

NOV 17 2004

FILED

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT NOV 17 2004

UNITED STATES OF AMERICA :

vs. :

DWIGHT D. YORK :

THOMAS K. KAHN
CLERK

APPEAL NO. 04-12354-II

GOVERNMENT'S MOTION TO STRIKE
APPELLANT'S BRIEF

COMES NOW the United States of America, by and through its attorney, the United States Attorney for the Middle District of Georgia, and moves that the Court strike the Opening Brief of Appellant that was served on November 12, 2004. The government respectfully submits that the brief fails to comply with the requirements of the Federal Rules of Appellate Procedure and the Rules of this Court in numerous respects.

This appeal involves a complex and closely contested proceeding, including RICO counts, that was tried over a period of 14 trial days. The trial produced a transcript of more than 3,700 pages. Among other things, the government alleged and proved a pattern of sexual abuse involving children.

The defects in the Opening Brief of Appellant include the following:

1. The Statement of the Case and the Statement of the Facts together account for 3 pages of the brief. They utterly fail to apprise the Court, with appropriate citations, as to the charges against York and as to the proof that supported the jury's verdicts. The government believes that appellate counsel has a duty to describe the case fairly and to place the allegations of error in some context. See, e.g., Fed. R. App. P. 28(a)(6)-(7), (9)(A); 11th Cir. R. 28-1(i)(ii).
2. Portions of the brief are further unsupported by either citations to the record or citations to the governing case law. For example, at pages 17-18, York comments that this Court has spoken to the circumstances in which a motion to dismiss an indictment is an appropriate vehicle, but does not identify the Court's precedent. In arguing about the sufficiency of the evidence on various counts (at pages 34-39), beyond the standard of review York fails to identify or describe any of the government's proof or any case law other than a 1974 decision from another circuit. At pages 42-44, in arguing that the trial court erred in denying a continuance, York fails to cite the record even once, and fails to disclose that he had other counsel assisting in his defense. Similarly, York does not cite the record at all in regard to the sentencing arguments at pages 44-52 of his brief.
3. Finally, in raising claims of error, York often fails to cite or describe

the trial court's ruling. For example, in arguing his claim of prejudicial joinder (at pages 10-15 of his brief), York does not pause to explain the trial court's ruling on the matter. He takes a similar approach (at pages 15-21 of his brief) in arguing that the RICO counts should have been dismissed.

4. In stark contrast, when briefing other questions on appeal, York repeatedly refers to the victims of child sexual abuse by name and without regard for the fact that the trial transcript was placed under seal. (E.g., Brief at pages 7-8, 24-29, 31-33, 36, and 39). York's counsel certainly could have used initials rather than proper names if he felt that the specific identity of the witness was important. See 18 U.S.C. § 3509(d)(2)

Accordingly, the government requests that the Court strike the Opening Brief of Appellant and instruct him to file a proper brief within a reasonable time certain.