

IN THE SUPREME COURT OF FLORIDA

ROCCO GIORDANO,

Petitioner,

v.

Case No. SC17-1375

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE  
THE DISTRICT COURT OF APPEAL,  
FOURTH DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

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### **PRELIMINARY STATEMENT**

Respondent, the State of Florida, the appellee in the District Court of Appeal for the Fourth District (hereinafter "the Fourth District") and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Rocco Giordano, the appellant in the district court and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The petitioner's Initial Brief on Jurisdiction will be designated by the symbol "IB." That symbol will be followed by the appropriate page number.

### **STATEMENT OF THE CASE AND FACTS**

The decision of the lower tribunal can be found at Giordano v. State, 42 Fla. L. Weekly D1415, 2017 WL 2664697 (Fla. 4<sup>th</sup> DCA June 21, 2017). The decision of the Court of Appeal, Fourth District (hereinafter the Fourth District), reads, in full:

*Affirmed. See Flynn v. State*, No. 4D15-3792 (Fla. 4<sup>th</sup> DCA May 3, 2017). *Conflict certified with Merkle v. State*, 88 So. 3d 375 (Fla. 2<sup>d</sup> DCA 2012).

Giordano, 42 Fla. L. Weekly at D1415.

### **SUMMARY OF ARGUMENT**

The Fourth District affirmed in the instant case based on its own prior precedent in Flynn v. State, 217 So. 3d 1055 (Fla. 4<sup>th</sup>

DCA 2017). Recognizing that it had, in the Flynn case, certified conflict with an opinion from the Second District, Merkle v. State, 88 So. 3d 375 (Fla. 2d DCA 2012), the Fourth District certified the same conflict with Merkle in the instant case. Because the Flynn case is already pending this Court's decision on jurisdiction based on the alleged conflict with Merkle, it appears the instant case is dependent on the outcome of the Flynn case and should be stayed pending the outcome of Flynn.

**ARGUMENT**

**THIS CASE SHOULD BE STAYED PENDING THE OUTCOME OF FLYNN.  
(RESTATED)**

Petitioner essentially contends that this Court has jurisdiction pursuant to Article V, §3(b)(3), of the Florida Constitution, and Jollie v. State, 405 So. 2d 418 (Fla. 1981). In Jollie, this Court explained that this Court had jurisdiction to review district court per curiam affirmances which cite as controlling a case that is pending review in, or has been reversed by, this Court.

Petitioner also contends this Court has jurisdiction pursuant to Article V, §3(b)(4), of the Florida Constitution, which parallels Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi). The Constitution provides: "The supreme court ... [m]ay review any decision of a district court of appeal ... that is certified by it to be in direct conflict with a decision of another district court of appeal."

In the instant case, the Fourth District affirmed in the instant case based on its own prior precedent in Flynn v. State, 217 So. 3d 1055 (Fla. 4th DCA 2017). Flynn itself certified conflict with an opinion from the Second District, Merkle v. State, 88 So. 3d 375 (Fla. 2d DCA 2012). So, in addition to affirming the instant case based on its own prior precedent in Flynn, the Fourth District also certified conflict with Merkle in the instant case, just as the court did in Flynn.

It appears the Flynn case is currently pending this Court's decision on jurisdiction in case number SC17-1197 based on an alleged conflict with Merkle; notably, the State is contending in the Flynn case that this Court should decline to accept jurisdiction because there is no actual conflict with Merkle. It further appears that any decision on jurisdiction in the instant case would be dependent on the outcome of any decision on jurisdiction in the Flynn case. Therefore, Respondent agrees that the instant case should be stayed pending the outcome of Flynn.

#### **CONCLUSION**

Based on the foregoing reason, the State respectfully requests this Honorable Court stay the instant case pending the outcome of the Flynn case.

#### **CERTIFICATE OF SERVICE**

I certify that a copy hereof has been furnished to the following by E-MAIL via the E-Portal on August 23, 2017: Ian Seldin,

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**CERTIFICATE OF COMPLIANCE**

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