IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA	:	
	:	
v.	:	**No. 5:06-cr-22(S1)-Oc-10GRJ**
	:	
WESLEY TRENT SNIPES	:	

DEFENDANT SNIPES' MEMORANDUM IN AID OF SENTENCING

Wesley Trent Snipes, through his counsel, hereby respectfully submits this Memorandum to assist this Honorable Court in the exercise of its discretion when imposing sentence upon him under 18 U.S.C. § 3553(a) for the three misdemeanor convictions of willful failure to file in violation of 26 U.S.C. § 7203.

For these misdemeanor convictions, Mr. Snipes respectfully requests that this Court impose a sentence of probation that does not include imprisonment. Such a sentence reasonably provides just punishment, protects the public, promotes respect for the law, affords adequate deterrence and promotes rehabilitation as required by 18 U.S.C. § 3553(a)(2). It conforms to Congress' treatment of this offense as a misdemeanor and avoids "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). As such, it is a sentence that is "sufficient, but not greater than necessary" to comply with the purposes of sentencing as required by 18 U.S.C. § 3553(a).

This memorandum

(1) addresses the factors set out in 18 U.S.C. § 3553(a), which the Court must consider in determining the particular sentence to impose;

(2) attaches more than three dozen letters from friends, family and colleagues, who uniformly praise Wesley Snipes' good character, his kindness to others and his devotion to family;

(3) sets out the reasons why the tax guideline is flawed and why the provision that increases the range well beyond the statutory maximum, which fails to comply with Congress' directive is invalid;

(4) explains why imprisonment for three years would result in unwarranted disparity; and

(5) responds to the government's sentencing memorandum.

I. INTRODUCTION

At age 45, after a life-time of hard work and dedication to his family, to his craft and to the struggle to better himself, Wesley Trent Snipes stands before the Court to be sentenced on three misdemeanor charges that he willfully failed to file income tax returns for the years 1999, 2000, and 2001 in violation of 18 U.S.C. § 7203. He is contrite, promises that he will never again break the law, and respectfully asks the Court to consider not just the jury verdict but also all the good that he has done in his life. He asks this Honorable Court to impose a sentence that does not include imprisonment.

In exercising its discretion, this Court should be mindful that § 7203 is not a felony. It is the least serious criminal offense enacted by Congress in a "carefully graduated scheme of criminal penalties" for violations of the Internal Revenue Code. S*ee United States v. Hajecate*, 683 F.2d 894, 904 (5th Cir. 1982). Yet the tax guideline results in a sentencing range identical to that for the most serious of tax felonies and is inconsistent with 28 U.S.C. § 994(j), which explicitly directs the Sentencing Commission to provide alternatives to imprisonment for cases involving nonviolent violations such as the ones of which Mr. Snipes stands convicted. The failure of the tax guideline to abide by this explicit statutory directive makes it invalid when applied to the § 7203 misdemeanor tax violations. *See United States v. LaBonte*, 520 U.S. 751, 753 (1997) (invalidating guideline amendment that failed to comply with 28 U.S.C. § 994(h) because the guidelines cannot disregard the "specific requirements" which Congress imposed).

The government's request that the Court imprison Mr. Snipes for three years ignores the fact that he stands convicted of misdemeanors *not* felonies and relies in large part on conduct, which the jury rejected after a full trial on the merits, or on allegations that were never charged. The Sixth Amendment jury trial guarantees cannot be disregarded in this fashion. Moreover, "a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment." *Gall v. United States*, 128 S.Ct. 586, 599 (2007) (internal quotation omitted) (quoting with approval a district court's reason for departing down from the guideline range to impose a sentence of probation in a case involving distribution of ecstasy).

Sending Mr. Snipes to prison will not advance any of the other purposes of sentencing set out in 18 U.S.C. § 3553(a)(2). Wesley Snipes is not a dangerous man, who needs to be imprisoned to protect the public. There is also no need to imprison him to reflect the seriousness of the offense; these are misdemeanor violations. It is therefore fitting for the Court to be lenient, consistent with Congress' express views in this area and Mr. Snipes' otherwise lawful life. A sentence that does not include imprisonment is just and reasonable.

The Court has a mandate in this case to impose a sentence that is "sufficient, but not greater than necessary" and to be just in its punishment, protect the public, deter others, and provide any needed rehabilitation. 18 U.S.C. § 3553(a). To withstand appeal, the Court's sentence must be reasonable. It must take into consideration the nature and circumstances of the offense and the history and characteristics of Wesley Snipes, without requiring extraordinary mitigating circumstances in order to sentence below the guideline range. It must also consider the kinds of sentences available, the sentencing guidelines and policy statements, without giving them any presumptive weight. It must also avoid disparity among defendants "with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(1)-(7); *see Rita v. United States*, 551 U.S. __, 127 S.Ct. 2456, 2467 (2007); *Gall v. United States*, 128 S. Ct. 586, 595 (2007).

The long list of mitigating circumstances relating to Wesley Snipes personal characteristics, family circumstances, history of good works and employment history support a sentence of probation in this case. This Court should therefore reject the

government's request that it sentence Mr. Snipes to 36 months in prison, the maximum possible sentence authorized.

Moreover, by aggregating the tax loss and stacking the guideline sentence, the advisory guidelines defeat Congress' statutory scheme, which established these offenses as 12-month misdemeanors. This procedure also ignores that Mr. Snipes owed no taxes for the year 2000. Although he was convicted of failing to file a tax return in 2000, the government admits that Mr. Snipes did not owe any taxes in that year. Hence, if the Court is going to run the sentences consecutively, it ought not to count the 12-month sentence corresponding to the 2000 return in this calculation. It ought, therefore, to consider that no sentence above 24-month imprisonment may be imposed. *Cf. Boulware v. United States,* 128 S.Ct. 1168, 1172 (2008) ("[T]he capstone of [the] system of sanctions ... calculated to induce ... fulfillment of every duty under the income tax law," *Spies v. United States,* 317 U.S. 492, 497, 63 S.Ct. 364, 87 L.Ed. 418 (1943), is 26 U.S.C. § 7201, making it a felony willfully to "attemp[t] in any manner to evade or defeat any tax imposed by" the Code. One element of tax evasion under § 7201 is "the existence of a tax deficiency," *Sansone v. United States,* 380 U.S. 343, 351 (1965); *see also Lawn v. United States,* 355 U.S. 339, 361, (1958), which the Government must prove beyond a reasonable doubt, *see ibid.* **("[O]f course, a conviction upon a charge of attempting to evade assessment of income taxes by the filing of a fraudulent return cannot stand in the absence of proof of a deficiency**") (emphasis added).

A sentence that does not include imprisonment is a just and reasonable sentence and is "sufficient, but not greater than necessary to comply with the purposes of sentencing."

II. MR. SNIPES' HISTORY AND CHARACTERISTICS AND THE NATURE AND CIRCUMSTANCES OF THE OFFENSE WARRANTS A NONPRISON SENTENCE

A. Wesley Snipes's Upstanding Life, His Good Works, His Family Circumstances, His Remorse and Post-Offense Rehabilitation, and The Likelihood That He Will Not Be A Recidivist Warrant Leniency

Mr. Snipes has led an otherwise exemplary life and is deeply sorry for his wrongful conduct. He has retained reputable tax professionals to assist him in resolving his tax liability and will make amends. Unlike a number of celebrities, Wesley Snipes has led his life out of the limelight, helping and mentoring others and making a difference in their lives quietly and without much fanfare. Attached herewith are dozens of letters sent by friends, colleagues, family and those who have been helped by Wesley Snipes attesting to his admirable kindness, loyalty and integrity. *See* Exhibit A.

1. Wesley Snipes is a Good Person, Who Through Hard Work and Dedication Has Overcome His Impoverished Life to Become an Accomplished Artist

A native of Orlando, Wesley was the oldest of three children on his mother's side. He also has four half-brothers and -sisters on his father's side. After his father deserted the family, his mother raised him and his two sisters in a working class family of quite modest means. While he was still an infant, his mother moved the family to New York City where he attended the High School of the Performing Arts, a highly competitive and prestigious public school, all the while holding down odd jobs to help

his mother support the family. When he was a teenager, his mother moved back to Orlando, where he graduated from high school. At each point in his young life, he worked hard to better himself and stay out of trouble in an environment that graduated more young men to a life of crime, drugs and at times violent death than to the life of accomplishment that Wesley wanted for himself and worked hard to achieve.

After high school, he attended the State University of New York on a scholarship. It was there that he took theater arts and continued the long road to becoming a successful actor. Like most struggling artists, he continued working to support himself while perfecting his stage craft ultimately becoming one of the leading cinematic heroes in America. Along the way, he has helped his extended family and many others. His mother continues to live in Orlando, in a house that Wesley purchased for her.

2. Wesley Snipes' Family Circumstances Warrant A Sentence That Does not Include Imprisonment

Wesley Snipes is married and the father of five children. The four youngest children are aged 7, 6, 4 and a 1-year old toddler. He also has a 20-year old son from his first marriage. Imprisoning Mr. Snipes, while his children are at such a critical developmental stage where a father's love, guidance and nurturance are essential to their development will cause the children irreparable harm. The youngest ones will cry themselves to sleep, not understanding why their father is no longer there to love them. The older ones will internalize the pain and feelings of abandonment, often developing medical problems and doing badly in school. While children, whose parents are

imprisoned always suffer, where as here the offense involves nonviolent misdemeanors, it is not "necessary" to cause such irreparable anguish to his innocent children. *See United States v. Galante*, 111 F.3d 1029, 1033-37 (2d Cir. 1997).

In *Galante*, the Second Circuit recognized the need for maintaining an intact family. *Galante* upheld a downward departure in a heroin conspiracy case based on family circumstances where the district court determined that a sentence of 24 months home detention, 225 hours community service plus five years supervised release was warranted in light of the defendant's family obligations. The defendant was a 41 year-old married father of two children, ages eight and nine, with no criminal record, who was convicted of conspiracy to distribute and possess with intent to distribute nearly half a kilogram of heroin (478.97 grams), an offense that carries a five-year statutory mandatory minimum term of imprisonment. The district court found, among other things, that if defendant were imprisoned the family unit would be destroyed to the detriment of the children. The court departed down pursuant to U.S.S.G. § 5H1.6 from an adjusted offense level of 23 (46 to 57 months), which included a safety valve and role reduction to offense level of 10 (6 to 12 months) to allow imposition of a sentence of home detention. In Mr. Snipes case, which involves a much less serious offense, this Court should also consider the emotional and psychological needs of his young children in rejecting the lengthy sentence sought by the prosecutors.

3. Good Works and an Upstanding Life

Wesley Snipes has given of himself to a number of charitable causes and donated his time and resources to organizations that teach, feed, and help others. The

Court has before it a number of letters from diverse persons, who uniformly praise Wesley Snipes' character, his kindness to others and his devotion to his family. The letter writers range from some of the most famous and accomplished people to simple, everyday folk, who have known Wesley all his life.

Academy Award winner Denzel Washington, writes that Wesley has been his friend for over twenty years. Mr. Washington speaks of Wesley as a "mighty oak" who notwithstanding his current problems has lived a principled life "built" on "honesty, truth and courage."

Bob Wall, the owner with Chuck Norris of a large chain of martial arts school, writes about his friendship of over twenty years with Wesley Snipes. Mr. Wall writes that he has known Wesley Snipes as an "exceptional martial artist, actor, American citizen, father, husband, friend and just plain outstanding human being." He writes that Wesley is a valued friend, "an honorable, honest, truthful, selfless man and friend, who is there whenever you need him." Mr. Wall also writes that while Wesley, "like all of us, may have made errors in his life," he "always faces the many challenges I've seen him encounter with hard work, honor and dignity." He writes that Wesley has "always been kind and caring to the people he works with, his fans, and my family and friends." Lastly and significantly, Mr. Wall writes of the help that Wesley provided "within one day of the World Trade Center tragedy." As he writes,

> a group of the finest martial artists were called to help create a program we named "America In Defense" (AID), later expanded and called "Aviation in Defense." Wesley Snipes was one of the outstanding people we called on

> whose help was instrumental in creating what we believe is the finest cabin crew self-defense programs ever created.
>
> All of the instructors were required to submit to a criminal background check and go through the certification process. On October 21, 2001, we at World Black Belt began teaching the AID absolutely free of charge. Several months later, we were contracted by American Airlines and taught thousands of their cabin crews. Wesley was a huge help in creating the program and never asked for or received any payment or press for his efforts.

Mr. Wall also writes that Chuck Norris, his partner and friend for over 42 years also "admires and respects" Wesley Snipes.

There are many more letters like those. They all share the same sentiment of admiration for Wesley Snipes and their view that he is a man of integrity and a good and loyal friend. The letters describe for the Court that the man they know is not the man portrayed by the government during the trial or in its sentencing memorandum. The Wesley Snipes described in the letters is a man of God, who cares about others, and who is a good father and a selfless coworker, who enriches the lives of all whom he touches. He is a good friend and a kind person, who cares for his family, for his friends and for strangers in need. His friends and co-workers know him as a decent, honest and hard-working man, who has overcome substantial odds to better himself and his family. These letters reflect that Wesley Snipes has the support of his family, his friends and his colleagues; something that as the Court well knows is an essential ingredient to rehabilitation and the assurance that Wesley Snipes will not again commit a crime. In determining the sentence to impose, the Court should consider the good that Mr. Snipes has done in his life and the esteem with which he is held by so many. *See, e.g., Gall v.*

United States, 128 S. Ct. at __ (noting that district court could consider "flood of letters" evidencing that defendant had the support of family and friends, who uniformly praised his character and work ethic as a mitigating factor under § 3553(a)).

B. The Nature and Circumstances of the Offense

1. The Offenses Are Misdemeanors Not Serious Felonies

In its lengthy memorandum, prosecutors argue that this "case cries out for the statutory maximum term of imprisonment, as well as a substantial fine, because of the seriousness" of the crime and because of the "singular opportunity this case presents to deter tax crimes nationwide." These arguments ignore Congress' decision to classify §7203 as a misdemeanors. No matter how the government seeks to ignore that fact, Congress' determination in this regard controls.

At base, the prosecutors' arguments require the Court to disregard the "carefully graduated scheme of criminal penalties" for violations of the Internal Revenue Code set up by Congress, which created § 7203 misdemeanors, as the least serious criminal violations. S*ee United States v. Hajecate*, 683 F.2d 894, 904 (5th Cir. 1982) (noting the hierarchy which establishes tax evasion, with a 5-year statutory maximum as the most serious offense; false statement cases, with a 3-year statutory maximum as an offense of intermediate severity; and § 7203 misdemeanors, with a 1-year statutory maximum as the least severe violation in the hierarchy); 18 U.S.C. §3559(a)(6) (sentencing classification of offenses).

In various contexts, courts have explicitly recognized that § 7203 misdemeanors are categorically not serious offenses. *See, e.g., In re Wray*, 433 F.3d 376, 378 (4th Cir.

2005) (reversing disbarment of an attorney based on the attorney's § 7203 misdemeanor conviction because as the Fourth Circuit explained the offense of willful failure to pay income taxes "does not constitute a 'serious crime' within the meaning" of the disciplinary rules); *United States v. Eaken*, 995 F.2d 740 (7th Cir. 1993) (remanding for resentencing in a case where the tax evasion count was vacated). In *Eaken*, the Seventh Circuit noted that

> as the difference in the maximum sentences under sections 7203 and 7201 reflects, failure to file is considered a less serious crime than tax evasion. Therefore, absent a tax evasion conviction, we will not assume that the district court would automatically impose the maximum period of incarceration for failure to file.

United States v. Eaken, 995 F.2d at 743. Similarly, in *United States v. Lachmann* 469 F.2d 1043 (1st Cir. 1972), the First Circuit noted that Congress sought to reach less serious conduct in enacting § 7203:

> But we also reject defendant's claim that the conscious intent that the government must show is an intent to defraud the fisc. Conduct chosen with that evil motive is separately provided for in section 7201 of the Code, and is made a felony. Presumptively there was a reason for section 7203. The very fact that Congress regarded violation of that section as a misdemeanor, only, at once supplies the reason and indicates that a less serious motive is addressed to.

United States v. Lachmann, 469 F.2d 1045 -1046.

Indeed, Congress explicitly expressed its desire to create alternatives to imprisonment for cases involving nonviolent violations such as the ones before this Court, directing the United States Sentencing Commission to:

> insure that the guidelines reflect the general appropriateness of imposing a sentence **other than imprisonment** in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense. . .

28 U.S.C. §994(j) (emphasis added). *See United States v. LaBonte,* 520 U.S. 751, 753 (1997) (Congress "imposed upon the Commission a variety of specific requirements" which the Commission cannot disregard).

2. The Tax Loss Is Substantially Less Than the Government Argues

The prosecutors' arguments in support of a 3-year term of imprisonment also rely on an inflated, inaccurate calculation of the tax loss. For 1999, for example, the prosecutors argue that the tax loss is more than $2 million dollars where in actuality that number is approximately $150,000. *See* Defense Expert's Analysis for 1999, attached as Exhibit B, previously submitted to the Probation Officer. Both parties agree that there was no tax loss in 2000. For 2001, the prosecutors argue that the tax loss is more than $5 million where the more accurate calculation based on the Revenue Agent's own report and testimony at trial is approximately $220,000.

3. Prosecutors Seek to Disregard the Jury Verdict

The prosecutors' argument that the three § 7203 misdemeanors are serious offenses is primarily based on allegations and legal theories rejected by the jury or not charged at all. To accept the prosecutors' theory is to allow acquitted and uncharged conduct to be the "tail that wags the dog" of sentencing. *See United States v. Watts,* 519 U.S. 148, 156 (1997) (pre-*Booker* case acknowledging divergence of opinion among the

Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence").

In *Blakely v. Washington,* Justice Scalia eloquently explained that the jury trial guarantee cannot be so easily discounted. The jury trial guarantee is a structural component of our criminal justice system and not "a mere formality," which is how it is being regarded by the prosecutors in this case. *Blakely v. Washington,* 542 U.S. 296, 305-306 (2004).

> Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. *See* Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed.1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control ... in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative"); *Jones v. United States,* 526 U.S. 227, 244-248 (1999). *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

Blakely v. Washington, 542 U.S. at 305-306. This Court simply cannot disregard the jury's verdict as the government seeks. Indeed, even were it permissible to do so, this Court in the exercise of its discretion ought to respect the jury verdict. To ignore the jury verdict, in such a high profile case will promote disdain rather than respect for the law. American citizens would be shocked and dismayed to learn that an acquittal by a jury of one's peers is so lightly regarded.

3. The Acquitted and Uncharged Conduct is Not Relevant to the Offense of Conviction

The offense of conviction is this case is a willful failure to file tax returns. The acquitted and uncharged conduct relied on by the government and set out in the Presentence Report under the offense conduct is insufficiently related to these misdemeanor offenses of conviction to be taken into account in setting the guideline range or involve conduct by others, for which Mr. Snipes should not be held liable. *See, e.g., United States v. Barakat*, 130 F.3d 1448, 1457-58 (11th Cir.1997) (error to rely on conduct related to acquitted mail fraud charge as basis for imposing sophisticated means enhancement on tax evasion count).

4. The Message the Prosecutors Want to Send Is Not Warranted

Most objectionable, the prosecutors seek to have the Court "send a message that Snipes did not 'beat the rap.'" Govt's Memo at 21. In fact, the jury did acquit Wesley Snipes of the felony counts that alleged a fraudulent conspiratorial agreement and related fraudulent acts. The government cites no authority for the proposition that the Court may impose a harsh sentence in an attempt to reverse the accurate public

perception that a duly sworn jury acquitted Wesley Snipes of the two felonies and of three other misdemeanor charges brought against him. The government's argument distorts the notion of general deterrence and approaches the type of vindictiveness prohibited by the due process clause. *See Blackledge v. Perry*, 417 U.S. 21, 28 (1974) ("fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge"). This Court ought not to sentence Mr. Snipes more harshly because a jury acquitted him of the more serious offenses. Indeed, the acquittal should result in more lenient, not harsher, punishment. Such a strategy is likely to diminish rather than enhance respect for the law as required under 18 U.S.C. § 3553(a)(2).

III. THE SENTENCING GUIDELINES AND POLICY STATEMENTS

A. Application of the Tax Table to § 7203 Misdemeanors Violates 28 U.S.C. § 994(j) and § 994(b)

When applied to § 7203 misdemeanors, the tax table that is used to enhance the offense level in the tax guideline, U.S.S.G. § 2T1.1 is structurally flawed and invalid because it fails to comply with an explicit requirement imposed by Congress. *See United States v. LaBonte*, 520 U.S. 751 (1997).

> In 1984, Congress created the Commission and charged it with "establish[ing] sentencing policies and practices for the Federal criminal justice system." 28 U.S.C. § 991; *see Mistretta v. United States*, 488 U.S. 361, 367-370 (1989). The Commission, however, was not granted unbounded discretion. Instead, Congress articulated general goals for

> federal sentencing and imposed upon the Commission a variety of specific requirements. *See* §§ 994(b)-(n).

United States. v. LaBonte, 520 U.S. at 753.

Section 994(j) of Title 28 provides:

> The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence **other than imprisonment** in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense. . .

28 U.S.C. §994(j) (emphasis added). Congress designated § 7203 as a Class A misdemeanor, with a statutory maximum 1-year term of imprisonment for all § 7203 offenses regardless of the amount of taxes owed. By any measure, misdemeanors are not serious offenses. The statutory maximum for misdemeanors, including § 7203 is one year. Probation is not prohibited for misdemeanors, as it is for certain classes of felonies. *See* 18 U.S.C. § 3561(a)(1) (prohibiting probation for Class A and B felonies). Misdemeanors do not result in restrictions on the right to vote, bear arms and other civil rights and federal benefits. As discussed above in Section II.B.1, misdemeanors are not "serious offenses."

By requiring application of a graduated tax table in § 2T4.1, the Commission adopted a guideline that results in a prison sentence in any misdemeanor § 7203 case where the tax loss is a $12,500 or more. As Congress determined that all § 7203 offenses are misdemeanors, without regard to the amount of tax loss, no violation of § 7203 can be deemed a serious offense. Hence the Commission failed to comply with 28 U.S.C. § 994(j).

In *LaBonte,* the Supreme Court found that a guideline provision that did not comply with the Congressional directive in 28 U.S.C. § 994(h) was invalid and could not be applied. The provision at issue in *LaBonte* required the Commission to "assure" that the Sentencing Guidelines specify a prison sentence 'at or near the maximum term' for a certain category of offenders. *LaBonte*, 520 U.S. at 752. When the government challenged application of one particular provision of the career offender guideline on the basis that it did not comply with the § 944(h) requirement, the Supreme Court agreed and held that the particular provision in the guideline that adopted by the Commission was invalid and could not be applied.

In this case, U.S.S.G. § 2T1.1(a)(1), which requires application of graduated enhancements from the tax table equally fails to comply with another one of the requirements in 18 U.S.C. § 994. Application of § 2T1.1(a)(1) results in a sentencing range requiring imprisonment in any case involving a tax loss in excess of $12,500, including in Mr. Snipes' case. Section 2T1.1(a)(1) is therefore invalid. If § 2T1.1(a)(1) is invalidated for § 7203 misdemeanors, the base offense level for these misdemeanors will be 6, as provided by U.S.S.G. § 2T1.1(a)(2).

An offense level of 6 is entirely consistent with a misdemeanor offense. Indeed, that is exactly how the Sentencing Commission deals with other offense, where Congress has enacted both felony and misdemeanor offenses. For example, with controlled substance offenses, the guidelines clearly recognize the statutory distinction between misdemeanors and felonies. Thus, U.S.S.G. § 2D2.1, applicable to simple possession misdemeanors, does not provide an enhancement for the quantity of drugs.

Instead, it just provides for a base offense level ranging from 8 to 4, depending on whether the substance is scheduled as an opiate, hallucinogen or schedule I chemical. *See* U.S.S.G. § 2D2.1(a)(1), (a)(2), and (a)(3). In contrast, for felony controlled substance offenses, where the statutory maximum allows up to a life sentence, § 2D1.1 provides for graduated enhancements based on the quantity of drugs.

The failure of the tax guideline to conform the guideline to the statutory maximum creates another flaw in the guideline, which is also inconsistent with the statutory requirement in 28 U.S.C. § 994(b)(1), which requires the guidelines "establish a sentencing range that is consistent with all pertinent provisions of title 18." By establishing a guideline that as a matter of course exceeds the statutory maximum for § 7203 misdemeanors, the provision of the tax guideline that requires an enhancement based on the tax table also violates § 994(b). As in *LaBonte*, this Court should invalidate U.S.S.G. § 2T1.1(a)(1) for the § 7203 misdemeanors at issue here.

Section 2T1.1 as applied to § 7203 misdemeanors can be consistent with 994(j) if no enhancement from the tax table is added. In that case, the base offense level under § 2T1.1(a)(2) would be 6. Two specific offense characteristics would be applicable. *See* U.S.S.G. § 2T1.1(b)(1) (2-level enhancement where the source of income was derived from criminal activity) *and* § 2T1.1(b)(2) (2-level enhancement if sophisticated means were employed).

The propriety of applying the tax table to felony tax offense is not at issue. With respect to misdemeanor offenses, the guideline's tax table enhancement violates

Congressional directive in § 994(j). As *LaBonte* makes clear, a guideline that fails to comply with one of the specific directives in § 994 is invalid and cannot be applied.

B. The Tax Guideline Is Not the Product of Careful Empirical Evidence

Section 2T1.1 as applied to misdemeanor § 7203 offense is also invalid for another reason. As with the crack guideline considered by the Supreme Court in *Kimbrough*, the Commission in adopting § 2T1.1 for misdemeanor failure to file offenses varied from its usual practice of employing an "empirical approach based on data about past sentencing practices." *See Gall*, 128 S.Ct. at 594 & n. 2 (the guidelines "are the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions [but] notably, not all of the Guidelines are tied to this empirical evidence"); *see also Kimbrough v. United States*, 128 S. Ct. 558 (2007) (authorizing sentence below crack guideline range because guideline was flawed and not based on empirical approach). As it explains in the background note to § 2T1.1, the Commission deviated from the pre-guideline practice to increase the sentencing length for such offenses and "to increase significantly the number of violators who receive a term of imprisonment." U.S.S.G. § 2T1.1, comment. (backg'd) (1988).

That admission by the Commission flies in the face of the requirement in § 994(j) as it applies to § 7203 misdemeanors. Moreover, in 2001, the Commission once again decided to "increase significantly the number of violators who receive a term of imprisonment" by adjusting upward the tax table enhancements, making § 2T1.1 even less compliant with § 994(j) with respect to misdemeanors. *Compare* U.S.S.G. § 2T4.1

(1988) (providing tax loss enhancements of 6 to 18 levels) *with* § 2T4.1 (2001) (providing tax loss enhancements of 6 to 36 levels). A copy of the 1998 Tax Table is attached as Exh C. Whatever the propriety in felony cases of the Commission's decision to significantly increase the number of persons whose guideline range should result in imprisonment, that decision violates § 994(j) when applied to § 7203 misdemeanor violations.

Accordingly, the Court should not apply U.S.S.(a)(1) in this case. The base offense level would therefore be 6, the default level established in § 2T1.1(a)(2).

C. Alternatively, the More Accurate Determination of the Tax Loss is That Calculated by Defense Experts

If the Court rejects our arguments regarding the invalidity of applying the enhancement from the tax table, the Court should apply the "more accurate" determination of tax loss submitted by defense experts. *See* U.S.S.G. § 2T1.1(c)(2), Note A (apply "more accurate determination of the tax loss" if one can be made). Defense experts using the numbers generated by the Revenue Agent and his trial testimony and current provisions of the tax law, determined a "more accurate" tax loss. *See* Supplemental Objections to PSR and attachments.

> We continue to object to the taxable income and unpaid tax liability proposed by the government, which is reflected in ¶¶ 67, 70, 72, 78 and 114 and forms the basis for determining the base offense level and total offense level at ¶¶ 78, 83 and 85. The more accurate "tax loss" for 1999 is $155,020. The more accurate total "tax loss" for the three years corresponding to the counts of conviction is $227,959. Attached is a summary and analysis of the more accurate and reasonable calculation of the "tax loss" prepared by our experts for the years 1999-2004.

> The government's calculation of the estimated "tax loss" is incorrect and inaccurate for several reasons. For example, for 1999 the government submits a "tax loss" of $2,083,301. This number fails to take into account a "net operating loss carryover" of more than $1 .5 million, fails to apply the lower capital gains tax rate to the income from capital gains, and fails to apply a "foreign tax credit" of more than $700,000, among other things. Similar mistakes are found in the government's calculations for the other years. As you know, we provided the government with a copy of this analysis for 1999 and have been informed by Mr. Scott that their revenue agents are reviewing that information.
>
> . . . As we explained, in calculating the tax loss our experts relied on and utilized the financial information contained in the report ("RAR") prepared by the IRS Revenue Agent and applied tax rates, adjustments and credits to income required and authorized by law. We did so to simplify the tax loss calculation despite the fact that we believe some of the information included in the RAR overstates income in some instances and fails to account for other deductions.
>
> Thus, our tax loss calculation is a conservative number. Accordingly, neither the government's incorrect calculations nor the 20% alternative tax loss should be used in determining the tax loss in this case.

Hence, the correct "tax loss" for 1999-2001 is less than $400,000, which corresponds to a base offense level of 18.

We also object to the inclusion of the tax loss for 2002-2004 as relevant conduct. First, the jury acquitted Mr. Snipes on those three misdemeanor counts. Second, inclusion of those three years would result in a guideline calculation where the acquitted conduct would drive the sentence and violate Mr. Snipes' Sixth Amendment jury trial guarantees.

Use of such conduct on the basis of judicial fact-finding violates Mr. Snipes' Sixth Amendment jury trial guarantees. *See Booker*, 543 U.S. at 244 (use of acquitted crimes to calculate the guideline range is "fundamentally opposite to the spirit of our

constitution") *quoting* 4 Blackstone 343-44. The Supreme Court's decision in *United States v. Watts*, 519 U.S. 148 (1997) (*per curiam*) merely held that the use of acquitted conduct to calculate the guidelines did not violate the double jeopardy clause. *See Booker*, 543 U.S. at 240 & n. 4 ("*Watts*, in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause" and there was not "any contention that the sentencing enhancement exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment").

Under the Sixth Amendment principle laid down in a string of Supreme Court precedents since 2000, a district court is not required to impose a guidelines sentence that derives from facts beyond the guilty verdict and any valid admissions. *See Rita*, 127 S.Ct. at 2466 ("a nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the sentencing judge to impose that sentence") (emphasis in original); *Cunningham v.California*, 127 S. Ct. 856, 860 (2007) ("placing sentence-elevating factfinding within the judge's province[ ]violates a defendant's right to trial by jury safeguarded by the Sixth Amendment. . . ."); *United States v. Booker*, 543 U.S. 220, 233 (2005); *Blakely v. Washington*, 542 U.S. 296, 304-05 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

Use of such conduct under a preponderance standard also violates Mr. Snipes' rights under the Due Process Clause of the Fifth Amendment, which requires proof beyond a reasonable doubt to protect against factual error when a person's liberty is at stake. *In re Winship*, 397 U.S. 358, 363-64 (1970); *see also Schriro v. Summerlin*, 542

U.S. 348 (2004) (despite lack of jury fact-finding, use of reasonable doubt standard by judge assured that accuracy was not seriously diminished).

The Eleventh Circuit has addressed and rejected some of the constitutional arguments pressed by Mr. Snipes. *See, e.g.*, *United States v. Smith*, 480 F.3d 1277, 1281 (11th Cir. 2007) (rejecting Sixth Amendment challenge to preponderance standard at sentencing); *United States v. Thomas*, 446 F.3d 1348, 1355 (11th Cir. 2006) (rejecting Fifth Amendment challenge to preponderance standard at sentencing); *United States v. Baker*, 432 F.3d 1189, 1254 (11th Cir. 2005) (refusing to extend Crawford protections to sentencing). Nonetheless, Mr. Snipes hereby asserts his rights to these Constitutional protections, whose parameters in the sentencing context have not yet been resolved by the Supreme Court. In part, moreover, the Eleventh Circuit's decisions have not fully addressed the issues raised by Mr. Snipes. Indeed, the Supreme Court has never held that in the face of an acquittal, the Sixth Amendment jury trial guarantee allows a court to sentence a defendant to the same extent as if the jury had convicted a defendant. The Supreme Court in *Watts* also left open the possibility that a preponderance standard could not be applied where the sentencing facts were the "tail that wagged the dog" of sentence. Watts, at n. 2.

V. A SENTENCE OF IMPRISONMENT WOULD GENERATE UNWARRANTED SENTENCING DISPARITIES

In determining the appropriate sentence, this Court must consider the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). The government has

suggested that this Court must sentence Wesley Snipes to prison for three years to avoid disparities with his codefendants and with a number of other ARL clients who have been prosecuted throughout the United States. The major flaw with the government's argument is that each of the persons it uses as a reference point has not been found guilty "of similar conduct." Each of the persons the government points to, including the list of persons included in the presentence report who have been prosecuted in similar cases were convicted of felony offenses. Wesley Snipes stands convicted of misdemeanor offenses and *nothing more*. A number of them were convicted of multiple felonies. They are therefore not similarly situated for purposes of the disparity argument. Indeed, any disparity with the sentence for those persons is warranted.

Indeed, several cases make clear that imposing a term of imprisonment on Mr. Snipes would result in unjust and unwarranted disparity. Thus, for example, Milton Baxley, was sentenced in November 2006, by a federal judge to 18 months in prison and fined him $10,000 for contempt of court. A jury had convicted Baxley on two counts of violating an injunction order barring him from promoting a tax fraud scheme. Baxley gave American Rights Litigators (aka Guiding Light of God Ministries) permission to use his name and signatures on pro forma letters for customers to send to the IRS and pro forma complaints to send to the Treasury Inspector General for Tax Administration. The letters made frivolous arguments and the complaints falsely accused IRS employees of misconduct.

On April 15, 2008, a billionaire, Igor Olenicoff, who agreed late last year to pay $52 million to settle a federal criminal tax case was sentenced by United States District

Judge Cormac Carney in Santa Ana, California to two years probation and 120 hours of community service. Forbes magazine has estimated Olenicoff's personal fortune at $1.7 billion. In that case, federal prosecutors had recommended that Olenicoff be placed on probation for three years. Newspaper reports of the case reflect that Olenicoff state:

> Olenicoff, 65, offered a long explanation about how he opened accounts overseas on the advice of bankers, lawyers and accountants, which he failed to disclose to the Internal Revenue Service, leading to his eventual guilt plea after years of resisting IRS efforts to pay more taxes.
>
> "It was bad advice and me not thinking about it," he told U.S. District Judge Cormac Carney. "I'm sorry. The intent was never to defraud the federal government."
> The Orange County Register, April 15, 2008, News 18.

A number of other cases involving high-profile failure to file cases were resolved without incarceration:

1. In early 2007, singer/actor Marc Anthony agreed to pay approximately $2.5 million in back taxes owed to the federal and state governments after failing to file returns on nearly $15.5 million in income over a five-year period. No criminal charges were ever brought against him.
2. On October 29, 2005, former Washington, D.C. Mayor Marion Barry pleaded guilty to two misdemeanor tax charges for failing to file tax returns from 1999 through 2004. Despite having a criminal history, he was sentenced to three years of supervised probation and ordered to negotiate a plan to settle his tax debt.

3. On July 18, 2005, Norman Whitfield, the co-writer of such songs as *Papa Was a Rolling Stone* and *I Heard it Through the Grapevine,* was sentenced to six months home confinement and ordered to pay a $25,000 fine after pleading guilty to one count of felony tax evasion. He had been charged with five counts of willful failure to file and multiple counts of tax evasion. The government had alleged that he owed $956 thousand in back taxes.
4. Perhaps in one of the most celebrated tax deficiency cases, the Tax Court approved a settlement of a tax debt owed by Willie Nelson, the famed singer. The IRS alleged that Mr. Nelson owed approximately $17 million in back taxes involving deficiencies dating back to 1972. Mr. Nelson settled the debt for $6.5 million.

In another recent celebrated case involving much more serious charges, Rapper T.I. pleaded guilty in Atlanta to federal weapons possession charges, and is to be sentenced in one year, after completing a period of community service. As reported by CNN:

> In the year that he is awaiting sentencing, T.I., whose real name is Clifford Harris, must complete at least 1,000 hours of a total 1,500 hours of community service, talking to youth groups about the pitfalls of guns, gangs and drugs.
>
> . . .
>
> He pleaded guilty to possession of an unregistered firearm, possession of machine guns and possession of a firearm by a convicted felon.
>
> Harris was arrested Oct. 13, just blocks away and hours before he was to headline the BET Hip-Hop Awards in Atlanta.

> He had been charged with possession of unregistered machine guns and silencers, as well as possession of firearms by a convicted felon. He had faced a maximum of 10 years in prison and a $250,000 fine for each count.
>
> Harris is one of pop music's most successful artists. His sixth album, "T.I. vs. T.I.P.," was released July 3, debuting at No. 1. He appeared in the 2007 film "American Gangster," which starred Denzel Washington and Russell Crowe.
>
> Harris was allegedly trying to buy unregistered machine guns and silencers. He initially pleaded not guilty, and has been under house arrest since he was released on $3 million bond Oct. 26.
>
> . . .
>
> In 2004, warrants were issued for his arrest on probation violations for a drug conviction, and he was sentenced to three years behind bars.

http://www.cnn.com/2008/SHOWBIZ/Music/03/27/rapper.arrested.ap/.

Countless other cases involving famous or just notorious persons could be set out in this section. Suffice it to say, however, that the T.I. case and the other cases involving well-known persons who have been charged, convicted or merely run afoul of the tax laws point out the travesty of imprisoning Wesley Snipes for his misdemeanor convictions.

CONCLUSION

For all these reasons, Wesley Snipes respectfully requests that this Honorable Court reject the government's request for a 3-year term of imprisonment. We respectfully ask the Court to heed the eloquent words of Justice Kennedy in *Koon v. United States*, upholding the downward departures in that notorious case, who wrote:

> It has been "uniform and constant in the federal judicial tradition" for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate . . . the crime and the punishment to ensue.

Koon v. United States, 518 U.S. 81, 113 (1996).

A sentence of probation with whatever conditions the Court deems just and proper is "sufficient, but not greater than necessary" to impose just punishment on Wesley Snipes.

Respectfully submitted.

_/s/ *Linda Moreno*_____

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following CM/ECF participants:

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