



## White Collar Criminal Defense and Special Investigations Alert

What Florida's Business Community Should Know

[www.bergersingerman.com](http://www.bergersingerman.com)

September 2010

# Prosecutions for Obstructing Federal Investigations

Last month, the Eleventh Circuit Court of Appeals signaled that a lower *mens rea* requirement may exist in certain obstruction of justice cases. In *United States v. Fontenat*, 22 Fla. L. Weekly Fed. C1153a (11th Cir. 2010), the Court upheld a conviction where the trial judge instructed the jury that it did not have to find that the Defendant knew he was falsifying a document that would be relied on in a federal criminal investigation. In so ruling the Eleventh Circuit suggested, without finding, that the Government need not prove that the Defendant knew the jurisdictional implications of his falsification.

Title 18 U.S.C. §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 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.

In *Fontenat*, the federal government prosecuted a State of Florida corrections officer for falsifying a State mandated "use of force" report that he wrote after using excessive force on a inmate. At trial, Fontenat admitted that he had falsified the report. The jury was instructed as follows:

[t]he 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.

Critically, the Defendant did not object to the jury instruction. After his conviction, the

Defendant appealed arguing that the Government failed to prove that the Defendant knew the report would be used in a federal investigation. Importantly, the Court interpreted this argument as an objection to the jury instruction, which the Court reviews under the "plain error" standard. Had the Defendant's counsel properly objected to the jury instruction, the trial court's allowance of the instruction would have been reviewed under an abuse of discretion standard of review, which – while deferential – permits reversal when the instructions are not an accurate representation of the law. Thus, rather than being required to show the presence of law supporting its position, the government here merely needed to demonstrate that there is no "obvious" or "clear" current law that conflicts with the instruction given by the court under the plain error standard, due to the Defendant's failure to object. *United States v. Humphrey*, 164 F.3d 585, 588 (11th Cir. 1999) (quoting *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1777, 123 L. Ed. 2d 508 (1993)). In other words, if the ruling is not in direct conflict

with current law, the Defendant's conviction would be affirmed.

Imposing the plain error standard, the Court reviewed the plain language of the statute, the legislative history, and the handful of cases that discuss 18 U.S.C. § 1519. **Based on this review, the Court could not conclude that the application of the statute was limited to cases where the Defendant knew that an investigation resulting from the issuance of a falsified report would be a federal investigation. Rather, the Court found that there is "no circuit law that clearly requires the government to prove that a defendant knows the investigation falls under federal jurisdiction."** Accordingly, the Defendant's conviction was affirmed.

The 11th Circuit explicitly noted, however, that "[w]e make no holding regarding the actual requirements of the statute. For our purposes, it is sufficient to observe that the statutory language is not so clear as to allow reversal for plain error in the jury instructions." While the Court's ruling is clearly limited to review of an error at trial that was not objected to, the road for defendants being investigated for document destruction or falsification has become more problematic. The Court has signaled that a lower *mens rea* standard may exist than that which may have previously been assumed. Federal prosecutors may well view the appellate court's dicta as a green light for federal prosecutions based on activities that appear to be grounded only in state or local jurisdiction.

The lessons here: public officials and corporate clients need to be aware that federal prosecutions for obstruction of justice can result from falsifying, destroying, altering or concealing a document that on its face has no federal implications. For defense lawyers: objections to jury instructions are critical to reversal and should not be overlooked. ■

---

*\*Courtesy of Berger Singerman's White Collar Criminal Defense and Special Investigations Practice Group with offices in Fort Lauderdale, Miami, Boca Raton and Tallahassee.*

*The information in this newsletter is of a general nature only and is not intended to be relied upon as, nor a substitute for, specific professional advice. Berger Singerman is not responsible for any loss or damage occasioned to any person in connection with acting on or refraining from action as a result of any material in this publication.*

*The hiring of a lawyer is an important decision that should not be based solely on advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.*

---

### **Berger Singerman's White Collar Criminal Defense and Special Investigations Practice Group**

Berger Singerman's White Collar Criminal Defense & Special Investigations Practice Group provides legal guidance on corporate regulatory compliance before and during regulatory inspections. We provide a strategy to deal with whistleblower complaints and civil or criminal investigations and the collateral impact on the corporation.

Melanie Ann Hines  
Sharon Kegerreis  
Charles Lichtman  
Etan Mark  
Stefanie C. Moon

(850) 521-6722  
(305) 714-4393  
(954) 712-5138  
(305) 714-4360  
(954) 712-5151

MHines@bergersingerman.com  
SKegerreis@bergersingerman.com  
CLichtman@bergersingerman.com  
EMark@bergersingerman.com  
SMoon@bergersingerman.com