

IN THE SUPREME COURT OF OHIO  
COLUMBUS, OHIO

STATE OF OHIO,

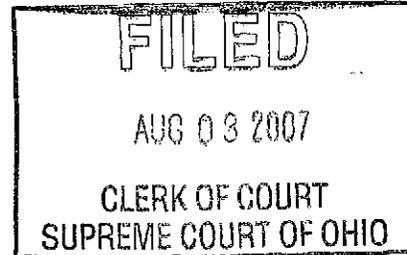
CASE NO. 07-1203

Plaintiff-Appellee,

vs.

BRIAN L. BALDERSON,

Defendant-Appellant.



ON MOTION FOR LEAVE TO APPEAL FROM  
THE OHIO COURT OF APPEALS FOR STARK COUNTY,  
FIFTH APPELLATE DISTRICT,  
CASE NO. 2006-CA-00226

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MEMORANDUM IN RESPONSE  
OF PLAINTIFF-APPELLEE,  
STATE OF OHIO

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JOHN D. FERRERO,  
PROSECUTING ATTORNEY,  
STARK COUNTY, OHIO

DAVID H. BODIKER  
Ohio Sup. Ct. Reg. No. 0016590  
Ohio Public Defender

By: RONALD MARK CALDWELL  
Ohio Sup. Ct. Reg. No. 0030663  
Assistant Prosecuting Attorney  
110 Central Plaza, South  
Suite 510  
Canton, Ohio 44702-1413  
(330) 451-7897

KENNETH R. SPIERT  
Ohio Sup. Ct. Reg. No. 0038804  
Assistant State Public Defender  
Office of the Ohio Public Defender  
8 East Long Street, 11th Floor  
Columbus, Ohio 43215  
(614) 466-5394

FAX: (330) 451-7965

FAX: (614) 644-0703

Counsel of Record for Plaintiff-Appellee

Counsel of Record for Defendant-  
Appellant

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## WHY THIS CASE SHOULD NOT BE ACCEPTED FOR REVIEW

The Supreme Court of Ohio should not accept this case for review because it does not involve a substantial constitutional question, and is not of public or great general interest.

Brian L. Balderson attempts to manufacture an issue between void and voidable judgments in order to somehow resurrect his moribund challenge to the renotification of his post-release control obligations. This Court clearly held recently in *Cruzado* that sentencing judgment entries that omit noting that a defendant has been notified of his post-release control obligations are void. Balderson had no expectation in the finality of a void judgment, hence no constitutional right was implicated by the trial court's actions in this case. The trial court simply had Balderson return from prison, renotify him of his post-release control obligations (which had been done at the original criminal sentencing hearing), and then memorialize this renotification by judgment entry (which had been omitted from the original sentencing entry).

The appeal should accordingly be rejected.

The State, however, recognizes that the court of appeals in this case based its ruling, overruling Balderson's challenges to his renotification, on its earlier *Rich* decision.<sup>1</sup> This Court has already accepted the appeal in the *Rich* case and has held that case for decision in the *Simpkins* case from Cuyahoga County.<sup>2</sup> If the Court should accept this case for review, it should do so in the same manner as the *Rich* case.

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<sup>1</sup>See *State v. Rich*, Stark App. No. 2006-CA-00171, 2007-Ohio-362, 2007 WL 220176.

<sup>2</sup>See *State v. Rich*, 114 Ohio St.3d 1424, 2007-Ohio-2904, 868 N.E.2d 679. See also *State v. Simpkins*, Cuyahoga App. No. 87692, 2006-Ohio-6028, 2006 WL 3317928, *accepted for review* (2007), 113 Ohio St.3d 1440, 2007-Ohio-1266, 863 N.E.2d 657.

**STATEMENT OF THE CASE AND FACTS**

In 1998, Brian L. Balderson was charged by indictment returned by the Stark County Grand Jury with one count each of aggravated vehicular homicide (with a DUI specification), driving under the influence, failure to comply, receiving stolen property, and driving under suspension. The case proceeded to trial by jury in the Stark County Court of Common Pleas, during which Balderson entered into a negotiated plea agreement with the State of Ohio. In exchange for a guilty plea to the charges and specification, Balderson would receive a prison term of eight and one-half years. Pursuant to those terms, Balderson pleaded guilty, after which the court imposed the agreed upon sentence.<sup>3</sup>

During the guilty plea and sentencing hearing, the trial court notified Balderson of his post-release (PRC) obligations as part of his sentence. The trial court specifically notified Balderson that his sentence included a period of post-release control of three years.

After prison release you may have up to 3 years post release control. The period of post release control is optional in this case. For violations the Parole Board may impose more restrictive or longer parole sanction including a 9 month prison term for each violation up to a maximum of 50 percent of the prison term stated at sentencing.

If the violation is a new felony, you may get the greater of one year or time remaining on post release control plus a prison term for the new felony conviction.

T.(I) at 15.

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<sup>3</sup>The court imposed a prison term of five years for the aggravated vehicular homicide conviction, eighteen months for both the DUI and failure to comply convictions, and a six-month term for the receiving stolen property conviction. The court imposed these prison terms consecutively. With regard to the misdemeanor driving under suspension charge, the court imposed a concurrent six-month prison term.

The sentencing judgment entry admittedly did not make reference to these PRC obligations,<sup>4</sup> and the State did not appeal.

On June 26, 2006, the trial court conducted another hearing to review Balderson's PRC obligations. The court noted that it had notified him of these obligations at the 1998 hearing, but had failed to include this notification in its judgment entry.<sup>5</sup> At this 2006 hearing, the court once again notified Balderson of his PRC obligations.

The Court did indicate to you at the time of sentencing that you would be subject to post-release control, although the record will reflect that the Court indicated that it was optional. However, out of an abundance of caution, and given the nature of the offenses, the Court is going to again indicate to you that after prison release, you will have a three year period of post-release control. The period of post-release control is mandatory in this case.

T.(II) 5.

The trial court then proceeded to notify Balderson of the consequences of violating his PRC.<sup>6</sup> Balderson personally stated to the court that he understood these obligations, but objected to them. Balderson noted that the court had originally stated at the 1998 sentencing hearing that PRC was a possibility instead of mandatory.<sup>7</sup> The trial court acknowledged this difference.

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<sup>4</sup>After his sentencing, Balderson tried to have his convictions vacated via both a Crim. R. 32.1 motion to withdraw guilty plea and a R.C. 2953.21 petition for post-conviction relief. See *State v. Balderson* (Sept. 27, 1999), Stark App. No. 1999-CA-00110, unreported, 1999 WL 770778 (affirming the trial court's overruling the motion to withdraw guilty plea) and *State v. Balderson* (July 10, 2000), Stark App. No. 2000-CA-00036, unreported, 2000 WL 968690, appeal denied (2000), 90 Ohio St.3d 1467, 738 N.E.2d 380 (affirming dismissal of PCR petition).

<sup>5</sup>T.(II) 3.

<sup>6</sup>T.(II) 5-6.

<sup>7</sup>T.(II) 6.

I am acknowledging that I am modifying the notice to indicate that in this particular case, because of the nature of the offense, that it may be, in fact, a mandatory three year period of post-release control.

T.(II) 7.

Balderson again objected, this time through counsel, arguing that this notification violated due process and double jeopardy principles. The court overruled the objections, further noting that a new judgment entry would be forthcoming to reflect his PRC obligations.<sup>8</sup>

On June 29, 2006, the trial court filed a nunc pro tunc judgment entry of the 1998 Change of Plea and Sentence Judgment Entry. This nunc pro tunc entry, however, did not include any reference to Balderson's PRC obligations.

On June 30, 2006, the court conducted another hearing on Balderson's PRC obligations to address the mandatory-optional issue. Because the guilty plea form that was executed to reflect the negotiated plea agreement indicated that PRC was optional, the court notified Balderson that PRC control in this case would be optional.

... [T]he Court has had another opportunity to review and consider this matter. And upon looking at the plea form, the plea form did indicate an optional three-year period of post-release control, as did the original sentencing transcript.

And so the Court is going to reaffirm what was said at the time of sentencing and also indicated at the time of the plea and written in the plea form, and the Court will reaffirm that the community control in this case -- I'm sorry, that the post-release control, after your release from prison, Mr. Balderson, is an optional three-year period of post-release control. That would be up to a maximum of three years.

...

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<sup>8</sup>T.(II) 7.

Again, to reiterate and underscore, this was, in fact, the community control [*sic*] notification that was set forth in the plea form. This is what the Court indicated at the time of sentencing. And, therefore, that will be reflected in the Court's Judgment Entry as well.

T.(III) 3-4.

On August 4, 2006, the trial court filed another nunc pro tunc judgment entry of the 1998 sentencing entry, as well as a separate judgment entry captioned as an Order. In this new nunc pro tunc judgment entry, the court added a paragraph about Balderson's PRC obligations.

The Court had further notified the defendant that post release control is optional in this case up to a maximum of 3 years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code section 2967.28. The defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control.

*State v. Balderson*, Stark County Court of Common Pleas Case No. 1998-CR-0838, Judgment Entry - Change of Plea and Sentence Nunc Pro Tunc (as of 6/29/06) (filed Aug. 4, 2006), at 6.

In a separate judgment entry, the court filed the same day, the court specifically noted that it had notified Balderson of his PRC obligations.

The Court finds that on September 22, 1998, as reflected by the transcript of proceedings and the plea form, that Defendant was previously advised of his post release control obligations.

Whereupon in open court, the Court re-advised the Defendant of his post release control obligations as had been done on the date of his plea.

Whereupon, the Court advised the Defendant that post release control is optional in this case up to a maximum of three (3) years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code Section 2967.28. The Defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and

any prison term for violation of that post release control.

*State v. Balderson*, Stark County Court of Common Pleas Case No. 1998-CR-0838, Order (filed Aug. 4, 2006), at 1-2.

Balderson appealed both of these judgment entries of the trial court to the Court of Appelas for Stark County (Fifth Appellate District). Balderson raised two assignments of error: one challenged the renotification of his post-release control obligations, and the other challenged the trial court's use of a nunc pro tunc judgment entry to memorialize the renotification. The court of appeals overruled these two assignments of error, and affirmed the trial court.<sup>9</sup>

Balderson thereafter filed the instant appeal to this Court.

## **ARGUMENT**

### **PROPOSITION OF LAW NO. I**

**A TRIAL COURT HAS AUTHORITY TO RENOTIFY A DEFENDANT OF HIS POST-RELEASE CONTROL OBLIGATIONS AT ANY TIME AFTER THE IMPOSITION OF THE CRIMINAL SENTENCE BUT BEFORE THE COMPLETION OF THE PRISON TERM, WITHOUT VIOLATING DOUBLE JEOPARDY PRINCIPLES.**

Balderson's first proposition of law challenges the decision of the court of appeals finding that the trial court did not err in notifying him of his post-release control obligations after he had originally been sentenced but before he has served his term of imprisonment. He essentially argues that he had a reasonable expectation of finality in his sentence since the State did not

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<sup>9</sup>*State v. Balderson*, Stark App. No. 2006-CA-00226, 2007-Ohio-2463, 2007 WL 1470447.

appeal the original sentence, and double jeopardy thus precludes the “imposition” of his post-release control obligations after the fact. Balderson’s argument, however, is without merit. Balderson does not have a reasonable expectation in the finality of a void (or voidable) sentence. Furthermore, the trial court did not impose a new sentence. Post-release control was statutorily a part of his original sentence. The trial court’s subsequent action of renotifying Balderson of these obligations, and then memorializing this renotification simply allows the parole board to place him on post-release control after his release from prison.

In *Cruzado*,<sup>10</sup> the Ohio Supreme Court reviewed whether a trial court had authority to conduct a resentencing hearing in order to notify an offender of his PRC obligations. At the original sentencing hearing in 2003, the trial court notified the offender incorrectly about his PRC obligations, and did not memorialize that notification by judgment entry. In response to the supreme court’s *Hernandez* decision,<sup>11</sup> the trial court conduct a resentencing hearing in 2006, at which time the court notified the offender correctly of his PRC obligations, as well as memorializing that notification by judgment entry. The offender sought a writ of prohibition against the trial judge on the grounds that he had no authority to conduct such a resentencing procedure after the time for appeal any invalid sentence had passed. The supreme court rejected this argument, finding that a criminal sentence that omitted a correct notification of an offender’s PRC obligations was void, and that trial courts have the authority to correct such void sentences at any time after the original sentence until the expiration of prison term imposed at that original sentencing hearing.

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<sup>10</sup>*State, ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263.

<sup>11</sup>*Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301.

In so ruling, this Court relied upon its earlier *Beasley* decision<sup>12</sup> to reaffirm that a trial court has authority to correct a void sentence.<sup>13</sup> The court next determined that a sentence that does not include the PRC notification is a void sentence. The court held that any sentence that does not include statutory requirements is “a nullity or void,” and the proper remedy is resentencing.

Judge Zaleski’s error falls within the first exception. In the July 2003 sentencing entry for Cruzado’s robbery conviction, Judge Zaleski did not include the three-year postrelease-control term, which R.C. 2967.28(B)(2) requires for a second-degree-felony conviction such as Cruzado’s. “Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void.” *Beasley*, 14 Ohio St.3d at 75, 14 OBR 511, 471 N.E.2d 774. “[W]here a sentence is void because it does not contain a statutorily mandated term, the proper remedy is \* \* \* to resentence the defendant.” *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶23.

*Cruzado*, supra at ¶ 20 (footnote omitted).

This Court noted, per *Hernandez*, that the trial court’s jurisdiction to resentence was limited by the term of imprisonment. In other words, the trial court’s jurisdiction terminates upon the offender’s completion of his prison term. Until that time, however, the trial court retains jurisdiction to correct a void sentence.<sup>14</sup>

The holding of this Court’s *Cruzado* decision was clear and unambiguous. The Court, however, did avoid deciding the double jeopardy claim raised by Cruzado since such claims are

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<sup>12</sup>*State v. Beasley* (1984), 14 Ohio St.3d 74, 471 N.E.2d 774.

<sup>13</sup>*Cruzado*, supra at ¶ 19.

<sup>14</sup>See *Cruzado*, supra at ¶ 32 (“Based on the foregoing, Judge Zaleski did not lack jurisdiction, much less *patently and unambiguously* lack jurisdiction, to correct Cruzado’s sentencing entry *before his journalized sentence had expired.*”) (emphasis in original).

not cognizable in prohibition actions.<sup>15</sup> The issue, however, is without merit since the trial court did not impose a new sentence upon Balderson in this case.

In support of his double jeopardy argument, Balderson relies primarily on the United States Supreme Court's *DiFrancesco* decision.<sup>16</sup> This decision, however, does not support Balderson's double jeopardy claim, and in fact mitigates against it since it implicitly recognized that double jeopardy principles do not bar resentencing in response to a void sentence. Since any original sentence that omitted a notification of a defendant's PRC obligations is void per *Cruzado*, Balderson's argument that correcting a void sentence violates double jeopardy is without merit.

In determining whether the government's statutory right to appeal a criminal principle violates double jeopardy rights of a criminal defendant, the Supreme Court noted in *DiFrancesco* that there is a difference between a jury's verdict of acquittal and a criminal sentence in the finality and conclusiveness that is attached. The correct focus of double jeopardy analysis is not on the government's right to appeal in itself, but the relief requested by that appeal.

The double jeopardy focus, thus, is not on the appeal but on the relief that is requested, and our task is to determine whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal. We conclude that neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy support such an equation.

*DiFrancesco*, 449 U.S. at 132.

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<sup>15</sup>*Cruzado*, supra at ¶ 31.

<sup>16</sup>*United States v. DiFrancesco* (1980), 449 U.S. 117.

In concluding that a sentence does not have the degree of finality as an acquittal for double jeopardy purposes, the Supreme Court looked to its earlier *Bozza* decision.<sup>17</sup> In *Bozza*, the defendant had been convicted of a federal crime that required a mandatory minimum sentence of imprisonment and a fine. The trial court, however, only imposed the prison term at the original sentencing hearing. The court thereafter recalled the defendant and imposed both the prison term and the fine. The Supreme Court concluded that the defendant's double jeopardy rights had not been violated. As the *Bozza* Court noted, "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner."<sup>18</sup>

In addition, the *DiFrancesco* Court noted that double jeopardy jurisprudence does not preclude the imposition of a more severe sentence after a defendant's successive appeal on his conviction and sentence.<sup>19</sup>

Balderson focuses and relies upon language in *DiFrancesco* concerning a defendant's expectation of finality in his criminal sentence. In this regard, the Supreme Court noted:

The defendant, of course, is charged with knowledge of the statute and its appeal provisions, and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired.

*DiFrancesco*, 449 U.S. at 136.

Balderson's reliance on this passage is misplaced. While a defendant may have an

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<sup>17</sup>*Bozza v. United States* (1947), 330 U.S. 160. See *DiFrancesco*, 449 U.S. at 134-135.

<sup>18</sup>*Bozza*, 330 U.S. at 166-167.

<sup>19</sup>*DiFrancesco*, 449 U.S. at 135-136. See also *North Carolina v. Pearce* (1969), 395 U.S. 711, 720, 722.

expectation of finality after any appeal is concluded or the time to appeal has expired, this does not mean that this expectation is on par with the expectation of finality attached to a verdict of acquittal. As the *DiFrancesco* Court noted, “The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be.”<sup>20</sup> This expectation of finality is to be contrasted with the finality attached to an acquittal.

The double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence. We have noted above the basic design of the double jeopardy provision, that is, as a bar against repeated attempts to convict, with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent. These considerations, however, have no significant application to the prosecution’s statutorily granted right to review a sentence. . . . The defendant’s primary concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him. The defendant is subject to no risk of being harassed and then convicted, although innocent.

*DiFrancesco*, 449 U.S. at 136.

Balderson therefore overstates *DiFrancesco* to argue that double jeopardy precludes and adjustment, correction, or modification of sentence once an appeal time runs based on some expectation of finality.

Finally, this expectation of finality must be in accordance with law. A trial court has the authority to correct a void sentence, as the supreme court recently noted in *Cruzado*. This authority has long existed.<sup>21</sup> As this Court noted in its *Beasley* decision, a sentence that ignores

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<sup>20</sup>*DiFrancesco*, 449 U.S. at 137.

<sup>21</sup>The *Cruzado* court cited to its earlier decision of *State v. Beasley* (1984), 14 Ohio St.3d 74, 75, 471 N.E.2d 774, 775, in support of this proposition of law. See also *State v. Garretson*

or omits statutorily required punishments is a void sentence, and jeopardy does not attach to a void sentence.

Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void. The applicable sentencing statute in this case, R.C. 2929.11, mandates a two to fifteen year prison term and an optional fine for felonious assault. The trial court disregarded the statute and imposed only a fine. In doing so the trial court exceeded its authority and this sentence must be considered void. Jeopardy did not attach to the void sentence, and, therefore, the court's imposition of the correct sentence did not constitute double jeopardy.

*Beasley*, 14 Ohio St.3d at 75, 471 N.E.2d at 775.

Since the originally sentencing entry in this case did not include the PRC notification, Balderson's expectation of finality was minimal given the fact that the trial court could correct this void portion of the sentence at any time before the expiration of his prison sentence. Balderson's double jeopardy argument, therefore, is without merit.

For the foregoing reasons, the proposition of law should be rejected, and this appeal dismissed for want of a substantial constitutional question.

### **PROPOSITION OF LAW NO. II**

#### **A NUNC PRO TUNC ENTRY IS PROPER WHEN USED TO REFLECT WHAT THE TRIAL COURT ACTUALLY DECIDED.**

Balderson's second proposition of law challenges the trial court's authority to file a nunc pro tunc judgment entry in this case. He argues that the entry filed by the trial court was not

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(2000), 140 Ohio App.3d 554, 559, 748 N.E.2d 560, 564.

really a nunc pro tunc entry, and therefore exceeded the scope of a court's inherent authority to correct mistakes in its judgment entries. The court, however, has jurisdiction to file its correcting judgment entry to reflect what had occurred at the original sentencing hearing, as well as during the subsequent resentencing hearings, whether it is labeled a nunc pro tunc entry, amending entry, correcting entry, or the like. In addition, the court in this case file a separate contemporaneous judgment entry, entitled "Order," memorializing the PRC notification at the original and subsequent sentencing hearings. The proposition of law is without merit.

The trial court's second nunc pro tunc judgment entry in this case memorialized what had occurred at the original sentencing hearing, i.e., the notification of Balderson's PRC obligations upon his guilty plea, and that these obligations were part of his criminal sentence.<sup>22</sup> In other words, it simply stated and reflected what had occurred at the original sentencing hearing, at which Balderson was notified of his PRC obligations. As this Court noted in its *Cruzado* decision, nunc pro tunc entries are permitted to reflect what the court actually decided.

Although courts possess inherent authority to correct clerical errors in judgment entries so that the record speaks the truth, "nunc pro tunc entries 'are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided.' " *Mayer*, 97 Ohio St.3d 276, 2002-Ohio-6323, 779 N.E.2d 223, ¶ 14, quoting *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St.3d 158, 164, 656 N.E.2d 1288.<sup>23</sup>

*Cruzado*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 29 (footnote added).

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<sup>22</sup>Cf. *Ayers*, supra (upholding nunc pro tunc judgment entry reflecting notification of PRC obligations).

<sup>23</sup>See *State ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 2002-Ohio-6323, 779 N.E.2d 223.

Furthermore, the trial court in this case filed a separate judgment entry, contemporaneous with the second nunc pro tunc judgment entry, that also notified Balderson of his PRC obligations. The order noted that Balderson had been notified initially at the original sentencing hearing, and was again notified at the 2006 resentencing hearings. The order noted what his PRC obligations were. Thus, any defect in the nunc pro tunc judgment entry is remedied by the separate order.

The second proposition of law is accordingly without merit.

**JOHN D. FERRERO,  
PROSECUTING ATTORNEY,  
STARK COUNTY, OHIO**

By: *Ronald Mark Caldwell*  
RONALD MARK CALDWELL  
Ohio Sup. Ct. Reg. No. 0030663  
Assistant Prosecuting Attorney  
110 Central Plaza, South  
Suite 510  
Canton, Ohio 44702-1413  
(330) 451-7897  
FAX: (330) 451-7965

Counsel for Plaintiff-Appellee

**PROOF OF SERVICE**

A copy of the foregoing MEMORANDUM IN RESPONSE was sent by ordinary U.S. mail this 2nd day of August, 2007, to DAVID H. BODIKER and KENNETH R. SPIERT, counsel for defendant-appellant, at Office of the Ohio Public Defender, 8 East Long Street, 11th Floor, Columbus, Ohio 43215.



RONALD MARK CALDWELL  
Ohio Sup. Ct. Reg. No. 0030663  
Assistant Prosecuting Attorney  
110 Central Plaza, South  
Suite 510  
Canton, Ohio 44702-1413  
(330) 451-7897

FAX: (330) 451-7965

Counsel for Plaintiff-Appellee