

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

DAVIAN WILSON,
also known as Chaba
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 17-60197

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- 1) Whether the district court erred by finding that the prosecution produced sufficient evidence at trial for a reasonable jury to return a guilty verdict against Mr. Wilson.
- 2) Whether the district court erred by allowing admission of Mr. Wilson's clothing into evidence at trial, when the evidence was not properly authenticated.
- 3) Whether the district court ordered a substantively unreasonable sentence because Mr. Wilson's sentence was unjustly disparate in comparison to the co-participants in the alleged crime and in comparison to other defendants convicted of murder in federal court.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED FOR REVIEW	ii
PARTIES TO THE PROCEEDING.....	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES	vi
I. OPINIONS BELOW	1
II. JURISDICTIONAL STATEMENT.....	3
III. CONSTITUTIONAL PROVISION INVOLVED.....	4
IV. STATEMENT OF THE CASE	5
A. Basis for federal jurisdiction in the court of first instance.....	5
B. Statement of material facts.....	5
V. ARGUMENTS	11
A. Review on certiorari should be granted in this case	11
B. The district court erred by finding that the prosecution produced sufficient evidence at trial for a reasonable jury to return a guilty verdict against Mr. Wilson.....	11
1. Standard of review and applicable legal tests	11
2. The evidence admitted at trial was insufficient to prove guilt	13
C. The district court erred by allowing admission of Mr. Wilson's clothing	

into evidence at trial, when the evidence was not properly authenticated	16
1. Standard of review and applicable legal tests	16
2. The district court abused its discretion by allowing Mr. Wilson's clothing into evidence at trial.....	17
D. The district court ordered a substantively unreasonable sentence because Mr. Wilson's sentence was unjustly disparate in comparison to the co-participants in the alleged crime and in comparison to other defendants convicted of murder in federal court.....	19
1. Standard of review	19
2. The district court abused its discretion by ordering a sentence that was unreasonably long in comparison to other comparable defendants.....	20
a. Average sentences for similarly situated defendants	23
b. Sentences ordered for defendants with crime-related facts similar to Mr. Wilson's case	25
c. Conclusion – disparate sentence issue	29
VI. CONCLUSION.....	31
CERTIFICATE OF SERVICE	32
(Appendices 1, 2 and 3)	

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases:</u>	
<i>Ferguson v. Extraco Mortgage Co.</i> , 264 Fed. App'x 351 (5th Cir. 2007)	22
<i>Schweiker v. Wilson</i> , 450 U.S. 221, 101 S. Ct. 1074 (1981).....	4
<i>United States v. Contreras</i> , 452 Fed. App'x 538 (5th Cir. 2011)	19
<i>United States v. Jackson</i> , 636 F.3d 687 (5th Cir. 2011),	17
<i>United States v. Jardina</i> , 747 F.2d 945 (5th Cir. 1984)	17
<i>United States v. Lowery</i> , 135 F.3d 957 (5th Cir. 1998)	16
<i>United States v. Moreland</i> , 665 F.3d 137 (5th Cir. 2011)	11, 12
<i>United States v. Simmons</i> , 649 F.3d 301 (5th Cir. 2011)	20
<i>United States v. Smith</i> , 440 F.3d 704 (5th Cir. 2006)	20, 22, 23
<u>Statutes:</u>	
18 U.S.C. § 2	1, 5
18 U.S.C. § 1111	1, 5
18 U.S.C. § 1153	1, 3, 5

18 U.S.C. § 3231 5

18 U.S.C. § 3553 22

28 U.S.C. § 1254 3

Rules:

Rule 10, Supreme Court Rules 11

Rule 13.1, Supreme Court Rules 3

Rule 29.5, Supreme Court Rules 32

Rule 29, Fed. R. Crim. P. 14

Rule 201, Fed. R. Evid. 22

Rule 901, Fed. R. Evid. 17

Sentencing Guidelines Provisions:

Guidelines Sentencing Table 26

U.S.S.G. § 4A1.3 20

U.S.S.G. § 5K1.1 26

Provisions of the United States Constitution:

Amendment XIV, United States Constitution 4

I. OPINIONS BELOW

Petitioner Davian Wilson was indicted on March 10, 2016, by a Federal Grand Jury for the Southern District of Mississippi. The charge was second degree murder, in violation of 18 U.S.C. §§ 1111, 2, and 1153. The district court case number is 3:15cr68-DPJ-LRA.

While murder is typically a crime reserved for state court prosecution, the subject offense involved Native Americans and the alleged acts underlying the charge occurred in what is legally classified as “Indian country,” i.e., tribal lands of the Mississippi Band of Choctaw Indians. Therefore, the case was properly brought in federal court under 18 U.S.C. § 1153.

Trial of this case began on December 12 and ended on December 15, 2016. The jury returned a guilty verdict. The district court conducted a sentencing hearing on March 6, 2017. Even though the probation officer calculated the Guidelines sentencing range at 235 to 293 months in prison, the court sentenced Mr. Wilson to serve 400 months in prison. The court also sentenced him to serve five years of supervised release following completion of the prison term, and pay a \$1,500 fine. The court entered a Judgment reflecting this sentence on March 20, 2017. A copy of the district court’s Judgment is attached hereto as Appendix 1.

Mr. Wilson appealed his conviction and sentence to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit case number is 17-60197. The

Fifth Circuit affirmed the conviction and sentence on April 20, 2018. It filed an Opinion and a Judgment on that day, both of which are attached hereto as composite Appendix 2. The Fifth Circuit's Opinion appears in the Federal Appendix at 720 Fed. App'x 209. A copy of the Opinion as it appears in the Federal Appendix is attached hereto as Appendix 3.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Opinion and its Judgment in this case on April 20, 2018. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case pursuant to the provisions of 28 U.S.C. § 1254(1), titled “Courts of appeals; certiorari; certified questions,” and 18 U.S.C. § 1153, titled “Offenses committed within Indian country.”

III. CONSTITUTIONAL PROVISION INVOLVED

The sentencing issue presented in this Petition rests on important Fourteenth Amendment equal protection guarantees.¹ The relevant clause states “nor shall any State … deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, sec. 1.

¹ “This Court repeatedly has held that the Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment.” *Schweiker v. Wilson*, 450 U.S. 221, 227 n.6, 101 S. Ct. 1074, 1079 n.6 (1981) (citations omitted).

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of one criminal counts levied against Mr. Wilson for second degree murder, in violation of 18 U.S.C. §§ 1111, 2, and 1153. The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charges levied against Mr. Wilson arose from the laws of the United States of America.

B. Statement of material facts.

This case focuses on the killing of Jonis Joe. On the night that he was killed, several people were partying and having fun at Heidi Billy's back yard on the evening of August 14 and the early morning hours of August 15, 2014. It is illegal to drink alcohol on the Choctaw Indian Reservation (hereinafter "Reservation") where Ms. Billy's house is located. Nevertheless, most of the people there were drinking.

All three of the defendants in this case – Mr. Wilson, James Bell and Tommy Cotton – were at the party. Also, J. W. (a minor who must be referred to by his initials) was there. J. W. was charged with the murder of Jonis Joe in Choctaw Tribal Court, but the charge against him was dismissed and he was granted immunity for testifying at trial against Mr. Wilson.

Because it is illegal to drink alcohol on the Reservation, the partygoers fled Ms. Billy's back yard when they saw blue lights approaching from down the road. After a few minutes, people began to return to the back yard. Trial evidence indicated that Mr. Wilson fought with someone while he was gone.

Trial testimony conflicted as to whether Mr. Wilson stated the name of the person he fought with while he was gone from the party. One of the party attendants, Sequoyah Lewis, testified that Mr. Wilson stated the name of the person that he fought with, but he did not say that it was Jonis Joe. She testified that Mr. Wilson named another person, but she could not remember who. Mr. Bell also testified that Mr. Wilson did not identify the person he fought with. Shalonda Tubby, another one of the partygoers, testified at trial that Mr. Wilson stated that he fought Jonis Joe. However, immediately after the incident when the police were actively investigating the killing, Ms. Tubby never stated that Mr. Wilson identified Mr. Joe as the person he fought with.

After everyone regathered at Ms. Billy's back yard, Mr. Wilson stated that he wanted to go and find out who he fought with. Specifically, Mr. Bell testified that “[h]e just wanted to go see who it was.” The “he” in the foregoing quote was Mr. Wilson and the “who it was” referred to the person Mr. Wilson was in a fight with.

Mr. Wilson, Mr. Bell, Mr. Cotton and J. W. then left the party to find out who Mr. Wilson fought with. The four of them came upon Mr. Joe, who had a handgun. It turned out that the handgun was a BB gun but none of the defendants knew that because it was dark outside. The gun looked like an automatic pistol.

As the defendants were pursuing Mr. Joe, he stopped and began running toward them. As stated above, Mr. Joe had a handgun. The gun was in Mr. Joe's right hand. The four defendants knocked Mr. Joe to the ground and Mr. Wilson held down his right arm to try to get the gun. A fight ensued, and Mr. Bell continued to assault Mr. Joe after the other three defendants fled.

As a result of the altercation, Mr. Joe died. The medical examiner testified that "the cause of death was internal bleeding of vital organs due to multiple puncture wounds as a consequence of upper front back torso arms, neck and facial area[.]" In other words, Mr. Joe was stabbed to death. For reasons that become apparent below, it is important to note that the cause of death was not blunt force trauma.

At trial, Mr. Bell admitted that he stabbed Mr. Joe. In fact, he pled guilty to murdering Mr. Joe. What is questionable is whether Mr. Wilson stabbed Mr. Joe.

Mr. Bell testified that Mr. Wilson did stab Mr. Joe. However, Mr. Bell had a number of ulterior motives to provide that testimony. For example, he expected to receive a reduced sentence by testifying against Mr. Wilson. Further, Mr. Wilson

had been involved in a sexual relationship with Mr. Bell's mother, which angered Mr. Bell.

Other trial evidence conflicted with Mr. Bell's testimony that Mr. Wilson participated in the stabbing. J. W., an assailant that received immunity for his testimony, stated that he did not see Mr. Wilson with a knife immediately before the altercation. He also testified that the only thing he saw Mr. Wilson do during the fight was punch Mr. Joe in the face. That is, he did not see Mr. Wilson stab Mr. Joe.

All of the defendants were arrested on August 15, 2014, soon after Mr. Joe's death. Relevant to one of the issues on appeal is law enforcement's handling of the clothing that Mr. Wilson was purportedly wearing during the incident. On November 23, 2016, the undersigned received a letter from the prosecutor stating that "Choctaw Detention Center employees either did not fill out property log sheets or have lost property log sheets for the clothing and property of the defendants arrested in this case." The defense filed a pre-trial Motion *In Limine* to exclude this evidence at trial based on lack of authentication.

The prosecution attempted to cure this problem at trial. However, the person who allegedly logged Mr. Wilson's clothing in at the Choctaw Detention Center on August 15, 2014, did not testify. Rather, testimony was provided by a jail employee who was only "familiar with those procedures and processes in August

2014[.]” Further complicating the matter is a gap from August 16, 2014, when Investigator Smith with the Choctaw Police Department took custody of the clothing, through August 22, 2014, when the evidence room at the Choctaw Detention Center took custody of the clothing. Who had custody of the clothing during this period cannot be definitively determined. The defense again objected to the admission of Mr. Wilson’s clothing at trial, and the court overruled the objection.

Law enforcement submitted Mr. Wilson’s clothing for forensic examination. Mr. Bell testified that Mr. Wilson was wearing a black sweatshirt on the night in question. It is important to note that the area of the sweatshirt where blood was found was on the inside of the sweatshirt. The “dominant” DNA type found on the samples were from Mr. Wilson. Also, a “minor” DNA type was found on the sweatshirt. Mr. Joe’s DNA type could not be specifically excluded as being present on the sweatshirt in the area of the “minor” DNA type, but it could not be specifically included either.

At trial, the defense requested a jury instruction on the affirmative defense of self-defense. The court allowed the jury to be instructed on the issue, but in a somewhat different than the instruction requested by the defense. The instruction is further analyzed below under the sufficiency of the evidence argument of this Petition.

The jury returned a guilty verdict against Mr. Wilson. The probation officer calculated his Guidelines sentencing range at 235 to 293 months in prison. Before sentencing, the prosecution moved for an upward departure and/or upward variance from the Guidelines range.

At the sentencing hearing, the prosecution again argued for an upward departure / variance. The defense, of course, argued a contrary position. The court granted both an upward departure and an upward variance, and ordered a sentence of 400 months in prison.² The defense objected to this sentence. The court overruled the objection and this appeal followed.

² The unreasonable sentence that Mr. Wilson received is one of the issues on appeal. The specifics regarding how the district court calculated the 400 month sentence are set forth below in the “Arguments” section of this Petition.

V. ARGUMENTS

A. Review on certiorari should be granted in this case.

As stated in Rule 10 of the Supreme Court Rules, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons.” An example of a compelling reason to grant certiorari is when a lower court “has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to exercise this Court’s supervisory power.” Supreme Court Rule 10(a). Mr. Wilson asks this Court to grant certiorari in his case under this provision of Rule 10(a).

B. The district court erred by finding that the prosecution produced sufficient evidence at trial for a reasonable jury to return a guilty verdict against Mr. Wilson.

1. Standard of review and applicable legal tests.

A properly preserved sufficiency of the evidence argument is reviewed *de novo*. *United States v. Moreland*, 665 F.3d 137, 148 (5th Cir. 2011) (citation omitted). The issue was properly preserved at trial, so *de novo* review applies to this analysis.

In *Moreland*, this Court reversed a criminal conviction finding that the evidence presented at trial court was insufficient to support a finding of guilt.

Moreland, 665 F.3d at 154. Of significance to Mr. Wilson's case, the *Moreland* Court set forth a roadmap for analyzing sufficiency of the evidence issues.

The *Moreland* Court held “[i]n deciding whether the evidence was sufficient, we review all evidence in the light most favorable to the verdict to determine whether a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt.”

Moreland, 665 F.3d at 148-49 (citation omitted). “[I]n viewing the evidence in the light most favorable to the prosecution, we ‘consider the countervailing evidence as well as the evidence that supports the verdict in assessing sufficiency of the evidence.’” *Id.* at 149 (citation omitted). “[A] verdict may not rest on mere suspicion, speculation, or conjecture, or on an overly attenuated piling of inference on inference.” *Id.* (citations omitted). “We also have held that no reasonable jury could find a defendant guilty of an offense where the ‘evidence gives equal or nearly equal circumstantial support to a theory of guilt, as well as to a theory of innocence.’ Convictions based on such evidence must be reversed.” *Id.* (internal and end citations omitted).

We can reduce the above holdings from *Moreland* into the following concise rules of law:

- the evidence must be reviewed in a light favorable to the guilty verdict;
- however, evidence of innocence must be considered as well;

- a guilty verdict based on speculation or piling inference on inference must be reversed; and
- if evidence of guilt and innocence are equal or nearly equal, then a guilty verdict must be reversed.

2. The evidence admitted at trial was insufficient to prove guilt.

Mr. Wilson contends that the evidence at trial was insufficient to return a guilty verdict regardless of whether or not he was acting in self-defense. The self-defense instruction given to the jury, however, provides even further support for his argument. That is, if Mr. Wilson's actions resulted in Mr. Joe's death, the jury reasonably should have found that Mr. Wilson acted in self-defense. That would have required the jury to return a verdict of not guilty.

As to the self-defense issue, the district court instructed the jury as follows:

The defendant may argue that he acted in self defense. The use of force is justified when a person reasonably believes that force is necessary for the defense of one's self or another against the immediate use of unlawful force. But to claim this defense, there must be no reasonable legal alternative to violating the law, no chance both to refuse to do the criminal act and also to avoid the threatened harm. Moreover, a person claiming this defense must be free from fault in prompting the force he allegedly feared from the victim because one cannot provoke a fight and then rely on a claim of self defense when that provocation results in a counterattack unless he has previously withdrawn from the fight and communicated his withdrawal.

Normally a person claims this defense if he recklessly or negligently places himself in a situation in which it was probable that he would be forced to choose to engage in criminal conduct. Finally, a person must use no more force than appears reasonably necessary under the circumstances. Accordingly, force likely to cause death or great bodily injury is justified in self defense or defense of another only if a person reasonably believes such

force is necessary to prevent death or great bodily harm. The government must prove beyond a reasonable doubt that the defendant did not act in reasonable self defense.

In this context, we must determine whether the district court erred by denying Mr. Wilson's Rule 29 Motion for Judgment of Acquittal.

The prosecution's star witness at trial was Co-defendant James Bell. Mr. Bell testified that Mr. Wilson participated in Mr. Joe's stabbing. However, to judge whether his testimony was truthful, we must realize that Mr. Bell was:

- a person who had already pled guilty to murdering Mr. Joe;
- a person who admitted to stabbing Mr. Joe;
- a person who continued to assault Mr. Joe after the other three alleged participants in the assault left the scene;
- a person who expected to receive a reduced sentence for testifying against Mr. Wilson; and
- a person who had “lashed out” at Mr. Wilson because of Mr. Wilson’s sexual relationship with his mother.

These facts cast serious doubt on the credibility of Mr. Bell's testimony.

Another fact that the defense anticipates that the prosecution will highlight is Mr. Wilson's alleged statement to Casey Bell that he (Mr. Wilson) may have killed someone during the fight. While this evidence may seem damaging on its face, we must consider it in the context of whether Mr. Wilson acted in justifiable self-

defense. If he did, then the statement does nothing to prove the subject murder charge.

The following facts support an argument that Mr. Wilson acted in self-defense. Mr. Joe turned and ran toward the defendants when he saw them. Mr. Joe displayed a handgun in his right hand. While it turned out that the handgun was a BB gun, it appeared to be a real automatic weapon. After Mr. Joe was taken to the ground, Mr. Wilson held down his right arm in an attempt to get the handgun. These actions indicate the Mr. Wilson was acting in justifiable self-defense.

Mr. Joe's official cause of death was "internal bleeding of vital organs due to multiple puncture wounds as a consequence of upper front back torso arms, neck and facial area[.]" Simply stated, Mr. Joe was stabbed to death, and his death was not caused by blunt force trauma.

This is important because J. W., who had no motive to provide testimony that benefitted Mr. Wilson, testified that the only thing he saw Mr. Wilson do during the fight was punch Mr. Joe in the face. This is consistent with the fact that all of the blood found on Mr. Wilson's sweatshirt was on the inside of the sweatshirt. That is, if he had been stabbing Mr. Joe, then his sweatshirt should

have been covered in blood.³ J. W. also testified that he did not see Mr. Wilson with a knife prior to the fight.

In summary, Mr. Joe turned and faced the alleged assailants during the fight. Mr. Joe possessed a handgun. Mr. Wilson held down Mr. Joe's arm in an attempt to get the gun. Mr. Bell admitted that he stabbed Mr. Joe during the fight. While the evidence conflicted on the issue, credible evidence indicated that all Mr. Wilson did during the fight was punch Mr. Joe in the face. Then, after the other three alleged assailants left the scene, Mr. Bell stayed and continued to assault Mr. Joe. All of these facts support a conclusion that the jury had insufficient evidence to return a guilty verdict against Mr. Wilson. Accordingly, the Judgment against Mr. Wilson should be vacated and this Court should render a judgment of acquittal.

C. The district court erred by allowing admission of Mr. Wilson's clothing into evidence at trial, when the evidence was not properly authenticated.

1. Standard of review and applicable legal tests.

“A district court’s evidentiary rulings are reviewed for abuse of discretion.”

United States v. Lowery, 135 F.3d 957, 959 (5th Cir. 1998) (citation omitted).

“The abuse of discretion must create the likelihood of prejudice to the defendant and the substantial right at issue must be made known to the court.” *Id.* (citation omitted). “[I]f the district court erred in its evidentiary rulings, such error can be

³ There was conflicting testimony as to whether Mr. Wilson was wearing a sweatshirt earlier in the night.

excused if it was harmless error.” *Id.* (citation omitted). A nonconstitutional trial error cannot be deemed harmless if it “had substantial and injurious effect or influence in determining the jury’s verdict.” *Id.* (citations omitted).

This issue begs the question of whether the prosecution satisfied its burden to properly authenticate what was purported to be the clothing worn by Mr. Wilson on the night in question. Rule 901 of the Federal Rules of Evidence governs both authentication of evidence and establishment of chain of custody of evidence.

United States v. Jardina, 747 F.2d 945, 951 (5th Cir. 1984) (citations omitted).

Rule 901(a) states: “To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” The sponsor of the contested evidence bears the burden to make a *prima facie* showing of authenticity.

Jardina, 747 F.2d at 951.

In *United States v. Jackson*, 636 F.3d 687, 693 (5th Cir. 2011), the Fifth Circuit found that the government failed to meet the burden to prove authenticity of evidence it sought to admit. The court held “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” *Id.* (citing Fed. R. Evid. 901(a)).

2. The district court abused its discretion by allowing Mr. Wilson’s clothing into evidence at trial.

On November 23, 2016, the defense received a letter from the prosecutor stating that “Choctaw Detention Center employees either did not fill out property log sheets or have lost property log sheets for the clothing and property of the defendants arrested in this case.” Based on this letter, the defense filed a Motion *In Limine* asking the district court to render a pre-trial ruling that Mr. Wilson’s clothing could not be admitted at trial. Specifically, Mr. Wilson argued that “it will be difficult or impossible for the prosecution to prove that the clothing and other property *purportedly* taken from the defendants are *actually* the clothing and property of the defendants in this case.” The issue was not decided prior to trial.

The prosecution attempted to address this authentication / chain of custody issue at trial. Absent from the prosecution’s efforts to cure this problem was any testimony from the person who allegedly logged Mr. Wilson’s clothing in at the Choctaw Detention Center on August 15, 2014. Instead, the prosecution offered testimony was from a jail employee who was only “familiar with those procedures and processes in August 2014[.]”

The prosecution’s burden to supply a continuous chain of custody for the clothing was further complicated by an unexplained gap from August 16, 2014, when Investigator Smith with the Choctaw Police Department took custody of the clothing, through August 22, 2014, when the evidence room at the Choctaw Detention Center took custody of the clothing. Who had custody of the clothing

during this period cannot be definitively determined. The defense again objected to the admission of Mr. Wilson's clothing at trial, and the court overruled the objection.

Based on the above stated facts, the district court erred by finding that Mr. Wilson's clothing was properly authenticated, and/or that a proper chain of custody for the clothing was established. This error was not harmless. Without the evidence, the prosecution would have had one less link in its already weak evidentiary chain. This error requires the Court to vacate the Judgment of Conviction and remand the case to district court for re-trial.

D. The district court ordered a substantively unreasonable sentence because Mr. Wilson's sentence was unjustly disparate in comparison to the co-participants in the alleged crime and in comparison to other defendants convicted of murder in federal court.

1. Standard of review.

An issue on appeal is whether the district court ordered a substantively unreasonable sentence because it was overly harsh in comparison to both the other alleged assailants in this case, and in comparison to other defendants who have been convicted and sentenced for murder in federal courts nationwide. The defense specifically argued the disparity issue at sentencing.

The issue of sentencing disparity is considered a substantive reasonableness issue. *See United States v. Contreras*, 452 Fed. App'x 538, 542 (5th Cir. 2011). “We ordinarily review sentences ... for substantive reasonableness, applying an

abuse of discretion standard.” *United States v. Simmons*, 649 F.3d 301, 303 (5th Cir. 2011) (citations omitted).

2. The district court abused its discretion by ordering a sentence that was unreasonably long in comparison to other comparable defendants.

The probation officer calculated Mr. Wilson’s Guidelines sentencing range at 235 to 293 months in prison. This was based on a criminal history category of I and an offense level of 38.

Before sentencing, the prosecution moved for an upward departure and/or upward variance from the Guidelines range. At the sentencing hearing, the prosecution again argued for an upward departure / variance. The defense argued that a sentence within the Guidelines range calculated by the probation officer would be reasonable. The court granted both an upward departure and an upward variance.⁴

As to the departure, the district court found that Mr. Wilson’s criminal history calculation was underrepresented. So it added five criminal history points to the calculation, which increased his criminal history category from I to III. This was done under the provisions of U.S.S.G. § 4A1.3. At a criminal history category of III and an offense level of 38, Mr. Wilson’s Guidelines sentencing range after

⁴ The court’s authority to depart derives from the Guidelines themselves, so a sentence supported by a departure is also a “Guideline sentence.” *United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006). A court may impose a non-Guidelines sentence. *Id.* A non-Guidelines sentence is often referred to as a “variance.”

departing upward was 292 to 365 months in prison. This, of course, is substantially higher than the 235 to 293 month range calculated by the probation officer.

The district court also ordered an upward variance at sentencing. It ordered the variance “primarily based on the brutality of this crime and the history and characteristics of the defendant.”

The sentence ordered by the district court after granting the prosecution’s Motion for both an upward departure and upward variance was **400 months in prison**. The defense objected to this sentence. The court overruled the objection.

The prosecution alleges that four people were involved in the killing of Mr. Joe. They were Davian Wilson, James Bell, Tommy Cotton and J. W. Mr. Wilson’s co-defendants received the following sentences for their participation in Mr. Joe’s death:

- **J. W.** received **no sentence at all**. He was not indicted in federal court and he was granted complete immunity in Choctaw Tribal Court and federal court for testifying at trial against Mr. Wilson.
- **Tommy Cotton** received a sentence of **57 months in prison**. He was originally charged with murder along with the other co-defendants, but presumptively because he agreed to cooperate with the prosecution, the murder charge was dismissed and he pled guilty to a Criminal Information

charging him with “assault resulting in serious bodily injury” in district court case number 3:16cr69-DPJ-LRA.⁵ Interestingly, Mr. Cotton refused to testify at Mr. Wilson’s trial. Nevertheless, for reasons unknown to the undersigned, the prosecution opted not to revive the murder charge against him.

- **James Bell** received a sentence of **180 months in prison.**⁶

Avoiding unwarranted sentencing disparities must be considered under 18 U.S.C. § 3553(a)(6), which states:

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
* * * * *

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[.]

Analyzing sentencing disparities consists of two elements. First, a court should consider “average sentences for similarly-situated defendants[.]” *United States v. Smith*, 440 F.3d 704, 709 (5th Cir. 2006). Next, a court should consider sentences ordered in particular cases that involve defendants whose facts in

⁵ The Judgment against Mr. Cotton that states the 57 month prison term is filed under docket entry number 21 in district court case number 3:16cr69. Under Rule 201 of the Federal Rules of Evidence, this Court can take judicial notice of the pleadings filed in other cases. *See Ferguson v. Extraco Mortgage Co.*, 264 Fed. App’x 351, 352 (5th Cir. 2007) (citation omitted).

⁶ Mr. Bell’s Judgment is not a part of the record on appeal, but it appears as docket entry number 11 in the subject district court case – 3:15cr68. As presented in footnote 5 above, this Court can take judicial notice of the Judgment.

relation to his/her crime are similar to the facts of the subject defendant's crime.

Id. Analyses of both of these factors follow:

a. Average sentences for similarly situated defendants.

On the following page are charts depicting average sentences for defendants convicted of murder in federal court. The information in these charts comes from the United States Sentencing Commission's website, which is www.ussc.gov. The first chart covers murder sentences ordered in federal district courts nationwide, by year, from 2014 through 2016. The chart states the average sentence, the median sentence and the number of cases each year. The second chart covers the same types of information for the Fifth Circuit.

MURDER – FEDERAL COURT SENTENCE STATISTICS

Nationwide:

	mean # months	median # months	total # cases
2014	273	240	75
2015	287	300	93
2016	244	210	84

United States Court of Appeals for the Fifth Circuit:

	mean # months	median # months	total # cases
2014	239	220	4
2015	245	159	4
2016	318	360	6

In summary, the national average sentences for federal court murder convictions range from 244 to 287 months in prison over a three-year period. In the Fifth Circuit, the average ranges from 239 months to 318 months in prison. These averages are significantly lower than the 400 month prison term ordered by the district court in Mr. Wilson's case. Likewise, the median sentences ordered nationally and in the Fifth Circuit are significantly lower than the sentence ordered in Mr. Wilson's case. This supports a conclusion that the district court ordered an unreasonably high sentence in this case

b. Sentences ordered for defendants with crime-related facts similar to Mr. Wilson's case.

Analysis of sentences ordered in a factually similar case requires us to look no further than the subject case, in which the co-participants in the crime were sentenced as follows:

- J. W. will serve no time in prison.
- Tommy Cotton was sentenced to 57 months in prison.
- James Bell was sentenced to 180 months in prison.

As presented above, J. W. was granted complete immunity in return for testifying against Mr. Wilson. Mr. Cotton was allowed to plead guilty to a lesser charge in return for his cooperation in the case, even though he opted not to cooperate at all. Clearly, these two defendants, who both participated in the exact

same alleged crime as Mr. Wilson, received disproportionately lower sentences than the 400 month sentence ordered for Mr. Wilson.

As to Mr. Bell, he was indicted for, and pled guilty to, the exact same crime that Mr. Wilson was found guilty of – second degree murder. He received a sentence of only 180 months in prison, in comparison to Mr. Wilson’s 400 month sentence. From here, we must analyze the differences in these two defendants in regard to the Guidelines sentencing calculation.

Both Mr. Wilson and Mr. Bell were in criminal history category I. Mr. Wilson’s offense level was 38, and Mr. Bell’s offense level was 35. The three point difference was due to Mr. Bell receiving a reduction for acceptance of responsibility because he pled guilty. These combinations of criminal history categories and offense levels yielded Guidelines sentencing ranges of 235 to 293 months in prison for Mr. Wilson and 168 to 210 months in prison for Mr. Bell.

Also, Mr. Bell received another three point reduction of his offense level under U.S.S.G. 5K1.1 because he provided trial testimony against Mr. Wilson. This resulted in a final offense level of 32 for Mr. Bell. Combining a criminal history category of I with an offense level of 32 yields a Guidelines sentencing range of 121 to 151 months in prison. *See Guidelines Sentencing Table.*

In summary, if it had not been for the 3 point reduction that Mr. Bell received for acceptance of responsibility and an additional three point reduction

under § 5K1.1, his Guidelines sentencing range would be identical to Mr. Wilson's. True enough, a defendant deserves credit for accepting responsibility and assisting the prosecution. But that does not explain why Mr. Bell received a sentence only 29 months over the top-end of his Guidelines range (180 month sentence less 151 months at the top-end of the Guidelines range), and Mr. Wilson received a sentence 107 months over the top-end of his Guidelines range (400 month sentence less 293 months at the top-end of the Guidelines range).

Next we consider the district court's rationale for departing and varying upward when it sentenced Mr. Wilson, and see if that same rational would be applicable to Mr. Bell. In other words, if all of the reasons stated by the district court for upwardly departing and varying in regard to Mr. Wilson also apply to Mr. Bell, then that provides yet another building block supporting a finding that Mr. Wilson's sentence was disproportionately high.

At sentencing, the district court based its decision to depart upward on the proposition that Mr. Wilson's criminal history category "substantially underrepresent[s] not only his criminal history but the likelihood that he is going to commit other offenses." That proposition is not born out by the district court's treatment of Mr. Bell. As the undersigned argued at sentencing, Mr. Bell had an ambitious criminal history as well.

As to the district court’s reference to the likelihood of committing further offenses as support for the departure, trial evidence indicated that Mr. Bell was equally or more likely to recidivate, especially in regard to violent crimes. For example, Mr. Bell admitted that he gets violent when he is intoxicated. He also agreed that he was mentally evaluated because he has “a tendency to lash out and get angry.”

To summarize, the reasons that the district court stated for departing upward in Mr. Wilson’s case applied at least equally in Mr. Bell’s case. Yet it does not appear that the district court applied an upward departure in Mr. Bell’s case.⁷ Also, even after applying an upward departure in Mr. Wilson’s case, he was sentenced 107 months over the top-end of his Guidelines range, and Mr. Bell was sentenced to only 29 months over the top-end of his Guidelines range. This clearly indicates disparate treatment.

Now we move to analyzing the reasons for the district court varying upward in regard to Mr. Wilson’s sentence. The court varied upward “primarily based on the brutality of this crime and the history and characteristics of the defendant.” We discussed the comparable nature of Mr. Wilson’s and Mr. Bell’s history and characteristics above. In regard to brutality of the crime, Mr. Bell’s actions were

⁷ A review of the docket indicates that the prosecution did not file a motion for upward departure in Mr. Bell’s case.

more egregious than Mr. Wilson's. He continued to assault Mr. Joe after Mr. Wilson, Mr. Cotton and J. W. Mr. Wilson had to come back and urge Mr. Bell to leave. In short, the level of brutality displayed by Mr. Wilson was less than or certainly not greater than the level of brutality displayed by Mr. Bell. So why was Mr. Wilson's sentence much higher above the Guidelines than Mr. Bell's sentence was? There is no legally justifiable answer to this question.

c. Conclusion – disparate sentence issue.

Mr. Wilson, Mr. Bell, Mr. Cotton and J. W. all allegedly participated in Mr. Joe's murder. Mr. Wilson's sentence was 2.23 times higher than Mr. Bell's sentence (400 months / 180 months). Mr. Wilson's sentence was 7.02 times higher than Mr. Cotton's sentence (400 months / 57 months). Mr. Bell's sentence was infinitely higher than J. W.'s sentence because he will serve no time in prison for his part in Mr. Joe's death. As defense counsel pointed out at sentencing, the only explanation for these gigantic variations in the subject sentences is the fact that Mr. Wilson exercised his constitutional right to go to trial.

Also, we have considered the difference in Mr. Wilson's sentence and the sentences ordered for similarly situated defendants convicted of murder in federal court. The averages sentence range nationwide from 2014 through 2016 was 244 months to 273 months in prison. In the Fifth Circuit, the average range during the

same time period was 239 months to 318 months in prison. Mr. Wilson's 400 month prison sentence is considerably higher than either of these sets of averages.

All of these facts and analyses support a conclusion that district court ordered Mr. Wilson to serve a disproportionately high prison sentence. Therefore, he asks the Court to vacate the 400-month sentence and remand the case to district court for further sentencing proceedings.

VI. CONCLUSION

For all of the reasons stated above, Mr. Wilson asks this Court to grant his Petition for Writ of Certiorari.

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