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13 IN THE UNITED STATES DISTRICT COURT

14 DISTRICT OF ARIZONA

15 United States of America,
16
17 Plaintiff,

18 vs.

19 Thomas Mario Costanzo,
20 Defendant.

No. CR-17-0585-PHX-GMS

**DEFENSE RESPONSE
TO DKT. # 123**

21 Thomas Mario Costanzo, through undersigned counsel, hereby responds
22 and objects to the Government's Notice of Intent to Introduce Evidence Pursuant to Rule
23 404(b). (Dkt # 123) The Government proposes to introduce at trial evidence of three
24 distinct bad acts as alleged by a federal defendant who has pleaded guilty to drug
25 trafficking charges:

- 26 1) That Mr. Costanzo conducted bitcoin exchanges beginning in the spring of
27 2015 with an individual who did not expressly reveal his illicit intent with
28 regard to the bitcoins he purchased from Mr. Costanzo.
- 2) That after conducting exchanges with said individual for approximately 10
months, the individual mentioned to Mr. Costanzo something about 10,000
bars of Xanax being seized.
- 3) That Mr. Costanzo later purchased a miniscule amount of DMT from said
individual. pleaded guilty to federal drug trafficking charges in an unrelated
case.

1 See Exhibit A, ROI for May 11, 2017 Proffer (filed separately under seal). This Court
2 should preclude each of the three instances of proposed 404(b) evidence for the reasons
3 provided in this filing. In short, that the government’s proffered 404(b) evidence is more
4 prejudicial than probative, unreliable, and unnecessary.

5 I. ARGUMENT

6 A. The Government bears the burden of showing that the evidence it seeks to 7 admit is relevant and that it is more probative than prejudicial.

8 Pursuant to Rule 404(b), “[e]vidence of a crime, wrong, or other act is not
9 admissible to prove a person’s character in order to show that on a particular occasion the
10 person acted in accordance with the character.” Fed. R. Evid. 404(b)(1). It may, however,
11 “be admissible for another purpose, such as proving motive, opportunity, intent,
12 preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Fed. R.
13 Evid. 404(b)(2).

14 It is the “government’s burden to show that the evidence offered is relevant,
15 and that it is more probative than prejudicial.” *United States v. Herrera-Medina*, 609 F.2d
16 376, 379 (9th Cir. 1979). “The government ‘must articulate precisely the evidential
17 hypothesis by which a fact of consequence may be inferred from other acts evidence.’”
18 *United States v. Alfonso*, 759 F.2d 728, 739 (9th Cir. 1985) (quoting *United States v.*
19 *Mehrmanesh*, 689 F.2d 822, 830 (9th Cir. 1982)).

20 Evidence of prior crimes or bad acts “is not looked upon with favor.” *Herrera-*
21 *Medina*, 609 F.2d at 379. Such evidence must first meet a four-part test for inclusion.
22 *United States v. Garcia-Orozco*, 997 F.2d 1302, 1304 (9th Cir. 1993). The other act
23 evidence may be admissible if (1) the evidence “tends to prove a material point”; (2) “the
24 other act is not too remote in time”; (3) there is evidence “sufficient to support a finding
25 that the defendant committed the other act”; and (4) where intent is at issue, “the other
26 act is similar to the offense charged.” *Id.*; *United States v. Mayans*, 17 F.3d 1174, 1181
27 (9th Cir. 1994).

28 Even when these requirements are met, the evidence may be admitted “only if,
on balance, its probative value is not substantially outweighed by the danger of unfair

1 prejudice to the defendant.” *United States v. Hodges*, 770 F.2d 1475, 1479 (9th Cir. 1985).
2 In other words, the Court must conduct an analysis under Rule 403, which provides that
3 “[t]he court may exclude relevant evidence if its probative value is substantially
4 outweighed by a danger of one or more of the following: unfair prejudice, confusing the
5 issues, misleading the jury, undue delay, wasting time, or needlessly presenting
6 cumulative evidence.” Fed. R. Evid. 403. “Unfair prejudice” is defined as relevant
7 evidence that has an “undue tendency to suggest decision on an improper basis,
8 commonly, though not necessarily, an emotional one.” Fed. R. Evid. 403 advisory cmte
9 note.

10 The risk of unfair prejudice can hardly be overstated, given the highly
11 inflammatory nature of other acts evidence, and that risk is greater when the government’s
12 proffered evidence is similar to the crime charged. *See, e.g., United States v. Bagley*, 772
13 F.2d 482 488 (9th Cir. 1985) (“To allow evidence of a prior conviction of the very crime
14 for which a defendant is on trial may be devastating in its potential impact on a jury.”);
15 *United States v. Bradley*, 5 F.3d 1317, 1319 (9th Cir. 1993) (“Our reluctance to sanction
16 the use of evidence of other crimes stems from the underlying premise of our criminal
17 justice system, that the defendant must be tried for what he did, not for who he is.”)
18 (internal citations and quotations omitted); J. Patterson, Evidence of Prior Bad Acts:
19 Admissibility Under the Federal Rules, 38 *Baylor L. Rev.* 331, 333 (Spring 1986) (noting
20 that prior bad acts evidence presents a risk that “the jury might conclude that the defendant
21 is a ‘bad man’ who deserves punishment regardless of his innocence of the crime charged
22 and warrants imprisonment to prevent future maleficent acts”); S. Yost, Reversals of
23 Fortune: How the Ninth Circuit Reviews Erroneously Admitted “Other Acts” Evidence
24 Under Federal Rule of Evidence 404(B), 23 *Sw. U. L. Rev.* 661, 665-66 (1994) (noting
25 that the exclusion of other acts evidence rests on concerns that a jury will “judge an
26 individual based on his or her ‘other’ conduct, rather than on evidence directly relevant
27 to the conduct charged” or that a jury will “give[] too much weight to ‘other acts’ evidence
28 in relation to all of the evidence presented at trial”). The more instances of prior crimes

1 or bad acts that are introduced the greater the risk of “confusing the issues.” Patterson,
2 *supra*, at 334.

3 Moreover, here the government seeks to admit evidence of three distinct “bad
4 acts” arising from Mr. Costanzo’s alleged dealings with a cooperating federal defendant:

5 First, that Mr. Costanzo conducted bitcoin exchanges with an individual who
6 has pleaded guilty to federal drug charges but that said individual never
7 mentioned the intended illicit use of the bitcoins he purchased. Exhibit A.

8 Second, that said individual mentioned something to Mr. Costanzo regarding
9 the seizure of 10,000 bars of Xanax about 8-10 months after they had begun
10 exchanging, which purportedly should have put Mr. Costanzo on notice
11 regarding the individual’s line of work as a drug trafficker. *Id.*

12 Third, that Mr. Costanzo later purchased a small amount—1/2 gram—of a
13 controlled substance—DMT—from the government’s proffered cooperating
14 witness. *Id.*

15
16 It is the position on the defense that these are three distinct bad acts, each of which must
17 be considered under the four-part test set forth above in *Mayans*. 17 F.3d at 1181.

18 **B. If this Court finds there is sufficient evidence to support a finding that Mr.
19 Costanzo committed the proffered other act evidence, such evidence would be
20 only minimally relevant to show knowledge, intent, or plan, and, in any event,
21 the probative value of the purported prior acts is substantially outweighed by
22 the danger of unfair prejudice, confusing the issues, misleading the jury, and
23 undue delay.**

24 Here, the Government proposes to introduce evidence based entirely on the
25 word of a federal defendant who stands to benefit from his testimony against Mr.
26 Costanzo at trial. The government broadly claims that this evidence will show “motive,
27 intent, opportunity, preparation, plan, knowledge, absence of mistake, or lack of
28 accident.” *See* Dkt. 123 at 1, 2.

Whatever relevance the government’s proffered 404(b) evidence may have is
substantially outweighed by the danger of unfair prejudice. For instance, the relative

1 probative value of “other acts” evidence can depend on its *necessity* to prove intent, as
2 was explained by the Fifth Circuit in *United States v. Beechum*, 582 F.2d 898 (5th Cir.
3 1978):

4 Probity in this context is not an absolute; its value must be determined with regard
5 to the extent to which the defendant’s unlawful intent is established by other
6 evidence, stipulation, or inference. It is the incremental probity of the evidence that
7 is to be balanced against its potential for undue prejudice. Thus, if the Government
8 has a strong case on the intent issue, extrinsic evidence may add little and
9 consequently will be excluded more readily. If the defendant’s intent is not
10 contested, then the incremental probative value of the extrinsic evidence is
11 inconsequential when compared to its prejudice; therefore, in this circumstance the
12 evidence is uniformly excluded.

13 *Id.* at 914-15 (internal citations and footnotes excluded).

14 Similarly, Rule 403 contemplates that the Court, in evaluating the probative
15 value of other acts evidence, will consider whether there are alternative means to prove
16 intent. *See Old Chief v. United States*, 519 U.S. 172, 184 (1997) (explaining that “what
17 counts as the Rule 403 ‘probative value’ of an item of evidence, as opposed to its Rule
18 401 ‘relevance,’ may be calculated by comparing evidentiary alternatives”); Fed. R. Evid.
19 403 advisory cmte notes (stating that when considering “whether to exclude on grounds
20 of unfair prejudice,” the “availability of other means of proof may . . . be an appropriate
21 factor”).

22 Here, we must consider individually the three instances of proposed other act
23 evidence:

24 As to the first, the exchange of bitcoin with someone who is silent regarding
25 his nefarious intent, is innocent conduct and does not advance the government’s
26 case save to inform the jury that said individual turned out to be a drug dealer.
27
28

1 As to the second, the government has not provided sufficient information to
2 discern whether this conversation—which purportedly took place some 10
3 months into the cooperating defendant Sperlings dealings with Mr. Costanzo—
4 was sufficient to put Mr. Costanzo on notice as the government claims.

5 As to the third, the alleged purchase of a miniscule quantity of DMT is not
6 relevant to proving anything to do with money laundering and is rather a targeted
7 smear of Mr. Costanzo’s character—suggesting he is a drug-user.

8
9 Therefore, in each case, whatever the probative value with respect to intent or every other
10 reason under the rule cited by the government, the potential for unfair prejudice is too
11 great and the government’s rationale in support of admission of these acts is far too
12 general and overbroad.

13 Furthermore, the probative value of the proffered other acts evidence is
14 diminished by the fact that there are other means to prove intent, lack of mistake, etc.
15 Here, the undercover agents’ transactions with Mr. Costanzo were recorded in their
16 entirety and available for use at trial. Likewise, the undercover agents themselves are
17 available to testify for the government in this case. The government’s proffered other act
18 evidence is simply not needed by the Government to prove its case, thereby greatly
19 reducing its probative value and risking that it will be used for the forbidden purpose of
20 showing propensity.

21 **II. CONCLUSION**

22 For the foregoing reasons, Thomas Mario Costanzo asks this Court to
23 specifically prohibits the government from introducing its noticed 404(b) evidence.

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26 *s/Maria Teresa Weidner*
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