

instructions to the jurors cautioning them against giving any consideration to Wong not testifying:

[t]he law does not require a defendant to prove his innocence or produce any evidence at all, and no inference or conclusion may be drawn from a defendant's decision not to testify. In this case, that Defendant Wong did not testify must not be considered by you in any way or even discussed to determine whether he is guilty as charged in the Indictment. On the other hand, Defendant Bohuchot did testify, and you are to consider his testimony and weigh it as you would any other witness's testimony.

(R3/459-460.) *Compare Ward*, 481 F.2d at 187 (Court examined and approved precautionary and curative instructions given by district court in determining that trial was not infected with plain error based on claim of improper prosecutorial comment on defendant's decision not to testify).

If this Court determines that the comments were constitutionally impermissible, then the Court must consider whether they were harmless beyond a reasonable doubt. *Grosz*, 76 F.3d at 1326, citing *Chapman v. California*, 386 U.S. 18, \_\_\_ (1967). A comment will not warrant reversal if, beyond a reasonable doubt, it did not contribute to the jury's verdict. *United States v. Moreno*, 185 F.3d 465, 475 (5th Cir. 1999). This one comment in the sea of evidence and argument had no impact on the jury's verdict. Moreover, a curative instruction can "militate against finding a constitutional violation, or become central to the

harmless error analysis.” *Moreno*, 185 F.3d at 477, citing *Greer v. Miller*, 483 U.S. 756, 764 (1987); *United States v. Carter*, 953 F.2d 1449, 1466 (5th Cir. 1992). Here, the court’s very strong and specific instruction weighs against any finding of such a violation.

#### IV.

### **THE DISTRICT COURT DID NOT REDUCE THE *MENS REA* FOR THE MONEY-LAUNDERING CONSPIRACY IN THE JURY INSTRUCTIONS**

Appellants contend that the district court, in charging the jury, improperly reduced *mens rea* from “intentional” to “knowing” for count ten of the indictment, which alleged a conspiracy, under 18 U.S.C. § 1956(h), to violate 18 U.S.C. § 1956(a)(1)(B)(i). Their contention has no merit. Read in context, the instructions properly charged the jury as to the correct *mens rea*.

#### Standard of Review

Generally, this Court reviews *de novo* whether an instruction misstated an element of a statutory crime. *United States v. Guidry*, 406 F.3d 314, 321 (5th Cir. 2005). Because neither appellant objected to the court’s instruction, however, the proper standard of review is plain error.<sup>31</sup> FED.R.CRIM.P. 30(d), 52(b); *United*

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<sup>31</sup> Contrary to appellants’ contention, they did not request a jury instruction going to the proper *mens rea* for money laundering. Wong cites to pages 3036 through 3038 of the record to support appellants’ claim that jury instructions on the requisite *mens rea* for money laundering

For you to find Defendants Bohuchot and Wong guilty of the crime of conspiracy to launder monetary instruments **as charged in count 10**, you must be convinced that the Government has proved each of the following beyond a reasonable doubt:

*First:* That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan to violate Title 18 U.S.C. § 1956(a) **as charged in the Indictment**; and

*Second:* That the defendant, knowing the unlawful purpose of the plan, willfully joined in it, that is, with the intent to further the unlawful purpose.

(R3/478.) (Emphasis added.)

Appellants seize on the court's short-hand description of a violation of 18 U.S.C. § 1956(a) – “which 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” – to argue that the court changed the *mens rea* from “intentional” to “knowing” for conviction under count 10.<sup>32</sup> (Wong brief, pp. 50-53.) As is clear from the instructions, however, the jury was directed to read the indictment and to convict only if they found that appellants conspired “to violate Title 18 U.S.C. § 1956(a)

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<sup>32</sup> The language used by the district court partially mirrors Fifth Circuit Pattern Jury Instructions: Criminal § 2.76 (2001), which addresses the laundering of monetary instruments under 18 U.S.C. §§ 1956(a)(1)(A)(i) and 1956(a)(1)(B)(i).

**as charged in the Indictment,**” which appellants acknowledge alleged the correct *mens rea*.<sup>33</sup> (Emphasis added.) Read in context, the instruction provided clear and correct instructions to the jury as to the proper *mens rea* for conviction. See *Nolen*, 472 F.3d at 380, citing *United States v. Price*, 877 F.2d 334, 338 (5th Cir. 1989) (“Specific instructions may not be judged in artificial isolation, but must be viewed in the context of the overall charge, and the charge’s correctness is measured not by isolated passages but in light of the charge as a whole.”); see also *United States v. Slovacek*, 867 F.2d 842, 847 (5th Cir. 1989) (in face of plain error standard, reference in instructions to indictment sufficient to overrule claim that instructions failed to set out element of offense), citing *United States v. Brown*, 616 F.2d 844, 847-848 (5th Cir. 1980) (same). There is no error here, and, certainly, no plain error.

V. and VI.

**APPELLANTS’ SENTENCES ARE NEITHER PROCEDURALLY  
NOR SUBSTANTIVELY UNREASONABLE**

Both appellants contend that the district court, in calculating the “value” of the bribe for sentencing purposes, improperly used the “total cost of ownership” for two boats used by Bohuchot, but owned by Wong and his partners, and

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<sup>33</sup> (Wong brief, p. 50.)

improperly enhanced their sentences under USSG §2C1.1(b)(1) for multiple bribes. Neither contention has merit where the record supports the district court's fact finding and sentencing methodology.

#### Standard of Review

As a result of the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the federal sentencing guidelines are advisory, and appellate review of sentencing decisions is limited to determining whether they are reasonable. *Gall v. United States*, 552 U.S. \_\_\_, \_\_\_, 128 S. Ct. 586, 594 (2007). The reasonableness of a sentence is reviewed under a deferential abuse-of-discretion standard. *Gall*, 552 U.S. at \_\_\_, 128 S. Ct. at 597; *United States v. Williams*, 517 F.3d 801, 808 (5th Cir. 2008); *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008).

In performing that review, this Court "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [18 U.S.C.] § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range." *Gall*, 552 U.S. at \_\_\_, 128 S. Ct. at 597; *see also Cisneros-Gutierrez*, 517

F.3d at 764 (same). Once the Court determines that the sentence is procedurally sound, then it considers the “substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.” *Id.* A sentence within a properly calculated range is presumptively reasonable. *Rita v. United States*, 551 U.S. 338, 127 S. Ct. 2456, 2462-2466 (2007); *United States v. Alonzo*, 435 F.3d 551, 553-554 (5th Cir. 2006); *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005).

In *Booker*'s wake, a district court's factual findings with respect to the sentencing guidelines continue to be reviewed for clear error, while the court's application and interpretation of the sentencing guidelines are subject to *de novo* review.<sup>34</sup> See *United States v. Gonzalez-Terrazas*, 529 F.3d 293, 296 (5th Cir. 2008); see also *United States v. Edwards*, 303 F.3d 606, 645 (5th Cir. 2002) (sentencing court's determination of loss is reviewed for clear error). A factual

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<sup>34</sup> In their objections to the presentence report, both Wong and Bohuchot challenged the manner in which the value of Bohuchot's use of the boats was calculated. (Bohuchot's "Defendant's Objections to Presentence Report," pp. 5-7; Wong's "Defendant's Objections to Presentence Investigation Report," pp. 9-12.) Bohuchot also objected to the two-level enhancement based on multiple bribes, but, in his objections to the presentence report, Wong objected to the two levels only so far as denying Bohuchot was a "public official" for purposes of the adjustment. *Id.* In making its rulings, however, the court elected to overrule the objection as to Wong to the extent that he might also be challenging whether there were multiple bribes. (Wong Sentencing/3353-3354.) Given these circumstances, the government does not concede that Wong properly preserved error. If the Court agrees that Wong failed to properly object, then his portion of this claim must be reviewed under a plain error standard. *United States v. Simmons*, 568 F.3d 564, 566 (5th Cir. 2009) (failure to object results in plain error standard).

finding is not clearly erroneous so long as it is plausible in light of the record as a whole. *Cisneros-Gutierrez*, 517 F.3d at 761; *see also In re Dennis*, 330 F.3d 696, 701 (5th Cir. 2003) (factual finding is clearly erroneous only if, based on the Court’s review of the record, it is left with the definite and firm conviction that a mistake has been committed).

“Value” of the Bribe

In determining the applicable guideline range, the presentence report increased appellants’ offense levels based on a guideline manual provision that

[i]f 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 a public official, or the loss to the government from the offense, whichever is greatest, exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

USSG §2C1.1(b)(2) (Nov. 2007). (Wong PSR, ¶ 50; Bohuchot PSR, ¶ 51.) The court concluded that the value of the payment received by Bohuchot was \$945,942.56, which translated into 14 levels being added to Bohuchot’s and Wong’s offense levels.<sup>35</sup> (Wong PSR, ¶ 50; Bohuchot PSR, ¶ 51.) *See* USSG

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<sup>35</sup> The probation officer rejected the government’s position that appellants’ offense level should be increased based on the total benefit Wong received under the two contracts, noting that the total benefit received by Wong was unknown. (United States’ Response to the Presentence Report; pp. 1-2; Second Addendum to the Presentence Report, p. 1.)

§2B1.1(b)(1)(H). Central to the value of the payment was Bohuchot's use of two boats – Sir Veza and Sir Veza II. The total of \$945,942.56 included 90 percent of Sir Veza's ownership, operation, and maintenance (.9 times \$407,741.81 equals \$366,967.62), and 80 percent of Sir Veza II's ownership, operation, and maintenance (.8 times \$375,914.63 equals \$300,731.70), for a total of \$667,699.32. (Wong PSR, ¶¶ 38-39, 50; Bohuchot PSR, ¶¶ 38-39.)<sup>36</sup>

The court's decision to use this method to determine the value of the bribes to Bohuchot was predicated on evidence that, in exchange for his aid in helping MSE secure lucrative contracts from DISD, Bohuchot was provided extensive use of two boats belonging to Wong and his partners. The presentence report summarized that evidence:

Sometime in October 2002, Bohuchot called Daniel Tingley and asked him to help him (Bohuchot) purchase a boat. Subsequently, Tingley inspected a boat, at the direction of Bohuchot. On October 20, 2002, Statewide purchased this 46-foot Post motor yacht for approximately \$305,000. Tingley was hired by Bohuchot and Wang as the boat captain. Tingley was hired to manage and oversee daily upkeep and operations of the yacht. Witness testimony showed that the yacht was named Sir Veza and was controlled by Bohuchot. According to witness testimony Bohuchot negotiated Tingley's salary, chose where the boat was docked, and directed the ordering of

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<sup>36</sup> The court concluded that the \$945,942.56 was a conservative estimate; the presentence report recounted other benefits provided by Wong and received by Bohuchot, including meals, sporting event tickets, and rounds of golf, which were not included in this amount. (Wong PSR, ¶ 42; Bohuchot PSR, ¶ 42; Bohuchot Sentencing/3610; Wong Sentencing/3348.)

gear and supplies for the boat. Specifically, on one occasion Bohuchot told Tingley some of the upgrades on the boat could not be done until DISD paid MSE some of the funds from a contract MSE had with DISD. Tingley testified that on one occasion Wong told him (Tingley) to keep Bohuchot happy, because he (Wong) had no use for the yacht if Bohuchot did not want to use it. The investigation revealed that Bohuchot initially arranged for Tingley to have a “petty cash fund” to be used for yacht related expenses. This fund was maintained by MSE. When Tingley told Bohuchot that the petty cash fund was insufficient to cover expenses, Bohuchot indicated he would arrange for Wong to provide a credit card to Tingley to use for the yacht related expenses. This credit card was supplied by MSE on June 2003. From October 2002 through July 2005, the total cost of this yacht’s ownership, operation, and maintenance paid by MSE and Statewide was approximately \$404,741.81. The investigation also revealed that Bohuchot used the yacht, Sir Veza, 90 percent of the time the yacht was in use.

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On June 13, 2004, after the E-Rate 6 contract was obtained, MSE, through Statewide purchased a second, larger yacht. The evidence showed that Bohuchot named this yacht, Sir Veza II. Tingley continued to act as the boat captain on Sir Veza II as well. Sir Veza II was a 58-foot Viking and was purchased for almost \$800,000. The investigation revealed that Bohuchot used Sir Veza II, 80 percent of the time the boat was in use. All of the expenses and operating costs of this yacht, including the boat captain’s salary, were paid by Statewide and MSE, at Wong’s direction. The total cost of this yacht’s ownership paid by MSE and Statewide was \$375,914.63. Witnesses testimony showed that in 2005, Bohuchot directed Tingley to remove the guest registry book from the yacht due to an investigation at DISD. Testimony also showed that Bohuchot asked the boat captain and his wife to hide the true ownership of the yacht. Additionally, on one occasion, Bohuchot introduced Tingley as the owner of the yacht to friends Bohuchot had invited to spend the day on [the] yacht.

(PSR, ¶¶24, 26.)

Instead of determining the gain to Bohuchot based on the “cost of ownership” of the boats, Bohuchot and Wong contend that the court should have determined the value of the boats’ use to Bohuchot by multiplying the cost of daily rental use of each boat by the number of times Bohuchot used them. (Wong Brief, pp. 54-56.) The record supports the court’s rejection of their position and selection of its methodology.

First, the value of the boats to Bohuchot would not have been effectively captured by merely multiplying the number of times that Bohuchot was on board the boats times the daily cost of chartering the boats. As the court explained, the trips lasted more than one day and several lasted for up to two weeks at a time. (Bohuchot Sentencing/3602-3603.) The method suggested by appellants would have resulted in a value far below that enjoyed by Bohuchot.

Second, the district court did not err in crediting Captain Dan Tingley’s estimate of the amount of time that Bohuchot used the boats as opposed to others who used them. (Bohuchot Sentencing/3603-3604.) Given that Captain Tingley was in the best position to make that determination, there is no basis for concluding that the estimates were anything other than plausible. *See Cisneros-Gutierrez*, 517 F.3d at 761.

Third, as noted by the court, the evidence at trial established that, although others may have used them, the boats were purchased for Bohuchot's use and that he not only used the boats extensively, he, in fact, controlled them.<sup>37</sup> (Bohuchot Sentencing/3602; V245/457-499, 528-533, 564-569, 573.) As recounted in the Statement of Facts, Captain Dan Tingley testified that Bohuchot made almost all of the decisions concerning the two boats, including naming them, negotiating the captain's salary, choosing where the boat would be docked, and directing the ordering of gear and supplies. (Wong PSR, ¶ 24; Bohuchot PSR, ¶ 24; V245/457, 466-468; V266/2977.) Wong made clear to Captain Tingley that, but for Bohuchot, there would be no boat.<sup>38</sup> (Wong PSR, ¶ 24; Bohuchot PSR, ¶ 24; V245/518-519) When the petty cash fund proved to be too meager, Wong also provided a credit card to Tingley to wine and dine Bohuchot and his guests when they went off-ship. (V245-524-525.) As the court noted, after hearing the trial testimony, "you really come away with a distinct impression that the boat or boats were there for Mr. Bohuchot's benefit and use. And the people who were on that

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<sup>37</sup> For example, the court pointed to testimony from Captain Tingley that Bohuchot was the only person who could wear shoes on Sir Veza II's light-colored carpet. (Bohuchot Sentencing/3603.)

<sup>38</sup> The comment arose when Captain Tingley approached Wong about instituting a rule to prevent Bohuchot and others from operating the boat when they had had too much to drink. (V245/518-519.)

boat family, friends, and other associates of Mr. Bohuchot.” (Wong Sentencing/3339.)

The court properly attributed a significant portion of the costs of having the boats as a value to Bohuchot for his part in the bribery. Moreover, because the manual provides for a 14-level increase when the value of the payment is greater than \$400,000, but less than \$1,000,000, appellants would have to show that the court’s estimate of \$667,699.32 is off by more than \$545,942.56, to reduce it enough to move them to the next lower level. *See* USSG §2B1.1(b)(1). Looking at it another way, the court’s estimate of the value of the payment to Bohuchot is \$278,243.24 without the value of Bohuchot’s use of the boats included (\$945,942.56 minus \$667,699.32). If the court had attributed only an additional \$121,758 for the value of Bohuchot’s use of the boats, appellants’ offense level would still have been increased by 14 levels. Given the information before the court, including the benefits to Bohuchot that were not accounted for in the \$945,942.56, it simply cannot be shown that the court clearly erred in determining the amount of the payment. *See United States v. Griffin*, 324 F.3d 330, 366 (5th Cir. 2003) (amount need not be determined with precision).

### More Than One Bribe

The sentencing guidelines provide that “[i]f the offense involved more than one bribe or extortion, increase by 2 levels.” USSG §2C1.1(b)(1). “Subsection (b)(1) provides an adjustment for offenses involving more than one incidence of either bribery or extortion. Related payments that, in essence, constitute a single incident of bribery or extortion (*e.g.*, a number of installment payments for a single action) are to be treated as a single bribe or extortion, even if charged in separate counts.” USSG §2C1.1(b)(1), comment. (n.2.) The court applied the enhancement in sentencing appellants. (Wong PSR, ¶ 50; Bohuchot PSR, ¶ 51.)

On appeal, appellants contend that, because the government’s theory showed no more than multiple perks in return for a single action, *i.e.*, giving early inside information on the Seats Management contract, the court erred in finding more than one bribe. The court disagreed,

The Court believes that more than one bribe was involved. In fact, the counts of conviction reflect that. This is not where you had a single bribe and quote, unquote, installment payments were made on that particular bribe. And when I look at United States Sentencing Guidelines Section 2C1.1(b)(1) and look at the application notes, the Court does not believe that this involved a quote, unquote, single bribe, and the Court believes that the two-level enhancement applied by the probation officer was correct. The Court, therefore overrules the objection to paragraph 51 of the pre-sentence report.

(Bohuchot Sentencing/3614.)

As the court noted, the counts of conviction support the finding of more than one bribe. Moreover, the length and breadth of the payments made, and benefits provided, to Bohuchot, spanning as they do both the Seats Management and E-Rate Year Six contracts, support the court's finding that there was more than one bribe. One incident recounted at trial and set forth in the presentence report specifically supports the finding. Captain Tingley testified that he was told by Bohuchot to wait to upgrade some boat equipment because Wong was waiting for some money to be released on a contract he had been awarded by the school district. (V245/539-541.) Bohuchot later told the captain that he could go forward with the purchase because the funds had been received. (V245/542.) The equipment was for the Sir Veza II, which was not purchased until June of 2004, after the consortium had been awarded the E-Rate contract and had begun being paid. (V245/469-471; GE27, 31, 77.) In addition, the money funneled through Bohuchot's son-in-law to Bohuchot was from the E-Rate contract. (V264/2640-2642; V265/2852.) This evidence shows that Bohuchot received "payments" under the second contract as well – justifying the court's finding of more than one bribe.

The court did not procedurally err in the calculation of appellants' guideline range; thus, their sentences are procedurally reasonable. Given that the court

varied substantially in the sentences it ultimately imposed on Bohuchot and Wong – Bohuchot, who was sentenced to 132 months, faced an imprisonment range of 292 to 365 months, while Wong, who was sentenced to 120 months, had a imprisonment range of 188 to 235 months – appellants cannot establish that their sentences are substantively unreasonable. (Bohuchot Sentencing/3628; Wong Sentencing/3364.)

### CONCLUSION

For the foregoing reasons, appellants' convictions and sentences should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on the 13th day of October, 2009, the original and six copies of the foregoing brief, and a computer diskette containing same, were sent via the United States mail to the Clerk of the United States Court of Appeals for the Fifth Circuit, and two copies of the brief and one computer diskette containing the brief were likewise served on David Gerger and Dane Ball, GERGER & CLARKE, counsel for Frankie L. Wong, 1001 Fannin, Suite 1950, Houston, Texas 77002, and Jerry V. Beard, Assistant Federal Public Defender and counsel for Bohuchot, 819 Taylor Street, Suite 9A10, Fort Worth, Texas 76102.

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## CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5th Cir. R. 32.2.7(b)(3), THE BRIEF CONTAINS:

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