

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

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

UNITED STATES OF AMERICA)
)
 v.) **SENTENCING MEMORANDUM**
)
 JAMES BOYCE BLACK,)
 a/k/a Jim Black)

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby submits this memorandum for the Court's consideration in connection with the sentencing of the defendant, James Boyce Black, a/k/a Jim Black. This memorandum is divided into the following sections: (i) Introduction; (ii) Objections to Presentence Investigation Report ("PSR"); (iii) Response to Defendant's Request for Downward Departure; (iv) Information Related to Upward Departure Grounds; (v) Assessment of Defendant's Cooperation; and (vi) Section 3553 Factors.

I. INTRODUCTION

The defendant, James Boyce Black, a/k/a Jim Black, served as a member of the North Carolina House of Representatives from January 1985 to February 2007. Black was elected as Speaker of the North Carolina House of Representatives for four terms from 1999 to 2006. As Speaker of the House, the defendant wielded enormous influence over legislation and other state business, such as the budget of the State of North Carolina. Due in large part to the power held by the Speaker of the House, Speaker Black received

millions of dollars of campaign contributions from individuals and political action committees during his tenure as Speaker. Included among these contributors were chiropractors, optometrists, video poker operators, members of the payday lending industry, and lobbyists.

Sometime between 2000 and February of 2002, Speaker Black approached two chiropractors and informed them that cash payments would be more helpful than campaign contributions in gaining support from other members of the North Carolina House of Representatives. The two chiropractors agreed to provide Speaker Black with cash payments and ultimately recruited a third chiropractor to provide cash payments to Speaker Black. As noted below, the defendant received \$25,000 in cash payments and an improper check for \$4,000 from the following three chiropractors: (i) Dr. Thomas Brown; (ii) Dr. Fletcher Keith; and (iii) Dr. Steven Willen.¹

During the time period that the defendant received payments from the three chiropractors, a number of pieces of legislation pertaining to the chiropractic industry were considered by the North Carolina legislature, including legislation prohibiting health insurers from requiring patients to pay higher co-payments

¹The identity of these three chiropractors was made public at the defendant's guilty plea in state court on February 20, 2007. The Government has also consulted with counsel for each chiropractor and received consent to identify such persons during the sentencing proceedings in this case.

for visits to chiropractors than for visits to physicians.²

After the results of the general election of November, 2002, left the North Carolina House of Representatives with 61 Republican members and 59 Democratic members, it was unclear whether Speaker Black would be re-elected as Speaker. Consequently, Speaker Black met in the restroom of an IHOP Restaurant with Michael P. Decker Sr., a long time Republican member of the House of Representatives, and reached an agreement under which the defendant agreed to give Decker \$50,000 and one staff position in return for his promise to switch from the Republican Party to the Democratic Party and support the defendant for Speaker of the House.³

Pursuant to his agreement with Speaker Black, on January 23, 2003, just prior to the start of the legislative session, Decker switched his party affiliation. As a result of his party switch, the North Carolina House of Representatives was evenly split between 60 Republicans and 60 Democrats. This split allowed Speaker Black, after an 8-day stalemate, to negotiate a party sharing arrangement under which he was named co-speaker. Speaker

²During the 2005 legislative session, Speaker Black caused legislation to be drafted to accomplish this goal, and helped get it inserted into the House version of the Budget Bill (Senate Bill 622). The provision was ultimately passed into law. See North Carolina Session Laws, 2005-276, § 6.29, amending N.C. Gen. Stat. § 58-50-30(a3).

³On February 20, 2007, the defendant entered an Alford guilty plea to a two-count bill of information charging him with offering a bribe and obstruction of justice relating to his agreement with Decker. See Exhibit 1 hereto.

Black then gave about \$38,000 in campaign checks from his traditional supporters to Decker, along with \$12,000 in cash.

As noted in Exhibit 2, during the period from February, 2002, through December, 2005, chiropractors Thomas Brown, Fletcher Keith, and Steve Willen provided Speaker Black with \$29,000 in corrupt payments, of which \$25,000 was in the form of cash.⁴ A chart detailing the corrupt payments provided by such chiropractors to Speaker Black is attached hereto as Exhibit 2. It is noteworthy that, as was the case in striking his agreement with Decker, Speaker Black met Steve Willen in bathrooms to receive two of the corrupt cash payments.⁵

Speaker Black did not deposit the aforementioned cash payments, totaling approximately \$25,000, into the bank account of his campaign and did not report the payments to the North Carolina State Board of Elections ("NC-BOE") as campaign contributions. In receiving these payments and converting them to his own use,

⁴In addition to providing Speaker Black with corrupt payments during this time period, the chiropractors held fund-raisers for Speaker Black and met with Speaker Black to discuss legislation relevant to their practice.

⁵On December 14, 2004, Speaker Black met with chiropractor Steven Willen in a restaurant restroom in Concord and accepted \$4,000 in cash. On December 3, 2005, a fund-raiser for Speaker Black was held by a group of chiropractors at the Capital Grille in Charlotte, North Carolina. During the fund-raiser, Willen met Speaker Black in a restroom in order to secretly deliver to Speaker Black a \$3,000 cash payment. When a restaurant employee entered the restroom, Willen and Speaker Black stepped just outside the restroom and completed the delivery. Upon receiving the \$3,000 in cash, Speaker Black stated to Willen, "This is just between me and you. Don't you ever tell anybody about this."

Speaker Black intended to be rewarded in connection with the business of state government in which he participated, said state business involving many millions of dollars. On February 15, 2007, the defendant entered a guilty plea to receiving corrupt payments in connection with business of state government related to federal programs, in violation of 18 U.S.C. § 666(a)(1)(B).

II. OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT ("PSR")

The Government has two objections to the PSR: (A) the use of USSG §2C1.1, rather than USSG §2C1.2, in calculating the advisory guideline range in this case (see PSR ¶ 44); and (B) the inclusion of the amount of the bribe Black paid to Decker in the value of the payment from the chiropractors to Black, for purposes of USSG §2C1.1(b)(2) or USSG §2C1.2(b)(2), whichever is used (see PSR ¶¶ 21, 46). In subsection C below, the Government responds to the defendant's factual objection regarding the basis for the obstruction of justice enhancement.

A. Objection to the PSR's use of Guideline Section 2C1.1.

As stipulated by the parties in paragraph 5.a. of the Plea Agreement, the Government respectfully submits that the applicable guideline in this case is USSG §2C1.2, not §2C1.1. The Statutory Index to the USSG cites both of these guidelines for violations of 18 U.S.C. § 666(a)(1)(B). The Introduction to the index provides as follows:

If more than one guideline section is

referenced for the particular statute, use the guideline most appropriate for the offense conduct charged in the count of which the defendant was convicted.

USSG App. A. The Criminal Information to which the defendant pled guilty charges him with accepting things of value "intending to be **rewarded** in connection with the business" of state government. Criminal Information at 2 (emphasis added). The Government chose this charging language (instead of "intending to be **influenced**") because it concluded that a *quid pro quo* in this case was not readily provable. See United States v. Griffin, 154 F.3d 762, 763 (8th Cir. 1998) ("The distinction between a bribe and a gratuity is the corrupt intent of the person giving the bribe to receive a *quid pro quo*, something that the recipient would not otherwise have done."). In this case, Black received cash from persons who were campaign contributors and these persons in some respects treated these money transfers as campaign contributions, e.g., staying for the most part within the legal limit of \$4,000 per election cycle (even though they exceeded the legal limit for cash contributions). Cf. McCormick v. United States, 500 U.S. 257, 266, 273 (1991) (In the context of campaign contributions, the United States Supreme Court held that a conviction under the Hobbs Acts requires "proof of *quid pro quo*, that is, a promise of official action or inaction in exchange for any payment or property received."). Without an explicit *quid pro quo*, the defendant's solicitation of corrupt

payments from the chiropractors still constitutes the illegal acceptance of corrupt payments in connection with the business of state government. Consequently, focusing on the criminal conduct for which the defendant is being sentenced, the Court should apply USSG §2C1.2 in determining the defendant's advisory guideline range.

In a recent § 666 case, the Second Circuit discussed the distinction between bribes and gratuities:

Section 666 was patterned on the general federal bribery and gratuity statute, 18 U.S.C. § 201(b) [and] (c) . . . , although the language of the two provisions differs in significant respects. In United States v. Sun-Diamond Growers of California, 526 U.S. 398, 119 S.Ct. 1402, 143 L.Ed.2d 576 (1999), the Supreme Court, in construing the general federal bribery and gratuity statute, explained the difference between bribery-"influencing"-and illegal gratuity-"rewarding"-as follows:

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 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.

Sun-Diamond, 526 U.S. at 404-05, 119 S.Ct. 1402 (emphasis in original).

United States v. Ford, 435 F.3d 204, 210 (2nd Cir. 2006) (internal citation and footnote omitted). Under § 666, both bribes and

gratuities are corrupt payments, and that is why the statutory index to the Guidelines makes reference to both the bribe and gratuity guidelines. Given the corrupt nature of the payments, it is not surprising that the payments to Black were accomplished surreptitiously. But the Government lacked direct evidence of a *quid pro quo*—a specific intent of the chiropractors to give, and Black to receive, the payments in exchange for specific official acts.⁶ That is why the Criminal Information charged that Black solicited and accepted the payments intending to be **rewarded**, as opposed to **influenced**. Accordingly, the gratuity guideline, §2C1.2, should be used.

B. Objection to PSR's inclusion of the value of the Decker bribe in determining the relevant value of the payments to Black.

As stipulated by the parties in paragraph 5.a. of the Plea Agreement, the Government respectfully submits that, for purposes of USSG §§2C1.2(b)(2) and 2B1.1(b)(1), the applicable value of corrupt payments to the defendant does not exceed \$30,000. As shown in Exhibit 2 and in the Government proffer in the factual basis filed on February 15, 2007, the best estimate of the total amount of cash payments, based on the interviews of chiropractors

⁶This is in contrast to the Black/Decker transaction, on which Michael Decker's federal conviction and Black's state court conviction for bribery are based. In that matter, there is direct evidence of an explicit *quid pro quo* for Black to pay Decker in exchange for the official acts of Decker switching parties and voting for Black as Speaker.

Thomas Brown, Fletcher Keith, and Steven Willen, and other evidence, is \$25,000. A non-cash payment that was similarly treated by the defendant, specifically, a \$4,000 check from Dr. Thomas Brown, should also be counted as part of the "value of the gratuity," USSG §2C1.2(b)(2).

The defendant does not dispute that he received \$25,000 in corrupt cash payments from the chiropractors, but disputes that the \$4,000 check from Thomas Brown was a corrupt payment. The defendant claims that the check was merely a legal campaign contribution that was accidentally deposited into his personal account by his office assistant because Dr. Brown had made the check payable to "Jim Black." Defense counsel then argues that this mistake was discovered when the defendant was preparing to respond to NC-BOE subpoenas and the money was reimbursed to the contributor. However, the defendant fails to address the fact that he met with Dr. Brown in January or February of 2006, after the defendant was fully aware of the federal grand jury investigation, and instructed Dr. Brown that if questioned about the \$4,000 check to state that it was a gift to the defendant to cover his personal expenses. The defendant's attempt to influence Dr. Brown's statements to investigators about the nature of the \$4,000 check evidences the corrupt nature of such payment.

The PSR, in paragraph 46, reaches an applicable value figure of \$200,000-\$400,000. In order to reach this figure, the PSR

includes the \$29,000 in corrupt payments from the chiropractors to Black, \$67,100 in cash and checks provided by Black to Decker, the \$360 that Black spent at the Red Roof Inn to house Decker during the period surrounding the vote for Speaker in 2003, the \$82,575.45 in salary for the staff position allocated to Decker as part of his deal with Black, and the \$48,000 allocated by Black to create a position for Decker at the North Carolina Department of Cultural Resources.

The Government submits that these amounts are not properly included in the value of the gratuity (or bribe, if §2C1.1 is used). The offense to which Black pled guilty was **receiving** corrupt payments **from** the chiropractors. The amounts that Black **paid to** Decker are not part of the offense of conviction, or preparation for or concealment of the offense, or part of the same course of conduct or common scheme or plan as the offense. See USSG §1B1.3(a). The bribe of Decker by Black was a completely separate act by Black. As part of the negotiated plea in this case, the Government agreed not to charge Black in connection with the bribe of Decker. Plea Agreement, ¶ 4.c. Black did plead guilty in state court to bribing Decker, in violation of N.C.G.S. § 14-218, and he is accountable for that conduct in that court. See Exhibit 1.

Thus, the correct loss attributable to the defendant is \$29,000. The Government believes, however, that the information

about Black's bribe of Decker is appropriately included in the PSR for the Court to consider as background information in determining the ultimate sentence.

C. Government's response to the defendant's efforts to minimize his efforts to obstruct the federal grand jury investigation.

As noted above, the defendant objects to the inclusion of the \$4,000 check from Dr. Brown as part of the loss figure for purposes of computing the defendant's advisory guideline range.⁷ With regard to the defendant's efforts to get Dr. Brown to lie to investigators about the purpose of the \$4,000 payment, the defendant argues that any comments made to Dr. Brown about the \$4,000 cannot support an obstruction enhancement because the \$4,000 check did not constitute illegal conduct. This argument is meritless. At the time of the statement to Dr. Brown in January-February 2006, Black well knew that federal and state investigations into his fund-raising were underway. The defendant's effort to influence whatever information Dr. Brown might give to investigators about this payment clearly constitutes an obstruction of justice within the meaning of the Guidelines. USSG § 3C1.1, comment. (n.4(a), (b), & (i)).

⁷Exclusion of this \$4,000 would not change the guideline calculation. Both USSG §§ 2C1.1(b)(2) and 2C1.2(b)(2) reference the table in USSG §2B1.1(b)(1). For any amount over \$10,000 and under \$30,000, the guideline adjustment is the same. USSG §2B1.1(b)(1)(C). The number used by the PSR, which includes the value of the bribe Black paid Decker, is \$227,035.45. PSR ¶ 21. Subtracting \$4,000 from this figure would not make no difference in guideline application. USSG §2B1.1(b)(1)(G).

The defendant engaged in the same obstructive conduct months later in attempting to get the chiropractors to lie to a federal grand jury. Each of the three chiropractors who made cash payments to Speaker Black received a Grand Jury subpoena requiring their appearance before a Federal Grand Jury in Raleigh, on August 16, 2006. On August 15, 2006, Speaker Black personally visited Fletcher Keith, under the guise of a sore shoulder, and indicated that he was aware of the subpoenas. Speaker Black then suggested that the three chiropractors should tell the Grand Jury that the cash payments to Speaker Black consisted of "a little bit of money to help [Black] with expenses along the road while [Black] was out running around the country."

The defendant's repeated efforts to influence the testimony of potential witnesses before a Federal Grand Jury clearly warrants the enhancement for obstruction of justice, pursuant to USSG § 3C1.1.

III. RESPONSE TO DEFENDANT'S REQUEST FOR DOWNWARD DEPARTURE

It appears that the defendant will seek a downward departure based on two claims: (1) because the defendant refrained from commission of his first crime until the age of 73; (2) because of the years of public service provided by the defendant; and (3) due to his physical and mental condition. The Government respectfully submits that each of these arguments fail to support a downward departure.

The defendant's claim that a downward departure is necessary because he refrained from crime for the first 70 years of his life is contrary to the facts. The defendant's history of violating campaign finance laws dates back to at least 2000. For example, in June of 2000, the defendant, while serving as Speaker of the House of Representatives, received a \$500,000 check from a lobbyist ("the Lobbyist"), which was deposited directly into his campaign account. The defendant then wrote a check out of his campaign account back to the Lobbyist, but shortly thereafter made another deposit of \$500,000 into his campaign account. In the defendant's NC-BOE filings he reflected this entire transaction simply as a personal loan to his campaign. As a matter of law, each of these transactions should have been disclosed in his filings with the NC-BOE.⁸

The defendant also admitted during an NC-BOE hearing in February of 2006, to filling Decker's name in on the payee line of at least two blank-payee-line checks from optometrists, totaling \$4200. See Order of Judge Dever, filed June 5, 2007, at 15. This has been found to be a violation of North Carolina campaign finance laws. See generally state-court criminal information (Exhibit 1 hereto) (Count Two), and transcript of February 20, 2007, plea hearing, judicially noted in Judge Dever's Order, filed June 5,

⁸The facts related herein about these transactions comes from information provided to the Government by North Carolina state officials and records, and is independent of any information provided by the defendant pursuant to his plea agreement. See Plea Agreement, ¶ 4.e.; USSG §1B1.8.

2007, at 2 n.3. Likewise, the defendant's bribe to Decker in late 2002 stands as a separate criminal offense, of which the defendant has been convicted in state court. In light of such criminal activities, it is clear that the illegal conduct in accepting corrupt payments from the chiropractors was not aberrant conduct by the defendant.

The defendant's claim that his long years of public service warrant a downward departure is not persuasive. As shown from the facts in this case, the defendant's corrupt conduct has done great damage to any confidence citizens of North Carolina might have in their elected officials. The defendant, while holding one of the most powerful positions in State government, repeatedly engaged in corrupt conduct. Thus, a downward departure for "public service" is not warranted on this ground.

The defendant is unable to show how his age, physical condition, and mental condition warrant a downward departure. The facts in this case show that the defendant, who is 72 years of age, has been an avid golfer and has remained more active than most persons his age. Furthermore, any issues surrounding his mental condition differ very little from other persons facing a term of imprisonment.

IV. INFORMATION RELATED TO UPWARD DEPARTURE GROUNDS

In an Order entered by Judge Dever, prior to his recusal from the case, the court stated:

The grounds for this possible upward departure include application note 7 of U.S.S.G. § 2C1.1 . . . , circumstances not adequately taken into account under U.S.S.G. § 5K2.0, [and] disruption of governmental function under U.S.S.G. § 5K2.7 As for the issue under U.S.S.G. § 2C1.1, 5K2.0, or 5K2.7, the court wants to receive evidence concerning 2007 legislative remedial measures that the General Assembly has taken with respect to laws concerning chiropractors.

Order, filed May 1, 2007, at 2. See also PSR ¶ 68.

The defendant solicited corrupt payments intending to be rewarded for his conduct of the business of state government. As noted above, in 2005, Speaker Black was instrumental in causing a law to be passed prohibiting health insurers from requiring patients to pay higher co-payments for visits to chiropractors than for visits to physicians. Following the defendant's guilty pleas on corruption charges in state and federal court, the North Carolina legislature repealed this provision. See history of law repealing chiropractic law attached as Exhibit 2.

V. ASSESSMENT OF BLACK'S COOPERATION

Under Paragraph 4.d. of the Plea Agreement, the Government is obligated to make known to the Court the nature and extent of the defendant's cooperation pursuant to the plea agreement, including whether the defendant has rendered substantial assistance in the investigation or prosecution of others. See USSG §5K1.1. The defendant submitted to two debriefings by investigative agents and Government attorneys. The information provided by the defendant in these sessions did not substantially assist in the investigation or

prosecution of others, nor it is likely to ripen into such assistance.

The defendant provided mostly what might be described as intelligence information about activities in state government. Much of what the defendant reported was already known to investigators, from news accounts and other sources. Moreover, it is the Government's assessment that the defendant was not completely forthcoming and truthful in the debriefing. The Government is prepared to proffer on this subject at the sentencing hearing if the Court desires more detail on this assessment.

VI. SECTION 3553 FACTORS

After the Court determines the applicable guideline range, the Court "must determine whether a sentence within that range serves the factors set forth in [18 U.S.C.] § 3553(a) and, if not, select a sentence within the statutory limits that does serve those factors." United States v. Davenport, 445 F.3d 366, 370 (4th Cir. 2006) (quoting United States v. Moreland, 437 F.3d 424, 432 (4th Cir. 2006)). "In doing so, the district court should first look to whether a departure is appropriate based on the Guidelines Manual or relevant case law" Id. Whether or not the Court finds that there is an appropriate basis for departure, the Court must then decide whether to further adjust the sentence by "impos[ing] a non-guideline sentence (a 'variance sentence')." Id. "The explanation of the variance sentence must be tied to the factors

set forth in §3553(a) and must be accompanied by findings of fact as necessary. The district court need not discuss each factor in checklist fashion; it is enough to calculate the range accurately and explain why (if the sentence lies outside it) this defendant deserves more or less." Id.

As explained in Section III above, the Government submits that there are no applicable grounds for downward departure. In Section IV above, the Government has submitted information from which the Court can make a determination on upward departure, and stands ready to answer at the sentencing hearing any inquiries from the Court regarding facts that the Court may deem relevant to departure.

The Government respectfully submits that each § 3553(a) factor that is applicable on the facts of this case should be considered aggravating, and not mitigating: the nature and circumstances of the offense; the history of the defendant; the seriousness of the offense; the need for deterrence; and the need to avoid unwarranted sentence disparities among defendants with

similar records who have been found guilty of similar conduct. 18
U.S.C. §3553(a).

Respectfully submitted, this 9th of July, 2007.

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CERTIFICATE OF SERVICE

This is to certify that I have this 9th day of July, 2007, served a copy of the foregoing upon the defendant in this action either electronically or by depositing a copy of the same in the United States mail in a postpaid envelope addressed as follows:

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