No. 98-1299

IN THE SUPREME COURT OF THE UNITED STATES

THE STATE OF NEW YORK,
Petitioner

v.

MICHAEL HILL
Respondent

BRIEF FOR RESPONDENT

Filed August 10, 1999

QUESTION PRESENTED

Was the New York Court of Appeals correct in holding that no waiver of the time requirements imposed by the Interstate Agreement on Detainers (IAD) was effected by defense counsel's concurrence with the court's setting of a trial date beyond the 180-day time period, where the IAD, enacted for the benefit of society and the individual prisoner, contains tolling provisions which reflect a congressional intent to limit the circumstances in which its time requirements may be extended?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

Michael Hill[1] was serving a sentence of imprisonment in the State of Ohio when, on January 4, 1994, he was served with notice that he was being charged with murder and robbery in the Town of Gates, New York (*see* Appendix, hereinafter "A," at 3-6). On that date, he was also notified of his rights under the Interstate Agreement on Detainers (IAD) (A at 3-6). *See* N.Y. Crim. Proc. Law § 580.20. He then requested, in writing, that he be brought to trial within 180 days on the outstanding charges (A at 7-10).

A series of forms[2] were completed in relation to this written request by Mr. Hill. The prosecuting attorney and

---

[1] Respondent has been ascribed a number of different names, i.e., Michael Hill, Dwain Reid, and Leroy Foster. In the case at bar he was prosecuted by Indictment Number 160/94, the caption of which read People of the State of New York versus Michael Hill a/k/a Dwain Reid. After conviction, the proceedings continued (including the order granting certiorari by this Court) under the name Michael Hill. Accordingly, Michael Hill is the name used in this brief.

[2] The forms referred to are captioned at the top "Agreement on Detainers," and included the form signed by Mr. Hill (who was incarcerated in Ohio under the name "Leroy Foster," which explains the forms' reference to Mr. Hill by that name), the document notifying the Monroe County District Attorney of Mr. Hill's request, the form sent by the prosecuting attorney (Gregory Huether, Esq.) to New York's IAD administrator indicating that New York was taking custody of Mr. Hill and trying him in accordance with the IAD, and the form signed by Mr. Huether and the trial judge advising the Ohio prison where Mr. Hill was held that temporary custody of Mr. Hill was accepted and that they intended to bring Mr. Hill to trial in accordance with IAD, Article III (A at 3-20).

the trial judge signed these forms, in which the prosecutor agreed to bring Mr. Hill to trial within the time requirements of the IAD (A at 16-18).

In its decision denying Mr. Hill's motion to dismiss for violation of the IAD's time requirement, the trial court excluded various time periods between January 4, 1994 and January 9, 1995 because they fit within tolling provisions expressly set forth in the IAD. *People v. Reid*, 627 N.Y.S.2d 234 (N.Y. Co. Ct. [Monroe Co.] 1995). At a court appearance on January 9, 1995, Mr. Prosperi, the prosecutor who appeared on behalf of Mr. Huether, the prosecutor assigned to prosecute Mr. Hill, explained that Mr. Huether was engaged in a trial. Mr. Prosperi then stated that Mr. Huether had told him *"that the Court was to set a trial date today.* I believe the Court may have had preliminarily discussed a May 1st date" (emphasis added). Despite having acknowledged in writing their respective obligations to comply with the time requirements of the IAD, neither the prosecutor nor the court ever mentioned that, given the non-excludable time which had already passed, the IAD required Mr. Hill's trial to begin by January 28, 1995. Rather, the prosecutor only stated that "Mr. Huether says that [the May 1st date] would fit in his calendar." After the Court learned that the May 1, 1995 date "would fit the Assistant District Attorney's calendar," the Court asked how that date was with defense counsel. Defense counsel simply replied, "[t]hat will be fine, your Honor" (A at 35). No cause was placed on the record as to why an earlier trial date was not possible or why the case needed to be adjourned 112 days.

What transpired almost six months earlier on July 20, 1994 is particularly revealing in view of the court's and

prosecutor's actions at the January 9, 1995 appearance when Mr. Hill's trial date was set. On July 20, 1994, the trial prosecutor sought more time to reply to defense counsel's omnibus motion stating, "I just completed a trial yesterday and have not had the opportunity to draft a written response." Defense counsel replied that "[m]y client and I have no objection to an adjournment for that, Your Honor."[3] Significantly, when the court granted the prosecutor's request for a continuance for additional time to prepare his motion response and for the argument of motions, the court stated, for the record, that the adjournment was "with the consent of both attorneys" (A at 40). The court ultimately found, in its written decision denying the defense motion to dismiss for violation of the IAD, that such continuance was part of the time period excludable from the 180-day calculation pursuant to the tolling provisions of IAD, Article III(a) and Article VI. *People v. Reid*, 627 N.Y.S.2d 234, 236 (N.Y. Co. Ct. [Monroe Co.] 1995). It is also significant to note that the court did not find that there was a waiver of IAD rights regarding this time period. In contrast, at the January 9, 1995 appearance, the trial court did not indicate for the record that the 112-day continuance for the trial of this matter was "with the consent of both parties" as it had on July 20, 1994. Nor did the court find that this period was excludable under a tolling provision of the IAD.

---

[3] This statement by defense counsel belies the accusations by the Petitioner that defense counsel was "sandbagging" or otherwise resorting to "gamesmanship." *See* Brief for Petitioner, at 11, 20-22; Brief for United States as Amicus Curiae, at 17, 20-21 and n. 12.

On April 17, 1995, defense counsel brought a motion to dismiss this indictment pursuant to the IAD based upon the State's failure to bring Mr. Hill to trial within the required 180 days (*see* Defendant's Notice of Motion, filed April 17, 1995) (A at 21-25).

The prosecutor's reply motion claimed that his exercise of due diligence in trying to comply with Mr. Hill's demand for resolution of the charges against him, Mr. Hill's bringing of motions, and that defense counsel's response of "fine" to the court-proposed trial date constituted "consent" to the delay after January 9, 1995, and thus demonstrated "good cause shown," pursuant to Article III(a) of the IAD (A at 26-32).

Defense counsel responded to the prosecutor's reply motion that his response of "fine" to the court-proposed trial date was merely an indication "that there was no barrier to proceeding on that date" (A at 53-54). In this responding affirmation, defense counsel affirmed that he had been contacted "[i]n the latter part of December 1994" by the trial court's secretary, who had asked if the defense could be ready to proceed to trial in January or February of 1995. Defense counsel affirmed that he had informed the court's secretary that any date in January or February of 1995 would be acceptable, and further affirmed that after December 5, 1994, the defense had never indicated a lack of readiness for any trial date for this indictment, suggested or requested a trial date beyond the 180-day limit, or waived the 180-day limit. Defense counsel was ready and able to try the case in January or February of 1995, had advised the court's secretary of such, and "specifically denie[d] that portion of paragraph 9 of the prosecution's Reply to Notice of

Motion that states the May 1, 1995 trial date 'was specifically agreed upon by the defense after the Court and both counsel reviewed their prospective schedules and availability in 1995' " (A at 53-54). The prosecutor never contested defense counsel's statements in the responding affirmation.[4]

The trial court denied defense counsel's motion to dismiss the indictment pursuant to the IAD, stating that the issue turned on the ninety-eight-day period from January 9, 1995, the date the court scheduled Mr. Hill's trial, to April 17, 1995, when defense counsel moved to dismiss the indictment based on Mr. Hill not having been brought to trial within 180 days. *People v. Reid*, 627 N.Y.S.2d 234, 236 (N.Y. Co. Ct. [Monroe Co.] 1995). The trial court held that defense counsel's acquiescence to the May 1, 1995 date, set by the court, was an "explicit agreement to the trial date set beyond the 180-day statutory period [and] constituted a waiver or abandonment of defendant's rights under the IAD." *Id.* at 237. Further, the court wrote that "[h]ad counsel raised an objection to the proposed trial date, the Court had been in a position to set the date within the 180-day statutory period." *Id.* at 237. The trial court did not make a finding that "good cause" had been shown for the continuance of Mr. Hill's case from January 9, 1995 to May 1, 1995. Further, and equally important, the court did not make any findings that the length of the adjournment was either necessary or reasonable.

---

[4] Therefore, pursuant to New York State law, these facts are "deemed to be conceded." *People v. Gruden*, 42 N.Y.2d 214, 216-217 (1977).

After deliberations, the jury found Mr. Hill guilty of second degree felony murder and first degree robbery. On June 8, 1995, the court sentenced Mr. Hill to concurrent sentences of twenty-five years to life for murder and eight and one-third to twenty-five years for robbery. These sentences were to run consecutively to the Ohio sentence Mr. Hill was already serving. The Supreme Court of the State of New York, Appellate Division, Fourth Department affirmed Mr. Hill's conviction "for reasons stated in decision at Monroe County Court. . . . " *People v. Hill*, 668 N.Y.S.2d 126 (N.Y. App. Div. [4th Dept.] 1997).

The New York State Court of Appeals reversed the order of the Appellate Division and dismissed the indictment holding,

> 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 effectuated. Defendant's mere concurrence in the suggested trial date did not constitute an affirmative request for a trial date beyond the speedy trial period. Moreover, it is the burden of the prosecutor and the court to comply with the IAD's speedy trial requirements.

People v. Hill, 704 N.E.2d 542, 546 (N.Y. 1998).

Following the prosecutor's petition for writ of certiorari, Mr. Hill's response, and a reply by the Petitioner, this Court granted certiorari on May 17, 1999. This appeal follows.

SUMMARY OF ARGUMENT

Article III of the IAD imposes a strict 180-day deadline for the commencement of trial of a prisoner who has invoked its provisions. Congress has set forth the requirements that must be met before a continuance is excluded from IAD calculations by providing that only "necessary or reasonable" continuances granted for "good cause shown" in open court are excludable. As such, the continuances under the IAD are similar to those granted under the Federal Speedy Trial Act (FSTA) in that courts must apply the congressionally sanctioned test to determine whether a continuance, even one granted with the consent or concurrence of counsel, is to be excluded from its provisions. Given these provisions, waiver analysis should not override, but must complement, these congressionally enacted tests for tolling the statutory time period.

On January 9, 1995, when the May 1, 1995 trial date was set, neither the court nor the prosecutor acknowledged the State's obligation under the IAD. Instead, without providing any reason for delaying the start of Mr. Hill's trial an additional 112 days, the court proposed and the prosecutor agreed to that trial date. No good cause was set forth or found for this lengthy continuance. Defense counsel's ambiguous response of "fine" when asked by the court about the May 1, 1995 trial date does not constitute a basis for finding on this record either that it was a "necessary and reasonable" continuance granted upon "good cause shown" or for finding that Mr. Hill waived his right to even assert his speedy trial rights under the IAD. *United States v. Mauro*, 436 U.S. 340, 364

(1978), *aff'g United States v. Ford*, 550 F.2d 732 (2nd Cir. 1977).

Having failed to establish that this time period should be excluded under the statutory good cause test, the Petitioner argues that Mr. Hill waived his IAD rights. In order to make this argument, the Petitioner characterizes defense counsel's statement of "fine" as an "express agreement" which he argues transforms counsel's mere concurrence to a trial date proposed by the court into a waiver of Mr. Hill's IAD rights. First, the argument ignores the conclusion reached by the New York Court of Appeals that defense counsel merely concurred with the date proposed by the court. The Petitioner's argument also disregards the fact that many other federal statutes and rules – but not the IAD – expressly provide that consent automatically nullifies the statutory time periods set in those statutes and rules. Further, the Petitioner's argument ignores the holdings that consent to a continuance does not automatically nullify the time periods set by the FSTA, a statute similar in subject matter, purpose, and content.

The fact that a continuance was granted after the concurrence or consent of the defendant does not necessarily establish either "good cause" for the continuance or waiver. When Congress intends for consent to *per se* toll or waive a time period, it expressly so provides. Thus, Congress has enacted numerous statutes and rules which expressly provide that the time periods set forth therein are inapplicable upon either a finding of "good cause . . . or consent." By contrast, the IAD provision authorizing the tolling of time periods for continuances granted upon "good cause" does not also provide for

automatic tolling on "consent. " The decision of Congress not to include any language found in these many congressionally passed laws and rules is strongly indicative of a congressional rejection of a rule that consent automatically tolls or waives the time periods of the IAD. To hold otherwise would result in a judicial circumvention of the congressional intent in enacting the IAD.

As with the FTSA, the specific and limited provisions in the IAD for excluding time periods mean that waiver should be found only where the actions of the defendant clearly require a finding that the defendant relinquished his right to assert violations of the IAD. The Petitioner fails to acknowledge this distinction between the applicability of the IAD's "good cause" tolling provision and the test to be applied for determining whether a defendant has waived his IAD claim.

An express request to be treated contrary to the provisions of the IAD, or the entry of a guilty plea which gives up the right to a trial, may be held to constitute a waiver of the right to complain of a violation of the IAD. However, mere concurrence to a court-suggested date should not be found to constitute a waiver. Rather, such action should be viewed in the context of the IAD's tolling provisions, which exclude the time periods where "good cause" has been shown for necessary or reasonable continuances.

Such an analysis is very similar to that employed to determine whether the FSTA time periods should be tolled for a continuance to which the defendant consented. In such cases, consent is a factor to consider but it is not dispositive. Courts must ultimately determine

whether "the ends of justice" support the tolling. Similarly, the IAD time requirements may be tolled for "necessary or reasonable" continuances granted for "good cause shown" in open court. Consent should be one factor to consider in determining whether the provisions of the IAD be tolled but should not be dispositive.

The IAD is a plainly worded and deliberately forceful statute that is written in a manner which both provides concrete parameters while still giving member-states a degree of latitude by which to consider the totality of the circumstances presented by a particular case. In reviewing this New York State prosecution, the New York Court of Appeals recognized the State's failure to fulfill its responsibilities under the IAD. This holding of the Court of Appeals is in total harmony with congressional intent and with the language of the IAD and should not be overturned.

ARGUMENT

POINT I: THE NEW YORK COURT OF APPEALS WAS CORRECT IN HOLDING THAT DEFENSE COUNSEL'S CONCURRENCE WITH THE COURT'S SETTING OF A TRIAL DATE DID NOT WAIVE THE TIME REQUIREMENTS IMPOSED BY THE INTERSTATE AGREEMENT ON DETAINERS.

A. The IAD Places the Burden of Compliance on the Receiving State.

The IAD is a compact among forty-eight states, the District of Columbia, Puerto Rico, the Virgin Islands and the United States, and while "indeed state law, [it] is a

law of the United States as well."[5] *Reed v. Farley*, 512 U.S. 339, 347 (1994); *Cuyler v. Adams*, 449 U.S. 433, 438 (1981).

The purpose of the Act, to which New York State and Ohio (the state from which Mr. Hill was transferred) are signatories, is to require the expeditious and orderly disposition of outstanding detainers based on untried indictments, informations or complaints in order to ease difficulties in securing the speedy trial of persons incarcerated in other jurisdictions. N.Y. Crim. Proc. Law § 580.20; *Carchman v. Nash*, 473 U.S. 716, 720 (1985); *Cuyler*, 449 U.S. at 438; *U.S. v. Mauro*, 436 U.S. 340, 356, 359-360 (1978). Acceleration of the disposition of the charges upon which the detainers are based benefits the public interest in a speedy trial as well as the interests of the prisoner. IAD, Article I; *Carchman*, 473 U.S. at 720; *Pitsonbarger v. Gramley*, 103 F.3d 1293 (7th Cir. 1996).

In an effort to assure that these important purposes are achieved, Congress drafted the IAD to expressly provide that it "shall be liberally construed so as to effectuate its purposes." IAD, Article IX.

Mr. Hill, who was incarcerated in Ohio on unrelated charges, made a written request for a final determination

---

[5] The decision to join or remain a signatory to this agreement is made by each state, as evidenced by the fact Mississippi and Louisiana have chosen not be participates in the IAD. *Birdwell v. Skeen*, 983 F.2d 1332 n.4 (5th Cir. 1993). Further, member states retain the right to opt out of the IAD. *Bush v. Muncy*, 659 F.2d 402 n.11 (4th Cir. 1981) (the options available to states with respect to the IAD are to join "in substantially the form" of the Agreement; to decline to join at all; or completely to withdraw after having joined).

of all untried charges against him in New York, pursuant to Article III of the IAD[6] (A at 7-10). Properly notified of the demand, the State of New York accepted temporary custody of Mr. Hill, and the prosecutor agreed in writing to try him within the period specified by Article III(a) of the IAD (A at 16-18).

The principal sections of the IAD applicable to Mr. Hill's case (Articles III[a] and V[c]), codified in Section 580.20 of the New York Criminal Procedure Law, are as follows:

> [w]henever 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 . . . he [the prisoner] shall be brought to trial within one hundred 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 . . . ; 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.
>
> . . . [I]n 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.

[6] The Petitioner's veiled attempts to shift the burden of compliance to the defendant in Article III cases because, unlike Article IV situations, Article III is initiated by the defendant, is without merit. The statutory language only distinguishes between these two Articles in terms of the number of days in which a state must prosecute and in the requirements regarding waiver of extradition. The IAD clearly places the burden of compliance squarely upon the state pursuant to both Articles.

Accordingly, as a result of Mr. Hill's causing to be delivered to the court and prosecutor of New York a request for a final disposition of his New York charges, the prosecutor and the trial judge were statutorily bound to try Mr. Hill within 180 days or the New York charges against him would be dismissed with prejudice.

"Congress spoke with unmistakable clarity when it prescribed both the time limits for trying a prisoner whose custody was obtained under the IAD and the remedy for a violation of those limits." *Reed v. Farley*, 512 U.S. at 367 (Blackmun, J., dissenting). Other than making a written request to invoke the IAD pursuant to Article III, the IAD places no affirmative duty on the defendant to alert the court to the provisions of the Act. *See, e.g., Reed*, 512 U.S. at 368 (Blackmun, J., dissenting); *Brown v. Wolff*, 706 F.2d 902, 907 (9th Cir. 1983); *People v. Allen*, 744 P.2d 73, 77 (Colo. 1987). Rather, the "statute unambiguously directs courts to dismiss charges when the time limits are breached. . . . This arguably puts the responsibility on the courts and States to police the applicable

time limits." *Reed*, 512 U.S. at 370 (Blackmun, J., dissenting). "This is a reasonable choice for Congress to make" as "[j]udges and prosecutors are players who can be expected to know the IAD's straightforward requirements and to make a simple time calculation at the outset of the proceedings." *Id.* at 370-371 (Blackmun, J., dissenting); *see also United States v. Eaddy*, 595 F.2d 341, 345 (6th Cir. 1978). As noted by the Sixth Circuit Court of Appeals, to hold otherwise would shift the burden from state officials where Congress very deliberately placed it. *United States v. Eaddy*, 595 F.2d at 344; *see also Allen*, 744 P.2d at 77; *Roberson v. Kentucky*, 913 S.W.2d 310, 314 (Ky. 1994).

Under Article III of the IAD, a defendant has a single responsibility to notify prison officials of his request to be brought to trial on the charges on which the out-of-state detainer is based and to thus demand treatment in accordance with the IAD. IAD, Art. III(a) and (d); *Carchman v. Nash*, 473 U.S. at 721; *Fex v. Michigan*, 507 U.S. 43, 58 (1993) (Blackmun, J., dissenting).

"Quite simply, Congress has determined that a receiving state must try a defendant within [the statutorily provided time-frame] or not at all . . . a remedy rarely seen in criminal law." *Reed v. Farley*, 512 U.S. at 367-368 (Blackmun, J., dissenting); *Brown v. Wolff*, 706 F.2d 902 (9th Cir. 1983); IAD Article V(c). Thus, the failure of the state to comply with the IAD results in the dismissal of the accusatory instrument without regard to prejudice. IAD, Article III(d). The only exceptions set forth in IAD to the state's obligation to timely try a prisoner who requests a trial pursuant to Article III of the IAD are the

provisions stated in the IAD for the tolling of the statutory time limit. Specifically, exceptions exist only if the prisoner escapes, is unable to stand trial, or where, in open court, a continuance is granted for "good cause shown." IAD, Article III(a) and (f) and VI(a).

Violations of speedy trial statutes generally have been held to be preserved for review as long as a defendant makes a motion before trial for dismissal based on such violation. In instances of alleged evidentiary errors, a contemporaneous objection requirement is generally imposed. By contrast, no such objection is usually required to alert the court or prosecutor to potential violations of speedy trial statutes. *See, e.g., People v. Beyah*, 367 N.E.2d 1334 (Ill. 1977); *People v. Cortes*, 604 N.E.2d 71 (N.Y. 1992); *Commonwealth v. Yant*, 461 A.2d 239 (Pa. Super. 1983).

The IAD contains no language which would indicate that there is a contemporaneous objection requirement. Furthermore, in *United States v. Mauro*, 436 U.S. 340, 364 (1978), *aff'g United States v. Ford*, 550 F.2d 732 (2nd Cir. 1977), this Court sustained respondent Ford's IAD claim despite the fact that Mr. Ford neither objected to the continuances or delays on the basis of the IAD nor moved to dismiss pursuant to the IAD.

In *Reed v. Farley*, 512 U.S. 339, this Court held that where a defendant in a collateral proceeding failed to timely object to a violation of the IAD, and did not make a showing of prejudice, he could not obtain relief by way of a federal habeas corpus proceeding. Four justices of this Court would have granted habeas corpus relief for a violation of the IAD to which there was no objection.

(Unlike *Reed*, the case at bar is before this Court on direct review.) Indeed, had this Court intended to interject into the language of the IAD a contemporaneous objection requirement, its extended analysis of the availability of review by means of a writ of habeas corpus would have been rendered unnecessary, as the Court's ruling could have simply rejected Mr. Reed's claim based solely upon the lack of objection. As a result, it can be fairly inferred from this Court's holding in *Reed* and the clear language of the IAD itself that an objection to the setting of a trial date beyond the IAD's time limits is not required for a case being reviewed on direct appeal. *See Reed*, 512 U.S. at 370 (Blackmun, J., dissenting).

After the IAD is triggered by a defendant's written request, the state must strictly comply or the indictment against the defendant will be dismissed with prejudice. In the case at bar, Mr. Hill triggered the statute by demanding speedy disposition of the charges against him pursuant to the IAD (A at 7-10). The State, as evidenced by forms signed by the prosecutor and trial judge, agreed to do so. Yet Mr. Hill was not timely tried and, as detailed below, no tolling provision recognized by the IAD – or otherwise – can explain or excuse the state's failure to honor Mr. Hill's statutory rights under the IAD.

B. The Continuance of this Case from January 9, 1995 to May 1, 1995 Was Not A Necessary or Reasonable Continuance Granted upon "Good Cause Shown" As Required by the IAD's Tolling Provision.

The IAD includes provisions which expressly exclude certain specified time periods from the time requirements

of the IAD. The test set forth in the IAD for determining whether a continuance should toll the 180-day time period for trying an Article III case is whether it was "necessary or reasonable" and was granted for "good cause shown" in open court. IAD, Article III(a). The only other provisions for tolling the statutorily prescribed time period within which to try a prisoner are where the prisoner escapes or is unable to stand trial.[7] Neither of these two provisions is applicable to the case at bar. *See* IAD, Articles III(f) and VI(a).

In order to determine the nature of waiver under the IAD – and therefore reach the specific question upon which certiorari was granted, i.e., whether defense counsel's alleged consent to a court-proposed court date constituted an "explicit agreement" which waived Mr. Hill's IAD rights – it is necessary to first examine the tolling provisions of the IAD.[8] Since the waiver doctrine should not conflict with or override the legislative intent of the IAD, *see, e.g, United States v. Mezzanatto*, 513 U.S. 196 (1995), the process of defining waiver under the IAD must start with a review of the congressionally enacted tolling provisions in the statute before reaching waiver

---

[7] There has never been a claim by the State, nor a finding by a New York court, that Mr. Hill was unable to stand trial during the time period from January 9, 1995 until the filing of the motion to dismiss on April 17, 1995. That issue is, therefore, not before this Court.

[8] The Rules of this Court state that, "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." Sup. Ct. R. 14(1)(a).

analysis. As Congress explicitly enacted the tolling provisions in the IAD which unequivocally restrict the situations in which the state's burden is tolled, courts should not readily find waiver in those circumstances.

As set forth below, the Petitioner has never again raised the issue of "good cause" after the trial prosecutor's response to defense counsel's motion to dismiss for violation of the IAD. Therefore, the issue is deemed abandoned. As further set forth below, the prosecutor failed to comply with the procedural requirements of IAD, Article III(a) by never applying, in open court, for a "necessary or reasonable" continuance based upon a showing of "good cause," and the court never granted such a continuance.

The Petitioner has not pursued at any stage of the appellate process, including the petition for writ of certiorari and the brief on the merits to this Court, an argument that the "good cause" exception excused the delay after January 9, 1995. The only time the Petitioner asserted this claim was in response to defense counsel's motion to dismiss the indictment based upon the failure to comply with the IAD. It was only then that the trial prosecutor alleged in writing that the delay after January 9, 1995 should be considered a continuance for "good cause." Therefore, it is respectfully asserted that the Petitioner is now foreclosed from advancing the argument that "good cause" was shown for the continuance of January 9, 1995. *See, e.g., Bryan v. United States*, 524 U.S. 184 (1998); *Chandris v. Latsis*, 515 U.S. 347 (1995).

In the event this Court deems the issue not abandoned, it is urged that the January 9, 1995 continuance

did not satisfy the procedural requirements for tolling under IAD, Article III(a). The 112-day continuance granted by the trial court in this case was neither "necessary or reasonable" nor granted upon a showing of "good cause." When the court was setting Mr. Hill's trial date on January 9, 1995, the prosecutor asserted that May 1, 1995 "would fit" into the trial prosecutor's schedule (A at 35). He did not remind the court that the IAD time provisions, to which the prosecutor had agreed in writing to comply, required the trial to commence by January 28, 1995. No reason was given by the court or the prosecutor for delaying proceeding on this case for 112 additional days. It was only after, and in the context of the prosecutor stating that the May 1, 1995 date fit within the trial prosecutor's schedule, that the defense attorney was asked how that date was with him.

Clearly, the trial court never granted a continuance based upon "good cause," despite knowing of the tolling provision.[9] Accordingly, the procedural requirements of a continuance for "good cause shown," as plainly set forth in Article III(a), were not complied with by the prosecutor or trial court.

---

[9] The court's knowledge of the IAD's provisions is evidenced by its acknowledgment of the provisions of the IAD (A at 18) and by the trial court's written decision denying Mr. Hill's motion to dismiss the indictment for failure to comply with the IAD, which tolled the clock during that time Mr. Hill brought motions because, in part, "the delay may be excluded as a 'necessary or reasonable continuance' under Article III." *Reid*, 627 N.Y.S.2d at 236. However, the court did not make the same finding regarding the January 9, 1995 continuance.

In response to the motion to dismiss, the prosecutor alleged three "substantive" claims in support of the contention that the time period after January 9, 1995 should be considered tolled based upon the "good cause" provision of the IAD. Specifically, the prosecutor alleged that "good cause" was established based upon: "due diligence" shown in trying to comply with the statute; motions brought by defense counsel; and defense counsel's alleged "consent" to the court-proposed trial date (A at 26-32). The prosecutor's contentions do not comport with the case law defining the "good cause" exception.

That the prosecutor showed "due diligence" in his efforts can only be expected of a prosecutor doing his job and is not grounds for additional time than that allowed by the statute. In fact, the prosecutor himself stated that the process of obtaining custody of Mr. Hill and arraigning him in New York took only sixty-seven of the 180 days allotted him by the IAD.

The prosecutor's next argument, that Mr. Hill's motions established good cause, is equally without merit. The delay caused by the filing of defense motions (from May 18, 1994 to December 5, 1994), a period properly excludable under law, *see, e.g., United States v. Cephas*, 937 F.2d 816 (2nd Cir. 1991), *was* excluded. *People v. Reid*, 627 N.Y.S.2d at 236. Even without that excluded time, the State failed to try Mr. Hill within the required 180 days.

The prosecutor's final argument that Mr. Hill consented to the court date later determined to be outside the IAD's time period similarly fails to establish a basis for finding "good cause." Defense counsel's statement of "fine" was indistinguishable from that of the prosecutor

uttered immediately before defense counsel's response. Arguably, it was this precise sequence of events which led the Court of Appeals to conclude that defense counsel "concurred" in the proposed date, as opposed to having "consented" to the date.

The Petitioner's argument that the substance and sequence of what attorneys say in the courtroom is irrelevant semantics ignores that the meaning and significance of words is determined by the context in which they are spoken (Brief for Petitioner at 10-11). A court seeking to determine whether there was good cause shown for a continuance must consider who asked for it, the reason for the request, the response of the opposing party, the impact on the case and on the criminal justice system, and, most importantly, in IAD cases such as that at bar, which party bears the burden of compliance under the statute.[10] Thus, the New York Court of Appeals was precise and accurate in describing the defense counsel's response to the trial date suggested by the court as counsel having "concurred" in the court's proposal.

However, even assuming, *arguendo*, that Mr. Hill's attorney "consented" to the proposed trial date, such consent should not result in a *per se* finding of "good

---

[10] For instance, while there might not be good cause for delay where the continuance is due to court congestion, *Brown v. Wolff*, 706 F.2d 902, 906 (9th Cir. 1983); *Hammett v. McKenzie*, 596 S.W.2d 53 (Mo. Ct. App. 1980), or where requested by the prosecutor because the state has allocated insufficient funds to the prosecution, *cf. Mississippi v. Turner*, 498 U.S. 1306 (1991), there might be good cause when the continuance is requested by a defense attorney who needs time for discovery. *Dennett v. Maryland*, 311 A.2d 437 (Md. Ct. Spec. App. 1974).

cause." Rather, under the IAD, in contrast to numerous other federal statutes and rules, consent is not determinative of whether the failure to adhere to statutory time periods is excused. In numerous federal statutes and rules, set forth below, Congress has shown that it is quite capable of drafting a statute or rule which provides that a party's consent to be treated other than within the statutory time period necessarily and always excuses the non-compliance with the time period. In these statutes and rules, Congress has provided that time periods set forth therein are inapplicable either upon a finding of good cause or consent to non-compliance with the time period. The language in these statutes and rules separately excluding time because of "consent" makes the absence of "consent" language in the IAD significant because it illustrates legislative awareness that a party's consent does not necessarily establish "good cause" for a continuance. If "consent" *per se* constitutes "good cause," then use of the disjunctive in these statutes and rules is superfluous. Thus, these statutes expressly provide that consent automatically tolls time periods contained therein.

Examples of statutes and rules in which Congress has distinguished between "good cause" and "consent" include the following: 18 U.S.C. §§ 1467, 1963, 2253; 21 U.S.C. § 853 (Each of these sections separately provides that "[s]uch a temporary order shall expire . . . unless extended for good cause shown . . . or unless the party against whom it is entered consents to an extension. . . . "); 15 U.S.C. §§ 78k-1, 78o, 78o-4, 78o-5, 78ccc, and § 80b-3 (Each of these sections separately provides that "[t]he Commission may extend the time for the conclusion of such proceedings for up to . . . days if it finds good cause

for such extension and publishes its reasons for so finding or for such longer periods as to which the applicant consents."); Fed. R. Civ. P. R. 65 ("Every temporary restraining order . . . shall expire by its terms . . . unless . . . for good cause shown, is extended . . . or unless the party against whom the order is directed consents that it may be extended. . . . ").[11]

---

[11] Other examples are: 15 U.S.C. § 1116 ("That date shall be not sooner than ten days . . . unless the applicant shows good cause . . . or unless the party against whom such order is directed consents to another date. . . . "); 15 U.S.C. App., 37 C.F.R. § 2.102 (" . . . extensions of time may be granted . . . for good cause. In addition, extensions [of greater than 120 days] will not be granted except upon . . . consent . . . or . . . showing of extraordinary circumstances. . . . "); 28 U.S.C. § 140 ("Any district court may . . . with the consent of the judicial council of the circuit, pretermit any regular session of court for . . . good cause."); Ct. Cl. R. 65 ("Every temporary restraining order . . . shall expire by its terms . . . unless within the time so fixed the order, for good cause shown, is extended . . . or unless the party against whom the order is directed consents. . . . "); Fed. R. Crim. P. 5 ("With the consent of the defendant and upon a showing of good cause . . . time limits may be extended. . . . "); Ct. Int'l Trade R. 43 ("Timely service of . . . documents may be waived or the time extended . . . upon consent or by the court for good cause shown."); Ct. Int'l Trade R. 65 ("Every temporary restraining order . . . shall expire within such time . . . as the court fixes, unless . . . for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended. . . . "); *see also* T.C. R. 74 ("Upon consent of all the parties to a case, and within the time limits . . . a deposition may be taken. . . . Unless the Court shall determine otherwise for good cause shown, the taking of such a deposition will not be regarded as sufficient ground for granting a continuance. . . . ").

These examples demonstrate that when Congress intends that "consent" automatically results in the tolling of time periods, it drafts a statute accordingly. Yet, in contrast to the above-cited statutes and rules, the IAD, which does not contain the "good cause . . . or consent" disjunctive language, was drafted so as not to automatically require a tolling of its time provisions when there was consent to a continuance.

Similarly, in determining motions to dismiss under the FSTA (18 U.S.C. 3161 *et seq.*), courts considering whether the FSTA's tolling provision for the "ends of justice" applies, *see* 18 U.S.C. § 3161(h)(8)(A), have held that "consent" is only a factor to be considered in granting a continuance and not determinative. *See* Point I(C)(1)(b). That is, a defendant's consent alone does not toll the time limits. Rather, consent must be weighed by the court in applying the "ends of justice" test in order to make sure that the determination falls within a statutory exception and that the request outweighs the public's and defendant's interest in a speedy trial. *See, e.g., United States v. Barnes*, 159 F.3d 4, 12-13 (1st Cir. 1998) (fact that defense has requested or consents to a continuance not sufficient to toll time limits; whether continuance is lawful turns on whether court abused its discretion in granting the adjournment); *United States v. Staton*, 94 F.3d 643 (4th Cir. 1996) (defense motion for continuance only excludable if judge granted continuance based on findings that ends of justice served); Robert L. Misner, *Amended Speedy Trial Act Guidelines* (1981) ("The fact that the defendant has requested the continuance or consents to it is not in itself sufficient to toll the operation of the time limits.").

In determining whether "good cause" was shown for a continuance in a case subject to the IAD, courts have correctly considered the totality of the circumstances. *See, e.g., State v. Livernois*, 934 P.2d 1057 (N.M. 1997); *State v. Lippolis*, 262 A.2d 203 (N.J. 1970). A defendant's concurrence in a court proposed continuance is only a factor to consider. In this case, where there was no reason given by the court or the prosecutor for the lengthy continuance, defense counsel's concurrence to the court setting of a trial date does not even approach the tolling provision's requirement of "good cause shown."

C. Defense Counsel's Reply of "Fine" to a Court-Proposed Trial Date Did Not Waive Respondent's Rights Under the Provisions of the IAD.

1. Introduction.

This Court has previously rejected arguments by the government that a defendant waived his IAD rights by failing to object to delays which violate the IAD or by failing to move for dismissal of a prosecution on the basis of the violation of the IAD. *United States v. Mauro*, 436 U.S. 340, 364 (1978), *aff'g United States v. Ford*, 550 F.2d 732 (2nd Cir. 1977). Thus, this Court affirmed a dismissal of a conviction due to non-compliance with the IAD time requirements in a case in which a defendant neither objected to delays on the basis of the IAD nor made a motion to dismiss for failure to comply with the IAD, but rather merely sought dismissal on constitutional speedy

trial grounds.[12] *Mauro*, 436 U.S. at 364. The Court's determination in *Ford* that a waiver did not occur is consistent with Congress' intent that the IAD be "liberally construed to effectuate its purposes." IAD, Article IX. While clearly rejecting a broad application of waiver in IAD cases, the *Mauro* decision did not state, when, if ever, waiver of IAD rights should be found.

Waiver, as opposed to the determination by the court of a continuance for "good cause," is the intentional relinquishment of a known right. *See United States v. Olano*, 507 U.S. 725, 733 (1993). Analysis of waiver principles in an Article III case should begin with the recognition that it is the defendant who starts the procedure by affirmatively invoking his IAD rights.[13] In this case, Mr. Hill invoked his rights under Article III of the IAD (A at 7-10), which was his sole obligation before the burden of compliance shifted in full to the state to timely try him.

As detailed below, Mr. Hill did not waive the IAD rights which he had previously invoked in writing when, on January 9, 1995, his attorney merely responded "fine" to the court's setting of a May 1, 1995 trial date. Further, none of the limited circumstances in which waiver applies to IAD cases are present in the facts of this case.

---

[12] Ford also claimed a violation of his speedy trial rights under the Rules of the Southern District of New York. *Mauro*, 436 U.S. at 347 n.9.

[13] In so doing, a defendant who invokes his Article III rights relinquishes the right to challenge extradition to the receiving state with respect to the charge or proceeding underlying the detainer, and to serve any sentence imposed after completion of the term of imprisonment in the sending state. IAD, Article III(e).

Also, as detailed below, waiver analysis is not appropriate in this case because (1) Congress has clearly indicated its intent to limit the circumstances in which the rights created in the IAD may be lost; and (2) when a statutory right conferred on a party is also granted in the public interest, waiver of the right will not generally be allowed where such would thwart the legislative policy which it was designed to effectuate. Additionally, as set forth below, the holding of the New York Court of Appeals, in this New York prosecution, that Mr. Hill's attorney's mere response of "fine" to the court's setting of a trial date was not a waiver of Mr. Hill's IAD rights, was both a correct determination and one properly within the province of that court.

2. The limited circumstances where waiver analysis is appropriate in IAD cases are not present in this case.

Mr. Hill's attorney's response of "fine" to the trial date selected by the court and agreed to by the prosecution did not waive Mr. Hill's IAD rights. Defense counsel's uncontested[14] responding affirmation establishes that when contacted by the court's secretary in December of 1994 as to his readiness for trial in January or February of 1995, defense counsel responded that any date in those two months would be acceptable (A at 53-54). Had Mr. Hill been brought to trial by January 28, 1995, the statutory requirements would have been satisfied. Moreover,

---

[14] Therefore, pursuant to New York State law, these facts are "deemed to be conceded." *People v. Gruden*, 42 N.Y.2d 214, 216-217 (1977).

defense counsel affirmed that he had "never indicated a lack of readiness of any trial date for this Indictment, nor has your affiant or defendant ever requested or suggested a trial date beyond the 180 day limit, or waived the 180 day limit" (A at 53-54).

The Petitioner's characterization of defense counsel's response of "fine" to the court selected trial date as an express waiver of his IAD rights misconstrues the nature of and the requirements for waiver under the IAD.

In an IAD case, waiver can arise only in limited circumstances. Those circumstances appear to be as follows: (1) entry of a guilty plea;[15] or (2) an express request or action by the defense that is contrary to the provisions of the IAD. Additionally, it could be argued that in some circumstances, a defendant waives his IAD rights by failing to raise an IAD claim prior to trial.[16] Mr. Hill did not plead guilty and properly raised his IAD claim in a motion prior to trial. Therefore these bases for waiver will not be discussed in this brief. Further, as detailed below, Mr. Hill did not act, nor did he expressly request

---

[15] *See, e.g., Kowalak v. United States*, 645 F.2d 534 (6th Cir. 1981); *but see Mitchell v. United States*, ___ U.S. ___, 119 S.Ct. 1307 (1999) (wherein this Court recently discussed the limits on waiver as a result of guilty pleas).

[16] *United States v. Eaddy*, 595 F.2d 341 (6th Cir. 1978). However, as noted earlier, this Court has specifically refused to find that a defendant waived his rights under the IAD when he failed to object or make a motion to dismiss for failure to comply with the IAD, but rather merely sought dismissal on constitutional speedy trial grounds. *United States v. Mauro*, 436 U.S. 340, 364 (1978), *aff'g United States v. Ford*, 550 F.2d 732 (2nd Cir. 1977).

to be treated, in a manner contrary to the provisions of the IAD.

Numerous circuit courts have held that where a defendant affirmatively requests treatment in a manner contrary to the provisions of the IAD, he may be found to have waived his IAD rights. *See, e.g., Snyder v. Sumner*, 960 F.2d 1448 (9th Cir. 1992) (defense request for a continuance constituted waiver of the time period at issue); *Yellen v. Cooper*, 828 F.2d 1471 (10th Cir. 1987) (defendant's demand for a speedy trial on other charges delaying trial of charges on which detainer was based constituted waiver of IAD pre-transfer rights); *Webb v. Keohane*, 804 F.2d 413 (7th Cir. 1986) (prisoner's request to be transferred to another correctional facility waived his IAD rights); *United States v. Ford*, 550 F.2d 732, 742 (2nd Cir. 1977), *aff'd sub nom., United States v. Mauro*, 436 U.S. 340 (1978) (prisoner's request for transfer waived his Article IV(e) claim regarding the effected time period).

Of note, many courts around the nation have applied waiver analysis where, it is respectfully asserted, "good cause" was the applicable tolling provision. Even where the outcome of these cases was correct in that "good cause" was shown for the continuances in question, use by the courts of waiver analysis in such circumstances was, nonetheless, erroneous. This imprecise substitution of waiver analysis for the statutory standard of "good cause" has resulted in erroneous findings of "waiver." *See, e.g., United States v. Odom*, 674 F.2d 228 (4th Cir. 1982) (waiver found where defense counsel requested a continuance as the psychiatric evaluation of his client was not yet complete and jointly prepared with the Government a formal motion for continuance and exclusion under the

FSTA); *Drescher v. Superior Court*, 267 Cal.Rptr. 661 (Cal. Ct. App. 1990) (despite a finding that the continuances at issue were for "good cause shown," 267 Cal.Rptr. at 666 n.4, the court held waiver to apply as defendant freely acquiesced in the numerous continuances of the preliminary hearing); *People v. Jones*, 495 N.W.2d 159 (Mich. App. 1992) (agreement to a continuance constituted waiver).

Consequently, the impact of these holdings has been an erosion of the strict standards set by Congress for permitting departures from the time requirements imposed by the IAD for the disposition of the charges upon which a detainer was based. The harm flowing from this faulty analysis is especially egregious because it is essential to the maintenance of the separation of powers that judicial waiver analysis be consistent with the congressionally enacted tests. Accordingly, such waiver analysis should never override but, instead, must complement the statutory tests for tolling the IAD's time requirement.[17]

---

[17] A laudable recognition of the scope and purpose of the tolling provisions set forth by Congress in the IAD appears in *State v. Dolbeare*, 663 A.2d 85 (N.H. 1995), where the court rejected the claim that defendant's withdrawal of a notice of intent to plead guilty constituted a waiver of his IAD rights. The court wisely observed that, while not present in the facts before it, where a prisoner attempts to manipulate the system, e.g., by filing a notice of intent to enter a plea just before trial and then withdrawing it a few days after the scheduled trial date, the state could request a continuance pursuant to the "good cause" provision. Thus, where other courts might have incorrectly applied waiver analysis to these facts, the *Dolbeare* court's holding illustrates a proper application of the "good cause" tolling provision of the IAD.

Indeed, the case at bar presents just such an instance of where waiver analysis was inappropriately applied. When the Respondent moved to dismiss the indictment based upon the IAD violation, the court, instead of applying the "good cause" test for tolling found in the IAD, inappropriately held that the defendant's concurrence with the court's setting of a trial date was waiver. Where Congress has set forth a test for determining when continuances toll the IAD time requirements, courts should not ignore the statutory test and substitute a judicially created waiver analysis.

3. **Application of waiver analysis is not appropriate in the case at bar because (1) Congress affirmatively indicated an intent to limit the circumstances in which the rights created by the IAD may be lost and no such exceptions to the limitations apply in this case; and (2) the defense generally cannot, by itself, waive the time requirements of the IAD, as the IAD was enacted for the benefit of both society and prisoners.**

   a. **The general presumption that statutory rights are waivable does not apply to statutes in which Congress has indicated an intent to limit the circumstances in which rights created thereby may be lost or when the statutory provisions are enacted for both the benefit of society and the individual.**

This Court has held that waiver is not appropriate where Congress has affirmatively indicated an intent to limit the circumstances in which the rights created may be lost, *United States v. Mezzanatto*, 513 U.S. 196, 201

(1995), or where the statutory provisions at issue were enacted for the benefit of society as well as the party. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704 (1945).

In *Mezzanatto*, 513 U.S. 196, this Court held that there is a general presumption that statutory rights are waivable. However, this Court also recognized that waiver has a more limited application with respect to those statutes in which Congress has affirmatively indicated an intent to limit the circumstances where the rights created thereby may be lost. *Id.* at 201. "[I]f the generally applicable (and generally sound) judicial policy of respecting waiver of rights and privileges should conflict with a reading of the [statute at issue] as reasonably construed to accord with the intent of Congress, there is no doubt that congressional intent should prevail." *Mezzanatto*, 513 U.S. at 211 (Souter, J., dissenting).

Furthermore, this Court has held that "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704 (1945). "Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate." *Id.* at 704; *accord, Town of Newton v. Rumery*, 480 U.S. 386 (1987); *People v. Superior Court of Los Angeles County*, 37 Cal.Rptr.2d 729 (Cal. Ct. App. 1995).

b. By enacting the IAD with both strict time requirements and specific tolling provisions, Congress evinced its intent to limit the circumstances in which the rights accorded by the IAD could be lost.

Congress has enacted explicit tolling provisions within the IAD, thereby evincing its intent to limit the circumstances in which the rights accorded by the IAD could be lost. Additionally, the decision of Congress not to include in the IAD's tolling provision the "good cause . . . or consent" disjunctive language it placed in numerous other statutory tolling provisions further demonstrates an intent to limit the exceptions to the IAD's time requirements. (For examples of congressional statutes where "good cause . . . or consent" language is used, see Point I(B) at text at n.11.)

A review of the case law regarding waiver pursuant to the FSTA, which contains similar tolling provisions, is instructive because the FSTA and IAD are "related statutes having the same purpose" and "should be construed together." *United States v. Odom*, 674 F.2d 228, 231 (4th Cir. 1982). Citing this similarity in language and purpose to the FSTA in explaining why the IAD and FSTA should be construed together, the court in *Odom* stated:

> The Detainer Act and the Speedy Trial Act deal with the same subject matter. Both were enacted to serve the best interest of the public and the defendant by requiring the prompt disposition of criminal charges. Both provide for detaining a defendant imprisoned in another jurisdiction and require his prompt transfer and trial. Both contain statutory limitations on the time that may elapse before a defendant is brought to

> trial. Both permit extensions of this time. Both impose the sanction of dismissal of the charges when their limitations are transgressed.

Id. at 231. The court also wrote that "[w]henever possible, the interpretation of the Acts should not be discordant." *Id.* at 231.

In enacting the FSTA, Congress provided numerous tests for determining whether time periods should be tolled and also provided the "ends of justice" test for determining whether continuances – even those granted on the consent of the parties – are subject to the statutory time periods. The FSTA exemplifies congressional intent in limiting the circumstances where the rights created thereby can be lost. Therefore, the courts have uniformly applied the FSTA's tolling tests and not waiver analysis in determining whether a continuance should be excluded from the FSTA's time requirements. *See, e.g., United States v. Barnes*, 159 F.3d 4, 12-13 (1st Cir. 1998) (fact that defense has requested or consents to a continuance not sufficient to toll time limits; whether continuance is lawful turns on whether court abused its discretion in granting the adjournment); *United States v. Staton*, 94 F.3d 643 (4th Cir. 1996) (defense motion for continuance only excludable if judge granted continuance based on finding that ends of justice served).

Similarly, the IAD contains three congressionally enacted tolling provisions.[18] By enacting the IAD with

[18] As set forth in Point I(C), the three tolling provisions are: continuances for "good cause shown" (Article III[a]); inability of the defendant to stand trial (Article VI); and where a prisoner escapes (Article III[f]).

these explicit provisions, Congress specifically determined that matters covered by those provisions must be considered under the statutory test created therein for deciding whether the tolling provisions are applicable. Specifically, Congress decided that only "necessary or reasonable" continuances for "good cause shown" in open court are excludable from the IAD time requirements. Thus, instead of determining whether there was a waiver of Mr. Hill's IAD rights with respect to the continuance granted on January 9, 1995, the court should have determined whether the continuance was granted upon a showing of "good cause."

The trial court failed to undertake this required analysis. In failing to do so, it ignored the clear intent of Congress. It is essential that judicial waiver analysis be conducted in a manner consistent with the congressionally enacted tests since such analysis should never override but, instead, complement those for tolling the statutory time period. Deference to congressional intent requires that any waiver analysis regarding a statute, such as the IAD which contains tolling provisions, be limited. Otherwise, the judicially created waiver doctrine would effectively eliminate the "good cause" tolling provisions of the IAD.

The IAD, like the FSTA, has tolling provisions and does not have an express waiver provision. Nor does the IAD have a provision similar to that present in numerous other federal statutes expressly providing that a party's consent nullifies the statutorily mandated time period. Courts must presume that Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992)

(citations omitted). Courts are not free to modify or disregard the requirements of an interstate compact, and must grant relief in accordance with its express terms. *Texas v. New Mexico*, 462 U.S. 554, 564 (1983). Moreover, a court's task "is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993) (citation omitted).

Consequently, and contrary to the position of the Petitioner, just as with the FSTA, a defendant's concurrence to a trial date set by the court in an IAD case should not be considered to be a *per se* waiver of the defendant's rights under the Act. To hold otherwise would undermine the congressionally enacted IAD by allowing waiver analysis to effectively supplant its explicit tolling provisions.

c. The IAD was enacted for the benefit of both society and the detainee and, thus, the detainee's ability to waive the IAD's requirements is limited.

This Court has held that a party cannot, itself, waive its rights where the statute at issue was enacted for the benefit of society as well as the party. *See Brooklyn Savings Bank v. O'Neil*, 324 U.S. at 704; *accord, Town of Newton v. Rumery*, 480 U.S. 386 (1987); *People v. Superior Court of Los Angeles County*, 37 Cal.Rptr.2d 729 (Cal. Ct. App. 1995).

The FSTA again provides an excellent analogy. Numerous courts have held that a defendant generally

cannot waive the FSTA's speedy trial provisions.[19] These decisions, premised on recognition that the FSTA serves not only the interest of the defendant, but also that of the public, hold that a defendant generally cannot waive the public's interest in a speedy trial. As the First Circuit has recognized, " ' . . . [f]rom the point of view of the public, a speedy trial is necessary to preserve the means of proving the charge [and] to maximize the deterrent effect of prosecution and conviction. . . . ' Standards Relating to Speedy Trial § 1.1 commentary (1968)." *United States v. Pringle*, 751 F.2d 419, 429 (1st Cir. 1984) (holding that delay in an FSTA case may be held to be excludable where the defendant caused the delay).

As acknowledged in the Amicus Brief of the Solicitor General, in quoting Congress, there is a societal interest served by the IAD, which "enable[s] the prison authorities to plan more effectively for [the detainee's] rehabilitation and his return to society" (Brief for United States as Amicus Curiae at 12 n.6). One court has explained that the FSTA and IAD were both "enacted to serve the best interest of the public and the defendant by requiring the prompt disposition of criminal charges." *United States v. Odom*, 674 F.2d at 231. Other important societal interests are also served by the IAD, especially when, as in this case, it is invoked by the prisoner. The IAD requires that a prisoner who demands to be tried on the charge upon which the detainer is based waive extradition back to the sending state, thereby enabling a

---

[19] *See, e.g., United States v. Barnes*, 159 F.3d 4, 12-13 (1st Cir. 1998); *United States. v. Staton*, 94 F.3d 643 (4th Cir. 1996).

speedy resolution of the matter. IAD, Article III(e); *Pitsonbarger v. Gramley*, 103 F.3d 1293 (7th Cir. 1996). Thus, as the court in *Pitsonbarger* wrote:

> Article I of the IAD makes it clear that, insofar as individual interests may be created at all under the statute, they relate to the interest in the "expeditious and orderly disposition of [outstanding charges and untried indictments]" – in other words, the right to a speedy trial.

Id. at 1301-1302.

The Solicitor General, noting that the IAD authorizes the prisoner, but not the prison authorities, to request the disposition of the pending charges underlying a detainer, argues that the public's interests in the IAD is secondary to the interests of the prisoner (Brief for United States as Amicus Curiae at 12 n.6). First, this argument ignores the important societal benefits of the IAD which create a readily available procedure for states to obtain prisoners from other states so they can be expeditiously tried in the receiving state. *See, e.g, People v. Newton*, 764 P.2d 1182 (Colo. 1988) (one of the purposes of the IAD is to benefit states agreeing to accept its provisions by expediting the difficult process of disposing of criminal charges pending against persons who are no longer in the jurisdiction of the forum). The Solicitor General's argument in this regard also fails to recognize the substantial body of law regarding the societal benefits of speedy trial statutes. Next, the argument that the IAD procedures can only be invoked by the receiving state and by the prisoner but not by the sending state, and therefore there is only a secondary public benefit, fails to appreciate that the benefits to the prisoner also only attach when the IAD is

invoked. Additionally, this notion, that if the societal interests are somehow secondary the statutory requirements may be readily waived by an individual, is unsupported by this Court's holdings. *See, e.g., Brooklyn Savings Bank v O'Neil*, 324 U.S. 697 (1945); *accord, Town of Newton v. Rumery*, 480 U.S. 386 (1987). As the provisions of the IAD clearly benefit society, it follows that a defendant should not easily be allowed to waive the time requirements of the IAD.

4. The holding of the New York Court of Appeals in dismissing Mr. Hill's New York indictment was correct and was within the province of that court.

The IAD requires uniform interpretation as to the circumstances which are insufficient to permit either tolling or waiver of the IAD time requirements. Federal law establishes what conduct does not meet the requirements of the IAD tolling provisions and the application of waiver to the IAD. The establishment of a uniform federal standard as to what circumstances cannot excuse the failure to comply with the IAD time requirements is important. The congressional intent in enacting the IAD is undermined if receiving states that have obtained custody of other states' prisoners for the purposes of speedy prosecution can render decisions that readily delay such prosecution. Thus, without consistent holdings as to what circumstances neither toll nor waive the IAD's requirements, some sending states will be reluctant to send inmates to receiving states that are too eager to find "good cause" or waiver, thereby frustrating the societal

and individual interests advanced by compliance with the IAD.

By contrast, imposing a high standard for finding either "good cause" or waiver furthers the IAD's purpose of insuring that the receiving jurisdictions comply with the IAD time requirements and speedily dispose of the charges on which the detainer is based. This is the standard which Congress indicated should be applied when it wrote that the IAD is to be " . . . liberally construed in order to effectuate its purposes." IAD, Article IX. The refusal of the New York Court of Appeals to apply waiver in the case at bar furthered the congressional intent and purpose in enacting the IAD.

Nothing in the nature or purpose of the Act or the concepts of federalism[20] are interfered with – indeed each is furthered – when states, such as New York in this case, decide to interpret the provisions of the IAD in a manner which does not negatively impact any other state and which furthers the purposes of the IAD. In this state prosecution, the holding of the New York Court of Appeals did not reduce the obligation of New York to comply with the IAD. Rather, the holding furthered the purposes of the IAD of insuring that receiving states timely try prisoners transferred pursuant to the IAD, and did so without violating either Mr. Hill's rights or those of Ohio, the sending state.[21] The dismissal of the New

[20] The IAD is a federal and state law. *Carchman v. Nash*, 473 U.S. 716 (1985).

[21] New York courts could have dismissed Mr. Hill's charges for a variety of unrelated reasons (e.g., a defective grand jury proceeding; illegally obtained evidence; state speedy trial

York prosecution by the New York Court of Appeals for failure to comply with the IAD furthers the IAD's goals of assuring both New York detainees imprisoned in other states and the sending states that if the IAD is invoked, such detainees will have their cases speedily handled in New York.

Accordingly, even if a court in another state might be inclined to find that defense counsel's concurrence with the proposed trial date supports a finding of good cause or waiver, New York courts should still have the authority to rule that New York will not excuse New York's failure to comply with the IAD under these circumstances. After all, the IAD is, indeed, a law of New York State.[22] Moreover, allowing states to, arguably, require more of themselves in terms of the IAD than the federal baseline furthers the interests of society, the detainee, and the sending states. States such as New York, which in the context of their state speedy trial statutes, have held that if a purported waiver or tolling of speedy trial rights is ambiguous, such ambiguity will be resolved against the prosecutor and waiver or tolling will not be found, *People v. Cortes*, 604 N.E.2d 71 (N.Y. 1992), should be able to apply a consistent standard regarding an ambiguous purported waiver in IAD cases.

In *People v. Allen*, 744 P.2d 73 (Colo. 1987), the Colorado Supreme Court held that defense counsel's response of "fine" to a court proposed trial date was not a wavier

violation) without implicating the interests of Ohio, as Ohio would still have had Mr. Hill returned to it.

[22] N.Y. Crim. Proc. Law § 580.20; *Reed v. Farley*, 512 U.S. 339, 347 (1994); *Cuyler v. Adams*, 449 U.S. 433, 438 (1981).

of his client's IAD rights. Petitioner argues that *People v. Newton*, 764 P.2d 1182 (Colo. 1988), impliedly overruled *Allen*, 744 P.2d 73 (Brief for Petitioner at 17). However, in *Newton*, 764 P.2d 1182, 1188, the court read into the IAD a recently amended provision of a Colorado speedy trial statute which expressly requires an objection to an extension of the speedy trial period.[23] No such provision existed in Colorado at the time of the *Allen* decision. *People v. Allen*, 744 P.2d 73. New York does not have such an objection requirement within its state speedy trial statute.

The Supreme Court of Kentucky, in considering facts nearly identical to those in the case at bar, also refused to find that,

> the defendant's acquiescence in the . . . trial dates . . . directly contributed to the speedy trial violation. Instead, . . . the trial was set beyond the time allowed by statute because the prosecution was unaware of the precise character of the defendant's speedy trial rights and failed to comply with its obligations under the Interstate Agreement.

Roberson v. Kentucky, 913 S.W.2d 310, 314 (Ky. 1994) (quoting *Allen*, 744 P.2d at 76) (citations omitted).

Thus, Colorado and Kentucky, considering facts indistinguishable from those in the case at bar, both determined in the context of their state practices and laws that there was no waiver of IAD rights. The New York Court of Appeals' holding in Mr. Hill's case is in full accord with the holdings of these courts.

---

[23] The propriety of the Colorado court's holding, which effectively amended the IAD, is not at issue here.

The record in the case at bar depicts exactly that which the New York Court of Appeals found, i.e., "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 period." *People v. Hill*, 704 N.E.2d 542, 545 (N.Y. 1998). The Court of Appeals holding that "no waiver of his speedy trial rights was effected" is supported by, and is consistent with, the law in other states. States need enough flexibility to adequately determine cases where factual ambiguities of the type seen in the case at bar arise. A reversal of the holding of the New York Court of Appeals in Mr. Hill's case would undermine Congress' purpose and intent in enacting the IAD.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

EDWARD JOHN NOWAK
Monroe County Public Defender

BRIAN SHIFFRIN
First Assistant Public Defender

STEPHEN J. BIRD
Assistant Public Defender

August, 1999