CASE No. S20G1471

IN THE

Supreme Court of Georgia

STATE OF GEORGIA

SARA WALKER,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

Brief of Georgia Association of Criminal Defense Lawyers as *Amicus Curiae*

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INTRODUCTION

The power to dismiss for want of prosecution "is of ancient origin, having its roots in judgments of *nonsuit* and *non prosequitur* entered at common law." *Link v. Wabash R. Co.*, 370 U.S. 626, 630 (1962). It predates the founding of this country. And by allowing courts to maintain control of their own dockets, it furthers the interests of Georgians seeking resolution of their criminal and civil claims in Georgia courts.

There is no statute which clearly eliminates this power, and "statutes will not be interpreted as changing the common law unless they effect the change with clarity." *See* A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 318 (2012). *See e.g. United States v. Texas*, 507 U.S. 529, 534 (1993) (applying presumption to common-law requirement that states pay prejudgment interest on money owed the federal government).

Because dismissal is essential to a court's "ability to fashion an appropriate sanction for conduct which abuses the judicial process," we should not lightly do away with it. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991). "Chesterton reminds us not to clear away a fence just because we cannot see its point. Even if a fence doesn't seem to have a reason, sometimes all that means is we need to look more carefully for the reason it was built in the first place." See *Artis v. District of Columbia*, 138 S. Ct. 594, 608 (2018) (Gorsuch, J., dissenting).

We ask this Court to preserve this important power.

1. The Interests of *Amicus*

A frequent "friend of th[is] Court," GACDL is a professional association of Georgia criminal defense attorneys. Its members include both public defenders and private counsel who fight for due process and the liberty of the accused.

2. Questions Presented

1. What is the source of authority – constitutional, statutory, common-law, or decisional law – for a trial court to dismiss a criminal case without prejudice "for want of prosecution"?

2. If that authority is based on decisional law, to what extent does the doctrine of stare decisis apply to the pertinent precedents, and do stare decisis considerations weigh against overruling those precedents?

3. The Views of *Amicus*

A. At common law, courts possess the inherent power to control their dockets

There is a long-standing common-law rule allowing trial courts to dismiss cases for want of prosecution, and a statute must be extremely specific to abrogate that rule. In *Link v. Wabash R. Co.*, 370 U.S. 626 (1962), a plaintiff's case was dismissed by the trial court, *sua sponte*, for want of prosecution. The plaintiff argued that because Federal Rule of Civil Procedure 41(b) provided a means for defendants to move to dismiss when a plaintiff failed to abide by a court's rules or orders, *only* the defendant could make that motion. But the Supreme Court of the United States disagreed, holding that given how longstanding the rule was, and how many district courts relied on it to keep their dockets moving, it would "require a much clearer expression of purpose than Rule 41(b)" to get rid of it.

Link in many ways resembles today's case, down to the Supreme Court noticing that the rule seemed so essential, and so long accepted, that it had "long gone unquestioned," before rattling off a long list of state courts approving the practice in a footnote. *Id.* at 631. Georgia's rule has managed to go a few decades more without being questioned. It appears to have been taken as such a natural part of a court's function—like the ability to declare a recess—that there was no need to question its origin. *See e.g. State v. Grimes*, 194 Ga. App. 736, 737(1990) (affirming a trial court's power to dismiss a case, so long as it is without prejudice).

In federal criminal cases, this inherent power was codified in Federal

Rule of Criminal Procedure 48(b), under which trial courts have the discretion to dismiss the Government's case for want of prosecution, though they are only *required* to do so when the Defendant can make a showing that their constitutional speedy trial rights were violated. *See e.g. Mann v. United States*, 113 U.S. App. D.C. 27, 304 F.2d 394, 398 (1962) (holding that trial courts have the inherent authority to dismiss a case for want of prosecution, codified in Rule 48(b) even when they are only "moved by the plight of an accused unable to make bond.")

There was not time to do a full fifty state survey on the question, but it appears that quite a few states are in agreement that trial courts have the inherent power to dismiss criminal cases for want of prosecution:

1. Tennessee, *See State v. Austin*, No. W2004-01448-CCA-R3-CD, 2005 Tenn. Crim. App. LEXIS 264, at *6 (Crim. App. Mar. 22, 2005);
2. Hawaii: *State v. Mageo*, 78 Haw. 33, 36 (Ct. App. 1995);
3. Maine: *State v. Bowring*, 490 A.2d 667, 668 (Me. 1985);
4. Ohio: *State v. Stephens*, 52 Ohio App. 2d 361, 367, 370 N.E.2d 759 (1977);
5. New Jersey: *State v. Garthwaite*, 23 N.J.L. 143, 148 (1851) (surveying how states deal with prosecutorial delay, and pointing out Georgia as having the harshest remedy—acquittal—after a speedy trial demand);
6. Florida: *State v. Romano*, 300 So. 2d 22, 22 (Fla. Dist. Ct. App. 1974).
7. Wisconsin: *State v. Braunsdorf*, 98 Wis. 2d 569, 578 (1980) (holding that trial courts lack the inherent authority to dismiss a case *with* prejudice, but affirming the power to do so *without* prejudice);
8. Rhode Island: *State v. Grover*, 112 R.I. 649, 652, 314 A.2d 138, 139 (1974)

A few other states, have held that courts have the inherent power to dismiss in civil, but not criminal, cases, often for reasons that sound a lot like policy. For instance, in *People v. Guido*, 11 Ill. App. 3d 1067, 1069 (1973), the Illinois Court of Appeals upheld a trial court's inherent authority to dismiss civil cases, but held that criminal cases were simply different, because a dismissal would affect public safety and welfare, and because there was always a separate federal right to a speedy trial that the defendant could invoke. Texas, similarly, has held that courts lack the inherent power to dismiss the State's cases for want of prosecution because it does not "enable our courts to effectively perform their judicial functions and to protect their dignity, independence and integrity." *State v. Johnson,* 821 S.W.2d 609, 613 (Tex. Crim. App. 1991).

But the only authority *Johnson* cites for this proposition is an earlier Texas case, *State v. Anderson*, 119 Tex. 110, 26 S.W.2d 174 (Tex.Cr.App. 1930). That case held that a trial court may not dismiss an indictment with prejudice simply because the defendants have been acquitted of multiple counts within that indictment that necessarily decided the remaining counts, noting that at common law, the Attorney General had the "sole power" to enter a nolle prosequi. But what neither *Johnson* nor a Maryland case, *State v. Hunter*, 10 Md. App. 300, 304, 270 A.2d 343, 344 (1970), noted in relying on *Anderson* was that the Supreme Court of the United States has since held that a trial court may dismiss an indictment where an acquittal necessarily decides the central issues of that case. *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189 (1970). In *Ashe*, the Supreme Court held that a man acquitted of

robbing one poker player at a game could not later be indicted for robbing a second player when the first acquittal necessarily decided his innocence. In short, trial courts had the inherent power, under the Constitution, to issue exactly the kind of dismissal at issue in *Anderson*.

To summarize, the few cases that have held that trial courts lack this inherent authority talk more about policy issues, like public welfare or the job of the courts, than about the common-law history of the rule. And the one case relied on to provide more of a historical basis for that holding decided a totally separate issue—one that the Supreme Court of the United States would later differ on. To the extent that these few states have agreed with this "sole power" argument, it is far less compelling in Georgia because, Georgia, uniquely, vests all of the power of the District Attorney's office in the judicial branch. Ga. Const. Art. VI, § VIII, Para. I. A rule that deprived members of the judicial branch of the common law power to enter a *nolle prosequi* would deprive District Attorneys as well.

As the advisory committee notes, and every federal court has agreed, Federal Rule of Criminal Procedure 48(b) is simply "a restatement of the inherent power of the court to dismiss a case for want of prosecution." Fed. R. Crim. P. 48(b) Advisory Committee's Note to Subdivision (b). The Supreme Court of the United States has never questioned this. *See Carlisle v. United States*, 517 U.S. 416, 426 (1996) (cataloguing the inherent powers of federal courts but holding that sua sponte acquittal is not among them). And disaster has not followed in the wake of that holding.

It is clear that no state disclaims that trial courts have the inherent

authority to dismiss *some* cases. The only split of authority is whether that authority extends to cases brought by the Government. But given Georgia's long-standing view that such dismissals *are* appropriate, and the apparent agreement of the United States Supreme Court and every federal court in the country, there is no compelling reason to abandon the practice.

B. There are strong policy reasons to keep these dismissals for want of prosecution

The right to a speedy trial fixes one particular kind of problem: what to do when a defendant, through no fault of his own, is kept in jail for a few years awaiting trial and loses access to exculpatory evidence. But it does not fix another, more vexing problem: what to do when a defendant keeps showing up for arraignments and motions, and the State either isn't present or isn't ready? A judge could always, as some courts have suggested, hold a prosecutor in contempt. Or possibly attempt to force the State to go to trial on short notice. But neither of these solutions is fully satisfactory. By restricting the range of options courts have to restrict bad or dilatory behavior, we encourage it.

Take contempt, for instance. In many instances, it is a more extreme remedy than a dismissal without prejudice because it can mean, in a small county, that none of the State's cases might be prosecuted that day. There are thorny sovereign immunity questions that can crop up. *See In re Newlin*, 29 B.R. 781, 782 (E.D. Pa. 1983) (holding that sovereign immunity bars granting

of attorney's fees for contempt from the government). And, historically, such contempt findings have tended to provoke strong reactions from District Attorneys that are often not conducive to the swift administration of justice.

If the goal is to ease a trial court's workload and move cases swiftly, contempt, with its attendant hearings, appeals, and media coverage, seems unlikely to assist the court. Nor does it do much for the Defendant who will have to find childcare or take another week off work in the hopes that the State might be ready.

Similarly, the wholly separate remedy of dismissal with prejudice if a defendant's constitutional speedy trial rights are violated addresses a different problem and stems from a different source. Such dismissals are appropriate when a *defendant's* rights have been violated, and require a specific set of findings before the trial court has discretion to administer the remedy. But dismissals for want of prosecution are not primarily about the Defendant. They are about a Court's ability to smoothly run its business and punish bad behavior from litigants—even litigants with badges. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991) (holding that DWOP is simply part of a court's ability to fashion an appropriate sanction for conduct which abuses the judicial process). And, of course, the right to such dismissals far predates the multi-factor test for such constitutional speedy trial challenges. There is nothing in the language of *Barker v. Wingo* to suggest that the Supreme Court meant to limit a trial court's discretion to impose a less serious remedy in devising the test for the most serious remedy. *Barker v. Wingo*, 407 U.S. 514, 522 (1972).

There is also the possibility that a trial court might simply, if the State has showed up unprepared on the day of trial, push forward and empanel a jury. But this remedy is also largely ineffective, because the State's power to appeal, even at the last minute, and even without a certificate of immediate review, is so broad. *See*, for instance, OCGA 5-7-1 (a)(5) (allowing the State to appeal from any evidentiary ruling excluding evidence, so long as the prosecutor certifies it is not for the purpose of delay). If a ruling to go forward to trial without a witness that the State deems to be necessary is a ruling to exclude, then a trial court can *never* force the State go to trial against its will simply because it forgot to issue subpoenas.

Only this dismissal without prejudice remedy provides the short, sharp shock that the State often needs to get its case together, and, in the meantime, to free the Defendant from all the non-punitive-but-still-awful pretrial burdens of bond conditions or worse yet, pretrial detention.

And although this case hinges on the notion that the State would be bereft of its ability to bring charges again in the wake of such an order if the statute of limitations has run, this concern is muted in a few ways. First, such a dismissal may very well still provide the State with six months to bring the charges again under OCGA 17-3-3. Second, many of the most serious crimes in Georgia now either have no statute of limitations so long as there is some DNA evidence, or have extremely long statutes of limitations that are unlikely to run unless the State is extraordinarily dilatory. *See* OCGA 17-3-1 (d).

Federal courts, despite longstanding respect for the Department of Justice, appear to function quite effectively despite a centuries-old common-law rule that even the government's case may be dismissed for want of prosecution. So have Georgia courts. If the State is prepared to come to court ready to try its cases, it is unlikely to notice the rule even exists. And on the rare occasions that a judge does impose this sanction, it will likely be, as in this case, richly earned.

C, The stare decisis interest counsel against eliminating the inherent power of the courts

This is not a constitutional issue. Whatever this court decides, the General Assembly may change. "Even those who regard 'stare decisis' with something less than enthusiasm recognize that the principle has even greater weight where the precedent relates to interpretation of a statute." *Etkind v. Suarez*, 271 Ga. 352, 358 (1999). Even if Georgia courts, and federal courts, and quite a few state courts were *all* mistaken when they found an inherent right to dismiss criminal cases for want of prosecution, "Our institutional duty is to follow until changed the law as it now is, not as some Members of the Court might wish it to be." *Id* at 358.

We can recognize that *stare decisis* is not an "inexorable command" while still seeing that this is a rule that has worked, without apparent administrative problems, in thousands of courts nationwide for hundreds of years. *See Herring v. State*, 119 Ga. 709, 719 (1904) (noting, in passing, that a

magistrate had dismissed a criminal case for want of prosecution without questioning whether it had that inherent power). Nor is it obvious in this case that the reasoning of all of these opinions finding that courts have this inherent power is in some sense, fatally flawed. Common law is the accumulation of customs, and while some courts have favored special treatment for government litigants, a majority of others have found, as a matter of custom, that courts retain their inherent power to sanction them.

Nor does there seem to be any evidence that the current rule is "unworkable." On some rare occasions, prosecutors will persist in being unprepared for court, and will, as a result, have to refile their charging instrument to get the case moving again. This will be most burdensome not in serious felony cases, where the statute of limitations is unlikely to run, but in traffic offenses and other misdemeanors where the time to charge is short and the volume of cases heavy.

As for a special reliance interest, there doesn't seem to be any especially strong argument for it here. There's nothing in the record, or our research, to show how common dismissals without prejudice for want of prosecution are. It is simply useful as one of a number of deterrents—running from getting yelled at to getting sanctioned—to make sure people show up for court ready to press their case.

Ultimately, this rule is not broken. It does not seem to create problems. It is broadly adopted, nationwide. There are no compelling reasons to think that courts were reasoning incorrectly when they continued, without question, to use this inherent power of the courts. This Court, having come

across a fence that has stood for hundreds of years, should not lightly tear it down.

Respectfully submitted this 14th day of July, 2021.

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SARA WALKER,	*	
	*	Docket No. S20G1471
VS.	*	
	*	
THE STATE OF GEORGIA,		*
Defendant.	*	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the within and foregoing pleading via U.S. Mail with first-class postage upon the following parties:

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