

IN THE UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF NORTH CAROLINA
 WESTERN DIVISION
 No. 5:06-CR-197-1D

FILED IN OPEN COURT
 ON 4/27/07
 Dennis P. Iavarone, Clerk
 US District Court
 Eastern District of NC

UNITED STATES OF AMERICA)
)
 v.)
)
 MICHAEL P. DECKER, SR.,)
)
 Defendant.)

ORDER

On August 1, 2006, Michael P. Decker, Sr. (“Decker” or “defendant”) pleaded guilty, pursuant to a plea agreement, to conspiracy to commit extortion under color of official right, honest services mail fraud, and money laundering in violation of 18 U.S.C. § 371. The statutory maximum is 5 years imprisonment and a \$250,000 fine. The U.S. Probation office prepared a Presentence Investigation Report (“PSR”), to which Decker did not object. The PSR calculates an advisory guideline range under the U.S. Sentencing Guidelines of 37 to 46 months imprisonment.

On April 11, 2007, the court notified the parties it was concerned that the PSR did not fully account for the benefits Decker received from his criminal conduct and wanted to receive evidence at sentencing regarding when the United States became aware of certain benefits Decker received during his criminal conspiracy with former Speaker Jim Black of the North Carolina House of Representatives. This evidence pertains to the calculation of Decker’s base offense level under the United States Sentencing Guidelines (“Guidelines” or “U.S.S.G.”). Additionally, the court provided notice pursuant to Rule 32(h) of the Federal Rules of Criminal Procedure that it was contemplating an upward departure from the advisory guideline range calculated in the PSR and a variance above the advisory guideline range established at sentencing. On April 19, 2007, Decker filed a sentencing memorandum and provided notice that he intended to request a downward variance from the

advisory guideline range. On April 20, 2007, the government filed a sentencing memorandum and a motion for a downward departure pursuant to U.S.S.G. § 5K1.1 due to Decker's substantial assistance to the government. On April 24, 2007, the government filed a response to defendant's sentencing memorandum.

On April 27, 2007, the court held a sentencing hearing. The court has considered the PSR, all of the evidence presented, and the arguments and submissions of counsel. The court enters this order to explain Decker's sentence.

I.

Except as set forth below, the court accepts the facts as set forth in the Presentence Report. Decker was elected as a Representative in the North Carolina General Assembly in November 1984 and took office in January 1985. See PSR ¶ 3. He was reelected to represent his Forsyth County district in 1986, 1988, 1990, 1992, 1994, 1996, 1998, 2000, and 2002. See PSR ¶ 3.

As a result of the November 2002 general election, the North Carolina House of Representatives had 61 Republican members (including Representative Decker) and 59 Democratic members (including Speaker Jim Black). At that time, it was uncertain who would become the Speaker of the House when the General Assembly convened in January 2003. The Speaker of the House wields immense power within the House, including control over committee assignments, appointments to boards and commissions, the budget, and determining (in essence) whether any piece of legislation will receive a vote on the House floor. See PSR ¶ 3.

As of November 2002, Jim Black, a Democrat, represented a district in Mecklenburg County and had served as Speaker of the House since January 1999. Jim Black had represented a Mecklenburg County district in the North Carolina House of Representatives since the early 1990s and also during the 1980s.

Decker contacted Speaker Black in late 2002 and met with him twice at a restaurant in Salisbury, North Carolina. Decker was experiencing financial difficulties. See PSR ¶ 4. During the second meeting, Decker and Black spoke in a public restroom at the restaurant. Decker proposed a scheme to Black: in exchange for \$50,000 in cash and other things of value, Decker would switch affiliation to the Democratic Party thereby creating a 60-60 tie in the House and vote to support Black in his quest to remain Speaker. See PSR ¶ 4; Crim. Inf. ¶ 1. Black agreed to the scheme, but stated that he would provide \$50,000 to Decker in the form of campaign checks (instead of cash) because such checks would be easier to explain. At the time of the conspiracy, North Carolina law permitted a legislator to convert campaign contributions to personal use so long as the legislator reported the campaign contributions to the North Carolina Board of Elections.

On January 24, 2003, before the start of the legislative session, Decker switched party affiliation and registered as a Democrat. Crim. Inf. ¶ 2. Decker's party switch was widely reported in the press, and Decker and Black denied any impropriety in connection with the switch. The resulting 60-60 tie between Democrats and Republicans in the House enabled Black to negotiate an agreement with Republican Representative Richard Morgan to share the position of Speaker of the House. Each was designated co-Speaker. Following Decker's switch to the Democratic Party, Black funneled approximately \$38,000 in campaign checks to Decker from Black's contributors. See Crim. Inf. ¶ 4. Decker had never before received financial support from these contributors. See PSR ¶ 4. As a sign of Speaker Black's power, however, when Speaker Black asked these individuals and political action committees (PACs) to make campaign contributions to Decker, they promptly did so. Further, Speaker Black delivered \$12,000 in cash in an envelope to Decker. See Crim. Inf. ¶ 4. Decker took the cash home and put it in a safe. See PSR ¶ 4. After a period of time, Decker spent

the cash and deposited approximately \$1,000 into his own personal checking account. See PSR ¶ 4. Decker also converted the overwhelming majority of the campaign checks to his own personal use.

Another part of Decker and Black's scheme involved Speaker Black authorizing Decker to hire an administrative assistant and pay him \$50,000. See PSR ¶ 5. After securing his position as co-Speaker, Black created the administrative assistant position at a salary of \$46,000. See PSR ¶ 5. Decker then hired his son Michael Decker, Jr. (who knew nothing of the corrupt scheme and who was qualified for the job) to fill the position. See PSR ¶ 5. Decker later complained to Black that his son's salary was only \$46,000. See PSR ¶ 10. Black then provided Decker \$4,000 in campaign checks from Black's supporters to supplement his son's salary. See PSR ¶ 5, n.1.

In September 2003, after the General Assembly adjourned, Decker switched party affiliation back to the Republican Party. He sought reelection, but was defeated in the Republican primary in July 2004. Decker, however, remained a legislator for the balance of 2004. After Decker's reelection bid failed in July 2004, Decker "agreed to keep his campaign account open in case there was a need to run some money through it." Crim. Inf. ¶ 5. On August 24, 2004, Speaker Black's campaign contributed \$4,000 by check to Decker's campaign. See PSR ¶ 7. On February 9, 2005, Black's campaign made an additional \$4,000 contribution by check to Decker's campaign. See PSR ¶ 7. Decker converted these funds to his own personal use. See Crim. Inf. ¶ 5.

As a result of the November 2004 election, Democrats controlled 63 House seats and Republicans controlled 57 House seats. In January 2005, Decker was no longer in the House of Representatives, and Jim Black was again elected Speaker. Because Jim Black won a majority vote within the House, Black was the sole speaker. The co-speakership with Representative Richard Morgan ended.

In January 2005, Decker was unemployed and asked Black whether he could help Decker get a job. See PSR ¶ 6. Black agreed, and he instructed the North Carolina Department of Cultural Resources to create and fund a “community development specialist” position within the department. See PSR ¶ 6. Speaker Black’s staff informed the Department of Cultural Resources that there was a desired employee for the job and provided the department with a salary recommendation and draft job description before the department solicited applications. See PSR ¶ 6. The Department of Cultural Resources hired Decker at an annual salary of \$48,000 in February 2005. See PSR ¶ 6. In March 2005, the press reported on the creation of the job and Decker’s hiring. See U.S. Sent’g Mem., Ex. 2. Both Decker and Black denied any impropriety in connection with creating the job or Decker’s hiring. See id.

In June 2005, Decker received a federal grand jury subpoena concerning his activities while a legislator and after leaving office. At the direction of Speaker Black, Black’s campaign promptly sent \$5,000 to the White & Crumpler law firm, which Decker had retained after receiving the federal grand jury subpoena. In early 2006, the North Carolina Board of Elections began hearings on Black’s campaign finance operation. Black testified at the hearings and denied wrongdoing. Decker declined to testify, invoking his Fifth Amendment privilege against self-incrimination. The Board of Elections determined that state election law may have been violated and asked the Wake County District Attorney to investigate.

Decker’s employment with the Department of Cultural Resources ended on March 3, 2006. See PSR ¶ 25. On March 6, 2006, Decker and the United States entered into a proffer agreement for the purpose of Decker being interviewed to evaluate his conduct and the value of his information. See U.S. Sent’g Mem. 5-6. On May 31, 2006, Decker and the United States signed a plea agreement.

See U.S. Resp. to Def.'s Sent'g Filing 2. On August 1, 2006, Decker and the United States signed and executed an essentially identical plea agreement, and Decker pleaded guilty to the criminal information. See Plea Agreement, United States v. Decker, No. 5:06-CR-197-1-D (E.D.N.C. Aug. 1, 2007); U.S. Resp. to Def.'s Sent'g Filing 2. According to the United States, “[w]ith Decker’s cooperation now publicly known, the investigation gained new momentum.” U.S. Mot. for Downward Departure Due to Substantial Assistance ¶ 5. Within two weeks, three Black contributors who had received federal grand jury subpoenas agreed to cooperate with the investigation and signed proffer agreements. Id. These contributors admitted giving cash to Black while he was Speaker. According to the United States, “[t]hese disclosures, following further investigation, formed the basis of the federal charge against Jim Black” Id.

In November 2006, Black narrowly won reelection to the North Carolina House of Representatives. Throughout the campaign, Black maintained that he had done nothing improper and vowed to seek another term as Speaker. However, in December 2006, Black announced that he would not seek the speakership. On February 14, 2007, Black resigned from the House of Representatives.

On February 15, 2007, Black pleaded guilty in this court to violating 18 U.S.C. § 666(a)(1)(B). On February 20, 2007, Black entered an Alford plea to two charges in Wake County Superior Court. See North Carolina v. Alford, 400 U.S. 25 (1970). First, he pleaded guilty to offering a bribe and giving a bribe to Decker in the form of United States currency and checks. The information stated, “At the time this money and these checks were offered and given to [Decker] by [Black], [Black] knew that [Decker] was a Representative and it was intended that this money and these checks would influence his performance of an official duty, to wit: voting in the election for

the Speaker of the House of Representatives.” State v. Black, No. 07CRS10444, Information, ¶ 1 (filed Feb. 20, 2007). “This act was done in violation of N.C.G.S. § 14-218” Id. Second, Black pleaded guilty to obstruction of justice. Specifically, “on or between February 14, 2002, and December 3, 2005, in Wake County, [Black] unlawfully, willfully and feloniously did in secret and with malice obstruct public justice in his role as a candidate for the North Carolina House of Representatives by soliciting and collecting campaign contributions in the form of checks that had blank payee lines and cash. [Black] converted the cash and checks for his own use and failed to turn the contributions over to the treasurer of the Jim Black Campaign, causing her to file campaign finance disclosure reports to the State Board of Elections that were not complete, true, and correct” Id. ¶ 2.

II.

The Fourth Circuit has described the process for imposing a sentence under the now-advisory sentencing guidelines:

First, the court must correctly determine, after making appropriate findings of fact, the applicable guideline range. Next, the court must determine whether a sentence within that range serves the factors set forth in § 3553(a) and, if not, select a sentence within statutory limits that does serve those factors. In doing so, the district court should first look to whether a departure is appropriate based on the Guidelines Manual or relevant case law If an appropriate basis for departure exists, the district court may depart. If the resulting departure range still does not serve the factors set forth in § 3553(a), the court may then elect to impose a non-guideline sentence (a “variance sentence”). The district court must articulate the reasons for the sentence imposed, particularly explaining any departure or variance from the guideline range. The explanation of a 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 set forth in § 3553(a) 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.

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)); accord United States v. McClung, 2007 WL 1203018, at *3-4

(4th Cir. Apr. 25, 2007); United States v. Tucker, 473 F.3d 556, 560-61 (4th Cir. 2007). Of course, this court recognizes its duty to impose a sentence sufficient, but not greater than necessary, to comply with the purposes of 18 U.S.C. § 3553(a). See Tucker, 473 F.3d at 561; 18 U.S.C. § 3553(a).

A.

The base offense level for a violation of 18 U.S.C. § 371 is found in section 2X1.1 of the sentencing guidelines, which provides that the base offense level for a conspiracy is the base offense level for the substantive offense. See U.S.S.G. § 2X1.1(a) (2006). The base offense level for extortion under color of official right is located in section 2C1.1. Id. § 2C1.1. Under section 2C1.1(a)(1), the base offense level is 14 if the defendant was a public official. Id. § 2C1.1(a)(1). Accordingly, the court initially finds that the base offense level is 14.

Section 2C1.1(b) provides specific offense characteristics that increase the offense level. Id. § 2C1.1(b). “If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with the public official, or the loss to the government from the offense, whichever is greater, exceeded \$5,000,” the court uses the table in section 2B1.1 to increase the offense level corresponding to that amount. Id. § 2C1.1(b)(2). “The aggregate amount of the covered bribes is to be derived from the sum total of all relevant conduct” United States v. Tejada-Beltran, 50 F.3d 105, 109 (1st Cir. 1995). “Relevant conduct” includes:

all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and . . . in the case of a jointly undertaken criminal activity . . . , all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

U.S.S.G. § 1B1.3(a)(1); United States v. Newsome, 322 F.3d 328, 339 (4th Cir. 2003). However,

“[w]here a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and . . . the government agrees that self-incriminating information . . . will not be used against the defendant, then such information shall not be used in determining the applicable guideline range.” U.S.S.G. § 1B1.8(a); see United States v. Washington, 146 F.3d 219, 221-22 (4th Cir. 1998); United States v. Fant, 974 F.2d 559, 562-65 (4th Cir. 1992). The prohibition in section 1B1.8 does not extend to information “known to the government prior to entering into the cooperation agreement.” U.S.S.G. § 1B1.8(b)(1).

The PSR counts \$38,000 in campaign checks that Black gathered from his supporters and funneled in early 2003 to Decker directly after Decker’s switch to the Democratic Party, \$12,000 in cash that Black delivered in early 2003 to Decker, \$1,500 in campaign checks gathered from Black’s supporters that Black funneled in 2003 to Decker to compensate for the difference in the salary promised for the administrative assistant position in Decker’s office, and \$8,000 in campaign checks that Black’s campaign issued to Decker’s campaign following Decker’s July 2004 defeat in the Republican primary. See PSR ¶ 11. The resulting total of \$59,500 set forth in the PSR corresponds with a 6-level increase to the offense level. See U.S.S.G. § 2B1.1(b)(1).

The PSR does not count the \$46,000 annual salary for the administrative assistant position for Decker’s son, the additional \$2,500 in campaign checks from Black’s supporters that Decker received from Black concerning the administrative assistant position, the \$48,000 annual salary for the position in the North Carolina Department of Cultural Resources that Black created for Decker in 2005, and the \$5,000 payment that Black’s campaign made to the White & Crumpler law firm in 2005. See PSR ¶ 11. If these sums were counted, the total value of the benefits received by Decker would be more than \$200,000 and the offense level would be increased by 12 levels. See U.S.S.G. § 2B1.1(b)(1).

On April 11, 2007, the court issued an order indicating it wanted to receive evidence on when the United States became aware of these uncounted benefits. Cf. U.S.S.G. § 1B1.8(a); Plea Ag. ¶ 4(e). In response, the United States stated that it knew in March 2005 that Black had given Decker authority to hire an administrative assistant. U.S. Sent'g Mem. 7. The United States also stated that it had interviewed Michael Decker, Jr. about the job three times before Michael Decker, Sr. entered into the May 2006 plea agreement with the United States. Id. However, the United States stated it learned that the administrative assistant position was part of the conspiracy between Decker and Black only after Decker entered into the plea agreement. Id. Regarding Decker's position at the North Carolina Department of Cultural Resources, the United States stated it learned by March 2005 that Black created the position for Decker. Id. at 8. The United States stated it could not locate any evidence that it had learned prior to Decker's cooperation with the United States about the \$5,000 Black's campaign paid the White & Crumpler law firm in 2005. Id. at 8-9. Further, the United States clarified that Decker actually received \$41,600 in campaign checks from Black's supporters immediately after Decker switched parties. See id. at 4. This \$41,600 figure clarifies the statement in Decker's criminal information that he received "about \$38,000." Crim. Inf. ¶ 4.

In calculating its U.S.S.G. § 2B1.1 figure, the United States counts the \$43,100 in campaign checks from Black's supporters that Black provided Decker (i.e., \$41,600 immediately after Decker's party switch plus \$1,500 later due to the administrative assistant issue), \$12,000 in cash that Black provided Decker, and \$8,000 in campaign checks that Black's campaign paid to Decker after his July 2004 defeat. These amounts total \$63,100 in benefits of which the United States was aware at the time of the plea agreement. Id. at 9-10. This total, like the calculation in the PSR, corresponds with a 6-level increase to the offense level in the table in section 2B1.1. See U.S.S.G. § 2B1.1(b)(1).

In the plea agreement between Decker and the United States, the parties stipulate that the value of the benefits from the conspiracy is between \$30,000 and \$70,000. Plea Ag. ¶ 5(a). This amount falls within the range for a 6-level increase. As the plea agreement states, the court is not bound by the parties' stipulation. Plea Ag. ¶ 5; see United States v. Williams, 880 F.2d 804, 806 (4th Cir. 1989); U.S.S.G. § 6B1.4(d). Likewise, the calculations in the PSR are not binding on the court. See United States v. Gordon, 895 F.2d 932, 936 (4th Cir. 1990).

Based on the government's submissions of April 20, 2007, and April 24, 2007, the court finds that the United States knew prior to the May 2006 plea agreement that Black gave Decker authority to hire an administrative assistant and that Black created Decker's position in the North Carolina Department of Cultural Resources. However, in an abundance of caution and in order to follow the dictates of U.S.S.G. § 1B1.8(a), Decker's plea agreement of May 31, 2006, and his plea agreement of August 1, 2006, the court will not count those benefits (or the payment to White & Crumpler) for purposes of determining the offense level under section 2B1.1 or for any other purpose in sentencing Decker. Accordingly, for purposes of Decker's sentencing, the court finds that the value of benefits that Decker received from the conspiracy is \$63,100. See Gov't Ex. 1. Thus, pursuant to sections 2C1.1(b)(2) and the table in 2B1.1, the base offense level of 14 is increased by 6 levels to 20. Also, because Decker's offense involved an elected public official, his offense level is increased an additional 4 levels to 24 pursuant to section 2C1.1(b)(3). See U.S.S.G. § 2C1.1(b)(3).

The court has considered whether to make an adjustment for Decker's role in the conspiracy pursuant to section 3B1.1(c), which authorizes a 2-level increase "[i]f the defendant was an organizer, leader, manager, or supervisor" of criminal activity. Id. § 3B1.1(c); id. cmt. n.2; United States v. Harriott, 976 F.2d 198, 202 (4th Cir. 1992) (2-level enhancement appropriate where defendant directed activities of one other person). Factors distinguishing a leadership or

organizational role from a mere management or supervisory role include exercise of decision-making authority, the nature of the participation in the offense, recruitment of accomplices, the claimed right to a larger share of the proceeds, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised. U.S.S.G. § 3B1.1 cmt. n.4. “There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy.” Id. In order to invoke section 3B1.1, a district court must determine “status” and “scope.” See Tejada-Beltran, 50 F.3d. at 111; United States v. Smith, 914 F.2d 565, 569 (4th Cir. 1990). The “status” determination focuses on whether the defendant acted as an “organizer,” “leader,” “manager,” or “supervisor” of the criminal activities. See Tejada-Beltran, 50 F.3d at 111. The “scope” determination focuses on the number of participants in the criminal activities or the extensiveness of the criminal activities. See id.

The government and Decker argue that he should not receive an enhancement under U.S.S.G. § 3B1.1. See U.S. Sent’g Mem. 10; Def.’s Resp. to Court’s Order Filed 4/11/2007 ¶ 8. Having considered an enhancement under U.S.S.G § 3B1.1 in light of Decker’s role in the offense, the court declines to add a 2-level increase under U.S.S.G. § 3B1.1(c).

Finally, Decker has accepted responsibility for the offense, warranting a 3-level decrease pursuant to section 3E1.1(b). See U.S.S.G. § 3E1.1(b). In light of the foregoing, the court finds that the total offense level is 21. When this offense level is coupled with a criminal history category of I, Decker has an advisory guideline range of 37 to 46 months imprisonment.

B.

The court next must determine whether a sentence within that advisory guideline range serves the factors set forth in 18 U.S.C. § 3553(a), and, if not, select a sentence within statutory limits that does serve those factors. In doing so, the court first looks to whether a departure is appropriate based

on the sentencing guidelines or relevant case law. See, e.g., Tucker, 473 F.3d at 560; Davenport, 445 F.3d at 370. In its order of April 11, 2007, the court identified the following possible grounds for an upward departure: application note 7 of section 2C1.1, circumstances not adequately taken into account under section 5K2.0, disruption of governmental function under section 5K2.7, and uncharged conduct under section 5K2.21. As in calculating the advisory guideline range, the court has not considered for purposes of upward departure any self-incriminating information that Decker provided pursuant to his plea agreements with the United States. See, e.g., U.S.S.G. § 1B1.8(a). The court may, however, consider facts that the defendant admitted in his guilty plea to the offense. See Crim. Inf. ¶¶ 1-5.

Application note 7 to section 2C1.1 of the sentencing guidelines states that when “the defendant’s conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted.” U.S.S.G. § 2C1.1 cmt. n.7 (emphasis added). In light of the egregious nature of Decker’s crime, the length and elaborate nature of the conspiracy, and the deleterious effects that the offense has had and continues to have on North Carolina government, the court finds that Decker’s conduct was part of a systematic and pervasive corruption of the General Assembly that “may” and has caused a profound loss of public confidence in North Carolina government. In forming, furthering, and covering up this criminal conspiracy, Decker and Black did not operate in shades of gray or merely outmaneuver political opponents. Decker and Black’s corruption attacks the core of representative government in North Carolina. While every conspiracy to extort money under color of official right involves public corruption, the effects of Decker and Black’s scheme were extraordinary. Decker and Black’s actions subverted the 2002 general election and the ability of North Carolina’s 120 representatives to have an honest election of the Speaker in January 2003.

Instead of an honest election, Decker and Black duped all members of the General Assembly and swung control of the Office of the Speaker to a corrupt official – Jim Black. As stated, the Speaker of the North Carolina House of Representatives wields enormous power over the legislative process. Even in the co-speakership that Black shared in 2003 and 2004, Black wielded immense power. Further, what began as a bathroom bribery scheme where Decker sought money and Black sought to retain power became a prolonged effort to cover up the conspiracy.

In finding that Decker and Black’s corrupt conspiracy may have caused, has caused, and continues to cause a profound loss of public confidence in North Carolina government, the court notes that this case has been the subject of widespread media coverage in North Carolina and beyond. Cf. United States v. Reyes, 239 F.3d 722, 744-45 (5th Cir. 2001) (widely reported media coverage can fuel public perception of corruption); United States v. Reece, 1998 WL 116163, at *2 (4th Cir. Mar. 17, 1998) (per curiam) (unpublished) (multiple news reports support finding of loss of public confidence in government). Citizens of North Carolina have learned that one veteran legislator (Decker) sold his office to another veteran legislator (Black) for cash and other benefits. Each then took steps to further and cover up the conspiracy. Such a flagrant breach of the public trust undermines respect for the rule of law and faith in representative government. Accordingly, the court finds that Decker’s actions were part of a systematic and pervasive corruption that not only “may cause,” but has caused a loss of public confidence in North Carolina government and that an upward departure is appropriate under application note 7 to section 2C1.1.

Section 5K2.0 provides that a district court may depart from the guidelines where it determines that there exists “an aggravating circumstance[] of a kind or to a degree not adequately taken into consideration” by the guidelines. U.S.S.G. § 5K2.0. “Before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases

in the Guideline.” Koon v. United States, 518 U.S. 81, 98 (1996); United States v. Rybicki, 96 F.3d 754, 757 (4th Cir. 1996). “To determine whether a circumstance or consequence is ‘atypical’ or ‘unusual,’ and, therefore, capable of taking a case out of the applicable guideline’s heartland, district courts should consider not only the Guidelines themselves, but also the Sentencing Commission’s policy statements and official commentary.” Rybicki, 96 F.3d at 757.

In calculating his offense level, Decker received a 4-level increase for being an elected public official. See U.S.S.G. § 2C1.1(b)(3). However, that increase fails to adequately account for magnitude of Decker and Black’s criminal scheme. Decker and Black’s scheme involved a Representative and the Speaker of the House. The scheme defrauded the citizens of North Carolina, and also defrauded all of the legislators in the House in connection with a vote for the most powerful position in the House. The scheme resulted in Black retaining power as co-Speaker in 2003 and 2004. That role (and the success of the cover up) enabled Black to again become the sole Speaker of the House in 2005 and 2006.

Section 5K2.7 authorizes an upward departure for significant disruption of a governmental function. See U.S.S.G. § 5K2.7. According to this policy statement, an upward departure is permitted “to reflect the nature and extent of the disruption and the importance of the governmental function affected.” Id. § 5K2.7. “The appropriateness of a departure turns on the importance of the government function impacted, not the degree of the impact.” United States v. Bankston, 182 F.3d 296, 316 (5th Cir. 1999), rev’d on other grounds, Cleveland v. United States, 531 U.S. 12 (2000). However, section 5K2.7 also provides that a departure “ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.” U.S.S.G.

§ 5K2.7. Section 5K2.7 presumes, for example, that if the defendant is sentenced on the basis of the substantive crime of extortion under color of official right, “an upward departure would not be sustainable unless the disruption was so atypically great as to exceed the level of interference inherent in the offense.” United States v. Sarault, 975 F.2d 17, 19 (1st Cir. 1992).

The court finds that the disruption that Decker and Black caused is so atypically great as to take this case out of the heartland of the guidelines. See Rybicki, 96 F.3d at 757; United States v. Haidara, 1997 WL 205378, at *3 (4th Cir. Apr. 28, 1997) (per curiam) (unpublished) (affirming section 5K2.7 enhancement for subornation of perjury when defendant also received upward adjustment under section 3C1.1 for obstructing justice). Decker and Black did not conspire to profit from a single ministerial or legislative act – as awful as that would be. Rather, as stated, Decker sold his office for money and Speaker Black bought it for power. The scheme lasted from November 2002 until March 2006. The scheme resulted in a co-speakership that may never have arisen if there had been an honest election of Speaker in early 2003. Citizens of North Carolina and the current members of the General Assembly may question the legitimacy of certain laws enacted in 2003 and 2004 in light of the corrupt scheme that resulted in Black becoming co-Speaker. This concern may prompt a re-examination of certain laws passed during that session. One would be hard pressed to identify a more severe potential or actual disruption to the functioning of the House of Representatives. In short, this case presents the atypically great disruption contemplated by section 5K2.7.

In summary, the court finds that application note 7 of section 2C1.1, section 5K2.0, and section 5K2.7 all provide (individually and alternatively) authority to depart upwardly from Decker’s offense level. The court also finds that an upward departure is appropriate.

The court next must determine the magnitude of the departure from the offense level calculated initially. Once a sentencing court determines that a departure is appropriate, the departure needs to be reasonable and derived through principled methods. See United States v. Gary, 18 F.3d 1123, 1131 (4th Cir. 1994). “While the extent of the departure may be permissible, it is not permissible without any analytical reasoning behind the decision.” Id.

Although the circumstances of this conspiracy are deplorably unique, the court finds guidance from other cases where courts have found “systematic or pervasive corruption of a governmental function.” In Reyes, the Fifth Circuit affirmed a 2-level departure under application note 7 (then note 5) to section 2C1.1 in the case of a longtime city councilman convicted of mail fraud and bribery. Reyes, 239 F.3d at 744-45. The Fifth Circuit noted that the councilman was “at the apex of city government and had responsibilities that affected the lives of hundreds of thousands,” that the councilman organized the corrupt scheme, and that the widespread media coverage of the case had the potential to undermine public confidence in government. Id. Likewise, in United States v. Shenberg, 89 F.3d 1461 (11th Cir. 1996), the Eleventh Circuit upheld a 5-level upward departure where a state-court judge participated in a bribery scheme with court-appointed lawyers. See id. at 1476-77.

The court also has considered cases where courts found a “significant disruption of a governmental function” under section 5K2.7. Of course, the court understands that this section does not ordinarily apply when the underlying crime inherently involves disruption to the government. Nevertheless, in United States v. Garcia, 900 F.2d 45 (5th Cir. 1990), the Fifth Circuit affirmed a 4-level enhancement based on section 5K2.7 of a postal employee convicted of mail theft. The court stated that the large amount of mail involved in the offense and the fact that some of the mail did not reach its intended destination warranted an upward departure for serious disruption of a

governmental function. Id. at 49. In United States v. Gunby, 112 F.3d 1493 (11th Cir. 1997), the Eleventh Circuit upheld a 4-level adjustment to the offense level under section 5K2.7 of a county magistrate judge who embezzled court filing fees and pleaded guilty to mail fraud and tax fraud. The Eleventh Circuit allowed the section 5K2.7 adjustment in Gunby on top of an upward adjustment for breach of a public trust. Id., at 1499-1503.

The court finds that a 5-level upward adjustment to Decker's offense level is appropriate under either application note 7 of section 2C1.1, section 5K2.0, or section 5K2.7. Although these provisions are distinct, the court finds that the aggravating factor justifying the upward departure as to Decker is essentially the same – the corrupt cancer that Decker and Black foisted upon the General Assembly and the State of North Carolina during the life of the conspiracy and the continuing effects of that corrupt cancer. Accordingly, the court applies a 5-level upward adjustment to Decker's offense level under application note 7 of section 2C1.1, section 5K2.0, and section 5K2.7. Thus, Decker's offense level is increased by 5 levels. With this upward departure, Decker's adjusted offense level is 26. When that offense level is coupled with Decker's criminal history category I, then Decker's advisory guideline range becomes 63-78 months. Because Decker's offense of conviction statutorily caps his possible imprisonment at 60 months, the advisory guideline range is 60 months. See 18 U.S.C. § 371.

Finally, section 5K2.21 of the sentencing guidelines authorizes courts to depart upward based on uncharged conduct not reflected in the advisory guideline range. See U.S.S.G. § 5K2.21. The court provided notice on April 11, 2007, that it was considering an upward departure under section 5K2.21 and that it wanted to receive evidence concerning whether Decker paid taxes on the cash and campaign checks that he converted to his personal use. See Order at 3, United States v. Decker, No. 5:06-CR-197-1-D (E.D.N.C. Apr. 11, 2007). On April 20, 2007, the United States

confirmed that Decker did not pay taxes on the cash and campaign checks converted to his personal use. See U.S. Sent'g Mem. 10-11. At the sentencing hearing, defendant's counsel advised the court that Decker has taken steps to amend his tax returns to pay taxes on the money that he converted to his personal use.

The court need not and does not decide whether an upward departure is warranted under U.S.S.G. § 5K2.21. Even if appropriate, such a departure would not change the advisory guideline range of 60 months.

C.

The government has moved for a downward departure based on substantial assistance. See U.S.S.G. § 5K1.1. Both the United States Attorney's office and the Wake County District Attorney have described Decker's extensive and important contribution to the prosecution of Black. Indeed, absent Decker's cooperation, and the resulting investigative momentum, Black probably would not have pleaded guilty in federal or state court and may well still be the Speaker of the House. Additionally, Decker provided extensive and important assistance in connection with the prosecution of optometry PAC treasurer M. Scott Edwards. That PAC provided large sums of campaign contributions to Black. Ultimately, Edwards pleaded guilty to obstruction of justice in Wake County Superior Court.

The court also has considered and credits the testimony of Agent Stuber of the Federal Bureau of Investigation. Agent Stuber testified at the sentencing hearing that Decker's cooperation was "absolutely essential" to prosecute Black. Agent Stuber described Decker's level of cooperation as "the most extraordinary cooperation" he had seen in his 21-year career. The United States Attorney's office confirmed that Decker came forward before he was charged and before he was about to be charged and that he has fully cooperated. The court credits the views of the United States

Attorney's office, the Wake County District Attorney, and Agent Stuber as to Decker's cooperation. Thus, the court grants the government's motion under section 5K1.1 and will impose a prison sentence lower than the 60-month advisory guideline range.

D.

The court next considers whether the resulting advisory guideline range still does not serve the factors set forth in 18 U.S.C. § 3553(a). See, e.g., Tucker, 473 F.3d at 560; Davenport, 445 F.3d at 370. In fashioning a sentence under 18 U.S.C. § 3553(a), a court "shall consider (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner" 18 U.S.C. § 3553(a)(1)-(2). Section 3553(a) lists other factors as well. Although the court will not discuss those other factors, the court has considered all of them (as appropriate) in fashioning a sentence "sufficient, but not greater than necessary to comply with the purposes set forth in paragraph (2) of [18 U.S.C. § 3553(a)]." Id. § 3553(a).

As for the nature and circumstance of the offense, Decker has pleaded guilty to conspiracy to commit extortion under color of official right, honest services mail fraud, and money laundering in violation of 18 U.S.C. § 371. Decker and his co-conspirator Black engaged in an epic betrayal. Decker and Black betrayed their oath of office. Decker and Black betrayed their constituents. Decker and Black betrayed the citizens of North Carolina. Decker and Black betrayed all of their fellow legislators who serve with honor. Decker and Black betrayed all former legislators – living and dead – who served North Carolina with honor. Black was willing to buy Decker's office, and

Decker was willing to sell it. Decker and Black were then willing to use their offices and other means to cover up the conspiracy. Citizens expected faithfulness. Decker and Black provided faithlessness. Citizens expected integrity. Decker and Black provided dishonesty. Citizens expected servant leaders grounded in humility. Decker and Black provided a selfish tyranny grounded in arrogance. Decker's selfish tyranny was motivated by a feverish greed for money. Black's selfish tyranny was motivated by a feverish lust to retain power.

As for the history and characteristics of the defendant, Decker is 62 years old and has been married for 40 years. Decker and his wife have resided in Winston-Salem, North Carolina for approximately 39 years. He is the father of three adult children. Decker served honorably in the United States Navy from 1962 to 1968. He has received two undergraduate degrees and has been steadily employed since 1976. He has been active in his church and community. He served in the North Carolina General Assembly from 1985 until 2004. Decker has no prior criminal record. Like most elected officials who earn the trust of the people for such a long period, Decker has many friends and supporters who can attest to his good qualities. However, these qualities do not override the enormous harm that he has done to the public's faith in North Carolina government.

As for the need for the sentence imposed to reflect the seriousness of the offense, the court cannot articulate how seriously it views the conspiracy Decker and Black created, furthered, and covered up. Even excluding self-incriminating information provided by Decker under U.S.S.G. § 1B1.8(a) and his plea agreements, the conspiracy is breathtaking in its purpose and scope. Decker needed money, and Black had nearly instant access to large sums of other people's money. Specifically, Black had the power and used it in this case to raise large sums for Decker from lobbyists, PACs, and others interested in legislation. Black used that money to corruptly buy a political victory in the House. They then engaged in a lengthy cover up.

In fashioning a sentence that promotes respect for the law, the court notes the obvious: this conspiracy involved two lawmakers in the North Carolina House of Representatives. The criminal conspiracy between Decker and Black lasted for over three years. What began as a bribery scheme where Decker got money and Black got to retain power became a prolonged effort by Decker and Black to further and to cover up the conspiracy.

How can citizens respect the rule of law when lawmakers feloniously trample the laws that they have sworn to uphold? To the cynic, the conspiracy adds currency to the false notion that every member of the North Carolina General Assembly is for sale, and the only issue relates to negotiating the price. Such cynicism produces apathy about the political process and is a breeding ground for the destruction of our constitutional system. Engaged citizens who believe in our system of government participate in the life of our state and nation. Cynical and apathetic citizens do not.

The conspiracy also provides venom to the false notion that all politicians are corrupt. They are not. The overwhelming majority – regardless of political party – serve with honor. Yet when extensive corruption takes place (as here), toxins are unleashed on the body politic. The toxins permit the cynic to substitute reasoned debate with personal attacks on the motives of those who seek to serve honorably in public life.

As for imposing a sentence that provides just punishment, the court has balanced Decker's criminal conduct with his extensive, important, and "essential" cooperation. The court described that cooperation in granting the government's motion under U.S.S.G. § 5K1.1. The court has considered the defendant's arguments for a downward variance. The court also has considered the government's argument for a 50-60% reduction from the bottom of the advisory guideline range. The court does not believe, however, that the proposed reductions are appropriate in this case.

Nevertheless, Decker will receive an appropriate reduction in his prison sentence due to the timing, nature, and completeness of his cooperation.

As for imposing a sentence that affords adequate deterrence, the court views deterrence as a critical component of the sentence. The conspiracy in this case reflects corruption at the apex of the North Carolina General Assembly. Citizens can and do expect legislators of whatever political party to honor and follow the oath of office that each legislator takes at the beginning of his or her term of office. That oath of office states:

I do solemnly and sincerely swear that I will support the Constitution of the United States; that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; so help me God.

N.C. Gen. Stat. § 11-7. This oath has roots in the United States Constitution and the North Carolina Constitution. The United States Constitution provides: “[T]he Members of the several State Legislatures . . . shall be bound by Oath or Affirmation, to support this Constitution.” U.S. Const. art. VI, cl. 3. The North Carolina Constitution provides:

Each member of the General Assembly, before taking his seat, shall take an oath or affirmation that he will support the Constitution and the laws of the United States and the Constitution of the State of North Carolina, and will faithfully discharge his duty as a member of the Senate or House of Representatives.

N.C. Const., art. II, § 12. Notably, the oath does not reference supporting, being faithful, or bearing true allegiance to oneself, to another person, or to any political party. Instead, in taking this oath, each legislator swears to support, to be faithful, and to bear true allegiance to the Constitution of the United States, the Constitution of North Carolina, and the State of North Carolina.

In considering deterrence, the court cannot ignore that during this conspiracy Decker recited this oath in January 2003. Not only did Decker violate his oath, but he did so notwithstanding

numerous significant public corruption cases that were prosecuted during the conspiracy. In fashioning a sentence in this case, the court considers it important to deter those who may consider a journey down the same path of corruption.

The court also has considered the need for the sentence to protect the public from further crimes of the defendant. The court finds that Decker is unlikely to commit another crime.

E.

Alternatively, the court finds that even if it has incorrectly determined the advisory guideline range, and even if the advisory guideline range is 37 to 46 months imprisonment as set forth in the PSR, the court still would impose the same sentence set forth below. See 18 U.S.C. § 3553(a). In light of the record and all of the factors in 18 U.S.C. § 3553(a), such a sentence is the appropriate sentence for Decker. In reaching this conclusion, the court has considered United States v. McClung, 2007 WL 1203018, at *3-4 (4th Cir. Apr. 25, 2007). In McClung, the Fourth Circuit affirmed an 84-month sentence imposed after the district court fully considered the advisory guideline range of 51 to 63 months imprisonment, the PSR, the materials and arguments submitted, and the section 3553(a) factors. McClung was a former high-ranking West Virginia Department of Education official who extorted more than \$400,000 from a vendor. The Fourth Circuit found the district court's upward variance to an 84-month sentence to be reasonable in light of the defendant's duty to the public, his elaborate extortion scheme, and the need to punish and deter public officials from dishonoring their office by sacrificing the public interest for private gain. Id.; cf. United States v. Keene, 470 F.3d 1347, 1348-50 (11th Cir. 2006) (describing process of announcing a post-Booker alternative sentence).

III.

In fashioning the sentence, the court has not considered any self-incriminating information that Decker provided under U.S.S.G. § 1B1.8(a) or his plea agreements. The court has considered all of the factors set forth in 18 U.S.C. § 3553(a). The court has granted the government's motion under U.S.S.G. § 5K1.1 and considered Decker's extensive cooperation, but rejects the government's proposed sentence. Likewise, the court has considered but rejects defendant's proposed sentence. For the reasons explained earlier, it is the judgment of this court that defendant Michael P. Decker, Sr. is hereby committed to the custody of the Bureau of Prisons for a term of 48 months.


Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 2 years. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released. While on supervised release, the defendant shall not commit another federal, state, or local crime, and shall not illegally possess a controlled substance. The defendant shall not possess a firearm or destructive device. Further, the defendant shall comply with the standard conditions that have been adopted by this court, and shall cooperate in the collection of DNA as directed by the probation officer. The drug testing condition required by 18 U.S.C. § 3608 is suspended based upon the court's determination that the defendant poses a low risk of substance abuse.

It is further ordered that the defendant shall pay to the United States a special assessment of \$100, which shall be due immediately. Although provisions of the Victim and Witness Protection Act apply, restitution is not appropriate under the Act.

It is further ordered that the defendant shall pay to the United States a fine of \$50,000. The fine may be paid through the Inmate Financial Responsibility Program. The court, having

considered the defendant's financial resources and ability to pay, orders that any balance still owed at the time of release shall be paid in installments of \$400 per month to begin 60 days after defendant's release from prison. At the time of release, the probation officer shall take into consideration the defendant's ability to pay the balance and shall notify the court of any needed modification of the payment schedule. Finally, the court has advised the defendant of his appellate rights.

SO ORDERED. This 27 day of April 2007.


JAMES C. DEVER III
United States District Judge