

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1238

HERBERT SMITH,
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

Petitioner, HERBERT SMITH, was the attorney for a 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 Petitioner's brief.

STATEMENT OF THE CASE AND FACTS

Based on the facts as stated in the Third District Court's opinion it reached the following holding:

It is our view that an order imposing monetary sanctions on trial counsel and directing that the sanctions be paid by a date certain is a final order. It ended the judicial labor as to Mr. Smith, who was not a party to the case. (App. 3).

In reaching this holding the lower court found Cunningham v. Hamilton County, Ohio, 527 U.S. 198 (1999), not persuasive because the rule of finality in the federal appellate system differs from that of Florida.(App. 3). The lower court noted that the traditional test in Florida for determining the finality of an order is whether the order marks the end of judicial labor. (App. 3). It then found that judicial labor as to the sanctions entered against counsel, a nonparty to the case, ended on April 19, 2001. (App. 3).

QUESTION PRESENTED

WHETHER THE DECISION OF THE THIRD DISTRICT
CONFLICTS WITH A DECISION OF ANOTHER
DISTRICT COURT OF APPEAL OR A DECISION OF
THIS COURT?

SUMMARY OF THE ARGUMENT

There is no express and direct conflict between the opinion of the Third District Court of Appeal and a decision of either another district court of appeal or this Court. The lower court correctly identified the standard for determining finality of an order for appellate purposes. In applying that standard to the unique factual scenario of the instant case the lower court found that the prior order was final and could have and should have been appealed at the time it was entered. There is no other Florida decision addressing this point of law.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT DOES NOT CONFLICT
WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL
OR A DECISION OF THIS COURT.

The Petitioner contends that the lower court's decision conflicts with established authority as to finality. He argues that the lower court ignored the admonition that appellate courts do not favor piecemeal review . . . Piecemeal [or successive] appeals will not be permitted where claims are interrelated and involve the same transaction and the same parties remain in the suit as found in S.L.T. Warehouse Company v. Webb, 304 So. 2d 97 (Fla 1974). Contrary to the argument of the Petitioner there is no express and direct conflict between the lower court decision in the instant case and established authority as to finality. The lower court merely applied established precedent to reach the conclusion that under the unique factual situation presented the order as to sanctions to be paid by a date certain was final in that the judicial labor had ended as it pertains to counsel. There is no case in Florida addressing this issue under these facts.

There is no express and direct conflict between the instant decision and S.L.T. Immediately after noting that appellate courts do not favor piecemeal review, the Court in S.L.T. noted: "However, it may occur that a distinct and severable branch of the controversy, cause of action, may be adjudicated by order of the trial court which would be appealable." S.L.T. at 98. The Court then found:

[G]enerally, to be appealable as final, an order or decree must dispose of all

the issues or causes in the case, but *this general rule is relaxed where the judgment, order or decree adjudicates a distinct and severable cause of action, not interrelated with remaining claims pending in the trial court.* S.L.T. at 98. (emphasis added).

The Petitioner also cites Malone v. Costin, 410 So. 2d 569 (Fla. 1st DCA 1982), for the proposition that an order imposing monetary sanctions was a non-final order and not appealable. However, unlike the instant case, where sanctions were imposed against the attorney for a criminal defendant, the sanctions in Malone were imposed against a party to the action. Furthermore, the court in Malone found that the sanctions order was not a non-final order appealable under rule 9.130, Florida Rules of Appellate Procedure. In the instant case the court found the sanctions order to be a final order at the time it was entered against the attorney. The Petitioner's reliance on Johnson v. Troiano, 453 So. 2d 1139 (Fla. 1984), is completely misplaced, to the extent that he seeks to establish express and direct conflict. There are no facts other than those set forth in the dissent.

Far from being in express and direct conflict with a decision of this Court or another District Court of Appeal, the decision of the lower court in the instant case merely follows the established standards for determining whether an order is final for purposes of appeal. As found in S.L.T. and in the instant case, the general rule for determining whether an order on appeal is final is whether the order constitutes an end to the judicial labor in the cause and nothing further remains to be done by the court to effectuate a termination of the cause as between the parties directly affected. S.L.T. at 98. The

lower court applied just this test. It found that the order imposing monetary sanctions on trial counsel and directing that the sanctions be paid by a date certain was a final order in that it ended the judicial labor as to the attorney, who was not a party to the 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 facts of the instant case and the facts of S.L.T. are distinguishable. S.L.T. involved dismissal of third party amended complaint. S.L.T. at 98. The instant case involves the imposition of sanctions against a trial attorney in a criminal case.

As noted by the lower court, the Defendant's reliance on federal court decisions is not persuasive due to the differing rules of finality in the federal system. Furthermore, by its express terms, Article V ' 3(b)(3) provides that the supreme court may review any decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

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 5th day of August, 2005, to Roy A. Heimlich, Assistant Public Defender, 1320 N.W. 14th Street, Miami, FL 33125.

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