SYNOPSIS OF CRIMINAL OPINIONS IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI HANDED DOWN JUNE 14, 2016

***Jeffery Johnson (Bullet) v. State*,** No. 2015-KA-00070-COA

CASE: Possession of marijuana with intent to distribute, habitual offender, subsequent drug offender
SENTENCE: 6 years in MDOC without parole or probation, $500 fine

COURT: Oktibbeha County Circuit Court
TRIAL JUDGE: Hon. James T. Kitchens, Jr.

APPELLANT ATTORNEY: Charles Bruce Brown
APPELLEE ATTORNEY: Alicia Ainsworth

DISPOSITION: Affirmed. Greenlee, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair, James and Wilson, JJ., concur.

ISSUES: (1) Whether the State proved Johnson had an intent to distribute; (2) Whether the trial court erred in denying Johnson's proffered jury instructions D-5 and D-6; (3) Whether the trial court improperly limited cross-examination of a witness; (4) Whether the trial court erred when it allowed the State to amend the indictment; (5) Whether Johnson received ineffective assistance of counsel; (6) Whether the trial judge should have recused himself; (7) Whether Johnson was entitled to post-conviction bail.

FACTS: Starkville Police Officer Derek Nelson stopped Johnson for driving without a seatbelt. Nelson asked for Johnson's driver's license and noticed a "light smell" of marijuana coming from the car. Nelson got Johnson out of the car and interviewed him. He then called Joe Huffman, who was Johnson's probation officer, to assist. Huffman also smelled marijuana and took Johnson into custody. Johnson admitted that he had marijuana in the car, and Huffman found 29.6 grams of marijuana in the car. Johnson told Huffman, Nelson, and another officer that the marijuana was "for the women". Huffman also found sandwich bags and condoms in the trunk of Johnson's car.

Johnson was indicted for possession of marijuana, less than 30 grams, with intent to distribute, under Miss. Code Ann. §41-29-139. Three weeks before trial, the State moved to amend the indictment to charge Johnson as a habitual offender under Miss. Code Ann. §99-19-81, and as a second/subsequent drug offender under Miss. Code Ann. §41-29-147. That motion was granted.

Huffman testified that based on his experience, he believed Johnson intended to break the marijuana down into smaller amounts and trade it for sex. Johnson testified that he was going to a party where everyone shares what they bring, and that he would have shared his marijuana.

HELD: (1) The evidence was sufficient to show intent to distribute. All that is required is proof

of the defendant's intent to relinquish possession and control, regardless of whether he receives consideration.
(2) Jury instruction D-5, dealing with how to weigh witness testimony, was adequately covered by other instructions; Instruction D-6 dealt with evaluating inconsistent statements from witnesses, and was adequately covered in the court's instructions. (3) The trial court properly limited cross-examination of Officer Nelson, excluding questions about an unrelated traffic stop where Nelson was accused of turning off his microphone. Trial court said questioning would only confuse the jury. (4) Johnson's claim that the he was not given adequate notice regarding the amendments to his indictment, and hearing on the same day, were procedurally barred because he failed to object or request a continuance. Procedural bar notwithstanding, Johnson was given adequate notice that the State intended to amend the indictment. The indictment was filed more than two months before the start of trial. (5) Defense counsel was not ineffective. The trial court did not "admonish" trial counsel; nonetheless, the comments made were outside the presence of the jury. Trial counsel was not ineffective for not asking for a continuance when Johnson insisted on going to trial. Trial counsel not ineffective for failing to object to an undisclosed rebuttal witness called by the State. The State was not required to list the witness because he was not called in their case-in-chief. (6) There was no plain error in the case. (7) Because Johnson never moved to have the trial judge recused, he is procedurally barred from arguing it on appeal. Notwithstanding the procedural bar, it does not matter that the judge was a prosecutor for one of Johnson's prior convictions. (8) The trial court did not abuse its discretion in denying Johnson post-conviction bail pending appeal. Johnson did not meet his burden of showing that he was not a special danger to any person or the community.

***Adrian Crowell v. State*, No. 2014-KA-00784-COA**

CASE: Aiding and abetting shooting into a vehicle
SENTENCE: Five (5) years in MDOC

COURT: Hinds County Circuit Court
TRIAL JUDGE: Hon. Jeff Weill, Sr.

APPELLANT ATTORNEY: Mollie McMillin
APPELLEE ATTORNEY: Alicia Ainsworth

DISPOSITION: Affirmed. James, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Barnes, Ishee, Carlton, Fair, Wilson, and Greenlee JJ., concur.

ISSUES: Weight and Sufficiency

FACTS: The owner of a trucking company, Graves, met with Crowell in the Appleridge Shopping Center in Jackson to discuss damage caused to Crowell's car when a bucket fell off one of Graves's trucks and hit Crowell's car. Graves asked Crowell to get an estimate to provide to Graves's insurance company. Crowell would not provide a written estimate, but said that Capitol Body Shop quoted him a cost of $1200 to fix the car. Graves refused to give Crowell the money for the damage without a written quote from the body shop. The situation escalated.

Crowell called to the passenger of his car, who was never identified, to get out. Crowell said "Let's show this motherf***** we mean business." Graves dove into his truck, as Crowell told his passenger, "Man, handle it, handle it." The man then shot into Graves's truck, hitting it four times.

Crowell was charged with conspiracy and aiding and abetting shooting into a vehicle. Crowell argued on appeal that there was no evidence that he participated in the shooting or that he encouraged his passenger to shoot into the truck.

HELD: Crowell's comments to his passenger to "handle it" and to show Graves that they meant business provided sufficient evidence for the jury to make in inference that Crowell incited, encouraged, or assisted the passenger to shoot into the truck. Verdict was not against the overwhelming weight of the evidence.

***Amy Denise Towles v. State*, No. 2014-KA-01226-COA**

CASE: Aggravated Assault
SENTENCE: Twenty years in MDOC, 15 suspended, 5 to serve, 5 post-release supervision

COURT: Alcorn County Circuit Court
TRIAL JUDGE: Hon. Thomas J. Gardner, III

APPELLANT ATTORNEY: Julie Ann Epps
APPELLEE ATTORNEY: Abbie Koonce

DISPOSITION: Reversed and Remanded. Barnes, J., for the Court. Lee, C.J., Irving and Griffis, P.JJ., Ishee, Carlton, Fair, James, Wilson, and Greenlee JJ., concur.

ISSUES: (1) Whether the State's elements instruction constructively amended the indictment; (2) Whether the trial court erred in refusing Towles's self-defense instruction; (3) Whether instruction on accident or mistake was proper and whether counsel was ineffective for not objecting or offering proper instruction; (4) Whether the State improperly cross-examined defendant, and whether counsel was ineffective for failing to object; (5) Whether State's improper send-the-message argument in closing was reversible error.

HELD: (1) Addition of "recklessly" to elements instruction did not constructively amend the indictment, which had blended §§97-3-7(2)(a) and (b). The indictment itself did not specify a subsection of the statute, and there is no indication that the jury convicted based on the addition of the term "recklessly." (2) Trial court committed reversible error in denying Towles's proposed self-defense jury instruction. Self-defense theory did not conflict with Towles's assertion that the shooting was accidental, and defendants have a right to assert alternative theories of defense, even if they are inconsistent. (3) Defense counsel did not offer an alternative instruction or object to the State's version and trial court has no affirmative duty to offer instructions; ineffective assistance of counsel question is moot because of reversal in issue 2. (4) Prosecutor's questioning of defendant about a statement that she refused to sign was not a

comment on her invocation of the right to counsel but an attempt to point out inconsistencies between her testimony and the statement. There was no prejudice, and thus no ineffective assistance of counsel. (5) Prosecutor's comments that the jury was the "conscience of the community" were clearly send the message arguments and under cumulative error doctrine, the error combined with error in Issue 2, warrants reversal.