UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NO. 08-12266-HH

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

WILTON JOSEPH FONTENOT
Defendant-Appellant.

A DIRECT APPEAL OF A CRIMINAL CASE
FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF APPELLANT

THE LAW OFFICE OF
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NO. 08-12266-HH

UNITED STATES v. WILTON JOSEPH FONTENOT

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, I hereby certify that the following named persons are parties interested in the outcome of this case:

1. A. Brian Albritton, United States Attorney, Middle District of Florida.

2. Edward K. Chung, Co-Trial Counsel for the Government.

3. United States District Court Judge Timothy J. Corrigan.

4. Diana Katherine Flynn, Attorney, United States Department of Justice, Appellate Counsel.

5. Wilton Joseph Fontenot, Defendant-Appellant.

6. William Mallory Kent, Appellate Counsel for Defendant-Appellant Fontenot.

7. Magistrate Judge Thomas E. Morris.

8. David Paul Rhodes, Assistant United States Attorney, Appellate Counsel.

9. John Sciortino, Assistant United States Attorney, Government Co-Trial Counsel.

10. Karen L. Stevens, Attorney, United States Department of Justice, Appellate Counsel.

11. Quentin Till, Trial Counsel for Defendant-Appellant Fontenot.

STATEMENT REGARDING ORAL ARGUMENT

Wilton Joseph Fontenot requests oral argument. This appeal presents a question of first impression in this or any circuit.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over the issue in this case under 28 U.S.C. § 1291, which provides for an appeal from a final order of a district court. The notice of appeal was filed in a timely manner within ten days of rendition of judgment and sentence.

STATEMENT OF THE ISSUE

THE EVIDENCE WAS LEGALLY INSUFFICIENT AS TO COUNT THREE BECAUSE THERE WAS NO EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT FONTENOT HAD ANY INTENT TO OBSTRUCT A FEDERAL INVESTIGATION.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS

Wilton Joseph Fontenot was named in a three-count Indictment returned by a Middle District of Florida grand jury seated at Jacksonville on April 12, 2007, approximately three and one half years after the incident upon which the indictment was based. Fontenot was released on an unsecured bond April 17, 2007. [R8]

The indictment charged in Count One charged that, on November 22, 2003, at Raiford, Florida, the defendant, then an employee of Union Correctional Institution, while acting under the color of law did strike and choke Corey Milledge, then an inmate at Union Correctional Institution, thereby depriving Corey Milledge of a right secured and protected by the Constitution and laws of the United States, specifically the right not to be subjected to cruel and unusual punishment, in violation of Title 18, United States Code, Section 242.

Count Two charged that, on November 22, 2003, at Raiford, Florida, the defendant did corruptly persuade Joni White, a Union Correctional Institution officer, by telling White to make false statements with the intent to hinder, delay and prevent the communication of information relating to the commission of a federal offense to a law enforcement officer of the United States, in violation of Title 18, United States Code, Section 1512(b)(3).

Count Three charged that, on November 22, 2003, at Raiford, Florida, the defendant, then an employee of the Union Correctional Institution, did knowingly make a false entry in a document with the intent to impede, obstruct and influence the investigation of a matter within the jurisdiction of the United States Department of Justice by making false entries in a use-of-force report dated November 22, 2003, in violation of Title 18, United States Code, Section 1519.

On November 13, 2007, following a five-day trial, a jury found the defendant not guilty as to Counts One and Two and guilty as to Count Three of the Indictment. On November 16, 2007, United States District Judge Timothy J. Corrigan adjudged the defendant not guilty as to Counts One and Two and guilty as to Count Three.[1]

Fontenot was allowed to remain on bond pending sentencing. April 24, 2008 Fontenot was sentenced to 15 months imprisonment followed by 24 months supervised release. [R89] The district court allowed Fontenot to voluntarily surrender which he did, as directed, to Big Spring FCI, Big Spring, Texas on September 17, 2008. [R126] Fontenot filed a timely notice of appeal April 25, 2008 and this appeal has proceeded in a timely manner thereafter. [R91]

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[1] Except as expressly otherwise cited, the foregoing course of proceedings is taken from the PSI, §§ 1-5.

STATEMENT OF FACTS

OVERVIEW

On November 22,2003, the defendant, Wilton Joseph Fontenot, was employed as a Correctional Officer Sergeant with the Florida Department of Corrections. Fontenot was assigned to the Union Correctional institution (UCI) at Raiford, Florida. During the afternoon of November 22, 2003, Fontenot was working in UCl's mental health unit T-dorm. On that date, Correctional Officers Joni White and Clyde Daniel were also working in the T-dorm. Corey Milledge was an inmate confined in the T-dorm, cell T2-111.

On November 22, 2003, at approximately 4:20 p.m., Fontenot and Correctional Officer Clyde Daniel, entered Wing 2 of the T-dorm and walked down to the cell occupied by Corey Milledge. As Fontenot and Daniel interacted with Milledge a physical altercation transpired. Following the altercation, Fontenot completed and signed several hand written reports including an incident report, a disciplinary report worksheet and a report of force used. When completing the reports. Fontenot indicated that he and officer Daniel went to the cell of inmate Milledge to perform a cell search. Fontenot reported that he instructed inmate Milledge to comply with handcuffing procedures and began to open the pass-through flap of Milledge's cell door. Fontenot stated that as he opened the flap, he felt a sharp "hit" to the right side

of his right wrist. Fontenot indicated that he used spontaneous force, grabbing the inmate's right wrist, which caused inmate Milledge to drop a piece of concrete. Fontenot continued, indicating that inmate Milledge thrust his left hand out of the flap. Fontenot indicated that he grabbed the inmate's left hand, which caused him to drop what appeared to be a toothbrush sharpened on one end. Correctional Officer Joni White subsequently contacted a Correctional Officer Captain and Indicated that the reports completed by Sergeant Fontenot were not accurate. Officer White completed an incident report detailing a different set of circumstances. According to White, Fontenot walked to Milledge's cell while carrying a clear plastic garbage bag. White advised that Daniel followed Fontenot to ihe cell. White stated that Milledge's cell door was manually opened and that Fontenot and Daniel entered the cell. Although White could not see into the cell, she indicated that she listened to the activities taking place inside the cell using the prison's Intercom system. White advised that she could hear "a lot of banging" and that she then saw Fontenot exit the cell backwards while facing inmate Milledge, who was followed by officer Daniel. White reported that Fontenot and Milledge were fighting. White further advised that inmate Milledge took Fontenot to the ground at which time Daniel grabbed and held the inmate. White indicated that Fontenot then wrapped the plastic garbage bag around inmate Milledge's neck, chocking him until he lost

consciousness. Officer White reported that Fontenot then dragged the inmate back into his cell, locked the cell door and closed the pass-through flap.

Officer Clyde Daniel initially completed an incident report detailing the same circumstances as those reported by Fontenot. However, when subsequently interviewed, Daniel gave a sworn statement that contradicted his original report and the reports completed by Fontenot. During the sworn interview, Daniel indicated that Fontenot opened inmate Milledge's door prior to the inmate being handcuffed. Daniel stated that his glasses were knocked off during a scuffle that occurred after Fontenot opened the cell door. Nonetheless, Daniel advised that he was able to see Fontenot wrap a plastic bag around Milledge's neck. Daniel indicated that he did not know if Milledge lost consciousness, but that Fontenot told him (Daniel) that Fontenot had chocked Milledge into unconsciousness. In regards to the incident report Daniel originally completed, Daniel indicated that the report was false and that he had completed the report at the direction of Fontenot.[2]

The jury returned *not* guilty verdicts on each of counts one and two, but returned a guilty verdict on count three.

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[2] Except as expressly noted, the foregoing description of the trial evidence is taken from the PSI, §§ 7-11.

INSUFFICIENCY OF THE EVIDENCE AS TO COUNT THREE-GOVERNMENT ARGUMENTS AND EVIDENCE AND COURT'S JURY INSTRUCTIONS

Fontenot testified in his own defense. He denied counts one and two, but as to count three, he admitted knowingly making a false statement in his report to his Florida Department of Corrections supervisor the night of the incident, his motivation being, to try to prevent the two other junior officers from getting into trouble for not following regulations with respect to how they responded to the incident. [R111-67-70]

In opening statement, the Government focused on count one, the excessive use of force charge as to which the jury acquitted Fontenot. With respect to the false statement charge in Count Three, the Government only said in opening:

> And the defendant himself falsified official reports. Members of the jury, those are the charges in the indictment. Count One charges that the defendant attacked and used excessive force on the inmate. Count Two charges that he ordered a junior officer to lie about the incident. Count Three charges that he falsified official reports about the incident.

[R105-214]

> So the defendant immediately launched a cover-up with a fake story. He ordered the control room officer, Joni White, to lie and say that she was busy doing paperwork and she saw nothing. He decided that his cover story was going to be that the cell door was never opened, that the inmate attacked and struck him with a piece of concrete and a toothbrush through the flap on the cell door, through the flap on the closed cell door. That was his story that he created at that moment. And

he told the story to Clyde Daniel -- Officer Clyde Daniel, his junior officer. And he instructed Clyde Daniel to stick to that story and to write his reports based on that story. The flap story was then reported to the captain in charge of that shift, Captain Christopher Hodgson.

[R105-226]

Now, by this time the captain -- there is a real question in the captain's mind whether that cell door was really closed, as Sergeant Fontenot told him. And he wanted to go talk to Sergeant Fontenot to see if that was really true. And he met with Sergeant Fontenot in the hospital. And Sergeant Fontenot was absolutely adamant. The door – the cell door was never opened, was his story. Recall the defendant's cover story. He said that Corey Milledge attacked him through a closed cell door but through an open flap in the middle of the door. Will you put up 7 again, please. According to the defendant's official reports and this paperwork and his oral reports to his investigating officer, the entire attack happened through that little flap in the middle of the door. Now, Captain Hodgson, who now is Colonel Hodgson -- he's been promoted since this incident. Captain Hodgson will testify that that story struck him as odd from the beginning. Because when that cell flap is open, the prisoners are supposed to be walking backwards with their hands behind them to be cuffed through that -- through that flap in the door. And Captain Hodgson will testify that that's not a real effective way to try to hit somebody with a piece of concrete through a flap with your hands behind -- with the inmate's hands behind him. So he was dubious about this story to begin with.

[R105-228]

Members of the jury, that's it. The evidence at trial will be that the defendant, in a moment of rage, threw away all of his training and attacked an inmate. And then when the inmate was restrained, that he violently choked the inmate to unconsciousness. Afterwards, he orders his two junior officers to lie about the incident and write false reports. And the defendant himself falsifies his own reports. The evidence at trial will leave you firmly convinced that the defendant, Sergeant Joe

Fontenot, did all of those things.

[R105-230]

There was no mention in the Government's opening statement of any evidence to show that Fontenot made the alleged false statement with the intent to impede an investigation within the jurisdiction of the United States. The Government was not holding back a surprise in this regard, for in fact the Government did not put on any evidence in its case in chief or in rebuttal to show that Fontenot made the alleged false statement with the intent to impede an investigation within the jurisdiction of the United States.

The only evidence that came close to addressing this element was what appears in the following exchange during the Government's cross examination of Fontenot:

> Q. And your training included that there are such things as civil rights laws, correct?
>
> A. Yes, sir.
>
> Q. And you were trained that under certain circumstances the use of excessive force against an inmate can be a federal crime *or it can be a state crime*, correct? You knew that?
>
> A. I probably had a course on it. *I don't know* if I --

[R111-108-109; emphasis supplied]

In its closing arguments, the Government's only argument to the jury about

what it thought the evidence showed as to count three was as follows:

> The defendant also committed a crime when in his use-of-force reports he specifically made know -- knowingly made false entries in those use-of-force reports, with the intent to impede and obstruct future investigations.

[R113-55]

> And Count Three charges the defendant with making false entries in a document with the intent to impede, obstruct, or influence the investigation of a matter within the jurisdiction of the United States.

[R113-56]

While discussing count two in closing argument (which charged corruptly influencing Joni White to make a false statement consistent with his), the Government made the following remarks about what the Government *did not have to prove*, remarks that carried over as to count three as well:

> Now, the judge will give you several instructions about this regarding what, if anything, the defendant needed to know about potential investigations. Specifically, *the statute doesn't require the government to prove that the defendant knew the federal nature of the offense or that the investigator who eventually received this information was a federal law enforcement officer. He doesn't even have to know that the matter would or could eventually be investigated by a federal agency*.

[R113-75; emphasis supplied]

> There's a final count, ladies and gentlemen, Count Three. We spent a lot of time during this trial about Count Three. Count Three deals with the actual lies that he wrote down, the defendant wrote down, in his use-of-force report. . . . It is a federal crime for a person, any person,

> whether or not you're a law enforcement officer, to knowingly make a false entry in any record or document with the intent to obstruct or influence an investigation of a matter under the jurisdiction of the FBI or the Department of Justice. I want to show you Government's Exhibit 14. And this is where -- you'll have the indictment. If you can blow up the middle portion there. You'll have the indictment. And you'll look at these phrases themselves. I'm not going to go for -- I'm not going to read them to you. But the part where it says, I opened the flap of cell T 2-111 S. You've already had all of the information as to the fact that these statements, first, are false. In fact, the defendant told you that they were untrue. And Clyde Daniel told you that they were untrue. They also said -- you also can deduce from the evidence that because what's written here is completely opposite of what actually happened -- and even if you believe the defendant's story of what the defendant said happened, it's a false statement and the defendant, when he made the statement, knew that they were false.

[R113-77-78]

> Now, the defense has claimed that this is a rough draft -- or the defendant has testified that these are rough drafts. Rough drafts or not, you know from testimony that the defendant was required to be truthful in these documents. And there is no -- there is no element that says a rough draft is anything. All it says is a document or other object. In any event, the defendant knew that his statements would eventually reach law enforcement officers and investigators. Why? Remember his testimony. *Remember that he repeatedly said he thought it would be resolved that night. He thought it would be resolved that night.* He wasn't counting on the typewritten report, which would come 24 hours later. *He thought everything would be resolved that night based on these handwritten reports.*

[R113-78-79; emphasis supplied]

In his instructions to the jury, the District Court confirmed what the Government said about the Government having no burden to prove that the defendant

knew or intended that a false report reach a federal investigator or even that it was an offense that could be investigated as a federal crime:

> The third element of Count Two requires the government to prove that the defendant acted with the intent to hinder, delay, or prevent the communication of information to a federal law enforcement officer. While the government must prove that, in engaging in the misleading conduct alleged in the indictment, the defendant acted with the intent to hinder, delay, or prevent communication of information relating to the commission or possible commission of a federal offense, *the government is not required to prove that the defendant knew that the offense was federal in nature. The government also is not required to prove that the defendant knew or intended that a federal law enforcement officer would receive the false or misleading information. Nor is the government required to prove that there was any actual delay or withholding of truthful information from a federal law enforcement officer.* Therefore, this element may be proven by evidence establishing that the defendant corruptly persuaded another person to provide untruthful information with the purpose of hindering, delaying, or preventing the communication of truthful information to investigators, either permanently or for a period of time, *when the information relates to a potential federal offense and the information reached a federal law enforcement officer*.

[R113-146-147; emphasis supplied]

Specifically as to Count Three, the District Court instructed:

> Lastly, the third element of Count Three requires the government to prove that the defendant made the above described entry or entries with the intent to impede, obstruct, or influence the investigation of a matter within the jurisdiction of an agency of the United States or in relation to or in contemplation of any such matter or case. The government is not required to prove that the defendant knew his conduct would obstruct a federal investigation, or that a federal investigation would take place, or that he knew of the limits of federal jurisdiction. However, the

> government is required to prove that the investigation that the defendant intended to impede, obstruct, or influence did, in fact, concern a matter within the jurisdiction of an agency of the United States.

[R113-148-149]

Clearly the Government was of the view that it did not need to present any evidence to prove that Fontenot anticipated a federal investigation of a federal crime and that Fontenot had made any false statement with an intent to obstruct a federal investigation or even that the particular statements alleged in the indictment were themselves matters within the jurisdiction of the United States.

STANDARD OF REVIEW

Fontenot candidly acknowledges that the error presented in this appeal was not preserved by a motion for judgment of acquittal under Rule 29, Federal Rules of Criminal Procedure, and is therefore subject to the plain error standard of Rule 52,Federal Rules of Criminal Procedure.

Supporting his claim for appellate relief, Fontenot relies upon *Fitzpatrick v. United States*, 410 F.2d 513 (5th Cir. 1969), which held that when evidence is legally insufficient, even when no motion for judgment of acquittal was presented to the district court, the conviction would be reversed on appeal because to do otherwise would constitute a manifest injustice:

> A jury found appellants guilty of interstate transportation of a stolen motor vehicle in violation of the Dyer Act, 18 U.S.C. § 2312, and they were sentenced to prison terms of thirty months. We find no merit in several errors asserted. [footnote omitted] However, we agree with appellants that the evidence presented by the government was insufficient to support the verdict, and, accordingly, we reverse. Since appellants made no motion for judgment of acquittal, we reverse only because allowing these convictions to stand on the record before us would be a manifest miscarriage of justice. *Beckett v. United States*, 379 F.2d 863 (9th Cir. 1967); *Milam v. United States*, 322 F.2d 104 (5th Cir. 1963); *Clark v. United States*, 293 F.2d 445 (5th Cir. 1961).

Fitzpatrick v. United States, 410 F.2d 513, 514 (11th Cir. 1969).

SUMMARY OF ARGUMENT

THE EVIDENCE WAS LEGALLY INSUFFICIENT AS TO COUNT THREE BECAUSE THERE WAS NO EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT FONTENOT HAD ANY INTENT TO OBSTRUCT A FEDERAL INVESTIGATION.

In a prosecution under 18 U.S.C. § 1519, the Government is required to prove the defendant made a false written statement with the intent to obstruct a federal investigation. The Government failed to prove this element of the offense.

Fontenot was a sergeant with the Florida Department of Corrections at the time in question. In violation of state Department of Corrections regulations, Fontenot entered the cell of a dangerously violent mentally disturbed inmate without first obtaining the inmate's compliance with the regulation that the inmate put his hands through a chute in the cell door, so that the inmate could be handcuffed. Fontenot was entering the inmate's cell to search for a weapon the inmate had been reported to have in his cell.

A struggle ensued which resulted in Fontenot initiating a use of force report. Fontenot was supervising a probationary correctional officer who was with him at the time. Fontenot testified that he was concerned that if he accurately reported that he and the probationary officer entered the cell in violation of DOC regulations, that the probationary officer would be fired (and he would be suspended). Fontenot admitted

falsifying the report of the incident in this regard, that is, Fontenot wrote the report stating that the incident with the inmate all occurred while the inmate had his hands sticking through the chute of the door for handcuffing, not as actually happened when Fontenot entered the cell without first being able to handcuff the inmate. Fontenot thought the incident was closed and resolved the night of the report to his DOC supervisor. Instead he was terminated shortly thereafter.

Three years later the FBI began an investigation of the inmate's claim that Fontenot used excessive force. Fontenot was indicted on three counts, count one charging excessive force, count two charging that he corruptly persuaded one of the officers involved to write a false report to help cover up the excessive use of force, and count three charging that Fontenot made three false statements in his written report to the DOC supervisor the night of the incident, the falsity of all three of which related strictly to whether the incident had happened with the inmates hands sticking though the cell door chute or not.

There was no evidence that Fontenot ever knew the matter could be subject to a federal investigation or that he anticipated a federal investigation or that he made any of the admitted false statements with the intent to impede a federal investigation. Instead, the Government argued and the District Court instructed the jury that the Government did not have to prove any of those things to find Fontenot guilty.

Fontenot was acquitted of count one, excessive use of force, and acquitted of count two, corruptly persuading the other officer to falsify her report. He was convicted solely on count three, the false statement in his own report, a false statement that related strictly to a matter of state DOC regulations. These statements were not matters within the jurisdiction of the United States and were not made with intent to impede or obstruct a federal investigation. No evidence was presented to show that Fontenot even considered the possibility of such an investigation. The evidence that was presented was legally insufficient to convict Fontenot under 18 U.S.C. § 1519 of anticipatory obstruction of an investigation that was neither foreseen nor anticipated and as to statements that were not within the subject matter of any federal investigation.

ARGUMENT

THE EVIDENCE WAS LEGALLY INSUFFICIENT AS TO COUNT THREE BECAUSE THERE WAS NO EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT FONTENOT HAD ANY INTENT TO OBSTRUCT A FEDERAL INVESTIGATION.

Fontenot was convicted of only the third count of the three count indictment in his case. The third count charged a violation of a single provision of the Sarbanes-Oxley Act, codified as Title 18, U.S.C. § 1519.

Count Three of the indictment alleged:

> On or about November 22, 2003, in Raiford, Union County, Florida, in the Middle District of Florida,
>
> WILTON JOSEPH FONTENOT,
>
> the defendant herein, then an employee of the Union Correctional Institution, did knowingly make a false entry in a document with intent to impede, obstruct, and influence the investigation of a matter within the jurisdiction of the United States Department of Justice, and in relation to and in contemplation of such matter, that is, deprivation of rights under color of law, as charged in Count One of this Indictment. Specifically, the defendant made the following false entries in a use-of-force report dated November 22,2003:
>
> > (a) "I opened the cell flap of cell T2-1115 and felt a sharp hit to the right side of my right wrist."
> >
> > (b) "Spontanious [sic] force was immediately used and Inmate Milledge dropped what appeared to be a flat piece of concrete."

> (c) "Inmate Milledge responded by thrusting his left arm out of the cell flap and again I used spontanious [sic] force to remove what appeared to be a partially sharpened toothbrush."

All in violation of Title 18, United States Code, Section 1519.

Section 1519 provides:

> 1519. **Destruction, alteration, or falsification of records in Federal investigations and bankruptcy**
>
> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object *with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States* or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

18 U.S.C.A. § 1519 (emphasis supplied)

The court instructed the jury that the third element of this count required the Government to prove:

> That the defendant made the false entry *intending to impede, obstruct, or influence an investigation of a matter within the jurisdiction of an agency of the United States* or in relation to or contemplation of any such matter or case.

[R114-147]

The Government failed to meet its burden of proof as to the italicized provision

of section 1519. The Government presented *no evidence* to show that Fontenot acted with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States.

The Government failed to adduce any evidence that Fontenot knew or had any reason to know that his allegedly false report would impede a later federal investigation. What is missing from the record is any evidence that Fontenot knew and intended that his false statement would impede a *federal* civil rights investigation.

In the typical case such knowledge and intent could be inferred from the fact that the federal investigation would start first, the defendant would be contacted by the federal investigators or otherwise have knowledge of the federal investigation, then intentionally do some act or make some statement that would obstruct the federal investigation.

The question which Fontenot's case presents is whether the Government can obtain a conviction for *anticipatory* obstruction, that is, the obstructive conduct or statement precedes the investigation the obstruction of which is the gravamen of the crime when there is no evidence that the defendant knew there would be a federal investigation or intended to obstruct a future federal investigation.

It is generally conceded that prior to the enactment of § 1519 that it was

virtually impossible to obtain a conviction under the existing obstruction statutes in the case of *anticipatory* obstruction. *See e.g. Anticipatory Obstruction of Justice: Pre-emptive Document Destruction under the Sarbanes-Oxley Anti-Shredding Statute*, 18 U.S.C. § 1519, 89 Cornell L. Rev. 1519, 1530 *ff* (2004).

> Punishing anticipatory document destruction through § 1503 is close to impossible. Logically, the requirements the government must establish--the existence of a pending proceeding at the time of the act and the defendant's knowledge of that proceeding--foreclose a prosecutor's ability to indict a defendant for obstructive acts that occur merely in anticipation of a future proceeding. . . . the Supreme Court's decision in *U.S. v. Aguilar*,[3] [footnote omitted] requiring a

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[3] *United States v. Aguilar*, 515 U.S. 593 (1995).

In *U.S. v. Aguilar*, the Supreme Court established parameters for the "catch-all" language in § 1503. In *Aguilar*, the Court upheld the reversal of a conviction of a judge who lied to FBI agents during an investigation into his conduct. The Court did not directly confront the question of the required knowledge of the obstructed proceedings because there was evidence that the defendant in *Aguilar* knew of the grand jury proceedings against him when he lied to the FBI agents. The Court's reasoning, however, sheds light on the question of how pre-emptive obstruction can and cannot be criminalized.

The *Aguilar* Court held that the defendant's obstructive act of lying to investigators was not sufficiently connected to the grand jury proceedings to uphold his conviction. *Aguilar* required that in order to find a violation of § 1503, the courts must find a "nexus" between the obstructive act and the proceedings that the defendants sought to impede. The Court described the "nexus" element under § 1503 as requiring that "the act must have a relationship in time, causation, or logic with the judicial proceedings" and that "the endeavor must have the 'natural and probable effect' of interfering with the due administration of justice."

The *Aguilar* Court did not base the nexus requirement on constitutional grounds,

> sufficient "nexus" between the obstruction and the proceeding, may have further restricted the scope § 1503 in combating anticipatory obstruction. . . However, the "pending proceeding" requirement under § 1505 is more broadly construed than the requirement under § 1503, allowing convictions when the obstructive acts occur in the preliminary, investigative stages of the case. [footnote omitted] The *Aguilar* "nexus" requirement seems to apply to § 1505, as courts facing the issue have not distinguished the two statutes with regard to that requirement. [footnote omitted] While knowledge of the pending proceeding is required under § 1505, it is unclear if a general belief about the

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expressly disavowing such "broader grounds" for its ruling as "unnecessary." However, the Court alluded to the problem of fair notice for defendants that lack knowledge of the obstructed proceedings:

> We have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress and out of concern that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.

The Court approvingly quoted a 19th century Supreme Court interpretation of the federal obstruction statutes for the proposition that "a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court." The Court required this nexus not only to ensure fair notice to the defendant, but also because some knowledge of the proceeding's existence was a necessary component of the "intent to obstruct." The Court declared that "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." *Thus, the Aguilar Court's "nexus" element not only required a "natural and probable" link between the obstructive act and the proceedings, but also that the defendant had knowledge of the link during the time of the act.*

Anticipatory Obstruction of Justice: Pre-emptive Document Destruction under the Sarbanes-Oxley Anti-Shredding Statute, 18 U.S.C. § 1519, 89 Cornell L. Rev. 1519, 1535-1536 (2004) [footnotes omitted, emphasis supplied].

> proceeding to be obstructed, rather than knowledge about a specific pending proceeding, would suffice. [footnote omitted] . . .
>
> Can § 1505 be used to prohibit anticipatory obstruction of justice? Courts have interpreted § 1505 to prohibit obstructive acts occurring much earlier in the criminal storyline than covered under the omnibus provision. [footnote omitted] However, courts also require the government to establish that the defendant was aware of a pending proceeding before being convicted under § 1505. [footnote omitted] Courts have not broadened that awareness to include merely a generalized contemplation of an investigation. In addition, the linguistic similarity to § 1503 makes it more likely that courts may require the government to show a proper "nexus" between the obstructive act and the proceeding. Thus, even though the reach of § 1505 is less clear than that of § 1503 or § 1512, there are still potential obstacles for prosecutors to overcome before using the statute to charge a defendant for obstructing justice in anticipation of an agency investigation or proceeding. . . .
>
> Despite the ways in which § 1512(b) may ease a prosecutor's burden, the witness-tampering statute is still inadequate to effectively prohibit anticipatory obstruction. Courts have found that a conviction under § 1512(b) still requires the government to show the defendant's knowledge of an official proceeding. [footnote omitted] As explored below, some courts have taken the statutory requirement, "with intent to impair the object's integrity or availability for use in an official proceeding," to mean that a defendant who obstructs justice must be acting with knowledge of a specific investigation before he may be convicted under the statute. [footnote omitted] Without an active proceeding against the defendant, the government's attempt to prove an intent to prevent a document's availability for "an official proceeding" becomes complicated.

No case to date has addressed the issue of what standard applies to Sarbanes-Oxley's anti-shredding provision. Fontenot argues that whatever standard applies,

it must at a minimum include a requirement that the defendant have at least a general knowledge of the federal proceeding that he is alleged to have obstructed:

> When courts consider the scope of the new anti-shredding provision, they may examine the jurisprudence surrounding these other federal obstruction statutes and ask whether the limitations of those statutes should also apply to § 1519. The central question of "anticipatory" obstruction is whether the government is able to prohibit destruction of documents undertaken by an actor who, at the time of the act, had only general knowledge about the proceeding he sought to obstruct. Requiring that a defendant know about a proceeding before he obstructs serves two basic purposes. First, the requirement gives the actor fair notice that he is crossing the line from permissible to impermissible conduct. Second, it ensures that the defendant actually forms the required intent to obstruct justice. . . .
>
> This leaves the courts with three possible answers to the central question of how § 1519 can be used to prohibit anticipatory obstruction. First, courts could find that § 1519 applies only where the obstructive act and the proceeding are linked by a "nexus" that is currently required only of obstruction-of-justice charges brought under § 1503. The nexus requirement is driven by the concern that defendants have enough knowledge of the obstructed proceeding that they have "fair notice" their actions are proscribed. [footnote omitted] Second, courts could follow a line of cases under § 1512(b) which require the government to show the defendant's knowledge about a particular proceeding in order to establish their intent to obstruct justice. [footnote omitted] This combines both rationales--ensuring both "fair notice" and culpable intent in one requirement. Finally, courts could find that a defendant can be held accountable as long as he intends to obstruct justice, which can be accomplished even when he acts with vague or incomplete knowledge about the proceeding. [footnote omitted]

Anticipatory Obstruction of Justice: Pre-emptive Document Destruction under the Sarbanes-Oxley Anti-Shredding Statute, 18 U.S.C. § 1519, 89 Cornell L. Rev. 1519,

1534 (2004).

Anticipatory obstruction was the context in Fontenot's case, in which the alleged false statements came three years before the federal investigation, which is alleged to have been obstructed. Thus, in an anticipatory obstruction case such as Fontenot's, at best from the Government's point of view the knowledge and consequent intent to obstruct a *subsequent* federal investigation conceivably could be inferred from evidence that Fontenot knew that a federal investigation would subsequently ensue and made the statement with the intent to obstruct the investigation he anticipated would follow. There is neither direct nor circumstantial evidence to support this essential element of the offense.

No reported decision applying 18 U.S.C. § 1519 to date has squarely addressed this issue; but in the reported decisons not one decision has held or implied that the Government could obtain a conviction without establishing a nexus between the defendant's knowledge of the federal investigation and the false statement or obstructive conduct. Although not squarely presented in any reported case, it appears from the recital of evidence in each of the reported § 1519 decisions that the Government produced at least some evidence of such nexus. *See e.g. United States v. Lessner*, 498 F.3d 185, 197 (3rd Cir. 2007) ("There was more than sufficient evidence of Lessner's guilt to permit the District Court to accept her guilty plea to

count 19 [18 U.S.C. § 1519] even were we to assume that she disavowed an intent to impede the DCIS investigation. *Lessner stipulated that DCIS*[4] *Special Agents advised her she was under investigation* and was to remove only personal items from her desk." [emphasis supplied]);[5] *United States v. Wortman*, 488 F.3d 752 (7th Cir. 2007) ("A jury convicted Amanda Wortman of knowingly altering, destroying, and mutilating a tangible object with the intent to impede, obstruct, and influence the investigation of a matter within the jurisdiction of the Federal Bureau of Investigation (FBI), in violation of 18 U.S.C. § 1519. [footnote omitted] She claims that the government's evidence against her was insufficient. . . . She became involved in the investigation after the FBI discovered that McDonald had been using Wortman's mother's computer to view illegal images, and three FBI agents arrived at Wortman's

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[4] The term "DCIS" is not defined in the written opinion, but the case involved an investigation of fraud of contracts under the United States Defense Logistics Agency. DCIS is an acronym for the Defense Criminal Investigative Service of the United States Department of Defense, Office of the Inspector General.

[5] *See also United States v. Smythe*, 213 Fed.Appx. 102 (3rd Cir. 2007)("James Smyth appeals the non-standard conditions that were imposed as part of his sentence after pleading guilty to violating 18 U.S.C. § 1519. . . . Smyth was identified in connection with an investigation into a child pornography distribution ring being conducted by the Federal Bureau of Investigation ("FBI"). *After being contacted by an FBI agent* in November of 2003, Smyth agreed to provide his computer hard drive to the FBI; however, he provided a worthless part of the computer and dumped the actual hard drive in a body of water to prevent the FBI from retrieving and analyzing it." [emphasis supplied]).

mother's home wanting to search her computer's hard-drive. *Wortman drove to her mother's home as soon as she learned that the agents were there*, and the agents began questioning her about McDonald's interest in child pornography. . . . the agents instructed Wortman not to do anything with the CDs and drove off . . . Eventually, *Wortman and McDonald decided to disobey the agents' instructions* and drove to Tuttle's residence. McDonald called Rebecca Neville, Tuttle's girlfriend, and asked her to open the door to Tuttle's apartment. He told her that the FBI had visited him and that he needed to retrieve a CD from the apartment. Inside Tuttle's apartment, McDonald found the three CDs in question and determined which one contained child pornography. At trial, he testified that the following occurred once he found the CD that he was looking for: I put the other two [CDs] in my pocket, and I took that one and I said, "Okay. This is the one." I said, "I don't want it." And *I flexed it in my hand like I was going to break it, but I was afraid it would break and cut my hand so I said, "I don't want it." And I wiped it off. And then Amanda took it and said, "I will show you how it's done." And she snapped it in her fingers.*" [emphasis supplied]); *United States v. Ganier*, 468 F.3d 920, 922-923 (6th Cir. 2006) ("Ganier is charged with . . . three counts of altering, destroying, or concealing documents in violation of 18 U.S.C. §§ 1519 and 2 for, among other acts, allegedly deleting certain computer files with intent to impede a federal investigation. . . . In August 2002, a federal task force

was formed and began a criminal investigation of the contracts and solicitations as well as various companies associated with John Stamps. Assisted by the federal task force, *a federal grand jury began an investigation in September 2002, later transferred to a successive grand jury. Over the course of the next three months, the grand jury issued a number of subpoenas. In December 2002, after the grand jury issued subpoenas on various companies and state agencies, Ganier allegedly attempted to implement an email "retention" policy at ENA in which employees' emails would be set to delete after six months, deleted files relevant to the ongoing investigation from his laptop computer, deleted relevant files from his desktop computer, and deleted relevant files from an ENA employee's computer*." [emphasis supplied]).

The author of the Cornell Law Review article cited above concluded that Courts could require the Government to prove that the defendant knows a federal proceeding is in the offing when he engages in anticipatory obstructive conduct:

> [I]f courts understand *Aguilar* as requiring a certain minimal connection for all cases of obstruction of justice, its application would change. For example, under § 1519, an obstructive act would need to have the "natural and probable" effect of obstructing justice, and the government would also have to establish the defendant's knowledge of that connection. [footnote omitted] The anticipatory act of obstruction this Note describes is undertaken when the "natural and probable effect" of interfering with justice is low. If it is too speculative to infer a defendant's knowledge that lying to an FBI agent would obstruct a

> judicial proceeding of which he was aware, then it would clearly be too speculative to convict a defendant who shreds documents in advance of a proceeding he suspects is in the offing.

Anticipatory Obstruction of Justice: Pre-emptive Document Destruction under the Sarbanes-Oxley Anti-Shredding Statute, 18 U.S.C. § 1519, 89 Cornell L. Rev. 1519, 1539-1540 (2004).

Guidance as to how the Eleventh Circuit should decide this issue may be found in *United States v. Shively*, 927 F.2d 804, 811 (5th Cir. 1991). In *Shively* the Fifth Circuit was called upon to decide exactly this issue in a prosecution under 18 U.S.C. § 1512, and held that no matter how morally reprehensible obstructive conduct may be it is legally insufficient to establish intent unless the Government proves, even if only by circumstantial evidence, that the Defendant knew of the pending *federal* investigation:

> In January 1987, Mike Shively and Johnson took Coplen "for a ride." Coplen testified that Shively carried a pistol, and as they drove around for over an hour, the two demanded that he "be a witness" and "more or less, lie to the insurance company" regarding the Shivelys' state court suit against the insurance company. Coplen testified the two "told me what they wanted me to say" and insinuated that his refusal would result in harm to his family. Shively and Johnson returned the next day to drive him to his deposition, and watched him testify as rehearsed.
>
> This intimidation preceded by two and one-half years the filing of the first grand jury indictment against the Shivelys. In its brief on this point, the government is obscure about the exact parameters and dates of the federal investigation. It relies exclusively upon the testimony of state

fire investigator Womack to establish that both the requisite official proceeding and the Shivelys' intent to influence it existed. Womack testified he enlisted the ATF in the investigation in September 1984, some ten months before Renee Shively's telephonic threat to Marsha Coplen. Womack testified that when he subsequently interviewed Johnson, he told him that ATF was participating in the investigation. From this the government concludes a reasonable jury would necessarily believe that Johnson passed that information to his co-conspirators, Mike and Renee Shively. The government urges that the jury could have determined that one purpose for intimidating the Coplens was to deter Ronnie Coplen "from testifying honestly before any federal grand jury that might be convened." The government concedes that the record is silent as to the date that a federal grand jury actually began investigating the case. The record does not disclose whether either of the Coplens testified before the grand jury, nor whether the prosecution ever contemplated such testimony.

Section 1512 "reaches only certain specifically enumerated types of witness tampering; other types of conduct, no matter how morally reprehensible, are not prohibited by the statute." *United States v. Dawlett*, 787 F.2d 771, 775 (1st Cir.1986); see generally *United States v. Wesley*, 748 F.2d 962, 964 (5th Cir.), cert. denied sub nom. *Cooper v. United States*, 471 U.S. 1130, 105 S.Ct. 2664, 86 L.Ed.2d 281 (1984) (discussing enactment of § 1512). An intent to influence testimony in a state civil suit is clearly not within the ambit of this statute. While the evidence does show the intimidation of a witness, it was not done, as required by statute, "with intent to ... influence, delay, or prevent testimony of any person in an official proceeding." 18 U.S.C. § 1512(b)(1) (emphasis added).

Under this statute intent may, and generally must, be proven circumstantially. *United States v. Maggitt*, 784 F.2d 590, 593 (5th Cir.1986). "In determining whether a threat was intended to influence future conduct under 18 U.S.C. § 1512, it is the endeavor to bring about a forbidden result and not the success in actually achieving the result that is forbidden." Id. However, under § 1512(b)(1), what is forbidden is actual or attempted witness tampering with intent to affect testimony

in an official (federal) proceeding.

This conclusion must apply to § 1519 as well.

The only reported Eleventh Circuit decision appears to support Fontenot's argument that the Government is required to establish the nexus that the defendant had some knowledge of the federal investigation when he engaged in the obstructive conduct. In *United States v. Hunt*, 526 F.3d 739, 744-745 (11th Cir. 2008), the Court stated:

> *Hunt argues the evidence was insufficient to convict him under § 1519 because the evidence shows he simply made a misstatement in his report and did not intentionally make the false statement with the intent to influence, obstruct or impede the federal investigation.*
>
> . . .
>
> Adequate circumstantial evidence exists to support the jury's conclusion.
>
> ***The Government put forth evidence Hunt knew claims of excessive force would be investigated by the FBI*** . . .

[emphasis supplied]

In its response to Fontenot's appeal bond motion, the Government argued that it did present legally sufficient evidence under *Hunt* that Fontenot made the false statement with intent to impede a federal investigation, relying upon this single and

isolated exchange on cross-examination:

> Q. And your training included that there are such things as civil rights laws, correct?
>
> A. Yes, sir.
>
> Q. And you were trained that under certain circumstances the use of excessive force against an inmate can be a federal crime or it can be a state crime, correct? You knew that?
>
> A. I probably had a course on it. I don't know if I --

[R111-108-109]

As we will explain below, this colloquy is taken out of context. But in context or not, it fails to meet the Government's burden. The Government's emphasis on "civil rights laws" in the first cross examination question above overlooks that no distinction was drawn between *state* and *federal* civil rights laws. Under Florida law, law enforcement officers and their employing governmental agencies are liable for claims of *excessive use of force*. See, *e.g., City of Miami v. Simpson*, 172 So.2d 435 (Fla. 1965).

The Government's second question was in the disjunctive, *federal* or *state,* so without clarification, we do not know whether the answer, *had their been a clear answer,* would have meant that Fontenot admitted knowledge that under certain circumstances that the use of excessive force could constitute a federal crime.

The answer Fontenot gave - - and the Government's whole case would have to come down to this answer - - was "I probably had a course on it. I don't know if I –" does not tell us what Fontenot knew and is not legally sufficient evidence upon which to convict. He simply said that he probably had a course on it, but he doesn't know. He doesn't know if he did or not, he doesn't know what he was taught in the course, he doesn't know what he remembered about the course at the time he made the complained of false statement, etc.

Finally this exchange does not provide any evidence that Fontenot knew that his statement would be the subject of a later federal investigation or that he had any intent to obstruct a federal investigation that came three years after the fact. As the Government itself argued in closing, Fontenot thought the matter was over the very night the incident occurred. This was the Government's argument at trial as to what the evidence showed - - that Fontenot had no anticipation of any subsequent investigation, much less a federal investigation of a federal crime.[6]

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[6] A federal crime as to which the jury acquitted him. Indeed the only evidence on what Fontenot thought might or might not come later came in this exchange, in which the Government tried to block the answer:

Q. When you were driving home, did you think that this incident would be -- this would be your last day of your 20-year career?

A. No, sir. I was still confident it would be resolved.

Overriding all of this is the context. Fontenot was convicted on his own admission that he made a false statement about not entering the cell until he had handcuffed the inmate as required by Florida DOC regulations. Fontenot's stated concern in making the false statement to which he admitted was *not* an investigation of his possible use of excessive force [which was the basis for the *federal* investigation], but instead his concern and his admitted intent in making the false statement was to cover up his failure to comply with *state* DOC regulations prohibiting correctional officers from entering an inmate's cell without first handcuffing the inmate and the actions of his subordinates in connection with that; that is, his intent was to obstruct the state investigation of a purely state matter, the violation of the DOC administrative rule, not to frustrate any *federal* investigation of

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Q. *Did you have a clue that four years later you would be in a federal court being charged with these serious federal crimes*?

MR. SCIORTINO: Objection.

A. *No, sir.*

MR. SCIORTINO: Objection. Relevance.

THE COURT: Overruled.

[R111-82;emphasis supplied]

the use of excessive force.[7] Fontenot denied the use of excessive force and the jury

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[7] The Government elicited at length that what Fontenot did was in violation of the State Department of Corrections regulations:

> Q. Okay. Now, the procedures that you utilized on November 22nd, 2003, that was not exactly pursuant to prison regulations; is that right?
>
> A. No. No, sir.

[R111-41]

> Q. Now, under very clear Union regulations, in T dorm an officer is not supposed to open the cell door of an inmate or go into the cell when the inmate is not cuffed, right?
>
> THE COURT: Excuse me, Mr. Sciortino. When you say Union regulations, you mean Union Correctional Institute or do you mean union -- I just am unclear.
>
> BY MR. SCIORTINO:
>
> Q. Prison regulations.
>
> A. Could you say that again?
>
> Q. Under prison regulations, in T dorm you're not supposed to go into a cell unless the inmate has been cuffed, right?
>
> . . .
>
> Q. On November 22, 2003, you knew that policy?
>
> A. Knew what policy?
>
> Q. The policy about inmates having to be cuffed.

A. Right. As long as they're on restraints. Yes, sir.

Q. Like Corey Milledge, right?

A. Yes, sir. He was on restraints.

Q. And as Captain Hodgson testified, that's not a trivial policy, is it? That's an important policy?

A. Yes, sir.

[R111-110-112]

Q. So that's the cell door you decided to open contrary to policy, right?

A. The cell door Inmate Milledge was in?

Q. Yes.

A. Yes, sir.

Q. Now, at the moment the inmate refuses to be cuffed, a cell extraction team is mandatory, right?

A. Is mandatory?

Q. Right. You don't go into that cell without a cell extraction team?

A. It's mandatory -- mandatory not to go in -- no. If the inmate refuses to cuff, then he refuses to cuff, yes.

Q. And you don't go into that cell unless you're on a cell extraction team, right?

A. Yes, sir.

acquitted him of that count, hence the jury convicted him of count three based on his own version of the events and not based on the Government's argument that his statements denying excessive use of force were false.

> Q. Mr. Fontenot, the handwritten reports, handwritten incident report, Exhibit No. 13 -- Government's Exhibit 13, Government's Exhibit 14, handwritten disciplinary worksheet, handwritten report of force used, 15, unsigned report of force used -- three of them handwritten, one -- one typed, why did you write the reports the way you did, as far as content?
>
> A. I knew that there was no injuries to that inmate. He was not hurt. There was no injuries at all. If I would have wrote the reports exactly what happened and made a big deal out of that event right there --
>
> Q. Yeah.
>
> A. -- then it was -- at the time, in my frame of mind, both those officers would have been terminated. Now, I did testify that Officer Daniel didn't do anything wrong in the Department of Corrections. And I've seen it

---

> Q. But that's not what you did?
>
> A. I didn't go into the cell when I opened the door. I cracked the door to look in.
>
> Q. You're not supposed to do that, are you -- are you, Mr. Fontenot?
>
> A. Open the door? No, sir.
>
> Q. Would you agree with me, Mr. Fontenot, that even if the jury accepts your testimony as 100 percent true, it was not a good idea to open that door of that inmate on that day?

[R111-116-117]

over and over. I breached that -- when that door is breached and that inmate did come out, in essence, the fact that Officer Daniel was with me would have probably had him terminated, since he was on probation, 99 percent chance, more than likely.

Q. So you were concerned about the welfare of your --

A. That was my decision. I didn't -- I didn't think it would -- I knew if we made a big deal out of it, that's what would have happened. That's the direction it would have went.

Q. But, still, you didn't give it -- you didn't hesitate at all about following procedure and calling in the use of force?

A. No. I called for use of force, yes, sir.

Q. I mean, I guess you could have just got Milledge calmed down, fed him, and just kept it within the –

A. Yes, sir. I wouldn't be facing this charge right here. That's for sure. Because there wouldn't be a report -- I could have just said, No, no report, and not even write it. You're correct. Yes, sir.

[R111-211-213]

The jury acquitted Fontenot of the excessive use of force count, therefore the only *false* statements that Fontenot made were those reciting *how* he came into conflict with the inmate, that is, having gone inside the cell without first handcuffing the inmate in violation of the state DOC regulations. Fontenot admitted this false statement to the jury.

Indeed the indictment itself alleged three specific alternative false statements

and all three were about nothing more than whether Fontenot had engaged in the encounter with the inmate with his hands sticking out the chute of the cell door or not. In context, all three statements related only to whether Fontenot had complied with the DOC regulation that required correctional officers to handcuff the hands of violently dangerous mental inmates through the chute in the cell door before entering the cell of such inmates. This was not a matter within the jurisdiction of the United States, but was strictly a matter within the jurisdiction of the state of Florida DOC. Fontenot's admitted false statements were not statements made about a matter within the jurisdiction of the United States.

Coming back full circle to the District Court's jury instruction [Instruction 21], which told the jury that the Government did not have to prove knowledge of a federal investigation, it is easy to follow the jury's error and the manifest injustice in this case - - the jury found Fontenot credible in his denial of any use of excessive force (we know this because it acquitted him of that count), hence it could not have found him guilty of obstruction relating to a false statement about the use of excessive force, instead the false statement the jury had to rely upon was that admitted by Fontenot, that he lied with respect to entering the cell without first handcuffing the defendant in violation of the Florida DOC regulations. That false statement - - even had Fontenot known that a federal investigation might ensue for a claim of use of

excessive force and there is no evidence of that - - could not have been made to obstruct the federal investigation, but at worst to obstruct the state investigation of the violation of the state rule.

Therefore the error was not harmless, it resulted in a manifest injustice sufficient under *Fitzpatrick* to be reversed under the plain error standard.

CONCLUSION

Appellant Wilton Joseph Fontenot respectfully requests this honorable Court vacate his judgment and sentence with instructions that retrial is barred because the evidence was legally insufficient.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains approximately 10,435 words. Under Rule 32(a) the brief is permitted to have 14,000 words.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant certifies that the size and style of type used in this brief is 14 point Times New Roman.

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I hereby certify that a copy of the foregoing has been furnished to Diana Katherine Flynn, Attorney, United States Department of Justice, and to Karen L. Stevens and Diana Katherine Flynn, United States Department of Justice, P.O. Box 14403, Washington, DC 20044-4403, by United States Postal Service, first class mail, postage prepaid, this 27th day of October, 2008.

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William Mallory Kent