THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. Ken-24-125

STATE OF MAINE
Appellee

v.

AARON C. ENGROFF
Appellant

ON APPEAL from the Kennebec County
Unified Criminal Docket

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

After a jury-trial, Aaron Engroff was convicted of two counts of unlawful sexual contact, 17-A M.R.S. § 255-A(1)(E-1) (Class B) (Counts I & III); and a singular count of unlawful sexual touching, 17-A M.R.S. § 260(1)(C) (Class D) (Count II). The jury acquitted defendant of Counts V and VI, which had alleged violations of the same two statutes, and a judge dismissed Count IV because of a problem with the indictment. The Kennebec County Unified Criminal Docket (Murphy, J.) thereafter imposed an aggregate nine-year carceral sentence, suspending all but four years of that term for the duration of seven years' probation. This appeal follows.

I. Procedural history

As defendant's speedy trial rights are a central issue of this appeal, defendant takes care to detail the relevant procedural history.

The complaint was filed on March 2, 2022, roughly 22 and a half months before the eventual trial. (A38). Mr. Engroff quickly made bail, subject to conditions that, *inter alia*, he have no unsupervised contact with even his own children. (A4). Three weeks later, defendant was formally indicted. (A36). Defendant waived his initial appearance. *Waiver of Initial Appearance* of Apr. 4, 2022.

Some eight months after his arrest, the court convened its first proceeding in the matter, a dispositional conference on November 8, 2022. (A6). Dissatisfied with the level of specificity provided by the State's discovery, the defense filed, on December 27, 2022, a motion for a bill of particulars. (A6). A hearing was held on that motion 51 days later, on

February 16, 2023. (A7). The motion was denied by order dated March 15, 2023. (A7).

Five days after the hearing on the motion for a bill of particulars, on February 21, 2023, defendant formally requested a speedy trial. (A7. A40).

In late March, the defense, having just lost the motion for a bill of particulars, sought to narrow down the complainant's availability during the year-long span alleged in the indictment, moving *in limine* for an M.R. U. Crim. P. 17A subpoena to procure her out-of-state school records. *Motion in limine M.R.Crim.P. 12, 17A(f) Subpoena to: Hudson (NH) School Department* of Mar. 30, 2023. A few days later, the court (Murphy, J.) certified the petition for such a subpoena. *Certificate to Compel Confidential Documents* of Apr. 5, 2023. After the subpoenaed documents were reviewed *in camera*, the court (French, J.) authorized full disclosure to the parties. *Order After Review of Confidential Records* of May 23, 2023

Back on the record a few days later, defendant again requested a speedy trial. (Tr. of 6/7/2023 at 4-5). Defendant wanted to be on the next trial list. (*Id*. at 3-5). So as not to "lose priority," the court (Lipez, J.) put the case on the "blitz list." (*Id*. at 8).

But no trial was forthcoming in either July or August, and the court's (Murphy, J.) notation in the file indicated that the trial could not go forward in September, either. *File Notation* of Jul. 17, 2023; *see* Mot. Tr. of 1/5/2024 at 19-20. Apparently, the court had murder and manslaughter cases set in September, somehow precluding trial in this matter. (Mot. Tr. of 1/5/2024 at 20).

Nor was the trial scheduled for trial in October or November. Instead, in October, the clerk emailed that jury selection would commence on December 7. *See Letter to Clerk's Office from Defense Counsel* of Oct. 26, 2023. That prompted defense counsel to write to remind the court of what the defense had been saying since at least June: Because it planned to present out-of-state witnesses, the defense required fixed trial dates. *Ibid.*; *see also* Mot. Tr. of 1/5/2024 at 14-15. The court (Mitchell, J.) continued the case until January 2024, adding that "due to other scheduling constraints" it was unable to set a date certain for trial. *Order* of Nov. 3, 2023 handwritten on *Letter to Clerk's Office from Defense Counsel* of Oct. 26, 2023. Nearly a month later, the clerk's office followed up by email, scheduling a status conference for December 15, 2023. *See* Clerk's Email to Counsel of Nov. 29, 2023. Evidently, the resulting scheduling conference yielded the dates when the trial did actually occur, January 22-24, 2024.

On December 21, 2023, the defense moved to dismiss the charges against him, alleging that his federal and state constitutional rights to a speedy trial had been violated. (A49). He also sought dismissal pursuant to M.R. U. Crim. P. 48(b)(1). (A49).

Two days before jury selection, the State moved *in limine* to introduce the Children's Advocacy Center ("CAC") video of the complaining witness's "interview," pursuant to the newly effective 16 M.R.S. § 358. *State's Motion in Limine Regarding Admission of Forensic Interview* of Jan. 3, 2024. Defendant argued that this newly available statutory mechanism for

admitting the video wholesale should be considered "in the speedy trial context."[1] (Tr. of 1/10/2024 at 7).

In the meantime, the State was conducting its final preparations for trial when, apparently, the complaining witness recanted some of the allegations leveled in the CAC video. This Court's file contains copies of two "*Giglio* letters" sent to defense counsel and dated successively on January 11 and January 12, reporting the recantations. The prosecutor represented on the record that the complainant did not "remember" the allegations subject to the *Giglio* letters. (Tr. of 1/18/2024 at 10-12).

II. Preservation of and reasoning regarding defense motions

A. Speedy trial

The bulk of the court's speedy trial analysis took place on the morning of jury selection, when the court (Lipez, J.) denied defendant's motion to dismiss. This Court may read that analysis in its entirety at pages A27 through A28 of the appendix.

Here, defendant quotes that portion of the analysis discussing the reasons for the delay since June 2023, when the court found that defendant renewed his speedy trial demand:

> [I]t looked like both parties in June indicated they were ready to go forward[;] it was really the Court's schedule over the

[1] Regarding prejudice, defendant also argued that, given the unspecific dates of the alleged offenses – spanning all of calendar year 2020 (except for the one-month periods alleged in Counts V and VI, of which defendant was eventually acquitted) – fading memories were likely to prejudice defendant. (Mot. Tr. of 1/5/2024 at 12-13). Defense counsel enumerated other forms of prejudice, including the termination of defendant's military career; his inability to find other jobs while the charges were pending; and the requirement that he could not visit with his own children without supervision. (Mot. Tr. of 1/5/2024 at 13).

> next couple of months that prevented the case from being reached, and that really continues until it was placed on a Docket Call list, and the defendant was noticed sometime in October that he was on for December.
>
> So I find that the period of time between June and October, although the State was ready to go, certainly didn't do anything itself to delay the trial. The way the analysis works is, even the Court delays are supposed to weigh against the State. I find that time does weigh against the State.
>
> But then in October the defendant did file a motion indicating he needed it to be specially set. The Court often is not in a position to specially set cases, the expectation is that parties will appear for jury selection ready to go, we have a trailing list, we certainly entertain requests to be specially set, but I find that the request, which then further delayed the trial, should be held against the defendant. So the period of time from October to now I find should be weighed against the defendant.
>
> So, in terms of the reasons for the delay, it is really split between some of it due to the defendant, some due to the Court's schedule, which has to weigh against the State.
>
> I will say that Court delays which weigh against the State, the case law indicates that sort of a – in weighing the factors given less weight because it is not anything the State did to try to delay.

(A28; Mot. Tr. of 1/5/2024 at 26-27).

Turning to the next step, the court found: "I don't think the prejudice that's been asserted to me is significant or specific enough to warrant a dismissal in this case." (Mot. Tr. of 1/5/2024 at 28-29). It should be noted, though, that at this stage, the court had not yet made a final determination about whether the State would be permitted to introduce the CAC video as substantive evidence.[2]

[2] Because different judges were handling the motion and the trial, some questions, including the admissibility of the CAC video, were reserved until the judge presiding over trial was able to take them up. (*See* Tr. of 1/10/2024 at 3-7).

In fact, the next time the parties were back on the record, defense counsel renewed the motion to dismiss so that the State's attempt to introduce the CAC video via 16 M.R.S. § 358 would "be considered in the speedy trial context." (Tr. of 1/10/2024 at 7).[3] Defense counsel renewed the speedy trial argument, specifically regarding the CAC video, immediately before trial commenced. (1Tr. 27-28). As the court (Muprhy, J.) noted, the allegations of uncharged conduct comprised "the major part of the [CAC] video," which took about "half of the tape." (1Tr. 87; 3Tr. 11). Concerned about the last-minute invocation of 16 M.R.S. § 358, the court gave defendant the "opportunity to delay this case one more time, despite the demand for a speedy trial," which defendant turned down, insisting on trial. (1Tr. 30; *see* Tr. of 1/19/2024 at 7, 23, 68).

Defendant was not done arguing about speedy trial prejudice. After the prosecution's summation, during which the State's attorney gave a lengthy argument about how "memory is a fickle thing," 3Tr. 43-44 – an apparent attempt to explain away some testimonial inconsistencies, the defense renewed his motion to dismiss:

> [S]o, the defense feels that it is prejudiced by the argument that memory is fragile, that dates can't be remembered and

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[3] Defendant made two specific arguments about the CAC video and prejudice: *First*, "Defendant would have conducted discovery differently and considered different strategies if Title 16 M.R.S. § 358 were in effect from the outset of the case. For example, Defendant would have sought discovery about the Child Advocacy Center interview process and interview techniques and looked to hire an expert, sought the CAC interviews of [defendant's son] in the early portions of this case, and pursued different records related to the complaining witness." *Defendant's General Objection to State's Motion in limine* of Jan. 16, 2024 at 2-3. *Second*, within the CAC video are references to uncharged conduct – allegations of similar conduct to that which was charged but which took place out of the county. *See Defendant's Motion in limine* of Jan. 4, 2024 and *State's Argument Objecting to Defendant's Motion in limine Regarding Uncharged Conduct* of Jan. 16, 2024; Tr. of 1/19/2024 at 10-12.

> certain times, on the day of trial here today. And that defense asserts that if this trial were sooner that those issues would not be in play and wouldn't be an argument for the [S]tate to make today.

(3Tr. 48-50).

Defendant renewed both the speedy trial motion to dismiss and the related motion to exclude the CAC video via his motion for a new trial, without garnering a clear ruling.

B. Exclusion of the CAC video on due process grounds

As an alternative to dismissal on speedy trial grounds, the defense attorney requested that the CAC video simply be excluded from trial. (Tr. of 1/10/2023 at 8-9; Tr. of 1/19/2024 at 4). In a filing, defendant argued that admission of the video would violate his state and federal due process rights: "The Court should not disadvantage a Defendant who has asserted a speedy trial right by permitting the State to enter substantive evidence against him based on a law that went into effect seventeen months after Defendant's case started." *Defendant's General Objection to State's Motion in limine* of Jan. 16, 2024 at 2-3. Counsel added, before trial, that admission of the CAC video constituted a violation of defendant's due process right to a fair trial. (1Tr. 27-28).

The court (Murphy, J.), with all due respect, did not squarely rule on these objections. Rather, the court, acknowledging that it did "have some concerns about the fact that the motion to use the interview was filed way into the process," (Tr. of 1/19/2024 at 70), merely offered defendant the

opportunity to continue trial so the defense might better prepare to attack the procedures of the CAC interviewer. (1Tr. 29-30).

After trial, via a motion for a new trial, defendant renewed his argument that "[t]o be fair to the Defendant, the Court should not have permitted the State to play the interview pursuant to 16 M.R.S. § 358 when the case had been on the trial list for four months prior to the law coming into effect and Defendant had asserted his right to a speedy trial at docket call on June 7, 2023." A77; *Motion for a New Trial* of Feb. 5, 2024 at 3.

C. Exclusion of the CAC video on confrontation grounds

Pretrial, the defense objected that admission of the CAC video violated defendant's Confrontation Clauses rights under the Maine and United States Constitutions. *Defendant's General Objection to State's Motion in limine* of Jan. 16, 2024 at 2. Just before trial began, defendant repeated this objection. (1Tr. 27). Neither objection, with all due respect, yielded a clear ruling from the bench.

III. The trial

Cadence, the complaining witness, was born in September 2010. (1Tr. 139). Her aunt, Andria Engroff, was married to defendant for seven years until 2021. (1Tr. 194-95). In 2020, Cadence's mother dropped her off with Cadence's paternal grandmother, Donna Hawkins, to help care for the girl when she was out of school curing the COVID pandemic. (1Tr. 144-45, 167-68). Andria testified that Cadence would sometimes accompany the girl's grandparents to the defendant's and Andria's residence in West Gardiner;

this typically happened three to four times per year. (1Tr. 198-99). Each such visit lasted just a night or two. (1Tr. 199-200).

A. The CAC video was admitted into evidence pursuant to 16 M.R.S. § 358.

In the video, Cadence told the interviewer that, beginning when she was seven years old, defendant would put his hands under her clothes and touch her private parts and chest. (CACTr. at 10; SX1 ca. 6:55 to 7:50). Cadence recalls this occurring in the defendant's "old" house,[4] and she remembers that they moved into a new house when she was eight. (CACTr. at 12; SX 1 ca. 9:15 to 9:45). This is presumably the "uncharged" conduct which, the court instructed the jury, could be utilized only for "determining the relationship of the parties" and whether defendant had motive or intent with respect to the charged conduct. (3Tr. 60).

Defendant's and Andria's new home was in West Gardiner, Cadence told the interviewer. (CACTr. at 24-25; SX1 ca. 23:05 to 23:50). There, "the same thing" happened. (CACTr. at 26; SX1 ca 25:35 to 26:00). She remembered one time when the rest of the family went to Walmart, apparently leaving defendant alone with Cadence. (CACTr. at 27-28; SX1 ca. 26:50 to 27:25). She told the interviewer that the family "wouldn't let" her accompany them to Walmart because their vehicle was full. (CACTr. at 28; SX1 ca. 27:20 to 27:30).

Cadence reported that one time there were cookies in the oven, claiming that everyone else left the house while defendant touched her thighs

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[4] Apparently, this home was in Holden, in Penobscot County. (*See* 1Tr. 50).

and vagina. (CACTr. at 28-29; SX1 ca. 27:55 to 29:12). She recalled that the cookies ended up getting burnt. (CACTr. at 31; SX1 ca. 31:05 to 31:10). Cadence could not remember any other specific times that this sort of thing happened at the Engroffs' home in West Gardiner. (CACTr. at 32; SX1 ca. 32:00 to 32:10).

Cadence told the interviewer that she recalled one other occasion when defendant touched her thighs, vagina, and chest. (CACTr. at 33; SX1 33:30 to 34:55). This occurred at Christmastime at her great-grandmother's in Augusta. (CACTr. at 32-34, 35-36; SX1 34:55 to 35:10; 1Tr. 75). Defendant does not here detail this allegation, as the jury acquitted defendant of Counts V and VI, which related to this alleged incident. These acquittals were likely the product of family members' testimony that no such family Christmas get-together occurred that year because of COVID precautions. (1Tr. 186, 208; 2Tr. 31).

B. The State's testimonial case was comparably limited.

After some softball questions – literally, these were questions about Cadence playing softball, 1Tr. 69-70 – the direct examination of the complaining witness was brief, eliciting only Cadence's family tree, her identification of defendant, and the fact that defendant touched her in a manner that she found "offensive." (1Tr. 71-73).

C. The defense drew attention to the lack of opportunity for defendant to commit the alleged offenses.

In addition to its aforementioned elicitation of testimony tending to disprove the occurrence of a Christmastime get-together at the great-

grandmother's home, the defense worked to cast doubt upon Cadence's allegations. For example, counsel elicited from defendant's then-wife how, during COVID, she did her shopping (*e.g.*, at Walmart) by herself. (1Tr. 212-13). The ex-wife testified that she does not remember a time when defendant stayed home with Cadence when everyone else went shopping. (1Tr. 214). Nor does she recall a time when she and others returned home to defendant and Cadence to find burnt cookies. (1Tr. 214). Likewise, Cadence's grandmother had no specific memory of a time when defendant and Cadence were home alone together. (1Tr. 189-90).

D. Deliberations and verdicts

Over defendant's objection, during its closing argument the State was permitted to display that portion of the CAC video referencing the uncharged conduct. (1Tr. 10-17). And, again, the jury requested to rewatch the CAC video in its entirety after being released to deliberate. (3Tr. 83-89, 91-96).

After 4 p.m., the jury returned its verdicts. (3Tr. 105-07).

ISSUES PRESENTED FOR REVIEW

I. Did the trial court err by denying defendant's motion to dismiss pursuant to the speedy trial provisions of M.R. U. Crim. P. 48(b), ME. CONST. ART. I, § 6, and the Sixth Amendment?

II. Did the trial court err by admitting the CAC video over defendant's arguments pursuant to the Confrontation Clause of the Maine Constitution?

III. Did the trial court err by denying defendant's motion to preclude the State from utilizing 16 M.R.S. § 358 on due process grounds?

IV. Did the trial court commit obvious error by admitting the CAC video pursuant to 16 M.R.S. § 358 when, at the time, the legislature had not made that provision retroactive?

ARGUMENT

First Assignment of Error

I. The trial court erred by denying defendant's motion to dismiss pursuant to the speedy trial provisions of M.R. U. Crim. P. 48(b), ME. CONST. art. I, § 6, and the Sixth Amendment.

Aaron Engroff incurred palpable prejudice because, with all due respect, Maine courts cannot timely handle cases. Rather than holding trials during the summer months of 2023, our courts were undertaking a "blitz," in an attempt to procure plea deals in other cases. Rather than holding defendant's trial in September 2023, the courts chose to prioritize other trials – a choice that had consequences for litigants like Mr. Engroff. Without sufficient resources to schedule date-certain trials, the courts could not accommodate defendant at all until 2024.

As a result, in addition to the more quotidian forms of prejudice defendants face, Mr. Engroff was forced to have trial subject to the newly enacted 16 M.R.S. § 358. The complaining witness did not have to testify as to the allegations that comprise the State's case. Instead, the State was able to push play and show jurors her CAC video taken two years before trial. In a case where, suddenly before trial, the State had to send out two "*Giglio* letters" because the complaining witness recanted or could not recall

significant portions of her CAC interview, it is plain to see how unreliable the § 358 "process" is.

A. Preservation and standard of review

Defendant's arguments are preserved by his numerous filings and arguments, documented above. Therefore, this Court should review defendant's M.R. U. Crim. P. 48(b)(1) argument for abuse of discretion. *See State v. Brann*, 292 A.2d 173, 176-77 (Me. 1972).

Historically, this Court has utilized the same standard of review when reviewing preserved constitutional speedy trial arguments. *See State v. Hofland*, 2012 ME 129, ¶ 11, 58 A.3d 1023. However, defendant contends that abuse-of-discretion review is inappropriate for constitutional arguments (*e.g.*, the Fourth Amendment) and this Court would be better suited to utilize the bifurcated standard of review deployed by most federal courts. *See United States v. Irizarry-Colón*, 848 F.3d 61, 68 (1st Cir. 2017) (noting that "applying an abuse of discretion standard of review to constitutional speedy trial claims is in tension with the rules of other circuits, as well as this circuit's standard of review when considering other similar issues" but not resolving issue because the defendant prevailed under either standard); *United States v. Briggs*, 2023 U.S. App. LEXIS 10788 * 2 n. 5, 2023 WL 3220911 * 1 n. 5 (3d Cir. 2023) ("When considering constitutional speedy trial claims, we review the District Court's factual findings for clear error and legal conclusions de novo.") (cleaned up); *United States v. Scully*, 951 F.3d 656, 669 (5th Cir. 2020); *United States v. Griffith*, 2021 U.S. App. LEXIS 36620 **6-7 (6th Cir. 2021); *United States v. Hills*, 618 F.3d 619, 629

(7th Cir. 2010); *United States v. Parks*, 353 Fed. Appx. 78, 79 (8th Cir. 2009); *United States v. Dong*, 539 Fed. Appx. 753, 753 (9th Cir. 2013); *United States v. Vargas*, 97 F.4th 1277, 1286 (11th Cir. 2024); *United States v. Lopesierra-Gutierrez*, 708 F.3d 193, 202 (D.C. Cir. 2013); *see also United States v. Margheim*, 770 F.3d 1312, 1325 (10th Cir. 2014) (de novo).

B. Analysis

In accordance with this Court's preference to decide cases on nonconstitutional grounds when possible, defendant first discusses his M.R. U. Crim. P. 48(b)(1) argument. Following the primacy approach, he then turns to the state and federal constitutional arguments, in that order.

1. The court abused its discretion by not dismissing the charges pursuant to M.R. U. Crim. P. 48(b)(1).

i. The applicable standard

For a rule that has been on the books for the better part of six decades, it is astonishing how rarely invoked is M.R. U. Crim. P. 48(b). As a result of such desuetude, this Court has given little guidance about what analysis is to govern a court's exercise of its discretion concerning Rule 48(b) or its interplay with the constitutional speedy trial guarantees.[5] Nonetheless, defendant traces the broad contours.

In 1972, this Court wrote that the provision is supposed to be a more "flexible standard" than the former requirement that a trial occur by the second trial term post-indictment. *State v. O'Clair*, 292 A.2d 186, 192 (Me.

[5] It is likely for these reasons that the court below did not differentiate its Rule 48 analysis from its constitutional reasoning.

1972). Yet, importantly, this "change-over was not intended to be a repudiation of the long-standing judicial construction of the speedy trial provision" – seemingly a general reference to the former speedy trial statutes' timelines. *Ibid.* Thus, the *first principle* of Rule 48(b): Though no longer a hard and fast dictate, courts are still expected to afford a trial *within the ballpark* of a just a couple trial terms.

Rather, the innovation of the new rule, it seems, was that "the proper inquiry under Rule 48 goes not only to the *length* of delay but necessarily also addresses the *reasons* for the delay." *State v. Wells*, 443 A.2d 60, 64 (Me. 1982) (emphasis in original). *Wells* shed further light on just which such "reasons for the delay" are important:

> The purpose of the rule ensures not only a criminal defendant's constitutional right to a speedy trial, but also furthers important judicial policy considerations of relief of trial court congestion, prompt processing of all cases reaching the courts and advancement of the efficiency of the criminal justice process. Unreasonable delay in the determination of criminal actions subverts the public good and disgraces the administration of justice.

Wells, 443 A.2d at 63 (internal citation omitted); *see also State v. Lemar*, 483 A.2d 702, 704 n. 6 (Me. 1984) ("[T]he purpose of M.D.C. Crim. R. 48(b) encompasses a concern over trial court congestion.").

Two further principles emerge, which are the second and third general principles gleaned from this analysis: *second principle*: Rule 48(b) is meant to ensure a defendant's speedy trial rights and guard against those sorts of injuries caused by post-invocation delays; *third principle*: the easing of "trial

court congestion" lest "the administration of justice" be disgraced is a sound basis for granting Rule 48(b) relief.

Probably because of the solicitude Rule 48(b) owes to a defendant's interests in having a speedy trial, this Court looks for resulting prejudice. *Cf. O'Clair*, 292 A.2d at 192 ("[T]he appellant showed no resulting prejudice from the time lapse…."); *Dow v. State*, 295 A.2d 436, 440 n. 2 (Me. 1972) (querying whether, for Rule 48(b) purposes, there is "actual prejudice to the defendant because of delay"). This is a testament to the fact that the rule is meant to shield a defendant from prejudicial delay.

In summary, there are three general principles discernible from this Court's Rule 48(b) case-law: (1) delays beyond a couple of trial terms are disfavored; (2) the provision is meant to prevent ills resulting from the lack of a speedy trial, especially actual prejudice; and (3) relief is available to remedy court backlogs. Defendant now applies the facts of his case to this legal outline.

ii. Application of the facts to the law of Rule 48(b)(1)

Defendant was finally tried several trial terms after his renewed motion for a speedy trial. Frankly, it is telling that Maine courts cannot accommodate trials as quickly as they could over two hundred years ago when the state was founded. *See Winchester v. State*, 2023 ME 23, ¶ 20, 291 A.3d 707 (noting that, per Articles of Separation, trial was to take place in first term); *id.* ¶ 22 n. 8 & 9 (noting that Maine speedy trial statutes required trial within second term post-indictment); *id.* ¶ 19 (noting how nine to ten months post-arrest delay was offensive to 1790s Mainers). Defendant, of

course, does not mean to disparage members of the judicial branch. However, it is undeniable that Maine courts have been deprived of the resources necessary to provide justice as timely as Mainers expect.

The reasons for the delay bear out the fact that the delays are systemic. The plea-deal "blitz" that meant that defendant's trial could not occur in June, July or August 2023 was the result of the court's backlog. *See* Kennebec Journal, *Court 'blitz' underway in effort to tackle backlog of criminal cases in Kennebec County*, June 21, 2023. While resolving cases in this manner was perhaps beneficial for the system, it had detrimental consequences on those, like Mr. Engroff, who wanted a trial as soon as possible.

The same goes for September 2023, when Mr. Engroff was denied a trial because there were apparently more pressing (*e.g.*, murder and manslaughter) trials ongoing. And likewise for the court's unexplained failure to schedule a trial in October or the inability to schedule fixed-date trial at any point in 2023. Certainly, the Capital Judicial Center has enough courtrooms to accommodate these trials *and* defendant's. What it lacks is enough clerks, enough marshals, enough judges. *See* Chief Justice Stanfill, *The State of the Judiciary: A Report to the Joint Convention of the Second Regular Session of the 130th Maine Legislature* at 7, ("[W]e don't have enough marshals or clerks or, indeed, any other position."); National Center for State Courts, *Maine Judge and Clerk's Office Workload Assessment: Final Report* (May 2023) at 4-5, (finding that Maine judicial branch is short at least nine judges for its current intake-caseload). These are all

quintessential examples of "trial court congestion" of the sort this Court has reasoned are meant to be eased by Rule 48(b)(1).

The most important factor in this case, though, is actual prejudice. 16 M.R.S. § 358 – which had not even been mooted in the legislature when defendant was charged or indicted – took effect on October 25, 2023. Without that statute, Cadence would have had to testify about the bases for the charges against defendant. As is evidenced by the *Giglio* letters the prosecution had to send out just before trial, it seems highly unlikely that such testimony would have strictly matched up with the CAC video recorded two years prior. As the experienced judges of this Court know, young witnesses routinely give unpredictable testimony, including on direct examination.

iii. The court erred by conducting a constitutional analysis in lieu of an M.R. U. Crim. P. 48(b)(1) analysis.

Despite defendant's clear invocation of Rule 48(b), *see* A49, the court conducted no separate analysis of that provision. Rule 48(b) confers a protection separate and apart from the constitutional speedy trial rights. *See Winchester*, 2023 ME 23, ¶ 23 n. 10. Its analysis therefore was erroneous on several grounds.

First, Rule 48(b) contains no invocation requirement. *See* M.R. U. Crim. P. 48(b) ("…upon motion of the defendant or on the court's own motion"). Yet, the court's analysis mirrors the *Barker* standard, weighing "assertion of the right" as a separate factor. (Mot. Tr. of 1/5/2023 at 22).

From the foregoing analysis of Rule 48(b) jurisprudence, such emphasis was misplaced.

Second, there is no case-law interpreting Rule 48(b) to accord "less weight" to court-caused backlogs as opposed to those caused by the prosecution. Yet, that is how the court conducted the Rule 48(b) analysis – subsumed by its constitutional analysis. (Mot. Tr. of 1/5/2023 at 27).

Third and most important, the court's prejudice analysis is deficient. Defendant suffered unquestionable prejudice, prejudice that he would not have incurred had the trial been held before October 25, 2023. The court's omission to count this obvious harm "in the speedy trial context" is – by itself – appropriate cause to reverse. The "unnecessary" delay caused by the court's own decisions about how to prioritize cases given its limited resources prejudiced defendant.

2. The court erred by not dismissing the charges pursuant to the Maine Constitution.

i. The applicable standard

This Court's case-law about the state constitutional speedy trial provision is only just emerging from an "indeterminate status." *Winchester*, 2023 ME 23, ¶ 13. Few decisions define its contours. Nonetheless, generally, the state constitutional provision calls for consideration of four factors: length of the delay; reasons for the delay; assertion of the right; and prejudice. *Id.* ¶¶ 26-31.

Length of the delay. In comparison to federal law, Maine constitutional law is relatively uncertain regarding the effect of delay alone.

Id. ¶¶ 26-27. Nonetheless, we do know from history that delays of nine months to a year were offensive to Mainers and, at various points in our history, considered beyond the pale. *Id.* ¶¶ 19, 20, 22 n. 8 & 9. Importantly, "[t]he speedy trial clock starts with a[] ... formal accusation." *State v. Norris*, 2023 ME 60, ¶ 20, 302 A.3d 1.

Reasons for the delay. Naturally, the reasons for the delay are relevant to the speedy trial analysis. *Winchester*, 2023 ME 23, ¶ 28.

Assertion of the right. Perhaps the most significant deviation from the federal constitutional speedy trial right and Maine's is that the latter must be affirmatively invoked. *Id.* ¶ 29; *Norris*, 2023 ME 60, ¶¶ 15-17. At some point in the future, it seems likely that this quirk of Maine constitutional law will prompt public defenders statewide to file "an automatic, *pro forma* [speedy trial] demand made immediately after appointment of counsel" in all cases so as to ensure no defendant "waives" his rights by mere inaction. *See Barker v. Wingo*, 407 U.S. 520, 528 (1972).

Prejudice. Finally, courts assessing speedy trial claims will determine whether the delay has prejudiced a defendant. Mirroring federal law, this Court has "identified three harms that the right to a speedy trial seeks to prevent: (1) undue and oppressive incarceration prior to trial; (2) the accused's anxiety and concern accompanying public accusation, and (3) impairment of the accused's ability to mount a defense." *Winchester*, 2023 ME 23, ¶ 30; *see Barker*, 407 U.S. at 532. The State constitutional protection considers the effects of delay "in relation to the role of actual prejudice to the

defendant," which is often measured by these three categories of harm. *State v. Brann*, 292 A.2d 173, 184 (Me. 1972).

i. Application of the facts to the law of ME. CONST., art. I § 6

Measuring the delay is complicated in our case by the fact that, though defendant invoked his speedy trial rights in February and June 2023, he did not do so during the initial 11-month pendency of his case. Defendant contends that unless this Court is prepared to hold that defendants should file *pro forma* speedy trial demands as a matter of course or else forfeit their rights, this time must nonetheless count against the State. Indeed, defendants often initially trust the court system to move their cases expeditiously, formally invoking their right to a speedy trial only when the court's pace becomes slower than anticipated. Dispositional conferences may encourage pleas and thereby benefit the system, but a defendant who is forced to run the gauntlet of such formalities just to get to a stage where he is deemed ready for trial, does not do so voluntarily. "Normal" case-processing that eats up more than a year of time – itself beyond the timeframe Mainers would have historically found to be an acceptable time to wait for a trial, *see supra* – must count in a defendant's favor. Recall, in this case, the first court proceeding was held some eight months post-arrest.

Defendant accepts that the time between his formal invocation on February 21, 2023 and the court's (Cashman, J.) denial of his motion for a bill of particulars on March 15, 2023 can be ascribed to him. Similarly, defendant accepts that the time spent handling his out-of-state subpoena

request on March 29 until his renewed formal invocation on June 7 – some two and a quarter months – is deducted from the speedy trial clock. In all, defendant's actions caused about three months' delay.

The rest, respectfully, clearly falls in defendant's favor. Despite repeatedly insisting on a trial as soon as he could have it, the courts were otherwise occupied. Trials were not held over the summer to accommodate the "blitz." Defendant's trial was not prioritized in September because other, more pressing trials were held, and the courts lacked the resources necessary to convene both those trials and defendant's. No trial was held in October, despite defendant's demand. And the court had other commitments that precluded it from setting a date-certain trial until late January 2024. Certainly, requesting a date-certain trial is not a significant ask – or at least it shouldn't be – considering defendant's constitutional right to compulsory process. In all, more than 19 months of delay count in defendant's favor.

Then, there is prejudice, which defendant contends, *see infra*, is the most important factor in this case. Defendant suffered actual prejudice, most notably in the use of 16 M.R.S. § 358, which would not have been available to the State prior to October 25, 2023. Defendant was not able to visit his own children without chaperones. Defendant was discharged from the military and was unable to find other employment. The State argued in its closing about how the complaining witness's memory has faded with time.

iii. The court erred by not counting certain court-caused delays against the State and failing to recognize the admission of the CAC video as a form of prejudice.

When courts identify, as this one has, certain "harms that the right to a speedy trial seeks to prevent," *see Winchester*, 2023 ME 23, ¶ 30, it follows that a demonstrable incidence of such "harm" is a singularly important factor in the speedy trial analysis. So, for example, when "impairment" of the defense is actually demonstrated, that fact must count for quite a bit. *See Ibid.* Another way of saying this is that "the most important" speedy trial factor is "whether the defendant has suffered actual prejudice." *Phillips v. State*, 227 A.3d 779, 795 (Md. Ct. App. 2020) (quotation marks omitted); *State v. Simmons*, 54 S.W.3d 755, 760 (Tenn. 2001) ("The final and most important factor in the analysis is whether the accused suffered prejudice from the delay."). This Court, albeit in rather verbose terms, made this point in 1972. *Brann*, 292 A.2d at 184. Yet, in our case, the court omitted to count the actual prejudice to defendant of having the CAC video admitted wholesale, excusing the complainant from leveling her allegations in front of the jury.[6] That is error.

The court also erred by counting *against defendant* the court's inability to schedule a fixed-date trial from October through December 2023. (Mot. Tr. 1/5/2023 at 26-27). His witnesses' need for a specific trial date – as they

[6] It seems likely that this analytical omission occurred because, while Justice Lipez handled the speedy trial analysis, she did not decide at that point (or ever) that the CAC video would be admitted. And, while Justice Murphy handled the ultimate decision to admit the CAC video, she did not – despite defense counsel's renewed invitations – revisit Justice Lipez's speedy trial analysis.

are unable to show up in Maine and stand by for an entire month – is not within defendant's control. It is, with all due respect, a shortcoming of the court system that it is so inadequately resourced as to be able to accommodate this reasonable request.

3. The court erred by not dismissing the charges pursuant to the United States Constitution.

i. The applicable standard

The federal speedy trial test, established in *Barker*, remains good law:

Length of the delay. "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. "Delay of around one year is considered presumptively prejudicial, and the presumption that delay prejudices the defendant "'intensifies over time.'" *United States v. Carpenter*, 781 F.3d 599, 610 (1st Cir. 2015), quoting *Doggett v. United States*, 505 U.S. 647, 652 (1992).

Reasons for the delay. "[D]ifferent weights should be assigned to different reasons." *Barker*, 407 U.S. at 531. Of course, a "deliberate attempt" to delay trial counts "heavily" against the State. *Ibid*. Other factors, such as "overcrowded courts" must, too, count against the State, "since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Ibid*.

Assertion of the right. While "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial," a

defendant does not waive his speedy trial right by neglecting to demand it. *Id*. at 527-29, 532.

Prejudice. Courts measure the extent which a defendant's speedy trial interests are hampered by delay, either presumptively or actually, if such proof is available. The Supreme Court has "identified three such interests: (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*. at 532. "[T]he most serious" form of prejudice is impairment to the defense. *Ibid*. Per federal law, prejudice *vel non* is "the most important factor" in the *Barker* test. *United States v. Frias*, 893 F.3d 1268, 1275 (10th Cir. 2018).

ii. Application of the facts to the law of the Sixth Amendment.

The math is much the same as above, in the state constitutional analysis; of the 22-plus months between charging and trial, just over 19 months should be attributed to the State of Maine. However, there is a notable difference in how the federal and the state constitutions treat delay caused by non-prosecutorial state actors.

Federal constitutional law is more adamant than so far has been Maine state constitutional law: "The police and prosecutor are not the only governmental officials whose conduct is governed by the Speedy Trial Clause; it covers that of court personnel as well...." *Dickey v. Florida*, 398 U.S. 30, 51 (1970) (Brennan, J., concurring). Unconstitutional delay "may spring from a refusal by other branches of government to provide these agencies

and the judiciary with the resources necessary for speedy trials." *Ibid.* "[T[he crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have been avoided – whether it was unnecessary."

The underfunding of Maine's courts is a chronic problem. *See* Leigh I. Saufley, *Funding Justice: The Maine Judicial Branch – We Did Get There From Here*, 62 ME. L. REV. 671, 672 (2010) ("The lack of funding for justice in Maine is not a new problem."). From the standpoint of litigants like defendant, the resulting problems are quite unnecessary.

A second potential difference exists in federal law's lesser[7] tolerance of actual prejudice. *Doggett* stands for the proposition that, the longer the delay, the more prejudice will be presumed. 505 U.S. at 655-56. A corollary is that the more concrete the prejudice, the more likely a court will be to find a speedy trial violation regardless of the duration of the delay. That is not to say, of course, that defendant's 19-month wait for a trial is of insignificant duration. Rather, when those months mean the difference between the complaining witness having to testify in the heat of trial as to the allegations against defendant and the prosecutor pushing play on a video of those pre-recorded allegations taken two years prior, a court should be concerned with the impairment of the defendant's ability to demonstrate a lack of credibility.

[7] To be fair to Maine's state provision, case-law had not yet yielded a decision in which a defendant has been found to have suffered actual prejudice, so this difference is perhaps only theoretical. *Cf. State v. Couture*, 156 Me. 231, 247-48, 163 A.2d 646, 657 (1960) (prejudice "might" ensue).

iii. The court erred by not counting prejudice related to the CAC video and by not giving enough weight to delays caused by the courts.

As above in the state constitutional analysis, the trial court erred by not considering the CAC video "in the speedy trial context." Also, the court erred by counting delays from October on (*i.e.*, the request for a fixed-date trial) against defendant and by not giving court-caused delays enough weight.

Second Assignment of Error

II. The trial court erred by admitting the CAC video over defendant's arguments pursuant to the Confrontation Clause of the Maine Constitution.

For hundreds of years, the party with the burden of proof had to elicit their clients' allegations in court in order to carry their burden of proving those witnesses' credibility. Now, with the advent of § 358, and in exactly the cases in which assessing credibility is most important, statutory change is afoot. A law enforcement team member – that is what a CAC interviewer is: a victims' advocate taking directions from investigators – asks questions, years before trial, in a non-confrontational setting and in a manner designed to avoid inconsistencies. If this Court does not intervene now, interpreting the Maine Confrontation Clause as it has always been understood, there will be nothing to stop the evisceration of trials as we know them whenever the legislature wishes to put its thumb on the scales of justice.

A. Preservation and standard of review

Defendant's pretrial objections, documented in the Statement of the Case, served to preserve this argument. This Court reviews "'application of

the Confrontation Clause de novo.'" *State v. Gagne*, 2017 ME 63, ¶ 32, 159 A.3d 316, quoting *State v. Tozier*, 2015 ME 57, ¶ 16, 115 A.3d 1240.

B. Analysis

Historically, the Maine Constitution would not have brooked this radical deviation from trial practice. Case-law has consistently required face-to-face direct examination, except in limited circumstances not present here. The abandonment of that principle is underway, threatening several vital trial interests, including the very ability of jurors to assess credibility under fair conditions – the raison d'être of Maine's Confrontation Clause.

1. The text of the Maine Confrontation Clause requires confrontation "by" the State's witnesses.

ME. CONST., art I. § 6 guarantees the right "[t]o be confronted **by** the witnesses against the accused." (emphasis added). Defendant has highlighted what he believes to be a subtle yet telling distinction between the Sixth Amendment (conferring the right "to be confronted **with** the witnesses against him.") (emphasis added). "By" suggests that the witness against a defendant must take some action; "with," in comparison, suggests merely the *opportunity* to confront a witness (*i.e.*, cross-examination). Defendant suggests that this is a textual indication that the Maine Constitution protects more than merely the right to cross-examine a witness: It imposes an obligation for the witness, when available, to level her allegations via direct examination. *See* Jeremy A. Blumenthal, *Reading the Text of the Confrontation Clause: 'To Be' or Not 'To Be'*, 3 U. PENN. J. CONST. LAW 722, 737 n. 119 (2001) (suggesting that "confronted by" implies "a literal face-to-

face confrontation" more so than does "confronted with"). A defendant with the right to be confronted "by" the witnesses against him maintains the right to insist that his accuser "'cannot hide behind the shadow.'" *See Coy v. Iowa*, 487 U.S. 1012, 1017-19 (1988).

2. The Maine Constitution requires face-to-face direct testimony.

In 1879, this Court wrote that the "object" of § 6 "is to guard the accused in all matters, the proof of which depends upon the veracity and memory of witnesses, against the danger of falsehood or of mistake, by bringing the witnesses when they give their testimony as to such matters face to face with him." *State v. Frederic*, 69 Me. 400, 401 (1879). This face-to-face requirement, it is true, has been expressed in different ways by this Court; however, it has been expressed as early as 1859 and during our lifetimes. *See State v. Learned*, 47 Me. 426, 434 (1859) ("It is a right belonging to the humblest to meet his accuser face to face…."); *see also State v. Scholz*, 432 A.2d 763, 767 (Me. 1981) ("At the heart of this guarantee is a defendant's right to compel the witness to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.") (quotation marks omitted), quoting *Ohio v. Roberts*, 448 U.S. 56, 78 (1980) (Brennan, J., concurring). This, of course, is an unambiguous statement that § 6 requires the State to bring its witnesses before the defendant "when they give their testimony" – not just cross-examination.

Such history is a testament to the continuation of the face-to-face principle expressed in the Massachusetts Declaration of Rights, Part First, Article XII.

State v. Twist, 528 A.2d 1250 (Me. 1987) adds depth to the face-to-face requirement. In *Twist*, the Court considered the issue of whether child (6 years old) witnesses could be videotaped[8] so that the State could show their testimony at trial in lieu of trial testimony. Though the decision explicitly rests on the Law Court's interpretation of the federal Confrontation Clause, it is nonetheless telling because the Court found no "extraordinary circumstances" to reach the § 6 argument defendant presented on appeal. *See Twist*, 528 A.2d at 1255 n. 7. Of the face-to-face requirement, the *Twist* Court wrote:

> this would include affording the defendant his confrontation rights at the videotaping session itself; not just the right of cross-examination through competent counsel, but the right to see and be seen by the witnesses, face to face.

Id. at 1256. The Law Court did uphold the videotaping, but only because "it is clear that these children would have suffered severe psychological and emotional damage if they had been required to face the defendant when they gave their testimony in front of the videocamera," *ibid.* – a finding neither required by § 358 nor made in our case. Thus, we see that the Maine Constitution seemingly requires "not just the right of cross-examination through competent counsel, but the right to see and be seen by the witnesses, face to face." *See also State v. Crooker*, 123 Me. 310, 312, 122 A. 865, 866

[8] In *Twist*, unlike our case, **the defendant was present during the videorecording**, sitting behind a one-way mirror so that the complainant could not see the defendant. 528 A.2d at 1254.

(1923) (§ 6 means, *inter alia*, that witnesses "are to be made visible to the accused so that he shall have the opportunity to see and to hear them").

In 1906, this Court repeated that § 6 had a separate purpose, in addition to cross-examination: "that of having a witness present before the tribunal which is engaged in the trial of the case...." *State v. Herlihy*, 102 Me. 310, 313, 66 A. 643 (1906). This requirement could be dispensed with, for example, "where it cannot be obtained," such as when the declarant is deceased. *Ibid.*

Defendant contends that these cases indicate that the Maine Constitution generally requires *all* of a witness's testimonial statements to be made via direct examination.

3. The Maine Confrontation Clause is meant to ensure reliability, yet § 358 severely undermines reliability.

Frederic declared that the "object" of the Maine Confrontation Clause is to "guard...against the danger of falsehood or of mistake." 69 Me. at 401. Several historical measures of reliability, however, are undercut by permitting a complainant to make her allegations pursuant to § 358.

For example, the right to be present for one's trial is eviscerated when the substantive parts of that trial are instead videorecorded years earlier. *See State v. Jones*, 580 A.2d 161, 162-63 (Me. 1990) ("Called the Confrontation Clause, one of the most basic of the rights [§ 6] guarantees is the right of the accused to be present at every stage of the trial."); *see also State v. Pullen*, 266 A.2d 222, 228 (Me. 1970) ("The right of a criminal defendant to be present throughout his trial must be interpreted in the light of his

constitutional privilege providing him with the right … to be confronted by the witnesses against him."). As the Supreme Judicial Court of Massachusetts has reasoned, such a right is weakened by out-of-court testimony-by-videotape. *Commonwealth v. Bergstrom*, 524 N.E.2d 366, 372-73 (Mass. 1988). This right, post-§ 358, is now merely the right to *watch a video of* the most important part of trial.

Relatedly, "[a] public trial may benefit [a defendant] in that witnesses may testify more truthfully…." *Pullen*, 266 A.2d at 228. By comparison to in-court testimony, as anyone familiar with YouTube or TikTok can attest, exaggerating in front of a videocamera is seemingly commonplace.

Indeed, the ability to assess credibility is dealt a considerable blow. Obscured by poor camera angles and bad audio quality, disoriented to the jury by seat-position and a facemask, the complaining witness in our case was not made available for easy assessment of credibility as one would be, just feet away from the jury, in a courtroom. *Bergstrom*, 524 N.E.2d at 371 ("Underlying the confrontation guarantee is the concept that a witness is more likely to testify truthfully if required to do so under oath, in a court of law, and in the presence of the accused and the trier of fact."); Kermit V. Lipez, *The Child Witness in Sexual Abuse Cases in Maine: Presentation, Impeachment, and Controversy*, 42 ME. L. REV. 283, 358 (1990) ("In my view, there is a clear relationship between the face-to-face confrontation at trial and the reliability of an accuser's testimony.").

It is one thing to make allegations to a friendly CAC interviewer trained in best practices for avoiding eliciting contradictions; it is another to level

those same allegations in a court of law, after swearing an oath, in the presence of the person against whom the allegations are made. It used to be jurors' job to tell whether, in those solemn circumstances, a complainant should be believed. Section 358 has changed that requirement, reliability be damned.

Why bother requiring the complainant (for her softball direct examination) swear under oath to the veracity of her testimony when that in-court testimony is inconsequential? The key components of the complainant's statements – those parts that satisfy the elements of the offense – are unsworn. Historically, this Court has strongly disapproved of unsworn evidence, and it should be particularly alarmed by this innovation. *Pease v. Burrowes*, 86 Me. 153, 170, 29 A. 1053, 1060 (1893) ("A jury may not distinguish between the statements of strangers made out of court and not under the sanction of an oath, and testimony given under oath before them. If allowed to hear both, they are apt to consider both; therefore the admission of such evidence cannot be excused as immaterial and harmless.").

Then there is the one-sided nature of a new trial subject to § 358. As the highest court of Delaware has reasoned, arrangements like that permitted by § 358 effectively shift the burden of production:

> [T]he burden is shifted to the defendant to call the witness and it thus appears to the jury, regardless of technicalities of cross-examination and formal vouching for the witness, that the defendant is sponsoring the witness or refusing to sponsor him. That burden is not fair. If the State carried its position to its logical extreme, the State could rest its case without calling a single eyewitness to any pertinent fact. That is not a trial as we

> know it. The State should not be able to rest its case without calling the witnesses it relies upon to prove it. This is particularly true when the State relies on witnesses who have obvious vulnerability as to credibility.

Keys v. State, 337 A.2d 18, 23-24 (Del. 1975). This notion is doubly worrisome when it comes to child complainants. Defendants already must use "kid gloves" so as not to upset jurors' sensibilities. When the prosecution is not required to elicit anything uncomfortable but instead is permitted to ask only softball questions, the imbalance falls into starker relief.

The unusual arrangement procured by § 358, only applicable to the "victim," "mark[s] the defendant's cards in advance." *United States v. Cox*, 871 F.3d 479, 495 (6th Cir. 2017) (Sutton, J., concurring). The use of such "guilt-suggestive technology" implies that complainants are entitled to special protections – bordering on a presumption of believability – previously unheard of in courtrooms. *Ibid.* Section 358 thus tilts the scales.

By weakening jurors' ability to assess credibility, § 358 threatens the very right to a jury trial. Why bother convene twelve jurors in person if the key testimony will be given years earlier, out of the courtroom? It used to be that the jury had the best perspective to evaluate witnesses' credibility. For CAC interviewees, that is no longer so. Absent meaningful direct examination of the sort that has always been required, only the CAC interviewer can be said to have the superior vantage.

Third Assignment of Error

III. The trial court erred by denying defendant's motion to preclude the State from utilizing 16 M.R.S. § 358 on due process grounds.

By invoking his demand for a trial before 16 M.R.S. § 358 had been enacted or became effective, defendant attempted to ensure his right to have a trial at which the complainant must level her allegations via direct examination. In other words, he attempted to vest his right to have such a trial. His state constitutional right to such a right, which is required to ensure governmental fair play, was violated when defendant was subjected to a trial at which § 358 permitted the State to proceed without meaningfully eliciting the complainant's allegations on the witness stand.

A. Preservation and standard of review

Defendant's claim that the admission of the CAC video violated his due process rights was preserved by his objections before trial and in his motion for a new trial. This Court's review is therefore de novo. *State v. Williamson*, 2017 ME 108, ¶ 21, 163 A.3d 127.

B. Analysis

Even before the addition of § 6-A to the Maine Constitution, § 6 – which ensures the right not to be deprived of life, liberty or property but by the law of the land – was construed to protect "vested" rights. *NECEC Transmission LLC v. Bureau of Parks & Lands*, 2022 ME 48, ¶ 40, 281 A.3d 618; *see Adams v. Palmer*, 51 Me. 480 (1863). Since the enactment of § 6-A in 1963, additionally, the principle of "vested rights" has also been conferred

by the Due Process Clause of that section. *NECEC Transmission LLC*, 2022 ME 48, ¶ 41. Decisions from this Court "recognize[] implied due process protections … that guard against retroactivity" of legislation. *Ibid.* In other words, "the vested rights doctrine 'arises from' the Maine Constitution such that it constrains the power to enact retroactive legislation." *Id.* ¶ 42.

Though this Court has yet to apply the vested rights doctrine to other than cases involving "property," the doctrine's font in § 6 – which applies quite explicitly to criminal prosecutions – and the explicit mentions of both "life" and "liberty" (and "privileges," in § 6) within Sections 6 and 6-A must import the same protection. Surely, if due process protects land-owning rights, it must too protect life and liberty from retroactive legislation. *See Lawrence v. Louisville*, 29 S.W. 450, 451 (Ky. Ct. App. 1895) ("The law-making branch of the government has no more power to destroy a defense that has accrued than it has to take the citizen's property 'without due process of law.'").

Rather, this Court's silence so far on this score is likely a product of the unique circumstances of this case. A scenario like ours would occur only when the would-be retroactive law affects merely "procedural" or "remedial" rights, rather than "substantive" rights, because the Ex Post Facto Clauses already guard against retroactive modification of the latter. *See Landgraf v. Usi Film Prods.*, 511 U.S. 244, 275 n. 28 (1994); *see id.* at 291 (Scalia, J., concurring) (noting that "vested substantive rights" are touchstone of federal Ex Post Facto Clauses); *but see Weaver v. Graham*, 450 U.S. 24, 29 (1981) ("[A] law need not impair a 'vested right' to violate the *ex post facto*

prohibition."). And 1 M.R.S. § 302,[9] which was somehow not invoked before the trial court,[10] properly covers the remaining "procedural" and "remedial" bases. *See State v. Beeler*, 2022 ME 47, ¶ 1 n. 1, 281 A.3d 637. This is to say, in normal circumstances, there is simply no need for a criminal defendant to fall back upon his vested right to be tried free of retroactive laws.

What makes our case even more unique – and what qualifies as vesting – is defendant's invocation of his speedy trial right, a right so moribund in Maine state courts that it is rarely demanded (therefore, situations like ours rarely arise). By invoking that right, defendant demanded, as is his right, to be tried according to the laws then in effect. *See Barker*, 407 U.S. at 524 n. 22, 535 (speedy trial demand indicates desire for "immediate trial"); *Couture*, 156 Me. at 247. 163 A.2d at 657 ("immediate trial"). Respectfully, if Maine courts cannot timely process trials, they ought to at least freeze in time significant rules regarding those trials.

At bottom, the state constitutional guarantee of due process is a guarantee of "'governmental fair play.'" *State v. Le Blanc*, 290 A.2d 193, 197 (Me. 1972), quoting *State v. Munsey*, 152 Me. 198, 201, 127 A.2d 79, 81 (1956). 16 M.R.S. § 358 changed the rules of the game more than halfway into the pendency of defendant's case. That is not fair play.

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[9] 16 M.R.S. § 358 was amended effective April 22, 2024 to make the section applicable retroactively, notwithstanding 1 M.R.S. § 302. *See* P.L. 2024, ch. 646, § D-1.

[10] *See infra* Fourth Assignment of Error.

Fourth Assignment of Error

IV. The trial court committed obvious error by admitting the CAC video pursuant to 16 M.R.S. § 358 when, at the time, the legislature had not made that provision retroactive.

Separate from the due process challenge, by statute, the CAC video was not admissible pursuant to § 358. The court committed obvious error by giving retroactive effect to § 358 despite the statutory rule of construction, codified by 1 M.R.S. § 302, that statutes are not to be applied retroactively absent circumstances not present here. The remedy is remand for a new trial at which the CAC video should not be played pursuant to § 358.

A. Preservation and standard of review

This issue is not preserved. Therefore, this Court's review is for obvious error: (1) error (2) that is plain (3) affecting substantial rights and (4) which this Court will remedy to uphold the integrity, fairness or public reputation of the courts. *See State v. Pabon*, 2011 ME 100, ¶ 29, 28 A.3d 1147.

B. Analysis

1. It was error to apply § 358 retroactively.

"Actions and proceedings pending at the time of the passage, amendment or repeal of an Act or ordinance are not affected thereby." 1 M.RS. § 302. Defendant's case initiated with the complaint, filed March 2, 2022. It wasn't until June 8, 2023 that L.D. 765 cleared the senate; the governor signed it on June 16, 2023 – 15.5 months into the pendency of the case. In other words, defendant's "action" was "pending at the time of the passage … of" the act that became 16 M.R.S. § 358.

This "general rule" does not apply when "the new legislation expressly cites section 302 or explicitly states an intent to apply to pending proceedings." *Beeler*, 2022 ME 47, ¶ 1 n. 1. Though § 358 now includes such a provision, Subsection 5, such was not added to the statute until *after* defendant's trial and sentencing. *See* P.L. 2024, ch. 646, § D-1 (effective Apr. 22, 2024). In other words, no provision negated the "general rule" that § 358 should *not* be applied retroactively.

2. The error was plain.

Maine courts presume that even non-lawyers know the law. *State v. Austin*, 2016 ME 14, ¶ 11, 131 A.3d 377 ("[A]ll are presumed to know what the law is."). Certainly, "'a trial judge is presumed to know the law.…'" *State v. Pelletier*, 2019 ME 112, ¶ 16, 212 A.3d 325, quoting *State v. Powers*, 489 A.2d 4, 6 (Me. 1985). Moreover, § 302 is not complicated; it is plain and explicit, a factor which indicates that the failure to adhere to it is plain error. *See United States v. Bankston*, 945 F.3d 1316, 1318 (11th Cir. 2019). Respectfully, the two judges and three lawyers who missed the applicability of § 302 simply omitted to see the plain law that was readily apparent.

3. The error affected substantial rights.

There are three factors that indicate injury to substantial rights. First and most obvious, the verdicts are split; the jury acquitted defendant of two counts, meaning that jurors did not universally believe the State's case. Second, as is demonstrated by the two *Giglio* letters sent by the prosecution, there are significant reasons to doubt the reliability of Cadence's CAC-video allegations. Third, recall that defendant was placed between a rock and hard

place, forced to choose whether he would waive his speedy trial rights or forgo the opportunity to fully vet the CAC interviewer's techniques and qualifications. These factors suggest that there was a "reasonable probability" that the erroneous admission of the CAC video affected the outcome of trial. *Cf. State v. Robbins*, 2019 ME 138, ¶ 11, 215 A.3d 788. Indeed, without the video, which contained all of the allegations, the State would have had insufficient evidence to support the convictions.

4. This Court should vacate the convictions.

Especially considering defendant's efforts to have a speedy trial before § 358 became effective, this Court should vacate. Changing the rules midcourse is not a good look for any contest, let alone one in which a defendant's liberty is at stake.

This is also an opportunity to reflect on the appropriate remedy. An appellate remedy should restore, as much as possible, an aggrieved party. *See* 4 M.R.S. § 7 (Supreme Judicial Court "has general superintendence of all inferior courts for the prevention and correction of errors and abuses where the law does not expressly provide a remedy…."); M.R. App. P. 1 (calling for "just" construction of appellate rules). The only way to do that in this case is to bar the State from relying on § 358 on remand. Just as she should have had to do at the first trial, the complainant must testify to her allegations.

CONCLUSION

For the foregoing reasons, this Court should vacate and remand for entry of an order of dismissal or further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I sent a native PDF version of this brief to the Clerk of this Court and to opposing counsel at the email address provided in the Board of Bar Overseers' Attorney Directory. I mailed 10 paper copies of this brief to this Court's Clerk's office via U.S. Mail, and I sent 2 copies to opposing counsel at the address provided on the briefing schedule.

/s/ Rory A. McNamara

STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. Ken-24-125

State of Maine

v.

CERTIFICATE OF SIGNATURE

Aaron C. Engroff

I am filing the electronic copy of this brief with this certificate. I will file the paper copies as required by M.R.App.P. 7A(i). I certify that I have prepared the brief and that the brief and associated documents are filed in good faith, conform to the page or word limits in M.R.App.P. 7A(f), and conform to the form and formatting requirements of M.R.App.P. 7A(g).

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