

In the  
Supreme Court of Ohio

STEPHEN M. LESTER,	:	Case Nos. 2010-1372, 2010-1007
	:	
Defendant-Appellant,	:	
	:	On Appeal from the
v.	:	Auglaize County Court of Appeals,
	:	Third Appellate District
STATE OF OHIO,	:	
	:	Court of Appeals Case
Plaintiff-Appellee.	:	No. 2-10-20
	:	

MERIT BRIEF OF *AMICUS CURIAE*  
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IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OHIO

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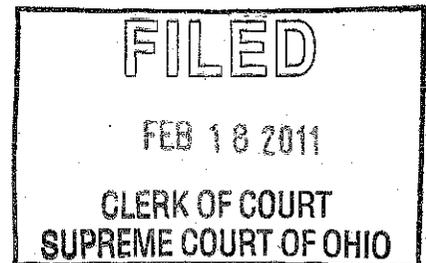
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## INTRODUCTION

The question in this case is whether a mere clerical error in a sentencing order invalidates all subsequent proceedings where the error is corrected through a nunc pro tunc entry. The answer to that question is no, owing to the retroactive character of nunc pro tunc orders. “Nunc pro tunc” means “now for then,” and is “accurately descriptive” of the process whereby a court may change the record to reflect what actually happened. *Nat’l Life Ins. Co. v. Kohn* (1937), 133 Ohio St. 111, 113. “The general purpose of such an entry is to record a prior but unrecorded act of the court. . . . It is a simple device by which a court may make its journal speak the truth.” *Id.* (citing *Reinbolt v. Reinbolt* (1925), 112 Ohio St. 526, syl. ¶ 1); see also *Caprita v. Caprita* (1945), 145 Ohio St. 5, 7; 56 Am. Jur. 2d Motions, Rules, and Orders § 62 (2010).

By claiming that Lester may appeal from the trial court’s nunc pro tunc entry below, Lester and his amicus, the Ohio Public Defender (“OPD”), wrongly seek to inflate a clerical issue into a substantive one. This Court should reject that invitation.

In this case, the trial court issued a nunc pro tunc entry adding “means of conviction” language to Lester’s sentencing judgment, in order to comply with Ohio Crim. R. 32(C) (“Rule 32(C)”). Lester then attempted to appeal from the nunc pro tunc entry and to raise anew various claims that he had already pursued through the original appeals process. The Third District Court of Appeals dismissed Lester’s appeal from the nunc pro tunc entry for lack of jurisdiction. *State v. Lester*, No. 20-10-20 (3d Dist. May 12, 2010), *unreported* (“App. Op.”). The court determined that the nunc pro tunc entry retroactively corrected the court’s original sentencing judgment, and that therefore, the results from Lester’s original appeal were the law of the case.

The Sixth District Court of Appeals, however, has ruled the other way on this issue, holding that a nunc pro tunc entry adding “means of conviction” language to a defendant’s

original sentencing entry is the first and only final appealable order. *State v. Lampkin* (6th Dist.), 2010-Ohio-1971.

The Third District's view is correct for several reasons. First, the trial court's nunc pro tunc entry adding language specifying the means of Lester's conviction was not a substantive order—it was simply a clerical fix that ensured that the court's original judgment entry accurately reflected the record. Indeed, this Court recently reiterated that a Rule 32(C) deficiency is properly remedied through a nunc pro tunc entry. *State ex rel. DeWine v. Burge*, 2011-Ohio-235, ¶ 18. Having determined that such a clerical error must be fixed by a nunc pro tunc order, and having recognized long ago that nunc pro tunc entries simply recognize “the subsequent recording of judicial action *previously* and *actually* taken,” *Nat'l Life Ins. Co.*, 133 Ohio St. at 113 (emphasis added), there is no basis for the Court to find any error in the original order that could operate to wipe out all subsequent proceedings. In other words, although any correction to the record inevitably unfolds at a later time, that sequence is not accorded legal weight. Rather, with nunc pro tunc entries “now” *becomes* “then”; the correction relates back to the original judgment and is retroactively effective. Accordingly, the Third District properly rejected Lester's attempt to treat the nunc pro tunc entry as a blank slate from which to begin the appeals process anew.

Second, the Third District's decision comports with the purpose behind nunc pro tunc entries, which is to facilitate the correction of clerical errors while leaving the substance of a case intact. A decision deeming nunc pro tunc entries substantive, rather than merely clerical, would wreak havoc on Ohio's judicial and penal systems. If this Court determined that further appellate rights arise from a new sentencing entry issued to comply with Rule 32(C), numerous criminal cases would unravel. Such a ruling would disrupt all cases in which a defendant's prior

sentencing entry did not comply with Rule 32(C) (including those where the defendant achieved a favorable result on appeal), as well as countless other cases in which an offender's charge relates back to a past offense.

This Court has long recognized both the clerical nature of nunc pro tunc entries and their retroactive effect. Accordingly, the Court should affirm the Third District, and answer the certified question in the negative.

### STATEMENT OF AMICUS INTEREST

As Ohio's chief law officer, R.C. 109.02, the Ohio Attorney General has a strong interest in the correct interpretation and application of Ohio's criminal laws and procedures, including the rule at the center of the parties' dispute—Rule 32(C).

### STATEMENT OF THE CASE AND FACTS

**A. Lester was convicted and sentenced to eight years in prison for attacking his ex-girlfriend.**

Lester approached his ex-girlfriend, Angela Gierhart, in her employer's parking lot and tried to force her into his car on January 24, 2006. *State v. Lester* (3d Dist.), 2008-Ohio-1148, ¶ 2. When Gierhart resisted, Lester held her at knifepoint and threatened to kill her. *Id.* One of Gierhart's co-workers, who was entering the parking lot, broke up the incident. *Id.* After Gierhart escaped, Lester retrieved her purse from the parking lot and fled. *Id.*

A grand jury indicted Lester on four felony counts: robbery, abduction, theft, and felonious assault. *State v. Lester* (3d Dist.), 2007-Ohio-4239, ¶ 3. He was also charged with one misdemeanor count of aggravated menacing. *Id.*

Following a two-day trial, a jury convicted Lester on all counts except for the robbery charge. *Id.* at ¶ 4. Lester was present throughout the trial, at the pronouncement of the verdicts,

and during the polling of the jury. *State v. Lester* (3d Dist.), 2010-Ohio-6066, ¶ 3. The trial court imposed an eight-year prison term.

**B. After the Third District remanded the case for resentencing, the trial court issued a corrected sentencing judgment.**

Lester appealed, and the Third District affirmed his sentence on the misdemeanor count, but vacated the felony convictions because the trial court had improperly sentenced Lester to a five-year term of post-release control rather than the three-year term set forth in the applicable statute. *Lester*, 2007-Ohio-4239, at ¶¶ 12, 14.

On August 30, 2007, the trial court resentenced Lester to eight years in prison. The Third District affirmed, *State v. Lester* (3d Dist.), 2008-Ohio-1148, and this Court declined jurisdiction, *State v. Lester*, 2008-Ohio-3880.

**C. Lester sought, and the trial court issued, a nunc pro tunc entry adding language to the sentencing judgment.**

In 2010, Lester moved to correct the journal entry of conviction. The trial court then filed a nunc pro tunc entry, correcting the original entry by adding the following line of text reflecting the “manner” of Lester’s conviction as required by Rule 32(C): “The Court finds that Defendant has been convicted pursuant to a verdict at Jury Trial returned May 16, 2006.” See Merit Brief of Appellant Stephen M. Lester (“App. Br.”), Ex. A; *State v. Lester*, No. 2006-CR-6 (Auglaize County Common Pls. Ct. Apr. 5, 2010), Nunc Pro Tunc—Journal Entry—Orders on Re-Sentencing.

**D. The Third District dismissed Lester’s appeal.**

Lester appealed from the court’s nunc pro tunc entry, but the Third District dismissed for lack of jurisdiction, holding that the trial court’s nunc pro tunc entry “is not a ‘final order’ subject to appeal.” App. Op. at 3.

Lester filed a notice of discretionary appeal and a notice of certified conflict with this Court, which consolidated Lester's two causes for briefing on a single issue: "Is a *nunc pro tunc* judgment filed for the purpose of correcting a clerical omission in a prior sentencing judgment by adding 'means of conviction' language, which was readily apparent throughout the record and to the parties but not originally included as required by Crim. R. 32(C), a final order subject to appeal?" *State v. Lester*, No. 2010-1372 (Sept. 28, 2010).

## ARGUMENT

### **Amicus Curiae Attorney General's Proposition of Law:**

*A nunc pro tunc entry issued to retroactively conform a prior judgment with Crim. R. 32(C) is not a final appealable order.*

The Third District had jurisdiction over Lester's 2007 appeal from his original sentencing judgment because the 2010 nunc pro tunc entry inserting "means of conviction" language retroactively rendered that judgment a final appealable order. As a result, the Third District's earlier affirmance of Lester's conviction governs, and Lester has already exhausted his right to appeal.

**A. The nunc pro tunc entry specifying the "means of conviction" merely ensured that the record "speaks the truth."**

According to Crim. R. 36, "[c]lerical mistakes in judgments . . . may be corrected by the court at any time. A clerical error "refers to a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment." *State ex rel. Cruzado v. Zaleski*, 111 Ohio St. 3d 353, 2006-Ohio-5795, ¶ 19. That is, a clerical mistake is a scrivener's error only—it bespeaks no error as to the validity of the trial court's original judgment, but merely reflects a flaw in the journalization of that judgment. See, e.g., *Jacks v. Adamson* (1897), 56 Ohio St. 397 ("The failure of the clerk of the court to enter the decree of

confirmation on the minutes of the court is not fatal to the purchaser's title, where it appears that such decree, in fact, was ordered by the court.”).

In such instances, the trial court may issue a correction—a nunc pro tunc entry—to ensure “that the record speaks the truth.” *Cruzado*, 2006-Ohio-5795 at ¶ 17. But as this Court has long made clear, a nunc pro tunc entry does not correct an error in “*the judgment itself*,” but simply a clerical flaw in the “*judicial record*.” *Caprita*, 145 Ohio St. at 7 (emphasis added). Nunc pro tunc is a simple device by which a court may “make [its] journal entry speak the truth.” *Reinbolt*, 112 Ohio St. 526 at syl. ¶ 1. Such “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.” *Cruzado*, 2006-Ohio-5795, at ¶ 19 (citations omitted).

This Court has already made clear that a Rule 32(C) error does not implicate the substance of “the judgment itself,” which is why the Court permits a trial court to fix a Rule 32(C) deficiency through a nunc pro tunc entry. As the Court recently reaffirmed, “the remedy for a failure to comply with Crim.R. 32(C) is a revised sentencing entry rather than a new hearing.” *Burge*, 2011-Ohio-235, at ¶ 18 (citing *State ex rel. Alicea v. Krichbaum*, 126 Ohio St. 3d 194, 2010-Ohio-3234, ¶ 2; *State ex rel. Culgan v. Medina County Court of Common Pleas*, 119 Ohio St. 3d 535, 2008-Ohio-4609, ¶¶ 10-11; *Dunn v. Smith*, 119 Ohio St. 3d 364, 2008-Ohio-4565, ¶ 10). The Court in *Burge* explained that the result was logical because “[a]ny failure to comply with Crim.R. 32(C) was a mere oversight that vested the trial court with *specific, limited jurisdiction* to issue a new sentencing entry to reflect what the court had previously ruled and not to issue a new sentencing order reflecting what, in a successive judge’s opinion, the court should have ruled.” *Id.* at ¶ 19 (emphasis in original). The Court also noted 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.” *Id.*

Thus, *Burge* settles the question presented here—nunc pro tunc entries correcting Rule 32(C) deficiencies have no effect on the validity of the court’s original judgment. Nor should they, as the case here easily demonstrates. Because Lester’s original judgment entry did not set forth “the manner of conviction,” the trial court issued a nunc pro tunc entry stating that the conviction was issued “pursuant to a verdict at Jury Trial returned May 16, 2006.” App. Br., A-25. As in *Burge*, the validity of Lester’s conviction and sentence is not in dispute. The trial court had jurisdiction to impose the sentence in 2007, and that sentence contained all the statutorily required terms. More importantly, the record is replete with references to the fact that a jury trial was held. The only oversight was a rule-based one—the trial court’s failure to indicate in the judgment entry that Lester was convicted “by a jury.” That error was “mechanical in nature,” “apparent on the record,” and “does not involve a legal decision or judgment.” *Cruzado*, 2006-Ohio-5795, at ¶ 19 (citation omitted). Indeed, Lester concedes as much when he asserts that “the trial court’s April 5, 2010 order was a valid nunc pro tunc order” which “explain[ed] what *actually happened.*” App. Br. 11 (emphasis in original).

Simply stated, the purpose of a nunc pro tunc entry is to repair a clerical error. Such an entry reflects no substantive error in the validity of the underlying judgment. Accordingly, the Court should reject Lester and the OPD’s efforts to inflate a clerical issue into a substantive one.

**B. Because the 2010 nunc pro tunc entry relates back to the court’s original judgment, that original judgment is valid.**

Both Lester and the OPD argue that Lester’s conviction was not a final appealable order until the court issued the nunc pro tunc entry. App. Br. 10-11; Amicus Br. 8-9. Thus, they posit

that the Third District's previous affirmance of Lester's conviction was a nullity, and Lester may appeal anew from the nunc pro tunc entry of 2010.

That novel theory fails. Having determined that a Rule 32(C) error is a clerical one that can be fixed by a nunc pro tunc entry, and having repeatedly recognized that nunc pro tunc entries do not correct an error in "the judgment itself," but simply a clerical flaw in the "judicial records," *Caprita*, 145 Ohio St. at 7, there is no basis for the Court to find the underlying "judgment itself" defective such that all subsequent proceedings are invalidated.

The phrase "[n]unc pro tunc" means "now for then," and is "accurately descriptive" of the process whereby a court may change the record to reflect what actually happened. *Nat'l Life Ins. Co.*, 133 Ohio St. at 113. Although a clerical correction inevitably is made temporally *after* the order it corrects, that sequence is not accorded legal weight. Rather, the purpose of nunc pro tunc entries is that "now" *becomes* "then," meaning that the court views the original entry as if it had been properly executed from the start.

In other words, Lester and the OPD's argument only succeeds if the Court deprives a nunc pro tunc entry of its retroactive effect. But by definition, a nunc pro tunc entry relates back to the original judgment entry and is retroactively effective. Indeed, *Black's Law Dictionary* (7th ed. 1999) defines a nunc pro tunc entry as "[h]aving retroactive legal effect through a court's inherent power." And this Court recently confirmed the retroactive effect of nunc pro tunc orders in *State ex rel. Womack v. Marsh*, 2011-Ohio-229, ¶ 15. There, the defendant argued that because the trial court failed to include a required post-release control term in his original sentencing entry, the court was required to vacate his convictions, conduct a new sentencing hearing, and issue a new sentencing entry. This Court rejected that claim, finding that "the trial court's failure to include the postrelease-control term in the original sentencing entry was

manifestly a clerical error” that could be remedied by a nunc pro tunc entry. *Id.* at ¶ 13. And the Court explained that the nunc pro tunc entry “related back to [defendant’s] original sentencing entry so that neither Crim. R. 32(C) nor *State v. Baker* . . . [was] violated.” *Id.* at ¶ 15 (emphasis added) (citing *State v. Harrison* (12th Dist.), 2010-Ohio-2709, ¶ 24; *State v. Yeaples* (3d Dist.), 2009-Ohio-184, ¶ 15 (a nunc pro tunc entry correcting a clerical error “does not extend the time within which to file an appeal, as it relates back to the original judgment entry”))).

Decisions by the federal courts are in accord. See, e.g., *Trepel v. Roadway Express, Inc.*, 64 F. App’x. 439, 443 (6th Cir. 2003) (nunc pro tunc order correcting improper damages award had retroactive effect; plaintiff’s appeal from original order was therefore proper and defendant could not appeal from the nunc pro tunc order itself); *White v. Westrick*, 921 F.2d 784 (8th Cir. 1990) (because of a nunc pro tunc order’s retroactive effect, such an order does not initiate a new period for filing a notice of appeal).

Lester and the OPD’s constitutional arguments likewise fail. They contend that foreclosing an appeal from a nunc pro tunc entry infringes on a criminal defendant’s constitutional right to appeal. The OPD speculates, for instance, that if a trial court waited longer than thirty days to issue a nunc pro tunc entry correcting a Rule 32(C) deficiency, the defendant would lose his right to appeal altogether. Amicus Br. at 9. That is baseless. A defendant should not sit on an appeal of his conviction because he believes that his original judgment entry did not satisfy Rule 32(C). He should simply raise the Rule 32(C) deficiency—and any other claims—as part of a timely appeal. A subsequent nunc pro tunc entry correcting the Rule 32(C) oversight just moots that particular claim, while allowing the rest of the appeal to proceed as if the original sentencing entry had complied with Rule 32(C).

**C. Lester and the OPD's authorities are inapposite.**

None of Lester or the OPD's authorities undermine the Third District's decision. Lester appears to rely on *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St. 3d 352, 1993-Ohio-120, to assert that the trial court's nunc pro tunc entry is the first and only final appealable order. App. Br. at 11. In that case, the plaintiff sued several defendants for damages arising from a workplace injury. *Id.* Forty-nine days after the court granted summary judgment to *some*, but not all, of the defendants, the plaintiff petitioned the court for a nunc pro tunc entry reflecting that there was "no just reason for delay" to appeal under Civ.R. 54(B). *Wisintainer*, 67 Ohio St. 3d at 354. The court's retroactive addition of that language to its summary judgment order allowed the plaintiff to file an immediate appeal, and the plaintiff appealed from the nunc pro tunc entry. *Id.* at 354-55.

*Wisintainer* is irrelevant to this case. The *Wisintainer* plaintiff could not appeal until the court determined under Civ.R. 54(B) that the "interest of sound judicial administration [was] best served by allowing an immediate appeal." *Id.* at 355. By contrast, here, the nunc pro tunc entry adding "means of conviction" language reflected no judicial fact-finding that would affect a defendant's right to appeal. It merely changed the record to reflect what the parties already knew—Lester was convicted and sentenced following a jury trial. Most importantly, however, unlike the *Wisintainer* plaintiff, Lester immediately appealed from the original judgment entry, and the nunc pro tunc entry does not negate his prior appeal, or the Third District's affirmance of Lester's conviction and sentence.

The authorities on which the OPD relies are also unavailing. The OPD mistakenly argues that *State v. Ketterer*, 2010-Ohio-3831, exemplifies a case in which a defendant successfully appealed directly from a nunc pro tunc entry correcting Rule 32(C) deficiencies. Amicus Br. at 8. He is wrong. The OPD ignores the facts that the defendant in that case *also* appealed from his

original sentencing entry and that the Court simply folded the nunc pro tunc correction into its consideration of the original appeal. Thus, far from treating the nunc pro tunc entry as a final appealable order, *Ketterer* treated the entry as one that made a retroactive clerical correction to the record, and nothing more.

The OPD also misinterprets the appeals court's decision in *Garrett v. Wilson* (5th Dist.), 2007-Ohio-4853, see Amicus Br. at 8, a habeas case that ultimately supports the Third District's view of nunc pro tunc orders as retroactively-effective clerical repairs. In *Garrett*, after pleading guilty to various criminal charges, the defendant failed to appeal from the trial court's sentencing entry. *Id.* at ¶ 3. Because the court's initial sentencing entry did not recite a finding of guilt, the defendant later moved for a revised journal entry. *Id.* at ¶ 5. The trial court issued a nunc pro tunc order stating the finding of guilt. *Id.* In denying the inmate's subsequent habeas petition, the court determined that although the court's initial sentencing entry omitted a finding of guilt, the trial court had properly corrected the omission through the nunc pro tunc entry. *Id.* at ¶ 7. The court noted that the inmate had been free to pursue an appeal from the sentencing entry but chose not to; and since an adequate remedy at law existed by virtue of a direct appeal, the court could not issue a writ of habeas corpus. *Id.* at ¶ 10. The OPD reads the Fifth District as saying that the inmate could have appealed from the *revised* sentencing entry, but that is wrong. The court's reference to the "sentencing entry" was immediately followed by the observation that the petitioner chose not to file an appeal from *that entry*—which very obviously indicates that the entry the court was referring to was the *original* one. See *id.* This Court should not indulge the OPD's strained interpretation.

Finally, the OPD relies on a handful of inapposite out-of-state cases to argue that a nunc pro tunc entry can be the original entry from which an appeal is taken. See Amicus Br. at 8 n. 1.

(citing cases). Each cited decision is rooted in the principle that a court cannot use a nunc pro tunc entry to reduce the time for or defeat a party's right to appeal. As noted above, however, that does not mean that a criminal defendant should sit on an appeal of his conviction because he believes that his original judgment entry did not satisfy Rule 32(C). And the cases certainly do not mean that a nunc pro tunc order gives a defendant *another* right to appeal.

**D. Because nunc pro tunc orders do not invalidate prior judgments, there is no basis for a rule allowing nunc pro tunc entries to give rise to new appellate rights and thereby undo countless settled judgments.**

The OPD defies all law and logic in claiming that an appeal from a nunc pro tunc entry “promotes finality” by drawing a clear line between “appealable” and “non-appealable” orders. Amicus Br. at 3. It is just the opposite. Allowing nunc pro tunc entries to give rise to new appellate rights would void or disrupt settled rulings in numerous criminal cases—and for no justifiable reason, since a Rule 32(C) correction is, by definition, clerical in nature and indicates no substantive error in the underlying proceedings.

In the wake of *Baker*, every criminal defendant who has already appealed from a judgment entry with a Rule 32(C) problem could try to use the court's clerical error to nullify his original appeal and get a second bite at the apple. Such a rule would also affect countless other cases in which an offender's charge relates back to a past offense. For instance, under R.C. 2941.149, when a trial judge determines that an offender is a “repeat violent offender,” R.C. 2929.01, the judge indicates as such, and considers the specification when deciding the offender's sentence. To make the necessary determination, the judge reviews a “certified copy of the entry of judgment of a prior conviction as proof of that prior conviction.” R.C. 2941.149(C). If the Court overturns the Third District, however, then a trial judge's R.C. 2941.149 determination will fall flat whenever a “repeat violent offender's” first criminal judgment did not comply with Rule

32(C). There is no basis for burdening the courts with the flood of cases that would ensue from a decision that allows a mere scrivener's error to begin a defendant's appellate proceedings anew.

Moreover, although Lester's legal theory would give *him* a second bite at the apple in this case, his theory would unquestionably hurt criminal defendants in other cases—specifically the cases where Ohio appeals courts side with the criminal defendant on direct appeal. For instance, Ohio courts routinely find that the police issued improper *Miranda* warnings, the prosecutor failed to turn over exculpatory information, or the jury received improper instructions. See, e.g., *State v. Sabbah* (6th Dist. 1982), 13 Ohio App. 3d 124, 135 (reversing a defendant's conviction where the police impinged upon his Fifth Amendment rights). Also possible, is a finding that the State's evidence was insufficient to support the defendant's conviction. See, e.g., *State v. Barnett* (3d Dist. 1993), No. 13-92-3, 1993 Ohio App. Lexis 2498, at \*17 (reversing conviction for insufficient evidence and remanding to the trial court).

Under Lester's rule, however, an appeals court's decision in favor of a defendant arising from a sentencing judgment with a Rule 32(C) deficiency would be void. Thus, these defendants' convictions and sentences (although previously vacated by an appellate court) would be revived, and the prosecutor could attempt to defend them anew. Accordingly, if Lester prevails, criminal defendants who have already received a favorable disposition on appeal would be forced to relitigate their cases. That result makes just as little sense in those cases as it does in this one.

Lester has already had an opportunity to appeal the merits of his conviction, used that opportunity, and lost the battle. See *Lester* (3d Dist.), 2008-Ohio-1148. He now seeks to exploit a clerical error in his original judgment entry to redo the appeals process. But there is no basis for bloating a clerical error into such a windfall, particularly where the error affected neither the

original appellate proceedings nor the defendant's ability to challenge the merits of his conviction and sentence.

In short, the purpose of nunc pro tunc entries is to allow courts to remedy clerical errors while keeping the rest of a case intact. There is no basis for the Court to undercut that purpose by adopting Lester and the OPD's novel theory here.

### CONCLUSION

For the foregoing reasons, the Attorney General respectfully asks this Court to affirm the Third District's decision dismissing Lester's appeal for lack of subject matter jurisdiction.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Plaintiff-Appellee State of Ohio was served by U.S. mail this 18 day of February, 2011, upon the following counsel:

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