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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE DISTRICT OF ARIZONA

14 United States of America,
15 Plaintiff,

16 vs.

17 Thomas Mario Costanzo,
18 Defendant.

CR-17-00585-PHX-GMS

**GOVERNMENT'S RESPONSE TO
MOTION IN LIMINE TO PRECLUDE
EVIDENCE OR ARGUMENT AS TO
DARKNET(S) AND/OR THE ONION
ROUTER (Tor)**

19
20 Costanzo's motion to preclude *any* mention of Tor or the dark net by the government
21 during the *entire* trial is too broad and should be denied. While the government
22 acknowledges that—in the wrong context—mention of the dark net or Tor could
23 potentially be prejudicial, a brief mention of those subjects to provide context, background,
24 or to rebut claims made by Costanzo or his witnesses is appropriate and supported by the
25 rules of evidence. Additionally, if granted, Costanzo's motion would place the government
26 at an unfair disadvantage because it would allow the defense witnesses to freely talk about
27 Tor or the dark net with no opportunity for the government to rebut or respond to that
28 evidence.

1 **I. Introduction and Background.**

2 Costanzo is charged with engaging in five separate financial transactions for two
3 purposes: to conceal and disguise the nature, location, source, ownership and control of the
4 undercover agents' drug money, in violation of 18 U.S.C. § 1956(a)(3)(B); and with the
5 intent to avoid a transaction reporting requirement that any financial institution would be
6 required to make, in violation of 18 U.S.C. § 1956(a)(3)(C). The government has the
7 burden to establish beyond a reasonable doubt that Costanzo acted with the intent to either
8 conceal the nature and source of the dirty money or to otherwise avoid federal transaction
9 reporting requirements. In all of the transactions charged here, Costanzo provided bitcoin
10 in exchange for money represented to be drug proceeds.

11 As mentioned in previous pleadings, this undercover operation began back in 2015,
12 when federal law enforcement began looking closely at peer-to-peer bitcoin exchangers
13 offering their services on a website called localbitcoins.com. (Doc. 79, at 3.) That scrutiny
14 was based on concerns about bitcoin being used to further illegal activity. (Doc. 79, at 7.)
15 That illegal activity included traditional money laundering, but it also included money
16 laundering specifically related to drugs and other contraband being sold on the dark net.
17 (Doc. 79, at 9.)

18 **II. Potential Uses At Trial.**

19 Mention of the dark net or Tor at trial would be limited at trial to a few situations—
20 none of which violate the rules of evidence or unfairly prejudice Costanzo. As detailed
21 below, the only potential times when those topics would come up is for background on
22 how this investigation began, to explain the training and experience of a few witnesses, or
23 to rebut or impeach Costanzo or his witnesses. It is also important to bring up during voir
24 dire to determine whether any potential jury members have specialized knowledge or
25 training that could impact their ability to be fair and impartial, or impact their duty to rely
26 solely on the evidence presented at trial.

27 **A. To Provide Background About The Investigation.**

28 It is well-established that agents may explain the origins of an investigation. *See,*

1 e.g., *United States v. Wahchumwah*, 710 F.3d 862, 871 (9th Cir. 2013) (denying a
2 confrontation clause claim seeking to preclude complaints by third parties that prompted
3 investigation); *United States v. Hassan*, 742 F.3d 104, 137 (4th Cir. 2014) (affirming
4 admission of agent’s testimony about information received that explained the origins of the
5 investigation); *United States v. Mohamud*, 941 F.Supp.2d 1303, 1313 (D. Or. 2013) (“A
6 jury may hear some background information on why a criminal investigation began.”); see
7 also *United States v. McLean*, 138 F.3d 1398, 1403 (11th Cir. 1998) (“Evidence, not part
8 of the crime charged but pertaining to the chain of events explaining the context, motive
9 and set-up of the crime, is properly admitted if linked in time and circumstances with the
10 charged crime, or forms an integral and natural part of an account of the crime, or is
11 necessary to complete the story of the crime for the jury.”); *United States v. Feldman*, No.
12 8:14-CR-521-T-27AEP, 2016 WL 3002418, at *5 (M.D. Fla. May 20, 2016) (“The
13 evidence that was admitted simply provided an explanation of why law enforcement
14 targeted pain clinics in general and this Defendant in particular”) (“It provided factual
15 context for the investigation of Defendant and his pain clinic and was necessary to explain
16 why law enforcement sent undercover agents into his medical practice”) (“Evidence
17 describing the rising epidemic of prescription drug abuse and the manner by which the
18 abusers acquired prescription narcotics . . . was certainly relevant to put this case in its
19 proper perspective.”). A brief mention of the dark net is necessary here to put the
20 investigation in context and to explain why federal agents were looking into peer-to-peer
21 exchangers like Costanzo. This type of background and context is particularly important
22 if the defense plans to make arguments to the jury similar to the arguments made back in
23 January before this Court, when defense counsel used strong terms to criticize the
24 government’s investigation in this case. (RT 1/4/18, at 35.) Testimony regarding what
25 prompted this investigation, including use of bitcoin by dark net vendors, is relevant and
26 necessary to explain the origins of this investigation and does not “insinuate the existence
27 of nefarious activity that is confusing,” mislead the jury, or “seek[] to cast aspersions about
28 Mr. Costanzo by association.” (Doc. 135, at 4.)

1 **B. To Provide Information About The Training and Experience of Agents.**

2 Mention of Tor and the dark net might also come up while agents are providing
3 testimony about their training and background. Many of the witnesses scheduled to testify
4 at trial are part of a joint task force responsible for the investigation of dark net vendors
5 and local drug traffickers who use the dark net to obtain drugs to sale in Arizona. Virtual
6 currency and the dark net go hand in hand. For many of the dark net marketplaces, bitcoin
7 is the only payment method accepted. As such, much of the agents' training and experience
8 includes training and presentations on the dark net. To exclude the mere mention of an
9 agent's area of training or expertise because the subject matter can sometimes have a
10 negative connotation is asking too much and is not supported by the rules of evidence. The
11 mere mention of a detective's training and experience in homicide cases shouldn't prevent
12 that same detective from mentioning that specialized training and experience during a
13 robbery or burglary trial. It is the same as saying an FBI agent who has experience on the
14 Joint Terrorism Task Force shouldn't be allowed to mention that training or experience
15 when testifying at a felon in possession of a firearm trial. The mere fact that an agent has
16 training in one area has nothing to do with Costanzo's character. The exclusion of the
17 agents' training is not logical and Costanzo cannot establish that the mere mention of
18 specialized training or experience, along with its probative value, is substantially
19 outweighed by unfair prejudice, confusion of the issues, delay, or any other reason set forth
20 in Rule 403.

21 **C. To Rebut or Impeach Costanzo or His Witnesses.**

22 If Costanzo testifies at trial, his knowledge of the dark net and the presence of Tor
23 on his electronic devices could be used to impeach or rebut his testimony. Likewise, if
24 Costanzo's witnesses at trial attempted to assert that he never used encryption, Tor, or the
25 dark net, the evidence showing that he is familiar with those topics would certainly be
26 relevant to rebut that testimony. Additionally, the argument in Costanzo's own motion
27 seems to cut against itself. It asks this Court to prevent any mention of Tor—or the fact
28 that it was found on several of his electronic devices—because it would be unfairly

1 prejudicial or improper character evidence, but at the same time it argues that many
2 respected people use the Tor browser and that not many people use Tor anymore because
3 “it could no longer provide the degree of anonymity sought by users.” (Doc. 135, at 5.)
4 The bottom line is that mention of the dark net or Tor may be relevant to rebut or impeach
5 Costanzo or his witnesses and the Court should not make a blanket ruling prior to trial
6 excluding any mention of these topics before the defense witnesses have even testified.

7 **D. To Ensure That Jurors Do Not Have Specialized Knowledge That Could**
8 **Impact Their Ability to be Fair and Impartial.**

9 Finally, mention of the dark net is important for voir dire—which is why the
10 government has asked the Court to consider making that inquiry during jury selection.
11 (Doc. 130, at 4.) As mentioned above, it is important to find out whether potential jury
12 members have specialized knowledge or training that could impact their ability to be fair
13 and impartial, or impact their duty to rely solely on the evidence presented at trial.
14 Alternatively, if the current question of, “Have you ever accessed the dark net?” might
15 seem too prejudicial or invasive, that question could be softened to “Have you heard about
16 the dark net?”¹

17 **III. Conclusion.**

18 For the reasons set forth above, Costanzo’s motion to preclude any and all mention
19 of Tor or the dark net by government attorneys or agents is simply too broad. Those two
20 subjects are not character evidence, are relevant to limited parts of the trial and can be
21 presented in ways where any potential prejudice, confusion, or delay does not substantially
22 outweigh the probative value. Thus, the motion should be denied.

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28 ¹ The Court may also direct the jury in voir dire away from imputing dark net
suspicions onto Costanzo as to the charged transactions. For example, the Court could
introduce the question by saying, “You may also hear about the use of the dark net to
anonymize purchases made with virtual currency. To be clear, the defendant did not use
the dark net in any of his transactions or communications with undercover agents.”

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Respectfully submitted this 6th day of March, 2018.

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District of Arizona

s/ Matthew Binford

MATTHEW BINFORD
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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to counsel of record in this case.