No. 08-1109

IN THE

Supreme Court of the United States

CRYSTAL PORTER,
Petitioner,
v.
UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

STEPHEN U. BAER
THE BAER LAW FIRM
12830 Hillcrest Road
Suite 111
Dallas, Texas 75230
(972) 364-9020

JONATHAN D. HACKER
(Counsel of Record)
MEAGHAN MCLAINE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Petitioner

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The decision below unambiguously holds that 18 U.S.C. §§ 471 and 472, which criminalize the making and passing of counterfeit currency, require that the fake money at issue bear only "a likeness or resemblance to genuine currency" (Pet. App. 11a)—*not* a likeness or resemblance close enough to deceive a person of ordinary intelligence. The decision flatly rejects exactly that heightened degree of similitude, holding that it applies only to prosecutions under 18 U.S.C. § 473, which criminalizes dealing in counterfeit currency. According to the Fifth Circuit, §§ 471 and 472 "do[] not require a particularly high level or degree of similitude," whereas § 473 "requires that the phony bills have a substantially greater level or degree of similitude to the genuine article." Pet. App. 13a; *see id.* at 11a (emphasizing "the distinguishing differences between, on the one hand, the object crimes under §§ 471 and 472 ... and, on the other hand, the object crime under § 473, under which [petitioner] was never charged").

The Government's opposition to certiorari nowhere defends on the merits the Fifth Circuit's reading of §§ 471 and 472 as requiring only a "likeness or resemblance to genuine currency," rather than a *convincing* likeness. Nor does the Government deny that nine other courts of appeals have held squarely the opposite. Pet. 12-15.

Thus tacitly conceding that there are no grounds for opposing review of the Fifth Circuit's *actual* opinion and holding, the Government instead attempts to rewrite the opinion below in a vain effort to obscure its obvious certworthiness. The Government's ar-

guments are merely distracting quibbles with the propriety of this case as a vehicle for resolving the clear conflict created by the decision below. But none of them provides a valid reason to deny review. It is irrelevant that petitioner was charged with conspiracy to make and pass counterfeit obligations under §§ 471 and 472; the key error was in the trial court's failure to instruct the jury properly on the meaning of "counterfeit" in those object offenses, leaving the jury no way to evaluate petitioner's defense that the bills she agreed to pass, while obviously fake, did not qualify as "counterfeit" precisely *because* they were so obviously fake. And it is simply wrong to say the instructions in fact properly advised the jury on the objective similitude requirement; the instruction on that element was incorrect—as the Government implicitly recognizes—and the instruction on the distinct "intent" element could not and did not cure that prejudicial error. For these reasons, there is no merit to the Government's ultimate suggestion that the decision below "need not be interpreted," Gov. Br. 14, as holding what it so plainly holds, *viz.*, that §§ 471 and 472 require only that the bills at issue bear *some* resemblance or likeness to genuine currency, not a *convincing* one.

Certiorari should be granted.

1. The Government primarily argues that review is unwarranted because petitioner was charged only with *conspiracy* to commit the object offenses of making and passing counterfeit currency under §§ 471 and 472. Because "the basis of a conspiracy charge is the agreement itself and the defendant's intent," the Government observes, a conspiracy "may exist and be punished whether or not the substantive of-

fense was actually committed by the conspirators." Gov. Br. 8-9. Thus, argues the Government, even if the bills actually passed by petitioner and her co-conspirators were too pathetic to deceive a person of ordinary intelligence, she was still guilty of conspiracy if she intended to pass *better* bills, i.e., bills that satisfied the higher standard of §§ 471 and 472. *Id.* at 9.

But that, of course, is the problem. Petitioner's central defense was that she did *not* agree to pass better bills, but only the amateurish bills she was shown at her co-conspirators' home. As the Government concedes, petitioner could be convicted of conspiracy only if the *particular act she agreed to commit* "would satisfy all of the elements of a substantive criminal offense." *Id.* at 8 (quoting *Salinas v. U.S.*, 522 U.S. 52, 65 (1997)). Because petitioner was charged with conspiracy to make and pass counterfeit notes under §§ 471 and 472, the Government was required to prove that she agreed to pass bills that would qualify as "counterfeit" under those statutes. If what she agreed to pass were bills that did *not* qualify as counterfeit, as petitioner vigorously insisted at trial, then she is not guilty of conspiracy.

The Government contends that the evidence would support a finding that petitioner did agree to pass bills that could qualify as counterfeit under §§ 471 and 472. Gov. Br. 11-12. But there is no way to know that a *properly instructed* jury would have made that finding. The facts of this case amply support the inference that the conspirators' design from the outset was to make purchases with merely fake bills using a person on the inside *who did not need to be deceived* by high-quality fakery. Pet. 3-5. Indeed,

the entire point of bringing petitioner into the conspiracy in the first place was her co-conspirators' understanding that the laughably amateurish bills—color-copied on manila paper glued together, with "magnetic strips" drawn on—were unlikely to fool an ordinary, unsuspecting person. Pet. 3-4.[1] Without a correct instruction on the meaning of "counterfeit," petitioner's jury was unable to distinguish between a plan to make and pass *fake* bills (which is not a federal crime) and a plan to make and pass *counterfeit* bills (which is). With a proper instruction, the jury easily could have found "that the specific bills she agreed to pass were not sufficiently real to qualify as counterfeit." Pet. App. 22a (Haynes, J., dissenting).

2. There is even less merit to the Government contention that the jury *was* accurately instructed, in substance, on the objective similitude requirements of §§ 471 and 472. Gov. Br. 9-11. As Judge Haynes observed below: "Simply by looking at the given instruction on the general meaning of 'counterfeit' and the rest of the charge as a whole, it is clear that [petitioner's] proffered instruction was not substantially covered." Pet. App. 19a. The Government's theory rests entirely on the instructions' description of the *intent* element under §§ 471 and 472. According to the Government, even though the trial court failed to instruct the jurors that a bill qualifies as counterfeit only when it bears a *convincing* likeness, the jurors nevertheless understood essentially the same point, because the intent charge for §§ 471

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[1] *See also, e.g.*, RE 38 (testimony of E. Horton) ("You would have to know somebody to pass the money off to.... [Y]ou could tell it was fake[, so i]t would have to be somebody you know.").

and 472 described the required "intent to defraud" as "intending to cheat someone by making the other person think that the Federal Reserve notes were real." Pet. App. 5a; *see* Gov. Br. 10.

The Fifth Circuit did not accept the Government's argument that the intent instruction adequately covered the objective similitude requirement. Doing so would only have compounded its error, because relying on the intent element to substitute for a stringent similitude requirement misses the entire point of the federal counterfeiting laws—"the protection of the bonds or currency of the United States, and not the punishment of any fraud or wrong on individuals." *Prussian v. U.S.*, 282 U.S. 675, 678 (1931); *see* Pet. 17. Criminal liability for making or passing counterfeit money thus requires not only that the person *intend* that the notes be taken as genuine, but *also* that the notes *actually appear convincingly genuine*, for only the latter, objective similitude element reflects the statutes' concern for protecting the monetary system. Under the jury's instruction below, however, a person could be convicted of making and passing any low-quality fake bills merely so long as the person *thought*—sensibly or not—her scheme would trick the person into thinking the bills were real. Thus, for example, the conspirators here apparently believed petitioner needed only to receive something vaguely resembling genuine currency at her register, and that her employer would not inspect the bills closely or trace them back to her register. That kind of petty fraud simply does not create the problem the counterfeiting offenses target, and failing to give a proper instruction on the meaning of "counterfeit" allowed the

jury to convict petitioner of conspiring to commit an act that does not constitute a federal crime.

The Government asserts that *U.S. v. Johnson*, 434 F.2d 827 (9th Cir. 1970), supports its contention that the jury's instructions "adequately covered the issue of the bills' similitude." Gov. Br. 10. But *Johnson* does not suggest in any way that the stringent similitude requirement of §§ 471 and 472 may be smuggled in through the back door of the intent element, as the Government contends. To the exact contrary, *Johnson* expressly invokes the similitude standard rejected by the Fifth Circuit here, *viz.*, whether the counterfeit bills "bear such a likeness or resemblance to genuine currency 'as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest.'" *Johnson*, 434 F.2d at 829 (quoting *U.S. v. Weber*, 210 F. 973 (W.D. Wash. 1913)). Applying that rule, the *Johnson* court affirmed the defendant's conviction for one set of bills and reversed it for another. *Id.* at 829-30. In the part of the opinion reversing the conviction—for bills that were printed in "bad" ink on "only one side" of "poor paper" with a "pinkish color," *id.* at 829—the court explained that a conviction under § *474* may be proper for an incomplete note, but "[u]nder section 472 ... the counterfeit obligation of the United States must be sufficiently complete to be an imitation of and to resemble the genuine article." *Id.* at 830. Remarkably, the Government represents the latter passage to be *Johnson*'s statement of § 472's similitude requirement, which the Government describes as "essentially the same as the instruction given to petitioner's jury." Gov. Br. 11.

But in context the court's point is clear: manufactured bills must be sufficiently complete to "resemble" genuine currency *under the stringent § 472 standard.* The Government's contention that *Johnson* endorses the weaker mere "resemblance" standard applied below (*id.*) blatantly misreads the decision.

3. Finally, the Government suggests that some other decisions have agreed with the Fifth Circuit that §§ 471 and 472 require a different kind of intent from other counterfeiting offenses, which in turn shows that §§ 471 and 472 require a lower degree of similitude. Gov. Br. 13. The Government is wrong—no other circuit has adopted the Fifth Circuit's erroneous downgrading of the similitude required for §§ 471 and 472. In the decisions cited by the Government, courts merely observed that a high degree of similitude may support an inference of the "intent to defraud" required under §§ 471 and 472 when the defendant was caught in possession of fake bills, whereas "mere possession of a counterfeit bill of very poor quality might not give rise to such an inference," since "poor quality suggests that it would be unlikely to be accepted in a transaction." *U.S. v. Mousli*, 511 F.3d 7, 15 (1st Cir. 2007); *see U.S. v. Hall*, 801 F.2d 356, 359-60 (8th Cir. 1986).[2] But here

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[2] As the district court's instructions below recognized, the "intent to defraud" element of §§ 471 and 472 is functionally equivalent to the § 473 element requiring the defendant to intend that the note be passed as "true and genuine." *See* Pet. App. 5a (describing "intent to defraud" element of §§ 471 and 472 as intent to "cheat someone by making the other/that person think the Federal Reserve notes were real"). Section 473 does not employ the "intent to defraud" formulation, however,

the Fifth Circuit drew the *opposite* conclusion—that the defendant's intent should define the level of objective similitude required to qualify as "counterfeit." That conclusion is wrong on its own terms, *see* Pet. 19-22, and, unsurprisingly, none of the cases cited by the Government supports it in the least.

The Government's discussion of *Hall* illustrates the Government's mischaracterization of the conflicting precedents. The Government notes that the defendant in *Hall* was denied a similitude instruction similar to the instruction sought by petitioner here. Gov. Br. 13. What the Government fails to acknowledge, however, is that the court affirmed the denial of the instruction specifically because the defendant was charged with passing *altered* currency, *not* "counterfeit" currency. Altered currency, the *Hall* court emphasized, "simply is not synonymous with an obligation made after the similitude of any obligation of the United States." 801 F.2d at 360; *see id.* at 360 n.7 (explaining that "[s]imilitude has come to be synonymous with counterfeit," not altered). *Hall* thus does nothing to excuse the failure to provide an accurate similitude instruction in a case involving an alleged conspiracy to make and pass counterfeit notes.[3]

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because it prohibits *dealing* counterfeit notes, i.e., buying and selling them. A person who sells or buys counterfeit notes does not intend to defraud the counterparty by tricking him into thinking the notes are real. The statute thus requires instead that the defendant buy or sell the notes with the intent that the notes *later* be "passed, published, or used as true and genuine." Pet. 2.

[3] To the extent the Government suggests that the Fifth Circuit's holding is muted by the abuse of discretion standard the

The Government's sweeping, string-cited dismissal of other precedents conflicting with the decision below fails to identify any legitimate basis for distinguishing them. The Government's main argument is that none of them charged a conspiracy. Gov. Br. 15. As already discussed, however, the conspiracy context is irrelevant—the instructional error in describing the object offenses precluded the jury from fairly deciding whether *the acts petitioner conspired to commit* constituted any federal crime. *See supra* at 3-4. The Government's claim that because of the conspiracy charge, the decision below "need not be interpreted as addressing the objective level of similitude that actual bills must attain to be 'counterfeit' in cases charging the completed crime," Gov. Br. 14-15, is simply inexplicable. The court's holding could hardly be clearer: "[B]ecause the object crimes for [petitioner's] conspiracy were those enumerated in §§ 471 and 472 [rather than § 473], the district court sufficiently defined 'counterfeit' in the instruction that it gave to the jury." Pet. App. 14a; *see id.* at 13a. That holding squarely addresses the object offenses and affirms the trial court's in-

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court applied to its review of the instructions given, *see* Gov. Br. 12, the argument is meritless. The court of appeals' conclusion that the district court was "within its discretion" in rejecting petitioner's proposed instruction was predicated on its conclusion that "the district court sufficiently defined 'counterfeit' in the instruction that it gave to the jury." Pet. App. 14a. That is, the court held not that the charge was in the right ballpark, but that it was *legally correct*. *Cf. Koon v. U.S.*, 518 U.S. 81, 100 (1996) (district court "by definition abuses its discretion when it makes an error of law"). That holding creates a conflict with other courts of appeals on the proper meaning of "counterfeit" for purposes of §§ 471 and 472.

struction defining "counterfeit" under those offenses; the conspiracy context has nothing to do with it.[4]

The Government's other basis for distinguishing the conflicting precedent is that many did not address instructional error, but instead considered whether the trial evidence sufficed to meet the legal definition of "counterfeit." Gov. Br. 15. But the question of the proper scope of a criminal offense routinely arises through alleged instructional error, *see, e.g.*, *Arthur Andersen LLP v. U.S.*, 544 U.S. 696, 704-08 & n.10 (2005), and the Government does not even begin to explain why a decision declaring and applying a legal standard to the evidence would not also define the standard that should be given to the jury in its instructions.

The unavoidable fact is the Fifth Circuit has broken decisively from a longstanding consensus in the

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[4] Nor did the court reach its holding on the basis of an assumption that petitioner's view of the law under §§ 471 and 472 is correct, as the Government contends. Gov. Br. 12. In the very last passage of its analysis, only *after* having held that §§ 471 and 472 do not require the same high level of similitude that § 473 requires, the court observed that the district court acted "within its discretion in declining to adopt [petitioner's] proffered language, and "[t]his would be so even if we were to assume *arguendo* that hers was a correct statement of the law." Pet. App. 14a. The court provided no explanation why, but it appears to be referring to petitioner's "statement of the law" *as to § 473*. In other words, petitioner may be right that "counterfeit" means a convincing resemblance to genuine currency *under § 473*, but because she was charged with object offenses under §§ 471 and 472, which (in the court's view) require a lower degree of similitude, "the trial court's charge on the meaning of 'counterfeit'" was sufficient even if petitioner's view of the law is correct. Pet. App. 14a.

federal courts over the meaning of "counterfeit" under §§ 471 and 472. In the Fifth Circuit, "counterfeit" in those statutes means merely "hav[ing] a likeness or resemblance to genuine currency." Pet. App. 11a. That standard will apply not only to appellate review for sufficiency of the evidence, but also to the juries who must review the evidence in the first instance. In other circuits, juries and appellate panels apply a different, higher standard in determining whether the bills made or passed by the defendant qualify as "counterfeit" under §§ 471 and 472. The resulting differential treatment of similarly situated defendants is unfair and should not be tolerated.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, the petition should be granted.

Respectfully submitted,

STEPHEN U. BAER
THE BAER LAW FIRM
12830 Hillcrest Road
Suite 111
Dallas, Texas 75230
(972) 364-9020

JONATHAN D. HACKER
(*Counsel of Record*)
MEAGHAN MCLAINE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Petitioner