United States of America
First Circuit Court of Appeals

NO. 97-1403

UNITED STATES OF AMERICA,

Appellee,

v.

MAC S. NOAH,

Defendant/Appellant

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction of this case pursuant to 28 U.S.C. § 1291. The defendant was charged in the Rhode Island District Court with criminal violations of 18 U.S.C. § 2 and 18 U.S.C. § 287.

Mr. Noah was found guilty by a jury on December 19, 1996 and sentenced on March 11, 1997. He filed his notice of appeal on March 11, 1997, from a final order of the Rhode Island District Court.

STATEMENT OF ISSUES

I. Was the evidence against the defendant sufficient to sustain a conviction where other people had opportunities to do the crimes and they also had family and close social relationships with the victims?

II. Did the court unlawfully deny the defendant's motions, which were made before the beginning of trial and renewed at various times throughout trial, to proceed *pro se* or to have another lawyer appointed to him?

III. Did the court's failure to grant the defendant's motion in limine, which was a request for a bill of particulars and which sought to keep out of evidence hundreds of tax returns containing uncharged conduct, unduly burden the defendant by forcing defense counsel to spend time and effort learning the facts and circumstances surrounding each of the uncharged tax returns?

IV. Did the court unlawfully elevate the defendant's sentence for special skill where the ability to use a computer to file tax returns is not a special skill, and even if he had a special skill it was unrelated to the crime charged?

V. Should the trial judge have recused himself after showing his ethnic and racial bias against the defendant's homeland?

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Mac Noah was indicted on six counts of knowingly presenting false claims by filing false income tax returns with the IRS, pursuant to 18 U.S.C. § 2 and 18 U.S.C. § 287. He was found guilty of all six counts by a jury in the Rhode Island District Court (*Lagueux*, C.J.). He was sentenced to 33 months imprisonment on each count, followed by three years of supervised release on condition that he make restitution, with sentences on each count to be served concurrently. IX *Transcript* at 24-25.[1] This appeal followed.

Mr. Noah set up a business called Easy Electronic Tax Service (EETS) in 1993. The business was created to electronically file federal tax returns with the IRS for its customers, I *Transcript* at 37, and also provide them with a "refund anticipation loan" through a bank, II *Transcript* at 137, such that a customer could get their tax refund within a day or two of giving EETS their tax information. The business operated approximately February through April of 1993, the tax season for 1992 taxes. II *Transcript* at 185.

False returns bearing EETS's identification name and numbers were filed with the IRS. The false information included claims of elevated or non-existent of earnings, and non-existent

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[1]References to the trial and sentencing transcripts are to the volume number and page number, with volume numbers as follows:

I . . . . . (Trial) . . . . . December 9, 1996
II . . . . . (Trial) . . . . . December 10, 1996
III . . . . . (Trial) . . . . . December 11, 1996
IV . . . . . (Trial) . . . . . December 12, 1996
V-a . . . . . (Trial) . . . . December 13, 1996 (morning session)
V-b . . . . . (Trial) . . . December 13, 1996 (afternoon session)
VI . . . . . (Trial) . . . . . December 16, 1996
VII . . . . . (Trial) . . . . . December 17, 1996
VIII . . . . . (Trial) . . . . . December 19, 1996
IX . . . . . (Sentencing) . . . . . March 11, 1997

dependents. EETS had an arrangement with Beneficial National Bank whereby it provided refund anticipation loans to EETS's customers. The Government alleged that the defendant cashed the loan checks, gave the actual refund due to the customer, and kept the difference.

SUMMARY OF ARGUMENT

The defendant first argues that his conviction should be reversed on the grounds that the evidence is not sufficient to sustain a conviction. Although it is clear that false tax returns were filed with the IRS by somebody, the defendant did not do it; or if he did, he merely unwittingly electronically transmitted information which he believed to be accurate. The defendant argues that one of his employees, Shedrick Geyetay, had either family or close social relationships with all of the people in whose names false returns were filed, that he had easy opportunities to carry out the crime, and that the evidence points enough toward him rather than the defendant to raise reasonable doubt.

The defendant next argues that he was unlawfully denied his right to self-representation, and that therefore his conviction should be reversed.

Next, the defendant argues that his attorney properly filed a motion which was a request for a bill of particulars, which the court unlawfully denied. As a result, the defendant's attorney was forced to prepare to defend against dozens of uncharged tax returns on the proper assumption that they might come into evidence.

The defendant also argues that while his sentence was enhanced based on an alleged special skill, he did not have any skill not possessed by millions of ordinary taxpayers. On this basis, his case should be remanded for re-sentencing.

Finally, the defendant argues that because the judge made disparaging comments about the defendant's homeland and ethnic background, the judge should have recused himself. As a result, all orders subsequent to the judge's comment, including the finding of guilt, should be reversed.

ARGUMENT

I. The Evidence Is Not Sufficient to Sustain a Conviction

A. Reasonable Doubt

"A reasonable doubt . . . means a doubt founded upon reason and not speculation." *United States v. Flannery*, 451 F.2d 880, 883 (1st Cir. 1971). The evidence is insufficient to sustain a conviction on appeal, if, based on the totality of the evidence at trial, a rational juror could not find all of the elements of the charged offense beyond a reasonable doubt. *United States v. Machor*, 879 F.2d 945 (1st Cir. 1989), *cert. denied*, 493 U.S. 1094; *United States v. Henson*, 945 F.2d 430 (1st Cir. 1991). Credibility of witnesses is resolved by the jury. *United States v. Garcia*, 905 F.2d 557 (1st Cir. 1990), *cert. denied*, 493 U.S. 1094. On appeal, this court does not deal with credibility directly, but instead considers the evidence as a whole, including all inferences that may be reasonably drawn therefrom. *Id.*

B. Pairs of Witnesses Show Crimes Were Committed

The government presented several pairs of witnesses — employers and alleged employees — illustrating that the person who claimed income either never worked for the employer or that the amounts claimed were false.

1. Fred Gayetay & His Claimed Employer

William Fernandes was Payroll Manager for an employer called Job Link. I *Transcript* at 73-74. He testified that a W-2 form for Fred Gayetay and bearing his company's name was not prepared by his company, but was created elsewhere with a typewriter. I *Transcript* at 74-78.

Fred Gayetay testified that he worked at the Wrentham State School, never worked at Job Link, I *Transcript* at 90-97, never saw tax forms filed in his name nor received refunds claimed

thereon, I *Transcript* at 94-100, and never asked Easy Electronic Tax Service to do his taxes, I *Transcript* at 98.

2. Minah Carto & Her Claimed Employer

Kathy Brickel was the Payroll Personnel Director for an employer called Charlesgate Nursing Center. I *Transcript* at 143. She testified that a W-2 form for Minah Carto and bearing her company's name was not prepared by her company, I *Transcript* 147, and that Minah Carto did not work for Charlesgate in 1992, I *Transcript* 146.

Minah Carto testified that she was not employed at all in 1992 because she had just arrived in the country, II *Transcript* at 49-50, had never worked for Charlesgate, II *Transcript* at 55, did not file any income tax forms in 1992, II *Transcript* at 50, never had EETS do taxes for her, II *Transcript* at 54, never saw the tax forms filed in her name, II *Transcript* at 55, did not sign or accept any checks in her name, II *Transcript* at 57, and did not receive a tax refund claimed for her, II *Transcript* at 53.

3. Varwoi Jordan & Her Claimed Employer

Kathy Brickel also testified that a W-2 form for Varwoi Jordan and bearing her company's name was not prepared by her company, I *Transcript* at 147, and that Varwoi Jordan did not work for Charlesgate in 1992, I *Transcript* at 145-46.

Varwoi Jordan testified that she was not employed at all in 1992, II *Transcript* at 25-26, because she was a 16-year old high school student, II *Transcript* at 23-24, had never worked for Charlesgate, II *Transcript* at 30, never had EETS do taxes for her, II *Transcript* at 29, did not have a child that was claimed for her, *Transcript* at 28, never saw the tax forms filed in her name, II *Transcript* at 27, did not sign a tax form in her name, II *Transcript* at 32, and did not receive a

tax refund claimed for her, II *Transcript* at 28.

4. Prince Jordan & His Claimed Employer

Similarly, Martha Norris was the Human Resource Manager at an employer called Elmwood Sensors. II *Transcript* at 76. She testified that a W-2 for Prince Jordan and bearing her company's name was not issued by her firm. II *Transcript* at 77-79.

Prince Jordan testified that he was a junior in highschool in 1992, II *Transcript* at 5, that he held only part-time odd-jobs in 1992, II *Transcript* at 6, never worked for Elmwood Sensors, II *Transcript* at 11, didn't file taxes in 1992, II *Transcript* at 6, didn't go to EETS for help, II *Transcript* at 10, had never seen tax forms filed with his name and social security number, II *Transcript* at 7-8, didn't sign tax forms bearing his name, II *Transcript* at 12, and didn't receive the refund claimed in his name, II *Transcript* at 8.

5. Dorothy Johnson & Her Claimed Employer

Joyce Sormanti was the Administrator of Heritage Hills Nursing Center. I *Transcript* at 117-118. She testified that Dorothy Johnson had not worked there in 1992, I *Transcript* at 120, and that a W-2 form for Dorothy Johnson and bearing her company's name was not prepared by her company, I *Transcript* at 121.

Dorothy Johnson testified that she had never worked for Heritage Hills Nursing Center, I *Transcript* at 131, did not file a tax return in 1992, I *Transcript* at 135, did not have the child her return claimed, I *Transcript* at 129, and did not sign or receive a tax refund check bearing her name, I *Transcript* at 133.

6. Lauretta Gaye & Her Claimed Employer

Finally, William Fernandes, as above, testified that a W-2 form for Lauretta Gaye and bearing his company's name was not prepared by his company, but was created elsewhere with a typewriter. I *Transcript* at 78-82. Lauretta Gaye testified that she had never worked for Job Link in 1992. II *Transcript* at 92.

Thus, there is no dispute that false tax returns were submitted to the IRS and that crimes were committed.

C. Shedrick Geyetay Did the Crimes

However, no clear connection was made by any of the witnesses to the defendant's alleged role in the crimes. It was uncontradicted testimony that Mr. Noah never filled out any tax forms, but only that he unknowingly electronically transmitted false information contained on them to the IRS. Rather, the evidence shows that several people, notably Shedrick Geyetay, had easy opportunities to do the crimes, had family or close personal relationships with all the victims, and had a financial motive as well.

The defendant is not asking this court to review the credibility of witnesses. That is the job of the jury. *United States v. Garcia*, 905 F.2d 557 (1st Cir. 1990), *cert. denied,* 493 U.S. 1094. The jury clearly believed all the witnesses cited, for it could not have rendered a verdict of guilty without believing them. Rather, the defendant is pointing out that the guilt of Shedrick Geyetay is at least as plausible as the guilt of the defendant. Accordingly, because there is doubt based on reason, the defendant's conviction must be reversed.

Both Shedrick Geyetay, III *Transcript* at 101, 104, IV *Transcript* at 41-42, and Eleanor Gaye, IV *Transcript* at 42, had keys to the office. Both worked there. A typewriter, which might

have been used to create several false W-2 forms, VI *Transcript* at 43-51, was kept in the front section of the office and was accessible to all. II *Transcript* at 90-91, 120, 123; III *Transcript* at 60; III *Transcript* at 186-87; IV *Transcript* at 14; IV *Transcript* at 43.

Shedrick Geyetay was taught how to fill out W-2 and 1040 tax forms, III *Transcript* at 77-78, although the IRS intends for it to be done by every taxpayer without specialized training. Moreover, as the court pointed out at sentencing, anyone with any experience in taxes knows that the IRS would easily discover false W-2s because both employees and employers must file them. IX *Transcript* at 13. But Shedrick Geyetay was inexperienced and unworldly enough to believe that he could get away it. His entire job history is as a menial worker. He emptied bed pans at a state school for the mentally retarded, III *Transcript* at 37, was a janitor, III *Transcript* at 39, and in Liberia a laborer, machinist, and security guard. III *Transcript* at 74. Before working at EETS he had no tax experience, III *Transcript* at 44, and none of his jobs involved bookkeeping or other significant paper-work. III *Transcript* at 38. His employment history probably befits his intellect, as he testified that the retained no knowledge from the classes he was given about filing taxes. III *Transcript* at 76-77. Thus Shedrick, rather than the defendant, is much more probably the type of person capable of making the very poor assumption that he could get away with this crime.

A government witness who also worked at EETS testified that she was suspicious that some tax forms on file at EETS were awry, IV *Transcript* at 45-46, that she told Shedrick, *id.*, but that Shedrick apparently did nothing even though he was a close friend of the defendant.

Shedrick had family or close social relationships with all the victims. While it is not clear how the government claims that the information necessary to create false tax returns ever got in

the hands of the defendant, each of the victims' testimony suggests a clear route for the information to get into Shedrick's. In addition, Shedrick's signature appears on tax documents or tax checks for all but one of the victims.

1. Fred Gayetay & His Tax Information

Shedrick is Fred Gayetay's father. I *Transcript* at 105. Shedrick had Fred's social security number because at some point Shedrick claimed Fred on Shedrick's taxes. III *Transcript* at 65. While Fred never asked his father to file his income taxes for him, I *Transcript* at 102, Fred allows that Shedrick might have done it anyway. I *Transcript* at 116. Although Fred knows the defendant because Mr. Noah is Shedrick's friend, I *Transcript* at 102-103, Fred never had any connection with Easy Electronic Tax Service. I *Transcript* at 98. Shedrick admitted that he, Shedrick, signed a check bearing Fred Gayetay's name. III *Transcript* at 55. The government did not provide a cogent explanation for how the defendant might have gotten Fred's tax information, and the only reasonable explanation is that Shedrick got it from his son and filed a false tax return using it.

2. Minah Carto & Her Tax Information

Shedrick got Minah Carto's tax information from Minah Carto's mother, Marian Wonlah.

Minah Carto's mother is Marian Wonlah. I *Transcript* at 139; II *Transcript* at 61; III *Transcript* at 88. Marian Wonlah is friends with Shedrick, I *Transcript* at 109, and they are also cousins, III *Transcript* at 88. Marian and Shedrick know each other because Marian emigrated from Africa with Shedrick's son Fred. II *Transcript* at 58, 62, 108. Shedrick admitted that he signed tax forms bearing Minah Carto's name, III *Transcript* at 50 and also signed a check bearing Minah Carto's name, III *Transcript* at 58.

Minah Carto did not know the defendant, II *Transcript* at 59, and the government provided no cogent explanation for how Minah Carto's tax information got into the defendant's hands. The only reasonable explanation is that because Minah Carto was a brand-new immigrant, II *Transcript* at 49-50, she gave her tax information to her mother, Marian Wonlah, and Marian gave it to Shedrick. Moreover, because Shedrick admitted that Marian Wonlah also gave him Dorothy Johnson's tax information, III *Transcript* at 93, (see *infra*), it likely that she gave him Minah Carto's as well.

3. Varwoi Jordan & Her Tax Information

Shedrick got Varwoi Jordan's tax information either directly from Varwoi Jordan, or from Varwoi's mother, Elizabeth Powell.

Elizabeth Powell is Varwoi's mother. II *Transcript* at 33. In 1992, Elizabeth Powell was Shedrick's girlfriend., II *Transcript* at 14, 33-34; III *Transcript* at 49-50, 61, and apparently the relationship was close enough so that Varwoi considered Shedrick her stepfather. II *Transcript* at 36. During 1992, Shedrick and Elizabeth Powell were probably living together. II *Transcript* at 20; III *Transcript* at 61. Shedrick and Elizabeth Powell have borne children together. I *Transcript* at 105, II *Transcript* at 17, 42; III *Transcript* at 85. Shedrick admitted that he was Elizabeth Powell's boyfriend. Shedrick admitted that Elizabeth Powell gave him, Shedrick, Varwoi's tax information. III *Transcript* at 61, 86-87. Shedrick also admitted that he signed tax forms bearing Varwoi's name. III *Transcript* at 49. Shedrick further admitted that he had seen Varwoi's photo identification. III *Transcript* at 86

Varwoi did not know the defendant, II *Transcript* at 34, and never contacted his business regarding taxes, II *Transcript* at 29. The government provided no cogent explanation for how

her tax information and identification wound up in EETS's files, II *Transcript* at 44, or what connection the defendant had to them. The only reasonable explanation is that Shedrick got Varwoi's tax information from Varwoi or from Elizabeth Powell, Varwoi's mother, and that Shedrick created tax forms using false information.

4. Prince Jordan & His Tax Information

Shedrick got Prince Jordan's tax information from Prince, or from his mother, Elizabeth Powell.

Prince Jordan is Varwoi's Jordan's brother, II *Transcript* at 35, and Prince's mother is also Elizabeth Powell. II *Transcript* at 13. As noted above, Shedrick and Elizabeth Powell were very close, and were probably living together. As Prince was a junior in high school at the time, Prince's mother Elizabeth Powell kept for safe-keeping his important documents, including his social security and identification cards. II *Transcript* at 20-21. In 1992 Prince gave his tax information to his mother, II *Transcript* at 11, 18, and she said she would make sure his taxes were done. II *Transcript* at 18. Shedrick admitted that Elizabeth Powell gave him, Shedrick, Prince's tax information, III *Transcript* at 61 III *Transcript* at 86-87, and that he had seen Prince's social security and identification cards. III *Transcript* at 86. Prince did not know the defendant, II *Transcript* at 14-15, and didn't go to the defendant's business for tax help. II *Transcript* at 10. Shedrick admitted that he signed tax forms bearing Prince's name. III *Transcript* at 50.

The government provided no cogent explanation for how the defendant got hold of Prince's tax information or identifications. The only reasonable explanation, as in his sister's case, is that Shedrick got them from Prince or from Elizabeth Powell, Prince's mother, and that Shedrick created tax forms with false information.

5. Dorothy Johnson & Her Tax Information

Shedrick got Dorothy Johnson's tax information from Marian Wonlah, who in turn got them from Dorothy Johnson's mother.

Dorothy's mother is Rebecca Fireman. I *Transcript* at 136. In 1992 Dorothy didn't understand tax forms, so she gave her tax documents to her mother so that Rebecca could bring them to a friend, Marian Wonlah, who either Dorothy or Rebecca believed understood taxes. I *Transcript* at 126-127. Marian Wonlah is close friend of Dorothy's mother, I *Transcript* at 136, and Marian Wonlah is also friends with Shedrick. I *Transcript* at 109. Dorothy testified that Marian Wonlah took Dorothy's tax information and came back with prepared returns. I *Transcript* at 136-8. Shedrick admitted that Marian gave him, Shedrick, Dorothy's W-2 form. III *Transcript* at 93. Dorothy does not know the defendant, I *Transcript* at 134, (although Shedrick was probably aware that they are related, IV *Transcript* at 46).

The government provided no cogent explanation for how the defendant would have gotten Dorothy's tax information. But it is apparent that they were given to Shedrick. Thus, the only reasonable explanation for the existence of a false tax return in Dorothy's name is that Shedrick did it.

6. Lauretta Gaye & Her Tax Information

In Lauretta Gaye's case, the government provides the only plausible connection — albeit tenuous — between the defendant and any false tax return. On direct examination Lauretta Gaye testified with clear, direct, and active-voice statements that she gave her tax information to Mr. Noah, and not to her mother. II *Transcript* at 92. On cross examination, however, she equivocates:

"Q: Did you give your W-2 form to your mother?

A: Did I give my W-2 form to my mother? I think I show it to her but, you know, it was given to him, to Mac Noah.

Q: So you showed it to your mother. Did she give it to Mr. Noah?

A: No. She said that I'm not going to make any money from it, then Mr. Noah said he would look at it. . . ."

II *Transcript* at 124. On cross examination her active-voice statement becomes passive — the tax form "was given" to Mr. Noah. Thus, there is no basis to know whether Mr. Noah ever got the tax return from her.

Moreover, even Lauretta Gaye's statement does not connect Mr. Noah with any illegal conduct. At most it puts him in possession of Lauretta Gaye's W-2 form. Shedrick and others still had access to the office. Although Lauretta Gaye testified that Mr. Noah prepared her tax return , *Transcript* at 100, she provided no basis for this belief. She did not see Mr. Noah do anything beyond take her W-2 from her (if that). In addition, both Lauretta and Shedrick testified that Shedrick, and not Mr. Noah, signed the return bearing Lauretta's name. II *Transcript* at 99; III *Transcript* at 53

Finally, the falsified facts — that Lauretta worked for an employer called Job Link, and that the W-2s purporting to have been prepared by Job Link in Lauretta's name were created using a typewriter and not by Job Link — are identical to the falsified facts of the W-2s bearing Fred Gayetay's name. This leads to the conclusion that the crimes in these two instances were done by the same hands. As shown above, the government proffered no evidence tying Fred Gayetay's case with the defendant; but rather there is plenty of evidence tying Fred's tax information to his father Shedrick. Thus, it is likely that Lauretta Gaye's falsified taxes were

done by Shedrick, and not by the defendant.

It is important to point out as well that Lauretta's name was misspelled on the falsified tax documents. II *Transcript* at 93-94. These errors look more like the work of Shedrick, who has little schooling and has held only menial jobs requiring no reading or writing, than they do of Mr. Noah, who claims a much more literate background.

D. The Defendant Cashed Checks as a Service for His Customers

The government apparently relies on the fact that Mr. Noah had members of his staff cash refund checks. Mr. Noah testified that he had the checks cashed because he recognized that many of his customers did not have bank accounts, and that he felt it was important to give his customers their refunds in cash. In fact his story was corroborated. In at least two instances a government witness saw Mr. Noah give cash to customers. IV *Transcript* at 25, 42, 44.

II. The Defendant Was Denied His Right to Self-representation

Criminal defendants have a Sixth Amendment right to self-representation. *Faretta v. California*, 422 U.S. 806 (1975); *Johnstone v. Kelly*, 808 F.2d 214 (2d Cir. 1986), *after remand*, 812 F.2d 821, *cert. denied*, 107 S.Ct. 3212. They also have statutory rights:

> "In all courts of the united States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

28 U.S.C. § 1654.

While the right is absolute if the request to proceed *pro se* is made before trial, *United States v. Wesley*, 798 F.2d 1155 (8th Cir. 1986), the court has discretion to deny self-representation once trial has begun. *United States v. Smith*, 780 F.2d 810 (9th Cir. 1986) (request made on second day of three-day trial); *but c.f., United States v. Lawrence*, 605 F.2d 1321 (4th Cir. 1979), *cert. denied,* 100 S.Ct. 1041 (motion made on eve of trial before jury sworn in, but there had been extensive pre-trial legal maneuvers).

After trial has begun, the court may consider whether allowing self-representation will disrupt the proceedings, *id*; *United States v. Bentvena*, 319 F.2d 916 (2d Cir. 1963) (extensive subsequent case history omitted), and whether the defendant has an extraordinary disability rendering him incapable of presenting a defense. *United States v. Purnett*, 910 F.2d 51 (2d Cir. 1990) (court doubted defendant's competency); *Savage v. Estelle*, 908 F.2d 508 (9th Cir. 1990) (defendant had severe speech impediment). However, the court cannot deny the defendant his right to self-representation merely because of a lack of legal training, *Faretta v. California*, 422 U.S. 806 (1975), because of a general lack of expertise or professional capability, *United States v. Bennett*, 539 F.2d 45 (10th Cir. 1976), *cert. denied*, 429 U.S. 925, the seriousness of the

charges , *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972), or the court's opinion that self-representation is usually inadequate. *United States v. Price*, 474 F.2d 1223 (9th Cir. 1973), *reh'g denied,* 484 F.2d 485.

The appeals court may not apply a harmless error analysis when the trial court denies a motion to proceed *pro se*. *McKaskle v. Wiggins*, 465 U.S. 168 (1984), *reh'g denied*, 465 US 1112.

> "Since the right to self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless."

McKaskle, 465 U.S. at 177 n.8. *See also Flanagan v. United States,* 465 U.S. 259 (1984). Thus, the defendant need not make a showing of prejudice.

When self-representation is unlawfully denied, reversal is required.[2] *Johnstone v. Kelly*, 808 F.2d at 214.

> "[T]he Supreme Court has recognized that some constitutional errors require reversal without regard to whether such error might have affected the outcome of the trial.
>
> . . .
>
> Since harmless error analysis serves to promote fair trial outcomes at trial, its application has generally been limited to denial of rights accorded defendants to facilitate their defense or to insulate them from suspect evidence. . . . Harmless error analysis has not been applied to rights that are essential to the fundamental

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[2] *Before McKaskle* and *Flanagan*, the circuits were split on whether, without a showing of prejudice, reversal was not the appropriate remedy. The second, fifth, and eighth circuits required a showing of prejudice. *Juelich v. United States*, 342 F.2d 29 (5th Cir. 1965); *Butler v. United States*, 317 F.2d 249 (8th Cir. 1963), *cert. denied*, 375 US 836, cert den, 375 U.S. 838; *United States v. Cantor*, 217 F.2d 536 (2d Cir. 1954), while the seventh and ninth circuits found that because proceeding *pro se* is a constitutional right, reversal was necessary regardless of prejudice, *United States v. Price*, 474 F.2d 1223 (9th Cir. 1973), *reh'g denied*, 484 F.2d 485; *Lowe v. United States*, 418 F.2d 100 (7th Cir. 1969).

> fairness of a trial or that promote systemic integrity and individual dignity. . . . The right to self-representation derives principally from interests beyond ensuring the trial outcomes are fair. . . . The Sixth Amendment's right to self-representation reflects values of individual integrity, autonomy, and self-expression. . . . Violation of the right to self-representation sacrifices these values even in the absence of effect on the outcome of the trial."

Johnstone, 808 F.2d at 217-18 (citations omitted).

Mac Noah attempted to fire his attorney and proceed *pro se* before his trial began. On the first day of trial, after some preliminary matters, the court announced that it had to excuse one juror and pick an alternate. I *Transcript* at 9. Attorney Leo Manfred, the defendant's trial counsel interrupted the court and announced:

> "MR. MANFRED: Excuse me, your Honor. I realize it's highly unusual, but my client wants to express a desire to address the Court.
>
> THE COURT: No. That's not appropriate.
>
> MR. NOAH: I don't want to address the Court on issues between my counsel. I request your Honor - -
>
> THE COURT: You be quiet. You have a lawyer who speaks for you, and that's enough. Be seated, please, while I proceed with this trial."

I *Transcript* at 10. The Court then went on with other business and the jury was shortly sworn in. I *Transcript* at 12.

The defendant, Mr. Noah, is ineloquent and hampered by his foreign accent. However, he made his point. He made it clear enough so that the court's response indicated its intention to not allow the defendant to go forward *pro se*. Because Mr. Noah effectively made his motion before the commencement of the trial, and it was denied, reversal of his conviction is necessary.

On the third day of trial the defendant tried again to fire his lawyer. In the morning before the jury was brought into the courtroom, the court allowed Mr. Noah to make a motion to

proceed *pro se*. III *Transcript* at 3-10. After stating his reasons, including how his attorney had failed, in the defendant's view, to put certain facts into evidence, the court commented on the defendant's abilities:

> "THE COURT: It isn't your case yet, so you can't offer evidence at the moment. You have to wait until it's your turn, until it's your case. You see, you don't understand the rules of evidence.
>
> MR. NOAH: Okay.
>
> THE COURT: And I think if you try this case, you're going to botch it up to a farethewel [sic]. You're going to assure that you're going to prison for a long period of time."

III *Transcript* at 7. After further stating his reasons, the court further commented on the defendant's abilities and the court's view that *pro se* defendants harm themselves:

> "THE COURT: None of that is relevant . . . . I don't think you have the ability to defend yourself in this case, and you'll be putting yourself in prison, and I'm going to protect you from that.
>
> . . .
>
> And I think you're incompetent to represent yourself in this case. You may think you know a lot about the tax laws, but you don't know anything about trying a case in court. I've been doing this a lot of years, and I've seen people like you who choose to defend themselves, and they end up convicting themselves. So I'm going to protect you against yourself. . . . So your motion is denied."

III *Transcript* at 8-10.

On the fourth day of trial, the defendant again attempted to fire his lawyer. Again in the morning before the jury was shown into the courtroom, the court allowed the defendant to renew his motion.

> "THE COURT: So what kind of a hearing do you want?
>
> MR. NOAH: A further hearing that is to prove to you that I am capable to defend myself in this case.

THE COURT: Well, have you ever studied the law in this county?

MR. NOAH: I have not studied the law in this country in school, but I have followed the law carefully, and I am a college graduate, and have my MBA in Economics, my Bachelor's in Economics, okay? And I have a minor in Sociology, minors in Accounting.

THE COURT: That doesn't make you a lawyer.

. . .

. . . This is a criminal case. It involves the criminal law. It involves the rules of evidence, the admissibility of evidence, and you obviously have no knowledge of the law of evidence, do you?

. . .

MR. NOAH: Your Honor, are you saying my motion is denied?

THE COURT: I think it would be a tragedy for you to try to represent yourself in this case because I'm sure you couldn't possibly know how to cross-examine witnesses, and I'm sure that you wouldn't know how to make a proper final argument to the jury.

MR. NOAH: Your Honor, I'm capable - -

THE COURT: And I'm sure that you will attempt to influence the jury by your actions as a lawyer in the case in attempting to testify not under oath, and this is a complete disruption of the proceedings.

I'm satisfied that to allow you to defend yourself in this case would be a disruption, since we are almost through the Government's case. And to allow you to come in now and discharge your lawyer in midstream would be totally destructive of the orderly process of - -

MR. NOAH: Your Honor - -

THE COURT: - - criminal law, the trial of cases. This is the United States of America. You're given more rights here than you ever had in Liberia. I'm sure of that.

. . .

MR. NOAH: Are you denying my motion, your Honor?

THE COURT: Your motion is denied because the disruption of the proceedings outweighs your right to represent yourself. If this matter had come up before trial,

then I could have dealt with it. I could have allowed you to represent yourself and have standby counsel.

MR. NOAH: I didn't know that until we were into the trial - -

THE COURT: But now that the trial has started, it's too disruptive.

MR. NOAH: I didn't know that until we were into the trial before I found out what I found out. Had I known before, I would have made this motion before the trial begins.

THE COURT: Well, it's too late."

IV *Transcript* at 3-7.

While the court finally came around to a permissible reason to deny the defendant's motion — disruption — it is clear that the denial was based on the court's view, expressed on two consecutive days, of the defendant's abilities. Moreover, the court put the defendant in an impossible situation. On the first day of trial before the jury was sworn in, the defendant tried to fire his attorney, but the court wouldn't let him speak. When he was finally allowed to speak, the court impermissibly denied his motion based on its view of the defendant's ability to defend himself, his education, his knowledge of the law, the court's experience with this type of defendant, and — circularly — that the motion was too late.

Mr. Noah's conviction should be reversed because his a timely motion to represent himself was denied, and because that denial was based on impermissible grounds.

III. The Defendant Was Denied His Right to a Bill of Particulars

A criminal defendant has a right to request a bill of particulars. *United States v. Debrow*, 346 U.S. 374 (1953). The standard of review from a refusal to grant a bill is abuse of discretion. *Wong Tai v. United States*, 273 U.S. 77 (1927).

The function of a bill of particulars is to enable the defendant to prepare a defense and to avoid the danger of surprise at trial. *See e.g., United States v. Glaze*, 313 F.2d 757 (2d Cir. 1963).

On or about October 11, 1996, the defendant filed a "Defendant's Motion in Limine." It asked for:

> "an Order limiting the scope and range of the Government's case in chief and rebuttal to the (6) counts charged in the indictment. The Defendant's attorney seeks a protective Order against the raising of 'anywhere from (15) to maybe (60) additional cases', from being presented to the Government's case in chief and rebuttal, in that these additional non-charged files and information is highly prejudicial to the Defendant, and the purpose of allowing such numerous additional files and information, being injected into the trial, although relevant at sentencing, if applicable, would highly bog down the Defendant's attorney, consume all this time in preparing for this one trial, requiring review with the Government IRS agent as well as Defendant, and separating relevant and non-relevant and inadmissible information; surely resulting in additional Motions before this Court."

Defendant's Motion in Limine, Appendix at 1. The Government's response pointed out that:

> "The Internal Revenue Service (IRS) has identified approximately 100 income tax returns which the defendant prepared and which were electronically filed with the IRS. Of those 100 income tax returns the IRS has identified approximately 60 which contain false items. Of those 60 income tax returns, approximately 18 are essentially fictitious returns. Those 18 returns include the six returns which form the basis for the six counts of the instant indictment."

Government's Response to Defendant's Motion in Limine, Appendix at 3-4. The defendant's attorney was thus forced to assume that any one or all of approximately 60 returns, beyond those charged in the indictments, would be introduced into evidence by the Government.

Although the defendant's Motion for Limine was not entitled "Request for a Bill of Particulars," it should have been treated as one. FED. R. CRIM. P. 7(f). The misnaming of such a motion does not result in their denial. *United States v. Leighton*, 265 F. Supp. 27 (D.N.Y. 1967) (request for Information treated as Demand for Bill of Particulars); *United States v. Brown*, 179 F. Supp. 893 (D.N.Y. 1959) (Motion for Information and Inspection treated as Motion for Bill of Particulars). The rules of criminal procedure are designed to promote function over form rather than the reverse. *See Daley v. United States*, 231 F.2d 123 (1st Cir. 1956), *cert. denied*, 76 S.Ct. 1028, 351 US 964; *see also* FED. R. CRIM. P. 2.

Admittedly the defendant's motion is inartfully drafted, but it makes clear that preparing for 100, or even 60, returns, when only 6 are charged, would unfairly burden the defendant. Because the defendant did not know what facts would be presented, counsel was forced to learn and understand the facts contained in all the returns, discuss each with the defendant, investigate each one, contact and prepare witnesses associated with each, and prepare to defend against them. The defendant made a showing of what he wanted — that non-disclosure of the information would lead to surprise, and to the obviation of a meaningful defense preparation. It is clear that the motion, regardless of its name, was a request for a bill of particulars.

The defendant filed his Motion in Limine more than 10 days after arraignment because it was not until discovery took place that he became aware of the government's refusal to limit itself at trial to the documents charged in the indictment.

The court denied the motion on the morning of trial. I *Transcript* 3-6. Although defense counsel made his argument regarding the burden of preparing for returns that were not part of the charged offenses, the court regarded the motion as simply a request to suppress certain bits of

evidence, such as a 404(b) motion, and indicated that the court would rule on each particular bit of evidence as it was introduced. I *Transcript* 6. The court missed the point. By the court's failure to grant the motion, the harm — the defense having to prepare for all the returns — had been done.

The denial of a bill of particulars should result in reversal. *Wong Tai v. United States*, 273 U.S. 77 (1927).

IV. The Defendant Does Not Have a Special Skill Used in the Crime

The defendant's sentence was elevated two points for use of a special skill pursuant to the sentencing guidelines, which provides enhancement:

> "[i]f the defendant . . . used a special skill, in a manner that significantly facilitated the commission or concealment o the offense."

U.S.S.G. § 3B1.3. "Special skill" is defined as

> "a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts."

U.S.S.G. § 3B1.3, Application note 2. To be a special skill, the skill must be one that is not widely held by the general public and must require substantial education, substantial training or substantial licencing.

This court reviews *de novo* whether a particular skill is a special skill for the purposes of the sentencing guidelines. *United States v. Connell*, 960 F.2d 191, 197 (1st Cir. 1992).

The District Court erroneously found that Mr. Noah's abilities are a "special skill" and therefore erroneously elevated his sentence based on that finding. In fact, what Mr. Noah allegedly did was quite simple; the government needed just two witnesses to explain it. The first was Robert Riley, employed by the IRS's custodian of records. I *Transcript* at 34. He explained the IRS's electronic filing system, how it is done, and how a person gets authorized to do it for others. Mr. Riley's entire testimony spans only 38 pages. I *Transcript* at 34-73. The second was Lisa Clark, Assistant Manager for Financial Transactions at Beneficial National Bank. She explained how her bank sets up refund anticipation loans. While much of her testimony concerned the issuance of specific checks, it still totaled just 36 pages. II *Transcript* at 130-166.

Mr. Noah's business consisted of collecting customers' tax returns, typing them into a computer, sending them electronically to the IRS, issuing a refund loan check, and at times cashing those checks. Any reasonably intelligent member of the public could do what Mr. Noah did.

Nonetheless, the court found Mr. Noah had a special skill based on a number of factors.

First, it found that he was educated in the field. To have a special skill, the guidelines require that the defendant have a "substantial education." U.S.S.G. § 3B1.3, Application note 2. At most, however, the defendant claimed he had a minor in accounting from a college in Colorado, Illinois, or California. But he could produce no documentation of a degree, and the U.S. Probation Officer who wrote Mr. Noah's Pre-Sentence Investigation Report (PSI) was unable to verify that Mr. Noah completed any higher education. *PSI,* Appendix at 14-15. In fact, the court specifically found that Mr. Noah did not have an education. The court said:

> "I think his educational background is a big fraud, that he never received a bachelor's degree from any accredited college or university in this country, or a Master's Degree. Woodbury College, supposedly in southern California, doesn't seem to exist. If it does exist, it was probably a diploma mill. It can't be found, in any event, and the probation officer made an attempt to find it. Even the defendant couldn't find it. His excuse was, maybe they moved."

IX *Transcript* at 15. Moreover, the court, in commenting on the defendant's apparent poor planing, said:

> "If he had any ounce of common sense or knowledge in this field, he would have known that sooner or later the IRS would have matched up these W-2 forms with what they received from employers, and that these W-2 forms in these many instances would have been found fictitious, and that's exactly what happened."

IX *Transcript* at 13. The court is correct, for it is common knowledge that both employers and employees must send copies of W-2s to the IRS. The court's statement belies any possible

finding that Mr. Noah had substantial education in accounting, finance, taxation, or any other field that would give him a special skill. *Cf. United States v. Aubin*, 961 F.2d 980, 984 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 248 (defendant was trained service repair person for company which manufactured ATMs, and knew how to cause malfunction that would bring service people to the machine, thus enabling defendant to enter machine).

Mr. Noah's case is unlike *United States v. Fritzson*, 979 F.2d 21 (2d cir. 1992), in which the defendant was convicted of filing false tax returns and his special skill as an accountant was used to enhanced his sentence. In *Fritzson*, the defendant falsely inflated earnings and withholdings, but also prepared and filed false corporate payroll tax returns to bolster the withholding representations made in the false income tax returns. Mr. Fritzson, although he was caught, had not only the common sense, but the educated sense, to attempt a complex scheme to avoid the simplistic double-check of which Mr. Noah was apparently unaware.

The court also based its finding of special skill on the fact that Mr. Noah knew how to file tax returns electronically. IX *Transcript* at 15. Perhaps the process seemed mysterious to the court, but the fact is that Mr. Noah's business used a computer program called "Turbo Tax." VI *Transcript* at 31. Turbo Tax is a mass-marketed consumer product — the most popular tax preparation computer software — widely available for less than $50. *Tax Bytes*, CONSUMER REPORTS, Mar. 1997, at 32; *Taxation Without Frustration*, PC MAGAZINE, Mar. 18, 1997 at 281. Electronic filing of federal income taxes using such software is now routine, with 14.6 million 1993 tax returns electronically filed in 1994. *Getting the IRS to Cough up Quicker*, BUSINESS WEEK, Feb. 7, 1994 at 122. The same software the defendant had is used each year by millions of Americans who electronically file their returns right from their home PCs for a charge of

$9.95. *Tax Bytes*, *supra*; *Taxation Without Frustration*, *supra*.

The court further based its finding of special skill on Mr. Noah's use of a computer. IX *Transcript* at 15. Perhaps computers also mystify the court, but in the 1990s computers are a ubiquitous consumer commodity, with over 27 million of them sold in the United States in 1996 alone. *Looking Back*, PC MAGAZINE, Mar. 25, 1997 at 108, 129. Knowing how to use a computer can hardly be considered a special skill.

The court also found that Mr. Noah's ability to get approval from the IRS to file other people's taxes was a result of a special skill. IX *Transcript* at 15. However, as the Government's IRS witness described, the process is hardly taxing:

> "A firm or individual who desired to be involved with the electronic . . . return system, would first of all complete an application. That would be sent to the Internal Revenue Service for review. The second step would be for the firm or individual to pass a suitability check. By suitability, I mean that . . . Internal Revenue Service would check past history of the firm or individual for their own tax filing history, and . . . then if the individual or firm is determined to be reputable and conscientious, and would truthfully handle the integrity, or promote the integrity of the electronic system, they would be accepted on the suitability side, and the last step would be that the individual for firm have the computer hardware and software capable of transmitting to the electronic system at the Internal Revenue Service."

I *Transcript* at 36-37. The applicant then receives an "electronic filing identification number" (EFIN). *Id.* at 42. All one needs to do is apply.

Further, no license necessary to be a part of the IRS's system:

> "According to the Department of Business Regulation, the State of Rhode Island does not require an individual to be an accountant or to have special licensure in accounting to operate a tax service."

Addendum to PSI, Appendix at 29.

Even if the IRS's nominal application can be considered a license, it is not the

"substantial . . . licensing" required by the guidelines. U.S.S.G. § 3B1.3, Application note 2. This case is not like some where the defendants met significant licensing requirements, such as accountants, *United States v. Rice*, 52 F.3d 843 (10th Cir. 1995) (tax evasion); *United States v. Fritzson*, 979 F.2d at 21(filing false tax return); *United States v. Kaufman*, 800 F. Supp. 648 (N.D. Ind. 1992) (skimming funds from corporate accounts), attorneys, *United States v. Shenberg*, 89 F.3d 1461, 1478 (11th Cir. 1996) (use of skill to file pleadings and review documents in perpetrating crime); *United States v. Graham*, 60 F.3d 463 (8th Cir. 1995) (trust and estate attorney invented trust documents); *United States v. Franklin*, 837 F. Supp. 916 (N.D. Ill. 1993) (bankruptcy attorney), stockbrokers, *United States v. Connell*, 960 F.2d 191, 197 (1st Cir. 1992) (money laundering through complex trades); *United States v. Ashman*, 979 F.2d 469 (7th Cir. 1992) cert den., 510 U.S. 814 (fraudulent trading by CBOT trader), a physician, *United States v. Johnson*, 71 F.3d 539 (6th Cir. 1995), *cert. denied*, 116 S.Ct. 1338 (distribution of illegal drugs), licensed pilots, *United States v. Mettler*, 938 F.2d 764 (7th Cir. 1991) (pilot flew surveillance); *United States v. Culver*, 929 F.2d 389 (8th Cir. 1991), or a licensed large-truck driver. *United States v. Lewis*, 41 F.3d 1209 (7th Cir. 1994) (drove truck to conceal crime).

The court also found that Mr. Noah had a special skill based on his ability to set up the refund anticipation loan arrangement with his bank. However, this is not difficult — just a two-page application to the bank. 2 *Transcript* at 137-38, 160. The bank apparently relies on the government's suitability check by asking for the applicant's EFIN number. In no way can this be regarded as licensing, and the process is simple.

The court also deemed that Mr. Noah had a special skill based on its finding that he "held himself out to have" a special skill. IX *Transcript* at 16. First, there is no indication in the

record anywhere that Mr. Noah advertised or indicated to anyone that he had any special skills. At most he advertised that his business could get its customers fast refunds. "Further, the probation officer ha[d] no information suggesting that the defendant conducted business by advertising himself as an accountant." *Addendum to PSI*, Appendix at 29. Second, even if he did hold himself out as having a special skill, "holding out" is not an element of the enhancement guideline. In *United States v. Hickman*, 991 F.2d 1110 (3d Cir. 1993), the defendant was a building contractor convicted of mail fraud for mailing letters, progress reports, and supposed photos of a house on St. Croix to his clients in New York who had contracted to have the house built. The appeals court found that his sentence should not have been enhanced because his alleged special skill as a contractor was used to woo the clients, not to do the crime. Thus, what one says to attract customers, or how one holds himself out, is not a consideration in whether the defendant has a special skill used to perpetrate the crime.

Finally, the court found that Mr. Noah had a special skill because he told his employees he would train them. However, the undisputed testimony, or even complaints, from all of his employees is that they never got taught how to file tax forms electronically until sometime after the end of the tax season. *See e.g.*, III *Transcript* at 60 (Shedrick); IV Transcript at 43 (Eleanor Gaye).

Nothing in the court's finding or in the record indicate that the defendant possessed a special skill. Even if he did possess a special skill, he could not have used the skill to facilitate or conceal the crime. Mr. Noah's alleged crime consisted of filing tax returns — a feat performed by every American taxpayer every year — combined with entering the wrong numbers. All of this was done without the aid of a computer, or any other know-how or

technology beyond an eraser and a typewriter. Thus even if he had a special skill, the crime alleged could be done by any literate person with a generalized knowledge of how to file an income tax return.

V. The Trial Judge Should Have Recused Himself for Bias

Criminal defendants have a due process right to an impartial judge. *Re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307 (2d Cir. 1988); *see United States v. Penes*, 577 F.2d 754 (1st Cir. 1978). The standard of review of a denial of recusal is abuse of discretion. *United States v. Voccola*, 99 F.3d 37 (1st Cir. 1996).

Federal law provides that:

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

28 U.S.C. § 455(a); *see also* 28 U.S.C. § 144. Recusal under section 455(a) and section 144 are measured by the same standards. *United States v. Kelley*, 712 F.2d 884 (1st Cir. 1983).

A judge should recuse himself when the judge's impartiality may be reasonably questioned. The court must ask whether an objective knowledgeable member of the public would find a reasonable basis for doubting the judge's impartiality. *Re Allied-Signal, Inc.*, 891 F.2d 967 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 2561; *United States v. Cowden*, 545 F.2d 257, 265 (1st Cir. 1976), *cert. denied*, 430 U.S. 909 (1977). Statements showing a judge's bias need not be extrajudicial. *Liteky v. United States*, 114 S. Ct. 1147 (1994); *United States v. Chantal*, 902 F.2d 1018 (1st Cir. 1990).

Section 455(a) does not require proof of any bias or prejudice in fact, but only that there is the appearance of possible bias. *United States v. Chantal*, 902 F.2d 1018 (1st Cir. 1990); *United States v. Antar*, 53 F.3d 568 (3d Cir. 1995).

Bias and prejudice has been defined by the Supreme Court. There is a

> "pejorative connotation [to] the words 'bias or prejudice.' Not *all* unfavorable disposition towards and individual (or his case) is properly described by those

> terms. . . . The words connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that he subject ought not to possess, . . . or because it is excessive in degree."

Liteky, 114 S. Ct. at 1155. (emphasis in original). In addition, bias and prejudice ought to be measured by a public standard of impartiality. Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 745 *passim* (1973).

In the case at hand, the trial judge made pejorative and inappropriate comments about the defendant's homeland. During a colloquy concerning the defendant's wish to represent himself, the Judge commented:

> "This is the United States of America. You're given more rights here than you ever had in Liberia. I'm sure of that."

IV *Transcript* at 6. Mr. Noah, with dark black skin, is a Liberian who at the time of trial had lived and worked in the United States for nearly 20 years. In fact, until its recent civil war, Liberia was a functioning democracy with a well-developed justice system based on Anglo-American common law. Central Intelligence Agency, *The World Factbook* (1996) (available on the Internet at http://www.odci.gov./cia/publications/pubs.html or from the CIA Public Affairs Staff, Washington, DC 20505 (703) 482-0623). The court simply expressed its racial and ethnic bias toward blacks and Liberians generally, and Mr. Noah specifically.

In making these comments the court went further than mere "expressions of impatience, dissatisfaction, annoyance, [or] even anger, that are within the bounds of what imperfect men and women . . . sometimes display." *Liteky*, 114 S. Ct. at 1157. Mr. Noah's motion for recusal, VI *Transcript* at 40-41, was not based on mere rulings negative to his position, court opinions, judicial ruling, or alleged remarks from the bench in other cases. *Phillips v. Joint Legislative*

Comm. on Performance & Expenditure Review, 637 F.2d 1014 (5th Cir. 1981), *cert. denied*, 456 U.S. 960. Rather it was based on bias against Liberians and this particular defendant.

Racial or ethnic comments are grounds for recusal. *Berger v. United States*, 255 U.S. 22 (1921), was a World War I era case in which the United States Supreme Court found that Judge Kenesaw Mountain Landis should have recused himself for saying in court of German-Americans that "[t]heir hearts are reeking with disloyalty." *Berger*, 255 U.S. at 28; *see Liteky*, 114 S. Ct. at 1157 (approving *Berger* and finding that the statement there would still cause recusal). In-court racial remarks show bias for which the judge should be recused if the defendant is of the group against which he spoke. *United States v. Ettinger*, 36 M.J. 1171, 1175 (Navy-Marine Corps Court of Military Review 1993) (comments were "reminiscent of somebody in the KKK"). The Fifth Circuit found that a judge should have recused himself for out-of-court comments, referring to the defendant, "that he was going to get that nigger." *United States v. Brown*, 539 F.2d 467 (5th Cir. 1976). In *Davis v. Board of Sch. Commrs.*, 517 F.2d 1044 (5th Cir. 1975), *reh'g denied*, 521 F.2d 814, *cert. denied,* 425 U.S. 944, the court found that racial prejudice might be grounds for recusal, but in that case the prejudice was against the attorney, and not the litigant. *See* Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 250 (1978) (standard of impartiality should be viewed from standpoint of reasonable person who is sensitive to concerns of racial group).

The trial court made unfounded pejorative comments about the defendant's ethnic background. As such he should have recused himself from the case. The error demands reversal.

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CONCLUSION

For the above-stated reasons, the appellant requests that this court reverse Mr. Noah's conviction because the evidence is not sufficient to sustain a conviction; because he was not allowed to represent himself; because he was not provided with a bill of particulars; and because the judge should have recused himself thus voiding all orders made after his comment, including the finding of guilt; or in the alternative, remand for re-sentencing because the defendant did not possess a special skill or use it in the commission or concealment of the alleged crime.

Respectfully submitted,

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By his Attorney,

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Dated: August 6, 2000

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I hereby certify that on August 6, 2000, a copy of the foregoing will be forwarded to Charles Tamuleviz, Esq., Loretta Argrett, Esq., and Leo Manfred, Esq.

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APPENDIX