ORIGINAL

IN THE SUPREME COURT OF OHIO

Case No. 2009-1606

| | | |
|---|---|---|
| STATE OF OHIO | : | |
| Plaintiff-Appellee | : | |
| vs. | : | |
| | : | On Appeal from the Cuyahoga County Court of Appeals Eighth Appellate District Court CA: 91543 |
| ANDREW MILLER Defendant-Appellant | : | |

# MERIT BRIEF OF APPELLANT ANDREW MILLER


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## INTRODUCTION

A divided panel of the Eighth District, in conflict with other district courts of appeals, has held in the instant case that a trial judge retains the ability to enter a nunc pro tunc order to impose a different sentence than that stated in open court several months earlier. Trial courts who employ such remedial measure offend jurisdictional limitations, violate the multiple punishment provision of the State and federal constitutions, destroy the constitutionally protected expectation of privacy in criminal sentences, and improperly employ the procedural mechanism of "nunc pro tunc."

To make matters worse, in the instant case, the trial judge who revised the sentence was not the judge who originally imposed the sentence – the second judge merely read the transcripts from the prior proceedings and determined that the first judge made a mistake. Thus, according to the Eighth District, a successor judge now has the ability to reconsider old sentences in an effort to glean the sentencing judge's original intent.

At the same time, it is important to recognize what this case is *not* about. This is not a case where a trial judge made a mistake and corrected it immediately.[1] This is not even a case where the trial judge made a mistake and corrected it before journalization. This is a case where a party moved the trial court some seven weeks later to add restitution where restitution was never mentioned at sentencing, either verbally or via the journal entry. And this is a case where a trial court used a nunc pro tunc entry to effect such a change.

This Court is asked to adopt the two propositions presented herein and reverse the Eighth District's decision in the instant case.

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[1] Failing to recognize this distinction, the Opinion Below incorrectly relies upon the Twelfth

District 's decision in *State v. Middleton,* CA 2004-01-003, 2005-Ohio-681.

## STATEMENT OF THE CASE AND FACTS

Defendant-Appellant Andrew Miller was charged with two counts of felonious assault. Indictment. On November 14, 2007, the day that trial was scheduled to proceed, Visiting Judge Michael J. Corrigan, discussed with the Defendant a plea offer that the State of Ohio extended, which offer was also recommended by defense counsel. That offer was that the Defendant plead guilty to one count of aggravated assault, a fourth degree felony. As explained by Judge Corrigan at that time, the possible penalty included prison, a fine and restitution in the amount of $20,410, an amount the trial court indicated was unconfirmed at that time. (T. 2-5). Judge Corrigan stated that, "even if [restitution] were to be ordered," a failure to pay despite good faith efforts would not result in a violation of community controlled sanctions, assuming the defendant were placed on community controlled sanctions. (T. 6).

Following a recess, Judge Corrigan indicated to the defendant that a plea of guilty would result in a sentence to community controlled sanctions, as opposed to prison. Judge Corrigan also said "I'm gonna include restitution." Judge Corrigan indicated that he was predicting the sentence to be imposed to this extent because he was a visiting judge and the regularly assigned trial judge, Judge Lillian Greene, had already indicated to counsel that the sentence imposed would be of a similar nature. (T. 9-10).

Judge Corrigan then engaged the defendant in a plea colloquy. Judge Corrigan referred to the potential penalty as including a "potential order of restitution in the amount of $20,409.35." (T. 15). The plea was accepted. (T. 17). Judge Corrigan asked the prosecutor to "tell the victims that they're welcome to be here on November 28th?" The prosecutor agreed to do so. (T. 17).

At sentencing on November 28th, the Defendant and counsel appeared but neither the prosecution nor the victims appeared. (T. 18 ff). The Defendant was sentenced to community

controlled sanctions. Judge Corrigan imposed costs, but noted that the chances of them being paid by Mr. Miller "are between slim and none." (T. 27). Judge Corrigan explicitly did not impose a fine. (T. 26).

On January 22, 2008, approximately seven weeks later, the State of Ohio moved the trial court to reconsider its sentence and include restitution. Docket.

On March 21, 2008, the trial court, Judge Greene now presiding, held a hearing on the State's motion. The hearing was continued to April 8, 2008, so that Judge Greene could review a transcript of the plea proceedings. (T. 31-32).

At the hearing on April 8, 2008, Judge Greene ordered that restitution be included in the sentence. Judge Greene told the defendant:

> But you pled guilty to an offense with restitution as part of the plea. And that's in the record, sir, so that's the only thing I have to go on because I wasn't here.

(T. 37). Judge Greene announced that she was issuing a nunc pro tunc entry which amended the sentence to include restitution in the amount of $20,409.35. (T. 37-38).

On that same day, April 8, 2008, an order was journalized that was consistent with what Judge Greene announced in open court that same day. However, the journalized order did not include the term "nunc pro tunc." Docket, April 8, 2008.[2]

On appeal, the Eighth District, by a two to one margin, affirmed. Motions for reconsideration and to certify conflicts, respectively, were denied. This timely appeal followed.

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[2] The journal entry appears to have been prepared prior to April 8, 2008. The dates April 3 and April 4 appear on the written entry. However, journalization did not occur until April 8, 2008. Defendant is uncertain as to whether this discrepancy was the result of a clerical error. In any event, it does not appear to be material to this appeal.

## ARGUMENT

*Proposition of Law I:*

**A trial court cannot enter a judgment that includes restitution as part of a criminal sentence when restitution was not imposed at the sentencing hearing.**

The trial court lacked jurisdiction to impose restitution. As a general matter, trial courts cannot revisit their final criminal judgments. *State ex rel Cruzado v. Zaleski,* 111 Ohio St.3d 353, 2006-Ohio-5795. *Cruzado* recognizes two exceptions to this rule. First, a void sentence may be corrected. Second, a clerical error may be corrected. However, clerical errors must be "mechanical in nature and apparent on the record, which does not involve a legal decision or judgment." Id., at par. 19.

In the instant case, the original sentence was valid. Moreover, the sentencing hearing conducted by Judge Corrigan never imposed restitution. Thus, the journal entry entered pursuant to the November 28, 2007, sentencing hearing accurately reflected what took place in open court. Under *Cruzado,* this ends the inquiry.

Two district courts of appeals have addressed the issue presented herein in the specific context of an after-the-fact addition of restitution. The Fifth District Court of Appeals in *State v. Beam,* Delaware App. No. 06CAA030018, 2007-Ohio-386 and the First District Court of Appeals in *State v. Purnell,* 171 Ohio App.3d 446, 450, 2006-Ohio-6160, each held that restitution must be addressed at the sentencing hearing in such a manner that the record reflects the trial court's determination at the hearing that restitution in a particular amount is part of the sentence. *Purnell* articulated this requirement by stating:

> Therefore, the plain language of R.C. 2929.18(A)(1) establishes that if the trial court orders restitution at sentencing, it must determine the amount of restitution at that time. There is no statutory authority for the trial court to exercise continuing

> jurisdiction to modify the amount of a financial sanction. It can, however, modify the "payment terms of any restitution," id., or enter a less restrictive sanction, see R.C. 2929.15(C), or suspend the financial sanction as provided in R.C. 2929.18(G). The trial court retains authority to impose a more restrictive financial sanction only if the defendant violates the conditions of his community control. See R.C. 2929.15(B).

*State v. Purnell*, 171 Ohio App. 3d 446, 450, 2006 Ohio 6160, at par. 9.

*Beam* used similar language in reaching the same conclusion:

> A trial court is authorized to order restitution by an offender to a victim in an amount based upon the victim's economic loss. R.C. 2929.18(A)(1). The trial court is to determine the amount of restitution at the sentencing hearing. Id. The amount of the restitution must be supported by competent, credible evidence from which the court can discern the amount of the restitution to a reasonable degree of certainty. *State v. Gears* (1999), 135 Ohio App.3d 297, 733 N.E.2d 683. A trial court abuses its discretion in ordering restitution in an amount that was not determined to bear a reasonable relationship to the actual loss suffered. *State v. Williams* (1986), 34 Ohio App.3d 33, 516 N.E.2d 1270.

*Beam*, 2007 Ohio 386, at par. 15.

Constitutional considerations also prohibited imposition of restitution. The Fifth Amendment's multiple punishment prohibition precluded the trial court from adding additional punishment to an already imposed sentence. Yet, this was precisely what happened. See generally *Crist v. Bretz* (1978), 437 U.S. 28, 33 (Double Jeopardy Clause advances societal interest in protecting the integrity of final judgments). See also, *North Carolina v. Pearce* (1969) 395 U.S. 711, 720.

Moreover, Fourteenth Amendment due process recognized that Mr. Miller enjoyed a protected expectation of finality in his already imposed sentence – which did not include restitution. *United States v. Daddino* (C.A. 7 1993), 5 F.3d 262, 265. See generally, *United States v. Diffrancesco* (1980), 449 U.S. 117.

These statutory and constitutional considerations trump even an inadvertent omission by the trial court to impose restitution at the original sentencing But here, the record does not reflect that Judge Corrigan's omission was inadvertent. Judge Corrigan indicated that restitution in the amount requested by the State was a "potential" award in an amount that was still unconfirmed. (T. 2-5, 15). At the sentencing hearing, the State, which did not appear, offered no evidence of this amount. (T. passim). Moreover, Judge Corrigan, apparently noting that the Defendant was not financially stable, explicitly declined to impose a fine and noted that the defendant's ability to pay costs was "between slim and none." (T. 26-27). Accordingly, Judge Greene's conclusion, shared by the Eighth District majority, that restitution was inadvertently omitted is not well-founded in the record.

For all these reasons, the trial court erred when it imposed restitution and the restitution order should be vacated.

*Proposition of Law II.*

> **A trial court may not use a nunc pro tunc entry to impose a sentencing sanction that the trial court intended to impose but did not impose at the sentencing hearing.**

The trial court was not permitted to use a nunc pro tunc entry to add restitution. As the Ninth District noted in *State v. Battle,* Summit App. No 23404, 2007-Ohio-2475, nunc pro tunc entries can only be used in those circumstances where the trial court took a particular action but then misreported that action in the ensuing journal entry. Here, the nunc pro tunc entry does not reflect what was previously said in open court See, *State ex rel Cruzado v. Zaleski,* 111 Ohio St.3d 353, 2006-Ohio-5795, at par 19 (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.")

The court of appeals in the instant case, at par. 13, incorrectly characterized the original

omission of restitution as a type of "clerical mistake " It is not Judges do not perform a simple ministerial act when they sentence a defendant. Rather, the judge passes judgment and makes a considered decision about punishment

While use of a nunc pro tunc entry is never appropriate in these circumstances, it was particularly inappropriate where, as here, the judge who found that a mistake had been made was not the judge who imposed the sentence originally Under such circumstances, the second judge's actions are a substituted judgment – not a corrected one.

Accordingly, the restitution order should be vacated.

## CONCLUSION

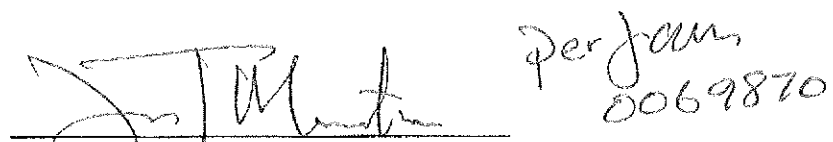
For these reasons, this Court should reverse the Eighth District and order the trial court to vacate its order of April 8, 2008, and reinstate the original sentencing order of November 28, 2007, which was journalized on November 30, 2007.

Respectfully submitted,

JOHN T. MARTIN, ESQ.
Assistant Public Defender

## CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was sent via U.S. mail to William Mason, Cuyahoga County Prosecutor and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 3rd day of May, 2010.



JOHN T. MARTIN, ESQ.

# APPENDIX

ORIGINAL

IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| STATE OF OHIO | : | 09-1606 |
| Appellee | : | |
| -vs- | : | On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals |
| ANDREW E. MILLER | : | |
| Appellant | : | CA: 91543 |

## NOTICE OF APPEAL OF ANDREW E. MILLER

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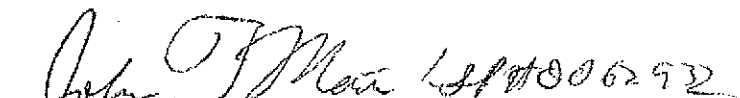
FILED
SEP 08 2009
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Appellant ANDREW E. MILLER

Appellant ANDREW E. MILLER hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No. 91543, and journalized on July 22, 2009.

This felony case raises substantial constitutional questions and is one of public and great general interest.

Respectfully submitted,



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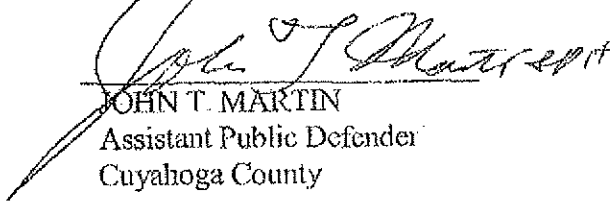
CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was sent via U.S. mail upon William D Mason, Cuyahoga County Prosecutor, The Justice Center - 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 8th day of September, 2009



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COUNSEL FOR APPELLANT

A-3

Judge Mason

JUL 22 2009

FILED
2009 JUL 29 P 1:51
GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

FEE
3
TAXED

JOURNAL ENTRY AND OPINION
No. 91543

## STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

## ANDREW E. MILLER

DEFENDANT-APPELLANT

**JUDGMENT:**
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-493934

**BEFORE:** Blackmon, J., Gallagher, P.J., and McMonagle, J.

**RELEASED:** July 2, 2009

**JOURNALIZED:** JUL 22 2009

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

JUL 22 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

JUL 2- 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

CA08091543 58306023

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 TAXED

PATRICIA ANN BLACKMON, J.:

Appellant Andrew Miller appeals the trial court's decision that ordered him to pay restitution in the amount of $20,409.35. Miller argues that the restitution order was invalid and assigns the following errors for our review:

> **"I. The lower court abused its discretion by failing to determine on the record whether there was any evidentiary support for the requested restitution."**
>
> **"II. The lower court abused its discretion by entering a restitution order after the final sentencing order had been journalized."**

Having reviewed the record and pertinent law, we affirm the trial court's order of restitution.

## Facts

Miller allegedly injured the victim when he forcefully ejected him from a bar where Miller worked as a bouncer. Thereafter, the State charged Miller with two counts of felonious assault. He entered a plea to the lesser included offense of aggravated assault. In discussing the plea agreement, the trial court informed Miller that the victim was requesting restitution in the approximate amount of $20,410. Miller's attorney stated that he had discussed the plea with Miller but Miller was "concerned" about the restitution; the court allowed Miller's attorney to have further discussions with Miller about the plea agreement.

Afterwards, Miller pled guilty to the agreed-upon charge. The trial court informed him that the plea included a sentence that consisted of Miller serving community control and paying restitution. Miller indicated that he understood the consequences of his plea.

Approximately two weeks later, Miller's sentencing hearing was conducted. As promised, the trial court placed Miller on community control. However, the trial court failed to mention Miller's restitution obligation and did not include restitution in the sentencing entry.

The State motioned for a hearing to be conducted to impose the restitution. At this hearing, the State argued that the restitution obligation was agreed to by Miller and was part of the plea agreement. Miller's attorney argued that Miller never agreed to pay restitution; moreover, the State failed to produce evidence of the amount of the restitution. The trial court recessed the matter to review the transcript of the hearing.

Two weeks later, the hearing was reconvened; the trial court concluded the transcript indicated that Milller agreed to pay restitution in the amount of $20,409.35 as part of the plea. The trial court determined that restitution was "inadvertently" omitted from the order and amended the sentence to include the restitution amount.

## Restitution

We will address Miller's first and second assigned errors together because they both concern the trial court's ability to amend the sentencing entry to include Miller's obligation to pay restitution in the amount of $20,409.35.

We conclude the trial court had jurisdiction to include restitution as part of the sentence. During the plea phase of the case, the trial court informed Miller that restitution had been requested. Miller's lawyer stated on the record that restitution was part of the plea agreement, and he had discussed the restitution with his client who was concerned with the restitution. The court permitted Miller to consult with his attorney again before deciding whether to accept the plea. When Miller returned he decided to enter the plea and acknowledged in the affirmative to the court that indeed the plea agreement included restitution. During the plea colloquy, the following took place:

"Court: **How do you plead to aggravated assault, a fourth degree felony, possible sentence of six to eighteen months, fine of up to five thousand dollars, post-release control up to three years, potential order of restitution in the amount of $20,409.35? Guilty or not guilty?**

"Miller: **Can I have a minute?**

"Court: **Yeah. It's your case.**

"Miller: **Guilty, your Honor."**

Miller is correct that the trial court failed to advise him of the $20,409.35 restitution amount at the sentencing hearing. The court also failed to include restitution in the original sentencing entry; however, the court included it later in an amended journal entry. We conclude that the entry is valid because the trial court was correcting a mistake, not extending or modifying the sentence.

This is no different than what the trial court did in *State v. Middleton*,[1] where the trial court imposed a 4-year sentence when it should have been a 7-year sentence. The court in *Middleton* mistakenly at sentencing referred to the burglary charge as a third-degree felony when it was a second-degree felony. The appellate court held the trial court could correct the mistake because Middleton was advised he was pleading to a second-degree felony, which carried a maximum sentence of eight years, at his plea hearing.

Likewise, Miller entered into a plea agreement and agreed to pay $20,409.35 in restitution. Principles of contract law are generally applicable to the interpretation and enforcement of plea agreements; if possible, courts should give effect to every provision therein contained.[2] The plea contract in

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[1] 12th Dist. No. CA2004-01-003, 2005-Ohio-681.

[2] *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853.

this case should be honored and the trial court should be allowed to correct its inadvertence.

In *State v. Williams*,[3] although factually different, the appellate court defined a clerical mistake as a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment. *Williams* involved Crim.R. 36; however, it is helpful in defining when a trial court's error is legally correctable. *Williams* explains that the error is legally correctable when the mistake is apparent from the record.

Here, the error was apparent from the record. Miller acknowledged that the plea agreement included $20,409.35 in restitution; Miller was charged with two counts of felonious assault that was bargained to one count of aggravated assault, and he pled to the agreed-upon charge. Consequently, the error is apparent from the record. The trial court was not attempting to modify or enhance the sentence. This was not an afterthought. It was part of the plea agreement, which was the result of the plea bargain to which Miller agreed.

In *State v. Turner*,[4] another case that was not exactly on point, but nonetheless instructive, recognized the importance of sua sponte entries that

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[3]6th Dist. No. L-02-1394, 2004-Ohio-466.

[4]Cuyahoga App. No. 81449, 2003-Ohio-4933.

allow for conformance to the transcript. We appreciate that *Turner* involved the sentencing hearing itself, where the original sentencing entry incorrectly sentenced the defendant to a concurrent sentence when it should have been a consecutive sentence. In *Turner*, we held that the trial court could, sua sponte by journal entry, make the correction because the transcript evidenced the error. This is the same concern in this case.

Accordingly, we conclude that when the trial court's journal entry seeks to correct a clerical mistake, which is evidenced in the transcript or record, the trial court's action is valid under its continued jurisdiction to correct clerical mistakes so long as the transcript does not evidence an attempt by the trial court to modify or extend the sentence. Accordingly, Miller's assigned errors are overruled.

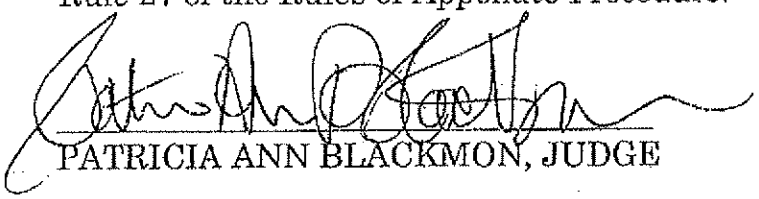
Judgment affirmed.

It is ordered that appellee recover of appellant its 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. 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

SEAN C. GALLAGHER, P.J., CONCURS
(WITH ATTACHED CONCURRING OPINION)
CHRISTINE T. McMONAGLE, J., DISSENTS
(WITH ATTACHED DISSENTING OPINION.)

SEAN C. GALLAGHER, P.J., CONCURRING:

I concur with the majority opinion.

At the plea hearing, it was represented that restitution in the amount of $20,409.35 was a condition of the plea agreement. Consistent therewith, the trial court judge stated probation would be imposed, but that "there are going to be conditions" and that the court was going to "include restitution." Although a "potential" order of restitution, as well as prison terms, were discussed in reviewing the possible penalties that could be imposed, Miller's guilty plea was entered with the understanding that the conditions of the plea agreement would be imposed as part of Miller's sentence. However, at sentencing, the trial court omitted restitution.

Crim.R. 36 provides in relevant part that "errors in the record arising from oversight or omission, may be corrected by the court at any time." I agree with the majority that the record reflects restitution was to be included in the sentence and that its oversight or omission in failing to reflect the actual agreed-to plea bargain was a legally correctable mistake. The trial court was not modifying its sentence, but rather was correcting a mistake apparent from the record. Further, having agreed to the restitution, including the amount, as part of the plea agreement, appellant cannot complain on appeal that the trial court erred in ordering him to make restitution.

CHRISTINE T. McMONAGLE, J., DISSENTING:

Respectfully, I dissent.

At the time of the plea, Miller was asked in pertinent part: "[h]ow do you plead to aggravated assault *** possible sentence of six to 18 months *** potential order of restitution in the amount of $20,409.35?" Nothing was said on the record about restitution at the time of sentencing, nor was restitution ordered in the sentencing entry. At a later date, without further hearing, and out of the presence of the defendant, an amended journal entry was made adding an order of restitution in the amount of $20,409.35.

In the first instance, the court informed Miller of a *potential* order of restitution. Potential means "possible, as opposed to actual." Webster's Revised Unabridged Dictionary (1996). In short, Miller was told that an order of restitution in the amount of $20,409.35 could *possibly* be imposed. He was not told that an order of restitution in the amount of $20,409.35 would actually be imposed. I do not agree with the majority that the admonitions given Miller at the plea colloquy adequately notified him that restitution in the amount of $20,409.35 would in fact be ordered. Nor do I believe his response of "guilty" represents his consent to this specific order of restitution.

But more importantly, I do not believe that the court could utilize a nunc pro tunc entry to supply the missing order of restitution. In *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, the Ohio Supreme Court held that trial courts lack authority to reconsider their own valid final judgments in criminal cases, subject to two exceptions: (1) the court is authorized to correct a void sentence (not at issue here); and (2) it can correct clerical errors in judgments. (See Crim.R. 36.) "The term 'clerical mistake' refers to a mistake or omission, *mechanical in nature and apparent on the record, which does not involve a legal decision or judgment*." *Cruzado* at ¶19. "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.*" Id. (Emphasis added.) A nunc pro tunc entry relates back to the date of the journal entry it corrects. It is used to record that which the trial court did, but which has not been recorded. *Ohio v. Battle*, 9th Dist. No. 23404, 2007-Ohio-2475.

It is uncontroverted that the trial court did not, at the time of sentencing, order restitution. A nunc pro tunc order cannot cure that failure. Further, because the judge never ordered restitution at sentencing and Miller never agreed to it at the plea hearing, the trial court's decision to impose restitution subsequent to sentencing involved a legal judgment as to whether restitution should be ordered; it was not a judgment correcting an error "apparent on the record."

Accordingly, I would hold that the trial court was without jurisdiction to reconsider its own valid final judgment and that the order or restitution made by nunc pro tunc entry is hence void.

# 2929.15 Community control sanctions - felony.

(A)(1) If in sentencing an offender for a felony the court is not required to impose a prison term, a mandatory prison term, or a term of life imprisonment upon the offender, the court may directly impose a sentence that consists of one or more community control sanctions authorized pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code. If the court is sentencing an offender for a fourth degree felony OVI offense under division (G)(1) of section 2929.13 of the Revised Code, in addition to the mandatory term of local incarceration imposed under that division and the mandatory fine required by division (B)(3) of section 2929.18 of the Revised Code, the court may impose upon the offender a community control sanction or combination of community control sanctions in accordance with sections 2929.16 and 2929.17 of the Revised Code. If the court is sentencing an offender for a third or fourth degree felony OVI offense under division (G)(2) of section 2929.13 of the Revised Code, in addition to the mandatory prison term or mandatory prison term and additional prison term imposed under that division, the court also may impose upon the offender a community control sanction or combination of community control sanctions under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

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The duration of all community control sanctions imposed upon an offender under this division shall not exceed five years. If the offender absconds or otherwise leaves the jurisdiction of the court in which the offender resides without obtaining permission from the court or the offender's probation officer to leave the jurisdiction of the court, or if the offender is confined in any institution for the commission of any offense while under a community control sanction, the period of the community control sanction ceases to run until the offender is brought before the court for its further action. If the court sentences the offender to one or more nonresidential sanctions under section 2929.17 of the Revised Code, the court shall impose as a condition of the nonresidential sanctions that, during the period of the sanctions, the offender must abide by the law and must not leave the state without the permission of the court or the offender's probation officer. The court may impose any other conditions of release under a community control sanction that the court considers appropriate, including, but not limited to, requiring that the offender not ingest or be injected with a drug of abuse and submit to random drug testing as provided in division (D) of this section to determine whether the offender ingested or was injected with a drug of abuse and requiring that the results of the drug test indicate that the offender did not ingest or was not injected with a drug of abuse.

(2)(a) If a court sentences an offender to any community control sanction or combination of community control sanctions authorized pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, the court shall place the offender under the general control and supervision of a department of probation in the county that serves the court for purposes of reporting to the court a violation of any condition of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender's probation officer. Alternatively, if the offender resides in another county and a county department of probation has been established in that county or that county is served by a multicounty probation department established under section 2301.27 of the Revised Code, the court may request the court of common pleas of that county to receive the offender into the general control and supervision of that county or multicounty department of probation for purposes of reporting to the court a violation of any condition of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender's probation officer, subject

to the jurisdiction of the trial judge over and with respect to the person of the offender, and to the rules governing that department of probation

If there is no department of probation in the county that serves the court, the court shall place the offender, regardless of the offender's county of residence, under the general control and supervision of the adult parole authority for purposes of reporting to the court a violation of any of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender's probation officer.

(b) If the court imposing sentence upon an offender sentences the offender to any community control sanction or combination of community control sanctions authorized pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, and if the offender violates any condition of the sanctions, any condition of release under a community control sanction imposed by the court, violates any law, or departs the state without the permission of the court or the offender's probation officer, the public or private person or entity that operates or administers the sanction or the program or activity that comprises the sanction shall report the violation or departure directly to the sentencing court, or shall report the violation or departure to the county or multicounty department of probation with general control and supervision over the offender under division (A)(2)(a) of this section or the officer of that department who supervises the offender, or, if there is no such department with general control and supervision over the offender under that division, to the adult parole authority. If the public or private person or entity that operates or administers the sanction or the program or activity that comprises the sanction reports the violation or departure to the county or multicounty department of probation or the adult parole authority, the department's or authority's officers may treat the offender as if the offender were on probation and in violation of the probation, and shall report the violation of the condition of the sanction, any condition of release under a community control sanction imposed by the court, the violation of law, or the departure from the state without the required permission to the sentencing court

(3) If an offender who is eligible for community control sanctions under this section admits to being drug addicted or the court has reason to believe that the offender is drug addicted, and if the offense for which the offender is being sentenced was related to the addiction, the court may require that the offender be assessed by a properly credentialed professional within a specified period of time and shall require the professional to file a written assessment of the offender with the court. If a court imposes treatment and recovery support services as a community control sanction, the court shall direct the level and type of treatment and recovery support services after consideration of the written assessment, if available at the time of sentencing, and recommendations of the professional and other treatment and recovery support services providers

(4) If an assessment completed pursuant to division (A)(3) of this section indicates that the offender is addicted to drugs or alcohol, the court may include in any community control sanction imposed for a violation of section 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2925.11, 2925.13, 2925.22, 2925.23, 2925.36, or 2925.37 of the Revised Code a requirement that the offender participate in a treatment and recovery support services program certified under section 3793.06 of the Revised Code or offered by another properly credentialed program provider.

(B) If the conditions of a community control sanction are violated or if the offender violates a law or leaves the state without the permission of the court or the offender's probation officer, the sentencing court may impose a longer time under the same sanction if the total time under the sanctions does not

exceed the five-year limit specified in division (A) of this section, may impose a more restrictive sanction under section 2929.16, 2929.17, or 2929.18 of the Revised Code, or may impose a prison term on the offender pursuant to section 2929.14 of the Revised Code The prison term, if any, imposed upon a violator pursuant to this division shall be within the range of prison terms available for the offense for which the sanction that was violated was imposed and shall not exceed the prison term specified in the notice provided to the offender at the sentencing hearing pursuant to division (B)(3) of section 2929.19 of the Revised Code. The court may reduce the longer period of time that the offender is required to spend under the longer sanction, the more restrictive sanction, or a prison term imposed pursuant to this division by the time the offender successfully spent under the sanction that was initially imposed.

(C) If an offender, for a significant period of time, fulfills the conditions of a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code in an exemplary manner, the court may reduce the period of time under the sanction or impose a less restrictive sanction, but the court shall not permit the offender to violate any law or permit the offender to leave the state without the permission of the court or the offender's probation officer.

(D)(1) If a court under division (A)(1) of this section imposes a condition of release under a community control sanction that requires the offender to submit to random drug testing, the department of probation or the adult parole authority that has general control and supervision of the offender under division (A)(2)(a) of this section may cause the offender to submit to random drug testing performed by a laboratory or entity that has entered into a contract with any of the governmental entities or officers authorized to enter into a contract with that laboratory or entity under section 341.26, 753.33, or 5120.63 of the Revised Code.

(2) If no laboratory or entity described in division (D)(1) of this section has entered into a contract as specified in that division, the department of probation or the adult parole authority that has general control and supervision of the offender under division (A)(2)(a) of this section shall cause the offender to submit to random drug testing performed by a reputable public laboratory to determine whether the individual who is the subject of the drug test ingested or was injected with a drug of abuse

(3) A laboratory or entity that has entered into a contract pursuant to section 341.26, 753.33, or 5120.63 of the Revised Code shall perform the random drug tests under division (D)(1) of this section in accordance with the applicable standards that are included in the terms of that contract A public laboratory shall perform the random drug tests under division (D)(2) of this section in accordance with the standards set forth in the policies and procedures established by the department of rehabilitation and correction pursuant to section 5120.63 of the Revised Code. An offender who is required under division (A)(1) of this section to submit to random drug testing as a condition of release under a community control sanction and whose test results indicate that the offender ingested or was injected with a drug of abuse shall pay the fee for the drug test if the department of probation or the adult parole authority that has general control and supervision of the offender requires payment of a fee. A laboratory or entity that performs the random drug testing on an offender under division (D)(1) or (2) of this section shall transmit the results of the drug test to the appropriate department of probation or the adult parole authority that has general control and supervision of the offender under division (A)(2)(a) of this section.

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# 2929.18 Financial sanctions - felony.

(A) Except as otherwise provided in this division and in addition to imposing court costs pursuant to section 2947.23 of the Revised Code, the court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section or, in the circumstances specified in section 2929.32 of the Revised Code, may impose upon the offender a fine in accordance with that section. Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

(1) Restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss. If the court imposes restitution, the court shall order that the restitution be made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court. If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount. All restitution payments shall be credited against any recovery of economic loss in a civil action brought by the victim or any survivor of the victim against the offender.

If the court imposes restitution, the court may order that the offender pay a surcharge of not more than five per cent of the amount of the restitution otherwise ordered to the entity responsible for collecting and processing restitution payments

The victim or survivor may request that the prosecutor in the case file a motion, or the offender may file a motion, for modification of the payment terms of any restitution ordered If the court grants the motion, it may modify the payment terms as it determines appropriate.

(2) Except as provided in division (B)(1), (3), or (4) of this section, a fine payable by the offender to the state, to a political subdivision, or as described in division (B)(2) of this section to one or more law enforcement agencies, with the amount of the fine based on a standard percentage of the offender's daily income over a period of time determined by the court and based upon the seriousness of the offense. A fine ordered under this division shall not exceed the maximum conventional fine amount authorized for the level of the offense under division (A)(3) of this section.

(3) Except as provided in division (B)(1), (3), or (4) of this section, a fine payable by the offender to the state, to a political subdivision when appropriate for a felony, or as described in division (B)(2) of this section to one or more law enforcement agencies, in the following amount:

(a) For a felony of the first degree, not more than twenty thousand dollars;

(b) For a felony of the second degree, not more than fifteen thousand dollars;

(c) For a felony of the third degree, not more than ten thousand dollars;

(d) For a felony of the fourth degree, not more than five thousand dollars;

(e) For a felony of the fifth degree, not more than two thousand five hundred dollars

(4) A state fine or costs as defined in section 2949.111 of the Revised Code.

(5)(a) Reimbursement by the offender of any or all of the costs of sanctions incurred by the government, including the following:

(i) All or part of the costs of implementing any community control sanction, including a supervision fee under section 2951.021 of the Revised Code;

(ii) All or part of the costs of confinement under a sanction imposed pursuant to section 2929.14, 2929.142, or 2929.16 of the Revised Code, provided that the amount of reimbursement ordered under this division shall not exceed the total amount of reimbursement the offender is able to pay as determined at a hearing and shall not exceed the actual cost of the confinement;

(iii) All or part of the cost of purchasing and using an immobilizing or disabling device, including a certified ignition interlock device, or a remote alcohol monitoring device that a court orders an offender to use under section 4510.13 of the Revised Code.

(b) If the offender is sentenced to a sanction of confinement pursuant to section 2929.14 or 2929.16 of the Revised Code that is to be served in a facility operated by a board of county commissioners, a legislative authority of a municipal corporation, or another local governmental entity, if, pursuant to section 307.93, 341.14, 341.19, 341.23, 753.02, 753.04, 753.16, 2301.56, or 2947.19 of the Revised Code and section 2929.37 of the Revised Code, the board, legislative authority, or other local governmental entity requires prisoners to reimburse the county, municipal corporation, or other entity for its expenses incurred by reason of the prisoner's confinement, and if the court does not impose a financial sanction under division (A)(5)(a)(ii) of this section, confinement costs may be assessed pursuant to section 2929.37 of the Revised Code. In addition, the offender may be required to pay the fees specified in section 2929.38 of the Revised Code in accordance with that section.

(c) Reimbursement by the offender for costs pursuant to section 2929.71 of the Revised Code.

(B)(1) For a first, second, or third degree felony violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code, the sentencing court shall impose upon the offender a mandatory fine of at least one-half of, but not more than, the maximum statutory fine amount authorized for the level of the offense pursuant to division (A)(3) of this section. If an offender alleges in an affidavit filed with the court prior to sentencing that the offender is indigent and unable to pay the mandatory fine and if the court determines the offender is an indigent person and is unable to pay the mandatory fine described in this division, the court shall not impose the mandatory fine upon the offender.

(2) Any mandatory fine imposed upon an offender under division (B)(1) of this section and any fine imposed upon an offender under division (A)(2) or (3) of this section for any fourth or fifth degree felony violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code shall be paid to law enforcement agencies pursuant to division (F) of section 2925.03 of the Revised Code.

(3) For a fourth degree felony OVI offense and for a third degree felony OVI offense, the sentencing court shall impose upon the offender a mandatory fine in the amount specified in division (G)(1)(d) or (e) of section 4511.19 of the Revised Code, whichever is applicable. The mandatory fine so imposed shall be disbursed as provided in the division pursuant to which it is imposed.

(4) Notwithstanding any fine otherwise authorized or required to be imposed under division (A)(2) or (3) or (B)(1) of this section or section 2929.31 of the Revised Code for a violation of section 2925.03 of the Revised Code, in addition to any penalty or sanction imposed for that offense under section 2925.03 or sections 2929.11 to 2929.18 of the Revised Code and in addition to the forfeiture of property in connection with the offense as prescribed in Chapter 2981 of the Revised Code, the court that sentences an offender for a violation of section 2925.03 of the Revised Code may impose upon the offender a fine in addition to any fine imposed under division (A)(2) or (3) of this section and in addition to any mandatory fine imposed under division (B)(1) of this section. The fine imposed under division (B)(4) of this section shall be used as provided in division (H) of section 2925.03 of the Revised Code. A fine imposed under division (B)(4) of this section shall not exceed whichever of the following is applicable:

(a) The total value of any personal or real property in which the offender has an interest and that was used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of section 2925.03 of the Revised Code, including any property that constitutes proceeds derived from that offense;

(b) If the offender has no interest in any property of the type described in division (B)(4)(a) of this section or if it is not possible to ascertain whether the offender has an interest in any property of that type in which the offender may have an interest, the amount of the mandatory fine for the offense imposed under division (B)(1) of this section or, if no mandatory fine is imposed under division (B)(1) of this section, the amount of the fine authorized for the level of the offense imposed under division (A)(3) of this section.

(5) Prior to imposing a fine under division (B)(4) of this section, the court shall determine whether the offender has an interest in any property of the type described in division (B)(4)(a) of this section. Except as provided in division (B)(6) or (7) of this section, a fine that is authorized and imposed under division (B)(4) of this section does not limit or affect the imposition of the penalties and sanctions for a violation of section 2925.03 of the Revised Code prescribed under those sections or sections 2929.11 to 2929.18 of the Revised Code and does not limit or affect a forfeiture of property in connection with the offense as prescribed in Chapter 2981 of the Revised Code.

(6) If the sum total of a mandatory fine amount imposed for a first, second, or third degree felony violation of section 2925.03 of the Revised Code under division (B)(1) of this section plus the amount of any fine imposed under division (B)(4) of this section does not exceed the maximum statutory fine amount authorized for the level of the offense under division (A)(3) of this section or section 2929.31 of the Revised Code, the court may impose a fine for the offense in addition to the mandatory fine and the fine imposed under division (B)(4) of this section. The sum total of the amounts of the mandatory fine, the fine imposed under division (B)(4) of this section, and the additional fine imposed under division (B)(6) of this section shall not exceed the maximum statutory fine amount authorized for the level of the offense under division (A)(3) of this section or section 2929.31 of the Revised Code. The clerk of the court shall pay any fine that is imposed under division (B)(6) of this section to the county, township, municipal corporation, park district as created pursuant to section 511.18 or 1545.04 of the Revised Code, or state law enforcement agencies in this state that primarily were responsible for or involved in making the arrest of, and in prosecuting, the offender pursuant to division (F) of section 2925.03 of the Revised Code.

(7) If the sum total of the amount of a mandatory fine imposed for a first, second, or third degree felony violation of section 2925.03 of the Revised Code plus the amount of any fine imposed under division (B)(4) of this section exceeds the maximum statutory fine amount authorized for the level of the offense under division (A)(3) of this section or section 2929.31 of the Revised Code, the court shall not impose a fine under division (B)(6) of this section.

(8)(a) If an offender who is convicted of or pleads guilty to a violation of section 2905.01, 2905.02, 2907.21, 2907.22, or 2923.32, division (A)(1) or (2) of section 2907.323, or division (B)(1), (2), (3), (4), or (5) of section 2919.22 of the Revised Code also is convicted of or pleads guilty to a specification of the type described in section 2941.1422 of the Revised Code that charges that the offender knowingly committed the offense in furtherance of human trafficking, the sentencing court shall sentence the offender to a financial sanction of restitution by the offender to the victim or any survivor of the victim, with the restitution including the costs of housing, counseling, and medical and legal assistance incurred by the victim as a direct result of the offense and the greater of the following:

(i) The gross income or value to the offender of the victim's labor or services;

(ii) The value of the victim's labor as guaranteed under the minimum wage and overtime provisions of the "Federal Fair Labor Standards Act of 1938," 52 Stat. 1060, 20 U.S.C. 207, and state labor laws.

(b) If a court imposing sentence upon an offender for a felony is required to impose upon the offender a financial sanction of restitution under division (B)(8)(a) of this section, in addition to that financial sanction of restitution, the court may sentence the offender to any other financial sanction or combination of financial sanctions authorized under this section, including a restitution sanction under division (A)(1) of this section.

(C)(1) The offender shall pay reimbursements imposed upon the offender pursuant to division (A)(5)(a) of this section to pay the costs incurred by the department of rehabilitation and correction in operating a prison or other facility used to confine offenders pursuant to sanctions imposed under section 2929.14, 2929.142, or 2929.16 of the Revised Code to the treasurer of state. The treasurer of state shall deposit the reimbursements in the confinement cost reimbursement fund that is hereby created in the state treasury. The department of rehabilitation and correction shall use the amounts deposited in the fund to fund the operation of facilities used to confine offenders pursuant to sections 2929.14, 2929.142, and 2929.16 of the Revised Code.

(2) Except as provided in section 2951.021 of the Revised Code, the offender shall pay reimbursements imposed upon the offender pursuant to division (A)(5)(a) of this section to pay the costs incurred by a county pursuant to any sanction imposed under this section or section 2929.16 or 2929.17 of the Revised Code or in operating a facility used to confine offenders pursuant to a sanction imposed under section 2929.16 of the Revised Code to the county treasurer. The county treasurer shall deposit the reimbursements in the sanction cost reimbursement fund that each board of county commissioners shall create in its county treasury. The county shall use the amounts deposited in the fund to pay the costs incurred by the county pursuant to any sanction imposed under this section or section 2929.16 or 2929.17 of the Revised Code or in operating a facility used to confine offenders pursuant to a sanction imposed under section 2929.16 of the Revised Code.

(3) Except as provided in section 2951.021 of the Revised Code, the offender shall pay reimbursements imposed upon the offender pursuant to division (A)(5)(a) of this section to pay the costs incurred by a municipal corporation pursuant to any sanction imposed under this section or

section 2929.16 or 2929.17 of the Revised Code or in operating a facility used to confine offenders pursuant to a sanction imposed under section 2929.16 of the Revised Code to the treasurer of the municipal corporation. The treasurer shall deposit the reimbursements in a special fund that shall be established in the treasury of each municipal corporation. The municipal corporation shall use the amounts deposited in the fund to pay the costs incurred by the municipal corporation pursuant to any sanction imposed under this section or section 2929.16 or 2929.17 of the Revised Code or in operating a facility used to confine offenders pursuant to a sanction imposed under section 2929.16 of the Revised Code.

(4) Except as provided in section 2951.021 of the Revised Code, the offender shall pay reimbursements imposed pursuant to division (A)(5)(a) of this section for the costs incurred by a private provider pursuant to a sanction imposed under this section or section 2929.16 or 2929.17 of the Revised Code to the provider.

(D) Except as otherwise provided in this division, a financial sanction imposed pursuant to division (A) or (B) of this section is a judgment in favor of the state or a political subdivision in which the court that imposed the financial sanction is located, and the offender subject to the financial sanction is the judgment debtor. A financial sanction of reimbursement imposed pursuant to division (A)(5)(a)(ii) of this section upon an offender who is incarcerated in a state facility or a municipal jail is a judgment in favor of the state or the municipal corporation, and the offender subject to the financial sanction is the judgment debtor. A financial sanction of reimbursement imposed upon an offender pursuant to this section for costs incurred by a private provider of sanctions is a judgment in favor of the private provider, and the offender subject to the financial sanction is the judgment debtor. A financial sanction of restitution imposed pursuant to division (A)(1) or (B)(8) of this section is an order in favor of the victim of the offender's criminal act that can be collected through execution as described in division (D)(1) of this section or through an order as described in division (D)(2) of this section, and the offender shall be considered for purposes of the collection as the judgment debtor. Imposition of a financial sanction and execution on the judgment does not preclude any other power of the court to impose or enforce sanctions on the offender. Once the financial sanction is imposed as a judgment or order under this division, the victim, private provider, state, or political subdivision may bring an action to do any of the following:

(1) Obtain execution of the judgment or order through any available procedure, including:

(a) An execution against the property of the judgment debtor under Chapter 2329. of the Revised Code;

(b) An execution against the person of the judgment debtor under Chapter 2331. of the Revised Code;

(c) A proceeding in aid of execution under Chapter 2333. of the Revised Code, including:

(i) A proceeding for the examination of the judgment debtor under sections 2333.09 to 2333.12 and sections 2333.15 to 2333.27 of the Revised Code;

(ii) A proceeding for attachment of the person of the judgment debtor under section 2333.28 of the Revised Code;

(iii) A creditor's suit under section 2333.01 of the Revised Code.

(d) The attachment of the property of the judgment debtor under Chapter 2715 of the Revised Code;

(e) The garnishment of the property of the judgment debtor under Chapter 2716 of the Revised Code.

(2) Obtain an order for the assignment of wages of the judgment debtor under section 1321.33 of the Revised Code.

(E) A court that imposes a financial sanction upon an offender may hold a hearing if necessary to determine whether the offender is able to pay the sanction or is likely in the future to be able to pay it.

(F) Each court imposing a financial sanction upon an offender under this section or under section 2929.32 of the Revised Code may designate the clerk of the court or another person to collect the financial sanction The clerk or other person authorized by law or the court to collect the financial sanction may enter into contracts with one or more public agencies or private vendors for the collection of, amounts due under the financial sanction imposed pursuant to this section or section 2929.32 of the Revised Code. Before entering into a contract for the collection of amounts due from an offender pursuant to any financial sanction imposed pursuant to this section or section 2929.32 of the Revised Code, a court shall comply with sections 307.86 to 307.92 of the Revised Code.

(G) If a court that imposes a financial sanction under division (A) or (B) of this section finds that an offender satisfactorily has completed all other sanctions imposed upon the offender and that all restitution that has been ordered has been paid as ordered, the court may suspend any financial sanctions imposed pursuant to this section or section 2929.32 of the Revised Code that have not been paid.

(H) No financial sanction imposed under this section or section 2929.32 of the Revised Code shall preclude a victim from bringing a civil action against the offender.

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