04-12354-II

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

DWIGHT D. YORK,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION

District Court No: 5:02-CR-27-CAR

BRIEF OF APPELLEE

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United States of America v. Dwight D. York
Appeal No. 04-12354-II

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned counsel of record certifies that no persons, in addition to those listed in the Appellant's certificate, also have an interest in the outcome of this case.

_____

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STATEMENT REGARDING ORAL ARGUMENT

The Appellee submits that oral argument will not assist the court in deciding this case because the issues have been adequately addressed by the parties in their briefs.

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction because this matter involves a timely appeal from a final order in a criminal case, entered by a district court within this Circuit. 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether there was misjoinder of counts, and whether the trial judge otherwise abused his discretion in refusing to separate certain counts for trial.

2. Whether, as a matter of law, a religious organization can constitute a RICO enterprise, and whether the government must allege and prove that the enterprise has an organized crime connection.

3. Whether the superseding indictment was subject to dismissal on the ground that the Grand Jury may have been affected by adverse pretrial publicity.

4. Whether the trial judge abused his discretion when he allowed a government witness to testify on rebuttal, and then did not allow a contrary defense witness to testify a second time on sur-rebuttal.

5. Whether the trial evidence was sufficient to prove that the minors were transported in interstate commerce with the intent that they engage in unlawful sexual activity, and whether the government was required to prove the applicable Georgia law as if it

constituted a factual matter.

6. Whether the trial judge erred as a matter of law in holding that the age of the victim at the time of transport is the dispositive age for purposes of an interstate transport count.

7. Whether York's claim that his post-trial counsel was ineffective is ripe for consideration on York's direct appeal.

8. Whether the trial judge abused his discretion in denying a continuance.

9. Whether the judge at sentencing committed plain error by imposing Guideline enhancements on the basis of his own findings by a preponderance of the evidence and, if so, how re-sentencing should be governed.

10. Whether the sentencing judge's use of a more current Guidelines manual created an ex post facto problem, given that the Guidelines manual in effect at the earlier times set forth the same base offense level and enhancements.

STATEMENT OF THE CASE

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.[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 financial transactions.[2] The first trial judge rejected the plea agreement, and later recused himself on defense motion because he arguably had become entangled with the plea

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[1](R1-1).

[2](R1-78 through 1-86). This brief is being submitted without access to the formatted docket sheet and corresponding record volumes that later will be transmitted to the Court. Accordingly, all motions, briefs, orders, and other pleadings are commonly referenced herein as if they are contained in a single volume, i.e. "R1" followed by the item number from the docket sheet. All transcripts will be referenced by date and description, with the exception of the trial transcript volumes, which are uniformly referenced as "TT" followed by the volume and page number.

negotiations.[3] In the meantime, York was sent for a psychological examination.[4] York thereafter withdrew his guilty plea and the parties made ready for trial.[5]

The Grand Jury returned a superseding indictment that formed the basis for trial.[6] Count One of the superseding indictment charged a RICO conspiracy (18 U.S.C. § 1962(d)) to violate 18 U.S.C. § 1962(c), in that the coconspirators would conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity.[7] The alleged racketeering activity that was the object of the conspiracy consisted of multiple acts of (1) transporting minors in interstate commerce with the intent that the minors engage in unlawful sexual activity for which a person can be charged with a criminal offense, such as child molestation prohibited by the Georgia Code, in violation of 18 U.S.C. § 2423(a);

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[3](R1-107, 1-119, 1-121, 1-124, 1-133).

[4](R1-112, 1-131, 1-132, 1-135).

[5](R1-138, 1-145).

[6](R1-158).

[7](R1-158-1-23).

(2) traveling in interstate commerce for the purpose of engaging in unlawful sexual activity with minors, in violation of 18 U.S.C. § 2423(b); and (3) structuring cash transactions to evade the reporting requirements of 18 U.S.C. § 5313(a) and regulations thereunder, by making multiple deposits of United States currency in amounts less than $10,000, in transactions with an FDIC-insured institution, contrary to 31 U.S.C. § 5324(a)(3).[8]

Count Two charged a substantive RICO offense (18 U.S.C. § 1962(c)) based on seven specific racketeering acts, i.e. four episodes of transporting minors in interstate commerce for unlawful sexual activity and three episodes of structuring cash transactions to evade the currency transaction reporting requirements.[9] These four episodes of interstate transport were set forth again as Counts Four, Five, Six, and Eight of the superseding indictment.[10] The three episodes of structuring were set forth again as Counts Nine, Ten,

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[8](R1-158-2-3).

[9](R1-158-23-29).

[10](R1-158-31-34).

and Eleven of the superseding indictment.[11]

Count Three charged a 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.[12]

Counts Four, Five, Six, and Eight charged specific acts of transporting minors in interstate commerce with the intent that the minors engage in unlawful sexual activity for which a person can be charged with a criminal offense, such as child molestation prohibited by Georgia law.[13] In parallel to Count Eight, Count Seven

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[11](R1-158-34-37).

[12](R1-158-29-30).

[13](R1-158-31-34). 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.," "K.L.," and "S.W." An attachment to the unredacted superseding indictment further identified the minors. Counts Four, Five, Six, and Eight mirrored the violations of 18 U.S.C. § 2423(a) that were set forth as predicate offenses in Count Two of the indictment. (R1-158-24-26).

charged specifically that York traveled in interstate commerce to Orange County, Florida in 1996 for the purpose of engaging in an unlawful sexual act.[14]

Counts Nine, Ten, and Eleven charged the structuring of cash transactions.[15] Count Twelve set forth the RICO forfeiture allegations, while the forfeiture allegations of Count Thirteen were based on unlawful transport of minors.[16]

Based on concerns about extensive pretrial publicity including reports about the prior submission of York's guilty plea, the trial judge ordered that the trial venue be moved to the Brunswick Division of the Southern District of Georgia.[17] The trial judge further regulated spectator access and the course of jury selection to protect the jury and other participants.[18]

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[14](R1-158-33).

[15](R1-158-34-37). Counts Nine, Ten, and Eleven mirrored the structuring violations that were set forth as predicate offenses in Count Two of the indictment. (R1-158-26-29).

[16](R1-158-37-48).

[17](R1-146).

[18](R1-179, 1-200, 1-216, 1-217).

At the close of the government's case in chief, defense counsel moved generally for a directed verdict based on insufficient evidence.[19] Counsel also offered some specific remarks about particular aspects of the government's case that allegedly were insufficient.[20] The trial judge took the verbal motions under advisement.[21] 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.[22] York did not renew his motions at the close of all evidence.[23]

After fourteen days of trial, the jury returned guilty verdicts on all counts of the superseding indictment but Count Eight.[24] In regard to Count Two, the jury entered findings that each of the

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[19](TT-9-2374). Trial transcript volumes 1-14 are hereafter cited as TT-1 through TT-14.

[20](TT9-2374-83). Defense counsel later recharacterized the motion as one seeking a judgment of acquittal, and then sought further to identify or clarify the grounds for the motion. (TT10-2602, TT12-3165-68).

[21](TT9-2382).

[22](TT12-3387).

[23](See, e.g., TT13-3563-64).

[24](R1-234; TT14-3735-36).

seven predicate offenses had been proven beyond a reasonable doubt.[25] Shortly thereafter, the jury returned various findings in regard to forfeiture issues.[26]

York filed timely motions for a judgment of acquittal or a new trial.[27] York thereafter submitted another new trial motion on the basis of alleged newly discovered evidence.[28] In the course of a hearing about that last motion for a new trial, which was denied, the initial post-trial motions were withdrawn.[29]

In the meantime, York came forward for sentencing.[30] The trial judge imposed a total imprisonment sentence of 1,620 months.[31]

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[25](R1-234-2-3; TT14-3735).

[26](R1-235; TT14-3755-56).

[27](R1-242, 1-243).

[28](R1-294, 1-298).

[29](R1-342, 1-347-1, Transcript of August 13, 2004 hearing, at pages 3, 22-23).

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

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

York promptly filed a notice of appeal.[32]

B. **Statement of Facts.**

York was the leader of an organization that began in New York during the 1960's, and which has been known by a number of names.[33] At the beginning of the relevant time period, the organization was based in Brooklyn, New York and was known as the Ansaru Allah community.[34] York and his followers thereafter moved their base to Sullivan County in upstate New York.[35]

In 1993, York initiated a move to the State of Georgia, where he and his followers occupied a significant acreage on Shady Dale Road in Eatonton, Putnam County, Georgia.[36] In late 1998, York purchased a home in Athens, Clarke County, Georgia, but through the time of

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and 120 months on Count Eleven.

[32](R1-299).

[33](TT2-420-22, 3-803, 3-828-30, 6-1445, 6-1449, 6-1548, 6-1570-71, 6-1616-17, 6-1815, 7-2058, 9-2501, 9-2559, 11-2968, 12-3178-80).

[34](TT2-420, 3-803, 4-1143-44).

[35](E.g., TT2-431-33, 3-824-25, 3-899).

[36](TT2-353-55, see also 6-1671).

his arrest he remained a presence in Eatonton as well.[37]

During its time in Georgia, the organization was known variously as "The United Nation of Nuwabian Moors" and the "Yamasee Native American Moors of the Creek Nation."[38] The philosophy or teachings of the organization changed many times over the years, for example, from a basis in Islam; to Hebrew; to cowboy regalia; to ancient Babylonian and/or Egyptian; to Yamasee Indian.[39]

York, whose birth name is listed on this brief, also has been known by a variety of names.[40] At times during the course of

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[37](TT2-354, 2-360, 2-364-65, 4-985, 6-1608).

[38](TT5-1242, 6-1624, 11-3090-91, 11-3113-14, 13-3443-44; Govt. Exs. 159 and 232; see R1-142-6, 1-142-43, 1-161-3, Transcript of 6/30/03 hearing at page 4). At the time of sentencing, York claimed that the Eatonton property was owned by the Yamassee Native American Moors of the Creek Nation, and utilized by the Egiptian Church of Karast, the Nuwaupian Grand Lodge, and the Ancient Egiptian Order. (PSR Addendum at page 3).

[39](TT3-822-25, 3-839-41, Govt. Exs. 231-32, TT4-924-26, 4-928-31, 6-1521, 6-1565, 6-1589-90, 6-1611-14, 6-1616-17, 6-1721, 6-1726, 7-1831, 8-1889-90, 10-2787; see Transcript of 6/30/04 hearing at pages 4, 15; R1-142-6; Transcript of 12/30/03 In Camera Hearing at page 6).

[40](R1-142; TT3-828-29, 5-1296, 6-1726, 6-1733, 7-1845, 7-1975, 7-2032, 7-2056, 10-2785-87, 11-2994, 12-3173, Def. Ex. 48).

proceedings, York insisted that he is Maku "Chief" Black Thunderbird "Eagle."[41] Children and others in the organization typically addressed York as "Doc," "Baba" (father), "Imam" (leader), and/or "Isa" (Jesus).[42] The organization held a "Savior's Day" event each June that coincided with York's birthday.[43]

York ran a number of shops and outlets in various names and in conjunction with off-site operators.[44] Those operations included (1) The Holy Tabernacle Store, (2) The Holy Tabernacle Ministries, and (3) The Ancient Order of Melchizedek.[45] These outlets generated revenue from the sale of items such as clothing, candles, and incense; "passports" and teaching materials; and book sales and yearly-fee memberships.[46] During ceremonies and parties that were

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[41](R1-142-4; PSR Addendum at Page 3).

[42](TT2-421-22, 3-803, 3-819-20, 3-827-32, 4-930-31, 4-1146, 6-1519, 6-1547, 6-1669, 6-1815, 7-2032, 8-2280, 9-2544).

[43](TT2-528, 6-1640-41, 6-1815, 8-2302; see 7-2119).

[44](TT3-825-26, 4-933-34, 6-1617-19).

[45](TT6-1619-21, 6-1623-26, 7-1940-41, 7-1987; see Defendant's Ex. 48, a 1999 federal income tax return in the name of Malachi Z. York, attached Schedule C.).

[46](TT2-512, 6-1621, 7-1986-87).

open to the public, books and other merchandise were sold.[47]

The way of life in the organization.

During the more recent times in Sullivan County, New York, and Eatonton, Georgia, the lifestyle within the organization was highly restricted.[48] York had many "wives" who served him in his home and businesses.[49] York made the rules for his community and his followers were expected to abide by his rules or face punishment or expulsion.[50]

Within the organization and "on the land," traditional family life was replaced by a different model.[51] Men and women did not live together, children beyond the toddler stage usually were separated from their parents, and children generally were separated and lived in buildings and rooms according to their sex and age group under

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[47](TT6-1640-42, 6-1569-60).

[48](See TT3-813, 4-921, 6-1520, 6-1627, 9-2501-02).

[49](TT3-818, see TT6-1663, 6-1816-17, 7-1976-79, 9-2503-04, 10-2620-21, 10-2623-24, 11-3079-80).

[50](TT2-523, 3-829-30, 4-928-31, 4-941-43, 4-999-1000, 4-1005, 4-1074-75, 4-1174-75, 6-1527, 6-1581-82, 6-1587, 6-1590-91, 6-1610-11, 6-1751-52, 7-1977-80, 7-2002).

[51](TT2-523, 7-2033).

the supervision of older women.[52] Children were home-schooled on the land.[53] On family day, children were allowed to interact with their biological parents for a period of time.[54]

The residents of the community worked on community projects without a salary or income.[55] Residents did not pay for housing or food, and thus they were dependent on York and the organization for basic necessities such as personal-hygiene items.[56]

York's leadership course of conduct.

Over the years, York often had sexual contact with girls and boys within the organization, including oral, vaginal, and anal sex.[57]

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[52](TT2-423-24, 2-429-30, 2-433, 2-526, 3-815-17, 3-826-27, 3-830, 4-1144-45, 4-1149, 5-1218-19, 5-1241, 5-1306, 6-1478, 6-1489-90, 6-1551, 6-1589-91, 6-1721-23, 7-1983-84, 7-2062, 12-3232).

[53](TT2-430, 2-435-36, 2-525, 3-635, 3-820-23, 6-1560-61).

[54](TT2-428, 3-817-18, 3-898, 6-1549).

[55](TT2-435, 2-516-17, 3-833, 4-921, 4-992-94, 4-1169-70, 5-1244-45, 6-1522, 8-2302, 9-2443).

[56](TT2-523-24, 4-980-82, 6-1660-61, 9-2461).

[57](TT3-844-47, 3-878-79, 4-899, 4-903-12, 4-939-40, 4-943-48, 4-953-56, 4-987-990, 4-1023, 4-1151-57, 4-1164-68, 5-1229-30, 5-1246-47, 5-1249-56, 5-1258-63, 6-1444-62, 6-1525-26, 6-1550-58, 6-1566-68, 6-1602-04, 6-1606-07, 6-1643-44, 6-1652, 6-1729-30, 6-1732-36, 6-1744-47, 6-1756, 7-1840-42, 7-1875-80, 7-1885-88, 7-2068-70, 7-2073-80, 7-2101, 8-2307-10, 13-3443-47, 13-3452-54).

Some of the "wives" or older females helped to cultivate or entice younger girls for sex.[58] In turn some of these children, as they grew older, helped groom younger children for York's attentions.[59]

In a number of instances, the younger girls were told that York was going to teach the girls about sex, ostensibly to prepare the girls to keep a husband satisfied in marriage.[60] It sometimes was said that as an ancient cultural practice in Sudan, a father had a responsibility to teach the girls about sex.[61] At times the abuse would begin with the exhibition of sexually explicit movies and cartoons, and then it might progress with York having sex with one of the wives or with another child.[62] The children generally were instructed not to disclose these events.[63]

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[58](TT2-442, 2-448, 2-450, 3-847, 3-869-75, 6-1552-57, 6-1568-69, 6-1602-04, 6-1727, 6-1733, 7-1872-73).

[59](TT2-440-41, 2-485-86, 2-500, 6-1573, 7-1822-23, 7-2036-37, 13-3446).

[60](TT6-1552, 6-1573, 6-1596-97).

[61](TT3-870, 7-1819-20). York sometimes made direct comments of this nature, e.g. to children whom he had initiated. (TT4-1075-76, 6-1458, 6-1462, 6-1562, 7-1880-81; see also 8-2314).

[62](TT2-441-42, 2-449, 3-876-78, 6-1747-48).

[63](TT2-451, 4-900-01, 4-1154, 5-1268-69, 5-1333-34, 6-1464, 6-1597-98, 7-1828, 7-2071, 8-2284-85).

The children often were rewarded for their submission with restaurant meals and gifts such as diamond rings and other jewelry.[64] Several of the girls conceived York's children prior to turning 18 years old themselves.[65] On the other hand, when the children failed to respond as desired, they suffered from less attention and inferior housing and food, and similar manipulations.[66]

York had a finance office that was staffed by female residents on the land in Eatonton.[67] These workers were responsible for collecting and handling the monies earned by York's businesses.[68] The workers would receive the money, count the cash, and separate out the $50 and $100 bills.[69] Those larger bills were given to York

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[64](TT2-500-03, 3-649-51, 4-940-41, 4-978, 5-1253, 5-1285, 6-1463, 6-1728-29, 6-1756-57, 7-1830, 7-2075, 7-2085-86, 8-2311).

[65](TT6-1512-17, 6-1550, 6-1584-85, 6-1759-61, 7-1870, 7-1884-85).

[66](TT2-510, 4-912-14, 4-921-24, 4-999-1000, 4-1005-06, 4-1015-16, 4-1176-77, 5-1321-22, 6-1757-58, 7-1830, 7-1845-48, 7-1892, 7-2089-94).

[67](TT6-1618-19, 6-1622, 6-1628).

[68](Ibid.)

[69](TT6-1619-20, 7-1988).

and placed in a suitcase.[70] Most of the remaining funds were prepared for deposit in a conventional bank.[71]

Proof of the key events.

York personally selected and approved the persons who moved from New York to the land in Eatonton, Georgia.[72] The children were moved when and as the organization directed.[73] Similarly, York selected the children who were rewarded by being allowed to accompany him on trips from Georgia to Disney World in Florida.[74]

The minor victim of Count Four, a transport count, was "I.J."[75] I.J. was the subject of York's sexual interest at a young age, even

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[70](See TT2-402-04, Govt. Ex. 249, TT2-516, TT4-1120-21, 4-1124-25, Govt. Exs. 137, 138, and 147, TT6-1642).

[71](TT6-1619-20, 6-1642). York was known to handle significant sums in cash. (TT4-928, 6-1583, 7-1935-36).

[72](TT6-1582-83, 6-1586-87, 7-1882-84, see 7-1981).

[73](TT6-1587-88, 6-1749-51).

[74](TT6-1606, 6-1761-62).

[75]I.J. was present during a sexual contact between York and N.L. (TT4-1074). I.J. also was the subject of sexual references that York made to others. (TT4-1156-58, 6-1663-64, 6-1759). However, I.J. was not a cooperating witness at the time of trial, and in his testimony he denied the government's allegations. (TT7-1908-16, see also 8-2181-82). The government further impeached I.J.'s denials. (TT7-1918-19, 7-2080).

before the move from New York to Georgia.[76] I.J. was under the age of five when York and others moved to Eatonton.[77] York had sexual contact with I.J. after the move to Eatonton.[78]

Count Five, another transport count, referred to "K.H.," "A.N.," and "D.N." K.H. had sexual contact with York by the age of six, when they were living in New York state.[79] K.H. was moved from New York to Eatonton as directed by the organization.[80] York's sexual contact with K.H. resumed in Eatonton.[81]

When A.N. was 8 years old and living in Sullivan County, New York, York began to have sexual contact with A.N.[82] In about April

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[76](TT6-1576).

[77](See TT7-1907 (I.J.'s age at the time of trial)). I.J. regarded York as being I.J.'s father. (TT7-1908).

[78](TT 4-1161-63, 5-1313-14, 6-1454-56, 6-1591, 6-1595-96, 8-2303-06).

[79](TT2-452-53, 6-1574-76, 6-1588, 8-2283-89). York made another child, N.L., aware of his sexual interest in K.H. (TT4-917-19).

[80](TT7-1974-76, 7-1981-82, 8-2992). K.H.'s mother was one of York's "wives." (TT7-1976-77).

[81](TT2-484-85, 6-1591, 6-1594-95, 7-2071-72, 8-2294-2301, 8-2308-10; see also 8-2231-32, 8-2252, 8-2255).

[82](TT2-436-37, 2-439, 2-449, 2-455, 3-645, 4-919-20, 6-1571-73; see 6-1568-69, 8-2285-86).

1993, when A.N. was roughly 9 years old, A.N. traveled down to Eatonton, Georgia in a van with other people.[83] Within a few weeks, York re-initiated the sexual activity with A.N., which continued thereafter over a period of years.[84]

D.N. also was the subject of York's sexual interest while D.N. was under the age of ten.[85] York introduced D.N. to sexual contact at age 7 while they were living in upstate New York.[86] After the move to Eatonton, which occurred when D.N. was no more than 8 years old, York and D.N. had regular sexual contact.[87]

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[83](TT2-455-56, 6-1587-88). York at one time told A.N.'s sibling N.L. that N.L. would not be coming to Georgia because N.L. and York didn't see eye-to-eye "on certain things." (TT4-914). At other times York made N.L. aware of York's sexual interest in A.N. (TT4-914-17). After York first had intercourse with N.L., N.L. was told that N.L. would be moving to Georgia after all. (TT4-921-24).

[84](TT2-461-66, 2-472-73, 2-496-99, 2-517, 2-544-45, 3-580-81, 3-645-46, 3-689, 4-936-37, 6-1593-95, 6-1606, 7-1835-36, 7-1887-88, 7-2076, 8-2298, 8-2303). A.N. was approaching twenty years old at the time of trial. (TT2-418).

[85](TT4-1157-61, 5-1295). A.N. and D.N. are siblings. (TT2-419). Until D.N. was a teenager, D.N. thought that York was D.N.'s father. (TT5-1299).

[86](TT5-1299, 5-1303).

[87](TT5-1307-09, 5-1312, 5-1318-20; see also 8-2182-83).

Count Six, another transport count, involved "A.T." A.T.'s mother was considered to be one of York's wives.[88] York had sexual contact with A.T. in Eatonton, beginning shortly after A.T.'s fourteenth birthday.[89]

When A.T. was age 11 or 12, York gave A.T. a gold bracelet.[90] At age 13, A.T. was introduced to the possibility of having sex with York.[91] A.T. and A.T.'s mother were sent to New York for a short period of time, and then at A.T.'s request the organization moved A.T. -- without A.T.'s family -- back from New York to Eatonton, where York commenced to have sexual contact with A.T.[92]

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

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[88](TT7-1816-17).

[89](TT6-1596-97, 7-1822-28, 7-1857).

[90](TT7-1817).

[91](TT7-1819-21).

[92](TT7-1821-27, 7-1829).

Florida; K.L. and S.W. also went on that trip.[93] York did not engage in sexual activity with A.N., who had become ill, but while on that trip York had sexual contact with the other two children.[94] The parties stipulated that in 1996, K.L. was no more than 13 years old.[95] S.W. also was no more than 13 years old in that year.[96] However, S.W. and K.L. were not cooperating witnesses at the time of trial and in testimony during the defense case they denied the government's

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[93](TT2-504). A.N. believed that K.L. and S.W. were 15 and 16 years old at the time, respectively. (TT2-505-07). K.L. and S.W. were present with A.N. at some other times when York had sex with A.N. (TT2-488-89, 2-493).

[94](TT2-507-09). York told N.L., A.N.'s older sibling, that if A.N.'s attitude did not improve then A.N. would not be allowed to join in the Disney World trip. (TT4-937-38).

[95](TT9-2411-12).

[96](TT9-2411-12; Govt. Ex. 267). Other testimony in the record indicated that S.W. would have been no more than 15 years old in 1996, because S.W. was said to be about 17 years old in 1999. (TT7-2043). The witness observed sexual contact between York and S.W. at the latter time. (Ibid.) A different witness, who would have been 11 years old in 1996, indicated that S.W. was three or four years older. (TT7-2055-56, 7-2064, see 7-2120). S.W. once approached this second witness (age 10) about having sexual contact with York. (TT7-2066).

allegations about that trip.[97]

As for the structuring counts: York ordered the workers not to deposit $10,000 or more cash into any one of the bank accounts at any one time.[98] On different occasions, a bank teller told one of the women to complete a form before the bank deposit would be completed.[99] On each occasion, the worker followed York's instructions by refusing to complete the form.[100]

The government proved specific instances of structuring.[101] On September 29 and September 30, 1999, deposits in the amounts of

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[97](TT10-2691-95, 10-2774-77). S.W. and K.L. agreed that A.N. was present with them and with York on that trip, that their parents were not present, and that York was the only father-figure who went on that trip. (TT10-2712-13, 10-2783-84). The government separately offered rebuttal evidence that York sexually molested S.W. and that S.W. recruited at least one other child for York. (TT13-3443-47, 13-3452).

[98](TT6-1631-32, 7-1988-89, 7-2025). Testimony indicated that York wanted the money to be handled by workers with whom York had a sexual relationship. (TT7-2046). York would accompany the young women to the bank, where the women would go inside to make the deposits. (TT5-1389).

[99](TT5-1390, 5-1392-93, 6-1631-33, 7-1989, see also 6-1704).

[100](Ibid.)

[101](TT6-1633-40, 6-1706-08).

$7,562, $110, and $8,300 separately were made to Account No. 13111201, a Holy Tabernacle Stores account at Wachovia Bank, through its Mitchell Bridge Road branch in Athens.[102] On October 6 and October 8, 1999, deposits in the amounts of $4,833, $4,000, and $2,803 were made in the same fashion through the same institution.[103] Once again on April 5 and April 11, 2000, deposits in the amounts of $8,876 and $7,805 were made at Wachovia via the same method.[104]

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[102](TT5-1399-1401, Govt. Exs. 80-82, ibid.). York opened the account in his name, doing business as Holy Tabernacle Stores. (TT5-1385-88, Govt. Exs. 262 and 263). During the relevant time period, Wachovia Bank was an FDIC-insured institution. (TT5-1384-85, Govt. Ex. 79).

[103](TT5-1401-02, Govt. Exs. 83-85, ibid.).

[104](TT5-1402-04, Govt. Exs. 86-87, ibid.).

C. **Statement of the Standard or Scope of Review.**

1. Proper joinder under Fed. R. Crim. P. 8(a) is reviewed de novo as a matter of law. Then the Court will determine as per Fed. R. Crim. P. 14 whether the district court abused its discretion in denying the motion. The Court will not reverse unless it is shown a clear abuse of discretion that results in compelling prejudice. See United States v. Walser, 3 F.3d 380, 385 (11th Cir. 1993).

2.,3., and 6. The Court reviews the district judge's denial of a motion to dismiss the indictment for abuse of discretion, but the sufficiency of an indictment is a legal question that is reviewed de novo. See United States v. Pendergraft, 297 F.3d 1198, 1204 (11th Cir. 2002).

4. The district court's decision whether to allow sur-rebuttal testimony is reviewed for abuse of its sound discretion. See United States v. Haimowitz, 706 F.2d 1549, 1560 (11th Cir. 1983). Similarly, the district court's decision whether to reopen the government's case and receive additional evidence is reviewed for abuse of its sound discretion. See United States v. Gomez, 908 F.2d 809, 810 (11th Cir. 1990); United States v. Duran, 411 F.2d 275, 277 (5th Cir. 1969).

Finally, the district court's decision whether to grant a mistrial is reviewed for abuse of its sound discretion. See United States v. Mendez, 117 F.3d 480, 484 (11th Cir. 1997).

5. The sufficiency of the evidence to sustain the convictions is reviewed de novo, taking the evidence in the light most favorable to the government, with all reasonable inferences and credibility choices made in the government's favor. See United States v. Rudisill, 187 F.3d 1260, 1267 (11th Cir. 1999). The key question is whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See United States v. Charles, 313 F.3d 1278, 1284 (11th Cir. 2002).

However, when a defendant's motion for judgment of acquittal has been denied, the defense has presented evidence in rebuttal of the government's case, and yet the defendant fails to renew the challenge to the sufficiency of the evidence by motion for judgment of acquittal at the close of all evidence, the Court will reverse only to prevent a manifest miscarriage of justice. See United States v. Bichsel, 156 F.3d 1148, 1150 (11th Cir. 1998); United States v. Jones, 32 F.3d 1512, 1516 (11th Cir. 1994); United States v. Hamblin, 911

F.2d 551, 556-57 (11th Cir. 1990). This high standard is met only if the record is devoid of evidence pointing to guilt or the evidence on a key element of the offense is so tenuous that a conviction would be shocking. See United States v. Adams, 91 F.3d 114, 116 (11th Cir. 1996); United States v. Wright, 63 F.3d 1067, 1072 (11th Cir. 1995).

7. An ineffective assistance of counsel claim is a mixed question of law and fact. The Court reviews any lower court fact-findings for clear error, and reviews de novo the ultimate question -- whether counsel's performance passed constitutional muster. See Conklin v. Schofield, 366 F.3d 1191, 1201 (11th Cir. 2004).

8. The denial of a motion for continuance is reviewed for an abuse of discretion and specific, substantial prejudice. See United States v. Tokars, 95 F.3d 1520, 1531 (11th Cir. 1996).

9. A claim of constitutional or Apprendi-type error has not been presented and preserved, and the claim will be reviewed only for plain error, if a defendant raises an objection based upon the sufficiency of the evidence at sentencing and does not articulate an alleged constitutional error. See United States v. Cromartie, 267 F.3d 1293, 1294 (11th Cir. 2001); United States v. Gallego, 247 F.3d 1191,

1996 (11th Cir. 2001); United States v. Wims, 245 F.3d 1269, 1271 (11th Cir. 2001); United States v. Candelario, 240 F.3d 1300, 1306, 1308-09, 1311 (11th Cir. 2001) (defendant did not raise a constitutional claim of error simply by objecting to the PSR and at sentencing in terms of the quantity of drug that was attributed to him); United States v. Nealy, 232 F.3d 825, 828-29 (11th Cir. 2000) (defendant explicitly raised claim of constitutional error before trial and at sentencing, when he invoked recent precedent). Furthermore, Apprendi-type error does not amount to a jurisdictional or structural defect that overcomes the need for "plain error" analysis. See United States v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002); United States v. Sanchez, 269 F.3d 1250, 1272-73 (11th Cir. 2001) (en banc); see also Schriro v. Summerlin, 542 U.S. ___, 124 S.Ct. 2519 (June 24, 2004) (Ring v. Arizona did not involve a watershed rule of criminal procedure that implicated the fundamental fairness and accuracy of the proceeding).

9. and 10. The Court generally will review a sentencing determination de novo as to whether it correctly interpreted the guidelines or otherwise violated the law, while accepting the

sentencing judge's fact findings unless they are clearly erroneous and while giving due deference to the district court's application of the guidelines to the facts. See United States v. Miranda, 348 F.3d 1322, 1330 (11th Cir. 2003); 18 U.S.C. § 3742(e).

SUMMARY OF THE ARGUMENT

1. Consistent with this Court's precedent, the RICO counts provided a common thread to the indictment as a whole and there was no misjoinder of counts. Furthermore, the trial judge did not abuse his discretion in denying York's motion for separate trials on groups of counts. For one thing, York makes no clear showing of prejudice. Perhaps most important, York was prepared to go forward with a common trial on the child sexual abuse counts, and those were the most complex and challenging counts in the entire case.

2. This Court has held that a religious organization can constitute a RICO enterprise. The government was not required to allege or prove that the organization had an "organized crime" connection.

3. This Court has held that an indictment is not subject to dismissal simply because the Grand Jury may have been affected by adverse pretrial publicity. The Grand Jury is an investigative body.

4. The trial judge soundly exercised his discretion in allowing a government witness on rebuttal to contradict the prior testimony

of defense witnesses. The trial judge was not obliged to delay the trial and let a defense witness testify again, simply to have the last word.

5. The evidence sufficiently showed that as leader, York exercised direct control over the interstate transport of these minors. York sexually abused children before and after his organization moved from New York to Georgia. In having the children moved, York was significantly motivated by his continuing desire to keep these children available to him for sexual contact. The government was not required to prove that only by interstate movement could York sexually abuse the children. And the trial judge properly took judicial notice of the pertinent Georgia law, rather than requiring that it be placed in evidence.

6. Based on persuasive authority, the trial judge correctly concluded that the victim's age at the time of interstate transportation is the dispositive age for purposes of this federal offense.

7. York complains that his post-trial counsel unilaterally withdrew certain motions. But York's ineffective-assistance claims cannot be addressed without an additional evidentiary hearing, and so the claims are not ripe on direct appeal.

8. York changed his lawyers with some frequency. When York changed lawyers again, shortly prior to trial, the trial judge did not abuse his discretion in denying a continuance. The trial judge reasonably concluded that York would not suffer from undue prejudice, given that York had counsel available who had been in the case from its earliest stages.

9. The sentencing judge did apply sentence-enhancements based upon his own findings by a preponderance of the evidence. But alleged Blakely error is not plain error at this time. Even if the Supreme Court does clarify the law in York's favor, however, the Court must consider how York's re-sentencing should be governed on remand. In that event, the sentencing judge should be instructed to sentence between the statutory minimum and the statutory maximum for each count of conviction, referring to the Guidelines calculation as advice.

10. The sentencing judge used a more current version of the Guidelines manual. But the earlier versions of the Guidelines manual set forth the same base offense level and enhancements for interstate transport of minors. Accordingly, the use of the more current manual did not create an ex post facto issue.

ARGUMENT AND CITATIONS OF AUTHORITY

1. **There was no misjoinder, and York does not show substantial prejudice.**

York complains that the trial judge denied his motion to sever.[105] In the trial court, York moved to dismiss the RICO counts (Counts One and Two) of the superseding indictment, and then moved to sever and hold separate trials on groups of the remaining counts.[106] The trial judge first denied the motion to dismiss the RICO counts, then he held that there was no misjoinder with the RICO counts in the case -- in fact, the motion to sever essentially was moot -- and that a joint trial of all counts against York was appropriate.[107] Following York's outline on appeal, in part 2 of this brief we separately discuss his motion to dismiss the RICO counts.

As the trial judge recognized, the RICO counts brought together a variety of proof that York participated in the conduct of

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[105]Defendant's Brief at pages 10-15.

[106](R1-161, 1-162).

[107](R1-198). In argument, York's counsel acknowledged that if the RICO counts were not dismissed before trial, then the motion simply addressed itself to the trial judge's discretion. (See Transcript of 12/16/03 Pre-Trial Hearing at page 6).

the affairs of this Nuwaubian enterprise for his personal gratification. The presence of the RICO counts provided an overall connection that linked some seemingly disparate acts, such as the interstate transport of minors with the intent to engage in illegal sexual activity, and the structuring of financial transactions. This Court's precedent has recognized that RICO cases are especially appropriate for such joinder, given this vital common thread: the conduct of the affairs of the enterprise.[108] The fact that the Court's precedent typically addressed Rule 8(b) issues in terms of multiple defendants, including potentially different levels of involvement among the defendants, certainly should not weaken the persuasive impact of that precedent for York's case. This case involved a trial of just one leadership figure on multiple counts.

The proof at trial demonstrated some linkage in the evidence between the allegations related to sexual abuse of minors and the structuring of financial transactions. H.W. began a sexual

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[108]See United States v. Welch, 656 F.2d 1039, 1048-53 (5th Cir. 1981); United States v. Stratton, 649 F.2d 1066, 1072-74 (5th Cir. 1981); United States v. Bright, 630 F.2d 804, 812-13 (5th Cir. 1980).

relationship with York at age 13 and had two children from him.[109] H.W. later was a significant figure in terms of arranging York's sexual access to various other children, and also became responsible for handling these financial transactions under York's direction.[110]

Although again York's argument assumes that the RICO counts have disappeared, York asserts in a conclusory fashion that the joinder prejudiced him.[111] He alleges, for example, that the structuring counts served to portray him as "a sinister tax cheat."[112] The argument proves too much, for York was not charged with tax evasion and yet he claims that the necessary impact of structuring charges was to portray him as guilty of a different offense.

York further suggests that the additional jury instructions could have aggravated the complexity of the case and created

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[109](TT6-1546-53).

[110](TT6-1568-71, 6-1573, 6-1594, 6-1596-98, 6-1602-05, 6-1609, 6-1629, 6-1631-42, 6-1696; see, e.g., TT2-440-42, 2-447-48, 2-450, 7-1819-20, 7-1822-23, 7-1825-26, 7-2036-37, 7-2039-43).

[111]Defendant's Brief at pages 14-15.

[112]Defendant's Brief at page 14.

possible jury confusion.[113] However, a review of the record will show that the greater variety of acts, victims, time frames, and governing law, associated with York's sexual abuse of children, should have posed the more difficult challenge for the jury.[114] The pertinent law and proof of the structuring allegations was relatively simple and straightforward, not a significant added burden. Nonetheless York had no objection to going forward with trial on the various "child molestation charges" as a group.[115] Thus joinder was proper in the first instance and York has not made a substantial showing of prejudice.

2. **The RICO counts of the indictment sufficiently charged offenses, and the trial judge did not err in refusing to dismiss them as a matter of law.**

York argues that the trial judge should have dismissed the RICO counts.[116] First, he contends that a religious organization

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[113]Defendant's Brief at page 15.

[114]The jury was charged that it must give individual consideration to the counts of the superseding indictment. (TT14-3696, 14-3699-3700, 14-3706-07).

[115](R1-162-11; see Transcript of 12/16/03 Pre-Trial Hearing at pages 8-9).

[116]Defendant's Brief at pages 15-21.

cannot constitute an enterprise within the meaning of the RICO statute.[117] Second, he points out that the superseding indictment alleged that A.T. was 14 years old at the time of certain events in or about November 1993,[118] therefore he reasons that Counts Two (racketeering act three) and Six cannot state a federal offense by reference to Georgia law based on the interstate transport of A.T. in or about April 1993.[119]

The original motion argued that when the alleged crimes were committed, York was not conducting the affairs of the enterprise, which York then referred to as a Native American Indian tribe (rather than a religious organization).[120] This argument did not attack the legal sufficiency of the indictment, but rather it was an anticipatory attack on the government's case at trial. Because a motion to

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[117]Defendant's Brief at pages 16-20. York is referring to R1-161, 1-186, and
1-198-1-7.

[118](Count One, at Paragraphs 35-38 of the overt acts).

[119]Defendant's Brief at 20-21. York is referring to a separate motion. (R1-175, 1-197, 1-205).

[120](R1-161-3 et seq.; see also Transcript of June 30, 2003 hearing at pages 4,15; R1-142; Transcript of 12/30/03 In Camera Hearing at page 6).

dismiss an indictment is not a proper vehicle to address the underlying merits of the case, York's argument did not justify the dismissal of the indictment.[121]

On appeal, what once was an Indian tribe now is a religious organization.[122] Of more importance, York now takes the view that a religious organization cannot be an enterprise within the meaning of the RICO statute, in part because the goal of the RICO legislation is to eradicate organized crime.[123] But the Court held otherwise in Beasley, and explained that precedent has permitted a wide range of legitimate enterprises to be named as the vehicle through which racketeering acts are committed.[124] The government also is not required to allege or prove that the enterprise has an "organized

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[121]See United States v. Salman, 378 F.3d 1266 (11th Cir. 2004); United States v. Critzer, 951 F.2d 306 (11th Cir. 1992).

[122]Defendant's Brief at pages 16, 18-20.

[123]Defendant's Brief at pages 15-17, 20.

[124]United States v. Beasley, 72 F.3d 1518, 1525 (11th Cir. 1996) (Yahwehs). See generally United States v. Stratton, 649 F.2d 1066, 1074-75 (5th Cir. 1981) (state judicial circuit); cf. United States v. Starrett, 55 F.3d 1525, 1545 (11th Cir. 1995) (associational enterprise).

crime" connection.[125]

As for York's second argument, concerning the references in the indictment to A.T.'s age, York repeats this argument in greater detail later in his brief.[126] So the government will respond and address this topic in Section 6 of its argument below.

3. **Given the investigative role of a Grand Jury, the indictment was not subject to dismissal based on the alleged taint of adverse pretrial publicity.**

York argues that the Grand Jury was tainted by adverse publicity, and therefore the indictment should have been dismissed.[127] However, the district judge properly rejected York's argument, which adopts the fairness concerns that apply to a jury trial on the merits and seeks to apply those concerns in an investigative setting before a grand jury. In Waldon, this Court has

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[125]See H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 243-49, 109 S.Ct. 2893, 2903-06 (1989); United States v. Turkette, 452 U.S. 576, 580-83, 101 S.Ct. 2524, 2527-29 (1981). A "relationship requirement" is included among the RICO elements, but it may be satisfied by showing the connection between the predicate offenses and the enterprise. See United States v. Starrett, 55 F.3d 1525, 1542-43 (11th Cir. 1995).

[126]Defendant's Brief at pages 39-41.

[127]Defendant's Brief at pages 21-24. York is referring to R1-174 and 1-199.

since made it clear generally that adverse publicity, of the sort that perhaps may influence a grand jury, will not justify the dismissal of an indictment.[128]

4. **The trial judge did not abuse his sound discretion in allowing some limited rebuttal testimony and in refusing to let York recall his witness for sur-rebuttal.**

York argues at great length that the trial judge so abused his discretion in allowing a government rebuttal witness to testify, and in limiting York's opportunity to respond, that the trial judge should have ordered a mistrial altogether.[129] The government submits that the trial judge acted well within the range of his sound discretion in controlling the scope of rebuttal and sur-rebuttal, while seeking to avoid needless consumption of time.[130]

The fracas centered on a particular witness, M.F., who also was referenced in an allegation of the superseding indictment.[131]

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[128]United States v. Waldon, 363 F.3d 1103, 1109-10 (11th Cir. 2004). See also Martin v. Beto, 397 F.2d 741, 751-53 (5th Cir. 1968) (Thornberry, J., concurring).

[129]Defendant's Brief at pages 24-33.

[130]See Fed. R. Evid. 611(a).

[131](R1-130-17-18, one of the overt acts in the RICO conspiracy count).

During York's defense, he offered the testimony of a witness, S.W., whom the government regarded as a victim, but who testified to the contrary.[132] In the course of doing so, S.W. denied having or seeing any sexual contact between York and S.W., M.F., and/or S.T.[133] Similarly, York offered the testimony of S.T., who further denied having any sexual contact with York.[134]

During its rebuttal case, the government called M.F. as a witness.[135] Upon repeated objections from York, the trial judge severely limited the permissible scope of M.F.'s testimony, but M.F. was allowed to testify that S.W. solicited M.F. to have sex with York, and that S.W. was present when M.F. later had sexual contact with York.[136] M.F. further testified that M.F. was present on two occasions when S.W. had sexual contact with York.[137] In addition,

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[132](TT10-2691 et seq. (S.W.)).

[133](TT10-2694-96).

[134](TT12-3302).

[135](TT13-3438).

[136](TT13-3446).

[137](TT13-3438-67). The government's direct examination of M.F. appears from TT13-3443 to 47 and from TT13-3452 to 54.

M.F. testified to observing sexual contact on perhaps four occasions between S.T. and York.[138]

Later York insisted that he must have the right to call S.W. again in sur-rebuttal, for S.W. to tell the jury that M.F. was wrong and for S.W. to deny soliciting or being present at a time when York had sexual contact with M.F.[139] The trial judge did not permit York to recall S.W. for this cumulative testimony. However, the trial judge did instruct the jury that S.W. now was unavailable, but if present S.W. would testify further that S.W. did not solicit M.F. for sex with York.[140] Throughout this exasperating dialogue, the trial judge kept his focus on his desire to avoid needless cumulative testimony.

York cites no ruling from this Court that the government cannot call a rebuttal witness if the government interviewed the witness before indictment. He cites no ruling from this Court that if the government fails to call a witness during its case in chief -- so as to anticipate the possible testimony of a witness who perhaps may

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[138](TT13-3453-54).

[139](TT13-3524-31, 13-3535-36, 13-3538-39, 13-3542-45, 13-3546-49, 13-3551, 13-3553).

[140](TT13-3559).

testify for the defense -- then the government is foreclosed from calling its witness in rebuttal after the defense witness has testified.

York insists that S.W. and S.T. "never mentioned" M.F.'s name during their testimony.[141] As far as S.W. is concerned, the record refutes him: York's counsel asked S.W. whether S.W. ever saw York molest M.F., and S.W. denied such observation.[142]

York insists that the testimony amounted to the reopening of the government's case. As explained above, York is wrong. But even if York was correct, the trial judge has a sound discretion to let the government reopen.[143]

York contends that M.F. disrupted York's "positive momentum" which resulted from putting up alleged victims who denied that they were molested.[144] But that is the legitimate purpose of rebuttal: M.F.'s testimony contradicted the testimony of two such defense witnesses, S.W. and S.T.

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[141]Defendant's Brief at page 26.

[142](TT10-2694-95).

[143]See United States v. Gomez, 908 F.2d 809, 810 (11th Cir. 1990); United States v. Duran, 411 F.2d 275, 277 (5th Cir. 1969).

[144]Defendant's Brief at pages 26-27.

York urges that the government exceeded the limitations imposed by the trial judge, and so a mistrial was necessary.[145] He ignores the fact that the trial court was in the best position to make that judgment, and obviously disagreed that such a remedy was justified or appropriate. York did not make a showing of substantial prejudice that mandated a mistrial.[146]

Finally, York contends that the trial judge acted arbitrarily by refusing to delay the trial for S.W.'s return to the courtroom.[147] But the trial judge simply balanced the equities and arrived at a reasonable judgment: The trial judge recognized that S.W. already had testified once in the jury's presence, and so he gave an instruction that allowed the trial to be concluded without further delay for this very limited additional testimony.

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[145]Defendant's Brief at pages 27-31.

[146]See United States v. Chastain, 198 F.3d 1338, 1352 (11th Cir. 1999) (legal standard).

[147]Defendant's Brief at pages 31-32.

5. **The government proved the intent underlying the transport of the minors in interstate commerce, but the government was not required to prove Georgia law as if it constituted a factual matter.**

York generally challenges the sufficiency of the evidence to prove the bad intent underlying the transportation of the minors in interstate commerce.[148] York relies on two alleged defects in the government's case: (1) the government did not show that the purpose of the interstate travel was to engage in unlawful sexual activity;[149] and (2) the government did not prove that the sexual activity was unlawful, insofar as the government did not place any law into evidence.[150] However, the government's proof of intent was sufficient for the jury, and the trial judge properly took judicial notice of the governing law.

As a preliminary matter, the government notes that York did raise a sufficiency argument of this nature at the close of the government's case.[151] However, this motion was not renewed at the

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[148]Defendant's Brief at pages 33-39.

[149]Defendant's Brief at pages 34-36.

[150]Defendant's Brief at pages 36-39.

[151](TT9-2374-76, TT10-2602).

close of all evidence, and York did not object to the Court's charge insofar as it set forth the elements of the interstate transport offense.[152] Accordingly, this Court's review is limited to a manifest miscarriage of justice or plain error.

This Court apparently has not construed the pertinent provisions of the Mann Act. However, other circuits have made it clear that a defendant has the requisite intent or illegal purpose if one of the defendant's significant motives for bringing the victim on an otherwise legitimate trip was to have the minor victim available for illegal sexual activity.[153] Thus, in assessing a defendant's intentions, evidence of pre-transport sexual abuse also is probative.[154]

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[152](See, e.g., TT13-3563-64, TT14-3710-11). The most pertinent language of the charge appears at TT14-3692-96.

[153]See United States v. Hayward, 359 F.3d 631, 637-38 (3rd Cir. 2004) (defendant was coach on cheerleading trip abroad); United States v. Meacham, 115 F.3d 1488, 1495-96 (10th Cir. 1997) (defendant was driving truck for business); United States v. Ellis, 935 F.2d 385, 389-92 (1st Cir. 1991) (defendant was boyfriend of victim's mother, and was part of family trips); United States v. Kinslow, 860 F.2d 963, 967-68 (9th Cir. 1988) (defendant was prison escapee who took family hostage).

[154]See United States v. Cole, 262 F.3d 704, 709 (8th Cir. 2001); Meacham, 115 F.3d at 1495; Ellis, 935 F.2d at 390-91.

As set forth in the government's statement of facts, the government presented a host of evidence that York sexually abused the specified victims and/or other children before and after the children moved from New York to Georgia.[155] The government proved that regular access to the children for sexual activity was very important to York. York's legitimate motives for directing and arranging the travel to Georgia may have been more impressive than those of defendants in the cases cited, but York, on the other hand, maintained a more pervasive atmosphere of regular sexual contact with children. Accordingly, there was no manifest miscarriage of justice or plain error in letting the jury resolve this case.

York further argues that the government failed in its burden to submit evidence and prove the content of Georgia law. The argument reflects a basic misunderstanding. At least since 1835, the federal courts have taken judicial notice of domestic law.[156] This

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[155]York personally selected and approved the persons who moved from New York to the land in Eatonton, Georgia. (TT6-1582-83, 6-1586-87, 7-1882-84, see 7-1981). The children were moved when and as the organization directed. (TT6-1587-88, 6-1749-51).

[156]See Charlotte Dye Owings and Frances v. Hull, 34 U.S. (9 Pet.) 607, 625, 9 L.Ed. 246 (1835).

Court's precedent has so held, in criminal cases as well as civil.[157] York does not claim any substantive error in the trial judge's instructions to the jury concerning Georgia law, and that should end the matter.

6. The district judge correctly ruled that the age of the victim at the time of transportation is dispositive for purposes of an interstate transport count.

The superseding indictment alleged in Count One at Paragraphs 35-38 that victim A.T. was 14 years old in November 1993.[158] York therefore reasons that Counts Two (racketeering act three) and Six cannot state a federal offense by reference to Georgia law based on the interstate transport of A.T. in or about April 1993, because at that time, 14 years was the age of consent under applicable Georgia law.[159] However, the trial judge rejected York's argument because the underlying offense, now codified as 18 U.S.C.

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[157]See United States v. Rivero, 532 F.2d 450, 458 (5th Cir. 1976); United States v. Romano, 482 F.2d 1183, 1191 (5th Cir. 1973); Strickland v. Humble Oil & Refining Co., 140 F.2d 83, 86 (5th Cir. 1944); cf. Fed. R. Crim. P. 26.1 (determination of foreign law); Fed. R. Evid. 201 (judicial notice of adjudicative facts).

[158](R1-130-17).

[159]Defendant's Brief at 39-41. York is referring to R1-175, 1-197, and 1-205.

§ 2423(a), directly focuses upon a defendant's intent at the time when the victim is transported interstate -- rather than the time, place, and manner of any unlawful sexual activity that later may occur -- and the superseding indictment adequately alleged that A.T. was 13 years old at the time of transportation.[160]

In 1993, the code section punished anyone "who knowingly transports any individual under the age of 18 years in interstate commerce ... with intent that such individual engage in ... any sexual activity for which any person can be charged with a criminal offense ...." Later sexual activity should be probative of the earlier intention, but the plain language of the statute focuses on the defendant's intent as of the time when the victim was transported.[161] Thus the district judge did not err in denying the motion to dismiss.

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[160](R1-205; see 1-130-14, subparagraph (17), 1-130-15, subparagraph (25)).

[161]See, e.g., United States v. Cole, 262 F.3d 704, 708-09 (8th Cir. 2001); United States v. Johnson, 132 F.3d 1279, 1280 (9th Cir. 1997); United States v. Ellis, 935 F.2d 385, 390-92 (1st Cir. 1991).

7. **The allegation that York's post-trial counsel was ineffective is not ripe for consideration in this Court.**

York alleges that his post-trial counsel was ineffective because he withdrew York's motions for new trial and for judgment of acquittal.[162] However, this Court will consider an ineffective-assistance claim on direct appeal only if the record below is sufficiently developed and an additional evidentiary hearing is not required.[163]

Of course, York alleges that his counsel simply withdrew the motions without York's consent.[164] But an evidentiary hearing would be necessary to verify and evaluate the relevant circumstances. So York's ineffectiveness claims should not be considered on direct appeal.

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[162]Defendant's Brief at pages 41-42. York is referring to R1-242, 1-243,
1-342, and 1-347.

[163]See United States v. Camacho, 40 F.3d 349, 355 (11th Cir. 1994).

[164]Defendant's Brief at page 41.

8. **The trial judge did not abuse his discretion in denying another continuance.**

Shortly prior to trial, York's latest counsel asked for a continuance. The trial judge did not abuse his discretion in denying the belated motion. However, this issue requires an understanding as to York's apparent strategy in using his counsel.

A. The course of proceedings.

After the initial court appearance on the original indictment, Mr. Garland entered his appearance for York at the detention hearing before the magistrate judge in May 2002.[165] At York's guilty plea hearing in January 2003, Mr. Garland represented that he and Mr. Arora of his firm had thoroughly investigated the case in advance of York's proposed plea, and York affirmed that he was satisfied with his lawyer's services.[166] Mr. Garland and Mr. Arora continued to represent York when the first trial judge advised that

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

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

he would not accept the plea agreement.[167]

When counsel returned for a motions hearing in July 2003, Mr. Rubino entered his appearance as additional counsel for York.[168] Mr. Garland remained in the case when it came before the second trial judge.[169]

Mr. Patrick and Mr. Benjamin Davis entered their appearances for York in December 2003, after the superseding indictment was returned.[170] In the meantime, Mr. Rubino had filed a number of motions on York's behalf.[171]

When the case was called for a pretrial hearing on December 16, 2003, Mr. Garland, Mr. Arora, Mr. Patrick, and Mr. Benjamin Davis appeared on York's behalf, and Mr. Garland acted as lead counsel for that hearing.[172] At that time the trial judge warned

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

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

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

[170](R1-171; Transcript of 12/16/03 Pre-Trial Hearing at page 2).

[171](R1-142, 1-161, 1-162).

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

counsel that he would not continue the case due to the addition of new counsel and further stated that he would not allow a withdrawal of counsel if it might cause a problem for the trial of the case.[173]

Two weeks later, Mr. Patrick, Mr. Arora, and Mr. Benjamin Davis returned for another pretrial hearing.[174] At that time it was announced that York wanted to have only Mr. Patrick and Mr. Davis to represent him at trial.[175] Mr. Patrick said that he had learned of York's decision just the night before.[176]

The trial judge made clear his belief that York was seeking to manipulate and delay the trial process.[177] Thereafter Mr. Arora stated his willingness to be available for the assistance of the defense, and the trial judge left that option open for York to

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

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

[175](Transcript of 12/30/03 In Camera Hearing at page 10).

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

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

consider.[178]

Mr. Arora and Mr. Patrick largely shared the motion arguments at the December 16th and December 30th conferences.[179] Through this time period, Mr. Arora filed a host of motions on his client's behalf.[180]

Prior to jury selection, the trial judge instructed that Mr. Arora must remain in the case and be available to Mr. Patrick, even if Mr. Patrick was going to be lead counsel.[181] Mr. Arora actively participated on the defense team.[182]

After several days of trial, the trial judge said that he no longer would require that Mr. Arora be present, but would leave that up to Mr. Arora and his client.[183] Mr. Arora remained on the defense team

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

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

[180](E.g., R1-192 through 1-195, 1-201, 1-218 through 1-220).

[181](TT1-11-12; see TT1-269-71, 3-708).

[182](See, e.g., TT1-40 et seq., 3-668 et seq., 3-758 et seq., 5-1407 et seq.).

[183](TT4-1195-97). Mr. Arora told the trial judge that York had asked Mr. Arora to remain on the case. (TT4-1196).

thereafter, at least for some time.[184] Mr. Patrick and Mr. Arora were joined at trial by Mr. Cedric Davis, a different lawyer than Mr. Benjamin Davis, who apparently left the team.[185]

After trial was over and post-trial motions had been filed, Mr. Patrick submitted a motion for leave to withdraw.[186] At a hearing on that motion, Mr. Johnson entered his appearance.[187] A short time earlier, Mr. Marks had entered the case without filing a formal notice and had begun to submit defense objections to the PSR.[188] York consented to Mr. Patrick's withdrawal, but the trial judge took the matter under advisement, in part due to his concern that Mr. Patrick should be available to appellate counsel.[189]

Mr. Marks and Mr. Charles appeared for York's sentencing.[190] They also handled a later hearing in regard to York's motion for a

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[184](E.g., TT5-1425 et seq.).

[185](See, e.g., TT1-211, 1-215, 2-391).

[186](R1-261).

[187](R1-273, 1-274).

[188](R1-272; PSR Addendum).

[189](R1-274-2).

[190](4/22/04 Transcript of Sentencing).

new trial on the basis of newly-discovered evidence.[191]

The shifting pattern has repeated itself in this Court. First, Mr. Robinson entered his appearance and submitted some motions in regard to the briefing schedule. Then Mr. Patrick emerged at the point when York's brief on appeal came due, and Mr. Patrick signed and submitted a merits brief that does not reference Mr. Robinson's name.

B. The motions for continuance.

York filed not one but two motions for continuance, on the eve of trial.[192] One of the motions has the appearance of being written by a non-lawyer, and perhaps was prepared by York on his own behalf.[193] Among other things, that motion and its attachment accuse Mr. Garland's firm of being ineffective, in part because those lawyers raised the question of their client's possible incompetence to stand trial.[194]

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[191](8/13/04 Transcript of Hearing on Motion for New Trial).

[192](R1-209, 1-211).

[193](R1-211).

[194](R1-211, Ex. A, Ex. C; cf. Transcript of 12/30/03 In Camera Hearing at page 6 ("And then my evaluation was established in order to say

The other motion is somewhat conclusory as well, although it does attempt to raise a need for the defense to retain certain expert witnesses.[195] After some additional discussion, the trial judge denied these motions prior to jury selection.[196] In making that record, Mr. Patrick took pains to repeat his claim that the trial judge's decision would create "a prima facie case of ineffective counsel."[197]

C. The merits of the motions.

York sought to engage the trial judge in a game of musical chairs, in which York would select and replace the lawyers, and thereby call the tune. In refusing the game, the trial judge did not abuse his discretion or create some prejudicial effect.[198]

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that I was not prepared to cooperate with my attorneys ....").

[195](R1-209-1).

[196](TT1-4-10). The trial judge clarified that counsel could seek to retain another expert (TT1-9), and that any possible need for a defense expert on DNA evidence was moot (TT1-6-9).

[197](TT1-9; Transcript of 12/30/03 In Camera Hearing at page 14).

[198](See Transcript of 12/30/03 In Camera Hearing at page 12). If the appellate proceedings are included, at least ten chairs have been occupied by York's counsel.

York argues that Mr. Patrick "suddenly" became lead counsel, six days before trial, and therefore it was impossible for York to have an effective defense.[199] York makes no effort to demonstrate any prejudicial effect, other than the prejudice that he regards as inherent, and does not acknowledge that he had access to other resources.[200] However, the trial judge wisely recognized that Mr. Arora, whose knowledge of the case dated back to the early stages, should be present and available to York's defense.

York relies on Verdarame, but that was an extreme case in which there was little opportunity to prepare any defense at all: the trial judge denied an unopposed motion for continuance and then pushed this new case to trial very quickly, so that the defendant had the assistance of counsel for approximately one month.[201] On the other hand, this Court has recognized that a defendant's right to choose his counsel is not absolute, but must be balanced against the public interest "in the fair, orderly, and effective administration of the

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[199]Defendant's Brief at page 42.

[200]Defendant's Brief at pages 42-44.

[201]See United States v. Verdarame, 51 F.3d 249 (11th Cir. 1995).

courts."[202] Here the trial judge respected York's ability to select his own trial counsel, but in part due to Mr. Arora's own sense of professionalism, the trial judge assured that York would have access to Mr. Arora. In any event, the record makes it clear that if York and his lead counsel did not have the full benefit of York's prior representation, then it was by York's own hand.

Rather than just Verdarame, the Court should look to Darby and Saget for guidance.[203] Darby recognizes that the Court should ask whether the defendant played any role in shortening counsel's effective preparation time, and further should consider if prior counsel's representation may have accrued to defendant's benefit.[204] Saget requires at least some showing that a continuance would have made a difference in the outcome at trial.[205]

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[202]United States v. Koblitz, 803 F.2d 1523, 1528 (11th Cir. 1986).

[203]See United States v. Darby, 744 F.2d 1508, 1521-23 (11th Cir. 1984); United States v. Saget, 991 F.2d 702, 708 (11th Cir. 1993).

[204]Darby, 744 F.2d at 1522-23, citing United States v. Uptain, 531 F.2d 1281, 1286-87 (5th Cir. 1976). The Uptain general criteria also were relied upon in United States v. Garmany, 762 F.2d 929, 936 (11th Cir. 1985).

[205]Saget, 991 F.2d at 708.

York set the stage for this complaint when he persisted in reshuffling his counsel. But the trial judge nonetheless gave him a fair trial. The trial judge and the prosecutor did not deprive York and his counsel of the benefit that accrued from the motions filed previously or from the discovery and disclosure notices provided during the pendency of the case.[206] York has not shown an abuse of discretion.

9. **Blakely-type error is not plain error at this time, and the full implications of Blakely remain to be seen.**

Like most defendants who have come before this Court since June 2004, York alleges that, in light of Blakely v. Washington,[207] his sentence should be vacated and the case remanded.[208] However, York did not assert a Sixth Amendment claim at sentencing, and so at most he is entitled to plain-error review.[209]

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[206]See, e.g., R1-127 (prosecution's detailed written notice of uncharged sexual molestation conduct); Transcript of 12/30/03 Hearing in Courtroom at page 35 (prosecution had an open discovery policy with the defense, dating back to May 2002).

[207]542 U.S. ___, 124 S.Ct. 2531 (2004).

[208]Defendant's Brief at pages 44-50.

[209]PSR Addendum; 4/22/04 Sentencing transcript. See, e.g., United States v. Gallego, 247 F.3d 1191, 1996 (11th Cir. 2001)

While the Supreme Court has these issues under advisement, the government will not repeat the lengthy arguments that have been made so many times in this and other courts.[210] But even if Blakely were the governing authority at this moment (it is not),[211] York has not shown how Blakely should affect his sentence.

York offers a general discussion of Blakely and its underpinnings. He then leaps to the conclusion that his sentence should have been determined "exclusively" by the base offense level corresponding to the offense reflected in the jury verdict.[212]

However, a requirement that enhancing -- but not reducing -- facts must be submitted to the jury and proven beyond a reasonable doubt would distort the operation of the sentencing system in a manner that would not have been intended by Congress or the

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[210]As the Court noted in United States v. Reese, 382 F.3d 1308, 1312 n.2 (11th Cir. 2004), the Supreme Court is expected to provide further guidance within this term.

[211]United States v. Reese, 382 F.3d 1308 (11th Cir. 2004).

[212]Defendant's Brief at 50. York is correct that the sentencing judge made his own factual determinations and did not apply a standard of proof beyond a reasonable doubt. See April 22, 2004 Sentencing Transcript. The government concedes that a remand for resentencing would be required if York's construction of Blakely is the correct one.

Sentencing Commission. Accordingly, rather than attempt to apply the Guidelines with a Blakely overlay of jury fact-finding, the courts should conclude that if Blakely governs the federal sentencing Guidelines, then the unconstitutional aspects of the Guidelines system are not severable from the Guidelines system as a whole.[213]

In an instance where Blakely precludes judicial factfinding under the Guidelines, the Guidelines as a whole should not govern the sentence to be imposed. Accordingly, the district judge should be instructed to sentence between the statutory minimum and the statutory maximum penalty for each offense. The sentencing court must consider the sentencing range under the Guidelines and give that range "due regard" in imposing sentence, per 18 U.S.C. § 3553(a)(4), even if it is not bound to follow the Guidelines range.

10. **The use of a more current Guidelines Manual did not prejudice York's sentence.**

York complains that the sentencing judge violated the ex post

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[213]See, e.g., United States v. Marrero, 325 F.Supp.2d 453, 456-57 (S.D.N.Y. 2004); United States v. Lockett, 325 F.Supp.2d 673, 677 (E.D.Va. 2004); United States v. Einstman, 325 F.Supp. 2d 373, 380-81 (S.D.N.Y. 2004); United States v. Lamoreaux, 2004 WL 1557283 (W.D. Mo. July 7, 2004). But see United States v. Ameline, 376 F.3d 967, 980-83 (9th Cir. 2004).

facto clause of the Constitution by using the 2002 edition rather than the 1993 edition of the Sentencing Guidelines Manual to calculate his sentence.[214] York raised this claim of error at sentencing but acknowledged that this Court's precedent was contrary to his position.[215]

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[214]Defendant's Brief at pages 50-52.

[215]PSR Addendum; 4/22/04 Sentencing transcript at page 3. In fact the PSR reflects that sentence was computed according to the November 1, 2000 edition of the Guidelines manual. PSR at ¶ 69. The confusion may arise because the superseding indictment among other things charged conspiracies that continued into the year 2002. (R1-130-1, 1-130-29).

In Bailey, this Court held that the "one book" rule overcomes the ex post facto problem if the sentencing involves related offenses committed in a series.[216] The Bailey court patterned its rule on the analysis that applies to conspiracies and other continuing offenses.[217]

However, the government believes that the Court need not reach the ex post facto issue under Bailey, because York's argument rests on a false premise. York contends that the Guidelines in effect during 1993 did not contain a cross-reference to Section 2A3.1 and did not include the various enhancements that were applied here.[218] But the 1993 Manual provided that the pertinent guideline for an 18 U.S.C. § 2423 transport offense involving a minor was Section 2G1.2 (rather than Section 2G1.1, the current provision).[219] As of 1993, there indeed was a cross-reference from Section 2G1.2(c)(2) to

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[216]See United States v. Bailey, 123 F.3d 1381, 1404-05 (11th Cir. 1997).

[217]123 F.3d at 1405, 1406.

[218]Defendant's Brief at pages 51-52.

[219]As shown in the Historical Note under Section 2G1.2 in the current Manual, the two separate sections were consolidated, effective in November 1996, and Section 2G1.2 was eliminated at that time.

Section 2A3.1, which in turn provided a base offense level of 27, an enhancement of 4 levels if the victim had not attained the age of 12 years, or 2 levels if the victim was more than age 12 but less than age 16, and a 2 level enhancement if the victim was under the care or supervisory control of the defendant. So the difference in the Manual did not prejudice York.

CONCLUSION

For the foregoing reasons, the United States respectfully submits that the District Court's judgment should be affirmed.

Respectfully submitted this 14 day of December, 2004.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type and volume limitations of FRAP 32(a)(7)(B). Using the WordPerfect 9.0 software program, this brief employs proportionally spaced, 14-point characters in Serifa font. This brief contains 11,890 words according to the word-counting function of the word-processing program used to create this brief, excluding the parts of the brief exempted by Fed. R. App.P. 32(a)(7)(B)(iii).

_____

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CERTIFICATE OF SERVICE

I, Dean S. Daskal, Assistant United States Attorney, do hereby certify that I have this date served the within and foregoing Brief of Appellee upon Defendant by mailing a copy of same in a properly addressed and stamped envelope as follows to his counsel of record:

Adrian L. Patrick, Esq., 1044 Baxter Street, Athens GA 30606.

I further certify pursuant to Rule 25(a)(2)(B), Fed. R. App. P., that this Brief was dispatched for filing with the Clerk of Court by Federal Express overnight delivery on the date below.

This 14 day of December, 2004.

_____

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