

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION

NO. 5:07-CR-42-1D

UNITED STATES OF AMERICA )  
 )  
 v. )  
 )  
 JAMES BOYCE BLACK, a/k/a )  
 JIM BLACK )

**MOTION TO RECUSE AND**  
**MEMORANDUM IN SUPPORT**

Defendant **JAMES BOYCE BLACK, A/K/A JIM BLACK** (“Black”), through his undersigned counsel, Hunton & Williams LLP, and pursuant to 28 U.S.C. § 455(a) and (b), respectfully moves the Honorable James C. Dever, III to recuse himself from all further proceedings in this matter, including the sentencing hearing currently scheduled for May 18, 2007. In support of this motion, Black shows the Court as follows:

**INTRODUCTION**

As recently as February 2003, Judge Dever and his former law firm, on behalf of Republican Members of the General Assembly and the North Carolina Republican Party, sued then-Speaker of the North Carolina House of Representatives Black, and others, alleging that election districts drawn by them constituted illegal gerrymandering for the express purpose of maintaining Democratic control of the General Assembly. Judge Dever’s successful litigation resulted in the 2002 general election being conducted under court-drawn legislative districts rather than those drawn by Democrats in the General Assembly, and seemed to return Republicans to control of the North Carolina House of Representatives by a margin of 61/59. In January 2003, former Republican Representative Michael Decker (“Decker”) changed his party

registration to Democrat and voted for Black for Speaker of the House, resulting in a 60/60 split between Democrats and Republicans. Black eventually entered into a power sharing arrangement with twelve other Republicans (also political adversaries to Judge Dever's former clients) and became co-Speaker of the House with Republican Richard Morgan. As governed, the 2003-2004 General Assembly enacted redistricting plans that returned full power in the House to Democrats following the 2004 general election, and Black to sole Speaker of the House. Judge Dever said in Decker's sentencing Order of April 27, 2007 that Black's retention of Speakership power during the 2003-2004 session calls into question "certain" legislation passed during those two years, presumably including the legislative redistricting statutes which reversed the litigative victory Judge Dever and his clients won in 2002 and 2003.

The press, public and some of Judge Dever's former clients have already connected the redistricting litigation to the alleged wrongful conduct of Black. If Judge Dever imposes judgment on Black it will appear to the public that Judge Dever will indeed have had the last word on the redistricting battle engaged in during his private practice. These facts, coupled with Judge Dever's statements in Decker's sentencing Order and his Order of May 1, 2007 in Black's case, would lead a reasonable person to reasonably question Judge Dever's impartiality in imposing judgment on Black, and cause grave damage to the public's rightful perception of an impartial judiciary.

#### **ISSUES PRESENTED**

1. Whether Judge Dever should disqualify himself from proceeding further in this matter pursuant to 28 U.S.C. § 455(a) because a reasonable person, with knowledge of all relevant facts, would have a reasonable basis to question the Judge's impartiality.

2. Whether Judge Dever should disqualify himself from proceeding further in this matter pursuant to 28 U.S.C. § 455(b)(2) because while in private practice he participated in the matter in controversy.

3. Whether Judge Dever should disqualify himself from proceeding further in this matter pursuant to 28 U.S.C. § 455(b)(1) because he may have personal knowledge of facts related to the proceeding learned from an extrajudicial source.

### **APPLICABLE LEGAL STANDARDS**

“A fair trial in a fair tribunal is a basic requirement of due process.” *In re Murchison*, 349 U.S. 133, 136 (1955). The right to a fair trial extends to the sentencing phase of a proceeding as well. *See Witherspoon v. Illinois*, 391 U.S. 510, 518 (1968).

28 U.S.C. § 455, the general recusal statute, governs disqualification of all federal judges.<sup>1</sup> Section 455(a) provides that “[a]ny justice, judge or magistrate judge of the United States *shall* disqualify himself in any proceeding in which his impartiality might reasonably be questioned” (emphasis added). Subsection (a) contemplates an objective standard for recusal; what matters is not actual prejudice, bias or another conflict of interest, but merely the *appearance* of such prejudice or bias. *See, e.g., Liteky v. United States*, 510 U.S. 540, 548 (1994). Subsection (a) provides a broad basis for recusal, as it covers *all* aspects of partiality, not just those explicitly addressed in subsection (b). *See id.* at 553, n. 2. Moreover, “[s]ciencer is not an element of a violation of § 455(a).” *Liljeberg v. Health Svcs. Acquisition Corp.*, 486 U.S. 847, 859 (1988). Recusal is proper if a judge’s impartiality might reasonably be questioned by

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<sup>1</sup> 28 U.S.C. § 144 also provides for disqualification of federal District Court judges where a party files an affidavit averring that the judge has a “personal bias or prejudice against him or in favor of any adverse party.” Section 455, and particularly subsection (a) of that statute, provide a broader basis for recusal than does § 144. *See, e.g., Liteky v. United States*, 510 U.S. 540, 548 (1994) (§ 455(a) requires recusal not only in presence of actual prejudice or bias, but merely the *appearance* of prejudice or bias). Black submits this motion under § 455(a) and (b).

others, even if he is not personally aware of a disqualifying circumstance. *See id.* (holding that recusal was necessary even where no actual harm would arise from judge's participation in case, because "people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges").

The proper inquiry under § 455(a) is whether a reasonable person, with knowledge of the relevant facts, would have a reasonable basis to question the judge's impartiality. *See In re Beard*, 811 F.2d 818, 827 (4<sup>th</sup> Cir. 1987). Applying this standard, the Fourth Circuit has held that recusal is required even where the judge has no memory of the circumstances giving rise to the apparent conflict, and even when the Court has "confidence" the judge "subjectively . . . [is] conscious of no want of impartiality." *See Rice v. McKenzie*, 581 F.2d 1114, 1117-18 (4<sup>th</sup> Cir. 1978) (requiring recusal of federal judge on ground that he participated in related state court decision while sitting on state Supreme Court). At least some judges within the Fourth Circuit, true to this standard, have taken a cautious approach to recusal. *See, e.g., Hoke v. Charlotte-Mecklenburg Hosp. Authority, Inc.*, 550 F. Supp. 1276, 1278 (W.D.N.C. 1982) (judge recused himself based on son's prior representation of party in a wholly unrelated matter, even where he did not question his impartiality, because "[t]he integrity of the court as a public institution, as seen even through the anxious eyes of litigants, is far more important than any opinion of [the judge]").

The hypothetical reasonable person is a "well-informed observer who assesses 'all the facts and circumstances.'" *United States v. DeTemple*, 162 F.3d 279, 286 (4<sup>th</sup> Cir. 1998) (citation omitted). In assessing the likely perception of a reasonable person, the Court should bear in mind that this individual is not a judge, and not "accustomed to the process of dispassionate decision making." *Id.* at 287. If the question of recusal is a close one, the Judge should not feel

compelled to hear the case. *See id.* at 286-87 (§ 455(a) “abolishes the rule that courts should resolve close questions of disqualification in favor of a judge’s so-called ‘duty to sit’”).

Section 455(b) requires a judge to recuse himself from a proceeding in a number of particular circumstances indicative of a conflict of interest, including: (1) “[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; and (2) [w]here in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.” Recusal is mandatory if any of the circumstances enumerated in subsection (b) are present. *See, e.g., In re Rodgers*, 537 F.2d 1196, 1198 (4<sup>th</sup> Cir. 1976) (legislative history indicates disqualification is mandatory under this statutory provision).

Some Courts have held that § 455(b)(2) mandates recusal only where the Judge has served as counsel in precisely the same action -- under the same caption -- while in private practice. *See Blue Cross & Blue Shield of Rhode Island v. Delta Dental of Rhode Island*, 248 F. Supp.2d 39, 46 (D.R.I. 2003) (the term “matter in controversy” in § 455(b)(2) should be read “as applying only to the case that is before the Court as defined by the docket number attached to that case and the pleadings contained therein”). The Fourth Circuit has rejected such a narrow interpretation of the “matter in controversy” requirement. *See Rodgers*, 537 F.2d 1196.<sup>2</sup> In *Rodgers*, during the time they practiced together, the judge’s former law partner represented clients in their attempt to purchase a race track. The partner also drafted legislation to

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<sup>2</sup> The Court in *Delta Dental* expressly noted that the Fourth Circuit had rejected such a narrow reading of § 455(b)(2), and stated that *Rodgers* implied “that the Court should look well beyond the four corners of the actual case before the court to examine the actual potential for bias or perception of bias resulting from the relationship.” *See* 248 F. Supp.2d at 43-45. It also cautioned that even a restrictive application of § 455(b)(2) would not rule out recusal in any particular case, as any recusal question must also be considered in light of § 455(a)’s objective standard. *Id.* at 46-47.

consolidate certain tracks, including the one at issue in the case. The petitioners, who also had attempted to purchase the track, were charged with using unlawful means to secure passage of the bill. At trial, the petitioners intended to argue that their conduct was no more culpable than that of the party represented by the judge's former law partner. The petitioners moved for recusal under § 455(b)(2), arguing that the judge's former law partner had been involved as counsel in the "matter in controversy." The government urged that recusal under § 455(b)(2) was not appropriate, since "matter in controversy" means "the actual case before the Court." *Id.* at 1198. The Court disagreed, and noted that even if the government was right, the "actual case before the Court" included more than just the charges brought by the government. *Id.*

### **BACKGROUND**

Black is a former member of the North Carolina House of Representatives who represented the State's 100<sup>th</sup> House District (including a portion of Mecklenburg County) for 11 terms, and served as Speaker of the House from January 1999 through December 2006. This case is the culmination of a multi-year investigation into Black's campaign funding practices, as well as those of former North Carolina Representative Michael Decker.

#### **A. THE GOVERNMENT'S CASE AGAINST BLACK**

On February 15, 2007, the government filed a one-count Criminal Information against Black, which charged him with a violation of 18 U.S.C. § 666(a)(1)(B): accepting things of value of more than \$5,000 in connection with the business of a state government receiving federal funds. Specifically, the Criminal Information charged that Black accepted cash payments from three different chiropractors between 2000 and 2005,<sup>3</sup> as a reward for supporting legislation of interest to the chiropractic profession. *See* Criminal Information dated February 15, 2007

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<sup>3</sup> The evidence at sentencing will show that cash totaling not more than \$25,000 was received between February 2002 and December 2005.

(Docket No. 1). That same day, Black entered a Plea Agreement under which he waived indictment and pled guilty to the one-count Criminal Information. *See* Memorandum of Plea Agreement dated February 15, 2007 (Docket No. 4). The Court, Judge James C. Dever, III presiding, accepted Black's plea and scheduled a sentencing hearing for May 2007. Minute Entry for Proceedings dated February 15, 2007 (Docket No. 2).

On April 10, 2007, the United States Probation Office circulated to counsel for the government and Black a Draft Presentence Investigation Report (PSR) to be used in connection with Black's sentencing.<sup>4</sup> Though Black pled guilty only to accepting illegal gratuities from three chiropractors between 2000 and 2005, the Draft PSR contained extensive discussion of Black's alleged improper relationship with former North Carolina Representative Michael Decker.<sup>5</sup> Specifically, the Draft PSR alleged that Black agreed to pay Decker \$50,000 in campaign contributions and cash in exchange for Decker's agreement to switch parties following the November 2002 election, which had left the House with a 61/59 Republican majority. According to the Draft PSR, Black and Decker's illicit agreement evened the balance of power in the House to a 60/60 split and allowed Black to retain his position as co-Speaker of the House. The Draft PSR also recited that Black permitted Decker to hire to his son, Michael Decker, Jr., as

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<sup>4</sup> The U.S. Probation Office originally disclosed a draft of the PSR on April 6, 2007, but subsequently amended that draft. The Amended PSR is dated April 10, 2007.

In a letter dated April 24, 2007, Black objected to much of the information contained in the Draft PSR. The statements contained in this motion should not be construed as a waiver of any such objections, or an acknowledgement of the validity of the information contained within that report. The provisions of the Draft PSR are discussed in this motion solely to demonstrate the type of information the Court is likely to consider when determining an appropriate sentence for Black.

<sup>5</sup> In order to conclude this joint state/federal investigation, Black entered a plea in state court pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to an Information charging in part that Black gave a bribe to Decker. Judge Dever referred to this plea in Decker's sentencing Order. *See* Sentencing Order at 6. By Order of May 1, 2007 the Court has asked the parties in Black's case to address the effect of this plea on Black's criminal history category, and Noticed its contemplation of an upward departure based on uncharged criminal conduct (5:07-CR-42-D, Docket No. 9).

an administrative assistant at an annual salary of \$46,000 per year; created a position for Decker with the North Carolina Department of Cultural Resources when he lost his bid for reelection in July 2004, financing that position with money from a legislative fund; contributed several thousand dollars to Decker's campaign account; and issued checks from his campaign fund to pay Decker's legal expenses.<sup>6</sup>

**B. THE GOVERNMENT'S CASE AGAINST MICHAEL DECKER**

On these allegations, Decker was charged with and pled guilty to a violation of 18 U.S.C. § 371, conspiracy to commit extortion under color of official right, honest services mail fraud, and money laundering. *See* Memorandum of Plea Agreement as to Michael Decker, dated August 3, 2006 (5:06-cr-00197-d-ALL, Docket No. 4). On April 27, 2007, the Court sentenced Decker to 48 months imprisonment, 2 years of supervised release, and a \$50,000 fine. *See* Order of the Court on Sentencing as to Michael Decker ("Decker Sentencing Order") (Docket No. 24). This sentence was *more* than the maximum suggested by the Guidelines and recommended in Decker's Presentence Investigation Report, even with a downward departure under U.S.S.G. § 5K1.1 for Decker's "absolutely essential" cooperation with the government in its investigation of Black.<sup>7</sup> *See id.* at 19-20. And it was more than twice the Government's recommended

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<sup>6</sup> Decker's version of these events have never been tested by cross-examination and presentation of contradictory witnesses. If the Decker allegations are considered during Black's federal sentencing Black will vigorously contest Decker's truthfulness.

<sup>7</sup> Decker's PSR calculated an advisory guideline range of 37 to 46 months of imprisonment under the Guidelines. After the Court's upward departure, the guidelines range exceed the statutory maximum sentence allowed.

sentence of 50 to 60 percent below the bottom of the advisory guideline range.<sup>8</sup> *See* Decker Sentencing Order at 22.

Judge Dever presided over Decker's sentencing hearing, and authored his Sentencing Order. In that Order, Judge Dever held that an upward departure from the guideline range was appropriate in Decker's case because his, and Black's, conduct "was part of a systematic or pervasive corruption of a governmental function, process or office that may cause loss of public confidence in government." *See* Sentencing Order at 13-14 (citing U.S.S.G. § 2C1.1, cmt. n. 7). Judge Dever also found an upward departure warranted because Decker's and Black's conduct caused disruption "so atypically great as to take this case out of the heartland of the guidelines." *Id.* at 16 (citing U.S.S.G. § 5K2.0 and 5K2.7). Ultimately, Judge Dever held that a 5-level upward adjustment to Decker's base offense level was warranted under the circumstances. *See id.* at 18.

### **C. BLACK'S IMPENDING SENTENCING HEARING**

Although Black did not admit to any of this alleged conduct in his Plea Agreement -- and indeed, was not charged with any offense arising from his relationship with Decker -- the allegations relating to Black's purported corruption scheme with Decker will no doubt feature prominently in Black's sentencing hearing. Indeed, by Order of May 1, 2007 the Court has given Notice of its contemplation to depart upward from the applicable guidelines range and impose a variance sentence based in part on uncharged conduct pursuant to U.S.S.G. § 5K2.21.<sup>9</sup>

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<sup>8</sup> The government's recommendation to the Court of a reduction to 50 to 60 percent of the low end of the advisory guideline range, if accepted by the Court, would have resulted in a sentence of 18.5 to 22.5 months.

<sup>9</sup> Black maintains that because his one-count conviction was for the offense of receiving illegal gratuities, not bribery, none of the allegations regarding Decker can be considered as "relevant conduct" under U.S.S.G. § 1B1.3. This motion merely acknowledges the possibility that the Court may not agree with that position.

Black's sentencing hearing, currently scheduled for May 18, 2007, is set to proceed before Judge Dever. Shortly before filing this motion, counsel for Black learned that Judge Dever, while in private practice, represented some of Black's most outspoken political opponents, prominent Republican members of the North Carolina General Assembly and the North Carolina Republican Party Chairman, in redistricting litigation impacted by the allegations in Black's and Decker's cases.

**D. THE *STEPHENSON* LITIGATION**

In a seminal North Carolina redistricting case captioned *Stephenson v. Bartlett*, Judge Dever -- at that time, a member of the Raleigh firm Maupin, Taylor & Ellis P.A. -- represented several Republican North Carolina legislators, including Leo Daughtry, Patrick Ballantine and Arthur "Art" Pope, and the Chairman of the North Carolina Republican Party, in a successful constitutional challenge to the General Assembly's 2001 redistricting plans. Black, a Democrat, in his capacity as Speaker of the North Carolina House, was a *named defendant* in that action.

The Plaintiffs in the *Stephenson* litigation alleged that the Democrat-controlled General Assembly's redistricting plans were impermissible gerrymandering, designed solely to secure the re-election of Democratic incumbents. In 2002, the North Carolina Supreme Court declared the 2001 plans unconstitutional. *See Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (N.C. 2002) ("*Stephenson I*").<sup>10</sup> On remand, the trial court ordered the General Assembly to submit revised redistricting plans prior to the 2002 election. *See Stephenson v. Bartlett*, 357 N.C. 301, 303-04, 582 S.E.2d 247, 248-49 (N.C. 2003) ("*Stephenson II*"). The General Assembly timely

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<sup>10</sup> The litigation also passed through federal courts. The District Court for the Eastern District of North Carolina wrote an opinion on the lack of federal jurisdiction and remanded the case to state court. It also went to the United States Supreme Court on Defendants' application for a stay of the N.C. Supreme Court decision declaring the redistricting plans unconstitutional. In a brief opinion, Justice Rehnquist, sitting as a single justice, determined that a stay was not warranted.

submitted revised 2002 redistricting plans, which the trial court again found to be constitutionally deficient. *See id.* The trial court ultimately imposed its own interim redistricting plans for use only in the November 2002 election. *See id.* That election resulted in a 61/59 Republican majority within the House of Representatives, which allegedly spawned Decker and Black's purported scheme to defraud the voting public. Decker Sentencing Order at 2-3.

In 2003, the North Carolina Supreme Court affirmed the trial court's characterization of the revised 2002 plans as unconstitutional. *See Stephenson II*, 357 N.C. 301, 582 S.E.2d 247. Judge Dever was listed as counsel of record in both *Stephenson* decisions, and ostensibly authored the briefs filed by his law firm in those actions. *See* Plaintiff-Appellee's Brief dated March 28, 2002, attached as *Exhibit A*; Plaintiff-Appellee's Brief dated February 10, 2003, attached as *Exhibit B* (both of which list Judge Dever in the signature block).

The *Stephenson* litigation involved the same essential allegation present in both the Black and Decker cases: the alleged manipulation of the electoral process to ensure a Democratic majority within the General Assembly, and the corresponding retention of a Democrat -- Black -- in the position of House Speaker. Further, the alleged criminal conduct by Black and Decker, according to Judge Dever, resulted in "certain" acts of the 2003-2004 General Assembly, presumably including the redistricting statutes, being "illegitimate. In Judge Dever's words, "The scheme resulted in Black retaining power as co-Speaker in 2003 and 2004. That role . . . enabled Black to again become the sole Speaker of the House in 2005 and 2006. . . . Citizens of North Carolina and the current members of the General Assembly may question the legitimacy of certain laws enacted in 2003 and 2004 in light of the corrupt scheme that resulted in Black becoming co-Speaker. This concern may prompt a re-examination of certain laws passed during that session." *See* Decker Sentencing Order at 15 and 16.

**E. OTHER REDISTRICTING LITIGATION**

Though the *Stephenson* case is the only one in which Judge Dever actually sued Black, it was not the only case in which Judge Dever and his former law firm accused Democratic leaders of similar corruption. Maupin Taylor also represented several Republican party members, including Art Pope, in another challenge to a congressional redistricting plan promulgated by a Democrat-controlled General Assembly in 1991. *See Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992). In that case, the Western District dismissed the Republican Plaintiffs' Complaint that the re-districting plans were unconstitutional political gerrymandering, and the United States Supreme Court summarily affirmed that decision. *See Pope v. Blue*, 506 U.S. 801 (1992). Though Dever is not expressly listed as counsel in these decisions, he became associated with Maupin Taylor in 1992, the same year the *Blue* case was decided.

Shortly after *Pope v. Blue* was filed, several voters filed suit challenging the same redistricting scheme on racial gerrymandering grounds. *See Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994), *rev'd*, 517 U.S. 899 (1996). Eleven Republicans from North Carolina, including Art Pope, sought to intervene in that case as Plaintiffs. *See id.* at 420. The Court allowed Pope and others to intervene, provided they adopted the Plaintiffs' complaint in that action as their own. *See id.* Maupin Taylor represented the Republican Plaintiff-Intervenors in that action. Though the *Shaw* litigation involved allegations of racial rather than political gerrymandering, the motivation of the Plaintiff-Intervenors in challenging the redistricting plans were clear. In fact, in the *Shaw* opinion, the Eastern District of North Carolina expressly noted that the Plaintiff-Intervenors had previously challenged the redistricting plan on the ground that its lines were drawn to favor Democratic incumbents. *See id.* at 418 (referencing *Pope v. Blue*).

Although the lower court in the *Shaw* litigation found the proposed redistricting plans constitutional, the United States Supreme Court reversed that decision and held that the

redistricting plans at issue violated the Equal Protection Clause. *Shaw v. Hunt*, 517 U.S. 899 (1996). Judge Dever was involved in the *Shaw* litigation. In fact, he successfully argued before the Fourth Circuit that the Republican intervenors qualified as “prevailing parties” under 42 U.S.C.A. § 1988, and were therefore entitled to recover their attorneys’ fees. *See Shaw v. Hunt*, 154 F.3d 161 (4<sup>th</sup> Cir. 1998).

Examination of these cases demonstrate that Maupin Taylor, during the time Judge Dever was associated with that firm, frequently asserted constitutional challenges, on behalf of Republican party members, to redistricting plans submitted by a Democrat-controlled General Assembly. In these actions, Maupin Taylor represented parties who accused Democratic decision-makers of improper manipulation of the electoral process, with the goal of securing a Democratic majority within the North Carolina House and Senate. Judge Dever was listed as counsel of record in two of those actions. One of them levied allegations directly at Black, a named Defendant.

Upon learning of Judge Dever’s participation in the redistricting litigation, Black timely filed this motion requesting that Judge Dever recuse himself in accordance with 28 U.S.C. § 455(a) and (b). Black respectfully submits that Judge Dever’s participation in related litigation against him and other Democratic legislators casts doubt on Judge Dever’s ability to act impartially in this proceeding.

### **ARGUMENT**

#### **A. JUDGE DEVER SHOULD RECUSE HIMSELF PURSUANT TO § 455(A) BECAUSE A REASONABLE OBSERVER WOULD QUESTION HIS ABILITY TO BE IMPARTIAL.**

A reasonable observer would question Judge Dever’s partiality in this case, for several reasons.

*First* - a reasonable observer would believe that Judge Dever would be unable to disregard any knowledge or opinions about Black he obtained as a result of his involvement in the redistricting proceedings, or set aside his personal feelings about those proceedings. Allegations and sentencing considerations already indicated by Judge Dever to be relevant to Black's sentencing are inextricably intertwined with the redistricting litigation handled by Judge Dever in private practice. The result of the North Carolina Supreme Court's decision in the *Stephenson* case was an interim redistricting scheme, which resulted in a 61/59 Republican-controlled House following the 2002 election. *See Stephenson II*, 357 N.C. 301, 582 S.E.2d 247; Decker Sentencing Order at 2. According to Judge Dever, Decker's and Black's alleged conspiracy arose immediately after that election, was intended to thwart the Republican majority achieved as the result of that election, evened the balance of power in the House, and ultimately allowed Black to retain (as co-Speaker) his position as Speaker of the House. *See Decker Sentencing Order* at 2-3. In other words, Judge Dever's victory in the redistricting case generated the need for Black's alleged deal with Decker, and Black's alleged deal with Decker destroyed Judge Dever's victory in the redistricting case.<sup>11</sup>

Both cases involve the same fundamental allegation: improper conduct by Democratic decision makers (specifically, Black) designed to ensure a Democratic majority within the

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<sup>11</sup> These circumstances are undeniably unique. The North Carolina Supreme Court has acknowledged that redistricting cases are "inordinately complex, politically volatile, and relatively rare." *Stephenson v. Bartlett*, 358 N.C. 219, 230, 595 S.E.2d 112, 119 (N.C. 2004). It is even more extraordinary that a Judge who handled several of these cases while in private practice would be called upon to judge, in a criminal forum, a named defendant from one of those actions. These are precisely the type of facts which support a recusal motion under § 455(a). *See United States v. DeTemple*, 162 F.3d 279, 287 (4<sup>th</sup> Cir. 1998) ("the more common a potentially biasing circumstance and the less easily avoidable it seems, the less that circumstance will appear to a knowledgeable observer as a sign of partiality") (citation omitted). Certainly the reverse is true as well.

General Assembly, and to allow Black to retain his position as Speaker of the House. Both cases also involve the same alleged harm. In the *Stephenson* case, Judge Dever argued that:

The use of the 2001 redistricting plans in the 2002 elections will produce *on-going and continuous irreparable harm*. It occurs not only when elections are held under an unconstitutional scheme, but also *every day that plaintiffs and all voters are forced to vote and then be governed for two years by legislators elected under illegal redistricting plans*. What is particularly harmful is that these legislators elected under an unconstitutional scheme will then be given the opportunity in 2003 to revise the illegal redistricting plans and to resolve the public policy issues of this State. They also will have the *significant political advantage* of incumbency when they stand for re-election under a constitutional plan. Having an election this year under plans that violate the North Carolina Constitution will only serve to reinforce a harmful governmental message: it is okay to break the law . . . Holding elections under unconstitutional plans will *further heighten cynicism among this State's 4,990,081 registered voters* about the electoral process.

*Exhibit A* at 87 (emphasis added). Judge Dever made remarkably similar statements in the Decker Sentencing Order:

Decker and Black's corruption attacks the core of representative government in North Carolina . . . Decker and Black's actions *subverted the 2002 general election* and the ability of North Carolina's 120 representatives to have an honest election of the Speaker in January 2003 . . . the Court finds that Decker's actions were part of a systematic and pervasive corruption that not only "may cause," but *has caused a loss of public confidence in North Carolina government* . . . The scheme defrauded the citizens of North Carolina, and also defrauded all of the legislators in the House in connection with a vote for the most powerful position in the House . . . Citizens of North Carolina and the current members of the General Assembly *may question the legitimacy of certain laws enacted in 2003 and 2004* in light of the corrupt scheme that resulted in Black becoming co-Speaker.

Decker Sentencing Order a 13-16 (emphasis added).

Given Judge Dever's previous participation in the undeniably similar redistricting litigation, a reasonable observer would believe Judge Dever's position on these issues originated, at least partially, from an extrajudicial source. In private practice, Judge Dever served in a

position adversarial to Black -- in fact, he filed a lawsuit against him. Now, Judge Dever is being asked to pass on the same type of alleged conduct by Black in the role of impartial arbiter. These roles are necessarily in conflict, and a reasonable person would question Judge Dever's ability to act impartially under the circumstances.

The public, including some of Judge Dever's former clients, certainly see the connection between the redistricting litigation and the alleged conduct of Black and Decker. Writing for the *John William Pope Civitas Institute*, President Jack Hawke<sup>12</sup> said the alleged "bribe led to the passage of redistricting legislation in 2003 that redrew the legislative and congressional districts. . . . The greatest impact of the corrupt takeover of the state House of Representatives in 2003 was the enactment of a redistricting plan that insured one-party domination in North Carolina for eight years." *Civitas Institute Conservative Perspective on North Carolina Issues*, February 28, 2007, attached as **Exhibit C**. *Charlotte Observer* columnist Jack Betts wrote "[B]ecause in the 2003 session that Republicans should have controlled, Democrats and some Republicans cooperated on a new redistricting plan that, in the 2004 House election, resulted in the Democrats winning the House outright, 63-57." <http://jackbetts.blogspot.com/> (April 30, 2007), attached as **Exhibit D**. *The Raleigh News and Observer* editorialized "[w]ith Black able to buy Decker's vote, both Black and the Democratic Party salvaged a hold on power in the state House for an entire legislative session. That certainly influenced the fate of legislation, and since some of that legislation involved a redistricting scheme that put Republicans at a disadvantage, the influence of the corrupt bargain could prove to be long-lasting." *News & Observer*, Editorial May 1, 2007, attached as **Exhibit E**. The North Carolina Republican Party posted on its web site the above *News & Observer* editorial, calling it, "the truth about how the Democrats stole the

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<sup>12</sup> Mr. Hawke is a past Chairman of the North Carolina Republican Party.

2002 election from the Republicans and illicitly maintained their control of the North Carolina House of Representatives. This act enabled them to effect a redistricting scheme that unfairly bundled Republicans in districts that weakened Republican voter gains across the state.” <http://www.ncgop.org/home/index.asp> (May 2, 2007), attached as **Exhibit F**.

Black is not the first to question Judge Dever’s ability to act impartially in litigation involving the drawing of legislative districts. When the Senate Judiciary Committee confirmed Judge Dever’s judicial nomination on April 28, 2005, Senator Patrick Leahy raised precisely this concern about Judge Dever’s extensive involvement in redistricting litigation:

Judge Dever’s only two Supreme Court briefs argued against State legislative redistricting action designed to comply with the Voting Rights Act of 1965. When I asked Judge Dever to give me some assurance that he would be impartial when called upon to hear a redistricting case, he could only state that he believed he would be fair.

Much of Judge Dever’s experience is in the area of representing Republican clients. While employed at a law firm, he provided legal services to several Republican campaigns and has been listed on the Republican National Lawyers Association webpage as an affiliated lawyer. I would like to believe that Judge Dever was nominated based on his own merits, and that his personal relationships will not affect his ability to rule impartially if he is confirmed. I have concerns.

151 Cong. Rec. S4477-01 (daily ed. April 28, 2005) (statement of Sen. Leahy).

Faced with the additional circumstance that Judge Dever is now asked to judge impartially a formerly sued **named defendant** in a strikingly similar context, any reasonable observer would question Judge Dever’s ability to act impartially. There is no question recusal is proper under § 455(a).

**Second** - Judge Dever made statements in connection with the redistricting litigation which could lead a reasonable observer to believe he was biased against Democratic legislators generally, and Black in particular. In briefs filed in the related *Stephenson* litigation, Judge

Dever repeatedly impugned the integrity and motivations of Democratic leaders within the General Assembly, including Black as a named defendant in that action. Among other things, Judge Dever argued:

- That the 2001 redistricting plans “completely ignore[d] the role of counties in North Carolina, and [were] intended to significantly increase the Democrat majorities in both houses of the General Assembly [and] to protect Democrat incumbents” (*Exhibit A* at 35);
- That it was “no wonder” a political commentator had likened North Carolina to a “third-world country -- with the proviso that voters in most third-world countries have more options than the people of North Carolina when it comes to electing candidates of their choice to the Senate or House” (*Exhibit A* at 39);
- That the Defendants (including Black) intended to deny North Carolina citizens the right to a fair election by imposing delays and to “run out the clock” until it was too late for a Court to provide a remedy for the 2002 election (*Exhibit A* at 61);
- That the “purpose behind [parts of the revised redistricting plans] . . . was political,” and that by grouping certain counties, “the Democrat leadership had a larger population pool to manipulate [and] . . . create three safe Democrat seats in Mecklenburg County for then-Democrat incumbents” (*Exhibit B* at 51, n.27); and
- That The General Assembly exhibited “a pattern of conduct” that “underpopulated ‘safe’ Democrat seats and overpopulated (i.e. ‘packed’) safe Republican seats in the unconstitutional 2001 Senate and House Plans” (*Exhibit B* at 84, n. 46).

Judge Dever’s opinion of Black as an individual willing to manipulate the electoral process to fit his own ends has persisted to the present day. In the Decker Sentencing Order, Judge Dever opined that “Black engaged in an epic betrayal” of his oath of office, his constituents, the citizens of North Carolina, and his fellow legislators. *See* Decker Sentencing Order at 20. Judge Dever also opined that “Black’s selfish tyranny was motivated by a feverish lust to retain power.” *See id* at 21. The Decker Sentencing Order also made plain Judge Dever’s continued concern for the redistricting issue. Specifically, Judge Dever alluded to the redistricting issue when he noted that (a) “as a result of the November 2004 election,” Democrats

again regained control of the House, and Black again became sole speaker; (b) that Black's "scheme" with Decker "enabled Black to again become the sole Speaker of the House in 2005 and 2006," and; (c) that citizens and legislators "may question the legitimacy of *certain laws* enacted in 2003 and 2004 in light of the corrupt scheme that resulted in Black becoming co-Speaker." *See Decker Sentencing Order* at 4, 15, 16 (emphasis added). One need not read between the lines to hear Judge Dever questioning the legitimacy of the General Assembly's redistricting plans passed on November 25, 2003, as well as 2003 N.C. Session Law 434, enacted the same day, which venued all redistricting-related challenges in Wake County and provided for a three-judge panel to hear such challenges. *See Act of November 25, 2003, ch. 434, 2003 N.C. Sess. Laws (1<sup>st</sup> Extra Sess. 2003)*.<sup>13</sup>

Admittedly, Judges are entitled to state their opinion about the merits of a case without fear of disqualification, so long as that opinion was formed as a result of knowledge obtained in the course of the proceeding. *See, e.g., Liteky*, 510 U.S. at 550-51, 555.<sup>14</sup> However, statements such as the ones Judge Dever made in the Decker Sentencing Order can be indicative of impermissible prejudice or bias -- or at least the appearance of such bias -- when they arise from an extrajudicial source. *See id.* Here, a reasonable observer would believe that Judge Dever's opinion of Black is at least partially attributable to his experience opposite Black in the redistricting litigation. Recusal under § 455(a) is necessary under these circumstances. *See id.; Hathcock v. Navistar Int'l Transportation Corp.*, 53 F.3d 36, 41 (4<sup>th</sup> Cir. 1995) (inflammatory

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<sup>13</sup> The North Carolina Supreme Court upheld the constitutionality of Session Law 434, eventually codified at N.C.G.S. § § 1-81.1, 1-267.1, 120-2.3 and 120-2.4, in a case brought by former Maupin Taylor member (and Judge Dever's former partner) Thomas A. Farr. *See Stephenson v. Bartlett*, 358 N.C. 219, 595 S.E.2d 112 (N.C. 2004).

<sup>14</sup> However, even statements of opinions formed in the course of a judicial proceeding can serve as a basis for recusal if they "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *See Liteky*, 510 U.S. at 555.

comments made by judge served as one proper basis for recusal, as there was some suggestion bias originated from extrajudicial source); *In re Federal Deposit Ins. Co.*, 835 F.2d 874 (4<sup>th</sup> Cir. 1987) (unpublished)<sup>15</sup> (requiring recusal where sum total of judge’s extrajudicial statements demonstrated that judge was so passionate about particular cause that his impartiality could reasonably be questioned).

**B. RECUSAL ALSO IS REQUIRED UNDER § 455(B).**

**1. Judge Dever Filed Related Litigation Against Black and Others While in Private Practice, Which Requires Recusal Under § 455(b)(2).**

Though *Rodgers* is not directly on point, it does demonstrate the Fourth Circuit’s view that the “matter in controversy” for the purposes of § 455(b)(2) extends beyond the charges in the instant case. So long as the related matter has a reasonable connection to the pending litigation, the Court will consider related litigation to be part of the same “matter in controversy” presently before the Court. *See Rodgers*, 537 F.2d at 1198.

Here, while in private practice and essentially simultaneously with the alleged criminal conduct, Judge Dever served as a lawyer in several legislative redistricting cases and against the defendant now before him, which raised the same fundamental question present in this prosecution: whether Democratic legislators (including Black) used improper means to manipulate election results to maintain a Democratic majority and secure Black’s position as Speaker of the House. As described more fully above, the relationship between the redistricting litigation and the instant case justifies a finding that these cases are part of the same “matter in controversy” for the purposes of § 455(b)(2). Under that statute, disqualification is required upon such a finding.

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<sup>15</sup> All unpublished decisions cited are attached collectively to this Motion as *Exhibit G*.

**2. Judge Dever May Have Extrajudicial Knowledge of Facts Relevant to Black's Sentencing as a Result of the Redistricting Litigation.**

During Decker's sentencing, Judge Dever held an upward departure was warranted under U.S.S.G. § 2C1.1 because Decker's conduct "was part of a *systematic or pervasive* corruption of a governmental function, process, or office that may cause loss of public confidence in government." *See* Decker Sentencing Order at 13-14 (citing U.S.S.C. § 2C1.1, cmt. n. 7) (emphasis added). Judge Dever has indicated he is likely to consider the same basis for upward departure when sentencing Black. *See* Order of May 1, 2007 at 2.

When assessing whether Black's charged and uncharged conduct is part of a "systematic or pervasive" corruption of a governmental function, Judge Dever may be tempted to consider information he learned about Black while serving opposite him in the redistricting litigation -- namely, evidence which allegedly suggests Black has engaged in a series of successive actions designed to manipulate the results of state elections, all to ensure a Democratic majority and maintain his position as Speaker of the House.

Section 455(b)(1) requires that a Judge recuse himself "[w]here he has a personal bias or prejudice concerning a party, or *personal knowledge of disputed evidentiary facts concerning the proceeding*" (emphasis added). In other words, § 455(b)(1) requires recusal when the judge's knowledge of facts relevant to the proceeding comes from an extrajudicial source. *See, e.g., Greenville County School District v. U.S. Gypsum Co.*, 831 F.2d 290 (4<sup>th</sup> Cir. 1987) (unpublished) (holding recusal was not necessary because judge's knowledge was obtained in the course of proceeding rather than outside source).

Here, Judge Dever has knowledge of facts that could bear on the Court's determination of an appropriate sentence for Black, and that knowledge comes from an extrajudicial source: Judge Dever's representation of Plaintiffs, in a suit where Black was a named Defendant, when Judge

Dever was in private practice. Judge Dever cannot know that nothing he learned in his role as counsel in the redistricting litigation will be relevant in Black's sentencing proceedings. *See, e.g., Wessmann v. Boston School Committee*, 979 F. Supp. 915, 918-19 (D. Mass. 1997) (judge recused herself because of participation in related litigation while in private practice because she "cannot be certain that something [she] learned from that representation -- in a submission to the parties, in an interview with a witness, by reviewing an exhibit -- will not be a disputed fact in this case"). He will necessarily bring that extrajudicial knowledge to bear when sentencing Black. Under these circumstances, recusal also is warranted under § 455(b)(1).<sup>16</sup>

### CONCLUSION

It is possible that Judge Dever could set aside any prior opinion of Black -- and any knowledge he obtained as a result of his participation in the redistricting litigation -- and preside over Black's sentencing hearing with the requisite impartiality, but the obvious appearance of impropriety cannot be overcome. The due process clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Aiken County v. BSP Division of Envirotech Corp.*, 866 F.2d 661, 678 (4<sup>th</sup> Cir. 1989) (citation omitted).

Any one of the circumstances detailed in this motion would cause a reasonable observer to question Judge Dever's ability to act impartially in these proceedings. Together, they lead to the unassailable conclusion that recusal is necessary. *See DeTemple*, 162 F.3d at 287 ("it is certainly possible for a confluence of facts to create a reason for questioning a judge's

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<sup>16</sup> Even if Judge Dever somehow was able to disregard everything he learned about Black during his work on the redistricting litigation, recusal still is proper. At the very least, a reasonable observer would believe Judge Dever would consider this knowledge when sentencing Black, in which case recusal is required under § 455(a). *See, e.g., Rice v. McKenzie*, 581 F.2d at 1117-18 (holding that recusal was required even though judge had no recollection of participation in related case several years earlier).

impartiality, even though none of those facts, in isolation, necessitates recusal under § 455(a)"). Judge Dever has expressed great concern that Black's actions have undercut public confidence in the government. Throughout the Decker Sentencing Order, Judge Dever rightly proclaimed the profound need for public confidence in its governmental institutions, particularly in well-publicized matters. The compelling need for public confidence in the impartiality of the courts can only be protected in this heavily reported case by Judge Dever disqualifying himself from further proceedings.

For the foregoing reasons, Black respectfully moves that Judge Dever recuse himself from all further proceedings in this matter, and that this case be assigned to another United States District Court Judge for sentencing and any related proceedings.

Respectfully submitted this 3rd day of May, 2007.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **MOTION FOR RECUSAL AND MEMORANDUM IN SUPPORT** has been electronically filed, which will provide electronic notification of filing to all counsel of record as shown below:

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This the 3rd day of May, 2007.

s/ Kenneth D. Bell  
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