

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES  
OF AMERICA

MIKE AUSTIN ANDERSON  
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. 23-60040

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**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. Anderson.
- 2) Whether the district court erred by denying Mr. Anderson's Motion to Revoke or Amend Magistrate Judge's Denial of Defendant's Motion to Order Recusal.

## **PARTIES TO THE PROCEEDING**

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

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## **I. OPINIONS BELOW**

The grand jury returned a six-count Indictment against Mr. Anderson on June 15, 2021. The district court case number is 3:21cr62-1. The Indictment alleges:

Count 1, assault with a firearm with intent to commit murder in violation of 18 U.S.C. §§ 1153 and 113(a)(1);

Counts 2 and 5, assault with a firearm with intent to do bodily injury in violation of 18 U.S.C. §§ 1153 and 113(a)(3);

Count 3, assault resulting in serious bodily injury in violation of 18 U.S.C. §§ 1153 and 113(a)(6);

Count 4, using a firearm during and in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii); and

Count 6, brandishing a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii).

Prior to trial, the parties filed several pleadings related to one of the issues on appeal – whether the district court erred by denying Mr. Anderson’s Motion to Revoke or Amend Magistrate Judge’s Denial of Defendant’s Motion to Order Recusal. The court filed two orders pertaining to that issue. Pleadings and orders related to that issue are:

- Motion to Order Recusal of the Office of the United States Attorney for the Southern District of Mississippi from the Prosecution of this Case;
- Response to Defendant's Motion to Order Recusal of the Office of the United States Attorney for the Southern District of Mississippi from the Prosecution of this Case;
- Reply to Government's Response to Motion to Order Recusal of the Office of the United States Attorney for the Southern District of Mississippi from the Prosecution of this Case;
- Government's Supplemental Response to Defendant's Motion to Order Recusal of the Office of the United States Attorney for the Southern District of Mississippi from the Prosecution of this Case;
- Reply to Government's Supplemental Response to Defendant's Motion to Order Recusal of the Office of the United States Attorney for the Southern District of Mississippi from the Prosecution of this Case;
- Order by the magistrate judge denying the Motion to Order Recusal of the Office of the United States Attorney for the Southern District of Mississippi from the Prosecution of this Case;
- Motion to Revoke or Amend Magistrate Judge's Denial of Defendant's Motion to Order Recusal;

- Response to Defendant's Motion to Revoke or Amend Magistrate Judge's Denial of Defendant's Motion to Order Recusal;
- Reply to Government's Response to Motion to Revoke or Amend Magistrate Judge's Denial of Defendant's Motion to Order Recusal filed; and
- Order by the district judge denying the Motion to Revoke Magistrate Judge's Order.

A jury trial of the case began on October 3 and ended on October 5, 2022.

The jury returned verdicts of not guilty on counts 1, 5 and 6. It returned guilty verdicts on counts 2, 3 and 4.

The Court conducted a sentencing hearing on January 13, 2023. It sentenced Mr. Anderson 24 months in prison on each of Counts 2 and 3, to run concurrently, and 120 months in prison on Count 4, to run consecutively to the sentences imposed on Counts 2 and 3. This resulted in a total sentence of 144 months in prison. The court also ordered a total of 60 months of supervised release following the prison term, and a \$500 fine. The court entered a judgment reflecting this sentence on January 27, 2023. The Judgement is attached hereto as Appendix 1.

Mr. Anderson appealed the district court's Judgment to the United States Court of Appeals for the Fifth Circuit on January 30, 2023. The appeal is assigned case number 23-60040. The Fifth Circuit entered an Order affirming the district

court's Judgment on February 21, 2024. It filed a Judgment on the same day. The Fifth Circuit's Order and Judgment are attached hereto a composite Appendix 2.

## **II. JURISDICTIONAL STATEMENT**

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgment in this case on February 21, 2024. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

### **III. CONSTITUTIONAL PROVISION AND RULE OF PROFESSIONAL CONDUCT INVOLVED**

The sufficiency of the evidence issue implicates the right to a fair trial under the Sixth Amendment to the United States Constitution. The Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The recusal issue must be decided under 1.9 of the Mississippi Rules of Professional Conduct. Rule 1.9 states:

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) represent another in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
- (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Rule 1.9, Miss. R. Prof Conduct.

## **IV. STATEMENT OF THE CASE**

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

This case arises out of criminal convictions entered against Mr. Anderson in federal district court. 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. Anderson arose from the laws of the United States of America.

### **B. Statement of material facts.**

#### **1. Facts about Mike's background.**

To put the subject convictions in context, we must consider Mr. Anderson's background. He is a Native American member of the Choctaw Indian Tribe. He was one of 11 children. Unfortunately, Mr. Anderson's mother surrendered him to foster care when he was four or five years old. Mr. Anderson was in foster care until he was seven, then he returned home to his mother. But this did not make life easier because his mother was an alcoholic and his father was a truck driver "who was 'gone most of the time.'"

When Mr. Anderson was young, one of his brothers was murdered. Another brother drowned, and family members blamed Mr. Anderson for the drowning incident. To cope with life's stresses, he began drinking alcohol at an early age. He

acknowledges the alcohol problem and is ready to undergo substance abuse treatment. To his credit, Mr. Anderson has no problem with any other drugs.

Compounding Mr. Anderson's problems, he was diagnosed with ADHD as a child. Later, he underwent hip replacement surgery and back surgery. He still experiences pain from the hip malady.

Notwithstanding his difficult childhood environment, Mr. Anderson graduated from high school. After that he went to community college for three semesters.

Mr. Anderson has a solid employment history. He began working at age 18. Over the years, he worked as a security guard, as a department manager at Walmart and as a desk clerk at Pearl River Resorts. To support his family Mr. Anderson periodically worked two jobs and had a side job as a hardwood cutter. He worked hard "to fulfill [his] obligations as a father should."

Mr. Anderson emersed himself in community events. He helped the Choctaw Tribe obtain food through Feed America during the COVID-19 pandemic. Also, he has mentored troubled children within the Tribe.

Perhaps the best indicator of Mr. Anderson's positive influence on his community is the prosecutor's own statement at sentencing. The prosecutor stated:

Your Honor, there is no doubt in my mind that Mr. Anderson had the potential to do good in the community. He is not an uneducated person. He is a smart man. It's almost as if the person standing in front of you this

morning is Jekyll and Hyde. Some of what he's telling you, I do believe. He's done good in the community. I know he has.

The prosecutor's "Jekyll and Hyde" comment pertains to a comparison between all the good that Mr. Anderson has done (Jekyll), and the bad associated with the subject shooting (Hyde). The district court attributed the "Hyde" aspect of Mr. Anderson's character to alcohol consumption. The court stated, "I don't think that this crime would have happened had you not been continuing to drink that night." As stated above, Mr. Anderson recognizes his problem with alcohol and is ready to get help to cure his addiction.

## **2. Facts about the trial.**

### **a. The charges and jury verdicts.**

The jury heard evidence about the six charges alleged against Mr. Anderson. As presented in detail above, count 1 alleged that Mr. Anderson assaulted Julian McMillan (hereinafter "Julian") with a firearm, with intent to commit murder. The jury returned a not guilty verdict on this charge.

Counts 2 and 5 alleged that Mr. Anderson committed assault with a firearm with intent to do bodily injury. The alleged victim in count 2 was Julian, and the alleged victim in count 5 was Tonya Anderson (hereinafter "Tonya"). The jury returned a guilty verdict on count 2 and a not guilty verdict on count 5.

Counts 3 and 4 respectively alleged assault resulting in serious bodily injury, and use of a firearm in furtherance of a crime of violence. Julian was the alleged victim on both counts, and the jury returned guilty verdicts on both counts.

Finally, count 6 alleged brandishing a firearm in furtherance of a crime of violence. The jury returned a not guilty verdict on count 6.

**b. Evidence presented at trial and at the sentencing hearing.**

Tonya made a 911 call to the Choctaw Police Department at 3:30 a.m. on May 29, 2021. On the call, Tonya states that Mr. Anderson shot her brother-in-law, Julian (hereinafter “Julian”). She gives the address of the shooting and asks for help. The prosecution did not call Tonya as a trial witness.

The events of the evening of May 28 and the early morning hours of May 29, 2021, begin with Julian and his girlfriend, Susanna Shoemake (hereinafter “Susanna”), going to Tonya’s house. Susanna and Tonya are sisters. The three of them were enjoying a night of drinking when Mr. Anderson called or texted and asked if someone could bring him a cigarette.

Julian asked Susanna if they could go to Mr. Anderson’s house and take him a cigarette. Susanna agreed, then she and Julian left in her car. Julian was driving, even though he did not have a driver’s license. They continued drinking at Mr. Anderson’s house. When they ran low on alcohol, Mr. Anderson and Julian decided to go back to Tonya’s house and get more beer and whiskey.

Evidence presented at trial is inconsistent regarding where Mr. Anderson and Julian stopped after leaving Mr. Anderson's house and before returning to Tonya's house. Julian stated that they stopped at Susanna's mom's house to use the restroom and get a cigarette. Mr. Anderson told law enforcement that they stopped at a crack house. Regardless of which house they stopped at, it is undisputed that Julian went inside while Mr. Anderson waited in the car.

Mr. Anderson's and Julian's next stop was Tonya's house, where the subject shooting occurred. Julian was driving Susanna's car, which had a handgun under the passenger's side front seat. The gun belonged to Susanna.

Julian knew the gun was under the car seat. This is important because he has prior felony convictions for aggravated assault with a deadly weapon, grand larceny and burglary of an occupied dwelling. When asked about his prior convictions at trial, Julian stated he has been a felon "since the day I was born." As a convicted felon, Julian understood it is illegal to possess a gun.<sup>1</sup> The prosecution granted Julian immunity from prosecution in return for his trial testimony against Mr. Anderson.

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<sup>1</sup> Under this Court's binding precedent, the concept of "constructive possession" of a gun extends beyond gun ownership. "Constructive possession is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object." *Henderson v. United States*, 575 U.S. 622, 626 (2015).

Four people were at Tonya's house during the shooting. Tonya was there. She was intoxicated at the time. Tonya's hearing impaired daughter, Catiea Anderson (hereinafter "Catiea"), was there. Mr. Anderson and Julian were there as well.

What actually happened after Mr. Anderson and Julian arrived at Tonya's depends on which version of the conflicting witness' testimonies one chooses to believe. The district judge recognized the inconsistencies in the evidence presented against Mr. Anderson. The judge stated, "in candor, none of the witnesses are very credible[.]"

According to testimony given by both Julian and a nurse that treated him, Julian said that Mr. Anderson argued with both him and Tonya after arriving at Tonya's house. He could not remember what the argument was about. It is undisputed that Julian was intoxicated at the time.

Julian testified that he tried to get Mr. Anderson back in the car during the argument. Mr. Anderson purportedly refused his request, then shot Julian multiple times after retrieving the handgun from under the car seat. According to Julian, after the shooting Mr. Anderson got in Susanna's car and left. Then Susanna returned to Tonya's house and took Julian to the hospital.

Catiea was the next witness called by the prosecution. As stated above, Catiea is Tonya's daughter. Catiea testified that she is "[a]lmost" completely deaf."

In fact, the district court had lengthy discussions with the parties about how to present Catiea's testimony to the jury. A review of Catiea's testimony reveals the difficulty the parties had with questions presented to her, as well as her answers to the questions.

Catiea's testimony was suspect. First she testified that Mr. Anderson came into the house. Then she testified that Mr. Anderson was outside of the house the whole time. She testified at trial that Mr. Anderson got beer from Tonya's house then carried the beer to Susanna's car. However, prior to trial she provided a written statement that Mr. Anderson dropped the beer on the ground before going to the car and shooting Julian. When confronted with this contradiction at trial, Catiea admitted she does not remember which rendition of events is correct.

At trial, Catiea testified that Mr. Anderson pressed the handgun against Tonya's forehead during the argument. However, in her written statement to law enforcement, she said nothing about Mr. Anderson putting the gun to Tonya's head.

In her trial testimony, Catiea stated that Mr. Anderson fired the gun into the ground before shooting Julian. However, her prior written statement to law enforcement says that Mr. Anderson initially fired shots into the air.

At trial, Catiea testified that she was “in the car” when she witnessed gunshots. Then she testified that she does not know where she was when the gun went off.

It was dark outside during the shooting, which complicated Catiea’s ability to actually see what happened. Catiea testified to this fact, as did Terrell Allen, the F.B.I. agent assigned to the case. Liza Ketcher, an officer with the Choctaw Police Department, testified that when she arrived at the scene at about 3:15 or 3:30 a.m., it was dark outside, there were no street lights, and that she could not see clearly without a flashlight.

The prosecution did not call Tonya as a trial witness. However, her rendition of the events was presented to the jury through Agent Allen’s testimony. Tonya told him that Julian fired the gun in the air twice before Mr. Anderson took possession of it. This is consistent with what Mr. Anderson told Agent Allen. Mr. Anderson told him that he (Mr. Anderson) heard two shots fired before he blacked out.

Agent Allen took Mr. Anderson’s statement about the shooting. Mr. Anderson admitted that he was at Tonya’s house, but he never admitted to committing any crime. Mr. Anderson told Agent Allen that after he heard two shots, he blacked out and could not remember what happened after that. Mr.

Anderson's story about the events was consistent throughout the entire investigation.

Agent Allen obtained a search warrant for Mr. Anderson's house. He did not find the gun in Mr. Anderson's house, and Officer Ketcher did not find the gun in Susanna's car. In fact, the gun was never found. However, Agent Allen recovered the shell casings, but he never ordered a fingerprint analysis of them.

At sentencing, the court granted Mr. Anderson a downward departure. Justifying the departure, the court stated that evidence presented at trial placed the gun in Julian's hand before Mr. Anderson allegedly took possession of it. Specifically, the court held:

[M]y recollection is that Tonya Anderson did tell Special Agent Allen that McMillan had the gun first. The defendant said in his interview that McMillan had the gun first. And when you asked McMillan at trial whether he had the gun first, he said, "I don't remember."

Cathea said -- was the only one that said that he -- that the defendant had the gun first, but in candor, none of these witnesses are very credible, including her. And McMillan is the one who knew where the gun was concealed inside the car. It was essentially his gun. So in light of all of that, especially the fact that he doesn't remember whether he -- he couldn't deny having pulled the gun out himself. It seems like if it's a preponderance standard. It seems like McMillan pulled the gun first, and this is a big issue to me in terms of this departure.

The jury instruction conference was not transcribed and is not a part of the record on appeal. However, from the court's above stated comments at the

sentencing hearing, it is apparent that the court believed Mr. Anderson had a viable self-defense argument.

The court allowed a self-defense jury instruction, and allowed the defense to argue the issue to the jury. The court charged the jury with the following self-defense instruction:

[T]he use of force is justified when a person reasonably believes that force is necessary for the defense of oneself or another against the immediate use of unlawful force; however, a person must use no more force than appears reasonably necessary under the circumstances.

Force likely to cause death or great bodily injury is justified in self-defense 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 self-defense.

As presented above, the jury found Mr. Anderson not guilty of all the charges for which Tonya was the alleged victim. Those charges are stated in counts 5 and 6. It also found him not guilty of assault with intent to murder Julian, which is alleged in count 1. The jury found Mr. Anderson guilty of the three remaining counts, all of which pertained to shooting Julian.

At the sentencing hearing, the court granted Mr. Anderson a downward departure from the Sentencing Guidelines. It granted the departure under U.S.S.G. § 5K2.10. This Guidelines provision allows a downward adjustment the sentencing range when “*the victim's wrongful conduct* contributed significantly to provoking

the offense behavior[.]” U.S.S.G. § 5K2.10 (emphasis added). The “victim” that engaged in “wrongful conduct” was Julian.

In addition to granting a departure under § 5K2.10, the court ordered a sentence at the bottom of the Guidelines range because of “mitigating circumstances[.]” The court did not elaborate on the “mitigating circumstances.” An overall review of the sentencing hearing transcript, however, indicates that the court was referring to Julian’s role in the shooting incident.

The court ultimately ordered Mr. Anderson to serve 144 months in prison. The reasonableness of the sentence is not at issue on appeal.

### **3. Facts about the recusal issue.**

Kevin Payne was the lead prosecutor in this case. From August 2004 until September 2007, he was a Staff Attorney with Choctaw Legal Defense. The district court found that Mr. Payne represented Mr. Anderson at a tribal court arraignment in 2007, a few days before his employment with Choctaw Legal Services ended. Mr. Payne admitted this in his Declaration submitted to the district court.

In addition to representing Mr. Anderson at the arraignment, Mr. Payne represented Mr. Anderson’s father. His father was incarcerated, so Mr. Anderson and Mr. Payne discussed facts about that case. Mr. Anderson disclosed confidential information during their discussions.

Based on these facts, the defense filed a Motion seeking an order requiring Mr. Payne to recuse himself from the subject prosecution. The Motion was initially addressed and denied by the magistrate judge. The defense filed a Motion asking the district judge to revoke the magistrate judge's Order. The district judge denied the Motion.

## V. ARGUMENT

### **A. Introduction / review on certiorari should be granted in this case.**

Rule 10 of the Supreme Court Rules states, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion.” In Mr. Anderson’s case, the prosecution presented insufficient evidence at trial for reasonable jurors to return guilty verdicts. Based on the facts of the case, Mr. Anderson acted in self-defense during the shooting incident. Therefore, we ask this Court to exercise its discretion, and grant certiorari to protect the important Sixth Amendment right to a fair trial raised by this case.

Also, certiorari should be granted because of the important ethical issue raised in Mr. Anderson’s recusal argument. The lower courts allowed a prosecutor that had previously defended Mr. Anderson to prosecute him in the subject case. Certiorari should be granted to provide future guidance to all courts on this issue of ethics.

### **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. Anderson.**

#### **1. Applicable law.**

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). In *Moreland*, the Fifth Circuit reversed a criminal conviction finding that

the evidence presented at trial court was insufficient to support a finding of guilt. 665 F.3d at 154. Of significance to Mr. Anderson'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); *United States v. Davis*, 735 F.3d 194, 198 (5th Cir. 2013)<sup>2</sup> (holding that on appellate review, the Court is required “to consider trial evidence that countervails the jury’s verdict, and allows us to ‘draw upon only reasonable inferences from the evidence to support the verdict.’” (emphasis added; citation omitted). “We also have held that no reasonable jury could find a defendant guilty of an offense where the ‘evidence gives equal or

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<sup>2</sup> In *Davis*, the Fifth Circuit reversed the conviction based on insufficiency of the evidence. 735 F.3d at 2021.

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." *Moreland*, 665 F.3d at 149 *Id.* (internal and end citations omitted); *United States v. Clemons*, 700 Fed. App'x 341, 344 (5th Cir. 2017)<sup>3</sup> (citation 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.**

**a. Introduction.**

This Court should grant certiorari and vacate the convictions against Mike because the prosecution failed to prove beyond a reasonable doubt that Mike committed any crime. *See Moreland*, 665 F.3d at 148-49 (citation omitted).

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<sup>3</sup> In *Clemons*, the Fifth Circuit vacated the conviction based on insufficiency of the evidence. 700 Fed. App'x at 346.

Specifically, evidence presented at trial proves that Mike acted in self-defense during the shooting incident.<sup>4</sup>

As the court instructed the jury, “[t]he use of force is justified when a person reasonably believes that force is necessary for the defense of oneself[.]” Trial Tr., ROA.826. Further, the court instructed the jury that “[t]he government must prove beyond a reasonable doubt that the defendant did not act in self-defense.” *Id.* at ROA.826 (emphasis added). The prosecution failed to meet its burden to prove that Mike did not act in self-defense.

**b. Proof pertaining to Julian McMillan’s testimony.**

Julian appears to be proud of the fact that he is a convicted felon. When asked about his criminal history at trial, he stated he has been a felon since “the day I was born.” As a convicted felon, Julian knew that the law prohibited him from possessing a gun.<sup>5</sup>

As the district judge stated, Julian “is the one who knew where the gun was concealed inside the car. It was essentially his gun.” In fact, the prosecution could have charged Julian with being a felon in possession of a gun. Instead, the

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<sup>4</sup> The jury found Mike not guilty of all the charges for which Tonya was the alleged victim. Verdict Form, ROA.337-38. So the self-defense issue pertains solely to the confrontation between Mike and Julian.

<sup>5</sup> *See supra*, footnote 1.

prosecution offered him immunity from prosecution in return for his trial testimony against Mike. This casts doubt on the veracity of Julian's testimony.

Further casting doubt on Julian's testimony is his state of mind on the night of the shooting. Evidence proves that he was intoxicated. Nurse Adkins' notes relating to her treatment of Julian state that he was "actually intoxicated[.]" Her notes also state "yes" by the phrases "drug use" and "alcohol use[.]"

Julian testified that he attempted to break up the argument between Mike and Tonya. As he attempted to break up the argument, Julian testified that Mike got the gun from under the car seat and shot him.

Julian's contention that Mike is the person who got the gun from under the car seat is contradicted the district judge's finding. The district court stated to the prosecutor, "when you asked McMillan at trial whether he had the gun first, he said, 'I don't remember.'" The court went on to state, "[s]o in light of all of that, especially the fact that he doesn't remember whether he -- he couldn't deny having pulled the gun out himself. It seems like if it's a preponderance standard. It seems like McMillan pulled the gun first[.]" This clearly supports Mike's self-defense argument.

In summary, Julian's testimony was not credible. And the district court appeared to agree. This is true based on the court's finding that "none of the witnesses are very credible[.]"

**c. Proof pertaining to Catiea Anderson's testimony.**

Catiea's testimony offers little insight about events surrounding the shooting. This is true because she offered confusing and contradictory testimony.

For example, when asked about where Mike was during the shooting, Catiea testified that he came into the house. Then she testified that Mike was outside of the house the whole time.

She testified at trial that Mike got beer from Tonya's house then carried the beer to Susanna's car. In her written statement provided to the police, she said Mike dropped the beer on the ground before going to the car and shooting Julian. At trial, defense counsel asked her about this contradiction. Catiea answered by admitting she does not remember which rendition of events is correct.

At trial, Catiea testified that Mike pressed the handgun against Tonya's forehead during the argument. In her written statement to law enforcement, however, she did not say anything about Mike putting the gun to Tonya's head.

Catiea's written statement to law enforcement says that Mike initially fired shots into the air. In her trial testimony, Catiea stated that Mike fired the gun into the ground before shooting Julian.

Catiea's testimony about where she was when shots were fired provides another contradiction. At trial, Catiea testified that she was "in the car" when she

witnessed gunshots. Later, she testified that she does not know where she was when the gun went off.

Perhaps some of Catiea's conflicting testimony can be explained by the fact that it was dark outside, which probably impaired her ability to see what happened. Catiea testified that it was dark outside, as did F.B.I. Choctaw Police Officer Ketcher testified that when she arrived at the scene at about 3:15 or 3:30 a.m., it was dark outside, there were no street lights, and that she could not see clearly without a flashlight.

Catiea's conflicting testimony clearly diminishes her credibility. The veracity of her testimony is further diminished by the fact that it was difficult to see the events because it was dark outside.

**d. Proof pertaining to Tonya Anderson's statement to law enforcement.**

Tonya was one of the eyewitnesses to the shooting. As such, she might have been a reliable witness. The prosecution, however, did not call Tonya as a witness at trial.

The jury heard some of Tonya's rendition of the events through Agent Allen's testimony. Tonya told him that Julian fired the gun in the air twice before Mike took possession of it. This is consistent with what Mike told Agent Allen. Mike told him that he (Mike) heard two shots fired before he blacked out. The

district court also stated, “Tonya Anderson did tell Special Agent Allen that McMillan had the gun first[.]”

Perhaps the prosecution did not call Tonya as a witness because her testimony would have supported Mike’s self-defense theory. That is, her testimony may have supported that Mike reasonably acted in self-defense after Julian grabbed the gun and began firing it.

### **3. Conclusion – sufficiency of the evidence issue.**

Under Fifth Circuit precedent, “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.” *Moreland*, 665 F.3d at 149 (internal and end citations omitted); *Clemons*, 700 Fed. App’x at 344 (citation omitted).

In Mike’s case, the district court found that “none of the witnesses are very credible[.]” This conclusion by the court is supported by the evidence presented at trial.

As the district court noted, Julian could not remember who initially took the gun from under the car seat. Based on the evidence presented at trial, the court commented that under a preponderance of the evidence standard, “[i]t seems like McMillan pulled the gun first[.]” This clearly supports Mike’s self-defense theory.

Catiea's testimony does not support the guilty verdict either. She provided conflicting statements and testimony about whether Mike or Julian possessed the gun first. In fact, she conflicted herself in much if not most of her testimony, as indicated by the district court's recognition that Catiea was not credible.

In summary, the prosecution failed to carry its burden to prove that Mike was not acting in self-defense. As the district court instructed the jury, “[t]he government must prove beyond a reasonable doubt that the defendant did not act in self-defense.” At most, the prosecution provided “equal or nearly equal circumstantial support to a theory of guilt, as well as to a theory of innocence.” *Moreland*, 665 F.3d at 149 (citations omitted). Equally balanced evidence does not support the jury’s guilty verdict. *Id.* Therefore, the Judgment of Conviction must be vacated as a violation Mr. Sixth Amendment right to a fair trial.

**C. The district court erred by denying Mike’s Motion to Revoke or Amend Magistrate Judge’s Denial of Defendant’s Motion to Order Recusal.**

Assistant United States Attorney Kevin Payne prosecuted the subject case against Mike. Prior to his employment with the United States Attorney’s Office, Mr. Payne worked as a staff attorney for Choctaw Legal Defense. As the district court found, Mr. Payne represented Mike on criminal charges in Choctaw Tribal Court in 2007.

Based on this fact scenario, the defense filed a Motion to Order Recusal of the Office of the United States Attorney from the Prosecution of this Case

(hereinafter “Motion to Recuse”). The Motion to Recuse relies on two Mississippi Rules of Professional Conduct. First is Rule 1.9, which requires recusal of an attorney who represented someone in a prior proceeding. Second is Rule 1.10, which in relevant part requires recusal of a law firm if any member of the firm is required to recuse under Rule 1.9. For purposes of this appeal, we focus on the provisions of Rule 1.9.<sup>6</sup>

Rule 1.9 is titled Conflict of Interest: Former Client. The Rule states:

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) represent another in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
- (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Rule 1.9, Miss. R. Prof. Conduct.

Rule 1.9 applies in Mike’s case because “[u]nder Local Rule 83.5 of the Rules of the United States District Courts for the Northern and Southern Districts

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<sup>6</sup> If the Court finds that Mr. Payne must be recused from this case, then the Office of the United States Attorney for the Southern District of Mississippi must be recused as well. This is true because:

Rule 1.10(b) explicitly states that “[w]hen a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.”

*Owens v. First Fam. Fin. Servs., Inc.*, 379 F. Supp. 2d 840, 850 (S.D. Miss. 2005).

of Mississippi, the Fifth Circuit has adopted the Mississippi Rules of Professional Conduct.” *Occu-Health, Inc. v. Mississippi Space Servs.*, No. 1:06-CV-159-LG-RHW, 2006 WL 2290472, at \*2 (S.D. Miss. Aug. 9, 2006) (citation omitted).

Under Rule 1.9, “[a]bsent former client consent, a lawyer shall not represent a current client with materially adverse interests to the former client in the same or a substantially related matter. A lawyer also may not use confidential information to the disadvantage of the former client.” *Id.*

“[M]otions to disqualify are substantive motions affecting the rights of the parties and are determined by applying standards developed under federal law.” *C.F. Gollott & Son Seafood, Inc. v. Gollott*, No. 120CV00159TBMJCG, 2021 WL 6618648, at \*3 (S.D. Miss. Mar. 5, 2021) (citing *In re Am. Airlines, Inc.*, 972 F.2d 605, 610 (5th Cir. 1992)). “Federal courts may adopt state or ABA rules as their ethical standards, but whether and how these rules are to be applied are questions of federal law.” *Gollott*, 2021 WL 6618648, at \*3 (citing *In re Am. Airlines*, 972 F.2d at 610).

“A party seeking to disqualify opposing counsel on the ground of a former representation must establish two elements: 1) an actual attorney-client relationship between the moving party and the attorney he seeks to disqualify and 2) a substantial relationship between the subject matter of the former and present representations.” *In re Am. Airlines*, 972 F.2d at 614 (citations omitted).

The district court found that Mr. Payne represented Mike at a tribal court arraignment in 2007. Mr. Payne admitted this in his Declaration submitted to the district court. Also, records provided by Choctaw Legal Defense indicate the Mr. Payne represented Mike twice in the past.

Mr. Payne also represented Mike's father. His father was incarcerated, so Mike and Mr. Payne discussed facts about that case. Mike disclosed confidential information during their discussions about both his case and his father's case.

Under these facts, the Court should find that the first required factor stated in *In re American Airlines* is met. That is, the Court should find that "an actual attorney-client relationship between the moving party and the attorney he seeks to disqualify[.]" See *In re Am. Airlines*, 972 F.2d at 614 (citations omitted).

The Court should also find that a "substantial relationship between the subject matter of the former and present representations." See *In re Am. Airlines*, 972 F.2d at 614 (citations omitted). This is true because both cases involve criminal charges, and Mike disclosed confidential case related information to Mr. Payne. This satisfies the second required element of proof set forth in *In re American Airlines*.

Both factors set forth in *In re American Airlines* are met. Since the district court erroneously failed to order Mr. Payne's recusal, this Court should grant certiorari and vacate the convictions against Mike and remand the case for retrial.

*See Williams v. Pennsylvania*, 579 U.S. 1, 16 (2016) (holding that the proper remedy when a judge should have recused himself or herself is remand for a new trial with a different judge).

## VI. CONCLUSION

Based on the arguments presented above, Mr. Anderson asks the Court to grant his Petition for Writ of Certiorari in this case.

Submitted May 20, 2024 by:



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