Legal Sidebar

Supreme Court Considers Meaning of "An Offense Relating to Obstruction of Justice" for Immigration Enforcement Purposes

June 29, 2023

On June 22, 2023, in *Pugin v. Garland* (decided together with *Garland v. Cordero-Garcia*), the Supreme Court considered the meaning of the phrase "an offense relating to obstruction of justice" for immigration enforcement purposes. Under federal statute, an alien who has been lawfully admitted to the United States but is later convicted of an aggravated felony, which is defined to include, among other things, a federal or state offense "relating to obstruction of justice," is subject to removal from the United States. Resolving a circuit split, the Supreme Court in a 6-3 decision held that a criminal offense constitutes "an offense relating to obstruction of justice," and therefore an aggravated felony, even if the offense does not require a pending investigation or proceeding.

Statutory Background

Under provisions of the Immigration and Nationality Act, classified in Title 8 of the *U.S. Code*, aliens lawfully admitted into the United States, including lawful permanent residents (LPRs), are subject to removal if they have committed certain enumerated criminal offenses. Specifically, under 8 U.S.C. § 1227(a)(iii), an alien convicted of an aggravated felony at any time after admission is removable. Apart from removal, an alien convicted of an aggravated felony may be ineligible for various forms of relief from removal (e.g., asylum and cancellation of removal), and, if removed from the United States, may be permanently barred from future admission into the United States.

In 1996, pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act and the Antiterrorism and Effective Death Penalty Act, Congress expanded the definition of "aggravated felony," found in 8 U.S.C. § 1101(a)(43), to include a wide range of criminal offenses. The expansion resulted in § 1101(a)(43)(S), which defines an aggravated felony to include "an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year." The statute does not define "an offense relating to obstruction of justice." However, the Board of Immigration Appeals (BIA), the highest administrative body responsible for interpreting and applying federal immigration laws, provided some guidance in *Matter of Valenzuela Gallardo*. In this

case, the BIA ruled in 2018 that § 1101(a)(43)(S)'s "offense relating to obstruction of justice" provision covers offenses designated as "Obstruction of Justice" under Chapter 73 of Title 18 of the *U.S. Code* (e.g., retaliation against a witness) or any other federal or state offense that involves (1) an affirmative and intentional attempt; (2) that is motivated by a specific intent; (3) to interfere either in an investigation or proceeding that is ongoing, pending, *or* reasonably foreseeable by the defendant, or in another's punishment resulting from a completed proceeding. In *Valenzuela Gallardo v. Barr*, the Ninth Circuit in 2020 rejected the BIA's construction of 8 U.S.C. § 1101(a)(43)(S), ruling that the phrase "an offense relating to obstruction of justice" unambiguously covers only offenses that seek to interfere with *existing* investigations or proceedings, thereby not including those that are reasonably foreseeable.

Litigation History and Circuit Split

The Supreme Court's consideration of *Pugin v. Garland* and *Garland v. Cordero-Garcia* involved cases where the lower courts reached conflicting opinions about the meaning of "an offense relating to obstruction of justice" under 8 U.S.C. § 1101(a)(43)(S).

Pugin arose when Jean Pugin, an LPR, was convicted in Virginia of being an accessory after the fact to a felony. During removal proceedings, Pugin disputed his removability as an alien convicted of an aggravated felony "offense relating to obstruction of justice." In his view, 8 U.S.C. § 1101(a)(43)(S) encompassed only offenses that had some nexus to an ongoing or pending proceeding or investigation, and did not cover obstruction of a reasonably foreseeable proceeding.

In a split decision, the Fourth Circuit in 2021 affirmed the BIA's order dismissing Pugin's appeal of his removal order. The court first determined that 8 U.S.C. § 1101(a)(43)(S) was ambiguous as to whether the phrase "relating to obstruction of justice" requires an offense to be linked to an existing proceeding or merely a foreseeable proceeding. The court then held that the BIA's definition of "offense relating to obstruction of justice" in *Valenzuela Gallardo* was entitled to *Chevron* deference given the "contemporary meaning" of that phrase when § 1101(a)(43)(S) was enacted. The court explained that, while most federally designated "Obstruction of Justice" crimes require as an element an ongoing proceeding, a few crimes listed do not. Further, the court observed that a separate federal offense, accessory after the fact under 18 U.S.C. § 3, is considered a form of obstruction of justice and does not require an ongoing proceeding. The court held that the BIA's construction of the "offense relating to obstruction of justice" definition as including interference with ongoing and reasonably foreseeable proceedings was thus permissible.

In *Cordero-Garcia*, another LPR, Fernando Cordero-Garcia, was convicted in California of dissuading a witness from reporting a crime. Cordero-Garcia argued during removal proceedings that he was not removable as an alien convicted of an aggravated felony "offense relating to obstruction of justice." The Ninth Circuit, in a split 2022 decision, reversed the BIA's decision dismissing Cordero-Garcia's appeal of his removal order. Citing its 2020 decision in *Valenzuela Gallardo*, the court held that § 1101(a)(43)(S) unambiguously requires an offense to be linked to an ongoing or pending criminal proceeding, and rejected the BIA's interpretation of the statute as extending to interference with reasonably foreseeable proceedings or investigations.

The Supreme Court's Decision

The Supreme Court granted Pugin's and the government's respective petitions to review the appellate courts' decisions in *Pugin* and *Cordero-Garcia*. The Court consolidated the cases for review to decide whether, to qualify as "an offense relating to obstruction of justice" under 8 U.S.C. § 1101(a)(43)(S), a predicate offense must have a nexus with a pending or ongoing investigation or judicial proceeding. On

June 22, 2023, the Court, in a 6-3 decision, affirmed the Fourth Circuit's decision in *Pugin*, and reversed the Ninth Circuit's decision in *Cordero-Garcia.*

In the majority opinion authored by Justice Kavanaugh (joined by Chief Justice Roberts and Justices Thomas, Alito, Barrett, and Jackson), the Court held that a criminal offense may constitute "an offense relating to obstruction of justice" under 8 U.S.C. § 1101(a)(43)(S) even if the offense does not require that an investigation or proceeding be pending. In reaching this decision, the Court relied on what it characterized as the "widespread and contemporary understanding" of obstruction of justice at the time § 1101(a)(43)(S) was enacted in 1996.

The Court first explained that the contemporaneous dictionary meaning of "obstruction of justice" covered any offense that sought to interfere with the legal process, such as threatening a potential witness, and did not necessarily require a pending investigation or proceeding. The Court then looked to long-standing federal and state statutes for guidance. The Court observed that the offenses designated as "Obstruction of Justice" under Chapter 73 of Title 18 include certain offenses that do not require a pending investigation or proceeding. For example, the Court explained that the federal witness tampering statute states that "an official proceeding need not be pending or about to be instituted at the time of the offense." The Court also observed that the federal offense of destruction, alteration, or falsification of investigation and bankruptcy records covers acts that prevent a federal investigation or proceeding—including those that have not even begun. Although the federally designated obstruction crimes also include offenses that require a pending investigation or proceeding, the Court reasoned that Congress could have cross-referenced those specific statutes in § 1101(a)(43)(S), but did not do so. The Court also recognized that many state obstruction of justice-related statutes existing at the time of § 1101(a)(43)(S)'s enactment did not require a pending investigation or proceeding. Finally, the Court considered the fact that the Model Penal Code, which is used to facilitate uniformity in state criminal laws, generally does not require a pending investigation or proceeding for obstruction of justice.

In short, the Supreme Court agreed with the government that "one can obstruct the wheels of justice even before the wheels have begun to move." Moreover, the Court determined, requiring obstruction of justice-related offenses to involve a pending investigation or proceeding would remove many "heartland obstruction offenses" from the scope of § 1101(a)(43)(S). The Court remarked that, even if there were ambiguity as to whether § 1101(a)(43)(S) requires a pending investigation or proceeding, Congress's use of the phrase "relating to" removes that ambiguity by ensuring that the statute covers offenses that have "a connection with" obstruction of justice, which may include those that occur in the absence of a pending investigation or proceeding.

Finally, given the "broad and general language" of § 1101(a)(43)(S), the Court declined to interpret the statute as requiring that an investigation or proceeding be reasonably foreseeable. Under the majority's reading of the statute, an offense constitutes "an offense relating to obstruction of justice" so long as there is an intent to interfere with the legal process, regardless of the foreseeability or existence of an investigation or proceeding.

In a concurring opinion, Justice Jackson agreed with the majority that "an offense relating to obstruction of justice" under § 1101(a)(43)(S) requires no nexus to a pending investigation or proceeding. Justice Jackson, however, took the view that this conclusion was supported by an additional, and possibly sufficient reason: when Congress included the phrase "offense relating to obstruction of justice" in that statute, it may have simply intended to reference the offenses long designated as "Obstruction of Justice" under Chapter 73 of Title 18, which do not all contain a pending-investigation or proceeding requirement.

In a dissenting opinion, Justice Sotomayor (joined by Justice Gorsuch, and Justice Kagan in part) argued that, based on the historical and "established" meaning of "obstruction of justice" when Congress enacted § 1101(a)(43)(S), an "offense relating to obstruction of justice" must require a pending investigation or proceeding. Justice Sotomayor criticized the majority's reliance on "outlier" federal and state statutes that

do not require a pending investigation or proceeding in constructing a "far-ranging" interpretation of "obstruction of justice," arguing that that those statutes are the exception to the general rule that an ongoing investigation or proceeding lies "at the core" of obstruction.

Considerations for Congress

As discussed in this Sidebar, Congress has defined an "aggravated felony" to include numerous types of crimes, thereby increasing the likelihood that aliens convicted of serious offenses are subject to removal and other adverse immigration consequences. The Court's decision in *Pugin* underscores the broad scope of § 1101(a)(43)'s aggravated felony definition, holding that the "offense relating to obstruction of justice" prong of that statute requires no nexus to an ongoing investigation or proceeding. Instead, aliens convicted of any offense that could potentially interfere with law enforcement, such as witness tampering or being an accessory-after-the-fact, may be subject to removal regardless of the existence of any investigation or proceeding. The majority opinion in *Pugin* concludes that this broad construction of § 1101(a)(43)(S) mirrors the "common sense" meaning of obstructing justice. In her dissenting opinion, Justice Sotomayor counters that this "expansive reading" of the statute could be applied to many "low-level offenses" that "bear little resemblance to core obstruction of justice," such as failing to report a crime or presenting false identification to the police.

While the Supreme Court has clarified the meaning of "offense relating to obstruction of justice," Congress may provide its own guidance on the meaning of that phrase. To the extent there is concern about ambiguity or the statute's breadth, Congress could amend § 1101(a)(43)(S) by cross-referencing federal statutes (as many other aggravated felony provisions do) that relate to obstruction of justice, such as those offenses specifically designated as "Obstruction of Justice" under Title 18. In the alternative, Congress could clarify that an "offense relating to obstruction of justice" must interfere with a pending investigation or proceeding, or one that is reasonably foreseeable to the perpetrator.

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