No. 10-8178

IN THE

Supreme Court of the United States

PETHTEL,

Petitioner,

v.

BALLARD

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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January 26, 2011

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae, the National Association of Criminal Defense Lawyers ("NACDL"), is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and the appropriate application of criminal statutes in accordance with the United States Constitution. Because it consistently advocates for the fair and efficient administration of criminal justice, members of the NACDL have a keen interest in assuring that the Interstate Agreement on Detainers Act ("IAD") is uniformly and fairly applied, and that federal habeas review is available for fundamental rights like those protected by the IAD. Amicus and its clients have a special interest in the expeditious disposition of outstanding criminal charges, which this Act promotes.

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1 Pursuant to Supreme Court Rule 37.6, *amicus curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certify that counsel of record for both parties received timely notice of *amicus curiae*'s intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

INTRODUCTION AND SUMMARY

Complementing the Petition for Certiorari, this amicus petition offers the perspective of practitioners who frequently represent the individuals whose rights are protected by the Interstate Agreement on Detainers Act ("IAD"). The argument below describes the interstate compact underlying the IAD and the significance of the remedy provided in that compact for violations like those at issue in this case. In addition, this amicus petition emphasizes an area of inconsistency in the application of the IAD that amici find particularly troubling.

The IAD is an inter-jurisdictional compact among nearly all the states and the federal government that protects the right of certain criminal defendants to a prompt and fair trial and ensures uniformity in the criminal justice system. These rights are fundamental and merit habeas review. Indeed, Congress and the states considered the rights protected by the IAD so important that they provided a severe, mandatory remedy when the IAD is violated by a state: dismissal of the pending criminal charges with prejudice. The Constitution charges the Federal Government with enforcing interstate compacts like the IAD. A federally enforced compact was appropriate here because states often have interests that conflict with the IAD's requirements. Federal habeas review is the only meaningful mechanism by which the IAD can be enforced against unwilling states and the only reasonable remedy for a criminal defendant whose rights under the IAD have been violated.

The federal circuits are in discord, however, with respect to whether the anti-shuttling provision, or indeed whether any provision of the IAD, is entitled to habeas review. The decision below furthers this

discord. The result is a situation in which a criminal defendant's right to have a federal court review the propriety of his conviction in light of his rights under the IAD may well depend on the federal circuit in which he faces criminal charges. This case presents the ideal opportunity to undo that inequity, resolve an important circuit split, and create a uniform rule applicable to all federal court review of violations of a significant federal law. This Court should therefore grant Petitioner's request for certiorari and reverse the Fourth Circuit's ruling in the decision below.

ARGUMENT

I. THE IAD IS AN IMPORTANT FEDERAL LAW RESULTING FROM A COMPACT AMONG THE STATES AND THE FEDERAL GOVERNMENT THAT PROTECTS FUNDAMENTAL RIGHTS OF FAIR PROCEDURE FOR CRIMINAL DEFENDANTS

1. The Interstate Agreement on Detainers Act ("IAD" or "IADA") is a federal law resulting from a compact entered into by forty eight states, Puerto Rico, the Virgin Islands, the District of Columbia and the Federal Government.2 See *Carchman* v. *Nash*, 473 U.S. 716, 719 (1985). The Act is a congressionally-sanctioned interstate compact passed pursuant to the Compact Clause, U.S. Const. Art. I, § 10, cl. 3, and is thus subject to federal interpretation and federal enforcement. *Id.*; *Cuyler* v. *Adams*, 449 U.S. 433, 439–40 (1981) ("By vesting in Congress the power to grant or withhold consent [to interstate compacts] . . . the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action . . . ."). This Court has previously recognized the need for federal preeminence in interpreting the IAD. *Reed* v. *Farley*, 512 U.S. 339, 349 (1994) (IAD created "a nationally uniform means of transferring prisoners between jurisdictions[, which] can be effectuated only

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2 The compact was promoted by the Attorney General and by the National Association of Attorneys General. S. Rep. No. 91-1356, at 3, 5–6 (1970); H.R. Rep. No. 91-1018, at 3 (1970); 116 Cong. Rec. 38,841 (1970). Support was virtually universal. 116 Cong. Rec. 38,840 (1970) ("To the knowledge of this Senator, there is no opposition to this proposal.").

by [a] nationally uniform interpretation."). Absent federal oversight, the uniform system created by this compact could dissolve, particularly if states adopt divergent views of their obligations—as West Virginia has done in this case.

The IAD protects fundamental rights of criminal defendants akin to rights guaranteed by the Constitution, thus meriting federal habeas enforcement. See *Hill* v. *United States*, 368 U.S. 424, 428 (1962) (to merit habeas review the asserted error of law must be "a fundamental defect which inherently results in a miscarriage of justice.") Two rights in particular fit this description. First, the IAD requires prison authorities to inform prisoners of all charges underlying detainers that have been lodged against the prisoner by other jurisdictions. See 18 U.S.C. app. 2 § 2 art. III(a). Upon promptly receiving this information, prisoners may then request a trial on the pending charges. *Id.* If the jurisdiction bringing the new charges does not begin the prisoner's trial within 180 days of receiving such a request—or within 120 days of the jurisdiction's own request to transfer the prisoner for trial—"the appropriate court of the jurisdiction where the [charges have] been pending shall enter an order dismissing [the charges] with prejudice." 18 U.S.C. app. 2 § 2 arts. III(a), IV(c), V(c).

Second, the Act provides that if "trial is not had on any indictment, information, or complaint . . . prior to the prisoner's being returned 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*." 18 U.S.C. app. 2 § 2 art. IV(e) (emphasis added); see also *id.* at art. III(d). This latter provision—known as the anti-shuttling

provision—was wantonly violated by West Virginia and is the subject of the decision below. *Pethtel* v. *McBride*, No. 1:07cv74, 2008 WL 4377143, at *9 (N.D. W. Va. 2008) ("It is therefore clear, and undisputed, that [the trial judge's] actions violated the anti-shuttling provision of the IADA.").

Together these provisions of the IAD protect a criminal defendant's right to a prompt and fair trial. For example, the anti-shuttling provision provides a criminal defendant the opportunity to participate in the development and presentation of his own defense because the provision requires that the defendant remain in the receiving jurisdiction until the charges have been resolved. Prisoners protected by the IAD are often represented by appointed counsel. It is rarely the case that the court or counsel has sufficient funds for the attorney to travel out of state to visit her client in the sending jurisdiction. Thus, even well-meaning counsel are less likely to provide effective assistance to such a client, if only because they lack meaningful access to the defendant.

Moreover, the IAD allows for prisoner transfer in order to avoid deterioration of evidence. Prisoners are generally at a "serious[] disadvantage[because they are] in custody and therefore in no position to seek witnesses or to preserve [their] defense." S. Rep. No. 91-1356, at 3 (1970); H.R. Rep. No. 91-1018, at 3 (1970). As the Attorney General of the United States remarked during deliberation on the IADA, "memories dim and witnesses disappear [and c]onsequently, both prosecution and defense [are] adversely affected." S. Rep. No. 91-1356, at 5; H.R. Rep. No. 91-1018, at 5–6. By providing for physical transfer of the defendant to the jurisdiction in which he faces criminal charges, the anti-shuttling provision makes it possible for the defendant to test

at trial the substantiality of the charges against him before the reliability of the evidence deteriorates.

The speedy-trial and anti-shuttling provisions of the IAD protect criminal defendants from being prosecuted with undue delay and being convicted based on stale evidence.[3] The anti-shuttling provision also guarantees that the defendant can participate in the development of his defense. These protections are akin to the Constitutional guarantees of a "speedy trial" and the power to obtain "witnesses in [the defendant's] favor," and to "confront[] the witnesses against him." U.S. Const. amend. VI. These are precisely the protections that merit federal habeas review and enforcement.

The fundamental nature of the IAD is made particularly clear by reference to the remedy Congress chose for violations of the compact. Congress and the states considered the rights protected by the IAD so important that they provided for only one sanction for a violation of the compact: dismissal of the criminal charges *with prejudice*. See 18 U.S.C. app. 2 § 2 arts. III(d), IV(e). Only a fundamental defect, the type "requiring remedy by habeas corpus," can justify this "absolute defense." *Shack* v. *Att'y Gen.*, 776 F.2d 1170, 1173 (3d. Cir. 1985); *United States* v. *Williams*, 615 F.2d 585, 590 (3d Cir. 1980). The clarity of this remedy and the rarity with which Congress chooses it send a clear signal to courts. See *Shack*, 776 F.2d at 1173;

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3 The IAD also expressly sought to discourage unexpected transfers at the caprice of other jurisdictions, which can cripple formal rehabilitation programs. *Alabama* v. *Bozeman*, 533 U.S. 146, 154 (2001) (stating the "point is obvious" that the violations of the anti-shuttling provision "directly and intentionally" impact a prisoner's rehabilitation); S. Rep. No. 91-1356, at 6; H.R. Rep. No. 91-1018, at 7.

Williams, 615 F.2d at 590 ("Congress chose to make the defense [of dismissal] absolute when the Government violates the [IAD] . . . it is precisely the 'exceptional circumstances' making [habeas] relief appropriate.").

This Court recognized the importance of the IAD in *Alabama* v. *Bozeman*, 533 U.S. 146, 155 (2001). In that case, authorities transferred Michael Bozeman from Florida, where he was imprisoned, to Alabama for pre-trial purposes on charges pending there. The following afternoon, before the trial began, the Alabama authorities returned Bozeman to Florida. *Id*. at 151. Because the Alabama charges were not resolved "prior to the prisoner's being returned to the original place of imprisonment," 18 U.S.C. app. 2 § 2 art. IV(e), the Alabama Supreme Court reversed the trial court's denial of Bozeman's motion to dismiss based on the IAD. *Bozeman*, 533 U.S. at 152. This Court affirmed the decision, holding that there are no *de minimis* exceptions to the statute's unambiguous command. *Id.* at 153 ("[T]he language of the [IAD] militates against an implicit exception, for it is absolute."). That holding affirmed that the interests protected by the IAD are fundamental.

2. Federal review of the IAD is also important because states often have incentives to violate the rights protected by the IAD, and federal habeas review is the only meaningful mechanism to compel unwilling states to comply with the compact. In this case, West Virginia's financial incentives led the trial court judge to violate the IAD. Judge Risovich, the West Virginia judge that presided over Pethtel after he was transferred from Ohio, violated the anti-shuttling provision by returning Pethtel to Ohio before the trial in West Virginia had even begun. See 18 U.S.C. app. 2 § 2 art. IV(e). Every state and

federal court to review this case has determined that the IAD was violated. *Pethtel* v. *Ballard*, 617 F.3d 299, 305 (4th Cir. 2010) ("we recognize West Virginia likely did violate the IADA . . . ."); *Pethtel*, 2008 WL 4377143, at *9 r("It is therefore clear, and undisputed, that these actions violated the anti-shuttling provision of the IADA."); *Pethel* v. *McBride*, 638 S.E.2d 727, 746 (W. Va. 2006) ("a technical violation of the IAD"); *Pethtel* v. *McBride*, No. 03-C-506, slip op. at 9 (W. Va. Cir. Ct. Oh. Cnty. 2004) ("The [anti-shuttling] provisions of…the [IADA] were violated in the underlying criminal action . . . .").

Judge Risovich explained his decision to prematurely transfer Pethtel back to Ohio in this way: " 'I don't want him for an indefinite period. I don't want our county to have to pay the costs of keeping him here.' " *Pethel*, 638 S.E.2d at 734.[4] The federal district court, having reviewed the proceedings, concluded that there was no other basis for this decision. See Order Granting Certificate of Appealability Pet. App. 27a. The West Virginia Supreme Court recognized that the IAD had been violated, but refused to grant the appropriate relief: dismissal of the charges against Pethtel in West Virginia. Compare 18 U.S.C. app. 2 § 2 art. IV(d) ("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*.")

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4 Under the IAD, "the state in which the one or more untried indictments, informations, or complaints are pending . . . shall be responsible for the prisoner and *shall also pay all costs of transporting, caring for, keeping, and returning the prisoner*." 18 U.S.C. app. 2 § 2 art. V(h) (emphasis added).

(emphasis added) with *Pethel*, 638 S.E.2d at 746 (while there was "a technical violation of the IAD" . . . "It shall not be a violation . . . if, prior to trial, the prisoner is returned to the custody of the sending State pursuant to an order of the appropriate court issued after reasonable notice to the prisoner and the State of West Virginia and an opportunity for a hearing."). Where the IAD made dismissal mandatory, West Virginia created a exception. In effect, budgetary concerns—among others—led West Virginia to repudiate the obligations it adopted in a compact with the other states.

Without federal habeas review, there is no mechanism to compel unwilling states—like West Virginia here—to follow the terms of the compact. Moreover, there is no meaningful remedy for prisoners whose rights under the IAD have been violated. This Court should make clear that the federal government can fulfill its responsibilities under the Compact Clause and ensure enforcement of the IAD and the fundamental rights it provides for criminal defendants.

II. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AND CREATE A UNIFORM RULE FOR HABEAS REVIEW OF VIOLATIONS OF THE IAD

1. The federal circuits are divided on the availability of habeas review for violations of the anti-shuttling provision, as well as for violations of the IAD more broadly. With respect to the anti-shuttling provision specifically, the 4th Circuit prohibits review of every violation of the anti-shuttling provision, no matter how egregious. See *Pethtel*, 617 F.3d at 303–04 (citing *Bush* v. *Muncy*, 659 F.2d 402, 428 (4th Cir. 1981)). The Third Circuit, pointing to the "absolute"

remedy Congress provided for violations of IAD, has held that every violation of the anti-shuttling provision of the IAD entails "exceptional circumstances" and is worthy of habeas review. See *Williams*, 615 F.2d at 590. The Sixth Circuit occupies a middle ground, holding that collateral review is available only if the circumstances surrounding the Act's violation rise to a level warranting review. See *Metheny* v. *Hamby*, 835 F.2d 672, 674 (6th Cir. 1987); see also Pet. at 10-11 (setting forth the circuit split with respect to habeas review of anti-shuttling claims).

The circuits also split over whether to grant habeas review for violations of other provisions of the IAD. As the Petition for Certiorari notes, only the Third and Fourth circuits have established complete bars to habeas review of individual provisions of the IAD. Pet. at 10 (noting that the Fourth Circuit categorically precludes review of anti-shuttling violations and that the Third Circuit bars review of all article V(d) violations, which prohibits trying prisoners on more than the charges that formed the basis of their detainer). The approach of these two courts of appeals contrasts with that of every other court of appeals that has addressed the question of the circumstances in which a violation of a provision of the IAD merits habeas review. Those courts of appeals have held that it is necessary to engage in a case-by-case analysis to determine whether any violation of a specific provision of the IAD is accompanied by sufficiently aggravating circumstances to warrant habeas review. Pet. at 14-15 (collecting cases).

These two circuit splits result in a lack of uniform review of a statute that protects fundamental rights of criminal defendants. Had the state that violated

Mr. Pethtel's rights under the IAD belonged to any of the several circuits that do not categorically preclude habeas review of IAD claims, his criminal conviction would likely—or, in the case of the Third Circuit, would of a certainty—be found entitled to habeas review. The result is of obvious importance to criminal defendants relying on the rights granted them under the IAD. Absent review from this Court, Mr. Pethtel will serve a prison sentence of 53 to 155 years, despite the clear violation of the IAD that occurred in this case and his constitutional right to habeas review of that violation. In light of the remedy afforded by Congress for violation of the IAD—dismissal with prejudice—this arbitrary application of habeas review is of particularly startling consequence.

The current disparity in the application of a compact that has the force of federal law and which affects the rights of countless criminal defendants need not, and should not, persist. The decision below involves a violation of federal law under exceptional circumstances. It also implicates both the test for determining whether a violation of the anti-shuttling provision merits review as well as the test for determining whether a violation of any individual provision of the IAD merits such review. This case therefore presents the Court with an ideal opportunity to resolve both outstanding circuit splits and create a uniform test by which the courts of appeals may determine when violations of the IAD, including violations of the anti-shuttling provision, are entitled to habeas review.

CONCLUSION

For these reasons, and those set forth by Petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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