UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA

-vs- Case No. 5:06-cr-22-Oc-10GRJ

WESLEY TRENT SNIPES
EDDIE RAY KAHN
DOUGLAS P. ROSILE
_____/

O R D E R

The Court conducted a hearing on all pending motions on December 11, 2007, (Doc. 326). After carefully considering the arguments of all Parties, as well as all relevant motions papers, the Court makes the following rulings.

I. Motions of Defendant Wesley Trent Snipes

Defendant Wesley Trent Snipes' Motion to Exclude Purported Expert Testimony of William C. Kerr, (Doc. 149), is GRANTED IN PART AND DENIED IN PART. The Court finds that Mr. Kerr is qualified to testify as an expert with respect to the four "Bills of Exchange" signed by Defendant Snipes, and that, with one exception, his opinions are reliable. See Fed. R. Evid. 702; Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993); Kumho Tire Company Ltd., et al. v. Carmichael, 526 U.S. 137 (1999). Mr. Kerr may provide expert testimony concerning the "Bills of Exchange" as described in the Parties' moving papers, but may not provide any testimony or render any conclusions to the effect that the "Bills of Exchange" were "created solely for the purpose of perpetrating

fraud." As the Government concedes, any such conclusions by Mr. Kerr would constitute impermissible expert opinion concerning Defendant Snipes' mental state. See Fed. R. Evid. P. 704(b).

Defendant Snipes' Motion to Designate the Case as Complex, (Doc. 246), is DENIED AS MOOT. The Court has previously determined that this case is complex for purposes of the Speedy Trial Act. See Docs. 85, 186, 229. See also 18 U.S.C. § 3161(h)(8)(B)(ii).

Defendant Snipes' Motion to Bar All 404(b) Evidence Against Snipes From Trial, (Doc. 250) is premature and therefore DENIED WITHOUT PREJUDICE. The Court does not have the evidence at issue before it, and there is no record context in which to evaluate its admissibility. Defendant Snipes may state his objections at the appropriate time during trial, if and when the Government seeks to admit such evidence.

Defendant Snipes' Motion to Strike Surplusage, (Doc. 271), is DENIED WITHOUT PREJUDICE. As correctly stated by the Government, (Doc. 293), the proper procedure when faced with a motion to strike surplusage is to reserve ruling until the Court has heard all evidence that will establish the relevance (or irrelevance) of the allegedly surplus language. See United States v. Awan, 966 F.2d 1415, 1426 (11th Cir. 1992). Moreover, the Court has already created a redacted version of the Superseding Indictment to provide to the jury at the beginning of trial. This was previously approved by counsel for all Parties. (Doc. 216).

Defendant Snipes' Motion to Exclude the Government's Handwriting Expert Witnesses and Handwriting Exemplar From Trial, (Doc. 272), is DENIED. Defendant Snipes asserts that the Government engaged in prosecutorial misconduct during the grand jury proceedings by seeking enforcement of a grand jury subpoena compelling Defendant Snipes to provide an handwriting exemplar after the grand jury had returned the initial indictment. This argument fails, however, because it presupposes that the handwriting exemplar was relevant only to the § 287 charge in Count Two, yet it is clear that the handwriting exemplar was equally relevant to the additional charges in the Superseding Indictment - in particular the conspiracy charge - concerning which an investigation was ongoing. Because the Government "may continue an investigation from which information relevant to a pending prosecution 'may be an incidental benefit'," see United States v. Alred, 144 F.3d 1405, 1413 (11th Cir. 1998) (internal citation omitted), and given the lack of any positive evidence of prosecutorial misconduct, the motion is due to be denied.

Defendant Snipes' Motion to Exclude the Government's Expert Witnesses From Trial for Untimely Disclosure, (Doc. 273), is DENIED AS MOOT. Defendant Snipes seeks to exclude Agent Combs as an expert witness on the grounds that the Government did not identify Agent Combs until several months after the Court's disclosure deadline. During the December 11, 2007 hearing, the Assistant United States Attorney stated that the Government no longer intends to call Agent Combs as a witness, unless and until an issue arises during trial requiring his individual expertise. Accordingly, the relief requested by

Defendant Snipes is no longer necessary; however, Defendant Snipes may revisit this issue should the Government seek to call Agent Combs as an expert witness during trial.

Defendant Snipes' Motion in Limine to Preclude the Admission of Alleged Co-Conspirator Statements Absent a Pretrial Showing Under Federal Rule of Evidence 801(d)(2)(E) and Request for a James Hearing, (Doc. 274), is DENIED WITHOUT PREJUDICE. As Defendant Snipes correctly notes, a hearing pursuant to United States v. James, 590 F. 2d 575, 579-80 (5th Cir. 1979), is not mandatory. See United States v. Hasner, 340 F.3d 1261, 1274-75 (11th Cir. 2003); United States v. Van Hemelryk, 945 F.2d 1493, 1498-99 (11th Cir. 1991). Any issue concerning Fed. R. Evid. 801(d)(2)(E) will be carried with the case and determined at trial when appropriate objections, if any, are made.

Defendant Snipes' Motion for Attorney Conducted Voir Dire and For Use of a Juror Questionnaire, (Doc. 275), is DENIED for the reasons stated by the Court during the December 11, 2007 hearing. (Doc. 328). The Parties may submit to the Court proposed voir dire questions at any time up to and including the time the jury is empaneled.

Defendant Snipes' Motion to Disclose Grand Jury Transcripts, (Doc. 276) and Motion to Unseal the Record For a Case Related to Underlying Grand Jury (Doc. 277) are DENIED. Defendant Snipes seeks disclosure of the entire grand jury transcript as well as the entire record of all grand jury proceedings relating to the issuance of the Superseding Indictment in this case in order to ascertain whether any prosecutorial misconduct took place during grand jury proceedings, and in particular, to verify what the Assistant United States Attorney represented to the United States District Judge with respect to the use of

Snipes' handwriting exemplar. Defendant Snipes has not satisfied the standards for disclosure set forth in Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211 (1979). In particular, the Court finds the request to be overly and unnecessarily broad - more in the nature of a "fishing expedition" - and that Defendant Snipes has not established any potential injustice or compelling need that would be require or justify disclosure of this information.[1] See Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959) ("The burden . . . is on the defense to show that 'a particularized need' exists for the minutes which outweigh the policy of secrecy."). See also Fed. R. Crim. P. 6(e)(3)(E)(ii).

Defendant Snipes' Motion to Dismiss or Transfer Based on Racially Discriminatory Venue Selection, (Doc. 278), is DENIED. Notably, Defendant Snipes does not contend that venue is improper in this Court. In fact, during the December 11, 2007 hearing, counsel for Defendant Snipes conceded that venue is proper in this District for at least the conspiracy charge (Count I) and the § 287 fraud charge (Count II). With respect to the failure to file counts (Counts III through VIII), counsel for Defendant Snipes also conceded that the proper procedure for challenging venue is to submit all disputed issues of fact to the jury under a preponderance of the evidence standard of proof.[2] See United States v. Stickle, 454 F.3d 1265, 1271-72 (11th Cir. 2006); United States v. Breitweiser, 357 F.3d

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[1]The Court also notes that the Assistant United States Attorney, as an officer of the Court, has represented that no one from the Government has ever affirmatively stated that the handwriting exemplar is relevant only to the § 287 charge.

[2]Upon direct questioning by the Court, counsel was unable to provide any legal authority to support his request that venue be determined in advance of trial.

1249, 1253 (11th Cir. 2004). Rather, in addition to making numerous accusations of prejudice and bigotry on the part of the residents of the Ocala Division, Defendant Snipes argues that venue in the Ocala Division of the Middle District of Florida is improper because the racial disparity between the jury venire for the Ocala Division and the Manhattan Division of the Southern District of New York is far greater than 10%.[3]

However, as the Government correctly points out, (Doc. 294), Defendant Snipes has engaged in a faulty comparison. To determine whether a defendant's Fifth and Sixth Amendment rights have been violated by selection of a racially discriminatory venue, the proper comparison is between the percentage of the distinctive group in question that is among the qualified jury wheel and the percentage of that same group in the population eligible for jury service. United States v. Grisham, 63 F.3d 1074, 1078-79 (11th Cir. 1995). Comparison between different venues is not appropriate. See, e.g. United States v. Pepe, 747 F.2d 632 (11th Cir. 1984); United States v. Tuttle, 729 F.2d 1325 (11th Cir. 1984). Given the lack of any evidence of a constitutionally relevant racial disparity in the Ocala Division's jury venire, Defendant Snipes' motion is due to be denied.[4]

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[3]According to Defendant Snipes, African-Americans (21%) and Latinos (30%) constitute more than half of the jury venire in the Manhattan Division, whereas African-Americans (9%) and Latinos (7%) constitute only 16% of the jury venire in the Ocala Divison.

[4]The Court is also unpersuaded by Defendant Snipes' arguments under Fed. R. Crim. P. 21(b) that venue should be transferred to the Southern District of New York in the interests of justice. As the Court has previously made abundantly clear, (see Doc. 188, pp. 13-21), there are no compelling reasons to transfer this case to another venue, particularly where the case involves two co-conspirators with strong ties to Florida, and where the question of Defendant Snipes place of residence during the relevant time period remains a fact question very much in dispute. (continued...)

Defendant Snipes' Motion to Dismiss Indictment or For an Alternative Sanction, (Doc. 280), is DENIED. The motion asserts the following alleged acts by the Government: (1) an improper disclosure of Defendant Snipes' income tax returns in another related civil matter; (2) a false representation during grand jury proceedings concerning the use of Defendant Snipes' handwriting exemplar; (3) the failure to offer Snipes his conferencing rights under United States v. LaSalle National Bank, 437 U.S. 298 (1978); and (4) the Government's reference to Snipes in the press as a fugitive. The Court has carefully reviewed Defendant Snipes' allegations, as well as the relevant case law and finds that the Government did not engage in any improper conduct.[5] More importantly, Defendant Snipes has utterly failed to demonstrate any prejudice that he has or will suffer as a result of these alleged Government actions.

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[4](...continued)
Defendant Snipes' reliance on Rule 1.02(d) of the Local Rules of the Middle District of Florida is equally misplaced. The Superseding Indictment alleges actions by the Defendants in both Lake County, which is within the Ocala Division, and Orange County, which is within the Orlando Division. Because at least some of the acts are alleged to have taken place within the Ocala Division, transfer of this case is not appropriate. Moreover,"an indictment returned in any Division shall be valid regardless of the county or counties within the District in which the alleged offense or offenses were committed." Local Rule 1.02(d). See also Pepe, 747 F. 2d at 647, n. 15 (noting that defendants have no constitutional rights to venue within a division).

[5]For example, the Court finds that the Government did not violate any disclosure rules when it attached Defendant Snipes' 1997 amended tax return to a filing in a tax civil matter against co-Defendant Rosile. See 26 U.S.C. § 6103(h)(4)(C). The Court further finds that to the extent any pre-indictment conference rights may exist under LaSalle or any other legal authority, they do not apply to grand jury investigations and do not apply where the defendant does not request such a conference, as appears to be the case here.

Defendant Snipes' Motion to Exclude Exemplars Taken in Violation of the Fifth Amendment, (Doc. 281), is DENIED. In the motion itself, Defendant Snipes concedes "that current Eleventh Circuit case-law allows state compelled exemplars without meaningful limitation and simply preserves a good faith challenge to that existing precedent." See Doc. 281, p. 1; see also Gilbert v. California, 388 U.S. 263, 266-67 (1967); United States v. Stone, 9 F. 3d 934, 942 (11th Cir. 1993). Defendant Snipes' objection is duly noted for the record.

Defendant Snipes' Renewed Motion For Transfer to District of Residence Pursuant to 18 U.S.C. § 3237(b), (Doc. 282), is DENIED. The Court previously denied this very same motion on timeliness grounds, see Doc. 188, p. 11-13, and Defendant Snipes' new counsel have not raised any additional arguments to persuade the Court that this prior ruling should be altered.

Defendant Snipes' Motion for Pretrial Status Conference, (Doc. 296), and the United States' Motion for Hearing Regarding Candor to the Court and Potential Conflict of Interest, (Doc. 303), are DENIED AS MOOT. The Parties had an opportunity to be heard on all pending motions, including the issues raised in both of these motions, during the December 11, 2007 hearing. In addition, the majority of the issues Defendant Snipes' counsel wishes to address with the Court were previously resolved in the Court's October 3, 2007 Order. (Doc. 216).

II. Motions of Defendant Eddie Ray Kahn

Defendant Eddie Ray Kahn's Motion to Continue Trial, (Doc. 262), is DENIED. Defendant Kahn seeks a 138-day continuance on the grounds that he has not received any discovery in this case, and requires additional time to review over 800,000 discovery documents. This motion is without merit because the Government has provided Defendant Kahn with all discovery as it has become available, and informed Defendant Kahn of the existence of any other discovery that would be available for review. A continuance is not warranted based on Defendant Kahn's own failure to engage in discovery review.[6]

Defendant Kahn's Motion for All Discovery, (Doc. 263), and Motion To Exclude All Evidence Against Kahn For Massive Discovery Violations, (Doc. 268), are DENIED for the same reasons. The Government has either provided to Defendant Kahn all discovery, or made discovery available for inspection and review. To the extent Defendant Kahn seeks Giglio or Brady discovery materials, that request is due to be denied for the same reasons set forth in the Court's November 2, 2007 Order denying Defendant Snipes' identical request. See Doc. 261.

Defendant Kahn's Motion to Dismiss for Want of Personal Jurisdiction, or Alternatively, Motion for Plaintiff's Misconduct, (Doc. 264), is DENIED for the reasons set forth in the Government's response in opposition. (Doc. 286). See also United States v.

[6]See the United States' Combined Response. (Doc. 285). The record is not inconsistent with the representations of the Government made in that Response.

Alvarez-Machain, 504 U.S. 655 (1992); United States v. Arbane, 446 F.3d 1223 (11th Cir. 2006).

Defendant Kahn's Motion to Adopt Snipes' Motion for Immediate Brady and Giglio Material as His Own, (Doc. 266), is DENIED AS MOOT. The Court previously denied Defendant Snipes' underlying motion on November 2, 2007. See Doc. 261.

Defendant Kahn's Motion for Disclosure of State Department File, (Doc. 267), is DENIED. The Government asserts that it is unaware of the existence of any such file, and Defendant Kahn has not demonstrated why the disclosure of such a file, assuming it does exist, would be relevant to any issue in this case.

Defendant Kahn's Notice of Motion and Motion to Depose Judge With Accompanying Memorandum of Law, (Doc. 269), is without merit, does not cite to any relevant legal authority, and is therefore DENIED.

Defendant Kahn's Motion to Disqualify Judge Wm. Terrell Hodges From Case #5:06-cr-22, (Doc. 270), is DENIED. Defendant Kahn bases his motion on the fact that he believes I have a "vendetta" against him and because the Court has denied all of Kahn's motions and "notices" as frivolous and without merit. Defendant Kahn further contends, without any legal or factual support, that I am not an Article III Judge, but am in actuality impersonating a federal judicial officer.[7] In other words, Defendant Kahn bases his entire

[7]This claim comes as a surprise after thirty-six years of service, especially since I have the benefit of a mandate of the Supreme Court of the United States (perhaps the only one of its kind) refusing certiorari to review the Court of Appeals' refusal to enjoin my investiture in 1971. Fair v. (continued...)

motion on judicial rulings and other actions I have taken in my role as United States District Judge - he has presented no evidence or made any allegations that any supposed bias stems from extrajudicial sources. See 28 U.S.C. §§ 455(a), (b)(1); United States v. Grinnell Corp., 384 U.S. 563, 583 (1966) (judicial rulings alone almost never constitute a valid basis for recusal based on bias or partiality); Litekey v. United States, 510 U.S. 540 (1994) (judicial rulings, without any evidence of extrajudicial bias, may form the basis of an appeal, not recusal); United States v. Bailey, 175 F.3d 966, 968 (11th Cir. 1999) ("Bias sufficient to disqualify a judge under § 455(a) and § 455(b)(1) must stem from extrajudicial sources, unless the judge's acts demonstrate 'such pervasive bias and prejudice that it unfairly prejudices one of the parties.'") (quoting United States v. Ramos, 933 F.2d 968, 973 (11th Cir. 1991). Accordingly, Defendant Kahn has failed to satisfy the statutory standards for recusal set forth under 28 U.S.C. § 455.

III. Motions of Defendant Douglas P. Rosile

Defendant Douglas P. Rosile's Motion to Strike Surplusage From Indictment, (Doc. 203), is DENIED WITHOUT PREJUDICE. The Court will reserve ruling until the Court has heard all evidence that will establish the relevance of the allegedly surplus language. See United States v. Awan, 966 F.2d 1415, 1426 (11th Cir. 1992). Moreover, the Court has already created, with approval of all Parties, a redacted version of the Superseding

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[7](...continued)
Hodges, 409 U.S. 872, 93 S. Ct. 202 (1972).

Indictment to provide to the jury at trial. (Doc. 216). Defendant Rosile may revisit this issue at the appropriate time during trial.

IV. Motions Relating to All Defendants

The United States' Motion In Limine to Exclude Anticipated Tax-Protestor "Evidence" and Argument, (Doc. 208), is CARRIED WITH THE CASE. The United States is free to raise any appropriate objection if and when any party seeks to introduce such evidence and/or argument at trial.

The United States' Unopposed Motion to Continue Trial Subpoenas, (Doc. 232), is GRANTED.

The Joint Motion By All Co-Defendants For a Continuance Based on Newly Discovered 1.6 Million or More Pages of Discovery, (Doc. 321), is DENIED. The Defendants contend that an additional three-month continuance is necessary in order to review approximately 1.6 million pages of allegedly newly discovered evidence. However, as the Government explained at the hearing, counsel for the Defendants have been well-aware of this additional discovery since at least the time of each Defendant's arraignment, and the Court finds that Defendant Snipes' new counsel received this discovery from prior counsel in a timely manner. At the time of arraignment, the Government provided each Defendant with the vast bulk of all discovery, and informed each Defendant that the electronic discovery now in question was available for inspection and copying upon request. The Government further explained at the hearing that the majority of the

electronic discovery consists either of computer software programs or copies of documents previously provided to the Defendants in hard copy or other form, and that the Government intends to use at trial only approximately 20 documents which originated from electronic form. The Court is therefore convinced that the Government has not deliberately withheld any important discovery materials from any Defendant, and that the Defendants have had an ample opportunity to review and analyze the discovery material and prepare adequately for the trial of this case. Moreover, the Defendants have not demonstrated any specific prejudice that will result from the denial of a continuance to review what are largely irrelevant and/or duplicative materials.

The Clerk is directed to send a copy of the transcript from the December 11, 2007 hearing directly to Defendant Snipes, along with a copy of this Order.

IT IS SO ORDERED.

DONE and ORDERED at Ocala, Florida this 24th day of December, 2007.

UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record
Maurya McSheehy, Courtroom Deputy
Wesley Trent Snipes
Eddie Ray Kahn
Douglas P. Rosile5:06cr23