IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2008
No.

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs.

KOBEAY QURAN SWAFFORD
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE QUESTION

I.

This Court has held that "A detainer is a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." Is a document from a state law-enforcement agency notifying the United States Marshal that a federal *pretrial detainee* is wanted to face pending charges a detainer, and if not, does it become a detainer if forwarded by the United States Marshal to the appropriate federal correctional institution after the pretrial detainee is convicted of the pending federal charges?

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NOW COMES the State of Michigan, by KYM L WORTHY, *Prosecuting Attorney for the County of Wayne*, and TIMOTHY A. BAUGHMAN, *Chief of Research, Training, and Appeals*, and prays that a Writ of Certiorari issue to review the judgment of the Michigan Supreme Court, entered in this cause on March 18, 2009.

OPINIONS BELOW

The original opinion of the Michigan Court of Appeals is unpublished, and appears as Appendix A. That's court's opinion on remand appears as Appendix B. The opinion of the Michigan Supreme Court appears as Appendix C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 10, Clause 3, of the U.S. Constitution provides in pertinent part that "No State shall, without the consent of Congress ... enter into any Agreement or Compact with another State."

Article III(a) of the Interstate Act on Detainers (MCL 780.601) provides in pertinent part:

> 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 eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate

> court of the prosecuting officers' 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. . . .

Article V(c) of the Interstate Act on Detainers (MCL 780.601) provides, in pertinent part:

> 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.

Statement of Material Facts and Proceedings

Respondent was charged with Murder in the 1st Degree. Before trial he filed a motion to dismiss based upon a violation of the Interstate Agreement on Detainers (IAD), MCL § 780.601 et seq.

Respondent was charged in a warrant which was issued on April 13, 2004. On May 28, 2004, Respondent was arrested and charged in federal court in Tennessee with Bank Robbery. On June 1, 2004, Petitioner filed a notice (a "hold")[1] with the United States Marshal's Office in Tennessee that Respondent was wanted to face pending charges in Michigan. See appendix D. On November 19, 2004, Respondent was sentenced to a term of incarceration to the United States Department of Justice, Bureau of Prisons, and was imprisoned in the custody of the Bureau of Prisons in Beckley, West Virginia.

The hold filed against Respondent was forwarded, apparently by the United States Marshal, to Respondent's place of incarceration, and on March 2, 2005, it appears that a prison official spoke by telephone with a paralegal in Petitioner's Office who, according to a notation by that official, "verified the request to lodge a detainer." See Michigan Supreme Court opinion, appendix C, footnote 1. Petitioner did not file any document purporting to be a detainer as to Respondent with the United States Bureau of Prisons, Beckley FCI, or any other federal prison or correctional institution. On March 7, 2005, Petitioner received a request by respondent for disposition of

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1. For want of a better term, and to distinguish this document from an IAD (Interstate Act on Detainers) detainer, Petitioner will refer to this document as a "hold."

the Michigan charges. Acting on this request, on June 15, 2005 Petitioner signed a form indicating a purpose to bring respondent to trial "within the time specified in Article III(a) of the Agreement on Detainers." Respondent was arraigned in Michigan on October 6, 2005.

Respondent moved to dismiss charges for failure to bring him to trial within 180 days of receipt of his request for disposition of the charges. The trial court granted the motion, but on Petitioner's appeal the Michigan Court of Appeals reversed, finding that the filing with the United States Marshal was not a "detainer" as respondent was not then serving a term of imprisonment, so that the Act was never triggered. See Appendix A. The Michigan Supreme Court remanded for further consideration (in the meantime, Respondent was tried and convicted of first-degree murder).[2] On remand, the Michigan Court of Appeals held again that because Petitioner had never filed a detainer with the institution in which respondent was serving a term of incarceration, the Act was never triggered.

On March 18, 2009, the Michigan Supreme Court reversed. The court held that given the use of the passive voice in the statute ("has been lodged"), the document notifying that the person in custody is wanted to answer on existing charges in that jurisdiction need *not* be filed after the individual in custody has commenced a term of imprisonment, but constitutes a "detainer" within the meaning of the Act that simply has been *forwarded* by the custodian of the pretrial detainee to the place of imprisonment

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2. That trial was had while a timely application in the Michigan Supreme Court was pending is itself problematic, but not relevant to the issue here.

(assuming the pretrial detainee is convicted), thereby triggering the Act's requirements. See appendix C. In other words, the hold filed against the pretrial detainee is actually an IAD detainer that the custodian of the pretrial detainee"lodges"by forwarding it to the imprisoning institution if the pretrial detainee is convicted.

Because Petitioner believes that the Michigan Supreme Court's construction conflicts with the construction of the Act by this Court and other courts, Petitioner seeks certiorari.

Reasons for Granting the Writ

A. The Question Begging of the Michigan Supreme Court Opinion

In this case Petitioner filed a document with the United State's Marshal—a hold[3]—regarding a federal pretrial detainee, indicating that he was wanted to face criminal charges in Wayne County, Michigan. The question is whether such a document filed with the custodian of a pretrial detainee *is* a detainer within the meaning of the Interstate Act on Detainers (IAD). Petitioner has argued not. A "detainer" is a term of art, and when used in the IAD means, according to this Court, "a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, 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, 113 S.Ct. 1085, 1087, 122 L.Ed. 2d 406 (1993) (emphasis supplied).

The Michigan Supreme Court in its opinion begged this question in its discussion. That court expressed the view that the legislative "use of the passive voice makes *when* the detainer was lodged irrelevant so long as it was lodged before the defendant requested a final disposition" (emphasis in the original). Slip opinion, at 8. Continuing in this vein, the court stated that it matters not whether a "detainer" (within the meaning of the IAD) is "initially filed with another institution," as long as it "nevertheless reaches the institution in which the prisoner is serving his sentence." Slip opinion, at 12.

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3. See footnote 1.

Assumed in the Michigan Supreme Court's discussion is that a detainer within the meaning of the IAD *was involved* in this case, the question being the legal effect and consequences of its filing at a place other than the place of imprisonment, and at a time before there was even a conviction. But the question is whether both the time and the place of the filing, as well as by whom the "filing" is made, matter with regard to whether the document filed *is* a detainer within the meaning of the IAD, a question the Michigan Supreme Court never answered. The court assumed from the outset that the document—the hold—filed with the Marshal's Office when Respondent was a federal pretrial detainee was an IAD detainer, though the IAD is, as Petitioner will show, absolutely inapplicable to pretrial detainees. The question cannot be begged, and its answer shows that the IAD was never triggered here.

B. A "Detainer" (Or Hold) Is Not A Detainer Within the Meaning of the IAD Unless and Until Filed with the Imprisoning Institution by the Requesting Jurisdiction or Agency

Authority is unanimous that a document filed with an institution holding a pretrial detainee notifying that institution that the detainee is wanted to answer for charges pending in another jurisdiction (that is, the jurisdiction sending the notice) is, whatever its label or form, *not* a detainer as that term is employed in the IAD; to avoid confusion, Petitioner refers to this sort of document as a "hold." See e.g. *United States v Pardue*, 363 F.3d 695 (CA 8, 2004); *United States v Muniz*, 1 F.3d 1018 (CA 10, 1993); *People v. Walton,* 167 P.3d 163, 165 (Colo.App. 2007); *Christian v. United States,* 394 A.2d 1, 40 (D.C.1978); *People v. Reyes*, 179 P.3d 170, 174

(Colo.App.,2007). Indeed, if the detainee is acquitted of the pending charges, the mechanism of the IAD cannot be employed to send him back to the requesting jurisdiction, as the IAD is simply never triggered. Thus, the "when and the where" of the filing is critical to determining whether the document filed *is*, in fact, an IAD detainee, as is the "who"; that is, by whom the purported filing was made.

The use of the passive voice in the legislation will not carry the weight assigned to it by the Michigan Supreme Court here. "The boy was bitten by the dog" is an example of the passive voice, the active voice being "The dog bit the boy." But even with the passive voice it is clear that the actor was the dog and the receiver of the dog's action (biting) was the boy. Here the statute says that "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 eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officers' 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" (emphasis supplied). The Michigan Supreme Court viewed the use of the passive voice as meaning that *"when* the detainer was lodged [is] irrelevant as long as it was lodged before the defendant requested a final disposition." This is true so far as it goes—*if* what is filed *is* a detainer. But the question is whether a hold filed against someone who is not a "prisoner serving a sentence" is a

detainer, and whether such a hold, if forwarded to the place of imprisonment by someone other than the jurisdiction which filed it, is transformed by that forwarding into an IAD detainer.

There is nothing wrong with the use of the passive voice in the statutory language quoted above. The statutory focus is on that which is to occur when a prison inmate requests disposition on charges contained in a detainer that "has been lodged." But the statute could just as easily have been written to say "Whenever during the continuance of a term of imprisonment a party state *lodges a detainer* regarding any untried indictment, information or complaint against a person who has entered upon a term of imprisonment in a penal or correctional institution of a party state, he 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 officers' 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." It is clear that the statute contemplates—being a compact among states (and including the federal government)—that the "lodging" entity be the party state where untried charges are pending. And case law so refers to the lodging of the detainer; indeed, this Court has defined a detainer as "a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking that the prisoner be held *for the agency* [that is, the agency filing the request], or that the agency be advised when the prisoner's release is imminent" (emphasis supplied). *Fex*, supra. See also *United States v Mauro,* 436 U.S. 340, 98 S.Ct. 1834, 56 L.Ed.2d 329 (1978); *Carchman v Nash*, 473 U.S. 716, 105 S.Ct. 3401, 87 L.Ed.2d 516

(1985). A detainer is a request, then, that the prisoner be held *for the party state filing the detainer*. If the document, whatever its label, is *not* filed by a party state requesting the prisoner be held *for* the party state, it is not a detainer. The hold against the federal pretrial detainee was forwarded by the United States Marshal to the Bureau of Prisons. It was never filed by the party state where the charges were pending, and thus it was never a detainer.

Other jurisdictions have reached this conclusion. In *Headrick v. State,* 816 So.2d 517, 524 (Ala.Crim.App.,2001) the court held that "we cannot agree with Headrick that the hold became a detainer upon his conviction and sentence in federal court. The hold was filed with the United States Marshal. . . ." The Maine Supreme Court in *State v. Herrick,* 686 A.2d 602 (Me.1996) held that a "detainer" (or "hold") filed against a pretrial detainee does not become a detainer under the IAD once that individual is convicted and sentenced: "The letter sent by [Maine authorities] in December 1994 was not a 'detainer' for the purposes of the [Agreement] because Herrick was not yet serving a prison sentence. . . .Herrick's attempts to invoke his rights under the [Agreement] prior to May 1995 did not trigger the 180 day time limit contained in Article III because there was no *effective* detainer lodged against him at that time" (emphasis added). Similarly, the Kansas Supreme Court in *State v. Hargrove,* 45 P.3d 376, 383 (Kan.,2002) concluded that "Pretrial detainees are not under the protection of the Agreement. A detainer filed prior to sentencing is not one that effectively invokes the provisions of the Agreement. Once sentencing and service of that sentence occurs, then the provisions of the Agreement may become effective and can be invoked. In our present case, the

detainer filed against Hargrove was filed prior to sentencing. Therefore, it was ineffective under the Agreement and it did not invoke the protection of the Agreement."

C. Conclusion

The "where," "when," and "who" in the filing of a hold are critical to a determination of whether that hold is a particular kind of hold; that is, a detainer under the Interstate Act on Detainers. Where filed by a party state against a pretrial detainee in custody in another party state, the hold is not a detainer, nor does it become one by the fact of the ultimate conviction of the pretrial detainee. Nor does the forwarding of that hold by the custodian of the pretrial detainee to the prison authorities in that jurisdiction constitute an IAD detainer "lodged by" a party state. The Michigan Supreme Court has erred in finding to the contrary, its ruling conflicting with authority from this Court and with that of other jurisdictions.

The IAD was thus never triggered in this case. This is not to say the situation was well handled. Petitioner is tempted to follow the lead of the Michigan Supreme Court and allow that "mistakes were made," but it is more precise to say that Petitioner (and others) made mistakes. The Marshal should not have forwarded the hold to the Bureau of Prisons (a notification to the jurisdiction—Wayne County, Michigan—which had placed the hold would have been appropriate). The Bureau of Prisons should not have treated the hold as a detainer, and when the Bureau called Petitioner's office the paralegal should not have been asked to "verify" the detainer (none existed) and should not have done so, but should have then filed one. When the Bureau

sent Respondent's request for disposition purporting to be under the Act, Petitioner's office, rather than responding as it did, should have answered that no detainer had been filed and filed one. But the question is not whether this matter was mishandled, or whether individuals and entities acted "as though" under the Act. The question is whether *under the statute* the Act was triggered by the filing of a detainer, and it was not (if, in these circumstances, the party state with pending charges wished to obtain custody of the inmate based on the forwarded hold, the inmate would surely be able to resist on the ground that no detainer had been filed).

The remedy under the Act is draconian—dismissal of charges with prejudice, here in a murder case. The Act must be actually triggered, then, and not "thought to be." The matter is not one of assessing blame for the errors made here, but of whether a detainer was filed. Petitioner never lodged a detainer—never filed a detainer "with the institution in which a prisoner is incarcerated, asking that the prisoner be held for Petitioner, or that Petitioner be advised when the prisoner's release was imminent. Rather, the Marshal forwarded to the Bureau of Prisoners the pretrial hold filed by Petitioner, and when the Bureau of Prisons treated that hold as a detainer Petitioner mistakenly proceeded in that fashion. But the Act was not triggered, and dismissal of the first-degree murder charges is not required by the Act.

Relief

Wherefore, the Petitioner requests that certiorari be granted.

Respectfully submitted,

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