

Case	Indictment Alleged	Government Proved / Jury Instruction Allowed	Constructive Amendment?
<i>Stirone</i>	Defendant interfered with sand	Defendant interfered with sand or steel	Yes
<i>Salinas I</i>	Defendants were directors	Defendants were directors or officers	Yes
<i>Salinas II</i>	Defendant aided and abetted a specific person	Defendant aided and abetted a different person	Yes
<i>Adams</i>	Defendant used a license with a false name	Defendant used a license with a false name or false residence	Yes
<i>Mize</i>	Defendant defrauded a member bank	Defendant defrauded a member or insured bank	Yes
<i>Doucet</i>	Defendant possessed an assembled machine gun	Defendant possessed an assembled or unassembled machine gun	Yes
<i>Nunez</i>	Defendant assaulted officer with a gun	Defendant assaulted officer with or without a gun	Yes
<i>Chambers</i>	Defendant possessed ammunition that traveled in interstate commerce	Defendant possessed ammunition and either it or its components traveled in interstate commerce	Yes
<i>Hoover</i>	Defendant knew his statement was false for a specific reason	Defendant knew his statement was false for any reason	Yes
<i>Choy</i>	Defendant gave thing of value to an official	Defendant gave thing of value to a private citizen who indirectly conferred value on the official	Yes

Similarly, Mr. Wong's Indictment alleged that he bribed Mr. Bohuchot for early inside information but the evidence and instructions allowed conviction on broader or different bases. Under *Stirone* and its progeny, this Court should reverse Mr. Wong's bribery-related convictions (Counts 1-9), and the money-laundering conviction (Count 10) resting upon them also must fall. Issue II below addresses whether this Court should remand for new trial or render an acquittal.

ISSUE II: THE GOVERNMENT INTRODUCED INSUFFICIENT EVIDENCE TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT ON THE INDICTED BRIBERY THEORY

If the evidence at trial was sufficient to establish guilt beyond a reasonable doubt on the indicted allegation, a constructive amendment leads to a new trial. *Chambers*, 408 F.3d at 247 & n.6. But if the evidence was insufficient to prove the indictment, this Court *renders* judgment in defendant’s favor. *Id.* Here, the government’s evidence was insufficient on the indicted theory.

A. The Government’s Witnesses Refuted the Indictment’s “Early Information” Allegation

No witness or document suggested that MSE received inside information on E-Rate. Thus, this discussion will focus on whether the government introduced sufficient evidence as to Seats.

Four government witnesses—Taylor, Thomas, Goeters, and Coleman—testified relevant to the Indictment’s early inside-information bribery allegation. Each refuted it, indicating that the information MSE received was immaterial, did not give HP an advantage in submitting a superior proposal, or likely was shared with competing companies.

1. Roland Taylor

Mr. Taylor was the DISD associate superintendent who headed the purchasing department and drafted the RFP. The government did not ask him

whether anyone at DISD gave MSE inside information. Regardless, Mr. Taylor was unsure what information other companies received. (R.1881.) Thus, Mr. Taylor's testimony did nothing to support the inside-information allegation.

What Mr. Taylor did say, however, *undermined* the allegation. He generally informed companies when DISD was about to issue an RFP: "Well, if I knew, then I would tell them, okay, something is coming down the pipe, watch the website." (R.1881.) This put to rest the government's suggestion in opening statement that knowing an RFP is "coming up" is inside information.

In addition, all companies were invited to the pre-proposal conference to ask questions about the RFP and how best to respond, and DISD here extended the proposal due date by three weeks to ensure all vendors had enough time. (R.1889.) Thus, it was highly unlikely that an alleged "sneak-peak" at a draft RFP just four days before the official broadcast date was useful inside information.

2. *Blair Thomas*

Mr. Thomas was MSE's sales representative to DISD. He described the information he received from Mr. Bohuchot as a "very rough" or "50,000-foot" overview of the Seats program. (R.992-997.) His testimony made clear that the government's statement in opening that Mr. Bohuchot and MSE had "months of these detailed conversations" was factually inaccurate. For example, when asked to describe these conversations, Mr. Thomas stated:

[Mr. Bohuchot] wanted to relay how he saw the process taking place . . . and why he wanted to take [Seats] into the school district. And he explained the process of annually bringing in new computers and how they would roll over every three years; and that new systems would always be available for the students.

He described how the district was having a problem with the old systems, that one student may be on one system that's old and another student [may] be on a brand-new system and that he wanted to be able to bring up the technology.

He summed up with: "It was not a surprise." (R.1061.)

Mr. Thomas did remember one "detail" that Mr. Bohuchot gave him: offering to sponsor the DISD golf tournament would be a good "value add" to the Seats program. (R.996.) But this was not inside information. HP and MSE already were DISD golf-tournament sponsors. (R.2311.) And Mr. Taylor's discussion with Mr. Bohuchot about value adds "wasn't something new or enlightening." (R.1059.)

Moreover, Mr. Thomas disagreed with the government's contention that communication between districts and technology companies prior to the official RFP broadcast date is inappropriate (or even unusual)—districts often approached companies during program development to ask "Does this make sense?" or "Can we do this?" (R. 2196.) Thus, Mr. Thomas did not support the indicted bribery theory.

3. *Garrett Goeters*

Mr. Goeters was HP's account executive for DISD. In 2001 HP implemented Seats in RISD and then started "educating" DISD on how it worked—not the other way around. (R.47, 2229, 2280.) MSE participated with HP in RISD's Seats program. (R.47-48, 2231.) Thus, MSE already understood Seats because DISD's Seats program was "the same type of program that was implemented at Richardson." (R.2232, 2283.) Indeed, MSE already had more information than DISD could offer. Mr. Goeters did not recall Mr. Bohuchot giving him any inside information; rather, at times Mr. Bohuchot asked Mr. Goeters how Seats worked. (R.2232.)

Mr. Goeters explained that his conversations with Mr. Bohuchot were "not unusual conversations for [him] to have with a client" (R.57-58); to the contrary, they were "consistent with how [he] visit[s] with public sector technology officers to develop programs for districts." (R.2280.) In fact, he had similar conversations with RISD while developing its Seats program. (R.2280.) And he confirmed that this type of interaction between private companies and school districts is "part of his job" to "educate" districts—it is "what he is supposed to do." (R.2280.) Mr. Goeters did not think he received any illegal pre-RFP information. (R.2280.)

Mr. Goeters discussed an internal HP email that the government apparently thought showed that HP knew too much prior to the official RFP broadcast date.

The email indicated that HP knew DISD was going to broadcast the RFP in a few days; knew the “rough expectations” on the amount and type of equipment that would be required; and knew that value adds would be part of the proposal. But Mr. Goeters explained that the upcoming RFP broadcast date was “no shock” and that it was not unusual for districts to tell him when an RFP would be broadcasted; most of the “rough expectations” were “common knowledge” in the industry or based on Mr. Bohuchot’s explanation of his general “vision of the program”; and the value adds were consistent with those in RFPs from other districts. (R.71-72, 2298-2299.)

Mr. Goeters also explained that other companies knew that DISD was about to release the RFP—not a surprise considering Mr. Taylor had just testified that he would give companies such information. (R.2288-2289.) Regardless the specific piece of information the government chose to focus on, Mr. Goeters summed up all of the information he received: “There wasn’t any secret information given; correct? Correct.” (R.2284.)

Finally, Mr. Goeters made clear that getting information four days before the RFP’s broadcast date simply would not give a vendor an advantage regardless of how detailed the information was or whether it was given to other vendors. Companies “had plenty of time to prepare this response”— HP needed two weeks; DISD gave six. (R.61-62, 75.)

4. *William Coleman*

Mr. Coleman, the education-contracts consultant MSE hired to help prepare the Seats proposal, also testified for the government. In his words, he “[put] together the deal to get the Seats Management Program implemented.” (R.2772.)

Mr. Coleman testified that Mr. Bohuchot never gave him any material inside information before the May 7 broadcast date. (R.2679). Nor did Mr. Wong. (R.2679.) And no one at HP or MSE appeared to have—or even suggested they had—material inside information. (R.2790-2791, 2864.) To the contrary, Mr. Coleman described the information MSE received from Mr. Bohuchot as generic: he learned more specific information about Seats from the internet and articles than he did from Mr. Bohuchot. (R.2768.)

Mr. Coleman did not know for sure whether anyone from MSE had seen the RFP before the broadcast date. But no one at HP or MSE seemed to have *material* inside information. Indeed, after the RFP broadcast date, Mr. Coleman attended a meeting with HP to review the RFP “line by line, section by section and figure out what [they] were going to say to respond to each of the requirements.” (R.2685.) When asked how much time they spent preparing for the proposal prior to the official broadcast date, Mr. Coleman responded: “Before May 7; none.” (R.2679.)

Still, “it is the job at all vendors to go out and find out what is coming down the pipe.” (R.2676.) Mr. Coleman opined that there is nothing wrong with

communication between the district and companies during the RFP-preparation process; rather, it is after the RFP broadcast date that communication should cease.

(R.2725.)

Furthermore, Mr. Bohuchot would share information prior to the broadcast date with “any vendor who came to him” with questions—not just MSE or HP.

(R.2769.) In fact, Mr. Coleman stated: “every time I was with [Mr. Bohuchot], and vendors would approach he would answer their questions.” (R.2769, 2801.)

In sum, this evidence was insufficient to prove that Mr. Wong bribed Mr. Bohuchot for early inside information that gave HP an advantage in submitting a superior proposal.

B. The Government Failed to Call a Competitor to Establish Whether Other Companies Received the Same Information

The Indictment alleged not only that Mr. Bohuchot gave MSE information, but that he gave it to MSE early; that is: “before the information was provided to competitors.” (R.E. 3 at 8.) As set out above, the evidence about what MSE (Mr. Wong) saw four days “early” is unclear. But the government presented no evidence about what *competitors* received and when. Notably, the government failed to call any competitor as a witness. In contrast, Mr. Bohuchot testified that MSE did *not* receive early inside information.

In closing, the government simply stated as fact what it never attempted to prove—“No other vendors got this information.” (R.3152)—and then shifted the

burden to the defense to disprove the inside-information allegation: “Now, the defense has jumped up and down and said the government should have brought [competitors] to you. There is none because if there was, they would have used their equal subpoena power and paraded them in front of you like a July 4th parade.” (R.3152-3153.) The prosecutor even argued that the jury could infer the defendants’ “guilty knowledge” because, while “Mr. Bohuchot sa[id] all vendors knew about the preinformation,” the defendants’ “ticker tape parade [of competitor witnesses] ha[d] not yet arrived.” (R.3177.)

The defense had no burden to use its “equal subpoena power” to disprove the allegation underlying the Indictment’s bribery charges. The prosecutor’s comments were a direct concession that the government failed to carry its burden.

C. The Remaining Evidence Showed That MSE Entertained Customers Consistent With Industry Practice; Mr. Wong Was Generous; and Mr. Wong and Mr. Bohuchot Were Good Friends—Not That Mr. Wong Bribed Mr. Bohuchot

Each of the government’s witness testified that it was customary for technology companies like HP and MSE (*e.g.*, Dell, IBM, and Cisco) to treat their customers—including school district employees—to golf outings, dinners, and sporting events. (R.1032-1038, 1828-1832, 2091-2093.) It was an industry-wide practice. (R.2091-2093.) The government attempted to demonize the practice—and such practice may be imprudent—but it simply does not violate § 666 unless done corruptly to influence their actions in connection with district business.

Mr. Thomas testified that it was his job to use MSE's marketing budget to "build relationships" with all customers, including RISD and DISD, through golf, meals, happy hours, and sporting events. (R.1032-1038, 2082.) Mr. Wong left to Mr. Thomas's discretion how to use MSE's budget to entertain customers, including DISD and Mr. Bohuchot. (R.2082.)

Mr. Thomas also put many of the perks in perspective. For example, the government showed a picture of Mr. Bohuchot golfing with Mr. Wong and emphasized that MSE paid for the golf. But as Mr. Thomas explained, it was a DISD fundraiser tournament—none of the DISD employees paid for their golf, and other companies sponsored and played in the tournament. (R.1045.) The government also focused on a laptop that MSE gave to Mr. Bohuchot. Mr. Thomas explained that it was common to give computer customers demos of new products. (R.1048.)

Similarly, the government called Kim Ngang, Mr. Wong's personal assistant at MSE. She explained that MSE gave perks to Mr. Bohuchot—but to its other customers as well. The company's event suites were used by "anyone"—employees, customers, and friends or family members of employees and customers. (R.52-55.) In her time at MSE, Ms. Ngang never saw Mr. Wong turn down tickets to a single client if they were available. (R.62-63.) Same went for dinner and drink tabs—she estimated that of the hundreds of times she and Mr.

Wong entertained customers, Mr. Wong picked up the entire tab for everyone “over 90%” of the time. And it made no difference whether Mr. Bohuchot was present: “Frankie paid for everybody’s everything.” (R.69.)

When it became clear that the golf, meals, drinks and sports tickets were industry practice, the government focused on Mr. Bohuchot’s use of MSE’s sport-fishing boats and frequent flyer miles. But the government’s own witnesses again disagreed. First, they explained that Mr. Wong and Mr. Bohuchot were personal friends, not just business acquaintances. (R.40-41, 2760-2761, 2798, 2809.) Furthermore, MSE let other customers and business partners and even competitors use its boats. (R.39-40.) Ms. Ngang testified that, like the sports tickets, Mr. Wong never turned down anyone’s request to use the boats. (R.64-65.)

She also explained that Mr. Wong’s MSE credit card bill often was hundreds of thousands of dollars, accruing so many frequent flyer miles that Mr. Wong had her use them on “scores of people.” (R.76-78.) For example, she used his miles to book 20 round trips tickets for a friend’s baseball team to attend the Little League World Series. (R.78.) On another occasion, Mr. Wong gave a friend over 500,000 miles to take a group to Puerto Rico. (R.2936.)

Finally, Mr. Bohuchot testified consistent with the government’s witnesses. Though he took advantage of Mr. Wong’s generosity, he never accepted anything to influence his work at DISD. (R.633.)

In sum, the government proved beyond a reasonable doubt that MSE excelled at an industry practice of high entertainment and that Mr. Wong and Mr. Bohuchot were good friends. But the government did not prove beyond a reasonable doubt that Mr. Wong corruptly gave Mr. Bohuchot anything for early inside information. When the government fails to prove the *indicted* theory beyond a reasonable doubt, acquittal rather than new trial is appropriate.

ISSUE III: THE PROSECUTOR IMPERMISSIBLY COMMENTED ON MR. WONG'S DECISION NOT TO TESTIFY

Mr. Wong did not testify. In closing argument, the prosecutor not only faulted him for not calling competitors to disprove the Indictment's bribery allegation, but also impermissibly commented on Mr. Wong's decision not to take the stand.

As discussed previously, two government witnesses suggested that Mr. Bohuchot showed Mr. Wong a draft Seats RFP in Key West four days before the web posting. Mr. Coleman was unsure exactly what the document was and did not remember anyone looking at its contents, though he thought it had a "DISD logo" or said "RFP" on it. Mr. Thomas briefly reviewed a document that he described as "the start of an RFP" or "information for a Seats Management program."

In rebuttal closing, after which Mr. Wong's counsel had no opportunity to respond, the prosecutor said this about the Key West trip:

[W]e know Mr. Bohuchot was on it. Mr. Coleman was on it. Mr. Thomas was on it, and Mr. Wong was on it. *The four men—two of which talked to you about the RFP being there and the other two are sitting here.*"

(R.3153.) This comment crossed a constitutional line.

A prosecutor's "comment on the refusal to testify is a remnant of the inquisitorial system of criminal justice, which the Fifth Amendment outlaws." *Griffin v. California*, 380 U.S. 609, 614 (1965) (internal quotation marks omitted).

“Prosecutors are prohibited from commenting directly or indirectly on a defendant’s failure to testify in a criminal case.” *United States v. Johnston*, 127 F.3d 380, 396 (5th Cir. 1997). A comment is impermissible “if the prosecutor’s manifest intent was to comment on the defendant’s silence or if the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant’s silence.” *Id.*; *United States v. Bates*, 512 F.2d 56, 58 (5th Cir. 1975); *see also United States v. Rodriguez*, 260 F.3d 416 (5th Cir. 2001).

There is no reasonable way to interpret the prosecutor’s comment other than: “Our witnesses testified; Mr. Wong did not.”

Defense counsel did not object to the prosecutor’s comment—perhaps because doing so often draws more attention to the comment—and we realize the government may argue plain error. We respectfully submit that the prosecutor’s comment meets even that test. *See Bates*, 512 F.2d at 58 (finding plain error without additional analysis based on the “context of the record”). As explained previously, the government did not introduce overwhelming evidence of guilt. And the timing of the comment—during rebuttal closing—magnified its effect. Finally, the comment related to a pivotal allegation in the Indictment.

ISSUE IV: THE JURY INSTRUCTIONS IMPERMISSIBLY LOWERED THE *MENS REA* FOR THE MONEY-LAUNDERING CHARGE (COUNT 10)

A. The Instructions Lowered the *Mens Rea* from “Intentional” to “Knowing”

Count 10 alleged a money laundering conspiracy as follows: (1) MSE hired Mr. Bohuchot’s son-in-law; MSE overpaid him; and he gave part of his salary to Mr. Bohuchot; and (2) Mr. Wong overpaid his personal assistant at MSE; and she gave part of her salary to Mr. Wong. Count 10 alleged both prongs of 18 U.S.C. § 1956(h): “promoting” further unlawful activity in violation of § 1956(a)(1)(A)(i) and (2) “concealing” the illegal nature of proceeds in violation of § 1956(a)(1)(B)(i). (R.E. 3 at 21.)

The Indictment included the proper *mens rea*, alleging that defendants agreed to “intentionally” promote and “knowingly” conceal. (*Id.*) At trial, the defense requested a jury instruction that specified the proper *mens rea*. (R.3036-3038.) The district court denied this request and instead lowered § 1956(a)’s *mens rea* requirement:

18 U.S.C. § 1956(a) [] prohibits *knowingly* using the proceeds of certain illegal activity *to promote* the carrying on of certain illegal activity *or conceal* or disguise the nature, location, source, ownership, or control of the proceeds.

(R.E. 6 at 20 (emphasis added).)

This instruction can be read two ways, both of which are erroneous. First, the instruction can be read to require that defendants *knowingly* used funds, but permit conviction without any *mens rea* requirement at all as to promoting or concealing. Under this reading, the instruction lowered—indeed eliminated—the *mens rea* elements of both promoting and concealing.

Second, the instruction can be read to require that defendants *knowingly* used funds, and *knowingly* promoted or *knowing* concealed. Even under this interpretation, however, the instruction lowered the *mens rea* for “promotion” from “intentional” to “knowing.”

Either way, the instruction modified an essential element of the charge, and Count 10 should be reversed.

B. “Knowing” Promotion is Not a Crime

“Knowing” promotion does not violate § 1956(a)(1)(A)(i), and thus there can be no illegal agreement to “knowingly” promote. The statute requires intentional promotion. *Id.* The Fifth Circuit settled this issue in *United States v. Brown*, holding that:

Section 1956(a)(1)(A)(i) . . . has a specific intent element: The government must show [it] was conducted “with the *intent to promote* the carrying on of specified unlawful activity.

This element is not satisfied by mere evidence of promotion, or even knowing promotion, but requires evidence of intentional promotion. By contrast, § 1956(a)(1)(B), the money laundering provision applicable to “concealment” transactions, requires only knowing

concealment, indicating that *Congress intended a stringent mens rea requirement for promotion money laundering.*

186 F.3d 661, 670 (5th Cir. 1999) (emphases added). Thus, “knowing” promotion is not a crime.

Additionally, it makes no difference whether the instruction on Count 10 left a second, valid basis for a money-laundering conviction—“knowing” concealment. *See Yates v. United States*, 354 U.S. 298, 312 (1957), overruled on other grounds in *Burks v. United States*, 437 U.S. 1 (1976). In *Yates*, the defendant was convicted on a single conspiracy count that conjunctively alleged two bases for conviction: (1) “advocating” the violent overthrow of the government and (2) “organizing” the communist party. *Id.* at 300. Although the “advocating” basis was legally sufficient to support the conspiracy conviction, the “organizing” basis was legally insufficient because it was barred by limitations. *Id.* at 312. The Court reversed because the general verdict did not indicate which ground the jury used to convict:

In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.

Id. The rationale of *Yates* is even more compelling here—“knowing” promotion is not just barred by limitations; it is not a crime.

The Fifth Circuit has applied *Yates* when it is unclear whether a conviction rested on valid or invalid grounds. *United States v. Howard*, 517 F.3d 731, 736 (5th Cir. 2008); *see also United States v. Brown*, 459 F.3d 509, 518, 523 (5th Cir. 2006) (setting aside conspiracy conviction under *Yates* because one of three underlying grounds for conviction was legally erroneous and finding no need to address the viability of the remaining two grounds).

Here, as in *Yates* and the Fifth Circuit cases above, the jury's general verdict makes it "impossible to tell which ground the jury selected" for conviction on Count 10. Thus, this Court should reverse.

ISSUE V: THE DISTRICT COURT USED A LEGALLY-ERRONEOUS METHOD TO DETERMINE THE “VALUE” OF THE ALLEGED BRIBE UNDER THE SENTENCING GUIDELINES

The district court also miscalculated Mr. Wong’s Guidelines range by overstating the “value” of the alleged bribe. *See* U.S.S.G. § 2C1.1(b)(2) (offense level is increased according to the value of the bribe). Specifically, the court calculated the “value” of the bribe at \$946,942. Of this amount, \$667,669 related to MSE’s sport-fishing boats, which Mr. Bohuchot used approximately 40 times over a two-and-a-half year period. (R.178-179.)

The court calculated the boat trip “value” as follows: (1) MSE’s “total cost of ownership” for the first boat was \$407,741; (2) Mr. Bohuchot was on the first boat approximately 90% of the time *it was in use*; (3) MSE’s “total cost of ownership” for the second boat was \$375,914; and (4) Mr. Bohuchot was on the second boat approximately 80% of the time *it was in use*. Thus, the court attributed to Mr. Bohuchot 90% and 80% of MSE’s total cost of ownership for the two boats respectively—\$667,669 in total. This included two-and-a-half years of mortgage payments, insurance, storage, gas, maintenance, and the MSE boat captain’s salary.

This methodology overstated the “value” of the alleged bribe, a legal question this Court reviews *de novo*. *United States v. Griffin*, 324 F.3d 330, 365 (5th Cir. 2003). The Background Commentary to § 2C1.1 explains that the

“value” of an alleged bribe is the “gain to the payer [here Mr. Wong] or the recipient [here Mr. Bohuchot], whichever is greater.” The district court made no attempt to calculate any “gain” to Mr. Wong because there was no evidence that MSE made a profit on either contract. Thus, the court should have used the “gain” to Mr. Bohuchot.

Mr. Bohuchot did not “own” the boats. Rather, he “used” them for several days. The “value” of such use is best captured by rental rates, and the defense objected to the court’s “cost of *ownership*” analysis. The evidence showed that Mr. Bohuchot could have rented the first boat (even for his *exclusive* use) for \$1500 to \$2500 per day and the second boat for \$2500 to \$3500 per day. Even these amounts overstate the actual “gain” to Mr. Bohuchot because almost every time he was on the boat Mr. Wong was present with his own guests. (R.179.)

Treating 80-90% of MSE’s total cost of ownership as the “gain” to Mr. Bohuchot defies economic reality. Mr. Bohuchot could not have sold an 80-90% interest in the boats; or used the boats as collateral to obtain a loan; or rented the boats out to others. Simply put, Mr. Bohuchot lacked the “bundle of rights” that comes with ownership.

The following example demonstrates the logical flaw in the district court’s methodology: had the boats been used only once, and that by Mr. Bohuchot, the

district court would have valued the bribe at 100% of the cost of ownership—or \$946,942—for one boat ride that Mr. Bohuchot could have rented for \$2500.

“Value” under the Guidelines must be “grounded in economic reality,” *see United States v. Ollis*, 429 F.3d 540, 547 (5th Cir. 2005)—for example, the boats’ daily rental cost multiplied by the number of days Mr. Bohuchot used them. The government conceded as much during closing argument: “[The boat captain] talked about how much it would cost to rent [the first boat] for [three quarters of] a day . . . \$1500 to \$2500. Every day Ruben Bohuchot spent on this boat was something of value to him.” (R.3157); and “The value of a three-quarter day trip on [the second boat], \$2500 to \$3500. That is a lot of value to Mr. Bohuchot.” (R.3169.)

This Court should remand for resentencing.

**ISSUE VI: THE DISTRICT COURT ERRONEOUSLY FOUND
“MULTIPLE BRIBES” UNDER THE SENTENCING
GUIDELINES**

The district court also erred by adding two points under U.S.S.G. § 2C1.1(b)(1), which applies when the “offense involved more than one bribe.” Application Note 2 states: “Related payments that, in essence, constitute a single incident of bribery . . . are to be treated as a single bribe . . . even if charged in separate counts.” As an example, Note 2 references “related payments” made to induce “a single action.” As explained in Issue II, the government’s theory showed no more than multiple perks in return for a single action—giving early inside information on Seats—and thus this Court should remand for resentencing.

CONCLUSION

For the foregoing reasons, this Court should reverse and render an acquittal on all counts based on the constructive amendment to the Indictment and the prosecutor's impermissible comment on Mr. Wong's decision not to testify. If any conviction stands, the Court should remand for resentencing based on the district court's misapplications of the Guidelines.

Respectfully submitted,

/s/ David Gerger _____

David Gerger

Dane Ball

GERGER & CLARKE

1001 Fannin, Suite 1950

Houston, Texas 77002

713-224-4400

713-224-5154 (fax)

CERTIFICATE OF SERVICE

I, David Gerger, certify that today, August 7, 2009, a hard copy of this brief, a CD containing a copy of this brief, a copy of the record excerpts, a CD containing a copy of the record excerpts, and the official record in this case were served upon Susan Cowger, Assistant United States Attorney, Northern District of Texas, by Federal Express to 1100 Commerce St., Suite 300, Dallas, Texas 75242.

/s/ David Gerger
David Gerger