

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

UNITED STATES,	)	
	)	
	)	
Plaintiff,	)	
	)	Case No. <u>5:06-cr-00022-WTH-GRJ</u>
v.	)	
	)	<b>Emergency Motion</b>
WESLEY SNIPES,	)	Hearing & Oral Argument Requested
	)	
Defendant.	)	
_____	)	

**DEFENDANT SNIPES’ MOTION FOR RECONSIDERATION OF  
THE COURT’S DENIAL OF A CONTINUANCE AND JOINT MOTION  
WITH ALL CO-DEFENDANTS FOR A NINETY DAY CONTINUANCE**

Wesley Trent Snipes (“Snipes”), the defendant in the above-captioned matter, by and through counsel of record, Robert G. Bernhoft, respectfully moves for reconsideration of the court’s prior denial of a continuance in this matter and, in the alternative, jointly moves with all other co-defendants for a ninety day continuance of the currently calendared trial date in this matter. Counsel hereby also respectfully requests a hearing and oral argument on this emergency motion and incorporates the memoranda of law in support of the motion herewith, as required under local rule 3.01. An emergency motion to file an overlength brief is filed contemporaneously herewith.

The Court’s recent Order denying Snipes his requested continuance relied upon an unfortunate, but serious, misapprehension of fact, and an unfortunate, but significant, misapplication of the relevant law. The denial of the motion without a hearing or any form of inquiry whatsoever constitutes unfortunate, but plain, error. Additionally, and independently, facts discovered since the initial motion further support the motion for a continuance, brought in

good faith and for good cause.

## **Introduction**

Snipes terminated former counsel for one reason only: his complete lack of trust and confidence in Attorney Martin, Snipes' former lead trial counsel. Reasonably and intelligently choosing not to proceed with counsel inattentive to preparing Snipes' defense, Snipes substituted counsel familiar with criminal tax cases, and who previously secured complete vindication for Snipes in false state allegations arising from a New York civil case. Snipes has no interest whatsoever in delay for its own sake; in fact, each day of delay denies him a chance for full vindication at trial, and further undermines his professional opportunities and personal reputation. The court, understandably frustrated with the habits of former counsel, appears to have misattributed and shifted that blame to Snipes.

Ultimately, Snipes' suspicions were completely correct. The scope of Mr. Martin's pretrial preparation failures, independent of the previously noted errors by former counsel, makes a frightening list:

- *no* meaningful index of the 800,000 discovery documents, alleged to be stored on an antiquated database, in a complex tax and conspiracy case, where the government intends to introduce evidence, including 404(b) evidence, spanning at least eight years of Snipes' financial and tax matters;
- *no* review, or even knowledge apparently, of the sixty-some-odd boxes of documents concerning the Commonwealth Trust Company ("CTC")-related case located in Philadelphia, Pennsylvania, in the custody of IRS Special Agent Hueston, though the government intends to introduce CTC issues as 404(b) evidence, including Mr. Martin's failure to identify exculpatory reliance documents from Attorney Brownlee, former CTC

counsel;

- *losing* critical government discovery documents, then misleading current counsel about the fact the discovery documents could not be found, documents the government is apparently in the process of re-shipping to Attorney Martin as this motion is drafted;
- *no* witness interviews with many critical potential exculpatory defense witnesses, with Mr. Martin not even interviewing *any* of the 2,000 former ARL clients who could provide critical testimony;
- *no* witness interviews with the co-defendants in this matter;<sup>1</sup>
- *no* witness interviews with the more than thirty government witnesses (former counsel incorrectly believed there would be only about 10 government witnesses for the trial as late as October 1, 2007, when, in fact, there will be more than 30);
- *no* detailed investigation into the factual predicate known to be needed to support a selective prosecution claim;
- *no* identification of expert witnesses on the operational ownership claims of various foreign entities under Swiss law and the law of various other foreign nations, especially when the law of a foreign nation is a fact question, and when the government intends to argue that foreign law recognized Snipes as the legal owner of those entities;
- *no* timely assertion of statutory venue transfer rights, significant here where there is a substantial racial disparity in the two potential jury pools and minimal connection of the case to Ocala;
- *no* motion to dismiss Count Three on statute of limitations grounds from the insufficiency of the indictment itself;

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<sup>1</sup> Former counsel did not even know critical facts concerning co-defendants Rosile and Kahn before October 2, 2007.

- *no* investigation into grand jury abuse stemming from use of the grand jury as an investigative tool to support an already issued indictment;
- *no* proper request to amend the standing criminal scheduling order concerning *Brady*, *Giglio* and *Jencks* materials, in order that those materials be disclosed earlier than eleven days and five days before trial, respectively, in such a difficult and complex case, with more than thirty government witnesses; and
- *no* proper motion in limine to exclude 404(b) evidence, which former counsel, as late as October 4, 2007, post-discharge, told current counsel *may* have to be filed prior to trial, manifestly unaware that the 404(b) motions had to be filed at the already passed motion deadline under this court's criminal standing scheduling order, apparently having never sufficiently attended to the order governing timely filings and deadlines in this case.

Consequently, Snipes seeks reconsideration of the court's denial of the continuance, or, in the alternative, renews his motion for continuance, given additional information confirms Snipes' reasoned and well-founded suspicions. Co-defendants Rosile and Kahn join in this request for a continuance, while the prosecution, despite just weeks ago taking no position on a ninety-day request for continuance of this trial, now objects.

## **I. Background for the Reasons and Timelines of Substitution**

### Sequence of Events Triggering the Substitution of Counsel

1. September of 2007: Throughout the month, Snipes has difficulty reaching Attorney Martin, and increasing doubts about Attorney Martin's dedication to his case, as Attorney Martin appears distracted by other high-profile cases. Snipes communicates his concerns to Attorney Meachum throughout the month.

2. September 19, 2007: Attorney Meachum's medically documented severe back problems lead him to advise the court and client he may not be able to partake in the trial at all.

3. September 24, 2007 & September 25, 2007: The news reports announce a state grand jury will, and does, indict Michael Vick<sup>2</sup>, represented by Attorney Martin, Snipes' same lead attorney in this case, exposing Vick to an extensive sentence in Virginia state prison, rendering his federal plea dubious to many observing the case, and triggering wide-spread criticism of Mr. Martin's handling of the matter in multiple forums. Of particular concern to informed commentators, Mr. Martin's announced defense for Vick suggests he misadvised Vick on easy legal issues, suggesting to the media implicitly that double jeopardy could preclude state charges following a federal plea.<sup>3</sup> In a public statement, Mr. Martin stated that Vick's legal team would examine the charges "to ensure that he is not held accountable for the same conduct twice."<sup>4</sup> Mr. Martin apparently was unaware that double jeopardy does not apply to successive prosecutions by different sovereigns under the century-long established "dual sovereignty" principle.

Further information vindicated broad concern about Martin's distractions with other cases after state prosecutors noted Martin's apparent non-involvement with them.<sup>5</sup> This succeeded earlier concern from information about Vick's legal strategy leaking plea advice to the New York Times prior to a plea, though it was unknown if Mr. Martin was the source.<sup>6</sup>

Around this time, Snipes voices his concern to Attorney Meachum that Martin's inattentiveness created the Vick problem, and that this could happen to him. Snipes immediately

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<sup>2</sup> [http://www.ajc.com/sports/content/sports/falcons/stories/2007/09/25/vick\\_0925.html](http://www.ajc.com/sports/content/sports/falcons/stories/2007/09/25/vick_0925.html)

<sup>3</sup> [http://www.ajc.com/sports/content/sports/falcons/stories/2007/09/25/vick\\_0925.html](http://www.ajc.com/sports/content/sports/falcons/stories/2007/09/25/vick_0925.html)

<sup>4</sup> [http://www.ajc.com/sports/content/sports/falcons/stories/2007/09/25/vick\\_0925.html](http://www.ajc.com/sports/content/sports/falcons/stories/2007/09/25/vick_0925.html)

<sup>5</sup> [http://www.ajc.com/sports/content/sports/falcons/stories/2007/10/03/vick\\_1004.html](http://www.ajc.com/sports/content/sports/falcons/stories/2007/10/03/vick_1004.html)

<sup>6</sup> <http://www.nytimes.com/2007/08/17/sports/football/17vick.html> (*Lawyers Tell Vick to Accept Plea Deal*).

scheduled a conference with current counsel, who Snipes knew had prior success in federal criminal tax and conspiracy defenses in cases involving similar charges, and with whom he had a prior relationship including successful civil rights representation. Snipes instructed current counsel to comprehensively review the court record and perform an independent consultation to discuss whether what happened to Vick could happen to him from Martin's inattention to his case.

3. September 28, 2007: The motion for reconsideration of critical issues is denied, highlighting reasons for concern.

4. September 30, 2007: Snipes engages in an extensive conference with an independent consultation by the undersigned counsel and his partner, Attorney Robert Barnes, conducted in Vancouver, conducted for most of the late afternoon and early evening;

5. October 1, 2007: Snipes decides to substitute the Bernhoft Law Firm for former counsel and communicates the same to Attorney Bernhoft and Attorney Meachum. The Bernhoft Law Firm understands that Attorney Meachum will communicate the discharge and substitution to former counsel. Attorney Meachum misunderstood Snipes' directive to Attorney Meachum as severe disgruntlement with former counsel, rather than what Snipes intended as an immediate directive to terminate former counsel and substitute new counsel.

6. October 2, 2007:

(a) Current counsel is in expedited transit from Vancouver, B.C. through Seattle, Washington, to Milwaukee, Wisconsin, and then on to Orlando, both to meet with Attorney Meachum that evening and be available for a personal appearance after filing all proper notices of appearance before the court on October 3, 2007;

(b) Current counsel meets with Attorney Meachum before he boards a plane to Atlanta, to

discuss immediate substitution and status of discovery preparation. Bernhoft and Barnes express their concern with the lack of notice to the court and other counsel concerning the discharge.

Attorney Meachum explains his misunderstanding of Snipes' directive. Mr. Meachum explains he reasonably relied upon Mr. Martin for pre-trial preparation of discovery review as Martin's role. Mr. Meachum travels to Atlanta that evening. Upon his arrival in Atlanta, Mr. Meachum will conference with Snipes to seek clarification of his instructions.

7. October 3, 2007:

(a) Very early the next morning, Attorney Meachum notifies counsel his misunderstanding was corrected. Mr. Meachum sends notices to all attorneys they have been discharged. Upon Mr. Meachum's communications to current counsel, current counsel makes their appearance (Doc. 210) and former counsel files their motion to withdraw (Doc. 214); Mr. Meachum reviews the motion for continuance prior to filing, and the motion is filed within hours of current counsel's appearance in the case (Doc. 213);

(b) Current counsel, in transit to Ocala to be available for the court on October 3, 4, or 5, 2007, contacts the court's chambers after obtaining approval from AUSA Scot Morris to make the contact, to appear in person to discuss the continuance and substitution; the clerk for the court's chambers apprises counsel the court is not available for such a conference since the court is out for the week, but counsel can file a motion for a hearing next week; approximately thirty minutes after the conference with the court's clerk, counsel receives word the court denied Snipes' request for a continuance, a decision issued without a telephonic conference, chambers inquiry, or hearing;

8. October 4, 2007: After initially delaying production of discovery to the defense, Attorney Martin begins forwarding discovery by express courier later in the day;

9. October 5 and 6: Upon review of the discovery files by a team of forensic discovery reviewers and counsel, all of Snipes' fears are further confirmed and corroborated concerning the scope of inattentive pre-trial preparation, exceeding even the worst expectations, including a complete lack of a meaningful index for the supposed discovery review, only a few pages of notes for all the discovery review on just a subset of a few emails, lost discovery that encompasses a likely third of the government's case-in-chief documents, multiple failures to interview critical witnesses including any of the 2,000 ARL witnesses considered critical to the defense, and failures to know the motion deadline for 404(b) objections.

### **Timeliness**

Prior to the public disclosure and subsequent widespread public commentary on the Vick debacle and the personal conference with current counsel on September 30, 2007, no client in Snipes' position would have likely known of Martin's fundamental inattentiveness in preparation of his trial, reasonable suspicions completely and further confirmed upon interval events between the discharge and the filing of this motion.

Each of the critical errors itemized above and below are facts a layman would not usually be aware of; only diligent counsel, versed in federal criminal tax law and cases, could identify and document each of the above failures. Indeed, the failure of anyone in much of the mainstream press to question Mr. Martin document that a person in Snipes' position would not apprehend the scope of the failures without review of independent counsel, an event precipitated by the Vick debacle, not even known until September 25, 2007. Equally, Mr. Martin's waiting for the eve of trial to interview witnesses, prepare his client, determine trial strategy after that witness interview and review process and after receipt of *Brady*, *Giglio*, and *Jencks* discovery, could not, given Mr. Martin's dilatory actions, be known to Snipes any earlier than it was.

Finally, Attorney Martin's willingness to withhold information from substitute counsel concerning discovery his office lost and his willingness to make untrue claims in an affidavit attacking Snipes discloses how Martin could keep a client like Snipes in the dark about his own inadequate preparation.

### **Martin's Response**

Attorney Martin falsely accuses Snipes and his counsel of "reckless" and "false" allegations. The public record, and revelations from his discovery files, speak clearly otherwise. Attorney Martin further accuses Snipes' counsel of not conducting a factual investigation of this matter. Attorney Martin is, quite simply, mistaken. The sources of investigation by counsel prior to filing of the motion were as follows: (1) review of the court record, public filings, and media reports in this matter; (2) review of relevant case-law on certain legal aspects concerning the issues; (3) comprehensive review all of issues with Mr. Snipes; (4) telephonic and personal discussions with Attorney Meachum concerning the matter; and (5) Attorney Meachum's review of the motion prior to its filing. With the added benefit of review of Martin's work product from transfer of client files, each of counsel's concerns were corroborated.

Martin obliquely refers to an irreconcilable conflict of interest but fails to explicate that conflict. The conflict is indeed obvious and irreconcilable.

### **Failure to Timely Raise Statutory Right to Transfer Under 18 U.S.C. 3237(b)**

Snipes alleged Attorney Martin "failed to timely raise critical issues of venue." Mr. Martin claims this allegation of untimely assertion of venue rights is "false" and Snipes was "reckless" to make it. The facts dictate otherwise. In order to timely raise the right to transfer of venue under § 3237(b) of Title 18 of the United States Code, Mr. Martin merely had to assert Snipes' right within twenty days of the arraignment, or December 28, 2006. Counsel familiar

with federal criminal tax matters would never make this critical oversight. This court already found the assertion was untimely. (Doc. 188, p.12.) The court also found that none of the excuses proffered by Martin for his failure were legitimate nor could they “excuse” the “tardiness” in assertion of fundamental venue election rights. Mr. Martin’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.

### **Failure to Seek Remedy for Grand Jury Abuse**

Snipes alleged Attorney Martin “failed to seek remedy for serious grand jury abuse of which he should have known with the exercise of reasonable diligence.” Martin claims this allegation is “false” and making it was “reckless.” Two facts prove otherwise. First, Attorney Martin never filed any motion in this court for dismissal of the charges or exclusion of evidence on any grounds of grand jury abuse. Second, there were sufficient grounds to do so. The evidence related thereto will be the subject of a motion to unseal grand jury records before the Honorable Timothy J. Corrigan or this court, as appropriate. Again, it appears the reason for this is the same reason Martin missed the venue transfer deadline, filed motions for discovery he already has in his possession, lost other discovery, and was unaware, even as of October 4, 2007, of the timelines and deadlines under the court’s standing scheduling order (not knowing, for example, that 404(b) discovery that any motion objecting to such evidence was due back in June of 2007). In this instance, the fundamental issue is use of grand jury and judicial compulsion to obtain evidence specifically requested solely for an indictment already issued.

### **Lack of Diligence in the Discovery Process**

Snipes alleged Attorney Martin’s discovery practice demonstrated “lack of diligence” in the discovery process. That is already evident by the lack of any meaningful index of the

discovery documents, lost discovery related to the government's case-in-chief, lack of any substantial notes on the supposed detailed discovery review, repeatedly needing the government to apprise him where basic information (like Rosile's returns or the names of the un-indicted co-conspirators) are located in the discovery as late as August, 2007, misidentifying potential reliance individuals as attorneys who are neither attorneys nor accountants, and failure to interview critical witnesses whose importance can be disclosed by the discovery.

Mr. Martin's motion practice discloses the same absent diligence. In order to successfully move this court for an order compelling further discovery, only three simple requirements need be met: first, review the discovery in detail to know precisely what is and what is not located in the discovery, with the prerequisite detailed index of documents, notes on the discovery review, and proper organizational formatting for structuring the discovery review; second, what factual predicates would support a particularized discovery request and confer with government counsel on the specific issues in dispute after complete discovery review; and third, file a motion to amend the criminal schedule standing order if any discovery sought is not due at that time under the order. None of these things happened under former counsel's watch.

Instead, "boilerplate" discovery motions were filed that could mislead a client, but not competent counsel, as to complete inattention to this important matter. Mr. Martin failed the simple elementary step of conferring with counsel prior to filing the motions. The court scolded him for the same, noting he "failed to advise whether he has conferred with counsel" prior to filing the motion, despite the rule requiring the same. (Doc. 184, p. 1.) The court repeated the criticism again for "failure to advise the court." (Doc. 184, p. 2.)

Martin secondly failed the merely procedural step of seeking an amendment of the standing order for any *Brady* or *Giglio* discovery, an order whose time schedule can be

reasonably and seasonably adjusted to accommodate the complexity of cases as an aid to avoid undue delay at trial and protect the due process rights of the accused. Again, the court scolded Martin for this failure to perform a simple, elementary task, twice criticizing Martin for the “failure to comply with the criminal standing schedule order.” (Doc. 184, p. 2; Doc. 184, p. 3.) Worse yet, Martin did not even appear to know what *Giglio* stood for, apparently assuming it allowed discovery of impeachment information for non-testifying witnesses – something no competent counsel would confuse. The court noted the problem. (Doc. 184, p. 3.)

The third failure is perhaps the most devastating to competent motion practice and adequate trial preparation: inept and superficial discovery review. Here, the court’s own conclusions speak volumes. Worse yet, Martin still appears to not even know the number of documents in discovery. Martin refers to “over 400,000” documents; in fact, there are, according to the government, over 800,000 documents in discovery.

Again, the court records, to knowledgeable counsel, disclosed the problems: first, Martin actually filed an order to compel discovery for documents *already in* the discovery he claimed to have reviewed, which the government had to “direct” him to (Doc. 184, p. 2) (noting the government had already “provided documents” at issue and that the government would resolve the issue by its promise to “direct” Martin to where the documents were); second, Martin failed to “identify any other particular document” the government had withheld (p.1); third, in a separate order denying a bill of particulars, the court noted the very information Martin sought was already in the discovery Martin claimed to have reviewed, the court noting the government’s conclusion that the “identities of the unindicted co-conspirators is made apparent in the voluminous discovery.” (Doc. 185, p. 4) The identities of unindicted co-conspirators is an extremely important matter when defending a *Klein* conspiracy charge.

Independently, despite the news stories across the country detailing accusations concerning Snipes in the Commonwealth Trust Company (“CTC”) prosecution and the prosecution’s disclosure of very limited CTC evidence in this case, Attorney Martin never once requested to review the voluminous documents in the government’s possession in Philadelphia concerning CTC. Counsel is aware of those files because counsel demanded and received access to those files in prior CTC-related cases. Included in those files is an attorney opinion letter essential to Snipes’ defense under Martin’s publicly proclaimed reliance theory of defense. Defense counsel received approval and full access to review the documents in Philadelphia within 48 hours of appearing in this case. Counsel suspects the CTC failures are just the tip of the iceberg in missing discovery requests and review, given the high profile nature of the CTC case amid public disclosure of the case in the news connected to Snipes, a suspicion continuously confirmed as counsel reviews the paucity of discovery notes, absence of meaningful indexes, and patent misapprehension of critical facts concerning utility and interviews of potential witnesses.

**Further Problems: Poor Briefing, Inadequate Research and No Investigation**

This court often noted the significant problems with Martin’s motions, noting how one of Martin’s motions “makes little sense” (Doc. 185, p. 5), others were “without merit,” (Doc. 188, p. 1), relied on “non sequitur” claims (Doc. 188, p. 7), and too easily relied upon unpublished and non-criminal cases as authority (Doc. 188, fn.3, fn.25). What else could the court conclude when in a motion for reconsideration on critical issues of venue and severance, Martin introduced his brief with this perplexing statement?: “As set forth fully in the attached memorandum of law, Mr. Snipes should reconsideration of its denial of the Motion to Sever.” (Doc. 191, p.1.) Such inattention to basic detail almost always evidences far more serious deficiencies in those areas, like discovery review, that require deep attention to detail.

The court further noted how often Mr. Martin's arguments were procedurally improper. As the court opined: "such arguments cannot properly be considered in deciding a pretrial motion." (Doc. 188, p. 3.) The court noted it was "necessary to conduct his [Mr. Martin's] own investigation" as to critical factual matters, rather than ask for bills of particulars, especially when a competent discovery review over time would provide "more than sufficient information to perform an investigation." (Doc. 185, p. 3; Doc. 185, p. 5.) Moreover, in the critical selective prosecution claim made by Snipes, no investigation was performed at all. The court criticized Mr. Martin for trying to get the court to "improperly look" beyond the indictment for legal challenges and detailed the complete lack of factual predicate or investigation necessary for the selective prosecution claim. (Doc. 188, 8.) The court noted that despite the former defense being "in possession of entire [ARL] list for some time," he was "unable to present anything more than speculation." (Doc. 188, fn.8.) Consequently, this failure to conduct any inquiry and failure to identify the relevant control group – similarly situated but white, rich, or famous clientele – meant he "failed to meet his burden." (Doc. 188, p. 8.)

The failures to investigate and inquire do not end there. The issues of pretrial adverse publicity and potential racial prejudice in a jury pool are yet to be explored. Snipes' counsel failed to request a jury questionnaire until September 19, 2007, and, despite the court requesting Snipes' counsel make their request in a written motion, Snipes' counsel failed to do so. (Doc. 193.)

### **Snipes' Suspicions Confirmed: Negligent Preparation Was Extensive**

#### Further Deficiencies by Attorney Martin

1. Failure to move to dismiss Count Three of the indictment for violation of the statute of limitations, given the indictment's failure to allege sufficient facts to change the filing

deadline of April 17, 2000 to October 16, 2000;

2. Failure to interview critical government witnesses prior to trial or make any apparent attempt to do so;

3. Failure to move to exclude all 404(b) evidence, untimely provided in contravention of the court's Criminal Schedule Standing Order, which Attorney Martin did not even request any legal review of until October 1, 2007, more than six weeks after provision of the 404(b) notice;

5. Failure to request amendment of the court's standing Scheduling Order to authorize earlier disclosure of *Brady*, *Giglio* and *Jencks* discovery than five days or eleven days before trial, respectively and failure to request exhibit and witness lists at least 30 to 45 days prior to trial, rather than 5 days prior to trial, when 30 to 45 days has been ordered in complex cases of this kind for due process purposes;

6. Failure to create and maintain any useful index or notes of discovery documents aside from an abbreviated review of a small subset of the discovery;

7. Failure to keep a critical set of discovery documents that form an essential component of the government's case-in-chief, identified as some of the "DR" disks, which Attorney Martin could not locate upon request by current counsel for discovery documents in his possession, but failed to communicate the same to defense counsel, instead requesting the government send him an extra copy of the disk, a request made after his discharge in this case;

8. Failure to investigate the racial/ethnic profile of other ARL clients, their tax filing records, and their economic status in order to document the selective prosecution of Snipes;

9. Failure to know, according to the sparse existing notes, that certain potential witnesses were neither accountants nor attorneys, despite an apparent belief that they were, due

to lack of inquiry and investigation, critical to the “reliance defense” announced early as the primary defense strategy in this case;

10. Failure of former counsel to know that 30 witnesses, not 10 witnesses, would be testifying on behalf of the government, a deficiency apparently not corrected until October 2, 2007.

These errors, along with other critical issues already identified, objectively evidence the reasonableness of Snipes’ decision to seek an independent consultation from attorneys familiar with federal criminal tax cases and then quickly substitute counsel.

### **Choice of Substitute Counsel Was Not Unreasonable**

Counsel is aware of multiple “861” and prosecutions of former ARL clients, all of which, to the knowledge of current counsel, resulted in convictions save two: the two tried by the Bernhoft Law Firm. According to the 2003 Department of Justice Report, federal prosecutors took 35 criminal tax cases to trial, only losing 2 of the 35. *See Compendium of Federal Justice Statistics*, p.62 (2003). During that same period, the Bernhoft Law Firm only had to take 1 federal criminal tax to trial. That case was 1 of the only 2 acquittals in the nation, securing complete acquittals on all charges. Snipes’ choice was reasonable.

### **Timeliness**

Snipes entrusted his former counsel, reasonable given the promotion of Attorney Martin as a “high powered” attorney, and chose substitute counsel only upon grave doubts arising from recent events concerning Attorney Martin’s inattentiveness, publicly disclosed mishandling of comparable matters, conclusions reached only after detailed review of this matter with current counsel, and detailed review of current counsel’s trial stratagems for the case, none of which could be fully known to Snipes prior to September 30, 2007, with Snipes’ decision finalized

within 24 hours and Attorney Meachum correcting his misunderstanding with communications to all former counsel and the court, precipitating timely action thereafter.

## **ARGUMENT**

Every court must minimally conduct an inquiry with substituted counsel before denying a motion for a continuance by substituted counsel. With all the respect with which this point can be made, and has to be made, the court did not allow any inquiry into this matter, and as such, constituted reversible legal error.

Separately, the court unfortunately did not discuss the controlling legal standard for continuances upon substitution of counsel, including the governing Fifth and Sixth Amendment rights of Snipes' to due process, confrontation of witnesses, and to effective counsel. Snipes wants trial sooner, not later; Snipes simply and justifiably wants a fair trial with competent and effective counsel who have adequate time to prepare this complex case for trial and actually pay attention to his case. That is not a dilatory request.

### **I. The Court Made An Unfortunate, but Clear, Error of Law in Failing to Conduct the Necessary Inquiry Prior to Ruling on the Motion to Continue Upon Substitution of Counsel.**

The lack of inquiry by the court was plain legal error, as circuit after circuit has found. Failure of the court to “investigate or consider reasonable alternatives,” instead of issuing “a simple denial of the motion” for a continuance, requires reversal. *Gandy v. Alabama*, 569 F.2d 1318, 1328 (5th Cir. 1978). A recent decision of a sister Circuit reemphasized the recurrent problem with federal courts highlighting rigid commitment to judicial scheduling over the meaningful concerns and Constitutional rights of defendants, condemning trial court's tendencies to summarily adjudicate critical continuance matters upon supposition and speculation:

Here, the District Judge had apparently made up his mind that he was not going to grant a continuance without even hearing from the defendant. In fact, he decided

this at a meeting that the Defendant did not even attend. **Due process is violated when fundamental constitutional rights are so decided.**

*United States v. Nguyen*, 262 F.3d 998, 1002 (9th Cir. 2001) (emphasis added).

This follows long-standing law. A court that “summarily denied the motions, making no adequate inquiry into the cause of Brown’s dissatisfaction with his counsel or taking any other steps which might possibly lead to the appointment of substitute counsel in whom Brown could repose his confidence” committed evident and reversible error. *Brown v. Craven*, 424 F.2d 1166, 1169 (9th Cir. 1970). A judge that “proceeded under a misapprehension” committed reversible error in denying a continuance for counsel. *Everitt v. United States*, 281 F.2d 429, 437 (5th Cir. 1960).

Where a trial court “displayed nothing even approaching the requisite concern and understanding of the defendant’s Sixth Amendment rights,” the appellate court had no choice but to reverse for a plain abuse of discretion. *Nguyen*, 262 F.2d at 1003. Similarly, a court committed “an abuse of its discretion” when it “denied the motions for continuance and for reconsideration without making inquiry into the accused’s concerns.” *United States v. Prochilo*, 187 F.3d 221, 229 (1st Circuit 1999). Where a defendant had “gravely divergent views on trial strategy” or any conflict arose with former counsel, it was reversible error not to hold a hearing and grant a continuance if those divergent views or conflict had not been known to the client in advance of the time his substitute counsel would have needed for a continuance. *Id.* at 226-27. A court of appeals would, in such instance be “constrained by the Sixth Amendment to direct that Prochilo’s conviction be set aside.” *Id.* In this case, Snipes could not have known what he now knows ninety days prior to October 22, 2007 – Mr. Martin’s lack of diligent preparation, effectively masked and hidden until close to trial, as is often the case when a layman uncovers

the failures of his lawyers, when ninety days is the time substitute counsel requests to continue the trial.

“For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant privately and in depth and examine available witnesses.” *Nguyen*, 262 F.3d at 1004. Critically, “even well-founded suspicions of intentional delay and manipulative tactics can provide no substitute for the inquiries necessary to protect a defendant’s constitutional rights.” *Pazden v. Maurer*, 424 F.3d 303, 314 (3rd Cir. 2005).

Snipes’ current counsel can appreciate, after review of the record, the court’s evident and justifiable frustration with former counsel; former counsel was consistently dilatory and neglectful in simple and elementary tasks, a fact only a lawyer, not a layman, would recognize.<sup>7</sup> What cannot be fair or factually correct, however, is to hold Snipes to blame for his former counsel’s health problems, trial conflicts, and lack of diligence. To do so does not further the salutary goal of insuring the perception of judicial fairness in federal criminal proceedings, much less protect Snipes’ constitutional rights.

Equally, the court’s determination of what a reasonable person would have a suspicion of, despite the unfortunately incorrect legal analysis, is both empirically and inductively unsound. The court inferred that because Attorney Martin once asked for a continuance based on a conflict in his trial calendar, that such a prior request must mean Snipes was trying to delay trial at that time. Frankly, that is not a reasonable inference. How can Snipes be blamed for his attorney’s trial calendar?

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<sup>7</sup> For example, the court’s apparent assumptions that Martin’s trial calendaring conflicts and Martin’s belated filings concerning discovery, severance, and venue were somehow delay-oriented reflect on Martin’s lack of diligent review, but should not be shifted to Snipes. Martin did not even appear to know what the criminal scheduling standing order required concerning 404(b) evidence and could not locate critical discovery documents *after* he was discharged.

The court then inferred that because Attorney Daniel Meachum suffered from a severe back condition in mid-September (and continues to suffer this condition), and requested a continuance to insure his presence at trial to seek medical treatment, that Snipes was somehow blameworthy again. Frankly, that is not a fair or reasoned inference. How can Snipes be blamed for Mr. Meachum's medically documented back problems?

Finally, the court's last inference was that because Snipes' substitution of counsel took place nineteen days before trial, then his only possible motivation could be unnecessary delay, rather than a simple desire to choose the counsel he can have confidence in to give him a fair trial. The fact is Snipes only recently uncovered, as is often the case with counsel problems, the severity of those problems. These inferences, while understandably expressing frustration at the neglectful habits of former defense counsel, reflect an unfortunate rush to judgment against Snipes, not a reasoned analysis after a productive inquiry. The "peculiar sacredness" of the Sixth Amendment right to counsel of choice "demands" the most "scrupulously review" of the record. *See Avery v. State of Alabama*, 308 U.S. 444, 447 (1940).

With due regard and proper respect for the court, Snipes sincerely requests reconsideration and a hearing at the currently calendared October 9, 2007 hearing date, where Snipes will, as the court ordered, be personally present, and his current trial attorneys stand ready to give account and advocate for their client.

**II. The Court Made An Unfortunate, but Clear Error of Law in Interpreting a Permissive Local Rule to Unduly Burden Snipes' Exercise of His Sixth Amendment Right to Counsel of Choice, Sixth Amendment Right to Effective Assistance of Counsel, Sixth Amendment Right to Confront Adversarial Witnesses, and Fifth Amendment Right to Due Process, Including His Right to a Fair Trial.**

The court relied upon Local Rule 2.03 for its decision not to continue this case. The court's application of the local rule results in a two-fold consequence: first, the local rule

punishes a defendant in a criminal case from obtaining effective substitute counsel if at the time of substitution, more time is needed to prepare for trial including preparing an adequate confrontation of witnesses; and second, a defendant in a criminal case must suffer the prejudice of his former counsel's inattentiveness, shifting that burden to the client and substitute counsel, under the mantle that an attorney accepts a case as he finds it. This application of the local rule would render the rule unconstitutional by violating Snipes' rights secured under the Fifth and Sixth Amendments to the United States Constitution, and create a substantial risk of reversal upon appeal from any conviction, which would unnecessarily postpone Snipes' interest in a conclusive resolution and full vindication at trial, as well as the public's and the court's interest in judicial efficacy and conclusive trials.<sup>8</sup>

The local rule, permissive and discretionary in nature for the court to apply, cannot trump the Fifth and Sixth Amendments to the United States Constitution. *See Lee v. Kemna*, 534 U.S. 362 (2002) (rigid application of local rule to deny continuance can violate due process rights of defendant). Those Constitutional rights, and the court's supervisory obligations to insure the appearance of a fair trial, supersede the local rule and compel a construction of the local rule different than the one applied by the court.

Reconsideration is therefore warranted:

While we appreciate the heavy case loads under which the district courts are presently operating and understand their interest in expediting trials, we feel compelled to caution against the potential dangers of haste, and to reiterate that an insistence upon expeditiousness in some cases renders the right to defend with counsel an empty formality. In our system of justice, the Sixth Amendment's

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<sup>8</sup> Equally of note, if Snipes had ever intended to "game" the court, he would stay silent about this reversible legal error, in order to sabotage any conviction. Snipes seeks no unnecessary delays or retrials; Snipes merely seeks a fair trial and timely vindication in court before an impartial jury, compelling this modest continuance for substitute counsel. The fact he filed this reconsideration motion evidences his sincerity in a timely and fair resolution of this case and his consistent, continuous, respectful approach to this court.

guarantee to assistance of counsel is paramount, insuring the fundamental human rights of life and liberty. “The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done.” *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963).

*United States v. Verderame*, 51 F.3d 249, 252 (11th Cir. 1995).

**A. The Application of Local Rule 2.03 to this Situation did not Regard Snipes’ Sixth Amendment Right to Counsel of Choice.**

As the Eleventh Circuit articulated in reversing a conviction for failure to provide a continuance for counsel:

The Sixth and Fourteenth Amendments to the U.S. Constitution guarantee that any person brought to trial in any state or federal court must be afforded the right to assistance of counsel before he or she can be validly convicted and punished by imprisonment. Under certain circumstances, denial of a motion for continuance of trial may vitiate the effect of this fundamental right.

*United States v. Verderame*, 51 F.3d at 251 (11th Cir. 1995).

Half of the recited cases by the Eleventh Circuit in prior cases required reversal for denials of a continuance to the accused. *See United States v. Baker*, 432 F.3d 1189, 1248 (11th Cir. 2005). The Sixth Amendment right to counsel guarantees a defendant “both a fair opportunity to be represented by counsel of his own choice and a sufficient time within which to prepare a defense.” *Id.* at 1248 (citing *Gandy v. Alabama*, 569 F.2d 1318, 1321 (5th Cir. 1978)).

We have previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him. It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice. The Government here agrees, as it has previously, that the Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.

*United States v. Gonzalez-Lopez*, 126 S.Ct. 2557 (2006) (internal citations and quotations omitted).

An accused financially able to retain counsel must not be deprived of the opportunity to do so: “We recognize that the right to choice of counsel devolves not only from the due process clause of the Fifth Amendment but also from the more stringent and overlapping standards of the Sixth Amendment.” *United States v. Burton*, 584 F.2d 485, 489 (C.A.D.C. 1978). Moreover, “[s]ince the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court’s authority to deprive an accused of his life or liberty.” *Pazden*, 424 F.2d at 318 (relying upon *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938) (“Compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court’s authority to deprive an accused of his life or liberty.”))

As the Supreme Court recently articulated:

Where the right to be assisted by counsel of one’s choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is “complete” when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice-which is the right to a particular lawyer regardless of comparative effectiveness-with the right to effective counsel-which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

*Gonzalez-Lopez*, 126 S.Ct. at 2563.

A court should not “confuse the right to counsel of choice-which is the right to a particular lawyer regardless of comparative effectiveness-with the right to effective counsel-which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.” *Id.* The right to a particular attorney is a right “regardless of comparative effectiveness.” *Id.* at 2563. Indeed, the “erroneous deprivation of the right to counsel of choice . . . unquestionably qualifies as ‘structural error.’” *Id.* at 2564. The reason is simple:

Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the “framework within which the trial proceeds -or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all.

*Id.* at 2564-65.

Thus, “it is not a matter of showing that the violation was harmless, but of showing that a violation of the right to effective representation *occurred*. A choice-of-counsel violation occurs *whenever* the defendant’s choice is wrongfully denied.” *Id.* at 2565.

Independent of former counsel’s incompetence – which merely explains the good faith underpinning Snipes’ decision and imposes its own independent reasons for the substitution and continuance to remedy the wrong – Snipes does not have to demonstrate that Mr. Martin was incompetent; rather, Snipes must demonstrate merely that his choice to substitute current counsel for Mr. Martin was not unreasonable and solely for delay. “The claimed deprivation is an arbitrary encroachment on the right to counsel of choice, not a claim of ineffective assistance.” *Baker*, 432 F.3d at 1248. The right of an accused “to be heard through his own counsel” is “unqualified.” *Chandler v. Fretag*, 348 U.S. 3, 9 (1954). “A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth.” *Id.* at 10. The choice of counsel is the client’s comfort and trust, “not the comfort of the court or the competency of the attorney”. *Nguyen*, 262 F.3d at 1004.

**B. The Application of Local Rule 2.03 to this Situation did not Regard Snipes' Sixth Amendment Right to Effective Assistance of Counsel.**

Where the court is on notice of ineffective assistance of prior counsel and fails to remedy it, then the court violated the right of the accused to effective representation of counsel and “failed in his duty to accord justice to the accused.” *White v. Estelle*, 566 F.2d 500, 503 (5th Cir. 1978). As sister circuits hold, “to compel one charged with grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever.” *Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970). A “defendant is denied his Sixth Amendment right to counsel when he is forced into a trial with the assistance of a particular lawyer with whom he is dissatisfied, with whom he will not cooperate, and with whom he will not, in any manner whatsoever, communicate.” *Nguyen*, 262 F.3d at 1003-04. Two “compelling” grounds identified by the Eleventh Circuit for substitution of former counsel include whenever an “actual conflict had arisen” or former counsel was fired. *United States v. Robinson*, 2007 WL 2490940 (11th Cir. 2007) (unpublished). Mr. Martin has acknowledged both in his recently filed “Affidavit.” (Doc. 218.)

**C. The Application of Local Rule 2.03 to this Situation did not Regard Snipes' Sixth Amendment Right to Due Process and a Fair Trial.**

“A concomitant due process doctrine, a variation on the right to counsel theme, has evolved which basically guarantees a defendant both a fair opportunity to be represented by counsel of his own choice and a sufficient time within which to prepare a defense.” *Gandy v. Alabama*, 569 F.2d 1318, 1321 (5th Cir. 1978). The right to “to an adequate opportunity to prepare the defense, and to confront witnesses” are part of those rights. *Id.* at 1323, n.9.

“Due process demands that the defendant be afforded a fair opportunity to obtain the assistance of counsel of his choice to prepare and conduct his defense. The

constitutional mandate is satisfied so long as the accused is afforded a fair or reasonable opportunity to obtain particular counsel, and so long as there is no arbitrary action prohibiting the effective use of such counsel.”

*Id.* at 1323 (quoting *United States ex rel. Carey v. Rundle*, 409 F.2d 1210, 1215 (3rd Cir. 1969)).

While federal appellate habeas review of cases arising from state courts is limited to due process concerns under the 14th Amendment, *Estelle*, 566 F.2d at 503, n.3, federal courts must protect the Sixth Amendment right to counsel and the supervisory obligation to insure the *appearance and actuality* of a fair trial. This supervisory obligation represents the “independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.” *Gonzalez-Lopez*, 126 S.Ct. at 2566; *see also United States v. Millican*, 414 F.2d 811, 813 (5th Cir. 1969) (recognizing supervisory obligation to protect perceived fairness of trials through reasoned continuances of a federal criminal trial). “The trial judge must steer clear of the Scylla and Charbdis of extremes.” *Gandy*, 569 F.2d at 1322.

Thus, the right to counsel theme of the due process clause has at least four important variations: the right to have counsel, the right to a minimal quality of counsel, the right to a reasonable opportunity to select and be represented by chosen counsel, and the right to a preparation period sufficient to assure at least a minimal quality of counsel.

*Id.* at 1323.

Putting Snipes to trial without a continuance would be inappropriate here, given his former counsel’s multiple problems, when Snipes deployed a timely and effective remedy by substituting counsel as quickly as he reasonably could upon his layman’s discovery of those problems, and with all respect, would both violate Snipes’ due process rights and plague the perceived fairness of this proceeding.

**D. The Application of Local Rule 2.03 to this Situation did not Regard Snipes' Sixth Amendment Right to Confront His Accusers.**

The legal standard enunciated by the Eleventh Circuit for continuances necessary to confront witnesses, guaranteed by the Sixth Amendment to the United States Constitution, is set forth thusly:

In so doing, we consider four factors: (1) the diligence of the defense in interviewing the witness and procuring his testimony; (2) the probability of obtaining the testimony within a reasonable time; (3) the specificity with which the defense was able to describe the witness's expected knowledge or testimony; and (4) the degree to which such testimony was expected to be favorable to the accused, and the unique or cumulative nature of the testimony.

*United States v. Douglas*, 489 F.3d 1117, 1128 (11th Cir. 2007).

“The constitutional right of the accused to have compulsory process to obtain witnesses in his defense is well established.” *Dickerson v. Alabama*, 667 F.2d 1364, 1369 (11th Cir. 1982). “A court may not, however, refuse to grant a reasonable continuance for the purpose of obtaining defense witnesses where it has been shown that the desired testimony would be relevant and material to the defense.” *Id.* at 1370. Indeed, as this Circuit has held, “the failure by the trial court to grant a continuance to allow [the defendant] the opportunity to compel the presence of a credible alibi witness violated Dickerson’s Sixth and Fourteenth Amendment rights to compulsory process.” *Id.* at 1370-71.

Without the continuance, Snipes cannot procure sufficient witnesses for his defense; indeed, this would have happened without substitution of counsel, as Attorney Martin had not interviewed any of the 2,000 ARL prospective witnesses, experts on certain critical issues related to the 404(b) issues, and any of the other critical exculpatory defense witnesses. As the court implicitly recognized previously, the complexity of this case compelled ten months of pre-trial preparation; unfortunately, former counsel used almost none of that ten months for meaningful

preparation. A ninety-day continuance is anything but excessive or unreasonable under these circumstances to insure identification and subpoenaing ARL witnesses and gathering sufficient information to impeach adverse witnesses and confront their testimony.

**III. Reviewing 800,000 Documents and Substantial other Un-reviewed Documents, Interviewing 2,000 Previously Un-interviewed Potential ARL Witnesses, Interviewing Multiple Critical Government and Essential Defense Witnesses, Conducting Necessary Surveys of Juror Pool Concerns on Pretrial Publicity, Filing Omitted Pre-Trial Motions to Strike Surplusage, Dismiss Charges in the Indictment, Exclude Evidence, Venue Equal Protection Concerns, and Preparing for Snipes' Testimony Requires More Than Twelve Days to Prepare, Particularly When Little of the Above Was Performed By Prior Lead Trial Counsel, the Incarcerated Co-Defendant Kahn and Co-Defendant Rosile Join the Motion for a Continuance, and the Government Previously Did Not Object Just A Few Weeks Ago to a 90 Day Continuance to Late January.**

Whatever discretion afforded the court changes when the court's actions burden the constitutional rights of the accused:

Yet when the continuance is sought to retain or replace counsel, the defendant's Sixth Amendment right to the assistance of counsel is implicated . . . . Thus, the trial judge may not insist on such expeditiousness that counsel for the defendant lacks reasonable time to prepare for trial; stripping away the opportunity to prepare for trial is tantamount to denying altogether the assistance of counsel for the defense.

*Burton*, 584 F.2d at 489.

"The proper exercise of the trial court's discretion thus requires a *delicate* balance between the defendant's right to adequate representation by counsel of his choice and the general interest in the prompt and efficient administration of justice." *Baker*, 432 F.3d at 1248 (emphasis added).

It is only when a defendant substitutes counsel on a "whim and caprice" solely to subvert "the fair administration of justice," that denial of a continuance may not be an abuse of discretion.

*Gandy*, 569 F.2d at 1323.

The relevant factors that were not consider here included: the length of the delay, which should factor in the complexity of the case; whether replacement counsel is new to the case;

how much preparation replacement counsel would need normally to prepare; whether other continuances (intended to be *based on conduct within the defendant's control*) were made and granted; convenience to co-defendants; whether any legitimate reason exists for the requested continuance, such as prejudice to the defendant and inability to meaningfully confront witnesses; and any independently unique factors. *See Baker*, 432 F.3d at 1248-49 (identifying these factors as counter-balancing judicial efficiency and governmental interest, both relevant but limited factors, in unduly expediting trials).

Here, every factor favors the continuance.

#### The Short Length of Delay Favors the Continuance.

The length of delay is short – only 90 days, in a previously identified complex federal criminal tax trial, which will likely last 8-12 weeks, not 4-8 weeks, covering more than seven years of complicated financial transactions and tax matters in a three-defendant conspiracy case involving 2,000 clients of the other co-defendants, when similar cases usually take 22 to 36 months to prepare for trial. *See United States v. Vallone*, et al, 1:04-cr-0372-1 (N.D. Illinois) (criminal tax trial of Aegis defendants; scheduled for trial 33 months after indictment); *United States v. Meredith*, et al, 2:02-cr-0372-DDP-1 (criminal tax trial of We The People promoters, where trial occurred 22 months after indictment); *United States v. Poseley*, 2:03-cr-00344-MHM-1 (criminal tax trial of promoters, where trial occurred 26 months after indictment).

Where the “shortness of preparation time” and a “denial of the continuance” “meld,” then failure to afford time for the purpose of preparation cannot conform to the “standards of a proper trial” under a federal court’s supervisory obligations to insure fair trials. *See United States v. Millican*, 414 F.2d 811, 813 (5th Cir. 1969). As the Eleventh Circuit noted, “we found a right to counsel violation based purely on the fact that defendant’s counsel was given insufficient time to

prepare.” *Baker*, 432 F.3d at 1249. Only allowing new counsel 34 days to proceed to trial in a far less complex case than this one constituted reversible error. *See United States v. Verderame*, 51 F.3d 249 (11th Cir. 1995). “We find that the 34 days failed to provide defense counsel with sufficient time to defend against a case which the government spent years investigating.” *Id.* at 252; *see also Linton v. Perini*, 656 F.2d 207, 212 (6th Cir. 1981) (denial of continuance reversible error partly because defendant charged with multiple serious crimes). “Implicit in this right to counsel is the notion of adequate time for counsel to prepare the defense.” *Verderame*, 51 F.3d at 252.

Moreover, even “a long delay and a great deal of inconvenience may be tolerated” where new counsel is present in a very complex case. *Burton*, 584 F.2d at 492. Generally, “the complexity of the case, the fact that numerous defendants and counts were involved, the prior delay in pre-trial discovery, and the fact that counsel for one of the defendants had been retained only one week before the originally scheduled trial date” justified a continuance. *United States v. Chalkias*, 971 F.2d 1206, 1211 (6th Cir. 1992). Where “defense counsel’s inability to interview all of the witnesses on the witness list before the trial was to begin,” denial of a continuance can violate the Constitutionally protected rights of the defendant. *Pazden*, 424 F.3d at 316, n.15. Denial of thirty-day continuance was abuse of discretion in just a simple gun case. *United States v. McClendon*, 146 Fed.Appx. 23, (6th Cir. 2005) (unpublished). This is no simple gun case; a ninety-day continuance is reasonable.

The law in this Circuit is clear. Where “defendants were prevented from proceeding with and trying their case to the best advantage of their clients,” their right to counsel of choice was denied. *Everitt v. United States*, 281 F.2d 429, 434 (5th Cir. 1960). Equally, “the denial to the defendants and their newly appointed counsel of the required additional time to adequately

prepare for trial” constitutes an abuse of discretion. *Id.* When a defendant, with prior counsel, sought a continuance in the same month of the trial, despite a prior three-month adjournment, the denial of the continuance was an error, an “equally serious and reversible” error. *Id.* . “To say that appellant’s attorney’s modest request for more time to investigate a very serious felony case was dilatory is to stretch credulity.” *Linton*, 656 F.2d at 211.

#### The Substitution of Counsel Favors the Continuance.

Replacement counsel is new to this case, with 800,000 discovery documents to index and review (indexing the documents meaningfully for the first time in this case), apparently more than 30,000 documents as government case-in-chief exhibits (none of which has been indexed or mastered), and 30 or more government witnesses to prepare (on 404(b) issues the former defense began preparing only one week ago), exculpatory witnesses from the 2,000 unexplored ARL list to contact and interview, other exculpatory defense witnesses to interview (none of whom have been interviewed apparently), and a complex, criminal tax trial to prepare for. The court previously recognized that the necessity of such preparation compelled ten months to prepare; prior counsel simply did not prepare adequately, so affording defense counsel nineteen days to prepare would not be fair to Snipes.

A trial court abuses its discretion when it denies a continuance for substitute counsel, especially where it is not difficult to reschedule the trial and there is sufficient evidence to suggest the attorney-client relationship has broken down. *See Newcomb v. State*, 651 P.2d 1176, 1181 (Alaska App. 1982) (applying federal standard). Denying a continuance for substitution of counsel constitutes reversible error, a legal principle spanning decades of decisions and states across the nation, protecting the same rights at issue here. *See State v. Garcia*, 75 P.3d 313 (Mont. 2003); *State v. Bronaugh*, 445 N.E.2d 262 (Ohio App. 1982).

We recognize that the trial court needs broad discretion to deal with the problem of a defendant who, on the day of trial, wishes to have a continuance and a new attorney because of a similar ethical problem. However, in this case the record indicates that there was no reason why the case could not be continued or why the continuance of the case would hinder the administration of justice. The record also supports the fact that the attorney-client relationship had broken down and does not support the inference that another attorney-client relationship would similarly break down. These are the factors which lead us to the conclusion that the trial court abused its discretion in not allowing Newcomb a continuance so that he could later proceed to trial with another attorney.

*Newcomb*, 651 P.2d at 1183.

When “the trial judge denies a request for a continuance where it would have been fair and reasonable to have done so to enable the defendant to retain or substitute counsel, and thereby violates the defendant’s Sixth Amendment right, the violation is made out, and harmless error tests do not apply.” *Burton*, 584 F.2d at 491.

If circumstances have arisen that vitiate the original choice or lead the accused to believe sincerely that his earlier pick is unsatisfactory, a request for leave to choose new counsel must be carefully and seriously considered. *See United States v. Johnston*, 318 F.2d 288 (6th Cir. 1963); *see also United States ex rel. Davis v. McMann*, 386 F.2d 611, 620 (2nd Cir. 1967); *United States v. Mitchell*, 354 F.2d 767, 769 (2nd Cir. 1966). Any “defendant must have complete confidence in counsel and hence, a change, if it occurs, or even a discharge, will usually point to a continuance.” *United States ex rel. Davis v. McMann*, 252 F. Supp. 539, 545 (N.D.N.Y. 1996) (aff’d 386 F.2d 611, 620 (2nd Cir. 1967)). As long as the continuance is before the impaneling of the jury, then the substitution should be permitted in the absence of bad faith. *See Chapman v. United States*, 553 F.2d 886 (5th Cir. 1977).

Whether the court likes substitute counsel “are considerations wholly irrelevant to the constitutional issues confronting the trial court. It is the Defendant’s confidence which is at stake, not that of the court.” *Magee v. Superior Court*, 506 P.2d 1023, 1025 (Cal. 1973). It can

be error for a trial court to second-guess a defendant's reasons for a substitution of counsel. *See Chapman*, 553 F.2d at 894.

The right to effective assistance of counsel and the right to counsel of choice, insures that a “defendant may not be forced to proceed with incompetent counsel; a choice between proceeding with incompetent counsel or no counsel is in essence no choice at all.” *Pazden*, 424 F.3d at 313 (citing *Wilks v. Israel*, 627 F.2d 32, 35 (7th Cir.1980)).

As a sister circuit explained:

[A] state may not arbitrarily interfere with this right [to substitute counsel] in the name of docket control. Evidence that a defendant was denied this right arbitrarily and without adequate reason is sufficient to mandate reversal without a showing of prejudice. Basic trust between counsel and defendant is the cornerstone of the adversary system and effective assistance of counsel.

*Linton*, 656 F.2d at 211-12.

This First Request from Snipes For a Continuance for Substitute Counsel Favors the Continuance.

As this court noted, the court denied the prior requests for continuances and none have ever been granted Snipes to locate or substitute counsel and give them adequate time to prepare. As sister circuits conclude, the illness of an attorney and the scheduling conflicts of an attorney are both circumstances “beyond [the defendant’s] control.” *Burton*, 584 F.2d at 499. Imputing a bad faith motive to Snipes for circumstances beyond his control in his prior counsel’s seeking a continuance is unjustified. There should not be “an arbitrary and inelastic calendaring of cases without due regard, for example, to the existence of conflicting demands for the service of a particular counsel by different courts or by the schedules within a multi-judge court. In judicial administration, too, there should be no absolutes.” *Gandy v. Alabama*, 569 F.2d 1318, 1325 (5th Cir. 1978) (binding precedent on the Eleventh Circuit). Yet here, former counsel’s request for a

continuance based on a scheduling conflict appears to have been factored in and imputed to Snipes, while the legitimate calendaring concerns of current counsel appear not to have been considered.

This issue goes to whether it was Snipes who was responsible for any prior delay in the proceedings and the reasons and reasonableness of those prior delays; here Snipes is responsible for no prior delay in this matter, nor has he ever sought delay previously for substitution of counsel. With his life and liberty on the line, one substitution of counsel in an entire case cannot be considered a *per se* dilatory act. The fact he could only uncover the depth and severity of his prior counsel's failures twenty days before trial, after a thorough review with independent counsel, cannot be considered *per se* dilatory; nor is such prior counsel problems a precondition for Snipes to choose substitute counsel.

Even where a defendant learned right before trial that he had "gravely divergent views on trial strategy," a continuance was compelled if the substitution of counsel was reasonably close in time to that discovery. *Prochilo*, 187 F.3d at 226. It is usually "something of a stretch" for others "blandly to charge" the client or counsel with "disingenuousness" merely because the motion to continue is close to trial, especially without the required judicial inquiry. *Id.* at 227, n.6. A judge's assumption, even in good faith, that a continuance is just a "garden variety" is not sufficient where there is an equally competing reason to view the continuance as necessary and in good faith. *White v. Estelle*, 566 F.2d 500, 504 (5th Cir. 1978). Anytime a defendant has "a genuine belief that defense counsel was not sufficiently prepared to represent him," his request is not dilatory or to pervert justice." *Pazden*, 424 F.3d at 319, n.21.

Essentially, the quick order misattributed to Snipes the responsibility for the trial conflicts and illnesses of his discharged counsel, attributing to him *their* requests for

continuances, while an unfortunate failure to inquire into the justifiable reasons for Snipes' decision, a decision that has nothing to do with the time of his day in court. Point in fact, given the negative publicity and substantial interference with prospective economic opportunity these charges present, Snipes is anxious for his day in court to vindicate himself and his reputation. Mr. Martin's lack of diligence alone precipitated this issue, and he alone should bear the burden.

The Convenience of the Other Defendants Favors the Continuance When the Incarcerated Defendant Joins the Request for the Continuance.

Generally "losing the services of retained counsel outweighed any inconvenience to the court or other parties." *Baker*, 432 F.3d at 1249. Here, every co-defendant joins in the motion to continue the trial: both Mr. Kahn and Mr. Rosile now join this request for a continuance. The government originally "[took] no position on motion to continue trial date from 10/22 to January trial term" for a near identical 90-day continuance of the trial date, with less compelling grounds. (Doc. 193, filed on Sep. 19, 2007.) The government now reverses itself after Snipes obtained new counsel, while simultaneously admitting former counsel's problems in raising timely motions.

Protecting Constitutional Rights Compels the Continuance.

The reason for the continuance could not be more deserving of protection: the Constitutionally consecrated right to choice of counsel, effective assistance of counsel, confrontation of witnesses, preparation for trial, and a fair trial. Equally, the principal unique factor present is, without a continuance, the trial proves dubious, both in appearance of fairness and in probable reversal of result, due to the patent ineffective assistance of counsel this court can remedy in advance. Where "there were no unique, countervailing factors to balance against

the grant of the motion, other than traditional interests of judicial economy,” it was reversible error to deny the motion. *Gandy*, 569 F.2d at 1328.

The “myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defense with counsel an empty formality.” *Ungar v. Sarafite*, 376 U.S. 575, 589-91 (1964); *see also Baker*, 432 F.3d at 1248. As a sister circuit noted on near-identical facts:

“We have previously criticized a trial judge who seemed “above all to be determined not to disturb [the court’s] trial schedule.” *United States v. Moore*, 159 F.3d 1154, 1160 (9th Cir. 1998). In fact, an “unreasoning and arbitrary ‘insistence upon expeditiousness in the face of a justifiable request for delay’ violates the right to the assistance of counsel.” *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) . . . the District Judge in Nguyen’s case improperly emphasized his own schedule at the expense of Nguyen’s Sixth Amendment rights.

*Nguyen*, 262 F.3d at 1003.

This is not a simple case with minor discovery, few facts, little risk, and a short trial. This is not a case where Snipes went through successive counsel again and again. This is not a case where Snipes requested any continuance personal to him. This is not a case where the court granted multiple continuances previously. This exceptionally complex case has not, in any way, languished on the docket. This is not a case where Snipes provided no explanation or stood mute for the reasons of his discharge of former counsel. This is not a case where Snipes chose random counsel to substitute. This is not a case where a person in Snipes’ position could have even known the facts precipitating discharge until a week before he made his decision.

On the contrary, this is a case with more than 800,000 discovery documents. This is a case with more than thirty government witnesses and more than 30,000 government documents in exhibits. This is a case with three co-defendants, where the imprisoned defendant joins in this request for a continuance. This is a case with multiple government expert witnesses and more

defense expert witnesses needed. Interviewing witnesses is critical and always grounds for a continuance, under the due process clause, the right to counsel clause, and the confrontation clause. *Linton*, 656 F.2d at 211.

### CONCLUSION

To impute invidious intent to Snipes, without an inquiry with current counsel telephonically or otherwise, is, under these facts, neither fair nor accurate. Equally, a local rule cannot force a defendant to bear the burden of his prior attorney's lack of diligence, nor so completely restrict his ability to substitute counsel of his choice when he loses all trust in prior counsel merely because his discovery of the same is close to trial. Consonant to Snipes' Fifth and Sixth Amendment rights, reconsideration is warranted and a ninety-day continuance justified.

WHEREFORE, with due regard and deferential respect for the court, counsel must respectfully request reconsideration of the court's prior denial of the continuance. Snipes must, sincerely and respectfully, request the court grant the short ninety-day continuance, and counsel, reasonably and respectfully, seeks solely to insure their client a fair and meaningful trial.

Respectfully submitted on October 9, 2007.

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

UNITED STATES,	)	
	)	
	)	
Plaintiff,	)	
	)	Case No. <u>5:06-cr-00022-WTH-GRJ</u>
v.	)	
	)	
WESLEY SNIPES,	)	
	)	
	)	
Defendant.	)	
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**CERTIFICATE OF SERVICE**

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

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Dated: October 9, 2007

/s/ Daniel J. Treuden  
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