16-4159

To Be Argued By:
ANDREA L. SURRATT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 16-4159

UNITED STATES OF AMERICA,

Appellee,

—v.—

VIRGIL FLAVIU GEORGESCU,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

JOON H. KIM,
Acting United States Attorney for the Southern District of New York,
Attorney for the United States of America.
One St. Andrew's Plaza
New York, New York 10007
(212) 637-2200

ANDREA L. SURRATT,
ILAN GRAFF,
KARL METZNER,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases:

PAGE

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Preliminary Statement

Virgil Flaviu Georgescu ("Georgescu") appeals from a judgment of conviction entered on May 27, 2016 in the United States District Court for the Southern District of New York, by the Honorable Ronnie Abrams, United States District Judge, following a ten-day jury trial.

Indictment 14 Cr. 799 (RA) (the "Indictment") was filed on December 3, 2013, in two counts. Count One charged Georgescu and his two co-defendants with conspiracy to murder officers and employees of the United States, in violation of Title 18, United States Code, Section 1117. Count Two charged Georgescu and his co-defendants with conspiracy to provide material

support to a terrorist organization, in violation of Title 18, United States Code, Section 2339B.

Trial against Georgescu began on May 11, 2016 and ended on May 25, 2016, when the jury found Georgescu guilty of both counts of the Indictment. On December 6, 2016, Judge Abrams sentenced Georgescu principally to 120 months' imprisonment to be followed by three years' supervised release.

Georgescu is currently serving his sentence.

Statement of Facts

A. The Government's Case

Virgil Flaviu Georgescu led a months-long conspiracy to provide military-grade weapons to the *Fuerzas Armadas Revolucionarias de Colombia* (the "FARC"), a notoriously violent designated foreign terrorist organization. (A. 30; PSR ¶ 12). Georgescu recruited co-conspirators to further his effort to acquire and sell more than $15 million worth of guns, grenades, and other weapons to the FARC. Georgescu and his co-defendants traveled to seven countries, meeting with weapons suppliers, test-firing weapons, negotiating prices, and securing fake documents to make the weapons deal appear legitimate. Unbeknownst to Georgescu and his co-conspirators, however, the supposed FARC representatives with whom he had been negotiating were in fact confidential sources ("CSs") working at the direction of the Drug Enforcement Administration ("DEA").

1. Georgescu's Introduction to CS-1 and Initial Efforts to Obtain Weapons for the FARC

Georgescu first learned of the FARC's purported need for weapons in 2012, when one of the CSs ("CS-1") was introduced to a Southern California resident named Andi Georgescu ("Andi"). (Tr. 177, 181).[1] During the years of their acquaintance, CS-1 represented himself to Andi as a Colombian drug trafficker, money launderer, and weapons broker. (Tr. 101). In 2012, a DEA agent pretending to be CS-1 provided Andi with a detailed list of weapons that CS-1 was attempting to procure, including shoulder-fired rockets, grenades, sniper rifles, and ammunition (the "Weapons List"). (Tr. 181). In May 2014, Andi introduced CS-1 via telephone to Georgescu, whom Andi explained to CS-1 had direct contact with weapons suppliers. (Tr. 176; PSR ¶ 18). In recorded phone calls, CS-1 told Georgescu that he worked for the FARC and hoped to procure weapons for his organization. Georgescu said that he could help, and repeatedly urged CS-1 to communicate only via encrypted mobile applications to ensure that communications regarding the weapons deal would not be intercepted. (Tr. 177, 187). On subsequent calls

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[1] "Tr." refers to the trial transcript; "Sen. Tr." refers to the sentencing transcript; "GX" refers to a Government trial exhibit; "PSR" refers to the Presentence Investigation Report; "A." refers to the appendix filed with Georgescu's appeal brief; "Br." refers to Georgescu's appeal brief; and "Add." refers to the addendum to this brief.

with CS-1, Georgescu became very agitated when CS-1 spoke openly about the proposed arms deal, without the benefit of encryption. (Tr. 189).

Meanwhile, Georgescu began attempting to procure the weapons for the FARC. Through a mutual acquaintance, Georgescu contacted eventual co-defendant Cristian Vintila, who had contacts in the weapons industry by virtue of his former employment as a high-ranking official in the Romanian government. (Tr. 552-53; PSR ¶ 19). Georgescu came to Vintila's house in Romania and displayed for Vintila a list of weapons and ammunition that Georgescu sought to procure. (Tr. 553). After installing an encrypted communication application on Vintila's phone, Georgescu sent the weapons list to Vintila. (Tr. 554). Vintila agreed to help Georgescu procure weapons for the Colombians, and Vintila began canvassing his weapons contacts in Romania, Russian, and Ukraine. (Tr. 560). With Vintila's help, Georgescu put one of Vintila's Ukrainian weapons contacts—a man named Gintas Barauskas—in telephonic contact with CS-1 so that CS-1 could discuss the FARC's weapons needs directly with the supplier. (Tr. 190-91, 561; PSR ¶ 19). In particular, Georgescu passed to Vintila the phone number of Georgescu's FARC contact—CS-1—so that CS-1 and Barauskas could discuss the FARC's weapons needs. (Tr. 562).

2. The First Bucharest Meeting

After they were introduced by phone, Georgescu and CS-1 continued to discuss the weapons deal. Even-

tually, they agreed to meet in person and, on September 23, 2014, CS-1 met in Bucharest, Romania, with Georgescu and an individual identified only as "Marian" whom Georgescu said had close contacts with Serbian weapons suppliers (the "First Bucharest Meeting"). (Tr. 200-03). During the First Bucharest Meeting, which was recorded, the parties discussed weapons sales and CS-1 stated in front of Georgescu that CS-1's associates "want to fight and they want to kill the Americans. And they want to buy this [weaponry] because of the Americans. They want to shoot helicopters and airplanes." (PSR ¶ 20). After Marian indicated he understood, Georgescu added, "[I]t's the same thing in America. In America they sell you the gun. If you kill someone they don't care. They sell it to defend yourself." (Tr. 205; PSR ¶ 20). In Georgescu's presence, CS-1 also explored paying for some of the weapons with cocaine and re-emphasized that his associates wanted weapons to "protect their drug industry" and "bring down the American helicopters because they're the enemy." (Tr. 205; PSR ¶ 20).

3. The Second Bucharest Meeting

Georgescu and CS-1 agreed to meet the following day, September 24, 2014 (the "Second Bucharest Meeting"). Vintila testified that, prior to the Second Bucharest Meeting, Georgescu called Vintila and asked if Vintila would attend this meeting and try to sell weapons to the CSs. (Tr. 567). Vintila agreed, and brought with him to the meeting four catalogues detailing weapons, optical devices, and other items that Vintila could procure through his Romanian weapons contacts. (Tr. 568; PSR ¶ 21).

At the Second Bucharest Meeting, CS-1 and a second DEA CS ("CS-2") who was pretending to be a weapons expert, met with Georgescu and Vintila at a hotel in Bucharest, Romania. (Tr. 208-09). At this recorded meeting, CS-1 and CS-2 repeatedly stated that they wanted to secure weapons for the FARC to shoot down American helicopters in Colombia. CS-1 and CS-2 expressed their own distaste for the United States, at which point Georgescu interjected that once Americans established a presence in a country, it was impossible to rid that country of their presence. (Tr. 211-12, 14; PSR ¶ 22). CS-1 echoed Georgescu's sentiment and explained that he and CS-2 wanted high-quality weapons to get the Americans out of Colombia, "even if we have to put them in [body] bags." (Tr. 214). Georgescu replied "Exactly," adding that "[t]hey [Americans] did the same thing in Iraq." (Tr. 214). Vintila proceeded to complain about the restrictions that Americans had placed on the defense industry in Romania and other European countries. (PSR ¶ 22).

Georgescu and Vintila next discussed the logistics of supplying CS-1 and CS-2 with an array of military-grade weapons. (PSR ¶ 22). Vintila introduced himself as the "head of the Army Industry in Romania," displayed his catalogues for the CSs, which showcased items that Vintila indicated he could provide, including handguns, machine guns, and an anti-aircraft cannon. (Tr. 568-70; PSR ¶ 23). The meeting participants discussed specific items on the list, and Vintila and Georgescu repeatedly assured CS-1 and CS-2 that they could supply them. Because of Vintila's previous job in the Romanian government and the industry connections it afforded him, he in fact could have facilitated

the sale of many of the weapons in these catalogues to the CSs and was prepared to do so at Georgescu's direction. (Tr. 570-72; PSR ¶ 23). Toward the close of the meeting, Georgescu stated that Vintila would investigate fake end-user certificates ("EUCs")—documents designed to make an illegitimate weapons deal look lawful—and that the parties would talk again once that matter had been resolved. (Tr. 575; PSR ¶ 23).

4. The October Tivat Meeting

Two days after the Second Bucharest Meeting, still attempting to procure weapons for the FARC, Georgescu approached Massimo Romagnoli[2] and asked if Romagnoli had any weapons contacts for Georgescu's "Colombian friends." (Tr. 916). Romagnoli said that he did, showed Georgescu a photo of a gun, and in Georgescu's presence called an individual named Gerardo Tanga, whom Romagnoli knew to have the ability to procure weapons. (Tr. 916-17). Tanga indicated that he could help supply the weapons, and that he could issue an EUC from Ethiopia. (Tr. 918). In response to this information, Georgescu thanked Romagnoli and indicated that he (Georgescu) would have a weapons order to send to Tanga. (Tr. 918-19). Just as he had done with CS-1 and Vintila, Georgescu

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[2] Romagnoli and Vintila were both charged with Georgescu in both counts of the Indictment. Prior to trial, Romagnoli and Vintila each pled guilty to both counts of the Indictment pursuant to cooperation agreements with the Government and testified against Georgescu.

insisted that Romagnoli use only encrypted software to communicate about the weapons deal and, in fact, installed such a program on Romagnoli's phone during their first meeting about the weapons deal. (Tr. 919; PSR ¶ 23). In particular, Georgescu told Romagnoli that Georgescu wanted him to use encrypted software to communicate to "avoid being intercepted by Americans, by FBI, by everybody." (Tr. 942). Georgescu also explained to Romagnoli that the application would "automatically delete[]" Romagnoli and Georgescu's communications, even if Romagnoli forgot to delete them. (Tr. 920).

Next, on October 8, 2014, the defendants met with CS-1, CS-2, and a third DEA CS who was portraying a FARC representative ("CS-3") at a Tivat, Montenegro, hotel (the "October Tivat Meeting"). (Tr. 261-63). Georgescu paid for Vintila's trip to Tivat, and also paid for all of Vintila's subsequent trips in furtherance of the weapons deal. (Tr. 602). At the October Tivat Meeting, which, like the other meetings, was recorded, the CSs repeated that they worked for the FARC and hoped to obtain weapons to kill Americans in Colombia, including antiaircraft weapons to shoot down American helicopters. (PSR ¶ 25). At the outset of the meeting, Romagnoli introduced himself and Georgescu explained that Romagnoli would be providing all of the documentation for the weapons. Romagnoli showed CS-3 an image of a sample Ethiopian EUC on Georgescu's laptop, and Georgescu discussed the logistics of transferring the weapons from Ethiopia to Colombia. (Tr. 923; PSR ¶ 25).

Also at the October Tivat Meeting, Romagnoli produced a catalogue of weapons (the "Romagnoli Catalogue"), which included pictures and quantities of different weapons systems. (Tr. 924). Romagnoli obtained the catalogue from Gerardo Tanga and brought it to the meeting to show it to Georgescu. (Tr. 924). Vintila answered the CSs' questions about certain weapons systems, and made suggestions about what weapons would be most valuable in their fight in the Colombian jungle. (Tr. 606). Georgescu, too, explained to the CSs how certain weapons systems worked, including explaining how a particular missile hones in on the thermal signature of aircraft. (Tr. 604). Vintila stated to Georgescu in Romanian that the CSs should pay an advance, come to the arms factory, test fire weapons, and then move forward with discussions about the order and payment. Georgescu roughly translated what Vintila had said, and emphasized that in two weeks the defendants would finalize the list of weapons they had available and the relevant prices, after which the CSs could go to the factory and "test the merchandise." (PSR ¶ 26). The CSs asked Romagnoli how he wanted to be paid and if there was a particular account to which money could be wired. CS-2 stated that if Romagnoli did not have an account, the CSs would be happy to bring Romagnoli money in a box or to make payment in any one of a number of European countries. Romagnoli replied in Italian that payment in Spain would be best. (PSR ¶ 26). Georgescu then volunteered that with fifty ZU23s, the CSs would be able to "change the balance in [their]

country overnight," and emphasized that the anti-aircraft cannons could shoot "six hundred rounds a minute." (Tr. 276; PSR ¶ 26).

5. The Dinner in Podgorica and Meeting in Rome

On the evening of October 8, after Romagnoli left Tivat, Georgescu suggested to the CSs that they meet for dinner in Podgorica, Montenegro. (Tr. 277, 607). That evening, Georgescu and Vintila drove from Tivat to Podgorica and met with the CSs in a hotel. (Tr. 607). Georgescu told Vintila that the purpose of this second meeting was to "build a good relationship with the Colombians." (Tr. 607). During the ensuing conversation with the CSs, Georgescu repeatedly remarked on how "stupid" Americans were and how the United States was a country "built on bullshit." (Tr. 278). He explained sarcastically that to impress Americans, one has to "tell them bullshit, I am proud, I am I'm… I, I am so proud to live in America. Oh, I love America, you know, God bless America." Georgescu also installed an encrypted application on CS-1's telephone, which Georgescu explained would allow CS-1 and Georgescu to speak without fear of interception. (Tr. 281). Georgescu instructed CS-1 on how to use the application to talk or send covert text messages and saved Vintila and Georgescu's contact information in CS-1's phone. (Tr. 281, 608; PSR ¶ 27). Vintila saved Georgescu's contact information in his (Vintila's) own phone's encrypted applications under a pseudonym because Georgescu asked Vintila not to use Georgescu's real name. (Tr. 610).

Following the October Tivat Meeting, Georgescu, Vintila, and Romagnoli continued to search for a weapons supplier. With the help of a German associate of Gerardo Tanga's named Werner Wintermeyer, the defendants submitted a request to a Ukrainian weapons company, asking if that company could procure the items on the Weapons List. (PSR ¶ 28). Around this same time, Georgescu asked Vintila and Romagnoli to meet with him in Rome, Italy, at the Italian Parliament where Romagnoli maintained an office (the "Rome Meeting"). (Tr. 612). Georgescu and Vintila traveled to Rome on October 29, 2014 and, like before, Georgescu paid for Vintila's travel. (Tr. 612). While in Rome, Georgescu, Vintila, and Romagnoli discussed the ways in which they could advance the weapons deal, and decided that they needed to travel to Germany to visit Wintermeyer to discuss the weapons in the Romagnoli Catalogue in person. (Tr. 614-16, PSR ¶ 28).

6. Georgescu's Continued Efforts to Procure Military Weapons for the FARC

Subsequent to the Rome Meeting, at Georgescu's direction, Vintila had the Colombians' list of desired weapons translated into Ukrainian to attempt to procure the weapons from a Ukrainian weapons supplier. (Tr. 624). To induce the Ukrainian company to send the weapons, however, it was necessary to make the request to the Ukrainian weapons supplier appear to be coming from another company licensed to purchase weapons. (Tr. 624-25). However, when the German company sent the request back to Vintila, it was not signed or stamped, which was a requirement for this

type of deal. (Tr. 625). Georgescu was upset by this development, and texted Vintila that he felt "his head spinning" and suggested that he and Vintila simply forge a signature in order to get the deal done. (Tr. 625-26). Vintila refused to forge a signature on the document, and it was ultimately signed by Wintermeyer. (Tr. 629). This request for weapons to the Ukrainians was outstanding at the time Georgescu, Vintila, and Romagnoli were arrested. (Tr. 629-30).

In October and November 2014, Georgescu and CS-1 spoke on the telephone numerous times (on one occasion CS-1 spoke with Romagnoli as well). (Tr. 290-91; PSR ¶ 29). During these calls, Georgescu confirmed that he and his co-conspirators had located the weapons that the CSs had asked for, and Georgescu and CS-1 discussed how the weapons would be transported. (Tr. 294; PSR ¶ 29). Georgescu also told CS-1 that Georgescu could obtain the surface-to-air missiles that CS-1 wanted to shoot down American helicopters. Georgescu told CS-1 that Georgescu, Vintila, and Romagnoli would meet the CSs in December to deliver the weapons. (Tr. 301; PSR ¶ 29).

On November 15, 2014, Georgescu, Vintila, and Romagnoli met in Frankfurt, Germany, with Tanga and Wintermeyer to discuss the Romagnoli Catalogue and Wintermeyer's ability to supply the weapons. (Tr. 630, 635; PSR ¶ 30). The group discussed possibilities for prices, financing, commissions, and the viability of the Ethiopian EUC. (PSR ¶ 30). Wintermeyer suggested that the group meet in Albania to inspect weapons at a factory, in the hopes that these weapons could be the

ones that the defendants could sell to the FARC. (Tr. 637; PSR ¶ 30).

Georgescu, Vintila, Romagnoli, Tanga, and two other individuals traveled to Albania on December 9 and 10, 2014. (Tr. 638, 652; PSR ¶ 31). Together, they drove to Gramsh, Albania and visited a weapons factory producing a military-style rifle. (Tr. 652-53). Vintila and Romagnoli test-fired the rifle, but the defendants left empty-handed since the factory was not producing what the FARC sought. (Tr. 654-55; PSR ¶ 31).

7. The Weapons Deal with the Bulgarian Supplier

Still seeking a reliable supplier of weapons, Georgescu sent Romagnoli to Poland to make contact with a weapons supplier there, while Georgescu and Vintila drove to Bulgaria to meet with representatives of a Bulgarian weapons company called Biem. (Tr. 659-60; PSR ¶ 32). On the day-long drive to Bulgaria, Georgescu and Vintila were stopped at a border crossing. (Tr. 660). Georgescu was "panicked [about the delay] because the next morning [they] were supposed to visiting the Bulgarian [weapons] company." (Tr. 661).

On December 12, 2014, Georgescu, Vintila, and Romagnoli went to Biem headquarters and met with two company executives: Stefan Penchev and Peter Mangicov. (Tr. 662-63). Biem was able to supply the weapons that the CSs requested, and Georgescu left Biem on December 12 with a draft contract. (Tr. 666). The next day, Georgescu and Vintila returned to Biem.

Vintila asked Penchev to make some edits to the contract, and once those edits were implemented, Penchev signed the €18 million contract on behalf of his company, promising to deliver the weapons that Georgescu sought for the FARC. (Tr. 670-71; PSR ¶ 32). However, because Romagnoli was going to receive the commission from Biem, Georgescu devised another plan to maximize his own profit. (Tr. 859-60). Georgescu raised the price on the Biem contract before presenting it to the CSs by creating a new, fake annex to the contact with higher prices than were in fact being charged by Biem. (Tr. 861).

In addition to the weapons in the contract for the FARC, Georgescu discussed with Biem the possibility of purchasing weapons for future deals. (Tr. 672-73). For instance, Georgescu had an offer from an agent of the Libyan government to do a weapons deal, and Biem had in stock the weapons that Georgescu was seeking to procure on behalf of the Libyans, including 1,400 or 1,500 rocket launchers. (Tr. 673, 693). In fact, the only reason that Georgescu did not meet with the Libyan agent to discuss a weapons deal was because he was arrested. (Tr. 674).

8. The Final Meeting and Georgescu's Arrest

On December 15, 2015, Georgescu and Vintila met the CSs in Podgorica, Montenegro. (Tr. 702; PSR ¶ 33). At this final meeting, Georgescu and Vintila explained what Biem could offer to the FARC, both immediately and in future deals. Vintila again discussed with the CSs the details of particular weapons in Biem's product line. (*See, e.g.*, Tr. 703). Following this discussion,

Georgescu and Vintila were arrested. (Tr. 708-09; 116). At the DEA's direction, Georgescu called Romagnoli and asked him to come to Montenegro. Romagnoli did, and was arrested in Montenegro the following day. (Tr. 117; PSR ¶ 33).

9. Georgescu's History as an FBI Source

Between 2001 and 2003, Georgescu was a confidential source for the Federal Bureau of Investigation ("FBI"). (Add. 1-9). In 2001, Georgescu walked into the FBI office in Las Vegas, Nevada and offered to provide information about a variety of crimes. (Add. 1). Georgescu became an FBI source in July 2001 and thereafter met regularly with his handling agents. (Add. 1-2). On one occasion, pursuant to the agents' instructions, Georgescu travelled within the United States, and was reimbursed for this travel. (Add. 2). During the time that Georgescu was an FBI source, the information he provided was used in multiple criminal investigations.

In June 2001, before becoming a source, Georgescu signed the FBI's rules for criminal informants. (Add. 2, 4-6). These admonitions are administered annually to informants and list a number of rules that informants must follow. (Add. 4). Among other things, the admonitions that Georgescu signed in 2001 stated that, as an FBI source:

> His assistance to the FBI would not exempt him from arrest or prosecution for violation of the law;
>
> He would not initiate a plan to commit criminal acts;

> He would not participate in criminal activities unless specifically authorized by the FBI;
>
> He would report all positive information, both inculpatory and exculpatory, as promptly as possible; and
>
> He would not take or seek to take independent action on behalf of the U.S. Government and will not initiate a plan to commit a criminal act.

(Add. 4-5). Similar admonitions were administered to Georgescu in 2002. (Add. 7-9).

10. Georgescu's Calls To A CIA Tip Line in 2012

In April 2012—approximately two years before the offense conduct in the instant case—Georgescu called the CIA via a publicly-available CIA tip line (the "CIA Call"). In this two-part call (Georgescu called back after the initial call was terminated), which was recorded by the CIA, Georgescu provided CIA telephone operators (the "CIA Telephone Operators") with his name and contact information, and told the CIA that he had information about weapons being sent to Colombia. In the first call, the CIA Telephone Operator told Georgescu that if he wished to provide information, he needed "to go to the [U.S.] Embassy" in Romania to do so. (A. 141-42).

After the first call ended, Georgescu again called the CIA's public tip line and spoke with a different CIA Telephone Operator. (A. 147). During this second call,

which lasted approximately 30 minutes, Georgescu described elements of the proposed deal as Georgescu understood it from Andi. In response to Georgescu's sometimes lengthy colloquies, the CIA Telephone Operator listened politely, asked some factual questions, and responded to Georgescu with "Uhm-hm" and "Okay" and "I understand." At no point did either of the CIA Telephone Operators direct or suggest to Georgescu that the CIA was asking him to undertake any kind of proactive role in an investigation of international terrorists and arms traffickers. Indeed, at no point in either of the CIA Calls did Georgescu tell the CIA that he intended to undertake any action on behalf of the CIA or otherwise.

Georgescu told the second CIA Telephone Operator that he was "try[ing] to be useful to the U.S. government" and that he understood the "procedure" because it was the "same drill with the FBI." (A. 148, 151). The CIA Telephone Operator told Georgescu that the CIA Telephone Operator was asking questions of Georgescu because the CIA has to "be able to vet and confirm the things" that Georgescu was describing. (A. 151). The CIA Telephone Operator then asked Georgescu to describe the people that were trying to purchase the ammunition and firearms. (A. 152). Georgescu provided contact information for Andi Georgescu, whom Georgescu described as a Romanian living in Los Angeles who owns a shipping company. (A. 156). Georgescu said that Andi knew Colombians who were interested in a $10 million deal at the outset, with the possibility for additional deals to follow. (A. 152). Georgescu orally provided the CIA Telephone Operator weapons from the Weapons List that the

DEA had provided to Andi Georgescu. (A. 153). Throughout, the CIA Telephone Operator asked Georgescu specific factual questions, such as the ultimate location for the weapons, and the affiliations of the purchasers. (A. 154).

Georgescu described his conversation with Andi, and explained at length to the CIA Telephone operator that Andi did not have an EUC and that Andi wanted Georgescu to serve as a middleman for the transaction (an idea about which Georgescu professed his discomfort). To this, the CIA Telephone Operator responded: "Okay." (A. 157). Georgescu also told the CIA Telephone Operator that, with respect to Andi, the CIA should "be careful how you approach this guy [because] any approach which is not in a specified procedure, you scare him and he run [sic]." (A. 155). To this, the CIA Telephone Operator responded, "[o]kay" and assured Georgescu that the CIA will "look at the information . . . . and investigate it very delicately." (A. 155). After Georgescu described how he knows "how it work everything in this world [sic];" and how he knows that agents are being killed in Colombia, the CIA Telephone Operator said, at various points, "Okay" and "Right," and asked Georgescu for a contact number in case the CIA had additional questions. (A. 156-58).

The CIA Telephone Operator then told Georgescu that he would "send this information to an internal desk" at the CIA so that the CIA could "look at it . . . and begin to investigate." (A. 159). The CIA Telephone Operator told Georgescu that the CIA "may be in touch with" Georgescu on the phone number he provided. (A. 159). In response, Georgescu described at length to

the CIA Telephone Operator about a time when he was a source with the FBI, and expressed that he did not want to put his life in danger. The CIA Telephone Operator responded: "I understand." Georgescu then continued by offering to "let me work for you, and I give you more information." (A. 160). He offered: "You just give me a call, or someone, and tell me 'Go forward.' And I go forward . . . ." (A. 160). The CIA Telephone Operator responded: "Okay. I understand." (A. 161). Georgescu then provided additional information about Andi and Andi's business, to which the CIA Telephone Operator responded: "I understand. I'll just pass on the information . . . for people to take a look at. And if we need to reach back out to you, we can do that." (A. 163).

Georgescu did not have any additional contact with the CIA subsequent to these 2012 calls. (Add. 10-11).

B. The Defense Case

Georgescu elected to testify in his own defense at trial. On direct examination, Georgescu explained that he was introduced to Andi Georgescu in around 2000 in connection with a request to ship a car to Switzerland. (Tr. 1094). Georgescu and Andi became friendly after that and, in 2012, Andi called Georgescu about the proposed weapons deal. (Tr. 1094). On this initial call, Andi told Georgescu that Andi knew some Colombians living in Miami who were looking to purchase guns to protect their cocaine plantations. Andi told Georgescu that these Colombians were fighting against the United States because the United States was attempting to eradicate the drug industry in Colombia. (Tr. 1095). Around this time, Andi sent

Georgescu two lists' worth of weapons sought by the Colombians. (Tr. 1096).

Georgescu testified that after Andi sent these lists to Georgescu, Georgescu called the CIA because as a "proud American" it was the right thing to do. (Tr. 1096-97). He also testified that he did not want to visit the U.S. embassy in Romania, as suggested by the first CIA Telephone Operator, because "all the security's provided by the Romanian government" and the "Romanian government . . . play[s] both sides." (Tr. 1100-01). Georgescu also told the jury that when the CIA Telephone Operator told Georgescu "I appreciate what you, what you're saying, again, we have to understand," Georgescu understood the operator to mean that he had "an agreement" with the CIA. (Tr. 1119-20). Georgescu explained that when the CIA Telephone Operator responded to his colloquies with "Ok," Georgescu understood that to mean that the CIA was "agreeing with [Georgescu's] conditions" and that Georgescu and the CIA would "work together and [were] on the same page" (Tr. 1122) or that Georgescu has "another authorization, another confirmation on [his] idea how [Georgescu and the CIA] can proceed from that moment." (Tr. 1129-30, 1132). Similarly, when the CIA Telephone Operator told Georgescu that "we have to have all the information to be able to vet what you're telling us is even viable," Georgescu said that he understood that to mean that "from that moment [Georgescu and the CIA would] work together on this subject and [they were] on the same page." (Tr. 1131). In sum, Georgescu testified because the CIA Telephone Operator repeatedly and politely re-

sponded "Ok" in response to Georgescu's lengthy musings, and at "no point did he tell" Georgescu to stop (Tr. 1137-38), Georgescu understood himself to have authority from the CIA to undertake a months-long, clandestine investigation into arms-seeking Colombian terrorists.

Once Andi contacted Georgescu again in 2014—two years after the 2012 CIA Calls—Georgescu testified that he did not think to call the CIA back because "[i]t was the same story as two years previously" and "nothing else had happened." (Tr. 1143). Georgescu testified that he intended to call the CIA back only when he had obtained a "[weapons] contract complete, signed by both sides, by both parties." (Tr. 1143). According to Georgescu, he involved Vintila and Romagnoli in his purported plan to gather evidence for the CIA because Vintila could assist Georgescu in "understand[ing] how the system works" and to allow Georgescu to "gather more information" and because Romagnoli was selling weapons and also had a solution to the problem of finding an EUC for the weapons. (Tr. 1160, 1162).

At the conclusion of his direct examination, Georgescu's counsel asked Georgescu if he "regret[s] what he did," to which Georgescu responded: "No, never, and I will do it again. I promise to everybody. If I walk, I will do it again. Never." (Tr. 1204).

On cross-examination, Georgescu admitted that, although he had told the CIA Telephone Operator that he feared retribution by the Romanian government for cooperating with the United States and that is why he

insisted on encrypted communications, he invited Vintila, a Romanian Government official, to participate in the weapons deal. (Tr. 1217). Georgescu also testified that he rebuffed CS-1's efforts to invite Georgescu to discuss the deal in the United States, and instead invited CS-1 to Romania—again, even though he was purportedly afraid of the Romanians. (Tr. 1219-20). Georgescu further testified that, although he "keep[s] in contact with the FBI all the time," he never contacted the FBI about the weapons deal" because he called the CIA instead. (Tr. 1222). In fact, Georgescu admitted that he travelled to Los Angeles in 2014, but did not contact either the FBI or the CIA at that time. (Tr. 1229-30). Georgescu was asked on cross-examination whether he contacted the CIA after making contact with Vintila and learning Vintila's phone number (Tr. 1232-33); after learning a Russian arms supplier's email address (Tr. 1234); after learning Romagnoli's phone number (Tr. 1234); when he had obtained Gerardo Tanga's contact information (Tr. 1235); after obtaining a copy of Vintila's identification card (Tr. 1235); after receiving weapons catalogues from Vintila (Tr. 1236); when he had a fake EUC (Tr. 1237); after meeting with Vintila and Romagnoli at the Italian parliament (Tr. 1237); following his meeting with Tanga and Wintermeyer in Germany (Tr. 1238); after learning of a Polish weapons deal (Tr. 1238); after viewing a Biem weapons presentation (Tr. 1238); and after obtaining a weapons contract (Tr. 1238). The answer to each was no. (Tr. 1232-38).

C. Georgescu's Sentencing

The PSR calculated Georgescu's total offense level as 43. First, pursuant to United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") Section 2A1.5(a), the PSR determined that the base offense level is 33. Six levels were added pursuant to Section 3A1.2(a)(1) and (2) since the purported victims of Georgescu's crimes were government officers or employees. Twelve additional levels were added pursuant to Section 3A1.4(a) since the offense is a felony that involved a federal crime of terrorism. The PSR also added two levels for obstruction of justice pursuant to Section 3C1.1.

Prior to sentencing, both parties provided the district court with sentencing submissions. In his submission, Georgescu argued that (i) a downward departure pursuant to U.S.S.G. § 5K2.0 was appropriate, based on his 2012 call to the CIA; (ii) an enhancement for obstruction of justice pursuant to U.S.S.G. § 3C1.1 was not appropriate; (iii) the application of the terrorism enhancement, U.S.S.G. § 3A1.4(a) was "unwarranted and unjust;" and (iv) the enhancement for official victims pursuant to U.S.S.G. § 3A1.2 was "unwarranted." (Dkt. 68). The Government opposed Georgescu's arguments, and additionally asked the district court to apply an enhancement for obstruction of justice based on (i) Georgescu's perjurious trial testimony, and (ii) threats that he made to Vintila and Romagnoli prior to trial in order to suborn their perjury. (Dkt. 132). The Government also asked the district court to apply a leadership enhancement pursuant to Section 3B1.1.

The Government disagreed with the PSR in one respect, and asked the district court to decline to apply the official victim enhancement pursuant to Section 3A1.2. Ultimately, though Georgescu's Guidelines range was life imprisonment, and despite the seriousness of his offense, the Government asked the district court to impose a sentence below this Guidelines range.

Georgescu was sentenced on December 2, 2016. (Sen. Tr. 1). Judge Abrams concluded that the terrorism enhancement pursuant to Section 3A1.4(a) was applicable, and declined to apply the leadership enhancement. (Sen. Tr. 5, 9). Judge Abrams also applied the two-level enhancement for obstruction of justice, reasoning that, after hearing Vintila and Romagnoli's testimony, Georgescu "threaten[ed], intimidate[ed], or unlawfully influenc[ed] [his] codendant[s]." (Sen. Tr. 6-7). Judge Abrams stated that she credited Vintila and Romagnoli's testimony that "Mr. Georgescu urged them to lie and say what he ultimately did at trial, that they weren't trying to make a weapons deal with the FARC, but rather to collect information to provide to the U.S. government." (Sen. Tr. 7). Judge Abrams also found that Georgescu's trial testimony was perjurious, which provided a separate basis for the enhancement. (Sen. Tr. 7). Specifically, Judge Abrams found that

> [i]n light of the evidence presented at trial which was consistent with the jury's verdict, Georgescu's testimony that he was engaged in a single-handed effort to gather evidence from the FARC for the

> CIA was simply not credible . . . . Although he uses his prior status as an FBI informant to support his position, he knew and certified in connection with that FBI work that he was not permitted to participate in criminal activities unless specifically authorized by the FBI, nor to take or seek any independent action on behalf of the United States government.
>
> Similarly, the CIA calls he relies on took place approximately two years prior to the offense conduct in this case and I simply don't credit Mr. Georgescu's testimony that he spent thousands of dollars of his own money to travel across the world to acquire high-grade weapons on behalf of the CIA without telling anyone from the CIA or the U.S. government, all while insisting that his co-conspirators use encrypted applications to communicate.

(Sen. Tr. 7-8).

Accordingly, Judge Abrams calculated Georgescu's total offense level as 43, his criminal history category as VI (thanks to the operation of the terrorism enhancement), for a Guidelines range of life. Judge Abrams granted Georgescu's request for a downward departure based on the notion that his criminal history category overrepresented his past criminal conduct, but his Guidelines range was still life, even after the departure. (Sen. Tr. 12). Ultimately, Judge Abrams

varied downward from the Guidelines range of life and sentenced Georgescu to 120 months' imprisonment to be followed by three years' supervised release. (Sen. Tr. 31). Georgescu does not challenge his sentence on appeal.

ARGUMENT

Georgescu Presented All Legally Cognizable Defenses to a Properly Instructed Jury

Georgescu was found guilty at the conclusion of a fair trial establishing that he conspired to kill officers and employees of the United States and to provide material support to the FARC from May 2014 to October 2014. Challenging that verdict, Georgescu argues that Judge Abrams erred by including the word "affirmative" in her instruction on entrapment by estoppel. (Br. 21). Georgescu also asserts that he was erroneously precluded from making a negation of intent argument with respect to Count One, that is, from claiming that his interactions with the CIA telephone operators spurred a subjective, mistaken belief that prevented him from formulating the requisite *mens rea* to participate in a conspiracy to kill United States officers and employees. (Br. 34).

Georgescu's arguments lack merit. Judge Abrams' entrapment-by-estoppel instruction echoed controlling authority from this Court, and conveyed a thoroughly accurate legal framework to the jury. Judge Abrams also did not abuse her discretion by declining to instruct the jury on a variation on the public authority

defense—negation of intent—that has never been recognized by this Court, while allowing the Georgescu to vigorously argue that he lacked the intent to commit the charged offenses.

A. Applicable Law

1. The Public Authority Defense

This Court has recognized two forms of the public authority defense. The first, "actual public authority," is an affirmative defense, which requires a showing that "a defendant has in fact been authorized by the government to engage in what would otherwise be illegal activity. *United States v. Giffen*, 473 F.3d 30, 39 (2d Cir. 2006); *see also United States v. Doe*, 63 F.3d 121, 125 (2d Cir. 1995). The second, "entrapment by estoppel," is also an affirmative defense, whereby a defendant is permitted to argue that he "commit[ed] forbidden acts in the mistaken but reasonable, good faith belief that he has in fact been authorized to do so." *United States v. Gil*, 297 F.3d 93, 107 (2d Cir. 2002) (quoting *United States v. Abcasis*, 45 F.3d 39, 43 (2d Cir. 1995) (internal quotation marks omitted)). "To make out this affirmative defense, a defendant must show an affirmative assurance from the government that his conduct was legal." *United States v. Miles*, 748 F.3d 485, 489 (2d Cir. 2014) (citing *United States v. Giffen*, 473 F.3d at 39); *see also* Sand, *Modern Federal Jury Instructions*, Instr. 8-7.1 ("The misrepresentation must have been a clear statement directly by the official to the defendant that the conduct defendant is charged with here was in fact legal.").

This Court has identified "negation of intent" as a third variation on the public authority defense, albeit one that it has never recognized. *Giffen*, 473 F.3d at 43 (noting that the theory had "been expressly recognized only in the Eleventh Circuit"); *see also United States v. Mergen*, 764 F.3d 199, 205 (2d Cir. 2014); *United States v. Alvarado*, 808 F.3d 474,487 (11th Cir. 2015) ("[I]n recognizing the availability of an innocent intent theory of defense for a defendant who has failed to meet the standard for a public authority affirmative defense, we acknowledge that our Circuit may be the only circuit to explicitly allow an innocent intent defense in this context."). As the Court has explained, this doctrine "is not an affirmative defense," but instead an effort by a defendant "to rebut the government's proof of the intent element of a crime by showing that the defendant had a good-faith belief that he was acting with government authorization." *Giffen*, 473 F.3d at 43. In other words, negation of intent contemplates a situation in which a defendant "honestly, albeit mistakenly, believed he was committing the charged crimes in cooperation with the government." *Id.*

The *Giffen* Court expressed "great difficulty" with the negation-of-intent theory, observing that such a doctrine would "swallow the actual public authority and entrapment-by-estoppel defenses." *Id.* As the Court explained, "[s]uch an unwarranted extension of the good faith defense would grant any criminal *carte blanche* to violate the law should he subjectively decide that he serves the government's interests thereby," rendering "[l]awbreakers . . . their own judges and juries." *Id.* (quoting *United States v. Wilson*, 721 F.2d

967, 975 (4th Cir. 1983)); *see also United States v. Edwards*, 101 F.3d 17 (2d Cir. 1996) (per curiam) (upholding district court's denial of defense request for a lengthy adjournment to pursue a particular defense theory, "because the defense was rooted in the erroneous assumption that good motive for committing a crime is inconsistent with criminal intent") (internal quotation marks omitted).

Notwithstanding these serious concerns, the Court has "assume[d] for purposes of argument . . . that, at least in some circumstances, a defendant may offer evidence that he lacked the intent essential to the offense charged because of his good-faith belief that he was acting on behalf of the government." *Giffen*, 473 F.3d at 43. Even then, however, "[t]he relevance, and hence admissibility, of such a belief would depend . . . on the nature of the intent element of the charged crime," and, in particular, on "whether a defendant's belief that his actions were authorized by the government would negate that intent." *Id.* at 43-44.

2. Appellate Review of Jury Instructions

A defendant challenging a jury instruction faces a heavy burden. He must establish both that the defense requested an instruction that "accurately represented the law in every respect" and that the charge delivered was erroneous and prejudicial. *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004); *see also United States v. White*, 552 F.3d 240, 246 (2d Cir. 2009) (" 'To secure reversal on a flawed jury instruction, a defendant must demonstrate both error and ensuing prejudice.' ") (quoting *United States v. Quinones*, 511 F.3d

289, 313-14 (2d Cir. 2007)); *United States v. Mulder*, 273 F.3d 91, 105 (2d Cir. 2001). This Court "will not find reversible error unless a charge either failed to inform the jury adequately of the law or misled the jury as to the correct legal rule." *United States v. Alfisi*, 308 F.3d 144, 148 (2d Cir. 2002).

In reviewing contested instructions, this Court looks not only to the particular words or phrases questioned by the defendant, but also to "the instructions as a whole to see if the entire charge delivered a correct interpretation of the law." *United States v. Bala*, 236 F.3d 87, 94-95 (2d Cir. 2000) (quoting *United States v. Carr*, 880 F.2d 1550, 1555 (2d Cir. 1989)); *United States v. Mulder*, 273 F.3d at 105 (court must "look to 'the charge as a whole' to determine whether it 'adequately reflected the law' and 'would have conveyed to a reasonable juror' the relevant law") (quoting *United States v. Jones*, 30 F.3d 276, 284 (2d Cir. 1994)). As a general matter, no particular wording is required for an instruction to be legally sufficient, so long as "taken as a whole" the instructions correctly convey the required legal principles. *See Victor v. Nebraska*, 511 U.S. 1, 5 (1994). The district court "has discretion to determine what language to use in instructing the jury as long as it adequately states the law," *United States v. Alkins*, 925 F.2d 541, 550 (2d Cir. 1991), and a defendant "cannot dictate the precise language of the charge," *United States v. Han*, 230 F.3d 560, 565 (2d Cir. 2000).

A district court's refusal to give a requested jury charge is reviewed for abuse of discretion. *United States v. Slaughter*, 386 F.3d 401, 403 (2d Cir. 2004).

To establish prejudicial error based on denial of a requested instruction regarding a defense theory, a defendant must show that the charge requested "is legally correct, represents a theory of defense with basis in the record that would lead to acquittal, and the theory is not effectively presented elsewhere in the charge." *United States v. Kozeny*, 667 F.3d 122, 136 (2d Cir. 2011) (citation and internal quotation marks omitted).

B. Discussion

1. Judge Abrams Correctly Instructed the Jury on Entrapment by Estoppel

Georgescu's entrapment-by-estoppel argument relies on his remarkable assertion that Judge Abrams' instruction, despite having effectively echoed this Court's recent articulation of the doctrine in *United States v. Miles*, was, nevertheless, erroneous. (Br. 26). To advance this claim, Georgescu argues that the Circuit's recitation of the legal standard in *Miles* was *itself* sufficiently mistaken as to render the District Court's reliance on that decision "impos[ition of] a higher standard . . . than this Court's precedents permit." (Br. 27). Georgescu is mistaken.

a. Relevant Facts

In advance of trial, Georgescu submitted a proposed jury charge on entrapment by estoppel. (Dkt. 57). Georgescu's instruction read as follows:

The defense of entrapment by estoppel is available to a defendant where the government procured the defendant's commission of the illegal acts by leading the defendant to reasonably believe he was authorized to commit them. The defendant must show that the government, by its own actions, induced him to do those acts and led him to rely reasonably on his belief, even if that belief was mistaken, that his actions would be lawful by reason of the government's seeming authorization.

The defense of entrapment by estoppel can be established without the defendant having received actual authorization. It depends on the proposition that the government is barred from prosecuting a person for his criminal conduct when the government, by its own actions, induced him to do those acts and led him to rely reasonably on his belief that his actions would be lawful by reason of the government's seeming authorization.

If you find that the defendant Georgescu has proved that the following three things are more likely true than not true: 1) a government agent, 2) effectively communicated an assurance that the defendant is acting under government authorization, and 3) that the defendant relying thereon, committed forbidden acts in the

> mistaken but reasonable, good faith belief that he had in fact been authorized to do as an aid to law enforcement, then entrapment by estoppel bars conviction and you must find him not guilty.

(*Id.* at 1-2). In support of his instruction Georgescu cited generally to this Court's decisions in *Giffen* and *Abcasis*, without reference to particular language in either case.

On May 16, 2016, Judge Abrams distributed a sample entrapment by estoppel instruction for the parties' consideration. The following day, the Government filed a letter, proposing that the Court insert additional language to the proposed charge as follows:

> To establish this defense, the defendant must show that the government agent's statements or acts constituted an affirmative assurance to the defendant that the specific conduct with which the defendant is charged here was in fact authorized. You must also find that the defendant's conduct was within the general scope of the perceived authorization. In other words, this defense will not support a claim of open-ended license to commit crimes in the expectation of receiving subsequent authorization from a government official.

(Add. 12). The Government noted that the additional language was "drawn directly from the Second Cir-

cuit's articulation of the entrapment by estoppel defense and align[ed] closely with Sand's proposed instructions." (Add. 12 (citing cases)). Georgescu did not file a response to the Government's letter.

On May 20, 2016, the parties appeared for the charge conference. (Tr. 868-92). Judge Abrams initially indicated that she would include the last two of three sentences proposed by the Government, with minor, stylistic changes. (Tr. 868). The parties' principal disagreement as to the balance of the instruction turned on the potential inclusion of the term "affirmative" to characterize the type of Government assurance necessary to give rise to the defense. (Tr. 877-84).

For its part, the Government emphasized that the use of the term "affirmative" mirrored the language in *Miles* and noted that the emphasis on affirmative assurances was particularly necessary to honor the entrapment-by-estoppel doctrine's emphasis on Government misconduct. (Tr. 878, 882). In response, defendant counsel argued that "[e]very case is different on facts," and noted that unspecified cases other than *Miles* did not include the term "affirmative." (Tr. 880, 883). Following argument, Judge Abrams proposed to instruct the jury that the defense turned on whether "reasonable person sincerely intent on obeying the law could have believed that he obtained an agent's *affirmative authorization* of his conduct and would not have been put on notice to make further inquiries to the government agent before . . . engaging in that conduct." (Tr. 883) (emphasis added).

The issue was revisited twice more before the jury was charged: on May 23, 2016, and shortly before summations on May 24, 2016. (Tr. 1033-37, 1250-57). On the second occasion, the Court acceded to a defense request that the word "affirmative" be used to modify statements or acts, rather than "authorization." (Tr. 1254). The resulting charge as given read, in relevant part, as follows:

> Now let me describe the entrapment by estoppel defense to you. This is a defense to the charges in the indictment if you find that a government official made *affirmative statements* or committed acts that produced in the defendant a reasonable belief that he was authorized to engage in the illegal conduct as an aid to law enforcement, even though that belief turned out to be wrong. The entrapment by estoppel defense focuses on what was in the defendant's mind and the reasonableness of that belief.
>
> To establish this defense, the defendant must prove each of the following two elements: First the defendant must prove that *affirmative conduct or statements* of a government official caused him in good faith to believe that he was authorized to engage in the charged conduct. This is a subject[ive] inquiry, *i.e.,* what was actually in the defendant's mind.
>
> Second, the defendant must also prove that he acted reasonably in relying on

> that authorization. This means that a reasonable person sincerely intent on obeying the law could have believed that he had obtained the official's authorization of his conduct and would not have been put on notice to make further inquiries of the government official before engaging in that conduct. This is an objective inquiry, *i.e.*, was what was in the defendant's mind reasonable [ ] in light of all the circumstances?

(Tr. 1470) (emphasis added).

b. Discussion

Georgescu claims that Judge Abrams' instruction was flawed, because its inclusion of the term affirmative "grafted a nearly impossible bar onto the standard for [him] to hurdle in order to prove his good faith and reasonable belief that he was working with the CIA." (Br. 16). According to Georgescu, the resulting charge "blurred [the] distinction" between entrapment-by-estoppel and "the substantially higher standard of the 'actual authority' defense." (Br. 22). This claim is meritless. As Georgescu concedes, the language used by the district court was drawn directly from this Circuit's decision in *Miles*. Even assuming, *arguendo*, that *Miles* was "an outlier," (Br. 22), it is nevertheless controlling law. Moreover, given the defense theory in this case, the instruction was not only legally correct but also wholly aligned with the principles underpinning the entrapment-by-estoppel doctrine.

First, any alleged error in the entrapment-by-estoppel instruction cannot have prejudiced Georgescu because he was not entitled to an instruction on that defense in the first place. "A defendant is entitled to an instruction on an affirmative defense only if the defense has a foundation in the evidence." *United States v. Gonzalez*, 407 F.3d 118, 122 (2d Cir. 2005) (quotation omitted). That foundation must apply to each element of the defense. *Id.* If "the defendant's evidence is insufficient as a matter of law to establish the defense, the court is under no duty to give the requested jury charge." *United States v. Paul*, 110 F.3d 869, 871 (2d Cir. 1997). Georgescu failed to present even colorable evidence supporting the second element of the entrapment-by-estoppel defense, because no "reasonable person sincerely intent on obeying the law could have believed that he had obtained the official's authorization of his conduct" from a call to a toll-free CIA telephone tip line.

During those conversations, neither of the CIA Telephone Operators ever solicited or encouraged—let alone authorized—Georgescu to do anything more than answer their questions or go to his closest U.S. Embassy to present his information in person. (*See, e.g.*, A. 142 ("Well, you can tell me over the phone. You can write an email on the public website—if you go to CIA.gov and go to contact us, you can write it all out, or you can go to the Embassy. Those are your three options."); *id.* at 143 ("Okay, well my suggestion to you . . . is to go to the U.S. Embassy. Because you're a U.S. citizen, so you need to talk to somebody at the Embassy, okay?"); *id.* at 148 ("Okay, well, as I understand it, I don't, I don't think there was anything that the

Agency could do to, to assist or facilitate what you're trying to accomplish."); *id.* at 151 ("[W]e have to be able to vet and confirm the things that you're, you're telling us, because a lot of people call . . . with those information and contacts, so when we ask you these questions . . .we're . . . trying to [unintelligible] make sure we're not wasting our time and yours."); *id.* at 7 ("And, and so, you, what is your role specifically in this request?"); *id.* at 154-55 ("Okay, so how does this person . . . contact you? I mean, what do you know about him? What's his name? His email? That's the type of information that we would need to, to look at this."); *id.* at 158 ("How do I get back in touch with you . . . with any questions?")).

The CIA Operators repeatedly emphasized that, if appropriate, *the CIA* would assess Georgescu's information, refer it to the relevant authorities, and, at most, be in touch with him with any additional questions. (*See, e.g.*, A. 146 ("[I]f you were forthright with all the details, and we could verify your story, that's something . . . we might look into and pass to the right authorities."); *id.* at 157-58 ("It's definitely something that, if we can verify, would be of interest to the, to the Agency to be aware of, you know."); *id.* at 159 ("I will send this information to an internal desk here for inside purposes only so they can look at it . . . and begin to investigate. They may be in touch with you on this phone number."); *id.* at 165 ("[W]ell, sir, I have enough information to get started on it. Thank you, again. I will pass it on, and hopefully they'll be in touch with you.")).

Given the substance of Georgescu's conversations with the CIA Telephone Operators, no reasonable person could have concluded that, as a result of those calls, he was authorized to organize and execute an international arms trafficking operation involving multiple foreign countries, numerous participants, several clandestine meetings, and attempts at creating false documentation, all without any participation or assistance whatsoever from United States law enforcement personnel. *See Giffen*, 473 F.3d at 39 (noting, in the actual public authority context, that "[w]hether a defendant was given governmental authorization to do otherwise illegal acts through some dialogue with government officials necessarily depends, at least in part, on precisely what was said"). To countenance an entrapment-by-estoppel defense on these facts would be akin to allowing a civilian call to CrimeStoppers to transform the caller into a detective vested with governmental authority to investigate and arrest the offenders. No reasonable person could draw such a conclusion, and Georgescu therefore could not have made out his proffered defense.

Second, Judge Abrams's instruction was entirely correct. When considering entrapment by estoppel, this Court has explicitly recognized that a defendant seeking to rely on the affirmative defense "must show an affirmative assurance from the government that his conduct was legal." *United States v. Miles*, 748 F.3d at 489; *see also United States v. Corso*, 20 F.3d 521, 528 (2d Cir. 1994) ("Entrapment by estoppel applies when an authorized government official tells [a] defendant that certain conduct is legal and the defendant be-

lieves the official.") (quoting *United States v. Weitzenhoff*, 1 F.3d 1523, 1534 (9th Cir. 1993)).[3] Judge Abrams' instruction effectively mirrored this articulation of the doctrine.

Contrary to Georgescu's representations, the language in *Miles* was not a "deviat[ion] from the Second Circuit's body of law on this issue" (Br. 22), but instead an accurate encapsulation of the principles that have long underpinned the estoppel doctrine. For decades, this Court has recognized that estoppel defense "focuses on the *conduct of the government* leading the defendant to believe reasonably that he was authorized to do the act forbidden by law," and "depends on the unfairness of prosecuting one who has been led by the conduct of government agents to believe his acts were authorized." *Abcasis*, 45 F.3d at 44 (emphasis added). The need for a clear, affirmative statement from a government agent that could reasonably be interpreted as assuring a defendant that illegal conduct was in fact legal, has, unsurprisingly, been a recurring theme in assessing the doctrine's availability. *See, e.g.*, *Mergen*,

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[3] Judge Sand's model entrapment-by-estoppel instruction similarly emphasizes the need for unequivocal guidance from the government as a basis for the defense. Sand, *Modern Federal Jury Instructions*, Instr. 8-7.1 ("The misrepresentation must have been a clear statement directly by the official to the defendant that the conduct defendant is charged with here was in fact legal.").

764 F.3d at 205 ("'[T]he defendant's conduct must remain within the general scope of the solicitation or assurance of authorization' and the 'defense will not support a claim of an open-ended license to commit crimes in the expectation of receiving subsequent authorization.'" (quoting *Abcasis*, 45 F.3d at 43-44); *United States v. George*, 386 F.3d 383, 389 (2d Cir. 2004) ("The defense of entrapment by estoppel bars conviction of a defendant whose commission of a crime results *from government solicitation*, so long as the defendant reasonably believes that government agents authorized him to commit the criminal act.") (emphasis added); *United States v. Corso*, 20 F.3d at 528 (finding the defense unavailable where there "was no communication from an authorized government official to the defendant to the effect that his [illegal activity] was lawful").

Here, Judge Abrams was particularly justified in including the word "affirmative" given the facts underlying Georgescu's trial defense. Georgescu's assertion that the CIA Telephone Operators' perfunctory responses to his grandiose statements some two years before the offense conduct somehow authorized his recruitment of partners for a months' long effort to enlist weapons suppliers for the FARC was flatly at odds with the substance of those conversations and a substantial departure from prior cases in which this Court has recognized the viability of the estoppel defense. During the CIA Calls, Georgescu at no point articulated his intent to launch an independent investigation of the weapons traffickers about whom he was reporting or recruit others to help advance the weapons

deal.[4] Nor did he receive any instruction to do so. Indeed, as reflected above, the CIA Calls are conspicuously devoid of any CIA tasking. *Cf. Corso*, 20 F.3d at 528 (clarifying that the defense applies "when an authorized government *official tells [a] defendant that certain conduct is legal* and the defendant believes the official") (emphasis added).

In light of the tenuousness of Georgescu's claim to the entrapment-by-estoppel defense, and the doctrine's longstanding emphasis on clear assurances from a government actor, Judge Abrams' instruction appropriately emphasized the need for Georgescu to demonstrate "affirmative statements" on which he relied as a basis for the defense. (Tr. 1470). The instruction accurately stated controlling law and was necessary for the jury to properly understand the defense theory. To the extent any instruction should have been given at all, it was correct.

2. Georgescu Was Permitted to Argue That He Lacked Intent

Georgescu next urges that he was precluded from arguing that he lacked the requisite intent to support his conviction of conspiring to kill officers of the United States. (Br. 34-35). His claim proceeds from a false premise. Although Judge Abrams declined to instruct

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[4] To the contrary, Georgescu expressly indicated that he would only take action if directed to do so by the CIA. *See* A. at 160 ("You just give me a call, or someone, and tell me, 'Go forward.' And I go forward . . . .").

the jury on "negation of intent"—a doctrine this Court has declined to recognize and has appropriately viewed with significant skepticism—Georgescu was afforded ample opportunity to argue that he did not intend to join the charged conspiracies and vigorously did so at every stage of the trial.

a. Relevant Facts

In advance of trial, the parties engaged in extensive briefing on the applicability of the "negation of intent" doctrine to the offenses charged in the Indictment. (A. 92, 104-12, 171-80, 228-30, 235-41, 253-86, 320-331; Dkt. 75, 77). Judge Abrams ultimately declined to instruct the jury on negation of intent, noting that this Court had expressed concern about the doctrine and reasoning that if the defendant affirmatively intended to achieve a charged conspiracy's goals, then he would be "guilty of conspiracy whether or not he believe[d] the goal [wa]s illegal, or ha[d] some other ulterior motive." (A. 323-325) (citing *Giffen*, 473 F.3d at 43; *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001)). Judge Abrams emphasized, however, that her ruling did not end the inquiry, as the defendant remained free "to argue that he lacked the requisite *scienter* required for conviction." (A. 325-26). In other words, while Judge Abrams opted not to instruct the jury on the "innocent intent" doctrine recognized exclusively by the Eleventh Circuit, she gave Georgescu leave to assert that he lacked the requisite intent to commit either charged offense. (A. 328).

Georgescu proceeded to make precisely that argument at every stage of the trial. In his opening statement, defense counsel urged that the evidence would show that the offense conduct had been undertaken as part of an independent undercover operation aimed at gathering information for the U.S. government—that is, that Georgescu never intended to join the charged conspiracies. (*See, e.g.*, Tr. 65 ("You will hear during the course of this trial that Flaviu . . . stayed in the act to get them [the CIA] the confirmation they needed."); *id.* ("If any one of you has ever seen Donnie Brasco, the movie, you can appreciate what I'm saying, the stress level that [Georgescu] had to go through."); *id.* at 69 ("He did not accept a single dime from anyone in this conspiracy. He did not deliver a single bullet. His main role was only intelligence gathering, information.")). Defense counsel developed that theme during lengthy cross-examinations of Government witnesses. (*See, e.g.*, Tr. 128 ("Q: In fact, during the course of your investigation, isn't it true that you have learned that Flaviu Georgescu was not even interested in making money during this, in this particular arms deal, proposed arms deal? Isn't that true? . . . . / A: Yes."); *id.* at 443 ("Q: As you sit here today, do you know why Flaviu convinced Vintila to remain in this transaction, despite signs or concerns that you were actually pretending to be FARC members? / A: He had his own interest on having this continue. /Q: Do you know what that interest was? Do you know what was inside his mind as to his interest? / A: Not really.")).

Georgescu himself spoke directly to his purported lack of intent during his trial testimony.[5] (*See, e.g.*, Tr. 1144 ("Q: Did you ever, during the course of this investigation of yours, did you ever intend to provide material support to a terrorist organization? Yes or no, please. / A: No. No, never. Never in my life. / Q: What did you intend to do? / A: The only thing I had in mind and the only intent was to bring, to produce the evidence, the proofs that were asked in the phone conversation."); *id.* at 1160 ("Q: And why did you need to understand the way the system works? / A: Because I had this understanding with the CIA agent to provide evidence."); *id.* at 1259 ("I was learned to call in the information and put information together, not just piece by piece. The agency, they cannot put everything together. I was there inside, not the agents."). Finally, defense counsel made Georgescu's state of mind the centerpiece of the defense summation. (*See, e.g.*, Tr. 1378 ("What is important in this case is what was inside his mind when he said those words. What did he mean? What did he want to do? What did he want to accomplish, and did he accomplish it or not?")).

---

[5] During a sidebar related to defense counsel's questions to Georgescu regarding his state of mind, defense counsel explicitly acknowledged that the Court had "not preclude[ed] [counsel] from anything" in that regard and had instead "given [counsel] a lot of leeway." (Tr. at 1153).

b. Discussion

At trial, Georgescu vigorously argued through jury addresses, cross-examination, and his own trial testimony that, as principally evidenced by the CIA Calls, he lacked the requisite intent to commit either of the charged offenses. Despite having been given every opportunity to advance that claim, Georgescu now asserts that the absence of a negation of intent instruction deprived him of a meaningful defense. (Br. 40-41). It did not.

Judge Abrams properly declined to instruct the jury on negation of intent. Her reasoning was entirely consistent with this Court's expressed skepticism of the novel doctrine, which has been acknowledged only in the Eleventh Circuit. *See Giffen*, 473 F.3d at 43; *see also* A. 322 (discussing *Giffen*). Moreover, even absent the instruction, Georgescu had ample opportunity to argue "that he lacked the intent essential to the offense charged because of his good-faith belief that he was acting on behalf of the government," *id.*—and did so at every stage of the proceeding. Accordingly, he suffered no discernible prejudice and his argument fails.

This Court's most recent discussion of negation of intent illustrates the point. In *Mergen*, the defendant argued that he was entitled to a negation of intent instruction, because he had testified that he participated in an arson—which resulted in a conviction under the Travel Act—as part of his work as an FBI informant. *Mergen*, 764 F.3d at 205. After noting that the negation doctrine had not been recognized in this Circuit, the Court observed that, "[e]ven if [it] were to recognize the doctrine, it is unclear what independent role

it would play; Mergen already argues that he lacked the requisite intent for a Travel Act violation because of his informant status." *Id.* at 205-06. There, as here, the defendant was permitted to cite his interactions with government representatives as evidence tending to undercut the requisite *mens rea*. Georgescu was given every opportunity to adduce evidence about his brief contact with the CIA and argue that those interactions showed he did not intend to commit the charged offenses—a theory that the jury resoundingly rejected. No more was required.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: New York, New York
June 29, 2017

Respectfully submitted,

JOON H. KIM,
Acting United States Attorney for the Southern District of New York, Attorney for the United States of America.

ANDREA L. SURRATT,
ILAN GRAFF,
KARL METZNER,
Assistant United States Attorneys, Of Counsel.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 11,333 words in this brief.

JOON H. KIM,
Acting United States Attorney for the Southern District of New York

By: KARL METZNER,
Assistant United States Attorney

ADDENDUM

Add. 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	STIPULATION
- v. -	:	14 Cr. 799 (RA)
VIRGIL FLAVIU GEORGESCU,	:	
Defendant.	:	

IT IS HEREBY STIPULATED AND AGREED by and among the United States of America, by Preet Bharara, United States Attorney for the Southern District of New York, Ilan Graff and Andrea Surratt, Assistant United States Attorneys, of counsel, and VIRGIL FLAVIU GEORGESCU, the defendant, with the consent of his attorney, Albert Dayan, Esq., respectively, that:

1. In approximately early June 2001, GEORGESCU, on his own initiative, visited the Federal Bureau of Investigation ("FBI") Field Office in Las Vegas, Nevada.

2. At this initial meeting in early June 2001, GEORGESCU told FBI agents that he could provide information about credit card fraud, immigration fraud, identity theft, drugs, prostitution, and burglaries. GEORGESCU told the agents that he did not want to be known as an "informant," and did not want to have to testify in court.

3. GEORGESCU officially began work as an FBI source on

GOVERNMENT EXHIBIT 1003
14 Cr. 799 (RA)

Add. 2

or about July 5, 2001. GEORGESCU thereafter continued to meet with FBI agents, who were now assigned as GEORGESCU's handlers, on a regular basis. At these meetings, GEORGESCU continued to provide information about the criminal activities of other people.

4. On one occasion, pursuant to FBI agents' instructions, GEORGESCU travelled within the United States. GEORGESCU was reimbursed by the FBI for his travel expenses in connection with this trip.

5. GEORGESCU was officially closed as an FBI source in August 2003. During the period that GEORGESCU was an FBI source, the information that he reported was used as part of multiple investigations, including investigations that resulted in criminal charges. GEORGESCU did not receive any monetary compensation for his cooperation with the FBI.

6. In June 2001, as part of becoming an FBI informant, GEORGESCU signed the FBI's rules for criminal informants, which is marked as Government Exhibit 502. In June 2002, for a second time, GEORGESCU was advised of the FBI's rules for criminal informants, which is marked as Government Exhibit 503.

Add. 3

IT IS FURTHER STIPULATED AND AGREED that this stipulation, and Government Exhibits 502 and 503, may be received in evidence at trial.

Dated: New York, New York
April 28, 2016

PREET BHARARA
United States Attorney
Southern District of New York

By: _____
Ilan Graff
Andrea Surratt
Assistant United States Attorneys

By: _____
Albert Dayan, Esq.
Attorney for Defendant VIRGIL FLAVIU GEORGESCU

Add. 4

(01/26/1998)

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE **Date:** 06/06/2001

To: Las Vegas

From: Las Vegas
Squad 3/OC
Contact: SA Robert L. Clymer, (702) [redacted]

Approved By: Hanford Jerry W

Drafted By: Clymer Robert

Case ID #: [redacted]

Title: [redacted]

Synopsis: Required admonishments to criminal informants/cooperating witnesses (CIs/CWs) pursuant to the Attorney General guidelines. These admonishments must be reiterated at least annually or at anytime there is an indication that there is a need. (Furnished at conversion of CW or CI and yearly thereafter.)

Details: Captioned individual has been provided with the following admonishments in accordance with Manual of Investigative Operations and Guidelines, section 137-6, and Resolution 18. These admonishments must be made clear to the CI/CW at the earliest opportunity, but in no event, later than the second contact after being converted.

1. **Assistance Voluntary** - The CI/CW's assistance is strictly voluntary and will not exempt him/her from arrest or prosecution for any violation of law except where such violations were approved by the appropriate (FBI) official pursuant to Section 137-5.

2. **Plan Criminal Acts** - CI/CWs will not initiate a plan to commit criminal acts.

3. **Participation with Subjects** - CI/CWs will not participate in criminal activities unless specifically authorized by the FBI.

4. **Unlawful Acts** - CI/CW's assistance is strictly voluntary. He/she must not engage in any unlawful acts, except as specifically authorized by representatives for the FBI, and is subject to prosecution for any unauthorized unlawful acts.

5. **Truthfulness** - CI/CW must provide truthful information at all times. He/she must report all positive information, both inculpatory and exculpatory, as promptly as possible.

GOVERNMENT EXHIBIT 502
14 Cr. 799 (RA)

[redacted] 00130

Add. 5

6. **FBI Instructions** - CI/CW must abide by the instructions of the FBI and not take or seek to take any independent action on behalf of the United States Government. He/she will not initiate a plan to commit a criminal act.

7. **Not Employee** - CI/CW is not an employee of the FBI and may not consider or represent himself/herself to be an employee or undercover agent of the FBI.

8. **Jurisdiction** - CI/CW was advised of the pertinent legal issues related to the FBI jurisdiction regarding the specific criminal violations on which source is reporting.

9. **Acts of Violence** - CI/CW must not engage or participate in acts of violence to include witness tampering, witness intimidation, entrapment, or the fabrication, alteration, or destruction of evidence. When asked to participate in such an act, or learns of plans to commit such an act, he/she is to take all reasonable measures to discourage the violence and report the incident to his/her handling agent at their earliest opportunity.

10. **Payments are Income** - CI/CW is liable for any taxes that may be owed on monies the United States Government pays to him/her for services rendered.

11. **Payments not Guaranteed** - The FBI cannot guarantee any rewards, payments, or other compensation to the CI/CW.

12. **Prosecutive Promises** - When a CI/CW is cooperating with the FBI in exchange for consideration by a prosecuting office(s), and upon request of the source, the FBI will advise the prosecuting office(s) of the nature and extent of the person's assistance to the FBI but cannot make any prosecutive or sentencing promises.

13. **Alien Status** - In cases involving foreign nationals, no promises or representations can be made regarding alien status and/or their right to enter or remain in the United States.

14. **Grant of Confidentiality** - CI/CW's relationship must be maintained in the strictest confidence, and he/she must exercise constant care to ensure that the relationship is not divulged to anyone. The United States Government will strive to protect a CI/CW's identity (and CW's identity except as necessary for trial and/or related investigative purposes) but cannot guarantee that it will not be divulged.

15. **No Contracts** - The CI/CW may not enter into any

Add. 6

To: Las Vegas From: Las Vegas
Re: [redacted] 06/06/2001

contracts or incur any obligations on behalf of the United States Government, except as specifically instructed and approved by the FBI.

Cooperating Witness Signature

June 8, 2001
Date

Case Agent Signature

Co-case Agent Signature

♦♦

Add. 7

(01/26/1998)

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE **Date:** 06/17/2002

To: Las Vegas

From: Las Vegas
Squad 3/OC
Contact: SA Matthew A. Mohr, 702-[redacted]

Approved By: Hanford Jerry W

Drafted By: Mohr Matthew A:mam

Case ID #: [redacted]

Title: [redacted]

Synopsis: Required admonishments to criminal informants/cooperating witnesses (CIs/CWs) pursuant to the Attorney General guidelines.

Details: Captioned CW has been provided with the following admonishments in accordance with Manual of Investigative Operations and Guidelines, section 137-6, and Resolution 18. These admonishments must be made clear to the CI/CW at the earliest opportunity, but in no event, later than the second contact after being converted.

1. **Assistance Voluntary** - The CI/CW's assistance is strictly voluntary and will not exempt him/her from arrest or prosecution for any violation of law except where such violations were approved by the appropriate (FBI) official pursuant to Section 137-5.

2. **Plan Criminal Acts** - CI/CWs will not initiate a plan to commit criminal acts.

3. **Participation with Subjects** - CI/CWs will not participate in criminal activities unless specifically authorized by the FBI.

4. **Unlawful Acts** - CI/CW's assistance is strictly voluntary. He/she must not engage in any unlawful acts, except as specifically authorized by representatives for the FBI, and is subject to prosecution for any unauthorized unlawful acts.

5. **Truthfulness** - CI/CW must provide truthful information at all times. He/she must report all positive information, both inculpatory and exculpatory, as promptly as possible.

6. **FBI Instructions** - CI/CW must abide by the instructions of the FBI and not take or seek to take any

GOVERNMENT EXHIBIT 503
14 Cr. 799 (RA)

[redacted]

FG000100

Add. 8

independent action on behalf of the United States Government. He/she will not initiate a plan to commit a criminal act.

7. **Not Employee** - CI/CW is not an employee of the FBI and may not consider or represent himself/herself to be an employee or undercover agent of the FBI.

8. **Jurisdiction** - CI/CW was advised of the pertinent legal issues related to the FBI jurisdiction regarding the specific criminal violations on which source is reporting.

9. **Acts of Violence** - CI/CW must not engage or participate in acts of violence to include witness tampering, witness intimidation, entrapment, or the fabrication, alteration, or destruction of evidence. When asked to participate in such an act, or learns of plans to commit such an act, he/she is to take all reasonable measures to discourage the violence and report the incident to his/her handling agent at their earliest opportunity.

10. **Payments are Income** - CI/CW is liable for any taxes that may be owed on monies the United States Government pays to him/her for services rendered.

11. **Payments not Guaranteed** - The FBI cannot guarantee any rewards, payments, or other compensation to the CI/CW.

12. **Prosecutive Promises** - When a CI/CW is cooperating with the FBI in exchange for consideration by a prosecuting office(s), and upon request of the source, the FBI will advise the prosecuting office(s) of the nature and extent of the person's assistance to the FBI but cannot make any prosecutive or sentencing promises.

13. **Alien Status** - In cases involving foreign nationals, no promises or representations can be made regarding alien status and/or their right to enter or remain in the United States.

14. **Grant of Confidentiality** - CI/CW's relationship must be maintained in the strictest confidence, and he/she must exercise constant care to ensure that the relationship is not divulged to anyone. The United States Government will strive to protect a CI/CW's identity (and CW's identity except as necessary for trial and/or related investigative purposes) but cannot guarantee that it will not be divulged.

Add. 9

To: Las Vegas From: Las Vegas
Re: [redacted] 06/17/2002

15. **No Contracts** - The CI/CW may not enter into any contracts or incur any obligations on behalf of the United States Government, except as specifically instructed and approved by the FBI.

Matthew A. Mol
Case Agent Signature:

06/17/2002
Date:

♦♦

Add. 10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
	:	STIPULATION
- v. -	:	
	:	14 Cr. 799 (RA)
VIRGIL FLAVIU GEORGESCU,	:	
Defendant.	:	

IT IS HEREBY STIPULATED AND AGREED by and among the United States of America, by Preet Bharara, United States Attorney for the Southern District of New York, Ilan Graff and Andrea Surratt, Assistant United States Attorneys, of counsel, and VIRGIL FLAVIU GEORGESCU, the defendant, with the consent of his attorney, Albert Dayan, Esq., respectively, that:

1. In or about April 2012, the defendant, VIRGIL FLAVIU GEORGESCU, placed two telephone calls (the "Calls") to a publicly-available telephone number for the Central Intelligence Agency ("CIA");

2. Government Exhibit 1D is a compact disc containing true and accurate recordings of the Calls, which have not been modified other than to redact identifying information of the individuals with whom the defendant, VIRGIL FLAVIU GEORGESCU, spoke;

3. The CIA has searched its records and has not

GOVERNMENT EXHIBIT 1004
14 Cr. 799 (RA)

identified any further contact between the defendant, VIRGIL FLAVIU GEORGESCU, and the CIA between the April 2012 date of the Calls and the defendant's December 15, 2014, arrest in this case.

IT IS FURTHER STIPULATED AND AGREED that both this stipulation and Government Exhibit 1D may be received in evidence at trial.

Dated: New York, New York
April 28, 2016

PREET BHARARA
United States Attorney
Southern District of New York

By: _____
Ilan Graff
Andrea Surratt
Assistant United States Attorneys

By: _____
Albert Dayan, Esq.
Attorney for Defendant VIRGIL FLAVIU GEORGESCU

Add. 12

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

May 17, 2016

BY EMAIL

The Honorable Ronnie Abrams
United States District Judge
Southern District of New York
Thurgood Marshall U.S. Courthouse

Re: United States v. Flaviu Georgescu,
14 Cr. 799 (RA)

Dear Judge Abrams:

On May 16, 2016, the Court distributed a sample entrapment by estoppel instruction for the parties' consideration (the "Williams Instruction"). The Government considers the Williams Instruction an appropriate foundation for an entrapment by estoppel charge in this case. However, it respectfully proposes one modification to the proposed charge. A copy of the Williams Instruction with the Government's proposed language included is attached hereto as Exhibit A.

In particular, the Government asks that the Court insert the following language before the last paragraph of the charge:

> To establish this defense, the defendant must show that the government agent's statements or acts constituted an affirmative assurance to the defendant that the specific conduct with which the defendant is charged here was in fact authorized. You must also find that the defendant's conduct was within the general scope of the perceived authorization. In other words, this defense will not support a claim of open-ended license to commit crimes in the expectation of receiving subsequent authorization from a government official.

The proposed language is drawn directly from the Second Circuit's articulation of the entrapment by estoppel defense and aligns closely with Sand's proposed instructions. See United States v. Miles, 748 F.3d 485, 489 (2d Cir. 2014) ("To make out this affirmative defense, a defendant must show an affirmative assurance from the government that his conduct was legal"); United States v. Abcasis, 45 F.3d 39, 43-44 (2d Cir. 1995) ("Needless to say, the defendant's conduct must remain within the general scope of the solicitation or assurance of authorization; this defense will not support a claim of an open-ended license to commit crimes in the expectation of receiving subsequent authorization."); United States v. Corso, 20 F.3d 521, 528 (2d Cir. 1994) ("Entrapment by estoppel applies when an authorized government official tells [a] defendant that certain conduct is legal and the defendant believes the official.") (quoting United States v. Weitzenhoff, 1 F.3d 1523, 1534 (9th Cir. 1993)); Sand, Modern Federal Jury Instructions, Instr. 8-7.1 ("The misrepresentation must have been a clear statement directly by the official to the defendant that the

conduct defendant is charged with here was in fact legal."); see also Abcasis, 45 F.3d at 44 (noting that the doctrine "focuses on the *conduct of the government* leading the defendant to believe reasonably that he was authorized to do the act forbidden by law" and "depends on the unfairness of prosecuting one who has been led by the conduct of government agents to believe his acts were authorized"). The Government also respectfully reserves the right to propose additional modifications at the charge conference in the event that defense counsel alters his proposed entrapment by estoppel theory.

Respectfully submitted,

PREET BHARARA
United States Attorney

by: 

Ilan Graff / Andrea Surratt
Assistant United States Attorneys
(212) 637-2296 / 2493

cc: Albert Dayan, Esq. (by email)

Exhibit A

Add. 15

Entrapment by Estoppel Defense

(Given in *United States v. Williams*, 526 F. App'x 29 (2d Cir. 2013)—
Government's proposed modification in bold)

Now, if you conclude that the Government has proven the defendant's guilt beyond a reasonable doubt with respect to the count in the Indictment that you are considering, you should then also consider whether the defendant has proven the affirmative defense called entrapment by estoppel with respect to that count. I will now explain this affirmative defense to you.

The entrapment by estoppel defense is an affirmative defense. This means it is the defendant's burden to prove it, not the Government's. The defendant has to prove the affirmative defense by a preponderance of the evidence. You should follow my prior instructions on what it means to prove something under the standard of preponderance of the evidence.

Now let me describe the entrapment by estoppel defense to you. This is a defense to the charges in the Indictment if you find that a government agent in fact made statements or committed acts that produced in the defendant a reasonable belief that he was authorized to engage in the illegal conduct as an aid to law enforcement, even though that belief turned out to be wrong. The entrapment by estoppel defense focuses on what was in the defendant's mind and the reasonableness of that belief.

To establish this defense, the defendant must prove each of the following two elements: First, the defendant must prove that conduct or statements of government officials caused him in good faith to believe that he was authorized to engage in the charged conduct. This is a subjective inquiry, i.e., what was actually in the defendant's mind?

Second, the defendant must also prove that he acted reasonably in relying on that authorization. This means that a reasonable person sincerely intent on obeying the law could have believed he had obtained the agents' authorization of his conduct and would not have been put on notice to make further inquiries of the government agents before engaging in that conduct. This is an objective inquiry, i.e., was what was in the defendant's mind reasonable in light of all the circumstances?

To establish this defense, the defendant must show that the government agent's statements or acts constituted an affirmative assurance to the defendant that the specific conduct with which the defendant is charged here was in fact authorized. You must also find that the defendant's conduct was within the general scope of the perceived authorization. In other words, this defense will not support a

Add. 16

claim of open-ended license to commit crimes in the expectation of receiving subsequent authorization from a government official.

You must consider the affirmative defense independently as to each of the two counts charged in the Indictment. With respect to each count in the Indictment, if you find that the defendant has satisfied his burden of proving the defense, then you must find the defendant not guilty. Conversely, if you find that the defendant has not satisfied his burden of proving this affirmative defense, and you find that the Government has proven beyond a reasonable doubt each of the elements of the count in the Indictment that you are considering, then you must find the defendant guilty.