No. 08-12266

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

WILTON JOSEPH FONTENOT,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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UNITED STATES v. WILTON JOSEPH FONTENOT, No. 08-12266

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that the legal issues in this case are straightforward and can be decided on the briefs. However, the United States would not object to oral argument if the Court determines argument would be helpful.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231. The district court entered judgment on April 24, 2008, R. 89,[1] and defendant filed a timely notice of appeal on April 25, 2008, R. 91. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Did the district court commit plain error by instructing the jury that 18 U.S.C. 1519 requires proof that, as a factual matter, the investigation the defendant

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[1] Citations to the Record in the District Court are denoted "R." Citations to the exhibits admitted at trial by the District Court are denoted "Exh." Citations to Fontenot's Brief as Appellant are denoted "Br."

intended to obstruct is within the jurisdiction of a federal agency, and does not require proof that the defendant knew federal jurisdiction existed or intended specifically to interfere with a federal investigation?

2. Did the district court commit plain error by allowing the jury to consider whether the investigation of a state prison guard's use of force on an inmate is a matter within the jurisdiction of a federal agency, where the defendant was indicted for violating 18 U.S.C. 242 based on that use of force?

STATEMENT OF THE CASE

This case arose from defendant Wilton Joseph Fontenot's altercation with an inmate at the Union Correction Facility (UCI), a Florida prison where Fontenot worked as a sergeant. Fontenot was indicted on three counts on April 12, 2007. R. 1 at 1. Count One charged Fontenot with violating 18 U.S.C. 242 by striking and choking Corey Milledge, while acting under color of law, causing bodily injury and depriving Milledge of his constitutional right to be free from cruel and unusual punishment. R. 1 at 2. Count Two charged Fontenot with obstructing justice in violation of 18 U.S.C. 1512 by corruptly persuading Officer Joni White to state falsely that she did not see Fontenot strike and choke Milledge, with the intent to delay or prevent the communication to a law enforcement officer of information related to the commission of a federal offense. R. 1 at 3. Count Three charged Fontenot with knowingly making a false entry in a document with the intent to impede, obstruct or influence an investigation within the jurisdiction of a federal agency in violation of 18 U.S.C. 1519. R. 1 at 3.

After a jury trial, Fontenot was acquitted of Counts One and Two and found guilty of Count Three, violating 18 U.S.C. 1519. On April 24, 2008, the court sentenced Fontenot to 15 months imprisonment followed by 24 months of supervised release. R. 89 at 2. Fontenot appealed. Fontenot entered federal custody and began serving his sentence on September 17, 2008. R. 132.

STATEMENT OF FACTS

1. The November 22, 2003 Incident

On November 22, 2003, Fontenot was assigned to UCI's mental health unit, known as the "T-dorm." R. 109 at 170-171 (Trial Tr. Nov. 7, 2007). Fontenot was a sergeant with 20 years experience with the Florida Department of Corrections. R. 109 at 165. Officers Joni White and Clyde Daniel were working under Fontenot's supervision on the same unit. R. 107 at 136-137 (Trial Tr. Nov. 6, 2007). Corey Milledge, then a juvenile, was an inmate on T-dorm. R. 107 at 36.

T-dorm housed inmates with mental health or psychological problems, including individuals who had the potential to harm themselves. R. 107 at 19. Cell doors in T-dorm have a flap near the center, which allows staff to pass items to the inmates without opening the cell door. R. 107 at 135. The Department of Correctional Facilities regulations specified that before entering a cell on T-Dorm, the officer had to handcuff the inmate through the flap on the cell door. R. 107 at 135. If the inmate refused to submit to this handcuffing procedure, the officer was to call an extraction team before entering the cell. R. 107 at 39-40; R. 109 at 206.

An extraction team consists of five officers who enter the cell with a heavy plastic shield to secure the inmate. R. 109 at 221-222.

Shortly after beginning their shift at 4:00 pm, Fontenot and Daniel walked down to Milledge's cell. White remained in the control room. Fontenot testified that he opened the flap in Milledge's cell door and asked Milledge to "cuff-up"; that is, to turn his back to the door and put his hands behind his back and through the flap so that he could be handcuffed. R. 109 at 259. Milledge did not respond. R. 109 at 259.

Fontenot testified that he did not call an extraction team to remove Milledge from the cell, as was required under the regulations. Instead, Fontenot unlocked the cell door and opened it slightly. Milledge then abruptly pulled the door open and stood near the rear of the cell. R. 109 at 262-263. Fontenot testified that as he walked into the cell to pull the door closed, Milledge struck him with a piece of concrete. Fontenot testified that he partially blocked the blow with his hand, but that the object struck his head. R. 109 at 264-265. Milledge then slipped by Fontenot and grabbed Officer Daniel, who was behind Fontenot. R. 109 at 266-267. Fontenot testified that he tried to pull Milledge off of Daniel and that all three men moved out into the hallway. R. 109 at 275.

Fontenot stated that he fell to the ground, and Milledge ended up over him, kicking and punching him. Daniel pulled Milledge off of Fontenot and threw Milledge to the ground. R. 109 at 276-277. Fontenot testified that he placed a plastic garbage bag between Milledge's teeth to prevent Milledge from biting

anyone, and that Milledge then went limp. R. 109 at 278-279; R. 111 at 53-54 (Trial Tr. Nov. 8, 2007). After Milledge stopped struggling, Fontenot stated, Fontenot took the bag out of Milledge's mouth and placed it under his jaw. R. 111 at 54-55. Fontenot testified that he pulled Milledge back into his cell, and Milledge began to regain consciousness. R. 111 at 55-57. Fontenot testified that Daniel handcuffed Milledge in his cell, and that Daniel then found a piece of concrete on the cell floor. R. 111 at 57-58.

Officer Daniel testified that it was Fontenot, not Milledge, who threw the first punch after Fontenot entered Milledge's cell. R. 107 at 143. Daniel stated that when Fontenot opened the door, Milledge stepped back in the direction the door opened. R. 107 at 142. Daniel testified that Fontenot swung at Milledge's head, hitting Milledge in the face. After Milledge was hit, he began to fight back. R. 107 at 142. Daniel stated that the momentum from the struggle moved all three men out into the hallway and that Fontenot ended up on the ground with Milledge over him. R. 107 at 143-144. After Daniel pulled Milledge off Fontenot, Daniel said, Fontenot pulled a plastic garbage bag out of his pocket and choked Milledge around the neck until Milledge was unconscious. R. 107 at 144-145. Daniel testified that Milledge's body went rigid and his eyes rolled back in his head, at which point Daniel handcuffed Milledge and pulled him back into the cell. R. 107 at 146-147. After Milledge began to regain consciousness, Daniel stated, he uncuffed Milledge. Daniel testified that after they brought Milledge back into the cell, Daniel found a piece of concrete in the cell. R. 107 at 146-147.

After the incident, Daniel and Fontenot returned to the control room for T-dorm. R. 107 at 147-148. Fontenot later went to the medical unit to report an injury to his wrist. R. 111 at 70, 72.

Later during their shift that evening, Fontenot and Daniel completed use of force incident reports as required by UCI policy and regulations. Fontenot testified that incident reports at Union must be truthful, and that an officer could be fired for making a false report. R. 111 at 127; R. 109 at 179.

Fontenot testified that because Daniel and White were still on probationary status, and could have been terminated for any reason, Fontenot decided to "play it down." R. 111 at 68-69. Fontenot told Daniel that he would take the blame in the reports by writing that the whole altercation took place through the cell flap door while the door was closed, rather than inside Milledge's cell. R. 111 at 69. Fontenot testified that by playing the incident down in this way, he was confident that the incident would be "resolved that night." R. 111 at 79.

Fontenot wrote an incident report stating that he asked Milledge to submit to handcuffing procedures and opened the flap on Milledge's cell door. He wrote that he felt a sharp blow to his wrist through the flap door and that he grabbed Milledge's hand through the door, forcing Milledge to drop an object that appeared to be concrete. Fontenot wrote that Milledge thrust his other hand out of the flap and that Fontenot grasped Milledge's other hand, forcing Milledge to drop a sharpened toothbrush. Exh. 13. Fontenot's report did not mention that he opened the cell door or that he and Daniel entered Milledge's cell. Fontenot

signed and dated the incident report and the Disciplinary Report Worksheet. R. 111 at 133, 144. At the trial, Fontenot admitted that the part of his statement reporting that the incident happened through the flap while the door was closed was a lie. R. 111 at 131, 140, 143.

Daniel initially completed an incident report that repeated the false outline of events in Fontenot's report. Exh. 12; R. 107 at 152-153. When interviewed by an inspector later that evening, however, Daniel admitted his report was false, and told the inspector that Fontenot went into Milledge's cell and that Fontenot threw the first punch. R. 107 at 204.

Daniel was fired that same night. R. 107 at 154-155. Fontenot was fired two days later. R. 111 at 77.

2. Statutory Background And Proceedings Below

Section 1519 provides:

> 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 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. 1519.

At trial, the court instructed the jury that to find the defendant guilty of violating Section 1519, the government had to prove three elements:

> First: That the defendant made a false entry in a record or document;
> Second: That the defendant knew the entry was false;
> Third: 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.

R. 113 at 147 (Trial Tr. Nov. 9, 2007).

With respect to the third element, the district court instructed:

> 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.

R. 113 at 149.

Fontenot did not object to the instructions. After deliberating, the jury found Fontenot guilty of Count Three. R. 79 at 2. Fontenot did not move for a judgment of acquittal. Br. 14.

SUMMARY OF ARGUMENT

This Court should affirm Fontenot's conviction for violating Section 1519. Fontenot couches his appeal as a challenge to the sufficiency of the evidence. But his argument is entirely dependent on this Court adopting a legal standard that is inconsistent with the district court's explicit instructions, instructions to which Fontenot offered no objection below. Fontenot's arguments therefore are subject to review only for plain error under Rule 52(b) of the Federal Rules of Criminal Procedure. Under Rule 52(b), reversal is not permitted "unless the error is clear under current law." *United States* v. *Mitchell*, 146 F.3d 1338, 1342 (11th Cir.

1998) (quoting *United States* v. *Olano*, 507 U.S. 725, 734, 113 S. Ct. 1170, 1777 (1993)), cert. denied, 525 U.S. 1031, 119 S. Ct. 571 (1998). Fontenot has not satisfied that standard.

The district court instructed the jury that, in order to convict Fontenot on Count Three, it had to find two things: that Fontenot intended to obstruct an investigation or matter, and that the investigation or matter was within the jurisdiction of the United States. This was not error, much less plain error. Fontenot argues that the statute should be read to require finding that the defendant specifically intended to obstruct a *federal* investigation. But the district court's construction is consistent with the statutory language, and there is no authority supporting Fontenot's interpretation. In addition, because of the arguable ambiguity in the statutory language, it is appropriate to consider the legislative history and the statutory scheme. The legislative history consistently and expressly rejected Fontenot's interpretation, stating that "*The fact that a matter is within the jurisdiction of a federal agency is intended to be a jurisdictional matter, and not in any way linked to the intent of the defendant.*" *Legislative History of Title VIII of H.R. 2673: The Sarbanes-Oxley Act of 2002*, 107th Cong. 419 (2002) (Statement of Sen. Patrick Leahy) (emphasis added). Fontenot has not cited any contrary binding authority. The district court adopted the better reading of the statute, and there is no basis for finding that its instruction was a clear or obvious error under the current law.

Fontenot's alternative argument is that, even accepting the district court's

instruction, the evidence was not sufficient to find that his false statements related to an investigation or matter within the jurisdiction of the United States. He claims that his incident report, which falsely stated Fontenot's contact with Milledge occurred through the flap of a closed cell door, related only to his compliance with the handcuffing procedures under Florida's correctional regulations and not to a federal matter. But Fontenot's report was directly related to his fight with Milledge, which was investigated by the FBI and led to his indictment for a federal offense. Clearly, as a factual matter, this investigation fell within federal jurisdiction.

ARGUMENT

I

THE DISTRICT COURT'S INSTRUCTIONS ON SECTION 1519 WERE NOT PLAIN ERROR

A. Standard Of Review

Because Fontenot did not object to the court's instructions below or move for a judgment of acquittal, this Court reviews this issue for plain error. To satisfy this standard, a defendant "must show that there is (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Johnson* v. *United States*, 520 U.S. 461, 467, 117 S. Ct. 1554, 1549 (1997) (quoting *United States* v. *Olano*, 507 U.S. 725, 732, 113 S. Ct. 1770, 1776 (1993)). "'Plain is synonymous with clear or, equivalently, obvious.' Accordingly, the Supreme Court has stated that a court of appeals may not correct an error pursuant to Rule 52(b) 'unless the error is clear under current law.'" *United States* v. *Mitchell*, 146 F.3d 1338, 1342 (11th Cir. 1998) (quoting *Olano*, 507 U.S. at 734, 113 S. Ct. at 1777), cert. denied, 525 U.S. 1031, 119 S. Ct. 571 (1998); *United States* v. *Humphrey*, 164 F.3d 585, 588 (11th Cir. 1999) ("Without precedent directly resolving Humphrey's kind of claim, we conclude the district court's alleged error is not 'obvious' or 'clear' under current law.'"). "If all three conditions are met, an appellate court may then exercise its

discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Hall*, 312 F.3d 1250, 1259 (11th Cir. 2002) (quoting *Olano*, 507 U.S. at 732, 110 S. Ct. at 1776); (other internal quotation marks and citation omitted), cert. denied, 538 U.S. 954, 123 S. Ct. 1646 (2003).

B. The District Court's Instructions Are Consistent With The Language Of Section 1519 And Its Legislative History And Are Not Contradicted By Any Controlling Authority

Fontenot contends (Br. 19-20) that the evidence was legally insufficient to convict him on Count Three because the government did not prove that he knew or intended that his false statement would impede a *federal* investigation. The language of Section 1519 imposes no such requirement, and the legislative history of Section 1519 offers further proof that Congress did not intend to so limit Section 1519. Furthermore, even if the district court had erred, that error would not be plain.

The third element of Section 1519 requires proving that the defendant "[made] 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 in relation to or contemplation of any such matter or case*." 18 U.S.C.

1519 (emphasis added). The district court instructed the jury that to find the requisite intent, 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 the limits of federal jurisdiction." R. 113 at 149.

The district court's construction is consistent with the statutory language. A natural reading of Section 1519 is that "intent" applies only to the first phrase of the subsequent clause, "to impede, obstruct, or influence the investigation or proper administration of any matter," and does not apply to the following phrase, "within the jurisdiction of any department or agency of the United States." Under this reading, the portion of the clause limiting Section 1519 to matters within federal jurisdiction ensures that Congress does not exceed its legislative authority, similar to provisions that limit criminal statutes to conduct affecting interstate commerce. It does not impose an additional condition on the defendant's intent.

Fontenot proposes a different reading, under which "intent" applies to the entire clause and would require that a defendant specifically intend to impede a federal investigation. To the extent that Section 1519 is susceptible to both the district court's and Fontenot's interpretation, this Court should look to the legislative history to clarify any ambiguity. *United States* v. *McLemore,* 28 F.3d

1160, 1163 (11th Cir. 1994) ("When a statute's language is not unambiguous on its face, [this Court] look[s] to the legislative history and the statutory scheme.") (citing *Moskal* v. *United States*, 498 U.S. 103, 109-113, 111 S. Ct. 461, 465-468 (1990) (other citations omitted)).

Section 1519's legislative history clearly supports the district court's interpretation. Both the Senate Report and statements by the author of Section 1519 indicate that Congress intended the phrase "within the jurisdiction of any department or agency of the United States" to be jurisdictional rather than an element of the defendant's intent. The Senate Report explained that Section 1519 applies broadly to

> court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries, regardless of their title. Destroying or falsifying documents to obstruct any of these types of matters or investigations, *which in fact are proved to be within the jurisdiction of any federal agency* are covered by this statute.

S. Rep. No. 146, pp. 14-15, 107th Cong., 2d Sess. 366 (2002) (Senate Report) (emphasis added).

Senator Patrick Leahy, who drafted Section 1519, further clarified the distinction between intent and jurisdiction. In a section-by-section analysis of the bill submitted for the Congressional record, Senator Leahy explained:

> *The fact that a matter is within the jurisdiction of a federal agency is intended to be a jurisdictional matter, and not in any way linked to the intent of the defendant.* Rather, the intent required is the intent to obstruct, not some level of knowledge about the agency processes or the precise nature of the agency or court's jurisdiction.

Legislative History of Title VIII of H.R. 2673: The Sarbanes-Oxley Act of 2002, 107th Cong. 419 (2002) (emphasis added). And, speaking before the final vote on the bill, Senator Leahy stated:

> [T]his section would create a new 20 year felony which could be effectively used in a wide array of cases where a person destroys or creates evidence with the intent to obstruct an investigation or matter *that is, as a factual matter, within the jurisdiction of any federal agency or any bankruptcy.* It also covers acts either in contemplation of or in relation to such matters.

Id. at 418 (emphasis added).

Thus, considering the statutory language and the legislative history, the district court's adoption of this construction was not error, much less plain error. An error is not plain under Rule 52(b) "unless the error is clear under current law." *Mitchell*, 146 F.3d at 1342 (quoting *Olano*, 507 U.S. at 734, 110 S. Ct. at 1777). As Fontenot concedes in his statement requesting oral argument, this is a question of first impression in this circuit, and there is no authority contrary to the district court's instruction. As such, there is no clear error under current law and the district court's interpretation is not plain error.

The other cases Fontenot cites (Br. 29-31) are not contrary authority. *United States* v. *Shively*, 927 F.2d 804, 811 (5th Cir.), cert. denied, 502 U.S. 1209, 111 S. Ct. 2806 (1991), interpreted 18 U.S.C. 1512, not Section 1519, and was decided in another circuit. *United States* v. *Hunt*, 526 F.3d 739 (11th Cir. 2008), which was decided in this circuit, addressed a different issue.

The defendant in *Hunt* challenged the sufficiency of the evidence of the second element of his conviction under Section 1519, arguing that the false statement in his police report was a mere misstatement and was not made knowingly. 526 F.3d at 744. Rejecting this argument, the district court cited several pieces of circumstantial evidence supporting the jury's verdict that Hunt knew that his statement was false. Among this evidence was the fact that Hunt knew claims of excessive force would be investigated by the FBI at the time he made his report. *Id*. at 745. The Court cited this evidence to show that, at the time he made out his report, Hunt knew that he might have engaged in wrongful behavior. This knowledge permitted the inference that when he filled out his report, Hunt was knowingly trying to minimize his exposure, and did not make an innocent mistake. The Court thus relied on the evidence that Hunt was aware of federal civil rights laws to support *knowledge*, the second element of proof under Section 1519. *Ibid*. *Hunt* did not address whether knowledge of a federal

investigation is required to establish *intent* as part of the third element of proof. Because Fontenot is challenging the third element of his conviction, not the second, *Hunt* is not controlling on this question and does not support a finding of plain error.

Fontenot's claim (Br. 28-29) that the "nexus" requirement established in *United States* v. *Aguilar*, 515 U.S. 593, 115 S. Ct. 2357 (1995), is not satisfied in this case also misses the mark.[2] The Court's decision in *Aguilar* addressed 18 U.S.C. 1503, a different provision. And Congress specifically rejected application of the ruling in *Aguilar* when it passed Section 1519. See Senate Report p. 14 (noting *Aguilar's* narrow interpretation of Section 1503, as well as other limitations in the current statutory scheme, and concluding: "In short, the current laws regarding destruction of evidence are full of ambiguities and technical limitations that should be corrected. This provision is meant to accomplish those ends."). Accordingly, there is no nexus requirement with respect to Section 1519.

Even if there were a nexus requirement, there was enough evidence in the record to avoid a finding of plain error. Fontenot was asked about his training on

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[2] Fontenot's arguments (Br. 23-25) that Section 1519 "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" appear to be based on a similar nexus argument.

civil rights laws by the government at trial:

> 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 ---

R. 111 at 108-109.

Because Fontenot did not move for a judgment of acquittal, he cannot obtain relief on this basis unless he can demonstrate plain error. See *United States* v. *Hamblin*, 911 F.2d 551, 556-557 (11th Cir. 1990) (permitting reversal of conviction for insufficiency of the evidence "only to prevent a manifest miscarriage of justice"), cert. denied, 500 U.S. 943, 111 S. Ct. 2241 (1991). The evidence "must be viewed in the light most favorable to the government, accepting all reasonable inferences and credibility choices that tend to support the jury's verdict." *Id*. at 557 (quoting *United States* v. *Eley,* 723 F.2d 1522, 1525 (11th Cir. 1984)). The permissible inferences under this Court's precedent include inferring that the jury did not find Fontenot's answer credible. See *Hunt*, 526 F.3d at 745 ("[W]hen a defendant chooses to testify, he runs the risk that if disbelieved the jury might conclude the opposite of his testimony is true." (quoting *United States* v. *Brown*, 53 F.3d 312, 314 (11th Cir. 1995))).

Fontenot has not satisfied the first or second conditions of plain error. Taken in the light most favorable to the government, and drawing all inferences in favor of the jury's verdict, Fontenot's testimony is sufficient for a jury to conclude that Fontenot knew using excessive force could be a federal crime. Fontenot admitted, in the context of being questioned about the professional treatment of prisoners, that he knew there were applicable civil rights laws. Fontenot contends (Br. 33-34) that his subsequent, equivocal answer that he "probably" had a course that explained that excessive force could be a "state *or* federal" crime permits the inference that he might have been trained only about state law, not federal law. But that inference is not favorable to the jury's verdict. In fact, a jury reasonably could have concluded that Fontenot was being evasive and hostile on cross-examination, and that, during his 20 years as a corrections official, he did take a course explaining that excessive force could violate both federal and state law. At least, considering such inferences would not rise to "clear" or "obvious" error, the second requirement for plain error.

Finally, even if the error were deemed plain, this Court should decline to reverse because Fontenot has not satisified the fourth condition of plain error. Fontenot's testimony is sufficient to ensure that the jury's verdict does not call the fairness or integrity of the judicial proceedings into question, and would not rise to

a manifest miscarriage of justice.

II

THE EVIDENCE SUPPORTING FONTENOT'S CONVICTION IS SUFFICIENT TO WITHSTAND PLAIN ERROR REVIEW

Because Fontenot did not move for a judgment of acquittal below, his challenge to the sufficiency of the evidence is reviewed for plain error. See *United States* v. *Hamblin*, 911 F.2d 551, 556-557 (11th Cir. 1990), cert. denied, 500 U.S. 943, 111 S. Ct. 2241 (1991).

Fontenot's final argument (Br. 17, 39) is that, as a factual matter, his false statements related strictly to his compliance with Florida's Department of Corrections regulations and were not within the jurisdiction of the United States. The only response necessary to this argument is Fontenot's indictment. The FBI investigated and a federal grand jury indicted Fontenot for a federal criminal count, violating 18 U.S.C. 242. It is self-evident that the November 23, 2003, incident was a matter within the jurisdiction of the United States. That the jury ultimately acquitted Fontenot on the 18 U.S.C. 242 count does not mean that the federal government lacked jurisdiction to investigate and prosecute the offense.

In addition, even accepting Fontenot's characterization of his false statements, those statements were clearly related to or were in contemplation of a

matter or investigation within federal jurisdiction and are thus covered by Section 1519. Fontenot falsely stated that his contact with Milledge occurred through the cell door flap and involved only their hands. Exh. 13. Fontenot admitted that he made these statements to "play down" the incident in hopes that it would be resolved that night and that he could avoid a full investigation of his altercation with Milledge inside the cell. The false statements about what prompted Fontenot to use force on Milledge and the nature of that force thus clearly related to a matter within the jurisdiction of the United States, Fontenot's alleged use of excessive force under the color of law, in violation of a right guaranteed by the Constitution.

CONCLUSION

This Court should affirm district court's judgment finding Fontenot guilty of violating Section 1519.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation required by Fed. R. App. P. 32(a)(7)(B). This brief was prepared using WordPerfect 12.0 and contains no more than 4,898 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

s/ Karen L. Stevens
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Attorney

Date: December 22, 2008

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2008, I electronically filed the BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court using the EDF system.

In addition, I hereby certify that on December 22, 2008, the original and six copies of the BRIEF FOR THE UNITED STATES AS APPELLEE were served by first class certified mail on the Clerk of the Court for the 11th Circuit Court of Appeals. I also certify that one copy of the foregoing was served by first class certified mail on the following:

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