APPEAL NO. 08-12402-HH
DISTRICT COURT NO. 5:06-CR-22-OC-10GRJ

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Cross-Appellant,

vs.

WESLEY TRENT SNIPES,
Defendant-Appellant-Cross-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

PRINCIPAL BRIEF OF UNITED STATES OF AMERICA RESPONDING TO SNIPES'S BRIEF AND PRESENTING UNITED STATES' ARGUMENT ON ITS CROSS-APPEAL
CRIMINAL CASE

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DATE: January 28, 2009

United States v. Snipes

Appeal No. 08-12402-HH

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1, 11th Cir. R. 26.1-1, and 11th Cir. R. 26.1-2(b), the undersigned hereby certifies that, in addition to the persons and entities identified in the certificate of interested persons and corporate disclosure statement in the appellant's brief filed by Wesley Snipes, the following persons and entities have an interest in the outcome of this case:

1. Albritton, A. Brian, United States Attorney;
2. Gross, Wayne R., Esquire;
3. Hechtkopf, Alan, Chief, Criminal Appeals & Tax Enforcement Policy Section, Tax Division, United States Department of Justice;
4. International Fidelity Insurance Company, surety;
5. Kanan, Henry B., Esquire;
6. Rhodes, David P., Assistant United States Attorney, Chief, Appellate Division; and
7. Snipes, Wesley Trent.

STATEMENT REGARDING ORAL ARGUMENT

The United States does not request oral argument.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

The United States certifies that this brief contains 16,496 words.

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the United States District Court for the Middle District of Florida in a criminal case including a challenge to a sentence imposed in the judgment. The district court entered final judgment against Wesley Snipes on August 18, 2008.[1] D501. The district court had jurisdiction to enter the judgment pursuant to 18 U.S.C. § 3231. Snipes filed a notice of appeal on August 21, 2008. D502. The United States filed a notice of cross-appeal on September 19, 2008. The notices were timely. See Fed. R. App. P. 4(b). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and authority to examine the challenge to the sentence pursuant to 18 U.S.C. § 3742(a) and (b).

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[1]The district court had entered a judgment against Snipes on May 1, 2008, that omitted the statutorily mandated cost of prosecution pending resolution of the disputed amount of that cost by the magistrate judge. D458; D461 at 77-81, 98. In responses to this Court's June 12, 2008, jurisdictional question, both parties agreed that the May 1 judgment was not final.

STATEMENT OF THE ISSUES

A. DEFENDANT'S ISSUES

I. WHETHER THE COURT ERRED IN DENYING SNIPES'S UNTIMELY STATUTORY ELECTION TO TRANSFER THE CASE (SNIPES'S ISSUE I(A)).

II. WHETHER THE COURT ABUSED ITS DISCRETION IN DECLINING TO HOLD A PRETRIAL EVIDENTIARY HEARING ON SNIPES'S MOTION TO TRANSFER THE CASE (SNIPES'S ISSUE I(B)).

III. WHETHER THE COURT PLAINLY ERRED IN NOT SUA SPONTE ENTERING JUDGMENT OF ACQUITTAL BASED UPON INSUFFICIENT PROOF OF VENUE (SNIPES'S ISSUE II).

IV. WHETHER THE COURT ABUSED ITS DISCRETION IN DECLINING TO GIVE SNIPES'S REQUESTED JURY INSTRUCTION ON GOOD FAITH RELIANCE UPON THE FIFTH AMENDMENT (SNIPES'S ISSUE III).

V. WHETHER THE COURT ERRED IN DETERMINING SNIPES'S BASE OFFENSE LEVEL IN ACCORDANCE WITH USSG §2T1.1, THE GUIDELINE FOR HIS CRIMES (SNIPES'S ISSUE IV(C)).

VI. WHETHER THE COURT CLEARLY ERRED IN IMPOSING AN OBSTRUCTION-OF-JUSTICE ENHANCEMENT (SNIPES'S ISSUE IV(B)).

VII. WHETHER THE COURT VIOLATED SNIPES'S SIXTH AMENDMENT RIGHTS BY RELYING UPON NON-JURY FINDINGS TO DETERMINE HIS SENTENCING GUIDELINES RANGE (SNIPES'S ISSUE IV(D)).

VIII. WHETHER THE COURT ABUSED ITS DISCRETION IN SENTENCING SNIPES TO 36 MONTHS' IMPRISONMENT (SNIPES'S ISSUE IV(A)).

B. UNITED STATES' ISSUE

WHETHER THE COURT ERRED IN RULING THAT THE SOPHISTICATED-MEANS ENHANCEMENT DID NOT APPLY.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

In October 2006, a grand jury in the Middle District of Florida returned a superseding indictment charging Wesley Snipes, Eddie Kahn, and Douglas Rosile with conspiring to defraud the United States by impeding the IRS in its collection of Snipes's taxes, in violation of 18 U.S.C. § 371; and with filing a false claim for a refund of Snipes's taxes, in violation of 18 U.S.C. §§ 2, 287; and Snipes alone with six counts of willfully failing to file an income tax return (for years 1999-2004), in violation of 26 U.S.C. § 7203. D6. They pled not guilty. D16; D33; D58. Snipes was arraigned on December 8, 2006. D58.

The magistrate judge set the motion deadline for January 12, 2007, and the trial for the March 2007 term. D61 at 7-8. Snipes moved for an extension on January 12 due to the complexity of the case and the need to analyze discovery, and the judge reset the deadline to June 4, 2007, and the trial for October 2007. D72; D73; D79; D85; D131; D134.

On the new motion deadline, Snipes filed many motions, including one to transfer the case to the Southern District of New York. D144. The indictment alleged that Snipes was a resident of Windermere, Orange County, Florida, and that American Rights Litigators (of which Snipes was a member, Kahn was the

founder, and Rosile was a contractor) was in Mount Plymouth, Lake County, Florida. D6 at 1-3, 12. In his motion to transfer the case, Snipes asserted: (1) that he was electing, pursuant to 18 U.S.C. § 3237(b), to be tried in the Southern District of New York on the failure-to-file charges because he had resided in New York City during the relevant time period; (2) venue on those charges was improper in the Middle District of Florida because of that alleged residency; and (3) although venue was proper in the Middle District of Florida for the conspiracy and false claim charges, the only proper venue for all of the charges was the Southern District of New York, and the pertinent factors favored trying the case there. D144.

The court denied the motion. D188 at 13. As to the first ground, the court ruled that Snipes's attempted transfer election was untimely because section 3237(b) expressly requires that a transfer election be made "within twenty days after arraignment," but Snipes had waited over five months after that period to do so. Id. at 11-12. The court rejected Snipes's excuse that his delay was based upon the order extending the motion deadline, observing that Snipes had not requested a deadline extension until after the transfer election period had expired and further observing that the order did not address the statutory transfer election. Id. at 11-12. As to the second ground, the court ruled that the jury must decide the disputed

issue of venue. Id. at 12-13. As to the third ground, the court ruled that the pertinent factors did not favor transfer. Id. at 14-21.

Snipes sought reconsideration, D191, this time arguing that the indictment did not create a "bona fide disputed issue of fact" regarding venue because it alleged his "residency" as opposed to "legal residency," D192 at 1, 8-10. Snipes requested an evidentiary hearing on his legal residency and, although having conceded venue for the conspiracy and false claim charges, asserted that he would "be prejudiced by having to defend the six failure to file counts" in the Middle District of Florida. Id. at 9. The court denied the motion and request, ruling that Snipes had not "provided any persuasive reason why" the court should change its original ruling. D204.

Just before trial was to begin, Snipes fired his counsel, hired new counsel, and moved to continue the trial based upon, inter alia, alleged ineffective assistance. D209; D213; D214; D218; D226. Snipes alleged that his former counsel had been ineffective because of, inter alia, his untimely statutory transfer election. D224 at 9. According to Snipes: his former counsel "had to assert Snipes' right" within 20 days of arraignment; counsel "familiar with federal criminal tax matters would never make [that] critical oversight"; and his former counsel's "excuse that the magistrate tolled the filing requirement ignores the plain fact that the magistrate entered no such order before the time lapsed to file the

statutory venue transfer election." Id. at 9-10. The court granted the continuance motion due to the apparent irreconcilable differences between Snipes and his former counsel, ordered the parties to file any additional motions by November 2, 2007, and reset the trial for the January 2008 term. D215; D224; D225; D229; D230.

Through his new counsel, Snipes filed 41 more pretrial motions, including two motions again seeking transfer of the case to the Southern District of New York. D278; D282. In one, Snipes moved to dismiss the indictment or transfer the case based upon alleged racially discriminatory venue selection, contending that the United States had deliberately chosen "the most racially discriminatory venue available to the government with the best possibility of an all-white southern jury." D278 at 1; D328 at 7-11. In the other, Snipes again attempted to make a statutory transfer election. D282. Snipes acknowledged that section 3237(b) "places a 20-day deadline" on transfer elections but this time argued that the court could disregard that deadline based upon the "good cause" provision of Fed. R. Crim. P. 12(e) due to his former counsel's ineffective assistance in effecting a "waiver of a mandatory deadline." Id. at 3; D328 at 16. Finding these arguments unpersuasive, the court denied the motions and Snipes's requests for evidentiary hearings to prove his allegations of racial discrimination, ineffective assistance of counsel, and legal residency. D278 at 2; D282 at 4; D332 at 5-8.

After the denial of another motion to continue filed by Snipes, and just before trial was to begin, Snipes filed a notice of appeal of the venue-related orders, purporting to raise the issue of "[w]hether a criminal defendant who claims a constitutional right . . . not to be tried by a jury of the district selected by the government may be denied a pretrial evidentiary hearing necessary to determine the facts underlying his venue claims." D321; D338; Snipes's Response in Appeal No. 08-10114-A. This Court dismissed the interlocutory appeal, holding that it lacked jurisdiction because "an order pertaining to venue is effectively reviewable after entry of judgment." D366 at 2 (U.S. v. Snipes, 512 F.3d 1301 (11th Cir. 2008)).

The case proceeded to a 14-day trial. D379-D381; D383; D384; D397-D400; D405; D406; D423-D425. After the United States had rested, Snipes moved for judgment of acquittal on only the false claim charge and the failure-to-file charge for 1999 based upon the statute of limitations. D389; D400 at 56-57; D405 at 3-7. The court denied the motion. D391; D394; D396; D405 at 4-5, 8, 51-52. Snipes rested without presenting evidence, and the court deemed renewed–and again denied–Snipes's acquittal motion. D405 at 9, 18, 68.

Snipes requested a jury instruction on venue. D395 at 1-2; D405 at 36-37, 53-55. The court granted his request and instructed the jury that if the United States had not satisfied its burden to prove Snipes's legal residency in the Middle

District of Florida during the relevant time, the jury had to acquit him of the failure-to-file charges. D405 at 55; D406 at 184-86; D416 at 18-19.

To supplement the pattern jury instruction defining "willful," Snipes requested instructions on general good faith and good faith reliance upon the advice of counsel. D355; D395 at 5-8; D380 at 200-03; D405 at 38-40; D406 at 187-88; D416 at 22; see 11th Cir. Pattern Jury Instrs. (Criminal Cases) Nos. 9.1, 17, 18. The court granted Snipes's requests and, on general good faith, instructed the jury both preliminarily and finally that good faith was "a complete defense to the charges in the indictment since good faith on the part of the defendant is inconsistent with . . . willfulness which is an essential part of the charges." D381 at 14-15; D405 at 39; D406 at 186-87; D416 at 20.

Snipes also requested an instruction on good faith reliance upon the Fifth Amendment. D395 at 8. Snipes observed that in May 2002, IRS Special Agent Cameron Lalli had advised him that he had the right to remain silent, and Snipes argued that he had believed based upon that advice that he had a right not to file returns. D395 at 9; D405 at 40. Snipes included the same argument among those in support of his successful request for the instruction on general good faith. D395 at 7. In declining to give the instruction, the court explained, inter alia, that there was no evidence that Snipes had asserted his Fifth Amendment right as a basis for not filing his returns. D405 at 40-42. Snipes did not state disagreement with that

reasoning. Id. at 42. In closing argument, Snipes's counsel read the general good faith instruction and repeatedly argued that Snipes's failures to file returns had not been willful because Special Agent Lalli had advised him in May 2002 that he had a right to remain silent, and Snipes had believed in good faith, based upon that advice, that he had a right to not file returns. D406 at 63-65, 70-71, 75-76, 90, 92-96.

The jury found Kahn and Rosile guilty and Snipes not guilty of the conspiracy and false claim charges. D417-D419; D425 at 5-6. The jury found Snipes guilty of three failure-to-file charges (for 1999, 2000, and 2001) but not guilty of the failure-to-file charges for those returns that were due after Agent Lalli had informed him of his right to remain silent (for 2002, 2003, and 2004). D417; D425 at 5-6.

The probation office prepared a Presentence Investigation Report and recommended: a base offense level of 28 pursuant to USSG §2T1.1(a) and the table in USSG §2T4.1 based upon its determination that Snipes had intended a loss of $41,038,051; a 2-level increase pursuant to USSG §2T1.1(b)(2) based upon its determination that Snipes had used sophisticated means to hide assets from taxation by using foreign accounts; and a 2-level increase pursuant to USSG §3C1.1 based upon its determination that Snipes had obstructed justice by directing his employee Carmen Baker to refuse to respond to a grand jury subpoena and

threatening her with recourse if she responded. PSR ¶¶ 42, 77, 78, 81. Snipes objected to those recommendations. D453 at 16-24; D461 at 33-76; PSR Addendum.

The court sustained in part Snipes's objection to the base offense level. D461 at 70, 82-83. The court rejected his argument that the Sentencing Commission had contravened 28 U.S.C. § 994(j) when it promulgated section 2T1.1(a) because the tax guideline allegedly failed to provide for probation for "non-serious" offenses.[2] D453 at 11-13; D461 at 33-47. The court ruled that Snipes's crimes, although not as serious as felonies, nevertheless were serious because they could by statute subject him to a loss of liberty. D461 at 44, 83. Invoking Fed. R. Crim. P. 32(i)(3)(B), the court then ruled that it did not need to resolve the loss amount; the statutory maximum of 36 months' imprisonment would cap the sentencing guidelines range regardless of whether the court accepted the probation office's figure of $41,038,051, Snipes's figure of $228,000, or the United States' compromise figure of $7,500,000 (the default calculation of 20% of

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[2]Section 994(j) directs the Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a . . . serious offense."

gross income pursuant to USSG §2T1.1(c)(2)). Id. at 68, 70, 85, 90-91, 97-98. The court therefore used Snipes's figure, the one most favorable to him. Id. at 98.

The court overruled Snipes's objection to the obstruction-of-justice enhancement. Id. at 74, 82-83. The court agreed with the probation office that Snipes had obstructed justice and rejected Snipes's argument that his obstructive conduct had not related materially to his crimes. Id. at 57-60, 82-83.

The court sustained Snipes's objection to the sophisticated-means enhancement. Id. at 74, 82-83. The court said, "using sophisticated means and not filing a return is a little difficult conceptually to me." Id. The prosecutor began to explain that Snipes's sophisticated means related to the concealment of the crimes, but the court cut him off, saying, "I don't think we have to extend this. I'm inclined to sustain that objection, and we'll just get it out of the case. It has little or no impact on the calculation of the ultimate guideline sentence in any event." Id. at 73-74.

The court determined a base offense level of 20, a criminal history category of I, and a sentencing guidelines range of 33-41 months, capped by the statutory maximum of 36 months. Id. at 98.

Snipes asked for a sentence of probation or two years of home detention. D453 at 1; D461 at 159. He argued for leniency in light of his acquittal on some

charges, his attempt to plead guilty to one charge,[3] his asserted need to work to pay his tax liabilities, his lack of criminal history, his lack of dangerousness, his modest background, his hard work in becoming a movie star, his status as a parent, his asserted status as a role model, his involvement in a program to teach karate to flight crews after the September 11 attacks, his donation of money to charter schools to buy supplies, the possibility that he would be at risk in prison given his stardom, and the asserted high regard in which both stars and "simple, everyday folk" hold him. D453 at 1-16; D461 at 105-85; PSR ¶ 122; PSR Addendum. Snipes further argued that his crimes were less serious than other crimes, that he did not even owe taxes for one of the years in which he did not file a return, that sentencing him to 36 months' imprisonment would create a disparity between his sentence and those of other criminals, that sending a "strong message" would be an

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[3]The United States observed that Snipes's plea offers did not demonstrate acceptance of responsibility. D441 at 27 n.19; D461 at 205-06. One was an offer to enter a sealed Alford plea (i.e., one accompanied by an assertion of innocence) to one charge, with a sentence that he give public service announcements warning others not to become "victims" of tax scam artists; the other was an offer by Snipes's counsel to "recommend" that Snipes plead guilty to one charge for a joint recommendation of probation and a stay of sentencing pending an appeal. D441 at 27 n.19; D461 at 205.

"improper ground" upon which to sentence him, and that the court should consider only jury findings in determining his sentence. D453 at 1-16; D461 at 105-85; PSR ¶ 122; PSR Addendum. In allocution, Snipes stated that his fame and fortune had attracted "jackals and wolves" and that he had not been "immune to a good hustle." D461 at 189-90.

The United States asked for a sentence of 36 months' imprisonment and a fine of at least $5 million. D441 at 1; D461 at 209. The United States argued for that sentence as "sufficient, but not greater than necessary," in light of the enormous tax loss that Snipes had intended, his lack of remorse and continued portrayal of himself as a victim, and his extended campaign to escape paying taxes and brazen defiance of tax laws, as demonstrated by: his failure to file personal returns and pay income tax for almost a decade; his failure to file corporate or trust returns and failure to pay income tax for his companies despite their receipt of millions of dollars from his movies; his failure to file returns or pay taxes due to California during the prosecution years; his attempt to escape paying taxes to Canada for his work there on Blade III, for which he had been paid $343,750 weekly; his concealment of millions of dollars in accounts in Switzerland, Antigua, and the Isle of Man; his creation and use of sham entities as repositories for his salaries; his submission of two fraudulent claims to the United States for tax refunds totaling $11 million based upon the frivolous "861" argument that United

States citizens are not subject to tax on income derived from United States sources;[4] his submission of fraudulent Bills of Exchange by which he purported to pay his tax obligations; his promotion of tax misconduct among his employees; his threats and false accusations against IRS employees who had challenged his frivolous claims; and his inundation of the IRS with obstructive and frivolous correspondence. D441; D461 at 205-09; GX33; GX87-41. The United States also argued that general deterrence of tax fraud and respect for the law were predominant factors given the national media attention that this case had received and the large tax defier following that it had garnered. D441 at 19-22; D461 at 209-13. The United States further argued that avoiding unwarranted disparity was an important factor to consider and observed that defendants in less egregious tax cases had been sentenced to multiple years of imprisonment. D441 at 27-28; D461 at 208-09.

The district judge had presided over this case since its inception and received detailed PSR recommendations, observed Snipes's allocution, and considered extensive sentencing arguments made in memoranda and during the day-long sentencing. D441; D453; D461 at 222-23. Before imposing sentence,

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[4]The "fallacious" 861 or "U.S. Sources" argument, which purportedly derives from regulations promulgated under 26 U.S.C. § 861, "has been universally discredited." U.S. v. Bell, 414 F.3d 474, 475-76 (3d Cir. 2005).

the court observed the advisory nature of the guidelines and the court's obligation "to fashion a sentence in the manner prescribed by" 18 U.S.C. § 3553(a). Id. at 216-17. The court discussed the weight that it would give the relevant factors in section 3553(a). Id. at 217-22. The court sentenced Snipes to a total of 36 months' imprisonment, to be followed by one year of supervised release, and mandatory prosecution costs of $217,363.75. D461 at 224; D501. The court declined to impose a fine in deference to the civil process that would determine Snipes's tax liabilities. D461 at 225. Snipes did not object to the sentence as too long but objected "to the extent that Mr. Snipes is getting a three-year sentence because he happens to be Mr. Snipes." Id. at 231-32. The court overruled that objection, explaining that the sentence was rendered not because Snipes is Snipes, it was "fair and just," and it was imposed after a "full and fair" hearing. Id. at 231.

The court allowed Snipes to remain free on bail pending this appeal. D475. Although the court was "dubious as to the 'substantiality'" of the issues that Snipes indicated he would raise, the court observed that his crimes were misdemeanors and that the time required for the disposition of this appeal might approximate his term of imprisonment. Id.

B. STATEMENT OF THE FACTS

1. THE CRIMES

Snipes did not file federal income tax returns for 1999 to 2004, even though he earned more than $37 million in gross income in those years, exclusive of more than $20 million paid to his companies for his work on movies. D400 at 12-33; GX53; GX144. Likewise, he did not file federal tax returns for his companies in those years. GX54-GX57.

Snipes gave various reasons for not filing returns and not paying taxes. At first, he made the frivolous "861" argument that United States citizens are not subject to tax on income derived from United States sources, and also claimed that he did not understand the IRC, he did not understand whether the IRC applied to him, and he had never received notice that he is either a taxpayer or liable for tax. D399 at 135; GX87-11. Later, Snipes also claimed that: he did not generate "income"; remuneration that he received was exempt from taxation; tax that had been withheld from him had been withheld illegally and therefore had been stolen; he is not a "taxpayer" (which he defined as "one who operates a distilled spirit Plant"); he is not a United States "citizen"; he does not maintain a United States "domicile"; he is a "non-resident alien" of the United States; he is "divorcing" the United States; he is "not authorized" to file a Form 1040; Form 1040 creates a false presumption that he is a "statutory U.S. person"; it is impossible for him to sign a

Form 1040 “under penalty of perjury” because he is not under oath of office; Form 1040 has not been approved by the Office of Management and Budget; Form 1040 indicates that it originates with the IRS, but he cannot determine “who or what” the IRS is; the First, Fourth, and Fifth Amendments give him the right not to file a return; neither the Ninth Amendment nor any other constitutional provision states a right “to trust the Federal Government and to rely on the integrity of its pronouncements”; IRS assessments amount to Fifth Amendment takings; any social security number connected to him does not belong to him; human labor cannot be subject to taxation; individuals are not subject to income tax under the IRC, and their participation in taxation is voluntary; the term “United States” as used by the IRS does not include the 50 states; only the Virgin Islands has enacted the IRC; the “Internal Revenue” appears to be the “Puerto Rico special (Trust) fund,” the “internal revenue” appears to be the “Philippines Special (trust) fund,” and he has not incurred liability to those funds; only Congress has authority to impose taxes, and Congress has never passed the IRC; the IRS is not a federal agency, has no authority to determine liability or collect taxes, and cannot avail itself of any enforcement provision in the IRC; IRS service centers no longer have authority to receive and process returns; the Commissioner of the IRS has no authority to administer any tax but wagering tax; and 26 U.S.C. § 7203 is only a

penalty provision that does not establish liability.[5] GX106; GX128-1; GX128-2; GX129-1; GX134-1.

When Snipes asked his long-term tax advisors to consider the frivolous "861" argument, they informed him that: he was required to file returns; his contrary position was incorrect and "ridiculous"; there was "absolutely no way" that he could avoid filing a return based upon the "861" argument; if he did not believe them he should discuss the matter with other competent tax experts; and, for them to accurately prepare his returns, he had to give them information about money that he had transferred to foreign accounts and to his newly-created business entities.[6] D383 at 145-49, 167-68, 178-84, 195, 199-210; GX68-1-

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[5]In his brief, though not contesting the jury's finding that he had acted willfully, Snipes implies that he was merely a hapless dupe under Kahn's influence, Br. at 7-13; Snipes, however, made these frivolous claims in his own letters, signed only by him, and well after Kahn had fled to Panama. See D397 at 56-65 (Kahn fled in March 2004); GX106 (signed by Snipes in December 2006); GX128-1 (signed by Snipes in May 2004); GX128-2 (same); GX129-1 (same); GX134-1 (signed by Snipes in August 2005).

[6]Among other things, Snipes established the "Royal Guard of Amen Ra Ltd." in Antigua, which he described as an "offshore parent company (holding company)" for, inter alia, "asset protection," and moved $2.4 million to

GX68-3; GX68-5; GX68-6. Snipes refused to change his position, and so they terminated him as an accounting client, reiterating that his position was contrary to their advice and that they therefore could not effectively help him. D383 at 145-53, 184, 188; GX69. They sent follow-up letters to Snipes informing him of the return dates and providing information for the returns. D383 at 153; GX68-7-GX68-9. After the termination, Snipes's companies, Amen RA Films and Kymberlyte Production Services International, no longer separated payments for his personal expenses and those for his business expenses. D384 at 6-7, 43.

When Snipes asked Baker, an accounts payable employee of Amen RA Films, to consider the "861" argument at a "seminar" that he hosted at his house, she thought it was a "scam" and questioned how it could be true that United States citizens did not have to pay taxes; he responded by ordering her to leave his house and leave behind the seminar pamphlets and her notes. D384 at 4, 10-14. Afterward, Baker felt unwelcome in the office, and Amen RA Films stopped

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Switzerland, Antigua, and the Isle of Man. GX50; GX68-2; GX68-5. Snipes met with Kahn and an investor, and Snipes ordered that payments to Amen Ra Films be put in an envelope for that investor to deposit in Antigua. D384 at 20-22. Snipes sold his assets in Amen RA Films to a "Swiss Trust corporation" incorporated in Switzerland and then established "Amen Ra Films PCT," which he described as a "new unincorporated Pure Trust Organization." GX68-4; GX68-5.

deducting taxes from her and other employees' paychecks. Id. at 14-16. Baker contacted her accountant and the IRS to determine whether she herself needed to pay the taxes, after which Snipes called her into the back of the office and told her that he was "disappointed" in her, that he would "take care of his people," and that "he didn't know any other way to make them rich, but to go ahead and play along with the game." Id. at 17-19. When Baker responded that she did not agree with what had been presented at the seminar and felt that she had to pay her taxes, he told her that if she was "not going to play along with the game plan," she should find another job. Id. at 19.

In addition to not filing returns, Snipes filed an amended tax return, prepared by Rosile, based upon the "861" argument in which he sought a refund of more than $4 million.[7] GX87-5. An IRS employee explained that his "861" argument was frivolous and had been rejected resolutely by courts; Snipes, through his representative, responded by threatening the employee with disciplinary action and demanding a refund with interest. GX87-6; GX87-7. Snipes filed another amended income tax return, again prepared by Rosile and again based upon the "861" argument, this time seeking a refund of more than $7 million. GX64. In

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[7]This type of fraudulent return has worked for some; upon receipt of an amended tax return seeking a refund, the IRS service center may send the refund immediately but mistakenly. D398 at 68; D400 at 46.

that one, Snipes altered the standard jurat to state that he was filing it under "no penalty" of perjury. Id.; D383 at 27-28.

Even though Snipes purported to believe that he did not have to file returns or pay taxes, he–four times–sent the Department of Treasury official IRS Payment Vouchers (Form 1040-ES) together with fraudulent Bills of Exchange,[8] in which he purported to draw upon a fictitious personal account–complete with a nonexistent account number–with the Department of Treasury. D398 at 158-65; GX117-GX120. Two were for $1 million, one was for $12 million; and one was for $27,485.31. GX117-GX120. With some, Snipes included UCC Financing Statements in which he purported to offer himself as collateral, and official but irrelevant documents upon which he stamped official-appearing but nonsensical words.[9] D398 at 163-65; GX117-GX120.

Snipes also sent the IRS a document that he entitled "Filing Statement For Tax Year 1999 in Affidavit Form" and similar documents for 2000 and 2005. GX128; GX134. In each document, he stated that the document was a "return," stated frivolous reasons for not filing a Form 1040 or paying taxes, and "directed"

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[8]A Bill of Exchange ordinarily is a legitimate financial document between two parties for, e.g., the sale of goods or securities. D398 at 158.

[9]A UCC Financing Statement ordinarily is a legitimate financial document used by a lender to secure its right to certain collateral. D398 at 163-64.

the IRS to correct any erroneous statements that he had made. GX128; GX134. In numerous follow-up letters, Snipes purported to enter "default" judgment against the IRS for failure to "rebut" his statements. GX130; GX132; GX133; GX135; GX136.

IRS Special Agent Cameron Lalli began investigating Snipes after the IRS received his second amended tax return seeking a refund based upon the "861" argument. D397 at 78. At the end of May 2002, Agent Lalli spoke to Snipes and his lawyer by telephone, and Agent Lalli advised Snipes that he was under investigation for tax crimes and read him his non-custodial rights, which included his right to remain silent. Id. at 85-89, 132-33. (The Fifth Amendment, however, does not relieve one of the obligation to file returns. D398 at 133.) Snipes replied: "very interesting." D397 at 88-89. By letter, Agent Lalli tried to arrange an in-person meeting with Snipes, but that letter was returned to sender. Id. at 90.

The next year, Snipes sent IRS Special Agent Gary Graf, also assigned to Snipes's case, two letters, one with 228 pages of attachments, in which he questioned Agent Graf's authority. GX139; GX140. In one, Snipes asserted that he was "startled by a little-known regulation that casts substantial doubt upon [his] belief that IRS Special Agents such as yourself are really law enforcement officers." GX139. Snipes cited a regulation that addresses a deduction for unmarked law enforcement vehicles. Id.; D398 at 170.

Through an administrative summons, Agent Lilli tried to get financial documents of Amen RA Films to help the investigation by shedding light on Snipes's income and how he was conducting his business, but that summons was refused. D397 at 91-92. The grand jury then served subpoenas upon Sandra Farrior, the office manager for Amen RA Films, and Baker, her subordinate, for financial documents. D397 at 92-93; D384 at 6, 50. When Farrior received the subpoena, she threw it on the ground. D397 at 94. When Baker received the subpoena, she called Farrior. D384 at 51. Snipes then called Baker and "told [her] not to respond, not to talk to anybody or to disclose any information on the company." Id. at 52. When Baker asked why, and observed that it was government-issued, Snipes responded, "It doesn't matter. I have that paper [a confidentiality agreement] with your signature on it. . . . And if you do contact them, you will have to pay the consequences." Id. The conversation made Baker feel "very upset," "uneasy," and "scared." Id. The United States did not succeed in getting documents from Amen RA Films. D397 at 94-95.

Snipes made accusations and threats against IRS employees involved in his case. He accused them of intending to extort money and property from him, of engaging in or condoning racketeering and "RICO activity," and of engaging in "identity theft" by usurping his social security number and assigning it to "an unauthorized fictional corporation titled Wesley Snipes." GX106; GX129. Snipes

claimed that: he was a victim of their fraud; the criminal investigation of him had resulted from "posting errors" by "improperly supervised IRS employees"; and he was trying to "lawfully disassociate" with what he considered "a corrupted, lawless, unaccountable oppressor of our constitutional rights." GX129-1. Snipes threatened them that: illegal collection action "will result in significant personal liability for you and your supervisor"; their failure to rebut his arguments was a felony; and "pursuit of such a high profile target will open the door to your increased collateral risk." GX106. To the latter threat, Snipes added, "I certainly don't believe this is in your best interest and can be avoided." Id.

Snipes also made accusations and threats against the Department of Justice. He accused the DOJ and the IRS of "engaging in criminal activities" and conspiring against him "to promote, exploit, and manipulate the fear, ignorance, and compelled presumptions that YOU, as the government, manufactured in the public FOOL system to turn the jury into an angry lynch mob of tax consumers who will be upset about having their federal 'benefits' reduced." Id. Snipes claimed that the asserted "conspiracy against his rights" was a criminal trespass for which he intended to file a criminal complaint against the DOJ and the court. Id. Snipes threatened the DOJ that if it did not dismiss the indictment, he reserved the right to file a "mandatory criminal cross-complaint against the U.S. Attorney." Id.

2. VENUE

Snipes was born in Orange County, Florida, in the Middle District of Florida. GX117. In January 1992, he incorporated Amen RA Films in Florida. GX30. In March 1992, he bought a home among other celebrity homes in Isleworth Country Club, an exclusive development in the Orlando suburb of Windermere, Orange County, Florida. D381 at 140-42; GX2-1. Snipes bought the home for himself but told the seller that he wanted to put the deed in his company's name because he was getting a divorce and did not want the house to be part of it. D381 at 141-42.

Snipes has had a Florida driver's license since 1978. GX1-1. He used his Windermere address for license renewals for 1997-2004 and 2004-2010. GX1-2; GX1-3.

In 1996, 2001, and 2003, Snipes signed contracts for his work in Blade, Blade II, and Blade III, respectively. GX71. In them, Snipes, through his companies, represented and warranted that his "current place of residence is Windermere, Florida." D397 at 9-10, 15, 25, 49-50; GX71. Based upon those representations and warranties, the movie makers agreed to pay Snipes travel-related expenses (such as first-class airfare, a weekly allowance of $2000, and monthly hotel reimbursement of up to $10,000) if his services were needed more than 75 miles from Windermere. GX71.

In his application for services received by American Rights Litigators in March 2000, Snipes listed his Windermere address as his address. GX87-1.

In a UCC Financing Statement that Snipes filed with the Texas Secretary of State in 2000, Snipes listed his Windermere address as his mailing address. D397 at 165; GX87-8.

In March 2003, Snipes filed documents with the Comptroller of Orange County, Florida, identifying his Windermere address as his home. D381 at 89-90; GX2-1-GX2-4. In one, Snipes attached the deed to his Windermere home, averred that he is a citizen of Florida, and claimed all rights guaranteed to him as a Florida citizen by the Florida Constitution. GX2-1. In another, Snipes averred that he is a citizen of Florida and set forth his Windermere address. GX2-2. In another, Snipes averred that he had "taken up dwelling" at his Windermere home and that he desired to avail himself of any homestead property-tax exemption. GX2-3. In another, Snipes averred that he had maintained his "de jure domicile" in Orange County since 1977 and recognized and intended his Windermere address to be his "permanent," "predominant," and "principal" home even if he has or buys additional houses elsewhere. GX2-4.

From 2000 to 2004, Snipes sent the IRS and the Department of Treasury various documents in which he listed his Windermere address as his address: (1) a Form 1040-ES for 2000, GX118; (2) another Form 1040-ES for 2000, GX119; (3)

a letter concerning power of attorney authorization signed in March 2000, GX87-2; (4) a Form 2848 signed in March 2000, GX87-4; (5) an October 2000 UCC Financing Statement, GX118; GX119; (6) a Form 1040-ES for 2001, GX119; (7) a January 2001 UCC Financing Statement, GX119; (8) a July 2002 UCC Financing Statement, GX117; and (9) a Form 2848 signed in March 2004, GX58.

In August 2005, Snipes sued New Line Cinema and others in a California federal court. D381 at 97-100; D397 at 25, 51-52. In the verified complaint, Snipes swore, under penalty of perjury, that he "is a citizen and resident of the State of Florida." GX2-5.

C-1. STATEMENT OF THE STANDARD OR SCOPE OF REVIEW FOR DEFENDANT'S ISSUES

I. This Court will review for abuse of discretion the district court's denial, on untimeliness grounds, of Snipes's statutory election to transfer venue. See U.S. v. Smith, 918 F.2d 1501, 1509 (11th Cir. 1990); see also U.S. v. Humphreys, 982 F.2d 254, 260 (8th Cir. 1992) (reviewing for abuse of discretion court's refusal to transfer case based upon untimely election pursuant to 18 U.S.C. § 3237(b)). This Court will review de novo Snipes's related legal arguments. See U.S. v. Jackson, 544 F.3d 1176, 1181 n.1 (11th Cir. 2008).

II. This Court will review for abuse of discretion the district court's denial of Snipes's pretrial motion for an evidentiary hearing on his motion to change venue. See U.S. v. Diaz, 811 F.2d 1412, 1414 (11th Cir. 1987). This Court will review de novo Snipes's related constitutional arguments. See U.S. v. Brown, 364 F.3d 1266, 1268 (11th Cir. 2004).

III. This Court will review for plain error the district court's failure to grant Snipes judgment of acquittal, sua sponte, based upon evidence of venue because Snipes did not raise that issue below. See U.S. v. Hunerlach, 197 F.3d 1059, 1068 (11th Cir. 1999). Thus, this Court would undertake discretionary review only if the district court committed error and the error was plain, affected Snipes's substantial rights, and seriously affected the fairness, integrity, or reputation of the trial. See id.

IV. This Court will review for abuse of discretion the district court's denial of Snipes's request for a jury instruction on good faith reliance upon the Fifth Amendment. See U.S. v. Merrill, 513 F.3d 1293, 1305 (11th Cir. 2008).

V. This Court will review de novo the district court's application of USSG §2T1.1(a) to Snipes's crimes. See U.S. v. Ndiaye, 434 F.3d 1270, 1280 (11th Cir. 2006).

VI. This Court will review for clear error the district court's factual findings concerning Snipes's obstruction of justice and will review de novo the district court's application of USSG §3C1.1 to those findings. See U.S. v. Massey, 443 F.3d 814, 818 (11th Cir. 2006).

VII. This Court will review de novo whether the district court violated Snipes's Sixth Amendment rights by relying upon non-jury findings to determine his sentencing guidelines range. See U.S. v. Chau, 426 F.3d 1318, 1321 (11th Cir. 2005).

VIII. This Court will review for abuse of discretion the district court's sentence if it concludes that Snipes sufficiently preserved an argument that the sentence is substantively unreasonable. See Gall v. U.S., 128 S. Ct. 586, 597 (2007). This Court should review for plain error that sentence if it concludes that Snipes did not sufficiently preserve that argument by his narrow post-sentence objection. See U.S. v. Palis, No. 07-15721, 2008 WL 5401436 *4 & *4 n.1 (11th Cir. Dec. 29, 2008) (unpublished); see also U.S. v. Peltier, 505 F.3d 389, 391 (5th Cir. 2007) (agreeing with five other circuits that failure to object to sentence as substantively unreasonable triggers plain error review), cert. denied, 128 S. Ct. 2059 (2008); but see U.S. v. Castro-Juarez, 425 F.3d 430, 433-34 (7th Cir. 2005).

C-2. STATEMENT OF THE STANDARD OR SCOPE OF REVIEW FOR UNITED STATES' ISSUE

This Court will review for clear error the district court's factual findings concerning Snipes's use of sophisticated means and will review de novo the district court's failure to apply USSG §2T1.1(b)(2) to those findings. See U.S. v. Campbell, 491 F.3d 1306, 1315 (11th Cir. 2007).

SUMMARY OF THE ARGUMENT IN RESPONSE TO DEFENDANT'S ARGUMENTS

I. The court correctly applied the express transfer election period in 18 U.S.C. § 3237(b). That election period has not been superseded by implication and cannot be disregarded. Fed. R. Crim. P. 21 was still available to Snipes after he missed that election period.

II. The court acted pursuant to precedent by submitting the disputed factual issue of venue to the jury. As with any other factual issue that is part of the prosecution's case, Snipes did not have a right to a bench trial before the jury trial on that issue.

III. Snipes has failed to establish the plain-error prerequisites for this Court's discretionary review of the sufficiency of the evidence to establish venue in the Middle District of Florida. The evidence included that Snipes was born there, owned a home there, and often claimed that home as his address.

IV. The court did not abuse its discretion in declining to give Snipes's requested supplemental jury instruction on good faith reliance upon the Fifth Amendment. That defense was not before the jury for his counts of conviction because it derived from advice that Agent Lalli gave him after he had completed those crimes. Moreover, Snipes's instruction was covered by the

court's instructions on willfulness and general good faith, and its absence did not seriously impair his ability to present an effective defense.

V. The court correctly determined Snipes's base offense level in accordance with USSG §2T1.1, the guideline for his crimes. This Court already has rejected the argument that the Commission did not comply with the directive in 28 U.S.C. § 994(j). Applying section 2T1.1 to all defendants found guilty of violating 26 U.S.C. § 7203 avoids unwarranted sentencing disparities.

VI. The court did not clearly err in imposing an obstruction-of-justice enhancement based upon Snipes's instruction to Baker not to respond to a grand jury subpoena and threatening her with recourse if she did so. The evidence supported that Snipes intended to obstruct justice and that the subpoena requested documents pertinent to this case. Even if the court had clearly erred, the error would be harmless because the court should have imposed an equivalent two-level enhancement for Snipes's use of sophisticated means, so this error would not have affected Snipes's sentence.

VII. Binding precedent precludes success on Snipes's argument that the district court violated his Sixth Amendment rights by relying upon judicial factfinding to determine his advisory sentencing guidelines range.

VIII. Snipes has failed to satisfy his burden of proving that his sentence is substantively unreasonable. His guidelines range sentence is reasonable considering, inter alia, his history of contempt for tax laws, the enormous tax loss that he intended, the need to promote respect for tax laws, and the need to deter others from choosing not to file their returns or pay taxes that are due.

SUMMARY OF THE ARGUMENT FOR UNITED STATES' CROSS-APPEAL

For the reasons presented in this brief, this Court should affirm Snipes's judgment and sentence. Affirmance would make the United States' cross-appeal moot. If, however, this Court concludes that the district court erred in applying the obstruction-of-justice enhancement, this Court should reverse the district court's ruling on the sophisticated-means enhancement and conclude that any error on obstruction of justice was harmless. If this Court concludes that the district court imposed a substantively unreasonable sentence, this Court should reverse the district court's ruling on the sophisticated-means enhancement.

ARGUMENT AND CITATIONS OF AUTHORITY IN RESPONSE TO DEFENDANT'S ARGUMENTS

I. THE COURT CORRECTLY DENIED SNIPES'S UNTIMELY STATUTORY ELECTION TO TRANSFER THE CASE.

Snipes argues that the court erred in denying as untimely his election to transfer the case to the Southern District of New York, contending that Fed. R. Crim. P. 12(c) superseded the transfer election period in 18 U.S.C. § 3237(b); and, even if the election period is effective, the court should have disregarded it based upon the scheduling order and his former counsel's asserted excusable neglect. Br. at 20-24. To the contrary, the court correctly applied that express statutory election period.

Venue for willful failure to file a return, in violation of 26 U.S.C. § 7203, is proper in both the judicial district of the defendant's legal residence at the time of the offense and the judicial district of the applicable IRS service center. U.S. v. Calhoun, 566 F.2d 969, 973 (5th Cir. 1978). To allow a defendant the option of defending a section 7203 prosecution in the judicial district where he resides rather than the potentially distant district of the applicable IRS service center, section 3237(b) provides that if a section 7203 prosecution is begun in a judicial district other than the district where the defendant had resided, the defendant "may upon

motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: Provided, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information." 18 U.S.C.
§ 3237(b) (emphasis in original); see In re U.S., 608 F.2d 76, 79 (2d Cir. 1979). Thus, through section 3237(b), Congress gave tax defendants a transfer right, but circumscribed that right by requiring those seeking to invoke it to do so within 20 days of arraignment. The purpose of that circumscription is "to prevent dilatory transfers by defendants," S. Rep. No. 85-1952 (1952), as reprinted in 1958 U.S.C.C.A.N. 3261, 3263, and the concomitant issues associated with transferring lengthy records, Abrams v. McGohey, 260 F.2d 892, 894 (2d Cir. 1958).

This Court need not address Snipes's arguments concerning section 3237(b) because any error in the court's application of the transfer election period would be harmless. See Fed. R. Crim. P. 52. The jury's finding that Snipes's residence was in the Middle District of Florida was supported by a preponderance of the evidence, see Argument III below, and therefore is binding upon this Court. See U.S. v. Brown, 415 F.3d 1257, 1271-72 (11th Cir. 2005) (jury finding on conflicting evidence binding). Because the prosecution was brought "in the district in which [Snipes] was residing at the time the alleged offense was committed," the statutory transfer election does not benefit him. See 18 U.S.C.

§ 3237(b).

If this Court proceeds further, it should conclude that the district court correctly applied the statutory transfer election period by denying Snipes's untimely transfer election made over five months after his arraignment on the failure-to-file charges. The 20-day transfer election period is unambiguous, Abrams, 260 F.2d at 894, and the court therefore was correct to apply it, see Carlisle v. U.S., 517 U.S. 416, 116 S. Ct. 1460 (1996) (court must apply limitation period in Fed. R. Crim. P. 29(c) for filing acquittal motion); U.S. v. Albertini, 472 U.S. 675, 680, 105 S. Ct. 2897, 2902 (1985) (courts applying criminal law must follow statute to avoid trenching upon "legislative powers vested in Congress").

In the district court, Snipes acknowledged that the statutory transfer election period was a "mandatory deadline" when he accused his former counsel of ineffectiveness, asserting that counsel "familiar with federal criminal tax matters would never make [that] critical oversight." D282 at 3; D224 at 9-10. Nevertheless, to circumvent the transfer election period in section 3237(b), Snipes argues that Rule 12(c), which allows district courts to set pretrial motion deadlines, implicitly superseded section 3237(b). Br. at 21. That argument fails for three separate reasons.

First, Snipes's supersession argument fails because it disregards that, absent clear congressional intent to the contrary, a general rule does not undermine a

specific one, regardless of priority. See Morton v. Mancari, 417 U.S. 535, 550-51, 94 S. Ct. 2474, 2483 (1973); accord ConArt, Inc. v. Hellmuth, Obata + Kassabaum, Inc., 504 F.3d 1208, 1210 (11th Cir. 2007). Rule 12(c) is a general rule concerning district court discretion to set pretrial motion deadlines; section 3237(b) is a specific statute concerning the time to make a transfer election; there is no congressional intent for the former to undermine the latter; thus, Rule 12(c) does not supersede section 3237(b).

Second, Snipes's supersession argument fails because it disregards that Rule 12(c) and section 3237(b) do not directly conflict. Implicit repeals of statutory provisions are disfavored. Laperriere v. Vesta Ins. Group, Inc., 526 F.3d 715, 719 (11th Cir. 2008). Read harmoniously to avoid implicit repeal, section 3237(b) simply governs a defendant's obligation to make his transfer election within the election period to prevent dilatory transfers that waste judicial resources, while Rule 12(c) simply governs a court's discretion to set deadlines for the filing of various pretrial motions to encourage the making of motions before trial. See Fed. R. Crim. P. 12 advisory committee's note (subsection (c) is "designed to make possible and to encourage the making of motions prior to trial, whenever possible, and in a single hearing rather than a series of hearings.").

Third, even assuming direct conflict, Snipes's supersession argument fails because a statute passed after a conflicting rule takes precedence over the rule,

Mitchell v. Farcass, 112 F.3d 1483, 1489 (11th Cir. 1997), and Congress passed section 3237(b)–with its transfer election period–in 1958, see Pub. L. No. 85-595, 72 Stat. 512, after the Supreme Court had adopted Rule 12–with its provision of district court discretion to set pretrial motion deadlines–in 1944, see Fed. R. Crim. P. 12(b)(3) (1944). Even though the Court amended Rule 12 in 1974, its provision giving courts discretion to set pretrial motion deadlines did not change in a way that materially affected that discretion, and certainly not in a way that would indicate an intent to repeal the transfer election period. Compare Fed. R. Crim. P. 12(b)(3) (1944) ("Time of Making Motion") with Fed. R. Crim. P. 12(c) (1974) ("Motion Date"); see Fed. R. Crim. P. 12 advisory committee's note.

In any event, even if Rule 12(c) would have allowed the district court to extend section 3237(b)'s deadline, the court nonetheless declined to apply the rule retroactively, noting that Snipes had not requested a deadline extension until after the transfer election period had expired. D188 at 11-12.

Snipes next argues that, regardless of supersession, the court could have disregarded or tolled the election period in section 3237(b) by using its power to control its case scheduling and to excuse untimeliness. Br. at 23-25. Snipes's alternative argument fails because it disregards that the statutory election period is an inflexible one.[10]

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[10]To the extent that Snipes argues that the court could have used its general

Courts may relax some limitation periods but must strictly enforce others. See John R. Sand & Gravel Co. v. U.S., 128 S. Ct. 750, 753 (2008). Those in the former category may be relaxed because special equitable considerations underlie the law and weigh more heavily than the need for strict enforcement. Id. at 753. Those in the latter category must be strictly enforced because they are jurisdictional, see Bowles v. Russell, 551 U.S. 205, 127 S. Ct. 2360, 2366 (2007) (time for filing civil notice of appeal); because they are inflexible claims-processing rules, Eberhart v. U.S., 546 U.S. 12, 15, 126 S. Ct. 403, 404-05 (2005) (time for filing motion for new trial); or because their structure indicates inflexibility and the availability of tolling would create administrative problems, U.S. v. Brockamp, 519 U.S. 347, 350-53, 117 S. Ct. 849, 851-52 (1997) (time for filing tax refund claim).

Although not jurisdictional, the election period in section 3237(b) falls into the latter category and not the former. That conclusion is compelled by the language of section 3237(b). Immediately after conferring the transfer right,

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supervisory power to disregard the election period, that argument fails because a court's use of such power is invalid if it conflicts with statutory provisions; "To allow otherwise would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." Bank of Nova Scotia v. U.S., 487 U.S. 250, 254, 108 S. Ct. 2369, 2373 (1988).

Congress not only used but also emphasized the word, "Provided." The use and emphasis of that word indicate intent for strict enforcement. See Alaska N. R. Co. v. Municipality of Seward, 229 F. 667 (1916) ("provided" is expression of congressional intent "to withhold something out of that which in general terms has been granted"). "There is simply no room in the text . . . for the granting of an untimely" transfer election. See Carlisle, 517 U.S. at 420, 116 S. Ct. at 1464 (quoted). Moreover, that Congress did not include time-limitation periods in other venue statutes supports that Congress intended strict enforcement of the one that it did include in section 3237(b). See, e.g., 28 U.S.C. §§ 1402, 1404, 1406, 1407, 1412; cf. Love v. Delta Air Lines, 310 F.3d 1347, 1357 (11th Cir. 2002) (inclusion of language in one section but omission in another creates presumption that Congress acted purposely in disparate inclusion and exclusion).

The conclusion that a court must strictly enforce the election period in section 3237(b) also is compelled by its purpose. Like other inflexible claims-processing rules, the election period has a broad system-related goal of promoting judicial efficiency. See S. Rep. No. 85-1952 (1952), as reprinted in 1958 U.S.C.C.A.N. 3261, 3263. Accomplishment of that goal can be realized only through strict enforcement. See John R. Sand, 128 S. Ct. at 753 (limitation periods with broad system-related goals are absolute to ensure accomplishment of goals); Eberhart, 546 U.S. at 15 (claims-processing rules are inflexible absent forfeiture);

see also U.S. v. Leijano-Cruz, 473 F.3d 571, 574 (5th Cir. 2006) (court does not err in enforcing inflexible claims-processing rule). Invocation of Rules 12, 21, and 45, as Snipes suggests, would undermine both that goal and the requirement that rules must be construed to eliminate unjustifiable expense and delay. See Fed. R. Crim. P. 2. Here, for example, the court's disregard of section 3237(b) would have resulted in a waste of judicial resources in both the Middle District of Florida and the Southern District of New York.

The availability of Fed. R. Crim. P. 21 negates that a defendant would ever be unduly penalized by strict enforcement of the election period. A tax defendant's right to transfer his case pursuant to section 3237(b) is absolute in the sense that, if properly and timely invoked, a court must transfer the case without consideration of any factor that would warrant leaving the case where it is. If a defendant misses the election period, Rule 21 remains available to him. By then, however, time has passed, judicial resources have been spent, and other considerations that the court should be allowed to consider–in addition to the defendant's residency–have become important. Here, for example, Snipes, having missed the election period by more than five months, also sought transfer pursuant to Rule 21. D144. The court considered that motion and found that transfer was not warranted by the interests of justice and other pertinent factors such as the location of Snipes (California), any travel hardship to him (he requested leave to travel to Canada and

Africa anyway), the location of witnesses (many in Florida), the location of events (many in Florida), the location of documents (many available by computer), and the location of counsel (Florida, Georgia, and Washington, D.C.). D188 at 14-22; D328 at 13-14. Moreover, even if the court could have disregarded the election period in section 3237(b), it would not have done so based upon Snipes's former counsel's failure to understand that period because such failure does not constitute excusable neglect. See Corwin v. Walt Disney Co., 475 F.3d 1239, 1255 (11th Cir. 2007).

Snipes has not shown error in the application of the express transfer election period in section 3237(b). He is not entitled to relief.

II. THE COURT ACTED WITHIN ITS DISCRETION IN DECLINING TO HOLD A PRETRIAL EVIDENTIARY HEARING ON SNIPES'S MOTION TO TRANSFER THE CASE.

Snipes argues that the court abused its discretion by declining to hold a pretrial evidentiary hearing on his motion to transfer the case, contending that he had a right to have the court decide before trial the disputed issue of his residency. Br. at 24-28. To the contrary, the court acted pursuant to longstanding precedent by submitting that disputed factual issue to the jury.

The Constitution provides that a criminal trial shall be held in the state where the crime was committed, U.S. Const. art. III, § 2, cl. 3; and that the accused has a right to be tried by an impartial jury of the state and district where the crime was committed, U.S. Const. amend. VI; accord Fed. R. Crim. P. 18. Venue is an "essential element[] of any offense." U.S. v. Rivamonte, 666 F.2d 515, 517 (11th Cir. 1982). A disputed issue of venue is a question of fact for the jury to decide. Green v. U.S., 309 F.2d 852, 856-57 (5th Cir. 1962); U.S. v. Muhammad, 502 F.3d 646, 656 (7th Cir. 2007).

"[A] court may not dismiss an indictment . . . on a determination of facts that should have been developed at trial." U.S. v. Torkington, 812 F.2d 1347, 1354 (11th Cir. 1987). Thus, an indictment, "if valid on its face, is enough to call for trial of the charge on the merits." Costello v. U.S., 350 U.S. 359, 363, 76 S. Ct. 406, 409 (1956). To hold otherwise and allow each defendant "a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury" would run counter to the history of the grand jury institution and would result in "interminable delay" without adding "to the assurance of a fair trial." Id. at 363-64; 76 S. Ct. at 408-09.

The indictment alleged that Snipes was a resident of Windermere, Orange County, Florida. D6 at 12. Snipes conceded that those allegations were "sufficient facts to confer venue in the Middle District of Florida." D328 at 10. Because the

indictment was facially sufficient, and because the disputed issue of venue is factual question for the jury, the court correctly denied Snipes's request for a pretrial evidentiary hearing to decide his residency and correctly submitted that issue, like the other disputed factual issues, to the jury.

Snipes nevertheless argues he has a right–one apparently not previously recognized–to a pretrial evidentiary hearing to decide the disputed factual issue of his residency, contending that his venue right cannot be "meaningfully vindicated by putting the question of what place that is only to a jury selected in the disputed location." Br. at 26. In essence, Snipes asks this Court to create a new right to a bench trial before a jury trial to decide part of the prosecution's case. That request conflicts with precedent that a district court cannot decide facts that should be developed at trial, see Torkington, 812 F.2d at 1354, and asks for the creation of a new right and concomitant criminal procedure that would result in "interminable delay" without adding anything to the "assurance of a fair trial," see Costello, 350 U.S. at 364, 76 S. Ct. at 409 (quoted).

Snipes's argument that the venue right cannot be "meaningfully vindicated" without a pretrial evidentiary hearing disregards that the right may be upheld by use of a motion to dismiss if the grand jury returned an indictment that insufficiently alleged venue (Snipes tried this but later conceded that the indictment sufficiently alleged venue); by use of an acquittal motion based upon

proof of venue (Snipes did not even try this); and by use of direct appeal (Snipes now raises sufficiency of evidence to prove venue). This conclusion is compelled by this Court's binding precedent and, as it turns out, by law of the case. See U.S. v. Snipes, 512 F.3d 1301 (11th Cir. 2008). In dismissing Snipes's interlocutory appeal of the denials of his requests for pretrial evidentiary hearings on his venue-related motions, this Court held that it lacked jurisdiction because "an order pertaining to venue is effectively reviewable after entry of judgment" and explained that Snipes's venue claim was "unlike [claims] involving the right not to be subjected to double jeopardy and similar rights which would be lost by going to trial" and could "be adequately reviewed and any rights vindicated on direct appeal." Id. at 1302 & 1302 n.1.

Snipes also argues that adjudicating venue at trial meant that he could not testify about his residency without giving up his right not to incriminate himself. Br. at 26-27. For that argument, Snipes cites Simmons v. U.S., 390 U.S. 377, 88 S. Ct. 967 (1968), in which the Court held that, to prevent a defendant from being deterred from asserting his Fourth Amendment rights, his testimony as to standing at a suppression hearing was inadmissible against him at trial. Simmons, 390 U.S. at 394, 88 S. Ct. at 976. Snipes, however, never sought to offer his testimony in his requests for pretrial evidentiary hearings, never requested judicial immunity to do so, never proffered what his testimony would be, and never put on evidence of

residency at trial through other sources. See generally D192; D282; D328. In any event, Snipes's argument fails because this Court has declined to extend Simmons in recognition that "Simmons . . . has been considerably narrowed and its reasoning questioned." In re Federal Grand Jury Proceedings, 975 F.2d 1488, 1492 (11th Cir. 1992).

Snipes asks this Court to remand the case for another evidentiary hearing (the jury trial was the first one) and a second factual finding of his residency (this time by the court and not the jury). Br. at 54. Snipes is not entitled to relief.

III. THE COURT DID NOT ERR, LET ALONE PLAINLY ERR, IN NOT SUA SPONTE ENTERING JUDGMENT OF ACQUITTAL BASED UPON INSUFFICIENT PROOF OF VENUE.

Snipes argues that the court should have acquitted him of his crimes, contending that the United States presented insufficient evidence of venue in the Middle District of Florida. Br. at 28-37. Snipes has not demonstrated any of the plain-error prerequisites for reversal.

The United States bears the burden of proving venue by a preponderance of the evidence, not by the more difficult beyond-a-reasonable-doubt standard. U.S. v. Wuagneux, 683 F.2d 1343, 1357 (11th Cir. 1982). The United States may satisfy that burden through circumstantial evidence. Id. When a defendant challenges venue, this Court asks "whether, viewing the evidence in the light most favorable to the government and making all reasonable inferences and credibility choices in favor of the jury verdict," the United States "proved by a preponderance of the evidence that the crimes occurred in the district in which the defendant was prosecuted." U.S. v. Breitweiser, 357 F.3d 1249, 1253 (11th Cir. 2004).

At Snipes's request, the court instructed the jury that: Snipes had a constitutional right to venue where he allegedly had committed his crimes; venue was proper in the district where Snipes had his "legal residence"; "legal residence" meant "the permanent fixed place of abode which one intends to be his residence and to return to it, despite absences or temporary residence elsewhere"; whether the United States had satisfied its burden to prove that Snipes's "legal residence" was in the Middle District of Florida was an issue; and if the United States had not satisfied that burden, the jury had to acquit Snipes of the failure-to-file charges. D395 at 1-2; D406 at 184-86; D416 at 18-19. This Court must assume "that the jury evaluated the evidence in light of" that correct statement of the law. See U.S. v. Calhoun, 566 F.2d 969, 973 (5th Cir. 1978) (quoted).

As the jury found, the United States proved venue by a preponderance of the evidence. Snipes owned a home in Windermere, which is in the Middle District of Florida. D381 at 140-42; GX2-1. Snipes has a Florida driver's license and listed that Windermere address for renewals for 1997-2004 and 2004-2010. GX1-1-GX1-3. Snipes, through his companies, represented and warranted that his "current place of residence is Windermere" in the Blade I, Blade II, and Blade III contracts he signed in 1996, 2002, and 2003. GX71-1-GX71-3. Snipes filed documents with the Comptroller of Orange County, Florida, identifying his Windermere address as his home, seeking a homestead tax exemption for that home, stating that he had "taken up dwelling" in that home, and averring that it was his "permanent," "predominant," and "principal" home even if he bought houses elsewhere. GX2-1-GX2-4. Snipes sent numerous documents to the IRS and other entities in which he listed his Windermere address as his address. GX58; GX87-1; GX87-2; GX87-4; GX87-8; GX117-GX119. In a pleading in a federal case, Snipes swore under penalty of perjury that he "is a citizen and resident of . . . Florida." GX2-5.

Based upon that evidence, viewed in the light most favorable to the United States and drawing all reasonable inferences in favor of the jury's guilty verdict, the court did not err, plainly or otherwise, in not sua sponte acquitting Snipes of his crimes based upon proof of venue. Even assuming error, given that same evidence,

Snipes has not demonstrated error that affected his substantial rights or substantially affected the fairness, integrity, or public reputation of judicial proceedings. See Johnson v. U.S., 520 U.S. 461, 469, 117 S. Ct. 1544, 1550 (1997). Snipes observes that the venue right is premised upon the policy that an accused should not be sent arbitrarily to a "strange locality" to defend charges. Br. at 25-26. The Middle District of Florida was not arbitrarily chosen and was not a strange locality to Snipes; he was born there, he owned a home there, he often claimed that home as his residence, dwelling, and address, and he had to defend his conspiracy and false-claims charges there. Moreover, for a movie star with homes in many states (Florida, California, New Jersey, and New York, D188 at 15; D381 at 140; D384 at 38-39, 72; D394 at 28) and jobs in many countries (United States, Namibia, and Canada, D188 at 16 n.22), Snipes likely would have challenged the evidence of venue no matter where the case was brought.[11]

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[11]For example, Snipes filed a civil rights action in New York challenging a New York court's exercise of jurisdiction over him, arguing that he "had insufficient ties with the State of New York to meet Fourteenth Amendment due process standards" and asserting that "[a]t no time" between February 2001 and January 2005 was he "a resident of, or domiciled in, . . . the State of New York." D303 at 2-3 & Exs. 2, 3. On appeal in that case, Snipes observed that he had included his Florida driver's license to "document[] his Florida residence." Id.

Snipes's argument is flawed because it does not employ the applicable plain-error standard of review and even disregards the less stringent standard of review that he purports to apply because it is based upon his own rendition of the evidence instead of upon evidence viewed in the light most favorable to the United States, with all reasonable inferences in favor of the jury verdict. See Breitweiser, 357 F.3d at 1253. Indeed, his argument to this Court reads much like his closing argument to the jury, which the jury rejected based upon the evidence summarized above. Compare Br. at 29-37 with D406 at 98-116.

Without establishment of the plain error prerequisites, Snipes is not entitled to relief.

IV. THE COURT ACTED WITHIN ITS DISCRETION IN DECLINING TO GIVE SNIPES'S REQUESTED JURY INSTRUCTION ON GOOD FAITH RELIANCE UPON THE FIFTH AMENDMENT.

Snipes argues that the court abused its discretion in declining to give his requested jury instruction on good faith reliance upon the Fifth Amendment. Br. at 37-43. To the contrary, the court acted well within its discretion.

This Court gives district courts "broad discretion in formulating jury instructions." U.S. v. Mintmire, 507 F.3d 1273, 1293 (11th Cir. 2007). Thus, this Court will not reverse a district court's declination to give a requested instruction

unless the defendant establishes that: (1) it was substantially correct; (2) it dealt with an issue properly before the jury; (3) it was not otherwise addressed; and (4) the failure to give it seriously impaired the defendant's ability to present an effective defense. U.S. v. Lyons, 53 F.3d 1198, 1200 (11th Cir. 1995). Snipes has not established the second, third, and fourth prerequisites.

To obtain a conviction for a violation of 26 U.S.C. § 7203, the United States must prove that the defendant acted willfully. Cheek v. U.S., 498 U.S. 192, 193-94, 111 S. Ct. 604, 606 (1991). "Willfulness" is the "voluntary, intentional violation of a known legal duty." Id. at 201, 111 S. Ct. at 610. Thus, good faith may negate willfulness, id. at 202, 111 S. Ct. at 610, and, although the Fifth Amendment cannot justify the failure to file a return, "a good faith claim of privilege against self-incrimination . . . is a defense to the element of willfulness," U.S. v. Goetz, 746 F.2d 705, 710 (11th Cir. 1984).

Here, Snipes's requested instruction did not deal with an issue properly before the jury with respect to his counts of conviction (for 1999, 2000, and 2001). For his Fifth Amendment defense, Snipes argued to the jury that he had not acted willfully because he had had a "good faith" belief that he did not have to file returns based upon Special Agent Lalli's advice that he had the right to remain silent. D406 at 63, 75-76, 90, 92-96. That defense did not pertain to his three counts of conviction because Agent Lalli rendered his advice in May 2002, after

Snipes had completed those crimes. Although Snipes now claims that "the jury could have entertained at least a reasonable doubt whether Mr. Snipes had maintained [his Fifth Amendment] position since he came under the influence of . . . Kahn in March of 2000," Br. at 43, Snipes never based his Fifth Amendment defense upon anything that Kahn had told him and Snipes has not pointed to any evidence that would have supported that defense. See generally D406.

In any event, even if a requested jury instruction is proper, there is no reversible error if the instructions given cover the substance of the requested instruction. U.S. v. Stone, 702 F.2d 1333, 1339 (11th Cir. 1983). Thus, in the tax context, the Supreme Court held in U.S. v. Pomponio that because the district court adequately instructed the jury on willfulness, "[a]n additional instruction on good faith was unnecessary." 429 U.S. 10, 13, 97 S. Ct. 22, 24 (1976). Likewise, also in the tax context, in U.S. v. Johnson, this Court's predecessor held that the district court's instructions on willfulness and general good faith adequately covered the defendant's request "that the jury be allowed to consider, on the issue of willfulness, [his] reliance on constitutional rights." 577 F.2d 1304, 1312 (5th Cir. 1978).

Here, the court twice instructed the jury that to find that Snipes had acted willfully, it had to find that Snipes had acted "voluntarily and purposely, with the

specific intent to do something the law forbids; that is, with bad purpose either to disobey or disregard the law." D381 at 14; D406 at 187-88; D416 at 22.

The court went further; per Snipes's request, it also twice instructed the jury that "[g]ood faith is a complete defense to the charges in the indictment since good faith on the part of the defendant is inconsistent with . . . willfulness which is an essential part of the charges" and that "[t]he burden of proof is not on the defendant to prove good faith, of course, since the defendant has no burden to prove anything. The government must establish beyond a reasonable doubt that the defendant acted with . . . willfulness, as charged in the indictment."[12] D381 at 14-15; D406 at 186-87; D416 at 20. Certainly, the jury that found that Snipes had not acted in good faith necessarily rejected the argument that Snipes had acted in good faith reliance upon the Fifth Amendment. See U.S. v. Walker, 26 F.3d 108, 109 (11th Cir. 1994) (no abuse of discretion in declining to give good faith defense instruction in addition to instruction on intent to defraud; "finding of specific intent to deceive categorically excludes a finding of good faith"). Thus, the court's

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[12]Snipes incorrectly states that the court's general good faith instruction "focused solely on the advice of professionals." Br. at 42 n.36. As Snipes had requested, the court gave both a general good faith instruction and a good-faith-reliance-upon-advice-of-counsel instruction. Compare D355 at 2-3 (Snipes's requested instructions) with D406 at 186-87 (instructions given).

instructions on willfulness and general good faith substantially covered the content of Snipes's requested instruction on good faith reliance upon the Fifth Amendment, making that instruction unnecessary. See Pomponio, 429 U.S. at 13, 97 S. Ct. at 24; Johnson, 577 F.2d at 1312; see also U.S. v. McCarty, 665 F.2d 596, 597 & 597 n.2 (5th Cir. 1982) (court submitted defendant's good-faith-reliance-upon-Fifth-Amendment defense to jury by giving general good faith instruction). Indeed, in arguing for the general good faith instruction, Snipes contended that it was warranted, inter alia, because of his asserted defense that he had relied in good faith upon the Fifth Amendment. D395 at 7.

Moreover, the virtually unrestricted cross-examination, the instructions that were given, and Snipes's closing argument laid his defense of good faith reliance upon the Fifth Amendment squarely before the jury, and the absence of the requested instruction did not "seriously impair" his ability to present effectively that defense. See U.S. v. Merrill, 513 F.3d 1293, 1306 (2008) (quoted). In his closing, Snipes's counsel read the willfulness and general good faith instructions and argued repeatedly that Snipes's failures to file returns had not been willful because Special Agent Lalli had advised him that he had a right to remain silent, and he had believed in good faith, based upon that advice, that he had a right not to file returns. D406 at 63, 70-71, 75-76, 90, 92-96, 116-17. Apparently accepting his defense, the jury acquitted Snipes of his charges for returns due after Agent

Lalli's advice and found him guilty only of crimes that had occurred before that advice.

Snipes bases his argument primarily upon the court's reasoning for declining to give his requested instruction on good faith reliance upon the Fifth Amendment. Snipes did not contest that reasoning below, D405 at 42, and that reasoning is irrelevant under the applicable standard of review. See Lyons, 53 F.3d at 1200 (reasoning not among prerequisites for reversal); U.S. v. Simmons, 368 F.3d 1335, 1342 (11th Cir. 2004) (this Court may affirm on any ground, even one upon which district court did not base its decision).

Snipes also bases his argument upon Goetz, 746 F.2d 705, U.S. v. Morris, 20 F.3d 1111 (11th Cir. 1994), and U.S. v. Murdock, 290 U.S. 389, 54 S. Ct. 223 (1933), but they do not, as Snipes suggests, require a separate instruction on good faith reliance upon the Fifth Amendment. Br. at 38-39, 41. In Goetz, this Court held that the district court had erred by refusing to allow the defendants to present a good faith defense to the jury, explaining that the refusal "impermissibly invaded the province of the jury." Id. at 707, 712. Here, contrary to Snipes's assertion that the court "made essentially the same error," Br. at 38, the court allowed Snipes to present his good-faith-reliance-upon-the-Fifth-Amendment defense to the jury and Snipes did so. In Morris, this Court held that the district court erred in failing to give a general good faith instruction because the court had not incorporated

"knowingly" into its offense charge. 20 F.3d at 117. Here, unlike in Morris, the court gave an additional instruction on general good faith. D381 at 14; D406 at 187-88; D416 at 22. Finally, in Murdock, a defendant who had invalidly asserted the Fifth Amendment privilege when questioned by a revenue agent was prosecuted for willfully failing to supply information. 290 U.S. at 391, 54 S. Ct. at 224. The Court held that the district court had erred in refusing to instruct the jury to consider his asserted claim of good faith because the jury could find that his failure to supply information "was not prompted by bad faith or evil intent, which the statute makes an element of the offense." Id. at 398, 54 S. Ct. at 226. Nothing in the Court's opinion, however, indicates that the substance of the instruction the defendant sought was otherwise covered by an instruction on willfulness. To the contrary, the district court in Murdock had given instructions that effectively took from the jury "the question of absence of evil motive." Id. at 396, 54 S. Ct. at 226. The conclusion that Murdock does not require a separate good-faith-reliance-upon-the-Fifth-Amendment instruction is supported by Pomponio, in which the Court discussed willfulness, cited Murdock, and ruled that a separate general good-faith instruction was not required. See Pomponio, 429 U.S. at 12-13, 97 S. Ct. at 24.

Without establishment of the prerequisites for reversal, Snipes is not entitled to relief.

V. THE COURT CORRECTLY DETERMINED SNIPES'S BASE OFFENSE LEVEL IN ACCORDANCE WITH USSG §2T1.1, THE GUIDELINE FOR HIS CRIMES.

Snipes argues that the court rendered an unreasonable sentence by determining his base offense level in accordance with USSG §2T1.1, contending that the court should have disregarded it and the resulting sentencing guidelines range because: (1) the Sentencing Commission, in promulgating that guideline to apply to both misdemeanors and felonies, did not comply with 28 U.S.C. § 994(j), which directs the Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a . . . serious offense"; (2) application of that guideline creates unwarranted sentencing disparities; and (3) that guideline is not the product of "careful empirical evidence." Br. at 48-52. These arguments are without merit.

Snipes's argument that the Commission did not comply with the directive in section 994(j) fails on any number of bases. First, that argument fails because this Court already has held that the Commission followed the directive in section 994(j) when it promulgated the guidelines. See U.S. v. Erves, 880 F.2d 376, 380 (11th Cir. 1989); accord USSG §1A1.1 (edit. n.4(d)) (Commission followed directive through availability of probation for first offenders with offense levels one to ten

and aberrant behavior guideline for first offenders with higher offense levels). Snipes improperly isolates section 2T1.1 without consideration of the other guidelines (i.e., probation, aberrant behavior, and criminal history guidelines) that serve the directive by working with section 2T1.1 to allow probation for first-offender cases that involve little loss and consequently are less serious. See USSG §§2T1.1(a), 2T4.1, 4A1.1, 5B1.1; USSG Sentencing Table; see also USSG §2T1.1, comment., backg'd ("greater tax loss is obviously more harmful to the treasury and more serious than a smaller one with otherwise similar characteristics"). Second, Snipes's argument fails because, as this Court already has explained, that type of argument is "best brought to Congress's attention." See In re U.S., 60 F.3d 729, 733 (11th Cir. 1995). Third and relatedly, Snipes's argument fails because Congress separately has deemed imprisonment appropriate for Snipes's crimes, see 26 U.S.C. § 7203; that section 2T1.1 became effective without Congressional intervention, and remains without Congressional modification, means that Congress itself thought that section 2T1.1 is not inconsistent enough with its directive so as to require change. See U.S. v. Lueddeke, 908 F.2d 230, 233 (7th Cir. 1990) (argument that guidelines contravene congressional intent is "fatally weakened" by fact that they became effective only with congressional consent); see generally 28 U.S.C. § 994(p) (Congress has power to revoke or amend guidelines). Fourth and finally, Snipes's argument fails because Snipes has not shown injury by

the Commission's asserted failure to follow the directive in section 994(j); the directive did not apply to his crimes because they are serious.[13] See U.S. v. Griffith, 85 F.3d 284, 292 (7th Cir. 1996) (defendant lacked standing to argue Commission did not follow directive in section 994(j) because he failed to explain how he had been injured).

Snipes's argument that section 2T1.1 creates unwarranted sentencing disparities in disregard of 28 U.S.C. § 991(b)(1) fails because it is premised incorrectly on the ground that Congress, in the Sentencing Reform Act, sought to avoid unwarranted sentencing disparities among misdemeanants and felons. To the contrary, Congress sought to avoid unwarranted sentencing disparities "among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1); accord 18 U.S.C. § 3553(a)(6). The application of section 2T1.1 to all defendants found guilty of willful failure to file a tax return serves to avoid unwarranted sentencing disparities among defendants who have been found guilty of similar criminal conduct.

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[13]The court's finding that Snipes's crimes are serious, D461 at 44, 83, 218, was not clearly erroneous. See Statement of Facts above; see also USSG §1A1.1 (edit. n.4(d)) (financial crimes are "serious"); USSG §2T1.1, comment., backg'd ("Tax offenses, in and of themselves, are serious offenses[.]"); U.S. v. Crisp, 454 F.3d 1285, 1291 (11th Cir. 2006) (loss reflective of seriousness).

Finally, Snipes is incorrect that section 2T1.1 is not the product of careful empirical evidence. The Commission determined, through empirical studies, that sentences for white collar crimes, such as embezzlement and tax evasion, were considerably lower than those for the substantially equivalent crime of larceny and made a policy decision to adopt a guideline structure under which those crimes would be treated essentially identically "[i]n light of the legislative history supporting higher sentences for white-collar crime." U.S. Sentencing Commission, Supp. Rpt. on Initial Sentencing Guidelines and Policy Statements 18 (1987) (citing S. Rep. 98-225 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3259-60).

Without establishment of error in the court's use of section 2T1.1, Snipes is not entitled to relief.

VI. THE COURT DID NOT CLEARLY ERR IN IMPOSING AN OBSTRUCTION-OF-JUSTICE ENHANCEMENT.

Snipes argues that the court clearly erred in imposing an obstruction-of-justice enhancement pursuant to USSG §3C1.1 based upon his instruction to Baker not to respond to a grand jury subpoena for documents of Amen RA Films and threatening her with recourse if she did so, contending that the evidence was insufficient to establish his intent or that the evidence sought by the subpoena was pertinent to the case. Br. at 16, 46-48. To the contrary, the court properly found,

and certainly did not clearly err in finding, that Snipes had intended to obstruct justice in this case.

A two-level obstruction-of-justice enhancement applies when a defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation . . . of the instant offense of conviction" and the obstructive conduct related to the offense of conviction or any relevant conduct. USSG §3C1.1. "Obstructive conduct can vary widely in nature, degree of planning, and seriousness." USSG §3C1.1, comment. (n.3). Examples include threatening or intimidating a witness, or attempting to do so. USSG §3C1.1, comment. (n.4(a)). It is irrelevant whether the defendant succeeds; "[a] defendant's mere attempt to obstruct the government's case is sufficient to qualify him for the obstruction increase." U.S. v. Taylor, 88 F.3d 938, 944 (11th Cir. 1996).

Baker's trial testimony establishes that after she was served with a grand jury subpoena for documents of Snipes's company, Amen RA Films, Snipes called her and: "told [her] not to respond, not to talk to anybody or to disclose any information on the company"; told her that it did not matter that it was a government subpoena; reminded her of the confidentiality agreement that she had signed; and threatened her that she would "have to pay the consequences" if she

did "contact them." D384 at 52. Snipes's instruction and threat made Baker "very upset," "uneasy," and "scared." Id.

"Encouraging a witness not to cooperate with an investigation may justify application of an obstruction enhancement," and Snipes does not contend otherwise. See U.S. v. Dukes, 153 F. App'x 591, 595 (11th Cir. 2005) (quoted); see also U.S. v. Rudisill, 187 F.3d 1260, 1263-64 (11th Cir. 1999) (upholding enhancement for defendant who encouraged witness to flee rather than comply with grand jury subpoena); U.S. v. Garcia, 13 F.3d 1464, 1471 (11th Cir. 1994) (upholding enhancement for defendant who brought witness into freezer and asked him not to speak to FBI agents). Based upon Baker's testimony, the court properly found, and certainly did not clearly err in finding, that Snipes had intended to obstruct the investigation of this case.

At sentencing, Snipes argued that his obstructive behavior had not related materially to his crimes. D461 at 57-60. Now, Snipes argues that the evidence was insufficient to establish his intent to obstruct the investigation, hypothesizing that he "may have believed that responding to a subpoena would indeed violate the [confidentiality] agreement." Br. at 16, 46-48. Whether a defendant has the requisite intent is a credibility determination left to the sound discretion of the district court. U.S. v. Chatmon, 324 F.3d 889, 893 (7th Cir. 2003). An objective standard is used instead of "evaluating the subjective intent of the defendant." U.S.

v. House, No. 07-4043, 2008 WL 5412109 *4 (7th Cir. Dec. 31, 2008). Notwithstanding Snipes's belated hypothesis concerning his intent, there was no clear error in finding that Snipes's instructions to Baker not to respond to the subpoena, not to disclose any information about Amen RA Films, and "not to talk to anybody," and Snipes's threat that she would have to "pay the consequences" if she did "contact them," evinced the requisite intent to obstruct justice, particularly considering that those instructions and threat made Baker feel "uneasy" and "scared," D384 at 52. See, e.g., U.S. v. Williams, 527 F.3d 1235, 1252 (11th Cir. 2008) (rejecting argument that evidence did not establish intent to obstruct); U.S. v. Brazel, 102 F.3d 1120, 1163-64 (11th Cir. 1997) (same).

Snipes also argues that the evidence was insufficient to establish that the grand jury subpoena served upon Baker sought evidence pertinent to this case. Br. at 16, 46-48. To the contrary, the court properly inferred that the subpoena sought evidence pertinent to the case from evidence that the grand jury issued the subpoena in this particular case, that the grand jury issued the subpoena after Agent Lalli's failed attempt to administratively summons financial documents of Amen RA Films to "look into . . . any income of the films or how [Snipes] was conducting his business," and that Snipes's instructions to Baker related to any information on Amen RA Films. D397 at 91-95; D384 at 52.

Snipes has not established clear error. He is not entitled to relief.

Even if this Court were to determine that the district court clearly erred in imposing the two-level enhancement for Snipes's obstruction of justice, any error would be harmless because the district court should have imposed an equivalent two-level enhancement for Snipes's use of sophisticated means (see Cross-Appeal Argument below). As a result, no remand would be necessary because the asserted error would not have affected Snipes's sentence. See U.S. v. Scott, 441 F.3d 1322, 1329-30 (11th Cir. 2006).

VII. THE COURT DID NOT VIOLATE SNIPES'S SIXTH AMENDMENT RIGHTS BY RELYING UPON NON-JURY FINDINGS TO DETERMINE HIS SENTENCING GUIDELINES RANGE.

Snipes argues that the court violated his Sixth Amendment rights by relying upon judicial factfindings of tax loss, non-conviction misconduct, and obstruction of justice to determine his advisory sentencing guidelines range, contending that his sentence could not be deemed reasonable absent those findings.[14] Br. at 52-54.

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[14]Although Snipes references the Fifth Amendment in his argument heading, he discusses only the Sixth Amendment in his argument. He accordingly has not properly raised a Fifth Amendment issue. See Transamerica Leasing, Inc. v. Inst. of London Underwriters, 430 F.3d 1326, 1331 n.4 (11th Cir. 2005) (passing reference to issue in brief insufficient to raise issue).

That argument does not raise a "novel constitutional question" as Snipes contends, Br. at 54; rather, it is foreclosed by U.S. v. Booker, which permits reliance upon extra-verdict findings in the non-mandatory guidelines regime. 543 U.S. 220, 259-60, 125 S. Ct. 738, 764-65 (2005); accord U.S. v. Rodriguez, 398 F.3d 1291, 1301 (11th Cir. 2005); see also Oregon v. Ice, No. 07-901, 2009 WL 77896 (U.S. Jan. 14, 2009) (no Sixth Amendment violation for court to decide sentencing facts to impose consecutive instead of concurrent sentences; declining to extend Apprendi and Blakely). A post-Booker sentencing court violates a defendant's Sixth Amendment rights by applying the guidelines mandatorily. U.S. v. Douglas, 489 F.3d 1117, 1129 (11th Cir. 2007). Here, the court regarded the sentencing guidelines as advisory, D461 at 216-17, and Snipes does not contend otherwise. In any event, even if the court could consider only the guilty verdicts and Snipes's offender characteristics as Snipes suggests, 36 months' imprisonment still would be within the statutory range and still would be reasonable. See 26 U.S.C. § 7203. Snipes is not entitled to relief.

VIII. THE COURT ACTED WITHIN ITS DISCRETION IN SENTENCING SNIPES TO 36 MONTHS' IMPRISONMENT.

Snipes argues that the court abused its discretion in sentencing him to serve 36 months' imprisonment, contending that the court should have segregated the count involving a year in which he did not owe taxes and that the court relied too heavily upon general deterrence and not heavily enough upon the other factors in 18 U.S.C. § 3553(a). Br. at 43-45. To the contrary, the court acted well within its broad discretion.

This Court reviews a sentence for substantive reasonableness under a deferential abuse-of-discretion standard. Gall v. U.S., 128 S. Ct. 586, 597 (2007). Under that standard, this Court considers the sentence in light of the factors in section 3553(a). U.S. v. Williams, 435 F.3d 1350, 1355 (11th Cir. 2006). This Court commits the weight to be accorded any factor "to the sound discretion of the district court," and this Court "will not substitute [its] judgment in weighing the relevant factors." U.S. v. Amedeo, 487 F.3d 823, 832 (11th Cir.), cert. denied, 128 S. Ct. 671 (2007). Indeed, "[i]n any given case there will be a range of sentences that are reasonable and the district court gets to pick within that range." See U.S. v. Crisp, 454 F.3d 1285, 1290 (11th Cir. 2006). Further, because the guidelines remains central to the sentencing process, this Court ordinarily would expect a

sentence within the guidelines range to be reasonable. U.S. v. Talley, 431 F.3d 784, 788 (11th Cir. 2005). The party challenging the sentence has the burden of establishing that it is unreasonable. Id.

Snipes has not satisfied his burden of establishing that his sentence is unreasonable. The court observed the advisory nature of the guidelines and its obligation "to fashion a sentence in the manner prescribed by" section 3553(a). D461 at 216-17. The court heard trial testimony, sentencing testimony, Snipes's allocution, Snipes's proffered reasons for leniency, and extensive argument. D441, D453, D461. The court carefully explained the weight that it was giving to the relevant factors in section 3553(a). D461 at 217-23. (Indeed, the district judge informed counsel at sentencing that he had the factors in front of him. Id. at 156.) The court imposed the sentence in light of those factors. Id. at 222-23. That sentence was reasonable considering Snipes's history of contempt for tax laws, the very substantial tax loss that he had intended (whether based upon the probation office's figure of $41,038,051, Snipes's figure of $228,000, or the United States' compromise figure of $7,500,000), his threats and false allegations against IRS employees who had challenged his frivolous claims, his inundation of the IRS with obstructive and frivolous correspondence, his apparent lack of remorse for his crimes and continued portrayal of himself as a victim, the need to promote respect for tax laws, and the need to deter others from not filing their returns or paying

taxes that are due. Moreover, the sentence was within the sentencing guidelines range and therefore fostered the avoidance of unwarranted sentencing disparities. (Had the court given Snipes the sophisticated-means enhancement he deserved, see pages 70-72 below, his guidelines range would have been 41-51 months (before application of the statutory maximum), rendering the sentence of 36 months even more obviously reasonable.)

After the court imposed sentence, Snipes objected only "to the extent that Mr. Snipes is getting a three-year sentence because he happens to be Mr. Snipes."[15] Id. at 231-32. Now, Snipes argues that his sentence is unreasonable because the court assertedly relied too heavily upon general deterrence. Br. at 44-45. In making that argument, Snipes proffers the same purported reasons for leniency that he had proffered to the district court. Compare id. with D453, D461 at 138-85. Snipes's argument fails because it disregards the deferential standard of review, under which this Court leaves to the district court the weight to be given the sentencing factors. Amedeo, 487 F.3d at 832. That court gave due consideration to the sentencing factors and appropriately found weighty the factors of promotion of respect for the nation's tax laws, general deterrence, and guidelines policy. D461 at 219-21; see 18 U.S.C. § 3553(a)(2)(A), (a)(2)(b), (a)(5); USSG §2T1.1,

[15]Snipes is not entitled to relief regardless of whether this Court applies the abuse of discretion or plain error standard of review.

intro. comment. (tax laws protect public interest in preserving integrity of tax system; deterrence primary consideration in tax case because of limited number of prosecutions relative to incidents of crimes).

Snipes also argues that his sentence is unreasonable because the court "failed to consider" that he did not owe tax for one of the years that he did not file a return. Br. at 44. To the contrary, the court heard Snipes's argument–made twice–that the court should not sentence him to any imprisonment for that charge, and therefore the court considered that argument in determining his sentence. D453 at 5; D461 at 152. Moreover, Snipes's argument disregards other factors that go into the sentencing process, and Snipes does not dispute that the court determined his sentence in accordance with the guidelines for implementation of the total sentence. See USSG Ch. 3, Pt. D & Ch. 5, Pt. G.

Snipes has not satisfied his burden of establishing that his sentence is unreasonable. He is not entitled to relief.

ARGUMENT AND CITATIONS OF AUTHORITY
FOR UNITED STATES' CROSS-APPEAL

THE COURT ERRED IN RULING THAT THE SOPHISTICATED-MEANS ENHANCEMENT DID NOT APPLY.

For the reasons stated, this Court should affirm the judgment and sentence of the district court. In an abundance of caution, however, the United States cross-appeals the court's erroneous denial of a two-level enhancement pursuant to USSG §2T1.1(b)(2) for "sophisticated means."

The sophisticated-means enhancement applies if there is "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means." USSG §2T1.1, comment. (n.4) (emphasis supplied). Because the sophisticated-means enhancement is within the guideline for the crime of willful failure to file, the enhancement is available in those cases. USSG §2T1.1(b)(2); see, e.g., U.S. v. Barakat, 130 F.3d 1448, 1456-57 (11th Cir. 1997) (sophisticated-means enhancement warranted where, inter alia, defendant conceals extent of tax offense on which he was convicted); U.S. v. Frandsen, No. 99-30159, 2000 WL 3666272 *2 (9th Cir. Apr. 5, 2000)

(unpublished). Although a mere failure to file a return is not within the purview of the enhancement, concealing the amount of income that is not reported through the use of sham and offshore entities constitutes sophisticated concealment of both the existence and the extent of the crime of willful failure to file a return. Moreover, income amounts influence the IRS's decision whether to conduct a civil examination or open a criminal investigation and are relevant to whether the defendant's intent rose to the level of criminal "willfulness." See, e.g., U.S. v. Schafer, 580 F.2d 774, 782 (5th Cir. 1978) (willfulness supported by pattern of under-reporting large amounts of income).

Here, the district court said that "the very notion of . . . using sophisticated means and not filing a return is a little difficult conceptually to me." D461 at 72-74. The enhancement, however, applied because Snipes used sham entities (such as "Amen Ra Films PCT," which he described as a "new unincorporated Pure Trust Organization"), corporate shells (such as the Royal Guard of Amen Ra Ltd.), and offshore financial accounts (in Switzerland, Antigua, and the Isle of Man) to conceal his income, and that information would have been relevant to determining both whether he was required to file returns and how the United States would investigate his failures to file returns. Certainly, and contrary to Snipes's argument at sentencing, his sophisticated means were relevant to the concealment of his crimes. Cf. U.S. v. Wallace, No. 99-30185, 2000 WL 329170 *1 (9th Cir.

Mar. 29, 2000) (unpublished) (upholding application of enhancement in willful-failure-to-file case under pre-1993 guideline because sophisticated means impeded discovery of extent of violation and "hiding the amount of income prevents the IRS from determining whether a taxpayer is required to file at all"). Thus, the district court erred in not imposing the sophisticated-means enhancement.

The district court imposed the statutory maximum sentence, so its error here should not affect Snipes's sentence. If, however, this Court were to uphold Snipes's challenge to the obstruction-of-justice enhancement or to the substantive reasonableness of his sentence, the sophisticated-means error becomes important. As we explain at page 64 above, any error with respect to the two-level obstruction-of-justice enhancement is harmless because the district court should have imposed an equivalent two-level enhancement for Snipes's use of sophisticated means; therefore, any such error does not affect Snipes's sentence and does not require a remand. See Scott, 441 F.3d at 1329-30.

CONCLUSION

The United States requests that this Court affirm the judgment and sentence of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 28th day of January, 2009, via ordinary mail, a copy of this document was served on:

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