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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

**JOINT PROPOSED JURY INSTRUCTIONS**

18 The parties jointly submit the following proposed jury instructions for this case:

19 **I. MODEL INSTRUCTIONS**

20 **A. Preliminary Instructions**

- 21 ST 1.1 Duty of Jury
- 22 ST 1.3 What is Evidence
- 23 ST 1.4 What is Not Evidence
- 24 ST 1.5 Direct and Circumstantial Evidence
- 25 ST 1.6 Ruling on Objections
- 26 ST 1.7 Credibility of Witnesses
- 27 ST 1.8 Conduct of the Jury
- 28 ST 1.9 No Transcript Available to Jury

- 1 ST 1.10 Taking Notes
- 2 ST 1.11 Outline of Trial
- 3 **B. Instructions in the Course of Trial**
- 4 ST 2.1 Cautionary Instruction – First Recess
- 5 ST 2.2 Bench Conferences and Recesses
- 6 ST 2.7 Transcript of Recording in English
- 7 ST 2.10 Other Crimes, Wrongs or Acts of Defendant (as applicable)
- 8 **C. Instructions at End of Case**
- 9 ST 3.1 Duties of Jury to Find Facts and Follow Law
- 10 ST 3.2 Charge Against Defendant Not Evidence – Presumption of Innocence
- 11 – Burden of Proof
- 12 ST 3.3 Defendant’s Decision Not to Testify OR
- 13 ST 3.4 Defendant Decision to Testify
- 14 ST 3.5 Reasonable Doubt – Defined
- 15 ST 3.6 What Is Evidence
- 16 ST 3.7 What Is Not Evidence
- 17 ST 3.8 Direct and Circumstantial Evidence
- 18 ST 3.9 Credibility of Witnesses
- 19 ST 3.10 Activities Not Charged (as applicable)
- 20 ST 3.11 Separate Consideration of Multiple Counts – Single Defendant
- 21 ST 3.20 On Or About Defined
- 22 **D. Consideration of Particular Evidence**
- 23 ST 4.3 Other Crimes, Wrongs or Acts of Defendant (as applicable)
- 24 ST 4.6 Impeachment, Prior Conviction of Defendant (as applicable)
- 25 ST 4.10 Government’s Use of Undercover Agents and Informants
- 26 ST 4.11 Eyewitness Identification
- 27 ST 4.14 Opinion Evidence, Expert Witness
- 28

- 1 ST 4.14A Dual Role Testimony
- 2 ST 4.15 Summaries Not Received in Evidence OR
- 3 ST 4.16 Charts and Summaries in Evidence
- 4 **E. Responsibility**
- 5 **PL 5.7 Deliberative Ignorance<sup>1</sup>**
- 6 **F. Specific Defenses**
- 7 **G. Jury Deliberations**
- 8 ST 7.1 Duty to Deliberate
- 9 ST 7.2 Consideration of Evidence
- 10 ST 7.3 Use of Notes
- 11 ST 7.4 Jury Consideration of Punishment
- 12 ST 7.5 Verdict Form
- 13 ST 7.6 Communication With Court

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15 **II. STIPULATED NON-MODEL INSTRUCTIONS**

16 **A. Testimony of Witness Involving Special Circumstances (modified 4.9)**

17 You have heard testimony from Nolan Jack Sperling, a witness who pleaded guilty  
18 to a separate crime and who received a cooperation benefit from the government.

19 Mr. Sperling’s guilty plea is not evidence against the Mr. Costanzo, and you may  
20 consider it only in determining Mr. Sperling’s believability as a witness in this trial.

21 For this reason, in evaluating the testimony of Nolan Jack Sperling, you should  
22 consider the extent to which or whether his testimony may have been influenced by the  
23 benefit he received—or hopes to receive—from the government in exchange for testifying

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26 <sup>1</sup> Defendant adds a fourth element to the money laundering sting instructions, i.e., a  
27 belief under the reasonable person standard that the funds were proceeds of drug  
28 trafficking. The Ninth Circuit is silent as to the additional element. To the extent the Court  
adds the fourth element, and to the extent otherwise supported by the facts, the government  
preserves the ability to seek a deliberate ignorance instruction.

1 against Mr. Costanzo. In addition, you should examine the testimony of Nolan Jack  
2 Sperling with greater caution than that of other witnesses.

3 **III. GOVERNMENT’S PROPOSED NON-MODEL INSTRUCTIONS**

4 **A. Presumption of Innocence and Summary of Charges (modified 1.2)**

5 This is a criminal case brought by the United States government. The government  
6 charges the defendant with conducting five financial transactions involving property  
7 represented to be the proceeds of specified unlawful activity, which is a form of Money  
8 Laundering. The charges against the defendant are contained in the indictment. The  
9 indictment simply describes the charges the government brings against the defendant. The  
10 indictment is not evidence and does not prove anything.

11 The defendant has pleaded not guilty to the charges and is presumed innocent unless  
12 and until the government proves the defendant guilty beyond a reasonable doubt. In  
13 addition, the defendant has the right to remain silent and never has to prove innocence or  
14 to present any evidence.

15 In order to help you follow the evidence, I will now give you a brief summary of  
16 the elements of the crime which the government must prove to make its case:

17 First, the defendant conducted or attempted to conduct a financial transaction;

18 Second, the property involved in the transaction was represented by an undercover  
19 law enforcement officer to be the proceeds of specified unlawful activity; and

20 Third, *either* the defendant conducted the transaction with the intent to avoid a  
21 transaction reporting requirement under federal law, *or* the defendant conducted the  
22 transaction with the intent to conceal or disguise the nature, location, source, ownership or  
23 control of the property.<sup>2</sup>

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27 <sup>2</sup> See Model Criminal Jury Instruction 1.2, and, as to the elements, *United States v.*  
28 *Nelson*, 66 F.3d 1036, 1040 (9th Cir. 1995).

1           **B. Money Laundering Offense Conduct (modified 8.147)**

2           The defendant is charged in each count of the indictment with conducting a financial  
3 transaction involving property represented to be the proceeds of specified unlawful activity  
4 in violation of Section 1956(a)(3)(B) and (C) of Title 18 of the United States Code. In  
5 order for the defendant to be found guilty of that charge, the government must prove each  
6 of the following elements beyond a reasonable doubt:

7           First, the defendant conducted or attempted to conduct a financial transaction;

8           Second, the property involved in the transaction was represented by an undercover  
9 law enforcement officer to be the proceeds of specified unlawful activity; and

10           Third, *either* the defendant conducted the transaction with the intent to avoid a  
11 transaction reporting requirement under federal law, *or* the defendant conducted the  
12 transaction with the intent to conceal or disguise the nature, location, source, ownership or  
13 control of the property.<sup>3</sup>

14           A financial transaction is a transaction involving one or more monetary instruments,  
15 or the movement of funds by wire or other means, that affects interstate or foreign  
16 commerce in any way.<sup>4</sup> The term “funds” includes any currency, money or other medium  
17 of exchange that can be used to pay for goods and services.<sup>5</sup>

18           “Proceeds” means any property derived from or obtained or retained, directly or  
19 indirectly, through some form of illegal activity, including the gross receipts of such  
20 activity.<sup>6</sup>

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23           <sup>3</sup> For the elements of a sting offense, *see Nelson*, 66 F.3d at 1040.

24           <sup>4</sup> Copied from Model Instruction 8.147

25           <sup>5</sup> As delivered in *United States v. Ulbricht*, CR14-0068-KBF (S.D.N.Y. 2015), at  
26 81. *See also United States v. Ulbricht*, 31 F. Supp. 3d 540, (S.D.N.Y. 2014) (denying  
27 motion to dismiss, and recognizing that the broad statutory definition of “financial  
transaction” includes the use of bitcoin.

28           <sup>6</sup> 18 U.S.C. § 1956(c)(9).

1 The term “specified unlawful activity” means the manufacture, importation,  
2 receiving, concealment, buying, selling or otherwise dealing in a controlled substance or  
3 listed chemical under the Controlled Substances Act.<sup>7</sup> The government need not show that  
4 the undercover law enforcement officers explicitly stated that the cash in question was the  
5 direct product of unlawful activity.<sup>8</sup>

6 A “transaction reporting requirement” means either the currency transaction  
7 reporting requirement for currency deposits or withdrawals exceeding \$10,000 into or from  
8 a financial institution, or the suspicious activity reporting requirements for financial  
9 institutions, including the “know your customer” guidelines.<sup>9</sup>

#### 10 **IV. DEFENDANT’S PROPOSED NON-MODEL INSTRUCTIONS**

##### 11 **A. Presumption of Innocence and Summary of Charges (modified 1.2)**

12 This is a criminal case brought by the United States government. The government has  
13 charged Mr. Costanzo with money laundering. Specifically, the government has alleged  
14 that Mr. Costanzo conducted five financial transactions involving money represented to be  
15 the proceeds of a specified unlawful activity.

16 The charges against the Mr. Costanzo are contained in the indictment. The indictment  
17 simply describes the charges the government brings against the defendant. The indictment  
18 is not evidence and does not prove anything.

19 Mr. Costanzo has pleaded not guilty to the charges and is presumed innocent unless and  
20 until the government proves he is guilty beyond a reasonable doubt. In addition, Mr.  
21 Costanzo has the right to remain silent and never has to prove innocence or present any  
22 evidence.

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25 <sup>7</sup> 18 U.S.C. §§ 1956(c)(7) and 1961(1).

26 <sup>8</sup> *Nelson*, 66 F.3d at 1041.

27 <sup>9</sup> *E.g.*, *Nelson*, 66 F.3d at 1040 (using the failure of a business to file a Form 8300  
28 for cash receipts in excess of \$10,000 as the predicate). *See also Government’s Response to Motion for Bill of Particulars* (CR 117), at 2.

1 In order to help you follow the evidence, I will now give you a brief summary of the  
2 elements of the crime which the government must prove to make its case:

3 Under the sting provision of the money laundering statute, the Government must prove that  
4 Mr. Costanzo:

5 (1) conducted or attempted to conduct a financial transaction;

6 (2) that the transaction involved funds represented by undercover agents to be the  
7 proceeds of some unlawful activity—in this case, illegal drug trafficking;

8 (3) that Mr. Costanzo acted with the belief that the funds were proceeds of the criminal  
9 activity represented by undercover agents; and

10 (4) that Mr. Costanzo acted with the intent to either:

11 (a) conceal or disguise the nature, source, or ownership of the funds, or

12 (b) conducted the transaction with the intent to avoid a currency transaction  
13 reporting requirement under federal law.<sup>10</sup>

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16 <sup>10</sup> There is no model jury instruction in the Ninth Circuit detailing the elements  
17 necessary to convict pursuant to the money laundering sting statute. The proposed elements  
here are derived from and supported by the following authority:

18 A) **Legislative history:** 134 Cong. Rec. S17360-02, 1988 WL 182529 (“This  
19 amendment to the money laundering statute, 18 U.S.C. 1956, would permit  
20 undercover law enforcement officers to pose as drug traffickers in order to obtain  
21 evidence necessary to convict money launderers. The present statute does not  
22 provide for such operations because it permits a conviction only where the  
23 laundered money ‘in fact involves the proceeds of specified unlawful activity.’  
24 18 U.S.C. 1956(a)(1). Since money provided by an undercover officer posing as  
25 a drug trafficker does not ‘in fact’ involve drug money, the laundering of such  
26 money is not presently an offense under the statute. The amendment would add  
to section 1956 a new subsection (a)(3) dealing specifically with undercover  
operations. The first part of the amendment contains a mens rea requirement that  
is stricter than that in 1956(a)(1). The defendant would have to have specific  
intent to promote specified unlawful activity, to conceal what he believes to be  
the proceeds of such activity, or to avoid reporting requirements. It would not be  
sufficient, as it is under (a)(1), that the defendant merely know that the  
transaction was being conducted with the second or third of those purposes in  
mind.”)

27 B) **Caselaw:** *United States v. Kaufmann*, 985 F.2d 884, 892 (7th Cir. 1993)(setting  
28 forth the four elements proposed by the defense in this non-model instruction);  
*United States v. Stratievsky*, 430 F. Supp. 2d 819 (N.D. Ill. 2006)(same); *United*

1           **B. Money Laundering Offense Conduct (modified 8.147)**

2           The defendant is charged in each count of the indictment with conducting a  
3 financial transaction involving funds represented to be the proceeds of specified unlawful  
4 activity in violation of Section 1956(a)(3)(B) and (C) of Title 18 of the United States Code.  
5 In order for the defendant to be found guilty of that charge, the government must prove  
6 each of the following elements beyond a reasonable doubt:

7           (1) Mr. Costanzo conducted or attempted to conduct a financial transaction;

8           (2) that the transaction involved funds represented by undercover agents to be the  
9 proceeds of a specified unlawful activity;

10           (3) that Mr. Costanzo acted with the belief that the funds were proceeds of the  
11 criminal activity represented by undercover agents; and

12           (4) that Mr. Costanzo acted with the intent to either:

13                   (a) conceal or disguise the nature, source, or ownership of the funds, or

14                   (b) conducted the transaction with the intent to avoid a currency  
15 transaction reporting requirement under federal law.<sup>11</sup>

16           A financial transaction is a transaction involving one or more monetary instruments,  
17 or the movement of funds by wire or other means, that affects interstate or foreign  
18 commerce in any way. The term “funds” includes any currency or money.

19           “Proceeds” means any property, including money, derived from or obtained  
20 or retained, directly or indirectly, through some form of illegal activity, including the gross  
21 receipts of such activity.

22 \_\_\_\_\_  
23           *States v. Castaneda-Cantu*, 20 F.3d 1325, 1331 (5th Cir. 1994) (citing *Kaufman*  
24 985 F.2d at 893 (“It is enough that the government prove that an enforcement  
25 officer or other authorized person made the defendant aware of circumstances  
26 from which a reasonable person would infer that the property was drug  
27 proceeds.”)); *United States v. Palazzolo*, 1995 WL 764416 at 4 (6th Cir. 1995)  
(unpublished)(“[t]he funds used by law enforcement officials to pursue the  
28 undercover investigation need not be unlawfully generated. It is only necessary  
that the defendant ‘believed’ the funds to be the proceeds of other crimes”).

<sup>11</sup>*Id.*



1           The term “specified unlawful activity” includes the manufacture,  
2 importation, receiving, concealment, buying, selling or otherwise dealing in a controlled  
3 substance or listed chemical under the Controlled Substances Act. The government need  
4 not show that the undercover law enforcement officers explicitly stated that the cash in  
5 question was the direct product of unlawful activity.

6           A “transaction reporting requirement” means either the currency transaction  
7 reporting requirement for currency deposits or withdrawals exceeding \$10,000 into or from  
8 a financial institution, or the suspicious activity reporting requirements for financial  
9 institutions, including the “know your customer” guidelines.

10           **C. Mens Rea: Specific Intent (modified 5.4) and Willfully (modified 5.5)<sup>12</sup>**

11           You may find that that Mr. Costanzo acted with the intent to conceal or disguise the  
12 nature, source, or ownership of the funds, or avoid a currency transaction reporting  
13 requirement under federal law if you find beyond a reasonable doubt that Mr. Costanzo:

- 14           (1) Acted with the specific intent to promote specified unlawful activity, to conceal  
15 what he believes to be the proceeds of such activity, or to avoid reporting  
16 requirements.<sup>13</sup>

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20           <sup>12</sup> While the commentary provided for Model Rule 5.4 counsel against instructions  
21 that distinguish between “specific intent” and “general intent,” asserting that the “preferred  
22 practice” is to give an intent instruction that reflects the intent requirements of the offense  
23 charged. Here, Congress expressly stated that the intent for the sting provision of § 1956 is  
24 “specific intent,” further elaborating that specific intent is a mens rea that is stricter than  
25 “knowingly,” the culpable state of mind under § 1956(a)(1). *See United States v. Nguyen*,  
26 73 F.3d 887, 891 (9th Cir.1995)(where statute is silent regarding the necessary mens rea of  
the crime, the court should examine the statute’s legislative history); *see also United States*  
*v. Barajas-Montiel*, 185 F.3d 947, 952 (9th Cir.1999) (following *Nguyen* and holding that  
criminal intent is required for conviction of the felony offenses of 8 U.S.C. §  
1324(a)(2)(B)). The meaning of “willfully” necessarily depends on particular facts arising  
under the applicable statute; no generic instruction defining that term is provided in the  
Model Instructions.

27           <sup>13</sup> *See supra n. 10* (this language is taken directly from the legislative history noting  
28 that the sting provision of the status has a stricter men rea of specific intent as compared to  
the less stringent mens rea of knowingly for the non-sting provisions).

1 Here, specific intent means that defendant actions were a voluntary, intentional violation  
2 of a known legal duty.<sup>14</sup>

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4 **Government objection:** The parties have been diligently discussing what “specific  
5 intent” means in the context of a money laundering sting, and it may be that the standard  
6 Ninth Circuit guidance (do not give an instruction, *see* Model Rule 5.4, comment) does not  
7 apply here. But any definition of “specific intent” should not conflate the higher tax and  
8 regulatory standard of “willfulness” with the intent to engage in money laundering activity.  
9 *See generally Nelson*, 66 F.3d at 1041-42 (holding that section 1956 has no willfulness  
10 requirement [in contrast to the pre-*Razlaf*-fix version of the structuring statute]).

11  
12 Respectfully submitted this 1st day of March, 2018.

13  
14 ELIZABETH A. STRANGE  
15 First Assistant United States Attorney  
16 District of Arizona

17 *s/ Gary Restaino*  
18 \_\_\_\_\_  
19 MATTHEW BINFORD  
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21 GARY RESTAINO  
22 Assistant U.S. Attorneys

23 *s/ Maria Weidner with permission*  
24 \_\_\_\_\_  
25 MARIA WEIDNER  
26 ZACHARY CAIN  
27 Assistant Federal Public Defenders  
28 Attorneys for defendant

14 *See* Model Instruction 5.5, Comment. (noting that the term willful has many meanings and construction is often influenced by context). This proposed instruction is borrowed from *United States v. Easterday*, 564 F.3d 1004, 1006 (9th Cir. 2009) (for crime of failure to pay employee payroll taxes, “willful” defined as “a voluntary, intentional violation of a known legal duty”)

**CERTIFICATE OF SERVICE**

1 I hereby certify that on this 1st day of March 2018, I electronically transmitted the  
2 attached document to the Clerk's Office using the CM/ECF System for filing and  
3 transmittal of a Notice of Electronic Filing to all counsel of record.

4  
5 s/Cristina Abramo  
U.S. Attorney's Office

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