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OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: NEW YORK, Petitioner v. MICHAEL HILL.

CASE NO: 98-1299 C-1

PLACE: Washington, D.C.

DATE: Tuesday, November 2, 1999

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THE SUPREME COURT  
OF THE  
UNITED STATES  
CAPTION: NEW YORK BARBARA & MICHAEL WILLIAMS  
CASE NO: 98-1337  
PLACE: Washington, D.C.  
DATE: Tuesday, November 9, 1999  
PAGES: 1-22

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1 P R O C E E D I N G S

2 (10:52 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 98-1299, New York v. Michael Hill.

5 Mr. Mastrocola.

6 ORAL ARGUMENT OF ROBERT MASTROCOLA

7 ON BEHALF OF THE PETITIONER

8 MR. MASTROCOLA: Mr. Chief Justice, and may it  
9 please the Court:

10 This case involves the Interstate Agreement on  
11 Detainers, or IAD, which establishes a set of procedures  
12 for the interjurisdictional transfer of prisoners from --  
13 who are facing charges in the other jurisdiction. It's  
14 our position that a defendant cannot be permitted to  
15 expressly agree to a trial date which is beyond the time  
16 period prescribed by the IAD and then turn around and, on  
17 the basis of that very violation of the right, because  
18 it's been conducted after the time period, have his  
19 charges dismissed.

20 QUESTION: Now, you say -- you say expressly  
21 agree. The defendant's counsel expressly agreed. Do you  
22 -- do you say that is the same thing as the defendant  
23 agreeing?

24 MR. MASTROCOLA: Well, it is proper for the  
25 defense attorney in these circumstances to make those

1 decisions. And therefore, yes, a waiver --

2 QUESTION: And --

3 MR. MASTROCOLA: -- by defense counsel is  
4 sufficient for the court to rely on.

5 QUESTION: In this case, respondent was  
6 transferred from Ohio to New York to face murder and  
7 robbery charges, and following the completion of pretrial  
8 proceedings, the parties met in court for the express  
9 purpose of setting a trial date. A date was proposed by  
10 the court. Defense counsel expressly agreed to that, said  
11 that would be fine. So, the date was set.

12 Now, that date happened to be beyond the 180-  
13 day period. Once that --

14 QUESTION: It's just a matter of -- as a matter  
15 of convenience for everyone, I wonder why the prosecutor  
16 didn't point out that it was beyond the 180 days.

17 MR. MASTROCOLA: I don't know that either --

18 QUESTION: I mean, it would certainly have  
19 avoided a lot of problems. Wouldn't you think prosecutors  
20 ought to do that normally?

21 MR. MASTROCOLA: They -- they certainly can do  
22 that, and frankly, the courts can do that as well.

23 QUESTION: Well, it should.

24 MR. MASTROCOLA: But I think the question here  
25 then is, is that an absolute requirement?

1 QUESTION: Probably not, but I just wonder about  
2 the kind of practice if the lawyer doesn't point it out to  
3 the court.

4 MR. MASTROCOLA: Well, I think, on the other  
5 hand, Your Honor, you could also posit that in fact you  
6 would assume that all the parties are aware of the rights  
7 and aware of the time provisions and they don't need to  
8 expressly discuss those provisions at the time. When  
9 they're setting a trial date, if it happens to be outside  
10 the period, that's understood. And if defense counsel  
11 wants to agree to that, that's fine, and if he doesn't, he  
12 can say he doesn't want for -- because it's outside the  
13 period or for any other reason.

14 So, there's no obligation to conduct a full  
15 colloquy regarding the Interstate Agreement on Detainers  
16 and the particular trial provisions. It's no different  
17 from any other statutory speedy trial right, for that  
18 matter.

19 In this case --

20 QUESTION: You said it's no different from any  
21 statutory speedy trial, but as I understand, at least the  
22 Federal Speedy Trial Act is different in that you can't  
23 waive the time limits apart from the express provisions in  
24 -- in the statute for waiver.

25 MR. MASTROCOLA: The Federal Speedy Trial Act,

1 unlike the IAD, does contain an express waiver provision,  
2 and it also has been interpreted, because of its  
3 legislative history which specifically indicates that the  
4 intent was that a defendant could not waive that, and  
5 therefore the Federal courts of appeals have held that  
6 that is not waivable by a defendant.

7           You don't have any express language in the IAD  
8 regarding waiver. You have nothing in the legislative  
9 history of the IAD indicating that waiver was meant to be  
10 precluded. And in fact, the IAD was enacted, against this  
11 background presumption, that statutory rights are normally  
12 waivable.

13           QUESTION: So, you -- you started out to say  
14 it's just like the Speedy Trial Act, but it isn't.

15           MR. MASTROCOLA: Well, I apologize. Yes, the  
16 Federal Speedy Trial Act would be distinguishable on that  
17 basis. I'm referring to what my understanding is of the  
18 basis for most typical State speedy trial statutes  
19 throughout the Nation.

20           QUESTION: May I ask you a question about your  
21 position? I don't understand you to argue that this --  
22 this was a necessary and reasonable continuance within the  
23 meaning of Article III(a). You're just -- you're just  
24 relying entirely on waiver.

25           MR. MASTROCOLA: That's correct, Your Honor.

1 QUESTION: You do not contend that it was a --  
2 that you could -- you could prevail by arguing that that  
3 -- this was just a necessary and reasonable continuance.

4 MR. MASTROCOLA: No.

5 QUESTION: Why not?

6 MR. MASTROCOLA: It's our position that the  
7 necessary and reasonable continuance provisions,  
8 specifically in the statute -- that also includes a good  
9 cause standard, and it also has to be done in open court.  
10 And it's our position --

11 QUESTION: Well, this was done in open court.

12 MR. MASTROCOLA: But there was no --

13 QUESTION: If two lawyers say to the judge, it's  
14 inconvenient to go to trial on such and such a day, we'd  
15 like a later date, why isn't that good cause for a trial  
16 judge? I mean, I know this -- I should be asking your  
17 opponent this, but I'm just puzzled that you didn't make  
18 this argument.

19 MR. MASTROCOLA: Well, I believe because it was  
20 in the nature of the colloquy here and there was no  
21 discussion about the reasons why that was done, because  
22 there was no need for the -- any discussion. Once the  
23 date was proposed and the counsel agreed to it, there was  
24 no need for a discussion as to why that was or was not  
25 appropriate. And so, it was just accepted by the court

1 that that was --

2 QUESTION: The mere fact that the judge and both  
3 lawyers think the case ought to be put over is not good  
4 cause. That's not a showing --

5 MR. MASTROCOLA: I'm sorry, Your Honor.

6 QUESTION: The mere fact that the trial judge  
7 and counsel on both sides think a later date is -- would  
8 be -- would be better -- would justify a continuance, that  
9 would not be good cause in your view.

10 MR. MASTROCOLA: I think if there's some  
11 articulation as to what the reason was, other than just  
12 indicating, as you typically do in trial practice, when  
13 the parties get together and a date is selected. A lot of  
14 times, unless there is a problem with that date, you don't  
15 get any discussion as to why or why -- why it's not good.  
16 The parties just agree and -- and it's understood that  
17 that's going to work out for everybody and it's  
18 acceptable.

19 QUESTION: That's the point. I mean, why isn't  
20 that -- that's the point. Why isn't that good cause?

21 MR. MASTROCOLA: It's our position that that  
22 provision of the IAD really applies for when the  
23 government is seeking a continuance over the defendant's  
24 objection. That's why we have the statutory presumption  
25 of waivability. If the defendant wants to waive it,

1 that's fine, but if the government needs a continuance and  
2 the defendant wants to object, the court can go ahead and  
3 find good cause. And I think --

4 QUESTION: I thought the term continuance is --  
5 is used when a date has already been set and you want to  
6 extend the date. It would seem to me strange to talk  
7 about setting an initial date as being a continuance for  
8 good cause.

9 MR. MASTROCOLA: I think under a very strict  
10 interpretation of that term, that's correct. The courts  
11 over the years, though, have basically treated it as --

12 QUESTION: I'm talking normal English. You  
13 continue a date that -- from a date that's already been  
14 set.

15 MR. MASTROCOLA: I wouldn't disagree with that,  
16 Your Honor, but I believe the courts --

17 QUESTION: That's why you didn't argue it.  
18 Right? Because it wouldn't have made much sense to argue  
19 it.

20 (Laughter.)

21 QUESTION: Well, I'm not -- I'm not sure that's  
22 so because doesn't it come within the reasonable and  
23 necessary continuance? A defendant makes a lot of  
24 motions, and it takes time for the judge to decide those  
25 motions. And if you didn't deduct that time, you would be

1 over the 180-day period.

2 MR. MASTROCOLA: That's correct, Your Honor.  
3 The courts use both the good cause continuance provision,  
4 as well as a separate provision in the IAD, which says  
5 that you don't count time when the defendant is unable to  
6 stand trial. That's also been interpreted as allowing  
7 tolling of the time periods. When you're calculating the  
8 time period, you toll those periods when there's defense  
9 motions or other things the defense has done.

10 QUESTION: The -- the question you brought here,  
11 Mr. Mastrocola, though you might not have realized it from  
12 all the questions, is, does the defendant's express  
13 agreement to a trial date beyond the 180-day period  
14 required by the IAD constitute a waiver of his right to  
15 trial within the period?

16 MR. MASTROCOLA: That's correct, Your Honor.  
17 And that's exactly what we're saying because that is a  
18 tactical decision, a case management decision in terms of  
19 the trial date, which counsel is entitled to make. There  
20 is no need for any kind of specific on-the-record inquiry  
21 of counsel about this. The court is entitled to rely on  
22 the fact that the counsel is managing the case properly.  
23 And therefore, when he agrees to that trial date, he is  
24 not entitled then to come in and await the statutory  
25 period to run and say, aha, I got you. Now, you have to

1 dismiss the case. The court --

2 QUESTION: And that is because the court can  
3 reasonably interpret the counsel's act -- specific  
4 agreement as a waiver of the IAD.

5 MR. MASTROCOLA: That's right because counsel  
6 has done something on behalf of the defense that is  
7 contrary to or inconsistent with relying on those rights  
8 under the IAD.

9 The court of appeals here made the distinction  
10 that even though the right is waivable and the defense  
11 counsel merely concurred in the trial date -- he didn't  
12 actually ask for the date -- and on the basis of that  
13 distinction, they said there was no waiver. In other  
14 words, even though the defense had fully agreed to be  
15 treated in a fashion contrary to the IAD, he didn't  
16 actually ask to be treated in such a contrary fashion.  
17 And that was the basis for the finding that there was no  
18 waiver of the IAD, and on that basis, they set aside the  
19 convictions and the sentence.

20 QUESTION: Well, and they directed the dismissal  
21 of a murder indictment, did they not?

22 MR. MASTROCOLA: That's correct. This defendant  
23 was convicted of murder and robbery and received up to a  
24 life sentence. And the court, on that distinction, which  
25 we submit is an improper and obviously a very fine

1 distinction, found that there was no waiver.

2 We believe that once -- again, the standard  
3 about acting contrary to or inconsistent with your rights  
4 under the statute, in this case the IAD, is a workable  
5 standard for a court to rely on. And therefore, they can  
6 determine that under those -- under that standard when a  
7 defendant has, in fact, waived his rights.

8 It's important I think to remember also that the  
9 IAD, like other speedy trial statutes -- and again,  
10 referring to the particular State speedy trial statutes -  
11 - it's not intended to be a trap that the defense can  
12 spring on the court. At some point, the defendant does  
13 have an obligation to assert his rights or he loses them.

14

15 Now, there --

16 QUESTION: Well, he did assert his rights. He  
17 asserted in writing, didn't he? He said he wanted a trial  
18 within 180 days.

19 MR. MASTROCOLA: That was how the process was  
20 initiated, Your Honor, but --

21 QUESTION: And he has to keep the prosecutor  
22 advised to what that means?

23 MR. MASTROCOLA: He doesn't have to keep the  
24 prosecutor advised, but at some point, if he is given the  
25 opportunity to determine whether he continues to insist on

1 those rights, he has to indicate that. All he has to do,  
2 if he wants to maintain that right --

3 QUESTION: I mean, the statute requires him to  
4 request it twice, not just once.

5 MR. MASTROCOLA: He has -- well, no, he has to  
6 refrain from doing something to indicate to the court that  
7 he's no longer relying on those rights. And when a court  
8 specifically, instead of forcing a date on counsel, when a  
9 court gives the respondent an opportunity for input into  
10 that decision and if the date proposed happens to be  
11 outside that, at that point there is an obligation for the  
12 defendant to speak up.

13 Now, it may be --

14 QUESTION: The court of appeals thought the  
15 obligation was on the prosecutor.

16 It seems very likely that both lawyers  
17 overlooked the point, and then the question is who should  
18 -- who should bear the loss. Which one has the primary  
19 responsibility after the demand has been made? Is it the  
20 prosecutor who has a duty to go forward or is the  
21 defendant -- defendant's lawyer have to keep it in mind  
22 all the time?

23 MR. MASTROCOLA: Well, it is, just like any  
24 other decision defense counsel has to make, that is part  
25 of the case management. And again, if -- in a situation

1 where at least at a minimum he's given the opportunity to  
2 decide whether he's going to continue to rely on those  
3 rights or not, it's fair then, when he indicates that he's  
4 not, for the court to reasonably rely on that.

5 Obviously, in a perfect world, it would --  
6 everybody would be aware of their rights. There would be  
7 a discussion of their rights probably every time they come  
8 into court and that would all be well and good. But the  
9 question now is when that doesn't happen, is it fair then  
10 for -- to say that the court acted reasonably based on  
11 what representations came from the respondent's side.

12 QUESTION: Did the defense counsel participate  
13 in drafting the initiation of rights under the IAD, the  
14 formal -- the formal -- the request for a disposition?

15 MR. MASTROCOLA: The particular detainer form in  
16 this case?

17 QUESTION: Yes. Or was the defense counsel  
18 appointed after he came to New York.

19 MR. MASTROCOLA: Counsel was assigned to the  
20 case when he came to New York when the defendant -- when  
21 respondent was transferred from Ohio to New York and  
22 proceedings began is my understanding.

23 QUESTION: I -- I assume -- or maybe I'm wrong  
24 -- that the IAD request is in the -- is in the court file?

25 MR. MASTROCOLA: It is part of the record, yes.

1 QUESTION: Is there any indication that this  
2 defense counsel knew of the IAD request?

3 MR. MASTROCOLA: In terms of an affirmative  
4 indication? I don't believe there is, but there is no  
5 indication that he doesn't. Again, my understanding,  
6 again this is just with our practice in New York, is there  
7 is full pretrial discovery, and -- and any of these sorts  
8 of documents are provided during the course of pretrial  
9 discovery. And there also is -- and again, counsel  
10 certainly was aware that this defendant was being  
11 transferred from Ohio to New York and that he was  
12 imprisoned in Ohio. And I think in -- in toto then it  
13 certainly can be assumed that counsel was aware of that.

14 QUESTION: Mr. Mastrocola, what if I think that  
15 one of the purposes of the 180-day period is -- is to  
16 protect the sending State, the State in which the prisoner  
17 was incarcerated? New York requests the prisoner to -- to  
18 try him and he's sent to New York. And then New York  
19 counsel and the prisoner's counsel diddle -- diddle along  
20 with this -- with this case, extend the 180 period  
21 indefinitely. And I'm the sending State and I say, you  
22 know, I want this prisoner back.

23 MR. MASTROCOLA: I think, Your Honor --

24 QUESTION: Wouldn't it be better to have a flat  
25 180-day rule so that -- so that I know when I send this

1 prisoner, I'll have him back in my State so I can try him  
2 as soon as possible?

3 MR. MASTROCOLA: Well, in the normal course of  
4 things, the 180-day period, as with most speedy trial  
5 statutes, is not a chronological period. It's understood  
6 that you're not actually going to have a trial within the  
7 180 days because of all these pretrial proceedings. So,  
8 it's not that the case -- they can honestly expect that  
9 they're going to get this defendant back within 180 days.

10 QUESTION: Well --

11 MR. MASTROCOLA: Now, they may have an interest  
12 in getting that prisoner back, but that interest is  
13 secondary to this prisoner's interest and what he wants to  
14 do facing these charges in the case that he's facing on  
15 the matter that he's been transferred on. And it's I  
16 think important to note that whatever interest the sending  
17 State has in terms of -- and I think -- are you referring  
18 to the prison authorities?

19 QUESTION: Right.

20 MR. MASTROCOLA: And the --

21 QUESTION: Oh, he's in a cushy prison while he's  
22 -- while he's waiting trial in the other State.

23 MR. MASTROCOLA: Yes. That's -- again, that  
24 concern is secondary to the prisoner's interest in terms  
25 of how he wants to control the case because the whole

1 focus of the IAD is on how this may affect the prisoner in  
2 terms of his rehabilitation. Now, obviously --

3 QUESTION: In this case, the trial in Ohio had  
4 already -- he had been convicted in Ohio.

5 MR. MASTROCOLA: Right.

6 QUESTION: It wasn't that the Ohio case was put  
7 on hold --

8 MR. MASTROCOLA: No.

9 QUESTION: -- while he went over to New York.

10 MR. MASTROCOLA: No. The IAD applies when the  
11 person is actually serving a sentence --

12 QUESTION: Yes. So, it isn't the case that one  
13 State would have to give up its priority in trying the  
14 person. It's the person that has already been tried and  
15 put in prison --

16 MR. MASTROCOLA: Right.

17 QUESTION: -- and then is asked to be sent over  
18 to the other State for the second trial.

19 MR. MASTROCOLA: That's correct.

20 QUESTION: What if he's in prison on -- on one  
21 conviction and -- and is -- is also accused on another  
22 charge in the -- in the sending State? Does the sending  
23 State have no obligation to send him off?

24 MR. MASTROCOLA: He's --

25 QUESTION: He's already incarcerated, but

1 there's another -- there's another criminal complaint  
2 filed against him which has not yet been -- which has not  
3 yet been tried in that same State. And then another State  
4 requests his extradition for -- for trial on yet a third  
5 criminal charge. He doesn't have to be sent?

6 MR. MASTROCOLA: Under the IAD -- and I think  
7 this -- this goes back to your earlier question about the  
8 -- the sending State's interest.

9 QUESTION: Right.

10 MR. MASTROCOLA: The sending State cannot  
11 initiate itself any procedures for transfer under the IAD.  
12 The IAD reserves exclusively to the prisoner the absolute  
13 control over whether he is going to activate the transfer  
14 to the other State.

15 Now, if the detainer, of course, being lodged -  
16 - I would guess it would be a matter of comity between the  
17 States if, in fact, our -- our State lodged detainer and  
18 said, we would like to come and get him, but the other  
19 State said, well, we have charges here.

20 QUESTION: We want to try him --

21 MR. MASTROCOLA: Normally that jurisdiction  
22 where the -- where the prisoner is and -- and has charges  
23 pending would take precedence, and we would normally await  
24 that. But again, the idea is that the -- whatever  
25 interest there is in the sending State is secondary to the

1 prisoner's. And they have no right, no matter how they  
2 want to either send the prisoner or get him back, to do  
3 anything under the IAD.

4 With the Court's permission, I'd like to reserve  
5 whatever remaining time I have for rebuttal.

6 QUESTION: Very well, Mr. Mastrocola.

7 Ms. Blatt, we'll hear from you.

8 ORAL ARGUMENT OF LISA S. BLATT

9 FOR THE UNITED STATES, AS AMICUS CURIAE,

10 SUPPORTING THE PETITIONER

11 MS. BLATT: Thank you. Mr. Chief Justice, and  
12 may it please the Court:

13 Respondent waived his speedy trial right under  
14 Article III of the IAD when his counsel consented to a  
15 trial date falling beyond the statutory period.

16 This Court has held that statutory rights are  
17 presumptively subject to waiver as a clear indication that  
18 the legislature intended to depart from that presumption.  
19 There is nothing in the text or history of the Interstate  
20 Agreement on Detainers that indicates that either Congress  
21 or the adopting States intended to preclude prisoners from  
22 waiving their rights under the agreement. Indeed, only  
23 the prisoner may invoke the speedy trial right under  
24 Article III by requesting disposition of an outstanding  
25 detainer.

1           The history of the agreement, moreover, makes  
2 clear that the speedy trial right is primarily designed to  
3 benefit the prisoner by protecting him from the ill  
4 effects of detainers. A prisoner may, therefore, waive  
5 the protections of the IAD by taking --

6           QUESTION: But if you say the prisoner is the  
7 only person who can invoke the right, why wouldn't it seem  
8 to follow naturally that he would be the only one who  
9 could waive the right? And we don't have any indication  
10 he knew what was going on.

11           MS. BLATT: Well, he was present at the hearing,  
12 but this Court has indicated that the defendant personally  
13 need not give personal consent with respect to strategic  
14 and trial type decisions. The adversarial system  
15 basically couldn't function if every time counsel made a  
16 decision, the trial judge had to say to the defendant --

17           QUESTION: Well, it's normal tactics and all the  
18 rest. But here you're waiving an important right. You  
19 don't think -- you don't think there's any -- any interest  
20 -- maybe it's not strong enough -- making sure that the -  
21 - the defendant himself agreed to it.

22           MS. BLATT: This Court has indicated that  
23 instances in which the defendant must give personal  
24 informed consent is -- is, by and large, limited to  
25 fundamental constitutional trial type rights.

1 QUESTION: Well, I understand that, but here you  
2 have a statute, which you just emphasized the point, that  
3 in order to invoke the right, his lawyer couldn't have  
4 invoked the right for him. Could he?

5 MS. BLATT: That's correct. The decision is up  
6 -- the prisoner initiates the transfer by filing the  
7 request, but generally speaking, and certainly something  
8 like a trial date, the decisions by counsel are usually  
9 binding on the client. And there's no reason to depart  
10 from that here.

11 QUESTION: I understand that, but I'm just  
12 wondering, given the fact that this statute is different  
13 in that it says the prisoner has to do it himself.

14 MS. BLATT: Well, the --

15 QUESTION: You'd just say, no, it isn't.

16 QUESTION: Is it clear that it can't be done by  
17 counsel? Counsel could not --

18 MS. BLATT: Counsel could fill out the form. I  
19 don't -- I mean, I guess there's no reason to think -- I  
20 don't know whether the defendant personally has to sign it  
21 or not. I don't -- there's no reason to think that  
22 counsel couldn't --

23 QUESTION: Well, but that's very crucial to --  
24 to the whole line of questions that Justice Stevens was --  
25 -

1 MS. BLATT: Right. I -- that's correct, Justice  
2 Scalia. The key point about Article III --

3 QUESTION: You think it would be ineffective  
4 if --

5 MS. BLATT: No.

6 QUESTION: -- if he made a request through  
7 counsel?

8 MS. BLATT: No, it would be. My key point --  
9 and let me be clear on this -- is that the sending State  
10 cannot force the -- the transfer. It's up to the -- the  
11 prisoner, and he can do that through counsel.

12 QUESTION: I would think he could do it through  
13 counsel.

14 MS. BLATT: Right, he could. And the -- when  
15 you're in the sending State and the trial is going and the  
16 -- and the court sets a date and trial counsel says that  
17 would be fine, that that's reasonably viewed by the trial  
18 court as -- as an express consent.

19 QUESTION: What if he didn't say that would be  
20 fine? Are you taking the position -- I mean, what -- what  
21 if the date was set and the defendant says nothing about  
22 it? Wouldn't that be -- reasonably be considered his  
23 waiver of his right to have it within 180 days?

24 MS. BLATT: If -- if the court solicited the  
25 party's input and there was no response, that that might

1 be a waiver. But generally pure silence would be, at  
2 least in the Federal system, a procedural default under -  
3 - the -- the prisoner would not be able to get relief  
4 unless he met the plain error standard for procedural  
5 default. But if there's express consent, then that --  
6 that is a waiver and -- and --

7 QUESTION: I'm not sure what that means. Are  
8 you taking the position that if -- if a date is set and  
9 the defendant does not object to that date, what? Has he  
10 waived it?

11 MS. BLATT: That is generally in the -- in the  
12 Federal system, he would not be entitled to relief. It  
13 would be procedural default unless plain error was met.  
14 The only category where it might fall into waiver is if  
15 the trial court expressly solicited the input of counsel  
16 and said, how's this date with you, and counsel just  
17 didn't respond, maybe that kind of situation.

18 QUESTION: Well, does it have to be waiver  
19 rather than procedural default here?

20 MS. BLATT: This case is express consent and --

21

22 QUESTION: I understand that. But I'm -- I'm  
23 wondering -- you know, we have to write the opinion and -

24 -

25 MS. BLATT: It's waiver in this case.

1 QUESTION: Is -- is waiver the only way to get  
2 around it? Can there be a procedural default of your  
3 right to --

4 MS. BLATT: Absolutely. Again, but that is a -  
5 - I'm not sure the court would be able to resolve that  
6 because that would be a question of States --

7 QUESTION: Would that be a State law question?

8 MS. BLATT: Yes.

9 QUESTION: This came up from New York State --

10 MS. BLATT: Yes.

11 QUESTION: -- not from the Federal court. And  
12 you were -- you were very careful to say, when you're  
13 talking about procedural default, you're talking about  
14 procedure in Federal courts. New York could have it any  
15 way it wants, couldn't it?

16 MS. BLATT: Right, and that wouldn't be a  
17 question for this Court. That would be a question for the  
18 New York courts.

19 But it is a Federal question about waiver and  
20 the scope of the waiver, and it's clear that express  
21 consent is a waiver. And this Court made that clear in  
22 *Peretz v. United States* and in other cases.

23 QUESTION: I can't see it in the statute. Do  
24 you happen to know the answer to Justice Scalia's  
25 question? What happens if the defendant is convicted in

1 Ohio but there's another charge pending in Ohio, and then  
2 there's a request to go to New York? Can Ohio insist on  
3 trying its second charge before it ships?

4 MS. BLATT: My understanding is no. The only -  
5 - the only control the sending --

6 QUESTION: That's my --

7 MS. BLATT: -- State has is under Article IV.  
8 If New York had filed the request for temporary custody,  
9 then the Governor would have 30 days to -- to veto that.

10 QUESTION: So, Ohio would have an interest in  
11 getting the prisoner back, I take it.

12 MS. BLATT: Yes. There is a general interest -  
13 -

14 QUESTION: In the -- in the hypothetical  
15 instance.

16 MS. BLATT: Right, but that interest doesn't  
17 suggest that the right is not waivable or still can't be  
18 waived. There -- by joining the Interstate Agreement on  
19 Detainers, States have consented to some delay inherent  
20 when the prisoner is transferred out of the jurisdiction  
21 to be tried on -- on outstanding charges.

22 QUESTION: May I ask you a question about --

23 QUESTION: Well, but the -- if I could --

24 QUESTION: Go ahead.

25 QUESTION: But the point is then there might be

1 an argument that it is not waivable by the defendant  
2 because then Ohio's interest are prejudiced.

3 MS. BLATT: The -- well, I'm not sure I'm  
4 following you. If the -- if the -- well, if the defendant  
5 requests transfer, there's nothing the sending State can  
6 do about that, and there's going to be some delay  
7 necessary to -- to try him, and then the -- the --

8 QUESTION: Is that clear? Because that -- that  
9 was not the same answer that co-counsel gave. Co-counsel  
10 said it would be something -- comity would be worked out  
11 between the two States.

12 MS. BLATT: Yes, they could work that out. Yes.  
13 But the -- the -- when the defendant is -- is taken to New  
14 York and tried there, New York does have an obligation to  
15 return him to the sending State when that is done. And  
16 then Ohio could try him.

17 QUESTION: May I ask you a question about the  
18 relationship to State law and Federal law here? What if  
19 New York had a statute that said the waiver of this right  
20 has to be by -- signed by the -- by the defendant, the  
21 prisoner? Would that be trumped by the agreement, or  
22 would that be enforceable?

23 MS. BLATT: If the State had --

24 QUESTION: And then my next question would be if  
25 the legislature could do it, why can't the court of

1 appeals do it?

2 MS. BLATT: Because it's a Federal question and  
3 I don't think States can amend Federal law. And so, it  
4 has to be subject to uniform interpretation, but if -- and  
5 so --

6 QUESTION: You think it's a Federal question  
7 that would preempt any contrary New York --

8 MS. BLATT: Yes, on the scope of the waiver,  
9 States are -- only could have procedural rules, but I  
10 think the -- the question of waiver is one of Federal law  
11 in which there has to be a single, uniform interpretation.

12 QUESTION: Well, certainly the New York Court of  
13 Appeals treated it as a Federal question, didn't it?

14 MS. BLATT: Yes.

15 QUESTION: It cited a bunch of other Federal  
16 cases involving IAD's to decide whether this had been  
17 waived or not.

18 MS. BLATT: Yes. In -- in this case the New  
19 York Court of Appeals purported to interpret Federal law  
20 and -- and saying that Federal law -- you couldn't waive  
21 it by consent.

22 QUESTION: I still think we've got an unanswered  
23 question in my -- what we're trying to explore is whether  
24 or not Ohio has an interest in not having this time period  
25 waived, just as arguably there is under the Speedy Trial

1 Act. And so, there may be instances where there's a very  
2 serious charge in Ohio. He wants to avoid that. So, he  
3 goes to New York and just continually waives and waives  
4 and waives.

5 MS. BLATT: Right. Well, as -- as a practical  
6 matter, there's no reason to think that either the trial  
7 court or the prosecutor are going to just let the  
8 defendant say I don't -- I don't care when I'm tried --

9 QUESTION: Well, but that's the whole reason for  
10 a time limit under the act.

11 MS. BLATT: Well, there are State speedy trial  
12 acts. In the Federal system, there would be the Federal  
13 Speedy Trial Act, and the defendant would have to be --  
14 would have to be tried in accordance with those terms and  
15 then --

16 QUESTION: Justice Stevens -- I have to  
17 attribute it. The reality of the matter is that the  
18 sending State is probably delighted to have the receiving  
19 State feed and house the prisoner for as long as it wants.

20 MS. BLATT: Well, this agreement has been around  
21 since 1957 and I've never heard of States complaining  
22 about this problem. But generally the -- you know, our  
23 position is that even if there's some public purpose to be  
24 served, that doesn't suggest that the right is not  
25 waivable.

1           QUESTION: When you're scheduled for a trial in  
2 the Supreme Court of Monroe County, I don't think the  
3 defendant could get away with simply saying, you know, I  
4 don't want -- I want to be tried 6 months from now.  
5 Eventually the court is going to say, look, we're going to  
6 set a trial date whether you want to waive anything or  
7 not. This is going to be the trial date.

8           MS. BLATT: But our position is not the  
9 defendant has a right to a waiver. The -- the trial court  
10 always has discretion to -- to not grant a continuance if  
11 there's no cause. But the -- so, there's no reason to  
12 think the trial court would -- would do that. And there's  
13 certainly nothing to stop Ohio from calling up New York,  
14 saying, you know, can you speed this up.

15           QUESTION: Well, of course, I think he would  
16 have a right to waive the IAD. I thought that's the whole  
17 point of the case.

18           MS. BLATT: The court can reject the waiver.

19           QUESTION: He -- he may not have a right to  
20 delay trial indefinitely. I'm sure he doesn't. The  
21 question is whether or not he has a right to waive the  
22 IAD, and I thought that's the whole point of your case,  
23 that he does and he did.

24           MS. BLATT: Can I answer the question?

25           It's more in the nature of a privilege. The --

1 the trial court is not bound to accept the waiver.

2 QUESTION: Thank you, Ms. Blatt.

3 Mr. Shiffrin, we'll hear from you.

4 ORAL ARGUMENT OF BRIAN SHIFFRIN

5 ON BEHALF OF THE RESPONDENT

6 MR. SHIFFRIN: Mr. Chief Justice, and may it  
7 please the Court:

8 Both the language of the IAD and the public  
9 interests served by the statute, particularly the  
10 interests of the sending State, unrepresented in the  
11 courtroom in the receiving State, require that in IAD  
12 cases continuances, except those requested by or  
13 instigated by -- by the defense, must be judged by the  
14 statutory good cause standard.

15 The defense response to a suggestion of a  
16 continuance by either the court or the prosecution is a  
17 factor to consider in determining whether the good cause  
18 standard was met. The defense response could be an  
19 objection. It could be silence. It could be a  
20 concurrence, a statement of availability, or a consent.

21 The -- if I can address the -- the multitude of  
22 questions with respect to the interest of the sending  
23 State, I would respectfully suggest the interest of the  
24 sending State is -- is greater than merely the situation  
25 where there's also pending charges. Sending States have

1 an interest in where convicted felons --

2 QUESTION: Did the New York Court of Appeals  
3 rely on the interest of the sending State in its opinion?

4 MR. SHIFFRIN: The -- they did not expressly,  
5 Your Honor.

6 QUESTION: Well, do you think they did so in  
7 some other -- ordinarily one thinks of an opinion as being  
8 express.

9 MR. SHIFFRIN: The -- I believe that the  
10 decision setting up a dichotomy between waiver occurring  
11 when there's a request by defense counsel for a  
12 continuance and all of the circumstances subject to the  
13 good cause test is a reflection of the public policy  
14 interest. If I can -- if I can explain --

15 QUESTION: Well, I -- I asked you rather  
16 specifically not what the arguments were, but whether the  
17 New York Court of Appeals opinion relied on that.

18 MR. SHIFFRIN: They did not rely on that. No,  
19 Your Honor.

20 QUESTION: Okay.

21 MR. SHIFFRIN: The sending State's interest in  
22 having their prisoners serve sentences in maximum security  
23 prisons in their State rather than local jails elsewhere  
24 is best evidenced by a number of things. The provisions  
25 of the statute, Article III(e), requires an inmate who's

1     invoking the statute to sign a document agreeing to go  
2     back to that sending State as soon as the receiving State  
3     is finished.

4             Article V(e) requires the receiving State to  
5     send the individual back to the sending State immediately.  
6     In this case, Mr. Hill was sent back to Ohio immediately.

7             Indeed, in this -- this Court's decision in  
8     Mauro points out the principles and reasons behind the  
9     enactment of the IAD was that there should be an assurance  
10    that the prisoner who stands trial in one State is going  
11    to be returned in an orderly fashion. There would have  
12    been a need for an IAD if sending States didn't care and  
13    were simply glad to get rid of -- of the guy.

14            One of the concerns sending States have --

15            QUESTION: Is he held, as you said -- is he held  
16    in jail instead of in -- in a penitentiary while he's --

17            MR. SHIFFRIN: While he's awaiting trial, he's  
18    in the local jail, which is a different set of  
19    circumstances.

20            Additionally, while in a local jail, a State  
21    prisoner from Ohio, in this case Ohio, is not able to take  
22    advantage of various programs for rehabilitation which  
23    affect the sending State because if that individual is  
24    eligible for parole and gets released to that sending  
25    State, it's in the interest of the sending State to have

1 that person better suited for rehabilitation.

2 All those reasons are -- are reflected in a  
3 statute that says, fine, we'll give you our guy, but you  
4 have to send him back to us quickly, and there are strict  
5 time requirements to be strictly enforced.

6 And Congress went a step further. They enacted  
7 a very limited tolling provision, a tolling provision  
8 based on good cause as opposed to the tolling provision in  
9 numerous other statutes saying time periods could toll on  
10 either a good cause or consent.

11 The determination to not include the or consent  
12 language here I think is important because what's being  
13 argued by the petitioner is that consent is a per se basis  
14 for giving up those rights. But if time periods are --  
15 can, in fact, be per se lost by consent, there would not  
16 be a need for that language elsewhere.

17 QUESTION: One thing that makes me pause about  
18 your argument, Mr. Shiffrin, is that the drastic effect of  
19 -- of the result reached by the -- an indictment for  
20 murder against this person was simply dismissed.

21 MR. SHIFFRIN: This is very similar to speedy  
22 trial statutes in general, whether it's the Federal Speedy  
23 Trial Act, New York's, or Ohio's. There's been a  
24 legislative determination that the best way to achieve the  
25 societal interests in the speedy disposition of the

1 charges is to make sure that the State understands the  
2 very drastic remedy that will -- that will occur if  
3 there's not compliance --

4 QUESTION: Well --

5 MR. SHIFFRIN: -- and monitoring of the time  
6 requirements. And therefore --

7 QUESTION: Mr. Shiffrin, what -- what if the  
8 defendant and his lawyer both went in the courtroom when  
9 the trial date was being set and expressly said, both of  
10 them, to the court, we waive any right to be tried within  
11 the 180 days? It's okay if we go to trial May 1. Let's  
12 -- let -- how about that? Is that okay?

13 MR. SHIFFRIN: The answer to your question  
14 depends upon the context of what was said before that, and  
15 let me explain what I mean by that.

16 QUESTION: Can't -- can't you answer Justice  
17 O'Connor's hypothetical question and then explain?

18 QUESTION: The trial court says a convenient  
19 date for trial is May 1. Now that date is beyond the 180  
20 days. The defendant and his lawyer say, we know that's  
21 beyond the 180 days. We waive that and May 1 is okay.

22 MR. SHIFFRIN: It's my position -- and what was  
23 different I believe in the second time the question was  
24 asked is we found out what was said beforehand, which is  
25 the court has -- the court is proposing a delay. And at

1 that point, that continuance, consented to expressly --

2 QUESTION: It's not a continuance. We're  
3 setting the trial date for the first time. The court says  
4 May 1. That is beyond the 180 days. Everybody knows  
5 that. Defendant and his counsel say okay. Now, is that  
6 going to be sufficient as a waiver?

7 MR. SHIFFRIN: No, it is not.

8 QUESTION: No.

9 MR. SHIFFRIN: And the reason I say that is,  
10 first of all, I disagree with your predicate. I believe  
11 all adjournments of court proceedings are a continuance of  
12 that case. The -- in determining whether the adjournment  
13 and continuance is -- is to be counted against the 180-  
14 day --

15 QUESTION: Well, if there's never been a trial  
16 date set, how could it be a continuance?

17 MR. SHIFFRIN: There might not have been a trial  
18 date set. There had been prior court proceedings. There  
19 -- the court proceedings keep on getting continued.  
20 Indeed, the -- they brought back this case on January 9th,  
21 1995 nearly 400 days after the first court appearance in  
22 this case, after -- after the -- the time period began.  
23 The --

24 QUESTION: Well, that -- that may be New York  
25 practice. You're certainly more familiar with it than I

1 am. It certainly wasn't the practice in Arizona to talk  
2 about a -- I agree with Justice O'Connor who, of course,  
3 herself practiced in Arizona.

4 (Laughter.)

5 QUESTION: You don't refer to a continuance  
6 unless you're talking about a change of a trial date that  
7 has already been set.

8 But this has to have national application, and  
9 the word continuance is used.

10 MR. SHIFFRIN: The -- the statute sets forth a  
11 very strict time requirement and a strict enforcement  
12 mechanism. As you point out, by the way, that the penalty  
13 of dismissal, Your Honor, is different in Federal court  
14 than it is in State courts because the IAD has a different  
15 provision in Federal courts where there's not dismissal  
16 with prejudice, as opposed to the law in New York State.

17 But going back -- going back to the question,  
18 the -- by -- by only allowing extensions of that very  
19 strict time period, when there are continuances on good  
20 cause shown, there's a -- there's a statement by the  
21 legislation -- by the legislature that the best way to  
22 achieve the balance of the interests of the defendant, the  
23 interests of the receiving State and the sending State, is  
24 to -- is to limit the circumstances in which -- in which  
25 those time periods can be lost.

1           The reason we distinguish the situation where  
2 there's a request for a -- for a delay by the defendant is  
3 twofold. First of all, it's simply unfair and unjust for  
4 defendant to ask for something, get it, and then be able  
5 to complain about it. But more importantly, the public  
6 interest of -- served by the IAD, the interest of the  
7 sending State, would be lost if defendants could do that  
8 because they would be encouraged to delay cases.

9           And the -- it's important to keep in mind the  
10 unrepresented interest of the sending State as a limiting  
11 factor as to the circumstances in which waiver applies.

12           QUESTION: Well, we don't have any objection by  
13 Ohio in this case, do we?

14           MR. SHIFFRIN: There's -- Ohio wasn't a party in  
15 the courtroom. That's -- that's the problem. That's why  
16 we need to have a limit on -- on waiver. You have in the  
17 courtroom --

18           QUESTION: So, let -- let me see if I can  
19 understand your position. Counsel for both parties and  
20 the defendant are in court, and the court said, now, I  
21 know that the 180 days is going to run in -- in April.  
22 Based on my conversations with counsel, it would be more  
23 convenient for both of their calendars to try the case  
24 beyond the 180 days. Do you waive -- Mr. Prisoner and  
25 your counsel, do you waive the IAD? And they say yes.

1           You're telling me that the court must say, well,  
2 even if you do, I cannot give you a continuance unless I  
3 -- or an extended date unless I find good cause for doing  
4 so. I cannot let you opt out of the IAD. I must find  
5 that there is good cause as the IAD finds that -- defines  
6 that for extending this trial date.

7           MR. SHIFFRIN: If --

8           QUESTION: That's your position.

9           MR. SHIFFRIN: There's one -- one provision in  
10 that hypothetical which -- which I call your attention to  
11 to explain my answer. In your hypothetical, you talked  
12 about this being for the convenience of defense counsel.  
13 If this was a request by defense counsel, it's one thing.  
14 Otherwise, in this very case, in July of 1994, that's  
15 precisely what happened, and the judge ruled ultimately  
16 that that continuance, the July '94 continuance, with  
17 consent of the defendant, was on good cause. In this  
18 case, the district attorney's response --

19           QUESTION: Mr. Shiffrin, did this -- the trial  
20 court dismissed the indictment, you say, in 19 -- or the  
21 lower courts didn't dismiss the indictment.

22           MR. SHIFFRIN: That's correct, Your Honor.

23           QUESTION: Oh, so the prisoner was in New York  
24 for -- for several years.

25           Did Ohio ever request his return during this

1 time?

2 MR. SHIFFRIN: Yes. The prisoner was not in --  
3 well, he was in New York State for about a year and a  
4 half. As soon as the trial was over, Ohio requested him  
5 to be returned there, and he's serving his sentence in  
6 Ohio, which is further evidence of the interest of Ohio  
7 and other sending States. They want their prisoners to  
8 serve sentences in their prisons and -- which is why --

9 QUESTION: Well, but if he had been -- if he had  
10 been -- if he were tried in New York and he could be sent  
11 back after that, could he not? I mean, it's not as if  
12 Ohio was asking that this murder indictment be dismissed.

13 MR. SHIFFRIN: Ohio doesn't have to ask that  
14 under the statute. Before they -- before they gave up  
15 control of their prisoner, they were entitled to rely on  
16 the statute that says 180 days, we're getting him back,  
17 unless there's exceptions -- unless there's continuances  
18 for good cause shown or if there's waiver by means of  
19 defense request.

20 QUESTION: Okay. 180 days to go to trial in the  
21 supreme court. Then supposing that he's convicted and he  
22 appeals, he's going to be in New York for a number of  
23 years. It's not --

24 MR. SHIFFRIN: The way the statute reads, as  
25 soon as the trial is over, he's required to be sent back

1 to the sending State. He doesn't have a right -- he does  
2 not have a right under the statute to stay in New York  
3 during that appellate process.

4 QUESTION: So that he -- he is appealing his  
5 case in New York, but he -- he has to go back to Ohio?

6 MR. SHIFFRIN: That's correct. And Mr. Hill is  
7 in Ohio and has been in Ohio for a number of years now,  
8 serving his Ohio sentence. He's not serving the New York  
9 sentence. The New York sentence was vacated last year by  
10 the court of appeals, but during the period between  
11 conviction, appeal to the appellate division in New York,  
12 and appeal to the court of appeals, he was not in New York  
13 serving the New York sentence. He was in Ohio because  
14 Ohio is entitled to exercise their right to have custody  
15 of their prisoner.

16 QUESTION: But, Mr. Shiffrin, you've conceded  
17 that the defendant can trump that by requesting.

18 MR. SHIFFRIN: Yes, and there's two reasons for  
19 that.

20 QUESTION: So, this defendant comes first and -  
21 - and not the State of Ohio.

22 But you talked about speedy trial provisions.  
23 And do you agree with opposing counsel who informed us  
24 that, unlike the Federal act, most State acts do allow for  
25 waiver in circumstances like this, where counsel says,

1 fine, we'll have the trial when the judge says?

2 MR. SHIFFRIN: Actually I do not agree with  
3 that. I believe most speedy -- most speedy trial statutes  
4 are written in a manner similar to the Federal Speedy  
5 Trial Act, which -- which places a burden of compliance on  
6 the State and makes -- limits greatly the circumstances in  
7 which the defendant can cause delay in -- in the case.

8 QUESTION: But -- but the one big difference is  
9 that there is an explicit provision for waiver and two  
10 situations in which you can ask for waiver. One can imply  
11 from that that that's it, where opposing counsel started  
12 out here with the point that ordinarily it's presumed that  
13 a statutory right is waivable.

14 MR. SHIFFRIN: That is correct. In Mezzanatto,  
15 this Court held that statutory rights are presumptively  
16 waivable. However, in Mezzanatto, this Court instructed  
17 that the courts must examine both the language of a  
18 statute and -- and the public interests and policies  
19 served to determine how waiver applies to a particular  
20 statutory right.

21 With respect to the language of the statute,  
22 setting forth very strict time requirements, very limited  
23 exceptions as to when those time requirements could be  
24 expanded and phrased without the or consent language that  
25 Congress has used in, again, almost a score of other

1 statutes, that the language suggests -- and also I should  
2 add, the -- Article IX says this statute is to be  
3 liberally construed --

4 QUESTION: But your interpretation just leaves  
5 it open to the defendant to sandbag, to appear to give  
6 consent the way this defendant did. In fact, the attorney  
7 explicitly -- and then to come in later and say, well,  
8 look, it's too late. Dismiss my murder indictment.

9 MR. SHIFFRIN: A few -- a few answers are needed  
10 with respect to that question, Your Honor.

11 First of all, in this particular case, when  
12 nearly 400 days had passed between the commencement of the  
13 IAD period and the January 9th appearance, no -- and none  
14 of which was -- was clearly already determined to have  
15 been calculated under the statute, it's impossible to --  
16 to say that any attorneys were purposely seeking delay to  
17 avoid the consequences.

18 Indeed, it just is possible on this record where  
19 we know that, Mr. Huether, the trial DA, was otherwise --  
20 was otherwise occupied -- he wanted a delay and was  
21 hoping that without mentioning the IAD --

22 QUESTION: Yes, but the defendant at least  
23 consented to it.

24 MR. SHIFFRIN: But the reason that the statutory  
25 test is not the intent of the defense counsel or the

1 district attorney, but rather whether good cause was  
2 shown, is because just like with the Federal Speedy Trial  
3 Act where consent in the Federal Speedy Trial Act does not  
4 result in waiver, is we want to have --

5 QUESTION: But you can waive statutory rights.  
6 You've agreed to that.

7 MR. SHIFFRIN: Yes, and --

8 QUESTION: The statute doesn't have to say so.

9 MR. SHIFFRIN: We're not disagreeing at all.

10 But the question is under what circumstances can a  
11 particularly statutory right be waived. And the reason we  
12 argue that -- that with respect to this statute and these  
13 statutory rights, the line for waiver should be with  
14 continuances at the request of the defense is -- is again  
15 because to allow those type of requests -- requests of  
16 continuances to -- to escape review would be to encourage  
17 delay and therefore defeat the public policy interests.  
18 But all other types of requests should -- should be -- the  
19 onus should be put on the State to determine whether or  
20 not there's good cause shown.

21 QUESTION: Have any of the States filed amicus  
22 briefs here supporting your position because they might be  
23 in the position of -- of a sending State?

24 MR. SHIFFRIN: No, Your Honor.

25 QUESTION: I don't understand why your -- if you

1 do, indeed, and we should, indeed, have a concern for the  
2 sending State, I don't know why it wouldn't -- wouldn't  
3 extend to continuances at the request of the defendant as  
4 well or to, you know, extensions at the request of the  
5 defendant. Why should that make a difference?

6 MR. SHIFFRIN: The -- the reason that -- that I  
7 believe the line could be drawn at continuances at the  
8 request of the defendant is if you allow continuances at  
9 the request of the defendant to actually delay -- delay  
10 proceedings, you're -- you're encouraging defendants to  
11 delay proceedings.

12 QUESTION: Why is it that they want to delay  
13 these proceedings? That's just a factual issue that I  
14 guess I'm not sure that I'm clear on. He's behind bars  
15 whether he's in New York or whether he's in Ohio. I mean,  
16 is it just that it's more fun to be getting ready for  
17 trial?

18 MR. SHIFFRIN: The -- first of all --

19 QUESTION: Why does he want to stay --

20 MR. SHIFFRIN: We're not suggesting that's what  
21 occurred in this particular case. However, in some  
22 cases --

23 QUESTION: No, but you're suggesting as a kind  
24 of a systemic way that most -- or a lot of defendants are  
25 going to want to stay in -- in the requesting State.

1 MR. SHIFFRIN: The advantage of -- of delay in  
2 trials in general -- and it's something recognized in the  
3 speedy trial statutes -- is evidence could be lost,  
4 witnesses could --

5 QUESTION: So, it's just the delay. They're not  
6 enjoying themselves. They just want to string it out.

7 MR. SHIFFRIN: I believe that's -- that's one of  
8 the primary motivators for passing the speedy trial  
9 statutes which have addressed remedy of dismissal to  
10 ensure the State keeps track of the time and -- and meets  
11 their burden of complying with the statute.

12 But --

13 QUESTION: Suppose in this case the IAD was  
14 openly discussed by all counsel and by the court. And the  
15 court said, you know, I've got -- got a problem here.  
16 We've got -- excludable time ends after this proposed  
17 trial date. Could the trial judge on this record have  
18 made a finding consistent with the act that would have  
19 allowed him to set the trial -- the May trial date?

20 MR. SHIFFRIN: Yes, Your Honor. We are not  
21 disputing that -- the facts that you posited or in fact  
22 what occurred in this case could have been considered  
23 under a good analysis --

24 QUESTION: Well, then it seems to me that a  
25 waiver in that context makes a lot more sense because the

1 defendant could say, Your Honor, we waive the necessity of  
2 those findings based on this -- the situation before us.  
3 It's -- it's likely that finding could be made. You don't  
4 need to go through that step.

5 MR. SHIFFRIN: I -- I would -- I would respond  
6 that by making that statement, effectively the defendant  
7 is saying, I want this delay, and if the defendant is  
8 saying that, he has waived his right to complain. That is  
9 not what occurred here.

10 By the way, in context what occurred here is the  
11 district attorney was asked whether he was available, and  
12 -- and the answer was that would fit his -- his calendar.  
13 And in that context, the defense attorney was asked how  
14 was that with defense counsel, and the response was,  
15 that's fine with me. That's a statement of availability,  
16 not desirability.

17 I don't think it's critical on the issue of  
18 waiver, but rather whether good cause was found because  
19 depending on the circumstances, the defense response is a  
20 factor to consider and -- and a stronger response, for  
21 instance, the response that occurred in this case a year  
22 earlier or 6 months earlier in July, I consent to the  
23 delay, clearly is a strong factor in finding good cause.

24 QUESTION: You think -- you think I consent to  
25 the delay is different from that's fine with me when

1 you're -- when the judge has proposed a trial date?

2 MR. SHIFFRIN: The -- one of the problems with  
3 the language, that's -- that's fine with me, in this  
4 context it could very well have meant I'm free too, Your  
5 Honor. I'm also available. There's -- there is ambiguity  
6 as to what was -- what was intended.

7 QUESTION: But these sort of exchanges take  
8 place all the time in courtrooms. And, you know, we don't  
9 get out a Webster's unabridged dictionary every time to  
10 figure out what it means.

11 MR. SHIFFRIN: And I'm not suggesting that  
12 there's a need to. To the contrary, I'm suggesting  
13 there's a simple rule. If the defendant has not requested  
14 the -- the delay, there's not waiver. Rather, let's  
15 consider whether this delay meets the good cause test  
16 before -- before a judge grants it.

17 QUESTION: Well, but that simply goes contrary  
18 to the rule that statutory rights can be waived.

19 MR. SHIFFRIN: Except that in the same decision,  
20 Mezzanatto, this Court which, you know, articulated that,  
21 the Court went through a very lengthy analysis of the  
22 public interests served by that rule because this Court  
23 recognized that, depending on the public interests that  
24 are served, there -- there could be limits on -- on the  
25 presumption of waivability.

1           QUESTION: Yes, but in Mezzanatto, the statute  
2 in fact -- I forget whether it was the statute or the  
3 legislative history now -- articulated that public  
4 interest. And -- and that's what we don't have in -- in  
5 this case, and this is -- that's another distinction  
6 between this case and the Federal speedy trial statute.

7           MR. SHIFFRIN: The statute itself, in the IAD,  
8 has a provision, Article IX, saying liberally construe  
9 this statute to effectuate its purposes. The purposes  
10 were -- for the IAD were set forth in a number of  
11 documents which are -- are incorporated in this Court's  
12 decision in Mauro. And one of those purposes is to ensure  
13 that prisoners released to stand trial in -- in another  
14 jurisdiction will be returned to that jurisdiction  
15 promptly. The -- we have that as part of -- of the  
16 history in this statute.

17           The decision by New York --

18           QUESTION: Well, do you think there's no public  
19 interest in seeing to it that the defendant is tried of  
20 these very serious crimes in New York?

21           MR. SHIFFRIN: I think there's --

22           QUESTION: I -- I would think that may be an  
23 overriding public interest here where you can find  
24 circumstances in which you can say there was a waiver by  
25 the defense counsel of the -- the period of time. I would

1 think the public interest would fall on the side of  
2 allowing New York to conduct those proceedings.

3 MR. SHIFFRIN: I -- I agree that receiving  
4 States have a very strong interest in the speedy  
5 disposition of their -- of their charges, which is why  
6 under this statute, just like the New York speedy trial  
7 statutes, there's a strong incentive for prosecutors to  
8 comply with speedy trial --

9 QUESTION: Well, not just a speedy disposition,  
10 but a disposition. You know, to say that if you don't get  
11 it done in 90 days, you dismiss a murder indictment is  
12 pretty strong medicine. Certainly New York has an  
13 interest in bringing to trial, in a fair trial and  
14 reasonable time, a person charged with murder, and getting  
15 a verdict from the jury either guilty or not guilty.

16 MR. SHIFFRIN: I would suggest that strong  
17 interest is reflected in the legislative determination in  
18 New York, that by dismissing an occasional case, they will  
19 achieve that goal in more -- in many more cases of speedy  
20 disposition of cases. And that again is consistent with  
21 the speedy trial statutes in general. Some cases get  
22 dismissed, but more cases, as a result, are tried speedily  
23 because prosecutors and courts are going to be wary of  
24 allowing time periods to go unnoticed.

25 What happened here was New York State dismissed

1 a New York prosecution. If in fact, the line for -- for  
2 what constitutes waiver is not as I'm proposing and as the  
3 New York Court of Appeals held, requested delay, but even  
4 if the line is something else, if New York or any other  
5 State wishes to impose upon itself a higher standard, it  
6 effectuates the purposes of the act. The interest --

7 QUESTION: But there is no indication the New  
8 York Court of Appeals did wish to impose on itself a  
9 higher standard. The cases it cited are all Federal cases  
10 from other States.

11 MR. SHIFFRIN: That's correct, Your Honor. My  
12 point in this regard is if -- if a State wished -- in  
13 fact, wanted -- wanted to do so, that would be proper  
14 because what's required for uniformity is a floor as to  
15 what circumstances are not -- are not permitted.

16 QUESTION: Well, yes. If the New York Court of  
17 Appeals had said, we think this is a State law question,  
18 not a Federal question, and we are therefore going to say  
19 that it can't -- it is not waived under these  
20 circumstances, we would then have before us the question  
21 of whether -- the IAD, being a Federal statute, as we've  
22 held in a case -- New York can do that. But we don't have  
23 that question here because New York didn't try to do that.

24 MR. SHIFFRIN: However, if -- if this Court were  
25 to adopt a different standard than New York's, I would

1     urge that the case at least be remanded to allow New York  
2     the opportunity to determine under New York's version of  
3     the IAD, they want to impose a higher obligation upon  
4     themselves --

5             QUESTION: They had that opportunity before and  
6     didn't choose to take it.

7             MR. SHIFFRIN: I -- I would suggest that their  
8     decision -- setting a standard of request reflects a  
9     determination of New York policy that their -- New York's  
10    interests, as well as the interests of the sending State  
11    and Mr. Hill, are served best by having strict time  
12    requirements to be strictly -- strictly applied.

13            QUESTION: If we did what you ask, wouldn't we  
14    have to first decide that, yes, New York can do this  
15    compatibly with the Federal legislation?

16            MR. SHIFFRIN: If --

17            QUESTION: And that's a question that hasn't  
18    been argued and briefed.

19            MR. SHIFFRIN: The -- if -- if the Court were to  
20    -- were to reject my -- my contention that New York was  
21    correct with respect to the waiver standard being at  
22    request not -- not at consent -- again, I should point out  
23    in this case, the trial DA did not argue waiver. The  
24    trial DA argued this was good cause. And this -- this  
25    very well might have been a factor -- the dialogue that

1 occurred on January 9th might have been a factor in a good  
2 cause determination. That argument has been abandoned.

3 What's left here is in a situation where the  
4 petitioner has chosen not to rely on the statute, is  
5 seeking -- is seeking to rely on waiver analysis, and it's  
6 our position that waiver analysis, with respect to the  
7 IAD, exists and occur -- and -- and must exist in a  
8 limited fashion in order to ensure that not only the  
9 interests of Mr. Hill and other defendants are met, but  
10 also the interests of the -- of the two States.

11 The interests of not only -- I've discussed the  
12 sending State, but the interests of the receiving State  
13 are not always adequately represented by trial  
14 prosecutors. That's reflected in speedy trial statutes  
15 that allow for dismissal, even when there's no objection  
16 by defendants, as a means to ensure that the prosecutors  
17 know that they have a burden of compliance. This statute  
18 puts a burden of compliance on -- on a State. The only  
19 burden the statute puts on the defendant, in this case Mr.  
20 Hill, was to invoke the statute, which he did in writing,  
21 the document in writing, actually had a form for -- for  
22 the defendant to sign. There's no place for -- for  
23 counsel to sign. He invoked that statute in writing. He  
24 -- at that point as the statute is written, puts the  
25 burden of compliance solely on the State. The State

1     apparently neglected its burden and chooses not to rely on  
2     statutory language, but instead is hoping that the -- that  
3     this Court were to adopt a waiver analysis which has no  
4     limits.

5             The reason I say that it has no limits, it's not  
6     clear from the petitioner is he's saying is consent the  
7     test. What constitutes consent? Is it concurrence? Is  
8     it -- is it failure to object?

9             I would suggest an easy test which assures that  
10    the goals of the IAD are met as a test adopted by New York  
11    State which is if there was not a defense requested or  
12    initiated continuance, then consider whether the -- the  
13    continuance that was granted was a good cause showing  
14    continuance which would justify extending the statutory  
15    time periods. By doing that, by keeping the statute --  
16    statutory waiver provisions narrow, what we do is achieve  
17    the goal of assuring the public interests of both sending  
18    States receiving -- and receiving States are met.

19            Thank you, Your Honors.

20            QUESTION: Thank you, Mr. Shiffrin.

21            Mr. Mastrocola, you have 4 minutes left.

22            REBUTTAL ARGUMENT OF ROBERT MASTROCOLA

23                    ON BEHALF OF THE PETITIONER

24            MR. MASTROCOLA: Thank you, Your Honor.

25            If I could perhaps clear up a couple of things.

1           Waiver of a Federal law or a Federal right is a  
2 Federal question. The IAD is a Federal law. We need  
3 uniform interpretation. That's why this Court, in fact,  
4 has taken some previous cases to resolve particular issues  
5 of interpretation of the IAD instead of letting 50  
6 different States have their own interpretations.

7           Whether there are State procedural rules in  
8 terms of appellate practice and whether issues can be  
9 raised, that deals with forfeiture. That's a separate  
10 issue. That has nothing to do with what the scope is of  
11 waiver of the IAD as a Federal standard.

12           With respect to the questions about what if Ohio  
13 has a charge, I just wanted to suggest one thing. If in  
14 fact the sending State also has criminal charges pending,  
15 as I suggested before, it might be a matter of comity  
16 between the States. If the defendant initiated this  
17 procedure and wanted to go back to New York, and Ohio  
18 insisted that they wanted to try them there, I think very  
19 clearly there is a provision under the IAD which says the  
20 time is tolled whenever a defendant is unable to stand  
21 trial. And that could very easily be invoked based on  
22 some sort of agreement between the States because even  
23 though he's invoked it here, Ohio wants to take  
24 precedence. They'll just delay until that's done in Ohio.  
25 So, that can be invoked right under the IAD. That's not a

1 problem.

2 As far as the sending State's interest in this  
3 prisoner and about, well, Ohio wanted this individual back  
4 as soon as possible, the statute itself requires it. As  
5 soon as the proceedings are terminated in the receiving  
6 State, he has to go back to the sending State. So, this  
7 wasn't a matter of Ohio contacting New York regularly and  
8 say, we want this guy, we want this guy, you know, when  
9 you going to be done. He just goes back automatically.

10 QUESTION: May I ask just one question? I  
11 notice in the joint appendix there are a series of forms  
12 that are Form III, Form VI, and Form so forth that are  
13 prepared under the agreement, the statute. Is there -- is  
14 there a form that's been prepared to deal with the  
15 situation we have before us in this case?

16 See, one of the -- I think the strongest  
17 argument against your position is that if you had a form,  
18 you always get the lawyer to sign the form, you won't have  
19 this argument again about whether there's a waiver. But I  
20 guess there isn't a form --

21 MR. MASTROCOLA: Well, because what happens is  
22 the prisoner is always in another State when he activates  
23 these proceedings. He just -- he's given a choice and he  
24 wants to tell the sending State that -- or the receiving  
25 State that he wants to face these charges. That's all

1 done while he's in prison. Once he comes back into the  
2 other State, the receiving State, then it starts like a  
3 regular criminal prosecution.

4 And I think in response to one of the other  
5 questions about counsel, I don't believe there's any bar  
6 to the State assigning counsel in the receiving State if  
7 he wants to consult with the defendant about whether he  
8 wants to initiate this process or whatever. His rights  
9 can be protected if -- if necessary or if the court wants  
10 to. That's not necessarily required while he's still in  
11 Ohio --

12 QUESTION: I gather your answer is there isn't  
13 really a form such as I'm --

14 MR. MASTROCOLA: There's no form, no. But  
15 there's no form required for waiver of a right, a  
16 statutory right, that I'm aware of in any other context.

17 QUESTION: Yes, but if you had such a form and  
18 executed, we wouldn't have these problems anymore.

19 MR. MASTROCOLA: Well, you've got the  
20 distinction between when he's in prison and when he's  
21 starting the process and then what happens sometime later  
22 once he's been transferred to the other State and now he's  
23 into the process of the criminal prosecution in that  
24 State.

25 The sending State, to the extent it has an

1 interest in rehabilitation, let's not forget that  
2 rehabilitation starts with the defendant. So, it's not  
3 just the interest of the sending State in saying, we want  
4 to get this prisoner back here to rehabilitate him. It's  
5 got to be dependent on what that prisoner's state of mind  
6 is. That's what the whole focus of this IAD is, and  
7 that's why it gives the prisoner the right, if he wants  
8 to, to decide I'm not going to stay in prison, I'm going  
9 to go back. It gives him the choice.

10 And I would submit that in terms of this public  
11 policy, the proof is in the pudding in the sense that the  
12 IAD has been with us now for some 40 years. The courts  
13 have uniformly held these rights waivable, and there has  
14 been no indication by the States, no outcry, that somehow  
15 this is impeding the sending State's interest. There has  
16 been no rush to drop out of the IAD, and in fact, over the  
17 years, despite this waivability principle, States have  
18 continued to join to the point where now every one but two  
19 States are party to this agreement.

20 And again, just for clarification, we're not  
21 talking about a right to waiver. We're talking about --

22 QUESTION: Who are the two States, just -- just  
23 out of curiosity.

24 MR. MASTROCOLA: Louisiana and Mississippi, and  
25 there may be something -- some joke there, but I don't

1 want to say it at this point.

2 (Laughter.)

3 MR. MASTROCOLA: Basically --

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr. --  
5 thank you, Mr. Mastrocola.

6 The case is submitted.

7 (Whereupon, at 11:49 a.m., the case in the  
8 above-entitled matter was submitted.)

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## 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:

NEW YORK, Petitioner v. MICHAEL HILL.

CASE NO: 98-1299

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BY

*Ann Marie Federico*

(REPORTER)