State of Maine	Supreme Judicial Court sitting as the Law Court Docket no. ARO-21-312
Winchester v. State of Maine	Appeal from Aroostook County Unified Criminal Docket

Brief for Amicus Curiae

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Issues Presented for Review

The issues on appeal are whether: 1) the appellant's right to a speedy trial under the Maine Constitution was violated; and 2), if not, whether his speedy-trial right under the United States Constitution was violated.

Summary of the Argument

The right to a speedy trial under Maine's constitution should be recognized as a greater right or protection than its equivalent under the U.S. constitution because the Law Court has never held clearly held these rights to be identical. Moreover, even if *arguendo* Maine's precedents are interpreted to mean that these speedy-trial provisions are coextensive, the appropriate time has come to depart from those precedents because Maine, unlike other jurisdictions, has no speedy-trial right protections under court rules or statutes, and because Maine's trial courts have a gigantic backlog of cases that requires a systemic change to preserve the right to a speedy trial for criminal defendants in general.

The Court should vacate the decision on appeal and remand with an order for the lower court to decide whether Winchester's right to a speedy trial under Maine's constitution was violated.

Because the state constitutional right provides greater protection than the equivalent federal constitutional right, neither this Court nor the lower court needs to analyze the case under the federal constitution.

Argument

1.1 Standard of Review

As a threshold matter, this appeal is subject to a standard of review in which the Court "review[s] questions of law *de novo*." Theriault v. State, 2015 ME 137, ¶ 12, 125 A.3d 1163.

1.2. The Court Should Recognize Section 6 as Distinct from the Sixth Amendment

The Law Court has frequently either assumed without deciding or has expressly stated that a particular right provided by the Maine Constitution is no greater than its equivalent right under the United States Constitution. *See, e.g.*, State v. Tarantino, 587 A.2d 1095, 1098 (Me. 1991) (rejecting without explanation appellant's "suggestion that we use this case to announce the existence of a state exclusionary rule based on article I, section 5 of the Maine Constitution and on these facts to extend greater protection under our constitution than that required under the" Fourth Amendment). But the federal constitution sets the floor, not the ceiling, for individual rights and protections, *see* State v. Caouette, 446 A.2d, 1120, 1122 (Me. 1982) ("federal decisions do not serve to establish the complete statement of controlling law but rather

to delineate a constitutional minimum or universal mandate for the federal control of every State"), and, moreover, there is no obvious reason why the Court should treat any provision of the Declaration of Rights (*i.e.*, Article I of Maine's constitution) as surplusage or little more than a duplication of its analogue under the federal Bill of Rights (*i.e.*, the first ten amendments to the United States' constitution), *cf.* Labbe v. Nissen Corp., 404 A.2d 564, 567 (Me. 1979) ("Nothing in a statute may be treated as surplusage if a reasonable construction supplying meaning and force is otherwise possible."). On the contrary, this Court has recognized greater rights or protections under the Maine Constitution in comparison with other federal constitutional rights. *See*, *e.g.*, State v. Hunt, 2016 ME 172, ¶ 19, 151 A.3d 911 (distinguishing analysis for due process fairness for use of a defendant's incriminating statements at trial under Maine's due process clause from analysis under the federal Fifth Amendment); State v. Sklar, 317 A.2d 160, 170 (Me. 1974) (holding that right to jury trial under the Maine Constitution is more expansive than the right to a jury trial under the U.S. Constitution). And there are several compelling reasons why the

Court should adopt a construction of the state right to a speedy trial that offers greater protection than the Sixth Amendment does.

First, the Court's speedy-trial precedents, based on the research by the undersigned, have never clarified whether the federal and Maine versions of the right are identical. Under the "primacy approach," State v. Rowe, 480 A.2d 778, 781 (Me. 1984), Maine's constitution is "the primary protector of the fundamental liberties of Maine people," State v. Larrivee, 479 A.2d 347, 349 (Me. 1984), and accordingly the Court should not begin with an assumption that any provision from the Declaration of Rights is merely a redundancy for a right provided by the U.S. Constitution. To date, although the Court has held that the method of "analysis" under both provisions is "identical," State v. Joubert, 603 A.2d 861, 863 (Me. 1992), it has not held that the *substantive content* of each right is identical. And in other cases it has: suggested that the federal right offers only the "minimal protections," State v. Brann, 292 A.2d 173, 177 (Me. 1972); declined to decide whether Maine's speedy-trial right offers the same protections as the federal Sixth Amendment, State v. Cadman, 476 A.2d 1148, 1152 (Me. 1984); and applied the U.S. Supreme Court's test from Barker v. Wingo,

407 U.S. 514 (1972), with language that implies that a different test might control in other cases, State v. Murphy, 496 A.2d 623, 627 (Me. 1985) ("In a number of cases we have used the balancing test of *Barker v. Wingo* under both our state and federal constitutions. *See*, *e.g.*, State v. Smith, 400 A.2d 749 (Me. 1979)."). Furthermore, the undersigned has located no precedent in which the Law Court explains why it does not consider Section 6 to provide a greater right than the Sixth Amendment. Finally, as the leading treatise on the Maine Constitution has noted, in several older cases the Court used a speedy-trial analysis "without reference to the federal Constitution" and without any requirement of "a showing of actual prejudice." Tinkle, *The Maine State Constitution* 40 (2nd ed. 2013). Tinkle summarizes various holdings here and concludes that "the court has not overruled or sought to reconcile its past decisions in this area[.]" *Id.*

Second, even if *arguendo* this Court's unclear speedy-trial precedents are interpreted as recognizing no greater speedy-trial right under Section 6 than under the Sixth Amendment, the case at bar presents an opportunity to depart from that line of cases and establish greater protection under the state constitution. *Stare decisis*, after all,

does not require mindless adherence to precedent. *See* Helvering v. Hallock, 309 U.S. 106, 119 (1940) ("*stare decisis* is a principle of policy and not a mechanical formula"); Myrick v. James, 444 A.2d 987, 997 – 998 (Me. 1982). ("Precedents, once so established, however, do not become totally immune from change for all time."). At least one of the five factors for reconsideration of an established precedent that are described in *Myrick* apply to the speedy-trial issue:

> the rule of the prior decision operates harshly, unjustly and erratically to produce, in its case by-case application, results that are not consonant with prevailing, well-established conceptions of fundamental fairness and rationally-based justice[.]

Id. 1000. The rest of the factors do not clearly apply to this case, and, in any event, *Myrick* itself indicates that the five factors it discusses do not constitute an exhaustive list. *See id.* (courts must apply "these and *other similar* guidelines") (emphasis added). The use of the *Barker* balancing test might have been adequate in pre-pandemic times, but it certainly no longer protects the right to a speedy criminal trial in Maine. *See*, *e.g.*, State v. Reeves, 2022 ME 10, ¶¶ 25 – 33, _A.3d_ (discussing delays in trials caused by pandemic). Moreover, as discussed

above, it is far from clear what "rule of the prior decision[s]" has emerged from this Court's speedy-trial precedents, and, thus, a new framework would not mark a break from clearly established rules.

The enduring backlog of criminal cases in Maine's unified criminal dockets has exposed the problems that can result from reliance on a federal right to speedy trial that poorly fits Maine's system of criminal law. In recent years Maine's district and superior courts, despite the best efforts of everyone involved to keep the dockets moving, have failed to protect this important constitutional right and instead have caused defendants to endure stressful delays in the disposition of their cases. *See A Report to the Joint Convention of the Second Regular Session of the 130th Maine Legislature* (2022) (testimony of Chief Justice Valerie Stanfill) ("Pending cases overall have increased about 45% since pre-pandemic levels."); *A Report to the Joint Convention of the First Regular Session of the 130th Maine Legislature* (2021) (testimony of Acting Chief Justice Andrew Mead) ("the number of pending criminal matters increased by approximately 10,000 cases" between February 2020 and February 2021). Such results contravene principles of "fundamental fairness and rationally-based justice," as phrased in

Myrick, and the detailed speedy-trial standards proposed by the American Bar Association, *see ABA Standards for Criminal Justice: Speedy Trial and Timely Resolution of Criminal Cases* 12-1.2(a) (3rd ed. 2006) (right to speedy trial is "fundamental" and "should be effectuated and protected by rule or statute"). A trial in a normal case that occurs, for instance, two years after arraignment hardly resembles the common conception of "speedy." *See* Merriam-Webster's Collegiate Dictionary (Frederick C. Mish, ed., 11th ed. 2014) 1199 (defining *speedy* as "marked by swiftness of motion or action"). There is no constitutionally valid reason why defendants should bear the burden of the notorious backlog. *Cf.* State v. Cadman, 476 A.2d 1148, 1152 (Me. 1984) (delay caused by "crowded docket" "must be weighed against the State, because the responsibility for an overcrowded docket rests with the government rather than with an accused."); United States v. Black, 918 F.3d 243, 253 (2nd Circ. 2019) ("Pursuant to the Sixth Amendment, the court and the government owe an affirmative obligation to criminal defendants and to the public to bring matters to trial promptly.") (quotation marks omitted).

Third, the U.S. Supreme Court's Sixth Amendment precedents have been rendered against the backdrop of a statutory Speedy Trial Act, 18 U.S.C. §§ 3161 – 3174, and, with the exception of the small number of cases that fall under the two detainer statutes, *see* 34-A M.R.S. §§ 3042 and 9603, Maine has no analogue to that act. Maine has no procedural rule promulgated by the Supreme Judicial Court or enacted by the Legislature to enable a defendant to clearly assert the right to a speedy trial, and the only mechanism available is a motion for expedited trial under the generic rules for pretrial motions. *See generally* M.R.U. Crim. P. 12(b). Furthermore, Maine, unlike, *e.g.*, New York, *see* People v. Sibblies, 985 N.Y.S.2d 474, 8 N.E.3d 852, 853 (2014), has no black-letter law that provides defendants with a timetable of when they can expect the resolution of their cases and has nothing that remotely resembles a set of deadlines for trials based on the gravity of offense.

The absence of black-letter law (other than, of course, the federal and state constitutions) calls for this Court to issue a decision that unambiguously establishes strong protections for defendants who want to exercise the right to a speedy trial. The Maine Constitution, after all,

provides the overarching structure within which the judicial and legislative branches operate, *see* Me. Const. art. VI, § 6 (vesting Supreme Judicial Court with "[t]he judicial power of this State") and Me. Const. art. IV, § 1 (granting general power to make laws to the Legislature), and nothing in its text suggests that they may operate in a way that deprives individuals of rights that are found elsewhere in the same constitution or that some constitutional provisions outweigh others, *see id.* (Legislature has "full power to make all reasonable laws and regulations … not repugnant to this Constitution"). Consequently, both the trial court system and the criminal statutes must be understood to have no claim of superiority over the Declaration of Rights. The Maine Legislature, in promulgating criminal statutes and in deciding how to allocate funding to courts, law enforcement agencies, and prosecutors' offices, has played a major role in the volume of unresolved criminal cases, but, again, nothing in the Maine Constitution suggests that the legislature's exercise of its powers to make laws and set budgets, *see* Me. Const. art. IV, §§ 1 and 9, may be accomplished at the expense of individual rights. Finally, no provision of the Maine Constitution gives Maine's executive branch, acting

through the offices of the Attorney General, the various District Attorneys, and the governor to "faithfully execute[]" state laws, Maine Const. Art. V, § 12, any special priority over the rights of the individuals that they bring before the courts as defendants.

The Maine Supreme Judicial Court, given its roles as the primary source of interpretation of the Maine Constitution, *see* 4 M.R.S. § 57, and the administrative organ of the state judicial branch, *see* 4 M.R.S. § 1, is uniquely positioned to both construe the text of this constitution and issue rules that bind the lower courts.

It bears noting that other states' supreme courts have found the federal courts' approach inadequate, at least implicitly. Minnesota's version of the *Barker* analysis has the presumption of prejudice arising much sooner than it does under the federal courts' framework. *Compare* State v. Taylor, 869 N.W.2d 1, 9 (Minn. 2015) ("A delay that exceeds 60 days from the date of the demand [for a speedy trial] raises a presumption that a violation has occurred, and we must apply the remaining factors of the [*Barker*] test.") *with* Goodrum v. Quarterman, 547 F.3d 249, 257 (5th Circ. 2008) ("As the Supreme Court has observed, courts generally view a delay of approximately one year as

sufficient to require a full *Barker* analysis."). California, which has a statute that enforces the speedy-trial right under its state constitution, also considers its state constitution to offer a distinct protection of the same right in addition to the statute. *See* People v. Benhoor, 99 Cal.Rptr.3d 827, 177 Cal.App.4th 1308, 1317 (2009). Montana's supreme court has construed its state constitution's right to a speedy trial in a way that applies an independent "meaning to *Barker's* four factors," State v. Ariegwe, 2007 MT 204, ¶ 35, 167 P.3d 815 (Mont. 2007) (quotation marks omitted), and has a bright-line rule that no speedy-trial violation occurs unless a minimum of 200 days elapses between formal accusation and trial, *id.* ¶ 107. Montana's court, in a long decision, has given greatly detailed guidance on the test that the state's trial courts must use when a defendant asserts his or her right to a speedy trial has been violated. *See id.* ¶¶ 106 – 113. It bears repeating that, although other states may consider their respective state constitutions to offer no greater speedy-trial right than the Sixth Amendment, they do so in the context of court rules or statutes with clear timetables for trial, which may vary depending on whether a defendant has asserted the right. *See*, *e.g.*, State v. Wasson, 879 P.2d

520, 523 – 524 (Haw. 1994) (six-month period per court rule); Sweeney v. State, 704 N.E.2d 86, 99 – 100 (Ind. 1998) (one-year period per court rule).

If a deprivation of a defendant's right to a speedy trial is established on appeal the only remedy is dismissal of the case with prejudice, *see* Strunk v. United States, 412 U.S. 434, 440 (1973); State v. Steeves, 383 A.2d 1379, 1382 (Me. 1978), whereas the analysis of the speedy-trial issue at the PCR stage adds the element of the effectiveness of representation by counsel under the *Strickland* standards, *see* Strickland v. Washington, 466 U.S. 668, 687 – 688 (1984); United States v. Mala, 7 F.3d 1058, 1062 – 1064 (1st Circ. 1993).

1.3 Proposed Rules

The American Bar Association has issued a set of proposed standards for protection of the right to speedy trial, and it provides a good starting point for any framework. For example, the ABA has urged courts to adopt a presumptive, basic period of six months from first appearance until trial for a defendant who is not in custody, except for unusually complicated cases. *ABA Criminal Justice Standards: Speedy Trial and Timely Resolution of Criminal Cases* 12-2.1 (3rd ed. 2006).

The Montana Supreme Court has devised an impressively detailed framework for protection of the speedy-trial right that likewise can serve as a model for Maine. For example, it held that "Bad-faith delay, such as a deliberate attempt to gain a tactical advantage or to avoid trial, weighs heavily against the party that caused it." State v. Ariegwe, 2007 MT 204, ¶ 113, 167 P.3d 815 (Mont. 2007).

Any new rules that this Court establishes must, at a minimum, provide: a procedural mechanism for each defendant to clearly invoke the speedy-trial right, *see ABA Criminal Justice Standards* 12-2.1(a); a reasonable deadline for trial after such an invocation, *see id.*; a clear process for noting on the docket record whether any continuance has been granted over the objection of or with the acquiescence of the defense, *see Ariegwe* ¶ 74 ("the overall accuracy of the balancing test is enhanced when the totality of the accused's responses to pretrial delays is considered"); and significant relief to the defendant if the deadline is not satisfied, *see ABA Criminal Justice Standards* 12-2.7.

There also should be distinctions between the speedy-trial protections before trial and on appeal. The trial court should retain the power to dismiss charges with prejudice when the right has been

violated. *See* State v. Steeves, 383 A.2d 1379, 1382 (Me. 1978). However, in cases where the right has not been violated but is threatened, trial courts should have a clear mandate to order other appropriate remedies for a defendant: for example, to discharge a defendant from secured bail or other bail restrictions, *see ABA Criminal Justice Standards* 12-2.7(a); to schedule a trial without further delay, *see id.* 12-2.7(a)(ii)(A) *and* Braden v. 30th Judicial Circ. Ct. of Kentucky, 410 U.S. 484, 486 (1973); or to issue an evidentiary order that ameliorates the potentially prejudicial effects of delay, *cf.* M.R.U. Crim. P. 16(e) (potential sanctions for discovery-rule violations). However, the only precedential (or logical) remedy for a determination on appeal that a defendant's speedy-trial right was violated is an order to dismiss a case with prejudice on remand. Strunk v. United States, 412 U.S. 434, 440 (1973). As with any other right, a defendant may choose to waive the right to a speedy trial as a matter of strategy. *See* New York v. Hill, 528 U.S. 110 (2000) (defendants may waive statutory speedy-trial right provided by detainer statute); Peretz v. United States, 501 U.S. 923, 936 (1991) (summarizing precedents demonstrating defendants' waiver of various rights).

Finally, regardless of whether the court on remand ultimately concludes that *this* defendant's speedy-trial right was not violated, his appeal presents an opportunity to establish a Maine-specific framework that addresses the systemic problem in which defendants are being deprived of speedy trials. Speedy trial is a "fundamental" right that stretches back in Anglo-Saxon jurisprudence at least as far back as the Magna Carta, continuing through the time of Sir Edward Coke's "Institutes" and exported to colonial America. Klopfer v. North Carolina, 386 U.S. 213, 222 – 226 (1967). No one should need a citation to authority to recognize that this right is particularly important in cases where the defendants are incarcerated before trial because they cannot post bail, and no observer can plausibly assert that the current state of the criminal dockets in Maine does not reflect a wide-ranging deprivation of the right to speedy trial that pervades the sixteen counties. It bears noting that specifically demonstrated prejudice is not always necessary and, indeed, is sometimes impossible to show when a defendant asserts a speedy-trial violation, *see* Doggett v. United States, 505 U.S. 647, 655 (1992) ("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"), and other states' criminal courts now recognize and apply scientific findings about the inevitable decline over time in reliability of memory when evaluating various issues surrounding witness testimony, *see*, *e.g.,* State v. Henderson, 208 N.J. 208, 27 A.3d 872, 907 (2011) (discussing studies of "memory decay"); State v. Derri, slip op. *37, _P.3d_ (Wash. 2022) ("Memory deteriorates after viewing an event and never improves.").

1.4 Application to the Main Case

The dispositive question here is twofold: first, whether, under either the Sixth Amendment or Section 6, Winchester's right to a speedy trial was violated; and, second, whether, under *Strickland*, his trial counsel provided ineffective assistance in failing to raise the speedy-trial argument before trial or preserve it for appeal. It is not clear whether the trial court accorded Winchester a speedy trial in the second case that went to trial, originally docketed as CARSC-CR-2014-545, A. 25, and the decision on post-conviction review ("PCR") did not state clearly how it was analyzing the speedy-trial issue under PCR standards, *see* A. 38 – 43. The decision consequently should be remanded for clarification, at minimum. *See* 4 M.R.S. § 57 (second

paragraph); Alexander, *Maine Appellate Practice* § 12.1(c)(1)(1) (5th ed. 2018) (Law Court may vacate decision and issue order on remand to lower court for new hearing or findings of fact).

Although many of the delays in resolution of Winchester's case may be partially attributable to his conduct, such as repeatedly requesting replacement counsel, A. 21 – 25, the trial court did not bring him to trial for three years after his first appearance, A. 114 – 120, during which time he was incarcerated, either for execution of his sentence for the first case that went to trial or for a bail hold in another case, A. 22. The delay was so long that he had already served his prison sentence for the first conviction when the second case went to trial. A. 22 – 26. The PCR court's decision attributed some of the delay to Winchester's various motions, including motions to suppress, A. 40 – 42, but, at the risk of stating the obvious, he had no control over the court's scheduling decisions. Also, the undersigned is aware of no authority to suggest that a defendant must waive other rights in order to preserve the right to a speedy trial.

Furthermore, the PCR court, in deciding Winchester's petition for post-conviction review, analyzed his claim of ineffective assistance of

counsel regarding the speedy-trial issue in a way that erroneously conflated the analyses for prejudice under *Strickland* and *Barker*. *See* A. 38 – 43. The *Barker* test considers demonstrable prejudice as one potential factor for consideration when a defendant asserts a deprivation of the speedy-trial right, Barker v. Wingo, 407 U.S. 514, 532 (1972), but a defendant sometimes can establish a speedy-trial-right violation without a specific demonstration of prejudice to his or her defense because prejudice is, in effect, presumed when a violation of this right is established, Doggett v. United States, 505 U.S. 647, 655 (1992) ("impairment of one's defense is the most difficult form of speedy trial prejudice to prove, because time's erosion of exculpatory evidence and testimony can rarely be shown"). The analysis for prejudice under *Strickland* is distinct, *see* Theriault v. State, 2015 ME 137, ¶ 19, 125 A.3d 1163 ("When prejudice cannot be presumed in a post-conviction challenge based on ineffective representation, the actual prejudice that a petitioner must prove is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.") (quotation marks omitted), and prejudice is presumed only in "rare" cases where defense counsel's performance works a

"constructive denial of the assistance of counsel," *id.* ¶ 17 (quotation marks omitted).

Finally, if this Court adopts an interpretation of Section 6 that recognizes that Maine's right to a speedy trial is greater than the contours of the Sixth Amendment right, the PCR court should apply that interpretation to Winchester's case. *See* 4 M.R.S. § 57 ("Whenever, in the opinion of the Law Court, the ends of justice require, it may remand any case to the court below or to any justice or judge thereof for the correction of any errors in pleading or procedure."); 15 M.R.S. § 2130 (PCR relief may include "reversal of another order or decision, with or without affording the State or other party a new hearing").

2.1 Proposed Order on Remand

Accordingly, on remand, the analysis should be: first, whether Winchester implicitly or expressly waived his right to a speedy trial, *see* Vermont v. Brillon, 556 U.S. 81, 129 S.Ct. 1283, 1290 (2009); State v. Beauchene, 541 A.2d 914, 919 (Me. 1988) (defendant's "considerable efforts to avoid trial," including challenge to extradition from New York, undercut his argument that he was deprived of speedy trial); then, if it was not waived, whether his right to a speedy trial was violated, *see*

Brillon 1290 – 1291; and finally, if this right was violated, whether his trial attorneys' conduct was objectively unreasonable and prejudicial to his defense, *Strickland* 687. Of course, the analysis should apply a Maine-specific rule pursuant to Section 6.

2.2 Conclusion

In conclusion, the PCR court erred in its decision by failing to properly differentiate between *prejudice* in the speedy-trial sense and *prejudice* in the *Strickland* sense. The order on remand should include instructions to apply Maine-specific rules for the right to a speedy trial and to determine on that basis whether Winchester's right was violated.

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