

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

<b>UNITED STATES OF AMERICA</b>	:	
	:	
v.	:	<b>5:06-cr-22-Oc-10GRJ</b>
	:	
<b>WESLEY TRENT SNIPES</b>	:	
	:	
		<b>0000000</b>

**RESPONSE IN OPPOSITION TO GOVERNMENT’S BILL OF COSTS**

Wesley Trent Snipes, through his undersigned counsel, hereby opposes the Government’s request for costs because the costs are not allocable solely to the three § 7203 offenses of which he was convicted, not material, reasonable and necessary to the proof of those offenses, and not authorized to be imposed under 28 U.S.C. §§ 1920 and 1821.

**INTRODUCTION**

On February 1, 2008, Mr. Snipes was acquitted of five of the eight counts charged in the Superseding Indictment. He was acquitted of two felony counts: conspiracy to defraud the United States in violation of 18 U.S.C. § 371 (Count I) and presenting a false claim against the United States in violation of 18 U.S.C. § 287 (Count II); and of three misdemeanor counts of failure to file an income tax return for the years 2002 (Count VI), 2003 (Count VII) and 2004 (Counts VIII), each in violation of 26 U.S.C. § 7203. He was only convicted of three misdemeanor counts of failure to file an income tax return for the years 1999 (Count III), 2000 (Count IV), and 2001 (Count V). The two codefendants, Kahn and Rosile tried with Mr. Snipes were convicted of the two felony counts of which Mr. Snipes was acquitted.

The government has now filed a Bill of Costs (Doc. 449) against Mr. Snipes, seeking reimbursement of \$257,687.74. The government has attested that the costs were necessarily incurred in “this case.” However, the government has failed to attest that the costs are reasonable

and necessary not just in the case but solely with respect to the three counts of conviction against Mr. Snipes, a prerequisite to imposition of costs.<sup>1</sup> See *United States v. Palmer*, 809 F. 2d 1504, 1509 (11<sup>th</sup> Cir. 1987) (vacating award of costs in case involving acquittal of some counts and remanding to the district court “to determine what portion of the prosecution’s costs were reasonable and necessary to prove” and material to the violations for which defendant was convicted). The government also seeks costs not authorized under 28 U.S.C. § 1920.

### **I. Limited Statutory Authority to Impose Costs**

Recoverable costs are strictly limited by “the list set out in 28 U.S.C. § 1920, the general statute governing the taxation of costs in federal court, and the recovery of witness fees under §1920 is strictly limited by § 1821, which authorizes travel reimbursement and a \$40 per diem.” *Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 297-298 (2006);<sup>2</sup> see also *United States E.E.O.C. v. W&O, Inc.*, 213 F.3d 600, 620 (11<sup>th</sup> Cir. 2000) (“a court may only tax costs as authorized by statute”).

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<sup>1</sup> The government has not filed a bill of costs against the other defendants.

<sup>2</sup> In pertinent part, 28 U.S.C. § 1920 authorizes the assessment of the following costs:

...

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

...

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

**A. Only Costs Related to Counts For Which Defendant Was Convicted May Be Assessed**

As the Eleventh Circuit has made clear:

[A] defendant convicted on fewer than all the counts of an indictment cannot be properly taxed with the costs of the counts on which he was acquitted or otherwise discharged.

*United States v. Palmer*, 809 F.2d at 1509. Moreover, where the defendant argues that he should not be assessed costs because the evidence presented went to proving elements of an acquitted offense, the “district court is the proper factfinder to determine which of the costs incurred by the prosecution were reasonable and necessary to prove” the violations. *Id.* And the “the evidence presented must be more than merely relevant, the cost incurred in presenting such evidence must be reasonable and necessary to the proof” of the offense for which the defendant was convicted. *Id.* In addition, a court may not assess the “costs associated exclusively with the unsuccessful prosecution of a codefendant.” *United States v. Hiland*, 909 F.2d 1114, 1141 (8<sup>th</sup> Cir. 1990). Nor can costs related to the investigation be assessed. *Hiland*, 909 F. 2d at 1142; *United States v. Vaughn*, 636 F.2d 921, 922 (4<sup>th</sup> Cir. 1980) (“assessment of the “costs of prosecution” against a defendant under § 7201 or § 1920 does not include investigation expenses”).

Hence, in this case Mr. Snipes may only be assessed costs with respect to the prosecution of the three § 7203 misdemeanor failure to file offenses for which he himself was convicted. He may not be assessed any costs related to the investigation and prosecution of the felony offenses for which he was acquitted and his codefendants convicted. The costs imposed assessed against him may only be those authorized by statute.

**B. Copying and Other Costs Should Not Be Assessed Because the Government Has Failed to Make the Necessary Showing**

While costs of copies attributable to discovery is taxable, costs of “general copying” are not recoverable. *United States E.E.O.C. v. W&O, Inc.*, 213 F.3d 600, 620 (11<sup>th</sup> Cir. 2000); *Duckworth v. Whisenant*, 97 F.3d 1393, 1399 (11th Cir.1996). Likewise, costs incurred for the convenience of counsel such as extra copies of documents may not be assessed because they are not copies ‘necessarily obtained for use in the case’ within the meaning of 28 U.S.C. § 1920(a). In a recent case out of the Middle District of Florida, Judge Conway explained in some detail which copying costs are taxable:

Section 1920(4) authorizes the taxation of costs for “copies of papers necessarily obtained for use in the case.” 28 U.S.C. § 1920(4). Costs for the convenience of counsel, however, are not allowed. *Helms v. Wal-Mart Stores, Inc.*, 808 F.Supp. 1568, 1570 (N.D.Ga.1992). *See also, Duckworth v. Whisenant*, 97 F.3d 1393, 1399 (11th Cir.1996) (general copying costs are not recoverable). The party seeking recovery of photocopying costs “must come forward with evidence showing the nature of the documents copied, including how they were used or intended to be used in the case ... A prevailing party may not simply make unsubstantiated claims that such documents were necessary, since the prevailing party alone knows for what purpose the copies were made.” *Helms*, 808 F.Supp. at 1570 (internal citations omitted). *See also Desisto College, Inc. v. Town of Howey-in-the-Hills*, 718 F.Supp. 906, 914 (M.D. Fla.1989) (declining to award photocopy costs where party did not itemize the photocopies that are the subject of the motion).

*King v. FSA Network, Inc.*, No. 6:07-cv-78-Orl-22JGG, 2007 WL 3072262, at \*4 (M.D. Fla. Oct. 19, 2007) (denying photocopying charges where party insufficient showing that photocopy charges were necessary for the case); *see also Case v. Unified School District*, 157 F.3d 1243, 1258-59 (10th Cir.1998) (upholding denial of copying costs because “[i]t was not the district court's burden to support the substantial weight of 71,194 copies or any lesser amount....”). Lastly, “exhibit costs

are not taxable because there is no statutory authorization” for the taxation of charts and exhibits. *United States E.E.O.C. v. W&O, Inc.*, 213 F.3d at 623.

## **II. Particularized Objections to the Assessment of Costs**

In its Bill of Costs, the government seeks \$257,687.74 in costs for prosecuting three misdemeanor offenses but fails to make the requisite showing that these substantial costs are properly allocable as “reasonable and necessary to prove” that Mr. Snipes committed three misdemeanor § 7203 failure to file offenses. *See Palmer*, 809 F.2d at 1509. In assessing the reasonableness of these substantial expenses, the Court should take into account that for purposes of sentencing Judge Hodges found that the total taxes owed for the three taxable years amounted to \$227,959. As will be shown below, it is clear that the costs the government seeks in this case are not reasonable and necessary to the three misdemeanor counts of conviction. The substantial costs sought relate to the acquitted counts and the prosecution of the other defendants.

### **A. Fees for Daily Transcripts (\$2,456.00)**

Mr. Snipes objects to being assessed costs for daily transcripts as such an expense is not “reasonable and necessary to prove” the three § 7203 offenses. Daily transcripts are particularly unnecessary and an unreasonable expense to prove a misdemeanor offense. Rather, daily copies of transcripts are a mere convenience for the lawyers, not a necessity. *See Goodwall Const. Co. v. Beers Const. Co.*, 824 F. Supp. 1044, 1064 (N. D. Ga. 1992), *aff’d and remanded*, 991 F.2d 751 (Fed. Cir. 1993) (disallowing costs for transcripts finding that transcripts were not necessary for use in the case).

Both the statute and interpreting case law permit a prevailing party to recover costs for daily copies of the trial transcript where the transcript is “indispensable.” [*Whitney National Bank v. Bank of*

*New Orleans ("Farmer")*], 379 U.S. 411, 415-416 (1965); 28 U.S.C. § 1920(2). By indispensable, the Court means that the transcripts were not obtained primarily for the convenience of the attorneys, but were necessarily obtained for use in the case. *Id.*; *Studiengesellschaft Kohle mbH v. Eastman Kodak Co.*, 713 F.2d 128, 132 (5th Cir.1983); *In re Nissan Antitrust Litigation*, 577 F.2d 910, 918 (5th Cir.1978). Factors to be considered are the complexity of the issues tried, the length of the trial, and whether the attorneys are required to submit briefs and proposed findings to the court during trial. *Farmer*, 379 U.S. at 416.

*Goodwill Const. Co. v. Beers Const. Co.* 824 F. Supp. at 1064.

None of the special factors to be considered in allowing costs of daily transcripts are present with respect to the prosecution of the three misdemeanor § 7203 offenses. Accordingly, Mr. Snipes should not be taxed for this cost.

**B. Fees for Scanning, Printing & Numbering of Documents (\$193,716.98) and for Copying and Certification of Trial Exhibits (\$188.18)**

Mr. Snipes objects to the assessment of nearly \$200 thousand which the Government seeks as costs for “scanning, printing and numbering documents.” The government has made no showing that this substantial amount of money was a reasonable and necessary expense for the proof of the three § 7203 offenses for which Mr. Snipes was convicted.<sup>3</sup> *Compare, e.g., United States v. Palmer*, 809 F.2d at 1504 (bill of costs for three § 7203 counts totaled \$57,970). Even the much lower amount sought in *Palmer*, which is about 20% of the costs the government seeks against Mr. Snipes was held to be error because it included costs that were properly allocable to three acquitted felony tax evasion counts.

Significantly, the two invoices from Labat-Anderson, Inc, which the government has

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<sup>3</sup> The government must prove two elements beyond a reasonable doubt to support a § 7203 conviction: (1) failure to pay taxes when due; and (2) willfulness. *Sansone v. United States*, 380 U.S. 343, 351 (1965).

provided in support of these costs state that the expenses were incurred for “Kahn Investigation and Related Cases.” The two invoices list the following expenses: \$136,005.77 for “miscellaneous reproduction;” \$26,527.14 for “miscellaneous blowback;” and \$23,952.48 for “miscellaneous blowback.” Thus, although the government seeks costs for “scanning, printing and numbering of documents,” \$136,000 of the nearly \$200,000 sought is for copying costs with another approximately \$50,000 for “miscellaneous blowback.” No explanation of these terms, the particular documents copied, or the manner in which these documents were used in the prosecution of the three misdemeanor convictions is listed in the invoices.

While § 1920(3) explicitly allows recovery of costs for “printing” and § 1920(4) explicitly allows recovery of costs for copies of papers “necessarily obtained for use in the case,” neither section allows recovery of costs for those tasks if obtained for the convenience of counsel including extra copies of filed papers, correspondence, and copies of cases. *Desisto Coll., Inc. v. Town of Howey-In-The-Hills*, 718 F.Supp. 906, 913 (M.D. Fla.1989), *aff’d sub nom. Desisto Coll., Inc. v. Line*, 914 F.2d 267 (11th Cir.1990). Moreover, the moving party bears the burden of proof for showing that it is entitled to costs for copying expenses because the information concerning the use of the documents is within its exclusive knowledge. *Desisto*, 718 F.Supp. at 910 n. 1; *see also George v. GTE Directories Corp.*, 114 F. Supp. 2d 1281, 1299 (M. D. Fla. 2000) (“prevailing party must produce adequate documentation” to obtain costs); *Corsair Asset Mgmt., Inc. v. Moskovitz*, 142 F.R.D. 347, 352 (N.D.Ga.1992) (simply making unsubstantiated claims that such documents were necessary is insufficient to permit recovery); *accord Cullens v. Ga. Dep’t of Transp.*, 29 F.3d 1489, 1494 (11th Cir.1994) (disallowing copying costs because the plaintiff failed to provide evidence of the documents’ use or intended use); *see also Scelta v. Delicatessen Support Servs. Inc.*, 203 F.Supp.2d 1328, 1340-41 (M.D. Fla.2002) (holding that “since the

defendants have not described the photocopying costs sufficiently to permit a determination of which photocopies were necessarily obtained for the use in this case, reimbursement for photocopying costs is rejected in its entirety); *Helms v. Wal-Mart Stores, Inc.*, 808 F.Supp. 1568, 1570 (N.D.Ga.1992) (“A prevailing party may not simply make unsubstantiated claims that such documents were necessary, since the prevailing party alone knows for what purpose the copies were made.”). As the Government has not made the necessary showing in this case, its requests that Mr. Snipes be assessed \$193,716.98 for “scanning, printing and numbering” of documents should be rejected in its entirety.

In the alternative, these costs are not properly allocable to Mr. Snipes for other reasons also. First, there is no explanation of how, if at all, the scanning, printing and numbering of these documents were reasonable and necessary expenses to prove the three § 7203 Snipes convictions rather than the five offenses for which he was acquitted. *See Palmer*, 809 F.2d at 1509 (error to assess defendant for “costs that were properly allocable to the § 7201 charge of which he was acquitted”). There is also no allocation of these costs with respect to the Kahn or Rosile prosecutions and convictions (for which Mr. Snipes was acquitted). Even though Mr. Snipes was only one of nearly 4000 of Kahn’s clients, there is also no allocation of costs related to the investigation and prosecution of any of the other related cases. Clearly, Mr. Snipes cannot be assessed costs for investigations or prosecution of others including Kahn and Rosile. Indeed, he cannot be assessed costs for any investigation, even of his own conduct. *See United States v. Hiland*, 909 F.2d at 1142 (costs related to an investigation cannot be assessed); *United States v. Vaughn*, 636 F.2d at 922 (“assessment of the “costs of prosecution” against a defendant under § 7201 or § 1920 does not include investigation expenses”).

The request for \$193,716.99 should therefore be denied.

**C. Fees and Disbursements for Witnesses (\$61,326.18)**

Section 1920(3) authorizes a court to “tax as costs ... [f]ees and disbursements for. . . witnesses.” 28 U.S.C. § 1920(3). Fees and allowances for witnesses is limited by 28 U.S.C. § 1821(a)(1) & (b). “The logical conclusion from the language and interrelation of these provisions is that § 1821 specifies the amount of the fee that must be tendered to a witness [and] § 1920 provides that a fee may be taxed as a cost. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987). The recovery of witness fees under § 1920 is strictly limited by § 1821, which authorizes travel reimbursement (up to 100 miles), a specified subsistence allowance when an overnight stay is required and a \$40.00 per diem attendance fee. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006). Moreover, in *Crawford*, the Supreme Court held that, “when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of § 1821(b), absent contract or explicit statutory authority to the contrary.” *Id.* at 439, 445 (rejecting claim that “a federal court is empowered to exceed the limitations explicitly set out in [28 U.S.C.] §§ 1920 and 1821 without plain evidence of congressional intent to supersede those sections”), *superseded on other grounds*, 42 U.S.C. § 1988(c) (1991).

Witness costs can only be assessed against a defendant where the testimony of the witness is “material to the offense for which the defendant was convicted” and “reasonable and necessary to prove” the violation for which the defendant was convicted. *United States v. Palmer*, 809 F. 2d at 1509. Costs “properly allocable” to acquitted charges cannot be awarded. *Id.* Set forth below are specific objections on the basis of *Palmer* to the fees and disbursements, which the Government seeks with respect to fourteen separate witnesses.

**1. Paul Crowley (\$4,466.65)**

Mr. Snipes objects to the impositions of costs with regard to any of Crowley's testimony that is related to acquitted conduct. Such costs cannot be taxed against Mr. Snipes. Thus, for example, Crowley's testimony concerning the absence of tax returns for 2002-2004 refers to acquitted counts. Similarly, testimony regarding pre-1999 and post 2001 conduct or conduct related to the felony charges should not be assessed against Mr. Snipes.

**2. Mike Anderson (\$1,561.70)**

Mr. Snipes objects to the imposition of all costs for this witness. His testimony primarily related to letters from defendant Kahn to persons other than Mr. Snipes. The only testimony related to Mr. Snipes was not material to the three misdemeanor convictions.

**3. Kurt Anderson, Shauna Henline, Kenneth Starr, Ronald Starr, Michael Canter, Carmen Baker, Raymond Coudriet, and Craig Alexander - Various Costs**

Mr. Snipes objects to the imposition of costs for these witnesses absent exclusion of the costs "properly allocable" to the acquitted charges and determination of "what portion of the prosecution's costs were reasonable and necessary to prove the three misdemeanor convictions against Mr. Snipes, in accordance with the holding of *United States v. Palmer*.

**4. Tanya Burgess (\$300)**

Mr. Snipes objects to the imposition of all costs for this witness. Her testimony related to a letter involving a Dr. Ward Dean, that was not relevant nor material to Mr. Snipes' misdemeanor convictions.

**5. William Kerr (\$861.00)**

Mr. Snipes objects to the imposition of all costs for this witness, who testified with respect to Count II, a count for which the jury acquitted Mr. Snipes.

**5. Gus Lesnevich (\$41,586.69)**

Mr. Snipes objects to the imposition of all costs for this witness, a forensic document examiner who testified concerning handwriting exemplars of codefendant Rosile. Mr. Snipes stipulated to his handwriting on all exhibits tendered by the government. Thus, Lesnevich offered no material testimony reasonably necessary to prove the three Snipes misdemeanor convictions. Moreover, to the extent the government seeks fees in excess of those set out in 28 U.S.C. § 1821 for its own expert, such fees cannot be assessed against Mr. Snipes. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987).

**CONCLUSION**

WHEREFORE, for the reasons set forth, and those which may be presented at a hearing on this matter, Wesley Trent Snipes respectfully requests that this Court deny the Bill of Costs sought by the United States and grant such further relief as the Court deems just and proper. The costs sought by the United States are not allocable solely to the three § 7203 offenses of which he was convicted. The costs are not material, reasonable and necessary to the proof of those offenses, and not authorized to be imposed under 28 U.S.C. §§ 1920 and 1821.

Dated: May 28, 2008

Respectfully submitted,

/s/

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY that a copy of the foregoing document was served via the District Court's ECF system, to the following email addresses:**

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**I hereby certify that on May 29, 2008, a true and correct copy of the foregoing will be mailed to the following non-CM/ECF participant(s):**

**Eddie Ray Kahn  
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**Dated: May 28, 2008**

/s/  
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Carmen D. Hernandez