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Speedy Trial Protection for Indiana Criminal Defendants Under Indiana's Amended Trial Rule 4

NOTES

SPEEDY TRIAL PROTECTION FOR CRIMINAL DEFENDANTS UNDER INDIANA'S AMENDED CRIMINAL RULE 4

INTRODUCTION

A defendant's right to a speedy trial on a criminal charge is fundamental to Anglo-American jurisprudence.[1] A speedy trial is guaranteed by the sixth amendment of the United States Constitution.[2] The United States Supreme Court has declared this portion of the sixth amendment applicable to the states through the fourteenth amendment;[3] in addition, each of the fifty states guarantees the right to a speedy trial to its citizens.[4] Indiana Criminal Rule 4[5] is one of many state statutes which attempts to provide a definitive safeguard of this right.

The purpose of this note is to examine the recently amended CR 4 in light of the problems courts have encountered in interpreting the rule's predecessors. The examination will isolate and criticize the changes made in the new rule as well as suggest further solutions to the interpretive questions which remain. Thus, the note will seek to serve as a guide to readers unfamiliar with CR 4, an aid to attorneys and courts who are called upon to use or interpret the existing rule and a source of suggestions to committee members and legislators contemplating further change of the rule.

After CR 4 has been presented and its history has been traced, the purpose of the rule will be delineated. With this purpose as a touchstone, various problems and questions will be met and answered. First, the listed exceptions to CR 4 will be explained and the validity of each will be measured. Second, the method for determining the rule's specified time period will be analyzed. In conjunction with that determination, the applicability of CR 4 to

1. In *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967), the Supreme Court refers to a recognition of the right to speedy justice in the Assize of Clarendon, 1166.

2. "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . ." U.S. CONST. amend. VI.

3. 386 U.S. at 223.

4. Smith v. Hooey, 393 U.S. 374, 377 (1969).

5. IND. R. CRIM. P. 4 [hereinafter cited in the text as CR 4].

defendants incarcerated on other offenses will be clarified. Third, the necessity of demand requirements under the rule will be explored. Finally, the assignment of the burden of establishing cause of delay will be examined.

CR 4 In Perspective

CR 4 must be seen in its entirety in order to appreciate the problems that courts have experienced in the specific application of the rule's predecessors. In stating the rule and briefly outlining its historical development, this section will provide the background for that perspective.

CR 4 Stated

Indiana Criminal Rule 4 declares that one accused of a crime is to be released on his own recognizance if incarcerated without a trial for an aggregate period exceeding six months from the date he was charged or arrested.[6] There are three exceptions to the operation of this rule.[7] The first exception applies to those instances in which a defendant successfully makes a motion for a continuance. The second exception applies when the delay in the trial is caused by the defendant's act. The third listed exception becomes applicable when a trial cannot be held during the statutory period because of a congested court calendar. A prerequisite for this final exception requires the prosecutor to request a continuance in the trial. The prosecutor's motion for such continuance must be made at least ten days prior to the trial date and must allege a congested court calendar as grounds for the motion. If such motion is made within the ten-day period prior to the trial date, the prosecutor must also demonstrate that he was free from fault in causing the delay.[8]

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6. Ind. R. Crim. P. 4(A) provides that
[n]o defendant shall be detained in jail on a charge, without a trial, for a period in aggregate embracing more than six [6] months from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge (whichever is later).

7. Ind. R. Crim. P. 4(A) provides exceptions
where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar.

8. Ind. R. Crim. P. 4(A) provides
that in the last-mentioned circumstances, the prosecuting attorney shall make such statement in a motion for continuance not later than ten [10] days prior to the date set for trial, or if such motion is filed less than ten [10] days prior to trial, the

A procedure is provided by which an accused detained in jail pending trial may file a motion for an early trial.[9] If an incarcerated defendant makes such a motion,[10] he is entitled to trial within fifty judicial days. If his trial is not commenced within that time and none of the three conditions of exception mentioned above is present, the defendant is entitled to discharge.[11]

CR 4 further provides for defendants released on recognizance or bail.[12] An accused must be tried within one year from the date that a charge was filed against him or the date he was arrested, whichever occurs later. The only instances in which the operation of this provision is defeated are the three exceptions referred to above in conjunction with an incarcerated defendant.[13] In cases where any one of these three exceptions is present, the rule's time limitations are tolled.[14] The applicable period resumes counting only after the intervening delay has terminated. Where delay occurs during the final thirty days of any CR 4 trial time limitation *and* such delay was caused by the defendant's act, the prosecution may petition the trial court for an additional thirty-day extension in which to try the defendant.[15]

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prosecuting attorney shall show additionally that the delay in filing the motion was not the fault of the prosecutor.

9. IND. R. CRIM. P. 4(B) provides that

[i]f any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within fifty [50] judicial days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such fifty [50] judicial days because of the congestion of the court calendar. Provided, however, that in the last mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as under subdivision (A) of this rule.

10. *See* Gross v. State, ___ Ind. ___, 278 N.E.2d 583 (1972).

11. *See* note 9 *supra*.

12. IND. R. CRIM. P. 4(C) provides that

[n]o person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later.

13. IND. R. CRIM. P. 4(C) concludes by saying that "[a]ny defendant so held shall, on motion, be discharged."

14. IND. R. CRIM. P. 4(F) states that

[w]hen a continuance is had on motion of the defendant, or delay in trial is caused by his act, any time limitation contained in this rule shall be extended by the amount of the resulting period of such delay caused thereby.

15. IND. R. CRIM. P. 4(F) concludes by stating that

When present, one other special set of circumstances may extend the six-months, fifty-judicial days and one-year time periods specified in CR 4. At the time an accused makes a motion for discharge, the trial court may continue the cause for ninety days provided three criteria are established: first, there exists evidence which the state has not been able to secure; second, the state has made a reasonable effort to obtain the evidence; third, the trial court has good reason to believe that the state will be able to procure the evidence within ninety days. If the defendant has not received a trial at the end of this ninety-day extension, he is to be discharged.[16]

A CR 4 discharge effectively bars a subsequent prosecution for the same offense.[17] While the courts have emphasized that the discharge is not an acquittal in that it does not determine a defendant's guilt or innocence,[18] such discharge stands in the record as if the defendant had been acquitted.[19] In that sense, the order granting a discharge is a final judgment in the cause.[20]

Historical Outline of CR 4

Indiana's original discharge statute was enacted in 1881.[21] As the predecessor of CR 4, its form was substantially the same as the

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if the defendant causes any such delay during the last thirty [30] days of any period of time set by operation of this rule, the State may petition the trial court for an extension of such period for an additional thirty [30] days.

16. IND. R. CRIM. P. 4(D) provides that

[i]f when application is made for discharge of a defendant under this rule, the court be satisfied that there is evidence for the state, which cannot then be had, that reasonable effort has been made to procure the same and there is just ground to believe that such evidence can be had within ninety [90] days, the cause may be continued, and the prisoner remanded or admitted to bail; and if he be not brought to trial by the state within such additional ninety [90] days, he shall then be discharged.

17. McGuire v. Wallace, 109 Ind. 284, 10 N.E. 111 (1887); *cf.* State v. Taylor, 235 Ind. 632, 137 N.E.2d 537 (1956). A CR 4 discharge on an offense does not bar subsequent prosecution for a separate offense, even one arising out of the same transaction. Foreman v. State, 214 Ind. 79, 14 N.E.2d 546 (1938); *accord*, Kirk v. State, ___ Ind. ___, 287 N.E.2d 334 (1972) (a discharge is effective as to any lesser included offense charged under another count).

18. State v. Soucie, 234 Ind. 98, 123 N.E.2d 888 (1955).

19. State *ex rel.* Hasch v. Johnson Circuit Court, 234 Ind. 429, 127 N.E.2d 600 (1955); State v. Gardner, 233 Ind. 557, 122 N.E.2d 77 (1954).

20. State v. Soucie, 234 Ind. 98, 123 N.E.2d 888 (1955).

21. Ch. 36, §§ 207-09, [1881] Ind. Acts 153.

present rule.[22] Some procedural changes, however, have been incorporated in the present rule.

A significant difference between CR 4 and the earlier discharge statute is the manner in which the maximum time for trial is expressed. The original statute provided that a defendant was not to be held on recognizance for "more than *three terms*."[23] The present rule no longer speaks of "term" time; rather, under CR 4 "[n]o defendant shall be held . . . for . . . more than *one year*."[24] This change from a specified number of terms to a specified number of months effected a state-wide uniform application of the discharge rule.[25] Under the earlier statute, since the number of court terms which were commenced each year varied from county to county,[26] the degree of statutory protection varied accordingly.[27] By eliminating any reference to the beginning and end of trial court terms, CR 4 guarantees a trial for all defendants within the same time period. This guarantee also provides greater ease of administration than that provided by the earlier statute.

A further difference between CR 4 and its predecessor is the inclusion in the rule of a fifty-judicial day provision.[28] The older discharge statute did not contain any provision comparable to CR 4(B), which requires trial within fifty judicial days for an incarcerated defendant who has made a motion for an early trial. This

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22. It was reenacted in the Recodification Act of 1905, ch. 169, §§ 219-21, [1905] Ind. Acts 584 (codified at Ind. Ann. Stat. §§ 9-1402 to 1404 (repl. 1956)). In pertinent part, § 9-1403 provided that

> [n]o person shall be held by recognizance to answer an indictment or affidavit, without trial, for a period embracing more than three [3] terms of court, not including the term at which a recognizance was first taken thereon, if taken in term time; but he shall be discharged unless a continuance be had upon his own motion, or the delay be caused by his act, or there be not sufficient time to try him at such third term.

23. *Id.*

24. *See* note 12 *supra*.

25. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL § 2.1 (1970) [hereinafter cited as ABA STANDARDS]. The commentary to section 2.1 notes that some speedy trial plans express time limits according to how many court terms have elapsed. These are criticized as causing "lack of uniformity throughout a jurisdiction and being difficult for defendants and counsel to understand." Comment at 14.

26. *Compare* State v. Mabrey, 199 Ind. 276, 157 N.E. 97 (1927) (Monroe county had four terms per year) *with* Palmer v. State, 198 Ind. 73, 152 N.E. 607 (1926) (Owen county had two terms per year).

27. Callahan v. State, 247 Ind. 350, 214 N.E.2d 648, *cert. denied* 385 U.S. 942 (1966).

28. *See* note 9 *supra*.

innovation in the rule serves two purposes. Its obvious function is to provide the opportunity for an earlier trial for incarcerated defendants. It also serves, however, to negate the requirement of a demand for trial as a prerequisite to the operation of CR 4(A).[29]

PURPOSE OF CR 4

Prior to the 1974 amendments, CR 4 was surrounded by problems relating to its interpretation and application. These problems included a determination of the method to be used in counting the rule's time requirements, the application of the rule to defendants in jail on a different offense, the demand required by the rule, and with whom the burden of proof should reside in a discharge hearing. A proper understanding of these problems and the extent to which they have been effectively alleviated by the rule's recent amendments requires an examination of the purpose of CR 4.

The Indiana Supreme Court has enumerated three possible purposes for CR 4. One view describes the rule as a practical implementation of the Indiana Constitution. A second view suggests that CR 4 serves to prod the prosecution into trying a case promptly. According to the third view the purpose of CR 4 is to bring the defendant to trial within the stated period of time, provided that the rule's exceptions do not apply. While all three propositions are accurate, the emphasis should be placed on the third view mentioned.

CR 4: Implementation of the Constitution

The Indiana Supreme Court has often expressed the purpose of CR 4 as being a "practical implementation" of Article 1, Section 12 of the Indiana Constitution.[30] This section provides in pertinent part that "[j]ustice shall be administered . . . speedily, and without delay."[31] Expressing the rule's purpose in terms of the speedy trial right guaranteed by the constitution, however, fails to provide a definitive guide in the application of the rule. Resort to the constitution does not clarify difficult situations governed by CR 4.

That reference to the Indiana Constitution does not provide

29. *See* notes 144-46 *infra* and accompanying text.

30. Johnson v. State, 252 Ind. 70, 245 N.E.2d 659 (1969); State *ex rel.* Hasch v. Johnson Circuit Court, 234 Ind. 429, 127 N.E.2d 600 (1955); Liese v. State, 233 Ind. 250, 118 N.E.2d 731 (1954).

31. IND. CONST. art. I, § 12 (1891).

valuable assistance in solving discharge problems is demonstrated by *State v. Beckwith*.[32] In that case the clerk's entry book indicated the amount of defendants' bail, but no further entry of any court proceedings occurred until a new judge assumed office six months later. After four additional months had expired, each defendant filed a motion for discharge. The trial judge sustained the motions. On the state's appeal, the Indiana Supreme Court reversed the trial court's decision due to lack of evidence concerning the time that the defendants were released on bail.[33] While holding that the defendants had failed to present the necessary proof to bring them within the terms of the statute, the supreme court felt a "duty to affirm the judgment if regardless of the statute the special judge reached the correct conclusion."[34] In turning to the question of reasonable time, as guaranteed in the Bill of Rights beyond which the trial of an accused may not be delayed, the *Beckwith* court stated that "no Indiana case which we have been able to find disposes of the question."[35] The words of the Indiana Constitution, "speedily and without delay," presented the court with only vague guidelines:

> A speedy trial is, in general, one had as soon as the prosecution, with reasonable diligence can prepare for it;
>
> . . . .
>
> Due allowance must be made for the delays which are a natural incident to every criminal prosecution. These must be regarded as reasonable. The guaranty is against unreasonable delay.[36]

Applying this definition to the facts in *Beckwith*, the court did not find sufficient facts from which to draw a conclusion that the trial was unreasonably delayed.

The futility of seeking the aid of the constitution in measuring the validity of a discharge claim can be seen in the language of the *Beckwith* court. CR 4 encompasses within it the constitutional guarantee of a trial commenced "speedily and without delay,"[37] but it

32. 222 Ind. 618, 57 N.E.2d 193 (1944).
33. *Id.* at 620, 57 N.E.2d at 194.
34. *Id.* at 623, 57 N.E.2d at 196.
35. *Id.*
36. *Id., quoting* 22 C.J.S. *Criminal Law* § 467 (1936).
37. *See* note 31 *supra*. Nor does a consultation of the United States Constitution or federally established speedy trial requirements provide more than vague minimum guidelines

defines *specifically* the length of time beyond which a delay in trial will not be permitted. Whether a delay is permitted under the rule does not depend on whether it is a "natural incident" to criminal proceedings in general, as dictated by the *Beckwith* definition of the constitutional guarantee; CR 4 allows delay *only* if it is caused by the defendant or a crowded court calendar.

CR 4: Penalty to the Prosecutor

The Indiana Supreme Court has also expressed the purpose of the discharge rule as a limitation upon the right of the prosecutor to hold the defendant for trial.[38] Under this view, a failure to bring the defendant to trial within the statutory period results in a pen-

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for CR 4 analysis. Prior to *Barker v. Wingo*, 407 U.S. 514 (1972), the United States Supreme Court considered only single aspects of the speedy trial right. United States v. Marion, 404 U.S. 307 (1971) (three-year delay in the bringing of indictments); Dickey v. Florida, 398 U.S. 30 (1970) (state's failure to respond to defendant's request for speedy trial on state charge when defendant was serving a federal sentence); Smith v. Hooey, 393 U.S. 374 (1969) (similar failure to respond to requests of a defendant serving a federal sentence); Klopfer v. North Carolina, 386 U.S. 213 (1967) (nolle prosequi of a charge by the state with leave to restore the indictment at a later date); United States v. Ewell, 383 U.S. 116 (1966) (dismissal of earlier indictment relating to same charge was cause of delay in trial); Pollard v. United States, 352 U.S. 354 (1957) (validity of sentence imposed after two-year delay); Beavers v. Haubert, 198 U.S. 77 (1905) (removal proceedings where defendant was charged on different indictments); United States v. Provoo, 17 F.R.D. 183 (D. Md.), *aff'd mem.*, 350 U.S. 857 (1955) (delay in defendant's trial caused by deliberate act of the government). The *Barker* decision marked the first attempt by the Court to speak comprehensively to the entire speedy trial question and delineate a single set of criteria by which the right is to be measured.

According to the *Barker* Court, four factors are to be considered in deciding a sixth amendment speedy trial claim: the length of delay, the defendant's assertion of his right, the reason for the delay and the prejudice to the defendant. By use of a balancing test, these factors are to be considered along with other relevant circumstances. 407 U.S. at 530. What the *Barker* Court expressly declined to do was "hold that the Constitution requires a criminal defendant to be offered a trial within a specified time period." *Id.* at 523. The Court did realize that specification of a time limit would remove much of the difficulty courts experience in deciding a speedy trial claim. However, finding no constitutional basis which would allow this kind of judicial fiat, the Court instead chose a "less precise" approach. *Id.*

CR 4 does specifically state time periods beyond which a defendant's trial cannot be delayed. Subject only to its own exceptions, the rule requires discharge after one year for a defendant on recognizance and after fifty judicial days for an incarcerated defendant who makes a demand for an early trial. As recently expressed by the Indiana Supreme Court in *Fossey v. State*, 254 Ind. 173, 258 N.E.2d 616 (1970):

> Quite obviously, the standard imposed on Indiana courts and prosecutors is stricter than that imposed in the federal system since any delay exceeding the specified limit is considered a *per se* denial of the "speedy trial" right.

Id. at 177, 258 N.E.2d at 618-19.

38. State v. Kuhn, 154 Ind. 450, 57 N.E.2d 106 (1900).

alty to the prosecutor. The court in *Weer v. State*[39] analyzed delays caused by pleas in abatement and premature efforts by the defendant to effect a change of venue in these terms: "The state is not answerable for these delays and the motion to discharge was properly overruled."[40] This approach places too great an emphasis upon the determination of whether or not the prosecutor was delinquent in bringing the defendant to trial. Such an approach is not supported by the rule, since *lack* of delinquency in prosecution is not one of the rule's listed exceptions. Thus, language such as that found in *Alyea v. State*,[41] wherein it was held that "[a]ny delay incident to the taking of a change of venue by the defendant cannot be discharged [*sic*] to the State,"[42] is unnecessarily confusing. What the court should have said is that the delay was or was not chargeable to the *defendant*.

CR 4: Bring Defendant to Trial

The third view expressed by the Indiana Supreme Court is that the purpose of the discharge rule is to bring the defendant to trial within the statutory period, provided the trial is not delayed by his act.[43] The way in which a speedy trial claim is decided under this view of the statute is demonstrated in *Colglazier v. State*.[44] In that case a defendant charged with reckless homicide posted a recognizance bond in January of 1951. During the March term of that year, a special judge was qualified pursuant to the defendant's motion. The prosecutor then filed a similar motion during the May term of court. In attempting to qualify another judge, the trial court made repeated errors, making it impossible to hold a trial until after the November term of court had expired. As a result, even though the delay was not directly attributable to the prosecutor, the statutory limit passed before a trial of the case could be held.[45]

The state contended that the delay in defendant's trial "was caused by the court's error and could not be properly charged to the state."[46] Approaching the question with a "penalty to the prosecu-

39. 219 Ind. 217, 36 N.E.2d 787 (1941).
40. *Id.* at 220, 36 N.E.2d at 789.
41. 198 Ind. 364, 152 N.E. 801 (1926).
42. *Id.* at 367, 152 N.E. at 801-02.
43. Zehrlaut v. State, 230 Ind. 175, 102 N.E.2d 203 (1951).
44. 231 Ind. 571, 110 N.E.2d 2 (1953).
45. *Id.* at 573, 110 N.E.2d at 3.
46. *Id.* at 575, 110 N.E.2d at 4.

tor" analysis, the trial court agreed with the state and refused discharge. On appeal, the Indiana Supreme Court reversed:

> The Statute does not say that the person shall be discharged if his trial is delayed . . . by an act of the prosecutor, but does say that he (the person held) shall be discharged unless a continuance be had upon his motion or the delay caused by his act. *It makes no difference whether the delay is caused by the prosecuting attorney or the court, so long as it is not caused by an act of the accused.*[47]

This view of the statute is supported by the plain words of the rule. "No defendant shall be detained in jail . . . without a trial . . . for . . . more than six months . . . except" where his acts, including motions for continuance, delay the trial, or the congestion of the court calendar causes delay. A CR 4 discharge is not expressed in terms which grant the prosecutor the right to try the defendant so long as the proecutor does not cause the delay. Rather, "any delay exceeding the specified time limit is considered a *per se* denial of the 'speedy trial' right."[48] It is this positive right of the defendant which CR 4 was designed to protect.

Viability of CR 4 Exceptions

Positive protection of a defendant's speedy trial rights under CR 4 can only be frustrated if one of the rule's express exceptions is present. These exceptions must be examined in light of the rule's purpose.

Delay Caused by Defendant's Act

If the purpose of the rule is to bring the defendant to trial so long as he himself is not instrumental in preventing this, a provision which reads "except where . . . the delay was caused by his act"[49] is entirely consistent with this purpose. The defendant who causes a delay in his trial is not necessarily saying that he "no longer wishes to avail himself of the benefit" of CR 4, as one court said,[50] but by his actions the defendant is making the realization of a speedy trial

47. *Id.* (emphasis added).
48. Fossey v. State, 254 Ind. 173, 179, 258 N.E.2d 616, 619 (1970).
49. *See* note 7 *supra*.
50. Summerlin v. State, 256 Ind. 652, 666, 271 N.E.2d 411, 418 (1971).

more difficult. This fact alone would seem to justify a retention of this exception.

In identifying delays caused by the defendant, the courts have applied the general rule that *any* motion made by the defendant is to be included within this exception.[51] Thus, when a defendant makes a motion for a change of venue,[52] a motion for a change of venue from the judge,[53] a motion for severance,[54] a plea in abatement[55] or where his plea of temporary insanity necessitates competency hearings,[56] the delays which result are treated as defendant-caused delays. The same reasoning applies to a defendant who requests and receives a continuance.[57] This situation, presently listed as a separate exception[58] in the rule, could conveniently be handled under the "delay caused by defendant's act" exception. Isolating this particular type of delay simply emphasizes what is already apparent—that the defendant is chargeable for the delay "where a continuance was had on his motion."

Congested Court Calendar Exception

If the purpose of CR 4 were simply to prevent prosecutors from delaying the trials of criminal defendants,[59] the crowded court calendar exception to the rule might be consistent with that purpose. The exception does conflict, however, with the spirit of CR 4—that a defendant who has not been instrumental in causing delay must be brought to trial within the time period specified in the rule. This conflict was recognized in the early case of *State v. Kuhn*,[60] decided

51. This general rule does *not* apply to a defendant's motion to quash. State v. McCarty, 243 Ind. 361, 185 N.E.2d 732 (1962); Zehrlaut v. State, 230 Ind. 175, 102 N.E.2d 203 (1951).

52. Norris v. State, 251 Ind. 155, 240 N.E.2d 45 (1968); Colglazier v. State, 231 Ind. 571, 110 N.E.2d 2 (1953); State v. Mabrey, 199 Ind, 276, 157 N.E. 97 (1927); Alyea v. State, 198 Ind. 364, 152 N.E. 801 (1926).

53. Easton v. State, ___ Ind. ___, 280 N.E.2d 307 (1972); State v. Grow, 255 Ind. 183, 263 N.E.2d 277 (1970); Wedmore v. State, 237 Ind. 212, 143 N.E.2d 649 (1957).

54. State v. Hawley, 256 Ind. 244, 268 N.E.2d 80 (1971).

55. Weer v. State, 29 Ind. 217, 36 N.E.2d 787 (1941).

56. State *ex rel.* Demers v. Miami Circuit Court, 249 Ind. 616, 233 N.E. 2d 777 (1968).

57. Under the proposal found in ABA STANDARDS § 2.3(c) "[a] defendant without counsel should not be deemed to have consented to a continuance unless he has been advised by the court of his right to a speedy trial and the effect of his consent."

58. *See* note 7 *supra*.

59. In State v. Hicks, 353 Mo. 950, 185 S.W.2d 650 (1945), a Missouri court adhered to this view in discussing the purpose of that state's speedy trial statute.

60. 154 Ind. 450, 57 N.E. 106 (1900).

prior to the adoption of CR 4. In *Kuhn* the defendant was released on bail during the February term of 1895. After three subsequent terms of that year had passed without trial, the defendant filed her motion for discharge. The state claimed that discharge was not in order, since it had appeared by counsel and demanded that the judge set the cause for trial. The state further indicated that in response to its demands, the trial judge had stated that: "[O]wing to the crowded condition of the docket of the court, it would be impossible to try the cause for want of time."[61] The Indiana Supreme Court refused to apply the exception by affirming the trial court's grant of discharge. The court held that the crowded docket exception

> meant that the defendant must, at least, be brought to trial within such third term, and, if it turns out that the trial cannot be completed within the term, it may continue to completion beyond the term.[62]

A more recent case involved the question of whether the provision contained in the predecessor statute, which excepted discharge "where there was not sufficient time to try him [defendant] during such terms,"[63] applied where the trial court facilities were inadequate to allow a defendant's trial within three terms of court. In *Castle v. State*[64] there had not been enough time to try the defendant within three terms of court because the trial court was obliged to share the only courtroom suitable for jury trials with another court. Holding this practice to be "not compatible with the orderly, prompt and efficient administration of justice,"[65] the Indiana Supreme Court said:

> Needless to say, appellant should not be prejudiced by the admitted facts appearing of record which show there was not sufficient time to try his case during the third term of court because of the court's practice of dividing its courtroom facilities with another court. The accused's right to a trial speedily and without delay is certainly meaningless if it can be thwarted by the failure of the county commission-

61. *Id.*
62. *Id.* at 452, 57 N.E. at 107.
63. *See* note 22 *supra.*
64. 237 Ind. 83, 143 N.E.2d 570 (1957).
65. *Id.* at 87, 143 N.E.2d at 572.

ers to provide the necessary amenities which are a prerequisite to the running of an efficient court.[66]

The reason for the court's holding is particularly enlightening:

For an accused to be entitled to discharge under the statute, it is immaterial whose act caused the delay, unless the delay was caused by the accused.[67]

Although these two cases were decided under the statute which preceded CR 4, the holdings present compelling arguments for excluding a crowded court calendar exception from the present rule. While the earlier statute did not explicitly contain a "crowded court docket" exception, it did allow for delay "where there was not sufficient time to try him [defendant] during such terms." The language of this third listed exception might easily have been interpreted to include the congested court calendar condition contained in CR 4. Courts deciding the earlier cases were correct in refraining from such an interpretation.

It is apparent from the recent decision in *Harris v. State*[68] that the potential injustice to a defendant resulting from the third listed exception of the *present* discharge rule cannot be easily avoided, nor will it disappear by means of judicial disapproval. The defendant in *Harris* made a motion for discharge after having been detained in jail for over six months. Trial had been set beyond the six-month deadline, and the trial judge "indicated that the delay was necessary due to his busy trial schedule."[69] The supreme court held that discharge had been properly denied, saying that it was clear that "one circumstance, *recognized by the rule*, excusing trial within the six month period is where the trial docket is congested and trial cannot be had within the time allotted."[70] The decision reached in *Harris* was the only one possible under the present discharge rule. To be internally consistent, however, CR 4's operation should not be thwarted by this exception. A defendant who has not himself caused the delay of his trial should not be denied a discharge on the fortuitous basis that the jurisdiction in which he is being held has a

66. *Id.*, 143 N.E.2d at 573.
67. *Id.* at 86, 143 N.E.2d at 572 (emphasis added).
68. 256 Ind. 464, 269 N.E.2d 537 (1971).
69. *Id.* at 466, 269 N.E.2d at 538.
70. *Id.* at 468, 269 N.E.2d at 539 (emphasis added).

crowded court docket. His "right to a trial speedily and without delay is certainly meaningless if it can be thwarted by failure"[71] of that jurisdiction to provide sufficient judicial machinery to avoid excessive delay. CR 4 should be further amended to exclude the crowded court docket exception.

If this exception were deleted from CR 4, as suggested, it is possible that the judicial machinery of jurisdictions with especially overcrowded dockets would require major alterations.[72] It is also possible that in those jurisdictions, prior to the creation of a more adequate system to handle the volume of criminal cases, many defendants would be discharged. The result of this might be an increase in public pressure for improvement, hopefully followed by an increase in governmental spending to provide the necessary judicial reform.[73] By providing the impetus for such action, the abolition of the crowded court calendar exception could ultimately bring Indiana one step closer to the optimum system—a system which would operate so efficiently within CR 4 standards that no discharge would ever be necessary.

Counting CR 4 Time

Prior to the 1974 amendments, a major problem presented by CR 4 cases was the manner in which the rule's time periods were to be determined. There are two aspects of this problem which deserve consideration: (1) following a delay caused by a defendant, whether by a requested continuance or some other act, does the time referred to in CR 4 merely resume counting or must it begin to run anew?; (2) where the defendant acts in such a way that he is charged, for CR 4 purposes, with the delay of his trial, and the result of his act is a longer delay than he could foresee, or have reason to foresee, should he be charged with the entire delay, or only a reasonable portion thereof?

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71. Castle v. State, 237 Ind. 83, 87, 143 N.E.2d 570, 573 (1957).

72. In United States *ex rel.* Frizer v. Mann, 437 F.2d 1312, 1315-16 (2d Cir. 1971), Chief Judge Lombard, referring to the chronic congestion of New York criminal courts and realizing the apparency of the "egregious failure on the part of numerous public officials to anticipate the problems and to adopt measures necessary for their solution or their easing," indicated his conviction "that the continuance of this situation cannot excuse denial of due process rights in any particular case where a defendant has not been a party to the delay." *Id.* at 1315-16.

73. *Id.* at 1316. *See also* E. Friesen, E. Gallas & N. Gallas, Managing the Courts 79 (1971).

Resume Counting or Begin Anew?

Indiana courts interpreted the pre-amendment CR 4 to mean that after a delay chargeable to the defendant "the time begins to run anew."[74] The state supreme court first addressed this problem in *State v. Mabrey*,[75] in which two defendants were charged with a crime and released on the first day of the 1922 September term of the Lawrence Circuit Court. According to the discharge statute then in effect, they were not to be held without a trial for a period embracing more than three terms of court, not including the 1922 September term, during which a recognizance was first taken. On the fifth judicial day of the 1922 November term the defendants filed motions for a change of venue. These motions were sustained and venue was changed to the Monroe Circuit Court. The defendants' causes were repeatedly continued on the trial court's own motions. On October 6, the twenty-fourth judicial day of the 1923 September term of the Monroe Circuit Court, the defendants filed petitions for discharge, claiming that the November, February and April terms had elapsed. The trial court sustained the petitions for discharge and the state appealed.[76]

In reversing the trial court, the Indiana Supreme Court held that "[t]he three terms of court, as contemplated by the statute, had not elapsed."[77] The court said that the delay caused by the defendants' venue motions

> stopped the running of the time of the three terms of limitation, until, by law, the causes would stand for trial in the new jurisdiction. . . . The term of limitation began to run at the beginning of the February term, 1923, and continued through the April term . . . and the September term. . . . The court had until the end of the third term (September term, 1923) to try the causes.[78]

This view of term time, which cancelled all time spent awaiting trial before the delay, was not limited to cases involving a change of venue. The interpretation by which defendant's time under the pre-

74. State v. Grow, 255 Ind. 183, 191, 263 N.E.2d 274, 278 (1970).
75. 199 Ind. 276, 157 N.E. 97 (1927).
76. *Id.* at 277-78, 157 N.E. at 97.
77. *Id.* at 280, 157 N.E. at 98.
78. *Id.* at 279, 157 N.E. at 98.

amendment rule was required to begin anew also applied to delays caused by motions for change of judge,[79] motions for continuance,[80] motions for severance,[81] appeals[82] and requests for new attorneys.[83]

In *Summerlin v. State*[84] a defendant was indicted and incarcerated on June 10, 1969. Over four months later, on October 23, his attorney withdrew from the case at the defendant's request. The court appointed a new attorney on November 12, 1969. Some time prior to February 25, 1970, the defendant filed a timely motion for discharge. Although eight and one half months had expired from the time of the defendant's imprisonment, and the delay caused by the appointment of a new attorney covered only twenty days, the *Summerlin* court denied the defendant's discharge. In support of its decision that the four month period spent in jail prior to October 23 was cancelled, the *Summerlin* court said:

> The rule is for the benefit of the defendant and any action which he initiates which would obstruct the speedy trial process should cause the time to start anew since it is then apparent that defendant no longer wishes to avail himself of the benefit.[85]

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79. Weer v. State, 219 Ind. 217, 36 N.E.2d 787 (1941).

80. Morrow v. State, 245 Ind. 242, 196 N.E.2d 408, *cert. denied*, 379 U.S. 864 (1964).

81. State v. Hawley, 256 Ind. 244, 268 N.E.2d 80 (1971).

82. State *ex rel.* Walker v. Ratliff, 253 Ind. 495, 255 N.E.2d 223 (1970). In Martin v. State, 245 Ind. 224, 231, 194 N.E.2d 721, 724 (1963), after the defendant had one conviction reversed, the prosecutor filed a motion for a change of judge. The trial court denied the motion and the state appealed. During the interim, the statutory time elapsed without any action taken in the trial court. In subsequently denying discharge of the defendant the Indiana Supreme Court held that

> the terms of court involved are those of the trial court, and the responsibility for bringing the action to trial is thrust upon the prosecuting attorney and the trial judge, neither of whom could exercise any control over the judicial process in this court.

Id. at 231, 194 N.E.2d at 724. Although the court declared this position "is supported by the clear language of the statute," the statute is anything but clear on this problem. In fact, the decision raises a very basic question of the relation of the statute to the constitutional mandate that "justice shall be administered . . . speedily, and without delay."

If it is assumed that the word "speedily" and the phrase "without delay" are not redundant expressions, what content does the statute pour into these words? If the statute assures the defendant that his case will be brought to trial "without delay," does it also assure him that the final disposition of that case will occur "speedily"? While under the fact situation of the *Martin* case the defendant had already received a trial, albeit not one free from error, query what protection is afforded an accused whose trial has not received a final disposition.

83. Summerlin v. State, 256 Ind. 652, 271 N.E.2d 411 (1971).

84. 256 Ind. 652, 271 N.E.2d 411 (1971).

85. *Id.* at 666, 271 N.E.2d at 418.

This statement is erroneous in its sweeping generality. As a justification for the "begin anew" interpretation of CR 4 time, it is inconsistent with the purpose of the rule. The rule exists to insure the defendant that he will receive a trial within the specified time period.[86] The operation of the rule remains in effect regardless of whether or not the defendant relishes the thought of trial.[87] In all cases, a concerted effort should be made to hold trial within that specified period. If this cannot be done because of delay caused by the defendant, the feasibility of succeeding in the attempt is decreased—not to the extent of an entire additional time period (for example, six months), but simply by the amount of time consumed by the delay.

Defendants often make various motions in criminal proceedings pursuant to their right to a fair trial. Thus, the defendant in *Easton v. State*,[88] denied a discharge because of the delay caused by his motion for change of judge, argued that to "charge him with the delay requires him to elect between his constitutional guarantees of a speedy trial and a trial by an unbiased court."[89] This election between a speedy trial and a fair trial, forced by the "begin anew" interpretation, was the primary evil resulting from that interpretation.[90]

A defendant who has awaited trial for a number of months and who subsequently discovers the necessity of making some "delaying" motion to preserve his right to a fair trial no longer has to forfeit all CR 4 time. The Indiana Supreme Court, in its recent amendments to the rule, undoubtedly recognized the chilling effect this forfeiture created on such motions—and utimately on the fair trial of the defendant. The specified time period in CR 4 is now extended only by the time consumed in delays caused by the defendant's act.[91]

86. Randolph v. State, 234 Ind. 57, 63, 122 N.E.2d 860, 863 (1954).

87. ABA STANDARDS § 2.2. The commentary states that

> the trial of a criminal case should not be unreasonably delayed merely because the defendant does not think it is in his best interest to seek prompt disposition of the charge. Comment at 17.

88. ___ Ind. ___, 280 N.E.2d 307 (1972).

89. *Id.* at ___, 280 N.E.2d at 308.

90. *See* Aptheker v. Secretary of State, 378 U.S. 500 (1964), wherein the doctrine of "unconstitutional conditions" is developed.

91. *See* note 14 *supra*.

Entire Delay or Reasonable Portion?

In extending CR 4's deadlines by only that time which results from the defendant's acts, the amendments have brought the rule's operation into closer harmony with its purpose. The Indiana Supreme Court is to be commended for effecting these changes in CR 4's provisions. Despite the elimination of the former "begin anew" interpretation, however, the amended application of CR 4 provides inadequate protection to a defendant if the length of the delay bears no reasonable relation to the act from which it originated.

The facts in *State v. Grow*[92] illustrate this inadequacy. The defendant therein moved for a change of venue from the judge. In the two succeeding panels named by the presiding judge the nominee failed to qualify. The special judge finally appointed by the Indiana Supreme Court did not qualify until six months from the time the defendant filed his motion. The supreme court decided that the rule's time period did not beginrunning until the slecial judge had been qualified.[93] In his brief, the defendant correctly analyzed the situation:

> From the facts and records in this case, the resulting delay following the appellee's motion for a change of judge cannot be said to have arisen by the reason of the defendant's filing of such motion for a change of venue from the judge, and certainly the defendant in the instant case should not be held responsible for, nor be required to, predict that there would be such delays as there was [*sic*] in the trial of this cause as a result of the action of defendant herein moving for a change of venue.[94]

A further illustration of the inequities which result from counting rule time as the court did in the *Grow* case is demonstrated in *Wedmore v. State*.[95] The defendant in *Wedmore* also requested and was granted a change of judge. Following a two-year delay, it was determined that the special judge had not qualified. The defendant

92. 255 Ind. 183, 263 N.E.2d 277 (1970).

93. *Id.* at 185, 263 N.E.2d at 278.

94. Brief for Appellee at 13, State v. Grow, 255 Ind. 183, 200, 263 N.E.2d 277, 285 (1970) (Jackson, J., dissenting).

95. 237 Ind. 212, 143 N.E.2d 649 (1957).

filed a motion for discharge two years and three months after his original motion. The state supreme court held that this twenty-seven month delay would not be counted under the discharge statute.[96]

> Appellant, by his request for a change of judge, set in motion the chain of events which caused the delay in his trial. This delay was caused by his acts, hence he is not entitled to a discharge.[97]

This reasoning is inconsistent with the purpose of CR 4. To hold the defendant responsible for delays which were beyond his control and which he had no reason to foresee is contrary to the speedy trial which CR 4 seeks to ensure. While it may be difficult to decide at what point in time a delay which was initiated by the defendant ceases to remain a defendant-caused delay and begins to acquire all the characteristics of a delay caused by the trial court, justice demands that that decision be attempted.

Judge DeBruler recognized this necessity in his dissenting opinion in the case of *State v. Hawley*.[98] An issue in *Hawley* was a three-month period during which the trial court delayed a ruling on the defendant's motion for a separate trial. The trial court allowed discharge, but the supreme court reversed the decision, saying that this was a delay "to which delaying time he [defendant] was not entitled to credit."[99] In dissent, Judge DeBruler asserted that the entire period of three months should not have been attributed to the filing of a motion for severance:

> The only part of this period properly attributed to the motion is that time necessary for trial court to rule on the motion, and the remainder of the delay would not be caused by the pending motion. In this case, the trial court stated that he was delaying the ruling on the motion for the reason that the co-defendant had entered a plea of insanity. Such a turn of events is obviously no responsibility of the appellee.[100]

96. 1967 OP. ATT'Y GEN. IND. 371, 375 (discussion of facts not contained in *Wedmore* opinion).

97. 237 Ind. 212, 216, 143 N.E.2d 649, 651. *See also* Ward v. State, 246 Ind. 374, 205 N.E.2d 148 (1965).

98. 256 Ind. 244, 268 N.E.2d 80 (1971).

99. *Id.* at 251, 268 N.E.2d at 83.

100. *Id.* at 252, 268 N.E.2d at 84.

The suggestion which followed in Judge DeBruler's dissent merits serious consideration:

> In my opinion, ten days would constitute a reasonable period for the trial court to study the motion, hear arguments, if necessary, and rule on the motion. I would, therefore, consider the delay from . . . the end of such ten day period . . . as delay not caused by the act of the appellee.[101]

This limitation would not require a trial court to make its ruling within ten days. It would simply dictate, for purposes of counting CR 4 time, that delay following the ten-day deadline would be treated as delay of the defendant's trial not "caused by his act." The ten-day limitation could be extended to all of the ordinary motions made by defendants in criminal trials.[102] A similar forty-day limitation could be applied to the counting of rule time when appeals are taken.[103] Such limitations would eliminate the inequitable practice of charging defendants with inordinate delays of which they were only technically the instigators.

Defendants Incarcerated on Another Charge

A related time-counting problem under CR 4 is whether the rule's stated periods should be determined differently for those defendants in jail for multiple offenses. The recent amendments failed to meet the question of whether the fact of the defendant's custody on another charge tolls the running of the time within which CR 4 requires his trial on a new charge.

The state supreme court first addressed itself to this question in *Palmer v. State*.[104] In that case an indictment ws returned against

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101. *Id.*

102. Certain motions might require a somewhat longer limitation. For example, sanity hearings would probably require a limitation exceeding ten days. *See* United States v. Dunn, 459 F.2d 1115 (D.C. Cir. 1972).

103. A limitation on appeal time seems to be necessary because CR 4 time is not counted while a defendant's case is being appealed. In State *ex rel.* Walker v. Ratliff, 253 Ind. 495, 255 N.E.2d 223 (1970), a defendant was arrested in March of 1967 and tried in July of that year. He appealed his conviction and in November of 1968 a new trial was ordered. In February of 1969, 23 months after his arrest, the defendant filed a motion for discharge. The Indiana Supreme Court denied discharge saying

> [i]t would be unrealistic for this Court to hold that time required for the perfection of his (defendant's) appeal would be charged against the state and upon return of tte cause to the trial court that court would be required to discharge the defendant by reason of the expiration of time.

Id. at 498, 255 N.E.2d at 224.

the defendant in Owen county while he was incarcerated in a different county on conviction of an unrelated charge. Over six months later, the Owen county sheriff arrested the defendant and transferred him to the Owen county jail. Having remained in jail two full terms following the return of the indictment, the defendant claimed he was entitled to discharge. The *Palmer* court rejected the defendant's argument, saying that the time the defendant was in custody on the different offense was not to be counted for discharge purposes toward the Owen county indictment.[105]

Over forty years after the *Palmer* decision, the United States Supreme Court dealt with the question of the speedy trial rights of prisoners held by another jurisdiction in the case of *Smith v. Hooey*.[106] The accused in that case was being held in a federal prison in Kansas in 1960, at which time he was indicted upon a theft charge in Texas. Shortly thereafter, the petitioner requested a speedy trial on the Texas charge. He was notified that a trial would be afforded him any time within two weeks of the date he could be present in Texas. The authorities in Texas, however, made no effort to obtain the petitioner's presence, and his repeated demands for trial continued for six years.[107] In refusing Smith's mandamus action to dismiss the indictment, the Texas Supreme Court reaffirmed an earlier holding[108] based on reasoning similar to that used by the Indiana Supreme Court in *Palmer*. The United States Supreme Court held that "Texas had a constitutional duty to make a diligent, good-faith effort to bring him for trial."[109] The Court suggested four compelling reasons for protecting the speedy trial rights of a defendant already in prison under another sentence. First, the chances of a defendant incarcerated on a prior conviction to serve his sentences concurrently are diminished if his second trial is delayed. Second, the pendency of a second charge may increase the duration of the first sentence and worsen the conditions under which it must be served. Third, the anxiety, uncertainty and concern accompanying the sec-

104. 198 Ind. 73, 152 N.E. 607 (1926).

105. *Id.*

106. 393 U.S. 374 (1969).

107. *Id.* at 375.

108. Cooper v. State, 400 S.W.2d 890 (Tex. 1966). In referring to a defendant's speedy trial rights, the *Cooper* court said that "despite some cases holding to the contrary, it appears that a different rule is applicable when two sovereignties are involved." *Id.* at 891.

109. 393 U.S. 374, 383 (1969).

ond charge have a chilling effect on efforts for rehabilitation and self-improvement. Fourth, incarceration seriously limits a defendant in his efforts to mount an adequate defense.[110]

Smith was cited by the Indiana Supreme Court in *Fossey v. State*.[111] In *Fossey* the defendant was awaiting trial on a state charge while serving a sentence imposed as a result of a federal conviction. Two years after the prosecution had filed its affidavit, the defendant was still awaiting trial on the state charge. By denying the defendant's discharge claim, the *Fossey* court failed to give full effect to the *Smith* decision. In discussing the prospective application that was to be given to *Smith*, the court in *Fossey* only indicated a recognition "that there is now a constitutional obligation imposed upon the states to make, *upon demand of an incarcerated defendant*, a diligent, good-faith effort to bring him to trial."[112] Although the defendant in the *Smith* case made repeated demands for trial, that factor should not be determinative in deciding the validity of a CR 4(A) claim. Thus, *Smith v. Hooey* should be read as eliminating the distinction, for CR 4 purposes, between a defendant in jail on a prior conviction and an accused concerned only with a trial on one pending charge.[113] The *Fossey* court erred in retaining the requirement of a demand. Having realized that

> the standard imposed on Indiana courts and prosecutors is stricter than that imposed in the federal system since any delay exceeding the specified time limit is considered a *per se* denial of the "speedy trial" right,[114]

the court in *Fossey* seemed to ignore the stricter standard established by CR 4.[115]

All Indiana cases decided after *Fossey* have required defendants incarcerated on prior offenses to make a demand for trial before affording them CR 4's protection.[116] In light of the four considerations given in the *Smith* case emphasizing the urgency of

110. *Id.* at 378-79.
111. 254 Ind. 173, 258 N.E.2d 616 (1970).
112. *Id.* at 181, 258 N.E.2d at 620.
113. *But see* Smeltzer v. State, 254 Ind. 165, 171, 258 N.E.2d 647, 650 (1970).
114. Fossey v. State, 254 Ind. 173, 179, 258 N.E.2d 616, 619 (1970).
115. *See* notes 133-36 *infra* and accompanying text.
116. Hart v. State, ___ Ind. ___, 292 N.E.2d 814 (1973); Napiwocki v. State, 257 Ind. 32, 272 N.E.2d 865 (1971); Smeltzer v. State, 254 Ind. 165, 258 N.E.2d 647 (1970).

protecting the speedy trial interests of these defendants,[117] this requirement can only be justified in the event that a demand requirement is considered a condition precedent to discharge for *all* Indiana criminal defendants, including those *not* serving sentences imposed for prior convictions.

DEMAND REQUIREMENTS UNDER CR 4

There are two distinct types of "demand" to consider in conjunction with CR 4. The first type is a demand for discharge prior to the trial. The second type is a demand for trial. While the former type is compatible with the rule's purposes in some circumstances, a requirement of the latter type is contrary to that purpose and well-reasoned case law.

Demand for Discharge

In *Randolph v. State*[118] the difference between the two kinds of "demand" was recognized and clarified. The defendant in that case was brought to trial beyond the statutory time limit. He had not asked for a trial, and he attempted to invoke the discharge statute for the first time after the conviction. The *Randolph* court said that under the discharge statute there was "no burden upon the defendant to request a speedy trial."[119] Distinct from the demand for trial, however, is the demand for discharge. The court felt that a different requirement of the defendant attached to this kind of demand:

> [I]f the terms of court specified in the statute go by and he is, through no fault of his own, not brought to trial, the burden of invoking the statute then falls upon him and his rights thereunder can be asserted only through some affirmative action on his part.[120]

Because the holding in *Randolph* is based on the concept of waiver,[121] it is necessary to examine the possible reasons that a defendant might have for failing to move for a discharge prior to trial. It is submitted that the majority of such cases falls into one of two

117. Smith v. Hooey, 393 U.S. 374, 378-79 (1969).
118. 234 Ind. 57, 122 N.E.2d 860 (1954).
119. *Id.* at 65, 122 N.E.2d at 864.
120. *Id.* at 67, 122 N.E.2d at 865; *accord*, Durrett v. State, 247 Ind. 692, 694, 219 N.E.2d 814, 815 (1966); *In re* Brooks, 247 Ind. 249, 250, 214 N.E.2d 653, 654 (1966); Callahan v. State, 247 Ind. 350, 356, 214 N.E.2d 648, 651 (1966).
121. Randolph v. State, 234 Ind. 57, 73, 122 N.E.2d 860, 868 (1954).

categories: (1) the defendant is convinced that he would be acquitted at his trial, and prefers acquittal to discharge, or (2) the defendant or his counsel failed to make a motion prior to trial because of lack of knowledge of the opportunity to do so.[122]

It is submitted that the majority of defendants who fail to seek discharge prior to trial, even though entitled to such discharge, do so because they are unaware that such an option is open to them. The rule in *Randolph*, as applied to these defendants, would be subject to question. Chief Justice Gilkinsan, in his dissenting opinion in *Randolph*, expressed his concern over the fact that "[t]he opinion labors to justify its indulgence in a presumption that by mere silence the defendant waived his unquestioned right to discharge for the state's delay in bringing him to trial."[123] The chief justice went on to observe that "[w]here fundamental constitutional rights are involved, waiver cannot be assumed under any circumstances, especially when human liberty is at issue."[124] To be consistent with this constitutional analysis of waiver, the rule in *Randolph* should be confined to those cases in which a conscious choice was made not to seek discharge prior to trial.

The problem inherent in a selective application of the *Randolph* rule is in determining whether the waiver of the right to discharge was knowingly made. Yet to require that the discharge demand must be raised before trial in *all* cases penalizes certain defendants. As a result, the general rule should be that the right to discharge is not deemed to be waived by failure to raise the issue at the trial level. The obvious objection to allowing this issue to be raised for the first time on appeal is that a defendant could then go to trial in hopes of an acquittal, but if convicted, allege that the trial should never have been held at all.[125] Realistically, however, this would rarely occur. Most defendants, if given the choice, would prefer discharge to the risk involved in going to trial on a criminal charge. Allowing this practice to the few who might take such a risk is a relatively small price to pay. While it might add to the workload

122. Easton v. State, ___ Ind. ___, 280 N.E.2d 307 (1972); *see In re* Brooks, 247 Ind. 249, 251, 214 N.E.2d 653, 654 (1966); Callahan v. State, 247 Ind. 350, 356, 214 N.E.2d 648, 651 (1966).

123. Randolph v. State, 234 Ind. 57, 73, 122 N.E.2d 860, 868 (1954).

124. *Id.* at 74, 122 N.E.2d at 869.

125. Callahan v. State, 247 Ind. 350, 214 N.E.2d 648 (1966).

of state appeals courts, it would protect those defendants who either had no knowledge of CR 4 or were represented by incompetent counsel.

Demand for Trial

The rule requiring a defendant to demand trial in order to be entitled to discharge was judicially abolished in 1951 in *Zehrlaut v. State*.[126] The discharge statute changes in 1965, retained in the 1974 amendments, further evidence the abolition of the requirement for this type of demand.[127] A recent Indiana Supreme Court decision,[128] however, has raised doubt over the status of the demand for trial requirement as it relates to CR 4. This necessitates a re-examination of the "demand-waiver" rule.

The "demand-waiver" rule was explained by the Indiana Supreme Court in *State v. Beckwith*.[129] In considering "what action must be taken by the accused to avail himself of the right to a dismissal because of delay,"[130] the *Beckwith* court thought that "a demand for trial, resistance to postponement, or some other effort to secure a speedy trial on the part of the accused"[131] should be shown. Addressing itself to the waiver aspect, the court in *Beckwith* said:

> [I]t would seem that the constitutional right should be deemed waived by the failure to ask for trial, the silent acquiescence in the delay, and the failure to claim the constitutional right until the cause had been definitely set for trial upon the request of the state, and then only by a motion to dismiss.[132]

This portion of the *Beckwith* opinion was expressly overruled, however, in *Zehrlaut v. State*.[133] In *Zehrlaut* the Indiana Supreme Court re-examined the demand-waiver rule. Realizing that the statute casts the burden upon "the state and its officers, the trial courts

126. 230 Ind. 175, 102 N.E.2d 203 (1951).
127. IND. R. CRIM. P. 4(B).
128. Bryant v. State, ___ Ind. ___, 301 N.E.2d 179 (1973).
129. 222 Ind. 618, 57 N.E.2d 193 (1944).
130. *Id.* at 629, 57 N.E.2d at 198.
131. *Id.*
132. *Id., quoting* State v. Miller, 72 Wash. 154, 156, 129 P. 1100, 1101 (1913).
133. 230 Ind. 175, 102 N.E.2d 203 (1951).

and prosecuting attorneys"[134] to bring the defendant to trial within the time stated, the court declared:

> [I]t is *not* a fault of the defendant if he remain silent while under recognizance, on the contrary, that is his right. He is *not required to make any demand* of the state or the court for a speedy trial. That demand is made for him by the constitution and its implementing statute.[135]

The *Zehrlaut* opinion firmly established the rejection of the rule that an accused must demand a speedy trial. Indeed, the case was cited by the United States Supreme Court as standing for Indiana's rejection of this kind of demand rule.[136]

However, a question as to the status of the rule at the present time has been raised by a recent Indiana Supreme Court decision. In *Bryant v. State*[137] the case of a defendant awaiting trial was docketed in the Marshall Circuit Court subsequent to a change of venue. Some time later a trial date which was twelve days beyond the rule's six-month deadline was selected. Since the record of the trial court did not reflect the presence of either the defendant or her counsel at the time the case was set for trial, the Indiana Supreme Court assumed that neither participated in the choice of the trial date. Six months expired without any delays attributable to the defendant. When the time had elapsed, but prior to the trial's commencement, the defendant made a motion to discharge. The trial court overruled the motion; the supreme court affirmed.[138]

An examination of the facts in *Bryant* indicates that the defendant had satisfied her demand requirement. That is, she made a demand for a discharge prior to trial. If a further "demand" were to be required of her at all, it would have to be the "demand for trial" which was rejected in *Zehrlaut*.[139] The court in *Bryant* held, however, that the defendant's "failure to object" to the date set for trial "must be regarded as acquiescence therein and a waiver of the

134. *Id.* at 183, 102 N.E.2d at 207.

135. *Id.* (emphasis added); *accord*, Durrett v. State, 247 Ind. 692, 694, 219 N.E.2d 814, 815 (1966).

136. Barker v. Wingo, 407 U.S. 514, 524 n.21 (1972).

137. ___ Ind.___, 301 N.E.2d 179 (1973).

138. *Id.* at ___, 301 N.E.2d at 180.

139. *See* note 126 *supra* and accompanying text.

right to discharge."[140] The case appears to have been decided incorrectly for two reasons. First, since the defendant's "failure to object" is tantamount to a failure to demand trial, the *Bryant* court seems to be reinstating the "demand-waiver" rule. If so, this reinstatement is difficult to justify, since the *Bryant* court realized that under CR 4 the "[d]efendant was entitled to be brought to trial within six months, and she was not required to take affirmative steps to obtain a trial within that period."[141] Certainly, demanding a different trial date is an "affirmative step" which the defendant "was not required to take."[142] Second, since the decision is in direct conflict with the holding in *Zehrlaut v. State*, it seems strange that the court in *Bryant* makes no mention of the *Zehrlaut* case.[143] By failing to do so, the *Bryant* decision raises unnecessary doubts concerning the "demand-waiver" doctrine in Indiana.

It is believed that these doubts can be resolved by a careful reading of CR 4. Part (B) of the rule deals specifically with the procedure in cases where a defendant does demand an early trial.[144] In such cases, a defendant "shall be discharged if not brought to trial within fifty (50) judicial days from the date of such motion."[145] To read the demand-waiver doctrine into CR 4(A) is to give part (B) little or no effect. Once a demand for trial is made, part (B) governs. Part (A) relates to cases in which a demand was *not* made; it necessarily negates the "waiver" idea, and only requires that the defendant either be tried within one year or be discharged.[146]

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140. ___ Ind. at ___, 301 N.E.2d at 180.

141. *Id.*

142. In Utterback v. State, ___ Ind. App. ___, 300 N.E.2d 688 (1973), under facts similar to those in *Bryant*, the court said that a defendant need not

> familiarize the prosecutor and the courts with critical procedures. It is the responsibility of the state to prosecute and prosecute properly. The appellant need not provide the instructional manual for the construction of his prison cell.

Id. at ___, 300 N.E.2d at 689.

143. The court in *Bryant* relied on the cases which had been expressly overruled in *Zehrlaut*. *See* Chelf v. State, 233 Ind. 70, 58 N.E.2d 353 (1944); State v. Beckwith, 222 Ind. 618, 57 N.E.2d 193 (1944).

144. *See* notes 9-11 *supra* and accompanying text.

145. IND. R. CRIM. P. 4(B).

146. *See* Johnson v. Zerbst, 304 U.S. 458 (1938), wherein the United States Supreme Court refused to find waiver of an absolute right absent a competent, knowing and intelligent waiver of this right by the accused. Although this case dealt with the right to counsel in federal courts by virtue of the sixth amendment, it presents a strong analogy in deciding whether a defendant has waived CR 4 rights.

BURDEN OF PROOF UNDER CR 4

Once a demand for discharge has been made, it is the responsibility of the trial court to determine the validity of the defendant's claim.[147] Such determination depends upon whether or not the delay in the trial is due to some act of the defendant. Indiana courts have traditionally given the defendant the burden (the risk of non-persuasion) on this issue. If this practice is tobe retained, it should at least be modified by shifting the burden of going forward with the evidence to the prosecution after a defendant has established a prima facie case for discharge. The case cited repeatedly as dispositive of the issue of who should bear the burden of proof in a discharge claim is *Sullivan v. State*.[148] In that case, a dispute arose concerning which party requested a continuance. After listening to conflicting evidence at a hearing on the motion, the trial court denied discharge and the defendant appealed. The Indiana Supreme Court affirmed, stating what has since been referred to as the *Sullivan* rule:[149] "A defendant must show that the delay complained of was caused *by the state* and not by him."[150] Since CR 4 itself does not expressly allocate the burden of proof on the issue of delay, a court's view of the rule's purpose becomes crucial to the way the *Sullivan* rule will be applied.

A court which sees CR 4's purpose as prodding the prosecutor will apply the *Sullivan* rule so that a defendant will be required to show a delay caused by the prosecutor. Such a showing actually involves two aspects of proof. A defendant would have to present affirmative evidence that it was the state which initiated the delay in his trial. He would further be required to demonstrate that he did not participate in that delay. If, however, the court adhered to the view that CR 4 exists primarily to bring non-delaying defendants to trial, then at most a defendant would have to prove that he did not cause the delay. This approach merely interprets the *Sullivan* rule to require a defendant to raise the discharge issue and establish a prima facie case. The defendant could meet this burden by alleging and proving that he was held in jail or under recognizance, without

147. McGuire v. Wallace, 109 Ind. 284, 288, 10 N.E.2d 111, 113 (1887).
148. 215 Ind. 343, 19 N.E.2d 739 (1939).
149. Johnson v. State, 252 Ind. 79, 87, 246 N.E.2d 181, 185 (1969).
150. 215 Ind. 343, 347, 19 N.E.2d 739, 741 (emphasis added); *accord*, Norris v. State, 251 Ind. 155, 163, 240 N.E.2d 45, 49 (1968).

trial, for a time period exceeding that provided in CR 4. A prima facie case established, the burden of going forward with evidence on the issue of the cause of delay would then shift to the state. To avoid discharge, the state would then be compelled to prove a viable exception to the rule's operation.

To determine whether or not the present practice of relieving the prosecutor of this burden at CR 4 hearings is justifiable, certain basic criminal concepts of policy and fairness must be emphasized.[151] If the entire burden of proof (risk of nonpersuasion *and* burden of producing the evidence) were determined on the basis of the pleadings themselves, the defendant should carry that burden. Wigmore points out that the burden is often placed "upon the party having the affirmative allegation."[152] Wigmore immediately adds, however, that "this is not an invariable test, nor even always a significant circumstance."[153] There exist compelling reasons, in a hearing on a CR 4 motion, which counterbalance the tendency to place the entire burden on the defendant.

A defendant's proof in his claim for discharge often depends exclusively on what the court records indicate.[154] If these records are not properly kept, a defendant may be effectively denied discharge solely on this basis.[155] This unnecessry prejudice to a defendant could be avoided by shifting the burden of going forward with the evidence to the prosecution. Another factor to consider is whether the defendant should be required to prove a ngative.[156] Unless the burden is shifted to the prosecutor, a defendant is forced to demonstrate that of all the many possible reasons for the delay in his trial, none of these include his own acts.[157] If the burden is shifted, the prosecutor would not be required to prove that the state did not cause the delay, since the rule requires discharge unless the delay was caused by the defendant.

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151. C. McCORMICK, EVIDENCE 789 (2d ed. 1972).

152. 4 WIGMORE, EVIDENCE § 2486 (2d ed. 1905).

153. *Id.*

154. Norris v. State, 251 Ind. 155, 163, 240 N.E.2d 45, 49 (1968); Harbaugh v. State, 234 Ind. 420, 425, 126 N.E.2d 576, 578 (1955); State v. Beckwith, 222 Ind. 618, 625, 57 N.E.2d 193, 196 (1944).

155. State v. Gardner, 237 Ind. 557, 559, 122 N.E.2d 77, 78 (1954).

156. 4 WIGMORE, EVIDENCE § 2486 (2d ed. 1905).

157. Harbaugh v. State, 234 Ind. 420, 426, 126 N.E.2d 576, 579 (1955); Barker v. State, 188 Ind. 263, 265, 120 N.E.2d 593, 594 (1918).

In addition to the policy reasons and considerations of fairness developed above, the allocation of the burden to the state in discharge disputes finds support in the first reported case which involved the statute. In *McGuire v. Wallace*,[158] the Indiana Supreme Court stipulated that "[a]s long and as often as the *State* is able to make it appear that the occasion of the delay is one of the excepted causes, the application must fail."[159] The converse was also held to be true: if the state could not establish a delay occasioned by the defendant, assuming the requisite number of terms had expired, the defendant's application would result in his discharge.[160] This early interpretation of the statute is sound. It recognizes the extent of protection to which a defendant is entitled under the discharge statute. If trial is delayed beyond the specified time, the *only* exceptions to discharge will be those listed in the statute. The interpretaton in *McGuire* avoids the danger inherent in the *Sullivan* rule—that an additional exception might be added whereby a bona fide claim for discharge would be overruled merely because the *defendant* failed to prove its validity.[161]

Presumptions also affect the determination of whether the burden should be shifted to the prosecution. In dealing with a defendant's motion to discharge which had presented questions of fact relative to the cause of the delay of the trial, the supreme court in *State v. McGuire* said, "Both the State and the accused were entitled to be heard upon this investigation. *The presumptions were in favor of the accused.*"[162] By its operation, the *Sullivan* rule dictates the presumption that the delay in the defendant's trial was caused by his own act. Deciding which presumption should be adopted essentially involves one question: if there is doubt as to the cause of the delay in the defendant's trial, how should CR 4 be construed to resolve that doubt? The Indiana Supreme Court has repeatedly indicated that "[t]he discharge statute is to be so construed that

158. 109 Ind. 284, 10 N.E. 111 (1887).

159. *Id.* at 288, 10 N.E. at 113 (emphasis added).

160. *Id.*

161. Stokes v. State, ___ Ind. App. ___, ___, 299 N.E.2d 647, 649 (1973).

162. McGuire v. Wallace, 109 Ind. 284, 288, 10 N.E. 111, 113 (1887) (emphasis added). A possible explanation for this can be seen in *Alford v. State*, ___ Ind. ___, 294 N.E.2d 168 (1973): "Rules 4(A) and (B) refer only to defendants who are in jail awaiting trial and who are, therefore, presumed innocent." *Id.* at ___, 294 N.E.2d at 170.

all doubts are to be resolved in favor of the accused."[163] If any practical effect is to be given to these words, then the burden of going forward with the evidence on the cause of delay should not reside with the defendant after he has established a prima facie case for discharge. That burden should rest with the state.

CONCLUSION

The right to a speedy trial exists to protect criminal defendants from the prejudice which follows a delay in the disposition of pending criminal charges. In general, CR 4 has operated satisfactorily in alleviating prolonged imprisonment, the anxiety and public suspicion attendant upon an untried criminal charge, and the hazard to the defendant of a trial after prolonged delay.[164] The recent amendments will increase the effectiveness of the rule. To more adequately fulfill its purpose of bringing all defendants to trial within its specified time periods, however, a further amendment abolishing CR 4's crowded docket exception is required.[165] CR 4's purpose would best be served by the retention of the "delay caused by the defendant's act" exception only.

The manner in which rule time is counted when a defendant does delay his own trial is also crucial to whether CR 4 will adequately achieve its function. In such a case, the rule as amended now dictates that all time spent by defendant prior to his own act which causes delay is to be counted towards the maximum time within which he can be incarcerated or held on recognizance without

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163. Castle v. State, 237 Ind. 83, 88, 143 N.E.2d 570, 572 (1957); *see also* Shewmaker v. State, 236 Ind. 49, 53, 138 N.E.2d 290, 292 (1956); Colglazier v. State, 231 Ind. 571, 576, 110 N.E.2d 2, 4 (1953).

164. 21 AM. JUR. 2D, *Criminal Law* § 242 (1965).

165. The proposal in the ABA STANDARDS § 2.3(b) asserts that general court congestion is no excuse for noncompliance with the statutory time limits. It does recommend, however, a provision excluding from computation of time limits "[t]he period of delay resulting from congestion of the trial docket when the congestion is attributable to exceptional circumstances." This provision is explained in the comments:

> Although it is fair to expect the state to provide the machinery needed to dispose of the usual business of the court promptly, it does not appear feasible to impose the same requirements when certain unique, nonrecurring events have produced an inordinate number of cases for court disposition. Thus, when a large-scale riot or other mass public disorder has occurred, some leeway for additional time is required to ensure that the many resulting cases may receive adequate attention from the prosecutor's office, defense counsel (possibly a single defender office), and the judiciary.

Comment at 28.

trial. The rule is silent, however, on the procedure to be followed in gauging the actual length of time which can be said to proximately result from a defendant's delaying act. An amendment definitively relating designated periods of delay to various motions made by defendants would be helpful for purposes of clarification. In the interim before such possible amendment, a judicial interpretation of the rule which credits a defendant with that portion of unforeseeable delay subsequent to his act is desirable.

The manner in which Indiana courts apply CR 4 to a discharge claim made by a defendant incarcerated on a separate charge deserves thoughtful reconsideration. CR 4 does not expressly require that a defendant in this category demand trial before he is protected by CR 4 safeguards; by implication, subdivision (B) of the rule negates such a construction for all Indiana criminal defendants. Both CR 4 and the Indiana Constitution which it implements make demands for trial on behalf of these defendants. As a result, the only "demand" consideration which deserves attention in the CR 4(A) hearing is whether demand for discharge was made prior to trial. If such an inquiry is to be made, it should not focus on whether a technical waiver exists, but whether that waiver was knowingly made.

A final area in which CR 4's operation could be improved deals with the delegation of the burden of establishing cause of delay at CR 4 hearings. Indiana courts, with little or no opposition, have required defendants to carry this burden. The present stance of Indiana's judiciary should be modified if a defendant can establish a prima facie case for discharge. By requiring the state to go forward in the event the defendant displays a valid claim, no deserving defendant will be denied discharge unless the delay is proven to have been caused by his act.

If the amendments and differing interpretations suggested are applied to CR 4, the rule's effectiveness in combating evils incident to the denial of a speedy trial will improve. The 1974 amendments have demonstrated an effort to obtain this goal. Further progress is required, however, before every criminal defendant in Indiana is provided with the speedy trial to which he is entitled.