

**In The
Supreme Court of the United States**

— ♦ —
JOHN JOSEPH CARVALHO, II,
Petitioner,

v.

NORTH CAROLINA,
Respondent.

— ♦ —
**ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA**

— ♦ —
**BRIEF OF *AMICI CURIAE* THE NORTH CAROLINA
ADVOCATES FOR JUSTICE AND NORTH CAROLINA
PRISONER LEGAL SERVICES, INC.
IN SUPPORT OF PETITIONER**

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- Andrew M. Siegel, *When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land Time Forgot*, 32 Am. J. Crim. L. 325 (2005) 5, 6
- Laura Sullivan, *Inmates Who Can't Make Bail Face Stark Options*, Nat'l Pub. Radio (Jan. 22, 2010), <http://www.npr.org/templates/story/story.php?storyId=122725819> 14

INTEREST OF *AMICI CURIAE*¹

The North Carolina Advocates for Justice (NCAJ) is a professional association of more than 2,700 North Carolina attorneys. More than 600 of its members belong to its Criminal Defense Section. A primary purpose of NCAJ is the advancement and protection of the constitutional rights of individuals, including those accused of crimes. In furtherance of its mission, NCAJ regularly participates in the legislative process, prepares resource materials, conducts continuing legal education seminars, and appears as *amicus curiae* before state and federal courts.

North Carolina Prisoner Legal Services, Inc., is a non-profit law firm that contracts with the North Carolina Office of Indigent Defense Services to assist in providing inmates with constitutionally meaningful access to the courts. Its attorneys represent defendants in post-conviction litigation in cases where the defendant has a constitutional or statutory challenge to his conviction or sentence.

SUMMARY OF THE ARGUMENT

In *Barker v. Wingo*, 407 U.S. 514, 529 (1972), the Court held that speedy trial claims brought under the Sixth Amendment to the Constitution of the

¹ This brief was written entirely by counsel for *amici*, as listed on the cover. No counsel for either party authored this brief in whole or in part, and neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the members of the organizational *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have given written consent to the filing of this brief, and those documents have been filed with the Clerk's Office.

United States should be evaluated with a four-part balancing test that “places the primary burden on the courts and the prosecutors to assure that cases are brought to trial.” The four factors – “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant” – call for a “a difficult and sensitive balancing process[.]” *id.* at 530, 533, but the analysis was never intended to lessen the government’s responsibility to try cases promptly, *see id.* at 529. The North Carolina Court of Appeals and Supreme Court have misapplied *Barker* and its progeny to the detriment of the Sixth Amendment rights of Mr. Carvalho and other defendants throughout North Carolina.

Before and after *Barker* was decided, the Court taught that the Sixth Amendment right to a speedy trial

has universally been thought essential to protect at least three basic demands of criminal justice in the Anglo-American legal system: “(1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation and (3) to limit the possibilities that long delay will impair the ability of an accused to defend himself.”

Smith v. Hooey, 393 U.S. 374, 377–78 (1969) (footnote omitted) (quoting *United States v. Ewell*, 383 U.S. 116, 120 (1966)). Those ills are not diminished because delays are routine in a jurisdiction and affect many defendants. *Cf. Vermont v. Brillon*, 556 U.S. 81, 94 (2009) (noting that delays because of systemic problems with indigent defense services can be held against the State in speedy trial analysis).

Despite this Court’s clear teaching in *Barker* and its predecessors that delays are not permissible under the Sixth Amendment simply because they are routine, and that a defendant does not have to prove how he was prejudiced, the North Carolina Court of Appeals denied the petitioner relief because he did not show that the delays in his case were the result of the respondent’s negligence or willfulness and because he did not show “affirmative proof of prejudice.” *See State v. Carvalho*, 777 S.E.2d 78, 85 (N.C. Ct. App. 2015), *aff’d*, 794 S.E.2d 497 (N.C. 2016) (per curiam).² Unless this Court grants the petition and corrects the errors below, courts in North Carolina will continue to prevent defendants from vindicating their Sixth Amendment right to a speedy trial.

ARGUMENT

I. REQUIRING PETITIONER TO PROVE NEGLIGENCE OR WILLFULNESS IS IMPRACTICABLE UNDER NORTH CAROLINA LAW AND CONTRARY TO *BARKER*

In *Barker*, the Court held that the right to a speedy trial means that courts and prosecutors have “the primary burden . . . to assure that cases are brought to trial.” 407 U.S. at 529. The Court recognized that there was “a large backlog of cases in urban courts” but did not hold defendants responsible for administrative delays that they did not cause. *See id.* at 519, 531. As the Court explained, “Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state’s

² As petitioner states, certiorari is properly directed to the North Carolina Supreme Court’s judgment dismissing the appeal. *See Grady v. North Carolina*, 135 S. Ct. 1368, 1370 n.* (2015) (per curiam).

fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority.” *Doggett v. United States*, 505 U.S. 647, 657 (1992). In North Carolina, the government is gambling with the interests of an alarming number of defendants while preventing them from proving their losses.

A. Long Delays Are a Matter of Course in Criminal Prosecutions in North Carolina

Mr. Carvalho is not the only defendant waiting years for a case to be resolved: in fiscal year 2015-2016, there were 9,666 felony cases pending in North Carolina superior courts between 366 and 545 days, 5,610 felony cases pending between 546 and 730 days, and 10,915 felony cases that were pending 731 days or more. N.C. Admin. Office of the Courts, *Criminal/Infraction Case Activity Report by County*, N.C. Ct. Sys., http://www.nccourts.org/Citizens/SRPlanning/Statistics/CARReports_fy15-16.asp (select “Criminal/Infraction Case Activity Report by County”) (last visited Apr. 2, 2017).³ All of those delays were long enough to be presumptively prejudicial under *Barker*’s first prong. *See Doggett*, 505 U.S. at 652 n.1.

Delays are not confined to murder cases. As of March 2017, 316 murder cases had been pending in North Carolina superior courts for more than 730 days, and 17,488 other felonies had been pending for more than 545 days. N.C. Admin. Office of the

³ The source does not indicate whether one case refers to one charged offense or multiple charged offenses that are resolved together. *See* N.C. Admin. Office of the Courts, *Case Activity Reports – Fiscal Year 2015-2016*, N.C. Ct. Sys., http://www.nccourts.org/Citizens/SRPlanning/Statistics/CARReports_fy15-16.asp (last visited Apr. 3, 2017).

Courts, *Superior Court Criminal – State Totals*, N.C. Ct. Sys., <http://www1.aoc.state.nc.us/cpms/login.do> (select “Enter”; select “Criminal” hyperlink under Superior Court; select hyperlink to statistical data) (last visited Apr. 3, 2017). The median age of a pending charge for first-degree rape in North Carolina superior courts is 387 days, and the median age of a pending charge for intentional child abuse inflicting serious injury is 395 days. N.C. Admin. Office of the Courts, *Felony Case Activity Report*, N.C. Ct. Sys., http://www.nccourts.org/Citizens/SRPlanning/Statistics/CARports_fy15-16.asp (select “Felony Case Activity Report”) (last visited Apr. 2, 2017).

B. North Carolina’s Prosecutors Have an Unusual Level of Control over Criminal Calendars and Are Unconstrained by a Speedy Trial Statute

Doggett’s reminder not to make defendants pay the price for prosecutors’ delay is especially salient in North Carolina, where “[t]he district attorney shall prepare the trial dockets.” N.C. Gen. Stat. § 7A-61 (2015). North Carolina’s criminal calendar-ing system has long been an outlier: “Sometime in the first half of the Twentieth Century, the institution of prosecutorial control of the docket began to fade away.... By the 1960s, prosecutorial control of criminal court dockets was in wide retreat through most of the nation.” Andrew M. Siegel, *When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land Time Forgot*, 32 Am. J. Crim. L. 325, 336-37 (2005) (footnote omitted). In contrast, North Carolina gave prosecutors “full statutory authority to set the criminal court calendar” until 2000. *Id.* at 341; *see also State v. Smith*, 607 S.E.2d 607, 625-26 (N.C. 2005) (Brady, J.

concurring) (describing history of prosecutorial control over calendar in North Carolina), *cert. denied*, 546 U.S. 850 (2005). In the 1990s, the situation in Durham County was so severe that “retired judges, former prosecutors, defense attorneys and . . . defendants” attested to prosecutorial abuse of calendaring practices in civil litigation raising federal due process claims and state constitutional claims. See *Simeon v. Hardin*, 451 S.E.2d 858, 864 (N.C. 1994) (reversing trial court’s dismissal of federal and state constitutional claims and remanding for further proceedings). *Simeon* prompted public discussions of calendaring practices in North Carolina and led to North Carolina’s current regime. See Siegel, *supra*, at 342.

Under current North Carolina law, after a defendant is indicted for a felony and initial matters are handled at administrative sessions, the trial court gives a tentative trial date for a case. N.C. Gen. Stat. § 7A-49.4(b) (2015). At least ten days before that tentative trial date, the district attorney shall publish a trial calendar listing “the cases in the order in which the district attorney anticipates that they will be called for trial.” N.C. Gen. Stat. § 7A-49.4(e) (2015). On the trial date, “[t]he district attorney, after calling the calendar and determining cases for pleas and other dispositions, shall announce to the court the order in which the district attorney intends to call for trial the cases remaining on the calendar.” N.C. Gen. Stat. § 7A-49.4(f) (2015).

In practice, North Carolina’s criminal calendaring statute “vests the prosecutor with considerable authority over the calendaring of criminal cases for trial. The authority to calendar cases is a powerful tool, which may be subject to abuse.” 1 John Rubin & Alyson A. Grine, *North Carolina*

Defender Manual 7-23 (2d ed. 2013) (citations omitted), <http://defendermanuals.sog.unc.edu/pretrial/7-speedy-trial-and-related-issues>. There are several ways in which prosecutors can delay cases:

by failing to call particular cases and thus subjecting defendants to excessive pre-trial detention or multiple futile trips to court; by calendaring far more cases than can possibly be heard in a session, leaving defense lawyers unable to predict the trial schedule or adequately prepare for trial; and altering the calendar with inadequate notice to defendants and their attorneys.

Id. These concerns are not academic. *See, e.g., State v. Washington*, 665 S.E.2d 799, 804 (N.C. Ct. App. 2008) (noting “overwhelming evidence that the actual reason for the [four year and nine month] delay in this case was not a neutral factor, but rather, was repeated neglect and underutilization of court resources on the part of the Durham County District Attorney’s Office”).

North Carolina’s system contrasts sharply with the American Bar Association’s recommendations: “Control over the trial calendar, and over all other calendars on which a case may be placed, should be vested in the court. The court should exercise responsibility for case scheduling and for the expeditious resolution of all cases beginning at the time of first appearance” ABA Standards for Criminal Justice: Speedy Trial and Timely Resolution Cases 12-4.5 (Am. Bar Ass’n 2006).

North Carolina is also unusual in that it has no speedy trial act. *See* N.C. Gen. Stat. § 15A-701 *et seq.* (repealed 1989) (2015); 5 Wayne LaFave et al., *Criminal Procedure* § 18.3(c) (4th ed. 2015) (“In addition,

all but a few states have adopted statutes or rules of court on the subject of speedy trial.”). Claims under North Carolina’s state constitutional guarantee of a speedy trial are resolved based on the *Barker* factors, albeit with the troublesome burdens imposed on the petitioner here. See N.C. Const. art. I, § 18; *State v. Tindall*, 242 S.E.2d 806, 809 (1978) (citing *Barker*, 407 U.S. 514). Without a speedy trial act or state constitutional guarantees that exceed federal protections, and with defense counsel having no real input into calendaring cases, the Sixth Amendment right to a speedy trial is the only protection defendants have from unconstitutional delays.

C. The Combination of Prosecutorial Control of the Calendar and Routine Delay Results in Scenarios that *Barker* Was Intended to Prevent

Barker depended on the premise that it is not the defendant’s job to administer courts efficiently. See *Barker*, 407 U.S. at 529. Instead, the Court “place[d] the primary burden on the courts and the prosecutors to assure that cases are brought to trial.” *Id.* Purely administrative delays weigh less against the government than deliberate ones, but the government has “ultimate responsibility” for “negligence or overcrowded courts.” *Id.* at 531. Yet the North Carolina Court of Appeals held that “[a] defendant must demonstrate the delay stemmed from either negligence or willfulness on the part of the State. Ordinary or reasonable delays do not create prejudice.” *Carvalho*, 777 S.E.2d at 78 (citations omitted); see also *State v. Hughes*, 282 S.E.2d 504, 506 (N.C. Ct. App. 1981) (“Our courts have consistently recognized congestion of criminal court dockets as a valid justification for delay.”).

The North Carolina Court of Appeals and Supreme Court have placed defendants in a dilemma that *Barker* was meant to prevent. The normal course of business in North Carolina is delay: as of March 2017, there were 17,488 non-murder felonies pending for more than 545 days. N.C. Admin. Office of the Courts, *Superior Court Criminal – State Totals*, *supra*; see also, e.g., *State v. Strickland*, 570 S.E.2d 898, 903 (N.C. Ct. App. 2002) (denying speedy trial claim where “the long period of defendant’s pre-trial incarceration [940 days] was the result of a prosecutorial backlog of other serious felony cases”), *cert. denied*, 602 S.E.2d 679 (N.C. 2003). If a defendant is one of the many people whose case has been pending for months or years, then the government is well-positioned to say that the delay is normal practice, not prosecutorial negligence or willfulness, and therefore permissible under *Barker*’s second prong as interpreted by North Carolina courts. See *Carvalho*, 777 S.E.2d at 84; see also *State v. Spivey*, 579 S.E.2d 251, 255 (N.C. 2003) (holding that there was no speedy trial violation where “[t]he State made a showing . . . that the dockets were clogged with murder cases”). The Court of Appeals’ holding below that there was no speedy trial violation despite an almost-nine-year delay is the disturbing but predictable result of North Carolina’s law and common practices. See *Carvalho*, 777 S.E.2d at 84; *Spivey*, 579 S.E.2d at 262 (Brady, J., dissenting) (“Does the potential cutoff point for pretrial delays even exist, if the day should come when our state’s courts become so backlogged that seven- or even nine-year delays are accepted as commonplace? What becomes of the individual who gets caught up in the judicial quagmire, through no fault of his own, and winds up spending two years in jail awaiting trial for an of-

fense that carries a maximum prison sentence of twenty-four months?”).

Even if there were prosecutorial negligence or willfulness, North Carolina law makes it difficult for defendants to prove it. Although North Carolina has open file discovery, N.C. Gen. Stat. § 15A-903 (2015), the State does not have to provide defense attorneys with prosecutors’ work product, including “records, correspondence, reports, memoranda, or trial preparation interview notes” that might explain why the prosecutor chooses to calendar cases in a certain order, N.C. Gen. Stat. § 15A-904(a) (2015). Public records laws explicitly exempt prosecutorial work product from disclosure. *See* N.C. Gen. Stat. § 132-1.9(g) (2015).

Despite the difficulties of proving that the government is acting negligently or willfully, and the well-documented problems of trial courts’ dockets in North Carolina, Mr. Carvalho and similarly situated defendants cannot rely on a fact that, without further explanation, should be persuasive evidence of prejudice: a case has languished on the docket for years. *See Carvalho*, 777 S.E.2d at 84. As a result, defendants experience the harms that this Court has recognized and tried to avoid for decades through *Barker* and its progeny. *See Barker*, 407 U.S. at 531.

II. REQUIRING DEFENDANTS TO GIVE AFFIRMATIVE PROOF OF PREJUDICE PLACES AN IMPERMISSIBLY HIGH BURDEN ON DEFENDANTS, DESPITE EVIDENCE THAT PRETRIAL DELAYS ARE GENERALLY HARMFUL

The Court has consistently taught that the right to a speedy trial has several goals: “(1) to prevent undue and oppressive incarceration prior to trial,

(2) to minimize anxiety and concern accompanying public accusation and (3) to limit the possibilities that long delay will impair the ability of an accused to defend himself.” *Smith*, 393 U.S. at 377–78 (quoting *Ewell*, 383 U.S. at 12). *Barker* relied on those concerns when it made prejudice to the defendant one of the four prongs for analyzing a speedy trial claim. See *Barker*, 407 U.S. at 530, 532 n.33 (collecting cases, including *Ewell*, 383 U.S. at 120). The Court emphasized again in *Doggett*, 505 U.S. at 655, that the loss of memory and evidence before trial is intrinsically difficult to prove. Accordingly, the Court taught that “excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove.” *Id.*

Despite the clear language in *Barker*, North Carolina courts require defendants to prove how they were harmed by delays in a case. See *Carvalho*, 777 S.E.2d at 85. Forcing North Carolina defendants to satisfy an impossible burden of proof violates their Sixth Amendment rights.

A. Pretrial Delays and Detention Affect Thousands of Defendants in North Carolina, but the Harms Are Difficult to Prove in Any One Case

Pretrial detention is common in North Carolina, where 18,520 inmates were in local jails as of 2013. Nat’l Inst. of Corrs., *Corrections Statistics by State*, Nat’l Inst. of Corrections, <https://nicic.gov/statestats/default.aspx?st=NC> (last visited Apr. 3, 2017). Although there is no publicly available, state-wide data indicating how many of those in jail are pretrial detainees, one study of six counties representing 10.3% of North Carolina’s population found that 67% of inmates were being held before trial. John Clark

et al., *Upgrading North Carolina's Bail System: A Balanced Approach to Pretrial Justice Using Legal and Evidence-Based Practices*, N.C. Commission on the Admin. of Law & Just., 12 (Aug. 15, 2016), <https://nccalj.org/wp-content/uploads/2016/10/Upgrading-NCs-Bail-System-PJI-2016-003.pdf>. That finding accords with national findings. See Todd D. Minton & Zhen Zeng, *Jail Inmates at Midyear 2014*, Bureau of Just. Stats., 1 (May 2013), <https://www.bjs.gov/content/pub/pdf/jim14.pdf> (“[A]bout 6 in 10 inmates were not convicted, but were in jail awaiting court action on a current charge....”). If even half of the inmates in North Carolina’s jails are awaiting trial and North Carolina’s jail population has not grown in the past four years, then more than 9,000 jail detainees are now awaiting trial in North Carolina. Many of those detainees, particularly people of color, are likely in jail because they cannot afford to post a bond. Cf. Cynthia E. Jones, “*Give Us Free*”: *Addressing Racial Disparities in Bail Determinations*, 16 Legis. & Pub. Pol’y 919, 935, 941 (2013) (describing national studies of pretrial detainees and racial and ethnic disparities in detainees’ ability to post bond).

Since *Barker*, there has been a wealth of research into the negative effects of pretrial delays on jail inmates’ cases. See *id.* at 936-38. Not surprisingly, defendants who are detained before trial “face a much greater prospect of incarceration and receive longer prison sentences than released defendants with similar charges and a similar criminal history.” *Id.* Defendants who are detained before trial also risk losing their employment and becoming isolated from family and friends. See *United States v. Marion*, 404 U.S. 307, 320 (1971). As the Court has recognized, the longer a person has to wait in jail before

trial, the more difficult it is to defend his case and prepare for life after leaving custody. *See Doggett*, 505 U.S. at 657; *Barker*, 407 U.S. at 520. In North Carolina and across the nation, being in jail is itself a safety risk. *See Jones, supra*, at 937; Ron Gallagher *et al*, *17-year-old Durham Murder Suspect Found Dead in Her Jail Cell*, News & Observer (Mar. 23, 2017), <http://www.newsobserver.com/news/local/crime/article140270603.html>.

Despite this Court’s clear teachings in *Barker* and *Doggett*, the holding below incorrectly required the petitioner, and other defendants, to produce “affirmative proof of prejudice.” *Carvalho*, 777 S.E.2d at 85. This holding makes little logical sense, because it is difficult to point to the evidence that might have been used during investigation or trial but is no longer available. *Barker*, 407 U.S. at 532.

The holding is also problematic because proving how a defendant would have fared in a court system without systemic delays requires the defendant to point to counterfactuals that by definition do not happen and are not documented. A defendant could not produce any affirmative proof that the prosecutor would have offered a certain plea deal if the disposition process were faster, for example, and the great deference to prosecutors makes it difficult to predict what they would do under different circumstances. *See Wayte v. United States*, 470 U.S. 598, 607 (1985). Defense attorneys would have an even harder time proving how any specific employment opportunity would have turned out differently if a case had been resolved sooner, yet such practical consequences are legally relevant and well-documented by researchers who are not operating within the constraints of the criminal justice system. *See Barker*, 407 U.S. at 532-33; *Jones, supra*, at 937-

38. This Court recognizes that proving the harm of delay is not always feasible, and North Carolina courts should do the same. *See Doggett*, 505 U.S. at 656; *Barker*, 407 U.S. at 532.

Particularly for the many defendants who are detained before trial because they cannot afford bond and cannot persuade a prosecutor to proceed more quickly under North Carolina’s calendaring regime, the only options may be making a speedy trial motion or accepting a plea deal. Of course, if speedy trial law gives defendants an impossibly heavy burden, the pressure to plead guilty regardless of the facts of a case becomes extreme. *Cf.* Laura Sullivan, *Inmates Who Can’t Make Bail Face Stark Options*, Nat’l Pub. Radio (Jan. 22, 2010), <http://www.npr.org/templates/story/story.php?storyId=122725819> (describing pre-trial detainees’ rationales for pleading guilty despite believing in their factual innocence). Knowing the consequences of pretrial delays, this Court has not given defendants the burden of proving harm from long pretrial delays. *See Doggett*, 505 U.S. at 655. The North Carolina Supreme Court erred when it affirmed a decision incorporating that burden into the *Barker* inquiry.

B. The Harms of Pretrial Delays Are Not Evenly Distributed in North Carolina

This Court’s speedy trial cases reflect “the general concern that all accused persons be treated according to decent and fair procedures.” *Barker*, 407 U.S. at 519. Just as other parts of the Sixth Amendment set a constitutional minimum that every local jurisdiction must meet, *see, e.g., Strickland v. Washington*, 466 U.S. 668, 685 (1984), the Sixth Amendment sets a minimum standard for the right to a speedy trial that ought to apply everywhere in North

Carolina, *see Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (“We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment.”).

In reality, the pace of trials across North Carolina is uneven and can dip well below the floor that this Court has set. *See* N.C. Admin. Office of the Courts, *Criminal/Infraction Case Activity Report by County*, *supra* (providing data by county on age of pending and disposed cases). One striking disparity is that less populous counties appear to be more affected by delays than more populous counties. *See id.* Of the ten counties with the longest median age of pending cases, none are among the ten most populous counties. Seven are among the twenty least populated counties. Graham County, which has the third smallest population in the state, has the longest median age of pending superior court cases, 775 days. Mecklenburg County, the largest county in the state, has a median age of pending superior court cases of only 161 days, and Wake County, home to North Carolina’s capital, has a median age of pending superior court cases of 199 days. *Id.*; 2015 Certified County Population Estimates – Ranked by Size, N.C. Office of State Mgmt. & Budget (Sept. 19, 2016), <https://www.osbm.nc.gov/demog/county-estimates> (select “Ranked by Size” under “Certified 2015”).

Under North Carolina law, the differences across counties have a pernicious consequence: if a defendant in Graham County who has had charges pending for two years – still less than the median length of pending charges in that county – raises a speedy trial claim, the delay might well seem typical to a local trial court. If a defendant in Wake County who has had charges pending for the exact same time makes

a speedy trial claim, however, the Wake County defendant can point to an unusual deviation from the norm. See N.C. Admin. Office of the Courts, *Criminal/Infraction Case Activity Report by County*, *supra*. Although speedy trial claims cannot be resolved only by comparing the length of delays, *Barker*, 407 U.S. at 530, local jurisdictions' norms have an important effect on how trial and appellate courts resolve speedy trial claims, *see, e.g., Strickland*, 570 S.E.2d at 903 (denying speedy trial claim where "the long period of defendant's pretrial incarceration was the result of a prosecutorial backlog of other serious felony cases"); *State v. Hammonds*, 541 S.E.2d 166, 174 (N.C. Ct. App. 2000) (holding that there was no speedy trial violation in part because "the local docket was congested with capital cases"), *aff'd*, 554 S.E.2d 645 (2001) (per curiam), *cert. denied*, 536 U.S. 907 (2002).

It would be bizarre if defendants in North Carolina have more or less extensive rights under the Sixth Amendment because different counties' dockets have different degrees of backlog. Defendants in any county are harmed by long pretrial delays, and they should have the same protection under the Sixth Amendment. By correcting the erroneous holding below that a defendant must present affirmative proof of how a delay harmed him, *Carvalho*, 777 S.E.2d at 85, this Court can ensure that all North Carolinians' Sixth Amendment rights are protected.

CONCLUSION

This Court's speedy trial jurisprudence has relied for decades on several key premises: states have a responsibility to manage their dockets efficiently, *see Barker*, 407 U.S. at 531, and pretrial delays hurt defendants in ways that they cannot always demonstrate, *see Doggett*, 505 U.S. at 655. The North Carolina Court of Appeals and Supreme Court have interpreted the Sixth Amendment contrary to those premises and this Court's holdings in *Barker* and *Doggett*. Mr. Carvalho was given an impractical and impermissible burden that this Court should remove.

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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Dated: April 5, 2017

APPENDIX

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N.C. Admin. Office of the Courts, <i>Superior Court Criminal – State Totals</i> , N.C. Ct. Sys., http://www1.aoc.state.nc.us/cpms/login.do (select “Enter”; select “Criminal” hyperlink under Superior Court; select hyperlink to statistical data) (last visited Apr. 3, 2017)	1a

SUPERIOR COURT CRIMINAL – STATE TOTALS

Data are current as of March 2017

CASES (past 12 months)

	Begin Pending	Total Filed	Total Disposed	Disposed as % Filed	Total End Pending
Murder:	1,157	688	552	80%	1,293
Other Felonies:	100,877	108,296	123,360	114%	85,813
Misdemeanors:	10,685	15,678	14,819	95%	11,544
Misdemeanor Appeals:	11,104	11,271	12,514	111%	9,861

Disposed Cases by Age (past 12 months)

	Number of Days						Total
Murder:		0 - 90	91 - 180	181 - 365	366 - 730	> 730	
	#	73	13	83	117	266	552
	No guidelines exist at this time						
Other Felonies:		0 - 120	121 - 180	181 - 365	366 - 545	> 545	
	#	37,773	13,713	28,514	13,939	29,421	123,360
	%	31	11	23	11	24	
Misdemeanors:		0 - 120	121 - 180	181 - 365	366 - 545	> 545	
	#	5,943	1,881	3,537	1,507	1,951	14,819
	%	40	13	24	10	13	
Misdemeanor Appeals:		0 - 180	> 180				
	#	5,121	7,393				12,514
	%	41	59				

Pending Cases by Age (as of March 2017)

	Number of Days						Total
Murder:		0 - 90	91 - 180	181 - 365	366 - 730	> 730	
	#	166	125	297	389	316	1,293
	No guidelines exist at this time						
Other Felonies:		0 - 120	121 - 180	181 - 365	366 - 545	> 545	
	#	28,987	9,462	20,158	9,718	17,488	85,813
	%	34	11	23	11	20	
Misdemeanors:		0 - 120	121 - 180	181 - 365	366 - 545	> 545	
	#	4,218	1,330	2,718	1,113	2,165	11,544
	%	37	12	24	10	19	
Misdemeanor Appeals:		0 - 180	> 180				
	#	4,258	5,603				9,861
	%	43	57				