No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

LOUIS CHARLTON, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

/s/ Larry D. Simon
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QUESTION PRESENTED

Was Petitioner denied the Sixth Amendment guarantee of a trial by an impartial jury when he was not allowed a fair opportunity to present his defense to the jury?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Louis Charlton, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The Sixth Circuit's unpublished opinion is reproduced in the Appendix (App.) at 1a-8a. *See United States v. Charlton,* No. 17-5910, ___ F.App'x ___ (6th Cir. 2018); 2018 WL _____.

JURISDICTION

The Sixth Circuit issued its opinion on June 6, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury which district shall have been previously ascertained by law, and…to be confronted with the witnesses against him…"

STATEMENT OF THE CASE

On November 4, 2015, Edward LaGantta was stopped while being investigated for narcotics by Louisville [Kentucky] Metro Police Department (LMPD) detectives. (R.149, Trial Transcript Vol. II, Page ID # 873, 973) The officers found LaGantta in possession of marijuana and suspected pieces of crack cocaine in his buttocks. (R.149, Trial Transcript Vol. II, Page ID # 876, 974-975) The officers did not take LaGantta into custody, but cited him for the Kentucky state offenses of Trafficking in a Controlled Substance, First Degree, First Offense (less than 4 grams of cocaine); Possession of Marijuana; Trafficking in Synthetic Drugs, First Offense; and Tampering with Physical Evidence (R.149, Trial Transcript, Vol. II, Page ID # 877) Before letting him go, the police officers obtained LaGantta's cellphone number. (R.149, Trial Transcript, Vol II, Page ID # 884, 979-980, 1046, 1066)

Two weeks later, the police called LaGantta and he met with narcotics detectives for the purpose of arranging a controlled purchase of one-half ounce of cocaine from Louis Charlton, the Petitioner. (R. 47 Sealed; Transcript of Evidentiary Hearing on 8/24/2016 (Hearing), Page ID # # 180-181; R.148 and 149, Trial Transcripts, Vol. I, Page ID #838-

840, Vol. II, Page ID #874, 880, 885-886, 912-913, 1048) The detectives gave LaGantta a concealed transmitting device and $700.00 in currency to purchase the cocaine. (R. 148 and 149, Transcript, Vol. I, Page ID # 843-847; Vol. II, Page ID # 913-915)

LaGantta entered the residence and soon thereafter came back outside and met the officers at a prearranged location (R. 148, Trial Transcript, Vol. I, Page ID # 850 - 854), where he gave the detectives the cocaine he had purchased from Petitioner (R. 148 and 149, Trial Transcript, Vol. I Page ID #854-855, Vol. II, Page ID # 921-922).

Soon after LaGantta completed the controlled purchase, the detectives learned that Petitioner was himself working as a confidential informant for another LMPD detective, Jeremy Ruoff, a "task force" officer assigned to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and an ATF Agent named Kevin Funke. (R.47 Sealed; Hearing Transcript, Page ID #186, 217; R. 149, Trial Transcript, Vol. II, Page ID #946).

On the same day as the controlled purchase, the police obtained a state search warrant and executed it at Petitioner's residence. (R.47 Sealed, Hearing Transcript, Page ID #180; R.149, Trial Transcript, Vol.

II, Page ID # 928-929). The police found two firearms, more than 50 grams of powder cocaine, a small amount of crack cocaine, ammunition, paraphernalia, surveillance cameras, and approximately $96,000.00 in currency (R. 149, Trial Transcript, Vol. II Page #943, 1053).

After Petitioner Charlton, his wife, and their two daughters had been secured by the police and the contraband was being inventoried, the officers took Petitioner to the basement of his house, Mirandized him, and asked if he wanted to cooperate with law enforcement. (R.47 Sealed, Hearing Transcript, Page ID #181; R.149, Trial Transcript, Vol. II, Page ID #933-934). Petitioner agreed to cooperate and told the detectives that he was already working with Detective Ruoff and Agent Funke (R.47 Sealed, Hearing Transcript, Page ID ## 247-248; R. 149, Trial Transcript, Vol. II, Page ID ## 934). Petitioner began giving the officers the names of people involved with narcotics trafficking. (R.47 Sealed, Hearing Transcript, Page ID # # 187-188, 196, 214, 221; R. 149, Trial Transcript, Vol. II, Page ID #934-939, 1055-1056). The detectives took notes of the statement, but couldn't keep up with Petitioner; they decided to take him to a police station and record his statement, which they did (R. 47

Hearing Transcript, Page ID ##189-190, 215, 222). (Govt. Hearing Ex #1; R. 149, Trial Transcript, Vol. II, Page ID ## 941-942; Govt. Trial Ex. #8).

In the taped statement, Detective Hannah Carroll and ATF Agent Walker told Petitioner they would help him get out of jail and, in return for his cooperation, would protect his family. (R.47 Sealed; Hearing Transcript, Page ID # 223, 249; Govt Trial Ex. #8 (Recorded Statement of Louis Charlton, 11/17/2015 ("11/17/2015 statement"), 7:35-7:47; 17:00-17:29)[1] The officers told Petitioner that they could have arrested his wife (R. 149, Trial Transcript, Vol. II, Page ID # 953 Govt Trial Ex. #8 (11/17/2015 Statement at 13:06-13:25). They told him that it would be in his interest to cooperate with the police and give them information (R.149, Trial Transcript, Page ID #950).

Petitioner allowed the police to take names and phone numbers from his cell phone (R.47 Sealed, Hearing Transcript, Page ID #225). He agreed to contact the narcotics detectives as he had in the past. (Govt. Trial Ex #8, 11/17/2015 Statement at 1:55-5:50; 17:16-17:28)

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[1] Detective Carroll testified that she "told him that [she] would watch out for his family. I gave his wife my phone number. I instructed – I don't know if I instructed her or Charlton or her to – that if she needed anything to call 911. She could also call me." (R.47 Sealed, Hearing Transcript Page ID #184)

In truth, Petitioner and other law enforcement agents had established a course of dealing with each other for several years prior to November 2015.

In May 2011, Petitioner's previous residence was searched pursuant to a warrant. The seizures that followed resulted in his arrest on state charges of Trafficking in Cocaine and Marijuana and Possession of a Handgun by a Convicted Felon (R.47, Sealed, Hearing Transcript, Page ID #237). Agent Ruoff was the case agent on this search, and Petitioner signed an Informant Agreement. According to Petitioner, the police told him that the Agreement would allow him to "work your case off." (R. 47 Sealed, Hearing Transcript, Page ID #241) After approximately 14 months of "work," Petitioner was allowed to plead guilty to a misdemeanor and was sentenced to time served for the two days he had already spent in custody. (R.129, Presentence Investigation Report, ¶52, Page ID #741)

In January 2015, Petitioner's residence on Fifth Street in Louisville was searched pursuant to a federal warrant from the United States District Court for the Western District of Kentucky at Louisville. Agent Ruoff was one of the case agents on this search, which resulted in the

seizure of cocaine, firearms, ammunition and paraphernalia (R.47 Sealed; Hearing Transcript, Page ID ## 243-244). However, the agents allowed Petitioner to keep all the money (between $11,000 and $12,000) found in this search. (R.47 Sealed, Hearing Transcript, Page ID #245).

Soon thereafter, on January 21, 2015, Petitioner executed another written "Informant Agreement" and performed the requirements of this agreement as a paid informant for the government. (R.47 Sealed, Hearing Transcript, Page ID ## 245-246, 254-255, Govt. Hearing Ex. #3)

Petitioner was never charged with any criminal offenses as a result of the police seizure of illegal drugs and firearms in January, 2015.[2]

Petitioner testified that he did not know in advance the specifics of what was going to happen to his felony charges. "It was left up to Ruoff

[2] Petitioner was previously convicted of Possession of a controlled Substance, First Degree (Cocaine) and Tampering with Physical Evidence in 1993; Receiving Stolen Property Over $300 and being a Persistent Felony Offender in the Second Degree in 1994; and Possession of a Controlled Substance, First Degree (Cocaine) in 2010 (Charlton's Presentence Investigation Report R. 129, Defendant's Criminal History, paragraphs 39-51, Page ID #763-767) As such, he was a prohibited person from possessing firearms and ammunition pursuant to 18 U.S.C. §§922(g)(1) and 924(a)(2)

to tell you when you did enough" to have one's case resolved favorably. (R.47 Sealed, Hearing Transcript, Page ID #242).

On this occasion, however, after having previously performed the tasks assigned to him as a confidential informant, Petitioner found himself locked up on felony drug trafficking and firearm charges with a $10,000.00 cash bond.

Based upon the statements made to him by Detective Carroll before his arraignment, Petitioner called Detective Carroll's cellphone from jail and told her he did not have money for the bond. She told him that "she'd follow up on that and see what she could do." (R. 47 Sealed, Hearing Transcript, Page ID #192)

After Petitioner's call, Detective Carroll contacted Agent Ruoff, Petitioner's handler, and asked him to come to a meeting in the jail with her and Petitioner to receive information about his contacts in the drug trade (R.149, Trial Transcript, Vol. II, Page ID #949).

The recording of this meeting is the most probative evidence in the case. It demonstrates the superior bargaining position of the police. The rattling of Petitioner's handcuffs and leg chains are audible on the recording of this interview; Agent Ruoff audibly mocks him. (Defendant's

Trial Exhibit 1, Recorded Statement of Louis Charlton, 11/20/2015 ("11/20/2015 Statement") at 00:10 - 00:21).

Before Petitioner was Mirandized, Agent Ruoff told him, "You need to let Carroll and Walker know what you can do to help yourself." (R.47 Sealed, Hearing Transcript, Page ID #195-196, Govt Hearing Ex #2, 11/20/2015 Statement, 01:16 - 01:30).[3]

The two recordings reveal the extent of the agreement between the Government agents and Mr. Charlton. On review of these recordings, this Court will find the following offers made by the agents to Mr. Charlton:

> HANNAH CARROLL: Well, you going to work with us when you get out? You want me to help you get out?
>
> LOUIS CHARLTON: I already told you I was going to work with you.

Government Exh. 8, 14:19 – 14:26.

> HANNAH CARROLL: I' ll look after your – I'll look after them [family] and I'll try and get you out.

Id. at 15:48 – 15:56.

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[3] The tape-recorded statements were played for the jury at trial but were not transcribed as part of the record. Government's Exhibit 8; Defendant's Exhibit 1. After the trial, Mr. Charlton moved that the District Court allow filing of the previously prepared transcripts of those statements in the record under seal. R. 130, PageID #784–85. The District Court denied Mr. Charlton's Motion. R. 154, PageID# 1202-1206.

> ERIK WALKER: […]we'll do what we can to get you out, try to work with you.
>
> HANNAH CARROLL: I'm going to give you my cell phone; I'll give you his. Your girlfriend, or your wife, Misty, she has my phone number. When you get out, call me, and I'm going to give you your cell phone and everything back.

Id. at 17:05 – 17:30.

Petitioner acquiesced in their demands for information about drug and gun dealers, based upon the officers' statements and prior course of dealing.

Even though Petitioner had continued to deal drugs and possess firearms without the authorization of his handlers for the five years that he was their confidential informant, Agent Ruoff never confronted Petitioner with any of the provisions in his "Informant Agreements" that prohibited illegal or unauthorized drug transactions. (Govt. Hearing Ex. #2; Charlton Trial Ex. #1; R. 149, Trial Transcript, Vol. II, Page ID # 958-959) According to Petitioner, nobody told him that his activities on November 16, 2015 were in violation of the Agreement(s) or that he would be prosecuted for engaging in that conduct (R. 47 Sealed, Hearing Transcript, Page ID ## 269-270).

Based on his history with Ruoff, Petitioner believed that by cooperating with the police – even after being arrested and held in custody in lieu of posting a bond – "either nothing will happen to me or very little will happen to me." (R. 47 Sealed, Hearing Transcript, Page ID #270).

Contrary to the stated intentions of the agents to continue the previous course of dealing with Petitioner, they unilaterally decided that they "weren't going to use him as a confidential informant." (R. 149, Trial Transcript, Vol II, Page ID # 960) However, this decision was made **after** the Defendant had given his second tape-recorded statement to Agent Walker, Detective Carroll and Agent Ruoff. (R. 47 Sealed, Hearing Transcript, Page # 207, 226).

By contrast, although LaGantta denied that he had sought favorable consideration on his charges by working as an informant, Detective Carroll testified that she told LaGantta if he would cooperate, the police "could try and help him with court," although she couldn't "promise anything." She admitted that she allowed subjects in LaGantta's position "the opportunity... [to] work and then we can discuss

that with a prosecutor in court." (R. 149, Trial Transcript, Vol II, Page ID # 1046)

LaGantta, a person with prior felony convictions for trafficking in drugs, eventually received and accepted an offer to plead guilty to a misdemeanor; he received a suspended jail sentence without supervision. (R. 148 and 149, Trial Transcript Vol. I, Page ID # 836, Vol. II, Page ID # 879, 882, 1066-1067).

Petitioner was indicted on March 16, 2016, for possessing with intent to distribute cocaine (2 counts) in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C); carrying a firearm during a drug trafficking crime in violation of 18 U.S.C. §924(c)(1)(A); and being a convicted felon in possession of firearms pursuant to 18 U.S.C. §§922(g)(1) and 924(a)(2) (R. 9, Page ID # 33-35).

On June 21, 2016, Petitioner filed his sealed Motion to Dismiss (R. 24 Sealed, pursuant to Court's Order R. 25). The United States responded (R. 25 Sealed, July 21, 2016). The defendant filed a Supplemental Brief under seal on August 15, 2016 (R. 43 Sealed)

On August 24, 2016, the Court held an evidentiary hearing on the Motion to Dismiss. *See* Memorandum of Hearing (R. 46 Page ID # 174);

Sealed Transcript (R. 47 Page ID## 175-285). The two recorded statements were submitted to the court as sealed Government Hearing Exhibits 1 and 2, which the trial judge reviewed *in camera* (Memorandum Opinion and Order; R. 45 Sealed).

In the meantime, a Superseding Indictment (R.38, Page ID # 135-137) was filed on July 20, 2016. The second count of the original indictment was superseded to include the transaction between Mr. LaGantta and Petitioner, which involved crack cocaine (R. 37, Page ID # 135)

On October 19, 2016, the trial Court entered its Memorandum Opinion and Order (R. 45 Sealed), ruling that neither dismissal of the Indictment nor suppression of Petitioner's statements was warranted. R. 45.

The government filed a Second Superseding Indictment on March 7, 2017 (R. 85, Page ID# 413-415). In addition to the previously indicted charges, the Second Superseding Indictment added three additional counts: possession with intent to distribute marijuana in violation of 21 U.S.C. §§841(a)(1) and 841(b)(1)(D); a second count of possession with intent to distribute crack cocaine; and possession of a firearm in

furtherance of a drug trafficking crime pursuant to 18 U.S.C. §924(c)(1)(C).

The United States was aware of Petitioner's prior informant agreements and that he had received favorable treatment from law enforcement when he continued his drug dealing "on the side." The United States thus filed a motion *in limine* (R. 79, under seal), a supplement to its Pretrial Memorandum (R. 92), objecting "to any argument, testimony, or presentation of evidence concerning Charlton's prior experiences with law enforcement and apparent favorable treatment" as a basis for acquittal, (*Id.* at 6, PageID #447), asserting that any such evidence was for the "sole purpose of jury nullification." *Id.; see also* Response to Defendant's Revised Trial Memorandum and Proposed Jury Instructions (R. 105).

The trial court granted the Government's motion to exclude any argument by the defense that the law enforcement agents unfairly breached the "cooperation for immunity" agreement that was unequivocally established by the statements of the parties in the second recorded statement, in conjunction with the course of dealing between the parties (R. 108).

Similarly, the trial court rejected Petitioner's tendered jury instructions

> [b]ecause Charlton's "variation" of the entrapment-by-estoppel[4] defense is not a viable legal defense and would allow him to avoid conviction even if the government proved every element of its case, the Court finds that his argument is one for jury nullification.

Order, R. 108 at 5, PageID #532, *citing United States v. Jean-Charles*, No. 15-80055-CR, 2015 WL 7820716, at *5 (S.D. Fla. Dec. 2, 2015), (entrapment case). The Court thus denied Mr. Charlton an instruction on his theory of the case.

Trial took place on March 29-31, 2017. The jury returned verdicts of not guilty on count 2 (carrying a firearm in relation to a drug trafficking crime) and count 6 (possessing a firearm in relation to a drug trafficking crime). Guilty verdicts were returned on the remaining five counts (R. 124, Page ID # 684-685).

The trial court sentenced Petitioner to a term of 108 months imprisonment (R. 136, Page ID # 795-797).

[4] *See United States v. Triana,* 468 F.3d 308 (6th Cir. 2006).

Notice of Appeal of the Judgment and Sentence was filed on April 18, 2017 (R. 140; Page ID # 813).

The United States Court of Appeal for the Sixth Circuit affirmed the conviction, stating in pertinent part:

> The district court correctly rejected Charlton's proposed instruction because it lacked evidentiary support. *See United States v. Morgan*, 216 F.3d 557, 566 (6th Cir. 2000). As discussed above, no officer ever promised him immunity. And his prior cooperation agreements never promised him immunity, either—not even for the crimes they related to. Instead, they stated explicitly that the government might prosecute him for future crimes.

United States v. Charlton, No. 17-5910, June 6, 2018, slip op. at 7 (Appendix A7).

This Petition follows.

REASONS FOR GRANTING THE PETITION

MR. CHARLTON'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE TRIAL COURT'S REFUSAL TO ALLOW DEFENDANT'S TENDERED PROPER JURY INSTRUCTIONS REGARDING HIS IMMUNITY-FOR-COOPERATION AGREEMENT WITH GOVERNMENT AGENTS.

This issue was preserved for review by Mr. Charlton's Memorandum filed under Seal (R. 84); Supplemental Pretrial

Memorandum and Notice (R. 98, Page ID #483, 485-486); and by his Proposed Jury Instructions (R. 103).

Standard of Review

A district court's decision not to give proposed jury instructions is reviewed for abuse of discretion. *See, e.g., United States v. Lavictor,* 848 F.3d 428, 453-454 (6th Cir. 2017), *cert. den.,* Case No. 15-1580, June 5, 2017, *citing United States v. Ursery*, 109 F.3d 1129, 1136 (6th Cir. 1997); *United States v. Carrasco*, 381 F.3d 1237, 1242 (11th Cir., 2004).

It is well-established law that a refusal to give requested instructions is reversible error only if (1) the instructions are correct statements of the law; (2) the instructions are not substantially covered by other delivered charges; and (3) the failure to give the instruction impairs the defendant's theory of the case. *Lavictor, supra, citing United States v. Newcomb*, 6 F.3d 1129, 1132 (6th Cir. 1993); *Carrasco, supra,* (deliberate-ignorance instruction); *see generally United States v. Parrish*, 736 F.2d 152, 156 (5th Cir. 1984).

An immunity agreement – even an informal one – is contractual. *See, e.g., United States v. Fitch,* 964 F.2d 571, 574 (6th Cir. 1992); *United States v. Brown*, 801 F.2d 352, 354 (8th Cir. 1986). The question is

whether, in light of the evidence presented at trial of the agreement and of its breach by the government, Mr. Charlton was entitled to a jury instruction thereon.

Here, the trial court's failure to allow the instruction violated all three of the criteria enumerated by *Parrish* and its progeny throughout the federal courts.

Mr. Charlton was a criminal defendant whose liberty was at stake. The trial court denied him his opportunity to present his defense to his jury, which was based on common-law principles of contracts recognized by the Sixth Circuit as the federal common law in that court. By contrast, if Mr. Charlton had been a civil litigant, with a common-law contractual claim exceeding twenty dollars, his right to a jury trial would have been preserved. U. S. Const., Amdt. VII.

Whether or not an immunity agreement existed and whether or not it was breached are not elements of the offense, but they constitute a defense. As facts in dispute, they depend on the credibility of the parties, to be determined under contract principles which juries are historically allowed to decide.

A side-by-side reading of Sixth Circuit Pattern Jury Instructions Chapter 6.00, §6.09, Entrapment by Estoppel, and Mr. Charlton's proposed instruction demonstrates that Mr. Charlton's proposed instructions were supported by the facts and perfectly conform to the law of this Circuit. §6.09 reads as follows:

> (1) One of the questions in this case is whether the defendant reasonably relied on a government announcement that the criminal act was legal. This defense is called entrapment by estoppel. Here, unlike the other matters I have discussed with you, the defendant has the burden of proof.
>
> (2) For you to return a verdict of not guilty based on the defense of entrapment by estoppel, the defendant must prove the following four factors by a preponderance of the evidence:
>
> (A) First, that an agent of the United States government announced that the charged criminal act was legal.
>
> (B) Second, that the defendant relied on that announcement.
>
> (C) Third, that the defendant's reliance on the announcement was reasonable.
>
> (D) Fourth, that given the defendant's reliance, conviction would be unfair.
>
> (3) If the defendant proves by a preponderance of the evidence the four elements listed above, then you must find the defendant not guilty.

> (4) Preponderance of the evidence is defined as "more likely than not." In other words, the defendant must convince you that the four factors are more likely true than not.

The differences in Mr. Charlton's proposed jury instructions are emphasized below:

> 1. One of the questions in this case is whether the defendant reasonably relied on a Government **agent's promise that the defendant would not be prosecuted for criminal acts that he may have committed on or about November 16, 2015**. Here, unlike the other matters I have discussed with you, the defendant has the burden of proof.
>
> 2. For you to return a verdict of not guilty based upon what the defense says in this case, the defendant must prove the following four factors by a preponderance of the evidence.
>
> > A. First, that a government agent **made a promise that the defendant would not be prosecuted for the criminal acts that he may have committed on or about November 16, 2015.**
> >
> > B. Second, that the defendant relied on **that promise**.
> >
> > C. Third, that the defendant's reliance on **the promise** was reasonable.
> >
> > D. Fourth, that given the defendant's reliance, conviction would be unfair.
>
> 3. If the defendant proves by a preponderance of the evidence the four elements listed above, then you must find the defendant not guilty.

> 4. Preponderance of the evidence is defined as more likely than not. In other words, the defendant must convince you that the factors are more likely true than not.

Defendant's Proposed Jury Instructions at 2, R. 103, Page ID #510. Mr. Charlton's Instruction also specifically omits the words "entrapment by estoppel" in subsection (1) and the introduction to subsection (2).

The trial court denied Mr. Charlton the instruction on the ground that Charlton's proposed change would "flip the sequence of the defense," allowing him to avoid liability based on an officer's alleged promises of leniency after the illegal conduct has occurred. Charlton's proposed defense "would not be entrapment, but merely an alleged subsequent approval of illegal conduct…" (Order, R. 108, Page ID #530, *citing United States v. Triana,* 468 F.3d 308, 316 (6th Cir. 2006) (emphasis added)).

Restatement (Second) Contracts §202(4) provides that

> [w]here an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.

Here, the evidence at trial demonstrated a course of dealing between the parties over time, which is a legitimate source of evidence of a contractual agreement.

Clearly, Mr. Charlton had been working for the government for large portions of the period between 2011 and November 2015. This included a search earlier in 2015, where the officers not only did not charge him with a crime but let him keep over $11,000.00 they found during the search.

The trial Court's error was in characterizing the November 2015 representations by the police as the only evidence of promises made to Mr. Charlton for purposes of the proposed Instruction.[5] The Court discounted the years of dealings between the parties on which it had already heard abundant proof.

Likewise, with respect to the second two prongs of §6.09, it is clear that Mr. Charlton did in fact rely on their promises, insofar as he

[5] The trial Court appears to have acknowledged as much at sentencing when it noted that "Mr. Charlton likely expected leniency based on the officer's statements regarding cooperation and his past experience working as an informant." Transcript, Sentencing, July 24, 2017, at 20, (R. 151, Page ID# 1183); *see supra* at 22.

answered all their questions and provided the agents with all the information that he had at his disposal. Moreover, given the previous four years of dealings between Ruoff and Mr. Charlton, there is ample proof to demonstrate that the reliance was reasonable.

Regarding the fourth prong, fairness, the Committee Commentary to §6.09 states in pertinent part:

> Case law does not clearly define unfairness…(citations omitted) However, the court has emphasized the government's role in actively misleading the defendant. As the court explained in *Levin*, because the defense is grounded "upon fundamental notions of fairness embodied in the Due Process Clause of the Constitution," *id.* at 468, "criminal sanctions are not supportable if they are to be imposed under 'vague and undefined' commands; or if they are 'inexplicably contradictory'; *and certainly not if the Government's conduct constitutes 'active misleading.'*" *Id.* at 467 (citations omitted; emphasis in original)

Id., citing United States v. Levin, 973 F.2d 463, 468 (6th Cir. 1992).

By contrast to the trial Court's ruling against Petitioner, the proof at trial established that the informant LaGantta clearly made a **post-crime agreement** to cooperate with the same detectives in return for consideration in the form of a misdemeanor settlement of his felony case.

"[S]o long as there is even weak supporting evidence, '[a] trial court commits reversible error in a criminal case when it fails to [give] an adequate presentation of a theory of defense.'" *Id., citing Triana,* 468 F.3d at 316; *United States v. Plummer*, 789 F.2d 435, 438 (6th Cir. 1986).

Mr. Charlton was foreclosed from arguing the preponderance-of-the-evidence standard of §6.09 before his jury was even empaneled. Even with the limitations placed upon him by the Court's Order, Mr. Charlton established sufficient proof of a defense to support the giving of an instruction consistent with Pattern Jury Instruction §6.09. His instructions, as submitted, meet the standards articulated in *Newcomb* and most recently in *Lavictor*. It was error for the trial Court to have so limited his presentation of his defense to the jury, to have denied him a proper jury instruction thereon, and his Constitutional right to present his defense to a jury of his peers.

CONCLUSION

Mr. Charlton asks that this Court grant the writ of certiorari to the United States Court of Appeals for the Sixth Circuit and remand his case for a new trial, directing the trial court to allow the tendered jury instructions.

Respectfully submitted,

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NOT RECOMMENDED FOR PUBLICATION

No. 17-5910

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LOUIS CHARLTON, Defendant-Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

BEFORE: BOGGS and GRIFFIN, Circuit Judges; HOOD, District Judge.*

GRIFFIN, Circuit Judge.

After defendant Louis Charlton was caught selling drugs out of his house, a jury convicted him of numerous drug and firearm crimes. On appeal, he requests that we vacate his convictions and sentence, arguing that the government promised him immunity and that he deserves a lower sentence because he accepted responsibility for his actions. We disagree, and affirm.

I.

In November 2015, Charlton sold crack cocaine to a police informant. Because the sale took place in Charlton's house, the police obtained a warrant and searched the home. During the search, they found two pistols, 50 grams of powder cocaine, a small amount of crack cocaine, 63 grams of marijuana, more than $90,000 in cash, and other gun and drug paraphernalia.

*The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Thereafter, Charlton was arrested and advised of his *Miranda* rights. He waived them, and admitted that the drugs and guns were his. He also said he was worried about his family's safety, and in response a detective said that she would watch out for his family and would give her phone number to his wife.

Police then took Charlton to the station for a second interview, which they recorded. Defendant again admitted to selling drugs. He also gave up information about others involved in drug trafficking. And a detective said that if police decided to work with Charlton, she would try to get him released on bond.

A few days later, police spoke with Charlton a third time. Defendant again waived his *Miranda* rights, and police again recorded the interview. Charlton provided much of the same information he had given during his previous interviews. And police reiterated that they would try to help him, but made no specific promises.

As it turned out, this wasn't defendant's first offense. In 2011, and again in January 2015, Charlton had been caught selling drugs and had served as a police informant. Both times he entered into cooperation agreements. The first time, his felony charges were reduced to a misdemeanor. The second time, he was never charged with a crime—he even got to keep his drug money.

But this time was different. Police decided not to use him as an informant because his information was stale. Even though they talked with him about his potential cooperation, and although he claims there was an oral agreement, they never offered him a written cooperation agreement.

Instead, the government charged Charlton with seven crimes: Distributing crack cocaine, a violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) (Count 1); Carrying a firearm during and in relation to a drug-trafficking crime, a violation of 18 U.S.C. § 924(c)(1)(A) (Count 2); Possession

with the intent to distribute controlled substances (cocaine, marijuana, and crack cocaine, respectively), violations of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) (Counts 3, 4, and 5); Possessing firearms in furtherance of drug trafficking crimes, a violation of 18 U.S.C. § 924(c)(1)(A) (Count 6); and Possessing firearms as a felon, a violation of 18 U.S.C. § 922(g)(1) and 924(a)(2) (Count 7).

Charlton moved to dismiss the indictment, or in the alternative to suppress his confession, arguing that the government had promised him immunity and that the promise had coerced his confession. After holding an evidentiary hearing, the district court ruled that the government had never promised Charlton immunity and that he confessed voluntarily. So the district court denied the motion.

Before trial, the government moved to exclude arguments regarding jury nullification. In response, Charlton advised the district court that he planned to ask the jury to acquit him on the basis of the alleged immunity agreement. As part of that strategy, he wanted the district court to issue a modified entrapment-by-estoppel jury instruction. The district court ruled that Charlton's proposed defense was not viable, and accordingly granted the government's motion (thus rejecting Charlton's proposed instruction).

The jury ultimately convicted Charlton on all counts except the two armed-drug-trafficker offenses (Counts 2 and 6). At sentencing, Charlton moved for a reduction to his offense level because of acceptance of responsibility. The district court denied the motion on the grounds that Charlton had not demonstrated acceptance of responsibility.

II.

Charlton now challenges the district court's refusal to: (1) dismiss the indictment; (2) suppress his confession; (3) issue a modified entrapment-by-estoppel jury instruction; and (4) reduce his offense level. We address each in turn.

A.

Charlton first appeals the district court's denial of his motion to dismiss the indictment, arguing that the government promised him immunity. The district court denied the motion on the grounds that there was no immunity agreement. We review that factual finding for clear error. *See United States v. Orlando*, 281 F.3d 586, 593 (6th Cir. 2002). To reverse, we must have a definite and firm conviction that the district court made a mistake. *Id.*

Charlton claims that the government granted him immunity in two ways. First, he contends, the government granted him immunity when a detective told him: "[W]hen you get out, call me, and I'm going to give you your phone and everything back." And second, he argues, his two prior cooperation agreements required him to repeatedly give officers information, and thus provided immunity when he spoke with officers after they searched his house.

Neither argument has merit. After reviewing the record, we find no promise of immunity. Although a detective did discuss what she would do "when" Charlton got out (which implied that he *would* get out), earlier in the conversation the same detective made clear that she would "try" to get Charlton out. Other officers made similar, non-committal statements—they said they would do what they could to help Charlton, but never promised him immunity.

Second, Charlton's contention that his prior cooperation agreements granted him immunity for future crimes lacks any basis in logic or fact. He admits that those agreements warned that the

government might prosecute him for future crimes. Indeed, the January 2015 agreement went further by stating:

> ATF cannot promise or agree to any immunity from federal prosecution or specific consideration, since that benefit lies solely with the United States Attorney's Office and the court.

So, although the government ultimately never prosecuted Charlton for the crimes he allegedly committed in January 2015, his cooperation agreement never promised him immunity for those crimes—much less for future crimes. In short, the district court did not commit clear error in finding that no immunity agreement existed for Charlton's crimes in this case.

B.

Charlton also challenges the district court's refusal to suppress his confession, arguing that police coerced him to confess involuntarily through promises of immunity and protection for his family. We review the district court's factual findings for clear error and its legal conclusions de novo. *United States v. Meyer*, 359 F.3d 820, 824 (6th Cir. 2004). To determine whether police coerced a confession, we ask whether (1) what police did was objectively coercive; (2) the coercion was sufficient to overpower the defendant's will; and (3) the alleged misconduct was the crucial motivating factor in the defendant's decision to confess. *See United States v. Binford*, 818 F.3d 261, 271 (6th Cir. 2016).

Charlton contends that the immunity agreement and the offers to protect his family "make it clear" that the officers' "manipulative and coercive behavior" caused him to confess. Although he mentions the three-part test we apply to claims of coerced confessions, he never explains why what happened here meets any of those parts.

Charlton's argument fails because the officers' conduct was not objectively coercive. Although promises of leniency can be objectively coercive, *see United States v. Johnson*, 351 F.3d 254, 261 (6th Cir. 2003), as explained above, the district court did not clearly err by finding that officers never promised Charlton leniency. Instead, they simply offered (1) to try to help him if they could and (2) to try to protect his family. Charlton has identified no case holding that such non-committal statements are objectively coercive, and we have found no authority saying as much. To "coerce" means to "compel by force or threat." *Black's Law Dictionary* 315 (10th ed. 2014). Here, the officers' offers to *attempt* to help Charlton neither forced him to confess nor threatened him if he didn't. Coercion is not the same as persuasion, and what the officers did fell into the latter category, not the former. Charlton confessed voluntarily.

C.

Next, Charlton challenges the district court's refusal to give his requested, modified entrapment-by-estoppel instruction. We review the district court's decision for an abuse of discretion. *United States v. Geisen*, 612 F.3d 471, 485 (6th Cir. 2010). And we will reverse only if (1) the rejected instruction correctly stated the law; (2) other instructions did not cover the same information; and (3) the rejection impaired Charlton's theory of the case. *See United States v. Newcomb*, 6 F.3d 1129, 1132 (6th Cir. 1993).

Charlton contends that whether he had an immunity agreement was a factual issue he should have been able to present to the jury. He argues that he had a viable defense if the government promised him immunity, he relied on that promise, his reliance was reasonable, and his reliance made his conviction unfair. And he submits that he presented sufficient evidence for a jury to find his defense persuasive.

The district court correctly rejected Charlton's proposed instruction because it lacked evidentiary support. *See United States v. Morgan*, 216 F.3d 557, 566 (6th Cir. 2000). As discussed above, no officer ever promised him immunity. And his prior cooperation agreements never promised him immunity, either—not even for the crimes they related to. Instead, they stated explicitly that the government might prosecute him for future crimes. Charlton's claim fails.

D.

Finally, Charlton challenges the district court's refusal to reduce his offense level for acceptance of responsibility. For us to reverse, Charlton must show by a preponderance of the evidence that a reduction was warranted. *See United States v. Denson*, 728 F.3d 603, 614 (6th Cir. 2013). When reviewing the district court's decision, we give great deference to factual findings; we will not disturb them unless they are clearly erroneous. *United States v. Hollis*, 823 F.3d 1045, 1047 (6th Cir. 2016) (per curiam).

Charlton argues that he is entitled to the reduction because he (1) admitted that he committed the crimes and (2) only went to trial to assert a legal defense to his guilt: the alleged immunity agreement.

We reject this argument. When a defendant goes to trial, a district court determines whether the acceptance-of-responsibility reduction applies by looking to pretrial conduct, *see* U.S.S.G. § 3E1.1, Application Note 2 (2016), which includes both conduct that demonstrates acceptance and conduct that is inconsistent with it. *See Hollis*, 823 F.3d at 1047. Here, the district court concluded that Charlton's pretrial conduct did not demonstrate acceptance of responsibility. Part of that conduct was Charlton's claim that police told him his case would disappear—a statement the district court found to be untruthful when it determined that police never promised

Charlton leniency. To fabricate evidence in an attempt to escape conviction is conduct inconsistent with acceptance of responsibility. On this record, we cannot conclude that the district court clearly

erred in finding that the officers did not promise immunity or leniency, and thus that Charlton should not get credit for acceptance of responsibility. Charlton has not met his burden.

III.

For these reasons, we affirm Charlton's convictions and sentence.

United States District Court

Western District of Kentucky

LOUISVILLE DIVISION

UNITED STATES OF AMERICA
V.
Louis Charlton

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 3:16-CR-33-1-DJH
US Marshal No: 18273-033
Counsel for Defendant: **Larry D. Simon, Appointed**
Counsel for the United States: **Jo E. Lawless, Asst. U.S. Atty.**
Court Reporter: **Dena Legg**

THE DEFENDANT:

☐ Pursuant to plea agreement

☐ Pleaded guilty to count(s)

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

☒ **Was found guilty on counts 1, 3, 4, 5, and 7 of the Second Superseding Indictment on March 31, 2017, following a jury trial.**

ACCORDINGLY, the Court has adjudicated that the defendant is guilty of the following offense(s):

Title / Section and Nature of Offense	Date Offense Concluded	Count

FOR CONVICTION OFFENSE(S) DETAIL - SEE COUNTS OF CONVICTION ON PAGE 2

The defendant is sentenced as provided in pages 2 through 8 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ **The defendant has been found not guilty on counts 2 and 6 of the Second Superseding Indictment.**

☒ **The Indictment and Superseding Indictment are dismissed on the motion of the United States.**

IT IS ORDERED that the defendant shall 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 shall notify the Court and the United States Attorney of any material change in the defendant's economic circumstances.

7/24/2017
Date of Imposition of Judgment

David J. Hale, Judge
United States District Court

July 27, 2017

DEFENDANT: **Charlton, Louis**
CASE NUMBER: **3:16-CR-33-1-DJH**

COUNTS OF CONVICTION

Title / Section and Nature of Offense	Date Offense Concluded	Count
21:841(a)(1) and 841(b)(1)(C) - DISTRIBUTION OF COCAINE BASE	11/16/2015	1ss
21:841(a)(1) and 841(b)(1)(C) - POSSESSION WITH INTENT TO DISTRIBUTE COCAINE	11/16/2015	3ss
21:841(a)(1) and 841(b)(1)(D) - POSSESSION WITH INTENT TO DISTRIBUTE MARIJUANA	11/16/2015	4ss
21:841(a)(1) and 841(b)(1)(C) - POSSESSION WITH INTENT TO DISTRIBUTE COCAINE BASE	11/16/2015	5ss
18:922(g)(1) and 924(a)(2) - POSSESSION OF FIREARMS AND AMMUNITION BY A CONVICTED FELON	11/16/2015	7ss

DEFENDANT: **Charlton, Louis**
CASE NUMBER: **3:16-CR-33-1-DJH**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total **term of 108 months as to each of Counts 1, 3, 5, and 7, and 60 months as to Count 4 of the Second Superseding Indictment, which shall be served concurrently for a total term of 108 months imprisonment.**

☒ **The Court makes the following recommendation to the Bureau of Prisons: the defendant should be housed as close to his family in Louisville, Kentucky as possible.**

☒ **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 2:00 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

☐ The defendant shall continue under the terms and conditions of his/her present bond pending surrender to the institution.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ To _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

DEFENDANT: **Charlton, Louis**
CASE NUMBER: **3:16-CR-33-1-DJH**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a **term of 3 years as to each of Counts 1, 3, 4, 5, and 7 of the Second Superseding Indictment, which shall run concurrently for a total of 3 years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must 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 you pose a low risk of future substance abuse.
4. ☒ **You must cooperate in the collection of DNA as directed by the probation officer.**
5. ☐ You must 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 you reside, work, are a student, or were convicted of a qualifying offense.
6. ☐ You must participate in an approved program for domestic violence.

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

DEFENDANT: **Charlton, Louis**
CASE NUMBER: **3:16-CR-33-1-DJH**

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **Charlton, Louis**
CASE NUMBER: **3:16-CR-33-1-DJH**

SPECIAL CONDITIONS OF SUPERVISION

14. The defendant shall participate in a program approved by the U.S. Probation Office for treatment of narcotic addiction or drug or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall contribute to the Probation Office's cost of services rendered based upon his/her ability to pay as reflected in his/her monthly cash flow as it relates to the court-approved sliding fee scale.
15. The defendant shall participate in a community-based mental health treatment program approved by the U.S. Probation Office. The Defendant shall contribute to the Probation Office's cost of services rendered based upon his ability to pay as reflected in his monthly cash flow as it relates to the court-approved sliding fee scale.
16. The defendant shall submit his or her person, property, house, residence, vehicle, papers, computers [as defined in 18 USC 1030(e)(1)], other electronic communications or data storage devices or media, or office to a search conducted by the United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of their release and that the areas to be searched may contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions,* available at: www.uscourts.gov.

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision, (2) extend the term of supervision and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

_____ _____
Defendant Date

_____ _____
U.S. Probation Officer/Designated Witness Date

DEFENDANT: **Charlton, Louis**
CASE NUMBER: **3:16-CR-33-1-DJH**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$ 500.00**		

☒ **The fine and the costs of incarceration and supervision are waived due to the defendant's inability to pay.**

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

☒ **Restitution is not an issue in this case.**

☐ The defendant shall 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 in full prior to the United States receiving payment.

Name of Payee	** Total Amount of Loss	Amount of Restitution Ordered	Priority Order Or Percentage Of Payment

☐ If applicable, restitution amount ordered pursuant to plea agreement. . . . . $

☐ The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. 3612(f). All of the payment options on Sheet 5, Part B may be Subject to penalties for default and delinquency 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 and/or ☐ Restitution

☐ The interest requirement for the ☐ Fine and/or ☐ Restitution is modified as follows:

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

DEFENDANT: **Charlton, Louis**
CASE NUMBER: **3:16-CR-33-1-DJH**

SCHEDULE OF PAYMENTS

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

A ☐ Lump sum payment of $ Due immediately, balance due
☐ not later than , or
☐ in accordance with C, D, or E below); or

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

C ☐ Payment in (E.g. equal, weekly, monthly, quarterly) installments of $
Over a period of (E.g. months or years) year(s) to commence (E.g., 30 or 60 days)
after The date of this judgment, or

D ☐ Payment in (E.g. equal, weekly, monthly, quarterly) installments of $
Over a period of (E.g. months or years) year(s) to commence (E.g., 30 or 60 days)
after Release from imprisonment to a term of supervision; or

E ☒ **Special instructions regarding the payment of criminal monetary penalties:**

Any balance of criminal monetary penalties owed upon incarceration shall be paid in quarterly installments of at least $25 based on earnings from an institution job and/or community resources (other than Federal Prison Industries), or quarterly installments of at least $60 based on earnings from a job in Federal Prison Industries and/or community resources, during the period of incarceration to commence upon arrival at the designated facility.

Upon commencement of the term of supervised release, the probation officer shall review your financial circumstances and recommend a payment schedule on any outstanding balance for approval by the court. Within the first 60 days of release, the probation officer shall submit a recommendation to the court for a payment schedule, for which the court shall retain final approval.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons Inmate Financial Responsibility Program, are to be made to the United States District Court, Gene Snyder Courthouse, 601 West Broadway, Suite 106, Louisville, KY 40202, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

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) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA, Plaintiff,

v. Criminal Action No. 3:16-cr-33-DJH

LOUIS CHARLTON, Defendant.

* * * * *

ORDER

Defendant Louis Charlton was arrested and charged with several crimes related to drug trafficking and firearms possession. (Docket No. 26, PageID # 87) Charlton filed a motion to dismiss the indictment, claiming that law enforcement officers coerced inculpatory statements by promising him that he would not be prosecuted if he cooperated and provided them with information on other individuals who trafficked in drugs and firearms. (*See* D.N. 24; D.N. 43) After a hearing, the Court concluded that no such promises of leniency were made by the officers, and denied Charlton's motion to dismiss. (D.N. 48) Charlton repeated similar arguments in his motion to suppress, which was also denied. (D.N. 61; D.N. 80)

Charlton has indicated that he intends to raise the issue of "whether there was a cooperation agreement . . . between the Defendant and the police officers" at trial. (D.N. 84, PageID # 410) However, Charlton did not file notice of a public-authority defense pursuant to Fed. R. Crim. P. 12.3. (D.N. 94; D.N. 103; D.N. 104) The United States filed a motion in limine, seeking to exclude "evidence or argument that would lead to jury nullification." (D.N. 90, PageID # 389) At issue is whether Charlton may argue that the jury should find him not

guilty because of his alleged agreement with police. Charlton argues that he may do so under a "variation" of the entrapment-by-estoppel defense.[1] (D.N. 103, PageID # 510)

"Entrapment by estoppel is an affirmative defense that is rarely available." *United States v. Theunick*, 651 F.3d 578, 589–90 (6th Cir. 2011) (quoting *United States v. Rector*, 111 F.3d 503, 506 (7th Cir. 1997), *overruled on other grounds*, *United States v. Wilson*, 169 F.3d 418, 426–27 (7th Cir. 1999)). "Entrapment by estoppel applies when an official tells a defendant that certain conduct is legal and the defendant believes that official to his detriment." *United States v. Triana*, 468 F.3d 308, 316 (6th Cir. 2006). "[T]o prove the defense of entrapment by estoppel, a defendant must show that: (1) a government agent announced that the charged conduct was legal; (2) the defendant relied on the agent's announcement; (3) the defendant's reliance was reasonable; and (4) given the defendant's reliance, prosecution would be unfair." *Id*. (citing *United States v. Levin*, 973 F.2d 463, 468 (6th Cir. 1992)).

"Lack of predisposition is 'the principal element in the defense of entrapment.'" *United States v. Helton*, 480 F. App'x 846, 848–49 (6th Cir. 2012) (citing *United States v. Russell*, 411 U.S. 423, 433 (1973)). The defense "focuses upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime." *Id*. at 849 (quoting *Mathews v. United States*, 485 U.S. 58, 63 (1988)).

For example, in *United States v. Smith*, a Kentucky state legislator admitted to taking money in exchange for "help[ing] a convict obtain early release from prison." 23 F.3d 409, 1994 WL 162584, at *1 (6th Cir. 1994). Before he was indicted, the state legislator agreed to cooperate with FBI agents "in gathering evidence against others in the Kentucky Legislature."

[1] The parties do not dispute, and the Court agrees, that Charlton may introduce evidence regarding the circumstances of his inculpatory statements as they relate to the credibility and voluntariness of those statements. *See Crane v. Kentucky*, 476 U.S. 683, 688 (1986).

Id. at *2. The defendant moved to suppress inculpatory statements that he made, "arguing that he had not been read his *Miranda* rights and that the FBI had coerced him through promises of leniency." *Id.* The defendant asserted an entrapment defense but was found guilty on several counts related to his acceptance of money. *Id.* The Sixth Circuit rejected the defendant's claim that he should have prevailed on the entrapment defense as a matter of law. *Id.* at *3–4. According to the Sixth Circuit, this was "not a case of a 'persistent and overzealous Government pursuing a reluctant and unresponsive individual over an extended period of time.'" *Id.* (citing *United States v. Kussmaul*, 987 F.2d 345, 349 (6th Cir. 1993)). The Sixth Circuit reasoned that it was the defendant, not the government agents, who "proposed the bribes, and . . . readily accepted them." *Id.* at *4.

In the absence of any evidence that prior to committing the alleged crimes, a government agent informed Charlton that the conduct was legal, Charlton seeks to alter the elements of the entrapment defense. He argues that the first element of the entrapment-by-estoppel test should be changed to "a government agent made a promise that the defendant would not be prosecuted for the criminal acts that he may have committed." (D.N. 103, PageID # 510) However, this would fundamentally alter the entrapment-by-estoppel defense. *See Triana*, 468 F.3d at 316. Entrapment by estoppel is meant to address a situation where the defendant relied on an officer's statement when committing an offense. *See id.* Charlton's proposed change would flip the sequence of the defense, allowing him to avoid liability based on an officer's alleged promises of leniency after the illegal conduct has occurred. Charlton's proposed defense would not be entrapment, but merely an alleged subsequent approval of illegal conduct. *See id.*

Arguing that a jury should find a defendant not guilty because he believed that he had a deal with law enforcement officers (or that they approved his conduct after-the-fact) is not a

recognized legal defense. As in *Smith*, alleged promises of leniency are not sufficient to prevail on an entrapment defense. 1994 WL 162584, at *2–3. Charlton was not an "unwary innocent" that the government pursued over an extended period of time. *Helton*, 480 F. App'x at 848–49; *see also Smith*, 1994 WL 162584, at *4. Rather, Charlton demonstrated a predisposition for committing the alleged crimes that was not based on the statements of government agents. *See Helton*, 480 F. App'x at 848–49.

Raising an entrapment defense at trial when the defendant has not met the requirements for proving the defense "could serve but one purpose, to cause jury confusion or nullification." *United States v. Jean-Charles*, No. 15-80055-CR, 2015 WL 7820716, at *5 (S.D. Fla. Dec. 2, 2015) (citing *United States v. Funches*, 135 F.3d 1405, 1409 (11th Cir. 1998); *Cave v. Singletary*, 971 F.2d 1513, 1518 (11th Cir. 1992); *Zal v. Steppe*, 968 F.2d 924, 930 (9th Cir. 1992) (Trott, J., concurring); *United States v. Trujillo*, 714 F.2d 102, 106 (11th Cir. 1983); *United States v. Gorham*, 523 F.2d 1088, 1097-98 (D.C. Cir. 1975); *United States v. Smith*, 2009 WL 692149 (S.D. Ala. 2009); *United States v. Lucero*, 895 F. Supp. 1421 (D. Kan. 1995)). "Nullification occurs when a juror violates his or her oath by failing to apply the law as instructed by the court[,] thereby acquitting a defendant even though the government has proven its case beyond a reasonable doubt." Kevin F. O'Malley, et al., 1 Fed. Jury Prac. & Instr. § 5:16 (6th ed. 2017) (citations omitted).

A defendant has no right to ask the jury to nullify. *See id*. (citing *Hunt v. Lee*, 291 F.3d 284, 293 (4th Cir. 2002); *United States v. Horsman*, 114 F.3d 822, 829 (8th Cir. 1997); *United States v. Gonzalez*, 110 F.3d 936, 947–48 (2d Cir. 1997); *Briggs v. Marshall*, 93 F.3d 355, 360–61 (7th Cir. 1996); *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983)). "In fact, the court has the power and even the duty to prevent this type of conduct." *Id*. (citing *United*

States v. Bruce, 109 F.3d 323, 327 (7th Cir. 1997); *United States v. Edwards*, 101 F.3d 17, 20 (2d Cir. 1996); *United States v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993); *United States v. Powell*, 955 F.2d 1206, 1212–13 (9th Cir. 1991)).

Because Charlton's "variation" of the entrapment-by-estoppel defense is not a viable legal defense and would allow him to avoid conviction even if the government proved every element of its case, the Court finds that his argument is one for jury nullification. *See Jean-Charles*, 2015 WL 7820716, at *5. Therefore, Charlton will not be permitted to raise this argument during trial.

The Court acknowledges that the line between acceptable argument regarding the circumstances of his statements and an unacceptable request for jury nullification is a fine one. To clarify, Charlton may introduce evidence of his alleged understanding with law enforcement to go to the weight that the jury should give to his inculpatory statements; however, he may not assert that the jury should find him not guilty because of the alleged agreement with law enforcement officers.

Accordingly, and the Court being otherwise sufficiently advised, it is hereby

ORDERED that the United States' motion in limine to exclude argument that would lead to jury nullification (D.N. 79) is **GRANTED in part**.

March 21, 2017

David J. Hale, Judge
United States District Court