OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-835 & 84-776

TITLE NEW JERSEY DEPARTMENT OF CORRECTIONS, Petitioner V. RICHARD NASH; and PHILIP S. CARCHMAN, MERCER COUNTY PROSECUTOR, Petitioner V. RICHARD NASH

PLACE Washington, D. C.

DATE April 22, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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NEW JERSEY DEPARTMENT OF :
CORRECTIONS, :
Petitioner, :
V. : No. 84-835
RICHARD NASH; and :
PHILIP S. CARCHMAN, MERCER :
COUNTY PROSECUTOR, :
Petitioner, :
V. : No. 84-776
RICHARD NASH :

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Washington, D.C.

Monday, April 22, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:52 o'clock a.m.

APPEARANCES:

PHILIP S. CARCHMAN, ESQ., Trenton, New Jersey; on behalf of the petitioners.

JOHN BURKE, III, ESQ., East Orange, New Jersey; pro hac vice, on behalf of the respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in New Jersey Department of Corrections against Nash and the related case.

Mr. Carchman, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF PHILIP S. CARCHMAN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. CARCHMAN: Mr. Chief Justice, and may it please the Court, the issue presented in the case today is whether the Interstate Agreement on Detainers, a uniform statute adopted by 48 states, the District of Columbia, and the federal government, applies to detainers based on probation and parole violations.

The facts before the Court are quite simple and brief. Respondent Nash --

QUESTION: You raised two questions in your petition for certiorari, didn't you? The first one you have just stated, and the second one was whether the state of New Jersey complied with Article III of the IAD.

MR. CARCHMAN: That is correct. The Court certified as to the first question only.

QUESTION: We granted only as to the first question?

MR. CARCHMAN: That is correct, Justice.

The respondent Nash was charged and convicted in New Jersey of various criminal offenses, and as part of his sentence he was sentenced to a jail term. Part of the sentence was suspended, and he was placed on probation for a period of two years.

While on probation, Nash was charged and convicted in the state of Pennsylvani for various criminal offenses, and was sentenced to a term of five to ten years.

The Mercer County probation department issued a warrant of a parole violation, and lodged that warrant as a detainer with the appropriate Pennsylvania corrections authorities. Nash sought to resolve the detainer using the IAD.

Nash proceeded to file a habeas petition in the United States District Ccurt, and the court suspended the habeas proceeding until state remedies were exhausted.

A state trial judge heard the probation revocation prcceeding, found the defendant was in fact in violation of probation, and sentenced the defendant to an aggregate term of three years to be served consecutive to the Pennsylvania sentence.

The United States District Court found that

the IAD did in fact apply to probation violations, and further determined that since the state had failed to bring Nash back to the state of New Jersey within 180 days as required by the statute, the state in fact violated the IAD, and the violation of probation was declared a nullity.

The Court of Appeals for the Third Circuit affirmed and determined that the IAD did in fact apply to probation violations, and thus became the first court in the United States, including the federal and state courts which have decided the issue, to so hold.

It is the position of the petitioners that detainers based on probation and parole violations do not fall within the scope of the IAD. The first and most obvious avenue of inquiry is to look at what we submit is the plain and clear language of the IAD.

The critical language is found in Article III and elsewhere, but Article III applies to the facts of this case.

The key language is the phrase, and I quote, "untried indictment, information, and complaint."

QUESTION: Incidentally, Mr. Carchman, does New Jersey have any complaint procedure for criminal cases?

MR. CARCHMAN: New Jersey has a sur complaint

procedure. The initial --

QUESTION: I am sorry. I didn't hear that.

MR. CARCHMAN: The initial filing is a sur complaint, which then proceeds before the grand jury, where if a grand jury makes a determination --

QUESTION: There is no information --

MR. CARCHMAN: There is no information. There is an accusation proceeding, but there is no information. The information is perhaps akin to New Jersey's accusation proceeding.

QUESTION: Do you think the accusation proceeding would come within the Detainer Act?

MR. CARCHMAN: Yes, because I don't think that the --

QUESTION: What is it? It is not an indictment, an information, what is it, a complaint?

MR. CARCHMAN: It is akin to an information. The accusation is a waiver of grand jury proceedings by the defendant and a plea to an accusation. It is prior to the matter being submitted to a grand jury. The words --

QUESTION: I think basically the state's position is, at least the probation one is not either indictment, information, or complaint.

MR. CARCHMAN: That is correct.

QUESTION: And yet an accusation would be neither indictment, information, or complaint, but you say akin to information.

MR. CARCHMAN: We do not feel that the determination should rest on the actual nomenclature used. It is specifically designed to deal with the nature of the proceeding.

The terms "indictment," "information," and "complaint" refer to the initial stages in the bringing of criminal proceedings, and we contrast this with the probation violation, which is in the nature of a warrant issued by a judicial body as opposed to the executive, being the prosecuting agency, or a parole revocation which is issued by an administrative agency completely divorced from the prosecution.

QUESTION: Well, may I ask, do you think the word "complaint" is something unknown to New Jersey procedures and therefore not within that word --

MR. CARCHMAN: Oh, no, "complaint" is well known in New Jersey procedures, and as I have indicated, is the initial filing which generates a new criminal charge. It later becomes transformed through the process into an indictment if the grand jury makes a determination.

As I have indicated, the words "indictment,"

"information," and "complaint" are words of art. They have a specific meaning in law, and they do in fact refer to the initiation of criminal proceedings.

When these words are viewed in the totality of the statute, I think it is clear that the framers of the statute were speaking about criminal proceedings and criminal trials. I refer to the three words.

If we look further we see the word "untried" is used. And the word "trial" is used. And these are words which refer to a plenary adjudication of criminal charges, and these are the words that the framers of the statute use.

I contrast that with the hearing procedures which this Court discussed in Gagnon versus Scarpelli when it differentiated between a plenary trial and a probation hearing, and the rights which attach to a trial are significantly different from the rights which attach to a hearing.

There is the issue of uncertainty as a result, again, the phrase "uncertainty" being used in the statute, and as I will discuss later when we discuss the legislative history, the framers were talking about uncertainty in the first instance as to guilt or innocence, and this is not an issue which will be involved on a probation or parole violation which is

based on a subsequent conviction.

The statute talks about notice, and as we examine the notice provisions, we see that notice refers to notice to the prosecuting attorney and to the court. If we take first the example of the parole violation, neither the court nor the prosecuting official is involved in that notice procedure. In fact, that is a separate administrative agency who under the terms of the statute will receive no notice.

In the probation area, the issue is less clearly defined, but we are talking about notification to a court and a prosecutor who may or may not, depending on the particular state's practices, be involved in the revocation proceedings.

And lastly, the statute talks about speedy trial, and that is a phrase which has been dealt with by this Court on many occasions, and it is a phrase which has specific meaning, not in terms of hearing, but in terms of plenary adjudication.

We submit that a reasonable interpretation of this particular statute does not allow for construction which will include a probation revocation hearing or a parole hearing within its scope.

The inquiry as to what this statute means, we submit, could end here, but the legislative history of

this statute supports our position. The commentators have recognized three types of detainers.

The first is a detainer based on a criminal charge. The second is a detainer based on a sentence, be it consecutive or concurrent. And the third is a detainer based on a probation or parole violation. We submit that only the first applies here.

As the legislative history indicates --

QUESTION: Tell me, Mr. Carchman, there is an amicus brief here which says that at least in Virginia criminal charges may be lodged by way of a presentment. Would a presentment, do you think, fall within the detainer statute?

MR. CARCHMAN: That apparently is a unique procedure whereby the executive was not involved in --

QUESTION: Do you think it would fall within the detainer statute?

MR. CARCHMAN: We do not feel that that presentment would fall within the detainer statute. If the Court -- If the Court --

QUESTION: Well, the effect on the accused is no different, is it?

MR. CARCHMAN: Well, it is in the nature of a somewhat hybrid criminal proceeding brought by the judiciary through the grand jury rather than the

executive. If it initiates a new --

QUESTION: New Jersey has a presentment practice, too, doesn't it?

MR. CARCHMAN: Yes, but that does not involve -- specifically does not involve criminal proceedings. If the presentment generates a form of a criminal charge against the accused, then it may well fall within the scope. However, I think that this is a procedure somewhat unique to the state of Virginia rather than to the other signatories.

QUESTION: Well, incidentally, in Mauro, didn't we say that where the policies underlying the detainer agreement are involved, there is no reason to give an unduly restrictive meaning to the words?

MR. CARCHMAN: Yes, and Mauro --

QUESTION: What are you going to do with that in this case?

MR. CARCHMAN: Well, in Mauro this Court pointed out --

QUESTION: We did say that, didn't we, in Mauro?

MR. CARCHMAN: Yes, you did, and Mauro pointed out the significant legislative history on which that statement was based, which would support the position that the framers of this statute were concerned with

something that is not involved with probation and parole violations.

In untried indictment, indictment, information, and complaint, the basic issue which is not resolved is the issue of guilt or innocence. When we are dealing with a probation or parole violation based on a subsequent conviction, we are dealing with something that this Court has recognized is factually conclusive.

In fact, language has been used by this Court that the result of these hearings will essentially be predictive or probable. We are talking about a fact which is established not by the testimony of witnesses or by plenary proceedings, but by the simple presentation of a subsequent conviction, a certified judgment of conviction which will in essence prove the fact without more.

We don't feel that we are urging a restrictive view. We feel that we are urging a view which frankly was the prime concern of the framers of this statute. In Mauro this Court cited the findings of the Joint Committee on Detainers, and they set forth essentially five guidelines, four of which are relevant for this Court and for this determination.

And in each of those four guidelines save one,

they were concerned about the validity of the detainer initially, detainers -- they used language "detainers based on suspicion." They used language about the validity of the charge. They used language which in essence said we cannct have detainers which may not be valid affecting prisoners.

So, their primary concern was to eliminate detainers or to establish the validity of the detainers, and that is not implicated by probation or parole violations based on subsequent convictions. That issue has essentially been determined by the subsequent conviction.

That is the theme that runs through the joint committee's concerns which later become relevant to the Council on State Governments when they actually draft the statute.

In fact, turning to the Council on State Governments, we see language there that their concern is uncertainy, anxiety, apprehension on the part of the various prisoners involved, and in the first instance it is the issue of validity of the detainer.

The effect on the prisoners only becomes relevant when the validity cannot be established. Once the validity is established, then we have certainly reduced, if not eliminated uncertainty. The anxiety is

certainly eliminated. The apprehension is eliminated. The validity has in fact been established.

In fact, this Court in Moody versus Daggett went to some lengths to discuss the practical impact of having a speedy adjudication of probation and parole violations. The prisoner who is involved with a probation or parole violation will not be benefitted by a speedy adjudication of the violation, because since we are talking about subsequent convictions, what is most critical to the prisoner involved is to have a record which will justify a finding by the appropriate agency that they can live in society crime-free or not involved with criminal activity, that they have in fact been rehabilitated.

And certainly if they had a quick adjudication of the subsequent conviction, what the parole board will have before it or the judge hearing the probation violation is a subsequent conviction which will in effect establish that they cannot live in society without the element of crime involved.

We feel that the testing issue, the issue of validity was of prime concern to the joint committee in the first instance, and certainly the counsel as well, and what must not be forgotten is that if there is a quick adjudication of the parole violation or the

probation violation, the defendant will return to the prison system with a detainer.

It will be the second of the three detainers which I alluded to earlier. It will be a detainer based on a sentence. So if it is a consecutive sentence, there will be a detainer. If there is a concurrent sentence, there will be a detainer, and the respondent's brief makes no distinction between these various detainers, and we must assume whatever impact a detainer may have on this particular prisoner will continue.

We look lastly to the Congressional legislative history, and I recognize that this Court has indicated that this is history after the fact, if you will, because this history is generated by Congress in 1970, some 13 years after the statute was passed, but it is relevant to examine what Congress's concerns were as they enacted this statute, and the issue that they addressed directly is the issue of speedy trial.

And it is the issue that was generated by this Court's decision in Smith versus Huey as we examine the Senate proceedings, as we examine the House proceedings, as we examine Senator Hruska's comments.

We notice that at the forefront of all of the commentary is the issue of speedy trial, and that was the preliminary issue that Congress was concerned with,

a speedy adjudication of the outstanding criminal charges pending against the defendant, and what is not implicated when we deal with parole and probation violations is speedy trial.

Where there is a subsequent conviction, as I have indicated earlier, the matter is predictive and probable. There is no issue of witnesses dying or becoming unavailable to the defendant. There is no issue of memories fading. There is no issue of changed perceptions. There is no issue of defendant's access to witnesses. There is in fact no issue of prejudice to the defendant in a speedy trial context.

What is required is a simple five-minute hearing and the presentation of a certified judgment of conviction, and I note further that the language that this Court used in its decision in Smith versus Huey talks about the issue of anxiety, apprehension, and uncertainty, and it was directed to the issue of speedy trial.

The statute was not intended to grant a new speedy trial right based on probation and parole violations. In fact, the explicit language of the statute adopted by the states was that the statute shall not create any new substantive rights, and by determining that this statute does in fact apply to

probation violations or parole violations, as was the Third Circuit's decision, it created a new right, not yet known.

There was a concern in the Third Circuit's opinion about technical violations. In fact, the Third Circuit went to some lengths to discuss the issue of technical violations, yet technical violations are not involved here.

In two cases decided in the various states, there is in fact a technical violation, in both cases, its failure to report, and yet as you closely examine those decisions, you will find that the failure to report is a failure to report based on the subsequent conviction.

Again, since the IAD is only triggered when there is a conviction and there is a sentence in another state, there will always be available to the violating agency a subsequent conviction which will generate a probation or parole violation.

There has been a great deal raised certainly in the Third Circut opinion which the Third Circuit candidly indicated was based solely on policy, that the effect on prisoners is the key area of focus. We submit it is not.

In fact, as you can see from the appendix

which was filed on behalf of the Department of Corrections, the effect of detainers on various prisoners becomes a matter of prison administration rather than some of the areas that were referred to in Cooper versus Lockhart.

And there is one area that cannot be left without some discussion, and that is the area of the effect of holding that probation or parole violations apply to the states, and that is the area of cost.

As the amicus brief filed by the 38 Attorneys Generals, the 38 states in support of our position indicates, there are approximately 15,000 parole warrants now listed on the National Crime Information Center. There are 27,000 probation warrants listed on the NCIC. Now, we are not indicating that all of these warrants will be involved in subsequent convictions and be directly applicable here.

However, as the appendix and the affidavit file by the State of New Jersey indicates, the cost may range in excess of $2,000 to bring these prisoners back, and that is a serious consideration, and it obviously was a serious consideration when the various legislators throughout the United States passed this statute.

We urge that upon a clear reading of the language in the statute, combined with an analysis of

the legislative history, that the position that is espoused by the state of New Jersey that this statute does not apply to probation and parole violations is the correct one.

We would urge that this Court reverse the determination of the United States Court of Appeals for the Third Circuit.

Thank you.

CHIEF JUSTICE BURGER: Mr. Burke.

ORAL ARGUMENT OF JOHN BURKE, III, ESQ.,
PRO HAC VICE, ON BEHALF OF THE RESPONDENT

MR. BURKE: Mr. Chief Justice Burger, and may it please the Court, the first remark I would like to make is that I believe the prosecutor has mischaracterized the question that is presently pending before the Court. He seems to think that this Court needs to decide whether probation and parole violation detainers come within the scope of the Act. That is simply not true.

The Third Circuit decision upon which certiorari was granted specifically limited its holding to probation violation complaint because of the unique characteristics of a probation violation complaint when compared with the policies and terms of the Act.

The split in the circuit of decision upon

which certiorari was granted in this case between the Ninth and the Third Circuit therefore is merely based upon the decision to hold a probation violation complaint comes within the terms of the Act, so in construing this case, this Court need not consider probation and parole violations taken together.

Even though this Court has recognized that there isn't a constitutional significance between the two when the Court is determining a legal issue for purposes of deciding this case, there are practical distinctions between the two that make one much more amenable to applications of the Act than the other.

This case juxtaposes the prisoner's interest in the opportunity to participate in rehabilitation programs while serving the prison sentence against the state's interest in depriving the prisoner of those opportunities because it has lodged a detainer against him.

More specifically, it requires the question of whether a prisoner against whom a probation violation detainer has been lodged can demand a prompt probation revocation hearing under Article III of the Interstate Agreement on Detainers. That question turns on whether a probation violation complaint can be considered an untried complaint within the meaning of the operative

phrase of Article III.

A review of the statutory language itself, the legislative policies, and the legislative history compel the conclusion that a probation violation complaint is an untried complaint within the intentment of Article III, and that a prisoner has a statutory right to a prompt revocation hearing.

It is a fundamental canon of statutory construction that a statute must be read as a whole, and that no individal part of a statute can be read in isolation. When Article III is read against the other relevant provisions of the statute, it is absolutely clear that a probation violation complaint is an untried complaint within the meaning of Article III.

Article I, which sets out the agreement's very broad purposes explicitly applies the agreement to all charges outstanding against a prisoner, since a violation of probation -- since a charge based upon a violation of probation is a charge outstanding against a prisoner in the purest sense, it is encompassed within Article I of the agreement.

Furthermore, Article IX of the agreement mandates that the terms of the statute be construed liberally to effectuate its purposes. The main purpose of this agreement which is evident in the decisions of

this Court and in the legislative history is to dissipate the adverse effects of detainers upon prisoners and upon correction officials.

Since a detainer base upon a probation violation charge causes the same adverse effects as a detainer based upon any other charge, it must come within the terms of the agreement. Any other statutory construction leads to absurd results, completely disregards the governing articles, Article I and Article IX, and defeats the very purposes for which the statute was drawn.

Also, a complaint, unlike an indictment or information, doesn't have a static, fixed meaning. A complaint is simply --

QUESTION: Mr. Burke, I notice you use the phrase or term "complaint" in describing these documents that are filed to revoke probation.

MR. BURKE: Yes.

QUESTION: I am not sure what all states use by way of terminology, but it appears that many of them refer to it as a warrant or a motion and don't call it a complaint to revoke probation.

Does your use of that term reflect some broad utilization across the country?

MR. BURKE: Well, all of the cases that I have

read have indicated that the courts generally do file a complaint against the probationer. I think --

QUESTION: I just have never heard the term used before, and I didn't know how broadly --

MR. BURKE: Well, the term was used -- the term "warrant" was used in Hopper, which is a parole revocation case, not a probation revocation case. All of the cases that have been decided in the state courts, the district levels and circuit levels have unanimously used the word complaint, and a complaint is simply a statement of charges against an accused.

In that sense, a complaint based upon a charge of a violation of probation is a complaint within the general definition of the word. It is untried because a final judgment has not yet been entered, and the underlying charge has not yet been tested.

QUESTION: In these cases you refer to, who has filed the complaint, the prosecutor?

MR. BURKE: Well, the prosecutor, the prosecutor files the complaint, but the proceeding is a judicial matter.

QUESTION: Yes.

MR. BURKE: The proceeding is handled by a court which makes application of Article III of a probation violation detainer amenable to the provisions

of the Act. I am specifically referring to the notice requirements, where the prisoner is required to notify both the prosecutor and the court in a jurisdiction where the charge is pending.

QUESTION: Was there a complaint in this case?

MR. BURKE: Yes, there was. There was a complaint based upon the arrest in --

QUESTION: Something called a complaint. Something called a complaint.

MR. BURKE: Yes, probation violation detainer. Underlying that is a complaint that the probationer had violated the conditions of his probation in this case by being arrested in Pennsylvania.

QUESTION: Is that complaint in the record?

MR. BURKE: Excuse me?

QUESTION: Is that complaint in the record?

MR. BURKE: It is in the record, but it is not in the papers before this Court.

QUESTION: Was it a formally styled complaint?

MR. BURKE: What do you mean by a formally styled complaint?

QUESTION: Was it labeled "Complaint?"

MR. BURKE: Yes, they are labeled complaints.

QUESTION: Was it in this case? It was labeled a complaint.

MR. BURKE: I believe it was labeled a complaint.

QUESTION: Well, can you say for sure that it was?

MR. BURKE: I can't -- I would have --

QUESTION: Isn't the entire record up here?

MR. BURKE: I don't believe that the initial complaint was reproduced in the appendix.

QUESTION: Well, maybe not in the appendix, but the --

MR. BURKE: Or in the papers that are before this Court. I do not have a copy of the complaint in my papers.

QUESTION: Do you want us to rely on the complaint?

MR. BURKE: Well, the -- I really --

QUESTION: Do you want us to rely on it?

MR. BURKE: Do I want you to rely on the representation that the prosecutor filed a complaint against the defendant in this case? Yes, sir.

QUESTION: Well, shouldn't you let us see it?

MR. BURKE: I will provide the Court with a

copy of it as soon as I get it, but I can't --

QUESTION: Provided the other side agrees.

MR. BURKE: Well, if the Court feels it is necessary for its decision --

QUESTION: I am not -- you are handling your own case. I want to know, do you think I can rule on whether this is a complaint or not without seeing it? I guess, take your word.

MR. BURKE: I will provide a copy of the original paper with the Court. I can't provide the Court with it now because I don't have it. But I am representing to you that the original charge was filed within the term of a complaint, and the complaint charged that the probationer, Richard Nash in this case, had violated a term by being arrested in Pennsylvania.

QUESTION: Mr. Burke, would your position as you view it be sericusly impaired if it turned out that the revocation proceeding was instituted by a document that was not labeled complaint but was labeled something else?

MR. BURKE: No, I don't feel that that is critical to the case. I do believe that it was called a complaint in this case, but if it wasn't so labeled, it would be the functional equivalent, and I still think that would bring it within the statutory language,

because it implicates all of the policies of the Act.

QUESTION: You think that what was filed here was called a warrant?

MR. BURKE: No, I don't. I believe it was called a complaint, and that is the ordinary manner in which probationers are notified of a violation within the state of New Jersey. Although I can't produce the document for the Court now, I can safely represent to the Court that it was a complaint, a narrowly --

QUESTION: Mr. Burke, may I ask you one other question? You referred to Article I, which uses the language, "charges outstanding against a prisoner."

MR. BURKE: Yes.

QUESTION: And it goes on, "detainers based on untried indictments, informations, or complaints." Do you equate the words "charges outstanding" with the words "indictments, informations, or complaints?"

MR. BURKE: I don't identify the two as referring to identical instruments.

QUESTION: Which is the broader concept?

MR. BURKE: The broader concept is all charges outstanding against a prisoner.

QUESTION: But Article III then uses the narrower concept.

MR. BURKE: Yes, but you can't subordinate the

rest of the statute to Article III.

QUESTION: But what is relevant about what is in Article I if you say it has a different meaning from the words in Article III?

MR. BURKE: I don't believe that it does have a different meaning. I believe that the meaning evident in Article I is incorporated in Article III.

QUESTION: Let me go through it again. Do you contend the words "charges outstanding" are equivalent to the other three terms or broader than the other three terms?

MR. BURKE: I believe that the two phrases are self-evident. I believe that --

QUESTION: Well, which -- do you think they are equivalent, or is one broader than the other?

MR. BURKE: I believe that one is broader than the other.

QUESTION: "Charges" is broader than the other three?

MR. BURKE: But I also believe that you cannot interpret this statute by looking only to the provision of the statute which is used to execute its purposes. Article I sets out --

QUESTION: I am looking at Article I. What enlightenment should I get out of Article I then?

MR. BURKE: I think Article I explains that the legislative intent is to have the Act apply to all charges outstanding against a prisoner. I don't think you can therefore look to th executing provision of the statute to determine the entire scope of the agreement.

I mean, I think it is self-evident that Article III was intended to be subordinate of Article I and Article IX.

Alsc, if you were going to strictly construe the statute, and hold that it cnly applies to untried indictments, informations, or complaint, you are excluding presentments and accusations, which are the funtional equivalents of indictments and informations.

So, even an advocate of the strict position would not countenance that result, because in effect ycu would be excluding from the scope of the Act the same charges which essentially underlie an indictment or information but happened to --

QUESTION: But does that really follow? Couldn't you say those three words and their functional equivalents are covered by Article III, but a probation violation charge is not a functional equivalent?

MR. BURKE: I don't think it is necessary to do that.

QUESTION: It is not necessary, but one could

logically do it.

MR. BURKE: Yes, but I think the term "complaint" is broad enough to encompass a probation violation complaint, especially when it implicates all of the policies of the Act and would attain all of the benefits to be conferred upon both the prisoner and the correction official, the prosecutor and society. I don't see why one needs to make that fine a distinction.

QUESTION: The complaint is also the way you institute a civil proceeding in many states. I would think it is something of a mistake to start getting bogged down in the procedural name that various states give to the institution of a particular phase of a criminal proceeding, because certainly if one particular state used something in a parole revocation or probation revocation that was neither a complaint or an indictment or anything mentioned in the statute, if we concluded that those were covered by the statute, certainly that state wouldn't be immune just because it gave the proceeding a different name.

By the same token, I would think that the fact that this was a complaint and New Jersey uses a complaint to revoke -- what was it, probation?

MR. BURKE: Probation.

QUESTION: Probation, doesn't mean you are home free. The basic question is, are we talking about criminal offenses triable by a jury, or are we talking about other sort of proceedings that could have an effect on a person's record?

MR. BURKE: I think we are talking about -- we are talking about resolving those detainers which implicate the policy of the acts and cause the adverse effects to be placed upon the prisoner, and those charges which are open and pending against the prisoner are the ones encompassed by the statute.

So, I don't think you need refer to the idiosyncratic language that may be used by the various states, and again, I reiterate that the term "complaint" is extremely broad, and under that definition of complaint the only one that could possibly be given to it, it must encompass a probation violation complaint.

QUESTION: But I don't understand your opponents to say that a complaint couldn't possibly embrace this sort of thing. I understand them to say that perhaps that is one of their arguments, but the other arguments are that it is basically -- the IAD deals with the disposition of outstanding criminal charges and need to be tried the way an ordinary criminal case is tried.

MR. BURKE: No, that is an incorrect characterization of the statute.

QUESTION: I realize that, but I think -- I don't doubt you have a response to it. But I think it would be desirable to hear the response as well as deal with all the idiosyncracies as you mentioned.

MR. BURKE: Well, that question, statement, observation you made assumes that the sole function of the statute is to effectuate speedy trial rights and an analysis of the legislative history, and an analysis of the constitutional right to a speedy trial shows that that is not the case at all.

At the time this statute was drafted, this Court had not yet recognized an application of the federal constitutional right to a speedy trial to the states. That did not occur until 1967 in Klopfer versus North Carolina.

In the same respect, this Court did not apply the principle in Klopfer to incarcerated stated prisoners until 1970 in Smith versus Huey. This statute was written in the early 1950's.

Although there is an indication in the legislative history that speedy trial rights were of some concern to the drafters, the overwhelming evidence indicates that the sole purpose of this agreement was to

reduce the adverse effects of detainers upon the prisoner and prison officials.

I don't read the legislative analysis in Mauro to reach a different conclusion. In Mauro, this case essentially held that the primary purpose of the detainer act was to remove the onerous conditions that the detainer imposed upon the prisoner.

So, therefore the argument that the statute was enacted to effectate speedy trial rights has no basis in historical reality. Also, four years after the federal government adopted this agreement, it also adopted the Speedy Trial Act of 1974.

If Congress thought that this statute had in effect protected the speedy trial right considerations of the prisoner, it wouldn't have passed that Act four years later. Also, the Congressional legislative history in this statute --

QUESTION: The Speedy Trial Act passed by Congress covered federal proceedings, didn't it?

MR. BURKE: Yes, but the federal government is a party to this agreement. Also, one last remark on the speedy trial rights argument. The statute does not place an affirmative duty on the prosecutor to bring the charge to a conclusion.

The statute would permit the prosecutor to

have the detainer languish throughout the duration of the prisoner's sentence. That can be for as long as 10 to 20 years, so that undercuts any sort of argument that this statute, it protects speedy trial rights. It doesn't protect them at all.

Rather, it is a mechanism by which to transfer prisoners from one jurisdiction to another for resolution of detainers, and it implicates all of those detainers that give rise to the adverse effects which were recognized by the drafters at the time the Act was written.

Those adverse effects were that it effectively denied the prisoner an opportunity for a concurrent sentence, that it generally resulted in a classification as a maximum security risk, that it left him ineligible for work release and study release programs for preferred living quarters, for preferred work assignments.

In addition, it induced within the prisoner --

QUESTION: Mr. Burke, may I just interrupt you with regard to the policy? That is, of course, true with regard to untried charges where you don't know whether the man is guilty or not because the facts haven't been developed.

Do those policy considerations have the same

force in the case which your opponent says is typical -- I don't know if that is right or not -- but in which there has already been a conviction of the basic finding of whether he performed the harmful act or not.

The only question in most cases is whether it is going to be used to justify revocation of his probation. But when you know what the facts are, are the policy considerations quite the same as with regard to untried charges?

MR. BURKE: Absolutely. The policy considerations are not based upon an adjudication of innocence or guilt. They are based upon the fact that there is uncertainty as to the prisoner's future release date.

That is the entire underlying rationale for imposing the restrictions upon the prisoner. It is not because one has not yet adjudicated factual innocence or guilt. So therefore that concern, the fact that there is uncertainty about the prisoner's future release date, is as applicable to probation violation detainers as to those based upon completely untried charges.

The rationale is, not knowing the eventual release date of the prisoner, the prison administrator is in no position to design a program of treatment which would effectively address that particular prisoner's

needs.

So, once a probation revocation hearing was held and either probation was not revoked because there is nothing to inhibit the discretion and report in spite of a presumption in the face of a --

QUESTION: What do you say to their argument that if it is done properly, the probability in most cases would be a revocation. It is established as a matter of fact since he has been convicted in the jurisdiction which is being detained that he did commit the crime, and so the only question is a matter of discretion, shall I decide not to --

MR. BURKE: There is partial truth to that statement. I believe that the presumption in many cases would lead to a revocation, but that is not the only issue involved here. It is also a disposition, and there is absolutely no

QUESTION: If you had a prompt revocation, would they not also a as matter of precaution impose some kind of a sentence on the original charge, presumably, which would at least make uncertain the eventual release date?

MR. BURKE: They may impose, for example, a concurrent charge -- concurrent sentence, which would obviate the need for imposing the restrictions based

upon the information I just discussed.

QUESTION: Except that what they are sentencing him on is the underlying charge rather than the second violation. In other words, if the underlying charge was quite a serious charge, and then a rather minor matter led to the revocation, they aren't necessary equivalent by any means.

MR. BURKE: Well, the sentencing is upon the original charge for which the probation was eventually given, yet I don't see how that is dispositive of the issue in this case at all, but rather the sentence that would be imposed by the court even in the event of revocation could in many instances lead to a disposition that would under the terms of this Act be favorable to the prisoner.

So, in most cases that is going to be the interest of the prisoner most at stake. If the prisoner were given a concurrent sentence, obviously it establishes a certain release date for the prisoner and undercuts all the reasons why he is not getting the opportunity to participate in rehabilitative programs and the other amenities and privilges which are accorded other inmates.

Also, if a consecutive sentence --

QUESTION: Well, the fact that it is

concurrent doesn't necessarily mean the two sentences expire on the same day. The first crime may have been a more serious crime or less serious, either way, and the fact they are running concurrently I don't think necessarily tells you when he is going to be eligible for release on the other charge.

MR. BURKE: Well, but it would establish a relese date when both charges are taken together and sentences are aggregated.

QUESTION: Suppose after probation is revoked he gets a sentence on the other charge of from five to ten years, something like that. You just have a range of dates when he may be released. You don't have a certain date necessarily.

MR. BURKE: Well, I believe that would establish enough certainty to persuade prison officials not to impose some of the restrictions that it does, and also there is no reason to assume that in all cases the sentence imposed will be for a range. You might in some instances receive a specific determinant sentence which would definitely establish a certain release date.

Even were the sentence on the probation revocation charge to be imposed consecutive to the out-of-state term, if it were of such a short duration, nonetheless the prison officials where the prisoner is

serving his out-of-state sentence might nonetheless under those circumstances, knowing the nature of the sentence, remove the restrictions against the prisoner and thus attain all of the legislative policies to be accomplished by the Act.

The relevant legislative history is contained in documents prepared by the Council of State Governments.

The most telling piece of legislative history is the 1948 report issued by the Joint Committee on Detainers. That report can only be described as absolutely sweeping. It encompasses every detainer, every charge pending against a prison based upon a detainer.

It was the thinking of that Committee that all charges pending against a prisoner should be resolved promptly. That same committee, although reconstituted under the Council of State Governments, was later responsible for actually drafting the Act.

There is nothing in the legislative history to suggest that they meant to limit in the drafting of the agreement itself the purposes which were set out in its earlier report.

QUESTION: You made the comment earlier, Mr. Burke, that a lot of things had changed in the field of

constitutional law since the adoption of the IAD. Certainly in the field of probation revocation, a lot has changed, too, has it not?

Would the people who made this legislative history back in 1948 necessarily have contemplated the sort of structured revocation hearing with personal presence and so forth that we now have because of cases from this Court?

MR. BURKE: They might not have, but that still is no reason to presume that they would not have intended the Act to apply to probation violation detainers. Their primary concern was with the disposition of the detainer and the dissipation of the adverse effects.

I don't think that because of this Court's decision, for example, in Gagnon, which establishes the structure of the hearing to be given a probation violator, that that in any way is not compatible with an application of Article III to probation violation detainers.

It seems to me that the state's argument is basically an attempt to eschew its responsibilities under the agreement. The state never needs to impose a probation violation detainer in the first place. It can always use extradition to get custody of the prisoner to

prosecute its charge.

But once it files the detainer against the prisoner, knowing full well the adverse negative effects that the detainer has upon the prisoner, upon the correction official, it should not be able to escape its obligations and deny the prisoner a prompt revocation hearing in those cases where the prisoner would want one.

Such an argument was rejected by this Court in Mauro. Also, in Mauro, under the test used to define a detainer, a detainer based upon a probation violation complaint falls within the parameters of the definition used in Mauro because it has the property of being able to linger against the prisoner for the duration of the term and implicates all of the policies of the Act.

To decide in this case that the detainer is not a detainer recognizable under the Act would be rejecting the underlying rationale and system of thought which supported Mauro.

Lastly, the application of Article III to a probation violation detainer should not be seen as a loophole for the prisoner, but rather it confers a benefit upon the prisoner, upon the prosecutor, and upon society.

I have explained the benefits to be received

by the prisoner. The benefits to be enjoyed by the prosecutor are improvements in the efficiency of prosecuting its charges and facilitating its affirmative duty not to allow state charges to linger unresolved against an out-of-state accused.

QUESTION: Mr. Burke, may I ask you just one other question? At the beginning of your argument, you emphasized the point that this is a probation case and not a parole case.

MR. BURKE: Yes.

QUESTION: And I notice the legislative history that you call our atttention to, you have italicized in your brief, refers to parole violations but doesn't mention probation.

MR. BURKE: The legislative --

QUESTION: I wonder why you distinguish between the two so emphatically.

MR. BURKE: Yes, but the legislative history of the 1948 report applies to all charges.

QUESTION: You refer to a local prosecutor, a state prison, a parole board, or a federal official.

MR. BURKE: Well, a local prosecutor is the one who files the probation violation complaint.

QUESTION: And prison and parole authorities. But do you think -- I am just not quite clear on why you

emphasize the distinction between parole and probation. Do you think they are different, or do you think they are both --

MR. BURKE: I think they are different for resolution of this case in two respects. The notice requirements of the statute aptly apply to probation violation detainer. That is, the prisoner notifies the prosecutor and the court that he wants his probation revocation hearing.

In most states the officials in charge of adjudicating parole revocation proceedings are not the court or the prosecutor. It is generally a state parole board.

Therefore, the statute does not apply so readily in that context. I am saying that this Court need not also -- the discretion that can be exercised by a court is much broader than that which can be exercised by a parole board, which is generally governed by statutory law. The same is not true of the discretion of a court. Lastly, as --

CHIEF JUSTICE BURGER: Your time has expired, counsel. Your time has expired.

Do you have anything further, Mr. Carchman?

ORAL ARGUMENT OF PHILIP S. CARCHMAN, ESQ.,
ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. CARCHMAN: Mr. Chief Justice, I will be very brief.

The record is in fact complete, Justice Marshall. Page 55 of the appendix does indicate that first of all the document which was used in this case was found by the trial judge to be designated a probation violation complaint. We urge, however, that this case does not turn on the particular terminology used by a jurisdiction as to how the matters are started.

Secondly, and perhaps more important, Page 55 of the appendix indicates that it was not the prosector that commenced this action, and that is critical. It was the Mercer County Probation Department, an arm of the court, which initiated these proceedings.

Secondly, in reference to --

QUESTION: May I ask on that, just to follow up on the thought with your opponent, the material he quotes at Page 17 of his brief, which does say prison and parole authorities should take prompt action to settle detainers -- this was back in '48 -- isn't that persuasive against you, the fact that they were thinking about parole violations and probably a fortiori, it would seem, probation violations?

MR. CARCHMAN: There is reference in that

guideline to parole violations. There is, however, contained in the next sentence in that guideline or the next two sentences references to notice should be made as to whether the parole officer will allow current, et cetera.

That was something that, as you will see as you examine the counsel history, and the language of the statute was never adopted, and there was concern initially with the joint committee on the issue of -- or they did mention parole, but again, what is thematic about that joint committee history is the constant repetition of validity, the constant concern that these detainers have some validity, and that is an issue which is resolved in this particular case.

Justice Stevens, there was a question that you inquired about in the term "outstanding charges." My colleague refers to the expression "all outstanding charges." As you examine Article I, you will not find the word "all" contained in that article.

The assumption or the insertion of the word "all" is something which is beyond the scope of Article I. Article I was merely a statement. It does not amount to a definition.

The last point which I indicated earlier must be mentioned in response to Mr. Burke's comments is the

fact that whatever sentence is imposed, and I just note for the Court that under New Jersey state law a parole revocation involves a presumption of a consecutive sentence as opposed to a concurrent sentence, and moreover, in response to the issue as to whether the parole board or the probation department must file a revocation proceeding, it might be considered a breach of duty if they failed to do so and file the appropriate warrant and lodge a detainer.

The prisoner will return to the jurisdiction with a detainer, and whatever negative implications follow from a filed detainer with prison authorities, those implications will follow the prisoner back to the sending state after the adjudication of a parole or probation violation.

I think that is a key reason why the states and the Congress did not intend that these matters be adjudicated in the manner suggested by the respondent. Thank you.

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

(Whereupon, at 11:45 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-835 - NEW JERSEY DEPARTMENT OF CORRECTIONS, Petitioner V. RICHARD NASH; and
#84-776 - PHILIP S. CARCHMAN, MERCER COUNTY PROSECUTOR, Petitioner V. RICHARD NASH

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)