

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**UNITED STATES OF AMERICA,**

\*

**Plaintiff – Appellee,**

\*

**-vs-**

\*

**Case No. 04-12354**

**DWIGHT D. YORK, aka  
MALAKAI Z. YORK,  
ISA MUHAMMAD, and  
ISA ALIHAD MAHDI**

\*

\*

\*

**Defendant – Appellant.**

\*\*\*\*\*

\*

**APPELLANT’S RESPONSE IN OPPOSITION TO  
GOVERNMENT’S MOTION TO STRIKE BRIEF**

\*\*\*\*\*

\*

COMES NOW, Appellant, Malachi Z. York, by and through his Attorney of Record and files his response to the Government’s Motion to Strike Appellant’s Opening Brief. The Appellant requests that the Government’s Motion be denied, declared frivolous, and that the Government be sanctioned for filing such a frivolous Motion. In support of this Response the Appellant states the following:

1.

As an initial matter, it is the Appellant’s contention that the Government’s

Motion is frivolous, without merit, and should be denied. By filing this Motion, the Government is requesting that this Court establish new brief guidelines exclusively for their benefit. Although the Federal Rules of Appellate Procedure are comprehensive, the Government suggests that it should contain rules which require that the Appellant obtain the approval of the Government (Appellee) before filing its brief. This notion is absurd and the Government's motion is deficient.

Additionally, the Government is simply attempting to cause unnecessary delay and get more time to file their brief.

2.

In its first enumeration, the government cites virtually no case authority for the proposition that an Appellant is required to ensure that such facts are included in the Appellant's brief as to satisfy, an Appellee's notion of what "fairly" places allegations of error into context. This is a sophomoric idea with no basis in law. One need only review the Government's reference to the Federal Appellant rules to expose the fallacy of the Government's position.

3.

The Government in paragraph number 1 does not actually cite precedent, while moving this Court to set a precedent that an Appellant's brief contain sufficiently objective facts as to satisfy the whim and caprice of an adversary.

4.

The Federal Rules of Appellate Procedure 28(a)(6)-(7) states in pertinent part as follows: **(a). The appellant’s brief must contain, under appropriate headings and in the order indicated: ... (6) a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below; (7) a statement of facts relevant to the issues submitted for review with appropriate references to the record ...**

5.

Rule 28(a)(6) only requires the Appellant to state his case briefly. Rule 28(a)(7) allows the Appellant to use his discretion to include only those facts which he deems are relevant.

6.

Similar to 28(a)(7), Federal Rule of Appellate Procedure (9)(A) **requires the argument must contain appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies ...** There is nothing to be taken from 9(A) but that the Appellant should shape the “argument” to contain his “contentions” and not the contentions of the Appellee.

7.

Federal Rule of Appellate Procedure 28-1(i)(ii) state in pertinent part as follows:

(i) Statement of the Case. In the statement of the case, as in all other sections of the brief, every assertion regarding matter in the record shall be supported by a reference to the volume number (if available), document number, and page number of the original record where the matter relied upon is to be found. The statement of the case shall briefly recite the nature of the case and shall then include:(i) the course of proceedings and dispositions in the court below. **IN CRIMINAL APPEALS, COUNSEL MUST STATE WHETHER THE PARTY THEY REPRESENT IS INCARCERATED;** (ii) a statement of the facts. A proper statement of facts reflects a high standard of professionalism. It must state the facts accurately, those favorable and those unfavorable to the party. Inferences drawn from facts must be identified as such;

8.

There is nothing to be taken from Federal Rule 28-1(i)(ii) but that it requires that the Appellant “briefly recite the nature of the case” ..., albeit, this brief

recitation shall include facts which are favorable and unfavorable, the Government does not complain that “unfavorable” facts were wholly omitted but rather subjectively favorable facts were not included. This argument is misplaced. The language requiring unfavorable facts does not define an unfavorable fact to include those facts which the government believed supported a jury verdict. This is a subjective notion.

In the case at hand, the Appellant’s Statement of the Case/Facts does indicate unfavorable facts - that there were witnesses that stated the Appellant and other members of the organization committed acts of child molestation. This is an unfavorable fact. However, the Statement of the Case/Facts also states that there are witnesses that stated that no child molestation occurred.

It is the Appellant’s contention that in accordance with the Appellate Court’s concept of a brief statement of the case/facts, that the generalized statements of the witnesses’ testimony was appropriate. The government’s counter contention to our “generalization” of the witness testimony contention, is that we should provide the Court with a detailed outlined of each of the over 80 (eighty) witnesses’ testimony over a 3 week period with detailed citations to the record. The government’s counter contention would have insulted this Court intelligence, because this contention could only indicate to the Court, that the briefing party believes the Court does not have the ability to read and make its own interpretations of the facts.

The government's complaint is that "citations as to the charges against York and as to the proof that supported the jury's verdict" were omitted. The superseding indictment is in the record and referred to, this explains the charges. Also, there is no objective way for one to know what degree of citations if included would satisfy the government.

9.

Paragraph Number 2 contains no citation to authority or competent argument and appears to be an extension of the argument set forth in Paragraph Number 1 except as to make the general point that unspecified "portions of the brief" are unsupported. The Government's arguments in this paragraph are unintelligible. For example, one unintelligible argument is that in this paragraph the Government refers to pages 34-39 of the brief stating that the Appellant did not provide any proof or any case law other than a 1974 decision from another circuit. Well for the Government to make this argument it is clear that the Government has not read the brief; because, this argument goes to the point that there was **NO EVIDENCE presented** by the Government to prove necessary elements of the referenced crimes under the MANN ACT. The government presented failed to provide and proof and presented **NO PROOF** of the elements of **purpose** or **unlawful sexual activity**. Thus, there is no government proof to give this Court. If the Appellee had read the Appellant's brief, then the Government should understand that the

Appellant's contention is that the Government presented **NO EVIDENCE** of these elements; thus, this argument should have never been presented to this Court. This is why the Appellant states that the Government's position is unintelligible. This example is indicative of the frivolous nature of the Government's entire Motion, indicating that this Motion was done arrogantly and in haste, simply as a delay mechanism. Appellee's issue appears to have more to do with style than substance. As a remedy, Appellee can include in his response one sentence which includes the missed citation to the record.

10.

Paragraph Number 3 cites no citation to authority for the notion that the Appellant should amply describe a trial court's ruling. This court gets the entire record and will read in the lower court's order which was made apart of the record. This argument makes no sense and is unintelligible.

11.

Paragraph Number 4 makes no sense. It begins with the phrase "in stark contrast" but fails to identify how one of the Appellant's positions has contrasted with another. The rest of the paragraph is equally nonsensical and therefore deserves no further response.

Additionally, this Court receives an unredacted copy of the transcript which includes all of the victim's names. Thus, this unredacted transcript makes this

issue moot. In one sense the government is saying that the Appellant is being too general and now the government is saying that the Appellant is being too specific. This position of the Government is frivolous.

12.

In conclusion, all the concerns raised by the Appellee are sufficiently covered by the current Federal Appellate Rules. Federal Rule of Appellate Procedure **28(b)** entitled “**Appellee’s Brief**” states in pertinent part as follows: **the appellee’s brief must conform to the requirements of Rule 28(a)(1)–(9) and (11), except that none of the following need appear unless the appellee is DISSATISFIED with the appellant’s statement: (1) the jurisdictional statement;(2) the statement of the issues; (3) the statement of the case; (4) the statement of the facts; and (5) the statement of the standard of review.** Hence, if the Appellee is dissatisfied, he can file his own statement of the issues, case and facts and then the Appellant can file a response.

13.

However, in light of our position, Appellant is fully willing to follow the Court’s instructions.

Accordingly, the Appellant prays for the following:

- a. That the Court deny the Government's Motion to Strike;
- b. That the Court declare the Government's Motion to Strike frivolous;
- c. That the Court reprimand and/or sanction the Government for filing such a frivolous Motion when the Federal Rules of Appellate Procedure allow the Government the opportunity to raise all the issues contained in this Motion to Strike in its Appellee's Brief;
- d. That the Court deduct the total number of words in the Government's Motion to Strike from the word limit for their Appellee's Brief because all these issues should have been covered in their Appellee's brief.
- e. For any other relief deemed necessary and proper by this Court

Respectfully submitted this 29<sup>th</sup> day of November, 2004 by:

---

Attorney Adrian Patrick Bar #565945  
1044 Baxter Street Athens, GA 30606  
(404) 219-1789

---

Attorney Benjamin Davis Bar #207525  
1201 Peachtree Street Suite 200 Atlanta, GA 30361  
(404) 233-0120

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**UNITED STATES OF AMERICA,** \*

**Plaintiff – Appellee,** \*

**-vs-** \*

**Case No. 04-12354**

**DWIGHT D. YORK, aka** \*

**MALAKAI Z. YORK,** \*

**ISA MUHAMMAD, and** \*

**ISA ALIHAD MAHDI** \*

**Defendant – Appellant.**

\*\*\*\*\*

\*

**APPELLANT’S RESPONSE IN OPPOSITION TO  
GOVERNMENT’S MOTION TO STRIKE BRIEF**

\*\*\*\*\*

\*

I, **ADRIAN L. PATRICK**, Attorney for Appellant, do hereby certify that I this day served a copy of the within and foregoing **APPELLANT’S RESPONSE IN OPPOSITION TO GOVERNMENT’S MOTION TO STRIKE BRIEF** before the same was offered for filing by depositing the same in the United States Mail with proper postage affixed thereon to insure delivery addressed to :

          **Dean S. Daskal**            
Attorney for Appellee, Assistant USA P.O. BOX 2568 Columbus, GA 31902

This the 29<sup>th</sup> day of           November          , 2004.

By:\_\_\_\_\_

Adrian L. Patrick, Attorney for Appellant GA State Bar # 565945  
1044 Baxter Street Athens, Georgia 30606 (706) 546-6631