THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0569

The State Of New Hampshire

v.

Hjalmar Bjorkman

STATE'S MEMORANDUM OF LAW IN LIEU OF BRIEF UNDER SUPREME COURT RULE 16(4)(b)

STATEMENT OF THE CASE AND FACTS

On October 21, 2016, the Grafton County Grand Jury returned an indictment charging the defendant, Hjalmar Bjorkman, with one count of using a computer online service to seduce, entice, or lure a person he believed to be a child to engage conduct that would constitute a violation of RSA chapter 632-A. Def. Br. App. 3.[1] *See* RSA 649-B:4, I(a) (2016). The court scheduled the defendant's arraignment for November 7, 2016, but the defendant was serving a prison sentence in Vermont on that date. Def. Br. App. 10, 22. In January 2017, the defendant sent a demand for disposition of the indictment under the Interstate Agreement on Detainers. Def. Br. App. 13.

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[1] References to the defendant's notice of appeal will be made as "NoA __."
References to the transcript of the motion hearing on July 21, 2017, will be made "Mot. Tr. __."
References to the transcript of the trial will be made as "Tr. __."
References to the defendant's brief will be made as "Def. Br. __."
References to the appendix to the defendant's brief will be made as "Def. Br. App. __."

The Grafton County Attorney's Office received the defendant's IAD forms on January 17, 2017. Def. Br. App. 22. The County Attorney's Office then requested that the Grafton County Superior Court issue a trial schedule. Def. Br. App. 22. The court issued a schedule, setting the final pretrial conference on June 28, and jury selection for July 11, 2017. Def. Br. App. 22. This schedule was modified at a dispositional conference on May 4, 2017. Def. Br. App. 22. The court scheduled jury selection for four days earlier, on July 7, and scheduled the trial for July 24, 2017. Def. Br. App. 22.

Jury selection took place as scheduled on July 7, 2017. On July 18, 2017, the defendant filed a motion to dismiss the charge, alleging a violation of the 180-day deadline for disposition set by the Interstate Agreement on Detainers. Def. Br. App. 10–12. *See* RSA 606-A:1, art. III(a) (2001). Starting from the County Attorney Office's receipt of the IAD paperwork on January 17, 2017, the defendant calculated the statutory 180-day deadline as falling on July 17, 2017. Def. Br. App. 11. (July 16, 2017, which was 180 days after January 17, was a Sunday.)

The State filed an opposition on July 19, 2017, in which it made two arguments. Def. Br. App. 22–23; NoA 24–26.[2] First, the State argued that the statute allowed for continuances for good cause, and that there was good cause in this case. NoA 25. Specifically, jury selection had to be specially scheduled around the Fourth of July holiday, there was no judge in the Grafton County Superior Court on July 10–14, and a State's witness was unavailable on July 10–14 and 20. NoA 25. Second, the State

[2] The second page of the State's pleading is missing from the appendix attached to the defendant's brief. However, it is included in the attachment to the defendant's notice of appeal. *See* NoA 25.

argued that there had been no violation of the deadline because the jury had been selected before July 17, and therefore the defendant had been "brought to trial" within 180 days. NoA 25–26; Def. Br. App. 23.

The superior court (Macleod, J.) held a hearing on the motion on July 21, 2017. The defendant argued that there had been no continuance ordered, and no showing of good cause, where the defense had not been made aware of any scheduling issues until they had been brought up in the State's pleading opposing his motion. Mot. Tr. 3–4. The defendant also argued that "brought to trial" referred to the commencement of the trial, which was when the jury was sworn, the charge was read, and jeopardy attached. Mot. Tr. 4–6. Therefore, the defendant concluded, his trial would not begin until July 24, which was beyond the 180-day deadline. Mot. Tr. 6.

The State argued that the court had granted "the functional equivalent of a continuance," caused by the scheduling issues set out in its pleading. Mot. Tr. 7. Given those scheduling issues, the State argued that "it was impossible for the State to … have been in compliance with the 180[-]day rule given what occurred for practically half—you could say half of the month of July at that point in time. It simply wasn't available." Mot. Tr. 7–8.

On the morning of July 24, 2017, just before the jury was brought into the courtroom and sworn, the court made an oral order denying the defendant's motion. The court said:

And so having considered the matter Defense motion is denied. I've ruled as a matter of law that the trial began in this case at the time of jury selection, which is a critical part of the—of the trial, critical stage. Both counsel engaged in direct attorney conducted voir dire with the jury raising issues that will—they anticipate would be presented at trial in this matter. And I would just state that … the IAD statute is intertwined or part of the speedy trial, constitutional right to speedy trial. And I think I stated that I was considering relying on *State v. Rodriguez* and just for the record the citation of that if 63 F.3d 1159 (1st Cir.), which is "Under the Federal Speedy Trial Act the trial must commence within 70 days of arraignment." Several circuits of the Federal Court of Appeals have held that "a trial commences on voir dire of the jury."

I've also relied on *United States v. Gonzalez*, the cite for this is 671 F.2d 441, that's a 1982 case, which again holds that the trial began when voir dire was undertaken and the jury impaneled. And the jury in this case has been impaneled. And with regard to—I'm going to just quote from that case as well. "We hold that, for purposes of the Act, a jury trial 'commences' which is in quotes, 'when the court begins the voir dire.[']" And it makes a distinction which I agree with, with regard to double jeopardy and the swearing of the jury because they're different legal concepts and they seek to—to address different issues of protection for the Defendant. And as this case states in a footnote:

> "Cases dealing with the attachment of jeopardy are based upon constitutional considerations wholly different from the premises of the Act, namely concerns (with) finality of judgments, the minimization of harassing exposure to the harrowing experience of a criminal trial, and the valued right to continue with the chosen jury."

So I'd also note that at this juncture once the jury has been impaneled under—under RSA 606:7, the Defendant does not have a right to withdraw from that and proceed on a bench trial. And I'd also state just as a practical matter that in complex cases where Defendant is brought here to face say a murder trial or some other case voir dire could go on for days, perhaps a week or more which would certainly make it difficult to commence the trial if that means starting the case where the trial commences when the Clerk call[s] the case as today, shortly, just doesn't seem to make any sense to me. So that's my ruling.

Tr. 3–5 (ellipsis omitted).

After a one-day trial, the jury found the defendant guilty as charged. Tr. 75.

After the trial, the defendant filed a motion to reconsider, in which he took issue with the Court's reliance on federal caselaw interpreting the Speedy Trial Act of 1974, arguing that the language and purposes of that statute were different from the language and purposes of the IAD. Def. Br. App. 25. The defendant offered instead the meaning of "brought to trial" as used in California's speedy-trial act, as construed in *People v. Cory*, 204 Cal. Rptr. 117 (Ct. App. 1984). Def. Br. App. 26. The State opposed the motion, supporting the trial court's interpretation based on *United States v. Gonzalez*, 671 F.2d 441 (11th Cir.), *cert. denied*, 456 U.S. 994 (1982). Def. Br. App. 28. The court denied the defendant's motion for reconsideration by a written order issued on September 13, 2017. Def. Br. App. 1–2.

On September 26, 2017, the defendant was sentenced to a stand-committed term of two to four years, with credit for 303 days. Def. Br. App. 8–9. This appeal followed.

ARGUMENT

The defendant was "brought to trial" for purposes of the 180-day deadline set by the Interstate Agreement on Detainers where jury selection took place 171 days after the State received the defendant's IAD request.

"The IAD 'is a compact entered into by 48 States, the United States, and the District of Columbia to establish procedures for resolution of one State's outstanding charges against a prisoner of another State." *State v. Brown*, 157 N.H. 555, 557 (2008) (quoting *New York v. Hill*, 528 U.S. 110, 111 (2000)). "Its purpose is to secure the

speedy trial of people incarcerated in jurisdictions that have enacted similar statutes." *State v. Sprague*, 146 N.H. 334, 335–36 (2001). "As a congressionally sanctioned interstate compact, the IAD is a federal law subject to federal construction." *Brown*, 157 N.H. at 557 (quoting *Sprague*, 146 N.H. at 336).

"The purpose of the IAD is to encourage the expeditious and orderly disposition of outstanding charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints." *Brown*, 157 N.H. at 557 (quoting *Carchman v. Nash*, 473 U.S. 716, 720 (1985)). "To achieve this purpose, Article III of the IAD 'establishes a procedure by which a prisoner incarcerated in one party State may demand the speedy disposition of any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner by another party State.'" *Id.* (ellipsis omitted) (quoting *Carchman*, 473 U.S. at 720). "After a detainer has been lodged against him, a prisoner may file a request for a final disposition to be made of the indictment, information, or complaint." *Id.* (quoting *Hill*, 528 U.S. at 112). "Upon receiving such a request, 'the authorities in the receiving State then must bring the prisoner to trial within 180 days.'" *Id.* (brackets omitted) (quoting *Carchman*, 473 U.S. at 721).

> The 180-day period may be extended ... in three circumstances. First, "provided 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." Second, in certain circumstances, a defendant may waive his IAD speedy trial rights. Finally, "the running of the 180-day time period shall be tolled whenever

> and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter."

Id. at 557–58 (brackets omitted) (quoting *Hill*, 528 U.S. at 112, and RSA 606-A:1, art. VI(a) (2001)); *accord Sprague*, 146 N.H. at 336.

"In the absence of a waiver, the defendant's inability to stand trial, or a proper continuance, the pending charges must be dismissed with prejudice if a prisoner is not brought to trial within the prescribed time period." *State v. Dolbeare*, 140 N.H. 84, 86 (1995), *quoted in Brown*, 157 N.H. at 558. However, this Court has recognized that "the IAD 'mandates that it be liberally construed so as to effectuate its purposes.'" *Brown*, 157 N.H. at 566 (brackets omitted) (quoting *Birdwell v. Skeen*, 983 F.2d 1332, 1339 (5th Cir. 1993)).

"The denial of a defendant's motion to dismiss an indictment under the IAD is a question of law reviewed *de novo*. The factual findings underlying the decision are reviewed on a clearly erroneous standard." *Id.* at 556–57 (brackets omitted) (quoting *United States v. Hall*, 974 F.2d 1201, 1204 (9th Cir. 1992)). "The burden of showing compliance with the IAD is upon the State." *Id.* at 558.

In the language of the IAD, a prisoner who has sent a detainer to the receiving state "shall be *brought to trial* within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court … written notice of the place of his imprisonment and his request for a final disposition …." RSA 606-A:1, art. III(a) (2001) (emphasis added). "The words 'brought to trial' contained in Article III mean only that a proceeding must be initiated, not that the case must be finally

disposed of." *Sprague*, 146 N.H. at 338 (quoting *State v. White*, 673 P.2d 1106, 1111 (Kan. 1983)). "The IAD does not provide any specific method for computing the 180-day period." *Id.* Jurisdictions therefore may use their own methods of computation to determine the 180-day deadline. *See id.* (applying former Superior Court Rule 12 to determine timeliness under the IAD).

The parties below agreed that the 180-day deadline fell on July 17, 2017. Def. Br. App. 10. Thus, as the defendant explains, the only dispute was whether the defendant's trial began when the jury was selected—which occurred before the deadline—or when the first witness was called—which took place a week after the deadline. *See* Def. Br. 5.

The defendant makes several arguments in support of his claim that his trial began after the deadline had passed. First, he argues that he was not "brought to trial" for purposes of the IAD statute until the first witness was called and the parties began to present evidence. Def. Br. 8. Next, he argues that his interpretation of the statutory phrase "brought to trial" fulfills the purpose of the IAD statute. Def. Br. 8–11. Specifically, he argues that the purpose of the IAD statute is to protect prisoners by guaranteeing "the orderly and expeditious resolution of pending out-of-state[ ]charges for the sake of advancing prisoners' treatment and rehabilitation." Def. Br. 9. Thus, he argues, the IAD's deadlines are meant "to guarantee a prisoner's right to speedy trial to facilitate his rehabilitation, and not to uphold society's interest in the speedy resolution of cases involving defendants detained out-of-state." Def. Br. 11.

Similarly, he argues that the comparison with the Speedy Trial Act, on which the superior court relied here, is faulty because the purpose of that act includes vindication of "a societal interest in prompt disposition," Def. Br. 15 (quoting *Zedner v. United States*, 547 U.S. 489, 501–02 (2006)), whereas the 180-day deadline in the IAD is strictly for the defendant's benefit. Def. Br. 15–16. He concludes that these different purposes should require that the IAD deadline be interpreted more strictly in the defendant's favor. Def. Br. 17. As explained below, none of these arguments requires that the phrase "brought to trial" be defined as the point when jeopardy attaches, as opposed to when the jury is selected.

The narrow issue presented in this case—whether a defendant has been "brought to trial" under article III(a) of the IAD when the jury has been selected—is an issue of first impression in New Hampshire. Thus, the superior court was correct to rely on the federal courts' comparison of the 180-day deadline in the IAD to the 70-day deadline in the federal Speedy Trial Act, 18 U.S.C. § 3161(c)(1) (2012).

Many federal courts of appeals have held that a jury trial has commenced within the meaning of the Speedy Trial Act upon *voir dire* of the jury. *See, e.g.*, *United States v. Fox*, 788 F.2d 905, 908 (2d Cir. 1986); *United States v. Crane*, 776 F.2d 600, 603 (6th Cir. 1985); *United States v. Martinez*, 749 F.2d 601, 604 (10th Cir. 1984); *United States v. Gonzalez*, 671 F.2d 441, 443 (11th Cir.), *cert. denied*, 456 U.S. 994 (1982). In *United States v. Odom*, 674 F.2d 228 (4th Cir.), *cert. denied*, 457 U.S. 1125 (1982), the United States Court of Appeals for the Fourth Circuit reached the same

conclusion with respect to the 120-day deadline in article IV(c) of the IAD. As that court reasoned:

> The Detainer Act and the Speedy Trial Act deal with the same subject matter. Both were enacted to serve the best interest of the public and the defendant by requiring the prompt disposition of criminal charges. Both provide for detaining a defendant imprisoned in another jurisdiction and require his prompt transfer and trial. Both contain statutory limitations on the time that may elapse before a defendant is brought to trial. Both permit extensions of this time. Both impose the sanction of dismissal of the charges when their limitations are transgressed.

Id. at 231. Further, as the United States Court of Appeals for the Eleventh Circuit said in its discussion of the purpose of the Speedy Trial Act, "We do not think that the Congress envisioned dismissal of an indictment when the court begins the voir dire within the Act's required limit, but does not actually swear the jury within that time." *Gonzalez*, 671 F.2d at 443.

Outside the federal courts, there is scant caselaw in other jurisdictions on this question. One case on point, however, is *Bowie v. State*, 816 P.2d 1143 (Okla. Crim. App. 1991). In that case, the defendant claimed that the State had failed to bring him to trial under the 120-day deadline imposed under article IV(c) of the IAD. *Bowie*, 816 P.2d at 1147. Both parties agreed that the deadline fell on December 2, 1986. *Id.* The defendant claimed "that the trial did not commence on December 1, 1986, when jury selection began, but rather on December 4, 1986, when the jury was sworn and ready to receive testimony. He claim[ed] that therefore the State lost jurisdiction over him for failure to timely prosecute." *Id.*

The Court of Criminal Appeals of Oklahoma rejected this claim. The court reasoned that "[j]ury selection is an intrinsic part of the trial process." It considered the purposes of the IAD that this Court has already recognized, "to encourage the expeditious and orderly disposition of indictments or informations that a prisoner may have outstanding while in the custody of another state," and that "[t]he mandatory [120-]day limit can be extended by the proper tolling of the statute if the State can demonstrate 'good cause' for that tolling." *Id.* (quotation omitted). Furthermore, it considered that "[t]he statute does not require that a final verdict be had within that limit, only that the trial commence." The court then concluded that "the initial trial did commence within the time limit," and held that "[a]lthough jeopardy does not attach until the jury is sworn, … for purposes of the IAD, a trial commences when the jury selection begins." *Id.* This Court should adopt the same reasoning.

The purpose of the IAD is set out in the statute itself:

> 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.

RSA 606-A:1, art. I (2001). The State does not contest that the pendency of a detainer may have an effect on a defendant's opportunities for treatment and rehabilitation. But so long as the State and the courts move expeditiously to bring defendants to trial, it should make little difference whether the deadline is met at jury selection or upon the attachment of jeopardy. The purpose of the IAD will still be satisfied.

The defendant's argument that to allow the State to meet the deadline upon jury selection somehow frustrates the purpose of the IAD is misplaced. *See* Def. Br. 12–14. He argues that the selection of a jury is like the selection of the presiding judge at a bench trial, a decision that may be made a long time before that judge begins to hear the evidence. Def. Br. 12. Further, he argues that in some cases, jury selection can take place weeks before what he terms "the commencement of trial." Def. Br. 13. Until the jury is sworn, he argues, the State may still abort the prosecution and renew it at a later date. Def. Br. 13. The defendant's fears that the purposes of the IAD will be easily frustrated, however, are unfounded.

Setting the time that a defendant is "brought to trial" at jury selection does not mean that the statutory deadline can be manipulated to the State's advantage with long delays between jury selection and jeopardy. Indeed, in holding that the deadline under the Speedy Trial Act was met at jury selection, the Eleventh Circuit gave this proviso:

> We caution that our decision not be viewed as a license to evade the Act's spirit by commencing voir dire within the prescribed time limits and then taking a prolonged recess before the jury is sworn and testimony is begun. The district courts must adhere to both the letter and the spirit of the Act, and we will not hesitate to find that a trial has not

> actually "commenced" within the requisite time if we perceive an intent to merely pay the Act lip service.

Gonzalez, 671 F.2d at 444. The courts of New Hampshire may similarly guard against any such manipulation.

In this case, however, there is no evidence of any such manipulation. The defendant's trial was originally scheduled to start with jury selection on July 11, 2017. Def. Br. App. 22. This schedule was later modified so that jury selection would take place four days earlier, on July 7, and evidence would begin 17 days later, on July 24, 2017. Def. Br. App. 22. There is no reason here to conclude that the schedule was being manipulated to delay the defendant's trial past the 180-day deadline by picking a jury, and then letting the case languish. The defendant's arguments on this score, therefore, should be rejected.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State waives oral argument. *See Sup. Ct. R.* 16(4)(b).

Respectfully submitted,

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July 5, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I have sent two copies of the State's memorandum of law to counsel for the defendant, Eric Wolpin, Assistant Appellate Defender, by first-class mail postage prepaid, at the following address:

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July 5, 2018

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