

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)

SENTENCING MEMORANDUM

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INTRODUCTION

James Boyce Black (a/k/a “Jim Black”) (“Dr. Black” or “Black”) by and through his attorneys Kenneth D. Bell and Jack M. Knight, Jr., respectfully submit the following as a memorandum of law in support of Dr. Black’s motion for a sentence below the advisory guideline range pursuant to *United States v. Booker*, 543 U.S. 220 (2005) and its progeny.

Having committed his first crime at sixty-seven years of age, Dr. Black pleaded guilty to accepting illegal gratuities and provided the Court a deep, heartfelt expression of contrition for the damage his conduct has caused his family, friends, former fellow legislators and the people of North Carolina. As serious as this charge is, Dr. Black’s criminal conduct is much less egregious, and in fact, if Dr. Black had been prosecuted for what he actually did, and had he been a federal elected official, he would be guilty of only a misdemeanor.

By the government’s own uncontradicted evidence, Dr. Black accepted \$25,000 cash over the course of nearly 4 years from three chiropractors.¹ Each chiropractor is a sophisticated political contributor to a variety of candidates, and over the years has contributed substantial sums to Dr. Black by wholly legal means. Each chiropractor has told the government he gave cash to Dr. Black in amounts and at times calculated to remain within the legal limits of campaign contributions, and the government’s evidence confirms this fact. Each chiropractor has told the government they did not ask for, receive or expect any specific legislative action from Dr. Black because of the cash contributions, and all told the government they gave money to Dr. Black because he had supported issues of interest to the chiropractic profession for many years. Indeed, the chiropractic profession contributed \$113,000 to Dr. Black over the last four elections. These cash campaign contributions, although illegal in form, were no more intended

¹ As will be discussed more fully below, this amount is far less than the \$36,600 of free eye care he provided to indigent patients during the last 6 years.

to be bribes, or even gratuities, than any other campaign contribution given by any contributor to any candidate.

Dr. Black asks the Court to be guided by Title 18 U.S.C. § 3553(a) and impose a sentence that is “*sufficient, but not greater than necessary*” to effectuate the goals of criminal punishment. A sentence of incarceration for this seventy-two year old man is not necessary to achieve the sentencing goals. As will be discussed below, rather than costing taxpayers almost \$30,000 a year to incarcerate him, Dr. Black respectfully offers to provide free eye care and glasses to needy, underserved children and families, with an annual economic value to the people of North Carolina of hundreds of thousands of dollars, while on house arrest under whatever conditions the Court deems appropriate.

ISSUES PRESENTED

I. THE FACTS THAT SUPPORT DR. BLACK’S GUILTY PLEA MOST CLOSELY RESEMBLE THE CRIME OF ILLEGAL CASH CAMPAIGN CONTRIBUTIONS TO A CANDIDATE FOR FEDERAL OFFICE

A. Nature of the Cash Given to Dr. Black

Dr. Black has pled guilty to violating 18 U.S.C. § 666(a)(1)(B) and fully accepts responsibility for accepting illegal cash. To better understand how Dr. Black should be sentenced, one must closely examine the facts of this case. The most fair and accurate reading of the Reports of Interviews of Drs. Keith, Willen and Brown is that each intended the cash given to Dr. Black to be campaign contributions, albeit in illegal form. Affidavits and/or testimony at sentencing can confirm and establish these intentions beyond all doubt.

Dr. Keith, according to investigators, on August 17, 2006 said: “Regarding the \$4,000 figure, Keith thought that was the amount he could give to a candidate. At that time, Keith did not know he could not give more than \$100 in cash. Even though he gave the cash to Black, Keith did not feel right about doing it.”

Again according to investigators, Dr. Willen said on August 17, 2006: “Regarding how he arrived at the \$4,000 figure, Willen gave cash to Black in the amounts of \$4,000 because he knew \$4,000 was the most someone could give a candidate. Willen knew it was wrong to give that amount in cash, he just picked the \$4,000 figure because that was the most by check a person could give a candidate. The amount was discussed with Keith; however, Willen was not sure which of them first brought up the amount of \$4,000.” During an interview by investigators on October 26, 2006 Dr. Willen contradicted himself in other respects, but still maintained his rationale for the amount of cash given: “. . . Willen asked Keith if that was okay, to give cash contributions to Black. . . . Keith told Willen the Speaker had said it was okay to give him cash. . . . Approximately a year later, Willen asked Keith if it was still okay to give cash to Black. Again, Keith said he would ask ‘Jim.’ At some point later, Keith told Willen that ‘Jim’ said it was okay.”

Dr. Brown was consistent with the others during his interview by investigators on August 29, 2006: “Brown discussed with Keith if they were ‘safe’ to give cash to Black and decided it was Black’s obligation to report the receipt of the cash. Brown did not know at the time that it was illegal to give cash to political candidates. Brown was aware that the maximum amount an individual could give to a candidate was \$4,000. Brown said whatever Black did with the money was ‘okay’ with him.”

Bolstering this reading of the evidence is the pattern of reported contributions made by each of the three chiropractors to Dr. Black. Accumulating their reported contributions made by check and their unreported, illegal cash contributions, demonstrates that they all kept their total contributions for the Primary/General Election Cycle at or below the lawful \$8,000 limit:

2000 Election

Chiropractor	Reported Check	Illegal Cash
Dr. Keith	\$4000 (5/4/99) \$4000 (5/17/00)	
Dr. Willen	\$4000 (4/13/99) \$1000 (9/28/00)	
Dr. Brown	\$4000 (5/4/99)	

2002 Election

Chiropractor	Reported Check	Illegal Cash
Dr. Keith	\$2000 (7/12/01) \$ 500 (5/21/02)	\$4,000 (Tower Club 2/14/02)
Dr. Willen	\$1000 (7/12/01)	
Dr. Brown		\$4,000 (Tower Club 2/14/02)

2004 Election

Chiropractor	Reported Check	Illegal Cash
Dr. Keith	\$4000 (4/16/04)	\$4,000 (Tower Club 12/12/02)
Dr. Willen		\$4,000 (Tower Club 12/12/02) \$4,000 (Concord 2/14/04)
Dr. Brown		\$2,000 (Tower Club 12/12/02)

2006 Election

Chiropractor	Reported Check	Illegal Cash
Dr. Keith	\$2720.13 (12/22/05) ² \$1279.87 (12/22/05) ³	

² (check - balance after in-kind Capital Grille luncheon)

³ (in-kind contribution at Capital Grille on 12/3/05)

Chiropractor	Reported Check	Illegal Cash
Dr. Willen	\$1279.87 (12/22/05) ⁴	\$3,000 (Capital Grille 12/3/05)
Dr. Brown	\$1,000 (3/30/05)	

This is not to deny that Dr. Black received illegal cash from all three chiropractors.

Below is a chart of receipts Dr. Black admits:

Tower Club	2/14/02	Keith Brown	\$4,000 \$4,000
Tower Club	12/12/02	Keith Brown Willen	\$4,000 \$2,000 \$4,000
Concord Restaurant		Willen	\$4,000
Capital Grille		Willen	<u>\$3,000</u>
Total Cash			\$25,000 ⁵

⁴ (in-kind contribution at Capital Grille on 12/3/05)

⁵ Even though Dr. Black admits for purposes of sentencing the above amounts, some of Willen's claims are not credible. In his interview by investigators on August 16, 2006 Willen referred to "both occasions" on which he wrote \$4,000 checks to cash and gave it to Dr. Black and that both times it occurred at the Tower Club. During this interview Willen made no mention of cash being given to Dr. Black at the restaurant in Concord. During his interview on August 21, 2006 Willen mentions for the first time that he gave Dr. Black cash in a restaurant in Concord from a check to cash dated November 5, 2003, more than 3 months prior to the event. In his third interview, on October 26, 2006, Willen's story had evolved to include his allegation that he handed the cash to Dr. Black in the restaurant restroom, in the presence of Keith, and that he saw Keith give Dr. Black an envelope as well. But Keith told interviewers nothing about giving cash to Dr. Black at the Concord restaurant, and said nothing about a transfer of cash from Willen occurring in the bathroom.

Willen's version of giving cash to Dr. Black at the Capital Grille on December 3, 2005 also evolved. In his August 16, 2006 interview he first told investigators he gave Dr. Black between \$2,000 and \$4,000 from cash he saved in a drawer, and then decided it was in fact \$4,000. Yet during his interview on August 21, 2006, he told investigators the money came from \$1,000 received from a deposit on December 2, 2005 and another \$2,000 retrieved from a desk drawer. With respect to either version, no evidence has been provided by the government to corroborate Willen's claim that he had between \$2,000 and \$4,000 on hand. Also during this

Additionally, all three chiropractors are experienced, large contributors to political campaigns, and often give the maximum allowable contributions. A schedule of their contributions, legal and illegal, to top state elected officials, shown below, further demonstrates their intention to make campaign contributions to Dr. Black.

	Black	Basnight	Easley	Cooper	Perdue
<u>2000</u>					
Keith	8,000	--	8,000	1,000	1,000
Willen	5,000	2,000	1,000	1,000	--
Brown	4,000	--	4,000	500	--
<u>2002</u>					
Keith	6,500	4,000	NA	NA	NA
Willen	1,000	4,000	NA	NA	NA
Brown	4,000	4,000	NA	NA	NA
<u>2004</u>					
Keith	8,000	6,000	4,000	5,000	--
Willen	8,000	5,000	2,000	1,000	--
Brown	2,000	4,500	4,000	2,000	--
<u>2006</u>					
Keith	4,000	2,000	NA	NA	4,000 (2008)
Willen	4,000	2,000 (4,000 for 2008)	NA	NA	--
Brown	1,000	--	NA	NA	--

The Presentence Report (“PSR”) submitted by the United States Probation Office erroneously includes a \$4,000 check from Dr. Brown. At the Concord restaurant fund raiser on February 14, 2004, attended by 15 - 20 chiropractors, Dr. Brown gave Dr. Black a \$4,000 check made payable to “Jim Black.” Virginia Kelly, Dr. Black’s Professional Office Manager and Treasurer of the Committee to Elect Jim Black, is available to testify that after the event there

second interview he claimed the delivery occurred near the bathroom, a fact he did not tell investigators during the first interview.

was a stack of checks on her desk, and that while most were made payable to the Committee, eight were made payable to Jim Black. She would testify⁶ that, without any direction from Dr. Black, she deposited the checks to the Committee into the Committee account, and the checks made payable to Jim Black were deposited into his personal account. In responding to subpoenas from the State Board of Elections, Dr. Black's counsel discovered the error, determined that those eight checks were intended to be campaign contributions that were mistakenly deposited into Dr. Black's personal account by Ms. Kelly, and caused all eight contributors to be reimbursed from Dr. Black's personal account. This error was corrected prior to any investigation into the events sustaining Dr. Black's guilty plea.

B. Purpose of the Cash Given to Dr. Black

It is also the most fair and accurate reading of the evidence that the cash was given not as a bribe for legislative action, nor in fact even a gratuity or reward for legislative acts, but as recited above, as illegal campaign contributions. Not one of the three chiropractors told investigators they gave cash to Dr. Black as a quid pro quo, nor did they say anything even approaching such a conclusion. Investigators report that on August 29, 2003 "Brown was adamant that he did not give cash to Black in return for anything from Black." Similarly, investigators report that Willen told them on August 16, 2006 that "Black never promised Willen and Keith anything in return for the cash." Apparently Keith never told investigators anything about an intention to give a bribe or gratuity, because nothing of the sort is recited in the investigators' reports. The following chart tracks the legislative history of bills in the North Carolina House of Representatives of interest to chiropractors. This chart makes it clear that Jim

⁶ Ms. Kelly has been interviewed by both state and federal investigators, but she has never been asked about these events. Counsel has repeatedly proffered Ms. Kelly's testimony to the government and invited her interview on the subject. The government has chosen not to ask.

Black has a long history of supporting chiropractic practices, as he has supported the legislative interests of all health care providers, and the money given by Drs. Keith, Brown and Willen did not produce a change in Dr. Black's position.

<u>Year</u>	<u>Bill</u> ⁷	<u>Sponsor</u>	<u>Jim Black's vote?</u>	<u>Result</u>
1999	H835: limits ownership of chiropractic practices to persons licensed as chiropractors.	Moore	Jim Black did not vote on the bill.	Bill ratified
1999	S685: insurer cannot impose any limitations on treatment or levels of coverage if performed by a duly licensed chiropractor.	Lucas	Jim Black voted for the bill.	Bill ratified
1999	H714: insurer cannot impose any limitations on treatment or levels of coverage if performed by a duly licensed chiropractor.	Alexander	Jim Black voted for the bill.	Bill ratified
2001	H593: chiropractors included in list of healthcare professionals entitled to reimbursement for services.	Alexander	Jim Black voted for the bill.	Bill ratified
2001	H1170: attempted to develop a chiropractic treatment protocol for the treatment of injuries resulting from automobile accidents.	Wilson	Record does not reflect any voting history.	Bill did not pass.
2001	S721: authorizes chiropractic examiners to increase certain fees and to increase compensation of board members.	Purcell	Jim Black did not vote on the bill.	Bill ratified
2001	H1266: insurer cannot impose any limitations on treatment or levels of coverage if performed by a duly licensed chiropractor.	Wright	Jim Black did not vote on the bill.	Bill ratified

⁷ H= House of Representative Bill; S= Senate Bill

<u>Year</u>	<u>Bill</u> ⁷	<u>Sponsor</u>	<u>Jim Black's vote?</u>	<u>Result</u>
2001	H722: allows the board of chiropractic examiners to bring an action for injunctive relief in superior court to prevent persons from practicing chiropractic without a license.	Cox	Jim Black did not vote on the bill.	Bill ratified
2001	H1747: authorizes the board of chiropractic examiners to collect a fee for the annual recertification of chiropractic diagnostic imaging technicians.	Baddour	Jim Black voted in favor of the bill.	Bill ratified
2001	H278: gives the board of chiropractic examiners greater authority and discretion regarding examinations for licensure.	Culpepper	Jim Black voted in favor of the bill.	Bill ratified
2003	H462: insurer cannot impose any limitations on treatment or levels of coverage if performed by a duly licensed chiropractor unless a comparable limitation is imposed on the medically necessary treatment if performed or authorized by any other duly licensed physician.	Alexander	Jim Black voted in favor of the bill.	Bill ratified
2005	S622: insurer cannot impose any limitations on treatment or levels of coverage if performed by a duly licensed chiropractor unless a comparable limitation is imposed on the medically necessary treatment if performed or authorized by any other duly licensed physician. An insurer shall not impose as a limitation on treatment or level of coverage a co-payment amount charged to the insured for chiropractic services that is higher than the co-payment amount charged to the insured for the services of a duly licensed primary care physician for the same medically necessary treatment or condition.	Garrou	Jim Black voted in favor of the bill.	Bill ratified

As a result of Dr. Black's long time support of issues important to the chiropractic profession, members of the profession have generously supported Dr. Black's political campaigns, as the attached chart demonstrates (Exhibit 1).

The facts of this case most clearly resemble that of a federal politician receiving illegal cash campaign contributions. The federal statute that covers this type of activity is Title 2 U.S.C. § 441g, which states:

No person shall make contributions of currency of the United States or currency of any foreign country to or for the benefit of any candidate which, in the aggregate, exceed \$100, with respect to any campaign of such candidate for nomination for election, or for election, to federal office.

Violations of this statute are punished pursuant to Title 2 U.S.C. § 437g(d)(1)(A):

(1)(A) Any person who knowingly and willfully commits a violation of any provision of this act which involves the making, receiving, or reporting of any contribution, donation, or expenditure

(i) aggregating \$25,000 or more during a calendar year shall be fined under Title 18, or imprisoned for not more than 5 years, or both; or

(ii) aggregating \$2,000 or more (but less than \$25,000) during a calendar year shall be fined under such title, or imprisoned for not more than 1 year, or both.

Unfortunately, Dr. Black was not a candidate for federal office so he could not plead guilty to this provision, even though the facts supporting Dr. Black's guilty plea are consistent with all of the other elements of Title 2 U.S.C. § 441g. As was mentioned earlier, all of the chiropractors who made donations to Dr. Black kept those donations under the \$8,000 limit and, when interviewed by federal authorities, stated they did not expect anything from Dr. Black in return for their contributions. Dr. Black should not be treated more harshly because he is a state, rather than a federal, politician. This Court should depart downward from the sentencing guidelines established for 18 U.S.C. § 666 (a)(1)(B) because this case does not fit within the

heartland of the type of gratuity case the Sentencing Commission had in mind when it developed § 2C1.2. This case is outside of the heartland because the Sentencing Commission envisioned traditional gratuity cases when it developed § 2C1.2. The Sentencing Commission did not envision that a state politician, who took \$25,000 in cash campaign contributions over 4 years, would be sentenced more harshly than someone who was running for the United States House of Representatives or the United States Senate, who accepted the exact same amount of cash contributions over the same period of time.

If Dr. Black had been a federal politician and pled guilty to 2 U.S.C. § 441g, the statutory maximum that Dr. Black could have received would have been not more than one year in prison pursuant to 2 U.S.C. § 437g(d)(1)(A)(ii). The Sentencing Guideline that would have applied under 2 U.S.C. § 441g would have been § 2C1.8, which is Making, Receiving or Failing to Report a Contribution, Donation, or Expenditure in violation of the Federal Election Campaign Act, and would have established a base offense level of 8. After the base offense level was set at 8, § 2C1.8(b)(1) would have directed that the specific offense characteristic that would have applied would have been the amount of the illegal campaign contribution with the amounts found in § 2B1.1. The corresponding amount found in § 2B1.1, more than \$10,000 but less than \$30,000, would have added an additional 2 points for a total of 12. In the case at hand, the only other points that would apply would be the two additional points for obstruction of justice. The total offense level Dr. Black could have received under a plea to being a federal candidate while receiving illegal cash campaign contributions would have been 12. Dr. Black would have then received a 2 point reduction for acceptance of responsibility leaving him with a total offence level of 10.

A level 10 with no prior convictions would face a sentencing range in Zone B, which would have made him eligible for probation. If Dr. Black did not receive a probationary sentence, he would face 6 - 12 months of incarceration. Therefore, if Dr. Black had been a federal politician and pled guilty to receiving cash campaign contributions, he would be sentenced to no more than one year in prison, and most likely far less. The fact that Dr. Black faces the possibility of serving a much longer sentence, one in the range of 33 - 41 months, does not comport with justice because such a sentence would unfairly punish him for being a state, rather than a federal, elected official. Such an arbitrary result would hold state politicians to a higher standard than federal politicians and generally violate federalism principles. To prevent such an injustice, the Court should depart downward and sentence Dr. Black to no more than one year in prison.

II. DR. BLACK IS NOT GUILTY OF ANY ILLEGAL ACTIVITY ASSOCIATED WITH MICHAEL DECKER AND ANY SUCH ACTIVITY IS NOT RELEVANT CONDUCT

Dr. Black did not bribe Michael Decker in exchange for his for vote for Speaker in 2003. There was no agreement for \$50,000 in exchange for Mr. Decker's vote. The government's only evidence for such a bribe is the entirely uncorroborated statement of Mr. Decker, a man unworthy of belief.

The essence of Mr. Decker's statements to the government is that in late 2002 and early 2003 he entered into an agreement with Dr. Black to sell his vote for Speaker in exchange for \$50,000. At the time of Mr. Decker's switch of party affiliation he repeatedly told the press, the public, and his friends and family that he switched parties and voted for Dr. Black because of his poor treatment by the Republican caucus and because he could not and would not ever support the Republican majority leader for Speaker. Mr. Decker admits he told his son he switched parties because he could not support Mr. Daughtry for Speaker. Mr. Decker told his wife he was

switching parties because of what the Republicans had done to him. It is well known, and easily proven, that at the Republican caucus meeting immediately following the 2002 election Mr. Decker felt that he had been lied to and abused by his party. Mr. Decker had been led to believe that he would be elected to the position of Speaker Pro Tem by the caucus, but when the votes were counted it was clear nearly all of his promised supporters had lied to him. Also during this caucus meeting Mr. Decker's 2002 primary opponent was introduced to the caucus by the party leadership as one of three "go to" lobbyists for the upcoming legislative session. Many elected Republicans can testify to these events and Mr. Decker's leaving the caucus and promising to never support the Republican leadership for Speaker. On the morning of the very day Mr. Decker publicly changed parties and announced his support for Dr. Black, Mr. Decker told a Republican candidate for Speaker that he would vote for her.

When Mr. Decker was first interviewed by federal agents he told them these same reasons for his party switch and support of Dr. Black for Speaker. He told them he received nothing in exchange for his vote, and that he was motivated solely by his treatment by the Republican caucus and by his absolute refusal to ever support Mr. Daughtry for Speaker. Mr. Decker admits he told Dr. Black's attorneys the same thing.

Mr. Decker now says he and then Representative Steve Wood met with Dr. Black at an IHOP restaurant in November 2002 to discuss their votes for Speaker. Mr. Decker claims that, in the presence of Mr. Wood, he told Dr. Black he could "help" Dr. Black but needed something in return, and needed it "up front." Mr. Wood has told investigators that while he was present for the meeting, he did not hear Mr. Decker say any such thing. (After Mr. Decker's first interview by federal agents, in which he said he was given nothing by Dr. Black in exchange for his vote, Mr. Decker met with Mr. Wood and asked if Mr. Wood remembered this discussion at the IHOP.

Mr. Wood told Mr. Decker that he did not remember any such discussion.) Mr. Decker further claims that at this point in the conversation he and Dr. Black left the table and went into the bathroom alone to discuss Mr. Decker selling his vote, then returned to the table where Mr. Wood was seated. Again, however, Mr. Wood has told investigators that while he was at the table he did not see Mr. Decker and Dr. Black leave and go to the restroom together.

Mr. Decker claims that he received an envelope containing \$37,000 in campaign checks and \$12,000 in cash from Dr. Black in his office in payment for the bribe. Mr. Decker has told investigators he invited Mr. Wood to his office to see the checks, but Mr. Wood declined. Investigators specifically asked Mr. Wood if Mr. Decker invited him to his office to see the checks, and Mr. Wood said it never happened. Dr. Black engaged in similar fundraising efforts for Mr. Wood as he did for Mr. Decker, yet Mr. Wood has stated publicly, and told investigators, that he asked for no support from Dr. Black, was offered nothing by Dr. Black for his support, and was completely unaware of Dr. Black's fund-raising efforts.

Mr. Decker claims his deal with Dr. Black included Mr. Decker being given a legislative assistant position. While Dr. Black was not told of Mr. Decker's intention, the position was filled by Mr. Decker's son. The salary for the job was set at \$46,000 a year. Mr. Decker claims that at some point he complained to Dr. Black that he had hoped the position would pay \$50,000 a year. Mr. Decker told the government he received from Dr. Black an additional \$4,000 in checks that were intended for his campaign in March 2003. Mr. Decker first told investigators that he cashed these checks and used them for his personal benefit. Later, Mr. Decker claimed that Dr. Black gave him these checks to supplement the salary of his son, bringing his annual pay up to \$50,000 a year. Later still, Mr. Decker told investigators there was no discussion between

him and Dr. Black as to what to do with these checks. In fact, Mr. Decker paid his son a \$4,000 subsidy from his campaign account.

When Mr. Decker was defeated in his re-election bid in 2004, he was financially desperate for a job and asked Dr. Black to help him secure a state job. Although Mr. Decker did not initially mention the promise of future employment as part of his original bargain with Dr. Black, he later told investigators this job was part of his deal with Dr. Black.

Mr. Decker claims that in January 2003, after he publicly switched his party affiliation, he was with Dr. Black in his office. According to Mr. Decker, Dr. Black was on the phone with Governor Easley and told the governor that Mr. Decker might need a job in the future: "I want you to give him a job after this is all over," Mr. Decker quotes Dr. Black telling the governor. Dr. Black denies he said any such thing to the governor. Counsel do not know if the government has asked Governor Easley if he can corroborate Mr. Decker's story, but the answer is likely "no."

Dr. Black's campaign committee contributed \$4,000 to Mr. Decker's campaign in 2004. Dr. Black's campaign made many similar contributions to other candidates, including several at the same time he contributed to Mr. Decker. (Chart of Committee to Elect Jim Black political contributions attached as Exhibit 2.) Yet Mr. Decker claims that Dr. Black told him to keep his campaign account open "in case he needed to run some money through it." Even according to Mr. Decker, by 2004 the agreed \$50,000 bribe had been paid, and even overpaid. This is one of several clear attempts by Mr. Decker to fabricate stories about Dr. Black. Compare this statement with Mr. Decker's explanation of Dr. Black's committee contributing \$4,000 to Mr. Decker's committee in 2005. Mr. Decker says Dr. Black told him the contribution was given in the event Mr. Decker decided to run for office again. Mr. Decker perceived this contribution as a

way for Dr. Black to show his appreciation, and was told by Dr. Black to keep his campaign account open because more contributions would come his way. Unbeknownst to Dr. Black, immediately after receipt of this contribution Mr. Decker closed the account and pocketed the money.

Mr. Decker's current claims to have switched his party affiliation in 2003 in exchange for a bribe is entirely at odds with what he said publicly, to his friends and family, and what he told federal investigators initially, and is inconsistent with other witnesses, known facts, and common sense. His statements, if taken as true, describe a bribe of \$50,000 that was overpaid by thousands of dollars. When Mr. Decker began telling his story to investigators, he obviously arrived at the \$50,000 figure by adding the \$37,600 reported by his campaign for the first half of 2003 and claiming a \$12,000 bribe to round the total up to a convenient \$50,000. What Mr. Decker failed to take into consideration were \$4,750 in contributions from PAC's he failed to report on his campaign disclosure reports and \$4000 in unreported checks that he cashed and converted to his own use. The total contributions by check raised by Dr. Black for Mr. Decker was \$46,350. Mr. Decker's claim of an additional \$12,000 cash would bring the total payments received from Dr. Black up to \$58,350. State and federal authorities assert that \$4,000 contributions from the Black Committee to the Decker campaign in 2004 and 2005 were also part of the "bribe." So, according to Mr. Decker and prosecutors, Dr. Black paid \$66,350 for a \$50,000 bribe.

Just for good measure, Mr. Decker told investigators he has probably received cash from Dr. Black on other occasions, although he did not say when, where, how much or for what. Only when Mr. Decker was faced with unavoidable federal criminal prosecution for converting campaign contributions to his personal use and money laundering did he begin to tell his story of

a bribe. Faced with certain significant prison time, Mr. Decker sought to help himself through the only means available, often employed by criminal defendants, of implicating a "bigger fish." Such statements, especially when uncorroborated and contradicted by all other evidence and witnesses, should be closely scrutinized and with suspicion.

Dr. Black has been consistent in his description of the circumstances of Mr. Decker's party switch in 2003, including during public and sworn testimony. Mr. Decker offered to sell his vote for Speaker to Dr. Black in 1997. Dr. Black immediately refused Mr. Decker's offer of a bribe and told others of Mr. Decker's offer at the time. Following the 2002 election Republicans held a slim 61-59 majority in the House of Representatives. It was well known that the Republican House caucus was deeply divided and that several members were adamant against supporting party leader Leo Daughtry. There ensued almost immediately a series of negotiations among several Republican factions and Dr. Black for some kind of power-sharing arrangement. Most prominently, Richard Morgan and four other Republican members vowed to never support Mr. Daughtry for Speaker, and approached Dr. Black about a power sharing arrangement soon after the election. In November 2002 Steve Wood was one of those negotiating with Dr. Black. Mr. Wood called Dr. Black and told him that Mr. Decker would like to meet with him. Dr. Black at first refused because of Mr. Decker's attempt to sell his vote in 1997. Dr. Black was assured by Mr. Wood that Mr. Decker was not asking for anything in return, and was motivated only by his anger at the Republican Party and his refusal to support Mr. Daughtry under any circumstances. Based upon that representation, Dr. Black agreed to meet Mr. Wood and Mr. Decker. Dr. Black insisted Mr. Wood be present as a witness because of Mr. Decker's solicitation of a bribe from Dr. Black in 1997. Dr. Black began the meeting, and reiterated

throughout, that no one's vote was for sale and he was not buying anyone's vote. There was no discussion at this meeting of a bribe in any form.

In anticipation of the support of Mr. Decker and Mr. Wood, Dr. Black engaged in entirely legal fund-raising efforts on their behalf. Mr. Wood has stated publicly, and told investigators, that Dr. Black never offered him anything in exchange for his support for Speaker, and he was unaware of any fund-raising efforts on his behalf.

Dr. Black solicited campaign contributions for Mr. Decker, all in the form of checks, and delivered them to Mr. Decker. Much has been made of the practice of some politically active optometrists in providing campaign contribution checks with payee lines left blank. None of those involved in this process believed it to be illegal, and legal experts are divided on the issue. Mr. Decker unlawfully converted some of these checks to his personal use entirely without the knowledge or consent of Dr. Black.

During more than twelve hours of interviews by investigators, Dr. Black volunteered to investigators that Mr. Decker was held in very low esteem by fellow members and the public for his well-known habit of living in a dilapidated van and giving himself sponge baths in General Assembly washrooms while the legislature was in session. Dr. Black felt pity for Mr. Decker's living condition and also thought it reflected poorly on the General Assembly. Moved both by pity and gratitude, Dr. Black offered to improve Mr. Decker's living conditions. There was discussion of Dr. Black giving Mr. Decker a nicely outfitted excursion van to improve his living conditions. However, the Black family decided the van was too valuable to give away. Dr. Black gave Mr. Decker \$10,000 for the express purpose of allowing Mr. Decker to better house himself while in Raleigh for legislative business. Instead, Mr. Decker purchased for himself a van to live in from his campaign account, and pocketed Dr. Black's gift. This gift was never

discussed, and was never intended to be, in exchange for Mr. Decker's support of Dr. Black for Speaker.

By operation of law, and by the terms of his plea agreement, Dr. Black understood that he could tell the government of any criminal wrongdoing without punishment. With no motivation but to tell the truth, Dr. Black voluntarily told authorities about his \$10,000 gift to Mr. Decker. If Dr. Black had in fact bribed Mr. Decker he was at complete liberty to admit it to authorities without fear of punishment. If Dr. Black wanted to lie to the government he could have merely denied he ever gave any cash to Mr. Decker; the government could never have proved otherwise. If Dr. Black wanted to play it safe, earn the government's trust and tell them what they wanted to hear and already believed, he would have admitted a bribe; under the law and plea agreement he would not have been punished any more severely for such an admission. Understanding that the government believed Mr. Decker's story, Dr. Black nonetheless disputed the allegations of bribery for no reason other than he was compelled to tell the truth.

Dr. Black entered a guilty plea to two counts in state court pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). An Alford plea is taken when a defendant does not admit the act charged and asserts innocence, but admits that sufficient evidence exists with which the prosecution could convince a judge or jury to find the defendant guilty.

The first state count charged an obstruction of public justice due to his participation in a longstanding practice of optometrists providing campaign checks to a decision maker with blank payee lines. None of the participants in this practice, including Dr. Black, thought it illegal, and still don't. Legal experts provided the State Board of Elections sworn affidavits and testimony opining that the conduct and practice at issue was entirely legal as North Carolina statutes then

existed. Dr. Black entered his *Alford* plea to resolve all state and federal claims. Dr. Black does not deny that Decker converted checks intended as campaign contributions to his own use.

The second count combined a charge of receiving illegal gratuities in the form of cash campaign contributions (to which Dr. Black admits his guilt) with a charge of bribing Decker for his 2003 Speaker vote (which Dr. Black denies). Again, to resolve all state and federal allegations, and because Dr. Black could not plead guilty to illegal gratuities without pleading guilty to bribery, he entered a plea pursuant to *Alford*.

The Honorable James C. Dever, III, mentioned in dicta in his June 5, 2007 order that “in sentencing Decker this court obviously credited Decker’s version of the conspiracy to which he pleaded guilty, this court does not view that conspiracy (including the bribe) as ‘relevant conduct’ for the purpose of Black’s guideline calculation under Chapters 2 and 3 of the guidelines. *See, e.g.*, U.S.S.G. § 1B1.3(a); United States v. Dugger, 2007 WL 1345826, at *4-5 (4th Cir. May 9, 2007).” (See page 36 or Judge Dever’s Order filed June 5, 2007).

III. GUIDELINE COMPUTATIONS

A. Base Offense Level

The government and Dr. Black agree that the correct Sentencing Guideline is § 2C1.2 and both object to using Section 2C1.1. The Honorable James C. Dever, III, in his Order filed June 5, 2007, mentions in dicta that “[t]he court has reviewed the cases that the parties cited in their objections, conducted its own research, and agrees with the objections.” (See page 37 of Judge Dever’s Order filed June 5, 2007). Judge Dever goes on to say “this court believes section 2C1.2 would be the appropriate starting point to determine Black’s base offense level.” (See page 37 or Judge Dever’s Order filed June 5, 2007)

The appropriate Sentencing Guideline is § 2C1.2, and calls for a base offense level of 11. The statutory index in the Guidelines Manual references both § 2C1.1 (bribes) and § 2C1.2

(gratuities) for violations of 18 U.S.C. § 666(a)(1)(B). In interpreting 18 U.S.C. § 201, the counterpart to § 666 for federal violators, a unanimous Supreme Court defined the distinction between the two separate offenses:

The distinguishing feature of each crime is its intent element. Bribery requires intent “to influence” an official act or “to be influenced” in an official act, while [an] illegal gratuity requires only that the gratuity be given or accepted “for or because of” an official act. In other words, for bribery there must be a *quid pro quo* - a specific intent to give or receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.

United States v. Sun-Diamond Growers, 119 S.Ct. 1402, 1406 (1999).

To establish bribery, the government must prove a link between the gift and a “particular” or “specific” official act. *See id.* at 1407-08 and 1411. The year before the *Sun-Diamond* decision the Fourth Circuit applied essentially the same standard:

Whether a payment is a bribe or an illegal gratuity under § 201 depends on the intent of the payor. A bribe requires that the payment be made or promised “corruptly,” that is, with “corrupt intent.” Under § 201, “corrupt intent” is the intent to receive a specific benefit in return for the payment. In other words, the payor of a bribe must intend to engage in “some more or less specific *quid pro quo*” with the official who receives the payment. . . . *An illegal gratuity, on the other hand, is a payment made to an official concerning a specific official act (or omission) that the payor expected to occur in any event.* No corrupt intent to influence official behavior is required. The payor must make the payment “for or because of” some official act.

United States v. Jennings, 160 F.3d 1006, 1013 (4th Cir. 1998) (emphasis added)

(citations omitted). Other Courts of Appeals have held similarly: *United States v. Mariano*, 983 F.2d 1150, 1159 (1st Cir. 1993) (“The essential difference between a bribe and an illegal gratuity is the intention of the bribe-giver to effect a *quid pro quo*.”); *United States v. Griffin*, 154 F.3d 762, 763 (8th Cir. 1998) (“The distinction between a bribe and an illegal gratuity is the corrupt intent of the person giving the bribe to receive a *quid pro quo*, something that the recipient would

not have done otherwise.”); *United States v. Patel* 32 F.3d 340, 345 (8th Cir. 1994); *United States v. Strand*, 574 F.2d 993, 995 n.2 (9th Cir. 1978).

The chiropractors who gave Dr. Black the cash all say they intended to be making campaign contributions (albeit in an illegal form) and that they received no promises of specific future official acts from Dr. Black and had no expectation of specific future official acts. The reports of interview of the chiropractors may be supplemented by affidavits, live testimony or both to completely establish there was no corrupt intent. There is simply no evidence to support a conclusion of bribery. As the Supreme Court said, “a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.” *Sun-Diamond*, 119 S.Ct. at 1406. The Supreme Court has also cautioned that special care be taken when the gift falls into the realm of campaign contributions, even illegal ones.

[T]o hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interest of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime. . . . To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

McCormick v. United States, 111 S.Ct. 1807 (1991).

IV. SENTENCES FOR SIMILAR CONDUCT

The goal of every court is to treat those who appear before it fairly and consistently. The sentence Dr. Black receives should be significantly lower than sentences other defendants have received for much more egregious conduct. Congress has mandated in 18 U.S.C. § 3553(a)(6) that courts should avoid unwarranted sentencing disparities.

A. Sentences of Other Public Officials Guilty of More Egregious Conduct

A review of the recent sentences given to other public officials shows that Dr. Black is facing a sentence that is far more severe than others who have committed even more egregious crimes. A review of the sentences of several political figures reveals the following.

1. John Rowland (District of Connecticut): the former Governor of the State of Connecticut was sentenced on March 20, 2005 to one year and one day in prison for taking private chartered trips to Las Vegas at no charge, vacationing alone with his family at no charge in a Vermont vacation home, having construction work performed on his own vacation home at no charge, and accepting over \$100,000 in bribes and gratuities for introducing multiple pieces of legislation and approving retroactive tax breaks for several of the companies that provided the benefits and money. Rowland also allocated money and approved bond agendas for the companies that had provided him with the bribes. This was all done while Rowland served as the top elected official in the state of Connecticut. *(Attached is the United States Attorney's Office District of Connecticut Press Release at Exhibit 3.)*

2. Bob Ney (District of Columbia): the former United States Congressman, was at the center of the Jack Abramoff investigation and took part in what many have called the largest bribery scandal ever involving federal officials. Ney was sentenced on January 19, 2007 to 30 months in prison for accepting, *inter alia*, lavish trips to Scotland, a trip to the Superbowl, trips to the Northern Marianas Islands, with trip costs exceeding \$170,000, thousands of dollars worth of gambling chips, for accepting \$10,000 in campaign contributions as a bribe to enter statements into the federal record, and for accepting substantial campaign contributions from Abramoff's clients for whom Ney had agreed to perform official acts. *(Attached is the Robert Ney Bill of Information from the District of Columbia found at Exhibit 4.)*

3. Alvin Thomas, Jr (Middle District of Louisiana): the former county commissioner in Ascension Parish, Louisiana pleaded guilty to violating Title 18 U.S.C. § 666(a)(1)(B) by accepting bribes from businessmen to support those businessmen's sewer contracts with the Parish. Since Thomas' case involved a true bribe and there was a direct quid pro quo between the bribes and the sewer contracts awarded to the companies that provided the bribes, the court sentenced Thomas to a term of 21 months in prison. Thomas solicited these bribes and even told one of the businessmen "how to bribe a politician without being too overt." (*Attached is the Press Release from the United States Attorney's Office from the Middle District of Louisiana at Exhibit 5, p. 2.*)

4. Randy "Duke" Cunningham (Southern District of California): the former United States Congressman from California's 50th Congressional District pleaded guilty to accepting at least \$2.4 million in bribes. Cunningham listed out the bribes he required and the monetary rewards associated with the amounts of each bribe. As an example, a \$50,000 bribe would mean the defense contractor would receive a 19 million dollar contract instead of a 18 million dollar contract. On March 30, 2006, Cunningham was sentenced to eight years and four months in prison. Cunningham received the longest jail term ever given to a former United States Congressman in what the government called "unparalleled corruption." (*Attached is Government's Sentencing Memorandum from the Southern District of California at Exhibit 6.*)

5. Ray Liberti (Southern District of Florida): the former West Palm Beach City Commissioner was sentenced on October 19, 2006 to 18 months in prison for receiving \$68,000 in bribes and for ordering law enforcement officials to inspect businesses in an attempt to drive down the price of real estate in certain areas. (*Attached as United States Attorney's Office for the Southern District of Florida Press Release at Exhibit 7.*)

These examples show that public officials that have recently been found guilty of committing far more egregious acts than those Dr. Black is charged with, including soliciting for bribes, received significantly lighter sentences than what is being recommended in this case. Dr. Black's correctly calculated guidelines sentence of 33 to 41 months is far more than what public officials who have committed worse crimes have received and such a sentence would frustrate Congresses' intent of eliminating disparities between similarly situated defendants.

V. A DOWNWARD DEPARTURE IS APPROPRIATE FOR DR. BLACK

The Sentencing Guidelines provide that "sentencing courts are to treat each guideline as carving 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). However, while the Sentencing Guidelines are intended to ensure "a more honest, uniform, equitable, proportional, and therefore effective sentencing system," U.S.S.G. Ch. 1, Pt.A (3), they must not be interpreted as eliminating judicial discretion. *Koon v. United States*, 518 U.S. 81, 92 (1996). Thus, in imposing sentences, courts must comply with Congress' unequivocal directive that they "impose a sentence sufficient but not greater than necessary to comply with the purposes of criminal sanctions." 18 U.S.C. § 3553(a) (emphasis added).

In keeping with this mandate, Congress provided for judicial departure from the Sentencing Guidelines whenever a "court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3353(b). In the same way that the Sentencing Commission could not have foreseen every type of criminal case, it could not have foretold every potential ground for justifying departure from the Guidelines. *See Koon*, 518 U.S. at 83 ("Commission chose to prohibit consideration of only a few factors, and not otherwise to limit, as a categorical matter,

the considerations which might bear upon the decision to depart.”); *see also* U.S.S.G. § 5K.20 (“Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance.”). Except for a few limited grounds that the Commission has expressly eliminated as reasons for departing—race, sex, national origin, creed, religion, and socioeconomic status⁸—the Commission has made it clear that it “does not intend to limit the kind of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.” U.S.S.G. Ch. 1, Pt. A (4)(b).

Dr. Black is an extraordinarily compelling candidate for downward departure. His case presents the following circumstances warranting a departure from the proposed guideline range:

1. Facts of the case or Actual Criminal Conduct;
2. Dr. Black’s age, his medical condition, and the medical condition of his wife;
3. The fact that Dr. Black lived almost 70 years before committing his first criminal offense; and
4. Dr. Black’s extraordinary public service.

Dr. Black’s case is not within the “heartland” anticipated by the Sentencing Commission because: (1) the offense conduct falls outside the heartland of gratuities violations; (2) he is an elderly, infirm offender with serious medical problems and an ailing wife; (3) a man who lived almost 70 years before he committed his first criminal offense; and (4) he is a man who has dedicated his life to public service. In this case, a sentence that does not include imprisonment, or includes a very short time in prison, is adequate to deter, reflects the seriousness of the offense, and takes into account the extraordinary circumstances warranting departure.

⁸ *See* U.S.S.G. § 5H1.10.

A. Dr. Black's Age and His Serious Medical Condition, As Well as the Medical Condition of His Wife, Merit a Downward Departure⁹

See *United States v. Leon*, 341 F.3d 928, 931 (9th Cir. 2003) (“Permissible downward departures generally involve situations where the defendant is an irreplaceable caretaker of children, elderly, and/or seriously ill family members, and the extent of the departure appropriately serves to protect those family members from the impact of the defendant’s prolonged incarceration.”) (emphasis added). For example, in *United States v. Gutierrez*, 432 F. Supp. 2d 960 (D. Neb. 2006), the court granted the defendant’s motion for downward departure based upon its finding that the defendant was critical to the care of her disabled brother, despite the fact that a nurse provided additional assistance six days a week. As the court stated, the defendant was “her brother’s anchor.” *Id.* at 962. Similarly, in *United States v. Colp*, 249 F. Supp. 2d 740, 743 (E.D. Va. 2003), the court concluded that downward departure was warranted based upon the defendant’s status as the “sole caretaker of her disabled husband.” In reaching its conclusion, the court noted that “the well-being of [defendant’s husband] stands to be significantly impacted if left without the support of [defendant].” *Id.* See also *Leon*, 341 F.3d 928 (affirming downward departure where defendant was the only person available to tend to his wife’s poor emotional and physical health); *Dominguez*, 296 F.3d 192 (finding that the district court erred in concluding that it lacked authority to depart where the defendant resided with her elderly parents who were physically and financially dependent on her); *United States v. Best*, No. 1:01CR166-1, 2001 WL 1729709 (M.D.N.C. Sept. 26, 2001) (granting defendant’s motion for downward departure based on her status as the primary caretaker for her disabled husband and daughter). Exhibit 8.

⁹ A specific discussion of the medical evidence for Dr. and Mrs. Black will be filed separately under Motion to Seal to protect their privacy.

Dr. Black's advanced age, coupled with his serious medical conditions, warrants a downward departure. Section 5H1.4 of the Sentencing Guidelines suggests that while "physical condition" is not "ordinarily relevant" in determining a downward departure, "extraordinary physical impairment may be a reason to depart downward." Indeed, the Guideline goes on to suggest that "in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment." *Id.*

As one federal district court has recognized,

[a]lthough the Guideline does not define what is "extraordinary" and what is "ordinary," several significant themes emerge. First, although the Guideline drafters speak of "extraordinary physical impairment," the remainder of the Guideline seems to embody a less severe standard, "seriously infirm." Second, the Guideline drafters suggest that with respect to the latter, a court is to balance infirmity and cost, allowing for a departure when home detention may be as efficient and less costly than imprisonment.

United States v. Willis, 322 F. Supp. 2d 76, 82 (D. Mass. 2004).

Section 5H.1 of the Sentencing Guidelines, which addresses age, is similar. While this Guideline provides that "age" is not "ordinarily relevant" in determining a departure, it also directs that age may be a reason to impose a sentence below the Guideline range when the defendant is "elderly and infirm and where a form of punishment such as home confinement might be equally efficient and less costly than incarceration." *Id.* "Again, the Guideline does not speak in terms of extraordinary age or extraordinary infirmity, but simply 'elderly and infirm.' And again, the Guideline invites the [c]ourt to balance infirmity and costs, where home confinement may be less costly than incarceration.'" *Willis*, 322 F. Supp. 2d at 82 (emphasis in original).

Although it repeatedly appears in the Sentencing Guidelines, the Commission did not define the term "extraordinary." Rather, the court must determine, on a case-by-case basis,

whether a defendant's age, coupled with his medical problems, could "trigger" a departure. *Id.* at 84. *See also United States v. Deigert*, 916 F.2d 916, 919 (4th Cir. 1990) (whether or not factors are extraordinary is a question of fact); *United States v. Lacy*, 99 F. Supp. 2d 108, 118 (D. Mass. 2000) ("While the Sentencing Commission has not indicated what illnesses or physical burdens qualify, courts have stepped in the breach.") (collecting cases). The court must then balance the costs of home detention with the costs of incarceration. *Willis*, 322 F. Supp. at 84.

1. Dr. Black's physical impairments and age are sufficient to trigger a departure.

Other courts have concluded that defendants with health conditions and ages similar to Dr. Black's were deserving of a departure. For example, in *United States v. Barbato*, No. 00 CR. 1028 (SWK), 2002 WL 31556376 (S.D.N.Y. 2002), the court concluded that departure was warranted for an 81-year old defendant who "suffer[ed] from a variety of serious medical ailments, including hypertension, carotid artery disease, and coronary artery disease." *Id.* at *1, Attached as Exhibit 9. As the court stated, "the combination of [defendant's] medical condition and his advanced age are such that a downward departure would be appropriate." *Id.* at *5. Similarly, in *Willis*, 322 F. Supp. 2d 76, the court concluded that the 69-year old defendant's age and health problems, which included heart and lung problems, enlarged prostate, colon polyps, and acid reflux disease, warranted a departure. *See also United States v. Whitmore*, 35 Fed. Appx. 307 (9th Cir. 2002) (district court did not err in finding that the defendant's age, in combination with his health problems, warranted departure); *United States v. Kloda*, 133 F. Supp. 2d 345 (S.D.N.Y. 2001) (defendant's advanced age of 63 and health problems warranted departure). *Cf. United States v. Overman*, 182 F.3d 911 (4th Cir. 1999) (holding that the district court erred in finding that it lacked discretion to depart despite its conclusion that the defendant had a number of serious medical conditions, including coronary artery disease, eye tumors,

prostate problems, and hypertension). These cases demonstrate that Dr. Black's old age, considered in light of his numerous health problems, are sufficient to trigger a departure pursuant to U.S.S.G. §§ 5H 1.1 and 5H1.4.

B. The Fact That Dr. Black Lived Almost 70 Years Before Committing His First Criminal Offense Warrants a Downward Departure

Dr. Black did not commit his first criminal offense until February 2002. At that time, Dr. Black was nearly 67 years old. The Guidelines fail to take into account the fact that Dr. Black lived such a long amount of time without committing any criminal offenses. See *U.S. v. Ward*, 814 F. Supp. 23 (E.D. Va. 1993). Sixty-six years with no criminal convictions shows the activity which brings Dr. Black before the Court today is an aberration and he presents a very low risk of being a recidivist.

The former Chancellor of the University of North Carolina at Charlotte, Jim Woodward, put it well in his letter to Judge Dever, attached,¹⁰ which states:

I came to UNC Charlotte in 1989 as Chancellor after having served for 20 years in various faculty and administrative roles at The University of Alabama in Birmingham, a public university with a large academic health center.

[In Alabama] I had extensive interaction with state officials, and I was appalled at the questionable, and perhaps dishonest, behavior I frequently observed. While I don't know the current political environment in Alabama, at the time I worked in the state, that environment at the local and state level was, in my opinion, rife with unethical acts by elected and appointed officials.

So when I came to North Carolina in 1989, I had a well-developed "antenna" in matters related to dishonesty with local and state government. During my 16 years as Chancellor of UNC Charlotte I am pleased to say that I witnessed, or sensed, very few acts I would consider unethical, or even borderline unethical. Further, in my extensive dealings with Jim Black since 1990, I have not seen,

¹⁰ Character letters submitted to the Court on behalf of Dr. Black are attached as Exhibit 10.

nor sensed, a single act that I would consider dishonest or unethical.

Let me provide a simple, but I think telling, example of what I mean. As I am sure you know, it has been routine for universities to invite governmental officials to athletic events. In 1994 UNC Charlotte was the official host institution for the NCAA Men's Basketball Final Four Tournament held in Charlotte. In that role, we were provided some hundred tickets, a few of which were among "the best in the house." At my invitation, Jim joined me at the games. But he insisted on paying for the tickets.

Although seemingly a minor matter, the event described above indicated the kind of man I came to know and respect. He simply never asked for anything from me that would bring him personal gain. Even in his political fund-raising activities in the Charlotte region, not once did he put any undue pressure on me or other supporters of the university. That is, I never observed, nor heard of, him asking for anything in return for his support of UNC Charlotte. Letter from James H. Woodward, April 27, 2007, attached.

C. Dr. Black's Extraordinary Public Service Merits a Downward Departure

As with the Guidelines discussing departures for age, physical condition, and family ties and responsibilities, "civic, charitable, or public service ... and similar prior good works are not ordinarily relevant in determining whether a departure is warranted." U.S.S.G. § 5H1.11. Thus, a court may depart when a defendant's public service is extraordinary or exceptional. *See, e.g., United States v. Crouse*, 145 F.3d 786, 790 (6th Cir. 1998). As demonstrated below and in the numerous letters submitted to the Court, Dr. Black has led an extraordinary and exemplary life. That extraordinary and exemplary life merits a departure pursuant to U.S.S.G. § 5H1.11.

1. Dr. Black has led an extraordinary and exemplary life by serving and helping others

As demonstrated by the numerous letters submitted to the Court by Dr. Black's family, friends, and colleagues, Dr. Black had led a life of honesty, integrity, and commitment to helping others. Whether by providing optometry services to indigent adults and children, serving as a

mentor to disadvantaged children, volunteering at his grandson's school, loaning money to a virtual stranger, or working tirelessly to ensure that North Carolina residents have access to education, Dr. Black has demonstrated that he is an exemplary and extraordinary human being. The circumstances that bring him before this Court stand in stark contrast to the life he has led and the lifelong service he has provided to the people of this state.

(a) *Dr. Black has dedicated his life to helping others.*

Dr. Black has dedicated his life helping others. Harold M. Edwards, a Charlotte attorney and former United States Attorney for the Western District of North Carolina, notes, "I have never known a more compassionate and dependable person. He is a dear friend and I would proudly have him my brother." Letter from Harold M. Edwards (4/9/2007), attached.

Dr. Black served as a North Carolina legislator for over 26 years, devoting himself to making North Carolina a better place for all of its residents. As his neighbors aptly summarized:

[t]he public has no idea how hard and for how many hours Jim has devoted to this State. Financially, and in hours driving up and down the road, there is no possible way he could be repaid for what he has given. Letter from Deborah and Roger Price (4/22/2007), attached.

In keeping with his lifelong dedication to helping others, Dr. Black has always recognized the importance of helping those less fortunate than himself. His daughter remarked on his lifelong dedication to providing free medical services to those in need:

For 22 years [my father and I] have practiced optometry together in uptown Charlotte and Matthews, and I have had the opportunity to see what a blessing my father has been to so many people.

In both of our offices we have a very diverse patient population. Some are very wealthy. Some are very poor, even homeless. My father is kind to them all, showing respect and providing excellent eye care. Over the years I have seen how much time that Daddy has devoted to rendering services and eye glasses to many indigent adults and children. Many of these patients have come to our practice for over 35 years and they have told me of his kindness and how he has given them a sense of dignity. My father has the

heart of a servant, giving of himself to be a blessing to others.
Letter from Deborah Black Carpenter (4/28/07), attached.

During his 45 years of optometric practice, Dr. Black has often provided free eye care to those who could not afford it. Many of Dr. Black's patients over the years have been uninsured and on Medicaid, and were ineligible for what most would call basic vision services. One example is found in the fact that Medicaid patients under the age of 21 are only allotted one pair of glasses every 12 months. So if a school child broke his glasses at the start of the school year, he would have to go without glasses for the rest of the year. On many occasions, Dr. Black offered free glasses and services in these types of situations.

Below is a chart that was compiled after a review of Dr. Black's optometric records for the last few years. The chart, which most likely underestimates the number of patients because records were not always kept about this activity, shows how Dr. Black has financially helped those who could not help themselves.

Year	Number of Patients	Value of Free Services
2001	10	\$1,553.00
2002	14	\$1,629.50
2003	9	\$1,301.39
2004	15	\$1,291.00
2005	76	6,453.00
2006	211	\$18,380.00
2007 (Jan.-May)	66	\$6,026.00

In 2005, Dr. Black began offering fundus (retinal) photography to his patients. The usual and customary fee for this service is \$79. This is a noncovered service by Medicaid and Social Services. In cases of diabetic patients or patients with other systemic or ocular disease, Dr. Black will provide this service at no charge to indigent patients. Letter from Deborah Black-Carpenter (4/28/2007). *See also* Letter from Galen Grayson, M.D. (5/4/2007) ("I cannot begin to cite the examples of compassion and care that Dr. Black has demonstrated to patients over the years. This includes providing free services and even free glasses to patients who were unable to

pay.”). Mr. Gregory Culpeper, one of Dr. Black’s patients, elaborated on the profound effect Dr. Black’s charitable deeds had on him:

My medical situation was changing. I had a growing cataract that had seriously compromised my vision. As a result of divorce, I had neither the funds nor insurance to acquire the surgery I needed. I wanted to postpone the surgery until I could afford it. Dr. Black said I couldn’t wait, that my long-term vision was at risk. It was time for surgery regardless of my ability to pay. Dr. Black said he would make some arrangements for me and would call in a few days to let me know what they were. He suggested that I would be able to make payments over time, possibly on a discounted rate and receive the surgery that I needed to save and restore my vision.

In fact, what Dr. Black did was to persuade the eye surgeon that he had recommended to gift not only the surgery itself, but the clinical support services related to that surgery as well.

I am a man of neither means nor influence. There was no opportunity for quid pro quo. When I could not care for myself, I was the beneficiary of a selfless act of pure generosity and compassion by Dr. Black. I had nothing to offer Dr. Black beyond my thanks ... The restoration of my vision literally changed my life and I was and remain overwhelmed by the kindness of a man that I was only beginning to know.

[]

Dr. Black has been a friend to me when I had nothing. He is a blessing in my life. I am his friend forever.

Letter from Gregory Alan Culpeper (5/1/2007).

Dr. Black demonstrated his selfless nature and dedication to others by providing financial assistance to virtual strangers in order to better their lives. For example, Dr. Thomas D. Grimes, a Matthews dentist, recalled the life-changing assistance provided to him by Dr. Black, whom he had known for only a short time. Fresh out of dental school, Dr. Grimes had no funds with which to start his dental practice. Letter from Thomas D. Grimes, D.D.S. (4/23/2007). Dr. Black offered to let Dr. Grimes start his practice in a small space within his office, and waived the first six months’ rent. *Id.* Later on, when Dr. Grimes was ready to expand his practice, he could not obtain financing. *Id.* Dr. Black co-signed a loan at a good interest rate, which

permitted Dr. Grimes to purchase the property on which his dental practice still sits. *Id.* As Dr. Grimes acknowledges, “[w]ithout [Dr. Black’s] assistance, it would have been impossible for me to expand my business.” *Id.* See also Letter from Laura Setliff (4/24/2007) (recalling Dr. Black’s generosity in purchasing a basketball uniform for her son when she could not afford it).

(b) *Dr. Black has admirably served his country and his state.*

Prior to Dr. Black’s service in the North Carolina House of Representatives, he served the United States in the U.S. Navy from 1956 to 1958. At the end of his time in active service, Dr. Black continued to serve as a member of the United States Naval Reserves for four years.

Dr. Black has also dedicated himself to the people of North Carolina at the expense of his career as an optometrist and to the detriment of his own financial situation.

(c) *Dr. Black’s extraordinary life of service warrants departure.*

Dr. Black’s lifelong service to the people of North Carolina is nothing short of extraordinary and warrants a departure pursuant to U.S.S.G. § 5H1.11. As mentioned earlier, Dr. Black tirelessly served the people of North Carolina through eleven terms in the House of Representatives. Dr. Black served his state at the expense of his own career. Other cases in which downward departure has been allowed based upon civic, charitable, and public service demonstrate why Dr. Black’s service qualifies as extraordinary.

In *United States v. Woods*, 159 F.3d 1132 (8th Cir. 1998), the defendant pled guilty to bankruptcy fraud and money laundering and sought a downward departure based on her charitable activities of (1) taking in two troubled young women, one of whom was her niece, and paying for their education; and (2) caring for an elderly friend. *Id.* at 1136-37. The United States Court of Appeals for the Eighth Circuit upheld the downward departure, stating that “the district court thought these efforts by [defendant] were exceptional, and we have no basis for holding that they were not.” *Id.* at 1137.

United States v. Huber, 462 F.3d 945 (8th Cir. 2006), also is instructive. There, the court affirmed the district court's decision to allow a downward departure based upon the defendant's acts of loaning money to neighbors and others in need, which helped finance the start-up and continuation of businesses in the local community. *Id.* at 952. *See also United States v. Canova*, 412 F.3d 331 (2d Cir. 2005) (district court did not abuse its discretion by granting downward departure on basis of defendant's public service and good works, including past and present military and volunteer service).

The deeds found sufficient to warrant departures in *Woods*, *Huber*, and *Canova* pale in comparison to the civic and charitable deeds Dr. Black has performed throughout his lifetime. Dr. Black's exemplary and extraordinary life, best demonstrated by his selfless commitment to the people of North Carolina, certainly merits a departure.

VI. PROPOSED EYE CLINIC FOR INDIGENT PATIENTS

Instead of wasting taxpayers' valuable dollars by incarcerating Dr. Black, which the United States Probation Department estimates costs \$2,036.92 per month, this Court should require Dr. Black to use his profession, that of an optometrist, to benefit the community and to save the taxpayers money.

As an alternative to prison, this Court should, as a condition of probation, require Dr. Black to see indigent patients who otherwise would not receive any eye care. Attached as Exhibit 11, the Court will find a detailed business plan and pictures submitted by Dr. Black for just this purpose.

In this plan, the details of which are attached, Dr. Black would provide his services, free of charge, five days per week to those who could not afford to be treated otherwise. Dr. Black would provide the facility, the overhead, the equipment, and all of the resources necessary for 8 comprehensive eye examinations every day, which would come out to 2,000 examinations per

year. The total economic value of this project to taxpayers would be \$543,882 per year, and hundreds of indigent patients would receive eye care who otherwise would not. Dr. Black already owns the property for this proposed clinic, which is located in an economically deprived area. The pictures attached to the business plan show that this is a viable clinic that is currently being upfitted and could be up and running within a few days. Dr. Black has also arranged to have glasses donated to his clinic so it will be truly free to those who need it. This plan would allow Dr. Black to serve his punishment in a way that is beneficial to the community at large. This plan would save the taxpayers considerable money, and would provide indigent children with corrective vision services that would otherwise go unattended.

VII. CONCLUSION

Dr. Black violated the federal gratuities statute, as he fully admits. The actual criminal conduct, however, more closely resembles the offense of receiving illegal cash campaign contributions, which would be a misdemeanor if Dr. Black had been a federal official and allowed to plead guilty to that statute. Dr. Black lived an exemplary life of service to his family, friends and the people of North Carolina for 67 years before he committed this aberrational conduct. Given the totality of circumstances, including his poor health and that of his wife, his advanced age, and his willingness to give his professional services worth hundreds of thousands of dollars a year to indigent North Carolinians, Dr. Black respectfully moves the Court to depart downward from the calculated Sentencing Guidelines range and impose a sentence of probation with condition of house arrest and other conditions deemed appropriate by the Court.

Respectfully submitted this 9th 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 **SENTENCING MEMORANDUM** 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 9th day of July, 2007.

s/ Kenneth D. Bell
Kenneth D. Bell

s/ Jack M. Knight, Jr.
Jack M. Knight, Jr.