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JOHN C. SEARS

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff-Appellee v. JOHN C. SEARS, Defendant-Appellant.	CR 14-00667-RGK (14-tk-0412-PLA) (CVB NO. 1060412/13/14) **DEFENDANT-APPELLANT'S REPLY BRIEF**

Appellant-Defendant John Sears, by and through his counsel of record, hereby files his Reply Brief.

Dated: March 2, 2015

Respectfully submitted,

/s/ *Daniel I. Kapelovitz*
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ARGUMENT

I. Mr. Sears's Conviction Should Be Reversed Because, Based on the Offense's Maximum Punishment, He Was Entitled to a Jury Trial

The government cites Lewis v. United States for the proposition that "defendants charged with petty offenses having a maximum six-month term of imprisonment are presumed not to be entitled to a jury trial." Government's Brief at 3:26-4:6. However, the Lewis court merely held that charging a defendant "with two counts of a petty offense does not revise the legislative judgment as to the gravity of that particular offense." Lewis v. United States, 518 U.S. 322, 327 (1996). The Court further reasoned that the government could merely avoid a jury trial in such cases by trying the petty offenses separately.

Mr. Sears was charged with two offenses, but this is not why he is entitled to a jury trial. He is entitled to a jury trial because each of the two offenses carry a maximum punishment of six months in jail, a $5,000 fine, and five years of supervised probation. As the Ninth Circuit held,

> [T]here clearly comes a point where potential punishment other than incarceration may be so severe that the offense will no longer be considered petty. This is especially true if the punishment may be imposed in addition to a term of imprisonment. . . . Where the additional punishment could involve the imposition of a very large fine, or a very long period of probation, or the forfeiture of substantial property, the severity of the total punishment may be sufficiently great so as to turn what would otherwise be a petty offense into a serious one.

United States v. Ballek, 170 F.3d 871, 876 (9th Cir. 1999) (citations omitted).

The Ballek Court ruled that the defendant had no right to a jury trial because the additional "punishment" consisted of restitution for unpaid child support, which "does not impose an additional obligation on the defendant; rather, it recognizes the debt he already owes the victim." Id. In United States v. Stanfill El, another case on which the government relies, the court held that an order of restitution did not qualify as additional punishment that would trigger the Sixth Amendment right to jury. United States v. Stanfill El, 714 F.3d 1150, 1153 (9th Cir. 2013). The $5,000 maximum fine that Mr. Sears faced was punishment, not restitution. When this fine is added to six months of incarceration and five years of supervised probation, the punishment is "sufficiently great so as to turn what would otherwise be a petty offense into a serious one."

Next, the government contends that Nachtigal is not distinguishable from the present case because "before the Nachtigal opinion, petty offenders were subject to six months of custody as a condition of probation . . . during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation or supervised release.") Government's Brief at 4:18-24. However, although the Nachtigal Court notes the existence of discretionary probation conditions, it did not consider the possible intermittent incarceration when

rendering its decision. In fact, the Court specifically reasons that, "while [the discretionary probation conditions] obviously entail a greater infringement on liberty than probation without attendant conditions, *they do not approximate the severe loss of liberty caused by imprisonment for more than six months." United States v. Nachtigal*, 507 U.S. 1, 6 (1993) (emphasis added).

The government further argues that the "burden of providing jury trials for all petty offenses has been thought disproportionate to the citizen's need for the additional protection against the power of the state that a jury would give him." Government Brief at 5:16-19, 82 F.3d 1370. However, a constitutional right should never give way to convenience. The majority of the states agree. See Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 Wis. L. Rev. 133, 171-73. ("[M]ost states guarantee jury trial far beyond that which is required by the Supreme Court's six months' imprisonment test. . . . Only ten states adopt the stance that an offense punishable by imprisonment of six months or less does not trigger a right to jury trial.")

II. The Law Requires That Mr. Sears Knew His Camping Was Unlawful

A. The Camping Statute Is Not a Public Welfare Offense

The government contends that 36 C.F.R. § 2.10(b) requires no *mens rea* because it is a public welfare offense. However, as the government concedes, public welfare offenses are those crimes that affect the regulation of "industries,

trades, properties or activities that affect the public health, safety or welfare." Morissette v. United States, 342 U.S. 246, 254 (1952)).

As the Supreme Court held, a statute criminalizing the unauthorized acquisition of food stamps could not be considered a public welfare offense because such offenses are limited to "conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." Liparota v. United States, 471 U.S. 419, 433 (1985). The Court then distinguished the food-stamp offense from two offenses where a reasonable person should know of the conduct's stringent regulation:

> [I]n United States v. Freed, 401 U.S. 601 (1971), we examined the federal statute making it illegal to receive or possess an unregistered firearm. In holding that the Government did not have to prove that the recipient of unregistered hand grenades knew that they were unregistered, we noted that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act." Id., at 609. Similarly, in United States v. Dotterweich, 320 U.S. 277, 284 (1943), the Court held that a corporate officer could violate the Food, Drug, and Cosmetic Act when his firm shipped adulterated and misbranded drugs, even "though consciousness of wrongdoing be totally wanting." The distinctions between these cases and the instant case are clear. A food stamp can hardly be compared to a hand grenade, see Freed, nor can the unauthorized acquisition or possession of food stamps be compared to the selling of adulterated drugs, as in Dotterweich.

Id. (internal citations omitted).

Likewise, camping in a non-designated area of a National Park can hardly be compared to possessing hand grenades or selling adulterated drugs. Nor would a reasonable person know that such camping is subject to stringent regulation. In another case on which the government relies, United States v. Wilson, 438 F.2d 525 (9th Cir. 1971), the Ninth Circuit held that a regulation prohibiting the cutting of timber in the national forests is a strict liability offense. However, as Judge Pregerson explains, "The cutting of timber . . . is a 'public welfare offense' that causes irreparable harm to our national forests. On the other hand, a mere occupier of land . . . does not 'seriously threaten the community's health or safety' and can be ejected in a civil action." United States v. Kent, 945 F.2d 1441, 1448 (9th Cir. 1990) (Pregerson, J., dissenting) (distinguishing the Kent case from Wilson).

Public welfare offenses are also typically limited to those offenses where "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." Morissette, 342 U.S. at 256. Given that definition, it is difficult to imagine how § 2.10(b)(10) could be considered a public welfare offense. As discussed above, the possible punishment is six months incarceration, a $5,000 fine, and five years probation. This is no small penalty. And as the Supreme Court recognized in Baldwin v. New York, "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and *may well result in quite serious repercussions affecting*

his career and his reputation." Baldwin v. New York, 399 U.S. 66, 73 (1970) (emphasis added).

The government further argues that "reading a 'willful' *mens rea* requirement into this regulation would make the regulatory scheme excessively difficult to enforce due to the necessity of proving in each instance that a defendant intended to camp on land that he knew was National Park Service property where boundaries, as in this case, were not marked at the broken fence where defendant entered." Government's Brief at 7:5-10.

But as the Liparota Court explained, its holding requiring *mens rea* did not put an unduly heavy burden on the government in prosecuting violators of the law:

> [T]he Government need not show that [the defendant] had knowledge of specific regulations governing [the offense]. Nor must the Government introduce any extraordinary evidence that would conclusively demonstrate petitioner's state of mind. Rather, as in any other criminal prosecution requiring *mens rea*, the Government may prove by reference to facts and circumstances surrounding the case that petitioner knew that his conduct was unauthorized or illegal.

Liparota, 471 U.S. at 434. "If justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try . . . unless we are justified in sacrificing individuals to public convenience." Oliver Wendell Holmes, Jr., The Common Law, at 45 (Belknap Press, 2009) (1881).

Furthermore, the "existence of a *mens rea* is the rule of, rather than the

exception to, the principles of Anglo-American criminal jurisprudence." Dennis v. United States, 341 U.S. 494, 500 (1951). Criminal offenses requiring no *mens rea* are generally disfavored. Liparota, 471 U.S. at 426. "Certainly far more than the simple omission of the appropriate [*mens rea*] from the statutory definition is necessary to justify dispensing with an intent requirement." United States v. United States Gypsum Co., 438 U.S. 422, 438 (1978)).

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." Morissette, 342 U.S. at 250.

Furthermore, "the holding in Morissette can be fairly read as establishing, at least with regard to crimes having their origin in the common law, an interpretative presumption that *mens rea* is required." United States Gypsum Co. 438 U.S. at 437. Because the anti-camping regulation has its roots in the common law crime of trespass, it is presumed to require *mens rea*.

B. Lack of Notice is a Due Process Violation

Even if § 2.10(b)(10) is interpreted as a strict liability offense, "[d]ue process requires that a penal statute give fair warning of what the law 'commands or forbids'" Kent, 945 F.2d at 1448-49 (Pregerson, J., dissenting) (quoting

Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)); see also Dunn v. United States, 442 U.S. 100, 112 (1979) (The "long-established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity . . . is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited.").

> The complexity of environmental statutes and regulations is well known, but their obscurity may not be fully understood. A significant problem in this area is that the government's interpretation of regulations is often issued in "guidance documents" that may not be generally available. No one seems to know (or even to have investigated) the number of memoranda reflecting a federal agency's interpretation of its own regulations, even though that interpretation is generally considered controlling.

Edwin Meese III and Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. Crim. L. & Criminology 743 n.100 (2013) (citations omitted).

III. The Camping Regulation Violates the Constitutional Right to Travel

As the government acknowledges, "[r]elying on historical support and the practical necessity of the right to intrastate travel, circuit courts have found an individual has the right to travel locally through public spaces and roadways." Government's Brief at 9:26-28.

The Supreme Court has also recognized the fundamental right to travel. In Papachirstou v. City of Jacksonville, the high court could have just as easily been thinking of Mr. Sears when it wrote the following:

> [T]hese activities [walking, strolling, and wandering] are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been, in part, responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent, and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits, rather than hushed, suffocating silence.

Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972).

Because the right to travel is a fundamental right, any regulation that infringes on that right must survive strict scrutiny. The government never addresses this issue, nor could it given that the anti-camping statute is not narrowly tailored to serve a compelling government interest, nor is it the least-restrictive means of achieving its goal. As such, the anti-camping statue is unconstitutional both on its face and as applied to Mr. Sears.

IV. Mr. Sears's Camping Was Justified by Necessity

The government basically contends that Mr. Sears should be forced to risk his life and those of his animal companions because he has chosen an unorthodox lifestyle. Government's Brief at 11:25-12:4. The government then argues that Mr. Sears had "a legal alternative that only required him to walk a couple of more miles down an administrative road, not trough the 'wilderness' as he claims." Government's Brief at 12:7-10. This misstates the testimony and evidence

received during the trial. The photographs introduced into evidence clearly show that Mr. Sears was not camping on an administrative road, but rather in the wilderness. Furthermore, the most direct route to the equestrian ranch was through the Boney Mountains State Wilderness Area, not along an administrative road as the government contends.

According to the government, Mr. Sears "always has the alternative to plan his travels to allow him to camp where it is legal. He cannot create a necessity to break the law because he does not like legal campgrounds." However, as discussed at length above, Mr. Sears did not know he was camping somewhere in violation of a federal regulation. The boundaries were poorly marked, and Mr. Sears had no idea he was sleeping in an area not designated for camping. Thus, he did not purposely create the situation whereby he had to choose between walking miles through the wilderness in pitch darkness with two mules or be arrested.

CONCLUSION

For the reasons set forth above, Mr. Sears respectfully requests that his convictions be reversed.

Dated: March 2, 2015

Respectfully Submitted,

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