No. 06-1591

# In the Supreme Court of the United States

PERRY REICH, 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**

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## QUESTIONS PRESENTED

1. Whether intent to defraud is an element of the offense of forging the signature of a federal judge under 18 U.S.C. 505.

2. Whether the district court abused its discretion in allowing cross-examination of petitioner's character witness about a specific instance of petitioner's conduct.

3. Whether an effect on the ultimate outcome of the proceedings is an element of the offense of obstruction of justice under 18 U.S.C. 1512(c)(2) (Supp. IV 2004).

4. Whether the false statement supporting a conviction under 18 U.S.C. 1001 (2000 & Supp. IV 2004) must be in a recording, transcript, or other written document.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 479 F.3d 179. The opinion of the district court (Pet. App. 26a-58a) is reported at 420 F. Supp. 2d 75.

## JURISDICTION

The judgment of the court of appeals was entered on March 2, 2007. The petition for a writ of certiorari was filed on May 29, 2007. 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 was convicted of corruptly obstructing a judicial proceeding, in violation of 18 U.S.C. 1512(c)(2) (Supp. IV

2004); forging a judge's signature, in violation of 18 U.S.C. 505; and making a false statement to a federal officer, in violation of 18 U.S.C. 1001(a)(2). He was sentenced to 27 months of imprisonment, to be followed by two years of supervised release. The court of appeals affirmed. Pet. App. 1a-25a.

1. In 2002, petitioner, a lawyer, brought an arbitration claim against his brokerage firm, Gruntal & Co., alleging that the firm mishandled his brokerage account and caused him to lose about $2 million in savings. Pet. App. 3a; PSR para. 5. Gruntal petitioned for bankruptcy, and another brokerage firm, Ryan Beck & Co. (Ryan Beck), purchased its assets. Petitioner amended his arbitration claim to proceed against Ryan Beck. Ryan Beck, in turn, filed a lawsuit in the United States District Court for the Eastern District of New York against petitioner and other investors with pending arbitrations; it sought to enjoin the investors from proceeding against it in arbitration. Pet. App. 3a-4a.

The case was assigned to Chief Judge Edward R. Korman, who referred it, with the consent of the parties, to Magistrate Judge Roanne L. Mann. Pet. App. 4a. In September 2002, Magistrate Judge Mann denied Ryan Beck's motion for a preliminary injunction staying arbitration. On June 4, 2003, she denied reconsideration. Thereafter, Ryan Beck sought a writ of mandamus from the United States Court of Appeals for the Second Circuit to compel Magistrate Judge Mann to rule on its pending summary judgment motion. *Id.* at 4a-5a & n.4.

While waiting for a ruling on the mandamus petition, Joel Davidson, counsel for Ryan Beck, received a facsimile at 11:10 a.m. on June 17, 2003, that purported to be an order issued by Magistrate Judge Mann. Pet. App. 6a. The order had the same caption, final page,

and facsimile header as Magistrate Judge Mann's June 4 order, and it appeared to be authentic. *Ibid.* In fact, it was a forgery—the date of the June 4 order had been changed by hand, and new text had been pasted in. *Ibid.* The new text contained information that only someone knowledgeable in the law and familiar with the litigation would have known. *Ibid.* It purported to vacate the order denying a preliminary injunction, to enjoin the defendants from proceeding in arbitration, and to recuse Magistrate Judge Mann from further proceedings. *Ibid.*

Upon receiving the order, Davidson believed that it was legitimate and that it mooted Ryan Beck's mandamus petition, so he drafted a letter withdrawing the petition. Pet. App. 6a. Davidson also circulated the order to counsel representing Ryan Beck in other jurisdictions. *Ibid.*

Magistrate Judge Mann learned of the forged order when the attorney for another defendant called her chambers seeking a copy. Pet. App. 6a. She then issued an order stating that the forged order was fraudulent and had not been issued by the court. *Id.* at 6a-7a. She also reported the incident to the United States Attorney's Office. *Id.* at 7a.

The Federal Bureau of Investigation began an investigation, which uncovered phone records that linked petitioner's phone number to the fax transmission. Specifically, the records showed that "at 11:08 a.m. on June 17, a call lasting several minutes was initiated to Davidson's fax machine from [petitioner's] home using a pre-paid calling card." Pet. App. 6a. Agents then discussed the incident with petitioner on three separate occasions. At first, petitioner denied that he had any contact with Davidson on June 17, 2003, and he denied using prepaid phone cards. Pet. App. 7a. In a subsequent interview,

petitioner said that he "may have contacted Davidson" that day and "may have dialed the fax line inadvertently and hung up." *Ibid.* When asked "why such an inadvertent call would last over three minutes, he stated that his phone did not always disconnect the line immediately upon hanging up." *Ibid.* Later, petitioner and his attorney had another meeting with the agents, and petitioner said that "he had dialed the Davidson fax by mistake" and that he did not own or use prepaid calling cards, but that he had purchased one for his girlfriend. *Id.* at 7a-8a.

2. A federal grand jury in the Eastern District of New York returned a three-count indictment against petitioner charging him with corruptly obstructing a judicial proceeding, in violation of 18 U.S.C. 1512(c)(2) (Supp. IV 2004); forging a judge's signature, in violation of 18 U.S.C. 505; and making a false statement to a federal officer, in violation of 18 U.S.C. 1001(a)(2). The case proceeded to trial.

As part of his defense, petitioner introduced a character witness who testified "that he and others believed [petitioner] to be a person of honesty and integrity." Pet. App. 9a. On cross-examination, the government sought to ask the witness whether his opinion would change based on "an incident in which [petitioner], immediately after learning that his law partner Steven Schapiro had terminal cancer, allegedly changed the beneficiary of Schapiro's life insurance plan from Schapiro's family to the partnership without first notifying [Schapiro] as the partnership agreement required." *Ibid.* After reviewing documents proffered by the government, the district court found that "there's a good faith basis for asking the question." C.A. App. 835. The court permitted the following question: "[I]f I told you

that [petitioner] had changed the beneficiary of an insurance policy away from Mr. Schapiro's family members, designating the law firm the beneficiary in the event of Mr. Schapiro's death, without notice to Mr. Schapiro and in violation of the partnership agreement that the two of them had, would that change your opinion" of "the defendant's honesty or good character?" Pet. App. 9a (first brackets in original); C.A. App. 847-848. The witness responded, "It might." *Id.* at 848.

With respect to the Section 505 forgery count, petitioner requested an instruction requiring the government to prove that forgery was done "willfully and with the intent to defraud another." C.A. App. 15a. The district court denied the request, relying on *United States* v. *Cowan*, 116 F.3d 1360, 1363 (10th Cir. 1997), cert. denied, 522 U.S. 1109 (1998), which held that "[a] forged signature on a document which the forger intends to appear authentic is the only intent requirement of Section 505." C.A. App. 432. The district court then charged the jury that, to find petitioner guilty, they needed to find that he "knowingly and intentionally forged the signature of a judge" and "that the signature was forged for the purpose of authenticating a document." *Id.* at 1431.

The jury returned a verdict of guilty on all counts. Pet. App. 10a. In a post-verdict motion under Federal Rule of Criminal Procedure 29, petitioner argued that "no rational juror could have found that Reich sent the forged Order to the Davidson firm to 'knowingly, intentionally and corruptly obstruct, influence and impede,' the Ryan Beck lawsuit, in violation of 18 U.S.C. § 1512(c)(2)" because there was no evidence that he "intended to deceive the court in sending the forged Order to the Davidson firm." *Id.* at 40a. The court rejected

petitioner's argument, finding that the statute is satisfied where the evidence shows the action was taken with the reasonable expectation that it would interfere with a judicial proceeding. *Id.* at 41a. The court further noted that, even if an intent to deceive a court were required, there was "sufficient evidence for a rational juror to conclude that [petitioner] intended in sending the forged Order to deceive the Second Circuit into believing that the writ of mandamus was moot." *Id.* at 41a & n.3.

3. The court of appeals affirmed. Pet. App. 1a-25a.

The court of appeals held that an "intent to defraud" is not an element of the crime of forging the signature of a federal judge under Section 505. *Id.* at 14a-20a. The court began by recognizing that the "plain language" of Section 505 does not require an intent to defraud, but "only requires that a defendant . . . knowingly forge the signature of a federal judge 'for the purpose of authenticating any proceeding or document.'" *Id.* at 15a (quoting *Cowan*, 116 F.3d at 1362). The court acknowledged that the common-law crime of forgery required an intent to defraud, but it explained that "courts should not assign a common-law meaning to a statutory term 'when that meaning is . . . inconsistent with the statute's purpose.'" *Id.* at 16a (quoting *Taylor* v. *United States*, 495 U.S. 575, 594-595 (1990)). The court further noted that the purpose of Section 505 is to "protect[] the integrity of a government function—namely, federal judicial proceedings," rather than simply to prevent "wronging one in his property rights by dishonest methods or schemes." *Ibid.* (quoting *McNally* v. *United States*, 483 U.S. 350, 358 (1987)). Thus, the court concluded, Section 505 should apply whenever "an individual forges a judge's signature in order to pass off a false document

as an authentic one issued by the courts of the United States," because "such conduct implicates the interests protected by [Section] 505 whether or not the actor intends to deprive another of money or property." *Id.* at 17a.

The court of appeals further held that the district court did not abuse its discretion in allowing cross-examination of petitioner's character witness. Pet. App. 20a-22a. Federal Rule of Evidence 405(a) provides that "[o]n cross-examination" of a character witness, "inquiry is allowable into relevant specific instances of conduct." *Id.* at 20 n.11. Here, because petitioner's character witness stated his personal opinion that petitioner was "a person of honesty and integrity," the court of appeals found that the question about the specific instance of misconduct involving the life insurance policy was pertinent to that opinion. *Id.* at 9a; see *id.* at 21a-22a. The court rejected petitioner's claim that a specific instance of misconduct must be generally known in the community, finding that even if there were such a limitation on "reputation" testimony, it would not apply in this case, where the character witness provided "opinion" testimony. *Ibid.*

Finally, the court of appeals rejected petitioner's argument that "no 'obstruction' occurred within the meaning of [Section] 1512(c)(2) because there was no evidence that 'the fairness or outcome of the Ryan Beck lawsuit was affected in any way.'" Pet. App. 13a (citation omitted). The court held that petitioner's argument was "inconsistent with the plain language of the statute, which encompasses all actions that 'corruptly . . . influence[]' a proceeding—or even attempt to do so—not merely those that affect its ultimate outcome." *Id.* at 14a (brackets in original). The court concluded that the

"injection of the forged Order into the Ryan Beck lawsuit at the very least 'influence[d]' the proceedings" because it caused the opposing party to withdraw its mandamus filing and required the Magistrate Judge to issue an order. *Ibid.* (brackets in original).

**ARGUMENT**

Petitioner argues (Pet. 14-30) that the district court erred in its interpretation of the statutes under which he was convicted and in its decision to allow cross-examination of a defense witness. The court of appeals carefully considered all of petitioner's claims and correctly rejected them. Although petitioner has identified a conflict among the court of appeals with respect to the elements of the offense of forging a judge's signature under 18 U.S.C. 505, the decisions he cites are decades old. If the courts that have agreed with petitioner were to confront the issue today, they might well reconsider their position in light of more recent decisions from this Court. This Court's intervention is therefore unnecessary at this time. In all other respects, the decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 14-17) that an intent to defraud is an element of an offense under 18 U.S.C. 505. Petitioner is incorrect. Section 505 makes it a felony to "forge[] the signature of any judge * * * of any court of the United States * * * for the purpose of authenticating any proceeding or document." Nothing in the text of the statute makes intent to defraud an element of the crime. Rather, the only required intent is that the forgery be committed "for the purpose of authenticating any proceeding or document." *Ibid.*

Petitioner argues (Pet. 14) that the word "forges" in Section 505 should be read to require proof of an intent to defraud because the common-law crime of forgery required such proof. Statutory terms do not carry their common-law meaning, however, if a contrary legislative intent can be inferred from the statute. See *United States* v. *Wells*, 519 U.S. 482, 491 (1997); *Moskal* v. *United States*, 498 U.S. 103, 117 (1990). As the court of appeals noted, see Pet. App. 15a, Section 505 already contains an express mens rea requirement, *i.e.*, that a defendant falsely portray the signature of a federal judge "for the purpose of authenticating any proceeding or document." There is therefore no need to read into the statute an additional intent element. Moreover, the purpose of Section 505 is not to "outlaw a narrow category of fraud," but "to protect the reputation and integrity of the federal courts, their official documents and proceedings." *United States* v. *Cowan*, 116 F.3d 1360, 1363 (10th Cir. 1997), cert. denied, 522 U.S. 1109 (1998). Forgery of a federal judge's signature for the purpose of authenticating a document necessarily threatens the integrity of the courts, whether or not the action is accompanied by a fraudulent intent. Pet. App. 19a. Thus, the court of appeals correctly concluded that "engrafting an intent-to-defraud element onto [Section] 505 would not effectuate Congress's intent." *Ibid.*

As the court of appeals noted, see Pet. App. 17a-18a, the larger statutory context in which Section 505 appears provides additional support for the conclusion that Congress did not intend to make an intent to defraud an element of the offense. At the same time that Congress enacted Section 505 as part of its 1948 recodification of the federal criminal code, Act of June 25, 1948, ch. 645, 62 Stat. 714, it explicitly required proof of an "intent to

defraud" in four other provisions involving forgery. See 62 Stat. 705 (18 U.S.C. 471 (forgery of federal obligations)); 62 Stat. 707 (18 U.S.C. 478 (forgery of foreign obligations)); 62 Stat. 708 (18 U.S.C. 482 (forgery of foreign bank notes)); 62 Stat. 712 (18 U.S.C. 500 (forgery of postal service money orders)). The absence of any similar "intent to defraud" language in Section 505 indicates that Congress did not mean to require any additional element of intent when it prohibited a person from "forg[ing]" a federal judge's signature "for the purpose of authenticating any proceeding or document."

The decision of the court of appeals is consistent with decisions of this Court resolving analogous interpretive questions. For example, in *Wells*, this Court held that materiality is not an element of the crime of knowingly making a false statement to a federally insured bank under 18 U.S.C. 1014 (1994). The Court emphasized that the statutory text did not "so much as mention[] materiality." *Wells*, 519 U.S. at 483. The Court found further support for its interpretation in the fact that Congress did include materiality as an element in several false-representation provisions that it enacted at the same time as Section 1014. *Id.* at 492.

Similarly, in *Bates* v. *United States*, 522 U.S. 23, 33 (1997), this Court held that 20 U.S.C. 1097(a), which prohibits the "knowing[] and willful[] * * * misappl[ication]" of federally provided student loan funds, does not require proof that the defendant "aimed to injure or defraud anyone." The Court noted that "[t]he text of [Section] 1097(a) does not include an 'intent to defraud' state of mind requirement, and we ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates*, 522 U.S. at 29. It also explained that Section 1097(d), enacted at the same time as

Section 1097(a), expressly contains an "intent to defraud" element. *Ibid.* "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* at 29-30 (brackets in original).

This Court's decisions in *Wells* and *Bates* support the conclusion that Section 505 does not require proof of an intent to defraud. The express words of Section 505 do not require an additional element of intent, and the fact that Congress expressly required proof of an intent to defraud in other forgery statutes is a strong indication that Congress acted deliberately in not including an "intent to defraud" element in Section 505.

Petitioner argues (Pet. 15-17) that this Court's review is warranted to resolve a conflict among the courts of appeals on whether Section 505 requires proof of an intent to defraud. The Sixth Circuit has concluded that Section 505 should be read to require proof of an intent to defraud. See *United States* v. *Bertrand*, 596 F.2d 150, 151-152 (1979), cert. denied, 450 U.S. 1004 (1981); *Levinson* v. *United States*, 47 F.2d 470, 471 (1931). In dictum, the Eleventh Circuit has expressed a similar view. See *United States* v. *London*, 714 F.2d 1558, 1563-1564 (1983).[1] Those cases, however, were decided long before this Court's decisions in *Wells* and *Bates*. Cf. *Cowan*, 116 F.3d at 1362 (relying on *Wells* in deciding not to read an intent-to-defraud element into Section 505). Until the Sixth and Eleventh Circuits have had an opportunity to reconsider their position in light of *Wells*

[1] In *United States* v. *Dyer*, 546 F.2d 1313, 1316 & n.4 (1976), the Seventh Circuit also suggested that Section 505 requires proof of an intent to defraud but found it unnecessary to decide the issue.

and *Bates*, this Court's review of the issue would be premature.[2]

2. Petitioner argues (Pet. 17-23) that the district court abused its discretion when it allowed the government to cross-examine his character witness about a specific instance of misconduct without providing sufficient procedural protections to ensure that the "incident at issue [was not] purely private." That claim lacks merit, and the court's case-specific determination that the cross-examination was proper does not warrant further review.

Federal Rule of Evidence 405(a) provides that character evidence may be presented in the form of "testimony as to reputation or by testimony in the form of an opinion," and that a witness's character testimony may be rebutted on cross-examination by asking about "relevant specific instances of conduct." Here, during direct examination, petitioner's character witness testified that his "personal experience is [that petitioner has] always been a person of high honesty and integrity, a person that you can trust." C.A. App. 813. He further testified that he thought that "others share that same opinion." *Ibid.* The district court did not abuse its discretion in allowing cross-examination into whether that opinion would change if the witness knew that petitioner had changed the beneficiary of his law partner's life insur-

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[2] In any event, this case is not an appropriate vehicle for considering decide whether Section 505 requires proof of an intent to defraud. Extensive evidence supported a finding that petitioner forged the signature with fraudulent intent. As the district court noted, petitioner forged the order "with the intent to deceive an adverse party" in the context of litigation over a $2 million claim. Pet. App. 41a. Even if the failure to instruct on intent to defraud was erroneous, the error was harmless in this case. Cf. *Neder* v. *United States*, 527 U.S. 1 (1999).

ance policy to his advantage without notice to his partner.

Contrary to petitioner's contention (Pet. 17-21), the decision below does not conflict with the decisions of other circuits concerning the procedures for allowing cross-examination about a specific instance of misconduct. Petitioner contends that other courts have required that the government "demonstrate both a good-faith factual basis for the incidents sought to be raised during cross-examination, and that the incidents inquired about are relevant to the character traits at issue." Pet. 18. But in this case, the court provided precisely those safeguards because it required the government to establish a good-faith basis for the question, which was plainly relevant to petitioner's honesty and integrity. The government offered documentary support for the question, and the judge heard lengthy arguments from counsel out of the hearing of the jury. C.A. App. 817-847.

The decision below also does not conflict with the Eighth Circuit's decision in *United States* v. *Monteleone*, 77 F.3d 1086, 1090 (1996), which held that questions of a reputation witness must relate to conduct of a type "likely to have become a matter of general knowledge, currency or reputation in the community." In *Monteleone*, the character witness provided reputation testimony, so the court held that "the specific acts inquired about" must have been likely to be known by others in the community, or else they "would have no relevance to a defendant's reputation, and, thus, no relevance to the witness's knowledge of that reputation." *United States* v. *Bruguier*, 161 F.3d 1145, 1150 (8th Cir. 1998) (citing *Monteleone*, 77 F.3d at 1090).

The Eighth Circuit has since distinguished the situation in *Monteleone* from the one presented here, where the character witness offers his own personal opinion of the petitioner's character. When "the witness gives her own opinion about a trait of character, as opposed to her opinion about general reputation in the community, * * * [a] specific instance of misconduct, even if not of the kind generally known in the community, would be relevant to the witness's own opinion." *Bruguier*, 161 F.3d at 1150. Therefore, because the character witness in this case testified that his "personal experience is [that petitioner has] always been a person of high honesty and integrity, a person that you can trust," C.A. App. 813, a question about an incident of dishonesty, whether private or public, was appropriate even under the Eighth Circuit's approach. In any event, the government presented evidence that the incident in question *was* widely known in the community. *Id.* at 823-827.[3]

3. Petitioner contends (Pet. 23-27) that a "tendency to affect the merits" of the litigation is an element of an obstruction-of-justice offense under 18 U.S.C. 1512(c)(2) (Supp. IV 2004). That contention lacks merit.

Section 1512(c) makes it a felony to "corruptly * * * obstruct[], influence[], or impede[] any official proceeding, or attempt[] to do so." Petitioner acknowledges that the government presented evidence that he forged an order that purported to grant an injunction and recuse the Magistrate Judge, that the forgery caused opposing counsel to withdraw a pending motion before the United

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[3] To the extent petitioner contends (Pet. 22) that the question violated his Sixth Amendment right of confrontation, he has raised that claim for the first time in the petition for a writ of certiorari, so it is not properly before the Court. See Pet. C.A. Br. 37; *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

States Court of Appeals for the Second Circuit, and that it required the Magistrate Judge to contact the Chief Judge, the United States Attorney, and the court of appeals and to issue an order declaring the forged order void. Pet. 6, 26-27. He contends, however, that he did not "influence" the proceeding because "the bogus order was void and unenforceable, and [therefore] had no impact on the decisions of the Magistrate Judge." Pet. 26. Petitioner cites no authority for his assertion that an action to "influence" a proceeding must be successful in changing the ultimate result of that proceeding. In light of the plain meaning of the word "influence," any effect on the proceedings is sufficient; there is no need to change the ultimate outcome of the litigation. See *Webster's Third New International Dictionary* 1160 (1993) (defining "influence" as "to affect or alter * * * by indirect or intangible means" or "to have an effect on the condition or development of"). Because the jury found that petitioner sent the forged order with intent to influence the proceeding, see C.A. App. 1429-1430, petitioner's conviction was proper.[4]

4. Finally, petitioner argues (Pet. 27-29) that a conviction under 18 U.S.C. 1001 (2000 & Supp. IV 2004) for making a false statement requires that the false statement be contained in a "recording, transcript, or other written document." Because that argument was not raised or passed on below, it is not properly presented here. See *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509

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[4] Petitioner contends (Pet. 23) that deception of the court is required for a completed obstruction offense, but deception of the court is not mentioned in Section 1512(c)(2) and should not be considered an element of the offense. In any event, the district court found that there was sufficient evidence that petitioner deceived the United States Court of Appeals for the Second Circuit. Pet. App. 41a.

U.S. 1, 8 (1993). Petitioner also suggests (Pet. 28-29) that his statement to the FBI was not false because he did not necessarily deny sending the forged order when he said, "I didn't do it." That factbound claim lacks merit and does not warrant further review.[5]

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Petitioner contends (Pet. 29-30) that this Court's decision in *Rita* v. *United States*, 127 S. Ct. 2456 (2007), might address the role of the Confrontation Clause at sentencing. It is unclear precisely what Confrontation Clause issue petitioner wishes to assert. In any event, *Rita* did not address the Confrontation Clause.