

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
OCALA DIVISION**

UNITED STATES,	)	
	)	
Plaintiff,	)	
	)	Case No. 5:06-cr-00022-WTH-GRJ
v.	)	
	)	
WESLEY TRENT SNIPES,	)	
	)	
Defendant.	)	
_____	)	

**DEFENDANT SNIPES’ REPLY TO GOVERNMENT’S OPPOSITION  
TO MOTION FOR BAIL PENDING APPEAL**

Wesley Trent Snipes (“Snipes”), a defendant in the above-captioned matter, has moved pursuant to 18 U.S.C. § 3143(b), Fed.R.Crim.P. 46(c) and Fed.R.App.P. 9(b) for bail pending his appeal to the United States Court of Appeals for the Eleventh Circuit from his conviction and sentence. In his motion papers (Doc. 464), Mr. Snipes explains why he does not present a risk of flight and demonstrates the existence in the case of at least four issues which meet the Eleventh Circuit’s interpretation of the statutory standard for bail. In response, the government half-heartedly questions the risk of flight factor, and disputes the substantiality of the issues by trying to prove the defendant’s arguments – which it gratuitously labels “frivolous” -- will be rejected on appeal. Pursuant to Local Rule 3.01(d) and by leave of Court (Doc. 472), Mr. Snipes now replies to the United States’ response in opposition (Doc. 470) to the bail motion. The government’s arguments for denial of bail are far from persuasive.

1. *There Is No Risk of Flight.* In a footnote, Opp. 1-2 n.1, the government professes to express “concern about the possibility” of Mr. Snipes’ fleeing. Giving new meaning to the expression that “no good deed goes unpunished,” the prosecutors seek to use against him the fact that Mr. Snipes made substantial payments at and before sentencing on his tax liabilities. The fact is that Mr. Snipes, aided by capable accountants, answered the questions posed to him about his finances by the Probation Office, orally or by questionnaire. The existence of Kymberlyte and its role in Mr. Snipes’ finances was not a surprise to the IRS or to the government on the date of sentencing, as the trial record shows. There has been no “apparent lack of candor about his assets,” nor is there any “incongruity” that needs to be “explained.” *Id.*

Surely, if Mr. Snipes intended to flee, he would not have paid this enormous sum, nor would he be – as in fact he is, although the government fails to mention it – actively engaged in resolving his liabilities with the IRS civilly. (A meeting is presently scheduled for May 28, 2008.) As this Court found at sentencing, Mr. Snipes has demonstrated by his conduct and circumstances that he presents no danger to the community, and no risk of flight. The Kymberlyte checks to which the prosecutors now refer were presented at sentencing, prior to the Court’s ruling allowing voluntary surrender. Nothing has been identified to cause this Court to change its conclusion that Mr. Snipes meets the criteria of 18 U.S.C. § 3143(b)(1)(A).

2. *The Anticipated Appellate Issues Are Substantial.*

(a) Snipes’ first substantial issue for appeal is whether the Court should have allowed a pretrial hearing on the issue of legal venue. The question is “whether [the Article III and Sixth Amendment venue] right can be vindicated constitutionally by

putting the question to a jury selected in the wrong location – [or] whether only a pretrial factual determination by the Court can protect the constitutional venue right.” Bail Mtn. at 6. None of the cases cited by the government addresses the issue to be raised by Mr. Snipes. Accordingly, it is not frivolous, see *United States v. Hastings*, 681 F.2d 706, 709 (11th Cir. 1982); rather, the proposed venue issue could be decided either way.

In addition, the appeal will present the novel and undecided question whether the 20-day deadline of 18 U.S.C. § 3237(b), being procedural in nature, has been superseded under the Rules Enabling Act. The government appears to question whether Fed.R.Crim.P. 12(e) applies to venue motions, Opp. 4, but that objection lacks merit: issues of venue are plainly within Rule 12(b)(3)(B) (“a defect in the indictment”), and are thus subject to Rule 12(e) relief. See 1A Charles A. Wright, *FEDERAL PRACTICE AND PROCEDURE: CRIMINAL* § 193, at 347 (3d ed. 1999).

Finally, the government argues that the Eleventh Circuit’s ruling that it lacked collateral order jurisdiction over Snipes’ attempted interlocutory appeal, *United States v. Snipes*, 512 F.3d 1301 (2008) (per curiam), telegraphs the appellate court’s probable ruling on the merits of the venue question. *Id.* 4-5. It is axiomatic that a decision holding that the Court lacks collateral order jurisdiction does not and cannot address the merits, and no decision on that matter would be binding on the merits panel. 11th Cir. R. 27-1(g). The Court of Appeals simply held the venue question, unlike a Double Jeopardy violation, could be adequately vindicated by a later appeal, because the Constitution’s venue clauses do not confer any absolute right “not to be tried,” but only set the proper location of that trial. The Court of Appeals did not decide

whether Mr. Snipes had a right to a pretrial judicial determination of venue (in addition to his rights at trial) on the failure-to-file counts. Because the venue issue is novel and could be decided either way, bail should be allowed.

(b) Mr. Snipes' second substantial issue is this Court's failure to instruct the jury on the applicable, special definition of "willfulness" in criminal tax cases under the Eleventh Circuit Pattern Instructions, by using Basic Instruction 9 rather than Special Instruction 9.1. The Opposition appears to suggest that on appeal the government will launch an attack on the *Pomponio/Cheek* definition, Opp. 6-7, going so far as to suggest that the Supreme Court itself, in the majority decision in *Bryan*, misstated the law of intent in tax cases. Opp. 6 n.3. The government further suggests that there is no material difference between the two explanations of willfulness in tax cases, and that the Special Instruction may even be incorrect. *Id.* 5 & 7.

In *US v. Pomponio*, 429 U.S. 10 (1976), the Supreme Court summarily reversed a court of appeals decision which had overturned a false tax returns conviction for lack of any instruction requiring the jury to find "a bad purpose or evil motive." In that context, where the defense was not based on any misunderstanding of tax law (those defendants knew that dividends had to be reported as income, for example; the issue was whether the funds they received were dividends or loans), the Court held a standard willfulness instruction – unchallenged despite its failure to mention the required "voluntary, intentional violation of a known legal duty" – to be "adequate," *id.* 13, even in the absence of a separate "good faith" charge. Here, by contrast, this Court *did* charge on "good faith" (albeit limited to advice of counsel upon full disclosure), but overlooked the need to advise the jury it must find a "known legal

duty,” where a principal issue on these counts at trial was whether Mr. Snipes had such knowledge. This error was “plain,” and in light of the jury’s acquittals on five of eight counts, this issue cannot be dismissed as harmless by claiming the evidence was “overwhelming.” The jury was not told they must acquit on the counts of conviction unless convinced beyond a reasonable doubt that Mr. Snipes, on or about October 16, 2000, April 15, 2001, and/or April 15, 2002, knew for a fact (that is, believed that what Mr. Starr advised him was correct, notwithstanding contrary advice he had also received) that he was required by law to file a federal income tax return.

For these reasons, it is at least a close question whether the Court of Appeals may find plain error in the delivery of the wrong instruction on willfulness in this case.

(d) Mr. Snipes’ third substantial issue will address the Court’s refusal to give a good faith belief charge as applied to Mr. Snipes’ asserted Fifth Amendment right not to file an income tax return for 1999, 2000 or 2001. The government mistakenly claims this issue only applies to the counts on which Mr. Snipes was acquitted, Opp. 9, but in fact Mr. Snipes’ erroneous Fifth Amendment belief was simply different for each three year period. (That the Supreme Court said in 1927 that there is no Fifth Amendment privilege to refuse to file an income tax return does not mean Mr. Snipes knew this to be true in 1999, 2000 and/or 2001.) Apparently entirely unable to answer Mr. Snipes’ argument, the prosecution simply ignores the subsequent Supreme Court (*Murdock* [1933] and *Cheek* [1991]) and Eleventh Circuit (*Goetz*) decisions on which the defense relies for the right to present a good-faith-misunderstanding defense on this basis. *Compare* Bail Mtn. 12 *with* Opp. 9. The prosecutors thus fail to demonstrate that the issue to be presented is not substantial.

(d) The government's Opposition suffers a similar deficiency as applied to Mr. Snipes' anticipated sentencing issue. That issue is principally founded upon an application of the Supreme Court's decision in *LaBonte* [1997], which the government's memorandum does not even cite. In that case, the Court struck down as contrary to 28 U.S.C. § 994(h) a 1994 amendment to the Sentencing Guidelines which likewise had been presented to Congress and not disapproved – even more prominently than had § 2T1.1. Thus, although the Guidelines may in general reflect an attempt to implement the provisions of § 994, the Supreme Court has recognized that the effort has been far from perfect, and that particular provisions applied to a defendant may be challenged on this basis. Nothing in *In re United States*, 60 F.3d 729, 733 (11th Cir. 1995) (per curiam) (granting mandamus to quash pre-sentence subpoenas), or *United States v. Erves*, 880 F.2d 376, 380 (11th Cir. 1989) (holding Guidelines “generally,” and as applied to supplier of 2 kilograms of 92% pure cocaine, comply with § 994(j)), is on point to the contrary. The Opposition's reliance on a hodge-podge of other pre-1997 lower court decisions (not to mention, pre-2005 [*Booker*] or 2007 [*Kimbrough*]), *id.* 9-13, reveals how short the government falls from demonstrating that Snipes' sentencing issue is not substantial.

The issue to be raised on appeal – whether USSG § 2T1.1 fails to comply with the statute's requirement that the Commission distinguish between more and less serious tax offenses, by treating misdemeanors the same as felonies – is a legal and categorical one. It does not depend on the prosecutors' view of the facts of this case, particularly one which mixes elements of the offense of conviction with circumstances falling entirely outside those offenses. See Opp. 13. No one could seriously argue

that when Congress referred in § 994(j) to a “crime of violence or an otherwise serious offense” it meant to exclude only offenses which were so trivial that they were not likely to be prosecuted in federal court at all. (Rather, an offense is “otherwise serious” under § 994(j) if it is as serious as a crime of violence but in a different way.) In this case, in compliance with its interpretation of that flawed Guideline, this Court imposed the maximum possible sentence of a full year’s imprisonment for the failure to file a return for the year 2000, even though there was no tax loss for that year. Nothing could better illustrate the irrationality of the Guideline than that result, or at least so a panel of the Court of Appeals might reasonably conclude.

*Conclusion.* For these reasons and those set forth in the original motion, the Court should grant defendant Snipes’ motion for bail pending appeal. If the Court denies the motion, however, it should extend the voluntary surrender date by two additional weeks, to and including June 17, 2008, at the earliest, to allow the bail motion to be renewed and litigated in the Court of Appeals without unduly pressing and inconveniencing that Court to decide in the face of an imminent surrender date.

Respectfully submitted on May 21, 2008.

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	)	
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Defendant.	)	

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document was sent to all parties by sending a copy to their attorneys of record, via the District Court's ECF system, to the following email addresses:

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I hereby certify that on May 21, 2008, a true and correct copy of the foregoing will be mailed to the following non-CM/ECF participant(s):

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Dated: May 21, 2008

/s/ Daniel R. Meachum  
Daniel R. Meachum