PD-0870-18
COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

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COURT OF CRIMINAL APPEALS
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JAMES E. WILLIAMS, APPELLANT	§	
V.	§	**NO. PD-0870-18**
THE STATE OF TEXAS, APPELLEE	§	

PETITION FOR DISCRETIONARY REVIEW FROM THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS' UNPUBLISHED 2-1 PANEL OPINION IN CASE NUMBER 02-17-00001-CR, IN THE APPEAL FROM CAUSE NUMBER 1469951R, IN THE 297TH JUDICIAL DISTRICT COURT OF TARRANT COUNTY, TEXAS; THE HONORABLE DAVID HAGERMAN, PRESIDING.

STATE'S PETITION FOR DISCRETIONARY REVIEW

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IDENTITY OF JUDGE(S), PARTIES, AND COUNSEL

- The parties to the trial court's judgment are the State of Texas and Appellant, Mr. James E. Williams.

- The trial judge was the Honorable David Hagerman (elected judge of the 297th Judicial District Court, Tarrant County, Texas).

- Counsel for the State at trial were Tarrant County Criminal Assistant District Attorneys, Kimberly D'Avignon and Randi Hartin, 401 W. Belknap Street, Fort Worth, Texas 76196-0201.

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- Counsel for Appellant at trial were Pamela Fernandez, 8609 Mid Cities Boulevard, Suite 200, North Richland Hills, Texas 76182, and Zachary K. Ferguson, II, 5001 Brentwood Stair Road, Suite 204, Fort Worth, Texas 76112.

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STATEMENT REGARDING ORAL ARGUMENT

The State requests oral argument if this petition is granted. Oral argument would assist the Court in deciding whether the court of appeals erred in holding that a trial court does not have the authority to sign a nunc pro tunc order while it retains plenary jurisdiction. TEX. R. APP. P. 39.1(d).

STATEMENT OF THE CASE

Appellant was convicted of attempted kidnapping. [CR 261] Appellant timely filed a motion for new trial and in arrest of judgment. [CR 266] While that motion was pending, the trial court *sua sponte* signed a Nunc Pro Tunc Order Correcting Minutes of the Court ("Nunc Pro Tunc Order") within thirty days of Appellant's conviction. [CR 298] Appellant filed a notice of appeal of the "judgments" seventy-one days after his conviction, but more than thirty days after the trial court signed the Nunc Pro Tunc Order. [CR 317]

On appeal, Appellant's complaints were limited to challenging the Nunc Pro Tunc Order. *See Appellant's Brief*, p. 3. A majority of the Second Court of Appeals' panel rejected the State's argument that the appellate court lacked jurisdiction based

on Appellant's failure to file a separate notice of appeal (of the Nunc Pro Tunc Order) within thirty days after the order was signed. The majority nonetheless affirmed the trial court's judgment (on the merits), "including the attached nunc pro tunc orders." *See Williams v. State*, 02-17-00001-CR, 2018 WL 3468458, at *5 (Tex. App. – Fort Worth Jul. 19, 2018) (mem. op., not designated for publication).

STATEMENT OF PROCEDURAL HISTORY

On July 19, 2018, the Second Court of Appeals issued a 2-1 panel decision written by Justice Gabriel and joined by Chief Justice Sudderth. *See Williams v. State*, 2018 WL 3468458, at *4 (available at Appendix A). The majority rejected the State's jurisdiction argument, but otherwise affirmed the conviction (including the Nunc Pro Tunc Order of which Appellant complained). *Id.* Justice Pittman dissented and concurred with written opinion, opining that the appellate court did not have jurisdiction as the notice of appeal was not timely filed as to the Nunc Pro Tunc Order. *Id.* at *5 (Pittman, J., dissenting) (available at Appendix B).

GROUNDS FOR REVIEW

The trial court's order correcting its prior judgment was signed while the trial court retained plenary power. Although labeled as a "Nunc Pro Tunc Order," the court of appeals concluded that the order was merely a modification of the judgment and not an order "nunc pro tunc." The court of appeals reasoned that a "nunc pro tunc" order/judgment, by definition, can only be entered *after* the trial court loses plenary power. Texas case law and the rules of appellate procedure suggest that the majority is incorrect. This Court should clarify the issue.

Trial court's order correcting a clerical error in the judgment is a valid nunc pro tunc order. Under Texas law, a nunc pro tunc order is an "appealable order under TEX. R. APP. P. 26.2 (a)(1). As such, Appellant had 30 days to file his notice of appeal. Because Appellant's notice of appeal was untimely, isn't the dissenting opinion of the Second Court of Appeals correct in concluding that Appellant's appeal should have been dismissed for lack of jurisdiction?

REASONS FOR REVIEW

There are numerous reasons why this Court should grant discretionary review, including:[1]

[1] After rejecting the State's jurisdiction challenge, the majority ruled in favor of the State on the merits. The State contends that the majority erred in rejecting the State's challenge to jurisdiction. Appellant's appeal should have been dismissed for want of jurisdiction. The Court of Appeals' affirmance of the trial court's judgment (on the merits) does not negate this Court's review of the State's jurisdiction challenge.

The State is asking this Court to reverse the Second Court of Appeals and hold that the appeal should be dismissed for lack of jurisdiction, just as the dissent below concluded.

(1) The Second Court of Appeals has decided an important question of state law that has not been, but should be, settled by the Court of Criminal Appeals, *see* TEX. R. APP. P. 66.3(b). That is:

(a) Whether the trial court is prohibited from signing a *nunc pro tunc order* while still within its plenary jurisdiction, and

(b) Whether a *nunc pro tunc order* is a separate appealable order if signed while the trial court has plenary jurisdiction.

(2) The majority's misconstruction of Rules 23.1 and 26.2 of the Texas Rules of Appellate Procedure justifies review by this Court, *see* TEX. R. APP. P. 66.3(d);

(3) The court of appeals justices have disagreed (2-1) on a material question of jurisdictional law necessary to the decision, *see* TEX. R. APP. P. 66.3(e); and

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See Williams v. State, 2018 WL 3468458, at *6. This case is distinguishable from *Flores v. State* and *Kou v. State* because the holding of this Court would not be an advisory opinion. *See Flores v. State*, --- S.W.3d ---, 2018 WL 3135288, *1 (Tex. Crim. App. June 27, 2018) (Keller, P.J., concurring) ("But to grant only the State's petition when it prevailed at trial and in the court of appeals would ordinarily be setting the stage for rendering an advisory opinion."); *Kou v. State*, --- S.W.3d ---, 2018 WL 2710953, at *1 (Tex. Crim. App. June 6, 2018) (Keller, P.J., concurring) (same).

(4) The majority opinion has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, *see* TEX. R. APP. P. 66.3(f).

ARGUMENT

I. The Second Court of Appeals erred when it held that the trial court's Nunc Pro Tunc order (signed while the trial court retained plenary power) was merely a modified judgment because a nunc pro tunc order can only be entered after the trial court loses plenary power.

Under Texas law, a nunc pro tunc order (in a criminal case) constitutes a separate appealable order. *See Blanton v. State*, 369 S.W.3d 894, 903-04 (Tex. Crim. App. 2012). Here, the Second Court of Appeals held that the order correcting the prior judgment, even though titled "nunc pro tunc," cannot be a "nunc pro tunc" order because it was signed while the trial court retained plenary power. *See Williams*, 2018 WL 3468458, at *4. The Second Court of Appeals reasoned that a true nunc pro tunc order can only be entered after the trial court loses its plenary jurisdiction. *Id.* As such, the Court of Appeals concluded that the order correcting the prior judgment in the instant case: (1) is merely an order "modifying" the judgment (during the trial court's plenary power), and (2) is not a "nunc pro tunc" order. *Id.* From these conclusions, and based on its interpretation of the 90 day extension period under Rule 26.2(a)(2), the majority held that the Appellant was not required to file a separate notice of appeal of the order correcting judgment within

30 days of that order, and, therefore, the Appellant's appeal (filed within 90 days of the after the sentence was imposed) was timely. *Id.* Accordingly, the Second Court of Appeals concluded that it had jurisdiction over Appellant's complaints. *Id.*

A. The trial court has always had the inherent authority to, at any time, correct clerical errors by order nunc pro tunc so that its records, judgments, and orders reflect what actually occurred.

The Second Court of Appeals held that the trial court had no authority to sign a nunc pro tunc while possessing plenary power because Rule 23.1 allows for a nunc pro tunc order "only if the trial court's plenary power to determine the case has expired." *See Williams v. State*, 2018 WL 3468458, at *4. Notably, nothing in Rule 23.1 states this. Moreover, the trial court has always had inherent authority to correct clerical errors (during its plenary power or after), and this authority does not stem from Rule 23.1 or its predecessor rules. The dissent in *Blanton v. State* explained the narrow scope of Rule 23.1:

> [Rule 23.1] is concerned with the failure to render judgment at all; it has nothing to do with correcting a clerical error in a written judgment.
>
> . . . [Rule 23.1's predecessor] Article 42.06 codified some long-standing rules regarding what to do when the trial court has failed to enter an appealable judgment. In the late nineteenth and early-to-mid twentieth

> centuries, a criminal conviction was appealable only if a judgment had been entered before the trial court lost jurisdiction. Early in that period, the trial court lost jurisdiction when two events occurred (1) the defendant filed a notice of appeal, and (2) the court term in which the notice was filed expired. A judgment could not be validly entered while appeal was pending. If an appellate court determined that no valid judgment had been entered, then the appeal had to be dismissed. Once the appeal was dismissed, however, the trial court could enter a valid judgment *nunc pro tunc*. The defendant could then appeal from the *nunc pro tunc* judgment.

Blanton v. State, 369 S.W.3d at 905-06 (Keller, P.J., dissenting) (citations omitted); *but see State v. Bates*, 889 S.W.2d 306, 309 (Tex. Crim. App. 1994) ("Rule 36 vests a trial court with the authority to correct mistakes or errors in a judgment or order after the expiration of the court's plenary power, via entry of a judgment nunc pro tunc.").[2]

So, where does the trial court's nunc pro tunc authority to correct mistakes in its records originate? In 1855, the Supreme Court of Texas held:

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[2] In 1856, article 686 of the first Texas Code of Criminal Procedure, Rule 23.1's first predecessor, was enacted. *See* TEX. CODE CRIM. PROC. art. 686 (Vernon 1856). Though article 686 was renumbered numerous times between its enactment and 1986, the substance has remained substantially the same. *See* TEX. CODE CRIM. PROC. art. 797 (Vernon 1879); TEX. CODE CRIM. PROC. art. 837 (Vernon 1895); TEX. CODE CRIM. PROC. art. 772 (Vernon 1925) (added the title "sentence nunc pro tunc"); TEX. CODE CRIM. PROC. art. 42.06 (Vernon 1965) (changed to "at any subsequent time"); TEX. R. APP. P. 36 (West 1986); TEX. R. APP. P. 23.1 (West 1997).

> Every court has a right to judge of its [sic] own records and minutes; and if it appear satisfactorily to the that an order was actually made at a former term and omitted to be entered by the clerk, they may at any time direct such order to be entered on the records as of the term when it was made. A court has a right to amend the records of any preceding term by inserting what had been omitted either by the act of the court or the clerk.

Burnett v. State, 14 Tex. 455, 456 (Tex. 1855) (correcting an indictment). In 1939, this Court held:

> It was the court's duty to *enter* in the *minutes* of the court a *true* record of the judgment *rendered*. 2 Vernon's Crim. Statutes, art. 853 [Vernon's Ann. C. C. P. art. 766]. Failing to make such record at that time, article 2015, Vernon's Civil Statutes [Vernon's Ann. Civ. St. art. 2228], gave the court authority to amend the record according to the truth. This authority existed by the inherent power to so correct its minutes at a subsequent term.

Ex parte Mattox, 137 Tex. Crim. 380, 386, 129 S.W.2d 641, 644 (Tex. Crim. App. 1939) (emphasis in the original) (citations omitted). Article 853 of the Texas Code of Criminal Procedure merely defined "judgment" and listed what was required therein. TEX. CODE CRIM. PROC. art. 853 (Vernon 1911), *see also* TEX. CODE CRIM. PROC. art. 766 (Vernon 1925). And article 2015 of the Texas Civil Statutes allowed for the trial court to correct any mistakes in the record or judgment to reflect the truth. TEX. CIV. ST. art. 2015 (Vernon 1911); *see also* TEX. CIV. ST. art. 2228

(Vernon 1925). Therefore, this Court pointed not to the "nunc pro tunc" statute, but to both the trial court's duty and inherent authority to maintain a true and correct record. *Id.*

In 1940, this Court noted in *Ex parte Patterson* that "[w]e think there is no doubt of the court's power to enter a judgment nunc pro tunc independent of [article 859]." 141 S.W.2d 319, 322-23 (Tex. Crim. App. 1940).[3] Then, in 1960, this Court pointed back to *Ex parte Mattox*, as support that the trial court had "authority to correct minutes so as to make them truly reflect the judgment pronounced." *See Koudelka v. State*, 334 S.W.2d 444, 445 (Tex. Crim. App. 1960). Since *Koudelka*, it appears that courts, including this one, have cited to the "nunc pro tunc" rule when discussing clerical errors in the judgment. *See, e.g.*, *State v. Bates*, 889 S.W.2d at 309; *Jones v. State*, 795 S.W.2d 199, 201 (Tex. Crim. App. 1990).[4] But there does

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[3] The Court then noted that a clerical error could also fall under the statute because earlier cases had held that failure to enter a correct judgment was a failure to render judgment. *Id.* (citations omitted).

[4] *See also Smith v. State*, 439 S.W.3d 451, 460 (Tex. App. – Houston [1st Dist.] 2014, no pet.); *State v. Posey*, 300 S.W.3d 23, 33 (Tex. App. – Texarkana 2009), *affirm'd State v. Posey*, 330 S.W.3d 311 (Tex. Crim. App. 2011); *State v. Dudley*, 223 S.W.3d 717, 721-22 (Tex. App. – Tyler 2007, no. pet.); *Fortson v. State*, 948 S.W.2d 511, 512-13 (Tex. App. – Amarillo 1997, pet. ref'd).

not appear to be authority (or reasoning) that the trial court's authority to correct clerical errors arises solely from Rule 23.1. This appears to be confirmed by the dissent in *Blanton* that Rule 23.1, as written, "has nothing to do with correcting a clerical error in a written judgment." *Blanton v. State*, 369 S.W.3d at 905-06 (Keller, P.J., dissenting).

In light of the foregoing, it is clear that Texas criminal courts have always had the inherent authority to enter nunc pro tunc orders both during their plenary power and after their plenary power expires. The Second Court of Appeals erred in concluding that Rule 23.1 dictates otherwise, and erred in concluding that Rule 23.1 creates a distinction between plenary power nuncs and post plenary power nuncs.

It appears that the Second Court of Appeals' erroneous and artificial distinction between nunc pro tunc orders "during plenary power" versus "post-plenary power" arises from the court's flawed interpretation of Rule 23.1. The Second Court of Appeals drew the "during plenary" versus "post-plenary" distinction based on the language of Rule 23.1:

> This reasoning is further supported by the fact that nunc pro tunc proceedings regarding a trial court's judgment and sentence may be had *"at any time" but only if a new trial was not granted, the judgment was*

> *not arrested, or the defendant did not appeal*. *See* TEX. R. APP. P. 23.1. *In other words, only if the trial court's plenary power to determine the case has expired*.

Williams v. State, 2018 WL 3468458, *at 4 (emphasis added). But the language in Rule 23.1 that a nunc proceeding may be at "at any time" unless a motion for new trial or a motion in arrest of judgment has been *granted* or unless a notice of appeal has been filed, necessarily means that nunc pro tunc orders can be entered while the trial court retains plenary power. This language in Rule 23.1 certainly does not mean "only if the trial court's plenary power to determine the case has expired" as the Second Court of Appeals suggests.

Under the language of Rule 23.1, a nunc may be signed at any time: (1) *before* a notice of appeal has been filed, and (2) before a motion for new trial or a motion in arrest of judgment has been *granted*. For example, the trial court could sign a nunc pro tunc 15 days after the conviction (i.e., during the trial court's plenary power) at a time when no notice of appeal has been filed and before a motion for new trial or arrest of judgment has been filed (much less granted). The plain language of Rule 23.1 would allow the nunc pro tunc under this scenario. And this scenario illustrates the fundamental error in the Second Court's interpretation of

Rule 23.1 (i.e., the Court's interpretation that Rule 23.1 only contemplates/allows a nunc pro tunc after the trial court's plenary power has expired).

It appears the Second Court of Appeals' reached its flawed interpretation by erroneously defaulting to civil rules and cases where "[a] true nunc pro tunc judgment is one correcting clerical errors executed *after* the trial court has lost plenary power." *See Ferguson v. Naylor*, 860 S.W.2d 123, 126 (Tex. 1993) (emphasis in original); TEX. R. CIV. P. 316, 329b (West 2017).[5] The Second Court of Appeals has misinterpreted Rule 23.1 in this criminal case.

The Second Court of Appeals interpretation of Rule 23.1 is inconsistent with case law from this Court. On at least two occasions, this Court has held that the trial court was within its power to enter a nunc pro tunc before the appeal *because* the trial court had continuing plenary jurisdiction. *See Resnick v. State*, 574 S.W.2d 558, 560 (Tex. Crim. App. 1978) ("Before the appellate record was filed in this Court, a nunc pro tunc hearing was held, and the judgment and sentence were corrected. The

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[5] Recently, in *State v. Hanson*, this Court discussed the inapplicability of civil statutes, including Rule 329b of the Texas Rules of Civil Procedure, to cases "construing a statute, not judicial precedent or construction of the Texas Rules of Civil Procedure. --- S.W.3d ---, 2018 WL 3133690, at *2 (Tex. Crim. App. June 27, 2018).

trial court was within its power in entering the judgment and sentence nunc pro tunc."); *Perkins v. State*, 505 S.W.2d 563, 564 (Tex. Crim. App. 1974) (the trial court entered "a nunc pro tunc order correcting the judgment and the sentence to reflect a conviction for felony theft rather than for burglary as entered originally as the result of a clerical error."). This Court, in *Perkins*, even stated that it did

> not interpret Article 42.06, Vernon's Ann. C. C. P. (which provides that a judgment and sentence may be entered nunc pro tunc if there has been a failure to enter the same 'unless a new trial has been granted, or the judgment arrested, or an appeal has been taken') as prohibiting the action of the trial court herein.

Id. Therefore, Rule 23.1, like its predecessor article 42.06, does not prohibit the trial court from signing a nunc pro tunc order while the trial court retains plenary power.

Here, the trial court's October 25, 2016, order is clearly a nunc pro tunc order and was a valid exercise of the trial court's plenary power. Based on its flawed interpretation of Rule 23.1, and ignoring the plain language of Rule 23.1 that allows nunc pro tunc proceedings "at any time," the Second Court of Appeals erred in concluding that nunc pro tunc orders can only be entered after the trial court loses its plenary power.

B. This Court's recent recognition of modified judgments does not limit the scope of the trial court's authority to sign nunc pro tunc orders during its plenary power, but rather gives the criminal practitioner an additional tool with which to seek the correction of errors in judgments and sentences.

1. A trial court's ability to correct judicial errors through a modification of the judgment and sentence appears to be a recent development.

The trial court's authority to correct its records through a nunc pro tunc order precedes the Texas Code of Criminal Procedure. *See Burnett v. State*, 14 Tex. at 456; TEX. CODE CRIM. PROC. art. 686 (Vernon 1856). But it appears that the ability for the trial court to modify its judgment and sentence is much more recent. As recent as 2005, this Court appears to have first held that "a trial court retains plenary power to modify its sentence if a motion for new trial or motion in arrest of judgment is filed within 30 days of sentencing." *See State v. Aguilera*, 165 S.W.3d 695, 697-98 (Tex. Crim. App. 2005) (citing prior concurring opinions from the Court that "have touched on the subject of plenary power). The purpose of this change was to give the court a way to correct judicial decisions in the judgments and sentences. *See id*. Subsequent case law supports that the intent of the modified judgment was to correct judicial errors and not clerical ones. *See, e.g.*, *Tiede v. State*, No. 06-16-

00083-CR, 2017 WL 3401402, at *13 (Tex. App. – Texarkana Aug. 9, 2017, pet. ref'd) (mem. op., not designated for publication) (appellate court renamed nunc pro tunc as a "modified judgment" because it corrected judicial errors); *Loud v. State*, 329 S.W.3d 230, 241 (Tex. App. – Houston [14th Dist.] 2011, pet. ref'd) (Frost, J., dissenting) (opining trial court's order should have been affirmed because it was a proper exercise in plenary jurisdiction to correct judicial errors).

2. Contrary to the Second Court of Appeals' conclusion, whether the trial court retains plenary jurisdiction to correct judicial errors is irrelevant to the trial court's ability to correct clerical errors.

The Second Court of Appeals appears to hold that, because the trial can modify its judgments, the court's ability to sign nunc pro tunc judgments is limited. *See Williams v. State*, 2018 WL 3468458, at *3-4. However, there is no authority to support the conclusion that it is an either/or situation. And there may be reasons why a party would file a motion for a nunc pro tunc order over a motion to modify the judgment.

This is not the only circumstance where a practitioner has options to achieve the same result. For example, a defense attorney raising a pre-trial double jeopardy

or statute of limitations issue may file a pre-trial writ of habeas corpus or a motion to quash the indictment. *Compare Ex parte Watkins*, 73 S.W.3d 264 (Tex. Crim. App. 2002) (pre-trial writ for double jeopardy claim), *with Stevenson v. State*, 499 S.W.3d 842, 844 (Tex. Crim. App. 2016) (motion to quash indictment on double jeopardy grounds); *and compare Hernandez v. State*, 127 S.W.3d 768 (Tex. Crim. App. 2004) (motion to quash indictment on statute of limitations grounds), *with Ex parte Dickerson*, 549 S.W.2d 202 (Tex. Crim. App. 1977) (pre-trial writ for statute of limitations indictment claim). Likewise, a defense attorney seeking a bond reduction may file a pre-trial writ of habeas corpus or a motion to set reasonable bond. *Compare Ex parte Weise*, 55 S.W.3d 617, 619 (Tex. Crim. App. 2001) (pre-trial writ for reasonable bond), *with Ragston v. State*, 424 S.W.3d 49, 52 (Tex. Crim. App. 2014) (no right to appeal denial of motion to set reasonable bond). While there is no right to interlocutory appeal, there may be a reasonable strategy for filing motions in lieu of a pre-trial writs of habeas corpus. And the fact that there are two procedural tools to accomplish the same goal does not invalidate or limit either tool.

Similarly, there is no basis in law for the conclusion that the availability of a modified judgment limits the option of a nunc pro tunc order.

3. The proper inquiry as to whether the trial court's order was a proper nunc pro tunc order or a modified judgment should have been whether it was a proper use of a nunc pro tunc and not whether it was entered while the trial court retained plenary jurisdiction.

Appellate courts may "look past the label assigned to the order by the trial court" and consider its functionally equivalent order. *See State v. Savage*, 933 S.W.2d 497, 499 (Tex. Crim. App. 1996) (holding that the trial court's JNOV was improper but was "the functional equivalent of granting a motion for new trial.").[6] However, these reclassifications appear to only occur when the order was improper and not a "traditional" criminal order. *Id.* Therefore, because the trial court had the authority to enter a nunc pro tunc order while it retained plenary power, the Second Court should have only looked at whether the Nunc Pro Tunc Order was proper when determining whether it was a nunc pro tunc order or a modified judgment.

The Second Court of Appeals held that the corrections were appropriate for a

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[6] *See also State v. Bates*, 889 S.W.2d at 310 (because the intent of the order "was to grant a new trial" the State could appeal.); *State v. Evans*, 843 S.W.2d 576, 578 (Tex. Crim. App. 1992) (the trial court order was "functionally indistinguishable from an order granting a new trial"); *Tiede v. State*, 2017 WL 3401402, at *13 (the modified judgment was "mistakenly titled" a nunc pro tunc because it corrected judicial errors and not clerical ones.).

nunc pro tunc order. *See Williams v. State*, 2018 WL 3468458, at *4 (citations omitted). Therefore, the Second Court of Appeals should have concluded the trial court's Nunc Pro Tunc Order was a proper nunc.

II. Because the trial court's Nunc Pro Tunc Order was proper, the Second Court of Appeals was without jurisdiction without a timely notice of appeal.

As explained above, the trial court acted within its inherent authority to correct clerical errors when it entered the Nunc Pro Tunc Order. Entry of this October 25, 2016, Nunc Pro Tunc Order was a proper and valid exercise of the trial court's plenary power. As such, the October 25, 2016, order is a valid nunc pro tunc order.

As the dissent noted, Rule 26.2 (a)(1) of the Texas Rules of Appellate Procedure provides the deadline for filing a notice appeal of the Nunc Pro Tunc Order:

> A nunc pro tunc order is an appealable order; a notice of appeal challenging it must therefore be filed within thirty days after the trial court signs it.

Williams v. State, 2018 WL 3468458, at *6 (citations omitted)[7]; *see also* TEX. R.

[7] As the majority notes, Appellant's appeal was limited to challenging the October 25, 2016,

APP. P. 26.2 (a)(1).

> Appellate rule 26.2 provides that a criminal defendant's notice of appeal must be filed:
>
> > (1) within 30 days after the day sentence is imposed or suspended in open court, or after the day the trial court enters an appealable order; or
> >
> > (2) within 90 days after the day sentence is imposed or suspended in open court, if the defendant timely files a motion for new trial.

Id. at *5 (citing Tex. R. App. P. 26.2)

Based on the plain language of Rule 26.2, the dissent correctly concluded that Appellant's notice of appeal was untimely:

> A motion for new trial does not extend the deadline for filing a notice of appeal from an order nunc pro tunc because it is merely "an appealable order."

Id. at *5.

> "A plain reading of the rule reveals that a timely-filed motion for new trial can only extend the deadline for filing an appeal from the imposition or suspension of a sentence; it cannot extend the deadline for filing an appeal from a mere 'appealable order.'" *Martin v. State*, No. 2-06-272-CR, 2007 WL 529905, at *1 (Tex. App.—Fort Worth Feb. 22, 2007, no pet.) (mem. op., not designated for publication); *see also Ex parte Delgado*, 214 S.W.3d 56, 58 (Tex. App.—El Paso 2006,

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Nunc Pro Tunc. *Williams v. State*, 2018 WL 3468458, at *2.

> pet. ref'd) (mem. op.) (noting "[r]ule 26.2(a)(2) does not include 'or other appealable order' in providing for" an extension of time to file a notice of appeal based on a motion for new trial and concluding under "the [rule's] plain language" that when the appealed order "does not involve imposition or suspension of a sentence, the notice of appeal must be filed within the thirty-day time period provided by rule 26.2(a)(1)"); *Welsh v. State*, 108 S.W.3d 921, 922 (Tex. App.—Dallas 2003, no pet.) (same).

Id.[8] So, the majority erred when it held that the motion for new trial extended the time for filing the notice of appeal as to the trial court's Nunc Pro Tunc Order. *See id.*

Appellant's notice of appeal, filed more than thirty days after the trial court signed the Nunc Pro Tunc Order, was untimely. *Id.* at *6. As the dissent below concluded, the Second Court of Appeals was without jurisdiction to entertain Appellant's appeal. *Id.* In short, the dissent was correct: the majority erred when it did not dismiss Appellant's appeal for want of jurisdiction. *Id.*

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[8] However, the majority held, based on its erroneous conclusion that the trial court was without authority to enter the Nunc Pro Tunc Order, that Rule 26.2 (a)(2) applied. *Id.* at *3 (citations omitted). The majority then concluded that Appellant's timely filed motion for new trial extended the timing for filing of the notice of appeal for the trial court's order. *Id* (citations omitted).

PRAYER FOR RELIEF

The State prays that this petition be granted; that the court of appeals' judgment be reversed; that this Court find that the appellate court was without jurisdiction to consider Appellant's issues; and that this Court hold that Appellant's appeal should be dismissed for want of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

There are 4,479 words in the portions of the document covered by TEX. R. APP. P. 9.4(i)(1).

/s/ Andréa Jacobs
Andréa Jacobs
Asst. Criminal District Attorney

CERTIFICATE OF SERVICE

A copy of the State's Petition for Discretionary Review has been electronically sent to counsel for Appellant, Mr. James Williams, by and through his attorney of record, Ms. Danielle A. Kennedy, thekennedyfirm@att.net, and the State Prosecuting Attorney, Ms. Stacey M. Soule, State Prosecuting Attorney, at information@spa.texas.gov, on the 19th day of September 2018.

/s/ Andréa Jacobs
Andréa Jacobs
Asst. Criminal District Attorney

APPENDIX A
THE MAJORITY OPINION

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00001-CR

JAMES E. WILLIAMS — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 297TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1469951R

MEMORANDUM OPINION[1]

Appellant James E. Williams appeals from his conviction for attempted kidnapping and argues that the trial court's later entry of a sex-offender-registration requirement was invalid and made without notice and an opportunity to be heard. The State asserts that because Williams's postjudgment motions for new trial and motion in arrest of judgment did not extend the appellate timetables

[1]*See* Tex. R. App. P. 47.4.

regarding any complaint directed to the order imposing the registration requirement, we lack jurisdiction over Williams's appeal complaining of the order. We conclude that Williams's postjudgment motions extended the time within which he was required to file his notice of appeal, invoking this court's jurisdiction over his appeal. Even so, the trial court did not err by adding the registration requirement.

I. BACKGROUND

A. JUDGMENT OF CONVICTION

On October 6, 2016, a jury found Williams guilty of the attempted kidnapping of A.H., who was younger than fourteen, while she was walking home from school.[2] *See* Tex. Penal Code Ann. §§ 15.01, 20.03 (West 2011). After a punishment hearing, the jury assessed his sentence at two years' confinement with a $10,000 fine. The trial court imposed the sentence in open court and rendered judgment in accordance with the jury's verdict on October 6. As relevant to this appeal, the trial court's judgment found that Williams was not required to register as a sex offender and did not award any credit for the time Williams had already spent confined:

> **Sex Offender Registration requirements do not apply to the Defendant.** TEX. CODE CRIM. PROC. chapter 62.
>
> The age of the victim at the time of the offense was **N/A**.
>
> If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.

[2]This offense was a lesser-included offense of the indicted offense of aggravated kidnapping. *See* Tex. Code Crim. Proc. Ann. art. 37.09 (West 2006).

Time Credited: If Defendant is to serve sentence in county jail or is given credit toward fine and costs, enter days credited below.
N/A Days Notes: N/A

B. POSTJUDGMENT MOTIONS AND FIRST NUNC PRO TUNC ORDER

On October 13, Williams filed a combined motion for a new punishment trial and a motion in arrest of judgment, arguing that the punishment was contrary to the law and the evidence and that the denial of credit for the time Williams served violated the code of criminal procedure. *See* Tex. Code Crim. Proc. Ann. arts. 42.03, § 2, 42A.559(c) (West 2018); Tex. R. App. P. 21.1(b), 21.3(h), 22.2(c). On October 24, Williams filed a verified motion for new trial, supported by Williams's affidavit and a business-records affidavit from the Tarrant County Sheriff's Department, raising the same arguments as in his October 13 motion. *See generally King v. State*, 29 S.W.3d 556, 569 (Tex. Crim. App. 2000) (discussing when affidavit required to support new-trial motion). That same day—October 24—Williams also filed a motion for judgment nunc pro tunc, arguing that the judgment was "incorrect" because it failed to award him credit for the eighteen months he spent in jail before trial. *See* Tex. R. App. P. 23.2.

On October 25, the trial court signed a "**NUNC PRO TUNC ORDER CORRECTING MINUTES OF THE COURT**" (the first nunc pro tunc order), which "amended and corrected" the October 6 judgment to state that Williams was required to register as a sex offender and that A.H. was younger than fourteen at the time of the offense. No other portions of the judgment were included in the first nunc pro tunc order. The trial court directed the trial-court clerk "to attach a

copy of this Order to the original Judgment in the above styled and numbered cause."

On October 26, the State filed a response to Williams's motion for judgment nunc pro tunc, agreeing that he was entitled to the time credit and requesting that the trial court grant his motion.[3] On October 27, Williams filed an amended motion for judgment nunc pro tunc again asserting that he was entitled to time-served credit.

C. Second Nunc Pro Tunc Order and Appeal

On October 28, the trial court signed a "**JUDGMENT NUNC PRO TUNC**" (the second nunc pro tunc order) and found that the October 6 judgment "should be amended and corrected" to recite that Williams would receive time credit "**From: April 18, 2015 To: October 6, 2016**."[4] Again, the trial court did not include all terms of the judgment, but ordered the trial-court clerk "to attach a copy of this Order[5] to the original Judgment in the above-styled and numbered

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[3]Although Williams raised this argument in his motions for new trial and motion in arrest of judgment as well, the State's response was directed only to his motion for judgment nunc pro tunc.

[4]The trial court stated in the second nunc pro tunc order that it had "considered" Williams's amended motion for judgment nunc pro tunc but did not expressly rule on the motion.

[5]The trial court entitled its document as a judgment; however, the substance of the document shows that it was intended as an order to be attached to the prior judgment—a supplement to the October 6 judgment. The substance of the order controls over its title. *Cf. Mathes v. Kelton*, 569 S.W.2d 876, 878 & n.3 (Tex. 1978) (in civil context, holding substance of judgment, not its title, controlled in determining validity of judgment nunc pro tunc).

cause." After Williams's motions for new trial and motion in arrest of judgment were deemed denied, Williams filed a notice of appeal on December 16 "from judgments heretofore rendered against him." *See* Tex. R. App. P. 21.8(c), 22.4(b).

On appeal, Williams argues that the trial court erred by entering the registration requirement in the first nunc pro tunc order because the correction was not clerical and was not part of the original judgment; thus, its absence could not be corrected by way of a nunc pro tunc order. He further asserts in a related issue that the registration requirement was improperly added to the judgment without first giving him notice and an opportunity to be heard.

II. JURISDICTION

The State argues that we do not have jurisdiction over this appeal because Williams failed to file his notice of appeal within thirty days of the first nunc pro tunc order—by November 28, 2016[6]—which is the appealable order he challenges on appeal. *See* Tex. R. App. P. 26.2(a)(1); *Blanton v. State*, 369 S.W.3d 894, 902 (Tex. Crim. App. 2012). In making this argument, the State asserts that Williams's motions for new trial and motion in arrest of judgment, while timely, did not extend the appellate timetables regarding the trial court's

[6]The thirtieth day after the trial court signed the first nunc pro tunc order was November 24, which was Thanksgiving Day. Because that was a legal holiday and because the clerk's office was closed the next day—Friday, November 25—the thirty-day deadline would have been extended to the next business day—Monday, November 28. *See* Tex. R. App. P. 4.1.

first nunc pro tunc order. In other words, the State asserts that if Williams had raised an appellate issue directed to his judgment and sentence as imposed on October 6, his notice of appeal was timely; but because he attacks the registration requirement included in the first nunc pro tunc order, the State argues that Williams's notice of appeal was due no later than thirty days after the trial court entered the first nunc pro tunc order under Rule 26.2(a)(1).

While this argument is initially persuasive, we cannot agree under the singular facts of this appeal. We have jurisdiction to determine appeals in criminal cases only to the extent authorized by law. *See Abbott v. State*, 271 S.W.3d 694, 696–97 (Tex. Crim. App. 2008). The rules of appellate procedure, while not determinative of our jurisdiction, do provide procedures that litigants must follow to invoke it. *See Chavez v. State*, 183 S.W.3d 675, 679 (Tex. Crim. App. 2006); *Olivo v. State*, 918 S.W.2d 519, 523 (Tex. Crim. App. 1996). These rules provide that a defendant invokes our jurisdiction by filing a compliant notice of appeal either "(1) within 30 days after the day sentence is imposed or suspended in open court, or after the day the trial court enters an appealable order; **or** (2) within 90 days after the day sentence is imposed or suspended in open court **if the defendant timely files a motion for new trial**." Tex. R. App. P. 26.2(a) (emphases added).

The State's argument focuses on subsection (a)(1) to assert that the first nunc pro tunc order was an appealable order that started a new appellate clock as to any complaint regarding the contents of the first nunc pro tunc order. But

Williams timely filed motions for new trial and a motion in arrest of judgment, which extended the trial court's plenary power and classified his appeal as one falling under subsection (a)(2) of Rule 26.2. *See* Tex. R. App. P. 21.8, 22.4; *cf. Collins v. State*, 240 S.W.3d 925, 927 n.2 (Tex. Crim. App. 2007) ("We have suggested in past cases that a trial court has plenary power to modify or rescind its order if a motion for a new trial or a motion in arrest of judgment is filed within 30 days of sentencing."); *Davis v. State*, No. 02-15-00283-CR, 2015 WL 10028889, at *1 (Tex. App.—Fort Worth Oct. 22, 2015) (mem. op., not designated for publication) (discussing trial court's plenary power), *pet. ref'd*, 502 S.W.3d 803 (Tex. Crim. App. 2016). Nothing in Rule 26.2(a)(2) limits the expanded ninety-day deadline to the substance of an appellant's complaints on appeal or to the grounds raised in the motion. *Cf.* Tex. R. App. P. 21.2 (providing motion for new trial not prerequisite for appellate issue unless necessary to "adduce facts not in the record"). All that is required is that "the defendant **timely** files **a** motion for new trial." Tex. R. App. P. 26.2(a)(2) (emphases added); *see also* Tex. R. App. P. 22.5 (equating order denying motion in arrest of judgment to order denying motion for new trial for purposes of timely perfecting appeal); *cf.* Tex. R. App. P. 21.4(a) (providing defendant "may file a motion for new trial before, but no later than 30 days after, the date when the trial court imposes or suspends sentence in open court"); Tex. R. App. P. 22.3 (providing same deadline for motion in arrest of judgment, which is during trial court's plenary power). Therefore, the plain language of rule 26.2(a) leads to a conclusion that

Williams's notice of appeal was due no later than January 4, 2017—90 days after the trial court imposed Williams's sentence in open court—based on his timely filed motions for new trial and motion in arrest of judgment, rendering his December 16 notice of appeal timely filed.

To hold as the State urges would lead to a conclusion in this case that there were three separately calculable deadlines for Williams to file his notice of appeal, each dependent on the claim raised and each based on actions taken by the trial court during its plenary power: (1) ninety days after the trial court imposed sentence in open court for claims arising from his conviction of the lesser-included offense; (2) thirty days after the trial court's entry of the first nunc pro tunc order for claims arising from the registration requirement; and (3) thirty days after the trial court's entry of the second nunc pro tunc order for claims arising from the time-credit calculation.[7] *See generally Harkcom v. State*, 484 S.W.3d 432, 434 (Tex. Crim. App. 2016) ("A person's right to appeal a civil or criminal judgment should not depend upon traipsing through a maze of technicalities."). Certainly, when a judgment nunc pro tunc is entered months, if

[7]It is not clear if the State would agree that because Williams raised the time-credit issue in his motions for new trial and motion in arrest of judgment, those postjudgment filings operated to extend his appellate timetable to ninety days from October 6. Indeed, the State instead could assert under its jurisdictional theory that Williams's challenge to the time-credit calculation was subject to the thirty-day deadline because the postjudgment motions were filed before the second nunc pro tunc order was entered. In any event, multiple notice-of-appeal deadlines, based on the trial court's actions that all occurred during its plenary power, seem untenable under the facts of this case.

not years, after the first judgment was rendered and after the trial court's plenary power expired, the nunc pro tunc judgment starts a new appellate timetable under rule 26.2(a)(1) as "an appealable order," allowing the appellant to appeal from the nunc pro tunc judgment. *See Blanton*, 369 S.W.3d at 896–97, 902–04 (holding nunc pro tunc judgment entered twenty-two years after original judgment and sentence was an appealable order under rule 26.2(a)(1), starting new appellate timetable on appellate claims directed to changes included in nunc pro tunc judgment); *Dewalt v. State*, 417 S.W.3d 678, 688–90 (Tex. App.—Austin 2013, pet. ref'd) (holding under rule 26.1(a)(1), notice of appeal challenging nunc pro tunc judgment due thirty days after its entry, which was six years after date sentence imposed in open court). But where a timely motion for new trial or motion in arrest of judgment is filed, the plain language of rule 26.2(a)(2) renders a notice of appeal timely if filed no later than ninety days after the trial court imposed sentence in open court. Williams did just that and, thereby, invoked our jurisdiction to consider his appeal directed to the trial court's actions taken within its plenary power.

The jurisdictional puzzle in this appeal appears to have been heightened by the parties' and the trial court's misnomers of the actions the trial court took in the first and second nunc pro tunc orders. Nunc pro tunc orders or judgments generally are reserved for actions taken outside a trial court's plenary power, requiring a trial court to rely on its inherent authority to make the record reflect what previously and actually occurred during its plenary power. *See, e.g.*,

Alvarez v. State, 605 S.W.2d 615, 617 (Tex. Crim. App. [Panel Op.] 1980); *Ware v. State*, 62 S.W.3d 344, 354–55 (Tex. App.—Fort Worth 2001, pet. ref'd). A trial court may correct only clerical errors in a nunc pro tunc order or judgment precisely because it lost plenary power and, thus, jurisdiction to correct judicial errors:

> The Rules of Appellate Procedure allow a trial court to modify, correct or set aside judgment and orders through motions for new trial, motions to arrest judgment and motions for judgment nunc pro tunc. Rule 36 [now, Rule 23] vests a trial court with the authority to correct mistakes or errors in a judgment or order after the expiration of the court's plenary power, via entry of a judgment nunc pro tunc. A judgment nunc pro tunc, which literally means "now for then," may not be used to correct "judicial" errors, i.e., those errors which are a product of judicial reasoning or determination. Instead, nunc pro tunc orders may be used only to correct clerical errors in which no judicial reasoning contributed to their entry, and for some reason were not entered of record at the proper time.

State v. Bates, 889 S.W.2d 306, 309 (Tex. Crim. App. 1994) (citations omitted). This reasoning is further supported by the fact that nunc pro tunc proceedings regarding a trial court's judgment and sentence may be had "at any time" but only if a new trial was not granted, the judgment was not arrested, or the defendant did not appeal. *See* Tex. R. App. P. 23.1. In other words, only if the trial court's plenary power to determine the case has expired.

Here, the trial court continued to have plenary power over its October 6 judgment at the time it entered the first and second nunc pro tunc orders. *See generally Ex parte Matthews*, 452 S.W.3d 8, 13 (Tex. App.—San Antonio 2014, no pet.) (discussing plenary power and postjudgment motions). Therefore,

because the trial court's two post-October 6 orders were not nunc pro tunc orders (despite being labeled as such) but were appropriate exercises of its plenary power over its judgment, the cases relied on by the State, allowing for a timely appeal under Rule 26.2(a)(1) after a nunc pro tunc order is entered far outside of the trial court's plenary power, are inapposite to the case at hand. In any event, Williams's motions for new trial and motion in arrest of judgment operated to extend the time within which Williams was to file his notice of appeal based on the plain language of Rule 26.2(a)(2). Because Williams invoked this court's jurisdiction over this appeal based on his timely notice of appeal, we turn to the merits of his appellate complaints. *Cf. Gutierrez v. State*, 307 S.W.3d 318, 321 (Tex. Crim. App. 2010) (recognizing merits of claim may be addressed only if appellate court has jurisdiction over appeal).

III. REGISTRATION REQUIREMENT

Williams asserts that the trial court erred by including the sex-offender-registration requirement in the judgment because it was more than a clerical change and because it was added without notice and an opportunity to be heard. Williams does not argue that the offense he was convicted of was not subject to sex-offender registration. It was. *See* Tex. Code Crim. Proc. Ann. art. 62.001(5)(E), (G) (West 2018). The registration requirement and A.H's age at the time of the offense were statutorily required to be included in the trial court's judgment. *See id.* arts. 42.01, § 1.27, 42.015(a) (West 2018). As such, their addition in the first nunc pro tunc order was a clerical act, not a judicial one,

appropriate even for a nunc pro tunc order. *See Dewalt*, 417 S.W.3d at 690 (dicta); *cf. Ex parte Poe*, 751 S.W.2d 873, 876–77 (Tex. Crim. App. 1988) (concluding absence of jury's deadly-weapon finding in judgment was clerical error remediable by judgment nunc pro tunc). But even if the first nunc pro tunc order effected more than a clerical change, the trial court had the power to do so. As we recognized in our jurisdictional discussion, the first and second nunc pro tunc orders were entered within the trial court's plenary power when the trial court had the authority to address even judicial errors. The trial court did not err, and we overrule Williams's first issue.

Regarding Williams's second issue raising the lack of notice and a hearing, we agree with the State that any presumed error arising from these failures was harmless and must be disregarded because the inclusion of the registration requirement was mandatory and nondiscretionary. *See* Tex. R. App. P. 44.2(b); *cf. Guthrie-Nail v. State*, 506 S.W.3d 1, 2, 7 (Tex. Crim. App. 2015) (recognizing defendant entitled to notice and a hearing before adverse nunc pro tunc judgment entered but concluding remand appropriate only if correction depends on resolution of issue of fact). We overrule issue two.

IV. CONCLUSION

We conclude that Williams's motions for new trial and motion in arrest of judgment, which were timely filed after the trial court imposed sentence in open court, extended the deadline by which Williams was required to file his notice of appeal. Williams's notice of appeal, filed less than ninety days after sentence

was imposed, invoked this court's jurisdiction over the trial court's actions taken within its plenary power. But the first nunc pro tunc order was either an appropriate exercise of the trial court's plenary power over its judgment or effected a mere clerical change in the October 6 judgment. Therefore, the lack of notice and a hearing must be disregarded because such would have been a "useless task." *Horman v. Hughes*, 708 S.W.2d 449, 454–55 (Tex. Crim. App. 1986) (orig. proceeding). We overrule Williams's issues and affirm the trial court's judgment, including the attached nunc pro tunc orders. *See* Tex. R. App. P. 43.2(a).

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

PANEL: SUDDERTH, C.J.; GABRIEL and PITTMAN, JJ.

PITTMAN, J., filed concurring and dissenting opinion.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: July 19, 2018

APPENDIX B
THE DISSENTING AND CONCURRING OPINION

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00001-CR

JAMES E. WILLIAMS — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 297TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1469951R

MEMORANDUM DISSENTING AND CONCURRING OPINION[1]

Appellant's December 6, 2016 notice of appeal is timely as to his conviction and sentence pronounced on October 6, 2016, *see* Tex. R. App. P. 26.2(a)(2), but he chose to complain of neither. Instead, he complains of the trial court's October 25, 2016 "Nunc Pro Tunc Order Correcting Minutes of the Court." If this court had jurisdiction to entertain the issues Appellant chose to raise in his

[1]*See* Tex. R. App. P. 47.4.

brief on appeal, I would join the majority in holding that the trial court did not err by adding language reflecting mandatory sex offender registration requirements to its judgment via the challenged nunc pro tunc order; I concur to that extent. However, a motion for new trial does not extend the deadline for filing a notice of appeal from an order nunc pro tunc because it is merely "an appealable order." I therefore have no choice but to dissent from the majority's reaching the merits of Appellant's issues.

Appellate rule 26.2 provides that a criminal defendant's notice of appeal must be filed:

> (1) within 30 days after the day sentence is imposed or suspended in open court, or after the day the trial court enters an appealable order; or
>
> (2) within 90 days after the day sentence is imposed or suspended in open court if the defendant timely files a motion for new trial.

Tex. R. App. P. 26.2. "A plain reading of the rule reveals that a timely-filed motion for new trial can only extend the deadline for filing an appeal from the imposition or suspension of a sentence; it cannot extend the deadline for filing an appeal from a mere 'appealable order.'" *Martin v. State*, No. 2-06-272-CR, 2007 WL 529905, at *1 (Tex. App.—Fort Worth Feb. 22, 2007, no pet.) (mem. op., not designated for publication); *see also Ex parte Delgado,* 214 S.W.3d 56, 58 (Tex. App.—El Paso 2006, pet. ref'd) (mem. op.) (noting "[r]ule 26.2(a)(2) does not include 'or other appealable order' in providing for" an extension of time to file a notice of appeal based on a motion for new trial and concluding under "the

[rule's] plain language" that when the appealed order "does not involve imposition or suspension of a sentence, the notice of appeal must be filed within the thirty-day time period provided by rule 26.2(a)(1)"); *Welsh v. State*, 108 S.W.3d 921, 922 (Tex. App.—Dallas 2003, no pet.) (same).

A nunc pro tunc order is an appealable order; a notice of appeal challenging it must therefore be filed within thirty days after the trial court signs it. *See* Tex. R. App. P. 26.2(a)(1); *Blanton v. State*, 369 S.W.3d 894, 903–04 (Tex. Crim. App. 2012); *Loftin v. State*, No. 02-11-00366-CR, 2012 WL 5512391, at *2 (Tex. App.—Fort Worth Nov. 15, 2012, no pet.) (mem. op., not designated for publication); *see also Ortiz v. State*, 299 S.W.3d 930, 933 (Tex. App.—Amarillo 2009, no pet.) ("It has been held that 'entered' by the court means a signed, written order.") (citations omitted). Accordingly, Appellant's notice of appeal from the October 25, 2016 nunc pro tunc order was due November 28, 2016. *See* Tex. R. App. P. 4.1(a), 26.2(a)(1). Filed December 16, 2016, his notice of appeal was filed too late to vest this court with jurisdiction over that order. *See* Tex. R. App. P. 26.2(a)(1).

Therefore, interpreting rule 26.2 as it is written, I would hold that we have no jurisdiction to address the issues Appellant chose to raise in his brief. *See id.*; *see also Dewalt v. State*, 417 S.W.3d 678, 690 (Tex. App.—Austin 2013) (holding same but noting that "[t]his is the sort of clerical error that can properly be corrected by nunc pro tunc") (internal quotation marks omitted), *pet. ref'd*, 426 S.W.3d 100 (Tex. Crim. App. 2014); *cf.* Letter from James Madison to

Charles Jared Ingersoll (June 25, 1831), *reprinted in The Mind of the Founder: Sources of the Political Thought of James Madison* 391 (Marvin Meyers ed., 1973) ("[A] law [must] be fixed in its meaning and operation[.]").

Despite the unique posture of this case, in which we could not determine our jurisdiction until Appellant filed his brief, the two issues he raised do not challenge his conviction or sentence but instead complain of an order which his notice of appeal was filed too late to encompass; I would therefore dismiss his appeal. *See Slaton v. State*, 981 S.W.2d 208, 210 (Tex. Crim. App. 1998) ("If an appeal is not timely perfected, a court of appeals . . . can take no action other than to dismiss the appeal.") (citing *Olivo v. State*, 918 S.W.2d 519, 523 (Tex. Crim. App. 1996)). Because the majority instead reaches the merits of Appellant's issues, I respectfully dissent.

/s/ Mark T. Pittman

MARK T. PITTMAN
JUSTICE

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: July 19, 2018