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 PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner seeks discretionary review of a Third District Court of Appeal decision that conflicts with decisions of this Court and of other District Courts as to when an order made during an ongoing litigation is final and appealable as of right, and as to when an appeal taken at the end of the case is properly dismissed as untimely on the ground that an earlier order was final when made. The symbol "A." refers to the lower court opinion and order denying rehearing, set forth in the Appendix.

STATEMENT OF THE CASE AND FACTS

The District Court stated the facts as follows (A. 2):

> Appellant Herbert Smith was trial counsel for Maurice Dalbec ("defendant Dalbec"), who was charged with homicide. In April 2001, while that case was pending, the trial court imposed sanctions against Mr. Smith and ordered him "to make reimbursement to [the County] in the amount of $532.00 . . . ." Order, April 19, 2001.
>
> Mr. Smith and defendant Dalbec timely petitioned for a writ of certiorari in this court, seeking to quash the sanctions order. This court ordered a response from the State, and then denied the petition for writ of certiorari without opinion. *See Dalbec v. State,* 792 So.2d 463 (Fla. 3d DCA 2001).[1]
>
> In May 2004, defendant Dalbec entered a guilty plea to the charge of second degree murder. The trial court accepted the plea and imposed judgment and sentence.

[1] The trial court subsequently stayed the deadline for payment of the sanctions by Smith, who is an Assistant Public Defender.

> Within thirty days after entry of the judgment and sentence against defendant Dalbec, Mr. Smith filed a notice of appeal of the April 2001 sanctions order entered against him.
> The District Court ruled as follows (A. 2-3):
>
> The State moved to dismiss the appeal as untimely filed. The State argues that appellate review of the April 2001 order imposing sanctions on counsel needed to be taken within thirty days of the date that it was entered, and cannot be appealed at this time. The State's position is well taken.
>
> 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. *See* Philip J. Padovano, Florida Appellate Practice § 21.2 at 322 (2005 ed.).
>
> Mr. Smith cites *Cunningham v. Hamilton County, Ohio,* 527 U.S. 198 . . . (1999), in support of his claim that orders imposing sanctions are not final orders appealable prior to the entry of final judgment. That case is not persuasive here, for the rules of finality in the federal appellate system differ from those in Florida. As already mentioned, in Florida, the traditional test for determining the finality of an order is whether the order marks the end of judicial labor. Judicial labor as to the sanctions entered against counsel, a nonparty to the case, ended on April 19, 2001.

The District Count denied rehearing on June 10, 2005 (A4).

SUMMARY OF ARGUMENT

The decision of the Third District holding the sanctions order was final is in conflict with established authority as to finality, and improperly forfeits Assistant Public Defender Smith's right to review of the sanctions

imposed against him, on the ground that his appeal is untimely, even though he made timely application for certiorari review.

ARGUMENT

THE THIRD DISTRICT'S DECISION IS IN CONFLICT WITH ESTABLISHED AUTHORITY AS TO FINALITY, AND IMPROPERLY FORFEITS SMITH'S RIGHT TO REVIEW OF THE SANCTIONS IMPOSED AGAINST HIM, EVEN THOUGH HE MADE TIMELY APPLICATION FOR CERTIORARI REVIEW

The test of whether an order on appeal is final was stated by this Court in *S.L.T. Warehouse Company v. Webb*, 304 So. 2d 97 (Fla. 1974): "whether the order in question 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.*, 304 So. 2d at 99; *see also Hotel Roosevelt Co. v. City of Jacksonville*, 192 So. 2d 334, 338 (Fla. 1st DCA 1968); Philip J. Padovano, *Florida Appellate Practice* § 21.2 (2005 Ed.).[2]

[2] The appellate jurisdiction of the District Courts is generally limited to final orders. *See* R. 9.030(b)(1)(A), Fla. R. App. P.). *S.L.T.* has become the standard Florida finality formulation, and has often been cited, but never for the proposition that an order is final as to a party, non-party or issue while the case continues to be litigated.

While paying lip service to this rule, the District Court turned it on its head, indicating that the sanctions order "ended the judicial labor as to Mr. Smith" and was final and immediately appealable as of right, though Smith was never a party to the case, was continuing as counsel, the sanctions order left all the issues between the parties to be resolved in the future, and the order was plainly not final as to Dalbec. The District Court applied its finality formulation not to allow review, but to effect a forfeiture of appellate rights. Moreover, the District Court dismissed the appeal because it was untimely, though certiorari review of the sanction order **had been** sought by Smith and Dalbec within thirty days, and denied.[3]

See Hoffman v. Hall, 817 So. 2d 1057, 1058 (Fla. 1st DCA 2002); *State Farm Mut. Auto Ins. Co. v. Open MRI of Orlando, Inc.*, 780 So. 2d 339, 340-41 (Fla. 5th DCA 2001); *Prime Orlando Properties v. Department of Business Regulation*, 502 So. 456, 459 (Fla. 1st DCA 1987); *Miami-Dade Water and Sewer Authority v. Metropolitan Dade County*, 469 So. 2d 813, 814 (Fla. 3d DCA 1985); *Pruitt v. Brock*, 437 So. 2d 768, 773-74 (Fla. 1st DCA 1983); *SCI, INC., v. Aneco Company*, 410 So. 2d 531 Fla. 2d DCA 1982); *Hotel Roosevelt*, 192 So. 2d at 338. *See also Theo. Hirsh Co. v. Scott*, 87 Fla. 336, 100 Southern 157, 158 (1924) (citing the definition in Blackstone's *Commentaries*).

[3] No claim was raised in the certiorari proceeding that the sanctions order was final. It is fundamental that the denial of a petition for certiorari that does not determine any of the issues in the case is not res judicata, collateral estoppel or law of the case. *See DeGrassse v. Wertheim*, 566 So. 2d 515 (Fla. 3d DCA 1990). The District Court, when it denied rehearing, also denied Smith's motion

In doing so the District Court ignored the admonition that "[a]ppellate 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." *S.L.T.*, 304 So. 2d at 99 (emphasis added).

Previous authorities had held sanctions orders against counsel were not final and not immediately appealable prior to the entry of final judgment ending the litigation in the trial court. *See Malone v. Costin*, 410 So. 2d 569 (Fla. 1st DCA 1882) (order imposing monetary sanctions was a non-final order and not appealable); *see also Johnson v. Troiano*, 453 So. 2d 1139 (Fla. 4th DCA 1984) (same). Then Chief Judge Anstead's dissent in *Johnson* pointed out the need to avoid a wholly unacceptable result, "that the order imposing monetary sanctions is not subject to review at all." *Johnson*, 453 So. 2d at 1139.

The United State Supreme Court held in *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198 (1999), that allowing appeals from sanctions orders where the underlying action was ongoing ran counter to the salutary policies of the final judgment rule. Allowing appeals of sanctions orders

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to vacate the order denying the certiorari petition and to deem it a timely notice of appeal (A4).

might foster "the very sorts of piecemeal appeals and concomitant delays that the final judgment rule was designed to prevent." *Cunningham*, 527 U.S. at 208-09. *Cunningham* noted that sanctions orders would often be "inextricably intertwined with the merits of the action" and that a case by case analysis of whether a particular order was appealable was inappropriate. *Cunningham*, 527 U.S. at 205-06. *Cunningham* agreed that there was "no reason why, after final resolution of the underlying case . . . a sanctioned attorney should be unable to appeal the order imposing sanctions." *Cunningham*, 527 U.S. at 202 (internal quotation omitted).

The Florida test of finality is whether the order "ends the judicial labor in the cause," leaving nothing to be done to effect a termination of the cause as between the parties. The federal test is whether the order "ends the litigation on the merits." *Cunningham,* 527 U.S. at 203-04. The District Court here found the Florida test of finality so markedly different from the federal rule because the District Court lopped off the Florida requirement that the final order terminate the litigation. It is this aspect of the test that inhibits piecemeal review. The differences between the Florida and federal formulations do not warrant ignoring *Cunningham's* analysis.

Few jurisdictions are better situated than Florida to deal properly with every case, either by extraordinary writ review or by review at the end of the case. Faced with the prospect that there could be no intermediate review if the Court held the sanctions orders were not final, the *Cunningham* Court nonetheless held them not final and not reviewable until the end of the case. The overwhelming weight of authority in Florida instead supports extraordinary writ review of orders made during an ongoing case. *See Haines City Development v. Heggs*, 658 So. 2d 523 (Fla. 1995); *Combs v. State*, 436 So. 2d 93 (Fla. 1883). Under the District Court's abbreviated finality formulation, there may be many "final" orders in a single case, and many intermediate appeals as of right, not just one at the end of the case, as the finality rule suggests.

Rule 9.110(k) provides that "partial final judgments are reviewable **either** on appeal from the partial final judgment or on appeal from the final judgment in the entire case. If a partial final judgment **totally disposes of an entire case as to any party**, it must be appealed within 30 days of rendition." It is manifest that a "partial final judgment" is not a "final judgment," and absent this Rule would not be immediately appealable. Smith was a non-party, not a party, but the District Court treated the sanctions

order as if it were a partial final judgment against a party, even though it was entirely collateral to the homicide prosecution in which Smith was counsel, and not a separate proceeding, as a contempt proceeding would be. Actually, the District Court's ruling either makes Rule 9.110 (k) surplusage or extends it, since it apparently indicated that any order that disposes of an entire claim is final.

As the court observed in *Pruitt*, 437 So. at 774, "[t]he end of all required or permitted judicial labor at the trial level is obviously not reached until that court loses jurisdiction." Accordingly, if a timely notice of appeal (rather than a petition for certiorari) had been filed to seek review of the sanctions order, a determination that the sanctions order was **final** for appeal would entail a finding that the Circuit Court had **lost jurisdiction** over the prosecution of Mr. Dalbec. This "tail wags the dog" conclusion shows that the sanctions order was not final.

Moreover, the trial court retains jurisdiction to alter or modify its interlocutory orders at any time prior to final judgment. *See Travelers Indem. Co. v. Walker*, 401 so. 2d 1147, 1148 n. 3 (Fla. 3d DCA 1981) (Schwartz, J.) and cases cited. Here, as soon as certiorari review was refused, counsel moved for and the trial court granted a

stay, pending a motion at the end of the case to vacate the sanctions, and an appeal following final judgment. If the sanctions order was final, not interlocutory, the trial court was without power to vacate or modify it.

"[T]he rules of procedure must not be permitted to become so technical that they obscure the justice of the cause. Rather, the rules should be construed in such a manner as to further justice, not to frustrate it. Only by applying what we perceive to be the preferred construction to rules of procedure, can we carry out the intended purpose behind the rules' adoption: **that a case be determined on its merits**." *Pruitt,* 437 So. 2d at 774 (emphasis added, internal quotations and citations omitted). Here the rules have instead been applied so that the merits of the sanctions order can not be addressed, and Smith's right to appeal is forfeited.

The result that Smith here forfeited the right to seek review of the sanctions order at the end of the case because he sought review during the case by unsuccessful petition for certiorari, and not by notice of appeal, is without justification. No legitimate interests are served by **denying** review at the end of the case where review has not been sought during the case or has been sought unsuccessfully. 15B Charles Alan Wright, Arthur R. Miller

and Edward H. Cooper, *Federal Practice & Procedure* § 3914.30 at n. 11 (2004). Failure to appeal from an order made during the case does not generally bar review of that order after final judgment even if the rules would have permitted an appeal during the case; any appeal is permitted, not compulsory. *Securities and Exchange Commission v. Quinn*, 997 F. 2d 287 (7th Cir. 1993); *Reise v. Board of Regents*, 957 F. 2d 293 (7th Cir. 1992). Florida guarantees the right to appeal. *Ramos v. Phillip Morris Companies*, 714 So. 2d 1146, 1148 (Fla. 3d DCA 1998).

No objection was ever raised or suggested to Smith's petition for certiorari on the ground that he had an adequate remedy at law by appeal, because the sanctions order was final as to him.[4] Yet when it denied rehearing, the District Court also denied Smith's request to vacate the order dismissing the certiorari proceeding and deem the certiorari petition a notice of appeal.[5] According to the

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[4] *See, e.g., Slatcoff v. Dezen*, 72 So. 2d 800, 801 (Fla. 1954), holding that common law certiorari "will not issue . . . if the order sought to be quashed is one which may be brought to this court for review by direct appellate proceedings." *Accord, Haines,* 658 So. 2d at 525-26.

[5] "If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought" and "the court may permit any part of the proceeding to be amended so that it may be disposed of on the merits. In the absence of amendment, the court may disregard any procedural error or defect that does not adversely affect the

District Court, Smith was entitled to review if he served the right paper within thirty days after the entry of the sanctions order; he lost his right to review because, with Dalbec, he sought review by petition for certiorari instead of notice of appeal.

The decision of the Third District is in conflict with established authority as to finality, and improperly forfeits Assistant Public Defender Smith's right to review of the sanctions imposed against him, even though he made timely application for certiorari review.

CONCLUSION

The Court should grant discretionary review.

Respectfully submitted

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substantial rights of the parties." Rule 9.040 (c) and (d), Fla. R. App. P.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to John D. Barker, Assistant Attorney General, Office of the Attorney General, Criminal Appeals Division, 444 Brickell Avenue, Suite 950, Miami, Florida 33131 on July , 2005.

Assistant Public Defender

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is Courier New 12 point, except that the headings are in 14 point proportionately spaced Times New Roman.

ROY A. HEIMLICH
Assistant Public Defender

A P P E N D I X