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The Defendant'S Dilemma: Valid Charge Or Speedy Trial

may be underlying factors in decisions which have held that contract uncertainty or ambiguity is to be most strongly construed against the party who caused the uncertainty to exist.[58] This is especially true if it is the party who selected the language of the contract[59] or for whose benefit an uncertain provision was inserted.[60]

It appears that the court in *Sears* did not realize the significance of the contractual issue in the case. It conveniently implied an express risk-allocation provision in the credit agreement to place liability on the cardholder. By resolving the issue in this manner, the court ignored the implications of the bipartite arrangement and basic contract principles. In addition, it overlooked the untenable position in which it placed the cardholder. The immediate impact of the decision was the imposition of a heavy financial burden upon a cardholder who appeared no more at fault than the issuer and was certainly less able to absorb the loss. Of greater significance is the fact that *Sears* has established a precedent which extends a cardholder's liability to situations not expressly contemplated in the terms of a credit agreement. In this respect the decision directly conflicts with that in *Allied* and poses a difficult precedent problem in future bipartite credit card cases.

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THE DEFENDANT'S DILEMMA: VALID CHARGE OR SPEEDY TRIAL

A majority of American jurisdictions have statutory provisions which implement the speedy trial guarantees of the various state constitutions.[1] Generally, such statutes provide that if, at the fault of the

[58]*E.g.*, Couture v. Ocean Park Bank, 205 Cal. 338, 270 P. 943 (1928); Andrews v. City of Springfield, 56 Ill. App. 2d 201, 205 N.E.2d 798 (Dist. Ct. App. 1965); Handley v. Mutual Life Ins. Co., 106 Utah 184, 147 P.2d 319 (1944).

[59]W. C. Shepard Co. v. Royal Indem. Co., 192 F.2d 710 (5th Cir. 1951); Couture v. Ocean Park Bank, 205 Cal. 338, 270 P. 943 (1928); Cedar Park Cemetery Ass'n v. Village of Calumet Park, 398 Ill. 324, 75 N.E.2d 874 (1947); Badders v. Peoples Trust Co., 236 Ind. 357, 140 N.E.2d 235 (1957) (applied to bank rules printed in passbook); Green v. Royal Neighbors, 146 Kan. 571, 73 P.2d 1 (1937); Lyman-Richey Sand & Gravel Co. v. State, 123 Neb. 674, 243 N.W. 891 (1932); Ayres v. Harleysville Mut. Co., 172 Va. 383, 2 S.E.2d 303 (1939); Hoffman v. Pfingsten, 260 Wis. 160, 50 N.W.2d 369 (1951) (holding that an interpretation of a contract against the party who prepared the instrument is preferred where different interpretations are possible). *See also* RESTATEMENT OF CONTRACTS § 236 (1932).

[60]Southern Ry. v. Columbia Compress Co., 280 F. 344 (4th Cir. 1922); Tuten v. Bowden, 173 S.C. 256, 175 S.E. 510 (1934).

[1]People v. Godlewski, 22 Cal. 2d 667, 140 P.2d 381 (1943); Wadley v. Commonwealth, 98 Va. 803, 35 S.E. 452 (1900). ILL. CONST. art. 2, § 9, *implemented by* ILL. ANN. STAT. ch. 38, § 103-5 (Smith-Hurd 1964); VA. CONST. art. I § 8, *imple-*

state, the defendant is not brought to trial within a specified period of time after he is formally charged, he shall be discharged from further prosecution under that formal charge.[2] Where a challenge to the validity of the formal charge results in a delay in the proceedings, the prevailing view is that the delay is caused by the accused and tolls the running of the discharge statute.[3] The accused is thus forced to decide

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mented by VA. CODE ANN. § 19.1-191 (Repl. Vol. 1960); W. VA. CONST. art. 3, § 14, *implemented by* W. VA. CODE ANN. § 62-3-21 (1966). *See* ALASKA STAT. § 12.20.050(a)(3) (1962); ARK. STAT. ANN. § 43-1709 (Repl. Vol. 1964); COLO. REV. STAT. ANN. § 39-7-12 (1963); DEL. CODE ANN. tit. 10, § 6910 (1953); FLA. STAT. ANN. § 915.02 (1944); GA. CODE ANN. § 27-1901.2 (1953); IDAHO CODE ANN. § 19-3501 (1948); IND. ANN. STAT. § 9-1403 (1956); IOWA CODE ANN. § 795.2 (Supp. 1969); KAN. STAT. ANN. § 62-1431 (1964); MASS. ANN. LAWS ch. 277, § 72 (1968); MICH. COMP. LAWS ANN. § 28.1024 (Rev. Vol. 1954); MINN. STAT. § 611.04 (1965); MISS. CODE ANN. § 2518 (1942); MO. ANN. STAT. § 545.890 (1953); MONT. REV. CODES ANN. § 94-9501 (1947); NEB. REV. STAT. § 29-1203 (1964); NEV. REV. STAT. § 178-556 (1967); N. M. STAT. ANN. § 41-11-4 (1953); N.Y. CODE CRIM. PROC. § 668 (McKinney 1958); OHIO REV. CODE ANN. § 2945.71 (Baldwin 1968); OKLA. STAT. ANN. tit. 22, § 812 (1969); ORE. REV. STAT. § 134.120 (1968); PA. STAT. tit. 19, § 781 (1964); R. I. GEN. LAWS ANN. § 12-13-7 (1956); S. D. CODE § 34.2202 (Supp. 1960); TENN. CODE ANN. § 40-2001 (1956); TEX. CODE CRIM. PROC. art. 1.05 (1966); UTAH CODE ANN. § 77-1-8 (1953).

[2]In some states, discharge under such a statute is a bar to further prosecution; *e.g.*, VA. CODE ANN. § 19.1-191 (Repl. Vol. 1960). In other states, the same charge may be reinstituted; *e.g.*, IDAHO CODE ANN. § 19-3506 (1948). Discharge statutes exist in different forms in the various states. The time period varies, from "the next term of court in which the indictment is triable," N.Y. CODE CRIM. PROC. § 668 (McKinney 1958), to one hundred and twenty days. ILL. ANN. STAT. ch. 38, § 103-5 (Smith-Hurd 1964). Some states couch the time period in general terms; thus, in Alaska, the trial must be held "within a reasonable period of time." ALASKA STAT. § 12.20.050 (a)(3) (1962). Another variation is to require the defendant to *demand* a trial before the time period begins to run. The Georgia statute, GA. CODE ANN. § 27-1901.2 (1953), provides, for example:

> If more than two regular terms of court are convened and adjourned after the term at which the demand is filed and the defendant is not given a trial, then he shall be absolutely discharged and acquitted of the offense charged in the indictment....

The provisions for tolling the running of the discharge statute also vary. Both the Virginia statute, VA. CODE ANN. § 19.1-191 (Repl. Vol. 1960), and the West Virginia statute, W. VA. CODE ANN. § 62-3-21 (1966), are quite explicit as to what circumstances will toll the statute. The New York and California statutes, on the other hand, employ a "good cause" provision. N.Y. CODE CRIM. PROC. § 668 (McKinney 1958); CAL. PENAL CODE § 1382 (West 1956). A third type of provision is exemplified by the statutes of Illinois and Kansas. This provision tolls the statute if the delay is "occasioned by the defendant," ILL. ANN. STAT. ch. 38, § 103-5 (Smith-Hurd 1964); or if "the delay shall happen on the application of the prisoner," KAN. STAT. ANN. § 62-1431 (1964).

[3]People v. Grace, 88 Cal. App. 222, 263 P. 306 (Dist. Ct. App. 1928); Latson v. State, 51 Del. 377, 146 A.2d 597 (1958); People v. Hamby, 27 Ill. 2d 493, 190 N.E.2d 289, *cert. denied*, 372 U.S. 980 (1963); State v. Barger, 148 Kan. 590, 83 P.2d 648 (1938); State v. Robinson, 271 Ore. 612, 343 P.2d 886 (1959); Common-

whether he wants a speedy trial or a valid formal charge.

In the recent case of *State ex. rel. Farley v. Kramer*,[4] Farley was indicted in September, 1966, on a charge of murder. The case was continued at his request until January, 1967, at which time he successfully moved to have the indictment quashed. Farley was reindicted in May, 1967, and the following month filed a motion to quash that indictment. Trial was set for January, 1968, but was continued by the court because of inclement weather. In March, 1968, the court sustained the June, 1967, motion to quash.[5] On May 21, 1968, he was again indicted. A ten day continuance was granted on motion to allow him to file a "plea and motion."[6] On May 27, Farley filed a motion to be discharged from further prosecution, based on West Virginia's "three term" statute which provides that a defendant shall be discharged from further prosecution if not brought to trial within three terms of court after an indictment is found against him.[7] The motion to be discharged was denied, and the defendant filed a petition for a writ of prohibition in the Supreme Court of Appeals of West Virginia. That court, relying on *Ex parte Bracey*,[8] held that the motions to quash the indictments were proceedings which forced continuances of the case and thus were to be held against the petitioner.[9]

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wealth v. Petrisko, 432 Pa. 250, 247 A.2d 581 (1968); Ramsdell v. Langlois, 100 R.I. 468, 217 A.2d 83 (1966); Mealy v. Commonwealth, 193 Va. 216, 68 S.E.2d 507 (1952). *Contra*, State v. Pruett, 101 Ariz. 65, 415 P.2d 888 (1966); *Ex parte* Miller, 66 Colo. 261, 180 P. 749 (1919); State v. McCarty, 243 Ind. 361, 185 N.E.2d 732 (1962); *Ex parte* Bracey, 82 W. Va. 69, 95 S.E. 593 (1918).

[4]— W. Va. —,169 S.E.2d 106 (1969), *cert. denied*, 90 S.Ct. 482 (1969) (mem.). Since a denial of certiorari by memorandum opinion in no way goes to the merits of a case, this comment remains timely.

[5]The jury commissioner had systematically excluded women from the grand jury.

[6]169 S.E.2d at 111.

[7]W. VA. CODE ANN. § 62-3-21 (1966).

[8]82 W. Va. 69, 95 S.E. 593 (1918). The court in *Bracey* held that a demurrer to an indictment, which was not acted upon by the court for more than six months, was not chargeable to the defendant. The statement in *Bracey* which was relied on in *Farley* was dictum: "If [the accused] instigates a proceeding which forces a continuance of the case at a particular term of court, he will not be permitted to take advantage of the delay thus occasioned." 95 S.E. at 596. This statement was taken out of context and was followed by:

> It will be seen that this... has no application to the facts presented here. Petitioner did not institute, or was not responsible for, any proceeding of any kind, either in the court in which the indictment was pending, or in any other place, which necessitated continuing his case.

Id.

[9]169 S.E.2d at 115. President of the Court, Justice Haymond, in an eight page dissent, objected to the majority's decision on the grounds that petitioner had been compelled to surrender his constitutional right to a speedy trial in order to assert his constitutional right of being tried on a valid indictment. *Id.* at 121.

The purpose of discharge statutes is to ensure the accused's right to a trial within a short period of time after he is charged.[10] Where the defendant deliberately delays trial he is considered to have waived his right to a speedy trial and the statute becomes inoperative.[11] Several theories have been used by those courts which hold that challenging the validity of an indictment is a delay caused by the accused.

One theory is that the motion itself is a delay. Representative of this approach is *People v. Hamby*,[12] where the court reasoned that since the state does not have the means to defend an attack on the validity of an indictment without causing a long delay, the state should not be prejudiced by that delay. This is essentially a "utilitarian" doctrine. A second theory, which is a corollary of the first, is that the defendant should be charged with the delay because he should reasonably foresee that challenging the validity of the formal charge will necessarily cause delay in the proceedings. As early as 1837 it was held in *Ex parte Walton*[13] that a motion to quash an indictment was equivalent to a postponement of trial with the defendant's consent. It is not necessary that the defendant's purpose be that of delay; it is enough that the action be precipitated by the defendant and that the result was a delay.[14] A third theory, adopted in *Mealy v. Commonwealth*,[15] per-

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[10]*See* People v. Godlewski, 22 Cal. 2d 667, 140 P.2d 381 (1943); Wadley v. Commonwealth, 98 Va. 803, 35 S.E. 452 (1900).

[11]*E.g.*, People v. Jenkins, 101 Ill. App. 2d 414, 243 N.E.2d 259 (1968); People v. Walker, 100 Ill. App. 2d 282, 241 N.E.2d 594 (1968); People v. Blake, 31 App. Div. 2d 614, 295 N.Y.S.2d 509 (1968).

[12]27 Ill. 2d 493, 190 N.E.2d 289, *cert. denied*, 372 U.S. 980 (1963). Four months elapsed from the time the defendant filed his motion to quash the first of two indictments and the time that the court denied the petition for discharge. Were discharge to be allowed, because of a motion to test the validity of a formal charge,

> ... the People would be obliged to either successfully defend all such motions or incur the risk of the accused being discharged under the statute. Such perfection cannot be demanded, even of the People, nor should such a weapon to permit potential abuse be placed in the hands of an accused.

190 N.E.2d at 291.

[13]2 Whart. 501 (Pa. 1837).

[14]People v. Grace, 88 Cal. App. 222, 263 P. 306 (Dist. Ct. App. 1928); People v. Hamby, 27 Ill. 2d 493, 190 N.E.2d 289, *cert. denied*, 372 U.S. 980 (1963); State v. Barger, 148 Kan. 590, 83 P.2d 648 (1938); State v. Robinson, 217 Ore. 612, 343 P.2d 886 (1959); Commonwealth v. Petrisko, 432 Pa. 250, 247 A.2d 581 (1968); Ramsdell v. Langlois, 100 R.I. 468, 217 A.2d 83 (1966).

[15]193 Va. 216, 68 S.E.2d 507 (1952). The formal charge was determined to be invalid on the defendant's motion. He was reindicted and then sought discharge under Virginia's "three-term" statute, VA. CODE ANN. § 19-165 (1950), *as amended*, VA. CODE ANN. §19.1-191 (Repl. Vol. 1960). In refusing to grant discharge, the court noted that since the original indictment had been declared invalid on the defendant's motion, he could not claim that he had been continuously in jeopardy.

tains only to charges declared invalid at the instance of the accused. Since the discharge statute becomes operative only when a formal charge is pending, if the charge is declared invalid the accused is outside the protection of the statute. Consequently, the discharge statute does not relate back to the original charge, but only to the charge which is in fact valid.

Three states have taken a position contrary to the result in the principal case and have held that a motion challenging the validity of a formal charge does not constitute a delay caused by the defendant.[16] For example, in *Zehrlaut v. State*,[17] the court granted a motion for discharge, holding that an earlier motion testing the validity of the formal charge was not a dilatory motion, and that the state should have anticipated and prepared for such a challenge when the criminal charge was filed.[18] The reasoning of the courts which apply such a rule is that a defendant has a right to a valid formal charge and that the state should foresee that a questionable formal charge will be tested.[19] Hence, a delay caused by the state's or the court's response to the motion should not be charged to the defendant. This, in effect, is a response to the "utilitarian" approach advanced by the court in *Ham-*

See Ex parte Rosenberg, 23 Cal. App. 2d 265, 72 P.2d 559 (Dist. Ct. App. 1937). The defendant demurred to an indictment, the demurrer was sustained, and the defendant was reindicted. The defendant argued that sustaining the original demurrer did not result in a termination of the proceedings. However, the court held that the original indictment being void, the discharge statute did not commence running until two months later when the defendant was reindicted. The same argument was presented in Latson v. State, 51 Del. 377, 146 A.2d 597 (1958) with the same result. *Cf.* State v. Rowland, 172 Kan. 224, 239 P.2d 949 (1952).

[16]State v. Pruett, 101 Ariz. 65, 415 P.2d 888 (1966) (by implication); *Ex parte* Miller, 66 Colo. 261, 180 P. 749 (1919); Zehrlaut v. State, 230 Ind. 175, 102 N.E.2d 203 (1951). The West Virginia rule, prior to the principal case, was in accord with this position. *Ex parte* Bracey, 82 W. Va. 69, 95 S.E. 593 (1918).

[17]230 Ind. 175, 102 N.E.2d 203 (1951). The defendant was indicted in August, 1948. A month later he moved to quash the indictment. The motion was not acted upon until four months later, when it was overruled. In May, 1949, four months after the motion was overruled, the defendant, not yet having been tried, successfully moved to dismiss the indictment because of delay in prosecution.

[18]102 N.E.2d at 207.

[19]State v. Pruett, 101 Ariz. 65, 415 P.2d 888 (1966) (dictum); Zehrlaut v. State, 230 Ind. 175, 102 N.E.2d 204 (1951) (by implication). The Supreme Court of Arizona recently expressed such reasoning:

> There can be little doubt that the defendant should not be penalized for his exercise of a fundamental constitutional right.... Defendant's motions to dismiss or quash were pursuant to the criminal procedure rules of this state and were, no doubt, anticipated by the state in this, as well as in most cases.

415 P.2d at 891. For a discussion of the defendant's right to be procecuted only on a valid formal charge see note 53 *infra* and accompanying text.

by.[20] In rejecting the "utilitarian" concept these courts hold that, since the original formal charge is still valid, the time period runs from that formal charge, and if the defendant is not brought to trial within the prescribed time period, he should be discharged.[21] Where the challenge to the validity of the formal charge is sustained, as in *Farley*, only one jurisdiction has held that the time period continues to run from the original charge.[22] The Supreme Court of Indiana, relying on *Zehrlaut*, held that dismissal of an indictment, on the defendant's motion, did not remove the charge itself; rather, it only operated as against that particular indictment.[23] The court stated that to hold otherwise would force a hardship on the defendant:

> [T]he accused would be forced to accept one of two prejudicial courses of action: either file motions to quash which would, even though sustained, toll the three-term statute, or waive the defects by not filing the motions to quash, so as not to toll the three-term statute. No such burden should be placed on the defendant.[24]

Although Indiana is the only state to specifically hold this position, a Maryland court recently echoed a similar opinion.[25] Though finding that the defendant had not been placed within the discharge statute, that particular court noted that if the actions of the state, in failing to draw up a valid indictment until the third try, had resulted in an unreasonable delay, the defendant might have been denied due process of law.[26]

A person, once arrested should be entitled to both a speedy trial[27] and a substantively valid formal charge.[28] The right to a speedy trial,

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[20]Text accompanying note 12 *supra*.

[21]*See Ex parte* Miller, 66 Colo. 261, 180 P. 749 (1919); *Ex parte* Bracey, 82 W. Va. 69, 95 S.E. 593 (1918).

[22]State v. McCarty, 243 Ind. 361, 185 N.E.2d 732 (1962).

[23]*Id.*

[24]185 N.E.2d at 737.

[25]Greathouse v. State, 5 Md. App. 675, 249 A.2d 207 (Ct. Spec. App. 1969).

[26]249 A.2d at 215 (dictum).

[27]Cases cited note 42 *infra* and accompanying text. Various time provisions have been suggested to define a speedy trial. It was suggested, for example, that to ensure a speedy trial, jurisdictions should make it mandatory that a defendant be brought to trial within thirty days after an indictment. 24 CRIM. L.J. 1113 (1924). Another suggestion has been that the period from arrest to trial in felony cases should not be more than four months. REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 155 (1967). The federal courts use a "reasonable time" standard. *See* Baker v. United States, 393 F.2d 604 (9th Cir. 1968).

[28]Text accompanying note 54 *infra*.

as set out in the United States Constitution,[29] was recently extended by the Supreme Court to criminal proceedings in all state and local courts.[30] This right had previously been guaranteed by various state constitutional provisions, which were patterned after[31] or directly incorporated[32] the federal constitutional provision. The prevailing view today is that the right to a speedy trial does not arise until the accused has been formally charged.[33] While the Supreme Court has not yet expressly held that the right to a speedy trial arises prior to the formal

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[29]U.S. CONST. amend. VI provides, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...."

[30]Klopfer v. North Carolina, 386 U.S. 213 (1967).

> The pendancy of the indictment may subject him [petitioner] to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression... the criminal procedure condoned in this case... clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment....

Id. at 222.

[31]*E.g.*, CONN. CONST. art. 1, § 8.

[32]*E.g.*, CALIF. CONST. art. 1, § 13.

[33]*E.g.*, Benson v. United States, 402 F.2d 576 (9th Cir. 1968); United States v. McCarthy, 292 F. Supp. 937 (S.D.N.Y. 1968). *Cf.* State v. Saiz, 103 Ariz. 567, 447 P.2d 541 (1968); State v. Jestes, — Wash. —, 448 P.2d 917 (1968). Recently, however, a different position has been expressed by some courts. In United States v. Provoo, 17 F.R.D. 183 (D. Md.), *aff'd.* 350 U.S. 857 (1955) (mem.), a federal district court held that where the defendant was imprisoned for seven months without any formal charge being placed against him, then released and subsequently reindicted over five years later, the delay by the government was a sufficient ground for dismissal.

A further modification of the right to a speedy trial is the "demand rule." Apparently, the earliest judicial pronouncement of the demand rule was in Phillips v. United States, 201 F. 259 (8th Cir. 1912), where the court held: "It is his duty, if he wants a speedy trial, to ask for it; and we must presume that he would have been granted an earlier trial if he had so asked." *Id.* at 262. The effect of this rule was shown in United States v. Lustmann, 258 F.2d 475 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958), where it was held that five years from the date of the indictment to the date of trial was not an unreasonable delay, since the defendant had not demanded a trial. The American Bar Association has recommended dropping the "demand rule": "The time for trial should commence running without demand by the defendant...." ABA STANDARDS RELATING TO SPEEDY TRIAL, RULE 2:2 (1969).

Some states have statutory provisions for the right to a speedy formal accusation; *e.g.*, VA. CODE ANN. § 19.1-163 (Repl. Vol. 1960) provides, in part:

> A person in jail on a criminal charge shall be discharged from imprisonment if a presentment, indictment or information be not found or filed against him before the end of the second term of the court at which he is held to answer....

charge,[34] one federal court[35] and three state courts[36] have adopted this principle. The District of Columbia Circuit held recently that the constitutional guarantee of a speedy trial should protect against inordinate delays in presenting a formal charge as well as delays between the formal charge and trial.[37] Supplementing this view, the court later held that the prosecutor's duty to ensure a speedy trial should begin as soon as the arrest is made, without regard to when an indictment is returned.[38] The Supreme Court of Illinois in a recent case noted that a substantial number of cases hold that the sixth amendment's speedy trial guarantee has no application until after an indictment or information has been found by the state, and a delay before the formal charge generally is governed by the statute of limitations. However, a long lapse between arrest and indictment may deprive the defendant of his right to a speedy trial.[39] In a recent Idaho case where the accused was not arrested for the purpose of being formally charged until over eleven months after a complaint was filed against him and the prosecutor knew of his whereabouts during these eleven months, the court held:

> Under the [state] constitutional provisions, no logical conclusion can be reached other than that the time within which an accused is to be secured in his right to a speedy trial must be computed from the time the complaint is filed against him.[40]

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[34]However, the court by way of dictum has implied that such may be the case:

> [I]f, contrary to sound judicial administration in our federal system, arrest and incarceration are followed by inordinate delay prior to indictment, a defendant may, under appropriate circumstances, invoke the protection of the Sixth Amendment.

Smith v. United States, 360 U.S. 1, 10 (1959).

[35]Hanrahan v. United States, 348 F.2d 363 (D.C. Cir. 1965); Nickens v. United States, 323 F.2d 808 (D.C. Cir. 1963), *cert. denied*, 379 U.S. 905 (1964); Mann v. United States, 304 F.2d 394 (D.C. Cir.), *cert. denied*, 371 U.S. 896 (1962).

[36]Jacobson v. Winter, 91 Idaho 11, 415 P.2d 297 (1966); People v. Hryciuk, 36 Ill. 2d 500, 224 N.E.2d 250 (1967); State v. Johnson, 275 N.C. 264, 167 S.E.2d 274 (1969).

[37]Mann v. United States, 304 F.2d 394, 396 n.4 (D.C. Cir.), *cert. denied*, 371 U.S. 896 (1962).

[38]Hanrahan v. United States, 348 F.2d 363, 366 (D.C. Cir. 1965). Apparently the District of Columbia Circuit is the only federal jurisdiction which has adopted this view.

[39]People v. Hryciuk, 36 Ill. 2d 500, 224 N.E.2d 250 (1967). The accused was arrested in 1939 on a rape charge. Several days later he confessed to a 1937 murder. He was indicted on the rape charge and convicted. In 1953 he successfully challenged the rape conviction and was released. He was then indicted and convicted on the 1937 murder charge. The appellate court reversed, holding that he had been denied his right to a speedy trial.

[40]Jacobson v. Winter, 91 Idaho 11, 415 P.2d 297, 300 (1966).

The courts in each of these jurisdictions reasoned that there exists no logical reason to immunize delay *before* the formal charge from the constitutional requirement of a speedy trial and censure delay *afterwards*.[41] The former delay is as equally deleterious and thwarts the protection afforded by speed between indictment and trial; it creates the very dangers now avoided by a timely trial after indictment. It prolongs pretrial judicial control of a party as yet presumed innocent; it increases anxiety and the attendent burdens placed on a party under public accusation; and it impairs the ability of the accused to defend himself, due to a greater probability of lost witnesses and faded memories.[42]

The Supreme Court itself has not expressly held that the right to a speedy trial arises prior to the filing of the formal charge. However, in the *Escobedo*[43] and *Miranda*[44] cases the Court did extend to pre-indictment activities in the states one of the constitutional guarantees[45] formerly thought to arise only after the formal charge had been placed against the accused. In *Escobedo,* the court held that it made no difference that the defendant had not been formally indicted; the constitutional protection attached when he became "the accused."[46] This view was expanded two years later in the *Miranda* decision where the court held that the constitutional protection arises when an individual is ". . . deprived of his freedom by the authorities in any significant way . . . ."[47] Although the constitutional protection involved in the *Escobedo* and *Miranda* cases was the privilege against self-incrimination, these cases show a willingness to protect the defendant prior to indictment and demonstrate the application of constitutional rights without regard to the formalities of criminal procedure. This anticipates the increased acceptance of the position taken by courts in Idaho,[48] Illinois[49] and the District of Columbia Circuit,[50] that the constitutional

[41]State v. Johnson, 275 N.C. 264, 167 S.E.2d 274, 279 (1969); *cf.* Hanrahan v. United States, 348 F.2d 363 (D.C. Cir. 1965); Mann v. United States, 304 F.2d 394 (D.C. Cir.), *cert. denied,* 371 U.S. 896 (1962); People v. Hryciuk, 36 Ill. 2d 500, 224 N.E.2d 250 (1967); Jacobson v. Winter, 91 Idaho 11, 415 P.2d 297 (1966).

[42]Hanrahan v. United States, 348 F.2d 363, 366 (D.C. Cir. 1965); *accord, Ex parte* Altman, 34 F. Supp. 106 (S.D. Cal. 1940).

[43]Escobedo v. Illinois, 378 U.S. 478 (1964).

[44]Miranda v. Arizona, 384 U.S. 436 (1966).

[45]U.S. CONST. amend. V states, in part: "[N]or shall be compelled in any criminal case to be a witness against himself. . . ."

[46]378 U.S. at 485.

[47]384 U.S. at 478.

[48]Jacobson v. Winter, 91 Idaho 11, 415 P.2d 297 (1966).

[49]People v. Hryciuk, 36 Ill. 2d 500, 224 N.E.2d 250 (1967).

[50]Cases cited note 35 *supra.*

right to a speedy trial should relate to the time the accused is initially taken into custody.

In addition to a speedy trial, the defendant should also be entitled to a substantively valid formal charge. The technical procedure of an indictment by a grand jury in all major criminal cases, as guaranteed by the Constitution,[51] has not yet expressly been extended by the Supreme Court to persons brought before state courts.[52] However, the Court has recognized the necessity of a valid formal charge on which to base a prosecution.[53] In the early case of *Hurtado v. California*,[54] it was held that the fourteenth amendment provision for "due process of law"[55] does not necessarily require an indictment by a grand jury in a state prosecution, but that a prosecution on the basis of an information is sufficient.[56] This sentiment has repeatedly been voiced by the Supreme Court[57] as well as by the courts of the various states.[58] The necessity of a valid formal charge on which to base a criminal prosecution has long been recognized in Anglo-American law.[59] The indictment or information informs the accused of precisely the crime

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[51]U.S. CONST. amend. v states, in part: "No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury...."

[52]In O'Callahan v. Parker, 89 S. Ct. 1683 (1969), the Supreme Court emphasized that the right to an indictment by a grand jury should be given the widest possible application. Justice Douglas stated, "If the case does not arise 'in the land or naval forces,' the accused get *first* the benefit of an indictment by a grand jury...before a civilian court as guaranteed by the Sixth Amendent...." *Id.* at 1685.

[53]*See* Smith v. United States, 360 U.S. 1 (1959); Hurtado v. California, 110 U.S. 516 (1884).

[54]110 U.S. 516 (1884).

[55]U.S. CONST. amend. XIV, § 1.

[56]110 U.S. at 538.

[57]*See, e.g.*, Kennedy v. Walker, 337 U.S. 901 (1949) (applying Conn. law); Lem Woon v. Oregon, 229 U.S. 586 (1913). In *Kennedy*, four justices dissented from the *per curiam* affirmation of a Connecticut court's holding that an indictment was not a constitutional requirement in state court cases. *See* Kennedy v. Walker, 135 Conn. 262, 63 A.2d 589 (1948).

[58]Smith v. Warden, 25 Conn. Supp. 509, 209 A.2d 521 (Super. Ct. 1964), *cert. denied*, 381 U.S. 411 (1965); State v. Linehan, 276 Minn. 349, 150 N.W.2d 203 (1967); State v. Barr, 126 Vt. 112, 223 A.2d 462 (1966); Goyer v. State, 26 Wis. 2d 244, 31 N.W.2d 888 (1965).

[59]L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 204 (1947):

> It is a fundamental tenet of Anglo-American law that no person can be subjected to trial until he has been informed formally and in writing what the charge is against which he must be prepared to defend himself.

For an excellent history of the development of the indictment and information see WHYTE, IS THE GRAND JURY NECESSARY? 45 VA. L. REV. 461 (1959).

with which he is being charged so that he can prepare a defense.[60] Thus, it is essential that the formal charge be substantively valid and that it be brought against the defendant in accordance with the law. Were the procedural and substantive validity of a formal charge not required, a public prosecutor could charge without just cause any person whom he suspected of committing a crime. The requirement of validity is further emphasized by the holding in many jurisdictions that a trial under an invalid formal charge is a nullity and the defendant may be retried.[61] This result has been explained on the grounds that jeopardy attaches only when a valid charge is pending against the accused[62] and that a valid charge is "jurisdictional" — the court having no jurisdiction over the defendant, the judgment is void.[63] The defendant should challenge a formal charge suspected of invalidity, to ensure both that his rights are protected and to avoid the possibility of a time consuming retrial.

In the principal case, Farley asserted his right to a valid formal charge by challenging three invalid indictments returned against him. By asserting his right to a valid charge, Farley was protecting both himself and the state. Nevertheless the court, following the prevailing view, held that the assertions by Farley of his right to a valid indictment were continuances, or postponements, of the trial and thus tolled the discharge statute. Therefore, by asserting his right to a valid in-

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[60]J. WAITE, CRIMINAL LAW IN ACTION 55 (1934):

> Under the state constitutions, and indeed as an obvious essential to fairness and justice, the defendant has an absolute right to be informed before trial of exactly what wrong doing he is charged with—he may 'demand the nature and cause of his accusation.' Not only must the accusation explicitly inform the accused of what he is alleged to have done, but also the acts so alleged must amount to a crime. Obviously one should not be put to trial on a charge of having done what no law forbids his doing. Therefore, the statements in the accusation must make it evident that if the accused did in fact do what he is charged with having done, he did commit a crime.

[61]*E.g.*, Presley v. State, 6 Md. App. 419, 251 A.2d 622 (Ct. Spec. App. 1969); People v. Cianciuli, 59 Misc. 2d 187, 298 N.Y.S.2d 217 (Dist. Ct. 1969); State v. Simmans, 18 Ohio App. 2d 143, 247 N.E.2d 785 (Ct. App. 1969); Mealy v. Commonwealth, 193 Va. 216, 68 S.E.2d 507 (1952). *Cf.* Benton v. Maryland, 89 S. Ct. 2056 (1969); United States v. Franke, 409 F.2d 958 (7th Cir. 1969).

[62]Mealy v. Commonwealth, 193 Va. 216, 68 S.E.2d 507 (1952).

[63]J. WAITE, CRIMINAL LAW IN ACTION 56 (1934):

> It does not matter that the accused has actually been tried and found guilty of a specific crime and that the evidence produced leaves no doubt of his guilt. The courts have held, and many still do hold, that a valid indictment is 'jurisdictional' and that trial, however fairly conducted, is a nullity if it eventually appears that the accusation was formally insufficient....

dictment Farley was forced to waive his right to a speedy trial.[64] The burden of placing a valid charge against a defendant is on the state, and thus the defendant should not be required to obtain such a valid charge only by a waiver of another constitutional right. The assertion by the court, that since the defendant had quashed the original indictment he was not in jeopardy and hence could not invoke the discharge statute, fails to recognize that it is the delay, latent with dangers to the defendant, and not the formal stage of the proceedings, which is crucial. This delay begins the moment a party is deprived of his freedom. Therefore, it is from this point that the right to a speedy trial commences. Nor can the result in *Farley* be justified by the "utilitarian" argument employed in the *Hamby* decision. The fact that a state may not have the resources to make a timely defense to every attack upon the validity of an indictment should not take precedence over the right of the accused to a speedy trial.

A dilatory plea filed by an accused should toll the running of the discharge statute. However, a motion testing the validity of a formal charge should not be held against him. The accused should not be forced into the dilemma of determining whether or not to waive his right to a speedy trial in order to assert his right to a proper charge.

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[64] 169 S.E.2d at 121.