

**IN THE
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

OPENING BRIEF OF APPELLANT

Matthew M. Robinson, Esq.
Attorney for the Appellant
11331 Grooms Road
Suite 3000
Cincinnati, OH 45242
(513) 381-8033

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

CERTIFICATE OF INTERESTED PERSONS

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

Richard S. Moultrie, Assistant U.S. Attorney

Verda Colvin, Assistant U.S. Attorney

Dean S. Daskal, Assistant U.S. Attorney

Maxwell Wood, U.S. Attorney

Honorable C. Ashley Royal, United States District Judge

Honorable Hugh Lawson, United States District Judge

Manubir S. Arora, Defense Attorney

Harry Jean Charles, Defense Attorney

Benjamin A. Davis, Defense Attorney

Edward T.M. Garland, Defense Attorney

Leroy R. Johnson, Defense Attorney

Jonathan Marks, Defense Attorney

Adrian L. Patrick, Defense Attorney

Matthew M. Robinson, Defense Attorney

Frank A. Rubino, Defense Attorney

Stephanie Thacker, Dept. of Justice

Kathy C. Johnson, Co-defendant

Dwight D. York, Defendant

Identifiable victims exist in the instant matter, including; **REDACTED OUT**

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

By: _____
Matthew M. Robinson, Esq.

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant respectfully submits that the issues raised on appeal are based on well-settled precedent and legal principles, requiring nothing more than reference to the case law and the record in order for the Court to decide in favor of the Appellant.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONSi

STATEMENT REGARDING ORAL ARGUMENT..... iii

TABLE OF CONTENTSiv

TABLE OF CITATIONS.....vi

STATEMENT OF JURISDICTION.....x

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS.....9

SUMMARY OF ARGUMENTS16

STANDARD OF REVIEW14

ARGUMENTS20

I. The Appellant Was Denied a Fair Trial and Due Process Due to the Trial Court’s Denial of His Motion to Sever Disparate Counts20

II. The District Court Erred in Denying Appellant’s Motion to Dismiss The Rico Claims (Counts One, Two, And Twelve)26

III. The Trial Court Abused Its Discretion in Refusing to Accept the Plea Agreement, Refusing to Allow the Government to Dismiss Certain Counts of the Original Superseding Indictment, And in Actively Indicating a Crucial Term of an Acceptable Plea Agreement.....33

IV. The District Court’s Denial of New Counsel’s Motion For Extension Deprived Appellant of a Fair Trial And Due Process of Law38

V. The Court Abused its Discretion in Refusing to Grant a New Trial39

VI.	Appellant’s Sixth Amendment Right to a Jury Trial was denied When He was Sentenced Based upon Facts Not Reflected in the Jury Verdict.....	42
VII.	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	49
VIII.	The District Court Erred in Denying the Appellant’s Motion to Dismiss the Forfeiture Count.....	51
IX.	The District Court Erred in Ordering Restitution Based upon 18 U.S.C. § 3663A	54
	CONCLUSION	58
	CERTIFICATES OF COMPLIANCE	59
	CERTIFICATE OF SERVICE	59

TABLE OF CITATIONS

<i>CASES:</i>	<i>PAGES</i>
<u>Anderson v. Fuller</u> , 455 U.S. 1028 (1982)	44
<u>Apprendi v. New Jersey</u> , 530 U.S. 466 (2000).....	43, 44, 45, 47
<u>Blakely v. Washington</u> , 124 S. Ct. 2531 (2004).....	45, 46, 47
<u>Dysert v. United States Sec'y of Labor</u> , 105 F.3d 607 (11 th Cir. 1997).....	14, 15
<u>Harris v. United States</u> , 122 S.Ct. 2406 (2002)	43
<u>Hughey v. United States</u> , 495 U.S. 411 (1990)	58
<u>In re Winship</u> , 397 U.S. 358, 364 (1970).....	43
<u>Lynce v. Mathis</u> , 519 U.S. 433 (1997)	55
<u>Miller v. Florida</u> , 482 U.S. 423, 431 (1987)	49
<u>Rinaldi v. United States</u> , 434 U.S. 22, 98 S.Ct. 81 (1977)	20
<u>Ring v. Arizona</u> , 536 U.S. 584 (2002)	45
<u>Sherbert v. Verner</u> , 374 U.S. 398 (1963)	52
<u>United States v. Ameline</u> , 376 F.3d 967 (9 th Cir. 2004)	46, 48
<u>United States v. Bailey</u> , 975 F.2d 1028 (4 th Cir. 1992)	57
<u>United States v. Bennett</u> , 368 F.3d 1343 (11 th Cir. 2004)	14
<u>United States v. Bennett</u> , 37 F.3d 687 (1 st Cir. 1994).....	55
<u>United States v. Bergouignan</u> , 764 F.2d 1503, 1508 (11 th Cir.1985).....	38

<u>United States v. Blanchard</u> , 9 F.3d 22, 24 (6 th Cir. 1993)	15
<u>United States v. Booker</u> , 375 F.3d 508 (7 th Cir. 2004)	46, 48
<u>United States v. Caldwell</u> , 594 F. Supp. 548 (N.D. Ga. 1984)	26
United States v. Casallas, 59 F.3d 1173, 1177 (11 th Cir. 1995)	36
<u>United States v. Coleman</u> , 22 F.3d 126, 133 (7 th Cir. 1994)	23
United States v. Conhaim, 160 F.3d 893 (2 nd Cir. 1998).....	56
<u>United States v. Copple</u> , 74 F.3d 479 (3 rd Cir. 1996)	57
<u>United States v. Corbitt</u> , 996 F.2d 1132, 1135 (11 th Cir. 1993)	36
<u>United States v. Diaz</u> , 138 F.3d 1359 (11 th Cir. 1998)	14, 37
United States v Forsythe , 429 F. Supp 715(WD Pa. 1977)	28
<u>United States v. Garcia</u> , 13 F.3d 1464 (11 th Cir.1994)	15
<u>United States v. Green</u> , 2004 U.S. Dist. LEXIS 11292 (D. Mass. 2004).....	47
<u>United States v. Hall</u> , 854 F.2d 1269, 1271 (11 th Cir. 1988).....	41
<u>United States v. Hersh</u> , 297 F.3d 1233 (11 th Cir. 2002)	23
<u>United States v. Hobson</u> , 825 F.2d 364, 366 (11 th Cir. 1987)	41
United States v. Holmes, 975 F.2d 275 (6 th Cir. 1992)	50
United States v. Jaamar, 328 F.Supp.2d 1276 (M. D. Fla. 2004).....	48
<u>United States v. Johnson</u> , 89 F.3d 778, 782-83 (11 th Cir. 1996)	37
<u>United States v. Kersey</u> , 130 F.3d 1463 (11 th Cir. 1997).....	40
<u>United States v. Knox</u> , 396 U.S. 77, 83, 84 n.7 (1969)	28

<u>United States v. Kussmaul</u> , 987 F.2d 345 (6 th Cir. 1993).....	50
<u>United States v. Lane</u> , 474 U.S. 438, 446 n. 8 (1986)	23
<u>United States v. Leach</u> , 325 F.Supp.2d 557(E.D. Pa. 2004).....	47
<u>United States v. Levin</u> , 973 F.2d 463 (6 th Cir. 1992).....	28
<u>United States v. Mahoney</u> , 859 F.2d 47, 52 (7 th Cir. 1988).....	57
<u>United States v. Medas</u> , 232 F.Supp.2d. 436 (E.D.N.Y. 2004)	47
<u>United States v. Nabors</u> , 45 F.3d 238, 240 (8 th Cir. 1995)	29
<u>United States v. Overton</u> , 421 F.2d 277 (11 th Cir. 1969).....	40
<u>United States v. Patti</u> , 337 F.3d 1317 (11 th Cir. 2003).....	15
<u>United States v. Puche</u> , 350 F.3d 1137 (11 th Cir. 2003)	14, 15
<u>United States v. Reed</u> , 887 F.2d 1398, 1404 (11 th Cir.1989).....	41
<u>United States v. Reese</u> , 2004 U.S. App. LEXIS 18605 (11 th Cir. 2004)	46
<u>United States v. Rosner</u> , 516 F.2d 269, 273 (2 nd Cir. 1975).....	40
<u>United States v. Rostoff</u> , 164 F.3d 63 (1 st Cir. 1999)	55
<u>United States v. Sanders</u> , 95 F.3d 449 (6 th Cir. 1996)	56
<u>United States v. Siegel</u> , 152 F.3d 1256 (11 th Cir. 1998).....	55, 56
<u>United States v. Streebing</u> , 987 F.2d 368 (6 th Cir. 1993).....	55
<u>United States v. Verderame</u> , 51 F.3d 249, 252 (11 th Cir.1995)	38, 39
<u>United States v. Waldon</u> , 363 F.3d 1103, 1108 (11 th Cir. 2004)	14, 15

<u>United States v. Walser</u> , 3 F.3d 380, 385 (11 th Cir. 1993).....	23
<u>United States v. Weaver</u> , 905 F.2d 1466 (11 th Cir. 1990)	22, 24
<u>United States v. Werker</u> , 535 F.2d 198, 203 (2 nd Cir. 1976)	36
<u>United States v. Wright</u> , 63 F.3d 1067, 1071 (11 th Cir.1995)	14
<u>Weaver v. Graham</u> , 450 U.S. 24 (1981)	49
<u>Wheeler v. United States</u> , 116 F.3d 749, 769-770 (5 th Cir. 1997).....	52
<u>Wilson v. Garcia</u> , 471 U.S. 261, 271, 105 S. Ct. 1938 (1985)	27
 <i>STATUTES:</i>	
Fed. R. Crim. P. 8(a)	22, 23, 25
Fed.R.Crim P. 11(e)(1)	14, 35, 36, 37
Fed. R. Crim. P. 14.....	23, 25
U.S.S.G. § 1B1.3.....	43
U.S.S.G. § 2A1.3	50
U.S.S.G. § 2F1.1(b)(1)	55
U.S.S.G. § 2G1.1.....	50
18 U.S.C. §§ 1961 and 1962	29
18 U.S.C. § 2253	51
18 U.S.C. 2423(a)	20
18 U.S.C. § 3282	20, 26
18 U.S.C. §§ 3663 and 3663A	19, 54, 55, 56

31 U.S.C. § 5324(a)(3).....21

42 U.S.C. § 2000bb.....51, 52, 53

STATEMENT OF JURISDICTION

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

STATEMENT OF ISSUES

- I. Appellant Was Denied a Fair Trial and Due Process Due to the Trial Court’s Denial of His Motion to Sever Disparate Counts.
- II The Court Erred in Denying Appellant’s Motion to Dismiss The Rico Claims (Counts One, Two, And Twelve).
- III. The Trial Court Abused Its Discretion in Refusing to Accept the Plea Agreement, Refusing to Allow the Government to Dismiss Certain Counts of the Original Superseding Indictment, And in Actively Indicating a Crucial Term of an Acceptable Plea Agreement.
- IV. The District Court’s Denial of New Counsel’s Motion For Extension Deprived Appellant of a Fair Trial And Due Process of Law.
- V. The Court Abused its Discretion in Refusing to Grant a New Trial
- VI Appellant’s Sixth Amendment Right to a Jury Trial was denied When He was Sentenced Based upon Facts Not Reflected in the Jury Verdict

- VII. 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.
- VIII. The District Court Erred in Denying Appellant's Motion to Dismiss the Forfeiture Count.
- IX. The District Court Erred in Ordering Restitution Based upon the Mandatory Victims Restitution Act

STATEMENT OF THE CASE

The instant appeal involves the criminal case charged against the Appellant, Dwight D. York in the Middle District of Georgia. As discussed below, York was convicted in the district court and is currently incarcerated in federal prison.

On May 2, 2002, the Grand Jury for the Middle District of Georgia returned a sealed indictment against York. (Doc.1, Indictment). The indictment charged York with four counts of interstate transport of minors for unlawful sexual activity in violation of 18 U.S.C. § 2423(a). (Doc.1, Indictment). York entered a plea of not guilty to the charges in the indictment. Prior to trial, York filed a motion *in limine*, a motion to suppress evidence and statements, and discovery motions. (Doc.32, 40, 37, 38, 39, 41, 43, 44, 45, 47, Motions).

On January 23, 2003, a three count superseding information was returned against York. (Doc. 78, Superseding Information). The information charged two counts of transporting a minor in interstate commerce for unlawful sexual activity in violation of 18 U.S.C. § 2423(a)(Count One); structuring of cash transaction to evade reporting requirements in violation of 31 U.S.C. §§ 5324(a)(3) and 5313(a) and 18 U.S.C. § 2(Count Two); and a forfeiture allegation in accord with 18 U.S.C. § 2253(o)(Count Three). On January 23, 2003, York entered a plea of guilty pursuant to a written plea agreement on this new information. (Doc.80; Plea Agreement; Doc. 81). The motion to suppress and motion *in limine* were therefore terminated. (Doc. 81; Plea). The plea stipulated to a fifteen year term of incarceration. (Doc. 80, Plea Agreement;).

On June 25, 2003, the court issued an order rejecting the plea agreement, as the sentence stipulated therein was, in the eyes of the judge, too lenient, as the guideline range of imprisonment was calculated to be between 235 and 292 months and the plea contemplated a sentence of 180 months. (Doc. 107, Order). Thereafter, York filed a motion for change of venue and a motion for a psychological exam, both of which were granted. (Doc. 108, 109; Motions). The psychological exam resulted in the need for further testing in order to insure York's competency to stand trial. (Doc. 131, Order).

York also filed a motion to suppress evidence obtained from a search of his residence at 404 Shady Dale Road, Eatonton, Georgia. (Doc.116, Motion). A motion for the recusal of the trial judge was also filed. (Doc.119; Motion). The government filed a motion to admit evidence of uncharged criminal conduct and 404(b) evidence, which was granted. (Doc.125, Motion; Doc.126, Order). The uncharged evidence centered upon the alleged sexual molestation of fifteen different minors. (Doc.125, Motion). An evidentiary hearing was held on York's motions, with the motions taken under advisement. (Doc.124, Minutes).

Eventually, the motion to recuse the trial judge was granted, causing the case to be transferred from the Hon. Judge Hugh Lawson to the Hon. Judge C.A. Royal. (Doc. 133, Order). York also filed a motion to dismiss for lack of jurisdiction at this time. (Doc. 142, Motion).

On October 24, 2003, Judge Royal found York competent to stand trial. (Doc. 145, Minutes). Also at that time, York's plea of guilty was formally withdrawn and changed to a plea of not guilty. (Doc. 145, Minutes). York's motion to dismiss for lack of jurisdiction was also denied. (Doc. 147, Order). However, the motion *in limine* was granted. (Doc. 154, Order).

On November 21, 2003, another superseding indictment was returned against York. (Doc. 158, Superseding Indictment). The indictment charged York with:

conspiracy to commit racketeering acts in violation of 18 U.S.C. § 1962(d)(Count One); racketeering violations of 18 U.S.C. § 1962(c)(Count Two); conspiracy to transport minors in interstate commerce for unlawful sexual activity and conspiracy to structure cash transactions to evade currency reporting requirements in violation of 18 U.S.C. § 371(Count Three); transporting minors in interstate commerce for the purposes of unlawful sexual activity in violation of 18 U.S.C. §§ 3283, 2423(a) and 2(Counts Four through Six and Eight); traveling in interstate commerce for the purpose of engaging in unlawful sexual acts with a minor in violation of 18 U.S.C. §§ 3283 and 2423(b)(Count Seven); structuring transactions to evade reporting requirements in violation of 31 U.S.C. §§ 5324(a)(3) and 5313(a) and 18 U.S.C. § 2(Counts Nine through Eleven); RICO forfeiture pursuant to 18 U.S.C. § 1963(Count Twelve); and criminal forfeiture in violation of exploitation of minors pursuant to 18 U.S.C. § 2253(Count Thirteen). (Doc.158, Superseding Indictment).

York filed a motion to separate Count Three of the superseding indictment and to sever counts pursuant to Fed.R.Crim.P. 8(a) and 14. (Doc.162, Motion). York also filed a motions to dismiss the indictment based upon the outrageous government conduct (Doc.160, Motion); to dismiss the superseding indictment based upon York possessing head of state immunity as the leader of the Yamassee Indian tribe (Doc.174, Motion); to dismiss Counts Six and Two of the superseding

indictment for failing to allege a violation of federal law (Doc. 175, Motion); and to exclude the testimony of Kenneth Lanning. (Doc.193, Motion).

On December 16, 2003, York entered a plea of not guilty to all counts of the indictment. (Doc.177, Arraignment). On December 30, 2003, the court denied York's motion to sever and separate the indictment. (Doc.198, Order). York's motions to dismiss the indictment and to suppress evidence obtained from 404 Shady Dale Road were also denied. (Doc.199, 205, 215, Orders; Doc.206, Order). Furthermore, the testimony of Kenneth Lanning was ruled admissible. (Doc. 214, Order).

On December 12, 2003, Adrian L. Patrick entered his appearance as counsel for York. On January 2, 2004, a motion to continue the trial in the interest of justice was filed so that counsel could prepare for trial. (Doc.211, Motion). This motion was terminated by the court on January 5, 2004, meaning that counsel had less than one month to prepare for York's trial. (Doc.221, Minutes).

Voir dire started in the instant matter on January 5, 2004. (Doc.221, Voir Dire). The trial lasted until January 23, 2004, at which point the jury returned a verdict of guilty as to all counts of the superseding indictment except for Count Eight. (Doc.234, Jury Verdict). A second deliberation was held by the jury on the forfeiture counts, both under RICO (18 U.S.C. 1963) and under the general criminal

forfeiture statute (18 U.S.C. 2253) The jury unanimously found York not guilty under the RICO forfeiture claim but guilty on the second forfeiture count.

On January 30, 2004, York filed a motion for a new trial. (Doc. 242, Motion).

On the same day, a motion for judgment of acquittal was also filed. (Doc.243, Motion)

Prior to sentencing, a Pre-sentence Investigation Report (PSI) was prepared. As several counts of conviction consisted of numerous criminal acts, each act was identified and grouped with other acts that exhibited a common criminal objective, pursuant to U.S.S.G. § 3D1.2. (PSI at ¶¶ 71-77). Twelve groups were created.

Count Groups IV, V, and VI all involved the interstate transport of minors for unlawful sexual activity as the common criminal objective. These three groups had the highest total offense level. A base offense level of 27 was received in these groups for criminal sexual abuse, pursuant to U.S.S.G. § 2A3.1(a). (PSI at ¶¶ 102, 111, 120). A four level enhancement was issued pursuant to U.S.S.G. § 2A3.1(b)(2)(A) as the victims had not reached the age of twelve. (PSI at ¶¶ 103, 112, 121). Two levels were added to the base offense level pursuant to U.S.S.G. § 2A3.1(b)(3)(A) as the victim was under the care and supervisory control of York. (PSI at ¶ 104, 113, 122). A four level leadership enhancement was also issued. (PSI at ¶¶ 105, 114, 123). A further two level enhancement was issued pursuant to

U.S.S.G. § 3B1.4 as a person under the age of 18 was used to aid in committing the offenses at issue. (PSI at ¶¶ 106, 115, 124). The total offense level was determined to be 39. (PSI at ¶¶ 109, 118, 127). No jury involvement occurred in connection with these enhancements.

Count Groups II and III, also based upon the interstate transport of minors for unlawful sexual activity, resulted in the calculation of a base offense level of 35. (PSI at ¶¶ 92, 100). Unlike Count Groups IV thru VI, York did not receive a two level enhancement for using an individual under the age of 18 in committing the offenses and the age of the victim was between 12 and 16, necessitating a two level enhancement instead of a four level enhancement, pursuant to U.S.S.G. § 2A3.1(b)(2)(B). (PSI at ¶¶ 87, 95). Taking the greatest adjusted total offense level value, 39, and adding the appropriate number of 'units' as determined by U.S.S.G. § 3D1.4, which was calculated to be 4, the combined total offense level in this matter was 43. (PSI at ¶ 188). With only one criminal history point, York's criminal history category was determined to be I. (PSI at ¶ 221). Based upon an offense level of 43 and a criminal history category of I, the guideline range of imprisonment was LIFE imprisonment. Pursuant to U.S.S.G. § 5G1.2(d), because the count carrying the highest statutory maximum is less than the guideline range of

imprisonment, sentences imposed on other counts run consecutively in order to produce a combined sentence equal to the guideline range of imprisonment.

York filed several objections to the to the PSI. (Doc.272, Objections). York argued that the 1993 version of the Sentencing Guidelines should have been utilized in this matter instead of the 2002 Guidelines, in order to avoid an *ex post facto* violation. (Doc.272, Objections). York also moved for a downward departure based upon his worsening mental state as well as the possibility that he will be victimized in prison due to the nature of his case. (Doc. 272, Objections). Objections were also made to the § 3B1.1 leadership enhancement and a 'care and supervisory' enhancement pursuant to § 2A3.1(b)(3)(A). (Doc. 272, Objections).

On April 22, 2004, York appeared for sentencing. The court denied all objections and sentenced York to 1,620 months incarceration. (Doc.275, Sentencing). Judgment was entered against York on May 7, 2004. (Doc. 285, Judgment). A timely notice of appeal was filed on May 7, 2004. (Doc.289, Notice of Appeal).

On May 19, 2004, York filed another motion for a new trial. (Doc.294, Motion). The motion was based upon newly discovered evidence, in that one of the government's witnesses, Habiyyah Washington, recanted her testimony and cast doubt onto the reliability of the testimony of several other witnesses, providing said

witnesses with a motive to fabricate tales against York. (Doc.294, Motion). The court denied the motion for new trial on August 18, 2004. (Doc. 287, Order)

An amended judgment modifying the restitution order was entered in May 21, 2004. (Doc. 297, Amended Judgment). In that judgment, York was ordered to pay \$566,066.00 in restitution. (Doc.286, Restitution Order)

STATEMENT OF THE FACTS

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

In 1998, law enforcement officials started receiving anonymous letters and e-mails stating that sexual misconduct was occurring on York's property in Eatonton,

Georgia. (Doc.301, Trial Transcript, Vol.III, at 806-808). By 2001, local and federal law enforcement officials were receiving telephone calls alleging sexual misconduct on York's property, including sexual abuse and molestation of children.

York allegedly kept his followers in a compound in Eatonton, Georgia. (Doc.302, Trial Transcript, Vol. IV at 1148). At the compound, York had many wives, as endorsed by his faith and culture, with Kathy Johnson being the "main" wife. (Doc.300, Trial Transcript, Vol.II at 424). Children were taught to obey York and to refer to York as Baba (father), Imam (leader), and Isa (Jesus). (Doc.300, Trial Transcript, Vol.II at 421-22; Doc. 301, Trial Transcript, Vol.III at 827-28). Children received home schooling within the compound. (Doc.300, Trial Transcript, Vol.II at 430; Doc. 301, Trial Transcript, Vol.III at 823). York insured food, clothing, and living space distribution in the compound. (Doc.301, Trial Transcript, Vol.III at 813).

Allegedly, York "brain-washed" his followers, instilling in them a fear of the world outside of the compound and a fear of the desire of "whites" to suppress them. (Doc.305, Trial Transcript, Vol.VII at 1848; Doc.305, Trial Transcript, Vol.VII at 1893). York spread this message through web sites, newsletters, and a chain of stores to sell teachings, memberships, publications, and other merchandise associated with their faith. (Doc.304, Trial Transcript, Vol.VI at 1610-1611,

1617-1618, 1620). Weekly ceremonies were also held on the Eatonton compound, generating weekly cash income of approximately \$4,000. York also hosted an annual week-long "Savior's Day Party." (Doc.304, Trial Transcript, Vol.VI at 1641). In 1999, this event raised \$250,000 and in 2000 the event raised \$278,000. (Doc.304, Trial Transcript, Vol.VI at 1642).

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

One bank with which York had regular dealings filed several suspicious activity reports (SARs) and currency transaction reports (CTRs) regarding York's financial dealings. (Doc.303, Trial Transcript, Vol.V at 1393-1396). The FBI obtained these reports, learning that on 41 separate occasions, multiple deposits totaling more than \$10,000 were made to one or more of York's bank accounts. At

trial, the government presented evidence that deposits made on September 29 and 30, 1999; October 6 and 8, 1999; and April 5 and 11, 2000 were structured to obviate currency reporting requirements. (Doc.303, Trial Transcript, Vol.V at 1399-1400, 1401-1402, 1402-1403).

Aside from the financial irregularities alleged to have occurred in this case, allegations of sexual abuse of minors by York were also raised. According to the government's allegations, previously molested younger children were employed to bring new children to York once they had gotten older. (Doc.304, Trial Transcript, Vol. VI at 1568). Children refusing York's advances were ignored, not fed well, and not allowed to go outside and play. (Doc.303, Trial Transcript, Vol.V at 1321; Doc.305, Trial Transcript, Vol.VII at 1830). Eventually, a family could be expelled from the compound following repeated refusals to join in sexual activity by children.

The children were told that the sexual activity was instructional as well as part of an ancient Sudanese ritual, assisting in preparing the child for marriage. (Doc.301, Trial Transcript, Vol.III at 847, 853-854; Doc.304, Trial Transcript, Vol. VI at 1552).

Several of the children allegedly received sexually transmitted diseases from these encounters. Chlamydia Trachomatis, Herpes Simplex I, and Herpes Simplex II were detected in several children involved in the instant matter. However, no such

diseases were present in York. The government also presented the testimony of Kenneth Lanning, an expert in the area of behavioral and social disorders that cause individuals to molest minors. (Doc.301, Trial Transcript, Vol.III at 709-757).

Investigation in this matter revealed eleven identifiable victims of sexual molestation that had crossed state lines. REDACTED denied being molested. (Doc.305, Trial Transcript, Vol.VII at 1908). However, witnesses attested that York engaged in oral sodomy and anal intercourse with REDACTED when REDACTED was 12 years old. (Doc.303, Trial Transcript, Vol.V at 1314).

Other individuals presented evidence of being victimized at the Eatonton compound as part of the religious ministry of York. (Doc.305, Trial Transcript, Vol.VII at 1818-1827, 1830).

Following the presentation of all evidence, the jury retired to deliberate and ultimately found York guilty of all but counts Eight and Twelve.

After the trial, Habiba Washington, in a sworn affidavit, stated that her testimony at trial had been fabricated. (Doc.294, Motion, Washington Affidavit at ¶ 1-3). Washington stated that the allegations raised against York were coerced from Jacob York, the York's son, who blamed York for the premature death of his mother. (Doc.294, Motion, Washington Affidavit at ¶ 3). Nevertheless, the Court discounted the recantation and denied motions for a new trial.

STANDARDS OF REVIEW

- I. The denial of a motion to sever is reviewed, in a general standard, for abuse of discretion. United States v. Bennett, 368 F.3d 1343 (11th Cir. 2004)
- II. This court reviews the district court's denial of a defendant's motion to dismiss an indictment under an abuse of discretion standard. United States v. Waldon, 363 F.3d 1103, 1108 (11th Cir. 2004). The denial of a motion to dismiss, when based upon a district court's findings of fact, are reviewed for clear error. United States v. Puche, 350 F.3d 1137 (11th Cir. 2003). The proper interpretation of a statute, however, is a question of law that is reviewed *de novo*. Dysert v. United States Sec'y of Labor, 105 F.3d 607 (11th Cir. 1997).
- III. A court of appeals reviews a judge's pretrial actions relative to a plea agreement, especially where there is a violation of Fed.R.Crim P. 11(e)(1), under a plain error standard. United States v. Diaz, 138 F.3d 1359 (11th Cir. 1998)
- IV. The Court reviews the disposition of requests for trial continuances for abuse of discretion. See United States v. Wright, 63 F.3d 1067, 1071 (11th Cir.1995).

- V. A motion for a new trial is committed to the discretion of the trial court and will not be overruled on appeal absent an abuse of discretion. United States v. Garcia, 13 F.3d 1464 (11th Cir.1994)
- VI. A district court's application of the sentencing guidelines is reviewed *de novo*, and its findings of fact for clear error. United States v. Patti, 337 F.3d 1317 (11th Cir. 2003)
- VII. A district court's application of the sentencing guidelines *de novo*, and its findings of fact for clear error. United States v. Patti, 337 F.3d 1317 (11th Cir. 2003)
- VIII. The denial of a defendant's motion to dismiss an indictment is reviewed for abuse of discretion. United States v. Waldon, 363 F.3d 1103, 1108 (11th Cir. 2004). The denial of a motion to dismiss, when based upon a district court's findings of fact, are reviewed for clear error. United States v. Puche, 350 F.3d 1137 (11th Cir. 2003). The proper interpretation of a statute is a question of law that is reviewed *de novo*. Dysert v. United States Sec'y of Labor, 105 F.3d 607 (11th Cir. 1997).
- IX. A district court's order of restitution is reviewed for abuse of discretion, but reviews the district court's application of a statute *de novo*. See, United States v. Blanchard, 9 F.3d 22, 24 (6th Cir. 1993).

SUMMARY OF THE ARGUMENTS

- I. The lower court erred in ignoring the dictates of Rules 8(a) and 14 of the Federal Rules of Criminal Procedure by misjoining distinct and disparate counts under the umbrella of one superseding indictment. Though York sought severance to prevent bias and prejudice at trial, the lower court improperly denied severance of the dissimilar charges, resulting in unfair prejudice to York at trial. This misjoining of distinct and disparate offenses blurred statute of limitations issues relative to Mann act claims and influenced the jury's verdict. The government sought to eliminate the objectivity of the jury by submitting evidence of York's alleged wrongdoing regarding cash structuring in an effort to make York appear guilty of other unrelated crimes of child molestation and vice-versa. Therefore, York's Fifth Amendment right to a fair trial was violated and his convictions must be vacated.

- II. The District Court committed reversible error when it denied York's motion to dismiss the RICO claims of the indictment. As a matter of law, the provisions of the criminal RICO statutes were designed to reign in the excess of organized crime and not the isolated criminal acts of a single clergy member in a religious organization. Without the proper nexus of racketeering activity and a corrupt enterprise, the RICO provisions are inappropriate and

improperly utilized. The lower court should have dismissed these claims from the case.

- III. The district court, through the actions of the presiding judge, erred when it involved itself in the negotiations of a plea agreement. By announcing to all parties the sentencing parameters it would accept, the court became a partner in the negotiations. The court exercised this role materially and prejudicially when the court refused to allow the government its inherent right to dismiss claims in an indictment. These errors call into question the integrity of the judicial process and served to substantially prejudice York by leaving York with no choice but to go to trial. Accordingly, York's convictions must be overturned.
- IV. Just a few weeks prior to this long and arduous trial, the district court permitted new counsel, Andrian Patrick, to enter an appearance as counsel for York. The court also permitted previous counsel to withdraw from the case. In attempting to review the 20 months of activity in the case, including, indictments, superseding indictments, discovery information, motions, and court orders; new counsel requested an extension in the trial date so that he could adequately prepare for trial. The district court refused and trial proceeded as planned. The court's failure to grant an extension, given the circumstances, deprived York of his right to counsel, due process and a fair trial.
- V. When faced with new evidence of York's actual innocence to the charges, the district court abused its discretion when it failed to grant York's motion for

new trial. Had the information presented in York's motion for new trial come to light during trial, there is a reasonable probability that York would not have been convicted of the sex counts. Furthermore, since the RICO counts involved the alleged transportation of minors to engage sex, York would not have been convicted of the RICO counts. Thus, York's convictions must be overturned.

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

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

VIII The District Court erred when it refused to dismiss the criminal forfeiture count of the indictment in light of the nature of the real estate and the dictates of the Religious Freedom and Restoration Act.

IX Under the mistaken belief that restitution is mandatory in this case, the District Court has ordered York to pay over a half of million dollars in restitution. Such an order ignores any of York's current expenses and financial responsibilities. As the acts requiring restitution occurred prior to April of 1996, the proper guidelines for determining restitution is 18 U.S.C. § 3663 and not § 3663A. Any other application would violate the ex post facto protections of the Federal constitution.

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.**

The strength of American jurisprudence lies in several overarching principles, principles delineated in the Federal constitution. These principles range from the enumerated rights of the first Ten Amendments to the genius of the structure of the judiciary. Part of the judiciary's structural integrity is the limitations on the government from manipulating charging instruments so as to circumvent jurisdiction. *See, Rinaldi v. United States*, 434 U.S. 22, 98 S.Ct. 81 (1977)

In the case below, the government used all of its vast resources to bring federal charges against York notwithstanding the challenges of the applicable statutes of limitations. Specifically, York was originally indicted on May 2, 2002 with four counts of interstate transport of minors for unlawful sexual activity in violation of 18 U.S.C. 2423(a) (hereinafter referred to generally as "Mann Act violations"). (Doc.1, Indictment) However, the government recognized serious problems with this indictment in light of the five year statute of limitations for the application of these charges. *See*, 18 U.S.C. § 3282 As reflected in each of the charging instruments, most of the allegations against York related to events occurring in 1988 through 1994.

A superseding indictment was returned against York on January 23, 2003, re-focusing the allegations of Mann Act violations and adding a criminal forfeiture claim. (Doc. 78, Superseding Information) This information was returned in anticipation of a plea agreement; however, as discussed below, the plea agreement dissolved due to the prejudice and interference of the original trial judge, the Honorable Hugh Lawson.¹

Subsequently, the government returned a second superseding indictment against York. (Doc. 158, Superseding Indictment) This final indictment again attempted to address the government's challenge of charging York with old, dated, and stale allegations of Mann Act violations (18 U.S.C. 2253) by creating a hazy aggregation of Mann Act claims, claims of improperly structuring legal cash deposits in violation of 31 U.S.C. § 5324(a)(3), conspiracy claims, and racketeering claims based upon the belief that a recognized church ministry and Native American tribe constitutes an enterprise for illegal racketeering akin to a drug cartel or an organized crime syndicate.

On December 8, 2003, York sought to bring judicial attention to the government's manipulation of the judicial process. York moved to separate Count

¹District Judge Hugh Lawson recused his presiding over this case upon York's Motion. (See, Doc. 133, Recusal Order of July 18, 2003)

Three of the Second Superseding Indictment (conspiracy to violate the Mann Act) and to sever the wholly unrelated financial reporting allegations. (Contemporaneously, York also sought dismissal of the RICO claims, a matter of further District Court error discussed below.)

It is clear from the pleadings that the government joined together two *independent and unrelated* claims against York: first, that York sought to transport minors across state lines for the purpose of engaging in unlawful sexual activity sometime in the distant future, and second, that York engaged in improper structuring of legal cash deposits to circumvent required administrative currency reporting regulations. Such a joinder offends due process and as importantly runs contrary to the Federal Rules of Criminal Procedure.

Rule 8(a) allows "two or more offenses [to] be charged in the same indictment . . . in a separate count for each offense if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Fed. R. Crim. P. 8(a). See, United States v. Weaver, 905 F.2d 1466 (11th Cir. 1990).

The underlying principles of the constitutionally required indictment process are founded in the bedrock guarantee of due process. Disparate claims against a

defendant, joined under the umbrella of one indictment, are susceptible to severance under Federal Rules of Criminal Procedure, Rules 8(a) and 14, most notably when the government's joinder of such claims prejudices the defendants. The clear basis for the severance of dissimilar claims is in the application of Rules 8(a) and 14. The clear rationale is fairness and due process. In fact, the Supreme Court has held that "misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." United States v. Lane, 474 U.S. 438, 446 n. 8 (1986)

In reviewing the propriety of whether separate charges were properly joined, this Court, in United States v. Hersh, 297 F.3d 1233 (11th Cir. 2002), outlined a two-step analysis for any appellate court to use in determining whether separate charges were properly tried at the same time. First, the appellate court should review *de novo* whether the initial joinder of charges was proper under Fed. R. Crim. P. 8(a). Second, the appellate court must determine whether the district court abused its discretion under Fed. R. Crim. P. 14 by denying a motion to sever.

Case law is clear that Fed. R. Crim. P. 8(a) is not limited to crimes of the "same" character but also covers those of "similar" character, which means "nearly corresponding; resembling in many respects; somewhat alike; having a general likeness." United States v. Walser, 3 F.3d 380, 385 (11th Cir. 1993). Moreover,

when offenses are joined under Rule 8(a) by virtue of their "same or similar character," the offenses need only be similar in category, not in evidence. *See, United States v. Coleman*, 22 F.3d 126, 133 (7th Cir. 1994).

In relying on these most liberal and literal cases regarding the Rule 8(a), it is illogical to argue, suggest, or hold, as the lower court did, that Mann Act violations are similar in category, evidence, resemblance, or general likeness to alleged violations of currency reporting regulations. Such an argument belies logic for no definition can transform these disparate allegations into similar ones. Thus, there is no question that the Mann Act violations were misjoined with the money structuring offenses.

The second step, under Hersh, is to apply Federal Rules of Criminal Procedure Rule 14. This Rule directs that "[i]f the joinder of offenses . . . in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." The standard for applying this rule is that an appellate court is required to reverse a denial of a motion to sever if the joinder of disparate claims creates prejudicial error and results in actual prejudice that had "substantial and injurious effect or influence in determining the jury's verdict." United States v. Weaver, 905 F.2d 1466, 1477 (11th Cir. 1990)

There can be no question that the joinder of the unrelated charges in the indictment served to prejudice York. Not only does this joinder obfuscate statute of limitations issues relative to Mann act claims, it clearly influenced the jury's verdict. The government sought to eliminate the objectivity of the jury by submitting evidence of York's alleged wrongdoing regarding cash structuring in an effort to make York appear guilty of other unrelated crimes of child molestation and vice-versa.

Presenting allegations of sexual misconduct against a clergy member and a leader of a large "religious organization that consisted of approximately 5,000 members" (see, Superceding Indictment, Count One) may not impact a jury in today's environment of similar claims against religious leaders in Boston, Cincinnati, Chicago, and other metropolitan areas. Consequently, the government sought, *inter alia*, to characterize York as a major criminal, a corrupt racketeer, an opportunistic false priest. Through its joinder of dissimilar allegations, the government sought to influence the jury with the claims that York was a child molester, a sinister tax cheat who wanted to hide where his ministry's income originated, and a corrupt crime leader involved in racketeering and other corrupt practices. Thus, evidence of guilt concerning one act would spill over to lead the jury to conclude that York was guilty of other acts too.

The lower court, pursuant to Rules 8(a) and 14, should have sustained York's motion to sever the Mann Act counts with those related to claims of improper currency reporting of legal cash deposits under Title 31 of the U.S. Code. The legal standards for these separate acts are complex and, at the very least, the jury instructions alone may have prejudiced and confused the jurors in addition to any actual prejudice accruing due to the jury recognition of many, multiple count allegations of guilt. *See, United States v. Caldwell*, 594 F. Supp. 548 (N.D. Ga. 1984); *also see* Trial Transcript, Volume 14, p. 3685 et. seq. (charge to jury).

In sum, York was prejudiced by the joinder of the objectively dissimilar charges of the Superceding Indictment and the lower court erred in not sustaining York's motion for a severance. The misjoinder of the dissimilar offenses charged under the single indictment resulted in prejudice so great as to deny York's Fifth Amendment right to a fair trial. Therefore, York's convictions must be vacated and York should be granted a new trial.

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

York's motion to dismiss should have been granted because the allegation that the religious organization is an enterprise for RICO purposes is beyond the scope of the statute. Additionally, the RICO allegations should have been dismissed due to

the absence of any government allegation of a violation of federal law in counts six and two.

When the government sought a superseding indictment from the Grand Jury of the Middle District of Georgia, it needed to insulate the claims of Mann Act violations from beyond the limitation protections of 18 U.S.C. § 3283 with the totally unrelated currency regulations.² In addition to this misjoinder, the government manipulated the judicial process with one additional layer of inappropriate claims by alleging that a recognized religious organization, whose

²As indicated in the superceding indictment, the transportation of minor children in interstate commerce allegedly occurred in 1988, 1990, 1991, 1992, 1993, 1994, and perhaps in 1996. While the actual sexual activity with minors allegedly occurred more recently, the overt acts of transporting minors across state lines occurred years outside the applicable statute of limitations. Without the vehicle of alleged RICO claims, federal jurisdiction for Mann Act violations would be statutorily barred. As the Supreme Court observed in Wilson v. Garcia, 471 U.S. 261, 271, 105 S. Ct. 1938 (1985), "A federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws.'" Id.

spiritual leader is charged with a felony, is a criminal enterprise as defined under the RICO statutes.

The Racketeer Influenced and Corrupt Organization statute (RICO) is a powerful and in many respects draconian tool adopted by Congress in 1970 with one specific focus: "...to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.". Act Oct. 15, 1970, P.L. 91-452, §§ 1, 84 Stat. 922 The statute's principal purpose is to strengthen the means of preventing money and power obtained from such illegal endeavors as syndicated gambling, loan sharking, theft and fencing of property, importation and distribution of narcotics and other dangerous drugs from being used to infiltrate and corrupt legitimate businesses and labor unions and to subvert and corrupt our democratic processes so as to interfere with free competition and to burden interstate and foreign commerce. United States v Forsythe , 429 F. Supp 715(WD Pa. 1977), rev'd on other grounds 560 F.2d 1127 (3rd Cir. 1977).

This case, as is clear from all filings, is not a matter of prosecuting organized crime. It does not deal with loan sharking, syndicated gambling, theft and fencing of stolen property, or even the distribution and trafficking of narcotics. This is a simple,

yet powerful, state case of alleged child molestation. Nevertheless, the government has manipulated this state case into a proverbial federal one, a dated one into a current allegation, and a case of singular wrongdoing into a RICO concern. The district court erroneously denied York's motion to dismiss these RICO claims. This court now has the opportunity of correcting this error. York concedes that motions to dismiss indictments are creatures of limited procedural availability in this circuit. Although the Sixth Circuit has found that Federal Rule of Criminal Procedure 12 provides a basis for granting a pre-trial motion to dismiss a criminal indictment, *see* United States v. Levin, 973 F.2d 463 (6th Cir. 1992)(as a matter of law, criminal intent could not be proven), four circuits limit this view. *See* United States v. Knox, 396 U.S. 77, 83, 84 n.7 (1969) (evidentiary questions concerning whether the defendant established a duress defense or whether his false statement was made "willfully," as required by statute, should be determined initially at trial, and not on a motion to dismiss under Federal Rule of Criminal Procedure 12(b)(1)).

This circuit, along with the third, eighth, and ninth, take a limited view, yet one still applicable to the case at bar. While these circuits have reversed dismissals of indictments based on the insufficiency of the evidence, the vehicle of a motion to dismiss is still much in use and applicable when, as a matter of law, the government

cannot sustain an indicted charge. *See, United States v. Nabors*, 45 F.3d 238, 240 (8th Cir. 1995)(the trial court dismissed an indictment on the basis that the government's proffered evidence was insufficient to prove the facts alleged in the indictment) .

In the current case, the motion to dismiss the RICO claims was based on the fact that, as a matter of law, there was no nexus between the defined enterprise (the religious organization of the United Nation of Nuwaubian Moors)³ and the pattern of racketeering activities allegedly undertaken by some members of the church.

The RICO statute, 18 U.S.C. § 1961, requires several key elements, each defined

in the statute. All RICO violations under 18 U.S.C. § 1962 entail "(1) a person who engages in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise." RICO requires an enterprise that is involved in racketeering activities. Both the definition of an enterprise and the specific definition of racketeering activities are placed in the context of organized crime and corrupt organizations. Perhaps the racketeering component in this case provides the greatest support for pretrial disposition. In its second superseding indictment, the government alleges that the entire religious organization

³Superseding Indictment, Count One, Section A

is the “enterprise” involved in the corrupt activities. In fact, the government almost indicts as a co-conspirator the personnel and membership of the 5,000 strong church.

In the charging instrument, the government is clear. It defines the “enterprise” as the Nuwaubian religious organization. It further states that this religious ministry was “an ongoing organization whose members functioned as a continuing unit for the common purpose of achieving the objectives of the enterprise.” The government then alleges that a common purpose of the religious organization was to “groom minors for purposes of engaging in unlawful sexual activity, engage with minors in unlawful sexual activity and transport minors in interstate commerce for purposes of engaging in unlawful sexual activity.”⁴

⁴Defining a religious organization as a racketeering enterprise easily moves on the slippery slope of prosecutorial manipulation. Once the government can indict an entire ministry based on the acts of one member of its clergy, the precedent is chilling. York asks that this Court simply re-read the indictment’s definition of the enterprise, mentally re-defining the religious organization as the Catholic Church. Would the government seek to indict the Catholic Church under RICO, and seek criminal forfeiture of its properties, when priests molest children? The rhetorical question is even more poignant when the secrecy of Vatican and individual diocese finances are viewed with the words of the subject indictment: “It was a further purpose of the enterprise that YORK, with the assistance of other members of the enterprise, maintained the

secrecy of the enterprise by directing its members to conceal the financial activities of the enterprise...”

While the specific allegations of the indictment are clear, the government sought to confuse the issue before the court in a pretrial hearing on December 16, 2003 when Mr. Moultrie, the assistant U.S. Attorney, attempted to re-write the indictment with his own oral argument:

What I would like to make clear, Your Honor, is that this is not an indictment of the entire Nuwabian [sic] nation or its group. There are lots of fine people who believe in Mr. York now, there are lots of fine people who believe in him when he was arrested. This indictment is not an indictment of those people or what they believed then or what they believe now. The RICO count charges Mr. York with conspiring with certain individuals among the Nuwabian [sic] nation to commit a criminal enterprise. ***

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

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

(Doc.177, Arraignment, pp. 30-32)

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

“enterprise” in such a manner, the subject of the racketeering activities must relate back to the entire religious organization and not just, as Mr. Moultrie proclaimed at the same hearing, to the “illegal intent of Mr. York and some of his co-conspirators to commit illegal acts.” (Id. at 32)

As a matter of law, the lower court should have sustained York’s motion to dismiss as the allegation that the religious organization is an enterprise for RICO purposes is well beyond the scope of the statute. While the religious ministry technically conforms to the definition of enterprise, it does not comport with the claims of defined racketeering activity.

In addition, the RICO allegations should have been dismissed due to the absence of any government allegation of a violation of federal law in counts six and two. The racketeering activity alleged is that York knowingly transported a minor from Kings County, New York to Bibb County, Georgia and Putnam County, Georgia with the intent that said minor would engage in sexual activity for which a person could be charged as violating the State of Georgia’s criminal code, to-wit Sections 1664 and 1665. The state offenses to which the federal charge refers are child molestation and enticing a child for indecent purposes. The problem, incorrectly sustained by the lower court, is that before York can be accused of violating the terms of the federal statute, sufficient and proper allegations must be

made in the indictment that he also violated the underlying criminal offenses under Georgia law.

The government alleges various facts in its indictment to support these counts. One such fact, found on page 17 of the indictment, alleges that in April of 1993, the victim P-23 was fourteen years of age. In 1993, Georgia state law did not criminalize engaging in any immoral or indecent act with a child who was age 14. To be a criminal offense, required under the federal statute, the child had to be under the age of 14. Both O.C.G.A. 1664 and 1665 maintained the same age ceiling. To be a state criminal offense, the victim child was required to be under the age of 14. (It was not until 1995 that the state statutes were amended to raise the age to 14.)

As the government did not adequately allege facts to support a violation of federal law, the lower court should have granted York's motion to dismiss these counts. Failing so, the court committed reversible error.

III. The Trial Court Abused Its Discretion in Refusing to Accept the Plea Agreement, Refusing to Allow the Government to Dismiss Certain Counts of the Original Superseding Indictment, And in Actively Indicating a Crucial Term of an Acceptable Plea Agreement.

A funny thing occurred one day when York sought to change his plea to guilty. The government, in its prosecuting capacity, agreed that in exchange for a guilty plea to counts one, two, and three of the first superseding indictment, York would

receive a sentence of fifteen years. (See, Doc.80, Plea Agreement) The government consented to such an agreement for various reasons including a recognition of the statute of limitations issue haunting all of the allegations associated with the Mann Act violations. All parties were in concurrence. York agreed to a statement of facts that was accepted as the court's Findings of Fact. (Doc. 83, Findings of Fact) York agreed to a preliminary forfeiture order affecting hundreds of acres of land. (Doc. 85, Preliminary Order of Forfeiture)

But then the presiding judge, the Honorable Hugh Lawson stepped in. On June 25, 2003, Judge Lawson issued an Order rejecting the plea agreement and giving York five brief days to withdraw his plea of guilty. (Doc. 107, Order) In a hearing held on May 28, 2003, Judge Lawson articulated his rejection of the mutually negotiated plea agreement solely because the stipulated sentence was not within the applicable guideline range. After reviewing the presentence investigation report, Judge Lawson did not want to agree to a fifteen year sentence. (Doc. 115, Transcript of June 30, 2003 Hearing, pp. 3-4) This arbitrary determination was made without any judicial determination of objections to the presentence investigation report. (Id., p. 8) This capricious position was made based on inaccuracies in the presentence report and without a full hearing on the contentions, allegations, and arguments contained in that report including the issues of (a) the application of the

correct guidelines, and (b) whether York has accepted responsibility for his actions.

(Id.)

After Judge Lawson indicated his intention to reject the plea agreement, the government and counsel for York conferred for over ninety minutes. (Doc. 239, Transcript of Hearing, July 10, 2003, p. 23) During that time period, defense counsel met with the United States Attorney Maxwell Wood as well as the assistant U.S. Attorney Richard Moultrie. In that conference, the government advised the defense that it intended to dismiss all but one count of the then current indictment. (Id.) Pursuant to the government's authority, such an act would bring the plea agreement and its stipulated lengthy sentence within the applicable guideline range.

When this mutual agreement was presented to Judge Lawson, he indicated to all parties that he would not allow the government to dismiss those counts. He also, after inquiries, indicated that he would only accept a twenty year sentence. (Id., p. 25, 31)

The Federal Rules of Criminal Procedure address this particular matter. Rule 11 speaks to plea agreements and the role a court must take. York contends that the district court violated Fed.R.Crim.P. 11 when it announced that the court would not approve a plea agreement unless York stipulated to at least 20 years incarceration. Such an activity by the court prejudiced York at sentencing because the district

court's participation in the plea negotiation process prevented him from accepting responsibility, and receiving the requisite downward departure, which he was prepared to do but for the court's interference. Fed. R. Crim. P. 11(e)(1) provides that "the court shall not participate in any [plea negotiation] discussions." "[T]he unambiguous mandate of Rule 11 prohibits the participation of the judge in plea negotiations under any circumstances: it is a rule that, as we have noted, admits of no exceptions." United States v. Casallas, 59 F.3d 1173, 1177 (11th Cir. 1995) Rule 11's prohibition on court participation in plea negotiations is designed to entirely eliminate judicial pressure from the plea bargaining process. United States v. Corbitt, 996 F.2d 1132, 1135 (11th Cir. 1993).

The district court's role under Rule 11 is to evaluate a plea agreement once it has been reached by the parties and disclosed in open court. Prior to that time, a court should not offer comments touching upon proposed or possible plea agreements because "statements and suggestions by the judge are not just one more source of information to plea negotiators; they are indications of what the judge will accept, and one can only assume that they will quickly become 'the focal point of further discussions.'" United States v. Werker, 535 F.2d 198, 203 (2nd Cir. 1976). Furthermore, "the purpose and meaning of this prohibition are that 'the sentencing judge should take no part whatever in any discussion or communication regarding

the sentence to be imposed prior to the entry of a plea of guilty or conviction, or submission to him of a plea agreement." Corbitt, 996 F.2d at 1134

In the present case, because the sentencing judge took an active part in discussing York's probable sentence before the time of his conviction and because he commented on the extensive matters in his presentence investigation report, it is vitally important that this Court holds that the court violated Rule 11(e)(1). See, United States v. Diaz, 138 F.3d 1359 (11th Cir. 1998) Error transpired at the lower court in May and June of 2003. The error was that the lower court (a) rejected a plea agreement based upon challenged issues in a presentence report, without a hearing or opportunity to address those inaccuracies, (b) impugned the United States Attorney's rights to seek dismissal of portions of an indictment, and (c) actively participated in plea bargaining by notifying both the defense and the government as to the minimum sentence he would accept in any plea.

These errors call into question the integrity of the judicial process, which this Court has determined to be one of the rationales for the strict prohibition on judicial participation in plea negotiations. See, United States v. Johnson, 89 F.3d 778, 782-83 (11th Cir. 1996) Furthermore, the court's actions served to substantially prejudice York by leaving York with no choice but to go to trial. Accordingly, York's convictions must be overturned.

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

Just a few weeks prior to this long and arduous trial, the district court permitted new counsel, Andrian Patrick, to enter an appearance as counsel for York.

The court also permitted previous counsel to withdraw from the case. In attempting to review the 20 months of activity in the case, including, hearings, indictments, superseding indictments, discovery information, motions, plea agreements, and court orders; new counsel requested an extension in the trial date so that he could adequately prepare for trial. The district court refused and trial proceeded as planned.

The court's failure to grant an extension, given the circumstances, deprived York of his right to counsel, due process, and a fair trial.

York submits that denying his motion to continue left the defense with an inadequate amount of time to prepare for trial. United States v. Verderame, 51 F.3d 249, 252 (11th Cir.1995). As a result, York's rights to counsel and due process were violated and his convictions must be reversed.

When the trial court denied York's motion for continuance in the trial, York suffered substantial prejudice in the defense of his case. See United States v. Bergouignan, 764 F.2d 1503, 1508 (11th Cir.1985). "Implicit in [the] right to counsel is the notion of adequate time for counsel to prepare the defense," and the trial

court's denial of a continuance deprived new counsel time to prepare an adequate defense. See, Verderame, 51 F.3d at 252. Importantly, as evidenced by the 48 page Superseding Indictment and the three week long trial, the government's case grew increasingly more complicated as time went by. See, Verderame, 51 F.3d at 252. New counsel, Mr. Patrick, was entered as counsel of record only after the trial court had taken the steps of refusing to allow York to plead guilty, and after the indictment had been superseded several times. With only three weeks to prepare, new counsel did his best to defend York at this lengthy and complicated trial.

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

V. The Court Abused its Discretion in Refusing to Grant a New Trial

Prior to sentencing York filed a motion for new trial based on newly discovered evidence pursuant to Rule 33. Specifically, the motion was based upon newly discovered evidence, in that one of the government's witnesses, Habiyyah Washington, recanted her testimony and cast doubt onto the reliability of the testimony of several other witnesses, providing said witnesses with a motive to fabricate tales against York. (Doc.294, Motion) Had this information come to light

during trial, there is a reasonable probability that York would not have been convicted of the sex counts. Furthermore, since the RICO counts involved the alleged transportation of minors to engage sex, York would not have been convicted of the RICO counts. Thus, York's convictions must be overturned.

A motion for new trial based on new evidence will only be granted when the new evidence is not merely cumulative or of an impeaching nature, but is of such a nature as to cause a different result at trial. United States v. Overton, 421 F.2d 277 (11th Cir. 1969). The court "must weigh whether or not there is in reality a 'significant chance' that the disclosure would have induced a reasonable doubt in the minds of enough jurors to prevent a conviction." United States v. Rosner, 516 F.2d 269, 273 (2nd Cir. 1975), cert. denied, 427 U.S. 911, 49 L. Ed. 2d 1203, 96 S. Ct. 3198 (1976).

When the district court learns of newly discovered evidence after a conviction, it should provide relief if the defendant makes a showing that the evidence is, in fact, new, i.e., it could not have been discovered exercising due diligence before or during trial, and that the evidence is so material and non-cumulative that its admission "would probably lead to an acquittal." United States v. Kersey, 130 F.3d 1463 (11th Cir. 1997).

This circuit has set forth the five-part test courts must apply when evaluating a motion for new trial base on newly discovered evidence:

(1) the evidence must be discovered following trial; (2) the movant must show due diligence to discover the evidence; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material to the issues before the court; and (5) the evidence must be of such a nature that a new trial would probably produce a new result.

United States v. Hall, 854 F.2d 1269, 1271 (11th Cir. 1988); United States v. Hobson, 825 F.2d 364, 366 (11th Cir. 1987) The district court cannot grant a motion for a new trial based on newly discovered evidence once it has determined that the movant has failed to satisfy any part of the test. United States v. Reed, 887 F.2d 1398, 1404 (11th Cir.1989) The new evidence submitted in the instant case satisfied all prongs of that test.

After the trial, Habiba Washington, in a sworn affidavit, stated that her testimony at trial had been fabricated. (Doc.294, Motion, Washington Affidavit at ¶ 1-3). Washington stated that the allegations raised against York were coerced from Jacob York, the York's son, who blamed York for the premature death of his mother. (Doc.294, Motion, Washington Affidavit at ¶ 3). Nevertheless, the Court discounted the recantation and denied motions for a new trial.

First, it is indisputable that York only obtained the evidence after trial. Second, York exercised due diligence in obtaining the evidence. Obviously, he could not

have obtained evidence that Washington had fabricated her testimony at trial until after the trial. It was only after York had been convicted that Washington came forward with the information. Third and fourth, the evidence was not merely cumulative or impeaching as it directly refuted the government's allegations that York was involved in the acts charged in the indictment. As such it was material to the case. Fifth, had the newly discovered evidence been presented to the jury, York would not have been convicted.

Under the circumstances the district court abused its discretion in failing to grant a new trial. Accordingly, York's conviction must be reversed.

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

The U.S. Constitution guarantees each defendant a trial by jury wherein no punishment is imposed until a jury determines the defendant guilty of particular conduct beyond a reasonable doubt. *See* U.S. Const. Amends. V, VI. At odds with that system is the Sentencing Reform Act of 1984, which sets up a system that requires a district court to sentence or punish a defendant based upon conduct that is not admitted or proved beyond a reasonable doubt. *See* Title II of The Comprehensive Crime Control Act of 1984; U.S.S.G. Chapter 1, Part A, intro., comment (3).

In addition to a base sentencing range established by reference to the jury verdict alone, the guidelines prescribe enhanced sentencing ranges based on sentencing factors that are determined by a judge after trial, by a preponderance of the evidence. U.S.S.G. Chapter 1, Part A, introduction, comment (2) and (4)(a). In his dissent in Harris v. United States, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002), Justice Thomas reminded us that due process requires that every fact necessary to constitute a crime must be found beyond a reasonable doubt by a jury if that right is not waived. *Id.* at 2424 (Thomas, J., dissenting), citing In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Society has long recognized a necessary link between punishment and crime. Harris, 122 S.Ct. at 2424 (Thomas, J., dissenting), citing Apprendi v. New Jersey, 530 U.S. 466, 478, 120 S.Ct. 2348 (2000) (“The defendant’s ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime”). “Why, after all, would anyone care if they were convicted of murder, as opposed to manslaughter, but for the increased penalties for the former offense, which in turn reflect the greater moral opprobrium society attaches to the act?” Harris, 122 S.Ct. at 2424 (Thomas, J., dissenting).

The Guidelines do precisely what is prohibited under the Sixth Amendment and require district courts to punish a defendant based upon conduct that is not

admitted or proved beyond a reasonable doubt. For example, U.S.S.G. § 1B1.3, gives an expansive interpretation of “Relevant Conduct.” Under it, ordinary *crimes* such as perjury, subornation of perjury, escape, and obstruction of justice arguably become “relevant conduct” or “sentencing factors.” According to Guidelines theorists, these semantics are enough to exempt such criminal conduct from the provisions of the 5th and 6th Amendments to the U.S. Constitution even though citizens can be sent to prison for years simply by the government proving with “reliable information” (not trial quality evidence) to a judge (not a jury) that it is more probably true than not true (not “beyond a reasonable doubt”) that the defendant committed such “relevant conduct” (not crime).

But the sentencing guidelines cannot supersede the U.S. Constitution and should not be used to accomplish an “end-run” around the fundamental right to trial by a jury and to usurp the role of the jury. The district court should not be permitted to use the sentencing guidelines to ignore a verdict, take the jury’s role, find culpability for conduct beyond what is reflected in the jury verdict, and punish based upon that extra-jury determination at a standard lower than proof beyond a reasonable doubt. *See Anderson v. Fuller*, 455 U.S. 1028, 1032, 102 S.Ct. 1734 (1982) (Burger, C. J., dissenting) (noting that federal courts should not usurp the function of a jury in finding facts).

Recently, the Supreme Court has begun to realize the fundamental defects in way our justice system determines sentences for criminal defendants in a series of decisions. In Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), the Supreme Court held that “other than the fact of a prior conviction, any fact that increases the penalty for crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” In Ring v. Arizona, 536 U.S. 584 (2002), the Supreme Court clarified and reaffirmed this rule, stating that the rule in Apprendi applies to any aggravating fact necessary to expose a defendant to punishment beyond an otherwise mandatory statutory limit. Id.

After Apprendi, the various courts throughout the country assumed the term “statutory maximum” referred to in Apprendi and Ring, was the maximum sentence set forth under the statute listed in the indictment. The courts have assumed that the term “statutory maximum” does not apply to the various sentencing thresholds established under the federal sentencing guidelines. The Supreme Court’s decision in Blakely v. Washington, 124 S. Ct. 2531 (2004) indicates that the courts have been wrong, holding that “the ‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose **solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*** * * When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the

facts ‘which the law makes essential to the punishment.’ Id. at 2537 (emphasis in original)

The Blakely decision not only clarifies what was meant by the term “statutory maximum,” but as a result of that clarification, calls into question the constitutionality of current sentencing practices in federal court. The Court noted that the rule announced in Apprendi reflected two longstanding tenets of common-law criminal jurisprudence: “that the truth of every accusation against the defendant should afterwards be confirmed by a unanimous [jury verdict], and that an accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law and it is no accusation in reason.” (cites omit) Blakely, at 2536. The Court then noted the principle in American jurisprudence that “‘every fact which is legally essential to the punishment’ must be charged in the indictment and proved to a jury.” Blakely, at 2537, n.5

In the days following Blakely, several courts, including the Seventh and Ninth Circuit Courts of Appeals have applied Blakely to the Federal Sentencing Guidelines.⁵ See United States v. Booker, 375 F.3d 508 (7th Cir. 2004)(vacating

⁵ This Circuit has recently rendered an opinion that the holding in Blakely does not alter the application of the Federal Sentencing Guidelines. United States v. Reese, 2004 U.S. App. LEXIS 18605 (11th Cir. 9/2/04) However, the court

defendant's sentence because sentencing enhancements violated the Sixth Amendment right to jury trial after Blakely); United States v. Ameline, 376 F.3d 967 (9th Cir. 2004)(same); United States v. Jaamar, 2004 U.S. Dist. LEXIS 13496 (Middle Dist. Florida- July 19, 2004); United States v. Landgarten, 2004 U.S. Dist. LEXIS 13172 (E.D.N.Y. July 15, 2004)(court orders that in light of Blakely, sentencing must be held in front of a jury); United States v. Medas, 232 F.Supp.2d. 436 (E.D.N.Y. July 1, 2004) (holding the application of the Guidelines is unconstitutional after Blakely); United States v. Croxford, 02-CR-00302 (C.D. Utah, June 29, 2004); United States v. Lamoreaux, 2004 WL 1557283 (D. Mo. July 7, 2004); United States v. Leach, 325 F.Supp.2d 557(E.D. Pa. July 13, 2004); United States v. Green, 2004 U.S. Dist. LEXIS 11292 (D. Mass. June 18, 2004).

York submits that compliance with the Sixth Amendment requires "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" must be proved beyond a reasonable doubt. Apprendi, 530 U.S. at 490. The statutory maximum is not the maximum penalty provided by statute of conviction. Instead, the Supreme Court has held that the "'statutory maximum' for Apprendi purposes is

recognized that the decision was likely to be overturned by the Supreme Court stating, "in light of this instability [of the decision], we recognize that district courts might deem it wise and appropriate to take protective steps in case the Guidelines are later found unconstitutional in whole or in part. Id., at * 11-12

the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely at 2537. The jury verdict alone - or the defendant's admission alone - "must authorize the sentence." Id. Therefore, the upper bound of the appropriate guideline range, based on facts proven to a jury beyond a reasonable doubt or admitted by the defendant, establishes the relevant statutory maximum for *Apprendi* purposes.

Under the Federal Sentencing Guidelines, dollar amounts, drug amounts, other enhancements, and upward departures all have the same effect – namely, they all *increase* the maximum permissible sentence under the guidelines. A judge's reliance on such factors at sentencing is therefore unconstitutional. United States v. Booker, 375 F.3d 508 (7th Cir. 2004); United States v. Ameline, 376 F.3d 967 (9th Cir. 2004)(same); United States v. King, 328 F.Supp.2d 1276 (M. D. Fla. 2004)

Simply put, *Blakely* changes the way the Guidelines must be applied. 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 had York's sentence increased based on enhancements that were never submitted to the jury. This is error and should be reversed. 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.

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

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

It is well-established that the ex post facto clause in the Constitution "forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." Weaver v. Graham, 450 U.S. 24, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981). The clause demands that where Congressional revision of the Federal Sentencing Guidelines "changes the legal consequences of acts completed before its effective date" to the detriment of the convict, the Guidelines in effect at the time of the criminal act must be applied. Miller v. Florida, 482 U.S. 423, 431, 96 L. Ed. 2d 351, 107 S. Ct. 2446 (1987). Therefore, the guidelines in effect at the time of sentencing apply, *unless doing so would cause the defendant to receive a higher sentence than he would if sentenced under the guidelines in effect at the time the crime was committed* in violation of the Ex Post Facto Clause to the Constitution. United States v. Kussmaul, 987 F.2d 345, 351-52 (6th Cir. 1993); United States v. Holmes, 975 F.2d 275, 278-80 (6th Cir. 1992)

In the instant case, the probation office correctly cites that § 2G1.1 applies to the offense of transporting individuals, including minors, for the purpose of prohibited sexual conduct. However, despite the fact the offense conduct occurred in 1993, the court used the 2002 version of the Federal Sentencing Guidelines to determine the York's base offense level.

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

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

VIII. The District Court Erred in Denying Appellant's Motion to

Dismiss the Forfeiture Count.

The final count of the superseding indictment is a criminal forfeiture allegation, under 18 U.S.C. § 2253, a count to which the jury specifically found York guilty. However, the application of this forfeiture count runs contrary to the Religious Freedom and Restoration Act (42 U.S.C. § 2000bb, hereinafter referred to as the "RFRA.") and thus should have been dismissed by the lower court.

On February 4, 2004, this court entered a preliminary order of forfeiture against the real property commonly known as 155 Mansfield Court, Athens, Clarke County, Georgia (hereinafter referred to as the “Mansfield Property”) and against the real property commonly known as 404 Shady Dale Road, Eatonton, Putnam County, Georgia (hereinafter referred to as the “Shady Dale Property”). After said preliminary forfeiture order was published, YF Limited Partnership filed a notice and verified claim of ownership as an innocent owner pursuant to 18 U.S.C.2253(m) regarding the Mansfield Property and Ethel Richardson, Patrice Evans, and Anthony Evans filed respective notices and verified claims of ownership as tenants in common as innocent owners pursuant to 18 U.S.C. 2253(m) regarding the Shady Dale Property. One of the bases for reflecting their ownership interests was because those fee owners held the subject properties for and on behalf of the Nuwaubian ministry. These individuals are bona fide purchasers of the subject real estate to maintain its use for the religious organization.⁶

⁶ A “bona fide purchaser” is a buyer in a transaction in which the purchaser makes the purchase in good faith, for a valuable consideration and without notice for any reason against the sale. *See*, Black’s Law Dictionary (5th Ed. 1979) “Bona fide,” as defined in this recognized reference, means “in or with good faith; honestly, openly, and sincerely; without deceit or fraud” and “Real, actual, genuine, and not feigned.” *Id.* at 160. A purchaser is bona fide if he acts in good faith and that selfish motives do not vitiate an otherwise real, actual or genuine transaction from being bona fide. Wheeler v. United States, 116 F.3d 749, 769-770 (5th Cir. 1997)

The RFRA presents a new, but important balance to the imposition of forfeiture claims. The RFRA is a straight-forward, easily understood expression of a Congressional mandate. The law was passed originally to guarantee the application of the compelling interest test, discussed in Sherbert v. Verner, 374 U.S. 398 (1963), to all cases where free exercise of religion is substantially burdened by government. The law states that “Government shall not substantially burden a person’s exercise of religion...” In closing the statute addresses remedies,

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government...”
42 U.S.C. 2000bb-1(c)

In the instant matter, York’s motion to dismiss the forfeiture count should have been granted by the lower court once the court recognized that the real property involved is owned, maintained, and controlled for the benefit of the religious organization. To allow such church property to be forfeited to the government would create a burden on the Nuwaubians protected by this legislation.

This case raises unique and very challenging issues regarding faith, religion, and their constitutional and statutory guaranties in our Federal system. While Congress has devise a mechanism for criminal forfeitures in Title 18 for the purpose of punishing wrongdoers, the RFRA forces both the government and the judiciary to

balance this form of punishment against the prohibition of burdening the free exercise of faith.

The subject real estate is inherently valuable... not because of its fair market value, but because of its primary use by the Nuwaubians as their church. This subject property is the geographic focus of their educational, religious, spiritual, and social activities. It is the geographic place where their own vision of spirit and earth meet.

Several years ago, Congress decided to add additional protection to religious organizations. Through the brief verbiage of 42 U.S.C. 2000bb(b)(1), Congress proclaimed that no government “may substantially burden a person’s exercise of religion.” While there is little if any case law supporting this proposing, logic should lead this court on the right and fair path. Affirming a criminal forfeiture of real estate owned by innocent third party claimants is in furtherance of no material and compelling governmental interest. Yet, it presents a scary set of circumstances and precedents.

If the government is allowed to forfeit real estate from religious organizations when one of the church employees breaks the laws, then well-tenured, established faiths are at risk. Where would the Catholic Church be if over-eager government

prosecutors could forfeit church property when a priest breaks the law. Is this the goal of criminal forfeiture or is it the contrary objective of the RFRA?

The Church at hand is responsible for certain real estate through the technical ownership by several of its leaders. If this property can be forfeited, then the Government is imposing a substantial burden on ownership interest and on the use of this property by a church. Congress enacted a law to bar such activity – and for just the right reason. The District Court was petitioned to dismiss this criminal count of forfeiture and did not. That error must be corrected by this court.

IX. The District Court Erred in Ordering Restitution Based upon 18 U.S.C. 3663A

The applicable law for guiding sentencing courts in the fashioning of restitution orders is the Mandatory Victims Restitution Act (“MVRA”) codified in 18 U.S.C. § 3663A. It requires courts to order full restitution to victims regardless of a defendant’s ability to pay.

However, the MVRA became effective on April 24, 1996. (*See* Legislative History, § 3663A) Because the MVRA imposes harsher sanctions and criminal penalties than its predecessor, the Victim and Witness Protection Act of 18 U.S.C. §3663 (“VWPA”), courts throughout the nation have ruled that the MVRA’s application to offenses committed prior to April 24, 1996 would violate the *ex post facto* clause of the United States Constitution. Lynce v. Mathis, 519 U.S. 433 (1997);

United States v. Siegel, 152 F.3d 1256 (11th Cir. 1998); United States v. Streebing, 987 F.2d 368 (6th Cir. 1993), cert.denied, 508 U.S. 961; United States v. Rostoff, 164 F.3d 63 (1st Cir. 1999)(nature of restitution is penal).

The case of United States v. Bennett, 37 F.3d 687 (1st Cir. 1994) sheds some light on the issue. In Bennett, the defendant had been sentenced under Sentencing Guidelines in effect at the last date of the offenses he committed. The sentencing issue dealt with the 1989 amendment to the loss table in § 2F1.1(b)(1). All of the overt acts in that case occurred prior to the amendment, while some relevant conduct to the acts occurred after the amendment date. The Court held that since all of the acts comprising the underlying offenses occurred prior to the amendment, utilizing the harsher penalties would violate the ex post facto clause of the Constitution. The Constitution “forbids the application of any law or rule that increases punishment to preexisting criminal conduct.” Id. at 699. The Court specifically rejected the Government’s position that since some related acts occurred after the amendment, the criminal conduct represented by the overt acts alleged in the indictment should be subject to the harsher, increased penalties.

Under § 3663, though, a sentencing court’s imposition of a restitution order is discretionary. In order to impose such a sentencing order of restitution, a court must first examine certain statutory factors. The court, the statute outlines, shall consider:

(I) the amount of the loss . . . ; and

(II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate. 18 U.S.C. § 3663(B)(i).

The case law support for the requirement of an affirmative review of these statutory factors crosses all circuits, as the prevailing view is that a sentencing court is obligated to at least consider these factors prior to imposing restitution as part of a sentence. *See, United States v. Siegel*, 153 F.3d 1256 (11th Cir. 1998)(district court erred in ordering restitution even though the court had “considered” the meager financial condition of the defendant as reflected in the presentence investigation report). *United States v. Conhaim*, 160 F.3d 893 (2nd Cir. 1998), *United States v. Sanders*, 95 F.3d 449 (6th Cir. 1996)

In the present case, York's PSI report indicates that at the time of sentencing he has a meager net worth, yet despite meager assets, the sentencing court ordered York to pay restitution in an amount in excess of \$500,000.00.

Under the terms of 18 U.S.C. § 3663(f)(2), restitution judgments are required to be satisfied within five years of the end of any imposed incarceration. Judicial integrity requires the fashioning of restitution judgments which defendants can reasonably and probably satisfy. *United States v. Copple*, 74 F.3d 479 (3rd Cir. 1996)

For York to satisfy the present restitution order within five years of his imprisonment, he would not only have to have his life sentence modified, he would have to generate an income of over \$100,000 each year in addition to the income required to support himself.

The imposition of restitution orders which are, in effect and in logic, impossible to satisfy is against both the intent and the expression of the statute. Fashioning a restitution order to which a defendant could not possibly be expected to comply threatens respect for judicial orders generally. United States v. Bailey, 975 F.2d 1028 (4th Cir. 1992) “An impossible order of restitution . . . is nothing but a sham, for the defendant has no chance of complying with the same, thus defeating any hope of restitution and impeding the rehabilitation process.” United States v. Mahoney, 859 F.2d 47, 52 (7th Cir. 1988)

Though York fully recognizes the seriousness of the criminal acts for which he was found guilty, the integrity of the judicial process requires a realistic criminal penalty for any wrongdoings. A restitution order which mandates a payment of over \$500,000 coupled with a life sentence is exactly the type of order found improper by the Supreme Court in Hughey v. United States, 495 U.S. 411 (1990) when the Court stated that “Congress plainly did not intend that . . . a defendant’s dependents to be forced to bear the burden of a restitution order . . . ” Id. at 417.

CONCLUSION

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

Respectfully Submitted,

Matthew M. Robinson, Esq.
Attorney for the Appellant
11331 Grooms Road
Suite 3000
Cincinnati, OH 45242
(513) 381-8033

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 13,830 words.

Matthew M. Robinson
Attorney for the Appellant

CERTIFICATE OF SERVICE

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

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

(2) Stephanie Thacker
1400 New York Ave., NW
Suite 600
Washington, D.C. 20530

Matthew M. Robinson, Esq.