

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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United States of America,	)	
	)	
Plaintiff,	)	2:17-cr-0585-GMS-1
	)	
vs.	)	Phoenix, Arizona
	)	March 13, 2018
Thomas Mario Costanzo,	)	9:39 a.m.
	)	
Defendant.	)	
	)	

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BEFORE: THE HONORABLE G. MURRAY SNOW, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FINAL PRETRIAL CONFERENCE

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Sandra Day O'Connor U.S. Courthouse, Suite 312  
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Proceedings Reported by Stenographic Court Reporter  
Transcript Prepared by Computer-Aided Transcription

A P P E A R A N C E S

For the Government:

U.S. Attorney's Office  
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MATTHEW H. BINFORD, ESQ. and  
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For the Defendant Thomas Mario Costanzo:

Federal Public Defenders Office - Phoenix  
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## P R O C E E D I N G S

(Proceedings resume at 9:39 a.m.)

THE COURT: Please be seated.

COURTROOM DEPUTY: This is CR17-585, United States of America versus Thomas Mario Costanzo, on for final pretrial conference.

Counsel, please --

MR. RESTAINO: Good morning, Your Honor.

COURTROOM DEPUTY: -- announce your appearances.

MR. RESTAINO: Good morning, Your Honor.

Gary Restaino, Matt Binford, and Carolina Escalante Konti for the United States. Seated with us at counsel table is Task Force Officer Chad Morton.

THE COURT: Good morning.

MS. WEIDNER: Good morning, Your Honor.

Maria Weidner for Mr. Costanzo. I'm joined at counsel table with co-counsel, Mr. Zachary Cain.

THE COURT: Good morning.

All right. This is the final pretrial conference. We've got some issues to work through.

Are we trying this case based on the first superseding indictment, Mr. Restaino?

MR. RESTAINO: We are, Your Honor.

THE COURT: All right. So which counts -- I know Count 8 and several of the initial counts have been dismissed.

1 I want to know which counts they are.

2 MR. RESTAINO: As written in the superseding  
3 indictment, it's Counts 3, 4, 5, 6, and 7.

4 THE COURT: As well as Count 8, I have dismissed. So  
5 we're trying Counts -- we are not trying Counts 1, 2, and 8.

6 MR. RESTAINO: That is correct.

7 THE COURT: If you want me to read the indictment to  
8 the jury, have you got -- have you prepared a redacted version  
9 and run it by the defendants to make sure that it's -- can be  
10 read to the jury?

11 MR. RESTAINO: Your Honor, we weren't planning on  
12 having it read, and I think we're pretty close on the statement  
13 of the case.

14 THE COURT: All right. So as well, just in case you  
15 are, just so we're clear, the forfeiture allegations pertaining  
16 to the ammunition have also been dismissed; correct?

17 MR. RESTAINO: That is correct, Your Honor. There is  
18 a bill of particulars, and we have four items within the bill  
19 of particulars that are -- that pertain to this defendant.

20 THE COURT: Right. And those are also in the  
21 indictment?

22 MR. RESTAINO: I suppose they are not granularly  
23 listed in the indictment, Your Honor. The parties filed -- or  
24 the government filed a bill of particulars --

25 THE COURT: All right.

1 MR. RESTAINO: -- in this matter.

2 THE COURT: And I don't have it front of me, but it  
3 does relate to one of the motions in limine we're going to  
4 discuss today, the bill of particulars?

5 MR. RESTAINO: I don't think it does, but we'll --  
6 we'll raise it as needed, Judge.

7 THE COURT: All right. Thank you.

8 Are you going to arrive at a joint statement of the  
9 case, or not?

10 MR. RESTAINO: Judge, I thought we were really pretty  
11 close. We -- we left a couple of spots for you to make a  
12 decision on.

13 THE COURT: All right. So I will make the decision.  
14 Here is what we're going to do. The yellow part that says "and  
15 to conceal and disguise the nature of the money" will be read  
16 to the jury. "Mr. Costanzo denies the charges" will not be  
17 read to the jury. I will allow, as I allowed the government to  
18 flesh out a little bit its case, I will allow also the defense  
19 to flesh out its case. And I will read "Mr. Costanzo denies  
20 that he intended to evade federal currency transaction  
21 reporting requirements when he exchanged the Bitcoins for  
22 money. Mr. Costanzo asserts that he did not rely on  
23 representations made by the undercover agents that the money  
24 involved was drug trafficking proceeds."

25 Does either party want to be heard further on that?

1           MR. RESTAINO: Nothing from the government on that,  
2 Your Honor.

3           MS. WEIDNER: Nothing from the defense, Your Honor.

4           THE COURT: All right.

5           So on 3, you have provided me a list of joint proposed  
6 voir dire questions. You haven't sought to tailor them in any  
7 way to my standard voir dire questions. And as a result,  
8 you've repeated a number of the questions and not repeated  
9 others, some of which I feel obliged to give to the jury, I  
10 feel like they need to be advised of the defendant's  
11 Constitutional rights during the voir dire process, and we need  
12 to inquire whether or not they're going to have any trouble  
13 affording the defendant his Constitutional rights. And none of  
14 that was mentioned.

15           In addition, in your joint proposed voir dire  
16 questions, you proposed to ask questions that I do not think  
17 are helpful and I'm not going to entertain, unless you can tell  
18 me why I should, and you're going to have an uphill battle on  
19 that one. I don't think that you're entitled to know what  
20 people read by the way of magazines, newspapers, and  
21 periodicals, and I -- I don't know that you're entitled to know  
22 what blogs they read. If you want to ask about specific blogs  
23 that may relate to the facts of this case, I'll consider it.  
24 But I'm not going to be inclined to do that otherwise.

25           You've repeated some questions that I already ask and

1 will intend to ask in the same way that I ask it in -- in my  
2 standard voir dire as I tailor it.

3 I don't know that investing in precious metals such as  
4 gold or silver has anything to do with this action. I can see  
5 where you might believe that there is some sort of tie between  
6 that and particular political beliefs, but I'm not sure that  
7 that is disqualifying or sheds light in any way on who you  
8 should get as a juror in this case.

9 Do either -- does either party want to be heard on  
10 that?

11 MR. BINFORD: Well, Your Honor, I believe silver and  
12 gold were mentioned by Mr. Costanzo in some of the  
13 conversations with the undercover agents. We also thought that  
14 they were a form of alternative value, a form of alternative  
15 currency, much like the Bitcoin that's mentioned in this case.  
16 We just wanted to know if there were jurors that seem to tend  
17 more likely to invest in the non-standard -- something outside  
18 of the U.S. dollar, and kind of get a sense of that.

19 THE COURT: Ms. Weidner?

20 MS. WEIDNER: Your Honor, I think that if we followed  
21 that argument, we could also ask people if they invest in real  
22 estate or if they invest in, really, any kind of store value.  
23 The defense does not object to the removal of question 8.

24 THE COURT: All right.

25 How about: Have you, a family member, or close friend

1 ever had any negative experiences with a bank?

2 This doesn't really involve negative experiences with  
3 banks, does it?

4 MR. BINFORD: Well, Your Honor, there is a lot of  
5 anti-bank -- there are a lot of anti-bank statements made by  
6 Mr. Costanzo throughout this, I think. Part of that, the  
7 government intends to show that he intended to avoid these  
8 reporting requirements that financial institutions are required  
9 to make, and we intend to use his statements about banks, his  
10 negative views about banks, to support our theory and to prove  
11 beyond a reasonable doubt that he was intending to avoid those  
12 reporting requirements.

13 THE COURT: Ms. Weidner?

14 MS. WEIDNER: Your Honor, we likewise would not object  
15 to the removal of question 14. I think that the possibility  
16 that an individual may have had an unpleasant experience with a  
17 bank, which I think probably all of us have had at one point in  
18 time or another, and for example, the recently publicized Wells  
19 Fargo issues would not detract from a juror's ability to  
20 recognize that there are banking regulations that those banks  
21 are required to follow. And so I -- we would not object to the  
22 removal of question 14, Your Honor.

23 THE COURT: All right. Well, I'll consider that  
24 before I give you what I intend to be my final version.

25 I have reviewed all of the motions in limine. I am



1 going to rule on them today.

2           You asked about accessing the Darknet. The government  
3 wants that instruction. I will tell you what I'm likely to  
4 rule on the motion in limine. The government said that I  
5 can't -- I should not tie their hands, and if the defense opens  
6 the door to the Darknet, then they should be allowed to get  
7 into it. But I don't see any relation between any of the  
8 allegations pertaining to what Mr. Costanzo is alleged to have  
9 done and the Darknet itself.

10           Am I wrong about that, Mr. Binford?

11           MR. BINFORD: I think if we're just talking about the  
12 five transactions in isolation, it's never been on our position  
13 that Mr. Costanzo engaged in any transaction over the Darknet  
14 with the undercover acts. But we believe that the Darknet is a  
15 large reason that this investigations was started, and that's  
16 well-documented throughout the reports, is that the reason the  
17 government agents went after peer-to-peer exchangers, it  
18 started investigating peer-to-peer exchangers, because they  
19 were enabling people to conduct transactions on the Darknet.  
20 And that's a large part of the history here. I think if  
21 Mr. Costanzo was allowed to raise an entrapment defense, the  
22 government should be allowed to explain why this investigation  
23 started, why he was identified, what the concerns are of the  
24 federal agents.

25           THE COURT: Sounds to me like that's rebuttal

1 testimony; right?

2 MR. BINFORD: I -- I think -- I think it tells the  
3 whole story. I think it's background on the investigation. I  
4 cited a few cases in our response that --

5 THE COURT: Well, I will tell you that I'm not  
6 inclined to allow you to get into the Darknet. I would,  
7 however, warn the defense that if you're going to raise an  
8 entrapment theory, and I think that fairness demands on  
9 rebuttal an examination of the Darknet, then -- or if you  
10 otherwise open the door -- I may allow testimony on the  
11 Darknet. But I'm not going to allow you -- I'm not going to  
12 allow you to introduce evidence about the Darknet.

13 I should tell the defendant that although I didn't  
14 realize it, I did attend the district conference for Arizona on  
15 Friday, last Friday. Agent Ellsworth was a presenter at that  
16 district conference, and I listened to his presentation. I'm  
17 not sure that that in any way prejudices me one way or another  
18 with regard to this case, but I do want to disclose that I was  
19 there and heard what Agent Ellsworth said, and he did present  
20 both on the Darknet and on Bitcoin.

21 I do not see -- I do believe that to the extent that  
22 the Darknet -- well, I don't think that the Darknet in and of  
23 itself is relevant to the charges as they are brought. To the  
24 extent that it may be relevant to Agent Ellsworth's expertise,  
25 I don't think it is sufficiently relevant to justify 403

1 concerns that I might have.

2 And so, while I will not preclude the prosecution from  
3 seeking on the rebuttal case if they think they have a basis  
4 for raising the Darknet to raise it -- and if you do, you will  
5 check with me before you raise it -- I'm otherwise granting the  
6 motion in limine as it pertains to the Darknet.

7 And as a result, I am not going to ask any questions  
8 on voir dire pertaining to the Darknet.

9 MR. BINFORD: And Judge, I just -- I want to clear  
10 this with you first. Our proposed plan of action, several of  
11 the agents are members of a task force responsible for  
12 investigating Darknet crimes.

13 In anticipation of possibly receiving this ruling, we  
14 had talked to them about sanitizing their background, their  
15 training and experience to Internet crime, drug trafficking on  
16 the Internet, statements like that.

17 Is that something that you think is --

18 THE COURT: I think that is permissible.

19 Do you want to be heard on that?

20 MS. WEIDNER: Yes, Your Honor.

21 I think that as the Court has provided, this is a case  
22 where the -- even the Grand Jury transcripts and the questions  
23 posed by government counsel and the responses from SA Ellsworth  
24 indicate the Darknet was not involved with Mr. Costanzo.

25 THE COURT: Right.

1 MS. WEIDNER: And so this sanitizes -- to say that  
2 these agents have training in Internet crimes and things like  
3 that, we don't have a problem with that. The problem is is  
4 that there's this, you know, "the Darknet." It sounds -- it  
5 sounds very nefarious, and I think that there is prejudice that  
6 attaches to that. And we appreciate the Court's ruling and  
7 would like to be heard if the government thinks that there is a  
8 basis to raise the Darknet, notwithstanding Agent Ellsworth's  
9 testimony to the Grand Jury that defendants were not involved  
10 in the Darknet, and that peer-to-peer transactions are, in  
11 fact, the very opposite of going on the Internet. It's about  
12 meeting someone in person to conduct an in-person exchange.

13 Nothing further, Your Honor.

14 THE COURT: Okay.

15 I take it -- a least --

16 COURTROOM DEPUTY: Judge, what number motion in limine  
17 was that?

18 THE COURT: I will rule on that again --

19 COURTROOM DEPUTY: Okay.

20 THE COURT: -- and make it clear.

21 COURTROOM DEPUTY: Thank you.

22 THE COURT: But it is, I believe -- one moment,  
23 Kathleen. I'll get you that.

24 COURTROOM DEPUTY: Thank you, Judge.

25 (Pause in proceedings.)

1           THE COURT: That was doc 135, motion in limine to  
2 preclude evidence or argument as to Darknets and/or the Onion  
3 Router.

4           COURTROOM DEPUTY: Thank you, Judge.

5           THE COURT: The Onion Router also seems to me not to  
6 have any relation to the facts of this case, as at least as it  
7 pertains to the charges.

8           Am I wrong about that, Agent Binford?

9           MR. BINFORD: Your Honor, the -- the only time we  
10 would introduce that evidence -- and that -- and that's all  
11 based on a later ruling that this Court has to make regarding  
12 the electronic evidence -- but the Onion Router -- the Onion  
13 Router was an application that was found on some of  
14 Mr. Costanzo's electronic devices. So as we mentioned in our  
15 response document 140, we would only seek to introduce that in  
16 terms of rebuttal evidence, either -- rebuttal or  
17 impeachment -- either against Mr. Costanzo or some of the  
18 defense witnesses that have been noticed.

19           THE COURT: Well, is there any suggestion based on  
20 what you've looked at that Mr. Costanzo used the Onion Router  
21 in any way related to the transactions charged here?

22           MR. BINFORD: No.

23           THE COURT: Well, then, I'm going to grant the motion  
24 in limine with respect to the Onion Router under the same  
25 conditions that I did the Darknet, which is you won't raise it,

1 either in your case in chief or on rebuttal, without first  
2 seeking the permission of the Court on a sidebar conference  
3 based on specific testimony.

4 MR. BINFORD: Yes, Your Honor.

5 THE COURT: All right?

6 Now, Ms. Weidner, I have disclosed to you that I did  
7 hear the class presentation by Agent Ellsworth. Does that give  
8 the defense any concern about the neutrality of the Court?

9 MS. WEIDNER: Your Honor, I was not present at that  
10 presentation. I had colleagues who were. The government also  
11 disclosed to me Agent Ellsworth's PowerPoint presentation that  
12 he provided. Based on the nature of his testimony, which I  
13 guess we'll get to later in this hearing, I -- that does not  
14 raise concern for me, Your Honor.

15 THE COURT: All right. I will note that I believe,  
16 unless I'm wrong, that the entirety of that presentation was  
17 recorded, and you can listen to it. I sat next to some of your  
18 colleagues at a table, and so I don't believe -- I will say  
19 that the -- I will avow that although the information was an  
20 explanation of what "Bitcoin" is, what the "Darknet" is, and  
21 how Bitcoin can be used on the Darknet, there was nothing that  
22 was related to the facts of this case.

23 MS. WEIDNER: Understand that to be the case, Your  
24 Honor. And I would also add that the -- I -- from reviewing  
25 the PowerPoint presentation, I do plan to see Agent Ellsworth's

1 presentation that was recorded. It sounds like the information  
2 is akin to pretty much what you would find if you did a Google  
3 search for the same sorts of things, just looking for  
4 information. It's -- it's not secret, it's easily accessible  
5 to anyone. And I think given how much press Bitcoin has gotten  
6 in recent months, especially that this is -- this is quickly  
7 moving from a specialized area to kind of common knowledge.

8 THE COURT: All right. Well, there was an amusing  
9 explanation by -- it wasn't -- it was a late night -- it was  
10 Conan O'Brien. They had a nice Conan O'Brien explanation of  
11 Bitcoin, which is worth your time.

12 127, motion in limine to preclude an entrapment  
13 defense.

14 Do you want to be heard on that? I've read it.

15 MS. ESCALANTE: Your Honor, the government would stand  
16 by its motion. We believe at this point that the defense has  
17 not shown anything towards entrapment, and that they should be  
18 precluded from arguing.

19 THE COURT: All right.

20 Ms. Weidner?

21 MS. WEIDNER: Yes, Your Honor.

22 An entrapment defense requires two things: One, to  
23 show that there was a predisposition to commit the charged  
24 crime prior to the government's engagement with the defendant,  
25 which I don't think that the government has shown at all. And

1 second, that the defendant was not induced.

2 I think at this point, Your Honor, based on the fact  
3 that, you know, the issue has been pled, it is premature for  
4 this Court to determine whether or not there is sufficient  
5 evidence for an entrapment defense. I will note that the law  
6 is that only slight evidence is necessary. The bar is not high  
7 for us to clear in order to merit an entrapment defense. But  
8 the big concern for the defense, more than that -- because like  
9 I said, I think it's premature -- is the government's request  
10 that not only Mr. Costanzo be precluded from presenting an  
11 entrapment defense, but that Mr. Costanzo be precluded from  
12 presenting any evidence that would be suggestive of a lack of  
13 pre-disposition or inducement. And I think that the government  
14 is -- is overreaching in that request. I think that request is  
15 overbroad. I think it is unconstitutional. It is attempting  
16 to shut down the adversarial nature of this trial by basically  
17 making it impossible for us to mount a defense at all.

18 THE COURT: All right. What I'm going to do, it does  
19 seem to me that how I rule on this motion relates also to  
20 whether or not I'm going to allow the government to admit some  
21 of the 404(b) evidence that they indicate they're going to  
22 offer because I do believe if you're allowed to introduce --  
23 and I think you are -- allowed to introduce evidence that  
24 Mr. Costanzo was not predisposed, then the government also may  
25 be allowed to introduce some of the 404(b) evidence that



1 they've otherwise offered.

2           So I am going to deny this motion with prejudice. I  
3 am going to note, however, that it does affect how I may rule  
4 on some of the government's 404(b) motions.

5           As it pertains to document 132, it strikes me that the  
6 government's response -- and I don't know if I'm dealing  
7 with -- who I'm dealing with on the government's case -- it  
8 strikes me that the government has no problem with 132 except  
9 to the extent that it wishes to introduce testimony -- in other  
10 words -- I will tell you how I view this, view what you've  
11 said, Mr. Restaino, which is that you're not going to try and  
12 show that Mr. Costanzo is a constitutionalist or has any  
13 particular beliefs of any generalized stripe that may be  
14 prejudicial, but you do seek to introduce statements that are  
15 included in recordings that relate to anti-bank regulation  
16 sentiments.

17           Have I correctly characterizing your response?

18           MR. RESTAINO: You have, Your Honor. I would have one  
19 point to add, and that's I think we've made great progress with  
20 the defense, and I anticipate we're going to have, for anything  
21 that winds up getting introduced, a relatively complete and  
22 agreed-upon series of segments from those recordings that  
23 should ameliorate any of the politics concerns. And both sides  
24 have worked hard to do that as to the recordings.

25           THE COURT: All right.

1 Ms. Weidner, do you want to be heard on 132?

2 MS. WEIDNER: Yes, Your Honor. Just briefly.

3 I -- I want to confirm what Mr. Restaino said. We  
4 have been working with the government on the transcripts that  
5 will be admitted in this case. The government has been  
6 agreeable to excluding information that is either political in  
7 nature and unnecessary or inflammatory, both for the defense  
8 case and potentially for the government's case. It is, I  
9 believe -- and I think Mr. Restaino is on board with this  
10 too -- it is in the interest of both parties to avoid exciting  
11 biases of the jury. It is -- it would be misleading, it would  
12 be confusing, and it would deter the jury from its focus, which  
13 is the facts of this case. Those biases could easily cut  
14 against the government as much as they could against us.

15 Also I think it merits mention that Mr. Costanzo has a  
16 constitutional right to espouse whatever political views he  
17 wishes, and it would be unseemly and improper to urge the jury  
18 to conclude that it should find Mr. Costanzo guilty based on  
19 his beliefs rather than the charged acts that the government is  
20 formed to prove at trial.

21 I think that we are on a good path in that regard at  
22 this point. Again, I think that if the views are limited to  
23 the statements that Mr. Restaino suggested and -- and what the  
24 parties have discussed as far as these undercover recordings  
25 that are going to be a big part of the evidence, I think we're

1 on good ground.

2 THE COURT: All right. So I just want to make it  
3 clear to the extent that the parties have not already agreed on  
4 this, and perhaps they have, it does strike me that Mr. -- it's  
5 going to be hard to demonstrate to me, I think, that  
6 Mr. Costanzo's political views, even if they are radical and  
7 anti-government, are going to in themselves be sufficiently  
8 relevant to overcome the prejudice that might result. However,  
9 to the extent that in the recordings he does express anti-bank  
10 regulation-type biases, I think they are sufficiently relevant  
11 that they are admissible, despite 403, 401, or whatever. And  
12 so I don't know if that's any guide to you, but about anti-bank  
13 regulation biases and statements made by the defendant in the  
14 videotapes or otherwise, I will be inclined to admit.  
15 Statements about him being a constitutionalist, an anarchist,  
16 or whatever else, generally I don't think are sufficiently  
17 probative to overcome the prejudice.

18 MR. RESTAINO: And so, Judge, that's -- that's helpful  
19 to get that guidance, and we had agreed with that previously as  
20 well.

21 There's a little bit of work to be done, I can tell  
22 you, on some exhibits. We'll be fronting those to the -- to  
23 the defense and have already started to do that. But some of  
24 the few exhibits that might need tailored redactions, to take  
25 that into account as well.

1 THE COURT: All right.

2 As I read the motions and the responses, document 133,  
3 which is the defense's motion in limine to preclude expansion  
4 of trial of regulatory bases asserted by the government in  
5 document 117 is granted without governmental objection.

6 MR. BINFORD: That's correct, Your Honor.

7 THE COURT: All right.

8 So document 134, and this is the defense motion to  
9 preclude digital evidence for late discovery, it seems to me  
10 that by the response the government has limited what it may use  
11 at all at trial to specific categories of information, which I  
12 am now about to discuss.

13 Three letters that the government might use on  
14 rebuttal, depending upon the -- whether or not any cases set  
15 forth for entrapment by the defendant;

16 Three text message strings offered in the case --  
17 three text message strings offered in the case of an entrapment  
18 defense;

19 Three recordings with the witness in the case that  
20 appeared on the witness' telephone;

21 The government will not introduce any hard drive  
22 evidence that it has produced to the defendant;

23 And there is one text in the encrypted chat  
24 communication that the government may reserve the right to  
25 introduce.

1           Have you specified -- is that a correct understanding?

2           MR. RESTAINO: That's correct, Your Honor.

3           THE COURT: Have you indicated what those specific  
4 documents and recordings are to the defendant?

5           MR. RESTAINO: We have indicated the text message  
6 string. I don't think we've yet indicated the letters, Judge.  
7 We will do that shortly.

8           THE COURT: All right. Just so you're clear,  
9 Mr. Restaino, it's my intent to grant the motion in limine,  
10 with the exception of the items that you've set forth in the  
11 response, and I would require that those items be specifically  
12 identified to the defense so they have adequate time to take  
13 them into account and to advise Mr. Costanzo concerning those  
14 documents to the extent they haven't already done so.

15           MR. RESTAINO: To the extent anything hasn't been  
16 specifically identified, we will do so by the end of the day,  
17 Your Honor.

18           THE COURT: Ms. Weidner?

19           MS. WEIDNER: Your Honor, that, at this point -- and  
20 I'll just be completely frank -- because of the timing of these  
21 disclosures, I have to say that as far as my eyes on them,  
22 hasn't happened at all. This was right before the deadline for  
23 the motions in limine, then we had responses, preparing for all  
24 of -- well, preparing for this proceeding, and also just  
25 preparing for trial. So if you would give me just a moment to

1 consult with our paralegal, she unfortunately was in trial the  
2 week that we got these disclosures, but she has been looking at  
3 these and communicating with the government to try to -- to  
4 figure out where we are.

5 May I have just a moment?

6 THE COURT: You may.

7 (Pause in proceedings.)

8 MS. WEIDNER: So, Your Honor, looking at the items  
9 that the government has highlighted, the defense does not  
10 object to the Court permitting the government to use the  
11 fliers. We do object to the text message strings on the  
12 Samsung fund identified in Exhibit 1. Those are on other  
13 bases.

14 Regarding any communications with Mr. Steinmetz, who  
15 is no longer a defendant in this case, and the admission of --  
16 of those kinds of communications, we have objection to that  
17 on -- on other bases.

18 THE COURT: What are the other bases?

19 MS. WEIDNER: Well, that it is -- well, it's 403, and  
20 it's -- it's hearsay. You know --

21 THE COURT: Well, it's not hearsay if they're  
22 statements by the defendant; correct?

23 MS. WEIDNER: Yes, but statements by another person  
24 who -- because it's not just Mr. Costanzo's statements. It is  
25 an exchange purportedly between Mr. Costanzo and an individual

1 who's not even a witness in this case.

2 THE COURT: Well, I'll tell you what. Because  
3 Mr. Costanzo's statements are not hearsay, I'm not going to  
4 preclude you from seeking to file a motion in limine to the  
5 extent that you were only recently aware that the government  
6 sought to introduce these as evidence, even though it would be  
7 outside the scope of the scheduling order. But I am going to  
8 ask you to look -- you've got a week -- if you've got another  
9 basis to seek to, see if you can work it out with the  
10 government team. If you can't work it out and you want me to  
11 make evidentiary rulings on the admissibility of evidence that  
12 will not wait until trial, I will allow you to file a  
13 supplemental motion in limine. But I'm going to ask you to  
14 have it on file on Monday morning so that I'll have time to  
15 look at it and address it with you on Tuesday.

16 MS. WEIDNER: So you would like that filed by Monday  
17 morning, Your Honor?

18 THE COURT: I would. And that will give the  
19 government a chance to reply. And please be brief about it.

20 MS. WEIDNER: Yes, Your Honor. I will.

21 THE COURT: Okay.

22 So as it pertains to document 134, I am going to grant  
23 the motion, except to the extent that the government has  
24 identified documents in its response that it seems to me both  
25 sufficiently limit the -- what would otherwise be an

1 overwhelming scope of disclosure to those documents for which  
2 the defendant can adequately prepare for trial, and that is  
3 without prejudice to the defense filing a supplemental motion  
4 in limine based on other grounds for which they believe that  
5 the documents are inadmissible. I am going to ask that any  
6 supplemental motion in limine be filed by Monday morning, and  
7 then any response the government has by Tuesday morning so I  
8 can look at it before we begin seating the jury in this case,  
9 to the extent that we can get a jury seated and begin testimony  
10 on that day.

11 Any question by either party?

12 MR. RESTAINO: No questions, Your Honor.

13 If I could just state for the record, we will be  
14 identifying a letter of 5-9-17 and a letter of 5-12-17 later  
15 today with specifics to the defense.

16 THE COURT: All right. Thank you.

17 As it pertains to document 135, I've already indicated  
18 my ruling on that. I've pretty much granted it. That is, it  
19 isn't that the defense can't open the door, they might open the  
20 door, but in the government's case in chief, we're not going to  
21 have any testimony about the Darknet or the Onion Router,  
22 unless in cross-examination the defense opens the door, in  
23 which case the parties will check with me at sidebar before  
24 seeking to introduce such evidence.

25 Document 141, which has to do with the other-act



1 evidence, I was not too sure about the -- even though you've  
2 set forth the chronology in what I'm sure you feel is fairly  
3 clear fashion, I was still not too clear about it, so I have a  
4 question or two before ruling.

5 So we apparently have testimony that Mr. Costanzo  
6 conducted Bitcoin exchanges in the spring of 2015 with an  
7 individual, and there isn't any testimony that Mr. Costanzo  
8 knew at that point that the individual was involved in drug  
9 transactions; that thereafter, the individual indicated to  
10 Mr. Costanzo 10 months after May 2015 something about 10,000  
11 bars of Xanax being seized, and that there -- that thereafter  
12 Mr. Costanzo purchased a miniscule amount of DMT from that  
13 individual.

14 Were Bitcoin exchanges ongoing throughout this time?

15 MS. ESCALANTE: Yes, Your Honor.

16 THE COURT: All right. And so to the extent that  
17 you're going to argue predisposition or reserve the right to  
18 argue predisposition why shouldn't I let this in as 404(b)  
19 opportunity evidence?

20 MS. WEIDNER: Your Honor, I think that as far as -- it  
21 is -- I think that this is solely 404(b), and then it is the  
22 Court's province to determine if it's more prejudicial than  
23 probative of any relevant fact.

24 I think as far as predisposition evidence, it fails  
25 because the government claims that Mr. Costanzo was on notice.

1 And by that time, the IRS aspect of the investigation was well  
2 underway. There is no --

3 THE COURT: Well, had an arrest been made? When was  
4 the arrest made in this action?

5 MS. WEIDNER: The arrest was made on April 20th, 2017.

6 THE COURT: And when did Mr. Costanzo purchase the  
7 amount of DMT?

8 MS. WEIDNER: Your Honor, I believe that -- and I  
9 believe that if we look at the timeline -- the government  
10 initiated the IRS aspect of the investigation in March of 2015.

11 THE COURT: But that wasn't my question.

12 MS. WEIDNER: Yes.

13 But I believe that a purchase, based on the chronology  
14 that the government provided, based in the -- in their report  
15 of information of -- of Mr. Sperling's retox, that this  
16 purchase would have happened eight to 10 months at least after  
17 Mr. -- after -- after these Bitcoin exchanges began. So it  
18 would have been closer to the beginning of the DEA portion of  
19 the investigation, and the closure of the IRS portion.

20 THE COURT: All right. So --

21 MS. ESCALANTE: And, Your Honor -- I'm sorry, if I  
22 may.

23 Just bringing the Court's attention to the entrapment  
24 jury destruct -- instruction, it is stated in the footnotes  
25 that evidence gained after government conduct with the

1 defendant can still be used to show that the defendant was  
2 predisposed prior to the government conduct. And the  
3 government would also argue then any contact within this  
4 regarding the Bitcoin exchanges and the DMT purchase and all  
5 that stuff shall come in.

6 THE COURT: It strikes me that the information offered  
7 by the government is relevant to predisposition, and it is  
8 relevant in such a way that it overcomes not only any 404(b)  
9 hurdle, but any 403 hurdle. And so I am going to allow the  
10 government to admit the evidence.

11 I think that takes care of all the outstanding  
12 motions, are there any motions -- other than motions to seal,  
13 which are granted -- is there any outstanding motion?

14 MR. RESTAINO: There was document 145, which sought --  
15 it was a defense motion seeking to exclude or prevent any  
16 reference to the Darknet or tour by Special Agent Ellsworth. I  
17 think your ruling covers that. But then there was a supplement  
18 to that that says -- that sought to prevent the government from  
19 introducing any testimony regarding the Bank's Secrecy Act or  
20 associated regulations.

21 THE COURT: Well, I am not going to allow Agent  
22 Ellsworth to testify about what the law means. I will allow  
23 him to testify what kind of crimes he investigates. And --  
24 does that provide any clarification?

25 MR. BINFORD: I -- I kind of set it out in document

1 151, his anticipated testimony regarding the Bank Secrecy Act  
2 is --

3 THE COURT: I apparently didn't read 151. I tried to  
4 read everything, but I don't remember anything about his  
5 anticipated testimony. So why don't you just repeat it for me  
6 here.

7 MR. BINFORD: Okay, Your Honor.

8 So in there we set out that Mr. Costanzo was charged  
9 here with two ways of money laundering: One is concealing  
10 money that he knows is drug money; and then the other way is  
11 intentionally avoiding a transaction recording requirement when  
12 he accepted that drug money.

13 To explain to the jury -- in order for the jury to  
14 determine whether or not he intentionally engaged in a  
15 transaction seeking to avoid a transaction reporting  
16 requirement, they're going to have to know what those  
17 transaction reporting requirements are. And so we anticipated  
18 having Special Agent Ellsworth testify that, you know, a --  
19 what a currency transaction report is, what a suspicious  
20 activity report is, what Know Your Customer requirements are,  
21 and just explain those things.

22 THE COURT: Well, why don't you just have him testify.  
23 He can testify to all of that, but what he needs to testify to  
24 is what the government's understanding of those requirements  
25 are. And then if I need to clarify it by explaining what the

1 requirements are in jury instructions, I will do it.

2 MR. BINFORD: Okay. And he's certainly not going to  
3 give any legal opinion or anything like that.

4 THE COURT: All right.

5 Ms. Weidner?

6 MS. WEIDNER: Your Honor, the concern that the defense  
7 has in regard to Agent Ellsworth's testimony -- proposed  
8 testimony on the Bank Secrecy Act -- is partially at least --  
9 the government has noticed him as an expert. And the  
10 government has assured me that Agent Ellsworth will not testify  
11 as to legal conclusions.

12 THE COURT: I think I'm going to allow him to testify  
13 as to legal conclusions, but how am I supposed to allow the  
14 government to put on its case if I don't allow the government  
15 to explain what it investigates, whether they're -- rightly or  
16 wrongly?

17 MS. WEIDNER: I think, Your Honor, that couching that  
18 in what Agent Ellsworth does in his line of work as opposed  
19 to -- and having -- well, and having the government provide any  
20 further instruction to the jury by way of a jury instruction  
21 that this Court would provide regarding the --

22 THE COURT: Well, there is an instruction that you may  
23 have seen, Ms. Weidner, which specifies how you deal with an  
24 expert who is both a percipient fact witness and an expert  
25 testifier. If you want to suggest to the government

1 bifurcating Agent Ellsworth's testimony into fact testimony and  
2 expert testimony, and clearly delineating what is expert  
3 testimony and what is fact testimony, I am not opposed to doing  
4 that in order to avoid any prejudice that you might perceive.

5 MS. WEIDNER: May I have just a moment, Your Honor?

6 THE COURT: Sure.

7 (Pause in proceedings.)

8 MS. WEIDNER: Your Honor, that sounds -- that sounds  
9 as though it would be appropriate. I can understand how  
10 information about Bitcoin and Blockchain might be something  
11 that is seen as expert, whereas the fact of a law is a fact of  
12 a law. We don't need an expert opinion on the law.

13 THE COURT: Okay. Well, it's actually not going to be  
14 the fact of the law, it's going to be the fact of what the  
15 government investigates as violations of the law. And then if  
16 the parties feel like they need me to instruct on what the  
17 regulations require in the jury instructions, I'll do it. That  
18 way, you can make it clear.

19 Now, do we have any outstanding motions that need to  
20 be ruled on?

21 MS. WEIDNER: Your Honor, the government noticed a  
22 desire to use as impeachment a 1985 felony conviction. That  
23 would be document --

24 THE COURT: Why don't we wait until Mr. Costanzo tries  
25 to -- decides to testify or not testify, and then determine

1 whether it's necessary for me to rule on that.

2 MS. WEIDNER: Well, Your Honor, I think that the thing  
3 that is a little discomfoting in the government's notice is  
4 that they wish to try to impeach him with this 1985 conviction,  
5 should he exercise his right to testify at trial, which the  
6 Court raised. Also, if he presents character witnesses in his  
7 defense, which -- understandable, and/or succeeds in producing  
8 his own statements through another witness. Given that this is  
9 a case that is heavily going to rely on statements,  
10 particularly Mr. Costanzo's statements, I'm concerned that that  
11 is a bit broad, that third category.

12 THE COURT: Well, because the 1985 conviction is quite  
13 stale, I'm going to ask the government, if you feel like,  
14 during the course of the testimony, you have a basis for  
15 raising that, you raise it with me first at sidebar. It is  
16 quite stale. You're going to have -- you're going to have a  
17 burden to -- I'm not going to say at this point it is an  
18 unreachable burden, so I'm not going to rule as a matter of  
19 motion in limine depending on what the testimony might be. But  
20 a 1985 marijuana conviction, you're going to have a pretty  
21 specific reason why I'm going to allow that in as impeachment.

22 Mr. Restaino?

23 MR. RESTAINO: I don't want to necessarily make that  
24 in evidence. It's not a marijuana conviction. It's assault  
25 and flight from a law enforcement officer conviction.

1           THE COURT: That's right. But doesn't the evidentiary  
2 rule require that it relate, to the extent you're talking about  
3 character, to the character for honesty, for truthity or --  
4 truth or falsity?

5           MR. RESTAINO: Sure. And I -- I will have an  
6 argument, if we need to, why flight from law enforcement does  
7 go towards that. We can certainly push this off to another  
8 day, Your Honor.

9           I will say, Ms. Weidner makes a fair point that we're  
10 asking for this to be able to be used potentially by statements  
11 that are introduced through other witnesses. We never intended  
12 that in this case to mean his statements that are going to be  
13 played in the recording. So I do think our intent is a bit  
14 narrower than it was framed there. But I understand the  
15 Court's ruling, and we will -- we will approach the Court prior  
16 to introducing anything on that.

17           THE COURT: All right.

18           MS. WEIDNER: And, Your Honor, the only other thing  
19 I'd like to add to this is if for some reason any conviction  
20 were to come in, we would ask that it be sanitized because it  
21 is -- we're talking about something that's wildly dissimilar;  
22 that if it were to come in, it would be referenced as a "felony  
23 conviction" without any further facts.

24           THE COURT: I think that depend a little bit. Was  
25 there a conviction for a MBT sale to Mr. Costanzo?



1 MS. WEIDNER: No, Your Honor.

2 THE COURT: All right. So the only convictions we're  
3 talking about are the fleeing from a police officer, the  
4 assault; and there was a marijuana conviction, or am I just  
5 confusing myself?

6 MR. RESTAINO: There was. It turns out to be a felony  
7 under state law, but not under federal law. But there was a  
8 conviction that stands.

9 THE COURT: Okay. The emergency conviction, because  
10 it's not a federal felony under federal law, you're  
11 acknowledging you're not attempting to use that, as I recall.

12 MR. RESTAINO: We're acknowledging without binding us  
13 in the future on that particular argument. But in this case,  
14 we absolutely acknowledge we're not trying to use that.

15 THE COURT: All right. So what we're really talking  
16 about is the fleeing from a police officer and the assault.

17 MR. RESTAINO: Sure. That's all that's left. We  
18 acknowledge it's stale, Judge.

19 THE COURT: All right. Anything else that the parties  
20 want to address by way of pending motions?

21 The two motions to seal, I'm going to grant them both  
22 because they don't seem to be contested.

23 Anything else that's outstanding as a pending motion  
24 before we move to other matters that we need to handle?

25 MR. RESTAINO: Nothing from my list, Judge.

1 MS. WEIDNER: Your Honor, I did present to the  
2 government just before this hearing based on some of the items  
3 that they were saying they intended to try to present at trial,  
4 some additional voir dire questions. And I think that the  
5 first question that --

6 THE COURT: Well, Ms. Weidner, I don't intend to deal  
7 with voir dire questions that haven't been submitted to me.

8 MS. WEIDNER: Okay.

9 THE COURT: So if you want to submit voir dire  
10 questions to me, you better do it before noon today.

11 MS. WEIDNER: Okay, Your Honor.

12 THE COURT: And that includes the government too.

13 I will submit what I intend to ask from the questions  
14 you've already submitted, and then if you feel like I've made a  
15 mistake and you really, really, really have to have a question  
16 submitted and dealt with, I'll hear you Tuesday morning. Okay?

17 As it pertains to those who may wish to attend this  
18 trial, and let me be clear that as members of the public, you  
19 are fully entitled to be here and hear this trial. But there  
20 are rules that accompany the Court operations, and they may be  
21 rules that you don't particularly agree with, and I understand  
22 that. I do not wish to make a rules so ungainly so as to  
23 prevent your attendance. But there are rules about recording  
24 proceedings, there are rules about rather mundane things, and  
25 the marshals do enforce those rules.

1           So I think that -- I understood that there was a  
2 gentleman who wanted to be able to wear his hat today. There  
3 are generally Court rules against that. It doesn't offend me  
4 if you wear a hat, if you want to wear a hat, but if you do  
5 that, we do -- the marshals may feel that it's indicated -- and  
6 if they ask me to, I'm going to allow them to check just to  
7 make sure that there aren't recording or other devices used in  
8 clothing that is otherwise not permitted by Court rule.

9           My apologies for that. I don't want to make it  
10 impossible for you to be here or even inconvenient for you to  
11 be here. But we are going to ask you to abide by the rules,  
12 and if we make exceptions to them, we may ask you to submit to  
13 some other procedures.

14           Let's see.

15           Mr. Binford, have you tried a case in front of me  
16 before? I think you have.

17           MR. BINFORD: I have not tried a case in this  
18 courtroom, Your Honor. And I have read your rules.

19           THE COURT: What?

20           MR. BINFORD: I have read your rules and procedures.

21           THE COURT: All right. I don't -- Ms. Escalante, have  
22 you?

23           MS. ESCALANTE: Your Honor, I had that bench trial  
24 before you about --

25           THE COURT: No jury trials?

1 MS. ESCALANTE: -- two or three weeks ago. No.

2 THE COURT: I don't recall ever having you before me,  
3 Mr. Restaino.

4 MR. RESTAINO: No, Your Honor. This is my first in  
5 front of you as well.

6 THE COURT: I know Ms. Weidner has tried a case. I  
7 believe Mr. Cain, you've tried a case, haven't you?

8 No?

9 MR. CAIN: No, Judge.

10 THE COURT: Well, then let's review for everybody how  
11 we do this.

12 We have trial set for the 20th, the 21st, and the  
13 22nd, the 27th, the 28th, the 29th, for April 3rd, 4th, and  
14 5th. Is the government going to need that long? I don't want  
15 to request jurors stay longer than they need to.

16 MR. RESTAINO: Judge, it's -- I think we will be done  
17 with our case in chief sometime on the fourth or fifth trial  
18 day. I'm just not sure how quite long it's going to take with  
19 the audio and the challenges that sometimes come along with  
20 that. That -- that's the best guess that I've got.

21 THE COURT: And then is the defense going to have a  
22 lengthy defense case, Ms. Weidner?

23 MS. WEIDNER: I do not believe so, Your Honor.

24 THE COURT: So we're really not looking at nine trial  
25 dates.

1 MR. RESTAINO: No, Judge. It could be as few as six.  
2 That's the -- that's the rub.

3 THE COURT: Ms. Weidner, if the government has six  
4 days, how many days do you estimate that you're going to have?

5 MS. WEIDNER: Your Honor, we would estimate being  
6 one-and-a-half.

7 THE COURT: All right. So we're still looking at  
8 bridging three weekends and going into April, to be on the safe  
9 side; correct? I'm looking at April 3rd or 4th.

10 MR. RESTAINO: I think that's right, at least at the  
11 outset, Your Honor.

12 THE COURT: All right. So generally I take an extra  
13 alternate for every weekend we bridge. So we're looking at  
14 seating 14 or 15 jurors.

15 Do the parties have -- wish to be heard on how many  
16 alternates they want?

17 MR. RESTAINO: Judge, we've -- we've had some issues  
18 in other cases recently with alternates. I guess as a matter  
19 of course I would ask for the 15.

20 THE COURT: Any objection?

21 MS. WEIDNER: No, Your Honor.

22 THE COURT: All right. So we will seat 15 jurors,  
23 with three of them to be designated as alternates.

24 I do think that affects the number of peremptory  
25 strikes by statute. It goes up from, I think, seven and 11 is

1 if you seat 15. I think it goes up -- no, at 14. I think it  
2 goes up if you seat 15. I'll check the statute. I'll advise  
3 the parties to check the statute. But under 14, the seven --  
4 the government gets seven peremptories and the defense gets 11.  
5 If it's 15, I think the peremptory number goes up for both.

6 Kathleen, we'll need to check that before we request  
7 the number of jurors. So if you'll let me check that after  
8 this -- after this final pretrial conference.

9 Are we going to talk then 55 jurors to pick from; is  
10 that going to be enough?

11 MR. RESTAINO: Judge, a few more than normal perhaps.  
12 It all depends on the voir dire questions you want to ask.

13 THE COURT: Fifty-five is a few more than normal.

14 MR. RESTAINO: Is 55 a few more?

15 THE COURT: Yeah, we usually do 45.

16 MR. RESTAINO: Okay. I -- I would think that the 55  
17 is a good number then from the government's perspective.

18 MS. WEIDNER: Your Honor, given the number of  
19 peremptories, I would prefer a few more.

20 THE COURT: Well, we may go up to 60, if there are  
21 additional peremptories; okay?

22 MS. WEIDNER: Thank you, Your Honor.

23 THE COURT: Now, what we do is the first 16 are seated  
24 in the jury box, and the remaining 34 will be seated behind you  
25 in the audience section in numerical order.

1           I ask, as I believe you know, all the voir dire  
2 questions that are directed to the panel. If you have  
3 questions you want directed to the entire panel, you better get  
4 them to me, if you don't already have them to me, because I do  
5 not allow you, either of you, to ask questions of the entire  
6 panel. I will ask the questions, I will ask the follow-up  
7 questions.

8           I will allow you to ask individual questions of  
9 individual jurors that my questions reveal an interest in you  
10 following up. But I don't invite you to try to pre-try your  
11 case. And if you get into that, I will cut you off and not  
12 allow you to do it. And I ask you not to make me do that. But  
13 if you're going to make me do it, I will. I will cut you off.  
14 So do not try and pre-try your case in voir dire.

15           You are entitled, both of you, to a fair and impartial  
16 juror -- jury, and I will allow questions that get to that, but  
17 not -- not an attempt to pre-try or pre-argue your case.

18           Usually I can get through the questions -- maybe a  
19 little longer in this case -- but usually I can get through  
20 them by lunch. I suspect we'll take a little longer than that  
21 here, which complicates matters a little bit.

22           I do not excuse -- I do not excuse jury panel members  
23 during voir dire, even if they answer a question in a way that  
24 seems obvious they will be disqualified. I don't do it until I  
25 consult with you during a break. And if you both agree that

1 jurors have indicated that they would be disqualified, I will  
2 excuse them during breaks, but I don't otherwise excuse them.

3 Sometimes we are able to select jurors during the  
4 lunch break. We may or may not be able to do that here.

5 When we are in the process of selecting final jurors,  
6 I excuse the jurors. I then decide removals for cause or for  
7 hardship. I then leave you to your peremptory strikes and to  
8 their exercise. Those are exercised simultaneously and  
9 secretly pursuant to local federal rule.

10 Any problem with that?

11 MR. RESTAINO: No, Your Honor.

12 MS. WEIDNER: No, Your Honor.

13 THE COURT: All right.

14 Then after you have simultaneously and secretly  
15 exercised your peremptory strikes, you get to see each other's  
16 peremptory strikes and determine whether or not there will be  
17 any Batson challenges. If there are Batson challenges, I will  
18 rule on them. Then I will ask to you to pass the panel.

19 We will seat the first 15 jurors in numerical order,  
20 and the remainder of the jurors will be dismissed.

21 It is my general habit, despite the rule that  
22 specifies to the contrary, that we pick the alternates at the  
23 end of the case. I do that because I don't think it's helpful  
24 to have three jurors know they are alternates at the start of  
25 the case. They tend not to pay as much attention, or at least



1 that has been my belief, and so we don't designate alternates  
2 here until after they have heard closing instructions and  
3 closing arguments?

4 Any objection to that?

5 MR. RESTAINO: No objection, Your Honor.

6 MS. WEIDNER: No objection from defense, Your Honor.

7 THE COURT: I do not allow the jury to ask questions  
8 during the trial. They will only be able to hear the questions  
9 that you ask of your counsel -- or of the witnesses. But I do  
10 allow them to take notes. I do not allow them to discuss the  
11 merits of the case until after they've heard all of the  
12 evidence, both from the plaintiff and from the defense.

13 It is my general habit to instruct the jury, give the  
14 jury the final jury instructions before your closing arguments,  
15 and in that way if you wish to use my instructions in closing  
16 arguments, you may do so.

17 I have already reviewed with you what I anticipate the  
18 trial schedule will be. It looks like we will go to the 3rd or  
19 4th of April, even if trial doesn't run as long as you think,  
20 which would be nice if we can keep it -- if we can officially  
21 use the jury's time.

22 Are we going to invoke the rule, Ms. Weidner?

23 MS. WEIDNER: Yes, Your Honor.

24 THE COURT: All right.

25 So you'll pre-instruct your witnesses, Mr. Restaino?

1 MR. RESTAINO: We will, Your Honor.

2 I had one pending question to the defense, to the  
3 extent they were going to permit agents who might testify to  
4 see the opening statements. That's obviously up to them.  
5 We'll discuss that with them. If they were okay with it, is  
6 the Court okay with that?

7 THE COURT: Yeah.

8 MS. WEIDNER: Your Honor, we have no problem with  
9 that.

10 Also, I just wanted to let the Court know, we  
11 discussed with the government yesterday that with respect to  
12 invocation of the rule, that neither party will object to their  
13 expert being present while the other party's expert is  
14 testifying, at counsel table.

15 THE COURT: You agree with that, Mr. Restaino?

16 MR. RESTAINO: I do, Your Honor.

17 THE COURT: So your expert is Agent Ellsworth; yours  
18 is -- I've forgotten -- somebody --

19 MS. WEIDNER: Todd Kandaris.

20 THE COURT: All right. Fine.

21 Does the defendant waive his presence at sidebar?

22 (Pause in proceedings.)

23 MS. WEIDNER: Your Honor, he waives his presence at  
24 the sidebar.

25 THE COURT: All right.

1           Have we discussed and exhausted any possibility of  
2 settlement in this case?

3           MR. RESTAINO: We have, Your Honor. I'd like to make  
4 a Frye-Lafler colloquy at some point.

5           THE COURT: Do you want to do it now?

6           MR. RESTAINO: I will do so now, if that's okay.

7           THE COURT: Any objection to having it done now,  
8 Ms. Weidner?

9           MS. WEIDNER: No, Your Honor.

10          THE COURT: All right. Go ahead, Mr. Restaino.

11          MR. RESTAINO: Your Honor, on January 18th, 2018, the  
12 government did convey a plea offer in letter form to defense  
13 counsel, which would have been for a plea to Count 3, 4, 5, or  
14 6 of the superseding indictment, not the higher amount in Count  
15 7; would have involved a stipulation for guideline laundering  
16 amount of more than 40,000 but less than \$95,000. It would  
17 have involved a stipulation that the four-level enhancement for  
18 being in the business of laundering funds does not apply.  
19 There would have been two recommendation: One, that the  
20 two-level enhancement for sophisticated means does not apply  
21 here; and the other, a recommendation to a sentence of the low  
22 and mid point of the guideline range, and it would have called  
23 for the forfeiture of the four items in the bill of particulars  
24 that pertain to Mr. Costanzo. It was rejected by the defense  
25 on February 2nd, 2018.

1 THE COURT: All right. Thank you.

2 And no other offers are going to be extended?

3 MR. RESTAINO: That is correct, Your Honor.

4 THE COURT: All right. So you heard that offer,  
5 Mr. Costanzo?

6 THE DEFENDANT: Yeah. Yes, I did.

7 THE COURT: And did you reject it?

8 THE DEFENDANT: Absolutely.

9 THE COURT: All right.

10 I have a handout on the Intranet of trial conduct and  
11 decorum. I would ask the parties to review that.

12 Do we anticipate any special problems with the  
13 evidence in this case?

14 MR. RESTAINO: I don't think so, Your Honor. I can  
15 tell you that we'll try and work with your courtroom deputy to  
16 arrange some time to come in to -- to ensure that the audio  
17 works and syncs up correctly. That's our biggest challenge,  
18 from a logistics perspective.

19 THE COURT: Well, she will give you -- she has the  
20 cards from Brian Lalley, the courtroom specialist. Let me ask  
21 you do exactly as you suggested. Ms. Weidner, I'd suggest that  
22 the defense team do the same. You may want to do it at the  
23 same time. I hate having a jury here while you phumpher around  
24 with equipment that you could have matched beforehand. And  
25 Mr. Lalley will be available. There are some dates the

1 remainder of this week that this courtroom will be open, and so  
2 that you can do that.

3 MR. RESTAINO: Judge, I do have one more issue on  
4 evidence, and this, again, may be a question for -- for  
5 Ms. Zoratti.

6 We've got some gold and silver to be forfeited that at  
7 some point will get introduced. I'm anticipating that our  
8 agent will maintain the custody of that evidence during the  
9 trial, but just wanted to see if there was anything you wanted  
10 special on that.

11 THE COURT: Yeah. I don't necessarily want any gold  
12 or silver hanging around in the courtroom.

13 MR. RESTAINO: Okay.

14 THE COURT: But you need to have all of your other  
15 exhibits marked, and you need to have the gold and silver  
16 marked with whatever it is you're going to introduce it, and  
17 need to have them available for Ms. Zoratti.

18 By when do we need them, Kathleen?

19 COURTROOM DEPUTY: Friday would be fantastic.

20 THE COURT: Can you do it by Friday?

21 MR. RESTAINO: We can. Is there a specific time on  
22 Friday?

23 COURTROOM DEPUTY: Whenever is convenient.

24 MR. RESTAINO: Friday close of business? We'll make  
25 sure we have them there, and we'll arrange the time.

1           COURTROOM DEPUTY: We just need to make a time -- set  
2 a time with me so I can be in the courtroom and meet you.

3           MR. RESTAINO: We will do that. Thank you.

4           And Judge, you will -- we'll get a binder for you, I  
5 take it, of the exhibits. We'll have audio files on CDs. I  
6 would take it the Court doesn't need separate copies for the  
7 bench file --

8           THE COURT: I do not.

9           MR. RESTAINO: -- in CDs.

10          THE COURT: I do not. Are we going to have  
11 transcripts on those files?

12          MR. RESTAINO: So what we're going to have, Judge, is  
13 synced-up audio that will be presented to the jury in Sanction.  
14 The transcripts, of course, won't go back to the jury when they  
15 deliberate. They'll just have the audio that goes back --

16          THE COURT: With a synced-up on transcript on some  
17 sort of video presentation while they're listening, or just  
18 audio synced-up to a non-transcripted video? That's what I'm  
19 asking.

20          MR. RESTAINO: Okay. For the presentation in the  
21 courtroom, the -- the -- we will have a Sanction program that  
22 syncs the audio four or five lines at a time to the transcript.

23          THE COURT: Okay. And that's acceptable to the  
24 defense?

25          MS. WEIDNER: Yes, Your Honor.

1 THE COURT: All right.

2 As it pertains to openings, are we both going to make  
3 opening statements?

4 MS. WEIDNER: Yes, Your Honor.

5 MS. ESCALANTE: Yes, Your Honor.

6 THE COURT: Are you going to be using any sort of a  
7 PowerPoint representation in your openings, or otherwise  
8 attempt to use evidence that you believe will be admitted  
9 before the jury, but has not yet been admitted?

10 MS. ESCALANTE: Your Honor, I am debating that right  
11 now. I am probably leaning towards using a brief PowerPoint.

12 THE COURT: All right. I do not allow PowerPoints to  
13 be used that refer to or incorporate -- I guess "incorporate"  
14 would be more correct -- exhibits, unless there is a  
15 stipulation to admit those exhibits or the other side does not  
16 object. If you're going to just say what you believe the  
17 evidence will show, that may be a different story. But if  
18 you're going to actually have a copy of the exhibit in  
19 PowerPoint and whatever else, you need to have a stipulation  
20 from the other side.

21 MS. ESCALANTE: Okay, Your Honor.

22 THE COURT: Are you going to be doing the opening,  
23 Mr. Cain?

24 MS. WEIDNER: Yes, Judge.

25 THE COURT: So you understand what I'm saying?

1 MS. WEIDNER: Yes, Your Honor.

2 THE COURT: All right. Do you intend to do a  
3 PowerPoint?

4 MR. CAIN: No.

5 THE COURT: All right. Anything else we need to  
6 discuss?

7 MR. CAIN: No.

8 MR. RESTAINO: I had a couple of issues, Judge.

9 There are four items that to be forfeited at the end  
10 of the case. We've spoken with the defense and understand that  
11 the defendant would prefer to have the jury make the nexus  
12 determination. And so we will have our -- ask one of our asset  
13 forfeiture lawyers prepare the standard instructions for use in  
14 the event of a guilty verdict.

15 THE COURT: All right. Then you will need to give  
16 that to me.

17 Do we -- let's see. Shall we wait until we get a jury  
18 verdict and determine whether or not we need to submit special  
19 interrogatories or do argument on that point separately?

20 MR. RESTAINO: I can tell you, Judge, we think we'll  
21 be able to just do argument. I don't think we're going to need  
22 to introduce any additional evidence because I think evidence  
23 will be admissible in -- in both phases.

24 THE COURT: All right. So you just do a separate  
25 argument on the forfeiture after, if there is a guilty verdict



1 rendered.

2 MR. RESTAINO: That's correct. Would be our proposal.

3 THE COURT: How does that strike you, Ms. Weidner?

4 MS. WEIDNER: We agree with that, Your Honor.

5 THE COURT: All right.

6 MR. RESTAINO: Judge, sidebars with multiple lawyers,  
7 there's three on our side and two on the defense. Are you  
8 comfortable with all the lawyers, or do you prefer if just the  
9 lawyer with the witness --

10 THE COURT: Well, I don't mind if all the lawyers want  
11 to come. But there are two things that pertain to sidebars  
12 that can be very aggravating: Number one, there is a  
13 microphone at sidebar. It is a flat surface microphone, but it  
14 isn't terrific. And it can't identify you. Nor will  
15 Ms. Powers be able to identify you necessarily because she will  
16 be over where she can't see who is speaking.

17 So if you come to sidebar, first off, approach the  
18 microphone if you're going to be the one who is going to be  
19 doing the speaking, and who that will be will be if, for  
20 example, you're taking direct, Ms. Weidner offers an objection,  
21 then you, Mr. Restaino, will be speaking at sidebar and you,  
22 Ms. Weidner, will be speaking. While I don't have any problem  
23 if the other attorneys come, I'm not going to allow everybody  
24 to speak. It's not a free-for-all. You need to identify  
25 yourself before you begin speaking, and you need to -- both of

1 you will need to approach the microphone. You'll see. I'll be  
2 sitting right on top of it. But I will try and push it your  
3 way and remind you to identify yourself. And to be clear,  
4 although not loud, in making your -- whatever statement you  
5 make there. White noise comes on in the courtroom, as you'll  
6 recall, Mr. Restaino, and that's precisely so the jury can't  
7 necessarily hear everything we say.

8 MR. RESTAINO: Great.

9 And then just one more question, Judge. I may have  
10 missed this in the Court's standing order, but I was trying to  
11 get a sense of the court day that the Court uses for the  
12 witness.

13 THE COURT: Well, normally -- this is a Phoenix jury  
14 panel? Sometimes when we have a Phoenix jury panel, if the  
15 jury can show up at 8:30 and wants to, I allow them to. But a  
16 normal court day begins at nine o'clock, not 8:30; goes to noon  
17 with one break in the morning. Usually sometime between 10:15  
18 and 10:30. I try to have you be aware of that. And if it's  
19 between 10:15 and 10:30, and you can tell me at a good place to  
20 take a break, I appreciate that; otherwise, I will ask you.

21 The afternoon goes from noon to 1:00 for a lunch  
22 break, sometimes we take 1:15, and we might do that with a  
23 15-person jury. We then -- but if we're going to need time, we  
24 go from noon to 1:00, and then, again, one 15-minute break in  
25 the afternoon, and then I usually run right up until 5:00.

1 MR. RESTAINO: Great. Thank you, Judge.

2 THE COURT: Anything from the defense?

3 MS. WEIDNER: No, Your Honor.

4 THE COURT: All right. I will see you then Tuesday  
5 morning.

6 Thank you.

7 MR. RESTAINO: Thank you, Your Honor.

8 (Proceedings in recess at 10:47 a.m.)

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C E R T I F I C A T E

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2  
3 I, CHARLOTTE A. POWERS, do hereby certify that I am  
4 duly appointed and qualified to act as Official Court Reporter  
5 for the United States District Court for the District of  
6 Arizona.

7 I FURTHER CERTIFY that the foregoing pages constitute  
8 a full, true, and accurate transcript of all of that portion of  
9 the proceedings contained herein, had in the above-entitled  
10 cause on the date specified therein, and that said transcript  
11 was prepared under my direction and control.

12 DATED at Phoenix, Arizona, this 19th day of March,  
13 2018.

14  
15 s/Charlotte A. Powers  
16 Charlotte A. Powers, RMR, FCRR  
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