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JURISDICTIONAL STATEMENT

Generally, the State cannot appeal a judgment for the accused unless a right of appeal is unequivocally conferred by statute. *State v. Burns*, 994 S.W.2d 941-942 (Mo. banc 1999); *State v. Jewell*, 628 S.W.2d 946 (Mo. App. W.D. 1982) (State could not appeal from order dismissing information by virtue of the running of statute of limitations). Thus, it is important for the State to identify what statutory provision gives the State the right to this appeal. Appellant has not identified the statute that gives it the right to file an appeal in this case or the particular portion of a statute that unequivocally confers the right of the State to appeal. Thus, this Court should decline to find that it has jurisdiction. A bare recitation that jurisdiction is proper is insufficient. *State v. Jackson*, 141 S.W.3d 391, 393 (Mo. App. S.D. 2004); *Carden v. City of Rolla*, 290 S.W.3d 728, 730 (Mo. App. S.D. 2009) (Appellant's jurisdictional statement is deficient in that it fails to cite constitutional or statutory provisions pertinent to the appeal and it “merely concludes that jurisdiction is proper); **Rule 84.04(b)**.

STATEMENT OF FACTS

On May 29, 2009, a complaint was filed in Lawrence County No. 09LW-CR00950 charging Respondent, Darrell Delong, with three felony counts (leaving the scene of an accident, first degree tampering, and resisting an arrest) (LF 6-9A). A warrant for his arrest for those offenses was also issued that day (LF 11-12). Darrell was also served with that arrest warrant on the same date (LF 12).

On May 29, 2009, an information was filed in Lawrence County No. 09LW-CR00952 charging Darrell Delong with misdemeanor driving while license was revoked (LF 66-67). A warrant for his arrest for those offenses was also issued that day (LF 75). Darrell was also served with that arrest warrant on the same date (LF 75). On June 10, 2009, an amended information was filed adding six additional misdemeanor counts: careless and imprudent, failure to maintain financial responsibility, three counts of failure to stop, and possession of license plate issued to another (LF 77-79).

On June 15, 2009, a complaint was filed in Lawrence County No. 09LW-CR01053 charging Darrell with four felony counts (first-degree burglary, stealing, and two counts of receiving stolen property) (LF 107-112). A warrant for his arrest for those offenses was also issued that day (LF 113). Darrell was also served with that arrest warrant on the same date (LF 113).

On September 17, 2009, Darrell filed a *pro se* motion for speedy trial on his Missouri felony charges; in that motion he noted that he was in custody in Custer

County, Oklahoma after having been sentenced on other charges (LF 29-32, 122-124).

On April 23, 2010, Darrell, through counsel, filed a “Request for Disposition of Detainer Pursuant to Section 217.450 RSMo,” in all three Lawrence County cases (LF 33-34, 84-85, 127-128). That Request indicated that Darrell was incarcerated in the Oklahoma Department of Corrections, and resided at Davis Correctional Facility (Davis), Hughes County, Oklahoma (LF 33, 84, 127). The Request asserted that it related “back to and incorporates the requests made in Defendant’s pro se Motion For a Speedy Trial filed September 17, 2009” (LF 33, 84, 127).

On April 26, 2010, a letter from a Legal Assistant of the Lawrence County Prosecutor’s Office was written to the Records Division at Davis regarding Lawrence County Case Nos. 09LW-CR01053 and 09LW-CR00950 (LF 35, 88, 129).¹ That letter enclosed a certified copy of the warrant on Darrell, and stated:

Please accept this letter as our request to place a detainer on him. I would request that the proper forms under the IAD be given to the defendant so that the paperwork can be started to bring the defendant back to Lawrence County.

(LF 25).

¹ The letter was filed in Lawrence County on April 27, 2010 (LF 35, 88).

Apparently on September 16, 2010, during a preliminary hearing, the associate circuit court overruled Darrell's "motion to dismiss for lack of jurisdiction" (LF 4). The case was taken under advisement for "additional evidence" (LF 4). The State of Missouri has not filed a transcript of that hearing.

On October 4, 2010, Darrell filed a Motion to Reconsider (LF 36-47, 131-132-141). A hearing was held on that motion on October 14, 2010 (LF 4, 106). The State of Missouri has not filed a transcript of that hearing either.

On October 21, 2010, the trial court issued an Order and Judgment dismissing with prejudice all criminal charges pending against Darrell Delong in Lawrence County Nos. 09LW-CR01053, 09LW-CR00950, and 09LW-CR00952 because of a violation of the IAD (LF 48-50, 91-93). That order made the following findings of fact:

- (1) On April 23, 2010, Darrell, through his attorney, filed a formal Request for Disposition of Detainer under § 217.450, and served a copy on the Lawrence County Prosecutor; that request indicated that Darrell was incarcerated by the Oklahoma Department of Corrections at the Davis Correctional Facility in Holdenville, Oklahoma;
- (2) On April 26, 2010, the Lawrence County Prosecutor's Office wrote a letter requesting that Oklahoma DOC place a hold on Darrell; the prosecutor also enclosed a certified copy of the Lawrence County warrant(s) for Darrell's arrest to support the formal detainer;

(3) On August 23, 2010, Darrell was arrested by Lawrence County on the warrants issued on August 20, 2009, in Lawrence County Case Nos. 09LW-CR01053, 09LW-CR00950, and 09LW-CR00952 (LF 48, 91).

That order made the following conclusions of law:

- (1) The Prosecutor's April 26, 2010, letter, which requested Oklahoma DOC to place a hold on Darrell, operated as a formal detainer in these cases. As a result of that letter, Darrell was held by Oklahoma authorities upon his parole from Oklahoma DOC to await transfer to Lawrence County, Missouri;
- (2) The effect of Darrell's formal Request filed on April 23, 2010, was to trigger the 180-day time lime for Appellant to be brought to trial on his Missouri charges;
- (3) The trial court noted the State's argument that since it did not receive a formal certificate of incarceration, Darrell had not substantially complied with Article III of § 217.490. But the trial court held that, despite the apparent absence of a formal certificate, Darrell arrived in Missouri custody on August 23, 2010, as the direct result of the detainer lodged against Darrell by the Prosecutor's April 26, 2010, letter. Thus, the absence of the certificate did not prevent the Prosecutor from placing a hold on Darrell in Oklahoma and bringing him into Lawrence County custody for the Missouri charges. Thus, nothing essential was omitted by Darrell, and thus

his failure to strictly comply with the formal requirements of Article III did not defeat his request for formal disposition, citing *State ex rel. Suitor v. Stremel*, 968 S.W.3d 221 (Mo. App. S.D. 1998);

(4) The Prosecutor had until October 20, 2010 (the 180th day from the filing of the formal Request on April 23, 2010), to bring the Missouri charges to trial. But since the Prosecutor missed that deadline, the trial court was compelled to dismiss with prejudice the Missouri charges.
(LF 49-50, 92-93, 143-144).

The State filed its notice of appeal on October 27, 2010 (LF 5, 51-58, 94-101, 145-152).

ARGUMENT

This Court should not address Appellant's point because Appellant has not filed a complete record. This is an appeal of the grant of a motion to dismiss under the Interstate Agreement of Detainers (IAD), yet Appellant did not file the transcripts of the hearings on the motion to dismiss and motion to reconsider. Further, Appellant's jurisdictional statement has not identified the statute that unequivocally confers the right of the State to appeal in this case.

Regarding the merits, Article III of § 217.490 (the IAD) required that Darrell be brought to trial on the Lawrence County charges within 180 days, - which he was not - when the following four matters occurred: (1) Darrell was imprisoned in a penal or correctional institution of a party State; (2) during the continuance of that term of imprisonment, the Lawrence County charges were pending against Darrell in Missouri; (3) a detainer based on such charges was lodged against Darrell; and, (4) Darrell caused written notice and request for final disposition of the charges to be delivered to the appropriate prosecuting authorities and court. The record shows that all four of these factors occurred, and, contrary to Appellant's argument, § 217.490 does not require that factor (3) occur before factor (4) in order for Darrell to be entitled to the IAD's protection.

The State's sole point relied on, which cannot be expanded upon by argument, contends that the associate circuit court erred in dismissing Darrell's Lawrence County charges under the Interstate Agreement on Detainers (IAD) "because no detainer had been filed against [Darrell] *at the time* he made his purported request under the IAD and thus [Darrell] was not entitled to the IAD's protection" (App. Br. at 8, 9) (emphasis added).

Darrell notes that the record on appeal does not reflect that the State of Missouri ever raised this argument at the trial court level. No pleading reflects it. Although there were two hearings held – one on Darrell's motion to dismiss (September 16, 2010) and another on Darrell's motion to reconsider (October 14, 2010) (LF 4), Appellant has not filed transcripts of those hearings. Were there any concessions made at the hearings? Was there any evidence presented on this issue? Did either party waive certain challenges? These questions cannot be determined without the transcripts.

If Appellant's arguments are being raised for the first time on appeal, they should not be considered by this Court. *State v. Trenter*, 85 S.W.3d 662, 670 (Mo. App. W.D. 2002); *State v. Williams*, 334 S.W.3d 177, 183 (Mo. App. W.D. 2011) ("The State cannot now argue for reversal based on an argument it never presented to the trial court."). Yet, we do not know if Appellant's argument was ever presented to the associate circuit court.

It appears that Appellant's sole point on appeal might not have been raised in the associate circuit court because Darrell's Motion to Reconsider notes that the

state argued that the 180-day time limit was not triggered because “the Custer County, Oklahoma Sheriff did not provide a formal certificate stating terms of Defendant’s commitment in Oklahoma pursuant to Article III of the [IAD],” and thus Darrell did not substantially comply with the IAD (LF 37-38). Later, the Motion to Reconsider states, “[a]t the hearing on September 16, 2010, Assistant Prosecuting Attorney Gary Troxell argued the only reason why Defendant’s request for disposition of detainer under the IAD was deficient was because a formal certificate of incarceration from Custer County, Oklahoma, was absent.” (LF 39). Appellant has not carried forward this argument on appeal, possibly because Darrell’s motion raised factual and legal arguments rebutting the prosecutor’s sole argument raised in the associate circuit court (LF 39-40).²

“The burden of presenting a proper record of the proceedings under Rule 30.04 is on the appealing party.” *State v. Hackler*, 122 S.W.3d 132, 135 (Mo. App. S.D. 2003). Our courts have held that the State is not entitled to appeal the dismissal of an indictment or information based on matters dehors the record. *State v. Brooks*, 372 S.W.2d 83, 85 (Mo. 1963). Without a transcript on appeal this Court cannot determine what was considered by the associate circuit court

² Since the State has not maintained that argument on this appeal, Darrell will not restate the reasons set out in the Motion to Reconsider as to why that argument was incorrect. *See, State ex rel. Suitor v. Stremel*, 968 S.W.3d 221 (Mo. App. S.D. 1998).

prior to dismissing the charges and whether the court considered matters dehors the record.

Darrell will also address the merits. As noted above, the State of Missouri has raised only one argument: “no detainer had been filed against [Darrell] at the time he made his purported request under the IAD and thus [Darrell] was not entitled to the IAD’s protection” (App. Br. at 8, 9).

According to Article III of the IAD, the requirement that Darrell be brought to trial on the Lawrence County charges within 180 days was triggered when the following four matters occurred: (1) Darrell was imprisoned in a penal or correctional institution of a party State (here, Oklahoma); (2) during the continuance of that term of imprisonment, the Lawrence County charges were pending against Darrell in another State (Lawrence County, Missouri); (3) a detainer based on such charges was lodged against Darrell; and, (4) Darrell caused written notice and request for final disposition of the charges to be delivered to the appropriate prosecuting authorities and court. *§ 217.490, Article III.*

Appellant’s point relied on does not challenge *the existence* of any of these four factors; rather it, and the argument section, assert that because No. 4 (the request for disposition) occurred *before* No. 3 (the detainer), then Darrell was not entitled to the IAD’s protection.

Although Article III mentions the above four factors in the order listed above, there is no explicit requirement that they accrue in any special sequence.

United States v. Hutchins, 489 F.Supp. 710, 713 (1980).³ Article IX of the IAD states that it is to be “liberally construed so as to effectuate its purposes.”

§ 217.490, Article IX. In order to preserve the effectiveness of the IAD as an attempt to address certain problems, it is necessary to call the IAD into play even when the requisite events do not occur in the ideal sequence. *Hutchins*, 489 F.Supp. at 713. The contemplated timing is not essential and should not be strictly required in a technical fashion when to do so would undercut the purposes of the IAD. *Id.* at 714. See, *State ex rel. Saxton v. Moore*, 598 S.W.2d 586, 590 (Mo. App. W.D. 1980) (“The courts have generally held that the Agreement does not require literal and exact compliance by the prisoner with the directions of the Agreement in order to avail himself of its benefits. If the prisoner makes a good-faith effort to bring himself within the Agreement's purview, and omits nothing essential to the Agreement's operation, then his failure of strict compliance will not deprive him of its benefits.”).

Appellant takes the position that “[t]he detainer filed by Lawrence County cannot ‘relate back’ to the prior IAD requests and validate them.” (App. Br. at 12). In support of its position, Appellant relies upon *State v. Hicks*, 719 S.W.2d 86 (Mo. App. S.D. 1986), *Burnes v. State*, 92 S.W.3d 342 (Mo. App. S.D. 2003),

³ Certain other aspects of the *Hutchins*’ opinion, which are not relevant here, has been called into question after the United States Supreme Court case of *Fex v. Michigan*, 507 U.S. 43 (1993).

Commonwealth v. Anderson, 378 N.E.2d 451 (1978), and *Commonwealth v. Petrozziello*, 491 N.E.2d 627 (Mass. App. 1986) (App. Br. at 12-15). The first three of these cases do not deal with the situation at hand. The last case more supports Darrell’s position than Appellant’s.

In *Hicks*, although there had been detainers lodged against the defendant with respect to Dallas County escape charges, there was *no detainer* lodged against him with respect to a Webster County robbery charge – the relevant charge on that appeal. *Hicks*, 719 S.W.2d at 89. Thus, this Court concluded: “Since no detainer had been lodged against Hicks with respect to the Webster County robbery charge at the time Hicks claims he made a request for final disposition ... his request, even if properly made with respect to the Dallas County charges, was ineffective with respect to the robbery charge and the Agreement on Detainers was not triggered with respect to the latter.” *Id.* at 90, footnote omitted.

Thus, *Hicks* is inapplicable because in that case there was no detainer filed regarding the applicable charge, whereas in Darrell’s case, a detainer was filed – albeit three days after Darrell made his request for disposition of the Lawrence County charges.

The *Anderson* case, cited by Appellant and the *Hicks* court, is also inapplicable for the same reason, because in *Anderson* the appellate court similarly stated, “We note that this request was not applicable to the instant charges, in that no detainer concerning any of them had been lodged with the New

Hampshire authorities.”⁴ *Anderson*, 378 N.E.2d at 493. Thus, no detainer had been filed regarding the relevant charges.

Burnes similarly is inapplicable because in that case it was conceded by Burnes that there was *no detainer filed* and Burnes argued that a presentence investigation (PSI) served as a *de facto* detainer even though no charges existed at the time of the PSI. *Id.* at 346-347. This Court ruled that the PSI did not serve as a *de facto* detainer because Greene County had not requested that the Department of Corrections (DOC) be advised when Burnes’ release was imminent, and because no charges were pending when the PSI was conducted or when Burnes filed his UMDDL demand for trial. *Id.* at 347. Thus, the *Burnes* court concluded that “the PSI report did not constitute a detainer as contemplated under the UMDDL.” *Id.* “We have concluded that no detainer was lodged against Movant when he filed his first demand for a speedy trial.” *Id.* “[W]e find that the PSI did not qualify as a detainer as contemplated under the UMDDL...” *Id.* at 348.

Thus, *Burnes* is inapplicable because in that case there was never a detainer filed – *de facto* or otherwise.⁵ Here a request for a speedy trial under the IAD was

⁴ The defendant in *Anderson* also voided his IAD request because of an escape from the New Hampshire State Prison. *Anderson*, 378 N.E.2d at 493-494.

⁵ Thus, the Western District’s case in *State v. Sharp*, 2011 WL 2118881 (Mo. App. W.D. 20110), incorrectly relied upon *Burnes*, because *Burnes* was a case that did not address the issue in question. But the *Sharp* court rejected the claim

filed on April 23, 2010 (LF 33-34, 84-85, 127-128). A detainer was mailed on April 26, 2010 (LF 35, 88, 129). There is no legitimate reason to require Darrell to file a duplicate of his IAD request again after the filing of the detainer a few days later since one had already been filed. *See, Hutchins*, 489 F.Supp. at 715 (“where a prisoner is led to believe that he has made an effective demand for final disposition of pending charges, the absence of a second demand ... when no second notice and opportunity were presented to the prisoner by custodial authorities cannot be held against the prisoner.”).

The *Petrozziello* case cited by Appellant supports Darrell’s position more than Appellant’s. In that case, the detainer was filed on 8/9/1983; on 12/02/1983, defendant’s counsel requested that the defendant be arraigned on the new charges; on 01/17/1984, the defendant made a request for the disposition of all charges against him; and on 03/13/1984, the defendant’s parole was revoked and he resumed serving a Federal sentence. *Petrozziello*, 491 N.E.2d at 632, fn. 7. The *Petrozziello* court determined that the applicable date for measuring the relevant time periods in that case was no earlier than 03/13/1984 because on that date all four requirements under the IAD had been satisfied. *Id.* at 632. The *Petrozziello* court noted that the defendant was *not* required to file a new request for the final

under the Uniform Mandatory Disposition of Detainers Law for several other reasons, and thus its reliance upon *Burnes* was not necessary for the disposition of the point on appeal and can be considered dicta.

disposition because both prosecutor offices should have been aware of the applicability of the IAD, *Id.*, which is Darrell's position. The court specifically followed the *Hutchins*' approach and noted that situations arising under the IAD are fact specific and are to be dealt with discretely, not mechanically. *Id.* at fn. 10, 11.

This Court should affirm the associate circuit court's order dismissing the Lawrence County charges against Darrell.

CONCLUSION

This Court should affirm the associate circuit court's order dismissing the charges against Darrell in Lawrence County Nos. 09LW-CR01053, 09LW-CR00950, and 09LW-CR00952, because of a violation of the IAD.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13-point font. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 3,583 words, which does not exceed the 27,900 words allowed for a respondent's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using Symantec Endpoint Protection, which was updated on July 20, 2011. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were hand-delivered this 21st day of July, 2011, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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