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

UNITED STATES OF AMERICA,)	1:08-cr-00080 OWW
)	(formerly 6:05-mj-00156 WNW)
Plaintiff,)	
)	
v.)	APPELLEE'S BRIEF
)	
LORENZO BACA,)	
)	
Defendant.)	
)	

The United States of America, by and through its undersigned attorneys of record, Lawrence G. Brown, Acting United States Attorney for the Eastern District of California, and Mark J. McKeon, Assistant United States Attorney, hereby file its appellee's brief to defendant, Lorenzo Baca's, appeal of conviction.

I.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Whether Magistrate Judge Wunderlich should have recused himself.

2. Whether the evidence presented at trial was sufficient to support the defendant's conviction for engaging in or soliciting business in park areas without a permit, contract or written agreement with the United States, in violation of Title 36, Code

1 of Federal Regulations, Section 5.3.

2 3. Whether the American Indian Religious Freedom Act provided the
3 defendant a defense to the criminal charges.

4 II.

5 JURISDICTION

6 The Magistrate Court had jurisdiction pursuant to 18 U.S.C. §
7 3401 (a). This court has jurisdiction pursuant to 18 U.S.C. §
8 3402.

9 III.

10 BAIL STATUS

11 The defendant is not in custody. At the defendant's
12 sentencing hearing before the magistrate court on August 29, 2007,
13 he was sentenced to 12 months of unsupervised probation, ordered
14 to complete 198 hours of community service, and to pay a \$20
15 special assessment. C.F. 40. The sentence was stayed pending
16 appeal. C.R. 48.

17 IV.

18 STATEMENT OF FACTS

19 Park Ranger Todd Bruno initiated an investigation of defendant
20 Lorenzo Baca in August 2004, in response to allegations that Baca
21 filmed and produced a commercial film without a permit and used
22 footage taken from within Yosemite National Park ("YNP") during
23 2002-2003. The film footage included Native American dancers
24 participating in a "Big Time" Native American Event within YNP at
25 the Indian Village. Further, the film contained additional
26 footage from the "Indian Village" of the interior of the
27 Roundhouse, Baca at the entrance of the Roundhouse and the Sweat
28 Lodge inside a closed area, with narration by Baca, and interviews

1 by the Baca of park service employees demonstrating traditional
2 Native American activities.

3 V.

4 ARGUMENT

5 A. Judge Wunderlich Did Not Err in Failing to Disqualify
6 Himself

7 The defendant had his first appearance in magistrate court on
8 May 10, 2005, in response to a summons charging him with Class B
9 misdemeanors. On December 13, 2005, Baca orally requested that
10 Magistrate Judge Wunderlich recuse himself. Judge Wunderlich did
11 not find sufficient basis for recusal.

12 A bench trial was begun on August 15, 2007 on a superseding
13 information charging Baca with three Class B misdemeanors. The
14 government concluded its presentation of its case-in-chief on
15 August 17, 2007. During the course of the trial, Baca orally
16 moved that the prosecutor, the Magistrate Judge, and the defense
17 attorney all recuse themselves or be disqualified. The requests
18 were made at different times. None of the requests were granted.

19 The defense began their case on August 17, 2007, and trial was
20 continued to the following Monday, August 20, 2007. On the
21 morning of August 20, the defendant arrived late and requested
22 that the trial be interrupted due to health reasons. The trial
23 was then continued until November 14, 2007. The trial concluded
24 on November 16, 2007.

25 The first motion to disqualify Judge Wunderlich was made on
26 December 13, 2005. The motion was apparently made in chambers,
27 and not on the record. Judge Wunderlich commented on the grounds
28 for the motion when denying it:

1 THE COURT: I'll take Lorenzo Baca. There's a
2 waiver on file for that matter. This is on today for a
3 motion to disqualify me as the trial judge, which we
4 discussed in chambers.

5 You stated your reasons. Is there anything else
6 you wanted to put on the record?

7 MS. MOSES: No, your Honor.

8 THE COURT: All right. I do not find there's
9 sufficient basis for me to step aside in this matter. I
10 understand the basis is that at his arraignment I told
11 him to stay out of trouble, and from that, he has
12 concluded that I might believe he is already been in
13 trouble. That certainly was not my intent or my
14 message. The motion to disqualify my as trial judge is
15 denied.

16 R.T. 1 (12/13/2005).

17 The defense is not now claiming that the court erred in
18 denying this first motion to disqualify Judge Wunderlich. On
19 November 14, 2007, however, the defense renewed their motion to
20 disqualify Magistrate Judge Wunderlich on a new ground. The basis
21 for this motion was that the defendant had seen a newspaper
22 article complete with photographs, and one of the photographs had
23 a hangman's noose hanging in the chambers. The defense
24 represented that:

25 Mr. Baca ... feels that as a result of the symbolism,
26 and he feels that hangman's noose represents, that it is
27 threatening, intimidating, offensive, and he feels
28 prejudiced that he would not be able to receive a fair
trial in this matter. He feels that this is symbolic of
cultural insensitivity and given the history of American
courts and the administration of justice by the white
man against Native Americans that this is just a
furtherance of that which he perceives to be injustice
and he would not receive a fair trial in this matter.

R.T. 5-2.

Judge Wunderlich denied the renewed motion for recusal,
stating:

1 Mr. Baca, on one level I guess I can understand your
2 concern. This item did not appear in the newspaper
3 article. To have seen this item, you would have had to
4 click on a slide show that was available on the Internet
5 that accompanied the article.

6 Nonetheless, it is true that it was a hangman's
7 noose hanging on a coatrack in my chambers. I explained
8 in the article and I will explain to you now that it was
9 given to me as a sort of memento, sort of a joke by the
10 people of the District Attorney's office when I left the
11 DA's office in 1985 to take the bench.

12 It was accompanied by a note saying don't forget
13 where you come from. I have always viewed it as
14 something of a joke and I hung onto it as a - something
15 given to me by people that I enjoyed working with. It
16 had really nothing to do with my personal philosophy. I
17 think anyone who knows me would tell you that I'm not
18 what they would call a hanging judge.

19 I tend to - I try to be sensitive to people's
20 feelings and I feel that I can do a fair job of
21 presiding over this trial. So if I have offended your
22 sensitivities by the possession of this item, I
23 apologize, but I am not recusing myself from the
24 remainder of this trial. Proceed.

25 R.T. 5-2 to 5-3.

26 Section 455 provides that a judge shall disqualify himself "in
27 any proceeding in which his partiality might reasonably be
28 questioned." 28 U.S.C. § 455. An appeals court reviews a lower
29 court's denial of a disqualification motion for an abuse of
30 discretion. Kulas v. Flores, 255 F.3d 780, 784 (9th Cir. 2001).
31 "[R]ecusal is appropriate where a reasonable person with knowledge
32 of all the facts would conclude that [the] judge's impartiality
33 might reasonably be questioned." Id. at 786.

34 In this case, no reasonable person could have questioned Judge
35 Wunderlich's impartiality based on his possession in his office of
36 a memento by his former colleagues at the D.A.'s office. Judge
37 Wunderlich explained that the noose did not represent his feelings
38 as a "hanging judge", and thus could not give a defendant cause to

1 believe that the judge was biased towards a conviction. Nor did
2 the noose in any fashion represent the judge's racial bias towards
3 Native Americans or towards anyone else. In some contexts a noose
4 might indeed represent a symbol of racial hatred and oppression.
5 Outside of a judicial context, it can represent the worst of the
6 era of "lynchings" and extra-judicial executions, particularly
7 when it is displayed in a threatening manner towards another.
8 Context is everything, however.¹ In a judicial legal context,
9 hanging is used in the United States as method of execution up to
10 the present day.² There is nothing in the context in which this
11 noose was displayed in Judge Wunderlich's office that would make a
12 reasonable person believe it was being displayed as a symbol of
13 racial hatred or oppression.

14 B. The Evidence Presented At Trial Was Sufficient Was
15 Sufficient To Convict the Defendant of Engaging in a
Business Without A Permit

16 1. Standard of Review

17 The evidence is sufficient if, after viewing the evidence and
18 record as a whole in the light most favorable to the government,
19 any rational trier of fact could have found the essential elements
20 of the crime beyond a reasonable doubt. United States v. Peters,
21 962 F.2d 1410, 1413 (9th Cir. 1992). The government is entitled
22 to all reasonable inferences that may be drawn from the evidence.
23 United States v. Johnson, 804 F.2d 1078, 1083 (9th Cir. 1986).

25 ¹A cross, for example, can be a religious symbol when
26 displayed in a church, but a symbol of racial hatred when burned
on a front lawn.

27 ²Hanging is still permitted as a means of execution in New
28 Hampshire and Washington. N.H. Rev. Statutes § 630:5; West RCWA
10.95.180.

1 The appellate court "does not weigh evidence or determine the
2 credibility of witnesses in making this determination." United
3 States v. Goldin, 311 F.3d 191, 194 (3rd Cir. 2002).

4 2. Argument

5 Baca challenges his conviction of "engaging or soliciting
6 business" in Yosemite National Park without a permit, in violation
7 of Title 36, Code of Federal Regulations, Section 5.5.³ This
8 regulation makes it a Class B misdemeanor to engage in the
9 following conduct:

10 Engaging in or soliciting any business in park areas,
11 except in accordance with the provisions of a permit,
12 contract, or other written agreement with the United
13 States, except as may be specifically authorized under
special regulations applicable to a park area, is
prohibited.

14 36 C.F.R. § 5.5. The defendant claims that "the evidence
15 presented by the park service came from the testimony of an
16 employee of the private nonprofit entity, Yosemite Association,
17 Nicole Brocchini. Appellant's Opening Brief, p.20. He claims
18 that Ms. Brocchini's testimony would not support his conviction.

19 This "straw man" argument is wrong on its face because it
20 erroneously identifies the evidence that supported his conviction.
21 Judge Wunderlich expressly stated the following conclusion:

22 You went in there to engage in a business and so I'm
23 finding you guilty of Count 3 as well. *Not because you*
24 *solicited business from Ms. Brocchini down at the museum*
but because on Big Time 2002 you were there to conduct a

25 ³In Appellant's Opening Brief, he actually cites 36 C.F.R. §
26 2.1(a)(5). This regulation makes it a crime to "walk on, climb,
27 enter, ascend, descend or traverse an archeological or cultural
28 resource", and has nothing to do with commercial activities. The
defendant was also convicted of violating this statute in Count
One. He is not challenging the sufficiency of the evidence to
support that conviction, however.

1 business. You were there to make a film that you
2 intended to sell. Your intent is made obvious by your
3 earlier conduct with the Tuolumne Band, all of which is
4 in evidence in this matter and with your subsequent
5 conduct in selling this to Mr. Puffer and to the museum.
6 You entered not for educational reasons but for business
7 reasons into the - into a cultural resource. You made a
8 movie you intended to sell. So I believe you were
9 engaged in a business in a park area without a permit
10

11 R.T. 6-104.

12 The defendant challenges only the evidence that he engaged in
13 commercial activity by selling through Ms. Brocchini, which was
14 not what he was convicted of doing; he does not challenge the
15 sufficiency of the evidence to support the actual finding of the
16 magistrate judge that he was engaging in a business by entering
17 the park to make a movie that he intended sell.

18 There was sufficient evidence to support this conviction.
19 First, it was undisputed that no permit to engage in this business
20 was obtained by Mr. Baca.

21 The evidence showed that at Yosemite, a "Big Time" is a type
22 of ceremony that is not open to the public, that begins up in the
23 mountains with a ceremony that is very, very private and removed,
24 as well as deliberations and preparations of ceremony in YNP in
25 the Indian Cultural village. T.R. 1-11.

26 After the Big Time ceremony ended, a national park ranger
27 obtained a copy of the video that Baca made and saw that it was
28 being sold for \$30 each at the museum. T.R. 1-34. The tape was
marked with a copyright designation. T.R. 1-39. Baca had
arranged with the museum shop to sell these tapes. T.R. 1-132.
The shop also sold other items made by Baca, including a CD of
Miwok songs. Id.

1 The court also heard testimony from Herbert Puffer. Mr.
2 Puffer operates a business in the Folsom area called Pacific
3 Western Traders. T.R. 2-84. The witness had known Mr. Baca for
4 more than 30 years. T.R. 2-84. He has sold in his shop cassettes
5 and videos that Mr. Baca made, including one of Miwok songs, a
6 cassette and CD and a video of a Big Time at Point Reyes National
7 Seashore Park in Marin County and one of a Big Time in Yosemite.
8 T.R. 2-85. The witness identified invoices for Big Time at
9 Yosemite videos he purchased from Mr. Baca. T.R. 2-87, 2-88.

10 A National Park Ranger identified certain slides taken
11 directly from the Big Time video. One of them contained the
12 following statement: "For your copy of Big Time at Yosemite,
13 indicate VHS or DVD format and send check or money order of \$30,
14 S&H to Lorenzo, P.O. Box 4343, Sonora, California, 95370" Below
15 that was a reference to a website,
16 AmericanIndianDesignsbyLorenzo.com. R.T. 2-113.

17 The ranger also discovered a civil suit had been filed against
18 Mr. Baca, where it appeared there was an audio recording of a
19 ceremonial dance made that was later offered for sale, and the
20 Tuolumne band of Miwoks or the dance troop was taking legal action
21 against Mr. Baca. T.R. 2-118. As evidence on Mr. Baca's intent,
22 the court heard testimony under Rule 404(b) of two witnesses about
23 Mr. Baca's prior activities in filming Native Americans dancing
24 and singing and then reducing that to a tape that was eventually
25 to be sold. T.R. 2-135 to 2-163.

26 Finally, another witness testified about his investigation
27 into the internet sales of Big Time in Yosemite. T.R. 3-47. He
28 found Big Time in Yosemite being advertised for sale for \$30 for

1 the video and \$40 for the DVD. T.R. 3-47.

2 This evidence, which was specifically referred to by Judge
3 Wunderlich in his decision, is sufficient to show that Mr. Baca
4 entered Yosemite for the purpose of engaging in a commercial
5 enterprise, that is, to produce a film that he intended to put up
6 for sale.

7 C. The American Indian Religious Freedom Act Did Not
8 Provide Baca To A Defense To These Criminal Charges

9 Without citing any case authority, Baca claims that he has a
10 complete defense to the criminal charges brought against him by
11 the American Indian Religious Freedom Act, 42 U.S.C. § 1996.

12 The American Indian Religious Freedom Act (AIRFA) provides as
13 follows:

14 On and after August 11, 1978, it shall be the policy of
15 the United States to protect and preserve for American
16 Indians their inherent right of freedom to believe,
17 express, and exercise the traditional religions of the
18 American Indian, Eskimo, Aleut, and Native Hawaiians,
including but not limited to access to sites, use and
possession of sacred objects, and the freedom to worship
through ceremonials and traditional rites.

19 42 U.S.C. § 1996.

20 On its face, AIRFA is a policy statement and does not create a
21 defense in a criminal case. United States v. Mitchell, 502 F.3d
22 931 (9th Cir 2007). In Mitchell, the defendant attempted to raise
23 as a defense against the imposition of the death penalty the
24 Navajo Nation's religious opposition to the death penalty. The
25 court first rejected a first amendment challenge⁴ raised by the

26
27 ⁴Baca does not raise in this appeal a first amendment
28 challenge to his conviction. This is probably because he admits,
in his brief, that he did not enter the roundhouse for religious
purposes, but claims rather that he intended "to film it for

1 defendant. It then found that the defendant's "reliance on AIRFA
2 fares no better as 'AIRFA is simply a policy statement and does
3 not create a cause of action or any judicially enforceable
4 rights.'" 502 F.3d at 949 (citing Henderson v. Terhune, 379 F.3d
5 709, 711 (9th Cir. 2004). Thus, AIRFA does not provide a defense
6 to Baca against the criminal charges brought against him.

7 Even if AIRFA did provide individual judicial rights, Baca's
8 conduct does not fit within the conduct described by the statute.
9 The statute is clearly designed to recognize the first amendment
10 free exercise rights of the Indians described in the act. Baca
11 did not enter the roundhouse for purposes of practicing his
12 religion, but rather claims to have done so "for purposes of
13 preservation and education." Appellant's Opening Brief, p. 24.
14 That is obviously a different matter than entering into a
15 religious site for purposes of "worship[ing] through ceremonials
16 and traditional rites." Indeed, Mr. Baca entered this site to
17 film those ceremonial rites, over the objections of the Native
18 American group whose traditional religious and sacred rites that
19 site represented. See R.T. 1-112.

20 Finally, it is unclear that the roundhouse would even be a
21 protected site under AIRFA. Baca testified at trial that the
22 roundhouse was not an authentic religious place. T.R. 6-32. He
23 did not claim that he viewed it as a sacred site.

24 //

25 //

26

27

28 purposes of preservation and education." Appellant's Opening
Brief, p.24

VI.

CONCLUSION

Based upon the foregoing, the Government requests that the court affirm the judgment of the trial court.

Respectfully submitted this 13th day of January, 2009

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