

No. 23-60040

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

MIKE AUSTIN ANDERSON
Defendant-Appellant

Appeal from the United States District Court
For the Southern District of Mississippi
Cause No. 3:21cr62-DPJ-LGI

BRIEF FOR APPELLANT

Omodare B. Jupiter (MB # 102054)
Federal Public Defender
N. and S. Districts of Mississippi
200 S. Lamar Street, Suite 200-N
Jackson, MS 39201
Telephone: 601-948-4284
Facsimile: 601-948-5510

Michael Scott Davis (MB # 103225)
Assistant Federal Public Defender

Attorney for Defendant-Appellant

CERTIFICATE OF INTERESTED PARTIES

The undersigned certifies that the following persons have an interest in the outcome of this case:

1. Mike A. Anderson, Defendant-Appellant;
2. Darren J. LaMarca, United States Attorney, Southern District of Mississippi;
3. Kevin J. Payne, Assistant United States Attorney, Southern District of Mississippi, Jackson, Mississippi;
4. Jennifer L. Case, Assistant United States Attorney, Southern District of Mississippi, Jackson, Mississippi;
5. Omodare B. Jupiter, Federal Public Defender, N. and S. Districts of Mississippi, Jackson, Mississippi;
6. Michael Scott Davis, Assistant Federal Public Defender, N. District of Mississippi, Oxford, Mississippi;
7. Jacinta Hall, former Assistant Federal Public Defender, S. District of Mississippi, Jackson, Mississippi; and
8. Honorable Daniel P. Jordan III, United States District Judge, Jackson, Mississippi.

This certificate is made so that the judges of this Court may evaluate possible disqualification or recusal.

/s/ Michael Scott Davis

Michael Scott Davis

Attorney for Defendant-Appellant

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested in this case. Oral argument will assist in applying the law to the facts of this case.

TABLE OF CONTENTS

| | <u>Page #:</u> |
|---|----------------|
| CERTIFICATE OF INTERESTED PARTIES | i |
| STATEMENT REGARDING ORAL ARGUMENT | iii |
| TABLE OF CONTENTS..... | iv |
| TABLE OF AUTHORITIES | vi |
| I. JURISDICTIONAL STATEMENT | 1 |
| II. STATEMENT OF ISSUES PRESENTED FOR REVIEW | 2 |
| III. STATEMENT OF THE CASE..... | 3 |
| A. Relief sought on appeal..... | 3 |
| B. Procedural history..... | 3 |
| C. Statement of facts | 6 |
| 1. Facts about Mike’s background..... | 6 |
| 2. Facts about the trial | 9 |
| a. The charges and jury verdicts | 9 |
| b. Evidence presented at trial and at the sentencing hearing | 10 |
| c. Facts about the recusal issue | 18 |
| IV. SUMMARY OF ARGUMENTS..... | 20 |
| V. ARGUMENTS..... | 21 |
| A. The district court erred by finding that the prosecution produced sufficient evidence at trial for a reasonable jury to return a guilty verdict against Mike | 21 |

| | |
|--|----|
| 1. Standard of review and applicable legal tests..... | 21 |
| 2. The evidence submitted at trial was insufficient to prove guilt..... | 23 |
| a. Introduction | 23 |
| b. Proof pertaining to Julian McMillan’s testimony..... | 24 |
| c. Proof pertaining to Catiea Anderson’s testimony..... | 25 |
| d. Proof pertaining to Tonya Anderson’s statement to law enforcement | 27 |
| 3. Conclusion – sufficiency of the evidence issue | 28 |
| B. The district court erred by denying Mike’s Motion to Revoke or Amend Magistrate Judge’s Denial of Defendant’s Motion to Order Recusal..... | 29 |
| 1. Standard of review | 29 |
| 2. Argument | 29 |
| VI. CONCLUSION..... | 34 |
| CERTIFICATE OF SERVICE | 35 |
| CERTIFICATE OF COMPLIANCE WITH RULE 32(a) | 35 |

TABLE OF AUTHORITIES

Page #:

Cases:

C.F. Gollott & Son Seafood, Inc. v. Gollott,
 No. 120CV00159TBMJCG,
 2021 WL 6618648t (S.D. Miss. Mar. 5, 2021)31

Henderson v. United States,
 575 U.S. 622 (2015)12

In re Am. Airlines, Inc.,
 972 F.2d 605 (5th Cir. 1992)31, 32, 33

Occu-Health, Inc. v. Mississippi Space Servs.,
 No. 1:06-CV-159-LG-RHW,
 2006 WL 2290472 (S.D. Miss. Aug. 9, 2006).....31

Owens v. First Fam. Fin. Servs., Inc.,
 379 F. Supp. 2d 840 (S.D. Miss. 2005)30

United States v. Clemons,
 700 Fed. App’x 341 (5th Cir. 2017)22, 28

United States v. Davis,
 735 F.3d 194 (5th Cir. 2013)22

United States v. Moreland,
 665 F.3d 137 (5th Cir. 2011)21, 22, 23, 28, 29

United States v. Scroggins,
 485 F.3d 824 (5th Cir. 2007)29

Williams v. Pennsylvania,
 579 U.S. 1 (2016).....33

Statutes:

18 U.S.C. § 1133, 4

| | |
|--|--------|
| 18 U.S.C. § 924..... | 4 |
| 18 U.S.C. § 1153 | 3, 4 |
| 28 U.S.C. § 1291 | 1 |
| <u>Rules:</u> | |
| Rule 4, Fed. R. App. P. | 1 |
| Rule 32, Fed. R. App. P. | 35 |
| Rule 29, Fed. R. Crim. P. | 21 |
| Rule 1.9, Miss. R. Prof. Conduct | 30, 31 |
| Rule 1.10, Miss. R. Prof. Conduct | 30 |
| Rule 83.5, Local Rules for the N. and S. Districts of Miss | 31 |
| <u>Sentencing Guidelines Provisions:</u> | |
| U.S.S.G. § 5K2.10..... | 17 |

I. JURISDICTIONAL STATEMENT

This appeal arises from a final order of the district court sentencing Mr. Anderson to 144 months in prison for violating federal law. Judgment, ROA.309-15. The court entered a Judgment on January 27, 2023. *Id.* at ROA.309-15. Mr. Anderson filed a timely Notice of Appeal on January 30, 2023, pursuant to Rule 4(b)(1)(A) of the Federal Rules of Appellate Procedure. Notice of Appeal, ROA.316-17. Jurisdiction is vested in this Court under 28 U.S.C. § 1291.

II. STATEMENT OF ISSUES 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.

III. STATEMENT OF THE CASE

A. Relief sought on appeal.

Mike Anderson (hereinafter “Mike”)¹ presents two issues on appeal. If this Court agrees with his first issue – that insufficient evidence was presented at trial for the jury to return a guilty verdict – then the Judgment must be vacated and Mike must be freed from prison. If this relief is granted, then the second issue is moot and the Court need not analyze it.

If the Court agrees with the second issue – that the district court erred by denying Mike’s Motion to Revoke or Amend Magistrate Judge’s Denial of Defendant’s Motion to Order Recusal – then then the Judgment must be vacated and the case must be remanded to district court for a new trial.

B. Procedural history.

The grand jury returned a six-count Indictment against Mike on June 15, 2021. Indictment, ROA.331-33. 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). Indictment, ROA.331.

¹ Some of the people involved in the subject incident have the same last name. For clarity purposes, people are referenced by their first names throughout the remainder of this Brief.

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). Indictment, ROA.331 (count 2) and ROA.332 (count 5).

Count 3, assault resulting in serious bodily injury in violation of 18 U.S.C. §§ 1153 and 113(a)(6). Indictment, ROA.331-32.

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). Indictment, ROA.332.

Count 6, brandishing a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii). Indictment, ROA.332-33.

Prior to trial, the parties filed a number of pleadings related to one of the issues on appeal – whether the district court erred by denying Mike’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. ROA.32-34.
- 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. ROA.44-98.

- 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. ROA.99-103.
- 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. ROA.111-170.
- 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. ROA.171-81.
- 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. ROA.187-200.
- Motion to Revoke or Amend Magistrate Judge's Denial of Defendant's Motion to Order Recusal. ROA.201-05.
- Response to Defendant's Motion to Revoke or Amend Magistrate Judge's Denial of Defendant's Motion to Order Recusal. ROA.206-13.
- Reply to Government's Response to Motion to Revoke or Amend Magistrate Judge's Denial of Defendant's Motion to Order Recusal filed. ROA.216-18.
- Order by the district judge denying the Motion to Revoke Magistrate Judge's Order. ROA.219-24.

A jury trial of the case began on October 3 and ended on October 5, 2022. *See* docket minute entries dated Oct. 3 through Oct. 5, 2022, ROA.14-15. The jury returned verdicts of not guilty on counts 1, 5 and 6. Verdict Form, ROA.337-38. It returned guilty verdicts on counts 2, 3 and 4. *Id.* at ROA.337-38.

The Court conducted a sentencing hearing on January 13, 2023. *See* docket minute entry dated Jan. 13, 2023, ROA.16. It sentenced Mike 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. Judgment, ROA.310. 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. *Id.* at ROA.311, 314. The court entered a judgment reflecting this sentence on January 27, 2023. *Id.* at ROA.309-15. This appeal followed. Notice of Appeal, ROA.316-17.

C. Statement of facts.

1. Facts about Mike’s background.

To put the subject convictions in context, we must consider Mike’s background. He is a Native American member of the Choctaw Indian Tribe. Presentence Investigation Report (hereinafter “PSR”), ROA.1425. He was one of 11 children. *Id.* at ROA.1446-47, ¶ 115. Unfortunately, Mike’s mother surrendered him to foster care when he was four or five years old. *Id.* at ROA.1447, ¶ 116.

Mike was in foster care until he was seven, then he returned home to his mother. *Id.* at ROA.1447, ¶ 116. 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.’” *Id.* at ROA.1447, ¶ 116; Sen. Hr’g Tr., ROA.906-07.

When Mike was young, one of his brothers was murdered. Sen. Hr’g Tr., ROA.907-08. Another brother drowned, and family members blamed Mike for the drowning incident. *Id.* at ROA.906-07; PSR, ROA.1448, ¶ 122. To cope with life stresses, he began drinking alcohol at an early age. Sen. Hr’g Tr., ROA.908; PSR, ROA.1448, ¶ 122. He acknowledges the alcohol problem and is ready to undergo substance abuse treatment. Sen. Hr’g Tr., ROA.926. To his credit, Mike has no problem with any other drugs. Sen. Hr’g Tr., ROA. 925 (district court noting that Mike does not have “a significant history of drug abuse”); *See also*, PSR, ROA.1448, ¶ 122.

Compounding Mike’s problems, he was diagnosed with ADHD as a child. PSR, ROA.1448, ¶ 121. Later, he underwent hip replacement surgery and back surgery. Sen. Hr’g Tr., ROA.910; PDR, ROA.1447, ¶ 120. He still experiences pain from the hip malady. PSR, ROA.1447, ¶ 120.

Notwithstanding his difficult childhood environment, Mike graduated from high school. PSR, ROA.1448, ¶ 123. After that he went to community college for three semesters. *Id.* at ROA.1448, ¶ 123.

Mike has a solid employment history. He began working at age 18. PSR, ROA.1448, ¶ 127. Over the years, he worked as a security guard, as a department manager at Walmart and as a desk clerk at Pearl River Resorts. *Id.* at ROA.1448, ¶¶ 124-27. To support his family Mike periodically worked two jobs and had a side job as a hardwood cutter. Sen. Hr’g Tr., ROA.910. He worked hard “to fulfill [his] obligations as a father should.” *Id.* at ROA.910.

Mike emersed himself in community events. Sen. Hr’g Tr., ROA.910. He helped the Choctaw Tribe obtain food through Feed America during the COVID-19 pandemic. *Id.* at ROA.910-11. Also, he has mentored troubled children within the Tribe. *Id.* at ROA.912.

Perhaps the best indicator of Mike’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.

Sen. Hr’g Tr., ROA.915.

The prosecutor’s “Jekyll and Hyde” comment pertains to a comparison between all the good that Mike has done (Jekyll), and the bad associated with the subject shooting (Hyde). The district court attributed the “Hyde” aspect of Mike’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.” Sen. Hr’g Tr., ROA.920-21. As stated above, Mike recognizes his problem with alcohol and is ready to get help to cure his addiction. *Id.* at ROA.926.

2. Facts about the trial.

a. The charges and jury verdicts.

The jury heard evidence about the six charges alleged against Mike. As presented in detail above, count 1 alleged that Mike assaulted Julian McMillan (hereinafter “Julian”) with a firearm, with intent to commit murder. Indictment, ROA.331. The jury returned a not guilty verdict on this charge. Verdict Form, ROA.337-38.

Counts 2 and 5 alleged that Mike committed assault with a firearm with intent to do bodily injury. Indictment, ROA.331-32. The alleged victim in count 2 was Julian, and the alleged victim in count 5 was Tonya Anderson (hereinafter “Tonya”). *Id.* at ROA.331-32. The jury returned a guilty verdict on count 2 and a not guilty verdict on count 5. Verdict Form, ROA.337-38.

Counts 3 and 4 respectively alleged assault resulting in serious bodily injury, and use of a firearm in furtherance of a crime of violence. Indictment, ROA.331-32. Julian was the alleged victim on both counts, and the jury returned guilty verdicts on both counts. Verdict Form, ROA.331-32.

Finally, count 6 alleged brandishing a firearm in furtherance of a crime of violence. Indictment, ROA.332-33. The jury returned a not guilty verdict on count 6. Verdict Form, ROA.337-38.

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. Trial Tr., ROA.560. Near the beginning of the trial, the prosecution entered an audio recording of the call as Exhibit G-26.² The jury heard portions of the recording. *Id.* at ROA.562.

On the call, Tonya states that Mike Anderson (hereinafter “Mike”) shot her brother-in-law, Julian (hereinafter “Julian”). Exhibit G-26, 911 recording. She gives the address of the shooting and asks for help. *Id.* 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. Trial Tr., ROA.633. Susanna and Tonya are sisters. *Id.* at ROA.633. The three of them were enjoying a night of drinking when Mike called or texted and asked if someone could bring him a cigarette. *Id.* at ROA.633, 655.

² There is no transcript of the 911 call. The disk on which the call is recorded was filed with the clerk of the district court as Exhibit G26.

Julian asked Susanna if they could go to Mike's house and take him a cigarette. Trial Tr., ROA.634. Susanna agreed, then she and Julian left in her car. *Id.* at ROA.635. Julian was driving, even though he did not have a driver's license. *Id.* at ROA.635, 667. They continued drinking at Mike's house. *Id.* at ROA.636, 656. When they ran low on alcohol, Mike and Julian decided to go back to Tonya's house and get more beer and whiskey. *Id.* at ROA.636-37, 641.

Evidence presented at trial is inconsistent regarding where Mike and Julian stopped after leaving Mike'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. Trial Tr., ROA.637, 657, 659. Mike told law enforcement that they stopped at a crack house. *Id.* at ROA.785. Regardless of which house they stopped at, it is undisputed that Julian went inside while Mike waited in the car. *Id.* at ROA.659, 785.

Mike's and Julian's next stop was Tonya's house, where the subject shooting occurred. Trial Tr., ROA.659. Julian was driving Susanna's car, which had a handgun under the passenger's side front seat. *Id.* at ROA.659, 663. The gun belonged to Susanna. *Id.* at ROA.662.

Julian knew the gun was under the car seat. Trial Tr., ROA.631-32. This is important because he has prior felony convictions for aggravated assault with a deadly weapon, grand larceny and burglary of an occupied dwelling. *Id.* at

ROA.629-30. When asked about his prior convictions at trial, Julian stated he has been a felon “since the day I was born.” *Id.* at ROA.660. As a convicted felon, Julian understood it is illegal to possess a gun.³ *Id.* at ROA.631, 660-61. The prosecution granted Julian immunity from prosecution in return for his trial testimony against Mike. *Id.* at ROA.527, 626-27, 783.

Four people were at Tonya’s house during the shooting. Tonya was there. *See* Trial Tr., ROA.571, 794-95. She was intoxicated at the time. *Id.* at ROA.772, 794-95. Tonya’s hearing impaired daughter, Catiea Anderson (hereinafter “Catiea”), was there. *Id.* at 571-72, 682-83. Mike and Julian were there as well.

What actually happened after Mike 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 Mike. The judge stated, “in candor, none of the witnesses are very credible[.]” Sen. Hr’g Tr., ROA.889.

According to testimony given by both Julian and a nurse that treated him, Julian said that Mike argued with both him and Tonya after arriving at Tonya’s house. Trial Tr., ROA.606, 642, 562-53. He could not remember what the

³ Under binding law, 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).

argument was about. *Id.* at ROA.606, 642, 652-53. It is undisputed that Julian was intoxicated at the time. *Id.* at ROA.610-12, 634-35, 636, 654.

Mike never placed his hands on Tonya during their argument. Trial Tr., ROA.673. Nevertheless, Julian testified that he tried to get Mike back in the car during the argument. Trial Tr., ROA.642, 653, 664. Mike purportedly refused his request, then shot Julian multiple times after retrieving the handgun from under the car seat. Trial Tr., ROA.642-45, 676. According to Julian, after the shooting Mike got in Susanna's car and left. *Id.* at ROA.645-46. Then Susanna returned to Tonya's house and took Julian to the hospital. Trial Tr., ROA.646-47.

After Julian testified, the next witness called by the prosecution was Catiea. Trial Tr., ROA.682. As stated above, Catiea is Tonya's daughter. *Id.* at ROA.684. Catiea testified that she is "[a]lmost" completely deaf." *Id.* at ROA.682. In fact, the district court had lengthy discussions with the parties about how to present Catiea's testimony to the jury. *Id.* at ROA.524-25, 679. 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. *See* Catiea's testimony in its entirety, Trial Tr., ROA.682-717.

Catiea's testimony was suspect. First she testified that Mike came into the house. Trial Tr., ROA.684. Then she testified that Mike was outside of the house the whole time. *Id.* at ROA.684. She testified at trial that Mike got beer from

Tonya's house then carried the beer to Susanna's car. *Id.* at ROA.691. However, prior to trial she provided a written statement that Mike dropped the beer on the ground before going to the car and shooting Julian. *Id.* at ROA.692. When confronted with this contradiction at trial, Catiea admitted she does not remember which rendition of events is correct. *Id.* at ROA.692.

At trial, Catiea testified that Mike pressed the handgun against Tonya's forehead during the argument. Trial Tr., ROA.686. However, in her written statement to law enforcement, she said nothing about Mike putting the gun to Tonya's head. *Id.* at ROA.704.

In her trial testimony, Catiea stated that Mike fired the gun into the ground before shooting Julian. Trial Tr., ROA.704-05. However, her prior written statement to law enforcement says that Mike initially fired shots into the air. *Id.* at ROA.704-05.

At trial, Catiea testified that she was "in the car" when she witnessed gunshots. Trial Tr., ROA.705. Then she testified that she does not know where she was when the gun went off. *Id.* at ROA.705.

It was dark outside during the shooting, which complicated Catiea's ability to actually see what happened. Trial Tr., ROA.705, 770. Catiea testified to this fact (ROA.705), as did Terrell Allen, the F.B.I. agent assigned to the case (ROA.770). 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. Trial Tr., ROA.585-86.

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 Mike took possession of it. Trial Tr., ROA.781-83. This is consistent with what Mike told Agent Allen. Mike told him that he (Mike) heard two shots fired before he blacked out. *Id.* at ROA.792.

Agent Allen took Mike's statement about the shooting. Mike admitted that he was at Tonya's house, but he never admitted to committing any crime. Trial Tr., ROA.764, 778-79. Mike told Agent Allen that after he heard two shots, he blacked out and could not remember what happened after that. *Id.* at ROA.765, 792; *see also* ROA.745-46 (Mike stating on the recorded interview that he blacked out). Mike's story about the events was consistent throughout the entire investigation. *Id.* at ROA.779.

Agent Allen obtained a search warrant for Mike's house. Trial Tr., ROA.761. He did not find the gun in Mike's house, and Officer Ketcher did not find the gun in Susanna's car. *Id.* at ROA.579, 761. In fact, the gun was never

found. *Id.* at ROA.761. However, Agent Allen recovered the shell casings, but he never ordered a fingerprint analysis of them. *Id.* at ROA.769.

At sentencing, the court granted Mike a downward departure. Justifying the departure, the court stated that evidence presented at trial placed the gun in Julian's hand before Mike allegedly too 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."

Catiea 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.

Sen. Hr'g Tr., ROA.889-90.

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 Mike 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.

Trial Tr., ROA.826.

As presented above, the jury found Mike not guilty of all the charges for which Tonya was the alleged victim. Verdict Form, ROA.338. Those charges are stated in in counts 5 and 6. Indictment, ROA.332-33. It also found him not guilty of assault with intent to murder Julian, which is alleged in count 1. Verdict Form, ROA.337; Indictment, ROA.331. The jury found Mike guilty of the three remaining counts, all of which pertained to shooting Julian. Verdict Form, ROA.337-38.

At the sentencing hearing, the court granted Mike a downward departure from the Sentencing Guidelines. Sen Hr’g Tr., ROA.893-97. It granted the departure under U.S.S.G. § 5K2.10. *Id.* at ROA.893. 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. Sen. Hr’g Tr., ROA.889-90.

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[.]” Sen. Hr’g Tr., ROA.922. The court did not elaborate on the “mitigating circumstances.” *Id.* at ROA.922. 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 Mike to serve 144 months in prison. *Id.* at ROA.922; Judgment, ROA.310. The reasonableness of the sentence is not at issue on appeal.

c. Facts about the recusal issue.

Kevin Payne was the lead prosecutor in this case. District Judge’s Order, ROA.219. From August 2004 until September 2007, he was a Staff Attorney with Choctaw Legal Defense. *Id.* at ROA.219. The district court found that Mr. Payne represented Mike at a tribal court arraignment in 2007, a few days before his employment with Choctaw Legal Services ended. *Id.* at ROA.220; Magistrate Judge’s Order, ROA.188. Mr. Payne admitted this in his Declaration submitted to the district court. ROA.97, ¶ 9.

In addition to representing Mike at the arraignment, Mr. Payne represented Mike’s father. Hr’g Tr., ROA.421. His father was incarcerated, so Mike and Mr.

Payne discussed facts about that case. *Id.* at ROA.421. Mike disclosed confidential information during their discussions. *Id.* at ROA.421.

Based on these facts, the defense filed a Motion seeking an order requiring Mr. Payne to recuse himself from the subject prosecution. Motion, ROA.32-34. The Motion was initially addressed and denied by the magistrate judge. Magistrate Judge's Order, ROA.187-200. The defense filed a Motion asking the district judge to revoke the magistrate judge's Order. Motion, ROA.201-05. The district judge denied the Motion. District Judge's Order, ROA.219-24.

IV. SUMMARY OF ARGUMENTS

Mike's first issue on appeal is that the prosecution presented insufficient evidence at trial for reasonable jurors to return guilty verdicts. Even the district court questioned the credibility of the prosecution's witnesses. In fact, the district court believed that Julian fired gun just before Mike took control of it. Based on these facts, Mike acted in self-defense during the shooting incident. Therefore, the Judgment of Conviction should be vacated.

The second issue is that the district court erred by denying Mike's motion to require recusal of Assistant United States Attorney Payne. Mr. Payne represented Mike in a prior criminal case in Choctaw Tribal Court. During that representation, Mike provided confidential information to Mr. Payne. This fact scenario required Mr. Payne's recusal from this case. The district court erred by ruling otherwise.

V. ARGUMENTS

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

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. Trial Tr., ROA.803-04, 811 (defense counsel making and renewing a motion for judgment of acquittal based on Rule 29 of the Federal Rules of Criminal Procedure).

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 Mike’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)⁴ (holding that on appellate review, the Court is required “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 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)⁵ (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;

⁴ In *Davis*, this Court reversed the conviction based on insufficiency of the evidence. 735 F.3d at 202.

⁵ In *Clemons*, this Court vacated the conviction based on insufficiency of the evidence. 700 Fed. App’x at 346.

- 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 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). Specifically, evidence presented at trial proves that Mike acted in self-defense during the shooting incident.⁶

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.

⁶ 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.

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.” Trial Tr., ROA.660. As a convicted felon, Julian knew that the law prohibited him from possession a gun.⁷ *Id.* at ROA.631, 660-61.

As the district judge stated, Julian “is the one who knew where the gun was concealed inside the car. It was essentially his gun.” Sen. Hr’g Tr., ROA.889. In fact, the prosecution could have charged Julian with being a felon in possession of a gun. Instead, the prosecution offered him immunity from prosecution in return for his trial testimony against Mike. Trial Tr., ROA.527, 626-27, 783. 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. Trial Tr., ROA.610-12, 634-35, 636, 654. Nurse Adkins’ notes relating to her treatment of Julian state that he was “actually intoxicated[.]” *Id.* at ROA.611. Her notes also state “yes” by the phrases “drug use” and “alcohol use[.]” *Id.* at ROA.611-12.

Julian testified that he attempted to break up the argument between Mike and Tonya. Trial Tr., ROA.642, 653, 664. As he attempted to break up the

⁷ See *supra*, footnote 3.

argument, Julian testified that Mike got the gun from under the car seat and shot him. Trial Tr., ROA.642-45, 676 (emphasis added).

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.'" Sen. Hr'g Tr., ROA.889. 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[.]" *Id.* at ROA.889-90. 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[.]" Sen. Hr'g Tr., ROA.889.

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. Trial Tr., ROA.684. Then she testified that Mike was outside of the house the whole time. *Id.* at ROA.684.

She testified at trial that Mike got beer from Tonya's house then carried the beer to Susanna's car. *Id.* at ROA.691. 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. *Id.* at ROA.692. At trial, defense counsel asked her about this contradiction. Catiea answered by admitting she does not remember which rendition of events is correct. *Id.* at ROA.692.

At trial, Catiea testified that Mike pressed the handgun against Tonya's forehead during the argument. Trial Tr., ROA.686. In her written statement to law enforcement, however, she did not say anything about Mike putting the gun to Tonya's head. *Id.* at ROA.704.

Catiea's written statement to law enforcement says that Mike initially fired shots *into the air*. Trial Tr., ROA.704-05. In her trial testimony, Catiea stated that Mike fired the gun *into the ground* before shooting Julian. *Id.* at ROA.704-05.

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. Trial Tr., ROA.705. Later, she testified that she does not know where she was when the gun went off. *Id.* at ROA.705.

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. Agent Allen. Trial Tr.,

ROA.705 (Catiea's testimony); ROA.770 (Agent Allen's testimony). 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. Trial Tr., ROA.585-86.

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. *See* Trial Tr., ROA.571, 794-95. 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. Trial Tr., ROA.781-83. This is consistent with what Mike told Agent Allen. Mike told him that he (Mike) heard two shots fired before he blacked out. *Id.* at ROA.792. The district court also stated, "Tonya Anderson did tell Special Agent Allen that McMillan had the gun first[.]" Sen. Hr'g Tr., ROA.889.

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); *United States v. Clemons*, 700 Fed. App’x 341, 344 (5th Cir. 2017) (citation omitted).

In Mike’s case, the district court found that “none of the witnesses are very credible[.]” Sen. Hr’g Tr., ROA.889. 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. Sen. Hr’g Tr., ROA.889. 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[.]” *Id.* at ROA.889-90. 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. Trial Tr., ROA.704-05. 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. *See* Sen. Hr'g Tr., ROA.889-90.

In summary, the prosecution failed to carry its burden to prove that Mike was *not* acting in self-defense. *See* Jury Instruction, Trial Tr. at ROA.826 (stating “[t]he government must prove beyond a reasonable doubt that the defendant did not act in self-defense.” (emphasis added)). 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.

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

1. Standard of review.

The undersigned uncovered no Fifth Circuit caselaw defining the standard of review for a district court's denial of a motion to recuse a prosecutor. Abuse of discretion is the standard of review for denial of a motion to recuse a district judge. *United States v. Scroggins*, 485 F.3d 824, 829 (5th Cir. 2007).

2. Argument.

Assistant United States Attorney Kevin Payne prosecuted the subject case against Mike. *See* docket sheet, ROA.3-4. Prior to his employment with the United States Attorney's Office, Mr. Payne worked as a staff attorney for Choctaw Legal

Defense. Order, ROA.220. As the district court found, Mr. Payne represented Mike on criminal charges in Choctaw Tribal Court in 2007. *Id.* at ROA.220.

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”). ROA.32-34. The Motion to Recuse relies on two Mississippi Rules of Professional Conduct. *Id.* at ROA.32. First is Rule 1.9, which requires recusal of an attorney who represented someone in a prior proceeding. *Id.* at ROA.32. 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 1.09. For purposes of this appeal, we focus on the provisions of Rule 1.9.⁸

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.

⁸ 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).

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 of Mississippi, this Court 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. District Judge’s Order, ROA.220; Magistrate Judge’s Order, ROA.188. Mr. Payne admitted this in his Declaration submitted to the district court. ROA.97, ¶ 9. Also, records provided by Choctaw Legal Defense indicate the Mr. Payne represented Mike twice in the past. Choctaw Legal Defense printout, Exhibit 1 to the Response to Motion to Recuse, ROA.61.

Mr. Payne also represented Mike’s father. Hr’g Tr., ROA.421. His father was incarcerated, so Mike and Mr. Payne discussed facts about that case. *Id.* at ROA.421. Mike disclosed confidential information during their discussions about both his case and his father’s case. *Id.* at ROA.421.

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. Hr'g Tr., ROA.420-21. 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 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

The district court erred in at least two respects at trial. First, the district court erred by denying the Mike's motion for judgment of acquittal. This requires the court to vacate the Judgment of Conviction.

If the Court does not rule in Mike's favor on the sufficiency of the evidence issue, then it must consider the second issue on appeal. The second issue focuses on the erroneous denial of Mike's motion for recusal of Mr. Payne from the prosecution of this case. This requires remand of the case to district court for retrial.

Omodare B. Jupiter
Federal Public Defender

/s/ Michael Scott Davis

Michael Scott Davis
Assistant Federal Public Defender
N. and S. Districts of Mississippi
1200 Jefferson Avenue Suite 100
Oxford, MS 38655.

Telephone: (662) 236-2889

Facsimile: (662) 234-0428

Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I, Michael Scott Davis, certify that today, May 12, 2017, a copy of the Brief for Appellant and Appellant’s Record Excerpts were filed via this Court’s electronic case filing system, which in turn forwarded electronic copies of both documents to all counsel of record in this case. Also, a copy of the Brief for Appellant only was delivered via United States Mail, postage prepaid to appellant Mike Austin Anderson.

/s/ Michael Scott Davis
Michael Scott Davis
Assistant Federal Public Defender

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type-Style Requirements

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(a)(7)(B)(iii), this document contains 7,105 words.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in proportionately spaced typeface using Microsoft Word in 14 point font size and Times New Roman type style.

/s/ Michael Scott Davis
Michael Scott Davis
Assistant Federal Public Defender