STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. ARO-21-312

DENNIS WINCHESTER,

Petitioner - Appellant,

v.

STATE OF MAINE,

Respondent - Appellee.

APPEAL FROM A JUDGMENT OF THE AROOSTOOK COUNTY UNIFIED CRIMINAL DOCKET

APPELLANT'S REPLY BRIEF

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Petitioner-Appellant Dennis Winchester respectfully submits this Reply Brief in support of the Appellant's appeal from a judgment of the Aroostook County Unified Criminal Docket.

1. Ineffective Assistance of Trial Counsel

An ordinary fallible criminal defense attorney representing a defendant in a delayed (2.5 years) or much delayed (3.5 years) pending criminal case, *upon request of the defendant*, should always assert a speedy trial violation claim in a motion to dismiss filed under M.R.U. Crim. P. 12(b)(1). Maybe under some circumstances such a speedy trial motion should be filed even if not requested by the defendant, but this case does not raise that issue because Winchester repeatedly requested his attorneys file such motions. ***Such a speedy trial motion should be filed even if it might be denied*** because (1) the motion might be granted (which would be a total victory for the defendant), (2) the motion might be denied without prejudice to its renewal if the criminal case does not move forward promptly or more promptly, (3) the motion might be denied with the setting by the trial court of a date or range of dates for trial, or (4) the motion, even if denied, might spur or stimulate the State and the Court to move forward with the processing of the criminal case more quickly (no more "languishing" of the cases). The point is that such a speedy trial motion may make a material and beneficial difference in a criminal case without actually being granted. The consideration of

such a speedy trial motion promotes "confidence in the outcome of the case." *Theriault v. State*, 2015 ME 137, ¶ 19, 125 A.3d 1163. So such a speedy trial motion should ordinarily and routinely be made upon request of the defendant in every delayed or greatly delayed criminal case. That is what an ordinary fallible criminal defense attorney would do. In PCR litigation a petitioner should *not* be required to prove that if a trial attorney had made a speedy trial motion that motion would have been granted. Instead, the petitioner should only be required to prove that if such a speedy trial motion had been made it would have had a beneficial effect on the criminal case (either a dismissal *or* a scheduling improvement) and promoted "confidence in the outcome of the case." The PCR court did not make this analysis of the various possible speedy trial motions, so the PCR judgment should be reversed. Finally, in this Winchester case the record is clear that Winchester wanted to vigorously assert his speedy trial rights and *repeatedly* spoke with his attorneys about that topic. 06/08/2021 Evidentiary Hearing at 13-19. The Appellee has acknowledged that Winchester advocated for an "assertion to a speedy trial." Appellee's Brief at 4.

Also, the PCR court erred in its resolution of the various motions for the return of property. Winchester filed motions seeking the return to him of various items that had been seized by the police and then returned by the police to the persons the police thought were the owners of the items. The PCR court found

that the hearing and disposing of motions "regarding the return of seized items to the owners" "took 15 months to be resolved." A 40. The PCR court said, "The largest delay was attributable to the litigation related to the motions filed regarding the return of seized items to the owners. . . . The court does not know why these motions took 15 months to be resolved, and agrees that seems excessive. But in no way does it appear it was due to fault of the State." A. 40. No, everybody was just litigating the return-of-property motions, for months and months. *But those return-of-property motions were* ***COLLATERAL*** *to Winchester's criminal cases* and in no way justified the delays in the prosecutions of Winchester's criminal cases. Those return-of-property motions easily could have been litigated while the criminal cases were moving forward or even after Winchester was acquitted, found guilty at a trial, sentenced, or had the indictments dismissed. The pendency of those return-of-property motions did not justify or excuse the complete failure of Winchester's trial attorneys to pursue speedy trial remedies in the face of such long, multi-year delays. The delays in Winchester's cases of 2.5 to 3.5 years were presumptively prejudicial. Amicus Maine AG Brief at 17, 19 (delays of "2.5 to 3.5 years" were "presumptively prejudicial"). The PCR court's denial of this claim of ineffective assistance of counsel was error.

2. The Substantive Right to a Speedy Trial

The Appellant requests that this Court rule that an unexcused delay of 12 months in the prosecution of a criminal case will ordinarily be viewed as a presumptively prejudicial delay warranting dismissal of the case. *State v. Willoughby*, 507 A.2d 1060 (Me. 1986)(a pretrial delay of 14 months was "presumptively prejudicial"); *Doggett v. United States*, 505 U.S. 647, 652 n. 1 (1992)("presumptively prejudicial at least as it approaches one year"). The Appellee complains about the Appellant's resort to the "presumptively prejudicial delay" analysis, Appellee's Brief at 5-6, but the "presumptively prejudicial delay" analysis has been a part of Maine speedy trial law for a long time, *State v. Willoughby*, *supra* at 1064-1065 (Me. 1986)(14 month delay was "presumptively prejudicial") and is recognized by the Maine Attorney General, Amicus Maine AG Brief at 17, 19 (delays of "2.5 to 3.5 years" were "presumptively prejudicial"). The delay period should be measured from the commencement of the criminal proceedings (arraignment on a complaint or initial appearance or arraignment on an indictment, whatever comes first). "Unexcused" means not affirmatively excused as being caused or requested by the defendant or extraordinary circumstances. "Unexplained" or "uncertain" delays should not be excused. To excuse "unexplained" or "uncertain" delays would eviscerate and undermine the speedy trial right in many if not most cases and fail to give the State an affirmative incentive to move forward with a prosecution in a timely manner. If a prosecutor

(who completely controls the initial timing of complaints and indictments) can let a case "languish" and get away with it, then that's what some prosecutors will do.

Finally, for reasons explained in the Appellant's Brief at 7-10, and as argued in the Amicus ACLU of Maine Brief at 6-7, to prevail on a speedy trial claim, a defendant should *not* be required to prove any particular prejudice from a delay. *Doggett v. United States*, 505 U.S. 647, 655-656 (1992)(no showing of actual prejudice required: "Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial *in ways that neither party can prove or, for that matter, identify*." (italics added)). To the extent the elimination of the showing of prejudice requirement will make Maine law under the Maine Constitution, Article I, Section 6 different from federal law under the Sixth Amendment to the U.S. Constitution (which it will), that is exactly what the Appellant requests that this Court do. This Court, not the U.S. Supreme Court, is in charge of the interpretation of the Maine Constitution, and the Maine Constitutional Speedy Trial Right unfortunately is not "fleshed out" by a Speedy Trial Act the way the federal constitutional right is. *See* Appellant's Brief at 13-15.

3. Clarification of A Sentenced Inmate's Speedy Trial Rights

The Appellant respectfully requests that this Court clarify that under Maine law a sentenced and incarcerated inmate has a speedy trial right under Article I,

Section 6 of the Maine Constitution, which provides in part: "In all criminal prosecutions, the accused shall have a right to . . . have a speedy, public and impartial trial." That provision makes no exception for incarcerated inmates. Indeed, incarcerated and sentenced inmates facing charges in new or other cases may need speedy trials *more* than unincarcerated defendants. For example, many MDOC programs (such as release to Community Supervision and some educational programs) are *not* made available by the MDOC to inmates that have unresolved pending criminal cases. The Appellee has argued that sometimes incarceration can benefit an inmate, Appellee's Brief at 8, but the reply to that argument is that such benefits may sometimes be available but not when MDOC programs are withheld from an inmate because the inmate has other pending cases. Simply put, the constitutional phrase "all criminal prosecutions" includes criminal prosecutions against incarcerated inmates. An attorney representing an incarcerated inmate in a delayed or much delayed pending criminal case should always assert a speedy trial violation claim in a motion to dismiss filed under M.R.U. Crim. P. 12(b)(1). That is what an ordinary fallible attorney would routinely do in such circumstances.

The Appellant makes this request for the clarification of the rights of sentenced and incarcerated inmates because "reading between the lines" of the evidence in this case Winchester suggests that what happened to him and his cases

is that once he was convicted in the first case and sent to prison, the prosecutor "took his foot off the gas" in the prosecution of the other cases because the prosecutor "had the defendant where he wanted him (i.e., in prison)" and there was no need to rush forward on the other cases. Winchester's defense attorneys may have felt the same way. So Winchester's cases languished, in violation of his Speedy Trial right.

4. The Claim Against Appellate Counsel

The ineffective assistance of counsel claim against Winchester's appellate counsel is complicated, of course, by this Court's draconian and unfortunate law concerning waiver of appellate claims, i.e., that a party may not normally appeal from an available claim not asserted in the trial court, and in this case Winchester's speedy trial claims were not asserted in the trial court by his attorneys (except just before the last trial) although Winchester himself raised speedy trial questions with the trial court. But this Court has the authority and power to consider such possibly otherwise-waived claims "in the interests of justice," and the whole point of the U.S. Supreme Court's *Garza* decision is that it may be ineffective assistance of counsel for an appellate counsel to fail to assert a client-requested appellate claim even if that claim is apparently unlikely to succeed. *Garza v. Idaho*, 586 U.S. __ (2019). If appellate counsel had raised the speedy trial issue on appeal, this Court would have had the opportunity to address

Winchester's speedy trial claims at that time.

5. Conclusion

Appellant Dennis Winchester respectfully requests that this Court vacate the UCD Court's denial of the Appellant's Petitions for Post-Conviction Review and remand this matter for further proceedings on said Petitions in the UCD Court.

Dated: September 1, 2022

/s/ Lawrence C. Winger

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Certificate of Service

The undersigned Lawrence C. Winger, Esq. hereby certifies that service of a filing was made as follows:

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Inmate Dennis Winchester (by U.S. Mail)

Date of Service: September 1, 2022

Dated at Portland, Maine, September 1, 2022

/s/ Lawrence C. Winger

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