No. 10-_____

In The
Supreme Court of the United States

WESLEY TRENT SNIPES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is an accused person deprived of the right under Article III and the Sixth Amendment to be tried only by a jury of the community where venue is proper, when factual questions determinative of whether venue has been correctly laid are determined solely by a jury selected in the place challenged by the defendant as incorrect?

2. Where venue is a contested factual issue in a criminal trial, does the government bear a burden of proof beyond a reasonable doubt or only by a preponderance of the evidence?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Snipes and respondent United States). Mr. Snipes had two co-defendants at trial, Eddie Ray Kahn and Douglas Rosile. Kahn did not appeal; Rosile dismissed his appeal.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Wesley Trent Snipes respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit affirming his conviction and sentence.

OPINIONS BELOW

The Eleventh Circuit's Opinion (per Marcus, J., with Fay and Anderson, S.JJ.) is reported at 611 F.3d 855; Appx. 1. The United States District Court for the Middle District of Florida wrote two relevant pretrial memoranda, filed September 5, 2007, and December 24, 2007; *see* Appx. 35, 46-59, 60, 65-69, *available at* 2007 WL 2572198 and 2007 WL 5041892. The Eleventh Circuit's opinion dismissing an earlier, collateral order appeal is published at 512 F.3d 1301 (11th Cir. 2008) (per curiam); Appx. 75.

JURISDICTION

The judgment of the Eleventh Circuit affirming petitioner's conviction and sentence was filed and entered on July 16, 2010. *See* Appx. 1. Petitioner timely sought rehearing, which was denied on September 29, 2010. Appx. 78. By orders dated December 22, 2010, and February 1, 2011, under No. 10A630,

Justice Thomas extended until February 26, 2011, a Saturday, the date for filing this petition. The petition is being filed by postmark on the first business day thereafter. Rules 13.1, 13.3, 13.5, 29.2, 30.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to Rule 14.1(f),(*i*)(v), the pertinent constitutional provisions, statutes, and rules of procedure are reproduced in the appendix.

STATEMENT OF THE CASE

This petition arises out of the conviction of petitioner Wesley T. Snipes, after a nine-day jury trial (plus two days of deliberations), on three counts of an eight-count indictment in the Middle District of Florida. The counts of conviction charged willful failure to file federal income tax returns, a misdemeanor under 26 U.S.C. § 7203, for the years 1999, 2000 and 2001. The jury acquitted petitioner of two felonies and three additional misdemeanor tax charges. The district court imposed three consecutive maximum one-year terms of imprisonment.

a. Procedural History

The trial evidence showed that during the earlier tax years in question petitioner Snipes resided with his family in New York City, but moved at the end of that time to a home in the northern New Jersey suburbs. He also maintained a residence near Los Angeles. The government alleged, the indictment charged, and the jury concluded, however, that his legal residence was in Florida. Out of this background, legal issues concerning venue on the failure-to-file counts pervaded the proceedings.

The district court denied a pretrial motion seeking a hearing on whether the failure-to-file counts had been brought in an improper venue, that is, before a constitutionally disqualified jury. Appx. 48-49. The motion sought dismissal, or in the alternative a transfer to the district where Snipes had made his legal residence during the time at issue. (It was undisputed that "legal residence" determines venue in a case of this kind.) The defense sought an evidentiary hearing to establish this fact, but the court denied the motion, deferring the issue for decision by the jury at trial. The district court denied reconsideration of its ruling, and also refused to allow the matter to be reopened when new counsel entered the case closer to the scheduled date for trial. Appx. 68-69. Petitioner's attempt to take a collateral order appeal on the question of whether venue was properly laid in Florida was dismissed by the Eleventh Circuit.

Appx. 75. Petitioner also sought a transfer of venue under either 18 U.S.C. § 3237(b) or under Fed.R.Crim.P. 21(b). All venue related relief was denied.

The defense at trial was focused principally on the issue of willfulness, but both parties also presented evidence bearing on venue, that is, on the question whether petitioner had resided in the Middle District of Florida during the years at issue. (This evidence is described in the Statement of Facts which follows.) Venue was also argued to the jury in closing as a defense on the failure-to-file counts. The jury found petitioner Snipes not guilty of conspiring with one Eddie Ray Kahn and others to defraud the United States and the Internal Revenue Service ("IRS") with respect to his tax obligations. He was likewise acquitted of knowingly submitting a false claim against the United States in the form of a 1040X (amended) return for the year 1997. Petitioner was also found not guilty of willfully failing to file personal income tax returns for the years 2002, 2003 and 2004. Petitioner was convicted, however, on Counts 3-5 of willful failure to file in 2000-2002 for tax years 1999-2001.

The district court (Wm. Terrell Hodges, Sr.U.S.D.J.) imposed three consecutive maximum one-year terms, for a total sentence of three years' imprisonment, to be followed by a one-year term of supervised release. As a special condition of supervision, in light of

petitioner's payment of a substantial amount of the delinquent taxes and of his ongoing participation in efforts to achieve a civil resolution with IRS, the sentencing court set a deadline of six months following his release from imprisonment for petitioner to attempt to settle his outstanding federal tax obligations. Judge Hodges also imposed the required special assessments, plus costs of prosecution.

Petitioner filed a timely appeal to the Eleventh Circuit. The government filed a cross-appeal, which became moot. Upon full briefing, and after having the matter under advisement for some seven months following oral argument, the panel issued an opinion on July 16, 2010. Appx. 1.

A petition for rehearing was denied. Appx. 78. This petition follows. After having been free on bail pending appeal, petitioner commenced service of his sentence on December 9, 2010.

b. Statement of Facts

Wesley Snipes, a well-known movie actor, had been a client of Starr & Co., a New York firm whose attorneys, accountants and staff handled his taxes and investments. Starr & Co. also ran Snipes' personal finances (such as bill-paying), a service it provided for many show business celebrities. The

principal of Starr & Co., attorney Kenneth I. Starr, testified that he terminated Snipes as a client for most purposes on June 29, 2000.[1]

American Rights Litigators ("ARL") was run by co-defendant Kahn. ARL purported to provide tax assistance, although its main strategy was to engage in endless legalistic efforts to frustrate the tax assessment and collection processes. ARL employed attorneys and accountants, who completed forms and generated voluminous correspondence addressed to the IRS. Embracing the teachings and methods of ARL, petitioner filed no federal income tax return for 1999 or subsequent years. Petitioner received far more in gross income in each year at issue than the minimum amount which requires the filing of a return. Willfulness was hotly contested at trial, with the jury acquitting petitioner on most counts, including all involving fraud.

On the failure-to-file counts, the defense contended at trial that the government could not prove

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[1] While petitioner's appeal was pending, Starr was indicted in the Southern District of New York (No. 10-CR-520), and sued by the SEC (No. 10-CV-4270), for defrauding his celebrity clients of more than $50 million, including stealing from them and forging their signatures. Starr later pleaded guilty to those charges and is awaiting sentencing within a week after the scheduled filing of this petition. The district court's denial of a motion for a new trial based on whether Starr perjured himself on those subjects (and others) at petitioner's trial, and whether the government knew or should have known of it, is currently pending appeal in the Eleventh Circuit.

that petitioner had his "permanent fixed place of abode" (which the parties agreed was the legal test for venue on these counts) within the Middle District of Florida on October 16, 2000 (the due date for his 1999 return), on April 16, 2001 (the due date for 2000), or on April 15, 2002 (the due date for 2001). Extensive evidence relevant to that question was adduced at trial by each side. In short, the defense brought forward documents in which petitioner claimed residence in New York or California, and witnesses testified that in fact he lived in California and New York (or, after 2002, in New Jersey) and not in Florida on or about the dates at issue. The government showed that petitioner spent at least some of his childhood in Florida, but there was no evidence that he continued to make his home there at any pertinent time and little that he intended to remain or return there.

While the government offered no evidence at trial that petitioner ever lived in Florida after leaving home to attend college, he did *own* a house in Windermere, a town within the Middle District of Florida, during the years in question.[2] The only witnesses with any

[2] Petitioner bought the house in 1992 in a corporate name. The house thereafter remained unoccupied for several years. No one ever saw any sign of him living there, and mail addressed to Mr. Snipes at that address during the pertinent time frame was returned by the Post Office as "undeliverable." The only person who was seen using the house was an older woman, and one witness testified the house was purchased "for his mother."

direct knowledge of the matter (called by the government) testified that petitioner had a residence near Los Angeles and another in New York City. A former assistant testified that she knew petitioner in 2003 lived with his new wife and their children in northern New Jersey, in a residence he bought in April 2002.[3] Prior to that, petitioner had a home in nearby New York City, the witness explained.[4] He "live[d] from time to time" in New Jersey, she said[5]; however, he "spent most of his time in the house in California, Marina Del Rey." When petitioner was not in New Jersey, at "other times he could have been at his home in California."

The total number of appearances in the thousands of pages of government exhibits of the Windermere and other Florida addresses was 929, while New York and

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[3] The transaction was not in petitioner's name, records showed, so that fans would not learn where he lived. He began making payments toward the purchase of the New Jersey house in late 2001. Petitioner maintained extensive home offices at the New Jersey residence, the witness reported.

[4] When petitioner renewed his ARL membership in February 2002, he gave as his "street address" what appears to be an apartment address on West 48th Street in New York City (with the notation: "Please note change of address."). The IRS computer specialist recovered ARL files on Mr. Snipes, which reported that address repeatedly, as well as "310" (Los Angeles) and "212" (New York) telephone numbers.

[5] A 42-page letter to IRS, purporting to be from petitioner in June 2004, was notarized in Bergen County, New Jersey, as was other correspondence with IRS in that time period. A "filing statement" he submitted to IRS in 2005 gave a California address.

California addresses were reported 6275 times, almost seven times as often. Similarly, petitioner's credit card records showed him to be shopping in New York and California, not in Florida. The ratio of all Florida transactions to the total, 19/2162, is only 0.87%.

The government, on the other hand, relied on various documents dated at times between the early 1990s and 2006, in which petitioner identified the State of Florida or an address in Florida as his "residence." These documents included driver license renewals, a loan document, tax forms, movie contracts, and a federal civil complaint (filed in 2005, more than three years after the dates at issue) with Snipes' declaration that he was a "citizen and resident of Florida." Thus, for example, on March 3, 2003 (almost a year after the last date at issue here), petitioner signed a "Declaration of Allodium Freehold Land Title" stating that he was "a Article IV, Section 2 Citizen's of the Republic State of Florida. . . ." (sic). At about the same time, he claimed the house in Windermere to be exempt from "forced sale" as a "homestead" "under the provisions of the United States of America Homestead Act of 1862, Section 4."[6]

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[6] There was no evidence that this so-called "homestead exemption" was ever recognized by any governmental authority. Moreover, the government never offered evidence that petitioner had claimed Florida's genuine "homestead objection" for the house in Windermere under the state Constitution (and implementing legislation) – an exemption from property tax on the first $25,000 of assessed valuation – which is available to the "legal or equitable" owner of real estate "who maintains thereon

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Having relied on the spurious nature of these very documents as evidence of criminal willfulness under the tax law, that is, of petitioner's *insincerity* in professing certain *beliefs*, the government thus invoked excerpts from the same documents as if they constituted admissions that petitioner was legally a "resident" of the Middle District of Florida. US CA11 Br. 14, 21. In the end, the court below found these sufficient, on a "plain error" standard of review, to meet a preponderance burden to prove petitioner's "permanent, fixed place of abode" between October 2000 and April 2002. Appx. 20 n.7.

c. Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii).

The United States District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal criminal offenses. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

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the permanent residence of the owner, or [of] another legally or naturally dependent upon the owner. . . ." Fla.Const., art. VII, § 6(a).

REASONS FOR GRANTING THE WRIT

1. Assigning the exclusive determination of contested venue to the jury in the challenged locale fails to protect a defendant's fundamental rights under Article III and the Sixth Amendment.

Section 2 of Article III of the Constitution of the United States guarantees the right to jury trial and promises that the trial will be held in the state where the alleged offense "shall have been committed." The Sixth Amendment reinforces that right by including in its specifically delineated provisions that the jury must be "of the state and district wherein the crime shall have been committed." Faced with petitioner's substantial claim that venue was improperly laid, as a matter of fact, for the counts charging him with failure to file income tax returns, the courts below ruled that the jury in the contested locale itself must decide the issue rather than allowing a pretrial hearing to determine venue. Relying on a jury drawn from a judicial district that petitioner challenged as an improper vicinage to itself determine if it embodied the important constitutional protections of the Constitution's venue provisions was inherently self-defeating. Certiorari should be granted to consider this fundamental constitutional issue.

If petitioner was entitled not to be tried in the Middle District of Florida for willful failure to file income tax returns, because when those omissions allegedly occurred, he did not have his permanent residence there – the circumstance that legally determines

venue for this offense – then a jury in that District could not constitutionally be the appropriate body to decide whether venue was properly laid. Certainly that same jury could not have decided itself if it was sufficiently "impartial" under the Sixth Amendment, and it similarly should not have been entrusted to determine its own venue. To preserve his Sixth Amendment rights, petitioner sought an evidentiary hearing to establish venue before trial commenced, which the district court denied. Appx. 46-49, 65-67. The court below then upheld the denial of this motion, because "the Sixth Amendment right to have venue proven as an element of the offense is safeguarded by integrating it into the trial. Snipes had a constitutional right to have venue decided by the jury. It did just that." Appx. 19-20. The court of appeals thus misapprehended the nature of the constitutional right at issue.

The Sixth Amendment does not merely provide "a right to have venue decided by the jury." Rather, it guarantees to the defendant in a criminal case the right to be tried only "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . ."[7] In other words, proper venue is not a freestanding right; rather, it is an essential attribute of the constitutional right to jury trial, much like – and intertwined with – the requirement

[7] *See* Appx. 81.

that the jury be "impartial." 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1785, at 662 (1833) (trial by jury under the Sixth Amendment "is at once speedy, impartial, and in the district of the offence"). The decisions of the courts below thus fell short of vindicating the constitutional rights at issue.

This Court has long held a crime consisting of the failure to file a required form is ordinarily "committed," for venue purposes, in the place where the form was required to be filed. *See Travis v. United States*, 364 U.S. 631, 636 (1961), explaining *United States v. Lombardo*, 241 U.S. 73, 76-78 (1916) (failure to file report of harboring of alien prostitute).[8] An individual income tax return must be filed either "in the internal revenue district in which is located the legal residence . . . of the person making the return," 26 U.S.C. § 6091(b)(1)(A)(i), or "at a service center serving the internal revenue district referred to in clause (i)." *Id.*(ii). Under either pertinent subsection of IRC § 6091(b), the place for filing, and thus the venue for the three counts of conviction, turned on the question of petitioner's residence. Accordingly, in this case the parties were in agreement, and the courts below concurred, that a prosecution for the offense of willful failure to file a federal income tax return, 26 U.S.C. § 7203, may be brought in the district where the

[8] *See also United States v. Anderson*, 328 U.S. 699 (1946) (failure to submit to military induction).

defendant has his or her legal residence, which is defined, again uncontroversially, as the defendant's "permanent fixed abode." *United States v. Calhoun*, 566 F.2d 969, 973 (5th Cir. 1978); *see also* 18 U.S.C. § 3237 (venue for continuing offenses and offenses "involving the use of the mails").[9]

The question of where petitioner had his "permanent fixed place of abode," for the period from October 2000 through April 2002 was very much in dispute. From the earliest stages of the case, petitioner vigorously and repeatedly challenged the government's presentation of the failure-to-file counts to a Middle Florida grand jury, and the indictment's inclusion of those counts, despite improper venue. He moved to transfer venue under 18 U.S.C. § 3237(b), and also under Fed.R.Crim.P. 18 and 21.[10] All these motions were denied.[11]

Petitioner's concerns were precisely those which led to the colonists' inclusion of a venue grievance in the Declaration of Independence, to the Framers' inclusion of a venue provision in Article III, and to the First Congress's incorporation of a vicinage requirement into the Jury Trial Clause of the Sixth

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[9] *See* Appx. 81-82.

[10] *See* Appx. 82, 85-86.

[11] He even attempted to bring a collateral order appeal from the denial, since the Sixth Amendment promises that he should not be tried at all, except by a jury "of the state and district wherein the crime shall have been committed." *See* Appx. 75-77.

Amendment: petitioner questioned whether he could receive a fair trial so far from his home, being judged by a jury not selected from his own community. *See generally Duncan v. Louisiana*, 391 U.S. 145, 152-53 (1968); *United States v. Palma-Ruedas*, 121 F.3d 841, 860-62 (3d Cir. 1997) (Alito, J., dissenting in part; reviewing history and policy of venue right), *rev'd*, *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999) (adopting position advocated by then-Judge Alito's dissent below). Petitioner had a right to have that constitutional objection adjudicated prior to trial.

To be sure, it has long been settled that once the case was set for trial petitioner was *also* entitled to contest the government's venue allegation before the jury, as he did. *See Burton v. United States*, 202 U.S. 344, 381-85 (1906).[12] But if petitioner was – as he contended – entitled *not* to be tried by a jury in the Middle District, then the jury which heard his case was constitutionally incompetent to perform the fact-finding essential to a venue determination. The very same policies that animate the Article III requirement that a trial be held only in the state where the crime was committed and the Sixth Amendment's requirement that the jury for that trial be drawn from that district compel the conclusion that a jury in a challenged location cannot itself be vested with sole authority to determine the propriety of its

[12] That is because venue is, in a sense, "an essential element" of the offense, which must be proven at trial. Appx. 17; *see also* Point 2 of this Petition *infra*.

composition. The only way to avoid this paradox, was to *also* afford petitioner Snipes a pretrial judicial determination of the facts, as sought in his venue motions, to ensure that trial, including a jury assessment of the venue allegation, would only occur in the locale where petitioner maintained his permanent residence, and thus where the alleged crime was "committed" for purposes of venue.

Commenting upon Article III's jury-venue provision, Justice Story wrote:

> The object of this clause is to secure the party accused from being dragged to a trial in some distant state, away from his friends, and witnesses, and neighbourhood; and thus to be subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities, or prejudices against him. Besides this; a trial in a distant state or territory might subject the party to the most oppressive expenses, or perhaps even to the inability of procuring the proper witnesses to establish his innocence.

3 Story, *supra*, § 1775, at 654. The Sixth Amendment elaborates on an accused person's historic right to be tried only "by an impartial jury" chosen in the "district wherein the crime shall have been committed." U.S. Const. amend. VI.[13] *See United States v.*

[13] Section 2, Clause 3, of Article III states, in pertinent part: "The trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been

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Cabrales, 524 U.S. 1, 6 & n.1 (1998).[14] This Court's understanding and explanation of the critical interests served by this protection have never varied:

> To require a citizen to undertake a long journey across the continent to face his accusers, and to incur the expense of taking his witnesses, and of employing counsel in a distant city, involves a serious hardship, to which he ought not to be subjected if the case can be tried in a court of his own jurisdiction.

Hyde v. Shine, 199 U.S. 62, 78 (1905).

As the court below recognized, "'questions of venue . . . are not to be taken lightly or treated as mere technicalities. . . .'" Appx. 17 (quoting Circuit precedent). Indeed, the threat of unfair prosecution in a remote and potentially hostile location requires that the important right of a defendant to trial by jury include that the jury be located only in the proper venue and drawn from the proper vicinage.

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committed. . . ." As this Court has pointed out, the right protected by Article III is properly described as "venue," while the jury right in the Sixth Amendment reflects the principle of "vicinage." *See Williams v. Florida*, 399 U.S. 78, 93-97 & n.35 (1970).

[14] Indeed, as this Court noted, one of the colonists' grievances against the tyranny of King George III, as expressed in the Declaration of Independence, was the holding of trials far from the place where the offense was allegedly committed. Indeed, the guarantee of trial by a jury convened in the proper venue may be the only example of an individual right that is addressed in all three of the Declaration, the original Constitution, and the Bill of Rights.

See United States v. Cores, 356 U.S. 405, 407 (1958) (venue right "is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place"). Moreover, the Sixth Amendment Jury-Vicinage Clause also vindicates the interests of the community itself, wronged by a crime, in bringing its moral judgments to bear and in seeing justice done. Akhil R. Amar, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 123-24 (1997). Since the "venue right" is a structural component of the right to jury trial, *see United States v. Wood*, 299 U.S. 123, 142-43 (1936), entrusting the venue question solely to the very sort of body that the Framers said could not decide *any* issue in the case (that is, a jury convened in the wrong district) cannot be the correct result. The procedure followed here did not serve to ensure that "the accused shall enjoy the right" (U.S. Const. amend. VI) that is guaranteed in Article III and further protected in the Bill of Rights.

The language of this Court's most recent venue decision supports petitioner's position. When determining where trial of a count should be held, the Court explained, "*a court must* initially identify the conduct constituting the offense (the nature of the crime) and then *discern the location of the commission of the criminal acts*." *Rodriguez-Moreno*, 526 U.S. at 279 (emphasis added). This Court did not say that the "court [*i.e.*, a judge] must discern the *alleged* location," but rather "*the* location." The court below thus overlooked this Court's most recent authoritative explication of how the jury-venue right is to be

enforced. It is simply illogical to suppose that the right not to be tried by a jury in a certain place can be meaningfully vindicated by putting the question of what place that is only to a jury selected in the disputed location. The Framers, based on their knowledge of and experiences with abusive practices of the Crown in haling colonists to trials in remote locations including England, did not trust such juries.

The alternative, readily available, is a pretrial evidentiary hearing. Here, the district court refused to allow a process by which it could fulfill its obligation to discern the authorized location for trial of the failure-to-file counts. The court below did not explain how the jury in the trial held in the challenged locale could have vindicated the constitutional right to have a jury from a particular district, and not any other, decide the case.

In general, the procedure for adjudicating a constitutional claim must be designed to preserve, not to defeat, the right itself. *See*, *e.g.*, *United States v. Broce*, 488 U.S. 563, 571 (1989) (defendant may be entitled to "a trial-type proceeding" prior to jury trial on second indictment if needed to establish claim of double jeopardy). Sometimes, this means a question must be decided twice. *See* 18 U.S.C. § 3501(a) (defendant entitled both to pretrial hearing on admissibility of alleged confession *and* to contest statement's credibility and evidentiary weight before jury at trial); *Lego v. Twomey*, 404 U.S. 477 (1972); *Jackson v. Denno*, 378 U.S. 368 (1964) (right to file motion to suppress

does not prevent defendant from challenging "confession" at trial). So, too, in this context, the nature of the right may call for both a pretrial and a trial proceeding. Petitioner was entitled, by analogy, to a "trial-type proceeding," that is, an evidentiary hearing, to show *before trial*, that he was not a permanent resident of the Middle District of Florida on or around the dates alleged in Counts 3 through 5. At such a hearing, he could have testified on the question of his permanent residence, offering what would have been the best possible evidence on that subject.

The courts below could have avoided the constitutional issue on statutory grounds, but an erroneous procedural ruling thwarted that outcome. A defendant charged with failure to file tax returns, 26 U.S.C. § 7203, enjoys a special right to a transfer of venue to his district of residence, upon demand, *even if* the indictment could constitutionally be brought in some other district. 18 U.S.C. § 3237(b). The statute requires that "the motion [be] filed within twenty days after arraignment. . . ."[15] Petitioner invoked this right by pretrial motion, within the deadline set for such motions by the district court, but his motion was dismissed as untimely. Appx. 47-48, 68-69. The court below affirmed, holding that the § 3237 period is rigid and non-extendible. Appx. 12-16.

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[15] *See* Appx. 82.

The ruling was in error. The 20-day deadline of § 3237(b) is no longer effective, because it was superseded by a later-adopted general procedural rule on motions, now found at Fed.R.Crim.P. 12(c).[16] Under the Rules Enabling Act, when a Rule of Procedure is enacted or amended, "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b). The clause referencing IRC § 7203 was added to § 3237(b), the venue statute, in 1966 (Pub.L. 89-713, § 2, 80 Stat. 1108). In 1974, Criminal Rule 12 was amended to add subsection (c), placing the time for filing all pretrial motions subject to the trial judge's control.[17] Accordingly, the amendment to Rule 12, being entirely procedural in nature, superseded the statutory 20-day limit.[18] *See also* Fed.R.Crim.P. 21(d) ("A motion to

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[16] This Rule states that "The court may, at the arraignment or as soon thereafter as practicable, set a deadline for the parties to make pretrial motions. . . ." Rule 12(c) is not qualified by any such phrase as "Except as otherwise provided by statute."

[17] Since their initial adoption in 1944, the Rules had granted the district court discretion to allow the filing of pretrial motions "within a reasonable time" after arraignment. Fed.R.Crim.P. 12(b)(3) (1944). The Advisory Committee expressly noted in 1944 that the rule superseded then-existing fixed statutory deadlines.

[18] The priority of Rules over statutes established by § 2072 as to matters of procedure is fundamental to the relationship between Congress and the courts. Moreover, it is commonplace for the Rules to deal in one general way with similar issues that had formerly been addressed in a plethora of particular statutory provisions. It is therefore immaterial whether § 3237(b) is more "specific" than Rule 12. *Cf. J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 137 n.9 (2001)

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transfer may be made at or before arraignment or at any other time the court or these rules prescribe.").[19] The only other Circuit to have addressed the question of Rule 12 motion-scheduling discretion in relation to motions under 18 U.S.C. § 3237(b) has agreed that the 20-day statutory deadline is subject to extension in the trial court's discretion. *United States v. Humphreys*, 982 F.2d 254, 260 (8th Cir. 1992).[20] Had transfer of the failure-to-file counts been granted, or its denial reversed, the constitutional issue would not have had to be decided. *See Tinsley v. Treat*, 205 U.S. 20 (1907) (statute construed to allow arrestee a pre-removal inquiry into the facts underlying an

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(referring to the specific/general maxim as a mere "purported rule," which applies at best where the meaning of one statute is "unresolved"); *Busic v. United States*, 446 U.S. 398, 406-07 (1980) (government contested application of "the principle that a more specific statute will be given precedence over a more general one, regardless of their temporal sequence").

[19] Even if the statute still applied, nothing would exempt the 20-day deadline from relaxation under Fed.R.Crim.P. 45(b), the general rule on extensions of time. *United States v. Turkish*, 458 F.Supp. 874, 878 n.8 (S.D.N.Y. 1978) (applying Rule 45 to motion under § 3237(b)). A motion-filing deadline is not jurisdictional in nature. *See Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam) (time to file post-trial motion). Accordingly, the district court did not lack power to modify it. *Compare Bowles v. Russell*, 551 U.S. 205 (2007) (time to file notice of appeal).

[20] Moreover, even if the failure to file a motion under § 3237(b) within 20 days caused a forfeiture of that right, the district court had power to act under Rule 12(e) to grant relief from "waiver" for "good cause" (formerly worded as "cause shown").

indictment's venue allegation); *accord*, *Price v. Henkel*, 216 U.S. 488, 491-94 (1910).

Contrary to the opinion below, Appx. 17-18, petitioner's argument on the constitutional venue issue does not conflict with the principle announced in *Costello v. United States*, 350 U.S. 359 (1956) (no challenge to sufficiency of evidence presented to grand jury); *see also Serfass v. United States*, 420 U.S. 377, 389-94 (1975) (claim that government will not be able to prove element at trial is not cognizable on pretrial motion in criminal case). Petitioner did not seek a pretrial determination of a point that should only be decided at trial, but rather a pretrial ruling on where the jury should be chosen *for* the trial (of all issues) to which he was entitled.[21] Petitioner had a

[21] Nor is petitioner's position contrary to the holding in *U.S. ex rel. Hughes v. Gault*, 271 U.S. 142, 149-51 (1926). The majority opinion, authored by Justice Holmes (from which Justice Brandeis dissented on due process grounds), states summarily that a person accused in an indictment "may be required to stand trial wherever he is alleged to have committed the crime." *Id.* 149. But the Court's holding was only that a showing of probable cause (not met by the mere existence of an indictment, which was said only to be *prima facie* proof) was sufficient to justify a defendant's removal from the district of arrest to the district where the indictment was pending; the relator's offer to prove his innocence at the removal hearing was properly disallowed and referred to the trial court. Although the relator apparently invoked his Article III and Sixth Amendment rights, *id.*, the opinion suggests that he may have been confusing venue with jurisdiction when he did so. In any event, no issue concerning a pretrial objection to venue was presented, only a challenge on habeas corpus to the relator's removal from Iowa to Ohio to face an indictment there.

constitutional right to be tried only by a jury selected in the place the offense was committed – and not simply in any place the government alleged that it was committed.

The logical paradox on which petitioner's argument is founded – that if the Framers did not believe a jury in the wrong venue could properly decide the issues in a criminal case, then the Constitution cannot be read to entrust to the sole authority of that same jury the question whether contested facts underlying a venue averment are true – is equally applicable to the suggestion that a court may not look behind a valid indictment, as decided in *Costello* and other such cases. The probable cause determination of a grand jury empanelled in a district other than the one allowed by law lacks the sanctity of a constitutional "grand jury," for the same reason that a jury trial in the wrong district does not satisfy the Sixth Amendment. *See Ex parte Gon-shay-ee*, 130 U.S. 343, 353 (1889) ("Whether a man shall be tried in the county where the offense was committed, or carried to some other county, perhaps hundreds of miles distant, is a matter of much consequence; it is of the venue of the trial. . . . [S]o also as to whether he shall be indicted by a grand jury summoned to serve for the county, and residents of the county, or by such a body summoned from [elsewhere]."); *cf. Midland Asphalt Corp. v. United States*, 489 U.S. 794, 802 (1989) (defendant may bring collateral order appeal from denial of motion claiming "a defect so fundamental that it causes the grand jury no longer to be a grand

jury, or the indictment no longer to be an indictment" within the meaning of the Fifth Amendment Grand Jury Clause)[22]; *In re Groban*, 352 U.S. 330, 346-47 (1957) (Black, J., dissenting) ("The traditional English and American grand jury is . . . selected from the general citizenry of the locality where the alleged crime was committed. They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community.").

Unlike in *Costello*, and other cases mentioned by the court below, the result of allowing petitioner his pretrial hearing, if he prevailed, would presumably have been a transfer of the case, not a dismissal. Moreover, as petitioner pointed out in his brief on appeal, at a pretrial hearing he could have testified on the question of his permanent residence without having to take the stand at trial. *Cf. Simmons v. United States*, 390 U.S. 377, 389-94 (1968) (testimony given by defendant at suppression hearing to establish Fourth Amendment standing not admissible at trial on issue of possession). It should be emphasized, however, that this Fifth Amendment dilemma was not the principal "constitutional dimension" to his venue issue. *Compare* Appx. 16.[23] The entire question

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[22] Indeed, on the basis that he had a right not to be tried at all in that District, petitioner even sought a "collateral order" appeal of his venue point prior to trial, only to be rebuffed. *See* Appx. 75-77.

[23] Whether or not the resulting dilemma whether to vindicate his Fifth Amendment rights or his rights under the Sixth was impermissible, Appx. 18-20, deciding the issue of venue only

(Continued on following page)

is of a constitutional nature: what procedure is necessary, in this case and cases like it, to vindicate the Article III and Sixth Amendment rights to be tried not merely by *a* jury, but by a jury *of the kind described in the Constitution*: both "impartial" and "of the State and district wherein the crime shall have been committed."

That there may have been venue in the Middle District of Florida for *other* counts, as the trial court noted, Appx. 65, does not address the issue at hand; venue must be proper for *each* count and is determined separately for each count. *See United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999) (closely analyzing proper constitutional venue for offense of using firearm under 18 U.S.C. § 924(c) where venue for related kidnapping count was not contested). The fundamental basis for petitioner's argument is that a defendant cannot be required to entrust the question of venue, as a factual matter, to the very jury from which he claims the Constitution protects him from being judged.

Trial before a constitutionally incompetent jury satisfies this Court's definition of a structural error, *see United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49 (2006); *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986), and thus cannot be excused as harmless. To address the important questions concerning the means

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at trial did in fact have the effect of keeping out some of the best evidence on that subject.

for enforcing Article III's jury trial and venue guarantees and the Sixth Amendment's Jury-Vicinage Clause, this Court should grant a writ of certiorari.

2. This case presents an additional Fifth and Sixth Amendment issue of national importance: whether venue, a fact necessary to the conviction in a criminal case, can be established by a mere preponderance of the evidence.

The widespread judicial assertion that venue in a criminal case need not be established by anything more than a preponderance of the evidence cannot co-exist with this Court's cases holding that every fact which is essential to the conviction and to determine the available maximum punishment – of whatever sort, however labeled, and regardless of historical tradition – must be proven beyond a reasonable doubt. *United States v. Gaudin*, 515 U.S. 506 (1995); *In re Winship*, 397 U.S. 358, 364 (1970); *accord*, *United States v. Booker*, 543 U.S. 220, 230 (2005). Whether venue is properly classified as an "element" of the offense for other purposes is not important; in *Ring v. Arizona*, 536 U.S. 584, 588-89 (2002), the Court "reaffirmed [its] conclusion that the characterization of critical facts [as 'elements' or not] is constitutionally irrelevant," citing *Booker*, 543 U.S. at 231. In petitioner's case, seemingly settled Circuit precedent collided head on with this Court's principled doctrine.

As this Court has made abundantly and repeatedly clear, the Fifth and Sixth Amendments do not countenance convictions premised on the finding of essential facts by less than the reasonable doubt standard. A preponderance standard of proof for venue cannot survive this Court's unbroken string of cases, from *Jones v. United States*, 526 U.S. 227 (1999), through *Cunningham v. California*, 549 U.S. 270 (2007). *See also Harris v. United States*, 536 U.S. 545, 557-66 (2002) (interpreting *Apprendi* as holding that any fact that increases a sentence beyond the maximum must be treated as an element of an aggravated offense). That principle echoed the Court's approach in a variety of cases, from *Victor v. Nebraska*, 511 U.S. 1 (1994), and *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (jury must be clearly instructed on reasonable doubt), to *Patterson v. New York*, 432 U.S. 197, 215 (1977) (prosecution "must prove every ingredient of an offense beyond a reasonable doubt"), and *County Court of Ulster County v. Allen*, 442 U.S. 140, 156 (1979) (burden-shifting devices must not "undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the *ultimate* facts beyond a reasonable doubt") (emphasis in original).

Most of the Courts of Appeals recognize – as did the court below – that "venue is an essential element of the government's proof at trial." Appx. 17; *see also* cases cited at n.24 *post*. By "element" in this context, the courts simply mean a fact which the government must prove if the defendant is to be found guilty. Yet at trial, the jury was instructed, in accordance with

settled precedent, to decide the venue issue by a preponderance of the evidence. Tr. 1/29/08, at 185. The defense did not object, which is understandable given the state of Circuit law. The court below held that the burden of proof on the government to prove venue at a criminal trial is only a preponderance of the evidence, thus finding no error, much less plain error. *See* Appx. 20 n.7; *United States v. Stickle*, 454 F.3d 1265, 1271-72 (11th Cir. 2006) (circuit "precedent is well established and clear" on this point).

Every Circuit follows this same rule as to the burden of proof.[24] Most if not all of these lines of authority in each Circuit can be traced to the same source: the opinion in *Dean v. United States*, 246 F.2d 335 (8th Cir. 1957). That case reasons (in contradiction to most Circuits' more recent authority) that "[v]enue is not an integral part of a criminal offense," *id.* 338, and goes on to say, without more, that "we have held, need not be proven beyond a reasonable

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[24] *See United States v. Lenoue*, 137 F.3d 656, 661 (1st Cir. 1998) ("not an element"); *United States v. Rommy*, 506 F.3d 108, 119 (2d Cir. 2007); *United States v. Perez*, 280 F.3d 318, 329-30 (3d Cir. 2002); *United States v. Griley*, 814 F.2d 967, 973 (4th Cir. 1987) ("not an element"); *United States v. White*, 611 F.2d 531, 535 (5th Cir. 1980); *United States v. Charlton*, 372 F.2d 663, 665 (6th Cir. 1967) (dictum); *United States v. Knox*, 540 F.3d 708, 714 (7th Cir. 2008); *United States v. Black Cloud*, 590 F.2d 270, 272 n.2 (8th Cir. 1979); *United States v. Powell*, 498 F.2d 890, 891 (9th Cir. 1974); *United States v. Hamilton*, 587 F.3d 1199 (10th Cir. 2009); *United States v. North*, 910 F.2d 843, 912 n.52 (D.C.Cir. 1990) (per curiam), *modified in other respects on rehearing*, 920 F.2d 940 (D.C.Cir. 1990) (per curiam).

doubt." *Id.* The opinion cited for the latter claim, however – *Blair v. United States*, 32 F.2d 130 (8th Cir. 1929) – says no such thing. It merely observes that "the great weight of the ruled cases" holds that venue "even in a criminal case, need not be proved beyond a reasonable doubt," citing a legal encyclopedia that counted eleven states as rejecting a reasonable doubt rule and two for it, as of about ten to twenty years earlier.[25] *Id.* 132.[26] Moreover, the *holding* of *Blair* was not actually as stated in *Dean* (the foundation of the Circuits' precedential lines). Rather, the Eighth Circuit in *Blair* actually ruled as follows: "But the learned trial judge included venue, as among the things in the case, which should be proved beyond a reasonable

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[25] The sole citation for this point in *Blair* reads, "13 Encyc. of Evidence 931." The reference is apparently to THE ENCYCLOPÆDIA OF EVIDENCE, edited by Edgar W. Camp, published in 14 volumes between 1902 and 1909 and supplemented biennially until about 1919. At pages 931-32 of volume 13 (with a publication date of 1909), this treatise states, in full, "The general rule seems to be that venue need not be proved beyond a reasonable doubt, though in some jurisdictions it is held to the contrary."

[26] Today (and since its promulgation in 1962), the Model Penal Code of the American Law Institute advises legislatures to treat venue as an element of a criminal offense and to require its proof beyond a reasonable doubt. ALI, MODEL PENAL CODE (OFFICIAL DRAFT) §§ 1.12(1), 1.13(9)(e), at 16, 18 (1985). For a discussion of the current division of opinion on this issue among state courts, *see* 4 Wayne R. LaFave, Jerrold H. Israel, Nancy J. King & Orin S. Kerr, CRIMINAL PROCEDURE § 16.1(g), at 749-50 (3d ed. 2007). The Annotation found at 67 A.L.R.3d 988 (1975 & cum. supp.) identifies 19 states as currently applying a reasonable doubt burden to proof of venue in criminal cases. *See id.* § 6.

doubt; so the point is not before us here." *Id.* (punctuation original).

In short, the lower courts' precedent on the burden of proof issue actually rests on the weakest of jurisprudential foundations, pure dictum which does not even express a firm view on the question, and has never been examined seriously on its merits. The entire edifice of authority is a house of cards. This Court, on the other hand, has never directly addressed this frequently recurring and fundamental issue. As the Court ruled in *Gaudin*, a long-standing practice must nonetheless be rejected if it is contrary to constitutional requirements for a jury trial under the Bill of Rights. 515 U.S. at 518-19.

Ultimately, it is the interests of the criminal justice system that most require an unflagging adherence to the reasonable doubt standard:

> [U]se of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

Winship, 397 U.S. at 364. The concern for public confidence expressed in *Winship* also underlies the constitutional guarantees relating to venue, which were of critical significance to the Framers. As Justice Frankfurter wrote for the Court in *United States v. Johnson*, 323 U.S. 273, 276 (1944), venue is a matter

that "touch[es] closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests."

As already noted, *In re Winship* holds that the government must prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [a defendant] is charged." 397 U.S. at 364. The underlying rationale for that requirement stems from the most fundamental tenets of our jurisprudence. As this Court explained:

> The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence – that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'

Id. at 363, quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895). This Court's analysis in those cases echoes its assessment of the jury-venue protections in the Constitution, which, as noted in *Johnson*, "are not merely matters of formal legal procedure[,]" but rather implicate "deep issues of public policy. . . ." 323 U.S. at 276; *see also Travis v. United States*, 364 U.S. 631, 634 (1961). These policy rationales contradict the attempts by some of the Circuits to justify application

of a reduced standard for proving venue, to the extent that any of the lower courts' cases even attempt to justify the dominant rule.

None of the Circuits' precedent supporting the use of a preponderance standard for factually disputed questions of venue has any substantial foundation in law or logic. The Third Circuit has perhaps ventured the most ambitious attempt to explain the lower courts' adherence to the preponderance rule, although its effort ultimately fails. Attempts to explain the conventional rule generally involve describing venue as "procedural" or "akin to jurisdiction," rather than "substantive," that is, "it does not either prove or disprove the guilt of the accused." *United States v. Perez*, 280 F.3d 318, 330 (3d Cir. 2002) (quoting other circuits). These explanations fall short, as the same could be said for the proof of jurisdictional facts including interstate or international travel or effect-on-commerce elements of numerous federal offenses, of mailing elements for others, or of commission of an offense within the statute of limitations.[27] Yet all of these are jury questions decided uncontroversially beyond a reasonable doubt. *See*, *e.g.*, *United States v. Robertson*, 514 U.S. 669 (1995) (per curiam); *Schmuck v. United States*, 489 U.S. 705, 708 n.3 (1989). For these reasons, a Fifth Circuit panel, in light of this Court's more recent Due Process

[27] *See*, *e.g.*, Sand, Siffert, *et al.*, MODERN FEDERAL JURY INSTRUCTIONS § 19.01.

and Jury Trial Clause decisions, has expressed "doubt that a mere preponderance of the evidence on [a jurisdictional] element could suffice to support a guilty verdict." *United States v. Perrien*, 274 F.3d 936, 939 n.1 (5th Cir. 2001) (per curiam).

The lack of objection at petitioner's trial is not a significant factor in these circumstances. In the similar case of *Gaudin*, this Court fully addressed the merits of the Sixth Amendment issue arising out of a jury instruction (that materiality, although an element of the offense, was to be determined by the court as a question of law), although the issue apparently arose there in a plain error posture as well. *See* 515 U.S. at 523 (Rehnquist, Ch.J., concurring). So here, the charge allowing a minimal burden of proof to suffice on the issue of venue was plain constitutional error, likely prejudicial to petitioner on the counts of conviction, and capable of causing the courts to fall into public disrepute. *See* Fed.R.Crim.P. 52(b); *see also United States v. Marcus*, 560 U.S. —, 130 S.Ct. 2159, 2164-66 (2010) (discussing third and fourth prongs of "plain error" test).[28]

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[28] *See also Black v. United States*, 561 U.S. —, 130 S.Ct. 2963, 2969 (2010) (noting that it was "undisputed" that Black at trial had preserved issue later decided in *Skilling v. United States*, 561 U.S. —, 130 S.Ct. 2896 (2010), although his cited jury charge objection had addressed a different aspect of 18 U.S.C. § 1346 entirely; yet the majority held that "by properly objecting to the honest services jury instructions at trial, Defendants secured their right to challenge those instructions on appeal," *id.* at 2970); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (an issue can be adequately raised and

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For these reasons, regardless of its answer to the first question presented in this petition (the right to a preliminary non-jury determination of venue, where the facts are disputed), the need for the strictest standard of proof, in order to protect the constitutional right to jury trial in the correct venue is of the utmost constitutional significance. The questions that juries are normally asked to decide by a preponderance of the evidence – liability and damages in routine civil cases – do not compare in importance to the question whether a criminal jury trial has been convened in a place permitted or prohibited by the Constitution for reasons deemed critical to the Framers.

In this case, the difference in burdens could not be deemed harmless, even if an error of this sort is not treated as "structural" on plain error review. *See Marcus*, 130 S.Ct. at 2164-65, citing *Sullivan v. Louisiana*, 508 U.S. 275 (1993). The application of a heightened burden of proof would likely have changed the verdict on the few counts where the jury convicted. As fully recited in the statement of facts, venue was vigorously disputed on the failure-to-file charges throughout the trial. Direct evidence supported petitioner's argument that venue was laid on those

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preserved for this Court's review by passing mention below, where squarely contrary to circuit precedent and in counsel's sound judgment additional "argument would be futile"). The question of burden of proof was raised by petitioner in his appellate brief, CA11 Br. 28-29 & n.22, expressly as a point he intended to preserve for review at a higher level.

counts in violation of Article III and of the Sixth Amendment, and (as shown in the Statement of Facts, *ante*) could readily have raised a reasonable doubt on that score. Petitioner Snipes was tried far from home and family, where neighbors would have had to travel a thousand miles or more to testify about where he actually resided, by a jury drawn from a venire composed of people who were strangers to him and his community.

On the issue of proof of venue, entrenched Circuit precedent persists in conflict with this Court's leading authority. Because the affirmance of petitioner's conviction by the court below depended on the wide-spread misapplication of an important constitutional doctrine, certiorari should be granted.

CONCLUSION

For the foregoing reasons, the petitioner, Wesley Trent Snipes, prays that this Court grant his petition for a writ of certiorari, and reverse the judgment of the United States Court of Appeals for the Eleventh

Circuit affirming the judgment of conviction and sentence.

Respectfully submitted,

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