

IN THE SUPREME COURT OF FLORIDA

ERINEO ACENSIO,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

Case No. 67,888

FILED
SID J. [unclear]

DEC 4 1985

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

RESPONDENT'S BRIEF ON JURISDICTION

JIM SMITH
ATTORNEY GENERAL

FRANK MIGLIORE, JR.
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602

Counsel for Respondent

FM/mev

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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 State v. Bruns, 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).^[1]

Petitioner's argument turns on a rejection of this distinc-
tion 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] "While Bruns holds that "[A]n attempt instruction does
not provide a 'step' within the meaning of Abreau." We
do not consider the holding in Bruns to apply where
the primarily charged offense is itself an attempt."
Acensio, supra.


[2] "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,

JIM SMITH
ATTORNEY GENERAL


FRANK MIGLIORE, JR.
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

Counsel for Respondent

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