STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 94-0811-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL J. AUKES,

Defendant-Appellant.

Appeal From The Judgment Entered In The Circuit Court For Walworth County, The Honorable James L. Carlson, Circuit Judge, Presiding

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CORRECTED BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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1. Whether the trial court erred in denying Mr. Aukes' motions to dismiss for failure to comply with the speedy trial requirements of the Interstate Agreement on Detainers, Wis. Stat. §976.05.

The trial court twice denied Mr. Aukes' motions to dismiss under the IAD, first on August 18, 1992, and again on November 29, 1993.

2. Whether the trial court erred by ordering Mr. Aukes to pay "restitution" to the state for "crime lab fees."

The trial court ordered the payment of such fees as part of Mr. Aukes' sentence.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. (Rule) 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a). At such time as counsel for appellant has had sufficient opportunity to review the brief of respondent, it may be that oral argument will be unnecessary because the briefs may fully present and meet the issues on appeal. Wis. Stat. (Rule) 809.22(b). Until the brief of respondent has been reviewed, however, appellant wishes to preserve his right to request oral argument.

Publication may be appropriate in light of the importance of the issues presented under the Interstate Agreement on Detainers. *See* Wis. Stat. (Rule) 809.22(a)5.

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 94-0811-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL J. AUKES,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

Nature Of The Case

Defendant-appellant, Michael J. Aukes, appeals from a judgment of conviction and sentence dated March 21, 1994, nunc pro tunc to November 29, 1993. This appeal is filed pursuant to Wis. Stat. §808.03 and Wis. Stat. (Rule) 809.30(2)(j).

Procedural History And Statement Of Facts

The defendant's offense conduct is undisputed and well presented in the State's Trial Memorandum (R53). It need only be summarized here.

In mid-November, 1982, Michael Aukes arranged to provide a quantity of cocaine to Paul Peters in Lake Geneva, Wisconsin (R53:7-9).[1] Unknown to Mr. Aukes, Peters was then an informant for the Wisconsin Department of Justice, Division of Criminal Investigation (DCI) (R53:7-8).

On November 11, 1982, Mr. Aukes provided Peters with approximately one ounce of cocaine in exchange for $2,250 (R53:10, 12). The two then arranged for the transfer of an additional four to eight ounces of cocaine that evening (R53:10-11; 13). Before completing the second transaction, however, DCI agents arrested Mr. Aukes (R53:14). The agents searched the interior of the truck Aukes was driving at the time and recovered about four ounces of cocaine, an O'Haus scale, and assorted drug paraphernalia (R53:14-17).

The DCI agents then obtained a search warrant for Mr. Aukes' motel room from Court Commissioner Daniel H. Eberhardt (R53:18-19). The agents executed that warrant early on

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[1] Throughout this brief, references to the record will take the following form: (R__:__), with the R__ reference denoting record document number and the following :__ reference denoting the page number of the document. Where the referenced material is contained in the Appendix, it will be further identified by Appendix page number as A.App. __.

November 18, 1982, and seized approximately 700 grams of cocaine and miscellaneous drug paraphernalia (R53:19-20).

By criminal complaint filed February 14, 1983, the state charged Mr. Aukes with one count of delivery of cocaine and one count of possession of cocaine with intent to deliver in violation of Wis. Stat. §161.41(1m)(b)(1) in Walworth County Case No. 83-CR-91 (R1). After a preliminary hearing on March 7, 1983, the court bound him over for trial (R3; R66).

Mr. Aukes failed to appear for a jury trial scheduled for May 24, 1983 (R67). Shortly thereafter, the state filed an additional complaint charging him with bail jumping in violation of Wis. Stat. §946.49(1)(b) in Walworth County Case No. 83-CR-258 (see R53:1).

Mr. Aukes subsequently was arrested and convicted on other charges in Colorado and, on February 3, 1992, the State of Wisconsin lodged a detainer against him with the appropriate Colorado authorities (R71:23). Mr. Aukes was informed of the detainer and, on February 26, 1992, he signed a Request for Speedy Disposition form under Article III of the Interstate Agreement on Detainers ("IAD") (R71:10, 12, 26). Sara Howard, the Colorado official who handles IAD matters, prepared the necessary documents and mailed them to the Wisconsin authorities on March 2, 1992 (R71:27). The Walworth County Circuit Court received the request on March 6, 1992 (R71:15), and the Wisconsin Attorney General's office received the packet from the Walworth County District Attorney on March

10, 1992 (R71:18).[2]

At about the same time, the State of Wisconsin initiated Mr. Aukes' involuntary return under Article IV of the IAD. The state received authorization from the Honorable James L. Carlson, Walworth County Circuit Judge, and mailed the necessary Request for Temporary Custody form to the appropriate Colorado authorities on March 2, 1992 (R71:16-17). Ms. Howard received Wisconsin's request on March 5, 1992 (R71:28).

Ms. Howard believed the transfer to have been initiated by Mr. Aukes' request under Article III (R71:29). An involuntary transfer under Article IV normally requires a pre-transfer hearing (R71:29-30). No such hearing was held prior to Mr. Aukes' transfer (R71:30). However, the exact same forms are used after the initial IAD request, regardless whether that request was under Article III or Article IV (R71:32-33).

Wisconsin deputies received Mr. Aukes at the Colorado prison on April 17, 1992 (R61). He was booked into the Walworth County Jail on April 18, 1992 (R71:8).

On July 30, 1992, Judge heard a number of motions from both the state and the defense (R70). In one such motion, Mr. Aukes moved to suppress the evidence seized from his motel

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[2] The transcript does not reflect specifically when the Walworth County District Attorney received the packet, but suggests it received it the same date as the court did (see R71:15).

room on the grounds that Court Commissioner Eberhardt was not authorized to issue such warrants (R23; R32). The court granted the suppression motion without an evidentiary hearing (R70:21-22) after the state stipulated to the factual statement in the defendant's motion, based upon review of the court file, to the effect that Court Commissioner Eberhardt was not authorized to issue the warrant in this case (R70:11; see R23:1-2).

The state immediately stated its intent to appeal that ruling and moved orally for a stay pending the appeal (R70:22-23). The court, however, declined to reschedule the trial date (R70:25). The court then ordered the drug charges consolidated with the bail jumping charge for trial on August 31, 1992 (R70:28).

On or about August 5, 1992, the state filed a written motion for a stay pending appeal (R34). Judge Carlson heard that motion on August 18, 1992 (R71). At the same time, the court heard a motion by Mr. Aukes, filed on August 17, 1992, to dismiss the charges for violation of the speedy trial provisions of the IAD (R35; R38; R71:4-43).

After an evidentiary hearing, the court denied Mr. Aukes' motion to dismiss (R71:43; A.App. 6). The court held that Mr. Aukes was produced pursuant to Article III rather than Article IV of the IAD, so that the statutory speedy trial time (180 days) had not elapsed (id.).

The court then granted the state's motion for a stay

imposed costs of $455.97, reflecting the costs of returning Mr. Aukes to Wisconsin (R61; R63),[3] and restitution of $619.20 to the state for "crime lab fees" (R63; see R74:52), and entered judgment (R63).[4]

Mr. Aukes timely filed his Notice of Intent to Pursue Post-Conviction Relief pursuant to Wis. Stat. (Rule) 809.30(2)(b) on December 13, 1993 (R60). He filed his Notice of Appeal on March 28, 1994 (R64). By Order dated June 7, 1994, this Court extended to June 15, 1994, the time within which Mr. Aukes must file his opening brief.

ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING MR. AUKES' MOTION TO DISMISS UNDER THE INTERSTATE AGREEMENT ON DETAINERS.

Mr. Aukes twice moved to dismiss this prosecution pursuant to the Interstate Agreement on Detainers ("IAD"), Wis. Stat. §976.05, first on August 18, 1992, and again just prior to trial on November 29, 1993. The trial court's denial

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[3] The trial court originally imposed extradition costs of $871.94 (R57; R74:52). The parties subsequently agreed that the applicable transportation costs in fact were $455.97 (R61), and the court amended the judgment accordingly (see R59).

[4] Due to minor errors, the trial court amended the initial judgment three times (see R57; R58; R59; R63). The final and controlling judgment appealed from here is the Third Amended Judgment dated March 21, 1994, *nunc pro tunc* to November 29, 1993 (R63).

of these motions was error, the applicable time limits for trial under the IAD having expired.

A. The Interstate Agreement On Detainers.

The Interstate Agreement on Detainers is an interstate compact among nearly all of the states, the District of Columbia and the United States. It is codified in Wisconsin at Wis. Stat. §976.05.[5]

"The purpose of the IAD is to provide a common procedure for the disposition of detainers between states to avoid, as much as possible, the disruption of a prisoner's course of rehabilitation and a prisoner's anxiety with regard to charges pending against him in other states." Bush v. Muncy, 659 F.2d 402, 404 n.1 (4th Cir. 1981) (citations omitted), cert. denied, 455 U.S. 910 (1982).[6] As Article I of the IAD notes,

> charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already

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[5] A copy of the IAD, Wis. Stat. §976.05, is included in the Appendix (A.App. 10-12).

[6] Wisconsin courts must "accord[] considerable weight" to the decisions of other state and federal courts which construe the IAD, although such decisions generally are not binding. State v. Whittemore, 166 Wis.2d 127, 479 N.W.2d 566, 569 (Ct. App. 1991) (citation omitted). Of course, the IAD, even though codified as a state statute, is an interstate compact and thus federal law subject ultimately to federal rather than simply state construction. Cuyler v. Adams, 449 U.S. 443, 438-42 (1981). Accordingly, United States Supreme Court decisions construing the IAD are binding. See id.

> incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation.

Wis. Stat. §976.05(1). See also United States v. Ford, 550 F.2d 732, 737-40 (2d Cir. 1977) (detailing disadvantages and potential abuses IAD enacted to address), aff'd sub nom., United States v. Mauro, 436 U.S. 340 (1978). The IAD accordingly is meant "to encourage the expeditious disposition of such charges and to provide cooperative procedures among member States to facilitate such disposition." United States v. Mauro, 436 U.S. 340, 351 (1978).

The IAD establishes procedures by which one jurisdiction may obtain temporary custody of a prisoner incarcerated in another jurisdiction for the purpose of bringing that prisoner to trial. See Wis. Stat. §976.05(4). Under Article IV, a prosecutor who has lodged a detainer against a prisoner can have him made available for trial by presenting "a written request for temporary custody or availability" to the officials of the holding state. Wis. Stat. §976.05(4)(a). Following a 30-day period during which the Governor of the sending state may decide to disapprove the request, id., the prisoner may be transferred to the temporary custody of the receiving state. He then must be brought to trial on the charges underlying the detainer within 120 days of his arrival. Wis. Stat. §976.05(4)(c).

The IAD also establishes procedures under which a prisoner may initiate his transfer to the receiving state for

speedy disposition of outstanding charges. See Wis. Stat. §976.05(3). Under Article III, the warden of the prison holding the prisoner must promptly inform him of any detainer lodged against him and of his right to request final disposition of the charges. Wis. Stat. §976.05(3)(c). When the prisoner makes such a request, by "caus[ing] to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint," the jurisdiction which filed the detainer must try him within 180 days. Wis. Stat. §976.05(3)(a). As indicated in the statutory language, this time period begins when the demanding state actually receives the prisoner's request for final disposition. State v. Whittemore, 166 Wis.2d 127, 479 N.W.2d 566, 569-70 (Ct. App. 1991), rev. denied, 482 N.W.2d 107 (1992).

Regardless how the procedure for transfer is first initiated, the IAD insures protection of the prisoner's speedy trial rights. If the prisoner is not brought to trial within 180 days of receipt of his request by the receiving state, or within 120 days of his arrival upon the state's request, the charges underlying the detainer must be dismissed with prejudice. Wis. Stat. §976.05(5)(c). Dismissal is mandatory; a showing of prejudice to the defendant is not required. E.g., Stroble v. Anderson, 587 F.2d 830, 839-40 (6th Cir.

1978), cert. denied, 440 U.S. 940 (1979); State v. Taylor, 555 N.E.2d 649, 653 (Ohio App. 1988). "The stringent sanction of dismissal is a prophylactic provision, whose aim is not to give the prisoner a windfall but is to place pressure upon the state to give the incarcerated defendant a speedy trial." State ex rel. Saxton v. Moore, 598 S.W.2d 586, 592 (Mo. App. 1980).

The IAD identifies only two exclusions from these time periods. First, "for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance." Wis. Stat. §976.05(3)(a) & (4)(c). Second, the running of these time periods "shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter." Wis. Stat. §976.05(6)(a). Accordingly, the time periods are tolled during any physical or mental disability of the defendant rendering him unable to stand trial, see Stroble, 587 F.2d at 838; People v. Valenti, 396 N.Y.S.2d 321, 323 (Monroe Co. Ct. 1977); Commonwealth v. Scott, 281 A.2d 754, 756 (Pa. Super. 1971), or when he is actually standing trial on other charges, see United States v. Mason, 372 F. Supp. 651, 653 (N.D. Ohio 1973); State v. Wood, 241 N.W.2d 8, 14 (Iowa 1976).

In addition to the statutory exclusions, this Court has recognized that a defendant's rights under the IAD "may be

waived by a defendant's request for a procedure inconsistent with its provisions," such as by requesting a trial date beyond the applicable IAD time limit. State v. Brown, 118 Wis.2d 377, 348 N.W.2d 593, 598 (Ct. App. 1984) (citation omitted).

B. The Trial Court Erred In Applying The 180 Day Period Under Article III Of The IAD.

The trial court denied Mr. Aukes' motions on the grounds that the 180-day time period under Article III applied rather than the 120-day period under Article IV (R71:43; R74:45-46; A.App. 2-4, 6). While the officials involved, as well as the trial court below, believed Mr. Aukes' transfer to be controlled by Article III and its 180-day time limit (R71:43, 29), they were wrong.

A brief chronology of the relevant facts demonstrates the error:

> *February 3, 1992*--Wisconsin detainer lodged against Mr. Aukes in Colorado (R71:23).
>
> *February 26, 1992*--Mr. Aukes signed Request for Speedy Disposition form under Article III (R71:12, 26).
>
> *March 2, 1992*--Colorado prison official sent detainer packet to Walworth County Sheriff's Office, District Attorney and Circuit Court by certified mail (R71:27).
>
> *March 2, 1992*--Wisconsin sent Request for Temporary Custody to Colorado under Article IV (R71:17).
>
> *March 5, 1992*--Colorado prison received Wisconsin Request for Temporary Custody (R71:28).

March 6, 1992--Walworth County Circuit Court and, apparently, the Walworth County District Attorney, received packet with Mr. Aukes' Request for Speedy Disposition (R71:15).

March 10, 1992--Wisconsin Department of Justice received packet with Mr. Aukes' Request for Speedy Disposition (R71:18).

April 18, 1992--Mr. Aukes booked into Walworth County jail (R71:8).

The state's "written request for temporary custody or availability" initiated the procedures under Article IV on March 5, 1992, when it was "present[ed] ... to the appropriate authorities of the state in which the prisoner [was] incarcerated." Wis. Stat. §976.05(4)(a). Mr. Aukes' request for speedy disposition under Article III did not take effect until it was received by both "the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction" from one to five days later. Wis. Stat. §976.05(3)(a) (emphasis added); see Whittemore, 479 N.W.2d at 569-70. See also, Birdwell v. Skeen, 983 F.2d 1332, 1337 (5th Cir. 1993) (IAD not triggered under Article III until both prosecutor and court receive request); Saxton, 598 S.W.2d at 590 (same).

Because procedures under Art. IV were initiated first, the time periods under that article control. Shewan v. State, 396 So. 2d 1133, 1134-35 (Fla. App. 1981) (On rehearing);[7] see

[7] In Shewan, the appellate court initially affirmed denial of the defendant's motion to dismiss under the IAD. The court believed that Shewan had initiated the procedures under Article III. On rehearing, however, the court determined that the state in fact had initiated the procedures first. (continued...)

People v. Allen, 744 P.2d 73, 74-75 (Colo. 1987) (state conceded point).

Ms. Howard's belief that she was acting under Article III is irrelevant. It is the timing of the request that controls. Shewan, supra. After the process is initiated by a request by either the state or the prisoner, the same forms and procedures are used under both articles (R71:21,32-33). See Wis. Stat. §976.05(5). The only added requirements applicable to Article IV were either satisfied (i.e., the 30-day period for gubernatorial action),[8] or rendered inapplicable by Mr. Aukes' request.[9]

The IAD is to be liberally construed to effectuate its remedial purpose "to protect prisoners against whom detainers are outstanding." Cuyler, 449 U.S. at 449-49; see Wis. Stat. §976.05(9). The state accordingly may not be allowed to manipulate the IAD in the manner attempted here to extend the

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[7](...continued)
"Subsequently Shewan did request trial by the state authorities, but only after the state had commenced the proceedings." 396 So. 2d at 1134. The 120-day period under Article IV thus controlled, mandating dismissal.

[8] Wisconsin's request was received by Colorado authorities on March 5, 1992 (R71:28), and they turned Mr. Aukes over to Wisconsin authorities on April 17, 1992 (R61).

[9] A prisoner normally must be informed by a judge of his right to challenge a request for temporary custody. Wis. Stat. §976.06; see State ex rel. Garner v. Gray, 55 Wis.2d 574, 201 N.W.2d 163 (1972). Mr. Aukes' request for final disposition, however, constituted waiver of any such challenge and consent to his production in Wisconsin, see Wis. Stat. §976.05(3)(e), even though the state's prior Article IV request rendered it unnecessary and ineffective to trigger the IAD's time limits.

applicable time limits for bringing the prisoner to trial. See Pittman v. State, 301 A.2d 509, 513-14 (Del. 1973) (state not permitted to "nullify the purpose and spirit" of the IAD by making Article IV request in attempt to extend time for trial otherwise required following prisoner's Article III request).

Even if the state's Article IV request for temporary custody had not triggered the IAD, the 120-day limit still would apply here. At least two courts have recognized that the 120- and 180-day periods jointly apply in every case in which a prisoner requests speedy disposition. United States v. Nesbitt, 852 F.2d 1502, 1516 (7th Cir. 1988), cert. denied, 488 U.S. 1015 (1989); People v. Webster, 343 N.W.2d 589 (Mich. App. 1983). Mr. Aukes notes, however, that this Court has held to the contrary. Whittemore, 479 N.W.2d at 569 n.3. This alternative ground for applying Article IV is raised, therefore, solely to preserve the issue for further appeal.

C. Regardless What Time Period Applies, The Trial Court Erred In Denying Mr. Aukes' Motion.

Regardless whether the 180-day time period under Article III or the 120-day period under Article IV properly applies, the trial court erred in denying Mr. Aukes' motions to dismiss. The state failed to bring Mr. Aukes to trial within either time period.

Under Article III, the speedy trial time began on

March 6, 1992, when Wisconsin received Mr. Aukes' request for speedy disposition, and expired on September 2, 1992. Under Article IV, the speedy trial time began on April 18, 1992, when Mr. Aukes arrived in Wisconsin, and expired on August 16, 1992.[10] Mr. Aukes was not tried, however, until November 29, 1993, 633 days after Wisconsin received his request for speedy disposition and 590 days after he was returned to Wisconsin.

None of the time prior to November 29, 1993 is excludable from the IAD time periods. At no time was Mr. Aukes unable to stand trial under Article VI, Wis. Stat. §976.05(6)(a), and the trial court, "the court having jurisdiction of the matter," never found otherwise. See Stroble, 587 F.2d at 838; State ex rel. Corbin v. Superior Court, 746 P.2d 937, 939 (Ariz. App. 1987). See also Birdwell, 983 F.2d at 1340-41.

To aid the Court in reviewing other erroneous bases for exclusion which may be asserted by the state, Mr. Aukes divides the remaining analysis into three time periods: the delay prior to the state's interlocutory appeal, the delay following that appeal, and the delay during that appeal.

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[10] Because August 16, 1992, was a Sunday, an August 17, 1992, trial would have been timely. See Wis. Stat. §801(1)(b). No trial was held on that date, however.

1. Pre-August 18, 1992 Delay.

The time period prior to August 18, 1992 (either 160 days under Article III or 121 days under Article IV) is not excludable for any reason. To the extent this Court agrees that the 120-day limit under Article IV applies here, this time period alone is sufficient to mandate dismissal. Wis. Stat. §976.05(5)(c).

As previously noted, the IAD provides that, "for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance." Wis. Stat. §§976.05(3)(a) & (4)(c). However, none of the delay may be excused as a "necessary and reasonable continuance," as no continuance covering that period was ever granted. See, e.g., People v. Sevigny, 679 P.2d 1070, 1076 (Colo. 1984); Hoss v. State, 292 A.2d 48 (Md. 1972). The record reflects only two requests for a continuance for the pendency of the state's interlocutory appeal, neither of which resulted in continuance prior to August 18, 1992. The state's oral request on July 30, 1992 was denied (R70:22-25). The state's subsequent written motion was granted on August 18, 1992 (R34; R71:45-46), and is discussed in the following section.

Nor can the state attempt to show good cause retroactively. The exclusion for a "good cause" continuance

> contemplates, in the absence of a waiver of the defendant's speedy trial rights, a prosecution motion for a continuance, made of

> record in the presence of the defendant or defense counsel and supported by facts amounting to "good cause."

Sevigny, 679 P.2d at 1076. The state never alleged good cause, or any other basis for exclusion in the trial court and thus waived the point. Pittman, 301 A.2d at 514; see State v. Brown, 96 Wis.2d 258, 291 N.W.2d 538, 541 (1980).

Also, the IAD

> contemplates a continuance of the trial deadline for "good cause" before expiration of the trial deadline; the Agreement does not contemplate that "good cause" be used as an excuse for failure to observe an uncontinued trial deadline.

United States v. Iwuamadi, 716 F. Supp. 420, 424 (D. Neb. 1989) (emphasis added), aff'd, 909 F.2d 509 (8th Cir. 1990). Accord Taylor, 241 N.W.2d at 13; Hoss, supra; Commonwealth v. Fisher, 301 A.2d 605, 607 (Pa. 1973); State v. Patterson, 256 S.E.2d 417, 418 (S.C. 1979); State v. Holbrook, 260 S.E.2d 181, 182 (S.C. 1979) (conviction reversed under IAD; "at no time during the one hundred and twenty-four days of incarceration in this jurisdiction prior to trial, did the state make a motion for continuance, nor does legal ground appear to excuse the failure to so move").

The statutory requirement of a judicial finding of good cause before any continuance ensures that control of the trial date stays with the court and that the exclusion does not merely become a means of absolving the prosecutor's own default or inattention to the statute. Whether or not the state can imagine good cause for a continuance after the fact

in this case, "it does not have, nor did it attempt to offer, an excuse for its dilatoriness in seeking [a] continuance." Fisher, 301 A.2d at 607-08.

The delay also may not be justified as resulting from any request by Mr. Aukes inconsistent with the IAD. See State v. Brown, 348 N.W.2d at 598. Mr. Aukes neither requested a continuance, requested any particular trial date, nor took any other action resulting in delay of the trial.

"The burden of compliance with the procedural requirements of the IAD rests upon the party states and their agents ...." Pittman, 301 A.2d at 514. Accord Birdwell, 983 F.2d at 1339; Gibson v. Klevenhagen, 777 F.2d 1056, 1058 & n.5 (5th Cir. 1985). The receiving state thus bears the burden of keeping track of proceedings to make the court aware of the IAD time limits. People v. Allen, 744 P.2d 73, 75 (Colo. 1987); see McBride v. United States, 393 A.2d 123, 128 (D.C. App. 1978), cert. denied, 440 U.S. 927 (1979); Saxton, 598 S.W.2d at 590; Commonwealth v. Kripplebauer, 469 A.2d 639, 640 n.2 (Pa. Super. 1983).

Stated otherwise, there is "no affirmative obligation on the prisoner to alert the court of his IAD rights." Brown v. Wolff, 706 F.2d 902, 907 (9th Cir. 1983). A defendant's mere silence, unlike the defendant's affirmative request in State v. Brown, supra, cannot be equated with waiver of his right to be tried in a timely manner. Birdwell, 983 F.2d at 1340; Brown v. Wolff, 706 F.2d at 907; Allen, 744 P.2d at 75-

76; Sevigny, 670 P.2d at 1075; State v. Edwards, 509 So.2d 1161, 1163 (Fla. App. 1987); State v. Arwood, 612 P.2d 763, 765 (Or. App. 1980).

Inattentiveness to the time within which the appropriate article requires trial to be held falls upon the plaintiff, not defendant. Arwood, 612 P.2d at 765; People v. Office, 337 N.W.2d 592, 595 (Mich. App. 1983). Accordingly, a defendant need not "demand that the prosecutor and the court comply with the IAD, as long as he [does] not affirmatively request that they follow a procedure inconsistent with it." Allen, 744 P.2d at 76-77 (citations omitted); see State v. Brown, 348 N.W.2d at 598.

Mr. Aukes made no such affirmative request. The delay prior to August 18, 1992, thus may not be excluded. E.g., Edwards, supra. This 121-day delay alone mandates dismissal under Article IV.

2. Post-Appeal Delay.

The same analysis applies to the 53-day period between October 7, 1993, when the case was returned to the trial court, and November 29, 1993, when Mr. Aukes finally was tried. Again, neither party requested a continuance and none was granted. The trial court's prior continuance, by its terms, extended only until decision by the appellate courts (R71:45; A.App. 8). Also, as demonstrated supra, a "good cause" continuance valid under the IAD cannot be created after

the fact and imposed retroactively. E.g., Iwuamadi, supra; Edwards, supra.

Contrary to the state's assertion below (R52:3), Mr. Aukes did not waive his right to a speedy trial under the IAD simply because he "acquiesce[d]" in the earliest available trial date after he reiterated his desire to be tried as quickly as possible (R73:31-33). Sevigny, 679 P.2d at 1075-76.[11] Silence in the face of the inevitable simply does not constitute the type of affirmative conduct necessary to a finding of waiver. E.g., Allen, supra.

3. Delay During Interlocutory Appeal.

The only continuance granted by the trial court was that on August 18, 1992, pending decision on the state's interlocutory appeal of the suppression order. Normally, such a continuance and exclusion would be appropriate under the IAD. E.g., United States v. Roy, 771 F.2d 54, 59 (2d Cir. 1985), cert. denied, 475 U.S. 1110 (1986). For at least two reasons, however, this period does not qualify for exclusion in this case.

Although the decision whether to grant a continuance normally rests within the trial court's sound exercise of

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[11] Although the state waived the point by not arguing it in the court below, it should also be noted that a congested court calendar does not provide "good cause" for a continuance where, as here, the trial court made no attempt to transfer the trial to a different judge. E.g., Haigler v. United States, 531 A.2d 1236, 1244 (D.C. App. 1987); Taylor, 555 N.E.2d at 652-53.

discretion, see Elam v. State, 50 Wis.2d 383, 184 N.W.2d 176, 180 (1971), here, the statute controls. E.g., Hoss, 292 A.2d at 52. That statute requires a showing of "good cause" and limits the excludable continuance to such time as is "reasonable or necessary." Wis. Stat. §§976.05(3)(a) & (4)(c). Each of these issues is subject to de novo review by this Court. See Birdwell, 983 F.2d at 1336.

Regardless how it appeared at the time, the continuance pending appeal was neither reasonable nor necessary. Rather, the delay was due solely to the state's negligence.

The motion to suppress was based and granted solely on the ground that Court Commissioner Daniel H. Eberhardt was not authorized to issue the search warrant of Mr. Aukes' motel room because the court file did not contain an order granting such authorization (R23; R37; R70:21-22). Yet, the prosecutor did not even investigate the issue by speaking with the court commissioner. Rather, she simply reviewed the court file and, finding no authorization document, stipulated that the court commissioner was without that authority (R70:11).

Had it conducted a reasonable investigation, the state would have spoken with Court Commissioner Eberhardt and would have learned that he in fact possessed a certified copy of the court order granting him that authority (R73:10-13; see State's Exh. 1(10/8/93)). Had the state investigated in a timely manner, rather than waiting until Judge Carlson accidentally found the order in a different court file almost

a year later (R45), the interlocutory appeal and nearly 14 months of unnecessary delay would have been avoided.

Such prosecutorial lack of preparation, inadvertence, or gross negligence simply is not "good cause" rendering delay either reasonable or necessary under the IAD. E.g., Dennett v. State, 311 A.2d 437, 442 (Md. 1973); Sevigny, 679 P.2d at 1076; People v. Crawford, 383 N.W.2d 172 (Mich. App. 1985). See also Pittman, 301 A.2d at 513:

> it would be a gross violation of the spirit of the IAD if we were to penalize Pittman for the neglect of the Attorney General's office or the mistake of the Maryland official.

The interlocutory appeal, and thus the continuance, similarly was neither reasonable nor necessary on the further ground that the suppression order did not undermine the state's ability to prove its case against Mr. Aukes. That order had no effect on the delivery charge; the state had the cocaine involved there, as well as the government informant directly involved in the transaction. This evidence was further bolstered by the four ounces of cocaine and other evidence seized from Aukes' truck later the same day as he sought to complete another transaction.

Also, unlike many drug possession cases, in which a suppression order deprives the state of the corpus of the offense and thus results in dismissal, this order suppressed only part of the cocaine possessed by Aukes as charged in

Count 2.[12] The state thus easily could still have made its case relying solely on the cocaine found in Mr. Aukes' truck and the obvious intent to distribute as demonstrated by his prior distribution and negotiations with Peters and the quantity of cocaine and drug paraphernalia seized from Aukes' truck. Indeed, the state conceded as much in its trial memorandum and argument at trial (R53:12-13; R74:30-31).

The items seized from Mr. Aukes' motel room added nothing substantive to the state's case and at best merely bolstered incrementally an already overwhelming case. Had the roles been reversed, and the suppression motion initially been denied, the state no doubt would have asserted any error to be harmless. The state would have been right. Delaying Mr. Aukes' trial for over a year for the state to pursue a meaningless appeal thus cannot be considered either reasonable or necessary.

Finally, even if the entire period of delay resulting from the state's interlocutory appeal is not excluded, at least the first 42 days of that period must be found to fall outside that which is reasonable or necessary. The suppression hearing was held on July 30, 1992 and Judge Carlson orally ordered suppression the same day (R70:21-22). The state immediately noted its intention to appeal, and requested

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[12]Aukes was charged in a single count with possession of both the cocaine in his motel room and that in his pickup truck. The order, however, suppressed only the cocaine seized from his motel room (see R37).

a continuance pending that appeal, first orally (R70:22-23), and, when that motion was denied (R70:25), in writing (R34). Even after the court granted that written motion and entered a written suppression order on August 18, 1992, the state nonetheless delayed for another 42 days, to September 29, 1992, a full 61 days from the initial ruling and the state's decision to appeal, before it filed its notice of appeal (R42).

Mr. Aukes submits here, as he did in the trial court (R49:1-2), that this delay by the state was neither reasonable nor necessary. Cf. Birdwell, 983 F.2d at 1341 n.22. The state has never suggested why it needed to leave Mr. Aukes sitting in legal limbo in the Walworth County Jail for 42 days after entry of the written suppression order before it could file a notice of appeal in this particular case. After all, this case was handled at the trial level by an experienced assistant attorney general. Surely the office which by law handles all felony appeals in this state must have had the experience and expertise to put together this simple form in something substantially less than 6 weeks.

This inexplicable delay is especially egregious as it breached the state's implicit promise, in requesting the continuance pending appeal, that it would prosecute that appeal as expeditiously as possible. Cf. Elam, 184 N.W.2d at 181 (discussing due diligence requirement for continuance). The delay is also outrageous in light of the state's insis-

tence that Mr. Aukes wait out its appeal in the Spartan confines of the Walworth County Jail, rather than allowing him to return temporarily to the Colorado prison and the various educational and rehabilitative programs awaiting him there (see R40; R71:45). Mr. Aukes agreed to waive his "anti-shuttling" rights under the IAD in return for such a transfer (R71:45; R39). See, e.g., Gray v. Benson, 608 F.2d 825, 827 (10th Cir. 1979) (by requesting transfer, defendant waived anti-shuttling provision of IAD).

One final point should be addressed. In response to Mr. Aukes' renewed motion to dismiss, the state asserted that the time limits under the IAD no longer applied to delay after Colorado paroled Mr. Aukes sometime in December, 1992, so that all time after that date must be excluded (R52:1-2; R74:5). While some courts have accepted such an argument,[13] those decisions are neither binding nor persuasive here.

To reach the state's desired conclusion, the Court must rewrite the IAD in a manner which the state apparently believes would better match the legislature's purpose in enacting that law than does the plain language it actually chose. Under Wisconsin law, however, such judicial amendment of a statute is not permitted.

The language of the IAD is clear, unambiguous and, above all, mandatory:

[I]n the event that an action on the indict-

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[13] See, e.g., State v. Holley, 571 A.2d 892 (Md. App. 1990).

> ment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in sub. (3) or (4), the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any effect.

Wis. Stat. §976.05(5)(c) (emphasis added). The IAD carefully spells out the beginning dates for its speedy trial limitations, as well as the limited exclusions from those limitations periods. Nowhere does that statute provide an exclusion for time following completion of the other state's term of imprisonment.

Under these circumstances, the statutory language controls. Where, as here, the statutory language is clear and unambiguous, there can be no recourse to statutory history or other extrinsic materials; the plain meaning of the statutory language rules. E.g., State ex rel. Girouard v. Circuit Court, 155 Wis.2 148, 454 N.W.2d 792, 795-96 (1990). Of course, even if the language were not otherwise clear, the legislative purpose to require speedy trials when the defendant's presence is pursuant to an interstate detainer is. As at least one court has noted:

> [n]on-discretionary dismissal with prejudice of all pending charges against a defendant is a severe sanction, and evidences a strong desire to ensure prompt disposition of cases.

Birdwell v. Skeen, 765 F. Supp. 1270, 1275 (E.D. Tex. 1991), aff'd, 983 F.2d 1332 (5th Cir. 1993).

No matter whether this Court applies the 120-day

speedy trial limitation of Article IV, as Mr. Aukes believes is the correct one, or the 180-day limit under Article III, the result therefore is the same. The state failed to meet its speedy trial obligation under the IAD and Mr. Aukes accordingly is entitled to his freedom unconditionally.

II.

THE TRIAL COURT ERRED BY REQUIRING PAYMENT OF CRIME LAB FEES.

At the state's request (R74:36), the trial court ordered that Mr. Aukes pay "restitution" to the state in the amount of $619.20 for "crime lab fees" (R63; R74:52; A.App. 1). Because such "restitution" is not authorized by law, the trial court was without jurisdiction to include it in the sentence.[14]

This Court's recent decision in State v. Evans, 181 Wis.2d 978, 512 N.W.2d 259 (Ct. App. 1993), is directly on point. There, as here, the trial court ordered the defendant to reimburse the state for crime lab fees. There, as here, the defendant was sentenced to straight prison time, with no probation.

This Court in Evans concluded that the trial court

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[14]Mr. Aukes did not object to the crime lab fees in the trial court. He has not, however, waived the issue because the court was without jurisdiction to require Mr. Aukes to pay such fees. Subject matter jurisdiction cannot be waived. E.g., State ex rel. Teach. Assts. v. Wis.-Madison Univ., 96 Wis.2d 492, 292 N.W.2d 657, 659, 667 (Ct. App. 1980).

erred. Except where probation is imposed, see State v. Connelly, 143 Wis.2d 500, 421 N.W.2d 859 (Ct. App. 1988), "no statute or other authority exists for the trial court to order such payment in connection with a criminal sentence." 512 N.W.2d at 259. The legislature simply has not authorized the assessment of costs related to investigation and prosecution. Id. at 260-61.

Because the court did not sentence Mr. Aukes to probation, the trial court could not legally require him to pay for crime lab fees as part of the sentence. The portion of the Third Amended Judgment imposing that assessment accordingly must be reversed.

CONCLUSION

The state failed to bring Mr. Aukes to trial within the time periods provided by the Interstate Agreement on Detainers. Accordingly, his conviction should be reversed and the charges against him dismissed.

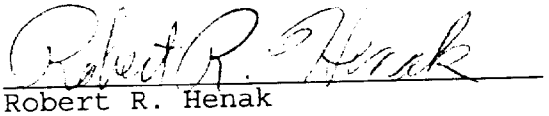
If the charges are not dismissed, the Third Amended Judgment must be reversed to the extent of striking the required payment of crime lab fees. The required payment of such restitution is not authorized by law.

Dated at Milwaukee, Wisconsin, June 21, 1994.

Respectfully submitted,

MICHAEL J. AUKES
Defendant-Appellant

SHELLOW, SHELLOW & GLYNN, S.C.



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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief and appendix produced with a mono-spaced font. The length of this brief is 31 pages.

Robert R. Henak

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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 94-0811-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL J. AUKES,

Defendant-Appellant.

APPENDIX OF DEFENDANT-APPELLANT

WISCONSIN CIRCUIT BRANCH # 11 WALWORTH COUNT

State of Wisconsin, Plaintiff -vs- Third AMENDED (**see below)

MICHAEL JASON AUKES, Defendant

08/14/45 Defendant's Date of Birth

TYPE OF CONVICTION (Select One)
X Sentence to Wisconsin State Prisons
___ Sentence Withheld, Probation Ordered
___ Sentence Imposed & Stayed, Probation Ordered

COURT CASE NUMBER 83CR00091

The defendant entered plea(s) of [ ] Guilty [X] Not Guilty [ ] No Contest

The [X] Court [ ] Jury found the defendant guilty of the following crime(s):

CRIME(S)	WIS STATUTE(S) VIOLATED	FELONY OR MISDEMEANOR (F OR M)	CLASS (A-E)	DATE(S) CRIME COMMITTED
DELIVERY OF COCAINE - Ct. #1 of Information	161.41(1)(b)	F		on or about 11/17/82
**POSSESSION OF COCAINE WITH INTENT TO DELIVER - Ct. #2 of Information	161.41(1m)(b)	F		on or about 11/17/82

(Repeater allegations pursuant to Sec. 161.48, Wis. Stats. as charged in Cts. #1 & #2 of Amended Information are dismissed.)

IT IS ADJUDGED that the defendant is convicted on Nov. 29, 1993 as found guilty and:

[X] on Nov. 29, 1993 is sentenced to prison for Five (5) years with three hundred and fifty-seven (357) days deadtime credit on Ct. #1 and two (2) years six (6) months consecutive on Ct. #2

[ ] on _____ is sentenced to intensive sanctions for _____

[ ] on _____ is sentenced to county jail/HOC for _____

[ ] on _____ is placed on probation for _____

CONDITIONS OF SENTENCE/PROBATION

Obligations: (Total amounts only)

Fine (includes jail assessments; drug assessments; penalty assessments) $ None

Court costs (includes service fees; witness fees; restitution surcharge; domestic abuse fees; subpoena fees; automation fees) $ **455.97

Attorney fees $ None

Restitution $ 619.20 crime lab fees

Other $ _____

Mandatory victim/witness surcharge(s)

felony **none counts $ none

misdemeanor _____ counts $ _____

Jail: To be incarcerated in the county jail/HOC for _____

Confinement Order For Intensive Sanctions sentence only - length of term: _____

Miscellaneous

IT IS ADJUDGED that -0- days sentence credit are due pursuant to s. 973.155 Wis. Stats. and shall be credited if on probation and it is revoked.

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department located in the City of Waupun, WI

NAME OF JUDGE: Hon. James L. Carlson

DISTRICT ATTORNEY: Donald V. Latorraca, Asst. Atty General

DEFENSE ATTORNEY: Robert R. Henak

FILED CIRCUIT COURT MAR 21 1994 Clerk of Circuit Court

BY THE COURT: _____ Circuit Court Judge

March 21, 1994, nunc pro tunc November 29, 1993
Date Signed

DEPARTMENT OF CORRECTIONS cc: Prison, Shf. Dept. Prob. Dept., Wis. Sentencing Commission

DOC-20 (Rev. 02/92) Wisconsin Statutes, Sections 939.50, 939.51, 972.13 & Chapter 973 JUDGMENT OF CONVICTION AND SENTENCE

ORAL DECISION (11/29/93)
DENYING SECOND MOTION
TO DISMISS UNDER IAD
(R74:6-7)

Thank you.

THE COURT: Well, the first and primary basis I think that I rely on would be my findings back in August of 1992 based on the facts that were presented to me at the time that this was a detainer under, I think it's Sub Section III, the 180-day time period rather than the 120-day time period; that at the time of that hearing and at the time the trial was scheduled, we were within that time period; that the Court did make a finding of good cause based on the issues of search warrant that were raised before he left the area and when he was brought back. Those matters had to be discussed first and the Court made a finding, it felt that the time Mr. Aukes being before the Court, the Court deeming it to be, and I believe there was a colloquy on the record, expeditious to have all matters tried together rather than the case that the Court had ordered suppressed, simply that count, could have gone ahead with the other cases as I indicated at that time, that there was good cause to stay the matter pending the State's appeal, which it has, as a matter of right under the Statute, and those are all a matter of record of the August 18, 1992 hearing. That stay must be reasonable and necessary, and I would conclude applies to the time when the case is brought back to this Court for hearing, which is reasonable after the matter of being remanded from the Supreme Court and was necessary in order to get everybody here at the same time and date. So I continue to feel that that stay was

reasonable up and to this point in time. The other matters are somewhat new, the other argument but that I'm not as familiar with, particularly as to the applicability of this action, the defendant's waiver, those may as well be grounds; however, I think I'm sticking with my basic ruling that this was a 180-day case; we stayed it for good cause and we are within that time period still. There may be other bona fide rationale and I don't feel I will address them specifically at this time, not feeling that's necessary. So it's been presented to the Court that the parties have a stipulation and I guess you should set that up on the record as far as whether that's the defendant's wish at this time today.

MR. RAYMOND: I think at this point we should first proceed and waive our right to a jury trial so we may proceed to a bench trial.

THE COURT: I think there's a number of rights apparently that this contemplates he would be waiving, including his right to have a jury trial.

MR. RAYMOND: That's the important thing, to get us to the bench trial and if the Court does want to address the stipulation, part of the reason we put it in writing is so it was there.

THE COURT: Do you have a written jury trial waiver form?

MR. RAYMOND: I have got to confess, Your Honor,

STATE OF WISCONSIN
CIRCUIT COURT
WALWORTH COUNTY
ELKHORN, WISCONSIN

ORAL DECISION (8/18/92)
DENYING FIRST MOTION
TO DISMISS UNDER IAD
(R71:43)

THE COURT: In fact, there's a case here that says if he doesn't get that hearing within 30 days he has grounds for dismissal.

MS. BACHMAN: Right.

THE COURT: So if he was really interested in a speedy disposition he could have brought a motion 30 days after that, was under your theory, served on him, and he could have had it dismissed then. I think I have to agree that based on the totality of the evidence before the Court that this was an Article III rather than Article IV proceeding, and I disagree that Mr. Aukes did everything he said he could to expedite or hurry his return, based on the evidence. Apparently he sat on the detainer for a couple of weeks, in fact, and after some prodding did sign the voluntary, and it was only when the State did not hear, that it started to use the other procedure, which it terminated, and I think went ahead with Mr. Aukes' voluntary return. I think we are within the 180 day time period and not the 120, and the trial, which is scheduled, is still within that time period. So your motion to dismiss is denied, and factual findings and determinations necessary based on this record was detailed on the record here today.

MS. BACHMAN: Then, Your Honor, I believe that would bring us to the State's motion requesting a stay pending appeal. It's my understanding from what Mr. Raymond said at the beginning of this hearing, or his client said, that his letter of

ORAL DECISION (8/18/92)
GRANTING STATE'S MOTION
FOR CONTINUANCE
(R71:45-46)

I disagree that you wouldn't have to do it. I think it's appropriate to do it. She's done it. I would only ask that if the Court grants that, I guess for Mr. Aukes' sake I'm not going to waive his right to have a trial within the 180 days, but if the Court grants that because we'll be tied up in the appellate court for a lengthy period of time, that the Court consider having Mr. Aukes returned to Colorado so he can continue his sentence. He's doing his sentence while he's here, but as he continues his sentence in Colorado he can then engage in the rehabilitation programs and remedial programs they have lined up for him.

MS. BACHMAN: In response to that, I don't believe the Court has the authority to do that, and once the defendant is returned to the sending state, he cannot be tried on this case.

MR. RAYMOND: I think, we are not waiving any other rights, but I think we can waive the right to have the case dismissed if he's sent back to the other state because it's important to him to try and finish his drug counseling and to finish the remedial computer programming course that he's in, so then when he comes out he'll be a better citizen.

THE COURT: Well, I'm going to grant the State's motion for a continuance of the trial date. I'm going to cancel the trial date until Notice of the Appeal's Court that that matter has been decided. I am making the ruling that it would be, and I have already discussed this, I think it would be impossible to

continue the bail-jumping trial independently, the two I have already joined together and I think it would be a waste of Court's time to try that independently. I suppose he could go ahead on that, I don't know. I have joined them together now and now the appeal would apply to the joined case, so I guess if you wanted it to be severed and try it separately, I suppose we could go ahead on it. You could be heard on it anyway. I'm not going to discuss that now. I'm only addressing the continuance because the cases are together and besides the Court's ruling, the Court's ruling was in his favor basically and substantially limited his liability and the State made a good argument, pursuasive argument that they should be allowed to talk about that kind of stuff for reasons of the other Counts still remaining and until there's a determination I feel uncomfortable proceeding with a trial. I think there is good cause for the continuance and I will grant the motion to take the matter off the trial calendar at this time then. I wish you could get together right now and get an agreement on that Order. If you can agree to the form, I'd just as soon get that part moving. I will give you some time to work on that.

(COURT IN RECESS)

THE COURT: Have you reached an agreement on the Order now?

MR. RAYMOND: Your Honor, I had drafted a proposed Order. We have whited out a couple of things which accounts

91-92 Wis. Stats.

Agreement on detainers. The agreement on detainers is hereby enacted into law and entered into by this state with all other jurisdictions legally joined therein in the form substantially as follows:

The contracting states solemnly agree that:

(1) ARTICLE I. The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

(2) ARTICLE II. As used in this agreement:

(a) "Receiving state" means the state in which trial is to be had on an indictment, information or complaint under sub. (3) or (4).

(b) "Sending state" means a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition under sub. (3) or at the time that a request for custody or availability is initiated under sub. (4).

(c) "State" means a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; and the Commonwealth of Puerto Rico.

(3) ARTICLE III. (a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he has caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner and any decisions of the department relating to the prisoner.

(b) The written notice and request for final disposition referred to in par. (a) shall be given or sent by the prisoner to the department, or warden, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The department, or warden, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner under par. (a) shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The department, or warden, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner under par. (a) shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of par. (d), and a waiver of extradition to the receiving state to serve any sentence there imposed upon him after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in par. (a) shall void the request.

(4) ARTICLE IV. (a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with sub. (5) (a) upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: provided that the court having jurisdiction of such indictment, information or complaint has duly approved, recorded and transmitted the request: and that there shall be a period of 30 days after receipt by the appropriate authorities before the request is honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request under par. (a), the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect to any proceeding made possible by this subsection, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this subsection shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery under par. (a), but such delivery may not be opposed or denied on the grounds that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment under sub. (5) (e), such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(5) ARTICLE V. (a) In response to a request made under sub. (3) or (4), the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice under sub. (3). In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

1. Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

2. A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority refuses or fails to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in sub. (3) or (4), the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence allows.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state received custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. This paragraph shall govern unless the states concerned have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

(6) ARTICLE VI. (a) In determining the duration and expiration dates of the time periods provided in subs. (3) and (4), the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

(7) ARTICLE VII. Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

(8) ARTICLE VIII. This agreement shall enter into full force as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

(9) ARTICLE IX. This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force as to the remaining states and in full force as to the state affected as to all severable matters.

(10) In this section:

(a) "Appropriate court", with reference to the courts of this state, means the circuit court.

(b) "Department" means the department of corrections.

(c) "Good time" includes time credit under s. 302.11.

(11) All courts, departments, agencies, officers and employees of this state and its political subdivisions are hereby directed to enforce the agreement on detainers and to cooperate with one another and with other parties in enforcing the agreement and effectuating its purpose.

(12) Nothing in this section or in the agreement on detainers shall be construed to require the application of s. 973.032 to any person on account of any conviction had in a proceeding brought to final disposition by reason of the use of said agreement.

(13) Any prisoner who while in another state as a result of the application of the agreement on detainers escapes from lawful custody shall be punished as though such escape had occurred within this state.

(14) The department shall give over the person of any inmate of any penal or correctional institution under its jurisdiction whenever so required by the operation of the agreement on detainers. The central administrator of and information agent for the agreement on detainers shall be the secretary of corrections.

(15) Copies of this section shall, upon its approval, be transmitted to the governor of each state, the attorney general and the secretary of state of the United States, and the council of state governments.

History: 1977 c. 449; 1979 c. 89; 1981 c. 390; 1983 a. 189, 528; 1989 a. 31.

See note to Art. I, sec. 8, citing State ex rel. Garner v. Gray, 55 W (2d) 574, 198 NW (2d) 163.

The question of whether another state which has filed a detainer has failed to grant the prisoner a speedy trial after demand must be decided by the demanding state. The appropriate officer to file a detainer under Art. IV (a) is the prosecuting officer of the county of the foreign state where the charges exist. State ex rel. Garner v. Gray, 59 W (2d) 323, 208 NW (2d) 161.

Res judicata should not be applied to bar multiple detainer requests where prior requests were dismissed because of the inadequacy or insufficiency of the supporting documents. In Matter of Custody of Aiello, 166 W (2d) 27, 479 NW (2d) 178 (Ct. App. 1991).

Writ of habeas corpus ad prosequendum issued by federal court directing state authorities to produce state prisoner for federal criminal trial is not a detainer under this section. United States v. Mauro, 436 US 340 (1978).

Prisoner has right to pretransfer hearing. Cuyler v. Adams, 449 US 433 (1981).

976.06 Agreement on detainers; additional procedure. Following receipt of the officer's written request as provided in s. 976.05 (4) (a), the prisoner shall forthwith be taken before a judge of a court of record of this state, who shall inform the prisoner of the request for temporary custody or availability, the crime with which charged and that the prisoner has the right to petition the governor to deny the request, to contest the request and to demand and procure legal counsel. If the prisoner or the prisoner's counsel shall state that the prisoner or the prisoner and counsel desire to test the legality of granting temporary custody or availability, the judge shall set a date for hearing which shall be not later than the expiration of the 30-day period established by s. 976.05 (4) (a). If a hearing is set, notice of the hearing shall be given to the appropriate officer of the state requesting temporary custody or availability and to the authorities having custody of the prisoner in this state. The scope of any hearing or ruling under this section shall be confined to the request for temporary custody or availability, and to the identification of the person sought by the requesting state, but shall not encompass the guilt or innocence of the prisoner as to the crime charged by the requesting state.

History: 1975 c. 158, 199; 1981 c. 390.

NOTE: See drafting file in Legislative Reference Bureau for Legislative Council Note to original bill. [Bill 263-A]

State's failure to hold hearing within 30-day period required discharge of prisoner from detainer. State v. Sykes, 91 W (2d) 436, 283 NW (2d) 446 (Ct. App. 1979).

976.07 Agreements on extradition; Indian tribes. (1) The attorney general may negotiate an agreement with any Indian tribe within the borders of this state exercising powers of self-government within the Indian country as defined in 18 USC 1151 to which this state has retroceded jurisdiction under 25 USC 1323, relating to the extradition of witnesses, fugitives and evidence found within the respective jurisdictions of this state and the tribe.

(2) An agreement negotiated under sub. (1) shall provide that a court of the sending jurisdiction, before issuing an order for the extradition of any person, shall:

(a) Notify the person named in the extradition warrant of the right to a hearing and to legal counsel.

(b) Hold a hearing to determine:

1. That the person named in the warrant is the person charged with the crime or is the witness demanded.

2. That there is probable cause to believe that the person named in a criminal extradition warrant was present in the demanding jurisdiction at the time of the alleged crime or that the person committed an act in any place with intent to commit a crime in the demanding jurisdiction.

(c) If the person contests the legality of his or her arrest, allow a reasonable time within which the person may commence an action for habeas corpus.

(3) The attorney general shall submit agreements negotiated under sub. (1) to the governor for approval. The governor shall have 30 days in which to review the agreement. If the governor takes no action within 30 days, the agreement becomes effective.

(4) The attorney general shall provide technical assistance and material support necessary to implement any agreement under this section.

(5) An agreement under this section may be revoked by the governor, after consulting with the attorney general, or by the tribal chairperson upon 6 months' written notice to the other party unless a different period of time is specified in the agreement.

(6) This section does not:

(a) Enlarge the criminal or civil jurisdiction of either the state or a tribal government under federal law.

(b) Permit an Indian tribe to enter into agreements other than those authorized by its organizational documents and laws.

(c) Permit this state or any of its political subdivisions to enter into agreements prohibited by the state constitution.

History: 1981 c. 368, 391.

976.08 Additional applicability. In this chapter, "prisoner" includes any person subject to an order under s. 48.366 who is confined to a Wisconsin state prison.

History: 1987 a. 27.