

No. 23-309

9/18/2023
ORIGINAL

**In The
Supreme Court of United States**

Michael Paul Nelson,
Petitioner
v.
State of North Carolina
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of North Carolina

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

People with disabilities often use electronic devices that help compensate for their disabilities. For visually impaired people, “prosthetic eyes” have been and are being developed to compensate for vision issues such as blindness, including video and audio notetaking features. Public entities (e.g., courts) often have policies forbidding the use of recording devices in public areas such as courtrooms.

The Questions Presented Are:

1. Does the Confrontation Clause of the 6th Amendment and/or the Due Process Clause of the 14th Amendment require a criminal court to modify its policies to allow a disabled defendant, who depends on prosthetic devices, to use such prosthetic devices during a criminal trial where the denial of same would effectively prevent the defendant from being present during all aspects of the criminal trial and where his absence frustrates the fairness of the trial?

2. Does at least the Fourteenth Amendment and/or federal anti-discrimination laws require a criminal trial court to provide a path for appellate review, *before the trial*, of the trial court’s denial of a request for reasonable accommodations and modifications to court procedures, where such denial materially affects or denies a fundamental human right?

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

State of North Carolina v. Michael Paul Nelson, No. **41P23**, Supreme Court of North Carolina, judgment entered **19 June 2023** (State's Motion to Dismiss Writ of Certiorari for lack of substantial constitutional question granted): 90-day appeal window closes **Sunday, 17 September 2023**. (App. 1a-3a)

State of North Carolina v. Michael Paul Nelson, No. **22-332**, North Carolina Court of Appeals, judgment entered **13 January 2023** (Nelson's Petition for Writ of Certiorari denied). (App. 4a-5a).

State of North Carolina v. Michael Paul Nelson, **20CRS50469**, Rockingham County Superior Court, judgment entered **27 January 2022**; (Judge R. Stuart Albright Order: Request for auxiliary aid (Visual Interpreter) – Denied; Request to use prosthetic eyes' Video Recording feature for visual notes during trial - Denied). (App. 6a-19a).

State of North Carolina v. Michael Paul Nelson, **20CRS50469**, Rockingham County Superior Court, Magistrate's Order (Magistrate J. L. Carter), (2 February 2020). (**App. 20a-22a**).

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Michael Paul Nelson (“Nelson”), respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court for North Carolina in this case.

OPINIONS BELOW

The decision of the Supreme Court of North Carolina (App. 1a – 3a) granting the State’s motion to dismiss the appeal for lack of a substantial constitutional question is not published. The State’s motion to dismiss the appeal (App. 50a – 59a) is not published. Petitioner’s reply (App. 60a – 68a) to the State’s motion to dismiss is not published.

The decision of the North Carolina Court of Appeals (App. 4a – 5a) granting the State’s motion to dismiss the appeal is not published.

The Rockingham County Superior Court Order (App. 6a – 19a) is not published.

Order of Magistrate J. L. Carter, Officer Keith Benfield Probable Cause Statement. (App. 20a-21a).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1251(b)(2) and 28 U.S.C. § 1257.

The Supreme Court of North Carolina entered judgment on 19 June 2023. The 90-day window for filing a writ of certiorari (Rule 13) requesting review of such a judgment tolls on Sunday, 17 September 2023, which shifts to Monday, 18 September 2023

(Rule 30.1). Forty copies of this petition prepared consistent with Rule 33.1, along with the docket fee (check made out to “Clerk, U.S. Supreme Court”) required by Rule 38(a) will be mailed to the Clerk on or before 18 September 2023.

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions not presented in the petition text are reproduced in the petition appendix. (App. 1a).

INTRODUCTION

Nelson is an honorably discharged veteran. (App. 77a). Nelson was discharged with multiple combat injuries, including a traumatic brain injury (TBI), resulting in numerous disabilities, including blindness and memory recall issues. Today, Nelson is a qualified person with a disability under the Americans with Disabilities Act of 1990 (ADA). The United States Department of Veterans Affairs (VA) has issued numerous prosthetic assistive devices to Nelson to help compensate for his disabilities, including “prosthetic eyes,” comprising a smartphone, a bodycam, a voice recorder, and associated software.

On 21 February 2020, Nelson was doing nothing while sitting in the passenger seat of a vehicle driven by his wife that was momentarily stopped in a church parking lot. (App. 23a). Neither Nelson nor his wife have a criminal record, and neither were engaged in criminal activity. The police approached the vehicle and demanded Nelson identify himself. Id. Nelson

contended the officer lacked reasonable suspicion of a crime, and thus, he was not required to identify himself. Id. Nelson was arrested and charged with violating N.C. Gen. Stat. § 14-223(a) (App. 28a) for peacefully refusing to provide ID to the police officer. (App. 23a) The Respondents demanded Nelson appear before a criminal court to answer the criminal charge. Id.

The North Carolina, criminal trial courts have a policy against recording devices in the courtroom (App. 6a-19a, ¶9, subsection 1), and, in violation of the U.S. Constitution, denied Nelson's requests for the full use of his prosthetic eyes (which record video and audio) while defending himself *pro se* at trial. Id. In addition, in violation of the ADA and its implementing regulation 28 C.F.R. § 35.160(b) (App. 26a), the trial court denied Nelson's request for a court-appointed visual interpreter as an auxiliary aid. (App. 6a-19a, ¶9, subsection 1). The court's order allowed Nelson to provide his own visual interpreter. Id. Both rulings basically "blind" Nelson and place Nelson at a substantial disadvantage regarding answering the Respondent's criminal charges and effectively prevents Nelson from being present during portions of the trial where visual information is exchanged (notably, up to 90% of communications is said to be visual – various sources).

Nelson appealed the trial court's order to the North Carolina Court of Appeals *before trial*, contending the order was an *administrative* order associated with a criminal trial. (App. 70a). The State's attorney

general filed a motion to dismiss for lack of appellate jurisdiction, submitting the trial court's order is a criminal order, and a criminal defendant's right to appeal is purely a creation of State statutes. The State further submitted that, for criminal trials, its statutes only grant such an appeal after conviction or a guilty plea. Otherwise, the appeal is interlocutory in nature and not permitted in criminal trials.

The North Carolina Court of Appeals granted the State's motion to dismiss the appeal. (App. 4a-5a).

That decision rested on at least two core errors: first, the decision supports an order that fundamentally misinterprets the type of order being appealed (**administrative** v. criminal), and second, depriving a disabled criminal defendant of the use of his prosthetic eyes required for effective communications, denies such a criminal defendant of his God-given human rights secured by at least the U.S. Constitution and federal anti-discrimination laws (e.g., ADA).

Nelson appealed the North Carolina Court of Appeals' decision to the North Carolina Supreme Court via a writ of certiorari based on a substantial constitutional question. (App. 32a). The State's attorney general filed a motion to dismiss based on a lack of a substantial constitutional question. (App. 50a) and Nelson filed a Reply (App. 60a). The Supreme Court of North Carolina erred by granting the State's motion to dismiss for lack of a substantial constitutional question as the questions in this case clearly affect fundamental human rights secured by

constitutional guarantees and, thus, present at least one substantial constitutional question. (App. 1a-3a).

The compelling reasons why this Court's review is urgently needed on both questions presented include: the North Carolina Supreme Court's decisions let a trial court's decision on a substantial federal question stand in a way that conflicts with decisions of this Court, and the North Carolina Supreme Court's decision lets a trial court's decision stand that violates fundamental human rights secured by Constitutional guarantees.

If allowed to stand, the Respondents will continue to inflict great harm on citizens with disabilities who use and have become dependent on assistive devices for effective communications with others and who find themselves charged with criminal offenses, especially when unjustly charged with low-level misdemeanor offenses. The Respondent's decisions in this case effectively require Nelson to further blind himself while presenting his defense during his criminal trial. Notably, the criminal trial court, which records everyone (i.e., courts find visual information critical and record the same), does not wish to allow a defendant to use assistive devices that record video (for visual notes) in the courtroom during a criminal trial.

STATEMENT OF THE CASE

A. Legal Background

This case involves the interactions between two competing interests – a public entity's interest in

controlling public property open to the public (e.g., trial court judge's control of the trial environment) versus the rights of disabled people to use assistive devices needed to compensate for disabilities. The assistive devices are necessary to give disabled people, as much as possible, equal access to the entity's facilities and services. However, a conflict arises when using the assistive device violates a policy established by the public entity. When the public entity is a criminal court, and the service is a criminal trial, this case raises two recurring questions of exceptional importance to citizens with disabilities who are charged with criminal offenses.

First, concerning purely constitutional questions, whether and when the Sixth Amendment's Confrontation Clause and the Fourteenth Amendment's Due Process Clause require a criminal trial court to modify its policies to allow a disabled defendant (who depends on prosthetic devices) to use prosthetic devices during a criminal trial where the denial of same would effectively prevent the defendant from being present during all aspects of the criminal trial where his absence frustrates the fairness of the trial.

Regarding federal anti-discrimination laws such as the ADA, the issue is whether and when the Fourteenth Amendment's Due Process Clause requires a trial court to grant an accommodation request under the ADA related to giving disabled people equal access to the courts.

Second, whether and when a disabled criminal

defendant has a right to appellate review of a trial judge's order denying an accommodation request where such denial deprives the disabled defendant of a fundamental human right protected by the U.S. Constitution and/or federal anti-discrimination laws (e.g., ADA).

1.1 Constitutional Guarantees

It is clearly established that the Sixth Amendment's Confrontation Clause and the Fourteenth Amendment's Due Process Clause guarantee a citizen's "right to be present at all stages of a criminal trial where his absence frustrates the fairness of the proceedings." Faretta v. California, 422 U. S. 806, 820, n. 15 (1975). Similarly, States are required, by the Fourteenth Amendment's Due Process Clause, to remove obstacles, including communication barriers, to a citizen's participation in judicial proceedings where needed to provide a meaningful opportunity to be heard, absent a countervailing state interest of overriding significance. Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

In 2004, this court decided Tennessee v. Lane, 541 U.S. 509 (2004). Lane is a person with paraplegia who uses a wheelchair as an assistive device to move around his environment. Lane alleged the Tennessee courts compelled him to appear to answer a set of criminal charges on the second floor of a county courthouse with no elevator. Id. at 513. Lane crawled up two flights of stairs to get to the courtroom at his

first appearance but refused to crawl in a subsequent appearance and was arrested for failure to appear. Id. at 514. The Lane Court noted a “long history of unequal treatment of disabled persons in the administration of judicial services” and that such had persisted “despite several state and federal legislative efforts to remedy the problem.” Id. at 511.

The Lane Court held that Title II of the ADA, as it applies to the “class of cases *implicating the fundamental right of access *534 to the courts*, constitutes a valid exercise of Congress’ § 5 authority to enforce the guarantees of the Fourteenth Amendment.” Id. at 533-534; (emphasis added). Citizens consider their fundamental human rights substantial rights even when government agents do not. Indeed, this Petition submits that even without the passage of the ADA, Lane acknowledges that citizens have a fundamental natural human right protected by at least the Fourteenth Amendment’s Due Process Clause to equal access to the courts. Further, when the court is a criminal court, such access is protected by the Sixth Amendment’s Confrontation Clause as described above.

Consequently, it is respectfully submitted that, based on the above, the Supreme Court of North Carolina’s decision to dismiss Nelson’s appeal for lack of a substantial constitutional question represents at least one error.

1.2 Federal Anti-Discrimination Laws

As noted above, a criminal trial court denied Nelson's (who has visual communication disabilities) request for a court-appointed visual interpreter under the ADA. (App. 6a-19a). Nelson appealed and filed an appeal brief based on the arguments above. In the State's response to Nelson's appeal brief to the North Carolina Supreme Court, the State's Attorney General argued that "The ADA, however, is a statutory mandate, not a constitutional one. (App. 50a-59a). In reply, Nelson submitted that concerning equal access to the courts, the ADA is a tool for forcing courts to comply with the Fourteenth Amendment's Due Process Clause. (App. 60a-69a). Thus, a violation of the ADA concerning equal access to the courts is a constitutional violation. Id.

The Americans with Disabilities Act of 1990 (ADA) aims to ensure that individuals with disabilities have the same opportunities and access to services and facilities as people without disabilities. It also promotes the removal of physical and communication barriers that can hinder full participation in society.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity." ADA § 12132. As stated in Lane, Congress passed Title II, acknowledging that when a public entity discriminates against and fails to accommodate

persons with disabilities, such often has the same practical effect as outright exclusion. Id. at 533. Indeed, Nelson's petition to the North Carolina Supreme Court for discretionary review stated:

Further, communication barriers, in substance, can and do prevent a criminal defendant from being present at all stages of a trial where such absence frustrates the fairness of the proceedings. When a court presents audio evidence at trial, are the deaf genuinely present without accommodations? When the court presents visual evidence at a trial, are the blind truly present at the associated proceeding to exercise fundamental rights guaranteed by the Due Process Clause? (App. 26a-44a).

The criminal trial court's order allowed Nelson to provide his visual interpreter. Such an order did not absolutely "require" Nelson to bring an interpreter; it only required Nelson to bring an interpreter if he wanted one. (App. 6a-19a) It should be appreciated that the implementing regulation for the ADA states: "A public entity shall not require an individual with a disability to bring another individual to interpret for him or her." 28 C.F.R. § 35.160(c)(1). (App. 26a) Nelson submits that if the State refuses to supply a necessary interpreter, it implicitly *requires* a defendant to bring his own. Consequently, under such facts, the criminal trial court's order denying a request for a court-appointed visual interpreter violates at least the Sixth and Fourteenth

Amendment protections.

2. Right to Appeal

On 3 February 2022, Nelson filed a written Notice of Appeal of Judge Albright's "ORDER TO CONTINUE CASE," (App. 69a) appealing the *administrative* portion (substance) of the court's order, not the form of its title, submitting the non-criminal interlocutory order deprives Nelson of a substantial right (equal access to the court) by denying his request to use his prosthetic eyes to make notes and denying his request under the ADA for a visual interpreter. (App. 6a-19a) Nelson's appeal was filed *before the criminal trial*, contending the order was not a criminal order but an *administrative* order associated with a criminal trial. (App. 69a). The State's Attorney General filed a motion to dismiss for lack of appellate jurisdiction, submitting the trial court's order is a criminal order, and a criminal defendant's right to appeal is purely a creation of State statutes. State v. Berryman, 360 N.C. 209, 214, 624 S.E.2d 350, 354 (2006). The State further submitted that, for criminal trials, its statutes only grant such an appeal after conviction or a guilty plea. State v. Pledger, 257 N.C. 634, 638, 127 S.E.2d 337, 340 (1962); N.C. Gen. Stat. § 7A-27(b)(3) (2022). (App. 24a). Otherwise, the appeal is interlocutory in nature and not permitted. State v. Doss, 268 N.C. App. 547, 549-50 836 S.E.2d 856, 857-58 (2019). For non-criminal trials, appealing an interlocutory order is

clearly allowed in North Carolina before a trial starts. N.C. Gen. Stat. § 7A-27(b)(3)(a). (App. 28a).

Administratively addressing ADA accommodation requests made by qualified persons with a disability is the method that Congress (via passage of the ADA) and the United States Supreme Court (via its decisions, see Lane, 541 U.S. 509 as one example) have demanded entities, such as courts, use to address accommodating people with disabilities. The processing of auxiliary aid requests can easily be, and often is, a function performed by court administrators rather than judges. In its enforcement of the ADA, the United States has seen courts establish system-wide administrative policies and delegate individual requests to system-wide administrators rather than individual judges¹.

It is respectfully submitted that, while a trial judge may be asked to consider and make a decision regarding ADA accommodation requests, and while the judge may make a decision and document the process in the FORM of a criminal court order, with a criminal case number and title in the header, such does not automatically convert the SUBSTANCE of the order into subject matter in a criminal case. See State v. Fuller, 865 S.E.2d 372 (N.C. Ct. App. 2021) (it is wrong to conclude that hiring decisions are brought within the court's jurisdiction or converted into

¹ North Carolina's Judicial Branch website:
<https://www.nccourts.gov/help-topics/disability-and-language-access>

judicial acts simply because a judge is acting within the scope of his authority.). Thus, if a judge happens to take on an administrative ADA task, the judge does not automatically acquire the power to address such administrative ADA task via his jurisdiction over an associated criminal case. Id. In addition, the associated judge would not enjoy judicial immunity for making non-judicial ADA-related decisions. Id.

Concerning North Carolina Courts and the ADA, the North Carolina Administrative Office of the Courts (NCAOC) has been given the authority to address ADA issues. (App. 70a) The NCAOC uses Disability Access Coordinators (DAC) to address ADA issues. The DACs listed on the NCAOC website for the many courts of North Carolina have administrative personnel assigned to the DAC positions. Judges are not listed as the DACs, presumably because ADA matters are administrative and not judicial². There appear to be two entities that can grant or deny a request for accommodations under the ADA: an ADA DAC and a Judge. Id. According to newly provided information on the North Carolina Judicial Branch website, the NCAOC only provides a review process if an NCAOC DAC denies an accommodation request. (see fn 1 supra).

The NCAOC has issued a document explaining the process for addressing ADA grievances titled: NCAOC, AMERICANS WITH DISABILITIES ACT

² See <https://www.nccourts.gov/programs/disability-access>

POLICY AND PROCEDURE FOR GRIEVANCES, (February 21, 2020). (App. 70a). In practice, the NCAOC's efforts have been found wanting. After filing a grievance for a final ADMINISTRATIVE review, the document is silent on the process for obtaining judicial review of a final NCAOC decision of an ADA request for reasonable modifications related to equal access to the courts (or any decision related to the ADA). Id.

In the present case, Nelson followed the NCAOC procedure for handling ADA requests. When the judge denied Nelson's ADA request, Nelson followed the administrative procedure in accordance with stated policy and federal law. However, the presiding judge did not wait for the NCAOC DAC to complete the review process and intended to start the criminal trial before the NCAOC review process had finished. It seems the NCAOC DAC lacks the power and authority to prevent such actions by judges. Id.; (see also, fn 3 below).

Nelson has noticed that since the filing of his appeal to the North Carolina Supreme Court, the North Carolina Judicial Branch website has changed to include this verbiage: "Once a judge has made a decision, it can be overturned only by filing a motion to set aside the decision or through ***an appeal***."³ (emphasis added).

³ See <https://www.nccourts.gov/help-topics/disability-and-language-access/disability-access>

Accommodation Disputes

What can I do if I believe a judge did not properly consider my disability when making a decision about my case?

Once a judge has made a decision, it can be overturned only by filing a motion to set aside the decision or through an appeal.

(image provided help in locating the text)

However, as this case clearly shows, and as argued by the North Carolina Attorney General, North Carolina criminal courts do not allow an appeal until the disabled have fully suffered whatever indignities and damages that will result from the accommodation denial. The same would be true if a criminal defendant attempts to appeal a denial of a motion to set aside the decision before the criminal trial. Notably, such is not a harmless error as it exacerbates Nelson's PTSD. (App. 80a).

As it stands today, according to North Carolina's Attorney General, the criminal trial court judge's decision denying a disabled defendant's reasonable request for modifications necessary for equal access to the court is not reviewable by anyone other than the judge who made the decision before a criminal trial. (App. 50a-59a). Only after a disabled defendant is forced to endure the full spectrum of indignities caused by unequal and inadequate access to the court during a criminal trial can the disabled criminal defendant appeal. Id. Only the trial judge can review his decision. Such represents a conflict of interest and

screams actual bias in making a decision and, perhaps more importantly – for the interests of the judicial system at large – the appearance of bias.

B. Factual And Procedural Background

1. Factual Background

Nelson is married with four children and is an honorably discharged 10-year United States Army veteran. (App. 73a). Before joining the military and while enlisted, Nelson had a nearly photographic memory that allowed him to remember almost everything he heard, read, or saw. Such put learning any topic of interest within his grasp. Nelson is also highly motivated. Combine ability and motivation, and one gets Green Beret material. Thus, when he decided to join the U.S. Army after 911 to help defend his country, he did not settle for any position; he wanted to be the best of the best – he wanted to be a Green Beret. Id. Due in significant part to his mental abilities, Nelson was quickly identified as a candidate to pursue the Green Beret. He scored consistently high during testing and was selected to be not simply a Green Beret but an 18D Special Forces Medical Sergeant (App. 74a) specializing in Arabic (a language he did not know when he entered the military).

What Green Berets are called upon to do to free the oppressed is dangerous. Nelson sustained multiple combat-related injuries that have caused his blindness, memory loss, debilitating migraines, cranial cervical instability, and PTSD-type injuries

and disorders that the North Carolina government agents and legal system discriminatory treatment have exacerbated. (App. 73a-80).

As a result of such injuries, Nelson went from a Green Beret “apex predator” to a disabled veteran dependent on assistive technologies to regain but a portion of what he lost defending his country. Such assistive technologies include electronic technology that comprises his prosthetic eyes that alleviate many of his disabilities. Nelson’s prosthetic eyes are necessary to perform everyday activities sighted people take for granted, including taking notes, documenting faces and names of people he encounters, and obtaining real-time feedback of his environment from a remote person watching his live stream video. In short, Nelson needs his prosthetic eyes to “see.” Nelson has become so proficient in using his prosthetic eyes people claiming he is faking blindness has become a trope of sorts.

The Arrest

In 2020, the Nelsons purchased a home in Madison, North Carolina (Rockingham County). On 21 February 2020, around 9:40 pm on a Friday night, the Nelsons took a break to drive around their new downtown after moving into their new home.. Ms. Nelson was driving the family car, and Mr. Nelson was in the passenger seat. (App. 23a) Ms. Nelson stopped in a church parking lot with a clear public view for about five minutes. Neither Mr. nor Ms. Nelson has a criminal history. As Ms. Nelson started to leave the parking lot, a police officer pulled into the

parking lot behind her and turned on the car's emergency lights. Id. The police demanded identification from both Mr. and Ms. Nelson. Mr. Nelson peacefully refused to provide identification to the police officer, contending the police officer did not have reasonable suspicion of a crime. (App. 20a). Mr. Nelson was arrested and charged with violating N.C. Stat. § 14-223 (Resist, Delay, or Obstruct), a class 2 misdemeanor) for failure to provide ID. Id.

The District Court Trial

The first district court bench trial was set for 6 October 2020. Nelson appeared at the courthouse before the time for his trial was to begin to attend his district court trial. Sheriff deputies refused to allow Nelson to enter the courthouse while wearing his prosthetic eyes. When the time for his trial had come and gone, the Sheriff's deputies arrested Nelson on the courthouse steps for allegedly failing to appear. (App. 22a). Judge Grogan set a \$50,000 cash-only bond with house arrest *if* Nelson could pay the bond before his trial date (for a misdemeanor that cannot result in jail time as Nelson had no criminal history). Id. On 7 October 2020, Judge Grogan ordered Nelson transferred to a maximum-security prison complex in Raleigh, North Carolina, for "safekeeping." Nelson's family paid the \$50,000 cash-only bond, and Nelson was released. (App. 20a-21a) As of the writing of this document, Rockingham County still holds Nelson's \$50,000 cash-only bond (which Nelson contends is yet another unconstitutional attack on people with disabilities who resist accommodation denials).

On 23 October 2020, Nelson was forced to attend this bench trial without his prosthetic eyes or forfeit his \$50,000 cash bond. At the bench trial, Judge Freeman ruled Nelson guilty. Notably, there are no statutory rights to discovery in North Carolina district courts or for misdemeanors on appeal to a superior court for trial *de novo* because the discovery statutes only apply to cases “within the original jurisdiction of the superior court.” See N.C. GEN. STAT. § 15A-901. Consequently, misdemeanor criminal cases within the District Court’s original jurisdiction are trials by ambush unless one hires a lawyer with a good relationship with the state’s prosecutor. State v. Hardy, 293 N.C. 105 (1977). Thus, many attorneys use the District Court trial as a discovery tool and provide no defense; they document the State’s evidence, take the loss, and file an appeal for a trial *de novo* at the Superior Court level, which Nelson’s attorney did for his case. Nelson submitted the \$50,000 cash bond was intended to prevent Nelson from filing for a trial *de novo* to the Superior Court, which would prevent Nelson from receiving a trial by a jury of his peers as the bond automatically transfers to the Superior Court, and most citizens cannot afford to have \$50,000 tied up in a cash-only bond.

Superior Court Trial

Nelson released his attorney and decided to defend himself *pro se* at the Superior Court trial. The case was scheduled for trial for the 24 January 2022 Rockingham County Superior Court session with Superior Court Judge R. Stuart Albright presiding.

(App. 6a). Before 11 January 2022, Nelson requested numerous accommodations pursuant to the Fourteenth Amendment and the ADA, including a request for the full use of his prosthetic eyes and a court-appointed visual interpreter. The trial judge eventually agreed to all the accommodations requested but for allowing Nelson to use his prosthetic eyes to take video and audio notes and a court-appointed visual interpreter. (App. 6a-19a) On 27 January 2022, Judge Albright filed an order title: “ORDER TO CONTINUE CASE” documenting his decisions regarding Nelson’s request for accommodations and modifications to court procedures and continuing the case to another day. Id. On 3 February 2023, Nelson filed a written Notice of Appeal of Judge Albright’s 27 January 2022 order. (App. 69a)

2. Procedural Background

On 21 February 2020, Nelson refused to provide identification to a police officer and was arrested for allegedly violating N.C. Gen. Stat. § 14-223 (Resist, Delay, or Obstruct). (App. 28a) The magistrate set a bond for \$2500. (App. 23a).

On 6 October 2020, the first district court bench trial was to be held. Nelson appeared at the courthouse but was denied entry by Sheriff Deputies because Nelson was wearing his prosthetic eyes, which included recording devices. Nelson was then arrested on the courthouse steps for failure to appear, and Judge Grogan set a \$50,000 cash-only bond (App.

20a) and stated that Nelson would be under house arrest *IF* he could pay the \$50,000 cash-only bond before his trial date (for a misdemeanor that cannot result in jail time as Nelson had no criminal history). Id.

On 23 October 2020, a bench trial was held before Judge Freeman, who ruled Nelson guilty. Nelson's attorney presented no defense and used the district court trial as a discovery tool.

On 28 October 2020, Nelson filed a written notice of appeal to the Superior Court for Rockingham County, and the case was scheduled for trial for the 24 January 2022 Rockingham County Superior Court session with Superior Court Judge R. Stuart Albright presiding. (App. 6a-19a)

On 24 January 2022, the court held pretrial hearings. In an order titled: "ORDER TO CONTINUE CASE" (filed 27 January 2022), Judge Albright documented the reasons for his denial of Nelson's ADA accommodation requests and his denial of Nelson's ADA-Based Motion to Dismiss. Id.

On 3 February 2022, Nelson filed a written Notice of Appeal of Judge Albright's ORDER TO CONTINUE CASE, appealing the administrative portion (substance) of the court's order, not the form of its title, submitting the non-criminal interlocutory order deprived Nelson of a substantial right (equal access to the court) and the substantial right remains lost if the order isn't reviewed before final judgment. (App. 70a).

On 13 January 2023, the North Carolina Court

of Appeals filed its decision dismissing Nelson's Appeal. (App. 4a).

On 25 January 2023, Nelson appealed the Court of Appeals' decision to the Supreme Court of North Carolina pursuant to N.C. Gen. Stat. § 7A-30 (Constitutional Question) and Rule 14(b)(2) of the North Carolina Rules of Appellate Procedure. (App. 32a – 50a).

On 19 June 2023, the Supreme Court of North Carolina filed its decision dismissing Nelson's appeal for lack of substantial constitutional question. (App. 1a-3a).

REASONS FOR GRANTING THE WRIT

A. The Criminal Court's Order Violates Fundamental Human Rights and This Court's Precedent

The North Carolina appellate court orders and decisions dismissing Nelson's appeal uphold a criminal trial court's order that violates fundamental human rights in two ways: (1) it denies a disabled defendant's accommodation and modification request necessary to allow the defendant to be present at all material times during a trial where his absence frustrates the fairness of the trial as well as denying the defendant equal access to the courts, and (2) denying a path for review of a criminal trial court's order denying a disabled defendant's accommodation requests under the ADA which are necessary to give the defendant equal access to the court. The actions of

both appellate courts allow a criminal court order to stand that violates at least the Sixth Amendment's Confrontation Clause and the Fourteenth Amendment's Due Process Clause.

1. The Sixth and Fourteenth Amendments

People with disabilities often depend on assistive devices that help compensate for their disabilities. When the disability is visual impairment (e.g., blindness), advancements in technology have significantly improved the quality of life of people who are blind through assistive devices. As noted above, Nelson is blind and uses VA-issued prosthetic devices to compensate for his blindness and memory issues caused by traumatic brain injuries (TBI) he sustained during combat while in the Army. Nelson has become dependent on his prosthetic eyes to move around his environment, to communicate with others, and to perform everyday tasks humans with untrammelled vision take for granted.

Such technology necessarily records video and audio and, for some features, can transmit the same to a remote system for monitoring purposes. Today, Nelson's prosthetic eye technology is relatively "bulky" as his prosthetic eyes comprise a smartphone, a bodycam, and associated software. When people without vision problems meet others, they can see who they are meeting and glean a significant amount of information about their intentions based on visual information. Blind people do not have this advantage. Without a recording of who they interact with, blind

people cannot even prove who they meet unless a voice is heard and recognized.

Further, blind people have problems taking manual notes. However, taking manual notes is unnecessary with assistive electronic recording devices. A problem arises, however, when public entities have policies against recording devices, even in public spaces with no confidential information. Such is particularly true for judicial services, but the problem is widespread among North Carolina public entities.

In North Carolina, a substantial minority, or majority, of public entities refuse to make any accommodations for allowing blind people to use "prosthetic eyes" that electronically record visual and audio information. Nelson has visited over 15 public entities (which represents almost 100%) in North Carolina that have refused to make full accommodations for Nelson. The government agents over some entities did threaten arrest for misdemeanors, such as trespassing if he did not turn off his prosthetic eyes. Such list includes Guilford County Courthouse in both High Point and Greensboro; Guilford County Department of Health in both High Point and Greensboro; Guilford County Sheriff's Department; High Point Police Department, Madison Police Department, Mayodan, Rockingham County Sheriff's Department; Department of Social Services in High Point; Lee County Courthouse; Lee County Sheriff's Department; Wake County Courthouse; Wake County Sheriff's Department;

Guilford County Department of Education; North Carolina State Police; and North Carolina Highway Patrol. Such is not an exhaustive list. While all these public entities have policies and websites professing their compliance with the ADA and desire to assist the disabled, the discrimination against blind people in North Carolina is widespread, systematic, and systemic.

North Carolina public entities, including North Carolina state courts (e.g., Respondents), have violated and continue to violate this Court's precedent and Congress' expressed purpose for passing the ADA — which mandates government entities grant accommodation and modification requests when necessary to comply with constitutional protections. Regarding judicial services and criminal trials, North Carolina courts refuse to make accommodations or modifications necessary for the visually impaired to comply with the Confrontation Clause of the 6th Amendment and/or the Due Process Clause of the 14th Amendment. Such Amendments and Federal anti-discrimination laws require a criminal trial court to modify its policies to allow a disabled defendant who depends on prosthetic devices to use such prosthetic devices during a criminal trial where the denial of same would effectively prevent the defendant from being present during all aspects of the criminal trial where his absence frustrates the fairness of the trial.

North Carolina's public entities discriminate against blind people at all levels of government. Such

discrimination is as stubborn and irrational as in the pre-Lane era when courts made people with paraplegia crawl up steps to get to courtrooms. It should be appreciated that such discrimination persisted until the United States Supreme Court forced States to stop it – in much the same way it was the United States Supreme Court that forced North Carolina and other states to respect the human rights of citizens with dark skin and end slavery, allowing them to drink water out of common sources, eating food in the same restaurants as whites (etc.). In this case, the discrimination differs only in degree, not in kind. Nelson's experience with government agents in North Carolina indicates that North Carolina has no intention of changing their policies that discriminate against blind people.

The issues of this case are only going to get worse over time as technology improves. In the not-too-distant future, prosthetic eye devices for blind people will fit into a "false eye" installed in an eye socket. Such will force North Carolina government agents to either blindfold blind people with prosthetic eyes or force such blind people to remove their prosthetic eyes (in much the same way pre-Lane era courts forced people with paraplegia to crawl to courtrooms). Only this Court's intervention can eliminate the discrimination outlined in this petition by forcing North Carolina and other states to broaden their level of moral enlightenment to include protecting the fundamental human rights of blind people and similarly situated disabled citizens.

**B. North Carolina Courts do not Allow
Timely Appeals of Criminal Orders
Denying Needed Accommodation to
Give Disabled People Equal Access to
the Courts**

As noted above, Nelson has a visual impairment (blindness) and uses VA-issued electronic prosthetic eyes to help compensate for his blindness. Nelson has become dependent on his prosthetic eyes to move around his environment and to do everyday tasks that people with untrammelled vision take for granted.

As noted above, Nelson was arrested for RDO for peacefully refusing to provide ID to a police officer. At his Superior Court criminal trial, Nelson would represent himself *pro se*. However, the criminal courts in North Carolina have a no-recording policy, and Nelson's prosthetic eyes record visual and audio data. Thus, Nelson requested accommodations to allow him the full use of his prosthetic eyes, including recording visual and audio notes. Nelson also requested a court-appointed visual interpreter. The Sixth Amendment Confrontation Clause and the Fourteenth Amendment Due Process Clause supported Nelson's accommodation requests. Federal anti-discrimination laws (ADA) also supported Nelson's accommodation requests.

The criminal trial court judge denied the requests, and Nelson appealed the denial (order) to the North Carolina Court of Appeals before the criminal trial,

contending the order was an administrative order. The State's Attorney General filed a motion to dismiss the appeal by characterizing the denial as an interlocutory order in a criminal trial. The North Carolina Court of Appeals agreed with the Attorney General and dismissed the appeal.

Nelson filed an appeal via a Writ of Certiorari to the North Carolina Supreme Court based on a substantial constitutional question. The State's Attorney General filed a motion to dismiss for lack of a substantial constitutional question. The North Carolina Supreme Court agreed with the Attorney General and dismissed the appeal for lack of substantial constitutional question.

As it stands today, according to the North Carolina Supreme Court (by adopting North Carolina's Attorney General position), the criminal trial court judge's decision denying a disabled defendant's reasonable request for modifications necessary for equal access to the court is not reviewable by anyone other than the judge who made the decision, before a criminal trial. Such represents a conflict of interest and screams actual bias in making a decision and, perhaps more importantly – for the interests of the judicial system at large – the appearance of bias.

According to the N.C. Supreme Court and the N.C. Attorney General, only after a disabled defendant has been forced to endure the full spectrum of indignities that result from unequal and inadequate access to the court during a criminal trial can the disabled criminal defendant appeal.

As noted above, Nelson submits North Carolina government agents have no intention of modifying the State's level of moral enlightenment to include protecting the human rights of blind people to appeal a criminal trial court's decision denying accommodation request necessary for equal access to the trial. Only this Court's intervention can eliminate the discrimination.

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This case is the ideal vehicle for this Court to use to address both questions presented. Each question was squarely presented to the North Carolina Supreme Court, which refused to acknowledge their constitutional significance and dismissed Nelson's appeal, allowing the criminal trial court's actions to stand.

Assistive technologies for the blind will advance significantly in the coming years such that prosthetic eyes far superior to Nelson's will be implanted in a human eyeball socket. Without this Court's intervention, North Carolina government agents will start blindfolding blind citizens (or take other similar actions) with prosthetic eye implants to prevent video recording. It is clear that North Carolina has no intention of stopping the discrimination on its own initiative. Only an opinion from this court can protect disabled citizens by forcing North Carolina to broaden its level of moral enlightenment to include honoring

the constitutional protections at play in this case.
Thus, Certiorari is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted on this 18th Day of
September 2023.

s/ Michael Paul Nelson

Michael Paul Nelson

Petitioner, *Pro Se*

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