16-4159-cr

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

– v. –

VIRGIL FLAVIU GEORGESCU,

Defendant-Appellant.

On Appeal From The United States District Court
For The Southern District Of New York

BRIEF AND SPECIAL APPENDIX
FOR DEFENDANT-APPELLANT

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON LLP
Attorneys for Defendant-Appellant
One New York Plaza
New York, New York 10004
(212) 859-8000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of New York (R. Abrams, D.J.) had jurisdiction over this matter pursuant to 18 U.S.C. § 3231. The district court entered a final judgment against Defendant-Appellant Virgil Flaviu Georgescu ("Appellant") on December 6, 2016, which disposed of all claims. JA 588-93. Appellant timely filed a notice of appeal on December 15, 2016. JA 594. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred by instructing the jury that, in order to establish the affirmative public authority defense of entrapment by estoppel, Appellant was required to prove that "affirmative" statements or conduct by a government official caused him to believe that he was authorized to engage in the charged conduct?

2. Whether the district court erred by refusing to permit Appellant to argue the defense of negation of intent with respect to Count I of the Indictment, where Appellant presented evidence and testimony demonstrating that he had a good faith belief that he was acting with government authorization in the course of the charged conduct, and, therefore, lacked the requisite *mens rea* to be convicted of conspiracy to kill officers and employees of the United States?

PROCEDURAL HISTORY

On December 4, 2014, Appellant was indicted on one count of conspiracy to kill officers and employees of the United States under 18 U.S.C. § 1114, and one count of conspiracy to provide material support or resources to a foreign terrorist organization under 18 U.S.C. § 2339B (the "Indictment"). JA 33-38. On May 25, 2016, following a trial before the Honorable Ronnie Abrams in the United States District Court for the Southern District of New York, a jury found Appellant guilty on both Counts of the Indictment. JA 334. On June 8, 2016, the undersigned was assigned as CJA counsel to Appellant. JA 20. Judge Abrams entered a final judgment on December 6, 2016, sentencing Appellant to 10 years of incarceration to be followed by three years of supervised release. JA 589-90. This timely appeal followed.

STATEMENT OF RELEVANT FACTS

Background & History of Cooperation.

People who are willing to risk their physical safety by reporting criminal activity and who also volunteer to act as undercover cooperators on behalf of law enforcement are rare. But Appellant Virgil Flaviu Georgescu is undeniably one of those people. Appellant was born in 1972 in Romania. He always believed that it was important to help the government and demonstrate that you are a good citizen,

on the government's side. JA 610-11. Indeed, he legally changed his name to "Georgescu" in 1994 due to concerns for his safety arising from his assistance to the Romanian government while working as a security inspector at a hotel in Bucharest, Romania. *See* Final Presentence Investigation Report, *United States v. Georgescu*, No. 14-cr-00799, ECF No. 129, ¶ 61 (S.D.N.Y Nov. 3, 2016) ("PSR").

Appellant immigrated to the United States in 1998, settling in Las Vegas, Nevada and is now a naturalized U.S. citizen, but his mind-set about helping his country remained with him in his adopted home. JA 609-11. In 2001, while working in Las Vegas, Appellant became aware of criminal activity. JA 610-11. He was not involved, but he knew the people who were, and was a witness to the crimes. *Id.* He thought that, as a good citizen, he should report the criminal activity and help the U.S. government to apprehend and prosecute the criminals. JA 611-12. He therefore, voluntarily and entirely of his own accord, approached the Las Vegas office of the U.S. Federal Bureau of Investigation ("FBI"), and told an agent what he knew. *Id.* The FBI found his information credible and useful, and for two years Appellant operated as an undercover confidential witness, assisting FBI agents with multiple investigations of Romanian criminal organizations operating in Nevada and elsewhere in the United States, some of which resulted in prosecutions. JA 513-15; JA 585-86; JA 612-20. As part of his work for the FBI, Appellant travelled to Seattle, Washington at the FBI's direction

to track criminal suspects. JA 496; JA 585. However, in 2003, as the result of his work with the FBI, Appellant again found himself in danger for his safety; as a result, he again changed his name and ceased his work for the FBI. *See* PSR ¶ 64; JA 620-21.[1]

In April 2012, Appellant Was Contacted Regarding a Potential Weapons Transaction and Voluntarily Notified the U.S. Central Intelligence Agency.

In or around April 2012, Appellant was contacted by Andi Georgescu (no relation), a Romanian businessman operating from Los Angeles, California, about a potential weapons transaction. JA 149; JA 624-25. Andi told Appellant that his clients in Miami, Florida were looking to purchase $10 million in weapons on behalf of Colombian guerillas, and invited Appellant to participate in the deal. JA 149; JA 624-25.

First call to the CIA. Rather than taking any steps to engage in the transaction with the purported Colombian guerillas, Appellant immediately contacted the U.S. Central Intelligence Agency ("CIA"). JA 141-45; JA 626-27. During this call, Appellant told the CIA official that individuals in Miami were trying to buy weapons from Andi Georgescu, including AK-47s, grenades, ammunition and other weaponry. *See* JA 144. He explained that the buyers were Colombian guerillas and they were willing to pay increased prices because they did

[1] Appellant has since changed his name back to Virgil Flaviu Georgescu. *See* PSR ¶ 64.

not have an end-user certificate ("EUC") to purchase weapons legally. JA 142. Despite Appellant's reporting of the weapons plot, the CIA official told Appellant that the CIA could not help him over the phone, and instructed Appellant to provide the information to the U.S. Embassy in Romania. JA 145.

Second call to the CIA. Undeterred by the initial CIA official's response, Appellant again called the CIA to report the purported weapons deal. *See* JA 147. Over more than thirty-six minutes, Appellant walked the second CIA official through detailed information on the proposed weapons deal, including the specific weapons and quantity that the guerillas were attempting to procure. Unlike the first CIA official who Appellant spoke with, the second CIA official did not direct Appellant to the U.S. Embassy in Romania, but instead expressed substantial interest in Appellant's information.

Appellant explained to the second CIA official that the buyers were seeking $10 million in weapons, with an interest in purchasing more weapons if this transaction went smoothly. JA 149-50. He read to that official from the list of weapons that the buyers had provided to Andi (the "Weapons List") and offered to email the Weapons List to the CIA official. JA 153. The Weapons List provided that the buyers sought one thousand AK-47s, one thousand M-4 carbines, one thousand anti-personnel mines, and additional weaponry and ammunition. *Id.*

Appellant explained to the CIA official his concerns about Colombian guerillas obtaining those weapons. JA 157. He expressed specific concern that the weapons would be used to harm American soldiers and personnel in Colombia. *See id.* ("I was try to provide this information to you, you know, you have a lot of headache in Colombia all the time, and . . . a lot of agents were killed over there, and . . . I'm not happy with that.").

Appellant also made clear his understanding that the buyers were trying to purchase and transport the weapons to Colombia illegally. JA 154 ("[T]hey cannot provide the end-user certification, because I tell them like that: send me the end-user certification, and it is a database which I can check the end-user certification which is legal or not."). Specifically, Appellant explained that the buyers sought a fraudulent EUC to illegally purchase and transport the weapons, offering to increase the price for the weapons in exchange. *Id.* ("I ask [Andi] for a [EUC]. He said, I don't have one. Can you increase the price and use someone like . . . middleman, like Nigeria or . . . Sierra Leone or something like that.").

Finally, Appellant provided the official with his own phone number (he had provided his Social Security number to the first CIA official (JA 141)), as well as identifying information regarding Andi Georgescu, including his business and home addresses, and his mobile and home phone numbers. JA 162-65. Appellant also warned the CIA to be careful if they investigated Andi, who he said had

successfully concealed illicit activities from U.S. law enforcement in the past. *See* JA 155-56.

More than once during the second call, the official indicated that the CIA would be interested in Appellant's information if it could get further confirmation of his story. JA 157-59. The official stated that the information was "definitely something that, if we can verify, would be of interest to the, to the Agency to be aware of, you know[.] Again, particularly if these guns are going to . . . cartels." JA 157-58.

The CIA Official Appears to Authorize Appellant's Offer to Conduct an Undercover Investigation of the Weapons Transaction.

In the course of providing the CIA official with all of the information that he had regarding the proposed weapons transaction, Appellant also disclosed that he had before worked with the FBI conducting investigations. JA 160. With that experience in mind, he suggested that the best way to deal with this criminal conduct would be for the CIA to investigate the buyers, and he offered to help conduct the investigation on behalf of the CIA, working as an undercover informant, as he had for the FBI in the past:

> If you want to find more, you have to allow me to continue the deal, to see the end-user certificate, the middleman, everything, and I can provide you more, more, and more information, because in this moment we get stuck, you know?

JA 157. The CIA agent responded "Okay." *Id.* Appellant also stated:

> [You] start the investigation, and after that, don't do anything – let me to get more deeper and deeper. . . . I was educated undercover operations, and I know everything. I'm not [going to] put my life in danger, eh, eh, if someone ask me, I'm not [going to] say [I] talk with you never in my life . . .

JA 160. Rather than telling him that the CIA did not want him to investigate, the CIA official encouraged Appellant to continue, saying: "I understand." *Id.*

Encouraged by the CIA's response, Appellant continued to explain his proposed investigation. He described not only the information he thought he could uncover, but how he might go about obtaining such information:

> but you let me work for you, and I give you more information and more. If you, if you find this information out, I'll, I'll work for you . . . . You just give me a call, or someone, and tell me, "go forward." And I go forward, and when I get the middleman in Nigeria or Sierra Leone, I provide all your information, because . . . in my opinion, you don't have to stop anything right now. You have to find out the way we gonna go from here to there, you know? This is my, my idea, uh, you know, because if you know the way, if you know the procedure, if you know the account which. . . . Because the thing it is they bring the cash in Miami with the private jet, and they have to, to put the money in the bank. But means you have to know that, too. But we have to go forward, forward, forward to see everything how, how they work, because, if they do this deal, for sure it's not the first one. 100% I guarantee you.

Id. Appellant also explained that, having worked undercover for the FBI in Las Vegas, he was experienced in undercover operations and was more than capable of

finding this information. JA 160-61. Again, the CIA official did not instruct Appellant to stand down. Instead, he replied: "Okay. I understand." JA 161.

Appellant continued to make clear his desire to help U.S. law enforcement, as he had worked with the FBI. He offered over and over to work together with the CIA to prevent the weapons deal: "we have to allow him to continue the deal, to find the whole, the whole picture. You know, right now . . . I can't put everything together – I don't know the people from . . . Colombia. I don't know the country which is the audition to be middleman in this transaction. I don't know nothing." JA 163.

Although the CIA official indicated that the CIA would contact him for more information at the end of the call, Appellant's focus was on his repeated offers to help the CIA and the CIA official's repeated assurances of "Okay" and "I understand." The CIA official stated that "it's definitely something that, if we can verify, would be of interest to the, to the Agency." JA 157. To Appellant, the CIA was interested in the information he provided, but needed further verification from him. He believed, based on the words of the CIA official and his past experience as a voluntary confidential witness for the FBI, that the CIA wanted him to engage in the proposed investigation to obtain confirmation of this weapons deal for the FARC.

Appellant Conducted the Investigation, As Discussed.

In May 2014, Appellant was contacted again by Andi, as the buyers had resurfaced and were again seeking weapons for Colombian guerillas. *See* JA 670. Based on his conversation with the second CIA official in April 2012, Appellant engaged with the buyers to open his undercover investigation of the weapons deal.

For several months, Appellant travelled across Europe posing as a weapons dealer and collecting information regarding weapons manufacturers and suppliers who were willing to provide illegal arms to Colombian guerillas. He met with the purported buyers working for those Colombian guerillas, the weapons manufacturers and suppliers, and middlemen who could procure fraudulent EUCs to enable the guerillas transport the weapons back to Colombia. *See* JA 689-98. Throughout this time, Appellant never sold even a bullet; rather, he continuously gathered incriminating evidence on all of the players involved in the weapons deal.

Appellant Is Arrested in Connection with a Drug Enforcement Agency Sting Operation.

The purported weapons buyers had been holding themselves out as representatives of the Fuerzas Armadas Revolucionarias de Colombia ("FARC"). Unbeknownst to Appellant, they were actually cooperators working for the U.S. Drug Enforcement Agency ("DEA"), and posing as FARC guerillas. *See* JA 466-70. The purported weapons deal was, in fact, a long running DEA sting operation.

On December 4, 2014, in connection with the DEA's sting operation, Appellant and two other individuals were indicted on charges of conspiracy to kill officers or employees of the United States and conspiracy to provide material support to a foreign terrorist organization in violation of 18 U.S.C. § 2339B. *See* JA 33-38. On December 15, 2014, following a meeting in which he obtained a signed contract from the buyers (which he believed would verify the weapons deal to the CIA), Appellant was arrested by the Montenegro National Police, which was working with the DEA. *See* JA 466.

Immediately upon his arrest, Appellant explained to DEA agents that he had been working undercover for the CIA. *See* JA 217. That night, Appellant provided the arresting agents with all of the information he had collected. *See* JA 466-70. To prove his loyalty to the U.S. government, he helped the DEA lure a co-defendant from Italy to Montenegro, where the co-defendant was apprehended. *See* JA 709-10. In subsequent interviews with U.S. government agents, Appellant consistently stated that he conducted all of the activities in connection with the purported weapons deal on the government's behalf. *See* JA 473-74; Sealed Letter from S. Witzel to Hon. Ronnie Abrams, *United States v. Georgescu*, No. 14-cr-00799, ECF No. 130 (S.D.N.Y. Nov. 14, 2016). All to no avail. In February 2015, Appellant and two codefendants were extradited to face trial in the Southern District of New York. *See* PSR ¶ 33.

The District Court Precluded Appellant from Presenting a Negation of Intent Defense.

Maintaining that he had engaged in all of the conduct underlying the charges against him innocently, as part of his undercover investigation for the CIA, Appellant faced trial on both charges. At trial, Appellant planned to argue that he did not have the requisite intent to commit either of the charged offenses because he believed in good faith that he was working for the government. To support this defense – commonly known as "negation of intent" – Appellant intended to present evidence regarding his prior cooperation with the FBI, his calls with the CIA in 2012, and his own testimony regarding his intentions.

Prior to trial, the government moved to preclude Appellant from presenting the negation of intent defense with respect to Count II of the Indictment, which charged Appellant with conspiracy to provide material support to a terrorist organization. *See* JA 104-112. The government argued that negation of intent was not an available defense to Count II in this case because 18 U.S.C. § 2339B only requires a showing that Appellant provided or agreed to provide material support to individuals he understood to be engaged in terrorist activity. *Id.* Appellant's subjective belief that he was acting on behalf of the CIA, according to the government, would not undermine evidence tending to show that Appellant agreed to provide and/or provided material support to a terrorist organization. *Id.*

With respect to Count I, charging conspiracy to kill officers or employees of the United States, the government acknowledged that a negation of intent defense could be appropriate. JA 111. That section requires the prosecution to demonstrate an elevated *mens rea* – *i.e.*, malice aforethought. *See* 18 U.S.C. § 1114. The government stated that, if Appellant were able to demonstrate a subjective, good faith belief that he was working on behalf of the CIA, such evidence would be relevant to the issue of whether Appellant acted with the intent or knowledge that the weapons would be used to kill officers or employees of the United States. JA 111. Defense counsel argued that the negation of intent defense was applicable and should be permitted as to both Counts. *See* JA 171-80.

The district court held that it would not permit Appellant to argue negation of intent as to either Count. JA 324-325. According to the court, negation of intent should not apply to either of the conspiracy charges because "allowing a defendant to argue that proof of scienter can be negated by a defendant's mistaken belief that his actions were authorized by the government would essentially amount to permitting a mistake-of-law defense." JA 325. The court reasoned that a defendant would be guilty of conspiracy "[i]f the defendant ha[d] the affirmative intent to make that goal occur . . . whether or not he believes the goal is legal or has some ulterior motive." *Id.* Accordingly, Appellant was precluded entirely from presenting a negation of intent defense at trial. *Id.*

The District Court Ruled that Appellant Could Argue Entrapment By Estoppel.

The district court ruled that Appellant could present the affirmative defense of entrapment by estoppel as to both Counts. JA 321-22. Entrapment by estoppel precludes conviction where the government, by its own statements or conduct, has led the defendant to believe that it authorized the charged activity. The evidence in support of this defense consisted of Appellant's FBI cooperation, his the thirty-six minute conversation with the CIA in which he detailed the proposed weapons deal, and his own testimony regarding his intentions. *See* JA 321. Because the second CIA official provided positive feedback and seemed to accept Appellant's repeated offers to investigate further, Appellant testified that he believed that he was authorized to conduct an investigation of the weapons deal for the CIA, with the understanding that he needed to provide the CIA with further verification. JA 663; JA 666-670.

The District Court's Jury Instruction on Entrapment by Estoppel Misstated this Circuit's Standard, and Was Erroneous.

The wording of the jury instruction for the entrapment by estoppel defense was hotly contested in briefing and in oral argument on several occasions both pretrial and during the trial. The main point of contention came down to whether this Court's jurisprudence permitted inserting the word "affirmative" into the jury charge so that the jury could only find that Appellant had proven entrapment by

estoppel if the government had engaged in "affirmative" statements or conduct that authorized him to undertake the investigation. JA 420-428; JA 771-776.

Ultimately, the court instructed the jury, in relevant part, as follows:

> [L]et 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 [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 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?

JA 460-62 (emphasis added). The jury convicted Appellant on both Counts. JA 334.

SUMMARY OF THE ARGUMENT

Point I: The district court committed reversible error when it instructed the jury that, in order to establish entrapment by estoppel, Appellant was required to prove that "affirmative" statements or conduct by a government official caused him to reasonably believe that he was authorized to engage in the charged conduct.

The district court's erroneous instruction on entrapment by estoppel put a higher burden of proof on Appellant than is warranted by this Court's precedents, which require a defendant to prove "seeming," rather than "affirmative" authorization. Requiring Appellant to prove "affirmative" authorization brought the standard for entrapment by estoppel closer to the standard for actual authority, essentially blurring the legal distinction between the two standards, which this Court has scrupulously adhered to.

The court grafted a nearly impossible bar onto the standard for Appellant to hurdle in order to prove his good faith and reasonable belief that he was working with the CIA when it inserted "affirmative" into the jury charge. By imposing this condition, the district court denied the jury the opportunity to evaluate Appellant's defense under the proper standard for entrapment by estoppel. This error was prejudicial in that it likely misled the jury into believing that, unless the government "affirmatively" instructed him to engage in the investigation (which would have constituted actual authority), Appellant could not prove entrapment by

estoppel. The evidence that Appellant adduced to support his defense was plainly sufficient to show – and allow a jury to find – that the government "seemingly" authorized him to act, and his good faith belief that he was so authorized was reasonable under his circumstances. Thus, this erroneous and prejudicial error in the jury instruction should result in reversal and a new trial.

Point II: The district court erred when it ruled that Appellant could not present the complete defense of negation of intent as to Count I of the Indictment.

Negation of intent rebuts the *mens rea* element of the crime when the defendant proves that he held an honest, good-faith belief that he was cooperating with the government when engaging in the offense conduct. While this theory has not been expressly recognized by the Second Circuit, this Court has acknowledged that there may be certain cases where evidence regarding the defendant's subjective belief that his actions were authorized by a government official would negate proof of *mens rea*. With respect to Count I, this is such a case.

The district court determined that the defense was not available here because Appellant's good faith belief that he was authorized by a government official to act could not have negated the intent element of either conspiracy charge. This was in error. The district court should have permitted Appellant to present this defense (and accordingly instructed the jury) as to Count I, which charged Appellant with conspiracy to kill officers or employees of the United States. That offense requires

a showing of malice aforethought, a heightened intent standard that is characterized by the defendant's conscious disregard for the lives of others. Appellant's good faith belief that he was acting on behalf of the CIA when he engaged in the charged conduct would negate proof of that intent. Because the court erroneously precluded the defense of negation of intent on Count I, the conviction on that charge should be reversed.

STANDARD OF REVIEW

Whether the challenged jury instructions were proper is a question of law that is reviewed *de novo*. *United States v. Coppola*, 671 F.3d 220, 247 (2d Cir. 2012); *United States v. Dove*, 916 F.2d 41, 45 (2d Cir. 1990).

Where an appellant claims that the trial court improperly denied him the opportunity to present a defense, reversal is appropriate if the trial court's decision was clear error. *United States v. Corso*, 20 F.3d 521, 524 (2d Cir. 1994).

ARGUMENT

I.

THE COURT COMMITTED REVERSIBLE ERROR WHEN IT INSERTED THE TERM "AFFIRMATIVE" IN ITS JURY INSTRUCTION ON THE ENTRAPMENT BY ESTOPPEL DEFENSE

"A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *Anderson v. Branen*, 17 F.3d 552, 556 (2d Cir. 1994) (citations omitted). "An erroneous instruction, unless harmless, requires a new trial." *Id.* (citation omitted). An error is harmless only if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999). "Objectionable instructions are considered in the context of the entire jury charge, and reversal is required where, based on a review of the record as a whole, the error was prejudicial or the charge was highly confusing." *United States v. Kopstein*, 759 F.3d 168, 172 (2d Cir. 2014) (citation and internal quotations marks omitted).

By instructing the jury that Appellant was required to prove that "affirmative" statements or conduct by the CIA official caused him to believe that he was authorized to engage in the charged conduct, the district court misapplied Second Circuit law on entrapment of estoppel. In so doing, the court blurred the line between entrapment by estoppel and actual authority, appearing to require

Appellant to demonstrate that he received actual authority from the CIA, rather than seeming authority. At the very least, the instruction likely caused confusion on the part of the jury as to the appropriate standard to apply. The CIA official's statements induced Appellant to reasonably and in good faith believe that he was so authorized; this meets this Court's standard for entrapment by estoppel. Accordingly, Appellant's conviction should be reversed and a new trial ordered.

A. The Jury Instruction on Entrapment by Estoppel Was Erroneous.

i. The Public Authority Defense.

Due process does not permit the conviction of a defendant where the government, by its own actions, solicited the defendant to engage in the charged conduct. *See Cox v. State of Louisiana*, 379 U.S. 559, 571 (1965); *United States v. Abcasis*, 45 F.3d 39, 43-44 (2d Cir. 1995). The public authority defense enables a defendant to contest charges using this due process principle, and is an affirmative defense. It requires the defendant to prove that, although the government has met its burden of demonstrating the elements of a crime, there should be no conviction because the government, by some conduct or communication, caused the defendant to believe that he was authorized to engage in the otherwise criminal conduct. *Abcasis*, 45 F.3d at 43-44.

This Court has expressly recognized two variations of the public authority defense. The first variation – the "actual authority" defense – is straightforward. It

requires the defendant to show that he "has *in fact* been authorized by the government to engage in what would otherwise be illegal activity." *United States v. Mergen*, 764 F.3d 199, 205 (2d Cir. 2014) (emphasis in original).

The second variation of the public authority defense – commonly known as "entrapment by estoppel" – does not require proof of actual authorization by the government. Instead, it requires a defendant to show that "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." *United States v. Giffen*, 473 F.3d 30, 41 (2d Cir. 2006) (emphasis in original). The government is therefore estopped from prosecuting a defendant where its own conduct led him to reasonably believe that he was authorized to engage in illegal conduct. *See Abcasis*, 45 F.3d at 43-44. "The doctrine depends on the unfairness of prosecuting one who has been led by the conduct of government agents to believe his acts were authorized." *Id.* at 44.

ii. The Jury Instructions Imposed an Erroneous Legal Standard for the Entrapment by Estoppel Defense.

This Court has made clear that entrapment by estoppel requires that the defendant prove that he was reasonably led to believe that his actions were lawful as the result of the government's "**seeming** authorization." *Giffen*, 473 F.3d at 41 (emphasis in original). This less stringent standard reflects the legal distinction between entrapment by estoppel and actual authority that this Court has always

scrupulously maintained. By requiring Appellant to demonstrate "affirmative" conduct or statements, the district court blurred that distinction and effectively imposed the substantially higher standard of the "actual authority" defense.

In deciding to insert the word "affirmative" into its entrapment by estoppel instruction, the district court largely relied on language from this Court's opinion in *United States v. Miles*, 748 F.3d 485 (2d Cir. 2014). *See* JA 772-73. In *Miles* – which, as explained below, is an outlier – the Court stated:

> An entrapment-by-estoppel defense may arise where a government agent authorizes a defendant 'to engage in otherwise criminal conduct and the defendant, relying thereon, commits forbidden acts in the mistaken but reasonable, good faith belief that he has in fact been authorized to do so. . . . To make out this affirmative defense, a defendant must show an affirmative assurance from the government that his conduct was legal.

748 F.3d at 489 (citation and internal quotation marks omitted). The *Miles* Court did not elaborate on the appropriate interpretation of this standard, which deviates from the Second Circuit's body of law on this issue. In particular, it did not explain what sort of statement or conduct could constitute "affirmative assurance."

This formulation of the entrapment by estoppel defense is contrary to longstanding Second Circuit precedent defining entrapment by estoppel, articulated over decades of case law in terms less definite and stringent than an "affirmative" authorization. When this Court first articulated the standard in *United States v. Abcasis*, it reviewed how other Circuits formulated the defense, including a Tenth

Circuit standard including the phrase "affirmatively misleads", 45 F.3d at 43 (citing *United States v. Nichols*, 21 F.3d 1016, 1018 (10th Cir. 1994)), a Sixth Circuit standard discussing a government "announcement", *id.* (citing *United States v. Levin*, 973 F.2d 463, 468 (6th Cir. 1992)), and a First Circuit case stating that entrapment by estoppel is available when "an official assures a defendant" conduct is legal. *Id.* (citing *United States v. Smith*, 940 F.2d 710, 714 (1st Cir. 1991)). After analyzing those standards, this Court held that, in the Second Circuit:

> [T]he defense of entrapment by estoppel can arise . . . [if] a drug enforcement agent solicits a defendant to engage in otherwise criminal conduct as a cooperating informant, or effectively communicates an assurance that the defendant is acting under authorization, and the defendant, relying thereon, commits forbidden acts in the mistaken but reasonable, good faith belief that he has in fact been authorized to do so as an aid to law enforcement.

Id. at 43-44. The Court did not require that the "assurance" be "affirmative", although it made clear that it had reviewed that formulation, which was put forth by the First Circuit.

Following *Abcasis*, the Court has issued a series of decisions defining what can constitute authorization required to make out the defense, but has never required that a defendant show "affirmative" authorization. For example, in *Mergen*, the Court held that entrapment by estoppel "requires that the government, by its own actions, induce[ ] [the defendant] to do [criminal] acts and le[a]d him to

rely reasonably on his belief that his actions would be lawful by reason of the government's seeming authorization." *Mergen*, 764 F.3d at 205 (alterations in original; citation and internal quotations marks omitted). This language, contemplating "inducement" by some "action," clearly does not allow for the additional hurdle of a specific "affirmative" statement. Indeed, "seeming" authorization is the opposite of affirmative authorization.

In *Giffen*, the Court held that

> 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.

Giffen, 473 F.3d at 41 (emphasis in original). "Seeming" authorization clearly encompasses conduct or statements far short of "affirmative" authorization.

More recently, in *United States v. Williams*, the Court held that "[e]ntrapment by estoppel arises where a government agent authorizes a defendant to engage in otherwise criminal conduct[.]" 526 F. App'x 29, 32 (2d Cir. 2013) (internal quotation marks omitted). Again, "authorizes" is different from "affirmatively" authorizes and encompasses government conduct other than an affirmative statement of approval.

No Second Circuit case save *Miles* has used the term "affirmative" in setting forth the standard. The result is a body of case law in which this Court has consistently and effectively maintained the clear distinction between the entrapment by estoppel standard and the actual authorization standard. *See United States v. George*, 386 F.3d 383, 399 (2d Cir. 2004) (citing *Abcasis*, 45 F.3d at 42) (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."); *United States v. Gil*, 297 F.3d 93, 107 (2d Cir. 2002) ("This defense arises where a government agent authorizes a defendant to engage in otherwise criminal conduct . . . and the defendant, relying thereon, commits forbidden acts in the mistaken but reasonable, good faith belief that he has in fact been authorized to do so.") (citation and internal quotation marks omitted).[2]

---

[2] Various district court decisions have followed suit. In *United States v. Tonawanda Coke Corp.*, the court did not include the term "affirmative" in its jury instruction on entrapment by estoppel. *See* No. 10-CR-219S, 2014 WL 1053729, at *7 (W.D.N.Y. Mar. 13, 2014), *aff'd*, 636 F. App'x 24 (2d Cir. 2016) (instructing jury: "to establish this defense, the defendants must show that they reasonably relied on the statement or conduct of a government official when they engaged in the conduct with which they are charged."); *see also United States v. Thomas*, No. 16-CR-147 (WFK), 2016 WL 5940364, at *3 (E.D.N.Y. Oct. 7, 2016) (citing *Giffen*, 473 F.3d at 39) (entrapment by estoppel defense "exists where the government procured the defendant's commission of the illegal acts by leading him to reasonably believe he was authorized to commit them") (internal quotation marks omitted).

By including the term "affirmative" in the jury instruction here, the district court effectively required Appellant to prove that he had actual authority, and at the very least blurred, and likely erased, the line between entrapment by estoppel and actual authority. Given the clear distinction between the two defenses, the body of this Circuit's precedents setting forth the "seemingly authorized" standard is plainly the standard that the district court should have chosen.

The district court's reliance only on *Miles* for its decision to include "affirmative" in the instruction was misplaced. The *Miles* decision is an outlier in this body of case law. It does not analyze the standard to make out the defense; rather, the decision focused on the issue of whether a federal agent had to have made the inducing statement (as opposed to a state or local officer). *Miles*, 748 F. 3d at 489. The *Miles* court articulated the standard from *Gil*, contemplating government authorization (and not affirmative authorization). *Id.* *Miles* then stated that "a defendant must show an affirmative assurance," citing *Giffen*. *Id.* Because the *Miles* Court was focused on the **source** of the government authorization and did not even address the **degree** of authorization the defendant must prove, its articulation of the entrapment by estoppel standard is, in effect, dicta.

Furthermore, while the *Miles* Court cited *Giffen* (as the district court pointed out) in its recitation of the legal standard, "affirmative" assurance is not the

standard that this Court articulated in *Giffen*. Rather, the only place where the term "affirmative" appears in *Giffen* is in a parenthetical following a citation to a First Circuit case, in a footnote. *Giffen*, 473 F.3d at 43 n.13 (citing, *inter alia*, *United States v. Pardue*, 385 F.3d 101, 108-09 (1st Cir. 2004)). "Affirmative" there refers to the First Circuit's standard. Far from requiring an "affirmative" statement or conduct, the *Giffen* Court held that "**seeming**" authorization was the standard, and expressly declined the government's invitation to impose a standard requiring a defendant to show "actual authority" on basic fairness grounds. *Id*. at 42 (emphasis in original) & n.12 ("[I]n this circuit," entrapment by estoppel includes instances "where the defendant reasonably relies on the inducements of government agents who have apparent authority."). By including the word "affirmative" in the jury charge, the district court imposed a higher standard on Appellant than this Court's precedents permit. Indeed, in *Mergen*, which postdates *Miles* and is therefore this Court's most recent articulation of the entrapment by estoppel defense, the Court did not use the term "affirmative." *See Mergen*, 764 F.3d at 205. Accordingly, the insertion of "affirmative" in the jury instruction was erroneous.

B. The Erroneous Jury Instruction Prejudiced Appellant's Entrapment by Estoppel Defense.

There is little doubt that Appellant was prejudiced by the erroneous instruction. At trial, Appellant did not attempt to rebut evidence that he

participated in any of the charged conduct. Rather, Appellant's entire defense was predicated upon his reasonable belief that, during his 2012 call with the CIA, the CIA official agreed with Appellant's suggestion that he should conduct an undercover investigation into the weapons deal. By imposing the erroneous standard requiring "affirmative conduct or statements" here, the Court effectively precluded the jury from finding that Appellant had proved entrapment by estoppel, where the statements Appellant relied on were objectively vaguer than affirmative statements or conduct. *United States v. Pabisz*, 936 F.2d 80, 83 (2d Cir. 1991) ("Since we conclude that the jury was erroneously instructed about the principal issue at trial, we are compelled to find that the fundamental fairness of the trial . . . was undermined.") (internal citation and quotation marks omitted).

A jury instruction that requires the defendant to prove an elevated standard for an affirmative defense is precisely the kind of prejudicial error that should result in reversal (especially where the new standard is nearly impossible to prove on these facts). *See id.* at 83-84 (reversing conviction where the district court erroneously imposed an elevated standard in its jury instruction on defendant's defense beyond what was permitted by law). The Eleventh Circuit's holding in *United States v. Grajales* is instructive. There, the defendant was charged with various offenses in connection with an attempted armed robbery that was, in fact, a sting operation orchestrated by federal agents and a confidential informant. *See*

450 F. App'x 893, 894-95 (11th Cir. 2012). At trial, the defendant argued negation of intent, testifying that he participated in the robbery based on his honest belief that he was working with the police through the informant. *Id.* at 896-97. With respect to this defense, the trial court instructed the jury that

> if you find . . . that the defendant had the honest and reasonable belief that he was performing the criminal acts with which he is charged to help law enforcement, in other words that he did not have the specific intent to commit the crimes charged, then you would be required to return a verdict of not guilty.

Id. at 900. The defendant objected to the inclusion of the word "reasonable" in the charge, insisting that it conflated the standards for the negation of intent defense and the more stringent public authority defense. *Id.* The objection was overruled and the defendant convicted. *Id.* The Eleventh Circuit reversed, ruling that by "impos[ing] the requirement that [the defendant]'s belief be reasonable, the district court confused the standards applicable to the innocent intent and public authority defenses." *Id.* at 901. The Court held that the trial court's error prejudiced the defendant because, unlike the objective test under the public authority defense, the innocent intent defense only calls for a "subjective test, requiring an honestly held belief." *Id.*

Like in *Grajales*, the district court here inserted language into the jury instruction that imposed a heightened standard on Appellant to prove his affirmative defense. In this instance, it is certainly not "clear beyond a reasonable

doubt" that the jury would have convicted Appellant had the word "affirmative" not exaggerated the level of authorization that Appellant had to prove. *Neder*, 527 U.S. at 18. By inserting the word "affirmative" into the instruction on entrapment by estoppel, the court invited the jury to erroneously apply the heightened standard of the actual authority defense. But entrapment by estoppel does not require a showing of actual authority. Rather, the defense requires proof of "**seeming** authorization." *See Giffen*, 473 F.3d at 41 (emphasis in original). Here, a jury could have found "seeming" authorization by the CIA agent's repeatedly saying "I understand" and "Okay" in response to Appellant's repeated offers to work for the CIA to investigate the weapons deal. But to a jury, "I understand" may well not reach the level of concreteness that an "affirmative statement" would.

At the very least, the court's failure to define "affirmative" conduct or statements is reversible error because it created a high risk of (and likely caused) jury confusion. A jury instruction creates jury confusion where it "offer[s] insufficient guidance for the jury" to determine the appropriate standard for reviewing the facts. *See Kopstein*, 759 F. 3d at 181. Here, "seeming authorization" is the legally correct and factually more appropriate lens through which the jury should have evaluated the second CIA official's statements to Appellant. Accordingly, the court should have made clear that the appropriate question for the jury was whether the government undertook some conduct or

made some statement that **seemingly** authorized Appellant to engage in the charged conduct. *See Giffen*, 473 F.3d at 41. Because the court did not provide any explanation as to the appropriate interpretation of "affirmative conduct or statements," the jury instruction "offered insufficient guidance for the jury" to determine whether Appellant made out his defense of entrapment by estoppel. *See Kopstein*, 759 F. 3d at 181 (reversing conviction where jury instructions created substantial jury confusion because they contained undefined and inconsistent references to the standard for entrapment). Accordingly this Court should reverse Appellant's conviction and remand for a new trial.

C. The Evidence Proffered by Appellant Supports a Finding that Appellant Held a Reasonable, Good Faith Belief that He Was Authorized to Engage in the Charged Activity.

The CIA official who Appellant spoke with for over a half hour repeatedly made encouraging comments and gave Appellant a reasonable basis for his good faith belief that he was authorized to conduct the investigation that he proposed. After identifying himself, identifying Andi Georgescu, and describing the deal that Andi Georgescu's clients sought, Appellant first offered to continue with the proposed transaction, specifically in order to glean more information to report to the government:

> If you want to find more, you have to allow me to continue the deal, to see the end-user certification, the middleman, everything, and I can provide you more, more and more information.

JA 157. The CIA operator replied, "Okay." *Id.* Appellant then discussed the concern that he had with these weapons getting to Colombia:

> [B]ecause, you know, when you go to investigate . . . something in Colombia, anything, you know, if something, someone throw, uh, throwing a rock to you, it's one thing. When someone comes with an AK-47, you are not really happy, you know. . . . You have family . . . every agent has family in the United States, kids, stuff like that. We have to protect each other. This is the way we have to work together.

JA 158. The CIA official responded, "No, I certainly understand that. How do I get back in touch with you with, with any questions?" *Id.* Following that was a discussion in which Appellant explained that while he was willing to do the investigation, he could not discuss anything within Romania and was not willing to go to the U.S. Embassy in Romania, because he did not trust the Romanian people working there not to report him to the Romanian government. JA 159. The CIA official said, "I will absolutely pass on your concerns and let them know that you would not support us if you had to go to the Embassy, or anything like that. Okay?" *Id.*

The Appellant then described the dangers faced by an undercover operative by describing the fear that he had about being discovered when he was an FBI undercover cooperator. JA 160. He then proposed:

> That's why I said start the investigation, and after that, don't do anything – let me to get more deeper and deeper. I know, I was educated undercover operations, and I know everything. I'm

> not put my life in danger, . . . if someone ask me, I'm not say I'm talk with you never in my life.

Id. The CIA official said, "I understand," and Appellant continued:

> …but you let me work for you, and I give you more information and more. If you, if you find this information out, I'll, I'll work for you. . . . You just give me a call, or someone, and tell me "go forward." And I go forward and when I get the middleman in Nigeria or Sierra Leone, I provide all your information, because they're . . . in my opinion, you don't have to stop anything right now. You have to find out the way we gonna go from here to there, you know?"

Id. Appellant continued at length, describing how he thought he would be able to handle the investigation and again, the CIA official said "Okay. I understand." JA 160-61. Appellant replied "Thank you so much for…" when the CIA official interrupted him to ask a question. JA 161. The official asked several more questions about how to contact Andi Georgescu and details of his business, and made sure that he had Appellant's number, and told Appellant that he would pass the information on and that someone would hopefully be in touch with Appellant. JA 165.

This conversation, viewed as a whole, led Appellant to reasonably and in good faith believe that he had once again taken up the mantle of an undercover cooperator for a U.S. government agency. His background, having been raised in Romania and taught to curry favor with the Romanian government, led him to become a voluntary FBI cooperator, which he successfully did for years. JA 585-

86. That same mindset influenced Appellant here, when he offered to leverage that experience as a CIA cooperator in connection with the proposed weapons deal. JA 159-61. Had the district court instructed the jury properly, using this Court's standard of seeming authority, it is entirely possible that the jury would have found that he proved his affirmative defense of entrapment by estoppel.

II.

THE DISTRICT COURT ERRONEOUSLY DECLINED TO ALLOW APPELLANT TO PRESENT A NEGATION OF INTENT DEFENSE ON COUNT I

Despite the fact that the government only moved to preclude Appellant from presenting a negation of intent defense as to Count II (conspiracy to provide material support to a foreign terrorist organization), the district court ruled that Appellant could not present a negation of intent defense on either Count. *See* JA 322-25. Comparing negation of intent to a mistake-of-law defense, the court concluded that, even if the Appellant could demonstrate a good faith belief that he was working on behalf of the CIA, such evidence could not negate the intent element of either of the charged conspiracies. *Id.* This was error.

Appellant's good faith belief that he was authorized by the CIA to engage in the charged conduct – supported by his calls with the CIA, his past experience working as a cooperating witness for the FBI, and his own testimony – would have negated evidence that he acted with the requisite intent for Count I. That count

charged Appellant with conspiracy to kill officers or employees of the United States, and contains a *mens rea* element. A good faith belief that he was acting with government authorization would negate *mens rea*, and prevent the government from meeting its burden. This Court should therefore reverse Appellant's conviction on Count I and remand for a new trial to enable him to argue negation of intent.

A. The Negation of Intent Doctrine.

Although related to the public authority defenses, the "negation of intent" doctrine is separate and distinct. It is not an affirmative defense; rather, it is "an attempt 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; *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1368 n.18 (11th Cir. 1994) (negation of intent is "a defense strategy aimed at negating the *mens rea* for the crime, an essential element of the prosecution's case"). The negation of intent doctrine is well-established in the Eleventh Circuit. *See United States v. Ruiz*, 59 F.3d 1151, 1155 (11th Cir. 1995) (reversing conviction where the jury charge failed to adequately capture defendant's negation of intent theory); *Baptista-Rodriguez*, 17 F.3d at 1363, 1368 & n.18 (reversing conviction where the trial court improperly limited cross-examination of FBI agent that would have elicited testimony supporting negation

of intent defense); *United States v. Juan*, 776 F.2d 256, 257-58 (11th Cir. 1985) (vacating conditional guilty plea where trial court prevented defendant from accessing evidence that would have supported negation of intent theory).

Although the negation of intent doctrine has not been expressly recognized in the Second Circuit, this Court has previously allowed 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. Specifically, the Court observed that "[t]he relevance, and hence admissibility, of such a belief would depend, however, on the nature of the intent element of the charged crime, and whether a defendant's belief that his actions were authorized by the government would negate that intent." *Id.* at 43-44. This is an appropriate case in which the Appellant should have been permitted to argue negation of intent, specifically as to Count I of the Indictment.

B. The Negation of Intent Doctrine Is Applicable to the Charge in Count I of the Indictment.

Appellant's good faith belief that he was working for the CIA would have rebutted the intent element of the substantive charge in Count I of the Indictment. Count I charged Appellant with conspiring to murder officers and employees of the United States, in violation of 18 U.S.C. § 1114. JA 33-36. Section 1114 reads, in relevant part:

> Whoever kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance, shall be punished--(1) in the case of murder, as provided under section 1111.

18 U.S.C. § 1114 (2012). In turn, 18 U.S.C. § 1111 defines murder as "the unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111(a) (2012). "Malice is the state of mind that would cause a person to act without regard to the life of another." 2-41 *Modern Federal Jury Instructions--Criminal*, ¶ 41.01 (2016). To prove malice aforethought, "the defendant must have acted consciously, with the intent to kill another person." *Id.*; *see United States v. Velazquez*, 246 F.3d 204, 214 (2d Cir. 2001) (malice aforethought is shown "when an assailant acts with awareness of a serious risk of death or serious bodily harm").

To prove that a defendant is guilty of conspiracy, the government must prove: "(i) an agreement about the object of the conspiracy, (ii) specific intent to achieve that object, and (iii) an overt act in furtherance of the agreement." *United States v. Wallace*, 85 F.3d 1063, 1068 (2d Cir. 1996). With respect to the second element, the defendant must be shown to have the requisite intent of the substantive offense. *See Ingram v. United States*, 360 U.S. 672, 678 (1959) ("Conspiracy to commit a particular substantive offense cannot exist without at

least the degree of criminal intent necessary for the substantive offense itself."). Therefore, to prove the conspiracy in Count I, the government had to prove that Appellant acted with the requisite intent to kill officers of the United States, *i.e.*, malice aforethought. *Ingram*, 360 U.S. at 678.

Malice aforethought is precisely the type of heightened *mens rea* contemplated by the *Giffen* court. With regard to Count I, the government's *mens rea* evidence focused on statements by DEA cooperators and Appellant suggesting that Appellant understood that the weapons would be used to kill American servicemen in Colombia. Testimony from Appellant that he believed he was working for the CIA – supported by the CIA calls and his past experience working as a confidential witness for the FBI – could have rebutted that evidence.[3] *See Giffen*, 473 F.3d at 43-44. Appellant's good faith belief that he was working for the CIA would undoubtedly be highly probative on the issue of whether Appellant, in fact, acted without regard for the lives of others and with a conscious intent to kill. *See Velazquez*, 246 F.3d at 214. Indeed, the government itself acknowledged this point in pretrial briefing. *See* JA 111.

---

[3] In fact, during his call with the CIA, Appellant specifically stated that he was providing that information to ***protect*** the lives of American servicemen and agents in Colombia. *See* JA 157 ("I . . . try to provide this information to you, you know, you have a lot of headache in Colombia all the time, and . . . a lot of agents were killed over there, and, and you know, I'm not happy with that.").

In declining to allow argument or evidence on the negation of intent defense, the district court erroneously compared Appellant's claim to the mistake of law claim rejected by this Court in *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001). *See* JA 324-25. There, the defendant was convicted of several counts arising from an online bookmaking business, including conspiracy to place bets on the wires. *Cohen*, 260 F.3d at 71. On appeal, the defendant claimed that that trial court erroneously instructed the jury to disregard his argument that he could not have the requisite intent for the charged offenses because he did not know that gambling was illegal in New York. *Id.* at 75-76. The Second Circuit upheld the conviction, rejecting the defendant's mistake of law defense and ruling that "it mattered only that [the defendant] knowingly committed the deeds forbidden by [the statute], not that he intended to violate the statute . . . . [The defendant]'s own interpretation regarding what constituted a bet was irrelevant to the issue of his *mens rea*." *Id.* at 76 (internal citations omitted).

Appellant's negation of intent claim is not analogous to a mistake of law, as rejected in *Cohen*. First, in *Cohen*, the statute at issue made it illegal to *knowingly* place bets using the wires. *Id.* at 75. The mistake of law defense was unavailing because the defendant had knowingly used the wires to place bets. *Id.* at 75-76. His misunderstanding of the lawfulness of gambling had no bearing on the intent element of the offense. *Id.* In contrast, Appellant's negation of intent defense goes

right to the heart of the intent element of conspiring to murder officers or employees of the United States. It would have demonstrated that Appellant did not have the requisite mental state to achieve the object of the charged conspiracy, negating an element of the crime. Appellant's good faith belief that he was working for the CIA to collect evidence (in part to protect American lives) would have been highly relevant to the jury's determination as to whether Appellant acted without regard to the lives of others and with a conscious intent to kill. The district court should have allowed the negation of intent defense here.

C. Appellant Made a Prima Facie Showing of Negation of Intent.

The Constitution guarantees a criminal defendant "a meaningful opportunity to present a complete defense." *Abcasis*, 45 F.3d at 42 (internal quotation marks omitted) (citing *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). "It is well-established that a criminal defendant is entitled to a jury charge that reflects any defense theory for which there is a foundation in the evidence." *Id.*

Here, Appellant's testimony that he believed he was authorized to investigate the weapons buyers, his calls to the CIA, and his past experience as an undercover witness for the FBI were more than sufficient to establish a foundation for a negation of intent claim. JA 140-166 (CIA calls); JA 608-738 (testimony); *see Juan*, 776 F.2d at 257-58 (reversing conviction on conditional plea and holding that defendant's prior relationship with the government was sufficient to allow

defendant to proceed on negation of intent theory). Accordingly, Appellant was entitled to argue negation of intent, and to a jury charge on negation of intent. *See Abcasis*, 45 F.3d at 45 (reversing conviction where "the district court's failure to instruct the jury . . . deprived [the defendant] of a meaningful opportunity to present a complete defense"). Accordingly, the Court should reverse Appellant's conviction on Count I.

* * *

CONCLUSION

For the foregoing reasons, Appellant's conviction should be reversed and the case remanded for a new trial.

Dated: New York, New York
March 30, 2017

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON LLP

By: /s/ Steven M. Witzel
Steven M. Witzel
Jennifer L. Colyer
Michael P. Sternheim

One New York Plaza
New York, New York 10004-1980
(212) 859-8000

Attorneys for Defendant-Appellant
Virgil Flaviu Georgescu

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9956 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and Times New Roman type style.

Dated: New York, New York
March 30, 2017

/s/ Michael P. Sternheim
Michael P. Sternheim

SPECIAL APPENDIX

TABLE OF CONTENTS

AO 245B (Rev. 10/15) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
Virgil Flaviu Georgescu

JUDGMENT IN A CRIMINAL CASE

Case Number: 14 Cr. 799-03 (RA)

USM Number: 92350-054

Steven M. Witzel, Esq. (212) 859-8592
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☑ was found guilty on count(s) (1), (2)
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 1117 & 3238	Conspiracy to Kill Officers and Employees of the US	12/15/2014	(1)
18 USC 2339B(a)(1), (d)(1)(C),(D),(E) & 3238	Conspiracy to Provide Material Support or Resources to a Foreign Terrorist Organization	12/15/2014	(2)

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

12/2/2016
Date of Imposition of Judgment

Signature of Judge

Ronnie Abrams, U.S.D.J.
Name and Title of Judge

12/6/2016
Date

USDC-SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: DEC 06 2016

SPA 2

AO 245B (Rev. 10/15) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: Virgil Flaviu Georgescu
CASE NUMBER: 14 Cr. 799-03 (RA)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

120 Months (on each count to run concurrent)

☑ The court makes the following recommendations to the Bureau of Prisons:

It is recommended that the defendant receive credit for time served while detained in Montenegro awaiting extradition. It is also recommended that he be housed in a facility in or near the New York City area where he can receive the necessary treatment for his medical issues.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SPA 3

AO 245B (Rev. 10/15) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: Virgil Flaviu Georgescu
CASE NUMBER: 14 Cr. 799-03 (RA)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

3 years to run concurrently on each count

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☑ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Virgil Flaviu Georgescu
CASE NUMBER: 14 Cr. 799-03 (RA)

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall submit his person, residence, place of business, vehicle, and any property or electronic devices under his control to a search on the basis that the probation officer has reasonable suspicion that contraband or evidence of a violation of the conditions of the defendant's supervised release may be found. The search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.

The defendant shall provide the probation officer with access to any requested financial information.

The defendant is to report to the Probation Office within 72 hours of release from custody.

The defendant shall be supervised by the district of residence.

AO 245B (Rev. 10/15) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: Virgil Flaviu Georgescu
CASE NUMBER: 14 Cr. 799-03 (RA)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 200.00	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 10/15) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

SPA 6

DEFENDANT: Virgil Flaviu Georgescu
CASE NUMBER: 14 Cr. 799-03 (RA)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 200.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.