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**EXPLANATION OF WHY THIS CASE INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION AND
WHY LEAVE TO APPEAL SHOULD BE GRANTED AS
A MATTER OF PUBLIC OR GREAT GENERAL INTEREST**

This case presents questions critical to every criminal defendant seeking appellate review regarding the finality of criminal judgments and the original jurisdiction of courts of appeals throughout Ohio. The constitutional question presented here is whether Ohio Constitution Article IV, Section 3(B)(2) is infringed upon when a court of appeals reviews a judgment of conviction that does not contain the name or section reference of each crime for which the defendant is convicted. The Appellant submits that such information is required to establish the fact of conviction and thereby render a judgment of conviction that is a final order under Crim.R. 32(C) R.C. § 2505.02(B)(1) and *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204. As a corollary, the Appellant maintains that a judgment entry that is improperly labeled nunc pro tunc may be appealed when it is entered to correct such a fact-of-conviction omission. In addition, this case raises novel questions with regard to the nature of specifications: (1) whether specifications found in R.C. § 2941 are added “crimes” (i.e., non-offense crimes); and (2) whether these specification “crimes” must be specifically identified in judgments of conviction by name and/or section reference for finality purposes, the same as the offense crimes that underlie them.

Ohio Constitution Article IV, Section 3(B)(2) limits an appellate court's jurisdiction over trial court decisions to the review of “final orders”. See also R.C. §§ 2501.02 and 2505.03. Successively, this Court's jurisdiction—in non-capital, felony cases—derives from judgments of courts of appeals that have been properly conferred jurisdiction by way of a final order. Ohio Constitution Article IV, Section 2(B)(2), (a)(ii), (b), (e), and (f). Final orders are, therefore, the lifeblood of appellate court jurisdiction. In accordance with Ohio Constitution Article IV,

Section 3(B)(2), the General Assembly enacted R.C. § 2505.02 to define the characteristics of various types of final orders. The Supreme Court has adopted Criminal Rule 32(C) to explain “the substantive requirements that must be included within a judgment entry of conviction to make it final for purposes of appeal.” *Lester*, ¶11. Pursuant to *Lester*, this rule requires a judgment of conviction to include, inter alia, the fact of conviction. *Id.* When this requirement is not met, a judgment of conviction is not a final order, and therefore may not be reviewed. *Id.*

In this case, the Tenth District Court of Appeals erroneously determined that Appellant's original entry, filed January 25, 2005, contained the fact of conviction and was a final order under Crim.R. 32(C), R.C. § 2505.02, and *Lester*, despite acknowledging that the entry failed to identify the name or section reference of the specification crime for which Appellant was convicted. *Mem.Dec.*, ¶2-7. The court further held that “the trial court's July 9, 2012 [amended] entry was therefore not a final, appealable order, and consideration of Appellant's arguments challenging his conviction is precluded by the doctrine of res judicata”. *Mem.Dec.*, ¶9. Consequently, the Appellant's appeals were sua sponte dismissed. The court's decision to dismiss the Appellant's appeals subverts rule of law handed down by this Court in *Lester*, ignores the underlying principles of finality, and prevents the Appellant from obtaining a lawful review of his conviction.

The Appellant contends that in order to contain the fact of conviction necessary to render a final order, a judgment of conviction must: (1) state that the defendant pleaded, or was found, guilty; and (2) enumerate each crime (offenses and specifications) the defendant is convicted of, by name, most appropriately, or section reference. See e.g. *State ex rel. Rose v. McGinty*, 128 Ohio St.3d 371, 2011-Ohio-761, ¶¶2-3. Since the Appellant's original entry does not contain the

name or section reference of the specification crime for which he was convicted, the fact of conviction is not included therein; therefore, the Tenth District's dismissal of Case No. 12AP-625, and its initial review of Case No. 05AP-149, offends Article IV, Section 3(B)(2) of the Ohio Constitution.

This Court has devoted considerable attention to clarifying finality questions, settling issues regarding the sentence aspect of Crim.R. 32(C) in *State v. Fischer*, 128 Ohio St.3d, 2010-Ohio-6238, declaring the single document rule in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, establishing the capital-case exception in *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, and then modifying the manner-of-conviction facet of *Baker* in *Lester*, paragraph one of the syllabus. Nevertheless, there remains inter-district conflict and apparent confusion with regard to the first substantive requirement of Crim.R. 32(C)—“that a judgment of conviction shall set forth the plea, the verdict, and the findings upon which each conviction is based”—termed fact of conviction.

Despite guidance from this Court, in *Lester*, explaining the fact of conviction to be a substantive requirement of Crim.R. 32(C), the question of what exactly constitutes the same is unsettled. The critical question is whether statutory indication, by name or section reference, is necessary to establish the fact of conviction. Whether guilt must be assigned to uniquely identified crimes is a fundamental question that warrants this Court's consideration.

Being that this Court did not define “fact of conviction” in *Lester*, the determination of what constitutes such has been left to the inconsistent whim of the lower appellate courts. Some courts have ruled, in error, that an entry does not need to enumerate the crimes a defendant is convicted of in order to contain the fact of conviction, while others correctly observe that

statutory indication—by name or section reference—is intrinsic to the first substantive requirement of Crim.R. 32(C). Cf. *State v. Brockmeier*, 4th Dist. No. 12CA20, 2013-Ohio-687; *State ex. rel. Viceroy v. Stafford*, 8th Dist. No. 95623, 2010-Ohio-5563, ¶¶2-7; and *State v. Madden*, 10th Dist. Nos. 12AP-625, 12AP-661, unreported. Furthermore, whether the names or section references of crimes comprise the fact of conviction or not, courts do not even concur on whether an entry that *does* omit the fact of conviction is a final, appealable order. Cf. *City of Logan v. Conkey*, 4th Dist. No. 11CA34, 2012-Ohio-2494, ¶¶11-15 and *State v. Bonnell*, 8th Dist. No. 96368, 2011-Ohio-5837, ¶¶10-11. Courts also do not agree on whether a subsequent appeal upon the correction of an omission of the name or section reference of the crimes is proper—especially in cases where the corrective entry is purported to be nunc pro tunc. Cf. *State v. Yeaples*, 3rd Dist., (2009), 180 Ohio App.3d 720, 907 N.E.2d 333, 2009-Ohio-184, ¶¶17-18 and *State v. Viceroy*, 8th Dist. No. 97031, 2012-Ohio-2494. Clearly, serious problems have developed as lower appellate courts have attempted to interpret this Court's decision in *Lester*. This case affords the chance for the Supreme Court to provide clarity by simply defining what the term fact of conviction entails and the appropriate remedy for instances of its omission.

Lastly, the court of appeals' decision establishes the illogical and untenable rule that the identification of specification crimes is not essential to the memorialization of guilt in an entry of conviction. This decision sets a precedent that reduces specification crimes to less than crimes, and has effectively created a class of defendants—those who pleaded, or were found, guilty of a specification under R.C. § 2941—whom are denied due process and equal protection under the United States and Ohio Constitutions, given they are left in legal limbo without a final order that identifies their specification crimes as is required by Crim.R. 32(C).

Specification convictions have become routine in felony prosecutions. For this reason, along with the inherent all-inclusive scope of finality, a decision by this Court on the issues presented here will have widespread effect on other criminal cases throughout the state, making this a matter of great general interest. Since the constitutionally rooted issue of finality is presented in every criminal case, even those in which an appeal is not sought, it is a matter of utmost importance for this Court to define the contours of the fact-of-conviction requirement of Crim.R. 32(C) as applied under the dictates of *Lester*, and with reference to specifications. This appears to be the last looming question in an area of constitutional and jurisdictional law that is on the verge of full development. The instant case would afford this Court the opportunity to not only define “fact of conviction,” but also settle the question of whether the variety of specifications described within R.C. § 2941 are indeed concomitant *crimes* that require statutory identification to comport with Crim.R. 32(C), R.C. § 2505.02 and Article IV, Section 3(B)(2) of the Ohio Constitution.

The public interest in the orderly operation of the judicial branch of government is profoundly affected by precedent, such as that recently established by the Tenth District, which would allow criminal judgments to remain interlocutory. Clearly the public, arguably even more so than the defendant, has a vested interest in the finality of criminal judgments; the certainty of convictions depend upon this basic principle. Moreover, the social and economic effect of the continuous, unencumbered accumulation of interlocutory cases—some of which will ultimately be relitigated, at taxpayers' expense, months, if not years, later, whether frivolous or not—cannot be overstated. This Court should recognize the public benefit in correcting this serious issue with expediency.

Because the issues presented in this felony case pose a substantial constitutional question involving the very foundation of the appellate process and deals with matters of public and great general interest, the Appellant urges this Court to grant leave to appeal to establish rule of law addressing the applicable constitutional principles regarding jurisdiction and finality

STATEMENT OF THE CASE AND FACTS

On July 18, 2003, the Franklin County grand jury indicted Defendant-Appellant, Kevin Madden, on one count of aggravated murder along with a specification for displaying, brandishing, indicating possession of, and/or using a firearm to facilitate the July 10th, 2003, shooting of Tabari "T-Pat" Patterson in the parking lot of the "Playaz Club" strip bar, located on Westerville Road in Columbus. On January 10, 2005, the Defendant was brought to trial in the Franklin County Court of Common Pleas, Case No. 03CR-07-4890. The Honorable Judge Alan C. Travis presided.

On January 14, 2005, the jury returned a verdict of not guilty on the count of aggravated murder, but guilty as to the lesser-included offense of murder, and guilty of the accompanying specification for the use of a firearm to facilitate that offense. The same day, the court proceeded with sentencing and imposed the statutorily-mandated penalty of fifteen years to Life for the murder conviction, plus an additional three-year term of actual incarceration for a firearm specification. The court's original judgment was journalized on January 25, 2005.

Defendant appealed. The court of appeals affirmed the judgment of the trial court on August 15, 2006. *State v. Madden, 10th Dist. App. No. 05AP-149, 2006-Ohio-4224*. January 24, 2007, the Ohio Supreme Court declined jurisdiction for review. Appellant filed an application for reopening which was denied May 1, 2008. *State v. Madden, 10th Dist. App No. 05AP-149, 2008-*

Ohio-2271. On September 10, 2008, the Supreme Court, again, declined discretionary review.

On February 15, 2012, Appellant filed a motion with the trial court compelling the issuance of a Crim.R. 32(C) compliant, final, appealable order. In this motion, the Appellant informed the court that the original entry failed to comply with the first substantive requirement of Crim.R. 32(C) because it failed to set forth what specification he was convicted of, and therefore failed to include the verdict (fact of conviction) on the specification for use of a firearm to facilitate the offense.

On July 6, 2012, the court announced its decision overruling the Appellant's latest motion for a final, appealable order, noting that it would enter a nunc pro tunc judgment which would not be a new final order from which an appeal may be taken. July 9, 2012, the court filed its decision. On the same day the court also journalized the amended judgment of conviction to include a statement setting forth what specification the Appellant was convicted of.

The Appellant executed an appeal of the trial court's decision and also appealed from the nunc pro tunc entry, contending that the nunc pro tunc entry was the first judgment of conviction that is a final, appealable order under *State v. Lester, 130 Ohio St.3d 303, 2011-Ohio-5204*, and challenging the merits of his conviction. Case Nos. 12AP-661 and 12AP-625 were assigned, respectively.

On March 29, 2013, the Tenth District Court of Appeals rendered its decision in Case Nos. 12AP-625 and 12AP-661, concluding that although the Appellant's original entry failed to identify the name or section reference of the specification crime for which he was convicted, it was a final order under Crim.R. 32(C) and *Lester*. The court also held that the amended entry is, therefore, not a final, appealable order and dismissed the appeal. *Mem.Dec.*, ¶¶1, 9. In making its

determination, the court of appeals unconscionably referred to the indictment to explain the omitted specification crime, which is contrary to the single document rule espoused in *Baker*. In short, the court's rationale is that if a defendant is only charged with one specification crime, the trial court is not required to comport with the dictates of Crim.R. 32(C) and conjecture is allowed.

The Appellant now seeks a reversal of the court of appeals' decision to dismiss on the grounds that the court's misreading of *Lester* infringes upon Article IV, Section 3(B)(2) of the Ohio Constitution. The Appellant presents the following argument in support of his position on the issue.

ARGUMENT

PROPOSITION OF LAW NO. 1

A court of appeals violates the jurisdictional authority conferred by Ohio Constitution Article IV, Section 3(B)(2) when it reviews a judgment of conviction that does not enumerate the name or section reference of each crime (offenses and specifications) for which a defendant is convicted, as such an entry does not contain the fact of conviction discussed in *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, nor constitute a final order under R.C. § 2505.02(B)(1) and Crim.R. 32(C)

Foremost, Ohio Constitution Article IV, Section 3(B)(2) limits an appellate court's jurisdiction over trial court decisions to the review of final orders. *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.* (2006), 108 Ohio St.3d 540, 844 N.E.2d 1199, ¶8, (stating that “[i]f an order is not final, then an appellate court has no jurisdiction” to act); *Hubbard v. Canton City Sch. Bd. Of Educ.* (2000), 88 Ohio St.3d 14, 15, 2000-Ohio-259, 260 (vacating opinion of the court of appeals as it lacked subject-matter jurisdiction because there was no final-appealable order).

It is beyond dispute that a judgment of conviction does not constitute a final order unless

and until it contains the fact of conviction required under the first substantive provision of Crim.R. 32(C). *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, paragraph one of the syllabus, ¶11.

In this case, the jury returned a verdict finding the Appellant guilty of MURDER under R.C. § 2903.02 and also guilty of the SPECIFICATION FOR USE OF A FIREARM TO FACILITATE THE OFFENSE, described in R.C. § 2941.145. However, the portion of the original January 25th entry that purports to set forth the verdict does not identify this specification, neither by name or section reference. Instead, the entry merely states that the jury found Appellant guilty of “murder *with specification*, in violation of R.C. § 2903.02.” (Emphasis added.)

Because the entry fails to identify the specific specification crime the Appellant was convicted of, it does not contain the fact of conviction on the aforementioned specification. Simply put, when an entry does not enumerate each specific crime—offenses and specifications alike—a defendant is convicted of, Crim.R. 32(C)'s first substantive requirement is not met. There can be no verdict or “fact of conviction” when the crimes (offenses and specifications) on which there was a finding of guilt are not enumerated. By definition, guilt must be ascribed to specific crimes.¹ The fact of what crimes a defendant is convicted of is precisely what comprises the fact of conviction.

Apparently the Tenth District has decided that specification-crimes are distinguished from offense-crimes to a degree that specifications are not required to have the same presence

¹ “Conviction” has been defined in, relevant part, as “the act***of judicially finding someone guilty of a crime; the state of having been proved *guilty*.” *Baker*, ¶11. (Emphasis added.) Consistent with such, the term “guilty”—to which the word conviction refers exclusively—is defined as: “[h]aving committed a *crime*; responsible for a *crime* <guilty of armed robbery>.” *Black's Law Dictionary* (9th Ed. 2009) 776, *definition of guilty* (adj.). Note that the contextual illustration given in the definition of guilty names a crime: i.e., “armed robbery.”

and specificity as offenses in judgments of convictions. Likely this is due to an inaccurate view of specifications as mere sentencing enhancements. However, because the Ohio Legislature has codified the “specification for use of a firearm” in R.C. § 2941.145 and has assigned a criminal punishment thereto, this specification is unquestionably a crime, although it is unique in requiring the simultaneous commission of an offense and obviously allows for an enhanced *aggregate* sentence.² Indeed, it may be said that every crime (offenses and specifications) allows for an enhanced *aggregate* sentence. But this does not make every crime, particularly specifications, fit the criteria which defines what is an enhancement.

R.C. § 2929.14 refers to such specification as a “charge” on which a defendant may be “convicted”. It, therefore, follows that for purposes of Crim.R. 32(C) specifications and offenses carry the same significance; both must be enumerated in the judgment of *conviction*. *State ex rel. Rose v. McGinty*, 128 Ohio St.3d 371, 2011-Ohio-761, ¶¶2-3. R.C. § 2929.19(B)(2)(b) demonstrates that specifications do indeed have names.³ The original entry should have named the specification by, at the very least, reciting that the defendant was found guilty of the SPECIFICATION FOR USE OF A FIREARM.

The mere use of the word Specification in an entry is similar to a blanket statement that a defendant is guilty of an Offense; neither of the two names a crime. The terms Specification and Offense are simply categories of crimes which may be further classified as follows: “Homicide Offense” or “Firearm Specification,” among others. Again these examples, though further

² The prison term that accompanies the specification found in R.C. § 2941.145 is not for the underlying offense, but for the specification itself. Therefore, such specification is not an enhancement to the offense; it is a crime of its own which simply requires the simultaneous commission of an offense. While it may be said that the *aggregate* sentence is increased, the sentence for the offense itself is not enhanced or in any way affected. In short, the added term of incarceration is for the additional specification crime, rather than an enhanced offense.

³ As a practical matter, the Appellant does not oppose a finding that it would suffice for a judgment of conviction to attribute guilt by simply stating, in substance, the elements of the specification crimes for which a defendant is convicted, given that the names of the specifications described in R.C. § 2941 trace the elements.

qualified, still fail to state a specific crime punishable under the law; therefore, such language does not suffice for purposes of memorialization pursuant to Crim.R 32(C). The language fails to recite a particular verdict as contemplated by the governing rule. Crim.R 32(C).

Especially problematic here is that because the entry fails to contain a statutory reference to the specific specification crime upon which the verdict was reached, one cannot determine from the face of the judgment whether an additional three-year prison sentence is authorized under R.C. § 2929.14 or whether some other term was required. This is an example of why courts must enumerate the crimes. To be clear, the Appellant does not posit that the jury failed to return an appropriate verdict, but rather that the court did not memorialize their finding in a way that finalizes the order. Presently, the only way to confirm the verdict would be to refer to the indictment and assume guilt as charged or reference the transcript record of the trial or the verdict form. However, doing either would be out of keeping with the axiom that “[a] court of record speaks through its journal,” which “Crim.R. 32(C) reflects.” *State ex rel. White Junkin (1997)*, 80 *Ohio St.3d* 335, 337. Also, referring to the record to determine the verdict would violate *Baker's* single document rule, which was not modified in *Lester*; facial validity must be determined from the four corners of a judgment of conviction. *Baker*, ¶1. In this case there is no proper statement of guilt to corroborate the sentence of “THREE (3) YEARS FOR FIREARM SPECIFICATION.” Without a designation in the form of a true verdict—one that lists the specification crime—to account for the three-year prison term for some unnamed firearm specification, the additional sentence is unsubstantiated.

Though the court of appeals acknowledged the original entry did not comply with Crim.R. 32(C) because the specification was not identified by name or section reference, the

court failed to characterize the omission as either a manner-of-conviction or fact-of-conviction error. The court stated only that the correction was in the nature of a clerical correction. *Mem.Dec.*, ¶8. However, being that the defect was not a manner-of-conviction error—since the original entry indicates that the *jury* found Appellant guilty—the only means left to describe the error within the realm of Crim.R. 32(C) defects, relative to the first requirement, is by characterizing the omission as a fact-of-conviction defect. Accordingly, the error was not clerical, but substantive. *Lester*, ¶11. The Appellant is therefore entitled to appeal from the nunc pro tunc entry of conviction in accordance with due process and equal protection under U.S. Const. Amend. XIV, Sect. 1 and Ohio Const. Art. I, Sect. 2 & 16.

PROPOSITION OF LAW NO. 2

When a judgment of conviction does not include the name and/or section reference of each crime (offenses and specifications) for which a defendant is convicted, and therefore does not contain the fact of conviction required to render a final order under Crim.R. 32(C) and *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, a nunc pro tunc entry that adds language to include what the defendant is convicted of may be appealed.

Since the early 1900's—prior to modern rules which require rendition through accurate recordation—and consistently today, the Ohio Supreme Court has ruled that a nunc pro tunc entry may not operate to deprive a party of a substantial right, such as the right to prosecute a lawful appeal. *Brown v. L.A. Wells Const. Co.* (1944), 143 Ohio St. 580, 584-585, 56 N.E.2d 451; *Eldridge & Higgins Co. v. Barrere* (1906), 74 Ohio St. 389, 394-396, 78 N.E. 516. The court's recent ruling in *Lester* made clear that a judgment of conviction that fails to include the fact of conviction is not a final order for purposes of appeal. *Lester* ¶11. Therefore a nunc pro tunc judgment filed to include the fact of conviction—and thereby create a final order—cannot

be effective as of the date to which it relates back. *Porter v. Lerch* (1934), 129 Ohio St. 47, 193 N.E. 766, paragraph five of the syllabus. To give such effect would deny a proper party the right of review. *Id.* “To preserve the right of review, the date upon which such [nunc pro tunc] judgment is actually filed will control.” *Petition for Inquiry into Certain Practices* (1948), 150 Ohio St. 393, 83 N.E.2d 58, paragraph one of the syllabus.

This principle was reaffirmed in *Ketterer*, where the Supreme Court court allowed an appeal from a nunc pro tunc entry, though under the mistaken premise that the original order was not final. *State v. Ketterer* (2010), 126 Ohio St.3d 448, 2010-Ohio-3831, ¶¶5, 19, (manner-of-conviction nonfinality aspect superseded by *Lester* modification). The Third District has followed this logic, ruling that because the original entry's failure to include the name or section reference of what the defendant had been convicted of rendered it non-final, the nunc pro tunc entry correcting that error was the court's first final order for purposes of appeal. *State v. Yeaples*, 3rd Dist., (2009), 180 Ohio App.3d 720, 907 N.E.2d 333, 2009-Ohio-184 at ¶¶17-18. See also *City of Niles v. Yeager*, 11th Dist. No. 2004-T-0004, 2004-Ohio-6698; *O'Neal v. Bradshaw*, (N.D. Ohio), Case No. 1:09CV1751, 2009 U.S. Dist.Lexis 124471 at *4, (federal habeas allowed from nunc pro tunc entry). Not only is a defendant's ability to know what assignments to raise hindered by the absence of an official declaration of conviction on *specific* crimes, but the appellate court is left without certainty as to whether assignments of error should be entertained when there is no indication of what statutory sections are under consideration. See *City of Lebanon v. Aselage*, 12th Dist., 2011-Ohio-5230, ¶9, quoting *Miller v. Lint* (1980), 62 Ohio St.2d 209, 215. These concerns are why it is perfectly logical that the requirement of the verdict/fact of conviction—which inherently includes specific crimes—treads along a

jurisdictional divide.

As it stands, the Defendant is statutorily entitled to appellate review in a court which has acquired subject-matter jurisdiction via a final order of conviction. R.C. §§ 2505.03, 2501.02, 2953.02, (comporting with OConst. Art. IV, Sect. 3(B)(2)). To date, a lawful review has not occurred considering the original entry was not final. *Titanium Metals Corp. at ¶8*. Hence the Appellant is still entitled to his first *valid* appeal to a court with proper jurisdiction, regardless of whether the amended entry was intended to be nunc pro tunc. See *Atkinson v. Grumman Ohio Corp. (1988)*, 37 Ohio St.3d 80, 84-85, 523 N.E.2d 851, citing *Griffin v. Illinois (1956)*, 351 U.S. 12, 18, 765 S.Ct. 585, (stating that “where a state provides a process of appellate review, the procedures used must comply with constitutional dictates of due process and equal protection”).

Given that the error corrected here was substantive rather than clerical, this Court should adopt the precedent established in *Yeaples* by construing the nunc pro tunc entry filed in this case to be the first final order from which an appeal may be taken. See *Lester, ¶11; Stallcup v. Baker (1869)*, 18 Ohio St. 544, 546, 1869 Ohio LEXIS 211, (explaining that “the act of rendering judgment on the verdict is not a ministerial but a judicial act, requiring consideration and discretion”). If this Court were to rule otherwise, Appellants statutory rights to a lawful appellate review would continue to be disregarded in violation of Appellant's right to be afforded due process and equal protection under U.S. Const. Amend. XIV, Sect. 1 and Ohio Const. Art. I, Sect. 2 & 16.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The Appellant requests that this Court accept

jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

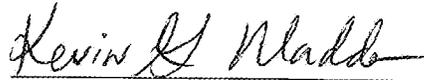


Kevin G. Madden (487-772)
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1580 State Route 56
London, Ohio 43140

Defendant-Appellant, pro se

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Memorandum of Jurisdiction was delivered via regular mail to Seth L. Gilbert, Assistant Franklin County Prosecuting Attorney, 373 South High St., Columbus, Ohio 43215, on this 14th day of June, 2013.



Kevin G. Madden (487-772)
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Defendant-Appellant, pro se

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. _____
	:	C.A. Nos. 12AP-625 and 12AP-661
Plaintiff-Appellee,	:	C.P. No. 03CR-07-4890
	:	
vs.	:	
	:	APPEAL FROM THE FRANKLIN
KEVIN G. MADDEN,	:	COUNTY COURT OF APPEALS
	:	
Defendant-Appellant.	:	

APPENDIX TO MEMORANDUM OF JURISDICTION OF
DEFENDANT-APPELLANT, KEVIN G. MADDEN

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	Nos. 12AP-625 and 12AP-661
v.	:	(C.P.C. No. 03CR-07-4890)
Kevin G. Madden,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

MEMORANDUM DECISION

Rendered on March 29, 2013

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Kevin G. Madden, pro se.

APPEALS from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} In 2005, the Franklin County Court of Common Pleas convicted defendant-appellant, Kevin G. Madden ("appellant"), of the crime of murder with a firearm specification. On direct appeal, we affirmed his conviction. *State v. Madden*, 10th Dist. No. 05AP-149, 2006-Ohio-4224. The appeal before us is from a July 9, 2012 entry by the trial court of a "Decision and Entry Denying Motion of the Defendant for Journalization of a Final, Appealable Order of Conviction." We find that this entry was a nunc pro tunc judgment entry issued for the sole purpose of complying with Crim. R. 32(C) to clarify the 2008 final judgment entry. We conclude, pursuant to the decision of the Supreme Court of Ohio in *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, that the trial court's July 9, 2012 entry was not a new final order from which a new appeal may be taken.

Accordingly, we sua sponte dismiss this appeal without addressing appellant's substantive arguments relative to the merits of his original conviction.

{¶ 2} The facts as relevant to this appeal are as follows. On January 14, 2005, a jury returned a verdict finding appellant guilty of the crime of murder and also finding that appellant had "a firearm on or about his person or under his control while committing the offense and did * * * display and/or brandish, and/or indicate that he possessed the firearm, and/or used the said firearm to facilitate the offense." On January 25, 2005, and consistent with the verdict, the trial court entered a judgment of conviction. The judgment entry stated that the case had been "tried by a jury which found the defendant * * * guilty of the lesser included offense of murder *with specification*, in violation of [R.C.] Section 2903.02." (Emphasis added.) The entry further recorded the court's sentence as follows: "The court hereby imposes the following sentence fifteen (15) years to life with an *additional three (3) years for firearm specification*." (Emphasis added.)

{¶ 3} As noted above, on direct appeal, we affirmed the conviction and sentence. We thereafter also affirmed the trial court's denial of an application filed by appellant, pursuant to App.R. 26(B), seeking to reopen his appeal based on alleged ineffective assistance of his appellate counsel. *State v. Madden*, 10th Dist. No. 05AP-149, 2008-Ohio-2271.

{¶ 4} On July 9, 2012, in response to a motion filed by appellant, the trial court issued the amended judgment entry that is the subject of the instant appeal. The judgment entry differed from the 2005 entry in that it reflected that the case had been "tried by a jury which found the defendant * * * guilty of the lesser included offense of murder, in violation of R.C. 2903.02, *and guilty of the three year firearm specification, also contained in Count One, in violation of section 2941.145*." (Emphasis added.) As in the first entry, the nunc pro tunc entry further reflected the court's sentence of "fifteen (15) years to life with an additional three (3) years *for the firearm specification*." (Emphasis added.) In short, the nunc pro tunc entry differed from the original entry only in that it specifically included language in its first reference to a "specification" by expressly identifying that the jury's guilty finding of a specification was the "firearm specification, also contained in Count One, in violation of section 2941.145."

{¶ 5} The syllabus in *Lester* states, as follows:

1. A judgment of conviction is a final order subject to appeal under R.C. 2505.02 when it sets forth (1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp indicating the entry upon the journal by the clerk. (Crim.R. 32(C), explained; *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, modified.)

2. A nunc pro tunc judgment entry issued for the sole purpose of complying with Crim.R. 32(C) to correct a clerical omission in a final judgment entry is not a new final order from which a new appeal may be taken.

{¶ 6} The 2005 entry initially referenced "murder *with specification*, in violation of R.C. 2903.02" (emphasis added), but did not further identify the specification. But the indictment issued charged appellant with only a single criminal count (violation of R.C. 2903.01, the aggravated murder statute), accompanied by a single specification (violation of R.C. 2941.145, defining a firearm specification). This initial phrase in the 2005 conviction entry relative to a specification sufficiently identified "the fact of the conviction," as specified in *Lester*, as it identified a finding of guilt of both the crime of murder and the only charged specification, i.e., a firearm specification. But the court in the same entry further identified the specification of which appellant was found guilty by issuing a sentence of "fifteen (15) years to life with an additional three (3) years *for the firearm specification*." (Emphasis added.) There is no question that the other three elements enumerated in the first paragraph of *Lester* were included in the original 2005 judgment entry of conviction. We find, therefore, that the 2005 entry contained all four necessary elements for a final, appealable order of conviction as enumerated in *Lester*. The legality of appellant's conviction is therefore now res judicata.

{¶ 7} On July 9, 2012, however, the trial court issued its nunc pro tunc entry as well as a written decision. In its decision, the trial court correctly observed that its original judgment entry of conviction identified the "specific" firearm specification of which appellant was convicted, i.e., a three-year firearm specification. (July 9, 2012 Decision, at 4.) The court nevertheless ordered entry of a "nunc pro tunc judgment of conviction, simply to include that which is, and has been perfectly obvious to all involved in the case:

that the Defendant was convicted of murder with a three year firearm specification." (July 9, 2012 Decision, at 4.) The court expressly noted, consistent with *Lester*, that its nunc pro tunc entry did not constitute a new final order from which a new appeal could be taken.

{¶ 8} The trial court thereby correctly analyzed the impact on this case of the second paragraph of the syllabus to *Lester*. While perhaps unnecessary, the trial court's July 9, 2012 nunc pro tunc entry did not make a substantive change to the 2005 entry of conviction and was in the nature of a correction of a clerical omission. Accordingly, pursuant to *Lester*, appellant may not appeal it. Accord *State v. Bonnell*, 8th Dist. No. 96368, 2011-Ohio-5837, ¶ 16 ("Ohio appellate courts have found that where a trial court issues a corrected judgment entry to comply with Crim.R. 32(C), a defendant who has already had the benefit of a direct appeal cannot raise any and all claims of error in successive appeals. In such circumstances, res judicata remains applicable and the defendant is not entitled to a 'second bite at the apple.' " (Citations omitted.)); *State v. Berryman*, 2d Dist. No. 25081, 2012-Ohio-5208, ¶ 15; *State v. Bates*, 5th Dist. No. 2012-CA-06, 2012-Ohio-4360, ¶ 37-41; *State v. Rodriguez*, 6th Dist. No. L-11-1147, 2012-Ohio-5803, ¶ 8-9; *State v. Gilmore*, 7th Dist. No. 11 MA 30, 2012-Ohio-5989, ¶ 7-8.

{¶ 9} The trial court's July 9, 2012 entry was not a final, appealable order, and consideration of appellant's arguments challenging his conviction is precluded by the doctrine of res judicata. We therefore sua sponte dismiss this appeal.

Appeal sua sponte dismissed.

KLATT, P.J., and SADLER, J., concur.

Franklin County Ohio Court of Appeals Clerk of Courts- 2013 Mar 29 5:06 PM-12AP000625

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, : Nos. 12AP-625 and
 : 12AP-661
 v. : (C.P.C. No. 03CR-07-4890)
 :
 Kevin G. Madden, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

JUDGMENT ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on March 29, 2013, it is the judgment and order of this court that this appeal is sua sponte dismissed for lack of a final, appealable order. Costs shall be assessed against appellant.

DORRIAN, J., KLATT, P.J., & SADLER J.

/S/ JUDGE_____

Tenth District Court of Appeals

Date: 03-29-2013
Case Title: STATE OF OHIO -VS- KEVIN G MADDEN
Case Number: 12AP000625
Type: JEJ - JUDGMENT ENTRY

So Ordered

The image shows a handwritten signature in cursive script, which appears to read "Julia L. Dorrian". The signature is written over a circular official seal. The seal contains the text "TENTH DISTRICT COURT OF APPEALS" around the top edge and "STATE OF OHIO" around the bottom edge. The center of the seal features a sunburst design.

/s/ Judge Julia L. Dorrian

Electronically signed on 2013-Mar-29 page 2 of 2

Appx. 7

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, : Nos. 12AP-625 and
 : 12AP-661
 v. : (C.P.C. No. 03CR-07-4890)
 :
 Kevin G. Madden, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

MEMORANDUM DECISION

Rendered on June 4, 2013

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for
appellee.

Kevin Madden, pro se.

ON APPLICATION FOR RECONSIDERATION AND
MOTION TO CERTIFY A CONFLICT

DORRIAN, J.

{¶ 1} Defendant-appellant, Kevin Madden ("appellant"), has filed a motion for reconsideration (more appropriately an application for reconsideration) of our decision in *State v. Madden*, 10th Dist. No. 12AP-625 (Mar. 29, 2013) (Memorandum Decision) ("*Madden II*"). In addition, appellant has filed a motion asking this court to certify a conflict between our March 29, 2013 judgment and the judgments of multiple other courts of appeals in other cases. For the reasons that follow, we deny both the application and the motion.

Appx. 8

Application for Reconsideration

{¶ 2} "Applications for reconsideration are governed by App.R. 26. The test we generally apply to applications for reconsideration is whether the [application] calls our attention to an obvious error in the decision, or raises an issue that we did not properly consider in the first instance." *Fleisher v. Ford Motor Co.*, 10th Dist. No. 09AP-139, 2009-Ohio-4847, ¶ 2. "App.R. 26(A) was not designed for use in instances where a party simply disagrees with the conclusions and logic of the appellate court." *Hudson v. Guarantee Title and Trust Co.*, 10th Dist. No. 08AP-1047, 2009-Ohio-5545, ¶ 2. Rather, "App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law." *State v. Owens*, 112 Ohio App.3d 334, 336 (11th Dist.1996).

{¶ 3} In 2006, this court affirmed appellant's conviction in the Franklin County Court of Common Pleas of murder with a firearm specification. *State v. Madden*, 10th Dist. No. 05AP-149, 2006-Ohio-4224 ("*Madden I*"). The trial court's January 25, 2005 judgment entry did not include a reference to the code section of the firearm specification of which appellant had been found guilty. Rather, the court entered judgment recording that the jury had found appellant guilty of "the lesser included offense of murder with specification, in violation of [R.C.] Section 2903.02." The judgment entry further imposed a 15-year sentence plus an "additional three (3) years for firearm specification." See *Madden II* at ¶ 2.

{¶ 4} Appellant seeks reconsideration of our 2013 decision in which we sua sponte dismissed appellant's appeal of a 2012 nunc pro tunc judgment entered on July 9, 2012. In that nunc pro tunc entry, the trial court expressly stated that, in addition to being found guilty of murder in violation of R.C. 2903.02, appellant had been found guilty "of the three year firearm specification, also contained in Count One, in violation of [R.C.] section 2941.145." (Emphasis added.) *Madden II* at ¶ 4. We dismissed the appeal in *Madden II* based on our conclusion that the July 9, 2012 nunc pro tunc judgment was not a final, appealable order. We further opined that appellant's original 2005 judgment entry of conviction had been a valid final, appealable order because it "contained all four necessary elements for a final, appealable order of conviction as enumerated in [*State v. Lester* [130 Ohio St.3d 303, 2011-Ohio-5204]." *Madden II* at ¶ 6. We therefore concluded

that appellant's arguments challenging his conviction were precluded by the doctrine of res judicata.

{¶ 5} In support of reconsideration, appellant again notes that the 2005 judgment entry of conviction failed to expressly state the Ohio Revised Code section number of the firearm specification of which appellant was found guilty. He argues that: (1) this 2005 "defect" invalidates the res judicata effect of our judgment in *Madden I*; (2) the 2012 nunc pro tunc order is a final, appealable order; and (3) he may reargue the merits of his original conviction in an appeal from the nunc pro tunc order. We disagree.

{¶ 6} Appellant's 2005 conviction entry referenced appellant's conviction of "murder with specification, in violation of R.C. 2903.02" and sentenced appellant to an additional three years in prison "for the firearm specification." The trial court unambiguously identified the firearm specification in its 2005 judgment entry, despite the trial court's failure to reference R.C. 2941.145. Therefore, as we stated in *Madden II*, the trial court's July 9, 2012 nunc pro tunc entry was "perhaps unnecessary." *Madden II* at ¶ 8.

{¶ 7} In seeking reconsideration of our holding, appellant simply restates the arguments he made in *Madden II*. He disagrees with this court's application of the decision of the Supreme Court of Ohio in *Lester* to his case. Appellant has not, however, called attention to an obvious error in our analysis, nor raised an issue that we did not consider in the first instance.

{¶ 8} Accordingly, we deny appellant's application for reconsideration.

Motion to Certify Conflict

{¶ 9} Ohio Constitution, Article IV, Section 3(B)(4) provides that:

Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

{¶ 10} A court of appeals is not justified in certifying the record to the Supreme Court based on conflict unless it finds that its judgment is in conflict with the judgment of a court of appeals of another district and that the asserted conflict is "upon the same

question." *State v. Monford*, 10th Dist. No. 09AP-274, 2010-Ohio-5624, ¶3, citing *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594 (1993), syllabus. Second, the alleged conflict must be on a rule of law and not facts. *Id.*

{¶ 11} Appellant contends that our March 29, 2013 decision and judgment conflicts with the judgments of other courts of appeals in the following cases: *State v. Brockmeier*, 4th Dist. No. 12CA20, 2013-Ohio-687; *State ex rel. Viceroy v. Saffold*, 8th Dist. No. 95623, 2010-Ohio-5563; and *State v. Carrasquillo*, 9th Dist. No. 08CA009424, 2009-Ohio-3140.

{¶ 12} Appellant frames the issues in conflict as:

[w]hether a judgment of conviction is a final, appealable order when a crime for which a defendant is convicted of [sic] is not named or referenced by section reference and whether a defendant may appeal an entry that adds such language[.]

(Appellant's Motion to Certify a Conflict, 6-7.)

{¶ 13} The Supreme Court of Ohio's decision in *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, which clarified the necessary elements of a final, appealable order of conviction, was decided on October 13, 2011, after the decisions of the Eighth and Ninth Districts in *Viceroy* and *Carrasquillo*. In both of those cases, the appellate courts found judgment entries of conviction to be invalid based on pre-*Lester* law. *Viceroy* and *Carrasquillo*, as well as other precedent cited by appellant but decided without the benefit of *Lester*, cannot serve as the basis for finding that a *current* conflict exists between this court and other Ohio courts of appeals as to the nature of a valid judgment entry of conviction.

{¶ 14} Nor do we find that our judgment in *Madden II* conflicts with the judgment of the Fourth District Court of Appeals in *Brockmeier*. In *Brockmeier*, the court of appeals found that it lacked jurisdiction in an appeal from the denial of an application for expungement. The court found that the original judgment of conviction was fatally flawed because it did not adequately identify the crimes of which the defendant had been convicted. The judgment entry stated only that the defendant had been convicted of "the above mentioned cases" without indicating the name of the crime, the code section, or the degree of offense. As discussed above, both the crime of which appellant was convicted

(murder in violation of R.C. 2903.02) and the specification (three-year firearm specification) were adequately identified in the 2006 trial court judgment entry. The facts in *Brockmeier* are therefore distinguishable from the facts in the case before us. We reject appellant's argument that the failure to specifically include a reference to R.C. 2941.145, the statutory authority for imposition of a three-year firearm specification, nullified the 2005 trial court judgment and our decision in *Madden I*.

{¶ 15} Appellant has, moreover, framed the legal question in conflict for certification to the Supreme Court as "whether a defendant may appeal an entry that adds * * * language" clarifying the statutory code sections of which appellant was originally convicted. However, in *Brockmeier*, there was no trial court entry modifying or amending the original judgment entry of conviction analogous to the trial court's 2012 nunc pro tunc order in this case. Rather, in that case, the court of appeals dismissed an appeal of a denial of expungement. The legal question in conflict as posited by appellant was therefore not implicated by the court of appeals' judgment in *Brockmeier*.

{¶ 16} Further, in both *Madden II* and *Brockmeier*, the courts of appeals dismissed the appeals for lack of final, appealable orders. Accordingly, the two judgments (as opposed to any reasoning used to support those judgments) did not conflict on the same legal question. " 'For a court of appeals to certify a case as being in conflict with another case, it is not enough that the reasoning expressed in the opinions of the two courts of appeals be inconsistent; the judgments of the two courts must be in conflict.' " *Monford*, at ¶ 4, quoting *State v. Hankerson*, 52 Ohio App.3d 73 (1989), paragraph two of the syllabus. Accordingly, we also deny appellant's motion to certify a conflict.

{¶ 17} For the foregoing reasons, appellant's application for reconsideration and motion to certify a conflict are both denied.

Application for reconsideration and motion to certify conflict denied.

KLATT, P.J., and SADLER, J., concur.

Franklin County Ohio Court of Appeals Clerk of Courts- 2013 Jun 04 1:03 PM-12AP000625

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
Plaintiff-Appellee, : Nos. 12AP-625 and
v. : 12AP-661
Kevin G. Madden, : (C.P.C. No. 03CR-07-4890)
Defendant-Appellant. : (REGULAR CALENDAR)

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on June 4, 2013, it is the order of this court that appellant's application for reconsideration is denied. Appellant's motion to certify the judgment of this court as being in conflict with the judgments in *State v. Brockmeier*, 4th Dist. No. 12CA20, 2013-Ohio-687; *State ex rel. Viceroy v. Saffold*, 8th Dist. No. 95623, 2010-Ohio-5563; and *State v. Carrasquillo*, 9th Dist. No. 08CA009424, 2009-Ohio-3140, is also denied. Costs are assessed against appellant.

DORRIAN, J., KLATT, P.J., & SADLER, J.

/S/ JUDGE

Tenth District Court of Appeals

Date: 06-05-2013
Case Title: STATE OF OHIO -VS- KEVIN G MADDEN
Case Number: 12AP000625
Type: JOURNAL ENTRY

So Ordered




/s/ Judge Julia L. Dorrian

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Appx. 14