MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

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

DEFENDANT'S EMERGENCY MOTION FOR INDICATIVE RULING PURSUANT TO FED. R. APP. P. 12.1 FOR RECONSIDERATION TO INTERVIEW JURORS AND DENIAL OF DEFENDANT'S MOTION FOR A NEW TRIAL PURSUANT TO RULE 33 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

COMES NOW Defendant, Wesley Trent Snipes, and files this Emergency Motion Pursuant to Fed. R. App. P. 12.1 and Local Rule 5.01 for Reconsideration of the Court's denial of Defendant's Motion for New Trial Pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The Court's denial followed a November 15, 2010 hearing on the Motion for New Trial and other motions pending before the Court.

1. Defendant Snipes believes the Court erred in not allowing an in camera interview with the jurors, especially, the first juror who emailed defense counsel. The Court's application of Federal Rule 606(b) warrants an in camera interview with the jurors, particularly in light of a recent public statement to the media by that juror.

2. Defendant Snipes believes the Court denied his Rule 33 motion in error because even the Court observed that the first email sent by a juror presents "a troubling set of circumstances" and that three jurors' "presumption of guilt formed before trial[,] if true,... would obviously be contrary to the Court's repeated instructions and should have been disclosed during voir dire..." Those observations clearly show why Mr. Snipes should be allowed an opportunity

to establish the truth of the "troubling set of circumstances" set out in the juror's email. Applying the Court's reasoning, if those circumstances were determined to be true, the Court would surely have concluded that Mr. Snipes did not receive a fair trial.

Pursuant Fed. R. App. P 12.1(a), this Court has the authority to enter an order indicating he would grant Defendant's motion, or that this motion raises a substantial issue that the district court would like to rule upon, even though Defendant has filed a Notice of Appeal of the November 19, 2010 Order. Fed. R. App. P 12.1(b) provides for the 11th Circuit to remand this case to the district court until the district court has had an opportunity to rule upon this motion.

ARGUMENT

1. The Court's application of Federal Rule of Evidence 606(b) and the first juror's statement to CNN's Larry King Show warrants an in camera interview with the juror.

On December 7, 2010, a quote from the first juror who emailed defense counsel was shown on CNN's Larry King Show. CNN attributed the following quote to the first juror:

----- Original Message -----
[redacted]
To: Dan Meachum
Sent: Tue Dec 07 23:18:54 2010
Subject: Here's what we put on the air

"...THERE WAS ONE JUROR THAT HAD SAID THEY KNEW MR. SNIPES WAS GUILTY WHEN THEY FIRST SAW HIM DURING THE JURY SELECTION. I TOLD THE JUROR THAT WAS NOT RIGHT AND IT WENT AGAINST WHAT THE JUDGE HAD SAID TO US BEFORE THE TRIAL WAS TO BEGIN. TWO OTHER JURORS THEN AGREED AND SAID... THAT THEY THOUGHT HE WAS GUILTY WHEN THEY FIRST SAW HIM... BEFORE THE TRIAL BEGAN..." "...WE WERE DEADLOCKED ON OUR DECISION ABOUT MR. SNIPES BEFORE THIS HAPPENED. I WAS NOT EXPECTING TO HEAR THAT FROM A JUROR AND MOST OF THE JURORS FELT THE SAME. THAT'S WHEN A DEAL WAS MADE TO FIND HIM [Snipes] GUILTY ON THE FAILURE TO FILE TAXES AND NOT GUILTY ON THE FEDERAL TAX EVASION CHARGE." "WE DID NOT THINK HE WOULD GO TO JAIL..."

Again, as noted in the Court's November 2010 Order, it appears the three jurors disobeyed the court's instructions. This Court's November 19, 2010 Order rejected the jury misconduct claim on the basis of Federal Rule of Evidence 606(b). The Court reasoned that the Defendant had not shown the exceptions of extraneous prejudicial information or outside influence on the jury. The Court further reasoned that all statements made in the "black box" stayed in the "black box." It is true that much of what the juror says in this interview would be protected from use by Rule 606(b). But only a hearing can determine what occurred outside the jury room and did not affect the process of deliberation, but rather constitutes misconduct during voir dire. Likewise, only a hearing can separate any factors that are external to the deliberations and may have caused prejudgment, from those that are internal. This latest revelation by the juror does not indicate that the statements made by the three jurors were during the deliberations. It provides the required "something more than mere speculation" that is required to allow a hearing. *United States v. Barshov*, 733 F.2d 842, 851 (11th Cir. 1984).

The Supreme Court recently vacated and remanded a case where an evidentiary hearing was not held on post-verdict allegations of misconduct. See *Wellons v. Hall*, 558 U.S. ---, 130 S. Ct. 727 (2010) (per curiam). The Eleventh Circuit had held that Wellons failed to make a sufficient showing to warrant questioning of the jurors because the defendant's claims of juror misconduct were grounded in "speculation" and "surmise." *Id.* at 730. The Supreme Court summarily reversed, noting that "had there been discovery or an evidentiary hearing, Wellons may have been able to present more than 'speculation' and 'surmise.'" *Id.* The Court went on to state that in these post-verdict circumstances it "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has an opportunity to prove actual bias." *Id.* at 731 (quoting *Smith v. Phillips*, 455 U.S. 209, 215 (1982)). The Eleventh Circuit has since

reversed and remanded to the district court for discovery and an evidentiary hearing. In Mr. Snipes' case as well, only at the hearing can the protected (Rule 606(b)) and unprotected information be properly sorted out. Therefore, in the interest of justice and fairness, the Court should at a minimum inquire of this juror as to whom, when, and where the other three jurors made the statements.

The juror's statements begs the question as to what extraneous prejudicial information or outside influence caused the three jurors to come to the conclusion before the trial started that Snipes was guilty. Defendant notes the Court's reliance on *U.S. v Siegleman,* 561 F.3d 1215 (11th Cir. 2009) and *U.S. v. Venske,* 296 F.3d 1284 (11th Cir.2002) in its November 19, 2010 Order. Defendant requests the Court to reconsider this case in light of *Wellons*.

II. The Court's own observations about the contents of an email describing three jurors' presumption of Defendant Snipes' guilt, formed before trial, establishes that Defendant Snipes may not have received a fair trial before an impartial jury.

When an accused is denied a fair hearing by an impartial jury, "even the minimum standards of due process" are violated. Irvin v. Dowd, 366 U.S. 717, 722 (1961). Thus, the three jurors' presumption of Defendant Snipes' guilt renders their votes and the entire verdict invalid.

In its Order dated November 19, 2010, this Court observed that the first email sent to defense counsel presents "a troubling set of circumstances." Such an observation clearly goes to whether Defendant Snipes received a fair trial, especially in light of the Court's second observation that, if true, the jurors' presumption of guilt, formed before trial, would have been contrary to the Court's **repeated instructions**. (Emphasis added).

Because the Court's articulated concerns clearly demonstrate its own trouble with the jurors' conduct, Defendant Snipes respectfully questions the Court's assertion that he had a fair

trial. Therefore, Defendant Snipes requests that the Court reconsider its denial of a new trial based on the jurors' misconduct of pre-determined guilt and grant Defendant bond pending determination of this motion. Alternatively, Defendant Snipes requests that the Court at least conduct an *in camera* interview of the author of the first email to determine the nature of the three jurors' conduct and finally resolve the spectra of jury misconduct.

Respectfully submitted on December 8, 2010.

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