

**23-60040**

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**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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UNITED STATES OF AMERICA

*Plaintiff-Appellee*

v.

MIKE AUSTIN ANDERSON

*Defendant-Appellant*

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FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
NORTHERN DIVISION  
3:21cr62DPJ-LGI

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**BRIEF OF APPELLEE**

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## STATEMENT REGARDING ORAL ARGUMENT

The United States does not request oral argument. The issues on appeal—challenging the sufficiency of the trial evidence and the non-recusal of counsel—do not require further elaboration. The questions presented can be considered fully by relying on the record and the briefs.

*See* FED. R. APP. P. 34(a)(2)(C); FIFTH CIR. R. 28.2.3.

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**BRIEF OF APPELLEE**

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**STATEMENT OF JURISDICTION**

This is a direct appeal from a final judgment of conviction entered by the United States District Court for the Southern District of Mississippi, following a three-day trial before the Honorable Daniel P. Jordan III, Chief

United States District Judge, and a jury. ROA.14-15; R.E.6 (judgment).<sup>1</sup>

Mike Anderson filed a timely notice of appeal. ROA.316; R.E.2. The district court had jurisdiction. *See* 18 U.S.C. § 3231. This Court's jurisdiction is properly invoked. *See* 28 U.S.C. § 1291; 18 U.S.C. § 3742.

### STATEMENT OF THE ISSUES

1. Whether the district court properly determined that the trial proof was sufficient to find Anderson guilty of assaulting his victim by shooting him with a gun and causing serious bodily injury, as shown by the testimony of the victim and an eyewitness, medical records, forensic evidence, and statements of a 911 caller.

2. Whether the court appropriately denied Anderson's motion to recuse the prosecutor after Anderson failed to show that the prosecutor's brief representation of him at a 2007 arraignment for domestic tribal crimes was in any way similar to this case, which involves Anderson shooting a victim repeatedly in 2021.

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<sup>1</sup>"ROA.14-15" refers to pages 14 to 15 of the Record on Appeal; "R.E." to Record Excerpt, cited by tab; "GX" to Government exhibit; and "Br." to Anderson's brief on appeal.

## STATEMENT OF THE CASE

Mike Anderson shot his victim multiple times, including while the victim fled for his life. Anderson asserts that the trial evidence was insufficient to support his two convictions for assault or his conviction for using a gun during a crime a violence. *See* Br. 20-29. The evidence was plentiful, and the judgment should be affirmed.

### **A. Anderson Shot his Victim Multiple Times as the Victim Tried to Seek Cover**

In the pre-dawn hours in late May 2021, Julian McMillan drove Mike Anderson to a friend's home in Mississippi's Conehatta community.<sup>2</sup> ROA.560 (911 call at 3:30 a.m.), ROA.569 (shooting location), ROA.659 (McMillan drove Anderson), ROA.764.<sup>3</sup> The men arrived there after a

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<sup>2</sup> The parties stipulated to the jurisdictional elements of the offenses. *See* ROA.555-56, ROA.1177-78 (GX 20 (stipulating that "the Mississippi Band of Choctaw Indians is a federally recognized Indian tribe" and that the victim and Anderson are enrolled members of that tribe)); ROA.557 (stipulating that the charged offenses occurred "within the confines of the Conehatta community of the Mississippi Band of Choctaw Indians").

<sup>3</sup> ROA.1312-14 (GX 11 at 17:25 to 19:35 and 20:30 to 21:45 (transcript of post-arrest interview describing drinking and riding with McMillan in girlfriend's car to get more alcohol)).



night of drinking. ROA.633-36 (describing drinking), ROA.794-95 (distinguishing sober and intoxicated witnesses). McMillan and the homeowner began quarrelling. ROA.642, ROA.685, ROA.764. McMillan attempted to stop the fight by asking Anderson to get in the car, but Anderson did not listen and kept arguing. ROA.642, ROA.685. Someone retrieved a gun from under the passenger seat of McMillan's girlfriend's car, which was parked in the driveway.<sup>4</sup> ROA.685, ROA.663 (location of gun).

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<sup>4</sup> McMillan testified that Anderson retrieved the gun from under the seat where he had been sitting. ROA.676 (Q: Who pulled that gun out from under that seat that night, or that morning? A: That night, Mike [Anderson]). An eyewitness testified similarly. ROA.685 (Q: When you saw them [Anderson and McMillan] go to the car, did you see anyone get a gun? A: That Mike took gun out of car seat.), ROA.707-08 (similar), ROA.1173-75 (GX 17 at 3:55 to 4:20 (eyewitness stating that Anderson took the gun from under the car seat)). During the investigation, Anderson told an FBI special agent that McMillan was the first possessor of the gun. ROA.782, ROA.1312-14 (GX 11 at 24:30 to 24:40 and 31:25 to 31:38 (Anderson interview)). The homeowner told the special agent that McMillan fired the gun two times before Anderson possessed it. ROA.782. That same person indicated in an interview of her daughter that she had covered her head and eyes during the event. ROA.1173-75 (GX 17 at 4:57 to 5:05 (physical action showing covering her head and eyes with her arms). Anderson also told the special agent that McMillan put the gun to his head. ROA.787. Neither Anderson nor the homeowner testified under oath at trial.

Quickly thereafter, Anderson gained possession of the gun, which he pointed at McMillan. ROA.642. Anderson then fired the gun, injuring McMillan's finger. ROA.643. McMillan tried to flee, but Anderson shot him in the leg. ROA.643-45, ROA.686, ROA.1173-75 (GX 17 at 3:30 to 3:45 (eyewitness stating that Anderson shot McMillan in the leg while McMillan was "running away")). No longer able to flee on foot, McMillan began to crawl. ROA.645, ROA.686 (eyewitness testifying that McMillan was "on the ground" with "too much blood"). Unsatisfied, Anderson followed McMillan as he tried to crawl toward cover. ROA.645, ROA.686 (eyewitness testimony that McMillan tried to get away from Anderson).<sup>5</sup> He shot McMillan at least two more times. ROA.645 (testifying that Anderson shot McMillan while McMillan was on the ground), ROA.686 (same), ROA.1173-75 (GX 17 at 3:40 to 3:55 (eyewitness stating that Anderson shot McMillan while McMillan was on the ground)). Ultimately,

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<sup>5</sup> See also ROA.724-29 (describing locations of spent shell casings), ROA.1124-59 (GX 2A-2R (photographs showing that spent shell casings were at many locations down the length of the driveway and that blood was in multiple locations in the yard and driveway)), ROA.1161-62 (GX 5 (log of collected evidence, including spent shell casings)).

Anderson shot McMillan four times in his legs. ROA.605, ROA.607 (noting three wounds to the left leg and one in the right leg).<sup>6</sup>

Anderson then jumped in McMillan's girlfriend's car and sped off, leaving his victim lying on the ground. ROA.645-46, 668, 764. McMillan was bleeding and in pain. ROA.600.

Because ambulance service was slow in this rural area, McMillan's girlfriend came back in her car and took McMillan to the emergency room, where medical professionals treated his multiple gunshot wounds.

ROA.646, ROA.597-98 (victim arrived in a personally owned vehicle after sustaining multiple gunshot wounds), ROA.668.

## **B. Course of Proceedings and Disposition Below**

In June 2021, the grand jury returned a six-count indictment charging Anderson with various violent offenses. Relevant here, the grand jury charged Anderson with assaulting a victim with a dangerous weapon, in

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<sup>6</sup> See also ROA.601 (McMillan tells emergency room practitioner that Anderson shot him multiple times with a 9-millimeter gun), ROA.606 (same); ROA.1187-89 (GX 26 at 0:13 to 1:00 (911 call wherein homeowner tells operator that there is "an emergency" because Anderson shot McMillan before he "took off" in a car)).

violation of 18 U.S.C. §§ 1153 and 113(a)(3) (Count 2); assaulting a victim, causing serious bodily injury, in violation of 18 U.S.C. §§ 1153 and 113(a)(6) (Count 3), and using a gun during and in relation to a crime a violence, in violation of 18 U.S.C. §§ 1153 and 113(a)(3) (Count 4).<sup>7</sup> ROA.331-33.

Trial began on October 3, 2022, and ended on October 5, 2022, when the jury returned a guilty verdict as to Counts 2, 3, and 4. R.E.1 (docket); ROA.337-38, R.E.5 (verdict).

### **C. Anderson's Appeal**

Anderson makes two arguments on appeal. First, the trial evidence was insufficient to show that he did not act in self-defense. *See* Br. 23-29. Second, the district court should have recused the prosecutor. *See* Br. 29-33.

The judgment should be affirmed.

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<sup>7</sup> The jury found Anderson not guilty of the remaining counts charged in the indictment. ROA.337-38; R.E.5.

## SUMMARY OF THE ARGUMENT

1. The evidence supports Anderson’s criminal conviction. The trial proof established that Anderson shot his victim many times—even as the victim unquestionably was disarmed, injured by gunshot wounds, and crawling on the ground. The proof, which included testimony from the victim and an eyewitness, was more than sufficient to support the jury’s verdict.

2. The court appropriately denied Anderson’s motion to recuse the prosecutor. Anderson failed to show that the prosecutor’s brief representation of him at a 2007 arraignment (for allegations of domestic tribal crimes) was in any way similar to the present case, which involves Anderson shooting a man repeatedly in 2021.

## ARGUMENT

### **I. The Jury’s Verdict Is Supported by Sufficient Evidence**

#### **A. Standard of Review**

When a defendant timely moves for a judgment of acquittal, this Court reviews a challenge to the sufficiency of evidence *de novo*. *United States v. Sanders*, 952 F.3d 263, 273 (5th Cir. 2020). The Court’s sufficiency

review “is highly deferential to the jury’s verdict.” *United States v. Mesquias*, 29 F.4th 276, 279 (5th Cir. 2022). The Court considers “only the ‘legal’ question ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ ” *United States v. Bedoy*, 827 F.3d 495, 504 (5th Cir. 2016) (emphasis by the Court). This Court “will reverse only if no rational jury could have found [the] defendant[] guilty beyond a reasonable doubt.” *Mesquias*, 29 F.4th at 279; see *United States v. Swenson*, 25 F.4th 309, 316 (5th Cir. 2022) (“[A] defendant seeking reversal on the basis of insufficient evidence swims upstream.”) (citation and quotation marks omitted); *Bedoy*, 827 F.3d at 504 (“Sufficiency review essentially addresses whether the government’s case was so lacking that it should not have even been submitted to the jury.” (citations and quotation marks omitted)).

## **B. Applicable Law**

Relevant here, Anderson was charged with assault with a dangerous weapon (Count 2), assault resulting in serious bodily injury (Count 3), and

using a gun during and in relation to a crime a violence (Count 4), all in violation of 18 U.S.C. §§ 113 and 1153. ROA.331-33.

Anderson raised the issue of self-defense. “Self-defense requires a person (1) to reasonably believe that force is necessary for the defense of oneself against the immediate use of unlawful force and (2) to use no more force than appears reasonably necessary under the circumstances.” *United States v. Waller*, 605 Fed.Appx 333, 338 (5th Cir. 2015) (unpublished per curiam) (citations and quotation marks omitted); *United States v. Ramos*, 537 F.3d 439, 465 (5th Cir. 2008) (approving of the self-defense pattern instruction); Fifth Circuit Pattern Jury Instructions (Criminal) § 1.39 (2019).

### **C. Discussion**

On appeal, Anderson disputes the sufficiency of the evidence, arguing that he acted in self-defense when shooting his victim. Br. 20, 23-29.<sup>8</sup>

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<sup>8</sup> The jury was instructed on all elements of the offenses, including the possibility of self-defense. *See* ROA.824-30. Anderson’s appeal concerns only whether evidence supports the jury’s finding that he did not act in self-defense. Br. 20-29.

There is ample evidence of the three violent crimes for which Anderson was convicted. Even Anderson does not dispute that he shot McMillan multiple times. *See generally* Br. 23-29. Rather, he argues that he acted in self-defense because two people who did not testify at trial—one being the defendant himself<sup>9</sup>—said that McMillan was the first person holding the gun. *Id.*

Who possessed the gun initially is not determinative. Whether Anderson had to shoot McMillan is.<sup>10</sup> He did not. The district court

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<sup>9</sup> In a voluntary, lengthy interview with a federal agent, Anderson recalls many details of the evening in question, save the critical ones (e.g., how many times he shot the victim and where he put the gun afterward). *See generally* ROA.1312-14 (GX 11 Anderson’s post-arrest statements). For these critical details, Anderson claims to “black out.” *See, e.g.*, ROA.1312-14 (GX 11 at 32:10 to 33:14 (recalling what was said, what his concerns were, and what occurred until the agent asked what he did with the gun after shooting it)); ROA.1312-14 (GX 11 at 34:30 to 35:15 (recalling events in detail until agent points out the high number of gunshot wounds, then claiming to have “blacked out”)); ROA.1312-14 (GX 11 at 39:20 to 41:05 (recalling events before the shooting *and* immediately after the shooting—including that he walked away—but stating that he “blacked out” for the shots that wounded the victim)). Through its verdict, the jury clearly discounted Anderson’s self-serving and selective statements wherein he claimed that he acted in self-defense but had no idea how McMillan was shot because he “blacked out.”

<sup>10</sup> *See Waller*, 605 Fed.Appx at 338 (holding that even if the ultimate victim was the initial aggressor, such that a defendant “was justified in responding with force, a reasonable jury could conclude that [the defendant] forfeited his right to self-defense by using more force than appeared reasonably necessary”).



properly instructed the jury on self-defense.<sup>11</sup> In so doing, the court instructed that a person claiming self-defense “must use no more force than appears reasonably necessary under the circumstances.”

The facts at trial showed that Anderson used far more force than was “reasonably necessary” when he chased down his unarmed victim and shot him over and over again. ROA.642-46 (victim testimony), ROA.675-76, ROA.684-86 (eyewitness testifying that McMillan tried to get away from Anderson but was “on the ground” with “too much blood”), ROA.707-708, ROA.1173-75 (GX 17 at 2:50 to 3:55 (eyewitness stating that Anderson shot McMillan in the leg while McMillan was “running away”)). In fact, the trial evidence established that Anderson shot McMillan many times—even when McMillan unquestionably was disarmed, injured by gunshot

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<sup>11</sup> See ROA.826 (“[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.”). Compare *id.* with Fifth Circuit Pattern Jury Instructions (Criminal) § 1.39 (2019).

wounds, and crawling on the ground trying to escape the bullets that Anderson was hurling his way. *E.g.*, ROA.684-87 (eyewitness testimony).

This was not self-defense.

The district court appreciated this point when it said at sentencing,<sup>12</sup> “I think that the verdict is easily supported by the evidence even if McMillan is the first to pull the gun out, because they [i.e., the jurors] heard McMillan testify that he was being shot at as he was running and crawling away.” ROA.890; *see also* ROA.893 (remarking at sentencing that Anderson fired the gun “at a moving target”).<sup>13</sup> As the jury found, Anderson did not act in self-defense.

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<sup>12</sup> Of course, the jury was not a fact finder at trial. The Government highlights the court’s statements here because Anderson’s brief on appeal relies heavily on the court’s statements from Anderson’s sentencing. *See, e.g.*, Br. 24-25, 27-28.

<sup>13</sup> At sentencing, the district court also stated that, after Anderson possessed the gun, “McMillan wasn’t persisting” and Anderson “was not trying to prevent further confrontation.” ROA.895. Rather, Anderson “shot McMillan multiple times as he was trying to get away,” which is consistent with McMillan’s testimony, his wounds, and “the location of the shell casings and the blood that was found at the scene.” ROA.895. The court also remarked: “Once the defendant had the gun, he kept shooting at McMillan as McMillan was running, and then crawling away.” ROA.896. *See also* ROA.897 (“I instructed the jury on self-defense, and I believe the jury convicted Mr. Anderson because he shot Mr. McMillan multiple times as Mr. McMillan was trying to get away.”).

The jury's verdict is supported by testimony from the victim and an eyewitness. ROA.642-46, ROA.675-76 (victim testimony), ROA.684-86, ROA.707-708 (eyewitness testimony). It is also supported by the wounds that the victim received (first to his hand, then to his knee, then to his legs). ROA.675, ROA.1165-72 (GX 12 (photographs of injuries)), ROA.1183 (GX 23 (same)), ROA.605, ROA.1340 (GX 13 (medical record)). It is also supported by the location of the blood and spent shell casings that make a trail along the driveway and front yard. ROA.574-76, ROA.581-85, ROA.723-31, ROA.1161-62; ROA.1112-23 (GX 1A-1F (photographs)), ROA.1124-29 (GX 2A-2R (photographs)), ROA.1161-62 (GX 5 (evidence log)), ROA.1184-86 (GX 24 (photographs)). Finally, it is supported by a 911 call that a second eyewitness made just after the events unfolded, by the victim's statements to the emergency room practitioner, and by the statement of an eyewitness that was recorded by law enforcement within hours of the violent encounter. ROA.561-62 (testimony regarding 911 call), ROA.1187-89 (GX 26 (911 call)), ROA.601 & ROA.606 (statements while at emergency

room), ROA.1340 (GX 13 (medical record)), ROA.697, ROA.1173-75 (GX 17 at 2:50 to 5:40 (eyewitness interview)).

This Court should hold that the evidence is sufficient to show that Anderson did not act in self-defense.

## **II. The Court Properly Denied Anderson’s Motion to Recuse the Prosecutor**

Anderson argues that the prosecutor should have been recused.

Br. 29-33. The court did not err in denying Anderson’s motion for recusal.

### **A. Relevant Facts**

Unless otherwise specified, the facts are taken from the order of the magistrate judge, as those are the facts found by the court. ROA.191-200 (court’s factual findings and conclusions). *See also* ROA.220-24 (district court order reviewing the magistrate court’s ruling using a clearly erroneous and contrary-to-law standard and concluding, “Having reviewed the record, the hearing transcript, and the parties’ briefs, the Court finds that it was not clearly erroneous to credit the Government’s evidence over Anderson’s testimony.”); ROA.223-24 (“[Magistrate] Judge Isaac’s order was well reasoned and based on detailed factual findings.

There is no indication that the alleged victims in the 2021 shooting overlap with the victims of the 2007 charges or that the cases bear any other relationship other than Anderson’s alleged involvement in them. Based on Judge Isaac’s factual findings—which were not clearly erroneous—her ruling regarding Payne’s representation was not contrary to law.” (footnote omitted)).

Facts relevant to the recusal issue are as follows:

Years before he joined the U.S. Attorney’s Office,<sup>14</sup> the prosecutor in this case (Kevin Payne) worked as a public defender for the Mississippi Band of Choctaw Indians.<sup>15</sup> ROA.195, ROA.96-97 (Payne declaration). Five days before leaving that job in September 2007, Payne handled an afternoon of arraignments for his employer, Choctaw Legal Defense. ROA.96-97 (Payne declaration). That afternoon, he handled multiple arraignments—including an arraignment for Anderson. ROA.195, ROA.70-

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<sup>14</sup> See ROA.96 (stating that Kevin Payne began working as a Special Assistant U.S. Attorney in 2016 and as an Assistant U.S. Attorney in 2021).

<sup>15</sup> Choctaw Legal Defense serves as a public defender’s office for the reservation. ROA.443.

71 (docket sheet listing arraignments), ROA.61 (database printout of Choctaw Legal Defense showing Anderson's history of representation by that office), ROA.67-68 ¶ 7 (declaration of Choctaw Legal Defense Director), ROA.96-97 (Payne declaration). On the single afternoon that attorney Payne was Anderson's counsel for the purposes of arraignment, Anderson faced charges for domestic battery, domestic criminal trespass, domestic criminal damage to property, and domestic theft for activities that occurred in August 2007. ROA.70-71 (tribal court records).

When attorney Payne covered arraignments on a given day, he "served as stand-in counsel for all persons listed on the court's docket for arraignment purposes only." ROA.97 ¶ 8 (Payne declaration). While covering arraignments on the afternoon in question, Payne had "brief interaction[s]" with multiple defendants. ROA.97 ¶ 9. He "did not speak with Mike Austin Anderson about the facts, parties, or other substantive details of his case." ROA.97.

Just after Anderson's 2007 arraignment, the public defender's office paneled his case out to a different defense lawyer. ROA.195, ROA.67-68 ¶ 7

(declaration of Choctaw Legal Defense Director), ROA.97 ¶ 9 (Payne declaration). Attorney Payne had no further involvement in the case. ROA.195, ROA.67-68 ¶ 7 (declaration of Choctaw Legal Defense Director). Indeed, he ceased working for Choctaw Legal Defense five days later. ROA.195, ROA.67-68 ¶ 7 (declaration of Choctaw Legal Defense Director), ROA.97 ¶ 9 (Payne declaration).

## **B. Relevant Procedural History**

Shortly after his 2021 arraignment in this case, Anderson filed a motion to recuse AUSA Payne. ROA.4-6 (docket). After briefing, the magistrate judge held a hearing, wherein she heard from witnesses, accepted evidence, and heard argument from the parties. ROA.6-8 (docket), ROA.411-86 (hearing transcript). After additional briefing, the magistrate judge entered a lengthy order that included detailed factual findings, a summary of the relevant professional-responsibility standards and legal principles, and case-specific legal conclusions. ROA.187-200 (order), ROA.8-9 (docket).

Anderson appealed to the district court. ROA.201-05. After briefing, the court denied that motion. ROA.219-24 (order reviewing the magistrate court ruling using a clearly erroneous and contrary-to-law standard). The district court concluded that the magistrate judge's "order was well reasoned and based on detailed factual findings." ROA.223. After review[ing] the record, the hearing transcript, and the parties' briefs, the district court specifically found that "it was not clearly erroneous to credit the Government's evidence over Anderson's testimony." ROA.222. The court further found that there "is no indication that the alleged victims in the 2021 shooting overlap with the victims of the 2007 charges or that the cases bear any other relationship other than Anderson's alleged involvement in them." ROA.223-24. Given these facts, which the district court found "were not clearly erroneous," the court concluded that the magistrate judge's order "regarding Payne's representation was not contrary to law." ROA.223-24 (footnote omitted).



### **C. Standard of Review**

For disqualification-of-counsel rulings, this Court reviews a district court's findings of fact for clear error. *See In re Am. Airlines, Inc.*, 972 F.2d 605, 609-10 (5th Cir. 1992). It reviews the court's application of relevant ethical standards *de novo*. *See id.*

### **D. Applicable Law**

#### **1. Rules of Professional Conduct**

Anderson bases his appeal on Mississippi Rule of Professional Conduct 1.9. Br. 30.<sup>16</sup> Rule 1.9 prevents a lawyer from representing a party in a matter that is the same as, or substantially related to, the matter involved in a prior representation.<sup>17</sup>

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<sup>16</sup> The parties agree that, through local rules, the Mississippi Rules of Professional Conduct apply to this case. *See, e.g.*, L.U. Crim. R. 1, 44.1; L.U. Civ. R. 83.5.

<sup>17</sup> Miss. R. Prof'l Conduct 1.9 ("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.").

## 2. Substantial-Relationship Test

In cases challenging an attorney's ability to represent a client adverse to her former client, this Court uses the "substantial relationship" test.<sup>18</sup> *In re Am. Airlines, Inc.*, 972 F.2d 605, 614 (5th Cir. 1992). That test requires that the "party seeking to disqualify opposing counsel on the ground of a former representation" 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.

*Id.* (citations and quotation marks omitted). If "the prior matters are substantially related to the present case," the Court imposes two irrebuttable presumptions: "relevant confidential information was

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<sup>18</sup> The former client also can seek to "disqualify counsel by showing that his former attorney possessed relevant confidential information in the manner contemplated by" the applicable professional rules. *See In re Am. Airlines*, 972 F.2d at 615 (5th Cir. 1992). Anderson does not raise such a challenge on appeal (*see* Br. 29-32), so it is not addressed here. *Guillot on behalf of T.A.G. v. Russell*, 59 F.4th 743, 751 (5th Cir. 2023) ("Parties forfeit contentions by inadequately briefing them on appeal.").

disclosed during the former period of representation” and “confidences obtained by an individual lawyer will be shared with the other members of his firm.” *Id.* & n.1 (citations and quotation marks omitted).

Notwithstanding these irrebuttable presumptions, this Court has “never applied the test in a mechanical way that might prevent an attorney from ever representing an interest adverse to that of a former client.” *In re Am. Airlines*, 972 F.2d at 614 (citation and quotation marks omitted).

“Rather, a substantial relationship may be found only after the moving party delineates with specificity the subject matters, issues and causes of action common to prior and current representations and the court engages in a painstaking analysis of the facts and precise application of precedent.” *Id.* (citation and quotation marks omitted). “[T]he party seeking disqualification bears the burden of proving that the present and prior representations are substantially related.” *Id.*

## E. Discussion

On appeal, Anderson argues that the court erred in denying his motion to recuse the prosecutor.<sup>19</sup> Br. 29-33. The court did not err.

For purpose of this response, the Government assumes that attorney Payne represented Anderson at an arraignment in September 2007 and that Payne, therefore, had an attorney-client relationship with Anderson for a brief time<sup>20</sup> on one afternoon more than a decade ago.<sup>21</sup> ROA.70-71 (tribal court records).

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<sup>19</sup> The notice of appeal refers only to the “Court’s Judgment.” ROA.316, R.E.2. The absence of any reference to the denial of Anderson’s motion to recuse presents the question whether this recusal issue is properly before this Court. *Compare In re Katrina Canal Breaches Litig.*, 2008 WL 5069808, at \*1 (5th Cir. 2008) (unpublished per curiam) (declining to consider recusal issue that was not part of the appeal); *Sama v. Hannigan*, 669 F.3d 585, 589 (5th Cir. 2012) (this Court lacked jurisdiction to address recusal issue not subject to notice of appeal) *with Stringer v. Funchess*, 291 Fed.Appx. 617, 619 (5th Cir. 2008) (unpublished per curiam) (appellant’s “notice of appeal does not mention the orders denying the motions for recusal, but we will review those orders as sufficiently related to the final judgment”). In view of the uncertainty as to whether the recusal issue is properly before the Court, this brief defends the court’s order denying the recusal motion.

<sup>20</sup> See ROA.442 (noting that Choctaw Legal Defense counsel gets little notice about defendants on the docket for arraignments before appearing in court), ROA.443 (noting that, in 2007, the arraignments occurred on Wednesday afternoons at 1 p.m.).

<sup>21</sup> As the court found, attorney Payne did not represent Anderson on any other occasion. ROA.192-96 (magistrate finding). He did represent Anderson’s father in 2006, but there is no evidence that such representation created an attorney-client relationship between Anderson and Payne. ROA.193 (same). In the district court, Anderson asserted

Given this assumption, the sole issue before this Court is whether the 2007 representation was substantially related to the present case. It was not. *First*, the matters are dissimilar. The 2007 matter involved domestic crimes (battery, trespass, damage to property, and theft). ROA.70-71 (tribal court records). The present case involves aggravated assault with a gun and other violent crimes against Anderson’s friends. ROA.331-33 (indictment). The locations are distinct—the residences of Matilda King and Mack Anderson (for the 2007 crimes) versus residence of Tonya Anderson (for the 2021 assaults). ROA.79, ROA.82, ROA.640-41. The times are distinct—being separated by more than a decade. ROA.70-71 (2007 tribal court records), ROA.631 (victim shot in 2021), ROA.560 (911 call made in 2021). The offense conduct is distinct—one case involved domestic crimes and the other involved using a gun to threaten and harm

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that Payne represented him in 2006. *See, e.g.*, ROA.417-19, *but see* ROA.424 (Anderson’s testimony that the 2006 events were not related to this case). *See also* ROA.116-19 (declaration of attorney who actually represented Anderson in 2006). Anderson does not mention that alleged representation in his appellate brief, so it is not addressed here. *Guillot on behalf of T.A.G. v. Russell*, 59 F.4th 743, 751 (5th Cir. 2023) (“Parties forfeit contentions by inadequately briefing them on appeal.”).

others. ROA.70-71, ROA.684-87 (eyewitness to 2021 assaults). The alleged victims are distinct—Matilda King and Mack Anderson (in 2007) versus Julian McMillan and Tonya Anderson (in 2021). ROA.79, ROA.82, ROA.684-87 (eyewitness to 2021 assaults). Other than Mike Anderson, the matters have nothing in common.

*Second*, there is no evidence that Anderson related confidential or case-related information to attorney Payne during his brief encounter with him at an arraignment in 2007. ROA.195 (magistrate factual finding that Payne represented “Anderson in a 2007 arraignment for theft” but “no confidential communications were exchanged during the representation.”). The facts support the court’s finding that no confidential communications were exchanged: It was not the practice for an attorney for the public defender’s office to do anything at an arraignment other than collect personal identifiers, pled the defendant to not guilty, and get a court date. *See, e.g.*, ROA.195 (magistrate judge’s factual finding that “Payne’s 2007 representation of Mr. Anderson did not extend beyond an appearance at Mr. Anderson’s arraignment”), ROA.444-46, 451 (testimony of Choctaw

Legal Defense Director noting that, at an arraignment, “you don’t have time” to have extended conversations with defendants about the facts and legal defenses and arguments because “the judge is calling another case”), ROA.444 (“All you do is plead somebody not guilty, give them a trial date, and have their file ready to run a conflicts check to see who can represent them.”), ROA.454 (similar). Moreover, Anderson’s case was paneled out to another defense lawyer, and attorney Payne ceased working for the public defender five days after the arraignment. ROA.195 (magistrate factual finding that, “Payne’s employment at Choctaw Legal Defense ended very shortly” after the arraignment “and another attorney was assigned to Mr. Anderson’s case” in 2007), ROA.68 ¶ 7 (declaration of Choctaw Legal Defense Director), ROA.97 ¶ 9 (Payne declaration).

The facts do not support Anderson’s unfounded assertion that the 2007 criminal charges in Choctaw court were related in any way—much less substantially related—to the present matter. *In re Am. Airlines, Inc.*, 972 F.2d 605, 614 (5th Cir. 1992) (requiring the former client to show that “a substantial relationship between the subject matter of the former and

present representations” (citation and quotation marks omitted)). Nor do the facts support any allegation that client confidences or case-specific legal advice were exchanged when Payne represented Anderson for a part of a day in 2007.<sup>22</sup> Anderson failed to “delineate[] with specificity the subject matters, issues and causes of action common to [the] prior and current representations.”<sup>23</sup> *Id.* (citation and quotation marks omitted). Because of this failure, the court correctly concluded that Anderson did not meet his burden to show that a substantial relationship existed.<sup>24</sup> *Id.* (“[T]he party

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<sup>22</sup> Anderson cites two pages of the record to support his assertion that he exchanged confidences with attorney Payne. *See* Br. 33 (citing ROA.420-21). A close review of that portion of the recusal-hearing transcript shows that Anderson was not testifying about Payne’s representation of him in 2007. The first alleged exchange of confidences occurred when Payne allegedly represented Anderson in 2006. *See* ROA.417-20. That representation never occurred; thus, no attorney-client relationship was formed. ROA.116-19 (declaration of attorney who actually represented Anderson in 2006). The second alleged exchange of confidences occurred when Payne represented Anderson’s father, not Anderson. ROA.421. Because no attorney-client relationship existed between Anderson and Payne, Anderson is not a former client within the meaning of the professional-responsibility rules.

<sup>23</sup> Anderson’s brief on appeal states only that “both cases involve criminal charges.” Br. 32-33. This is wholly insufficient to satisfy Anderson’s burden. *In re Am. Airlines, Inc.*, 972 F.2d at 614.

<sup>24</sup> Anderson has not alleged that the court misapplied the law. *See generally* Br. 29-33. Even if that were at issue on appeal, the record establishes that the court used the



seeking disqualification bears the burden of proving that the present and prior representations are substantially related.”). The court’s order should be affirmed.

### CONCLUSION

For the foregoing reasons, the judgment of conviction should be affirmed.

Respectfully submitted,

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correct legal standard and applied the facts to the law appropriately. ROA.187-200 (magistrate judge’s order).

## CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed the foregoing with the Clerk of the Court using the Electronic Case Filing system (ECF), which caused the filing to be served on counsel of record.

Dated: June 5, 2023

*/s/ Jennifer Case*

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 5,251 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).
2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the typestyle requirements of FED. R. APP. 32(a)(6) because the brief has been prepared using Palatino Linotype 14-point font produced by MS Word software; the footnotes are in 12-point type.
3. Privacy redactions required by FIFTH CIR. R. 25.2.13 have been made to this brief.
4. The electronic submission of this brief is an exact copy of the paper document as required by FIFTH CIR. R. 25.2.1.
5. This brief has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

Dated: June 5, 2023

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