A PERFECT STORM: PROSECUTORIAL CALENDAR CONTROL AND THE RIGHT TO A SPEEDY TRIAL IN THE NORTH CAROLINA CRIMINAL COURT SYSTEM

In the North Carolina criminal court system, criminal defendants are subjected to a "perfect storm" of procedural deficiencies that leave them exposed to undue delays between indictment and trial and without sufficient avenues for remedy. The current trial calendaring scheme allows prosecutors to leverage their calendaring authority to the detriment of defendants. The absence of a speedy trial statute leaves defendants without a concrete tool to challenge excessive delays. Defendants instead must litigate their speedy trial claims in court. Unfortunately for criminal defendants, the North Carolina Supreme Court's development of a burden-shifting speedy trial analysis forces defendants to prove that prosecutors are willfully or negligently delaying a case. All of these procedural realities combine to leave defendants with scant protection against abuses of prosecutorial calendar control. Several possible statutory solutions exist, however, to combat this perfect storm and ensure criminal defendants in North Carolina are given access to justice without delay.

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I. INTRODUCTION

During the 2017–2018 fiscal year, 131,101 criminal cases were filed in superior courts across North Carolina, and 1,387,735 were filed in district courts.[1] In the same time period, superior courts and district courts disposed of 156,754 and 1,637,419 criminal cases, respectively.[2] The underlying charges ranged from the mildest Class 3 misdemeanor to the most serious Class A felony and involved all manner of circumstances, situations, and actors.[3] Despite the variations, all of these cases shared a common thread: at one point, each case was placed on a trial court's calendar.[4] In other words, the case was assigned a date and time for the matter to be resolved in court.[5] This function is so basic to a system of adjudication that it feels almost automatic, a reflexive component of the daily processes that bind a court system together.[6] And yet this deceptively simple function can grant the decision-maker, the person who creates the calendar and decides the timeline for hearing cases, tremendous power over the ultimate resolution of a case.[7]

In North Carolina criminal procedure, there is a precarious crossroads between control of the calendar and the right to a speedy trial, which leaves criminal defendants exposed to excessive and undue delays between indictment and trial. Trial calendars in superior courts across the state are prepared and published by prosecutors, subject to certain constraints and oversight by the court.[8]

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1. N.C. JUD. BRANCH, STATISTICAL AND OPERATIONAL REPORT OF THE NORTH CAROLINA TRIAL COURTS 3, 6 (2018), https://www.nccourts.gov/assets/documents/publications/2017-18_trial_courts_statistical_and_operational_report.pdf.

2. *Id.*

3. *Id.*

4. *Id.* at 5, 7. *See generally Criminal Calendars*, N.C. JUD. BRANCH, http://www1.aoc.state.nc.us/www/calendars/Criminal.html (last visited Apr. 1, 2021) (providing a current database with the criminal calendar of each county in North Carolina).

5. *See* 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, 331–32 (2005) (describing the historical development of criminal docket control in the U.S.).

6. *Id.* at 330.

7. N.C. DEFENDER MANUAL VOL. 1 PRETRIAL 7-29 (John Rubin ed., 2019), https://defendermanuals.sog.unc.edu/pretrial/7-speedy-trial-and-related-issues.

8. N.C. GEN. STAT. § 7A-49.4(e) (2020); *see* John Rubin, *1999 Legislation Affecting Criminal Law and Procedure*, ADMIN. JUST. BULL., Oct. 1, 1999, at 10, https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/aoj9905crim legislation.pdf.

While prosecutors are technically not in complete and exclusive control of the calendar, they do retain substantial power to determine which cases are called during a trial session and in what order they are called.[9] The prosecutor can choose to exclude cases from the official trial calendar, even if the case was previously scheduled during an administrative setting for that court session.[10] If a case is removed from a trial calendar by the prosecutor, there is no statutory guidance regarding how and when the case is to be rescheduled.[11] These opportunities for prosecutorial discretion during the final preparation and publication of trial calendars are the focus of this Comment.

Prosecutorial calendar control is often considered problematic by practitioners and scholars due to the potential for the prosecutor to abuse their authority and leverage the calendar over the defendant.[12] The primary situation envisioned by critics involves the manipulation of the trial calendar resulting in a three-, four-, sometimes five-year or longer delay in the resolution of a case.[13] Some of those concerns could be alleviated by the Sixth Amendment, which guarantees the right to a speedy trial.[14] Unfortunately for criminal defendants in North Carolina, there is currently no statutory scheme codifying the right to a speedy trial (unlike the federal government and other states such as, New York).[15] While the lack of codification does not mean a defendant is without protection, the absence of statutory guidelines forces trial judges to engage in ad hoc analysis when evaluating each speedy trial claim.[16] Trial judges must apply a four-part balancing test, the contours of which are defined exclusively through case law,

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9. § 7A-49.4(e); *see* Rubin, *supra* note 8, at 10 ("A prosecutor may have the discretion, however, not to put on the calendar all of the felony cases scheduled for that session. G.S. 7A-49.4(e) states that the calendar 'should not contain cases that the district attorney does not reasonably expect to be called for trial.' This language may mean only that in proposing trial dates at the final administrative setting, prosecutors should endeavor not to schedule too many cases for any particular session. In addition, it may mean that in preparing the calendar prosecutors have the responsibility to remove felony cases that cannot reasonably be reached. (A prosecutor may not have the authority to drop a case, however, if the court has set a definite trial date under new G.S. 7A-49.4(c), discussed above.)").

10. N.C. GEN. STAT. § 7A-49.4(b) (2020); *see also* Rubin, *supra* note 8, at 10.

11. *See* Rubin, *supra* note 8, at 11.

12. *See infra* Subpart II.B. *See generally* Siegel, *supra* note 5 (describing the historical development of criminal docket control in the U.S.).

13. *See* Siegel, *supra* note 5, at 342–43.

14. U.S. CONST. amend. VI.

15. *See* 18 U.S.C. §§ 3161–74; *see, e.g.*, N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2019).

16. *See infra* Subpart II.C.

consuming the valuable time of judges in a system that is already stretched to the breaking point.[17]

A few legal articles have explored prosecutorial calendar control around the country or in other states like South Carolina. Other articles have discussed the right to a speedy trial in North Carolina. This Comment examines the intersection of the two concepts and the resulting impact on North Carolina criminal defendants. Based on this analysis, this Comment warns that prosecutorial exploitation of calendaring authority has overcome the relatively weak protections for the right to a speedy trial in North Carolina, thereby posing an increased threat to defendants.

Further, this Comment advocates for a revision of the current calendaring statute for superior courts in North Carolina and renewed statutory protection for the right to a speedy trial. Part II sets the stage by recounting the history of criminal court calendaring in North Carolina, briefly discussing potential abuses of calendaring authority, and tracing the development of the right to a speedy trial in North Carolina law. Part III analyzes the dangers presented by the unique juxtaposition of an imbalanced calendaring scheme and the lack of a speedy trial statute in North Carolina criminal procedure. To conclude, Part IV suggests solutions for alleviating the obstacles to a fair and just system of criminal adjudication presented by this "perfect storm" of procedural woes in North Carolina.

For purposes of this Comment, the trial calendar "is a list of the cases for trial by the term, the week, or even the day, at which a particular case will come on for trial," whereas the docket "is a formal record of cases for trial."[18] Calendaring authority is typically derived from each state's criminal procedure statutes, and while there are typical models, calendaring schemes differ from state to state.[19] Further, control over the calendar may also differ regarding the resolution of felonies versus misdemeanors.[20] The focus in this Comment will remain on calendaring in North Carolina superior courts, which adjudicate felonies, although calendaring in district courts may share analogous circumstances and arguments.[21] Lastly, while administrative settings and the scheduling of initial trial dates comprise the beginning stages of the overall criminal case docketing

17. *See infra* Subpart II.C.

18. 75 AM. JUR. 2D *Trial* § 20 (2020).

19. *See, e.g.*, FLA. STAT. ANN. § 43.26(2) (West 2020) ("The chief judge of the circuit shall have the power . . . [t]o supervise dockets and calendars."); MASS. GEN. LAWS ch. 278, § 1 (2020) ("Cases may be added . . . by discretion of the court, on its own motion or upon motion of the district attorney or of the defendant."); *see also* Siegel, *supra* note 5, at 342–43.

20. *See* Rubin, *supra* note 8, at 10.

21. Michael Crowell, *Control of the Calendar in Criminal District Court*, UNC SCH. GOV'T 3 (July 2010), https://www.sog.unc.edu/sites/www.sog.unc.edu/files/additional_files/DistrictcourtcalendaringauthorityJuly_10.pdf.

scheme in North Carolina, this Comment focuses exclusively on the preparation of the trial calendar that occurs in the final stage of pretrial litigation.[22]

II. THE HISTORY OF CRIMINAL COURT CALENDARING AND THE RIGHT TO A SPEEDY TRIAL IN NORTH CAROLINA

A. The History of Calendar Control in North Carolina

For much of the twentieth century, prosecutors had nearly complete power to schedule felony trials on North Carolina's superior court calendars.[23] In 1949, the North Carolina General Assembly passed North Carolina General Statute ("N.C.G.S.") section 7A-49.3,[24] codifying prosecutorial control of the trial calendar within North Carolina criminal procedure. In combination with N.C.G.S. section 7A-61,[25] which lists the duties of the district attorney, including preparation of the trial docket, section 7A-49.3 allotted prosecutors control of the trial calendar with unabated freedom. However, this practice came under scrutiny as early as the 1960s, with increased criticism leading to policy changes in the 1970s.[26] This state-level criticism echoed the national sentiment at the time; the American Bar Association's Standards for Criminal Justice advocated for calendaring authority to be given to the trial court as early as 1972.[27]

In 1975, the Fourth Circuit Court of Appeals, in *Shirley v. State of North Carolina*,[28] held that a North Carolina defendant's due process rights were violated after the trial court denied a continuance requested by defense counsel.[29] The defense requested the continuance because a key material witness was absent when the case was called in court.[30] The need emerged after the prosecutor, on May 4, 1971, scheduled the case for trial only seven days later, on May 11, 1971.[31] The defense was unable to subpoena the key witness, who

22. Comparing N.C.G.S. section 7A-49.4(b)–(d) (2020) with N.C.G.S. section 7A-49.4(e) (2020). *See also* Rubin, *supra* note 8, at 10–11. At an administrative setting, the court is responsible for determining the status of the defendant's representation, setting deadlines for discovery and arraignment, and conducting a plea conference or hearing motions as applicable. § 7A-49.4(b).

23. *See* Rubin, *supra* note 8, at 10.

24. See Appendix A for the full text of N.C.G.S. section 7A-49.3 (repealed by Session Laws 1999-428, s. 2).

25. See Appendix A for the full text of N.C.G.S. section 7A-61 (2020).

26. Shannon Tucker & Paul M. Green, *Abuses of Calendaring Authority*, N.C. OFF. INDIGENT DEF. SERVS. (Nov. 6, 2008), http://www.ncids.org/Defender%20Training/2008%20Fall%20Conference/AbusesofCalendaring.pdf.

27. Siegel, *supra* note 5, at 337.

28. 528 F.2d 819 (4th Cir. 1975).

29. *Id.* at 820.

30. *Id.* at 821.

31. *Id.* at 820.

was on active military duty, in time for trial.[32] In its opinion, the Fourth Circuit highlighted the power that North Carolina prosecutors had to place defendants in such untenable positions:

> Under North Carolina practice, sanctioned by statute, the prosecutor controls the criminal calendar and decides when to set cases for trial. He must file his calendar at least one week before trial. Until he does so criminal defendants are unable to subpoena witnesses, for the statute requires defense subpoenas to state the date of trial, a detail which, of course, cannot be known until the case is calendared.[33]

The one-week timeline for publication of the trial calendar, in combination with the restriction on subpoena power, left defendants in a precarious position. The calendaring statute, N.C.G.S. section 7A-49.3(c), did provide the court with the ability to override the prosecutor's control of the calendar and determine which cases were actually called for the day.[34] In many places across the state, however, "judges apparently abdicated this authority to prosecutors," which meant prosecutors' calendaring authority went entirely unchecked.[35]

The controversy surrounding calendar control continued to grow as the 1970s progressed.[36] In 1979, the North Carolina Supreme Court reviewed whether the scheduling of postconviction hearings was the responsibility of the district attorney or the trial court in *State v. Mitchell*.[37] The court held that trial courts maintain sole calendaring authority for hearings on postconviction motions.[38] While the specific issue was resolved with relative ease, at least one justice acknowledged the continuing controversy over calendar control in North Carolina.[39] Perhaps prophetically, Justice Carlton stated, "a district attorney risks inviting the legislature to scrutinize his calendaring powers and perhaps diminish them if any untoward event in calendaring trials and motions occurs."[40]

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32. *Id.* at 821.

33. *Id.* at 820.

34. State v. Mitchell, 259 S.E.2d 254, 257 (N.C. 1979) (Carlton, J., concurring) ("[T]he fact remains that the wording of the statute posits residual power in the trial court to override this practice.").

35. Siegel, *supra* note 5, at 341.

36. *See infra* notes 37–40 and accompanying text.

37. 259 S.E.2d at 255.

38. *Id.*

39. *Id.* at 256 (Carlton, J., concurring) ("I mention all of this not in an attempt to resolve the continuing controversy in North Carolina over whether calendar control of criminal cases should be in the court or the district attorney. My purpose is to issue a reminder that many, both judges and attorneys, feel the office of district attorney is vested with powers which they perceive to be excessive.").

40. *Id.* at 257.

The criticism surrounding prosecutorial calendar control in North Carolina came to a head in the 1990s, as litigation and debate targeting the imbalanced authority increased.[41] In 1992, David Simeon and Peter Zegler challenged the constitutionality of prosecutorial calendar control by filing a class action on behalf of all current and future criminal defendants in Durham County, North Carolina, against the Durham County District Attorney.[42] In his complaint, Simeon alleged that prosecutors used their calendaring authority as a tactical advantage.[43] Specifically, his amended complaint alleged that the current calendaring scheme gave prosecutors "the power to select a particular judge, the power to keep a jailed defendant from being tried for an extended period of time, the power to force criminal defendants released on bail to miss work and come to court repeatedly, and the power to severely inconvenience disfavored defense attorneys."[44]

The North Carolina Supreme Court heard the case, *Simeon v. Hardin*,[45] in 1994 and held that the challenged statutes, N.C.G.S. section 7A-49.3 and section 7A-61, were constitutional on their face.[46] In addressing the constitutionality of N.C.G.S. section 7A-49.3, the court specifically noted that while prosecutors prepared the trial calendar, the trial court retained ultimate control.[47] The court proffered that it could not presume prosecutors in North Carolina abused their calendaring authority in evaluating the constitutionality of the statute as a whole.[48] Nevertheless, the *Simeon* court held that the plaintiffs had sufficiently raised a claim that the statutes were applied unconstitutionally by the district attorney in Durham County.[49]

Following *Simeon*, the wheels of reform slowly began to turn as stakeholders in North Carolina convened to negotiate a new system of calendar control.[50] The Commission for the Future of Justice and the Courts in North Carolina ("Futures Commission"), which operated from 1994 to 1996 and included the input of criminal defense attorneys, recommended removing calendar control from prosecutors and placing it in the hands of the court or the trial court

41. *See* Rubin, *supra* note 8, at 9.

42. Simeon v. Hardin, 451 S.E.2d 858, 862 (N.C. 1994) ("[T]he Office of the District Attorney has been given excessive power over administration of the criminal courts in violation of the state and federal constitutions.").

43. *Id.* at 863.

44. *Id.*

45. *See id.*

46. *Id.* at 868.

47. *Id.* at 870.

48. *Id.* at 870–72.

49. *Id.* at 872.

50. *See infra* notes 50–53 and accompanying text.

administrator.[51] The recommendation echoed the complaint in *Simeon* and ultimately went a step further than the North Carolina Supreme Court's holding by advocating for *complete* removal of calendar control from prosecutors.[52] In the late 1990s, the North Carolina legislature began drafting a new statute to govern calendar control. The statute aimed to serve as a compromise between total control by the prosecutor and total control by the court.[53]

In 1999, the North Carolina General Assembly voted to repeal N.C.G.S. section 7A-49.3 and replace it with the current statute, section 7A-49.4,[54] effective January 1, 2000. Although control of the calendar remains with the prosecutor, the district attorney is now required to develop "a criminal case docketing plan, in consultation with the resident superior court judge and the defense bar" in each superior court district.[55] In addition, while the prosecutor still prepares and publishes the trial calendar, the General Assembly added new restrictions and checks.[56] Unlike the prior statute, most of these are activated in the initial stages of trial docketing rather than during the actual preparation of the trial calendar by the prosecutor.[57]

Regarding calendar control, section 7A-49.4(e) states, "[t]he trial calendar shall schedule the cases in the order in which the district attorney anticipates they will be called for trial and should not contain cases that the district attorney does not reasonably expect to be called for trial."[58] The provision allows for a prosecutor to determine the final order of cases on a trial calendar and remove cases from the final calendar that are scheduled for a particular session.[59] The provisions of section 7A-49.4 are listed as the minimum requirements for calendaring and can be enhanced by local rules in the various districts across the state.[60] The statute fails, however, to provide any specific remedy for abuse of calendaring authority by the prosecutor.[61]

Despite the new statutory scheme, North Carolina criminal law practitioners remain concerned about prosecutorial control of the calendar.[62] In 2008, a main topic at the North Carolina Public

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51. James F. Wyatt III & Tamura D. Coffey, *Criminal Justice: Looking to the Next Century*, 3 N.C. ST. B.J. 10, 11 (1998).
52. *Id.*
53. Siegel, *supra* note 5, at 342.
54. See Appendix A for the full text of N.C.G.S. section 7A-49.4.
55. N.C. DEFENDER MANUAL VOL. 1 PRETRIAL, *supra* note 7, at 7-30.
56. N.C. GEN. STAT. § 7A-49.4(b)–(d) (2020).
57. *Id.*
58. *Id.* § 7A-49.4(e).
59. Rubin, *supra* note 8, at 10.
60. *Id.* at 9–10.
61. N.C. DEFENDER MANUAL VOL. 1 PRETRIAL, *supra* note 7, at 7-31.
62. *See infra* notes 63–66 and accompanying text.

Defender Conference was abuses of calendaring authority by the prosecutor.[63] At a 2015 meeting of the North Carolina Courts Commission, a main concern raised at a panel on criminal court calendaring was the power wielded by prosecutors to control the calendar.[64] Furthermore, the discussion in the comments section of a blogpost on the UNC School of Government's Criminal Law Blog (a popular and well-regarded tool for criminal law attorneys in North Carolina) showcases the continuing sentiment among practitioners that any court-retained calendar control is merely illusory.[65] As one commentator, who identified herself as a former superior court judge, noted, "I can *promise* you that the District Attorney[']s office in our district control[s] the calendar."[66]

B. Abuses of Calendar Control

Recognizing the problematic nature of calendaring authority in North Carolina, it is necessary to understand precisely why control of the calendar is such a controversial issue. As previously mentioned, much of the concern focuses on the fact that prosecutors can use calendar control to their tactical advantages in a variety of ways.[67] These advantages, or more accurately, abuses, existed prior to the implementation of N.C.G.S. section 7A-49.4 and evidently still occur. After all, as Professor James C. Drennan intimated in a response to questions about the new calendaring statutory scheme, "[s]imply passing a law does not always change the culture in an institution."[68]

While abuses of calendar control will manifest differently from case-to-case, there are several reasons prosecutors leverage calendar control for their own tactical advantage. First, prosecutors can wait until a friendly, pro-prosecution judge, or a judge that is known to

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63. Tucker & Green, *supra* note 26. Paul M. Green was also the attorney for David Simeon in the landmark North Carolina Supreme Court case *Simeon v. Hardin*, 451 S.E.2d 858, 862 (N.C. 1994).

64. Jeff Welty, *Is North Carolina the Only State in Which the Prosecutor Controls the Calendar?*, UNC SCH. GOV'T: N.C. CRIM. L. (Nov. 17, 2015, 11:35 AM), https://nccriminallaw.sog.unc.edu/is-north-carolina-the-only-state-in-which-the-prosecutor-controls-the-calendar/.

65. Comment Section of *Is North Carolina the Only State in Which the Prosecutor Controls the Calendar?*, UNC SCH. GOV'T: N.C. CRIM. L., https://nccriminallaw.sog.unc.edu/is-north-carolina-the-only-state-in-which-the-prosecutor-controls-the-calendar/ (last visited Apr. 1, 2021). The discussion in the comments section of this blogpost is particularly spirited, and I encourage the reader to visit the blogpost and see the extent of the concern from practitioners around the state.

66. Kim Taylor, Comment to *Is North Carolina the Only State in Which the Prosecutor Controls the Calendar?*, UNC SCH. GOV'T: N.C. CRIM. L. (Nov. 17, 2015, 7:39 PM), https://nccriminallaw.sog.unc.edu/is-north-carolina-the-only-state-in-which-the-prosecutor-controls-the-calendar/.

67. *See supra* Subpart II.A.

68. Siegel, *supra* note 5, at 343 (internal quotation marks omitted).

take a hardline stance on certain types of crimes, is available to hear a case.[69] While this type of judge shopping is not exclusive to prosecutors alone (defense attorneys are also prone to seek out favorable judges for motions, orders, etc.), the statutorily granted ability to prepare the trial calendar gives the prosecution an inherent advantage.[70]

Second, a prosecutor can wear down the defense by calendaring the case multiple times without ever intending to call it.[71] In one outrageous example, a North Carolina district attorney calendared a case thirty-one times over a three-year timespan without ever calling the case for trial.[72] Contacting witnesses, executing subpoenas, and preparing mentally in advance of trial only for a prosecutor not to call a case during the trial session can become an exhausting cycle for defendants and defense attorneys.[73] Tangentially, a defense attorney may become accustomed to preparing for trial at the last minute because of the absence of a predictable trial calendar.[74]

Third, prosecutors can use their calendaring authority as leverage against defendants who have strong cases but remain incarcerated due to their inability to make bail.[75] This type of abuse was a chief component of the complaint in *Simeon*, where David Simeon claimed that the district attorney declined to calendar his case in order to pressure Simeon into accepting a plea deal.[76] Simeon was jailed prior to trial, and although he stood a good chance of winning an acquittal, the pressure to plead guilty increased the longer he was incarcerated.[77] Even if a defendant is out on bond, the constant need to rearrange schedules, find transportation, miss work,

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69. Wyatt III & Coffey, *supra* note 51, at 11.

70. *See id.* at 10–11; *see also* Richard R.E. Kania, *Ethical Challenges for Prosecutors*, *in* JUSTICE, CRIME, AND ETHICS 162, 171 (Michael C. Braswell et al. eds., 10th ed. 2020) ("Both prosecutors and defense attorneys may engage in 'judge shopping.'").

71. Wyatt III & Coffey, *supra* note 51, at 11; *see also* Siegel, *supra* note 5, at 354 (explaining that the "cumulative effect" of consistent prosecutorial calendar control can lead defense attorneys to "opt out" by "becoming prosecutors themselves" or moving to another jurisdiction).

72. State v. Chaplin, 471 S.E.2d 653, 654 (N.C. Ct. App. 1996) ("Defendant's unrefuted evidence shows that between the years of 1992 and 1995, defendant's case was placed on the trial calendar thirty-one times. Nothing in the record indicates that defendant ever asked for a continuance. In fact, the record reveals that the district attorney did not call the case to trial, until 20 March 1995.").

73. Siegel, *supra* note 5, at 353.

74. *Id.* at 354–55 (discussing the coping mechanisms utilized by defense attorneys in a system in which prosecutors use their calendar control as a "strategic tool").

75. Wyatt III & Coffey, *supra* note 51, at 11.

76. Simeon v. Hardin, 451 S.E.2d 858, 866 (N.C. 1994).

77. *Id.*

and other related difficulties can become so wearisome that a defendant may take a plea deal to move on with life.[78]

C. The Right to a Speedy Trial in North Carolina

The right to a speedy trial for criminal defendants in North Carolina is grounded in the Sixth Amendment of the United States Constitution, which states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,"[79] and in Article I, Section 18 of the North Carolina Constitution, which states in part that "justice shall be administered without favor, denial, or *delay*."[80] The Sixth Amendment right to a speedy trial was incorporated to the states through the Due Process Clause of the Fourteenth Amendment via a case involving a Duke University professor and the civil rights movement in North Carolina.[81] In *Klopfer v. North Carolina*,[82] the U.S. Supreme Court heralded the fundamental nature of the right to a speedy trial within the American justice system, calling it "one of the most basic rights preserved by our Constitution."[83] The Court traced the historical roots of this right, identifying the Magna Carta as one of the earliest articulations of the right to a speedy trial.[84]

Although a criminal defendant in North Carolina has both state and federal constitutional protections for the right to a speedy trial, North Carolina no longer has any statutory protection. The speedy trial provisions contained in N.C.G.S. section 15A-701 through section 15A-710 (known as the Speedy Trial Act) were repealed in 1989.[85] The Speedy Trial Act was originally passed by the North Carolina General Assembly in 1977.[86] The North Carolina statute mirrored the Federal Speedy Trial Act by detailing deadlines by which trials must be scheduled, provisions for the extension of

78. Siegel, *supra* note 5, at 326–27; *see also Simeon*, 451 S.E.2d at 866 (highlighting Plaintiff Peter Zegler's complaint that he "incurred unnecessary witness-related expenses" due to the repeated calendaring of his trial for misdemeanor simple assault).

79. U.S. CONST. amend. VI.

80. N.C. CONST. art. I, § 18 (emphasis added).

81. The history behind *Klopfer v. North Carolina*, 386 U.S. 213 (1967), is particularly compelling for the North Carolina reader. For a brief overview of the case see Paul Shechtman, *Speedy Trial Guarantee Applies to States: '*Klopfer v. United States' *Turns 50*, N.Y.L.J. (Mar. 10, 2017, 2:02 PM), https://www.law.com/newyorklawjournal/almID/1202781054894/speedy-trial-guarantee-applies-to-states-klopfer-v-united-states-turns-50/.

82. 386 U.S. 213 (1967).

83. *Id.* at 226.

84. *Id.* at 223.

85. N.C. DEFENDER MANUAL VOL. 1 PRETRIAL, *supra* note 7, at 7-17.

86. *See* Ronald M. Price, *The North Carolina Speedy Trial Act*, 17 WAKE FOREST L. REV. 173, 174, 218–21 (1981) (including the full text of the original Speedy Trial Act).

deadlines, sanctions for failing to meet deadlines, and grounds for a defendant to claim their Sixth Amendment right had been violated.[87] Implementation of the Speedy Trial Act in North Carolina was problematic from the beginning.[88] Due in part to the weakness of court administration systems[89] and concerns that more and more cases would be dismissed for failure to comply, the North Carolina General Assembly voted to repeal the Speedy Trial Act rather than revise the statute.[90]

State legislators made an effort in 1995 to pass a new speedy trial statute that would allow for more flexibility and discretion by litigants, administrators, and the court.[91] The new statute also aimed to ensure that justice would not be forsaken at the cost of protecting defendants' procedural rights, a primary concern of Speedy Trial Act critics.[92] The bill failed in the North Carolina House, however, and the North Carolina General Assembly has yet to pass new speedy trial legislation.[93]

In assessing a Sixth Amendment right to a speedy trial claim, the Supreme Court delineated a four-part balancing test in *Barker v. Wingo*,[94] which trial courts should use on an ad hoc basis.[95] The four factors are as follows: (1) length of pretrial delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant.[96] While no one factor is dispositive, the Supreme Court emphasized that the length of delay serves as a triggering mechanism in that "[u]ntil there is some delay that is presumptively prejudicial," the trial court does not need to inquire into the other factors.[97] Additionally, the Court espoused three objectives comprising the rationale underlying the right to a speedy trial: to prevent oppressive pretrial incarceration, to minimize anxiety and concern of the accused, and to limit the possibility that

87. *Id.* at 175–76, 212.

88. *Id.* at 214–15.

89. *Id.*

90. S.B. 730, Gen. Assemb., 1989 Sess. (N.C. 1989), https://www.ncleg.net/EnactedLegislation/SessionLaws/PDF/1989-1990/SL1989-688.pdf.

91. H.B. 254, Gen. Assemb., 1995 Sess. (N.C. 1995), https://www.ncleg.gov/Sessions/1995/Bills/House/PDF/H254v1.pdf.

92. Price, *supra* note 86, at 215 (calling the speedy trial statute a "technical defense to criminal responsibility").

93. *H.B. 254 (1995-1996 Session)*, N.C. Gen. Assembly, https://www.ncleg.gov/BillLookUp/1995/H254 (last visited Mar. 5, 2021).

94. 407 U.S. 514 (1972).

95. *Id.* at 530 ("A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right.").

96. *Id.*

97. *Id.*

the defense will be impaired.[98] Courts should use these objectives to determine whether and to what extent a delay has prejudiced the defendant.[99]

North Carolina courts adhere to the four-part *Barker* test in analyzing speedy trial claims that arise under the Sixth Amendment of the Constitution or Article I, Section 18 of the North Carolina Constitution.[100] Regarding the second factor, the reason for delay, courts in North Carolina have developed a burden-shifting test.[101] To begin, "[t]he burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution."[102] If such a showing is established by the defendant, then the state is permitted to offer an explanation for the delay.[103] The court will then consider whether the reason for delay was reasonable.[104]

Good-faith delays that are reasonably necessary for the prosecution to prepare its case for trial are permitted.[105] On the other hand, "purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort" are not permitted.[106] For example, a congested court docket is considered an acceptable reason for delay,[107] whereas misrepresentation about the status of a State Bureau of Investigation laboratory report is evidence of negligence on the part of the prosecution.[108] Further, the North

98. *Id.* at 532.

99. *Id.*

100. *See* State v. Hill, 287 N.C. 207, 211 (1975) ("Numerous decisions by the federal courts and by this Court have established the following four interrelated factors to be considered in determining if a defendant's right to a speedy trial has been violated: (1) The length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice resulting to defendant from the delay."). *See generally* State v. Smith, 289 N.C. 143, 148 (1976) ("The question whether a defendant has been denied a speedy trial must be answered in light of the facts in the particular case.").

101. State v. Spivey, 357 N.C. 114, 119 (2003).

102. *Smith*, 289 N.C. at 148; State v. Webster, 337 N.C. 674, 679 (1994) ("The defendant has the burden of showing that the reason for the delay was the neglect or willfulness of the prosecution.").

103. *Spivey*, 357 N.C. at 119.

104. *See id.*

105. State v. Washington, 192 N.C. App. 277, 283 (2008).

106. *Id.*

107. State v. Hammonds, 141 N.C. App. 152, 160 (2000), *aff'd*, 354 N.C. 353, 554 S.E.2d 645 (2001) ("Our courts have consistently recognized congestion of criminal court dockets as a valid justification for delay." (quoting State v. Hughes, 54 N.C. App. 117, 119 (1981))).

108. State v. Wilkerson, 257 N.C. App. 927, 933 (2018) ("The prosecutor may not have been willfully misrepresenting the status of the SBI report to the trial court at the hearing, but at a minimum he most certainly was negligent in not knowing the status of this completed report he expressly used as a reason to delay the trial, regardless of what he asserted at the hearing.").

Carolina Supreme Court accepts that it is the prerogative of the prosecutor to prepare the trial calendar under N.C.G.S. section 7A-61, and the prosecutor can exercise selectivity in doing so.[109] Such selectivity may constitute a permitted reason for delay unless a defendant can show the selection was based upon "an unjustifiable standard such as race, religion or other arbitrary classification."[110]

Regarding the fourth *Barker* factor, prejudice to the defendant, the standard is considerably high for a defendant to prove that the outcome of his trial was or will be prejudiced by the delay.[111] The three objectives underlying a right to a speedy trial[112] are used to evaluate the extent to which the delay prejudiced the defendant. Of the three, the impact on a criminal defendant's defense strategy is considered the most important.[113] For example, in *State v. Flowers*,[114] the North Carolina Supreme Court acknowledged that a five-year and eight-day delay from indictment to trial prevented the defendant from calling a defense witness who supposedly confessed to the murder.[115] Despite that assessment, the *Flowers* court held that the defendant failed to show that the delay altered the outcome of his trial and therefore was not prejudicial.[116]

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109. State v. Cherry, 257 S.E.2d 551, 562 (N.C. 1979) ("It is the district attorney's statutory duty to prepare the trial docket and prosecute criminal actions in the name of the State. G.S. 7A-61. In order to properly perform this duty, he must exercise selectivity in preparing the trial calendar. Our courts have recognized that there may be selectivity in prosecutions and that the exercise of this prosecutorial prerogative does not reach constitutional proportion unless there be a showing that the selection was deliberately based upon '"an unjustifiable standard such as race, religion or other arbitrary classification."') (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).

110. The standard for assessing prosecutorial selectivity is cited by the North Carolina Court of Appeals in *State v. Hammonds*, 541 S.E.2d 166, 174 (N.C. Ct. App. 2000), as well as by the North Carolina Supreme Court in *State v. Spivey*, 579 S.E.2d 251, 256 (N.C. 2003). In *Spivey*, the court affirmed the district attorney's decision to selectively calendar the trial for the murder of Michael Jordan's father ahead of Spivey's trial. 579 S.E.2d at 256.

111. *Spivey*, 579 S.E.2d at 257 (noting that to prove the fourth *Barker* factor, "[a] defendant must show actual, substantial prejudice," rather than just prejudice).

112. Barker v. Wingo, 407 U.S. 514, 532 (1972).

113. *Wilkerson*, 810 S.E.2d at 394 ("*Of these, the most serious is the last*, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.") (quoting State v. Webster, 447 S.E.2d 349, 352 (N.C. 1994)) (emphasizing *Barker*).

114. 489 S.E.2d 391 (N.C. 1997)

115. *Id.* at 406–07 ("Specifically, defendant contends that the delay prevented him from calling as a witness Vernon Lunsford, who, according to the defense, admitted killing the victim.").

116. *Id.* at 407; *Spivey*, 579 S.E.2d at 259 (discussing *State v. Flowers* and the court's determination that the defendant was not prejudiced by the absence of the witness).

III. ANALYZING THE INTERSECTION OF AN IMBALANCED CALENDARING SCHEME AND THE LACK OF A SPEEDY TRIAL STATUTE

Ordinarily, the right to a speedy trial could and should assuage some of the fears related to prosecutorial calendar control. If a prosecutor is abusing their authority by repeatedly calendaring a case or delaying the calendaring of a case altogether, a defense attorney could file a right to a speedy trial motion to force the prosecutor's hand. A defense attorney facing such a situation in North Carolina can certainly make a speedy trial motion, but the current state of the law leaves defendants fighting against the odds. Part III discusses why the power retained by prosecutors over the trial calendar and the lack of a speedy trial statute create a "perfect storm" for criminal defendants. Proposed legislative and practical solutions for increasing the procedural protections afforded defendants follow said discussion.

A. The Fallacy of the Prosecutor as Both a Party Litigant and Controller of the Trial Calendar

Prosecutorial calendar control is so potent because a party litigant is handed the power to determine exactly when a case will be heard.[117] Although this seems obvious, the suitability of a party litigant preparing or managing the trial calendar seems questionable at best and nefarious at worst.[118] As one North Carolina State Bar writer posited, "[i]magine the outcry in the civil bar if only plaintiffs or only defendants could select both the time for trial and the judge to hear the case."[119] Criminal cases by their very nature are brought on behalf of "the people." This demonstrates that the harm is considered to be done against the people of the state as a whole and not just the victim. The prosecutor, as the advocate for the people, is affirmatively an interested party in the outcome of a criminal case.

While the trial judge could also potentially be considered a part of "the people" with an interest in the prosecution of the defendant, our justice system allows for the judge to remain and be considered a neutral party who oversees the adjudication process out of necessity. Defense attorneys too could be considered a part of "the people," but the rules of professional responsibility preserve their ability to solely and zealously advocate for their clients. The prosecutor, however,

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117. *See supra* Subpart II.A.

118. Woodall v. Laurita, 195 S.E.2d 717, 719 (W. Va. 1973) ("Chapter 56, Article 6, Section 1 of the Code of West Virginia, 1931, provides that before every term of the circuit court, the clerk shall make out a docket of the cases pending, and that he shall, under control of the court, set the cases to certain days. This statute contemplates an orderly procedure for the setting of the criminal docket, and *explicitly contemplates the control of the docket by the court and not by a party litigant*.") (emphasis added).

119. Wyatt III & Coffey, *supra* note 51, at 11.

does not enjoy such neutrality and, therefore, the desire to obtain a tactical or strategic advantage in the course of litigation becomes second nature. This is not meant to insinuate that all prosecutors are going to act unethically by manipulating the trial calendar to their advantage, but rather to highlight the adversarial nature of the criminal justice system. Litigants will inherently seek out advantages in an adversarial system. By granting prosecutors the great responsibility of preparing and publishing the final trial calendar, the North Carolina calendaring scheme does nothing to address the temptation to use this to gain an advantage.[120] If an advantage can be gained by exploiting a mechanism as subtle and seemingly routine as calendar control, then the prosecution benefits at the expense of a fair system of justice.

Although the basic logic of having a party litigant serve as the calendar manager is problematic, the division of calendaring authority also raises pertinent questions regarding separation of powers. South Carolina operated a system of exclusive prosecutorial calendar control until 2012, making it the last state in the country to do so, outlasting even North Carolina.[121] In *State v. Langford*,[122] the South Carolina Supreme Court held that this system of control violated separation of powers and therefore, the calendaring statute, section 1-7-330, was unconstitutional. In stark contrast to the North Carolina Supreme Court's decision in *Simeon,* the court stated,

> [i]n 1980, we recognized that "[t]he authority of the court to grant continuances and to determine the order in which cases shall be heard is derived from its power to hear and decide cases." Williams v. Bordon's, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980). "This adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants." *Id.* The time has now come for us to acknowledge that section 1-7-330 is at odds with this intrinsically judicial power.[123]

The *Langford* court explained that establishing the trial calendar is the prerogative of the court as part of its intrinsic power to control its own business.[124] The prosecutor, the court determined, is a member of the executive branch, and by exclusively controlling the

120. *See generally* N.C. GEN. STAT. § 7A–49.4 (2020).

121. S.C. CODE ANN. § 1–7–330 (2012) ("The solicitors shall attend the courts of general sessions for their respective circuits. Preparation of the dockets for general sessions courts shall be exclusively vested in the circuit solicitor and the solicitor shall determine the order in which cases on the docket are called for trial.").

122. 735 S.E.2d 471 (S.C. 2012).

123. *Id.* at 475.

124. *Id.* at 478.

calendar, the prosecutor infringes upon the separation of powers.[125] Notably, the South Carolina Supreme Court posited that a prosecutor can have some control over the calendar subject to judicial oversight, as the court would ultimately retain final authority over the calendar.[126] In *Simeon*, the North Carolina Supreme Court ultimately determined that membership of the prosecutor in either the executive or judicial branch was ambiguous.[127] In contrast to the *Langford* court, the *Simeon* court reasoned that the prosecutor is a quasi-judicial official in North Carolina.[128] This line of reasoning led the North Carolina Supreme Court, in part, to determine that N.C.G.S. section 7A-49.3 and section 7A-61 were not facially unconstitutional.[129]

Deciding whether the prosecutor is a quasi-judicial official or a member of the executive branch does nothing to rectify the fact that the prosecutor is still a party litigant to each case. As the South Carolina Supreme Court stated in its central holding, the court has the power to control the order of its business as a way to "*safeguard the rights of the litigants*."[130] The civil justice system appears to acknowledge the reality that, if given the opportunity, a party litigant will use the trial calendar to their advantage.[131] Unlike the civil justice system, the litigants in criminal cases are the prosecutor and the defendant. A prosecutor therefore should not be granted the ability to decide precisely when a case should be litigated and then proceed to litigate the case. A criminal defendant is no less deserving of a safeguard (i.e., the court controlling the calendar) than a civil defendant simply because a claim is being brought against them by the people.

B. A Procedural Stranglehold: The Weaknesses of N.C.G.S. section 7A-49.4 and the Lack of a Speedy Trial Statute

With a party litigant in control of the final trial calendar, defendants in North Carolina are placed at an inherent disadvantage. The revised N.C.G.S. section 7A-49.4[132] does little to counteract this prosecutorial advantage in the stage of calendaring that matters most. Subsection (e) is an affirmative grant of authority for prosecutors to prepare and publish the final order of cases on the trial calendar.[133] The actual ordering of the trial calendar itself is

125. *Id.*
126. *Id.* at 479.
127. Simeon v. Hardin, 451 S.E.2d 858, 870 (N.C. 1994).
128. *Id.*
129. *Id.* at 872.
130. *Langford*, 735 S.E.2d at 475 (emphasis added).
131. Wyatt III & Coffey, *supra* note 51, at 11.
132. *See supra* note 54.
133. Subsection (e) of N.C.G.S. section 7A-49.4 states the following:

significant: if a prosecutor wants to appear as if they are ready to proceed to trial on a case, but is still intending to delay adjudication, then the prosecutor only has to place the case last on the trial calendar knowing the case will not get called. Alternatively, the prosecutor can assign the case to the middle of the order, behind cases the prosecutor knows will go to trial and consume the entirety of the court session, meaning the case they want delayed will be delayed.

Subsection (e) of N.C.G.S. section 7A-49.4 grants North Carolina prosecutors *autonomy* over the trial calendar, not simply the authority to compile the calendar.[134] Subsection (e) only assigns reasonableness as the legal standard for the removal of cases from the trial calendar (and reasonableness is a fairly low standard at that), but there is no standard by which the actual ordering of the calendar is to be evaluated.[135] Unlike subsections (b)–(d), which detail the involvement of the court in the early stages of trial docketing, there is no mention of the court or any potential involvement in subsection (e).[136] While subsection (h) is intended to establish the oversight of the court to all aspects of trial docketing, the lack of court oversight specifically in subsection (e) means prosecutors prepare and publish the trial calendar without any direct checks or input from the court.[137] Excluding the complications with subpoenas in the now-repealed N.C.G.S. section 7A-49.3, this level of autonomous control by prosecutors is almost synonymous with the 1970s prosecutorial situation that fueled the concern of the Fourth Circuit in *Shirley*.[138]

In North Carolina superior court, the juxtaposition between a prosecutor-friendly calendaring statute and the lack of a speedy trial statute places defense attorneys in the unenviable position of fighting a two-front procedural battle on behalf of a defendant. If a defense attorney in North Carolina suspects that a prosecutor is unfairly delaying a case by using their calendaring authority, the only recourse available to them is to move for a speedy trial. Again, there is no statutorily available remedy for a potential or an actual abuse of N.C.G.S. section 7A-49.4. Accordingly, the defense attorney must

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> No less than 10 working days before cases are calendared for trial, the district attorney shall publish the trial calendar. The trial calendar shall schedule the cases in the order in which the district attorney anticipates they will be called for trial and should not contain cases that the district attorney does not reasonably expect to be called for trial. In counties in which multiple sessions of court are being held, the district attorney may publish a trial calendar for each session of court.

134. *Id.*

135. *Id.*

136. *Id.* § 7A-49.4(b)–(d).

137. *Id.* § 7A-49.4 (e), (h). . G Subsection (h) of N.C.G.S. section 7A-49.4 states the following: "Nothing in this section shall be construed to affect the authority of the court in the call of cases calendared for trial."

138. *See supra* notes 28–33 and accompanying text.

go into court and prove the second *Barker* factor: that the prosecutor is negligently or willfully delaying the case per the burden-shifting requirement established by the North Carolina Supreme Court regarding the right to speedy trial.[139] Proof of such intention on the part of the prosecutor can be very difficult to obtain,[140] especially in light of the aforementioned weaknesses of N.C.G.S. section 7A-49.4, which allow prosecutors to prepare the trial calendar with almost complete autonomy.

Notably, since the passing of N.C.G.S. section 7A-49.4, there have been very few appeals regarding the prosecutor's control of the calendar.[141] The lack of cases could signal that the new statute is working and that there are fewer problems with prosecutorial calendar control. However, as previously discussed the concern among practitioners about the amount of calendaring authority retained by prosecutors remains.[142] Accordingly, the fewer appeals may, in actuality, signal that it has become harder for North Carolina defendants to establish a claim about abuses of calendar control and that any added protections from section 7A-49.4 are merely illusory.

Even if the defense attorney somehow manages to prove that the prosecutor is acting willfully or negligently, the prosecutor has the opportunity to explain the reason for the delay. Because the prosecutor essentially has complete and exclusive control of the preparation of the trial calendar without court oversight, the potential for the prosecutor to be able to offer an explanation that is acceptable to the court is immense. Furthermore, due to this almost illusory power granted to the court to oversee trial docketing in subsection (h), there is a presumption that the prosecutor is acting lawfully within the granted authority. Most notably, in the face of severe abuses of calendaring authority by the Durham District Attorney, the *Simeon* court stated that it could not assume that district attorneys around the state were abusing their control of the calendar.[143] However, even if the court is overseeing the trial calendar, at least in theory, then it still does not necessarily follow that the prosecutors are utilizing their calendaring authority in a fair and impartial manner.

The more prudent course of analysis regarding the second *Barker* factor, the reason for delay, would be to shift the burden to the prosecutor and require prosecutors to proactively explain their calendaring and trial ordering decisions. Especially in light of the amount of autonomy retained by the prosecutor to prepare the trial

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139. *See supra* notes 94–99 and accompanying text.

140. *See supra* notes 94–99 and accompanying text.

141. Based on case searches conducted in Westlaw and Lexis.

142. Carolina Attorneys, *How Is Court Scheduled in North Carolina?*, CAROLINA ATT'YS (Oct. 29, 2015), https://www.carolinaattorneys.com/blog/how-is-court-scheduled-in-north-carolina/.

143. Simeon v. Hardin, 451 S.E.2d 858, 870 (N.C. 1994).

calendar, the prosecutor should be required to prove the necessity of the delay. Currently, the criminal defendant, the injured party in the speedy trial analysis, is required to prove a negative: that the prosecutor did not act in accordance with the law. Such a change in North Carolina's speedy trial analysis would acknowledge the inherent power granted to prosecutors by the calendaring scheme and increase prosecutorial accountability, if only in the arena of calendaring cases. The result of such accountability would be a more just system and stronger protections for the procedural rights of criminal defendants.

The potential for the abuse of defendants' rights is compounded by the fact that North Carolina no longer has a speedy trial statute.[144] After all, even if the defense attorney manages to survive the prosecution-friendly, burden-shifting analysis for the reason for delay *Barker* factor, the defense is then required to prove the delay prejudiced the defendant.[145] Courts have found this burden to be substantially high, as demonstrated by courts disregarding scenarios in which delays led to codefendants turning on each other for better plea deals and material witnesses dying or being unavailable.[146] While the Supreme Court stated that no one *Barker* factor is dispositive, North Carolina case law demonstrates that absent an incredibly egregious reason for delay or prejudice to the defendant, the defense generally needs to win all *Barker* factors in order for a court to rule in their favor on a speedy trial claim.[147]

C. Proposals for the Future

The Futures Commission was tasked with propelling the North Carolina criminal justice system into the twenty-first century by surveying and recommending structural changes that would overhaul and redesign the system.[148] Growing dissatisfaction of the public and increasing pressure on the courts were two of the main reasons cited as to why such a commission was necessary.[149] Notably, the Futures Commission reported that North Carolina prosecutors filed 17,194 felonies in 1971 and 83,212 felonies in 1996.[150] A staggering 131,101 felonies were filed in 2017–2018, and that number is only going to

144. S.B. 730, Gen. Assemb., 1989 Sess. (N.C. 1989) https://www.ncleg.net/EnactedLegislation/SessionLaws/PDF/1989-1990/SL1989-688.pdf.

145. Barker v. Wingo, 407 U.S. 514, 532 (1972).

146. *See supra* notes 94–116 and accompanying text.

147. *See supra* notes 94–116 and accompanying text.

148. COMM'N FOR THE FUTURE OF JUST. & THE CTS. IN N.C., WITHOUT FAVOR, DENIAL OR DELAY: A COURT SYSTEM FOR THE 21ST CENTURY iii (1996), https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/WithoutFavorDenialOrDelayAll.pdf.

149. *Id.*

150. *Id.* at 4.

increase.[151] Accordingly, as the 2020s begin, it seems long overdue to recommend new structural and policy changes to ensure that North Carolina courts "satisfy the public demand for justice 'without favor, denial or delay.'"[152]

1. Recommendation One: A New Speedy Trial Statute

In discussing the recommendations of the Futures Commission, an article in the North Carolina State Bar Journal noted the lack of a speedy trial statute in parenthesis, almost as an afterthought, to emphasize the reality that criminal defense attorneys have few means at their disposal to force the district attorney to calendar a case.[153] While a speedy trial statute will certainly not solve all of the problems relating to delays in calendaring, a statute will partially relieve defense attorneys of the procedural burden they face at the present. North Carolina's addition of a burden-shifting analysis to the *Barker* four-part test has stacked the deck against defendants who raise a claim that their right to a speedy trial has been violated. Statutory guidance will give defense attorneys tangible tools to use in order to zealously advocate on behalf of their clients and ensure the clients' right to a speedy trial is safeguarded. A statute like the proposed 1995 bill,[154] with reasonable time limits, sufficient opportunities for continuances that are helpful to the prosecution, and sanctions for violations that are helpful remedies for the defense, could strike the necessary balance between proactively protecting the rights of defendants and ensuring the right to a speedy trial does not become a technical defense.

2. Recommendation Two: A Newly Revised Calendaring Statute

More than fifteen years after the new statute was implemented, the sentiment of practitioners is that prosecutors still control the calendar.[155] Regardless of the true and technical accuracy of that sentiment, the reality is that N.C.G.S. section 7A-49.4 has weaknesses that can be and likely are being exploited by prosecutors in North Carolina. Accordingly, the statute should be revised to give the court tangible control over the preparation of the trial calendar, rather than mere oversight of trial docketing, which includes the trial calendar as a subcomponent. Subsection (e) should be entirely reworked to include the court in the preparation and ordering of the

151. N.C. JUD. BRANCH, *supra* note 1, at 3.

152. COMM'N FOR THE FUTURE OF JUST. & THE CTS. IN N.C., *supra* note 148, at iii.

153. Wyatt III & Coffey, *supra* note 51, at 11.

154. *See generally* H.B. 254, Gen. Assemb., 1995 Sess. (N.C. 1995) https://www.ncleg.gov/Sessions/1995/Bills/House/PDF/H254v1.pdf. (including time limits and sanctions in the proposed bill).

155. *See supra* notes 59–66 and accompanying text.

trial calendar. The prosecutor should have to transparently explain the reasoning behind the ordering of the calendar as a means of ensuring cases are not being ordered to the advantage of the prosecutor. Further, an additional section should be added to provide for remedies and sanctions if a prosecutor is found to have violated one of the current or revised sections. Again, while sanctions are not fix-all solutions, they are significant tools that defense attorneys can use to safeguard the rights of criminal defendants to the best extent possible.

As an aside, trial court administrator offices ("TCAs"),[156] which are often mentioned in conversations regarding trial calendaring and caseflow management, are helpful in providing a measure of oversight, but are not the ultimate solution to the problem addressed in this Comment. In Mecklenburg County, for example, TCAs oversee scheduling conferences for superior court cases in which the prosecutor and the defense attorney both participate as part of the initial administrative setting.[157] While the purview of TCAs could potentially be extended to the preparation of the trial calendar itself, the current TCA model, as a purely administrative safeguard, would not be suitable. The court, rather than an administrator, is equipped with the necessary legal and practical knowledge to prepare the trial calendar.

3. Or the Best of Both Worlds?

In proposed legislation drafted to replace the calendaring statute that its supreme court ruled unconstitutional, South Carolina is structuring a calendaring system in which defendants can use the right to a speedy trial proactively, while still allowing prosecutors to prepare trial calendars.[158] Such a combination stalls a prosecutor's potential abuse of their calendaring authority by giving statutory weight to a defense attorney's invocation of the right to a speedy trial.

156. *Caseflow Management*, N.C. JUD. BRANCH, https://www.nccourts.gov/locations/mecklenburg-county/caseflow-management (last visited Apr. 1, 2021); *Trial Court Administrator's Office*, N.C. JUD. BRANCH, https://www.nccourts.gov/locations/wake-county/trial-court-administrators-office (last visited Apr. 1, 2021).

157. *See Trial Court Administrator's Office*, *supra* note 156 (describing a TCA's job in Mecklenburg County).

158. S.B. 444, 123d Gen. Assemb., 1st Reg. Sess. (S.C. 2019) ("(A) The circuit solicitor has the authority to call cases in such order and in such manner as will facilitate the efficient administration of his official duties, subject to the overall broad supervision of the trial judge. The circuit solicitor will determine the order in which the docketed cases are called subject to rulings of the court as outlined in subsection (B). A *defendant may move for a speedy trial* or he may make a motion for a continuance beyond the term or for postponement to a date later within the term. In the calling of cases for trial, the circuit solicitor has broad discretion in the first instance, and the trial judge has broad discretion in the final analysis.") (emphasis added).

In North Carolina, a similar statute might work only if the current burden-shifting analysis for the right to a speedy trial is modified. Simply mentioning the use of the right to a speedy trial in a calendaring statute would not alleviate the burden that defense attorneys presently face in North Carolina when raising a right to a speedy trial claim.

IV. CONCLUSION

In 1976, the North Carolina Supreme Court stated, "[u]ndue delay which is arbitrary and oppressive or the result of deliberate prosecution efforts 'to hamper the defense' violates the constitutional right to a speedy trial."[159] Prosecutorial control of the calendar has the potential to equate to an oppressive, undue delay at best and deliberate efforts to hamper the defense at worst. If either situation occurs, the North Carolina Supreme Court's own reasoning indicates that said action is a violation of a defendant's constitutional right to a speedy trial. Yet as the system currently stands, that equation (prosecutorial control of the calendar leads to an undue delay, which leads to a speedy trial violation) is nearly impossible to prove. Accordingly, for many defendants in North Carolina superior courts, procedural rights are violated with little chance for effective and just recourse.

The scope of the problem is hard to identify. Based on the anecdotal evidence discussed previously,[160] the imbalance of power regarding the trial calendar is a reality that persists today in courts across North Carolina. The natural next step for progression of this research would be to survey practitioners around the state, in both urban and rural counties, about the reality of calendaring practices. What are the typical practices of the prosecutor regarding the calendar? How much control does the court actually exert over the calendar? How long do defendants normally sit in jail before trial? Is the right to a speedy trial a readily accessible tool to move a case toward trial? For a component of the criminal justice system that affects every defendant it touches, state legislators need to better understand the impact of calendar control and identify the appropriate reforms needed to ensure our courts are operating with fairness and without delay.

The weaknesses of the calendaring statute in combination with the lack of a speedy trial statute have created a uniquely "perfect storm" for criminal defendants in North Carolina. Revisions to the law are needed to better safeguard the rights of defendants and ensure their attorneys are given effective tools to zealously advocate on their behalf.

159. State v. Smith, 221 S.E.2d 247, 250 (N.C. 1976).

160. *See supra* notes 59–66 and accompanying text.

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APPENDIX A

N.C. GEN. STAT. § 7A-49.3. Calendar for criminal trial sessions (repealed by Session Laws 1999-428, s. 2).

(a) At least one week before the beginning of any session of the superior court for the trial of criminal cases, the district attorney shall file with the clerk of superior court a calendar of the cases he intends to call for trial at that session. The calendar shall fix a day for the trial of each case listed thereon. The district attorney may place on the calendar for the first day of the session all cases which will require consideration by the grand jury without obligation to call such cases for trial on that day. No case on the calendar may be called for trial before the day fixed by the calendar except by consent or by order of the court. Any case docketed after the calendar has been filed with the clerk may be placed on the calendar at the discretion of the district attorney.

(a1) If he has not done so before the beginning of each session of superior court at which criminal cases are to be heard, the District Attorney, after calling the calendar and disposing of nonjury matters, including guilty pleas, if any such nonjury matters are to be disposed of prior to the calling of cases for trial, shall announce to the court the order in which he intends to call for trial the cases remaining on the calendar. Deviations from the announced order require approval by the presiding judge, if the defendant whose case is called for trial objects; but the defendant may not object if all the cases scheduled to be heard before his case have been disposed of or delayed with the approval of the presiding judge or by consent.

(b) All witnesses shall be subpoenaed to appear on the date listed for the trial of the case in which they are witnesses. Witnesses shall not be entitled to prove their attendance for any day or days prior to the day on which the case in which they are witnesses is set for trial, unless otherwise ordered by the presiding judge.

(c) Nothing in this section shall be construed to affect the authority of the court in the call of cases for trial.

N.C. GEN. STAT. § 7A-61. Duties of district attorney.

The district attorney shall prepare the trial dockets, prosecute in a timely manner in the name of the State all criminal actions and infractions requiring prosecution in the superior and district courts of the district attorney's prosecutorial district and advise the officers of justice in the district attorney's district. The district attorney shall also represent the State in juvenile cases in the superior and district courts in which the juvenile is represented by an attorney. The district attorney shall provide to the Attorney General any case files, records and additional information necessary for the Attorney General to conduct appeals to the Appellate Division for cases from

the district attorney's prosecutorial district. The Attorney General shall not delegate to the district attorney, or any other entity, the duty to represent the State in criminal and juvenile appeals. Each district attorney shall devote his full time to the duties of his office and shall not engage in the private practice of law.

N.C. GEN. STAT. § 7A-49.4. Superior court criminal case docketing.

(a) Criminal Docketing. - Criminal cases in superior court shall be calendared by the district attorney at administrative settings according to a criminal case docketing plan developed by the district attorney for each superior court district in consultation with the superior court judges residing in that district and after opportunity for comment by members of the local bar. Each criminal case docketing plan shall, at a minimum, comply with the provisions of this section, but may contain additional provisions not inconsistent with this section.

(b) Administrative Settings. - An administrative setting shall be calendared for each felony within 60 days of indictment or service of notice of indictment if required by law, or at the next regularly scheduled session of superior court if later than 60 days from indictment or service if required. At an administrative setting:

(1) The court shall determine the status of the defendant's representation by counsel;

(2) After hearing from the parties, the court shall set deadlines for the delivery of discovery, arraignment if necessary, and filing of motions;

(3) If the district attorney has made a determination regarding a plea arrangement, the district attorney shall inform the defendant as to whether a plea arrangement will be offered and the terms of any proposed plea arrangement, and the court may conduct a plea conference if supported by the interest of justice;

(4) The court may hear pending pretrial motions, set such motions for hearing on a date certain, or defer ruling on motions until the trial of the case; and

(5) The court may schedule more than one administrative setting if requested by the parties or if it is found to be necessary to promote the fair administration of justice in a timely manner.

Whenever practical, administrative settings shall be held by a superior court judge residing within the district, but may otherwise be held by any superior court judge.

If the parties have not otherwise agreed upon a trial date, then upon the conclusion of the final administrative setting, the district attorney shall announce a proposed trial date. The court shall set that date as the tentative trial date unless, after providing the parties an opportunity to be heard, the court determines that the interests of justice require the setting of a different date. In that event, the

district attorney shall set another tentative trial date during the final administrative setting. The trial shall occur no sooner than 30 days after the final administrative setting, except by agreement of the State and the defendant.

Nothing in this section precludes the disposition of a criminal case by plea, deferred prosecution, or dismissal prior to an administrative setting.

(c) Definite Trial Date. - When a case has not otherwise been scheduled for trial within 120 days of indictment or of service of notice of indictment if required by law, then upon motion by the defendant at any time thereafter, the senior resident superior court judge, or a superior court judge designated by the senior resident superior court judge, may hold a hearing for the purpose of establishing a trial date for the defendant.

(d) Venue for Administrative Settings. - Venue for administrative settings may be in any county within the district when necessary to comply with the terms of the criminal case docketing plan. The presence of the defendant is only required for administrative settings held in the county where the case originated.

(e) Setting and Publishing of Trial Calendar. - No less than 10 working days before cases are calendared for trial, the district attorney shall publish the trial calendar. The trial calendar shall schedule the cases in the order in which the district attorney anticipates they will be called for trial and should not contain cases that the district attorney does not reasonably expect to be called for trial. In counties in which multiple sessions of court are being held, the district attorney may publish a trial calendar for each session of court.

(f) Order of Trial. - The district attorney, after calling the calendar and determining cases for pleas and other disposition, shall announce to the court the order in which the district attorney intends to call for trial the cases remaining on the calendar. Deviations from the announced order require approval by the presiding judge if the defendant whose case is called for trial objects; but the defendant may not object if all the cases scheduled to be heard before the defendant's case have been disposed of or delayed with the approval of the presiding judge or by consent of the State and the defendant. A case may be continued from the trial calendar only by consent of the State and the defendant or upon order of the presiding judge or resident superior court judge for good cause shown. The district attorney, after consultation with the parties, shall schedule a new trial date for cases not reached during that session of court.

(g) Nothing in this section shall be construed to deprive any victim of the rights granted under Article I, Section 37 of the North Carolina Constitution and Article 46 of Chapter 15A of the General Statutes.

(h) Nothing in this section shall be construed to affect the authority of the court in the call of cases calendared for trial. (1999-428, s. 1.)