In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

PETITIONER,

AGAINST

JOHN MAURO AND JOHN FUSCO,

RESPONDENTS.

No. 76-1596

Washington, D. C.
February 27, 1978

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Petitioner,	:	
v.	:	No. 76-1596
JOHN MAURO and JOHN FUSCO, Respondents.	:	

Washington, D.C.
Monday, February 27, 1978

The above-entitled matter came on for argument at 10:56 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ANDREW L. FREY, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530; for the Petitioner.

KEVIN G. ROSS, Esq., 123-35 82nd Road, Kew Gardens, New York 11415; Court-appointed attorney for Respondents, pro hac vice.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 1596, United States v. Mauro and Fusco.

Mr. Frey, I think you may proceed now.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.

ON BEHALF OF THE PETITIONER

MR. FREY: Mr. Chief Justice, and may it please the Court:

This case is also here to review a judgment of the Court of Appeals for the Second Circuit, in this case fighting an order of the District Court dismissing criminal contempt prosecutions against the two respondents herein, on the ground that Article IV(e) of the Interstate Agreement on Detainers had been violated when these federal defendants were returned to state prison between arraignment and trial. I have a lot of ground that I would like to cover, and I think the facts essentially are very simple and can be stated very briefly. The criminal contempt indictments were returned at a time when both Mauro and Fusco were prisoners in New York State prisons. They were returned in the Eastern District of New York--in the same state, in other words. A writ of habeas corpus ad prosequendam was issued. No detainer was ever lodged against them on this criminal contempt charge. They were brought into federal court. They pleaded not guilty.

Their trial was scheduled. There was some discussion about whether they would stay in the metropolitan correctional

center, which is a federal pretrial detention facility in New York. Fusco indicated that he wanted to be returned to state prison, Mauro that he wished to stay in the federal holding facility. In fact, the federal holding facility was overcrowded, and both of them were returned to state prison.

Subsequently their lawyer, in what I think is a stroke of genius, made the motion to dismiss under the Interstate Agreement on Detainers and prevailed. The Court of Appeals, in a two-to-one decision upheld that action, concluding that if the writ of habeas corpus ad prosequendam were not treated as both a detainer and a request, the effect would be to allow the Federal Government to circumvent the requirements of the Interstate Agreement on Detainers by not lodging a detainer against the prisoner.

I would like to discuss first the general considerations, which I believe are the same in this case as in the prior case for why the writ should not be construed to constitute either a detainer or a request.

The Interstate Agreement on Detainers effected a dramatic change in the way state prosecutors could procure out-of-state prisoners for trial, and it provided for them a needed mechanism to deal with the very real problem in the case of state-to-state transfers and with federal adherence to the agreement to deal with a real problem securing federal prisoners for state trial. It gave federal prosecutors,

however, nothing that they did not as a realistic matter fully enjoy before federal adherence to the agreement.

There may have been an occasional instance in which a federal ad prosequendam writ was not honored. I think in the Ford case respondent's attorney found maybe two cases where that occurred.

It simply was not a realistic, practical problem, and it was not on anybody's mind.

Q However, you assume that when it was not honored, the Federal Government just dropped the matter?

MR. FREY: That is apparently what happened.

Q In the Gordon case, it was about two witnesses.

MR. FREY: I think they were co-defendants. They were also wanted as witnesses.

Q And the statement that they use, this dictum about five lines below.

MR. FREY: The issue arises in cases where the defendant is subsequently claiming that he should have been produced, and his speedy trial rights were violated or that his co-defendants should have been produced, and the Court

[Continued on page following.]

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observes and then cites the Ponzi case for the proposition that compliance is a matter of comity. We are fully prepared to stand on the proposition that the Supremacy Clause would compel requirement in the event that there were a federal/state confrontation, which is not to say that the state would and could not come into federal court under an analogy to the extension doctrine and say, for instance, "We are in the middle of a state trial. Would you"--

Q We do not have to decide that question here.

MR. FREY: Absolutely not. It is only pertinent in terms of understanding whether there was a problem that was dealt with by the Interstate Agreement on Detainers, and we maintain that there was absolutely no problem the federal prosecutors getting state prisoners for trial that was the concern of either the Council of State Governments or the Congress.

Q On this issue you agree with Judge Mansfield?

MR. FREY: On the issue that the--

Q Whether or not this is a detainer.

MR. FREY: Whether or not this is a detainer, but when you say this issue, I am addressing the broader issue first because if we win on the issue of whether the writ is a request, we win this case. We can also win this case even if the writ is a request on the grounds that the writ is not a detainer. The arguments as to why the writ is not a detainer

are I think fairly clear and have been well canvassed in our brief and Judge Mansfield's dissenting opinion. And I hope to address myself principally to the legislative history, the Speedy Trial Act, and the other factors that we think compel the conclusion that it is not even a request, let alone a detainer.

Q The things that our questions prevented you from addressing yourself to in the first argument.

MR. FREY: Perhaps, but they are fully relevant to this case.

In focusing on what the problem was that prompted the Council of State Governments to adopt a provision such as Article IV, I think it is crystal clear that they were not talking about the federal procedure with the ad prosequendam writ; and I would like to quote just a sentence from the statement of the Council of State Governments in connection with the circulation of the agreement as a proposal that they were recommending. They state: "In addition, the only way that a prosecuting official can secure for trial a person already imprisoned in another jurisdiction is by resort to a cumbersome special contract with the executive authority of the incarcerating state. Because of the difficulty and red tape involved in securing such contracts, they are little used." That is obviously not a description of the federal experience in procuring state prisoners.

Q If the states had the same right, they would not need the bill at all.

MR. FREY: If the states had a habeas corpus writ that ran outside their boundaries, that is true.

Q They would not need it at all.

MR. FREY: There would still be problems about how to handle expenses, about--one of the great concerns, one of the reasons a sending state was reluctant to relinquish a prisoner was they wanted an assurance they would get him back after the trial in the receiving state.

Congress enacted the Interstate Agreement as federal law in 1970. I think it is unmistakably clear to anybody who reads the legislative history that the motivation underlying federal adoption of the agreement was for two purposes and two purposes only. The first was to facilitate the efforts of states to procure federal prisoners for trial and to supply for federal prisoners a mechanism for clearing state detainers. This was thought particularly pressing in light of the decision a year earlier in Smith v. Hoosy involving the trial obligations of states with respect to federal prisoners.

The second objective was to provide a means for the District of Columbia to procure state prisoners for trial. It is impossible to believe that Congress meant to alter the means whereby the Federal Government acquired state prisoners for trial and to impose new conditions such as the no-return and

the speedy trial requirements of Article IV in connection with those proceedings. There is no mention of any such consequence in the section discussing the need for the legislation, and it seems at least passing strange that if Congress envisioned this consequence for federal prosecutions, this aspect of the agreement was confined to the effect on the District of Columbia. And of course the statement by the Commissioner of the District of Columbia or the Assistant Commissioner, which was not echoed by the Deputy Attorney General's explanation of what the bill would accomplish, I think should be given very little weight.

Moreover, a review of the various provisions of the agreement reflects anomalies that surely would have been addressed had Congress realized that it was changing the procedures whereby the Federal Government obtains the presence of state prisoners for trial.

The agreement is set forth in the appendix to our brief in Ford. The most obvious provision, which has been much discussed, is the proviso to Article IV(a), which is at page 8-A of the appendix, which gives the governor 30 days to disapprove the request. I am sure that Congress thought that when a state prisoner was wanted for federal trial, the governor had no power to say, "No, we will not deliver him," any more than the southern governors had power after Brown v. Board of Education to interpose state sovereignty to resist

federal orders there. And I think it would be extraordinary for Congress to create such a power in state governors, which they surely must not have thought previously existed without saying a word about it.

Indeed, whatever problems there may have been with the occasional case prior to federal adherence to the agreement where some state warden refused to honor the writ, these problems would surely be multiplied if this proviso in the agreement applied.

Secondly, Article IV(c) of the agreement is significant because it refers to in respect of any proceeding made possible by this article. That is the speedy trial provision. The notion that underlies this is that Article IV was making possible certain proceedings that were not previously possible or feasible, that it was providing--

Q Mr. Frey, on that point, I must say you are probably arguing the Ford case more than the Mauro case now, but that is all right. On that very point, supposing Indiana and Illinois prior to the adoption of this agreement had worked out an informal procedure where they exchanged prisoners upon request and worked out the finances and all the rest so that they never had a problem. Would this article apply to them after they both signed the agreement?

MR. FREY: Not if they continued to use the prior procedures, not if they did not procure prisoners by filing--

Q They would have to use that particular form, or else the agreement would not apply.

MR. FREY: That form or some other statement invoking their rights under Article IV of the agreement.

Q So, your construction is that the agreement only applies to those states which could demonstrate that they had previously been having problems getting prisoners.

MR. FREY: Even those states I think by and large abandoned their resort to--

Q So, even if they use the agreement form, your argument would still apply because if they had not been having any difficulties before, the procedure would not have been made possible by the agreement.

MR. FREY: But I think what that language means is that when you--what the framers had in mind was that this agreement was providing a mechanism that did not previously exist, that was different from ones that previously existed. There was, after all, extradition, which the states could still resort to. There were these special contracts which the state--

Q This very technical reading of the language is that the criminal trial had to have been made possible; is that right?

MR. FREY: No, I do not think so. I think that is talking about a proceeding to receive the prisoner from one

state to another.

Q I see. But you would say that if there were a pre-existing procedure--I am just not quite clear on your argument.

MR. FREY: I would say that if there were pre-existing procedure--I do not think what they mean by this is that the agreement applies only when it was impossible previously to get a prisoner from one state to another because it was not impossible previously. It was just extremely difficult. I think what they mean by this is that when you have availed yourself of the mechanism which we have supplied you here, then there are certain costs that are associated with certain responsibilities that we are going to impose on you. One is the speedy trial obligation. The second is the no-return obligation. These are a quid pro quo for a very substantial benefit the state prosecutors were getting, and I think that is what that--

Q So, in other words, you would read it as though it just said in respect of any proceeding under this article? Basically that is the way you interpret it?

MR. FREY: I think it means more than that for us because if that was all it said, it would not help me at all because that would--

Q That is exactly my point.

MR. FREY: --not get around the question. I think

what it means is any proceeding that is facilitated by this article. I do not think they had in mind the situation that Indiana and Illinois were going along swimmingly before and really they did not get any advantage out of this; but still for some reason they used this form and made a request under this agreement. I think if a request was made under this agreement and custody was delivered in accordance with the terms of this agreement, then the consequence would be that the conditions--

Q Then it all comes back to the question of whether the writ is a request under the terms of the agreement, still the same basic argument, the same basic issue.

MR. FREY: But I do not think that the speedy trial provision literally read can apply on--I think it is clear that the meaning of that provision is that your procurement of the prisoner has to have been facilitated. I do not think it makes any sense to say that this procedure--

Q You say that in the state/federal context, but then you say you do not make that argument as between two states that were getting along swimmingly.

MR. FREY: I would make the same argument if Illinois procured a prisoner from Indiana under their old procedures and then the Court--

Q Signed this agreement and then kept the man for 130 days. You would say he had no right under this agreement?

MR. FREY: I would say if the defendant said, "You should treat this whole procedure as a request under this agreement in order to prevent them from circumventing the agreement," I would disagree with that.

Q If Illinois asked for him under IV, and Indiana said, "We will give him to you under the old rule," would you think that is okay?

MR. FREY: I am not sure. I mean, there are a lot of combinations that can be played on this.

Q What I am trying to get at is, Who controls the destiny of this prisoner, the receiving state or the delivering state?

MR. FREY: The receiving state has the right under the agreement or under other procedures that may exist to secure--

Q You would have the right under either, would you not?

MR. FREY: Probably under either. We might have the right under the Interstate Agreement on Detainers if we wanted to invoke it.

Q Could a couple of states enter into a side agreement, saying, "We will only use the Agreement on Detainers when we really need it. Our general practice shall be the old-fashioned one where you give to us and we will take it. We will let the detainers still have all the adverse

consequences that it used to have. There will be no speedy trial rights, all the rest of it. We will just stay outside the agreement"; would that be permitted?

MR. FREY: It would be with respect to Article IV. There would be no problem. The evils of the detainers were really addressed in Article III. And if states were adherent to the agreement, the prisoner would have a right to demand a trial under Article III. But what we are talking about here is Article IV, and that is not addressed to the evils of the detainer system at all but to the difficulty of the state prosecutor obtaining a prisoner from another state for trial. So that I do not think there would be any problem in saying if the states wanted to not take advantage of what Article IV had given to them, they also would not have to pay the price that is associated with using Article IV. And we have not taken advantage of Article IV.

Q But is not the 120-day speedy trial requirement for the benefit of the prisoner, not for the demanding state?

MR. FREY: It is for the benefit of the prisoner in the sense that once you start the proceedings, you are obliged to continue them. But what I am suggesting is that Article IV basically was put in there to help the state prosecutor. But as a condition of rendering this assistance to the state prosecutor, which he desperately needed, certain conditions were imposed. If you are going to do this, you are

going to have to comply with the 120-day requirement and so on.

Q What if the--I am not saying it normally happens--but what if the prosecutor says--somebody comes in and says, "Look, there is no use your grabbing this guy because we cannot try him within 120 days." And the prosecutor says, "Take back that Article IV thing, and let us go by habea." That would be wrong, would it not?

MR. FREY: I suppose if he once used it, he would be--well--

Q You and I cannot conceive of a prosecutor doing that.

MR. FREY: But I am not sure. I do not think--once he started the ball rolling under that agreement, I do not think he could stop it.

Q For any reason.

MR. FREY: Except for continuance in open court for good cause and so on.

The conclusion that nobody understood federal adherence to the Detainer Agreement to alter the traditional use of the writ is confirmed by the events that followed its enactment. Although the speedy trial and no-return provisions would obviously constitute dangerous boobytraps for the unwary federal prosecutor, as Mr. Justice Stewart suggested earlier, if federal procurement of state prisoners was to be regulated by Article IV, the Justice Department, which had sponsored this

legislation in Congress, breathed not a word of these dire consequences to federal prosecutors. Instead it assigned the responsibility for administering federal participation in the agreement to the Bureau of Prisons, which was intimately involved with the responsibilities as a sending state but had a mostly tangential connection when the United States is a receiving state.

Q Mr. Frey, do you think that federal courts that ignore the dire consequences of the Speedy Trial Act on the ground that Congress did not know what it was doing when it asked federal judges to handle all of these cases without having enough federal judges to do the work?

MR. FREY: No.

Q Because Congress obviously did not know the consequences of that statute.

MR. FREY: The question here is whether these are consequences. I would agree that if Article IV(a) said, "Any proceeding instituted by the writ of habeas corpus ad prosequendam by a federal prosecutor shall be subject to the following conditions," then regardless of how little considered it was or what the consequences were, the courts would be obliged to follow it. But it certainly is a basic tenet of statutory construction that in deciding how to deal with ambiguous--or even in Train v. Colorado Public Interest Research Group with what seems to be very clear language, the

Court can consider the absurdities that might be created, the extent to which it defeats the congressional purposes, and the extent to which it creates problems with other legislation. And in this connection the Second Circuit made no mention of the Speedy Trial Act; but I think it is very important to judicial consideration of this statute. The Speedy Trial Act was adopted by Congress only four years after it had adopted the Detainer Agreement. And in adopting it, Congress reflected not the slightest awareness that it had already legislated on the question of trial deadlines and procedures for state prisoners brought in for federal trial. The result is a scheme that is at best redundant with the speedy trial protections that the Court of Appeals found already existed under the agreement, and is in several respects inconsistent with them.

Q There was, was there not, some opposition to the enactment of the Speedy Trial Act?

MR. FREY: Yes. The Speedy Trial Act was a much considered--in contrast to the Interstate Agreement--it was considered in quite some detail. And the Justice Department had some opposition to some of its provisions and structure.

Q Was the Judicial Conference of the United States involved?

MR. FREY: I am not sure. I think it may well have been.

Q Yes, it is a matter of public record that by unanimous vote the Judicial Conference opposed the passage of the act. But no hearings were conducted of any significance to let that opposition be heard.

Q Did any of the opponents to the enactment of the legislation mention in any way the existence of the Interstate Detainer?

MR. FREY: I am not aware of it; if they did, it escaped my attention. I think nobody mentioned it because it is quite clear that nobody thought it applied.

Q They were asleep at the switch, as I said earlier.

MR. FREY: That may be. But I think in terms of what Congress thought, in terms of what the Department of Justice thought, in terms of what the courts thought, in terms of what the defense bar thought, nobody thought it applied. Everybody thought when the Government proceeded by the ad prosequendam writ, it was doing what it had always done.

Q That is true. That much is true. That does not get you very far in the argument.

MR. FREY: I think it gets me quite a way because I think that it shows that there is no reason why this Court should go out of its way to say that a request under Article IV(a) of the agreement--that a writ of habeas corpus ad prosequendam is a request. There is no linguistic equivalence

in those two terms. The writ on its face is a command. It is true that you could say a command is a kind of request. But this is an area in which the Court has full flexibility to do what seems appropriate to achieve the congressional purposes and to produce a harmonious and rational scheme of legislation. And the problems--if you rule against us in the speedy trial area, there are serious problems of inconsistencies that will bedevil the courts in the future.

To take one example, the tolling provision for extending the time beyond. Under the Interstate Agreement on Detainers you have 120 days. Any extension thereafter must be for good cause shown and it has to be in open court with the defendant or its counsel present.

On the other hand, under the Speedy Trial Act, you have 60 days. There are tolling provisions, however. So that if in the middle of those 60 days there is a competency inquiry, there is an interlocutory appeal by the Government, some other event, those days simply do not count, which is quite different from the Interstate Agreement.

What is more, continuances can be granted under the Speedy Trial Act. They do not have to be in open court. The defendant or his counsel does not have to be present. But, on the other hand, there does have to be a statement of reasons on the record, either oral or written.

Q I suppose, if you lose, the prosecutors and courts

will just have to abide by the highest common denominator of the two overlapping statutes, the most restrictive provision.

MR. FREY: There are going to be a lot of states which will accomplish no substantial protection of anybody's rights but an awful lot of litigation for the courts.

Q People say that about the Speedy Trial Act generally.

MR. FREY: Well--

Q But Congress enacted it.

Q Mr. Frey, are you going to argue the moral case?

MR. FREY: Oh, yes. First of all, every one of these arguments is--

Q If you win on that argument, you win them all because the issue in the moral case, as I understand it, is whether the writ is a detainer, not whether the writ is a request.

MR. FREY: Of course, our contention that the writ is not a request--

Q If you win on the first point in the other case, you win both cases.

MR. FREY: That is right.

Q I would agree with that. But you are not going to argue the moral case separately because you have really a quite strong argument in the moral case--

MR. FREY: Oh, I have a very strong argument. And, as I indicated earlier to Mr. Justice Stewart, I had intended to rely largely on Judge Mansfield's dissent. I think it is clear that whatever else was intended, the framers of the agreement in Congress were dealing with the problems that were created by the lodging of a detainer. And I think it is clear that the writ ad prosequendam is not a detainer. It functions in a different way. And there is no reason to do--

Q May I ask this, Mr. Frey: You emphasize the practical situation; there are some 5,000 people. Is it each year there are 5,000 writs issued?

MR. FREY: That is the information that we have from the Marshal Service. That does not mean 5,000 different people because the writs could be issued more than once with respect to the same person.

Q First for indictment and then for trial.

MR. FREY: First for arraignment, yes.

Q Am I correct that about 3,000 of those are cases where there was a detainer and the other 2,000 there was no detainer?

MR. FREY: That is our information.

Q So, the 2,000 would be solved if you win the Mauro case. As to the 3,000, supposing this issue could not be raised on collateral attack--and that is something we do not have here. Is it not true that that would solve a great many

of those that are outstanding now?

MR. FREY: That would solve many of the past cases.

Q Would it not minimize the overwhelming character of this problem?

MR. FREY: It would minimize the problem, but it would by no means eliminate it because there are not only the inconsistencies with the speady trial I have just mentioned but there are even worse problems with the no-return provision. The no-return provision--

Q Could you not solve the no-return problem by just asking the prisoner if he wants to go back or not? And usually, as I understand it, when you pull him out, you have got him in a temporary, very undesirable facility. So, would he not normally want to go back to the more permanent place?

MR. FREY: He might or might not want to go back.

Q If he is aware of the problem and you give him the option, what is the difficulty? Just give him the choice.

MR. FREY: The problem could be solved. I am not saying that in the normal case--

Q Is it not a very simple problem, extraordinarily simple problem?

MR. FREY: It is not extraordinarily simple because if you look at a case like Thompson, the Third Circuit case which we have a pending petition for certiorari in, Thompson was in a state jail which happened to be also the facility

where federal prisoners are held. A detainer had been lodged against him, and he was then indicted on heroin distribution charges and brought in by writ into federal court to plead and returned several hours later to the same jail that he came from, which also was the jail where he would have been kept as a federal prisoner. But the paperwork that would have transformed him from a state prisoner into a federal prisoner was not done. And what we are going to have to rely on is that the secretaries in the marshal's office do not make a mistake with their paperwork because if they do, a defendant is going to get a windfall dismissal.

Q You say this was during the period when this was kind of a time bomb ticking away, and nobody realized it was there. But once you know the problem, can you not handle the paperwork?

MR. FREY: Yes, it can be done. But I am saying that mistakes are made. We know what Rule 11 requires district judges to do in the course of accepting a guilty plea. But I can assure you that across my desk are some dozens of cases in which they do not do it.

Q We should repeal Rule 11 because judges do not follow it?

MR. FREY: No, I am not suggesting--

Q Should we abandon this agreement because people are going to make mistakes and not be able to follow it? I do

not understand this kind of legal argument.

MR. FREY: I am simply suggesting that you should not assume--I am not asking you to do anything affirmative on that ground so much as asking that you not assume that there will be no problem in the future as an empirical matter, if you make it clear that the agreement applies because in fact there will be problems.

Q But, Mr. Frey, is it not a fact that this whole statue was adopted because there is a very serious problem of people subject to detainers being subjected to unfair treatment? Is that not to be weighed in the scale?

MR. FREY: There is no evidence, Mr. Justice Stevens, that there was any concern on the part of Congress or indeed on the part of the Council of State Governments with the effect of federal detainers. There is simply no--they were not--

Q Does not the evidence indicate that about half the detainers were issued by the Federal Government?

MR. FREY: That is true. And yet it is clear from the focus of the discussions that it was on the effect of state detainers. And let me make another point because the Speedy Trial Act now provides a mechanism for the state prisoner to clear the federal detainer. So, we are back in the situation where we do not need two mechanisms. We do not need both the agreement and the Speedy Trial Act. He can do it under the Speedy Trial Act. Congress dealt with the problem

there consciously, which I do not believe anybody could conclude it did in this area. And I think, just to sum up, if the Court holds that the provisions of Article IV of the Interstate Agreement are in applicable when the Federal Government uses the writ, this holding would not undermine the expectations or goals of Congress. It would not subvert the concerns that led the Council of State Governments to adopt the agreement. But rather it would create a harmonious relationship between the habeas corpus statute, the Speedy Trial Act, and the Interstate Agreement on Detainers. The state prisoner with a federal detainer can clear the detainer under the Speedy Trial Act. The state prosecutor who wants a federal prisoner can resort to the agreement, and speedy trials are guaranteed under the Speedy Trial Act. I cannot see why the Court should go out of its way to construe the writ as a request to undermine this essentially symmetrical system which provides adequate protection for all of the defendant interests and the interests of the criminal justice system.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Frey.

Mr. Ross.

ORAL ARGUMENT OF KEVIN G. ROSS, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. ROSS: Mr. Chief Justice, may it please the Court:

I would like to stress at first a few facts with

regard to the Mauro case that I believe were not covered sufficiently. The first thing is this. Mr. Mauro and Mr. Fusco were prisoners in the Auburn Correctional Facility in Auburn, New York at the time of their indictment in the Eastern District of New York.

Auburn, New York is approximately 300 miles from Brooklyn. After their indictment and at the beginning of November, 1975, they were produced in Brooklyn by writ. They were arraigned on November 24th, and they again appeared on December 2nd in court. They were returned, however, on both December 11th, I believe, and December 19th back to Auburn. The reason why I stress these facts is that this is not a case in which a prisoner is produced on writ for the purpose of one, discrete appearance in court and then returned the same day to his place of incarceration so that he has no substantial damage to his prospects of rehabilitation or treatment. This is a case in which there was a clear abuse of the purposes of the agreement.

The reason why I say this is that the Second Circuit has recently decided the case in which precisely this issue was before the Court. The name of the case was United States v. Chico, and I am sorry it was not in my brief; but it was reported after our briefs were filed. In that case--

Q Do you have the citation there?

MR. ROSS: Yes, I do, Your Honor. It is 558 F2nd 1047.

In that case, interestingly enough, Judge Mansfield wrote the decision. And in that case there was production of a prisoner on writ in the District of Connecticut, and he was returned the same day to his place of incarceration. Judge Mansfield, writing for a unanimous bench, held that under these circumstances there has not been the change in conditions of confinement which would warrant the enforcement of the Interstate Agreement on Detainers.

From this case I believe I see a coherent scheme in the interpretation of the agreement; and that is this. We do not look at the document which causes the transfer of the prisoner. We look at the transfer of the prisoner.

For example, in the Mauro case we have a case in which the prisoners were shuttled back and forth over a matter of months. They remained in Manhattan for three or four weeks at a time. For this reason I do not think it would matter that the document itself that causes the transfer of the prisoner is called a writ instead of a detainer.

The Government attempts in its brief to distinguish the writ from the detainer by stating that the writ is immediately executed and therefore it does not have the long-term perspective effects or future damaging effects of a detainer. However, I believe that the same analysis applies to that argument. The writ itself, although immediately executed, causes a complete disjunction--I am sorry--a complete

fragmentation of the continuity of rehabilitation so that the prisoner is shuttled from one jurisdiction to another.

Q What do you think the word "detainer" in the statute means?

MR. ROSS: Of course this is one of the main issues of the case, Your Honor.

Q That is why I thought I would ask you.

MR. ROSS: As Congressman Kastenmeier said, a detainer is a notification of charges pending against a prisoner, and that is the position that I have to take. And I believe that that is really what the detainer is all about. What we are looking at is how the notification is received by the authorities holding the prisoner. I have to believe that it is only human nature that when a warden receives notification of charges pending against a prisoner that his status is consequently adjusted. What was the case with regard to Mr. Mauro and Mr. Fusco? The original detainer in the case, which was for civil contempt, was lodged against Mr. Mauro and Mr. Fusco. They lost all footing. And it was for this reason in the Court below that they argued that a detainer had been lodged against.

I would also like to point out that it is our position that the Interstate Agreement does not construe an implied repeal of the writ. For one thing, there are still I believe four states that are not signatory to the agreement.

With regard to these states, therefore, the writ remains without any restriction in the production of prisoners.

Moreover, as had been mentioned in the prior argument, there always has been a question with regard to whether or not the writ is mandatory process or whether or not a state government complies with the writ as a matter of comity. This being the case, we see that the agreement is a framework which allows the writ to be implemented.

With regard to the Speedy Trial Act, I would have to say this. There is no indication of a congressional intent that the Speedy Trial Act abrogated any of the terms of the state agreement. Number one, it is always hazardous to elicit a gleaning of the intent of an earlier Congress from the act of a subsequent Congress. And, second of all, there is no express provision repealing the agreement. Thirdly, there is an express provision in the Speedy Trial Act which preserves the prior law with regard to the legality of prisoner transfers from one jurisdiction to another. Although the Speedy Trial Act is complementary, it serves a different purpose than the Interstate Agreement.

Q It is your position as to the definition of "detainer" in Article IV, I take it, that the governor of New York could have vetoed the Government's habeas corpus ad prosequendam if he had done so within the period provided therein?

MR. ROSS: Yes, it is, Your Honor.

Q And that Congress consented to that?

MR. ROSS: Yes, it is, Your Honor, because I believe that--well, to be perfectly frank with you, I do not think that that state of affairs was ever considered. But if we look at the scheme of the agreement as a whole, I believe that that is the only conclusion that can be drawn because at the time there was an understanding that there was at least great doubt as to the mandatory nature of the writ.

A very important feature of the Speedy Trial Act is that it does not have a no-return provision. And I believe that this is the most important issue of the whole case. Without the no-return provision, there is no Interstate Agreement on Detainers.

There are two main purposes of the Interstate Agreement on Detainers. The first is the prompt disposition of criminal charges against prisoners. The second is the prompt disposition of detainers that are lodged against prisoners. It has been recognized in the cases decided by the circuit courts of appeals after the Second Circuit decided this case that there is a disastrous, disruptive effect upon the rehabilitation of prisoners where a prisoner is shuttled from one jurisdiction to another. However, this is always seen in the context of the shuttling of the prisoner from one sending state to one receiving state. But if we look at many

of the cases that spoke of compliance with the writ as a matter of comity, I believe we see that oftentimes there are more than one receiving state which competes for the custody of the prisoner. In these circumstances there is only one way in which a prompt disposition of criminal charges or an orderly disposition of criminal charges against a prisoner can be resolved, and that is to provide that when a receiving state acquires custody of a prisoner, that receiving state must terminate prosecution before giving back that prisoner to the sending jurisdiction. Otherwise what would happen is we would have the case of a prisoner bouncing from one jurisdiction to another repeatedly by writ, which I believe has happened in this case and in other cases.

Q When you speak of this process of interrupted rehabilitation, I suppose that in cases where the prisoner files a petition for the traditional writ of habeas corpus in the federal court and secures a hearing, he or she is transported for the hearing. That has the same disruptive effect, as you put it, as I suppose the one you have described.

MR. ROSS: Not if he is successful, Your Honor.

Q He does not know at the outset whether he is going to be successful or not, and he may not hear for quite a while.

MR. ROSS: This is so, Your Honor. I would distinguish that, first of all, because I believe my argument is limited to

the writ of habeas corpus ad prosequendam--

Q But you are emphasizing the interruption of rehabilitation.

MR. ROSS: Yes, I am, Your Honor.

Q As though this were something peculiar to the kind of cases we are dealing with here. In other words, prisoners frequently cause an interruption on their own account.

MR. ROSS: Yes, Your Honor.

Q And we do not think that is bad, do we?

MR. ROSS: No, in that case there is no way that I could say that that is bad. I do not believe at all that that would be the type of thing which is contemplated by the Interstate Agreement.

Q And there were in one recent year more than 12,000 of those cases by escaped prisoners in federal court. So, I am simply suggesting that you are perhaps putting undue weight on this interruption of rehabilitation.

MR. ROSS: Your Honor, the weight that I am asserting is weight of the disastrous effects of prosecution upon rehabilitation, and that is the case with Mauro and Fusco.

Q I suppose it is disastrous on a person--the prosecution is disastrous in that sense if he is at-large and not confined.

MR. ROSS: Yes, Your Honor. For that reason, I would

like in the Interstate Agreement to a prisoner's bill of right, especially after having dealt with the Mauro case since its inception because I see what happens--I did see in that case what happens when a prosecution is initiated against a prisoner. And I do not think it is a fair analogy to reduce those facts to the facts of the writ of habeas corpus proceeding where a prisoner is attempting to have an adjudication with regard to the legality of his custody.

In conclusion, I would have to say this, that without the no-return provision, there would be no Interstate Agreement. The fabric of the agreement would be destroyed; if the Government is unilaterally allowed to exercise the writ at any time, then the agreement has no meaning. Its purpose is frustrated, and the agreement itself is destroyed. Therefore, I think it was with very good reason that the Second Circuit Court of Appeals held that in this case the Interstate Agreement controlled the use of the writ.

Q Before you sit down, on the issue of whether the writ is a detainer, Judge Mansfield cites a great deal of history about detainers causing harmful consequences on the prisoners against whom they have been lodged. Is there anything in all this history that preceded the enactment of this agreement or the adoption of this agreement and the enactment of the statute following it indicating that there had been any comparable abuse of the writ of habeas corpus

ad prosequendam?

MR. ROSS: Not that I am aware of, Your Honor. However, in the Mauro and Fusco case and in cases comparable to it, it seems as if there has been that abuse because the last consideration is the consideration for the prisoner. And the writ has been used without consideration to the prisoner to shuttle the prisoner back and forth.

Q But we cannot really rely on the facts of this case to explain what the statute means.

MR. ROSS: I understand, Your Honor. However, I am not aware in the history of any record of the use of the writ in that manner.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Frey?

REUBTTAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: Just one point I think is quite significant. I cannot understand the argument that it is a dreadful thing to return the prisoner to his state prison between arraignment and trial in a federal case. If a prison in Illinois is brought in for a federal trial in Indiana, let us say, he is likely to be kept in a local jail, which is severely overcrowded and where there are surely no rehabilitative programs of any kind; whereas instead, if he were

returned, he would go back to the same programs that he was in, whatever they were, and if no detainer had been lodged against him, the programs would not be affected by a detainer. He would not incur any loss. Indeed, in the Ford case I think it is significant that at sentencing Judge Motley said that she was impressed with the fact that despite Ford's serious criminal record, he had taken advantage of an opportunity offered in prison in Massachusetts to earn a high school equivalency diploma and apparently continuing to take further courses. So, it is clear that Ford actually benefited.

Q Mr. Frey, if the United States were held to be a receiving as well as a sending state but the writ is not deemed to be a detainer, is the United States in serious trouble or not?

MR. FREY: If you are suggesting that what we could do is radically revise our procedure for lodging detainers--

Q Was there a detainer in this case? There was not.

MR. FREY: Not in this case.

Q It was not something you called a detainer.

MR. FREY: There is a form which is normally used which is labeled a detainer.

Q That is the question in this case. But if we held that what you did here was not a detainer and it would not be a detainer in any other case, just to proceed by habeas

corpus, which is what you would like us to hold--

MR. FREY: That would--

Q --that would help you.

MR. FREY: That would help us in 40 percent of the cases.

Q If you really do want to use the detainer.

MR. FREY: We do use the detainers because they do perform an important function. It is normally useful and important, particularly since we are going to proceed promptly with disposition of the charges under the Speedy Trial Act; it is useful and important to tell the state custodian that indeed there are charges pending, that the person should not be released to the street without letting us know since that increases the possibility of escape and associated problems. There are good reasons for filing detainers, particularly in the federal system where the detainers are not--at least now with the Speedy Trial Act--accompanied by any of the abuses.

Q Of course if it were clear, if the act had said on its face that the United States is a receiving as well as a sending state, the passage of the Speedy Trial Act would not help you much, would it?

MR. FREY: There would be an issue as to whether the Speedy Trial Act would operate in some way as repeal of inconsistent provisions in the prior legislation. I think that

would be an issue. I do not think we have to confront that issue.

Q I know you think not, but we might disagree with you on whether the United States is a receiving state under this act. And if we did, you say that we should then see if the Speedy Trial Act did not partially repeal it.

MR. FREY: No, because the--well, let me backtrack for a minute. If you disagree with us that the United States is not a receiving state--an issue which I do not think you actually have to reach to decide these cases--you may nevertheless agree with us that the writ is not a request.

Q You wrote a lot of interesting words about it.

MR. FREY: But the words that we wrote--we structured the brief that way because the words that we wrote we feel are fully applicable to the proposition that the writ is not a request. It does not much matter to us which ground you decided on if you were willing to accept either of our arguments. There is, however, a difference which is that Article III would survive if you hold simply that we are a receiving state but the writ is not a request. And then whatever inconsistencies there are between Article III and the Speedy Trial Act would be a problem in the future. But I know of only one case in all of this litigation that was initiated under Article III. I mean, the fact is that prisoners do not usually want to clear detainers.

Q Is it clear under the act that if a state asked another state, just writes them a letter and says, "By the way, would you mind our sending over to pick up this prisoner?" and never files a detainer and the warden says to the prisoner that this next door state wants to try you and he says, "Great, I would like to get tried and I waive extradition or anything," that situation, I take it, is not subject to the act, is it?

MR. FREY: I believe it is not.

Q Mr. Frey, where are these two people domiciled before?

MR. FREY: Mauro and Fusco?

Q Yes.

MR. FREY: I am not sure. The investigation--the grand jury that called them to testify was investigating offenses in the Eastern District of New York, which would be Brooklyn, Queens, or Long Island.

Q My point was that if they lived in Brooklyn, then they would be better off in West Street than they would be in--

MR. FREY: That may be, and I am not suggesting that the District Court is without power to say they should be kept here. If they want to be kept, they can be kept if they make an appropriate showing to the Court. The issue here is whether if we make the mistake of returning them without

their consent, they are immune from prosecution.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[The case was submitted at 11:46 o'clock a.m.]

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