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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN C. SEARS, Defendant-Appellant.	No. CR 14-00667-RGK (CVB No. 1060412/13) GOVERNMENT'S ANSWERING BRIEF

Plaintiff United States of America, by and through its counsel of record, the United States Attorney for the Central District of California and Assistant United States Attorney Sharon McCaslin, hereby files the Government's Answering Brief.

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This Government's Answering Brief is based upon the attached memorandum of points and authorities, the files and records in this case, and such further evidence and argument as the Court may permit.

Dated: February 19, 2015

Respectfully submitted,

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1
TABLE OF CONTENTS

2 DESCRIPTION PAGE

3 TABLE OF AUTHORITIES..ii

4 MEMORANDUM OF POINTS AND AUTHORITIES................................1

5 I. ISSUES PRESENTED..1

6 II. STATEMENT OF THE CASE...1

7 A. NATURE OF THE CASE, COURSE OF THE PROCEEDINGS, AND DISPOSITION IN THE MAGISTRATE JUDGE'S COURT................1

8

B. JURISDICTION, TIMELINESS, AND BAIL STATUS.................2

9

III. STATEMENT OF FACTS..2

10

IV. ARGUMENT...3

11

A. Being Charged With Two Petty Offenses Did Not Entitle Defendant to a Jury Trial..................................3

12

13 B. The Law Does Not Require Proof That Defendant Knew He Was Camping In A National Park............................5

14

C. The Camping Regulation Is Not Unconstitutional............8

15

D. Defendant Cannot Establish That His Unlawful Camping Was Justified by Necessity................................11

16

17 V. CONCLUSION..12

18

19

20

21

22

23

24

25

26

27

28

TABLE OF AUTHORITIES

DESCRIPTION PAGE

FEDERAL CASES

Anderson v. City of Portland,
2009 WL 2386056 (D.Oregon Jul. 31, 2006)........................10

Attorney General of New York v. Soto-Lopez,
476 U.S. 898(1986)..10

Blanton v. City of North Las Vegas,
489 U.S. 538, 542 (1989).....................................5

Johnson v. City of Cincinnati,
310 F. 3d 484(6th Cir. 2002)...............................9, 10

Lewis v. United States,
518 U.S. 322(1996)..4, 5

Lutz v. City of York, Pennsylvania,
899 F. 2d 255 (3rd Cir. 1990)..............................9, 10

Memorial Hospital v. Maricopa County,
415 U.S. 250(1974)...9

Morissette v. United States,
342 U.S. 246, 250 (1952).....................................6

Nishi v. County of Marin,
2012 WL 566408 (N.D.Cal. Feb 21, 2010)....................10, 11

Nunez v. City of San Diego,
114 F. 3d 935(9th Cir. 1997).................................9

Papachristou v. City of Jacksonville,
405 U.S. 156(1972)..10

Saenz v. Roe,
526 U.S. 489, 500 (1999).....................................8

Sanchez v. City of Fresno,
914 F.Supp.2d 1079 (2012)...................................10

U.S. v. Soderna,
82 F.3d 1370(7th Cir. 1996)..................................5

United States v. Arellano-Rivera,
244 F.3d 1119,(9th Cir. 2001)...............................11

United States v. Kent,
945 F.2d.1441(9th Cir. 1991)..............................6, 8

1
TABLE OF AUTHORITIES (CONTINUED)

2
DESCRIPTION PAGE

3 United States v. Larson,
746 F.2d 455(8th Cir. 1984) 6
4
United States v. Launder,
5 743 F.2d 686(9th Cir. 1984) 7

6 United States v. Nachtigal,
507 U.S. 1, 3 (1983) 4
7
United States v. Northwest Pine Products,
8 914 F.Supp. 404 (D. Ore 1996) 6

9 United States v. Schoon,
971 F.2d 193(9th Cir. 1991) 11
10
United States v. Stanfill El,
11 714 F. 3d 1150, 1152 (9th Cir. 2013) 4

12 United States v. Wilson,
438 F.2d 525 (9th Cir. 1971) 6, 7
13

FEDERAL STATUTES

14
18 U.S.C. § 3401(a) 2
15
18 U.S.C. § 3402 2
16
18 U.S.C. § 3563(b)(10) 4
17
18 U.S.C. § 3563(b)(11) 4
18

FEDERAL REGULATIONS

19
36 C.F.R. § 1.1(a) 8
20
36 C.F.R. § 1.1(b) 8
21
36 C.F.R. § 2.10(b)(10) .... passim
22
36 C.F.R. § 2.32(a)(2) 1
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. ISSUES PRESENTED

1. Whether defendant is entitled to a jury trial for a petty offense.

2. Whether the regulations required proof of a *mens rea*.

3. Whether the regulations were unconstitutional.

4. Whether defendant's violations were excused because of necessity.

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF THE PROCEEDINGS, AND DISPOSITION IN THE MAGISTRATE JUDGE'S COURT

On May 8, 2014, defendant-appellant John Sears ("defendant") was issued three citations for petty offenses. 36 C.F.R. § 2.10(b)(10) (camping outside a designated area in a national park) and 36 C.F.R. § 2.32(a)(2) (violating a lawful order of a government employee). A third citation was dismissed. (R.T.4:17-25, 5:1-3).[1]

On July 16, 2014, defendant appeared for arraignment on the citations. On November 6, 2014, following a bench trial, the Honorable Paul Abrams, United States Magistrate Judge, found defendant guilty of both charges. (R.T. 66:14-20; 67:2-9).

The court sentenced defendant to pay a mandatory $10 special assessment and a mandatory $25 processing fee on one violation. The court declined to impose the mandatory assessment and fee on the second violation. Defendant was given three months to pay the $35. No fine was imposed. (R.T. 67:24-25, 68:5-8, 15-16; 70:19-25; 70:25; 71:1-4).

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[1] "R.T." refers to the reporter's transcript of the trial followed by a page number and line reference.

B. JURISDICTION, TIMELINESS, AND BAIL STATUS

The magistrate judge had jurisdiction pursuant to 18 U.S.C. § 3401(a). This court has jurisdiction to review the magistrate court's decision pursuant to 18 U.S.C. § 3402 and Federal Rule of Criminal Procedure 58(g)(2)(B).

Defendant filed a timely notice of appeal on November 21, 2014 pursuant to Federal Rule of Criminal Procedure 58(g)(2)(B).

Defendant is not in custody.

III. STATEMENT OF FACTS

For 31 years defendant has traveled about on foot accompanied by mules. He walks until tired then finds a place to spend the night. He refuses to stay in designated public campgrounds. (R.T.46:18-22; 47:17, 50:6-25, 51:1-20).

On the night of May 8, 2014, two rangers responded to a report by another ranger that he had seen a horse roaming around unattended just below his home, next to an administrative park road, within the Santa Monica Mountains National Recreation Area. (R.T.9:25; 10:1-2, 3-5, 13-14; 21:10-12).

Upon arrival, the rangers found defendant asleep in a sleeping bag, a mule tied to a tree, another untethered mule, an open flame gas stove, dishes, food, water, saddlebags, other equestrian equipment. (R.T.10:22-25; 11:2-6; 12:12-13; 22-24; 13:10-11; 21-23; 18:21-25; 19:1-4).

At least three times one of the rangers asked defendant to leave because the area was not a designated campsite. Defendant adamantly refused. The ranger had even called a nearby State Park equestrian camping facility and confirmed that defendant and his mules could stay there. The ranger told defendant about this facility. Defendant

1 did not believe the ranger and did not want to travel the
2 approximately two miles along the road to get there. (R.T.14:25;
3 15:1, 17-22; 16:1,4-11; 17:18-22; 19:5-13: 26:19-25; 27:1-3, 20-24;
4 28:16-19; 47:19-25; 48:1-9; 52:1-17; 53:10-20).

5 The previous year there had been a fire in this area, making
6 defendant's use of an open flame stove particularly dangerous.
7 Defendant admitted that he had used the open flame stove to cook his
8 dinner. (R.T. 7:10-11). Because of potential hazards posed to park
9 property, nearby residents, homes and the mules, the rangers had to
10 arrest defendant to remove him. The mules were briefly housed at a
11 nearby animal shelter. The defendant was cited for camping in an
12 undesignated campsite and refusing the ranger's orders to leave.
13 (R.T.16:12-18, 24-25; 17:1-4, 6-9; 10:1-6).

14 Signs were posted at the entrance to the road near defendant's
15 camp advising, among other things, that it was a no camping area and
16 subject to fire restrictions. (R.T. 31:17-20; 34:1-24; 35:1-2).
17 Defendant, however, testified that he did not see these signs because
18 he had entered the area through a broken portion of a barbed wire
19 fence. (R.T. 18:14-19; 43:15-19; 44:22-25; 45:1-3). Several times
20 defendant described the location as "public land" as opposed to
21 private property but denied knowing that it was park land.
22 (R.T.41:21-25; 42:1; 47:4-13).

23 **IV. ARGUMENT**

24 **A. Being Charged With Two Petty Offenses Did Not Entitle**
25 **Defendant to a Jury Trial**

26 It is settled Supreme Court and Ninth Circuit law that
27 defendants charged with petty offenses having a maximum six month
28 term of imprisonment are presumed not to be entitled to a jury trial

"unless the legislature has authorized additional statutory penalties so severe as to indicate that it considered the offense serious." Lewis v. United States, 518 U.S. 322, 324 (1996) (defendant charged with two petty offenses with six month terms of imprisonment was not entitled to a jury trial even though he faced an aggregate maximum one year term of imprisonment); United States v. Nachtigal, 507 U.S. 1, 3 (1983) (violation of National Park Service regulation carrying a maximum six month term of incarceration, or five year term of probation, and a $5000 fine did not entitle defendant to a jury trial); United States v. Stanfill El, 714 F. 3d 1150, 1152 (9th Cir. 2013) (order of legally mandated restitution for petty offense with a maximum six month term of imprisonment did not entitle defendant to a jury trial).

Defendant argues that Nachtigal is distinguishable because after that decision Congress authorized a "split sentence" for petty offenses, i.e., a maximum six month term of custody and a five year term of probation. O.B. pgs.17-18.[2]

However, long before the Nachtigal opinion, petty offenders were subject to six months of custody as a condition of probation. 18 U.S.C. § 3563(b)(10), codified as part of the Sentencing Reform Act of 1984 at 18 U.S.C. § 3563(b)(11)(during the first year of probation, custody can be required "during nights, weekends, or other intervals of time" up to the lesser of the maximum term for the offense or one year).

Thus, the only change after Nachtigal was allowing for a straight six month custodial period and probation rather than an

[2] "O.B." refers to defendant's Opening Brief.

intermittent one as a condition of probation. This change is not one indicating that petty offenses are "serious" thus entitling all petty offenders to a jury trial.

Even a potential one year term of imprisonment for a defendant convicted of two petty offenses "does not revise the legislative judgment as to the gravity of [a] particular offense, nor does it transform the petty offense into a serious one." Lewis, supra, 518 U.S. at 327.

Moreover, the Supreme Court has opined that the

> primary emphasis. . .must be placed on the maximum period of incarceration. Penalties such as probation or a fine. . . cannot approximate in severity the loss of liberty that a prison term entails. Indeed, because incarceration is an "intrinsically different" form of punishment, . . . it is the most powerful indicator whether an offense is "serious."

Blanton v. City of North Las Vegas, 489 U.S. 538, 542 (1989).

> [T]he social interest in effective law enforcement has been deemed to outweigh the citizen's interest in interposing a jury of lay persons between the state and himself when the penalty that he faces is mild. 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.

U.S. v. Soderna, 82 F.3d 1370, 1378 (7th Cir. 1996), citing Blanton, supra, 489 U.S. at 543.

B. The Law Does Not Require Proof That Defendant Knew He Was Camping In A National Park

Camping outside a designated camping area, 36 C.F.R. § 2.10(b)(10), is a strict liability offense requiring no *mens rea*. In order to violate this regulation, defendant need not have known that he was on National Park Service property. Defendant merely needed to commit the proscribed act of camping on such property outside a

designated site or area. Defendant contends that this regulation "should be read to require a *mens rea* component," arguing that defendant had to know that he was in a National Park. (O.B. p.123). However, this is incorrect, having no support in Supreme Court or Ninth Circuit precedent.

Strict liability is reserved for crimes that affect the regulation of "industries, trades, properties or activities that affect public health, safety or welfare," or "public welfare offenses." Morissette v. United States, 342 U.S. 246, 250 (1952). Public welfare offenses are violations of "neglect where the law requires care" which "impairs the efficiency of controls deemed essential to the social order." Id. at 256. The Supreme Court explained:

> [P]enalties commonly are relatively small, and conviction does not grave damage to an offender's reputation. Under such considerations, courts have turned to construing statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime.

Id.

Public welfare offenses lacking a *mens rea* requirement on public land include unauthorized occupancy, trespass by cattle, cutting wood, and timber operations. See United States v. Kent, 945 F.2d.1441, 1446 (9th Cir. 1991); United States v. Larson, 746 F.2d 455, 456 (8th Cir. 1984); United States v. Wilson, 438 F.2d 525 (9th Cir. 1971); United States v. Northwest Pine Products, 914 F.Supp. 404 (D. Ore 1996).

In Wilson, the Ninth Circuit declined to read a *mens rea* requirement into a Title 36 regulation prohibiting cutting and removing timber from a National Forest. Wilson, supra, 438 F.2d at

1 525. After acknowledging the lack of reference to intent in the
2 regulation, the court found that the omission was intentional. Id.
3 The court relied on the difficulty in enforcing a *mens rea* requiring
4 proof of "willfully" entering on forest land where boundaries are
5 often poorly marked. Id. As in Wilson, reading a "willful" *mens rea*
6 requirement into this regulation would make the regulatory scheme
7 excessively difficult to enforce due to the necessity of proving in
8 each instance that a defendant intended to camp on land that he knew
9 was National Park Service property where boundaries, as in this case,
10 were not marked at the broken fence where defendant entered.
11 Title 36 C.F.R. § 2.10(b)(10), prohibiting camping in
12 undesignated areas, is a public welfare offense, protecting National
13 Park Service property and resources and the well-being of the public
14 on such property. Allowing individuals to camp wherever they wish
15 would create a free-for-all on public land. The defendant in this
16 case camped on undesignated land with an untethered animal roaming
17 free, another animal tied to a tree, utilizing a flame burning stove,
18 without access to garbage or sanitary facilities. These hazards pose
19 harm to the park land and other resources and to the public in the
20 surrounding areas.
21 Defendant relies on United States v. Launder, 743 F.2d 686, 689
22 (9th Cir. 1984) O.B. p.19. However, that case is not dispositive.
23 In Launder, the Ninth Circuit interpreted a regulation making it a
24 crime to "permit" or "suffer" a fire to spread in a National Forest.
25 Id. The court found that these verbs implying a mental state were
26 "not the language of strict liability," and required the additional
27 finding of a willful act. Id.
28

Conversely, the language of this regulation clearly omits any reference to an intent requirement. The regulation simply states that "[c]amping outside of designated sites or areas" . . . is "prohibited," without any reference to the state of mind of the violator. 36 C.F.R. § 2.10(b)(10). The verb at issue in this regulation, "camping," speaks solely of action, with no reference to a mental state. See Kent, supra, 945 F.2d. at 1446 (holding that the verb "occupying" describes an action and does not require a "willful" *mens rea* requirement to be read into a 36 C.F.R. regulation).

Therefore, defendant did not have to know that he was camping on National Park property.

C. The Camping Regulation Is Not Unconstitutional

The purpose of the Title 36 regulations governing conduct within the jurisdiction of the National Park Service is to "provide for the proper use. . .and protection of persons, property, and natural and cultural resources." 36 C.F.R. § 1.1(a).

The regulations are used to "conserve scenery, natural and historic objects, and wildlife, and to provide for the enjoyment of those resources in a manner that will leave them unimpaired for the enjoyment of future generations." 36 C.F.R. § 1.1(b).

The Supreme Court has held that the Fourteenth Amendment guarantees the "right to travel" interstate. This right has three components: (1) "the right of a citizen of one State to enter and to leave another State," (2) "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State," and (3) "for those travelers who elect to become permanent residents, **the right to be treated like other citizens of the State**." Saenz v. Roe, 526 U.S. 489, 500 (1999) (emphasis added).

The third component is at issue in this case because of defendant's assertion that not allowing him to camp with his mules anywhere he wants on public land impairs his right to travel.

Other than defendant's conclusory testimony, no evidence was presented that there are insufficient designated campsites on public lands to enable defendant and his mules to travel among them. Indeed the evidence presented established that there was an equestrian camping facility approximately two miles down a road from where the rangers found defendant and his mules. However, defendant refuses to stay in designated campsites.

Clearly defendant's unconventional lifestyle allows him to plan the course of his journeys. Defendant made it to his arraignment and trial on the proscribed dates and times in Los Angeles.

Although the Supreme Court has acknowledged that there is a fundamental right to interstate travel, the Supreme Court and Ninth Circuit have failed to extend this right to include intrastate travel. Memorial Hospital v. Maricopa County, 415 U.S. 250, 255-56 (1974); Nunez v. City of San Diego, 114 F. 3d 935, 943 (9th Cir. 1997). The limited right to intrastate travel arises only under the Fourteenth Amendment Due Process Clause, not under the Equal Protections Clause or the Privileges and Immunities Clause. Johnson v. City of Cincinnati, 310 F. 3d 484, 498 (6th Cir. 2002); Lutz v. City of York, Pennsylvania, 899 F. 2d 255, 263, 265, 268 (3rd Cir. 1990) (Privileges and Immunities Clause is not implicated where ordinance applied to in-staters and out-of-staters equally).

Relying 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.

1 Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972); Lutz,
2 supra 899 F. 2d at 268.; Johnson, supra, 310 F. 3d at 498. However,
3 the right to intrastate travel does not include a right to camp
4 wherever an individual wishes. Sanchez v. City of Fresno, 914
5 F.Supp.2d 1079, 1110-11 (2012). A law having only an incidental
6 impact on travel, which is not discriminatory and has a purpose other
7 than restricting travel, is constitutionally permissible. Attorney
8 General of New York v. Soto-Lopez, 476 U.S. 898, 903 (1986); Sanchez,
9 supra, 914 F.Supp. at 1110. The right to travel does not give a
10 citizen a "right to live or stay where one will" on public or private
11 property. Nishi v. County of Marin, 2012 WL 566408 (N.D.Cal. Feb 21,
12 2010) (unpublished). Extending the right to include camping on any
13 public land is untenable; rather than maximizing individual
14 liberties, it would lead to chaos. Lutz, supra, 899 F. 2d at 269.
15 In Nishi, the court held that a camping ban did not violate the
16 plaintiff's right to travel. Id. at 4. The plaintiff in Nishi had
17 been cited for illegally camping on public land. Id. at 1. The
18 plaintiff had been asked to leave public land on previous occasions.
19 Id. The court found that the camping ban was non-discriminatory
20 because it does not distinguish between those who are residents and
21 those who are not, or between those who are homeless and those who
22 are not. Id. at 5. Further, the court found that the ban's impact
23 was, "at best," incidental. The plaintiff was merely prohibited from
24 camping on public land, but was still free to move within the land as
25 part of their personal liberty. Id. Therefore, the court found that
26 the ban on camping did not violate the plaintiff's right to
27 intrastate travel. See also Anderson v. City of Portland, 2009 WL
28 2386056 (D.Oregon Jul. 31, 2006) (unpublished) (anti-camping

ordinance does not "constitute interference with plaintiff's right to travel or freedom of movement that rises to the level of constitutional deprivation.")

Like the ban in Nishi, 36 C.F.R. § 2.10(b)(10), which prohibits camping outside designated sites or areas, is not discriminatory. It does not distinguish between residents and non-residents, nor does it target the homeless. Further, the impact that the ordinance has on an individual's right to travel is incidental. Because 36 C.F.R. § 2.10(b)(10) is non-discriminatory and places a merely incidental burden on travel, the ban at issue here does not violate Mr. Sears' right to intrastate travel.

D. Defendant Cannot Establish That His Unlawful Camping Was Justified by Necessity

In order to invoke the necessity defense, defendant needs to meet the four requirements laid out by the Ninth Circuit.

> [D]efendants colorably must have shown that: (1) they were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and (4) they had no legal alternatives to violating the law.

United States v. Schoon, 971 F.2d 193, 195 (9th Cir. 1991).

The test for whether a necessity defense is admissible is conjunctive, and therefore it may be precluded by a court if any one of the elements is lacking. Id.; accord United States v. Arellano-Rivera, 244 F.3d 1119,(9th Cir. 2001).

Defendant has chosen to live outside with his mules. He decides the route that he travels and when and where he will cook, eat and sleep. No one has forced this unorthodox life style upon him. His

choice does not give him the right to break the law for his convenience.

There were no "evils" to choose from that justified defendant's breaking the law. Nor was there "imminent harm" to defendant to be avoided. Only harm to the park. Defendant's *anticipation* of evil or harm did not justify ignoring the ranger's repeated orders to leave nor his camping illegally. O.B. p.11. He had a legal alternative that only required him to walk a couple of more miles down an administrative road, not through the "wilderness" as he claims. O.B. p.12.

Moreover, defendant 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.

V. CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court affirm defendant's conviction for the petty offenses of camping in an undesignated National Park area and refusing to obey a park ranger's orders to leave.