

IN THE SUPREME COURT OF FLORIDA,

ROCCO GIORDANO, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 )  
 \_\_\_\_\_ )

CASE NO. SC17-1375  
DCA No. 4D15-4451

PETITIONER’S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal, Fourth District, State of Florida

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## STATEMENT OF THE CASE AND FACTS

On June 21, 2017, the Fourth District affirmed Petitioner Giordano's appeal of the judgment and sentence of his criminal conviction on the authority Flynn v. State, 217 So. 3d 1055 (Fla. 4th DCA 2017). Giordano filed his notice of discretionary jurisdiction on July 21, 2017. The Fourth District also certified conflict between its decision at bar with the decision of the Second District, in Merkle v. State, 88 So. 3d 375 (Fla. 2d DCA 2012).

In Flynn, the defendant was convicted of, inter alia, concealment of a child contrary to a court order, in violation of section 787.04(1), Florida Statutes (2013). This section provides that, "It is unlawful for any person, in violation of a court order, to lead, take, entice, or remove a minor beyond the limits of this state, or to conceal the location of a minor, with personal knowledge of the order." This charge arose after the defendant "absconded with his child for several months in violation of a court order providing that [the defendant] and his ex-wife had shared custody of the child." Id at 1055.

At trial, the defendant moved for judgment of acquittal, based on the authority of the Second District, in Merkle v. State, supra. The Merkle court held that "a person cannot commit the violation of concealment of a child in violation of a court order unless there is a court order in place expressly telling the defendant that he or she is required to disclose the location of the child to the court," or

“suggests that the statutory offense is actually concealing the location of the child from the court.” Flynn v. State, supra at 1056, citing Merkle at 377-8. The Fourth District, in Flynn, rejected the defendant’s argument to apply the Merkle decision with regard to the construction and meaning of section 787.04(1) and, instead, adopted an opinion from the Fifth District, in Costlow v. State, 543 So. 2d 1259 (Fla. 5<sup>th</sup> DCA 1089), which held that “[c]oncealment’ means ‘concealing a child from a person entitled to its custody.” Flynn at 1056, quoting Costlow at 1262. Based on its adoption of the Fifth District’s construction of section 787.04(1), the Fourth District affirmed the Flynn defendant’s conviction.

The Flynn defendant filed a notice to invoke this Court’s discretionary jurisdiction, and a decision on jurisdiction is pending. Flynn v. State, No. SC17-1197.

## SUMMARY OF THE ARGUMENT

The Fourth District affirmed the case at bar on the authority of Flynn v. State, 217 So. 3d 1055 (Fla. 4th DCA 2017), which is pending review in this Court on the issue of jurisdiction. If this Court accepts jurisdiction of Flynn, this Court will have conflict jurisdiction pursuant to, and article V, section 3(b)(3), Florida Constitution. Additionally, the Fourth District also certified conflict with the case at bar with Second District's decision in Merkle v. State, supra. This Court should stay this case pending the decision on jurisdiction in Flynn. If this Court accepts jurisdiction of Flynn, it should accept jurisdiction of this case.

## ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THIS CASE IF IT ACCEPTS JURISDICTION OF FLYNN v. STATE.

The Fourth District affirmed on the authority of Flynn v. State, 217 So. 3d 1055 (Fla. 4th DCA 2017), which is pending review in this Court on the issue of jurisdiction. Flynn v. State, No. SC17-1197. If this Court accepts jurisdiction of Flynn, this Court will have conflict jurisdiction pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981), and article V, section 3(b)(3), Florida Constitution. See Harrison v. Hyster Co., 515 So. 2d 1279, 1280 (Fla. 1987). Moreover, this Court can accept jurisdiction on the ground that the Fourth District certified conflict between the case at bar and Merkle v. State, supra, in its own right. Fla. R. App. P, 9.030(a)(2)(A)(vi).

Accordingly, this Court should stay this case pending the decision on jurisdiction in Flynn. If this Court accepts jurisdiction of Flynn, it should accept jurisdiction of this case. Additionally, in the event this Court accepts jurisdiction of the case at bar, Petitioner request this Court grant him leave to file merits briefs concerning the conflict of law issue, in that the underlying occurrence and procedural facts of Flynn differ from those at bar.

## CONCLUSION

This Court should stay this case pending the decision on jurisdiction in Flynn v. State, No. SC17-1197.

If this Court accepts jurisdiction of Flynn, it should accept jurisdiction of this case.

## CERTIFICATE OF SERVICE AND ELECTRONIC FILING

I certify that this jurisdictional brief has been electronically filed with the Court and a copy of it has been served to Jeanine Germanowicz, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401, by email at CrimAppWPB@MyFloridaLegal.com this, 2nd day of August, 2017..

/s/ Ian Seldin  
Ian Seldin

## CERTIFICATE OF FONT

I HEREBY CERTIFY the instant brief has been prepared with 14 point Times New Roman type, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Ian Seldin  
Ian Seldin