

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA

v.

EDGARDO GANDARILLA NUNEZ,
Defendant.

From Wake County

STATE OF NORTH CAROLINA

v.

ROGELIO ALBINO DIAZ-TOMAS,
Defendant.

From Wake County

BRIEF OF *AMICUS CURIAE*
NORTH CAROLINA ADVOCATES FOR JUSTICE

INDEX

TABLE OF CASES AND AUTHORITIES	iii
RELEVANT PROCEDURAL HISTORY	2
ARGUMENT	4
I. DISMISSALS WITH LEAVE AND THE RESULTANT CONSEQUENCES AFFECT HUNDREDS OF THOUSANDS OF NORTH CAROLINIANS CHARGED WITH NONVIOLENT TRAFFIC OFFENSES	4
A. <u>The Vast Majority of Cases Dismissed with Leave are Nonviolent Misdemeanor Traffic Offenses that do not Involve Illegal Substances or Alcohol</u>	4
B. <u>Many Defendants Fail to Appear for Benign Reasons</u>	8
C. <u>Failures to Appear Lead to Driver’s License Revocation, Fines, and Other Collateral Consequences that Can Affect a Defendant for Decades</u>	11
i. One in seven North Carolina drivers, and disproportionately Black, Brown, and indigent drivers, have their licenses suspended, primarily due to failure to appear in court	11
ii. Unresolved Dismissals with Leave can draw defendants into a cycle of debt	13
iii. Dismissals with Leave impose other collateral consequences.....	14
CONCLUSION	16
CERTIFICATE OF SERVICE	18

**TABLE OF CASES AND
AUTHORITIES**

Cases

Klopper v. State of N.C., 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967) 12

State v. Diaz-Tomas, 841 S.E.2d 355 (N.C. Ct. App. 2020)..... 7, 9

United States v. Ewell, 383 U.S. 116, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966) 13

Statutes

N.C.G.S. § 15A-932 9, 12, 13

N.C.G.S. § 20-24.1(a)..... 16

N.C.G.S. § 20-24.1(b)..... 19

N.C.G.S. § 7A-304(a)(6) 18

Other Authorities

Aleksandra E. Johnson, *Decriminalizing Non-Appearance in Washington State: The Problem & Sols. For Washington’s Bail Jumping Statute & Court Nonappearance*, 18 Seattle J. for Soc. Just. 433 (2020) 15

Daniel J. Flannery & Jeff M. Kretschmar, *Fugitive Safe Surrender: Program Description, Initial Findings, and Policy Implications*, 11 Crimin & Pub Pol 437 (2012)..... 21

David I. Rosenbaum, *Court Date Reminder Postcards*, 95 Judicature 177 (2012) ... 14

Garrett, B. L, et. al., *Undeliverable: Suspended Driver’s Licenses and the Problem of Notice*, (2020) 4(1) *UCLA Criminal Justice Law Review*,190..... 13, 14

Jessica Smith and Ross Hatton, UNC School of Government Criminal Justice Innovation Lab, “How Long Does it Take to Process a Criminal Case? An Analysis of Disposition & Pending Case Times in North Carolina” (August 2020) 20

Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677 (2018) 21

Marie VanNostrand <i>et al.</i> , Virginia Pretrial Services Agencies, <i>In Pursuit of Legal and Evidence-Based Pretrial Release Recommendations and Supervision</i> (Revised March 2011).....	15
Meagan Cahill, Focusing on the Individual in Warrant-Clearing Efforts, 11 <i>Crimin & Pub Pol</i> 473 (2012)	21
Melissa Boughton, NC Policy Watch, <i>NC officials dismiss hundreds of thousands of old court cases as part of massive data “clean-up,”</i> June 6, 2019	19
North Carolina Administrative Office of the Courts, <i>July 1,2014 -June 30, 2015 Statistical and Operational Report of North Carolina Trial Courts</i> (Jan. 11, 2016)	10
North Carolina Administrative Office of the Courts, <i>July 1,2015 - June 30, 2016 Statistical and Operational Report of North Carolina Trial Courts</i> (Jan. 9, 2017)	10
North Carolina Administrative Office of the Courts, <i>North Carolina Judicial Branch Statistical and Operational Report, Trial Courts, July 1,2012 - June 30, 2013</i> (Jan. 8, 2014)	10
North Carolina Administrative Office of the Courts, <i>North Carolina Judicial Branch Trial Courts Statistical and Operational Report July 1, 2013 - June 30, 2014</i> (Jan. 30, 2015).....	10
North Carolina Administrative Office of the Courts, Research, Policy and Planning Fact Sheet, 2018-19	20
North Carolina Administrative Office of the Courts, <i>Statistical and Operational Report of the North Carolina Trial Courts 2016-17</i> (Jan. 12, 2018).....	10
North Carolina Administrative Office of the Courts, <i>Statistical and Operational Report of the North Carolina Trial Courts 2018-19</i> (Jan. 14, 2020).....	10
North Carolina Administrative Office of the Courts, <i>Statistical and Operational Report of the North Carolina Trial Courts 2019-20</i> (Sept. 30, 2020)	10
North Carolina Judicial Branch, <i>Misdemeanor Motor Vehicle Case Activity Report FY 2012-13</i> [Microsoft Excel spreadsheet].....	10, 11
North Carolina Judicial Branch, <i>Misdemeanor Motor Vehicle Case Activity Report FY 2013-14</i> [Microsoft Excel spreadsheet].....	11

North Carolina Judicial Branch, <i>Misdemeanor Motor Vehicle Case Activity Report FY 2014-15</i> [Microsoft Excel spreadsheet].....	11
North Carolina Judicial Branch, <i>Misdemeanor Motor Vehicle Case Activity Report FY 2015-16</i> [Microsoft Excel spreadsheet].....	11
North Carolina Judicial Branch, <i>Misdemeanor Motor Vehicle Case Activity Report FY 2016-17</i> [Microsoft Excel spreadsheet].....	11
North Carolina Judicial Branch, <i>Misdemeanor Motor Vehicle Case Activity Report FY 2017-18</i> [Microsoft Excel spreadsheet].....	11
North Carolina Judicial Branch, <i>Misdemeanor Motor Vehicle Case Activity Report FY 2018-19</i> [Microsoft Excel spreadsheet].....	10
North Carolina Judicial Branch, <i>Misdemeanor Motor Vehicle Case Activity Report FY 2019-2020</i> [Microsoft Excel spreadsheet].....	10
North Carolina Judicial Branch, State of North Carolina General Court of Justice, 14 th Judicial Branch, Notifications of Reported Positive COVID-19 Individual at Durham County Courthouse	15
Press Release, North Carolina Judicial Branch, <i>Court Date Notifications and Reminders for Criminal Cases Now Available via Text and Email</i> (Oct. 19, 2018)	14
Shea Denning, University of North Carolina School of Government, <i>Revoking Licenses for Failure to Pay: Is Change on the Horizon?</i> (24 April 2019).....	18
<i>Statistical and Operational Report of the North Carolina Trial Courts 2017-18</i> (Jan. 15, 2019)	10
U.S. Census Bureau (2019) <i>Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for North Carolina: April 1, 2010 to July 1, 2019</i> [Microsoft Excel spreadsheet]	12
William E. Crozier & Brandon L. Garrett, <i>Driven to Failure: An Empirical Analysis of Driver’s License Suspension in N. Carolina</i> , 69 Duke L.J. 1585 (2020) 12, 15, 17, 19	

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA

v.

EDGARDO GANDARILLA NUNEZ,
Defendant.

From Wake County

STATE OF NORTH CAROLINA

v.

ROGELIO ALBINO DIAZ-TOMAS,
Defendant.

From Wake County

**BRIEF OF *AMICUS CURIAE*
NORTH CAROLINA ADVOCATES FOR JUSTICE**

More than one hundred thousand district court criminal cases are dismissed with leave in North Carolina every year. *Amicus curiae*, an association comprising attorneys who regularly represent criminal defendants in North Carolina district courts, file this brief to help inform the Court about the scope of the dismissal with

leave disposition in our State's district courts, the causes for this disposition, its impact on many North Carolinians' lives, and the resulting need for judicial review over decisions whether or not to reinstate these cases.¹ Unless corrected, the Court of Appeals opinion in *State v. Diaz-Tomas*, 841 S.E.2d 355 (N.C. Ct. App. 2020), will allow prosecutors to dismiss with leave and refuse to reinstate a charge unless the defendant gives up his right to a trial and pleads guilty with no avenue for relief from the courts, leaving him with the choice of accepting long-lasting collateral consequences or giving up his constitutional rights. This system impacts a significant portion of the population. Therefore, this Court should reverse the Court of Appeals in *State v. Tomas-Diaz* and require the Superior Court to grant certiorari in both defendants' cases.

RELEVANT PROCEDURAL HISTORY

Both Mr. Nunez and Mr. Diaz-Tomas, after their cases were dismissed with leave and the State declined to reinstate them, filed motions in Wake County district court to reinstate their cases, including allegations and affidavits swearing that prosecutors had demanded guilty pleas to reinstate defendants' cases. R. Nunez pp. 31, 42; R. Diaz-Tomas pp. 33, 44. The State did not submit any written arguments at the trial level.

¹ Pursuant to Rule 28(i)(2), counsel for *Amicus* state that no person or entity other than *Amicus*, its members, or its counsel directly or indirectly authored this brief in whole or in part or made a monetary contribution to the preparation or submission of this brief.

On 15 July and 11 September, 2019 the District Court of Wake County issued nearly-identical orders, denying first Mr. Diaz-Tomas' and then Mr. Nunez's motions to reinstate. Despite noting that he had "reviewed Defendant's supporting affidavits," Judge Robert B. Rader did not hold an evidentiary hearing and made no findings of fact concerning the prosecutors' practice of demanding guilty pleas in these or other Wake County cases. R. Nunez pp. 51, 53; R. Diaz-Tomas p. 55, 56. Rather, the district court concluded as a matter of law that "discretion to reinstate charges previously dismissed with leave lies solely with the prosecutor," "that the State exercised its discretion and acted within its statutory authority pursuant to N.C.G.S. 15A-932 by declining to reinstate the charges" and "[t]hat for the court to reinstate the charges and mandate that the District Attorney prosecute the Defendant . . . would constitute an unauthorized and impermissible interference with the District Attorney's performance of constitutional and statutory duties." R. Nunez p. 54; R. Diaz-Tomas p. 57.

Both defendants filed petitions in the Superior Court, Wake County, seeking writs of certiorari to review the district court's denial of their motions to reinstate the charges. Both motions reiterated the argument that "[a] prosecutor declining to use his statutory authority to reinstate a case for the purpose of pressuring a guilty plea from an available criminal defendant is prejudicial to the administration of justice." R. Nunez p. 61; R. Diaz-Tomas p. 66. Just days after receiving these motions in each case, the Superior Court denied and dismissed the petitions for certiorari, on the scant and unexplained grounds that Mr. Nunez and Mr. Diaz "failed to provide

‘sufficient cause’ to support the granting of his Petition” and “is not entitled to the relief requested.” R. Nunez pp. 70-71; R. Diaz-Tomas pp. 71-72.

On 15 August 2019 the Court of Appeals granted Mr. Diaz-Tomas’ petition seeking writ of certiorari to review the Superior Court’s denial of his writ of certiorari. R. p. 74. On 11 October 2019, the Court of Appeals granted the same to Mr. Nunez’s petition seeking certiorari. R. pp. 73-74. On 21 April 2020, the Court of Appeals issued its opinion in *State v. Diaz-Tomas*, determining that “[e]ven 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,” and upheld the Superior Court order. *Diaz-Tomas*, 841 S.E.2d at 359.

I. DISMISSALS WITH LEAVE AND THE RESULTANT CONSEQUENCES AFFECT HUNDREDS OF THOUSANDS OF NORTH CAROLINIANS CHARGED WITH NONVIOLENT TRAFFIC OFFENSES

A. The Vast Majority of Cases Dismissed with Leave are Nonviolent Misdemeanor Traffic Offenses that do not Involve Illegal Substances or Alcohol

Pursuant to N.C.G.S. § 15A-932 (2020), prosecutors can dismiss cases with leave in three circumstances: when a defendant “[c]annot be readily found to be served with an order for arrest after the grand jury had indicted him”; when a defendant “[f]ails to appear at a criminal proceeding at which his attendance is required, and the prosecutor believes the defendant cannot readily be found”; and “pursuant to a deferred prosecution agreement[.]” According to data maintained by the North Carolina Administrative Office of the Courts (NCAOC), nearly one million

– a total of 937,748 – criminal cases have been dismissed with leave in North Carolina district courts, an average of 117,219 cases per year, since 2012. North Carolina Administrative Office of the Courts, Judicial Branch Statistical and Operational Reports, 2012-2020.²

Between 2012 and 2020, the vast majority, eighty-six percent, of dismissals with leave occurred in misdemeanor traffic cases. *Id.* During the same period, nearly thirty percent of dismissals with leave were for driving with license revoked (DWLR) cases. North Carolina Judicial Branch, Misdemeanor Motor Vehicle Case Activity Reports, FY 2012-13 through FY 2019-20.³ In other words, most cases affected by

² The data showing cases dismissed with leave in all North Carolina criminal district court cases came from reports published online by the NCAOC, all of which can be found at <https://www.nccourts.gov/documents/publications/north-carolina-courts-statistical-and-operational-reports>, and the individual citations of which are: North Carolina Administrative Office of the Courts, *Statistical and Operational Report of the North Carolina Trial Courts 2019-20*, p. 7 (Sept. 30, 2020); North Carolina Administrative Office of the Courts, *Statistical and Operational Report of the North Carolina Trial Courts 2018-19*, p. 7 (Jan. 14, 2020); North Carolina Administrative Office of the Courts, *Statistical and Operational Report of the North Carolina Trial Courts 2017-18*, p. 7 (Jan. 15, 2019); North Carolina Administrative Office of the Courts, *Statistical and Operational Report of the North Carolina Trial Courts 2016-17*, p. 7 (Jan. 12, 2018); North Carolina Administrative Office of the Courts, *July 1, 2015 - June 30, 2016 Statistical and Operational Report of North Carolina Trial Courts*, p. 7 (Jan. 9, 2017); North Carolina Administrative Office of the Courts, *July 1, 2014 - June 30, 2015 Statistical and Operational Report of North Carolina Trial Courts*, p. 7 (Jan. 11, 2016); North Carolina Administrative Office of the Courts, *North Carolina Judicial Branch Trial Courts Statistical and Operational Report July 1, 2013 - June 30, 2014*, p. 7 (Jan. 30, 2015); North Carolina Administrative Office of the Courts, *North Carolina Judicial Branch Statistical and Operational Report, Trial Courts, July 1, 2012 - June 30, 2013*, p. 7 (Jan. 8, 2014).

³ The data about the number of DWLR cases dismissed with leave came from reports published by the North Carolina judicial branch, available at <https://www.nccourts.gov/documents/publications/misdemeanor-motor-vehicle-case-activity-report>. The individual citations for each report follow: North Carolina Judicial Branch, *Misdemeanor Motor Vehicle Case Activity Report FY 2019-2020* [Microsoft Excel spreadsheet] [Accessed: 1 March 2021]; North Carolina Judicial Branch, *Misdemeanor Motor Vehicle Case Activity Report FY 2018-19* [Microsoft Excel spreadsheet] [Accessed: 1 March 2021]; North Carolina Judicial Branch, *Misdemeanor Motor Vehicle Case Activity Report FY 2017-18*

dismissals with leave have been charges of minor traffic offenses, and many people affected by dismissals with leave have merely been accused of these misdemeanors.

Year	All Dismissals With Leave (D/L)	D/L for Felonies	D/L for Misdemeanors, Other than Traffic	D/L for Traffic Misdemeanors, Including DWI	D/L for Driving While License Revoked (DWLR) (a category of traffic misdemeanors)
2012-13	105,958	978	15,493	89,487	30,980
2013-14	96,137	864	14,469	80,804	35,583
2014-15	102,009	788	12,411	88,810	Not impaired 25,666 Impaired 1,133
2015-16	117,649	935	16,256	100,458	Not impaired 32,306 Impaired 1,618
2016-17	121,900	1,144	15,436	105,320	Not impaired 33,785 Impaired 1,882
2017-18	125,385	1,242	16,218	105,925	Not impaired 33,301 Impaired 1,885
2018-19	121,720	1,246	13,062	107,412	Not impaired 35,229 Impaired 1,712
2019-20	146,990	1,394	15,410	130,186	Not impaired 43,752 Impaired 2,002
Totals	937,748	8,591	118,755	808,402	280,834

These dismissals with leave appear to have a disparate impact on African Americans. The NCAOC does not publish demographic data concerning dismissals with leave, but figures obtained by a study recently described in the Duke Law Journal revealed that, between 2013 and 2017, of the approximately 160,000 *charges*

[Microsoft Excel spreadsheet] [Accessed: 1 March 2021]; North Carolina Judicial Branch, *Misdemeanor Motor Vehicle Case Activity Report FY 2016-17* [Microsoft Excel spreadsheet] [Accessed: 1 March 2021]; North Carolina Judicial Branch, *Misdemeanor Motor Vehicle Case Activity Report FY 2015-16* [Microsoft Excel spreadsheet] [Accessed: 1 March 2021]; North Carolina Judicial Branch, *Misdemeanor Motor Vehicle Case Activity Report FY 2014-15* [Microsoft Excel spreadsheet] [Accessed: 1 March 2021] North Carolina Judicial Branch, *Misdemeanor Motor Vehicle Case Activity Report FY 2013-14* [Microsoft Excel spreadsheet] [Accessed: 1 March 2021] North Carolina Judicial Branch, *Misdemeanor Motor Vehicle Case Activity Report FY 2012-13* [Microsoft Excel spreadsheet] [Accessed: 1 March 2021].

of DWLR per year in North Carolina, many of which, as described above, resulted in dismissals with leave, 54 percent of the defendants charged were Black, though African Americans made up only about 22 percent of the state population during those years. William E. Crozier & Brandon L. Garrett, *Driven to Failure: An Empirical Analysis of Driver's License Suspension in N. Carolina*, 69 Duke L.J. 1585, 1607 (2020); U.S. Census Bureau (2019) *Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for North Carolina: April 1, 2010 to July 1, 2019* [Microsoft Excel spreadsheet] (available at <https://www.census.gov/data/tables/time-series/demo/popest/2010s-state-detail.html>) [Accessed: 1 March 2021]; *see also amicus curiae's* Argument C(1), *infra*, (concerning the racial disparity in North Carolina driver's license suspensions, many of which result from failures to appear).

The dismissal with leave statute mandates that “all process outstanding retains its validity, and all necessary actions to apprehend the defendant, investigate the case, or otherwise further its prosecution may be taken.” N.C.G.S. § 15A-932(b). Like another North Carolina prosecutorial procedural practice, which was struck down by the U.S. Supreme Court, the potential consequences of dismissals with leave, including the threat of arrest at any time, are an “oppression” that “may subject [defendants] to public scorn and deprive [them] of employment, and almost certainly will force curtailment of [their] speech, associations and participation in unpopular causes . . . as well as the ‘anxiety and concern accompanying public accusation.’ ” *Klopfers v. State of N.C.*, 386 U.S. 213, 222, 87 S. Ct. 988, 993, 18 L. Ed. 2d 1 (1967) (holding unconstitutional the nolle prosequi procedure through which North Carolina

prosecutors postponed cases by allowing a defendant to be “discharged and permitted to go whithersoever he will” with the understanding that “the case may be restored to the trial docket when ordered by the judge upon the [prosecuting attorney’s] application”) (quoting *United States v. Ewell*, 383 U.S. 116, 120, 86 S. Ct. 773, 776, 15 L. Ed. 2d 627 (1966)). If the Court of Appeals decision is not reversed, and district court rulings regarding reinstatement of cases dismissed with leave are not subject to further judicial review, hundreds of thousands of North Carolinians will have no way, short of giving up the right to trial, to finally dispose of their outstanding cases. N.C.G.S. § 15A-932(b).

B. Many Defendants Fail to Appear for Benign Reasons

Like Mr. Nunez and Mr. Diaz-Tomas, many defendants receive dismissals with leave for failing to appear in court at their initial or subsequent court dates. N.C.G.S. § 15A-932(a). Though some defendants miss court to avoid conviction and punishment, others do so, either unintentionally or intentionally, for more benign reasons. Some defendants fail to appear simply because they are not aware of their court date. In a recent study conducted in Wake County, researchers mailed surveys to more than 300 people randomly selected from a list, provided by the NCAOC, of “all of the people who have had suspended licenses between 2017–2018 in Wake County, North Carolina.” Garrett, B. L, et. al., *Undeliverable: Suspended Driver’s Licenses and the Problem of Notice*, (2020) 4(1) *UCLA Criminal Justice Law Review*,190 (available at <https://escholarship.org/uc/item/5fv5m8pm>). Though the “addresses from the AOC are the ones used by the court and the DMV to send legal

citations or correspondence,” and despite crosschecks of all the AOC-provided addresses to confirm that they were legitimate locations for residential housing, the researchers, after four months, received “107 unopened return-to-sender envelopes,” 101 of which “were returned for reasons related to an insufficient or undeliverable address.” *Id.* at 191. The high rate – more than one-third of the attempted mailings – of unopened, undeliverable mail constituted “strong evidence that a decent proportion of court and DMV notices may similarly be undeliverable due to a wrong address” throughout North Carolina. *Id.* at 192. “The implication of that finding is that a sizeable number of people may not know . . . that they may have a court date[.]” *Id.* at 193. North Carolina implemented a service in 2018 through which people can subscribe to receive telephone text or email reminders about court dates and alerts about court schedule changes, but those who do not sign up are presumably notified of their court dates solely by mail to the address maintained by the AOC. Press Release, North Carolina Judicial Branch, *Court Date Notifications and Reminders for Criminal Cases Now Available via Text and Email* (Oct. 19, 2018) (available at <https://www.nccourts.gov/news/tag/press-release/court-date-notifications-and-reminders-for-criminal-cases-now-available-via-text-and-email>).

In addition to those who miss court inadvertently because they are not notified, others forget their court dates. *See, e.g.* David I. Rosenbaum, *Court Date Reminder Postcards*, 95 *Judicature* 177, 178 (2012) (stating that “many defendants lead disorganized lives, forget, lose the citation and do not know whom to contact to find out when to appear”); Marie VanNostrand *et al.*, Virginia Pretrial Services Agencies,

In Pursuit of Legal and Evidence-Based Pretrial Release Recommendations and Supervision (Revised March 2011) (available at [https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/pursuit-legal-and-evidence-based-pretrial-release-recommendations-and-](https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/pursuit-legal-and-evidence-based-pretrial-release-recommendations-and-supervision.pdf)

[supervision.pdf](https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/pursuit-legal-and-evidence-based-pretrial-release-recommendations-and-supervision.pdf)) (reviewing “evaluations and studies . . . conducted in six different states over nearly 30 years [that] examined the effectiveness of court date notification programs” and noting that “[a]ll of the studies concluded that court date notifications in some form are effective in reducing failures to appear in court”).

Other people knowingly miss court dates, but for reasons having to do with familial and employment obligations rather than disrespect for the judicial system. *See, e.g.* Aleksandrea E. Johnson, *Decriminalizing Non-Appearance in Washington State: The Problem & Sols. For Washington’s Bail Jumping Statute & Court Nonappearance*, 18 *Seattle J. for Soc. Just.* 433, 441 (2020) (noting that some defendants “have other competing responsibilities (such as work, care for child or another person)”). Still others cannot get to court because they lack transportation. *Id.* And others may fear to come to court because of their citizenship status, and, in these times, fear of contagion from COVID-19. *See, e.g.* Crozier & Garrett, *supra* (noting that, in North Carolina, “we do see a much larger overrepresentation of Latinx individuals with FTAs [failures to appear] . . . a population that may avoid contact due to deportation concerns”); *see also, e.g.*, North Carolina Judicial Branch, State of North Carolina General Court of Justice, 14th Judicial Branch, Notifications of Reported Positive COVID-19 Individual at Durham County Courthouse (22

February 2021, 26 January 2021, 24 January 2021, 5 January 2021, 19 November 2020 (2 notifications), 12 November 2020, 10 November 2020, 9 November 2020, 12 October 2020, 20 August 2020, 11 August 2020, 8 July 2020) (available at <https://www.nccourts.gov/locations/durham-county>). To treat all people who fail to appear in court as intentional and willful absconders ignores the actual circumstances of many people who miss court and then suffer mounting consequences due to their initial failure to appear.

C. Failures to Appear Lead to Driver’s License Revocation, Fines, and Other Collateral Consequences that Can Affect a Defendant for Decades

- i. One in seven North Carolina drivers, and disproportionately Black, Brown, and indigent drivers, have their licenses suspended, primarily due to failure to appear in court.

Perhaps the harshest and most obvious consequence of a failure to appear in a motor vehicle case – which comprise most cases dismissed with leave (see argument A, *supra*) – is the revocation of the defendant’s driver’s license. North Carolina statute mandates that the Division of Motor Vehicles “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 . . . when the case was called for a trial or hearing.” N.C.G.S. § 20-24.1(a) (2020) (punctuation and numeral omitted). Further, “[t]he court must report to the Division the name of any person charged with a motor vehicle offense under this Chapter who [f]ails to appear to answer the charge as scheduled[.]” *Id.* (punctuation and numeral omitted). Researchers analyzing data from the NCAOC concerning driver’s license suspensions found “that there are

1,225,000 individuals with active driver’s license suspensions in North Carolina—827,000 for FTAs [failures to appear], 263,000 for FTCs [failures to comply], and 135,000 for both.”⁴ Crozier & Garrett, 69 Duke L.J. at 1607. Overall, this figure “constitutes about one in seven, or 15 percent, of all adult drivers—who total about 8.25 million people—in North Carolina.” *Id.* Suspensions for failures to appear thus represent approximately ten percent of all adult drivers in the State. *Id.*

Not only do these driver’s license suspensions affect a vast number of people; they disproportionately affect black, brown and indigent North Carolinians. The AOC data analysis showed that “33 percent of those with FTA suspensions are black and 24 percent are Latinx, while 36 percent are white,” compared to a general driving population in this State that is “21 percent black, 8 percent Latinx, and 65 percent white.” *Id.* at 1606. The study also noted that, “for the white population, we see evidence that the number of white individuals in poverty more strongly predicts FTC suspensions than white individuals above the poverty line,” a conclusion borne out even more strongly in the analysis of FTA suspensions. *Id.* at 1615-1618. Admittedly, dismissals with leave do not line up perfectly with these documented driver’s license

⁴ The study states that: “The data file analyzed here, provided by the North Carolina AOC, reflects all cases, as of September 2018, in which court records reflect that a driver’s license suspension was reported to the North Carolina DMV and the suspension is currently in place. These data come from ACIS. The time period extends back to the 1980s—which we report in the subsequent descriptive sections—but we only include data from 2010–2017 in regression models.” See William Crozier & Brandon Garrett, North Carolina Drivers License Suspensions, OPEN SCI. FRAMEWORK (Dec. 2, 2019, 7:28 AM), <https://osf.io/fwxja> [<https://perma.cc/LZ4MDU83>] (providing aggregate data, data-cleaning method, code, and preregistration). This site also contains information on the source of the data, the preregistration of analyses, and the general project.

suspensions, but the primary recipient of both consequences are people who fail to appear in court. It is extremely like that dismissals with leave have a similar disproportionate impact on indigent people and people of color.

- ii. Unresolved Dismissals with Leave can draw defendants into a cycle of debt.

Multiple recent studies have recognized a phenomenon succinctly summarized as follows:

The person is convicted of a relatively minor violation of the motor vehicle laws. Court costs and a fine are imposed. The person, who is financially unable to do so, fails to pay those amounts. Forty days after the judgment, the clerk of court reports the failure to pay to DMV. DMV mails a revocation order to the person, which becomes effective 60 days later. The person could forestall or end the revocation by paying the amounts owed, but she lacks the funds to do that. Yet she must drive in order to keep her job. So, notwithstanding the revocation, she continues to drive. Soon, she is charged with driving while license revoked and is convicted. Court costs are imposed again. And again, she lacks the funds to pay. DMV issues another revocation. When this cycle repeats itself over time, the person may wind up owing hundreds – or even thousands – of dollars in court debt, which, again, she lacks the resources to pay.

Shea Denning, University of North Carolina School of Government, *Revoking Licenses for Failure to Pay: Is Change on the Horizon?* (24 April 2019) (available at <https://nccriminallaw.sog.unc.edu/revoking-licenses-for-failure-to-pay-is-change-on-the-horizon/>). The research and litigation concerning this cycle of debt has generally applied to people who lose their license as the result of a failure to pay fines after a conviction, but impoverished people who miss court (a failure that itself may be the result of poverty), are assessed a fine for failing to appear, *see* N.C.G.S. § 7A-304(a)(6) (2020) (imposing \$200 court cost for failures to appear), and also have their license

suspended also get stuck in this cycle. People whose cases are dismissed with leave due an FTA and whose licenses are revoked cannot break out of the cycle until they “dispose[] of the charge in the trial division in which [s]he failed to appear when the case was last called for trial or hearing.” N.C.G.S. § 20-24.1(b) (2020). If prosecutors refuse, despite the mandate of section 20-24.1(b1) to reinstate such cases when the defendant reappears, this cycle could go on for years; the analysis of North Carolina license suspensions found “many drivers have long-standing suspensions stretching back to the 1980s [and] tens of thousands of people have suspensions that have been active for decades.” Crozier & Garrett, 69 Duke L.J. at 1608-09.

iii. Dismissals with leave impose other collateral consequences.

People whose case are dismissed with leave, even in the absence of a driver’s license suspension, suffer a myriad of other collateral consequences. The District Attorney of Durham County, Satana Deberry, has stated: “There are just lots of ways in which having been charged with something [that’s not] been resolved can harm people . . . just being charged with something shows up on individuals’ records and can impact their ability to find housing, jobs, get into college or qualify for financial aid.” Melissa Boughton, NC Policy Watch, *NC officials dismiss hundreds of thousands of old court cases as part of massive data “clean-up,”* June 6, 2019. Ms. Deberry’s comments were made in reference to the recent Data Integrity Initiative, launched by the NCAOC around 2017, “to engage local [District Attorney] offices in a widespread ‘clean-up’ of pending case records to ensure that the data entered into all Judicial Branch criminal and civil legacy systems reflect the most current information

available on a case prior to migration into the ICMS.” See North Carolina Administrative Office of the Courts, Research, Policy and Planning Fact Sheet, 2018-19 (available at <https://www.nccourts.gov/assets/documents/publications/Research-Policy-Planning-Fact-Sheet-2018-19.pdf?c0H753NZqQtDuzpuTLIeDN4RscY6WZs>).⁵

Ben David, the District Attorney of New Hanover and Pender County, dismissed cases as part of the Data Integrity Initiative because:

I have seen heartbreaking cases where women who have been abused by their husbands for instance, they fear calling 911 because they knew they had an outstanding order for their own arrest or maybe a bad check charge from eight years ago. . . [W]e’re way more concerned about her and her children than trying to prosecute an \$11 check to Dominos that bounced.

Boughton, *supra*. Additionally, “[d]efendants with outstanding warrants may avoid ‘secur[ing] legitimate and stable employment’ because of the fear of detection and

⁵ “District attorneys dismissed 1.2 million old low-level criminal cases in 72 counties as part of Data Integrity Initiative” in 2018-19, many of which had been unresolved for many years. Danielle Carmen & Kellie Myers, Public Law for the Public’s Lawyers presentation, “COVID-19 & The NC Court System,” slide 14 (23 October 2020); see also Jessica Smith and Ross Hatton, UNC School of Government Criminal Justice Innovation Lab, “How Long Does it Take to Process a Criminal Case? An Analysis of Disposition & Pending Case Times in North Carolina,” (August 2020) (available at <https://cjil.sog.unc.edu/wp-content/uploads/sites/19452/2020/08/Time-to-Disposition-8.6.2020.pdf>) (noting, at p. 3, that “a number of counties engaged in data integrity and dismissal projects in FY 2019, artificially inflating misdemeanor disposition times. Specifically, for counties that engaged in these projects, many older cases that previously had been dismissed with leave were classified as disposed in FY 2019. *This resulted in a dramatic increase in 2019 disposition times for these counties, far beyond rates seen in prior years*”) (emphasis added). Reinstating cases when defendants reappear in court, rather than waiting years to purge more than a million old cases, adheres to state statutory and constitutional law and invokes greater confidence in the judicial system.

arrest [and] 'have difficulty obtaining a driver's license, [and] cannot legally obtain public benefits.' ” Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 694 (2018) (first quoting Meagan Cahill, *Focusing on the Individual in Warrant-Clearing Efforts*, 11 Crimin & Pub Pol 473, 476 (2012), and then quoting Daniel J. Flannery & Jeff M. Kretschmar, *Fugitive Safe Surrender: Program Description, Initial Findings, and Policy Implications*, 11 Crimin & Pub Pol 437, 439 (2012)). Dismissing a person's case with leave affects that person's life and livelihood in ways that go far beyond the paper or electronic trail at the local courthouse, and he or she must be able to remedy these effects by reinstating the case, or at least having the denial of such reinstatement subjected to judicial review.

CONCLUSION

Thousands of North Carolinians have their cases dismissed for failing to appear in district courts statewide every year. The repercussions of having charges left open and unresolved, sometimes for years, can have devastating effects on defendants, a disproportionate number of whom are indigent and people of color. North Carolina statute requires prosecutors, when such defendants are located, to reinstate their cases so they can be heard on the outstanding charges. If the Court of Appeals decision in *State v. Diaz-Tomas*, which essentially forecloses judicial review when a prosecutor refuses to reinstate such cases, is not reversed, people whose lives are profoundly affected by their unresolved cases will have no recourse. This Court must reverse the Court of Appeals decision and require the Superior Court to grant certiorari in defendant's case.

Respectfully submitted,

This the First day of March, 2021.

/s/ Erwin Byrd

Erwin Byrd
North Carolina State Bar # 34435
2632 Lawndale Ave.
Durham, NC 27705
Telephone: (919) 923-3232
erwin.byrd@gmail.com
Consultant for NCAJ

N.C. R. App. P. 33(b) Certification: I certify that the attorney listed below has authorized me to list his name on this document as if he had personally signed it.

/s/ Thomas K. Maher

Thomas K. Maher
North Carolina State Bar #12771
Law Offices of Amos Tyndall PLLC
202-B South Greensboro St
Carrboro, N.C. 27510
Telephone 919-967-0504
tmaher@amostyndall.com

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that she served a copy of the foregoing brief on counsel for all parties by electronic mail as follows:

Joseph L. Hyde
Assistant Attorney General
North Carolina Department of Justice
jhyde@ncdoj.gov

Daniel P. O'Brien
Special Deputy Attorney General
North Carolina Department of Justice
dobrien@ncdoj.gov

Lorrin Freeman
District Attorney, Wake County
n.lorrin.freeman@nccourts.org

Daniel C. Watts
Assistant District Attorney, Wake County
Daniel.c.watts@nccourts.org

The Honorable Debra S. Sasser
Chief District Court Judge, Wake County
Debra.s.sasser@nccourts.org

Anton M. Lebedev
Counsel for Defendant
a.lebedev@lebedevesq.com

Nicholas C. Woomer-Deters
Counsel for Defendant
Nicholas.C.Woomer-Deters@nccourts.org

This the First day of March, 2021.

Electronically submitted
Erwin Byrd