APPENDIX

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APPENDIX A

Supreme Court of North Carolina

STATE of North Carolina
v.
Rogelio Albino DIAZ-TOMAS
No. 54A19-3
Filed November 4, 2022

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 271 N.C. App. 97 (2020), affirming an order denying defendant's petition for writ of certiorari entered on 24 July 2019 by Judge Paul C. Ridgeway in Superior Court, Wake County. On 15 December 2020, the Supreme Court allowed defendant's petition for discretionary review as to additional issues. Heard in the Supreme Court on 6 January 2022.

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

Anton M. Lebedev, for defendant-appellant.

MORGAN, Justice.

¶ 1 Defendant appeals from a divided opinion of the Court of Appeals, 271 N.C. App. 97 (2020), in which the Court of Appeals affirmed an order of the Superior Court, Wake County, denying defendant's petition for writ of certiorari. Defendant's petition for writ of certiorari requested that the superior court review an order of the District Court, Wake County, in which that court denied defendant's Motion to Reinstate Charges. Defendant's Motion to Reinstate

Charges asked that the District Court reinstate, and place on the trial court's calendar, several criminal charges with which defendant had been charged which had been "dismissed with leave" by the district attorney's office pursuant to N.C.G.S. § 15A-932(a)(2) due to defendant's failure to appear before the trial court as ordered. The Court of Appeals determined that only the Superior Court's order denying defendant's certiorari petition, and not the District Court's order denying defendant's Motion to Reinstate Charges, was properly before the appellate court due to the limited nature of the Court of Appeals' discretionary allowance of defendant's certiorari petition before the lower appellate court. *State v. Diaz-Tomas*, 271 N.C. App. 97, 102 (2020). A dissenting opinion was filed in the matter in which the dissenting judge at the Court of Appeals considered the Superior Court to have erred in denying defendant's petition for writ of certiorari to review the order of the District Court. *Id.* at 103 (Zachary, J., concurring in part and dissenting in part). Defendant timely filed notice of appeal to this Court based upon the dissenting opinion. Therefore, an issue presented for our determination here is whether the Superior Court properly denied defendant's petition for writ of certiorari. This Court additionally allowed defendant's conditional petition for writ of certiorari to review the decision of the Court of Appeals, as well as defendant's conditional petition for writ of certiorari to review the order denying his aforementioned Motion to Reinstate Charges. In sum, this Court is positioned to contemplate and resolve defendant's contentions regarding his ability to compel the reinstatement of his dismissed criminal charges and to compel the placement of these matters on a trial

court's criminal case calendar for disposition. We hold that a criminal defendant does not possess the right to compel the district attorney, who has the authority to place the defendant's unresolved criminal charges in a dismissed-with-leave status, to reinstate the dismissed charges and to place the charges on a trial court's criminal case calendar for resolution. We also hold that a trial court lacks the authority to order that criminal charges which have been dismissed with leave by the duly empowered district attorney be reinstated and placed on a trial court's criminal case calendar against the will of the district attorney. This Court therefore affirms the decision of the Court of Appeals which affirms the Superior Court's denial of defendant's petition for writ of certiorari.

¶ 2 Defendant also filed a petition for discretionary review which this Court allowed in part and denied in part by way of a special order entered on 15 December 2020, in which we opted to consider additional issues presented by defendant as to whether this Court and the Court of Appeals erred in declining to issue writs of mandamus to the District Attorney of Wake County and the District Court, Wake County, in order to effect defendant's desired outcome which he originally sought in the trial court and which he pursued through his initial Motion to Reinstate Charges. We take this opportunity to reaffirm the clear and well-settled principle of law which establishes that the extraordinary and discretionary writ of mandamus shall issue only when the subject of the writ invokes a legal duty to act or to forebear from acting. This recognition, coupled with our determination that the remaining issues contained in

defendant's petition for discretionary review are either academic in nature or are rendered moot by this Court's allowance of defendant's multiple petitions for writ of certiorari, obliges us to view defendant's petition for discretionary review as improvidently allowed.

I. Factual and Procedural Background

¶ 3 Defendant received a citation from an officer with the Raleigh Police Department charging him with the offenses of driving while impaired and driving without an operator's license on 4 April 2015. Defendant failed to appear for defendant's scheduled court date in the District Court, Wake County, on 24 February 2016, and on the following day, the trial court issued an order for defendant's arrest. While defendant's whereabouts were still unknown, the State dismissed defendant's charges with leave under the statutory authority and procedure of N.C.G.S. § 15A-932(a)(2) on 11 July 2016. While it appears that defendant did not possess a valid driver's license issued by the North Carolina Division of Motor Vehicles at the time of his 4 April 2015 charges, defendant's ability to apply for and to receive a valid North Carolina driver's license was indefinitely foreclosed as the result of his failure to appear for his 24 February 2016 court date and the State's dismissal of his charges with leave. On 24 July 2018, defendant was arrested in Davidson County and served with the order for arrest which had resulted from his previous failure to appear in court in Wake County. Defendant was given a new Wake County court date of 9 November 2018**;** however, defendant again failed to appear as scheduled in the District

Court, Wake County, and a second order for defendant's arrest was issued on 13 November 2018. Defendant was arrested on 12 December 2018 pursuant to the second order for arrest, and was given another court date in the District Court, Wake County, of 18 January 2019. However, defendant's court date was "advanced," or moved to an earlier date, and was set for the 14 December 2018 administrative session of the District Court, Wake County.

¶ 4 Defendant appeared for the 14 December 2018 administrative session of the District Court, Wake County, but the assistant district attorney declined to reinstate—in other words, to bring out of dismissed-with-leave status—defendant's two unresolved charges. Defendant therefore filed a Motion to Reinstate Charges in District Court on 28 January 2019. In his motion, defendant made several arguments addressing the claimed "duty," "inherent authority," and "mandate" of the District Court either to reinstate or to permanently dismiss defendant's outstanding charges. The motion was accompanied by two affidavits executed by licensed attorneys practicing in Wake County who both represented that it was the regular practice of the Wake County District Attorney's Office to decline to reinstate charges which had been placed in dismissed-with-leave status due to a defendant's failure to appear, unless the defendant agrees to plead guilty to the dismissed charges while simultaneously waiving the defendant's right to appeal these convictions to the Superior Court for a trial de novo. On 7 June 2019, defendant filed a document in the District Court, Wake County, captioned "Request for Prompt Adjudication of Defendant's Motion to Reinstate Charges"

in which defendant asked the tribunal "to promptly adjudicate his previously filed Motion to Reinstate Charges" in light of the District Attorney's position. The chief district court judge responded to the filing, in a letter to defense counsel and the prosecutor dated 10 June 2019, that defendant's motion presented only questions of law, that an evidentiary hearing would not be required, and that the chief district court judge would consider any supportive filings by the parties "in arriving at a ruling in this matter."

¶ 5 The District Court, Wake County, entered an order on 15 July 2019 denying defendant's Motion to Reinstate Charges.[1] The District Court determined 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 ... after [d]efendant failed to appear for his regularly scheduled court date." The District Court explained that the statutory language provided that in the event that a defendant is presented to the forum after failing to appear, "the prosecutor *may* reinstate the proceedings by filing written notice with the clerk," quoting the exact language of subsection (d) of N.C.G.S. § 15A-932 and adding emphasis to the permissive term "may." *See* N.C.G.S. § 15A-932(d) (2021). Because the presence of the word "may" in N.C.G.S. § 15A-932(d) "clearly indicates ... that discretion to reinstate charges previously dismissed with leave lies solely with the prosecutor," the Dis-

[1] During the interim period between the filing of defendant's motion and the District Court's ruling in the matter, defendant filed a Petition for Writ of Mandamus with this Court on 11 February 2019, which was promptly denied by this Court by an order dated 26 February 2019.

trict Court reasoned that the district attorney's office had "exercised its discretion and acted within its statutory authority ... by declining to reinstate the charges in this matter." The District Court further opined that this Court's directives in *State v. Camacho*, 329 N.C. 589 (1991), prohibited the trial court from invading the province of the "independently elected constitutional officer"—namely, the District Attorney and this official's subordinates—by having "criminal charges reinstated upon demand." The District Court concluded

> [t]hat for the court to reinstate the charges and mandate that the District Attorney prosecute the [d]efendant, as requested by [d]efendant in his motion, ... an unauthorized and impermissible interference with the District Attorney's performance of constitutional and statutory duties, which only the District Attorney or her lawful designees may perform, [would occur].

¶ 6 On 22 July 2019, defendant filed a petition for writ of certiorari in the Superior Court, Wake County, seeking a full review of the District Court's order which denied his motion. The Superior Court denied defendant's petition in an order dated 24 July 2019, explaining that a writ of certiorari was a discretionary writ "to be issued only for good or sufficient cause shown," quoting *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579 (1927), and finding that defendant had failed to present such good or sufficient cause to warrant certiorari review. The Superior Court further found that defendant was "not entitled to the relief requested." Defendant next petitioned the Court of Appeals for writ of certiorari, requesting that the lower appellate court review both

the District Court's order denying his Motion to Reinstate Charges as well as the Superior Court's order denying his petition for writ of certiorari. The Court of Appeals allowed defendant's petition on 15 August 2019 for the limited purpose of reviewing the Superior Court's denial of defendant's petition for writ of certiorari.

¶ 7 The Court of Appeals issued a divided, published opinion on 21 April 2020, affirming the Superior Court's denial of defendant's certiorari petition. *Diaz-Tomas*, 271 N.C. App. at 102. In light of the longstanding case law from this Court institutionalizing the principle that "[c]ertiorari is a discretionary writ, to be issued only for good or sufficient cause shown" which defendant candidly recognized in his appellate presentation, the Court of Appeals majority employed an abuse of discretion standard in assessing the correctness of the Superior Court's denial of defendant's petition. *Id.* at 100–01 (emphasis omitted) (quoting *Womble*, 194 N.C. at 579). The lower appellate court determined that defendant failed to meet his "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.'" *Id.* at 101 (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)). Although defendant asserted that he was entitled to the writ because he had presented "appropriate circumstances" and "compelling" reasons for certiorari to be granted by the Superior Court, the Court of Appeals majority concluded that "[i]t is not enough that [defendant] disagree with it, or argue — incorrectly — that the trial court was obligated to grant his petition" in or-

der to show an abuse of discretion. *Id.* at 101. Instead, "[d]efendant has to show that the Superior Court's decision was unsupported by reason or otherwise entirely arbitrary." *Id.* at 101. After all, a writ of certiorari "is not one to which the moving party is entitled as a matter of right." *Id.* at 100 (quoting *Womble*, 194 N.C. at 579).

¶ 8 The dissenting opinion disagreed with the view of the Court of Appeals majority that defendant had failed to show an abuse of discretion in the Superior Court's denial of defendant's petition for writ of certiorari. *Id.* at 106 (Zachary, J., concurring in part and dissenting in part). The dissent ventured that the Superior Court had provided no particular reason for the denial of defendant's petition other than the bare observations that defendant had failed to show "sufficient cause," for the allowance of the writ and that defendant otherwise possessed "no other avenue to seek redress" for "alleg[ed] statutory and constitutional violations akin to those at issue in *Klopfer* [*v. North Carolina*, 386 U.S. 213 (1967)] and *Simeon* [*v. Hardin*, 339 N.C. 358 (1994)]." *Id.* at 108–11 (Zachary, J., concurring in part and dissenting in part). Because article I, section 18 of the North Carolina Constitution guarantees "access to the court to apply for redress of injury," the Court of Appeals dissent opined that the Superior Court should have allowed defendant's petition for writ of certiorari in order to accord defendant his sole remaining route to review an apparent "no bargain": either to accept the outcome that his unresolved criminal charges would remain in dismissed-with-leave status without defendant's ability to regain his driver's license or to plead guilty as charged while simultaneously waiv-

ing his right to appeal for a trial de novo. *Id.* at 110 (Zachary, J., concurring in part and dissenting in part) (quoting *Simeon*, 339 N.C. at 378).

II. Analysis

A. Discretion of the District Attorney Under N.C.G.S. § 15A-932

¶ 9 In order to resolve this case, we first consider the issue of whether a district attorney may be compelled to reinstate charges under the statutory procedure described in N.C.G.S. § 15A-932. In *Camacho*, this Court observed that

> [t]he several District Attorneys of the State are independent constitutional officers, elected in their districts by the qualified voters thereof, and their special duties are prescribed by the Constitution of North Carolina and by statutes. Our Constitution expressly provides that: "The District Attorney shall be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district." The clear mandate of that provision is that the responsibility and authority to prosecute all criminal actions in the superior courts is vested solely in the several District Attorneys of the State.

Camacho, 329 N.C. at 593 (extraneity omitted) (quoting N.C. Const. art. IV, § 18). Prosecution of criminal offenses is the "sole and exclusive responsibility" of the duly elected district attorneys of the state. *In re Spivey*, 345 N.C. 404, 409 (1997). The General Assembly possesses the authority to frame the duties of a district attorney as the legislative body has established in N.C.G.S. § 7A-61, and one

such duty includes the obligation to "prosecute in a timely manner in the name of the State all criminal actions." N.C.G.S. § 7A-61 (2021). The General Assembly's dictate that criminal prosecutions must be executed in a "timely manner" serves to reiterate the North Carolina Constitution's grant of exclusive authority to the state's district attorneys regarding the prompt handling, scheduling, and disposition of criminal charges which are brought against alleged violators of the law. In the present case, the elected District Attorney initially satisfied the mandates of the office's duties in handling defendant's criminal charges by timely scheduling defendant's matters for disposition in the name of the State by placing them on a court calendar pursuant to the prosecutor's constitutional responsibility and authority to do so in the official's sole and exclusive power.

¶ 10 Section 15A-932 establishes the procedure by which the General Assembly has enabled the state's district attorneys to enter a criminal case's "[d]ismissal with leave ... when a defendant ... [f]ails to appear ... and cannot readily be found." N.C.G.S. § 15A-932(a) (2021). This statute empowers a district attorney or the officeholder's designee to place a pending criminal charge in dismissed-with-leave status either "orally in open court or by filing the dismissal in writing with the clerk," which has the effect of removing "the case from the docket of the court." N.C.G.S. § 15A-932(b)–(c). Although the case is removed from the docket of the trial court, and thus is not calendared before the trial court on a routine basis as an active criminal charge would be, nonetheless "all process outstanding retains its validity, and all necessary actions to apprehend the de-

fendant, investigate the case, or otherwise further its prosecution may be taken, including the issuance of nontestimonial identification orders, search warrants, new process, initiation of extradition proceedings, and the like." N.C.G.S. § 15A-932(b).

¶ 11 Of additional relevance to defendant's current appeal, the General Assembly has directed the Division of Motor Vehicles to revoke a defendant's driving privileges upon receiving "notice from a court that the person was charged with a motor vehicle offense and ... failed to appear." N.C.G.S. § 20-24.1(a) (2021). The statute goes on to provide that:

> (b) A license revoked under this section remains revoked until the person whose license has been revoked:
>
> (1) disposes of the charge in the trial division in which he failed to appear when the case was last called for trial or hearing[.]

N.C.G.S. § 20-24.1(b). In order to "dispose[ ] of the charge in the trial division," N.C.G.S. § 20-24.1(b), the charge must be reinstated in order to be placed back on the trial court docket, because when a district attorney places a charge in dismissed-with-leave status, it "results in removal of the case from the docket of the court," N.C.G.S. § 15A-932(b). Otherwise, the case record will reflect that the defendant's driving privileges remain in an indefinite state of suspension. Section 15A-932 provides a singular process by which a charge may be reinstated: "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" of court. N.C.G.S. § 15A-932(d) (emphasis added).

¶ 12 "Ordinarily when the word 'may' is used in a statute, it will be construed as permissive and not mandatory." *In re Hardy*, 294 N.C. 90, 97 (1978). Settled principles of statutory construction constrain this Court to hold that the use of the word "may" in N.C.G.S. § 15A-932(d) grants exclusive and discretionary power to the state's district attorneys to reinstate criminal charges once those charges have been dismissed with leave following a defendant's failure to appear in court to respond to them. In conjunction with our determination, it is worthy of note that the General Assembly created a single statutory exception in N.C.G.S. § 15A-932(d1) to the requirement that a district attorney exercise the official's discretion to "reinstitute the proceedings" in order to dispose of the charges which have been dismissed with leave, while simultaneously empowering a defendant to activate dormant charges, without the involvement of a district attorney, which have been placed in dismissed-with-leave status. Subsection 15A-932(d1) states, in pertinent part:

> If the proceeding was dismissed pursuant to subdivision (2) of subsection (a) of this section [for failing to appear at a criminal proceeding at which his attendance is required, and the prosecutor believes the defendant cannot be readily found] ... and the defendant later tenders to the court that waiver and payment in full of all applicable fines, costs, and fees, the clerk shall accept said waiver and payment without need for a written reinstatement from the prosecutor. Upon disposition of the case pursuant to this subsection, the clerk shall re-

> call any outstanding criminal process in the case ....

N.C.G.S. § 15A-932(d1). Contrary to defendant's argument that he was entitled to the automatic reactivation of defendant's criminal charges by the District Attorney upon defendant's chosen time to be available to the trial court to respond to defendant's charges which had been dismissed with leave after defendant's multiple failures to appear in court to respond to said charges when they were calendared on the trial court docket, the General Assembly has expressly designated in N.C.G.S. § 15A-932(d) and (d1) the narrow, specified ways in which criminal charges which have been placed in dismissed-with-leave status can be resolved.

¶ 13 In light of the cited constitutional, statutory, and appellate case law authorities which are all in clear and unequivocal tandem with one another, a district attorney cannot be compelled to reinstate the charges, due to the official's recognized exclusive and discretionary power to reinstate criminal charges once those charges have been dismissed with leave following a defendant's failure to appear in court to respond to the charges when calendared on a trial court docket.

B. Authority of the Trial Court to Reinstate Charges

¶ 14 In his Motion to Reinstate Charges in District Court, defendant asked the trial tribunal to reinstate his criminal charges that were dismissed with leave by the State, to set a court date for his criminal matters, and to grant defendant any other

and further relief that the District Court deemed to be just and proper given the circumstances.

¶ 15 The trial courts of this state enjoy broad authority to control the conduct of trial and the decorum of the courtroom within statutory and constitutional boundaries. *See Shute v. Fisher*, 270 N.C. 247, 253 (1967) ("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."); *State v. Rankin*, 312 N.C. 592, 598 (1985) ("[A] trial judge has the duty to supervise and control the course and conduct of a trial, and that in order to discharge that duty he is invested with broad discretionary powers."); *accord M.E. v. T.J.*, 380 N.C. 539, 2022-NCSC-23, ¶ 42. However, this Court has not ever held that, despite a trial court's wide and entrenched authority to govern proceedings before it as the trial court manages various and sundry matters, a trial court may invade the purview of the exclusive and discretionary power of a district attorney which was granted to the official through the provisions of the North Carolina Constitution and the statutory laws enacted by the General Assembly, absent a determination that the prosecutorial discretion was "being applied in an unconstitutional manner." *Simeon*, 339 N.C. at 378. As we have explained,

> it must be remembered that the elected District Attorneys of North Carolina are constitutional officers of the State whose duties and responsi-

> bilities are in large part constitutionally and statutorily mandated. The courts of this State, including this Court, must, at the very least, make every possible effort to avoid unnecessarily interfering with the District Attorneys in their performance of such duties. Therefore, any order tending to infringe upon the constitutional powers and duties of an elected District Attorney must be drawn as narrowly as possible.

Camacho, 329 N.C. at 595.

¶ 16 In the instant case, the district attorney's office exercised its exclusive authority and discretion regarding its constitutional responsibility to prosecute criminal actions when, on 14 December 2018, it declined to reinstate defendant's charges when defendant belatedly presented himself in court after his second failure to appear in court on the alleged offenses. Since defendant's requests of the District Court in his motion to reinstate his "dismissed with leave" criminal charges would have the effect, if granted by the District Court, of infringing upon the constitutional powers and duties of a district attorney as disapproved by *Camacho*, we hold that the trial tribunal did not err in denying defendant's Motion to Reinstate Charges in District Court. The District Court's allowance of defendant's motion also would have contravened our admonition to the courts of this state, as we announced in *Camacho*, to "draw[ ] as narrowly as possible" any curtailment of a district attorney's constitutional powers and duties. *Id.*

¶ 17 Defendant argues that N.C.G.S. § 20-24.1(b1) affords him "an absolute statutory right to have the

matter reinstated for a prompt trial or hearing." Despite this bald assertion, N.C.G.S. § 20-24.1(b1) contains no mention of the reinstatement of criminal charges. Subsection 20-24.1(b1) states in its entirety: "A defendant must be afforded an opportunity for a trial or a hearing within a reasonable time of the defendant's appearance. Upon motion of a defendant, the court must order that a hearing or a trial be heard within a reasonable time." N.C.G.S. § 20-24.1(b1). Defendant conveniently construes the term "appearance" to leniently apply to the eventual presentation of himself—whenever that may be—at a calendared session of the trial court after defendant has failed to appear for court when his criminal charges were originally scheduled for resolution within a reasonable time. After failing to appear for court on two scheduled opportunities to resolve his criminal charges when the District Attorney placed defendant's charges on a trial court docket for resolution within a reasonable time, defendant's insistence pursuant to his construction of N.C.G.S. § 20-24.1(b1) upon the reinstatement of his charges by the District Attorney or by the District Court "for a trial or a hearing within a reasonable time of the defendant's appearance" rings hollow when defendant did not come to court to respond to the criminal charges until nearly three years had passed since his original court date. Firstly, as previously stated, the allowance of defendant's demand that his "dismissed with leave" charges be activated would offend the delegated exclusive and discretionary power of the District Attorney to reinstate defendant's criminal charges after the charges were dismissed with leave due to defendant's failure to appear in court to answer to the charges. And secondly, if this Court were

to interpret N.C.G.S. § 20-24.1(b1) as defendant contends, then we would ignore the identical caution which we articulated in *Camacho* for the state courts with regard to the philosophy to "make every possible effort to avoid unnecessarily interfering with the District Attorneys in their performance of [constitutionally and statutorily mandated] duties," such that "any order tending to infringe upon the constitutional powers and duties of an elected District Attorney must be drawn as narrowly as possible." *See Camacho*, 329 N.C. at 595. Accordingly, defendant's argument that N.C.G.S. § 20-24.1(b1) gives him "an absolute statutory right to have the matter reinstated for a prompt trial or hearing" is without merit.

C. Discretion of the Superior Court to Deny Certiorari Petitions

¶ 18 A criminal defendant may seek certiorari review "when provided for by [the Criminal Procedure Act], by other rules of law, or by rule of the appellate division." N.C.G.S. § 15A-1444(g) (2021). "The authority of a superior court to grant the writ of certiorari in appropriate cases is, we believe, analogous to the Court of Appeals' power to issue a writ of certiorari," in the context of the Superior Court's review of a lower tribunal's action. *State v. Hamrick*, 110 N.C. App. 60, 65, *appeal dismissed, discretionary review denied*, 334 N.C. 436 (1993). A writ of certiorari is "an *extraordinary* remedial writ to correct errors of law," *Button v. Level Four Orthotics & Prosthetics, Inc.*, 380 N.C. 459, 2022-NCSC-19, ¶ 19 (emphasis added) (quoting *State v. Simmington*, 235 N.C. 612, 613 (1952)), and its issuance is only appropriate when a defendant has shown merit in his arguments

concerning the action to be reviewed or that "error was probably committed below," *State v. Ricks*, 378 N.C. 737, 2021-NCSC-116, ¶ 6 (quoting *State v. Grundler*, 251 N.C. 177, 189 (1959)). A writ of certiorari "is not one to which the moving party is entitled as a matter of right." *State v. Walker*, 245 N.C. 658, 659 (1957), *cert. denied*, 356 U.S. 946 (1958); *see Surratt v. State*, 276 N.C. 725, 726 (1970) (per curiam) (holding that the Court of Appeals was errorless in denying certiorari review of a trial court's denial of a habeas corpus petition because such judgment was "reviewable only by way of *certiorari* if the court *in its discretion* chooses to grant such writ" (second emphasis added)). The only exception to the entirely discretionary nature of certiorari review is the circumstance of a criminal defendant's loss of the right to appeal "due to some error or act of the court or its officers, and not to any fault or neglect of the [defendant]." *State v. Moore*, 210 N.C. 686, 691 (1936).

¶ 19 As we have determined, the District Attorney could not be compelled either by demand of defendant or by order of the District Court to reinstate defendant's charges which had been placed in the status of "dismissed with leave" after defendant had failed to appear in court as scheduled in order to respond to the criminal allegations against defendant. As we have further concluded, the District Court properly denied defendant's Motion to Reinstate Charges in District Court. Consequently, defendant failed to demonstrate that there was merit in his arguments or that error was probably committed by the District Court so as to qualify for the Superior Court's issuance of the extraordinary remedial writ in order for the Superior Court to correct, through

certiorari review, any errors committed by the District Court. The Superior Court expressly and correctly based its decision to deny defendant's petition for writ of certiorari on its accurate determination that "[d]efendant has failed to provide 'sufficient cause' to support the granting of his [p]etition" and that "[d]efendant is not entitled to the relief requested." Therefore, the Superior Court properly acted within its discretion in denying defendant's petition for writ of certiorari.

D. Denial of the Petitions for a Writ of Mandamus

¶ 20 Along with defendant's efforts to obtain the reinstatement of his criminal charges before the District and Superior Courts of Wake County, coupled with defendant's desire to obtain appellate review of both courts' respective denials of those efforts before the Court of Appeals, defendant filed multiple, duplicative petitions for a writ of mandamus before the Court of Appeals and this Court. "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.'" *In re T.H.T.*, 362 N.C. 446, 453 (2008) (quoting *Sutton v. Figgatt*, 280 N.C. 89, 93 (1971)). In order to obtain the *extraordinary* relief provided by a writ of mandamus, the petitioner must demonstrate: (1) that the petitioner possesses a clear and established legal right to the act to be commanded; (2) that the party who is potentially subject to the writ has a clear and undebatable legal duty to perform the act requested in the petition; (3) that the act requested in the petition is ministerial in nature

and does not involve exercising the discretion of the party who is potentially subject to the writ[2]; and (4) that the party who is potentially subject to the writ has, after the expiration of the appropriate time for the performance of the act requested in the petition, failed to perform the act requested. *Id.* at 453–54. In any event, a writ of "mandamus may not be used as a substitute for an appeal." *Snow v. N.C. Bd. of Architecture*, 273 N.C. 559, 570 (1968). The examination which we have already employed in assessing defendant's multiple theories and arguments regarding his claimed right to the reinstatement of his criminal charges after they were placed in the status of "dismissed with leave" due to defendant's failure to appear in court when scheduled similarly applies regarding defendant's petition for the extraordinary writ of mandamus. Defendant fails to satisfy any of the elements for the appellate courts' issuance of a writ of mandamus because he does not have a right to compel the activation of his charges which have been dismissed with leave or to require the exercise of discretionary authority to fit his demand for prosecutorial action regarding his charges. Defendant's petitions for a writ of mandamus are properly denied.

E. *Klopfer, Simeon* Distinguished

¶ 21 In the case of *Klopfer v. North Carolina* (*Klopfer II*), 386 U.S. 213 (1967), the Supreme Court of the United States granted a writ of certiorari to

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[2] "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 court does not require a particular result." *In re T.H.T.*, 362 N.C. 446, 454 (2008).

review the decision of this Court in *State v. Klopfer* (*Klopfer I*), 266 N.C. 349 (1966). In *Klopfer I*, this Court affirmed a trial court's order which tacitly allowed a prosecutor to utilize a procedural rule which bore some similarity to the dismissal-with-leave procedure employed in the case at bar. The procedure in *Klopfer*, known as a "*nolle prosequi* with leave," allowed prosecutors to effectively pause their prosecution of a crime by releasing a defendant from the accused's responsibility to appear for any further court dates while simultaneously maintaining the legitimacy of an indictment filed against the defendant. *Klopfer II*, 368 U.S. at 214. "Its effect is to put the defendant without day, that is, he is discharged and permitted to go whithersoever he will, without entering into a recognizance to appear at any other time." *Id.* (quoting *Wilkinson v. Wilkinson*, 159 N.C. 265, 266–67 (1912)). Over defendant Klopfer's objection, the State moved the trial court for permission to take a *nolle prosequi* with leave after a first attempt to prosecute defendant for a trespassing charge which had resulted in a hung jury. *Id.* at 217–18. The trial court granted the State's motion. *Id.* at 218. Defendant Klopfer appealed the trial court's grant of the State's motion to enter a *nolle prosequi* to this Court, asserting that the effect of the *nolle prosequi* procedure of pausing the prosecution of his alleged crime, without disposing of the charge itself, violated his Sixth Amendment right to a speedy trial as it was applied to the individual states through the Fourteenth Amendment. *Id.* This Court affirmed the trial court's order granting the State's *nolle prosequi* motion and held that the State had "followed the customary procedure" to obtain the trial court's permission to enter a *nolle prosequi* in the defendant's

case. *Klopfer I*, 266 N.C. at 351. This Court reasoned that

> [w]ithout question a defendant has the right to a speedy trial, if there is to be a trial. However, we do not understand the defendant has the right to compel the State to prosecute him if the State's prosecutor, in his discretion and with the court's approval, elects to take a *nolle prosequi*. In this case one jury seems to have been unable to agree. The solicitor may have concluded that another go at it would not be worth the time and expense of another effort.

Id. at 350.

¶ 22 The Supreme Court of the United States reversed the decision of this Court and remanded the case to the North Carolina courts for proceedings not inconsistent with its opinion. *Klopfer II*, 386 U.S. at 226. The high court opined:

> The North Carolina Supreme Court's conclusion—that the right to a speedy trial does not afford affirmative protection against an unjustified postponement of trial for an accused discharged from custody—has been explicitly rejected by every other state court which has considered the question. That conclusion has also been implicitly rejected by the numerous courts which have held that a *nolle prossed* indictment may not be reinstated at a subsequent term.
>
> We, too, believe that the position taken by the court below was erroneous. The petitioner is not relieved of the limitations placed upon his liberty by this prosecution merely because its suspension permits him to go "whithersoev-

> er he will." The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the "anxiety and concern accompanying public accusation," the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States.

Id. at 219–22 (footnotes omitted).

¶ 23 The dissenting opinion of the Court of Appeals in this case adopted the view that the Superior Court erred in denying defendant's petition for writ of certiorari, citing the outcome of *Klopfer II* in the Supreme Court of the United States and the outcome of *Simeon*[3] in this Court as representative of the legal issues for which defendant should have been af-

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[3] Upon plaintiff Simeon's allegations in his amended civil complaint that "the district attorney delayed calendaring [Simeon's] case for trial for the tactical purposes of keeping him in jail, delaying a trial at which he was likely to be acquitted, and pressuring him into entering a guilty plea," and that "the district attorney purposely delays calendaring cases for trial for the purpose of exacting pretrial punishments and pressuring other criminal defendants into pleading guilty," this Court determined that the allegations were "sufficient to state a claim that the statutes which grant the district attorney calendaring authority are being applied in an unconstitutional manner," and therefore "we reverse[d] the order of the trial court which granted defendant district attorney's motion to dismiss and remand[ed] th[e] case to that court." *Simeon v. Hardin*, 339 N.C. 358, 378, 379 (1994).

forded further review regarding his inability to obtain a trial or hearing to resolve his criminal charges which the District Attorney maintained in dismissed-with-leave status. *Diaz-Tomas*, 271 N.C. App. at 110 (Zachary, J., concurring in part and dissenting in part). However, both cases are readily distinguishable from the current case in the salient respect that in *Klopfer II* and in *Simeon*, the District Attorney was recognized to be in a position, based on the facts presented in those respective cases, to tactically utilize the official's prosecutorial discretion to prevent a defendant who continually sought to resolve his active criminal charges through the defendant's consistent availability to the trial court from doing so; alternatively, in the present case, the District Attorney placed defendant's criminal charges on a trial court docket for prosecution in a timely manner on multiple occasions while defendant continually sought to evade the resolution of his active criminal charges through his consistent unavailability to the trial court by failing to appear as scheduled for court until nearly three years after defendant's criminal charges were placed in dismissed-with-leave status. These important differences between the instant case and the cases of *Klopfer II* and *Simeon*, which the Court of Appeals dissent cites as persuasive here, render the dissenting view as misguided based upon its reliance on inapplicable cases.

III. Conclusion

¶ 24 Based upon our analysis of the factual and procedural background of this case, this Court modifies the decision of the Court of Appeals to the extent that we affirm the outcome reached by the lower ap-

pellate court without prejudice to defendant to pursue any other legal remedy which has not been determined by this Court's opinion. Discretionary review of issues which were not addressed in our review of the Court of Appeals majority opinion or in our discussion of the Court of Appeals dissenting opinion is dismissed as improvidently allowed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

Justice BERGER did not participate in the consideration or decision of this case.

APPENDIX B

Supreme Court of North Carolina

STATE of North Carolina
v.
Edgardo Gandarilla NUNEZ
No. 255PA20
Filed November 4, 2022

On writ of certiorari pursuant to N.C.G.S. § 7A-32(c) to review an order denying defendant's petition for writ of certiorari entered on 23 September 2019 by Judge Paul C. Ridgeway in Superior Court, Wake County. On 15 December 2020, pursuant to N.C.G.S. § 7A-31(a) and (b), and Rule 15(e)(1) of the North Carolina Rules of Appellate Procedure, the Supreme Court allowed defendant's petition for discretionary review prior to determination by the Court of Appeals. On 30 June 2020, this Court allowed the motion of the defendant in *State v. Diaz-Tomas*, —— N.C. ——, 2022-NCSC-115, to consolidate these cases for oral argument. Heard in the Supreme Court on 6 January 2022.

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

Glenn Gerding, Appellate Defender and Nicholas C. Woomer-Deters, Assistant Appellate Defender, for defendant-appellant.

Erwin Byrd and Law Offices of Amos Tyndall PLLC, by Thomas K. Maher, Chapel Hill, for North Carolina Advocates for Justice, amicus curiae.

PER CURIAM.

For the reasons stated in *State v. Diaz-Tomas*, —— N.C. ——, 2022-NCSC-115, the superior court's order is affirmed.

AFFIRMED.

Justice BERGER did not participate in the consideration or decision of this case.

APPENDIX C

Court of Appeals of North Carolina

STATE of North Carolina
v.
Rogelio Albino DIAZ-TOMAS, Defendant.
No. COA19-777
Filed: April 21, 2020

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.

With respect to his petitions for writ of mandamus, defendant seeks a writ compelling 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 "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 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 Ju-

ly 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 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. 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 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 sup-

port 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 with a motor vehicle offense "must be afforded an opportunity for a trial or a hearing within a rea-

sonable 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.

(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.