

IN THE  
SUPREME COURT OF OHIO

STATE OF OHIO : NO. 2010-1007 & 2010-1372  
Plaintiff-Appellee :  
vs. :  
STEPHEN LESTER :  
Defendant-Appellant :

**BRIEF OF AMICUS CURIAE,  
THE OHIO PROSECUTING ATTORNEYS ASSOCIATION,  
IN SUPPORT OF APPELLEE, THE STATE OF OHIO**

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| Defendant-Appellant | : | <b>ATTORNEYS ASSOCIATION,</b>      |
|                     |   | <b>IN SUPPORT OF APPELLEE, THE</b> |
|                     |   | <b>STATE OF OHIO</b>               |

**Interest of Amicus Curiae**

The Ohio Prosecuting Attorneys Association is a private non-profit membership organization that was founded for the benefit of the 88 elected county prosecutors. The founding attorneys developed the original mission statement, which is still adhered to, and reads: “To increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies which affect the office of Prosecuting Attorney, and to aid in the furtherance of justice. Further, the association promotes the study of law, the diffusion of knowledge, and the continuing education of its members.”

It is the OPAA’s belief that when a nunc pro tunc entry is issued to correct a clerical error that any previously settled matters are barred from further appellate review by res judicata. Only issues that may arise out of the correction should be subject to further appellate review. The OPAA, therefore, urges this Court to rule that the doctrine of res

judicata does not preclude the review of a void sentence, but that it still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence. Furthermore, this Court should hold that the scope of an appeal from a sentencing entry corrected to comply with Crim. R. 32 is limited to issues arising from the correction of the entry.

### **Statement of the Case and Facts**

Amicus adopts by reference the statement of the case and facts contained in the State of Ohio's merit brief.

## Argument

**Proposition of Law: The doctrine of res judicata does not preclude the review of a void sentence, but it still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence. The scope of an appeal from a sentencing entry corrected to comply with Crim. R. 32 is limited to issues arising from the correction of the entry.**

A clerical error should not disturb the finality of settled issues. This is a principle that this Court recently recognized in regards to its postrelease control jurisprudence. It is a principle that should be applied to Crim. R. 32(C).

As Justice Lanzinger noted in her concurrence in *State ex rel. DeWine v. Burge*, this case will resolve what new appellate rights arise from a nunc pro tunc sentencing entry issued in order to comply with Crim. R. 32(C).<sup>1</sup> Despite being unable to show how he was prejudiced by this clerical error, Lester wants this Court to hold that any entry that fails to comply with Crim. R. 32(C) is absolutely void and that anything that happens based off such an entry is a nullity. Similar arguments were recently made and rejected in regards to entries that failed to include a mandatory term of postrelease control.

Given the recent decisions that this Court has issued regarding postrelease control, this Court should issue two holdings. First, that the doctrine of res judicata does not preclude the review of a void sentence, but that it still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence. And, second, that the scope of an appeal from a sentencing entry corrected to comply with Crim. R. 32 is limited to issues arising from the correction of the entry.

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<sup>1</sup>*State ex rel. DeWine v. Burge*, Slip Opinion No. 2011-Ohio-235, ¶ 24.

In *State v. Fisher*, this Court considered what appellate rights were created when a trial court corrected a sentence to impose a proper term of postrelease control. After noting that a sentence that fails to include a statutorily mandated term of postrelease control is void, this Court held that only those aspects of the sentence that do not comply with the law were void. As such, when an sentence had already been appealed, "res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence" and "[t]he scope of an appeal from a resentencing hearing in which a mandatory term of postrelease control is imposed is limited to issues arising at the resentencing hearing."<sup>2</sup>

The *Fisher* remedy allows new issues that come from correcting the void aspects of a conviction to be appealed. But it does so while preserving the finality of otherwise settled issues. In other words, it prevents form from being elevated over substance. These same protections should be given to sentencing entries that are corrected to comply with Crim. R. 32.

This is especially true given that this Court recognized in *Burge* that "the technical failure to comply with Crim. R. 32(C) by not including the manner of conviction in [a defendant's] sentence is not a violation of a *statutorily* mandated term, so it does not render the judgment a nullity."<sup>3</sup> Unlike Crim. R. 32(C), the failure to impose a mandatory term of postrelease control is a statutory violation that causes a portion of a sentence to be void. If a conviction that is partially void due to the failure to comply with a statute can be remedied by granting limited appeal rights then a conviction that is marred only by a clerical error can also be remedied by granting the same limited appeal rights.

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<sup>2</sup>*State v. Fisher*, Slip Opinion No. 2010-Ohio-6238, paragraphs 3 and 4 of the syllabus.

<sup>3</sup>*Burge*, supra, 2011-Ohio-235, ¶ 19 (emphasis sic).

Extending *Fisher* to Crim. R. 32 errors is a logical and fair remedy. It protects both finality and the parties' appellate rights. And it ensures that form is not elevated over substance.

Should this Court go along with Lester's argument that the missing language deprived the appellate court of jurisdiction it will, obviously, be of great benefit to him. He will have a second chance to reargue everything he raised in the past and any new issues that he may have come up with in the mean time. But this Court's ruling goes beyond Lester.

Siding with him will leave similarly situated defendants in a dangerous state of limbo, stuck in prison having to pursue mandamus or procedendo actions to force the trial court to issue a new sentencing entry.<sup>4</sup> It would mean that any defendant who had successfully appealed their convictions in the past would be subject to future prosecution if the sentencing entry they appealed from contained a clerical error.

Just as clerical errors should not disturb the finality of settled issues, clerical errors should not push defendants into seeking extraordinary relief nor should they threaten double jeopardy.

Allowing a clerical error to deprive appellate courts of jurisdiction would infringe upon a defendant's Constitutional right to a timely appeal. Should, for example, an appellate court that wants to find that a defendant's conviction is not supported by sufficient evidence be forced to dismiss the appeal for want of jurisdiction because – no matter how clear it is from the record – the sentencing entry neglects to mention a jury found the defendant guilty? That would be a fundamentally unfair result. But that is what will happen if Lester's position is adopted.

And what of the defendant who did successfully appeal on weight and sufficiency grounds from an entry that did not comply with Crim. R. 32(C); should that defendant now be subject to a

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<sup>4</sup>See *State v. Baker*, 119 Ohio St. 3d 197, 2008-Ohio-3330, 893 N.E.2d 163, ¶ 16.

second prosecution because a clerical error meant they were never really convicted? That, too, would be a fundamentally unfair result. But that is what will happen if Lester's position is adopted.

The *Fisher* remedy prevents those problems. It ensures that defendants may seek timely appellate relief without having to jump through extra procedural hoops. It ensures that whatever issues are settled in an appeal remain settled. It protects defendants.

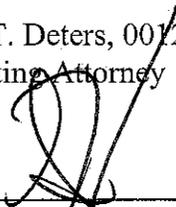
The fair and logical answer to the question before this Court is to extend the *Fisher* remedy to Crim. R. 32 errors. Amicus, therefore, urges this Court to hold two things. First, that the doctrine of res judicata does not preclude the review of a void sentence, but that it still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence. And, second, that the scope of an appeal from a sentencing entry corrected to comply with Crim. R. 32 is limited to issues arising from the correction of the entry.

**Conclusion**

A clerical error should not disturb the finality of settled issues. As such, this Court should hold that the doctrine of res judicata does not preclude the review of a void sentence, but that it still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence. Furthermore, this Court should hold that the scope of an appeal from a sentencing entry corrected to comply with Crim. R. 32 is limited to issues arising from the correction of the entry.

Respectfully,

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**Certificate of Service**

I hereby certify that I have sent a copy of the foregoing Merit Brief of Plaintiff-Appellee, by United States mail, addressed to:

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