STATE OF MAINE
AROOSTOOK, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. ARO-21-312

STATE OF MAINE,
Appellee

v.

DENNIS WINCHESTER,
Appellant

ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET

BRIEF OF AMICUS CURIAE, MAINE OFFICE OF THE ATTORNEY GENERAL

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STATEMENT OF THE ISSUES

I. **Whether Winchester's right to speedy trial was violated under either the Maine or United States Constitutions.**

II. **Whether this case is a proper vehicle to announce a change in the scope of the right to a speedy trial under the Maine Constitution.**

SUMMARY OF THE ARGUMENT

1. Winchester's right to speedy trial was not violated under either the Maine or United States Constitutions. For thirty years this Court has held the analysis of such claims under both constitutions is identical, and for fifty years has followed the Supreme Court's four-part balancing test to decide such claims. While the 2.5 to 3.5 years between charges and trial/plea in Winchester's many cases was presumptively prejudicial, it was not so long as to constitute a *per se* violation of the right to speedy trial. Winchester's multiple changes of counsel and protracted litigation of a motion to suppress were the causes of the delay. Winchester never filed a demand for speedy trial, nor did he move to dismiss the indictments based on an alleged violation of his right to speedy trial, nor did he show any actual prejudice to his defense, such as missing witnesses or diminished memory, as a result of the delay.

2. This case is a poor vehicle to announce a change in the scope of the right to a speedy trial under the Maine Constitution. As a discretionary appeal in a post-conviction matter, the only matter for the Court to be deciding is whether the post-conviction court properly decided that counsel were not ineffective for not filing motions for speedy trial and for not raising the issue on direct appeal. If this Court is considering expanding the protection of the Maine Constitution's right to speedy trial for the first time since statehood, it should wait for a case on direct appeal where the issue has been preserved and litigated below.

STATEMENT OF THE CASE

On March 31, 2014, the State filed a criminal complaint charging Winchester with burglary. *CR-14-147.* Counsel was appointed. On May 9, 2014, the Aroostook County Grand Jury returned an indictment on the burglary charge in CR-14-147.

On June 3, 2014, the State filed a criminal complaint charging Winchester with burglary and theft. *CR-14-267.* The same counsel on

CR-14-147 was appointed on this case. On July 11, 2014, the Aroostook County Grand Jury returned an indictment on the burglary charge in CR-14-267.

On November 10 and 25, 2014, the State filed additional criminal complaints charging Winchester with burglary, theft, and other charges. *CR-14-515, CR-14-545, CR-547.* The same counsel on CR-14-147 was appointed on these cases.

In November 2014, less than nine months after the complaint was filed, Winchester went to trial on the CR-14-147 burglary charge, but a mistrial was declared. At a retrial in January 2015, the jury returned a guilty verdict.

On January 9, 2015, the Aroostook County Grand Jury returned an indictment on the charges in CR-14-515, [1] CR-14-545, and CR-14-547, and also returned an indictment charging yet another burglary count and another theft count. *CR-15-3.* The same counsel on CR-14-147 and the other cases was appointed on CR-15-3.

[1] According to the docket record, the Grand Jury did not return an indictment on the burglary count in CR-14-515 that had initially been charged by complaint. (App. 104).

On February 18, 2015, the Superior Court (*Stewart, J.*) sentenced Winchester to a five-year term of imprisonment on CR-14-147, with all but three-years suspended.[2] On October 27, 2015, the Law Court affirmed Winchester's judgment of conviction in CR-14-147 in a memorandum of decision on direct appeal. *State v. Winchester,* Mem-15-82 (Oct. 27, 2015).

On March 6, 2015, the Aroostook County Grand Jury returned an indictment charging another burglary count and another theft count. *CR-15-67.*

Shortly thereafter, Winchester's appointed counsel moved to withdraw, and new counsel was appointed on all the pending charges. On April 12, 2015, Winchester himself wrote a letter to the clerk of courts inquiring whether his former counsel had filed, *inter alia,* motions for speedy trial on the pending charges.[3] An assistant clerk,

[2] Winchester was in execution of this sentence until May 2017. (App. 22).

[3] The letter identified the pending charges as docket numbers CR-14-515, CR-14-545, CR-14-547, and CR-15-3. The letter did not mention docket numbers CR-14-267 or CR-15-67. The letter also mentioned a docket number CR-14-546 that is not included in the appendix nor identified in the Superior Court's post-conviction decision.

identified only by initials, replied that he had filed the motions.[4]

On February 28, 2017, a jury was selected for the charges pending in CR-15-67, but trial was not held. Although the docket record does not reflect the reasons for this, the Superior Court issued an order on March 1, 2017 suggesting that Winchester was "trying to control the docket" by firing his lawyer.

In April 2017, at Winchester's request, his lawyer withdrew, and new counsel was appointed. In August 2017, that lawyer withdrew when he accepted employment in a different part of the state, and yet another lawyer was appointed to represent Winchester.

On November 9, 2017, Winchester was convicted after a jury trial on CR-14-545. On December 6, 2017, the Superior Court (*Stewart, J.*) sentenced Winchester to a straight five-year term of imprisonment in CR-14-545.

That same date, Winchester entered conditional *nolo* pleas on the remaining charges, preserving his ability to assert, among other issues, a denial of his right to speedy trial. *CR-14-267, CR-14-515, CR-14-547, CR-15-3, CR-15-67.* The court imposed five-year terms of imprisonment

[4] Regarding a motion to suppress in CR-15-3, the assistant clerk was correct. (App. 134); Regarding motions for speedy trial in any of the pending cases, the assistant clerk was wrong. (App. 103-105; 114-115; 123-124; 132-134).

to be served concurrently with each other but consecutive to the five-year term imposed in CR-14-545.

On September 13, 2018, the Law Court affirmed Winchester's judgments of conviction in a reported decision. *State v. Winchester,* 2018 ME 142, 195 A.3d 506*.* Although the speedy trial issue had been preserved as part of the conditional plea, Winchester's counsel elected not to raise the issue on appeal because no motion for speedy trial had ever been filed in any of the cases.

On January 28, 2019, Winchester filed six petitions for post-conviction review to challenge the convictions in CR-15-67 (*PCR CR-19-129*), CR-14-515 (*PCR CR-19-130*), CR-14-547 (*PCR CR-19-131*), CR-15-3 (*PCR CR-19-132*), CR-14-267 (*PCR CR-19-133*), and CR-14-545 (*PCR CR-19-134*). The petitions each asserted in part that counsel were ineffective for not filing motions for speedy trial and for not raising the speedy trial issue on direct appeal.

No amended petitions were filed, and on June 8, 2021 an evidentiary hearing was held. On July 28, 2022, the Superior Court (*Stewart, J.*) denied the petitions in a written decision. The court found, in part, that counsel were not ineffective for not filing motions for speedy trial as Winchester was responsible for the bulk of the delay

through his repeated changes of counsel and protracted litigation of motions to suppress, motions for return of property, including motions for reconsideration and for further findings. The post-conviction court specifically found that it "would have been more prejudicial to proceed to trial without rulings" on the various motions or "with an attorney representing him that he was in conflict with and wanted to fire." (App. 41).

On August 5, 2021, Winchester filed a notice of discretionary appeal to this Court. Following submission of a memorandum, the Court granted a certificate of probable cause on the speedy trial issue.

On April 14, 2022, the Clerk of this Court invited the undersigned to submit an amicus brief to address the following:

1. Was Winchester's right to a speedy trial violated under article 1, section 6 of the Maine Constitution? Your response should include a discussion of the proper test Maine courts should apply in analyzing claims of speedy-trial violations under the Maine Constitution.

2. If Winchester's right to a speedy trial was not violated under the Maine Constitution, was it violated under the Sixth Amendment of the United States Constitution?

ARGUMENT

I. Winchester's right to speedy trial was not violated under either the Maine or United States Constitutions.

Winchester's right to speedy trial was not violated under either the Maine or United States Constitutions. The undersigned includes both constitutions in this section because for the last thirty years this Court has stated that "the analysis of a speedy trial claim is identical under both the Federal and State Constitutions." *State v. Joubert,* 603 A.2d 861 (Me. 1992); *See also State v. Harper,* 613 A.2d 945 (Me. 1992). Indeed, for the past fifty years this Court has been applying the four-part balancing test announced in the United States Supreme Court's landmark decision in *Barker v. Wingo,* 407 U.S. 514 (1972) to claims under both the Maine and United States Constitutions.

The Court has considered speedy trial claims in 44 cases since statehood – *not one* has held that the Maine Constitution provides broader protection than is required under the Sixth Amendment.

A. Maine Constitution

Article I, section 6 of the Maine Constitution provides in part that "in all criminal prosecutions, the accused shall have a right … to a speedy, public and impartial trial." Me. Const. art. I § 6. From statehood

to 1967, when the United States Supreme Court incorporated the Sixth Amendment right to speedy trial against the states through the Fourteenth Amendment due process clause, *Klopfer v. North Carolina,* 386 U.S. 213 (1967), the only right to speedy trial a criminal defendant had was under the Maine Constitution.

The first mention of this right in a Maine case was in 1853 in *Inhabitants of Saco v. Wentworth,* in which the Court held that a statute adding fees and conditions to appeal a judgment of a municipal court was unconstitutional because it restricted the right to speedy trial. 37 Me. 165, 173 (1853). Over the course of the next 110 years, the Court only decided five more speedy trial cases. In the first three, the Court found no speedy trial violation because the defendants had made no demand for speedy trial; the Court determined that inaction on the part of a defendant could constitute a waiver of the right. *State v. Slorah,* 118 Me. 203, 106 A. 768, 769-770 (1919); *State v. Kopelow,* 126 Me. 384, 138 A. 625, 626 (1927); *State v. Boynton,* 143 Me. 313, 62 A.2d 182, 188-189 (1948).

In 1960, the Court held for the first time that a defendant's right to speedy trial had been violated. *State v. Couture,* 156 Me. 231, 163 A.2d 646, 656-657 (1960). In that case, a defendant who was in prison for

one offense was charged with a new offense, but had not been provided a copy of the new indictment for 8 months, thus preventing him from making a demand for speedy trial. *Id.* at 649-650. The Court stated that such a long delay could have been prejudicial to the defendant because favorable witnesses could have died or otherwise become unavailable. *Id.* at 657. *Couture* was notable because it did not require the defendant to show actual prejudice. The decision's precedential impact was substantially undercut the following year in *State v. Hale,* 157 Me. 361, 172 A.2d 631 (1961), when the Court held that *Couture* was limited to its facts. *Id.* at 635. Indeed, the Court later held that *Couture*'s language about prejudice was merely dictum. *State v. Brann,* 292 A.2d 173, 180 (Me. 1972).

In 1967, the Court recognized that the Supreme Court had incorporated the Sixth Amendment speedy trial provision against the states in *Klopfer. State v. Coty,* 229 A.2d 205, 215 (Me. 1967). In several cases decided soon thereafter, the Law Court began incorporating language from Supreme Court decisions interpreting the Sixth Amendment's speedy trial provision to address speedy trial claims. *See, e.g., State v. Castonguay,* 240 A.2d 747, 750 (Me. 1968), *citing United States v. Elwell,* 383 U.S. 116, 120 (1966)("the right of a speedy trial is

necessarily relative. It is consistent with delays and depends on the circumstances."); *State v. O'Clair,* 292 A.2d 186, 193 (Me. 1972), *citing Elwell* (right to speedy trial "is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of the accused to defend himself.").

In 1972, in *State v. Brann,* the defendant argued (as Winchester's attorney does here) that Maine's speedy trial provision provided more protection than the Sixth Amendment, relying on the Law Court's language in *Couture* about prejudice. 292 A.2d at 179. The Law Court's decision noted that Maine's speedy trial provision, at a minimum, guarantees no less protection than that guaranteed by the Sixth Amendment. *Id.* at 176. The Court addressed the claim under the Sixth Amendment first and found no violation because the defendant did not show that a nine-month delay between indictment and trial would trigger a presumption of prejudice, nor did he show actual prejudice. *Id.* at 177-179. The Court also rejected the state constitutional claim, specifically finding that *Couture's* language about prejudice was dictum and reiterating that a showing of prejudice was required to make out a speedy trial violation. *Id.* at 179-185.

Late that same year in *Dow v. State,* 295 A.2d 436 (Me. 1972), the Court cited *Brann*'s prejudice requirement in finding that a five-month delay between indictment and trial would not establish prejudice or trigger a presumption of prejudice. *Id.* at 439-440. The Court also noted that the defendant had not made a demand for speedy trial and had not filed a motion to dismiss because of a speedy trial violation. *Id.* Additionally, the Court found that the State was not responsible for the delay and that the delay was attributable to the defendant's pretrial motions and requests. *Id.*

In 1973, the Law Court recognized that the Supreme Court had decided *Barker v. Wingo* the previous year.[5] *State v. Carlson,* 308 A.2d 294, 298 (Me. 1973). The Court later described *Barker* as a "landmark" decision. *State v. Dudley,* 433 A.2d 711, 713 (Me. 1981). Over the next eleven years (and thereafter), the Law Court consistently applied the *Barker* test when addressing speedy trial claims, whether it was interpreting the U.S. Constitution, the Maine constitution, or both.[6]

[5] The Barker test will be discussed in the next section.

[6] *State v. Bessey,* 328 A.2d 807 (Me. 1974); *State v. Lewis,* 373 A.2d 603 (Me. 1977); *State v. Steeves,* 383 A.2d 1370 (Me. 1978); *State v. Catlin,* 392 A.2d 27 (Me. 1978); *State v. Fernald,* 397 A.2d 194 (Me. 1979); *State v. Smith,* 400 A.2d 749 (Me. 1979); *State v. Lee,* 404 A.2d 983 (Me. 1979); *State v. Goodall,* 407 A.2d 268 (Me. 1979);

In 1984, however, the Law Court signaled that it was going to be adopting a new approach to constitutional analysis called the "primacy" method. *State v. Cadman,* 476 A.2d 1148, 1150 (Me. 1984). Under this approach, the Court would assess claims under the Maine Constitution first and would only address claims under the U.S. Constitution if there was no remedy under the state constitution. *Id.*

Since the defendant in *Cadman* was making a speedy trial claim, the Court first assessed it under article I section 6. *Id.* at 1150-51. The Court stated that the right to speedy trial under the state constitution was "necessarily a relative matter," and "must be determined from the circumstances of the particular case." *Id.* at 1150. The court rejected the state constitutional claim finding that the defense had to show something more than a mere delay, noting that the defendant had only made a demand for speedy trial one month before trial began and that he had not shown prejudice. *Id.* at 1151

The Court then applied the *Barker* test under the Sixth Amendment and rejected the claim for similar reasons (no demand, no prejudice). *Id.* at 1151-52. The Court added a cautionary note: "we need

State v. Dudley, 433 A.2d 711 (Me. 1981); *State v. Mahaney,* 437 A.2d 613 (Me. 1981).

not, and do not, at this time express an opinion on whether the speedy trial guarantee of the Maine Constitution affords broader protection or less protection than its federal counterpart." *Id.* at 1152. To this date, the Court still has not expressed an opinion that Maine's speedy trial guarantee affords broader protection than the Sixth Amendment. All of the Law Court's speedy trial cases decided since *Cadman* implicitly suggest that the speedy trial provision in Article I section 6 provides coextensive protection, because the Court has utilized the same test to assess such claims under both constitutions.

Despite the language in *Cadman*, the Court almost immediately stopped using the primacy approach in speedy trial cases and went back to the four-part *Barker* test. *See, e.g., State v. Spearin,* 477 A.2d 1147, 1154 (Me. 1984). Indeed, in 1985 the Court stated that the *Barker* test had been used "under both our state and federal constitutions." *State v. Murphy,* 496 A.2d 623, 627 (Me. 1985). Over the next seven years, the Court decided six additional speedy trial cases, all using the *Barker* test under both constitutions.[7] In 1992, the Court explicitly stated that "the

[7] *State v. Willoughby,* 507 A.2d 1060 (Me. 1986); *State v. Beauchene,* 541 A.2d 914 (Me. 1988); *State v. Carisio,* 552 A.2d 23 (Me. 1988); *State v. McLaughlin,* 567 A.2d 82 (Me. 1989); *State v. Michaud,* 590 A.2d 538 (Me. 1991); *State v. Hunnewell,* 593 A.2d 216 (Me. 1991).

analysis of a speedy trial claim is identical under both the Federal and the State Constitution." *Joubert,* 603 A.2d 861, 863 (Me. 1992); *Harper,* 613 A.2d 945, 946 (Me. 1992).

Since 1992, in seven additional cases addressing speedy trial claims, whether under the U.S. or Maine Constitution, the Law Court has consistently applied *Barker's* four-part test.[8] The Court last addressed a speedy trial claim in 2012. "[B]ased on the court's most recent pronouncements, it is questionable whether this provision (art. I sec. 6's speedy trial clause] retains any independent jural significance today." Tinkle, *The Maine Constitution: A Reference Guide,* at 34 (1992).

The consistent threads throughout the Maine cases from the beginning have been the necessity for a *demand* for speedy trial, and, for the last fifty years, a showing of actual prejudice.

B. United States Constitution

The Sixth Amendment to the United States Constitution provides in pertinent part, "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial…" U.S. Const. amend VI. As

[8] *State v. Rippy,* 626 A.2d 334 (Me. 1993); *State v. Uffelman,* 626 A.2d 340 (Me. 1993); *State v. Wilson,* 671 A.2d 958 (Me. 1996); *State v. Hider,* 715 A.2d 942 (Me. 1998); *State v. Drewry,* 2008 ME 76, 946 A.2d 981; *State v. Christen,* 2009 ME 78, 976 A.2d 980; *State v. Hofland,* 2012 ME 129, 58 A.3d 1023.

referenced previously, the United States Supreme Court incorporated the Sixth Amendment's right to speedy trial against the states in 1967 and five years later decided *Barker v. Wingo,* which established the ad hoc balancing test the Supreme Court, and this Court, use in speedy trial cases. The test weighs four factors on a case-by-case basis: "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. at 530.

The first factor, length of delay, is a "triggering mechanism." *Id.* "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id.* There is no hard and fast rule about the length of time required to trigger a presumption of prejudice. "Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year." *Doggett v. United States,* 505 U.S. 647, 652 n. 1 (1992)(*citing* 2 W. LaFave & J. Israel, *Criminal Procedure* § 18.2, p. 405 (1984); Joseph, *Speedy Trial Rights in Application*, 48 Ford.L.Rev. 611, 623, n. 71 (1980)(citing cases)).

The second factor, reasons for the delay, assigns different weights in the balance depending on the cause of the delay – a deliberate

attempt to delay the trial by the government to hamper the defense weighs heavily against the government; negligence or overcrowded courts are neutral factors that weigh less heavily against the government; valid reasons, such as missing witnesses, should justify delay and not weigh against the government at all. *Barker,* 407 U.S. at 531. In contrast, delay caused by the defense weighs against the defendant. *Vermont v. Brillon,* 556 U.S. 81, 90 (2009).

The third factor, the defendant's assertion of his speedy trial right, "is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker,* 407 U.S. at 531-532. "[F]ailure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.* at 532.

Finally, the fourth factor, prejudice to the defendant, assesses three interests that the speedy trial right is designed to protect, "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.*

C. Winchester's case

Assessed under the identical test applied under the Supreme Court's and this Court's speedy trial precedents, the record readily establishes that Winchester's right to a speedy trial was not violated.

First, while Winchester was charged with multiple offenses at different times, the length of delay between charge and trial/plea in the cases that were at issue in the post-conviction proceedings ranged between 2.5 to 3.5 years.[9] This would be presumptively prejudicial, but not *per se* prejudicial. *State v. Joubert,* 603 A.2d 861, 863 (Me. 1992)(57 months not *per se* prejudicial); *State v. Michaud,* 590 A.2d 538, 540 (Me. 1991)(32 months not *per se* prejudicial). "The mere lapse of time, however, does not establish a *per se* violation of that right."[10] *State v. Beauchene,* 541 A.2d 914, 918 (Me. 1988)(8 year delay between indictment and trial not presumptively prejudicial). Since the length of

[9] In Winchester's first case, CR-14-147, the time between charge and first trial was only eight months, and retrial two months after that. He was sentenced on that charge in February 2015 and was in execution of that sentence until May 2017. His remaining charges were all resolved by trial or plea less than seven months after he completed his sentence in CR-14-147.

[10] Petitioner's present counsel advocates for a new constitutional rule that would establish a *per se* speedy trial violation based solely on passage of time without regard to the other *Barker* factors such as prejudice. *Blue Brief* at 9-10, 16. Given the toll of the pandemic and limited judicial resources, and if even a portion of these defendants committed the offenses, this would have the net effect of allowing hundreds, if not thousands, avoid responsibility for their crimes and cause untold pain to victims.

delay in Winchester's case is presumptively prejudicial, inquiry must be made into the other three *Barker* factors.

It is these three remaining factors that doom Winchester's speedy trial claims. Examination of the second factor, reasons for the delay, establishes that none of the delay was attributable to the State. *State v. Goodall,* 407 A.2d 268, 281 (Me. 1979)(finding it significant in rejecting speedy trial claim that the record did not show "any bad faith or improper motive on the State's part" to delay the trial). Rather, the lengthy delay was prompted by Winchester's multiple changes of counsel as well as his protracted litigation of motions to suppress and for return of property. *State v. Beauchene,* 541 A.2d 914, 919 (Me. 1988)(time spent litigating defense motions counts against defendant); *State v. Spearin,* 477 A.2d 1147, 1154 (Me. 1984)(citing multiple changes of defense counsel as factor in rejecting speedy trial claim). "Defendant was free to take whatever actions he felt were necessary to protect his rights prior to trial. He may not, however, use the delaying consequences of those actions as a basis for claiming that his trial was improperly delayed." *Id.* at 1154-55. This factor weighs heavily against Winchester.

The third factor, defendant's assertion of the right, also weighs against Winchester as formal demands for speedy trial were never filed in any of his cases, nor were motions to dismiss the charges based on an alleged violation of his speedy trial rights. As outlined above, under this Court's pre-*Barker* precedents, this factor alone would have foreclosed Winchester's speedy trial claim under the Maine Constitution, as such a demand was a necessary prerequisite for such claims. Even if his *pro se* letter to the clerk inquiring whether his prior attorney had filed a speedy trial motion could be considered a demand for speedy trial, the other *Barker* factors (the fact that Winchester's changes in counsel and multiple motions were the reasons for the delay, no actual prejudice) would clearly have outweighed this factor. *See, e.g., Hofland,* 2012 ME 129, ¶ 12, 58 A.3d 1023 (early demand for speedy trial outweighed by defendant's motions causing delay and no actual prejudice in finding no speedy trial violation).

Finally, Winchester showed no actual prejudice. *Goodall,* 407 A.2d at 281 (no actual prejudice, no speedy trial violation); *State v. Brann,* 292 A.2d 173, 184 (Me. 1972)(same). For much of the time between charges and trial/plea, Winchester was already in execution of a sentence for a previous burglary conviction, so "oppressive pretrial

incarceration" was minimally implicated. Moreover, Winchester never claimed that his defense was in any way hindered by the delay, such as through missing witnesses or diminished memory. Indeed, the delay allowed Winchester to litigate motions that, if successful, could have significantly enhanced his defense, and enabled him to proceed to resolution represented by counsel with whom he was satisfied. (App. 41, noting potential prejudice if motions and counsel issues were not resolved).

Since Winchester was responsible for the delay through his motions and changes in counsel, made no actual demand for speedy trial, and showed no actual prejudice from the delay, Winchester's speedy trial claims were not viable. Accordingly, the post-conviction court properly determined that trial and appellate counsel were not ineffective for not filing motions for speedy trial or for not raising the issue on direct appeal.

II. This case is a poor vehicle to announce a change in the scope of the right to a speedy trial under the Maine Constitution.

Since this is a discretionary appeal from the denial of a post-conviction review petition and not a direct appeal following conviction

where a speedy trial motion had actually been litigated, it is a particularly poor vehicle to announce a change in the scope of the right to a speedy trial under the Maine Constitution. In an appeal such as this, the only matter for the Court to consider is whether the post-conviction court properly determined that trial and appellate counsel did not provide constitutionally ineffective representation to Petitioner Winchester by not filing a motion to dismiss for violating his right to speedy trial or by not raising that issue on direct appeal. In other words, what would "ordinary, fallible" lawyers have done under the circumstances?

Since this Court has been applying the *Barker v. Wingo* four-factor balancing test for fifty years and has repeatedly held for over thirty years that the analysis of a right to speedy trial claim is identical under both the federal and state constitutions, an "ordinary, fallible" lawyer would reasonably have believed that the *Barker* test was the test that would have been applied to such a claim. Under this test, a motion to dismiss grounded in a violation of the right to speedy trial was doomed to fail.

An "ordinary, fallible" lawyer would have no basis, given this Court's many precedents, to assert that the right to speedy trial under

the Maine Constitution provides more protection to Petitioner Winchester than the same right under the Sixth and Fourteenth Amendments of the United States Constitution.[11]

If the Law Court is contemplating an expansion of this right under the Maine Constitution for the first time, it should consider the issue only in a case where the issue is properly preserved in the trial court and raised on direct appeal.

[11] The existence of the federal Speedy Trial Act does not invalidate the constitutional parameters established by the Supreme Court. *Cf. Blue Brief at 15.*

CONCLUSION

For the foregoing reasons, Winchester's right to speedy trial was not violated under either the Maine or United States constitutions. Given the facts and procedural history of this case, it is an inappropriate vehicle to formulate and announce a change in the scope of the right under the Maine Constitution. Accordingly, the order denying Winchester's petition for post-conviction review should be affirmed.

Respectfully submitted,

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DATED: August 10, 2022

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CERTIFICATE OF SERVICE

I, Donald W. Macomber, Assistant Attorney General, certify that I have mailed two copies of the foregoing "BRIEF OF AMICUS CURIAE, MAINE OFFICE OF THE ATTORNEY GENERAL" to the Winchester's attorney of record, Lawrence Winger, Esq. and to the State's attorney of record, District Attorney Todd Collins.

DATED: August 10, 2022

/s/ Donald W. Macomber
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