APPENDIX

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APPENDIX A

SUPREME COURT OF NEW JERSEY

No. A-9-2022

STATE OF NEW JERSEY
PLAINTIFF-RESPONDENT

v.

RAMI A. AMER
DEFENDANT-APPELLANT

Filed: July 3, 2023

Before: RABNER, Chief Justice, SOLOMON, PIERRE-LOUIS, WAINER APTER, FASCIALE, and PATTERSON, Justices, SABATINO, Judge (temporarily assigned).

OPINION

PATTERSON, Justice.

The Interstate Agreement on Detainers (IAD), codified in New Jersey as N.J.S.A. 2A:159A-1 to -15, is a congressionally sanctioned interstate compact addressing the transfer of a prisoner from the jurisdiction in which he is incarcerated to another jurisdiction in which he faces

criminal charges. When a jurisdiction in which the prisoner is subject to an "untried indictment, information or complaint" imposes a detainer against him, and the prisoner gives notice that he requests a transfer to that jurisdiction for a final disposition of his charges there, he must be "brought to trial within 180 days" of the receiving jurisdiction's receipt of that notice. N.J.S.A. 2A:159A-3(a).

That 180-day deadline for trial, however, may be extended in accordance with the compact's provisions. Pursuant to N.J.S.A. 2A:159A-6(a), that time period "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." In addition, the court with jurisdiction over the prisoner "may grant any necessary or reasonable continuance" for good cause, subject to conditions prescribed by the IAD. N.J.S.A. 2A:159A-3(a).

In this appeal, defendant Rami A. Amer requested to be transferred from a Pennsylvania correctional facility to New Jersey pursuant to the IAD to face criminal charges, thus commencing the 180-day period prescribed by N.J.S.A. 2A:159A-3(a). After his transfer, defendant filed two pretrial suppression motions, which remained pending for fifty-three days before they were denied. The trial court conducted jury selection 150 days after defendant's notice under the IAD, but the jury was not sworn and the evidence was not presented until several weeks later.

Following jury selection but before the jury was sworn, defendant moved to dismiss his indictment on the ground that the trial court violated his speedy trial rights under the IAD. He argued that he was not brought to trial within the IAD-mandated 180 days of his request for transfer and that there was no basis to toll the IAD's speedy trial requirements.

The trial court denied defendant's motion to dismiss. The court held that during the fifty-three days when defendant's suppression motions were pending, he was "unable to stand trial" within the meaning of N.J.S.A. 2A:159A-6(a), and the IAD's 180-day time period for defendant to be "brought to trial" was therefore tolled. The trial court also ruled that defendant was "brought to trial" when jury selection began within the 180-day period set by N.J.S.A. 2A:159A-3(a), and that his rights under the IAD were not violated. Defendant was tried before a jury and was convicted of four offenses, and he appealed his conviction and sentence.

The Appellate Division affirmed defendant's conviction but remanded the matter to the trial court for resentencing. *State* v. *Amer*, 471 N.J. Super. 331, 359 (App. Div. 2022). The appellate court held that in a colloquy with the trial judge during jury selection, defense counsel waived defendant's right to be brought to trial within 180 days of his notice pursuant to the IAD. It further concluded that defendant was "unable to stand trial" for purposes of N.J.S.A. 2A:159A-6(a) while his pretrial motions were pending; that N.J.S.A. 2A:159A-3(a)'s 180-day period for the commencement of trial was tolled during that period; and that the trial court had properly granted a continuance extending the deadline imposed by N.J.S.A. 2A:159A-3. *Id.* at 354.

We granted defendant's petition for certification, and we affirm as modified the Appellate Division's judgment. We do not concur with the Appellate Division that defense counsel waived defendant's rights under the IAD. We agree with the appellate court, however, that the IAD's 180-day time period was tolled during the pendency of defendant's pretrial motions, and that defendant was "brought to trial" when jury selection began prior to the

deadline set by N.J.S.A. 2A:159A-3(a). We therefore conclude that the trial court did not violate defendant's speedy trial rights under the IAD, and that the court properly denied defendant's motion to dismiss his indictment.

I.

A.

On November 21, 2016, defendant was arrested in Mantua Township in connection with seventeen burglaries committed over nine days in four Gloucester County municipalities. He was released from custody on December 12, 2016.

On December 24, 2016, defendant was arrested in Philadelphia in connection with a series of burglaries committed in Philadelphia County, Pennsylvania. On January 11, 2017 and January 23, 2017, defendant was charged in the Court of Common Pleas of Philadelphia County with seventeen counts of burglary, criminal trespass, criminal mischief, and other offenses.

In indictments returned on March 29, 2017 and April 26, 2017, a Gloucester County grand jury charged defendant with thirty offenses arising from the November 2016 burglaries. In a superseding indictment, defendant was charged with seventeen counts of third-degree burglary, five counts of third-degree theft, two counts of fourth-degree theft, two counts of fourth-degree attempted theft, and eleven counts of fourth-degree criminal mischief. Pursuant to N.J.S.A. 2A:159A-3(a), the Gloucester County Prosecutor's Office filed a detainer with Pennsylvania authorities on March 29, 2017.

On October 6, 2017, defendant pled guilty to the charges pending against him in Pennsylvania. He was

sentenced to serve between fifty-four months and ten years in prison and was incarcerated in a Pennsylvania state corrections facility.

On February 23, 2018, the State received defendant's notice under N.J.S.A. 2A:159A-3(a), in which he requested the prompt disposition of his New Jersey charges pursuant to the IAD. Defendant was transported from Pennsylvania to New Jersey the same day.

B.

By virtue of the State's receipt of defendant's notice under the IAD on February 23, 2018, the 180-day period set forth in N.J.S.A. 2A:159A-3(a) began to run. As the trial court acknowledged, at that point in time the IAD would have required that defendant be "brought to trial" no later than August 22, 2018.

On May 21, 2018, defendant filed two motions to suppress, one seeking suppression of evidence found in defendant's vehicle after his arrest on November 21, 2016, and the other seeking suppression of defendant's statement to police on the same date, based on an alleged violation of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). By order and opinion dated July 13, 2018,—fifty-three days after defendant filed the motions to suppress—the trial court denied both motions.

To "make preliminary determinations in this case so that jury selection and trial may proceed in the most expeditious manner," the trial court conducted a pretrial conference on July 23, 2018. The court ordered that jury selection would commence the following day.

During jury selection on July 24, 2018, the trial judge informed counsel that proceedings would continue the next day and that counsel should plan to be in court on

July 31, 2018. Anticipating a break in the trial because of the trial judge's obligations in pretrial detention matters and his planned vacation in August, as well as defense counsel's vacation scheduled for early September, the court notified counsel that after July 31, the trial would resume on September 13, 2018. Neither party objected to that proposed schedule.

However, when jury selection resumed the next day, defense counsel stated that the IAD required the trial to begin on August 22, 2018, and argued that defendant's rights under the IAD would be violated if, for example, the court began a trial but "put it off [for] six months." The State took the position that the trial had already commenced and that the IAD's deadline had been tolled during the pendency of defendant's suppression motions.

The court ruled that the trial had commenced for IAD purposes on the first day of jury selection, July 24, 2018, but acknowledged that defense counsel had preserved defendant's right to assert his speedy trial rights under the IAD.

Later in the day on July 25, 2018, the prosecutor asked the trial judge whether the State should be prepared to present witnesses "next Tuesday," referring to Tuesday, July 31, 2018. The trial judge commented that if he were the attorney trying the case, he "would say let's get the jury picked and then we'll start openings when we return." The court asked counsel to state their views on the schedule, and the following exchange between the trial judge and defense counsel took place:

> DEFENSE COUNSEL: I'm concerned about time, but what happens is there's no way that this trial finishes on Tuesday—
>
> THE COURT: No.

DEFENSE COUNSEL: —at this point, I do concede.

THE COURT: Right. I think it's best that we do that. I just think—I think what that will also help is prevent, hopefully, a lot of questions about the testimony that came in that, you know, on Tuesday, you know?

THE STATE: And then—

DEFENSE COUNSEL: And that would extend proceedings.

The trial court then entered an order stating that trial had commenced for IAD purposes on July 24, 2018, when jury selection began, and that the IAD's 180-day time period had been tolled between May 31, 2018, when defendant filed his suppression motions, and July 13, 2018, when those motions were resolved.

On July 31, 2018, the parties completed jury selection. The trial did not resume in August 2018.

In an August 28, 2018 letter, characterized as a motion to dismiss all charges and submitted pro se, defendant contended that the trial court had violated his right under the IAD to a trial—which, he claimed, included a final disposition of the case—by August 22, 2018. The trial court treated defendant's letter as a motion to dismiss his indictment.

In a written opinion and order, the trial court denied defendant's motion to dismiss. The court reasoned that defendant was "unable to stand trial" under N.J.S.A. 2A:159A-6(a) during the period between the filing and the disposition of his motions to suppress, and that those motions postponed the IAD's 180-day deadline from August 22 to October 14, 2018. The court also held that it had the authority to grant a continuance, on a showing of good cause, thus expanding the 180-day period set forth in the

IAD. The trial court further held that trial had commenced for IAD purposes at the start of jury selection on July 24, 2018, and that the court had accordingly met its obligations under the IAD.

When the trial resumed on September 13, 2018, defendant reserved the right to reopen the issue whether his rights under the IAD had been violated.

On October 4, 2018, the jury convicted defendant of third-degree burglary, third-degree theft by unlawful taking, fourth-degree criminal mischief, and fourth-degree attempted theft by unlawful taking. The jury acquitted defendant of the remaining charges. Defendant was sentenced to an aggregate sixteen-year term of incarceration, to run consecutively to the term of incarceration that he was serving for his Pennsylvania offenses.

C.

Defendant appealed his conviction and sentence. In his appeal, defendant challenged the trial court's ruling that his rights under the IAD were not violated by virtue of the timing of his trial.[1]

The Appellate Division affirmed defendant's convictions, vacated his sentence, and remanded for resentencing. *Amer*, 471 N.J. Super. at 359. The appellate court determined that the trial judge "properly denied defendant's motion to dismiss based on an IAD violation." *Id.* at 353. The court observed that N.J.S.A. 2A:159A-3(a)'s requirement that a prisoner transferred at his own request be brought to trial within 180 days is not absolute. It noted

[1] The other issues that defendant raised before the Appellate Division—the adequacy of the evidence presented to the jury, the trial court's denial of his motion to suppress evidence found in his vehicle, the admissibility of lay opinion testimony by a police officer, and the propriety of his sentence—are not before the Court in this appeal.

that the 180-day time period may be extended by a grant of a continuance on a showing of good cause, tolled because the prisoner subject to detainer is "unable to stand trial" for a portion of that period under N.J.S.A. 2A:159A-6(a), or nullified by the defendant's waiver of his rights under the IAD. *Id.* at 351-53.

The Appellate Division premised its determination on three separate grounds. First, the appellate court found that defendant waived his rights under the IAD "when his attorney conceded during jury selection on July 25, 2018 that the State should not be required to present witnesses to testify on the next scheduled court day of July 31." *Id.* at 353.

Second, the Appellate Division concurred with the trial court that "the period between the filing of defendant's suppression motions and their resolution several weeks later tolled the time under the IAD for defendant to be brought to trial." *Id.* at 354. Interpreting the IAD in conjunction with the time-exclusion provisions of the federal Speedy Trial Act, 18 U.S.C. § 3161, the Appellate Division viewed N.J.S.A. 2A:159A-6(a)'s extension of the IAD's 180-day deadline if the defendant is "unable to stand trial" to "'include those periods of delays caused by the defendant's own actions.'" *Id.* at 352 (quoting *United States* v. *Peterson*, 945 F.3d 144, 154 (4th Cir. 2019)).

Third, the Appellate Division acknowledged a trial court's authority to grant a continuance under the IAD for good cause and suggested that defendant's suppression motions constituted good cause for a continuance. *Id.* at 354. It declined to find an abuse of discretion in the trial

court's extension of the 180-day period based on the filing of those motions. *Ibid.*[2]

The Appellate Division therefore concluded that defendant was brought to trial in accordance with the IAD. *See Id.* at 350-53.

D.

We granted defendant's petition for certification, in which he challenged the Appellate Division's decision with respect to the IAD issue. 252 N.J. 89 (2022). We also granted the applications of the Association of Criminal Defense Lawyers of New Jersey (ACDL) and the Attorney General to participate in this appeal as amici curiae.

II.

A.

Defendant contends that the Appellate Division erred when it concluded that defense counsel waived defendant's right to be brought to trial within the IAD's time constraints. He argues that only a physical or mental disability renders a defendant "unable to stand trial" under N.J.S.A. 2A:159A-6(a), and that his motions to suppress did not toll the IAD's 180-day period during which the court was required to bring him to trial. Defendant contends that the trial court did not grant a continuance in accordance with the procedural requirements of N.J.S.A. 2A:159A-3(a).

B.

The State counters that, by filing his suppression motions and by virtue of his counsel's comments about the

[2] The Appellate Division did not reach defendant's contention that he was not "brought to trial" for purposes of N.J.S.A. 2A:159A-3(a) until September 13, 2018, when the jury was sworn and jeopardy attached.

schedule for the presentation of trial evidence, defendant implicitly agreed to the trial schedule set by the court. It contends that a defendant is "unable to stand trial" under N.J.S.A. 2A:159A-6(a) while his dispositive motions are pending before the trial court and that defendant's suppression motions therefore tolled the 180-day time period. The State argues that the trial court's finding of good cause for a continuance comported with the spirit of the IAD.

C.

Amicus curiae ACDL contends that defendant did not voluntarily waive his right to a trial within the time limitations set forth in the IAD. It asserts that defendant's suppression motions did not toll the 180-day period set forth in the statute, that the trial court did not grant a continuance on a showing of good cause, and that defendant's trial did not commence under the IAD until the jury was sworn on September 13, 2018.

D.

Amicus curiae the Attorney General argues that the trial court properly found that defendant was "unable to stand trial" under N.J.S.A. 2A:159A-6(a) while the court considered his motions to suppress and that defendant was "brought to trial" under 2A:159A-3(a) when jury selection commenced on July 24, 2018.

III.

A.

The IAD "is a congressionally sanctioned interstate compact within the Compact Clause, U.S. Const. Art. I, § 10, cl. 3." *Carchman* v. *Nash*, 473 U.S. 716, 719 (1985). It is a compact among the federal government, forty-eight states, the District of Columbia, Puerto Rico, and the

United States Virgin Islands. *Ibid.* The IAD was adopted in New Jersey in 1958 and is codified as N.J.S.A. 2A:159A-1 to -15. *See* L. 1958, c. 12.

The IAD was "drafted in response to a variety of problems arising out of the then unregulated system of detainers commonly used where one or more jurisdictions had charges outstanding against a prisoner held by another jurisdiction." *United States* v. *Ford*, 550 F.2d 732, 737 (2d Cir. 1977). As the Legislature found when it codified the IAD in New Jersey, "charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation." N.J.S.A. 2A:159A-1. The IAD reflects each party jurisdiction's policy "to encourage the expeditious and orderly disposition of [outstanding] charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints." *Ibid.*

Two provisions of the IAD are central to our analysis. The first is Article III of the IAD, codified as N.J.S.A. 2A:159A-3. That provision "gives a prisoner incarcerated in one State the right to demand the speedy disposition of 'any untried indictment, information or complaint' that is the basis of a detainer lodged against him by another State." *Carchman*, 473 U.S. at 718-19.[3] To that end, the

[3] Article IV of the IAD prescribes a separate procedure by which "the appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending" may request that "a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State" be transferred to that jurisdiction's temporary custody for trial. See N.J.S.A. 2A:159A-4(a). Under that provision for

IAD requires "[t]he warden, commissioner of corrections or other official having custody of" a prisoner to inform him about "any detainer lodged against him" and notify him of "his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based." N.J.S.A. 2A:159A-3(c). The compact also prescribes the method by which a prisoner provides to that official "written notice and request for final disposition," and requires the official to promptly forward the notice "to the appropriate prosecuting official and court by registered or certified mail, return receipt requested." *Id.* at (b).

Article III of the IAD requires that a prisoner

> be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint.

[*Id.* at (a).][4]

The IAD does not specify what it means to be "brought to trial" for purposes of that provision.

"[I]n the event that an action on the indictment, information or complaint on the basis of which the detainer has

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prosecutor-initiated transfer, the time period in which the prisoner must be brought to trial is 120 days, not 180 days as in Article III. *Id.* at (c).

[4] The 180-day period begins to run on the date that the written notice is delivered to the prosecutor in the receiving state, not the date on which the prisoner begins the process by requesting that an official of the jurisdiction in which he is in custody transmit the notice to the prosecutor. *See Fex* v. *Michigan*, 507 U.S. 43, 49 (1993) (noting that "delivery is the key concept"); *accord State* v. *Pero*, 370 N.J. Super. 203, 215 (App. Div. 2004).

been lodged is not brought to trial within the period provided in Article III or Article IV" of the IAD, "the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect." N.J.S.A. 2A:159A-5(c).

The court exercising jurisdiction over the matter, however, "may grant any necessary or reasonable continuance" based on "good cause shown in open court, the prisoner or his counsel being present." N.J.S.A. 2A:159A-3(a). Moreover, in certain circumstances, a defendant may be held to have waived his right to a speedy trial under the IAD by virtue of his counsel's consent to a trial date later than the date on which the 180-day time period expires. *New York* v. *Hill*, 528 U.S. 110, 112-18 (2000); *see also State* v. *Buhl*, 269 N.J. Super. 344, 357 (App. Div. 1994) (holding that a defendant who requested an adjournment of his trial until after the expiration of N.J.S.A. 2A:159A-3(a)'s 180-day period "waived his right to have the trial commence within 180 days of his request for final disposition of the pending charges").

The second IAD provision governing this appeal is Article VI, codified as N.J.S.A. 2A:159A-6. It states that "[i]n determining the duration and expiration dates" for purposes of Articles III and IV, "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." N.J.S.A. 2A:159A-6(a). Article VI further provides that no IAD provision or remedy made available by the compact "shall apply to any person who is adjudged to be mentally ill." *Id.* at (b).

The IAD "is a federal law subject to federal construction," *Carchman*, 473 U.S. at 719, and the interpretation

of its terms "presents a question of federal law," *State* v. *Pero*, 370 N.J. Super. 203, 214 (App. Div. 2004) (quoting *Cuyler* v. *Adams*, 449 U.S. 433, 442 (1981)). Accordingly, we look to decisions of the United States Supreme Court and federal courts for guidance in interpreting the IAD. *Ibid.*

B.

We first consider the Appellate Division's holding that defense counsel waived defendant's rights under the IAD by virtue of his comments to the court about trial scheduling on July 25, 2018. *See Amer*, 471 N.J. Super. at 353.

In *Hill*, the United States Supreme Court observed that "no provision of the IAD prescribes the effect of a defendant's assent to delay on the applicable time limits." 528 U.S. at 114. The Court stated, however, that in accordance with general principles of waiver in criminal cases, "courts have agreed that a defendant may, at least under some circumstances, waive his right to object to a given delay under the IAD, although they have disagreed on what is necessary to effect a waiver." *Ibid.* The Supreme Court held in *Hill* that the defendant waived his speedy trial rights under the IAD when he agreed to a trial date after the conclusion of the 180-day period for a defendant to be brought to trial under Article III. *Id.* at 113-18; *see also State* v. *Miller*, 277 N.J. Super. 122, 128-30 (App. Div. 1994) (holding that a defendant who pled guilty and then requested, pending sentencing, a transfer back to the jurisdiction from which he had been transferred had waived his rights under the IAD by making the request to return to the original jurisdiction).

Here, the Appellate Division found a "waiver in open court" based on what the appellate court viewed to be defense counsel's concession on July 25, 2018, that the State

should not be required to present witnesses on the next trial date, July 31, 2018, in order to avoid questions from the jury about any testimony presented on that date when the trial resumed in September 2018. *Amer*, 471 N.J. Super. at 353-54. As the trial transcript reflects, however, it was the trial judge, not defense counsel, who expressed a preference for delaying the State's presentation of testimony until trial resumed in September, given the potential for juror questions about such testimony when the trial resumed after a long delay. Defense counsel conceded only that the trial could not be completed on July 31, 2018—nothing more. As he had in the course of pretrial proceedings, defense counsel consistently asserted defendant's rights under the IAD during trial.

Accordingly, we respectfully disagree with the Appellate Division's view that defense counsel waived defendant's rights under the IAD. Defendant's argument that the trial court violated his speedy trial rights under the IAD was therefore preserved for appeal.

C.

We next review the Appellate Division's holding that the 180-day period prescribed by the IAD's Article III(a) was tolled while defendant's motions to suppress were pending before the trial court, because defendant was "unable to stand trial" under IAD Article VI(a) during that period. *See id.* at 354. We consider whether Congress intended the term "unable to stand trial" in Article VI(a) to denote only prisoners whose physical or mental condition renders them unable to stand trial, or whether it envisioned that the term would apply to a broader range of settings.

In that inquiry, we apply familiar principles of statutory construction. Our "overriding goal" is to determine

Congress's intent, and our analysis "thus begins with the language of the statute," affording the statute's words "their ordinary and accustomed meaning." *State* v. *Hudson*, 209 N.J. 513, 529 (2012); *see also* N.J.S.A. 1:1-1. "If a plain-language reading of the statute 'leads to a clear and unambiguous result, then our interpretive process is over. Only if there is ambiguity in the statutory language will we turn to extrinsic evidence.'" *State* v. *Hupka*, 203 N.J. 222, 232 (2010) (quoting *Richardson* v. *Bd. of Trs.*, PFRS, 192 N.J. 189, 195-96 (2007)). We refrain from adding "a qualification that has been omitted from the statute" by its drafters. *DiProspero* v. *Penn*, 183 N.J. 477, 493 (2005).

Here, Congress could have expressly stated that the phrase "unable to stand trial" as used in Article VI applies only to circumstances involving a physical or mental incapacity to stand trial. It did not do so. Instead, Congress chose general language in Article VI(a), without limiting the term "unable to stand trial" to settings involving prisoners with debilitating physical or mental conditions. *See* N.J.S.A. 2A:159A-6(a). We decline to impose limiting language that appears nowhere in the IAD.

Defendant's argument that nothing short of physical or mental incapacity satisfies the "unable to stand trial" language of N.J.S.A. 2A:159A-6(a) is further undermined by subsection (b) of that statute, which provides that no IAD provision or remedy made available by the interstate compact applies "to any person who is adjudged to be mentally ill." N.J.S.A. 2A:159A-6(b). It simply does not make sense that Congress would limit the "unable to stand trial" language of Article VI(a) to prisoners whose physical or mental conditions render them unable to stand trial, but entirely exclude any prisoner "adjudged to be mentally ill" from the IAD. *See ibid.* We conclude that the

phrase "unable to stand trial" was not intended to be given the narrow construction urged by defendant.

Our plain-language reading of N.J.S.A. 2A:159A-6(a) is underscored by federal appellate case law. The United States Supreme Court has yet to directly address the precise question whether the 180-day time period of Article III of the IAD is tolled during the pendency of pretrial motions.[5] As the Appellate Division noted in this appeal, however, a clear majority of federal courts of appeals that have considered whether pretrial defense motions render a defendant "unable to stand trial" have answered that question in the affirmative. *See Amer*, 471 N.J. Super. at 352 n.6.

In *Peterson*, the Fourth Circuit held that the 120-day time limit prescribed for IAD Article IV's prosecutor-initiated transfer procedure is tolled while the defendant's pretrial motions remain pending. 945 F.3d at 155. The court reasoned that the IAD's "unable to stand trial" language incorporates "'those periods of delays caused by the defendant's own actions,'" and that "a defendant's own actions include 'periods of delay occasioned by . . . motions filed on behalf of [a] defendant.'" *Id.* at 154-55 (alteration and omission in original) (first quoting *United States* v. *Ellerbe*, 372 F.3d 462, 468 (D.C. Cir. 2004); and then quoting *United States* v. *Nesbitt*, 852 F.2d 1502, 1516 (7th Cir. 1988)). As the Fourth Circuit observed, such an approach not only harmonizes the IAD with the federal Speedy Trial Act, but "also avoids creating an incentive for defendants to saddle district courts with innumerable

[5] In *Hill*, the Supreme Court observed that it was "uncontested" that the IAD's 180-day time limit had been tolled during the pendency of several motions filed by the defendant. 528 U.S. at 112.

pretrial motions in hopes of manufacturing delays and waiting out the [IAD]'s 120-day clock." *Id.* at 155.

Other circuit courts of appeals agree. In *Ellerbe*, the D.C. Circuit noted that Article VI of the IAD "expressly directs that the period be tolled 'whenever and for as long as the prisoner is unable to stand trial,' 18 U.S.C. app. 2, § 2, art. VI(a), which courts have construed to include those periods of delays caused by the defendant's own actions." 372 F.3d at 468. The Second Circuit reached the same conclusion in *United States* v. *Cephas*, noting its previous holding that the IAD excludes "all those periods of delay occasioned by the defendant." 937 F.2d 816, 819 (2d Cir. 1991) (quoting *United States* v. *Roy*, 771 F.2d 54, 59 (2d Cir. 1985)). In *Nesbitt*, the Seventh Circuit held "that both the district court's grant of a continuance . . . as well as the periods of delay occasioned by the multiple motions filed on behalf of the defendant" tolled the running of the time periods set forth in Articles III and IV of the IAD. 852 F.2d at 1516. The Ninth Circuit held in *United States* v. *Johnson* that fifteen days of pretrial delay due to the defendant's motions tolled the IAD's time periods, just as it tolled the time periods set forth in the federal Speedy Trial Act. 953 F.2d 1167, 1172 (9th Cir. 1992); *see also United States* v. *Collins*, 90 F.3d 1420, 1427 (9th Cir. 1996). The Eighth Circuit similarly held in *United States* v. *Sawyers* that pretrial motions tolled the time periods for the IAD. 963 F.2d 157, 162 (8th Cir. 1992). And in *United States* v. *Walker*, the First Circuit held that IAD Article IV's 120-day period was tolled during the pendency of the defendant's motion to suppress and other motions. 924 F.2d 1, 5 (1st Cir. 1991).[6]

[6] The Fifth and Sixth Circuits have construed the IAD's "unable to stand trial" language more narrowly. In *Birdwell* v. *Skeen*, the Fifth Circuit concluded that the phrase "unable to stand trial" in Article VI of the

Moreover, the courts of several of our sister states concur that a defendant is "unable to stand trial" pursuant to the IAD's Article VI(a) while his pretrial motions are pending. *See*, *e.g.*, *State* v. *Brown*, 953 A.2d 1174, 1181 (N.H. 2008) (holding that reasonable delay during the pendency of a defendant's pretrial motion tolls the IAD's time periods); *Diaz* v. *State*, 50 P.3d 166, 167-68 (Nev. 2002) (recognizing that a defendant's motion to dismiss tolls the IAD's time periods); *Commonwealth* v. *Montione*, 720 A.2d 738, 741 (Pa. 1998) (finding persuasive "the analysis and interpretation of the courts that held that delay occasioned by the defendant is excludable" from the IAD's time limitations); *State* v. *Batungbacal*, 913 P.2d 49, 56 (Haw. 1996) (concurring with the majority of "federal courts that have construed the phrase 'unable to stand trial' as including within the [A]rticle VI tolling provision all those periods of delay occasioned by the defendant, including delays attributable to motions filed on behalf of the defendant").

We find the reasoning adopted by those courts to be compelling. Those federal and state decisions recognize that as a practical matter, a criminal trial ordinarily will not proceed while a pretrial motion is pending. Indeed, our criminal court rule addressing pretrial proceedings

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IAD "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] in 1970. We decline to expand that phrase to encompass legal inability due to the filing of motions or requests." 983 F.2d 1332, 1340-41 (5th Cir. 1993) (footnotes omitted). And in *Stroble* v. *Anderson*, the Sixth Circuit held that absent a showing that the defendant "was physically or mentally disabled," the district court had erred when it found the defendant "unable to stand trial" under Article VI(a) while his motions were pending. 587 F.2d 830, 838 (6th Cir. 1978).

provides that "[a] motion made before trial shall be determined before the trial memorandum is prepared and the trial date fixed, unless the court, for good cause, orders it deferred for determination at or after trial." R. 3:10-2(b). A trial court's grant or denial of a pretrial motion to suppress such as the motions at issue here may have a profound—if not dispositive—impact on a defendant's prosecution and any plea negotiations. While the defendant awaits disposition of his suppression motions, he is "unable to stand trial" for purposes of N.J.S.A. 2A:159A-6(a).

We do not construe N.J.S.A. 2A:159A-6(a) to indefinitely toll the IAD's speedy trial provisions if a defendant subject to the interstate compact files a pretrial motion, however. Rule 3:25-4(i)(3), a provision of our court rules governing excludable time for speedy trial purposes following the Criminal Justice Reform Act (CJRA), N.J.S.A. 2A:162-15 to -26, provides that "[t]he time resulting from the filing of a motion by either the prosecution or defendant" is "excluded in computing the time in which a case shall be indicted or tried," subject to the following limitations:

> (A) If briefing, argument, and any evidentiary hearings required to complete the record are not complete within 60 days of the filing of the notice of motion, or within any longer period of time authorized pursuant to R. 3:10-2(f), any additional time shall not be excluded.
>
> (B) Unless the court reserves its decision until the time of trial, if the court does not decide the motion within 30 days after the record is complete, any additional time during which the motion is under advisement by the court shall not be excluded unless the court finds there are extraordinary circumstances affecting the court's ability to decide the motion, in

> which case no more than an additional 30 days shall be excluded.
>
> (C) If the court reserves its decision on a motion until the time of trial, the time from the reservation to disposition of that motion shall not be excluded. When the court reserves a motion for the time of trial, the court will be obligated to proceed directly to voir dire or to opening statements after the disposition of the motion.

[R. 3:25-4(i)(3)(A) to (C)].

Rule 3:25-4(i)(3) strikes an appropriate balance, in the CJRA context, between a confined defendant's interest in a speedy trial and the need to afford the court sufficient time to develop a thorough record and carefully decide pretrial motions. We consider the same limitations on tolling of time periods due to the pendency of pretrial motions to be appropriate in an IAD case.

Accordingly, a defendant who has filed a pretrial motion in an IAD case should be considered "unable to stand trial" under N.J.S.A. 2A:159A-6(a) during the pendency of a pretrial motion, with an important caveat: N.J.S.A. 2A:159A-3(a)'s 180-day trial deadline should not be tolled during any portion of the period in which the defendant's motion was pending that would not be considered excludable time for speedy trial purposes under Rule 3:25-4(i)(3).[7] We impose that limitation to ensure that defendants in cases governed by the IAD will not be subjected to inordinate trial delays when they file motions with the trial court.

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[7] As in the speedy trial setting under Rule 3:25-4(i)(3)(B), a finding of "extraordinary circumstances affecting the court's ability to decide the motion" in an IAD case warrants the addition of only 30 days to the time period for a defendant to be brought to trial.

D.

We briefly address the question whether a defendant is "brought to trial" for purposes of N.J.S.A. 2A:159A-3(a) when jury selection commences, as the State argues and the Appellate Division determined, or when the jury is sworn and jeopardy attaches, as defendant contends.

Although the United States Supreme Court and the federal courts of appeals have not yet addressed that question, appellate courts in two of our sister states that are parties to the IAD have concluded that a defendant is "brought to trial" under the IAD when jury selection begins.

In *State* v. *Bjorkman*, the New Hampshire Supreme Court rejected the defendant's argument that, because jeopardy does not attach until the jury is empaneled and sworn, a defendant is not "brought to trial" under the IAD until the jury is sworn and the State presents evidence. 199 A.3d 263, 267-69 (N.H. 2018). Citing the Fourth Circuit's interpretation of the federal Speedy Trial Act in *United States* v. *Odom*, 674 F.2d 228, 231 (4th Cir. 1982), the New Hampshire Supreme Court reasoned that jury selection is part of the trial process, and that the concerns underlying double jeopardy principles are distinct from the interests addressed by the IAD. *Bjorkman*, 199 A.3d at 267-69. Addressing the defendant's concern about the prospect of a long delay between jury selection and the presentation of evidence, the New Hampshire Supreme Court stated that "incident to [its] holding is [the] understanding that prosecutors and courts will act in good faith to ensure the speedy progression of all phases of trial," and it noted the State's burden to demonstrate compliance with the IAD. *Id.* at 269.

In *Bowie* v. *State*, the Court of Criminal Appeals of Oklahoma similarly held that "for purposes of the IAD, a trial commences when the jury selection begins," given that "[j]ury selection is an intrinsic part of the trial process." 816 P.2d 1143, 1147 (Okla. Crim. App. 1991).

We find those courts' reasoning to be persuasive. Jury selection is not a pretrial proceeding, but a critical stage of the trial itself. *See State* v. *Singletary*, 80 N.J. 55, 62 (1979) ("Jury selection is an integral part of the process to which every criminal defendant is entitled."); *accord State* v. *W.A.*, 184 N.J. 45, 54 (2005). Federal decisions consistently hold that under the Speedy Trial Act, trial begins with voir dire. *See*, *e.g.*, *United States* v. *Brown*, 819 F.3d 800, 810 (6th Cir. 2016) ("For the purposes of the Speedy Trial Act, trial generally commences when voir dire begins."); *Gov't of Virgin Islands* v. *Duberry*, 923 F.2d 317, 320 (3d Cir. 1991) ("While the statute does not define 'commence,' other courts of appeals have held that for Speedy Trial Act calculations, a trial commences when voir dire begins and we will follow that rule."); *United States* v. *Fox*, 788 F.2d 905, 908 (2d Cir. 1986) ("Trial normally 'commences' for purposes of the [Speedy Trial] Act with the voir dire of the jury.").

The speedy trial provision of the CJRA explicitly specifies that "a trial is considered to have commenced when the court determines that the parties are present and directs them to proceed to voir dire or to opening argument, or to the hearing of any motions that had been reserved for the time of trial." N.J.S.A. 2A:162-22(2)(b)(i); *accord State* v. *D.F.W.*, 468 N.J. Super. 422, 435 (App. Div. 2021).

We do not view the law of double jeopardy to control here; rather, we concur with the New Hampshire Supreme Court's reasoning in *Bjorkman* that "the protections afforded defendants and the goals achieved by the

IAD are distinct from those covered by double jeopardy principles." 199 A.3d at 268. As a general rule, we view a defendant to be "brought to trial" under N.J.S.A. 2A:159A-3(a) when jury selection begins.

That general rule, however, does not authorize trial courts to schedule jury selection far in advance of the trial's remaining stages in an effort to circumvent the IAD. We appreciate that scheduling conflicts or witness availability issues, among other considerations, may prevent a trial court from continuing a trial immediately after a jury is selected, but we caution trial judges to avoid prolonged recesses between voir dire and the presentation of evidence when the IAD's speedy trial provisions apply.

E.

We apply the principles stated above to this appeal.

When defendant provided notice to the State of his request for the disposition of his New Jersey offenses on February 23, 2018, N.J.S.A. 2A:159A-3(a) required that he be "brought to trial" by August 22, 2018. Defendant filed his suppression motions on May 21, 2018. The trial court denied the motions fifty-three days later, on July 13, 2018. During those fifty-three days, defendant was "unable to stand trial" under N.J.S.A. 2A:159A-6(a). Accordingly, the 180-day period prescribed in N.J.S.A. 2A:159A-3(a) was tolled during those fifty-three days, and the final deadline for defendant to be "brought to trial" shifted to October 13, 2018. Defendant was "brought to trial" under N.J.S.A. 2A:159A-3(a) when jury selection began on July 24, 2018. He was convicted on October 4, 2018.

Defendant was thus "brought to trial" well in advance of the deadline set by N.J.S.A. 2A:159A-3(a), as tolled pursuant to N.J.S.A. 2A:159A-6(a).[8] We concur with the Appellate Division that the trial court did not violate defendant's rights under the IAD, and we affirm the Appellate Division's determination that the court properly denied defendant's motion to dismiss his indictment.

IV.

The judgment of the Appellate Division is affirmed as modified.

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[8] In light of our ruling, we need not reach the question whether the trial court granted a "necessary or reasonable continuance" based on "good cause shown in open court, the prisoner or his counsel being present." N.J.S.A. 2A:159A-3(a). We remind trial courts, counsel, and parties that any such continuance must be premised on a showing of good cause and must be granted in open court, with the defendant or his counsel present. *See ibid.*

APPENDIX B

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

No. A-3047-18

STATE OF NEW JERSEY,
PLAINTIFF-RESPONDENT,

v.

RAMI A. AMER,
DEFENDANT-APPELLANT

Filed: March 31, 2022

Before: MESSANO, ROSE and ENRIGHT, Judges.

OPINION

ENRIGHT, Judge.

Defendant Rami A. Amer appeals from his February 11, 2019 convictions stemming from a series of "smash and grab" burglaries. We affirm defendant's convictions and remand for resentencing pursuant to *State* v. *Torres*, 246 N.J. 246 (2021).

I.

Background

During the period between November 12, and November 21, 2016, multiple burglaries occurred in municipalities throughout Gloucester County. The modus operandi was essentially the same. The suspect smashed the glass of a storefront, entered the business, and removed cash found on the premises. Some of the burglaries were captured on surveillance footage while in progress. Although the quality of the footage neither permitted identification of the suspect nor definitive identification of the light blue minivan the suspect used when committing the offenses, some footage captured images of the hooded, masked suspect wearing gloves and using a hammer to smash the glass, and displayed a damaged hubcap on the suspect's vehicle.

On November 19 at approximately 2:30 a.m., defendant was stopped by an officer from the Harrison Township Police Department. Prior to the stop, the officer saw one of the vehicle's headlights was out, observed defendant driving partially over the white line, and wanted to "double check[] on why [defendant] was in the area" that late at night. Defendant was driving a light blue Chrysler Town and Country minivan with Pennsylvania plates and had turned into a local shopping center. He received a ticket for the broken headlight and was permitted to leave without further incident.

The next day, officers from the same police department were asked to investigate burglaries committed at a local pet supply store and a spa. The businesses were situated in the same plaza where defendant was pulled over for the motor vehicle stop. Color surveillance footage from the pet supply store showed a light blue minivan with a

broken hubcap drive past the store at around 7:10 a.m., and a masked and hooded suspect wearing gloves shatter the storefront entrance with a hammer.

The police investigated whether there were any light blue minivans in their system that matched the one used during the burglaries. Their search revealed defendant's motor vehicle stop from November 19 and that his minivan was registered to Laila Amer, defendant's wife. Accordingly, the police drove past defendant's nearby residence, and found a light blue minivan parked in his driveway. The minivan was missing part of a hubcap.

On November 21, 2016, officers in Harrison Township responded to a complaint of another burglary, this time at a local bagel shop. The owner of the shop reported he received an alert shortly after 3:00 a.m. and when he went to the scene, he saw the glass front door was smashed. Surveillance footage obtained from a nearby bank captured the image of a light blue Chrysler minivan at the scene as the burglary was in progress.

That same morning, officers from the Mantua Township Police Department received a report of an erratic driver on Bridgeton Pike, the same thoroughfare where many of the burglaries had occurred. The description of the erratic driver's car purportedly matched the description of the minivan seen on surveillance video from recent burglaries. The police found the driver, later identified as defendant, in a parking lot on Bridgeton Pike. He was alone and sitting in the driver's seat; the rear passenger side hubcap on his car was broken. Defendant was removed from the vehicle and placed in a police car.

Although officers from Mantua Township stopped defendant, Detective Adam McEvoy, from the Harrison

Township Police Department, joined them at the scene after learning the suspect's car might match the description of the minivan associated with burglaries in the area. Detective McEvoy spoke to defendant while defendant was seated in the police car and given his *Miranda*[1] rights. The detective testified at trial that defendant asked him to retrieve his wallet and phone from inside his car, and Detective McEvoy complied with the request. When he went to pick up defendant's items, the detective saw a red hammer inside the minivan, purportedly matching the description of the hammer used by the suspected burglar as seen on surveillance footage. He also saw a large number of loose coins inside the minivan. The detective secured the hammer and loose change. Once defendant was removed from the minivan, the police also discovered shards of glass on the soles of defendant's work boots.

Defendant was transported to the Harrison Township Police Department for a custodial interview and when he arrived, officers observed a cut on his right arm. Defendant agreed to waive his *Miranda* rights and speak to members of various police departments who inquired about burglaries committed in their municipalities. The interview lasted several hours, during which defendant was afforded a break. He did not confess to any of the burglaries and finally advised he was unwilling to answer more questions.

While in custody, defendant executed a consent to search form for the minivan. Additionally, his wife signed another form authorizing the search and was present for the search. During the search, the police found black gloves matching those seen on surveillance video of some

[1] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

of the burglaries, as well as black clothing, a flashlight, and shards of glass.

Several months later, separate indictments were issued against defendant for his alleged role in the "smash and grab" burglaries, as well as related offenses; in June 2018, he was charged under a superseding indictment with seventeen counts of third-degree burglary, N.J.S.A. 2C:18-2(a)(1), five counts of third-degree theft, N.J.S.A. 2C:20-3(a), two counts of fourth-degree theft, N.J.S.A. 2C:20-3(a), two counts of fourth-degree attempted theft, N.J.S.A. 2C:5-1(a)(1), and 2C:20-3(a), and eleven counts of fourth-degree criminal mischief, N.J.S.A. 2C:17-3(a)(1), for a total of thirty-seven counts.

II.

Pretrial Motions and the Commencement of Trial

While defendant's case in New Jersey was pending, he began serving a state prison sentence in Pennsylvania for similar offenses. He requested disposition of his charges in New Jersey under the Interstate Agreement on Detainers (IAD), N.J.S.A. 2A:159A-1 to -15; the State of New Jersey received his request by February 23, 2018.

In May 2018, the trial judge in the present matter issued a scheduling order, directing any suppression motions related to the November 2016 warrantless search be filed within two days. The judge further ordered any other motions and supporting briefs be filed no later than June 1. The defense filed two suppression motions on May 21, but its corresponding letter briefs were submitted after the deadline fixed by the court. One such brief was filed electronically on the day of the suppression hearing and referenced a search warrant and a canine sniff, neither of which were implicated in this matter. In any event, defendant's filings confirmed he sought suppression of the

items seized from his person and his minivan, as well as statements made during his custodial interview.

On June 29, 2018, the judge proceeded with the suppression hearing. The State called one witness—the Woolwich Township police officer who conducted the search of defendant's minivan in the presence of defendant's wife and was present for a portion of defendant's custodial interview. The officer confirmed that after defendant's arrest, he was given his *Miranda* rights, was "very cooperative," and agreed to the search of the minivan. The officer also stated defendant's wife consented to the search.

In his closing argument, defense counsel noted that he presented the court with "twin motions of . . . *Miranda* and consent to search. And . . . they're intertwined[.]" Defendant's attorney did not dispute defendant was Mirandized at the commencement of his custodial interview, but contended defendant was "tired" during his interview. The judge responded to counsel's remarks, stating:

> This was a motion that you filed to challenge the search . . . that comes from the consent forms plus [defendant's] *Miranda* [rights] with regard to the statement. It's all right there apparently on the video but no one ever gave it to the [c]ourt. Your argument is that . . . he is so tired[,] that he is so sleepy, so groggy, so fatigued that his will is overborne and yet you don't give me the video to assess that.

Defense counsel continued his argument, stating:

> [W]ith regard to the consent to search[,] we . . . have . . . [defendant] at some point as he's getting more and more tired and . . . he's signing this consent to search and he waives his right to be present at execution [of

> the search], of course he can withdraw his consent at any time even though he is not present.
>
> We also have [defendant's wife]. And we hear . . . she is eager to get her car back . . . and so eager to get her car back she signs the consent to search and dutifully waits while they search . . . the vehicle.
>
> . . . .
>
> She doesn't do it knowing the circumstances of the situation and we don't know whether [defendant's wife] would have consented to that search . . . if she had been told something about what her husband was facing here . . . .
>
> And so, . . . defense also asserts that that consent to search is invalid and asks that the glove and all the photographs that were taken including of loose change and all that . . . be suppressed as well.

At no time during the hearing did defense counsel contest the State's recitation of facts in its June 1, 2018 brief that Detective McEvoy seized items in plain view when defendant asked him to retrieve items from the minivan.

At the conclusion of the hearing, the judge rendered a decision from the bench, finding,

> with regard to the search[,] there's no question that it was a valid search. The consent came from both the defendant as well as the wife. They signed the consent forms. . . . [T]here's nothing to suggest that the defendant was . . . in such a condition that he didn't . . . understand the consent form, that he . . . was unable to sign the form [because] he was so fatigued or otherwise. He waived his right to be present.
>
> The wife signed the consent form. She did not waive her right to be present. She was present during the

> search. There's nothing to suggest that the consent here was invalid in any way. So the search of the van is valid based upon the consent . . . .
>
> . . . I have nothing before me to suggest that the defendant's will was overborne in any way with regard to the statement. The witness testified that the defendant was very cooperative. He did appear tired, did appear fatigued, but without the benefit of reviewing the video to determine . . . whether or not he is completely incoherent because of fatigue or otherwise . . . there's nothing present before me to suggest that the defendant was of such a condition that he was incapacitated or incapable [in] any way to make a valid waiver of his rights.
>
> . . . .
>
> So . . . his waiver of his *Miranda* rights seems to be knowing and voluntarily made . . . . So . . . the motion to suppress the statement is denied. The motion to suppress the search is denied.

On July 13, 2018, the judge issued a written decision, supplementing his reasons for denying the suppression motions. Preliminarily, he commented in a footnote that "[d]efense counsel filed a notice of motion for both motions to suppress. However, defense counsel has only submitted a written brief in support of the motion to suppress [d]efendant's statement to police. The State has submitted briefs in opposition to both motions."[2]

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[2] The record reflects defense counsel did not alert the judge to the late electronic filing of his June 29 letter brief, and the judge remained unaware of this filing until well after he issued his July 13 written opinion. Nonetheless, following his review of the untimely brief, the judge notified counsel that its contents did not alter the court's "position that the evidence is not suppressed and the [suppression] motion's denied."

The judge found that when defendant was arrested and removed from his vehicle, he asked Detective McEvoy to enter the minivan to retrieve defendant's wallet and cell phone. Further, the judge noted that when the detective accommodated defendant's request, he inadvertently discovered a red hammer and large amounts of coins "in plain view inside the vehicle." Additionally, the judge found Detective McEvoy recognized the red hammer in defendant's car was similar to the hammer seen on surveillance videos of the "smash and grab" burglaries recently committed; the detective was aware the hammer was found in a blue minivan with a rear hubcap missing, just like the van seen on surveillance footage, and the amount of coins Detective McEvoy spotted was consistent with the money stolen from the cash drawers at the businesses targeted by the suspect. After highlighting the requirements for a plain view exception to the warrant requirement, under *State* v. *Mann*, 203 N.J. 328, 341 (2010), the judge found the detective properly seized the hammer and coins under that exception.

Additionally, citing *State* v. *Johnson*, 68 N.J. 349, 353-54 (1975), the judge confirmed the search of defendant's vehicle was valid under the "recognized exception to the warrant requirement" of consent. The judge found because "[d]efendant and his wife completed consent to search forms prior to the search of the vehicle[,]" defendant's wife "was present for the entire search[,]" and "consent was voluntarily given[,]" the search was lawful.

Further, the judge found "the State proved beyond a reasonable doubt that [d]efendant's decision to waive his *Miranda* rights was knowing and intelligent." The judge specifically rejected defendant's argument that his waiver was "not knowing and intelligent because [defendant] was sleep deprived at the time he waived his rights." Instead,

the judge found "[d]efendant's conduct during the interview demonstrated . . . the alleged lack of sleep did not affect his understanding of his *Miranda* rights," because he was "coherent during the course of the interview and able to make informed, deliberate decisions," including the decision to "assert[] his right to terminate the interrogation, which was honored." Citing *State* v. *Nyhammer*, 197 N.J. 383, 401 (2009), the judge concluded under the "totality of the circumstances[,]" including defendant's age and prior involvement with law enforcement, as well as the fact defendant "never confessed to any of the alleged crimes[,]" defendant's will was not "overborne."

Four days after he issued his supplemental suppression opinion, the judge executed a Trial Management Order, directing the parties to appear for a pretrial conference on July 23 and notifying counsel he "anticipate[d] selecting a jury" that morning "and opening thereafter." The order also stated "[c]ounsel must have witnesses available so as to utilize the entire trial day."

On July 23, the judge conferenced the matter with counsel, and jury selection was rescheduled to the next day. The judge noted jury selection would continue the following week, but the court would need to "take a break and then pick back up in September." Neither defense counsel nor the State objected to the timeframes outlined by the court. Also on July 23, defendant filed a motion in limine, asking the judge to bar the State from eliciting certain testimony during the trial.

Jury selection began on July 24, 2018. Later that day, the judge informed counsel that jury selection would continue the next day and the parties would return to court again on July 31. Because he anticipated a break in the proceedings in August, due to his calendar obligations and vacation schedule, and defense counsel's vacation plans in

early September, the judge also advised counsel they should expect to resume the case on September 13. Again, neither the State nor defense counsel objected to the dates provided by the court.

But on July 25, as jury selection continued, defense counsel informed the court that he and defendant discussed "the IAD" and defendant had expressed concern that "in August, we don't have trial." Counsel added:

> And I did go over it, you know, I understand [a] jury trial must commence within 180 days of the defendant's demand.
>
> . . . .
>
> . . . I just wanted to make a record . . . . I just note that I have availability for the month of August . . . . I have the days where this could be, I submit, accomplished in time.
>
> . . . And so, we're talking about delay—I looked at it this way, Your Honor is commencing this within 180 days, and so, that part is met. And then I thought . . . well what if a [c]ourt commenced the trial and then put it off, like six months and then didn't continue the trial . . . that would be violative and undue delay, unnecessary delay.
>
> [(Emphasis added).]

The assistant prosecutor countered:

> I think the IAD is very clear that trial must commence before the IAD date. We are commencing the trial, we're picking a jury as we're currently sitting. We still have another day in this month to continue . . . . The defense filed two motions, the dates between that motion being heard and the previous hearing, those

> should be excluded from the 180 days, which would put us well into September.
>
> Therefore, even if we didn't . . . commence until September, we would be commencing at the proper time.

The judge responded:

> [W]e commence[d] trial within 180 days and this is not the situation that . . . the defense . . . suggested . . . as a possibility for a six-month delay. The [c]ourt is commencing, getting it started. It is unavailable in August. It has a specific assignment in August that has to be achieved. The assignment is criminal justice reform where it does not permit trial days within that month.
>
> I do have vacation in that month. We realized yesterday that the defense has a vacation in early September. . . . The case cannot be tried when there's a dispositive motion that's pending. It has to be resolved. I think we did resolve it as expeditiously as we could, so I will look at that.
>
> But in any event, we commenced the trial within the statutory framework of the IAD . . . .
>
> So, we have begun the trial. There is going to be a disruption. I'll look into the question of tolling and that may provide the dates in question.
>
> . . . .
>
> Certain motions may call upon . . . that [IAD] clock to be tolled, . . . because if they're dispositive motions, the case can't be tried until they're briefed and heard. And I think both counsel have a right to be thorough in their review of the issue and brief it so the [c]ourt is well-informed in the argument . . . [a]nd we, in fact, did that.

> So, I'll consider, I'll look at the issue of exclusion, but within the confines of the IAD, we've started the case, we commenced it with 180 days, and I don't see that there's an IAD violation.

Later that day, the judge asked if either attorney had any issues that needed to be addressed. The assistant prosecutor asked, "should the State be ready to open, and more importantly, have witnesses for next Tuesday [July 31], or are we just going to finish jury selection?" The judge stated:

> If it were me trying the case, I would say let's get the jury picked and then we'll start openings when we return. You'll have a witness and a half, two witnesses, . . . and you'll be asking the jury to remember what they said . . . over . . . a month or so, so that would be what I'd be asking. But what do you think?

The following exchange then occurred between defense counsel, the judge, and the assistant prosecutor:

> DEFENSE COUNSEL: I'm concerned about time, but what happens is there's no way that the trial finishes on Tuesday—
>
> JUDGE: No.
>
> DEFENSE COUNSEL: —<u>at this point, I do concede. [D]o that. I just think—I think what that will also help is prevent, hopefully, a lot of questions about the testimony that came in . . . on Tuesday, you know?</u>
>
> ASSISTANT PROSECUTOR: And then—
>
> DEFENSE COUNSEL: And that would extend proceedings.
>
> JUDGE: Read backs and all that kind of stuff.
>
> [(Emphasis added).]

In response to a follow-up question by the assistant prosecutor, the judge stated it was not his intention to swear in the jury once the selection process concluded because jurors could be lost over the upcoming break. In fact, he stated, "in that time period, who knows? We could have a problem with one or more [jurors]."

The following day, the judge issued a six-page opinion, confirming he understood a "prisoner must 'be brought to trial within 180 days'" of the State receiving a prisoner's request for disposition under the IAD. The judge determined "New Jersey authorities received [d]efendant's request to address his untried matter(s) in New Jersey" on February 23, 2018 and the "[t]rial commenced on July 24, 2018 with jury selection," well within the 180-day timeframe under the IAD.

Noting defendant was transported to New Jersey in March 2018 and indicted by way of a superseding indictment in June 2018, the judge also found that at one point, defendant was "unable to stand trial due to the filing and pendency of [his] pretrial motions," thereby tolling the 180-day time period for disposition of his case. Further, the judge stated that a "delay attributable to disposition of motions filed by . . . defendant" constituted "good cause" for tolling under the IAD. He calculated that the 180-day period within which defendant was to be tried was tolled from May 21, when defendant's suppression motions were filed, to July 13, 2018, when they were resolved.

The parties returned to court on July 31, at which time the judge addressed defendant's pending in limine motion. The judge granted the motion, in part, and barred the State from eliciting testimony from police officers that the hammer, clothing, and boots recovered during defendant's arrest were the same items seen in surveillance foot-

age from the burglaries. Further, the judge granted defendant's request to prohibit officers from testifying about drugs and paraphernalia found in the minivan, as well as defendant's suspected drug use.

The judge also barred officers from testifying about how defendant may have received a cut on his arm before he was arrested, and, "[a]bsent expert testimony," the State's witnesses were not permitted to testify that shards of glass found in the minivan or on defendant's boot matched the broken glass found at the businesses burglarized. Still, the judge did not preclude the State from arguing at closing that the jury could draw an inference that the hammer, coins, and glass shards found in the minivan, along with the cut on defendant's arm and glass shards found in his boot, were tied to the burglaries. Moreover, the judge saw no reason to prohibit officers from testifying why, "based upon the commonality of things in different burglaries, [they] were focusing on finding a minivan, finding a hammer, [and] finding a person of [a certain] stature."

In a pro se letter to the judge dated August 28, defendant stated he was "filing a motion to dismiss all charges being held against him . . . due to a violation of his rights in regards of the [IAD]." He claimed the 180-day time limit expired "as of August 22, 2018." Nine days later, the judge entered an order, accompanied by a thirteen-page decision, denying defendant's application, noting defendant's "very issue was raised by defense counsel on July 24[] orally at the start of jury selection."[3] The judge reiterated many of the findings set forth in his July 26 opinion, and specified that the "180-day clock" was tolled for

[3] The September 6, 2018 order was amended to correct the date of the decision and refiled on September 17.

fifty-four days to account for the filing and resolution of defendant's suppression motions. By the judge's calculations, the "[t]olling of [fifty-four] days . . . move[d] the maximum date of August 22nd [to start the trial] to October 14th."[4]

Additionally, the judge expressed that after jury selection started on July 24, "[t]he court was unavailable to try any case in August due to its assigned duties . . . and a scheduled vacation." Further, he stated defendant's attorney "was unavailable to try the case until September 13, 2018, due to a scheduled vacation." Given "[o]pening statements [were] scheduled to commence on September 13th[,]" the judge reasoned, "[i]f you consider either July 24th or September 13th as the commencing date of trial, either is within the tolled 180- [d]ay statutory period." Therefore, the judge again found there was "no violation of the [IAD]."

On September 13, prior to opening statements, the judge informed counsel he saw no need for further argument regarding the IAD because no new issues were raised in defendant's pro se letter that had not been previously addressed. Later that day, the judge also declined to revisit his decision on the suppression motions.

After calling its first witness on September 13, the State introduced over one hundred exhibits, including surveillance footage and items seized from defendant's minivan. Also, the State provided photos of the cut found on defendant's right forearm when he was arrested. Further, it produced over one dozen witnesses, including victims of the burglaries, as well as Detective McEvoy, and Harrison Township Police Officer Kevin McGowan. Both

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[4] Although the time period between these two dates actually equals fifty-three days, that fact does not affect our decision.

members of law enforcement testified about their respective investigations, the surveillance footage they viewed, and the damaged hubcap they found on defendant's vehicle, which was similar to that seen in the footage.

At the close of the State's case, defendant moved for a judgment of acquittal, pursuant to Rule 3:18-1. The motion was denied. Defendant elected not to testify or call any witnesses.

On October 4, 2018, the jury returned its verdict, convicting defendant of: thirteen counts of third-degree burglary; one count of third-degree theft by unlawful taking; five counts of fourth-degree theft by unlawful taking; eight counts of fourth-degree criminal mischief; and one count of fourth-degree attempted theft by unlawful taking. It acquitted defendant of four counts of burglary.[5] Subsequently, defendant was sentenced to four consecutive terms of imprisonment of four years each, i.e., one four-year term for each day he committed burglaries in November 2016. The judge ordered defendant's sixteen-year aggregate sentence to run consecutively to the sentence defendant was serving in Pennsylvania.

III.

Defendant raises the following contentions for our consideration:

I. The Indictment Should Be Dismissed With Prejudice Because [Defendant] Was Not "Brought to Trial" Within 180 Days, as Required by the Interstate Agreement on Detainers.

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[5] The following counts were dismissed before the jury deliberated: counts two and three (involving a November 20, 2016 burglary); counts five and thirty-seven (involving burglaries on November 21, 2016); and count thirty-two (involving a November 15, 2016 burglary).

VIII. The Sentencing Court Failed to Explain Why the Four Consecutive Sentences Should Be of Equal Length, Which Resulted in an Excessive Sentence.

We are persuaded defendant's argument under Point II lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

As to Point IV, we affirm the denial of defendant's suppression motions for the reasons expressed by the trial judge in his oral and written opinions. To the extent defendant quarrels with the judge's determination that certain items were found by Detective McEvoy in plain view, the record reflects defendant failed to timely raise this argument before or during the suppression hearing. Further, even in his untimely June 29 brief, defendant simply asserted "[t]he items [recovered by law enforcement] were not in plain view until police had made [d]efendant exit the vehicle. He should have been allowed to go on his way."

"The mere allegation of a warrantless search . . . does not place material issues in dispute . . . ." *State* v. *Green*, 346 N.J. Super. 87, 91 (App. Div. 2001). Rule 3:5-7(b) provides that when a defendant files notice that he or she will seek to suppress evidence seized without a warrant, the State must file a motion, together with a brief and a statement of facts. The defendant then is required to file a brief and counterstatement of facts. R. 3:5-7(b). "It is only when the defendant's counter[-]statement places material facts in dispute that an evidentiary hearing is required." *Green*, 346 N.J. Super. at 90 (citing *State* v. *Hewins*, 166 N.J. Super. 210, 213-15 (Law. Div. 1979), *aff'd*, 178 N.J. Super. 360 (App. Div. 1981)). Under these circumstances, where defendant submitted no facts contrary to those presented by the State regarding Detective McEvoy's recovery of items in plain view, we decline to conclude it was error for

the judge to rule on the suppression motions and make his findings without requiring testimony from Detective McEvoy.

Additionally, because we reject defendant's individual claims of error relative to the judge's handling of the trial, we decline to reverse defendant's convictions under the cumulative error doctrine, as argued in Point V. *See State* v. *Terrell*, 452 N.J. Super. 226, 308 (App. Div. 2016). We address defendant's remaining contentions more fully.

A. The IAD

Regarding Point I, defendant renews his argument that he was not brought to trial within the requisite 180-day period under the IAD and therefore, his charges should have been dismissed. We are not convinced.

"As a 'congressionally sanctioned interstate compact,' the interpretation of the IAD 'presents a question of federal law.'" *State* v. *Pero*, 370 N.J. Super. 203, 214 (App. Div. 2004) (quoting *Cuyler* v. *Adams*, 449 U.S. 433, 442 (1981)). "Questions related to statutory interpretation are legal ones" and therefore, we review those conclusions de novo. *State* v. *S.B.*, 230 N.J. 62, 67 (2017).

The purpose of the IAD "is 'to encourage the expeditious and orderly disposition of such [outstanding] charges and determinations of the proper status of any and all detainers based on untried indictments, informations or complaints' and to provide 'cooperative procedures' for making such determinations." *State* v. *Perry*, 430 N.J. Super. 419, 424-25 (App. Div. 2013) (alteration in original) (quoting 18 U.S.C. app. 2, § 2, art. I; N.J.S.A. 2A:159A-1). The IAD "shall be liberally construed so as to effectuate its purposes." N.J.S.A. 2A:159A-9. Also, "whenever possible, the interpretation of the [IAD] and the [Speedy Trial Act (STA)], 18 U.S.C.S. §§ 3161-74 should

not be discordant." *United States* v. *Peterson*, 945 F.3d 144, 151 (4th Cir. 2019) cert. denied, 141 U.S. 132 (2020) (quoting *United States* v. *Odom*, 674 F.2d 228, 231-32 (4th Cir. 1982)).

Under Article III of the IAD, the prosecutor is required to proceed to trial within 180 days of written notice of the defendant's current place of imprisonment and his or her request for a final disposition. N.J.S.A. 2A:159A-3(a). The 180-day period to bring the prisoner to trial runs from the date the appropriate written notice is actually delivered to the prosecutor. *Fex* v. *Michigan*, 507 U.S. 43, 52 (1993); *Pero*, 370 N.J. Super. at 215. If the defendant is not brought to trial within the applicable period, the indictment is subject to dismissal with prejudice. N.J.S.A. 2A:159A-5(c).

However, the 180-day period is "not absolute." *State* v. *Binn*, 196 N.J. Super. 102, 108 (Law Div. 1984), *aff'd as modified*, 208 N.J. Super. 443, 450 (App. Div. 1986). Under Article III(a) of the IAD, "the court having jurisdiction of the matter may grant any necessary or reasonable continuance" "for good cause shown in open court, [and] the prisoner or his [or her] counsel being present[.]" N.J.S.A. 2A:159A-3(a). The grant of a continuance, on good cause shown, may be made "at any time prior to an actual entry of an order dismissing the indictment pursuant to Article V[.]" *State* v. *Lippolis*, 107 N.J. Super. 137, 147 (App. Div. 1969) (Kolovsky, J.A.D., dissenting), *rev'd on dissent*, 55 N.J. 354 (1970).

Good cause for a continuance under the IAD is analyzed for an abuse of discretion. *See State* v. *Buhl*, 269 N.J. Super. 344, 356 (App. Div. 1994). But the IAD does not define the term "good cause." *See Ghandi* v. *Cespedes*, 390 N.J. Super. 193, 196 (App. Div. 2007) (explaining "'[g]ood

cause' is an amorphous term . . . difficult of precise delineation"). Thus, "the question of whether good cause exists for a continuance must be resolved from a consideration of the totality of circumstances in the particular case, on the background of the considerations which motivated the interstate agreement, as expressed in N.J.S.[A.] 2A:159A-1." *State* v. *Johnson*, 188 N.J. Super. 416, 421 (App. Div. 1982) (quoting *Lippolis*, 107 N.J. Super. at 148-49 (Kolovsky, J.A.D., dissenting)).

Additionally, under Article VI(a), the 180-day period can 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." N.J.S.A. 2A:159A-6(a). "To bring this provision of the [IAD] into conformity with the STA, the clear majority of [federal] circuits have read this tolling section 'to include those periods of delays caused by the defendant's own actions[,]'" *Peterson*, 945 F.3d at 154 (quoting *United States* v. *Ellerbe*, 372 F.3d 462, 468 (D.C. Cir. 2004)), including "periods of delay occasioned by . . . motions filed on behalf of [a] defendant[,]" *Id.* at 155 (alterations in original) (quoting *United States* v. *Nesbitt*, 852 F.2d 1502, 1516 (7th Cir. 1988)).[6] *See also New York* v.

[6] We are cognizant a circuit split exists on whether pretrial defense motions render a defendant "unable to stand trial." At least six courts of appeal have found a defendant "unable to stand trial" when he or she has motions pending before the trial court. *See Peterson*, 945 F.3d at 154-55 (4th Cir. 2019); *Ellerbe*, 372 F.3d at 468-69 (D.C. Cir. 2004); *United States* v. *Cephas*, 937 F.2d 816 (2d Cir. 1991); *Nesbitt*, 852 F.2d at 1512-13 (7th Cir. 1988); *United States* v. *Johnson*, 953 F.2d 1167 (9th Cir. 1992); *United States* v. *Walker*, 924 F.2d 1 (1st Cir. 1991). By contrast, the Fifth and Sixth Circuits have found that "unable to stand trial" "refer[red] to a party's physical or mental ability to stand trial throughout the fifteen years prior to Congress enacting the [IAD]." *See Birdwell* v. *Skeen*, 983 F.2d 1332, 1340-41 (5th Cir. 1993); *Stroble* v. *Anderson*, 587 F.2d 830, 838

Hill, 528 U.S. 110, 112 (2000) (confirming the filing of "several motions" by defense counsel "tolled the time limits [under the IAD] during their pendency").

Notably, a defendant also will be deemed to have waived rights under the IAD if defense counsel requests or agrees to a trial date beyond the relevant 180-day timeframe. *Id.* at 114; *see also Buhl*, 269 N.J. Super. at 357. Such a waiver will bar the defendant from later seeking a dismissal of the indictment on those same grounds. As noted by the *Hill* Court, a defendant is "deemed bound by the acts of his [or her] lawyer[,]" and "[s]cheduling matters are plainly among those for which agreement by counsel generally controls." 528 U.S. at 115. The Court reasoned that when the trial date is at issue under the IAD, "only counsel is in a position to assess the benefit or detriment of the delay to the defendant's case." *Ibid.*

Governed by these principles, we are convinced the judge properly denied defendant's motion to dismiss based on an IAD violation. We reach this result because defendant waived his right to start the trial within 180 days of February 23, 2018, i.e., August 22, 2018, when his attorney conceded during jury selection on July 25, 2018 that the State should not be required to present witnesses to testify on the next scheduled court day of July 31. As discussed, this waiver evolved from a dialogue between the judge and counsel about whether it would be prudent to commence testimony on July 31, given the distinct possibility jurors might not recall such testimony when trial resumed several weeks later. During the colloquy, although defendant's attorney stated he was "concerned

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(6th Cir. 1978). The United States Supreme Court recently denied certiorari to the Fourth Circuit Court of Appeals on this discrete issue. *Sok Bun* v. *United States*, ___ U.S. ___, 141 S. Ct. 132 (2020).

about time," he also concluded, "there's no way that the trial finishes on Tuesday [July 31]" so "at this point, I do concede. [D]o that. I just think—I think what that will also help is prevent, hopefully, a lot of questions about the testimony that came in . . . on [July 31], you know?" (Emphasis added). This waiver in open court is fatal to defendant's contention the judge erred in rejecting his request for dismissal of the indictment.

Additionally, we are persuaded the judge correctly found the period between the filing of defendant's suppression motions and their resolution several weeks later tolled the time under the IAD for defendant to be brought to trial. Accordingly, we decline to disturb the judge's calculation that defendant's initial end date for being brought to trial, August 22, 2018, was extended by approximately fifty-four days to account for the time it reasonably took to resolve these motions. In short, because: the original IAD deadline was properly tolled and reset to October 14, 2018; defendant's trial commenced and concluded before October 14; the judge opted not to further toll the original deadline to account for defendant's additional motions; and there is no suggestion by defendant that the State engaged in dilatory tactics, we are satisfied the judge correctly concluded the tolling of the IAD deadline resulted in no IAD violation.

Although we need not address this issue further, for the sake of completeness, we note the judge also found there was "good cause" to extend the statutory 180-day period. As discussed, a court may grant a continuance under the IAD if "necessary or reasonable," "for good cause." Considering the judge listed, heard, and decided defendant's suppression motions within weeks of their filing, we decline to conclude the judge abused his discretion in finding there was "good cause" to extend the 180-day

period under the IAD due to the filing of defendant's suppression motions.[7]

B. Lay Testimony

Regarding Point III, defendant argues his convictions should be reversed because Detective McEvoy and Officer McGowan provided improper lay testimony "to the effect that they could positively identify [defendant's] hammer and . . . minivan in the surveillance videos." (Emphasis added). Because defendant did not object at trial to the portions of lay testimony he now challenges, we review the admission of this testimony for plain error. R. 2:10-2.

The plain error standard aims "to provide[] a strong incentive for counsel to interpose a timely objection, enabling the trial court to forestall or correct a potential error." *State* v. *Bueso*, 225 N.J. 193, 203 (2016). Indeed, "[t]he failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were made." *State* v. *Frost*, 158 N.J. 76, 84 (1999). The Court has repeatedly emphasized that "rerun[ning] a trial when the error could easily have been cured on request[] would reward the litigant who suffers an error for tactical advantage either in the trial or on appeal." *State* v. *Singh*, 245 N.J. 1, 13 (2021) (alterations in original) (quoting *State* v. *Santamaria*, 236 N.J. 390, 404-05 (2019)).

We typically defer to a trial court's evidentiary rulings absent an abuse of discretion. *State* v. *Garcia*, 245 N.J. 412, 430 (2021). Appellate courts review the trial court's evidentiary ruling "under the abuse of discretion standard because, from its genesis, the decision to admit or exclude

[7] Given defendant's waiver under the IAD, we also need not address his argument that he was not "brought to trial" as of the date jury selection began.

evidence is one firmly entrusted to the trial court's discretion." *State* v. *Prall*, 231 N.J. 567, 580 (2018) (quoting *Est. of Hanges* v. *Metro. Prop. & Cas. Ins. Co.*, 202 N.J. 369, 383-84 (2010)).

N.J.R.E. 701 governs the admission of lay opinion testimony.[8] "The first prong of . . . N.J.R.E. 701 requires the witness's opinion testimony to be based on the witness's 'perception,' which rests on the acquisition of knowledge through use of one's sense of touch, taste, sight, smell or hearing." *Singh*, 245 N.J. at 14 (quoting *State* v. *McLean*, 205 N.J. 438, 457 (2011)). "The second requirement of N.J.R.E. 701 is that lay-witness opinion testimony be 'limited to testimony that will assist the trier of fact either by helping to explain the witness's testimony or by shedding light on the determination of a disputed factual issue.'" *Id.* at 15 (quoting *McLean*, 205 N.J. at 458).

When it comes to testimony by law enforcement, "[f]act testimony has always consisted of a description of what the officer did and saw," and "an officer is permitted to set forth what he or she perceived through one or more of the senses." *Ibid.* (alteration in original) (quoting *McLean*, 205 N.J. at 460). Further, a witness is allowed to comment on something seen by the witness on a surveillance video, as long as the witness uses "neutral, purely

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[8] N.J.R.E. 701 provides:

> If a witness is not testifying as an expert, the witness'[s] testimony in the form of opinions or inferences may be admitted if it:
>
> (a) is rationally based on the witness'[s] perception; and
>
> (b) will assist in understanding the witness'[s] testimony or determining a fact in issue.

descriptive terminology such as 'the suspect' or 'a person.'" *Id.* at 18. Moreover, a jury is free to credit such testimony or reject it entirely. *Id.* at 20.

Here, we are not persuaded Detective McEvoy or Officer McGowan violated the tenets of N.J.R.E. 701. Our review of the record reflects neither witness identified the burglary suspect seen on surveillance video as defendant; likewise, neither witness testified the minivan seen on such footage belonged to defendant.

For example, when Detective McEvoy was asked what he observed from the November 20 video depicting the burglary at a pet supply store, he stated:

> As the . . . suspect vehicle approached the front of the store and drove by slowly, we then learned that it was a Chrysler Town and Country minivan, which was light blue in color. And . . . the rear passenger side hubcap had a large piece missing out of it.
>
> . . . .
>
> The subject obviously is dressed in all black, wearing work boots, and had a two-toned hammer, which was red and black . . . . Another thing that we[] learned from that video, Patrolman McGowan, who initially responded to the scene . . . later that day went back to our station and checked our records management system and . . . was able . . . to see if any vehicles matching that description had been stopped. And . . . he learned that the evening prior to that burglary at [the pet supply store], a light blue Town and Country minivan was stopped in that same complex and issued a summons for a . . . headlight violation. And at that time of the stop, [defendant] was driving the vehicle. And at that time, we identified the vehicle.

Detective McEvoy also stated he saw "the missing piece of hubcap . . . from the right rear of the vehicle" on surveillance footage.

Thus, instead of identifying defendant as the "the subject . . . dressed in black" or stating the "suspect vehicle" he saw on the video belonged to defendant, the detective used neutral language, leaving the jury to decide if defendant was the burglar at the scene or if the "light blue Town and County minivan" with the missing piece of hubcap seen on surveillance video belonged to defendant.

Additionally, when Detective McEvoy testified about the footage of the burglary from the bagel store, he confirmed the footage showed "a light blue, Chrysler minivan," not "defendant's light blue, Chrysler minivan." Further, when he testified about being at the scene of defendant's arrest on November 21, he stated:

> Upon my arrival, I had already been given the description of the vehicle and the tag and I was alerted by one of our officers that the same vehicle matched the description of a previously reported burglary in Woodbury and possibly Deptford earlier that morning. So[,] . . . I now observed the vehicle parked in a marked parking spot and it ha[d] been stopped by [the] Mantua Township Police Department and they had removed him from the vehicle at that time.
>
> Immediately upon approaching the vehicle is when I again observed the rear passenger side hubcap had a missing portion . . . out of it and then I began conversing with the officers on scene about what they observed.

Defendant argues this portion of the detective's testimony should have been excluded, in part, because the detective referred to "again" observing the damaged hubcap

on the minivan, despite it being the first time he saw defendant's minivan in person. While we understand defendant's concern in this regard, we decline to conclude the admission of this statement was plain error, given the remark was fleeting, and the detective did not state the minivan defendant drove on the date of his arrest was the same minivan seen in the footage. Further, a fair reading of the transcript reflects the detective made clear that on the date of defendant's arrest, a colleague suggested to him that defendant's stopped vehicle matched the description of a vehicle used in another reported burglary. Thus, the detective explained that once he arrived on the scene of defendant's arrest and saw defendant's damaged hubcap, he "began conversing with the officers on scene about what they observed"; he did not state he or fellow officers concluded the stopped vehicle was the same vehicle seen on surveillance video.

The nature of Detective McEvoy's testimony about the hammer found in defendant's minivan was along the same permissible lines. During the course of his testimony, Detective McEvoy recalled retrieving the hammer found in defendant's minivan at the time of his arrest "[b]ecause it was in plain view and it matched . . . the description of the item used . . . in the burglar investigations." Again, the detective did not explicitly state the hammer found in defendant's car was the same hammer used in the burglaries. Further, his testimony about the hammer was based on his having personally recovered it from defendant's vehicle, and from viewing surveillance footage containing images of a similar hammer.

Turning to Officer McGowan's testimony, we note he also addressed what he saw on surveillance video, without stating he saw defendant or defendant's minivan on the footage. For example, when describing surveillance video

from the burglary at the pet supply store, the officer stated:

> There was one camera . . . pointed towards the front glass doors that was able to observe a blue minivan that pulled up in front of the store, stopped and the suspect got out of the vehicle, entered the store. When the van's pulling away, you can observe the entire driver's side of the vehicle and I was able to notice that the back hubcap of the vehicle was cracked and broken off.

Asked what he did with the information he gleaned from the footage, Officer McGowan testified:

> We had multiple burglaries that had happened within the days prior to the [pet supply] store. So after clearing the scene[,] I went back to our station and started inputting some data into our record management system. I was looking for blue minivans similar to the type that I saw on the surveillance footage and I came across a blue minivan that was stopped by [a sergeant] the night before. It had a Pennsylvania registration on it but the driver of the vehicle that he had documented on his motor vehicle stop had actually a New Jersey driver's license that was registered just up the street from [the pet supply store].

When the officer was asked whose name was on the registration of the stopped vehicle, he gave the name of defendant's wife.

In describing what the officer did after he secured this information, he stated:

> Because it was just outside of my jurisdiction[,] I was able to drive past the residence that it was registered to. I drove past the residence and the van was in the

driveway and I observed the same missing piece of hubcap on the back driver's side tire.

These statements were admissible, as Officer McGowan provided no testimony positively identifying defendant's minivan as the same vehicle seen on surveillance footage. Instead, the officer explained how the footage led the police to pursue additional avenues of investigation.

On balance, given the neutral language law enforcement used to describe their interactions with defendant, their observations of his vehicle and what they perceived from surveillance video, and considering that jurors viewed the surveillance footage for themselves and determined what weight, if any, to give to the testimony of Officer McGowan and Detective McEvoy, we discern no reversible error regarding the challenged lay testimony.

C. Defendant's Sentence

Lastly, regarding Point VI, defendant argues he should be resentenced because the judge mistakenly found him ineligible for Drug Court and failed to explain why four consecutive prison terms of equal length were imposed. Although we are not persuaded by these contentions, in an abundance of caution, we remand this matter for resentencing due to the Court's recent holding in *Torres*.

A defendant's sentence is reviewed for an abuse of discretion. *State* v. *Jones*, 232 N.J. 308, 318 (2018). But "a trial court's application of the Drug Court Statute and Manual . . . involves a question of law," and thus is subject to de novo review. *State* v. *Maurer*, 438 N.J. Super. 402, 411 (App. Div. 2014).

Here, defendant contends the judge erred in deeming him ineligible for Drug Court.[9] We disagree. Because defendant was serving an existing prison sentence in Pennsylvania when he was sentenced for his New Jersey convictions, he was unable to participate in Drug Court, but more importantly, his ongoing imprisonment precluded imposition of a non-custodial probationary sentence. N.J.S.A. 2C:44-5(f)(1).[10] *See also State* v. *Crawford*, 379 N.J. Super. 250, 259 (App. Div. 2005).

Also, per Article V of the IAD, the sending State offers "temporary custody" of a prisoner to the receiving State and requires the prisoner to be returned to the sending State "at the earliest practicable time consonant with the purposes of [the IAD]." N.J.S.A. 2A:159A-5(e). Thus, defendant was in New Jersey temporarily under the IAD, and had to be returned to Pennsylvania to complete his sentence there before he began serving his New Jersey sentence. As the judge properly noted, "[D]rug [C]ourt is not available to [defendant] because he's got an out[-]of[-

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[9] As we have observed:

> [T]here are two tracks available for entry into our Drug Courts. Track One is available to those eligible for special probation pursuant to N.J.S.A. 2C:35- 14(a), and who otherwise satisfy the statutory criteria . . . . Track Two permits applicants to be admitted into Drug Court under the general sentencing provisions of the Code of Criminal Justice.

[*State* v. *Figaro*, 462 N.J. Super. 564, 566 (App. Div. 2020) (internal citations and quotation marks omitted).]

[10] N.J.S.A. 2C:44-5(f)(1) instructs that a court "shall not sentence to probation a defendant who is under sentence of imprisonment, except as authorized by [N.J.S.A. 2C:43-2(b)(2)]" (the split sentence provision).

]state sentence that really precludes him from participating . . . . The process is he returns to Pennsylvania . . . to continue the service of his sentence there first."[11]

Additionally, we are not convinced defendant's sentence is excessive. In imposing a sentence, the judge "first must identify any relevant aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b) that apply to the case." *State* v. *Case*, 220 N.J. 49, 64 (2014). The trial court is required to "determine which factors are supported by a preponderance of [the] evidence, balance the relevant factors, and explain how it arrives at the appropriate sentence." *State* v. *O'Donnell*, 117 N.J. 210, 215 (1989).

We cannot "substitute [our] judgment for that of the sentencing [judge,]" *State* v. *Fuentes*, 217 N.J. 57, 70 (2014), and are limited to considering:

> (1) whether guidelines for sentencing established by the Legislature or by the courts were violated; (2) whether the aggravating and mitigating factors found by the sentencing court were based on competent credible evidence in the record; and (3) whether the sentence was nevertheless "clearly unreasonable so as to shock the judicial conscience."

[*State* v. *Liepe*, 239 N.J. 359, 371 (2019) (quoting *State* v. *McGuire*, 419 N.J. Super. 88, 158 (App. Div. 2011)).]

When deciding whether to impose a consecutive sentence, trial courts are to consider the following factors

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[11] Given the passage of time since defendant's sentencing in New Jersey, he may now be eligible for a sentence change under Rule 3:21-10(b)(1) if he has completed his Pennsylvania sentence. This Rule permits a motion for a change in sentence to be filed at any time "to permit entry of the defendant into a custodial or non-custodial treatment or rehabilitation program for drug or alcohol abuse." R. 3:21-10(b)(1).

outlined under *State* v. *Yarbough*, 100 N.J. 627, 643-44 (1985):

> (1) there can be no free crimes in a system for which the punishment shall fit the crime;
>
> (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
>
> (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
>
> > (a) the crimes and their objectives were predominantly independent of each other;
> >
> > (b) the crimes involved separate acts of violence or threats of violence;
> >
> > (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
> >
> > (d) any of the crimes involved multiple victims;
> >
> > (e) the convictions for which the sentences are to be imposed are numerous;
>
> (4) there should be no double counting of aggravating factors; [and]
>
> (5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense.[12]

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[12] The *Yarbough* Court originally outlined six factors, but the sixth factor, which provided "there should be an overall outer limit on the cumulation of consecutive sentences for multiple offenses not to exceed the sum of the longest terms (including an extended term, if eligible) that

Recently, the Court reinforced the standards for imposing consecutive sentences and held that "essential to a proper *Yarbough* sentencing assessment" is "[a]n explicit statement, explaining the overall fairness of a sentence imposed on a defendant for multiple offenses in a single proceeding." *Torres*, 246 N.J. at 268.

Here, the judge found aggravating factors three, six and nine, N.J.S.A. 2C:44-1(a)(3) (risk of reoffense), (6) (prior criminal history), and (9) (need to deter), and gave these factors "significant weight." Additionally, he found mitigating factor six, N.J.S.A. 2C:44-1(b)(6) (defendant will compensate the victims for damages sustained) and afforded this factor "moderate weight." The judge also concluded the aggravating factors substantially outweighed the mitigating factor.

We see no reason to second-guess the judge's aggravating and mitigating factors analysis, considering defendant's history of substance abuse and significant criminal record, which consisted of "[twenty-five] felony convictions, [and] three misdemeanor disorderly persons convictions[,]" many resulting from burglaries in Pennsylvania during the same period he committed multiple burglaries in New Jersey.

Also, we note that when he applied the *Yarbough* factors, the judge carefully explained why he found the prison terms imposed should run consecutively, and why he rejected defendant's argument for concurrent sentences. Although defendant urged the judge to impose

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could be imposed for the two most serious offenses," was superseded by a 1993 amendment to N.J.S.A. 2C:44-5(a), which states "[t]here shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses."

concurrent sentences for each offense, based on his offenses being "fairly compact" in time and place, and committed with "one sole objective" for committing the crimes, namely "to feed [his] drug habit," the judge rejected this argument, explaining:

> [T]he events of each day appear to be a continuum of criminal activity on the part of the defendant, such that those particular events should run concurrent to each other. However, I do find that the defendant made a conscious decision from one date to the next to go back out and continue his criminal activity. It would be another thing if he continued through the daylight hours into the following day, and the next day, to continue to commit his burglaries . . . along the way, but . . . each individual date he consciously decided to go back out and commit more burglaries rather than stop his criminal behavior. Also, where he had an opportunity to reflect potentially on the criminal behavior the night . . . or the day before, that reflection . . . did not cur[b] his criminal activity. He went back out making that conscious choice.

In giving weight to the first *Yarbough* factor, i.e., "there [are] no free crimes[,]" the judge reasoned, "[i]f all of these were to be run concurrent[ly], it certainly would minimize the defendant's criminal behavior, and certainly would send the wrong message to the public [so] when they have an opportunity to curb their behavior and they don't, they should [receive] separate and distinct sentences." Additionally, the judge determined defendant's sentences should run consecutive to defendant's Pennsylvania sentence because defendant "did not get the message [after] being arrested . . . in New Jersey for . . . criminal conduct, and instead continued to commit crimes in

Pennsylvania" in December 2016, following his release from custody in New Jersey.

After imposing concurrent sentences for each batch of burglaries committed on a single day "because they continued relatively close in time, albeit, maybe not geographically . . . close," the judge imposed the standard fines and ordered restitution for various victims.[13] He also noted defendant would be eligible for parole in approximately "five years and four months."[14]

Defendant's aggregate sentence, while harsh, does not shock our judicial conscience. *State* v. *Tillery*, 238 N.J. 293, 323 (2019). But in an abundance of caution, we vacate the sentence and remand for resentencing, consistent with the Court's guidance in *Torres*, to allow the judge to provide "[a]n explicit statement, explaining the overall fairness" of the sentences imposed. 246 N.J. at 268.

To the extent we have not addressed any remaining contentions, it is because they lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Affirmed as to defendant's convictions and remanded for resentencing. We do not retain jurisdiction.

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[13] The judge also properly merged the theft and criminal mischief charges into the burglary charges for each business.

[14] The Department of Corrections website reflects defendant's parole eligibility date is in May 2024.

APPENDIX C

SUPERIOR COURT OF NEW JERSEY
GLOUCESTER COUNTY
LAW DIVISION, CRIMINAL PART

No. 18-06-00460

STATE OF NEW JERSEY

v.

RAMI AMER,
DEFENDANT

Filed: September 17, 2018

AMENDED MEMORANDUM AND ORDER

SMITH, Judge.

Defendant Rami Amer is present before the Court pursuant to the Interstate Agreement on Detainers ("IAD"). He is serving a state prison sentence in Pennsylvania. On or about February 23, 2018, New Jersey authorities received Defendant's request to address his untried matter(s) in New Jersey. Defendant arrived at the Salem County Jail on or about March 13, 2018. Defendant was arraigned on or about March 23, 2018, before this court. On March 29, 2017 a Gloucester County Grand Jury issued a true bill on Indictment 17-03-00187-I and on April

26, 2017 a Gloucester County Grand Jury issued a true bill on Indictment 17-04-00261-I. In total Defendant was charged with twenty-nine counts.

Subsequently, a Gloucester County Grand Jury issued a true bill on superseding Indictment 18-06-00460-S on June 6, 2018. Defendant is charged with thirty seven counts, including seventeen counts of third degree burglary in violation of N.J.S.A 2C:18-2A(l), five counts of third degree theft by unlawful taking and two counts of fourth degree theft by unlawful taking, in violation of N.J.S.A. 2C:20-3a; two counts of fourth degree attempted theft by unlawful taking, in violation of N.J.S.A. 2C:5-l/2C:20-3a; and eleven counts of fourth degree criminal mischief, in violation of N.J.S.A. 2C:17-3a(l).

On or about September 5, 2018, the court received a pro se submission by Defendant Rami Amer wherein he seeks dismissal of the indictment citing a violation of the Interstate Agreement on Detainers. He argues that he was not brought to trial within 180 days. This very issue was raised by defense counsel on July 24th orally at the start of jury selection. The motion was denied then and an appropriate order was filed on or about July 26, 2018. This motion to dismiss is also denied.

LEGAL ANALYSIS

"Forty-eight States, the Federal Government, and the District of Columbia . . . have entered into the Interstate Agreement on Detainers (Agreement), 18 U.S.C. App. § 2, p. 692, an interstate compact. The Agreement creates uniform procedures for lodging and executing a detainer, i.e., a legal order that requires a State in which an individual is currently imprisoned to hold that individual when he has finished serving his sentence so that he may be tried

by a different State for a different crime." *Alabama* v. *Bozeman*, 533 U.S. 146, 148 (2001). "The Agreement provides for expeditious delivery of the prisoner to the receiving State for trial prior to the termination of his sentence in the sending State. And it seeks to minimize the consequent interruption of the prisoner's ongoing prison term." *Id.* The Agreement consists of nine articles.

> Article III gives a prisoner against whom a detainer has been lodged the right to "request" a "final disposition" of the relevant charges, in which case "he shall be brought to trial within one hundred and eighty days" (unless extended by the trial court for "good cause"); otherwise, the relevant "indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." Art. III (a), (d).
>
> Article IV gives "the jurisdiction in which an untried indictment, information, or complaint is pending," i.e., the receiving State, the right "to have a prisoner against whom" it "has lodged a detainer . . . made available" for trial. Art. IV(a). It says further that, once the prisoner arrives in the receiving State, the "trial" must begin "within one hundred and twenty days" unless extended for "good cause." Art. IV(c). Article IV also sets forth the "antishuttling" provision at issue here. To repeat: that provision says that trial must be "had . . . prior to the prisoner's being returned to the original place of imprisonment"; otherwise, the charges "shall" be dismissed with prejudice.

Id. at 150.

New Jersey's codification of the IAD can be found at N.J.S.A. 2A:159A-1 to -15.

> The IAD undoubtedly serves several laudable goals from the perspective of an inmate in custody in another jurisdiction. We have noted that the intent and rationale behind the act was to counter the perceived evil when prosecutorial delay or inattention fail to provide a defendant incarcerated in another jurisdiction an opportunity for prompt disposition of charges thereby potentially prejudic[ing] a prisoner's opportunities and even his potential for concurrent sentences. Additionally, focusing on the inmate's status within his own correctional facility, we have noted that [t]he purpose of the IAD is to expedite outstanding charges in order to protect prisoners from the adverse consequences of detainers. One such adverse consequence is the uncertaint[y] produced by detainers which obstruct programs of prisoner treatment and rehabilitation.

State v. *Baker*, 400 N.J. Super. 28, 39 (App. Div. 2006), affirmed, 198 N.J. 189 (2009) (internal quotation marks and citations omitted).

"[W]hen a state—the receiving state—seeks to prosecute a person in the custody of another state - the sending state - the receiving state triggers the IAD by the coalescence of two separate but distinct acts: the lodging of a detainer with the sending state and the 'presentation of a written request for temporary custody or availability' to the sending state. N.J.S.A. 2A:159A-4(a)." *State* v. *Baker*, 198 N.J. 189, 192 (2009). Under the IAD, "either the prisoner himself (under Article III of the IAD, N.J.S.A. 2A:159A-3) or the prosecutor in the jurisdiction where the charge is pending (under Article IV, N.J.S.A. 2A:159A-4) can initiate proceedings to bring the prisoner to trial." *State* v. *Pero*, 370 N.J. Super. 203, 206 (App. Div. 2004).

Addressing the question of the calculation of the statutory time periods, N.J.S.A. 2A:159A-6(a) provides, in pertinent part, that "[i]n determining the duration and expiration dates of the time periods provided in Article III [N.J.S.A. 2A:159A-3] and IV [N.J.S.A. 2A:159A-4] 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." N.J.S.A. 2A:159A-6(a) [Article VI]. The 180-day period runs from the date the appropriate written notice [under Article III(a), N.J.S.A. 2A:159A-3(a)] is actually delivered. *Fex* v. *Michigan*, 507 U.S. 43, 52 (1993)*; Pero*, supra, 370 N.J. Super. at 215.

Sanctions for violating the anti-shuttling provisions of the IAD or the 180 day period are definite and significant. "It has been properly held that since the purpose of [the IAD] is remedial, it should be accorded liberal construction in favor of prisoners within its purview." *State* v. *Mason*, 90 N.J. Super. 464, 470 (App. Div. 1966). The IAD states that if a prisoner is returned to the sending state prior to the resolution of the charges in the receiving state, the indictment, information, or complaint "shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." N.J.S.A. 2A:159A-4(e) [Article IV(e)]. This prevents the shuttling or transporting of a prisoner back and forth between states which would frustrate the goal of the IAD. To ensure that the matters are handled swiftly by the prosecuting authorities within the receiving state, N.J.S.A. 2A:159A-S(c) requires that when the prisoner is not brought to trial within the time period proscribed by Article III [180 days] or Article IV [120 days], "the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer

based thereon shall cease to be of any force and effect." Violation of the IAD's anti-shuttling provision requires dismissal with prejudice, even when the violation may appear technical. *State* v. *Glaspie*, 429 N.J. Super. 558, 567 (App. Div. 2013), *certif. denied*, 216 N.J. 366 (2013).

"The right to be brought to trial within the 180 day period is triggered by the prisoner's request for final disposition of the pending charges. For obvious reasons, 'strict compliance with this provision is required.' *State* v. *Haimes*, 214 N.J. Super. 195, 202-203 (App. Div. 1986). *See also State* v. *Ternaku*, 156 N.J. Super. 30, 33-35 (App. Div. 1978), *certif. den.*, 77 N.J. 479 (1978); *State* v. *Brockington*, 89 N.J. Super. 423, 430 (App. Div. 1965); *State* v. *Chirra*, 79 N.J. Super. 270, 276 (Law Div. 1963)." *State* v. *Stiles*, 233 N.J. Super. 299, 306 (App. Div. 1989).

A defendant may waive his rights under the IAD. *New York* v. *Hill*, 528 U.S. 110, 114 (2000). A defendant waives adherence to the IAD time limits if he affirmatively requests, or willingly accepts, delay or "treatment inconsistent with the IAD's time limits." *Id.* at 118; *see State* v. *Buhl*, 269 N.J. Super. 344, 357 (App. Div.), *certif. denied*, 135 N.J. 468 (1994). Such a waiver may occur even if there has been no continuance meeting the requirements of N.J.S.A. 2A:159A-3(a) or -4(c). *See Hill*, supra, 528 U.S. at 116.

As an initial matter, it should be understood that the present case was a prisoner-initiated assertion of rights under the IAD. Gloucester County lodged a detainer against Defendant with the Pennsylvania authorities. That was only the first of two steps necessary to trigger the IAD. *See State* v. *Pero*, 370 N.J. Super. 203, 206 (App. Div. 2004). The second step was initiated by Defendant here. The right to be brought to trial within the 180-day

period is triggered by the prisoner's request for final disposition of the pending charges under Article III. The request for final disposition under the IAD requires resolution of all untried indictments, informations, and complaints for which detainers have been lodged. Because this was a prisoner-initiated request for final disposition, Article III is controlling and the relevant time period within which disposition must occur is 180 days.[1]

"In determining the duration and expiration dates of the time periods provided in [N.J.S.A. 2A:159A-3 and N.J.S.A. 2A:159A-4] 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." N.J.S.A. 2A:159A-6(a). "Under the IAD, the statutory time period will be tolled when a defendant is being tried on other charges in other jurisdictions." *State* v. *Miller*, 299 N.J. Super 387, 395 (App. Div. 1997). "The 180-day period is not absolute. When brought to the receiving state the prisoner may have many charges pending, all of which cannot humanly be tried within 180 days." *State* v. *Binn*, 196 N.J. Super. 102, 108 (Law Div.1984), *aff'd as modified*, 208 N.J. Super. 443, (App. Div.), *certif. denied*, 104 N.J. 471 (1986). "N.J.S.A. 2A:159A-6(a) is the legislative safety valve to prevent miscarriages of justice resulting from literal applications of the Act." *Ibid.*

"[W]hen a defendant must be tried on two or more separate and unrelated indictments in the same jurisdiction

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[1] While each signatory state to the IAD may establish administrative procedures and policies for the implementation of the IAD in their respective jurisdictions, those policies cannot frustrate nor be in contravention of the statutory framework of the IAD. New Jersey's policies and procedures are set forth at N.J.A.C. IOA: 14-1 to -11 and N.J.A.C. l0A:31-30.2.

within the statutory period under the IAD, the time that a defendant is being tried on one indictment will toll the statutory time on the other indictments." *Miller*, supra, 299 N.J. Super. at 396. Further, "[a] defendant cannot intentionally act in such a manner that causes the disposition of his indictment to occur beyond the 180-day statutory period and then complain later when the State fails to try him within the statutory time frame." *Id*. at 397.

On or about February 23, 2018, the State of New Jersey received via certified mail Forms I, II, III and IV of the IAD from Defendant. At the time, Defendant was serving a state prison term in Pennsylvania. The 180-Day clock would commence, therefore, on February 23rd, making the maximum date within which the trial must commence to be August 22, 2018.

A trial court may toll the IAD time limitation if the defendant is unable to stand trial. N.J.S.A. 2A:159A-6(a). Furthermore, for good cause shown, a trial court may grant a continuance of the time limitation. Factors for good cause include "the length of the delay, the reasons for the delay, defendant's assertion of his right to speedy trial, and any prejudice to defendant caused by the delay." *State* v. *Gallegan*, 117 N.J. 345, 355 (1989); *See also Miller*, supra, 299 N.J. Super. at 397. A defendant may not raise the IAD time limitation as an issue if the defendant causes the delay. *See Miller*, supra, 299 N.J. Super. at 397-99 (holding that the defendant caused the delay because the defendant discharged prior counsel).

An IAD defendant cannot be returned to the sending state until all untried charges have been resolved. To do so would violate the anti-shuttling provisions of the IAD. Violation of the IAD's anti-shuttling provisions requires

dismissal with prejudice, even when the violation may appear technical. *See State* v. *Glaspie*, 429 N.J. Super. 558, 567 (App. Div.), *certif. denied*, 216 N.J. 366 (2013).

In *State* v. *Miller*, the Appellate Division considered the question of tolling of the 180-day IAD limit. *See State* v. *Miller*, 299 N.J. Super. 387 (App. Div. 1997). Miller was an IAD defendant brought to New Jersey from New York where he was serving a prison sentence. The defendant had two pending indictments in Essex County. The court noted that the IAD permits tolling of the 180-day statutory time limit "when a defendant is being tried on other charges in other jurisdictions." *Miller*, 299 N.J. Super at 395 (citing *State* v. *Binn*, 196 N.J. Super. 102 (Law Div. 1984), *aff'd as modified*, 208 N.J. Super. 443 (App. Div. 1986), *certif. denied*, 104 N.J. 471 (1986); *Lippolis*, supra, 107 N.J. Super. at 137*)*. The court held:

> In the present case, however, defendant was at trial in this jurisdiction for four days of the statutory period. Defendant could not be tried on two separate and unrelated indictments simultaneously. We hold that when a defendant must be tried on two or more separate and unrelated indictments in the same jurisdiction within the statutory period under the IAD, the time that a defendant is being tried on one indictment will toll the statutory time on the other indictments.

Miller, 299 N.J. Super. at 395-96 (internal citations omitted) .

Here, while the original two indictments were placed on the trial list at the same time, the State subsequently re-presented the cases to the grand jury and consolidated the two original indictments into one superseding indictment. While the State could have sought joinder, it chose this course. Either way, however, the State's efforts

works to ensure that Defendant has a speedy trial on all pending charges in Gloucester County by trying all the alleged criminality during a single trial.

Further, on May 21, 2018, Defendant filed a pre-trial motion seeking suppression. After submissions of briefs, testimony and arguments were heard on June 29, 2018. On July 13, 2018, the court denied the motion via written opinion filed that same date. It would be appropriate, therefore, to toll the 180-Day clock for 54 days [May 21, 2018 to and including July 13, 2018]. Tolling of 54 days would move the maximum date of August 22nd to October 14th.

The court's order of July 26, 2018, settled this issue. While that order did not specify the dates as in the paragraph above, the court's intention was clear. The period of 54 days during the pendency of Defendant's suppression motion tolled the 180-Day statutory clock from August 22nd to October 14th.

Jury selection began on July 24, 2018 and concluded on July 25, 2018. The court was unavailable to try any case in August due to its assigned duties under Criminal Justice Reform and a scheduled vacation. Defense counsel was unavailable to try the case until September 13, 2018 due to a scheduled vacation. Opening statements are scheduled to commence September 13th. If you consider either July 24th or September 13th as the commencing date of trial, either is within the tolled 180-Day statutory period.

CONCLUSION

In consideration of the above, the Court finds no violation of the Interstate Agreement on Detainers. The trial has commenced within the statutory 180-Day period, as that period has been tolled, for good cause.

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
GLOUCESTER COUNTY
LAW DIVISION, CRIMINAL PART

No. 18-06-00460

STATE OF NEW JERSEY

v.

RAMI AMER,
DEFENDANT,

Filed: July 26, 2018

MOTION ORDER

SMITH, Judge.

Defendant Rami Amer is present before the Court pursuant to the Interstate Agreement on Detainers ("IAD"). He is serving a state prison sentence in Pennsylvania. On or about February 23, 2018, New Jersey authorities received Defendant's request to address his untried matter(s) in New Jersey. Defendant arrived at the Salem County Jail on or about March 13, 2018. Defendant was arraigned on or about March 23, 2018, before this court. On March 29, 2017 a Gloucester County Grand Jury issued a true bill on Indictment 17-03-00187-I and on April

26, 2017 a Gloucester County issued a true bill on Indictment 17-04-00261-I. In total Defendant was charged with twenty-nine counts.

Subsequently, a Gloucester County Grand Jury issued a true bill on superseding Indictment 18-06-00460-S on June 6, 2018. Defendant is charged with thirty seven counts, including seventeen counts of third degree burglary in violation of N. J. S. A. 2C: 18 2A (1), five counts of third degree theft by unlawful taking and two counts of fourth degree theft by unlawful taking, in violation of N.J.S.A. 2C:20-3a; two counts of fourth degree attempted theft by unlawful taking, in violation of N.J.S.A. 2C:5-1/2C:20-3a; and eleven counts of fourth degree criminal mischief, in violation of N.J.S.A. 2C:17-3a(l).

On or about May 21, 2018, Defendant filed motions to suppress his post-arrest statements and any evidence from the search of his vehicle. Oral argument and testimony on the motions were heard on June 29, 2018. The court ruled orally on the record denying the motions indicating that an opinion and order would follow. On July 13, 2018, that opinion and order was filed.

Trial commenced on July 24, 2018 with jury selection.

"[W]hen a state—the receiving state—seeks to prosecute a person in the custody of another state—the sending state—the receiving state triggers the IAD by the coalescence of two separate but distinct acts: the lodging of a detainer with the sending state and the 'presentation of a written request for temporary custody or availability' to the sending state. N.J.S.A. 2A:159A-4(a)." *State* v. *Baker*, 198 N.J. 189, 192 (2009). Under the IAD, "either the prisoner himself (under Article III of the IAD, N.J.S.A. 2A:159A-3) or the prosecutor in the jurisdiction where the charge is pending (under Article IV, N.J.S.A. 2A:159A-4)

can initiate proceedings to bring the prisoner to trial." *State* v. *Pero*, 370 N.J. Super. 203, 206 (App. Div. 2004). After the receiving state receives notification from the sending state of the prisoner's request for disposition of charges pending against him in another jurisdiction (the receiving state), the prisoner must "be brought to trial within 180 days." N.J.S.A. 2A:159A-3(a). The 180-day period begins to run when the New Jersey authorities receive a prisoner's completed IAD forms. *Pero*, supra, 370 N.J. Super. at 214.

N.J.S.A. 2A:159A-3(a) requires that a defendant imprisoned in a state which is party to the IAD "shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment." Trial would commence with the start of jury selection.

The present case was a prisoner-initiated assertion of rights under the IAD. Gloucester Counties lodged a detainer against Defendant with the Pennsylvania authorities as the first of two steps necessary to trigger the IAD. *See Pero*, infra, 370 N.J. Super. at 206. The second step was initiated by Defendant. The right to be brought to trial within the 180-day period is triggered by the prisoner's request for final disposition of the pending charges under Article III of the IAD, N.J.S.A. 2A:159A-3. The request for final disposition under the IAD requires resolution of all untried indictments, informations, and complaints for which detainers have been lodged. Because this was a prisoner-initiated request for final disposition, Article III is controlling and the relevant time period within which disposition must occur is 180 days.

Addressing the question of the calculation of the statutory time periods, N.J.S.A. 2A:159A-6(a) provides, in pertinent part, that "[i]n determining the duration and expiration dates of the time periods provided in Article III [N.J.S.A. 2A:159A-3] and IV [N.J.S.A. 2A:159A-4] 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." N.J.S.A. 2A:159A-6(a) [Article VI]. The 180-day period runs from the date the appropriate written notice [under Article III(a), N.J.S.A. 2A:159A-3(a)] is actually delivered. *Fex* v. *Michigan*, 507 U.S. 43, 52 (1993)*; Pero*, supra, 370 N.J. Super. at 215.

A defendant shall be deemed "unable to stand trial" and the running of the statutory IAD time period shall be tolled, during periods of delay caused by the defendant. *See*, *e.g.*, *United States* v. *Nesbitt*, 852 F.2d 1502, 1516 (7th Cir. 1988) (tolling the running of the IAD time limit when a pretrial motion was filed), cert. denied, 488 U.S. 1015, 109 S. Ct. 808, 102 L. Ed. 2d 798 (1989); *United States* v. *Neal*, 36 F.3d 1190, 1210 (1st Cir. 1994) (holding that delay attributable to disposition of motions filed by the defendant or other codefendants constitutes "good cause" under the IAD and is excludible from the 120-day computation); and *State* v. *Masselli*, 43 N.J. 1, 12, 202 A.2d 415 (1964) (holding that the defendant's personal request for leave to file a motion to dismiss the indictment constituted a good-cause reason to toll statutory period).

ACCORDINGLY,

IT IS on this 25th day of July, 2018,

ORDERED that the statutory time period under N.J.S.A. 2A:159A-3 under which trial must commence is hereby tolled from May 21, 2018, to and including July 13,

2018. Defendant was unable to stand trial due to the filing and pendency of pretrial motions. Since these motions were filed by Defendant, the tolling is for good cause.

APPENDIX E

SUPERIOR COURT OF NEW JERSEY
GLOUCESTER COUNTY
LAW DIVISION, CRIMINAL PART

No. 18-06-00460

STATE OF NEW JERSEY

v.

RAMI AMER,
DEFENDANT,

Date: July 25, 2018

TRANSCRIPT OF PROCEEDINGS

Before SMITH, Judge.

APPEARANCES

BRYANT J. FLOWERS
Attorney for the State

RONALD C. APPLEBY
Attorney for the Defendant

* * *

THE COURT: All right, thanks. Have a seat. All right, again, good morning, counsel. Day two of jury selection. We'll have a panel come in this morning. I guess they're going through their orientation now. Mr. Appleby, you had something you wish to address?

MR. APPLEBY: Thank you, Your Honor. If I could remain seated? It's—with the IAD, one of the things that my client had brought up yesterday morning, one of his of panoply, it was a myriad of things that he brought up, but was about this idea about the trial starts and then in August we don't have trial.

And I did go over it, you know, I understand jury trial must commence within 180 days of the defendant's demand or be brought to trial within 100 days of his request. *Fex* v. *Michigan* talks about the start date. I understand in this case it's either, like, August 20th or August 22nd, I recall as the calculation.

Now, looking at *Betterman* v. *Montana*, 2016 U.S. Supreme Court case, 136 Supreme Court 1609, they also talk about the rule directs the Court to avoid any unnecessary delay, any undue delay. *Betterman* v. *Montana* deals with a sentencing where there's a plea and then there's what's said to be inordinate delay, unnecessary delay, undue delay before the sentence. And justice is brought up that it's not only a speedy trial right, although that was the large one they could agree on, but it also—it also—there were protections for due process clauses of the Fifth and Fourteenth Amendments that raised as well and in it, went over the issues that have been long recognized since the 70's, a detention of an accused pre-trial disadvantages him.

I would just—I just wanted to make a record. I've seen some lower court, Wisconsin, Federal case that talked

about the defense didn't speak up. And so—or the defense, if it doesn't say anything, it's assumed that it was their strategy, their tactic. I just note that I have availability for the month of August. You know, as it turns out—so, if we were to keep going in August, I have—I have the days where this could be, I submit, accomplished in time.

If my client is convicted, then I'll have—there'll be a present report, he'll have to be sentenced and all that. And so, we're talking about delay—I looked at it this way, Your Honor is commencing this within 180 days, and so, that part is met. And then I thought about, okay, well what if a Court commenced the trial and then put it off, like, six months and then didn't continue the trial for—then definitely, you know, like, it'd be very obvious that that would be—that would be violative and undue delay, unnecessary delay.

I would submit defense is, you know, we've been—we're read in August and we ask—we don't accede to—object to any undue, unnecessary delay. I just don't want to—because my client became aware of it, I think, either, I think Monday afternoon, and so my client brought it up to me and I think it would be—I think it would be unfair to him for me not to—not to make a record of it.

THE COURT: I understand. All right, that's true.

MR. APPLEBY: Thank you.

THE COURT: Mr. Flowers, anything to add?

MR. FLOWERS: Your Honor, I think the IAD is very clear that trial must commence before the IAD date. We are commencing the trial, we're picking a jury as we're currently sitting. We still have another day in this month to continue. It would be the State's opinion at this time, since this argument has been brought up and I don't have

the exact dates, but the dates between the last—we had a motion. The defense filed two motions, the dates between that motion being heard and the previous hearing, those should be excluded from the 180 days, which would put us well into September.

Therefore, even if we didn't even commence until September, we would be commencing at the proper time. It's very clear that the defense filed two motions, they were heard, all that time should be excluded. That's—we were unable to try the case because we had to hear those two motions. Thank you.

THE COURT: I'll look at the question of excludable time that the Courts have viewed the IADs as containing, one Court even called it the safety valve, with regard to time that can be told for certain purposes.

Now, we commence trial within 180 days and this is not the situation that the State or the defense, rather, suggested it as a possibility for a six-month delay. The Court is commencing, getting it started. It is unavailable in August. It has a specific assignment in August that has to be achieved. The assignment is criminal justice reform where it does not permit trial days within that month.

I do have vacation in that month. We realized yesterday that the defense has a vacation in early September. I'll look at the exclusion issue, it's an interesting question. The case cannot be tried when there's a dispositive motion that's pending. It has to be resolved. I think we did resolve it as expeditiously as we could, so I will look at that.

But in any event, we commenced the trial within the statutory framework of the IAD under New Jersey's version of the IAD. I shouldn't say version, just about every state the language is identical. So it's a compact, it was

signed by, I believe, 48 of the states, as well as the Federal government in the District of Columbia.

So, we have begun the trial. There is going to be a disruption. I'll look into the question of tolling and that may provide the dates in question. One Court even recognized that in some instances, it is humanly not possible to try certain cases. When a defendant arrives here with 180 days, given what is necessary with regard to motion practice and things of that nature, some cases, frankly, take 180 days to try or more. Maybe not very frequently within the State's system, but they do.

And no case can be considered ready, I would think, on the day that the defendant arrives in the receiving state. Most often, they arrive here without even counsel, so that process even takes a while. But anyway, the normal course of a case of appearance and negotiation, evidence review, all are done within the confines of the ticking clock of the IAD.

Certain motions may call upon, however, that clock to be tolled, I'll look at that issue, because if they're dispositive motions, the case can't be tried until they're briefed and heard. And I think both counsel have a right to be thorough in their review of the issue and brief it so the Court is well-informed in the argument, so. And we, in fact, did that.

So, I'll consider, I'll look at the issue of exclusion, but within the confines of the IAD, we've started the case, we commenced it with 180 days and I don't see that there's an IAD violation. Of course the issue's preserved by the defense raising it. All right?

MR. APPLEBY: Thank you.

THE COURT: Do you have any word from downstairs?

LAW CLERK: Yeah, they're on their way up.

THE COURT: Oh, okay, good. I'm going to step out for a quick second to use the restroom. Do you need to use a restroom?

THE DEFENDANT: I'm good, thank you, Your Honor.

THE COURT: Okay.

THE DEFENDANT: Yeah, I made sure I was good.

THE COURT: All right, let me step out. You can start bringing them in—

LAW CLERK: Okay.

THE COURT: —and I'll come in momentarily.

(Judge exits)

MR. APPLEBY: What His Honor said is the issue's preserved by the defense raising it. It would have been wrong for me not to raise the issue.

THE DEFENDANT: I understand.

MR. APPLEBY: Yeah, so I'm glad that I finally had thought of it.

(Pause)

THE COURT: Folks, you don't need to stand. Come on and you can sit up here in the box. Just because you're being brought up here doesn't mean your number's getting called, all right? So don't worry about that. It may still be called, but there's no sense in standing when you can fill the box.

(Jurors enter)

THE COURT: Thank you. All right, good morning, folks. My name is Judge Kevin Smith and you're here in

Superior Court. You have been brought here today so that we may select a jury in the case . . .

* * *

THE COURT: Counsel, anything?

MR. FLOWERS: Scheduling, Your Honor, should the State be ready to open and, more importantly, have witnesses for next Tuesday, or are we just going to finish jury selection?

THE COURT: If it were me trying the case, I would say let's get the jury picked and then we'll start openings when we return. You'll have a witness and a half, two witnesses, whatever, and you'll be asking the jury to remember what they said—

MR. FLOWERS: And that's—

THE COURT: —over, you know, a month or so. So that would be what I'd be asking. But what do you think?

MR. APPLEBY: I'm concerned about time, but what happens is there's no way that the trial finishes on Tuesday—

THE COURT: No.

MR. APPLEBY: —at this point, I do concede.

THE COURT: Right I think it's best that we do that. I just think—I think what that will also help is prevent, hopefully, a lot of questions about the testimony that came in that, you know, on Tuesday, you know**?**

MR. FLOWERS: And then—

MR. APPLEBY: And that would extend the proceedings.

THE COURT: Read backs and all that kind of stuff.

MR. FLOWERS: I guess that goes to my next point, then I would ask that we not swear the jury in.

THE COURT: No, no, I expect—no, because in that time period, who knows? We could have a problem with one or more. We're going to have to address this issue on Monday—I mean, on Tuesday with—we'll voir dire the specific juror out of the presence of the remaining jurors. It could have been simply saying can you believe this process? But it also could be something substantive, I don't know. But we'll do our best to address it on Tuesday, okay?

MR. FLOWERS: Understood.

THE COURT: Keep your fingers crossed that it's nothing, that we don't have to start it all over again. All right?

MR. FLOWERS: Thank you, Your Honor.

MR. APPLEBY: Yes, sir.

THE COURT: See everybody Tuesday, well, on this case at least.