STATE OF MAINE
CUMBERLAND, SS.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NO.: Cum-24-282

STATE OF MAINE,

Appellee

v.

DAMION BUTTERFIELD,

Appellant

ON APPEAL FROM THE CUMBERLAND COUNTY
UNIFIED CRIMINAL DOCKET

BRIEF OF THE APPELLANT

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PROCEDURAL HISTORY

On June 8, 2022, a criminal complaint was filed in the Cumberland County Unified Criminal Docket against Defendant Damion Butterfield (hereinafter referred to as "Defendant" or "Damion"), alleging the offenses of Intentional or Knowing Murder (Class M) (17-A M.R.S.A. sec. 201(1)(A), Aggravated Attempted Murder (Class A) (17-A M.R.S.A. sec. 152-A(1)(A), Illegal Possession of a Firearm (Class C) (15 M.R.S.A. sec. 393(1)(A-1)(1), and Robbery (Class A) (17-A M.R.S.A. sec. 651(1)(E).

A warrant for Defendant's arrest was issued on the same date by Judge Maria Woodman.

An initial appearance on the complaint was held on June 10, 2022.

An indictment was filed on July 8, 2022.

On the same date the State filed a notice of joinder of this matter with those of three other defendants in Docket Nos. CUMCD-CR-2022-02189, CUMCD-CR-2022-2190, and CUMCD-CR-2022-2319.

An arraignment was held on July 18, 2022, and Defendant pled not guilty to all charges.

On December 20, 2022, the Court ordered mental examinations to determine competency and insanity.

On February 6, 2023, Defendant filed a Motion for Relief from Prejudicial Joinder.

On May 4, 2023, Defendant filed a Motion for a Hearing to Determine Competency to Stand Trial.

On May 22, 2023, Defendant filed a Motion to Suppress Statements with an attached neuropsychological evaluation.

On June 1, 2023, Defendant entered a plea of not criminally responsible by reason of insanity.

On July 13, 2023, the Court granted the State's Motion for Further Evaluation over the Defendant's objection.

On August 31, 2023, a hearing was held on the Defendant's Motion to Suppress Statements.

On September 13, 2023, Defendant filed a notice indicating that he joined in a motion for discovery sanctions filed by co-defendant Jonathan Geisinger.

On September 20, 2023, the Court: 1) Granted Defendant Damion Butterfield's Motion for Relief from Prejudicial Joinder; 2) granted Defendant Jonathan Geisinger's Motion to Sever; 3) granted Defendant Anthony Osborne's Motion for Relief from Prejudicial Joinder; and 4) denied

the State's Motion in Support of Joinder. The three cases previously joined in this matter were severed for trial.

On September 20, 2023, the Court denied Defendant's Motion to Suppress Statements.

On November 16, 2023, Defendant filed a first Motion for Discovery Sanctions.

On December 1, 2023, the Court denied a motion for leave to withdraw as counsel.

On December 1, 2023, the Court deferred ruling until trial on Defendant's Motion In Limine #1 to Exclude Use of Homophobic Terms.

On December 1, 2023, the Court ruled on Defendant's Motion to Exclude Evidence of Defendant's Use of Racist Terms, indicating that the court would read the definition of such terms as defined in the Urban Dictionary and provide a copy to the jury.

On December 1, 2023, the Court issued an order on Defendant's Motion to Exclude Evidence of Gang-Related Activity.

On December 4, 2023, the Court granted Defendant's first Motion for Discovery Sanctions regarding the Defendant's cell phone data.

Several other motions filed by Defendant were either withdrawn or deferred by the Court for consideration at trial.

On December 4, 2023, the attorneys for Defendant Jonathan Geisinger and Defendant Anthony Osborne filed letters with the Court indicating that their clients would exercise their fifth amendment rights not to testify if called as witnesses in the trial in this matter.

On December 6, 2023, a jury trial began with opening statements of the parties.

On December 13, 2023, Defendant filed a Motion to Dismiss for Failure to Disclose Exculpatory Evidence.

On December 14, 2023, the Court granted Defendant's Motion to Dismiss by prohibiting the State from using in its case-in-chief any recordings of phone calls placed by Mr. Butterfield at the Maine State Prison or York County Jail.

On December 15, 2023, there was a chambers discussion of instructions and the verdict form. Closing arguments were made. The jury was instructed and charged. The jury retired to deliberate.

On December 18, 2023, Defendant filed a Motion for Mistrial and Dismissal of Indictment with Prejudice. The motion was denied.

On December 18, 2023, the Defendant filed a Motion for Stay of Jury Deliberations. The motion was denied.

On December 19, 2023, the Court voir dired Defendant in chambers about a plea offer from the State and the Rule 11 process. The jury provided a note that it had reached a verdict. Defendant indicated that he accepted the State's plea offer.

On December 19, 2023, a Rule 11 hearing was held and Defendant entered a plea of guilty to each of the four counts in the indictment.

On January 2, 2024, Defendant filed a Motion for New Trial.

On January 2, 2024, Defendant filed a Motion to Withdraw Plea.

A status conference was held on January 8, 2024.

Another status conference was held on February 8, 2024, regarding Defendant's motion for new trial and to withdraw plea. As indicated in the docket record, the Court invited the attorneys for the parties to conference on a possible resolution of the pending motions. No agreement was reached.

On April 26, 2024, a hearing was held on Defendant's Motion for a New Trial and Motion to Withdraw Plea.

On May 7, 2024, the Court denied Defendant's Motion for New Trial and Motion to Withdraw Plea.

On June 13, 2024, the Court entered a judgment of guilty on all four counts of the indictment. Defendant was sentenced to the Department of

Corrections to a term of 35 years on the charge of Murder; 35 years on the charge of Aggravated Attempted Murder; 5 years on the charge of Illegal Possession of a Firearm; and 15 years on the charge of Robbery. The sentences were ordered to be served concurrently with each other and with a sentence imposed on a probation revocation motion in Docket No.: YORCD-CR-2020-21581.

On June 18, 2024, Defendant filed a Notice of Appeal and an Application to Allow Sentence Appeal.

STATEMENT OF FACTS

In the early morning hours of April 26, 2022, Derald Coffin was murdered on Woodford Street in Portland. Derald's friend, Annabelle Hartnett, was the victim of an attempted murder. Following an investigation by the Portland Police Department, 23 year old Defendant Damion Butterfield was charged with Intentional or Knowing Murder (Class M), Aggravated Attempted Murder (Class A), Illegal Possession of a Firearm (Class C), and Robbery (Class A).

The State prosecuted a trial in which it presented no evidence or arguments other than that Damion was the principal shooter. Three older individuals, all in their mid-forties, were charged with Felony Murder (Class A) and Robbery (Class A). Neither Jonathan "Jonny" Geisinger, Anthony "Bear" Osborne, nor Thomas "T-Mac" MacDonald were charged as accomplices to murder, aggravated attempted murder, or robbery. Accomplice liability of any of the four co-defendants was never raised as a theory by the State, either during the twenty months of pretrial litigation or during the trial itself. In fact, accomplice liability theory was specifically rejected during the trial by both the State (once) and trial justice (twice).

The evidence came in well for the defense under the State's theory that Damion was the principal shooter, so much so that an impromptu

informal settlement conference was held, after both parties had rested but before closing arguments, with Active Retired Justice Cole. At the settlement conference, the State started with a 20 year plea offer on a reduced charge of manslaughter. This offer was rejected by the defense, as it was clear that the State had not proven Damion's principal liability as the shooter. No mention of accomplice liability was raised during these settlement discussions, and it was nowhere on the radar of the defense. The parties left the courthouse during late afternoon, and the defense drove back to Lewiston to tweak its closing argument and get a good night's sleep before closings at 8:30 a.m. the next morning. At home, after a light dinner, undersigned counsel put on his sweatpants, readied for bed, watched a mindless episode of "Emily in Paris" on Netflix to clear his mind, and prepared to retire early.

After 7:00 p.m., that evening, undersigned counsel happened to check his email and discovered that the trial justice had sent an email to the parties that she had changed her mind and was now deciding to instruct the "complicated and cumbersome, "Don Macomber" accomplice liability instruction drafted by the State. This led to a bizarre sequence of events over the course of the next three business days, in which: a) neither the defense nor the State essentially touched accomplice liability during

closing arguments; b) the trial justice sent in inaccurate written instructions on accomplice liability that the jury had in its possession over the course of three days of deliberations; c) the jury sent out a series of notes that made it clear it was focusing on accomplice liability; d) Damion entered into a rushed guilty plea as it became clear the jury was prepared to convict under accomplice liability; and e) as Justice Kennedy was re-writing her accomplice liability instruction to correct the previously incorrectly drafted instructions that the jury had in its deliberation room, the jury came back with a note that it had a verdict. The note remains sealed to this date.

ISSUE PRESENTED

1. Whether the trial and unusual plea process were fundamentally fair.

ARGUMENT

1. The trial and unusual plea process were tainted by an improper late after hours instruction on accomplice liability.

Until literally the eleventh hour, Justice MaryGay Kennedy conducted a trial that was very fair to the defense. The evidence in this case was complex. There were thousands of pages of paper discovery, and hundreds of hours of audio/video interviews. The case involved complex forensic evidence, including DNA, latent fingerprints, gunshot residue, and cell phone data. As defense counsel noted several times during trial, the Portland Police Department did an outstanding job investigating this matter. Portland Police Detectives Andrew Hagerty and Daniel Townsend tirelessly pounded the streets of Portland for weeks in search of the perpetrators of these horrible crimes. At trial, Justice Kennedy entered two significant discovery sanction orders that severely handicapped the State's case and left it scrambling, by the end of trial, in search of an alternate theory of liability that it had not intended to pursue, from the beginning of the trial until the very end.

Although the State elected to charge Damion with intentional or knowing murder and aggravated attempted murder, the police also produced exculpatory evidence that, in the end, would have led the jury to

acquit Damion on all charges. In particular, evidence of co-defendant Jonny Geisinger's DNA on the hammer of the murder weapon – and the lack of identification of Damion's DNA thereon – would have resulted in Damion's acquittal as the primary perpetrator of the offenses charged.

During opening statements, the State told the jury: "At its core this is a straightforward case." (Trial Transcript, Volume 1, at 47.)

> Ms. Robbin: It was only through the tireless efforts of Detectives Hagerty and Townsend, along with their colleagues at the Portland Police Department, that *all* of the pieces of the puzzle were put together to present to you, evidence that will lead you to the conclusion beyond a reasonable doubt that Damion Butterfield murdered Darry Coffin and tried to murder Annabelle Hartnett.

(*Id.*) (Emphasis added.)

According to the State in its opening statement, Thomas MacDonald was not an accomplice to any crimes: "Tom MacDonald, he was only looking for drugs or a party. He got much more than he bargained for that night. You'll – he became a witness to murder and attempted murder." (Trial Transcript, Volume 1, at 49.) Tom had never seen Damion before that night, and did not know that Damion had a gun. (*Id.*) They picked up "the kid" and they drove back to Tom's apartment in Westbrook, where they did some cocaine. (*Id.*) They drove to Woodford Street and, according to the

prosecutor in her opening statement, “Geisinger and Butterfield pursued and assaulted Derry. Then Damion Butterfield pulled out a gun and aimed it at Darry and shot him twice in the abdomen. Geisinger and Tom began to run.” (*Id.* at 51-52.) At no point in her opening statement did the prosecutor advance a theory that Damion was anything other than the principal shooter at Woodford Street.

Following opening statements, the State presented witnesses and exhibits solely committed to the theory that Damion was the shooter. Among the numerous witnesses called by the State was Annabelle Hartnett, who testified that it was “the tall kid” who had fired the gun. She had never seen this kid before and she testified to no communications with him either prior to or following the incident. Ms. Hartnett could not specifically identify the shooter, but there was nothing about her testimony that raised any questions that it was anyone other than the tall kid who had done the shooting. (See testimony of Annabelle Hartnett at Trial Transcript, Volume 1.)

During the following days of trial, the State presented a number of law enforcement, forensic, and crime scene witnesses. None of the witnesses testified to any evidence that Damion had participated as an accomplice to a murder having been committed by one of the other co-defendants. To the

contrary, the State's witnesses were focused on proving that it was Damion who had the gun and shot Derald and Annabelle.

On the third day of trial, the State called Thomas MacDonald as a witness. Mr. MacDonald's direct examination testimony was consistent with the State's theory of the case as outlined by the prosecutor in her opening statement. Mr. MacDonald – who the State was asking the jury to believe – testified that Damion was the shooter. There was nothing in Mr. MacDonald's testimony, either during direct- or cross-examination, that indicated any evidence of a plan in which Damion would act as an accomplice with Johnny Geisinger or any other person who actually did the shooting. The plan was to go do some drugs with some girls in a hotel room down in South Portland. (Trial Transcript, Volume 3, at 37.) They went to pick up the drugs at an apartment on Cumberland Street in Portland. It was there that Tom first met Damion. (*Id.* at 39.)

Jonny, Bear, T-Mac, and Damion got in the car, and drove to the Woodford Street area, where Derald and Annabelle were located. During the ride, there was no discussion of any plan to rob or murder anyone. Jonny was driving.

Ms. Bogue: Was there any conversation?

Mr. MacDonald: Not so much. The only real conversation

was Bear was supposed to be the plug to get Jonny the drugs he wanted.

(*Id.*)

They dropped off Bear, and went back out to Tom's apartment in Westbrook. They did some cocaine. (*Id.* at 41.) They got back in the car and drove back to Woodford Street. Jonny received some unknown text messages from Bear. Damion received no such text messages. (*Id.* at 43.) They pulled up a few car lengths behind Annabelle's Range Rover.

Ms. Bogue: And what happened there?

Mr. MacDonald: We got out of the car.

Ms. Bogue: And did you – was there any conversation about what was happening or what was going on?

Mr. MacDonald: No. I assumed we were heading to the apartment that we were supposed to be meeting Bear at. And I thought there was some kind of a party or something going on.

(*Id.* at 45.)

Tom testified that, as they reached the Range Rover, he observed Damion get into a scuffle with Derald. (*Id.* at 47.) "Jonny was standing with me, like kind of off to the side." (*Id.* at 48.) Derald tried to get away from Damion, and at that point Jonny began to beat on Derald. Tom's testimony was unequivocal that it was Damion who shot Derald:

Mr. MacDonald: And at that point Jonny looked like he was going to hit him. And then within seconds of that happening Butterfield steps out into the middle of the street, that's when I notice he's got a gun and he just starts shooting.

(*Id.* at 49.)

And then Damion turned the gun on Annabelle:

Mr. MacDonald: I stood there frozen for a moment on the sidewalk. And that's when the girl gets out of the car and tries to run across the street and he turns the gun on her and shot her.

(*Id.* at 50.)

At this point, according to Tom, he, Jonny, and Damion ran back to the car. Jonny began yelling at Damion. (*Id.* at 51.) "At that point Butterfield threw the gun in the front seat." (*Id.* at 54.) Damion spent most of the next day at Tom's apartment in Westbrook. According to Tom, Damion proudly acknowledged that he was the shooter. (*Id.* at 59.) Damion told Jonny and Tom that he was going to take the blame for what had happened. (*Id.* at 81.) Through much of the remainder of Thomas MacDonald's direct testimony he testified about the extent to which Jonny was angry at Damion and Bear about what had happened, and that the plan had *not* contemplated that this incident would result in a homicide. (*Id.*)

During cross-examination, Tom reiterated and elaborated that there was no evidence, either prior to, during, or after the incident, that Damion was part of a plan in which somebody else would foreseeably commit a murder.

Mr. Howaniec: And your understanding is that you're just going to go out and pick up some drugs and party I believe with some girls out in – out in another town, Westbrook?

Mr. MacDonald: That was Jonny and I's initial plan.

Mr. Howaniec: Yup. Okay.

Mr. MacDonald: Bear and Butterfield were not part of that initial plan.

(*Id.* at 119-120.)

* * * *

Mr. Howaniec: And during that time there's no reference – there's no mention from Damion that he's planning on participating in any sort of robbery or anything like that, right?

Mr. MacDonald: At that time, absolutely not.

Mr. Howaniec: Okay. You're not seeing any evidence of – of any – any – some 31 bullets or anything like that in his possession, correct?

Mr. MacDonald: Correct.

Mr. Howaniec: And during that time it's just – there's nothing – there's nothing that Jonny has told you or that

Damion or Bear or anybody has told you that leads you to believe that anything unusual is about to happen, correct?

Mr. MacDonald: Correct.

Mr. Howaniec: Just another night in Portland, you're going to do some drugs, hang out with some girls and – just another fun evening, correct?

Mr. MacDonald: That's correct.

(*Id.* at 120-121.)

As they approached Woodford Street, there was nothing that led him to believe that anyone in the car was angry or homicidal, or that a robbery was going to occur. Nothing in the text messages from Bear to Jonny indicated to Tom anything other than a routine drug transaction. Damion was "pretty quiet." (*Id.* at 129-130.)

The State presented two eyewitnesses in its efforts to pin Damion as the shooter. Annabelle identified the shooter as the "tall kid." Tom identified the shooter as Damion. Neither eyewitness identified Jonny or anybody else as the shooter.

As the trial approached conclusion, there was an in-chambers discussion about potential jury instructions. On December 12, 2023, there was a discussion between the parties and the Court about instructions. The discussion begins at the top of page 112 of the transcript.

The Court: Have you had a chance to look at the state's Proposed jury instructions?

Mr. Howaniec: I only saw the three – I only saw the three elem – the three crimes. Is that – is that all you presented?

Ms. Robbin: Mm-hmm.

The discussion turned to manslaughter and lesser-included offenses. The defense acknowledged that defenses like abnormal condition of mind and self-defense had not been generated. This was followed by a brief discussion on a possible instruction concerning credibility. There was discussion about an alternate suspect instruction. The Court indicated that it was not going to give an instruction on alternate suspects. The discussion then returned to the appropriateness of a manslaughter instruction. There was discussion about boilerplate instructions and an instruction on the decision of the Defendant not to testify.

At that point, the discussion turned to accomplice liability:

Mr. Howaniec: I'm always – less is more, I'm always for keeping It simple.

Ms. Robbin: I mean there's – there's always the question of Whether we throw in an accomplice instruction. The accomplice instruction is based on the Asante case. And I feel like it is so convoluted. Because if he is intending murder or robbery, then it's still murder – it's like – it's just some crazy, crazy –

Mr. Howaniec: We had – you know, we went through the same

analysis. I say we keep away from – look, the state's theory of this case is this kid shot this guy.

The Court: *Right. Right. I agree. I hadn't heard accomplice in this.*

Ms. Robbin: *No, no.*

Mr. Howaniec: Yeah. So I think it's going to be straightforward. And – let's get back to you by the end of the day on manslaughter.

The Court: Okay.

Ms. Bogue: Okay.

(Trial Transcript, Volume 4, at 112-118.) (Emphasis added.)

The State proceeded with its efforts to introduce inculpatory statements made by Damion in monitored telephone calls from jail. It also intended to introduce an extremely incriminating text exchange between Damion and his girlfriend in which Damion "confessed" to being the shooter. In a very disturbing *Brady/Giglio* violation, it was determined that a highly exculpatory text exchange had occurred shortly before the apparent incriminating messages. The defense remains gravely concerned about this outrageous discovery violation. On the morning of Thursday, December 14, 2023, the Court appropriately significantly sanctioned the State in an order excluding the jail calls. The State is fortunate that a harsher sanction like dismissal was not imposed.

The State then rested its case. The State presented no new evidence that generated evidence of accomplice liability. The State gave absolutely no indication that it had changed its opinion on the "crazy, crazy" idea of accomplice liability. The defense proceeded with its defense strategies of defending against the State's theory that Damion was the principal shooter, and that the Court "hadn't heard accomplice in this." The defense had important strategy decisions to make right up to the end of trial. The defense deliberated whether to recall Mr. MacDonald as part of its case. It would have undoubtedly done so if it knew it was being required to dispel a theory that, even if he was not the shooter, the jury could find Damion guilty of murder as an accomplice to one of the other defendants, who were charged only with felony murder. The defense was prepared to play a recording of Annabelle making a recorded prior inconsistent statement about having been shot by "a tall kid that she had seen around town always carrying guns" (i.e., someone other than Damion). The defense was comfortable with the state of the evidence as of the end of the State's case, however, and made the difficult trial strategy decision to leave this issue alone. Finally, the defense went into settlement discussions with Justice Roland Cole – and made life-altering decisions on behalf of this 23-year-old young man – without any inkling that it was going to be

slammed with an eleventh hour accomplice liability instruction out of the blue.

After both parties rested, the State – for the first time in the 20 months that this case had been pending – presented a proposed instruction drafted by Assistant Attorney General Donald Macomber on accomplice liability. The state's argument was based on a convoluted theory that, because the State's case had been weakened by the Court's discovery sanction order (which was the result of the State's own conduct), it was now somehow entitled to an instruction that just a day before it had said was "crazy." According to the prosecution: "Without Damion Butterfield's admissions in the jail call, we think we need an accomplice liability instruction."

The State was now arguing, for the first time, that the jury could find Damion guilty of murder if he were the triggerman, or they could also find him guilty of murder if he were an accomplice with some other unidentified person who at worst had been charged with felony murder. The rationale behind this argument was that the prosecutors no longer felt they could prove their case beyond a reasonable doubt as a result of an order that punished them for *their* failures, and should therefore be rewarded with an

instruction that left the jury with little choice but to convict Damion of murder.

The defense objected to this late effort. The defense did not even have a copy of this instruction when it was argued to the Court. It had "just been emailed" by Attorney Robbin. The Court noted that "Don Macomber's version" contained "significantly beyond what Alexander includes" in section 6-33 of his volume on instructions. (Trial Transcript, Volume 6, at 112.) The defense asserted that just two days before the State had agreed that accomplice liability had not been generated. Attorney Robbin responded:

> Attorney Robbin: Well, I believe that my – my position is being mis-characterized. I never said that there was no accomplice liability generated on the record, what I said was we didn't think it was necessary to instruct on accomplice liability because of the evidence we anticipated coming in,especially after the orders on the motion to suppress.

(*Id.* at 121.) A review of the transcript of the prosecutor's position on accomplice liability reflects no such position having been taken.

The Court indicated that it would consider the State's request, "[b]ut I'm – my memory is similar to – that there was – *this is not an accomplice liability case.*" (*Id. at* 122.) (Emphasis added.)

The attorneys for both sides, dealing with hundreds of issues in this complicated case and closing arguments just hours away, left the courthouse that afternoon under the impression that accomplice liability was not going to be instructed in the case. The defense had not even seen the proposed "Don Macomber" instruction. Undersigned counsel went home to tweak the closing argument that had been in preparation for weeks, and prepared to go to bed at 8:30 p.m., as he normally does during complicated jury trials. Closing arguments during these high stress trials are often very difficult, challenging matters. Damion was sent back to the Cumberland County Jail and likewise prepared for bed.

At 5:45 p.m., nearly two hours after the close of court, the state filed a motion to reconsider the Court's ruling that accomplice liability had not been generated. At 6:41 p.m., without allowing the defense to even respond to the State's motion to reconsider, the Court sent an email to the parties that it was accepting word for word the "complicated and cumbersome" instructions provided by the State, which ridiculously favored the State, and basically invited jurors to convict Damion of murder even if they doubted he was the shooter. Undersigned lead counsel read the email after 7:00 p.m., and, at 7:07 p.m., replied that the defense objected and that the defense was in no position at the eleventh hour to alter its

closing argument on such a radically defense-strategy-altering issue as accomplice liability. The Court indicated that it had consulted with its peers in making its decision.

The next morning – thirteen hours later, most of it spent asleep – the defense made a closing argument – in a case in which a young criminal defendant was facing life in prison – having been left with no meaningful opportunity to re-analyze the evidence, seek out case law, think through what to add or subtract from a closing argument that had been in the works for weeks, discuss the issue at all with the Defendant who was himself readying for sleep at the Cumberland County Jail, or discuss the issue with his co-counsel in any meaningful way. Undersigned lead counsel's closing argument did not address accomplice liability. The State prosecutor did not mention accomplice liability in her closing argument, and referenced it briefly in passing in her rebuttal.

The Court sent out written instructions to the jury that were in the jury room for the entire deliberations across three days. For reasons that are not clear on the record, the Court did not consider the Alexander instructions. The Court merely copied the Don Macomber instructions to the jury. Even more problematic, the instructions that were provided to the jury were incorrect. The accomplice liability instructions were printed twice

in the jury instructions, the first time grossly incorrectly stating the law in favor of the State. When the defense asked how this happened, the Court acknowledged that it had simply cut and pasted what had been provided by the State. It remains unclear to the defense why incorrect instructions were provided to the Court by the State in the first place.

These incorrect instructions came into play almost immediately as the jury, within minutes, sent out a note inquiring about the incorrectly stated instructions on page 15. Over the course of three days of deliberation, the jury continued to send out notes that reflected confusion about the "complicated and cumbersome" Don Macomber instructions. The incorrectly drafted instructions remained in the jury chambers the entire time. As it appeared that the notes were turning against the defense, Damion decided under duress to plead guilty to an offer of 35 years of incarceration, thus waiving his right to appeal. As this decision was being made, word came in from the jurors that they had reached a verdict. The verdict remains sealed in the court file to this date.

The defense subsequently timely filed motions pursuant to Rule 32(d) and Rule 33 to vacate the plea and grant a new trial. After hearing, the Court denied both motions.

The defense argued that the plea should be vacated, citing the factors referenced by this Court in *State v. Hillman*, 749 A.2d 758 (Me. 2000). In arguing for a mistrial, the defense relied on Justice Alexander in *Maine Jury Instruction Manual*, (2012 ed.), sec. 5-2, "Instruction Request Practice":

> It is good practice to advise the court of unusual or Complicated instruction requests well in advance of the close of the evidence. This allows all concerned adequate time to consider and prepare jury instructions. Presenting complicated instruction requests at the last minute is bad practice, as the opportunity for deliberate consideration of such requests is reduced.
>
> An instruction request presented late in the trial or at the end of the evidence may be refused, even if it correctly states the law, if it would change the nature of the evidence or issues in the trial. *State v. Kelly*, 606 A.2d 786, 788 (Me. 1992). (Instruction on 20-year adverse possession claim properly refused when presented after close of evidence in case tried under 40-year claim statute.).

As a result of the late instruction, defense counsel was unable to address the issue in a murder trial closing argument. Getting word of the instruction so late in the evening – after <u>both</u> sides understood that there would be no such instruction – precluded "deliberate consideration" of the issue.

Furthermore, the Court's instructions – which were sent into the jury room during the three days in which the jury deliberated – misstated the

law of accomplice liability. The first reference, beginning at page 14 of the instructions, grossly misstated Maine law. It cited only part of the statute, and failed to reference key provisions with regard to foreseeability and mere presence at a crime. This was very deceptive and confused the jury as its third note referred to the last paragraph of that section on page 15 of the instructions.

As Damion cannot be an accomplice to himself, the jury should have been instructed that evidence that Damion had a gun must *not* be used as evidence for accomplice liability. The elements of accomplice liability were not alleged in the indictment. The state did not allege accomplice liability until late afternoon on the final day of trial, after the close of the evidence. The first that the jury heard of it as an allegation was in closing arguments. It is not factually accurate for the instructions to say that "the state alleges that Mr. Butterfield either personally committed the crimes . . . or was the accomplice of others in their commission." This is akin to raising a new count with new elements after the close of evidence. It is not a lesser included offense and requires more proof than felony murder, which the State could not argue because it was not charged.

Robbery was lumped in with the accomplice liability instruction on murder and nothing in the accomplice liability statute mentioned other

crimes being a basis for accomplice liability on a different crime. In its eleventh hour argument for an accomplice liability instruction, the prosecution argued that the instruction was "generated" as a result of the Court's discovery sanction order. It is a pretty bold assertion that the defense should be punished by this instruction as a result of the state's *Brady/Giglio* violation of gross proportions. The prosecutor said that the instruction was required because the State, without its jail calls, could now no longer prove its case beyond a reasonable doubt. The defense would have much rather been forced to deal with the jail calls than this instruction.

The instruction created a domino effect of legal absurdities, which the jury struggled to address. For twenty months, the state argued that Damion Butterfield shot Derald Coffin to death and directly attempted to murder Annabelle Coffin. Now it was saying that Damion should alternatively be convicted of murder based on conduct by Jonathan Geisinger, even though Geisinger was not charged with murder and was capped at 30 years. The state argued that Damion should be convicted of a crime punishable by a life sentence, because a co-defendant facing 30 years may have pulled the trigger in Damion's presence. Under the State's accomplice liability logic, Damion could get convicted of murder and

sentenced to life in prison because he committed a simple assault and was an accomplice to a theft that did not even happen.

The State put forth no evidence that Defendant had any knowledge of the firearm, or of any party possessing the firearm, prior to the alleged robbery or prior to the murder. The State put forth no evidence of premeditation or planning by Defendant other than evidence of his having had some level of contact with parties at the scene prior to and following the murder. Without Defendant having prior knowledge of the firearm or its being possessed by any party at the scene, no reasonable jury could find that murder would have been reasonably foreseeable by Defendant.

For a jury verdict or a Rule 11 plea to be legitimate, the process needs to be fundamentally fair, as guaranteed by the constitutions of the United States and the State of Maine.

In her concurring opinion in *State v. Dennis*, 2024 ME 54, Chief Justice Stanfill addressed the after-hours problem presented in this case:

> Although many lawyers regularly work during evenings and on holiday weekends, I am not willing to routinely require it, particularly when we do not require it of ourselves. *See* M.R.U. Crim. P. 54(b) ("The office of the clerk . . . shall be open on all days except Saturdays, Sundays, legal holidays, and such other days as the Chief Justice of the Supreme Judicial Court may designate."); M.R.Civ. P. 77(c) (providing the same terms); Hours of Operation, Me. Admin. Order JB-05-04 (as amended by A. 3-23) (effective Mare. 30, 2023) (setting courthouse and Judicial Branch hours of operation.)

Id. at 17, footnote 15. This is especially the case during the current constitutional crisis in the Maine judicial system.

This appeal is very unfortunate, because Justice Kennedy otherwise gave the defense an extraordinarily fair trial… so much so that Damion would have been acquitted on all charges on the principal-shooter evidence presented by the State at trial. The State's desire to strike a plea after the evidence was in (but before closing arguments) corroborates this fact.

The entire process, however, was poisoned – from closing arguments, through jury deliberations, through a last minute, rushed Rule 11 plea by a very mentally ill young man, through an unopened written verdict – resulting in a due process violation that robbed Damion Butterfield of a fundamentally fair trial as required by the United States and Maine constitutions.

CONCLUSION

The blindsiding of the defense with a late evening instruction on accomplice liability denied the Defendant of his basic due process rights to a fair trial. The evidence did not support such an instruction, and instead created logical absurdities that have no place in a murder (or any) trial. The State argued that Damion both fired the gun and that he did not fire the gun. If they were not arguing that he did not fire the gun, then he was not an accomplice. He cannot be an accomplice to himself. This last minute issue generated great confusion, as evidenced by the multiple notes submitted by the jury over three days of deliberations. The defense agreed with the prosecution that it would not have been able to prove its case beyond a reasonable doubt after the Court's order on discovery sanctions. The Court's Don Macomber instruction on accomplice liability wildly swung the pendulum completely over to the other end of the spectrum, however, inviting the jury to convict Damion Butterfield of murder by his mere presence in the vicinity of somebody else who may have shot the gun… a fact that, in the same breath, the state denied was the case. Damion's decision to enter into a plea was rushed and last minute, and made when

the Court received notice that the jury had returned an unknown verdict, following a trial that had been tainted in the eleventh hour.

For all the foregoing reasons, Appellant Damion Butterfield moves that this Court vacate the convictions in the above matter, and remand the matter to the trial court for entry of a judgment of not guilty on all counts in the indictment.

Dated: February 7, 2025

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CERTIFICATE OF SERVICE

I, James P. Howaniec, Attorney for the Appellant, Damion Butterfield, hereby certify that I have served two (2) copies of the foregoing brief upon Leanne Robbins, attorney for the state, by delivering two copies of the brief, by United States Mail, postage prepaid, to:

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CERTIFICATE OF SIGNATURE

I am filing the electronic copy of this brief with this certificate. I will file the paper copies as required by M.R.Civ.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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