No. 54A19-3 DISTRICT 10

NORTH CAROLINA SUPREME COURT

****

STATE OF NORTH CAROLINA	)	From Court of Appeals
	)	19-777 P19-490
v.	)	
	)	From Wake County
ROGELIO ALBINO DIAZ-TOMAS	)	15-CR-1985
Defendant-Appellant	)	

DEFENDANT-APPELLANT'S NEW BRIEF

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[1] The table of contents in the Petition for Discretionary Review erroneously states: N.C. Const. Art. I, § 13.

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No. 54A19-3 DISTRICT 10

NORTH CAROLINA SUPREME COURT

****

STATE OF NORTH CAROLINA	)	<u>From Court of Appeals</u>
	)	19-777 P19-490
v.	)	
	)	<u>From Wake County</u>
ROGELIO ALBINO DIAZ-TOMAS	)	15-CR-1985
Defendant-Appellant	)	

DEFENDANT-APPELLANT'S NEW BRIEF

****

NOW COMES, the Defendant-Appellant, Rogelio Albino Diaz-Tomas, by and through undersigned counsel, Anton M. Lebedev, and respectfully submits the foregoing opening brief in support of his appeal and *mandamus* requests.

ISSUES PRESENTED

- Whether the Defendant is entitled to the reinstatement of his criminal charges on the trial docket?
- Whether the District Court erred in denying the Defendant's motion to reinstate charges?
- Whether the Superior Court abused its sound discretion in denying the Defendant's petition for writ of *certiorari*?

- Whether the Court of Appeals abused its discretion in denying the Defendant direct *certiorari* review of the District Court order denying his motion to reinstate charges?
- Whether the Court of Appeals erred in affirming the order of the Superior Court?
- Whether the Court of Appeals erred in denying the Defendant's *mandamus* petitions?
- Whether the Court of Appeals erred in failing to take judicial notice of the local criminal calendar rules of the District Court?
- Whether this Court should issue its writs of *mandamus* to the District Court and the Wake County District Attorney?
- Whether this Court should consider any moot aspects of this appeal?
- Whether this Court should exercise its supervisory authority?
- Whether this matter should be remanded to the Superior Court for a hearing?

STATEMENT OF THE CASE

On 4 April 2015, Defendant-Appellant, Mr. Rogelio Diaz-Tomas was charged by criminal citation by Raleigh Police Officer J.D. Fox with driving while impaired in violation of N.C. Gen. Stat. § 20-138.1 and with driving without an operator's license in violation of N.C. Gen. Stat. § 20-7(a) in Wake County, North Carolina. (R pp 5, 83-84).

On 24 February 2016, Defendant failed to appear. (R pp 14, 86). An order for arrest was issued on 25 February 2016. (R p 14). On 11 July 2016, the State dismissed Defendant's case with leave pursuant to § 15A-932(a)(2). (R p 16). This disposition status is referred to by the prosecutors, attorneys, and the Court as "VL" status.

On 24 July 2018, Defendant was arrested on the warrant. His court appearance was scheduled for the afternoon session of 9 November 2018. (R pp 15, 17).

Defendant failed to appear again on the November 9 2018 court date. (R p 21-22, 86). On 13 November 2018, a new order for arrest was issued for failing to appear. (R p 22). Defendant was re-arrested on the new warrant on 12 December 2018, and a new court appearance was set for 18 January 2019 at 2 p.m. (R p 25).

Prior to that session, Defendant's appearance was advanced as an add-on to the administrative calendar of 14 December 2018 in courtroom 403. (R pp 30, 86). Defendant appeared on this date. (R p 30).

During that administrative session, the Assistant District Attorney in declined to reinstate Defendant's charges. (R pp 16, 30, 86). The 18 January 2019 court date never took place. (R p 82).

On 28 January 2019, Defendant filed a Motion to Reinstate Charges in the District Court. (R pp 33-50).

On 11 February 2019, Defendant filed a petition for writ of *mandamus* asking this Court to compel the District Court to promptly rule on his Motion to Reinstate and to compel the District Attorney to reinstate his charges.[2] (R p 51). On 14 February 2019, Defendant submitted additional documentation in support of his *mandamus* petition. On 20 November 2019, the State responded to the Petition, and the Defendant replied to the State's response on 20 February 2019. This Court denied Defendant's *mandamus* petition on 26 February 2019. Id.

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[2] While all petitions and motions previously filed by the Defendant are not included in the record on appeal, this Court may take judicial notice of referenced motions and petitions because they appear in interrelated proceedings with the same parties. See Lineberger v. N.C. Dep't of Corr., 189 N.C. App. 1, 6, 657 S.E.2d 673, 677, aff'd in part, review dism. in part, 362 N.C. 675, 669 S.E.2d 320 (2008) (citing West v. G. D. Reddick, Inc., 302 N.C. 201, 202, 274 S.E.2d 221, 223 (1981)) ("In addition to the record on appeal, appellate courts may take judicial notice of their own filings in an interrelated proceeding.")

On 7 June 2019, Defendant requested the District Court to promptly adjudicate his motion to reinstate the charges. (R pp 52-53). On 15 July 2019, the Honorable Chief District Court Judge, Robert B. Rader, denied the motion to reinstate the charges in chambers. (R pp 55-59).

On 22 July 2019, Defendant filed a petition for writ of *certiorari* in Superior Court seeking the review of the 15 July 2019 District Court order denying his Motion to Reinstate Charges. (R pp 60-70). The State did not respond to this petition, and on 24 July 2019, the Honorable Senior Resident Superior Court Judge, Paul C. Ridgeway denied Defendant's *certiorari* petition in chambers. (R pp 71-73).

On 27 July 2019, Defendant filed a petition for writ of *certiorari* with the Court of Appeals seeking review of the 15 July 2019 District Court order and the 24 July 2019 Superior Court order. (R pp 74-75). On 31 July 2019, the State responded to Defendant's *certiorari* petition. On the same day, Defendant replied to the State's response and moved the Court of Appeals to consider the reply.

On 15 August 2019, the Court of Appeals allowed Defendant's *certiorari* petition solely for review of the 24 July 2019 order of the Superior Court. (R p 75). On the same day, the Court of Appeals allowed Defendant's motion to

consider his reply. On 22 August 2019, the Superior Court declared the Defendant indigent for appellate purposes. (R pp 80-81).

On 4 September 2019, Defendant filed his opening brief and a petition for writ of *mandamus* seeking the Court of Appeals to compel the Wake County District Attorney to reinstate or dismiss his criminal charges. On the same day, Defendant filed a motion to expedite the consideration of his appeal at the Court of Appeals. On 6 September 2019, the Court of Appeals denied Defendant's motion to expedite the consideration of his appeal.

On 8 September 2019, Defendant moved the Court of Appeals to supplement his record on appeal to include one additional document. On the same day, Defendant moved the Court of Appeals to correct the dates on his *mandamus* petition and incorporate the settled record on appeal into the petition for writ of *mandamus*. On 9 September 2019, the Court of Appeals granted Defendant's request to correct the dates on the *mandamus* petition.

On 10 September 2019, the State responded to Defendant's first petition for writ of *mandamus*. On 22 September 2019, Defendant replied to the State's response.

On 25 September 2019, the Court of Appeals allowed the motion to supplement the record on appeal and ordered that the attached document be scanned and treated as an exhibit in the record on appeal.

On 26 September 2019, the State filed its responsive brief at the Court of Appeals. On 1 October 2019, Defendant moved the Court of Appeals to take judicial notice of the Wake County local rules, and on 4 October 2019, Defendant filed his reply brief at the Court of Appeals.

On 15 October 2019, counsel filed a motion for the appointment of a translator and interpreter for the indigent Defendant. On 1 November 2019, the Court of Appeals dismissed the same motion without prejudice to refile with an explanation as to the lack of timeliness for the request.

On the same day, counsel filed a second motion for the appointment of a translator and interpreter for the indigent Defendant with the requested explanation of the untimeliness.

On 4 November 2019, Defendant filed a second petition for writ of *mandamus* seeking the Court of Appeals to compel the District Court to reinstate his charges on the criminal calendar. The second petition for writ of *mandamus* was accompanied by a motion to deem the same petition timely filed.

On the same day, Defendant filed a consolidated petition for discretionary review, *certiorari*, and *mandamus* in this Court. A motion to deem the petition timely filed accompanied the consolidated petition.

On 8 November 2019, the State responded to Defendant's second *mandamus* petition and the consolidated petition. On the same day, this Court denied Defendant's consolidated petition and dismissed the Defendant's motion to deem his petitions timely filed as moot. On 9 November 2019, Defendant replied to the State's response to his second *mandamus* petition at the Court of Appeals.

On 13 November 2019, the Court of Appeals dismissed Defendant's second motion for the appointment of a translator and interpreter without prejudice for counsel to make arrangements with the Office of Language Access Services to purchase the requested services.

On 21 April 2020, the Court of Appeals affirmed the order of the Superior Court's denial of *certiorari* relief and denied Defendant's *mandamus* petitions. Judge Zachary concurred in part and dissented in part.

Later that day, Defendant petitioned this Court for a writ of *supersedeas* and moved for a stay of the Court of Appeals decision. On the same day, this Court allowed Defendant's motion for a temporary stay.

On 22 April 2020, Defendant moved the Court of Appeals to correct a clerical error in the date of its opinion. The Court of Appeals allowed the motion on 23 April 2020.

On the same day, Defendant moved the Court of Appeals to permit him to waive en banc rehearing in this matter. On 24 April 2020, the Court of Appeals dismissed Defendant's request, reasoning that the notice of appeal may not be filed until the issuance of the mandate.

On 12 May 2020, Defendant gave notice of appeal as a matter of right to this Court. On the same day, Defendant filed a petition for discretionary review on additional issues. This petition was accompanied by petitions for writs of *mandamus* to the District Court and the District Attorney, a conditional petition for writ of *certiorari* to review the 15 July 2019 order of the District Court, a conditional petition for writ of *certiorari* to review the 15 August 2019 order of the Court of Appeals, a motion to expedite the consideration of the Defendant's matters, a motion to proceed in forma pauperis, a motion to take judicial notice, and a motion for leave to amend notice of appeal.[3]

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[3] An identical copy of the motion for leave to amend notice of appeal was also filed in the Court of Appeals.

Also, on 12 May 2020, Defendant moved the Court of Appeals to transmit additional materials to this Court. The Court of Appeals dismissed the motion because it is the appellant's responsibility to provide documents to this Court.

On 8 June 2020, Defendant moved this Court to supplement the record on appeal. On 3 June 2020, this Court allowed Defendant's *supersedeas* petition. On 12 June 2020, this Court amended its order allowing the Defendant's *supersedeas* petition.

On 29 June 2020, Defendant moved this Court to consolidate the petitions for discretionary review in the Diaz-Tomas and Nunez matters, to clarify the extent of the *superesedeas* order, and alternatively to hold his *certiorari* and *mandamus* petitions in abeyance.

On 6 July 2020, Defendant moved this Court for leave to file a memorandum of additional authority. This Court dismissed the same motion on 8 July 2020.

On 17 August 2020, Defendant filed a petition for writ of *procedendo* at this Court seeking this Court to promptly proceed to its criminal judgment on the charges. Defendant also moved this Court to order the production of

certain discovery under seal and to print and mail copies of the petition for discretionary review on additional issues.

On 24 August 2020, Defendant moved this Court to amend the certificates of service to indicate corrected dates. On 28 August 2020, the Defendant filed an errata to the *procedendo* petition. On 2 September 2020, defense counsel filed a notice advising the Court that he had difficulties serving opposing parties by e-mail.

On 15 December 2020, this Court allowed Defendant's petition for discretionary review on issues I-V, VIII-IX, XII-XIV. On the same day, this Court dismissed the motion to clarify the extent of the *supersedeas* grant, but allowed the motion to amend his notice of appeal and the conditional petition for writ of *certiorari* to review the order of the District Court. This Court further allowed Defendant's conditional petition for writ of *certiorari* to review the order of the Court of Appeals, dismissed the Defendant's petition for writ of *procedendo*, dismissed the Defendant's motion for the printing and mailing of the petition for discretionary review on additional issues, allowed the Defendant's motion to supplement the record on appeal, dismissed the Defendant's motion to take judicial notice as moot, allowed the Defendant's motion to hold *certiorari* and *mandamus* petitions in abeyance and denied the Defendant's motion for discovery.

On 4 January 2021, Defendant moved this Court for an extension of time to file his opening brief. On 5 January 2021, this Court granted the Defendant's motion and extended the deadline to 12 February 2021. On 29 January 2021, Defendant again moved this Court for an extension of time to file the opening brief. On the same day, this Court granted the Defendant's second motion and extended the deadline to 1 March 2021.

STATEMENT OF GROUNDS FOR APPEAL

This Court has jurisdiction to review upon decisions of the lowers courts upon matters of law and legal inference. N.C. Const. Art. IV, § 8; N.C. Gen. Stat. § 7A-26. An appeal of right lies in this Court from any decision of the Court of Appeals containing dissenting opinion. N.C. Gen. Stat. § 7A-30(2).

Defendant's appeal in this case is based on Judge Zachary's dissent. Defendant properly gave notice of appeal in this Court and the Court of Appeals within fifteen days after the issuance of the Court of Appeals mandate. See N.C. R. App. P. 14(a) (a notice of appeal must be served and filed "with the clerk of the Court of Appeals and with the clerk of the Supreme Court and serving notice of appeal upon all other parties within fifteen days after the mandate of the Court of Appeals has been issued to the trial tribunal"); N.C. R. App. P. 32(b) ("[u]nless a court orders otherwise, its

clerk shall enter judgment and issue the mandate of the court twenty days after the written opinion of the court has been filed with the clerk.")

Defendant's appeal of right is effective because the Defendant gave notice of appeal after the deadline to request en banc rehearing has expired and neither party requested en banc rehearing. N.C. Gen. Stat. § 7A-30(2).

This Court is authorized to correct errors when there "has been a denial of pretrial motions or relief to which the Defendant is entitled, so as to affect defendant's .... presentation of his defense, to his prejudice." N.C. Gen. Stat. § 15A-1442(4)a. This Court is also permitted to correct any other error of law that was "committed by the trial court to the prejudice of" the Defendant. Id. at (6).

This Court also has jurisdiction over the Defendant's appeal pursuant to § 7A-31(c), § 7A-32(b) and N.C. R. App. P. 15 & 21. On 18 December 2020, this Court allowed Defendant's petition for discretionary review on additional issues I-V, VIII-IX, XII-XIV. On the same day, this Court also allowed Defendant's conditional petition for writ of *certiorari* to review the order of the District Court, and the Defendant's conditional petition for writ of *certiorari* to review the order of the Court of Appeals.

STATEMENT OF FACTS

On 4 April 2015, Defendant was charged by criminal citation by Raleigh Police Officer J.D. Fox with driving while impaired in violation of § 20-138.1 and with driving without an operator's license in violation of § 20-7(a) in Wake County, North Carolina. (R pp 5, 83-84).

On 24 February 2016, Defendant failed to appear in District Court. (R pp 14, 86). On 25 February 2016, an order for arrest was issued. (R p 14). On 11 July 2016, the State dismissed Defendant's case with leave pursuant to § 15A-932(a)(2). (R p 16). This resulted in the case being placed in what is referred to as "VL" status.

On 24 July 2018, Defendant was arrested and his court appearance was scheduled during the afternoon 9 November 2018 Criminal Session of Wake County District Court. (R pp 15, 17).

On 9 November 2018 at 2PM, Defendant again failed to appear during the Criminal Session of Wake County District Court. (R pp 21-22). On 13 November 2018, a second order for arrest was issued. (R p 22). On 12 December 2018, Defendant was arrested on the second order for arrest. (R p 25). Defendant's court appearance was then calendared for hearing in District Court on 18 January 2019 at 2 p.m. Id. However, prior to that

session, Defendant's appearance was advanced as an add-on case to the earlier afternoon 14 December 2018 Criminal Administrative Driving while Impaired Session of Wake County District Court in Room 403. (R pp 30, 86).

On 14 December 2018 at 2 p.m., Defendant appeared during the Criminal Administrative DWI Session of Wake County District Court. (R p 30). During that administrative session, Assistant District Attorney Jaren E. Kelly declined to reinstate Defendant's charges. (R pp 16, 30, 86). Defendant's 18 January 2019 Criminal District Court date never took place. (R p 82).

On 28 January 2019, Defendant filed a Motion to Reinstate Charges in District Court. (R pp 33-50). In that motion, Defendant argued that:

1. The District Court retains jurisdiction over matters that were dismissed with leave ("VL" matters);
2. The District Court has a duty to promptly adjudicate the motion;
3. The District Court has the authority to adjudicate the motion in chambers;
4. The District Court has the inherent authority and duty to control the dismissal with leave procedure;

5. Reinstatement or dismissal of Defendant's charges is consistent with the spirit and purpose of section § 15A-932;
6. Reinstatement of Defendant's traffic charges is mandated by N.C. Gen. Stat. § 20-24.1(b1);
7. The failure to reinstate or dismiss Defendant's charges would result in the denial of his right to a speedy trial;
8. The failure to reinstate or dismiss Defendant's charges would result in the denial of his rights to due process;
9. The District Court cannot accept a coerced guilty plea;
10. Reinstatement or dismissal of Defendant's charges is consistent with the Rules of Professional Conduct for attorneys;
11. The failure to reinstate or dismiss Defendant's charges is inconsistent with the spirit and purpose of section § 15A-952(g); and
12. Sections § 15A-543 and § 20-28(a2) rather than section § 15A-932 should be used to punish defendants who abscond during the pendency of such criminal proceedings.

(R pp 33-42).

Moreover, the motion contained the following additional argument:

> The State should not be permitted to decline to reinstate a criminal matter for reasons that it was not originally permitted to "dismiss" it "with leave". Once a Defendant is arrested and

> appears in Court, the declination of reinstatement becomes simply an extension of the "dismissal with leave" and must be supported by the same requirements as the original "dismissal with leave."

(R p 36).

Furthermore, the motion contained a footnote that read:

> If the State's position has changed and the State will reinstate the Defendant's charges in District Court or will permit the Defendant to enter a plea of guilty in District Court without waiving his right to appeal to Superior Court for a trial de novo, Defendant respectfully requests that the State responds to this motion accordingly.

(R p 33).

The same motion was accompanied by the affidavits of Defense Counsel, Anton M. Lebedev, and attorney Paul Elledge, as well as Defendant's certified driving record. (R pp 44-47). The affidavit of attorney Elledge stated that it is the practice and policy of Wake County District Attorney's Office to not reinstate older DWI cases that were dismissed with leave (VL status), including when the State is clearly unable to prove the charges. (R pp 46-47).

In his affidavit, Defense Counsel stated that "the State does not generally reinstate older DWI cases in VL status for trial – in cases where the Defendant willfully failed to appear in Court – unless the Defendant agrees to plead guilty to a DWI charge." (R pp 44-45). Defense Counsel

further stated that the defendants who plead guilty to a DWI in District Court "would need to waive their right to [] appeal at the time of the guilty plea." Id.

The certified driving record showed that Defendant's license was in a state of revocation, because of his failure to appear on the instant charges. (R pp 48-50).

On 11 February 2019, Defendant filed a petition for writ of *mandamus* at this Court, asking this Court to compel the District Court to promptly rule on the Motion to Reinstate and to compel the District Attorney to reinstate his charges. (R p 51).

A copy of the Wake County District Court calendaring rules were attached to the *mandamus* petition. The local rules stated that "[a]ll district court criminal/infraction cases should be disposed of at the earliest opportunity," that the "rules and policies shall apply to all criminal/infraction cases in the District Court," that "requests for continuances that will delay the resolution of the case beyond the established time standards shall only be granted for extraordinary cause," that "[n]o continuance should exceed more than four (4) weeks except upon a finding that a longer continuance is warranted based upon the interests of justice or court efficiency," and that

"misdemeanors should be disposed of within 120 days of the first setting."[4] The local rules also contained a commentary which stated that meeting the deadlines in the rules:

> may not be possible in instances in which a defendant fails to appear and is "called and failed". In these matters, *it is the responsibility of the district attorney to determine when it is appropriate to dismiss the charges*. Also, cases in which defendants are placed in authorized Diversion programs may not meet this deadline. THESE TIME STANDARDS IN NO WAY IMPLY ANY "RIGHT" BY THE STATE OR THE DEFENDANT TO A CONTINUANCE OR SERIES OF CONTINUANCES UP TO THE MAXIMUM TIME FOR DISPOSITION. *ON THE CONTRARY, THE POLICY, AS SET OUT IN RULE 1.1, IS THAT ALL DISTRICT COURT CASES SHOULD BE DISPOSED OF AT THE EARLIEST OPPORTUNITY, INCLUDING THE FIRST TRIAL SETTING.*

On 26 February 2019, this Court denied Defendant's *mandamus* petition. Id.

On 7 June 2019, Defendant, through counsel, requested the District Court to promptly adjudicate his motion to reinstate charges. (R pp 52-53). The same request included a statement that the State is refusing to reinstate the charges unless Defendant enters a plea of guilty and waives his right to appeal for a trial de novo to Wake County Superior Court. Id.

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[4] The State did not object to either the Court of Appeals taking judicial notice of the local rules or Defendant's argument that the District Court acted inconsistently with its own rules.

On 10 June 2019, the Honorable Chief District Court Judge, Robert B. Rader notified the parties that he is willing to consider additional arguments raised by both parties. (R p 54). Neither party provided additional arguments to the District Court. On 15 July 2019, Judge Rader denied the motion to reinstate charges in chambers. (R pp 55-59). In denying Defendant's motion, the District Court treated the factual allegations concerning procedural history as true and made the following conclusions of law:

1. That the court has jurisdiction in this matter;
2. That the facts with respect to procedural history of this case are not in dispute;
3. That Defendant's motion presents only questions of law and no evidentiary hearing is required.
4. That N.C.G.S. 15A-932(a) conveys to the State discretion to enter a dismissal with leave when a Defendant fails to appear;
5. That the State exercised its discretion and acted within its statutory authority pursuant to N.C.G.S. 15A-932 by entering a dismissal with leave on July 11, 2016, after the Defendant failed to appear for his regularly scheduled court hearing on February 24,2016;

6. That the court complied with N.C.G.S. 20-24.1(b1) by scheduling court dates for this matter to be heard in Wake County District Court on November 9, 2018 and December 14, 2018, following his arrests on July 24, 2018 and December 12, 2018 for failure to appear;
7. That N.C.G.S. 15A-932(d) conveys to the State discretion to reinstate charges that have been dismissed with leave once a Defendant has been apprehended or apprehension is imminent. Specifically, N.C.G.S. 15A-932(d) states: *Upon apprehension of the defendant, or in the discretion of the prosecutor when he believes apprehension is imminent, the prosecutor* *__may__* *reinstitute the proceedings by filing written notice with the clerk*;
8. That N.C.G.S. 15A-932(d) conveys to the State discretion to reinstate charges that have been dismissed with leave once a Defendant has been apprehended or apprehension is imminent. Specifically, N.C.G.S. 15A-932(d) states: Upon apprehension of the defendant, or in the discretion of the prosecutor when he believes apprehension is imminent, the prosecutor may reinstitute the proceedings by filing written notice with the clerk;

9. That use of the term "may" by the General Assembly in N.C.G.S. 15A-932(d) clearly indicates discretion to reinstate charges previously dismissed with leave lies solely with the prosecutor;

10. That the State exercised its discretion and acted within statutory authority pursuant to N.C.G.S. 15A-932 by declining to reinstate the charges in this matter on December 14, 2018;

11. That the District Attorney is an independently elected constitutional officer whose duties and prescribed by the Constitution of North Carolina and the North Carolina General Statutes. These duties include the responsibility to prosecute on behalf of the State all criminal actions and infractions requiring prosecution in the superior and district courts. N.C. Const. Art. IV § 18 and N.C.G.S. 7A-61;

12. That the court may not exceed its authority and invade the province of an independently elected constitutional officer in the performance of her duties. State v. Camacho, 329 N.C. 589, 406 S.E. 2d 868 (1991);

13. That for the court to reinstate the charges and mandate that the District Attorney prosecute the Defendant, as requested by Defendant in his motion, would constitute an unauthorized and impermissible interference with the District Attorney's performance

of constitutional and statutory duties, which only the District Attorney and her lawful designees may perform;

14. That the court is unaware of any legal right of Defendants to have criminal charges reinstated upon demand.

(R pp 55-58).

On 22 July 2019, Defendant, through counsel, filed a petition for writ of *certiorari* in Wake County Superior Court seeking the review of the 15 July 2019 District Court order denying his Motion to Reinstate Charges. (R pp. 60-70). In that petition, Defendant argued that the matter was ripe for interlocutory review by means of *certiorari*; and that the District Court erred in denying his motion to reinstate charges. Id. In support of his contention that the District Court erred, Defendant argued that:

1. The District Court did not comply with N.C. Gen. Stat. § 20-24.1(b1);
2. The District Court failed to take into account that it had independent power and duty to reinstate Defendant's criminal charges;
3. The State declining to reinstate the criminal charges of an available defendant constitutes a new and impermissible dismissal with leave;

4. Wake County District Attorney's Office's refusal to reinstate Defendant's criminal charges upon his appearance violates his rights to a speedy trial;

5. Wake County District Attorney's Office's refusal to reinstate Defendant's criminal charges upon his appearance violates his rights to due process;

6. Wake County District Attorney's Office engages in systematic prosecutorial misconduct;

7. The failure to reinstate or dismiss Defendant's criminal charges is inconsistent with the spirit and purpose of section § 15A-952(g);

8. Sections § 15A-543 and § 20-28(a2) rather than section § 15A-932 should be employed to punish defendants who abscond during the pendency of such criminal cases.

(R pp 60-68)

On 24 July 2019, the Honorable Senior Resident Superior Court Judge, Paul C. Ridgeway, denied Defendant's *certiorari* petition in chambers. (R pp 71-73). In denying the petition, the Superior Court stated:

> Here, the Court finds and concludes as a matter of law that the Defendant has failed to provide "sufficient cause" to support the granting of the Petition. Furthermore, the Court finds that the

> Defendant is not entitled to the relief requested and within the discretion of this Court, the Defendant's Petition for Writ of *Certiorari* is DENIED AND DISMISSED.

(R p 72).

On 27 July 2019, Defendant, through counsel, filed a petition for writ of *certiorari* with the Court of Appeals seeking review of the 15 July 2019 District Court order and the 24 July 2019 Superior Court order. (R pp 74-75).

On 15 August 2019, the Court of Appeals allowed Defendant's *certiorari* petition solely to review the 24 July 2019 order of the Superior Court. (R p 75).

On 4 September 2019, Defendant filed a petition for writ of *mandamus* seeking the Court of Appeals to compel the Wake County District Attorney to reinstate or dismiss his criminal charges. On 1 October 2019, Defendant moved the Court of Appeals to take judicial notice of the current Wake County local rules. On 4 November 2019, Defendant filed a second petition for writ of *mandamus* seeking the Court of Appeals to compel the Wake County Criminal District Court to reinstate his charges on the criminal calendar.

On 21 April 2020, in a split opinion, the North Carolina Court of Appeals affirmed the order of the Wake County Superior Court denying

certiorari relief and denied the Defendant's *mandamus* petitions. State v. Diaz-Tomas, 841 S.E.2d 355 (N.C. Ct. App. 2020). The Court of Appeals concluded that the Superior Court did not err by denying the *certiorari* petition. Id. at 358. The majority reasoned that *certiorari* is a discretionary writ, and the Defendant did not show that the superior court's decision was entirely arbitrary or unsupported by reason. Id. at. 359. As far as the two *mandamus* petitions were concerned, the Court of Appeals concluded that they were improper for two reasons: first, that the petitions were being used as a substitute for an appeal or *certiorari*; and second that the petitions should have been filed in Wake County Superior Court, not the Appellate Division. Id. at 358. As far as the motion to take judicial notice was concerned, the majority reasoned that it did not need to take judicial notice to decide the case. Id. Finally, the Court of Appeals declined to consider the defendant's argument that the district court erred by denying his motion to reinstate charges, unanimously concluding that the issue was not properly before the Court of Appeals. Id. at 359.

In Her Honor's dissent, for different reasons, Judge Zachary agreed with the majority that *mandamus* was not the proper remedy, but she would have granted the Defendant's motion to reinstate charges and concluded that the Superior Court abused its discretion by denying the Defendant's

certiorari petition. Id. In the absence of an order from the Superior Court revealing the basis for its rationale in denying the petition, and in light of the defendant's allegations, which she characterized as "cogent" and "well-supported," she would have remanded the case for a hearing and decision on the merits. Id. at 364.

On 12 May 2020, Defendant gave notice of appeal as a matter of right to this Court. On the same day, Defendant filed a petition for discretionary review on additional issues, along with petitions for writs of *mandamus* to the District Court and the District Attorney, a conditional petition for writ of *certiorari* to review the 15 July 2019 order of the District Court, a conditional petition for writ of *certiorari* to review the 15 August 2019 order of the Court of Appeals, and a motion for leave to amend the notice of appeal. The Defendant's petition for discretionary review requested this Court to review the following issues:

I. Whether the Court of Appeals erred in failing to vacate both the District and Superior Court orders?

II. Whether the Court of Appeals erred in failing to remand the matter to Superior Court for further remand to District Court with instructions to reinstate the Defendant's criminal charges on the active trial docket?

III. Whether the Court of Appeals erred in declining to issue a writ of *mandamus* to the Wake County District Court to command it to schedule a trial or hearing within a reasonable time?

IV. Whether the Court of Appeals erred in declining to issue a writ of *mandamus* to the Wake County District Attorney to command her to reinstate or dismiss the Defendant's criminal charges within a reasonable time?

V. Whether the Court of Appeals incorrectly reasoned in denying Defendant's *mandamus* petitions?

VI. Whether the Court of Appeals erred in failing to explain its decision to not consider reviewing the District Court Order Denying Defendant's Motion to Reinstate Charges?

VII. Whether the Court of Appeals erred in failing to review the District Court Order Denying Defendant's Motion to Reinstate Charges simultaneously with the Superior Court Order Denying Defendant's *Certiorari* Petition?

VIII. Whether this Court should issue its writ of *certiorari* to directly review the District Court Order Denying Defendant's Motion to Reinstate Charges?

IX. Whether this Court should issue its writ of *certiorari* to review the Court of Appeals Order on Defendant's *Certiorari* Petition?

X. Whether Appellate Rule 21 deems the Court of Appeals to be the appropriate court to review a *certiorari* petition seeking review of an interlocutory District Court criminal order?

XI. Whether the order of the Court of Appeals petition panel barred a later merits panel from issuing a writ of *certiorari* to also review the District Court order?

XII. Whether this Court should issue its writ of *mandamus* to the District Court to compel it to promptly schedule a trial or hearing for the Defendant?

XIII. Whether this Court should issue its writ of *mandamus* to the District Attorney to compel her to either reinstate or dismiss the Defendant's charges within a reasonable time?

XIV. Whether the prompt issuance of a writ of *mandamus* by this Court will render this matter no longer reviewable by this Court?

On 15 December 2020, this Court allowed Defendant's petition for discretionary review on issues: I-V, VIII-IX, XII-XIV and denied the Defendant's petition for discretionary on the remaining issues. On the same day, this Court also allowed the Defendant's conditional petition for writ of *certiorari* to review the order of the District Court, allowed Defendant's petition for writ of *certiorari* to review the order of the Court of Appeals, and

allowed the Defendant's motion to amend his notice of appeal. The amended notice of appeal listed the following issues:

I. Whether the Court of Appeals erred in denying the Defendant's motion to take judicial notice of the local rules of the criminal Wake County District Court, when the Defendant's motion seeking judicial notice alleged that the District Court acted inconsistently with its local rules?

II. Whether the Court of Appeals erred in affirming the order of the Wake County Superior Court denying and dismissing the Defendant's well articulated *certiorari* petition seeking review of the Wake County District Court order denying his motion to reinstate charges without sufficiently evaluating the merits of the Defendant's Superior Court *certiorari* petition?

III. Whether the Superior Court abused its discretion in denying and dismissing Defendant's *certiorari* petition, when the Defendant presented cogent arguments in support of the petition and the Defendant had no other remedies in the trial courts to seek reinstatement of his two criminal charges on the trial calendar?

IV. Whether the Court of Appeals erred in not reversing the summary order of the Superior Court denying Defendant's

certiorari petition and in not remanding this matter for further proceedings?

V. Any and all other issues that this Honorable Supreme Court permits the Defendant to argue. Defendant concurrently filed a petition for discretionary review containing a number of other proposed issues. (See pp. 50-51 of PDR)

STANDARDS OF REVIEW

This Court reviews the decisions of the Court of Appeals for errors of law. N.C. R. App. P. 16(a); State v. Melton, 371 N.C. 750, 756, 821 S.E.2d 424, 428 (2018).

To the extent that this Court is reviewing the orders of the trial courts, when a trial court sits without a jury, findings of fact are conclusive on appeal "if supported by any substantial evidence," Carolina Milk Producers Ass'n Coop., Inc. v. Melville Dairy, Inc., 255 N.C. 1, 22, 120 S.E.2d 548, 563 (1961), while conclusions of law are reviewed de novo, Davison v. Duke Univ., 282 N.C. 676, 712, 194 S.E.2d 761, 783 (1973).

However, a petition for writ of *certiorari* is granted or denied at the discretion of the court and ordinarily is reviewed for abuse of discretion, see N.C. Cent. Univ. v. Taylor, 122 N.C. App. 609, 612, 471 S.E.2d 115, 117 (1996), aff'd per curiam, 345 N.C. 630, 481 S.E.2d 83 (1997). "A ruling

committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." White v. White, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING THE DEFENDANT'S MOTION TO REINSTATE THE CHARGES.

The District Court stated, "The court is unaware of any legal right of Defendants to have criminal charges reinstated upon demand."[5] The reinstatement of criminal charges is better classified as a remedy than a right.

This Court has held a District Court has the power to fashion an appropriate remedy "depending upon the right violated and the facts of the particular case." Corum v. University of North Carolina, 330 N.C. 761, 784, 413 S.E.2d 276, 291, cert. denied, ___ U.S. ___, 113 S. Ct. 493, 121 L. Ed. 2d 431 (1992). The right in question is the right to a prompt trial or dispositive hearing. Given the circumstances of this case, the appropriate remedy is the reinstatement of the Defendant's criminal charges. District Court erred in

[5] This Court granted the Defendant its conditional writ of *certiorari* to review the District Court order denying his motion to reinstate charges. That petition was not improvidently granted. To prevent "plac[ing] form over substance" in this important case, this Court should review the District Court order directly. Bowen v. Gilliard, 483 U.S. 587, 606 (1987).

denying the Defendant's motion to reinstate his charges. Corum, 330 N.C. at 784, 413 S.E.2d at 291.

a. The Defendant has not been afforded a prompt trial or hearing as required by § 20-24.1(b1).

The prosecutor may enter a dismissal with leave ("VL") when the defendant fails to appear, and "the prosecutor believes the defendant cannot be readily found." N.C. Gen. Stat. § 15A-932(a)(2). "Dismissal with leave" ("VL") results in the removal of the case from the trial docket, but the criminal proceeding under the charging instrument is not terminated. All outstanding process retains its validity and the prosecutor may reinstitute the proceedings by filing written notice with the clerk.

The prosecutor may reinstate the case by filing written notice with the clerk. Id. at (d). The decision to reinstate the case is discretionary. See Little v. Penn Ventilator Co., 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986) ("may" indicates discretion). Such discretion must have reasonable boundaries.

For instance, when a defendant's driving privileges are suspended as a result of his non-appearance in court, he does not sacrifice his right to a trial or hearing when he does appear. "Upon motion of a defendant, the court *must* order that a hearing or a trial be heard within a reasonable time." N.C. Gen. Stat. § 20-24.1(b1). Ordinarily, the words "must" and "shall," "indicate a

legislative intent to make the provision of the statute mandatory." State v. Inman, 174 N.C. App. 567, 570, 621 S.E.2d 306, 309 (2005). Indeed, while § 15A-932(d) appears to make reinstatement of criminal charges discretionary, the more specific and mandatory provision in § 20-24.1(b1) resolves the conflict. See Utilities Comm. v. Electric Membership Corp., 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) ("[i]t is a well-established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, other sections which are general in their application"); Food Stores v. Board of Alcoholic Control, 268 N.C. 624, 628-629, 151 S.E.2d 582, 586 (1966) (same).

The State may argue the Defendant was already afforded an opportunity for a trial or hearing. Such an interpretation contravenes the core principle that section § 20-24.1(b1) should not be interpreted in a manner which would render any of its words superfluous." State v. Ramos, 193 N.C. App. 629, 637, 668 S.E.2d 357, 363 (2008) (citation and quotation marks omitted), aff'd, 363 N.C. 352, 678 S.E.2d 224 (2009). Instead, this Court construes "each word of [§ 20-24.1(b1)] to have meaning, where reasonable and consistent with the entire statute, because it is always presumed that the legislature acted with care and deliberation." Id. (citation and quotation marks omitted).

At any rate, the Defendant's case was never added to a trial calendar once it was placed in "VL" status. The case was only heard on an administrative calendar where the state is not required to move forward with the trial.

b. Camacho does not limit the District Court's authority to reinstate charges. The District Court failed to weigh the competing interests in determining how to calendar the case.

Dismissal with leave is merely a "calendaring device." State v. Patterson, 332 N.C. 409, 421 (1992); see also Duruji v. Lynch, 630 F. App'x 589, 592 (6th Cir. 2015) ("[A]dministrative closure is akin to a continuance.") A case remains active after a failure to appear and dismissal with leave. State v. Mark, 154 N.C. App. 341, 347, 571 S.E.2d 867, 871 (2002), aff'd per curiam, 357 N.C. 242, 580 S.E.2d 693 (2003).

In addition to statutorily denominated powers, the District Court possesses inherent powers "irrespective of constitutional provisions," Beard v. N.C. State Bar, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987), which "power[s] may not be abridged by the legislature." Id. "It is impractical and would be almost impossible to have legislation or rules governing all questions that may arise on the trial of a case. Unexpected developments, especially in the field of procedure, frequently occur. When there is no statutory provision or well recognized rule applicable, the presiding judge is

empowered to exercise his discretion *in the interest of efficiency, practicality and justice.*" Shute v. Fisher, 270 N.C. 247, 253 (1967); see also In re Mental Health Center, 42 N.C. App. 292, 296, 256 S.E.2d 818, 821 (reversing trial court's dismissal for lack of jurisdiction), cert. denied, 298 N.C. 297, 259 S.E.2d 298 (1979).

Court administration is a subject matter over which the District Court has inherent authority. Watters v. Parrish, 252 N.C. 787, 791, 115 S.E.2d 1, 4 (1960); Landis v. North American Company, 299 U.S. 248, 254-255, 57 S. Ct. 163, 81 L.Ed.2d 153 (1936); McDonald v. Goldstein, 79 N.Y.S.2d 690, 693 (App. Div. 1948). The "trial court is vested with wide discretion in setting for trial and calling for trial cases pending before it." Watters, 252 N.C. at 791, 115 S.E.2d at 4.

The "ultimate authority over managing the trial calendar is retained in the court," even though the statute gives the district attorney the authority to calendar cases for trial. See Simeon v. Hardin, 339 N.C. 358, 376, 451 S.E.2d 858, 870 (1994). "It is well settled that courts have substantial inherent powers to control their calendars and to supervise the conduct of litigation *as long as they do not deprive parties of their fundamental constitutional rights.*" Felix F. Stumpf, Inherent Powers of the Court, § 7.3 (The National Judicial College, 2008). The management of a court's calendar is a quintessential judicial function. It "calls for the exercise of judgment, which

must weigh competing interests and maintain an even balance." North American Company v. Landis, 299 U.S. 248, 254-255 (1936) (Cardozo, J.).

Subsection (h) of § 7A-49.4 specifically provides: "Nothing in this section shall be construed to affect the authority of the court in the call of cases for trial." N.C. Gen. Stat. § 7A-49.4(h). Just because § 15A-932 confers calendaring authority upon the prosecution does not mean the trial court "is without authority to schedule a matter for a hearing in court." State v. Mitchell, 298 N.C. 549, 550-51, 259 S.E.2d 254, 255 (1979) (holding that a trial judge has the authority and sole responsibility to schedule hearings on post-conviction matters).

The District Court has authority to fully control its criminal calendar. Simeon, 339 N.C. at 376, 451 S.E.2d at 870. The trial court has the inherent authority to schedule the Defendant a prompt trial or hearing. Watters, 252 N.C. at 791, 115 S.E.2d at 4.

In determining that it lacks the requisite calendaring authority, the District Court relied on State v. Camacho, 329 N.C. 589, 406 S.E. 2d 868 (1991). Camacho does not directly address calendaring authority. On the other hand, Simeon, which was decided after Camacho, specifically addresses the calendaring issue. Simeon, rather than Camacho, is the governing case on the calendaring authority issue. Simeon, 339 N.C. at 376, 451 S.E.2d at 870. Because of its misapprehension of governing law, the District Court

failed to "exercise [its] judgment [and] weigh competing interests and maintain an even balance" in determining how to properly calendar the Defendant's case. North American Company, 299 U.S. at 254-255.

c. The Defendant properly made a motion to reinstate rather than dismiss the criminal charges.

The State may argue that the proper remedy for the Defendant is an eventual motion to dismiss rather than a motion to reinstate the charges. That argument is flawed. It is well established that dismissal is a disfavored and "drastic remedy." See State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978); see also Harris v. Maready, 311 N.C. 536, 551, 319 S.E.2d 912, 922 (1984) (dismissal is to be applied only when the trial court determines that less drastic sanctions will not suffice); People v. Gallego, 143 Mich. App. 639, 372 N.W.2d 640, 643 (1985) (cited for persuasiveness); Commonwealth v. Stipetich, 539 Pa. 428, 652 A.2d 1294 (S.Ct.1995), aff'g in part and rev'g in part, 423 Pa. Super. 427, 621 A.2d 606 (1993) (cited for persuasiveness); State v. Courtney, 831 S.E. 2d 260, 281 (N.C. 2019) (Newby, J., dissenting) (Klopfer's victory meant he was *entitled to be tried* rather than to the substantive dismissal of the charges). Furthermore, the case must be re-calendared for an evidentiary hearing in order for a motion to dismiss on speedy trial grounds to even take place.

d. The State conceded any challenges to reinstatement by failing to assert them in the District Court.

Despite having ample opportunity, the State failed to respond to or challenge Defendant's contentions in his motion to reinstate charges. Some of the allegations in Defendant's motion involved accusations of impropriety that a reasonable prosecutor would immediately attempt to rebut, if untrue. See State v. Marecek, 152 N.C. App. 479, 502-04 (2002) (an adoptive admission "may be manifested in any appropriate manner").

As many courts have done before, this Court should take State's lack of response at the trial court level to constitute their implicit concession of both factual and legal issues raised in the motion. See Hoang v. People, 2014 CO 27, ¶ 52, 323 P.3d 780, 790 (2014) (noting the People's failure to contest the defendant's timely filing of his notice of appeal, which he discussed in his opening brief with the court of appeals, and "accept[ing] this implicit concession"); McLean v. City of Rome, New York, No. Civ. A. 95CV1713, 1998 WL 312350 at *5 (N.D.N.Y. June 8, 1998) (Pooler, D.J.) ("I find that [plaintiff] has consented to defendants' motion for summary judgment on this claim by failing to oppose it"); Koehler v. Bank of Bermuda (New York) Ltd., 96 Civ. 7885, 1998 WL 67652 at *8 (S.D.N.Y. Feb. 19, 1998) ("Because Plaintiff has failed to oppose Defendant['s] motion to dismiss these two counts, the Court views Plaintiff's failure to oppose as an implicit concession to the relief

sought by [defendant] and therefore dismisses these two counts as against [defendant]"), aff'd, 209 F.3d 130 (2d Cir. 2000); Eli Lilly & Co. v. Aradigm Corp, 376 F.3d 1352, 1360 (Fed. Cir. 2004) (finding implicit concession on need for construction by failure to seek any construction before evidence closed); Bonte v. U.S. Bank, N.A., 624 F.3d 461, 466 (7th Cir. 2010) (failure to respond to an argument results in waiver); Gonzalez-Servin v. Ford Motor Co., 662 F.3d 931, 933 (7th Cir. 2011) (failure to respond to a cited case is an "implicit concession" of its accuracy); U.S. v. Heavrin, 330 F.3d 723, 731-33 (6th Cir. 2003) (fee waiver applicant's affidavit statement that his net worth was under two million dollars constituted prima facie proof of that fact, and government's failure to request discovery regarding his net worth "can be considered an implied concession of [his] status as a party"); State v. Wiplinger, 343 N.W.2d 858, 861 (Minn. 1984) (recognizing an implied concession).

Our Appellate Rules support a similar conclusion. See, e.g., N.C. R. App. P. 10(a), (c). This Court should not allow the State to "swap horses" between courts, and should decline to consider the State's defenses that are raised for the first time on appeal. Weil v. Herring, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934).

e. The record does not suggest the Defendant waived his rights to a prompt trial or hearing.

The courts indulge every reasonable presumption against waiver of fundamental constitutional rights. State v. Stokes, 274 N.C. 409, 163 S.E.2d 770 (1968); State v. Brooks, 38 N.C. App. 445, 248 S.E.2d 369 (1978). However, a defendant may waive the benefit of statutory or constitutional provisions by "express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it." State v. Gaiten, 277 N.C. 236, 239, 176 S.E.2d 778, 781 (1970). "A waiver of the right to speedy trial is not to be lightly inferred from equivocal circumstances." State v. Steward, 543 P.2d 178 (Mont. 1975) (cited for persuasiveness).

The record does not show that the Defendant waived his right to a trial or a speedy trial. There is no express waiver on the record. Gaiten, 277 N.C. at 239, 176 S.E.2d at 781. While the Defendant did previously miss court appearances, it is unclear why the Defendant missed court and whether he did so willfully. Id. As far as the Defendant's waiver of his right to a jury trial is concerned, a jury trial can only be waived by following the procedures in § 15A-1201 and these procedures were clearly not followed here.

f. **An interpretation of § 15A-932 allowing the District Attorney *ex parte* calendaring authority is impermissibly unjust.**

"When interpreting statutes, this Court presumes that the legislature did not intend an unjust result." State v. Jones, 353 N.C. 159, 170 (2000).[6] Article IV, Section 13(2) of the North Carolina Constitution states that "[n]o rule of practice or procedure shall abridge substantive rights or limit the right of trial by jury." N.C. Const. art. IV, § 13(2). Procedural rules that violate substantive constitutional rights are unconstitutional, and it remains the duty of the state courts to provide a forum for individuals claiming that procedural rules abridge such rights. Indeed, "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them." Dogwood Dev. v. White Oak, 657 S.E.2d 361, 363 (N.C. 2008) (citing Hormel v. Helvering, 312 U.S. 552, 557, 61 S.Ct. 719, 85 L.Ed. 1037 (1941)).

Interpreting § 15A-932 as prohibiting the District Criminal Court from reinstating criminal charges on the trial calendar of an available defendant is impermissibly unjust. Jones, 353 N.C. at 170. To the extent that § 15A-932 permits the prosecution to *ex parte* calendar criminal matters, it improperly abridges the Defendant's substantive constitutional and statutory rights and

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[6] Another fundamental tenet of statutory interpretation is that if there are two reasonable interpretations of a statute, one of which is constitutional and the other not, the courts should choose the constitutional interpretation because they should not presume that the legislature violated the constitution. Gray v. Daimler Chrysler Corp., 821 N.E.2d 431, 435 (Ind. Ct. App. 2005) (cited for persuasiveness). Interpreting section § 15A-932 to give prosecutors unfettered authority to reinstate criminal charges would thus also be impermissible because such interpretation contravenes Klopfer v. North Carolina, 386 U.S. 213, 18 L. Ed. 2d 1 (1967) and Simeon v. Hardin, supra.

limits his right to a jury trial. N.C. Const. art. IV, § 13(2). Such interpretation would impermissibly defeat the ends of justice and cannot be adopted by this Court. Dogwood Dev., 657 S.E.2d at 363; Hormel, 312 U.S. at 557.

g. **The District Court ruling contravenes its own local calendaring rules.**

Unexplained deviation from established policies typically constitutes an abuse of discretion. See United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); I.N.S. v. Yang, 519 U.S. 26, 32 (1996) ("Though the agency's discretion is unfettered at the outset, if it announces and follows — by rule or by settled course of adjudication — a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as arbitrary, capricious, [or] an abuse of discretion'") (alteration in original); Ramaprakash v. F.A.A., 346 F.3d 1121, 1124 (D.C. Cir. 2003) ("agency action is arbitrary and capricious if it departs from agency precedent without explanation").

Indeed, an appellate court may reverse a trial court decision where it is convinced that the trial court has misconstrued its own rules. Smith v. Ford Motor Co., 626 F.2d 784, 796 (10th Cir. 1980); C. Wright A. Miller, Federal

Practice and Procedure: Civil § 3153 (1973); see also Colgrove v. Battin, 413 U.S. 149, 161 n. 18, 93 S.Ct. 2448, 2455 n. 18, 37 L.Ed.2d 522 (1973).

Because the District Criminal Court denied the Defendant reinstatement of his charges despite its own policies stating that such pending matters need to be promptly scheduled, the District Criminal Court abused its sound discretion and its order must be reversed. Yang, 519 U.S. at 32; Ramaprakash, 346 F.3d at 1124; Smith, 626 F.2d at 796; Colgrove, 413 U.S. at 161 n. 18, 93 S.Ct. at 2455 n. 18.

II. THE DEFENDANT IS ENTITLED TO THE REINSTATEMENT OF HIS CRIMINAL CHARGES ON THE TRIAL CALENDAR.

While the District Court did not directly address these issues, the Defendant is also entitled to the reinstatement of charges for several reasons. First, the unnecessary administrative closure of impaired driving matters is disfavored under our public policy. Second, Klopfer mandates reinstatement of the Defendant's criminal charges. Third, due process mandates the reinstatement of the Defendant's criminal charges or at the very least mandates the Defendant an opportunity to be meaningfully heard regarding the calendaring of his criminal charges. Fourth, North Carolina professional rules for lawyers support the immediate reinstatement or dismissal of the Defendant's criminal charges. Fifth, Defendant's criminal charges were reinstated by operation of law when he appeared in court and subsequently

declining to reinstate the same charges is baseless and violates § 15A-932(a). And sixth, there are alternative proper mechanisms for punishing defendants for absconding from such criminal court proceedings. Basically, there is overwhelming authority not mentioned in the District Court order that suggests that the Defendant is entitled to the reinstatement of his criminal charges on the trial calendar.

a. Unnecessary administrative closure of impaired driving matters is disfavored under public policy.

The dismissal of impaired driving cases is strongly discouraged and there is a strong public policy toward prosecuting these cases when they have any merit. See N.C. Gen. Stat. § 20-138.4 (requirement that prosecutor explain reduction or dismissal of charge in implied-consent case).[7] Likewise, the unnecessary administrative closure of such cases is discouraged.

Administrative closure of cases is disfavored not only in criminal proceedings but also in other tribunals such as the Immigration Courts. See Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018) (Immigration Judges do not have the general authority to indefinitely suspend immigration proceedings).

[7] A dismissal with leave "effectively dismisses" the "original charge in a case subject to the implied-consent law," because the defendant cannot be convicted. N.C. Gen. Stat. § 20-138.4(a)(4).

b. Klopfer mandates reinstatement of Defendant's charges.

Every person formally accused of a crime is guaranteed a speedy and impartial trial by not only our Constitution but also by U.S. Const., Amend. VI and XIV. The constitutional guarantee of a speedy trial outlaws bad faith delays which are not reasonably necessary for the State to prepare and present its case. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

In Klopfer, the United States Supreme Court held that allowing the State to take a nolle prosequi with leave to reinstate, a procedure which — like failing to reinstate a motor vehicle charge after the defendant has re-appeared for trial — leaves the case pending indefinitely without any means for the defendant to obtain a final resolution and, while the defendant continues to suffer adverse consequences from the pendency of the case, violates the speedy trial clause of the Sixth Amendment. Klopfer, 386 U.S. at 219-22. Klopfer makes it abundantly clear that an available Defendant is entitled to be added back to the active criminal docket upon his demand. See Newman v. State, 121 Ga. App. 692 (1970) (cited for persuasiveness).

c. Due process mandates the reinstatement of Defendant's charges or an opportunity to be meaningfully heard regarding the calendaring of his case.

The fundamental requirement of due process is the opportunity to be heard at a "meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). There must be a "hearing appropriate to

the nature of the case." Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982).

Moreover, in Simeon, this Court held there is a due process violation when the prosecution "delay[s] calendaring [a defendant's] case for trial for the tactical purposes of… pressuring him into entering a guilty plea." Simeon, 339 N.C. at 378, 451 S.E.2d at 871.[8] Furthermore, in Klopfer, Justice Harlan concurred with the result but would have found a violation of the due process clause of the Fourteenth Amendment instead of a violation of the defendant's rights to a speedy trial. Klopfer, 386 U.S. at 226-27, (Harlan, J., concurring).

By permitting the *ex parte* removal of the Defendant's criminal charges from its trial calendar and refusing to consider overriding the prosecutor's calendaring decisions, the Defendant's rights to be meaningfully heard were violated. Armstrong, 80 U.S. at 552. The nature of the case entitles the Defendant to a prompt trial and hearing. Logan, 455 U.S. at 428.

The indefinite suspension of the Defendant's criminal cases over his objection also results in the violation of the Defendant's rights to due process. Klopfer, 386 U.S. at 226-27. To the extent that the State is refusing to calendar the Defendant's matter to ensure that he pleads guilty and waives

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[8] In order for a plea of guilty to be valid, it must be made knowingly and voluntarily. Boykin v. Alabama, 395 U.S. 238, 23 L.Ed.2d 274 (1969). A guilty plea entered solely to have one's charges reinstated is far from voluntary.

his right to appeal, the Defendant's rights are being further violated. Simeon, 339 N.C. at 378, 451 S.E.2d at 871.

In sum, due process protections require the Defendant's charges to be reinstated or at the very minimum require the District Criminal Court to exercise its discretion in determining whether to interfere with the purported prosecutorial calendaring abuses. Armstrong, 80 U.S. at 552; Logan, 455 U.S. at 428; Klopfer, 386 U.S. at 226-27; Simeon, 339 N.C. at 378, 451 S.E.2d at 871.

d. The North Carolina Rules of Professional Conduct support the reinstatement or dismissal of Defendant's charges.

Courts "have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." Wheat v. United States, 486 U.S. 153, 160, 162-63 (1988). In fact, courts "should *sua sponte* raise ethical problems involving danger to a just, speedy, and inexpensive remedy, even if the parties do not." General Mill Supply Co. v. SCA Services, Inc., 697 F.2d 704, 711-12 (6th Cir. 1982). Though not precedential authority for this Court, North Carolina State Bar ethics opinions "provide ethical guidance for attorneys and . . . establish . . . principle[s] of ethical conduct." State v. Lynch, No. COA20-201 (N.C. Ct. App. Dec. 15, 2020).

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict or to uphold a conviction. See comment [1] to Rule 3.8, "Special Responsibilities of a Prosecutor". This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice. Id. A systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4 of the North Carolina Rules of Professional Conduct. Id.; Marshall v. Jerrico, Inc., 446 U.S. 238, 249 (1980) ("[p]rosecutors are also public officials; they too must serve the public interest")(citation omitted); State v. Mitchell, 353 N.C. 309, 311 (2001) ("prosecutors have a duty as officers of the court and as advocates for the people to conduct trials in accordance with due process and the fair administration of justice").

A prosecutor has broad discretion in selecting cases to prosecute. See Oyler v. Boles, 368 U.S. 448 (1962); State v. Spicer, 299 N.C. 309 (1980). Absent an improper motive, the deliberate exercise of discretion in determining which cases to prosecute does not run afoul of the constitution. Spicer, 299 N.C. at 313

However, while a prosecutor has broad discretion in deciding who to prosecute for which crimes, a prosecutor must use restraint in the discretionary exercise of her authority to calendar criminal cases. See

comment [1] to former Rule 7.3, "Special Responsibilities of a Prosecutor," ("...the prosecutor represents the sovereign and therefore should use restraint in the discretionary use of government powers...") (1997). The State simply cannot employ its calendaring authority to gain a tactical advantage over a criminal defendant. Simeon, 339 N.C. at 378, 451 S.E.2d at 871.

Like here, the prosecution violates its ethical obligations when it declines to reinstate charges and improperly pressures the Defendant to plead guilty. See N.C. Gen. Stat. § 15A-1021(b) ("No person representing the State or any of its political subdivisions may bring improper pressure upon a defendant to induce a plea of guilty or no contest"); North Carolina State Bar Ethics Opinion, 1997 RPC 243 (unethical for prosecutor to threaten that if the defendant did not accept the plea bargain, the prosecutor would make the defendant sit in the courtroom all week and place the defendant's case "on the calendar every Monday morning for weeks to come"). In sum, our professional conduct rules mandate the State to act reasonably and reinstate the criminal charges of the available Defendant.

e. The case was reinstated by operation of law when the defendant appeared in court.

When the Defendant was arrested and his charges were put back on the calendar, the case was reinstated by operation of law. State v. Bell, 156 N.C. App. 350, 356 (2003). When the District Attorney removed Defendant's

charges from the calendar, she actually impermissibly dismissed the Defendant's charges with leave a second time. See N.C. Gen. Stat. § 15A-932(a) (stating the only two grounds for dismissal with leave). No statute specifically provides the prosecution authority to decline to reinstate criminal charges. Id. Additionally, when a defendant is present and not entering into a deferred prosecution agreement, it is improper to renew the dismissal with leave under § 15A-932(a). Id. There was simply no basis in fact or law for such prosecutorial action.

f. The failure to reinstate the Defendant's criminal charges contravenes § 15A-952(g).

§ 15A-952(g) establishes the protocol for either the prosecution or the Defendant seeking a continuance when the Defendant is available. It is true that § 15A-952(g) is not the proper procedural mechanism to continue cases when the Defendant is unavailable. Bell, 156 N.C. App. at 356. On the other hand, when the Defendant is available but his charges are not duly re-calendared, the court improperly allows a continuance without considering the requisite factors listed in § 15A-952(g). See, e.g., Packheiser v. Miller, 875 A.2d 645, 650 (D.C. 2005) (abuse of discretion where trial court "mechanically denied the motion 'pursuant to Rule 4 (m)," without openly considering the Rule 41 (b) factors).

g. There are alternative mechanisms to sanction defendants for absconding from such criminal court proceedings.

A defendant's failure to appear does not need to be willful for his case to be dismissed with leave. See N.C. Gen. Stat. § 15A-932(a)(2). Indeed, § 15A-932 is not meant to serve a punitive purpose. Bell, 156 N.C. App. at 356. There can be no punishment of a defendant prior to an adjudication of guilt. See Bell v. Wolfish, 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979); see also City of Billings v. Layzell, 242 Mont. 145, 789 P.2d 221 (1990) (trial court's unreasonable delay in scheduling trial of pretrial detainee amounted to pretrial punishment in violation of the Fourteenth Amendment) (cited for persuasiveness).

If the Defendant willfully failed to appear in Court, the District Court can punish the Defendant by holding him in indirect criminal contempt of court. See State v. Dammons, 159 N.C. App. 284 (2003) (willful failure to appear in criminal court is punishable by indirect criminal contempt). Also, to criminally punish individuals for absconding on impaired driving offenses, our legislature enacted § 15A-543 and § 20-28(a2).

§ 15A-543 of the North Carolina General Statutes provides:

> (a) In addition to forfeiture imposed under G.S. 15A-544, any person released pursuant to this Article who willfully fails to appear before any court or judicial official as required is subject to the criminal penalties set out in this section.
>
> ….

(c) If, except as provided in subsection (b) above, a violator was released in connection with a misdemeanor charge against him, a violation of this section is a Class 2 misdemeanor.

Id. § 15A-543.

§ 20-28 (a3) establishes a class 1 misdemeanor for failing to appear for two years from the date of the charge after being charged with an implied consent offense." Id. § 20-28 (a2). While some believe that those penalties are not harsh enough, the authorized punishments for these crimes are a question for the legislature rather than for the courts. See State v. Warren, 114 S.E.2d 660 (N.C. 1960) (discussing political question doctrine).

In any event, it is clearly improper for prosecutors employ § 15A-932 provisions to attempt to secure a more severe punishment than that prescribed by § 20-28(a2). Our courts should not enable that improper approach.

III. THIS COURT SHOULD ISSUE ITS OWN WRITS OF *MANDAMUS* OR EXERCISE ITS SUPERVISORY AUTHORITY.

The literal translation of "*Mandamus*" is "we command." Black's Law Dictionary 980 (8th ed. 2004). A writ of *mandamus* is an extraordinary court order to "a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law." Sutton v. Figgatt, 280 N.C. 89, 93, 185 S.E.2d 97, 99 (1971). The appellate courts may issue writs of *mandamus* "to supervise and control the proceedings" of the

lower courts. N.C. Gen. Stat. § 7A-32(b), (c). Appellate courts may only issue *mandamus* to enforce established rights, not to create new rights. Moody v. Transylvania Cty., 271 N.C. 384, 390, 156 S.E.2d 716, 720 (1967).

Mandamus lies when the following elements are present: First, the party seeking relief must demonstrate a clear legal right to the act requested. Snow v. N.C. Bd. of Architecture, 273 N.C. 559, 570, 160 S.E.2d 719, 727 (1968). Second, the defendant must have a legal duty to perform the act requested. Moody, 271 N.C. at 391, 156 S.E.2d at 721; Steele v. Locke Cotton Mills Co., 231 N.C. 636, 640, 58 S.E.2d 620, 624 (1950) (noting that a defendant's duty to perform the act requested must exist both at the time of application for the writ and when the court issues the writ). Moreover, the duty must be clear and not reasonably debatable. See Moody, 271 N.C. at 390-91, 156 S.E.2d at 720-21. Third, performance of the duty-bound act must be ministerial in nature and not involve the exercise of discretion.[9] See id. at 390, 156 S.E.2d at 720-21; see also Gen. Elec. Co. v. Turner, 275 N.C. 493, 497-98, 168 S.E.2d 385, 388 (1969) (observing that *mandamus* cannot be issued to control the manner of exercise of a discretionary duty (citations omitted)). Nevertheless, a court may issue a writ of *mandamus* to a public official compelling the official to make a discretionary decision, as long as the

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[9] While this Court certainly lacks authority to set a specific trial date or hearing date for the Defendant's criminal matters, it can nonetheless order the Defendant's criminal matters to be either dismissed or re-calendared within some reasonable timeframe.

court does not require a particular result. See Moody, 271 N.C. at 390, 156 S.E.2d at 720; see also Hamlet Hosp. Training Sch. for Nurses, Inc. v. Joint Comm. on Standardization, 234 N.C. 673, 680, 68 S.E.2d 862, 868 (1952) (noting that *mandamus* lies to "compel public officials to take action, but ordinarily [does] not require them, in matters involving the exercise of discretion, to act in any particular way" (citation omitted)). Fourth, the defendant must have "neglected or refused to perform" the act requested, and the time for performance of the act must have expired. Sutton, 280 N.C. at 93, 185 S.E.2d at 99. *Mandamus* may not be used to reprimand an official, to redress a past wrong, or to prevent a future legal injury. Id. at 93-94, 185 S.E.2d at 99-100. Finally, the court may only issue a writ of *mandamus* in the absence of an alternative, legally adequate remedy. King v. Baldwin, 276 N.C. 316, 321, 172 S.E.2d 12, 15 (1970); Snow, 273 N.C. at 570, 160 S.E.2d at 727. When appeal is the proper remedy, *mandamus* does not lie. Snow, 273 N.C. at 570, 160 S.E.2d at 727. *Mandamus* relief can be granted to compel the performance of either constitutional or non-constitutional duties. See In re Alamance County Court Facilities, 329 N.C. 84 (1991); see generally J. Cratsley, Inherent Power of the Courts 26-28 (1980).

Mandamus serves as a check on "usurpation of judicial power." Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383, 74 S.Ct. 145, 98 L.Ed. 106 (1953). “The traditional use of the writ in aid of appellate jurisdiction”

has "been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943).

"When the writ of *mandamus* is sought from an appellate court to confine a trial court to a lawful exercise of its prescribed authority, the court should issue the writ almost as a matter of course." In Re Reyes, 814 F.2d 168, 170 (5th Cir. 1987). This is a case where the District Attorney and the Wake Criminal District Court have been long misconstruing their calendaring authority and the issuance of a writ of *mandamus* to either or both entities is warranted as a matter of course. Id.

a. Appellate Rule 10 is inapplicable to *mandamus* petitions before the Appellate Division.

Normally, having not objected at trial, and having not argued plain error, certain arguments in this brief may not be properly before this Court. N.C. R. App. P. Rule 10(b)(1); State v. Nobles, 350 N.C. 483, 514-15, 515 S.E.2d 885, 904 (1999). However, the "issuance of a writ of *mandamus* is an exercise of original and not appellate jurisdiction." Pue v. Hood, Comr. of Banks, 222 N.C. 310, 312, 22 S.E.2d 896 (1942). Since *mandamus* is not an appellate writ, Rule 10 is simply inapplicable.

b. A writ of *mandamus* can issue to both the District Attorney and the District Court.

The writ of *mandamus* can issue to the District Attorney as well as to lower tribunal but also to the District Attorney. See State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977) ("prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case") (cited for persuasiveness); see generally Witkin, Cal. Procedure, Extraordinary Writs § 87 at 874-76 & 2000 Supp. at 119-20 (4th Ed. 1997) (ministerial acts of local officers that can be compelled by *mandamus* are virtually unlimited). Indeed, the Appellate Division's *mandamus* authority "to supervise and control the proceedings" of the lower courts extends to regulating the actions of relevant quasi-judicial officials. N.C. Gen. Stat. § 7A-32(b), (c).

c. Defendant is not improperly seeking *mandamus* review of administrative action.

The majority opinion below stated, "*mandamus* is not a proper instrument to review or reverse an administrative board which has taken final action on a matter within its jurisdiction." Warren v. Maxwell, 223 N.C. 604, 608, 27 S.E.2d 721, 724 (1943). Warren, however, is readily distinguishable because here the defendant is only seeking writs of *mandamus* to be issued to judicial and quasi-judicial officials, rather than to an administrative agency. While Defendant is seeking a writ of *mandamus* be issued to the District Attorney, it is well established that the District

Attorney is not an administrative agency. Camacho, 329 N.C. at 593; NAACP v. Eure, 245 N.C. 331, 95 S.E.2d 893 (1957); State v. Loesch, 237 N.C. 611, 75 S.E.2d 654 (1953); State v. McAfee, 189 N.C. 320, 127 S.E. 204 (1925).

d. The District Court arbitrarily failed to rule on many of the Defendant's meritorious arguments.

In Stevens v. Guzman, the Court of Appeals concluded that a writ of *mandamus* is the proper remedy for a trial court's failure to enter an order. 140 N.C. App. 780, 783, 538 S.E.2d 590, 593 (2000), disc. rev. improvidently allowed, 354 N.C. 214, 552 S.E.2d 140 (2001). In Stevens, the Court of Appeals held the trial court was "obligat[ed] to enter orders disposing of a party's motions" but concluded that "[t]he failure of the trial court to enter an order, however, is not a matter to be addressed on an appeal from that inaction, but instead is to be addressed through a writ of *mandamus*." Id. at 783, 538 S.E.2d at 593 (citing N.C. R. App. P. 22(a)). The Court of Appeals therefore dismissed the appeal. Id.

Other jurisdictions agree that *mandamus* is the proper remedy when the lower court entirely fails to rule on the Defendant's claims. See Huckeby v. Frozen Foods Express, 555 F.2d 542, 549 n. 14 (5th Cir. 1977) (failure to rule); Hartland v. Alaska Airlines, 544 F.2d 992, 1001 (9th Cir. 1976) (failure to rule); United States v. Briggs, 514 F.2d 794, 808 (5th Cir. 1975) (failure to

rule); International Products Corp. v. Koons, 325 F.2d 403, 407 (2d Cir. 1963) (failure to rule).

In his motion to reinstate charges, the Defendant raised a number of arguments. While the District Court addressed the re-calendaring authority issue, the § 15A-932 issue and the § 20-24.1(a) issue, the District Court failed to address: (1) the due process issue[10]; (2) the § 15A-952(g) issue; (3) the prosecutorial misconduct issues; and (4) other important issues. Because the Defendant is generally required to "obtain a ruling" on issues below, an appeal is not a legally adequate alternative remedy for all of these issues given these circumstances. N.C. R. App. P. 10(a)(1); King, 276 N.C. at 321, 172 S.E.2d at 15; Snow, 273 N.C. at 570, 160 S.E.2d at 727.

Accordingly, this Court should issue a writ of *mandamus* to the Wake County Criminal District Court directing it to correct the order and rule on the unaddressed issues. Stevens, 140 N.C. App. at 783, 538 S.E.2d at 593; Huckeby, 555 F.2d at 549 n. 14; Hartland, 544 F.2d at 1001; Briggs, 514 F.2d at 808; International Products Corp, 325 F.2d at 407.

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[10] Granted, if this Court determines that § 15A-932 and § 20-24.1 entitle the Defendant to relief, addressing the constitutional issues may violate the long-standing principle that "the courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." Anderson v. Assimos, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002).

e. **The District Court acted under a misapprehension that it lacks authority to re-calendar criminal cases.**

While *mandamus* is not a substitute for appeal, it may be used to correct judicial action "that is clearly contrary to well-settled law, whether that law is derived from statute, rule, or opinion of a court" and *mandamus* is an available remedy when judicial action has "ignore[d] clear, binding precedent from a court of superior jurisdiction." See State v. Court of Appeals for Fifth Dist 34 S.W.3d 924, 929 (Tex. Crim. App. 2001) (cited for persuasiveness).

While there was extensive caselaw making it manifestly clear that the District Court possessed the requisite authority to re-calendar criminal cases, the District Court improperly relied on the inapposite case of Camacho to conclude that it lacks such authority. Simeon, 339 N.C. at 376, 451 S.E.2d at 870.

Because the trial court acted under a manifest misapprehension that it lacked discretion to re-calendar the Defendant's criminal charges, a writ of *mandamus* must issue to the District Criminal Court to compel it to exercise its discretion in how to calendar the Defendant's matters. See Tanenbaum v. D'Ascenzo, 356 Pa. 260, 263, 51 A.2d 757, 758 (1947) (where by a mistaken view of the law or by an arbitrary exercise of authority there has been in fact no actual exercise of discretion, the writ of *mandamus* will lie); see also State

ex rel. Corbin v. Murry, 10 Ariz. 184, 427 P.2d 135 (1967) (*mandamus* appropriate to direct a pretrial hearing where trial judge asserted that he had no jurisdiction to hold a pretrial hearing); see also In re Volkswagen of Am., 545 F.3d 304, 309 (5th Cir. 2008) (*mandamus* "is an appropriate remedy for 'exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion.")

f. The District Court arbitrarily concluded that the Defendant has been provided a non-illusory opportunity for a trial or hearing.

Mandamus is appropriate if the District Court's evidentiary determination was a manifest abuse or arbitrary or capricious exercise of its discretion. See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 602 (Nev. 1981) (cited for persuasiveness). An arbitrary or capricious exercise of discretion is one "founded on prejudice or preference rather than on reason," Black's Law Dictionary 119 (9th ed. 2009) (defining "arbitrary"), or "contrary to the evidence or established rules of law," id. at 239 (defining "capricious").

In this case, District Criminal Court arbitrarily determined that the Defendant had a prior opportunity for a trial or hearing. In light of this clearly erroneous factual determination, the issuance of a writ of *mandamus* is warranted to correct this absurd finding. See King v. Guerra, 1 S.W.2d 373, 376-77 (Tex. Civ. App. San Antonio 1927, writ ref'd) (*mandamus* may be appropriate to correct an order that is purely arbitrary or without reason); In

re Cordis Corp., 769 F.2d 733, 737 (Fed. Cir. 1985) (noting that "if a rational and substantial legal argument can be made in support of the rule in question, the case is not appropriate for *mandamus*").

g. It is not reasonably debatable that the Wake County District Court breached its calendaring duties.

In addition to the duties previously discussed, both the District Court and the District Attorney have a duty to prevent institutional delays. See Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L.Ed.2d 101 (1972); Hadley v. State, 66 Wis.2d 350, 225 N.W.2d 461, 78 ALR 3d 273 (1975) (cited for persuasiveness).

> The paramount duty of a trial judge is to control the course of a trial so as to prevent injustice to any party. In the exercise of this duty he possesses broad discretionary powers.

State v. Britt, 285 N.C. 256, 271-72, 204 S.E.2d 817, 828 (1974).

Indeed, it is the duty of the trial judge "to see that there is a fair and impartial trial, and to interpose his authority to prevent all unfair dealing and corrupt or fraudulent practices on the part of either the prosecution or the defense." State v. Bell, 81 N.C. 591 (1879) (Ashe, J.)

"The chief district judge, subject to the general supervision of the Chief Justice of the Supreme Court, has administrative supervision and authority over the operation of the district courts and magistrates in his district." N.C. Gen. Stat. § 7A-146. The Chief District Court Judge also has the duty to

arrange schedules and to assign sessions. N.C. Gen. Stat. § 7A-146(1),(7). Moreover, Canon 3(A)(5) of the Code of Judicial Conduct sets forth the principle that "[a] judge should dispose promptly of the business of the court"; see also North Carolina Code of Judicial Conduct, Canon 3(A)(4) (a judge should afford every person a "full right to be heard according to law").

All defendants "have a right to their day in court, and have a right to know, at least relatively, when that day will come, that he may prepare for his defense, or otherwise, as the case may be." Thomas v. The State, 36 Tex. 315, 317 (1871) (cited for persuasiveness). Consistent with these principles, to prevent manifest justice to the Defendant, the District Criminal Court had not only the authority but the duty to reinstate his charges. Britt, 285 N.C. at 271-72, 204 S.E.2d at 828. Because it is evident in this case that the Chief District Court Judge is manifestly failing to perform these duties to the Defendant's continuous detriment, a writ of *mandamus* must issue commanding the District Court to reinstate his criminal charges on the trial calendar.

h. It is not reasonably debatable that the Wake County District Attorney is breaching her duty to calendar the Defendant's matters for trial or hearing.

If the prosecution does not dismiss the Defendant's charges, it has an obligation to reinstate his charges within a reasonable time of his appearance. See State v. Reekes, 59 N.C. App. 672, 676-677 (1982) ("the State

is *required* to reinstitute proceedings"); see also Bell, 156 N.C. App. at 356 (dismissal with leave is a "procedural calendaring device intended not to suspend or hamper prosecution of a case, but rather to facilitate its continuance during a period of time *when a defendant is absent*.") Indeed, "[a] defendant must be afforded an opportunity for a trial or a hearing within a reasonable time of the defendant's appearance." N.C. Gen. Stat. § 20-24.1(b1)

Under our constitution, the district attorneys are *responsible* for the prosecution of criminal cases "on behalf of the State" and are *required* to "perform other such duties as the General Assembly may prescribe." N.C. Const. art. IV, § 18(1). "Criminal actions in the District Court Division shall be prosecuted in such manner as the General Assembly may prescribe by general law uniformly applicable in every local court district of the State." N.C. Const. art. IV, § 18(2).

The prosecution also has a statutory duty to "prepare the trial dockets" and to "*prosecute in a timely manner* in the name of the State all criminal actions and infractions requiring prosecution in the superior and district courts of the district attorney's prosecutorial district." N.C. Gen. Stat. § 7A-61. By declining to reinstate charges without authority and also without a good faith excuse or justification, the prosecution breaches its duties to prepare dockets and timely prosecute. Id. A writ of *mandamus* must issue to

the District Attorney to dismiss or reinstate the Defendant's criminal charges and address this dereliction of duty.

i. **Appellate Rule 22 has no bearing on our Appellate Courts issuance of writs of *mandamus* to the District Court and the District Attorney.**

By concluding it is procedurally barred from exercising its discretionary authority to issue writs of *mandamus*, the Court of Appeals has, as a practical matter, set its own limitations on its jurisdiction to issue writs of *mandamus*. See State v. Ledbetter, 814 S.E.2d 39, 42 (N.C. 2018) (applying same principle to *certiorari* petitions). "The practice and procedure [of issuing the prerogative writs] shall be as provided by statute or rule of [this Court], or, in the absence of statute or rule, according to the practice and procedure of the common law." N.C. Gen. Stat. § 7A-32(c) (emphasis added). "Therefore, in the absence of a procedural rule explicitly allowing review, such as here, the Court of Appeals should turn to the common law to aid in exercising its discretion rather than automatically denying the petition for writ of" *mandamus* or "requiring that the heightened standard set out in Rule 2 be satisfied." Ledbetter, 814 S.E.2d at 42.

"Accordingly, the Court of Appeals had both the jurisdiction and the discretionary authority to issue defendant's writ of" *mandamus*. Id. "Absent specific statutory language limiting the Court of Appeals' jurisdiction, the court maintains its jurisdiction and discretionary authority to issue the

prerogative writs." Id. Rule 22 "does not prevent the Court of Appeals from issuing writs of" *mandamus* "or have any bearing upon the decision as to whether a writ of" *mandamus* "should be issued." Id. "Therefore, the Court of Appeals should have exercised its discretion to determine whether it should grant or deny a defendant's" petitions for writs of *mandamus*. Id.

j. Sutton does not permit the Appellate Division to refuse *mandamus* relief.

Our appellate courts cannot refuse a petition for writ of *mandamus* when it is sought to enforce a clearly-established legal right. Sutton, 280 N.C. at 93, 185 S.E.2d at 99-100. Because the Defendant sought to enforce his clearly established legal rights, the Court of Appeals could not refuse the Defendant *mandamus* relief. Id. Likewise, this Court cannot lawfully refuse the Defendant the same *mandamus* relief.

k. Matter of Redwine precludes the Superior Court from issuing writs of *mandamus* to the District Court bench.

Also contrary to the Court of Appeals majority's determination, Defendant's *mandamus* petitions are not properly addressed to the Superior Court.[11] See In re Redwine, 312 N.C. 482, 484, 322 S.E.2d 769, 770 (1984) ("The superior court judge misconstrued his authority to issue the writ of *mandamus* to a judge of the General Court of Justice. A judge of the superior

[11] While Redwine does not appear to preclude the Superior Court from issuing a writ of *mandamus* to the District Attorney, Rule 19 and § 1-269 do not appear to permit an ancillary criminal *mandamus* petition to be considered by the Superior Court.

court has no authority or jurisdiction to issue a writ of *mandamus* ... to a district court judge.")[12]

l. ***Mandamus*, rather than *certiorari*, is the proper remedy to address the failure to hold a trial or hearing in District Court.**

Certiorari "differs from *mandamus* in that *mandamus* compels an unperformed clear legal duty; *certiorari* reviews a performed judicial duty." Wilson Realty Co. v. City & County Planning Bd., 243 N.C. 648, 656, 92 S.E.2d -10- 82, 87 (1956). This Court further held that "[m]*andamus* is the proper remedy when the trial court fails to hold a hearing" as required by statute. In re T.H.T., 362 N.C. 446, 454, 665 S.E.2d 54, 59 (2008). Because this case revolves primarily around the District Criminal Court failing to hold a trial or hearing, *mandamus*, rather than appeal or *certiorari* is the proper remedy. Id.

m. **The pendency of this appeal and the availability of *certiorari* relief does not preclude *mandamus* relief.**

A writ of *mandamus* ensures that the trial courts adhere to statutory time frames without the ensuing delay of a lengthy appeal. Moreover, the availability of the *mandamus* remedy ensures that the parties remain actively engaged in the district court process and do not "sit back" and rely upon an appeal to cure all wrongs. See In re J.N.S., 180 N.C. App. 573, 581,

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[12] The Court of Appeals has previously correctly issued a writ of *mandamus* to the District Court bench without requiring the defendant to improperly seek such *mandamus* relief before the Superior Court. See Order, State v. Lake, P19-170 (N.C. Ct. App. 12 Apr 2019).

637 S.E.2d 914, 919 (2006) ("I do not agree that a party who waits passively for the trial court to perform the ministerial duty of entering an order — that which *mandamus* concerns — should be allowed to successfully argue on Appeal `prejudice' resulting from the delayed entry of the order"); In re L.L., 172 N.C. App. 689, 700, 616 S.E.2d 392, 398 (2005) (noting that "had [DSS] requested another review hearing earlier or petitioned for writ of *mandamus*, some of the delay may have been avoided"). "*Mandamus* provides relatively swift enforcement of a party's already established legal rights, and [this Court] encourages parties to utilize *mandamus* in the appropriate circumstances." T.H.T., 362 N.C. at 455.

However, the Defendant is only entitled to *mandamus* relief only if he lacks an adequate remedy in the "ordinary course of law." See, e.g. State ex rel. Waters v. Spaeth 960 N.E.2d 452 (Ohio 2012) (stating that to be entitled to a writ of *mandamus*, a petitioner must establish a clear legal right to the requested relief, a clear legal duty on the part of the respondent to provide it, and the absence of an adequate remedy in the ordinary course of law); Oklahoma Natural Gas Co. v. White Eagle O. Co. 312 P.2d 879, 882 (Okla. 1957) (writ of *mandamus* may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law); State ex rel. Creighton Univ. v. Hickman, 245 Neb. 247, 512 N.W.2d 374 (1994) (a writ of

mandamus may not be issued where there is a plain and adequate remedy in the ordinary course of the law).

In this case, the Defendant lacks any available meritorious relief in the ordinary course of the law. Oklahoma Natural Gas Co. 312 P.2d at 882. The Defendant exhausted his ordinary legal remedies by filing the motion to reinstate charges in the Criminal District Court and the Defendant's appeal is ultimately only pending before this Court because the Court of Appeals granted him discretionary review.

While *certiorari* and this appeal may constitute alternative remedies, they are not legally adequate alternative remedies. King, 276 N.C. at 321, 172 S.E.2d at 15; Snow, 273 N.C. at 570, 160 S.E.2d at 727. Where *certiorari* is not a legally adequate alternative remedy, this Court previously granted *mandamus* relief in lieu of *certiorari* relief. See State v. Spruill, 358 N.C. 730, 601 S.E.2d 196 (2004). This Court should do the same here.

n. Writs of *mandamus* were previously issued to remedy similar concerns.

The Appellate Division has previously granted *mandamus* relief due to District Court delays approaching five months. See Order, State v. Lake, P19-170 (N.C. Ct. App. 12 Apr 2019) (issuing writ of *mandamus* to address delay of less than five months); Order, Reyes v. Arellano, P18-57 (N.C. Ct. App. 22

Feb 2018) (issuing writ of *mandamus* to address delay of less than five months).

Courts have previously also issued a writ of *mandamus* to the lower tribunals and the prosecutor to compel the calendaring a matter for a trial or hearing to which the defendants were entitled. See Eldredge v. Gourley, 505 F.2d 769, 770 (3d Cir. 1974) (per curiam) ("a writ of *mandamus* is an appropriate means of protecting the right to jury trial"); Mondor v. United States Dist. Court for the Cent. Dist. of Cal., 910 F.2d 585, 586 (9th Cir. 1990) (the "wrongful denial of a jury trial is an appropriate basis for [*mandamus*] relief"); In re Vorpahl, 695 F.2d 318, 319 (8th Cir. 1982) ("The remedy of *mandamus* in determining the right to a jury trial is firmly settled"); In re Zweibon, 565 F.2d 742, 746 (D.C.Cir. 1977) (per curiam) ("[D]enial of a jury trial may be reviewed on a petition for a writ in the nature of *mandamus*"); Higgins v. Boeing Co., 526 F.2d 1004, 1006 (2d Cir. 1975) (per curiam) ("Our power to preserve the important right to trial by jury by *mandamus* is clear" (citation omitted)); State v. Randall, 366 N.C. 217 (2012) (issuing writ of *mandamus* to District Attorney to calendar trial); Chapman v. Evans, 744 S.W.2d 133, 138 (Tex. Crim. App. 1988) (granting the relator's request for a writ of *mandamus* to compel the district court to set his case for trial); Thomas v. Stevenson, 561 S.W.2d 845, 846-47 (Tex. Crim. App. 1978) (concluding that the Texas Court of Criminal Appeals has authority to issue

writs of *mandamus* to compel a speedy trial in a criminal case); Bell v. 282nd Dist. Court, No. 3:06-CV-0463-B, 2006 WL 1899774 at *2 (N.D. Tex. 2006) (the "proper procedure for seeking pre-trial relief on speedy trial grounds is to file a petition for writ of *mandamus* in the Texas Court of Criminal Appeals"); Shepherd v. United States, 163 F.2d 974, 977 (8th Cir. 1947) (if "an accused deems that he is not being given a speedy trial, his remedy is to make demand by motion to the court for such trial, and not by motion to dismiss the indictment on account of the delay. If a motion for trial should be denied, his further remedy would be to apply to a proper appellate court for writ of *mandamus* to compel trial"); General Tire Rubber Co. v. Watkins, 331 F.2d 192, 194 (4th Cir.1964) ("We are inclined to the view that General's petition for Writ of *Mandamus* is properly before us for consideration since the question presented pertains to a denial of the constitutional right to trial by jury); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959) (the "right to grant *mandamus* to require jury trial where it has been improperly denied is settled"); c.f. Smith v. Gohmert, 962 S.W.2d 590, 593 & n.7 (Tex. Crim. App. 1998) (distinguishing between the availability of *mandamus* relief to compel a speedy trial from the availability of *mandamus* relief to compel dismissal on speedy trial grounds, which is not available in habeas or *mandamus*).

Courts have also previously granted *mandamus* to compel inferior tribunals to proceed to judgment. See In re Mesa Petroleum Partners, LP, 538 S.W.3d 153, 159 (Tex. App. 2017) (granting relief for a delay of more than eight months in rendering a final judgment). Given the related circumstances of this case, this Court should likewise issue its writ of *mandamus* to compel either the District Attorney or the District Criminal Court to cease unreasonably delaying calendaring the Defendant's misdemeanor matters for trial or hearing. [13]

o. Remanding this matter to the Court of Appeals will only cause further unnecessary delay.

Mandamus petitions "serve as useful 'safety valve[s]' for promptly correcting serious errors." Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 111 (2009) (alteration in original). A writ of *mandamus* "affords an expeditious and effective means of confining an inferior court to a lawful exercise of its prescribed jurisdiction or compelling a court to exercise its authority." Missouri v. U.S. Bankr. Ct. For the E. Dist. of Ark., 647 F.2d 768, 770 n. 3 (8th Cir.1981) (citing Ex Parte Peru, 318 U.S. 578, 583, 63 S.Ct. 793, 87 L.Ed. 1014 (1943)).[14]

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[13] The Defendant's matters can be later continued if deemed appropriate by the District Criminal Court.

[14] The District Criminal Court is, among other things, refusing to exercise its well-established authority to consider re-calendaring criminal matters in VL status. Missouri, 647 F.2d at 770 n. 3; Ex Parte Peru, 318 U.S. at 583.

In this case, the issuance of the writ of *mandamus* is the most prompt method of calendaring the Defendant's matter for trial or hearing in the Wake County Criminal District Court. Mohawk Indus., Inc., 558 U.S. at 111. On the other hand, remanding this matter to the Court of Appeals will foreseeably result in a less time-efficient solution. Missouri, 647 F.2d at 770 n. 3; Ex Parte Peru, 318 U.S. at 583.

p. These *mandamus* requests are easily distinguishable from Defendant's 20 February 2019 *mandamus* request to this Court.

It is true that on 20 February 2019, Defendant sought a similar *mandamus* petition from this Court and that his *mandamus* petition was denied. However, that petition is easily distinguishable from the Defendant's current *mandamus* requests. First, the 20 February 2019 *mandamus* request was only made several days after the filing of the *motion to reinstate the charges*. Second, at that time, the *motion to reinstate the charges* was not yet ruled on. To the extent that the Defendant sought this Court to compel the reinstatement of his criminal charges, the Defendant arguably had a legally adequate alternative remedy in the ordinary course of the law in the form of the pending *motion to reinstate charges*. King, 276 N.C. at 321, 172 S.E.2d at 15; Snow, 273 N.C. at 570, 160 S.E.2d at 727.

Third, the Defendant did not seek any relief in the Wake County Superior Court or the Court of Appeals at that time. Lastly, the Defendant

is seeking additional relief in this *mandamus* petition that he has not specifically sought in courts below. For those reasons, this Court should distinguish the Defendant's current *mandamus* requests from the 20 February 2019 *mandamus* request and should grant the Defendant the instant *mandamus* requests, notwithstanding its prior denial of *mandamus* relief.

q. To the extent that *mandamus* is not the proper remedy, this Court should grant the requested relief by exercising its supervisory authority.

When no remedies remain to address the manifest injustices as the one seen in this case, this Court can and should exercise its supervisory authority and address the compelling issue. See In re Brownlee, 301 N.C. 532, 548, 272 S.E.2d 861, 870 (1981) ("Under exceptional circumstances this [C]ourt will exercise power under [Article IV, Section 12, Clause 1 of the North Carolina Constitution] in order to consider questions which are not presented according to our rules of procedure; and this [C]ourt will not hesitate to exercise its general supervisory authority when necessary to promote the expeditious administration of justice") (citations omitted); State v. Stanley, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975) ("This Court will not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice. Under unusual and exceptional circumstances [the Court] will exercise this power to consider

questions which are not properly presented according to [its] rules.") (citations omitted).

To the extent that this Court lacks authority to issue the requested writs of *mandamus*, this Court should order the requests for relief discussed above under its broader supervisory authority. Id.

IV. THIS COURT SHOULD TAKE JUDICIAL NOTICE OF THE DISTRICT COURT'S LOCAL CALENDARING RULES.

"Except as permitted by the evidentiary doctrine of judicial notice, this Court is bound on appeal by the record on appeal as certified and can judicially know only what appears in it." State v. Lawson, 310 N.C. 632, 641, 314 S.E.2d 493, 499 (1984) (citation omitted), cert. denied, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985).

Under North Carolina Rules of Evidence, Rule 201, a court may however take judicial notice of adjudicative facts that are "not subject to reasonable dispute in that [the facts are] either (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C–1, Rule 201(b). "Judicial notice may be taken at any stage of the proceeding." Id. § 8C-1, Rule 201(f). Moreover, where a party makes a request and provides the court with the necessary information, judicial notice is mandatory. Id. § 8C–1, Rule 201(d).

The appellate courts may take judicial notice of any public records including official policies. See State v. Vogt, 200 N.C. App. 664, 669 (2009) (recognizing court's authority to judicially notice Sex Offender Management Interim Policy of the North Carolina Department of Corrections); Philips v. Pitt Cty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009) (observing that the Court "may properly take judicial notice of matters of public record"). In fact, the appellate courts *must* take judicial notice of important regulations having the force of law. Mann v. Henderson, 261 N.C. 338, 134 S.E.2d 626 (1964).

On the other hand, our courts may not take judicial notice of irrelevant materials. See, e.g., State v. Leyshon, 211 N.C. App. 511, 523 (2011) (trial court properly refused to take judicial notice of contents of Federal Register that had "no relevance to the North Carolina crime of driving while license revoked"); State v. Baskin, 190 N.C. App. 102, 106 (2008) (citation and quotation omitted) (trial court properly refused to take judicial notice of irrelevant fact); Little v. Little, __ N.C. App. __, 739 S.E.2d 876 (2013) (prejudicial error to take judicial notice of irrelevant material).

The Court of Appeals erred in declining to judicially note the Wake Criminal District Court calendaring policies. Vogt, 200 N.C. App. at 669. The Defendant provided necessary materials and argued that the Court of Appeals should consider the policies because trial court action is inconsistent with its policies. Because the Defendant requested the Court of Appeals to

take judicial notice, because the Defendant provided a copy of the court policies to the Court of Appeals, and because the policies had the force of law, judicial notice was mandatory. N.C. Gen. Stat. § 8C–1, Rule 201(d); Mann, 261 N.C. at 341.

To the extent that the State argues that these materials were irrelevant, the "standard for relevancy is low." United States v. Holmes, 751 F.3d 846, 850 (8th Cir. 2014). While the Defendant did not provide a detailed explanation on how the policies were relevant, the Defendant filed *mandamus* petitions at the Court of Appeals and the policies were relevant to "the time for performance[.]" T.H.T, 362 N.C. at 454 (citing Sutton, 280 N.C. at 93, 185 S.E.2d at 99).

Moreover, the Defendant argued to the Court of Appeals that the Superior Court abused its discretion in denying *certiorari* and the Court of Appeals should have considered unexplained deviations from established policy in its analysis. Yang, 519 U.S. at 32; Ramaprakash, 346 F.3d at 1124; Smith, 626 F.2d at 796; Colgrove, 413 U.S. at 161 n. 18, 93 S.Ct. at 2455 n. 18.

V. THE SUPERIOR COURT MANIFESTLY ABUSED ITS DISCRETION IN DENYING THE DEFENDANT *CERTIORARI* RELIEF.[15]

It is well settled that "[a]ppeals in criminal cases are controlled by the statutes on the subject." State v. King, 222 N.C. 137, 140, 22 S.E.2d 241, 242 (1942) (citation omitted). Our statutes, however, do not provide for appeal from the District Court's denial of a defendant's motion to reinstate criminal charges. Nevertheless, in such instances, "the defendant is not without a remedy. The remedy, retained by statute, approved by the court and generally pursued, is *certiorari* to be obtained from the Superior Court upon proper showing aptly made." Id. at 140, 22 S.E.2d at 243 (citations omitted); see also N.C. Gen. Stat. § 1-269 ("Writs of *certiorari*, recordari, and supersedeas are authorized as heretofore in use.")

The Superior Court has jurisdiction to issue a writ of *certiorari* to review District Court proceedings pursuant to Rule 19 of the General Rules of Practice for the Superior and District Courts. Rule 19 provides, in pertinent part: "In proper cases and in like manner, the court may grant the writ of

[15] While the Defendant is raising novel arguments in this brief, these arguments all relate to the same issues that were previously litigated at the North Carolina Court of Appeals. N.C. R. App. P. 28(a) ("*Issues* not presented and discussed in a party's brief are deemed abandoned") Also, as the Defendant's Superior Court *certiorari* petition was summarily denied by the Superior Court, the Defendant was not in position to raise these arguments before the trial court in order for them to be barred as impermissible "horse swapping." See Weil, 207 N.C. at 10, 175 S.E. at 838.

certiorari. When a diminution of the record is suggested and the record is manifestly imperfect, the court may grant the writ upon motion in the cause."

The Superior Court's authority "to grant the writ of *certiorari* in appropriate cases is ... analogous to [the Appellate Division's] power to issue a writ of *certiorari*[.]" State v. Hamrick, 110 N.C. App. 60, 65, 428 S.E.2d 830, 832-33, appeal dismissed and disc. review denied, 334 N.C. 436, 433 S.E.2d 181 (1993). As this Court long ago explained:

> [T]he Superior Court will always control inferior magistrates and tribunals, in matters for which a writ of error lies not, by *certiorari* , to bring up their judicial proceedings to be reviewed in the matter of law; for in such case "the *certiorari* is in effect a writ of error," as all that can be discussed in the court above are the form and sufficiency of the proceedings as they appear upon the face of them. ... It is ... essential to the uniformity of decision, and the peaceful and regular administration of the law here, that there should be some mode for correcting the errors, in point of law, of proceedings not according to the course of the common law, where the law does not give an appeal; and, therefore, from necessity, we must retain this use of the *certiorari*.

State v. Tripp, 168 N.C. 150, 155, 83 S.E. 630, 632 (1914).

"*Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." State v. Grundler, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959), cert. denied, 362 U.S. 917, 80 S.Ct. 670, 4 L. Ed. 2d 738 (1960). "A petition for the writ must show merit or that error was probably committed below." Id. (citing In re Snelgrove, 208 N.C. 670, 672, 182 S.E. 335, 336 (1935)).

"Two things ... should be made to appear on application for *certiorari*: First, diligence in prosecuting the appeal, except in cases where no appeal lies, when freedom from laches in applying for the writ should be shown; and, second, merit, or that probable error was committed" below. Snelgrove, 208 N.C. at 672, 182 S.E. at 336 (citation and quotation marks omitted).[16] This Court has interpreted "merit" in this context to mean that a petitioner must show "that he has reasonable grounds for asking that the case be brought up and reviewed on appeal." Id. The Defendant must also demonstrate "that the ends of justice will be . . . promoted." King v. Taylor, 188 N.C. 450, 451, 124 S.E. 751 (1924).

While the Superior Court has discretion in granting or denying *certiorari*, such discretion is not absolute. State v. Bryant, 833 S.E.2d 641 (N.C. Ct. App. 2019). Under certain circumstances, *certiorari* relief is practically mandatory. Id.

a. **The Superior Court's authority to grant *certiorari* relief is not as limited as this Court's authority to grant discretionary review.**

The critical issue in this Court and other highest courts is not whether there has been a correct decision in every individual case, see Griffin v. Illinois, 351 U.S. 12, 18 (1956), but rather whether "the subject matter of the

[16] Because the Defendant filed his *certiorari* petition almost immediately after the denial of his motion to reinstate charges, the State cannot articulate a reasonable argument that his petition was barred by laches.

appeal has significant public interest," whether "the cause involves legal principles of major significance to the jurisprudence of the State," or whether the decision below is in probable conflict with a decision of this Court. Id.

This Court may deny review even if it believes that the decision of the Court of Appeals was incorrect, see Peaseley v. Virginia Iron, Coal Coke Co., 282 N.C. 585, 194 S.E.2d 133 (1973), since a decision which appears incorrect may nevertheless fail to satisfy any of these criteria. [17] On the other hand, the Wake County Superior Court is not bound by these strict rules and should ordinarily grant *certiorari* when there has been an error of law below and the issuance of a writ of *certiorari* is essential to promote the interests of justice. Snelgrove, 208 N.C. at 672, 182 S.E. at 336; King, 188 N.C. at 451.

b. The importance of this case weighs in favor of granting *certiorari*.

As previously discussed, one does not have to demonstrate importance of a case to be granted *certiorari* at the Superior Court. Nonetheless, the apparent importance of this case weighs in favor of the Superior Court granting *certiorari*. See Fisher v. Flue-Cured Tobacco Coop. Stabilization Corp., 369 N.C. 202, 208, 794 S.E.2d 699, 705 (2016) (discretionary review is warranted when numerous people are affected by the outcome of an appeal).

[17] Justice Alito once stated that: "Unlike the courts of appeals, we are not a court of error correction, and thus I do not disagree with the Court's refusal to review the singular policy at issue here." Martin v. Blessing, 571 U.S. 1040, 1044 (2013).

c. Womble entitles the Defendant to a grant of *certiorari.*

An error of law is by definition an abuse of discretion. Cooter & Gell v. Hartmarx Corp, 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359, 382 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence"); Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 150 (4th Cir. 2002) ("Of course, an error of law by a district court is by definition an abuse of discretion").

This Court provides that:

> *Certiorari* is a discretionary writ, to be issued only for good or sufficient cause shown, and it is not one to which a moving party is entitled as a matter of right … A party is entitled to a writ of *certiorari* when – and only when – the failure to perfect the appeal is due to some error or act of the court or its officers, and not the fault or neglect of the party or his agent.

Womble v. Gin Co., 194 N.C. 577 (1927).

As the Defendant is being indefinitely prevented from perfecting the appeal from a potential final judgment due to the acts of the District Criminal Court and its officers, and not any fault or neglect of his own or that of his agent, Defendant is actually *entitled* to a writ of *certiorari* to remedy such barrier.[18] See Winborne v. Byrd, 92 N.C. 7 (1885); Johnson v. Andrews, 43 S.E. 926 (1903); Bank v. Miller, 190 N.C. 775, 130 S.E. 616 (1925); Trust

[18] Our Court of Appeals actually recognized that a criminal defendant may be *entitled* to a writ of *certiorari* in certain circumstances. See State v. Cloninger, 177 N.C. App. 564 (2006) ("defendant is *entitled* to a writ of *certiorari* to review his assignment of error.")

Co v. Parks, 191 N.C. 263 (1926). Because the Superior Court denied Defendant's *certiorari* petition based on a misunderstanding of the rule in Womble, it has manifestly abused its sound discretion.[19] Cooter, 496 U.S. at 405, 110 S.Ct. 2447, 110 L.Ed.2d at 382; Hunter, 281 F.3d at 150.

d. North Carolina law strongly disfavors pending litigation being in a state of limbo.

North Carolina law disfavors cases being in limbo of final judgment. The fact that the Defendant's matter is in limbo of final judgment strongly supports the grant of *certiorari*. See Taylor v. Johnston, 289 N.C. 690 (1976); see also N.C. Gen. Stat. § 50A-207, Official Comment (noting that a court declining jurisdiction on inconvenient forum grounds "may not simply dismiss the action. To do so would leave the case in limbo.") Indeed, our Court of Appeals also previously categorized circumstances similar to the ones in this case as "outrageous and shameful." White v. Williams, 111 N.C. App. 879 (1993) (cited for persuasiveness).

e. The exclusivity of the Superior Court petition as the only remaining meritorious trial court remedy weighs in favor of granting *certiorari*.

By denying and dismissing the Defendant's only remaining meritorious trial court remedy, the Superior Court abused its sound discretion. See Harvey v. Cedar Creek BP, 562 S.E.2d 80 (N.C. Ct. App. 2002) (terminating a

[19] To the extent that the Defendant has an overly expansive view of Womble, this Court should use this appeal as an opportunity to expand this rule.

party's "exclusive remedy" was an abuse of discretion) (cited for persuasiveness); Matthews v. CharlotteMecklenburg Hosp. Auth., 132 N.C. App. 11, 17, 510 S.E.2d 388, 393, disc. review denied, 350 N.C. 834, 538 S.E.2d 197 (1999) (in reviewing a dismissal for abuse of discretion, the exclusivity of the remedy must be considered).

f. The Superior Court abused its discretion by summarily denying the Defendant's *certiorari* petition.

Summary denial is "a rare exception to the completion of the appeal process . . . [and] is available only if an appeal is truly frivolous." United States v. Davis, 598 F.3d 10, 13 (2d Cir. 2010) (quotation marks omitted) (cited for persuasiveness). In this case, the Defendant's *certiorari* petition was not frivolous because the State failed to even provide a reason for delaying or refusing to reinstate his criminal charges. See Klopfer, 386 U.S. at 218 (observing that "no justification for [the delay] was offered by the State"); United States v. MacDonald, 456 U.S. 1, 20 (1982) (Marshall, J., dissenting) ("the government must affirmatively demonstrate a legitimate reason, other than neglect or indifference, for such a delay"); see also N.C. Gen. Stat. § 15A-1443(b) (it is the State's burden to demonstrate that an error under the federal constitution is harmless beyond a reasonable doubt).

The Defendant's petition was clearly non-frivolous and summary denial was completely unwarranted. Davis, 598 F.3d at 13.[20]

g. The Defendant was not seeking an improperly fragmentary, premature, or unnecessary appeal by *certiorari*.

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. . . . An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

Veazey v. Durham, 231 N.C. 354, 361-62, 57 S.E.2d 377, 381 (1950) (citations omitted). While final judgments are always appealable, interlocutory decrees may be only immediately appealable only when they affect some substantial right of the appellant and will work an injury to him if not corrected before an appeal from final judgment. Id. at 362, 57 S.E.2d at 381. "A nonappealable interlocutory order . . . which involves the merits and necessarily affects the judgment, is reviewable . . . on appropriate exception upon an appeal from the final judgment in the cause." Id. These rules are designed to prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard. Waters v.

[20] If it did not summarily deny the Defendant's petition, the Superior Court could have directed the parties to provide further legal arguments or could have held a non-evidentiary hearing on the issues in the *certiorari* petition.

Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978); Raleigh v. Edwards, 234 N.C. 528, 67 S.E.2d 669 (1951).

"There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." Veazey, 231 N.C. at 363, 57 S.E.2d at 382; see also Industries, Inc. v. Insurance Co., 296 N.C. 486, 251 S.E.2d 443 (1979). However, the Defendant is engaging in the opposite of procrastination and this case presents unique circumstances in which interlocutory review is truly warranted. Id.

h. The Superior Court order denying *certiorari* relief is inconsistent with the local criminal continuance policies.

When the Defendant filed his *certiorari* petition in Superior Court, the Defendant's matter was overdue to be re-calendered under the local policies. The Superior Court had constructive notice of the local rules. By denying the Defendant *certiorari* relief, the Superior Court manifestly abused its sound discretion and its order must be reversed. Yang, 519 U.S. at 32; Ramaprakash, 346 F.3d at 1124; Smith, 626 F.2d at 796; Colgrove, 413 U.S. at 161 n. 18, 93 S.Ct. at 2455 n. 18.

i. The weight of persuasive out-of-state authority supports the notion that discretion was manifestly abused.

Persuasive authority suggests that the function of *certiorari* review is to correct errors of law, apparent on the records, which adversely affect

material rights. See MacHenry v. Civil Service Comm'n, 40 Mass. App. Ct. 632, 634 (1996) (cited for persuasiveness). Persuasive authority from the same jurisdiction states that relief in the nature of *certiorari* is warranted where the Defendant demonstrates errors "so substantial and material that, if allowed to stand, they will result in manifest injustice to a petitioner who is without any other available remedy." Johnson Prods., Inc. v. City Council of Medford, 353 Mass. 540, 541 n. 2 (1968) (cited for persuasiveness), quoting Tracht v. County Comm'rs of Worcester, 318 Mass. 681, 686 (1945) (cited for persuasiveness).[21]

A substantial right is "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which [one] is entitled to have preserved and protected by law: a material right." Oestreicher v. Am. Nat'l Stores, Inc., 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (citation and internal quotation marks omitted).

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[21] Under Tennessee law, common-law writ of *certiorari* is *appropriate* to correct "(1) fundamentally illegal rulings; (2) proceedings inconsistent with essential legal requirements; (3) proceedings that effectively deny a party his or her day in court; (4) decisions beyond the lower tribunal's authority; and (5) plain and palpable abuses of discretion." Willis v. Tennessee D.O.C, 113 S.W.3d 706, 712 (Tenn. 2003) (citing State v. Willoughby, 594 S.W.2d 388, 392 (Tenn. 1980)). In addition, courts may properly grant a petition for a common-law writ of *certiorari* "[w]here either party has lost a right or interest that may never be recaptured." Hale v. State, 548 S.W.2d 878 (Tenn. 1977); State v. Dougherty, 483 S.W.2d 90 (Tenn. 1972)).

While *certiorari* relief can be more broadly issued under our state law, Willis, Willoughby, and Hale suggest circumstances when the Superior Court probably abuses its discretion in denying *certiorari* relief. All of the circumstances outlined in the Willis and Willoughby matters are present in this instant case.

Other persuasive authority dictates that for a court to review a nonfinal order by *certiorari*, the Defendant must demonstrate that the trial court departed from the essential requirements of the law, thereby causing irreparable injury which cannot be adequately remedied on appeal following final judgment. See Jaye v. Royal Saxon, Inc., 720 So.2d 214, 215 (Fla. 1998) (cited for persuasiveness).

A violation of a defendant's right to a speedy trial affects a substantial right that seriously affects the overall fairness of the judicial proceeding. See United States v. Reagan, 725 F.3d 471, 487 (5th Cir. 2013); United States v. Abad, 514 F.3d 271, 274 (2d Cir. 2008). A verdict is also a substantial right. State v. Rhinehart, 267 N.C. 470, 148 S.E.2d 651 (1966); see also State v. Caudle, 276 N.C. 550, 173 S.E.2d 778 (1970); State v. Doughtie, 237 N.C. 368, 74 S.E.2d 922 (1953).

This Court also held that a defendant has a "substantial right that some final judgment be rendered so as to enable him to preserve his right under the law." State v. Burgess, 192 N.C. 668 (1926); see also State v. Patton, 221 N.C. 117 (1942); State v. Calcutt, 219 N.C. 545 (1941); c.f. N.C. Gen. Stat. § 1-277 ("[a]n appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in

effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial").

The Defendant's material rights are being violated because he is unable to have a verdict rendered in Wake County District Criminal Court. Rhinehart, 267 N.C. at 481. Also, the Defendant's substantial rights are being detrimentally and irreparably affected because he is being denied a speedy trial, if not a trial altogether. Reagan, 725 F.3d at 487; Abad, 514 F.3d at 274. [22]

As previously extensively discussed, the trial court proceedings departed so drastically from the essential requirements of the law, causing the Defendant continuous injury which cannot be adequately remedied on appeal following final judgment. See Jaye, 720 So.2d at 215. It would be a manifest abuse of discretion under all of these persuasive authorities to deny the Defendant *certiorari* relief. See State v. Hart, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) (manifest injustice exists where the substantial rights of a criminal defendant are being adversely affected).[23]

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[22] Defendant recognizes that his substantial rights being adversely impacted alone will probably not automatically suffice to justify mandating *certiorari* review. However, this effect coupled with other discussed factors certainly mandates *certiorari* review.

[23] Under Arkansas law, *certiorari* lies to correct proceedings erroneous on the face of the record where there is no other adequate remedy, and it is available to the appellate court in its exercise of superintending control over a lower court that is proceeding illegally where no other mode of review has been provided. Lupo v. Lineberger, 313 Ark. 315, 855 S.W.2d 293 (1993).

j. No evidentiary hearings should be held on the Defendant's *certiorari* petition in the Superior Court.

While one may think that the proper remedy in this case is a remand to the Superior Court, it is not. That is because a writ of *certiorari* is "an extraordinary remedial writ to correct errors of law." State v. Simmington, 235 N.C. 612, 613 (1952); see also State ex rel. Spurck v. Civil Serv. Bd., 226 Minn. 240, 248-49, 32 N.W.2d 574, 580 (1948) (the "function of the court on *certiorari* … is to decide questions of law raised by the record, but not disputed questions of fact on conflicting evidence.")

When the Superior Court reviews a matter upon *certiorari*, it acts in an appellate capacity and has no authority to conduct an evidentiary hearing to make factual findings. See Godfrey v. Zoning Bd. of Adjustment, 317 N.C. 51, 63, 344 S.E.2d 272, 279 (1986) ("[f]act finding is not a function of our appellate courts.") The proper remedy is to instead remand the matter to District Criminal Court for any necessary factual determinations. Id.

k. Defendant's *certiorari* petition was well supported and the Superior Court order denying *certiorari* provided no reasoning for denying *certiorari* relief.

A trial court may be reversed for abuse of discretion only if the trial court made "a patently arbitrary decision, manifestly unsupported by reason." Buford v. General Motors Corp., 339 N.C. 396, 406, 451 S.E.2d 293, 298 (1994). In determining whether an abuse of discretion occurred, appellate

review is limited to "insuring that the decision could, in light of the factual context in which it was made, be the product of reason." Little, 317 N.C. at 218, 345 S.E.2d at 212.

"It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." Waters, 294 N.C. at 208, 240 S.E.2d at 343. In this case, the Superior Court fails to provide any reasons for this decision, and the overwhelming legal and factual support in allowing *certiorari* makes it practically impossible to reasonably justify a denial. Buford, 339 N.C. at 406, 451 S.E.2d at 298; see also U.S. v. Wright, 826 F.2d 938, 943 (10th Cir. 1987) (an "abuse of discretion could occur where the trial court fails to articulate a reason for denial of a" motion and "no such reason is readily apparent from the record").[24] Because the order of the Superior Court denying *certiorari* relief is manifestly unsupported by reason, it must be reversed. Buford, 339 N.C. at 406, 451 S.E.2d at 298.

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[24] "While reported cases have repeatedly held that the issuance of a common law writ of *certiorari* is not a matter of right but a matter resting within the sound discretion of the trial court[,]" such "general rule must yield to practical necessity." Gore v. Tennessee Dept. of Correction, 132 S.W.3d 369, 376 (Tenn. Ct. App. 2003).

VI. THE COURT OF APPEALS ABUSED ITS DISCRETION BY NOT GRANTING DIRECT REVIEW OF THE DISTRICT COURT ORDER.

The law eschews "plac[ing] form over substance". Bowen, 483 U.S. at 606. In deciding to grant review of the Superior Court order denying *certiorari* relief, the Court of Appeals determined that the Defendant's substantive claims were meritorious. Snelgrove, 208 N.C. at 672, 182 S.E. at 336, and determined that the review of the issues below will promote justice. King, 188 N.C. at 451.

Rule 21 did not require the Defendant to seek review of the motion to reinstate charges in the Superior Court. See N.C. R. App. 21(b) ("Application for the writ of *certiorari* shall be made by filing a petition therefor with the *clerk of the court of the appellate division* to which appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought.") Indeed, the appeals of District Court orders to the Superior Court are beyond the scope of Rule 21. See N.C. R. App. P. 1(b) ("These rules govern procedure in all *appeals from the courts of the trial division to the courts of the appellate division*"). Furthermore, "[r]ule 21 does not prevent the Court of Appeals from issuing writs of *certiorari* or have any bearing upon the decision as to whether a writ of *certiorari* should be issued." Ledbetter, 814 S.E.2d at 42. Lastly, "[r]ules of practice and procedure are

devised to promote the ends of justice, not to defeat them." Dogwood Dev, 657 S.E.2d at 363.

To the extent that the Court of Appeals believed that defendants should seek review in the Superior Court prior to petitioning the Court of Appeals for relief, the Defendant unsuccessfully sought *certiorari* review in the Superior Court. The proper remedy for the Court of Appeals was to allow *certiorari* review directly of the District Court order.

The substantive issues in this case are significantly more important than the procedural issues. Only granting *certiorari* review of the Superior Court order denying *certiorari* relief made the appeal more procedurally convoluted and improperly "place[d] form over substance." Bowen, 483 U.S. at 605. To the extent that procedural rules defeated the "ends of justice" by preventing the Court of Appeals from considering the substance of the Defendant's claim, this Court should consider directing the Court of Appeals to allow *certiorari* to directly review the District Court order. Dogwood Dev, 657 S.E.2d at 363.[25]

[25] This Court actually has a practice of granting review of trial court orders directly rather than granting review of the lower court orders denying or dismissing *certiorari* review. For instance, in Speight, the Defendant first sought review of the order denying his motion for appropriate relief in the Court of Appeals. After the Court of Appeals dismissed his *certiorari* petition, the Defendant sought *certiorari* review from this Court. Rather than granting him review of the Court of Appeals order dismissing his *certiorari* petition, this Court opted to directly review the trial court order denying his motion for appropriate relief. See Order, State v. Speight, 161P20 (N.C. Supreme Ct. 25 Sep 2020).

VII. THE COURT OF APPEALS ABUSED ITS DISCRETION BY AFFIRMING THE ORDER OF THE SUPERIOR COURT.

The Court of Appeals affirmed the order of the Superior Court denying the Defendant *certiorari* relief. In doing so, the Court of Appeals abused its sound discretion in several ways. First, contrary to the view of the Court of Appeals, Taylor actually compelled the Court of Appeals to consider the substantive merits of the Defendant's claim. Second, the Court of Appeals majority opinion essentially overruled the previously published Court of Appeals decision in Bryant.

a. Taylor compels the Court of Appeals to consider the substantive merits of the Defendant's claim.

In its published opinion, the Court of Appeals majority stated:

> "[I]n our review of the superior court's grant or denial of *certiorari* to an inferior tribunal, we determine only whether the superior court abused its discretion. *We do not address the merits of the petition to the superior court in the instant case.*"

Taylor, 122 N.C. App. at 612, 471 S.E.2d at 117.

In doing so, the Court of Appeals majority misconstrued Taylor and inferred that in determining whether the Superior Court abused its discretion in denying *certiorari*, it never considers the merits of the underlying *certiorari* petition. Taylor, 122 N.C. App. at 612, 471 S.E.2d at 117. However, Taylor was a unique case where an appeal was available as a matter of right, and the analysis in that case properly stopped before reaching the merits of the *certiorari* petition. Id.

Unlike the Defendant in Taylor, in this case, the Defendant did not have an appeal of right and the Court of Appeals clearly erred by failing to consider the merits of his substantive claim. See Steakhouse, Incorporated v. City of Raleigh, 166 F.3d 634, 641 (4th Cir. 1999) ("[E]ven when the superior court denies the writ, it appears to consider the merits.") By failing to consider all relevant factors in making its legal determination, the Court of Appeals manifestly abused its discretion. See, e.g., Packheiser, 875 A.2d at 650.

b. The Court of Appeals majority opinion essentially overruled the previously published Court of Appeals decision in Bryant.

In general, where a panel of the Court of Appeals has decided an issue, "a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." In re Civil Penalty, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989).

In State v. Bryant, the North Carolina Court of Appeals held that when reviewing the denial of the *certiorari* petition, the Court must review the merits of the substantive claim articulated in the petition. Bryant, 833 S.E.2d at 642-43. Notwithstanding Bryant, the Court of Appeals majority held in Diaz-Tomas that in reviewing the denial of a *certiorari* petition, the Court of Appeals does “not address the merits of the petition" Diaz-Tomas, 841 S.E.2d at 359. In doing so, the Court of Appeals majority essentially overruled

Bryant. See In re Civil Penalty, 324 N.C. at 384, 379 S.E.2d at 36. The opinion of the Court of Appeals must be reversed. Id.

VIII. ANY ASSIGNMENTS OF ERROR THAT WERE NOT RULED ON BELOW WERE EITHER PRESERVED BY OPERATION OF LAW, CONSTITUTE PLAIN ERROR, OR SHOULD BE ADDRESSED BY EXERCISING APPELLATE RULE 2.

While the Defendant raised due process, speedy trial, and other important claims in both the motion to reinstate charges and the Superior Court *certiorari* petition, the District Criminal Court never specifically ruled on any of those issues. It is a matter of debate whether the Defendant "obtain[ed] a ruling" from the trial court when the Superior Court summarily denied his *certiorari* petition. N.C. R. App. P. 10(a)(1).

Nonetheless, this Court should review these assignments of error for four reasons. First, when a motion addressed to the discretion of the Criminal District Court is denied upon the ground that the District Court has no power to grant the motion in discretion, the ruling is reviewable. Second, errors concerning the denial of a Defendant's right to an eventual jury trial are preserved by operation of law. Third, this Court should consider any unpreserved issues below as plain errors. Fourth and lastly, this Court

should employ Rule 2 and consider issues that were not ruled on by the District Criminal Court.[26]

a. A District Court's denial of a motion on the grounds that it lacks the authority to rule is reviewable.

"When a motion addressed to the discretion of the trial court is denied upon the ground that the trial court has no power to grant the motion in its discretion, the ruling is reviewable." State v. Johnson, 346 N.C. 119, 124, 484 S.E.2d 372, 375 (1997). In addition, there is error when the trial court refuses to exercise its discretion in the erroneous belief that it has no discretion as to the question presented. Where the error is prejudicial, the defendant is entitled to have his motion reconsidered and passed upon as a discretionary matter.'" Id. (quoting State v. Lang, 301 N.C. 508, 510, 272 S.E.2d 123, 125 (1980)).

In this case, the District Criminal Court erroneously concluded that it has no discretion to re-calendar the Defendant's criminal matters based on this Court's decision in Camacho. Because the District Criminal Court "refuse[d] to exercise its discretion in the erroneous belief that it has no discretion as to address the question presented," "the defendant is entitled to have his motion reconsidered and passed upon as a discretionary matter."

[26] It would be unfair to require criminal defendants to compose prolonged and comprehensive motions to simply have their matters reinstated on the trial calendar. Such requirement would particularly impact *pro se* defendants who typically lack the ability to produce such extensive motions.

Johnson, 346 N.C. at 124, 484 S.E.2d at 375; Lang, 301 N.C. at 510, 272 S.E.2d at 125.

b. **Errors concerning the denial of a Defendant's right to a jury trial are preserved by operation of law.**

Pursuant to the North Carolina Constitution, "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. 1, § 24. Generally, a defendant's failure to object to an alleged error of the trial court precludes the defendant from raising the error on appeal. "Where, however, the error violates [a] defendant's right to a trial by a jury of twelve, [a] defendant's failure to object is not fatal to his right to raise the question on appeal." State v. Ashe, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985).

In this case, the Defendant is being deprived not just of his "right to a trial by a jury of twelve," but his right to any eventually jury trial. Id. According, any errors involving the Defendant being continuously deprived of his right to a jury trial are preserved automatically by operation of law.

c. **This Court should consider any unpreserved issues below as plain errors.**

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to

amount to plain error." N.C. R. App. P. 10(a)(4). Plain error is defined as "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting United States v. McCaskill, 676 F.2d 995 (4th Cir. 1982)). Among other things, plain error requires a defendant to demonstrate that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." North Carolina v. Bishop, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

The United States Supreme Court has repeatedly emphasized the critical importance of the Sixth Amendment right to a jury trial. See, e.g. , Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (describing right to jury trial as "the great bulwark of our civil and political liberties") (brackets and internal quotation marks omitted). Our courts have clearly established that a defendant may not be punished for exercising his constitutional rights to a jury trial. State v. Boone, 293 N.C. 702, 712-13, 239 S.E.2d 459, 465 (1977).

To date, this Court has "has applied the plain error analysis only to instructions to the jury and evidentiary matters." State v. Atkins, 349 N.C. 62, 81, 505 S.E.2d 97, 109-10 (1998), cert. denied, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). However, other jurisdictions have applied the plain error analysis in cases where a defendant was erroneously denied his right to a

speedy trial[27] or a jury trial altogether and this Court should follow the same course in this case. See e.g. United States v. Serna-Villarreal, 352 F.3d 225, 231 (5th Cir.2003) (reviewing for plain error the defendant's claim that a violation of the constitutional right to a speedy trial resulted in actual prejudice); United States v. Sorrentino, 72 F.3d 294, 297 (2d Cir.1995) (reviewing both statutory and constitutional speedy trial claims for plain error where no motion to dismiss was filed in the district court); United States v. Gomez, 67 F.3d 1515, 1521 (10th Cir.1995) (reviewing constitutional speedy trial claim for plain error where the issue was not raised at all before the district court); United States v. White, 443 F.3d 582, 588-91 (7th Cir.2006) (noting that, where the defendant had never raised a speedy trial claim in the district court, the Speedy Trial Act decreed that his statutory right was "waived," but reviewing the constitutional claim without suggesting that plain error was the appropriate standard); People v. Gatlin, 415 Ill. Dec. 380, 82 N.E.3d 584, 593, 587 (Ill. App. Ct. 2017) ("It is well settled that, when a defendant's right to a jury trial has been violated, such an error may be deemed" to warrant reversal under the plain-error standard, because the error was "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process ....") (internal quotation marks

[27] That said, a defendant "is not required to assert his right to a speedy trial in order to make a speedy trial claim on appeal." State v. Johnson, 795 S.E.2d 126, 132-33 (N.C. Ct. App. 2016).

omitted); State v. Gomez-Lobato, 130 Hawai'i 465, 312 P.3d 897, 909 n.13 (2013) ("Because of the fundamental constitutional nature of the right to a jury trial, this court has held that the failure to waive a jury trial" warrants reversal under the plain-error standard).

d. **This Court should employ Rule 2 and consider issues that were not ruled on by the District Criminal Court.**

If the Defendant did not preserve certain other issues below, it would often bar appellate review. See State v. Valentine, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003).

However, in order

> [t]o prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2 (2019).

"Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances." State v. Campbell, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (emphasis in original) (citation omitted).

"[A] decision to invoke Rule 2 and suspend the appellate rules is always a discretionary determination." State v. Bursell ("Bursell II"), 372 N.C. 196, 201, 827 S.E.2d 302, 306 (2019) (internal marks and citation omitted). "A court should consider whether invoking Rule 2 is appropriate in light of the specific circumstances of individual cases and parties, such as whether substantial rights of an appellant are affected." Id. at 200, 827 S.E.2d at 305 (internal marks and citation omitted). Because of its discretionary and fact-specific nature, Rule 2 is not applied mechanically. Campbell, 369 N.C. at 603, 799 S.E.2d at 603.

To the extent that the constitutional issues raised in this brief are not adequately preserved, this Court should employ Rule 2 and excuse any such strict preservation requirements. As previously discussed, the Defendant's substantial rights are being impacted by his case being in limbo of judgment. Bursell, 372 N.C. at 201, 827 S.E.2d at 306. The subject matter of this appeal is important and failing to address key constitutional issues will further delay justice. Id.

The fact that the District Court did not address all issues in its order is no fault of the Defendant. The Defendant acted in good faith to try to obtain rulings on many issues from the District Criminal Court but was not necessarily successful. Lastly, the Court of Appeals did not have any

preservation concerns in its opinion in this case. Accordingly, this Court should consider any and all arguments in this brief.

IX. THIS COURT SHOULD CONSIDER ANY AND ALL ISSUES RAISED IN THIS CASE.

A case initially presenting all the attributes necessary for litigation may at some point lose some attribute of justifiability and become "moot." The usual rule is that an actual controversy must exist at all stages of trial and appellate consideration and not simply at the date the action is initiated. E.g., United States v. Munsingwear, 340 U.S. 36 (1950). Cases may become moot because of some act of one of the parties which dissolves the controversy. E.g., Commercial Cable Co. v. Burleson, 250 U.S. 360 (1919). But courts have developed several exceptions.

A court may consider a case that is technically moot if it "involves a matter of public interest, is of general importance, and deserves prompt resolution." N.C. State Bar v. Randolph, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989). However, this is a very limited exception that our appellate courts have applied only in those cases involving clear and significant issues of public interest. See, e.g., Granville Cnty. Bd. of Comm'rs v. N.C. Hazardous Waste Mgmt. Comm'n, 329 N.C. 615, 623, 407 S.E.2d 785, 790 (1991) ("Because the process of siting hazardous waste facilities involves the public interest and deserves prompt resolution in view of its general importance, we

elect to address it"); State v. Corkum, 224 N.C. App. 129, 132, 735 S.E.2d 420, 423 (2012) (holding that an issue of structured sentencing under the Justice Reinvestment Act of 2011 required review because "all felons seeking confinement credit following revocation of post-release supervision will face similar time constraints when appealing a denial of confinement credit effectively preventing the issue regarding the trial judge's discretion from being resolved"); In re Brooks, 143 N.C. App. 601, 605–06, 548 S.E.2d 748, 751-52 (2001) (applying the public interest exception to police officers' challenge of a State Bureau of Investigation procedure for handling personnel files containing "highly personal information" and acknowledging that "the issues presented ... could have implications reaching far beyond the law enforcement community").

This Court may reach its conclusions in this case without needing to address the entire brief. While the remaining portions of the brief may become "moot," this Court should nonetheless address all arguments in the Defendant's brief in the public interest. Randolph, 325 N.C. at 701, 386 S.E.2d at 186. This case presents clear and significant issues of public interest for several reasons.

First, this case affects a large number of impaired driving and traffic defendants in Wake County, North Carolina and elsewhere and a more comprehensive opinion will help prevent such issues in the future. Second,

this case presents this Court a rare opportunity to address nuances concerning various extraordinary writs and discretionary review. This Court should not miss out on this opportunity to enter as comprehensive of an opinion as possible and help streamline similar future litigation.[28]

The cessation of the challenged activity by the voluntary choice of the person engaging in it, especially if she contends that she was properly engaging in it, will moot the case only if it can be said with assurance "that there is no reasonable expectation that the wrong will be repeated." United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) (quoting United States v. Aluminum Co. of America, 148 F.2d 416, 448 (2d. Cir. 1945)).

This amounts to a "formidable burden" of showing with absolute clarity that there is no reasonable prospect of renewed activity. Already, LLC v. Nike, Inc., 568 U.S. ___, No. 11–982, slip op. at 4 (2013) (dismissal of a trademark infringement claim against rival and submittal of an unconditional and irrevocable covenant not to sue satisfied the burden under the voluntary cessation test) (citing Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 190 (2000)); see also Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. ___, No. 15–577, slip op. at 5 n.1 (2017)

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[28] In Spruill and Randall, this Court granted defendants specific forms of *mandamus* relief without significant explanation. This Court should take this appeal as an opportunity to explain why *mandamus* relief is or is not appropriate given the circumstance at hand. The failure to do so will keep future litigants guessing on the rationale of orders in cases such as Spruill and Randall.

(holding that a governor's announcement that religious organizations could compete for State monetary grants did not moot a case challenging a previous policy of issuing grants only to non-religious entities as the State had failed to carry its "heavy burden" of "making absolutely clear" that it could not revert to its policy of excluding religious organizations from the grant program).

Otherwise, the "[State] is free to return to [its] old ways" and this fact would be enough to prevent mootness because of the "public interest in having the legality of the practices settled." W.T. Grant Co., 345 U.S. at 632; but see A.L. Mechling Barge Lines v. United States, 368 U.S. 324 (1961).

Therefore, even if the State dismisses the Defendant's charges during the pendency of this interlocutory appeal, this interlocutory appeal should proceed. Shell Island Homeowners Ass'n v. Tomlinson, 134 N.C. App. 286, 517 S.E.2d 401 (1999). Indeed, Wake County District Attorney's Office cannot reasonably assure that there is no reasonable expectation that the wrong will be repeated. W.T. Grant Co., 345 U.S. at 633; Aluminum Co. of America, 148 F.2d at 448.

CONCLUSION

WHEREFORE, Defendant respectfully requests that this Honorable North Carolina Supreme Court reverse the opinion of the North Carolina Court of Appeals, reverse the order of Wake County Superior Court, reverse the order

of the Wake County District Court, issue its writ of *mandamus* to the Wake County District Court directing it to correct its order and reinstate his criminal charges on the trial calendar, issue its writ of *mandamus* to the Wake County District Attorney directing her to reinstate or dismiss his case, exercise its supervisory authority, and enter a comprehensive opinion on all argued issues, granting him any and all other relief that it deems just and proper.

Respectfully submitted, this the 1st day of March, 2021.

(Electronically Signed)________________________
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VERIFICATION

Pursuant to Emergency Directives of the Chief Justice of the North Carolina Supreme Court, counsel affirms, under the penalties for perjury, the representations in the foregoing application are true to counsel's knowledge except as to matters represented upon information and belief, and as to those matters, counsel believes them to be true.

Respectfully submitted, this the 1st day of March, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the original Defendant-Appellant's New Brief and appendix has been filed, pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, by electronic means with the Clerk of the North Carolina Supreme Court.

I further certify a copy of the above and foregoing New Brief and appendix been duly served upon Joseph L. Hyde, Assistant Attorney General by e-mailing it to jhyde@ncdoj.gov

I further certify a copy of the above and foregoing New Brief and appendix been duly served upon Daniel P. O'Brien, Special Deputy Attorney General by e-mailing it to dobrien@ncdoj.gov

I further certify a copy of the above and foregoing New Brief and appendix has been duly served upon N. Lorrin Freeman, Wake County District Attorney by e-mailing it to n.lorrin.freeman@nccourts.org

I further certify a copy of the above and foregoing New Brief and appendix has been duly served upon Daniel C. Watts, Wake County Assistant District Attorney by e-mailing it to daniel.c.watts@nccourts.org [29]

[29] Daniel Watts is the current supervisor of the Criminal District Court unit of the Wake County District Attorney's Office.

I further certify a copy of the above and foregoing New Brief and appendix has been duly served upon the Honorable Debra S. Sasser, Wake County Chief District Court Judge by e-mailing it to debra.s.sasser@nccourts.org [30]

Respectfully submitted, this the 1st day of March, 2021.

(Electronically Signed)____________________
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[30] The Honorable Robert B. Rader retired since the Defendant filed his petition for discretionary review on additional issues. The Honorable Debra S. Sasser is the new Wake County Chief District Court Judge.

No. 54A19-3 DISTRICT 10

NORTH CAROLINA SUPREME COURT

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STATE OF NORTH CAROLINA	)	From Court of Appeals
	)	19-777 P19-490
v.	)	
	)	From Wake County
ROGELIO ALBINO DIAZ-TOMAS	)	15-CR-1985
Defendant-Appellant	)	

APPENDIX

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AFFIDAVIT OF PAUL DEV. ELLEDGE

Paul DeVere Elledge, appearing before the undersigned notary and being duly sworn, states the following:

1. I am a licensed North Carolina attorney in good standing. I have been licensed in this State since April 18th, 2014, and my bar number is 47316. I am currently employed with Vasquez Law Firm, PLLC.

2. I have practiced criminal law in Wake County and elsewhere for about two (2) years. A large portion of my practice consists of defending traffic and driving while impaired (DWI) cases.

3. My DWI practice in Wake County District Court consists of handling pre-trial motions and bench trials and entering guilty pleas for defendants whose DWI cases were dismissed with leave or in "VL status".

4. I also interact with many credible members of the local Wake County Bar on a regular basis and participate in forums with the members of the local bar.

5. Based on my experience handling DWI cases in Wake County and interacting with members of the local bar, I can assert that Wake County District Attorney's Office declines to reinstate older driving while impaired that have been placed in VL status.

6. Based on my experience, the Office will reinstate the older DWI VL cases only if the Defendant enters into a plea agreement and pleads guilty to a DWI offense.

7. I have never seen a written copy of the Office's policy, but it is well known to be longstanding.

8. The Office explicitly told me that defendants are required to waive appeal of a trial de novo as part of the plea agreement.

9. On one occasion, the Office refused to reinstate the DWI case of my client which was over 20 years old. The State would not have been able to prove their case had the case gone to trial.

10. Wake County has a VL calendar during which individuals can enter guilty pleas to charges in VL status.

11. Based on my experience practicing in Wake County, I am not aware of a single District Court which has ordered the reinstatement of an older DWI case in VL status.

12. This practice in Wake County District Court concerns me because defendants enter guilty pleas to old cases in VL status in violation of their right to a trial because it is the only way they can have their licenses reinstated eventually.

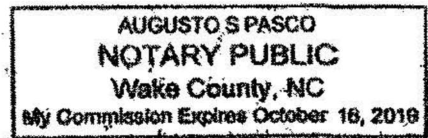
13. It is my professional opinion that this practice is unconstitutional because it deprives defendants of certain rights and privileges without Due Process of law.

This the 28th day of January, 2019.

Paul DeVere Elledge

Sworn to (or affirmed) and subscribed before me

this 28th day of January, 2019



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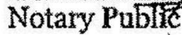

My Commission Expires: October 16, 2019

(Notary Seal)

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
TENTH JUDICIAL DISTRICT
DISTRICT COURT DIVISION

LOCAL RULES AND CONTINUANCE POLICIES FOR DISTRICT COURT CRIMINAL/INFRACTION CASES

The continuance rules, policies and time standards set out below were adopted to conform to the Supreme Court of North Carolina's Caseflow Management Plan, submitted to the General Assembly May 1, 1996 pursuant to Chapter 333 of the 1995 Session Laws, and to the recommendations of the Administrative Office of the Courts' District Court Model Continuance Policy Committee.

RULE 1: GENERAL RULES AND POLICIES FOR DISTRICT COURT CRIMINAL/INFRACTION CASES

1.1 Continuances

All district court criminal/infraction cases should be disposed of at the earliest opportunity, including the first trial setting. However, when compelling reasons for continuance are presented which would affect the fundamental fairness of the trial process, a continuance may be granted for good cause. Requests for continuances that will delay the resolution of the case beyond the established time standards shall only be granted for extraordinary cause.

1.2 Court Conflicts

The various district criminal/infraction courtrooms should work together to try to move cases as expeditiously as possible. Age of case, subject matter, and priority of setting should be given as much precedence as the level of court when resolving conflicts.

Attorneys shall notify the court and opposing counsel of any other court conflict(s) as they become known and shall keep the court advised of the resolution of that conflict. All judges shall communicate with other judges to resolve such conflicts. In resolving court conflicts, juvenile court cases shall take precedence over all other matters.

[Commentary: All attorneys are reminded of the provisions of Rule 2(e) of the General Rules of Practice requiring their appearance, or the appearance of a partner, associate, or another attorney familiar with the case.]

1.3 Evaluation of Motions for Continuance

Some of the factors to be considered by the appropriate court official when deciding whether to grant or deny a motion for continuance should include:

- the opportunity to exercise the right to effective assistance of counsel;
- the age of the case and seriousness of the charge;
- the incarceration status of the defendant;

- the effect on children and spouses if the issue is continued and not resolved;
- the impact of a continuance on the safety of the parties or any other persons;
- the status of the trial calendar for the session;
- the number, moving party, and grounds for previous continuances;
- the due diligence of counsel, including the District Attorney, in promptly making a motion for continuance as soon as practicable and notifying opposing counsel and witnesses;
- the period of delay caused by the continuance requested;
- the presence of witnesses;
- the availability of witnesses for the present session or for a future session;
- whether the basis of the motion is the existence of a legitimate conflict with another court setting;
- the availability of counsel;
- consideration of the financial consequences to the public, the parties, the attorneys, or witnesses if the case is continued; and
- any other factor that promotes the fair administration of justice.

1.4 Application

These rules and policies shall apply to all criminal/infraction cases in the District Court.

1.5 Effective Date

These rules and policies shall be effective on and after May 1, 2007.

RULE 2: APPEARANCE OF ATTORNEYS IN CRIMINAL/INFRACTION CASES

2.1 Appearance of Attorneys

Appearance of attorneys in criminal/infraction cases and the entry of such appearance on the records of the Court are controlled by N.C.G.S. 15A-141 *et seq*. and Rule 17 of the General Rules of Practice for the Superior and District Courts. These provisions are incorporated by reference and are supplemented by the following local rules:

a. Under no circumstances will an attorney be entered as attorney of record solely upon the representation of a defendant that he/she is represented by the attorney;

b. A privately retained attorney will be entered as attorney of record when it is represented to the court by a person with apparent authority that the attorney has undertaken to represent the defendant. This may be done orally in open court or by presenting the court with a written document, signed by the attorney, stating that the attorney is making an appearance for the defendant. This document shall be placed in and become a part of the case file;

c. Any appearance in a criminal proceeding including, but not limited to, filing a motion to continue or a motion to recall an order for arrest, by a privately

retained attorney that is not limited by the attorney filing a written notice thereof with the clerk is a general appearance pursuant to N.C.G.S. 15A-143;

d. No one except the Presiding Judge, Clerk of Superior Court, deputy clerk or privately retained attorney is authorized to enter the appearance of a retained attorney on a shuck. Once a privately retained attorney's name is written on a shuck, that attorney is presumed to have made a general appearance in the case. No attorney who has made a general appearance in a case shall be allowed to withdraw as counsel of record unless that attorney files a **written** motion to withdraw, serves that motion on the District Attorney and the defendant, and is allowed by court order to withdraw;

e. No one except the Presiding Judge, Clerk of Superior Court, or deputy clerk is authorized to enter the appearance of a court-appointed attorney on a shuck;

RULE 3: TRANSFER OF CASES BETWEEN CRIMINAL/INFRACTION COURTROOMS

No criminal/infraction cases on a printed calendar will be transferred to another courtroom without the express consent of the judge presiding in the courtroom to which the transfer is requested **as well as** the express consent of the judge presiding in the courtroom where the case is scheduled.

RULE 4: CONTINUANCE POLICY IN CRIMINAL/INFRACTION CASES

4.1 General Rules for Continuance

a. No case will be continued except for good cause shown; what constitutes good cause is in the sound discretion of the judge to whom a motion to continue is presented.

b. The State and the defendant should have an opportunity to be heard on all motions to continue.

c. No case will be continued beyond the established time standards except for extraordinary cause which may include:

1) the defendant's attorney has an unavoidable conflict involving an appearance in another court, in which case the judge must be informed of the court, the name of the case and the nature of the proceeding which necessitates the attorney's presence in that court; or

2) there are exigent circumstances such as medical or personal emergencies that necessitate the absence of either the defendant, the defendant's attorney, or witnesses for the defendant or the State, including the charging officer; or

3) the presiding judge determines in his/her sound discretion that the interests of justice require a further continuance.

4) No case which has been marked "LAST" will be continued except under the circumstances set forth in subsections c (1), (2), (3) of this rule.

5) No case will be continued because of the failure of either the defendant or the attorney to ascertain the court date; notice to the defendant is notice to the attorney, and notice to the attorney is notice to the defendant.

6) Cases involving law enforcement officers should be continued to the officer's next court date. No continuance should exceed more than four (4) weeks except upon a finding that a longer continuance is warranted based upon the interests of justice or court efficiency.

7) NO CASE SHALL BE SCHEDULED IN DISPOSITION COURT FOR MORE THAN TWO SETTINGS UNLESS THERE ARE EXTRAORDINARY CIRCUMSTANCES FOUND BY THE PRESIDING JUDGE.

4.2 In-Court Continuance Procedure

a. On the date of trial, no one except the presiding judge is authorized to continue a case with the following exception: Cases set in Disposition Court that do not require the Court to advise the defendant of his or her right to counsel, may be continued one time, **on the first setting only**, by the assistant district attorney assigned to that courtroom. All other motions for continuance must be directed to and ruled upon by the presiding judge.

b. No cases, except 90-96 and First Offenders deferrals, shall be rescheduled in Disposition Court once they have been continued out of that courtroom.

c. If a case is continued, it shall be the sole responsibility of the trial judge to mark on the case shuck:

1) The next court date; and

2) "D" if the continuance is for the defendant, "S" if the continuance is for the state or "NR" if the continuance resulted from the case not being reached for trial. If a case is set in Disposition Court no marking shall be made when continuing the case out of Disposition Court.

d. If the presiding judge in granting a continuance determines in his/her discretion that no further continuances should be granted, the judge may further mark the shuck **"LAST"** for the defendant, the state or both.

4.3 Out–of-Court Continuance Procedure

a. If a case is scheduled on a printed calendar, any motion to continue in advance of a trial date must be presented in writing and in duplicate to the presiding judge before whom the case is scheduled.

b. If a case is not yet scheduled for a printed calendar, motions to continue in advance of the trial date shall be presented in writing as follows:

1) Felony cases in district court shall be presented to the Presiding Judge in Courtroom 4D during the morning session only.

2) Misdemeanor domestic violence cases shall be presented to the Presiding Judge in the Domestic Violence Criminal Courtroom.

3) Misdemeanor non-domestic violence criminal/infraction cases shall be presented to the Presiding Judge in Disposition Court.

4) If the Presiding Judge specified above is unavailable, the request for continuance shall be presented to the Chief District Court Judge.

c. The motion to continue must be on the form attached hereto as Appendix A and must include the following information:

(1) Reason for the continuance;

(2) Charge/charges against the defendant, including all case numbers;

(3) All previous court dates and the party or reason for which the continuance was granted, i.e. “D” for defendant, “S” for state or “NR” for not reached;

(4) Any dates upon which the case was called and failed;

(5) Whether any court date has been marked “**LAST**”; and

(6) Whether there are any outside witnesses, i.e., witnesses other than law enforcement officers scheduled for their regular court date.

d. The presiding judge will either allow or deny the motion and will enter his/her ruling in writing on both copies of the motion; one copy of the motion and ruling will be returned to the attorney and the other copy will be given to the clerk to be placed in the court file.

e. If the motion to continue is allowed, the presiding judge will enter the next court date along with the ruling.

f. If the motion to continue is allowed and the case involves outside witnesses, it is the absolute responsibility of the attorney to notify all such witnesses of the continuance of the case and the next court date.

g. If any fact appears to be different from what is represented in the motion to continue, or if any outside witness is not notified of the continuance, the continuance may be revoked and the case called and failed.

h. Out-of-court motions to continue misdemeanor criminal or infraction cases must contain the written consent of the District Attorney or an Assistant District Attorney. Out-of-court motions to continue felony probable cause hearings must contain the written consent of the Assistant District Attorney who is, or will be, assigned to the case along with a continuance date agreed upon by the attorneys. If written consent from an Assistant District Attorney or the District Attorney cannot be obtained, the State shall be given an opportunity to be heard before any out-of-court continuance is granted.

4.4 Time Standards

a. Infractions

All infractions should be disposed of within 90 days of the first setting.

b. Misdemeanors – Criminal and Motor Vehicle

All misdemeanors should be disposed of within 120 days of the first setting.

c. Motions to Suppress

Motions to suppress evidence in DWI cases pursuant to N.C.G.S. 20-38.6 and pursuant to *State v. Knoll* and *State v. Ferguson* shall be made in writing within a reasonable time prior to trial. A reasonable time shall be defined in these local rules as not later than ninety (90) days after the first regular setting in District Court.

This rule shall apply unless there is an exception under N.C.G.S. 20-38.6 or unless a judge determines that extraordinary circumstances exist to permit the defendant additional time to file said motions.

d. Felonies

All felonies should be disposed of in District Court within 120 days of the first setting for probable cause hearing.

[Commentary: Meeting this deadline may not be possible in instances in which a defendant fails to appear and is "called and failed". In these matters, it is the responsibility of the district attorney to determine when it is appropriate to dismiss the charges. Also, cases in which defendants are placed in authorized Diversion programs may not meet this deadline. THESE TIME STANDARDS IN NO WAY IMPLY ANY "**RIGHT**" BY THE STATE OR THE DEFENDANT *TO* A CONTINUANCE OR SERIES OF CONTINUANCES UP TO THE MAXIMUM TIME FOR DISPOSITION. ON THE CONTRARY, THE POLICY, AS SET OUT IN RULE 1.1, IS THAT ALL DISTRICT COURT CASES

SHOULD BE DISPOSED OF AT THE EARLIEST OPPORTUNITY, INCLUDING THE FIRST TRIAL SETTING.]

This the 1st day of May, 2007.

JOYCE A. HAMILTON
CHIEF DISTRICT COURT JUDGE
TENTH JUDICIAL DISTRICT

SPEEDY TRIAL & RELATED ISSUES

Robert Farb, UNC School of Government (August 2016)

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I. Related Materials. The North Carolina Defender Manual**,** Ch. 7, Speedy Trial and Related Issues (2d ed. 2013), http://defendermanuals.sog.unc.edu/pretrial/7-speedy-trial-and-related-issues, provides a comprehensive resource on speedy trial and related issues. The North Carolina Prosecutors' Trial Manual 169-27, *Speedy Trial Issues (Constitutional and Statutory) and Interstate Agreement on Detainers* (5th ed. 2012) also discusses these topics. I gratefully acknowledge the incorporation in part of excerpts from these publications.

II. Due Process Issue When Delay Occurs Before Arrest or Charge. Although the Sixth Amendment right to speedy trial does not attach before arrest, indictment, or other official accusation, a defendant is protected from unfair or excessive pre-accusation delay by the Due Process Clause of the Fifth and Fourteenth Amendments. *See* United States v. Lovasco, 431 U.S. 783, 788-89 (1977); United States v. Marion, 404 U.S. 307, 325 (1971).

A. Standard. In *Lovasco*, the Court emphasized that the due process right to timely prosecution is limited. A due process violation occurs only when the defendant's ability to defend against the charge is prejudiced by the delay, and the reason for the delay is improper. 431 U.S. at 790.

1. Prejudice. To establish a due process violation a defendant must demonstrate prejudice—that is, the defendant must show that the pre-indictment delay impaired his or her ability to defend against the charge. *See Lovasco*, 431 U.S. at 790; *Marion*, 404 U.S. at 324-25; State v. McCoy, 303 N.C. 1, 7 (1981).

General allegations that the passage of time has caused memories to fade are insufficient to establish prejudice. *See* State v.

Goldman, 311 N.C. 338, 345 (1984) (prejudice was not established by showing that defendant did not recall the date in question or could not account for his whereabouts on that date). Instead, the defendant must establish that pre-accusation delay caused the loss of significant and helpful testimony or evidence. *See* State v. Dietz, 289 N.C. 488, 493-94 (1976) (so stating; contrasting case at hand against federal case where prejudice existed because the defendant showed that he was precluded from offering testimony of specific alibi witness because of the witness's uncertainty about the events); State v. Jones, 98 N.C. App. 342, 344 (1990) (the defendant failed to show that significant evidence or testimony that would have been helpful to defense was lost due to the delay).

Counsel also may have an obligation to ameliorate prejudice if possible. *See* State v. Hackett, 26 N.C. App. 239, 243 (1975) (defense motion denied in part because the defendant who alleged pre-accusation delay had not tried to remedy memory loss regarding underlying incident by moving for a bill of particulars or moving for discovery of the information).

2. **Reason for Delay Improper.** A court reviewing pre-accusation delay not only must find actual prejudice, but also must consider the reason for the delay. See *Lovasco*, 431 U.S. at 790. Delay in prosecution might be attributable to investigation, negligence, administrative considerations, or an improper attempt to gain some advantage over the defendant. To establish a due process violation, the defendant must show that the delay was "unreasonable, unjustified, and engaged in by the prosecution deliberately and unnecessarily in order to gain tactical advantage over the defendant." *McCoy*, 303 N.C. at 7-8; *see also Goldman*, 311 N.C. at 345 (citing *McCoy* and concluding that pre-indictment delay was attributable only to an ongoing investigation of the case and thus not improper).

   a. **When Delay Violates Due Process.** United States Supreme Court and North Carolina decisions generally require proof of intentional delay by the State to show a due process violation. *See* United States v. Gouveia, 467 U.S. 180, 192 (1984) (stating that due process requires dismissal of an indictment if the defendant proves that the government's delay caused actual prejudice and was a deliberate mechanism to gain an advantage over the defendant); State v. Graham, 200 N.C. App. 204, 215 (2009) (applying same two-pronged test). Cases finding a due process violation include:

      - State v. Johnson, 275 N.C. 264, 273-75 (1969) (due process violated by four- to five-year delay in prosecuting the defendant when the reason for delay was law enforcement's hope to arrest an accomplice and to pressure the defendant to testify against the accomplice once he was arrested; the pre-accusation delay caused the defendant to serve a prison term that might otherwise have run concurrently with earlier sentence).
      - Howell v. Barker, 904 F.2d 889, 895 (4th Cir. 1990) (due process violated where the state conceded that a several year delay in prosecuting the defendant resulted in a lost witness; the reason for delay was administrative convenience; the court

reached its conclusion by balancing prejudice and the reason for the delay).

b. **Excusable delay.** Courts have not found a due process violation when a delay in prosecuting a case is attributable to the exigencies of the investigation. *See Lovasco*, 431 U.S. at 795-96 (investigative delay acceptable; investigation before indictment should be encouraged); *Goldman*, 311 N.C. at 345 (delay of more than six years between the crime and the indictment did not result in due process violation when delay was attributable to ongoing investigation and the defendant failed to show actual or substantial prejudice resulting from delay); State v. Netcliff, 116 N.C. App. 396, 401 (1994) (pre-indictment delay was acceptable, based in part on end date of undercover drug operation in relation to date of indictment), *overruled in part on other grounds by* State v. Patton, 342 N.C. 633 (1996); State v. Holmes, 59 N.C. App. 79, 83 (1982) (delay excusable when necessary to protect identity of undercover officer).

Courts also have declined to find a due process violation when the delay in a prosecution is the result of delay in reporting crimes to law enforcement. *See* State v. Martin, 195 N.C. App. 43, 48 (2009) (delay of six years before Department of Social Services reported sexual offenses against child; DSS is not the prosecution or a law enforcement agency for purposes of delay inquiry); State v. Stanford, 169 N.C. App. 214, 216 (2005) (fifteen year delay before the victim filed report of sexual offenses committed when she was thirteen and fourteen years old); State v. Everhardt, 96 N.C. App. 1, 8-9 (1989) (offense reported three years after commission), *aff'd*, 326 N.C. 777 (1990); State v. Hoover, 89 N.C. App. 199, 202 (1988) (sexual offense against child not reported for six years, then prosecuted promptly).

Other cases not finding a due process violation on grounds of excusable delay or lack of prejudice include:

- State v. Goldman, 311 N.C. 338, 345 (1984) (six-year investigative delay in obtaining indictment; only prejudice was the defendant's assertions of faded memory about dates and events in question).
- State v. McCoy, 303 N.C. 1, 12-13 (1981) (eleven-month delay between the offense and trial; reasons for the delay were the defendant's hospitalization and overcrowding of court docket; court also held that the defendant was unable to show prejudice).
- State v. Dietz, 289 N.C. 488, 492-93 (1976) (four and one half-month delay between the offense and indictment; reason for the delay was to protect identity of undercover officer and only claim of prejudice was faded memory; court applied balancing test between reason for delay and prejudice).
- State v. Graham, 200 N.C. App. 204, 215 (2009) (general assertion of prejudice based on faded memory does not show

actual prejudice; the defendant did not assert that any particular witness would give testimony helpful to him).

- State v. Everhardt, 96 N.C. App. 1 (1989) (spouse abuse case where three-year delay in initiating prosecution was caused primarily by the victim's procrastination in reporting abuse; the defendant showed witness unavailability but did not prove that witnesses would have been available at an earlier time), *aff'd*, 326 N.C. 777 (1990).
- State v. Hackett, 26 N.C. App. 239, 243 (1975) (six-month delay in prosecuting the defendant to protect identity of undercover agent).

B. Procedure.

1. Defendant's Motion. A motion to dismiss for untimely prosecution may be brought under G.S. 15A-954(a)(4), which provides that the court must dismiss the charges in a criminal pleading if violation of the defendant's constitutional rights has caused irreparable prejudice. State v. Parker, 66 N.C. App. 293, 294 (1984) (court cites this statutory provision as well as G.S. 15A-954(a)(3) (dismissal for denial of speedy trial)).

G.S. 15A-954(c) permits a motion to be made "at any time." However, to avoid the risk of waiver, defendants typically make a motion before or at trial.

2. Hearing. When there are contested issues of fact regarding a motion to dismiss, the defendant is entitled to an evidentiary hearing, State v. Goldman, 311 N.C. 338, 346-47 (1984), but a defendant must specifically request a hearing. *See Dietz*, 289 N.C. at 494 (failure to hold hearing not error absent defense request).

3. Judge's Ruling. The judge should make findings of facts and conclusions of law when issuing a ruling granting or denying a motion. *Cf.* State v. Clark, 201 N.C. App. 319, 328-29 (2009) (court states that when an evidentiary hearing is required for a motion to dismiss for lack of a speedy trial, the trial court must make findings of fact and conclusions of law to support its order). The *Clark* statement would clearly apply to due process challenges as well.

III. Federal and State Constitution Right to Speedy Trial.

A. Basis of Constitutional Right to Speedy Trial. The defendant's right to a speedy trial is based on the Sixth Amendment to the United States Constitution and on Article I, Section 18 of the North Carolina Constitution. *See* Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) (Sixth Amendment speedy trial right applicable to states); State v. Tindall, 294 N.C. 689, 693 (1978) (noting state constitutional provision). North Carolina no longer has a speedy trial statute; the statutory provisions of Article 35 of Chapter 15A (G.S. 15A-701 through G.S. 15A-710) were repealed effective October 1, 1989.

B. Scope of Right. The Sixth Amendment's speedy trial guarantee does not apply to the sentencing phase of a criminal prosecution. Betterman v. Montana, ___ U.S. ___, 136 S. Ct. 1609, 1612 (2016). North Carolina appellate courts have not addressed whether the state constitution's speedy trial provision (Art I, Sec. 18) applies to the sentencing phase. "For inordinate delay in sentencing, . . . a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clause." *Id.* The *Betterman* Court reserved

the question of whether the speedy trial clause "applies to bifurcated proceedings in which, at the sentencing stage, facts that could increase the prescribed sentencing range are determined (e.g., capital cases in which eligibility for the death penalty hinges on aggravating factor findings)." *Id.* at 1613 n.2. Nor did it decide whether the speedy trial right "reattaches upon renewed prosecution following a defendant's successful appeal, when he again enjoys the presumption of innocence." *Id.*

C. **Standard.** The leading case on the Sixth Amendment standard for assessing speedy trial claims is *Barker v. Wingo*, 407 U.S. 514 (1972). North Carolina appellate courts apply the same standard under the North Carolina Constitution. State v. Spivey, 357 N.C. 114, 118 (2003). *Barker* held that the following four factors must be balanced to determine whether the right to speedy trial has been violated:

- length of the pretrial delay,
- reason for the delay,
- prejudice to the defendant, and
- defendant's assertion of the right to a speedy trial.

Barker emphasized that there is not a bright-line test to determine whether the speedy trial right has been violated. The nature of the right "necessarily compels courts to approach speedy trial cases on an ad hoc basis." *Id.* at 530. "No single [*Barker*] factor is regarded as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial." State v. McKoy, 294 N.C. 134, 140 (1978); *Barker*, 407 U.S. at 533 (none of the four factors are either a necessary or sufficient condition to finding a speedy trial violation). All the factors must be weighed and balanced against each other. *See* State v. Groves, 324 N.C. 360, 365-67 (1989) (court conducted analysis of four *Barker* factors and did not find a constitutional violation); State v. Washington, 192 N.C. App. 277, 283-97 (2008) (court conducted analysis of four *Barker* factors and found a constitutional violation).

1. **Length of Delay.** The length of delay serves two purposes. First, it is a triggering mechanism for a speedy trial claim. "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530; *see also* State v. Jones, 310 N.C. 716, 721 (1984) (length of delay not determinative, but is triggering mechanism for consideration of other factors). In felony cases, courts generally have found delay to be "presumptively prejudicial" when it exceeds one year. *See* Doggett v. United States, 505 U.S. 647, 652 n.1 (1992); State v. Webster, 337 N.C. 674, 679 (1994) (delay of sixteen months triggered examination of other factors); State v. Smith, 289 N.C. 143, 148 (1976) (delay of eleven months prompted consideration of *Barker* factors); State v. Pippin, 72 N.C. App. 387, 392 (1985) (fourteen months). *But see* State v. McCoy, 303 N.C. 1, 12 (1981) (delay of eleven months was not presumptively prejudicial).

   Second, the length of delay is one of the factors that must be weighed. The longer the delay, the more heavily this factor weighs against the State. *See Doggett*, 505 U.S. at 657 (1992) (delay of eight

years required dismissal); State v. Chaplin, 122 N.C. App. 659, 663 (1996) (particularly lengthy delay establishes prima facie case that delay was due to neglect or willfulness of prosecution and requires the State to offer evidence explaining the reasons for delay and rebutting the prima facie showing; constitutional violation found when the case was calendared for trial every month for three years but was never called for trial and the defendant had to travel from New York to North Carolina for each court date); State v. Washington, 192 N.C. App. 277, 297 (2008) (four years and nine months between arrest and trial constituted an unconstitutional delay in conjunction with other *Barker* factors); State v. McBride, 187 N.C. App. 496, 498-99 (2007) (delay of three years and seven months did not violate right to speedy trial when the record did not show the reason for the delay and the defendant did not assert the right until trial and did not show prejudice).

a. **De Novo Appeals**. In *State v. Friend*, 219 N.C. App. 338, 344 (2012), the court measured delay for speedy trial purposes from the time of the defendant's appeal to superior court for trial de novo to the time of trial in superior court. The court stated that it did not need to consider the delay in district court because the defendant did not make a speedy trial demand until after he appealed for a trial de novo in superior court; therefore, only the delay in superior court was relevant. Despite this statement, the *Friend* court considered the entire delay in assessing and ultimately rejecting the defendant's speedy trial claim. *See also* State v. Sheppard, 225 N.C. App. 655, *6 (2013) (unpublished) (in this DWI case, the defendant filed frequent requests for a speedy trial in district court and then in superior court after appealing for a trial de novo; the court upheld the superior court's dismissal of the charge on speedy trial grounds, basing its decision on the 14-month delay from the defendant's arrest to her trial in district court).

2. **Reason for Delay.** The length of delay must be considered together with the reason for delay. The *Barker* Court held that different weights should be assigned to various reasons for delay. "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered . . . . Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay." *Barker*, 407 U.S. at 531; *see also* State v. Pippin, 72 N.C. App. 387, 395 (1985) (negligence by the State may support a claim; the right to a speedy trial was violated when the State issued three defective indictments before issuing a valid indictment).

North Carolina courts generally have held that the defendant has the burden of showing that the trial delay was due either to neglect or willfulness on the part of the prosecution. *See* State v. McKoy, 294 N.C. 134, 141 (1978). However, there is a modification of this general rule when the delay is exceptionally long. Once the defendant has shown prima facie evidence to meet this burden, then the State must offer evidence to explain the delay to rebut the defendant's prima facie evidence. *See* State v. Branch, 41 N.C. App. 80, 85-86 (1979) (when the

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defendant showed a seventeen month delay after his request for a speedy trial, the State should have presented evidence fully explaining reasons for the delay, which it failed to do); *Washington*, 192 N.C. App. at 283 (the State did not rebut the defendant's prima facie evidence when the reason for a four year, nine month delay was not a neutral factor, but was repeated neglect and underutilization of court resources by the district attorney's office).

Establishing a violation of the defendant's constitutional right to a speedy trial does not require proof of an improper prosecutorial motive. A speedy trial violation can be found when the reason for the delay was administrative negligence. *Pippin*, 72 N.C. App. at 398 (speedy trial violation found when the State was negligent in obtaining a valid indictment); s*ee also Webster*, 337 N.C. at 679 (1994) (court "expressly disapprove[s]" of practice of repeatedly placing a case on the trial calendar without calling it for trial, but ultimately does not find a speedy trial violation). *But see* State v. Kivett, 321 N.C. 404, 409 (1988) (holding that the defendant's speedy trial rights were not violated when there was no evidence that: (1) other cases were not being tried, (2) the State was trying more recent cases while postponing the subject case, or (3) insignificant cases were being tried ahead of the subject case).

Valid administrative reasons, including the complexity of a case, congested court dockets, and difficulty in locating witnesses, may justify delay. *See* State v. Smith, 289 N.C. 143, 148 (1976) (eleven month delay caused by congested dockets and difficulty in locating witnesses was acceptable); State v. Hughes, 54 N.C. App. 117, 119 (1981) (no speedy trial violation found when reason for delay was congested dockets and policy of giving priority to jail cases). However, overcrowded courts do not necessarily excuse delay. *See Barker*, 407 U.S. at 531 ("[O]vercrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.").

If the defendant causes the delay, the defendant is unlikely to succeed in claiming a violation of speedy trial rights. *See* State v. Groves, 324 N.C. 360, 366 (1989) (no speedy trial violation when the defendant repeatedly asked for continuances); State v. Tindall, 294 N.C. 689, 695-96 (1978) (no violation when the delay was caused largely by the defendant's fleeing the state and living under an assumed name); State v. Leyshon, 211 N.C. App. 511, 524 (2011) (no violation when the delay was caused by the defendant's failure to state whether he asserted or waived his right to counsel at four separate hearings); *Pippin*, 72 N.C. App. at 394 (1985) (speedy trial claim does not arise from delay attributable to defense counsel's requested plea negotiations; State has burden of establishing delay attributable to that purpose).

Public defenders and counsel appointed to represent defendants are not state actors for purposes of a speedy trial claim, and the State ordinarily is not responsible for delays they cause. *See* Vermont v. Brillon, 556 U.S. 81, 92-93 (2009) (delay caused by appointed defense counsel is not attributable to the state when determining whether a defendant's speedy trial right is violated; however, the state may be responsible if there is a breakdown in the public defender system).

3. **Prejudice to the Defendant.** The *Barker* Court, 407 U.S. at 532, identified three types of prejudice that may result from a delayed trial:

- oppressive pretrial incarceration;
- the social, financial, and emotional strain of living under a cloud of suspicion; and
- impairment of the ability to present a defense.

The strongest prejudice claims are those in which a defendant can show that his or her ability to defend against the charges was impaired by the delay. *See, e.g.,* State v. Chaplin, 122 N.C. App. 659, 665 (1996) (loss of critical defense witness); State v. Washington, 192 N.C. App. 277, 293-97 (2008) (the State's witnesses' memories of key events had faded, interfering with the defendant's ability to challenge their reliability; the State's witnesses also were allowed to make in-court identifications of the defendant nearly five years after the date of offense, which increased the possibility of misidentification).

Courts also have found prejudice when a defendant was subjected to oppressive pretrial incarceration or when delay resulted in financial loss or damage to the defendant's reputation in the community. *See* United States v. Marion, 404 U.S. 307, 320 (1971) (formal accusation may "interfere with the defendant's liberty, . . . disrupt his employment, drain his financial resources, curtail his associations, . . . and create anxiety in him, his family and his friends"); *Pippin*, 72 N.C. App. 387, 396-98 (1985) (dismissal of charges upheld despite no real prejudice to defense when negligent delay in prosecuting case caused drain on defendant's financial resources and interference with social and community associations); *Washington*, 192 N.C. App. at 292 (fact that the defendant was incarcerated for 366 days as a result of pretrial delay was an "important consideration").

In some cases, courts have found delay to be so long, or so inexplicable, that prejudice is presumed. *See* Doggett v. United States, 505 U.S. 647, 655-56 (1992) (prejudice presumed when the trial delayed for over eight years); *McKoy*, 294 N.C. at 143 (willful delay of ten months outweighed lack of real prejudice to defendant; speedy trial violation found).

4. **Assertion of Speedy Trial Right.** *Barker* rejected a demand-waiver rule for speedy trial claims—that is, the court rejected a rule whereby a defendant who failed to demand a speedy trial would waive his or her right to one. Instead, *Barker* held that the defendant's assertion of or failure to assert his or her right to a speedy trial is one factor to be weighed in the inquiry into the deprivation of the right. *Barker*, 407 U.S. at 528. This factor will be weighed most heavily in favor of defendants who have repeatedly asked for a trial and who have objected to State motions for continuances. *See McKoy*, 294 N.C. at 142 (defendant asked eight or nine times for trial date and moved to dismiss for lack of speedy trial); State v. Raynor, 45 N.C. App. 181, 184 (1980) (stressing importance of objecting to State's continuance motions).

Conversely, the failure to assert the right to a speedy trial will weigh against a defendant. *See* State v. Webster, 337 N.C. 674, 680 (1994); State v. McCollum, 334 N.C. 208, 231 (1993) (where the

defendant made no attempt to assert his right to a speedy trial for thirty-two months, this factor weighed against the defendant). *Cf. Washington*, 192 N.C. App. at 290-91 (this factor favored the defendant when although the defendant did not formally assert the right until two years and ten months after indictment, the assertion was still one year and eight months before trial began, and defendant complained about delay in examination of physical evidence before formal assertion); *Chaplin*, 122 N.C. App. at 664-65 (with delay of almost three years, charge dismissed for speedy trial violation although the defendant did not assert right until 30 days before trial when defendant suffered great prejudice).

D. When Speedy Trial Right Attaches.

1. Defendant Must Be Charged with a Crime. The Sixth Amendment right to a speedy trial attaches at arrest, indictment, or other official accusation, whichever occurs first. *See* Doggett v. United States, 505 U.S. 647, 655 (1992); Dillingham v. United States, 423 U.S. 64, 65 (1975) (per curiam); *McKoy*, 294 N.C. at 140; State v. Friend, 219 N.C. App. 338, 343 (2012). This standard is highly likely to be adopted under the North Carolina Constitution because North Carolina appellate courts already apply the four-factor *Barker* standard under the North Carolina Constitution. *See* State v. Spivey, 357 N.C. 114, 118 (2003).

Even when the defendant is unaware that he or she has been charged with a crime, the defendant's speedy trial right attaches and the clock begins to run on issuance of the indictment or other official accusation. *See Doggett*, 505 U.S. at 653 (defendant unaware of indictment until arrest eight years later); *see also* State v. Kelly, 656 N.E.2d 419, 420-23 (Ohio Ct. App. 1995) (citing both *Doggett* and an earlier North Carolina case, *State v. Johnson*, 275 N.C. 264 (1969), for the proposition that a delay in arresting defendant following indictment was subject to speedy trial protection).

Doggett makes it clear that speedy trial rather than due process protections apply once a person has been indicted *or* arrested. In *State v. McCoy*, 303 N.C. 1, 10 (1981), issued before *Doggett,* the North Carolina Supreme Court left open the question of whether speedy trial protections attached when an arrest warrant has been issued, but the defendant has not yet been arrested. Although the language in *Doggett* suggests that speedy trial protections apply after any formal accusation is issued, jurisdictions have reached differing results on this question. *See* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 18.1(c), at 121-22 (4th ed. 2015) (noting that jurisdictions have reached differing results; stating as a general proposition, at the least, if a charging document short of an indictment is sufficient to give a court jurisdiction to proceed to trial, such as an arrest warrant for a misdemeanor to be tried in district court, speedy trial right attaches when charging document is issued regardless of whether defendant is aware of charge); *see also* Williams v. Darr, 603 P.2d 1021, 1024 (Kan. Ct. App. 1979) (speedy trial right attaches on issuance of arrest warrant, which commences prosecution).

However, lack of knowledge can affect the prejudice analysis in a speedy trial claim. A defendant who does not know of an indictment or

arrest warrant cannot claim anxiety or disruption of social relationships as a source of prejudice. On the other hand, because the defendant cannot make a demand for a speedy trial in this situation, the lack of a demand may not harm the defendant in the speedy trial analysis.

2. **Effect of Dismissal.** G.S. 15A-931 permits the State to take a voluntary dismissal of charges. Refiling of the same or a different charge is permitted following dismissal as long as jeopardy has not attached (and, in a misdemeanor case, the statute of limitations is not a bar). *See* State v. Muncy, 79 N.C. App. 356, 360 (1986).

   After charges are dismissed pursuant to G.S. 15A-931, the defendant's Sixth Amendment speedy trial rights are in abeyance until the State brings later charges. *See* United States v. Loud Hawk, 474 U.S. 302, 310-12 (1986) (no Sixth Amendment right to speedy trial after dismissal, even if the government is appealing the dismissal); United States v. MacDonald, 456 U.S. 1, 8-9 (1982) (Sixth Amendment right to speedy trial not implicated during four years between dismissal and reinstatement of charges). Undue delay in reprosecuting the charge could result in a due process violation, however. *See supra* Section II.

   If the State rearrests or reindicts the defendant for the same offense, the defendant can add together the pretrial periods following each arrest or indictment for speedy trial purposes. *See* State v. Pippin, 72 N.C. App. 387, 391 (1985) (reindictment case); United States v. Columbo, 852 F.2d 19, 23–24 (1st Cir. 1988) ("Were it otherwise, the government would be able to nullify a defendant's speedy trial right by the simple expedient of dismissing and reindicting whenever speedy trial time was running out on its prosecution.").

3. **Dismissal with Leave under G.S. 15A-932.** G.S. 15A-932 permits the prosecutor to take a dismissal with leave when a defendant has failed to appear in court (or pursuant to a deferred prosecution agreement). A case dismissed with leave is removed from the trial calendar. However, the criminal prosecution is not terminated; the indictment remains valid, and charges may be reinitiated without a new indictment. *See* State v. Lamb, 321 N.C. 633, 641 (1988).

   A defendant whose case is dismissed with leave pursuant to G.S. 15A-932 still has a speedy trial right, although the courts generally will not find a constitutional violation when the delay is caused by the defendant's own actions. *See* Barker v. Wingo, 407 U.S. 514, 531 (1972); State v. Tindall, 294 N.C. 689, 695-96 (1978) (delay caused by the defendant fleeing the jurisdiction; no speedy trial violation). Once the defendant has been arrested or otherwise appears, he or she has the right to proceed to trial; the State may not unduly delay calendaring the case for trial or refuse to calendar the case altogether. *See generally* Klopfer v. North Carolina, 386 U.S. 213, 221 (1967) (former North Carolina nolle prosequi procedure violated the defendant's speedy trial rights because the charges against the defendant remained pending, the prosecutor could restore them to the calendar for trial at any time, and there was no means for the defendant to obtain dismissal of the charges or have them called for trial; (now, the State may only take a dismissal with leave in narrow circumstances)); *see also* G.S. 20-24.1(b1) (if defendant has failed to appear on motor vehicle offense, which results in revocation of license,

he or she must be afforded an opportunity for a trial or hearing within a reasonable time of his or her appearance).

4. **Prisoner's Right to Speedy Trial.** Defendants who have been convicted of an unrelated crime do not lose the Sixth Amendment right to a speedy trial while in prison. *See* Smith v. Hooey, 393 U.S. 374, 377-78 (1969); State v. Wright, 290 N.C. 45, 54 (1976); State v. Johnson, 275 N.C. 264, 278 (1969). However, courts have held that prisoners cannot claim prejudice based solely on pretrial incarceration, reasoning that they would have been incarcerated in any event. *See* State v. Vaughn, 296 N.C. 167, 181 (1978); State v. McQueen, 295 N.C. 96, 116-17 (1978), *overruled on other grounds by* State v. Peoples, 311 N.C. 515 (1984). A defendant may argue that he or she was prejudiced by losing the opportunity to serve sentences concurrently, a type of prejudice that has been recognized in the pre-accusation delay context. *See* State v. Johnson, 275 N.C. 264, 275 (1969) (due process violated by four to five year delay in prosecuting the defendant when the reason for the delay was law enforcement's hope to arrest an accomplice and pressure the defendant to testify against the accomplice once he was arrested; court found prejudice when pre-accusation delay led to the defendant serving a prison term that might otherwise have run concurrently with earlier sentence). Concerning a prisoner's statutory method to obtain a trial, see Section V., below.

E. Case Summaries.

1. **Speedy Trial Violation Found.** A speedy trial violation was found in the following cases:

- Doggett v. United States, 505 U.S. 647, 655 (1992) (8½ year delay between indictment and trial, largely because of the prosecution's negligence in locating the defendant; excessive delay is presumptively prejudicial as it "compromises the reliability of a trial in ways that neither party can prove or . . . identify").
- State v. McKoy, 294 N.C. 134, 143 (1978) (22-month delay between arrest and trial, with ten months of delay attributable to willful negligence by prosecution; speedy trial violation found despite minimal prejudice to the defendant when the defendant requested that he be brought to trial eight or nine times).
- State v. Sheppard, 225 N.C. App. 655 (2013) (unpublished) (court of appeals upheld the dismissal of case on speedy trial grounds where the defendant was charged in September 2010 with impaired driving; case was repeatedly continued, once for the defendant to confer with counsel after initial appointment and remaining times at the State's request; the defendant filed numerous speedy trial requests in district court and, when the State requested another continuance after an 11-month delay since defendant's arrest, the district court denied the continuance; the State took a voluntary dismissal and recharged and rearrested the defendant the same day; the defendant made further requests for a speedy trial and moved for dismissal on speedy trial grounds,

which the district court denied; the defendant was tried and convicted in district court 14 months after her arrest; the defendant appealed for a trial de novo, made additional speedy trial requests, and then prevailed on her speedy trial motion in superior court; the *Barker* factors supported the superior court's ruling; the defendant did not waive her speedy trial rights by objecting to the chemical analyst's affidavit and asserting her right to confront the analyst, recognizing that a defendant may not be required to give up one constitutional right to assert another).

- State v. Washington, 192 N.C. App. 277 (2008) (trial was delayed nearly five years; reason for delay was repeated neglect and underutilization of court resources by the prosecutor's office, with much of delay caused by the State's failure to submit physical evidence to SBI lab for analysis; no indication that the delay was caused by factors outside of the prosecution's control; the delay resulted in actual particularized prejudice to the defendant, and the defendant asserted his right to speedy trial).
- State v. Chaplin, 122 N.C. App. 659 (1996) (trial was delayed for almost three years, even though the defendant did not assert the right until less than 30 days before trial; the case was repeatedly calendared but not called and, according to the defendant's unrefuted allegation, State waited for a defense witness to be paroled, making it more difficult for the defendant to secure that witness's testimony).
- State v. Pippin, 72 N.C. App. 387 (1985) (trial was delayed for fourteen months based primarily on the State's repeated mishandling of process of obtaining indictment; prejudice to the defendant was anxiety and drain on family's financial resources).

2. **No Speedy Trial Violation Found.** No speedy trial violation was found in the following cases:

- Barker v. Wingo, 407 U.S. 514, 533-36 (1972) (five-year delay so that the State could obtain a conviction of a co-defendant and use the co-defendant as witness against the defendant; court found minimal prejudice and that the defendant had acquiesced in delay).
- State v. Webster, 337 N.C. 674 (1994) (16-month delay but no showing of an improper purpose or motive by the State or prejudice to the defendant).
- State v. Groves, 324 N.C. 360, 365-67 (1989) (26-month delay; the defendant had not objected to the delay and had asked for 13 continuances; the defendant could not show prejudice beyond stating that delay resulted in the State having additional jailhouse witnesses against him).
- State v. Smith, 289 N.C. 143, 146-49 (1976) (11-month delay; no showing that delay was purposeful or oppressive or reasonably could have been avoided by State; the delay was due to congested dockets, understandable difficulty in locating out-of-

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state witnesses, and good faith efforts to obtain an absent co-defendant).

- State v. Kpaeyeh, ___ N.C. App. ___, 784 S.E.2d 582, 584-86 (2016) (3-year delay when changes in the defendant's representation caused much of the delay as well as miscommunication between the defendant and his first two lawyers, or neglect by these lawyers, and the defendant failed to show prejudice).
- State v. Carvalho, ___ N.C. App. ___, 777 S.E.2d 78, 83-85 (2015) (while 9-year delay was extraordinary, delay was not determinative and examination of *Barker* factors was required; delay did not stem from the State's negligence or willfulness; the defendant asserted speedy trial right 8 years after indictment; and the defendant failed to show prejudice).
- State v. Friend, 219 N.C. App. 338, 343-46 (2012) (the defendant was charged in March 2006 with impaired driving; case was continued 11 times, six of which were attributable to defense, two of which were by consent, and three of which were attributable to the State; in July 2007, when the State was not ready to proceed, district court refused to continue case and State took voluntary dismissal and refiled charges nine days later; the district court dismissed the case in October 2007 in light of its earlier refusal to grant continuance; and case moved between district and superior court until February 2010 for review of dismissal order and trial in district and superior court; the length of delay was not caused by the State because the continuances in district court were attributable to both parties and proceedings to review dismissal order was neutral factor).
- State v. Lee, 218 N.C. App. 42, 52-54 (2012) (22-month delay, including 10-month delay in holding of capacity hearing after the defendant's psychiatric evaluation, prompted consideration of *Barker* factors, but no speedy trial violation when record was unclear about the reasons for delay; courts stated that while troubled by delay in holding of capacity hearing, it could not conclude that delay was due to the State's willfulness or negligence when, among other things, the defendant repeatedly requested removal of trial counsel and the victim was out of country for medical treatment for injuries).
- State v. Branch, 41 N.C. App. 80, 85-87 (1979) (2-year delay was presumptively unreasonable and burden shifted to the State to explain delay; no constitutional violation found because the defendant failed to show sufficient prejudice; the defendant failed to make a record about testimony that lost witness would have given).

F. Remedy for Speedy Trial Violation. Dismissal of the charge with prejudice (which means the charge cannot be tried again) is the only remedy for violation of a defendant's constitutional right to a speedy trial. *See Barker*, 407 U.S. at 522; G.S. 15A-954(a)(3) (court must dismiss charges if defendant has been denied constitutional right to speedy trial); *see also* Strunk v. United States, 412

U.S. 434, 438-40 (1973) (court cannot remedy violation of right to speedy trial by reducing the defendant's sentence); State v. Wilburn, 21 N.C. App. 140, 142 (1974) (recognizing that dismissal is the only remedy after a determination that constitutional right to speedy trial has been violated).

G. Procedure.

1. **Defendant's Motion.** G.S. 15A-954(c) states that a defendant may make a motion to dismiss for lack of a speedy trial at any time. However, it typically is made before trial. *See* State v. Joyce, 104 N.C. App. 558, 568-69 (1991) (making motion for speedy trial at trial reduced issue to mere formality); *see also* State v. Thompson, 15 N.C. App. 416, 418 (1972) (speedy trial claim cannot be raised for first time on appeal).
2. **Hearing; Court's Ruling.** If the defendant's motion presents questions of fact, the court is required to conduct a hearing and make findings of fact and conclusions of law. *See* State v. Dietz, 289 N.C. 488, 495 (1976); State v. Chaplin, 122 N.C. App. 659, 663 (1996). If there is no objection, the evidence may consist of statements of counsel; however, the North Carolina courts have clearly expressed that the better practice is to present evidence and develop the record through affidavits or testimony. *See* State v. Pippin, 72 N.C. App. 387, 397-98 (1985).

IV. Out-of-State Prisoner's Right to Trial under Interstate Agreement on Detainers.

A. Trial Within 180 Days From Time When Out-of-State Prisoner Notifies Prosecutor. Article III(a) of the Interstate Agreement on Detainers (G.S. 15A-761) provides that an out-of-state prisoner against whom a detainer has been lodged must be tried within 180 days after the prisoner has "caused to be delivered" to the prosecutor and court written notice of the place of his or her imprisonment and a request for a final disposition to be made of the criminal charge. State v. Ferdinando, 298 N.C. 737, 740 (1979) (prisoner's request for a speedy trial before a detainer was lodged against him was ineffectual to trigger the interstate agreement); State v. Parr, 65 N.C. App. 415, 417 (1983) (the interstate agreement only applies to those charges that are the basis for the issuance of a detainer); State v. Vaughn, 296 N.C. 167, 176-77 (1978) (a prisoner's request was ineffectual because it failed to provide the information required by law); State v. Schirmer, 104 N.C. App. 472, 476 (1991) (similar ruling).

Continuances may be granted that extend the time in which the State may prosecute the charge. G.S. 15A-761, Article III; State v. Capps, 61 N.C. App. 225, 231 (1983). If a trial is not begun within the appropriate time period, the charge must be dismissed with prejudice, which means that the charge may not be tried again.

The beginning date for the 180-day period is when the prosecutor actually received the request, not when the prosecutor should have received the request. State v. Treece, 129 N.C. App. 93, 95-96 (1998) (the defendant mailed the request on January 16, 1996, but the request was not delivered to the district attorney's office until March 18, 1996; the latter date is the beginning of the 180-day period); State v. McQueen, 295 N.C. 96, 112 (1978) (no evidence that the district attorney's office received defendant's request), *overruled on other grounds by* State v. Peoples, 311 N.C. 515 (1984).

If a prisoner is released from prison before the expiration of the 180-day period, the interstate agreement no longer provides a defendant with the right to a speedy trial. State v. Dunlap, 57 N.C. App. 175, 177-78 (1982).

An order for arrest following an indictment by a State grand jury that is served on a defendant in federal custody does not constitute a "detainer" that subjects the State to requirements of the Interstate Agreement on Detainers when the order is not filed directly with federal Bureau of Prisons or any federal institution, and the State does not request federal officials to hold the defendant at end of the defendant's federal sentence or to notify the State of the defendant's release. State v. Prentice*,* 170 N.C. App. 593, 600 (2005).

The agreement does not apply to a North Carolina prisoner who has criminal charges pending in a North Carolina state court. State v. Dammons, 293 N.C. 263, 267-68 (1977). For such a prisoner, see Section V., below.

B. **Trial within 120 Days of Prisoner's Arrival in the State.** Article IV(c) of the Interstate Agreement on Detainers, G.S. 15A-761, provides that a prisoner in another state against whom a detainer has been lodged must be tried within 120 days of the prisoner's arrival in North Carolina when the State had requested the prisoner for trial. Continuances may granted that extend the time in which the State may prosecute the charge. G.S. 15A-761; Article IV(c). For cases upholding State's continuances or excluding time from the 120-day time limitation because of a defendant's continuances, *see* State v. Lyszaj, 314 N.C. 256, 262-63 (1985); State v. Vaughn, 296 N.C. 167, 178 (1978); *Capps*, 61 N.C. App. at 231; State v. Collins, 29 N.C. App. 478, 481 (1976).

If a trial is not begun within the appropriate time period, the charge must be dismissed with prejudice, which means that the charge may not be tried again.

If a trial is begun within 120 days and results in a mistrial, the State is not required to try the defendant again within the 120-day period. The State only is required to use due diligence in trying the defendant again. State v. Williams, 33 N.C. App. 344, 347-48 (1977).

The State has a duty to try an out-of-state prisoner before returning the prisoner to the other jurisdiction (federal or state prison). For example, in *Alabama v. Bozeman*, 533 U.S. 146, 152-56 (2001), an Alabama prosecutor requested and received custody, under Article IV of the Interstate Agreement on Detainers, of a prisoner in a Florida federal prison (for whom the state had filed a detainer) and arraigned him and appointed counsel on criminal charges in an Alabama state court. After spending one day in an Alabama jail, the prisoner was returned to the Florida federal prison. He later was returned to Alabama for trial. The court ruled that the act of bringing the federal prisoner to Alabama triggered Alabama's duty under subsection (e) of Article IV (see G.S. 15A-761, Article IV(e) for North Carolina's similar provision) to try the prisoner before returning him to the Florida prison. The Court affirmed the dismissal of the Alabama charges, rejecting Alabama's argument that dismissal is inappropriate for a "technical" violation. The Court stated in dicta that a prisoner could waive the right to trial under subsection (e) of Article IV.

V. **North Carolina Prisoner or Jail Inmate Requesting Trial in North Carolina State Courts.** North Carolina statutes provide methods for a person incarcerated in a North Carolina prison or jail to accelerate the process to dispose of a pending criminal charge.

A. **G.S. 15A-711.** G.S. 15A-711(a) and -711(c) provide that a written request to be produced for trial filed with the clerk of court where charges are pending by (i) a North Carolina prisoner serving a sentence, or (ii) a North Carolina defendant in custody awaiting trial, requires the State to file a request to the custodian of the prisoner or inmate for his or her temporary release to the State within six months from the date when the prisoner or inmate filed his or her request. G.S. 15A-711(a) authorizes the prosecutor to make a written request to the custodian of the institution where the prisoner is located to release the prisoner for a period of 60 days for trial.

If the State does not comply within the six-month time period to make the written request to the custodian for the prisoner's release for trial, then the charges must be dismissed with prejudice. In *State v. Doisey*, 162 N.C. App. 447, 450 (2004), the court made clear that the dismissal of charges is based solely on whether the State failed within six months of the defendant's request to be produced for trial to request the defendant's release from a penal institution for trial. The dismissal of charges is not based on the State's failure to try the defendant within a particular time period. The court distinguished statements made in *State v. Dammons*, 293 N.C. 263 (1977). *See also* State v. Turner, 34 N.C. App. 78, 84-85 (1977) (State proceeded within the six months' limitation when it requested the defendant from the state prison; a trial is not required within six months); State v. Williamson, 212 N.C. App. 393, 396 (2011) (the court noted that G.S. 15A-711 is not a speedy trial statute; the State satisfies its statutory duty when a properly-served prosecutor timely makes a written request for the defendant's transfer).

A prisoner's failure to serve a copy of his or her written request on the prosecutor in the manner provided by Rule 5(b) of the Rules of Civil Procedure, *see* G.S. 15A-711(c), bars the dismissal of charges. Thus, a defendant is not entitled to relief if the request is not properly served. State v. Pickens, 346 N.C. 628, 648 (1997); State v. Hege, 78 N.C. App. 435, 437 (1985).

B. **G.S. 15-10.2.** G.S. 15-10.2 provides that a prisoner serving sentence in the North Carolina prison system who has lodged against him or her a detainer for a criminal charge pending in state court must be brought to trial within eight months after the prisoner has sent by registered mail to the district attorney a request for final disposition of the charge. However, the statute provides that a court may grant a continuance for good cause.

For cases on this statutory provision, see *State v. McKoy*, 294 N.C. 134, 143-44 (1978) (the defendant was not entitled to relief when he did not send the district attorney a notice and request for trial by registered mail as required by the statute), and *State v. Dammons*, 293 N.C. 263, 266 (1977) (the defendant was not entitled to relief when the defendant's pro se request for trial was not sent by registered mail; additionally, the defendant was tried within eight months of the request).

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45254
Court of Appeals of Georgia

Newman v. State

121 Ga. App. 692 (Ga. Ct. App. 1970) · 175 S.E.2d 144
Decided Apr 21, 1970

45254.

ARGUED APRIL 13, 1970.

DECIDED APRIL 21, 1970.

Demand for trial. Fulton Superior Court. Before Judge Emeritus Hicks.

Larry Cohran, for appellant.

Lewis R. Slaton, District Attorney, Tony H. Hight, Joel M. Feldman, for appellee.

Placing a criminal case on the dead docket over a defendant's objection is an abuse of the trial court's discretion in that it violates the right to a speedy trial as guaranteed by both the Georgia and Federal Constitutions.

ARGUED APRIL 13, 1970 — DECIDED APRIL 21, 1970.

Defendant appeals from the denial of his motion for acquittal and from the order placing his case on the dead docket.

Defendant was indicted in January 1968. The case was called for trial in March and April and on both occasions defendant obtained a continuance. The case was also continued in June, although there is some dispute as to which side made the motion. When called again in September, the State asked for a continuance because the prosecuting witness was in Viet Nam. The same day defendant filed a demand for trial with the clerk. The State requested and received continuances in October, November and December, at which time the court ordered that the demand for trial be spread upon the minutes. In January and February of 1969, continuances were again granted to the State due to the absence of its witness. In February defendant's motion for acquittal was heard and denied, and the State's motion to place the case on the dead docket was granted. The trial court certified the order for immediate review.

HALL, Presiding Judge.

1. The motion to dismiss the appeal is denied.

2. The statutory right to demand a speedy trial is set out in *Code* § 27-1901: "Any person against whom a true bill of indictment is found for an offense not affecting his life may demand at either the term when the indictment is found, or at the next succeeding regular term thereafter, a trial; or, by special permission of the court, he may at any subsequent term thereafter demand a trial. In either case the demand for trial shall *693 be

placed upon the minutes of the court. If such person shall not be tried when the demand is made, or at the next succeeding regular term thereafter, provided at both terms there were juries impaneled and qualified to try him, he shall be absolutely discharged and acquitted of the offense charged in the indictment."

Defendant filed his demand with the clerk after the second term following indictment so that special permission of the court would be required to give the demand effect. *Without more,* the December 18 order spreading the demand upon the minutes would indicate that the court had given "special permission" under § 27-1901, since the section only calls for such recording in the case of a valid demand, i.e., by right or by special permission. The function of placing the demand on the minutes is to give notice to the State that the time in which trial must be had is running. *Moore v. State,* 63 Ga. 165. It would serve no purpose to record a demand in the usual fashion when permission to make it had not been granted.

However, doubt is cast on the meaning of this order by subsequent actions of the trial court. After the next succeeding regular term, the same judge denied defendant's motion for acquittal pursuant to *Code* § 27-1901, stating that he did not believe he had the power to do so. The transcript leads us to believe that the judge might have been unaware of the "special permission" feature of the statute and therefore could not have been granting it by the December 18 order. We will not determine the trial court's intent by sheer speculation. We will remand with direction that the trial court construe its December 18 order. See 60 CJS 109, Motions and Orders, § 64; *Jordan v. Russell,* 48 Ga. App. 200 (172 S.E. 469). If the court declares that defendant was thereby given special permission to make a demand, then he has already been acquitted by operation of law and nothing more remains to be done. *Thornton v. State,* 7 Ga. App. 752 (67 S.E. 1055); *Bishop v. State,* 11 Ga. App. 296 (75 S.E. 165).

3. If the trial court declares this was not the intent or meaning of the order, then it must make a definitive ruling either granting or refusing defendant permission to make the late demand. *694 The exercise of discretion under *Code* § 27-1901 lies with the trial judge rather than the appellate courts.

If permission is denied, however, the issue of defendant's constitutional right to a speedy trial still remains. The demand statute is only one device by which the defendant may assert this right. *Blevins v. State,* 113 Ga. App. 413 (148 S.E.2d 192); s.c., 113 Ga. App. 702 (149 S.E.2d 423). Defendant has also enumerated as error the placing of his case on the dead docket.

Statutory authority for the criminal dead docket is contained in *Code* § 24-2714 (5) (7) (duties of the clerk of the superior court). We can find no case law on the subject, but the State has suggested, and we agree, that the procedural device is analogous to North Carolina's nolle prosequi "with leave." With both, the prosecution is postponed indefinitely but may be reinstated any time at the pleasure of the court. Since the United States Supreme Court has declared entry of the nolle prosequi "with leave" over defendant's objection to be unconstitutional (Klopfer v. North Carolina, 386 U.S. 213 (87 SC 988, 18 L.Ed.2d 1)), we believe the trial court here abused its discretion when it placed the case on the dead docket over defendant's objection.

On the other hand, the State may still be able to make a reasonable showing for a continuance under *Code* § 27-2001. Whether a defendant has been denied a speedy trial is not merely a matter of time but depends upon the facts and circumstances of each case. United States v. Ewell, 383 U.S. 116 (86 SC 773, 15 L.Ed.2d 627); *Reid v. State,* 116 Ga. App. 640 (158 S.E.2d 461); *Blevins v. State,* 113 Ga. App. 702, supra.

The defendant is entitled to insist that the State show the court why it is unable to try the case now and *when it expects to be able to do so.* If the problem is the absence of the prosecuting witness in Viet Nam, then the State can surely ascertain when he is due back. If the further delay is not unreasonable (taking into account that more

than two years has already elapsed since indictment) the court may grant the State a continuance. *Code* § 27-2002.

695 *Judgment reversed with direction. Deen and Evans, JJ., concur.* *695

STATE v. RANDALL

[366 N.C. 217 (2012)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Durham County
	)	
ROBERT LANCE RANDALL	)	

No. 305P12

(Filed 24 August 2012)

ORDER

On 16 July 2012 pro se Defendant filed a petition for writ of mandamus in his case. On or about 4 November 2008, the Court of Appeals ordered a new trial. *State v. Randall*, 193 N.C. App. 611, 670 S.E.2d 644, 2008 N.C. App. LEXIS 1960, at *1 (Nov. 4, 2008) (COA07-1470) (unpublished). To date the case has not been calendared for trial.

Defendant's petition for writ of mandamus is allowed and the District Attorney, Fourteenth Judicial District is directed to calendar the case of *State v. Robert Lance Randall* within ninety days of this order.

"By order of the Court in Conference, this 26th day of July 2012."

Timmons-Goodson, J.
For the Court

Jackson, J., Recused.

No. 404A92-5
Supreme Court of North Carolina

State v. Spruill

358 N.C. 730 (N.C. 2004) · 601 S.E.2d 196
Decided Jul 1, 2004

No. 404A92-5

Filed 23 July 2004

ORDER

Defendant's Petition for Writ of Mandamus is allowed. The trial court concluded as a matter of law that defendant satisfied N.C.G.S. § 15A-2006 by proving that he was mentally retarded, as defined in N.C.G.S. § 15A-2005(a), at the time of the commission of the capital crime in 1984. This Court finds no basis for disturbing such conclusion of law and holds that a defendant who satisfied N.C.G.S. § 15A-2006 is lawfully entitled to appropriate relief pursuant to N.C.G.S. § 15A-2006. Accordingly, the Superior Court, Northampton County, is hereby ordered to grant defendant appropriate relief pursuant to N.C.G.S. § 15A-2006.

By order of the Court in Conference, this 23rd day of July, 2004.

s/Brady, J. For the Court

Upon consideration of the petition filed by Defendant on the 9th day of July 2004 in this matter for a writ of certiorari to review the order of the Superior Court, Northampton County, the following order was entered and is hereby certified to the Superior Court of that County:

"Dismissed as moot by order of the Court in conference, this the 23rd day of July 2004.

s/Brady, J. For the Court

731 *731

casetext

North Carolina Court of Appeals

DANIEL M. HORNE JR., Clerk

Fax: (919) 831-3615
Web: https://www.nccourts.gov

Court of Appeals Building
One West Morgan Street
Raleigh, NC 27601
(919) 831-3600

Mailing Address:
P. O. Box 2779
Raleigh, NC 27602

No. P19-170

STATE OF NORTH CAROLINA

V.

JWANA CHERISE LAKE
DEFENDANT

From Wake
(17CR732228)

O R D E R

The following order was entered:

The petition filed in this cause by petitioner on 27 March 2019 and designated 'Petition for Writ of Mandamus' is decided as follows: It appearing that petitioner filed a motion for appropriate relief in Wake County District Court on 4 December 2018, and that no order has been entered disposing of the motion, the petition for writ of mandamus is allowed, and it is hereby ordered that the District Court of Wake County enter an order disposing of petitioner's motion for appropriate within sixty days of issuance of this order.

A copy of this order shall be mailed to Chief District Court Judge and the District Attorney of Judicial District 10.

By order of the Court this the 12th of April 2019.

The above order is therefore certified to the Clerk of the Superior Court, Wake County.

WITNESS my hand and the seal of the North Carolina Court of Appeals, this the 12th day of April 2019.

Daniel M. Horne Jr.
Clerk, North Carolina Court of Appeals

Copy to:
Mr. Anton M. Lebedev, Attorney at Law, For Lake, Jwana
Mr. Daniel P. O'Brien, Special Deputy Attorney General, For State of North Carolina
Mr. Joseph L. Hyde, Assistant Attorney General
Mr. Adam Everett, Assistant District Attorney
Ms. Davis Cooper
Ms. Kristin Jo Uicker, Assistant Attorney General
Mr. Matthew K. Lively, Assistant District Attorney

Hon. Robert B. Rader, Chief District Court Judge
Hon. Frank Blair Williams, Clerk of Superior Court
Hon. Lorrin Freeman, District Attorney

No. 54A19-3 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

* * * * * * * * * * * * * * * *

STATE OF NORTH CAROLINA)
)
v.) WAKE COUNTY
)
ROGELIO ALBINO DIAZ-TOMAS)

* * * * * * * * * * * * * * * *

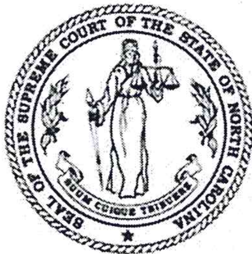
ORDER

Defendant's petition for discretionary review as to additional issues is allowed as to issues I–V, VIII–IX, XII–XIV. Except as to the issues specified, defendant's petition for discretionary review as to additional issues is denied.

By order of this Court in Conference, this 15th day of December, 2020.

Mark A. Davis
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of December, 2020.



AMY L. FUNDERBURK
Clerk of the Supreme Court

Copy to:
North Carolina Court of Appeals
Mr. Anton M. Lebedev, Attorney at Law, For Diaz-Tomas, Rogelio Albino - (By Email)
Mr. Daniel P. O'Brien, Special Deputy Attorney General, For State of N.C. - (By Email)
Mr. Joseph L. Hyde, Assistant Attorney General, For State of N.C. - (By Email)
Ms. N. Lorrin Freeman, District Attorney
Hon. Frank Blair Williams, Clerk
West Publishing - (By Email)
Lexis-Nexis - (By Email)

Supreme Court of North Carolina

STATE OF NORTH CAROLINA

v

ROGELIO ALBINO DIAZ-TOMAS

From N.C. Court of Appeals
(19-777 P19-490)
From Wake
(15-CR-1985 15CR1985)

O R D E R

Upon consideration of the conditional petition filed by Defendant on the 12th of May 2020 in this matter for a writ of certiorari to review the order of the North Carolina Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Allowed by order of the Court in conference, this the 15th of December 2020."

s/ Davis, J.
For the Court

Upon consideration of the conditional petition filed by Defendant on the 12th of May 2020 in this matter for a writ of certiorari to review the order of the Wake County District Court, the following order was entered and is hereby certified to the Wake County District Court:

"Allowed by order of the Court in conference, this the 15th of December 2020."

s/ Davis, J.
For the Court

The following order has been entered on the motion filed on the 12th of May 2020 by Defendant to Expedite the Consideration of Defendant's Matters:

"Motion Dismissed as moot by order of the Court in conference, this the 15th of December 2020."

s/ Davis, J.
For the Court

The following order has been entered on the motion filed on the 12th of May 2020 by Defendant to Proceed In Forma Pauperis:

"Motion Allowed by order of the Court in conference, this the 15th of December 2020."

s/ Davis, J.
For the Court

The following order has been entered on the motion filed on the 12th of May 2020 by Defendant to Take Judicial Notice:

"Motion Dismissed as moot by order of the Court in conference, this the 15th of December 2020."

s/ Davis, J.
For the Court

The following order has been entered on the motion filed on the 12th of May 2020 by Defendant for Leave to Amend Notice of Appeal:

"Motion Allowed by order of the Court in conference, this the 15th of December 2020."

s/ Davis, J.
For the Court

The following order has been entered on the motion filed on the 1st of June 2020 by Defendant for Summary Reversal:

"Motion Dismissed by order of the Court in conference, this the 15th of December 2020."

s/ Davis, J.
For the Court

The following order has been entered on the motion filed on the 8th of June 2020 by Defendant to Supplement Record on Appeal:

"Motion Allowed by order of the Court in conference, this the 15th of December 2020."

s/ Davis, J.
For the Court

The following order has been entered on the motion filed on the 29th of June 2020 by Defendant to Clarify the Extent of Supersedeas Order:

"Motion Dismissed by order of the Court in conference, this the 15th of December 2020."

s/ Davis, J.
For the Court

The following order has been entered on the motion filed on the 29th of June 2020 by Defendant in the Alternative to Hold Certiorari and Mandamus Petitions in Abeyance:

"Motion Allowed by order of the Court in conference, this the 15th of December 2020."

s/ Davis, J.
For the Court

The following order has been entered on the motion filed on the 17th of August 2020 by Defendant for Petition for Writ of Procedendo:

"Motion Dismissed by order of the Court in conference, this the 15th of December 2020."

s/ Davis, J.
For the Court

The following order has been entered on the motion filed on the 17th of August 2020 by Defendant for Printing and Mailing of PDR on Additional Issues:

"Motion Dismissed by order of the Court in conference, this the 15th of December 2020."

s/ Davis, J.
For the Court

The following order has been entered on the motion filed on the 17th of August 2020 by Defendant for the Production of Discovery Under Seal:

"Motion Denied by order of the Court in conference, this the 15th of December 2020."

s/ Davis, J.
For the Court

The following order has been entered on the motion filed on the 24th of August 2020 by Defendant to Amend Certificates of Service:

"Motion Allowed by order of the Court in conference, this the 15th of December 2020."

s/ Davis, J.
For the Court

The following order has been entered on the motion filed on the 28th of August 2020 by Defendant to Amend Motion for Petition for Writ of Procedendo:

"Motion Dismissed as moot by order of the Court in conference, this the 15th of December 2020."

s/ Davis, J.
For the Court

Therefore the case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 15(g)(2).

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of December 2020.

Amy L. Funderburk
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
Mr. Anton M. Lebedev, Attorney at Law, For Diaz-Tomas, Rogelio Albino - (By Email)
Mr. Daniel P. O'Brien, Special Deputy Attorney General, For State of N.C. - (By Email)
Mr. Joseph L. Hyde, Assistant Attorney General, For State of N.C. - (By Email)
Ms. N. Lorrin Freeman, District Attorney
Hon. Frank Blair Williams, Clerk
West Publishing - (By Email)
Lexis-Nexis - (By Email)

No. COA19-777
COURT OF APPEALS OF NORTH CAROLINA

State v. Diaz-Tomas

841 S.E.2d 355 (N.C. Ct. App. 2020)
Decided Apr 21, 2020

No. COA19-777

04-21-2020

STATE of North Carolina v. Rogelio Albino DIAZ-TOMAS, Defendant.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State. Law Offices of Anton M. Lebedev, by Anton M. Lebedev, for defendant-appellant.

YOUNG, Judge.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Law Offices of Anton M. Lebedev, by Anton M. Lebedev, for defendant-appellant.

YOUNG, Judge.

Where defendant failed to demonstrate that the Superior Court abused its discretion in denying his petition for certiorari, we affirm that decision. Where the District Court's denial of defendant's motion to reinstate charges is not properly before us, we dismiss such argument. Where mandamus is not an appropriate remedy, we deny defendant's petitions for writ of mandamus. Where defendant requests that we take judicial notice of local rules, but declines to show for what purpose we must do so, we deny defendant's motion to take judicial notice. We affirm in part and dismiss in part.

I. Factual and Procedural Background

On 5 April 2015, Rogelio Albino Diaz-Tomas (defendant) was cited for driving while impaired and without an operator's license. Defendant was told to appear in Wake County District Court for a hearing on the citation. On 25 February 2016, the Wake County District Court issued an order for arrest due to defendant's failure to appear. On 11 July 2016, the State entered a dismissal with leave of the charges.

On 24 July 2018, defendant was arrested and ordered to appear. On 13 November 2018, the court issued another order for defendant's arrest due to his failure to appear. On 12 December 2018, he was again arrested and ordered to appear.

On 28 January 2019, defendant filed a motion in Wake County District Court to reinstate the charges that the State had previously dismissed with leave. Defendant sought a writ of mandamus from the North Carolina Supreme Court, which the Court denied on 26 February 2019. On 15 June 2019, the Wake County District Court denied defendant's motion to reinstate the charges, holding that the State acted within its discretion and statutory authority by entering a dismissal with leave.

On 22 July 2019, defendant filed a petition for writ of certiorari in Wake County Superior Court, seeking review of the District Court's denial of his motion to reinstate the charges. On 24 July 2019, the Superior Court, in its discretion, denied and dismissed defendant's petition for writ of certiorari.

Defendant filed a petition for writ of certiorari to this Court. On 15 August 2019, this Court granted defendant's petition for the purpose of reviewing the order of the Superior Court denying defendant's petition for certiorari filed in that court.

II. Preliminary Motions

In addition to his arguments on appeal, defendant has filed two petitions for writ of mandamus and one motion to take judicial notice. For the following reasons, we deny all three.

358 With respect to his petitions for writ of mandamus, defendant seeks a writ compelling *358 the District Court to grant his motion to reinstate the charges. In essence, he seeks to attack the District Court's denial of his motion collaterally, rather than on appeal, by requesting that we compel the District Court to reverse itself.

However, "[a]n action for *mandamus* may not be used as a substitute for an appeal." *Snow v. N.C. Bd. of Architecture* , 273 N.C. 559, 570, 160 S.E.2d 719, 727 (1968). Our Supreme Court has held that "*mandamus* is not a proper instrument to review or reverse an administrative board which has taken final action on a matter within its jurisdiction." *Warren v. Maxwell* , 223 N.C. 604, 608, 27 S.E.2d 721, 724 (1943). Rather, if statute provides no right of appeal, "the proper method of review is by *certiorari* ." *Id* . As such, defendant's petitions – seeking to reverse the decision of the District Court – are not properly remedied by mandamus, but by appeal or certiorari, the latter of which defendant in fact pursued in Superior Court.

Moreover, even if mandamus offered an appropriate remedy, this Court would not be the appropriate venue. "Applications for the writ[ ] of mandamus ... shall be made by filing a petition therefor with the clerk of the court to which appeal of right might lie from a final judgment entered in the cause[.]" N.C.R. App. P. 22(a). From a final judgment entered in Wake County District Court, appeal of right lies to Wake County Superior Court. *See* N.C. Gen. Stat. § 7A-271(b) (2019). As such, a petition for writ of mandamus would properly have been filed with the Superior Court, not with this Court. For these reasons, we deny defendant's petitions for writ of mandamus.

With respect to defendant's motion to take judicial notice, defendant requests that this Court take judicial notice of the Wake County Local Judicial Rules. While defendant is correct that these rules are of a sort of which this Court may properly take judicial notice, defendant offers no reason for us to do so. His argument does not rely upon nor cite to these Rules. Nor need we rely upon them for our reasoning, as shown below. As such, we decline to take judicial notice of the Wake County Local Judicial Rules, and deny this motion as well.

III. Petition for Certiorari

In his second argument on appeal, which we address first, defendant contends that the Superior Court erred in denying his petition for certiorari. We disagree.

A. Standard of Review

"The authority of a superior court to grant the writ of certiorari in appropriate cases is ... analogous to the Court of Appeals' power to issue a writ of certiorari[.]" *State v. Hamrick* , 110 N.C. App. 60, 65, 428 S.E.2d 830, 832-33 (1993). "*Certiorari* is a discretionary writ, to be issued only for good or sufficient cause shown, and it is not one to which the moving party is entitled as a matter of right." *Womble v. Moncure Mill & Gin Co.* , 194 N.C.

577, 579, 140 S.E. 230, 231 (1927). "[I]n our review of the superior court's grant or denial of certiorari to an inferior tribunal, we determine only whether the superior court abused its discretion. We do not address the merits of the petition to the superior court in the instant case." *N.C. Cent. Univ. v. Taylor* , 122 N.C. App. 609, 612, 471 S.E.2d 115, 117 (1996), *aff'd per curiam,* 345 N.C. 630, 481 S.E.2d 83 (1997).

"Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis* , 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

B. Analysis

Defendant, in his brief, concedes that the decision whether to grant certiorari is discretionary. He argues, nonetheless, that "just because *certiorari* is a discretionary writ does not mean that the Superior Court can deny the writ for any reason."

While defendant is certainly correct in essence – the discretion of a trial court is not blanket authority, and must have some basis in reason – his argument goes too far afield. Defendant proceeds to argue, in essence, that the trial court abused its discretion in denying the writ because he was *entitled* to it. Defendant argues, for example, that he demonstrated *359 "appropriate circumstances" for the issuance of a writ "to review this compelling interlocutory issue[;]" that the court should have allowed the petition due to its potential influence on the outcome of other Wake County cases; and ultimately that the Superior Court apparently had an obligation to grant certiorari.

These arguments must fail. The Superior Court is under no obligation to grant certiorari. While certainly it must have some reason for denying the writ, that does not equate to an affirmative duty to grant it. Even assuming *arguendo* that the District Court's denial of defendant's motion to reinstate the charges was erroneous, the Superior Court was not obligated to grant certiorari to review it. The result would be unfortunate, but such is the case with discretionary writs. They are, by nature, discretionary.

On appeal, defendant bears the burden of showing that the decision of the Superior Court in denying his petition for certiorari was "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Hennis* , 323 N.C. at 285, 372 S.E.2d at 527. It is not enough that he disagree with it, or argue – incorrectly – that the trial court was obligated to grant his petition. Defendant has to show that the Superior Court's decision was unsupported by reason or otherwise entirely arbitrary. We hold that he has failed to do so. Accordingly, we hold that the trial court did not err in denying defendant's petition for certiorari.

IV. Motion to Reinstate Charges

Defendant also contends on appeal that the District Court erred in denying his motion to reinstate charges. However, as we have held, the Superior Court did not err in denying his petition for certiorari. Additionally, we note that this Court granted certiorari solely for the purpose of reviewing the Superior Court's denial of certiorari, not for the purpose of reviewing the District Court's denial of the motion to reinstate charges. Indeed, on review of an appeal from the superior court's denial of certiorari, "[w]e do not address the merits of the petition[,]" which in the instant case would be whether the District Court erred in denying the motion to reinstate the charges. *N.C. Cent. Univ.* , 122 N.C. App. at 612, 471 S.E.2d at 117. As such, this argument is not properly before us, and is moot. We therefore decline to address it, and dismiss it.

AFFIRMED IN PART, DISMISSED IN PART.

Judge BERGER concurs.

Judge ZACHARY concurs in part and dissents in part by separate opinion.

ZACHARY, Judge, concurring in part, dissenting in part.

I concur with the conclusion reached in Section IV of the majority's opinion regarding Defendant's arguments concerning the district court's "Order Denying Defendant's Motion to Reinstate Charges." As the majority explains, that order is not before this Court. We allowed Defendant's petition for writ of certiorari for the limited purpose of reviewing the superior court's "Order Denying Petition for Writ of Certiorari." *Majority* at 359. Accordingly, we lack jurisdiction over the district court's order, and Defendant's challenge thereto is improper.

As discussed below, I also agree with the majority that mandamus is an improper remedy to redress the errors alleged in this matter, although I reach this result for different reasons than the majority. However, I respectfully dissent from the remainder of the majority's opinion.

First, I would allow Defendant's "Motion to Take Judicial Notice of Current Local Rules." While noting that the Wake County Local Judicial Rules are indeed "of a sort of which this Court may properly take judicial notice," the majority nevertheless denies Defendant's motion on the grounds that he "offers no reason for us to do so. His argument does not rely upon nor cite to these Rules. Nor need we rely upon them for our reasoning ...." *Id.* at 358. I respectfully disagree. Defendant asserts in his motion that "[t]he local rules are inconsistent with the District Court's actions in this instant case." Furthermore, it is manifest that in order to conduct a full and thorough appellate review of the superior court's order—as is our mandate in *360 this appeal, pursuant to our Court's 15 August 2019 order allowing Defendant's petition for writ of certiorari—we must necessarily review the allegations of Defendant's underlying petition.

Moreover, as explained below, I cannot agree with the majority's analysis regarding the superior court's denial of Defendant's petition for writ of certiorari. For these reasons, I respectfully concur in part, and dissent in part, from the majority's opinion.

Facts and Procedural History

On 4 April 2015, Defendant was charged by criminal citation with driving while impaired, in violation of N.C. Gen. Stat. § 20-138.1 (2019), and driving without an operator's license, in violation of N.C. Gen. Stat. § 20-7(a). After Defendant failed to appear in Wake County District Court on 24 February 2016, the district court issued an order for his arrest. On 11 July 2016, the Wake County District Attorney's Office dismissed Defendant's charges with leave, due to his "fail[ure] to appear for a criminal proceeding at which [his] attendance was required and" upon the prosecutor's belief that he could not "readily be found." Defendant's driving privilege was also revoked as a result of his failure to appear.

In July 2018, Defendant was arrested on the February 2016 order for his arrest; but after he again failed to appear for his 9 November 2018 court date, the district court issued another order for his arrest. Defendant was arrested on 12 December 2018, and he was ordered to appear in Wake County District Court at 2:00 p.m. on 18 January 2019. However, Defendant's case was subsequently scheduled as an "add-on case" during the 14 December 2018 Criminal Administrative Driving While Impaired Session of Wake County District Court. Upon Defendant's appearance on 14 December 2018, the assistant district attorney declined to reinstate Defendant's charges.

According to Defendant, his scheduled "18 January 2019 Criminal District Court date never took place." Accordingly, on 28 January 2019, Defendant filed a "Motion to Reinstate Charges" in Wake County District Court, alleging, *inter alia* , that "[t]he State will not reinstate ... Defendant's criminal charges unless [he] enters a guilty plea to the DWI charge and waives his right to appeal[.]" On 15 July 2019, the district court entered its Order Denying Defendant's Motion to Reinstate Charges.

On 22 July 2019, Defendant petitioned the Wake County Superior Court to issue its writ of certiorari, seeking reversal of the district court's order and reinstatement of Defendant's criminal charges. The superior court "denied and dismissed" Defendant's petition for writ of certiorari by order entered 24 July 2019. The superior court determined that Defendant "failed to provide 'sufficient cause' to support the granting of his Petition" and "is not entitled to the relief requested[.]"

Defendant subsequently filed a petition for writ of certiorari with this Court. By order entered 15 August 2019, we allowed Defendant's petition "for purposes of reviewing the order entered by [the superior court] on 24 July 2019."

Discussion

As explained below, I concur in the denial of Defendant's (1) "Alternative Petition for Writ of Mandamus," and (2) "Second Alternative Petition for Writ of Mandamus," directed to the Wake County District Attorney and the Wake County District Court, respectively. However, I respectfully dissent from the majority's decision regarding the superior court's denial of Defendant's petition for writ of certiorari.

A. Mandamus

"Mandamus translates literally as 'We command.' " *In re T.H.T.* , 362 N.C. 446, 453, 665 S.E.2d 54, 59 (2008) (citation omitted). A writ of mandamus is, thus, an "extraordinary" court order issued "to a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law." *Id.* (citation and quotation marks omitted). Courts of the appellate division—that is, this Court and our Supreme Court—"may issue writs of mandamus 'to supervise and control the proceedings' of the" trial courts, but may only do so "to enforce established rights, not to create new rights." *Id.* (quoting *361 N.C. Gen. Stat. § 7A-32(b), (c) (2007)) (additional citation omitted). A number of requirements must be satisfied before a writ of mandamus may issue, *see id.* , but for our purposes, it is sufficient to note that "the party seeking relief must demonstrate a clear legal right to the act requested"; "the defendant must have a legal duty to perform the act requested"; and "the duty must be clear and not reasonably debatable." *Id.* at 453-54, 665 S.E.2d at 59 (citation omitted).

Here, Defendant filed two separate petitions for the writ of mandamus, requesting that this Court (1) "compel the Wake County District Attorney to promptly reinstate or dismiss his charges"; and (2) "compel the Wake County District Court to schedule Defendant a trial or hearing within a reasonable time." Contrary to the majority's determination, Defendant's petitions are properly addressed to this Court, not the superior court. *See In re Redwine* , 312 N.C. 482, 484, 322 S.E.2d 769, 770 (1984) ("The superior court judge misconstrued his authority to issue the writ of mandamus to a judge of the General Court of Justice. A judge of the superior court has no authority or jurisdiction to issue a writ of mandamus ... to a district court judge."). Consequently, if mandamus were the appropriate remedy in this case, it would be error for our Court to deny Defendant's petitions on that basis.

Nevertheless, as the majority correctly concludes, albeit for different reasons than I, mandamus is *not* the proper remedy here. Defendant fails to "demonstrate a clear legal right to the act[s] requested." *In re T.H.T.* , 362 N.C. at 453, 665 S.E.2d at 59 ; *see also* N.C. Gen. Stat. § 20-38.6(a) (setting forth the limited motions and procedures available for defense of implied-consent offenses in the district courts).

Nor can it be said that the Wake County District Attorney has a "clear and not reasonably debatable" legal duty to reinstate Defendant's criminal charges under these circumstances. *In re T.H.T.* , 362 N.C. at 453-54, 665 S.E.2d at 59. Indeed, the statutes governing the dismissal of criminal charges in implied-consent cases—and the rights of defendants whose failure to appear triggers dismissal—are anything but clear. *Compare* N.C. Gen. Stat. § 15A-932(a)(2) (providing that a "prosecutor may enter a dismissal with leave for nonappearance when a defendant ... [f]ails to appear at a criminal proceeding at which his attendance is required, and the prosecutor believes the defendant cannot be readily found"), *with id.* § 20-24.1(a), (b1) (providing that although the DMV "*must* revoke the driver's license of a person upon receipt of notice from a court that the person was charged with a motor vehicle offense and he ... failed to appear, after being notified to do so, when the case was called for a trial or hearing[,]" the defendant nevertheless "*must* be afforded an opportunity for a trial or a hearing within a reasonable time of the defendant's appearance" (emphases added)).

As these convoluted and often contradictory statutes illustrate, implied-consent law is rarely clear. For our purposes, however, it is sufficient to note that Defendant has failed to demonstrate a clear legal right to the acts he seeks to compel—i.e., the Wake County District Attorney's reinstatement of his criminal charges, followed by a trial or hearing in Wake County District Court—as this determination is fatal to his petitions for the writ of mandamus.

Accordingly, I concur in the majority's denial of Defendant's (1) Alternative Petition for Writ of Mandamus, and (2) Second Alternative Petition for Writ of Mandamus.

B. Certiorari

Contrary to the majority, I conclude that Defendant has met his burden of showing that the superior court abused its discretion by denying his petition for writ of certiorari. For the reasons set forth below, I would reverse the superior court's order denying Defendant's petition for writ of certiorari and remand for a hearing and decision on the merits.

The Nature of Certiorari

It is well settled that "[a]ppeals in criminal cases are controlled by the statutes on the subject." *State v. King* , 222 N.C. 137, 140, 22 S.E.2d 241, 242 (1942) (citation omitted). Our statutes, however, do not provide for appeal from the district court's denial of a defendant's motion to reinstate criminal charges. *362 Nevertheless, in such instances, "the defendant is not without a remedy. The remedy, retained by statute, approved by the court and generally pursued, is *certiorari* to be obtained from the Superior Court upon proper showing aptly made." *Id.* at 140, 22 S.E.2d at 243 (citations omitted); *see also* N.C. Gen. Stat. § 1-269 ("Writs of certiorari, recordari, and supersedeas are authorized as heretofore in use.").

The superior court has jurisdiction to issue a writ of certiorari to review district court proceedings pursuant to Rule 19 of the General Rules of Practice for the Superior and District Courts. Rule 19 provides, in pertinent part: "In proper cases and in like manner, the court may grant the writ of certiorari. When a diminution of the record is suggested and the record is manifestly imperfect, the court may grant the writ upon motion in the cause."

A superior court's authority "to grant the writ of certiorari in appropriate cases is ... analogous to [this Court's] power to issue a writ of certiorari pursuant to N.C. Gen. Stat. § 7A-32(c) [.]" *State v. Hamrick* , 110 N.C. App. 60, 65, 428 S.E.2d 830, 832-33, *appeal dismissed and disc. review denied* , 334 N.C. 436, 433 S.E.2d 181 (1993). As our Supreme Court long ago explained:

> [T]he Superior Court will always control inferior magistrates and tribunals, in matters for which a writ of error lies not, by *certiorari* , to bring up their judicial proceedings to be reviewed in the matter of law; for in such case "the *certiorari* is in effect a writ of error," as all that can be discussed in the court above are the form and sufficiency of the proceedings as they appear upon the face of them. ... It is ... essential to the uniformity of decision, and the peaceful and regular administration of the law here, that there should be some mode for correcting the errors, in point of law, of proceedings not according to the course of the common law, where the law does not give an appeal; and, therefore, from necessity, we must retain this use of the *certiorari* .

State v. Tripp , 168 N.C. 150, 155, 83 S.E. 630, 632 (1914).

"*Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler* , 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959), *cert. denied* , 362 U.S. 917, 80 S.Ct. 670, 4 L. Ed. 2d 738 (1960). "A petition for the writ must show merit or that error was probably committed below." *Id.* (citing *In re Snelgrove* , 208 N.C. 670, 672, 182 S.E. 335, 336 (1935)).

"Two things ... should be made to appear on application for *certiorari* : First, diligence in prosecuting the appeal, except in cases where no appeal lies, when freedom from laches in applying for the writ should be shown; and, second, merit, or that probable error was committed" below. *Snelgrove* , 208 N.C. at 672, 182 S.E. at 336 (citation and quotation marks omitted). Our Supreme Court has interpreted "merit" in this context to mean that a petitioner must show "that he has reasonable grounds for asking that the case be brought up and reviewed on appeal." *Id.*

Analysis

On appeal, Defendant alleges that the Wake County District Attorney's Office "refus[es] to reinstate the charges unless [Defendant] enters a plea of guilty and waives his right to appeal[.]" Defendant lacks an appeal of right from the district court's order denying his motion to reinstate the charges, or from the superior court's denial of his petition for writ of certiorari. Accordingly, Defendant filed a petition for writ of certiorari seeking this Court's review of the superior court's order. In our discretion, we allowed Defendant's petition for writ of certiorari. However, the majority's opinion fails to sufficiently address that order, which is now squarely before us, pursuant to the determination of a panel of our Court that Defendant's appeal presented "appropriate circumstances" to support issuing a writ of certiorari in order to enable our review. N.C.R. App. P. 21(a)(1).

As Defendant correctly notes, the discretionary nature of certiorari "does not mean that the Superior Court can deny the writ for any reason." While acknowledging that "the discretion of a trial court is not blanket authority, and must have some basis in reason[,]" the majority nevertheless misinterprets *363 Defendant's argument as an assertion that "the trial court abused its discretion in denying the writ because he was *entitled* to it." *Majority* at 358. Yet, in faulting Defendant for arguing "too far afield[,]" *id.* , the majority inadvertently commits the same error.

For example, the majority asserts:

> Even assuming *arguendo* that the District Court's denial of [D]efendant's motion to reinstate the charges was erroneous, the Superior Court was not obligated to grant certiorari to review it. The result would be unfortunate, but such is the case with discretionary writs. They are, by nature, discretionary.
>
> ....
>
> It is not enough that he disagree with it, or argue – incorrectly – that the trial court was obligated to grant his petition. Defendant has to show that the Superior Court's decision was unsupported by reason or otherwise entirely arbitrary.

Id. at 359.

As the majority explains, an abuse of discretion occurs when the trial court's ruling is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 359 (quoting *State v. Hennis* , 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)). Here, the superior court's order fails to reveal any basis for its rationale. The order lacks any explanation for the basis of the superior court's decision, other than the conclusory statements that "Defendant has failed to provide 'sufficient cause' to support the granting of his Petition" and "is not entitled to the relief requested[.]" And because all of the "motions and proceedings in this matter were adjudicated in chambers" without the benefit of recordation or transcription, the record before this Court fails to disclose the basis for the superior court's decision, as well.

Moreover, it is not clear that Defendant could meet the standard embraced by the majority under *any circumstances* , given the majority's refusal to "address the merits of the petition to the superior court in the instant case." *Id.* at 358 (citation and quotation marks omitted). I agree that the question of "whether the District Court erred in denying the motion to reinstate the charges" is not before us. *Id.* at 359. But this does not preclude our consideration of the allegations raised in Defendant's petition for writ of certiorari—i.e., his request that *the superior court* review the district court's denial of his motion to reinstate the charges. Indeed, how are we to fully review the superior court's order denying Defendant's petition without addressing its contents?

The superior court's unsupported conclusion that Defendant "failed to provide 'sufficient cause' to support the granting of his Petition" conflicts with our well-established standard for demonstrating merit and good cause for issuance of the writ of certiorari. A petitioner is not required to demonstrate a likelihood of success in every instance, merely (1) "diligence in prosecuting the appeal, *except in cases where no appeal lies, when freedom from laches in applying for the writ should be shown* "; and (2) "merit, or that probable error was committed" below. *Snelgrove* , 208 N.C. at 672, 182 S.E. at 336 (emphasis added); *cf. State v. Bishop* , 255 N.C. App. 767, 770, 805 S.E.2d 367, 370 (2017) ("As Bishop concedes, he cannot prevail on [his Fourth Amendment challenge to the trial court's order imposing lifetime satellite-based monitoring] without the use of Rule 2 because his constitutional argument is waived on appeal. In our discretion, *we decline to issue a writ of certiorari to review this unpreserved argument on direct appeal.* " (emphasis added)).

Clearly, Defendant's petition contains all of the required information, and his arguments show merit, as we have interpreted that standard, to support the issuance of a writ of certiorari in order to enable review on the record. In his petition to the superior court, Defendant raised numerous, detailed arguments alleging violations of his statutory and constitutional rights arising from the State's refusal to reinstate his criminal charges, including that:

> (1) The Wake County District Court failed to comply with N.C. Gen. Stat. § 20-24.1(b1) 's requirement that a defendant whose license is revoked due to his failure to appear after being charged

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> with a motor vehicle offense "must be afforded an opportunity for a trial or a hearing within a reasonable time" of his appearance. N.C. Gen. Stat. § 20-24.1(b1). "Upon motion of a defendant, the court must order that a hearing or a trial be heard within a reasonable time." *Id.* Defendant alleges that the hearing dates provided to him "were merely illusory as no opportunity for a trial or hearing actually existed on these dates."
>
> (2) The Wake County District Attorney's decision declining to reinstate Defendant's criminal charges was made for an improper purpose—namely, to coerce him to plead guilty. Citing a variety of authorities for support, Defendant further alleges that the circumstances of the instant case evince a pattern of "systematic prosecutorial misconduct" on the part of the Wake County District Attorney's Office, which the District Court had the authority to address.
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> (3) The District Attorney's refusal to reinstate his criminal charges violates his constitutional rights to due process and a speedy trial. According to Defendant, "a due process violation exists when a prosecutor exercises his calendaring authority to gain a tactical advantage over a criminal defendant." For support, Defendant cites *Klopfer v. North Carolina* , 386 U.S. 213, 87 S.Ct. 988, 18 L. Ed. 2d 1 (1967), and *Simeon v. Hardin* , 339 N.C. 358, 451 S.E.2d 858 (1994).

To be clear, I offer no opinion on the likelihood of Defendant's success on the merits of his petition, nor, as previously explained, is that question before us at this juncture. *See State v. Ross* , 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016) ("The decision concerning whether to issue a writ of certiorari is discretionary, and thus, the Court of Appeals may choose to grant such a writ to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause. As such, the two issues that [the] defendant raised in his petition for writ of certiorari to the Court of Appeals have not survived that court's decision to allow the writ for the limited purpose of considering the voluntariness of his guilty plea." (internal citation omitted)).

However, Defendant's petition for writ of certiorari contains cogent, well-supported arguments alleging statutory and constitutional violations akin to those at issue in *Klopfer* and *Simeon* , which—if true—are certainly concerning. He has no other avenue to seek redress for these alleged legal wrongs, because he has no right to appeal from the denial of his motion to reinstate charges. And if he pleads guilty, as the State intends, he waives his right to appeal altogether. This is no bargain.

> The open courts clause, Article I, Section 18 of the North Carolina Constitution, guarantees a criminal defendant a speedy trial, an impartial tribunal, and access to the court to apply for redress of injury. While this clause does not outlaw good-faith delays which are reasonably necessary for the state to prepare and present its case, it does prohibit purposeful or oppressive delays and those which the prosecution could have avoided with reasonable effort. Furthermore, Article I, Section 24 of the North Carolina Constitution grants every criminal defendant the absolute right to plead not guilty and to be tried by a jury. *Criminal defendants cannot be punished for exercising this right.*

Simeon , 339 N.C. at 377-78, 451 S.E.2d at 871 (emphasis added) (internal citations and quotation marks omitted).

Quite plainly, Defendant has no alternate means to seek redress of the issues raised in his petition before the superior court. The majority's opinion fails to address the issues raised in Defendant's petition—a necessary consideration upon review of the superior court's order denying his request for the writ of certiorari. For all of these reasons, I respectfully dissent.