No. 22-887

In the Supreme Court of the United States

ROGELIO ALBINO DIAZ-TOMAS AND
EDGARDO GANDARILLA NUNEZ
Petitioners,

v.

NORTH CAROLINA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Klopfer v. North Carolina*, 386 U.S. 213 (1967), this Court held that a North Carolina common-law rule allowing the State to dismiss pending criminal charges "with leave" to later reinstate those charges at any time violated the Sixth Amendment's Speedy Trial Clause. *Id.* at 222. State law gave the defendant in *Klopfer* "no means by which he [could] obtain a dismissal or have the case restored to the calendar for trial." *Id.* at 216. As a result, the defendant perpetually faced "anxiety and concern accompanying public accusation." *Id.* at 222 (internal quotation marks omitted).

A North Carolina statute now authorizes the State to dismiss pending charges with leave if a defendant fails to appear for court and cannot be readily found. N.C. Gen. Stat. § 15A-932(a)(2). Once the defendant is found, the State has discretion over whether or not to reinstate the charges. *Id.* § 15A-932(d). Either way, defendants have a statutory right to move to dismiss the charges at any time. *Id.* § 15A-954(a)(3), (c).

Here, the State dismissed Petitioners' charges with leave but declined to reinstate the charges when Petitioners appeared after a years-long delay. Rather than move to dismiss the charges, Petitioners sought to require the State to reinstate them instead.

The question presented is whether this Court's decision in *Klopfer* applies to the facts of these cases, where state law expressly provides a mechanism for Petitioners to vindicate their speedy-trial rights.

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INTRODUCTION

Petitioners claim that North Carolina has "revived" an "identical" practice to the one that this Court struck down under the Sixth Amendment's Speedy Trial Clause in *Klopfer v. North Carolina*, 386 U.S. 213 (1967). Pet. at 11. Specifically, Petitioners claim that, as in *Klopfer*, the criminal charges against them may remain pending "forever" under North Carolina law. Pet. at 11. Petitioners claim that they have no way to resolve the charges other than to plead guilty. Pet. at 10-11.

Petitioners' arguments are based on an incorrect understanding of state law. In *Klopfer*, the defendant had "*no* means by which he [could] obtain a dismissal or have the case restored to the calendar for trial." 386 U.S. at 216 (emphasis added). By contrast, Petitioners here have a readily accessible way to vindicate their speedy-trial rights. A state statute expressly gives them the right to move to dismiss charges at any time on the ground that they have "been denied a speedy trial as required by the Constitution of the United States and the Constitution of North Carolina." N.C. Gen. Stat. § 15A-954(a)(3), (c). Petitioners have never sought this relief. Instead, they sought an order requiring the State to reinstate their charges. Because state law provides a clear procedural mechanism for Petitioners to vindicate their speedy-trial rights, *Klopfer* does not apply, and these cases do not warrant this Court's review.

Review is unwarranted for other reasons as well. Petitioners ask for summary reversal, claiming that

the North Carolina Supreme Court "defied" *Klopfer*. Pet. at 11, 18. As explained above, that argument is based on a misunderstanding of state law. It also misreads *Klopfer* itself. *Klopfer* addressed a practice where charges could be dismissed with leave for any reason. At the same time, this Court expressly declined to address the constitutionality of a North Carolina statute that, as here, allowed the State to dismiss charges against a *nonappearing* defendant with leave to reinstate charges when a defendant was found. *Klopfer*, 386 U.S. at 215 & n.1. Thus, Petitioners are asking this Court to extend *Klopfer* to the new context of nonappearing defendants. But Petitioners have not even attempted to show a split on that question or otherwise show that it merits review.

This Court should deny the petition.

STATEMENT OF THE CASE

A. The State Dismisses the Charges Against Petitioners With Leave After They Repeatedly Fail to Appear for Court.

Under North Carolina law, when a defendant fails to appear at a required court proceeding and cannot be readily found, the State "may enter a dismissal with leave for nonappearance." N.C. Gen. Stat. § 15A-932(a)(2). This dismissal "results in removal of the case from the docket of the court." *Id.* § 15A-932(b). Thus, the case "is not calendared before the trial court on a routine basis as an active criminal charge would be." Pet. App. 12a. However, "the criminal proceeding under the indictment is *not* terminated." *State v. Lamb*, 365 S.E.2d 600, 604 (N.C. 1988) (emphasis in

original); N.C. Gen. Stat. § 15A-932(b). Once the defendant is found, the State "may reinstitute the proceedings by filing written notice with the clerk." N.C. Gen. Stat. § 15A-932(d).

Here, the State dismissed with leave the pending charges against Petitioners Rogelio Albino Diaz-Tomas and Edgardo Gandarilla Nunez after they failed to appear for court. Both Diaz-Tomas and Nunez were charged with driving while impaired and driving without a license in Wake County, North Carolina. Pet. App. 5a; *State v. Nunez*, No. COA20-202, Record on Appeal at 3 (N.C. Ct. App.), bit.ly/42vPHY9. They failed to appear for their initial court dates. Pet. App. 5a; Nunez Record at 4.

Diaz-Tomas was later arrested for his nonappearance. Pet. App. 5a. He failed to appear for his second court date and was again arrested. Pet. App. 5a-6a. Nunez was charged with another driving-related offense. Nunez Record at 7. He also failed to appear for this offense and was later arrested for his nonappearances. Nunez Record at 5, 8-9. The record does not show any justification or excuse for Petitioners' repeated failures to appear.

Both Petitioners appeared for their third court dates and were represented by counsel. Diaz-Tomas's appearance was more than three years after the initial charges against him were filed; Nunez's was more than five. Pet. App. 6a; Nunez Record at 10. By this time, the State had dismissed Petitioners' charges with leave. N.C. Gen. Stat. § 15A-932(a)(2); *see also* Pet. App. 5a; Nunez Record at 6, 10-11. The

State declined to reinstate the charges. Pet. App. 6a; Nunez Record at 13-16.[1]

In response, Petitioners filed motions to reinstate the charges. Pet. App. 6a; Nunez Record at 30-41. Among other things, they argued that the State's decision not to reinstate the charges against them violated the Sixth Amendment's Speedy Trial Clause. Pet. App. 6a; Nunez Record at 30-41. Petitioners have never moved to have the charges against them dismissed on speedy-trial grounds. *See* N.C. Gen. Stat. § 15A-954(a)(3).

Petitioners submitted two affidavits in support of their motions. *State v. Diaz-Tomas*, No. COA19-777, Record on Appeal at 44-47 (N.C. Ct. App.), bit.ly/3NKOsjx; Nunez Record at 42-45. In the first affidavit, Petitioners' trial counsel asserted that "the State does not generally reinstate older DWI cases" that were previously dismissed with leave. Diaz-Tomas Record at 44 ¶ 7; Nunez Record at 42 ¶ 4. Instead, the affidavit stated, the defendant must plead guilty and waive his right to appeal. Diaz-Tomas Record at 44 ¶¶ 7, 9; Nunez Record at 42 ¶ 3.

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[1] The statute includes an exception to the State's discretion over whether to reinstate charges. The exception applies only to those defendants charged with a "waivable" offense under state law—that is, an offense "for which written appearance, waiver of trial or hearing, and plea of guilty or admission of responsibility" is permitted. N.C. Gen. Stat. § 15A-932(d1). If a defendant tenders such a waiver and pays outstanding fines, costs, and fees, the clerk must "recall any outstanding criminal process." *Id.* The driving-while-impaired charges at issue here are not waivable offenses, so the exception does not apply. *See id.* § 7A-273(2).

The affidavit also stated that "the decision regarding whether to reinstate the charges is made on a case-by-case basis." Diaz-Tomas Record at 44 ¶ 6. The ground for these assertions was a conversation that trial counsel stated that he had with a local prosecutor. Diaz-Tomas Record at 44 ¶ 5; Nunez Record at 42 ¶ 3. In the second affidavit, another defense attorney described a similar "policy" based on the attorney's experiences defending driving-while-impaired cases in Wake County. Diaz-Tomas Record at 46 ¶¶ 5-8; Nunez Record at 44 ¶¶ 5-8.

B. The State Courts Reject Petitioners' Motions to Reinstate the Charges.

The state trial court denied Petitioners' motions to reinstate. Pet. App. 7a; Nunez Record at 54. Following unsuccessful appeals in the lower state courts, Petitioners sought review in the North Carolina Supreme Court, which consolidated their cases for oral argument. The state supreme court unanimously affirmed in both cases, using the Diaz-Tomas appeal to provide its reasoning. Pet. App. 2a-27a.

In rejecting Petitioners' arguments under the Speedy Trial Clause, the North Carolina Supreme Court discussed this Court's decision in *Klopfer*. Pet. App. 22a-26a. Unlike the State in *Klopfer*, the court emphasized, the State here "placed [Petitioners'] criminal charges on a trial court docket for prosecution in a timely manner on multiple occasions." Pet. App. 26a. And unlike the defendant in *Klopfer*, Petitioners here "continually sought to evade the resolution of [their] active criminal charges

through [their] consistent unavailability." Pet. App. 26a. These "important differences," the state supreme court explained, meaningfully distinguished this Court's decision in *Klopfer*. Pet. App. 26a.

Diaz-Tomas and Nunez now petition for certiorari.

REASONS FOR DENYING THE PETITION

I. This Court's Decision In *Klopfer* Does Not Apply To The Facts Of These Cases.

Petitioners assert that the only way to resolve their pending charges is to plead guilty. *See* Pet. at 9-13. They thus claim that the State has violated this Court's decision in *Klopfer*. Petitioners' arguments are based on a misunderstanding of state law.

Unlike the defendant in *Klopfer*, Petitioners here have a readily accessible way to vindicate their speedy-trial rights. In *Klopfer*, state law provided the defendant with "*no* means by which he [could] obtain a dismissal or have the case restored to the calendar for trial." 386 U.S. at 216 (emphasis added). Here, by contrast, Petitioners may move to dismiss the charges against them. State law expressly allows them to file a motion to dismiss their pending charges on speedy-trial grounds at any time. N.C. Gen. Stat. § 15A-954(a)(3), (c). Thus, Petitioners' claim that they "are unable to achieve any resolution of the pending charges" "unless they plead guilty and waive their appeals" is simply incorrect. Pet. at 10.

The North Carolina state courts have also interpreted the dismissal-with-leave statute in ways that require it to conform to the Speedy Trial Clause.

For example, they have held that "the speedy trial rights existing under the Sixth Amendment to the Constitution of the United States" require the State to reinstate charges "within some 'reasonable' time" after a defendant's appearance. *State v. Reekes*, 297 S.E.2d 763, 766 (N.C. Ct. App. 1982); *see also State v. Morehead*, 302 S.E.2d 834, 837-38 (N.C. Ct. App. 1983). Petitioners are therefore wrong that state law allows them to "languish under an unresolved charge forever." Pet. at 11.

Moreover, the Speedy Trial Clause does not authorize the unusual remedy that Petitioners seek here: to have the charges against them reinstated. This Court has held that the "*only* possible remedy" for a speedy-trial violation is dismissal. *Barker v. Wingo*, 407 U.S. 514, 522 (1972) (emphasis added); *accord Betterman v. Montana*, 578 U.S. 437, 444 (2016). If Petitioners had exercised their right to move to dismiss the charges against them on speedy-trial grounds, they would have had the opportunity to fully litigate the merits of their arguments. *See Barker*, 407 U.S. at 530-32 (setting out the factors for showing a speedy-trial violation); *accord State v. Farook*, 871 S.E.2d 737, 754-55 (N.C. 2022) (remanding for an evidentiary hearing under the *Barker* factors on defendant's motion to dismiss). Indeed, they remain free to file such a motion at any time—including after this Court denies review here. *See* N.C. Gen. Stat. § 15A-954(a)(3), (c).

In sum, Petitioners' assertion that they can resolve the pending charges against them only by pleading guilty is incorrect. State law provides Petitioners with

a clear mechanism for vindicating their speedy-trial rights through a motion to dismiss. Petitioners' claim that the state supreme court defied this Court's decision in *Klopfer* is therefore based on a false premise.[2]

II. These Cases Do Not Otherwise Warrant This Court's Review.

Review here is unwarranted for two additional reasons.

First, this case does not merit the summary reversal that Petitioners seek. *See* Pet. at 18. This Court summarily reverses only when a lower court makes the type of "fundamental errors that this Court has repeatedly admonished courts to avoid." *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018) (per curiam); *accord Parker v. Matthews*, 567 U.S. 37, 49 (2012) (per curiam) (summarily reversing to correct a "plain and repetitive error").

The North Carolina Supreme Court did not make an error of this kind. The court below held that *Klopfer* was "inapplicable" on the facts of these cases because, unlike Petitioners, the defendant in *Klopfer* timely appeared for court. Pet. App. 26a. Petitioners claim

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[2] Petitioners also raise a claim under the Fourteenth Amendment's Due Process Clause. Pet. at 13-14. But their due-process arguments are the same as their arguments under the Speedy Trial Clause. Under both Clauses, they claim that "North Carolina's dismissal with leave procedure indefinitely postpones defendants' prosecutions" and is therefore unconstitutional. Pet. at 14. Thus, Petitioners' due-process claim fails for the same reasons as their speedy-trial claim.

that their failures to appear are "no distinction at all." Pet. at 8. But this Court in *Klopfer* disagreed. There, the Court expressly declined to address a North Carolina statute that, like here, allowed the State to dismiss charges with leave when a defendant fails to appear. *Klopfer*, 386 U.S. at 215 & n.1. Petitioners are therefore wrong that this case involves an "identical" practice to the one that this Court previously considered. Pet. at 11. In *Klopfer*, the State could dismiss charges with leave for any reason. 386 U.S. at 214-16. Here, by contrast, the State can do so only when the defendant fails to appear. N.C. Gen. Stat. § 15A-932(a). As *Klopfer* itself made clear, this distinction matters: the Court stated that it was not addressing situations where charges are dismissed with leave following a defendant's nonappearance. 386 U.S. at 215 & n.1. Thus, because Petitioners are asking this Court to extend *Klopfer* to a new context, summary reversal would be inappropriate.

Moreover, Petitioners appear to concede that *Klopfer*'s application to nonappearing defendants is not otherwise certworthy. They do not allege a split. And they acknowledge that North Carolina's dismissal-with-leave statute is unique among the States. Pet. at 14-15.

Second, these cases are a bad vehicle for addressing the question presented. Petitioners claim that these cases show that "[p]rosecutors in North Carolina are now taking advantage of [the] dismissal with leave procedure" to coerce guilty pleas and indefinitely delay trials. Pet. at 5-6. The records here do not support that assertion. The only available

information about the source of any delay here—other than Petitioners' own years-long nonappearance for court proceedings—comes from two affidavits that Petitioners submitted to the trial court. *See supra* pp 4-5. No state court below made findings based on those affidavits. And for good reason: Petitioners did not seek to dismiss the charges against them under the Speedy Trial Clause, which would have allowed the state courts to assess the reasons for any delay, as well as the evidentiary basis for Petitioners' assertions. *Barker*, 407 U.S. at 530-32. But because Petitioners chose not to seek dismissal of the charges against them, no such record was developed here.

In any event, the affidavits themselves do not support Petitioners' claims. Those affidavits are based on the personal experiences of two defense attorneys in one North Carolina county. *See supra* pp 4-5. And far from showing an inflexible policy or rule, one affidavit even states that "the decision regarding whether to reinstate the charges is made on a case-by-case basis." Diaz-Tomas Record at 44 ¶ 6. Thus, the limited factual record here simply does not provide an adequate basis to consider Petitioners' assertion that "[d]istrict attorneys in North Carolina" have a policy of declining to reinstate charges. *See* Pet. at i.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 15, 2023