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13
14 IN THE UNITED STATES DISTRICT COURT
15 DISTRICT OF ARIZONA

16 United States of America,
17
18 Plaintiff,
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20 vs.
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22 Thomas Mario Costanzo,
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24 Defendant.

No. CR-17-585-PHX-GMS
TRIAL MEMORANDUM
RE: DKT. # 124

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Thomas Mario Costanzo, through undersigned counsel, submits that attached Trial Memorandum regarding the Government's Notice of Prior Impeachable Conviction [Dkt. # 124].

Respectfully submitted: March 12, 2018.

JON M. SANDS
Federal Public Defender

s/Maria Teresa Weidner

MARIA TERESA WEIDNER
Asst. Federal Public Defender

1 **TRIAL MEMORANDUM RE: The government’s proposed use of 1985**
2 **felony convictions for impeachment pursuant to FRE 609 .**

3 Under FRE 609(a), evidence of a prior conviction may be admitted for
4 impeachment purposes if the probative value out-weighs the prejudicial effect of
5 admission. In *United States v. Cook*, 608 F.2d 1175, 1185 n. 8 (9th Cir.1979) (en
6 banc), overruled on other grounds, *Luce v. United States*, 469 U.S. 38, 105 S.Ct.
7 460, 83 L.Ed.2d 443 (1984), the Ninth Circuit set forth a five-factor test for
8 balancing the relative probativeness and unfair prejudice of a prior conviction.

9 Specifically, the Court explained that a trial court should consider: (1) the
10 impeachment value of the prior crime; (2) the temporal relationship between the
11 conviction and the defendant's subsequent criminal history; (3) the similarity
12 between the past and the charged crime; (4) the importance of defendant's
13 testimony; and (5) the centrality of the credibility issue. *Id.*

14 While a trial court need not analyze each of the five factors explicitly, “the
15 record should reveal, at a minimum, that the trial judge was aware of the
16 requirements of Rule 609(a)(1).” *See, e.g., United States v. Martinez-Martinez*, 369
17 F.3d 1076, 1088 (9th Cir. 2004); *United States v. Jimenez*, 214 F.3d 1095, 1097–
18 98 (9th Cir.2000).

19 Here, the government seeks to exhume an assault and flight from law
20 enforcement conviction that is more than 30 years old as possible impeachment
21 should Mr. Costanzo:
22

- 23 1) exercise his right to testify at trial;
24 2) present character witnesses in his defense; and/or
25 3) succeeds in introducing his own statements through another witness.\

1 The defense concedes that if Mr. Costanzo chooses to testify and/or presents
2 character witnesses at trial, the government may rebut such evidence by presenting
3 evidence—such as the existence of prior felony convictions—to impeach his
4 credibility.

5 Given the nature of the instant case, however, where the government’s
6 evidence mainly consists of recorded bitcoin exchanges that took place between
7 Mr. Costanzo and undercover agents, there is a case to be made that Mr. Costanzo’s
8 own statements are inextricable from this case. The government’s threat under
9 these circumstances is tantamount to denying Mr. Costanzo the right to present a
10 defense at all. The defense therefore asserts that eliciting or relying upon Mr.
11 Costanzo’s statements to undercover federal agents—particularly where such
12 statements are necessary for context or pursuant to the rule of completion, the door
13 is NOT thereby opened to impeachment as suggested by the government in Dkt.
14 #124.
15

16 The defense now turns to the *Cook* factors this court must consider in
17 “balancing the relative probativeness and unfair prejudice of a prior conviction.”
18 *Martinez-Martinez*, 369 F.3d at 1088.

19 **(1) Impeachment value of the prior crime.**

20 Given the staleness of the 1985 convictions—which predate the creation of
21 bitcoin, accessibility of the internet to the general public (which occurred circa
22 1989), the 1988 amendments to 18 U.S.C. § 1956 that made the instant prosecution
23 even possible, and undersigned counsel’s graduation from primary school—the
24 impeachment value of the noticed crimes is minimal. A lot can—and does—change
25 in thirty years.

26 Additionally, the government is well-aware, based on its own investigation
27 of this case and the political statements made by Mr. Costanzo during his recorded
28

1 discussions with undercover agents, that his distrust of the government developed
2 until the early 2000s.

3 **(2) Temporal relationship between the conviction and the**
4 **defendant’s subsequent criminal history.**

5 Mr. Costanzo sustained the noticed 1985 convictions at the age of 21. He is
6 now in his early middle 50s. While he has sustained subsequent convictions, the
7 majority are for driving on a revoked or suspended license, as well as marijuana
8 use and possession. He had no law enforcement contacts in his 30s.

9 **(3) Similarity between the past and charged crime.**

10 There is no similarity between the past and charged crime in this case. The
11 government claims to the contrary, but has offered no support beyond the bare
12 statement that it indicates “an inability or unwillingness to follow law enforcement
13 directives.”¹ There is no information provided as to the facts and circumstances of
14 the 1985—save Mr. Costanzo’s conviction—to support this claim. Facially, there
15 is a world of difference between assault/flight and money laundering.

16 **(4) The importance of the defendant’s testimony.**

17 Should Mr. Costanzo choose to testify or present character witnesses, it may
18 be appropriate for the government to seek to impeach Mr. Costanzo’s credibility
19 with the fact of a prior felony conviction. The facts and circumstances of said
20 conviction, however, are unnecessary for the jury to hear and would unfairly
21 prejudice to Mr. Costanzo. The admission of any such evidence of prior conviction
22 should therefore be sanitized (i.e., limited to “a felony conviction” to ameliorate
23

24
25 _____
26 ¹ The also defense notes that the facts and circumstances that led to that 1985
27 conviction have not been disclosed by the government and, moreover, were not
28 noticed by the government in its 404(b) filing. *See* Dkt. #123.

1 any potential prejudice to defendant). *See, e.g., Martinez-Martinez*, 369 F.3d at
2 1088; *Jimenez*, 214 F.3d at 1097–98.

3 **(5) Centrality of the credibility issue.**

4 Should Mr. Costanzo choose to testify or present character witnesses, his
5 credibility will be an important factor for the jury to evaluate.

6 **CONCLUSION**

7 Based on the foregoing, this court is urged to preclude the government from
8 admitting evidence of the noticed felony convictions, which are more than three
9 decades old because such evidence is more prejudicial than probative of any
10 relevant fact at trial.

11 To the extent that this Court determines that the noticed 1985 convictions
12 sustained by Mr. Costanzo are sufficiently probative in helping the jury weigh his
13 credibility or evidence of his good character at trial, such conviction(s) must be
14 sanitized to avoid unfair prejudice to Mr. Costanzo at trial. *Id.*

15
16 Respectfully submitted: March 12, 2018.

17 JON M. SANDS
18 Federal Public Defender

19 *s/Maria Teresa Weidner*
20 MARIA TERESA WEIDNER
21 Asst. Federal Public Defender
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1 Copy of the foregoing transmitted
2 by ECF for filing March 12, 2018, to:

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