No. _____

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Respondent,

V.

AUSTIN RAY,

Petitioner,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Jason B. Wesoky
Member of the Tenth Circuit's CJA Appellate Panel
Appointed pursuant to 18 U.S.C. § 3006A
DARLING MILLIGAN PC
1331 17th Street, Suite 800
Denver, Colorado 80202
(303) 623-9133

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

1. Is the Interstate Agreement on Detainers ("IAD") triggered when a prisoner in custody is arrested by another jurisdiction?

2. When there is no evidence that the Sending State relinquished a prisoner to a Receiving State or consented to release a prisoner through a writ of habeas corpus, express consent, bail release, dismissal of charges, parole release, or expiration of sentence, but the receiving jurisdiction nonetheless arrests the prisoner while in custody of the primary jurisdiction, is the IAD triggered?

3. Can a Sending State impliedly consent to relinquish a prisoner to a Receiving State and not trigger the IAD?

PARTIES TO THE PROCEEDINGS

The petitioner in this case is Austin Ray. The respondent is the United States of America.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Statutes

Austin Ray respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *United States v. Ray*, 899 F.3d 852 (10th Cir. 2018) and reprinted in the Appendix at pp. 2-23. The opinion of the District Court is *United States v. Ray,* D.C. No. 1:14-CR-00147-MSK-2 (D. Colo.) and the holdings relevant to this petition are reprinted in the Appendix at pp. 32-53, 71-76, 80-82, 113-114, 118-119, 191-192, 194, 199, 200-206.

JURISDICTION

The Court of Appeals entered its judgment on August 6, 2018. Appellant petitioned the Court of Appeals for Rehearing on August 20, 2018. The Court of Appeals denied Appellants Petition for Rehearing on August 31, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction over the case pursuant to 28 U.S.C. § 3231.

STATUTORY PROVISIONS INVOLVED

This petition involves the Interstate Agreement on Detainers ("IAD"), 18 U.S.C. appx. (2000), Pub. L. 91-538, Dec. 9, 1970, 84 Stat. 1397. Hereinafter, the IAD will be cited as "IAD Art. __, ¶(__)."

I. STATEMENT OF THE CASE

This proceeding involves an exceptionally important issue decided by the Tenth Circuit that has not been, but should be, settled by this Court relating to state sovereignty, prisoner's rights under the IAD, and a government's ability to arrest someone already in custody without either a writ of habeas corpus or a detainer under the IAD. These issues have not been addressed by any court and the Tenth Circuit's decision could – and likely will – lead to the arrest of prisoners already in the custody of another sovereign without any ability of the prisoner to invoke their rights under the IAD.

When a prisoner is in custody, they are under the exclusive jurisdiction of the sovereign that arrested and convicted them. Until custody ends, that person cannot be taken into custody by another sovereign. The only exceptions to this are when the primary jurisdiction: a) explicitly consents; b) releases the prisoner (bail, parole,

dismisses the charges, or the sentence is fully served); c) a writ of habeas corpus is issued (*e.g. ad prosequendum*); or d) a detainer is lodged.

It is uncontested Ray was in Colorado's custody when the Federal Government arrested him on tax charges. *See Ray*, 899 F.3d at 857 ("Ray was living in a residential facility and participating in Colorado's community-corrections program as the result of unrelated offenses"); Appx. pp. 159:22-160:7, pp.193:20-194:3. It is uncontested no writ of habeas corpus was issued. *Ray*, 899 F.3d at 858 ("the government indisputably didn't file a writ"). It is uncontested there was no explicit consent by Colorado to relinquish Ray. *See* Appx. p. 74 (district court finding "Colorado appears to have **implicitly** consented to surrender its right to control Mr. Ray" (emphasis added)). It is uncontested Ray was not on parole or out on bail. *See* Appx. pp. 159:22-160:7, pp.193:20-194:3. The Tenth Circuit found no detainer was lodged. *See Ray*, 899 F.3d at 859-60. The Tenth Circuit thus concluded the U.S. Government could arrest Ray while he was in Colorado's custody without triggering the IAD. *Id.* ("Because the government never lodged a detainer with Colorado, the IAD didn't apply.").

The Tenth Circuit's published opinion creates a new means by which a sovereign can take custody of another sovereign's prisoner: implied consent of the Sending State. This allows the Receiving State to ignore and eliminate the prisoner's rights under the IAD so long as no detainer is lodged. Governments cannot avoid the IAD through implied consent. This Court should grant certiorari and reverse by finding implied consent is not a valid way for a Receiving State to obtain a Sending State's prisoner and the IAD is triggered unless one of the recognized means to obtain a Sending State's prisoner is implemented.

II. ARGUMENT

A. *A Receiving State Can Only Obtain a Prisoner Who is Already in Custody of a Sending State Through One of Four Recognized Means.*

When someone is arrested, the government or jurisdiction that arrested them first has primary jurisdiction, and, if the prisoner is going to be sent to another jurisdiction to answer charges, the state that sends the prisoner is called the "Sending State." IAD Art. II ¶(b). The jurisdiction that requests the Sending State's prisoner is called the "Receiving State." *Id.* at ¶(c).

There are four recognized ways a Receiving State can obtain a prisoner that is in custody of the Sending State, *i.e.* serving a sentence.

First, through a writ of habeas corpus such as a writ of habeas corpus ad prosequendum (to prosecute) or ad testificandum (to testify). *See United States v. Mauro*, 436 U.S. 340, 357-58 (1978). Such writs allow the Receiving State to borrow the prisoner, but the Sending State never relinquishes custody of the prisoner. *See e.g. Prosser v. Lawrence*, No. 06-3314-RDR, 2006 U.S. Dist. LEXIS 93209, at *6 (D. Kan. Dec. 22, 2006) ("A State does not lose its authority over an inmate simply because he is borrowed and transported pursuant to a writ of habeas corpus ad testificandum."). The prisoner must be returned to the Sending State once the purpose of the writ – *e.g.* prosecution or testimony – has been fulfilled. *See United States v. Welch,* 928 F.2d 915, 916 n.2 (10th Cir. 1991). The IAD is not triggered by any such writs. *See Mauro*, 436 U.S. at 361.

Second, under the doctrine of comity, the executive of the Sending State can **explicitly** consent to relinquish the prisoner. *See Ponzi v. Fessenden*, 258 U.S. 254, 261-62 (1922) (prisoner cannot "complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other [sovereign] may also subject him to conviction of crime against it."); *United States v. Warren*,

610 F.2d 680, 685 (9th Cir. 1980). The IAD is not triggered because the Sending State has consented to the Receiving State taking custody of the prisoner. *Warren*, 610 F.2d at 685.

Third, by relinquishing the prisoner through bail, parole, dismissal of charges, or expiration/completion of a prison sentence. *See United States v. Cole,* 416 F.3d 894 (8th Cir. 2005) ("Primary jurisdiction continues until the first sovereign relinquishes its priority in some way. Generally, a sovereign can only relinquish primary jurisdiction in one of four ways: 1) release on bail, 2) dismissal of charges, 3) parole, or 4) expiration of sentence."). The IAD is not triggered because the prisoner is no longer in custody of the Sending State since he is "free", whether on bail, parole, because charges were dismissed, or because his time has been served.

Fourth, through a detainer under the IAD. The IAD is an agreement between all but two states and the federal government that "enables a participating state to gain custody of a prisoner incarcerated in another jurisdiction, in order to try him on criminal charges." *Reed v. Farley*, 512 U.S. 339, 341 (1994).[1] The IAD creates procedures for

[1] Colorado adopted the IAD, which is codified at C.R.S. § 24-60-501.

resolution of one jurisdiction's outstanding criminal charges against another jurisdiction's prisoner. *See New York v. Hill*, 528 U.S. 110, 111 (2000). A jurisdiction "seeking to bring charges against a prisoner in another [jurisdiction's] custody begins the process by filing a detainer, which is a request ... [to] the institution in which the prisoner is housed" asking that facility to "hold the prisoner for the agency or notify the agency when release is imminent." *Id.* at 112. Once the person is tried by the Receiving State, however, he must be immediately returned to the Sending State to serve out the remainder of his sentence. *See* IAD Art. V ¶(e).

"[T]o show that a detainer has been 'filed' there must be, at a minimum, proof that authorities from the charging jurisdiction notified the authorities where the prisoner is held that the prisoner is wanted to face charges." *United States v. Weaver*, 882 F.2d 1128, 1133 (7th Cir. 1989).

B. The Tenth Circuit's Decision Affirmed the District Court's Incorrect Legal Conclusion that a Receiving Jurisdiction Can Obtain a Prisoner Through Implied Consent.

The District Court concluded, "Colorado **appears** to have **implicitly** consented to surrender its right to control Mr. Ray, despite

being the sovereign who first asserted jurisdiction over him." Appx. p. 74 (emphasis added).

It is uncontested in this case that Mr. Ray was in Colorado's custody at the time the Federal Government arrested him – he was serving his sentence in a community corrections facility and was not on parole. *See* Ray 899 F.3d at 857. Because Ray was in custody, the Government could not take him without consent from the State of Colorado in some form, whether express consent from the executive, a writ, relinquishment, or a detainer.

It is uncontested no writ was sought or issued. *Ray*, 899 F.3d at 858 ("the government indisputably didn't file a writ"). The Government has always asserted – and the District Court and the Tenth Circuit found – no detainer was issued. *See Ray,* 899 F.3d 859-60. But since Ray was serving a sentence and was in custody, an express consent to relinquish custody was the only other available means for the Government to obtain custody of him without the triggering the IAD. But no evidence of an express consent exists. Instead, there was only an implied consent.

Even though the District Court concluded, "Colorado **appears** to have **implicitly** consented to surrender its right to control Mr. Ray," *see* Appx. p. 74 (emphasis added), the Tenth Circuit offered no explanation for how the Government could obtain custody of Mr. Ray from Colorado without Colorado's consent, a writ, or a detainer. Instead, the Tenth Circuit's circular logic was simply: Ray's arrest was not a detainer, no detainer was lodged, and thus the IAD could not have been triggered. *See Ray*, 899 F.3d at 858-60.

The inexorable conclusion from the Tenth Circuit's opinion, then, is that a Receiving State that does not lodge a detainer, does not obtain a prisoner via a writ of habeus corpus, does not obtain the prisoner through express consent, and does not obtain the prisoner because they are not in custody (*i.e.* on bail, parole, sentence is completed, etc.), can nonetheless obtain custody of a Sending State's prisoner. But the only means available is implied consent from the Sending State, which is not consent at all. Indeed, basic principles of Federalism preclude one sovereign from arresting the prisoner of another sovereign. *See United States v. Comstock,* 560 U.S. 126, 144-145 (2010) (finding 18 U.S.C. §

4248 constitutional because, *inter alia*, it did not violate state sovereignty or principles of federalism).

C. A Sending State Cannot Impliedly Consent to Relinquishing a Prisoner.

Relinquishment of a prisoner by the Sending State cannot be implied; it must be express. *See e.g. State ex rel. Graves v. Williams*, 298 N.W.2d 392, 397 (Wis. Ct. App. 1980) ("The almost universal view of the state and federal courts which have addressed this issue is that no waiver of jurisdiction will be found unless waiver was 'manifestly intended' by the demanding state at the time it yielded to another sovereignty.").[2] *See also Lunsford v. Hudspeth*, 126 F.2d 653, 655 (10th Cir. 1942); *Weekes v. Fleming*, 301 F.3d 1175, 1181 (10th Cir. 2002) (citing *Lunsford*); *Taccetta v. Fed. Bureau of Prisons*, 606 F. App'x 661, 664 (3d Cir. 2015); *United States v. Warren*, 610 F.2d 680, 685 (9th Cir. 1980); *Vanover v. Cox*, 136 F.2d 442, 444 (8th Cir. 1943) (Virginia state prisoner's federal sentence could not have commenced unless "[t]he

---

[2] The court in *Williams* cited 11 cases in support of this proposition. *See Williams*, 298 N.W.2d at 397, fn. 11, 13. One of the cases cited was *Gottfried v. Cronin*, 555 P.2d 969, 973 (Colo. 1976) in which Colorado's Supreme Court found that "the rule prevailing in most jurisdictions, is that a waiver of jurisdiction should be found only in circumstances where the waiver is manifestly intended."

consent of the Virginia authorities" to a surrender of primary jurisdiction was "expressly shown."); *United States v. Gonzalez*, S-1 94 Cr. 313 (CSH), 1998 U.S. Dist. LEXIS 15300, at *6-7 (S.D.N.Y. Sep. 30, 1998) (rejecting argument that "the state implicitly waived its priority of jurisdiction by acquiescing in his federal prosecution" because the argument is based "on a theory of relinquishment that does not exist. The Defendant cites, and my own research has uncovered, no case which endorses a theory of relinquishment through implied waiver."); *Fisher v. Holinka*, No. 07-cv-639-bbc, 2008 U.S. Dist. LEXIS 23302, at *12 (W.D. Wis. Mar. 24, 2008) ("the sovereign may relinquish primary jurisdiction. Any such relinquishment must be express, not implied."). The district court's conclusion that Colorado impliedly consented to relinquish Ray was incorrect. The Tenth Circuit's conclusion that simply because no detainer was lodged the IAD was not triggered missed the point.

The Government had to obtain Ray through some means without violating basic principles of federalism and comity. *See Rosenthal v. Hunter*, 164 F.2d 949, 950 (10th Cir. 1947) ("Federal authorities should not take and hold a prisoner on parole from a penal institution of a

state without the consent of proper authorities of that state."). The only means available was through consent, but the only consent was implied, which is no consent at all. Thus, the Tenth Circuit erred and this Court should grant the petition to set forth the recognized means one sovereign can obtain custody of another sovereign's prisoner and make clear a state cannot impliedly consent to relinquish a prisoner in its custody.

D. A Detainer Must Be Recognized When the Sending State is Informed by the Receiving State the Prisoner is Wanted on Charges in the Receiving State.

When the Government called Colorado to discuss Ray, the state official noted, in writing, Ray was subject to a "detainer". *Ray*, 899 F.3d at 859. In affirming the District Court, however, the Tenth Circuit concluded Ray's arrest was not a detainer because the use of the word detainer "'was probably a bad choice of word[s].'" *Id.* (alteration in original). But that choice of words came as a result of a call to Colorado from an IRS agent to let them know Ray was wanted on tax fraud charges. *Id.*; Appx. pp. 172:17-175:14, 179:18-24, 182:3-8.

Under *United States v. Trammel*, 813 F.2d 946, 950 (7th Cir. 1987), that phone call triggered the IAD. The court in *Trammel*

concluded the IAD had not been triggered where the Government called the state but there was no indication the Government stated the prisoner "was wanted for prosecution in another jurisdiction." *Id.* Thus, *Trammel* stands for the proposition that when the Government calls a state **and** informs the state that a prisoner is wanted for prosecution, that is sufficient notice to trigger the IAD. Here, there was a call from the Government to the state that specifically stated Ray was wanted for federal prosecution, which resulted in a state employee creating a document that said, *inter alia*, "detainer." *See* Appx. pp. 179:18-24 (testimony that a "federal agent" told Colorado Department of Corrections employee that Mr. Ray was going to be arrested and "take[n] into custody."). Thus, under *Trammel*, the Government's call to Colorado was sufficient to trigger the IAD because it was a call from the Government to the state specifically informing the state that a state prisoner was wanted for prosecution in another jurisdiction: the federal court.

The conclusion and holding that no detainer was lodged in this case is contrary to the Seventh Circuit's holding in *United States v. Weaver* that "to show that a detainer has been 'filed' there must be, at a

minimum, proof that authorities from the charging jurisdiction notified the authorities where the prisoner is held that the prisoner is wanted to face charges." 882 F.2d 1128, 1133 (7th Cir. 1989). Here, Ray demonstrated the state was notified by the Government that he was wanted to face charges: the Government called Colorado before it arrested Ray and told Colorado employees Ray was wanted on felony charges. *See* Appx. pp. 182:3-8. Thus, a detainer had to have been lodged and this Court should grant the petition to articulate what constitutes "lodging" a detainer and that to lodge a detainer, a phone call is sufficient if the phone call from the Receiving State informs the Sending State the prisoner is wanted in the Receiving State on charges.

E. Implied Consent is Untraceable and Precludes Prisoners from Invoking Their Rights to Speedy Trial Under the IAD.

This case is exceptionally important because the Tenth Circuit's published opinion permits the arrest of a prisoner in another sovereign's custody without invoking the IAD or filing a writ. The idea that no detainer needs to be lodged to obtain custody of another sovereign's prisoner, when no other means to obtain the prisoner existed, sets a dangerous precedent and creates two problems: 1) it

establishes implied consent as a means to relinquish a prisoner in custody despite myriad holdings to the contrary; and 2) it allows one sovereign to arrest and take control of a prisoner that is in the custody of another sovereign without any evidence there was consent.

There is tremendous incentive to avoid the IAD if possible. Obtaining custody of a prisoner through a detainer creates a risk that, unless the IAD is strictly adhered to, the Receiving State's charges will be dismissed with prejudice. Why would any government subject themselves to the IAD if they could avoid it by simply not lodging a detainer and claiming "implied consent?"

Under the Tenth Circuit's opinion, a state prisoner in state custody who is, for example, picking up trash along the highway as part of their sentence, can now be arrested on the side of the road by the U.S. Government without notice or consent of either the prisoner or the state. Any rehabilitation that person was receiving in the state facility is interrupted while that person faces federal charges and perhaps trial, which violates the fundamental purpose of the IAD. *See* IAD Art. I. Further, that person is now subject to great uncertainty regarding whether their state sentence will be deemed to be served concurrent

with any new federal sentence. And, that person could be sent back and forth from the federal courts to the state courts for various proceedings without violating *Alabama v. Bozeman,* 533 U.S. 146 (2001).

The Tenth Circuit's decision allows one sovereign to arrest another's prisoner in violation of fundamental tenants of federalism, sovereignty, and comity. Such tactics, under the guise of "implicit consent" significantly impair a prisoner's access to rehabilitation and the Sixth Amendment right to a speedy trial. *See Bozeman*, 533 U.S. at 148; *State v. Anderson*, 855 P.2d 671, 676 (Wash. 1993) ("Delay in bringing a matter to trial can result in substantial prejudice to defendants, including lost opportunities to serve at least partially concurrent sentences, potential for increased duration of imprisonment under the sentence the defendant is presently serving, and diminished ability to prepare for trial, including inability to consult with counsel and problems of stale evidence."). The IAD allows a prisoner to either continue to serve out a sentence and wait until it is complete to face another jurisdiction's charges or invoke the right to a speedy trial in the second jurisdiction so they can ensure evidence is fresh while they contest the charges. *See Anderson*, 855 P.2d at 676.

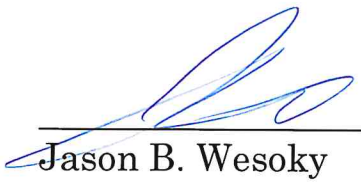
The Court should grant this petition to ensure that prisoner's rights under the IAD are preserved, to clarify a prisoner in custody cannot be obtained by another sovereign through "implied consent," and to require governments to specify which of the recognized means by which they have obtained another government's prisoner.

III. CONCLUSION

Any prisoner already in custody has rights under the IAD. The Government can avoid the IAD through a writ of habeas ad prosquendeum, a writ of habeas ad testificandum, or by obtaining the express consent of the jurisdiction with custody. The Government cannot take a prisoner in state custody without a writ, shuttle them back and forth to state and federal proceedings, and then claim the IAD does not apply because they never lodged a detainer. The Tenth Circuit's tacit endorsement of implied consent invents a new way to avoid the IAD and to condone the elimination of a prisoner's rights under the IAD.

WHEREFORE, Defendant/Appellant respectfully requests that the Court grant his Petition for Writ of Certiorari.

Respectfully submitted this 26th day of November, 2018.



Jason B. Wesoky
Darling Milligan PC
1331 17th Street, Suite 800
Denver, CO 80202
(303) 623-9133
Attorney to Petitioner

No. _____

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Respondent,

V.

AUSTIN RAY,

Petitioner,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

CERTIFICATION OF SERVICE OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 29.3, Petitioner, Austin Ray, through his attorney, Jason B. Wesoky, who was appointed under the Criminal Justice Act, 18 U.S.C. § 3006A, respectfully certifies that on November 26, 2018 a true and correct copy of the Petitioner's *Petition for Writ of Certiorari* was placed for delivery with the United States Postal Service, postage prepaid, and addressed as follows:

Solicitor General of the United States
Counsel for the United States of America
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Hetal Doshi
Robert M. Russel
Office of the United States Attorney
1225 17th Street, Suite 700
Denver, CO 80202

Austin Ray
FCI Englewood
Federal Correctional Institution
9595 W. Quincy Avenue
Littleton, CO 80123

Jason B. Wesoky
Darling Milligan PC
1331 17th Street, Suite 800
Denver, CO 80202
(303) 623-9133
Attorney to Petitioner