IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

DWIGHT D. YORK	:	
	:	
	:	CASE NO. 5:07-CV-90001-CAR
v.	:	(CRIMINAL NO. 5:02-CR-27-CAR)
	:	
UNITED STATES OF AMERICA	:	
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RESPONDENT UNITED STATES' ANSWER IN OPPOSITION TO
PETITIONER'S AMENDED MOTION PURSUANT TO 28 U.S.C. § 2255,
AND REQUEST FOR RULE 4 DISMISSAL

Come now the United States of America, and submit this answer in accordance with this Court's Order of September 4, 2007, and Rule 5, Rules Governing Section 2255 Proceedings.

A. Course of Proceedings.

York initially was indicted with a co-defendant on various counts of interstate transport and interstate travel for purposes of unlawful sexual activity with juveniles.[1] The government and York thereafter submitted a superseding information and a proposed plea agreement that called for a specified term of imprisonment.[2] The first trial judge rejected the plea agreement, and later recused himself on defense motion because he arguably had become entangled with the plea negotiations.[3] In the meantime, York was sent for a psychological examination.[4] York

[1](Doc. No. 1).

[2](Doc. Nos. 78 through 86). All transcripts will be referenced by date and description, with the exception of the trial transcript volumes, which are uniformly referenced as "Tr" followed by the volume and page number.

[3](Doc. Nos. 107, 119, 121, 124, and 133).

[4](Doc. Nos. 112, 131, 132, and 135).

thereafter withdrew his guilty plea and the parties made ready for trial.[5]

The Grand Jury returned a superseding indictment that formed the basis for trial.[6] Count One of the superseding indictment charged a RICO conspiracy (18 U.S.C. § 1962(d)) to violate 18 U.S.C. § 1962(c), in that the coconspirators would conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity. The alleged racketeering activity that was the object of the conspiracy consisted of multiple acts of (1) transporting minors in interstate commerce with the intent that the minors engage in unlawful sexual activity for which a person can be charged with a criminal offense, such as child molestation prohibited by the Georgia Code, in violation of 18 U.S.C. § 2423(a); (2) traveling in interstate commerce for the purpose of engaging in unlawful sexual activity with minors, in violation of 18 U.S.C. § 2423(b); and (3) structuring cash transactions to evade the reporting requirements of 18 U.S.C. § 5313(a) and regulations thereunder, by making multiple deposits of United States currency in amounts less than $10,000, in transactions with an FDIC-insured institution, contrary to 31 U.S.C. § 5324(a)(3).

Count Two charged a substantive RICO offense (18 U.S.C. § 1962(c)) based on seven specific racketeering acts, i.e. four episodes of transporting minors in interstate commerce for unlawful sexual activity and three episodes of structuring cash transactions to evade the currency transaction reporting requirements. These four episodes of interstate transport were set forth again as Counts Four, Five, Six, and Eight of the superseding indictment. The three episodes of structuring were set forth again as Counts Nine, Ten, and Eleven of the superseding indictment.

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[5](Doc. Nos. 138 and 145).

[6](Doc. No. 158).

Count Three charged a conspiracy per 18 U.S.C. § 371, the objects of which paralleled the predicate offenses set forth in Count One. And Counts Four, Five, Six, and Eight charged specific acts of transporting minors in interstate commerce with the intent that the minors engage in unlawful sexual activity for which a person can be charged with a criminal offense, such as child molestation prohibited by Georgia law. In parallel to Count Eight, Count Seven charged specifically that York traveled in interstate commerce to Orange County, Florida in 1996 for the purpose of engaging in an unlawful sexual act. Counts Nine, Ten, and Eleven charged the structuring of particular cash transactions.

After fourteen days of trial, the jury returned guilty verdicts on all counts of the superseding indictment but Count Eight.[7] In regard to Count Two, the jury entered findings that each of the seven predicate offenses had been proven beyond a reasonable doubt.[8]

York filed timely motions for a judgment of acquittal or a new trial.[9] York thereafter submitted another new trial motion on the basis of alleged newly discovered evidence.[10] In the course of a hearing about that last motion for a new trial, which was denied, the initial post-trial motions were withdrawn.[11]

In the meantime, York came forward for sentencing.[12] The trial judge imposed a total

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[7](Doc. No. 234; Tr14-3735-36).

[8](Doc. No. 234-2-3; Tr14-3735).

[9](Doc. Nos. 242 and 243).

[10](Doc. Nos. 294 and 298).

[11](Doc. Nos. 342, 347-1, Transcript of August 13, 2004 hearing, at pages 3, 22-23).

[12](Transcript of sentencing on April 22, 2004; transcript of restitution hearing on April 23, 2004).

imprisonment sentence of 1,620 months.[13] York appealed his convictions and sentence, but the Court of Appeals affirmed the district court's judgment. United States v. York, 428 F.3d 1325 (11th Cir. 2005). The Supreme Court denied certiorari on June 26, 2006. 126 S.Ct. 2948.

B. Statement of Facts.

York was the leader of an organization that began in New York during the 1960's, and which has been known by a number of names.[14] At the beginning of the relevant time period, the organization was based in Brooklyn, New York and was known as the Ansaru Allah community.[15] York and his followers thereafter moved their base to Sullivan County in upstate New York.[16]

In 1993, York initiated a move to the State of Georgia, where he and his followers occupied a significant acreage on Shady Dale Road in Eatonton, Putnam County, Georgia.[17] In late 1998, York purchased a home in Athens, Clarke County, Georgia, but through the time of his arrest he remained a presence in Eatonton as well.[18]

During its time in Georgia, the organization was known variously as "The United Nation

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[13](R1-285-3, 1-297). The sentence included consecutive terms of imprisonment as follows: 240 months on Count One, 240 months on Count Two, 60 months on Count Three, 180 months on Count Four, 180 months on Count Five, 180 months on Count Six, 180 months on Count Seven, 120 months on Count Nine, 120 months on Count Ten, and 120 months on Count Eleven.

[14](Tr2-420-22, 3-803, 3-828-30, 6-1445, 6-1449, 6-1548, 6-1570-71, 6-1616-17, 6-1815, 7-2058, 9-2501, 9-2559, 11-2968, 12-3178-80).

[15](Tr2-420, 3-803, 4-1143-44).

[16](E.g., Tr2-431-33, 3-824-25, 3-899).

[17](Tr2-353-55, see also 6-1671).

[18](Tr2-354, 2-360, 2-364-65, 4-985, 6-1608).

of Nuwabian Moors" and the "Yamasee Native American Moors of the Creek Nation."[19] The philosophy or teachings of the organization changed many times over the years, for example, from a basis in Islam; to Hebrew; to cowboy regalia; to ancient Babylonian and/or Egyptian; to Yamasee Indian.[20]

York, whose birth name is listed on this brief, also has been known by a variety of names.[21] At times during the course of proceedings, York insisted that he is Maku "Chief" Black Thunderbird "Eagle."[22] Children and others in the organization typically addressed York as "Doc," "Baba" (father), "Imam" (leader), and/or "Isa" (Jesus).[23] The organization held a "Savior's Day" event each June that coincided with York's birthday.[24]

York ran a number of shops and outlets in various names and in conjunction with off-site operators.[25] Those operations included (1) The Holy Tabernacle Store, (2) The Holy Tabernacle

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[19](Tr5-1242, 6-1624, 11-3090-91, 11-3113-14, 13-3443-44; Govt. Exs. 159 and 232; see Doc. Nos. 142-6, 142-43, 161-3, Transcript of 6/30/03 hearing at page 4). At the time of sentencing, York claimed that the Eatonton property was owned by the Yamassee Native American Moors of the Creek Nation, and utilized by the Egiptian Church of Karast, the Nuwaupian Grand Lodge, and the Ancient Egiptian Order. (PSI Addendum at page 3).

[20](Tr3-822-25, 3-839-41, Govt. Exs. 231-32, Tr4-924-26, 4-928-31, 6-1521, 6-1565, 6-1589-90, 6-1611-14, 6-1616-17, 6-1721, 6-1726, 7-1831, 8-1889-90, 10-2787; see Transcript of 6/30/04 hearing at pages 4, 15; Doc. No. 142-6; Transcript of 12/30/03 In Camera Hearing at page 6).

[21](Doc. No. 142; Tr3-828-29, 5-1296, 6-1726, 6-1733, 7-1845, 7-1975, 7-2032, 7-2056, 10-2785-87, 11-2994, 12-3173, Def. Ex. 48).

[22](Doc. No. 142-4; PSR Addendum at Page 3).

[23](Tr2-421-22, 3-803, 3-819-20, 3-827-32, 4-930-31, 4-1146, 6-1519, 6-1547, 6-1669, 6-1815, 7-2032, 8-2280, 9-2544).

[24](Tr2-528, 6-1640-41, 6-1815, 8-2302; see 7-2119).

[25](Tr3-825-26, 4-933-34, 6-1617-19).

Ministries, and (3) The Ancient Order of Melchizedek.[26] These outlets generated revenue from the sale of items such as clothing, candles, and incense; "passports" and teaching materials; and book sales and yearly-fee memberships.[27] During ceremonies and parties that were open to the public, books and other merchandise were sold.[28]

During the more recent times in Sullivan County, New York, and Eatonton, Georgia, the lifestyle within the organization was highly restricted.[29] York had many "wives" who served him in his home and businesses.[30] York made the rules for his community and his followers were expected to abide by his rules or face punishment or expulsion.[31]

Within the organization and "on the land," traditional family life was replaced by a different model.[32] Men and women did not live together, children beyond the toddler stage usually were separated from their parents, and children generally were separated and lived in buildings and rooms according to their sex and age group under the supervision of older

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[26](Tr6-1619-21, 6-1623-26, 7-1940-41, 7-1987; see Defendant's Ex. 48, a 1999 federal income tax return in the name of Malachi Z. York, attached Schedule C.).

[27](Tr2-512, 6-1621, 7-1986-87).

[28](Tr6-1640-42, 6-1569-60).

[29](See Tr3-813, 4-921, 6-1520, 6-1627, 9-2501-02).

[30](Tr3-818, see Tr6-1663, 6-1816-17, 7-1976-79, 9-2503-04, 10-2620-21, 10-2623-24, 11-3079-80).

[31](Tr2-523, 3-829-30, 4-928-31, 4-941-43, 4-999-1000, 4-1005, 4-1074-75, 4-1174-75, 6-1527, 6-1581-82, 6-1587, 6-1590-91, 6-1610-11, 6-1751-52, 7-1977-80, 7-2002).

[32](Tr2-523, 7-2033).

women.[33] Children were home-schooled on the land.[34] On family day, children were allowed to interact with their biological parents for a period of time.[35]

The residents of the community worked on community projects without a salary or income.[36] Residents did not pay for housing or food, and thus they were dependent on York and the organization for basic necessities such as personal-hygiene items.[37]

Over the years, York often had sexual contact with girls and boys within the organization, including oral, vaginal, and anal sex.[38] Some of the "wives" or older females helped to cultivate or entice younger girls for sex.[39] In turn some of these children, as they grew older, helped groom younger children for York's attentions.[40]

In a number of instances, the younger girls were told that York was going to teach the

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[33](Tr2-423-24, 2-429-30, 2-433, 2-526, 3-815-17, 3-826-27, 3-830, 4-1144-45, 4-1149, 5-1218-19, 5-1241, 5-1306, 6-1478, 6-1489-90, 6-1551, 6-1589-91, 6-1721-23, 7-1983-84, 7-2062, 12-3232).

[34](Tr2-430, 2-435-36, 2-525, 3-635, 3-820-23, 6-1560-61).

[35](Tr2-428, 3-817-18, 3-898, 6-1549).

[36](Tr2-435, 2-516-17, 3-833, 4-921, 4-992-94, 4-1169-70, 5-1244-45, 6-1522, 8-2302, 9-2443).

[37](Tr2-523-24, 4-980-82, 6-1660-61, 9-2461).

[38](Tr3-844-47, 3-878-79, 4-899, 4-903-12, 4-939-40, 4-943-48, 4-953-56, 4-987-990, 4-1023, 4-1151-57, 4-1164-68, 5-1229-30, 5-1246-47, 5-1249-56, 5-1258-63, 6-1444-62, 6-1525-26, 6-1550-58, 6-1566-68, 6-1602-04, 6-1606-07, 6-1643-44, 6-1652, 6-1729-30, 6-1732-36, 6-1744-47, 6-1756, 7-1840-42, 7-1875-80, 7-1885-88, 7-2068-70, 7-2073-80, 7-2101, 8-2307-10, 13-3443-47, 13-3452-54).

[39](Tr2-442, 2-448, 2-450, 3-847, 3-869-75, 6-1552-57, 6-1568-69, 6-1602-04, 6-1727, 6-1733, 7-1872-73).

[40](Tr2-440-41, 2-485-86, 2-500, 6-1573, 7-1822-23, 7-2036-37, 13-3446).

girls about sex, ostensibly to prepare the girls to keep a husband satisfied in marriage.[41] It sometimes was said that as an ancient cultural practice in Sudan, a father had a responsibility to teach the girls about sex.[42] At times the abuse would begin with the exhibition of sexually explicit movies and cartoons, and then it might progress with York having sex with one of the wives or with another child.[43] The children generally were instructed not to disclose these events.[44]

The children often were rewarded for their submission with restaurant meals and gifts such as diamond rings and other jewelry.[45] Several of the girls conceived York's children prior to turning 18 years old themselves.[46] On the other hand, when the children failed to respond as desired, they suffered from less attention and inferior housing and food, and similar manipulations.[47]

York had a finance office that was staffed by female residents on the land in Eatonton.[48]

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[41](Tr6-1552, 6-1573, 6-1596-97).

[42](Tr3-870, 7-1819-20). York sometimes made direct comments of this nature, e.g., to children whom he had initiated. (Tr4-1075-76, 6-1458, 6-1462, 6-1562, 7-1880-81; see also 8-2314).

[43](Tr2-441-42, 2-449, 3-876-78, 6-1747-48).

[44](Tr2-451, 4-900-01, 4-1154, 5-1268-69, 5-1333-34, 6-1464, 6-1597-98, 7-1828, 7-2071, 8-2284-85).

[45](Tr2-500-03, 3-649-51, 4-940-41, 4-978, 5-1253, 5-1285, 6-1463, 6-1728-29, 6-1756-57, 7-1830, 7-2075, 7-2085-86, 8-2311).

[46](Tr6-1512-17, 6-1550, 6-1584-85, 6-1759-61, 7-1870, 7-1884-85).

[47](Tr2-510, 4-912-14, 4-921-24, 4-999-1000, 4-1005-06, 4-1015-16, 4-1176-77, 5-1321-22, 6-1757-58, 7-1830, 7-1845-48, 7-1892, 7-2089-94).

[48](Tr6-1618-19, 6-1622, 6-1628).

These workers were responsible for collecting and handling the monies earned by York's businesses.[49] The workers would receive the money, count the cash, and separate out the $50 and $100 bills.[50] Those larger bills were given to York and placed in a suitcase.[51] Most of the remaining funds were prepared for deposit in a conventional bank.[52]

Proof of the key events. York personally selected and approved the persons who moved from New York to the land in Eatonton, Georgia.[53] The children were moved when and as the organization directed.[54] Similarly, York selected the children who were rewarded by being allowed to accompany him on trips from Georgia to Disney World in Florida.[55]

The minor victim of Count Four, a transport count, was "I.J."[56] I.J. was the subject of York's sexual interest at a young age, even before the move from New York to Georgia.[57] I.J.

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[49](Ibid.)

[50](Tr6-1619-20, 7-1988).

[51](See Tr2-402-04, Govt. Ex. 249, Tr2-516, Tr4-1120-21, 4-1124-25, Govt. Exs. 137, 138, and 147, Tr6-1642).

[52](Tr6-1619-20, 6-1642). York was known to handle significant sums in cash. (Tr4-928, 6-1583, 7-1935-36).

[53](Tr6-1582-83, 6-1586-87, 7-1882-84, see 7-1981).

[54](Tr6-1587-88, 6-1749-51).

[55](Tr6-1606, 6-1761-62).

[56]I.J. was present during a sexual contact between York and N.L. (Tr4-1074). I.J. also was the subject of sexual references that York made to others. (Tr4-1156-58, 6-1663-64, 6-1759). However, I.J. was not a cooperating witness at the time of trial, and in his testimony he denied the government's allegations. (Tr7-1908-16, see also 8-2181-82). The government further impeached I.J.'s denials. (Tr7-1918-19, 7-2080).

[57](Tr6-1576).

was under the age of five when York and others moved to Eatonton.[58] York had sexual contact with I.J. after the move to Eatonton.[59]

Count Five, another transport count, referred to "K.H.," "A.N.," and "D.N." K.H. had sexual contact with York by the age of six, when they were living in New York state.[60] K.H. was moved from New York to Eatonton as directed by the organization.[61] York's sexual contact with K.H. resumed in Eatonton.[62]

When A.N. was 8 years old and living in Sullivan County, New York, York began to have sexual contact with A.N.[63] In about April 1993, when A.N. was roughly 9 years old, A.N. traveled down to Eatonton, Georgia in a van with other people.[64] Within a few weeks, York re-initiated the sexual activity with A.N., which continued thereafter over a period of years.[65]

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[58](See Tr7-1907 (I.J.'s age at the time of trial)). I.J. regarded York as being I.J.'s father. (Tr7-1908).

[59](Tr4-1161-63, 5-1313-14, 6-1454-56, 6-1591, 6-1595-96, 8-2303-06).

[60](Tr2-452-53, 6-1574-76, 6-1588, 8-2283-89). York made another child, N.L., aware of his sexual interest in K.H. (Tr4-917-19).

[61](Tr7-1974-76, 7-1981-82, 8-2992). K.H.'s mother was one of York's "wives." (Tr7-1976-77).

[62](Tr2-484-85, 6-1591, 6-1594-95, 7-2071-72, 8-2294-2301, 8-2308-10; see also 8-2231-32, 8-2252, 8-2255).

[63](Tr2-436-37, 2-439, 2-449, 2-455, 3-645, 4-919-20, 6-1571-73; see 6-1568-69, 8-2285-86).

[64](Tr2-455-56, 6-1587-88). York at one time told A.N.'s sibling N.L. that N.L. would not be coming to Georgia because N.L. and York didn't see eye-to-eye "on certain things." (Tr4-914). At other times York made N.L. aware of York's sexual interest in A.N. (Tr4-914-17). After York first had intercourse with N.L., N.L. was told that N.L. would be moving to Georgia after all. (Tr4-921-24).

[65](Tr2-461-66, 2-472-73, 2-496-99, 2-517, 2-544-45, 3-580-81, 3-645-46, 3-689, 4-936-37, 6-1593-95, 6-1606, 7-1835-36, 7-1887-88, 7-2076, 8-2298, 8-2303). A.N. was approaching twenty years old at the time of trial. (Tr2-418).

D.N. also was the subject of York's sexual interest while D.N. was under the age of ten.[66] York introduced D.N. to sexual contact at age 7 while they were living in upstate New York.[67] After the move to Eatonton, which occurred when D.N. was no more than 8 years old, York and D.N. had regular sexual contact.[68]

Count Six, another transport count, involved "A.T." A.T.'s mother was considered to be one of York's wives.[69] York had sexual contact with A.T. in Eatonton, beginning shortly after A.T.'s fourteenth birthday.[70]

When A.T. was age 11 or 12, York gave A.T. a gold bracelet.[71] At age 13, A.T. was introduced to the possibility of having sex with York.[72] A.T. and A.T.'s mother were sent to New York for a short period of time, and then at A.T.'s request the organization moved A.T. -- without A.T.'s family -- back from New York to Eatonton, where York commenced to have sexual contact with A.T.[73]

Count Seven, an interstate travel count, and Count Eight, another transport count, involved "A.N.," "K.L.," and "S.W." At the age of 14, in 1996, A.N. joined York on a trip to

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[66](Tr4-1157-61, 5-1295). A.N. and D.N. are siblings. (Tr2-419). Until D.N. was a teenager, D.N. thought that York was D.N.'s father. (Tr5-1299).

[67](Tr5-1299, 5-1303).

[68](Tr5-1307-09, 5-1312, 5-1318-20; see also 8-2182-83).

[69](Tr7-1816-17).

[70](Tr6-1596-97, 7-1822-28, 7-1857).

[71](Tr7-1817).

[72](Tr7-1819-21).

[73](Tr7-1821-27, 7-1829).

Disney World, Orlando, Florida; K.L. and S.W. also went on that trip.[74] York did not engage in sexual activity with A.N., who had become ill, but while on that trip York had sexual contact with the other two children.[75] The parties stipulated that in 1996, K.L. was no more than 13 years old.[76] S.W. also was no more than 13 years old in that year.[77] However, S.W. and K.L. were not cooperating witnesses at the time of trial and in testimony during the defense case they denied the government's allegations about that trip.[78]

As for the structuring counts: York ordered the workers not to deposit $10,000 or more cash into any one of the bank accounts at any one time.[79] On different occasions, a bank teller

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[74](Tr2-504). A.N. believed that K.L. and S.W. were 15 and 16 years old at the time, respectively. (Tr2-505-07). K.L. and S.W. were present with A.N. at some other times when York had sex with A.N. (Tr2-488-89, 2-493).

[75](Tr2-507-09). York told N.L., A.N.'s older sibling, that if A.N.'s attitude did not improve then A.N. would not be allowed to join in the Disney World trip. (Tr4-937-38).

[76](Tr9-2411-12).

[77](Tr9-2411-12; Govt. Ex. 267). Other testimony in the record indicated that S.W. would have been no more than 15 years old in 1996, because S.W. was said to be about 17 years old in 1999. (Tr7-2043). The witness observed sexual contact between York and S.W. at the latter time. (Ibid.) A different witness, who would have been 11 years old in 1996, indicated that S.W. was three or four years older. (Tr7-2055-56, 7-2064, see 7-2120). S.W. once approached this second witness (age 10) about having sexual contact with York. (Tr7-2066).

[78](Tr10-2691-95, 10-2774-77). S.W. and K.L. agreed that A.N. was present with them and with York on that trip, that their parents were not present, and that York was the only father-figure who went on that trip. (Tr10-2712-13, 10-2783-84). The government separately offered rebuttal evidence that York sexually molested S.W. and that S.W. recruited at least one other child for York. (Tr13-3443-47, 13-3452).

[79](Tr6-1631-32, 7-1988-89, 7-2025). Testimony indicated that York wanted the money to be handled by workers with whom York had a sexual relationship. (Tr7-2046). York would accompany the young women to the bank, where the women would go inside to make the deposits. (Tr5-1389).

told one of the women to complete a form before the bank deposit would be completed.[80] On each occasion, the worker followed York's instructions by refusing to complete the form.[81] The government proved specific instances of structuring.[82]

C. Petitioner's Claims.

1. York contends that the trial judge forced him to utilize the services of discharged counsel, Mr. Arora, in addition to Mr. Patrick, his chosen counsel. York concludes that the Court infringed his Sixth Amendment right to counsel of his own choice. Memorandum at pages 2-4. York's Sixth Amendment claims require that the Court review the lengthy pertinent history of York's representation.

Background facts. After the initial court appearance on the original indictment, Mr. Garland entered his appearance for York at the detention hearing before the magistrate judge in May 2002.[83] At York's guilty plea hearing in January 2003, Mr. Garland represented that he and Mr. Arora of his firm had thoroughly investigated the case in advance of York's proposed plea, and York affirmed that he was satisfied with his lawyer's services.[84] Mr. Garland and Mr. Arora continued to represent York when Judge Lawson advised that he would not accept the plea

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[80](Tr5-1390, 5-1392-93, 6-1631-33, 7-1989, see also 6-1704).

[81](Ibid.)

[82](Tr6-1633-40, 6-1706-08).

[83]Transcript of 5/9/02 and 5/13 - 5/14/02 Arraignment and Detention Hearing at page 13. This is a composite transcript that includes two separate hearings. The transcript of the detention hearing begins at page 12.

[84]Transcript of 1/23/03 Change of Plea Hearing at pages 6-7.

agreement.[85]

When counsel returned for a motions hearing in July 2003, Mr. Rubino entered his appearance as additional counsel for York.[86] Mr. Garland remained in the case when it came before Judge Royal.[87]

Mr. Adrian Patrick and Mr. Benjamin Davis entered their appearances for York in December 2003, after the superseding indictment was returned.[88] When the case was called for a pretrial hearing on December 16, 2003, Mr. Garland, Mr. Arora, Mr. Patrick, and Mr. Benjamin Davis appeared on York's behalf, and Mr. Garland acted as lead counsel for that hearing.[89] At that time the trial judge warned counsel that he would not continue the case due to the addition of new counsel and further stated that he would not allow a withdrawal of counsel if it might cause a problem for the trial of the case.[90]

Two weeks later, Mr. Patrick, Mr. Arora, and Mr. Benjamin Davis returned for another pretrial hearing.[91] At that time it was announced that York wanted to have only Mr. Patrick and

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[85]Transcript of 6/30/03 Hearing.

[86]Transcript of 7/10/03 Hearing at page 2. At that time Mr. Arora handled the suppression motion in particular. Transcript at pages 2-3 et seq.; R1-116.

[87]See Transcript of 8/6/03 Status Conference.

[88](R1-171; Transcript of 12/16/03 Pre-Trial Hearing at page 2). The transcripts of the late December 2003 hearings were among those that were made a part of the supplemental record on direct appeal, per Judge Royal's Order of January 26, 2005. (Doc. No. 369).

[89](Transcript of 12/16/03 Pre-Trial Hearing at page 3).

[90](Transcript of 12/16/03 Pre-Trial Hearing at page 81).

[91](Transcript of 12/30/03 In Camera Hearing at page 2).

Mr. Davis to represent him at trial.[92] Mr. Patrick said that he had learned of York's decision just the night before.[93] The trial judge made clear his belief that York was seeking to manipulate and delay the trial process.[94] Thereafter Mr. Arora stated his willingness to be available for the assistance of the defense, and the trial judge left that option open for York to consider.[95]

Mr. Arora and Mr. Patrick largely shared the motion arguments at the December 16th and December 30th conferences.[96] Through this time period, Mr. Arora filed a number of motions on his client's behalf.[97]

Prior to jury selection, the trial judge instructed that Mr. Arora must remain in the case and be available to Mr. Patrick, even if Mr. Patrick was going to be lead counsel.[98] The trial transcript indicates that Mr. Arora actively participated on the defense team.[99]

After several days of trial, the trial judge said that he no longer would require that Mr.

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[92](Transcript of 12/30/03 In Camera Hearing at page 10). In the pleadings before the Court, York now asserts that the trial judge allowed Mr. Garland to withdraw his appearance, "thereby forcing Adrian Patrick into the position of lead counsel ...." Memorandum at page 6. York's attempt to portray himself as a passive victim of others' decisions is refuted by the existing record.

[93](Transcript of 12/30/03 In Camera Hearing at pages 13-14).

[94](Transcript of 12/30/03 In Camera Hearing at page 12).

[95](Transcript of 12/30/03 Hearing in Grand Jury Room at pages 2 et seq.)

[96](See Transcript of 12/16/03 Pre-Trial Hearing at pages 4 et seq.; Transcript of 12/30/03 Hearing in Courtroom at pages 10 et seq.).

[97](E.g., Doc. Nos. 192 through 195, 201, 218 through 220).

[98](Tr1-11-12; see Tr1-269-71, 3-708).

[99](See, e.g., Tr1-40 et seq., 3-668 et seq., 3-758 et seq., 5-1407 et seq.).

Arora be present, but would leave that up to Mr. Arora and his client.[100] Mr. Arora told the trial judge, on the record, that York had asked Mr. Arora to remain on the case.[101] Mr. Arora remained on the defense team thereafter, at least for some time.[102]

The point of this long story. The trial judge directed that Mr. Arora be present and make himself available to York's chosen defense team, as a trial resource. At no point did the trial judge mandate that York and his counsel actually utilize Mr. Arora's services at trial. The purpose of the trial judge's action was to protect York's right to effective representation, not to foist unwanted counsel on a criminal defendant. In contrast to United States v. Gonzalez-Lopez, 126 S.Ct. 2557 (2006), where the trial judge refused to allow the defendant's chosen counsel to be admitted pro hac vice and to represent the defendant, this is not a case in which the trial court (improperly or otherwise) deprived defendant of his choice of counsel. On the established record, York's first claim fails as a matter of law.

2. Next, York argues that the trial judge caused York to have ineffective assistance of counsel at trial, because the trial judge declined to grant York a last-minute continuance after it was announced that Mr. Patrick would be lead counsel. Memorandum at pages 4-7. However, on direct appeal, York's counsel argued that the trial judge abused his discretion when he denied the continuance, and the Court of Appeals rejected that argument, without separate discussion, for lack of merit. 428 F.3d at 1329-30 (seventh listed assignment of error). The district court does not sit in Section 2255 proceedings to review the decisions of the Court of Appeals. See

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[100](Tr4-1195-97).

[101](Tr4-1196).

[102](E.g., Tr5-1425 et seq.).

United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000). Given that the trial judge did not abuse his discretion when he denied the continuance, the refusal of the continuance did not impair York's Sixth Amendment right to counsel of his choice. See Morris v. Slappy, 461 U.S. 1, 11-12, 103 S.Ct. 1610, 1616 (1983); United States v. Koblitz, 803 F.2d 1523, 1528 (11th Cir. 1986); Thomas v. Wainwright, 767 F.2d 738, 742 (11th Cir. 1985); United States v. Grier, 2007 WL 2214603 at *6-7 (Appeal No. 06-13796, 11th Cir. August 3, 2007) (unpublished). Beyond that, the decision on York's ineffective assistance claim should not be influenced -- at least in York's favor -- by the fact that he made an untimely change in counsel and thereby limited his counsel's opportunity to prepare more fully for trial. Thus the existing record demonstrates that York's second "claim" does not advance his cause.

3. Finally, York argues generally that his trial counsel was at best ineffective and that he was prejudiced by counsel's representation. Memorandum at pages 7-10. However, the argument about counsel's performance is conclusory and virtually devoid of any factual detail, and York makes no effort to demonstrate, by use of the existing trial record, that if counsel had performed within the wide range of professional competence, then there is a reasonable probability that the jury would have acquitted him on one or more of the charges.

York achieves some degree of specificity when he refers to the testimonies of Mr. Kenneth Lanning and Dr. Frederick Bright. For instance, concerning Mr. Lanning's testimony, York contends that trial counsel was ineffective in failing to persuade the trial court to strike evidence offered by Mr. Lanning because: (1) Mr. Lanning's evidence did not satisfy the "reliability" or "relevance" prong of the test outlined by the Court of Appeals in Daubert v. Merrill Dow Pharmaceutical, Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993); (2) trial counsel did not

object to Mr. Lanning's testimony on that basis during the trial; and (3) trial counsel did not raise the issue of Mr. Lanning's testimony on York's direct appeal.

However, York apparently overlooks the trial court's pretrial conference hearing held on December 16, 2003, concerning the question of whether to admit Mr. Lanning's testimony for educational (rather than scientific) purposes. ((Transcript of 12/16/03 Pre-Trial Hearing at pages 96-140).[103] At that hearing, York was represented by Mr. Garland, Mr. Arora, Mr. Patrick and Mr. Davis. Mr. Garland vigorously cross examined Mr. Lanning about his training, education and experience in identifying certain patterns of behavior concerning both sex offenders and the children victimized by them. ((Transcript of 12/16/03 Pre-Trial Hearing at pages 119-138). Following that hearing, the trial court, on January 2, 2004, granted the Government's motion to admit Mr. Lanning's testimony. (Doc. No. 214; see also Doc. Nos. 163, 193). In so ruling, the trial judge made note of United States v. Romero, 189 F.3d 576 (7th Cir. 1999), an earlier case in which Mr. Lanning was permitted to testify and that decision was upheld on appeal.

Subsequently, on January 7, 2004, Mr. Lanning testified at York's trial. (Tr3-709-799). Mr. Arora, acting as counsel for York during the questioning of Mr. Lanning, reminded the Court of York's earlier objections to Mr. Lanning's testimony. (Tr3-717). Mr. Lanning testified about behavior patterns of sex offenders and their child victims, as researched and observed by him during the course of his career. (Tr3-717). Mr. Lanning did not testify as a scientific expert, nor did the Government proffer him as one. (Tr3-709-99). Following Mr. Lanning's direct examination, Mr. Arora conducted a thorough and sifting cross examination (Tr 3-758-

[103]This transcript is among those that were made a part of the supplemental record on direct appeal, per Judge Royal's Order of January 26, 2005. (Doc. No. 369).

799). Consequently, Mr. Arora – as did Mr. Garland before him – effectively and adequately challenged Mr. Lanning's testimony.

York provides an even more cursory explanation as to how he was harmed by his own attorneys' use of Dr. Frederick Bright at trial. Defense counsel offered Dr. Bright as an expert in the field of obstetrics and gynecology. (Tr11-2918). Dr. Bright testified that, after reviewing the medical records of several of the alleged child victims in the case, he noted numerous "irregularities" concerning their "medical diagnosis." (Tr11-2923; see 11-2924-44). According to York, because the Government "thoroughly impeached" Dr. Bright (see Tr11-2965-68, 11-2978-95, concerning Bright's prior active involvements with York and York's organizations), this Court should conclude that competent defense counsel would not have called Dr. Bright to testify. However, York again fails to analyze the probable impact of Dr. Bright's testimony, for the defense, on the jury's determination of York's guilt or innocence.

Based on the trial record, York is unable to show that his counsels' representation was ineffective, or that, in the absence of their unprofessional performance, there is a reasonable probability of a different outcome at trial. Likewise, York is unable to show that if his counsel had elected to challenge Mr. Lanning's testimony as error, on direct appeal, York might have persuaded the Court of Appeals that the trial judge abused his discretion and committed reversible error when admitted Mr. Lanning's testimony. In fact, the admissibility of such testimony is even more firmly established today than it was at the time of trial. See United States v. Hitt, 473 F.3d 146, 158-59 (5th Cir. 2006); United States v. Hayward, 359 F.3d 631, 635-37 (3rd Cir. 2004).

Under the circumstances, the decision whether to conduct an evidentiary hearing is

committed to the Court's discretion. A district court is not required to conduct an evidentiary hearing if the petitioner's factual allegations are contradicted by the record, if the claims are patently frivolous, or if the claims are mere conclusory allegations unsupported by specifics. See Lynn v. United States, 365 F.3d 1225, 1239 (11th Cir. 2004).

Certainly it is not required that the Court conduct an evidentiary hearing, simply so that trial counsel may set forth his own thoughts about these claims. The question of ineffectiveness does not depend on defense counsel's subjective mental processes. See Chandler v. United States, 218 F.3d 1305, 1315 n. 16 (11th Cir. 2000) (en banc). "When we can conceive of a reasonable motivation for counsel's actions, we will deny a claim of ineffective assistance without an evidentiary hearing." Gordon v. United States, 496 F.3d 1270, 1281 (11th Cir. 2007). To the extent that York, with the assistance of counsel, has set forth anything of substance in his petition, the existing record is sufficient to address his claims.

Wherefore, having answered, the government submits that the petition should be denied without an evidentiary hearing. The government requests that the Court dismiss the motion pursuant to Rule 4. Respectfully submitted this 3rd day of December, 2007.

MAXWELL WOOD
UNITED STATES ATTORNEY

BY:

s/Dean S. Daskal
Dean S. Daskal
Assistant United States Attorney
Post Office Box 2568
Columbus, Georgia 31902
Phone: (706) 649-7700
Fax: (706) 649-7667

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December, 2007, I electronically filed the within and foregoing Answer with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Reginald A. Greene, 675 West Peachtree St. N.W., Suite 4300, Atlanta GA 30375; Gregory L. Lattimer, 1100 H Street N.W., Suite 920, Washington D.C. 20005; and Malik Shabazz, 1250 Connecticut Ave. N.W., Washington D.C. 20036.

I also certify that I have mailed by the United States Postal Service the document to the following non-CM/ECF participants in a properly addressed and stamped envelope as follows: none.

MAXWELL WOOD
UNITED STATES ATTORNEY

BY:

s/Dean S. Daskal
Dean S. Daskal
Assistant United States Attorney
Post Office Box 2568
Columbus, Georgia 31902
Phone: (706) 649-7700
Fax: (706) 649-7667