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State v. Jones: Double Jeopardy and Substantial Rights in North Carolina Appeals

Karen E. Rhew

State v. Jones: Double Jeopardy and Substantial Rights in North Carolina Appeals

Both the law of the land clause of the North Carolina Constitution[1] and the fifth amendment to the United States Constitution[2] guarantee that no person may be put in jeopardy twice for the same offense.[3] North Carolina courts have regarded the right to be free from double jeopardy as "a fundamental and sacred principle of the common law,"[4] an "integral part of the 'law of the land.' "[5] Nevertheless, the North Carolina Court of Appeals' recent decision in *State v. Jones*[6] makes it clear that however "sacred," "fundamental," "integral," and constitutional the right may be, it is not a "substantial" right for the purposes of an appeal under section 1-277 of the North Carolina General Statutes.[7] Consequently, the court held that the defendant in *Jones* had no right to the immediate appeal of an interlocutory order[8] that denied his motion to dismiss the indictment against him on double jeopardy grounds.[9]

On April 13, 1981, Andrew Lynn Jones was indicted for the murder of

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1. N.C. CONST. art. I, § 19, provides: "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." This clause has been interpreted as protecting persons from being tried or punished twice for the same offense, although it does not explicitly prohibit double jeopardy. *See* State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Crocker, 239 N.C. 446, 80 S.E.2d 243 (1954) (prohibition against double jeopardy regarded as integral part of the law of the land).

2. The fifth amendment to the United States Constitution provides: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The double jeopardy clause of the federal Constitution was made applicable to the states by the fourteenth amendment to the United States Constitution. *See* Benton v. Maryland, 395 U.S. 784 (1969). In Arizona v. Washington, 434 U.S. 497 (1978), the Supreme Court reviewed the purposes behind the double jeopardy clause:

> The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal. The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though "the acquittal was based upon an egregiously erroneous foundation" . . . .
>
> Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's "valued right to have his trial completed by a particular tribunal." . . . Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted.

Id. at 503-04.

3. Jeopardy attaches in North Carolina when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information; (2) before a court of competent jurisdiction; (3) after arraignment; (4) after plea; and (5) when a competent jury has been impaneled and sworn to make a true deliverance of the case. State v. Crocker, 239 N.C. 446, 449, 80 S.E.2d 243, 245 (1954).

4. *Id.* at 449, 80 S.E.2d at 245.

5. *Id.*

6. 67 N.C. App. 413, 313 S.E.2d 264 (1984).

7. N.C. GEN. STAT. § 1-277 (1983) provides that "[a]n appeal may be taken from every judicial order or determination . . . which affects a substantial right claimed in any action or proceeding."

8. An interlocutory order is an order that does not determine the issues but directs some further proceeding preliminary to a final decree. Waters v. Qualified Personnel, Inc., 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978).

9. *Jones*, 67 N.C. App. at 416, 313 S.E.2d at 266-67.

David Lee Height.[10] The first of Jones' three trials based on this indictment was declared a mistrial.[11] Before the start of his second trial for the same offense, Jones moved to dismiss the indictment against him on double jeopardy grounds, arguing that the judge in his first trial had improperly declared a mistrial.[12] The judge presiding over Jones' second trial denied the motion and refused to stay the second trial pending the outcome of Jones' appeal.[13] Jones' second trial also ended in a mistrial.[14] At Jones' third trial for the same offense, he finally was convicted of second degree murder.[15]

Following his conviction, Jones appealed the second trial court's denial of his pretrial motion to dismiss. He argued that he had a constitutional right to immediate appeal of the order based on the United States Supreme Court's decision in *Abney v. United States*[16] and that under North Carolina General Statutes section 1-277 the trial court's order denying his motion for dismissal was immediately appealable because it affected a substantial right.[17]

The North Carolina Court of Appeals found that Jones did not have a constitutional right to immediate appeal.[18] In distinguishing *Abney*, the court found that the Supreme Court was merely interpreting the federal jurisdictional statute and not the federal Constitution when it held that the *Abney* defendant had a right to immediate appeal of an interlocutory order denying his motion to dismiss on double jeopardy grounds.[19] Interpreting the corresponding North Carolina jurisdictional statutes, sections 7A-27[20] and 1-277,[21] the court of appeals in *Jones* found that there was no right to immediate appeal of an interlocu-

10. *Id.* at 413, 313 S.E.2d at 265.

11. *Id.* Judge Britt, presiding over the case, found that the jury was deadlocked. The defendant immediately filed objections to the order of mistrial. State v. Jones, 67 N.C. App. 377, 380, 313 S.E.2d 808, 811 (1984) (separate appeal from conviction at third trial).

12. State v. Jones, 67 N.C. App. 377, 380, 313 S.E.2d 808, 811 (1984). The defendant asserted that the judge's declaration of a mistrial had been provoked by actions of the prosecutor and that the judge had failed to make either a judicial inquiry or finding of fact as to whether the jury actually was deadlocked. *Id.* at 386, 313 S.E.2d at 814. When a trial court makes no findings in the process of improperly ordering a mistrial over the defendant's objection, the defendant cannot be retried for the same offense. *Id.* at 388, 313 S.E.2d at 815-16.

13. Following the original trial court's order of a mistrial, defendant petitioned that court for habeas corpus relief. The trial court denied defendant's petition. Jones then petitioned the North Carolina Supreme Court for writs of supersedeas, habeas corpus, and mandamus. See *infra* note 24 for a discussion of these and other prerogative writs. The supreme court vacated Judge Britt's order of mistrial and remanded the case to the superior court for a de novo hearing on defendant's motion for habeas corpus relief before a different judge. Judge Bailey, presiding over the de novo hearing, denied defendant's petition for habeas corpus. Defendant then petitioned the North Carolina Supreme Court for writs of supersedeas and certiorari, but both writs were denied. Defendant filed similar motions in the United States District Court for the Eastern District of North Carolina, but did not succeed in preventing his retrial. State v. Jones, 67 N.C. App. 377, 381, 313 S.E.2d 808, 811 (1984).

14. State v. Jones, 67 N.C. App. 377, 380, 313 S.E.2d 808, 811 (1984). A mistrial was granted on defendant's motion.

15. *Id.*

16. 431 U.S. 651 (1977). The Court in *Abney* held that an order denying a motion to dismiss on double jeopardy grounds was a final decision within the federal jurisdictional statute and was immediately appealable under the statute. *See infra* notes 50-55 and accompanying text.

17. *Jones*, 67 N.C. App. at 415-16, 313 S.E.2d at 266.

18. *Id.* at 416, 313 S.E.2d at 266.

19. *Id.* at 415, 313 S.E.2d at 266.

20. N.C. Gen. Stat. § 7A-27 (1981). Although the court did not cite any specific subsection of

tory order unless the order would deprive the appellant of a substantial right if not reviewed before a final judgment on the merits.[22] Referring to two decisions of the North Carolina Supreme Court, the court in *Jones* determined that the right to avoid a rehearing or trial was not substantial within the meaning of the statute.[23] The court then reasoned that Jones' asserted right to avoid a second trial also was not substantial. The court added that the defendant's right to interlocutory review was adequately protected by his opportunity to obtain discretionary review in the appellate courts by means of prerogative writs.[24]

Judge Johnson dissented from the panel decision on two grounds. First, he contended that the "final decision" requirement of the federal jurisdictional statute was substantially similar to the "final judgment" requirement in the North Carolina appellate statute;[25] thus, the holding in *Abney* was equally applicable to North Carolina law.[26] Second, Judge Johnson criticized the majority for basing its decision solely on the authority of civil cases;[27] he argued that the cases relied on were inapplicable and that an important case involving rights substantially similar to those asserted by Jones had been overlooked.[28]

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§ 7A-27, it appeared to be referring to the final judgment rule in § 7A-27(b) which allows appeals of right to the court of appeals "[f]rom any final judgment of a superior court." *Id.* § 7A-27(b).

21. *See supra* note 7.

22. *Jones*, 67 N.C. App. at 415, 313 S.E.2d at 266 (citing Blackwelder v. Department of Human Resources, 60 N.C. App. 331, 299 S.E.2d 777 (1983)).

Jones appealed separately from the conviction entered at his third trial. *See* State v. Jones, 67 N.C. App. 377, 313 S.E.2d 808 (1984). The court of appeals in that case determined that the trial judge in the original trial had improperly declared a mistrial, because the judge had failed to make a judicial inquiry or finding of fact as to whether the jury actually was deadlocked. The court of appeals then held that "where the trial court makes no findings at all in the course of improperly ordering a mistrial over defendant's timely objection . . . the defendant cannot be tried again for the same offense." *Id.* at 388, 313 S.E.2d at 815-16.

23. *Jones*, 67 N.C. App. at 415, 313 S.E.2d at 266.

24. *Id.* Prerogative writs are extraordinary writs issued in the discretion of the court on a showing of proper cause. Among the prerogative writs authorized for issuance by the court of appeals or the supreme court under N.C. GEN. STAT. § 7A-32 (1981) are:

1) *Certiorari*, which allows the appellant to seek review of a case that would not otherwise be entitled to review. Certiorari may be issued by the court of appeals or supreme court in situations in which the right to appeal or petition for discretionary review has been lost by appellant's failure to take timely action, or in which no right to appeal exists from an interlocutory order.

2) *Supersedeas*, which is used to stay the enforcement of an order while review of that order is being sought.

3) *Mandamus*, which is used to correct erroneous judicial action, to compel judicial action that erroneously has been refused, or to compel the exercise of judicial discretion when discretionary action has been refused. *See* J. POTTER, NORTH CAROLINA APPELLATE HANDBOOK 49-53 (1978). Section 7A-32 also authorizes the court of appeals or supreme court to issue the writ of habeas corpus which is a writ "designed as an effective means of obtaining '. . . a speedy release of persons who are illegally deprived of their liberty or illegally detained.' " *In re* Stevens, 28 N.C. App. 471, 473, 221 S.E.2d 839, 840 (1976) (quoting 39 AM. JUR. 2D *Habeas Corpus* § 1 (1968)).

25. *Jones*, 67 N.C. App. at 418, 313 S.E.2d at 267 (Johnson, J., dissenting).

26. *Id.* It is unclear whether Judge Johnson was suggesting that Jones had a constitutional right to appeal on these facts or whether he was objecting merely to the majority's cursory treatment of *Abney*.

27. *Id.* at 418, 313 S.E.2d at 268 (Johnson, J., dissenting). Given the scarcity of criminal cases involving interlocutory appeals, *see infra* note 91 and accompanying text, the dissent's criticism may be unwarranted.

28. *Jones*, 67 N.C. App. at 418, 313 S.E.2d at 268 (Johnson, J., dissenting); *see infra* notes 92-93 and accompanying text.

This Note considers the propriety of the court of appeals' decision in *Jones* in light of the history of the substantial rights doctrine and evaluates the attempts of federal and state courts to balance the competing interests of judicial efficiency and individual rights. It concludes that although the court may have been correct in not relying on federal law, North Carolina precedent and policy dictate reversal of the decision.

Before considering the substantial rights doctrine, it is necessary to examine the rule that created the need for the substantial rights doctrine exception. The final judgment rule was developed over three hundred years ago in *Metcalfe's Case*[29] in which the King's Bench held that no appeal could be taken until an action had been disposed of completely.[30] The rule grew out of the common-law conviction that a case was a single judicial unit and that it was impossible to have two records in different courts upon the same original writ.[31] Today the rule is based on the desire for judicial economy; it allows appellate courts to consider the entire case at once, thus avoiding the inequities inherent in piecemeal review.[32]

All too often individual rights were lost in the common-law quest for judicial economy.[33] The substantial rights doctrine thus evolved to relieve some of the hardships of the final judgment rule; the doctrine allows immediate appeal to be taken from any interlocutory judgment that has affected a substantial right of a litigant.[34] The doctrine first appeared in New York's Field Code, which merged the final judgment rule of the common law with the liberal appeals policies of the courts of equity.[35] North Carolina adopted the substantial rights doctrine when it enacted its own Code of Civil Procedure based upon the Field Code.[36]

The doctrine remained part of North Carolina law even after the state adopted new rules of civil procedure based on the federal rules. Even though the federal rules did not explicitly provide for a substantial rights exception to the final judgment rule[37] and the substantial rights doctrine itself did not otherwise

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29. 77 Eng. Rep. 1193, 11 Coke 28 (1615).

30. *See* Comment, *Interlocutory Appeals in North Carolina: The Substantial Right Doctrine*, 18 WAKE FOREST L. REV. 857, 858 (1982).

31. *See* Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L. J. 539, 541-42 (1932); Frank, *Requiem for the Final Judgment Rule*, 45 TEX. L. REV. 292, 292 (1966).

32. Frank, *supra* note 31, at 292.

33. *Id.* at 292 & n.10.

34. *See* Comment, *supra* note 30, at 857.

35. N.Y. CIV. PROC. LAW § 5701(a)(2)(v) (McKinney 1978) (first modern code of civil procedure). Although the common law strictly had adhered to the final judgment rule, courts of equity generally allowed appeals from nonfinal orders and decrees. *See* Comment, *supra* note 30, at 858.

36. *See* N.C. CODE CIV. PROC. LAW § 299 (1868) ("An appeal may be taken from every judicial order or determination of a judge of a superior court . . . which affects a substantial right claimed in any action or proceeding . . . ."), *repealed by* Act of April 30, 1971, ch. 268, § 34, 1971 N.C. Sess. Laws 199.

37. Although the North Carolina Rules of Civil Procedure do not specifically provide for a substantial rights exception, the doctrine is part of the North Carolina General Statutes. *See supra* note 7; *see also* N.C. GEN. STAT. § 7A-27(d)(1) (1981) (providing for appeal as of right "from any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which . . . affects a substantial right").

become part of the federal law,[38] the federal system developed other exceptions, four judicial and four legislative, to the final judgment rule.[39] It was one of the judicially created exceptions, the collateral order doctrine,[40] that formed the basis for the Supreme Court's decision in *Abney v. United States*.[41]

The Supreme Court developed the collateral order doctrine in *Cohen v. Beneficial Industrial Loan Corp.*[42] *Cohen* involved a shareholder's derivative suit in which the district court had denied defendant corporation's motion to require plaintiff shareholders to post security to cover the cost of the litigation.[43] Defendant in *Cohen* had sought immediate review in the Third Circuit Court of Appeals, which reversed the decision of the district court.[44] On review of the appellate court's decision, the Supreme Court held that the pretrial order of the district court was a "final decision" for the purposes of the federal appellate jurisdiction statute.[45] In determining that the pretrial order was a final decision within the statute, the Court looked to three factors:

(1) whether the order fully disposed of the security issue;[46]

(2) whether the order constituted a resolution of an issue completely collateral to the rights asserted in the actions or was merely a "step toward final disposition of the merits";[47] and

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38. *See* Comment, *supra* note 30, at 859.

39. *See id.* The four legislative exceptions to the final judgment rule are: 28 U.S.C. § 1292(a)(1) (1982), which provides for immediate appeal to the court of appeals of interlocutory injunctive orders; 28 U.S.C. § 1651(a) (1982), which authorizes federal courts to issue writs of mandamus (North Carolina has a corollary to § 1651(a) in N.C. GEN. STAT. § 7A-32(b) (1981), which authorizes the court of appeals and supreme court to issue writs of mandamus); FED. R. CIV. P. 54(b) which allows appellate review of final judgments entered against fewer than all the parties or claims in a multiparty or multiclaim action (N.C. R. CIV. P. 54(b) parallels the federal rule except to the extent that it is limited by the North Carolina General Statutes); and 28 U.S.C. § 1292(b) (1982), which allows discretionary review of cases involving a controlling question of law about which there is substantial ground for difference of opinion and where the resolution of such an issue will materially advance the ultimate disposition of the litigation.

The four judicial exceptions to the final judgment rule are: the irreparable harm doctrine formulated in Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848), which permits immediate appeal of an order directing delivery of physical property when such an appeal is necessary to prevent irreparable injury to appellant's interests; the collateral order doctrine, *see infra* notes 42-49 and accompanying text; the death knell doctrine, which authorized appeal from an interlocutory order that has the effect of terminating the litigation (in Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) the Court put an end to the use of this doctrine in the federal courts); and the pragmatic balancing test formulated in Gillespie v. United States, 379 U.S. 148 (1964), which allows appeal of nonfinal orders that are fundamental to the furtherance of the litigation. *See generally* 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, §§ 3910-13 (1976) (comprehensive discussion of federal exceptions to final judgment rule).

40. *See generally* Abney v. United States, 431 U.S. 651, 657-59 (1977) (discussing development and application of collateral order doctrine); C. WRIGHT, A. MILLER & E. COOPER, *supra* note 39, § 3911, at 467 (same); Frank, *supra* note 31, at 300-02 (same); Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 364-67 (1961) (same).

41. 431 U.S. 651 (1977).

42. 337 U.S. 541 (1949).

43. *Id.* at 543.

44. *Id.* at 545.

45. *Id.* 28 U.S.C. § 1291 (1982) provides: "The court of appeals . . . shall have jurisdiction of appeals from all final decisions . . . except where direct review may be had in the Supreme Court."

46. *Cohen*, 337 U.S. at 546.

47. *Id.*

(3) whether the decision involved an important right that would be "lost, probably irreparably," if review had to await a final judgment.[48]

After considering these factors, the Court concluded that the pretrial order in *Cohen* fell within the "small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[49]

In determining whether the pretrial order denying a motion to dismiss on double jeopardy grounds belonged in the "small class" of *Cohen* orders, the Supreme Court in *Abney* considered each of the three factors outlined in *Cohen*.[50] The Court first found that the pretrial order constituted a final disposition of the double jeopardy claim, as no further steps could be taken in the trial court to block the trial.[51] Next, the Court determined that the double jeopardy claim was collateral to and independent of the principal issue in a criminal trial, as the claim was not relevant to defendant's guilt or innocence.[52] Last, the Court noted that the rights guaranteed by the double jeopardy clause would be "significantly undermined" if the claim were postponed until after the defendant's conviction.[53] The Court noted that the denial of an interlocutory appeal in this case would subject the defendant to the very "personal strain, public embarrassment, and expense of a criminal trial" from which the double jeopardy clause was designed to protect him.[54] Most significantly, the Court stated that for the defendant to enjoy the "full protection" of the double jeopardy clause, his double jeopardy challenge must be reviewable before he is exposed to a second criminal trial.[55]

Rather than requiring a "final decision" on a collateral issue as the basis for interlocutory appeal, as does section 1291, North Carolina's statute allows an appeal of right from "every judicial order or determination of a judge of a superior or district court . . . which affects a substantial right claimed in any action or proceeding."[56] The North Carolina Supreme Court and Court of Appeals have given the term "substantial right" differing, albeit consistent, definitions. Relying on Webster's definition, the North Carolina Supreme Court has defined

48. *Id.*

49. *Id.* Other orders belonging to the small class defined by *Cohen* are: an order vacating ar attachment in an admiralty appeal, the denial of a petition to proceed in forma pauperis, an orde challenging the amount of bail, and an order imposing on defendants 90% of costs of notifying clas members of class action. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172 (1974) (class action) Stack v. Boyle, 342 U.S. 1, 6 (1951) (bail); Roberts v. United States Dist. Court, 339 U.S. 844, 84 (1950) (in forma pauperis); Swift & Co. Packers v. Compania Colombiana Del Caribe, 339 U.S. 684 688-89 (1950) (attachment).

50. *Abney*, 431 U.S. at 659-62.

51. *Id.* at 659.

52. *Id.* at 659-60.

53. *Id.* at 660. The Court noted that the double jeopardy clause was designed to protect individuals not only from being convicted twice, but from being tried twice as well. Such protection would be lost, the Court said, if the defendant were forced to " 'run the gauntlet' " a second time before an appeal could be taken. *Id.* at 660-62.

54. *Id.* at 661.

55. *Id.* at 662.

56. N.C. GEN. STAT. § 1-277 (1983).

a substantial right as " 'a legal right affecting or invoking a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right.' "[57] The court of appeals has relied on Black's definition of substantial: " 'of real worth and importance: of considerable value, valuable.' "[58] As one commentator has noted, the term "substantial right" is best defined by example.[59]

Among those orders that North Carolina courts have found to affect a substantial right are orders granting or denying injunctions, orders maintaining the unity of adjudication, and orders concerning separation and divorce.[60] In the case of injunctive orders, North Carolina's substantial rights doctrine is comparable to the federal statute that allows immediate appeal of interlocutory injunctive orders in the federal courts.[61] In contrast to the federal statute, the substantial rights doctrine authorizes appellate review only of those injunctive orders that affect a substantial right instead of allowing appellate review of all injunctions.[62] The right of a litigant to have all of his claims litigated in one suit also has been considered substantial.[63] Thus, North Carolina courts have found that an interlocutory order that prevents the complete adjudication of all of a litigant's claims in one action is immediately appealable under the substantial rights doctrine.[64] Finally, North Carolina courts generally have found that orders granting claims for alimony and child support arrearages, or granting full faith and credit to another state's decree imposing one spouse's continuing support obligation, affect a substantial right.[65]

Prior to the North Carolina Court of Appeals' decision in *Stephenson v. Stephenson*,[66] North Carolina courts also had allowed immediate appeal of awards *pendente lite* in alimony and divorce actions.[67] Influenced by the backlog of cases and the increased use of interlocutory appeals as delay tactics, the court in *Stephenson* found that awards *pendente lite* do not "necessarily affect a substantial right."[68] Arguably, the *Stephenson* court's emphasis on the delay

57. Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1971)).

58. Setzer v. Annas, 21 N.C. App. 632, 634, 205 S.E.2d 553, 555 (1974) (quoting BLACK'S LAW DICTIONARY 1597 (4th ed. 1968)), *rev'd on other grounds*, 286 N.C. 534, 212 S.E.2d 154 (1975).

59. *See* Comment, *supra* note 30, at 867.

60. *See id.* at 867-73.

61. *See* 28 U.S.C. § 1292(a)(1) (1982).

62. *See* Comment, *supra* note 30, at 868 ("[T]he advantage of the case-by-case substantial right test [is] that it does not restrict the appellate courts to a black-letter rule requiring review of all injunctions, but rather allows them to examine the particular facts and the individual rights involved in deciding whether an immediate appeal should lie.").

63. *Id.* at 869.

64. *See, e.g.*, Hudspeth v. Bunzey, 35 N.C. App. 231, 241 S.E.2d 119 (denial of motion to amend answer for purpose of asserting compulsory counterclaim affects a substantial right), *disc. rev. denied*, 294 N.C. 736, 244 S.E.2d 154 (1978).

65. *See* McGinnis v. McGinnis, 44 N.C. App. 381, 387, 261 S.E.2d 491, 495 (1980).

66. 55 N.C. App. 250, 285 S.E.2d 281 (1981).

67. *See id.* at 252, 285 S.E.2d at 282. Alimony *pendente lite* is alimony paid pending final judgment of an action for alimony without divorce.

68. *Id.*

caused by interlocutory appeals altered that court's previous dictionary definition of substantial right to allow for consideration of judicial economy.[69]

It is clear that the state and federal applications of the substantial rights and collateral order doctrines differ. If the federal doctrine, as applied in *Abney*, is not constitutionally based, then it would appear not to be controlling in state court. However, the constitutional overtones of the Supreme Court's statement in *Abney* that a defendant's challenge must be reviewable before a final judgment if he is to enjoy the "full protection" of the double jeopardy clause suggest that the dissenting judge in *Jones* may have been correct in his assertion that Jones does have a constitutional right to immediate appeal.[70] A number of state courts have found that *Abney* rests in part on constitutional grounds that are applicable to both state and federal courts.[71] Nevertheless, the Court's preface to its discussion of the double jeopardy issue in *Abney* refutes such a conclusion. The Court observed that "it is well settled that there is no constitutional right to an appeal"[72] and noted that there was no right to appeal in criminal cases in the federal courts until 1889.[73]

Conceding that the right to appeal is purely a creature of statute, the dissenting judge in *Jones* nevertheless contended that no difference exists between the "final decision" requirement of section 1291 and the "final judgment" requirement of section 7A-27(b) of the North Carolina General Statutes.[74] Therefore, the dissenting judge argued that the constitutional principles of *Abney* are equally applicable to North Carolina law.[75] This argument has some merit because both the final judgment and the final decision requirement derive from the same common-law root.[76] Both requirements have the same practical effect of preventing piecemeal review.[77] Moreover, in the specific context of a criminal case, a final decision and a final judgment would appear to mean the same thing: the ultimate determination of the defendant's guilt or innocence. North Carolina's final judgment requirement and the federal final decision requirement are

69. *See* Comment, *supra* note 30, at 873 (*Stephenson* "may foreshadow a trend to constrict the path of interlocutory appeals by a re-evaluation of 'substantiality.' ").

70. The Court's assertion that the denial of Abney's interlocutory appeal would deny him full protection of the double jeopardy clause can be read as a suggestion that the denial works to deprive the defendant of rights guaranteed by the fifth amendment.

71. *See* State v. Janvrin, 121 N.H. 370, 430 A.2d 152 (1981) (citing *Abney* for the proposition that interlocutory appeal is necessary prior to retrial in order to protect defendant's constitutional right to be free from double jeopardy); State v. Berberian, 122 R.I. 693, 696, 411 A.2d 308, 309 (1980) ("[a]lthough the Court in [*Abney*] was construing statutory provisions . . . Mr. Chief Justice Burger appeared to base the majority opinion of the Court at least in part on constitutional grounds"; court found that *Abney* established constitutional right to appeal).

72. *Abney*, 431 U.S. at 656.

73. *Id.* at 656 & n.3.

74. *Jones*, 67 N.C. App. at 418, 313 S.E.2d at 267 (Johnson, J., dissenting).

75. *Id.*

76. *See supra* notes 29-32 and accompanying text.

77. *Compare* Tridyn Indus., Inc. v. American Mut. Ins. Co., 296 N.C. 486, 487, 251 S.E.2d 443, 446 (1979) (" 'Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for a single appeal from the final judgment.' ") (quoting Raleigh v. Edwards, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951)) *with Abney*, 431 U.S. at 656 ("[T]here has been firm congressional policy against interlocutory or 'piecemeal' appeals.").

at odds on this point. Under North Carolina law, a final judgment is one that " 'disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.' "[78] Under the federal collateral order doctrine, an order that does not dispose of the cause as to all the parties and that does leave issues to be determined in the trial court still may be considered a final decision provided it meets the *Cohen* criteria.[79] As Justice Jackson has noted, it was specifically a "final *decision* that Congress ha[d] made reviewable," and that "[w]hile a final judgment is always a final decision, there are instances in which a final decision is not a final judgment."[80] Arguably *Jones* embodies just such an instance. Indeed, one state court has found *Abney*'s interpretation of a final decision to be inapplicable to its own final judgment rule based on Justice Jackson's reasoning.[81]

Before disposing of the case completely, it should be noted that *Abney*, although not dispositive, is persuasive on the substantial rights issue. In the course of determining whether an interlocutory denial of a motion to dismiss on double jeopardy grounds was a final decision, the Court in *Abney* had to determine whether that denial "involved an important right which would be 'lost, probably irreparably' " if review had to await a final judgment.[82] The standard the Court used is strikingly similar to the standard applied in *Jones*; that is, whether the order "deprives the appellant of a substantial right which he would lose if the order is not reviewed before final judgment."[83] To say an *important* right that would be lost if not reviewed before a final judgment is not the same as a *substantial* right that would be lost if not reviewed before a final judgment is illogical.

Although the *Jones* decision may be sound constitutionally, it reflects an incomplete analysis of the North Carolina case law on the substantial rights issue. The court initially compared the defendant's right to be free from double jeopardy with the right to avoid a rehearing or trial.[84] The court then cited two civil cases, *Tridyn Industries, Inc. v. American Mutual Insurance, Co.*[85] and *Waters v. Qualified Personnel, Inc.*,[86] for the proposition that the right to avoid a

78. Atkins v. Beasley, 53 N.C. App. 33, 36, 279 S.E.2d 866, 869 (1981) (quoting Veazy v. Durham, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950)).

79. A collateral order by its very nature is an order that is collateral to the principal issue in the case.

80. Stack v. Boyle, 342 U.S. 1, 12 (1951) (separate opinion of Justice Jackson) (contending that order denying reduction in bail should be regarded as final decision even though order does not constitute final judgment, which, in a criminal trial, could be appealed only upon sentencing).

81. *See* State v. Fisher, 2 Kan. Ct. App. 353, 579 P.2d 167 (1978).

82. *See supra* note 48 and accompanying text.

83. *Jones*, 67 N.C. App. at 415, 313 S.E.2d at 266 (citing Blackwelder v. Department of Human Resources, 60 N.C. App. 331, 299 S.E.2d 777 (1983)).

84. *Id.*

85. 296 N.C. 486, 251 S.E.2d 443 (1979). In *Tridyn*, the superior court judge had granted plaintiff's motion for summary judgment on the issue of defendant's liability to plaintiff under a general insurance contract issued by defendant. The court reserved for trial the issue of damages. The court of appeals found that the order granting partial summary judgment did not deprive the defendant of any substantial right. The supreme court affirmed that the "case should be reviewed, if at all, in its entirety and not piecemeal." *Id.* at 494, 251 S.E.2d at 449.

86. 294 N.C. 200, 240 S.E.2d 338 (1978). In *Waters*, the superior court judge had set aside an order of summary judgment entered in favor of defendant on the ground that defendant had failed to

rehearing or trial is not substantial.[87] The court offered no explanation for its conclusion that the rights asserted in those cases were comparable to those asserted by Jones. In fact, examination of the practical effects of both *Tridyn* and *Waters* indicates that the rights asserted in those cases are *not* comparable to the constitutional right asserted by Jones. The practical effect of the decision in *Tridyn* was to subject defendant to a single trial on the issue of damages.[88] The practical effect of *Waters*, at worst, was to subject defendant to a single trial on the merits and, at best, to a rehearing on a motion for summary judgment.[89] In neither case was there a danger that the defendant would have to endure the "personal strain," "expense," or even the "embarrassment" of a second trial.[90]

Given that only a single trial was involved in both *Tridyn* and *Waters*, it is difficult to see the relevance of either case to the issue in *Jones*. The issue in *Jones* was not whether the defendant had a right to avoid an initial trial, but whether the defendant had a right to avoid a second criminal trial. Reliance on civil cases might be justified by the scarcity of North Carolina criminal cases involving interlocutory appeals.[91] The court, however, chose the wrong civil cases on which to rely; it failed to consider two cases that are relevant to the second trial issue. In *Oestreicher v. American National Stores, Inc.*[92] the Supreme Court of North Carolina held that the plaintiff had an immediate right to appeal the decision to grant defendant's motion for summary judgment as to some of plaintiff's claims when the effect would be to subject plaintiff to a possible second trial on these claims if the granting of the motion were ultimately found to be erroneous.[93] Similarly, the court of appeals in *Roberts v. Heffner*[94]

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file notice of hearing in conjunction with its motion for summary judgment. The supreme court held that such an order "setting aside without prejudice a summary judgment on the grounds of procedural irregularity . . . is not immediately appealable." *Id.* at 208, 240 S.E.2d at 343.

87. *Jones*, 67 N.C. App. at 416, 313 S.E.2d at 266.

88. *See* Comment, *supra* note 30, at 870-71 (citing *Tridyn* for the proposition that "orders for partial summary judgment that merely determine the liabilities of parties while reserving the issue of damages for trial do not affect substantial rights").

89. *See* Survey of Developments in North Carolina Law—Civil Procedure, 1978, 57 N.C.L. REV. 891, 909 (1979) ("In *Waters* . . . denial of the right to appeal the setting aside of defendant's summary judgment necessitates only a rehearing of the summary judgment and at most one trial.").

90. *See Abney*, 431 U.S. at 661.

91. Judge Johnson cited State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972), apparently the only criminal case in North Carolina allowing an interlocutory appeal, in his dissent. *See Jones*, 67 N.C. App. at 419, 313 S.E.2d at 267 (Johnson, J., dissenting). In *Bryant* the North Carolina Supreme Court found that an interlocutory order of a superior court judge authorizing police to retain obscene material illegally seized from defendant's store was immediately appealable. The court in *Bryant* found that a defendant may appeal immediately an order that " 'may destroy or impair or seriously imperil some substantial right of the appellant.' " *Bryant*, 280 N.C. at 411, 185 S.E.2d at 856 (quoting State v. Childs, 265 N.C. 575, 578, 144 S.E.2d 653, 655 (1965) (quoting Privette v. Privette, 230 N.C. 52, 53, 51 S.E.2d 925, 926 (1949))).

Childs, though denying the criminal defendant's interlocutory appeal of an order denying his motion for change of venue to another county, implicitly authorizes interlocutory appeals in criminal cases. *See Childs*, 265 N.C. at 578, 144 S.E.2d at 655. *Bryant* appears to be the only case in which such an appeal has ever been granted.

92. 290 N.C. 118, 225 S.E.2d 797 (1976).

93. *Id.* at 130, 225 S.E.2d at 805. In *Oestreicher*, the trial court granted summary judgment for defendant on two of plaintiff's three related claims. The supreme court held that plaintiff had a substantial right to have all three claims litigated in one action; thus, the grant of summary judgment was immediately appealable. If plaintiff had been forced to try his remaining claim, and if, on appeal

found that "the possibility of being forced to undergo two full trials on the merits . . . makes it clear that the judgment in question works an injury to defendants if not corrected before an appeal from a final judgment."[95] As the dissent in *Jones* noted, it seems illogical to hold that the mere possibility of facing a second trial on the merits in a civil case involves a substantial right, while the virtual certainty of facing a second criminal trial does not.[96]

The court in *Jones* also stated that there was no right to immediate appeal from a motion to dismiss because "such refusal generally will not seriously impair any right of the defendant that cannot be corrected upon appeal . . . ."[97] There are two problems with this assertion. First, the case cited for this proposition, *North Carolina Consumers Power, Inc. v. Duke Power Co.*,[98] recognized that there is a right to immediate appeal from a refusal to dismiss a cause of action for want of jurisdiction.[99] Thus, the court's conclusion is based on faulty authority. Second, regardless of the general effect of a refusal to dismiss an action, such a refusal on the facts in *Jones* impairs a right of the defendant that cannot be corrected on appeal. Even if a post-conviction appeal reverses an unfair conviction, the defendant still will have been unconstitutionally subjected to a second trial.[100] When the right not to be subject to a second trial is the right at issue, an appeal after that trial cannot erase the fact that a trial has already occurred.

In response to this last contention, the court in *Jones* stated that defendant's rights were adequately protected by his right to petition the court for prerogative writs.[101] The fallacy of this statement is illustrated by the consequences of Jones' appeal from his conviction in the third trial. Following the second trial court's denial of Jones' motion to dismiss on double jeopardy grounds, Jones petitioned the North Carolina Supreme Court for writs of supersedeas and prohibition, arguing that his retrial should be barred by double jeopardy principles.[102] The court refused to exercise its discretion and denied the petitions.[103] When Jones finally was allowed an appeal from the final judgment entered in his third trial, his conviction was reversed.[104] In the words of the dissenting judge, "Nothing in [the appellate files] indicates that the appellate courts considered

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from a final judgment, the summary judgment against plaintiff's two other claims had been overturned, the plaintiff would have been forced to face a second trial on those two claims. *Id.*

94. 51 N.C. App. 646, 277 S.E.2d 446 (1981).

95. *Id.* at 650, 277 S.E.2d at 449. Defendants in *Roberts* appealed from a trial court order dismissing their counterclaim for damages in excess of set-off to plaintiff's claims. The court of appeals found that if the denial of the counterclaim in excess of the set-off amount were overturned on defendant's appeal from a final judgment, defendants would be forced to undergo a second trial to determine their full measure of damages.

96. *Jones*, 67 N.C. App. at 418, 313 S.E.2d at 268 (Johnson, J., dissenting).

97. *Id.* at 416, 313 S.E.2d at 266 (citing North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 436, 206 S.E.2d 178, 180 (1974)).

98. 285 N.C. 434, 206 S.E.2d 178 (1974).

99. *Id.* at 438, 206 S.E.2d at 181.

100. *Jones*, 67 N.C. App. at 418, 313 S.E.2d at 267 (Johnson, J., dissenting).

101. *Id.* at 416, 313 S.E.2d at 266.

102. *Id.* at 414, 313 S.E.2d at 265.

103. *Id.*

104. *See supra* note 22.

the merits of defendant's various petitions, despite clear evidence of patently arbitrary judicial action."[105] The availability of prerogative writs did not offer Jones adequate protection; it offered him no protection at all.

One commentator has suggested that in interpreting the substantial rights language of section 1-277 North Carolina courts have shifted their focus from the protection of individual rights to concern for judicial economy.[106] It is conceivable that the majority in *Jones* was haunted by the "specter of dilatory appeals" when it endorsed an opinion that was founded neither in law nor in logic.[107] Even assuming that concerns for adjudicatory efficiency may outweigh considerations of constitutional rights in the context of appellate review, as a practical matter the court's decision in *Jones* may not be justifiable even on grounds of judicial economy. As a result of the denial of Jones' initial interlocutory appeal, the North Carolina judicial system was burdened with two full trials on the merits, two appeals, and countless petitions for discretionary writs, all of which might have been avoided by the grant of defendant's original appeal.[108]

Even disregarding the misuse of precedent and the possible absence of judicial economy, the court's decision in *Jones* is not justifiable as a matter of fairness. Regarding the concept of judicial economy, the Supreme Court has stated that "the Bill of Rights . . . [was] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency."[109] A number of state courts have recognized the wisdom of this sentiment and have permitted interlocutory appeals from orders denying motions to dismiss on double jeopardy grounds.[110] The court in *Jones*, however, was unwilling to recognize or give protection to the fragile value of freedom from double jeopardy despite the North Carolina courts' protection of seemingly less substantial rights in the past. In contrast to the result in *Jones*, the courts have singled out for protection as "substantial rights" the rights affected by court orders directing the opening of a defendant's safe,[111] prohibiting the defendant from deposing an out-of-state expert witness,[112] and requiring litigants to elect between disputed land boundaries in a land title action.[113] It is difficult to see how an order to open a safe compares with an order that has the effect of requiring the defendant to defend a second, or even third, criminal trial, in violation of that defendant's constitutional rights.

The cases relied on by the majority do not address the issue presented in

105. *Jones*, 67 N.C. App. at 418, 313 S.E.2d at 269 (Johnson, J., dissenting).

106. *See* Comment, *supra* note 30, at 857.

107. *Jones*, 67 N.C. App. at 418, 313 S.E.2d at 268 (Johnson, J., dissenting).

108. This analysis assumes that the North Carolina Court of Appeals would have reached the same conclusion had it allowed Jones' interlocutory appeal as it did when Jones appealed from the final judgment entered in his third trial.

109. Stanley v. Illinois, 405 U.S. 645, 656 (1972).

110. *See, e.g.*, Gray v. State, 36 Md. App. 708, 375 A.2d 31 (1977); State v. Janvrin, 121 N.H. 370, 430 A.2d 152 (1981); State v. Berberian, 122 R.I. 693, 411 A.2d 308 (1980).

111. *See* State *ex rel.* Hooks v. Flowers, 247 N.C. 558, 562, 101 S.E.2d 320, 323 (1958).

112. *See* Tennessee-Carolina Transp., Inc. v. Strick Corp., 291 N.C. 618, 625, 231 S.E.2d 597, 601 (1977).

113. *See* Jenkins v. Trantham, 244 N.C. 422, 427, 94 S.E.2d 311, 316 (1956).

Jones. The court's suggestion that prerogative writs can protect a defendant who has been forced to endure two unconstitutional trials, when his efforts to procure such writs failed, is illogical. While the majority was correct in concluding that the Supreme Court's decision in *Abney v. United States* was not dispositive, the logic of that decision, nevertheless, should have been persuasive. Without an opportunity for immediate appeal of an order denying defendant's motion to dismiss on double jeopardy grounds, a defendant cannot enjoy the "full protection" guaranteed by both the United States and the North Carolina constitutions. Understandably, perhaps, criminal appeals are in disfavor. Constitutional rights, however, should not be. The decision of the court of appeals in *State v. Jones* should not stand.

KAREN E. RHEW