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Court Encounters of the Slowest Kind: The District of Columbia's Implementation of the Amorphous Right to a Speedy Trial

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COURT ENCOUNTERS OF THE SLOWEST KIND: THE DISTRICT OF COLUMBIA'S IMPLEMENTATION OF THE AMORPHOUS RIGHT TO A SPEEDY TRIAL

The right to a speedy trial is deeply entrenched in Anglo-American jurisprudence. The sixth amendment to the United States Constitution provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial." Although the principal purpose of the sixth amendment is to protect the accused, the speedy trial right serves additional social interests which often conflict with those of the defendant. Judicial attempts to reconcile these conflicts have consistently rendered the speedy trial right relative rather than absolute. Thus, whether a delay violates the Constitution will depend on the circumstances of the particular case, the views of the trial judge, and the norm for delay in the particular jurisdiction. This inherent uncertainty has been a source of criticism and motivated Congress to pass the Speedy Trial Act, which strives for uniformity in the federal courts by imposing a strict timetable for each stage of a criminal adjudication.

Since the Act does not apply to local courts, nonfederal speedy trial claims must be resolved on a constitutional basis. Although the Supreme Court, in Barker v. Wingo, articulated the test for the determination of a

1. The origins of the right to a speedy trial can be traced to the Magna Carta. See A. HOWARD, MAGNA CARTA TEXT AND COMMENTARY (1964). Chapter 40 of the Magna Carta states: "To no one will We sell, to no one will We deny or delay, right or justice."
2. U.S. CONST. amend. VI.
5. Note, supra note 3, at 144.
speedy trial deprivation, the amorphous nature of the factors to be considered in this test has hindered uniformity among, as well as within, the states. The lack of consistency with which the courts of the District of Columbia have handled these cases illustrates the weaknesses of the highly situational approach to the speedy trial right.

I. THE BURGER COURT BALANCE: Barker v. Wingo

The Supreme Court has always held that the right to a speedy trial is relative rather than absolute, and therefore dependent upon the circumstances of the case. Since the Court’s determination that the right to a speedy trial is binding on the states, the Court has attempted to define with some specificity the scope of the sixth amendment right. For example, in 1971 the Court determined that the right to a speedy trial attached when the defendant was “accused,” either by the filing of formal charges or by arresting and holding him to answer criminal charges.

In early speedy trial cases, the Court required the accused to establish a purposeful governmental delay as an element of deprivation of the right. Today, bad faith is no longer required. Instead, in Barker v. Wingo, the Court articulated a balancing test to reconcile the interests of the accused with those of society. Despite a finding that the government had a clear excuse for only seven months of the more than five years between Barker’s arrest and trial for murder, the Court concluded that the defendant’s speedy trial rights had not been violated since the defendant was only minimally prejudiced and had acquiesced to much of the delay. While reaffirming the relativity of the speedy trial right, the Court identified four factors to be considered in determining whether violations of the right have occurred: length of delay, reasons for delay, assertion of the speedy trial right by the defendant, and prejudice to the defendant. Although the length of delay is, to some extent, a triggering mechanism, none of these factors is “either a necessary or sufficient

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9. Klopfer v. North Carolina, 386 U.S. 213 (1967). The Court concluded that “the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment” and is, therefore, binding on the states through the due process clause of the fourteenth amendment. Id. at 223.
10. United States v. Marion, 404 U.S. 307 (1971). Although the sixth amendment right to a speedy trial does not attach until accusation, a defendant may have due process rights to the prompt disposition of his case prior to accusation. See Favors v. Eyman, 466 F.2d 1325 (9th Cir. 1972).
13. Id. at 533-36.
14. Id. at 530.
condition to the finding of a deprivation of the right of speedy trial."  

Additionally, the Court specifically rejected the argument, previously accepted in most jurisdictions, that a defendant waives his right to a speedy trial for the period of time prior to his assertion of the right. Nonetheless, the Court reasoned that a defendant could still waive his right to a speedy trial for all or part of the delay, and that the force and frequency of the defendant's assertion of the right were elements to be considered in the balance.

In a subsequent decision, the Court concluded that the appropriate remedy for a violation of speedy trial rights was dismissal of the charges with prejudice, thereby foreclosing further prosecution. The severity of this remedy, which has been criticized as "draconian" and "more serious than an exclusionary rule" explains the reluctance of the courts to find speedy trial deprivations. Given the flexibility of the Barker balancing test and the scarcity of Supreme Court cases explaining it, local courts have been left with broad discretion in implementing the test. A court may tip the balance by concluding that a given factor should be heavily weighted in one case, but not in another. Comparatively balancing the factors on an ad hoc basis also results in inconsistent and sometimes incompatible decisions which make an accused's right to a speedy trial even more relative. An examination of the recent speedy trial cases in the courts of the District of Columbia illustrates the interplay of the Barker factors and some of the weaknesses of the balancing approach.

II. A SPEEDY TRIAL IN THE DISTRICT OF COLUMBIA:  
Branch v. United States

The most recent controversial speedy trial case is Branch v. United States, in which the District of Columbia Court of Appeals, relying on the local practice of shifting the burden of proof in cases involving delays over one year, held that a sixteen-month delay from arrest to trial

15. Id. at 533.
16. Prior to Barker only eight states had rejected this demand-waiver doctrine. The remaining jurisdictions employed numerous variations of the rule. See id. at 524 nn.20-22.
17. Id. at 531. The Court stated, "We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right." Id. at 528. However, the Court concluded, "We emphasize that failure to assert the right will make it difficult for a defendant to prove he was denied a speedy trial." Id. at 532.
22. For a more complete analysis of delays longer than one year, see notes 85-87 & accompanying text infra.
shifted the burden of justifying the delay to the government. The government objected on the theory that the defendant was not "accused" for four and a half months between the dismissal of one indictment and the filing of the second. By excluding this period, the net delay from arrest to trial was less than twelve months, too short to shift the burden. The court rejected this argument, concluding that the government intentionally delayed reindicting the defendant. Holding the government responsible for the delay, the court reversed Branch's conviction for second degree burglary. The court found that Branch had been prejudiced in three ways: he was incarcerated for nine of the sixteen months between arrest and trial; he had suffered anxiety, although no overt manifestations or specific instances were alleged; and his defense was impaired because the passage of time affected the memory of one witness and made it impossible to locate another. In placing the burden of proof on the government, the Branch court held that "it is impossible on the record to say that the passage of time did not impair appellant's defense." 

No other District of Columbia case has gone as far as Branch in making the right to a speedy trial absolute rather than relative. Although Branch applied the Barker balance, it placed a greater burden on the government than ever before. However, to some extent, the decision may have turned on the deliberateness of the government's delay.

The cases since Branch have reflected a more reserved approach by the appellate court. In United States v. Perkins, the court refused to shift the burden of proof to the government after a pretrial delay of slightly less than a year despite a conclusion that the delay "seemed excessive." Applying the Barker balance, the appellate court focused

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23. 372 A.2d at 1001.
24. Id. at 1002.
25. In Branch, the court required the government to prove that the delay did not prejudice the defendant. Thus, the government had the burden of showing that the defendant did not suffer anxiety over the possibility of reindictment, that eight months pretrial incarceration was not oppressive, and that the disappearance and loss of memory of defense witnesses was not prejudicial to the defendant. Furthermore, analogizing Branch to a case involving bad faith, United States v. Lara, 520 F.2d 460 (D.C. Cir. 1975), the court impliedly required the government to prove its own good faith. Although never specifically finding bad faith, the Branch court concluded that the government's delays were "deliberate and unjustified." 372 A.2d at 1001.
26. In Branch, the court analogized the delay to that in United States v. Lara, 520 F.2d 460 (D.C. Cir. 1975), which involved bad faith. Clearly the Branch court shifted a heavy burden to the government, but whether any circumstances could justify bad faith has not yet been resolved.
28. Id. at 885. The trial court had concluded that the defendant, charged with two misdemeanors, possession of a prohibited weapon (a blackjack) and carrying a deadly weapon, had been denied his speedy trial rights. Id. at 883.
primarily on the reasons for the delay and the issue of prejudice, and concluded that the defendant’s speedy trial rights had not been denied. Notwithstanding the trial court decision to the contrary, and the seemingly excessive delay for a misdemeanor, the appellate court found a “clear lack of substantial prejudice to the [defendant].”

In other decisions, the court of appeals paid lip service to Branch by claiming to shift the burden of proof to the government, but placed little or no actual burden on the government, thus rendering the shift meaningless. In United States v. Clark, although the trial court had found government obduracy in pursuing a grand jury subpoena which resulted in ten months of litigation, “the appellate court decided that the government-induced delay was not to be accorded the heavy weight assigned to intentional delays.” The court concluded that the defendant had suffered no clear prejudice since he was free on his own recognizance and had failed to establish how the delay impaired his defense or how the anxiety he allegedly experienced “weighed particularly heavily on him in specific instances.” Although the Clark court concluded that the government had “sufficiently justified the delay,” it is questionable whether the court actually shifted the burden to the government.

The question of who should be “charged” with a particular delay may be important in determining whether to shift the burden, as well as in determining whether the speedy trial right has been violated. In Washington v. United States, the appellate court refused to shift the burden to the government, although slightly over one year had elapsed from arrest to trial, because two months of the delay were attributed to the defendant when he changed counsel. In applying the Barker factors, the court then indicated that the defendant’s belated assertion of the speedy trial right and failure to assert prejudice were insufficient to establish a speedy trial violation.

29. The Perkins court held the defendant responsible for a two month delay to allow transfer of the case to another student attorney, even though the transfer was necessitated by delays caused by court congestion, chargeable to the government. Id. at 883 & n.4.
30. Id.
31. Id. at 885. The Perkins court treated the issue of prejudice very differently than did the Branch court. In Branch, prejudice was presumed and the government had the burden of attempting to show that it did not exist.
33. Id. at 437.
34. Id. at 436, quoting Morns v. Wyrick, 516 F.2d 1387, 1391 (8th Cir.), cert. denied, 423 U.S. 925 (1975).
35. Id. at 437.
37. Id. at 1352.
In many cases the court has concluded that the defendant has waived his right to a speedy trial for portions of the delay. In *Chatman v. United States*, which involved a sixteen-month delay from arrest to trial, two defendants charged with serious felonies made explicit waivers of all delays after the first year. Because of the waivers and because some of the delays during the first twelve months were attributable to the defendants, the court refused to shift the burden to the government. Since the defendants failed to allege prejudice with particularity, the court concluded that the defendants' speedy trial rights had not been denied.

Such a waiver of the speedy trial right need not be express. For example, *Cates v. United States* involved a delay of almost five years between arrest and trial for assault, and all but four months were attributable to the defendant. The court indicated that the defendant had waived his right to a speedy trial for this period and rejected the defendant's argument that the government should be charged with the delay on the theory that the government did not make a good faith effort to find him. The court concluded that there was no evidence that the government acted in bad faith. While its conclusions were sound, the court's opinion lacked clarity on the issue of shifting the burden of proof. Specifically, the court claimed to shift the burden of proof to the government because the total delay was over twelve months, even though the delay attributable to the government was less than a year. Such an approach is inconsistent with *Washington* and *Chatman*, since the court refused to shift the burden of proof in those cases despite delays of over one year because the length of delay attributable to the government was less than one year. In light of the court's determination that Cates had not been deprived of his right to a speedy trial, however, the purported shift of the burden in *Cates* may simply reflect excessive judicial zeal rather than a significant change in the court's approach to speedy trial cases.

### III. IMPLEMENTATION OF THE BARKER BALANCE BY THE DISTRICT OF COLUMBIA COURTS

If the speedy trial right is to be meaningful, there must be a degree of predictability in the resolution of speedy trial claims. Since decisions turn on the balancing of the particular circumstances of each case, it is important that the courts weigh the individual elements of the balance consistently. A factor-by-factor analysis of recent District of Columbia

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39. 379 A.2d 968, 972 (D.C. 1977) (fugitive used assumed names to avoid apprehension).
40. *Id.* at 970.
Court of Appeals decisions suggests, however, that such consistency is lacking.

A. Length of the Delay

The length of the delay is considered twice under the Barker approach, first as a triggering mechanism and then again as one of the elements in the balance. In Barker the Supreme Court stated that "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."41 However, the phrase "presumptively prejudicial" is misleading because the initial delay necessary to trigger a speedy trial analysis does not create a presumption that the defendant has suffered prejudice. Instead, the delay merely signals that an investigation into the other factors is warranted, and that the length of time from accusation to trial, sufficient to trigger an application of the Barker balance, will vary with the nature of the offense.42 Although the length of this triggering time for any given offense is a source of controversy among the jurisdictions, the majority of courts will apply the Barker balance to delays of more than one year in cases involving simple crimes.43

The courts in the District of Columbia subject all but the shortest delays to the complete Barker analysis. Although delays ranging from a few days to several months have been held insufficient to trigger the analysis,44 the courts generally scrutinize delays exceeding six months if a speedy trial claim is asserted.45 Both local and federal courts in the

42. See note 10 supra. A defendant may have a sixth amendment speedy trial right for periods when he is not technically accused. E.g., United States v. Lara, 520 F.2d 460 (D.C. Cir. 1975); Branch v. United States, 372 A.2d 998 (D.C. 1977). In both Branch and Lara the courts considered the time between the dismissal of one indictment and the filing of a second indictment as government delay although the defendants were arguably not technically accused during this period.
43. See Barker v. Wingo, 407 U.S. at 530-31; United States v. Lara, 520 F.2d at 463.
44. See Rudstein, supra note 3, at 17. Rudstein contends that a lapse of one year is considered sufficient to trigger an analysis of the Barker factors in almost all adjudications, regardless of the nature of the offense charged. Furthermore, he also notes that jurisdictions will often subject delays of less than one year to the Barker balance. Id.
45. See Parry-Hill v. District of Columbia, 291 A.2d 505, 507 (D.C. 1972). The court concluded that a delay of five days was not sufficient to trigger an investigation of a denial of speedy trial when the defendant was charged with only misdemeanors. See also Henson v. United States, 287 A.2d 106 (D.C. 1972) (a delay of less than five weeks was insufficient for a defendant charged with obtaining property under false pretenses).

However, in at least two cases local courts have examined the merits of cases involving
District of Columbia employ a general rule that the longer the delay and the less serious the offense, the more "presumptively prejudicial" the delay. 47

Once the analysis has been triggered, the length of delay is again considered. A delay of more than one year establishes a prima facie case of speedy trial deprivation and should shift to the government the burden of justifying the delay and showing lack of prejudice to the defendant. 48 The longer the delay, the heavier the burden on the government. While this shifting of the burden of proof based on the length of delay is unique to the District of Columbia, 49 some recent opinions suggest that shifting the burden to the government is merely pro forma. 50

B. Reasons for the Delay

Although the ultimate responsibility for bringing a defendant to trial rests with the government rather than the accused, 51 a defendant can waive his right to a speedy trial by his own delays. 52 It is often difficult to allocate responsibility for a particular delay or determine how various delays are to be weighted. In Barker, the Court reasoned that some delays should be weighted more heavily against the government than others. Thus an intentional delay by the prosecution should be weighted more heavily than court overcrowding or negligence, while an appropriate delay for a valid reason should not be charged against the government at all. 53

There is an unresolved controversy in the District of Columbia courts surrounding government delays involving bad faith. In Barker, the Supreme Court indicated that "[a] deliberate attempt to delay the trial in delays of less than six months. See United States v. Kramer, 286 A.2d 856 (D.C. 1972) (four month delay); United States v. Jones, 254 A.2d 412 (D.C. 1969) (delays ranging from 36-83 days).


49. The vast majority of jurisdictions refuse to shift the burden of proof to the government regardless of the length of the delay. Instead, these jurisdictions require the defendant to prove that the delay resulted in actual prejudice. See Rudstein, supra note 3, at 41-42.


51. Barker v. Wingo, 407 U.S. 514 (1972). The Court reasoned that "[a] more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." Id. at 531.

52. Id. at 529.

53. Id. at 531.
order to hamper the defense should be weighted heavily against the government," but that intentional delays per se do not automatically require a finding of speedy trial infringement. However, precedents in the District of Columbia suggest that government delays indicating bad faith are not justifiable under any circumstances. This issue is obfuscated by the courts' failure to articulate definitions, so that bad faith can be distinguished from intentional delay.

That subtle distinctions in weighting the delay can determine the outcome of a case is apparent from United States v. Clark. The trial court dismissed charges of second degree murder on the basis of its finding of "obduracy on the part of the prosecution in obtaining documents which merely reiterated information already made available to the grand jury . . . ." The trial court found that the subpoena was unjustified and that the government was proceeding in bad faith when the prosecution sought a writ of mandamus to overturn the trial court's quashing of the subpoena. The court of appeals reversed the trial court's finding of bad faith, concluding that the delay was "not to be accorded the heavy weight assigned to intentional delay." After rebalancing the factors, the court reversed the dismissal.

Cases involving court-appointed counsel and public defenders present particular problems since the government is responsible for both prosecution and defense. In United States v. Calhoun, the District of Columbia Court of Appeals held the defendant responsible for delays caused by the lack of proper funding and staffing of the public defender investigative services. The appellate court also charged the defendant with the three month delay caused by the court's removal of an inept defense lawyer from the case and the reappointment of another attorney. The trial court had held the government responsible for both delays. In another recent case, the defense was charged with the delay resulting from the transferral of the case to another student attorney even though the transfer was due to a government delay. The United States Court of Appeals for the District of Columbia Circuit took the opposite approach in United States v. Sarvis, attributing delays caused by the successive

54. Id.
57. Id. at 437.
58. Id. at 437, quoting United States v. Sarvis, 523 F.2d 1177, 1184 (D.C. Cir. 1975).
60. Id. at 279.
appointments of defense counsel to the government when these delays were the result of scheduling problems of the lawyers rather than the defendant. Since the interests of the defendant and his counsel are not always identical, the Sarvis approach is not unreasonable. Justice White's concurring opinion in Barker offers support for this view since he indicated that the crucial factor in attributing responsibility for delays was the defendant's intent.6 Since delays caused by understaffing in the prosecutor's office are charged to the government,64 the more prophylactic view would charge the government with delays caused by ineffective government-appointed counsel as well. However, it is doubtful that the Sarvis rule will be widely followed because of the reluctance of courts to find speedy trial violations which necessitate either dismissal of untried charges with prejudice or reversal of convictions.

Some difficulty has arisen in allocating responsibility for delays involving appeals. Both local and federal courts agree that appellate delay is ultimately the responsibility of the government, but, absent intentional delay, do not weight it heavily.65 The District of Columbia Superior Court handled the issue in an unusual manner in United States v. Anderson.66 While nominally holding the government responsible for the delay, the court denied, without prejudice, defendant's motion for dismissal on speedy trial grounds, thus allowing the case to be tried and the motion revived if the defendant were convicted.67 This approach to speedy trial cases should be closely scrutinized since interlocutory appeals taking several years are not unusual. Moreover, this deferred remedy is arguably an emasculation of the defendant's right to a speedy trial because the defendant may suffer prejudice through incarceration, anxiety, and impairments to his defense and still be foreclosed from the recognized remedy of dismissal.

C. Assertion of the Right

Although Barker brought an end to the demand-waiver doctrine, a

63. "[U]nreasonable delay... cannot be justified by simply asserting that the public resources provided by the State's criminal-justice system are limited... ." Barker v. Wingo, 407 U.S. 514, 538 (1972) (White, J., concurring).
67. 105 DAILY WASH. L. REP. at 607-08. The superior court based its decision to adopt this procedure on the Supreme Court's decision in United States v. Wilson, 420 U.S. 332 (1975) (the Supreme Court impliedly sanctioned a trial court's deferral of the defendant's due process claim until after the jury found the defendant guilty).
Right to a Speedy Trial

defendant's assertion of his desire for a speedy trial is still a factor to be considered in the balancing test. Although courts will not generally assume that a defendant has waived a constitutional right through silence, a defendant who does not assert his desire for a speedy trial stands little hope for success. In mitigation, most courts, including those of the District of Columbia, are willing to consider virtually any attempt by a defendant to initiate judicial proceedings to be an assertion of the right. For example, a speedy trial motion filed with the wrong court, and a motion for release from incarceration have both been sufficient assertions of the right. Both the local and federal courts in the District of Columbia have held that when the defendant is incarcerated, the government must assume he wants a speedy trial unless he asserts otherwise.

Although the courts in the District of Columbia are reluctant to find that a defendant has waived his right in all but the most blatant cases, courts examine the force and frequency of the assertions in the balancing process. In Calhoun, the court of appeals held that an "assertion of [the] right to a speedy trial after either initiating or consenting to several continuances is not . . . entitled to strong evidentiary weight." Thus, an assertion which appears to be merely pro forma will carry little weight with the courts.

D. Prejudice

The final element of the Barker balance is prejudice to the defendant.

68. See notes 16-17 & accompanying text supra.
70. See Rudstein, supra note 3, at 36-37.
71. One of the defendants in Anderson filed his motion for a speedy trial with the trial court. It was later determined that the correct forum was the appellate court, yet in reviewing his speedy trial claim the superior court specifically held that neither defendant had waived his right. United States v. Anderson, 105 DAILY WASH. L. REP. 601, 607 (D.C. Super. Ct. 1977).
73. Id. at 317; Branch v. United States, 372 A.2d 998 (D.C. 1977).
74. In Cates v. United States, the court of appeals held that the defendant had waived his right to a speedy trial for the 55 months he evaded justice through flight and the use of aliases. 379 A.2d 968 (D.C. 1977). Furthermore, explicit waivers made in court with the advice of counsel are clearly sufficient to waive the right. Chatman v. United States, 377 A.2d 1155 (D.C. 1977).
75. See, e.g., Barker v. Wingo, 407 U.S. 514 (1972); Rudstein, supra note 3, at 39. In rejecting the demand-waiver doctrine, the Barker Court stated that the new balancing test would "allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely pro forma objection." Id. at 529.
The *Barker* Court determined that the right to a speedy trial was designed to protect against three types of prejudice: oppressive pretrial incarceration, anxiety while awaiting trial, and the impairment of a defense. The Court also considered an impaired defense the most serious form of prejudice, although not a condition precedent to speedy trial relief. Courts recognize that an impaired defense is often difficult to prove since “what has been forgotten can rarely be shown.”

The *Barker* decision is often criticized for its vagueness on the issue of which party has the burden of proving prejudice. In speedy trial cases, the vast majority of jurisdictions place the burden of proving prejudice on the defendant. This is contrary to the general rule that the government has the burden of showing a lack of prejudice when other constitutional rights are violated. This distinction between the right to speedy trial and other constitutional rights may be caused by two factors. While violations of other constitutional rights are often considered harmless if the error does not prejudice the defense, the speedy trial right is of such a fundamental nature that its deprivation has never been considered a harmless error. Additionally, since prejudice is considered in determining whether a deprivation of speedy trial rights has occurred, a lack of prejudice cannot be alleged once the violation has been established.

The District of Columbia courts handle the issue of prejudice in an

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80. See Rudstein, *supra* note 3, at 41; see also *The Supreme Court 1971 Term*, 86 *Harv. L. Rev.* 1, 170-71 (1972); 58 *Cornell L. Rev.* 399, 409-10 (1973).
81. See Rudstein, *supra* note 3, at 41: The overwhelming majority of courts have required the accused to show actual prejudice in order for this factor of the balancing process to be weighed in his favor... In only a few cases have the courts either presumed prejudice from a lengthy delay, or shifted the burden of proof after a prima facie showing by the defendant of the possibility of prejudice.
82. In *Chapman v. California*, 386 U.S. 18 (1967), the Supreme Court articulated a test for harmless error. Under this test, a deprivation of constitutional rights can only be harmless if the state can demonstrate beyond a reasonable doubt that the constitutional error did not prejudice the defendant by contributing to his conviction. *Id.* at 24. In *Chapman*, the Court reversed the defendants’ convictions and granted them a new trial because the state failed to meet this burden. *Id.* at 26.
83. In *Chapman*, the Supreme Court specifically rejected the argument that all federal constitutional errors must always be deemed grounds for reversal. “We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.” *Id.* at 22. However, the Court went on to underscore the correctness of its previous holdings that “there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.” *Id.* at 23.
unusual manner by shifting the burden from the defendant to the government for delays longer than one year. In application, this rule has become so muddled that there are few generalizations which can be drawn with any certainty. If the total time from arrest to trial is less than one year, the defendant must bear the burden of showing prejudice. In at least one case involving total delays of more than one year, the court of appeals shifted the burden of proof to the government without specifically attributing responsibility to the government for the delay. But when the total time from arrest to trial is more than one year, and the amount of delay attributable to the government is less than one year, decisions of the court of appeals have been inconsistent. The decisions handed down within the past year suggest that the court of appeals may be divided on the issue of how and when the burden of proof should be shifted to the government.

Another unresolved consideration is the manner in which local courts should handle prejudicial anxiety. Given the amorphous nature of anxiety, it is easy to appreciate the difficulty of resolving its existence and extent. Since the Supreme Court seems to have relegated this type of prejudice to a secondary status, compared with defense impairment or oppressive pretrial incarceration, anxiety seldom appears determinative in the balancing process.

The extent to which a defendant must show how any delay weighed particularly heavily on him in specific instances is unclear in the District of Columbia courts. This situation may reflect the confusion surround-

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86. In Branch, which involved a total delay of sixteen months, the D.C. Court of Appeals shifted a heavy burden to the government without determining what portion of the delay was chargeable to the government. 372 A.2d at 1000-01.
87. Clark involved a total delay of seventeen months. Without specifically determining what portion of the delay was chargeable to the government, the court claimed to shift the burden to the government. 376 A.2d at 437. However, a close reading of the case suggests that the court never effectively shifted any burden to the government, despite the fact that the court specifically found that the defendant had not waived his speedy trial rights and that the government was chargeable with at least the ten month period spent litigating the propriety of a grand jury subpoena. Id. at 436.
In Washington v. United States, 377 A.2d 1348, 1352 (D.C. 1977), and in Chatman v. United States, 377 A.2d 1155, 1156-57 (D.C. 1977), the D.C. Court of Appeals refused to shift the burden of proof to the government when the total delay was over one year, but the delay attributable to the government was less than one year. Finally in Cates v. United States, 379 A.2d 968 (D.C. 1977), the D.C. Court of Appeals claimed to shift the burden to the government for a delay of over one year despite the fact that delay chargeable to the government was only four months. Id. at 970.
88. Rudstein, supra note 3, at 48.
89. Compare Branch v. United States, 372 A.2d 998 (D.C. 1977) (finding of anxiety
ing the burden of proof issue generally. Nonetheless, the manner in which the trial courts should examine how anxiety affected a particular defendant is also unresolved. In *Moore v. United States*, the court of appeals refused even to consider the defendant's allegation that he suffered anxiety from the threat of homosexual assaults during incarceration, while the court in *United States v. Perkins* did weigh, but rejected, arguments that the defendant's alleged prejudicial anxiety was caused by disrupting his work-study program for repeatedly postponed court appearances. Similarly, the court of appeals has refused to give consideration to the alleged special anxiety suffered by a police officer when charges threatened his career, yet has recognized the special impact of the revocation of a cabdriver's license pending the disposition of the criminal charges against the driver. Factors outside of the nature and extent of the alleged anxiety appear to weigh more heavily in determining the final outcome of each case.

IV. CONCLUSION

The adjudication of speedy trial claims in the District of Columbia lacks consistency in several important respects, especially in the treatment of the prejudice factor. Such inconsistency eliminates predictability and thus undermines the protection the sixth amendment was intended to assure.

A relative right to speedy trial, such as currently offered under the *Barker* balance, can never offer an accused the concrete protections present under a strict statutory scheme. However, a balancing approach has the advantage of permitting the tribunal to consider the particular circumstances of the case and to resolve the often conflicting interests of the accused and society as the existing variables of the case require.

based on the bare allegation of the defendant) with *United States v. Clark*, 376 A.2d 434 (D.C. 1977) (claim of anxiety by itself does not establish prejudice if the defendant neither asserts nor shows that the delay weighed particularly heavily on him in specific instances).

94. *See* note 88 & accompanying text *supra*. *United States v. Young*, 237 A.2d 542 (D.C. 1968), constitutes the high-water mark for the deference given to anxiety by the District of Columbia courts. The court's finding of a deprivation of speedy trial rights rested, to a large extent, on its conclusion that "prolonging the anxiety and concern unreasonably and extending the oppression that may accompany criminal prosecution can sometimes constitute a denial of a defendant's right to a speedy trial." *Id.* at 544. However, the precedential value of *Young* is questionable since the decision was prior to *Barker v. Wingo*, 407 U.S. 514 (1972), in which the Court considered anxiety to be somewhat less significant than other forms of prejudice.
In light of judicial reluctance to apply the severe remedy of dismissal with prejudice, and the uncertainty inherent in the balancing process, the consistency with which the courts implement the balance gains special importance. Since a cumulative, outcome-determinative approach will relegate the speedy trial right to a mere paper status, it is paramount that courts examine and weigh each element of the balance in an independent and consistent manner.

J. J. Cranmore