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13 IN THE UNITED STATES DISTRICT COURT
14 DISTRICT OF ARIZONA

15 United States of America,
16
17 Plaintiff,
18
19 vs.
20 Thomas Mario Costanzo,
21 Defendant.

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

**REPLY TO DKT. #85, THE
GOVERNMENT'S RESPONSE TO
MOTION TO SUPPRESS EVIDENCE
OBTAINED FROM THE APRIL 20,
2017 SEARCH OF MR. COSTANZO'S
RESIDENCE [DKT. # 65]**

(Evidentiary Hearing Requested)

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Thomas Mario Costanzo, by and through undersigned counsel, respectfully submits this Reply to the Government's Response to his Motion to Suppress. The argument presented in the government's response is unconvincing. The relief requested by the defense remains appropriate because 1) the affidavit filed in support of the warrant was misleading and did mislead the magistrate in his finding of probable cause to search for evidence of 21 U.S.C. § 846 violations, and 2) the search warrant was thus impermissibly overbroad.

Respectfully submitted: December 15, 2017.

JON M. SANDS
Federal Public Defender

s/Maria Weidner
MARIA WEIDNER
Asst. Federal Public Defender

REPLYINTRODUCTION

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3 The defense agrees that there was no *facially* false statement in the Affidavit
4 and Application for the search warrant issued—and now challenged—in the instant case.
5 However, the cumulative effect of copious non-relevant information suggestive of other
6 offenses (i.e., a Title 21 offenses) that were neither initially part of government’s
7 investigation nor were discovered in the course of the same, was misleading and did
8 mislead the magistrate. This is evidenced by the fact that the magistrate signed off on a
9 finding of probable cause to search for evidence of an offense for which no evidence
10 beyond misleading innuendo was presented in the Affidavit: 21 U.S.C. § 846. This
11 conclusion receives further support when the non-relevant and misleading information
12 suggestive of drug offenses is considered together with the Affidavit’s repeated references
13 to out-of-context and thus also-misleading statements made by both Mr. Costanzo and
14 Dr. Steinmetz. The result: an overbroad, general search warrant, in violation of the Fourth
15 Amendment.

16 **The government selected the underlying SUA in this case, drug sales, without any**
17 **particularized suspicion or probable cause to believe that Mr. Costanzo was**
18 **involved in any SUA.**

19 When the government decided to target Mr. Costanzo under the sting
20 provisions of 18 U.S.C. § 1956, it selected from among the host of “specified unlawful
21 activities” (SUAs) enumerated in § 1956(c)(7). The government opted for drug sales,
22 which are incorporated into the SUA definition per § 1956(c)(7)(A) and § 1961(1)(A).
23 Government disclosures reflect that this decision was made before anything at all was
24 known about Mr. Costanzo, save his enthusiasm for trading Bitcoin.

25 **The government’s 2-year investigation uncovered no evidence of drug trafficking**
26 **conspiracies other than the government’s own sting operation.**

27 Mr. Costanzo, in recorded meetings with UCAs which the government has
28 disclosed, repeatedly expressed his desire *not* be privy to the affairs of his clients. He
never expressed an interest to get “in” on the pretend drug deals alluded to by UCAs, nor
did he express, insinuate, or suggest that he was himself similarly involved in narcotics
or that he was in “business” with others so involved. In a word, even if the investigation

1 uncovered evidence in support of finding a reasonable probability that Mr. Costanzo was
2 involved in violations of 18 U.S.C. § 1956(a)(3) as a result of the government’s sting, no
3 evidence was developed sufficient to find even a scintilla of a “fair probability” that he
4 was involved in violations of any SUA, including 21 U.S.C. § 846.

5 **The government argues that its fiction alone, without more, is sufficient to support**
6 **a finding of probable cause to search for evidence of a crime for which there is zero**
6 **evidence Mr. Costanzo was involved: drug conspiracy.**

7 The government—attempting to salvage its flawed search warrant—insists
8 there was a “fair probability” that evidence of a drug trafficking conspiracy would be
9 uncovered in the search of Mr. Costanzo’s home. *See* Dkt. 85 at n. 3 and 14. This despite
10 the fact that the only mention of drug sales in government disclosures is the government’s
11 own fiction, its “sting.” Zero substantive evidence suggesting an actual drug conspiracy
12 involving Mr. Costanzo over the course of the 25-month investigation was uncovered by
13 the government. The government nonetheless urges that the inclusion of 21 U.S.C. § 846
14 is appropriate in the search warrant simply because the government happened to select
15 drugs sales as its SUA (and not murder, kidnapping, gambling, arson, robbery, bribery,
16 extortion, or obscene matter: the other SUAs available pursuant to 118 U.S.C.
17 §§ 1956(c)(7)(A) and 1961(1)(A)). *Id.* at n.3. Moreover, it is well-settled law that “[t]here
18 is neither a true agreement nor a meeting of minds when an individual ‘conspires’ to
19 violate the law with only one other person and that person is a government agent.” *United*
20 *States v. Escobar de Bright*, 742 F.2d 1196, 1199 (9th Cir. 1984). Thus, there was no drug
21 conspiracy, and no probable cause to search for evidence of one, either.

22 **CONCLUSION**

23 One need not lie to succeed at deception. The copious non-relevant and
24 misleading information regarding narcotics trafficking, the Darknet, The Onion Router,
25 and statements taken out of context and referenced in the Affidavit and Application for
26 Search Warrant were misleading and did mislead the magistrate. A non-deceptive warrant
27 application would have resulted in magistrate approval for a search far narrower in scope
28 than that the government obtained. The ammunition tucked away in the hallway closet
would not have been discovered.

1 Respectfully submitted: December 15, 2017.

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

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