IN THE SUPREME COURT

STATE OF WYOMING

THOMAS MERCHANT, Petitioner,	)
vs.	)
JASON STROHBEHN, Executive Director, Adult Community Corrections of Laramie County, and R.O. LAMPERT, Director, Wyoming Dept. of Corrections, Respondents.	)

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the petitioner, Thomas Merchant, by and through counsel, Diane Courselle, Director, and Charles Quinton, Student Intern, University of Wyoming Defender Aid Program, and submits this Memorandum in Support of Petition for Writ of Habeas Corpus filed herein.

I. Facts and Procedural History

Thomas Merchant was serving a sentence for a Colorado conviction, and was housed in the Colorado Territorial Correctional Facility in Cañon City, Colorado when a detainer was filed against him based on charges pending in the State of Wyoming. (Ex. C). Mr. Merchant requested disposition of the Wyoming charges. In October 1996, he was transported to Weld County, Colorado, and from there was delivered to Wyoming to stand trial on the pending charges. (Ex. D; Ex. E (Petition to Reconsider, ¶3); Ex. F, pp. 20-23).

Prior to his trial in Wyoming, Mr. Merchant was returned to Colorado on two occasions. He was returned to Weld County, Colorado for proceedings on Colorado charges on both

occasions. Mr. Merchant was returned to Weld County, Colorado on November 27, 1996 and held there until December 3, 1996, when he was sent back to Wyoming. He remained in Wyoming until February 20, 1997, when he was again returned to Weld County. He was held in Weld County until February 24, 1997, when he was again returned to Wyoming. Only then did he remain in Wyoming until the conclusion of his trial on the Wyoming charges. (Ex. E (Petition to Reconsider, ¶4); Ex. F, pp. 20-23). The following chart depicts the series of transfers:

October, 1996 Cañon City, CO →	Weld County, CO →	→ Cheyenne, WY
	Weld County, CO ←	November 27, 1996 ← Cheyenne, WY
	December 3, 1996 Weld County, CO →	→ Cheyenne, WY
	Weld County, CO ←	February 20, 1997 ← Cheyenne, WY
	February 24, 1997 Weld County, CO →	→ Cheyenne, WY
Cañon City, CO ←	←	October 1997 ← Cheyenne, WY

Mr Merchant was convicted of two (2) counts of making false written statements to obtain credit, four (4) counts of felony check fraud, two (2) counts of felony larceny, and two (2) counts of felony obtaining by false pretenses in violation of Wyoming Statutes §§ 6-3-612, 6-3-702(a)(b)(iii), 6-3-407(a)(i), 6-3-402(b)(c)(i). The judgment and sentence was entered October 3, 1997 in the District Court for the First Judicial District of Wyoming. (Ex. A). His sentence was later reduced in an order entered in July 2002. (Ex. B).

On direct appeal of his Wyoming convictions, Mr. Merchant raised the claim that the State violated the Interstate Agreement on Detainers Act (IAD), enacted into law in Wyoming Statutes §§ 7-15-101 through 7-15-105, when he was brought to Wyoming for final disposition

of the Wyoming charges, and then shuttled between Wyoming and Colorado before trial was conducted on the Wyoming charges. (See Exs. F, H). On April 4, 2000, this Court held that there was no violation of the IAD and affirmed the conviction. *Merchant v. State*, 4 P.3d 184, 189 (Wyo. 2000). (See Ex. I).

II. Jurisdictional Statement

This Court may properly consider Mr. Merchant's Petition for Writ of Habeas Corpus pursuant to W.S. § 1-27-104. While [h]abeas corpus is not permissible to question the correctness of … a court or judge when acting **within their discretion** and in a lawful manner," W.S. § 1-27-125 (emphasis added), habeas corpus is permissible when a court acts outside its jurisdiction, resulting in illegal restraint. W.S. § 1-27-101. According to W.S. § 7-15-101, Article III(d), any indictment, information, or complaint must be dismissed upon violation of the IAD. Because Mr. Merchant's trial was held subsequent to the violation of the IAD, it was conducted despite the Wyoming district court's loss of jurisdiction to try Mr. Merchant on those charges. Therefore, the sentence imposed on Mr. Merchant as a result of that trial is an illegal restraint on his liberty, and according to W.S. § 1-27-105, a writ must issue. Although there is no appeal from disallowance of writ of habeas corpus by a district court, the proper remedy is an application for such a writ to this Court; such a petition is treated as an original proceeding. *Foster v. Warden of Wyo. State Penitentiary*, 489 P.2d 1166 (Wyo. 1971).

III. Legal Analysis

1. Prior readings of "original place of imprisonment" are unreasonably narrow and are not consistent with the rest of the IAD.

The IAD was enacted into law in this state in Wyoming Statutes §§ 7-15-101 through 7-15-105. The policy behind the Act 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." W.S. § 7-15-101, Art. I. "Such outstanding charges otherwise would 'obstruct prisoner treatment and rehabilitation.'" *Greenwood v. State*, 665 N.E.2d 579, 583 (Ind. 1996) (quoting IAD, Art. I); see also W.S. § 7-15-101, Art. I (delay in resolving charges against "persons already incarcerated in other jurisdictions produce uncertainties which obstruct programs of prison treatment and rehabilitation").

At issue in Mr. Merchant's case is the "single transfer rule," or the "anti-shuttling" provision of the IAD, found in Article III. Article III(a) provides:

> 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 … after he shall have caused to be delivered to the prosecuting officer and the appropriate court … written notice of…his request for final disposition.

W.S. § 7-15-101, Art. III(a). Further, Article III(d) provides:

> Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof 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 … **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 further force or effect, and the court shall enter an order dismissing the same with prejudice.**

(emphasis added). This provision is called the "single transfer rule." See *Bunting v. State*, 564 A.2d 109, 110 (Md. 1989).

Because Mr. Merchant requested final disposition of the charges pending in Wyoming, Article III applies (as opposed to Article IV which applies when the receiving state requests final disposition of the charges). Accordingly, Article III(d) provides the remedy for violation of the

single transfer rule. If the rule is violated, the charges **shall** be dismissed; the court in the state with outstanding charges against the prisoner loses jurisdiction to try the prisoner on such charges. Thus, any subsequent trial on those charges is conducted without jurisdiction, and would violate due process. Any sentence imposed after the inappropriate trial would constitute an illegal restraint from which the prisoner is entitled to relief under W.S. § 1-27-101.

On direct appeal of his Wyoming convictions, Mr. Merchant presented his claim that the State violated the IAD by returning him to the sending state (Colorado) before he was brought to trial in the receiving state (Wyoming). Mr. Merchant argued that the IAD specifically provides for dismissal with prejudice of the charges against him under those circumstances. This Court found instead that no violation of the IAD had occurred. See *Merchant*, 4 P.3d at 189. There were two grounds for this Court's decision. First, this Court distinguished between Article III and Article IV of the IAD, pointing out that Article III requires dismissal of charges with prejudice if trial is not had before the prisoner is returned to "the original place of imprisonment." W.S. § 7-15-101, Art. III(d). In contrast, Article IV requires dismissal of charges with prejudice if trial is not had before the prisoner is returned to "the original place of imprisonment pursuant to Article V(e)." *Id*. Article V(e) refers to returning the prisoner to "the sending state." *Id*., Art. V(e). This Court applied the difference in language to hold that under Article IV the charges must be dismissed if the prisoner is returned anywhere within the sending state prior to final disposition of charges, but under Article III, no such dismissal is required unless the prisoner is returned not just to the sending state, but to the same institution from which he was sent. *Merchant*, 4 P.3d at 189. Based on this semantic difference between Articles III and IV, this Court held that when Mr. Merchant was shuttled between the states of Wyoming and Colorado, there had been no violation of the IAD because he had not been returned to what it

considered his original place of imprisonment, the Colorado Territorial Correctional Facility in Cañon City, Colorado; instead, he was sent to Weld County, Colorado. Implicit in this Court's reasoning is that if Mr. Merchant's case had fallen under Article IV, the IAD would clearly have been violated, but a different result is justifiable for Mr. Merchant because Mr. Merchant, and not the State of Wyoming, had requested final disposition of the Wyoming charges.

The plain meaning of the phrase, "original place of imprisonment" supports the conclusion that "place of imprisonment" referred to the jurisdiction in which the accused was originally incarcerated. "Place" is an indefinite term "which can be applied to any locality, limited by boundaries, however large or however small," and has been used to designate a locality as large as a nation or as small as a building; the extent of the locality that the word designates "must generally be determined by the connection in which it is used." *Black's Law Dictionary* 1148 (6th ed. 1990). Article II of the IAD defines "state," "sending state," and "receiving state," but not "place of imprisonment." W.S. § 7-15-101, Art. II. Article III, which controls when the request for final disposition of the charges is initiated by the prisoner, provides that "[I]f 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 notice or effect, and the court shall enter an order dismissing the same with prejudice," W.S. § 7-15-101, Art. III(d) (emphasis added), but gives no definition of "place of imprisonment." Article IV, which controls when the request for final disposition of charges is initiated by the receiving state, refers to "the original place of imprisonment pursuant to Article V(e) hereof." *Id*., Art. IV(e). Article V(e) states, "At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to **the sending state**." *Id*., Art. V(e) (emphasis added). Although this Court previously

concluded that Article V(e) did not qualify Article III(d), Article V, read in its entirety, indicates that all requests made under either Article III or Article IV are governed by Article V. *Id*., Art. V. Indeed, Article V sets out the rights and responsibilities of the parties "in response to a request made under Article III or Article IV." *Id*., Art. V(a).

Application of a restrictive meaning of "original place of imprisonment" to Article III, limiting it to the precise facility in which the defendant was originally housed would permit shuttling between sending and receiving states, as long as the prisoner was never returned to the facility in which he was originally incarcerated. The prisoner could be shuttled without limit between the receiving state and a second facility in the sending state, without violating the anti-shuttling provision of the statute. Such a practice would run counter to the original intent of the IAD, which is "to reduce uncertainties which obstruct programs of prisoner treatment and rehabilitation" and "to encourage the expeditious and orderly disposition" of charges. W.S. § 7-15-101, Art. I. Interstate shuttling under those circumstances would also be disruptive to the prisoner's access to counsel, and his ability to participate in his own defense. In Mr. Merchant's case, allowing such an exception meant that he had to face separate charges in two different jurisdictions, affecting his ability to prepare for either proceeding, a clear violation of the purposes and policy of the agreement. W.S. § 7-15-101, Art. I.

Not only is construing "original place of imprisonment" to refer to a specific correctional facility unnecessarily narrow, it creates a host of potential interpretive problems. "Place" could be read as narrowly as the cell in which the prisoner was originally housed, the custody unit, or the entire prison facility. Under such a narrow interpretation of the statute, there would be no IAD violation if the defendant is shuttled between the sending and receiving state before disposition of the charges, as long as he is located in a different location within the same facility

from whence he was sent to the receiving state. Additionally, because the time that a prisoner spends in a receiving state awaiting trial is applied to his sentence in the sending state, a defendant awaiting trial in the receiving state who reached a point in his sentence such that he qualified for transfer to a less restrictive facility upon his return to the sending state could be shuttled between the receiving state and the new facility prior to disposition of the charges in the receiving state without violating the IAD. These practices would clearly violate the spirit and purpose of the anti-shuttling provisions of the IAD.

Narrow interpretation of Article III would also violate another provision of Article V, which defines the temporary custody conferred upon a receiving state as follows:

> 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 (1) or more untried indictments, informations, or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction…

Id., Art. V(d). Thus, when Wyoming received temporary custody of Mr. Merchant, it was for the purpose of resolving the charges on which the detainer had been based. That temporary custody did not authorize Wyoming to shuttle him back and forth to Colorado to face other unrelated charges in that state. This too is reinforced by Article V(h), which provides that "[f]rom the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state," the receiving state is responsible for costs of keeping and transporting the prisoner. *Id*., Art. V(h). Taken together, these provisions indicate the receiving state is responsible for the prisoner until it has accomplished the purpose for which the detainer was initiated, and must then return the prisoner to the territory and custody of the sending state. Instead, in Mr. Merchant's case, he was transferred from the custody of Wyoming to that of Colorado in order to face charges in two jurisdictions. The repeated

transfers between the two jurisdictions interfered with Mr. Merchant's right to effective counsel as well as his ability to assist in his own defense by compelling him to face two proceedings in two jurisdictions during the same period of time.

2. The IAD is an interstate compact and is therefore subject to federal construction which supports reading "original place of imprisonment" in Article III the same as in Article IV.

The U.S. Supreme Court has held that the construction of an interstate agreement sanctioned by Congress under the Compact Clause of the Constitution is subject to federal interpretation. U.S. Const., Art. I, § 10, cl. 3, *Cuyler v. Adams*, 449 U.S. 433 (1981). Because the IAD is a congressionally sanctioned interstate compact, it is a federal law subject to federal construction. *Carchman v. Nash*, 473 U.S. 716, 719 (1985).

The only holdings supporting a narrow interpretation of the anti-shuttling provision of Article III of the IAD have come from state courts. In *Merchant v. State*, 4 P.3d 184 (Wyo. 2000) this Court noted the difference in language between Articles III and IV, and held that Article III's definition of "original place of imprisonment" was "more precise and restrictive" than the Article IV definition, leading to this Court's decision that no violation of Article III had taken place because Mr. Merchant had not been returned to Cañon City before disposition of his Wyoming charges. *Id*. at 189. The Supreme Court of Nebraska noted the same difference in language in *Nebraska v. Reed*, 668 N.W.2d 245 (Neb. 2003). The *Reed* Court, citing *Merchant v. State*, also held that the difference in language between Article III and Article IV meant that the return of a prisoner to the sending state to face pending charges does not violate the IAD's anti-shuttling provisions.

The issue of the IAD's definition of "original place of imprisonment has been reviewed in the federal courts. In *United States v. Kelley*, 300 F.Supp.2d 224 (D.Mass. 2003), charges were dismissed after a prisoner who requested speedy disposition of charges under Article III

was shuttled between state and federal custody. The court, citing *Alabama v. Bozeman*, 533 U.S. 146 (2001), noted that:

> The only difference between the anti-shuttling provisions of Article IV(e) and Article III(d) is that the language "prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof" in Article IV(e) is replaced with "return of the prisoner to the original place of imprisonment" in Article III(d). Article V(e) provides that "[a]t the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state."

Kelley, 300 F.Supp.2d at 230. As in the instant case, the government advocated a narrow interpretation of "original place of imprisonment," arguing that a violation of the IAD could only result from the return of the prisoner to the institution in which he was originally incarcerated, and not from his return to state custody at a different institution. *Id*. The *Kelley* court disagreed with this Court's holding in *Merchant v. State*, 4 P.3d at 188-189, noting that Article IX of the IAD states that the agreement "shall be liberally construed so as to effectuate its purposes," which are described in Article I as the encouragement of "the expeditious and orderly disposition of such charges and determination of the proper status of … detainers …" *Kelley*, 300 F.Supp.2d at 230-231. The court stated further that

> The purposes of the IAD would not be served by allowing a prisoner to be returned to the sending state, but depriving him of any remedy if the sending state housed him in a facility other than the one in which he was serving his original sentence. … Basing decisions on what facility a prisoner is in rather than who has custody of that prisoner would improperly elevate form over substance and prevent the IAD from serving its intended purposes.

Id. at 231. The court added that a "truly literal interpretation" of the IAD would require that no anti-shuttling violation could be found if a prisoner was returned to "a different bed, room, or unit than the one in which he was originally imprisoned," noting that such a literal reading had been implicitly rejected by the First Circuit in *Hunnewell*, when the First Circuit omitted the reference to Article V(e) in its description of the "material part" of Article IV(e). *Id*. at 231-232,

citing *United States v. Hunnewell*, 891 F.2d 955, 958 n. 3 (1st Cir. 1989). The court reasoned that the key to determining whether the anti-shuttling provisions have been violated is "who has custody of the prisoner, "rather than the 'irrelevant coincidence' of where the defendant is imprisoned." *Id*. at 232. On appeal, the First Circuit upheld the district court's construction of the anti-shuttling provisions, describing the district court's holding as "comprehensive and thoughtful," and concluding that "There is no dispute that the IAD was violated…" *United States v. Kelley*, 402 F.3d 39 (1st Cir. 2005).

3. Even under a narrow reading of "original place of imprisonment," Mr. Merchant's rights were violated.

This Court never considered that at the time Mr. Merchant was first transferred to Wyoming, Colorado, authorities had vested temporary custody of Mr. Merchant to Weld County, Colorado.[1] At the time of his first transfer, Mr. Merchant's place of incarceration could be considered Weld County, Colorado, the same place to which he was twice returned before final disposition of his Wyoming charges had been made. Other than the reference in Article V(e), the IAD is silent concerning its definition of "original place of imprisonment." It is reasonable to consider Mr. Merchant's "original place of imprisonment" to be the location from which he was transferred to Wyoming: Weld County, Colorado. Because all of the transfers between Wyoming and Colorado were either to or from Weld County, Colorado, Weld County could reasonably be considered his "original place of imprisonment" in the sending state. Thus, even with the more restrictive definition of "original place of imprisonment," the anti-shuttling provision of the IAD was violated when Mr. Merchant was shuttled back and forth between Weld County, Colorado and Laramie County, Wyoming prior to the final disposition of the charges against him.

[1] This Court likely did not consider this because Mr. Merchant's appellate counsel did not make the argument.

4. *De minimis* exceptions to the IAD are not permitted.

Alabama v. Bozeman, 533 U.S. 146 (2001), decided after *Merchant*, makes it clear that this Court erred in holding that the IAD was not violated in Mr. Merchant's case. Bozeman was serving a sentence of imprisonment in a federal penitentiary in Marianna, Florida when a detainer was lodged against him by the District Attorney of Covington County, Alabama, seeking temporary custody to arraign Bozeman on charges in that county. Bozeman was taken to Covington County, where he spent one night in jail, appeared in the local court the next morning, and was then returned to the federal facility in Florida. About one month later, he was returned to Covington County for further proceedings. Bozeman then filed a motion to dismiss all charges against him in Covington County, on the ground that the anti-shuttling provision of the IAD had been violated. The motion to dismiss was denied and Bozeman was convicted. *Id*. at 151.

At the U.S. Supreme Court, Alabama did not deny that the IAD had been violated, but argued instead that the underlying policies and purposes of the Act had been accomplished, because Bozeman was returned to his place of imprisonment after only one day in the receiving state. Alabama argued that "the one day interruption that occurred here did not interrupt rehabilitation significantly. Hence, any violation is 'technical,' 'harmless,' or '*de minimus*,'" *Id*. at 153, and advocated an "implicit exception for such trivial violations." *Id*.

The Court disagreed, citing the absolute language of the IAD, which states that when a prisoner is returned to the sending state before trial, the 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." *Id*. Noting that "[T]he word 'shall' is ordinarily 'the language of command,' the Court found no basis in the law for *de minimis* exceptions. *Id*. The Court also held that even

if one were to "assume for argument's sake" that the language of Article IX, which states that the Agreement "shall be liberally construed so as to effectuate its purposes," permits *de minimus* violations, the violation at issue in *Bozeman* (a one-day transfer of custody) did not qualify as "trivial." *Id*. Because the Agreement not only prevents return, but also requires the receiving state to pay all costs of transporting, keeping, and returning the prisoner, it provides an incentive for the receiving state to dispose of the detainer in the "most expeditious manner." *Id*. at 533. Alternatively, the Court reasoned that the Agreement's drafters may have thought that the shuttling itself added to the "uncertainties which obstruct programs of prisoner treatment and rehabilitation," and sought to minimize shuttling for that reason alone. *Id*. The Court concluded that, "in terms of either purpose," even a one-day violation cannot be considered "*de minimus*, technical, or harmless," and that the Court did not need to "decide precisely what led Congress and the many other legislatures" to agree to the Agreement's absolute language and its remedy. *Id*.

When Mr. Merchant's Wyoming conviction was affirmed in *Merchant v. State*, 4 P.3d 184 (Wyo. 2000), this Court concluded that "[t]he purposes and policies of the Agreement on Detainers were supported and implemented" by the facts of the case because the return of Mr. Merchant to Weld County, Colorado before his trial in Wyoming "facilitated an expeditious resolution" of the charges against him in Colorado, stating that "it would not make sense to require Mr. Merchant to sit in a Wyoming jail awaiting his trial" when he could participate in the disposal of other charges against him in Colorado. *Id*. This Court added that had Mr. Merchant remained in Wyoming until disposition of his charges had been completed, he would have undergone further delays in his "prisoner treatment and rehabilitation." *Id*. at 189, citing *United States v. Taylor*, 861 F.2d 316, 319 (1st Cir. 1988).

In its conclusion that "the purposes and policies behind the Agreement on Detainers actually were supported and facilitated" by Mr. Merchant's repeated transfers between Wyoming and Colorado, *Merchant*, 4 P.3d at189, this Court suggests that Mr. Merchant's claim alleged only a technical or *de minimus* violation of the IAD. The *Bozeman* Court, however, held that

> [T]o call such a violation "technical," because it means fewer days spent away from the sending State, is to call virtually *every* conceivable antishuttling violation "technical"--a circumstance which, like the 13th chime of the clock, shows that Alabama's conception of the provision's purpose is seriously flawed.

Bozeman, 533 U.S. at 155. The *Bozeman* Court reasoned that the IAD may have sought to remove obstructions to rehabilitation by providing a financial incentive to shorten the pretrial period (in which the receiving state is responsible for the prisoner's detention costs), or alternatively, by viewing the transfers themselves as one of the uncertainties which the IAD seeks to minimize. *Id*. at 155-156. The Court concluded that in terms of either of these purposes, even a one-day violation of the anti-shuttling provision cannot be considered *de minimus*, and in terms of the IAD's "absolute language", it is not necessary to "decide precisely what led Congress and the many other legislatures" to agree to the Agreement's anti-shuttling remedy. *Id*. at 156. In light of this opinion, this Court's reasoning that IAD "was not offended" by the transfers between Wyoming and Colorado, *Merchant*, 4 P.3d at 189, is not supported by current law.

For the foregoing reasons, the State of Wyoming lost jurisdiction to try Mr. Merchant on the charges alleged in its detainer, and has unlawfully restrained Mr. Merchant of his liberty. This Court should grant the writ of habeas corpus and release Mr. Merchant from his unlawful imprisonment.

DATED this____day of _____, 2006.

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