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8 IN THE UNITED STATES DISTRICT COURT  
9 DISTRICT OF ARIZONA

10 United States of America,  
11 Plaintiff,  
12 vs.  
13 Thomas Mario Costanzo, et al.,  
14 Defendant

No. CR-17-0585-01-PHX-JJT  
**MOTION TO DISMISS COUNT 8 OF  
INDICTMENT PREMISED ON  
ALLEGED VIOLATION OF  
18 U.S.C. § 922(g)(1)**

15 Defendant Thomas Mario Costanzo submits the attached memorandum of  
16 law in support of his Motion to Dismiss Count 8 of the first Superseding Indictment that  
17 rest upon Mr. Costanzo's alleged violation of 18 U.S.C. § 922(g)(1). Count 8 should be  
18 dismissed for the reasons set forth in the following Memorandum.

19 Excludable delay under 18 U.S.C. § 3161(h)(1)(D) may result from this  
20 motion or from an order based thereon.

21 Respectfully submitted: November 6, 2017.

22 JON M. SANDS  
23 Federal Public Defender

24 *s/Maria Teresa Weidner*  
25 MARIA TERESA WEIDNER  
26 Asst. Federal Public Defender  
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**MEMORANDUM**

**I. BACKGROUND**

The pertinent portion of the Indictment alleges that Mr. Costanzo, “having been convicted of a crime punishable by imprisonment for a term exceeding a year, to wit, Possession or Use of Marijuana, on March 17, 2015, in the Superior Court of Arizona for Maricopa County; did knowingly possess in and affecting interstate commerce, ammunition, that is, 60 rounds of 5.56 x45 mm caliber ammunition, said ammunition having been shipped and transported in interstate commerce.” *See* Doc. 18, First Superseding Indictment, at ¶ 11.

**II. STANDARD OF REVIEW**

Rule 12(b)(1) of the Federal Rules of Criminal Procedure provides that “[a]ny defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion.” Rule 12(b)(3)(B) specifies that claims of defects in the indictment must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits. In addition, claims that the applicable statute is unconstitutional may be raised by way of a motion under Rule 12(b). Fed. R. Crim. P. 12(b)(2) (jurisdictional objections may be raised at any time while the case is pending); *United States v. Montilla*, 870 F.2d 549, 552 (9th Cir. 1989), *amended*, 907 F.2d 115 (9th Cir. 1990) (claims that the applicable statute is unconstitutional qualify as jurisdictional). “In ruling on a pre-trial motion to dismiss an indictment for failure to state an offense, the district court is bound by the four corners of the indictment.” *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002).

**III. DISCUSSION**

The portion of the indictment alleging that Mr. Costanzo unlawfully possessed ammunition subsequent to suffering conviction “of a crime punishable by imprisonment for a term exceeding a one year” suffers from a fatal flaw and thus must be dismissed.

1           **IV.    FACTS**

2           Minute entries obtained in connection with the conviction alleged in Count 8  
3 have been obtained by undersigned counsel. Exhibit A, Minute Entry: Costanzo  
4 Sentencing: March 17, 2015. This document reflects that Mr. Costanzo was adjudged  
5 guilty of a Class 6 Designated Felony for Possession or Use of Marijuana. *Id.* at page 2.  
6 He was sentenced to a 24-month term of probation. *Id.* All remaining charges and  
7 allegations were dismissed by order of the court at sentencing. *Id.* at page 3. No  
8 aggravating facts were admitted by Mr. Costanzo, alleged by the government, or found  
9 by the court beyond a reasonable doubt. Exhibit A.

10           **V.    LAW AND ARGUMENT**

11                   **A.    Relevant Arizona Sentencing Statutes: A.R.S. §§ 13-701 & 13-702**

12           Arizona Revised Statutes, § 13-702 provides that “the term of imprisonment for a  
13 presumptive, minimum, maximum, mitigated, or aggravated sentence shall be within the  
14 range prescribed under this subsection.” A.R.S. § 13-702(D). For a Class 6 felony, the  
15 law provides for a mitigated sentence of .33 years, a minimum sentence of .5 years, a  
16 presumptive sentence of 1 year, a maximum sentence is 1.5 years, and an aggravated  
17 sentence of 2 years. *Id.* While it would thus appear that a Class 6 felony is “a crime  
18 punishable by a term of imprisonment exceeding a year,” such is not the case.

19           Arizona law further provides that “[u]nless a specific sentence is otherwise  
20 provided, *the term of imprisonment for a first felony offense shall be the presumptive*  
21 *sentence...*” A.R.S. § 13-702(A) (emphasis added). The statute further provides that  
22 “...the court may increase or reduce the presumptive sentence within the ranges set by  
23 subsection D of this section” but restricts this latitude by adding that “[a]ny reduction or  
24 increase shall be based on aggravating and mitigating circumstances listed in § 13-701,  
25 subsections D and E.” *Id.*

1 Aggravating and mitigating factors are listed as well as the parameters  
2 established for their application at sentencing, in A.R.S. § 13-701. It is specifically  
3 provided that “[t]he minimum or maximum term pursuant to § 13-702...may be  
4 imposed *only* if one or more of the circumstances alleged to be in aggravation of a crime  
5 are found to be true by the trier of fact beyond a reasonable doubt or are admitted by the  
6 defendant.” A.R.S. § 13-701(C).

### 7 **B. Determining the relevant statutory maximum sentence**

8 In 2007, the Supreme Court reaffirmed its holding that “the relevant statutory  
9 maximum...is not the maximum sentence a judge may impose after finding additional  
10 facts, but the maximum he may impose *without* any additional findings.” *Cunningham*  
11 *v. California*, 549 U.S. 270, 275 (2007) (quoting *Blakely v. Washington*, 542 U.S. 296,  
12 303-304 (2004))(emphasis in original).

13 In *Cunningham*, the Court analyzed California’s statutory sentencing scheme,  
14 which it noted provides for lower, middle, and upper term sentences. *Id.* at 277. The  
15 Court further observed that a California trial judge’s choice in imposing the lower,  
16 middle, or upper term of prison is controlled by statute, which provides that the court  
17 “shall order imposition of the middle term, unless there are circumstances in  
18 aggravation or mitigation of the crime.” *Cunningham*, 549 U.S. at 277. The Court  
19 concluded that “[i]n accord with *Blakely*, therefore, the middle term prescribed by  
20 California’s statutes, not the upper term, is the relevant statutory maximum.” *Id.* at 289  
21 (citations omitted).

22 California’s statutory sentencing construct is analogous to that in Arizona. The  
23 presumptive term prescribed by Arizona’s statutory sentencing construct is the  
24 functional equivalent of California’s middle term because in both cases, the state statute  
25 provides that a higher sentence is not available absent additional findings. *Id.*; compare  
26 A.R.S. §§ 13-701 & 13-702. Applying this reasoning to the instant case for purposes of  
27 determining whether Mr. Costanzo was convicted of a crime punishable by more than a  
28 year reveals, quite simply, that he was not.

1 In Mr. Costanzo's case, the relevant statute prescribes that the presumptive term  
2 for an Arizona Class 6 felony is 1 year. A.R.S. § 13-702(D). "Unless a specific sentence  
3 is otherwise provided, the term of imprisonment for a first felony offense *shall* be the  
4 presumptive sentence..." A.R.S. § 13-702(A) (emphasis added). "The minimum or  
5 maximum term pursuant to § 13-702...may be imposed *only* if one or more of the  
6 circumstances alleged to be in aggravation of a crime are found to be true beyond a  
7 reasonable doubt or are admitted by the defendant." A.R.S. § 13-701(C). Here, no such  
8 allegations were alleged by the state or the sentencing judge, or admitted by Mr.  
9 Costanzo. Exhibit A. Thus the "relevant statutory maximum sentence" he faced was the  
10 presumptive term prescribed by law: 1 year. The conviction alleged in Count 8 is not  
11 "punishable by imprisonment exceeding a year." Therefore, Count 8 must be dismissed.

## 12 VI. DISTINGUISHING *MURILLO*

13 The Ninth Circuit case of *United States v. Murillo*, 422 F.3d 1152 (9th Cir.  
14 2005), to the extent it is not impliedly overruled by *Cunningham*, is distinguishable. Mr.  
15 Costanzo's argument and the decision in *Cunningham* dealt with analysis of a statutory  
16 sentencing construct, discussed above. *Murillo* considered the dictates of sentencing  
17 statutes, and found that the 5-year statutory maximum provided for by law in the State  
18 of Washington was not altered or reduced by that state's advisory sentencing guidelines,  
19 which recommended a sentence of no more than 12 months. 422 F.3d at 1153.

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**CONCLUSION**

1  
2 Based on the arguments set forth above, this Court should dismiss Count 8  
3 of the Indictment.

4 Excludable delay under 18 U.S.C. § 3161(h)(1)(D) may result from this  
5 motion or from an order based thereon.

6 Respectfully submitted: November 6, 2017.

7 JON M. SANDS  
8 Federal Public Defender

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11 Copy of the foregoing transmitted by ECF for filing November 6, 2017, to:

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