

FILED

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MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

3:05-cv-400-J-20TEM

United States District Court		District Middle District of Florida	
Name (under which you were convicted): Avise Merrill Hunter		Docket or Case No.: 3:01-cr-108-J-20TEM	
Place of Confinement: U.S.P. Coleman, Florida		Prisoner No.: 29399-108	
UNITED STATES OF AMERICA		Movant (include name under which convicted)	
		v. AVISE MERRILL HUNTER	

MOTION

- (a) Name and location of court that entered the judgment of conviction you are challenging: U.S. District Court, Middle District of Florida, Jacksonville Division

(b) Criminal docket or case number (if you know): 3:01-cr-108-J-20TEM
- (a) Date of the judgment of conviction (if you know): August 1, 2002

(b) Date of sentencing: August 1, 2002
- Length of sentence: Ct. 1. Life, sup. release 120 mths, Spec. Assess \$200.00; Ct. 17, Life, Sup. release 96 mths. to run concurrently
- Nature of crime (all counts): Ct. 1, Conspiracy to dist. cocaine & 5 kilo's or more of Cocaine Base (21 U.S.C. 846) and Ct. 17, Distribution of 5 grams or more of Cocaine Base (21 U.S.C. 841(a)(1) & 841 (b)(1)(B))
- (a) What was your plea? (Check one)

(1) Not guilty  (2) Guilty  (3) Nolo contendere (no contest)

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? \_\_\_\_\_
- If you went to trial, what kind of trial did you have? (Check one) Jury  Judge only
- Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes  No

8. Did you appeal from the judgment of conviction? Yes  No

9. If you did appeal, answer the following:

(a) Name of court: U.S. Court of Appeals for the 11th Circuit

(b) Docket or case number (if you know): 02-14354-EE

(c) Result: Affirmed

(d) Date of result (if you know): 2/20/04

(e) Citation to the case (if you know): \_\_\_\_\_

(f) Grounds raised: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes  No

If "Yes," answer the following:

(1) Docket or case number (if you know): \_\_\_\_\_

(2) Result: \_\_\_\_\_  
\_\_\_\_\_

(3) Date of result (if you know): \_\_\_\_\_

(4) Citation to the case (if you know): \_\_\_\_\_

(5) Grounds raised: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes  No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: \_\_\_\_\_

(2) Docket or case number (if you know): \_\_\_\_\_

(3) Date of filing (if you know): \_\_\_\_\_

(4) Nature of the proceeding: \_\_\_\_\_

(5) Grounds raised: \_\_\_\_\_

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(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes  No

(7) Result: \_\_\_\_\_

(8) Date of result (if you know): \_\_\_\_\_

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: \_\_\_\_\_

(2) Docket or case number (if you know): \_\_\_\_\_

(3) Date of filing (if you know): \_\_\_\_\_

(4) Nature of the proceeding: \_\_\_\_\_

(5) Grounds raised: \_\_\_\_\_

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(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes  No

(7) Result: \_\_\_\_\_

(8) Date of result (if you know): \_\_\_\_\_

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes  No

(2) Second petition: Yes  No

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

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12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. *SEE INSERT - 11 PAGES*

GROUND ONE: \_\_\_\_\_

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(b) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes  No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes  No



(4) Did you appeal from the denial of your motion, petition, or application?

Yes  No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**GROUND TWO:** \_\_\_\_\_

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes  No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes  No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes  No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

\_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this

issue: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

GROUND THREE: \_\_\_\_\_

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(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): \_\_\_\_\_

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**(b) Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

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**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes  No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

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(3) Did you receive a hearing on your motion, petition, or application?

Yes  No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes  No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

\_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**GROUND FOUR:** \_\_\_\_\_

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): \_\_\_\_\_

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\_\_\_\_\_

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\_\_\_\_\_

\_\_\_\_\_

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes  No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_



Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes  No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes  No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: \_\_\_\_\_

NONE OF THE FOUR GROUNDS WERE PREVIOUSLY PRESENTED - EITHER DUE TO IAC AT DISTRICT COURT OR NOT BEING COGNIZABLE ON DIRECT APPEAL AT COURT OF APPEALS

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes  No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. \_\_\_\_\_

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: CHARLES ADAMS CJA

(b) At arraignment and plea: "

(c) At trial: "

(d) At sentencing: "

(e) On appeal: "

(f) In any post-conviction proceeding: WILLIAM MALLORY KENT  
1932 PERRY PLACE, JACKSONVILLE 32207 FORTUS 2255

(g) On appeal from any ruling against you in a post-conviction proceeding: \_\_\_\_\_

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes  No

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes  No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: \_\_\_\_\_

(b) Give the date the other sentence was imposed: \_\_\_\_\_

(c) Give the length of the other sentence: \_\_\_\_\_

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes  No

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.\*

YOUR STATEMENT OF THE TIME LIMIT  
IS WRONG. PLEASE CORRECT THE  
FORM. IT IS MISLEADING FOR  
PROSE PETITIONERS. SEE  
KAUFMANN VS U.S. 282 F3d 1336  
(11th CIR. 2002); CLAY V. U.S.,  
123 S.Ct. 1072 (2003).

\* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief: VACATE JUDGMENT +  
SENTENCE

or any other relief to which movant may be entitled.

William M. Kent

Signature of Attorney (if any)

WILLIAM MALLORY KENT  
FL BAR # 0260738, 1932 Perry Place,  
Jacksonville, FL

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this

~~Motion Under 28 U.S.C. § 2255 was placed in the prison mailing system on~~

\_\_\_\_\_ (month, date, year).

32207  
904-398-8000  
904-348-3124 FAX  
Kent@WILLIAMKENT.  
COM

Executed (signed) on \_\_\_\_\_ (date).

Christie Hunter

Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion. \_\_\_\_\_

\_\_\_\_\_

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UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION

AVISE MERRILL HUNTER,  
Petitioner,

vs.

Civil Case Number 3:05-cv-\_\_\_\_\_  
Criminal Case Number 3:01-cr-108-J-20

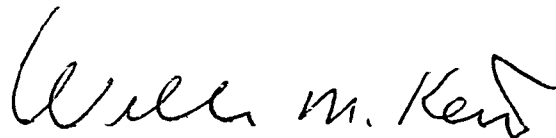
UNITED STATES OF AMERICA,  
Respondent.

PETITIONER HUNTER'S INSERTS TO 2255 FORM

Petitioner Hunter hereby supplements his answers to the sworn 2255 form by attachment of the following inserts thereto, hereunto annexed and by this reference made a part thereof.

Respectfully submitted,

THE LAW OFFICE OF  
WILLIAM MALLORY KENT



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WILLIAM MALLORY KENT  
Florida Bar No. 0260738  
1932 Perry Place  
Jacksonville, Florida 32207  
(904) 398-8000 Telephone  
(904) 348-3124 Facsimile  
kent@williamkent.com  
ATTORNEY FOR PETITIONER

12. - **GROUND ONE** - Violation of the Sixth Amendment - Hunter's Counsel rendered ineffective assistance of counsel by failing to advise Hunter that he could qualify for application of the safety valve provisions of 18 U.S.C. § 3553 as implemented by U.S.S.G. § 5C1.2 and § 2D1.1(b)(7), after having taken his case to trial and been convicted. Had Hunter's counsel advised him that he would have qualified for the safety valve simply by disclosing to the government post-trial (but pre-sentencing) all information and evidence that he, the defendant, had concerning the offense, Hunter would have done so. Had this taken place, the Court would no longer have been authorized to impose the mandatory life sentence it imposed under the government's enhancement information filed pursuant to 21 U.S.C. § 851. Instead, there would have been no minimum mandatory sentence applicable to Hunter, and the Court would have been required to sentence Hunter pursuant to the guidelines, which in turn would have been further reduced an additional two levels as a result of the safety valve, to a level 36, category I, for a sentencing range of 188-235 months.<sup>1</sup> Instead, Hunter was sentenced to mandatory life imprisonment. Hunter was prejudiced by his counsel's failure to advise him of the safety valve's application to his case after trial. The prejudice was the sentence of life imprisonment that would

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<sup>1</sup> We do not accept that this is the *correct* sentencing range. But this is the range which would have been applied under the presentence investigation report that the Court accepted without objection from either the Government or Hunter.

not have been imposed but for the failure of counsel to properly advise his client about the safety valve. Reasonably competent counsel would have known that the safety valve could be applied under these circumstances and would have advised his client of the opportunity to easily avoid the mandatory life sentence. The failure to do so constituted ineffective assistance of counsel on the part of Hunter's counsel and deprived Hunter of his right to effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution.

**(a) Supporting Facts**

Hunter was informed against under 18 U.S.C. § 851 on August 23, 2001 [Docket 153] The information was amended on August 28, 2001. [Docket 167] The trial commenced on November 27, 2001. [Docket 252] Hunter was convicted on December 5, 2001 [Docket 295] and sentenced to life imprisonment on August 1, 2002. [Docket 387] At no time was he advised that he could qualify for the safety valve by proffering to the government all information and evidence he had concerning the offense. This would have been a simple matter to accomplish because post-trial Hunter need only have confirmed and ratified what the trial evidence had shown had happened, something he could have done without impacting his right to appeal and without requiring that he be a witness against any other defendant or cooperate in the prosecution of any other person. Instead the sentencing transcript

reflects a notable attempt by the Court to suggest to Hunter - immediately *after* imposition of sentence - that Hunter should consider substantial assistance cooperation in order to provide the Court with an opportunity to reduce the life sentence. It is obvious that no one was considering the possibility of the safety valve, because Hunter could have readily satisfied the safety valve far more simply than he could have qualified for substantial assistance.

(b) Hunter appealed from the judgment and sentence and this issue was not raised. The issue could not be raised because it is an ineffective assistance of counsel issue not suitable for and not cognizable in a direct appeal.

(c) Hunter has not filed any prior post-conviction motion.



**12. Ground Two - Violation of the Sixth Amendment -** Hunter was denied effective assistance of counsel by the failure of his attorney to explain to him *pre-trial* that he could qualify for the application of the safety valve and avoid a mandatory minimum sentence merely by truthfully disclosing to the government *at any time prior to sentencing* all information and evidence that he, the defendant, had concerning the offense; that is, Hunter need not agree to cooperate with the government and need not even be a witness in the case, but only truthfully disclose his knowledge of the offense no later than his sentencing. Had counsel for Hunter advised Hunter of this option, he would have exercised this option rather than take his case to trial; that is, he would have pled guilty and sought acceptance of responsibility and at or before sentencing would have provided the required safety valve proffer, entitling him to the application of the safety valve, resulting in a sentencing range of 135-168 months.<sup>2</sup> Instead, Hunter went to trial, lost acceptance of responsibility, never knew he had an option of making a safety valve proffer, therefore never made a safety valve proffer, and was sentenced to mandatory life imprisonment. Hunter was prejudiced by his

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<sup>2</sup> Again, this is based on the PSI, which we dispute, *infra*. The PSI had a base level 38, category I, which would have been reduced two levels for safety valve to level 36, and reduced an additional three levels for acceptance of responsibility to level 33, which at category I would result in the 135-168 range cited above. We think the correct guidelines would have been lower as explained below.

counsel's failure to advise him of the safety valve's application to his case after notice of the § 851 information but before trial. The prejudice was that his decision to take the case to trial instead of pleading guilty was not knowingly and intelligently made, because it was not made with a correct understanding of the sentencing consequences and options available to him had he pled guilty but made a safety valve proffer, and the further prejudice was the sentence of mandatory life imprisonment that would not have been imposed but for the failure of counsel to properly advise his client about the safety valve. Reasonably competent counsel would have known that the safety valve could be applied under these circumstances and would have advised his client of the opportunity to easily avoid the mandatory life sentence. The failure to do so constituted ineffective assistance of counsel on the part of Hunter's counsel and deprived Hunter of his right to effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution.

**(a) Supporting Facts**

Hunter was informed against under 18 U.S.C. § 851 on August 23, 2001 [Docket 153] The information was amended on August 28, 2001. [Docket 167] The trial commenced on November 27, 2001. [Docket 252] [Docket 252] Hunter was convicted on December 5, 2001 [Docket 295] and sentenced to life imprisonment on August 1, 2002. [Docket 387] Hunter was sentenced to life imprisonment without

ever having been advised that he could have qualified for the safety valve and therefore without ever having made a safety valve proffer. Hunter could have pled guilty straight up to the indictment at any time prior to trial after the 851 information had been filed and avoided the life sentence, and still qualified for acceptance of responsibility reducing his sentencing range to 135-168 months based on the presentence investigation report's application of the guidelines, reduced by the two levels for the safety valve and three levels for acceptance of responsibility.<sup>3</sup> He could have done this without sacrificing his right to remain silent prior to sentencing, without having to testify as a government witness in the case, without having to cooperate other than truthfully providing no later than his own sentencing all information and evidence he had about the offense.

(b) Hunter appealed from the judgment and sentence and this issue was not raised. The issue could not be raised because it is an ineffective assistance of counsel issue not suitable for and not cognizable in a direct appeal.

(c) Hunter has not filed any prior post-conviction motion.

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<sup>3</sup> We do not accept that this is the *correct* sentencing range. But this is the range which would have been applied under the presentence investigation report that the Court accepted without objection from either the Government or Hunter.

**12. Ground Three - Violation of the Sixth Amendment -** Hunter was denied effective assistance of counsel by his counsel's failure to object to the determination of drug quantity both for sentencing guideline purposes and for purposes of application of the minimum mandatory sentence. Although the jury rendered a special verdict as to quantity (their finding being limited to the minimum mandatory threshold quantity, not a particularized quantity), the jury did not make an individualized determination of drug quantity for Hunter, rather the jury only determined that the *conspiracy* was accountable for a minimum mandatory quantity. This type of special verdict was not sufficient to trigger the application of the minimum mandatory sentence as to Hunter, rather, under *Harris*, the *court* was required to make a finding that the defendant personally was accountable for the minimum mandatory quantity. Therefore, the failure to object to the determination of drug quantity had a cascading effect, first rendering Hunter subject to the original ten year minimum mandatory sentence, then subject to the enhanced life minimum mandatory sentence based on the § 851 enhancement. Neither the trial evidence nor the presentence investigation report established any evidentiary basis for the attribution to Hunter of a minimum mandatory quantity of cocaine. Indeed, the presentence report detailed only eleven (11) grams of cocaine base for which Hunter was accountable, yet jumped to the unsupported assertion, without any citation of

authority in the record, that Hunter was accountable for one and a half kilograms of cocaine base. Had Hunter's counsel objected, the Court would have sustained the objection and found Hunter accountable for only 11 grams of cocaine base, subjecting Hunter to only a five year minimum mandatory sentence, which could have only been enhanced to ten years based on the prior convictions charged in the § 851 information. Therefore, Hunter was prejudiced by his counsel's failure to object to the drug quantity determination because the failure to object led to imposition of a mandatory life sentence, when even if enhanced under § 851 the maximum mandatory sentence was only ten years. Furthermore he was prejudiced because had the safety valve been applied to the true drug quantity for which Hunter was accountable, 11 grams, his base offense level would have been 26, reduced 2 levels for the safety valve to level 24, which would have had a sentencing range of 51-63 months without acceptance of responsibility or level 21, and a range of 37-46 months with acceptance of responsibility. Instead, Hunter was sentenced to mandatory life imprisonment. Hunter was prejudiced by his counsel's failure to object to the drug quantity determination. The prejudice was the sentence of life imprisonment that would not have been imposed but for the failure of counsel to object. Reasonably competent counsel would have objected to the determination of drug quantity. The failure to do so constituted ineffective assistance of counsel on the part of Hunter's counsel and

deprived Hunter of his right to effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution.

**(a) Supporting Facts**

The supporting facts are set forth in the statement of the issue, *supra*.

**(b)** Hunter appealed from the judgment and sentence and this issue was not raised.

The issue could not be raised because it is an ineffective assistance of counsel issue not suitable for and not cognizable in a direct appeal.

**(c)** Hunter has not filed any prior post-conviction motion.

**12. Ground Four** - Violation of the Fifth and Sixth Amendments - The indictment did not allege the drug quantity for which Hunter personally was to be held accountable in determining his sentence; the government did not prove beyond a reasonable doubt that Hunter was personally accountable for the drug quantity that was used to determine his sentence; the jury was not required to unanimously determine the drug quantity used to determine Hunter's sentence; instead these matters were either ignored or determined by the judge alone at sentencing. This violated Hunter's rights under the Fifth and Sixth Amendments to the United States Constitution.

**(a) Supporting Facts**

The supporting facts are set forth in the statement of the issue, *supra*.

**(b)** Hunter appealed from the judgment and sentence and this issue was not raised.

The issue could not be raised because it is an ineffective assistance of counsel issue not suitable for and not cognizable in a direct appeal.

**(c)** Hunter has not filed any prior post-conviction motion.