

No. 09-7373

---

---

IN THE SUPREME COURT OF THE UNITED STATES

---

ANGEL PEREZ, PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

---

ELENA KAGAN  
Solicitor General  
Counsel of Record

THOMAS E. PEREZ  
Assistant Attorney General

GREGORY B. FRIEL  
APRIL J. ANDERSON  
Attorneys

Department of Justice  
Washington, D.C. 20530-0001  
(202) 514-2217

---

---

QUESTION PRESENTED

Whether the government presented sufficient evidence that the federal Bureau of Prison's formal process for reviewing a corrections officer's use of force -- a process mandated by federal regulations and the agency's detailed interpretive rules -- is an "official proceeding" for purposes of 18 U.S.C. 1512(c)(2).

IN THE SUPREME COURT OF THE UNITED STATES

---

No. 09-7373

---

ANGEL PEREZ, PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

---

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 575 F.3d 164.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2009. The petition for a writ of certiorari was filed on November 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner -- who is a former

corrections officer at the Metropolitan Detention Center (MDC) in Brooklyn, New York -- was convicted of one count of obstruction of justice, in violation of 18 U.S.C. 1512(c)(2). Pet. App: A2, A5. Petitioner was sentenced to nine months of imprisonment, to be followed by three years of supervised release. Id. at A5. The court of appeals affirmed. Id. at A1.

1. On April 11, 2006, petitioner and several other corrections officers at MDC responded to an alarm sounded by another officer who was injured in an altercation with inmate Kenneth Howard. Pet. App. A3. Petitioner and the other responding officers handcuffed Howard and transported him to MDC's Special Housing Unit (SHU). Ibid. As the officers escorted Howard into an elevator, Officer Jamie Toro tripped him and threw him face down on the elevator floor. Id. at A3-A4. Officer Glen Cummings then attacked Howard, stomping on his back, shoulders, and neck, while petitioner and Lieutenant Elizabeth Torres looked on. Id. at A4. Torres eventually intervened, pushing Cummings off of Howard and telling the other officers to move away from the elevator. Ibid. Howard suffered several lacerations and bruises as a result of the incident. Ibid.

2. a. Every time a staff member at MDC uses force on an inmate, the Bureau of Prisons (BOP) conducts an investigation. Pet. App. A4. Congress has delegated to BOP broad statutory authority over "the management and regulation of all Federal penal

and correctional institutions," including "the safekeeping, care," "protection," and "discipline" of inmates. 18 U.S.C. 4042(a)(1)-(3). Pursuant to its rulemaking power, see 28 C.F.R. 0.96(o), BOP has issued regulations and interpretive rules creating a formal procedure for investigating and making findings about BOP employees' uses of force on inmates, see 28 C.F.R. Pt. 552, Subpt. C. Those regulations require "careful[] document[ation]" of every use of force. 28 C.F.R. 552.22(j); see 28 C.F.R. 552.27 ("Staff shall appropriately document all incidents involving the use of force."). The regulations are implemented through "Program Statements" issued by BOP. One Program Statement (which was part of the evidence introduced by the government in this case, see Pet. App. A12) implements the requirements of 28 C.F.R. 552.27 governing documentation of uses of force. See U.S. Dep't of Justice, Federal Bureau of Prisons, Program Statement No. P5566.06, ¶ 14(a) (Program Statement), available at [http://www.bop.gov/policy/progstat/5566\\_006.pdf](http://www.bop.gov/policy/progstat/5566_006.pdf). The Program Statement requires that a "Use of Force Report" be prepared following every use of force. *Ibid.*; Pet. App. A4. The report "must establish the identity of all involved in the incident," including "inmates, staff, and others," and must "provide a vivid, detailed description of the incident." Program Statement ¶ 14(a). In order to create the required report, every MDC officer who is involved in a particular incident must write a

"use of force memorandum." Pet. App. A4.<sup>1</sup> Those memoranda -- along with the lieutenant's log entry, medical reports, and the inmate's background information -- must be submitted within two working days to various BOP officials, including the Assistant Directors of the Correctional Programs and Health Services Divisions, the Central Office Correctional Services Administrator, the Regional Director, and the Regional Correctional Services Administrator. Program Statement ¶ 14(1); Pet. App. A4.

An After-Action Review Committee consisting of the facility's Warden, Associate Warden, Health Services Administrator, and Captain then convenes to conduct a "formal review" of the use of force, including whether "the force was appropriate and in proportion to the inmate's actions." Program Statement ¶¶ 14(a), 15; Pet. App. 4a. The After-Action Review Committee is charged with determining whether "policy was adhered" to, deciding whether "the matter requires further investigation," and completing an "After-Action Report" indicating its "findings." Program Statement ¶ 15; Pet. App. A4-A5. The Warden may refer the matter for further investigation to the Department of Justice's Office of Inspector

---

<sup>1</sup> BOP rules also require creation and retention of certain types of evidence, such as video recordings and medical observations. Program Statement ¶ 6(j) (implementing 28 C.F.R. 552.22(j)); ¶ 14(c), (d) (implementing 28 C.F.R. 552.27). Videos are maintained as secured evidence and the facility's Warden must review them and submit them to the BOP Regional Director, who forwards footage of any "questionable or inappropriate cases" immediately to the Assistant Director of the Correctional Programs Division in BOP's central office. Ibid.

General, BOP's Office of Internal Affairs, or the Federal Bureau of Investigation. Pet. App. A5.

b. Petitioner and other officers involved in the incident on April 11, 2006, gave false accounts of the attack on Howard to supervisors and in their Use of Force memoranda. Pet. App. A5. They falsely stated that Howard had become combative outside the elevator. Ibid. Petitioner falsely stated in his report that Howard was "kicking officers" and "resisting" them. Pet. 7. He noted that Howard had been "placed on the ground," but did not mention in his report that Cummings had kicked and stomped on Howard or that Howard had been thrown to the ground at a time when he was cooperating with the corrections officers. See ibid. Instead, he falsely stated that, after Howard was placed on the ground, he was "escorted to Special Housing with no further incident." Ibid. Petitioner's memorandum was part of the "Use of Force Report" prepared pursuant to the requirements of 28 C.F.R. 552.22(j) and 552.27, and the BOP interpretive rules contained in the Program Statement. The matter was referred to the Department of Justice's Office of Inspector General after a videotape of the incident was recovered. Pet. App. A5.

3. Petitioner was indicted on three counts: making a false statement in a matter within the jurisdiction of the executive branch, in violation of 18 U.S.C. 1001(a)(3); acting as an accessory to civil rights violations committed by other officers,

in violation of 18 U.S.C. 3; and obstruction of justice, in violation of 18 U.S.C. 1512(c)(2).<sup>2</sup> Pet. 4-5. Following a jury trial, petitioner was convicted of the Section 1512(c)(2) count, which alleged that petitioner "did knowingly, intentionally and corruptly obstruct, influence and impede, and attempt to obstruct, influence and impede, an official proceeding, to wit: a BOP investigation into the use of force against [Howard]." Pet. App. A5. He was sentenced to nine months of imprisonment, three years of supervised release (six months of which were to be served under monitored home detention), and a \$100 assessment. Id. at A16-A18.

4. The court of appeals affirmed petitioner's conviction and that of his co-defendants. Pet. App. A1-A14. On appeal, petitioner argued that the government failed to present sufficient evidence to prove that he attempted "to obstruct, influence and impede[] an official proceeding," as prohibited by Section 1512(c)(2), because BOP's investigation into the use of force was

---

<sup>2</sup> Section 1512(c) provides:

(c) Whoever corruptly--

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.



not an "official proceeding" under the statute. See Id. at A8-A9.<sup>3</sup> The court of appeals rejected that argument. Id. at A8-A13.

The court noted that 18 U.S.C. 1515(a)(1)(C) defines "official proceeding" to include "a proceeding before a Federal Government agency which is authorized by law," and it rejected petitioner's argument that the only proceedings contemplated in that definition are proceedings "in which a witness is directed to appear and testifies under oath." Pet. App. A9. The court recognized that at least one court of appeals had held that the term "official proceeding," as used in Section 1512(c)(2), does not include "an internal informal investigation, in its most preliminary stages, of employee violations of an agency policy." Id. at A11 (quoting United States v. Ramos, 537 F.3d 439, 463 (5th Cir. 2008)), cert. denied, 129 S. Ct. 1615 (2009)). But the court held that, "[w]hether or not agency investigations in general can satisfy the 'official proceeding' element of subsection 1512(c)[2], we conclude that the particular procedures required by the BOP's Use of Force Program Statement suffice to support a conviction under that subsection." Id. at A12.<sup>4</sup> In particular, the court noted that the Program Statement "contemplates more than a preliminary

---

<sup>3</sup> Petitioner also challenged the adequacy of the jury instructions on appeal, see Pet. App. A13-A14, but does not renew that challenge in his petition.

<sup>4</sup> The court of appeals referred to Subsection 1512(c)(1) rather than to Subsection 1512(c)(2) in two places in this portion of its opinion; that was apparently a scrivener's error.

investigation; it sets forth a detailed process of review and decision-making." Ibid. Because the review panel "must 'determine' if there has been a violation of BOP policy, must make 'findings,' and may 'decide' to refer the matter to senior department authorities," the court reasoned, "its work is sufficiently formal to satisfy the 'official proceeding' element of subsection 1512(c) [2]." Ibid.

#### ARGUMENT

Petitioner asks this Court to review the court of appeals' determination that the BOP's formal process for reviewing uses of force qualified as an "official proceeding" under 18 U.S.C. 1512(c) (2). That determination does not warrant further review, however, because the court of appeals' decision was correct and does not conflict with any decision from this Court or any other court of appeals.

1. a. The court of appeals correctly held that the evidence presented was sufficient to establish that the BOP use-of-force review process was an "official proceeding" under 18 U.S.C. 1512(c) (2). That statute provides that an individual who "corruptly \* \* \* obstructs, influences, or impedes any official proceeding, or attempts to do so" shall be subject to criminal penalties. 18 U.S.C. 1512(c) (2). Congress defined "official proceeding" as used in Section 1512 to mean:

(A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge

of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;

(B) a proceeding before the Congress;

(C) a proceeding before a Federal Government agency which is authorized by law; or

(D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce.

18 U.S.C. 1515(a)(1) (emphasis added). The court of appeals correctly held that BOP's review process falls within the definition in Subsection (C).

The word "proceeding" in Section 1515(a)(1)(C) must be construed "in accordance with its ordinary or natural meaning," FDIC v. Meyer, 510 U.S. 471, 476 (1994), and that meaning is broad. "Proceeding" can mean "[a]n act or step that is part of a larger action," Black's Law Dictionary 1324 (9th ed. 2009); "[t]he business conducted by a court or other official body," ibid.; "a particular step or series of steps adopted for doing or accomplishing something," Webster's Third New International Dictionary 1807 (1993); or "a particular action or course or manner of action," Random House Dictionary of the English Language 1542 (2d ed. 1987).

b. The BOP's use-of-force review process at issue here "fits comfortably" within the category of "official proceeding[s]" under 18 U.S.C. 1512(c). Pet. App. A12. As the court of appeals

correctly determined, BOP's Program Statement "contemplates more than a preliminary investigation; it sets forth a detailed process of review and decision-making." Ibid. That process is "formal" and comprehensive and includes a requirement that "a body of senior officials" with "quasi-adjudicative responsibilities" issue findings of fact and conclusions about the propriety of uses of force. Ibid. BOP's interpretive rules dictate the panel's composition, the timing of its decision, and the specific topics on which it must make findings. Ibid.; Program Statement ¶ 15. In light of these mandated procedures, the court of appeals correctly concluded that, "[b]ecause the review panel must 'determine' if there has been a violation of BOP policy, must make 'findings,' and may 'decide' to refer the matter to senior departmental authorities, its work is sufficiently formal to satisfy the 'official proceeding' element" of 18 U.S.C. 1512(c). Pet. App. A12.

In contending otherwise, petitioner effectively reads into the statute a requirement, found nowhere in the text, that an "official proceeding" involves "something akin to a hearing, i.e., a formal proceeding before an agency empowered to convene itself as a tribunal, compel testimony, subpoena documents, administer oaths, and render adjudications." Pet. 28; see also Pet. 11, 17. But nothing in the statute's "plain and unambiguous" language (Pet. 24) suggests that Congress intended to define "proceeding" narrowly to

cover only a subset of proceedings with particular judicial attributes.

Congress defined "official proceeding" in Section 1515(a)(1)(C) as "a proceeding before a Federal Government agency which is authorized by law." If Congress had intended to limit the scope of that term to judicial-like hearings, it would have done so -- by, for example, defining "official proceeding" as "a hearing before a Federal Government agency" or "a proceeding before a Federal Government agency which has the authority to compel testimony, subpoena documents, or administer oaths." Instead, Congress included the full panoply of proceedings that federal agencies are authorized by law to undertake.<sup>5</sup> The court of appeals

---

<sup>5</sup> Petitioner relies (Pet. 32-35) on judicial interpretations of 18 U.S.C. 1505 in support of his argument, noting that such cases have "held that not every lawful investigation by every government agency qualifies as a 'proceeding.'" But petitioner also acknowledges (Pet. 32) that courts have held that at least some preliminary agency investigations do qualify as "proceedings" within the meaning of Section 1505. United States v. Sutton, 732 F.2d 1483, 1490 (10th Cir. 1984) (holding Department of Energy investigation into oil sales was a "proceeding"), cert. denied, 469 U.S. 1157 (1985); see also United States v. Browning, Inc., 572 F.2d 720, 724 (10th Cir.) (holding that lying to customs investigators was obstruction of a "pending proceeding" as "the term 'proceeding' is not, as one might be inclined to believe, limited to something in the nature of a trial"; instead, it is "much more inclusive"), cert. denied, 439 U.S. 822 (1978); United States v. Fruchtman, 421 F.2d 1019, 1021 (6th Cir.) (holding FTC investigation into steel sales was a "proceeding," finding "no merit in appellant's contention that the word 'proceeding' refers only to those steps before a federal agency which are juridical or administrative in nature," and holding that "'proceeding' is a term of broad scope, encompassing both the investigative and adjudicative functions of a department or agency"), cert. denied, 400 U.S. 849 (1970). Indeed, all of the appellate decisions

correctly held that the investigation and determination that must follow a use of force within BOP is a proceeding before a federal agency that is authorized by law, and is therefore protected from obstruction under Section 1512(c)(2).

c. Petitioner also argues that "[t]he omission of the term 'investigation' from Section 1512(c)(2) is especially significant because the same Congress that enacted that provision in 2002 as part of the Sarbanes-Oxley Act simultaneously passed a new statute, § 1519, that made it a crime to obstruct an agency 'investigation.'" Pet. 26-27; see Pub. L. 107-204, §§ 802(a) and 1102, 116 Stat. 475; 800, 807 (2002). He reasons that Congress's inclusion of the word "investigation" in Section 1519 while simultaneously omitting it from Section 1512(c)(2) signifies Congress's intent that the latter provision not cover investigations. That argument reads too much into the enactment of Section 1519, but in any event, it is irrelevant because the court of appeals did not hold that the work of the BOP review panel was investigative. Instead, the court characterized the review panel as a body with "quasi-adjudicative responsibilities." Pet. App. A12.

---

petitioner cites (see Pet. 32-35) found that the agency investigations at issue were "proceedings" under Section 1505. Nor are cases adjudicating the scope of 18 U.S.C. 1503 (see Pet. 31-32) relevant. The "proceedings" covered in that statute are "proceeding[s] before any United States magistrate judge or other committing magistrate, in the discharge of his duty." 18 U.S.C. 1503(a).

d. Finally, petitioner contends (Pet. 28-30) that the Court should adopt his view of the meaning of "official proceeding" under the rule of lenity. But the rule of lenity "applies only if, after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." United States v. Wells, 519 U.S. 482, 499 (1997) (citations and internal quotation marks omitted). This case is not appropriate for application of the rule of lenity because this Court need not guess at Congress's intent to cover quasi-adjudicative proceedings of the type at issue here.

2. Contrary to petitioner's claim (Pet. 13-23), the courts of appeals are not divided about whether Section 1512(c)(2) covers quasi-adjudicative agency processes of the type conducted here. Petitioner argues that the decision below conflicts with the Fifth Circuit's decision in United States v. Ramos, 537 F.3d 439 (2008), cert. denied, 129 S. Ct. 1615 (2009). But the two decisions are, in fact, consistent. The defendants in Ramos were Border Patrol agents convicted under 18 U.S.C. 1512(c)(1) and (2) after they failed "to report to their supervisors the discharge of their firearms as required by the policies of the Border Patrol." Id. at 460. The Fifth Circuit found that the evidence presented by the government at trial did not "indicat[e] that the Border Patrol investigation was anything more than a 'mere police investigation.'" Id. at 463 n.17. The court held that such "an internal,

informal investigation, in its most preliminary stages, of employee violations of an agency policy [was] not an 'official proceeding' within the meaning of § 1512(c)." Id. at 463. But the Fifth Circuit also emphasized the limited nature of its holding, noting that it did not "address whether an agency investigation may never constitute an 'official proceeding,'" but "only [held] that the investigation here does not qualify." Id. at 464 n.18.

The court of appeals in this case similarly restricted the scope of its holding, remarking that it, too, did not decide whether "agency investigations in general can satisfy the 'official proceeding' element of" the statute, instead holding that "the particular procedures required by the BOP's Use of Force Program Statement suffice to support a conviction under 18 U.S.C. 1512(c)." Pet. App. A12. And, in contrast to the Border Patrol investigation that the Ramos court characterized as "informal," 537 F.3d at 463, the court of appeals concluded that the BOP review process was "detailed" and "formal" in its structure and purpose, and required factfinding and decisionmaking by a "quasi-adjudicative" panel of senior officials, Pet. App. 12a. In reaching its decision, the court of appeals relied on BOP's Program Statement, which was introduced into evidence and contains detailed agency interpretive rules prescribing each step in the review process, including mandates about when the panel of senior officials must rule, what evidence it must review, and what issues it must decide. Ibid.



Thus, whether or not Ramos correctly understood the procedures at issue there or correctly applied the statute, its decision does not conflict with the decision below. Indeed, the court of appeals in this case made clear that it did not view its decision as conflicting with Ramos. Id. at A11.

Petitioner also relies (Pet. 18-19) on the District of Columbia Circuit's decision in United States v. Kelley, 36 F.3d 1118 (1994), in support of his argument that the courts of appeals are divided. But in that case, the D.C. Circuit held that the agency investigation at issue did qualify as a "proceeding" under 18 U.S.C. 1505. Id. at 1127-1128. The court suggested that a "mere police investigation" would not be a "proceeding" under Section 1505 and noted that investigations covered by that statute "typically" involve agencies "with some rule making or adjudicative power, or with the power to enhance their investigations through the issuance of subpoenas or warrants." Id. at 1127. The court in Kelley did not hold, however, that those were the only types of agency investigations that would qualify as "proceedings" under Section 1505, and it concluded that the "formal," "albeit preliminary," agency investigation into employee misconduct at issue in that case was a "proceeding" under Section 1505. Ibid. Notably, the court declined to decide whether the term "'proceeding' has the same meaning in both § 1505 and § 1512." Id. at 1128. Instead, based on the parties' agreement that the statutes should be treated

as "parallel," the D.C. Circuit merely "assume[d]" that the agency investigation also qualified as an "official proceeding" under Section 1512. Ibid.

Because any differences in the outcomes in Ramos, Kelley, and the instant case respond at least in part to the differences in the particular agency processes involved in each case, there is no conflict warranting further review. In any event, the Court would benefit from the views of additional courts of appeals considering a wider range of procedures before deciding the issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

.....  
ELENA KAGAN  
Solicitor General

THOMAS E. PEREZ  
Assistant Attorney General

GREGORY B. FRIEL  
APRIL J. ANDERSON  
Attorneys

MARCH 2010