No. 09-20601

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

EUGENE MORRIS,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

Because the arguments in appellant's brief have not been properly preserved for appeal, the United States believes that oral argument is unnecessary.

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MISCELLANEOUS:

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction under federal law. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment on September 4, 2009 (R. 18, 656; R.E. Tab 3 at 1).[1] Defendant Eugene

[1] "R. __" refers to the page number following the Bates stamp "USCA5" on documents in the official Record on Appeal. "S.R. __" refers to pages in the supplemental record on appeal. "R.E. Tab __ at __" refers to pages within the tabbed items contained in the Record Excerpts filed with the appellant's opening brief on July 8, 2010. "U.S.R.E. Tab __ at __" refers to pages within the tabbed items contained in the United States' Record Excerpts filed with this Brief For The

(continued…)

Morris filed a timely notice of appeal on September 3, 2009 (R. 662-663; R.E. Tab 5 at 1-2). See Federal Rule of Appellate Procedure 4(b)(2). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE PRESENTED

Whether the district court plainly erred in denying defendant's motion for judgment of acquittal.

STATEMENT OF THE CASE

This case involves misconduct by correctional officers at a Texas prison. On October 29, 2007, a federal grand jury in the Southern District of Texas returned a five-count indictment charging correctional officers Eugene Morris and Tracy Jewett with criminal offenses arising out of an assault on inmate Robert Tanzini and the subsequent cover-up of that attack (R. 22-25; R.E. Tab 2 at 1-4). The assault occurred at the Ferguson Unit facility, a state penitentiary operated by the Texas Department of Criminal Justice (TDCJ) (R. 22-25; R.E. Tab 2 at 1). Count One charged Morris with violating 18 U.S.C. 242 by willfully using excessive force against Tanzini by kicking him, causing him bodily injury, and depriving him of his Eighth Amendment right to be free from cruel and unusual punishment (R.

(…continued)
United States As Appellee. "Br. ___" indicates the page number of appellant's opening brief.

22; R.E. Tab 2 at 1). Count Two alleged that Morris knowingly made a false entry in a TDCJ use-of-force report concerning Tanzini, with the intent to impede, obstruct, or influence an investigation of a matter within the jurisdiction of a federal agency, in violation of 18 U.S.C. 1519 (R. 23; R.E. Tab 2 at 2). Count Three charged Morris with obstruction of justice for attempting to persuade two correctional officers to give false statements to cover up the assault, in violation of 18 U.S.C. 1512(b)(3) (R. 23; R.E. Tab 2 at 2). Count Four alleged that Jewett knowingly made a false entry in a TDCJ use-of-force report, in violation of 18 U.S.C. 1519 (R. 24; R.E. Tab 2 at 3). Count Five charged Jewett with obstruction of justice under 18 U.S.C. 1512(b)(3) (R. 24; R.E. Tab 2 at 3).

Morris and Jewett were tried before a jury in May 2008 (R. 839-2441; S.R. 25-649). Morris moved for judgment of acquittal at the close of the United States' case-in-chief (R. 2130). The court denied the motion (R. 2130). At the close of all the evidence, Morris renewed his motion for judgment of acquittal, which the district court denied (S.R. 445). The jury acquitted Morris on Counts One and Three, but found him guilty on Count Two, knowingly making a false entry in a record in violation of 18 U.S.C. 1519 (S.R. 644). The jury acquitted Jewett of all counts (S.R. 644-645). Morris filed a post-verdict motion for judgment of acquittal on Count Two (R. 515-518), which the district court denied in a written opinion (R. 526-545).

The court sentenced Morris to a 24-month term of imprisonment and two years of supervised release (R. 652; S.R. 706).

STATEMENT OF FACTS[2]

1. Assault On Robert Tanzini

On November 17, 2002, Morris repeatedly kicked inmate Tanzini in the head as Tanzini lay on the floor with his hands cuffed behind his back. The United States presented evidence at trial that Jewett and Officer Troy Grusendorf, who both had the authority and opportunity to stop the unjustified assault, watched the attack without intervening. The United States further presented evidence that Morris, Jewett, and Grusendorf conspired to cover up the unjustified beating by falsifying reports and making false statements to law enforcement officials.

The evidence at trial showed that the incident began when inmate Tanzini became angry with Shineka McGuire, an African-American officer who entered his cell to perform a routine inspection for contraband while he was in the shower (R. 1423, 1673-1676). Tanzini argued with McGuire and called her a "black nigger bitch" (R. 1424, 1431, 1716). McGuire reported Tanzini's behavior to her supervisors, Morris and Grusendorf, who were in the prison's Administrative

[2] This factual recitation is set forth in the light most favorable to the government. See United States v. Brugman, 364 F.3d 613, 615 (5th Cir. 2004).

Segregation Office (Office) (R. 1146, 1424, 1431; S.R. 76). Morris told McGuire he would "take care of it" (S.R. 77).

Morris and Grusendorf then went to Tanzini's cell (R. 1146-1147, 1150). Morris confronted the inmate and began yelling at him (R. 1150-1152, 1220, 1680, 1970-1971). Morris, who is African American, asked, "Why don't you call me one?" and said, "Because you know what will happen if you call me. I'll bust you in your punk ass, white bitch" (R. 1220, 1602). Morris and Grusendorf then handcuffed Tanzini behind his back and escorted him to the Office (R. 1153-1154, 1221-1222, 1428; S.R. 87). Jewett joined them on the way to the Office (R. 1154, 1222).

Grusendorf testified about what happened next. Once in the Office, Morris repeatedly asked Tanzini why he called McGuire a racial epithet (R. 1155, 1222). Morris told Tanzini, "You know you want to say it. Call me one. Say it." (R. 1222). Morris continued, "Say it, because you know I'll bust you in your punk ass" (R. 1155).

At some point during this confrontation, Grusendorf walked to an adjacent room to find an available cell for Tanzini (R. 1155-1157, 1222-1223). Although Grusendorf could not see the men while he was in the other room, he heard Morris utter, "say it" (R. 1157, 1223). He then heard the slapping of skin and the scuffling of feet (R. 1157, 1223, 1306). Grusendorf testified that he saw Jewett looking in

the direction of Morris and Tanzini with a "look of disbelief" (R. 1157-1159, 1173-1175, 1359). As Grusendorf was reentering the Office, he saw Morris step over Tanzini, grab a door frame and kick in the direction of Tanzini, who lay on the floor (R. 1161, 1176, 1224). After the kick, Tanzini's legs and lower body shook and Grusendorf heard what sounded like air being expelled from Tanzini's chest (R. 1161, 1225).

Inmates Ahmad Sims and Chris Wadleigh also witnessed the assault. Sims testified that, as he stood in a chow-line and looked through the Office window, he saw Morris kick an inmate who lay on the floor with his hands cuffed behind his back (R. 1546-1549, 1554-1555). Although Wadleigh did not identify Morris by name (R. 1602), he gave a similar account at trial. He testified that, as he walked by the Office, he saw an African-American officer stomping an inmate on the floor at least five times (R. 1597-1600).

When the assault ended, Morris said, "[I] hit pretty hard for a nigger, huh[?]" (R. 1225). Grusendorf saw Tanzini lying on the floor with blood bubbling from his mouth (R. 1187-1188, 1194). Tanzini had to be carried out of the Office on a gurney (R. 1199-1200, 1500-1501, 1724-1726). As a result of the assault, Tanzini suffered multiple injuries, including brain damage and multiple facial and skull fractures (R. 2009-2021, 2051-2060, 2147, 2329, 2332-2333).

2. The Cover-Up

TDCJ's policy requires officers to prepare a use-of-force report after any incident in which they use force against an inmate or in which they witness such an application of force (R. 1886-1889; U.S.R.E. Tab 2 at 3-6, 8). The policy requires the officer to accurately document the use of force, including events before, during, and after the incident (R. 1886). In addition, the policy instructs officers to "not collaborate with another employee * * * in order to write a statement" (R. 1886; U.S.R.E. Tab 2 at 5).

Shortly after the assault on Tanzini, Grusendorf and Morris had a conversation in the Office about what to do next (R.1201). Morris told Grusendorf what to write in his use-of-force report (R. 1201-1204). Morris instructed Grusendorf to falsely claim that he was not present when Morris "took the offender out of the cell" (R. 1202), and to falsely claim that when he returned from the adjacent room, he saw Morris "restraining th[e] offender falling to the ground" (R. 1202, 1229-1230). Morris also instructed Grusendorf to put a copy of his false report in Jewett's box so he would know what to say (R. 1203). After Grusendorf expressed concern, Morris said, "Just stay down on what you wrote," which Grusendorf interpreted to mean that once he wrote the false report, he was not to change his story (R. 1203-1204).

On the day of the assault, Grusendorf wrote a false use-of-force report and put his report in Jewett's box (R. 1204, 1388). As Morris instructed, Grusendorf omitted from his report that he was present with Morris on the cell block when the incident began (R. 1202). Grusendorf testified at trial that he also falsely wrote in his report, as Morris had ordered, that he saw Morris wrap his arms around Tanzini and both of them fell to the floor (R. 1202, 1229-1230). His report omits that Morris kicked Tanzini (R. 1202, 1229-1230, 1390).

That same day, Morris included false assertions and omissions in his own use-of-force report (R. 646-648; U.S.R.E. Tab 3 at 1-3). Morris wrote a narrative of the use of force, declaring that he forced Tanzini to the ground in self-defense (R. 647-648; U.S.R.E. Tab 3 at 2-3). But his report fails to mention that he kicked Tanzini in the head, and he did not check a box on the report asking whether he had kicked the inmate (R. 647-648, 1905-1906; U.S.R.E. Tab 3 at 2-3). He also untruthfully checked a box on the report to indicate that he "attempt[ed] to calm or reason with the offender" prior to the use of force (R. 646; U.S.R.E. Tab 3 at 1). At the end of the narrative in his use-of-force report, Morris stated that he "ha[d] no further knowledge of this incident" (R. 648; U.S.R.E. Tab 3 at 3).

The day after the assault, Jewett wrote his use-of-force report on the incident (S.R. 295). Jewett alleged that, before force was used, he "went into the adjoining office" to retrieve a form (S.R. 264, 271; U.S.R.E. Tab 4 at 1). According to

Jewett's report, when he re-entered the Office, he saw Tanzini "on the floor" and Morris restraining him (S.R. 272; U.S.R.E. Tab 4 at 1-2).

That same day, Assistant Warden Thomas Merchant instructed Morris to write a more detailed report regarding the use of force on Tanzini (S.R. 124). Morris wrote a second use-of-force report (R. 649-651; S.R. 149-150; U.S.R.E. Tab 3 at 4-6). In both his first and second reports, however, Morris did not indicate that he kicked Tanzini or baited him prior to the use of force (R. 646-651; S.R. 150; U.S.R.E. Tab 3 at 4-6). At the end of the narrative in his second use-of-force report, Morris again stated that he "ha[d] no further knowledge of this incident" (R. 651; U.S.R.E. Tab 3 at 6).

The prison's internal affairs officials launched an investigation into the use of force on Tanzini (R. 1205). Grusendorf was interviewed by the prison's internal affairs officials the day after the assault (R. 1205), and he repeated the false story that he had included in his use-of-force report (R. 1205-1206). Following his interview, Grusendorf told Morris that internal affairs officials were "asking questions" about the assault (R. 1206). Morris replied, "It ain't nothing," and told Grusendorf, "Don't change your statement, just leave it like it is" (R. 1206).

Two days after the assault, Grusendorf again met with internal affairs officials (R. 1206). During his meeting with investigators, he wrote a second false report regarding the assault on Tanzini (R. 1208). This time, Grusendorf made a

minor change in his report (R. 1207). When Grusendorf told Morris he submitted a second report, Morris flew into a rage and said, "Goddamit, you don't ever change your fucking statement. * * * You don't tell them dick-sucking ho's [sic] nothing" (R.1208-1209). Grusendorf later admitted to investigators that he falsified his report at Morris's request (R. 1230).

Morris conceded at trial that he completed academy and in-service training, which included instruction on report writing and use-of-force policies (S.R. 147-148). Officer Terry Teetz, an expert in TDCJ's use-of-force policies, testified that TDCJ officers are trained that use-of-force reports should be complete, accurate, and truthful (R. 1886, 1891-1892; U.S.R.E. Tab 1 at 1, 4). Teetz also testified that officers are trained to know that uses of force often result in federal criminal investigations and prosecutions (R. 1870-1871).

SUMMARY OF ARGUMENT

Morris challenges the district court's denial of his motion for judgment of acquittal on two grounds, neither of which he preserved for appeal. Because the district court did not err, much less plainly err, in denying the motion for judgment of acquittal, this Court should affirm Morris's conviction.

1. Morris argues that 18 U.S.C. 1519 requires proof that, when he completed his false report, a federal investigation was already under way, and that he was aware of that ongoing federal investigation. The Court should refuse to

consider this argument because Morris waived it by consenting to a jury instruction that directly contradicts the interpretation of Section 1519 that he now advocates. Even if not waived, Morris's argument is forfeited because he failed to raise it below. Morris did not argue in his motions for judgment of acquittal that 18 U.S.C. 1519 required proof of an ongoing federal investigation. Accordingly, if this Court considers the argument at all, it should review it only for plain error.

Even if Morris had properly preserved the argument, it fails on the merits. The language of Section 1519, the legislative history, and the case law all confirm that the statute does not require that a federal investigation be ongoing when the defendant makes a false report or engages in other obstructive conduct. Indeed, Morris has not pointed to a single case adopting his interpretation of Section 1519. Consequently, he has failed to demonstrate that the district court erred, much less committed clear or obvious error, in interpreting Section 1519.

2. In challenging the sufficiency of the evidence, Morris also argues that the jury issued inconsistent verdicts when it found him guilty of violating 18 U.S.C. 1519 but acquitted his co-defendant of the same offense. Morris forfeited this argument by failing to raise it in his motion for judgment of acquittal, and, thus, this Court should review the claim only for plain error. Morris has also failed to show that the district court committed any error, plain or otherwise. Although the jury's verdicts are not, in fact, inconsistent, this Court has made clear that even if

they were, "inconsistent verdicts are not a bar to conviction so long as there is sufficient evidence to support the jury's determination of guilt." *United States* v. *Gieger*, 190 F.3d 661, 664 (5th Cir. 1999). This rule applies to verdicts in which one defendant is found guilty and his co-defendant is acquitted of the same offense.

The evidence at trial was more than sufficient to convict Morris under Section 1519. The jury could reasonably infer from the evidence that Morris made false entries in his use-of-force reports regarding the assault of inmate Tanzini, that he did so knowingly, and that he made the false entries with the intent to impede an investigation into excessive use of force by law enforcement officers – a matter that is within the jurisdiction of federal agencies. This evidence would be sufficient to affirm the conviction even if Morris had preserved the issue for appeal. It certainly is sufficient to survive plain-error review.

ARGUMENT

THE DISTRICT COURT DID NOT PLAINLY ERR IN DENYING MORRIS'S MOTION FOR JUDGMENT OF ACQUITTAL

Morris challenges his conviction on the ground that the district court erred in denying his motion for judgment of acquittal (Br. 11). His challenge is based entirely on two arguments that he failed to preserve for appeal. He waived the first argument and forfeited the second. Therefore, this Court should decline to

consider the first issue and review the second only for plain error. Because the district court did not err on either issue, much less commit plain error, this Court should affirm Morris's conviction.

A. Morris Waived His Argument That 18 U.S.C. 1519 Requires Proof Of An Ongoing Federal Investigation; In Any Event, The District Court Did Not Plainly Err In Interpreting Section 1519

1. Morris's Argument Is Waived, Or At Least Forfeited

Morris argues (Br. 12-15) that Section 1519 requires proof that a federal investigation was already under way, and that he was aware of that ongoing federal investigation when he completed his false report. The Court should refuse to consider this argument because Morris waived it by consenting to a jury instruction that directly contradicts the interpretation of Section 1519 that he now advocates. The district court instructed the jury that "[i]n order to find a defendant guilty [under Section 1519], you do not need to find that the investigation was pending or imminent at the time of the defendant's conduct" (R. 484; S.R. 473). Before the jury retired to deliberate, the district court asked counsel whether they had "any objections to the charge as delivered" (S.R. 583). Morris's trial counsel responded that, "Mr. Morris has none" (S.R. 584). By consenting to the jury instruction, Morris has waived his challenge to the statutory interpretation contained in that instruction. See *United States* v. *Whitfield*, 590 F.3d 325, 358 (5th Cir. 2009) (concluding that a defendant who consented to his co-defendant's continuance at

trial was precluded from challenging it on appeal), petition for cert. pending, Nos. 09-1422, 09-11039 (filed May 24, 2010), 09-11067 (filed May 25, 2010); *United States* v. *Anifowoshe*, 307 F.3d 643, 650 (7th Cir. 2002) (holding that defendant waived his challenge to jury instructions when defense counsel agreed with district court's statement "that the instructions were given without objection by either side"). Where, as here, the defendant has waived an argument, the Court will not review it on appeal – not even under a plain-error standard. See *United States* v. *Olano*, 507 U.S. 725, 733-734 (1993); *United States* v. *Rodriguez*, 602 F.3d 346, 350-351 (5th Cir. 2010).

Even if this argument was not waived, Morris's argument is forfeited because he failed to raise it below. In his post-verdict motion for judgment of acquittal, Morris argued that the evidence was insufficient to support his conviction under Section 1519 (R. 515-516). But Morris did *not* argue in that motion that 18 U.S.C. 1519 requires proof of an ongoing federal investigation or proof that the defendant was aware of such an ongoing investigation (R. 515-518). Nor did he make that argument in his motions for acquittal at the end of the government's case-in-chief (R. 2130) and at the close of all evidence (S.R. 445). Consequently, even if Morris had not waived the issue, this Court would review it only for plain error. See *United States* v. *Montes*, 602 F.3d 381, 385-386 (5th Cir. 2010) (applying plain-error review where defendant failed to object to jury

instructions in district court); *United States* v. *Cathey*, 259 F.3d 365, 368 (5th Cir. 2001) (reviewing sufficiency-of-evidence claim for plain error where defendant failed to properly move for judgment of acquittal); see also *United States* v. *Fontenot*, No. 08-12266, 2010 WL 2730659, at *2 (11th Cir. July 13, 2010) (applying plain-error review after concluding that defendant's challenge to the sufficiency of the evidence was tantamount to a challenge to Section 1519 jury instructions, to which defendant failed to object in the district court).

To prove plain error, Morris must "show (1) there was error, (2) the error was plain, (3) the error affected his 'substantial rights,' and (4) the error seriously affected 'the fairness, integrity or public reputation of judicial proceedings.'" *United States* v. *Jackson*, 549 F.3d 963, 975 (5th Cir. 2008) (citation omitted), cert. denied, 130 S. Ct. 51 (2009). To satisfy the first and second prongs, "the legal error must be clear or obvious, rather than subject to reasonable dispute." *Puckett* v. *United States*, 129 S. Ct. 1423, 1429 (2009). Even if there was an obvious error, reversal "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States* v. *Acosta*, 475 F.3d 677, 681 (5th Cir. 2007) (internal quotation marks and citation omitted).

2. Section 1519 Does Not Require Proof Of An Ongoing Federal Investigation

Even if not waived or forfeited, Morris's argument is meritless because the text and legislative history of 18 U.S.C. 1519 make clear that the government need not prove that a federal investigation was ongoing when the defendant made the false statement. And, *a fortiori*, Section 1519 does not require proof that the defendant was aware of an ongoing federal investigation when he made the statement.

The starting point for interpretation of a statute is the language of the statute itself. *United States* v. *Sealed Appellant 1*, 591 F.3d 812, 817 (5th Cir. 2009). Section 1519 provides that:

> 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 [of the U.S. Code], 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.

On its face, Section 1519 does not require proof of an "ongoing federal investigation." Rather, the language of the statute simply states that a false statement must be knowingly made "with the intent to impede, obstruct, or influence the investigation or proper administration of any matter" that is within

the jurisdiction of a federal agency. 18 U.S.C. 1519. One can intend to impede, obstruct, or influence an investigation even if the investigation has not yet commenced and even if it ultimately never takes place. Indeed, a defendant whose obstructive conduct is particularly effective may successfully prevent an investigation from being initiated.

If there were any doubts about this interpretation of the statute, they are dispelled by Section 1519's express coverage of obstructive conduct that is undertaken "in relation to or *contemplation* of any * * * matter" within the jurisdiction of a federal agency. 18 U.S.C. 1519 (emphasis added). This "contemplation" language confirms Congress's intent to prohibit anticipatory obstruction of justice, including false statements made in advance of the investigations the statements are intended to obstruct. See *Webster's Third New Int'l Dictionary Of The English Language Unabridged* 491 (1993) (defining "contemplation" to mean, among other things, "the act of looking forward to an event"); *The Random House Dictionary Of The English Language, Second Edition, Unabridged* 438 (2d ed. 1987) (defining "contemplation" to mean, among other things, "prospect or expectation").

Moreover, under the plain language of the statute, the investigation in question need not to be a *federal* investigation; rather, it simply has to involve a matter that is *within the jurisdiction of a federal agency*. Thus a state or local

investigation into excessive force by a law enforcement officer would be covered because, as the district court correctly instructed the jury, "an investigation into the deprivation of a prisoner's civil rights by a person acting under color of law is a matter within the jurisdiction of the Federal Bureau of Investigation and the United States Attorney's Office for the Southern District of Texas, which are agencies of the United States" (R. 484).

Had Congress intended Section 1519 to be limited to *ongoing federal* investigations, it easily could have drafted the statute to say so. For example, Congress could have omitted the "contemplation" language of Section 1519 and instead written the statute to criminalize obstructive conduct that is undertaken "with the intent to impede, obstruct, or influence an ongoing federal investigation."

Consistent with Section 1519's plain language, every court that has addressed the issue has concluded that the statute does not require proof that a federal investigation – or any investigation, for that matter – was ongoing at the time of the obstructive conduct. See *United States* v. *Jho*, 465 F. Supp. 2d 618, 635-636 (E.D. Tex. 2006) (rejecting defendant's "argument that there must be a pending 'investigation' before liability can attach" under Section 1519; "imposing a requirement that the matter develop into a formal investigation ignores the plain meaning of the statute and the legislative history"), rev'd on other grounds, 534 F.3d 398 (5th Cir. 2008); *United States* v. *Ionia Mgmt. S.A.*, 526 F. Supp. 2d 319,

329 (D. Conn. 2007) ("In comparison to other obstruction statutes, [Section 1519] by its terms does not require the defendant to be aware of a federal proceeding or *even that a proceeding be pending*.") (emphasis added); *United States* v. *Kernell*, No. 3:08-CR-142, 2010 WL 1543846, at *7 (E.D. Tenn. Mar. 30, 2010) ("Nothing in the text of Section 1519 can be interpreted to mean that the conduct it describes is proscribed only once an investigation has begun. Other courts have considered and rejected the argument that Section 1519 does not proscribe the conduct it describes unless an investigation has commenced."). Morris has failed to identify a single decision reaching a contrary interpretation of Section 1519.

The legislative history confirms that Section 1519 does not require proof that a federal investigation was ongoing when the false statement or other obstructive conduct took place. As the Senate Report explains,

> Section 1519 * * * is specifically meant *not* to include any technical requirement, which some courts have read into other obstruction of justice statutes, *to tie the obstructive conduct to a pending or imminent proceeding or matter*. It is also sufficient that the act is done 'in contemplation' of or in relation to a matter or regulation. * * * [Section 1519] also extends to acts done in contemplation of such federal matters, so that the *timing of the act in relation to the beginning of the matter or investigation is also not a bar to prosecution*.

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

In addition, Senator Patrick Leahy, the chief author and sponsor of Section 1519, submitted a section-by-section analysis of the bill emphasizing that the

statute would cover obstructive conduct done "in contemplation" of an investigation, even if the investigation was not yet under way when the conduct occurred. *Legislative History of Title VIII of HR 2673: The Sarbanes-Oxley Act of 2002*, 148 Cong. Rec. S7418-7419 (daily ed. July 26, 2002) (statement of Sen. Leahy); see also 148 Cong. Rec. S1785-1786 (daily ed. Mar. 12, 2002) (statement of Sen. Leahy).

In sum, the text and legislative history show that Morris's interpretation of the statute is incorrect. Section 1519 does not require proof that a federal investigation was ongoing when the obstructive conduct occurred. Consequently, Morris has failed to show that the district court committed any error in interpreting Section 1519, much less "clear or obvious" error that would affect his substantial rights and result in a miscarriage of justice.

B. Despite Morris's Assertion That The Jury Verdicts Are Inconsistent, He Has Not Proved That The District Court Committed Plain Error In Denying His Motion For Judgment Of Acquittal

Morris challenges the sufficiency of the evidence for his Section 1519 conviction on the ground that the jury's acquittal of his co-defendant for the same offense renders the verdict so inconsistent that his conviction cannot stand (Br. 16-17). Morris has forfeited this argument and, at any rate, it lacks merit.

1. Morris Has Forfeited This Argument

In moving for judgment of acquittal, Morris did *not* argue that his conviction under Section 1519 on Count Two was inconsistent with his co-defendant's acquittal (R. 515-16). Instead, Morris argued that the jury's guilty verdict on the Section 1519 charge was inconsistent with his *own* acquittal on Count One (the excessive-use-of-force charge under 18 U.S.C. 242). Because Morris now tries to challenge his conviction on a ground that he did not raise in his motions for judgment of acquittal, this Court should review his claim for plain error. See pp. 14-15, *supra*.

2. Inconsistent Jury Verdicts Are Permissible Where, As Here, The Evidence Is Sufficient To Support The Conviction

Morris has failed to prove that the district court plainly erred in denying his motion for judgment of acquittal. Although the jury verdicts in this case are not, in fact, inconsistent,[3] this Court has made clear that "inconsistent verdicts are not a bar to conviction so long as there is sufficient evidence to support the jury's determination of guilt." *United States* v. *Gieger*, 190 F.3d 661, 664 (5th Cir.

[3] The evidence was not identical as to Morris and his co-defendant, Tracy Jewett. Jewett asserted in his use-of-force report that he was in an adjoining office when force was used on Tanzini (S.R. 264-266, 304, 334-335). The jury may have believed that Jewett did not, in fact, see Morris kick Tanzini. Thus, the jury may reasonably have concluded that Jewett did not knowingly make a false statement with the intent to impede the investigation.

1999). Although Morris acknowledges this rule, he suggests that it applies only when the jury renders inconsistent verdicts related to a single defendant, rather than co-defendants charged with the same offense (Br. 17). Morris is mistaken. This Court has held, for example, that inconsistent verdicts do not bar a conviction for conspiracy even when all of the defendant's alleged co-conspirators are acquitted. See *United States* v. *Ramirez-Velasquez*, 322 F.3d 868, 873, 880 (5th Cir.), cert. denied, 540 U.S. 840 (2003); *United States* v. *Zuniga-Salinas*, 952 F.2d 876, 878 (5th Cir. 1992) (en banc).

Other circuits have applied the same rule in other contexts where the inconsistent verdicts concerned co-defendants as to whom the evidence was allegedly identical. See, *e.g.*, *United States* v. *Alvarado*, 882 F.2d 645, 654-655 (2d Cir. 1989) (rejecting a challenge to a conviction on the ground that a jury's acquittal of a co-defendant "on the same charge, despite the identity of the evidence against them, renders the verdict" inconsistent), overruled on other grounds, *Bailey* v. *United States*, 516 U.S. 137 (1995); *Longwell* v. *Arnold*, No. 08-5609, 2010 WL 1172476, at *6 (6th Cir. Mar. 29, 2010) (same); *United States* v. *Abbott Washrooms Sys., Inc.*, 49 F.3d 619, 622-623 (10th Cir. 1995) (same).

Therefore, even if the verdicts here are inconsistent, Morris's conviction must stand because the evidence adduced at trial is more than sufficient to prove that Morris violated 18 U.S.C. 1519. See *Gieger*, 190 F.3d at 664. As the jury was

instructed, in order to obtain a conviction under Section 1519, the United States was required to prove, beyond a reasonable doubt, that Morris (1) "falsified or made a false entry"; (2) "did so knowingly"; and (3) "did so 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 such matter" (R. 314). See *United States* v. *Hunt*, 526 F.3d 739, 743 (11th Cir. 2008) (discussing three elements of a Section 1519 offense). As the district court explained in its opinion (R. 537-545), the evidence at trial was more than sufficient to establish all three elements of a Section 1519 violation.

The first element – the making of a false entry – has been established. Even though the use-of-force report that Morris completed asked him to check a box if he kicked the inmate (R. 647, 650), Morris left that box unchecked (R. 647, 650, 1900, 1905-1906). Morris also wrote a narrative description of the assault declaring that the handcuffed inmate attacked him and that Morris forced Tanzini to the ground in self-defense (R. 647-648, 650-651). But the narrative in his report omits any mention that Morris kicked Tanzini in the head (R. 647, 650, 1896-1897; U.S.R.E. Tab 3 at 2, 5). Morris's omission of the kick is contrary to the eyewitness and physical evidence at trial that shows he did kick Tanzini in the head (R. 646-651, 1161, 1176, 1224, 1546-1549, 1554-1555, 1597-1600, 1900, 1905-1906). This material omission in Morris's use-of-force reports establishes the first element

of a Section 1519 violation. See *United States* v. *Cordell*, 912 F.2d 769, 773 (5th Cir. 1990) ("[A] material omission qualifies as a false entry.").

The district court also found sufficient evidence that Morris falsely indicated on his report that he "attempt[ed] to calm or reason with the offender" prior to implementing force (R. 540, 646, 649). But Grusendorf testified that Morris verbally provoked Tanzini prior to the use of force (R. 1150-1152, 1154-1157, 1220, 1222-1223). Morris's report omits any mention of verbal provocation (R. 647-648, 650-651; U.S.R.E. Tab 3 at 2-3, 5-6). Morris's false statement about "calming" Tanzini is also sufficient to satisfy the "false entry" element.

The second element – that the defendant acted knowingly – was established at trial. Morris wrote two use-of-force reports on the Tanzini assault (R. 646-651, U.S.R.E. Tab 3 at 1-6). As the district court recognized, however, Morris did not correct his first false report even after a period of overnight reflection and a chance to draft a second report in response to a request for additional information on the assault (R. 543; S.R. 123-124, 149-150). In addition, Morris's failure to mention the kick (or to check the box about the kick) was not a mere oversight. At the end of the narrative in both of his use-of-force reports, Morris stated that he "ha[d] no further knowledge of this incident" (R. 648, 651; U.S.R.E. Tab 3 at 3, 6). This evidence was sufficient for a reasonable jury to infer that Morris acted knowingly when he made his false statement.

Finally, the third element – intent to impede, obstruct, or influence an investigation into a matter that was, in fact, within the jurisdiction of a federal agency– was also established at trial.[4] Officer Teetz testified at trial that TDCJ officers are taught that use-of-force incidents can often result in federal criminal investigations and prosecutions (R. 1869-1871), and that use-of-force reports should be complete, accurate, and truthful (R. 1886). Morris conceded at trial that he completed academy and in-service training, which included instruction on report writing and use of force policies (S.R. 147-148). Evidence at trial also showed that Morris pressured Grusendorf to submit a false report consistent with his report (R. 1201-1204, 1206-1208, 1213-1230). As the district court found, a "reasonable jury could infer from this evidence that Morris was aware he engaged in wrongful behavior, that this awareness influenced what statements he put in his

[4] Although Morris has not raised the issue in his opening brief, and thus has waived it on appeal, we note that Section 1519 does not require the government to prove that the defendant knew that his obstructive conduct involved a matter that fell within the jurisdiction of a federal agency. See 148 Cong. Rec. S7419 (daily ed. July 26, 2002) (statement of Sen. Leahy) ("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 o[r] the precise nature of the agency's o[r] court's jurisdiction."); see also *Fontenot*, 2010 WL 2730659, at *2-3 (finding no plain error where the district court instructed jury that Section 1519 does not require that "the defendant know that the investigation will fall within the jurisdiction of the United States").

use-of-force report, and that the statements he chose to make were tailored to obstructing the investigation into the Tanzini incident" (R. 544-545).

In sum, the evidence is more than sufficient to support Morris's conviction for violating Section 1519. Accordingly, the district court did not commit any error, much less a clear or obvious error, in denying Morris's motion for judgment of acquittal.

CONCLUSION

Morris's conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2010, I electronically filed the foregoing Brief For The United States As Appellee with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system.

I certify that the following participant in this case is a registered CM/ECF user and that service will be accomplished by the appellate CM/ECF system:

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I certify (1) that all required privacy redactions have been made in this brief, in compliance with 5th Cir. Rule 25.2.13; (2) that the electronic submission is an exact copy of the paper document, in compliance with 5th Cir. R. 25.2.1; and (3) that the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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Date: August 25, 2010

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