UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Appellate Case No. **04-12354**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

DWIGHT D. YORK,

Defendant-Appellant,

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

CORRECTED REPLY BRIEF OF APPELLANT

Attorney Adrian L. Patrick
Attorney for the Appellant
1044 Baxter Street
Athens, Georgia 30606
(706) 546-6631

REDACTED REPLY BRIEF

TABLE OF CONTENTS

TABLE OF CITATIONS

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.

York reasserts the arguments made in his opening brief and nothing in the government's brief refutes his claims.

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 Federal Rule of Criminal Procedure 8(a) and 14. See, United States v. Weaver, 905 F.2d 1466 (11th Cir. 1990).

York sought severance of the dissimilar charges brought in the indictment to prevent bias and prejudice at trial. The lower court ignored 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, resulting in unfair prejudice to York at trial. Not only did the misjoining of distinct and disparate offenses blur statute of limitations issues relative to Mann Act claims, it also prejudiced York in the eyes of the jury and improperly influenced the jury's

verdict.

Not only did the government seek to eliminate the objectivity of the jury by submitting evidence of York's alleged wrongdoing regarding unrelated acts, the government unfairly circumvented the five year statute of limitations for many of the alleged acts by bringing all charges together under the umbrella of RICO. *See*, 18 U.S.C. § 3282. As noted in the opening brief, 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). (Doc.1, Indictment) However, most of the allegations against York related to events occurring in 1988 through 1994. Had it not been for the umbrella of RICO, these acts would not have been prosecutable.

Additionally, the Appellee's response to Appellant's argument is that severance and essentially the dictates of Rule 8(b) become null and void whenever the Government chooses to disguise the joinder of divergent facts and issues with no common scheme or plan. RICO in accord with the Appellee's argument allows one to avoid a severance. However, the Appellee's position is incorrect.

Citing three twenty year-old cases, i.e., United States v. Welch, 656 F.2d 1039 (5th Cir. 1981); United States v. Stratton, 649 F.2d 1066 (5th Cir. 1981); and United States v. Bright, 630 F. 2d 804 (5th Cir. 1980), the Appellee seeks to support

its position with such authority as would impress this Court to ignore the very purpose of the Federal Rule, 8(b).

8(b) says no joinder where there are inapposite facts and issues. It does not give exception to RICO but rather applies to all forms of prosecution rather it is RICO or not. So that, there is no hiding in the bowels of RICO from the light of Rule 8(b). That is to say that if the joinder was prejudicial then the severance should have been granted and it was error for the trial court to deny this Appellant's motion.

Accordingly, York's Fifth Amendment right to a fair trial was violated by the court's failure to sever disparate counts and his convictions must be vacated.

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

York reasserts the arguments made in his opening brief and nothing in the government's brief refutes his claims. In presenting its brief, the government mischaracterizes York's argument and also contends that this is the first time they have heard that York's "organization" was a religious organization. Such an argument is entirely disingenuous. The government argued during trial that York was the spiritual head of the United Nation of Nuwaubian Moors. The terms "religious organization" or "Indian tribe" are used, the organization was religious in nature, with York being the spiritual head.

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 and the pattern of racketeering activities allegedly undertaken by some members of the church/tribe. York's motion to dismiss should have been granted because the allegation that the religious organization or an Indian tribe is an enterprise for RICO purposes is beyond the scope of the statute.

Additionally, the government misrepresents the basis of the Appellant's argument. The Appellant's contention is not that a religious organization can never under any circumstances constitute an enterprise within the meaning of RICO but rather under the present circumstances, there was no enterprise within the meaning of RICO. The government instead of finding a criminal enterprise then sculpting a prosecution around it, used the RICO statue to combine rumor and conjecture to convict one person not a group or people acting in concert. The government prosecuted Dwight York not the religious organization he founded. If there were no RICO to use as the umbrella then the government would have suffered the rain of reasonable doubt.

III The District Court Erred in Denying 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

In this argument York is referring to his Motion to Dismiss Indictment [Doc.

174 - Motion to Dismiss Superseding Indictment], York reasserts the arguments made in his opening brief and nothing in the government's brief refutes his claims. In presenting its brief, the government mischaracterizes York's argument. The government states in its first sentence [Appellee's Brief p. 39 Argument 3 - 1st sentence]:

> "York argues that the Grand Jury was tainted by adverse publicity, and therefore the indictment should have been dismissed."

In misstating York's argument as indicated above, the Government is attempting to simply misconstrue York's argument so that it can squarely and easily fit into the parameters and holding of United States v. Waldon 363 F. 3d 1103, 1109 -10 (11th Circuit 2004). The purpose in doing this is in an attempt to mislead this Court into thinking that this is the same type case as Waldon and that Appellant's argument should be dismissed.

However, the issue presented in this case is much more complex than the issue presented and the Waldon case and should not be determined in the same manner and on the same grounds.

In the Waldon case, Karl T. Waldon, a former Jacksonville, Florida Sheriff's Deputy was appealing his conviction for his alleged involvement in several crimes ending in the robbery and murder of convenience store owner, Sami Safar. In December 2000, Waldon was charged by federal indictment. On August 21, 2002,

the government secured a second superseding indictment against Waldon.

As one of his enumerations of error, Waldon argued that pretrial publicity prejudiced the grand jury. Thus, the issue in the Waldon case is solely "whether the allegation of pretrial publicity alone is sufficient to dismiss an indictment. Based on this issue alone and the facts of the Waldon case, this Court issued its ruling on this issue on March 25, 2004, this Court held as follows:

> " . . . To the extent that this Court has not addressed the issue directly, we do so today. This argument [sole argument of pretrial publicity] misconstrues the role of the grand jury, which is an "investigative and accusatorial [body] unimpeded by the evidentiary and procedural restrictions applicable to criminal trial." United States v. Calandra, 414 U.S. 338, 349 (1974). Since the concern over adverse publicity is its effect on the fairness of the ensuing trial, and not its effect on the grand jury, the trial court did not err in failing to dismiss the indictment on this ground."

First of all, the Appellant would like to point out that our argument and issue is not solely "adverse or negative pretrial publicity." The Appellant's argument is more complex. In response to the government's attempt at confusing the issue, in the following paragraphs, the Appellant explains the pertinent aspects of his argument.

The Appellant's argument is that the Court issued a Change of Venue Order [Doc. 146] that clearly states amongst other things, the following:

> " . . . Defendant **cannot** obtain a fair trial in the Macon Division of the Middle District of Georgia."

At this point the Court has established a judicial fact that the "Defendant cannot obtain a fair trial." The court goes further to say the following in the same order:

> " . . . The Court has **grave concerns** about trying to select a jury in this case in any division in the Macon and Atlanta media markets . . ."

Additionally, at this point the Court has now established an additional judicial fact and that is that the Court does not believe that any jury [grand or trial] selected from the Macon and Atlanta markets would be proper.

Thus, there are **five facts** that this Court can rely on and these are facts uncontested by the government, per its Appellee's brief:

1. That the jury pool in the Macon Division of the Middle District of Georgia, in the Atlanta media market, and in the Macon media markets are tainted;

2. That the Court on **October 28, 2003**, acknowledged and judicially recognized the fact that these aforementioned areas were tainted, per its **Change of Venue Order dated October 28, 2003 [Doc. 146]**;

3. That the grand jury for the **Superseding Indictment issued on November 21, 2003** was after the Court had all ready issued its Change of Venue Order and the Government was given notice of this Order;

4. That the grand jury for this Superseding Indictment was selected from the "judicially recognized" tainted jury pool in the Macon Division of the Middle District of Georgia;

5. That the venue had been changed by the Court and the Government did not seek and did not have special permission from the Court to go and select any type of jury (grand or trial) from this previously judicially recognized tainted jury pool.

These five facts, amongst other factors, distinguish this case from the Waldon case. In the Waldon case, the Appellant, Waldon was simply making a general argument that because of the pretrial publicity that the indictment should be dismissed. In Waldon none of the five facts above existed. Primarily, the Court had not issued a change of venue order, prior to the selection of a grand jury for the 2nd superseding Indictment. Also, the Court had not clearly stated that the Appellant could not receive a fair trial and that the Court had grave concerns about selecting a jury from this area. Thus, based on the facts alone, this case can be distinguished from the case at hand.

In the case at hand, all of the aforementioned five facts were present. It is clear that this jury pool was tainted. The government never contested this fact.

Thus, that brings us to only one conclusion as to the government's position

on this issue, and that is: although the jury pool was tainted, it is perfectly fine to have tainted and biased jurors on the grand jury because the only role of the grand jury is to investigate and prosecute, per the Waldon case.

Waldon was decided on the particular facts of Waldon, which presents a different issue and different facts. However, to understand Waldon, we must analyze the case that the Waldon decision was based on and that is the case of United States v. Calandra, 414 U.S. 338 (1974).

In Calandra, the court states the following:

> "The institution of the grand jury is deeply rooted in Anglo-American history. In England, the grand jury [414 U.S. 338, 343] served for centuries **both** as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing **and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by a "presentment or indictment of a Grand Jury."** Cf. Costello v. United States, 350 U.S. 359, 361-362 (1956). **The grand jury's historic functions survive to this day.** Its responsibilities continue to include **both** the determination whether there is probable cause to believe a crime has been committed **and the protection of citizens against unfounded prosecutions.** Branzburg v. Hayes, 408 U.S. 665, 686-687 (1972).

The Appellant does not contest the fact that one of the functions of the grand jury is to investigate, but rather we contest the fact that this is the grand jury's sole function. It is the Appellant's position, that per Calandra, that the grand jury has a

dual role that is **both to investigate** to determine whether there is probable cause to believe a crime has been committed **and to investigate in order to protect** citizens against unfounded prosecutions. It is the Appellant's position that because the grand jury has both a **dual role to accuse and to protect.** It is this dual role that bars the selection of the grand jury from a "judicially recognized" tainted jury pool.

Thus, because of the distinctive facts of Appellant's case and the dual role of the grand jury to accuse and to protect, the Appellant's restates is original argument that the District Court erred in Denying the Appellant's Motion to Dismiss [Doc. 174]. Thus, the Appellant's conviction should be reversed. To rule otherwise would mean that the constitutional role of the grand jury is just to act as a rubber stamp for government prosecution, we respectfully request that this Court not negate the mandates of the Constitution and obliterate the 14th and 5th amendment rights of the Appellant. Thus, the reversal of this case on the issue and/or remanding this case for new trial on this issue is the only method to preserve the sanctity of the 5th amendment and the United States Constitution.

IV. The District Court Erred by:
A. Allowing the Government to Exceed the Scope of Rebuttal by Allowing the Government to Reopen Its Case-in-Chief and Present New Evidence
B. Denying the Appellant's Motion for Mistrial after the Government Exceeded the Scope of the Court Ordered Limitation of the Rebuttal

Witness' Testimony
C. Not Allowing the Appellant to Call His Own Rebuttal Witness to Rebut the Government's Rebuttal Witness

Appellant stands on its argument presented in its opening brief. Contrary to Appellant's opening position, Appellant does agree that the transcript indicates that "S.W." was asked one question about Muniyra Franklin in the direct examination.

However, Appellant does stand on the arguments presented. Appellant requests that his convictions be reversed.

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), Count 3 (B) Conspiracy, Count 4, Count 5, Count 6, and Count 7 - Traveling in Interstate Commerce to Engage in Unlawful Sexual Activity

Again the government is mischaracterizing the Appellant's argument, the Appellant's position is clear. As stated in the opening brief, proof of each and every element of an alleged crime must be proven beyond a reasonable doubt, this is black letter law. In the above-referenced crimes of the indictment there are at least two necessary elements that the government must prove beyond a reasonable doubt.

First, the government must prove that the sexual activity that the government's witnesses testified to was **unlawful**. In order to do this the

government must prove that the sexual activity would have been unlawful in the destination state. Thus, since Georgia was the destination state. The Georgia law would need to be put into evidence for the jury's consideration. The government's allegation that the federal court takes judicial notice of all state criminal and civil law is irrelevant, because the fact is that the government never presented this Georgia law as evidence to the jury. The jury instructions are not evidence. At the time the government rested and the court stated that the evidence was closed, there was no Georgia law entered into evidence to the jury. Thus, the government failed to prove the **unlawfulness element** beyond a reasonable doubt, it would have been as simple as "Your honor we moved to admit Georgia Code section 16-6-4 and 16-6-5 into evidence as Exhibits 3 and 4." This was never done and the law was never presented as evidence. The government does not contest the fact that the evidence was never presented, the government simply states that it was not necessary because it was read as a jury instruction. However, a jury instruction is not evidence and the government cannot circumvent their burden of proof by leaving it to the court to meet it for them through jury instructions. The Georgia law was a necessary evidence because without the Georgia law as evidence the jury could not determine what sexual activity was unlawful based on the evidence presented. The only evidence presented to the jury was that there was sexual activity that's it.

Sexual activity in and of itself is not a crime. The Georgia law was necessary and was not presented. Thus, the Appellant's conviction on all of the above-referenced counts should be dismissed.

Also, the government failed to prove the **purpose of the travel element** beyond a reasonable doubt. There was simply no evidence that the purpose of the travel was for sex with minors. The government's chief investigator stated that there were **no witnesses** that the purpose of the travel was for sex with minors. Also, no other witness stated that purpose of the travel was for sex with minors. The government simply attempted to show that there was sexual activity with minors in two different states. However, in order to invoke the federal jurisdiction over the state crimes of child molestation there must be proof beyond a reasonable doubt that the purpose of the travel was for that purpose. The government clearly failed to meet its burden of proof of this element to invoke federal jurisdiction. What the government did was attempt to prove a state child molestation case. Thus, the Appellant's convictions on all of the above-referenced counts should be dismissed.

Also, the government admits that York did make a sufficiency argument of this nature at the close of the government's case. However, the government argues that York did not renew his motion at the close of all the evidence. This argument

is a flat out lie. The government is fully aware that the Appellant renewed the sufficiency of the evidence argument in writing by filing a timely Motion for Judgment of Acquittal [Doc. 243] on January 30, 2004, within 7 days of the jury's verdict. The sufficiency of the evidence was clearly challenged in this document as the government is fully aware. However, the Appellant's post trial counsel, Jonathan Marks, without Appellant's consent withdrew this Motion. Thus, this creates the necessity for the Court to rule on the Appellant's issue Number 7 - Ineffective Assistance of Counsel Claim against Jonathan Marks.

VI. The District Court Erred by Denying the Appellant's Motion to Dismiss Count 2 Racketeering Act 3 and Count 6 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

The Appellee decided on appeal to change its theory of the case. In accord with the indictment, the government alleged that the Appellant had violated Georgia law. On Appeal the Appellee now argues that it was sufficient that his intent was to violate Georgia law, although at the time of the criminal offense it was impossible to do so. If the alleged victim was not underage, then even if Appellant wanted to commit the offense of child molestation he simply could not.

Moreover had the trial judge incorporated the Georgia statute which existed at the time of the alleged offense then it would have been impossible for the juror to find otherwise.

Appellant's convictions on all of the above-referenced counts should be reversed.

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

The government's does not disagree with that fact that the counsel was ineffective, the government's only contention is that the record was not complete and that an additional evidentiary hearing is necessary.

Appellant states that the record is clear. There is no place in the record that shows that the Appellant expressly made a voluntary, knowing and intelligent waiver of his constitutional appellate rights on the sufficiency issue by his counsel withdrawing his Motion for Judgment of Acquittal, neither is there evidence in the record that Appellant expressly withdrew his Motion for New Trial.

Appellant states in no uncertain terms that he did not consent to the withdrawal of either his Motion for Judgment of Acquittal or his Motion for New Trial and that his

counsel was ineffective in withdrawing the motions, and that should end the matter.

This fact is corroborated by the fact that Appellant filed a Motion [Doc. 348]. This was Appellant's **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 [referring to Jonathan Marks] and Unauthorized withdrawal of Defendant's New Trial "Initial" Motion, Suspend Judgment of New Trial, etc. This Motion was filed by Appellant on August 17, 2004, soon after the hearing where the Motion was filed. This Motion was denied by the Court as procedurally improper without ruling on the merits of the motion. Subsequently, Appellant filed a Motion to Reinstate this Motion which is still pending before the Court.

The Appellant's counsel should be deemed ineffective and the Appellant's case should be remanded for a full hearing on the Motion for Judgment of Acquittal and the New Trial Motion.

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

The Appellant stands on his argument in the opening brief. There was not enough time to prepare for a Superseding indictment of this complexity and magnitude between November 21, 2003 and January 5, 2004; regardless of the number of attorneys the Appellant had.

Additionally, the court's decision in denying the Appellant's Motion was

based on the Court's own interpretation of what and who the Defendant should have as his counsel. The Appellant has a constitutional right to have whatever counsel he wishes, if he has retained counsel. The Court demonstrated a total disrespect for the new counsel. The Court stated at one point in the hearing on the dismissal of counsel that the Court looked at Edward Garland as the grandfather of federal law and stated that Frank Rubino had represented Noriega. Then the Court went on to degrade, disrespect, and dishonor Appellant's new counsel, by saying this Adrian Patrick and Benjamin Davis "I never heard of them". Thus, implying that because he did not approve of the Appellant's new counsel he was not going to grant a continuance, at least that is the impression that Appellant's counsel, Adrian Patrick, had when the comment was made. The Court disregarded the fact that Adrian Patrick and Benjamin Davis had been practicing in federal court longer than he had been a federal judge.

A continuance was necessary and proper in this case, and the only reason that the Court gave for not granting it was that he felt Appellant would do something like this. At the cost of giving Appellant a fair trial in which his new counsel could properly prepare, the Court chose to go forward with the case because he felt Appellant would do something like this. The reasoning of the Court is clearly illogical, irrational, and insufficient. The Court should have

granted a reasonable continuance and allowed the Appellant a fair opportunity to present a proper defense for a case of this complexity. Thus, the Appellant's convictions should be reversed. [Transcript of 12/30/03 In Camera Hearing - describes the statements of the court].

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

York reasserts his argument that his Sixth Amendment rights were violated when he was sentenced on the basis of enhancements that were never submitted to the jury for proof beyond a reasonable doubt. After the Supreme Court announced this rule in Blakely v. Washington, 124 S. Ct. 2531 (2004), once the applicable offense guideline is selected based on the offense of conviction, *see* U.S.S.G. §§ 1B1.1(a) and 1B1.2, the base offense level and any adjustments to it must now be determined on the basis of facts found by a jury to have been proved beyond a reasonable doubt. See; United States v. Booker, 375 F.3d 508 (7th Cir. 2004); United States v. Ameline, 376 F.3d 967 (9th Cir. 2004).

In the instant case, the government sought increased penalties based upon enhancements that were never submitted to the jury. York's sentence should have been determined exclusively by the base offense level corresponding to the offense reflected in the jury verdict. Any increase in that sentence based on factors never submitted to the jury is in violation of York's Sixth Amendment right to a jury trial

and must be vacated.

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

Once again, York reasserts the arguments made at sentencing and on appeal in his opening brief. The government is correct in noting the "one book rule" which requires the Guidelines in effect at the close of the offense conduct should be used at sentencing. However, York's case is unique in that several disparate acts that allegedly occurred over a time span of nearly ten years were improperly joined together under a single indictment. If York was to be sentenced under the Federal Sentencing Guidelines, he should have been sentenced pursuant to the 1993 Guidelines – the Guidelines in effect at the time York allegedly committed the last wrongful act against a minor; not the 2002 Guidelines – the version in effect at the time York last allegedly committed his cash structuring offense.

The government next makes the argument that it wouldn't matter which version of the Guidelines York was sentenced under because the resulting offense level and range of imprisonment would be the same under wither the 1993 version or the 2002 version. Although, it is possible to arrive at the same offense level by manipulating the Guidelines, it is impossible to determine which calculation the court would have arrived at had it used the 1993 version of the Guidelines. York

asserts that his sentence would have been lower and an initial reference to the 1993 Guidelines supports this fact. Accordingly, York's sentence must be vacated.

CONCLUSION

For the reasons stated above, Appellant, York, respectfully requests that this Court overturn his convictions and/or grant a new trial. In the alternative, Appellant requests that this Court vacate his sentence and remand for re-sentencing consistent with the arguments raised herein.

Respectfully Submitted,

_____

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

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 4,725 words in 14 point Times New Roman typestyle.

_____

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

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, 2005, upon Office of the Assistant U.S. Attorney:

Dean Daskal, AUSA
P.O. Box 2568
Columbus, GA 31902

_____

Adrian L. Patrick Bar #565945, Attorney for the Appellant
1044 Baxter Street Athens, Georgia 30606