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IN THE UNITED STATES DISTRICT COURT IN AND FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES,

Plaintiff-Appellee,

v.

LORENZO BACA,

Defendant-Appellant.

Case No. 1:08-CR-00080 OWW
(Magistrate Case No. 6:05-mj-156-WNW)

APPELLANT'S OPENING BRIEF

I
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Magistrate abused discretion in refusing to recuse himself following news article and photograph of a hangman's noose on display in his chambers.

2. Magistrate's erroneous determination that appellant had engaged in a business in Yosemite National Park without a permit did not comport with the law or the facts.

3. Appellant as a Native American spiritual leader was protected by the Native American Religious Practices Act entitled to enter the roundhouse without permission.

II
STATEMENT OF THE CASE

Mr. Baca was convicted November 16, 2007 of two of the three charged violations of the Code of Federal Regulations following an eight-day judge trial before Magistrate Wunderlich.

The three charges stemmed from Mr. Baca's video taping different aspects of Big Time Native American celebration in Yosemite National Park in June of 2002. The three charges filed against Mr. Baca August 17, 2005 were:

Count One: Violation of Title 36, Code of Federal Regulations, section 2.1(a)(5), walk on, climb, enter, ascend, descend, or traverse an archeological or cultural resource, monument, or statue, except in designated areas and under conditions established by the superintendent;

Count Two: Violation of Title 36, Code of Federal Regulations, section 5.5(a), filming a motion picture . . . which involves the use of professional casts, settings, or crews, by any person other than bona fide newsreel or news television personnel, without first obtaining written permission from the Superintendent; and,

Count Three: Violation of Title 36, Code of Federal Regulations, section 5.3, engaging in or soliciting any business in park areas without a permit, contract or

written agreement with the United States, except as such may be specifically authorized under special regulations applicable to a park area.

At the conclusion of the 8-day judge trial, Mr. Baca was convicted of Counts One and Three and acquitted of Count Two. (RT 6-103-104.)[1]

On March 11, 2008 Mr. Baca was sentenced to 12 months of informal, non-reporting probation, a fine on Count One of $800 and on Count Two $1,000, which he could convert to 200 hours of community service to be completed within the first six months of probation. The court ordered Mr. Baca present himself for post-conviction booking on or before September 1, 2008. (RT 3/11/08, pp. 35, 36, 39.)

On March 14, 2008, a motion to stay sentence pending appeal was filed and on March 24, 2008 the court granted the motion in part. The order of the court stayed the sentence of community service, payment of a statutory assessment and probation pending appeal but did not stay post-conviction booking. On September 1, 2008, a request to stay the post-conviction booking order was filed. As of the date of this filing no action has been taken by the Court on this request.

A Notice of Appeal was filed March 20, 2008.

III
STATEMENT OF THE FACTS

The defendant-appellant Lorenzo Baca is part Mescalero Apache and part Pueblo Indian from New Mexico. (RT 6-11) He is a member of the Black Wolf Society of the Gourd Clan, and was the first Native American to obtain his master's

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[1] "RT" refers to Reporters Transcript of the hearings and trial in this matter.

degree in American Indian studies from the University of California, Los Angeles. (RT 6-15.) His thesis title was "Songs, Dances, and Tribal Traditions of the Tuolumne Band of California Miwok". (RT 6-15.)

Approximately five years before Mr. Baca obtained his M.A., he lived at the same rancheria as Brown Tadd, who Mr. Baca respected and described as the last man of the Tuolumne Miwok Band that possessed knowledge of traditional songs and dances. (RT 6-15, 6-16, 6-59.) Mr. Tadd was an elder of that tribal band. (RT 3-11.) They collaborated together to preserve Miwok culture by recording traditional songs and dances. (RT 6-15, 6-16, 6-23, 6-27.) Mr. Baca has had a continuing interest in preserving the cultural traditions, ceremonies, music and dances and sharing these traditions with others through lectures, performances, videos, recordings, manuscripts and photography. (RT 6-16, 6-22, 6-23.)

There was no commercial value in these topics and neither money nor profit was the reason Mr. Baca dedicated his efforts in preserving and sharing these traditions. (RT 6-23 to 6-26.) In June of 2002, he filmed dances, songs, and interviewed native artisans at the Yosemite Big Time, the California version of a powwow, open to tribal people and the general public. (RT 5-63, 1-92.) Before he filmed people he asked permission to do so. The intention of the Yosemite Big Time film was for educational and preservation purposes, not a commercial endeavor. (RT 6-26, 6-30 to 6-33, 6-36.) At Yosemite Big Time people bring their crafts to sell, there is traditional dancing and singing, and food. (RT 1-92.)

Those who had been filmed during the 2002 Big Time in Yosemite, included the following witnesses: Don Villa, lead singer of the dance troupe videotaped by

Mr. Baca (RT 2-3, 2-10, 2-28); Kimberly Cunningham-Summerfield, a park ranger/liason within the division of interpretation in the Indian Cultural Program (RT 1-74); Phillip Johnson, employed with the national park service as an interpretive park ranger and cultural demonstrator (RT 1-101, 1-102); and, Benjamin Cunningham-Summerfield an Indian Cultural Demonstrator at the Yosemite Museum (RT 2-75, 2-76.) Each testified that he/she had given his/her permission to be filmed by Mr. Baca as part of an "educational" film, not a film to be sold for profit. However, Julia Parker, testified that she gave her permission to be filmed and that permission would have been given even if the film were sold commercially. (RT 5-62, 5-63, 5-66, 5-69.)[2]

Differences of what "educational" purposes meant became evident through the testimony. Kimberly Cunningham-Summerfield stated that educational purposes did not include sharing a film with a public library, maybe a tribal library would fit that description. (RT 1-74.) Witness Johnson understood educational purposes to include libraries and schools. (RT 1-103.) Witness Villa understood educational purposes to include public schools but not libraries. (RT 2-27, 2-28.) Witness Stephen Walloupe believed that educational purposes was limited to educating Indians but not the general public. (RT 2-59.) Witness Benjamin Cunningham-Summerfield stated that anyone could film cultural demonstrations but not ceremonies. (RT 2-80.) Witness Hendricks' testified that "educational

[2] The videographer Richard Robinson gave Kimberly Cunningham-Summerfield, Julia Parker, and Phil Johnson a "Model Release" form which was signed and returned to Robinson and submitted by the defense as Exhibits E1, E2, and E3.

purposes" was defined by each Miwok tribe according to their tradition and culture. (RT 2-154.)

In addition many witnesses affiliated with the Miwoks, affirmed that theirs was an oral tradition and objected to the preservation of these traditions in any manner other than through traditional means. (RT 2-5, 2-9, 2-59, 2-63 to 2-69.) Witness Sonny Hendricks stated that the tradition of teaching young people was by word of mouth. (RT 2-151.) However, Steve Walloupe testified that it was appropriate to use a video to inspire the young to learn to dance. (RT 2-70.)

Ms. Parker had known Mr. Baca for over 30 years as an educator, and a spiritual leader. (RT 5-73.) She worked as a cultural interpreter and demonstrator in the park and gave talks about the first people, the Miwok and Paiute people, told stories, and gave demonstrations of basketry and games. (RT 5-61.) During her demonstrations she is constantly on camera, which she does not mind. (RT 5-62.) She learned the history and history of her people through stories. The Miwok way of life is learned from the elders. (RT 5-69, 5-70.)

Mr. Baca testified that is was his strongly held conviction that if he did not preserve the Native American culture through photography, video and recordings that it would disappear. (RT 6-23, 6-33.) By recording dances and songs, it could be used as a teaching tool for the next generation, but the Miwok was not interested in making recordings or documenting their traditions. (RT 6-72, 6-73.)

Ms. Parker was recognized by the court as an "informed source" on Native American history of Yosemite Valley. (RT 5-60.) When questioned about access restrictions to the roundhouse, Ms. Parker stated that there were none except

menstruating women. A person only needed to "feel good" when he entered the roundhouse with the permission of those at the door. (RT 5-66.) During ceremonies there are people at the door smudging and letting people pass through. (RT 5-73.) The roundhouse is a public place. Interpreters are allowed to take visitors in there and tell stories but there are rules about behavior in the roundhouse. (RT 5-73.) According to Ms. Parker it would be considered disrespectful to videotape inside the roundhouse. (RT 5-74.)

Ranger Todd Bruno had been an enforcement ranger in Yosemite National Park and the investigating officer in this case. At the time of his testimony in 2007 he had been an enforcement ranger in Glacier Bay National Park in Alaska for eight months. Ranger Bruno testified that he had been approached by Kimberly Cunningham-Summerfield regarding Mr. Baca's Yosemite Big Time video. (RT 2-101, 2-102.) She had given him a copy of the video while he was still an enforcement ranger in Yosemite National Park. In the video Ranger Bruno saw Mr. Baca go inside the roundhouse in Indian Village in Yosemite Valley and the sweat lodge. (RT 2-103 to 2-106.)

He checked to see if Mr. Baca had received permission to film inside the roundhouse and found Mr. Baca had not obtained prior permission. (RT 2-114, 2-115.) Witness Anthony Brochini, supervisor for Roads and Trails Branch for the Park service and supervisor of the solid waste and roads operations for the park, and Chairman of the Southern Sierra Miwok Nation confirmed that no permission was given by the tribe to Mr. Baca to enter the roundhouse in 2002. (RT 3-62, 3-63,

3-67.) However, witness Phillip Johnson could not remember if he had given Mr. Baca permission to go inside the roundhouse. (RT 1-113.)

When Ranger Bruno spoke with Mr. Baca, Mr. Baca did not deny shooting the film in Yosemite. Mr. Baca said he had decided to sell the film in an attempt to recoup costs of making the film and thought he had sold six copies. (RT 2-115, 2-116.) Ranger Bruno never spoke with Richard Robinson who actually filmed the disputed footage. (RT 2-128.)

At trial Mr. Robinson, a teacher at Fresno and Madera adult schools, testified that he had worked with Mr. Baca on approximately nine projects regarding documenting Native events, dances, songs, crafts and people. (RT 3-145.) Some of these projects included: Point Reyes Big Time, Yosemite Big Time, two films from New Mexico which he helped edit of a Santa Fe Indian Market, a Veteran's Day in Fresno to honor Native American vets, and the construction of a tule boat by the coastal Miwok for Drake's Pageant. (RT 3-185, 3-186.)

Neither he nor Mr. Baca were paid for these projects. All the costs came out of their pockets. (RT 3-146.) This was confirmed by Mr. Baca in his testimony. (RT 6-40.) The only money he has received was $20 from the Fresno County Library. If they sold any of the films wholesale it would be $2-3 per film, but ever since he created the website for internet sales four to five years ago there have been no sales. (RT 3-172, 3-173.) He was the one responsible for determining whether they needed a permit to film in the park and after reviewing the requirements determined that no permit was necessary. (RT 3-147, 3-148.) He also spoke with a Ms. Clark from

the park. She confirmed his conclusion that it was not necessary for them to obtain a film permit. (RT 3-148, 3-149.)

Mr. Robinson's intention in making the film was for educational purposes. (RT 3-165.) In all he made 20 copies of the Yosemite Big Time film. He took one to the Fresno County Library and the rest he mailed to Baca. Ten of those went to the Museum, and some to Puffer, and several were given away, including a copy to Kimberly Cunningham-Summerfield. (RT 3-166.)

Testimony and Evidence Regarding Violation of 36 C.F.R §2.1(a)(5): Entering an Archeological or Cultural Resource

Regarding the film footage of the interior of the roundhouse, Mr. Robinson testified that Mr. Baca had filmed this portion of the video. Mr. Robinson went on to explain how it could have been possible for Mr. Baca to film the interior of the roundhouse without actually entering the building by using the hand-held tripod. (RT 3-157 to 160; 5-10 to 5-11, 5-38, 5-39, 5-48.) The camera used to film Yosemite Big Time 2002 was a handheld consumer model Sony DigiLife Camcorder DCR TRV 103 digital 8, 10" long 4-5" wide and 3-4 lbs. (RT 5-8, 5-9, 5-10.)

The government's rebuttal witness Kristen Ramsey, was designated by the court as an expert witness regarding video filming, production and editing. (RT 11/15/07 pp. 30-33.) Contrary to the testimony of Mr. Robinson, Ms. Ramsey offered her opinion after reviewing the raw film footage, that it was impossible to use a handheld tripod to obtain the film footage of the interior of the roundhouse. (RT 11/15/07 pp. 35, 37, 39-46.)

Mr. Baca testified that he filmed the interior of the roundhouse while he was physically inside the roundhouse. (RT 6-21.) It was his opinion that the Yosemite roundhouse was not indigenous to the area but was a mere replica. As a Native American spiritual leader, Mr. Baca understood he had unlimited access under the American Indian Religious Freedom Act to Native American religious sites like the roundhouse in Yosemite. (RT 6-19 to 6-21.) Mr. Baca considered the roundhouse to be like the sweat lodge an artifact set up for educational purposes. (RT 6-45.) Witness Johnson testified that the current roundhouse and other structures in Yosemite Valley were replicas which sat on the original building sites. (RT 1-91.) Johnson also testified that the tribal council would not give permission to anyone to film the interior of the roundhouse. (RT 1-112.) Witness Kimberly Cunningham-Summerfield believed that the roundhouse had become unclean when Mr. Baca entered the roundhouse and filmed the interior. (RT 1-47.)

Mr. Baca testified that in the past he had received permission from Brown Tadd, Julia Parker and Craig Bates to be inside the roundhouse. He has slept in the roundhouse and on one occasion he had taken a group of Japanese high school students inside the roundhouse. (RT 6-31.)

Following the fifth day of trial, November 14, 2007, the parties and the court took a tour of the roundhouse with Tony Brochini. (RT, 11/15/07, p. 1.) The next morning the court put on the record a description of the events which occurred when they arrived at the roundhouse. These events included smudging with wormwood, a ceremony of offering gifts of tobacco to the four directions, and a lecture regarding the history of the roundhouse and a brief description of different

ceremonies which occurred in the roundhouse. (RT 11/15/07, pp. 1-5.) Mr. Baca did not participate in the smudging ceremony or the ceremony with the tobacco because he believed that the ceremony the court participated in could have been harmful as Brochini was not a captain and wormwood should not be burned, it could be evil. (RT 6-61.)

Testimony Regarding Violation Of 36 C.F.R. §5.3: Engaging In Business In The Park Without A Permit

Over the years Mr. Baca had sold his handmade jewelry at the Yosemite Museum gift store and had never been required to have a permit to do so. (RT 6-41 to 6-43, 1-126.) Nicole Brocchini the buyer for the museum store is employed as a sales station co-ordinator by the Yosemite Association, a not-for-profit organization. (RT 1-124.) As the buyer for the store, Brocchini can unilaterally decide whether to sell items out of the store. She does not need anyone's approval to do so. (RT 1-138.) When Ms. Brocchini met Mr. Baca in 1997, he was already a vendor to the store. (RT 1-134.) The vendors from whom Ms. Brocchini purchased items did not need a permit or business license because Yosemite Association bought the items and it had a business license and permit to sell the items in the park. (RT 3-93.)

In October of 2003, she purchased 10 of the videos Mr. Baca had made of the 2002 Yosemite Big Time for the museum store for $15 each and she was going to sell them for $30. (RT 1-125, 1-127, 1-130.) Only one of the videos was sold before the ranger confiscated the other 9 videos. (RT 1-131.)

The fact that a permit was never discussed or required at any time was reiterated during Mr. Baca's testimony. (RT 6-42, 6-43.) He never advertised the

Yosemite Big Time film in Yosemite, nor sold it at other Big Time events. (RT 6-43.)

None of the Native vendors who sold their crafts, art, books, food and other items at Yosemite Big Time were required to have a permit to make these sales in the Park. (RT 1-106.) Phillip Johnson testified that he helped organize the Big Time events including the 2002 event. Big Time vendors were not charged a fee but were asked to make a donation after they have sold their wares. (RT 1-106, 1-107.)

Julia Parker testified that her books are sold in the park's museum store, and she has sold those books during the Yosemite Bog Time events without a permit. (RT 5-64, 5-71.) During Yosemite Big Time she has sold baskets and her book about acorns, making soap with brushes and part of life story. (RT 5-63.)

Other than the Yosemite Museum gift shop, two copies of the video "Yosemite Big Time" were purchased by Herb Puffer who sells Native American art and educational supplies in his store Pacific Western Traders in Folsom, California. (RT 2-81, 2-87.) Mr. Puffer had known Mr. Baca for over 30 years as an artist, multi-media, painter sculptor, writer, jeweler, and silversmith, and considered Mr. Baca an educator whose goal it was to preserve Native American culture and traditions. (RT 2-81, 2-82, 2-97, 2-98.)[3]

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[3] Testimony regarding the second count for which Mr. Baca was acquitted is not included herein, *i.e.* whether Mr. Baca violated 36 C.F.R. §5.5(a), filming in the Park without a permit.

Over defense objections, the government was allowed to bring in testimony of "prior bad acts" under Rule 404(b), regarding an incident from 1992 in which Mr. Baca was sued civilly by the juveniles' parents for filming juvenile dancers without obtaining permission of the dancers' parents. Mr. Baca had obtained the permission of the individual dancers and the

IV
ARGUMENT

A. Magistrate Abused Discretion in Denying Mr. Baca's Motion to Disqualify Him After a News Article Regarding Magistrate Wunderlich in Which It was Revealed that the Judge Kept a Hangman's Noose in his Chambers

1. Standard of Review

A district court's order denying a motion to recuse is reviewed for abuse of discretion. *United States v. Bauer*, 84 F. 3d 1549, 150 (9th Cir. 1996).

2. 28 U.S.C.Section 455 Sets forth the Procedure for Disqualifying a Federal Magistrate

Section 455 describes the disqualification procedures of a magistrate judge:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

The House Report of the 1974 amendment to section 455 states:

> "This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case . . .
>
> "Disqualification for lack of impartiality must have a reasonable basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial." H.R. No. 93-1453, P.L. 93-512, 1974 U.S.C.C.A.N., pp. 6354-6355. *Fong v. American Airlines*, 431 F.Supp. 1334, 1336 (D.C.Cal. 1977).

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dance instructor Brown Tadd before filming. (RT 2-137, 2-139, 2-140, 6-27, 6-28.) The case was settled prior to trial. According to witnesses Carlos Geisdorff, who was under the age of 18 in 1992 when he performed in the dance Mr. Baca filmed, and Sonny Hendricks, the terms of the settlement included an injunction which prohibited Mr. Baca from selling the 1992 video. (RT 2-140, 2-157.) No criminal action was brought regarding this incident.

The language is clear that a judge may not sit in cases in which his "impartiality might reasonably be questioned." The appearance of partiality may be created even though "no actual partiality exists." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988). "Scienter is not an element of a violation of §455(a). The judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy, but it does not eliminate the risk that 'his impartiality might reasonably be questioned' by other persons." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859 (1988). Citation omitted. The standard for determining whether there is an appearance of partiality is whether a reasonable person perceives a "significant risk that the judge will resolve the case on a basis other than the merits." *In re Mason*, 916 F. 2d 384, 385 (7th Cir. 1990). Cited and quoted in *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008).

"Disqualification under section 455(a) is necessarily fact-driven and may turn on subtleties in the particular case. Consequently, the analysis of a particular section 455(a) claim must be guided, not be comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular claim at issue. (Citations omitted.) In general, the conscientious judge should also bear in mind that section 455(a) is limited by the 'extrajudicial source' factor which generally requires as the basis for recusal something other than rulings, opinions formed or statements made by the judge during the course of the trial." (Citations omitted.) *United States v. Holland, supra*, 519 F.3d at 913-914.

Recusal based upon the appearance of impropriety applies only to supreme court justices, magistrate judges, and other judges which are entitled to hold office during good behavior. 28 U.S.C. section 451.

Three days into the trial Mr. Baca made an oral motion to disqualify Magistrate Wunderlich based on a news article which ran in the local paper, Modesto Bee, and online at *http://www.modbee.com/local/story/38925.html*. In the article that ran on-line were two photographs of Judge Wunderlich in his chambers. Both photographs showed a hangman's noose draped over a coatrack. Attached hereto as Appellant's Exhibit 1 is a scanned copy of the article as it appeared on the internet.

The hangman's noose has been the symbol of racial hatred and oppression in America for centuries. Most recently the hangman's noose was displayed at a high school in Louisiana resulting in the Jena Six controversy. Even President Bush addressed this noxious form of symbolic speech stating the display of a noose is not a "symbol of prairie justice, but of gross injustice. Displaying one is not a harmless prank. And lynching is not a word to be mentioned in jest. As a civil society, we must understand that noose displays and lynching jokes are deeply offensive. They are wrong. And they have no place in America today." First Amendment Scholar, David L. Hudson Jr., "States move to add nooses to list of outlawed symbols," June 28, 2008, firstamendmentcenter.org: analysis. The noose symbol has been identified as the replacement for the burning cross as the primary symbol of white hate groups like the Ku Klux Klan. United Press International, Inc., October 20, 2007, "Top News Noose returns as symbol of hate", *http://www.UPI.com*.

The courts have also recognized the hate message inherent in the noose by finding the use of a hangman's noose was per se racial harassment in the employment context. *Vance v. Southern Bell Telephone & Telegraph*, 863 F.2d 1503, 1510-11 (11th Cir. 1989.) A noose hung twice over the work area of a black woman was considered a racial harassment of particular severity. The noose conveys a "violent message more disturbing or threatening than any mere use of racial epithets would be." *Id.* This decision has been adopted by the Ninth Circuit Court of Appeals in *Martinez v. Marin Sanitary Service*, 349 F.Supp2d 1234, 1253 (N.D.Cal. 2004).

Judge Wunderlich was oblivious both to the history of the hangman's noose and the abuse of people of color and to his obligations under 28 U.S.C. §455(a) when he considered the defense motion for his recusal.

On the fifth day of trial, November 14, 2007, the defense made its second motion to recuse Judge Wunderlich. Following the interruption of the trial in August due to Mr. Baca's chronic medical issues, an article was published along with photographs of a hangman's noose hanging in the chambers of Magistrate Wunderlich. (RT 5-1) The defense moved for Judge Wunderlich's recusal as Mr. Baca, a Native American, saw the noose as a "threatening, intimidating and offensive" symbol which raised his fear that he would not be able to receive a fair trial. (RT 5-2.) The defense explained that the noose was a symbol of cultural insensitivity, given the history of American courts and the administration of "justice" by the white man against Native Americans. (RT 5-2.)

The government objected to the recusal motion stating that the judge's "personal items" in chambers did not "necessarily reflect any personal philosophy or belief," and that her experience of Judge Wunderlich as impartial and fair should override concerns raised by the judge's display of a hangman's noose. (RT 5-2) This was an inaccurate analysis. The law on recusal under section 455(a) requires that the evidence of prejudice come from an extrajudicial source. *Mayes v. Leipziger*, 729 F.2d 605, 607 (9th Cir. 1984).

Judge Wunderlich stated that " on one level" he could understand concern but that the photo did not appear in the newspaper but only on the internet. (RT 5-2.) He then went on to explain that the noose was given to him by the District Attorney's office in 1985 to take with him to the appellate bench. The note that came with the noose, said "don't forget where you came from." (RT 5-3.) "If I have offended your sensitivities by the possession of this item, I apologize, but I am not recusing myself from the remainder of this trial." (RT 5-3)

The before denying Mr. Baca's motion did not review the language of the governing statute. If there had been such a review Judge Wunderlich most certainly have weighed the motion more seriously as section 455(a) requires recusal where a judge's impartiality might reasonably be questioned. Certainly the proud possession of a known symbol of racial hatred fit the type of "appearance of partiality" targeted by section 455(a) and required recusal.

In this circumstance under both 28 U.S.C. section 144 and 455, recusal was appropriate; any reasonable person knowing that the trier of fact in a criminal case involving a person of color a Native American maintained on display in his

chambers a hangman's noose, would conclude that the judge's impartiality might reasonably be questioned. *Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir. 1993). Given the history of the use of the hangman's noose to intimidate and to express racial hatred, the choice for Judge Wunderlich was obvious. However, even if this had been a " close case, the balance tips in favor of recusal." *United States v. Holland, supra*, 519 F.3d at 912.

3. Mr. Baca's Right to a Fair and Impartial Trial was Denied by The Magistrate's Refusal to Recuse Himself as the Trial Judge

The purpose of section 455 is to ensure that a litigant receives a fair trial whether it is criminal or civil matter. However, in criminal cases the Supreme Court has long established that the Due Process Clause guarantees a criminal defendant the right to a fair and impartial judge. *In re Muchison*, 349 U.S. 133, 136 (1955). "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." For federal magistrate judges, the system of laws requires recusal of a judge when there is the reasonable appearance of partiality. The partiality need not be actual to require a judge to remove himself from acting as the factfinder. The appearance of partiality in this case was not based on Judge Wunderlich's rulings or statements during trial but on his possession of a hangman's noose which he retained in chambers and which was photographed in an article about the Yosemite court.

"Among the fundamental rights secured by the Constitution is a criminal defendant's right to a jury that bases its verdict not upon ethnic bias, but upon the

facts of a particular case". *United States v. Davis*, 1 F.3d 1014, 1016 (10th Cir.1993).

"Actual bias against a defendant on a juror's part is sufficient to taint an entire trial. (Citations omitted.) In extraordinary circumstances, the facts may be such that bias may be inferred." *Green v. White*, 232 F.3d 671, 676 (9th Cir. 2000.)

"The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as [a] matter of law." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556-57 (1984).

Racial bias on the part of a fact finder be it jury or judge requires reversal. *United States v. Heller*, 785 F.2d 1524, 1525-27 (11th Cir. 1986). Evidence of racial bias includes use of racial slurs or the use of offensive symbols such as a confederate flag or hangman's noose. The court's display of a hangman's noose brought into question Judge Wunderlich's impartiality which required his recusal. His refusal to disqualify himself required reversal of Mr. Baca's conviction.

4. The Appearance of Bias was Substantiated by the Judge's Statements Regarding Mr. Baca During Trial

Three days after Mr. Baca's criminal trial began, Mr. Baca suffered an attack caused by chronic kidney problems, hydronephrosis, which required him to go to the hospital. (RT 4) Mr. Baca had contacted his trial attorney the night before trial to advise her that he was in excrutiating pain and would be seeing a doctor. The message was shared with the court to Judge Wunderlich responded that he wanted proof of this illness faxed to him as he did not "have much faith" in Mr. Baca. (RT 4-5).

Actually Mr. Baca arrived at court late but in extreme pain and requested a continuance of the trial so that he could seek medical attention. (RT 4-8.) The Court stated:

> "I will grant this continuance, even through it's a tremendous inconvenience to the government, and a very expensive situation to bring this ranger all the way back from Alaska when he's been sitting here for a week now." (RT 4-8.)

It is significant that the court responded with such doubt to a defendant's representations regarding a medical emergency. This reaction coupled with the Court's dismissal of defendant's concerns regarding the Court's impartiality supported the appearance of bias and impropriety. The Court's denial of Mr. Baca's recusal motion was an abuse of discretion. The uncontroverted facts established the appearance of partiality which required recusal. The remedy is reversal of the conviction and sentence.

B. The Magistrate's Finding That Mr. Baca Engaged in a Business in Yosemite National Park Without a Permit Did Not Comport With The Law or the Uncontroverted Evidence

Mr. Baca was convicted of violating 36 C.F.R. section 2.1(a)(5) for "engaging or soliciting business" in Yosemite National Park without a permit. The evidence presented by the park service came from the testimony of an employee of the private nonprofit entity Yosemite Association, Nicole Brocchini. Ms. Brocchini's position as sales station co-ordinator for the museum store, had the sole discretion to choose the items to purchase for the museum store. (RT 1-138.) The Yosemite Association as a Park partner purchased the items she chose. (RT 3-92, 3-95.)

There was no requirement that the persons who sold to the Yosemite

Association had to have a permit, because the Yosemite Association had the permit and business license and it was the entity which actually sold merchandise to the public in the Park. (RT 3-93.) No other evidence was presented on this issue. There was no evidence that Mr. Baca was required to have a permit to sell anything to the Yosemite Association. From the first time he sold his jewelry work to the Yosemite Association before 1997 he had never been required to have a permit. (RT 6-43.) In addition there was absolutely no testimony that Mr. Baca sold anything directly to the public in Yosemite National Park (YNP), or that he advertised in the Park.

The government did not produce any regulation, rules or other evidence that required an individual to obtain a permit to sell to the Yosemite Association. The testimony and the practice of buying merchandise by Ms. Brocchini was to the contrary; no permit had ever been required in order for the an individual to sell to the Yosemite Association.

Section 2.1(a)(5) does not include a definition as to the exact conduct covered by the regulation. There is no definition of the terms "engage in or solicit any business in park areas," but from Ms. Brocchini's testimony it is apparent that this regulation did not apply to those persons who sold their wares to the Yosemite Association. From this testimony it is reasonable to conclude that the regulation had been interpreted to cover those persons who sold directly to the public while in YNP without a permit. The purpose of the regulation to eliminate private profiteering on public lands would thus be accomplished and the Yosemite Association would be able to continue its relationship with the local artisans to purchase items and then sell them to the public with the profits benefiting YNP.

The items Mr. Baca sold to Yosemite Association, 10 video tapes of 2002 Yosemite Big Time and 20 compact discs of Miwok songs, were to be sold to the public and those profits would go to YNP not Mr. Baca.

There was no testimony or evidence to support the Court's conclusion that Mr. Baca violated section 2.1(a)(5). The Court found that Mr. Baca had solicited business from Ms. Brocchini to sell her the video of Yosemite Big Time which he had made with the intention of selling. (RT 6-104.) The Court did not differentiate between Mr. Baca and any of the other vendors who sold their merchandise to the Yosemite Association without a permit.

The Court's rationale fails on two points. First, every artisan who creates a piece of jewelry, writes a book, weaves a basket does so to sell it. This act alone is not prohibited in section 2.1(a)(5). In practice a violation of the regulation would occur if that person were to sell the item without a permit to the public while in YNP. The exception occurred during Yosemite Big Time when local artisans ssold their wares directly to the public without a permit. The Yosemite Association as a park partner had a permit and a business license to conduct business in the park, and that historically was sufficient to meet the terms of this regulation.

Secondly, every person who sells to the Yosemite Association must contact Ms. Brocchini in order to describe or show their wares to her. Again in practice, doing so without a permit to the Yosemite Association was never an act condemned by the Park Service under this regulation. The historical application of this regulation established that the violative conduct was not a person selling to the Yosemite Association, who has a permit, but for someone to solicit or sell items

without a permit to the public while in YNP. There is no other way to read the regulation given the testimony and its historically consistent interpretation.

The finding of the Court to the contrary is not based on the law or the facts and must be vacated.

C. Mr. Baca as a Native American Spiritual Leader had the Right to Enter the Roundhouse Without Permission Under the American Indian Religious Freedom Act

The American Indian Religious Freedom Act, 42 U.S.C. 1996, was enacted to protect and preserve the cultural rights and practices relating to Native American religious practices. The scope of the Act included the right for Native Americans to access cultural sites. Mr. Baca described himself and was recognized by witness Julia Parker as a spiritual leader. (RT 5-73, 6-12.) A spiritual leader is like an ordained minister. Mr. Baca has conducted wedding ceremonies, celebrations of each new season, funerals, memorials, house blessings. (RT 6-13.) At the time of this trial Mr. Baca was employed as a Native American spiritual leader with the California Department of Corrections at the Kern County state prison facility. (RT 6-14.) He is also the member of the Gourd Clan. (RT 6-14.) See also letters attached to Mr. Baca's Sentencing Memorandum, Docket #38.

As a spiritual leader Mr. Baca is protected under the Act to practice as the Native Americans did before they were "invaded and occupied by Europeans." (RT 6-21.) As a spiritual leader he is allowed access to the roundhouse[4] in YNP to film

[4] As noted by Mr. Baca the roundhouse is a replica of a structure and not indigenous to the area.

the structure in order to preserve and document a culture, a way of life and to educate others regarding those traditions. (RT 6-22, 6-23, 6-31, 6-33.)

Mr. Baca admitted to entering the roundhouse to film it for purposes of preservation and education. This conduct by Mr. Baca as a spiritual leader is protected under the American Indian Religious Freedom Act. The conviction for violation of 36 C.F.R. section 2.1(a)(5), ignored the fact that Mr. Baca, as a spiritual leader, was entitled to access this site to preserve and protect Native American culture and traditions. The conviction must be vacated.

D. Conclusion

The conviction of Mr. Baca must be vacated for all of the reasons argued above.

Dated: September 9, 2008

Respectfully submitted,

/s/Carolyn Phillips
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