No. ______

IN THE
Supreme Court of the United States

SOK BUN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant is "unable to stand trial" within the meaning of the Interstate Agreement on Detainers, 18 U.S.C. App. 2, § 2, art. VI(a), when he or she has a motion pending before the trial court.

LIST OF PROCEEDINGS

United States v. Bun, No. 18-4270, U.S. Court of Appeals for the Fourth Circuit. Judgment entered December 16, 2019.

United States v. Peterson, No. 18-4269, U.S. Court of Appeals for the Fourth Circuit. Judgment entered December 16, 2019.

United States v. Bun, et al., C/A No. 7:17-cr-94-TMC, U.S. District Court for the District of South Carolina. Judgment as to Sok Bun and James Robert Peterson entered April 27, 2018.

The other defendants in the district court proceeding did not file appeals. Those defendants were: Paul Ray Davis (judgment entered October 2, 2019), Jhon Marlon Acosta (judgment entered May 9, 2018), David Elijah Allen (judgment entered May 13, 2019), Samuel Travis Wiggins (judgment entered March 25, 2019), Robert Lee Moore (indictment dismissed August 22, 2017), and Marcus Antwan Pearson (judgment entered January 23, 2019).

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PROCEEDINGS ii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINION BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 4

A. Statutory Background 4

B. Factual and Procedural Background 8

REASONS FOR GRANTING THE WRIT 11

I. THERE IS AN ENTRENCHED CONFLICT OF AUTHORITY ON THE QUESTION PRESENTED 12

A. The Fifth and Sixth Circuits Hold That a Defendant Is Not "Unable to Stand Trial" Solely Because He Has Motions Pending Before the Trial Court 12

B. The First, Second, Fourth, Seventh, Ninth and D.C. Circuits Hold That a Defendant Is "Unable to Stand Trial" Solely Because He Has Motions Pending Before the Trial Court 14

II. THIS CASE PRESENTS AN IMPORTANT ISSUE WARRANTING THE COURT'S REVIEW 16

III. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE CONFLICT 17

IV. THE FOURTH CIRCUIT'S DECISION IS INCORRECT. 18

CONCLUSION 21

Appendix A
United States v. Peterson, 945 F.3d 144 (4th Cir. 2019) 1a

Appendix B
United States v. Bun, C/A No. 7:17-cr-94-TMC (D.S.C. July 14, 2017) 26a

TABLE OF AUTHORITIES

CASES

Alabama v. Bozeman, 533 U.S. 146 (2001) 7

Birdwell v. Skeen, 983 F.2d 1332 (5th Cir. 1993) 12, 13, 18, 21

Carchman v. Nash, 473 U.S. 716 (1985) 4

New York v. Hill, 528 U.S. 110 (2000) 19, 20

Stroble v. Anderson, 587 F.2d 830 (6th Cir. 1978), *cert. denied*, 440 U.S. 940 (1979) 13, 14

United States v. Cephas, 937 F.2d 816 (2d Cir. 1991), *cert. denied*, 475 U.S. 1110 (1986) .. 15, 16, 20

United States v. Ellerbe, 372 F.3d 462 (D.C. Cir. 2004) 14, 15

United States v. Johnson, 953 F.2d 1167 (9th Cir. 1992) 16

United States v. Mauro, 436 U.S. 340 (1978) 4, 5, 19, 20

United States v. Nesbitt, 852 F.2d 1502 (7th Cir. 1988), *cert. denied*, 488 U.S. 1015 (1989), *abrogated on other grounds by United States v. Durrive*, 902 F.2d 1221 (7th Cir. 1990) 16, 18

United States v. Odom, 674 F.2d 228 (4th Cir. 1982) 10, 16

United States v. Walker, 924 F.2d 1 (1st Cir. 1991) 16

United States v. Whiting, 28 F.3d 1296 (1st Cir. 1994) 16

STATUTES

18 U.S.C. App. 2, § 2 ..... 2, 4

18 U.S.C. App. 2, § 2, art. I 5

18 U.S.C. App. 2, § 2, art. III(a) 6

18 U.S.C. App. 2, § 2, art. IV(a) 1, 6

18 U.S.C. App. 2, § 2, art. IV(c) 2, 6

18 U.S.C. App. 2, § 2, art. IV(e) 7

18 U.S.C. App. 2, § 2, art. V(c) 6, 7

18 U.S.C. App. 2, § 2, art. VI(a) 2, 6, 10, 18

18 U.S.C. App. 2, § 9(1) 7

18 U.S.C. App. 2, § 9(2) 7

18 U.S.C. § 3161 *et seq.* 7

18 U.S.C. § 3161(d)(1) 10

18 U.S.C. § 3161(h) 7

18 U.S.C. § 3161(h)(1)(D) 7, 11

18 U.S.C. § 3161(h)(4) 8

18 U.S.C. § 3161(h)(7) 8

Interstate Agreement on Detainers Act, Pub. L. No. 91-538, 84 Stat. 1397 (1970) 5, 19

Speedy Trial Act of 1974, Pub. L. No. 93-619, tit. I, § 101, 88 Stat. 2076, 2080 (1975), as amended, Pub. L. No. 96-43, §§ 2 to 5, 93 Stat. 327, 327-28 (1979) 7, 19

LEGISLATIVE MATERIALS

H.R. Rep. No. 91-1018 (1970) 5

S. Rep. No. 91-1356 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4864 5

OTHER AUTHORITIES

Interstate Compacts, *Agreement on Detainers* (2019), http://apps.csg.org/ncic/Compact.aspx?id=1 4

PETITION FOR A WRIT OF CERTIORARI

Sok Bun petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The decision of the Fourth Circuit (Pet. App. 1a) is reported at 945 F.3d 144 (4th Cir. 2019). The decision of the district court (Pet. App. 26a) is unreported.

JURISDICTION

The judgment of the Fourth Circuit was entered on December 16, 2019.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Interstate Agreement on Detainers, 18 U.S.C. App. 2, § 2, art. IV(a) provides:

> The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated[.]

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[1] The Fourth Circuit had jurisdiction under 28 U.S.C. § 1291. The district court had jurisdiction under 18 U.S.C. § 3231.

18 U.S.C. App. 2, § 2, art. IV(c) provides:

> In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but 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.

18 U.S.C. App. 2, § 2, art. VI(a) provides:

> In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

INTRODUCTION

The Interstate Agreement on Detainers (IAD), 18 U.S.C. App. 2, § 2, sets the time limit by which a defendant must be tried when the defendant is charged in one jurisdiction while serving a sentence in another. These time limits are tolled during "necessary or reasonable continuance[s]," as ordered by the district court, 18 U.S.C. App. 2, § 2, art. IV(c), as well as during any time a defendant is "unable to stand trial." 18 U.S.C. App. 2, § 2, art. VI(a).

Under the IAD, trial must begin within 120 days after the defendant arrives in the jurisdiction. 18 U.S.C. App. 2, § 2, art. IV(c). Petitioner Sok Bun was serving a state sentence in South Carolina when he was indicted

in federal court for conspiracy to possess methamphetamine with the intent to distribute. He was tried over 120 days after he first appeared in federal court, following multiple defense motions and government-requested continuances. The Fourth Circuit concluded that the trial was timely, in part because the Petitioner (and his co-defendant's) motions had tolled the IAD's time limits.

In holding that the pendency of a defendant's motions render the defendant "unable to stand trial"—thus tolling the IAD's 120-day time limit—the Fourth Circuit joined the position adopted by a majority of courts in an entrenched and well-established conflict over the meaning of Article VI of the IAD. The Fifth and Sixth Circuits have held that a defendant's motions do not render him unable to stand trial, and thus time while motions are pending is not excludable under the IAD. The First, Second, Seventh, Ninth, D.C., and now Fourth Circuits have held directly to the contrary. This square conflict has existed for decades and will not be resolved absent this Court's intervention.

This issue upon which courts are divided is cleanly and squarely presented here, and there is no rational reason, and indeed significant unfairness, arising from the fact that the IAD means different things in different parts of the country. This unfairness is exacerbated by the fact that the majority rule—the one adopted by the Fourth Circuit—is incorrect. Holding that a defendant is unable to stand trial while he has motions pending before the trial court runs counter to the text of the IAD. Moreover, this holding cannot be justified by reference to the Speedy Trial Act (as the Fourth Circuit reasoned),

because the Speedy Trial Act was enacted *after* the IAD and, in any event, cannot change the IAD's unambiguous text.

The petition for certiorari should be granted.

STATEMENT OF THE CASE

A. Statutory Background

1. The Interstate Agreement on Detainers, 18 U.S.C. App. 2, § 2, governs the transfer and timely trial of criminal defendants who are indicted in one jurisdiction while serving a sentence in another. Forty-eight states, as well as the federal government, the District of Columbia, Puerto Rico, and the Virgin Islands, have entered into the IAD. *Carchman v. Nash*, 473 U.S. 716, 719 (1985). As a congressionally sanctioned compact, the IAD is a federal law subject to interpretation by the federal courts. *Id.*[2]

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." *United States v. Mauro*, 436 U.S. 340, 359 (1978) (quoting H.R. Rep. No. 91-1018, at 2 (1970); S. Rep. No. 91-1356, at 2 (1970)).

Before the IAD, detainers were widely misused, and remained pending over prisoners for extended periods of time. The problems with this system were identified in the 1940s by the Joint Committee on Detainers (an organization with representatives from law

[2] Louisiana and Mississippi have not entered into the Agreement. Council of State Governments, Nat'l Ctr. for Interstate Compacts, *Agreement on Detainers* (2019), http://apps.csg.org/ncic/Compact.aspx?id=1.

enforcement, prison, and criminal law groups) and echoed by the Council of State Governments in the 1950s. *Id.* at 349-50 & n.16. Prisoners were often held in close custody and denied access to rehabilitation, work, and training programs, for no other reason than that they were subject to a detainer originating from another jurisdiction. *Id.* at 359-60 (citing Council of State Governments, Suggested State Legislation Program for 1957, at 74 (1956)). In addition, prisoners with detainers sometimes lost interest in such rehabilitative programs when faced the possibility of further, unknown sentences in other jurisdictions. *Id.* at 359.

In response to these problems, the Council of State Governments created a draft version of the IAD and included it in its "Suggested State Legislation Program" in 1957. *Id.* at 350-51. Over the next two decades or so, almost all of the states enacted legislation to enter into the IAD. In 1970, Congress did so as well, raising the same concerns about lengthy detainers. Interstate Agreement on Detainers Act, Pub. L. No. 91-538, 84 Stat. 1397 (1970); H.R. Rep. No. 91-1018, at 3 (1970); S. Rep. No. 91-1356, at 3 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4864, 4865-66.

Article I of the IAD highlights the importance of resolving cases in a timely manner, noting that "difficulties in securing speedy trial of persons already incarcerated in other jurisdictions . . . obstruct programs of prisoner treatment and rehabilitation." 18 U.S.C. App. 2, § 2, art. I. The purpose of the IAD, therefore, is "to encourage the expeditious and orderly disposition of such charges . . . and all detainers." *Id.*

Article III and Article IV lay out the main mechanisms by which the IAD achieves this purpose. Both articles contain time limits on when a trial must begin.

Under Article IV—the article most relevant here—officers from the jurisdiction with a pending indictment, information, or complaint (the "receiving State") may obtain the temporary presence of an incarcerated defendant upon filing a written request with the incarcerating state (the "sending State"). 18 U.S.C. App. 2, § 2, art. IV(a). When the defendant's presence is obtained this way, "trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State." 18 U.S.C. App. 2, § 2, art. IV(c). However, if "the prisoner or his counsel are present" and if "good cause [is] shown in open court," "the court having jurisdiction of the matter [in the receiving State] may grant any necessary or reasonable continuance." *Id.* In addition, the time period is "tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter." 18 U.S.C. App. 2, § 2, art. VI(a).

Under Article III, a prisoner with a detainer lodged against him may request a final disposition on the indictment, information, or complaint. 8 U.S.C. App. 2, § 2, art. III(a). Once he has done so, he must be tried within 180 days, subject to the same tolling provisions described above. 8 U.S.C. App. 2, § 2, arts. III(a), VI(a).

If trial does not occur within the time limits, the indictment, information, or complaint must be dismissed. 18 U.S.C. App. 2, § 2, art. V(c). If the receiving State is the federal government, the dismissal may be with or

without prejudice, subject to the district court's weighing of certain enumerated factors. 18 U.S.C. App. 2, § 9(1). For all other receiving States, the dismissal must be with prejudice. 18 U.S.C. App. 2, § 2, art. V(c).

Separately, the IAD requires that once a prisoner has been bought to the receiving State, he must remain there until trial. 18 U.S.C. App. 2, § 2, art. IV(e). Only if the receiving State is the federal government and the court orders the defendant's return to the sending State after notice and an opportunity for a hearing may the defendant be sent back. 18 U.S.C. App. 2, § 9(2). If this "anti-shuttling" provision is violated, the indictment must be dismissed. 18 U.S.C. App. 2, § 2, art. IV(e); *Alabama v. Bozeman*, 533 U.S. 146, 149 (2001). Again, if the receiving State is the federal government, the dismissal may be with or without prejudice. 18 U.S.C. App. 2, § 9(1).

2. Four years after the federal government entered into the IAD, Congress passed the Speedy Trial Act of 1974. *See* 18 U.S.C. § 3161 *et seq.*; Speedy Trial Act of 1974, Pub. L. No. 93-619, tit. I, § 101, 88 Stat. 2076, 2080 (1975), as amended, Pub. L. No. 96-43, §§ 2 to 5, 93 Stat. 327, 327-28 (1979). The Speedy Trial Act imposes a seventy-day limit on the time between indictment and trial. In certain enumerated circumstances, however, that period is extended. 18 U.S.C. § 3161(h). For example, any "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion" is automatically excluded from the time limit. *Id.* § 3161(h)(1)(D). Also automatically excluded is "[a]ny period of delay resulting from the fact that the

defendant is mentally incompetent or physically unable to stand trial." *Id.* § 3161(h)(4). Finally, continuances are excluded from the seventy days as well, provided the judge finds that the "ends of justice served by [ordering the continuance] outweigh the best interest of the public and the defendant in a speedy trial" and sets forth her reasons for that finding in the record. *Id.* § 3161(h)(7).

B. Factual and Procedural Background

1. In September 2016, petitioner Sok Bun and fourteen other individuals were indicted in federal court in South Carolina for conspiracy to possess methamphetamine with intent to distribute, among other offenses. At the time, Bun was—and still is—serving a life sentence in South Carolina state prison. Bun and one of his co-defendants, James Peterson, were arraigned in federal court in early November 2016; detainers were then lodged against them that day.

Later that month, Peterson was brought to district court for a pretrial hearing. Following the hearing, he was returned to state custody. In response, Peterson moved to dismiss his indictment under the IAD's anti-shuttling provision. On January 23, 2017, the district court held a hearing and granted the motion. A week later, the court ruled that the dismissal would be without prejudice. Although the court found that Bun had not been improperly shuttled, because he had not appeared in district court between when his detainer was filed and the January 23 hearing, the court nevertheless dismissed the indictment as to Bun as well, for the sake of simplicity.

2. The government reindicted Bun, Peterson, and other defendants on February 15 and they were arraigned in federal court on February 24.

On April 7, the government and one of the other defendants moved for a continuance. After a hearing, the court granted the motion on April 11, finding that the ends of justice would be served by the continuance. The continuance ran until the next term of court, which was scheduled to begin July 10, 2017. In the meantime, on May 12, Bun and Peterson filed a motion to dismiss the indictment under the IAD and the Speedy Trial Act. They also filed a demand for a speedy trial, preemptively objecting to any continuance. While their motion to dismiss was pending, on June 16, the government issued a superseding indictment adding two new defendants. Bun and Peterson immediately moved to dismiss that indictment as well, also on speedy trial grounds.

Following the superseding indictment, the government requested another continuance until the next term of court. The court granted the request, pushing the trial back until at least September 13.

The court issued its order on the defendants' motion to dismiss on July 14. It first concluded that the Speedy Trial Act had not been violated. After excluding the delays attributable to the ends-of-justice continuances and the pretrial motion, less than seventy days had passed between the arraignment and the trial—even if the clock began with the very first indictment.[3] Nor was

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[3] Under the Speedy Trial Act, the dismissal of an indictment restarts the speedy trial clock if the dismissal was at the defendant's request, but not if the dismissal was at the government's request.

the IAD violated, the court held, reasoning that "[a] circumstance that would toll the 70-day Speedy Trial Act period also tolls the . . . 120-day" period under the IAD. Pet. App. 35a.

Following the district court's order, Bun and Peterson filed another speedy trial demand. The government requested no further continuances, and jury selection began on September 20—208 days after Bun appeared in court on the government's second indictment. After a five-day trial, the jury found Bun guilty. The following spring, the district court sentenced him to 360 months imprisonment, to run consecutive to his life sentence in state prison. This appeal followed.

3. The Fourth Circuit noted that the IAD's "120-day clock tolls 'whenever and for as long as the prisoner is unable to stand trial.'" Pet. App. 16a (quoting 18 U.S.C. App. 2, § 2, art. VI(a)). Acknowledging in its opinion the square conflict of authority on the question presented, the Fourth Circuit concluded that a defendant is unable to stand trial under this provision while he has motions pending before the district court. In so holding, the court relied on *United States v. Odom*, 674 F.2d 228 (4th Cir. 1982), which stated that, because the Speedy Trial Act and the IAD are similar, "[w]henever possible, [their] interpretation . . . should not be discordant." *Id.* at 231; Pet. App. 15a.

The court recognized in the decision below that the two laws are worded differently, but nonetheless determined "their time clocks have broadly harmonious

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18 U.S.C. § 3161(d)(1). Because both sides had effectively made the request in this case, the court assumed without deciding that the clock did not restart with the reindictment.

aims." Pet. App. 17a. The Speedy Trial Act expressly tolls its seventy-day time limit for pretrial motions. 18 U.S.C. § 3161(h)(1)(D). The Fourth Circuit reasoned that the IAD's time limit should also be tolled, at least during a defendant's pretrial motions, to "harmonize" the IAD and the Speedy Trial Act. Pet. App. 17a. This had the added benefit, the court noted, of removing the "incentive for defendants to saddle district courts with innumerable pretrial motions in hopes of manufacturing delays and waiting out the" IAD's time limits. *Id.*

On appeal, Bun challenged the tolling of the IAD's time limit during the pendency of his motions and during continuances granted to the government for good cause under the Speedy Trial Act (the latter of which is not at issue here). The court concluded that, while the parties "disagree[d] about some of the particulars of the district court's tolling analysis, what is clear is that if both continuances granted under the [Speedy Trial Act] and time spent adjudicating a defendant's pretrial motions stop the [IAD's] 120-day clock," then Bun's trial was timely. Pet. App. 17a.

REASONS FOR GRANTING THE WRIT

The courts of appeals are firmly and explicitly divided over whether pending motions render a defendant "unable to stand trial" within the meaning of the Interstate Agreement on Detainers. This is an important and recurring question in the federal courts, and the unfairness resulting from the existing split is manifest.

The petition for certiorari should therefore be granted.

I. THERE IS AN ENTRENCHED CONFLICT OF AUTHORITY ON THE QUESTION PRESENTED.

As the Fourth Circuit acknowledged below, courts of appeals have reached opposing conclusions about the meaning of the phrase "unable to stand trial" under Article VI of the IAD. Two courts of appeals hold that defense motions do not render a defendant unable to stand trial and therefore do not toll the IAD's time limits. In contrast, six courts of appeals hold that a defendant is unable to stand trial when he has a motion pending.

This conflict has existed for decades and no further percolation is necessary.

A. The Fifth and Sixth Circuits Hold That a Defendant Is Not "Unable to Stand Trial" Solely Because He Has Motions Pending Before the Trial Court.

In *Birdwell v. Skeen*, 983 F.2d 1332 (5th Cir. 1993), the defendant was indicted in Texas state court while serving a sentence in federal prison. *Id.* at 1334. On May 19, 1986, he requested that his state case be disposed of expeditiously, triggering the 180-day time limit under Article III of the IAD. *Id.* Over the next five months, the government received one week-long continuance and the defendant filed three speedy trial motions. *Id.* The defendant's motions were pending for more than three weeks. *See id.* On December 2—197 days after his request under the IAD—the defendant was tried. *Id.* at 1334-35. After exhausting his state appeals, he sought and received habeas relief in district court. *Id.* at 1335.

On appeal, the Fifth Circuit rejected the state's argument that the defendant was "unable to stand trial" while his motions were pending. *Id.* at 1340. That phrase "was consistently and only used by federal courts to refer to a party's physical or mental ability to stand trial throughout the fifteen years prior to Congress' enacting the [IAD]," the court determined. *Id.* at 1340-41 & nn.21-22 (citing cases). Because there was no contention of mental or physical incapability, "[t]he 'unable to stand trial' tolling provision [was] inapplicable." *Id.* at 1341. The court noted that a trial court could, of course, order a reasonable and necessary continuance to give the government more time to respond to a motion or give itself more time to rule on it. *Id.* at 1341 n.23. But automatically tolling the clock while a motion was pending might encourage prosecutors and trial courts to delay in responding to or ruling on defense motions. *Id.*

The Sixth Circuit has reached the same conclusion. *Stroble v. Anderson*, 587 F.2d 830 (6th Cir. 1978), *cert. denied*, 440 U.S. 940 (1979). The defendant in *Stroble* was serving a sentence in New York when he was indicted in Michigan state court for assault and murder. *Id.* at 831-32. He arrived in Michigan on June 27, 1968 and, 103 days later, was tried for assault. *Id.* Before his murder trial began, he filed a federal habeas petition on his assault conviction. *Id.* at 832. The district court dismissed the defendant's petition within a month; in the meantime, the state court continued his murder trial. *Id.* By the time the defendant was tried in state court on the murder charge, 173 days had passed since his arrival in the state. *Id.* Following his conviction and unsuccessful state court appeal, the defendant once again brought a

federal habeas petition, on which the Sixth Circuit eventually granted relief, holding that the time period should not be tolled on the basis that defendant was unable to stand trial. Indeed, the court noted, the defendant "was in Michigan within the jurisdiction of the trial court and there [was] no showing in [the] record that he was physically or mentally disabled." *Id.* at 838. The tolling provision "was written as a protective measure for a transferred prisoner," the court reasoned; it therefore "cannot appropriately be turned from a shield for the defendant into a sword for the prosecution." *Id.*

B. The First, Second, Fourth, Seventh, Ninth and D.C. Circuits Hold That a Defendant Is "Unable to Stand Trial" Solely Because He Has Motions Pending Before the Trial Court.

In the decision below, the Fourth Circuit joined five other courts of appeals in square disagreement with the Fifth and Sixth Circuits.

In *United States v. Ellerbe*, 372 F.3d 462 (D.C. Cir. 2004), the defendant—charged in D.C. federal court while incarcerated in Virginia—requested an expeditious disposition under the IAD on March 26, 2001. *Id.* at 463-64. Over the course of the next fifteen months, the defendant went through numerous lawyers and at times considered proceeding pro se. *Id.* at 464-65. On multiple occasions, he agreed to continuances while the district court appointed him new counsel. *Id.* The defendant did not raise the IAD's time limits until more than a year after his request for a disposition, at which point the district court rejected his argument, "because most, if not all, of the continuances were caused by [the

defendant's] own decisions about lawyers in the case." *Id.* at 465 (internal quotation marks omitted). The D.C. Circuit agreed, reasoning that "courts have construed" the unable-to-stand-trial provision "to include those periods of delays caused by the defendant's own actions." *Id.* at 468 (citing cases). The court therefore concluded that "the delays to which [the defendant] object[ed] were caused by [the defendant's] own conduct—notably his penchant for frivolous motions and his erratic stance on legal representation." *Id.*

The Second Circuit has also long held that a defendant is unable to stand trial during any "period[] of delay occasioned by the defendant." *United States v. Cephas*, 937 F.2d 816, 819 (2d Cir. 1991) (quoting *United States v. Roy*, 771 F.2d 54, 59 (2d Cir. 1985), *cert. denied*, 475 U.S. 1110 (1986)). In *Cephas*, the defendants—both state prisoners—were arraigned on their federal indictments on July 14, 1988. *Id.* at 820. On September 15, both defendants filed pretrial motions, one of which then remained pending for at least ten months. *Id.* Once that motion was resolved, one of the defendants filed another, which the trial court did not rule on until August 8, 1989, the day before trial. *Id.* The court held that all of that time was tolled, because it was occasioned by the defendant and because the Speedy Trial Act excluded such time. *Id.* at 818-19. Although the court acknowledged that the Speedy Trial Act and the IAD "contain differing time limits, use differing language, and have differing events to trigger the relevant clocks," they nevertheless both allow for tolling. *Id.* at 818. Echoing the Fourth Circuit's decision in *Odom*, the Second Circuit concluded that "the two statutory schemes [have] the same purpose" and should therefore

"be construed together." *Id.* at 819 (citing *Odom*, 674 F.2d at 231-32).

So too in the Seventh, *see United States v. Nesbitt*, 852 F.2d 1502 (7th Cir. 1988), *cert. denied*, 488 U.S. 1015 (1989), *abrogated on other grounds by United States v. Durrive*, 902 F.2d 1221 (7th Cir. 1990), and Ninth Circuits, *see United States v. Johnson*, 953 F.2d 1167 (9th Cir. 1992).

The same principle also governs in the First Circuit, which has held that the IAD is tolled during "time periods of delay occasioned by the defendant." *United States v. Walker*, 924 F.2d 1, 5 (1st Cir. 1991) (quoting *United States v. Taylor*, 861 F.2d 316, 321 (1st Cir. 1988), *overruled in part on other grounds by Bozeman*, 533 U.S. at 153-54). In the First Circuit, however, a defendant's motion only tolls the IAD's time limits when "(a) the prisoner fails to alert the court to the IAD's applicability, (b) the time taken by the court for resolving the matter would be excluded under the Speedy Trial Act, and (c) the delay is neither in bad faith nor offensive to notions of justice." *Id.* (quoting *Taylor*, 861 F.2d at 322). The First Circuit has since acknowledged the split on the question presented, as well as the fact that its own precedent bound it to the majority view. *See United States v. Whiting*, 28 F.3d 1296, 1307 (1st Cir. 1994).

II. THIS CASE PRESENTS AN IMPORTANT ISSUE WARRANTING THE COURT'S REVIEW.

The question presented is critically important to virtually every defendant who is transferred and tried

under the IAD. As the number of courts of appeals opinions suggests, this is a sizable group.

First, this issue can be the difference between a lengthy sentence and a dismissal with prejudice. And indeed, defendants that are identically situated in every respect but for the geographic circuit in which their case arises can have diametrically opposed outcomes in light of the current circuit split. That creates significant, irrational, unfairness.

Second, it is essential that defendants and defense counsel know the effect of their motions on the IAD's time limits. Indeed, the majority rule, adopted by the Fourth Circuit, is particularly problematic because defendants have no way of knowing, prospectively, whether their trial will end up occurring within the allotted time period, and thus defendants might well feel forced not to file otherwise meritorious motions in order to protect their speedy trial rights. This would be particularly perverse where, as here, the defendant's motions largely sought to vindicate his rights under the IAD itself.

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE CONFLICT.

This case is a suitable vehicle for resolving the split in the courts of appeals for a number of reasons. The case arises on direct appeal, and therefore has none of the procedural complications associated with habeas appeals.

Furthermore, the Fourth Circuit squarely ruled on this issue, holding that the IAD's "120-day clock tolls

'whenever and for as long as the prisoner is unable to stand trial,'" Pet. App. 16a (quoting 18 U.S.C. App. 2, § 2, art. VI(a)), including "periods of delay occasioned by . . . motions filed on behalf of [a] defendant," *id.* at 17a (quoting *Nesbitt*, 852 F.2d at 1516) (alteration in original). In doing so, it expressly recognized that it joined a split of authority. *Id.*

IV. THE FOURTH CIRCUIT'S DECISION IS INCORRECT.

Contrary to the Fourth Circuit's ruling, a defendant is not "unable to stand trial" within the meaning of the IAD when he has motions pending before the trial court. The majority rule runs counter to the text of the IAD and wrongly imports rules from the Speedy Trial Act, a statute with different text that did not even exist at the time of the IAD's drafting and passage.

The IAD's time limit turns on whether a defendant is able to stand trial. As the Fifth Circuit has pointed out, that concept historically referred to a defendant's physical or mental ability. *Birdwell*, 983 F.2d at 1340-41 & n.22 (citing cases). It was not used to refer to conditions external to the defendant, such as whether a court has ruled on his motion. If the IAD intended to cover that situation, it could have tolled the time limits while the court was unable to hold trial. It did not do so. Moreover, some motions take only a negligible amount of time to decide or need not be decided before trial can begin. It is not clear how a defendant could be considered unable to stand trial on the basis of such motions.

The Fourth Circuit relied on the Speedy Trial Act in concluding that a defendant's motions toll the IAD's

time limits. Pet. App. 16a. It reasoned that, because the Speedy Trial Act clock excludes days while pretrial motions are pending, and because the Speedy Trial Act and the IAD have the same purpose, the exclusions in the Speedy Trial Act must also apply to the IAD. Pet. App. 16a-17a. That conclusion was wrong for a number of reasons.

To start, the text of the IAD—unlike the Speedy Trial Act—does not mention pretrial motions at all. Congress knows how to identify and exclude pretrial motions and indeed did so in the Speedy Trial Act. It did not do so in the IAD. It is neither the practice nor the role of courts to read a term into a statute when that term is absent.

Moreover, the Speedy Trial Act was passed four years after the IAD was enacted by the federal government and more than fifteen years after the IAD was drafted and proposed by the Council of State Governments. 84 Stat. 1397 (IAD); 88 Stat. 2080 (Speedy Trial Act of 1974); *Mauro*, 436 U.S. at 350-51 (IAD proposal). Congress, of course, could not have considered, much less incorporated, any terms from a law which did not yet exist.

Nor are the IAD and the Speedy Trial Act even so similar. In fact, they have crucial differences, which further counsel against importing rules from the Speedy Trial Act into the IAD. This Court recognized as much in *New York v. Hill*, 528 U.S. 110 (2000). There, the defendant had attempted to analogize the IAD to the Speedy Trial Act and the Court concluded that the comparison was "inapt." *Id.* at 117 n.2. As the Court noted, for example, "[t]he time limits of the Speedy Trial

Act begin to run automatically rather than upon request." *Id.* The Second Circuit has made a similar observation, acknowledging that "[t]he two acts contain differing time limits, use differing language, and have differing events to trigger the relevant clocks." *Cephas*, 937 F.2d at 818. Even the tolling provisions themselves are structured differently—the IAD is general, while the Speedy Trial Act enumerates specific exclusions. The basic similarities—that both set time limits for when trial must begin, but allow for some tolling—are not enough to warrant the wholesale importation of the Speedy Trial Act into the IAD.

The text of the IAD must govern, a principle which this Court's decision in *Mauro* illustrates. There, the government argued that the IAD did not apply to the federal government when it received a prisoner under the Act—only when it sent a prisoner under the Act. *Mauro*, 436 U.S. at 353-54. The Court concluded that nothing the government pointed to justified "departing from the clear wording of the [IAD]." *Id.* at 356 n.24. Nor did the Court "view the subsequently enacted Speedy Trial Act of 1974 . . . as being inconsistent with" its holding, noting that "[i]n situations in which two different sets of time limitations are prescribed, the more stringent limitation may simply be applied." *Id.* at 356 n.24. So too here.

Finally, not only does the minority rule align with the text, it also strikes the correct balance between protecting the defendant's speedy trial rights and recognizing that there may be times when motions do require trial to occur after the statutory time limit. As the Fifth Circuit pointed out, if there are numerous or

complicated motions, the trial court could presumably grant a necessary or reasonable continuance, as permitted by Articles III and IV of the IAD. *Birdwell*, 983 F.2d at 1341 n.23. This would neutralize any incentive on a defendant's part to flood the trial court with motions in an attempt to wait out the clock—a concern raised by the Fourth Circuit—without giving prosecutors or trial courts the ability to unreasonably or unnecessarily delay on responding to or ruling on a defendant's motions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 19, 2020

APPENDIX

Appendix A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4269

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

JAMES ROBERT PETERSON,

Defendant – Appellant.

No: 18-4270

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

SOK BUN, a/k/a Friday,

Defendant - Appellant.

Appeals from the United District Court for the District of South Carolina, at Spartanburg. Timothy M. Cain, District Judge (7:17-cr-00094-TMC-4)

Argued: October 30, 2019   Decided: December 16, 2019

Before WILKINSON, MOTZ, and FLOYD Circuit Judges.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Motz and Judge Floyd joined.

ARGUED: Howard W. Anderson III, LAW OFFICE OF HOWARD W. ANDERSON III, LLC, Pendleton, South Carolina, for Appellants. Kathleen Michelle Stoughton, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee. **ON BRIEF:** C. Carlyle Steele, LAW OFFICE OF C. CARLYLE STEELE, Greenville, South Carolina, for Appellant Sok Bun. Sherri A. Lydon, United States Attorney, Brook Bowers Andrews, Assistant United States Attorney, Robert Frank Daley, Jr., Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee.

WILKINSON, Circuit Judge:

This case arises from the prosecution of two state inmates who were federally indicted for coordinating a methamphetamine distribution ring from prison. The overarching prosecution spanned three separate indictments; ensnared 15 other co-conspirators; and spawned some 50,000 pages of discovery. At the end of it, James Peterson and Sok Bun were tried together and found guilty. On appeal, they raise numerous claims, some jointly and others individually. One claim rises above the rest: They argue that the district court should have dismissed their initial indictment with prejudice because they were improperly transferred from federal to state custody in violation of the Interstate Agreement on Detainers Act (IADA). We disagree. The district court did not abuse its discretion in dismissing the indictment without prejudice, having carefully weighed the relevant set of non-exclusive factors set out in the IADA. Finding defendants' remaining five claims without merit, we affirm the district court's judgment.

I.

On September 14, 2016, Peterson and Bun, already inmates in the South Carolina Department of Corrections (SCDC), were indicted on a series of federal offenses for participating in a methamphetamine trafficking conspiracy while they were in prison. On September 25-29, 2017, the two were tried in connection with their involvement in this scheme. In those intervening twelve months, a litany of motions and procedural wrinkles bogged down the prosecution's pace, the details of which the parties continue to debate.

For purposes of this appeal, there are three key points to follow.

First, the parties disagreed extensively over where Peterson and Bun should have been held, consistent with federal law, in the leadup to their federal trial. Recall that defendants were indicted when they were already serving sentences in South Carolina state prison. This is important because the Interstate Agreement on Detainers Act generally requires an indicting jurisdiction (here, the federal government) to retain custody, once a detainer is filed, of a prisoner until disposing of his charges. 18 U.S.C. app. 2, § 2, art. IV(e). This dictate is often referred to as the IADA's "anti-shuttling" provision. And here, on two occasions in November 2016, at least one defendant was transferred from federal custody to state detention facilities. *See* J.A. 274, 338. In particular, on November 30, 2016, Peterson was transferred from federal to state custody under circumstances that, as all parties now agree, were in violation of the IADA's anti-shuttling provision. *See* J.A. 331.

In December 2016, defendants tried to have the charges against them dismissed with prejudice on the ground that the government violated the IADA by improperly transferring them from federal to state custody. They argued that the federal government had regularly violated the IADA in the District of South Carolina and that its conduct here was particularly egregious because it purportedly contravened a magistrate judge's order directing Peterson to be held in federal custody until the end of proceedings. The

United States moved to dismiss the indictment against both Peterson and Bun without prejudice. For reasons explained below, the district court decided that the IADA was violated only with respect to one defendant (Peterson), but dismissed without prejudice as to both. J.A. 338.

Second, there were a series of disputes over whether defendants were indicted properly and in a timely fashion. As noted, defendants were initially indicted in September 2016. Two other indictments followed. After the district court dismissed the charges against Peterson and Bun without prejudice under the IADA in January 2017, the government re-indicted defendants on the same charges on February 15, 2017. They were formally arrested on February 24, 2017. Then, on June 13, 2017, a grand jury returned a superseding indictment that added two new co-defendants but alleged the same substantive charges.

Defendants attempted to dismiss each of these indictments. They argued that the reindictment should be dismissed because the federal government violated the IADA's requirement that defendants be brought to trial within 120 days of being transferred to federal custody once a detainer is filed. In addition, they claimed that the superseding indictment should be dismissed because it was filed too late under the Speedy Trial Act (STA). For reasons discussed below, the district court rejected both these claims in June and July 2017. Before trial, the court also granted three continuances, two of them over the objection of defendants.

Third, there were a few issues relating to the trial itself. As noted, defendants were eventually tried starting on September 25, 2017. After a four-day jury trial, Peterson and Bun were found guilty of all offenses. The district court sentenced Peterson to 330 months imprisonment and 5 years of supervised release, consecutive to the thirty-five year state sentence he was serving. Bun was sentenced to 360 months imprisonment and 5 years of supervised release, also consecutive to his state sentence of life in prison. Peterson alone challenges several evidentiary rulings made by the trial court.

We address the joint claims first—that is, the claims involving the IADA's anti-shuttling provision, the Speedy Trial Act, and the IADA's speedy trial rights—and then turn to the individual claims—that is, Peterson's various evidentiary arguments.

II.

Peterson and Bun's primary challenge is to the district court's decision to dismiss the initial indictment without prejudice under Section 9(1) of the Interstate Agreement on Detainers Act. 18 U.S.C. app. 2, § 9(1). None of the parties contest that the government violated the IADA on November 30, 2016 when it transferred Peterson from federal custody to state prison after a pretrial hearing in federal court. *See* J.A. 331. The issue here is whether the district court abused its discretion in choosing, as provided for under the statute, to dismiss the indictment without rather than with prejudice. We conclude that it did not.

A.

The federal government and most states—South Carolina included—are signatories to the IADA, which sets out procedures by which one jurisdiction can resolve its charges against a prisoner in another jurisdiction's custody. *New York v. Hill*, 528 U.S. 110, 111 (2000). In broad strokes, this compact aims to remove uncertainties surrounding out-of-jurisdiction charges against a prisoner, and to prevent interruptions to programs of treatment and rehabilitation. 18 U.S.C. app. 2, § 2, art. I.

Two main provisions of the IADA work in tandem to accomplish these goals. Article III provides prisoners with certain speedy trial rights. Packaged with these guarantees are the protections of Article IV, which include the anti-shuttling provision. Under that section, as noted, the indicting jurisdiction must retain custody of a prisoner and dispose of his charges before transferring him back to the sending jurisdiction. 18 U.S.C. app. 2, § 2, art. IV(e). Articles III and IV are both set in motion when the indicting jurisdiction files a detainer and the prisoner is sent to that jurisdiction. *United States v. Mauro*, 436 U.S. 340, 343-44 (1978).

Ordinarily, a violation of the anti-shuttling provision visits strict consequences—a dismissal of the indictment *with* prejudice. 18 U.S.C. app. 2, § 2, art. IV(e). But Congress carved out an exception to this general rule for when the United States is the jurisdiction receiving a prisoner. 18 U.S.C. app. 2, § 9(1). In this circumstance, the statute empowers the district court to decide whether dismissal with or without prejudice is

appropriate, after considering a non-exclusive list of statutory factors. These are (1) "the seriousness of the offense"; (2) "the facts and circumstances of the case which led to the dismissal"; and (3) "the impact of a reprosecution on the administration of the agreement on detainers and on the administration of justice." *Id.*

This court has not yet adopted a standard of review for Section 9 dismissals. But the right choice naturally flows from the principle that "whenever possible, the interpretation of the [IADA and the STA] should not be discordant." *United States v. Odom*, 674 F.2d 228, 281-32 (4th Cir. 1982). Because the IADA has a dismissal clause nearly identical to that of the STA, 18 U.S.C. § 3162(a), and because we review a district court's decision to dismiss an indictment under the STA for abuse of discretion, *United States v. Jones*, 887 F.2d 492, 494 (4th Cir. 1989), we now hold the same standard applies in the IADA context. The decisions of our sister circuits are in accord. *See United States v. Kelley*, 402 F.3d 39, 41 (1st Cir. 2005); *United States v. McKinney*, 395 F.3d 837, 840 (8th Cir. 2005); *United States v. Kurt*, 945 F.2d 248, 252 (9th Cir. 1991).

B.

We ask first whether the district court abused its discretion in electing to dismiss Peterson and Bun's initial indictment without prejudice. We hold it did not. To be clear, the federal government only violated the IADA with respect to Peterson. The district court ultimately dismissed Bun's indictment as a matter of grace, not of right, "to resolve any uncertainty regarding the application of the IADA and the defendants' status."

J.A. 338. Because we uphold the district court's decision as to Peterson, the same holds for Bun.[1]

In a nutshell, Peterson argues the district court applied the IADA's statutory factors incorrectly. The district court held that all three cut against him. Peterson argues that two do not—the "facts and circumstances of the case which led to the dismissal" and the impact of re-prosecution on the administration of the IADA and the administration of justice. 18 U.S.C. app. 2, § 9(1). As to the first, according to Peterson, the surrounding facts supported a dismissal *with* prejudice because Peterson requested to stay in federal custody; his transfer to state custody violated a magistrate judge's order; and the District of South Carolina has systematically violated the IADA for twenty-plus years. As to the second, Peterson insists that federal prosecution on these charges would not further the administration of justice because he will still be in jail until 2040 for his state convictions and South Carolina can still bring state drug charges. Crediting these factors in his favor, Peterson contends, reveals that the district court abused its discretion when it dismissed the indictment without prejudice.

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[1] Unlike Peterson, Bun was transferred only once from federal to state custody in November 2016 following defendants' initial arraignment. The district court held that this transfer did not violate the IADA because Peterson and Bun's detainers were not lodged until after the transfer. J.A. 338. Accordingly, the IADA violation underyling this first claim stems only from Peterson's second transfer.

That is a tall order because the decision to dismiss with or without prejudice is committed to the trial court's discretion twice over. First, the IADA leaves it up to the district court to decide where each factor falls, and also what additional factors are appropriate to consider beyond the statute's non-exhaustive list. 18 U.S.C. app. 2, § 9(1). Second, the weighing of these factors collectively is also committed to the district court's discretion. *See United States v. Taylor*, 487 U.S. 326, 337 (1988) ("[W]hen the statutory factors are properly considered, and supporting factual findings are not clearly in error, the district court's judgment of how opposing considerations balance should not lightly be disturbed."). In short, the district court exercises discretion atop discretion in deciding whether to dismiss a case with prejudice. And we find no fault with the exercise of that discretion here.

To start, all parties do not dispute that at least one factor—the seriousness of the offense—cuts against a dismissal with prejudice. Courts have taken a "broad view" of this factor, examining the nature of the charged conduct and the potential sentence, which would necessarily include a defendant's prior criminal history. *United States v. Kurt*, 945 F.2d 248, 252-53 (9th Cir. 1991); *see also United States v. Ward*, Nos. 13-CR-40066-01-DDC, 14-CR-40139-01-DDC, 2015 WL 1959631, at *3-4 (D. Kan. Apr. 29, 2015) (collecting cases). Applied here, these considerations plainly show the seriousness of Peterson's offense. J.A. 333-34; *see Munez v. United States*, No. 09-3860, 2011 WL 221655, at *4-6 (D.N.J. Jan. 20, 2011) (holding that dismissal without prejudice is proper where prisoner participated in a crack cocaine

distribution conspiracy and was likely to recidivate). Not only does Peterson face a decades-long sentence for his participation in the nationwide drug trafficking conspiracy at issue here, but he also is already serving a thirty-five year sentence for a state murder conviction (along with assault and battery with intent to kill). In short, as the district court noted, the first factor supports dismissal without prejudice because Peterson remains "a potential threat to public safety." J.A. 334.

The second factor—the surrounding facts and circumstances—also weighs in favor of dismissal without prejudice. As the district court recognized, federal marshals have systematically violated the IADA in the District of South Carolina. J.A. 335, 337.[2] In this instance, however, the fact remains that Peterson was shuttled to accommodate his own preferences. As the trial court explained, "Peterson's subsequent transfer to [Perry Correctional Institution (a state prison)] was the result of the efforts by the magistrate judge and [the United States Marshals Service (USMS)] to accommodate his counsel's request that he be housed

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[2] Peterson urges that in response to this pattern this court should send a "big message" by dismissing his indictment with prejudice. J.A. 335. For the reasons stated, we do not think this case presents an appropriate vehicle to overrule the district court's considered exercise of discretion on this point. To the extent however that the USMS was failing to observe the terms of the IADA, we should underscore that disregard of a federal statute is not its prerogative. At oral argument, counsel assured the court that corrective measures have been and are being taken. We trust that courts will have the occasion in the future to take notice of their implementation.

locally to facilitate attorney-client communications and counsel's desire not to travel to [Lee Correctional Institution (another state prison)]." J.A. 334. The record is emphatic on this point. *E.g.*, J.A. 260, 300, 657-58. Indeed, at several junctures Peterson's counsel indicated that placing Peterson in a state facility satisfied his client's needs. For example, in an email to court personnel, Peterson's counsel stated that USMS's proposal to transfer Peterson to a closer state facility "obviate[d] the distance concern that [he] had," and accordingly, Peterson "would not need to spend a night in a local jail" under contract with the federal government. J.A. 300.

Moreover, even though a magistrate judge ordered the government in November 2016 to hold Peterson in a local jail under contract with the federal government, the government's conduct complied with the purpose of that order. The order's goal was to house Peterson closer to counsel, which is exactly what happened when Peterson was transferred to a nearby state facility in November 2016. J.A. 331. In fact, the magistrate judge took Peterson's transfer to that facility to render his former order unnecessary. J.A. 663. Furthermore, another relevant "fact and circumstance" is that there is no indication that the government acted in "bad faith." *United States v. Brewington*, 512 F.3d 995, 998 (7th Cir. 2008) (collecting cases). Specifically, as the district court recognized, there is no evidence that USMS, the federal agency responsible for Peterson's custody, colluded with the prosecution "to gain prosecutorial advantage in the case." J.A. 335; *see also id.* (noting the absence of "intentional misconduct or deliberate indifference in

regard to the IADA violations”). Together, these circumstances reasonably tilt against dismissal with prejudice.

Finally, we turn to the “administration of justice” factor. Here again Peterson comes up short. The district court properly concluded that neither of the IADA’s aims would be frustrated by a without-prejudice dismissal. Peterson’s transfer did not interrupt his receipt of any rehabilitation services, nor was the district court’s order likely to cost Peterson a fair and speedy trial. J.A. 336-37. Peterson does not contend otherwise. He instead assures us that his lengthy state sentence for prior crimes obviates the need for a federal prosecution for his more recent participation in a nationwide drug conspiracy. We are not persuaded. The district court observed, and we agree, that the federal government has a weighty interest in resolving on their merits crimes as serious as those before us; the “corrosive and devastating effects” of methamphetamine on society compel as much. J.A. 337. Plainly, this interest in merits resolutions bears upon the “administration of justice.” *See, e.g., United States v. Martinez*, 376 F. Supp. 2d 1168, 1176 (D.N.M. 2004).

In sum, we hold that the district court did not abuse its discretion in dismissing defendants’ initial indictment without prejudice. By affording district courts substantial discretion over this determination, Congress sought to ensure that violations of the IADA’s anti-shuttling provision would not needlessly encumber federal prosecutions. The district court’s order preserved that aim in full.

III.

Defendants also claim that their speedy trial rights under the IADA were violated. As relevant here, the IADA provides that a prisoner must be tried within 120 days of the date he arrives in the indicting jurisdiction after the filing of a detainer. 18 U.S.C. app. 2, § 2, art. IV(c). The IADA, though, "contains tolling provisions for certain events." *United States v. Winters*, 600 F.3d 963, 970 (8th Cir. 2010) (quotation omitted). Courts can grant "reasonable continuance[s]" upon a showing of "good cause." 18 U.S.C. app. 2, § 2, art. IV(c). The IADA clock also stops "whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction on the matter." *Id.* at art. VI(a).

The trial for Peterson and Bun started on September 25, 2017. While the parties disagree about when the IADA clock exactly started for defendants, everyone agrees that their trial commenced more than 120 calendar days after their detainers were filed and they arrived in federal custody. The district court held that their September 2017 trial date nonetheless complied with the IADA because the Act's clock had sufficiently tolled in the interim. Between November 2016 and September 2017, the district court granted three continuances, two of which defendants challenged, and also adjudicated a stream of motions raised by both the government and defendants. The district court held that these actions adequately tolled the IADA on the grounds that the Act's 120-day clock stopped for (1) continuances granted under the Speedy Trial Act (STA),

and (2) time spent adjudicating motions filed by defendants. J.A. 117-119.

Peterson and Bun contend that both these premises constituted legal error. We review this question of law de novo. *United States v. Han*, 74 F.3d 537, 540 (4th Cir. 1996). Specifically, defendants argue that continuances granted under the STA do not automatically toll the clock for the IADA because a finding that "the ends of justice [would be] served" (as required for continuances under the STA) does not necessarily constitute "good cause" (as required for continuances under the IADA). Further, they maintain that the IADA's clock does not stop for time spent adjudicating pretrial motions. As they see it, the IADA's 120-day clock tolls under only two specific circumstances: "good cause" continuances and when a defendant is "unable" to stand trial. Holding otherwise, they caution, would undermine the purposes of the IADA's speedy trial guarantees.

We disagree. Defendants' position would contravene our decision in *United States v. Odom*, 674 F.2d 228 (4th Cir. 1982). While Peterson and Bun's interpretation requires that we treat the IADA as materially distinct from the STA, we explained in *Odom* that "[w]henever possible, the interpretation of the Acts should not be discordant." 674 F.3d at 231. This because "related statutes having the same purpose should be construed together." *Id.* We thus held that periods excludable under the STA should also toll the clock under the IADA where possible. *See id.*; *United States v. Hines*, 717 F.2d 1481, 1486 (4th Cir. 1983).

Accordingly, it makes perfect sense to toll the IADA's clock for continuances granted under the STA. The STA has its own 70-day speedy trial provision, which tolls during, among other periods, continuances granted as "the ends of justice" require. 18 U.S.C. § 3161(h)(7)(A). Because the IADA's "good cause" standard is not materially different from the STA's "ends of justice" standard, it follows from *Odom* that what counts for the STA should satisfy the IADA. Indeed, on this logic, every circuit court to reach the issue has agreed that periods excludable under the STA for "ends of justice" continuances should also toll the 120-day clock under the IADA's substantially similar "good cause" continuance provision. *See, e.g.*, *United States v. McKay*, 431 F.3d 1085, 1091-92 (8th Cir. 2005); *United States v. Collins*, 90 F.3d 1420, 1428 (9th Cir. 1996); *United States v. Cephas*, 937 F.2d 816, 818-19 (2d Cir. 1991).

Likewise, it follows that the IADA's clock should toll when a district court is adjudicating pretrial motions raised by the defense. *See Hines*, 717 F.2d at 1486-87. STA's 70-day speedy trial clock tolls for the pendency of pretrial motions. 18 U.S.C. § 3161(h)(1)(D). Of a part, the IADA's 120-day clock tolls "whenever and for as long as the prisoner is unable to stand trial." 18 U.S.C. Art.VI(a). To bring this provision of the IADA into conformity with the STA, the clear majority of our sister circuits have read this tolling section "to include those periods of delays caused by the defendant's own actions." *United States v. Ellerbe*, 372 F.3d 462, 468 (D.C. Cir. 2004) (collecting cases from First, Second, Seventh, and Ninth Circuits). *But see Birdwell v. Skeen*, 983 F.2d 1332, 1340-41 (5th Cir. 1993). In particular, these courts

have held that a defendants own actions include "periods of delay occasioned by … motions filed on behalf of [a] defendant." *United States v. Nesbitt*, 852 F.2d 1502, 1516 (7th Cir. 1988). We agree with this interpretation of the IADA's "unable to stand trial" tolling provision. Not only does it harmonize the IADA with the STA, as our precedent in *Odom* requires, but it also avoids creating an incentive for defendants to saddle district courts with innumerable pretrial motions in hopes of manufacturing delays and waiting out the IADA's 120-day clock.

While the tolling provisions of the STA and IADA may have slightly different wordings, their time clocks have broadly harmonious aims, and courts have treated the two *in pari materia*. To that end, while the government and defendants disagree about some of the particulars of the district court's tolling analysis, what is clear is that if both continuances granted under the STA and time spent adjudicating a defendant's pretrial motions stop the IADA's 120-day clock, then Peterson and Bun's trial date complied with the statute. Because we hold that they do, we affirm the district court's judgment on this score.

IV.

Next, we turn to defendants' argument that the superseding indictment should have been dismissed because it was filed too late to comply with the Speedy Trial Act.

The STA requires that "any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served

with a summons in connection with such charges." 18 U.S.C. § 3161(b). As earlier noted, the defendants' initial indictment was dismissed without prejudice. Defendants were re-indicted on February 15, 2017 and arrested on February 24, 2017. J.A. 13, 39-47. But the grand jury delivered a superseding indictment on June 13, 2017, which added additional defendants. J.A. 91-99. And while the superseding indictment involved the same charges as the reindictment, it obviously came more than thirty days after the February arrest.

The issue here is thus relatively straightforward: Does the STA require all indictments to be filed within thirty days following an arrest or summons or, as the district court held, is Section 3161(b) satisfied so long as the original indictment is submitted within that time frame? Because the district court's interpretation of the STA is a question of law, we review it de novo. *United States v. Cherry*, 720 F.3d 161, 165 (4th Cir. 2013).

According to Peterson and Bun, the plain text of the STA compels an all-indictments-in-thirty-days reading. On their telling, "any indictment" means "any indictment," and the government is accordingly barred from filing any new or superseding indictments after the thirty-day window has passed. By contrast, the government contends that this reading is overly literalistic, and that the structure and substance of the STA show that the thirty-day window is concerned only with the original indictment to which superseding indictments are no more than a sequel or modification. Put otherwise, the point of the STA is to force the

government to charge someone within thirty days of an arrest or summons, not to set those charges in stone.

To start, every federal court to have addressed the question has concluded that a "superseding indictment filed more than thirty days after arrest . . . does not violate section 3161(b) so long as the original indictment was filed within the required thirty day time frame." *United States v. Walker*, 545 F.3d 1081, 1086 (D.C. Cir. 2008). By our count, eight circuits have considered this issue and eight circuits have agreed on the result.[3] Peterson and Bun nonetheless insist that those courts have simply failed to give the word "any" its natural meaning.

The structure of the STA militates against defendants' interpretation. In statutory interpretation, context matters. *Graham County Soil and Water Conservation Dist. v. United States*, 559 U.S. 280, 290 (2010). And here, the core remedial provision of the STA indicates that the phrase "any indictment" is best read as concerning only the original indictment. Section 3162(a)(1) reads:

> If, in the case of any individual against whom a complaint is filed charging such individual with an offense, *no indictment*

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[3] *Accord Walker*, 545 F.3d at 1086; *United States v. Hemmings*, 258 F.3d 587, 591-92 (7th Cir. 2001); *United States v. Berry*, 90 F.3d 148, 151 (6th Cir. 1996); *United States v. Mosquera*, 95 F.3d 1012, 1013 (11th Cir. 1996); *United States v. Orbino*, 981 F.2d 1035, 1037 (9th Cir. 1992); *United States v. Castellano*, 848 F.2d 63, 65 (5th Cir. 1988); *United States v. Mitchell*, 723 F.2d 1040, 1044-45 (1st Cir. 1983); *United States v. Rabb*, 680 F.2d 294, 297 (3d Cir. 1982).

> *or information* is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped.

18 U.S.C. § 3162(a)(1) (emphasis added). Under this section, the dismissal remedy requested by Peterson and Bun is invoked when "*no* indictment" is "filed within the time limit required by section 3161(b)." *Id.* (emphasis added); *see also Hemmings*, 258 F.3d at 592. If we take Section 3161(b) as referring only to the original indictment, then these provisions work cleanly in conjunction. But if we adopted defendants' interpretation, there would be a problem. That is, in order to dismiss a superseding indictment as untimely, we would have to hold that there was "no indictment" within the thirty-day window—put otherwise, we would have to maintain that the original indictment never happened. We see no reason to embrace this illogical reading when a coherent interpretation is readily available.

On a related front, defendants' reading of Section 3161(b) is also in tension with the substance of the STA. At bottom, their view requires the STA to "guarantee that an arrested individual indicted within thirty days of his arrest must, in that thirty-day period, be indicted for every crime known to the government." *Hemmings*, 258 F.3d at 592 (quoting *Mosquera*, 95 F.3d at 1013). This interpretation would force prosecutors to take a kitchen sink approach to indictments, lest they lose the ability to

bring otherwise viable charges against a defendant in the future. We decline to adopt a reading that would spur over-charging defendants at the outset in order to preserve the government's options down the road.

In short, we join every federal court to address the question and hold that a superseding indictment filed more than thirty days after an arrest does not violate Section 3161(b) so long as the original indictment was filed within the STA's thirty-day window.

V.

Having found each of defendants' joint claims unpersuasive, we turn our attention to the individual issues raised by Peterson. Speaking for himself, Peterson faults the district court for erring on a number of evidentiary issues at trial, which we review under an abuse-of-discretion standard. *United States v. Cole*, 631 F.3d 146, 153 (4th Cir. 2011).

Peterson claims initially that the district court abused its discretion when it forbade counsel from demonstrating to the jury that text message screenshots can readily be fabricated. At trial, the prosecution introduced a number of screenshots that documented text messages between undercover government agents and a phone number identified as belonging to Peterson. These exchanges culminated in an undercover buy of methamphetamine. At the time, Peterson did not object to the messages' authenticity, nor did he question their accuracy during cross-examination of the two government agents who testified as to the screenshots. Instead, two days after these witnesses testified, Peterson's counsel requested permission to demonstrate

for the jury with his own iPhone how to falsify text message exchanges by either changing the contact information that comes up for a specific phone number, or using a publicly available website for creating fake text message screenshots. The district court denied the request.

The district court clearly did not abuse its discretion in doing so. *See* F.R.E. 403 (A "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of," among other things, "unfair prejudice."). The attempted demonstration had virtually no probative value. Peterson offered no evidence to suggest that the screenshots submitted at trial were fabricated. Indeed, as the district court recognized, he did not even show that his lawyer's iPhone was the same make or model as any of the relevant phones used by the witnesses in this case. J.A. 1707; *see also United States v. Williams*, 461 F.3d 441, 446 (4th Cir. 2006) ("A courtroom demonstration that purports to recreate events at issue is relevant if performed under conditions that are substantially similar to the actual events.") (internal quotation omitted). Taken for what it is, Peterson's proposed demonstration was an attempt to prejudice the jury—an attempt to confuse it by throwing the veracity of text message screenshots *writ large* into doubt, without any effort to identify a connection to Peterson's case.

The same holds with respect to Peterson's next contention. Peterson argues that the district court abused its discretion when it prohibited him from telling the jury about his lengthy state sentence. In essence,

Peterson wanted to make the case that he had no financial motive to deal methamphetamine because he was going to be in jail for the next thirty-plus years anyway. According to the district court, though, the earlier state sentence had little probative value to the charged federal crimes. The court also found that this collateral information would be highly prejudicial, both because it could confuse the jury and also encourage it to acquit Peterson on the ground that he was already serving a lengthy jail sentence for state offenses. J.A. 157; *see also United States v. Muse*, 83 F.3d 672, 677 (4th Cir. 1996). The district court's decision to exclude the evidence fully reflected the sentence's low probative value and its self-evident invitation to jury nullification.

Finally we address Peterson's argument that the district court abused its discretion in excluding certain evidence that he wanted to use to impeach his co-conspirator. At trial, the jury heard testimony from a cooperating co-conspirator who recalled statements made by Bun that implicated Peterson in the drug trafficking ring. J.A. 1618-19. To discredit Bun, Peterson wanted to tell the jury about Bun's felony convictions and his ongoing life sentence. The district court decided to forbid testimony about both Bun's conviction and his sentence. It reached this conclusion after referencing Rule 403 and balancing the impeachment value to Peterson against the danger of unfair prejudice to Bun who was also standing trial. J.A. 1862-64. The court also noted that the "interest of . . . the Government" in avoiding jury nullification supported keeping the evidence out. *See id.* at 1863.

Peterson urges us to reverse this decision because the district court applied the wrong test. Namely, the district court used Rule 403's balancing test rather than the relevant test in Rule 609. The latter rule governs the use of criminal convictions for purposes of impeachment and sets out two different standards depending on the identity of the witness to be impeached. The trial judge must allow non-party witnesses to be impeached with their prior felony convictions, subject to the ordinary Rule 403 backstop. F.R.E. 609(a)(1)(A). Where a criminal defendant is the witness to be impeached, the trial judge must admit his prior felony conviction "if the probative value of the evidence outweighs its prejudicial effect *to that defendant*." F.R.E. 609(a)(1)(B) (emphasis added). Because the district court mistakenly believed the Rule 403-type analysis to govern, Peterson argues, it erroneously gave weight to an irrelevant factor—the government's interest—and therefore abused its discretion.

Even if true, this mistake does not negate what was a reasoned decision by the district court to exclude the evidence. Looking to the substance of the matter, it is plain that the district court reached a result consistent with Rule 609(a)(1)(B). *See, e.g.*, J.A. 1862-64 ("I have to balance the interest of Mr. Peterson in having that information provided to the jury against the interest of Mr. Bun and avoiding prejudice to him."). The court reasoned that the probative value of Bun's felony conviction as impeachment evidence was slight, while its potential prejudice to Bun was substantial. As to the former, Bun's incarcerated status was already on full display before the jury because he chose to wear his

jumpsuit to trial. As to the latter, the prejudicial impact to Bun of his prior conviction was apparent; in fact, Bun objected no less than five times to having this information before the jury. Relatedly, because the court properly excluded Bun's conviction, it follows that it was also well within its discretion to exclude his corresponding sentence.

One final point bears mention. The assignments of error all relate to evidentiary rulings in the course of conducting a trial, and the district judge was well within its discretion to rule as it quite reasonably did. *Even if* the district court erred on any or all of these matters, the result here would be the same because the aggregate effect of the errors would be harmless. *See United States v. Burfoot*, 899 F.3d 326, 340-41 (4th Cir. 2018). The jury had overwhelming evidence of Peterson's guilt. It heard, among other things, from a confidential informant, a cooperating co-conspirator, and several government agents linking Peterson to the criminal scheme. The jury also saw phone records between Peterson and the informant that led to an undercover buy of methamphetamine, as well as a series of text message screenshots pertaining to the same buy. Against this weight of evidence, we cannot say that any of these alleged evidentiary errors, taken alone or together, could have "substantially swayed" the jury's decision to convict. *Id.* at 340 (quotation omitted).

The judgment of the district court is accordingly

AFFIRMED.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

United States, v. Sok Bun, Paul Ray Davis, Jhon Marlon Acosta, James Robert Peterson, David Elijah Allen, Samuel Travis Wiggins, Robert Lee Moore, Defendants.	))))))))))))	C/A No. 7:17-cr-94-TMC **ORDER**

Before the court are Defendants James Robert Peterson, Paul Ray Davis, and Sok Bun's (collectively "Defendants") Motion to Dismiss and Supplemental Motion to Dismiss. (ECF Nos. 79, 105).[1] On June 18, 2017, the court held a hearing on these motions and numerous other motions. The court ruled on the majority of the motions at the hearing, but took these

[1] Defendants Bun and Davis filed motions (ECF Nos. 85 and 90) to join Defendant Peterson's motion, which the court granted. Bun also filed a memorandum in support of the motion to dismiss. (ECF No. 102).

particular motions under advisement. For the reasons discussed below, the court denies the motions to dismiss.

I. Background/Procedural History

On September 14, 2016, a federal grand jury returned an indictment charging Defendants and eleven others with conspiring to possess with intent to distribute significant amounts of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), 843(b) and 846; and other offenses. *United States v. Nancy Phon, et al.*, C/A No. 7:16-00776-TMC. Defendants are currently incarcerated with the South Carolina Department of Corrections. An arrest warrant was issued for Defendants and on November 3, 2016, Defendants were transported from state custody to federal court in Greenville, South Carolina, pursuant to a writ ad prosequendum for their initial appearance and arraignment. After the hearing, Defendants were returned to state custody and detainers were filed by the United States Marshals Service ("USMS").

On November 4, 2016, Defendant Peterson filed a motion for a hearing concerning his place of pre-trial confinement, specifically invoking his rights under the IADA. Peterson requested a hearing "so the court [could] decide the appropriate housing of [Peterson] pending trial in this action." Peterson later withdrew this motion on November 14, 2016.

On November 14, 2016, the Government filed a motion to continue the case beyond the November 2016 term of court. A pre-trial conference was held before the district court on November 30, 2016, at which time Defendants joined in the Government's pending motion

to continue the case beyond the November 2016 term, and the court granted the Government's motion to continue the case.

Following the pre-trial conference, Peterson was returned to state custody, and on the following day, December 1, 2016, Peterson filed a motion to dismiss the indictment based on alleged IADA violations. On January 23, 2017, after a hearing, the court orally dismissed the indictment and took under advisement whether the dismissal would be with or without prejudice. On January 30, 2017, the court issued a written order dismissing the indictments without prejudice.[2]

On February 15, 2017, a grand jury returned an indictment in the instant action charging Defendants with conspiracy to possess with intent to distribute methamphetamine and related offenses, in violation of 21 U.S.C. §§ 841(a)(1), 843(b) and 846; and conspiracy to launder money, in violation of 18 U.S.C. § 1956(h). On February 24, 2017, pursuant to a writ ad prosequendum, Defendants were transported to federal court for arraignment. On February 24, 2017, after their arraignment, USMS lodged detainers against the defendants with the SCDC.

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[2] The court found that the IADA had not been violated as to Defendants Bun, Acosta, and Davis, as detainers were not lodged until after the November 3rd hearing and these Defendants did not appear before the court again until January 23, 2017, for the hearing on the motion to dismiss based on alleged IADA violations.

II. Discussion

Defendants contend that their speedy trial rights have been violated under the Speedy Trial Act, the IADA, and the Sixth Amendment. (ECF Nos. 79 and 105)

A. Speedy Trial Act

In their Motion to Dismiss, Defendants allege violations of their speedy trial rights under the Speedy Trial Act. (ECF No. 79). Defendants argue the triggering event was the arraignment on February 24, 2016, and the 70 days allowed for trial under the Speedy Trial Act ran on May 5, 2017. (ECF No. 79 at 3). Defendants also argue that the continuance granted on April 11th does not mitigate the Government's failure to try him by May 5th. (ECf No. 79 at 3 n.2). The Government contends the clock started on February 25, 2017, the day after the new indictment, and that, after allowing for excludable time periods, there has been no violation of the Speedy Trial Act.

Under the Speedy Trial Act, a defendant facing felony charges must be brought to trial within seventy days of the later of his indictment or his initial appearance before a judicial officer. *See* 18 U.S.C. § 3161(c)(1). The seventy-day time period in the Speedy Trial Act does not run continuously. The Act provides that certain "periods of delay shall be excluded . . . in computing the time within which the trial . . . must commence." 18 U.S.C. § 3161(h). The excludable time includes delays attributable to continuances granted "at the request of the defendant or his counsel or at the request of the attorney for the Government," if the court

finds that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A). Delays attributable to pretrial motions are also excluded from computation, from the time of filing to disposition. 18 U.S.C. § 3161(h)(1)(D). Additionally, "when a prosecution involves multiple defendants, the 'time excludable for one defendant is excludable for all defendants.'" *United States v. Kellam*, 568 F.3d 125, 137 (4th Cir. 2009) (*quoting United States v. Jarrell*, 147 F.3d 315, 316 (4th Cir. 1998)); 18 U.S.C. § 3161(h)(6) (excluding a "reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted"). If there is a violation of the Speedy Trial Act, upon counsel's motion, the indictment must be dismissed, although the trial court has the discretion to determine whether the dismissal is with or without prejudice. 18 U.S.C. § 3162(a)(2). Neither type of dismissal is "the presumptive remedy for a Speedy Trial Act violation." *United States v. Taylor*, 487 U.S. 326, 334 (1988).

The Government first assumes Defendants have made out a prima facie case and acknowledges that it has the burden to show there has not been any violations of the Speedy Trial Act. Then, the Government cites to the automatic statutory exclusions found in 18 U.S.C. §3161(h), and sets forth the periods it thinks are excludable under both the Speedy Trial Act and the IADA.

As an initial matter, the court must determine when the clock started to run. Pursuant to the Speedy Trial Act, when an indictment is dismissed on a defendant's motion, the clock resets, but when it is dismissed on the government's motion, it merely pauses until a new indictment is filed. *See* 18 U.S.C. 3161 (d)(1). *See also United States v. Rojas-Contreras*, 474 U.S. 231, 239 (1985) (Blackmun, J., concurring in the judgment). The Government states that the clock started anew on February 25, 2017, because the prior dismissal was at the defendants' request. Although in their motion, Defendants state that the date should be February 25, 2017, for the application of the Speedy Trial Act (ECF No. 79 at 3), there was some discussion at the hearing as to whether the previous dismissal without prejudice was a granting of Defendants' or the Government's motion, and whether the second indictment re-started the clock.[3]

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[3] In regard to the prior dismissal, the court notes that this case presents an unusual procedural history. Defendants were the first to file for a dismissal of the prior indictment for alleged IADA violations. Defendants sought a dismissal with prejudice. In response, the Government filed a motion to dismiss without prejudice based on the allegations of an IADA violation. The Government was not seeking a dismissal for another reason, and Defendants acknowledge this as they state that the Government moved for a dismissal "because Mr. Peterson complained that the Government had not complied with the anti-shuffling provisions of the IADA]." (ECF No. 79 at 1). After hearing the parties arguments during the hearing, the court stated it was going to dismiss the indictment, and the only question was whether it should be with or without prejudice. The court took the matter under advisement. Subsequently, in a written order, the court determined the dismissal should be without prejudice. Thus, while the court

Assuming without deciding that the second indictment did not re-start the clock, there has been no violation of the Speedy Trial Act. The clock would have begun to run the day after Defendants were arraigned, November 4, 2016.[4] Ten days later on November 14, 2016, the Government filed a motion for a continuance, which the court granted on November 30, 2016, after the appropriate ends of justice analysis and finding and

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stated it was denying Defendants' motion and granting the Government's motion, it could have just as accurately stated it was granting the Defendants' motion in part and denying it in part. *See United States v. Irizarry-Colon*, 848 F.3d 61 (1st Cir. 2017) (subsequent reindictment of defendant began 70-day speedy trial clock anew because defendant filed motion to dismiss pending indictment with prejudice based on Speedy Trial Act grounds, and government merely filed a response to that motion, in which it conceded that dismissal was warranted but disputed whether it should be with prejudice); *United States v. Blackeagle*, 279 Fed. Appx. 588 (9th Cir. 2008). However, the court will assume without deciding for the purposes of these motions that the clock did not restart with the second indictment and arraignment.

[4] After acknowledging that the Fourth Circuit Court of Appeals held otherwise in *United States v. Stoudenmire*, 74 F.3d 60 (4th Cit. 1996), Defendants contend that the day of the arraignment is not excluded in calculations under the Speedy Trial Act. (ECF No. 133 at 2). The Fourth Circuit has held that Rule 45(a) applies in Speedy Trial Claims. *United States v. Wright*, 990 F.2d 147 (4th Cir. 1993). Moreover, "[t]he Committee Guidelines adopt Rule 45's time computations as the appropriate measures for computing time under the Speedy Trial Act." *United States v. Montoya*, 827 F.2d 143, 147 n.4 (7th Cir. 1987) (citing *Administration of the Criminal Law of the Judicial Conference of the United States, Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended* at 24-25 (1984)).

without opposition.[5] This stopped the clock for the Speedy Trial Act purposes until the next term of court in January. *See* 18 U.S.C. § 3161(h)(1)(D); *United States v. Dorlouis*, 107 F3d. 248 (4th Cir. 1997) (holding § 3161 provides for excluding delay after the filing of a pretrial motion and the court's prompt disposition of such motion.).

On December 1, 2016, Defendants then filed their first motion to dismiss based on IADA violations which also stopped the clock until a hearing was held and the motion was ruled upon. After a hearing on the motion, on January 30, 2017, the court dismissed the indictment without prejudice. Therefore, the clock stopped beginning on November 13, 2016, until the January term of court because of the continuance and was also stopped from December 1, 2016, until January 30, 2017, because of the then pending IADA motion. The clock remained stopped until Defendants were arraigned on the second indictment on February 24, 2017. *See* 18 U.S.C. § 3161(h)(5). The clock restarted on February 25, 2017. The clock was again stopped forty-two days later on April 8th when the motions to continue were filed by co-defendant Samuel Wiggins and the Government, which the court granted on April 11, 2017, after an ends of justice analysis and finding.[6] Moreover, the seventy-day

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[5] Arguably, Defendant Peterson's motion filed on November 4, 2016, specifically invoking his rights under the IADA also stopped the clock. Peterson withdrew this motion on November 14, 2016.

[6] The court's order granting the continuance on April 11th explained why the continuance met this standard:

> [T]he court finds this case is unusual and complex and that

period remains tolled because on June 19, 2017, after an ends of justice analysis and finding, the court granted another motion to continue the case until the September term of court. (ECF No. 179).[7] With at most 52 days having run, there has been no violation of the Speedy Trial Act.

B. IADA

There are two main provisions of the IADA regarding the time within a prisoner must be tried. When a prisoner is indicted in another jurisdiction, the IADA requires that he be brought to trial within 180

> counsel cannot adequately prepare for trial or further pretrial proceedings within the time limits established by 18 U.S.C. 3161. Further, failure to grant a continuance could result in prejudice and a miscarriage of justice to Wiggins, while no showing has been made that granting a continuance will prejudice the remaining defendants. Finally, there is no evidence that the Government has engaged in an intentional delay in seeking the indictment of the defendants subsequent to their dismissal from the related case.

(ECF No. 69 at 2-3). While Defendants objected to this continuance, the Speedy Trial Act states that "a reasonable period of delay" shall be excluded from the speedy trial calculation "when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion of severance has been granted." 18 U.S.C. § 3161(h)(6).

[7] Defendants also argue that the continuance granted on April 11th does not mitigate the Government's failure to try him by May 5th. The court finds this argument non-sensical. A continuance was granted before May 5th extending the trial to the July term of court, and stopping the clock in April. Therefore, there can be no violation for a trial not taking place earlier in May.

days after the prisoner has notified his warden, the indicting prosecutor and the court in which the indictment is pending, of his request for disposition of the indictment. 18 U.S.C. App. 2, § 2, Art. III(a); *Fex v. Michigan*, 507 U.S. 43, 53 (1993). Once the prisoner is transferred to the indicting jurisdiction, he must be brought to trial within 120 days. IADA § 2, Art. V(c). A circumstance that would toll the 70-day Speedy Trial Act period also tolls the 180- and 120-day IADA periods. *See* IADA § 2, Arts. III(a), IV(c); 18 U.S.C. § 3161(h); *United States v. Hines*, 717 F.2d 1481, 1486 (4th Cir. 1983) (citing *United States v. Odom*, 674 F.2d 228 (4th Cir. 1982) (holding that the Speedy Trial Act excludes delay resulting from a continuance based on a judge's findings "that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial" and this standard is similar to the provision in the IADA which allows a continuance only "for good cause.")).

In applying the IADA, Defendants contend that the clock started to run on November 30, 2016 - the date the court previously held Peterson had his first appearance in federal court after a detainer had been filed. Defendants then simply add 120 days and state that the trial should have been held by March 30, 2017.

Defendants were arraigned on the first indictment on November 3, 2016, and after the hearing they were returned to state custody. Later that day a detainer was filed. Defendant Peterson was again placed in federal custody for a status conference which was held on November 30, 2016, and this started the clock for the

IADA's 120-days limit. As noted above, after ten days, the Government filed a motion for a continuance on November 13, 2016, and the court granted it on November 30, 2016, after the ends of justice analysis and finding, which also stopped the clock until the next term of court in January. On December 1, 2016, Defendants then filed their first motion to dismiss based on IADA violations which also stopped the clock until a hearing was held and the motion was ruled upon. After a hearing on the motion, on January 30, 2017, the court dismissed the indictment without prejudice. Therefore, the clock stopped from December 1, 2016, until January 30, 2017, and remained stopped until Defendants were arraigned on the second indictment on February 24, 2017. The clock restarted on February 25, 2017. The clock was again stopped forty-two days later on April 8th when the motions to continue were filed by co-defendant Samuel Wiggins and the Government, which the court granted on April 11, 2017, after an ends of justice analysis and finding. Moreover, the 120-day period currently remains tolled because on June 19, 2017, after an ends of justice analysis and finding, the court granted another motion to continue the case until the September term of court. (ECF No. 179).

Again, the fact that Defendants did not consent to the continuances granted by the court does not change the analysis.[8] Furthermore, time excludable time under

[8] As noted above, the Speedy Trial Act excludes from the 70-day calculation certain periods of delay, including the "delay resulting from any pretrial motion, from the filing of the motion through the

§3161(h) of the Speedy Trial Act the equivalent of "good cause" under the IADA, and therefore toll the IADA's speedy trial time limits as well. *Odom* 674 F.2d at 229-30; *Hines*, 717 F.2d at 1486 (noting the decision in *Odom* "held that the periods excluded under the Speedy Trial Act . . . likewise should be excluded under the IAD."). The court considered the factors under § 3161(h)(7)(B) of the Speedy Trial Act in each instance, and found that the interests of justice were best served by granting a continuance. Based on the foregoing, the court finds no IADA violation.

B. Sixth Amendment

In their Supplemental Motion to Dismiss (ECF No. 105), Defendants also assert a violation of their speedy trial rights under the Sixth Amendment. Defendants rely on the initial indictment date of September 14, 2016, as the date the clock begins to run for a Sixth Amendment speedy trial rights claim. The Government contends that the initiation of federal charges was when Defendants were arraigned on February 24, 2017.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." U.S. Const. amend. VI. A criminal defendant's right under the Speedy Trial Act is separate and distinct from his Sixth Amendment right to a speedy trial. *See United States v. Woolfolk*, 399 F.3d 590, 594-98 (4th Cir. 2005). The Sixth Amendment clock begins to run upon indictment when no prior arrest on

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conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. § 3161(h)(1)(D).

the alleged offense is involved. *Dillingham v. United States*, 423 U.S. 64 (1975) (per curiam). In particular, the date of the indictment is the crucial date for a prisoner already incarcerated on a prior offense. *United States v. Manetta*, 551 F.2d 1352, 1354 (5th Cir. 1977).

Analysis of a Sixth Amendment speedy trial claim is governed by the Supreme Court's holding in *Barker v. Wingo*, which sets forth four factors to determining whether the right has been violated: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the extent of prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

In addressing a speedy court violation claim under the Sixth Amendment, a court must first decide whether the length of the delay triggers a speedy trial inquiry. *United States v. Hall*, 551 F.3d 257, 271 (4th Cir. 2009). Notably, "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Barker*, 407 U.S. at 531. When the delay is over one year, it is presumptively prejudicial. However, "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. *See also Woolfolk*, 399 F.3d at 597 ("One year is the 'point at which courts deem the delay unreasonable enough to trigger the *Barker* [i]nquiry.'") (*citing Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992)); *United States v. Brooks*, 66 F.3d 317 (4th Cir. 1995) (finding delay of eleven months is not inherently prejudicial); *United States v. Hammer*, C/A

No. 94-5063, 1994 WL 644903, at *2 (4th Cir. Nov. 16, 1994) (unpublished) (holding seven-month delay is on the ordinary side of the one-year threshold). The first *Barker* factor "acts as a threshold requirement," and "[i]f the delay is not uncommonly long, the inquiry ends there." *United States v. Grimmond*, 137 F.3d 823, 827 (4th Cir. 1998). Here, assuming without deciding that the earliest date of September 14, 2016, is the correct start date, the court finds no violation of Defendants' Sixth Amendment rights to a speedy trial. At this time, Defendants are not even close to the one-year threshold. Having failed to clear the threshold requirement, Defendants cannot show a violation of their Sixth Amendment right.[9]

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[9] Moreover, even when a delay exceeds one year, this does not, in itself, necessarily establish a violation of the defendant's rights to a speedy trial. *See Barker* at 533-36 (holding that more than a five year delay, while extraordinary, did not violate the defendant's right to a speedy trial). Defendants have made only a cursory argument as to the remaining *Barker* factors, and made no attempt to weigh the factors. The court notes, however, that it would have reached the same conclusion if it had considered the remaining *Barker* factors. "The reasons for a trial delay should be characterized as either valid, improper, or neutral. On this factor, a reviewing court must carefully examine several issues, specifically focusing on the intent of the prosecution." *Hall*, 551 F.3d at 272 (citation omitted). Here, the delay has stemmed from the undisputed complexity of the case, the voluminous discovery, and the number of defendants. Moreover, Defendants themselves have contributed to the delay by filing numerous pretrial motions. Clearly, there have been valid reasons for the trial delay. The third *Barker* factor addresses whether the defendants timely asserted their right to a speedy trial. *Barker*, 407 U.S. at 532. Defendants have done this, so this factor weighs in their favor. The final *Barker*

III. Conclusion

Based on the foregoing, Defendants' Motions to Dismiss (ECF Nos. 79 and 105) are **DENIED**.

IT IS SO ORDERED.

s/Timothy S. Cain
United States District Judge

Anderson, South Carolina
July 14, 2017

factor requires the court to consider the prejudice to Defendants. *Id.* Courts assess prejudice in the light of the interests which the speedy trial right was designed to protect: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. *Id.* There are no specific allegations that Defendants' detention has been oppressive. As to the second interest, Defendants have asserted generalized concerns that would affect many individuals who are detained. And most importantly, Defendants have not pointed to any impairment to their defense resulting from any delay in their trial. Rather, Defendants appear to base their speedy trial claim solely on the fact that a delay occurred. Only one of the *Barker* factors weighs in Defendants' favor. Accordingly, the court finds their Sixth Amendment rights to a speedy trial were not violated.