Nos. 14-798 and 14-7954

In the Supreme Court of the United States

DEANGELO MCLAURIN, PETITIONER

v.

UNITED STATES OF AMERICA

NICHOLAS LOWERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court gave a proper supplemental instruction on entrapment after the jury asked for clarification of the term "inducement."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Statutes—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-44)[1] is published at 764 F.3d 372. A previous opinion of the court of appeals is not published in the *Federal Reporter* but is reprinted in 466 Fed. Appx. 298.

[1] Citations to Pet. App. are to the appendix to the petition for a writ of certiorari filed in No. 14-798.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2014. A petition for rehearing was denied on September 19, 2014 (Pet. App. 73). Petitioner Lowery filed a petition for a writ of certiorari on December 18, 2014. On December 2, 2014, the Chief Justice extended the time for petitioner McLaurin to file a petition for a writ of certiorari to and including January 8, 2015. McLaurin filed his petition for a writ of certiorari on January 6, 2015. Both petitioners invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of North Carolina, both petitioners were convicted on one count of conspiracy to violate the Hobbs Act, in violation of 18 U.S.C. 1951(a); one count of conspiracy to possess with intent to distribute five or more kilograms of cocaine, in violation of 21 U.S.C. 841(b)(1)(A) and 846; and one count of conspiracy to use or carry a firearm during and in relation to a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. 924(*o*). Pet. App. 9-10, 75. Petitioner McLaurin was also convicted on two counts of being a previously convicted felon in possession of a firearm, in violation of 18 U.S.C. 922(g). Pet. App. 10, 74, 76. McLaurin was sentenced to concurrent terms of 151 months of imprisonment on the conspiracy and drug counts, and 120 months of imprisonment on the firearms counts, to be followed by three years of supervised release on the conspiracy and firearms counts and a concurrent term of five years of supervised release on the drug count. *Id.* at 10, 77. Petitioner Lowery was sen-

tenced to 168 months of imprisonment, to be followed by three years of supervised release on the conspiracy counts and a concurrent term of five years of supervised release on the drug count. *Id.* at 10; 2 C.A. J.A. 1004-1005. The court of appeals affirmed petitioners' convictions, but vacated McLaurin's sentence and remanded for resentencing. Pet. App. 1-32.

1. In 2011, a confidential informant introduced McLaurin to an undercover police officer. Pet. App. 3. During two meetings over three days, McLaurin sold the officer a .38 caliber revolver and a sawed-off shotgun. *Ibid.* Following the firearms transactions, the confidential informant identified McLaurin as a potential target for a reverse sting operation in which law enforcement officers provide willing individuals with the opportunity to rob a supposed drug stash house. *Id.* at 3-4. The confidential informant subsequently introduced McLaurin to two different undercover officers who posed as disgruntled couriers for a Mexican drug-trafficking organization and expressed an interest in stealing drugs from a stash house supposedly used by that organization. *Id.* at 4. One of the undercover officers—Special Agent Shawn Stallo of the Bureau of Alcohol, Tobacco, Firearms, and Explosives—told McLaurin that he was looking for someone to rob the stash house, and McLaurin expressed an interest in performing the job. *Id.* at 4-5. Agent Stallo made clear to McLaurin that McLaurin did not have to participate in the robbery and told him to take a few days to consider whether he wanted to be a part of it. *Id.* at 5. McLaurin assured Agent Stallo that he was "good with it" and said he would be in touch. *Ibid.*

Approximately two weeks later, Agent Stallo called McLaurin after Agent Stallo was unable to reach the confidential informant to ascertain whether McLaurin had expressed an interest in participating in the proposed robbery. Pet. App. 5-6. McLaurin returned Agent Stallo's message within minutes and the two agreed to meet the following day to discuss further plans for the robbery. *Id.* at 6. McLaurin informed Agent Stallo that he would bring to the meeting an associate who would also participate in the robbery. *Ibid.* McLaurin brought Lowery to the meeting and together petitioners described in detail how they would conduct the robbery, including the weapons they would use, as well as how they would distribute the drugs they planned to steal from the stash house. *Ibid.* During that meeting, Lowery stated that the potential consequences of participating in the robbery included "[g]etting killed, going to prison, or killing another" person. *Id.* at 6-7. Lowery continued that "if you ain't willing to accept those consequences," and McLaurin interjected, "[d]on't get involved." *Id.* at 7. As the meeting concluded, Agent Stallo reiterated that if petitioners did not want to go through with the robbery, they should forget about him and the plan. *Ibid.*

Nearly two weeks later, the undercover officers met with petitioners again to go over the details of the planned stash house robbery. Pet. App. 7. At the meeting, petitioners confirmed their commitment to the plan and Lowery mentioned purchasing an assault rifle for the robbery. *Ibid.* In the ensuing days, Agent Stallo gave McLaurin a specific date for the robbery and stated that he would call McLaurin with the location of the stash house. *Ibid.*

The undercover officers arranged to meet petitioners at a gas station on the date set for the robbery and the meeting took place as scheduled. Pet. App. 7-8. Petitioners then followed the officers to the supposed stash house where Agent Stallo arrested petitioners. *Id.* at 8.

2. A federal grand jury in the Western District of North Carolina indicted petitioners on one count of conspiracy to violate the Hobbs Act, in violation of 18 U.S.C. 1951(a); one count of conspiracy to possess with intent to distribute five or more kilograms of cocaine, in violation of 21 U.S.C. 841(b)(1)(A) and 846; and one count of conspiracy to use or carry a firearm in furtherance of a crime of violence or drug trafficking crime, in violation of 18 U.S.C. 924(*o*). McLaurin, who had prior felony convictions for common-law robbery, was also charged with two counts of being a convicted felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1).[2] Pet. App. 9-10, 75.

At trial, both petitioners presented an entrapment defense. Pet. App. 10. Lowery's counsel asserted in his opening argument that "[t]his was all a fantasy, contrived, started, initiated and carried forward by federal agents acting undercover." 1 C.A. J.A. 127. McLaurin's counsel added that law enforcement "ma[d]e up the drug quantity as well." *Id.* at 128.

Defense counsel elaborated on the entrapment theme at closing argument. As Lowery's counsel explained, petitioners "would not be sitting here today

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[2] Lowery was also charged with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Pet. App. 10. That count, which stemmed from an unrelated incident, was later severed from the indictment and was ultimately dismissed on the government's motion. *Ibid.*; 1 C.A. J.A. 16-17.

but for government agents starting this thing, putting this thing in motion saying, come on, * * * , we invite you in." 2 C.A. J.A. 590. Counsel continued, "the government wants you to convict [petitioner] Lowery of a conspiracy to go out and commit a crime on a scenario that didn't exist. * * * But there's no house. There's no firearms. There's no drugs. There's no Mexicans. There's nothing. This is all a fantasy in the mind of the federal agents." *Id.* at 592. McLaurin's counsel echoed Lowery's: "The government's in the business of protecting fictitious Mexican drug dealers. * * * They made up the story about the Mexican drug dealers. They made up the story about the drugs, this pure cocaine that you never saw." *Id.* at 596. The government countered that even though "this was a sting by law enforcement," the conspiracy crimes committed by petitioners were "real." *Id.* at 608.

The district court determined that petitioners had presented sufficient evidence of entrapment to entitle them to a jury instruction on that affirmative defense. Consistent with this Court's decision in *Mathews* v. *United States*, 485 U.S. 58, 63 (1988), and without objection from petitioners, the district court instructed the jury that the elements of the affirmative defense of entrapment are government inducement and lack of predisposition. Pet. App. 11-12; 2 C.A. J.A. 615-617. During its deliberations, the jury submitted a note to the court requesting clarification of several terms, including "entrapment" and "inducement." Pet. App. 12, 60.

To respond to the jury's question about the meaning of "inducement," the district court suggested relying on the definition of that term set forth in *United*

States v. *Hsu*, 364 F.3d 192, 198 (4th Cir. 2004). Pet. App. 62. McLaurin's counsel objected that that definition was too favorable to the government while Lowery's counsel stated that he had no objection. *Id.* at 62-68. The district court, considering itself bound by *Hsu*, overruled McLaurin's objection and informed the jury that: "[I]nducement requires more than mere solicitation by the government. Inducement is a term of art necessitating government overreaching and conduct sufficiently excessive to implant a criminal design in the mind of an otherwise innocent party." *Id.* at 12 (emphasis omitted), 70-71. Thereafter, the jury found both petitioners guilty on all the counts, 2 C.A. J.A. 938-941, and the court imposed sentences of imprisonment, Pet. App. 10.

3. a. The court of appeals affirmed petitioners' convictions, but vacated McLaurin's sentence and remanded for resentencing. Pet. App. 1-32. As relevant here, the court rejected petitioners' argument that the district court erred in giving the supplemental instruction on inducement. *Id.* at 10-13.[3] In particular, the court rejected petitioners' argument that the supplemental instruction "improperly permitted the jury to reject the entrapment defense based on a non-factual, value-laden determination that the

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[3] In the court of appeals, the government argued that Lowery had waived his objection to the instruction in question by explicitly agreeing to it. Gov't C.A. Br. 46. The government further argued that McLaurin's argument was "subject to plain error review" because McLaurin "did not challenge the legality of the instruction before the district court." *Ibid.* The court of appeals reviewed McLaurin's argument de novo, Pet. App. 10-11, and noted that it did not need to decide whether Lowery had waived his objection because it found no error in the supplemental instruction, *id.* at 13 n.1.

government had not overreached, without ever considering the core issue of an entrapment defense—predisposition." *Id.* at 13. The court held that the initial "unobjected-to general entrapment instructions * * * made it clear to the jury that an entrapment defense * * * could be rejected on either the inducement prong or the predisposition prong" and that the supplemental instruction on inducement "did not remove the predisposition element from the jury's consideration any more than the agreed-upon general instructions did." *Ibid.* The court explained that "the supplemental instruction simply elaborated on the circumstances that can be considered inducement, and did so in a manner consistent with the law of this circuit." *Ibid.* (citing *United States* v. *Daniel*, 3 F.3d 775, 778 (4th Cir. 1993), cert. denied, 510 U.S. 1130 (1994)).[4]

b. McLaurin (but not Lowery) filed a petition for rehearing en banc on the joinder issue. Pet. for Reh'g 1-15. The court of appeals denied that petition. Pet. App. 73.

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[4] The court of appeals also rejected petitioners' evidentiary arguments and McLaurin's challenge to the joinder of the felon-in-possession counts with the conspiracy counts. Pet. App. 14-30. Petitioners do not reassert those arguments in their petitions for writs of certiorari. The court of appeals did hold that the district court had committed reversible plain error in computing McLaurin's advisory sentencing range under the Sentencing Guidelines. *Id.* at 30-32. Accordingly, the court vacated McLaurin's sentence and remanded for resentencing. *Id.* at 32. Judge Floyd filed an opinion concurring in part and dissenting in part. *Id.* at 33-44. As relevant here, he agreed in full with the majority's opinion affirming the district court's use of the supplemental entrapment instruction. *Id.* at 33.

ARGUMENT

Petitioners argue (14-798 Pet. 14-17; 14-7954 Pet. 5-8) that the court of appeals erred in rejecting their challenge to the district court's supplemental entrapment instruction. Further review is not warranted because the court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals.

1. The affirmative defense of entrapment involves two related elements: (1) government inducement of the crime, and (2) a lack of predisposition on the part of a defendant. *Mathews* v. *United States*, 485 U.S. 58, 62-63 (1988). This Court has explained that the element of predisposition "focuses upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime." *Id.* at 63 (quoting *Sherman* v. *United States*, 356 U.S. 369, 372 (1958)). A traditional entrapment defense stems from the proposition that "Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them by the Government." *United States* v. *Russell*, 411 U.S. 423, 435 (1973). When the government has induced a person to break the law and the defendant alleges entrapment, "the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." *Jacobson* v. *United States*, 503 U.S. 540, 548-549 (1992). At the same time, "evidence that Government agents merely afforded an opportunity or facilities for the commission of the crime" to which the defendant was otherwise predisposed "would be insuf-

ficient to warrant" instructing the jury on entrapment. *Mathews*, 485 U.S. at 66.

Petitioners do not contest that the district court correctly instructed the jury on the standard elements of entrapment. Petitioners instead challenge the supplemental instruction the district court gave in response to the jury's request for a definition of the term "inducement." Their arguments lack merit because the district court's entrapment instruction—including its supplemental instruction on the meaning of "inducement"—was correct and consistent with this Court's precedents.

Petitioners focus on three words ("necessitating government overreaching") out of the two-sentence definition of "inducement," ignoring the context of both the surrounding words and the initial entrapment instruction. McLaurin argues (Pet. 14-16) that, by including a reference to "government overreaching" in the definition, the district court contravened this Court's instruction "that the entrapment defense focuses principally on the defendant's lack of predisposition to commit the crime" and instead focuses too much on the government's conduct. Lowery suggests (Pet. 6) that, by referencing government overreaching in the supplemental instruction, the district court asked the jury to make "a moral decision about the government's conduct, or whether the government's behavior was normatively wrong" rather than determining whether government agents did more than provide the defendants with the opportunity to commit a crime. Neither contention is correct.

When read in context, the reference to "government overreaching" in the supplemental instruction correctly informed the jury about the legal test for

entrapment as established by this Court. The supplemental instruction on inducement stated in full:

> You asked for further clarification on the term "inducement". And the law defines inducement, the first element, inducement requires more than mere solicitation by the government. Inducement is a term of art necessitating government overreaching and conduct sufficiently excessive to implant a criminal design in the mind of an otherwise innocent party.

2 C.A. J.A. 925-926. The supplemental instruction did not, as petitioners assert, inform the jury that it could find inducement only if it concluded that the government had overreached in the sense of behaving in a morally corrupt manner. The district court's instruction made clear that the only type of government overreaching relevant to the entrapment defense is "government overreaching and conduct sufficiently excessive to implant a criminal design in the mind of an otherwise innocent party." *Id.* at 926. When the reference to government overreaching is read in the context of the sentence in which it appears—as it must be—no doubt remains that the focus of the jury's inquiry remained whether the government had implanted a criminal design in the mind of an otherwise innocent party. That inquiry is precisely the sort this Court has held is the proper inquiry when a defendant raises an entrapment defense. See, *e.g.*, *Jacobson*, 503 U.S. at 548-549; *Mathews*, 485 U.S. at 63.

Petitioners would have this Court focus on isolated words in the supplemental instruction without consideration of the context. "But this is not the way we review jury instructions, because 'a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'"

United States v. *Park*, 421 U.S. 658, 674 (1975) (quoting *Cupp* v. *Naughten*, 414 U. S. 141, 146-147 (1973)). As the court of appeals correctly concluded, the "unobjected-to general entrapment instructions * * * made it clear to the jury that an entrapment defense consists of two elements and that the defense could be rejected on either the inducement prong or the predisposition prong." Pet. App. 13. In particular, the district court instructed the jury that, "where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, that person is a victim of entrapment, and the law as a matter of policy forbids that person's conviction in such a case." 2 C.A. J.A. 615-616. The district court further instructed the jury that, "if the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the government, then it is your duty to find the defendant not guilty." *Id.* at 616. Viewed as a whole, both the supplemental instruction alone and the entire set of entrapment instructions accurately conveyed that the jury should not convict petitioners if it found that they were not predisposed to commit criminal acts. The instructions were fully consistent with this Court's entrapment jurisprudence, including its longstanding recognition that government sting operations are a legitimate tool of law enforcement as long as they serve as a "trap for the unwary criminal" rather than a "trap for the unwary innocent." *Sherman*, 356 U.S. at 372; see *Jacobson*,

503 U.S. at 548-549; *Mathews*, 485 U.S. at 63; *Russell*, 411 U.S. at 428-429.[5]

2. Petitioners also err in arguing (14-798 Pet. 9-14; 14-7954 Pet. 8-9) that the court of appeals' decision conflicts with the decisions of other courts of appeals construing the entrapment defense. Their assertions of a conflict are premised on their failure to acknowledge that the district court's supplemental instruction defined the scope of relevant government overreach as actions that are "sufficiently excessive to implant a criminal design in the mind of an otherwise innocent party." Pet. App. 12.

McLaurin contends that the decision below conflicts with decisions of the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, none of which "require[s] the jury to find that the government's conduct was wrongful" in order to find entrapment. Pet. 10. Those other circuits, McLaurin argues, "require a jury considering the entrapment defense to focus on the defendant's predisposition to commit the crime, not on the propriety of the Government's conduct." *Ibid.* But the same is true of the Fourth Circuit in this case. As discussed above, the district court did not instruct the jury that it could accept the entrapment defense if it found the government's conduct to be morally wrong. The instruction unambiguously specified that the type of government overreaching that would justify a finding of entrapment is conduct that would "implant a criminal design in the mind of an otherwise innocent party." Pet. App. 12.

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[5] Petitioners do not appear to challenge the sufficiency of the evidence to prove that they were predisposed to commit the criminal acts in question.

McLaurin's contention (Pet. 12-13) that the decision below conflicts with decisions of the First Circuit also lacks merit. He contends that the First Circuit's pattern instruction instructs a jury to find entrapment if "the government's conduct was 'improper' but gives specific examples of 'improper.'" Pet. 12. That pattern instruction, McLaurin argues, "does not leave jurors to undertake" the inducement "inquiry in a vacuum or based on their individual sense of right and wrong." Pet. 13. But the district court in this case also provided guidance: it defined the type of government misconduct (or overreach) that would support an entrapment defense as conduct that would cause an otherwise innocent party to engage in criminal activity. Pet. App. 12. That instruction is consistent with entrapment instructions in every other court of appeals. Even McLaurin admits (Pet. 11) that differences in the wording of instructions from circuit to circuit do not create a conflict if the different instructions convey the same substance to jurors.

McLaurin is therefore correct that in all circuits a jury "must accept an entrapment defense if the defendant lacked predisposition to commit the crime when first approached by government agents," even if the agents "did not overreach or act wrongfully in conducting the sting." Pet. 12. The same was true in this case. The district court instructed the jury that when "a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, that person is a victim of entrapment." Pet. App. 11. The court of appeals' decision is thus consistent with the unanimous rule that a defendant's predisposition to commit a crime renders an entrap-

ment defense unavailable to him. See *Hampton* v. *United States*, 425 U.S. 484, 490 (1976) (opinion of Rehnquist, J.); see also *United States* v. *Mayfield*, 771 F.3d 417, 433 (7th Cir. 2014) (en banc) ("[T]he quantum of inducement necessary to raise the [entrapment] defense does not vary depending on whether the defendant was predisposed because *no* level of inducement can overcome a finding of predisposition."); *United States* v. *Myers*, 575 F.3d 801, 805 (8th Cir. 2009) (defendant can successfully raise an entrapment defense only if "the defendant was not predisposed to commit the crime independent of the government's activities") (quoting *United States* v. *Kurkowski*, 281 F.3d 699, 701 (8th Cir.), cert. denied, 537 U.S. 854 (2002)). Contrary to McLaurin's contention (Pet. 14), juries in every circuit—just like the jury in this case—must acquit a defendant who was induced by the government to engage in criminal activity if the jury finds that the defendant was not predisposed to commit criminal acts.

Lowery's brief assertion (Pet. 8-9) of a circuit conflict is unfounded for the same reasons. He contends that no other circuit "require[s] the jury to make a moral decision about whether the government's conduct was 'overreaching.'" Pet. 9. For the reasons set forth above, his contention is premised on a mischaracterization of the jury instructions below and does not provide a reason for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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