No. 98-1299

In the Supreme Court of the United States

THE STATE OF NEW YORK, PETITIONER

v.

MICHAEL HILL

ON WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Article III(a) of the Interstate Agreement on Detainers requires that a prisoner against whom a detainer has been lodged be brought to trial within 180 days after officials in the charging State have received the prisoner's request for disposition of the outstanding charges. The question presented is whether the defendant waives that time limit by expressly agreeing to a trial date beyond the expiration of the 180-day period.

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INTEREST OF THE UNITED STATES

The Interstate Agreement on Detainers (IAD) provides a means by which a prisoner being held in one jurisdiction (the sending State) may obtain a speedy resolution of charges pending against him in another jurisdiction (the receiving State). Article III(a) of the IAD provides that a prisoner against whom a detainer has been lodged "shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court * * * written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint." The question in this case is whether the

defendant's express agreement, through counsel, to begin his trial on a date that comes after the expiration of the 180-day period constitutes a waiver of his speedy trial rights under Article III(a). The United States is a party to the IAD, see 18 U.S.C. App. § 2, at 692, and is subject to the 180-day provision in Article III(a). See *United States* v. *Mauro*, 436 U.S. 340, 354 (1978). The Court's decision will therefore determine the waiver rules applicable to federal defendants who are brought to trial from state prisons pursuant to IAD Article III(a).[1]

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Interstate Agreement on Detainers, 18 U.S.C. App. § 2, at 692-695, are set forth in an Appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

1. The Interstate Agreement on Detainers (IAD) is a compact entered into by 48 States, the United States, and the District of Columbia to achieve the efficient disposition of outstanding criminal charges brought against prisoners incarcerated in other jurisdictions. As "a congressionally sanctioned interstate compact," the IAD is a federal law subject to federal construction. *Carchman* v. *Nash*, 473 U.S. 716, 719 (1985).

A detainer is "a request filed by a criminal justice agency with the institution in which a prisoner is incar-

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[1] State courts are governed by Article V(c) of the IAD, which requires dismissal with prejudice when the time limits of Article III(a) are not met, see 18 U.S.C. App. § 2, at 693-694. Congress has adopted a separate provision permitting dismissal without prejudice when the United States is the receiving jurisdiction. See 18 U.S.C. App. § 9, at 695.

cerated, asking that the prisoner be held for the agency, or that the agency be advised when the prisoner's release is imminent." *Fex* v. *Michigan*, 507 U.S. 43, 44 (1993). Article III(a) of the IAD provides that a prisoner against whom a detainer is lodged may demand that he "shall be brought to trial within one hundred and eighty days" after he delivers his written demand to the prosecutor and court in the receiving State, unless that court grants a continuance "for good cause shown." 18 U.S.C. App. § 2, at 692. Article V(c) of the IAD provides that if the prisoner "is not brought to trial within the period provided in article III," the court in which the indictment is pending "shall enter an order dismissing the [indictment] with prejudice, and any detainer based thereon shall cease to be of any force or effect." 18 U.S.C. App. § 2, at 694.[2]

2. On New Year's Eve, 1992, respondent and three companions robbed and murdered Michael Weeks in a suburb of Rochester, New York. C.A. Rec. on Appeal 3, 4-5. Respondent was subsequently incarcerated for a different crime in Grafton, Ohio. Pet. App. A12. He was serving that sentence on December 30, 1993, when Monroe County, New York, prosecutors filed a detainer against him based on the robbery and murder of Weeks. J.A. 3-6. On January 4, 1994, respondent signed a request pursuant to Article III(a) of the IAD for final disposition of the Monroe County charges. The request form advised respondent that, upon delivery of his

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[2] The IAD similarly requires dismissal of an indictment with prejudice when a prisoner is transferred to the receiving State upon the prosecution's initiative and the prisoner is not brought to trial within 120 days of the prisoner's arrival in the receiving State. IAD Arts. IV(c) and V(c), 18 U.S.C. App. § 2, at 693-694. See *Cuyler* v. *Adams*, 449 U.S. 433, 444 (1981); *United States* v. *Mauro*, 436 U.S. 340, 364-365 (1978).

request to the prosecuting officer and court, "[y]ou shall then be brought to trial within 180 days, unless extended pursuant to provisions of the Agreement [on Detainers]." J.A. 4, 6. Respondent's request was delivered to the Monroe County court and prosecutor on January 10, 1994, thus starting the IAD's 180-day speedy trial clock. Pet. App. A2.

Respondent was formally indicted on March 11, 1994, and returned to New York on May 13, 1994. Pet. 1; Pet. App. A2, A13. On May 18, 1994, the case was adjourned for the filing of defense motions. Pet. App. A6, A13. After pretrial hearings, the court resolved respondent's motions on December 5, 1994. *Id.* at A2, A6, A13. Respondent does not dispute that the filing of those motions tolled Article III's speedy trial provisions between May 18, 1994 and December 5, 1994. *Id.* at A5-A6, A13.[3]

On January 9, 1995, respondent, his counsel, and the prosecutor appeared before the court to set a trial date. J.A. 33-35; Pet. App. A2, A13. As of this date, 161 "countable" days had expired under the IAD. *Id.* at A13-A14.[4] At that hearing, the following colloquy took place:

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[3] See IAD, Article III(a), 18 U.S.C. App. § 2, at 692 (permitting reasonable and necessary continuances for "good cause shown in open court"); IAD Article VI(a), 18 U.S.C. App. § 2, at 694 (IAD speedy trial period tolled when prisoner "is unable to stand trial"); see also *United States* v. *Cephas*, 937 F.2d 816, 819 (2d Cir. 1991), cert. denied, 502 U.S. 1037 (1992).

[4] The trial court incorrectly calculated this period to be 167 days because it began counting on January 4, 1994, the day respondent requested his return to New York, rather than on January 10, 1994, the day that his request was received by the Monroe County judicial and prosecuting officials. Pet. App. A14;

> [PROSECUTOR]: Your Honor, Mr. Huether from our office is engaged in a trial today. He told me that the Court was to set a trial date today. I believe the Court may have preliminarily discussed a May 1st date, and Mr. Huether says that would fit in his calendar.
>
> THE COURT: How is that with the defense counsel?
>
> [DEFENSE COUNSEL]: That will be fine, Your Honor.

Id. at A14. The court then scheduled trial to begin May 1, 1995. *Id.* at A13.

On April 17, 1995, the respondent moved to dismiss the indictment based on Article III(a)'s speedy trial provision. Pet. App. A6, A13. The trial court denied the motion, holding that the respondent "waived his right to a trial within the 180-day period by concurring in the decision to set a trial date beyond the statutory period." *Id.* at A14. The court explained that counsel for respondent and the prosecutor "were present at the time the trial date was set"; "[t]he court sought input from both attorneys with respect to the proposed trial date"; and "[h]ad counsel raised an objection to the proposed trial date, the court was in a position to set the date within the 180-day statutory period." *Id.* at A15.

3. Respondent was subsequently tried and convicted of murder in the second degree and robbery in the first degree. Pet. App. A3. On appeal, the New York Supreme Court rejected his IAD claim, for the reasons stated by the trial court. *Id.* at A9-A10.

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see *Fex* v. *Michigan*, 507 U.S. at 51-52 (Article III clock starts when officials in receiving State receive the prisoner's request).

4. The New York Court of Appeals reversed and ordered that respondent's indictment be dismissed with prejudice under Article V(c). Pet. App. A1-A8. The court stated that "ensuring that a defendant is brought to trial within the [IAD's] speedy trial period is the responsibility of prosecutors and courts, not defendants." *Id.* at A6. In the court's view, "the IAD does not impose an obligation on defendants to alert the prosecution or the court to their IAD speedy trial rights or to object to treatment that is inconsistent within those rights." *Ibid.* "[T]o impose such an obligation," the court believed, "would be to shift the burden of compliance with the IAD from State officials," and "would diminish the statute's effectiveness and enforceability." *Id.* at A6-A7.

The court recognized that "[s]peedy trial rights guaranteed by the IAD may, of course, be waived by a defendant." Pet. App. A7. The court explained that "such waiver may be accomplished explicitly or by an affirmative request for treatment that is contrary to or inconsistent with those speedy trial rights." *Ibid.* The court held, however, that "where, as here, the defendant simply concurred in a trial date proposed by the court and accepted by the prosecution, and that date fell outside the 180-day statutory period, no waiver of his speedy trial rights was effected." *Id.* at A7-A8.

SUMMARY OF ARGUMENT

A. A defendant may waive his rights to a speedy trial under the IAD by agreeing to a trial date that comes after the expiration of the applicable IAD period. Statutory provisions are presumptively subject to waiver. *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995). Congress and the adopting States passed

the IAD to allow prisoners to obtain a speedy resolution of detainers because of the deleterious effects of outstanding detainers on prisoners. See *Cuyler* v. *Adams*, 449 U.S. 433, 448-449 (1981); *United States* v. *Mauro*, 436 U.S. 340, 359-360, (1978). Because the IAD confers speedy trial rights that are primarily for the prisoner's personal benefit, the prisoner may waive his rights under the IAD.

B. A waiver of speedy trial rights under the IAD occurs when defense counsel voluntarily consents to a trial date beyond the time period specified by the IAD. As a statutory right, there is no requirement that an IAD waiver be accomplished by the defendant's intentional relinquishment of a known right. "Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 237 (1973). Thus, a party may waive his speedy trial rights under the IAD by expressing his voluntary agreement to a trial date that would otherwise be untimely under the IAD. Cf. *Mezzanatto*, 513 U.S. at 201, 203.

In this case, respondent's counsel agreed to a trial date that fell after the expiration of Article III(a)'s 180-day limit. That conduct constitutes a voluntary waiver of respondent's speedy trial rights under the IAD.

C. The court of appeals' contrary conclusion rested on its belief that a defendant has no duty to assert his IAD speedy trial rights or to object to treatment that is inconsistent with those rights. Pet. App. A6-A8. Even assuming that to be the case, respondent here did not simply sit silently as the trial court unilaterally scheduled an untimely trial. Instead, respondent's counsel expressly consented in open court to the belated trial

date proposed by the court. The prosecutor and the trial court were entitled to rely on that action and to conclude that respondent had no legal objection to proceeding on that schedule.

The court of appeals' decision also is misguided as a matter of policy. It permits a defendant to agree to a late trial date under the IAD, and then obtain a reversal of his conviction because the trial court did precisely what the defendant agreed to. Such "sandbagging" is unfair and should not be rewarded, for it prevents trial courts and prosecutors from curing errors before they turn into fatal defects and confers an unjustified windfall on a defendant.

ARGUMENT

THE SPEEDY TRIAL PROVISIONS OF THE IAD ARE WAIVED BY THE PRISONER'S EXPRESS AGREEMENT TO A TRIAL DATE OUTSIDE THE IAD's TIME LIMITS

A. The Speedy Trial Rights Created By The IAD Are Waivable

Under Article III(a) of the IAD, a prisoner against whom a detainer has been filed has a right to be tried on the charges giving rise to the detainer within 180 days of the date the prosecutor and the court receive his demand for final disposition of the charges. There is no dispute in this case that the speedy trial rights under Article III(a) are waivable. See, *e.g.*, Pet. App. A7 ("Speedy trial rights guaranteed by the IAD may, of course, be waived."); Resp. C.A. Br. 11 ("[A]n inmate may, through his actions, waive the benefits of the IAD.").[5]

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[5] The state and federal courts that have addressed the issue agree. See, *e.g.*, *Yellen* v. *Cooper*, 828 F.2d 1471, 1474-1475 (10th

The principle that a litigant may waive a right provided for his benefit applies to "a broad array of constitutional and statutory provisions." *United States* v. *Mezzanatto*, 513 U.S. 196, 200 (1995). As this Court has noted, "[t]he most basic rights of criminal defendants are * * * subject to wavier." *Peretz* v. *United States*, 501 U.S. 923, 936 (1991). Those rights include the protection again double jeopardy, *United States* v. *Broce*, 488 U.S. 563, 573 (1989); the right to a jury trial, *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969); the right to have an Article III judge preside at voir dire, *Peretz*, 501 U.S. at 936-937; the right to counsel, *Faretta* v. *California*, 422 U.S. 806, 835 (1975); and the constitutional right to a speedy trial, *Barker* v. *Wingo*, 407 U.S. 514 (1972).

The fact that the IAD does not specifically address the question of waiver does not mean that IAD rights cannot be waived. See *Mezzanatto*, 513 U.S. at 200-203. (waiver of Fed. R. Crim. P. 11(e)(6) and Fed. R. Evid. 410's exclusion of statements made during plea discussions). "[A]bsent some affirmative indication of [the legislature's] intent to preclude waiver," this Court has "presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." *Id.* at 201 (citing *Evans* v. *Jeff D.*, 475 U.S. 717, 730-732 (1986)

Cir. 1987); *Webb* v. *Keohane*, 804 F.2d 413, 414-415 (7th Cir. 1986); *Brown* v. *Wolff*, 706 F.2d 902, 907 (9th Cir. 1983); *United States* v. *Odom*, 674 F.2d 228, 230 (4th Cir.), cert. denied, 457 U.S. 1125 (1982); *United States* v. *Eaddy*, 595 F.2d 341, 344 (6th Cir. 1979); *Camp* v. *United States*, 587 F.2d 397, 399-400 (8th Cir. 1978); *Drescher* v. *Superior Court*, 218 Cal. App. 3d 1140, 1146-1149 (1990); *People* v. *Allen*, 744 P.2d 73, 75 (Colo. 1987) (en banc); *Johnson* v. *Florida*, 442 So. 2d 193, 196-197 (Fla. 1983), cert. denied, 466 U.S. 963 (1984).

(prevailing party in civil rights action may waive its statutory eligibility for attorney's fees)).

While the "background presumption that legal rights generally * * * are subject to waiver by voluntary agreement of the parties" may be overcome if there is "some affirmative basis for concluding that [the relevant law] depart[s] from the presumption of waivability," *Mezzanatto*, 513 U.S. at 203-204, there is no "affirmative basis" for finding that the IAD's speedy trial rights are non-waivable. Rights under the IAD are not "so fundamental to the reliability of the fact-finding process that they may never be waived without irreparably 'discrediting the federal courts.'" *Id.* at 204 (citing 21 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5039, at 207-208 (1977)); see *United States* v. *Black*, 609 F.2d 1330, 1334 (9th Cir. 1979) (noting that "[t]he protections of the IAD are not founded on * * * the preservation of a fair trial"), cert. denied, 449 U.S. 847 (1980); *Yellen* v. *Cooper*, 828 F.2d 1471, 1474 (10th Cir. 1987) ("The concerns behind enactment of the IAD[] are not of the truth-seeking kind.").

In addition, nothing in the structure or the legislative history of the IAD suggests an intent to preclude waiver of the rights created by the Agreement. The central question is whether the speedy trial rights under the IAD were crafted primarily for the personal benefit of the defendant. If so, the rights may be waived. See *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 848-849 (1986) ("[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried."); *Insurance Corp. of Ireland* v.

Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived."); see also *Shutte* v. *Thompson*, 82 U.S. (15 Wall.) 151, 159 (1872) ("A party may waive any provision, either of a contract or of a statute, intended for his benefit."). Compare *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 704-711 (1945) (right to liquidated damages under the Fair Labor Standards Act not waivable in light of public policies underlying the Act).

Waiver is appropriate here because the speedy trial right under Article III(a) was created primarily to protect defendants from the disadvantages of detainers. See *United States* v. *Eaddy*, 595 F.2d 341, 344 (6th Cir. 1979) ("[T]he rights created by the Agreement are for the benefit of the prisoner. They exist for his protection and are personal to him."). "The legislative history of the Agreement, including the comments of the Council of State Governments and the congressional Reports and debates preceding the adoption of the Agreement on behalf of the District of Columbia and the Federal Government, emphasizes that a primary purpose of the Agreement is to protect prisoners against whom detainers are outstanding." *Cuyler* v. *Adams*, 449 U.S. 433, 448-449 (1981). In particular, the legislative history evidences concern that outstanding detainers seriously disadvantage prisoners by, *inter alia*, subjecting them to more onerous conditions of incarceration, precluding their participation in desirable work assignments and activities, and creating uncertainty about the length of their sentences. *Id.* at 449 (quoting H.R. Rep. No. 1018, 91st Cong., 2d Sess. 3 (1970); S. Rep. No. 1356, 91st Cong., 2d Sess. 3 (1970); *United States* v. *Mauro*, 436 U.S. 340, 357, 359-360

(1978) (citing Council of State Governments, *Suggested State Legislation Program for 1957*, at 74 (1956)); *Carchman* v. *Nash*, 473 U.S. 716, 730 n.8 (1985) (cataloguing ill effects of detainers).

Article III(a) permits prisoners to avert those disadvantages by obtaining a prompt resolution of the charges underlying the detainer. See IAD, Art. I, 18 U.S.C. App. § 2, at 692 (purpose of Agreement is "to encourage the expeditious and orderly disposition of [outstanding] charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints"); see also 116 Cong. Rec. 38,840 (1970) (Sen. Hruska notes during debates that "at the heart of this measure is the proposition that a person should be entitled to have criminal charges pending against him determined in expeditious fashion"). Because prisoners subject to detainers are the primary intended beneficiaries of the IAD's speedy trial provisions,[6] those provisions may be waived.[7]

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[6] The prisoner is not the only beneficiary of the IAD's speedy trial provisions. By providing the prisoner with "a greater degree of certainty as to his future," the IAD also "enable[s] the prison authorities to plan more effectively for his rehabilitation and his return to society." S. Rep. No. 1356, *supra*, at 2. But the IAD reserves to the prisoner, and not to prison authorities, the decision whether to request the disposition of pending charges underlying a detainer. See *Carchman* v. *Nash*, 473 U.S. at 733. Therefore, any benefit to prison authorities is secondary to the benefit to the prisoner himself.

[7] In this respect, the IAD differs significantly from the Speedy Trial Act, 18 U.S.C. 3161 *et seq.* The legislative history of the latter Act identifies the "protection of the societal interest in speedy disposition of criminal cases" as the Act's "primary objective," and explicitly disapproves of waiver by the parties. S. Rep. No. 212, 96th Cong., 1st Sess. 29 (1979); see also *Cephas*, 937 F.2d at 819 (noting that "the purposes of the speedy trial act

B. A Defendant Waives The IAD's Speedy Trial Rights When He Or His Counsel Voluntarily Takes Action That Is Inconsistent With An Assertion Of Those Rights

1. The conditions under which a right may be waived largely depend on the nature of the right itself. *United States* v. *Olano*, 507 U.S. 725, 733 (1993). For a limited class of fundamental constitutional rights, such as the right to be represented by counsel and the right to a jury trial, "the accused has the ultimate authority," and therefore the defendant must give personal and informed consent before a waiver is valid. *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Wainright* v. *Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring); see *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (waiver of

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extend beyond those of the detainer act, and protect as well the interests of society and of the government in obtaining prompt disposition of criminal charges"). Accordingly, several courts of appeals have held that the time limits of the Speedy Trial Act cannot be waived by the defendant. See, *e.g.*, *United States* v. *Gambino*, 59 F.3d 353, 359-360 (2d Cir. 1995), cert. denied, 517 U.S. 1187 (1996); *United States* v. *Saltzman*, 984 F.2d 1087, 1091 (10th Cir.), cert. denied, 508 U.S. 964 (1993); *United States* v. *Willis*, 958 F.2d 60, 62-65 (5th Cir. 1992); *United States* v. *Berberian*, 851 F.2d 236, 239 (9th Cir. 1988), cert. denied, 489 U.S. 1096 (1989); *United States* v. *Ray*, 768 F.2d 991, 998 n.11 (8th Cir. 1985); *United States* v. *Carrasquillo*, 667 F.2d 382, 388-390 (3d Cir. 1981). But see *United States* v. *Pringle*, 751 F.2d 419, 434-435 (1st Cir. 1984) (exception where waiver by defendant causes or contributes to delay); *United States* v. *Kucik*, 909 F.2d 206, 210-211 (7th Cir. 1990) (same), cert. denied, 498 U.S. 1070 (1991); *United States* v. *Keith*, 42 F.3d 234, 238 (4th Cir. 1994) (waiver upheld as long as reasons underlying it would justify a continuance under the Act). Because the reasoning of those cases is confined to the Speedy Trial Act context, they have no bearing on the issue presented here.

right to counsel defined as an "intentional relinquishment or abandonment of a known right or privilege").[8]

For other rights, however, defense counsel may make tactical decisions that result in waiver without securing or recording the defendant's personal informed consent. "Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 237 (1973). This Court therefore has not required a "showing of conscious surrender of a known right * * * with respect to strategic and tactical decisions, even those with constitutional implications, by a counseled accused." *Estelle* v. *Williams*, 425 U.S. 501, 508 n.3 (1976); see also *Taylor* v. *Illinois*, 484 U.S. 400, 418 (1988) ("The adversary process could not function effectively if every tactical decision required client approval."). Because it is a statutory right, an attorney may waive his client's rights under the IAD without a showing that the defendant is aware of those rights.[9]

There also is no requirement that defense counsel must explicitly advert to IAD rights in order to waive them. As respondent concedes, waiver of IAD rights

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[8] Of course Congress also can expressly provide that a statutory right may not be waived without satisfying certain requirements. See *Oubre* v. *Entergy*, 522 U.S. 422, 424, 426-427 (1998) (discussing requirements for waivers under Older Workers Benefit Protection Act).

[9] The lower courts have so held. See, *e.g.*, *Yellen*, 828 F.2d at 1474; *Webb* v. *Keohane*, 804 F.2d 413, 414-415 (7th Cir. 1986); *United States* v. *Lawson*, 736 F.2d 835, 837-838 (2d Cir. 1984); *United States* v. *Odom*, 674 F.2d 228, 230 (4th Cir.), cert. denied, 457 U.S. 1125 (1982); *Black*, 609 F.2d at 1334, *Eaddy*, 595 F.2d at 344; *Camp*, 587 F.2d at 400.

occurs whenever the defendant or his counsel takes "an act expressly or impliedly inconsistent with the provisions of the IAD." Br. in Opp. 2. See, *e.g.*, *Lawson*, 736 F.2d at 840; *Odom*, 674 F.2d at 230. That conclusion comports with decisions from this Court finding a valid waiver of even constitutional rights based on defense conduct that is inconsistent with those rights, notwithstanding the absence of an explicit reference to the rights relinquished. See *Ricketts* v. *Adamson*, 483 U.S. 1, 9-12 (1987) (plea agreement that specifies that a charge will be reinstated if the defendant declines to testify at co-defendants' trial waived double jeopardy bar even though "double jeopardy" was not specifically waived by name in the plea agreement); *Insurance Corp. of Ireland* v. *Campagnie des Bauxites de Guinee*, 456 U.S. at 703 (party may waive due process right that court have personal jurisdiction over it by "express or implied consent"); *United States* v. *Gagnon*, 470 U.S. 522, 528-529 (1985) (per curiam) (defendant's failure to assert right under Fed. R. Crim. P. 43 to attend judge's conference with juror of which he was aware constitutes valid waiver of right, and trial court need not get an express "on the record" waiver from defendant); see also *North Carolina* v. *Butler*, 441 U.S. 369, 373-376 (1979) (waiver of *Miranda* rights can be inferred from "the actions and words of the person interrogated"); *Diaz* v. *United States*, 223 U.S. 442, 445 (1912) (defendant's voluntary absence from trial after trial began operates as a waiver of his right to be present).

Similarly, a party's express or implied consent to governmental action often removes any claim that the action violated the party's rights. See, *e.g.*, *Peretz*, 501 U.S. at 934-937 (party's consent to voir dire conducted by magistrate removes any legal objection under Article III and Federal Magistrates Act, Pub. L.

No. 90-578, 82 Stat. 1107); *Estelle* v. *Williams*, 425 U.S. at 512-514 (no Fourteenth Amendment violation when defendant did not object to appearing at trial in prison clothes); *Levine* v. *United States*, 362 U.S. 610, 619 (1960) (no due process violation when public was excluded from criminal contempt proceedings when defendant did not request court to open the courtroom).

2. Applying those principles, respondent waived his speedy trial rights under the IAD when his counsel agreed that trial on a date after the 180-day period would be "fine." Respondent concedes that a defendant waives his IAD rights when he acts in a manner inconsistent with the Act. Since the trial could not be held, consistent with the IAD's time limits, the conclusion is inescapable that respondent waived his IAD speedy trial rights under Article III(a).

Respondent seeks to avoid that result by arguing that his counsel's "acquiescence" to the May 1 trial date did not constitute an "express agreement" to hold the trial on that date. Br. in Opp. 1, 5-7. Instead, respondent argues, an agreement to a trial date beyond the IAD's limits constitutes an "express agreement," and thus a waiver, only if (1) defense counsel "expressly requested" that date; or (2) the delay is "to the *benefit* of the defendant." *Id.* at 3.

Although some cases interpreting the IAD have distinguished between a "request" by the defendant and an "acquiescence" by him,[10] nothing in this Court's waiver jurisprudence supports that distinction. To the contrary, this Court has indicated that "legal rights generally, * * * are subject to waiver by *voluntary*

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[10] See, *e.g.*, *People* v. *Allen*, 744 P.2d 73, 76-77 (Colo. 1987) (en banc); but see *People* v. *Jones*, 495 N.W.2d 159, 161 (Mich. App. 1992).

agreement of the parties." *Mezzanatto*, 513 U.S. at 203 (emphasis added). The hallmark of a voluntary agreement, of course, is an objective manifestation of the parties' mutual assent. See Restatement (Second) of Contracts §§ 3, 22 (1981); 1 Joseph M. Perillo, *Corbin on Contracts* §§ 1.9, 4.13 (1993). Once a party has manifested his assent, it does not matter who originally proposed the term agreed to. What is important is that he consented to that term.[11]

Not only does respondent's approach distort the ordinary meaning of the term "agreement," but it would encourage misleading verbal gamesmanship by defense counsel. Under respondent's approach, the validity of counsel's waiver would turn on the precise phrasing of his agreement. If, for example, defense counsel said "I concur in the May 1 trial date," no waiver would occur, but if he said "I concur in the request for a May 1 trial date," his adoption of the request presumably would result in waiver. The result of criminal cases should not rest on such subtle semantic distinctions.[12]

Likewise without merit is respondent's contention (Br. in Opp. 3, 7) that a waiver occurs only if the delay to which defense counsel consented is shown to be for

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[11] In this case, defense counsel's statement that the May 1 trial date would be "fine" was reasonably interpreted to mean that there were no barriers, legal or otherwise, with proceeding to trial on that date. See J.A. 53 (May 2, 1995, Affidavit of Defense Counsel) ("By responding that the day would be fine, [counsel] was merely indicating that there was no barrier to proceeding on that date.").

[12] The fact that the IAD requires dismissal with prejudice, see IAD Article V(c), 18 U.S.C. App. § 2, at 693-694, makes it even less likely that Congress and the adopting States intended to endorse the kind of gamesmanship respondent's approach would produce.

the defendant's benefit. Courts presume that defense counsel assert or waive the defendant's rights based on a judgment about how best to promote the defendant's interests. Tactical decisions by defense counsel thus can bind the defendant whether or not there is a showing that they actually benefit the defense. *Reed* v. *Ross*, 468 U.S. 1, 13 (1984) ("absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel"); *Jones* v. *Barnes*, 463 U.S. at 754 (judges should not second guess reasonable professional judgments made by appellate counsel). The adversary system could not otherwise function. See *Estelle* v. *Williams*, 425 U.S. at 512; *Taylor* v. *Illinois*, 484 U.S. at 417.

Accordingly, the prosecutor and trial court were entitled to infer from the statement of respondent's counsel, that a May 1 trial date would be "fine," that counsel had no legal objection to proceeding on that schedule. There would have been no reason to question counsel's judgment in agreeing to postpone trial, for, as this Court has observed, "[d]elay is not an uncommon defense tactic." *Barker* v. *Wingo*, 407 U.S. at 521.[13]

C. Policy Considerations Do Not Support The Court of Appeals' Waiver Standard

In holding that respondent's consent to the May 1 trial date did not effect a waiver under the IAD, the

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[13] Respondent suggests (Br. in Opp. 6 n.3) that his counsel's "respectful acquiescence" to the proposed trial date was required by rules of "civility." But counsel may inform the trial court that a proposed course of action conflicts with his client's statutory rights without risking impoliteness. Nor is civility advanced when defense counsel agrees in open court to a particular trial date proposed by the court, and later files a motion arguing that the same trial date mandates dismissal of the indictment.

New York Court of Appeals reasoned that "it is the burden of the prosecutor and the court to comply with the IAD's speedy trial requirements." Pet. App. A8; see also *id.* at A6 ("[T]he IAD does not impose an obligation on defendants to alert the prosecution or the court to their IAD speedy trial rights or to object to treatment that is inconsistent with those rights."). It is far from clear that defense counsel should be freed from any obligation to call to a court's attention that it is on the brink of committing legal error, when a timely objection could easily permit the error to be cured. See *United States* v. *Gagnon*, 470 U.S. at 529. This is not a case, however, in which a defendant simply failed to object to a trial date that the trial court unilaterally scheduled.[14] To the contrary, the trial judge convened a hearing in open court to solicit the parties' views on

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[14] The lower courts are divided on whether such failure to object to the setting of a trial date beyond the 180-day period constitutes a waiver that bars relief on direct appeal. Compare, *e.g.*, *State* v. *Schmidt*, 932 P.2d 328, 334-335 (Haw. 1997) (failure to object to trial date set beyond 180-day period waived any objection brought after the period had run); *Reid* v. *State*, 670 N.E.2d 949, 951-952 (Ind. 1996) (same), with *State* v. *Dolbeare*, 663 A.2d 85, 86-87 (N.H. 1995) (failure to object to trial date set beyond 180-day period did not waive IAD claim); *Roberson* v. *Commonwealth*, 913 S.W.2d. 310, 314-315 (Ky. 1994) (same); *Eaddy*, 595 F.2d at 343-345 (defendant did not waive his rights under Article IV(c)'s anti-shuttling provision by failing to state a preference as to his place of incarceration). As for collateral relief, the matter is settled. Under *Reed* v. *Farley*, 512 U.S. 339 (1994), relief on federal habeas corpus for an alleged violation of the speedy trial period in IAD Article IV(c) is not available where the defendant did not object to the trial date at the time it was set and suffered no prejudice. *Id.* at 341, 349-353 (plurality opinion of Ginsburg, J.); *id.* at 355-359 (Scalia, J., concurring in part, and concurring in the judgment on the broader ground that violations of IAD time periods never warrant collateral relief).

an appropriate date, and respondent's counsel affirmatively consented to the date proposed by the court. Thus, even assuming the IAD places the duty of complying with the 180-day period solely on the government and the court, a defendant nonetheless waives the IAD's protections by affirmatively agreeing to a noncomplying trial date.

The court of appeals' belief that the burden of statutory compliance falls on the court and prosecutor (Pet. App. A8) would not in any event support the distinction the court drew between delay "requested" by the defense and delay in which counsel merely "acquiesced" or "concurred." Respondent concedes that he would have waived his rights under the IAD had he *requested* a trial date beyond the 180-day period. Br. in Opp. 3. Yet if a waiver when the defendant requests the delay would not "diminish the statute's effectiveness and enforceability" (Pet. App. A7), the same is true when the defendant agrees to the delay. In either situation, the defendant has voluntarily abandoned his right to a speedy trial in accordance with the IAD by consenting to a trial period outside the 180-day period.

There is an additional fundamental reason for rejecting the court of appeals' analysis. An approach that allows a party to agree to a particular procedure and then seek reversal because the court carried out the agreement is inconsistent with basic rules of fairness and "sound considerations of judicial economy." *Thomas* v. *Arn*, 474 U.S. 140, 147 (1985). A party may not engage in "sandbagging" by "suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later * * * claiming that the course followed was reversible error." *Freytag* v. *Commissioner*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring); cf. *City of Monterey* v. *Del Monte Dunes*,

119 S. Ct. 1624, 1636 (1999) (party that proposed "the essence of the instructions given to the jury * * * cannot now contend that the instructions did not provide an accurate statement of the law").[15]

This case illustrates the deficiencies of the court of appeals' approach. As the trial court noted, "[h]ad counsel raised an objection to the proposed trial date, the court was in a position to set the date within the 180-day statutory period." Pet. App. A15. Similarly, had respondent's counsel registered an objection at the January 9 hearing, the prosecutor could have asked the court to grant a "necessary or reasonable continuance" for "good cause shown in open court." IAD, Art. III(a), 18 U.S.C. App. § 2, at 692. Instead, when respondent's counsel consented to the trial date, its untimeliness went undetected by the court before the expiration of the 180-day period. Permitting a defendant to consent to a trial date, while reserving a timeliness objection until it is too late to cure it, is inconsistent with the defendant's "obligation to [bring his objection] to the court's attention so the trial judge will have an opportunity to remedy the situation." *Estelle* v. *Williams*, 425 U.S. at 508 n.3; *United States* v. *Gagnon*, 470 U.S. at 529; cf. *Wainwright* v. *Sykes*, 433 U.S. at 89-90 (contemporaneous objection rule permits trial court to correct error, allows government to respond accordingly, and prevents defense lawyers from "sandbagging").

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[15] We do not mean to suggest that defense counsel necessarily knew that the May 1, 1995, trial date was beyond the IAD's 180-day period. The present record does not resolve that issue, which is not, in any event, dispositive. See p. 14, *supra*. The rule respondent advocates, however, would preclude a waiver even where counsel knowingly acquiesced in a date beyond the 180-day limit.

Finally, the decision below confers an unjustified windfall on a defendant. Respondent claims no actual prejudice to the fairness of his trial (or to any other interest) and cannot claim that a failure to hold trial within the IAD's 180-day period establishes a violation of his constitutional rights. See *Reed* v. *Farley*, 512 U.S. 339, 352 (1994) (rejecting claim that IAD violation is a violation of Sixth Amendment trial rights). While the IAD "insure[s] that both prosecution and defendant may, *if they wish*, have their day in court on a prompt and timely basis," 116 Cong. Rec. at 38,840 (remarks of Sen. Hruska) (emphasis added), the IAD gives defendants "no greater opportunity to escape just convictions." Council of State Governments, *supra*, at 76-77; accord S. Rep. No. 1356, *supra*, at 2; H.R. Rep. 91-1018, *supra*, at 2. Here, the court of appeals ordered that the indictment for murder and robbery on which respondent was convicted be dismissed with prejudice on the ground that the trial date, to which respondent freely consented, fell beyond the 180-day period. Neither the text, history, nor underlying purposes of the IAD justify permitting respondent to profit from participation in an "unwitting judicial slip" (*Reed* v. *Farley*, 512 U.S. at 349 (plurality opinion)) after he specifically agreed to a trial date beyond the statutory period.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX A

Article III of the Interstate Agreement on Detainers, 18 U.S.C. App. § 2, at 692-693, provides, in pertinent part:

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: *Provided*, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of the parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, com-

missioner of corrections, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

Article V of the Interstate Agreement on Detainers, 18 U.S.C. App. § 2, at 693-694, provides, in pertinent part:

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

Article IX of the Interstate Agreement on Detainers, 18 U.S.C. App. § 2, at 695, provides, in pertinent part:

Notwithstanding any provision of the agreement on detainers to the contrary, in a case in which the United States is a receiving State—

(1) any order of a court dismissing any indictment, information, or complaint may be with or without prejudice. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: The seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of the agreement on detainers and on the administration of justice.