

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 5:06-cr-22(S1)-Oc-10GRJ

WESLEY TRENT SNIPES

**UNITED STATES' RESPONSE IN OPPOSITION TO
SNIPES'S MOTION FOR BAIL PENDING CERTIORARI PETITION**

The United States opposes Wesley Trent Snipes's motion for bail pending his filing of a certiorari petition and the United States Supreme Court's disposition of the petition (Doc. 566). As explained below, Snipes's motion is premature because this Court may not grant bail until after Snipes files his certiorari petition. This Court should deny Snipes's motion on that basis alone. Regardless, Snipes, a convicted criminal long-ago sentenced to a term of imprisonment, has not overcome the presumption that he should be incarcerated because he has not shown that the questions he plans to raise are substantial ones likely to result in reversal of his convictions.

I. BACKGROUND

Following Snipes's convictions on three counts of willful failure to file income tax returns and resultant three-year prison sentence, this Court granted Snipes's motion for bail pending direct appeal (Doc. 475). This Court was "dubious" as to the substantiality of the questions that Snipes planned to raise but granted the motion in recognition of the fact that his direct appeal might last longer than his sentence (Doc. 475).¹

Snipes lost his direct appeal. A unanimous panel of the United States Court of Appeals for the Eleventh Circuit affirmed the judgment and sentence "in all respects."

¹This Court was prescient. The United States Court of Appeals for the Eleventh Circuit issued the mandate on October 7, 2010 (Doc. 556), and, assuming gain time, Snipes would have just about completed his sentence by then. This Court should not have the same timing concern this time around. Snipes's service of his sentence will not effectively void his direct appeal because his direct appeal is over, and disposition of any certiorari petition should not take long (and in any event has been in part within Snipes's control). See S. Ct. R. 13-16 (timing rules for certiorari petitions).

United States v. Snipes, 611 F.3d 855, 859 (11th Cir. 2010). Pertinent here, the Eleventh Circuit rejected Snipes's argument that he was entitled to a bench trial before the jury trial on the factual issue of venue. Id. at 865-66. Citing governing law, the Eleventh Circuit explained that, as with other elements of a crime, a jury must decide if venue is proper, and that a facially-sufficient indictment is enough to call that factual issue for jury trial. Id. Snipes did not properly raise, and the Eleventh Circuit did not address, whether the United States must prove venue beyond a reasonable doubt as opposed to by a preponderance of the evidence.² See generally id.; Doc. 546, Att. B (Snipes's principal brief).

Snipes petitioned the Eleventh Circuit for panel and en banc rehearing, contending that his bench-trial-on-venue argument raised a "novel and important" question and briefing, for the first time, his reasonable-doubt-venue argument. Neither the panel nor the en banc court was persuaded; "no Judge in regular active service. . . requested that the Court be polled on rehearing en banc." (The Eleventh Circuit's order denying Snipes's rehearing petition is Attachment A to this response.)

Undeterred, Snipes now states that he will file a certiorari petition raising those two venue arguments (Doc. 566), and, pending both his filing of the certiorari petition and the Supreme Court's disposition of it, he wants this Court to further postpone enforcement of the judgment of conviction against him by quashing the order directing him to surrender for service of his term of imprisonment (Doc. 563). In that order, this Court already indicated its disinclination towards doing that, explaining: "The Defendant Snipes had a fair trial; he has had a full, fair, and thorough review of his conviction and sentence by the Court of Appeals; and he has had a full, fair, and thorough review of his

²Snipes mentioned the issue in a footnote of his principal brief purportedly to preserve it (Doc. 546, Att. B at 29 n.22), but did not designate it as an issue or otherwise brief it and therefore did not properly raise it, as evident by the Eleventh Circuit's failure to address it. See Access Now, Inc. v. Southwest Airlines, 385 F.3d 1324, 1330 (11th Cir. 2004) (appellant abandons issue by failing to brief it; "The Federal Rules of Appellate Procedure plainly require that an appellant's brief 'contain, under appropriate headings and in the order indicated . . . a statement of the issues for review.'") (quoting Fed. R. App. P. 28(a)(5)).

present claims, during all of which he has remained at liberty,” and concluding: “The time has come for the judgment to be enforced.” (Doc. 563 at 16.) Indeed it has.

II. AUTHORITY

The Bail Reform Act of 1984 (Bail Act), 18 U.S.C. § 3141 et seq., imposes stringent restrictions on the availability of bail pending appeal and certiorari. See Eugene Gressman et al., Supreme Court Practice § 17.15, at 884-885 (9th ed. 2007). The Bail Act mandates that a convicted criminal who has been sentenced to imprisonment be detained pending appeal and certiorari unless he establishes that he meets specified narrow criteria. See United States v. Giancola, 754 F.2d 898, 901 (11th Cir. 1985) (making clear that defendant bears burden of establishing criteria).³

Specifically, the Bail Act provides:

(b) Release or detention pending appeal by the defendant.—(1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—

(i) reversal,

(ii) an order for a new trial,

(iii) a sentence that does not include a term of imprisonment, or

(iv) a reduced sentence to a term of imprisonment less than the total of the time

³In placing the burden on a defendant, Congress reversed an earlier presumption in favor of release, because it had concluded that “[o]nce guilt of a crime has been established in a court of law, there is no reason to favor release pending imposition of sentence or appeal” and that “release of a criminal defendant into the community after conviction may undermine the deterrent effect of the criminal law, especially in those situations where an appeal of the conviction may drag on for many months or even years.” See S. Rep. No. 98-147, at 53 (1983).

already served plus the expected duration of the appeal process.

If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title, except that in the circumstance described in subparagraph (B)(iv) of this paragraph, the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence.

18 U.S.C. § 3143(b) (emphasis added). A judicial officer at any level (district court, court of appeals, Supreme Court) may grant bail pending disposition of a certiorari petition. United States v. Snyder, 946 F.2d 1125, 1126-27 (5th Cir. 1991).

III. ARGUMENT

A. Snipes's latest bail motion is premature.

By its express language, the Bail Act allows a judicial officer to grant bail in a post-appeal setting only if the defendant has already filed a certiorari petition. See id.

As one district court recently explained:

This makes sense. In order to obtain bail pending appeal, a defendant must show that he has raised substantial question of law or fact that would entitle him to a reversal, new trial or abrogation of his sentence. If the appeal is to the United States Supreme Court, such questions necessarily must be raised in a petition for certiorari. Because any reversal, new trial or abrogation of a defendant's sentence would be limited to questions raised in the petition, the petition must be filed so that its contents can be considered in conjunction with a request for bail.

United States v. Nacchio, 608 F. Supp. 2d 1237, 1239 n.4 (D. Col. 2009). In accordance with the express language of section 3143(b) and that rationale, this Court should deny Snipes's latest bail motion as premature.

B. Regardless, Snipes has not established that the questions he plans to raise are substantial ones likely to result in reversal.⁴

As stated above, in addition to demonstrating that he is not likely to flee or pose a danger if released (not issues here) and that his appeal or certiorari petition is not for the purpose of delay, a defendant must show that his appeal or certiorari petition raises

⁴See Morrison v. United States, 486 U.S. 1306, 1306-07 (1988) (single circuit justice denial of motion for bail pending to-be-filed certiorari petition on readily apparent ground that defendant failed to establish likely-to-result-in-reversal-of-all-counts criterion) (Rehnquist, C.J.).

a substantial question of law or fact likely to result in reversal (or other outcomes that are not pertinent here).⁵ 18 U.S.C. § 3143(b)(1)(B).

The Bail Act does not define “substantial question of law or fact likely to result in . . . reversal,” and, although the Bail Act has been around for decades, few cases have applied the phrase in the context of a certiorari petition, and even those do not provide much analysis. See Nacchio, 608 F. Supp. 2d at 1243-44; United States v. Derewal, No. CRIM 88-98, 1995 WL 672821, at *2 (E.D. Pa. Nov. 8, 1995); United States v. Stout, No. 89-317-1-2, 1991 WL 152925, at *1-2 (E.D. Pa. Aug. 5, 1991); United States v. DiSalvo, 663 F. Supp. 145, 147-48 (E.D. Pa. 1987); United States v. Rafsky, Cr. No. 85-00303-1, 1987 WL 7196, at *1-2 (E.D. Pa. Feb. 26, 1987) (unpublished).⁶ That dearth of cases suggests the extraordinariness of the relief that Snipes now seeks.

Whether a certiorari petition presents a substantial question of law or fact likely to result in reversal necessarily implicates the discretionary nature of Supreme Court review and the very limited bases upon which the Supreme Court ordinarily will grant a certiorari petition, specifically: (1) the circuit court has entered a decision in conflict with another circuit court on an important matter; (2) the circuit court “has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of [the] Court’s supervisory power”; (3) the circuit court has decided an important federal question in a way that conflicts

⁵The Bail Act’s legislative history explains that the requirement of an “affirmative finding that the chance for reversal is substantial . . . gives recognition to the basic principle that a conviction is presumed to be correct.” See S. Rep. No. 98-147, at 54 (1983).

⁶The Eleventh Circuit has defined the phrase only in the context of a motion for bail pending direct appeal. See Giancola, 754 F.2d at 900-01. In that context, the Eleventh Circuit held that a substantial question is a close question or “one that very well could be decided the other way,” and that the likelihood-of-reversal criterion focuses not on whether the defendant ultimately will prevail on the substantial question but on the impact that such success would have on his conviction and sentence. Id. This Court explained that a focus on whether the defendant ultimately will prevail unwisely would force a district court to determine that it likely had erred before granting bail. Id. Given the nature of Supreme Court review, that same concern does not apply in the context of a certiorari petition. Id.

with the relevant Supreme Court decisions; and (4) the circuit court has decided an important question of federal law that has not been, but should be, settled by the Supreme Court. See S. Ct. R. 10. That the Supreme Court grants so few certiorari petitions among the so many filed reflects just how limited those bases are. See Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2272 (2009) (“The success rate for certiorari petitions before this Court is approximately 1.1%, and yet the previous Term some 8,241 were filed.”) (Roberts, C.J., dissenting).

The leading treatise on Supreme Court practice explains the standard in the context of a certiorari petition this way:

The standard of substantiality or frivolousness for an appeal pending before a court of appeals differs . . . from the standard to be applied to a petition for certiorari in the Supreme Court. What may be substantial and likely to result in a reversal in terms of invoking the mandatory appellate jurisdiction of a court of appeals may well be insubstantial and unlikely to warrant the Supreme Court’s plenary review when one seeks to invoke the discretionary certiorari jurisdiction of the Court. Even a substantial question raised in a petition for certiorari may not appear worthy of review. Thus, in an application for bail pending certiorari, the applicant “must demonstrate a reasonable probability that four Justices are likely to vote to grant certiorari.”

Gressman, supra, at 889 (quoting Julian v. United States, 463 U.S. 1308 (1983) (Rehnquist, C.J.)); see also McGee v. Alaska, 463 U.S. 1339, 1340 (1983) (probability of granting certiorari “approaches, if it does not actually reach, zero”) (Rehnquist, C.J.).⁷

Snipes has not carried his burden of establishing that the questions he plans to raise in his certiorari petition are among the types for which the Supreme Court ordinarily will grant certiorari, that his certiorari petition likely will be among the select few granted out of the thousands filed, or that, if selected, he ultimately will prevail on the merits. In other words, Snipes fails to carry his burden of establishing that his certiorari petition will raise a substantial question of law or fact likely to result in reversal.

⁷Although Julian and McGee are pre-Bail Act cases, the Bail Act tightened, not loosened, restrictions on the availability of post-conviction bail. See S. Rep. No. 98-147, at 53-54 (1983).

The Eleventh Circuit's decision that Snipes was not entitled to a bench trial before the jury trial on the factual issue of venue rightfully rejected Snipes's attempt to create a heretofore unrecognized and unworkable right to a bench trial before a jury trial on a factual issue. See Snipes, 611 F.3d at 865-66. The decision does not conflict with any decision from another circuit court; the decision accords with the accepted and usual course of judicial proceedings; the decision accords with relevant Supreme Court cases; and the decision does not present an important question of federal law that should be settled. See S. Ct. R. 10. To the contrary, it is well settled that venue is an essential element of the United States' proof at trial, that a jury must decide the factual issue of venue, and that a facially sufficient indictment is enough to call the case for jury trial on the factual issue of venue. See Snipes, 611 F.3d at 865-66 (citing cases); Doc. 546, Att. A at 42-46 (United States' principal brief on the issue). This Court was unpersuaded by Snipes's argument; the unanimous Eleventh Circuit panel was unpersuaded by Snipes's argument; the unanimous en banc Eleventh Circuit was unpersuaded by Snipes's argument; and Snipes has not provided reason to think that the Supreme Court would be any different.

Snipes never raised in this Court, or properly in the Eleventh Circuit, the argument that the United States must prove venue beyond a reasonable doubt, and, well beyond that, waived any appellate review of that argument by agreeing to this Court's preponderance-of-the-evidence jury instruction (Docs. 355, 395; Doc. 416 at 18-19). See United States v. Frank, 599 F.3d 1221, 1240 (11th Cir.) ("[W]hen a party agrees with a court's proposed instructions, the doctrine of invited error applies, meaning that review is waived even if plain error would result."), cert. denied, 131 S. Ct. 186 (2010). It is inconceivable that the Supreme Court would review an argument that a petitioner raised for the first time in a rehearing petition, see Wills v. Texas, 511 U.S. 1097, 1097 (1994) ("It has been the traditional practice of this Court . . . to decline to review claims raised for the first time on rehearing in the court below.") (O'Connor, J., concurring in denial of certiorari), much less an argument that a petitioner relinquished

by waiver, see United States v. Olano, 507 U.S. 725, 733-34 (1993) (waiver of claim results in relinquishment of claim); United States v. Lewis, 492 F.3d 1219, 1221 (11th Cir. 2007) (en banc) (same).

In any event, every court of appeals has held that the preponderance-of-the-evidence standard applies to the issue of venue. See United States v. Salinas, 373 F.3d 161, 163 (1st Cir. 2004); United States v. Gonzalez, 922 F.2d 1044, 1054 (2d Cir.), cert. denied, 502 U.S. 1014 (1991); United States v. Perez, 280 F.3d 318, 330 (3d Cir.), cert. denied, 537 U.S. 859 (2002); United States v. Robinson, 275 F.3d 371, 378 (4th Cir. 2001), cert. denied, 535 U.S. 1006 (2002); United States v. Strain, 396 F.3d 689, 692 n.3 (5th Cir. 2005); United States v. Crozier, 259 F.3d 503, 519 (6th Cir. 2001), cert. denied, 534 U.S. 1149 (2002); United States v. Muhammad, 502 F.3d 646, 652 (7th Cir. 2007), cert. denied, 128 S. Ct. 1104 (2008); United States v. Johnson, 462 F.3d 815, 819 (8th Cir. 2006), cert. denied, 549 U.S. 1298 (2007); United States v. Pace, 314 F.3d 344, 349 (9th Cir. 2002); United States v. Cryar, 232 F.3d 1318, 1323 (10th Cir. 2000), cert. denied, 532 U.S. 951 (2001); United States v. Stickle, 454 F.3d 1265, 1271-1272 (11th Cir. 2006); United States v. Morgan, 393 F.3d 192, 195 (D.C. Cir. 2004). And, time and time again, including very recently, the Supreme Court has denied certiorari petitions seeking review of the issue. See, e.g., Elgindy v. United States, 130 S. Ct. 83 (2009) (petition at 2009 WL 2220083); Rommy v. United States, 552 U.S. 1260 (2008) (petition at 2008 WL 354082); Robles v. United States, 541 U.S. 1044 (2004) (petition at 2004 WL 838122).

Having failed to establish that his certiorari petition will raise a substantial question of law or fact likely to result in reversal, Snipes has not overcome the presumption that he should be incarcerated.

IV. CONCLUSION

Snipes's latest bail motion is premature because this Court may not grant bail until after Snipes files his certiorari petition. This Court should deny Snipes's motion on that basis alone. Regardless, Snipes has not overcome the presumption that he should be incarcerated by establishing that his certiorari petition will raise a substantial question of law or fact likely to result in reversal. As this Court has recognized, "[t]he time has come for the judgment to be enforced." (Doc. 563 at 16.)

WHEREFORE, the United States respectfully requests that this Court deny Snipes's motion for bail pending the filing and disposition of his certiorari petition (Doc. 566).

Respectfully submitted,

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November 30, 2010



ATTACHMENT A

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-12402-HH	FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT <div style="border: 1px solid black; padding: 5px; margin: 5px 0;">SEP 29 2010</div> KINLEY CLERK
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UNITED STATES OF AMERICA,

Plaintiff-Appellee
Cross-Appellant,

versus

WESLEY TRENT SNIPES,

Defendant-Appellant
Cross-Appellee.

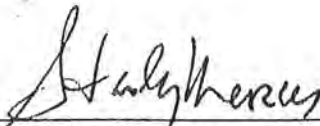
On Appeal from the United States District Court for the
Middle District of Florida

Before: MARCUS, FAY and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

U.S. v. SNIPES

Case No. 5:06-cr-22(S1)-Oc-10GRJ

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2010, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following CM/ECF participants:

Daniel R. Meachum
Kanan B. Henry
Linda G. Moreno
Carmen D. Hernandez
Michael William Nielsen
David Anthony Wilson
Roger A. Grad

I hereby certify that on November 30, 2010, a true and correct copy of the foregoing document and the notice of electronic filing was sent by United States Mail to the following non-CM/ECF participant:

Fast Release Bail Bonds
1401 NW 17th Avenue, Suite 2
Miami, Florida 33125

s/ Patricia D. Barksdale

PATRICIA D. BARKSDALE
Assistant United States Attorney

Radard
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