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 Supreme Court of North Carolina

REPLY BRIEF FOR PETITIONERS

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In North Carolina, DWI defendants who miss a court date are often placed into a kind of limbo that exists in no other state. Under the state's "dismissal with leave" procedure, the criminal charges remain pending, but no trial ever takes place. The case remains frozen in this posture, indefinitely, until the defendant pleads guilty and waives his right to appeal.

When North Carolina's prosecutors tried this tactic before, the Court held that it violates the Speedy Trial Clause. *Klopfer v. North Carolina*, 386 U.S. 213 (1967). It still does. The state is denying speedy trials in the most literal sense, by indefinitely refusing to try defendants who *ask* to be tried. North Carolina is also violating the Due Process Clause. *See id.* at 226-27 (Harlan, J., concurring in the judgment). The state is depriving defendants of liberty without due process, again in the most literal sense, by coercing them into pleading guilty rather than giving them an opportunity to contest their guilt at trial.

In its Brief in Opposition, North Carolina does not even try to defend the constitutionality of the state's bizarre practice. Instead, the Brief in Opposition offers three reasons for denying certiorari.

1. First, the state argues (BIO 6-8) that we sought the wrong relief. We asked for no more than what the Constitution guarantees—a speedy trial consistent with due process. The court below rejected this request because it took the view that we had not been denied our constitutional right to a speedy trial. Pet. App. 22a-26a. The state now argues that in-

stead of asking for a speedy trial, we should have asked to have the charges dismissed on the ground that we had been denied a speedy trial. But any such request would obviously have been futile. The court below didn't think there was any Speedy Trial Clause violation in the first place, so it certainly wouldn't have dismissed the charges on this ground. Had we sought dismissal, rather than the less drastic remedy of the reinstatement of the charges, the outcome would have been just the same.

The state errs, moreover, in asserting (BIO 7) that dismissal is the only appropriate remedy in these circumstances. To be sure, dismissal is the proper remedy where the speedy trial period has already expired. *Barker v. Wingo*, 407 U.S. 514, 522 (1972). Our claim, by contrast, is based on *Klopfer*, not on *Barker*. We're relying on *Klopfer*'s holding that the indefinite postponement of a prosecution over the objection of the accused violates the Speedy Trial Clause in and of itself, regardless of how much time has elapsed. In these circumstances, reinstatement of the charges is a more appropriate remedy than dismissal. In *Klopfer* itself, the defendant requested a trial rather than a dismissal of the charges. 386 U.S. at 218. After ruling in his favor, the Court remanded to the state courts rather than ordering the charges dismissed. *Id.* at 226.

2. Second, the state attempts to distinguish *Klopfer* (BIO 8-9). In *Klopfer*, the Court noted that North Carolina had a statute authorizing the procedural device then called "nolle prosequi with leave" where "the defendant has not been apprehended." 386 U.S. at 215 n.1. The Court observed that this

statute "does not apply to the facts of this case." *Id.* at 215. This was the Court's entire discussion of this point, which is located within a short inquiry into whether the "nolle prosequi" device was authorized by state statute or by state common law. *Id.* at 215-16.

The Brief in Opposition seizes on this passage to claim (BIO 9) that in holding the indefinite deferral of prosecutions unconstitutional, "the Court stated that it was not addressing situations where charges are dismissed with leave following a defendant's nonappearance." But the Court stated no such thing. The Court merely noted the existence of a statute setting forth a procedure that could be used while defendants had absconded. The Court did not make the distinction claimed in the Brief in Opposition.

Nor would such a distinction make any sense. While an absconding defendant is still at large, there can be no constitutional objection to delaying his trial. But once a defendant is back in court, the Speedy Trial and Due Process Clauses bar the state from keeping him perpetually under the cloud of a criminal charge. The defendant can of course be punished for the separate offense of missing a court date without a legitimate reason; every state does that, including North Carolina. But defendants who miss a court date do not lose the right to contest improper delays that occur after they have reappeared in court. Prosecutors cannot keep charges pending indefinitely merely because the defendant missed a court date at some point in the past.

3. Finally, the state suggests (BIO 9-10) that this case is a poor vehicle because there is insufficient

proof in the record that North Carolina's prosecutors often place cases in "dismissal with leave" status. This suggestion is, to put it mildly, disingenuous. The widespread use of this tactic is common knowledge among prosecutors and defense lawyers in North Carolina. The decisions below were based on this premise, a premise that the state did not contest in the lower courts and one that the lower courts never questioned. As we observed in our certiorari petition (Pet. 16), the state's own figures indicate that approximately 140,000 cases are dismissed with leave each year in North Carolina.

In any event, regardless of the frequency with which this tactic is used, the record is clear that it was used here. Petitioners asked to be tried, but the prosecutors refused to reinstate the charges unless they pled guilty and waived their right to appeal. Pet. App. 6a. This case is an excellent vehicle for addressing the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below should be summarily reversed. In the alternative, the petition should be granted and the case should be set for briefing and argument.

Respectfully submitted,

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