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8	IN THE UNITED STATES DISTRICT COURT	
9	EASTERN DISTRICT OF CALIFORNIA	
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11	UNITED STATES OF AMERICA,	CASE NO. 2:15-CR-00161 GEB
	Plaintiff,	UNITED STATES'S SENTENCING
12	v.	MEMORANDUM
13		DATE: August 12, 2016
14	ANDREW KIMURA,	TIME: 9:00 a.m. COURT: Hon. Garland E. Burrell, Jr.
15	Defendant.	COOKI. Hon. Garland L. Durien, Jr.
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The United States hereby submits its sentencing memorandum. For the reasons set for below, the United States recommends the Court sentence defendant Andrew Kimura to 46 months of imprisonment and to pay a fine of \$7,500 but with no restitution ordered.

#### I. <u>UNITED STATES'S SENTENCING RECOMMENDATION</u>

The Probation Officer has correctly calculated the advisory Sentencing Guidelines as a total offense level of 21 with a criminal history category of II, for an advisory range of 41 to 51 months' imprisonment. *See* PSR, 24-43. This includes the calculation of over \$80,000 in bribes paid by numerous individuals to Kimura and others involved in the conspiracies to provide commercial and general California driver licenses (CDL) to people who had not taken or passed the written or driving portions of the examinations.

Having correctly determined the total offense level is 21 with a criminal history category of II, the Probation Officer nonetheless recommends a departure under U.S.S.G. § 4A1.3(b)(1) on the basis

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that Kimura's criminal history category II over-represents the seriousness of his criminal history. The Probation Officer posits a criminal history I is more appropriate, and recommends a sentence of 37 months, which would be the low-end under that category. The United States respectfully disagrees.

In 2013, Kimura was arrested for reckless driving on a highway, which is a misdemeanor. Other equally serious charges, including illegal street racing, were dismissed. As a result of the conviction, he was sentenced to 36 months' probation beginning in 2014. *See* PSR ¶ 39. Yet, as the factual basis and the evidence show, at the very same time that the state court was sentencing Kimura to probation he was already involved in the illegal conspiracy to commit bribery and identity fraud (which began in 2013), and he continued it until his arrest in 2015. For this reason, two points were added to his criminal history because part of the offense conduct occurred while Kimura was on probation. *See* U.S.S.G. § 4A1.1(d). This is not a situation that warrants a downward departure under U.S.S.G. § 4A1.3, which applies only if "reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history category or the likelihood that the defendant will commit other crimes." U.S.S.G. § 4A1.3(b)(1).

In particular, the commentary for downward departures under § 4A1.3 states that a criminal history category I is meant for a "first time offender with the lowest risk of recidivism." *Id.*, Appl. Note 3. Kimura is not a "first time offender" and the fact that he so readily continued to engage in criminal conduct despite his state conviction demonstrates he has a higher risk of recidivism than others. Indeed, the whole reason the Guidelines add points to the criminal history score when a person commits a crime while on probation is to recognize that the such a person demonstrates a higher risk of recidivism as their prior experience with the criminal justice system was insufficient to correct their conduct. A downward departure to a criminal history category I is not warranted for Kimura.

Moreover, even if the Court finds that a criminal history category I more appropriately applies to Kimura, the Court should nonetheless sentence him to 46 months imprisonment. The Guidelines themselves recognize that an upward departure may be applicable to bribery schemes which endanger the public safety. *See* U.S.S.G. § 2C1.1, Appl. Note 7. Driving a motor vehicle is inherently dangerous. This is precisely why California and every other state requires every driver to prove they have a basic understanding of the rules of the road and an ability to safely operate a vehicle. The State accomplishes

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this task through the Department of Motor Vehicles (DMV), which requires all drivers to pass both a written and behind-the-wheel driving examination. The public relies on the fact that the DMV is fulfilling its mission whenever it takes to the road. Kimura circumvented this process and placed the public safety in peril as gave or helped to give unqualified drivers licenses to operate tractor-trailer trucks and other vehicles on California (and by extension the nation's) roads and highways. Fortunately, the United States is not aware of any fatalities or serious injuries directly attributable to Kimura's provision of illegal CDLs based on information presently known to the DMV. Nonetheless, Kimura's crime unquestionably jeopardized the public's safety.

Similarly, the factors under 18 U.S.C. § 3553(a) support a 46-month sentence. Both the nature and circumstances of this case and the history and characteristics of Kimura demonstrate the need for a significant sentence. In particular, as just explained, this is a very serious offense. Kimura abused the position he was placed in by the DMV to ensure that only properly trained and qualified drivers be permitted to operate vehicles, particularly commercial vehicles, on the public roads. Instead, motivated by greed, he endangered the public safety to earn tens of thousands of dollars for himself and his coconspirators. Further, unlike many defendants that come before this Court, Kimura was not raised in an abusive home or exposed to criminal conduct at an early age. Instead, he was raised in what he describes as a loving, supportive environment. He also has no history of substance abuse or mental health issues. Kimura's very serious criminal conduct was the solely result of his deliberate choices.

Moreover, Kimura's conduct cannot be considered aberrant. His conduct occurred when he was 27, and continued for two years. His misdemeanor conviction for reckless driving was not a wakeup call and he did not use his experience on state probation to change course. Instead, he continued in his criminal conspiracy. Thus, there is a strong need to promote respect for the law with respect to Kimura. Further, it is also extremely important that the other DMV employees who may be tempted to engage in similar criminal conduct for personal gain, and thereby endanger the safety of the public, be deterred. In consideration of all of the facts of this case, and the factors under 18 U.S.C. § 3553(a), the Court should sentence Kimura to 46 months' imprisonment. The United States also supports the imposition of a term of supervised release of two (2) years with the conditions as set forth on pages 16 and 17.

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### II. RESTITUTION AND FINE

The Probation Officer has recommended restitution in the amount of \$80,100 payable to the California DMV. This number appears based on the total amount of bribe payments paid to Kimura and his co-conspirators. However, the United States does not believe this is a proper measure of restitution because he DMV itself did not suffer an economic loss. The plea agreement reserved the right for the United States to seek restitution by any individuals who may have suffered economic harm due to the issuance of illegal CDLs, but to date, has not received any such claims. Thus, the United States does not believe that there is a factual basis to support an order of restitution for Kimura at this time.

Nonetheless, Kimura has substantial assets of \$86,000. *See* PSR, ¶ 63. The Probation Officer noted that Kimura might be able to pay a "minimal fine based on his net worth" but declined to recommend one because the Probation Officer believed that restitution would be ordered. *See* PSR, ¶ 64. Because the United States does not believe that restitution should be ordered, the prosecution instead recommends that the Court consider a fine. Under the Guidelines, the advisory range of a fine is \$7,500 to \$75,000. Based on the PSR, it appears Kimura would be able to pay a fine at the low-end of that range and the United States, therefore, recommends the Court impose a fine of \$7,500.

## III. <u>APPELLATE RIGHTS</u>

The defendant has waived his right to appeal his conviction and to appeal any sentence so long as the sentence does not exceed the statutory maximum (in this situation 10 years). The defendant should be advised of this waiver, and that it is generally enforceable in the event of an appeal. Further, such appeal will be a violation of the plea agreement.

# IV. <u>SELF-SURRENDER AND DESIGNATION</u>

The United States does not oppose self-surrender based on Kimura's history of compliance with the terms and conditions of his release pending sentencing, and otherwise defers to this Court as to whether self-surrender is appropriate and the date for any surrender. The United States takes no position as to which facility Kimura should be designated by the Bureau of Prisons.

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V. <u>DISMISSAL OF REMAINING CHARGES</u>

At the time of sentencing, the United States will orally move to dismiss the remaining counts in the indictment as to Kimura.

4 | 5 | Dated: August 5, 2016

PHILLIP A. TALBERT Acting United States Attorney

By: /s/ Todd A. Pickles
TODD A. PICKLES
Assistant United States Attorney