No. 99-2078

# In the Supreme Court of the United States

ARNOLD PAUL PROSPERI, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether Federal Rule of Evidence 606(b) prevents a district court from inquiring into allegations of juror misconduct before the jury reaches a verdict.

2. Whether the district court unconstitutionally coerced the jury to return a verdict of guilty when, after having already instructed the jurors not to surrender their conscientiously held beliefs, the court asked the jury to "continue to deliberate."

3. Whether the statutory definition of "counterfeited" under 18 U.S.C. 513 includes a "similitude" requirement or instead merely requires that the document "purport[] to be genuine."

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 201 F.3d 1335. The opinion of the district court (Pet. App. 24a-42a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on January 28, 2000. A petition for rehearing was denied on March 30, 2000 (Pet. App. 43a). The petition for a writ of certiorari was filed on June 26, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioner was convicted following a jury trial in the United States District Court for the Southern District of Florida on two counts of filing false tax returns, in violation of 26 U.S.C. 7206(1), and three counts of uttering counterfeit securities, in violation of 18 U.S.C. 513(a). The district court granted petitioner's post-verdict motion for a judgment of acquittal on the counterfeiting counts, and sentenced petitioner to 36 months of imprisonment and one year of supervised release on the tax counts. The court of appeals affirmed petitioner's tax convictions, but reversed the judgment of acquittal with respect to petitioner's counterfeiting convictions.

1. In 1979, petitioner, an attorney, began representing Patrick Donovan, an elderly Irish investor, in connection with Donovan's investments in the United States. In 1987, petitioner began embezzling large sums of money from Donovan. In particular, petitioner diverted to his own use proceeds from the sale of a golf course held by Donovan's offshore corporation, Amaretto. Petitioner then presented Donovan with fake "certificates of deposit" (CDs) and alleged correspondence from Citibank Corporation and J.P. Morgan purporting to show that the proceeds had been reinvested in those instruments. Gov't C.A. Br. 5-6.

In 1992, the Internal Revenue Service (IRS) began investigating the golf course sale because no tax return had been filed for the proceeds. When the IRS contacted petitioner as Amaretto's agent, petitioner claimed that no taxes were due. The IRS, however, discovered bank records showing that a substantial portion of the proceeds went directly to petitioner. Petitioner then claimed that Donovan's corporation had

loaned him the funds. He refused to provide the IRS with requested documents and information, and refused to identify Amaretto's beneficial owner. Gov't C.A. Br. 10-11. When the IRS notified Donovan that the golf course proceeds had gone to petitioner, Donovan filed a lawsuit against petitioner and began cooperating with the IRS, turning over the fake CDs and other documents petitioner had given him. *Id.* at 11-13.

Petitioner was convicted of three counts of uttering counterfeit securities, based on the fake CDs, in violation of 18 U.S.C. 513, and two counts of filing false tax returns, based on his failure to pay taxes on the diverted golf course proceeds, in violation of 26 U.S.C. 7206(1). At petitioner's trial, the government called numerous witnesses to testify about petitioner's embezzling activities. Petitioner's employees, for example, testified to having seen petitioner falsifying documents. The government also called representatives of Citibank and J.P. Morgan, who testified about the appearance of genuine certificates of deposit and identified features of the fake CDs that made them look like genuine certificates. Gov't C.A. Br. 14. Petitioner took the stand in his own defense and claimed that Donovan had approved his removal of monies from Donovan's investment portfolio, and that Donovan himself had forged the fake CDs. *Id.* at 15-16.[1]

2. On November 3, 1997, the district court submitted the case to the jury. At that time, the one remaining alternate was excused.

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[1] Based on petitioner's testimony at trial, the district court increased his sentence for obstruction of justice. Gov't C.A. Br. 16 & n.1.

a. On November 5, after the jury had deliberated for one full day, petitioner's counsel informed the court that he had twice contacted the excused alternate. Counsel said that the alternate believed that one of the sitting jurors had "made up his mind from day one and * * * sort of palled around with" another juror, whom the alternate suspected was "of similar mind." Counsel also stated that the excused alternate thought the pro-government juror had somehow "engineered the selection of a foreperson." Pet. App. 49a. Counsel then informed the court that between his first and second conversations with the excused alternate, the alternate had spoken with one of the sitting jurors, Ms. Budd. According to counsel, the alternate reported that Ms. Budd was pro-defense and was "being pummeled into submission" by a jury that was divided 10 to 2 in favor of conviction. *Id.* at 50a.

Petitioner's counsel moved for removal of the jurors whom the alternate suspected of favoring the government, and for an investigation of the sitting jury; counsel declined to consent, however, to trial before a jury of less than twelve if his motions were granted. The court admonished petitioner's counsel, stating that it had not "intend[ed] that you continue to talk with [the alternate] * * * [about] anything going on in the jury room," and noted that the alternate may have given "improper" advice to the sitting juror. The court also referenced Federal Rule of Evidence 606(b), which renders juror testimony about intrinsic influences on deliberations inadmissible to impeach the verdict.[2]

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[2] Rule 606(b) states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring

Although petitioner argued that the Rule did not apply where the jury had not yet rendered its decision, the court denied petitioner's motion for a mistrial. Pet. App. 50a-54a. Instead, the court sent a cautionary note to the jury, instructing the jurors not to discuss the case with anyone else or while outside the jury room. *Id.* at 54a-55a.

Later that afternoon, petitioner's counsel again approached the court. He stated that two unidentified persons had observed Ms. Budd engaged in "animated heated discussion" with the juror whom the alternate had accused of partiality. Counsel again moved for an evidentiary hearing and a mistrial, and the court again denied the motions. The court observed that the substance of the "animated" discussion was unknown, and stated that Rule 606(b) would prevent the court from taking a juror's statement about intrinsic influences. Pet. App. 65a-69a.

b. Later that same day, the jury sent the court a note.[3] The court informed the parties that the jury had

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> during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Fed. R. Evid. 606(b).

[3] The jury had been deliberating for less than two days. See 34 Tr. 4791 (jury released at 4:20 p.m. on November 3, to be

a verdict on the counterfeiting counts but was "hung up on [the tax counts] and they say there is no change in the near future." Pet. App. 64a-65a. The court concluded that the situation did not warrant resort to an *Allen* charge, see *Allen* v. *United States*, 164 U.S. 492 (1896), and instructed the jury to "continue to deliberate" on the tax counts. Pet. App. 65a. Petitioner's counsel moved for a mistrial, and the court denied the motion; at that point, the court again recessed. *Ibid.*

The next morning, the court interviewed (in open court, under oath) the alternate with whom petitioner's counsel had spoken. Pet. App. 75a-81a. The alternate admitted that she and Ms. Budd had exchanged phone calls during the jury's deliberations. She stated, however, that the gist of the calls was that Ms. Budd was upset, and that she (the alternate) simply told Ms. Budd to "stand by what she believed in." *Id.* at 77a-78a. Petitioner's counsel moved for further interrogation of the alternate about the sitting jurors' opinions of the case before deliberations, and their access to newspaper articles and other materials during trial. The court denied the motions, stating that "[t]hat goes into the prohibited areas of jury deliberations. The only thing I am concerned about is any extraneous information going into the jury room [from the alternate] and from the defendant's standpoint they certainly have no complaint because apparently she was urging her to stand by her position." *Id.* at 75a-80a.

That afternoon, the jury returned a verdict of guilty on all counts. The court polled the jury and all jurors confirmed the verdict. Pet. App. 81a-83a.

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dismissed for the day at 4:30 p.m.) and Pet. App. 64a (court informed counsel of jury note at 3:00 p.m. on November 5).

c. Following the jury's verdict, the district court first denied but then on reconsideration granted petitioner's motion under Fed. R. Crim. P. 29(b) for a judgment of acquittal on the counterfeiting counts. Pet. App. 24a-42a. The district court concluded that, although 18 U.S.C. 513(c) contains a definition of the word "counterfeited," the statute also incorporates the common-law definition, which requires "similitude" between the allegedly counterfeit security and the genuine article. Pet. App. 27a-28a. Examining the evidence in this case, the court concluded that it could not say, as a matter of law, that similitude was lacking. *Id.* at 37a. But it concluded that, because the government had not introduced a genuine CD to which the jury could compare the fake ones, the government had not produced sufficient evidence of similitude. *Id.* at 37a-40a.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-23a. First, the court of appeals upheld the district court's decision not to conduct further investigation of the sitting jury, holding that "[e]ven if the district court underestimated the scope of its discretion under Rule 606(b), the court's ultimate decision not to investigate allegations of misconduct that were entirely endemic to the deliberations was not an abuse of its discretion." *Id.* at 7a. Second, the court upheld, as non-coercive, the district court's instruction that the jury "continue to deliberate" in an effort to reach a verdict on all counts. *Id.* at 7a-8a.

The court of appeals reversed the judgment of acquittal on the counterfeiting counts, concluding that Section 513 does not contain a "similitude" requirement. Pet. App. 9a-22a. Beginning with the language of the statute, the court of appeals explained that Section 513 defines "counterfeited" without reference to "simili-

tude"; instead, Section 513(c) defines documents as counterfeit if they purport to be genuine, when in fact they are not. *Id.* at 9a. That construction, moreover, was consistent with Congress's purpose of addressing "the increasing production of counterfeited documents that are not as generally recognizable as currency, such as CDs," because citizens who do not know what CDs look like would not be protected by a statute that addresses only documents that in fact resemble genuine CDs. *Id.* at 9a-10a. The court found further support for its construction in the Sentencing Guidelines, which define "counterfeited" in the same terms. *Id.* at 14a.

**ARGUMENT**

1. Petitioner first contends (Pet. 11-18) that the courts of appeals are divided on the proper scope of Federal Rule of Evidence 606(b), which addresses the extent to which, "[u]pon an inquiry into the validity of a verdict or indictment," a juror may "testify as to any matter or statement occurring during the course of the jury's deliberations." Fed. R. Evid. 606(b). Under Rule 606(b), a juror may not testify about the jury's deliberations during such an inquiry unless the inquiry concerns "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." *Ibid.* In this case, petitioner argues, the court of appeals improperly applied Rule 606(b) to preclude a pre-verdict inquiry into juror misconduct, even though Rule 606(b) by its terms addresses juror testimony only in "an inquiry into the validity of a verdict." See Pet. 11.

a. As an initial matter, that issue is not properly presented by this case, because the court of appeals did not address the scope of Rule 606(b). To the contrary,

the court of appeals declined to reach the district court's construction of that rule, making it clear that, "*[e]ven if the district court underestimated the scope of its discretion under Rule 606(b)*, the court's ultimate decision not to investigate allegations * * * that were entirely endemic to the deliberations *was not an abuse of its discretion*." Pet. App. 7a (emphasis added); *ibid.* (decision was "within its discretion"). Thus, contrary to petitioner's assertions, the court of appeals did not uphold "the district court's conclusion that it *lacked* discretion under Rule 606(b) to conduct a pre-verdict hearing on the allegations of 'internal' juror misconduct." Pet. 11, 15 (emphasis added). Instead, the court of appeals merely concluded that, under the facts of this case, the district court did not abuse the discretion it had. In that respect, the court's holding resembles that of the court in *United States* v. *Sababu*, 891 F.2d 1308 (7th Cir. 1989), which petitioner cites (Pet. 14) as conflicting with the decision below. In *Sababu*, the Seventh Circuit found harmless the district court's statement that "he was barred from questioning the jury by [Rule 606(b)]," because "[t]he court had other valid reasons for refusing to question the jury." 891 F.2d at 1333, 1335.[4]

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[4] The court of appeals did not express the view "that a district court *ordinarily would err* if it elects to investigate any pre-verdict allegation of improper 'internal' influences," Pet. 12 (some emphasis added). The court of appeals merely stated that such an investigation "*may* have *invited* reversible error." Pet. App. 7a (emphasis added). The observation that error *might occur* if an investigation were conducted is not the same as a holding that the investigation itself would have been reversible error. It simply acknowledges that intrusion into the jury by investigation may inadvertently prejudice its deliberations. See, *e.g.*, *Sababu*, 891

That understanding of the decision in this case, moreover, comports with earlier Eleventh Circuit decisions, which recognize that trial courts *do* have discretion to interview jurors about intrinsic influences on their deliberations before verdict, notwithstanding Rule 606(b). See *United States* v. *Yonn*, 702 F.2d 1341, 1345 (11th Cir.) (recognizing the "wide latitude afforded the trial judge" in conducting a pre-verdict investigation of jury misconduct), cert. denied, 464 U.S. 917 (1983); *United States* v. *Gabay*, 923 F.2d 1536, 1541-1542 (11th Cir. 1991) (upholding pre-verdict voir dire of jurors, conducted under "the procedures outlined in *United States* v. *Yonn*," in response to allegations of premature deliberation); *United States* v. *Heller*, 785 F.2d 1524, 1525-1526 (11th Cir. 1986) (reversing conviction based on jurors' pre-verdict testimony as to allegation of racial slurs during deliberations); cf. *United States* v. *Hernandez*, 921 F.2d 1569, 1577 (11th Cir.) (upholding, without reference to Rule 606(b), the district court's decision not to investigate allegations of jurors sleeping during trial), cert. denied, 500 U.S. 958 (1991). The decision in this case does not purport to overrule that line of cases.[5] It merely finds no abuse of discretion on these facts.

The court of appeals' recognition of the distinction between "extrinsic" and "intrinsic" influences on the jury does not compel the conclusion that the court incorporated Rule 606(b) into the pre-verdict context.

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F.2d at 1334 (noting that investigation could cause jurors to attach undue importance to an issue or incident).

[5] Any claim of intra-circuit conflict is, in any event, for the court of appeals to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

See Pet. 12. As this Court has explained, alleged extrinsic influences on the jurors implicate the defendant's right to be tried exclusively on evidence admitted at trial. *Turner* v. *Louisiana*, 379 U.S. 466, 472 (1965). See also *Remmer* v. *United States*, 347 U.S. 227 (1954). Because of that, a court has less discretion not to conduct an investigation where there is a sufficiently colorable showing of "extrinsic" influence. *United States* v. *Rowe*, 906 F.2d 654, 656 (11th Cir. 1990); *United States* v. *Davis*, 15 F.3d 1393, 1412 (7th Cir.), cert. denied, 513 U.S. 896 (1994). In contrast, where the alleged influence is "intrinsic," the policy of preserving jury secrecy and independence, as well as the need to avoid the risk of influencing the jury through the investigation itself, weighs against an inquiry. As a result, in the pre-verdict context, district courts have correspondingly greater discretion to decline to conduct an investigation of intrinsic influences than they do with respect to extrinsic influences. See, *e.g.*, *United States* v. *Hanley*, 190 F.3d 1017, 1031 (9th Cir. 1999); *United States* v. *Chiantese*, 582 F.2d 974, 978 (5th Cir. 1978), cert. denied, 441 U.S. 922 (1979). See also *Grooms* v. *Wainwright*, 610 F.2d 344, 347 (5th Cir.), cert. denied, 445 U.S. 953 (1980). Indeed, one of the principal cases petitioner relies on, *United States* v. *Resko*, 3 F.3d 684 (3d Cir. 1993), cited Pet. 12-13, makes precisely that point. See 3 F.3d at 690 (distinguishing between intrinsic and extrinsic influences in the pre-verdict context; concluding that, because intra-jury influences do not create "reason to doubt that the jury based its ultimate decision only on evidence formally presented at trial," trial courts

exercise comparably broader discretion when deciding not to investigate claims alleging "only improper *intra*-jury influence").[6] In light of that recognized dichotomy, the court of appeals' mention of the distinction between intrinsic and extrinsic influences in Rule 606(b) does not mean that it applied all of the strictures of that rule (*e.g.*, its bar on interviewing jurors on intrinsic influences) to claims of misconduct that arise before verdict. If it had, the opinion's discussion of the district court's discretion to hold a hearing (or not) would have been beside the point.

b. Petitioner also asserts that the Third, Fifth, and Seventh Circuits permit pre-verdict inquiries into intrinsic influences based on the view that Rule 606(b) is inapplicable until after verdict, while "in the Sixth, Tenth, and * * * Eleventh Circuits, the district court would find itself without *any* authority to interrogate jurors about the scope of the misconduct and its prejudicial effect." Pet. 15. No such conflict exists. As indicated above, the Eleventh Circuit itself allows pre-verdict inquiries, including inquiries into internal influences, under appropriate circumstances. See p. 10, *supra*; see, *e.g.*, *Gabay*, 923 F.2d at 1541-1542. The same is true in the Sixth and Tenth Circuits.

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[6] Although the court of appeals in *Resko* repeatedly recognized the "broad" discretion exercised by district courts with respect to internal influence claims, 3 F.3d at 690, it concluded that, on the facts of that case, the district court had abused its discretion. In particular, it concluded that, because the alleged misconduct was so widespread—"every juror admitted to partaking in premature discussions"—the trial court was required to conduct a hearing. *Ibid.* Petitioner does not allege comparably widespread disregard of the court's instructions here.

Petitioner cites *United States* v. *Herndon*, 156 F.3d 629 (6th Cir. 1998), as barring pre-verdict inquiries into internal influences. Pet. 14-15. In that case, however, the court of appeals held that the district court abused its discretion by *failing* to investigate the defendant's pre-verdict allegations of improper influence. The court did not hold that Rule 606(b) *bars* pre-verdict inquiries into instances of internal misconduct. Nor does *Herndon* state that Rule 606(b) governs such inquiries. Petitioner notes (Pet. 15) that *Herndon* quotes Rule 606(b) at the beginning of its discussion and discusses the difference between extrinsic and intrinsic influences on the jury. But the court of appeals' reliance on the distinction between intrinsic and extrinsic influences was proper whether or not Rule 606(b) applies, since a district court has *less* discretion to *refuse* to investigate claims of improper extrinsic influences than it does with respect to intrinsic influence claims. See pp. 10-12, *supra*.

Petitioner's reliance (Pet. 15) on *United States* v. *Davis*, 1 F.3d 1014 (10th Cir. 1993), is likewise misplaced. In that case, the district court *did* conduct pre-verdict voir dire and an evidentiary hearing on jury bias, 1 F.3d at 1016, and the Tenth Circuit approved that practice, *id.* at 1016-1017. In so doing, the Tenth Circuit mentioned Rule 606(b), stating that "[i]nquiry into such matters, within the limitations of Fed. R. Evid. 606(b)," is "appropriate." Pet. 15 (quoting 1 F.3d at 1016) (emphasis omitted). But the court did not say (let alone hold) that Rule 606(b) applies to inquiries conducted before verdict or renders any type of pre-verdict inquiry per se improper. And in the later decision of *United States* v. *McVeigh*, 153 F.3d 1166, 1186-1188 (10th Cir. 1998), cert. denied, 526 U.S. 1007 (1999), the court recognized—without making any ref-

erence to Rule 606(b)—that district courts have discretion to hold hearings on claims of premature juror deliberations (*i.e.*, intrinsic misconduct). The court in fact stated that "holding a hearing would have been preferable" in the circumstances of that case, although it held that the district court had not abused its discretion in declining to do so. *Id.* at 1188.

c. Petitioner, in any event, cannot show that the district court abused its discretion in this case. Petitioner admits (Pet. 11) that he alleged only intrinsic influences on the jury, *i.e.*, premature deliberations and deliberative pressure brought by jurors against one another. The only evidence he presented to show premature deliberations, moreover, was defense counsel's report that the excused alternate thought a juror "had made up his mind from day one." Pet. App. 49a. In light of the vague and speculative nature of that claim, as well as its source—hearsay through defense counsel—the court was within its discretion to deny counsel's motion for further inquiry or mistrial.

Nor was there reason to investigate the deliberative pressure that jurors brought against each other. Petitioner cites no case, and we have found none, in which a court declared a mistrial based on internal deliberative pressure. See *Thompson* v. *Cain*, 161 F.3d 802, 810 (5th Cir. 1998) (distinguishing between deliberative pressure from court and deliberative pressure from other jurors, noting that the latter "does not raise the specter of a constitutional violation"). As the district court observed, it is common that deliberations become heated and confrontational when another person's life or liberty is at stake. Pet. App. 74a. Thus, the district court was also within its discretion when it decided not to investigate the jury's internal dynamics.

2. Petitioner next contends (Pet. 18) that the district court unconstitutionally coerced a guilty verdict by asking the jury to "continue to deliberate," without reiterating its earlier admonition that the jurors should not abandon their "honest beliefs" solely to reach a verdict. That contention is without merit, and does not in any event warrant review.

a. Following *Allen* v. *United States*, 164 U.S. 492 (1896), this Court has stated that a supplemental charge encouraging a deadlocked jury to continue deliberations must be examined "in its context and under all the circumstances" of the case. *Jenkins* v. *United States*, 380 U.S. 445, 446 (1965); *Lowenfield* v. *Phelps*, 484 U.S. 231, 237, 241 (1988). So long as the district court refrains from inquiring regarding the numerical division of the jury, see *Brasfield* v. *United States*, 272 U.S. 448, 449-450 (1926) (announcing per se rule preventing such inquiry), an instruction that encourages further deliberation may be upheld. The inquiry into coercion is thus necessarily fact-intensive.

Applying that totality test, courts evaluating requests merely to "continue deliberations" have often found no constitutional violation. See, *e.g.*, *Young* v. *Herring*, 938 F.2d 543, 556-559 (5th Cir. 1991) (upholding instruction to "continue your deliberations"), cert. denied, 503 U.S. 940 (1992); *United States* v. *Black*, 843 F.2d 1456, 1463 (D.C. Cir. 1988) (instruction urging continued deliberations, even after partial verdict instruction and two notes from jury, was "an entirely proper and non-coercive request"). See also Pet. 23 (collecting comparable cases). The totality of the circumstances in this case supports the court of appeals' decision to reach the same result here. As the court of appeals noted, the district court's request was "routine and neutral. Nothing in the brief [supplemental] instruction sug-

gested that a particular outcome was either desired or required." Pet. App. 8a. The request to "continue to deliberate," moreover, did not "speak specifically to the minority jurors"; indeed, the trial court did not, at the time it gave the instruction, know the nature of the division among the jurors, *ibid.*, and the jurors had no reason to believe the court of appeals would know. Contrast *Lowenfield*, 484 U.S. at 237 (instructions that speak directly to the minority are inherently more coercive).[7] In addition, the jurors themselves had not indicated an insurmountable impasse, but rather an inability to reach a decision in the "near" future; thus, the jurors would be less likely to interpret the further instruction to deliberate as a request for unanimity at all costs. Finally, the jury had been deliberating for only 15 hours, compare *United States* v. *Coffman*, 94 F.3d 330, 336 (7th Cir. 1996) (upholding court's instruction to "keep deliberating" when jury had indicated

[7] Petitioner implies (Pet. 7) that, because the alternate informed petitioner's counsel that she knew the jury's composition (10-2 in favor of conviction) at the beginning of deliberations, the court's instruction to "continue to deliberate" was directed toward the 2 jurors in favor of acquittal. The court's knowledge of the jury's composition, however, is irrelevant to the coercion inquiry; it is the jury's *awareness* of that knowledge that may render further instruction coercive. A minority juror who knows that the court is aware of his position in the minority may interpret any instruction to "achieve unanimity" or to "re-examine your views" as directed to him alone. But petitioner does not suggest that any minority jurors knew that Ms. Budd had spoken to the alternate, or that she had advised the alternate of the initial numerical division, much less that the judge had been advised of the division. And in any event, as the court of appeals noted (Pet. App. 8a), the district court here was "unaware of the composition of the jury's nascent verdict" at the time it gave the instruction.

disagreement after only ten hours of deliberation), cert. denied, 520 U.S. 1165 (1997), and after the court's instruction, it continued to deliberate for more than a day before reaching its decision. Compare *Lowenfield*, 484 U.S. at 240 (verdict returned 30 minutes after supplemental instruction might "suggest[] the possibility of coercion"), with *United States* v. *Estacio*, 64 F.3d 477, 482 (9th Cir. 1995) (verdict returned 75 minutes after court asked jurors to return later and inform the court of "where you are" so the court could make an appointment did not "give rise to any presumption of coercion"), cert. denied, 517 U.S. 1121 (1996).

b. Petitioner claims (Pet. 18-19) that the decision below conflicts with decisions of the "vast majority" of courts because the district court's charge contained no "cautionary language" reminding dissenting jurors not to surrender their conscientiously held beliefs. The district court, however, had once before instructed the jury "not [to] give up your honest beliefs solely because the others think differently or merely to get the case over with."[8] Jurors are presumed to follow their instructions, *Francis* v. *Franklin*, 471 U.S. 307, 324 n.9 (1985), and there is no reason to believe that they did

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[8] Before the jury retired to deliberate, the court instructed:

> It is your duty as jurors to discuss the case with one another in an effort to reach agreement, if you can do so. Each of you must decide the case for yourself * * *.
>
> While you are discussing the case, do not hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong, but do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

34 Tr. 4787-4788.

not do so here. Moreover, the cautionary language petitioner demands is curative in nature, *i.e.*, designed to eliminate circumstances that otherwise might be coercive. See *United States* v. *Mason*, 658 F.2d 1263, 1268 (9th Cir. 1981) (language is "ameliorat[ive]"); *United States* v. *Rogers*, 289 F.2d 433, 435 (4th Cir. 1961) (if *Allen* charge itself were "stripped of its complementary reminder," then it "might readily be construed by the minority of jurors as coercive"). Such an instruction thus is not required unless the trial court does something that, under the circumstances, would otherwise be coercive.

For those reasons, the decisions petitioner cites as conflicting with the decision below, Pet. 20-23, are all distinguishable. In *Smalls* v. *Batista*, 191 F.3d 272 (2d Cir. 1999), on which petitioner places primary reliance (Pet. 20-21), the jury informed the district court that "[t]he decision is 11 to 1, and we are unable to come to a conclusion." 191 F.3d at 275. The *Smalls* court then gave an instruction that "thrice" directed the jurors to try and "convince the others," asked the jurors to be "open to reason," and specifically indicated that jurors "should make every effort to convince the others whether it be one of eleven, two out of twelve, whatever number it may be." *Id.* at 275, 280. Thus, contrary to petitioner's claim (Pet. 20), the *Smalls* court did not merely direct the jury to "continue to discuss the case" or to "continue a free discussion," and the circumstances were hardly analogous to those here. Instead, because the jury knew that the judge was aware of the nature of the division, the minority juror would naturally have understood the instruction as singling him or her out to be "open to reason," and as reminding the majority of its "responsibility" to change the minority juror's mind. 191 F.3d at 280. Indeed, the

charge specifically directed the majority to "convince the others whether it be one of eleven, two out of twelve, whatever number it may be." *Id.* at 275. Moreover, the Second Circuit expressly declined to "decide whether the charge would have been coercive if it had included the requisite cautionary language." *Id.* at 280. Here, in contrast, the jury had no reason to believe the court was aware of the nature of its division, and the trial court made no reference to jurors convincing each other or changing their minds. And in this case, the trial court had earlier instructed jurors "not [to] give up your honest beliefs solely because the others think differently or merely to get the case over with." There is no indication that a similar instruction was given in *Smalls*.

In any event, both before and after its decision in *Smalls*, the Second Circuit has approved instructions to "continue deliberating," without additional ameliorative language. See *United States* v. *Wallace*, 213 F.3d 627 (2d Cir. 2000) (No. 99-1657) (unpublished) (citing *Smalls* and concluding that "although the supplemental instruction * * * did not caution the jurors not to abandon their individual conscientious views simply to achieve unanimity, we cannot see that it tended to coerce jurors to abandon any conscientiously held doubt"); *United States* v. *Fermin*, 32 F.3d 674, 679-680 (2d Cir. 1994) (approving district court's decision to "refrain[] from giving an *Allen* charge, * * * and simply inform[] the jury to continue to deliberate in accordance with prior instructions" without cautionary language (internal citation omitted)), cert. denied, 513 U.S. 1170 (1995); cf. *DeGrandis* v. *Fay*, 335 F.2d 173, 174 (2d Cir. 1964) (rejecting claim that requiring jury to continue deliberating "coerced the verdict" when court had instructed the jury to "[c]ontinue to deliberate,"

without adding cautionary language, in response to jury's note that "we cannot make a decision on all counts tonight"). There is little reason to think that the Second Circuit would not reach the same result on these facts as well.

The other cases cited by petitioner are inapposite for similar reasons. In *United States* v. *Mason*, 658 F.2d 1263, 1267 (9th Cir. 1981) (cited Pet. 21), for example, the supplemental charge stressed the expense that retrial would impose, and mentioned that the Supreme Court had approved the charge, giving it "special weight in the minds of the jury." And in *United States* v. *Scott*, 547 F.2d 334, 338 (6th Cir. 1977) (cited Pet. 22), the court stated "this, of course, is a very important case," referred to the scheduling problems that would arise if the case had to be retried, and suggested that the jury might reach verdict "in another 15 minutes, 20 minutes." Finally, in *Rogers*, 289 F.2d at 434-435 & n.2 (cited Pet. 21), the court instructed the jury about its "duty" to agree, and echoed the classic *Allen* language —which specifically asks jurors to reconsider their views—but omitted any ameliorative language.

3. Finally, petitioner challenges (Pet. 26) the trial court's instruction regarding the definition of "counterfeited" under 18 U.S.C. 513(c)(1). Tracking the language of that statute, the district court instructed the jury that a document was "counterfeited" if it "purports to be genuine, but is not, because it has been falsely made or manufactured in its entirety." Gov't C.A. Br. 17. Petitioner claims (Pet. 26) that the instruction was erroneous because it failed to include the common-law requirement of similitude. Petitioner, however, identifies no conflict among the circuits on the definition of "counterfeited" under Section 513; nor does one exist. The court below was the first to decide whether Section

513 incorporated a similitude requirement, and the only other appellate court that has since considered that question reached the same result. See *United States* v. *Akers*, 215 F.3d 1089, 1100 (10th Cir. 2000) (rejecting defendant's argument that fake checks were not "counterfeit" under Section 513 because "they were obviously not authentic" and stating that checks need only "purport[] to be genuine" under the statute). Moreover, as the court of appeals pointed out (Pet. App. 14a), courts interpreting an identical definition of "counterfeited" under the Federal Sentencing Guidelines, see Sentencing Guidelines § 2B5.1, have rejected the argument that that term includes an implicit requirement of similitude. See *United States* v. *Webster*, 108 F.3d 1156, 1157-1158 (9th Cir. 1997); *United States* v. *Lamere*, 980 F.2d 506, 513 (8th Cir. 1992); cf. *United States* v. *Kelly*, 204 F.3d 652, 657 (6th Cir.) (incomplete currency may be "counterfeit" under Guideline 2B5.1), cert. denied, 120 S. Ct. 2732 (2000).

Those decisions are correct. As petitioner (Pet. 26) and the court of appeals (Pet. App. 10a) both point out, courts have imposed a similitude requirement with respect to counterfeiting statutes *other* than Section 513. But unlike Section 513, those "older counterfeiting statutes"—18 U.S.C. 472 through 474—"left their key term undefined." The courts therefore filled the gap by incorporating the common-law definition of counterfeit, which required similitude. Pet. App. 10a (collecting cases). When Congress enacted Section 513, however, it defined "counterfeited" as a document that "purports to be genuine, but is not." The presumption that Congress intends a common-law term to incorporate the common-law meaning applies only in the "absence of contrary direction." *Morisette* v. *United States*, 342 U.S. 246, 263 (1952). Where a statute does provide a

definition that varies from the common law, the statutory definition prevails. See *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 325-326 (1992).

The fact that Congress provided a definition of counterfeited in Section 513, but did not include the term similitude, is particularly significant given that Congress has expressly incorporated a similitude requirement in other counterfeiting provisions. Pet. App. 11a (citing 18 U.S.C. 474, which prohibits the possession, with intent to sell, of "any * * * security made * * * after the similitude of any obligation or other security issued under the authority of the United States"). Furthermore, as the court of appeals also pointed out (Pet. App. 12a-13a), a definition of counterfeited that does not require similitude comports with Congress's intent under Section 513, which was to broaden the reach of the existing counterfeiting statutes. See S. Rep. No. 225, 98th Cong., 1st Sess. 371 (1983). Indeed, a similitude requirement would be entirely out of place in Section 513. Where a counterfeiting statute, like 18 U.S.C. 472 through 474, addresses the counterfeiting of documents, such as currency, that are uniform throughout the nation and easily recognizable by the average person, a similitude requirement makes sense. But Section 513 addresses the counterfeiting of documents that are less common and are often non-uniform. As a result, Congress needed to criminalize as "counterfeited" not only those documents that bear a "similitude" to genuine securities, but also those documents that, because they

purport to be genuine, might trick the many people who have never seen the real thing. See Pet. App. 13a.[9]

Petitioner also claims (Pet. 26) that the statutory definition of "counterfeited" under Section 513 *itself* requires a showing of similitude. He contends that, by using the words "purports to be genuine," Congress meant to require a showing that the counterfeit document is closely akin to a genuine security. Pet. 26. A document may "purport[] to be genuine" on its face, however, without actually simulating the genuine document—especially when, as here, the document is essentially the memorialization of a financial transaction, which may change form from organization to organization. Moreover, as the court of appeals found here, accompanying documents that vouch for the authenticity of the counterfeit securities, as well as the fact that the counterfeit securities were relied upon as real, all helped establish that the counterfeit securities "purport[ed] to be genuine." Pet. App. 15a.[10]

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[9] For example, although securities "of the United States" covered under the older statutes are uniform in appearance throughout the country, the form of securities of a "State or political subdivision thereof or of an organization," which are addressed in Section 513, may vary widely. Congress could not have meant for a counterfeit security that bears a similarity to one organization's genuine security, but is passed off as another's (although it lacks similitude to the second organization's document), to fall outside the statute's reach.

[10] Petitioner also points to a statement, in the legislative history of Section 513, suggesting that the term "counterfeited" requires similitude. Pet. 28. As this Court has repeatedly emphasized, however, when a statute "speaks with clarity to an issue," the inquiry is at an end. See, *e.g.*, *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). See also Pet. App. 12a (rejecting reliance on legislative history because statutory text

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2000

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is clear). For the same reasons, petitioner's reliance on Senator D'Amato's comments on a precursor to 18 U.S.C. 514 (Supp. IV 1998) (Pet. 29-30)—a provision passed a decade after Section 513—is unavailing. Indeed, "the views of a subsequent Congress" —let alone the views of the single Senator upon which petitioner places great reliance—"form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313 (1960). Petitioner, in any event, misconstrues Senator D'Amato's comments. Although Senator D'Amato indicated that Section 514 (Supp. IV 1998) would "close a loophole" in existing counterfeit law, that loophole did not arise from a "similitude" requirement in Section 513. It arose because Section 513 requires the counterfeited item to be a "security," which is defined as "note, stock certificate, treasury stock certificate, bond," etc. 18 U.S.C. 513(a) and (c)(3). Because of that, before Section 514 was enacted, a defendant could have argued that Section 513 was inapplicable if the allegedly counterfeited document purported to be a financial instrument that is not a "security" listed in Section 513(c)(3). It was for that reason that the Senator's proposed bill, which (as originally proposed) did not cover "securities," extended the counterfeiting prohibition to all "other financial instruments." 141 Cong. Rec. 18,038 (1995). As enacted, Section 514 covers both "securit[ies]" and "other financial instrument[s]." 18 U.S.C. 514 (Supp. IV 1998).