No. 05-10275

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

AUSTIN J. "SONNY" SHELTON,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF GUAM

BRIEF FOR THE UNITED STATES

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STATEMENT OF JURISDICTION

The United States agrees with the appellant's statement of jurisdiction.

STATEMENT OF ISSUES

l. Whether the court committed plain error in failing to find sentencing factors beyond a reasonable doubt.

2. Whether the court committed plain error in failing to find sentencing factors based on clear and convincing evidence.

3. Whether the court's two-level enhancement for obstruction under U.S.S.G. § 3C1.1 was based on a legally erroneous factor.

4. Whether the court's factual findings concerning obstruction, U.S.S.G. § 3C1.1, and role in the offense, U.S.S.G. § 3B1.1, are clearly erroneous.

STATEMENT

I. STATEMENT OF THE CASE

On September 24, 2001, a jury convicted Austin "Sonny" Shelton of two counts of wire fraud (18 U.S.C. §§ 2, 1343, 1346), six counts of bribery (18 U.S.C. § 666(a)(1)(B)), three counts of bid rigging (15 U.S.C. § 3), and one count of money laundering (18 U.S.C. §§ 2, 1957). ER Tab 14, Docket # 200.

The district court (Unpingco, Ch. J.) sentenced Shelton on January 22, 2002, to 120 months' imprisonment (the maximum sentence for bribery under 18 U.S.C. § 666(a)(1)(B)), and ordered him to pay $112,000 in restitution to the

Government of Guam. Docket # 260. Shelton was incarcerated pending appeal. Docket # 218.

On June 1, 2004, this Court affirmed Shelton's conviction and rejected most of Shelton's challenges to his sentence. *United States v. Shelton*, 99 F. App'x 136 (9th Cir. 2004) (unpublished) (*Shelton I*). ER Tab 9. However, because this Court concluded that one of the factors on which the district court had based a three-level upward departure under the Sentencing Guidelines was invalid, the case was remanded to the district court for resentencing. *Id.*

The district court stayed resentencing pending the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005), and Shelton was released on bond pending resentencing. Docket ## 300, 307.

On March 31, 2005, the court (Jones, J.) sentenced Shelton to 100 months in prison, and ordered him to pay $112,000 in restitution. ER Tab 11. Shelton was returned to prison on April 29, 2005.

II. STATEMENT OF FACTS

A. Shelton's Role in the Offenses

Shelton was convicted for using his position as Guam's Director of Parks and Recreation (DPR) corruptly to solicit and accept cash payments totaling $112,000 in connection with DPR's award of contracts for the cleanup and repairs

necessitated by the devastation caused by Typhoon Paka in December 1997. *See* ER Tab 1. Because Shelton challenges as clearly erroneous the sentencing enhancement for his leadership role in these offenses, we will briefly review some of the evidence presented at trial.

Immediately after Paka struck, Shelton asked Young Soo Yoon to help Shelton find a contractor to do debris removal and cleanup. Supp. ER 153-54. Shelton told Yoon that, in addition to the regular hourly rate for the equipment rental, Shelton wanted a cash payoff for awarding the contract. Supp. ER 156. Yoon called Chang Bok Son who agreed to do the work with the understanding that Shelton, the DPR "Director," was going to receive some of the proceeds. Supp. ER 96-98, 153-157. When Son billed DPR for the work, he charged for a fictitious extra backhoe to cover the payoff to Shelton. Supp. ER 99-100, 1109-114, 214. Shelton also altered Son's invoices by adding fictitious dates and cleanup sites, to ensure that the inflated charges would be paid, and to cover up the bribes. Supp. ER 101-109, 220-22.

In the following months, Shelton devised additional schemes to award contracts to co-conspirators through rigged bids, and to receive bribes out of the proceeds of those rigged projects. He assured Young Soo Yoon that Yoon and his confederates would be awarded projects for the repair of the Paseo Light Tower,

Wettengel Football Field, and Ypao Beach Pavilion if Yoon brought him three bids for each project. Shelton wanted three bids to create the appearance that the project award complied with Guam's competitive bidding regulations. Shelton also told Yoon what to bid on the contracts, and how much cash he wanted out of the proceeds. At Shelton's direction, Yoon then enlisted others to prepare fictitious and inflated bids. Shelton arranged for expedited processing of the project payments and, when the payment checks were ready, he called Yoon to have the contractors pick up the checks and then convert them into the cash that Shelton had demanded in bribes. Supp. ER 117-37, 139-48, 150, 158-63, 166-70, 173-76, 215-17.

Similarly, when repairs were needed for the Paseo Stadium and Agana Tennis Courts, Shelton called Primitivo Carlos, telling him that he would get the contract if he paid $25,000 to Shelton. Supp. ER 2-4. Shelton knew that Carlos could not do the work, but that he would enlist someone else who would agree to Shelton's terms. Supp. ER 5-10, 54-57. Shelton also told Carlos that he had to arrange for three bids to be submitted so that Shelton could award him the contract. Supp. ER 13-20. Pursuant to those directions, Carlos enlisted others to prepare non-competitive bids and do the work. The winning bid was inflated to cover Shelton's bribes. Proceeds from the payments for the work were converted

into cash for Carlos to give to Shelton. Supp. ER 11-32, 35-52, 57-61, 63-72.

Shelton also helped his friend John Martinez win the awards for the repair of the Paseo flagpole, billboards, and scoreboard. Shelton instructed Martinez to submit rigged bids, and told Martinez how much to bid for the projects. Supp. ER 77-88, 90-93.

To conceal the bribery and fraud on these projects, Shelton deliberately failed to provide to Guam's Recovery Coordination Office (RCO) the cost information and paperwork necessary for Guam to obtain reimbursement for the projects from the Federal Emergency Management Agency (FEMA). Supp. ER 180-90, 192-97. To this day, Guam has not recovered the monies (90% of Guam's costs) that FEMA set aside to reimburse Guam for its expenditures on most of the fraudulent projects. FEMA representatives testified at sentencing that the money will be deobligated and Guam is unlikely ever to be reimbursed because the projects were tainted by fraud. ER Tab 13, pp. 26, 56-57, 72-75.

B. The Original Sentencing

Under the mandatory Sentencing Guidelines regime that was then in place, the district court calculated a sentence using the 2001 Sentencing Guidelines (which were more favorable to the defendant than the 1997 Guidelines). ER Tab 13, p. 94. Among other things, the court imposed upward adjustments of four

levels for Shelton's role in the offense and two levels for obstruction. The court found, based on "clear and convincing" evidence, that Shelton was a leader or organizer of a criminal activity involving five or more participants, U.S.S.G. § 3B1.1(a), and that Shelton had obstructed the investigation by telling Lee Yoon that her husband, Young Soo Yoon, should stay in Korea until the government's investigation was over. U.S.S.G. § 3C1.1. ER Tab 8, pp. 183-86, Supp. ER 232-35.

The court found that, although the loss to Guam greatly exceeded the $112,000 that Shelton had taken in bribes, the court could not determine the precise monetary loss with sufficient precision to satisfy a clear and convincing standard which the court believed was required by this Court's decision in *United States v. Jordan*, 256 F.3d 922 (9th Cir. 2001). The court, therefore, calculated the fraud offense level using the $112,000 figure, but departed upward three offense levels pursuant to U.S.S.G. § 5K2.0. To justify the upward departure, the court relied on two factors that it believed were not adequately taken into consideration by the Guidelines. First, Shelton's conduct may have prevented Guam from receiving all the reimbursement to which it was entitled from FEMA. Second, Shelton may have adversely affected Guam's ability to receive FEMA funding on future projects because of additional oversight procedures that FEMA was

instituting to guard against fraud. Supp. ER 236-57.

C. *Shelton I*

In his prior appeal, Shelton raised 11 issues as grounds for overturning his conviction and sentence. Shelton did not challenge, however, the court's four-level adjustment for his role in the offense or the two-level enhancement for obstruction. Nor did Shelton challenge the district court's use of the "preponderance of the evidence" test for the three-level upward departure.[1] Supp. ER 250.

This Court affirmed Shelton's conviction and rejected all but one of Shelton's challenges to his sentence. *Shelton I*. ER Tab 9. The Court remanded for resentencing for only one reason: the district court had relied on two factors in making a three-level upward departure from the Guidelines level, but the Court held that only one of those grounds – lost FEMA reimbursement – was valid. Because the district court had not indicated that the valid factor standing alone would have warranted the upward departure, a remand was necessary. ER Tab 9,

[1] Shelton challenged the basis for the upward departure, the manner in which the court grouped the offenses under U.S.S.G. § 3D1.2, the admission of evidence under Fed. R. Evid. 404(b), the court's conduct of the voir dire, the government's closing remarks, some jury instructions, the failure to submit a special verdict form to the jury, the refusal to grant a continuance, and other alleged errors in the court's conduct of the trial. *See* ER Tab 9, pp. 2-11, 13-15.

p. 13.

D. The Resentencing

On resentencing, the court first calculated a Guidelines sentence using the 1997 Sentencing Guidelines because they were more favorable to the defendant than the 2004 Guidelines. ER Tab 13, p. 131. The court concluded that the offense level would not be affected by whether a $112,000 loss figure (the amount of the bribes) or a $400,000 loss figure (the losses to Guam occasioned by the lost FEMA reimbursement) was used. *Id.* at 139, 177. In calculating the offense levels for the four separate offenses (wire fraud, bribery, bid rigging, and money laundering), the court adjusted the offense levels for each offense upwards by adding four levels for role in the offense (U.S.S.G. § 3B1.1(a)), and two levels for obstruction (U.S.S.G. § 3C1.1). ER Tab 13, pp. 135-138, 141-143, 175-176. As previously noted, the same adjustments were made to Shelton's original sentence and were not challenged on appeal. The court also added a two-level enhancement for abuse of trust under U.S.S.G. § 3B1.3 (ER Tab 13, pp. 136, 138).[2] Finally,

[2] The calculations were as follows: for wire fraud, base level 10 (U.S.S.G. § 2C1.7), plus 8 under § 2C1.7(b)(1)(B) for elected official, plus 4 for leadership role in the offense, plus 2 for obstruction, yielding level 24 (ER Tab 13, p. 135); for bribery, base offense level 10, plus 10 for fraud over $400,000, plus 4 for role in the offense and 2 for obstruction, resulting in level 26 (*id.* at 137); for money laundering, base level of 20 (§ 2S1.1), plus 1 for over $100,000, plus 2 for abuse of trust (§ 3B1.3), plus 4 for role in the offense and 2 for obstruction, yielding

after grouping (U.S.S.G. § 3D1.4), the court initially calculated a Guidelines offense level of 30,[3] with a sentence range of 97 to 121 months. *Id.* at 135-139.

After the government pointed out some errors in the court's calculations, the court corrected the Guidelines offense level to 29,[4] with a sentence range of 87 to 108 months. The court also considered the other sentencing factors listed in 18 U.S.C. § 3553(a). *Id.* at 139-140. At offense level 29, the court refused the government's request to depart upward so that it could impose the 120-month sentence that Judge Unpingco had imposed at the first sentencing. *Id.* at 160, 177. The court also denied Shelton's request to depart downward. The court found these were "serious offenses." It reasoned that the people of Guam had lost faith in government; that Shelton had abused a position of trust; that he still failed to accept responsibility (blaming others for his conduct); and that Shelton had steadfastly refused to cooperate with the government to help prosecute others.

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level 29 (*id.* at 137-138); for restraint of trade, base 10 (§ 2R1.1), plus 1 for rigged bid, plus 1 for volume of commerce over $400,000, plus 2 for abuse of trust, 4 for role in the offense, and 2 for obstruction, yielding level 20. *Id.* at 138.

[3] To the highest group level, 29 for money laundering (*see* n.2, *supra*), the court added one level for grouping, resulting in an adjusted offense level of 30. ER Tab 13, pp. 138-39.

[4] The court had used the wrong money laundering provision (§2S1.1 instead of § 2S1.2), and had failed to include a two-level enhancement for taking more than one bribe. ER Tab 13, pp. 141-46

The court also explained that justice should be applied evenly and that "the rule of law" required Shelton to obey the same laws as anyone else. The court said that punishment for offenses should be meted out evenly for all defendants and that the Guidelines represent a fair range of how sentences are meted out across the United States. *Id.* at 160-165.

The government then noted some additional errors that the court had made in its wire fraud and grouping calculations. ER Tab 13, pp. 166-75. After adjusting the offense level accordingly, the court found that the correct Guidelines offense level was 31, with a sentence range of 108 to 135 months. *Id.* at 176. Given this new calculation, the court debated whether to impose the minimum 108 month sentence or depart downward. *Id.* at 179. Reversing its previous view, the court decided to depart downward one level, so that it could impose a sentence of 100 months.[5] *Id.* The court found that this was an "appropriate sentence," reasoning that, although Shelton's crime did not involve a "huge amount, this wasn't millions of dollars," "it was serious," given Shelton's position. *Id.* at 177. As for rehabilitation, the court thought Shelton was "humbler," but still had not

[5] The actual sentence was 60 months each on counts one and two, to run concurrently; 100 months each on counts three through eight, to run concurrently; 36 months on counts nine through 11 to run concurrently, but consecutively with counts one and two; and 100 months on count 12 to run concurrently with the other counts. ER Tab 13, p. 182-183.

"acknowledged the offense or [his] guilt in the offense." *Id.* at 178. The court also noted that Shelton had not made the restitution ordered at the first sentencing and that was "a very big factor in my mind, too." *Id.* at 180.

The court believed that the 100-month sentence sent a "strong message to the people of Guam that we're not going to tolerate this kind of conduct," *id.*, and that the sentence was "sufficient, but not greater than necessary . . . to comply with the purposes of sentencing as set forth in 18 USC 3553." *Id.* at 182. The court also reimposed the order of restitution in the amount of $112,000. *Id.* at 181, 185.

SUMMARY OF ARGUMENT

Shelton argues that the district court erred in not using a beyond a reasonable doubt standard in determining the facts relevant to his sentencing. Alternatively, he argues that the district court should have used a clear and convincing standard in its fact finding. Finally, Shelton argues that the facts found by the district court as a matter of law do not prove obstruction and that the court's factual findings were not proven by a preponderance of the evidence. Shelton's legal arguments are foreclosed by prior decisions of the Supreme Court and this Court and his factual claims are not supported by the evidence.

l. Shelton did not argue in the district court that a judge at sentencing must find the facts relevant to the sentence imposed beyond a reasonable doubt. Rather,

he argued that any facts relied on at sentencing must have been found by a jury beyond a reasonable doubt. Shelton has abandoned the argument he made in the district court, and his new argument is reviewable only for plain error. In any event, the Supreme Court has repeatedly held that a preponderance of the evidence standard satisfies due process at sentencing. *See, e.g., McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986); *Harris v. United States*, 536 U.S. 545, 558 (2002); *see also, United States v. Dare*, 425 F.3d 634, 642 (9th Cir. 2005). *Booker* did not change that standard and, indeed, at least implicitly recognized that a preponderance of the evidence standard would continue to govern judicial fact finding in sentencing under an advisory Guidelines regime. *See* 125 S. Ct. at 760.

2. Defendant's claim that *Jordan* required the court to use a "clear and convincing" standard to make Guidelines enhancements for role in the offense and obstruction both ignores the record and misapplies *Jordan*. At Shelton's first sentencing, the district court used a clear and convincing evidence standard in finding the facts it relied on in determining that Shelton's offense level should be adjusted upward for his role in the offense and for obstructing justice. Shelton did not challenge either adjustment in *Shelton I*. At Shelton's resentencing, the district court once again adjusted Shelton's offense level upward for both his role in the offense and obstruction, relying on the same facts found at the first

sentencing hearing. Since those facts had been found using a clear and convincing standard at Shelton's first sentencing, Shelton cannot complain at this late date about the legal standard employed by the district court at resentencing.

In any event, *Jordan* requires a clear and convincing standard when a resulting sentence is extremely disproportionate to the sentence that otherwise would be imposed. The adjustments for obstruction and role in the offense in this case do not result in an extremely disproportionate sentence.

3. Regardless of whether a clear and convincing standard or a preponderance of the evidence standard is applied, the district court's factual findings are amply support by the record and are not clearly erroneous. The jury's verdict that Shelton was guilty of six counts of bribery and three counts of bid rigging establishes that Shelton was the leader of an activity involving more than five participants *beyond a reasonable doubt*. The remaining two-level adjustment for obstruction was based on undisputed evidence (l) that Shelton had failed to submit the documentation necessary for Guam to receive FEMA reimbursement on the DPR projects he oversaw, even after the investigation into the Typhoon Paka fraud had begun, for fear that the documentation would uncover his fraud; and (2) that Shelton had asked a co-conspirator witness's wife to tell her husband to stay in Korea until the investigation was over. The court's reliance on these

factors to find obstruction was not clearly erroneous. Nor was there legal error. Since the court found that Shelton's instructions to his subordinates not to submit accurate information to FEMA continued into the period of the government's investigation, the court could rely on that fact in determining that Shelton had obstructed justice. And Shelton's telling Lee Yoon to have her husband stay in Korea until the investigation was over clearly constitutes obstruction under U.S.S.G. § 3C1.1 and the Guidelines commentary.

Finally, any error in finding an obstruction of justice in this case would be harmless because the two-level reduction in offense level would not have resulted in any change in Shelton's sentence. A two-level reduction to level 29 would still have provided for a 100-month sentence within the applicable Guidelines range, and it is clear that the court wanted to impose a 100-month sentence.

ARGUMENT

I. STANDARD OF REVIEW

Shelton correctly observes (Deft. Br. 13-14, 38) that his counsel at resentencing argued that *the jury* should have found all facts relevant to sentencing beyond a reasonable doubt, and that the court could not make any fact findings at all (ER Tab 13 pp. 106-07, 110, 136), an argument he has now abandoned. Shelton did not object to the use of a preponderance of the evidence

standard by the court at sentencing. In the absence of proper objection, the court's application of the burden of proof is reviewed for plain error. *United States v. Riley*, 335 F.3d 919, 925 (9th Cir. 2003). To establish plain error, the defendant must show that an error "affect[s] substantial rights," and this Court may only notice a forfeited error if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 466-67 (1997) (internal quotations omitted).

The court's interpretation of the Sentencing Guidelines and the burden of proof for judicial fact finding are legal questions that are reviewed de novo, while the court's factual findings on obstruction and role in the offense are reviewed for clear error. *Jordan*, 256 F.3d at 926.

II. THE COURT WAS NOT REQUIRED TO FIND FACTS SUPPORTING ADJUSTMENTS FOR DEFENDANT'S ROLE IN THE OFFENSE AND OBSTRUCTION BEYOND A REASONABLE DOUBT

Relying on *In re Winship*, 397 U.S. 358 (1970), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Shelton argues (Deft. Br. 20-30) that a sentencing court must use a reasonable doubt standard in finding the facts it relies on to support an upward adjustment under the now advisory Sentencing Guidelines. But the district court did not commit plain error, and indeed, did not err at all, in not using a reasonable doubt standard at sentencing in this case. The Supreme Court

has held in cases decided both before and after *Winship* and *Apprendi* that the use of a preponderance of the evidence standard at sentencing generally satisfies due process and does not violate the Sixth Amendment right to a jury trial. *Williams v. New York*, 337 U.S. 241, 246 (1949); *McMillan v. Pennsylvania*, 477 U.S. 79, 91, 93 (1986); *United States v. Watts*, 519 U.S. 148, 156 (1997) (per curiam); *Harris v. United States*, 536 U.S. 545, 558 (2002). This precedent forecloses Shelton's argument that either due process or the Sixth Amendment requires a judge to find sentencing facts beyond a reasonable doubt. *See* Deft. Br. 24-25.[6]

The Supreme Court consistently has held that different standards of proof govern the trial at which the jury determines whether or not the defendant is guilty of the charged offense and the sentencing proceeding at which the court determines the appropriate sentence. *Watts*, 519 U.S. at 155-56. While the reasonable doubt standard must be used by the jury in determining whether the defendant is guilty at trial[7] (*Winship*, 397 U.S. at 364), "[j]udicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth

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[6] Shelton apparently concedes that judicial fact finding under an advisory Guidelines regime does not violate the Sixth Amendment. Deft. Br. 25.

[7] Shelton's guilt was determined by a jury beyond a reasonable doubt.

Amendments." *Harris*, 536 U.S. at 558. Accordingly, the district court in this case did not apply an incorrect standard of proof.

Contrary to Shelton's contentions (Deft. Br. 20-30), *Booker* did not change the standard of proof governing judicial fact finding at sentencing. In *Booker*, the Supreme Court held that judicial fact finding pursuant to mandatory sentencing guidelines violated a defendant's Sixth Amendment right to a jury trial. 125 S. Ct. at 749. As both majority opinions in *Booker* explained, *id.* at 750 (Stevens, J.), 764 (Breyer, J.): "everyone agrees that the constitutional issues presented by these cases would have been avoided *entirely* if Congress had omitted from the [Sentencing Reform Act] the provisions that make the Guidelines binding on district judges" (emphasis added). Accordingly, the Court solved this problem by severing two statutory provisions (18 U.S.C. §§ 3553(b)(1) and 3742(e)) that made the Sentencing Guidelines mandatory, and rendered the Guidelines advisory. 125 S. Ct. at 756-69. Therefore, while sentencing courts are no longer required to follow the Guidelines, they "must consult those Guidelines and take them into account when sentencing." *Id.* at 767. In addition, *Booker* established a new standard of review – "unreasonableness" – for sentences on appeal. *Id.* at 765.

Nothing in *Booker* even suggests that the Court was altering its long established view that fact finding at sentencing is governed by the preponderance

standard. Indeed, Justice Breyer in his opinion noted "that a sentencing judge could rely for sentencing purposes upon a fact that a jury had found *unproved* (beyond a reasonable doubt)." 125 S. Ct. at 760, citing *Watts*, 519 U.S. at 157. Similarly, Justice Stevens assumed that a prosecutor need prove an enhancing factor only by a preponderance of the evidence, not beyond a reasonable doubt. 125 S. Ct. at 782 (Stevens, J., dissenting).[8] Moreover, the Court adopted an "unreasonableness" standard of review to apply to all future sentences because that standard was "already familiar to appellate courts" in cases involving departures from the Guidelines, revocation of supervised release, and other cases in which the Guidelines had not provided a particular standard of review. 125 S. Ct. at 765-66. In discussing what "reasonableness" review means, the Court cited cases in which the courts of appeals had specifically relied on and approved district court fact finding under a preponderance of the evidence standard. *Id.* at 766, citing *United States v. White Face*, 383 F.3d 733, 737 (8th Cir. 2004) and *United States v. Tsosie*, 376 F.3d 1210, 1218-19 (10th Cir. 2004); *see also* 18 U.S.C. § 3583(e)(3) (providing for revocation of supervised release under

[8] Justice Stevens was responding to the statement in Justice Breyer's majority opinion that the remedy advanced by Justice Stevens would have given prosecutors the ability to place sentencing criteria beyond a judge's purview entirely. *See* 125 S. Ct. at 763, 782.

preponderance of evidence fact finding). *Booker* assumed that such cases, which used a preponderance standard at sentencing, would guide the courts in the future. *Id.* at 766.

Finally, both defendants in the *Booker* case had been sentenced by judges who had employed a preponderance of the evidence standard at their sentencing hearings. *See* 125 S. Ct. at 746, 747, 751, 797. This included a finding with respect to defendant Freddie Booker that he had obstructed justice and thus should receive an upward adjustment in his offense level. *See* 125 S. Ct. at 796. Nevertheless, in remanding for resentencing under the new advisory Guidelines regime, *id.* at 746-56, the Court did not criticize the use of the preponderance standard at the first sentencing hearings, or suggest that the resentencings should be governed by proof beyond a reasonable doubt. *See id.* at 769. The Court's failure to even suggest that any different burden of proof should be applied on remand supports the conclusion that the Court did not intend to change the relevant standard.

Both this Court and other appellate courts have rejected expansive interpretations of *Booker*. In *United States v. Ameline*, 409 F.3d 1073, 1077 (9th Cir. 2005) (en banc), this Court observed that *Booker* did not change any aspect of sentencing proceedings except to make the Guidelines advisory. Similarly, in

Dare, this Court re-affirmed the "general rule" that a "preponderance of the evidence standard is the appropriate standard for factual findings used for sentencing." *Dare*, 425 F.3d at 642 (citing *United States v. Howard*, 894 F.2d 1085, 1089 (9th Cir. 1990).[9] Other circuits agree. *United States v. Chau*, 2005 WL 2347210 at *6 (11th Cir. Sept. 27, 2005) (*Booker* does not prevent court from finding facts by a preponderance of the evidence that went beyond the charges contained in the indictment to which defendant pled guilty as long as guidelines were applied in an advisory way); *United States v. Juluke*, 426 F.3d 323, 328 (5th Cir. Sept. 20, 2005) (no change post-*Booker* in the fact that the government has burden of proving two-level enhancement under U.S.S.G. § 2D1.1(b)(1) [possession of firearm] by a preponderance of the evidence); *United States v. Bothun*, 424 F.3d 582 (7th Cir. 2005) (same); *see also United States v. Edwards*, 424 F.3d 1106, 1108 (D.C. Cir. 2005) (Fifth Amendment does not foreclose judicial sentencing factors based on a preponderance of the evidence, but does not

[9] In *Dare*, the sentencing court had found by a preponderance of the evidence that the defendant intentionally had discharged a weapon in the course of a drug transaction, but the court expressly said that it would *not* have made that finding under a "clear and convincing" standard. 425 F.3d at 638. This Court sustained the sentence under the preponderance of the evidence standard.

reach Sixth Amendment issue).[10]

Finally, Shelton's suggestion that *Harris* is distinguishable because it involved a mandatory minimum and that it is also inconsistent with *Booker* (Deft. Br. 27-28), simply ignores what this Court held in *Dare*. In that case, the defendant claimed that the judicial finding of brandishing had doubled his minimum sentence from five to ten years and thus should have been made using a higher standard of proof than preponderance of the evidence. 425 F.3d at 638-40. He also argued that *Booker* effectively had overruled *Harris* and required a higher burden of proof than preponderance of the evidence. *Id.* at 640-42. This Court rejected both contentions. It held it could not "limit *Harris* based upon the harshness of the sentence imposed under § 924(c)." *Id.* at 640, citing *Harris*, 536 U.S. at 566 ("That a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element [to be proved beyond a reasonable doubt]"). The Court also said that it could not "question *Harris*' authority as binding precedent." 425 F.3d at 641. Thus, *Harris*,

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[10] The only case Shelton cites to the contrary is *United States v. Pimental*, 367 F. Supp. 2d 143, 153-54 (D. Mass. 2005). Deft. Br. 26-27. In that case, the district court refused to apply an enhancement for "related conduct" under a preponderance of the evidence standard because a jury had acquitted the defendant of those related charges. The court's reasoning that *Booker* had changed the burden of proof for judicial sentencing, however, is directly contrary to Justice Breyer's reliance on *Watts* (125 S. Ct. at 760) and this Court's decision in *Dare*. *See also United States v. Malouf*, 377 F. Supp. 2d 315 (D. Mass. 2005) (following *Pimental*).

McMillan, and *Dare* establish that, both before *Booker* and after, sentencing factors that are not elements of a crime and do not enhance the statutory maximum for the charged crime need not be charged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. *Harris*, 536 U.S. at 538; *Apprendi*, 530 U.S. at 487 n.13 (noting that Court was not overruling *McMillan*).

In this case, the facts establishing Shelton's role in the offense and his obstruction of justice are not elements of the crimes of bribery, wire fraud, money laundering or bid rigging, and the resulting adjustments to Shelton's sentence do not result in a sentence beyond the ten-year maximum set by Congress for the offense that carries that highest statutory maximum (bribery). Thus, neither *Winship* nor *Apprendi* is implicated. The district court correctly refused (and perforce did not commit plain error in refusing) to apply a reasonable doubt standard to find facts supporting upward adjustments under the Sentencing Guidelines.

III. THE DISTRICT COURT WAS NOT REQUIRED TO USE A CLEAR AND CONVINCING STANDARD FOR ITS FACTUAL FINDINGS

Relying on this Court's decision in *Jordan*, Shelton argues that the district court should have used a clear and convincing standard in making its factual findings. Deft. Br. 30-39. Even assuming that the court did not use a clear and convincing standard, it was not required to do so.

A. Shelton Did Not Object to the Leadership Role and Obstruction Adjustments in *Shelton I*

Shelton concedes that, at his original sentencing, the district court made the factual findings it relied on using a "clear and convincing" evidence standard. Deft. Br. 16, n.3; Supp. ER 228-32; ER Tab 8, pp. 183-185. Shelton never objected to those fact findings, and did not challenge the adjustments for obstruction or role in the offense in *Shelton I*. His failure to do so should preclude him from attempting "additional bites of the litigation apple." *See United States v. Patterson*, 147 F.3d 736, 737 (8th Cir. 1998), quoting *United States v. Santonelli*, 128 F.3d 1233, 1239 (8th Cir. 1997) (remand order for resentencing based on particular factor was not "open-ended" and precluded argument on other issues not adequately raised on prior appeal). Neither the law nor the facts have changed with respect to these adjustments under the Sentencing Guidelines. When the first panel remanded this case for resentencing it did so solely "because the court relied on an invalid factor in imposing a three-level upward departure." ER Tab 9, p. 15. The intervening Supreme Court decision in *Booker* simply required that resentencing be conducted using advisory rather than mandatory guidelines. As we have already noted, *Booker* did not change the manner in which sentencing adjustments are calculated, or provide a basis for revisiting facts that had not been challenged and that had not

changed.[11]

The court, on resentencing, based its obstruction and role in the offense adjustments on the same facts found by the first sentencing court. *See* ER Tab 13, pp. 129, 107-08 (referring to Judge Unpingco's findings); *see also* Supp. ER 228-31,[12] 234-35,[13] ER Tab 13, p. 136. Shelton correctly points out that the court at resentencing did not articulate the standard of proof it was adopting when it made the same findings on role in the offense and obstruction. Deft. Br. 16. But Shelton did not request a particular standard, or require the court to state the standard it was using on the record. While Judge Jones erroneously thought that Judge Unpingco had found obstruction by "a preponderance of the evidence" (ER Tab 13, pp. 107-08), he did not reveal any similar misapprehension with respect to Judge Unpingco's leadership role enhancement. *See* ER Tab 13, p. 129 (noting that Judge Unpingco's findings concerning Shelton's role in the offense had not been

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[11] The only new evidence relevant to the second sentencing hearing was whether a three-level upward adjustment was appropriate based solely on Shelton's failure to document the DPR projects that might have received reimbursement from FEMA. *See* ER Tab 9, pp. 11-13.

[12] The court found that Shelton "was a key player, the organizer of the scheme." Supp. ER 228.

[13] Judge Unpingco based the obstruction adjustment solely on Mrs. Yoon's testimony, concluding that it was "ample" to support the enhancement. Supp. ER 235.

challenged on appeal). In any event, Judge Jones did not articulate the standard that *he* was adopting. Nevertheless, Judge Unpingco did use a clear and convincing standard to make the same findings, and Shelton should not be permitted to challenge findings he failed to challenge in *Shelton I.*

B. Even If A Preponderance Standard Was Used, It Was Not Plain Error

l. Even if the sentence adjustments were made under a "preponderance of the evidence" standard, there was no error. As we have previously noted, the general rule is that sentencing factors can be found by a preponderance of the evidence. *United States v. Riley*, 335 F.3d 919, 925 (9th Cir. 2003); *United States v. Hernandez-Valdovinos*, 352 F.3d 1243, 1247 (9th Cir. 2003) ("'[D]ue process is generally satisfied by using a preponderance of the evidence standard to prove sentencing factors that are set forth in the [United States Sentencing Guidelines],'" quoting *United States v. Bonilla-Montenegro*, 331 F.3d 1047, 1049-50 (9th Cir. 2003). Although *Jordan* held that there may be instances in which a stricter, clear and convincing, standard is required "when a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction," 256 F.3d at 926, this is not such a case.

In order to determine which standard of proof is appropriate, this Court has held that district judges should consider the "totality of the circumstances,

examining several factors, none of which is dispositive." *Riley*, 335 F.3d at 925-26, citing *Jordan*, 256 F.3d at 928. Those factors include (l) whether the enhanced sentence falls within the maximum sentence for the crimes alleged; (2) whether the enhanced sentence negates the presumption of innocence or the prosecution's burden of proof; (3) whether the facts in support of the enhancement create new offenses requiring separate punishment; (4) whether the increase in sentence is based on the extent of a conspiracy; (5) whether the increase in the number of offense levels is more than four; and (6) whether the length of the enhanced sentence more than doubles the length of a sentence that otherwise would have been relatively short. *United States v. Peyton*, 353 F.3d 1080, 1088 (9th Cir. 2003).

Shelton concedes that the first four factors are not present in this case (Deft. Br. 35), and he relies solely on the last two factors. But factor six is not present because the combined six-level enhancements to which Shelton objects do not "more than double" the length of the sentence he otherwise would have received; nor would he have otherwise received a "relatively short" sentence. A six-level reduction would result in an offense level of 25 with a sentence range of up to 71 months, which is not "relatively short." And Shelton's 100-month sentence is not "more than double" that.

The only *Jordan* factor possibly relevant, therefore, is factor four – an

increase of more than four levels, because the two enhancements in combination increase the offense level by six.[14] In the totality of the circumstances, however, that factor alone does not warrant the requirement of clear and convincing proof because, as discussed above, the sentence imposed – 100 months – is not "extremely disproportionate" to the sentence that otherwise might have been imposed – 71 months. *See United States v. Dota*, 33 F.3d 1179, 1189 (9th Cir. 1994) (approving preponderance of the evidence standard for finding that an acquitted co-conspirator was nonetheless a "participant" for four-level enhancement under U.S.S.G. §3B1.1(a)); *United States v. Allen*, 341 F.3d 870, 892-93 (9th Cir. 2003) (approving preponderance of the evidence standard for four-level enhancement under §

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[14] *Jordan* was decided when the Sentencing Guidelines were mandatory. While this Court has continued to apply *Jordan* post *Booker*, we seriously doubt that a clear and convincing standard of proof at sentencing is consistent with *Booker* for several reasons. First, as we have already noted, *Booker* made the Guidelines strictly advisory and assumed that the applicable burden of proof at sentencing is preponderance of the evidence. *See* pp. 17-19, *supra*. Second, *Jordan* and its progeny considered the combined impact of separate adjustments made pursuant to the Guidelines. The logic of examining the combined impact of separate adjustments based on separate factual findings and different sentencing policy considerations is not entirely clear now that the Guidelines are advisory and only one of several factors a court should consider at sentencing. *See* 18 U.S.C. § 3553(a). Finally, sentences are now reviewable post-*Booker* for "reasonableness." Thus, even a correctly computed Guidelines sentence could be held unreasonable when reviewed in light of the section 3553(a) factors. Accordingly, while we recognize that this Court has not overruled *Jordan*, we believe that the Court may wish to reconsider whether a clear and convincing standard is consistent with *Booker*.

3B1.1(a) that was challenged along with several other enhancements, combining for at least six levels or more).

Indeed, in *Riley*, this Court held that use of a preponderance of the evidence test was proper because, "[a]lthough all of the challenged enhancements, taken together, increased Riley's offense level by 10, six of those levels were based on the extent of the conspiracy to which Riley pled guilty." 335 F.3d at 927 (footnote omitted). As we show below, pp. 30-33, the four-level adjustment for role in the offense is based on facts that the jury necessarily found when it convicted Shelton of wire fraud, bribery, money laundering, and conspiring to rig bids. That would leave only the two-level enhancement for obstruction based on a preponderance of the evidence. *Jordan* does not apply to a two-level adjustment.

2. Even if the Court were to conclude that the clear and convincing standard should have been used in this case, Shelton cannot demonstrate plain error. The only ground Shelton claims for plain error is that the record is "devoid of clear and convincing evidence supporting the application of the six-level enhancement." *See* Deft. Br. 39. But even if the court made findings that were clearly erroneous, which it did not, Shelton still has not met his burden of proving plain error. Rather, he must also show that the error affects his substantial rights and that failure to correct the error would seriously affect the fairness or the integrity of public proceedings.

Jordan, 256 F.3d at 930 (defendant must make a specific showing of prejudice).[15] Shelton has not attempted to meet that test. Any error in the burden of proof could not have affected Shelton's substantial rights because the district court made clear that it was going to impose a sentence of 100 months, primarily because it viewed Shelton's offenses as serious. *See generally United States v. Olano*, 507 U.S. 725, 734-36 (1993) (discussing defendant's burden in establishing plain error). Indeed, Shelton's abuse of a position of public trust to collect payoffs for work required to repair the damage caused by Typhoon Paka fully justified the sentence imposed by the district court. Finally, as we discuss below, regardless of the standard of proof used, the evidence fully supports the upward adjustments made by the district court. Thus, any error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 736-37.

[15] In *Jordan*, the Court found "plain error" based on numerous factors not present in this case, including the fact that the sentence was "extremely disproportionate," and that the facts on which the findings were based were subject to serious question on many fronts (inconsistent with polygraph results, resting on testimony of a single witness that had not been subject to cross-examination, inconsistent testimony, etc.). 256 F.3d at 931-933.

IV. THE COURT'S FINDINGS ON OBSTRUCTION AND LEADERSHIP ROLE ARE NOT CLEARLY ERRONEOUS

A. The Four-Level Adjustment for Role in the Offense Under U.S.S.G. § 3B1.1(a) Was Not Clearly Erroneous Under Any Standard of Proof

The only objection that Shelton raised to the adjustment for his role in the offense at his resentencing was that he solicited bribes from only two people. ER Tab 13, pp. 104-107; Deft. Br. 39-40. This objection acknowledged Shelton was a leader or organizer, and questioned only the number of participants.[16] But Shelton was also convicted of bid rigging, money laundering, and wire fraud, and the facts supporting those convictions expand the number of participants to far more than five. *See United States v. Savage*, 67 F.3d 1435, 1443-44 (9th Cir. 1995) (§ 3B1.1 enhancement considers the entire scheme, including all crimes of conviction plus all relevant conduct). Moreover, as the court pointed out, Shelton's objection ignores the fact that, when he solicited the bribes from Primitivo Carlos and Young Soo Yoon, he also devised the overall scheme by which those bribes should be paid, i.e., through bid rigging, fraud, and money laundering. ER Tab 13, pp. 105, 136.[17]

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[16] U.S.S.G. § 3B1.1(a) provides that "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels."

[17] Shelton's suggestion that the court based the four-level adjustment on the bribery counts alone (Deft. Br. 54) mischaracterizes the record. It was Shelton's counsel who tried to limit the breadth of Shelton's activities by relying solely on

Shelton does not dispute that he initiated the schemes. He wanted money and he devised the means to get it. He decided which projects would be rigged, how they would be rigged, how and when they would be paid, and how he would receive his cash bribes out of the project proceeds. *See* pp. 3-5, *supra*. And as Director of DPR, he was in the position to ensure that the scheme would go as planned: that the rigged projects were awarded to his co-conspirators, that DPR paid the inflated prices for the projects, and that the progress payments were expedited so they could be converted to cash sooner to pay Shelton's bribes. Once Shelton chose a project for his bribery scheme, he called people he could depend on to carry out the scheme. As the court noted, although some of the details were left to others, that does not negate Shelton's leadership role or the breadth of the schemes he devised, directed, and ultimately controlled. ER 13, pp. 105-06.[18] *See United States v. Barnes*, 993 F.2d 680, 685 (9th Cir. 1993) (defendant need not have control over all participants to qualify as leader/organizer); *accord Allen*, 341 F.3d at 892 ("[A]n adjustment is justified when . . . the defendant 'exercised *some control* over others involved in the

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the bribery counts. ER Tab 13, pp. 104-05, reprinted at Deft. Br. 40.

[18] Defense counsel's only response was that he was not trial counsel and that he did not think the jury found that fact. ER Tab 13, p. 106. This merely repeats an argument that Shelton has now abandoned – that the jury was required to find the sentencing factors beyond a reasonable doubt.

commission of the offense or [was] responsible for organizing others for the purpose of carrying out the crime,'" quoting *United States v. Alonso*, 48 F.3d 1536, 1545 (9th Cir. 1995) (citation omitted)) (emphasis added). That Shelton could foresee that many other participants and non-participants would be brought into the wire fraud and money laundering schemes also supports his role enhancement. *See Dota*, 33 F.3d at 1189 (although "foreseeability" is not necessary, "the district court's finding that [defendant] should have foreseen that Yoon would hire other people [to carry out the scheme] was not clearly erroneous" and supports the leadership finding). All of the evidence also satisfies the "otherwise extensive" alternative provision of U.S.S.G. § 3B1.1(a), even if a clear and convincing standard is applied. *United States v. Rose*, 20 F.3d 367, 374 (9th Cir. 1994) (whether a scheme is "otherwise extensive" depends on the number of knowing participants and unwitting outsiders, the number of victims, and the amount of money fraudulently obtained).[19]

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[19] There were numerous other persons who were not necessarily co-conspirator "participants" that were involved in the schemes. The jury convicted Shelton of wire fraud after being told it had to find beyond a reasonable doubt that supplies for the projects would be ordered in interstate commerce through the use of the wires. Thus, everyone involved in the wire fraud schemes was also a part of the scheme that Shelton organized so that he could receive kickbacks out of the DPR projects. Similarly, everyone involved in the money laundering scheme of which Shelton was convicted counted to make Shelton's crimes "otherwise extensive" under § 3B1.1(a). *See* Supp. ER 231.

In fact, Shelton's role as leader of an activity involving more than five participants or that was otherwise extensive is established on this record *beyond a reasonable doubt*. The jury convicted Shelton of three counts of bid rigging, six counts of bribery, two counts of wire fraud, and money laundering. In doing so, it necessarily found that Shelton had organized a criminal activity encompassing far more than five participants. *See Allen*, 341 F.3d at 895-96 ("[o]n the basis of the jury's guilty verdicts, it was not clearly erroneous for the district court to have used § 2A2.2 in calculating Allen's and Dixon's sentences," citing *United States v. Munoz*, 233 F.3d 1117, 1136-37 (9th Cir. 2000)). Indeed, six of Shelton's co-conspirators in these schemes pled guilty: Kenneth Koo Lee, Young Soon Yoon, Primitivo Carlos, John Martinez, Jaime Sioco, and Il Young Cho. Presentence Report at 4-5. Those guilty pleas and the jury's verdict on the twelve counts establish beyond a reasonable doubt that Shelton was a leader/organizer of criminal activity involving more than five participants.

B. The Two-Level Adjustment for Obstruction Was Not Clearly Erroneous and Did Not Rest on an Improper Interpretation of the Sentencing Guidelines

The court noted that Judge Unpingco had made an upward adjustment for

obstruction,[20] and asked why it could not "now accept his finding and/or make the same finding on the basis of what I've heard or read in the prior transcripts before him?" ER Tab 13, pp. 107-108. Shelton's counsel first responded that he believed the facts of obstruction had to be found by the jury in a special verdict form. *Id.* at 109-110, 113. As noted above, Shelton does not make that argument in this Court. Shelton's counsel also argued that any steps taken by Shelton to cover up the crime before a formal investigation had been opened could not be considered as obstruction. *Id.* at 113.

The court did not disagree with this latter objection. Rather, it concluded that two factors warranted an adjustment for obstruction, both of which occurred after the investigation had begun: (1) that Shelton told Young Soo Yoon's wife, Lee Yoon, that her husband should stay out of the country until the investigation was over; and (2) that Shelton had continuing instructions to his subordinates not to submit documentation that would show the projects had been completed, because completion would initiate the FEMA reimbursement process and entail FEMA scrutiny of the projects and costs. ER Tab 13, pp. 113, 136. Shelton concedes that the conversation with Mrs. Yoon occurred during the course of the government

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[20] Judge Unpingco found that, in telling Mrs. Yoon to tell her husband to stay in Korea so he could not be questioned by investigators, Shelton had attempted to influence a witness and co-conspirator. Supp. ER 233-35.

investigation, but claims that the latter conduct did not. Deft. Br. 47, 55.

l. None of the objections to Lee Yoon's testimony that Shelton now raises on appeal were raised in the trial court. Shelton's only objection at sentencing to reliance on Lee Yoon's testimony was that it was not "something that's found by the jury." ER Tab 13, p. 113. There clearly was no "plain error" in basing an obstruction enhancement on Lee Yoon's testimony. The finding is neither improper as a matter of law nor clearly erroneous.

Lee Yoon testified that, after learning that her husband was being investigated by the FBI in connection with Typhoon Paka, she called her husband, who was in Korea. Supp. ER 206-07. On her husband's advice, Mrs. Yoon went to see Shelton at his home. *Id.* at 207-09. Shelton said that the investigation was "not a big problem." *Id.* at 209. He said that "since it was cash transaction, nobody saw it, and if you don't – if your husband don't come back for about three months, it will be over with. And if your husband does come back, there's no way, he's not going to be able to talk during the investigation with FBI, so have him remain in Korea for about three months." *Id.* at 209-10. Thus, Shelton told Lee Yoon that her husband should stay in Korea until the investigation "will be over with," so that Mr. Yoon would not have to answer FBI questions. *Id.* at 210-11, 213. This constitutes obstruction.

Shelton's belated objections to Lee Yoon's testimony are frivolous. First, he objects that a finding of Shelton's intent to obstruct the investigation is erroneously based on "inferences." Deft. Br. 51. Intent, however, is necessarily based on inferences because it can rarely be proved directly. Juries are routinely instructed that they can infer intent from the evidence. *See, e.g., United States v. Lane*, 474 U.S. 438, 453 n.17 (1986) ("we agree . . . there was sufficient evidence for the jury to infer specific intent"); *United States v. Johnson*, 357 F.3d 980, 984 (9th Cir. 2004) (jury can infer intent to distribute drugs from possession of large quantify of drugs). Juries are also routinely instructed that circumstantial evidence, which includes evidence of intent, can be given the same weight as direct evidence. *See* NINTH CIRCUIT MODEL JURY INSTRUCTIONS CRIMINAL 3.8 & Comment.

Similarly frivolous is Shelton's suggestion that Judge Jones could not make a credibility finding because he did not observe Lee Yoon's demeanor at trial, and could not rely on Judge Unpingco's credibility determination. Deft. Br. 51. But Judge Unpingco did not base the obstruction adjustment solely on his belief that Mrs. Yoon was "credible." He also relied on the "import of what [Shelton] imparted to her." ER Tab 8, pp. 185-86. It "was very evident from her testimony that it was an obstruction, it was designed to influence the presence – or lack thereof of her husband, who was a very important witness in this case." *Id.* at 186. Nor did Judge

Jones rely on Judge Unpingco's credibility findings; rather, his obstruction findings were based, quite properly, on his reading of the record as well. ER Tab 13, pp. 107-08. In any event, Shelton accepts Mrs. Yoon's statements as true, and only challenges the court's interpretation of them. Deft. Br. 51 (claiming statements are "equivocal"). Lee Yoon's testimony, however, amply demonstrates Shelton's intent to influence a witness not to talk to government investigators.

Finally, Shelton is wrong in claiming that Mrs. Yoon's testimony cannot be the basis for obstruction as a matter of law because it "is not analogous to any of the examples" listed in the Guidelines commentary to § 3C1.1, and was not likely to have an effect on "Mr. Yoon himself." Deft. Br. 52. The examples of obstruction given in the Guidelines are "non-exhaustive." § 3C1.1, cmt. n. 3. Moreover, Shelton's conduct falls comfortably within, or certainly is analogous to, the conduct in the examples provided, i.e., "unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so" (cmt. n.3(a)); "directing another person to . . . conceal evidence that is material to an official investigation . . . or attempting to do so" (cmt. n.3(d)); *see also Dota*, 33 F.3d at 1190 ("A broad range of conduct can constitute obstruction of justice").

Therefore, there was no error – and certainly no plain error – in basing an obstruction adjustment on Mrs. Yoon's testimony.

2. Shelton's instructions to subordinates not to submit documentation necessary for FEMA reimbursement because Shelton feared that such documentation would reveal his bid rigging and bribery also justified an adjustment for obstruction. Shelton claims that the conduct preceded the start of the investigation, and cannot therefore constitute obstruction under U.S.S.G. § 3C1.1.[21] The court properly concluded, however, that Shelton's orders to his subordinates at DPR not to submit the necessary paperwork documenting the costs on the projects was "ongoing," ER Tab 13, p. 113, into the period of the government investigation. Indeed, Shelton did not leave DPR until the end of 1999, *see* Supp. ER 200-04, 218-19 (Shelton's secretary at DPR cashed his DPR pay checks for him on November 24, 1999), after the investigation had begun in October 1999. *See* ER Tab 7, p. 2774. And, at that time, DPR still had not submitted (and has not submitted to this day) the required documentation. ER Tab 13, pp. 73-74. Indeed, Shelton does not dispute the absence of DPR documentation on the projects he rigged. Up until the time he left, Shelton himself did not produce, and he did not permit his subordinates to produce, the documentation that was required for Guam to receive FEMA

[21] § 3C1.1 provides that "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels."

reimbursement. The court could certainly infer that this was done in an attempt to prevent scrutiny of the projects and thus conceal the fraud from government investigators. *See* U.S.S.G. § 3C1.1, cmt. n. 3(d).

Shelton also claims that the court clearly erred in concluding as a factual matter that Frank Herrero's testimony supports an obstruction finding. It is unclear that the court based its finding of obstruction on Herrero's testimony alone, however. In any event, the record shows that Herrero, who reported to Shelton at DPR, was responsible for helping to compile and submit the documents for the Guam Recovery Coordination Office to submit to FEMA. Supp. ER 177. Shelton told Herrero not to contact contractors for cost information that FEMA had requested. Supp. ER 178-79, 182-83.[22] He also told Herrero to submit false documentation to FEMA indicating that projects were not complete when in fact they had been completed. Supp. ER 185-89.

Even if this Court were to conclude that Shelton's instructions not to submit documentation was not obstruction, the Court could affirm the obstruction adjustment based solely on Lee Yoon's testimony. *See Dota*, 33 F.3d at 1190 (even if "[t]he district court's finding that Dota threatened Smith and Caravaggio through

[22] Another witness, Connie Jo Brennan, testified that she pressed Shelton for documentation so that RCO could seek FEMA reimbursement, but Shelton never provided the necessary information to her. Supp. ER 196-97.

Yoon [were] clearly erroneous . . . Dota's instruction to Yoon to lie to authorities was sufficient to support the finding that Dota had attempted to obstruct justice"); *United States v. Hernandez-Valdovinos*, 352 F.3d at 1248 (court examined record to conclude that clear and convincing standard was satisfied); *United States v. Bonilla-Montenegro*, 331 F.3d at 1050 (concluding that defendant's "[c]hallenges [to use of improper preponderance standard] fail because the record contains evidence sufficient for us to conclude that the district court's conclusion was correct").

3. Finally, even if this Court were to conclude that an adjustment for obstruction was unwarranted, the error would be harmless. If the Guidelines offense level were reduced from 31 to 29 to deduct for the obstruction enhancement, level 29 would still provide a sentence range of 87 to 108 months, *see* 1997 Sentencing Table, permitting the court to impose the same 100-month sentence. And the district court was very clear that it would impose a 100-month sentence at level 29.

At the sentencing hearing, the court first calculated an offense level of 30, with a sentence range of 97 to 121 months. At that point, the court said that it would not grant Shelton a downward departure, thus indicating quite plainly that the court was unwilling to sentence below 97 months. ER Tab 13, pp. 160-66. Only after the government pointed out that the offense level should be 31, with a range of

108 to 135 months, did the court decide to grant a one-level downward departure so that it could sentence Shelton to 100 months (a sentence that the court concluded was "sufficient *but not greater than necessary*" to comply with the sentencing purposes set forth in 18 U.S.C. § 3553). ER Tab 13, p. 182 (emphasis added). Had the court not made the two-level adjustment for obstruction, the offense level would have been 29, the sentence range would have been 87 to 108 months, and the court would still have imposed the 100-month sentence that it clearly thought was the appropriate one in this case. Thus, there would be no need for resentencing in any event.

CONCLUSION

The sentence should be affirmed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

l. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9956 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I certify that on this 10th day of November 2005 I served two copies of the accompanying Brief for the United States, by overnight express mail on:

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