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Enforcement of the Constitutional Right to a Speedy Trial

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The basic nature of the right to a speedy trial is disclosed by its deep roots in the early common law. Perhaps the earliest procedural development to give effect to the right is found in the common law commission of jail delivery of the 14th century by which jails were emptied twice each year and prisoners either convicted and punished or delivered from custody.[1] The English Habeas Corpus Act[2] in 1680 was the next development, and it served as the model for numerous state statutes giving effect to the right, such as the Illinois "Four Term" Act.[3]

In the United States the right to a speedy trial is guaranteed by federal and state constitutions. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy, and public trial . . . "[4] Although the Sixth Amendment applies only to criminal prosecutions in the federal courts,[5] the right to a speedy trial is so deeply rooted in our conception of fairness that it is probably encompassed in the due process clause of the Fourteenth Amendment, thus bringing state procedures within the ambit of federal protection. However, the crucial issues concerning the scope and method of enforcement of this federal guarantee in state criminal proceedings have not been decided.[6]

Right to a Speedy Trial in the Federal Courts

Paradoxically, while the Supreme Court has assumed the role of umpire over state criminal prosecutions to protect various other rights

1 *In re* Begerow, 136 Cal. 293, 68 Pac. 773, 774 (1902); Wyoming v. Keefe, 17 Wyo. 227, 98 Pac. 122, 126 (1901); 1 Bouviers Law Dict. (Rawle's 3d Rev. 1914) 1333, title "Gaol Delivery."

2 31 Car. II, c. 2 (1680): "That every person committed for treason or felony shall, if he requires it, the first week of the next term, or the first day of the next session of oyer and terminer, be indicted in that term or session, or else admitted to bail, unless the King's witnesses cannot be produced at that time; and, if acquitted, or if not indicted and tried in the second term or session, he shall be discharged from his imprisonment for such imputed offense." Wyoming v. Keefe, 17 Wyo. 227, 98 Pac. 122, 126 (1908); *In re* Begerow, 133 Cal. 349, 65 Pac. 828, 829 (1901).

3 Ill. Rev. Stat. (1947) c. 38, §748: "Any person committed for a criminal or supposed criminal offense, and not admitted to bail, and not tried by the court having jurisdiction of the offense, within four months of the date of commitment, shall be set at liberty by the court, unless the delay shall happen on the application of the prisoner, or unless the court is satisfied that due exertion has been made to procure the evidence on the part of the People, and that there is reasonable grounds to believe that such evidence may be procured at a later day in which case the court may continue the cause for not more than sixty (60) days. If any such person shall have been admitted to bail for an alleged offense, other than a capital offense, he shall be entitled, on demand, to be tried within four months after such demand: Provided, that if the court shall be satisfied that due exertion has been made to procure the evidence on behalf of the People and that there is reasonable ground to believe such evidence may be procured at a later day the court may continue the cause for not more than sixty (60) days."

4 Most state constitutions provide for this right in almost identical terms. The Constitution of Illinois provides: "In all criminal prosecutions the accused shall have the right to . . . a speedy public trial . . ." Ill. Const. Art. II §9. *Cf.* covering the right to a public trial, *In re* Oliver, 333 U. S. 257 (1948) (secret contempt proceeding by judge acting as "one man grand jury" held to violate due process under Fourteenth Amendment).

5 State v. Swain, 147 Ore. 207, 31 P. (2d) 745 (1934).

6 See the discussion in the text on "Collateral Attack in the Federal Courts," *infra.*

of the individual, the procedural rules governing the right to a speedy trial in the federal courts afford the accused substantially less protection than is found in most state courts. The Sixth Amendment has been construed to grant only a relative right to speedy trial dependent upon the surrounding circumstances.[7] Rule 48(b) of the recently adopted Federal Rules of Criminal Procedure substantially follows the rule established by federal case law which places the dismissal for delay in prosecution solely in the discretion of the trial court.[8] The accused has no right to be discharged from custody no matter how long the prosecution is delayed.[9] His rights are limited to making a demand on the trial court for a speedy trial; if that demand is refused, he must petition the circuit court of appeals for a writ of mandamus to compel the trial court to proceed with the trial.[10] Before the writ of mandamus will issue, the accused must show that the trial court has abused its discretion in permitting the continued delay in the prosecution of the case.[11] If the accused fails to take affirmative steps to bring the case before the court and fully to prosecute his demand for a speedy trial, he will be held to have acquiesced in the delay and will be unable to prosecute any collateral attack upon such a judgment on the grounds of a denial of his right to a speedy trial.[12] Furthermore, according to the federal rule, where the trial court has dismissed the indictment for lack of prosecution, the dismissal does not act as a bar to a subsequent indictment for the same offense, but the accused continues to be subject to the hazard of an impending prosecution.[13]

Right to a Speedy Trial in the State Courts

A few states follow the lead of the federal courts as to the scope and method of securing the right to a speedy trial.[14] There being no statutory

7 Beavers v. Haubert, 198 U. S. 77, 87 (1905).

8 18 USCA following §687 (Supp. 1947), Rule 48(b): "Dismissal: (b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint." United States v. McWilliams, 163 F. (2d) 695 (App. D.C. 1947) (where charges against defendants had been pending for nearly four and one-half years, dismissal for lack of prosecution was held to be within sound discretion of trial court; Edgerton, J., dissented).

9 Shepherd v. United States, 163 F. (2d) 974, 978 (C. C. A. 8th, 1947); Frankel v. Woodrough, 7 F. (2d) 796, 798 (C. C. A. 8th, 1925).

10 Pietch v. United States, 110 F. (2d) 817 (C. C. A. 10th, 1940); Daniels v. United States, 17 F. (2d) 339 (C. C. A. 9th, 1927); Shepherd v. United States, 163 F. (2d) 974 (C. C. A. 8th, 1947).

11 Frankel v. Woodrough, 7 F. (2d) 796 (C. C. A. 8th, 1925) (trial judge ordered to show cause why mandamus should not issue to begin trial or dismiss indictment where accused's demand for trial was refused because imprisoned under another sentence); *cf.* United States v. McWilliams, 163 F. (2d) 695 (App. D. C. 1947) (trial judge held not to have abused discretion when he dismissed indictment almost two years after mistrial and after several demands for trial made by defendant).

12 Fowler v. Hunter, 164 F. (2d) 668 (C. C. A. 10th, 1947); Phillips v. United States, 201 Fed. 259 (C. C. A. 8th, 1912).

13 *Ex Parte* Altman, 34 F. Supp. 106 (S. D. Cal. 1940).

14 In Michigan there is no statute supplementing the constitutional provision of the right to a speedy trial and the procedure there is governed by judicial decisions. People v. Foster, 246 Mich. 60, 246 N. W. 60 (1933); Note (1933) 46 Harv. L. Rev. 1027. In Louisiana the same result is reached by statute: Louisiana Code of Crime Procedure (Dart., 1943) Art. 320, "All persons accused of crime shall be entitled to a speedy trial, and may invoke the supervisory jurisdiction of the Supreme Court to enforce by mandamus this right."

enactment defining and implementing the right granted by the constitutions in these states, the right to be discharged for delay in prosecution has not been recognized. The accused is required to make demand for a speedy trial; if no demand is made, he will be considered to have waived his right; and where the demand for trial is refused, the accused's remedy is not to be discharged, but merely to bring an action of mandamus against the trial court.[15]

Most of the states, however, have enacted statutes to supplement and to give effect to the constitutional provision which preserve this right. Though there seems to be little uniformity in the terms of these statutes, they may be broadly classified into two groups on the basis of their effect. First, there are those statutes which provide the broadest protection to the accused and which have been construed almost as statutes of limitations; they may take effect without demand for trial by the accused and operate as a bar to a subsequent prosecution for the same offense.[16] The second classification consists of statutes which are not so sweeping as the first group, but still give more protection than is found in the federal courts.[17] These statutes differ from the federal rule in that the accused is given the right to secure his discharge from custody or the dismissal of the indictment after a fixed period of delay unless good cause to the contrary is shown to exist; but these statutes also provide that, except in the case of misdemeanors, the discharge or dismissal does not bar a subsequent prosecution for the same offense. This result is also reached in some states by construction of statutes which do not spell out the effect of a discharge as to subsequent prosecution but are analogous in terms to statutes that are construed in other states as statutes of limitations.[18] The running of the statutory period does not automatically discharge the accused, but the accused must take affirmative action to secure a trial or he will be held to have waived his

15 Hicks v. Boyne, Judge, 236 Mich. 689, 211 N. W. 35 (1926); People v. Den Uyl, —— Mich. ——, 31 N. W. (2d) 699 (1948); People v. Foster, 246 Mich. 60, 246 N. W. 60 (1933); Note, (1933) 46 Harv. L. Rev. 1027; State v. Banks, 111 La. 22, 35 So. 370 (1903).

16 Ill. Rev. Stat. (1947) c. 38 §748 (quoted, *supra* note 3); Indiana Stat. Anno. (Burns, 1933) §9-1403-04; Virginia Code of 1942, §4926.

17 Cal. Pen. Code (Deering, 1941) §§1381-1387. "§1382. The Court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: 1. When a person has been held to answer for a public offense and an information is not filed against him, within fifteen days thereafter. 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information. . . . §1383. If the defendant is not charged or tried, as provided in the last section, and sufficient reason therefor is shown, the court may order the action to be continued from time to time, and in the meantime may discharge the defendant from custody on his own undertaking of bail for his appearance to answer the charge at the time to which the action is continued. . . . . §1384. If the court directs the action to be dismissed, the defendant must, if in custody, be discharged therefrom; or if admitted to bail, his bail is exonerated, . . . §1387. An order for the dismissal of the action, as provided in this chapter, is a bar to any other prosecution for the same offense, if it is a misdemeanor, . . .; but an order for dismissal of the action is not a bar if the offense is a felony." See also Laws of New York (Thompson, 1939) c. 442, §§667-673; 4 Rev. Stat. of Washington (Remington, 1931) §§2311-2315.

18 Colo. Stat. Anno. (1935) c. 48, §485; People v. Henwood, 65 Colo. 566, 179 Pac. 874 (1919) (discharge for failure to prosecute within statutory period will not bar subsequent prosecution for same offense). *Contra* under analogous statute, Ill. Rev. Stat. (1947) c. 38 §748 (quoted *supra* note 3); People *ex rel.* Nagel v. Heider, 225 Ill. 347, 80 N. E. 291 (1907). *Cf.* Virginia Code of 1942, §4926, providing that an accused shall be "forever discharged".

rights to a speedy trial. In California when the motion to dismiss is refused and the accused is not discharged by the trial court, he may petition for a writ of mandamus.[19] However, the burden is on him to show that the trial court has abused its discretion.[20]

Illinois is typical of the group of states where statutes provide the broadest protection to the accused. The Illinois courts have so construed the statute supplementing the constitutional provision for a speedy trial that an accused has almost absolute protection from delays in prosecution. The Supreme Court of Illinois in applying the "Four Term" Act has repeatedly reiterated that the statute is mandatory upon the trial court and confers an absolute right on the accused which is not to be evaded by technicalities.[21] This general rule has been qualified, however, by certain Illinois decisions.

In *Guthman v. People*[22] it was established that where the defendant was committed to the county jail by the police magistrate upon a mittimus, the statutory period ran from the date of the defendant's incarceration and not from the date on which the indictment was returned. This precedent was followed in *People v. Emblen*,[23] which held that the police could not thwart the statute and the constitution by holding a man without judicial order. An allegation that the defendant was merely being held as a witness in another trial was not countenanced, but was considered as a technical evasion of the statute. In this case two indictments were returned against the defendants. The first charged him with conspiracy to commit an assault; and the second, under which he was tried and found guilty, charged him with assault with intent to commit murder. It was held that the statute could not be avoided by the use of two indictments which charged substantially the same offense.[24] However, in *People v. Stillwagon*,[25] the defendant had stolen a car in one county and transported it to another where he was apprehended and indicted for the crime of larceny. Subsequently, he was returned to the custody of the police in the first county and held under an indictment for robbery, the total time of his imprisonment prior to his trial exceeding the four month limitation. The court, while stating that the statute could not be evaded by technicalities, held that the crimes of

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19 *Ex Parte* Alpine, 203 Cal. 731, 265 Pac. 947 (1928). The situation in California seems to be confused as to the form in which the accused may seek relief where he claims that his right to a speedy trial has been denied. Where the accused is held in jail beyond the statutory period, he may petition for a writ of habeas corpus before the trial to secure his discharge, *Ex Parte* Vinton, 5 Cal. App. 624, 47 Pac. 1019 (1897). Also, after a mistrial, *In re* Begerow, 136 Cal. 293, 68 Pac. 773 (1902). But where the accused is on bail and submits to voluntary imprisonment, habeas corpus will not lie, *In re Ford*, 160 Cal. 334, 116 Pac. 757 (1911). Where the trial court overrules the defendant's motion to dismiss after the granting of a new trial, his only remedy is to petition for a writ of mandamus, *Ex Parte* Alpine, 203 Cal. 731, 265 Pac. 947 (1928). But where the defendant is tried, convicted and sentenced, his only remedy is by appeal, and not by habeas corpus.

20 Chrisman v. Superior Court, 63 Cal. App. 477, 219 Pac. 85 (1923).

21 People v. Stillwagon, 373 Ill. 211, 25 N. E. (2d) 795 (1940); Note (1940) 31 J. Crim. L. & Criminology 80; People v. Schmagien, 361 Ill. 371, 198 N. E. 142 (1935). The Illinois statute is quoted *supra*, note 6.

22 203 Ill. 260, 67 N. E. 821 (1903).

23 362 Ill. 142, 199 N. E. 281 (1936); Note (1936) 26 J. Crim. L. & Criminology 937.

24 Newlin v. People, 221 Ill. 166, 77 N. E. 529 (1906).

25 373 Ill. 211, 25 N. E. (2d) 795 (1940); Note (1940) 31 J. Crim. L. & Criminology 80.

larceny and robbery were distinguishable and that the statutory period runs only from the time of incarceration in the county which has jurisdiction of the offense.

Contrary to the rule in the federal courts, the defendant under the Illinois "Four Term" Act is not required to make a demand for trial where he has not been admitted to bail.[26] However, where the accused is admitted to bail, a demand for trial is required to set the statute in motion,[27] with the exception that where the accused is charged with a capital offense and is admitted to bail, the statute does not apply.[28] While a demand for trial is not always necessary, the accused must raise the issue by a motion for discharge[29] prior to the trial in order to obtain the ruling of the trial court as to whether the conditions justifying a delay exist; i.e., delay caused by application of the accused or needed to procure evidence for the prosecution if it may be reasonably expected that such evidence may be procured.[30] Consequently, the accused may waive his right to speedy trial by failing to make the motion for discharge or by withdrawing it prior to a ruling of the trial court on the motion.[31]

If the motion for discharge for want of prosecution is sustained by the trial court, the discharge will operate as a bar to subsequent commitment for the same offense,[32] but it will not bar the prosecution for other offenses growing out of the same transaction.[33] The rules of double jeopardy are applied in determining whether a subsequent prosecution is barred.[34]

The denial of the motion for discharge is not a final order and the accused must proceed with the trial.[35] Where the trial court has overruled the defendant's motion and the trial results in a conviction, the writ of error is the only method of review open to the accused in

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26 People v. Grandstaff, 324 Ill. 70, 154 N. E. 448 (1926). The Illinois statute is quoted *supra*, note 6.

27 People v. Fox, 269 Ill. 300, 110 N. E. 26 (1915); Meadowcraft v. People, 163 Ill. 56, 45 N. E. 303 (1896).

28 People v. Maniatis, 297 Ill. 72, 130 N. E. 323 (1921).

29 The motion for discharge for want of prosecution seems to be peculiar to the criminal procedure in Illinois. Its counterpart in civil practice is the motion for dismissal for want of prosecution as to which there are four intrinsic features: (1) The court has inherent power to grant this motion, there being no statutory provision or court rule for it; (2) The motion may be made by the defendant or the court may dismiss on its own motion; (3) Granting the motion is in the discretion of the trial court; (4) The court may order a vacation of a dismissal that has been granted in proper cases. 3 Nichols, Ill. Civil Practice (1941) §§2844-2856. In criminal procedure, while there is no statute or rule of court expressly governing the use of the motion for discharge, its use in regard to the right to a speedy trial is limited by the "Four Term" Act, which is said to be mandatory. Moreover, by judicial construction, a discharge under the statute is held to be a bar to subsequent prosecution for the same offense, and therefore, the order granting the motion may not be vacated.

30 People v. Utterback, 385 Ill. 239, 52 N. E. (2d) 775 (1944).

31 *Ibid; cf.* Anno. 129 A. L. R. 572.

32 People *ex rel.* Nagel v. Heider, 225 Ill. 347, 80 N. E. 291 (1907).

33 People v. Stillwagon, 373 Ill. 211, 25 N. E. (2d) 795 (1940) discussed in text over note 25, *supra;* Nagel v. People, 229 Ill. 598, 82 N. E. 315 (1907).

34 People v. Allen, 368 Ill. 368, 14 N. E. (2d) 397 (1938) (accused, indicted for killing a pedestrian in an automobile accident, was discharged under the "Four Term" Act; discharge held not to be a bar to prosecution under subsequent indictment for the death of another pedestrian also killed in the same accident).

35 People *ex rel.* Freeman v. Murphy, 212 Ill. 584, 72 N. E. 902 (1904).

Illinois.[36] Although the twenty-year common law limitation applies to this writ, its effectiveness, unless a bill of exceptions has been filed, is circumscribed by restricting review to the common law record.[37] But on this record a conclusive presumption that the trial court acted correctly and found conditions existed which justified the delay operates to preclude relief on the writ of error alone.[38]

It, therefore, becomes necessary to preserve the record of proceedings upon the motion for discharge by filing a bill of exceptions,[39] which by rule of court must be certified by the trial judge within fifty days of the rendition of the judgment.[40] However, where a bill of exceptions has been duly filed, and nothing appears in the record to indicate an application for delay by the prisoner or by the prosecution, a presumption will then operate in favor of the defendant sufficient to reverse the conviction on the basis that the statutory right to a speedy trial is mandatory and may not be disregarded.[41]

Although the Illinois "Four Term" Act is said to be mandatory and create an absolute right to be discharged after the statutory period has run, the expiration of the statutory period has been held not to raise any jurisdictional defects in the proceedings in the trial court.[42] Consistent with this position and its traditional holding as to the scope of writ of habeas corpus,[43] the Illinois court has expressly held habeas corpus may not be used to review the judgment of the trial court where the right to be discharged has been denied.[44] However, this position conceivably may be reversed in view of recent *dicta* of the court which indicates a possible enlargement of the scope of habeas corpus to review an alleged denial of a constitutional right.[45]

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36 *Ibid;* People v. Utterback, 385 Ill. 239, 52 N. E. (2d) 775 (1944). Habeas corpus is proper method of obtaining review in some other states: *Ex parte* Miller, 66 Colo. 261, 180 Pac. 749 (1919); *Ex Parte* Blankenship, 93 W. Va. 408, 116 S. E. 751 (1923); Anno. 58 A. L. R. 1510.

37 Comment (1947) 15 U. of Chi. L. Rev. 107, 118-131.

38 Daugherty v. People, 124 Ill. 557, 16 N. E. 852 (1888).

39 People v. Tait, 390 Ill. 272, 61 N. E. (2d) 166 (1945).

40 Supreme Court Rule of Practice and Procedure, Ill. Rev. Stat. (1947) c. 110 §259.74A.

41 People v. Schmagien, 361 Ill. 371, 198 N. E. (2d) 142 (1935).

42 People v. Utterback, 385 Ill. 239, 52 N. E. (2d) 775 (1944). But that the court may lose jurisdiction where there has been delay in imposing sentence, see People *ex rel.* Boehnert v. Barrett, 202 Ill. 287, 61 N. E. 23 (1903); People v. Penn, 302 Ill. 488, 135 N. E. 92 (1922) (involving the Illinois probation statute: Ill. Rev. Stat. (1947) c. 38 §784 *et seq.*).

43 People *ex rel.* Crowe v. Williams, Judge, 330 Ill. 150, 161 N. E. 312 (1928); for more cases see Comment (1947) 38 J. Crim. L. & Criminology 139; (1947) 42 Ill. L. Rev. 329.

44 People *ex rel.* Freeman v. Murphy, 212 Ill. 584, 72 N. E. 902 (1904); *cf.* People v. Utterback, 385 Ill. 239, 52 N. E. (2d) 775 (1944). But in Illinois where defendant has been discharged under "Four Term" Act, habeas corpus is proper mode of relief from imprisonment on a reindictment for the same offense, People *ex rel.* Nagel v. Heider, 225 Ill. 347, 80 N. E. 291 (1907).

45 According to the authorities cited *supra,* note 43, it had been generally accepted in Illinois that habeas corpus would only lie to attack jurisdiction. But several recent developments may indicate that Illinois has adopted a more liberal approach towards the scope of habeas corpus in the state proceedings. In Marino v. Ragen, 332 U. S. 561 (1947), the state courts had denied habeas corpus to an immigrant who in 1925 at the age of 18, allegedly without advice of counsel and without the services of an adequate interpreter, had been convicted of murder. While making the concession, to some surprising, that habeas corpus would lie in proper cases, the attorney general did not explain as clearly as might be desired what would be a proper case. See Mr.

Collateral Attack in the Federal Courts

In a recent case, *United States ex rel. Hanson v. Ragen*,[46] the Seventh Circuit Court of Appeals refused to intervene in a collateral attack by habeas corpus on an Illinois judgment where the petitioner had waited thirty-nine years after his trial to seek relief. The facts of the case were that the petitioner had been brought to trial in 1907, four months and twenty-five days after his arrest. A motion for discharge for want of prosecution was duly made before the trial started, but was overruled by the trial court. Oral evidence was presented in the habeas corpus proceedings tending to establish that the delay was due to the negligence of the prosecution.[47] The trial proceeded and the petitioner was found guilty of murder and sentenced to life imprisonment. The petitioner had insisted that his counsel not prosecute any appeal (presumably for fear of possible death penalty upon a retrial), and consequently, no review of the judgment was perfected and no bill of exceptions was filed. Under these circumstances the Circuit Court of Appeals denied the petition for habeas corpus as not justifying intervention by a federal court. The decision appears to be based on the waiver of the petitioner's right[48] to be discharged by his failure to exhaust his state remedies at the time such remedies were available to him.[49] However, in answer-

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Justice Rutledge's concurring opinion, *id.* at 567. Subsequently the Illinois Supreme Court in People v. Wilson, — Ill. —, 78 N. E. (2d) 514, 521 (1948); and People v. Shoffner, — Ill. —, 79 N. E. (2d) 200, 202 (1948) uttered some dicta which may well have been intended to suggest the availability of habeas corpus in certain instances in which there had been a denial of a substantial federal constitutional right. The *Williams* and *Shoffner* cases were urged upon the United States Supreme Court in Loftus v. Illinois, — U. S. —, 68 S. Ct. 1212 (1948) as establishing that habeas corpus is the proper remedy in cases in which there has been a denial of due process where the facts constituting the error were known to the trial judge at the time of conviction.

46 166 F. (2d) 608 (C.C.A. 7th, 1948).

47 Counsel who defended the petitioner in the trial in 1907 testified in the habeas corpus proceeding that when the motion for discharge was filed, the state's attorney offered to make a deal in return for the withdrawal of the motion and the entrance of a plea of guilty. When the offer was rejected by the defendant, the state's attorney stated he would have the case go to the Supreme Court, even though at that time there was no basis upon which the state could prosecute an appeal. Testimony further established that the offense was the murder of a policeman, that "feeling was running pretty high at the time," that application for change of venue was denied, and that the defendant refused to give his counsel permission to appeal the ruling on the motion for fear that "there might be something done there where they granted a new trial."

48 The dissenting opinion took the position that there was a distinction between waiving the right to be discharged and waiving the right to appeal to the Illinois Supreme Court. Regardless of whether or not the trial court lost jurisdiction, the "Four Term" Act created a mandatory duty upon the trial court and gave the defendant an absolute right which was denied to him; and therefore, he was entitled to be discharged even though he could not appeal to the Illinois court. It is interesting to note that the dissent finds that there was no waiver because of failure to file a bill of exceptions, because the common law record was sufficient to establish the petitioner's right to be discharged. This contradicts the position taken by the Illinois Supreme Court that in the absence of a bill of exceptions the common law record will be presumed to sustain the trial court's ruling, *supra* note 37.

49 The exhaustion of remedies doctrine as pronounced in *Ex Parte* Hawk, 321 U. S. 114 (1943), requires that a petitioner exhaust all state remedies prior to obtaining relief in the federal courts from a judgment of a state court. This rule has sometimes been interpreted as requiring more than the exhaustion of present state remedies; the petitioner must have exhausted his state remedies while they were

ing the contention of the petitioner that the trial court had lost jurisdiction and that the conviction was therefore void, the decision used language which indicates a regression from the approach adopted by the Supreme Court concerning the scope of habeas corpus.[50] Citing some older decisions by the Supreme Court to sustain its position,[51] the Circuit Court of Appeals seemed to adopt the narrow concept of jurisdiction followed until recently by the Illinois Supreme Court.[52] The court, however, did not reject the petition for habeas corpus on the grounds of jurisdiction, but held that the facts which would seem to establish a waiver did not justify federal intervention.

In examining the possibility of collateral attack in the federal courts upon a state criminal proceeding by petition for a writ of habeas corpus on the grounds of the denial of the constitutional right to a speedy trial, the basic problem is the scope of the Fourteenth Amendment. Unquestionably, it is a fundamental right of which recognition is requisite to fairness and of which denial might seriously prejudice an accused. Consequently, although there are no cases that establish the proposition, the Fourteenth Amendment perhaps could be invoked to secure the right to a speedy trial in state criminal proceedings.[53] But it is questionable whether the right to a speedy trial, if embraced by the Fourteenth Amendment, includes the right to discharge from all further prosecution. There seem to be three possible answers to this question. First, the position might well be taken that the Fourteenth Amendment does not guarantee anything more than is guaranteed by the Sixth Amendment, which though it reserves the right to a speedy trial has been construed as not carrying with it the right to be discharged where a speedy trial has been denied.[54] The argument is, of course, that if

available or justify his failure to do so. *See* Wade v. Mayo, — U. S. —, 68 S. Ct. 1270, 1282 (1948) (Reed, J., dissenting); Note (1948) 61 Harv. L. Rev. 657, 666. *Accord,* Goto v. Lane, 265 U. S. 393 (1924). A failure to exhaust state remedies in the proper time may be justified where state procedures have not been sufficiently delineated to enable an accused to know what his proper state remedy is. *See* Marino v. Ragen, 332 U. S. 561, 563 (1947) (Rutledge, J., concurring). *Compare,* Loftus v. Illinois, — U. S. —, 68 S. Ct. 1212 (1948). The requirement that all state remedies be exhausted, *Ex Parte* Hawk, *supra,* has been modified by Wade v. Mayo, *supra,* where it was held that "the exhaustion of but one of several available alternatives is all that is necessary," *id.* at 1273, and also that it was not necessary in all cases to petition the Supreme Court for certiorari to review a state court judgment.

50 Waley v. Johnston, 316 U. S. 101, 104-105 (1942) (habeas corpus will issue not only where "conviction is void for want of jurisdiction . . . It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused.

51 Harlan v. McGourin, 218 U. S. 442 (1910); Matter of Gregory, 219 U. S. 210 (1911).

52 Compare the Illinois cases cited in note 43 *supra* with those cited in note 45, *supra.*

53 The state's brief in United States *ex rel.* Hanson v. Ragen, 166 F. (2d) 608 (C.C.A. 7th, 1948), conceded this much: "The only command of the Fourteenth Amendment (we concede that such command can probably be inferred from the due process clause) is that the accused is entitled to a reasonably speedy and public trial." *In re Oliver,* 333 U. S. 257 (1948) (denial of a public trial by a state court held to violate due process of Fourteenth Amendment).

54 Cases cited *supra* footnote 9. *But see,* Adamson v. California, 332 U. S. 46, 123 (1947), (Murphy, J., dissenting): "I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights."

the Fourteenth Amendment were held to embrace the right to be discharged after a statutory period of delay, then the rule in the federal court would not be in accord with due process. *United States* ex rel. *Hanson v. Ragen*[55] appears to be the only case in which federal intervention has been sought on the grounds of a denial of the right to a speedy trial. Though this argument was raised, the majority opinion did not pass upon the issue, but may have indicated its position by citing two cases construing the Sixth Amendment.[56]

A second position could be taken that where a state has enacted a statute which seeks to enforce the right to a speedy trial by providing for a mandatory right of discharge after a specified delay in prosecution, due process requires that the trial court afford the accused the protection granted by the statute. A state may provide the accused more protection than would be required by the Sixth Amendment or by due process, but whatever procedure a state may adopt to implement the right to a speedy trial, the Fourteenth Amendment requires that it operate fairly and uniformly.[57] Hence, an arbitrary refusal to discharge an accused where he is so entitled under a statute such as the "Four Term" Act would be a denial of due process of law. This latter position is tenable and appears to have been assumed without discussion by the dissent in *United States* ex rel. *Hanson v. Ragen*.[58] But it would preclude federal intervention in state proceedings in states that follow the federal rule or do not grant an absolute right of discharge for want of prosecution, perhaps even in cases which warrant intervention. On the other hand, it would operate inexorably where there is a statute such as the Illinois "Four Term" Act and commit the federal courts to intervention whenever the statutory period has run and the accused has not waived his right to be discharged. It could conceivably operate to defeat justice and law enforcement where the prosecution can justify the delay and the accused has not been prejudiced materially.

The third and soundest position from the standpoint of flexibility is to measure the due process guarantee not by reference to the Sixth Amendment nor by reference to any particular statutory requirements, but by the concept of the fairness of the ensuing trial. "As in all long delayed cases, the witnesses now are scattered; some are not accessible, more particularly to the defendants who are without funds; the memories of witnesses as to events occurring many years ago are not clear. It is for these reasons among others that the Constitution of the United

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55 166 F. (2) 608 (C.C.A. 7th, 1948).

56 Beavers v. Haubert, 198 U. S. 77 (1904); Daniels v. United States, 17 F. (2d) 339 (C.C.A. 9th, 1927).

57 Apparently this position was also assumed by the district court at the hearing on habeas proceedings. See Transcript of Record, pp. 81-82, filed in circuit court of appeals, Mar. 13, 1947. "By Mr. Cunningham: Where is the Federal question involved here?

By the Court: Due process of law is all I see.

By Mr. Schwartz: There is no due process involved here at all, because we are interpreting a State statute, to wit, the 4-Term statute.

By the Court: I do not think you can use it this way with one person, and that way with another person."

But cf., Gryger v. Burke, — U. S. —, 68 S. Ct. 1256, 1258 (1948) where it is stated: We cannot treat a mere error of state law, if one occurred, as a denial of due process."

58 166 F. (2d) 608, 612 (C.C.A. 7th, 1948), *supra* note 46.