

NO. 09-2324

ORIGINAL

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 92103

STATE OF OHIO,

Plaintiff-Appellant

-vs-

WILLIAM CALHOUN,

Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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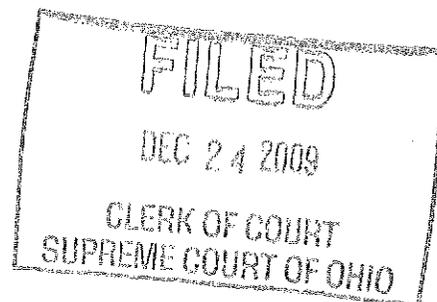


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State v. Calhoun, Cuyahoga App. No. 92103, 2009-Ohio-6097

I. EXPLANATION OF WHY THIS FELONY APPEAL DOES INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND AN ISSUE OF GREAT PUBLIC INTEREST

Under Double Jeopardy principles, the prosecution of an offender is only barred where the State brings a second prosecution for the same offense after acquittal or conviction, or where a defendant suffers multiple punishments for the same offense. The prohibition against double jeopardy does not prohibit the prosecution of an offender for shooting his victim and a prosecution of the same offender for the later, separate shooting and murder of that victim.

In this matter, Appellee William Calhoun was under indictment for the October 2006 shooting of Curtis Johnson, being charged with attempted murder and felonious assault. Just prior to trial, Appellee shot Johnson again and murdered him. Appellee was indicted, tried, and convicted of aggravated murder. The murder became aggravated murder upon multiple specifications, to include a Mass Murder specification based upon Appellee's prior attempted murder of Johnson and a Murder To Escape Accounting For Crime specification that alleged Appellee murdered Johnson to evade prosecution for the October 2006 shooting.

After Appellee's conviction for aggravated murder, the trial court dismissed the attempted murder and felonious assault charges arising from the October, 2006 shooting. In affirming dismissal of the charges, the Eighth Appellate District found that double jeopardy barred the State from prosecuting the October 2006 because Appellee was tried, convicted, and punished for those acts under both the Mass Murder and Murder To Escape Accounting For Crime specifications. The Court of Appeals reasoned that because the aggravated murder offense and specifications were tried first, any subsequent prosecution for the October 2006 shooting was barred. However, the Court also reasoned that had the

October 2006 charges been tried first, a trial upon the specifications attendant to the aggravated murder would not be precluded by double jeopardy. The court's analysis is irreconcilable with prior double jeopardy analysis and introduces a novel concept of law that equates a finding of guilt for an offense to a finding of guilt upon a specification. By elevating the status of a specification to an offense, the Court misinterpreted the function of a specification.

Prior to this case, a specification served only to define the level of offense or provide a range of punishment for an offense – it was not an offense for which an offender could be separately indicted, tried, and sentenced. A specification is not itself a separate statutory offense. Because an offender cannot be indicted, tried, or convicted solely for a specification, the prosecution of a charge that contains a specification alleging certain acts cannot serve to bar the prosecution upon those facts that allege an offender committed a separate statutory offense for those acts. This Court should accept jurisdiction of this matter and hold that:

For the purpose of double jeopardy, a finding of guilt upon a specification that alleges certain acts does not bar the subsequent prosecution for offenses arising from those certain acts.

II. STATEMENT OF THE CASE AND FACTS

Appellee William Calhoun was indicted in this case, Cuyahoga County Court Common Pleas Case CR490330, for the Attempted Murder and Felonious Assault of Curtis Johnson that occurred on October 29, 2006. Calhoun was further indicted with a charge of Having Weapons Under Disability. After indictment and prior to trial in this matter, Appellee murdered Johnson and was indicted for Aggravated Murder and other crimes in Cuyahoga County Court of Common Pleas Case No. CR497811. In that case, Appellee was

convicted of aggravated murder with both a mass murder and a murder to escape accounting for crime specification. Appellee was also indicted for numerous other crimes in Case No. CR497811, to include a charge of the Attempted Murder of Juwaun Leonard with one and three-year firearm specifications, the Felonious assault of Juwaun Leonard with one and three-year firearm specifications, Retaliation against the murder victim Curtis Johnson, counts of Having Weapon Under Disability, and Carrying a Concealed Weapon. He was tried and convicted of those charges. See, *State v. Calhoun*, Cuyahoga App. No. 92103, 2009-Ohio-6097.

The mass murder and murder to escape accounting for another crime specifications read in his aggravated murder indictment:

Mass Murder Specification:

The Grand Jurors further find and specify that the offense presented above was part of a course of conduct in which the offender purposely killed Curtis Johnson and purposely attempted to kill Curtis Johnson.

Murder To Escape Accounting For Crime:

The Grand Jurors further find and specify that the offender committed the offense presented above for the purpose of escaping trial for another offense committed by him to wit: attempted murder and/or felonious assault and/or having weapons while under disability in CR 490330.

The court sentenced Appellee after the merger of certain counts to serve life in prison without parole eligibility for the Aggravated Murder; 10 years each for attempted murder and felonious assault, 3 years on the firearm specifications; 5 years each on the retaliation and weapon under disability charges. In total, Appellee was sentenced to serve an aggregate of 23 years incarceration prior to the start of the life without parole sentence.

On September 12, 2008 after his conviction in Case No. CR497811, Appellee filed a Motion to Dismiss the indictment in the instant case. Appellee argued that he would be

placed twice in jeopardy because he was convicted of aggravated murder with the mass murder specification. He stated that jeopardy attached because he was sentenced to life in prison on the murder case and that the shooting in October 2006 was the same act or transaction underlying the mass murder specification that was proven in CR497811. At hearing, the State did not disagree with the procedural posture of the case. The trial court dismissed the indictment. The State appealed the dismissal; the judgment was affirmed by the Eighth District Court of Appeals in *State v. Calhoun*, Cuyahoga App. No. 92103, 2009-Ohio-6097.

The appellate opinion determined that in order to prove the mass murder and murder to escape accounting for crime specifications, the State, “had to prove that Calhoun attempted to murder Curtis Johnson, committed felonious assault ‘and/or’ had a weapon under disability as defined in the first indictment.” *Calhoun*, 2009-Ohio-92103, at ¶5. After noting the facts presented at the murder trial, the appellate court concluded:

[T]he details of Calhoun's attempted murder of Johnson were before the jury in his trial on the aggravated murder charge in the second indictment. Because Calhoun was tried and found guilty of aggravated murder, including the specification relating to his attempted murder of Johnson, jeopardy has attached. Calhoun has been tried, convicted, and as part of the specification, punished for the murder of Curtis Johnson.

Id., at ¶8.

The appellate court explained jeopardy attached because, “No defendant may be punished twice for the same offense chosen by the state.” *Id.*, at ¶10. It also found however that this case presented an issue of concern *only* because of the timing of the trials, stating:

Calhoun argues, and we agree, that had the state tried Calhoun on the first indictment, no jeopardy would have attached if they had later used that conviction as a specification on the second count. It is the backwards approach to this case that raises jeopardy.

Id.

The appellate court did not adopt the State's argument that the specifications were not offenses that would subject Appellant to double jeopardy. *Id.*, at ¶¶11, 12. It explained its holding affirming the trial court:

We recognize that the attempted murder shooting and the later aggravated murder shooting of Curtis Johnson are separate events occurring on separate dates. Our concern, and the trial court rightfully noted, is the dual trials on the same matter and dual punishments for the same act. In the trial, appellant, in order to prove the specification, had to prove the first indictment. Consequently, jeopardy prohibits subsequent trial on a matter previously tried.

Additionally, the trial court has punished Calhoun for the offenses. He was sentenced to life without possibility of parole. Finally, judicial economy supports the trial court's decision to grant Calhoun's motion to dismiss. Accordingly, we affirm the trial court's decision and overrule appellant's assigned error.

Id., at ¶ 13, 14.

III. LAW AND ARGUMENT

A. PROPOSITION OF LAW

As its proposition of law, the State asks that this Court accept this matter and hold:

For the purpose of double jeopardy, a finding of guilt upon a specification that defines the level of an offense does not constitute a finding of guilt on the underlying crime

Appellee William Calhoun was indicted in this case for shooting Johnson three times on October 29, 2006. The indictment comprised three distinct counts: Attempted Murder, Felonious Assault, and Having a Weapon Under Disability. Appellee was then indicted in CR497811 for murdering Johnson in March 2007, three days before he was to be tried for Johnson's attempted murder. Appellee was found guilty. In defining the act of murder, the jury found that the offense of murder "was part of a course of conduct in which the

offender purposely killed Curtis Johnson and purposely attempted to kill Curtis Johnson.” In that prosecution, Appellee was not prosecuted or punished for the October 2006 attempted murder: proof of those facts served only to define the manner and motive for which he committed Johnson’s murder as detailed in the specification.

Double jeopardy is applied only where the State pursues multiple prosecutions for the same acts. Here, the acts occurring in October 2006 were not charged as crimes in CR497811. They were presented as facts within specifications. Appellee was not punished for crimes committed in October, he was only tried and punished for acts occurring in March 2007. The facts of the October 2006 shooting presented at Appellee’s murder trial upon the specifications served to define the level of murder and to provide the range of punishment for the murder he committed – he was not found guilty of offenses occurring in October 2006.

Appellee was not found guilty of or acquitted of offenses that occurred in October 2006 within his murder prosecution. He was not prosecuted or punished for acts occurring in October 2006. As such, the State asks that the judgment of the appellate court affirming dismissal of the indictment be reversed and that this cause be remanded to the trial court in order that Appellee is held accountable for the indictment in this case.

- B. DOUBLE JEOPARDY DOES NOT BAR PROSECUTING APPELLEE FOR THE SHOOTING OF CURTIS JOHNSON IN OCTOBER 2006 WHERE APPELLEE WAS CONVICTED OF MURDERING CURTIS JOHNSON IN MARCH 2007.
- 1. THE PRINCIPLE OF DOUBLE JEOPARDY PROHIBITS ONLY PROSECUTION FOR OFFENSES THAT OCCUR FROM THE SAME TRANSACTION, NOT SHOOTINGS OCCURRING MONTHS APART

The bar against double jeopardy prohibits a successive prosecution for the same offense after judgment of conviction or acquittal and to prohibit multiple punishments for

the same offense. *State v. Woodson*, Cuyahoga App. No. 92315, 2009-Ohio-5558, at ¶ 48 (Citing, *United States v. Halper* (1989), 490 U.S. 435, 440, 109 S.Ct. 1892, 104 L.Ed.2d 487, citing *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656; *Benton v. Maryland* (1969), 395 U.S. 784, 786, 89 S.Ct. 2056, 23 L.Ed.2d 707; *State v. Tolbert* (1991), 60 Ohio St.3d 89, 90, 573 N.E.2d 617.

Appellee argued that he would be prosecuted a second time for the October 2006 shootings after being found guilty of the mass murder specification. However, the prohibition against double jeopardy bars a prosecution of the same criminal *offense*. A criminal offense is a violation of a criminal statute for the purposes of double jeopardy analysis. The State does not subject Appellee to a second prosecution of the same *offense* by trying him in this case simply because the State proved facts as part of a specification to a separate crime. A specification to an indictment is not a separate criminal offense. See, *State v. Blankenship* (1995), 102 Ohio App.3d 534, 547 657 N.E.2d 559; (Firearm specification is not an offense and thus not subject to double jeopardy prohibitions for the purpose of merger) see, also, *State v. Carter* (May 21, 1999), Lucas App. Nos. L-97-1162, L-97-1163, L-97-1169 (“Both prongs of Stacy’s argument are premised on the mistaken assumption that firearm specifications are “offenses.” *** Firearm specifications, however, are not separate offenses and thus cannot be “allied offenses of similar import” as contemplated by R.C. 2941.25.”)

In this matter, the March 2007 murder prosecution did not place Appellee in jeopardy for the October 2006 Attempted Murder, Felonious Assault, or Weapon Under Disability charges. Further, the dismissal of the charge of Having a Weapon Under

Disability in October 2006 cannot be reconciled with the reasoning in the appellate opinion; such was not prosecuted or alleged in the indictment in Case CR497811.

The appellate court stated that had Appellee first been tried in this case and convicted of attempted murder, the State would *not* be barred from prosecuting the aggravated murder specifications. It determined that double jeopardy bars prosecution of Appellee *solely* because he was convicted of aggravated murder where the mass murder specification was proven. This cannot be the statement of law of double jeopardy; prosecutions are either both duplicitous and barred by the principle of double jeopardy or they are not. The order of prosecution is irrelevant to the analysis; either an offender is both prosecuted and punished twice for the same offense or he is not. The appellate court erred in its application of the law because it equated a finding of guilt on a specification to be a finding of guilt on an offense.

2. APPELLEE WAS NOT PROSECUTED FOR THE OFFENSES OF ATTEMPTED MURDER, FELONIOUS ASSAULT, AND HAVING A WEAPON UNDER DISABILITY IN CASE CR497811

Appellee was convicted of the aggravated murder of Curtis Johnson. In that indictment, he was given notice of, and subsequently found guilty of, certain specifications detailing the motive and manner by which he committed the aggravated murder. Specifications in an indictment are not criminal offenses; they merely define the penalty that may be imposed if a defendant were to be found guilty of the offenses and the specifications charged. It is axiomatic that a defendant cannot be acquitted of a charge but be found guilty of a specification attached to that charge; accordingly, it is error for a court to equate a finding of guilt on a specification to a finding of guilt upon a criminal charge.

Appellee was not tried and convicted for the crimes of Attempted Murder, Felonious Assault, and Having Weapon Under Disability occurring on October 29, 2006 as charged in this case, nor has he been punished for those crimes. He has only been prosecuted and punished for crimes occurring in March 2007.

3. APPELLEE IS SUBJECT TO PROSECUTION FOR ACTS HE COMMITTED IN OCTOBER 2006.

The indictment in this case alleges that Appellee committed the crimes of Attempted Murder, Felonious Assault, and Weapon Under Disability in October 2006. The indictment in Case CR497811 alleged that Appellee committed the crime of Aggravated Murder in March 2007. The Aggravated Murder charge had specifications attached that *defined the penalty that could be imposed*. The trial court erred by dismissing the indictment because it could not reasonably find that the October 2006 felonious assault of Johnson and the March 2007 murder of Johnson were the same offense as argued by Appellee. Because of this, the prosecution is not barred by double jeopardy principles.

IV. CONCLUSION

Appellee has not been subject to answer for the attempted murder and felonious assault of Johnson occurring on October 2006. He has not been found guilty of any offense for crimes that occurred on that date, to include the weapon under disability charge. Although those actions were determined as being true under a specification in his murder prosecution, he has not been punished for those acts; he has only been punished for aggravated murder.

Appellee was not prosecuted or punished for acts occurring in October 2006. Accordingly, the court erred by applying the principle of double jeopardy and dismissing the criminal charges in this matter based upon the timing of the trials. For these reasons,

the State asks that this Court reverse the judgment in this matter and remand this case to the trial court to allow the State to hold Appellee accountable for the crimes he committed in October 2006.

Respectfully submitted,

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SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction has been mailed this 23rd day of December 2009, to John T. Martin, 310 Lakeside Avenue, 2nd Floor, Cleveland, Ohio 44113.



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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
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JOURNAL ENTRY AND OPINION
No. 92103

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

WILLIAM CALHOUN

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-490330

BEFORE: Blackmon, J., McMonagle, P.J., and Jones, J.

RELEASED: November 19, 2009

JOURNALIZED: DEC X I 2009

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FILED AND JOURNALIZED
PER APP.R. 22(C)

DEC 01 2009
GUYTON B. BERRY
CLERK OF THE COURT OF APPEALS
BY *SMB* DEP.

ANNOUNCEMENT OF DECISION
PER APP.R. 22(C) AND 20(A)
RECEIVED

NOV 19 2009

GUYTON B. BERRY
CLERK OF THE COURT OF APPEALS
BY *SMB* DEP.

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAKEN

PATRICIA ANN BLACKMON, J.:

Appellant state of Ohio (“appellant”) appeals the trial court’s dismissal of an indictment against appellee William Calhoun (“Calhoun”). The appellant assigns the following error for our review:

“I. The trial court erred by dismissing the case because the principles of double jeopardy did not apply. (Sep. 15, 2008 Journal Entry)”

Having reviewed the record and pertinent law, we affirm the trial court’s decision. The apposite facts follow.

It is undisputed that appellant charged Calhoun with attempted murder with a firearm specification, felonious assault with a firearm specification, and having a weapon under disability (referred to as the first indictment, CR-490330). The victim in the first indictment was Curtis Johnson. Before a trial on the attempted murder shooting, Curtis Johnson was shot again and identified Calhoun as the shooter; Johnson later died. Appellant thereafter indicted Calhoun for the aggravated murder of Curtis Johnson, which included mass murder and murder to escape specifications (referred to as the second indictment, CR-497811). Calhoun was also charged with numerous other counts that are not the subject of this appeal.

It is undisputed that Calhoun was tried on the second indictment that contained the following specifications:

“Mass Murder Specification:

The Grand Jurors further find and specify that the offense presented above was part of a course of conduct in which the offender purposely killed Curtis Johnson and purposely attempted to kill Curtis Johnson.

Murder To Escape Accounting For Crime:

The Grand Jurors further find and specify that the offender committed the offense presented above for the purpose of escaping trial for another offense committed by him to wit: attempted murder and/or felonious assault and/or having weapons while under disability in CR 490330.”¹

In order to prove the above specifications in the second indictment, appellant had to prove that Calhoun attempted to murder Curtis Johnson, committed felonious assault “and/or” had a weapon under disability as defined in the first indictment. The jury did convict Calhoun under the second indictment, and the trial judge sentenced him to 23 years in prison, which must be served before he serves a life sentence without parole.

Before appellant could try him on the first indictment, Calhoun filed a motion to dismiss it on double jeopardy grounds. The trial court agreed and pointed out that appellant opted to try the aggravated murder, and as such ruled

¹True Bill Indictment June 26, 2007.

that a trial on the attempted murder would constitute jeopardy. Appellant appealed and argued that jeopardy does not apply.

Motion to Dismiss Indictment

In affirming Calhoun's conviction in his direct appeal, we detailed Calhoun's course of conduct as follows:

"In the case at bar, Curtis Johnson was originally shot by appellant on October 29, 2006. The very next day, the victim scribbled appellant's nickname, 'Booka,' on a piece of paper at the hospital when he was asked who shot him. In addition, the victim was also presented with a photo array that included appellant's picture. After viewing the photo array, the victim identified appellant as the shooter. On November 25, 2006, the victim made a written statement identifying appellant as the shooter.

Appellant was subsequently indicted in Case No. CR-07-490330 and a trial was set for March 21, 2007. Sometime before trial, the victim told various family members that appellant and/or his friends had contacted him and tried to bribe him not to testify at the trial. On March 18, 2007, just three days before trial, Curtis Johnson was ambushed in his driveway and shot a second time by appellant. After he was shot, but before losing consciousness, Curtis Johnson identified appellant as one of the shooters.

The State properly demonstrated that Calhoun engaged in wrongdoing that resulted in the witness's unavailability, and the State further demonstrated that one of Calhoun's reasons for shooting the victim was to cause the witness to be unavailable at trial. This is demonstrated by the attempted bribes, police officer testimony, ballistics tests, witness identifications, and other evidence presented at trial. Accordingly, Calhoun forfeited his right to confront

Curtis Johnson in this case, and the trial court did not err in allowing Curtis Johnson's statements to be admitted as evidence at trial.”²

As reflected above, the details of Calhoun's attempted murder of Johnson were before the jury in his trial on the aggravated murder charge in the second indictment. Because Calhoun was tried and found guilty of aggravated murder, including the specification relating to his attempted murder of Johnson, jeopardy has attached. Calhoun has been tried, convicted, and as part of the specification, punished for the murder of Curtis Johnson.

The Double Jeopardy Clause prohibits the following: a second prosecution for the same offense, a second prosecution for the same offense after conviction, and multiple punishments for the same offense.³ The substance of the Double Jeopardy Clause is to protect a defendant from repeated prosecutions for the same offense.⁴ It is also designed to protect against multiple punishments.

Calhoun argues, and we agree, that had the state tried Calhoun on the first indictment, no jeopardy would have attached if they had later used that conviction as a specification on the second count. It is the backwards approach

²*State v. Calhoun*, Cuyahoga App. No. 91328, 2009-Ohio-2361.

³*North Carolina v. Pearce* (1969), 395 U.S. 711, overruled on other grounds (1982), 457 U.S. 368.

⁴*State v. Gresham*, 2nd Dist. No. 22766, 2009-Ohio-3305, citing *Oregon v. Kennedy* (1982), 456 U.S. 667, 671, 102 S.Ct. 2083, 2087, 72 L.Ed.2d 416.

to this case that raises jeopardy. No defendant may be punished twice for the same offense chosen by the state.

The state argues that to use this approach results in the use of specifications as a separate offense and this is forbidden under *State v. Blankenship*.⁵

Calhoun did not argue allied offenses. He argued that he cannot be tried and punished multiple times for shooting and killing Curtis Johnson. In *State v. Blankenship*, the court held "a firearm specification is not a separate offense and thus cannot be an allied offense of similar import for purposes of R.C. 2941.25. Therefore, no merger is required of the firearm specification and the underlying weapons charge. Consequently, *State v. Blankenship* is not helpful in the resolution of this case.

We recognize that the attempted murder shooting and the later aggravated murder shooting of Curtis Johnson are separate events occurring on separate dates. Our concern, and the trial court rightfully noted, is the dual trials on the same matter and dual punishments for the same act? In the trial, appellant, in order to prove the specification, had to prove the first indictment. Consequently, jeopardy prohibits subsequent trial on a matter previously tried.

⁵(1995), Ohio App.3d 534.

Additionally, the trial court has punished Calhoun for the offenses. He was sentenced to life without possibility of parole. Finally, judicial economy supports the trial court's decision to grant Calhoun's motion to dismiss. Accordingly, we affirm the trial court's decision and overrule appellant's assigned error.

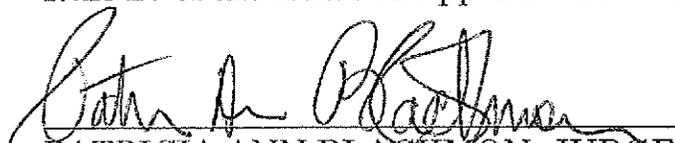
Judgment affirmed.

It is ordered that appellee recover of appellant his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


PATRICIA ANN BLACKMON, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
LARRY A. JONES, J., CONCUR