No. 18-8426

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES C. LYNCH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that the district court's caution to prospective jurors that "[n]ullification is by definition a violation of the juror's oath" and that it "is not your determination whether the law is just or * * * unjust" was a permissible discharge of the court's duty to ensure that the jury follows the law.

2. Whether the court of appeals correctly affirmed the district court's denial of an entrapment-by-estoppel instruction on two counts on the particular facts of this case, where such an instruction was given on other counts on which the jury found petitioner guilty.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A32) is reported at 903 F.3d 1061.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2018. A petition for rehearing was denied on December 11, 2018 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on March 11, 2019. 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 Central District of California, petitioner was convicted of one count of conspiracy to manufacture, possess, and distribute marijuana, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(B), and 846; two counts of aiding the distribution of marijuana to persons under 21 years of age, in violation of 18 U.S.C. 2 and 21 U.S.C. 841(a)(1) and 859(a); one count of marijuana possession with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B); and one count of maintaining drug-involved premises, in violation of 21 U.S.C. 856(a)(1). Am. Judgment 1. He was sentenced to 12 months and one day of imprisonment, to be followed by four years of supervised release. Ibid. Petitioner appealed, and the government cross-appealed his sentence. The court of appeals affirmed petitioner's convictions, vacated his sentence and remanded for resentencing, and directed the district court to address on remand an issue of appropriations law that petitioner raised on appeal. Pet. App. A3-A32.

1. From 2005 to early 2006, petitioner operated a commercial business selling marijuana in Atascadero, California. Pet. App. A9. In April 2006, after complaints from neighbors, petitioner moved his business to Morro Bay, California. Ibid. Over the next year, petitioner sold $2.1 million in marijuana and marijuana-related products. Ibid. In March 2007, the Drug

Enforcement Agency (DEA) searched petitioner's home and business pursuant to a warrant. Ibid. Petitioner continued to operate the business after the DEA search. Ibid.

2. On July 13, 2007, a grand jury in the Central District of California returned an indictment charging petitioner with five marijuana-related offenses, including two counts of aiding the distribution of marijuana to persons under the age of 21, in violation of 18 U.S.C. 2 and 21 U.S.C. 841(a)(1) and 859(a). Indictment 9. The case proceeded to trial.

a. On the first day of voir dire, defense counsel told prospective jurors that "the judge is only going to tell you what the law is, and that ultimate decision about what to do in this case is for you and only you to decide." Pet. App. A20. On the second day of voir dire, a prospective juror stated that she would be unable to follow the district court's instructions on federal marijuana offenses because of her view that "federal law is seriously flawed." Gov't C.A. Second Br. on Cross-Appeal 10 (Gov't C.A. Br.) (citation omitted). During a sidebar about whether to strike the prospective juror for cause, the government noted that defense counsel had made statements, including the one quoted above, that "seemed to be calling for jury nullification." Pet. App. A20. The court invited the government to object to future such statements. Gov't C.A. Br. 11.

After the sidebar, defense counsel resumed questioning the same prospective juror and "[w]ithin minutes" returned to a similar line of questioning, Pet. App. A20, asking the prospective juror whether she understood that the "ultimate decision" whether to find guilt would be "[her] decision," id. at A35. The prospective juror responded: "You finally said something I can relate to. I understand that completely. I believe there is something called jury nullification, that if you believe * * * the law is wrong * * * you don't have to convict a person. That's it." Id. at A35-A36. The district court stopped her before she could continue to describe her understanding of jury nullification in front of the jury pool. See ibid.

The district court excused the venire and consulted with the parties on an appropriate response. Pet. App. A21. At the government's request, the court gave the following instruction:

> Nullification is by definition a violation of the juror's oath which, if you are a juror in this case, you will take to apply the law as instructed by the court. As a jury -- as a juror, you cannot substitute your sense of justice, whatever it may be, for your duty to follow the law, whether you agree with the law or not. It is not your determination whether the law is just or when a law is unjust. That cannot be and is not your task.

Id. at A54. The court then asked each prospective juror whether he or she could follow that instruction, and each agreed that he or she could. Id. at A21; see id. at A54-A58.

b. Petitioner testified in his own defense. In that testimony, he admitted to what he acknowledged on appeal were

"sufficient facts to find him guilty of the five counts charged." Pet. App. A9. Petitioner claimed, however, that a representative of the DEA had led him to believe that his conduct was lawful. Id. at A10.

Petitioner testified that, before opening his business in 2005, he had read that, while California law did not prohibit some marijuana dispensaries, marijuana remained a controlled substance under federal law -- "just like heroin, LSD, 'ecstasy,' and on a higher schedule than cocaine." Gov't C.A. Br. 19-20 (citation omitted). Petitioner, who is not an attorney, testified that he called the local DEA field office in September 2005 to ask about DEA policies regarding marijuana. Id. at 20. Petitioner testified that, after several calls, he ultimately had a conversation with a man whose name, title, and job function petitioner did not know. Id. at 20-21. Petitioner testified that he asked this person what the DEA was "going to do about all of the medical marijuana dispensaries around" California. Id. at 20 (citation omitted). The person purportedly told him: "[I]t was up to the cities and counties to decide how they wanted to handle the matter." Id. at 21. (citation omitted) Petitioner testified that he then asked what would happen if he opened his own marijuana dispensary, and the person repeated that "it's up to the cities and counties to decide how they want to handle the matter." Ibid. (citation omitted); see Pet. App. A17.

Petitioner's phone records confirmed that he had called the DEA in September 2005. Pet. App. A17 n.2. The female DEA employee to whom the relevant phone number was assigned testified that "neither she nor any agent in her division would have given [petitioner] the information [petitioner] claimed to have received." Ibid. Petitioner also admitted that, after his purported conversation with the DEA representative, he had read memos and letters from various local officials indicating that marijuana use and distribution remained illegal under federal law. Gov't C.A. Br. 24; see Pet. App. A19 (describing the "vast swaths of information [petitioner] had about marijuana's illegality under federal law"). In addition, petitioner's own business distributed forms stating that "Federal Law prohibits Cannabis." Pet. App. A19. Although the same forms asserted that "California legalization had created an exception to the federal prohibition through the Tenth Amendment," ibid., petitioner did not claim to have discussed the Tenth Amendment with the unidentified DEA representative. And petitioner continued to operate his business after the DEA search warrant. See pp. 2-3, supra.

Based on his testimony about a phone call with the DEA, petitioner requested that the jury be instructed on the defense of entrapment by estoppel. Pet. App. A10. The district court gave such an instruction, but only with respect to the three counts of the indictment charging conspiracy to distribute marijuana,

possession of marijuana with intent to distribute, and maintaining drug-involved premises. Ibid. The court declined to instruct the jury on entrapment by estoppel for the two counts of the indictment charging petitioner with distributing marijuana to minors, because petitioner's version of events, "even if believed, did not suffice to allow the defense as against those charges." Ibid.

c. The jury found petitioner guilty on all counts: one count of conspiracy to manufacture, possess, and distribute marijuana, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(B), and 846; two counts of aiding the distribution of marijuana to persons under 21 years of age, in violation of 18 U.S.C. 2 and 21 U.S.C. 841(a)(1) and 859(a); one count of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B); and one count of maintaining drug-involved premises, in violation of 21 U.S.C. 856(a)(1). Amended Judgment 1. The jury found that the conspiracy involved at least 100 marijuana plants and at least 100 kilograms of marijuana. Gov't C.A. Br. 29. Although the jury's findings on the conspiracy count classified the offense as one requiring a five-year minimum term of imprisonment, see 21 U.S.C. 841(b)(1)(B)(vii), the district court invoked the "safety valve" provision of 18 U.S.C. 3553(f) to instead sentence petitioner to 12 months and one day of imprisonment on that count (with concurrent or shorter sentences on the other counts). Pet. App. A25; see Am. Judgment 1.

3. The court of appeals affirmed petitioner's convictions, vacated his sentence, and remanded for resentencing in accordance with the statutory minimum. Pet. App. A3-A32.

a. As relevant here, the court of appeals rejected petitioner's contention that the instruction relating to nullification given by the district court during voir dire was unduly coercive. Pet. App. A20. The court of appeals observed that "no juror has a right to engage in nullification"; that "such nullification is a violation of a juror's sworn duty to follow the law as instructed by the court"; and that "trial courts have the duty to forestall or prevent such conduct, including by firm instruction or admonition." Id. at A21 (citation and internal quotation marks omitted). The court also determined that, in the specific circumstances here, a cautionary instruction was warranted and that "the particular language chosen by the district court accurately stated the law." Ibid.

In particular, the court of appeals explained that the portion of the instruction informing prospective jurors that "[n]ullification is by definition a violation of the juror's oath * * * to apply the law as instructed by the court," Pet. App. A54, was both correct as a matter of law and was taken from a Second Circuit decision that the Ninth Circuit had previously "recognized * * * as an accurate guide to a judge's duty to prevent nullification," id. at A21 (discussing United States v.

Thomas, 116 F.3d 606, 614 (2d Cir. 1997)); see Merced v. McGrath, 426 F.3d 1076, 1079 (9th Cir. 2005), cert. denied, 547 U.S. 1036 (2006). The court of appeals further explained that the "district court correctly stated that the jurors did not have any right to nullify, but it did not tell them that they lacked the actual ability to do so" and "neither said nor implied that jurors would be subject to punishment if they acquitted [petitioner]." Pet. App. A21.

The court of appeals also rejected petitioner's challenge to the district court's decisions regarding entrapment by estoppel, including the district court's refusal to permit the defense as to the distribution-to-minors charges. Pet. App. A17. The court of appeals determined that petitioner "fail[ed] to provide a sufficient factual basis to establish the defense" and therefore "was not entitled to any instruction on, or jury consideration of, this defense in the first place." Ibid. The court reasoned that, to establish the defense of entrapment by estoppel under its precedent, a defendant has the burden to show: "(1) an authorized government official, empowered to render the claimed erroneous advice, (2) who has been made aware of all the relevant historical facts, (3) affirmatively told [the defendant] the proscribed conduct was permissible, (4) that [the defendant] relied on the false information, and (5) that [the] reliance was reasonable." Id. at A18 (quoting United States v. Schafer, 625 F.3d 629, 637

(9th Cir. 2010) (brackets in original), cert. denied, 563 U.S. 1015 (2011)). The court found that, "[e]ven crediting [petitioner's] testimony" and assuming both that he spoke with an authorized government official at the DEA and that he relied on the information he purportedly received, "the other elements of the defense [are] missing here." Ibid. The court observed that even on petitioner's own version of events, no federal official "told [him] that [his] proposed activities were legal," adding that the statement that "it was 'up to the cities and counties to decide' * * * lacked sufficient concreteness to have served as an affirmative authorization." Ibid.

The court of appeals additionally determined that "[t]o the extent that [petitioner] might have (improperly) understood the statement to be an affirmative authorization, any reliance on the statement was clearly unreasonable," because petitioner "clearly should still have been on notice that any purported categorical authorization to violate the federal drug laws was incorrect, or at least demanded further inquiry into the validity of that authorization." Pet. App. A19. The court explained that the evidence at trial showed that petitioner "had been actively following developments of marijuana law" and that he had "vast swaths of information * * * about marijuana's illegality under federal law," including repeated statements to that effect from local officials. Ibid.; see p. 6, supra. The court thus found

that, "[e]ven crediting [petitioner's] version of the call, a reasonable person possessing all the information [he] had would not have considered the call decisive of what the law required." Pet. App. A20.

The court of appeals also addressed two issues not presented here. First, on the government's cross-appeal, the court determined that petitioner was not eligible for sentencing under the "'safety-valve' provision" invoked by the district court, 18 U.S.C. 3553(f), and remanded for resentencing. Pet. App. A25. Second, petitioner argued that the proceedings against him conflicted with an appropriations rider, first enacted during his appeal, limiting the Department of Justice's use of certain funds to prevent California and other States from "implementing [their] own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Id. at A27 (quoting Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 537, 131 Stat. 228). In a prior case, the court of appeals had construed the appropriations rider to limit certain marijuana-related expenditures; here, the court directed the district court to consider on remand what effect, if any, the rider has on further proceedings in this case. Id. at A28-A29.

b. Judge Watford dissented. Pet. App. A29-A32. He would have granted petitioner a new trial on the basis of the district court's instruction regarding nullification. See ibid.

ARGUMENT

Petitioner contends (Pet. 13-29)[1] that the district court's curative instruction during voir dire, after a prospective juror responded to defense counsel's prompting by discussing jury nullification, was unduly coercive and that the court of appeals' approval of that instruction conflicts with the decisions of other courts. Petitioner also contends (Pet. 29-40) that the court of appeals erred in affirming the district court's decisions regarding petitioner's entrapment-by-estoppel defense. Neither of those contentions warrants this Court's review. The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. This case would also be an unsuitable vehicle to address the questions petitioner seeks to present. Accordingly, the petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that the district court's cautionary instruction to prospective jurors -- that "'[n]ullification is by definition a violation of the jury's oath'" and that it "'is not your determination whether the law is just or unjust'" -- "was entirely appropriate as a discharge of the court's own duty to forestall lawless conduct." Pet. App. A21

[1] All citations to the petition for a writ of certiorari are to the corrected version filed on April 15, 2019.

(citation omitted). That determination does not conflict with any decision of this Court or any other court of appeals.

a. The "federal courts have long noted the de facto power of a jury to render general verdicts 'in the teeth of both law and facts.'" United States v. Thomas, 116 F.3d 606, 615 (2d Cir. 1997) (quoting Horning v. District of Columbia, 254 U.S. 135, 138 (1920)). "However, at least since [this] Court's decision in Sparf v. United States, 156 U.S. 51, 102 (1895) (holding that, while juries are finders of fact, 'it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them'), courts have consistently recognized that jurors have no right to nullify." Ibid.; see United States v. Kerley, 838 F.2d 932, 938 (7th Cir. 1988) ("[J]ury nullification is just a power, not also a right."). "A jury has no more 'right' to find a 'guilty' defendant 'not guilty' than it has to find a 'not guilty' defendant 'guilty,' and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law." United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983) (per curiam). "Such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power." Ibid.

The courts of appeals have thus uniformly held that, "[w]hile juries have the power to ignore the law in their verdicts, courts have no obligation to tell them they may do so." United States v.

Edwards, 101 F.3d 17, 19-20 (2d Cir. 1996) (per curiam) (collecting cases); see, e.g., United States v. Sepulveda, 15 F.3d 1161, 1190 (1st Cir. 1993), cert. denied, 512 U.S. 1223 (1994); United States v. Dellinger, 472 F.2d 340, 408 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973). To the contrary, "'courts have the duty to forestall or prevent nullification, whether by firm instruction or admonition or . . . dismissal of an offending juror,' because 'it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence.'" United States v. Kleinman, 880 F.3d 1020, 1031 (9th Cir. 2017) (brackets omitted) (quoting Merced v. McGrath, 426 F.3d 1076, 1079-1080 (9th Cir. 2005), cert. denied, 547 U.S. 1036 (2006)), cert. denied, 139 S. Ct. 113 (2018); see also Thomas, 116 F.3d at 616.

The courts of appeals have approved jury instructions informing the jury of its duty to return a guilty verdict if warranted by the facts and law, or explicitly informing juries that they should not engage in nullification. For example, in United States v. Krzyske, 836 F.2d 1013 (6th Cir.), cert. denied, 488 U.S. 832 (1988), the court found no error when the district court, in response to a jury note, informed jurors that "[t]here is no such thing as valid jury nullification" and that it would "violate [the jurors'] oath and the law if [they] willfully brought in a verdict contrary to the law" as given by the court, id. at

1021; see also, e.g., United States v. Carr, 424 F.3d 213, 219–220 (2d Cir. 2005) (explaining that "[n]othing in our case law begins to suggest that the court cannot * * * tell the jury affirmatively that it has a duty to follow the law, even though it may in fact have the power not to"), cert. denied, 546 U.S. 1221 (2006); United States v. Bruce, 109 F.3d 323, 327 (7th Cir.) (approving an instruction that the jury "must not question any rule of law stated by [the judge]" and "must base [its] verdict on the law given") (citation omitted), cert. denied, 522 U.S. 838 (1997); United States v. Pierre, 974 F.2d 1355, 1357 (D.C. Cir. 1992) (per curiam) (finding that "it was proper for the district court to instruct the jury that it had a duty to find [the defendant] guilty if the government proved beyond a reasonable doubt every element of the offense with which he was charged"), cert. denied, 507 U.S. 1012 (1993).

In accord with that weight of authority, the court of appeals correctly determined that, in this case, the "district court's caution to the [prospective] jurors that they should not substitute their own sense of justice for their duty to find facts pursuant to the law was entirely appropriate as a discharge of the court's own duty to forestall lawless conduct." Pet. App. A21. The court of appeals also correctly determined that "the particular language chosen by the district court accurately stated the law." Ibid. Specifically, the district court properly informed the prospective

jurors that nullification is a violation of the juror's oath to apply the law as interpreted by the court. See, e.g., United States v. Fattah, 914 F.3d 112, 147 (3d Cir. 2019) ("[A] juror who * * * commits jury nullification violates the sworn jury oath and prevents the jury from fulfilling its constitutional role.") (citation omitted); see also Thomas, 116 F.3d at 616; Krzyske, 836 F.2d at 1021; United States v. Trujillo, 714 F.2d 102, 106 (11th Cir. 1983). The district court also accurately stated that a juror "cannot substitute [her] sense of justice * * * for [her] duty to follow the law" and that it is "not [a juror's] determination whether the law is just." Pet. App. A21; accord Kleinman, 880 F.3d at 1031-1032 (approving nearly identical language); cf. Bruce, 109 F.3d at 327 (finding that a jury was properly instructed that it "must not question any rule of law stated by [the judge]") (citation omitted).

b. Petitioner contends that the courts of appeals are divided on "whether and how a trial court may dissuade jurors from nullifying." Pet. 15 (emphasis omitted). In particular, petitioner asserts that the First and D.C. Circuits "have held that trial judges must refrain from instructing on nullification." Pet. 17. But the two decisions he identifies did not adopt such a categorical rule, and neither decision suggests that those courts would disapprove of the instruction given in this case.

In Sepulveda, the First Circuit affirmed an instruction that a district court gave after the jury sent a note during its deliberations asking the court to "[c]larify the law on jury nullification." 15 F.3d at 1189 (brackets in original). In that instruction, the district court told the jury that "[f]ederal trial judges are forbidden to instruct on jury nullification." Ibid. The court then repeated its earlier instructions on the burden of proof, which included the admonishment that "if the Government proves its case against any defendant, you should convict that defendant." Id. at 1189-1190; see ibid. (district court's statement that "[i]f [the government] fails to prove its case against any defendant you must acquit that defendant"). The First Circuit rejected the defendants' argument that the instruction was in effect "a judicial prohibition against the jury's use of its inherent power" to nullify, explaining that it was "an accurate recitation of the law." Id. at 1190. Nothing in that decision indicates that the First Circuit would disapprove of the instruction in this case. In particular, the fact that the First Circuit found that the instruction there had "no * * * chilling effect," ibid. -- and therefore that the defendants' argument about a "chilling effect" failed -- does not suggest that the First Circuit would find the district court's instruction here to be inappropriately chilling or would otherwise disapprove of it.

As to the D.C. Circuit, that court has long recognized that a jury has no right to engage in nullification and that "[s]uch verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power." Washington, 705 F.2d at 494. In United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972), "the court approved of instructions that 'never [told] * * * the jury in so many words that it must convict,' in the course of observing that defendants are not entitled to a jury nullification instruction." Carr, 424 F.3d at 221 n.3 (quoting Dougherty, 473 F.2d at 1135). But to whatever extent that decision might be read to support petitioner's argument here, the D.C. Circuit "later held squarely that juries may be instructed on their duty to convict upon a finding of guilt beyond a reasonable doubt." Ibid. (citing Pierre, 974 F.2d at 1357) (emphasis added).

Petitioner also contends (Pet. 19-23) that the decision below conflicts with decisions of two state courts of last resort. But none of the decisions he identifies purported to rest on an interpretation of federal law. Thus, no conflict would exist for this Court to resolve even if the state courts had adopted a rule against "anti-nullification" instructions. Sup. Ct. R. 10(b). In any event, the decisions did not adopt such a firm rule. See State v. Bonacorsi, 648 A.2d 469, 470-471 (N.H. 1994) (finding no error where the trial court twice instructed the jury that it "may" convict the defendant if it found that the government carried its

burden of proof, while declining to give a more specific instruction on nullification); State v. Richards, 531 A.2d 338, 342 (N.H. 1987) (per curiam) (finding no reversible error where the trial court "took upon itself the task of telling the jury of its nullification power" and "explain[ed] the law correctly"); cf. State v. Smith-Parker, 340 P.3d 485, 506-507 (Kan. 2014) (disapproving of an instruction on reasonable doubt that came "too close to * * * directing a verdict for the State" and thus "essentially forbade the jury from exercising its power of nullification").[2]

Like the dissenting judge below (Pet. App. A30), petitioner suggests that the Ninth Circuit itself previously "disapproved of an anti-nullification instruction" similar to the one given here. Pet. 16 n.3 (citing Kleinman, 880 F.3d at 1031-1033). As the court of appeals explained, however, its prior decision in Kleinman in fact "explicitly recognized that" an instruction like a portion of the one challenged by petitioner is "generally permissible." Pet. App. A21. As the court further explained, the precise language it had found to be problematic in Klienman did not appear in the instruction given here. Ibid.; see Kleinman, 880 F.3d at 1032

[2] In Smith-Parker, the Supreme Court of Kansas concluded that an instruction on alternative theories of liability "contained a misstatement of law with respect to reasonable doubt," where the instruction stated that jurors "will enter a verdict of guilty" if the government carried its burden of proof. 340 P.3d at 506. That decision, however, did not address a trial court's authority to caution against nullification in an appropriate case.

(disapproving of statements the court of appeals viewed as implying that "jurors could be punished for jury nullification" or than "an acquittal resulting from jury nullification is invalid"). In any event, the court of appeals is fully capable of resolving any tension between Kleinman and the decision below in a future case, if necessary. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

c. This case would in any event be an unsuitable vehicle for addressing any question about the general propriety of an instruction that juries must follow the law. The court of appeals here found the "caution was * * * particularly justified because it occurred on the second day of [petitioner's] counsel's asking questions suggestive of nullification, and after the [district] court's explicit admonishment to [his] lawyer not to ask such impermissible questions." Pet. App. A22. The court of appeals thus viewed the caution as effectively invited by petitioner. Ibid. Petitioner does not suggest that he has a right to a pro-nullification instruction, see Pet. 25 & n.6, and this case does not provide an occasion to consider when, if ever, a caution about nullification might be improper in the absence of suggestive conduct by defense counsel.

2. The court of appeals also correctly affirmed the district court's denial of an entrapment-by-estoppel defense on

the charges of distributing marijuana to minors. Pet. App. A10, A17-A20. The court of appeals' factbound determination does not conflict with any decision of this Court or any other court of appeals and does not warrant this Court's review.

a. Any defense of entrapment by estoppel "is a narrow exception to the general principle that ignorance of the law is no defense." United States v. Etheridge, 932 F.2d 318, 321 (4th Cir.), cert. denied, 502 U.S. 917 (1991). Such a defense could be available only where a responsible government official actively misleads a defendant into believing that certain conduct is legal and the defendant reasonably relies on those misleading statements. See United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655, 674-675 (1973) (PICCO); Cox v. Louisiana, 379 U.S. 559, 571 (1965); Raley v. Ohio, 360 U.S. 423, 425-426 (1959). As petitioner recognizes, to support the defense, the "relied-upon assurance cannot be 'vague or even contradictory.'" Pet. 33 (quoting Raley, 360 U.S. at 438). Instead, the government official must have engaged in "active misleading." Raley, 360 U.S. at 438.

The court of appeals correctly rejected petitioner's argument for application of the defense here. Petitioner testified that, in a September 2005 call with a representative of the DEA, petitioner asked "what you guys are going to do about all of these medical marijuana dispensaries around the State of California," and the DEA representative purportedly told him that "it was up to

the cities and counties to decide how they wanted to handle the matter." Pet. App. A17; see pp. 5-6, supra. The court correctly determined that the "vagueness and ambiguity" of that statement "did not allow it to serve as a basis for a claim of entrapment by estoppel." Pet. App. A19. Even by petitioner's own account, no federal official told him that "he could violate federal law" or that his "proposed activities were legal." Id. at A18. The court thus found that the statement was not the kind of "clear sanction that entrapment by estoppel requires." Ibid. The court also correctly determined that an entrapment-by-estoppel defense was not supported by the facts of this case for the separate reason that "any reliance on the statement was clearly unreasonable." Id. at A19. The evidence showed that petitioner had been "actively following developments of marijuana law"; that he was told (repeatedly) by local officials that the distribution of marijuana remained illegal under federal law; that he had read on the DEA's website that marijuana remained "illegal under federal law"; and that his own business distributed forms stating that "Federal Law prohibits Cannabis." Ibid. At a minimum, it was unreasonable for petitioner to proceed to run a multi-million dollar marijuana business based on a short, non-specific conversation with a DEA employee whose name and position he did not know (or at least failed to record), without even attempting to follow up or seek more detailed guidance.

b. Petitioner contends (Pet. 29-38) that the decision below conflicts with prior decisions of this Court and three other circuits because the decision below required that the "official misleading" be "express" rather than "implicit" to support an entrapment-by-estoppel defense. That contention is unsound.

The decision below did not turn an any putative distinction between "express" and "implicit" assurances. The court of appeals instead relied on well-established precedent that the defense of entrapment by estoppel is available only if an official "affirmatively told the defendant the proscribed conduct was permissible." Pet. App. A18 (brackets and citation omitted). Although the court noted that "[e]ven if [petitioner] took the statement as implicit authorization for his actions, this is not the same as saying that the statement was an affirmative and unambiguous grant of permission," ibid., the court did not hold that implicit assurances can never establish the defense. Rather, the court simply determined that in this particular case, "[t]he vagueness and ambiguity" of the statement precluded the defense. Id. at A19.

By contrast, the affirmative misrepresentations in Raley, Cox, and PICCO (cited at Pet. 30-33) were neither vague nor ambiguous. Raley, for example, involved the State of Ohio "convicting a citizen for exercising a privilege [against self-incrimination] which the State clearly had told him was available

to him." 360 U.S. at 426. Three of the defendants were expressly told that they were entitled to invoke their privilege against self-incrimination. Id. at 430-431. A fourth was "never told . . . in so many words" that the privilege was available, but the government's statements and "actions were totally inconsistent with a view on its part that the privilege against self-incrimination was not available." Pet. 33-34 (quoting Raley, 360 U.S. at 430, 431-432). Here, the unnamed DEA representative did not, even on petitioner's version of events, "obviously g[i]ve the * * * impression" that petitioner's conduct -- a complicated business enterprise about which he provided almost no detail -- was legal. Raley, 360 U.S. at 437.

Cox likewise involved unambiguous representations to the defendants that their demonstration across the street from a courthouse was permitted. Cox, 379 U.S. at 569–570. The "record * * * clearly show[ed] that the officials present gave permission for the demonstration." Id. at 569. The defendant's testimony that he was given "permission to conduct the demonstration" was "corroborated" by government witnesses, including the sheriff, who told the defendant that "you have been allowed to demonstrate" and that the sheriff had "no objection" to the demonstration if confined to a certain area. Id. at 569-570 (citation and quotation marks omitted). Indeed, the State "conceded" that "permission had been granted to demonstrate." Ibid.

The representations at issue in PICCO were even clearer. There, it was "undisputed" that the agency charged with administering the statute in question had, in "published regulation[s]," "consistently construed" the statute to permit the defendant's conduct. 411 U.S. at 672-673. In light of that "longstanding administrative construction" of the statute, this Court determined that the district court had erred in "refus[ing] to permit PICCO to present evidence in support of its claim that it had been affirmatively misled into believing that the discharges in question were not a violation of the statute." Id. at 673, 675.

The court of appeals' factbound determination that the vague statement here could not support an entrapment-by-estoppel defense turned on the particular evidence in this case, not on any broad conclusion about "implicit" or "express" government assurances. The result below is consistent with not only Raley, Cox, and PICCO, but also the circuit decisions petitioner identifies (Pet. 35-38). None of those decisions suggests that another court of appeals would have permitted the defense of entrapment by estoppel on these facts. To the contrary, each one required the kind of active misleading that the court found to be lacking here. See United States v. Alba, 38 Fed. Appx. 707, 709 (3d Cir. 2002) (affirming the district court's refusal to permit a defense of entrapment by estoppel where the defendant "failed to demonstrate that a

government official told him that he could reenter the United States without first writing to obtain permission") (emphasis added); United States v. Aquino-Chacon, 109 F.3d 936, 939 (4th Cir.) (similar; reasoning that an immigration form "did not affirmatively assure [the defendant] that reentry without permission was lawful") (emphasis added), cert. denied, 522 U.S. 931 (1997); United States v. Abcasis, 45 F.3d 39, 42-45 (2d Cir. 1995) (reversing and remanding where the district court failed to permit an entrapment-by-estoppel defense, in light of the "undisputed" evidence that DEA agents had "previously authorized the defendants to engage in narcotics transactions as informants" and the defendants "reasonably relied on that encouragement or assurance in believing they were once again authorized to participate in a narcotics transaction as informants").

c. In any event, this case would be an unsuitable vehicle in which to address the entrapment question.

First, the court of appeals found that an entrapment-by-estoppel defense was unsupported by the facts of this case for the independent reason that "any reliance on the statement was clearly unreasonable." Pet. App. A19; see pp. 10-11, 22, supra; cf. PICCO, 411 U.S. at 675 (noting that the court must decide whether "there was in fact reliance" on the government's misrepresentations, and "if so, whether that reliance was reasonable under the circumstances"). Thus, resolution of the question presented in

petitioner's favor would have no effect on the outcome of this case.

Petitioner argues (Pet. 13 n.2) that this alternative holding was "premised in part" on the aspect of the decision that he challenges in the petition. The court of appeals made clear, however, that it viewed the two issues as independent and alternative bases to reject the entrapment-by-estoppel defense on these facts. See Pet. App. A19 ("[E]ven to the extent that [petitioner] might have (improperly) understood the statement to be an affirmative authorization, any reliance on the statement was clearly unreasonable.") (emphasis added).

Second, any error was harmless. See Fed. R. Crim. P. 52(a). Petitioner was allowed to raise an entrapment-by-estoppel defense as to three of the charges against him, and the jury nonetheless found him guilty beyond a reasonable doubt. Pet. App. A10. Petitioner identifies no reason to think the result would have been any different had the district court permitted him to also raise the same defense -- based on the same purported statement from an unnamed DEA representative -- to the two charges of distributing marijuana to a minor. Indeed, even assuming the putative conversation were sufficiently germane to the specific conduct of distribution to minors to justify an entrapment-by-estoppel defense, the jury would be even less likely to conclude

that (if it happened at all) it provided an adequate assurance that such conduct was lawful.

3. Finally, the petition should be denied because the case comes to the Court in an interlocutory posture. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." Virginia Military Inst. v. United States, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari); see Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam). In addition to remanding for resentencing, the court of appeals also instructed the district court to address on remand petitioner's argument regarding the appropriations rider. See p. 11, supra. Those proceedings are ongoing at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2019