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**UNITED STATES DISTRICT COURT**

**District of Kansas**

(Topeka Docket)

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**CASE NO. 12-40109-01-JAR**

**DONALD GENE GARST,**

**Defendant.**

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**Government's Sentencing Memorandum**

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APPEARS NOW the United States of America, by and through Barry R. Grissom, United States Attorney for the District of Kansas, Jared S. Maag, Assistant United States Attorney, and Wade Weems, Trial Attorney, Fraud Section, Criminal Division, United States Department of Justice, and submits the following:

**Procedural Background**

(1) On October 15, 2012, the government filed a one-count Information charging the defendant Donald Gene Garst with Bulk Cash Smuggling, in violation of Title 31, United States Code, Section 5332(a)(1), a Class D Felony. *Information*, Doc. 1. The

defendant pled guilty to the Information on November 9, 2012, pursuant to a plea agreement. *Plea Agreement*, Doc. 16. Defendant's sentencing is now scheduled before the Court on February 12, 2013, at 9:00 a.m. *Notice of Hearing*, Doc. 21.

### **Factual Summary**

(2) At the time of the charged conduct, the defendant was employed as a manager in a private sector contracting company doing business with the United States and its armed forces at Bagram Airfield in Afghanistan, where the defendant lived and worked. The defendant's job involved identifying, evaluating, and monitoring subcontracts awarded to Afghan companies. In August 2010, the defendant met Abdul Mukhtar Abdul Kubar (Mukhtar), owner of Somo Logistics, an Afghan contracting company. The defendant entered into an illicit agreement with Mukhtar under which the defendant agreed to treat Somo Logistics favorably in the contracting process, and in return, Mukhtar would pay kickbacks to the defendant for every subcontract awarded by the defendant's employer to Somo Logistics. The agreement between Mukhtar and the defendant affected at least three subcontracts awarded to Somo Logistics by the defendant's company between August 2010 and May 2011. *Presentence Investigation Report* (PSI), Doc. 22, at 4-6, ¶¶ 7-17.

(3) Pursuant to the agreement, the defendant accepted approximately \$60,000 from Mukhtar in January 2011 after Somo Logistics received a subcontract from the defendant's employer for a 63-day lease of equipment. *PSI*, at 4, ¶ 11. After receiving

the \$60,000, the defendant deposited or caused to be wire transferred \$52,117.37 of those proceeds into bank accounts in the United States belonging to himself, his ex-wife, and his daughter.<sup>1</sup>

(4) Again pursuant to their agreement, the defendant accepted \$150,000 from Mukhtar as a kickback paid to the defendant after Somo Logistics received a second subcontract from the defendant's employer, this time for a 93-day lease of heavy equipment. *PSI*, at 5, ¶ 12. The defendant packaged and sent the \$150,000 in cash from Afghanistan via DHL to his ex-wife in Topeka, Kansas. After the box was confiscated by law enforcement agents on Bagram, the defendant was interviewed and gave a detailed confession about the kickback scheme described here. He also admitted that he had stated on customs forms that the value of the DHL box contents was \$1,000, despite being aware of the true value of its contents and the requirement to declare currency over \$10,000. *PSI*, at 6, ¶¶ 12, 15.

(5) The defendant admitted that he was to be paid an additional \$400,000, again pursuant to the agreement with Mukhtar, as a kickback for a third Somo Logistics subcontract from the defendant's employer. *PSI*, at 6, ¶ 16. Because the kickback

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<sup>1</sup> The *PSI* notes that the defendant hand-carried \$20,000 in a duffel bag to the United States from Afghanistan, and that Somo Logistics executives wired an additional \$30,451.37 to the defendant, his ex-wife, and his daughter. *PSI*, Doc. 22 at 4, ¶ 11. Bank records show that the defendant deposited \$10,800 in cash on January 20, 2011, and that his ex-wife deposited \$10,866 in cash on March 1, 2011. The combined total of the wire transfers from Somo Logistics and the cash deposits are the basis of the amount that the defendant agreed to pay as a fine pursuant to the Plea Agreement, \$52,117.37. *Plea Agreement*, Doc. 16 at 5, ¶ 6(e).

scheme was interrupted by the discovery of the DHL box, the defendant never actually received this payment.

(6) All three subcontracts described above were awarded in connection with a prime contract between the defendant's employer and the United States government. *PSI*, at 7, ¶ 65.

(7) In total, the defendant admitted that he had agreed to receive \$610,000 in illegal kickback money, of which he actually received \$210,000.

#### **Government's Recommendation**

(8) The defendant used his position within a private sector company to solicit and receive for his own enrichment a series of kickbacks on United States government subcontracts. The defendant sought to capitalize on the circumstances within the Afghanistan war zone to facilitate his criminal activity, in large part for his own financial benefit at the expense of the government. His illegal agreement with the Afghan company promised to net the defendant at least \$610,000, and perhaps more had the scheme not been interrupted by law enforcement. Of that amount, the defendant actually obtained more than \$200,000. The defendant falsified customs forms in his effort to smuggle \$150,000 of the kickback money into the United States as undeclared cash. Based on his admissions, he had previously smuggled cash and structured wire transfers in order to receive the proceeds from the first kickback. Not only did the defendant wrongly take money through the government contracting process, but because of his

position, as well as his past service in the military and deployments to conflict zones, one would have expected better from the defendant in terms of integrity, honesty, and lawful behavior.

(9) To his credit, once the scheme came to light, the defendant immediately admitted his involvement in it, offering a detailed confession regarding the illegal kickback agreement and his efforts to smuggle the proceeds into the United States. Because of his immediate confession, and because he accepted responsibility for bulk cash smuggling, the government agreed to recommend a three-level reduction in the total offense level, pursuant to U.S.S.G. § 3E1.1(a) and (b). The government notes that, in recent statements, the defendant appears to recant his confession and claim that over \$200,000 in smuggled funds came from a legitimate source, such as gambling, and that the kickback scheme he confessed to in detail was a fabrication. *See, e.g., PSI*, Doc. 22 at 11, ¶ 52. The potential impact on the Guideline calculation, and particularly on the Acceptance of Responsibility reductions, of the defendant's reversal as to his relevant conduct is addressed below in the Sentencing Factors, Paragraph (24).

(10) Accordingly, consistent with the relevant sentencing factors discussed below, the government requests that the Court impose a sentence within the resulting Sentencing Guidelines. *See United States v. Gall*, 552 U.S. 38, 51 (2007) (“[i]f the sentence is

within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness”).<sup>2</sup>

(11) In the Plea Agreement, the defendant agreed to a fine of \$52,117.37, which represents the total amount of funds that the defendant received from the first kickback and then deposited or caused to be deposited into his bank account and bank accounts belonging to his ex-wife and daughter and the funds received in wire transfers from Somo Logistics executives. *Plea Agreement* at 5, ¶ 6(e).

### **Sentencing Factors**

(12) Title 18, United States Code, Section 3553(a) provides that the Court should consider several factors in arriving at an appropriate sentence, including: (1) “the nature and circumstances of the offense and the history and characteristics of the defendant,” (2) the need for the sentence imposed to reflect the seriousness of the offense, to provide just punishment for the offense, to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed correctional treatment, (3) the Sentencing Guidelines and related Sentencing Commission policy statements, and (4) the need to avoid unwarranted sentence disparities. These factors, discussed in order below, support a sentence within the applicable Sentencing Guideline range. A sentence of incarceration as called for by the Guidelines in this case

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<sup>2</sup> In the Plea Agreement, the parties requested that the Sentencing Guidelines be applied by the Court to calculate the applicable sentence in this case. Further, the parties agreed that any uncharged related criminal activity would be considered as relevant conduct for purposes of calculating the offense level. *Plea Agreement* at 3, ¶¶ 3-4. The government did not commit to recommending a specific total offense level, guideline range, or period of incarceration. *Plea Agreement* at 3, ¶ 5.

will reflect the seriousness of the offense, promote respect for the law, and provide just punishment. 18 U.S.C. § 3553(a)(2)(A).

(13) The Nature and Circumstances of the Offense and Defendant Characteristics.

The nature and circumstances of the offense are described in detail above in the Factual Summary, and in the PSI. *PSI*, at 4-6, ¶¶ 7-17. The Court should also consider the history and characteristics of the defendant. The defendant is 51 years old, holds a bachelor's degree, and served in the United States Army for four years on active duty from 1982 to 1986, and in the National Guard from 1986 to 2009. *PSI*, at 13, ¶¶ 37, 55-56. The defendant has had multiple encounters with the criminal justice system – both civilian and military – arising from numerous acts of criminal misconduct, including crimes of dishonesty. His civilian criminal record reflects a conviction in 1987, and several violations of protective orders against his now ex-wife. *PSI*, at 8-9, ¶¶ 33-36. His military record reflects at least eight violations of military law, including fraternization, sexual harassment, falsifying a promotion package with intent to deceive, theft of government property, dereliction of duty, and three occasions of misuse of a government credit card. *PSI*, at 13, ¶ 56. These offenses resulted in the defendant's discharge "Under Other than Honorable Conditions" on March 24, 2009.<sup>3</sup> *Id.* Even

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<sup>3</sup> Army Regulation 135-178 (Army National Guard and Army Reserve Enlisted Separations), §2-9(c), states "Service may be characterized as under other than honorable conditions only when discharge is for misconduct, fraudulent entry, unsatisfactory participation, or security reasons, and under the following circumstances: (1) When the reason for discharge is based upon a pattern of behavior, or one or more acts or omissions, that constitutes a significant departure from the conduct expected of Soldiers. Examples of factors that may be considered include the following: (a) Use of force or violence to produce serious bodily injury or death; (b) Abuse of a position of trust; (c) Disregard by a superior of customary superior-

though none of these events in the defendant's past impact the calculation of the defendant's prior criminal history for purposes of determining the appropriate Guidelines, *PSI* at 8, ¶ 34, they paint a picture of an individual willing to violate the law to enrich himself, and suggest the instant conduct is not an aberration.

(14) Seriousness of the Offense. The offense of smuggling bulk cash into the United States from Afghanistan is undeniably serious, especially where the defendant committed the offense as part of a pattern of unlawful conduct on a United States military base located in a conflict zone. The defendant capitalized on the conflict, using the circumstances of the war to unlawfully enrich himself with complete disregard for the ways in which these crimes damage the integrity of the contracting process, disrespect the service of United States men and women serving in Afghanistan, undercut the mission of reconstruction, and erode the confidence of the Afghans, our coalition partners, and our own citizens in the efforts of the United States there.

(15) Promoting Respect for the Law. The government is confident that a sentence within the range prescribed by the Sentencing Guidelines will promote respect for the law under the circumstances of this case.

(16) Just Punishment. The Guidelines call for incarceration, and the facts of this case are such that a period of incarceration within the Guideline-recommended range of

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subordinate relationships; (d) Acts or omissions that endanger the security of the United States or the health and welfare of other Soldiers; (e) Deliberate acts or omissions that seriously endanger the health and safety of other persons.”

30 to 37<sup>4</sup> months is just and warranted. The gravity of such an offense, and the underlying conduct described above, is underscored by the fact that the defendant himself served in the United States military, and deployed to Iraq and Kosovo. Certainly as a senior enlisted soldier, in the logistics field, with training in such areas as Property Accountability and Leadership Development, he should have had a significant, if not even greater, sense of responsibility and respect for the ongoing efforts of the United States in Afghanistan, and the sacrifices of the United States service members deployed there.

(17) As mentioned above in discussing the defendant's criminal history, the defendant's conduct was not an isolated episode of bad judgment, nor did it arise from any sort of debilitating psychological problems resulting from prior deployments. To the contrary, it was the consequence of volition and careful planning. The defendant voluntarily accepted a position in Afghanistan with a private company. He was not sent by the United States government, and he accepted the job despite his professed distress over a crumbling marriage, caused in part, he says, by his frequent absences. Then, once in Afghanistan, by his own admission, the defendant devised a long-term fraud scheme that promised to pay him handsomely, contract by contract, over a period of several months; a scheme that would have continued indefinitely had his cash smuggling not been discovered by law enforcement. The defendant's criminal conduct was not the

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<sup>4</sup> For the reasons set forth below in the discussion of the Sentencing Guidelines, the government contends that the final offense level should be 19, not 17 as calculated in the PSI.

result of a single bad decision made by a stressed and troubled mind. It was a long series of deliberate criminal actions by which the defendant intended to steal from the very government that he now professes to have served so nobly.

(18) Adequate Deterrence. It is hoped that the conviction and the resulting sentence, including a period of incarceration, will provide adequate deterrence to this defendant. Of equal importance, a sentence of significant incarceration will also deter others from engaging in kickback schemes in matters involving federal funds. 18 U.S.C. § 3553(a)(2)(B) and (C). General deterrence is of critical importance in this case. Employees in the private sector, working overseas as the defendant was, and undertaking multi-million dollar engagements with United States government programs and using United States funds, particularly in conflict zones like Afghanistan, must understand that when they decide to defraud the United States and undermine its programs by soliciting and receiving kickbacks, and then smuggle the illicit proceeds into the United States, they will face significant punitive consequences. Otherwise, getting caught is just a cost of doing business.

(19) Public Protection. The facts of this case and the defendant's history do not demonstrate a need for public protection under the circumstances.

(20) Needed Educational or Vocational Training, Medical Care, or Correctional Treatment. The defendant has a series of medical issues, detailed in the PSI. *PSI*, at 10-12, ¶ 48-53. The Bureau of Prisons has a medical staff which is experienced in the full range of medical issues and capable of addressing this defendant's needs.

(21) The Sentencing Guidelines and Related Sentencing Commission Policy Statements. The PSI calculates a total offense level in this case of 17 under U.S.S.G. § 2S1.3, a Criminal History Category of I, and a resulting Guideline range of 24-30 months imprisonment, with a term of supervised release of one year to three years. *PSI*, at 15, ¶¶ 65, 68. The defendant is eligible for not less than one year and not more than five years of probation. *PSI*, at 15, ¶ 69.

(22) The government believes that the total offense level should include an additional two-level increase for the Special Offense Characteristics described in U.S.S.G. § 2S1.3(b)(2), resulting in a total offense level of 19, not 17 as calculated in the PSI. That subsection provides for a two-level increase when two conditions are met. The defendant meets the first condition because he was convicted under 31 U.S.C. § 5332(a)(1), which is an offense “under subchapter II of chapter 53 of title 31 of the United States Code.” U.S.S.G. § 2S1.3(b)(2)(A). The defendant meets the second condition because he committed his offense “as part of a pattern of unlawful activity involving more than \$100,000 in a 12-month period...” U.S.S.G. § 2S1.3(b)(2)(B). A “pattern of unlawful activity” is defined as “at least two separate occasions of unlawful activity..., without regard to whether any such occasion occurred during the course of the offense or resulted in a conviction for the conduct that occurred on that occasion.” U.S.S.G. § 2S1.3, App. Note 3. As described in this memorandum, the defendant admitted to receiving two kickbacks totaling \$210,000 from an Afghan company. He further admitted to smuggling approximately \$20,000 of the proceeds into the United

States in his luggage, and receiving over \$30,000 more in a series of six structured wire transfers. He admitted that he was expecting a third kickback of \$400,000, but law enforcement interrupted his fraud scheme before the payment was made. The defendant's scheme began in or about August 2010, when he met Mukhtar, and ended in or about May 2011, when he left Afghanistan. The defendant's instant offense of bulk cash smuggling \$150,000 of kickback proceeds, and the associated pattern of unlawful activity within a 12-month period meet the requirements for a two-level increase under U.S.S.G. § 2S1.3(b)(2)(A) and (B).

Accordingly, the Guideline calculations should be as follows:

Base offense level:	6	(U.S.S.G. § 2S1.3(a)(2))
Loss over \$200,000:	+ 12	(U.S.S.G. § 2B1.1(b)(1)(G))
Proceeds of illegal activity or bulk cash smuggling	+ 2	(U.S.S.G. § 2S1.3(b)(1)(A) or (B))
Bulk cash smuggling <i>and</i> pattern of unlawful activity involving more than \$100,000 in 12-month period	+ 2	(U.S.S.G. § 2S1.3(b)(2)(A) & (B))
Acceptance of Responsibility	- 3	(U.S.S.G. § 3E1.1(a) and (b))
<b>TOTAL OFFENSE LEVEL:</b>	<b>19</b>	

The total offense level of 19 and defendant's Criminal History Category of I result in a Guideline range of 30-37 months imprisonment.

(23) The government regrets its failure to object to the omission of the two-level increase prescribed by U.S.S.G. § 2S1.3(b)(2) prior to the finalization of the PSI. However, the government recently notified defense counsel and the PSI author of its intent to include this subsection and the two-level increase in the Guidelines calculation set forth in this memorandum, and in the government's recommendation to the Court of a sentence within the Guideline range for a total offense level of 19, which includes the U.S.S.G. § 2S1.3(b)(2) two-level increase.

(24) The government intends to abide by its obligations under the Plea Agreement and, for now, recommends a three-point decrease for Acceptance of Responsibility under U.S.S.G. § 3E1.1(a) and (b). However, as described in Paragraph (9) above, the defendant has indicated he may recant his confession, deny the existence of his kickback scheme, and claim a legitimate source of his smuggled funds. If so, the government is prepared to put on evidence that on May 6, 2011, when confronted by federal agents with the cash contents of his DHL box, the defendant voluntarily described, in great detail, his kickback agreement, payments he received, and the illegal transport of funds. Contemporaneous wire transfers to bank accounts belonging to the defendant and his family from the kickback payor, cash deposits by the defendant and his ex-wife, the defendant's role in the company, and the timing and nature of the subcontracts for which the defendant said he was paid kickbacks all corroborate the defendant's confession. If the defendant intends to disingenuously step away from taking responsibility for the full scope of his criminal scheme and relevant conduct, and claims an innocent source of his smuggled funds, the government has the

grounds to withdraw its recommendation of a reduction under this provision,<sup>5</sup> and the Court has the discretion to determine that the three-level decrease pursuant to U.S.S.G. § 3E1.1(a) and (b) is not appropriately applied. *See* U.S.S.G. § 3E1.1, App. Note 1(A) (“a defendant who falsely denies or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.”) The Probation Officer also suggests that “[i]f the defendant continues to contend the money he obtained was proceeds from gambling... the reduction for acceptance of responsibility should not apply.” *PSI*, Doc. 22 at 19, ¶ 94.<sup>6</sup>

(25) Need to Avoid Unwarranted Sentencing Disparities. Here, a Guidelines sentence would help prevent such disparities between the defendant and similar defendants. *See United States v. Gonzalez-Huerta*, 403 F.3d 727, 748-749 (10th Cir. 2005) (“the purpose of the Guidelines [is] to promote uniformity in sentencing so as to

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<sup>5</sup> While the government has agreed to recommend the reductions pursuant to U.S.S.G. § 3E1.1(a) and (b), the government’s obligation to do so “is contingent upon the defendant’s continuing manifestation of acceptance of responsibility as determined by the United States. If the defendant denies or gives conflicting statements as to his involvement, falsely denies or frivolously contests relevant conduct that the court determines to be true,... the United States reserves the right to request a hearing to determine if the defendant has breached this agreement.” Plea Agreement at 3, ¶ 5. In the event of a breach, the United States is no longer bound to recommend the acceptance of responsibility reductions.

<sup>6</sup> The government further notes what appears to be a pattern of deception regarding the defendant’s statements in other areas. First, he told the Probation Officer who authored the *PSI* that he had received an Honorable Discharge when his military record reflects a discharge Under Other than Honorable Conditions. *PSI*, at 13, ¶ 56. Second, the defendant’s former employer at Del Monte in Topeka is under the mistaken impression that the defendant was in Afghanistan “on military leave from January 9, 2009, to September 27, 2011,” a period when the defendant was in fact employed in the private sector. *PSI*, at 13, ¶ 58. Third, the *PSI* also shows that the defendant’s therapist is under the misapprehension that the defendant mailed \$150,000 worth of “gambling winnings” in the DHL box without understanding the requirement that he declare the true value of the contents. *PSI*, at 11, ¶ 52. Finally, as described in Paragraph (13), the defendant’s discharge from the military Under Other than Honorable Conditions resulted from a pattern of offenses that include instances of theft, deceit, and fraud.

prevent vastly divergent sentences for offenders with similar criminal histories and offenses.”)

(26) Conclusion. The government believes that the factors set forth in 18 U.S.C. § 3553(a), together with the terms of the Plea Agreement, the facts of the case, and the calculations under the Sentencing Guidelines, support a term of incarceration within the 30 to 37 month Guideline range, based on the calculated total offense level of 19. In addition, the government asks that the Court:

- order a term of three years supervised release following imprisonment;
- order a fine in the amount of \$52,117.37; and
- impose a special assessment of \$100.

Respectfully submitted,

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United States Attorney

By:           /s/ *Jared S. Maag*          

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## CERTIFICATE OF SERVICE

I hereby certify that on this 8<sup>th</sup> day of February, 2013, I electronically filed the foregoing Sentencing Memorandum with the Clerk of the Court by using the CM/ECF system which will send an electronic copy to the following:

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