

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 CONTINUE AND
MEMORANDUM IN SUPPORT**

Now comes the defendant, **JAMES B. BLACK**, by and through undersigned counsel, and hereby moves the Court to continue defendant's sentencing to not earlier than 35 days from July 3, 2007. In support of this motion the defendant shows the following.

1. By order dated June 14, 2007 the Court set a deadline of noon July 2, 2007 for the filing of motions to continue the defendant's sentencing scheduled for July 11, 2007.
2. Pursuant to Federal Rule of Criminal Procedure (Fed. R. Crim. P.) 32(e)(2) the defendant is entitled to receive the presentence report (PSR) at least 35 days before sentencing unless the defendant waives this minimum period.
3. Until 4:29 p.m. on July 2, 2007 the defendant had no reason to believe he would, or would need to, assert this right. Prior to that date and time counsel frequently communicated with the United States Probation Office (USPO) regarding the draft of the PSR. During counsel's last conversation with the USPO on June 14, 2007 counsel was informed that the PSR would recommend that defendant's base offense level be set

pursuant to United States Sentencing Guidelines (USSG) § 2C1.2, the guideline appropriate to punishment for the acceptance of illegal gratuities. Counsel was also informed then by USPO that as a result, allegations that defendant bribed former Rep. Michael Decker would not be recommended as "relevant conduct" for sentencing purposes.

4. At the above mentioned time and date counsel received an e-mail from the USPO informing him that the PSR would recommend defendant's base offense level be calculated pursuant to USSG § 2C1.1, the guideline applicable to bribery offenses, notwithstanding the agreement between the government and defendant that the appropriate guideline is § 2C1.2. "I wanted to give you a heads up that, after much discussion in our office, the final PSR will use the higher guideline of 2C1.1. I wanted to give you as much notice as possible." (email attached) This e-mail further stated that counsel would receive the PSR on the morning of July 3, 2007.

5. At 3:38 p.m. on July 3, 2007 counsel received the final PSR from the USPO. As forecast at the end of the previous day, the PSR recommended to the Court that defendant's base offense level be set pursuant to § 2C1.1. Use of this guideline section dramatically altered for the worse defendant's guidelines sentencing calculation from that expected based upon counsel's last conversation with the USPO. First, the PSR set the base offense level 3 levels higher than defendant had earlier been told to expect. Second, use of § 2C1.1 rather than § 2C1.2 rendered contested allegations that Mr. Decker was bribed by defendant "relevant conduct," significantly increasing the total offense level above defendant's expectations.

6. Had the PSR recommended that the base offense level be set pursuant to § 2C1.2, as counsel had most recently been told by USPO it would be and as the plea agreement recommends, the defendant would not be moving the Court to continue sentencing and asserting his right pursuant to Fed R. Crim. P. 32(e)(2). Because the defendant did not receive the surprise PSR until the day after the Court ordered deadline for filing a motion to continue sentencing, and indeed did not even receive notice that the PSR would be other than previously related to counsel until after the noon deadline of the day such a motion was ordered to be filed, the defendant could not have foreseen the need to move the Court to continue sentencing by the Court's deadline.

7. To respond to the erroneous sentencing guidelines calculations in the PSR, counsel will need to provide the Court with extensive briefing. Presumably the government will also submit a brief to the Court in opposition and objection to the PSR pursuant to the plea agreement. Further, the defendant will need to subpoena additional witnesses to the sentencing that he did not anticipate.

8. Further in support of this motion the defendant shows the Court that he has not yet obtained access to discovery the government agrees he is entitled to prior to sentencing pursuant to constitutional rights described by the United States Supreme Court. The government is awaiting authorization to provide defendant with this discovery. Review of this additional discovery is expected to lead counsel to investigate and present to the Court at sentencing relevant facts. While no blame is laid for the delay in defendant's access to this additional discovery, counsel's inability to review and make use of this discovery could render defendant's sentencing constitutionally deficient if it is held as scheduled on July 11, 2007.

Wherefore, defendant respectfully moves this Court to continue sentencing to not earlier than 35 days from July 3, 2007 pursuant to Fed. R. Crim. P. 32(e)(2), and further respectfully requests the Court to grant this motion sufficiently in advance of July 11, 2007 to avoid unnecessary travel by witnesses and others intending to attend the sentencing hearing.

Respectfully submitted, this 5th day of July, 2007.

s/ Kenneth D. Bell

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CERTIFICATE OF SERVICE

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

John S. Bruce
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This the 5th day of July, 2007.

s/ Kenneth D. Bell
Kenneth D. Bell