pursuant to R.9.030(a)(2)(A)(iv), Fla.R.App.P.

^{[1] &}quot;While <u>Bruns</u> holds that "[A]n attempt instruction does not provide a 'step' within the meaning of <u>Abreau</u>." We do not consider the holding in <u>Bruns</u> to apply where the primarily charged offense is itself an attempt." <u>Acensio</u>, supra.

^{[2] &}quot;This distinction should make no difference in the result." (Brief of Petitioner on Jurisdiction, P.4)

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Respondent would maintain that Petitioner has failed to demonstrate that conflict exists so as to invoke discretionary review of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail to Paul C. Helm, Assistant Public Defender, 455 North Broadway, P. O. Box 1640, Bartow, Florida 33830-3798, on this the 2nd day of December, 1985.

FRANK MIGLIORE, JR.

Of Counsel for Respondent