CORRECTING ERRORS SUA SPONTE AFTER ENTRY OF JUDGMENT

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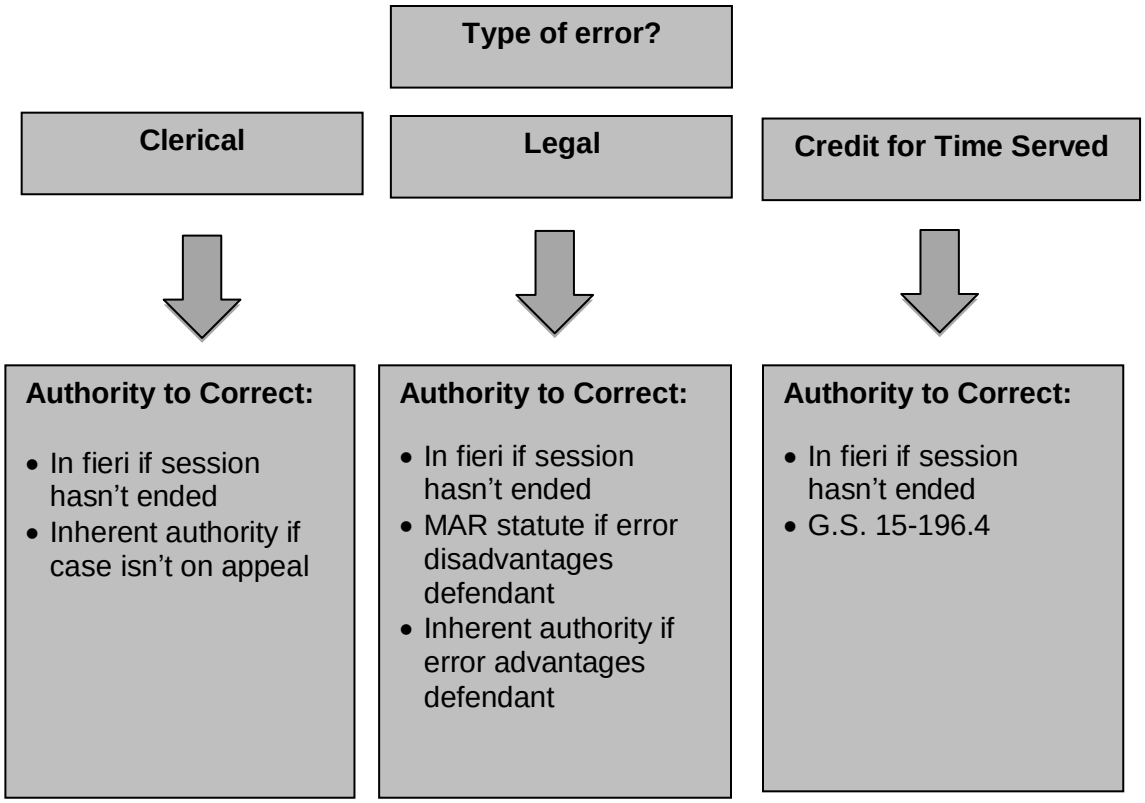
Contents

I. Generally. The trial judge's authority to correct an error on its own motion after entry of judgment in a criminal case depends on what type of error occurred, when it is discovered, and who benefits from the error. This section discusses the relevant authority.

Table 1: Analytical flowchart



II. Clerical Errors.

A. Inherent Authority. The trial judge has inherent authority to correct the record to make it "speak the truth." State v. Dixon, 139 N.C. App. 332, 337–38 (2000); State v. Linemann, 135 N.C. App. 734, 738 (1999) (quoting State v. Cannon, 244 N.C. 399, 403 (1956)); State v. Davis, 123 N.C. App. 240, 242 (1996). Put another way, the court may amend its records "to correct clerical mistakes or supply defects or omissions therein." *Davis,* 123 N.C. App. at 242–43; *Dixon*, 139 N.C. App. at 337.For example, suppose a judge announces in open court that the defendant is to receive consecutive sentences. Suppose further that the clerk erroneously omits this pronouncement from the judgment and the trial judge does not spot the error when she signs the judgment. In this example, the error is a clerical one and the judge has inherent authority to correct the judgment.

1. Case Must Be in the Trial Division. The only limitation on the court's inherent authority to correct clerical errors is that the case must be in the trial division in order for the trial court to act sua sponte. Once an appeal has been docketed, the trial judge cannot exercise this authority to correct the clerical error. *See Dixon*, 139 N.C. App. at 338 (after the record on appeal has been filed with the appellate court, the trial court only may amend or correct the record upon a directive from the appellate court). However, in these circumstances, a motion to correct or amend a judgment to make it "speak the truth" may be made in the appellate division. *See id.* When this occurs, or when the appellate court discovers a clerical error on its own, the court typically remands with instructions to correct the record. *See, e.g.,* State v. Sellers, 155 N.C. App. 51, 59 (2002) (directing trial court to correct error on remand); State v. Brooks, 148 N.C. App. 191, 194–95 (2001) (same); State v. Hendricks, 138 N.C. App. 668, 672–73 (2000) (same).

2. Determining Whether the Error is Clerical or Legal. Because this authority only applies to clerical errors it is important to understand the difference between clerical errors and legal errors. In general, clerical errors involve an incorrect recording of what actually happened. By contrast, legal errors involve mistakes in "judicial reasoning or determination." State v. Jarman, 140 N.C. App. 198, 202 (2000).

a. Uncertainty May Be Resolved in Defendant's Favor. When there is uncertainty regarding whether an error is clerical or legal, some decisions indicate that they "err on the side of caution" and resolve in the defendant's favor discrepancies between what is said in open court and what is stated in the case file. State v. Morston, 336 N.C. 381, 410 (1994); *see also Jarman,* 140 N.C. App. at 203 (quoting *Morston*). For example, in *Morston*, the defendant argued that the trial court improperly employed the same evidence to find the aggravating factors that the offense was committed to disrupt the lawful exercise of a governmental function or enforcement of laws and that it was committed to hinder the lawful exercise of a governmental function or enforcement of laws. The sentencing form indicated that the trial judge found both of these factors. However, the transcript revealed that the trial judge found the following aggravating factors in open court: the offense was committed to hinder the lawful exercise of a governmental function or the enforcement of the law; the offense was committed against a present or former law enforcement officer; and the defendant had prior convictions for criminal offenses punishable by more than sixty days confinement. Relying on the transcript, the State contended that the error was clerical. Acknowledging that this assertion may be correct, the Supreme Court

determined "that the better course is to err on the side of caution and resolve in the defendant's favor the discrepancy between the trial court's statement in open court, as revealed by the transcript, and the sentencing form." *Morston*, 336 N.C. at 410. The court concluded that the trial court improperly found two factors in aggravation on the basis of the same evidence and remanded for resentencing. *See id.* Although some cases adhere strictly to this rules, as evidenced by the cases listed in the very next section, many do not.

b. Examples of Clerical Errors. Cases have found the following types of errors to be clerical and thus capable of correction by inherent authority:

- The judgment listed the wrong case or file number. State v. Mohamed, __ N.C. App. __, 696 S.E.2d 724, 735 (2010); State v. Barber, 9 N.C. App. 210, 212–13 (1970).
- The judgment listed an erroneous offense date. State v. Murray, 154 N.C. App. 631, 639 (2002).
- The judgment incorrectly listed the defendant's race. State v. Linemann, 135 N.C. App. 734, 736–738 (1999).
- The judgment contained an incorrect statutory citation. State v. McKinnon, 35 N.C. App. 741, 743 (1978).
- The judgment contained an erroneous statement regarding the crime of conviction. State v. Ellison, __ N.C. App. __, 713 S.E.2d 228, 246 (2011); State v. Jamerson, 64 N.C. App. 301, 306 (1983).
- The judgment listed the wrong offense as the one for which the trial court arrested judgment. State v. Hendricks, 138 N.C. App. 668, 672–73 (2000).
- The judgment listed the wrong offense as having been dismissed. State v. McGill, 296 N.C. 564, 569 (1979).
- The judgment contained a sentence of imprisonment that did not correspond to what was announced in open court. State v. Lawing, 12 N.C. App. 21, 23 (1971); State v. Brown, 7 N.C. App. 372, 375 (1970).
- The judgment contained a typographical error regarding the sentence. State v. Spooner, 28 N.C. App. 203, 204 (1975).
- The judgment listed the wrong offense class for the offense of conviction. State v. Hammond, 307 N.C. 662, 669 (1983); State v. Eaton, __ N.C. App. __, 707 S.E.2d 642, 651 (2011); State v. Dobbs, __ N.C. App. __, 702 S.E.2d 349, 350-51 (2010); State v. Linemann, 135 N.C. App. 734, 737–38 (1999).
- The box on the judgment form indicating that the sentence was in the presumptive range erroneously was left unchecked. State v. Moore, __ N.C. App. __, 705 S.E.2d 797, 804, *rev'd in part on other grounds*, __ N.C. __, 715 S.E.2d 847 (2011).
- The box on the judgment form indicating that aggravating factors outweighed mitigating factors erroneously was left unchecked. State v. Sellers, 155 N.C. App. 51, 59 (2002) (judge made such a finding); State v. Murphy, 152 N.C. App. 335, 338 n.3 (2002).
- The judgment incorrectly indicated that the judge found that mitigating factors outweighed aggravating factors. State v. Brooks, 148 N.C. App. 191, 194–95 (2001) (transcript indicated that judge found aggravating factor outweighed mitigating factors).
- The judgment incorrectly indicated that aggravating and mitigating factors were found. State v. Hilbert, 145 N.C. App. 440, 446 (2001) (transcript

contained no such findings; defendant was sentenced in the presumptive range).

- The wrong aggravating factor was checked on the judgment form or an aggravating factor was erroneously not checked on that form. State v. Gell, 351 N.C. 192, 218 (2000); State v. Thomas, 153 N.C. App. 326, 341 (2002) (trial court found the aggravating factor); *Murphy*, 152 N.C. App. at 337 n.1, 338 n.2.; State v. Pimental, 153 N.C. App. 69, 80 (2002) (judgment indicated that trial court found a non-statutory aggravating factor that the murder was committed with malice, premeditation, and deliberation; although malice was an element of the substantive offense and could not be used as an aggravating factor, trial court's use of that term in open court was a *lapsus linguae*).
- The judgment stated that the trial judge made no written findings of fact because the prison term was imposed pursuant to a plea arrangement, when written findings were unnecessary since the defendant received the minimum sentence possible. State v. Leonard, 87 N.C. App. 448, 451–52 (1987).
- Listing the victim on the restitution worksheet as an "aggrieved party." State v. Blount, __ N.C. App. __, 703 S.E.2d 921, 927 (2011).
- The judgment granted the defendant credit for time served while under house arrest and the error resulted from inaccurate information inadvertently provided by the deputy clerk. State v. Jarman, 140 N.C. App. 198, 203 (2000) (finding that the judge "did not exercise any judicial discretion or undertake any judicial reasoning" when signing an order providing credit against the defendant's sentence, when the order was prepared by a deputy clerk and the judge was required to give the defendant credit for time spent in custody pending trial; the "judge's action in signing the order giving defendant credit to which he believed she was legally entitled was a mechanical and routine, though mistaken, application of a statutory mandate").
- An order revoking probation and finding that the conditions violated and the facts of each violation were set forth in a violation report, but giving the wrong date of that report. State v. Kerrin, __ N.C. App. __, 703 S.E.2d 816, 821 (2011).
- On the judicial findings and order for sex offender form, listing the incorrect offense of conviction. State v. Treadway, __ N.C. App. __, 702 S.E.2d 335, 347 (2010).
- Checking the wrong box on the judicial findings and order for sex offender form. State v. May, __ N.C. App. __, 700 S.E.2d 42, 44 (2010).

c. Examples of Judicial Errors. Although the trial court has inherent authority to correct clerical errors to make the record speak the truth, this authority only allows it to "make the record correspond to the actual facts." State v. Cannon, 244 N.C. 399, 404 (1956)); *see also* State v. Davis, 123 N.C. App. 240, 243 (1996) (quoting *Cannon*). The court cannot, "under the guise of an amendment of its records, correct a judicial error or incorporate anything in the minutes except a recital of what actually occurred." *Cannon*, 244 N.C. at 404; *see also Davis,* 123 N.C. App. at 243 (quoting *Cannon)*; State v. Jarman, 140 N.C. App. 198, 203 (2000) (same).

Legal errors include actions such as:

- Imposing a sentence above what is permissible by law. State v. Ransom, 74 N.C. App. 716, 718-19 (1985) (trial court committed a legal error when it consolidated offenses and sentenced the defendant to a term of imprisonment that was greater than that prescribed for the most serious offense consolidated).
- Sentencing a defendant to an aggravated term without finding that an aggravating factor existed and that an aggravated sentence was appropriate. State v. Rico, __ N.C. App. __, __ S.E.2d __ (Jan. 17, 2012).
- Dismissing the substantive offenses and sentencing the defendant to a term of imprisonment as a habitual felon. *Davis,* 123 N.C. App. at 243-44 (1996) (legal error was failing to recognize that habitual felon status is not a crime and, standing alone, cannot support a sentence); State v. Taylor*,* 156 N.C. App. 172, 176 (2003) ("Most assuredly, a trial court's entry of judgment and sentence on a 'non- crime' is not a clerical error.").
- Ordering satellite based monitoring for a period of ten years (instead of lifetime registration) after finding that the defendant was a recidivist. State v. Yow, 204 N.C. App. 203 (2010).

3. **Suggested Procedure.** It would be prudent for the trial court to provide notice and an opportunity to be heard before correcting a clerical error.
4. **Correction is Nuc Pro Tunc.** When the court amends its records to correct a clerical error, the amended record "stands as if it had never been defective, or as if the entry had been made at the proper time." State v. Dixon*,* 139 N.C. App. 332, 338 (citation omitted); *see also* State v. Linemann, 135 N.C. App. 734, 738 (1999). That is, the amended order is a *nunc pro tunc* entry. *See Dixon,* 139 N.C. App. at 338.

B. Authority to Correct "In Fieri" Judgment Before the Session Ends. If an error is brought to the court's attention before the session is adjourned, the court may correct it. Until the expiration of the session, the court's judgment is *in fieri,* and the judge has the power, in his or her discretion, to amend it or set it aside. *See* State v. Godwin, 210 N.C. 447 (1936) (modification of sentence); State v. Sammartino, 120 N.C. App. 597, 599-600 (1995) (same); State v. Quick, 106 N.C. App. 548, 561 (1992) (same); State v. Brown, 59 N.C. App. 411, 417 (1982) (same); State v. Edmonds, 19 N.C. App. 105, 106 (1973) (same); State v. Davis, 58 N.C. App. 330, 332–33 (1982) (deletion of finding in aggravation); State v. Oakley, 75 N.C. App. 99, 102 (1985) (vacating the judgment); State v. Carrouthers, __ N.C. App. __, 714 S.E.2d 460, 463 n.3 (2011) (dicta; modification of ruling on suppression motion); *see generally* BLACK'S LAW DICTIONARY 848 (9th ed. 2009) (the term *in fieri* means "([o]f a legal proceeding) that is pending or in the course of being completed").

1. **Authority Continues After Notice of Appeal.** Unlike the inherent authority discussed in section II.A., above, the court retains this authority to correct the judgment even if notice of appeal has been filed. *See Davis*, 58 N.C. App. at 333 (upholding the trial judge's amendment to the judgment deleting one of its findings in aggravation although notice of appeal had been filed; noting that "[c]ontrary to defendant's argument, there is no evidence that the court changed the judgment because defendant had given notice of appeal").
2. **Procedure.** When exercising this authority, the judge may hear further evidence in open court. *See* State v. Godwin, 210 N.C. 447 (1936); State v. Quick, 106

N.C. App. 548, 561 (1992); State v. Brown, 59 N.C. App. 411, 417 (1982). Both parties must be present when the evidence is taken. *Quick*, 106 N.C. App. at 561; *Brown*, 59 N.C. App. at 417.

3. **Authority Ends When Session Ends.** Unlike the court's inherent authority to make the record speak the truth, this discretionary authority to modify the judgment terminates when the session ends. State v. Jones, 27 N.C. App. 636, 638–39 (1975) (trial court not authorized to modify sentence after it had adjourned *sine die*); *see also* State v. Kelly, 5 N.C. App. 209, 211–12 (1969) (because the judge who imposes a sentence cannot modify it after expiration of the session, neither can a second judge).
   a. **What is a "Session"?** A session is the time during which a court sits for business and refers to a typical one-week assignment of superior court. State v. Sammartino, 120 N.C. App. 597, 599 (1995). A trial session ends when the time set for it by the Chief Justice expires, unless extended by order. *Jones*, 27 N.C. App. at 638; *Sammartino*, 120 N.C. App. at 599-600 (quoting *Jones*). A session can end earlier if, before this time, "the judge finally leaves the bench." *Jones*, 27 N.C. App. at 638; *Sammartino*, 120 N.C. App. at 599–600 (quoting *Jones*). A judge finally leaves the bench when there is an announcement in open court that the court is adjourned *sine die. Jones*, 27 N.C. App. at 639; *Sammartino*, 120 N.C. App. at 600 (quoting *Jones*). *Sine die* means "[w]ith no day being assigned (as for resumption of a meeting or hearing)." BLACK'S LAW DICTIONARY 1511 (9th ed. 2009); *see also Sammartino,* 120 N.C. App. at 600 (same); *Jones,* 27 N.C. App. at 639 (same).

III. Legal Errors.

A. Determining Whether the Error is Clerical or Legal. See section II.A.2 above for a discussion of this issue.

B. Authority to Correct "In Fieri" Judgment Before the Session Ends. As noted in Section II.B., above, when an error is brought to the court's attention before the session is adjourned, the court may correct it. Until the expiration of the session, the court's judgment is *in fieri,* and the judge has the power, in his or her discretion, to amend it or set it aside. This rule applies to clerical errors and to legal errors. See section II.B., above for detail regarding the scope and exercise of this authority. This authority, of course, ends when the session ends. The sections below explore the trial court's authority to sua sponte correct errors after the session ends.

C. Errors that Disadvantage the Defendant. If the legal error is one that works to the defendant's disadvantage—such as a sentence that is too severe—the trial judge has authority to sua sponte correct it under the motion for appropriate relief (MAR) statute. *See generally* G.S. 15A-1411 to -1422 (MAR statutes). Specifically, G.S. 15A-1420(d) provides that "[a]t any time that a defendant would be entitled to relief by motion for appropriate relief, the court may grant such relief upon its own motion." Thus, for example, if after the session has ended, the trial court learns that it erroneously sentenced the defendant to a term of imprisonment in excess of the statutory maximum, the court need not await a defense MAR to correct its sentencing error. Because the defendant would be entitled to relief, *see* G.S. 15A-1415(b)(8) (providing that one ground for a MAR is that the sentence is unauthorized by law), the trial court may exercise its authority under G.S. 15A- 1420(d) and *sua sponte* correct the error.

This authority under the MAR statute does not extend to errors that work to the defendant's advantage, such as a sentence that is too lenient. *State v. Oakley,* 75 N.C. App. 99 (1985), makes this distinction. In *Oakley,* the defendant pleaded guilty to assault with a deadly weapon inflicting serious injury. The trial judge accepted the plea and held a sentencing hearing. The judge imposed a suspended sentence, placed the defendant on supervised probation, and ordered him to pay $10,380.06 in restitution to the victim for her medical bills. The victim was not present when the State presented evidence that her medical bills totaled over $10,000. The following day, the victim appeared before the court expressing dissatisfaction with the proceedings and indicating that her medical bills totaled over $40,000. When the State made a MAR to set aside the judgment, the trial responded by setting aside the judgment, striking the guilty plea, and setting the case for trial. The defendant appealed. The court of appeals began noting that the State had no authority under the MAR statute to move to set aside the judgment based on the victim's new evidence. It went on to note, however, that because the session had not ended and the judgment was *in fieri*, the court had authority to set it aside. But as to the trial court's action of striking the guilty plea and setting the case for trial, the court found it unauthorized. It noted that G.S. 15A-1420(d) authorizes the trial court to grant relief on its own motion only if the defendant would be entitled to such relief on a MAR. *Id.* 103–04. It continued: "It follows that the trial court does not have the authority to grant appropriate relief which benefits the State. In this case, striking the guilty plea . . . and setting the case for trial on the original charge benefited the State exclusively." *Id.* at 104. Thus, under *Oakley,* and consistent with the language of the statute, the court has no authority under G.S. 15A-1420(d) to grant relief which benefits the State.

D. Errors That Advantage The Defendant. As noted above, the MAR statute does not authorize the trial judge to sua sponte correct legal errors that advantage the defendant, such as a sentence that is too lenient. However, the trial court has inherent authority to correct such errors. *State v. Branch* 134 N.C. App. 637 (1999), is the best authority on this point.

1. The *Branch* Rule. In *Branch,* the defendant pleaded guilty to several offenses, some committed on September 19, 1994, and some committed on October 4, 1994. The trial court combined the offenses and sentenced the defendant to twelve to fifteen months in jail under Structured Sentencing. After the session ended, the Department of Correction notified the trial court that offenses committed before October 1, 1994, could not be combined with offenses committed after that date. The trial judge then resentenced the defendant to twelve to fifteen months for the offenses committed on October 4, 1994 under Structured Sentencing, and ten years for the offenses committed on September 19, 1994 under Fair Sentencing. The defendant then filed a MAR, which was denied.

On appeal, the defendant argued, in part, that the resentencing hearing was unlawful because the trial court had no jurisdiction over the matter once the term ended. The court of appeals disagreed, stating that trial courts have authority to correct invalid sentences. It stated: "If a judgment is invalid as a matter of law, North Carolina Courts have the authority to vacate the invalid sentence and resentence the defendant accordingly, even if the term has ended." *Branch,* 134 N.C. App. at 641; *see also* State v. Petty, __ N.C. App. __, 711 S.E.2d 509, 513-14 & n.1 (2011) (having erroneously arrested judgment on a DWI charge to which the defendant had pleaded guilty, the trial court had authority to correct the

invalid judgment and sentence the defendant even after the session ended; citing *Branch*, the court noted in dicta that the trial court's authority to correct invalid sentences includes sentences that exceed the statutory maximum). *Cf.* State v. Roberts, 351 N.C. 325 (2000) (the trial court had the authority to resentence the defendant after learning that the original sentence was invalid because it did not fall within the Structured Sentencing Act; the defendant was sentenced to 8 to 10 months but the Act required a sentence of 29 to 44 months; "[t]rial courts are required to enter criminal judgments consistent with the provisions of the [Act]").

2. **Pragmatic Considerations.** Although not explored by *Branch*, a strong pragmatic argument supports its holding. If the trial court has no inherent authority to correct, out of session, illegal sentences that benefit defendants, there are certain situations when the errors will remain uncorrected. As noted above, the court has no authority under G.S. 15A-1420(d) to correct an error that works to the defendant's advantage through a *sua sponte* MAR. Thus, the court cannot exercise authority under the MAR statute to correct an illegal sentence that benefits the defendant. If the error is immediately detected, the State can seek to have it corrected through an appeal or a MAR filed within ten days of entry of judgment. *See* G.S. 15A-1416(a) (within ten days of entry of judgment, the State may file a MAR asserting any error which it may assert on appeal); *see generally* G.S. 15A-1445 (appeal by the State). If, however, the error is not immediately detected, the State will be foreclosed from pursuing these options. G.S. 15A-1416(b) provides that after the ten-day period has expired, the State may make a MAR only for: (1) the imposition of sentence when prayer for judgment has been continued and grounds for the imposition of sentence are asserted and (2) the initiation of any proceeding authorized under Article 82, Probation; Article 83, Imprisonment, and Article 84, Fines, with regard to modification of sentences. Thus, absent a post conviction action by the defendant or inherent authority of the court to act *sua sponte,* the illegal sentence will remain uncorrected.

IV. Errors Regarding Credit for Time Served. Occasionally a judgment fails to give the defendant proper credit against his or her sentence for time served in confinement as a result of the charge that culminated in the sentence. G.S. 15-196.4 authorizes the court, pursuant to a petition seeking credits not previously allowed, to determine the credits due and forward an order setting forth the allowable credit to the defendant's custodian.