IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA — FELONY DIVISION

Plaintiff, — CASE NO. F14-2923

v.

MICHEL A. ESPINOZA, — JUDGE TERESA POOLER

Defendant

_____/

MEMORANDUM OF LAW

QUESTIONS PRESENTED

I. Due to Florida's lack of defined regulatory treatment of virtual currency, would applying the Texas Banking Department interpretation on the matter be appropriate in deciding whether Bitcoin transactions are money transmission?

II. Under Florida Law, can virtual currency be included within the given statutory definition of financial transaction and monetary instrument under the money laundering statute?

BRIEF ANSWERS

I. Yes. In the absence of Florida regulation, a court could find Texas' interpretation of money transmission and virtual currency appropriate here, as well as the additional federal and state interpretations which follow similar reasoning, stating Bitcoin transactions cannot be considered money transmission.

II. No. A court would likely decide it is bound to the statutory definition of terms within the money laundering statute, none of which can be applied to virtual currency.

STATEMENT OF FACTS

The Defendant, Mr. Michel Espinoza, is charged with one count of Unauthorized Money Transmission and two counts of Money Laundering. These charges stem from multiple transactions in which Mr. Espinoza sold Bitcoin to Detective Arias while he was posing undercover as a common buyer. Contact was first made by the undercover detective to Mr. Espinoza on December 4th, 2013, expressing his interest in acquiring Bitcoin. Detective Arias found Mr. Espinoza through the Local Bitcoin website (http://localbitcoins.com), a typical and legal means of exchanging Bitcoin with individuals in close proximity. On December 5th, 2013, Mr. Espinoza sold Detective Arias $500 worth of Bitcoin, profiting $83.67 from the transaction. On January 10th, 2014, Detective Arias purchased an additional $1,000 worth of Bitcoin from Mr. Espinoza while Mr. Espinoza made a profit of $167.56 on the exchange. Another $500 transaction occurred on January 30, 2014 with Detective Arias as the buyer and Mr. Espinoza making a profit of $65.74. The series of transactions concluded on February 6th, 2014 when Detective Arias attempted to purchase $30,000 worth of Bitcoin from Mr. Espinoza after insinuating that the bitcoins were to be later used for acquiring stolen credit cards. The Bitcoin, however, was never exchanged for the currency and Mr. Espinoza was then arrested and charged with the crimes mentioned.

Bitcoin is a popular form of virtual currency that only exists on the Internet and is generated and controlled through software on a decentralized, peer-to-peer network. Bitcoins are obtained by solving mathematic equations in the software's algorithm which produce bitcoins, or they can be bought on secondary markets. Bitcoin is not a tangible item, nor is it issued or backed by any government, bank, or company. The price of bitcoins is set by its market and constantly fluctuates, however, it is not illegal to buy or sell them. Although some online

marketplaces accept bitcoins as payment, it is not a widely accepted form of payment. Bitcoins, while having a market price attached to them, are only worth what an individual is willing to pay. Possessing one does not entitle the owner to anything, including the right to redeem for United States currency, nor does it create any duties or obligations in one who sells or transfers it.

This Memorandum will discuss the merits of applying the Texas Department of Banking regulatory treatment of virtual currencies, and if a court can include virtual currency within the statutory definitions of financial transaction and monetary instruments.

DISCUSSION

Without the presence of controlling state law, a court could consider the Texas Department of Banking's position on virtual currency applicable, as other state and federal interpretations have in similar capacities, in concluding virtual currency transactions are not money transmission. A court will most likely find that virtual currency is not included in Florida's money laundering statute and therefore must follow the statutory defined terms. For a court to find a defendant guilty of unlicensed money transmission in Florida, the defendant must have transmitted currency, monetary value, or payment instruments without proper licensing. Fla. Stat. § 560.125(5)(A). Under Florida Law, a defendant is guilty of money laundering when the defendant's illicit conduct involves a financial transaction including the movement of monetary instruments. Fla. Stat. § 896.101. This Memorandum will not discuss money service business classification regarding money transmission or the knowing element of money laundering. Rather, this Memorandum will discuss whether virtual currency transactions fall under the money transmission statute once applying the Texas Banking Department's interpretation, and determine whether a court can include virtual currency into the definition of

monetary instruments. A court is likely to find virtual currency is not considered money under the Texas interpretation and the exchange of which is not considered money transmission. Additionally, a court is likely to find virtual currency does not fall within the statutory definition and that it is bound to follow the given definition. Therefore, a court will likely find Mr. Espinoza did not participate in unlawful money transmission or money laundering during his bitcoin transactions with Detective Arias.

I. Due to Florida's lack of defined regulatory treatment of virtual currency, would applying the Texas Banking Department interpretation on the matter be appropriate in deciding whether Bitcoin transactions are money transmission?

A court would most likely find Mr. Espinoza not guilty of unlicensed money transmission after adopting the virtual currency analysis outlined by the Texas Department of Banking because virtual currency, like Bitcoin, would not be considered money. For a court to find a defendant guilty of unlicensed money transmission in Florida, the defendant must have transmitted currency, monetary value, or payment instruments without proper licensing. Fla. Stat. § 560.125(5)(A). The Texas Banking Department's policy regarding virtual currency, in part, states virtual currency cannot be considered money or monetary value because it is not currency nor does it create any type of claim, and therefore does not apply to its Money Services Act which regulates money transmission. *See* Regulatory Treatment of Virtual Currency Under the Texas Money Services Act, Supervisory Memorandum 1037, Tex. Dep't of Banking (April 3, 2014) *available at* http://www.dob.texas.gov/public/uploads/files/consumer-information/sm1037.pdf. In June of 2014, Kansas adopted the Texas policy regarding virtual currency's relationship to money transmission. Kansas Office of the State Bank Commissioner, Regulatory Treatment of Virtual Currencies Under the Kansas Money Transmitter Act Guidance Document MT 2014-01 (June 6, 2014), *available at*

http://www.osbckansas.org/mt/guidance/mt2014_01_virtual_currency.pdf. For purposes of federal tax laws, the Internal Revenue Service (IRS) treats virtual currency as property, as opposed to money. *See* Internal Revenue Service, Notice 2014-21, *available at* http://www.irs.gov/pub/irs-drop/n-14-21.pdf. (last accessed June 9, 2016). Additionally, in December 2014, New York's Department of Taxation and Finance concluded that using virtual currency to pay for goods and services was a barter transaction not subject to sales tax because virtual currency was determined to be intangible property. *See* Michael R. Gordon et al., *Bitcoin to Blockchain: How Laws and Regulations are Conforming to and Impacting the Use of Virtual Currency*, N.Y. City Bar (2016). According to Black's Law Dictionary, the term "barter" is defined as "[t]he exchange of one commodity or service for another without the use of money." Black's Law Dictionary (10th ed. 2014).

In Mr. Espinoza's case, Florida lacks any clear existing law ruling on virtual currency as it relates to money transmission. As such, to determine whether Mr. Espinoza's bitcoin for dollars exchange was money transmission, looking to policy that exists elsewhere is prudent. Using the Texas policy, the series of transactions between Mr. Espinoza and Detective Arias was merely a sale of goods between two parties. This reasoning is derived from virtual currency's distinction from sovereign currency. The Texas Banking Department notes, specifically, that because virtual currency creates no claim or obligation, its sole means of ever becoming currency is finding a willing buyer. The dollar is recognized as legal tender in the United States, requiring the government and Federal Reserve officials to accept it as payment of taxes, fees, and loan payments. Bitcoins are released into circulation as a result of software users performing tasks within the software, and there is no obligation on anyone's part to accept bitcoins in exchange for goods, services, taxes, fees, or other payments. Therefore, there is no guarantee that

a form of virtual currency, such as Bitcoin, can be converted to sovereign currency. Based on Bitcoin's lack of intrinsic value, the exchange of bitcoins for currency is no different from a buyer purchasing any commodity. Through this interpretation, Mr. Espinoza could have been selling any commodity with a strong secondary market to Detective Arias. The reasoning behind Texas' interpretation is reinforced, by not only Kansas adopting the same guidelines, but the IRS treating these virtual currencies as property. Thus, if bitcoins are property, then Mr. Espinoza merely profited by selling goods. In the state of New York, if one were to purchase a good by using bitcoins, the transaction in fact would not be viewed as a purchase at all. New York's "barter" interpretation follows the same logic as Texas; virtual currency is not currency which holds intrinsic value, but rather a commodity that has value based on the market. Therefore, virtual currency, such as bitcoins, cannot be deemed money used to buy goods and services, but rather an item used to trade for other items or services. Applying Texas' treatment of virtual currency to Mr. Espinoza's case is appropriate, not only because of the reasoning behind the interpretation, but also because other state and federal entities have adopted the same reasoning in its policies.

Under the Texas Department of Banking guidelines, and those similar to it, a court will likely decide Mr. Espinoza selling bitcoins is no different than any common sale of goods and cannot be considered money transmission.

II. Under Florida Law, can virtual currency be included within the given statutory definition of financial transaction and monetary instrument under the money laundering statute?

A court will likely find virtual currency cannot be included in the statutory definition included in the money laundering statute after determining the clear and unambiguous language used must be followed by the courts. Under Florida Law, a defendant is guilty of money

laundering when the defendant's illicit conduct involves a financial transaction including the movement of monetary instruments. Fla. Stat. § 896.101. A financial transaction is one involving the movement of monetary instruments, transfer of real property, or a financial institution that affects commerce. Id. Monetary instruments are coin or currency of a country, traveler's checks, personal checks, bank checks, money orders, investment securities, or negotiable instruments that pass title through delivery. Id. Courts use defined meaning of specific terms within a statute unless it is unclear or ambiguous. Arthur Young & Co. v. Mariner Corp., 630 So.2d 1199, 1203 (Fla. 4th DCA 1994). See also Kasiscke v. State, 991 So.2d 803, 807 (Fla. 2008) (when determining legislative intent, courts first look to the statute's plain language, and when this language is clear and unambiguous, courts will not look behind this language to ascertain intent). A statutory definition of a word is controlling and will be followed by the courts. Ervin v. Capital Weekly Post, Inc., 97 So.2d 464, 469 (Fla. 1958). See also City National Bank of Miami v. Save Brickell Avenue, Inc., 428 So.2d 763 (Fla. 3d DCA 1983). The courts lack the authority to add or take away from what the legislature has done. Florida Dairy Farmers Federation v. Borden Co., 155 So.2d 699, 702 (Fla. 1st DCA 1963). A financial transaction occurs when the money itself has been collected. Rodriguez v. State, 36 So.3d 177, 178 (Fla. 2d DCA 2010).

In Mr. Espinoza's case, the virtual currency used in his transactions will be excluded from the money laundering statute because it does not fit within the given statutory definition. Since money laundering must involve a financial transaction, virtual currency must apply to one of the following: monetary instruments, real property, or financial institution. It is acknowledged that bitcoin is intangible property and therefore cannot be real property. Additionally, it is established that bitcoin is not issued or backed by any government or bank, therefore excluding it from financial institutions. According to the expert testimony given by Dr. Charles Evans,

bitcoins cannot be considered coin or currency of any country, traveler's checks, personal checks, bank checks, money orders, investment securities, or negotiable instruments that pass title through delivery. It cannot be ignored or overlooked that not only do bitcoins fail to fit into the definitions of financial transaction and monetary instruments, but they are not analogous to the defined terms either. The terms used to define monetary instruments create no ambiguity. The items stated in the statute's definition are physical manifestations of currency, demonstrating its intent to extend its terms to physical instruments and not virtual currencies. Case law in Florida has established courts' duty to follow statutory definitions, such as the one provided for monetary instruments within the money laundering statute. As such, a court would be abusing its discretion in failing to follow the statutory definition, or take it upon itself to add something new to an existing statute. Because forms of virtual currency cannot be included within the given statutory definition, courts cannot apply the money laundering statute to Mr. Espinoza's bitcoin transactions.

A court will likely find that, since virtual currency cannot be included in the statutory definitions given in the money laundering statute, Mr. Espinoza's bitcoin transactions did not constitute a financial transaction.

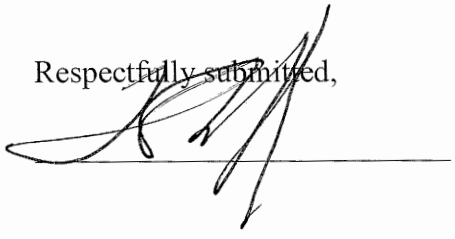
The financial transaction element of money laundering is present when the money itself has been collected. Id. at 178. In Rodriguez, the defendant moved for judgment of acquittal following a money laundering conviction. Id. The court held the defendant had not committed money laundering, reversing the conviction. Id. at 179. The court reasoned that while there was an attempt to collect money from the defendant, no evidence was presented to show an exchange of the money. Id. at 178.

In the present case, in the event that a bitcoin exchange was deemed a financial transaction, the unsuccessful attempt to collect Mr. Espinoza's bitcoins in exchange for $30,000 fails to meet the financial transaction requirement. Similar to Rodriguez, where the exchange was never completed, the transaction in question here was never completed. Because the court in Rodriguez decided the unsuccessful attempt to collect money was insufficient for a money laundering conviction, the court here should decide the Detective's unsuccessful attempt to collect bitcoins is equally insufficient. Since the illicit activity was only mentioned by Detective Arias prior to the last transaction, it is the lone occurrence when money laundering could have potentially occurred. However, without completing the financial transaction, no money laundering could have taken place.

CONCLUSION

For the foregoing reasons, Mr. Espinoza's conduct did not amount to unlicensed money transmission or money laundering.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was e-filed and e-served to ASA Thomas Haggerty at thomashaggerty@miamisao.com on this 14th day of June, 2016.

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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

THE STATE OF FLORIDA,
Plaintiff,

vs.

MICHELL ABNER ESPINOZA,
Defendant.
_____/

CRIMINAL DIVISION

CASE NO.: F14-2923

SECTION: 13

JUDGE: TERESA POOLER

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS THE INFORMATION

THIS CAUSE came before the Court on Defendant, **MICHELL ABNER ESPINOZA**'s multiple Motions to Dismiss the Information Pursuant to Florida Rule of Criminal Procedure 3.190(c)(4). This Court having reviewed the traverse and responses filed by the State; the arrest affidavit, dated February 6, 2014; the search warrant, filed on February 27, 2014; the deposition of Detective Ricardo Arias, filed on March 5, 2015; the deposition of Special Agent Gregory Ponzi, filed on April 8, 2015; Defendant's Memorandum of Law, filed on June 14, 2016; State's Memorandum of Law, filed on June 16, 2016; the court file; and having held multiple hearings, hereby **FINDS** as follows:

BACKGROUND

Detective Ricardo Arias is a detective of the Miami Beach Police Department who worked in conjunction with the United States Secret Service's Miami Electronic Crimes Task Force (hereinafter "Task Force"). The Task Force is a team led by the Secret Service that is comprised of state and local agents. Prior to his encounter with the Defendant, Detective Arias attended a meeting at the United States Secret Service relating to virtual currencies. In his deposition, Detective Arias stated that he "became intrigued of the possibility" of initiating a local investigation into virtual currencies. (Det. Arias Dep. 4:18, Jan. 13, 2015). He therefore reached out to Special Agent Gregory Ponzi from the United States Secret Service, which led to the Task Force's investigation into the purchase and sale of Bitcoin in South Florida.

On December 4, 2013, Detective Arias and Special Agent Ponzi accessed the Internet website https://localbitcoins.com seeking to purchase Bitcoin. Localbitcoins.com is a peer-to-peer Bitcoin exchange which defines itself as a marketplace where users can purchase and sell Bitcoin. Users who wish to sell Bitcoin create an advertisement containing the amount of Bitcoin they are offering and their asking price. Potential buyers browse the site and make arrangements to purchase Bitcoin with any seller they choose. The transaction can take place online, or, as in the instant case, the buyer and seller can agree to a local, face-to-face trade.

Detective Arias found multiple sellers of Bitcoin on the website, including the Defendant, whose username on the website was "Michelhack." The Defendant advertised that his contact hours were anytime and his meeting preferences were a Starbucks coffee store, internet café, restaurant, mall, or bank. The Defendant's posted advertisement, which Detective Arias found similar to a Criagslist.com advertisement, stated, "You will need to bring your wallet and your smartphone or the address the Bitcoin will be deposited to..." and further specified that interested buyers will have to pay in cash and in person. (*Id.* at 6:23-7:9). Based upon Defendant's username and advertisement, the Task Force determined that the Defendant might be engaged in unlawful activity and decided to initiate a Bitcoin trade with him. Although the Task Force specifically selected to investigate the Defendant, there were no previous reports that the Defendant was engaged in any illicit criminal activity and it appears that the Defendant was selected for the investigation based on his username, his 24-hour availability, and his desire to meet in public places.

On December 4, 2013, Detective Arias, acting in an undercover capacity as an interested buyer, contacted the Defendant by sending a text message to the Defendant's listed phone number. The Defendant responded to Detective Arias and agreed to meet with him the following day. On December 5, 2013, Detective Arias met with the Defendant at a Nespresso Café located at 1105 Lincoln Road, Miami Beach, Florida 33139. At this meeting, the Defendant agreed to sell .40322580 Bitcoin to Detective Arias in exchange for five hundred dollars ($500) in cash. The Defendant also explained to Detective Arias how the Bitcoin market worked, since Detective Arias claimed to be a new-time purchaser and inquired about the process. The Defendant explained to Detective Arias how he made a profit of eighty-three dollars and sixty-seven cents ($83.67) on this sale. Defendant further explained that he purchased the Bitcoin at ten percent (10%) under market value and sold the Bitcoin at five percent (5%) above market value. There was no discussion of illegal activity or stolen credit cards at this meeting. Detective Arias made several comments to the Defendant, none of which amounted to a direct statement that the Bitcoin were to be used for an illicit purpose. Detective Arias made it clear to the Defendant that he wanted to remain anonymous, and that the people he engaged in business with did not accept cash. Thereafter, the Defendant was followed by an undercover surveillance team to Citibank where he later completed the transaction.

On January 10, 2014, Detective Arias contacted the Defendant to arrange a second purchase. Detective Arias purchased one (1) Bitcoin in exchange for one thousand dollars ($1,000) at a Häagen-Dazs ice cream store located in Miami, Florida. At this meeting, Detective Arias told the Defendant that he was in the business of buying stolen credit card numbers from Russians and the Bitcoin would be used to pay for the stolen credit cards. Detective Arias did not show the Defendant any stolen credit cards or credit card numbers. Detective Arias asked the Defendant if the Defendant would be willing to accept stolen credit cards numbers as a trade for Bitcoin in their next transaction and the Defendant allegedly replied that "he would think about it." (Def. Arrest Aff. at 6). Despite the Defendant's purported indecisive response to Detective Arias' illicit proposal, there exists no evidence that the Defendant accepted stolen credit card numbers as payment for any subsequent Bitcoin transaction between the parties.

On January 30, 2014, Detective Arias again contacted the Defendant through a text message to arrange a purchase of more Bitcoin. The entire sale was conducted through text

message communication. Detective Arias purchased five hundred dollars ($500) in Bitcoin. The money was deposited into the Defendant's bank account. Detective Arias informed the Defendant through a text message that he wanted to purchase thirty thousand dollars ($30,000) worth of Bitcoin in the future.

On February 6, 2014, Detective Arias met the Defendant with the intent of conducting a fourth Bitcoin transaction in the amount of thirty thousand dollars ($30,000) and effectuating an arrest. The parties met in the lobby of a hotel where the Task Force had a hotel room wired with cameras that was being used for their operation. After a brief meeting in the lobby, Detective Arias brought the Defendant to the hotel room in order to complete the transaction and make the arrest. The meeting in the hotel room was filmed. At this meeting, Detective Arias and the Defendant discussed the illicit credit card operation that Detective Arias had fabricated as part of his cover for the investigation. Detective Arias explained to the Defendant that he was engaged in the activity of buying stolen credit cards wholesale to resell at a higher price. Detective Arias also produced a "flash roll" of hundred dollar bills purportedly containing the thirty thousand dollar ($30,000) payment. The money was in fact undercover funds that were counterfeit. The Defendant inspected the currency and immediately became concerned that the money was counterfeit. The Defendant told Detective Arias he had to take the money to five different banks because he purchased the Bitcoin from five different sellers. According to Detective Arias' deposition, the Defendant wanted to bring portions of the money to the bank "a little at a time" in order to verify its authenticity. The Defendant never took possession of the counterfeit money and was subsequently arrested.

The Defendant was charged with one (1) count of unlawfully engaging in business as a money services business, to wit, a money transmitter, in violation of § 560.125(5)(a), Fla. Stat. (Count I); and two (2) counts of money laundering, in violation of § 896.101(5)(a) and (5)(b), Fla. Stat. (Counts II and III).

On September 17, 2015, the Defendant filed his initial Motion to Dismiss the Information Pursuant to Florida Rule of Criminal Procedure 3.190(c)(4) (hereinafter "Defendant's Motion to Dismiss"). On October 22, 2015, the State filed its Motion to Strike the Defendant's Motion to Dismiss, and on December 4, 2015, the State filed its Second Motion to Strike Defendant's Motion to Dismiss. On December 15, 2015, the Defendant filed his First Amended Motion to Dismiss, and on January 20, 2016, the Defendant filed his Second Amended Motion to Dismiss. On March 3, 2016, the State filed both a Third Motion to Strike Defendant's Motion to Dismiss and a Traverse as to Defendant's Motion to Dismiss-Count One. Both parties submitted Memorandums of Law, filed on June 14th and 16, 2016 respectively.

I. UNAUTHORIZED MONEY TRANSMITTER

In Count I, the Defendant was charged with violating § 560.125(5)(a), Fla. Stat. Section 560.125(1), (5)(a) and (5)(b) states, in pertinent part, as follows:

> (1) A person may not engage in the business of a **money services business** or deferred presentment provider in this state unless the person is licensed or exempted from licensure under this chapter…

(5) A person who violates this section, if the violation involves:
(a) Currency or payment instruments exceeding $300 but less than $20,000 in any 12-month period, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
(b) Currency or payment instruments totaling or exceeding $20,000 but less than $100,000 in any 12-month period, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 560.125, Fla. Stat. (Emphasis added).

The State contends that the Defendant is operating as an unlicensed "money services business." Section 560.103(22), Fla. Stat., defines "***money services business***" as a person "**who acts as a payment instrument seller, foreign currency exchanger, check casher, or money transmitter.**" (Emphasis added). The term "***money transmitter***" means "a corporation, limited liability company, limited liability partnership, or foreign entity qualified to do business in this state which receives currency, monetary value, or payment instruments for the purpose of transmitting the same by any means, including transmission by wire, facsimile, electronic transfer, courier, the Internet, or through bill payment services or other businesses that facilitate such transfer within this country, or to or from this country." § 560.103(23), Fla. Stat.

Initially, the State charged the Defendant as operating a "money services business, to wit a money transmitter." During the course of the last hearing, however, the State orally amended the Information to include a "payment instrument seller." A "***payment instrument seller***" is defined as "a corporation, limited liability company, limited liability partnership, or foreign entity qualified to do business in this state which sells a payment instrument." § 560.103(30), Fla. Stat. A "***payment instrument***" means "a check, draft, warrant, money order, travelers check, electronic instrument, or other instrument, payment of money, or monetary value whether or not negotiable. The term does not include an instrument that is redeemable by the issuer in merchandise or service, a credit card voucher, or a letter of credit." § 560.103(29), Fla. Stat.

When construing the meaning of a statute, the courts must first look to its plain language. Defendant's sale of Bitcoin does not fall under the plain meaning of Section 560.125(5)(a) of the Florida Statutes. Firstly, the Defendant did not receive currency for the purpose of transmitting same to a third party. If one goes by the plain meaning of Section 560.125, Fla. Stat., a "money transmitter" would operate much like a middleman in a financial transaction. The term "***transmit***" means "to send or transfer (a thing) from one person or place to another." Black's Law Dictionary (10th ed. 2014). Defendant's actions do not meet the definition of "transmit." Defendant was not a middleman. A money-transmitting business, such as Western Union, fits the definition of "money services business." For example, Western Union takes money from person A, and at the direction of person A, transmits it to person B or entity B. *See, e.g., U.S. v. Elfgeeh*, 515 F.3d 100, 108 (2d Cir. 2008) (where an FBI agent's testimony in court compared a Hawala to a Western Union because "it's a money transfer operation…[a] business used to send money from one location to another.")

In this case, the Defendant was a seller. According to the Arrest Affidavit, the Defendant told Detective Arias that he purchases Bitcoin for ten percent (10%) under market value and sells them for five percent (5%) over market value. (Def. Arrest Aff. at 6). The Defendant explained

to Detective Arias that this fifteen percent (15%) spread is the method by which the Defendant yields a profit on his Bitcoin transactions. (Det. Arias Dep. 22:6-8, Jan. 13, 2015). The Defendant purchases Bitcoin low and sells them high, the equivalent of a day trader in the stock market, presumably intending to make a profit.

Secondly, the Defendant does not fall under the definition of "payment instrument seller" found in § 560.103(29), Fla. Stat. because Bitcoin does not fall under the statutory definition of "payment instrument." The federal government, for example, has decided to treat virtual currency as property for federal tax purposes (See I.R.S. Notice 2014-21, https://www.irs.gov/pub/irs-drop/n-14-21.pdf). "Virtual Currency" is not currently included in the statutory definition of a "payment instrument;" nor does Bitcoin fit into one of the defined categories listed.

Thirdly, the State alleges that the Defendant charged a commission or fee for the Bitcoin transaction, and therefore, the Defendant's actions meet the definition of a "money transmitter." Case law requires that a fee must be charged to meet all the elements of being a money transmitting business. "A money transmitting business receives money from a customer and then, *for a fee paid by the customer,* transmits that money to a recipient..." *United States v. Velastegui,* 199 F.3d 590, 592 (2d Cir.1999). (Emphasis added). In the case at bar, the Defendant did not charge a fee for the transaction. The Defendant solely made a profit. In his deposition, Special Agent Ponzi acknowledged as much, noting that the the Defendant made a profit of $83.67 on the $500 Bitcoin sale. (Ponzi Dep. 16:4-25, March 12, 2015). "Commission" is defined as "an amount of money paid to an employee for selling something." Merriam-Webster's Dictionary. (11th ed. 2016). The Defendant was not selling the Bitcoin for an employer. The Defendant was selling his personal property. The difference in the price he purchased the Bitcoin for and what he sold it for is the difference between cost and expenses, the widely accepted definition of profit.

Nothing in our frame of references allows us to accurately define or describe Bitcoin. In 2008 a paper was posted on the internet under the name Satoshi Nakamoto (thought to be a pseudonym for a person or group of people) which described a way to create a peer-to-peer network for electronic transaction which did not rely on trust. Satoshi Nakamoto, *A Peer-to-Peer Electronic Cash System* (2008). The network came into existence in 2009 when this network created the first block of Bitcoin. Subsequent Bitcoins are created by a process called "mining," essentially a record keeping process. To accrue Bitcoins, the miner must use open source software which allows their computer processors to catch and record peer-to-peer transactions. Bitcoins are bits of data that the miner receives in exchange for the use of their computer processor.

Bitcoin may have some attributes in common with what we commonly refer to as money, but differ in many important aspects. While Bitcoin can be exchanged for items of value, they are not a commonly used means of exchange. They are accepted by some but not by all merchants or service providers. The value of Bitcoin fluctuates wildly and has been estimated to be eighteen times greater than the U.S. dollar. Their high volatility is explained by scholars as due to their insufficient liquidity, the uncertainty of future value, and the lack of a stabilization

mechanism. With such volatility they have a limited ability to act as a store of value, another important attribute of money.

Bitcoin is a decentralized system. It does not have any central authority, such as a central reserve, and Bitcoins are not backed by anything. They are certainly not tangible wealth and cannot be hidden under a mattress like cash and gold bars.

This Court is not an expert in economics, however, it is very clear, even to someone with limited knowledge in the area, that Bitcoin has a long way to go before it is the equivalent of money.

The Florida Legislature may choose to adopt statutes regulating virtual currency in the future. At this time, however, attempting to fit the sale of Bitcoin into a statutory scheme regulating money services businesses is like fitting a square peg in a round hole. This Court finds that the Defendant's sale of Bitcoin to Detective Arias does not constitute a "money services business" for all the reasons stated above. The Motion to Dismiss is granted as to Count I.

II. MONEY LAUNDERING

In Counts II and III, Defendant is charged with money laundering in violation of §896.101(3)(c), Fla. Stat. "Money laundering" is commonly understood to be the method by which proceeds from illicit activity ("dirty money") becomes legitimized. There are numerous ways through which this can occur, but it generally begins with money that is "dirty." The portion of the money laundering statute which the Defendant is charged under is not so straightforward. Section 896.101(3)(c), Florida Statutes, makes it illegal for an individual to conduct or attempt to conduct a financial transaction involving property or proceeds that a law enforcement office has represented came from, or are being used to conduct or facilitate a specified unlawful activity, when the person's conduct is undertaken with the intent to: (1) promote the carrying on of specified unlawful illicit activity; (2) to control or disguise the illicit proceeds, or (3) to avoid reporting requirements. §896.101(3)(c), Fla. Stat. (2016).

The Defendant argues that the money laundering counts should be dismissed because the sale of Bitcoin does not meet the definition of "financial transaction" or "monetary instruments" under §896.101(2)(d) and (e), Fla. Stat. "***Monetary instrument***" is defined as "coin or currency of the United States or any other country, travelers' checks, personal checks, bank checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments in bearer form or otherwise such form that title thereto passes upon delivery." § 896.101(2)(e), Fla. Stat. (2016). "Virtual currency" is not separately included as a category in that definition, nor does Bitcoin fall under any of the existing categories listed.

The definition of "financial transaction" is found in § 896.101(2)(d), Fla. Stat. A "***financial transaction***" is a "transaction... involving one or more monetary instruments, which in any way or degree affects commerce..." If the statute is read to mean that in the transaction, the Defendant must be the party who uses the monetary instruments then the money laundering

statute would not apply in this case, because Bitcoins, as previously discussed, are not monetary instruments.

The more likely interpretation of the statute is that as long as one party to the transaction, in this case the law enforcement officer, is using a monetary instrument, a financial transaction has occurred. Therefore, any sale of property for cash is a financial transaction. Potentially any sale of property for cash could be a violation of the money laundering statute.

In this case, Detective Arias did not represent that the cash was the proceeds of an illegal transaction. Detective Arias did represent to the Defendant, in so many words, that he was planning to trade what he was buying from the Defendant (Bitcoin) for stolen credit card numbers. The statute requires that the officer as buyer merely make the representation that what was in this case, legally purchased Bitcoin is being used to facilitate or conduct illegal activity; it does not require any affirmative acknowledgement or action from the seller. Presumably the officer/buyer would be using the stolen credit cards to further engage in some kind of identity theft or fraudulent purchases, though they did not make this clear.

The statute does go on to require that the Defendant charged under this statute undertake the transaction with the **intent** to promote the carrying on of the illegal activity (Sections B and C do not apply here). § 896.101(3)(c)1, Fla. Stat. (2016). The usage of the word "promote" in § 896.101(3)(c)1 is troublingly vague. It is not clear to this Court what conduct is proscribed and what conduct is permitted. The term "***promoter***" is defined in Black's Law Dictionary as "someone who encourages or incites." Black's Law Dictionary 1333 (10th ed. 2014). The term "***incite***" is defined in Merriam-Webster Dictionary as "to cause (someone) to act in an angry, harmful, or violent way." Merriam-Webster's Dictionary (11th ed. 2016). The term "***encourage***" is defined as "to make (something) more appealing or more likely to happen." *Id.* Is it criminal activity for a person merely to sell their property to another, when the buyer describes a nefarious reason for wanting the property? Does "promoting" require that there be more of an affirmative act or does the mere act of selling constitute promoting? Has a seller crossed into the realm of "promoting" by virtue of simply hearing the illicit manner in which the buyer intends to use what's been purchased? There is unquestionably no evidence that the Defendant did anything wrong, other than sell his Bitcoin to an investigator who wanted to make a case. Hopefully, the Florida legislature or an appellate court will define "promote" so individuals who believe their conduct is legal are not arrested.

This Court is unwilling to punish a man for selling his property to another, when his actions fall under a statute that is so vaguely written that even legal professionals have difficulty finding a singular meaning. Without legislative action geared towards a much needed update to the particular language within this statute, this Court finds that there is insufficient evidence as a matter of law that this Defendant committed any of the crimes as charged, and is, therefore, compelled to grant Defendant's Motion to Dismiss as to Counts II and III.

WHEREFORE, it is **ORDERED AND ADJUDGED** that the Motion to Dismiss the Information is hereby **GRANTED**.

DONE AND ORDERED at Miami, Miami-Dade County, Florida, this 22 day of July, 2016.

TERESA POOLER
Circuit Court Judge

Copies Furnished to:

Mr. Frank Andrew Prieto, Esq., *Attorney for the Defendant Michell Abner Espinoza*, 1 Northeast 2nd Avenue, Suite 200, Miami, Florida 33132

Mr. Thomas Haggerty, Esq., *Assistant State Attorney*, State Attorney's Office, 1350 N.W. 12th Avenue, Miami, Florida 33136

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

THE STATE OF FLORIDA — FELONY DIVISION

Plaintiff, — CASE NO.: F14-2923

v. — JUDGE TERESA POOLER

MICHELL A. ESPINOZA,

Defendant.
_____/

SECOND AMENDED MOTION TO DISMISS INFORMATION PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.190 (c)(4)[1]

COMES NOW, the Defendant, **MICHELL A. ESPINOZA,** by and through his undersigned counsel, pursuant to Rule 3.190(c)(4) of the Florida Rules of Criminal Procedure, and moves this Honorable Court to enter an Order dismissing the Information in the above styled cause, to wit: Count 1: Unauthorized Money Transmitter, Fla. Stat. § 560.125(5)(A), Count 2: Money Laundering Fla. Stat. § 896.101(5)(b)., and Count 3: Money Laundering Fla. Stat. § 896.101(5)(A).

As grounds in support thereof, Defendant alleges that there are no material facts in dispute and that the undisputed facts do not establish a prima facie case of guilt against him.

The undisputed facts upon which this Motion is based are as follows:

1. On December 4th, 2013, Detective Arias of the Miami Beach Police Department surreptitiously sought out individuals for the purpose of luring them into a bitcoin transaction. Detective Arias targeted Espinoza, who has no criminal history, based on a posting in the Local Bitcoins website at http://localbitcoins.com.

2. On December 5th, 2013, Espinoza sold Detective Arias .40322580 bitcoin for $500.00 in U.S. currency.

3. On January 10th, 2014, Espinoza sold Detective Arias One bitcoin for $1000.00 in U.S. currency.

[1] This Second Amended Motion only amends the language used in the oath of Defendant; the knowledge element has been removed. All other contents remain unchanged.

4. On January 30th, 2014, Espinoza sold Detective Arias .54347826 bitcoin for $500.00 in U.S. currency.

5. On February 6th, 2014, Detective Arias attempted to lure Espinoza into selling $30,000.00 worth of bitcoins in exchange for U.S. currency. Espinoza never sold Detective Arias the bitcoins in exchange for the currency. Espinoza was arrested and subsequently charged as indicated above.

STATE OF FLORIDA)
)
COUNTY OF MIAMI-DADE)

BEFORE ME, the undersigned authority, personally appeared **Michell Espinoza**, on this _____ day January, 2016, who first being duly sworn, deposes and says that the facts contained herein are true and correct.

_____
Michell Espinoza

SWORN TO AND SUBSCRIBED BEFORE ME this _____, day of January, 2016.

_____
Notary Public-State of Florida

_____
Print, type or stamp commissioned
name of Notary Public
My Commission Number:
My Commission Expires:

[√ **One** only]
___ Personally Known **or**
___ Produced Identification
Type of Identification Produced _____

PRELIMINARY STATEMENT

Defendant Michell Espinoza respectfully submits this memorandum of law in support of his Motion to Dismiss Counts One, Two, and Three of the Information which charges as follows: Count 1: Unauthorized Money Transmitter, Fla. Stat. § 560.125(5)(A), Count 2: Money Laundering Fla. Stat. § 896.101(5)(b)., and Count 3: Money Laundering Fla. Stat. § 896.101(5)(A). Count One should be dismissed because the alleged conduct does not constitute "money transmitting" as contemplated by the statute. Counts 2 and 3 should also be dismissed as bitcoin do not fall within the definition of "Financial Transaction," or "Monetary Instruments," contained within Fla. Stat. § 896.101; the Florida Money Laundering Act.

I. BACKGROUND

The Information charges Espinoza in Count One with: Unauthorized Money Transmitter, Fla. Stat. § 560.125(5)(A) (Information ¶ 1); and Count Two, participating in a money laundering, an alleged violation of § 896.101(5)(b)., and Count 3, participating in money laundering, an alleged violation of Fla. Stat. § 896.101(5)(A). (Information ¶¶ 2-3). Count One alleges that the money transmitting business at issue was Espinoza himself, (Information ¶ 1). According to the government's theory of the case, bitcoins are a form of virtual **currency**, existing entirely on the Internet and not in any physical form. The government further claims in the arrest affidavit that bitcoin is **currency**, not issued by any government, bank or company, but rather is generated and controlled automatically through computer software operating on a decentralized, peer-to-peer network. (Arrest Affidavit, Page 1). More specifically, Bitcoin is a privately created commodity, acquired—or "mined"—by solving mathematical problems generated by a software algorithm. (Arrest Affidavit, Page 2-4). *See* Stephen T. Middlebrook & Sarah Jane Hughes, *Regulating Cryptocurrencies in the United States: Current Issues and Future Directions*, 40 Wm. Mitchell L. Rev. 813, 818 (2014). Bitcoin is not backed by the United States Government or any government and it is not directly regulated by any specific federal or state regulatory agency. (*See* Arrest Affidavit Pages 1-4). The purchase, sale, and exchange of bitcoins is entirely legal, and the value of a unit of bitcoin is determined solely by the actions of private market participants. (*See* Arrest Affidavit Pages 1-4). A would-be user of Bitcoin can obtain it either by mining it through participation in the algorithm that creates it or purchasing it on the secondary market. Middlebrook & Hughes, *supra*, at 818. Bitcoin does not have any intrinsic liquidity. Bitcoin is neither widely accepted nor is it supported by a monetary policy, and the fact that it can store value makes it no different in that regard from other more common commodities.

The Arrest Affidavit alleges that Espinoza sold bitcoins to Detective Arias and provided them to the Detective's "Bitcoin 'address' analogous to a bank account number, which is designated by a complex string of letters and numbers." (Arrest Affidavit pages 1-4).

II. STANDARD OF REVIEW

Rule 3.190 provides that when there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the Defendant, the court may grant dismissal.

III. DISCUSSION

The Information in this matter is defective because it fails in multiple ways to allege conduct that meets the definition of "money transmitting" as set forth in Fla. Stat. § 560.125(5)(A): (1) Bitcoin is not "money" under the statute; and (2) operating a Bitcoin exchange is not "transmitting" money under the statute, and (3) Bitcoin does not fall under the definition of "financial transaction," or monetary instrument, pursuant to Fla. Stat. 896.101; the Florida Money Laundering Act.

I. Bitcoin Is Not "Money", "Monetary Value" for purposes of a "Money Services Business", or "Money Transmitter."

Fla. Stat. § 560.125(5)(A),States in relevant part:

> Unlicensed activity; penalties.—
> (1) A person may not engage in the business of a money services business or deferred presentment provider in this state unless the person is licensed or exempted from licensure under this chapter.
>
> (2) Only a money services business licensed under part II of this chapter may appoint an authorized vendor. Any person acting as a vendor for an unlicensed money transmitter or payment instrument issuer becomes the principal thereof, and no longer merely acts as a vendor, and is liable to the holder or remitter as a principal money transmitter or payment instrument seller.
>
> (3) Any person whose substantial interests are affected by a proceeding brought by the office pursuant to this chapter may, pursuant to s. 560.113, petition any court of competent jurisdiction to enjoin the person or activity that is the subject of the proceeding from violating any of the provisions of this section. For the purpose of this subsection, any money services business licensed under this chapter, any person residing in this state, and any person whose principal place of business is in this state are presumed to be substantially affected. In addition, the interests of a trade organization or association are deemed substantially affected if the interests of any of its members are affected.

> (4) The office may issue and serve upon any person who violates any of the provisions of this section a complaint seeking a cease and desist order or impose an administrative fine as provided in s. 560.114.
>
> (5) A person who violates this section, if the violation involves:
> (a) Currency or payment instruments exceeding $300 but less than $20,000 in any 12-month period, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Fla. Stat. § 560.103 defines "monetary value", "money services business," and "money transmitter" as follows:

> (21) "Monetary value" means a medium of exchange, whether or not redeemable in currency.
>
> (22) "Money services business" means any person located in or doing business in this state, from this state, or into this state from locations outside this state or country who acts as a payment instrument seller, foreign currency exchanger, check casher, or money transmitter.
>
> (23) "Money transmitter" means a corporation, limited liability company, limited liability partnership, or foreign entity qualified to do business in this state which receives currency, monetary value, or payment instruments for the purpose of transmitting the same by any means, including transmission by wire, facsimile, electronic transfer, courier, the Internet, or through bill payment services or other businesses that facilitate such transfer within this country, or to or from this country.

Accordingly, a defendant can be guilty of an offense under the statute only where the object that he transmits is "currency, monetary value, or payment instruments." In this matter, the object at issue—bitcoins—is neither "money" nor "monetary value," nor "funds" under the statute. A logical reading of the statute does not include bitcoins. To expand the definition of "money" or "funds" or "monetary value" to bitcoin would cause the statute to lose all rational limitations.

A. "Money," "Monetary Value" and "Funds" Under the Statute Mean Currency

According to Black's Law Dictionary, the terms "money" and "funds" are nearly coextensive. Indeed, Black's defines "funds" to mean "[a] sum of money or other liquid assets established for a specific purpose." Black's Law Dictionary (9th ed. 2009). Money is a somewhat less elusive term. Black's Law Dictionary defines it in two primary ways: broadly, as "[a]ssets that can be easily converted to cash," and narrowly, as "[t]he medium of exchange authorized or

adopted by a government as part of its currency; esp. domestic currency." Black's Law Dictionary 1096 (9th ed. 2009).

The broad definition of money—convertible assets—cannot be applied to Fla. Stat. § 560.125 without rendering that statute utterly meaningless. Indeed, if Fla. Stat. § 560.125 applied to any asset with liquidity, it could encompass the business of moving almost any item and could make the transfer of any such items a felony offense in certain circumstances. It is a well-established canon of construction that statutes are to be interpreted to avoid illogical results. *See Troll Co. v. Uneeda Doll Co.*, 483 F.3d 150, 160 (2d Cir. 2007) (rejecting interpretation of a statute that would render it "absurdly broad"). Accordingly, the broad definition of money simply cannot apply to Fla. Stat. § 560.125.

The narrow definition of money—currency—applies a more natural and appropriate limitation on the application of Fla. Stat. § 560.125. Although the legislative history of Fla. Stat. § 560.125 is not instructive, it is obvious that in enacting Fla. Stat. § 560.125 the legislature could not have contemplated its application to virtual currencies, and the term "money" or "monetary value" as used in the statute would likely have been considered synonymous with the term "currency." Indeed, the purpose of the statute—to ensure that those who transmit money for a business register with the federal government, obtain state licenses, and submit to applicable regulations—seems much more appropriately directed to those who transmit currency. The federal and state governments have an obvious and substantial interest in currency: currency is issued by the federal government; it is printed by the federal government; and its value is regulated by federal monetary policy. *See generally* U.S. Const. art. I, § 8, cl. 5 (bestowing in the legislature the power "[t]o coin Money, [and] regulate the Value thereof"). A statute that seeks to punish those who transmit currency for others for profit but fail to properly register or obtain applicable licenses makes sense. On the other hand, the purpose of a statute that seeks to punish those who fail to register or obtain proper licenses for transmitting a virtual internet-based commodity that is completely a private creation is not apparent. Bitcoin or bitcoins are not directly regulated by the federal government or subject to monetary policy, and the federal government only recently expressed an interest in seeing the registration and licensing of those who engage in certain transactions involving Bitcoin or bitcoins. *See Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies*, FIN-2013-G001, Financial Crimes Enforcement Network (March 18, 2013), http://www.fincen.gov/statutes_regs/guidance/html/FIN-2013-G001.html. That occurred just over two years ago, on March 18, 2013, when the Financial Crimes Enforcement Network ("FinCEN"), the arm of the Treasury Department that is responsible for safeguarding the financial system from illicit use and money laundering activity, first issued guidance on the application of FinCEN's regulations to virtual currencies. *See id.* Finally, had Congress wanted the term "money"

to be defined expansively it would have done so explicitly. That is clear from a quick comparison to the federal money laundering statute, 18 U.S.C. § 1956, which does not rely on an expansive definition of "money" but instead expressly and broadly applies to, among other things, certain "financial transactions involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity." 18 U.S.C. § 1956(c)(2).

B. Bitcoin or Bitcoins are Not Currency

The U.S. Government recognizes significant differences between "currency" and Bitcoin or bitcoins. FinCEN defines "currency" as: [t]he coin and paper money of the United States or of any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issuance. Currency includes U.S. silver certificates, U.S. notes and Federal Reserve notes. Currency also includes official foreign bank notes that are customarily used and accepted as a medium of exchange in a foreign country. 31 C.F.R. § 1010.100(m) (2013). Bitcoins clearly do not meet this definition and therefore is not "currency." FinCEN further distinguishes "currency (also referred to as 'real currency')" from "virtual currency" which includes bitcoin and is defined as "a medium of exchange that operates like a currency in some environments, but does not have all of the attributes of real currency." *See Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies*, FIN-2013-G001, *supra*. FinCEN notes in particular that "virtual currency does not have legal tender status in any jurisdiction." *Id.*

The significant differences between "currency" and "virtual currency" are further recognized by the Internal Revenue Service ("IRS"), which does not treat "virtual currency" as "currency" for purposes of determining whether a transaction results in foreign currency gain or loss under U.S. federal tax laws. *See* Internal Revenue Service, Notice 2014-21, *available at* http://www.irs.gov/pub/irs-drop/n-14-21.pdf (last accessed July 3, 2014); *accord Bitcoin: MoreThan a Bit Risky*, FINRA (May 7, 2014), http://www.finra.org/Investors/ProtectYourself/InvestorAlerts/FraudsAndScams/P456458 (discussing IRS's position that Bitcoin is property).

C. Defining Bitcoin as "Money" Under the Statute Raises Constitutional Problems

Interpreting the terms "money," "monetary value," or "funds" under the statute to include a commodity such as bitcoins raises concerns that Fla. Stat. § 560.125 fails to "provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). "[T]he legislative purpose is expressed by the ordinary meaning of

the words used." *Richards v. United States*, 369 U.S. 1, 9 (1962). The ordinary understanding of "money," "monetary value," and "funds" is consistent with the definition offered above: currency, whether reflected in cash, specie, check, bank wire, or account balance. It does not include cars, real estate, baseball cards, Beanie Babies, Bitcoin, or other assets that, although valuable and potentially even a medium of exchange, do not fall within our ordinary understanding of the terms "money" "monetary value," or "funds." The Supreme Court has instructed courts, when confronted with a statute of ambiguous and potentially infinite reach, to interpret it consistent with the rule of lenity. Courts should "exercise[] restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, and out of concern that a fair warning should be given to the world in language that the common world will understand, or what the law intends to do if a certain line is passed." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) (citations omitted). Here, the statutory terms "money" and "funds" can either be given the ordinary meaning of "currency" or they can be given a meaning so broad as to have no meaning at all. The District Court should show the concern for plain meaning and fair warning that the Supreme Court has instructed, and find that the Indictment fails to allege a transaction in "money" or "funds" and therefore fails to state an offense under Fla. Stat. § 560.125.

II. The Information Fails to Allege that Mr. Espinoza Operated a "Money Transmitting Business" or Engaged in "Money Transmitting."

Count One of the Indictment should also be dismissed because the Indictment fails to allege that Espinoza operated a "money transmitting business" or engaged in "money transmitting" as contemplated by the statute.

A. Mr. Espinoza Did Not Operate a Money Transmitting Business

Fla. Stat. § 560.125 prohibits the unlicensed operation of a "money services business." The use of the term "business" in the statute clearly requires that a defendant sell money transmitting services to others for a profit. Here, the Indictment fails to allege that Espinoza sold such services. Rather, he is alleged to have sold Bitcoin to Detective Arias who engaged him as a source of bitcoins. To the extent that Espinoza is alleged to have participated in other activities to secure bitcoins to sell, such activities were purely incidental to the sale of bitcoins, were not requested by his customers, were unknown to his customers, and do not make his business a money transmitting business. There are simply no allegations that Espinoza transmitted bitcoins to other locations or persons. Rather, the allegations are simply that Espinoza sold bitcoins to the Detective.

B. A Seller of Bitcoins Does Not Meet the Definition of Money Transmitter or Exchanger Under the Applicable Regulations or Definitions.

The Information alleges that Espinoza acted as a money transmitter selling bitcoins to the Detective. A seller of bitcoins, however, is not included within FinCEN's definition of "money transmitter" and indeed such conduct is expressly excluded from the definition. The regulations provide, in relevant part:

> (5) *Money transmitter—(i) In general.* (A) A person that provides money transmission services. The term 'money transmission services' means the acceptance of currency, funds, or other value that substitutes for currency from one person and the transmission of currency, funds, or other value that substitutes for currency *to another location or person* by any means. . . .
> (ii) Facts and circumstances; Limitations. Whether a person is a money transmitter as described in this section is a matter of facts and circumstances. The term "money transmitter" shall not include a person that only: . . .
> (F) Accepts and transmits funds *only integral to the sale of goods or the provision of services*, other than money transmission services, by the person who is accepting and transmitting the funds. 31 C.F.R. § 1010.100(ff)(5)(ii)(F) (2013) (emphasis added).

Here, the Information alleges only that Espinoza sold bitcoins to the Detective. There is no allegation that Espinoza transmitted bitcoins to another location or person for anyone. Moreover, since bitcoins are "goods," Espinoza's alleged conduct is excluded from the definition of the term "money transmitter" under both FinCEN and Fla. Stat. §560.125. See, FinCEN Guidance of March 18, 2013, http://fincen.gov/statutes_regs/guidance/html/GIN-2-13-G001.html (stating that a user of virtual currency is **not** an MSB under FinCEN's regulations and therefore is not subject to MSB registration, reporting, and recordkeeping regulations)(stating that a user is a person that obtains virtual currency to purchase goods or services; an exchanger is a person engaged as a business in the exchange of virtual currency for real currency, funds, or other virtual currency)(a user who obtains convertible virtual currency and uses it to purchase real or virtual goods or services is not an MSB under FinCEN'S regulations. Such activity, in and of itself, does not fit within the definition of

"money transmission services" and therefore is not subject to FinCEN's registration, reporting, and recordkeeping regulations for MSB's.)[2]

C. Fla. Stat. § 560.125 recognizes that Operating a Money Transmitting Business Requires the Transmission of Money to a Third Party or Location

A plain reading of the statute further supports the assertion that Espinoza did not operate a money transmitting business because he did not, nor was he instructed by his customers to, transfer money to a third party or location. A traditional money transmitting business "operates in a similar fashion to a Western Union business." *United States v. Elfgeeh*, 515 F.3d 100, 108 (2d Cir. 2008) (quoting testimony of FBI agent). A critical element of such an operation is that "the business must *transmit* money *to a recipient in a place that the customer designates*, for a fee paid by the customer." *United States v. Banki*, 685 F.3d 99, 113 n.9 (2d Cir. 2012), as amended (Feb. 22, 2012) (emphasis added); *see also id.* at 113 (holding that this description of a money transmitting business is "legally correct"); *United States v. Bah*, 574 F.3d 106, 110 (2d Cir. 2009) (describing Government's evidence that "certain customers came to Bah's restaurant in the Bronx, delivered U.S. currency, *and instructed Bah to deliver the equivalent value of local currency to recipients* in West Africa" (emphasis added)). Additionally, although the statute contains no definition of the term "transfer," as included in the definition of the term "money transmitting," the Second Circuit has construed the statute to require direction of the funds from a customer to a third party identified by the customer: A money transmitting business receives money from a customer and then, for a fee paid by the customer, transmits that money to a recipient in a place that the customer designates, usually a foreign country. After the customer gives the money transmitter an amount to send to the designee, the transmitter notifies the "payer" with whom it has a contractual arrangement in the recipient country. The payer then notifies the designated recipient of the money, and pays the money to the designee at the payer's office. The transmitter then remits to the payer the amount paid to the designee, plus the payer's commission. *United States v. Velastegui*, 199 F.3d 590, 592 (2d Cir. 1999). Espinoza's conduct as alleged in the Indictment and elaborated upon in the Arrest Affidavit is quite different from that which is required under the statute. Espinoza was asked by the Detective to provide him with a valuable item—bitcoins. The Detective did not direct him to send their funds to a third party. Absent an active direction that funds be transferred to a place designated by the customer, Espinoza merely acted as any retailer, selling and/or purchasing bitcoins wholesale and selling it to members of the public in the hopes of a speculative gain with no guarantee of profit or loss. Espinoza is not alleged to have transmitted funds from one party to another at the direction of his client. He is simply

[2] It should be noted that FinCEN's guidance is silent as to investing, i.e., persons who buy and sell bitcoins for their own inventory in pursuit of speculative gains.

alleged to have bought and sold bitcoins. To the extent that he made any "transfer," it was only the sort of transfer inherent in any purchase or sale, and not the sort of directed transmittal required by the statute's definition of "money transmitter."

D. Fla. Stat. § 560.125 Should Continue to Be Interpreted Narrowly

Finally, to read Fla. Stat. § 560.125 to prohibit Espinoza's conduct—simply selling bitcoins to customers—without also requiring that Espinoza transfer the bitcoin to a third party or location at the direction of the customer would raise serious constitutional issues. "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, s 10, of the Constitution forbids." *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964). No court has ever applied the money transmitting statute to conduct such as that described in the Complaint, and the narrow statutory prohibition on unlicensed Western Union-style businesses has held sway in this State. Applying a "new construction of the statute" that encompasses the sort of purchase-transfer Espinoza is alleged to have engaged in would "depriv[e] [Espinoza] of rights guaranteed to [him] by the Due Process Clause." *Id.* at 362. Indeed, in federal cases such as *United States v Velastegui,* the strict definition of money transmitting has previously been the only thing saving the money transmitting statute from invalidity for failure to "give fair warning of the conduct that it makes a crime." *Bouie,* 378 U.S. at 350-51. In *United States v. Elfgeeh*, No. CR-03-0133CPS, 2004 WL 3767299 (E.D.N.Y. Apr. 13, 2004), the district court rejected a due process challenge to § 1960 by relying on the Second Circuit's conclusion that a "'money transmitting business' as used in Section 1960 unambiguously involves 'receiv[ing] money from a customer and then, for a fee paid by the customer, transmit[ting] that money to a recipient in a place that the customer designates.'" *Id.* at

*8 (quoting *Velastegui*, 199 F.3d at 592, 595). If this Court were to apply a broader construction of the statute than that approved in *Velastegui* and applied in *Elfgeeh*, it would be precisely the sort of "unforeseeable judicial enlargement of a criminal statute" that the Due Process Clause forbids, and it would raise severe questions about the validity of Fla. Stat. § 560.125. as a whole owing to its failure to provide adequate notice of the conduct it forbids.

The Florida Office of Financial Regulation (FLOFR) offers little to no guidance with respect to this issue; however, guidance can be found looking to the Texas Department of Banking Memorandum, http://dob.texas.gov/consumer-information/virtual-currency-guidance ("Exchange of cryptocurrency for sovereign currency between two parties is not money transmission. This is essentially the sale of goods between two parties. The seller gives units of cryptocurrency to the buyer, who pays the seller directly with sovereign currency. The seller does not receive the sovereign currency in exchange for a promise to make it available at a later time or different location.") *Id.* at

p. 3-4. This Court should conclude that the Information fails to allege an offense under Fla. Stat. § 560.125 and that Count One should be dismissed.

III. COUNTS 2 & 3 Should Also be Dismissed as Bitcoin do Not Fall Within the Definition of "Financial Transaction," or "Monetary Instruments," contained within Fla. Stat. § 896.101; the Florida Money Laundering Act.

Based on the above arguments and incorporating them herein for the Money Laundering charges contained in Counts 2 and pursuant to Fla. Stat. § 896.101(5)(b)., and Fla. Stat. § 896.101(5)(A), both Counts fail as the sale of bitcoins do not fall within the definitions of "financial transaction," or "monetary instruments." These terms are defined in Fla. Stat. § 896.101 as:

> (d) "Financial transaction" means a transaction involving the movement of funds by wire or other means or involving one or more monetary instruments, which in any way or degree affects commerce, or a transaction involving the transfer of title to any real property, vehicle, vessel, or aircraft, or a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, commerce in any way or degree.
>
> (e) "Monetary instruments" means coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments in bearer form or otherwise in such form that title thereto passes upon delivery.

As argued above in detail, the sale of bitcoins to detective Arias do not qualify under either definition above; as such, the sale of bitcoins cannot constitute money laundering under either Fla. Stat. § 896.101(5)(b)., or Fla. Stat. § 896.101(5)(A).

CONCLUSION

For the foregoing reasons, Mr. Espinoza respectfully requests that the Court dismiss all Counts of the Information.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **January 20th, 2016,** the foregoing was filed with the Miami-Dade County Clerk of Court using the Florida Court's e-Portal filer. I also certify that the forgoing is being served this day on all counsel of record or *pro se* parties in the manner specified, either via e-mail transmission which constitutes service under Florida Rule of Judicial Administration 2.516(b)(1), or in some other authorized manner for those counsel or parties who have not provided an address to receive service via e-mail.

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