

NORTH CAROLINA SUPREME COURT

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

.....

REPLY TO STATE’S RESPONSE TO DEFENDANT’S PETITION FOR WRIT OF *PROCEDENDO*

No. 54A19-3

DISTRICT 10

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NOW COMES, the Defendant, Rogelio Albino Diaz-Tomas, by and through undersigned counsel, Anton M. Lebedev and respectfully replies to the State’s response to his petition for writ of *procedendo*. In reply, the Defendant makes the following:

ARGUMENT

In its response to Defendant’s *procedendo* petition, the State argues, among other things, that Mr. Diaz-Tomas is essentially seeking the dismissal of his appeal before this Court, and that Mr. Diaz-Tomas

is filing a petition identical to his 11 February 2019 *mandamus* petition. Both of these contentions are clearly erroneous.

A. Mr. Diaz-Tomas is not moving for the dismissal of the appeal of right pending before this Court.

While an “order of *procedendo* accomplishes the same purpose as the dismissal of the appeal”, the filing of a petition for writ of *procedendo* is not tantamount to requesting the dismissal of the Mr. Diaz-Tomas’s appeal. See State v. Pollard, 83 N.C. 597, 601 (1880); cf. Caldwell v. Parks, 61 N.C. 54, 56 (1866) (“*the effect was . . . to discontinue the suit in the Superior Court*”).

Furthermore, an appeal may only be dismissed by the filing of a notice of withdrawal signed by a criminal defendant. See N.C. Gen. Stat. § 15A-1450; see also N.C. R. App. P. 37(d). As Mr. Diaz-Tomas has not authorized the dismissal of his appeal, the State cannot join the non-existent request to dismiss Mr. Diaz-Tomas. Id.

It is true that Mr. Diaz-Tomas’s appeal is not authorized as a matter of right in the ordinary course of the law and the Defendant’s case is only before the Appellate Division because the Court of Appeals issued its extraordinary writ of *certiorari*. However, that does not

constitute a ground to dismiss the Defendant's appeal of right pending before this Court.

B. Mr. Diaz-Tomas's 11 February 2019 *mandamus* petition is factually distinguishable from this instant petition.

Mr. Diaz-Tomas's instant *procedendo* petition is factually distinguishable from his 11 February 2019 *mandamus* petition. First and foremost, unlike a writ of *mandamus*, a writ of *procedendo* "can only issue when a proceeding has been instituted in the inferior court, *and is interrupted by an appeal*; in such cases the superior court puts the matter right, and directs the inferior court to proceed." Evans v. Governor's Creek Transp. & Min. Co., 50 N.C. 331, 333 (1858).

Moreover, the Defendant's 11 February 2019 *mandamus* petition was filed and adjudicated before the Wake County District Court entered its order denying Defendant's motion to reinstate charges. That *mandamus* petition sought to compel the State to reinstate the charges and the District Court to adjudicate his motion to reinstate charges. Since that *mandamus* petition was denied, substantial time has elapsed and circumstances have otherwise substantially changed.

CONCLUSION

WHREEFORE, notwithstanding the State's response to his *procedendo* petition, Mr. Diaz-Tomas respectfully requests that this Honorable Supreme Court of North Carolina issues its writ of *procedendo*, and grants Mr. Diaz-Tomas any and all other relief that it deems just and proper given the circumstances at hand.

Respectfully submitted, this the 28th day of August, 2020.

(Electronically Submitted)

Anton M. Lebedev

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CERTIFICATE OF SERVICE

I hereby certify that the original Defendant's Reply to State's Response to Defendant's Petition for Writ of *Procedendo* 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 Reply has been duly served upon Joseph L. Hyde, Assistant Attorney General, North Carolina Department of Justice, by electronic means by emailing it to jhyde@ncdoj.gov

I further certify a copy of the above and foregoing Reply has been duly served upon the Honorable Robert B. Rader, Wake County Chief District Court Judge, by electronic means by emailing it to robert.b.rader@nccourts.org

I further certify a copy of the above and foregoing Reply has been duly served upon Mary A. Slagle, Wake County Assistant District Attorney, by electronic means by emailing it to mary.a.slagle@nccourts.org

Respectfully submitted, this the 28th day of August, 2020.

(Electronically Submitted)

Anton M. Lebedev

Attorney for the Defendant-Petitioner

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