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

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Appellate Case No. **04-12354**

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**UNITED STATES OF AMERICA,**

*Plaintiff-Appellee,*

-vs-

**DWIGHT D. YORK,**

*Defendant-Appellant,*

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Appeal from the United States District Court
for the Middle District of Georgia
Macon Division

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# CORRECTED OPENING BRIEF OF APPELLANT

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**REDACTED VERSION**

**United States of America v. Dwight York**
**Appellate Case NO. 04-12354**

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following individuals have an interest in the outcome of this case:

Richard S. Moultrie, Assistant U.S. Attorney

Verda Colvin, Assistant U.S. Attorney

Dean S. Daskal, Assistant U.S. Attorney

Maxwell Wood, U.S. Attorney

Honorable C. Ashley Royal, United States District Judge

Honorable Hugh Lawson, United States District Judge

Manubir S. Arora, Defense Attorney

Harry Jean Charles, Defense Attorney

Benjamin A. Davis, Defense Attorney

Edward T.M. Garland, Defense Attorney

Leroy R. Johnson, Defense Attorney

Jonathan Marks, Defense Attorney

Adrian L. Patrick, Defense Attorney

Matthew M. Robinson, Defense Attorney

Frank A. Rubino, Defense Attorney

Stephanie Thacker, Dept. of Justice

Kathy C. Johnson, Co-defendant

Dwight D. York, Defendant

Identifiable alleged victims exist in the instant matter, including; (Ha.E), (Hu.E), (S.E), (K.E.), (K.E.), (M.F.), (K.H.), (R.H), (E.H),(I.J.), (C.L.), (K.L.), (Sa.L.), (Sal. L.), (N.L.), (H.M.), (K.M.), (Q.M.), (A.N.), (D.N.), (S.P.), (A.T.), (S.T.), (H.W.), (Su.W.), (S.W.).

I hereby certify that, to the best of my knowledge, the preceding list is a complete list of all parties having an interest in the outcome of this case.

By: _____
Attorney Adrian L. Patrick

## STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant, Malachi Z. York (Dwight York), respectfully requests oral argument in this case, as he believes that it would assist the Court in analyzing the legal issues raised herein.

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Appellant asserts that this Honorable Court has jurisdiction to hear this matter as it arises from a final adjudication of all claims and on the merits by a United States District Court, pursuant to 28 United States Code § 1291.

## STATEMENT OF ISSUES

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## STATEMENT OF THE CASE

The instant appeal involves the criminal case charged against the Appellant, Malachi Z. York. (The government alleges his name is Dwight D. York [Doc. 158]) This case arose in the Middle District of Georgia. As discussed below, York was convicted in the district court and is currently incarcerated in federal prison.

### A. Course of Proceedings and Disposition in the Court Below.

York initially was indicted with a co-defendant in the Middle District of Georgia, on various counts of interstate transport and interstate travel for purposes of unlawful sexual activity with juveniles. [Doc. 1] The government and York thereafter submitted a superseding information and a proposed plea agreement that called for a specified term of imprisonment, based on one count of interstate transport for purposes of unlawful sexual activity and one count of structuring a financial

transaction. [Doc. 78 - 86]. 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. [Doc. 107, 119, 121, 124, 133]. Thereafter, York filed a motion for change of venue and a motion for a psychological exam, both of which were granted. (Doc. 108, 109; Motions). In the meantime, York was sent for a psychological examination.[Doc. 112, 131, 132, 135]. York thereafter withdrew his guilty plea and the parties made ready for trial. [Doc. 138, 145].

Subsequently, the Grand Jury returned a superseding indictment that formed the basis for trial. [Doc. 158]. Count One of the superseding indictment charged a RICO conspiracy (18 U.S.C.§ 1962(d)) to violate 18 U.S.C.§ 1962(c), alleging that the coconspirators would conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity. [Doc. 158, pp. 1-23]. The alleged racketeering activity that was the object of the conspiracy consisted of alleged 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 allegedly 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). [Doc. 158, pp.2-3].

Count Two charged a substantive RICO offense (18U.S.C.§ 1962(c)) based on seven alleged specific racketeering acts, i.e. four alleged episodes of transporting minors in interstate commerce for unlawful sexual activity and three alleged episodes of structuring cash transactions to evade the currency transaction reporting requirements. [Doc. 158, pp. 23-29]. These four alleged episodes of interstate transport were set forth again as Counts Four, Five, Six, and Eight of the superseding indictment. [Doc. 158, pp. 31-34]. The three alleged episodes of structuring were set forth again as Counts Nine, Ten, and Eleven of the superseding indictment. [Doc. 158, pp. 34-37].

Count Three charged an alleged conspiracy per 18 U.S.C. § 371, the objects of which paralleled the predicate offenses set forth in Count One, i.e. transporting minors in interstate commerce with the intent that the minors engage in unlawful sexual activity, traveling in interstate commerce for the purpose of engaging in unlawful sexual activity with minors, and structuring cash transactions to evade currency transactions reporting requirements. [Doc. 158, pp.29-30].

Counts Four, Five, Six, and Eight charged specific alleged 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. [Doc. 158, pp. 31-34].

The alleged minor victim of Count Four was "I.J." Count Five referred to "K.H.," "A.N.," and "D.N." Count Six involved "A.T." Count Eight involved "A.N.," and "D.N." Count Six involved "A.T." Count Eight involved "A.N.," "K.L.," and "S.W." (A sealed unredacted version of this brief is being filed contemporaneously with this brief, which will further identify these alleged victims.) Counts Four, Five, Six, and Eight mirrored the violations of 18 U.S.C. Section 2423 (a) that were set forth as predicate offenses in Count Two of the indictment. [Doc. 158, pp. 24-26].

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. [Doc. 158, p. 33].

Counts Nine, Ten, and Eleven charged the structuring of cash transactions. [Doc. 158, pp. 34-37]. Counts Nine, Ten, and Eleven mirrored the structuring violations that were set forth as predicate offenses in Count Two of the indictment. [Doc. 158, pp. 26-29]. Count Twelve set forth the RICO forfeiture allegations, while

the forfeiture allegations of Count Thirteen were based on unlawful transport of minors. [Doc. 158, pp. 37-48].

On October 28, 2003, based on concerns about extensive pretrial publicity including reports about the prior submission of York's guilty plea, the trial judge ordered that the venue be moved to the Brunswick Division of the Southern District of Georgia. [Doc. 146].

On December 8, 2003, York filed a Motion to Dismiss Counts 1 and 2 [Doc. 161 and a Motion to Separate Count 3 [Doc. 162]. On December 12, 2004 [Doc. 174] York filed a Motion to Dismiss Indictment Based on the Court's Change of Venue Order. On December 16, 2004, York filed a Motion to Dismiss Counts VI and Count II Racketeering Act 3 [Doc. 175]. The court denied all of these Motions.

During the course of the trial Defense Counsel made a Motion for mistrial based on the government eliciting testimony contrary to a court ruling limiting the testimony of "M.F." [Trial Transcript hereinafter referred to as "T.T." Volume 13 P. 3447 Line 4 - P. 3448 Line 5].

At the close of the government's case in chief, defense counsel moved generally and specifically for a directed verdict based on insufficient evidence. ["T.T." Vol. 9, p. 2374]. Counsel also offered specific remarks about particular aspects of the government's case that were insufficient. [T. T. Vol. 9, pp. 2374-83]. Defense

Counsel later properly named the Motion as a Motion seeking Judgment of Acquittal based on insufficient evidence, and then land additional grounds and clarity for the Motion. [T. T. Vol. 10, p. 2602, T.T. Vol. 12, pp. 3165 - 68.]. The trial judge took the verbal motions under advisement. [T. T. Vol. 9, p. 2382]. Near the close of the evidence in the guilt phase, the trial judge declared that York's motions were overruled and the case would go to the jury. [T. T. Vol. 12 p. 3387]. York did renew his motion for judgment of acquittal at the close of all the evidence by written motion for judgment of acquittal [Doc. 243] filed on January 30, 2004. Additionally, York filed a Motion for New Trial [Doc. 242] on January 30, 2004.

After fourteen days of "actual" trial, the jury returned guilty verdicts on all counts of the superseding indictment but Count Eight [Doc. 234] and Count 12 [Doc.235]. In regard to Count Two, the jury entered findings that each of the seven predicate offense had been proven beyond a reasonable doubt. [Doc. 234, pp. 2-3; T. T. Vol. 14, p. 3735]. Shortly thereafter, the jury found that the properties at both 404 Shady Road, Eatonton, Georgia and 155 Mansfield Court, Athens, Georgia were **not** acquired or maintained through a pattern of racketeering activity per Count Two, but instead found that both properties were used to promote the allegations in Counts Four through Eight. [Doc. 235]. York filed timely motions for a Judgment of Acquittal and a New Trial. [Doc. 242, 243]. York thereafter submitted another new trial motion on

the basis of alleged newly discovered evidence. [Doc. 294, 298]. In the course of a hearing about the last motion for a new trial, which was denied, the initial post-trial motions were withdrawn by York's lead counsel, Jonathan Marks. [Transcript of August 13, 2004, pp. 3, and 22-23]. On August 13, 2004, York filed a Motion to Withdraw Jonathan Marks as Attorney due to Ineffective Assistance of Counsel. [Doc. 345]. Additionally, on August 17, 2004, York filed a Motion for Hearing to Reinstate and/or Reconsider New Trial "Initial" Motion, Judgment of Acquittal, to Amend All New Trial Motions of the Defendant Due to Ineffective Assistance of Counsel and Unauthorized Withdrawal of Defendant's Motions, etc. [Doc. 348]. The Court ruled that these motions were procedurally improper because York filed them "pro se." [Doc. 354]. On November 9, 2004, the Appellant's, new lead appellate counsel, Adrian L. Patrick, filed Amended Motions to Reinstate Motion for New Trial and Judgment of Acquittal [Doc. 363]. This Motions are still pending. Additionally, counsel filed a Motion in this Court requesting that the time to file this appeal be tolled until the District Court makes a decision on this aforementioned issue [ Appellate Court Docket Sheet].

In the meantime, York came forward for sentencing. [Transcript of sentencing on April 22, 2004; transcript of Restitution Hearing on April 23, 2004]. The trial

judge imposed a total imprisonment sentence of 1,620 months. [Doc. 285 pp 3, 297]. York promptly filed a notice of appeal. [Doc. 299].

**B. STATEMENT OF THE FACTS**

The instant charges arose out of an investigation conducted by Putnam County, Georgia law enforcement officials, the Federal Bureau of Investigation (FBI), and the Internal Revenue Service (IRS). York was the alleged leader of a religious organization, initially named the Nubian Islamic Hebrews, that represented both a religious ministry and a Native American tribe. The current name of the organization is the United Nation of Nuwaubian Moors, replacing the group title Yamassee Native American Moors of the Creek Nation. Allegedly, York is viewed as a prophet from a spiritual aspect as well as an acknowledged leader of the Nuwaubians from both a Native-American tribal standpoint and a religious ministry perspective. (Doc.304, T.T., Vol.VI at 1733; Doc.305, T.T., Vol.VII at 1880-1881).

In 1998, law enforcement officials allegedly started receiving anonymous letters and e-mails stating that sexual misconduct was occurring on York's property in Eatonton, Georgia. (Doc.301, T.T., Vol.III, at 806-808). By 2001, local and federal law enforcement officials were allegedly receiving telephone calls

alleging sexual misconduct on York's property, including sexual abuse and molestation of children.

Some of the community lived on land in Eatonton, Georgia. (Doc.302, T.T., Vol. IV at 1148). On the land, it is alleged that York had many wives, as endorsed by his faith and culture, with Kathy Johnson being the "main" wife. (Doc.300, T.T., Vol.II at 424). Allegedly, children were taught to obey York and to refer to York as Baba (father), Imam (leader), and Isa (Jesus). (Doc.300, T.T., Vol.II at 421-22; Doc. 301, T.T., Vol.III at 827-28). Children received home schooling on the land. (Doc.300, T.T., Vol.II at 430; Doc. 301, T.T., Vol.III at 823). The community insured food, clothing, and living space distribution on the land. (Doc.301, T.T., Vol.III at 813).

York taught through web sites, newsletters, and a chain of stores to sell teachings, memberships, publications, and other merchandise. (Doc.304, T.T., Vol.VI at 1610-1611, 1617-1618, 1620). Weekly ceremonies were also held on the Eatonton land, allegedly generating weekly cash income of approximately $4,000. York also hosted an annual week-long "Savior's Day Party." (Doc.304, T.T., Vol.VI at 1641). In 1999, this event allegedly raised $250,000 and in 2000 the event allegedly raised $278,000. (Doc.304, T.T., Vol.VI at 1642).

Weekly income from the organization's sale of goods was prepared for deposit after the alleged removal of large denomination bills, which were kept on hand on the land by York. (Doc.304, T.T., Vol.VI at 1619-1620). The allegation by the government was that no more than $9,000 was to be deposited into any single account at a time. (Doc.304, T.T., Vol.VI at 1632). Allegedly, no cash deposit was to exceed $10,000. Allegedly, York instructed others that current reporting paperwork was not to be filled out on any cash deposit. (Id). Allegedly, several times, a community member left the bank without making a deposit when instructed by the bank teller that a form would have to be completed. (Doc.303, T.T., Vol.V at 1390-1392).

One bank, with an overzealous bank teller (inference), with which York had regular dealings filed several suspicious activity reports (SARs) and currency transaction reports (CTRs) regarding York's financial dealings. (Doc.303, T.T., Vol.V at 1393-1396). The FBI obtained these reports, learning that on 41 separate occasions, multiple deposits totaling more than $10,000 were made to one or more of York's bank accounts. At trial, the government presented evidence that allegedly showed that deposits made on September 29 and 30, 1999; October 6 and 8, 1999; and April 5 and 11, 2000 were structured to obviate currency reporting requirements. (Doc.303, T.T., Vol.V at 1399-1400, 1401-1402, 1402-1403).

Aside from the financial irregularities alleged to have occurred in this case, allegations of sexual abuse of minors by York were also raised. According to the government's allegations, previously molested younger children were employed to bring new children to York once they had gotten older. (Doc.304, T.T., Vol. VI at 1568). Allegedly, children refusing York's advances were ignored, not fed well, and not allowed to go outside and play. (Doc.303, T.T., Vol.V at 1321; Doc.305, T.T., Vol.VII at 1830). Allegedly, the children were told that the sexual activity was instructional as well as part of an ancient Sudanese ritual, assisting in preparing the child for marriage. (Doc.301, T.T., Vol.III at 847, 853-854; Doc.304, T.T., Vol. VI at 1552).

Notably, some of the government's witnesses denied being molested. (Doc.305, T.T., Vol.VII at 1908). Other individuals presented evidence of allegedly being victimized at the Eatonton compound as part of the religious ministry of York. (Doc.305, T.T., Vol.VII at 1818-1827, 1830).

After the trial, another alleged victim, in a sworn affidavit stated that her testimony at trial had been fabricated. (Doc.294, Motion, Affidavit at ¶ 1-3). The individual swore that the allegations raised against York were coerced from Jacob York, York's son, who blamed York for the premature death of his mother.

(Doc.294, Motion, Affidavit at ¶ 3). Nevertheless, the Court discounted the recantation and denied motions for a new trial.

## STANDARDS OF REVIEW

I. The denial of a motion to sever is reviewed, in a general standard, for abuse of discretion. United States v. Bennett, 368 F.3d 1343 (11th Cir. 2004)

II/III. This court reviews the district court's denial of a defendant's motion to dismiss an indictment under an abuse of discretion standard. United States v. Waldon, 363 F.3d 1103, 1108 (11th Cir. 2004). The denial of a motion to dismiss, when based upon a district court's findings of fact, are reviewed for clear error. United States v. Puche, 350 F.3d 1137 (11th Cir. 2003). The proper interpretation of a statute, however, is a question of law that is reviewed *de novo*. Dysert v. United States Sec'y of Labor, 105 F.3d 607 (11th Cir. 1997).

IV (A): A Reviewing a decision made on a motion for mistrial. The Court looks for a manifest necessity by examining the entire record in the case without limiting itself to the actual findings of the trial court. Grooms v. Wainwright, 610 f.2d 344 (5th Circuit 1980). Abdi asks that we apply the clearly erroneous standard of review to the findings of the district court. But the district court made no findings of fact in the case; rather it performed the same function as this court, reviewing the record and applying the law to the facts. Accordingly, we subject the district court's decisions to plenary review. Cf. Sullivan v. Wainwright, 695 f.2d 1306 (11th Circuit 1983).

IV (B): The reopening of a criminal case after the close of evidence is within the discretion of the District court and the court reviews the District court's decision to reopen for abuse of discretion. United States v. Peay 972 F.2d 71 (4th Circuit 1992).

V. Whether the evidence is sufficient to sustain a defendant's conviction is a question of law which the appellate court reviews de novo. United States v. To, 144 F.3d 737 (11th Circuit 1998).

VI. This court reviews the district court's denial of a defendant's motion to dismiss an indictment under an abuse of discretion standard. United States v. Waldon, 363 F.3d 1103, 1108 (11th Cir. 2004). The denial of a motion to dismiss, when based upon a district court's findings of fact, are reviewed for clear error. United States v. Puche, 350 F.3d 1137 (11th Cir. 2003). The proper interpretation of a statute, however, is a question of law that is reviewed *de novo*. Dysert v. United States Sec'y of Labor, 105 F.3d 607 (11th Cir. 1997).

VII. An ineffective assistance of Counsel claim, which presents a mixed question of law and fact, is subject to plenary review. Lusk v. Dugger, 890 F.2d 332 (11th Circuit 1994).

VIII. The Court reviews the disposition of requests for trial continuances for abuse of discretion. See United States v. Wright, 63 F.3d 1067, 1071 (11th Cir.1995).

IX/X. A district court's application of the sentencing guidelines is reviewed *de novo*, and its findings of fact for clear error. United States v. Patti, 337 F.3d 1317 (11th Cir. 2003).

## SUMMARY OF THE ARGUMENTS

I. The lower court erred in ignoring the dictates of Rules 8(a) and 14 of the Federal Rules of Criminal Procedure by misjoining distinct and disparate counts under the umbrella of one superseding indictment, this calls for dismissal.

II. The District court committed reversible error when it denied York's motion to dismiss the RICO claims of the indictment. As a matter of law, the

provisions of the criminal RICO statutes were not designed for the isolated criminal acts of a single clergy member in a religious organization; thus, the RICO charge should have been dismissed.

III. On October 28, 2003, the District court issued an Order the granting the Defendant's Request for Change of Venue stating that due to the negative pre-trial publicity in that circuit ". . .the Defendant could not receive a fair trial." On November 21, 2003, subsequent to this ruling, a grand jury selected from this condemned jury pool returned the superseding indictment that the Appellant was found guilty on. Therefore, this indictment should have been dismissed.

IV. (A) The court allowed the re-opening of the government's case, but with a strict limitation that she government could only state that the witness was molested, with no details. The government violated this by soliciting details. The Appellant moved for a mistrial and the Court denied the motion. (B) The court did not allow the Appellant to put "S.W." on the stand to rebut what the government's rebuttal witness, "M.F.". Thus, the conviction should be vacated.

V. In relation to Count 1 (1), Count 1 (2), Count 2 (B) (1) Racketeering Act 1, Count 2 (B) (2) Racketeering Act 2, Count 2 (B) (3) Racketeering Act 3,

Count 2 (B) (4) Racketeering Act 4; Count 3 (A) and Count 3 (B) Conspiracy and Counts 4, 5, 6, 7, and 8 - Transporting Minors in Interstate Commerce for Unlawful Sexual Activity - The government failed to prove beyond a reasonable doubt all of the necessary elements of these crimes: specifically the **unlawful** sexual activity and the **purpose** elements. There was absolutely no evidence presented to prove that the travel in interstate commerce was unlawful, no State law was put into evidence during the State's presentation of their case and there was insufficient or no evidence that the purpose of the interstate travel was for sex with minors. Thus, the conviction should be reversed.

VI. "A.T.", the individual in Count 6 and Count 2 Racketeering Act 3, was 14 years of age at the time the alleged sexual act occurred; thus, as indicted this would not be a crime per Georgia law. Thus, this conviction should be reversed.

VII. The post-trial Counsel, Jonathan Marks, was ineffective because he withdrew the Appellant's Motion for Judgment of Acquittal and Motion for New Trial without the consent of the Appellant and with no sound legal basis. This has a negative and adverse impact on his appellate rights, including but not limited to the ability of the Appellant to challenge the

sufficiency and other relevant issues. No reasonably objective lawyer would have withdrawn the Motions because there was no rationale basis.

VIII. On December 30, 2003, six days before trial, the court permitted previous lead counsel to withdraw from the case; thereby, leaving new counsel Adrian L. Patrick, as lead counsel with 6 days to prepare. In attempting to review the 20 months of activity in the case, including, indictments, superseding indictments, discovery information, motions, and court orders; new counsel requested an extension in the trial date so that he could adequately prepare for trial. The district court refused and trial proceeded as planned. The court's failure to grant an extension, given the circumstances, deprived York of his right to counsel, due process and a fair trial.

IX. A. After York's conviction at trial, the district court improperly relied upon the United States Sentencing Guidelines to determine York's punishment. The use of the Guidelines served to increase York's punishment based on facts that were never submitted to a jury for proof beyond a reasonable doubt. York was denied his Sixth Amendment right to a jury trial when the district court took these steps and increased his punishment based on facts beyond what was reflected in the jury verdict. Blakely v. Washington, 124 S. Ct. 2531 (2004).

B. The recent Supreme Court decisions in U.S. v. Booker, Supreme Court Case No.: 04-104 and U.S. v. Fanfan, Supreme Court Case No: 04-105 affirmed the Blakely decision and essentially stated that the sentencing guidelines are unconstitutional and that the invalid parts can be excised and the remainder should be advisory, but not mandatory.

X. The use the most recent version of the Sentencing Guidelines at York's sentencing violates Ex Post Facto. York's punishment was increased based on the use of the most recent version of the Guidelines instead of the version in effect at the time York committed the charged offenses. Therefore, he must receive a new sentencing so that the court may employ the appropriate version of the Guidelines.

## ARGUMENT

### I. Appellant Was Denied a Fair Trial and Due Process Due to the Trial Court's Denial of His Motion to Sever Disparate Counts.

Part of the judiciary's structural integrity is the limitations on the government from manipulating charging instruments so as to circumvent jurisdiction. *See*, Rinaldi v. United States, 434 U.S. 22, 98 S.Ct. 81 (1977). In the case below, the government used all of its vast resources to bring federal charges against York notwithstanding the challenges of the applicable statutes of limitations. Specifically, York was originally indicted on May 2, 2002 with four

counts of interstate transport of minors for unlawful sexual activity in violation of 18 U.S.C. 2423(a) (hereinafter referred to generally as "Mann Act violations"). (Doc.1, Indictment) However, the government recognized serious problems with this indictment in light of the five year statute of limitations for the application of these charges. *See*, 18 U.S.C. § 3282 As reflected in each of the charging instruments, most of the allegations against York related to events occurring in 1988 through 1994. A superseding indictment was returned against York on January 23, 2003, re-focusing the allegations of Mann Act violations and adding a criminal forfeiture claim. (Doc. 78, Superceding Information) This information was returned in anticipation of a plea agreement; however, the plea agreement dissolved due to no fought of the Appellant. Subsequently, the final superseding indictment against York was returned.. (Doc. 158, Superseding Indictment) This final indictment again attempted to address the government's challenge of charging York with old, dated, and stale allegations of Mann Act violations (18 U.S.C. 2253) by creating a hazy aggregation of Mann Act claims, claims of improperly structuring legal cash deposits in violation of 31 U.S.C. § 5324(a)(3), conspiracy claims, and racketeering claims based upon the belief that a recognized church ministry and Native American tribe constitutes an enterprise for illegal racketeering akin to a drug cartel or an organized crime syndicate. On December

8, 2003, York moved to separate Count 3 of the 2nd Superseding Indictment (conspiracy to violate the Mann Act) and to sever the wholly unrelated financial reporting allegations. (Contemporaneously, York also sought dismissal of the RICO claims, a matter of further District Court error discussed below.) It is clear from the pleadings that the government joined together two *independent and unrelated* claims against York: first, that York sought to transport minors across state lines for the purpose of engaging in unlawful sexual activity sometime in the distant future, and second, that York engaged in improper structuring of legal cash deposits to circumvent required administrative currency reporting regulations. Such a joinder offends due process and as importantly runs contrary to the Federal Rules of Criminal Procedure. Rule 8(a) allows: "two or more offenses [to] be charged in the same indictment . . . in a separate count for each offense if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Fed. R. Crim. P. 8(a). See, United States v. Weaver, 905 F.2d 1466 (11th Cir. 1990).

The underlying principles of the constitutionally required indictment process are founded in the bedrock guarantee of due process. Disparate claims against a defendant, joined under the umbrella of one indictment, are susceptible to severance under Federal Rules of Criminal Procedure, Rules 8(a) and 14, most notably when the government's joinder of such claims prejudices the defendants. The clear basis for the severance of dissimilar claims fairness and due process. In fact, the Supreme Court has held that "misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial."

United States v. Lane, 474 U.S. 438, 446 n. 8 (1986). In reviewing the propriety of whether separate charges were properly joined, this Court, in United States v. Hersh, 297 F.3d 1233 (11th Cir. 2002), outlined a two-step analysis for any appellate court to use in determining whether separate charges were properly tried at the same time. First, the appellate court should review *de novo* whether the initial joinder of charges was proper under Fed. R. Crim. P. 8(a). Second, the appellate court must determine whether the district court abused its discretion under Fed. R. Crim. P. 14 by denying a motion to sever. Case law is clear that Fed. R. Crim. P. 8(a) is not limited to crimes of the "same" character but also covers those of "similar" character, which means "nearly corresponding; resembling in many respects; somewhat alike; having a general likeness." United States v. Walser, 3 F.3d 380, 385 (11th Cir. 1993). Moreover, when offenses are joined under Rule 8(a) by virtue of their "same or similar character," the offenses need only be similar in category, not in evidence. *See*, United States v. Coleman, 22 F.3d 126, 133 (7th Cir. 1994). In relying on these most liberal and literal cases regarding the Rule 8(a), it is illogical to argue, suggest, or hold, as the lower court did, that Mann Act violations are similar in category, evidence, resemblance, or general likeness to alleged violations of currency reporting regulations. Such an argument belies logic for no definition can transform these disparate allegations

into similar ones. Thus, there is no question that the Mann Act violations were misjoined with the money structuring offenses. The second step, under Hersh, is to apply Federal Rules of Criminal Procedure Rule 14. This Rule directs that "[i]f the joinder of offenses . . .in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." The standard for applying this rule is that an appellate court is required to reverse a denial of a motion to sever if the joinder of disparate claims creates prejudicial error and results in actual prejudice that had "substantial and injurious effect or influence in determining the jury's verdict." United States v. Weaver, 905 F.2d 1466, 1477 (11th Cir. 1990). There can be no question that the joinder of the unrelated charges in the indictment served to prejudice York. Not only does this joinder obfuscate statute of limitations issues relative to Mann act claims, it clearly influenced the jury's verdict. The government sought to eliminate the objectivity of the jury by submitting evidence of York's alleged wrongdoing regarding cash structuring in an effort to make York appear guilty of other unrelated crimes of child molestation and vice-versa. Presenting allegations of sexual misconduct against a clergy member and a leader of a large "religious organization that consisted of approximately *5,000* members" (see, Superceding

Indictment, Count One) may not impact a jury in today's environment of similar claims against religious leaders in Boston, Cincinnati, Chicago, and other metropolitan areas. Consequently, the government sought, *inter alia*, to characterize York as a major criminal, a corrupt racketeer, an opportunistic false priest. Through its joinder of dissimilar allegations, the government sought to influence the jury with the claims that York was a child molester, a sinister tax cheat who wanted to hide where his ministry's income originated, and a corrupt crime leader involved in racketeering and other corrupt practices. Thus, evidence of guilt concerning one act would spill over to lead the jury to conclude that York was guilty of other acts too. The lower court, pursuant to Rules 8(a) and 14, should have sustained York's motion to sever the Mann Act counts with those related to claims of improper currency reporting of legal cash deposits under Title 31 of the U.S. Code. The legal standards for these separate acts are complex and, at the very least, the jury instructions alone may have prejudiced and confused the jurors in addition to any actual prejudice accruing due to the jury recognition of many, multiple count allegations of guilt. *See*, United States v. Caldwell, 594 F. Supp. 548 (N.D. Ga. 1984); *also see* Trial Transcript, Volume 14, p. 3685 et. seq. (charge to jury). In sum, York was prejudiced by the joinder of the objectively dissimilar

charges of the Superceding Indictment and the lower court erred in not sustaining York's motion for a severance. The misjoinder of the dissimilar offenses charged under the single indictment resulted in prejudice so great as to deny York's Fifth Amendment right to a fair trial. Therefore, York's convictions must be reversed.

## II The District Court Erred in Denying Appellant's Motion to Dismiss The Rico Claims (Counts One, Two, And Twelve).

York's motion to dismiss should have been granted because the allegation that the religious organization is an enterprise for RICO purposes is beyond the scope of the statute. Additionally, the RICO allegations should have been dismissed due to the absence of any government allegation of a violation of federal law in counts six and two. When the government sought a superseding indictment from the Grand Jury of

the Middle District of Georgia, it needed to insulate the claims of Mann Act violations from beyond the limitation protections of 18 U.S.C. § 3283 with the totally unrelated currency regulations. In addition to this misjoinder, the government manipulated the judicial process with one additional layer of inappropriate claims by alleging that a recognized religious organization, whose spiritual leader is charged with a felony, is a criminal enterprise as defined under the RICO statutes. The Racketeer Influenced and Corrupt Organization statute (RICO) is a powerful and in many respects draconian tool adopted by Congress in

1970 with one specific focus: "...to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.". Act Oct. 15, 1970, P.L. 91-452, §§ 1, 84 Stat. 922 The statute's principal purpose is to strengthen the means of preventing money and power obtained from such illegal endeavors as syndicated gambling, loan sharking, theft and fencing of property, importation and distribution of narcotics and other dangerous drugs from being used to infiltrate and corrupt legitimate businesses and labor unions and to subvert and corrupt our democratic processes so as to interfere with free competition and to burden interstate and foreign commerce. United States v Forsythe , 429 F. Supp 715(WD Pa. 1977), rev'd on other grounds 560 F.2d 1127 (3rd Cir. 1977). This case, as is clear from all filings, is not a matter of prosecuting organized crime. It does not deal with loan sharking, syndicated gambling, theft and fencing of stolen property, or even the distribution and trafficking of narcotics. This is a simple, yet powerful, state case of alleged child molestation. Nevertheless, the government has manipulated this state case into a proverbial federal one, a dated one into a current allegation, and a case of singular wrongdoing into a RICO concern. The district court erroneously denied York's

motion to dismiss these RICO claims. This court now has the opportunity of correcting this error. York concedes that motions to dismiss indictments are creatures of limited procedural availability in this circuit. Although the Sixth Circuit has found that Federal Rule of Criminal Procedure 12 provides a basis for granting a pre-trial motion to dismiss a criminal indictment, *see* United States v. Levin, 973 F.2d 463 (6th Cir. 1992)(as a matter of law, criminal intent could not be proven), four circuits limit this view. *See* United States v. Knox, 396 U.S. 77, 83, 84 n.7 (1969) (evidentiary questions concerning whether the defendant established a duress defense or whether his false statement was made "willfully," as required by statute, should be determined initially at trial, and not on a motion to dismiss under Federal Rule of Criminal Procedure 12(b)(1)). This circuit, along with the third, eighth, and ninth, take a limited view, yet one still applicable to the case at bar. While these circuits have reversed dismissals of indictments based on the insufficiency of the evidence, the vehicle of a motion to dismiss is still much in use and applicable when, as a matter of law, the government cannot sustain an indicted charge. *See*, United States v. Nabors, 45 F.3d 238, 240 (8th Cir. 1995)( the trial court dismissed an indictment on the basis that the government's proffered evidence was insufficient to prove the facts alleged in the indictment) . In the current case, the motion to dismiss the RICO claims was based on the fact that, as a

matter of law, there was no nexus between the defined enterprise (the religious organization of the United Nation of Nuwaubian Moors) and the pattern of racketeering activities allegedly undertaken by some members of the church. The RICO statute, 18 U.S.C. § 1961, requires several key elements, each defined in the statute. All RICO violations under 18 U.S.C. § 1962 entail "(1) a person who engages in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise." RICO requires an enterprise that is involved in racketeering activities. Both the definition of an enterprise and the specific definition of racketeering activities are placed in the context of organized crime and corrupt organizations. Perhaps the racketeering component in this case provides the greatest support for pretrial disposition. In its second superseding indictment, the government alleges that the entire religious organization is the “enterprise” involved in the corrupt activities. In fact, the government almost indicts as a co-conspirator the personnel and membership of the 5,000 strong church. In the charging instrument, the government is clear. It defines the “enterprise” as the Nuwaubian religious organization. It further states that this religious ministry was “an ongoing organization whose members functioned as a continuing unit for the common purpose of achieving the objectives of the enterprise.” The government then alleges that a common purpose

of the religious organization was to "groom minors for purposes of engaging in unlawful sexual activity, engage with minors in unlawful sexual activity and transport minors in interstate commerce for purposes of engaging in unlawful sexual activity." While the specific allegations of the indictment are clear, the government sought to confuse the issue before the court in a pretrial hearing on December 16, 2003 when Mr. Moultrie, the assistant U.S. Attorney, attempted to re-write the indictment with his own oral argument: "What I would like to make clear, Your Honor, is that this is not an indictment of the entire Nuwaubian [sic] nation or its group. There are lots of fine people who believe in Mr. York now, there are lots of fine people who believe in him when he was arrested. This indictment is not an indictment of those people or what they believed then or what they believe now. The RICO count charges Mr. York with conspiring with certain individuals among the Nuwaubian [sic] nation to commit a criminal enterprise."

[T]his indictment - - -doesn't have anything to do with a lot of the legitimate purposes and beliefs and foundations that Mr. York put in place and that a lot of his believers continue to believe. ***

And again, Your Honor, I would state that the law is very clear that if the government can prove that the predicate acts relate to the overall enterprise, then the RICO count should stand. ***And in this case we have predicate acts that relate to the overall purpose of the enterprise, that is, to enrich Mr. York. (Doc.177, Arraign, pp. 30-32).

Notwithstanding the government's eloquence in proclaiming that the indictment has nothing to do with the legitimate purposes of the Nuwaubian nation, the enterprise defined in the indictment is, in fact, the organizational mission and goals of the Nuwaubian's religious organization. When the government defined

the "enterprise" in such a manner, the subject of the racketeering activities must relate back to the entire religious organization and not just, as Mr. Moultrie proclaimed at the same hearing, to the "illegal intent of Mr. York and some of his co-conspirators to commit illegal acts." (Id. at 32). As a matter of law, the lower court should have sustained York's motion to dismiss as the allegation that the religious organization is an enterprise for RICO purposes is well beyond the scope of the statute. While the religious ministry technically conforms to the definition of enterprise, it does not comport with the claims of defined racketeering activity. In addition, the RICO allegations should have been dismissed due to the absence of any government allegation of a violation of federal law in counts six and two. The racketeering activity alleged is that York knowingly transported a minor from Kings County, New York to Bibb County, Georgia and Putnam County, Georgia with the intent that said minor would engage in sexual activity for which a person could be charged as violating the State of Georgia's criminal code, to-wit Sections 1664 and 1665. The state offenses to which the federal charge refers are child molestation and enticing a child for indecent purposes. The problem, incorrectly sustained by the lower court, is that before York can be accused of violating the terms of the federal statute, sufficient and proper allegations must be made in the indictment that he also violated the underlying criminal offenses under Georgia

law. The government alleges various facts in its indictment to support these counts. One such fact, found on page 17 of the indictment, alleges that in April of 1993, the victim P-23 was fourteen years of age. In 1993, Georgia state law did not criminalize engaging in any immoral or indecent act with a child who was age 14. To be a criminal offense, required under the federal statute, the child had to be under the age of 14. Both O.C.G.A. 1664 and 1665 maintained the same age ceiling. To be a state criminal offense, the victim child was required to be under the age of 14. (It was not until 1995 that the state statutes were amended to raise the age to 14.). As the government did not adequately allege facts to support a violation of federal law, the lower court should have granted York's motion to dismiss these counts. Failing so, the court committed reversible error. Thus, the convictions should be reversed.

## III. The District Court Erred in Denying the Appellant's Motion to Dismiss the Superseding Indictment and Allowing the Jury Trial to go Forward on an Indictment that was Returned by a Grand Jury that was Selected from a Tainted Jury Pool

The District Court should have granted the Defendant's Motion to Dismiss Superseding Indictment based on the Tainted Grand Jury [Doc. 174] that was selected from the Macon Division of the Middle District of Georgia. On October 28, 2003, this Court issued an Order granting the Defendant's Motion to Change

Venue [Doc. 146 - Change of Venue Order]. This Order stated essentially the following:

"The Court GRANTS Defendant's Motion as to Fed. R. Crim. P. 21 (a) because the Court is satisfied that without changing venue for the trial of this case, ***Defendant cannot obtain a fair and impartial trial in the Macon Division of the Middle District of Georgia."*** The Court goes on to state the following: "In reaching the conclusion about where to try this case, the Court has carefully considered the **problem of media saturation** and potential bias involving not only the allegations against Malakai (Malachi) York, but also reports about the Nuwaubians because York is the leader of the Nuwaubians. The Court regularly reviews and has reviewed both the Macon Telegraph and the Atlanta Constitution for many years. Over the years the Court has noticed in both newspapers coverage of Defendant's criminal case and articles that reflect **unfavorably on the Nuwaubians that could adversely impact Defendant at trial. The Court has grave concerns about trying to select a jury in this case in any division in the Macon and Atlanta media markets . . ."**

It should be noted that the government did not file an objection to the Motion to Change Venue. [Doc. 146 - Court notes this fact in the Change of Venue Order]. Subsequent to this Order on November 21, 2003, the Superseding Indictment that Appellant was tried on was returned from a grand jury selected from the aforementioned tainted jury pool. In Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), the Court announced the standard for assessing non-constitutional errors in the grand jury. The Court established that the dismissal of the indictment is appropriate if it is established that the violation substantially influenced the grand jury's decision to indict or **if there is a grave doubt that the decision to indict was free from the substantial influence** of such violations. In

United States v. Sigma Intern, Inc. 244 F.3d 841, 853 (11th Circuit 2001), opinion vacated, 287 F.3d 1325 (11th Circuit 2002) rehearing en banc pending, the court applied this same standard to constitutional errors. Thus, in the case at hand, it was a violation for the United States Attorney to present a case to a grand jury selected from this tainted jury pool and it was a violation for the Court to select and/or allow to be selected a grand jury from this same jury pool that the Court had previously, summarily stated was tainted as indicated above. It would only be logical that any jury (trial jury or grand jury) selected from this jury pool would be tainted and equally affected by the same negative publicity. Thus, as contemplated by the aforementioned Supreme Court and 11th Circuit cases, there is clearly a grave doubt that the grand jury's decision to indict the Appellant on the Superseding Indictment was free from the adverse concerns expressed by the Court in its Order date October 28, 2003. The District court effectively and constructively took "judicial notice" of the fact that any jury selected from this District would be "tainted" or have an extremely high probability of being "tainted;" thus, it is clear that the grand jury for this superseding indictment was erroneously selected from the same District that the Court, per its own order issued October 28, 2003, already ruled insufficient; thus, it was error for the Court to deny

the Appellant's Motion to Dismiss the Superseding Indictment and to let the trial go forward. Thus, the Appellant's conviction should be reversed.

It shall be noted that the Court in denying York's Motion to Dismiss Indictment [Doc. 174] relied on the case of United v. Waldon, 363 f. 3d 380 (11th Circuit 2004). However, the Waldon case can be distinguished on the facts and substantive law as discussed in York's reply brief. York's position is that Waldon does not apply in the case at hand.

**IV. The District Court Committed Error by:**

**A. Denying the Appellant's Motion for Mistrial after the Government Exceeded the Scope of the Court Ordered Limitation of the Rebuttal Witness's Testimony**

**B. Not allowing the Appellant to call his own witness as a Rebuttal Witness to rebut the Government's Rebuttal witness**

After the close of the Government's Case-in-Chief and after the close of the Appellant's Case. The Government sought to introduce a new witness, "M.F.", who was one the alleged victim's named in the government's superseding indictment against Appellant. The Government sought to introduce her as an " rebuttal witness." Although the Government titled her a "rebuttal" witness, it is the Appellant's contention that she was actually a victim-witness that the government was using to reopen and modify their case-in-chief after they had already rested. The Appellant objected and questioned the reason why the Government was calling "M.F.", who is an alleged victim named in the indictment.

**A. The Court Erred by Denying the Appellant's Motion for Mistrial after the Government Exceeded the Scope of the Court Ordered Limitation of the Rebuttal Witness's Testimony**

After overruling the Appellant's objection to the introduction of alleged rebuttal witness, "M.F.", the Court allowed this erroneous testimony with strict limitations. After the Court announced these limitations, the government acknowledged their understanding of the limitation and then intentionally exceeded this limitation by prompting their witness, "M.F.", to testify about things that were in direct contradiction to the judge's order. The following excerpt is a continuation of the aforementioned discussion concerning "M.F.'s" alleged rebuttal testimony.

[T.T. p. 3441 Line 4 - 12]:

The Court: And that's why I'm restricting that so much.

Mr. Patrick: But, it's still coming in. They should have presented that ["M.F." during their main case. Your Honor, they're reopening their case. That's not the purpose of rebuttal .

Ms. Thacker: We are rebutting your two witnesses, "S.W." and "S.T.", and your legion of witnesses who said it simply didn't happen and – .

[T.T. Volume 13 P. 3441 line 15 - P. 3442 Line 2]:

Ms. Thacker: And I understand the Court's ruling that we are going to be limited in that regard . . .

[T.T. Volume 13 P. 3441 Line 22 - 23]:

The Court: No. I'm just going to restrict you to the fact that she was molested by him..

[T.T. Vol. 13 : P. 3442 Line 10 - 13]:
The Court: – of rebutting the testimony of "S.W." or others, I'm going to allow that, but this is **not a victim-type testimony. You're being restricted by that.**

[T.T. Vol. 13 P. 3442 Line 14 - 19]:

Mr. Patrick: When you allow them to get into the fact that there was an act of molestation, she is a victim-witness, and that's outside of the rebuttal, and we object to that because they're just re-opening their case, and this is not rebuttal testimony. They should have called her during their case. But I'll rest on my objection.

Testimony of"M.F." - T.T. Volume 13 P. 3444 line 9 - 11: (Note: Stephanie

Thacker is asking the Questions and "M.F." is Answering)

Q: Now, during that time period, did Dwight York ever molest you?
A: Yes, Ma'am.

[T.T. Volume 13 P. 3446 line 15 - P. 3447 line 3]:

Q: What happened after that?
A: She took me to his house, and he began to fondle me. He took my ants off, and he began to fondle me.
Q: Anything else?
A: No. He just began to fondle me and touching me.
Q: Did you touch him?
A: Yes, his private parts.
Q: Did you tell anybody about this?
A: He said not to tell nobody, so no.
Q: Was "S.W." present when this happened?
A: Yes, ma'am.
Q: Was this the first incident of sexual molestation by Mr. York?
A: Yes, ma'am.

[T.T. Volume 13 P. 3447 Line 4 - P. 3448 Line 5]:

Mr. Patrick: Your honor, I think the Court has ruled, and counsel is going beyond what the Court has ruled counsel could go into. . .

The Court: Well, I –

Mr. Patrick: And, Your Honor, we need to approach on an issue.

The Court: Okay.

Mr. Patrick: Your Honor you clearly informed the government that the only thing the government could go into was that she was molested and nothing else. She clearly went beyond that, to get into details. I want to make a Motion for a Mistrial at this point based upon that, because the Court was clear as to what counsel could get into, and she continued. She even started talking about another incident. The Court was clear your Honor and I think this is grounds for a mistrial. It was already tenuous because it was getting outside of the scope, and the Court was clear to the government about this, and she intentionally went beyond what the Court stated.

The Court: Well, let me just tell you that I told her she could give the testimony, the facts testimony related to "S.W.", and that's all she's done here. So your motion is –

Mr. Patrick: But, your Honor, she's talking about her –

The Court: . . . So your motion is overruled . . .

At this point even after the Court erroneously allowed the Government to reopen their case, the Court placed a strict limitation on this testimony, the Government understood this limitation and then the Government went beyond the limitation and start getting into the details of the molestation and even went so for

as to quantify this incident as the 1st time, indicating to the jury that if this was the 1st time there had to be many other incidents. This was clearly outside of the restriction that the Court put on this testimony. Based on the fact that the Government violated the strict limitation that the Court put on this testimony, by prompting the witness to testify to evidence that was in direct violation of the judge's restrictive order, the Appellant made a timely motion for mistrial which the judge denied. Per the rule established in United States v. Abdi,744 F.2d 1500 (11th Circuit 1984) it was a manifest necessity to declare a mistrial, because once the new act of child molestation was in the minds of the jury there was irreparable harm.

Therefore, it was error for the District court to deny the Appellant's request for a mistrial and we request that this conviction be vacated and/or remanded for a new trial.

**B. The District Court erred by not allowing the Appellant to call "S.W." as a rebuttal witness to rebut the Government's Rebuttal Witness**

After the Court had allowed "M.F." to testify in an attempt to rebut "S.W.'" testimony. The Appellant requested that the Court allow the Defense time to call "S.W." back to the stand. After "S.W.'" testimony in the Appellant's direct case she went back to Eatonton, Georgia which was about 6 hours from Brunswick. "S.W." was willing to come back to Brunswick to testify to rebut what "M.F."

testified to, but it would take her about 6 hours which would have taken us into the next day. Although we had been in trial approximately 3 weeks, the court refused to delay the trial one more day to allow the Appellant a chance to perfect his Defense. The court had given the Government approximately two weeks to present their case, but then refused to allow the Appellant one more day to present an effective and proper Defense.

The following is an excerpt of the discussion concerning the Appellant's ability to present "S.W." as a witness to rebut the "M.F." testimony.

> [T.T. Volume 13 P.3542 - Line 14 -18]:
>
> Mr. Patrick: Your honor one of the witnesses we have "S.W.", she's in Eatonton and – well, we didn't know we were going to need her [again]. She's far away . . . I mean, we can call her to come, but that'd be after 5:00.
>
> [T.T. Volume 13 P. 3543 Line 7 - 12]:
>
> The Court: I mean, as far as "S.W." in concerned, I wonder if we could work out an agreement where I advise the jury that "S.W." is not here and unavailable, and that she would testify that she didn't solicit – which was it?
>
> Mr. Patrick: "M.F.".
>
> [T.T. Volume 13 P. 3543 Line 19 - 25]:
>
> Mr. Patrick: But, Your Honor, I need "S.W." here on that stand to testify and in person so the jury can evaluate her credibility when she says it; because, Your Honor . . . if the Court just says that, I mean, it's not like the reinforcement of actually seeing the witness and the number of other things that a jury can interpret.

The Court: This is a very, very fine point . . .

[T.T. Volume 13 P. 3545 Line 4 - 13]:

Mr. Patrick: . . . Now they [the government] have introduced "M.F.", who they had a full opportunity to produce during their case. She's named a named person [in the indictment] – she [Ms. Thacker] said she was under subpoena. They just didn't call her. Thus, "S.W.", I want to call her to clear that issue up . . . And, Your Honor, there's no way for the Court or anyone to know what factor could change a jury's mind, either way . . . And I want to cover that base, and I have a right to cover that base . . .

[T.T.Volume 13 P. 3548 Line 14 -15]:

The Court: I'm not going to delay the trial for you to call "S.W." back

[T.T. Volume 13 P. 3551 Line 10 - 22]:

Mr. Patrick: Your Honor, we take exception to your ruling . . . I think that "S.W.'" testimony is extremely critical to the defense . . . I think the court not allowing "S.W." to the stand, in conjunction with the fact that the government had an opportunity, a full opportunity, to call her ["M.F."] during their case, substantially cripples the defense. And I ask that "S.W." herself be able to come and make that statement. Obviously, the Court has ruled, and I make exception to that.

In the case of United States v. Peay 972 F.2d 71, (4th Circuit 1992), the court held as follows:

"An important criterion for properly reopening a case is taking care that reopening does not "preclude an adversary from having an adequate opportunity to meet the additional evidence offered." Thetford, 676 F.2d at 182. The court's reopening of the government's case while at the same time denying Peay an opportunity to impeach Seager's with Rainer's testimony sustains Peay's assignment of error. The judgment must be vacated and the case remanded for retrial."

Similarly, in the case at hand, the Court's act of allowing the government to reopen their case by calling "M.F.", while at the same time denying the right of the Appellant to call "S.W." to impeach the government's alleged rebuttal witness is clearly erroneous and warrants that this conviction be vacated and the case should be reversed or in the alternative, the case should be remanded for retrial.

**V. The Evidence was Insufficient to Prove Beyond a Reasonable Doubt that the Appellant Committed the Acts Alleged in Count 1 (1), Count 1 (2), Count 2 (B) (1) Racketeering Act 1, Count 2 (B) (2) Racketeering Act 2, Count 2 (B) (3) Racketeering Act 3, Count 2 (B) (4) Racketeering Act 4; Count 3 (A) and Count 3 (B) Conspiracy, Count 4, Count 5, Count 6, Count 7, Count 8 - Transporting Minors in Interstate Commerce to Engage in Unlawful Sexual Activity**

The above-referenced counts of the indictment are codified in the following code sections:

> 18 U.S.C. Section 2421 and 18 U.S.C. 2423 state in pertinent part the following:
>
> 18 U.S.C. Section 2421 - Transportation generally
> Whoever knowingly transports any individual in interstate or foreign commerce . . . **with intent that such individual engage [purpose element]. . . in any sexual activity for which any person can be charged with a criminal offense [unlawfulness element]** . .
>
> 18 U.S.C. Section 2423 - Transportation of minors
> (a) Transportation with intent to engage in criminal sexual activity.-A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce . . . **with intent that such individual**

**engage [purpose element]. . . in any sexual activity for which any person can be charged with a criminal offense [unlawfulness element] . .**

There are two elements of the above-referenced charges that these arguments will focus on and that is a follows:

a. The intent or "purpose" element

". . . with intent that such individual engage . . ." 18 U.S.C. 2423 (a)

and

b. The "unlawfulness" element

". . . in sexual activity for which a person can be charged with a criminal offense . . ." 18 U.S.C. 2423 (a)

In a criminal case, the government must prove each and every element of a charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). The Eleventh Circuit has characterized this right as one of the most fundamental guarantees in a criminal trial. Nutter v. White, 39 F.3d 1154 (11th Circuit 1994).

Whether the evidence is sufficient to sustain a defendant's conviction is a question of law and fact which the appellate court reviews de novo. United States v. To, 144 F.3d 737 (11th Circuit 1998). In passing on this argument the court must view the evidence in the light most favorable to the government, Glasser v. United States, 315 U.S. 60 (1942).

**A. Necessary Element: Purpose.** There was a failure by the government to Prove the Appellant Guilty Beyond a Reasonable Doubt on all of the above-referenced charges because the Government never proved that the **purpose** of the travel was to engage in unlawful sexual activity. This failure defeats the federal court's jurisdiction from being invoked and leaves the alleged crimes only under the realm of the state's jurisdiction. Generally, the Government has alleged in the indictment that the travel from New York to Georgia was for illegal sexual purposes and the travel from Georgia to Florida was illegal. The jury found the Appellant not guilty of count 8, which covered the travel from Georgia to Florida. Thus, if you look at this case in the light most favorable to the government, the government could have possibly proven child molestation in New York and child molestation in Georgia. However, these are state crimes and in order to invoke the federal jurisdiction and to prove the federal crimes, the government must prove beyond a reasonable doubt that the travel was for the purpose of engaging in an unlawful act. However, the government presented no witnesses that testified that the purpose of the travel was to engage in unlawful sexual activity. There was no proof that the Appellant actually drove anyone of the alleged victims. There was no evidence that the Appellant directed anyone specifically to travel for that purpose.

[T.T. Volume 9 p. 2428 line 19- 23: (Attorney Adrian L. Patrick is questioning Federal Agent Jalaine Ward about her Detention Hearing Testimony May 9, 2002):

> Q: Read from "all right" down for us. Okay?
> A: "Now in connection with the travel for the purpose of having sex with a minor, do you have any witness who says that the purpose in the travel was to have the children have sex?"
> The witness – my answer is, "The witness that says that?"

[T.T. Volume 9 P. 2428 Line 25 - P. 2429 Line 7]:

> And my Answer is, "No."
> "You have no witness that says that?"
> "Not that says that, no."
> And you didn't say anything about "H.W." at that time, correct?
> No . . .

[T.T. Volume 9 Line 9 - 12]:

> She would be the witness that comes to mind.
> And this is sworn testimony May 9, 2002; correct?
> Yes. Yes.

At this point Jalaine Ward, the Federal Agent has indicated that it is her belief that "H.W." may fill this evidentiary void of providing a witness or any evidence that the purpose of the travel from New York to Georgia was for the **purpose** of unlawful sex; however, contrary to this agent's belief, upon review of "H.W.'s" entire testimony. There is no evidence that she provides indicating that the purpose of the travel was for unlawful sex with minors. Thus, there is no

evidence that would sufficiently support the federal jurisdiction over the state acts of alleged child molestation. Thus, due to the government's failure to prove beyond a reasonable doubt the **purpose** element of the above-referenced charges the convictions on all the charges individually and as a whole should be vacated and reversed.

**B. Necessary Element: Unlawful Sexual Activity.** There was a failure by the government to Prove the Appellant Guilty Beyond a Reasonable Doubt on all of the above-referenced charges because the Government never proved that the alleged sexual activity was unlawful.

An essential element of all of the aforementioned counts is that the travel must be with the intent to commit an unlawful sexual act. The government put the "unlawfulness" element in the indictment by writing it in, by putting it in parentheses and by underlining the term "unlawful sexual act4ivity" [Doc. 158 pp. 2, 24, 25, 29, 30, 31, 32, and 33]. Thus, by virtue of preparing this superseding indictment, the government has mandated that unlawfulness is a necessary element that they must prove beyond a reasonable doubt. However, the government presented absolutely no evidence during its case-in-chief, nor during its rebuttal case to prove that the alleged sexual acts where unlawful.

Specifically, the Government failed to put into evidence and prove the Georgia Law - Georgia Code 16-6-4 and 16-6-5, any State Law, nor any law that was going to be or that would show that the alleged sexual acts were unlawful. Once again, the government put the Georgia Code Sections in the superseding indictment [Doc. 158 pp. 2, 24, 25, 26, 29, 32, 34].

See United States v. Zemater 501 F.2d 540 (7th Circuit 1974), this court held as follows:

> ". . . But even if the activity in Saigon violated Illinois statue, it did not violate the Travel Act. Subsection (b) of the federal statute requires the acts committed after the travel to be in violation of the laws of the state "in which they are committed." Since Congress could have punished travel merely . . ."
>
> "That Congress did not intend to exercise its full constitutional powers in the area of local law enforcement is demonstrated by the wording of the Act and specifically by use of the word "thereafter" As the Senate Report on S.1653 states:
> . . .to come within the provisions of the bill some activity in furtherance of a racketeering enterprise, subsequent to the performance of the travel must take place . . ."

Although not directly on point, this case is used as support for the Appellant's contention that there must be proof presented by the Government during its case that the sexual activity "would be" unlawful or "is" unlawful if committed in the destination state.

In the case at hand, the government would have to prove that after the travel from New York to Georgia was complete, that any intended or actual sexual activity "would have been" or "is" unlawful. The government completely failed to do this. The government simply relied on the court to instruct the jury on the Georgia law at the end of the entire case; thereby, circumventing their obligation and burden of proof beyond a reasonable doubt of each and every element of the crime. The government essentially relied on the court to meet their burden of proof through its jury instructions. In this entire case, the jury instructions are the extent of the evidence of proof that the alleged sexual acts where unlawful. However, the jury instructions are not evidence.

First, it is necessary that the government prove what the law "is" or what the law "was" at the time of the alleged offenses. Next, it is necessary that the government must prove that this law was violated or was going to be violated in the destination state. As referenced above, 18 U.S.C. Section 2421- Transportation generally and 18 U.S.C. Section 2423 (a) - Transportation of minors, the state law is a necessary and material element, in order to prove the "unlawfulness" of the sexual activity. In the case at hand, that proof would have been the Georgia and Florida law. This element is necessary to prove beyond a reasonable doubt. It is necessary because if there was no crime that would be violated in the state of

destination - then there is no violation of the law. Without the government being required to prove this necessary element beyond a reasonable doubt, the government would have the freedom to criminalize "any travel with a minor," including parents with their children, uncles with nephews, etc. Even if you look at this case in the light most favorable to the government, the government completely failed to provide any evidence and completely failed to meet its burden of proof on this issue. Thus, by the Government failing to prove or provide any evidence of the applicable State Laws, a reversal is warranted on all of the above-referenced Counts: Count 1 (1), Count 1 (2), Count 2 (B) (1) Racketeering Act 1, Count 2 (B) (2) Racketeering Act 2, Count 2 (B) (3) Racketeering Act 3; Count Two (B) (4); Count 3 (A) and Count 3 (B)Conspiracy, Counts 4, Count 5, Count 6, and Count 7.

It shall be noted that York's contention is that 18 U.S.C. section 2423 (b) inherently and per the government's indictment have the same elemental requirements as the above-referenced laws.

**VI. The District Court Erred by Denying the Appellant's Motion to Dismiss Count Two Racketeering Act 3 and Count Six essentially ruling that the Government Could Base a Federal Violation on a Georgia Crime Which was no Crime at all at the Time of its Alleged Commission**

Count VI and Count II - RICO Act III, purports to set forth a violation of 18 U.S.C. 2423(a) in identical language as follows (Doc. 158):

In or about April 1993, . . . Dwight D. York ... knowingly transported and caused to be transported ("A.T."), . . .with the intent that such minor engage in **unlawful** sexual activity for which a person can be charged with a criminal offense including but not limited to **violations of Georgia Code Sections 16-6-4 an 16-6-5, . . .** Title 18, United States Code Section 2423, subsection (a) states in pertinent part as follows: a *person who knowingly transports an individual . . . in interstate ... commerce with the intent that the individual engage ... in any sexual activity for* ***which any person can be charged with a criminal offense ....*** *shall be fined under this title and imprisoned not more than 15 years.*

The "criminal offense" that the government purports to have been committed by this Defendant is a violation of Georgia State law namely, child molestation pursuant to O.C.G.A. Section 16-6-4 and Enticing a child for Indecent purposes pursuant to O.C.G.A. 16-6-5. Therefore, applying the Government's legal theory of the case as set forth in Counts VI and II (RICO ACT III) to the statutory language of Title 18 United States Code 2423 subsection(a)before this Defendant can be accused of violating the terms of this federal statute he must also have violated the 1993 versions of O.C.G.A 16-6-4 and 16-6-5. In accordance with the factual allegations set forth on page 17 of the indictment paragraph 37 and paragraph 38, in April of the year 1993, "A.T." was 14 years of age. This is significant because, per the 1993 version of O.C.G.A 16-6-4 this alleged sex act would not have been illegal.

The dicta of the Georgia Supreme Court case of Phagan v. State, 268 Ga. 272 (1997) lends credence to this argument to wit: **"... Effective July 1, 1995, it was illegal to have sex with a person under the age of 16 to whom the accused was not married... Prior to July 1, 1995, the conduct was illegal if one of the parties was under the age of fourteen ... "**

Thus, the Government did not adequately set forth a violation of federal law in Counts VI and II(RICO ACT III), accordingly the trial court erred by failing to dismiss said Counts and charge the jury that in 1993 it was not a crime to have sex with someone under the age of 16 and over the age of 14.

This argument refers to York's Motion [Doc. 175].

**VII. Post trial Counsel, Jonathan Marks, was Ineffective for Withdrawing the Appellant's Motion for New Trial and Motion for Judgment of Acquittal without Properly Informing and Receiving the Express Permission of the Appellant**

Attorney Jonathan Marks would not be considered trial counsel, because he entered the case after trial on March 26, 2004 per the Docket Sheet [Doc. P. 42 6th Entry; thus, it is York's contention that Jonathan Marks was his appellate and post trial counsel.

A defendant is entitled to effective assistance of counsel in general and in his direct appeal. Evitts v. Lucey, 469 U.S. 387 (1985).

Generally, the Court of Appeals will not consider claims of ineffective assistance of counsel on direct appeal because there is usually insufficient opportunity to develop the record regarding the merits of these claims. United States v. Camacho, 40 F.3d 349 (11th Circuit 1994). However, in certain cases the record is sufficient to enable the court to review counsel's performance. See, e.g., United States v. Andrews, 953 F.2d 1312 (11th Circuit 1992). In this case, it is Appellant's contention that the record is sufficient to enable the court to review counsel's performance. In support of this contention, the Appellant shows the following:

By presenting evidence a Defendant waives the right to appeal the denial of his Rule 29 motion made at the end of the government's case. United States v. Brown, 53 F.3d 312 (11th Circuit 1995). In this case it is clear that the Appellant presented a case; thus, the Appellant is only left with the written judgment of acquittal motion filed on January 30, 2004 (Doc. 243) to protect his appellate rights to challenge the sufficiency of the evidence. On August 13, 2004, the Post trial Counsel, Jonathan Marks, was ineffective because he withdrew the Appellant's Motion for Judgment of Acquittal and Motion for New Trial (Doc. 242) without the consent of the Appellant.

At minimum, the Attorney should have stood on the motions and should not have withdrawn the Motions. The Attorney's actions of withdrawing the Motion for Judgment of Acquittal definitely has a negative impact on the Appellant's appellate rights. The attorney's actions definitely adversely affects the Appellant's ability to challenge the sufficiency of the evidence; additionally, the withdrawal of the new trial motion has a more speculative negative impact.

Thus, the Appellant is requesting that this Court find that his counsel was ineffective and that his case be remanded back to the District court for a ruling on the issues contained within the Motion for New Trial and Motion for Judgment of Acquittal. In the alternative, the Appellant requests that the ineffectiveness of the Attorney in this post-trial matter be considered a manifest miscarriage of justice and rule on the sufficiency of evidence issues raised in this appeal. United States v. Jones, 32 F.2d 1512 (11th Circuit 1994) is cited for the proposition that if there is a showing of a manifest miscarriage of justice, this Court can consider the sufficiency of the evidence on appeal. In support of this request, the Defendant shows that he filed a "Pro Se" Motion on the Monday following these ineffective actions by counsel and Requested that the Court Reinstate these two aforementioned Motions (Doc.348).

## VIII. The District Court's Denial of New Counsel's Motion For Extension Deprived Appellant of a Fair Trial And Due Process of Law.

On December 30, 2003, just a few days prior to this long and arduous trial, the court permitted previous counsel to withdraw from the case. Also, the new lead counsel, Adrian Patrick made an oral Motion for Continuance that was denied by the Court [Transcript of Sealed hearing, December 30, 2003]. On January 2, 2004 [Doc. 211] Attorney Patrick filed a written Motion for continuance of the trial in the interest of justice.

Attorney Adrian L. Patrick was entered into this case on December 16, 2003 and suddenly became lead counsel 6 days prior to trial. For approximately 20 months, Edward Garland, was the lead counsel. In attempting to review the 20 months of activity in the case, including, hearings, indictments, superseding indictments, discovery information, motions, plea agreements, and court orders; new counsel requested an extension in the trial date so that he could adequately prepare for trial. The district court refused and trial proceeded as planned.

The court's failure to grant an extension, given the circumstances, deprived York of his right to counsel, due process, and a fair trial. York submits that denying his motion to continue left the defense with an inadequate amount of time to prepare for trial. United States v. Verderame, 51 F.3d 249, 252 (11th Cir.1995).

As a result, York's rights to counsel and due process were violated and his convictions must be reversed. When the trial court denied York's motion for continuance in the trial, York suffered substantial prejudice in the defense of his case. See United States v. Bergouignan, 764 F.2d 1503, 1508 (11th Cir.1985). "Implicit in [the] right to counsel is the notion of adequate time for counsel to prepare the defense," and the trial court's denial of a continuance deprived new counsel time to prepare an adequate defense. See, Verderame, 51 F.3d at 252. Importantly, as evidenced by the 48 page Superseding Indictment and the three week long trial, the government's case grew increasingly more complicated as time went by. See, Verderame, 51 F.3d at 252.

Such a short period of time to prepare for trial prejudiced York because it was impossible for counsel to adequately investigate the case and prepare a defense. This deprived York of his right to counsel, right to due process, and resulted in a trial that was fundamentally unfair. As such, York's convictions must be overturned.

## IX. A. Appellant's Sixth Amendment Right to a Jury Trial was denied When He was Sentenced Based upon Facts Not Reflected in the Jury Verdict

The U.S. Constitution guarantees each defendant a trial by jury wherein no punishment is imposed until a jury determines the defendant guilty of particular conduct beyond a reasonable doubt. *See* U.S. Const. Amends. V, VI.

In Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), the Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

The Supreme Court's decision in Blakely v. Washington, 124 S. Ct. 2531 (2004) indicates that the courts have been wrong, holding that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose **solely on the basis of the facts reflected in the jury verdict or admitted by the defendant**.

Additionally, Blakely calls into question the constitutionality of the entire federal sentencing system or guidelines.

Under the Federal Sentencing Guidelines, any enhancements and upward departures all have the same effect – namely, they all *increase* the maximum permissible sentence under the guidelines. A judge's reliance on such factors at sentencing is therefore unconstitutional. United States v. Booker, 375 F.3d 508 (7th Cir. 2004).

In the instant case, the government had York's sentence increased based on enhancements and upward departures that were never submitted to the jury. This is error and should be reversed. Thus, York's conviction should be reversed, and at minimum the case should be remanded for resentencing.

**IX. B. Appellant's Sentence is Void because Appellant was Sentenced under Federal Sentencing Guidelines that have been Ruled Unconstitutional as Applied in This Case**

On Wednesday, January 12, 2005 United States Supreme Court ruled in the Booker and Fanfan cases and the validity of the U.S. sentencing guidelines. Justice Stevens opinion addresses the first question on appeal, whether Blakely should be affirmed, and the Court agrees it should. Justice Breyer answers the second question as to whether the Guidelines are constitutional. Essentially, they are not, but the invalid parts can be excised and the remainder can stay as advisory but not mandatory. U.S. v. Booker, Supreme Court Case No.: 04-104 and U.S. v. Fanfan, Supreme Court Case No: 04-105. (Counsel did not specify the page number of the holding because Counsel does not have the published copy of the decision as of yet.)

"The Court held in these two cases that both courts correctly concluded that the Sixth Amendment as construed in Blakely does apply to the Sentencing Guidelines. In a separate opinion authored by Justice Breyer, the Court concludes that in light of this holding, two provisions of the Sentencing Reform Act of 1984 (SRA) that have the effect of making the Guidelines mandatory must be

invalidated in order to allow the statute to operate in a manner consistent with congressional intent." U.S. v. Booker, Supreme Court Case No.: 04-104 and U.S. v. Fanfan, Supreme Court Case No: 04-105**.**

Thus, York's conviction should be reversed and at minimum, the case should be remanded for resentencing.

## X. The Use of the 2002 Version of the Federal Sentencing Guidelines Instead of the 1993 Guidelines Violated Ex Post Facto Clause of the United States Constitution.

In the instant case, the alleged offenses listed for groups II, III, IV, V, VI all occurred no later than 1993. According to the government, this is when the intent to transport the minors across state lines allegedly formed, and when these crimes occurred. Because the sentencing guidelines in effect in 2002 are more severe than the guidelines in effect at the time York allegedly committed the instant offense, the 1993 version should be used to calculate his base offense level.

It is well-established that the ex post facto clause in the Constitution "forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." Weaver v. Graham, 450 U.S. 24, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981).

In the instant case, the probation office correctly cites that § 2G1.1 applies to the offense of transporting individuals, including minors, for the purpose of prohibited sexual conduct. However, despite the fact the offense conduct occurred

in 1993, the court used the 2002 version of the Federal Sentencing Guidelines to determine the York's base offense level.

Under the 2002 version, § 2G1.1(c)(2) instructs that if the offense involved criminal sexual abuse, then § 2A3.1 should be used to determine the offense level. When applying § 2A3.1, the Defendant's offense level becomes 27. Further, additional enhancements are applicable under § 2A3.1 based on the age of the victims and whether the victims were under the care or supervision of the York. As a result, of these enhancements, the Defendant's offense levels for the offenses listed in groups II, III, IV, V, and VI are increased drastically.

Importantly, the 1993 version of the Federal Sentencing Guidelines do not contain a cross reference to § 2A3.1. Instead, U.S.S.G. § 2G1.1 (1993) provides for a base offense level of 14 and no other enhancements apply under this section. Therefore, applying the 1993 Guidelines, York's offense levels should be drastically lower than the offense levels listed in the PSI. Therefore, in order to comply with the ex post facto clause of the Constitution, the 1993 version of the Guidelines should have been applied at York's sentencing. Accordingly, York's sentence must be vacated.

**CONCLUSION**

For the reasons stated above, York respectfully requests that this court overturn his convictions. In the alternative, York requests that this court vacate his sentence and remand for re-sentencing consistent with the arguments raised herein.

Respectfully Submitted,

_____
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**CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 13,950 words in 14 point Times New Roman

typestyle.

_____

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**CERTIFICATE OF SERVICE**

I certify that a true and accurate copy of the foregoing has been served via regular U.S. mail, this 14th day of January, 2004, upon Office of the Assistant U.S. Attorney:

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