

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

**Criminal Action No. 2:05cr22
(Maxwell)**

DEREK D. BENEDICT,

Defendant.

REPLY BRIEF OF APPELLANT

COMES NOW the Appellant, Derek B. Benedict, by counsel, and respectfully submits this reply to the Brief of the United States.

1. In response to the Brief of the United States, more particularly paragraphs 1 through 5, the Government clearly includes facts that do not apply directly to defendant in this matter. Many facts listed in the several paragraphs were not facts adduced at trial and are simply imputed to the brief to stir the passions of the decision maker. There are no facts to support the allegation that the defendant was a "marijuana smoking, half naked, Rainbow Family" member, screaming obscenities through the woods (Brief of United States pg. 3) or that defendant participated in any activity that would endanger the lands wherein the defendant was found (Brief of United States pg. 2). These are exaggerated stereotypes about a particular group and not about the defendant personally. Therefore, such exaggerations should not play a role in this Court's determination.

2. As for paragraphs 6 through 10 of the Government's brief, the Government maintains that the defendant was part of a group, yet offers no proof that the defendant was part of or intended to be part of a group known as the Rainbow Family. In fact, a review of the transcript, or at the parts decipherable, indicates no fact with which this Court can rely on to deem this individual defendant as part of the Rainbow Family.

Thus, as extensively discussed in defendant's original brief, the statute cannot be applied to the defendant without running afoul of the constitution. For reasons such as convenience, the Government lumps the defendant in with others in order to make the defendant part of a group in order to satisfy the statute. However, the Government simply offers no proof that the defendant was part of the Rainbow Family. Furthermore, the supposed warnings that were distributed to certain people that were congregated at the site, were not given to everyone (Tr. 139).¹ Yet, the Government would have this Court believe that everyone in the National Park on this day must have had notice of § 261.10(k) and that violating such section is "a habit that Rainbow Family members engage in year after year." (Brief of United States at pg. 5). The Government further added that there can be no doubt that the Rainbow Family was well aware of § 261.10(k) when it set up the camp at the Rattlesnake site. Again, this is another attempt to lump individuals together without the requisite proof that they in fact congregated as a group.

The defendant will not rehash the original brief filed in this reply, but it is respectfully requested that this Court refer to that brief in order to understand the constitutional arguments made about finding this defendant guilty of criminal liability which targets a group that the defendant was not a part of.

¹ Previously, defendant filed a copy of the transcript as transcribed by the undersigned's office and page numbers as listed in this reply conform to the transcript previously filed.

3. Pursuant to paragraph 11 of the Brief of the United States, it is argued by the Government that the inadequacies of the transcript could be compensated for by asking the client (defendant) to help decipher the audio recordings. First, in order to adequately gauge the incomprehensibility of the transcript, one must listen to the audiotape of the trial of the defendant in its entirety. Not only is it difficult, if not impossible, to understand everything that is being said, it is also difficult, if not impossible, to understand who is making the statements, given that numerous defendants were tried at the same time. It is impossible for the defendant to make arguments such as insufficiency of evidence, manifest weight of evidence, or the like, when the testimony of the defendant, witnesses, or even other co-defendants, cannot be clearly deciphered on the audiotape, which is the only record of the proceeding.

Furthermore, despite the contention of paragraph 11, it does not matter whether or not the client can remember what argument was posed to the Court in order to adequately base an appeal, it only matters whether or not that argument is properly recorded as part of the trial transcript. In this case, and after this Court listens to the audiotapes in its possession, the Court will understand that there was no information for counsel to base an appeal and no information for this Court to adequately judge such an appeal. A criminal defendant has a right to a meaningful appeal based on a complete transcript. *Hardy v. United States*, 375 U.S. 277, 279 (1964). Furthermore, the United States is correct when they maintain that the Defendant must show prejudice based on omissions from a transcript. However, prejudice is found when a trial transcript is so deficient that it is impossible for the appellate court to determine if the district court has committed reversible error. *United States v. Huggins*, 191 F.3d 532 (4th Cir. 1999) citing *United States v. Nolan*, 910 F.2d 1553, 1560 (7th Cir. 1990).

4. As for paragraph 12 of the Government's brief, they rely on *United States v. Johnson*, 159 F.3d 892 (4th Cir. 1998) in order to claim that sufficient evidence was produced to find the defendant guilty of the charge. As discussed in defendant's initial brief, the defendant is different than the defendant in *Johnson*. In the present case, there is no evidence that the defendant was forewarned regarding the regulation, as was the case in *Johnson*. Thus, there can be no finding of guilt.

CONCLUSION

For all of the foregoing reasons, this Court is requested to reverse the decision of the District Court, vacate the defendants' conviction and sentence, and dismiss with prejudice the citations filed against these defendants.

Respectfully Submitted,

Derek D. Benedict, Defendant

By: /s/ Patrick S. Cassidy
Of Counsel

Patrick S. Cassidy (W.Va. Bar No. 671)
Email: pcassidy@cmcvlaw.com
Timothy F. Cogan (W.Va. Bar No. 764)
Email: tfc@cmcvlaw.com
CASSIDY, MYERS,
COGAN & VOEGELIN, L.C.
The First State Capitol
1413 Eoff Street
Wheeling, WV 26003-3582
Phone: (304) 232-8100
Fax: (304) 232-8352

CERTIFICATE OF SERVICE

I hereby certify that on **November 30, 2006**, I electronically filed the foregoing **REPLY**
BRIEF OF APPELLANT with the Clerk of the Court using the CM/ECF system which will
send notification of such filing to the following CM/ECF participant:

STEPHEN D WARNER ESQ
ASSISTANT US ATTORNEY
300 3RD ST STE 327
ELKINS WV 26241
Steve.warner@usdoj.gov

By: /s/ Patrick S. Cassidy
Of Counsel