

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES : CRIMINAL NO. 3:06 CR 237 (JBA)
V. :
BEN A. HUNTER : APRIL 9, 2007

SENTENCING MEMORANDUM

The defendant, Ben A. Hunter, submits this memorandum in connection with his sentencing.

I. FACTUAL BACKGROUND

The Pre-Sentence Report (hereinafter "PSI") sets forth much of Ben Hunter's (hereinafter "Hunter") personal background. However, due to Hunter's unique background and its relevance to his request for downward departure, much of his history is repeated in this memorandum.

Hunter was born on May 30, 1947 in Greenville, North Carolina. He was the sixth of eight children and was born and lived on a plantation owned by a man named Clarence Little. The eight children and both parents were required to work long hours

◇ as sharecroppers and were paid little for their efforts. Hunter recalls that his family had very little money and was heavily indebted to Mr. Little, as he also owned the grocery and clothing store on the plantation.

Hunter attended a segregated school two miles away from the plantation with other children of sharecroppers. It was a schoolhouse with only three rooms and children of all ages were in attendance. The Hunter family did not own anything other than their clothing and struggled to survive. After two consecutive seasons of bad crops and a significant amount of debt owed to Mr. Little, the Hunters were forced to move off the plantation.

The family moved to New Haven, CT to be with Mamie and Mattie, two of Hunter's older sisters who, after the first year of bad crop, went north to find work. Hunter's father and his older brother, Alex, left the plantation first and eventually found an apartment in the Fair Haven Section of New Haven. Unfortunately, the apartment had only two bedrooms, a bathroom and a kitchen. The entire family could not fit in this apartment and the family once again had to split up. Alex and Hunter's sister, Usha, moved in with Mamie and Mattie, while Hunter, his parents and his three remaining brothers moved into the Fair Haven apartment. The Hunters did not have

◇ an automobile and the family was unable to be with each other often. This was a dark time for the entire family.

Soon after arriving in Connecticut, Hunter enrolled at the Ezekial Cheever elementary school, which was very different from his plantation school. His new school was five times the size and the children in it were much more advanced. Further, the classes at Cheever were not segregated and this was a major transition for Hunter. He was constantly ridiculed by the other students for the way that he talked and because he performed poorly in class. He had trouble understanding his work and he found the subject matter of the classes to be extremely difficult. Hunter soon found out he was functioning at a second grade level while the rest of his classmates were at a sixth grade level or above. The other children also teased him because his clothing was tattered and worn. There was no money for new clothes or school supplies.

Although Hunter's father found a job in construction shortly after moving to New Haven, it was only months later that he was laid off. This problem was further compounded when Hunter's older brother and sister lost their jobs as well.

Approximately five years later, Hunter's mother applied for an apartment through the City of New Haven Housing Authority. The apartment on James Street was

too expensive and too small and the family was threatened with eviction. Her application was successful and the family moved to the "projects" on Ashmun Street. The new apartment had three bedrooms and a living room and housed the entire family of ten people. Now that the family moved to a different area, Hunter was required to go to a different school and the adjustment was again difficult. However, Hunter was determined to do better academically. For the first time he earned a C average and he also began playing on the school's football and basketball teams. By this time, Hunter was old enough to obtain employment and he got a job with the New Haven Register delivering newspapers. He gave all the money he received from the Register to his parents.

Prior to commencing his junior year of high school, Hunter applied to an academic program at Bruton Heights High School in Williamsburg, Virginia. This was a high school for African-American students who were having trouble excelling in their non-segregated schools. Hunter was desperate to attend this school due to the constant stress at home and his inability to further improve his academic performance.

Fortunately, his application was accepted and the program found housing for him in West Virginia, at the home of the Athletic Director of the Bruton Heights High School.

◇ Hunter spent the remainder of his high school career at Bruton Heights and flourished there. His grades vastly improved and he also was given the honor of being an All-District Football Player. During the school year he worked as a busboy at a restaurant and sent the money he earned home to his parents. During the summers he would return to New Haven and work at the Wonder Bread Bakery.

Upon graduation from Bruton Heights, Hunter was accepted into West Virginia State University with a basketball scholarship. He was the first and only member of his family to go away to college. During the college school year he participated in work study programs through the school. At summertime, Hunter worked for a chemical company. Regardless of the time of year, Hunter always sent half of his paycheck home to his family. Around this time, Hunter's mother fell ill with cancer. She was unable work in or out of the home and the family suffered emotionally and economically. Hunter's mother survived but the family sunk further into debt.

Hunter graduated from West Virginia State University in four years with a Bachelor of Science degree in History. He returned to the family home and got a job at Traveler's Insurance Company as a claims adjuster. At this time, Hunter became involved with the community and started playing basketball and coaching basketball

◇ for children at the Dixwell Community House. He became well known in the community as a generous and caring man. After about three years, he was contacted by Troop Middle School in New Haven. Hunter was recommended to them as an individual who would be perfect for filling a position at the school working with delinquent teenagers. This new job required that he earn a reduced salary but his desire to work with young people outweighed monetary concern and he took the new job. Throughout this time he continued to provide half of his paycheck to his parents.

Hunter began working for the New Haven Board of Education in 1972 at the Troop Middle School. In 1982, Hunter transferred to the History Department at Hillhouse High School. In 1984, Mr. Hunter became associate principal at Hillhouse and continued in that role for the next twenty years, until his retirement in 2004. During those years he went back to school for his Master's Degree and Sixth Year Teaching Degree. He also spent much of his time officiating local basketball and softball games and working as a driver's education instructor at American Driving School in New Haven. Mr. Hunter has also been the recipient of numerous awards and accolades as an educator, a school administrator and for his charitable works in the community. A description of these honors and achievements follows:

- 1) A Proclamation issued by Mayor John C. Daniels of the City of New Haven for his many achievements and accomplishments which immensely benefited the children of New Haven;
- 2) A Resolution introduced and passed by the General Assembly of the State of Connecticut commending Ben Hunter for organizing the Connecticut Basketball Association to serve as an incentive measure for high school basketball players to excel in athletic and academic pursuits; for providing the opportunity for young people to develop the habit of clean athletic competition; for encouraging young people to develop respect for the accomplishments of others and to desire to strive for excellence; and for being instrumental in affording the athletes of the state of Connecticut the opportunity to be very selective in terms of the colleges and universities they seek to attend;
- 3) The Chief's Citizen Award for Meritorious Service from The City of New Haven's Department of Police Service which is awarded to a private citizen, who, at the risk of personal peril, aids the police in the performance of their duties; and who unselfishly acts to preserve human life;

- 4) An award from Temple Beth El First Tabernacle Church for helping their children excel in academics and athletics;
- 5) The My Brother's Keeper Award for stopping violence in the City of New Haven;
- 6) The Distinguished Service Award from the City of New Haven;
- 7) The Community Service Award from the New Haven Police Department;
- 8) The Community Service Award from the New Haven Small Business Coalition;
- 9) The Community Service Award from the United States Postal Union;
- 10) The Community Service Award from the Dixwell Community House;
- 11) The Community Service Award from the Alpha Kappa Alpha Sorority;
- 12) The Community Service Award from the Dixwell Congregational Church;
- 13) The Community Service Award from the Neighborhood Basketball League;
- 14) The Community Service Award from the NAACP;
- 15) The Community Service Award from Omega Psi Phi Fraternity;
- 16) Received an honorable mention from the President of West Virginia State University for having 25 students from New Haven attend the school;
- 17) Started the Connecticut Shoot-Out Basketball clinic and recruited troubled children to play;

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- 18) Inducted into the West Virginia State University Basketball Hall of Fame;
 - 19) Nominated as Grand Marshal for Ruell B. Blair Athletic Association in Williamsburg, VA;
 - 20) Nominated as Grand Marshal for Sierra Leone in the World Olympics;
 - 21) Selflessly contributed to various political causes by assisting Mayors DeStefano, DeLitto and Guida in their respective campaigns;
 - 22) Sponsored 20 students from the Hillhouse Class of 2002 for the cost of prom, graduation and yearbook totaling to \$180 per student; received a plaque for this service;
 - 23) United States Program for International Relations recruited Hunter to foster the relations between the youth of the United States and foreign cultures by coaching basketball in Puerto Rico, Mexico and the Dominican Republic;
 - 24) Bravery Award from the New Haven Police Department for disarming a student with a gun after he shot another student;
 - 25) Superintendent of New Haven public schools publicly recognized Hunter for disarming a student with a gun;
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- 26) Hillhouse Teacher the year twice and Hillhouse Administrator of the year twice, he was the first in New Haven to receive both of these awards for two consecutive years;
- 27) Instituted a successful program at Hillhouse High School called Code Blue. This program involved motivating students to go to class, study hard and set goals for themselves;
- 28) Participated in a program at Hillhouse to encourage the students to read. After the required number of books were read, Hunter agreed he would shave his head. Many students participated in the program;
- 28) Received a symbolic key to the city of New Haven for spearheading an effort to raise significant monies for renovations to Hillhouse High School;
- 29) Had the Calvin Murphy Marching band from Houston, Texas play at Golf Street Park for students. Calvin Murphy was a professional basketball player who also started the band. This assembly was provided to the students by Hunter to promote the arts;
- 30) As head of the Connecticut Basketball Association, became the first group to integrate inner-city athletes with athletes from the suburbs. All the athletes

participated in tournaments together at Hillhouse Highschool, Quinnipiac University and Yale University;

31) Instituted a program with the University of New Haven athletes to adopt a Hillhouse student for a day to experience college life;

32) In a successful effort to mend the relations between Yale and the City of New Haven while many employees were on strike, Hunter organized a day where the children of the parents on strike attended a Yale football game.

In 1974 Hunter married his college sweetheart, Sondra Carter. Tragically, she died suddenly of a heart attack when she was only thirty years old. Hunter never recovered from this and although he eventually remarried, it did not work out and he was divorced from his second wife shortly thereafter. Luckily, Hunter has been blessed with two daughters with whom he shares very close relationships.

Within the last ten years, Hunter has also lost two of his siblings to cancer and his father to a heart attack. Hunter's mother is currently ninety-five years old and lives in a nursing home. Hunter visits her every day and, with his surviving siblings, helps to pay the monthly costs of her stay.

◇ In the year 2000, Hunter had a serious motor vehicle accident. He was hit head on by a drunk driver. Hunter received a concussion, a laceration on his head and a severe hip injury. Hunter also has several other medical problems for which he takes many medications. They include (1) 40% impairment of his right hip which will require hip replacement surgery; (2) Type II Diabetes; (3) High Blood Pressure; (4) Sleep Disorder; (5) Stomach Disorder; (6) Abnormal Prostate; (7) Cirrhosis of the Liver and (8) Potential for Hepatitis C (testing is incomplete); (8) high cholesterol, dizziness, memory loss, severe back pain, and exhaustion and difficulty caring for himself. Mr. Hunter's nephew currently provides Mr. Hunter with in-home services which include helping Hunter bathe, cook, clean, and move about.

Ben Hunter is prescribed the following medications (1) Metformin, 500 mg. per day; (2) Diovan HCT, 125 mg per day); (3) Ambien CR, 125 mg per day; (4) Amox TR, 125 mg per day; (5) and certain vitamins every day (selenium, pygeum, Saw Palmetto, Lycopene, B Complex, and Strovite Advanced capsule); (6) liver purifier; (7) imbue 100 mg of lipitor each day; (8) 500 mg of multivitamin; (9) 200 mg of Choles twice a day; (10) 500 mg of cinnamon; (11) 1500 mg garlic tablets three times a day; and (12) 100 mg of B-12 each day.

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II. A DOWNWARD DEPARTURE IS WARRANTED BASED ON HUNTER'S ACCEPTANCE OF RESPONSIBILITY

Pursuant to U.S.S.G. §3E1.1 (a), a downward departure is warranted based on Hunter's acceptance of responsibility. Hunter has truthfully admitted the conduct comprising the offense of conviction and any additional conduct from which the defendant is accountable under U.S.S.G. §1B1.3. Moreover, he timely notified the authorities of his intention to plead guilty. Therefore, the court should depart downward by two levels pursuant to §3E1.1 (a). Further, as the Government concedes, Mr. Hunter is eligible for an additional one-level reduction for acceptance of responsibility as outlined in §3E1.1(b) of the Federal Sentencing Guidelines thereby reducing his offense level by a total of three¹.

III. A DOWNWARD DEPARTURE IS WARRANTED BECAUSE HUNTER AND THE GOVERNMENT STIPULATED AS TO THE APPLICABLE GUIDELINE RANGE

Though a sentencing court is presumptively required to sentence within the applicable Guidelines range, a district court has "wide discretion" to depart from the

◇ Guidelines. United States v. Sturgis, 869 F.2d 54, 56 (2d Cir. 1989); *see* 18 U.S.C. § 3553(b) (Supp. V 1987). Moreover, the Commission has explicitly opted not to foreclose the courts from considering any relevant factor in sentencing. United States v. Ryan, 866 F.2d 604, 606-07 (3d Cir. 1989).

The discretionary power to depart from the Guidelines is especially important where the elements of the Guidelines sentence threaten to make the widespread practice of plea bargaining unworkable. *See* United States v. Fernandez, 877 F.2d 1138 (2d Cir. 1989). Strict adherence to sentencing under the Guidelines may forestall any defendant from partaking in a plea agreement deal, since it may have little meaning if the likely sentence will depend on something other than the agreement. *See* United States v. Wright, 873 F.2d 437 441 (1st Cir. 1989). "Since the Sentencing Commission has not yet fully considered plea bargaining as a factor in shaping the current Guidelines, it is not startling that a district court presently may depart from a Guidelines sentence in order to give effect to a plea bargain if such a departure is warranted." United States v. Fernandez, 877 F.2d at 1145 (2d Cir. 1989).

◇ ¹ In a letter dated March 30, 2007 from Assistant United States Attorney, James Glasser, to Hunter's probation officer, Sandra Hunt, Glasser indicates that, "...Mr. Hunter [will] be eligible for a full three-level reduction for acceptance of responsibility, *see* 3E1.1(b)..."

◇ The parties have agreed that the appropriate offense level in this case is a ten, a criminal history category of I; with the resulting Guideline range of six to twelve months of incarceration and a fine range of \$2,000 to \$20,000. However, Hunter's probation officer has calculated his total offense level at fourteen, a criminal history category of I; with the resulting guideline range of 15 - 21 months of incarceration and a fine range of \$4,000 to \$40,000. For all the reasons highlighted in this memorandum and to give effect to the plea agreement and the intent of the parties, it is appropriate for the Court to depart downward from the offense level of ten.

III. A DOWNWARD DEPARTURE IS WARRANTED BECAUSE THE FACTS OF THIS CASE TAKE IT OUTSIDE THE HEARTLAND

The Sentencing Guidelines purport to carve out a "heartland," a set of "typical cases embodying the conduct that each guideline describes." U.S.S.G., Ch. 1, Pt.A§4(b). In creating the Guidelines, the Sentencing Commission did not take into account those cases that are "unusual." Koon v. United States, 518 U.S. 81, 93 (1996). Thus, the sentencing court may depart downward from the applicable sentencing range when it encounters a case in which "a particular guideline linguistically applies but where conduct significantly differs from the norm." Id. at 98-100. Factors that make a case

◇ atypical form a basis for granting a downward departure Id. at 94. "If a factor is unmentioned in the Guidelines, the court must, after considering the structure and theory of both relevant and individual guidelines and the Guidelines taken as a whole, decide whether it is sufficient to take the case out of the Guideline's heartland." Id. at 95-96.

It is respectfully submitted that this is such a case. Hunter's community contributions and prior good works demonstrate that this case differs significantly from the "heartland" cases. Hunter's physical impairments, medical conditions, motivation for committing the offense, his difficult upbringing and his employment record further indicate his case is far outside the Sentencing Commission's heartland of cases.

A. Hunter's civic contributions warrant a downward departure

Pursuant to §5K2.0, a sentencing court is authorized to grant a downward departure based on prior good works where such good works are extraordinary. United States v. Rioux, 97 F.3d 648, 663 (2d Cir. 1996). *See also* U.S.S.G. §5K2.0. Hunter has dedicated his life to helping his family and the children of the community of New Haven. He has, among many other things, devoted his time and energy to local athletes by providing them with access and opportunity to flourish their skills, their minds and

their hearts. He has helped an innumerable amount of students learn to drive, excel on the SAT's, get into college and have faith and confidence in themselves. There are not many people, if any, who have donated their time and energy to the young people of the community in the way that Hunter has. He has truly made a difference in the City of New Haven. He is also a family man who has two daughters who he supports emotionally and financially. He is a son to his 95 year old mother who is elderly and infirm and whom he visits each day. As such, his case is extraordinarily different from the heartland cases and justifies a downward departure.

B. Hunter's Medical Conditions and Physical Impairment

Pursuant to §5H1.4, and the rule in the Second Circuit, medical conditions are not ordinarily relevant to a defendant's motion for downward departure. "§5H1.4 of the sentencing guidelines restricts departures based on physical condition to defendants with an extraordinary physical impairment, such as those which render a defendant 'seriously infirm.'" United States v. Altman, 48 F.3d 96, 104 (2d Cir. 1995). In that case, the defendant suffered from poor health that required some monitoring. This was not regarded as an extraordinary physical impairment and made him ineligible for a downward departure on that basis. If a defendant does suffer from an extraordinary

◇ physical impairment, a court may depart from the sentencing guidelines where, for example, "home detention may be as efficient as, and less costly than, imprisonment." U.S.S.G. §5H1.4; *see also* United States v. Jimenz, 212 F. Supp.2d 214 (2002). Therefore, the Sentencing Commission considers an "extraordinary physical impairment" a legitimate reason for imposing a sentence below the applicable guideline range. U.S.S.G. Manual § 5H1.4. However, the Commission has failed to indicate which illnesses or physical burdens qualify for a downward departure. United States v. Hammond, 37 F.Supp.2d 204 (1999). There is a great variety of physical conditions that courts have deemed to be so extraordinary as to warrant sentencing departures. One of the disabilities warranting a downward departure has been a degenerative hip and knee condition with non-active tuberculosis and hyperactive adjustment disorder, United States v. Boy, 19 F.3d 30 (unpublished opinion), 1994 WL 59781, at *3 (9th Cir. 1994).

As outlined in the Factual Background Section of this memorandum, Hunter has a substantial number of extraordinary physical ailments and medical prescriptions. Although some of the above medical conditions and physical impairments are not extraordinary, all of them viewed together make them extraordinary and therefore

warrant a downward departure. The Sentencing Commission certainly did not contemplate or envision a defendant such as Hunter being incarcerated when, in light of his medical conditions, a sentence of supervised release or of home confinement would be as efficient and certainly less costly.

C. Defendant's Motivation for Committing the Offense

Hunter has led an exemplary life up until these most recent acts. He grew up in a household which taught him honor, respect and discipline. Hunter has followed that direction all of his life. He has also spent the majority of his life in financial struggle. At the time when Hunter committed these offenses, he was facing significant debt along with extreme emotional turmoil. Hunter had lost his father to a sudden heart attack and more recently, two of his siblings to cancer. He also had a debilitating car accident for which recovery was not going well. Further, he was diagnosed with diabetes and a myriad of other physical ailments. All of this was compounded by his mother's need for 24 hour care and the expense associated with it. During this time, Hunter was also challenged with the cost of much needed household repairs that included the replacement of his furnace, the repair and insulation of his attic and plumbing problems.

Although Hunter readily admits his actions were wrong and in very poor judgment, these actions were motivated by very real problems and are clearly out of character for Hunter. Hunter was facing extreme personal distress at the time that these offenses were committed and his motivation to commit the crimes stemmed from a set of facts and circumstances that can never be repeated. Hunter's unique situation takes his case outside of the heartland and warrants a downward departure.

D. Employment Record and Difficult Upbringing

The Sentencing Guidelines provide that previous employment record is not ordinarily relevant to the determination of whether a departure is warranted §5H1.5. Thus, a defendant's previous employment record should be a ground for departure only in exceptional or extraordinary cases. United States v. Jagmohan, 909 F.2d 61 C.A.2 (N.Y. 1990). In Jagmohan, the appellate court affirmed the district court's decision that Jagmohan's employment history was one that warranted a departure downward. In this case the defendant, an immigrant to the United States, had been gainfully employed for the nine years since he had entered the country. That fact, coupled with the defendant's use of a personal check while committing the offense of bribery of a public official was enough to warrant a downward departure. This, in the district court's view, reflected an

utter lack on the defendant's part of the sophistication usually shown by persons bribing an official. The appellate court affirmed, indicating that "... the picture painted of the [defendant] is one of a person with an entirely stable background, indicated by his employment history and whose unusually unsurreptitious conduct in undertaking the bribery constituted a mitigating factor [of a kind], not adequately considered by the Guidelines. Having set forth proper grounds for a departure, the district court's decision to depart was not unreasonable. Furthermore, the district court did not abuse its discretion in determining that probation, rather than some period of incarceration [set forth] by the Guidelines, was an appropriate sentence in light of the circumstances presented." Id at 62.

In following the rationale of Jagmohan, Hunter's employment record and difficult upbringing most definitely warrants a downward departure. Hunter, a United States citizen, has maintained steady employment and worked very hard for all of his life. As a young boy he was required to work as a sharecropper on a plantation to support himself and his family. Once he moved to New Haven, he began working as soon as the law allowed and one-hundred percent of every pay check he received went to his parents. Hunter worked throughout high school and college and full-time every

◇ summer so that he could support himself and his very large family. He committed himself to a profession where he could help others. He became the first in his family to go to college. He became a teacher and while working he earned his Master's degree and eventually became the Principal of his local high school. Of all the jobs he has had, big or small, Hunter demonstrated extreme responsibility and dedication. At a young age, Hunter was depended on to raise money for the family and for almost all of his sixty years, he has been gainfully employed. The unfortunate choices that bring Hunter before this Court presently, are the only choices he has made in his very long life that have put him in contravention with the law. Certainly Hunter's employment record and long-standing good will and reputation bring him outside the heartland.

V. A COMBINATION OF THE ABOVE FACTORS WARRANTS A DOWNWARD DEPARTURE

The commentary to § 5K2.0 authorizes a downward departure based on a combination of factors. "The commission does not foreclose the possibility of an extraordinary case that because of a combination of such characteristics or circumstances differs significantly from the 'heartland' of cases covered by the Guidelines that it is important to the statutory purpose of sentencing, even though none

of the characteristics or circumstances individually distinguish the case. U.S.S.G. §5K2.0; United States v. Rioux, 97 F.3d 648, 663 (2d Cir. 1996).

Many cases have addressed similar issues where defendants are being sentenced for their first substantive crime and where they have shown themselves to have benefited their community in some way. United States v. Leiva-Deras, 359 F.3d 183 (2004). See United States v. One Star, 9 F.3d 60, 61-62 (8th Cir.1993) (refusing to conclude that circumstances relied upon by the district court for its downward departure, including the difficult conditions of Indian reservation life, defendant's strong family ties and good employment record, factors not ordinarily relevant in a downward departure, were insufficiently unusual to warrant a departure); United States v. Big Crow, 898 F.2d 1326, 1331-32 (8th Cir. 1990) (upholding a downward departure based on defendant's lack of prior criminal record, excellent employment history, solid community ties and consistent efforts to overcome adverse living conditions on an Indian reservation because, taken together, these were mitigating circumstances of a magnitude inadequately taken into account by the Sentencing Commission); United States v. Somerstein, 20 F.Supp.2d 454, 464-64 (E.D.N.Y. 1998) (holding that presence of three factors, which may not alone justify a downward departure for fraud conviction,

could be relied on when taken together; defendant's charitable efforts, exceptional work history, and experiences as a child victim of the Holocaust).

A downward departure is warranted in his case based on a combination of all of the factors discussed in this memorandum. Hunter's history of living an otherwise law-abiding life, his hard working nature, his difficult upbringing, numerous misfortunes and his generosity with family members and community organizations are all relevant factors to be considered by this court in determining whether a downward departure is warranted. The combination of all aspects of Hunter's life merits a downward departure from the Sentencing Guidelines, as to prevent Ben A. Hunter from being incarcerated.

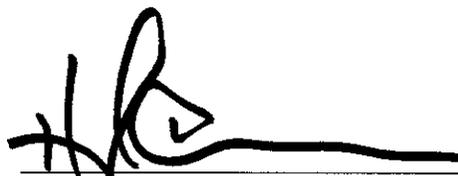
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CERTIFICATE OF SERVICE

UNITED STATES : CRIMINAL NO. 3:06 CR 237 (JBA)
V. :
BEN A. HUNTER : APRIL 9, 2007

I hereby certify that on April 9, 2007, a copy of the foregoing Sentencing Memorandum was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.



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