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11 IN THE UNITED STATES DISTRICT COURT

12 FOR THE DISTRICT OF ARIZONA

13 United States of America,

14 Plaintiff,

15 v.

16 Thomas Mario Costanzo,

17 Defendant.

CR-17-00585-PHX-GMS

**UNITED STATES' RESPONSE TO  
DEFENDANT'S MOTION  
TO SEVER COUNTS [Doc. 58]**

18

19 The United States responds in opposition to defendant's motion to sever the felon  
20 in possession count from the money laundering counts. Defendant's under-the-radar,  
21 unlicensed and unregistered exchanges of bitcoins for thousands or tens of thousands of  
22 dollars of cash necessitated protection in the form of firearms and other weapons. The  
23 concealment alleged in the Superseding Indictment further required a degree of precaution,  
24 and fairly links the money laundering activities to the ammunition found on a shelf in a  
25 hallway closet in defendant's residence as part of a common scheme and plan. The counts  
26 are properly joined. And the Court may provide limiting instructions and other protections  
27 to overcome prejudice. The remaining counts 3-8 should be tried together.

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1           A.     **The Superseding Indictment<sup>1</sup> and the Available Evidence Connect the**  
2                    **Money Laundering to the Prohibited Possession.**

3           The Superseding Indictment and the available evidence<sup>2</sup> demonstrate the link  
4           between the bitcoin activities and the presence of ammunition and other weapons for  
5           protection. In particular, the Superseding Indictment alleges that defendant operated an  
6           unlicensed and unregistered money transmitting business offering virtual currency [such  
7           as bitcoins] for cash (dkt. # 18, at ¶¶ 1-3) in an effort to conceal the source of the money.  
8           (Dkt. # 18, at ¶¶ 6-10).

9           The money laundering activities link to the presence of knives and firearms for  
10           protection. Count 7 is illustrative here; it describes the April 20 culmination of a \$107,000  
11           bitcoin-for-cash exchange with an undercover agent, which exchange was first discussed  
12           ten days prior. Prior to defendant's arrest on April 20, he engaged in a discussion with the  
13           undercover agent about protection. "I do my best to – you know – screw with anybody  
14           who I don't feel safe around."<sup>3</sup> And indeed, upon arrest on April 20 the defendant had a  
15           steel knife attached to the fanny pack where additional currency and precious metals were  
16           found. (*See* Exs. 1-2 [bates numbers 500, 535].) And on that same date agents found the

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18           <sup>1</sup> The government has separately moved to dismiss two counts from the Superseding  
19           Indictment. For the purposes of ongoing motion practice the extant portions of the  
20           Superseding Indictment are paragraphs 1-3 and 6-11. (Paragraphs 4-5 correspond to  
21           dismissed counts 1 and 2).

22           <sup>2</sup> Defendant cites to case law suggesting that joinder must be analyzed solely based  
23           on the allegations in the charging instrument. But the practice differs substantially from  
24           the purported rule, and Ninth Circuit case law recognizes the utility of reliance on evidence  
25           tied to the charging instrument. *See United States v. VonWillie*, 59 F.3d 922, 929 (9th Cir.  
26           1995). "In making our assessment, we examine only the allegations in the indictment.  
27           VonWillie's indictment charges him in count 1 with possessing the same three weapons  
28           that he is charged in count 2 with using in relation to a drug trafficking crime. Testimonial  
          and physical evidence relating to the location, discovery, and seizure of the firearms is also  
          common to both counts. This is sufficient to satisfy Rule 8(a)." *Id.* (internal citation  
          omitted); *see also United States v. Jawari*, 474 F.3d 565, 573 and n.2 (9th Cir. 2007)  
          (recognizing that "on occasion, our decisions have noted matters outside of the  
          indictment").

<sup>3</sup> *See* audio file of Deal # 5, at 1:34:35 to 1:35:21, previously produced in discovery  
          and available upon request. (Rough transcripts exist for the undercover discussions,  
          although the audio provides the clearest evidence.)

1 boxes of ammunition in defendant's hallway closet, which further suggests that at some  
2 point he possessed a corresponding firearm for additional use as protection during his  
3 efforts to conceal the money laundering activities.

4 The discussion between the undercover agent, defendant and a third person acting  
5 as his banker<sup>4</sup> on April 10, 2017 led directly to the charged conduct in Counts 7-8 on April  
6 20. And that discussion focused even more directly on the need for protection during  
7 bitcoin deals. The banker specifically noted that he would be armed during the transaction.  
8 (See report excerpt, attached as Ex. 3 [bates number 59]; see also audio at 51:28 to 52:10.)  
9 To be clear, the government does not rely on defendant's passive listening to the comments  
10 of a third party to justify the linkage. Rather, defendant himself interjected after the third  
11 party's comments about being armed for protection, and told the undercover agent that he  
12 (Costanzo) and the third party had a reputation for "reliability" in the community. *Id.* The  
13 use and presence of weapons forms part of defendant's means and methods of laundering  
14 money through exchanges of cash for virtual currency.

15 Nor is the charged transaction the only time defendant discussed protection. In an  
16 earlier interaction with an undercover agent in November 2016 the defendant, during a  
17 discussion about the limited role of government, analogized to protecting one's own house.  
18 "Like at your house – you have border protection 'cause you don't want somebody comin'  
19 in your house. . . . I mean – somebody comes in your house you blow his brains out. You  
20 know?" (See transcript excerpt, attached as Ex. 4 [bates 729-30]; see also audio at 1:00:35  
21 to 1:01:10).

22 **B. Count 8 is Properly Joined with Counts 3-7.**

23 Fed. R. Crim. P. 8(a) provides significantly broader bases to join multiple counts  
24 against a single defendant than Rule 8(b) provides in joining multiple defendants. In a  
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28 <sup>4</sup> The third person/banker in the discussion is the subject of Counts 1-2 of the  
Superseding Indictment, pending dismissal.

1 single-defendant case, the Rule “has been broadly construed in favor of initial joinder.”  
2 *Jawari*, 474 F.3d at 572. The money laundering and felon in possession charges are  
3 properly joined if part of a common scheme or plan, and the opinion in *Jawari* generally  
4 traces out some of those factors in other cases, such as the temporal connection between  
5 the counts, *id.* at 574 (citing to *United States v. Kinslow*, 860 F.2d 963 (9th Cir. 1998))  
6 which upheld joinder of, *inter alia*, firearm and stolen property counts), and the presence  
7 of concealment, *id.* at 575 (citing to *United States v. Whitworth*, 856 F.2d 1268 (9th Cir.  
8 1988)), which approved of the joinder of espionage and tax evasion counts. Courts in the  
9 Rule 8(a) analysis assess whether the counts are “logically related.” *United States v.*  
10 *Blatchford*, 2017 WL 2484182 at \* 1 (D. Ariz. 2017) (declining to find misjoinder of a  
11 SORNA charge with assault charges). The temporal connection and concealing activities  
12 support joinder here as well.

13 To be clear, the Ninth Circuit has sometimes approved of initial joinder of firearms  
14 counts with other counts and has at other times disapproved. *See, e.g., United States v.*  
15 *Nguyen*, 88 F.3d 812, 817-18 (9th Cir. 1996) (upholding joinder and holding the limiting  
16 instruction sufficient in light of the evidence); *VonWillie*, 59 F.3d at 929-30 (upholding  
17 joinder); and *United States v. Terry*, 911 F.2d 272, 277 (9th Cir. 1990) (reversing the  
18 firearm conviction and finding misjoinder where drug and firearm counts were combined,  
19 where there was a temporal disconnect between counts, and where the jury hung on the  
20 drug counts). *See also United States v. Lewis*, 787 F.2d 1318, 1323 (9th Cir. 1996)  
21 (reversing [for prejudicial joinder rather than misjoinder] where a felon in possession count  
22 was joined with a bank robbery count, because the cautionary instruction was too late and  
23 “less than emphatic”), *amended on denial of rehearing*, 798 F.2d 1250. Under the facts  
24 here these counts are properly joined, and ample opportunity exists for careful  
25 consideration of limiting instructions in the event the Court exercises its discretion to try  
26 properly-joined counts together.

1           **C.     The Efficiency of One Trial Outweighs Any Prejudice.**

2           Trial courts have substantial discretion to sever counts under Rule 14, *Zafiro v.*  
3 *United States*, 506 U.S. 534, 541 (1993), particularly where joinder requires the  
4 introduction of the stigma of a felony conviction that would otherwise be inadmissible.  
5 And defendant makes a reasoned argument why the joinder of a status crime to other  
6 charges might in the ordinary circumstances militate in favor of severance. But the  
7 additional facts and circumstances present here make continued joinder a feasible and  
8 reasonable outcome.

9           The commonality of charges articulated in Section B, *supra*, also supports the denial  
10 of the motion for prejudicial joinder. Moreover, in a single defendant case there is no risk  
11 of spillover harm to other defendants. Nor is it at all clear in this case that defendant's  
12 felony conviction is otherwise inadmissible. Indeed, defendant, using his alter-ego  
13 "Morpheus," openly discusses his felony past in the context of his entrepreneurial  
14 philosophy and the background to his bitcoin business. (*See* Ex. 5, "Who is Morpheus,"  
15 bates ## 1114-15.) "Here's where I thought the x-con [sic] makes it big." *Id.* Costanzo's  
16 internet postings are likely to be relevant to the charges against him, and would also appear  
17 admissible under Fed. R. Evid. 403: a person with knowledge of the criminal justice system  
18 is more likely to have the requisite knowledge of the specified unlawful activity as an  
19 element to the money laundering charges. Some grounds thus exist that the prior felony  
20 may come in at trial, regardless of the joinder of counts, and regardless of whether  
21 defendant takes the stand.

22           Under these circumstances, the Court should consider the efficiency inherent in one  
23 trial rather than two. *Zafiro*, 506 U.S. at 537. *Zafiro* analyzed and approved of joinder of  
24 multiple defendants in one trial, but its central premise stands here in the assessment of  
25 joinder of multiple counts against the same defendant. Severance is an appropriate remedy  
26 only if a "serious risk" exists that the trial would "compromise a specific trial right" or  
27 "prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 539.

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1 The facts here weigh in favor of continued joinder.

2 **D. Conclusion.**

3 For the foregoing reasons, the Court should find joinder proper under Rule 8(a) and  
4 deny severance under Rule 14.

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6 Respectfully submitted this 15th day of November, 2017.

7  
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9  
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20 **CERTIFICATE OF SERVICE**

21 I hereby certify that on November 15, 2017, I electronically transmitted the attached  
22 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a  
23 Notice of Electronic Filing to counsel of record in this case.

24 s/ Lauren M. Routen  
United States Attorney's Office