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11 IN THE UNITED STATES DISTRICT COURT
12 DISTRICT OF ARIZONA

13 United States of America,
14 Plaintiff,
15 vs.
16 Thomas Mario Costanzo, et al.,
17 Defendant

No. CR-17-0585-01-PHX-JJT

**REPLY TO DKT. # 73,
GOVERNMENT RESPONSE TO
DEFENDANT'S MOTION TO SEVER
COUNTS [DKT. #58].**

18 Defendant Thomas Mario Costanzo submits this Reply to the
19 Government's Response to his motion for severance of Count 8 of the superseding
20 indictment, felon in possession of ammunition in violation of 18 U.S.C. § 922(g)(1),
21 from Counts 3-7, which each allege violation of 18 U.S.C. § 1956(c). **Severance of
22 Count 8, or, in the alternative, bifurcation of Count 8 from Counts 3-7 is
23 appropriate in this case.**

24 The government's argument that a sufficient connection exists between:
25 1) ammunition found in the hallway closet of a Mesa apartment and 2) trades conducted
26 in public at cafes and fast food restaurants across the Phoenix metropolitan area for
27 joinder at trial is unconvincing for four reasons: First, no gun was ever recovered, just a
28 box of ammunition. Second, no evidence of money laundering prior to the government's
introduction of its ruse to entice unwitting citizens exists; thus undermining the
government's argument regarding the ammunition's function for "protection" and "con-

1 cealment.” Third, the mere peer-to-peer exchange of bitcoin—which the government
2 characterizes as “under-the-radar, unlicensed, and unregistered”—is not even illegal
3 under current federal or Arizona law. Finally, each of the three statements cited by the
4 government in support of the argument that the hallway shelf ammunition and alleged
5 money laundering were somehow “part of a common scheme or plan” are taken out of
6 context or outright misinterpreted.

7 **1. No gun...**

8 The government asks this court to conclude that the mere presence of
9 ammunition in a hall closet, in the absence of a firearm of any kind being recovered
10 from the person or property of Mr. Costanzo, both “suggest[s] that at some point he
11 possessed a corresponding firearm for additional protection...” and is a sufficient basis
12 to join this charge to the remaining counts of the indictment. But for the constitutional
13 fair trial concerns raised by joinder here, this is a comical position. Unfortunately, Mr.
14 Costanzo’s substantial rights are affected; there is no room for speculation or jocularity
15 here.

16 The government cites cases upholding joinder of felon in possession of a
17 *firearm* with other clearly related charges in support of its position; these are readily
18 distinguishable from the case at bar.

- 19
- 20 • *Nguyen* involves a case where co-defendants were tried on two indictments in a
21 consolidated jury trial. 88 F.3d 812, 814 (9th Cir. 1996). The first indictment
22 charged a conspiracy to transfer an unregistered sawed-off shotgun and aiding
23 and abetting the same. *Id.* The second indictment charged felon in possession of
24 a firearm, specifically, a handgun that defendant attempted to sell to the
25 undercover agent on the same day that transfer of the unregistered sawed-off was
26 negotiated. *Id.* The district court found that all counts in both indictments
27 “ar[ose] out of the same transaction or series of transactions [and] all ha[d] to
28 do with the sale of guns to this specific investigator.” *Id.* at 815 (citing *United*

1 *States v. Portac, Inc.*, 869 F.2d 1288, 1294 (9th Cir.1989) (finding joinder proper
2 when same facts are offered to prove each joined offense). Here not only do we
3 have a situation where the same facts will not be offered to prove the joined
4 offenses, we also have only a box of ammunition sitting on a hallway shelf, miles
5 away from where any bitcoin exchange was occurring.

- 6 • *VonWillie* involves a case where defendant was charged both with being a felon
7 in possession of multiple (loaded)¹ firearms and possessing those same firearms
8 in relation to a drug trafficking crime. 59 F.3d 922, 929 (9th Cir. 1995). In
9 finding no misjoinder, the court noted that “[t]estimonial and physical evidence
10 related to location, discovery, and seizure of the firearms” was common to both
11 counts. *Id.* In finding no prejudicial joinder, the court noted statements by the
12 defendant in connection to both the firearms and the drugs found in his home by
13 authorities. *Id.* at 930. In contrast, the bulk of the evidence in the instant case
14 arises from recorded conversations between Mr. Costanzo and undercover agents
15 at cafes and fast food restaurants, far from the box of ammunition on the hallway
16 shelf in Mesa, which was never discussed or even suggested.

17 **2. No money laundering save the government’s money laundering...**

18 In other filings, the government has conceded that it “found” Mr.
19 Costanzo through localbitcoins.com, not the Darknet. *See, e.g.* Dkt. #85 at 2. Absolutely
20 no evidence beyond the government’s general distrust of Bitcoin linked Mr. Costanzo to
21 money laundering before IRS and DEA agents decided to insert that ruse into their
22 investigation. In fact, of recent cases that undersigned counsel was able to identify
23 involving bitcoin traders targeted by federal agents via localbitcoins.com, the instant
24 matter is the only one where money laundering charges were pursued in the absence of
25 some particularized suspicion. *See* Dkt. # 63 at Part IV(1). Thus, apart from the
26 “thousands and tens of thousands of dollars” that the government chose to pour into this

27 _____
28 ¹ 59 F.3d 922, 924 (9th Cir. 1995)

1 masquerade over the course of 25 months, there is little evidence beyond Mr.
2 Costanzo's own unsubstantiated claims to support that he was even successful as a
3 trader of Bitcoin before the government stepped in with its deep pockets. *See e.g., id.* at
4 Part IV(2).

5 Thus the government cannot claim that it interrupted an ongoing criminal
6 activity (presumably money laundering, since the unlicensed money transmitting counts
7 have been dismissed) where "protection" and "concealment" were necessary; instead, it
8 sought to create one. Now it wishes to shoehorn the unrelated presence of ammunition
9 found by chance in a hall closet (in the absence of any firearm or plausible nexus to the
10 money laundering counts) into this trial.

11 **3. Unlicensed money transmitting is not a crime (in Arizona), and by the way,
12 Bitcoin is not money...**

13 Much of the government's rhetoric in its response is predicated on the
14 very charges it moved to dismiss two days prior to the filing of said response.
15 Specifically, the government repeatedly characterizes unlicensed peer-to-peer Bitcoin
16 exchanges as inherently criminal acts. This position is simply not defensible given the
17 state of Arizona, not to mention federal, law.

18 The government refers to Mr. Costanzo's peer-to-peer Bitcoin trading
19 activities as "under-the-radar, unlicensed, and unregistered." This appears to be because
20 18 U.S.C. § 1960(b)(1)(A) makes it a federal crime to operate a money-transmitting
21 business "without an appropriate money transmitting license in a State where such
22 operation is punishable as a misdemeanor or a felony under State law." The counts in
23 the first superseding indictment which alleged violations of § 1960(b)(1)(A) have been
24 dismissed. Dkt. # 74. However, it is worth mentioning that Arizona's money-
25 transmitting law contains a Definitions section that clearly excludes unofficial, "virtual"
26 commodities such as Bitcoin.

27 The pertinent Definitions section defines "Money" as "a medium of
28 exchange that is authorized or adopted by a domestic or foreign government as a part of

1 its currency and that is customarily used and accepted as a medium of exchange in the
2 country of issuance.” Ariz. Rev. Stat. Ann. § 6-1201(9). Bitcoin may be many things,
3 but it is emphatically not “authorized or adopted by a domestic or foreign government
4 as a part of its currency.” Indeed, not being an official government-regulated currency is
5 Bitcoin’s most essential feature and *raison d’etre*. “[T]he whole point of Bitcoin is to
6 escape any entanglement with sovereign governments.” *United States v. Petix*, No. 15-
7 CR-227A, 2016 WL 7017919, at *5 (W.D.N.Y. Dec. 1, 2016) (emphasis added); *see*
8 *also* Matthew Kien-Meng Ly, Coining Bitcoin’s “Legal-Bits”: Examining the
9 Regulatory Framework for Bitcoin and Virtual Currencies, 27 Harv. J.L. & Tech. 587,
10 590 (2014) (“No legal entity controls or administers Bitcoin. Additionally, no sovereign
11 or commodity backs the currency.”) (footnotes omitted). In short, because Arizona law
12 clearly does not require a license for businesses that transmit Bitcoin, Section
13 1960(b)(1)(A) was—and is—facially inapplicable to Mr. Costanzo’s alleged conduct.
14 Moreover, even if Arizona law did require a license for transmitting Bitcoin, Section
15 1960(b)(1)(A) still would not apply in Arizona because Arizona law does not make
16 unlicensed money transmitting “a misdemeanor or a felony.” 18 U.S.C.
17 § 1960(b)(1)(A); *see generally* Ariz. Rev. Stat. Title 6, Ch. 12.

18 On the federal front, it is a fact that Congress has not passed legislation
19 regarding Bitcoin or other virtual internet-based commodities as of yet. In the absence
20 of action by our legislative branch and a specific provision of authority to the Executive
21 Branch to promulgate regulations, extra-legislative guidance runs afoul of the
22 Separation of Powers. *See, e.g., F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502,
23 536-37(2009) (citing *Mistretta v. United States*, 488 U.S. 361, 372-374 (1989) (“If
24 agencies were permitted unbridled discretion, their actions might violate important
25 constitutional principles of separation of powers and checks and balances. To that end
26 the Constitution requires that Congress’ delegation of lawmaking power to an agency
27 must be ‘specific and detailed...’ Congress must ‘clearly delineat[e] the general policy’
28

1 an agency is to achieve and must specify the ‘boundaries of [the] delegated
2 authority....’ Congress must ‘lay down by legislative act an intelligible principle,’ and
3 the agency must follow it.”(internal quotations omitted). That is, the Department of
4 Treasury’s attempt—through the Financial Crimes Enforcement Network
5 (“FinCEN”)—to issue interpretative guidance exempt from public notice or comment
6 and in the absence of clear legislative authority, is simply unconstitutional and
7 unenforceable.

8 **4. Statements taken out of context...**

9 The government’s reliance on statements taken out of context in
10 attempting to give some substance to its claim that the ammunition in the hallway closet
11 had a nexus to the alleged money laundering is plainly untenable. A more complete
12 explanation of the context of the of the cited statements—as well as the UCA’s role in
13 eliciting them when appropriate—is provided here

14 **a. “I do my best to—you know—screw with anybody who I don’t feel safe 15 around.”**

16 This statement occurred on the date of Mr. Costanzo’s arrest at a local
17 Starbucks while attempting to conduct a \$100K Bitcoin transaction. After discussing
18 any number of topics, including Bitcoin, the human condition, a movie called “The
19 Matrix,” and actor Laurence Fishburne, the UCA turns the conversation to the need for
20 self-protection, and Mr. Costanzo discusses at length the steps he has taken to avoid
21 potentially dangerous situations with strangers, including the small knife he carries,
22 which the UCA refers to as a “little jabber.” *See* Exhibit A, Bates 1083-97 at 1083-84.
23 Mr. Costanzo then makes the statement cited by the government but also adds that he
24 would not use it “just for whatever reason.” *Id.* at Bates 1084.

25 Later, the UCA appears to try to elicit more from Mr. Costanzo regarding
26 the need for protection by saying, “[w]ell, especially if you’re walking around,
27 somebody sees you have money, decides to walk up and...”, Exhibit A at Bates 1085,
28 but Mr. Costanzo seizes the opportunity to instead provide a series of accounts of how
he avoided a person who seemed to be crazy (by not responding to him), *id.*,

1 evaded an individual who said he wanted to talk about Bitcoin but started acting
2 suspiciously (by excusing himself to go to the bathroom), *id.* at 1085-87, and doubted
3 the veracity of a gentleman asking for money at a McDonald's (but gave him fifty cents
4 anyway). *Id.* at 1087-88.

5 Before launching into a tale about a hitchhiker he picked up on a roadtrip
6 from Florida to Arizona—and who he found a roofing job for in Louisiana—Mr.
7 Costanzo pauses to say “[w]ell no, it’s just you gotta—you know especially in this
8 business you gotta, like, trust people...” Exhibit A at 1088-93. After Mr. Costanzo’s
9 good-samaritan-hitchhiker account is done, the UCA appears to try yet again to elicit
10 some damning statement as to protective measures, saying “Yeah. That’s the thing, you
11 got large amounts of cash like that and...” *Id.* 1095. Mr. Costanzo disregards this lure as
12 he launches into another hitchhiker account, *id.*, at 1095-96, then screams are heard—
13 apparently from Starbucks patrons frightened by the unnecessarily dramatic entry of
14 federal agents into the café to arrest Mr. Costanzo. He is heard to say only “[w]hat-
15 whoa-whoa What are you doing?” before being arrested without incident.” *Id.* at 1096.

16 **b. A “reputation for ‘reliability’ in the community.”**

17 Inclusion of this exchange as part of the government’s argument in
18 support of joinder is confusing, considering its obvious context. The excerpted
19 recording provided by the government does not require supplementation: it is clear that
20 Mr. Costanzo and Dr. Steinmetz were simply trying to put the UCA—who was
21 expressing nervousness about the planned \$100K exchange—at ease that he would not
22 be “jacked,” to use Dr. Steinmetz’s terminology. Dr. Steinmetz advised he would bring
23 a firearm for everyone’s safety, and Mr. Costanzo shortly thereafter added that they
24 both have good reputations in the community—presumably the Bitcoin community—
25 for reliability. The only reasonable inference there is that reliability means they are not
26 scam artists, they provide the Bitcoin promised and do not take advantage of clients to,

27 ///

1 for example, rob or short-sell them when they show up with cash for the trade. This
2 interpretation is further supported by the positive customer reviews on Mr. Costanzo's
3 localbitcoins.com account disclosed by the government. *See* Exhibit B, Bates 1127-
4 1129. It is simply wishful thinking on the part of the government to try to infuse that
5 innocuous statement with the promise of weaponry.

6 **c. "Like at your house—you have border protection 'cause you don't want**
7 **somebody comin' in your house...I mean—somebody comes in your house**
8 **you blow his brains out. You know?"**

9 This statement is taken entirely out of context. The conversation taking
10 place between the UCA and Mr. Costanzo, which was far longer than the 35-second
11 audio clip relied upon by the government, makes it clear that Mr. Costanzo was simply
12 talking politics as opposed to personal firepower.

13 Defense Exhibit C picks up as Mr. Costanzo is in the middle of explaining
14 how Bitcoin works to the UCA. Exhibit C, Bates 723-730, at 723-25. In response to the
15 UCA's questions, Mr. Costanzo tries to analogize to the Starbucks business model, *id.*
16 at 726-27, then his explanation becomes a rant against increasing the minimum wage,
17 *id.* at 728-29. Ultimately, Mr. Costanzo explains his political view that "the government
18 has no business being involved in school, being involved in marriage, being involved in
19 education, being involved in - in- in, uh, in- in employment." *Id.* at 729. Mr. Costanzo
20 then adds that "Their [the government's] job is to do two things. Protect our rights and
21 make sure that nobody gets in that comes across the border without, uh, you know,
22 some documentation or having some kind of, uh, border protection." *Id.* He then
23 analogizes the government's border protection duties with that of an owner protecting
24 his home: "Like at your house – you have border protection 'cause you don't want
25 somebody comin' in your house...I mean – somebody comes in your house you blow
26 his brains out. You know? But I mean that – these are the two things they're [the
27 government is] supposed to do and those are the two things they don't do. And it pisses
28 me off." *Id.*

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1 Copy of the foregoing transmitted by ECF for filing December 15, 2017, to:

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