IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1241

ARMANDO BAHENA OLGUIN,
Petitioner,

-vs-

THE STATE OF FLORIDA,
Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

Petitioners, ARMANDO BAHENA OLGUIN, was the DEFENDANT in the trial court and appellant in the District Court of Appeal of Florida, Third District. Respondent, STATE OF FLORIDA, was PROSECUTION in the trial court and the APPELLEE in the District Court of Appeal. The parties shall be referred to as they stand before this court. The symbol "App." followed by a page number refers to the appendix to this brief, containing a conformed copy of the opinion of the District Court.

STATEMENT OF THE CASE AND FACTS

The Third District Court of Appeal affirmed the Petitioner=s conviction for leaving the scene of an accident involving death. (App. A). The Petitioner claimed that the evidence was insufficient to sustain his conviction. (App. A, p. 2). The Third District found the evidence sufficient to support the conviction. (App., p. 2).

The Third District provided the following facts in its opinion:

> On January 26, 2002, while traveling northbound on 10th Avenue in Homestead, Olguin struck a bicyclist. The impact caused substantial damage to the driver's side of the windshield of Olguin's van and was so forceful that blood and tissue were left embedded in the glass. Olguin did not stop to render aid but drove on for approximately 420 feet before crashing into a utility pole. Although Olguin was assisted at the scene of this crash by two individuals, paramedics and the police, he did not mention striking the bicycle. Olguin was convicted of leaving the scene of an accident involving death and driving under the influence.

The Court later continued with the following factual conclusion:

> The evidence was that this horrific accident occurred literally before Olguin's eyes. When he hit the bicycle, the rider flew up into the windshield and landed only inches from Olguin's face. The impact of the cyclist's body on the windshield right before Olguin was so forceful that blood and tissue were left imbedded in the glass. This evidence was sufficient to send to the jury to determine whether Olguin either knew or should have known of the resulting injury or death.
>
> There also was evidence that Olguin was neither so drunk nor so impaired as to make him unable to comprehend or appreciate what had occurred. Two individuals who interacted with Olguin immediately following the crash testified that he neither stumbled when he walked nor slurred when he spoke. They also confirmed that he was oriented and coherent, declining an offer to call the police and an ambulance and asking instead that a family member be contacted. He even provided an accurate telephone number for

> this purpose. A paramedic who examined him for minor injuries also found him alert and able to describe events and follow commands. And after Olguin was advised that the police had been called, he had the presence of mind to return to the van and dispose of a number of beer cans.

After making these factual determinations the Third District applied this court's holding in Mancuso v. State, 652 So. 2d 370 (Fla. 1995) and concluded that the evidence was sufficient to establish that the Petitioner either knew or should have known of the resulting injury.

QUESTION PRESENTED

WHETHER THE DECISION OF THE THIRD DISTRICT CONFLICTS WITH THE DECISION OF THIS COURT IN MANCUSO V. STATE, 652 So. 2d 370 (Fla. 1995) WHERE THE TWO DECISIONS INVOLVE DIFFERENT FACTS AND THE DECISION IN THE INSTANT CASE MERELY APPLIES MANCUSO THE SPECIFIC FACTS PRESENTED.?

SUMMARY OF THE ARGUMENT

The decision of the lower court is not in conflict with the cited decision. The Mancuso decision established that criminal liability under section 316.027 requires proof that the driver charged with leaving the scene either knew of the resulting injury or death or reasonably should have known from the nature of the accident and that the jury should be so instructed. The lower court in the instant case expressly followed this holding and applied it to the facts of the instant case which are distinguishable from the facts of Mancuso.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN MANCUSO V. STATE, 652 So. 2d 370 (Fla. 1995) WHERE THE TWO DECISIONS INVOLVE DIFFERENT FACTS AND THE DECISION IN THE INSTANT CASE MERELY APPLIES MANCUSO TO THE SPECIFIC FACTS PRESENTED.

The Petitioner contends that the decision of the Third District Court of Appeal is in express and direct conflict with the decisions of this Court in Mancuso v. State, 652 So. 2d 370 (Fla. 1995). The decision of the lower court in the instant case is not in conflict with the cited decision. The facts of the two cases are distinguishable and the instant case merely involves an application of the rule of law from Mancuso to the facts of the instant case.

Where the case purported to be in conflict is distinguishable on its facts from opinion of other districts or Supreme Court conflict jurisdiction does not exist. See Dept. of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983).

The Third District Court of Appeal has applied this Court=s holding in Mancuso to the particular facts of the instant case. In Mancuso this Court held that Acriminal liability under section 316.027 requires proof that the driver charged with leaving the scene either knew of the resulting injury or death or reasonably should have known from the nature of the accident and that the jury should be so instructed.@ Mancuso at 372. The facts of Mancuso were that the defendant was charged with leaving the scene of an accident

involving death or personal injury. Id. at 370. The defendant struck two women walking on a darkened stretch of Interstate 95 at 4:30 a.m. Id. At 11:30 a.m. the defendant went to the police to report that his car had been involved in an accident but he did not know that he had hit anything. Id. He reported that he heard a loud noise, everything went black and his windshield cracked. Id. He pulled over inspected his car and did not see any debris in the road, he abandoned his car and walked home. Id. At trial the court did not instruct the jury that the defendant had to have knowledge that an injury occurred. Id at 371. The jury was only instructed that the defendant knew or should have known that he was involved in an accident and that he willfully failed to stop. Id. This court found that knowledge of an injury was a necessary element of the crime of leaving the scene of an accident involving death or personal injury. Id. at 372.

In the instant case the Petitioner did not claim that he jury was not instructed on the knowledge of an injury element but rather that the evidence was insufficient to establish his knowledge because he was too drunk to realize what he had done. (App., p. 2). The District Court first found that this issue was not preserved because at trial the Petitioner had expressly disavowed that he was too drunk to notice that person had been injured. (App., p. 3). Nevertheless the court went to describe that the horrific accident occurred right in front of the Petitioner=s eyes as the victim struck the windshield directly in front of him with such force that blood and tissue were left imbedded in the glass. (App., p. 3). The court then found the evidence showed that the Petitioner was not so

drunk or impaired as to make him unable to comprehend or appreciate what had occurred. (App., p. 4). The court concluded that under these facts there was sufficient evidence to support the jury finding that the Petitioner knew or reasonable should have known of the accident. The court correctly stated the law and applied it to the factual situation presented in the instant case.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Appellee respectfully requests that the Court decline to accept jurisdiction to review this cause.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this _____ day of July, 2005, to Armando Bahena Olguin, DOC#M43751, Desoto

Correctional Institution, 13617 Southeast Highway 70, Arcadia, FL 34266-7800.

JOHN D. BARKER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that the font used in this brief is in compliance with Fla. App. R. Proc. 9.210(a)(2) and is times new roman 14 point font.

JOHN BARKER
Assistant Attorney General