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“EV’RY AMERICAN EXPERIMENT SETS A PRECEDENT”¹: WHY ONE FLORIDA STATE COURT’S BITCOIN OPINION IS EVERYONE’S BUSINESS

By Allison Caffarone² & Meg Holzer³

The inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for the morrow. It must have a principle of growth.

-Benjamin Cardozo⁴

INTRODUCTION

July 22, 2016. A Florida state court dismisses a three-count information against a sole defendant in “a Miami money-laundering case that is being closely watched around the world.”⁵ The defendant, a dealer of the virtual currency bitcoin, is free to go.⁶ He is also free to continue engaging in the sale of bitcoin. This “victory for bitcoin users”⁷ was the first state court case to address Bitcoin in the context of the money services business and anti-money laundering statutes. And on every front, the court got it wrong—while the world was watching. Federal and state prosecutors, defense attorneys, judges, and the Bitcoin community paid careful attention to the case.⁸ And although the opinion is not binding, it

¹ Lin-Manuel Miranda et al., *What'd I Miss, on Hamilton: The Musical* (Atlantic Records 2015).

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⁴ Benjamin N. Cardozo, *The Growth of Law* (1963).

⁵ See David Ovalle, *Miami Money-Laundering Case May Define Whether Bitcoin is Really Money*, MIAMI HERALD (May 27, 2016, 6:14 PM), <http://www.miamiherald.com/news/local/crime/article80421072.html>.

⁶ *Florida v. Espinoza*, No. F14-293 (Fla. Cir. Ct. July 22, 2016), <http://www.miamiherald.com/latest-news/article91701087.ece/BINARY/Read%20the%20ruling%20.pdf>.

⁷ Larry White, *A Victory for Bitcoin Users*, Alt-M (Aug. 2, 2016), <http://www.alt-m.org/2016/08/02/a-victory-for-bitcoin-users>.

⁸ See, e.g., Stan Higgins, *In Rejecting Bitcoin As Money, Florida Court Sets Likely Precedent*, CoinDesk (July 25, 2016), <http://www.coindesk.com/court-reject-bitcoin-money-florida-espinoza-trial>; Lalita Clozel, *Bitcoin Is Not Money, Fla. Judge Says, Tossing AML Charge*, AmericanBanker (July 25, 2016), <http://www.americanbanker.com/news/law-regulation/bitcoin-not-money-fla-judge-says-tossing-aml-charges-1090384-1.html>; Carolina Bolado, *Fla. Judge Says Bitcoin Isn't Money Under The Law*, Law 360 (July 25, 2016), <http://www.law360.com/articles/821059/fla-judge-says-bitcoin-isn-t-money-under-the-law>; Jacob Bogage, *Bitcoin's not money, judge rules as she tosses money-laundering charge*, Wash. Post (July 26, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/07/26/bitcoins-not-money-judge-rules-as-she-tosses-money-laundering-charge>; Jon Southurst, *Bright Future for Bitcoin After Florida Case Dismissal*, Bitcoin.com (July 26, 2016); Kevin Petrasic, *Money, bits and banking: Florida case implicates legal status of digital currencies in the US*, White & Case (Oct. 3, 2016),

must be given its “proper regard.”⁹ The Little Case That Could has effectively become the Little Case That Shouldn't.¹⁰

Two avenues must be pursued to correct the problems with the *Espinoza* court's findings. First, a Florida appellate court must overturn the decision on appeal. Second, the legal and financial communities must, as the Southern District of New York already has, disregard the *Espinoza* court's ineffective reasoning as they continue to develop the law of Bitcoin. Because while this Florida state case awaits appeal,¹¹ and is not binding on any court, it remains persuasive authority in an area of law where few cases have directly analyzed the character of Bitcoin. As the law is in a constant state of growth, a trial court order opining on this topic has the possibility to cause damage. What exactly did the court do—and decline to do—when it dismissed the charges against Espinoza? And why is this state court dismissal of these charges against a sole defendant so potentially troubling across the world? To answer these questions, we first must turn to the currency (or is it?) at the center of the case: bitcoin.

Part I of this article seeks to explain in largely non-technical terms the design of the Bitcoin network. Part II explains the guidance and administrative rulings provided by the United States Department of the Treasury's Financial Crimes Enforcement Network in relation to the issues in the *Espinoza* case. Additionally, Part II surveys different approaches taken by state legislatures and regulators in seeking to address decentralized virtual currencies, including bitcoin. Careful attention is paid to how the terms “monetary value” and “virtual currency” are defined, and how those definitions have been interpreted. Part II further explores the differences in the way the respective laws and guidelines treat different members of the Bitcoin ecosystem. Part III analyzes the *Espinoza* case, taking a critical look at the reasoning behind the dismissal of the criminal information, and suggests that the court's holdings are analytically unsound. Finally, we argue that the *Espinoza* case must not be allowed to stand and needs to be reversed on appeal.

PART I: WHAT IS BITCOIN?

“Satoshi Nakamoto” created Bitcoin with the goal of allowing online payments to be sent directly from one party to another without the need for a trusted third-party financial institution or intermediary to guard against the problem known as double spending.¹² The objective was to create a virtual currency that would limit transaction costs, guarantee

<http://www.whitecase.com/publications/article/money-bits-and-banking-florida-case-implicates-legal-status-digital-currencies> (last accessed Nov. 30, 2016).

⁹ *United States v. Murgio*, 2016 WL 5107128, at *8 (S.D.N.Y. Sept. 19, 2016). (“This Court is therefore not bound by the decision in *Espinoza*, though it owes the decision ‘proper regard.’”).

¹⁰ See Watty Piper, *The Little Engine That Could* (1930) (this is a children's book featuring an optimistic little train engine that accomplishes more than its size predicts).

¹¹ See Stan Higgins, *Florida Files Appeal After Charges Against Bitcoin Seller Dismissed*, COINDESK (Aug. 22, 2016) <http://www.coindesk.com/florida-files-appeal-charges-bitcoin-seller-dismissed>.

¹² Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System* (Oct. 31, 2008), <http://bitcoin.org/bitcoin.pdf>. Satoshi Nakamoto is the pseudonym of the author of the academic “white paper” published in October 2008 that first outlined the technology behind Bitcoin. To date, Nakamoto's identity remains a mystery. See *Who is Satoshi Nakamoto*, COINDESK (Feb. 19, 2016), <http://www.coindesk.com/information/who-is-satoshi-nakamoto>.

security, and protect privacy in electronic payments.¹³ The resulting creation was an open-sourced, decentralized, peer-to-peer, digital currency ecosystem known as Bitcoin.

When people refer to Bitcoin, they may be referring to one of two things: units of the virtual currency (“bitcoin”) or the Bitcoin network as a whole.¹⁴ Although bitcoin has no physical form and exists only in the virtual world, units of bitcoin are akin to traditional coins in the sense that they can be used to transmit value.¹⁵ Just as one would do with any other form of currency, people can use bitcoin—by transferring it over the Internet using the Bitcoin network—to buy and sell goods or transfer value to other people or places around the world.¹⁶ Bitcoin is also similar to the U.S. dollar in that it has no intrinsic value. Like fiat currencies, bitcoin is not backed by a physical commodity; thus, if people lose faith in the currency, it will no longer have value.

Unlike the U.S. dollar, though, which is based on the faith and credit of the U.S. government, bitcoin is based on mathematics. Whereas the United States Department of the Treasury prints the U.S. dollar, no government or central authority produces bitcoin. Rather, certain members of the Bitcoin network known as “miners” are rewarded with new bitcoin for a process known as “mining.” There is no centrally owned computer or set of computers doing the mining (miners and their computers are spread out around the world); Bitcoin is completely decentralized.¹⁷

“Mining” is “the process of adding [new] Bitcoin transactions to the public ledger of past Bitcoin transactions.”¹⁸ When one generally thinks of adding entries to a ledger, one thinks of adding a line item to a spreadsheet or a page to a book. Bitcoin transactions, however, are added to the public ledger in “blocks,” with each block containing the record of one or more transactions, a reference to the “block” that came before it, and an answer to an extremely difficult math problem that requires significant computing power to solve.¹⁹ Because each block contains information about the previous block, the ledger is referred to as the “blockchain.” When a miner successfully adds a new block to the chain, that miner is rewarded with new bitcoin. The only way new bitcoin is generated is through the mining process.

Perhaps the greatest difference between bitcoin and other currencies exchanged over the Internet is that bitcoin transactions are peer-to-peer. In the past, electronic exchange of value transactions required a trusted third-party intermediary, (e.g., a financial institution) to process and authorize the transactions.²⁰ The third party would, among other things, verify that the payor did not send the same unit of currency to more than one recipient, a problem

¹³ *Id.*

¹⁴ See *Drawing the Distinction between the uppercase B and lowercase b in Bitcoin*, BLOCKCHAIN (Dec. 29, 2014), <https://blog.blockchain.com/2014/12/29/drawing-the-distinction-between-the-uppercase-b-and-lowercase-b-in-bitcoin>.

¹⁵ Andreas M. Antonopoulos, *Mastering Bitcoin 4* (2013)(ebook).

¹⁶ *Id.*

¹⁷ Jason Leibowitz, *Bitcoin: A 21st Century Currency Explained By a Wall Street Veteran*, COINDESK (Feb. 7, 2016), <http://www.coindesk.com/bitcoin-explained-global-currency-wall-street-veteran>.

¹⁸ *Mining*, Bitcoin Wiki, <https://en.bitcoin.it/wiki/Mining> (last visited Dec. 21, 2016).

¹⁹ *Block*, Bitcoin Wiki, <https://en.bitcoin.it/wiki/Block> (last visited Dec. 21, 2016).

²⁰ Nakamoto, *supra* note 12. A common problem of transacting with information-based currency is that of “double-spending,” where a payor sends a unit of currency to two different payees simultaneously, thereby defrauding one or both of them.

known as double spending.²¹ With bitcoin, however, there is no third party verifying the transactions.²² Instead, the miners are working together to authenticate the transactions.²³ Before a new block is submitted to the blockchain, the miner must complete a “proof of work” showing that all the transactions in the block have been verified.²⁴ The new block gets added to the blockchain only after the other miners reach a consensus that the work is accurate and that the payors have not double-spent their bitcoin.²⁵

Bitcoin transactions are often described as being pseudonymous.²⁶ Though the public blockchain contains a record of all bitcoin transactions, no information identifying the transacting parties is included in the ledger.²⁷ Thus, any observer of the blockchain can see that a payment has occurred, but cannot identify the payor or payee. To use an example familiar to the everyday public, this is similar to the level of information released by stock exchanges: the time and size of an individual trade are made public on the “tape,” but the parties to the transaction remain unidentified.²⁸ The blockchain makes it possible to transfer value—in this case, bitcoin—from person to person over the Internet, without a financial intermediary checking the accuracy or truth of the transaction, largely for free, in a short amount of time.

While the technology behind Bitcoin is complicated, it is quite simple to obtain bitcoin. Bitcoin can be acquired on a “bitcoin exchange,” or purchased from a local bitcoin dealer.²⁹ Bitcoin exchanges allow people to buy bitcoin using U.S. dollars or other currencies,³⁰ in much the same way that one would buy pesos or euros at a traditional currency exchange. Bitcoin can also be purchased in person from local sellers. The website LocalBitcoins.com connects local sellers with local buyers of bitcoin.³¹ The buyer generally comes armed with cash and the Bitcoin address to which the buyer wants the bitcoin to be delivered.³² To transfer the bitcoin to the buyer, the bitcoin seller, using a computer program

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 3.

²⁵ *Id.*

²⁶ *Bitcoin Is Not Really Anonymous, But Pseudonymous*, TOTAL BITCOIN <http://totalbitcoin.org/bitcoin-is-not-really-anonymous-but-pseudonymous> (last visited Dec. 21, 2016).

²⁷ Nakamoto, *supra* note 12.

²⁸ *Id.*

²⁹ *Frequently Asked Questions: How does one acquire bitcoin?*, BITCOIN <https://bitcoin.org/en/faq#how-does-one-acquire-bitcoins> (last visited Dec. 21, 2016).

³⁰ *Buying Bitcoins (the newbie version)*, BITCOIN WIKI [https://en.bitcoin.it/wiki/Buying_Bitcoins_\(the_newbie_version\)#Finding_a_direct_seller_online](https://en.bitcoin.it/wiki/Buying_Bitcoins_(the_newbie_version)#Finding_a_direct_seller_online) (last visited Dec. 2, 2016).

³¹ *Id.*, *Frequently Asked Questions: How does one acquire bitcoin?*, *supra* note 29.

³² *Frequently Asked Questions: How does one acquire bitcoin?*, *supra* note 29. The first step required to purchase bitcoin is to create a Bitcoin wallet (usually on a mobile device using an app or on a computer using a computer program) to store the bitcoin. Once a wallet has been created, a Bitcoin address will be generated automatically. See *How To Get Bitcoins: A beginners guide on where to buy your first bitcoins*, Blockchain info, <https://blockchain.info/wallet/how-to-get-bitcoins> (last visited Dec. 21, 2016). A Bitcoin address is a series of letters and numbers that functions as a destination to which bitcoin may be sent. See *Address*, Bitcoin Wiki, <https://en.bitcoin.it/wiki/Address> (last visited Dec. 21, 2016). An example of a Bitcoin address is: 1BvBMSEYstWetqTFn5Au4m4GFg7xJaNVN2. *Id.*

or smartphone app, need only enter the recipient's Bitcoin address and the payment amount and press send; the purchased bitcoin will be sent to the buyer's address.³³

PART II: FINCEN PROVIDES GUIDANCE REGARDING TREATMENT OF BITCOIN UNDER FEDERAL MONEY SERVICES LAWS.

The legitimate uses of virtual currency are significant and the potential for the underlying blockchain technology cannot be overstated.³⁴ However, the inherent features of bitcoin and other decentralized virtual currencies also allow the technology to be used to facilitate illicit activity. Transacting in bitcoin allows participants to conduct irreversible peer-to-peer transactions quickly and securely without any oversight from a central financial authority, all while maintaining partial anonymity.³⁵ Virtual currency has been used to facilitate a wide range of criminal activity, including money laundering, financial fraud, child exploitation, and cybercrime.³⁶

The primary tools available and relied upon by the federal authorities to combat the misuse of virtual currency in these areas are the money services business ("MSB") laws, money transmission laws included in the Bank Secrecy Act ("BSA"), and the anti-money laundering statutes, including the Money Laundering Control Act of 1986.³⁷

The BSA requires "[a]ny person who owns or controls a money transmitting business . . . [to] register the business . . . with the Secretary of the Treasury."³⁸ Under the BSA, a "money transmitter" includes a person who provides money transmission services, or any other person engaged in the transfer of funds.³⁹ 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."⁴⁰

The United States Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN")—the agency tasked with administering and promulgating regulations

³³ *Frequently Asked Questions: How difficult is it to make a Bitcoin payment?*, BITCOIN <https://bitcoin.org/en/faq#how-difficult-is-it-to-make-a-bitcoin-payment> (last visited Dec. 2, 2016).

³⁴ While the benefits of Bitcoin are beyond the scope of this paper, virtual currencies can empower users, lower transactions costs, increase access to capital, and bring financial services to many. See Press Release, U.S. Dep't of Treasury, Remarks From Under Secretary of Terrorism And Financial Intelligence David S. Cohen on "Addressing the Illicit Finance Risks of Virtual Currency (Mar. 18, 2014), <https://www.treasury.gov/press-center/press-releases/Pages/jl236.aspx>.

³⁵ Leslie R. Caldwell, Assistant Att'y Gen., Dep't of Justice, Remarks at the ABA's National Institute on Bitcoin and Other Digital Currencies (June 26, 2015), <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-aba-s-national-institute>.

³⁶ See *id.*, e.g., Cyrus Farivar, *Just a Month After Shutdown, Silk Road 2.0 Emerges*, Ars Technica (Nov. 6, 2013, 6:30 PM), <http://arstechnica.com/business/2013/11/just-a-month-after-shutdown-silk-road-2-0-emerges>; Eli Lake, *Hitman Network Says It Accepts Bitcoins to Murder for Hire*, The Daily Beast (Oct. 17, 2013, 5:45 AM), <http://www.thedailybeast.com/articles/2013/10/17/hitman-network-says-it-accepts-bitcoins-to-murder-for-hire.html>; Nick Wingfield, *Bitcoin Pursues the Mainstream*, N.Y. TIMES (Oct. 30, 2013), <http://www.nytimes.com/2013/10/31/technology/bitcoin-pursues-the-mainstream.html>.

³⁷ Caldwell, *supra* note 35.

³⁸ 31 U.S.C. § 5330(a)(1) (2012).

³⁹ 31 C.F.R. 1010.100(ff)(5).

⁴⁰ 31 C.F.R. 1010.100(ff)(5)(i)(A).

under the BSA—has issued guidance regarding the applicability of the BSA regulations to virtual currencies. On March 18, 2013, FinCEN defined “virtual currency” as “a medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency. In particular, virtual currency does not have legal tender status in any jurisdiction.”⁴¹ The agency drew a distinction between centralized and decentralized virtual currencies, defining “de-centralized convertible virtual currency” as “(1) [having] no central repository and no single administrator, and (2) [being one] that persons may obtain by their own computing or manufacturing effort.”⁴² Bitcoin fits squarely within this definition.

FinCEN then clarified how the BSA regulations, specifically the MSB and money transmission laws, apply to different members of the Bitcoin ecosystem, distinguishing between users, administrators, and exchangers: a user “obtains virtual currency to purchase goods or services”; an exchanger is “engaged as a business in the exchange of virtual currency for real currency, funds, or other virtual currency”; and an administrator is “engaged as a business in issuing (putting into circulation) a virtual currency, and who has the authority to redeem (to withdraw from circulation) such virtual currency.”⁴³

Mere users of bitcoin are not MSBs under FinCEN’s regulations and, therefore, are not subject to FinCEN’s MSB regulations. In contrast to users, bitcoin administrators and exchangers who (1) accept and transmit a convertible virtual currency or (2) buy or sell convertible virtual currency in exchange for currency of legal tender or another convertible virtual currency for any reason, are money transmitters and MSBs under FinCEN’s regulation.⁴⁴

On January 30, 2014, FinCEN explained that merely converting bitcoin to cash or another currency will not make a bitcoin user a money transmitter “so long as the user is undertaking the transaction solely for the user’s own purposes and not as a business service performed for the benefit of another”:

[I]t may be necessary for a user to convert Bitcoin that it has mined into a real currency or another convertible virtual currency, either because the seller of the goods or services the user wishes to purchase will not accept Bitcoin, or because the user wishes to diversify currency holdings in anticipation of future needs or for the user’s own investment purposes. In undertaking such a conversion transaction, the user is not acting as an exchanger, notwithstanding the fact that the user is accepting a real currency or another convertible virtual currency and transmitting Bitcoin, so long as the user is undertaking the transaction solely for the user’s own purposes and not as a business service performed for the benefit of another. A user’s conversion of Bitcoin into a real currency or another convertible virtual currency, therefore, does not in and of itself make the

⁴¹ Dep’t of the Treasury, Application of FinCEN’s Regulations to Persons Administering, Exchanging or Using Virtual Currencies (Mar. 18, 2013), <https://www.fincen.gov/resources/statutes-regulations/guidance/application-fincens-regulations-persons-administering>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Dep’t of the Treasury, Application of FinCEN’s Regulations to Virtual Currency Mining Operations (Jan. 30, 2014), <https://www.fincen.gov/resources/statutes-regulations/administrative-rulings/application-fincens-regulations-virtual-0>.

user a money transmitter.

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Bitcoin exchangers, however, will be considered MSBs if “the exchanger acts as a broker . . . or as a dealer (transacting from its own reserve in either convertible virtual currency or real currency).”⁴⁶

State legislatures and regulators address how virtual currency is treated under state money services business laws.

A number of states’ regulators and legislatures have begun to consider whether and how their respective state MSB and money transmission laws apply to decentralized virtual currency, such as bitcoin. Their approaches vary greatly. First, on one end of the spectrum, Texas⁴⁷ and Kansas⁴⁸ have issued guidance excluding decentralized virtual currency from their respective money transmission laws. Both states define money transmission, in part, as engaging in the business of receiving and transmitting “money” or “monetary value.”⁴⁹ Texas provides that “‘money’ or ‘monetary value’ means currency or a claim that can be converted into currency through a financial institution, electronic payments network, or other formal or informal payment system.”⁵⁰ Kansas defines monetary value as “a medium of exchange, whether or not redeemable in money.”⁵¹

The Texas Department of Banking reasoned that decentralized virtual currencies do not fit Texas’s statutory definition of “monetary value” because decentralized virtual currency is neither “currency” nor a “claim.” Notwithstanding the differences between the Texas and Kansas definitions of monetary value, Kansas relied on Texas’s guidance to reach the conclusion that decentralized virtual currency is not covered under Kansas’s MSB laws.⁵² Both states did, though, also announce that bitcoin exchanges wherein bitcoin is exchanged for fiat currency do engage in money transmission because they engage in the transmission of fiat currency.⁵³

⁴⁵ *Id.*

⁴⁶ Dep’t of the Treasury, Request for Administrative Ruling on the Application of FinCEN’s Regulations to a Virtual Currency Payment System (Oct. 27, 2014), https://www.fincen.gov/sites/default/files/administrative_ruling/FIN-2014-R012.pdf.

⁴⁷ See Texas Dep’t of Banking, *Supervisory Memorandum 1037 - Regulatory Treatment of Virtual Currencies Under the Texas Money Services Act* (Apr. 3, 2014), <http://www.dob.texas.gov/public/uploads/files/consumer-information/sml037.pdf>.

⁴⁸ See Kansas Office of the State Bank Commissioner, *Guidance Document MT 2014-01 - Regulatory Treatment of Virtual Currencies Under the Kansas Money Transmitter Act* (June 6, 2014), http://www.osbckansas.org/mt/guidance/mt2014_01_virtual_currency.pdf.

⁴⁹ Tex. Money Services Act, tit. 3, §151.301(b)(4), <http://www.statutes.legis.state.tx.us/Docs/FI/htm/FI.151.htm>; Kan. Money Transmitter Act, § 9-508(h), http://www.osbckansas.org/mt/mta_2015.pdf.

⁵⁰ Tex. Money Services Act, tit. 3, §151.301(b)(3), <http://www.statutes.legis.state.tx.us/Docs/FI/htm/FI.151.htm>.

⁵¹ Kan. Money Transmitter Act, § 9-508(g), http://www.osbckansas.org/mt/mta_2015.pdf.

⁵² Kansas Guidance, *supra* note 48.

⁵³ Texas Supervisory Memorandum, *supra* note 47. (“Exchange of cryptocurrency for sovereign currency through a third-party exchanger is generally

New York is on the other end of the spectrum in terms of its approach. New York was the first state to enact a regulatory regime covering virtual currencies.⁵⁴ Under the rules, mere consumers who use bitcoin to purchase goods and services, and merchants who accept bitcoin, will not have to register.⁵⁵ But any person engaging in any “Virtual Currency Business Activity” must obtain a license.⁵⁶ “Virtual Currency Business Activity is defined broadly and includes: (1) receiving virtual currency for transmission or transmitting it;⁵⁷ (2) holding virtual currency for others; (3) buying and selling virtual currency as a customer business; (4) performing exchange services as a customer business; and (5) controlling, administering, or issuing a virtual currency.”⁵⁸ Transmission is defined as “the transfer, by or through a third party, of Virtual Currency from a Person to a Person, including the transfer from the account or storage repository of a Person to the account or storage repository of a Person.”⁵⁹ Additionally, New York requires that licensees establish and maintain a comprehensive anti-money laundering program.⁶⁰

Other states have chosen to address the issue through legislative action rather than by passing administrative rules. New Hampshire, for example, revised its money transmission law to explicitly cover virtual currencies. As of January 1, 2016, New Hampshire defines “monetary value” as “a medium of exchange, whether or not redeemable in currency, and includes convertible virtual currency.”⁶¹ In July 2016, North Carolina also revised its money transmission laws to cover Bitcoin. As explained by the North Carolina Commissioner of Banks, because “money transmission” is defined as the “act of engaging in the business of receiving money or monetary value for transmission within the United States or to locations abroad by any and all means, including payment instrument, wire, facsimile, or electronic transfer,” and “monetary value” is further defined as a “medium of exchange, whether or not redeemable in money,” virtual currency is within the scope of the money transmission laws.⁶²

money transmission.”); Kansas Guidance, *supra* note 48. (“Exchange of cryptocurrency for sovereign currency through a third-party exchanger is generally considered money transmission.”).

⁵⁴ Benjamin A. Lawsky, Superintendent of N.Y. Fin. Services, NYSDFS Announces Final BitLicense Framework for Regulating Digital Currency Firms (June 3, 2015), <http://www.dfs.ny.gov/about/speeches/sp1506031.htm>. A full analysis of the NY BitLicense is beyond the scope of this article.

⁵⁵ N.Y. Fin. Services Law, tit. 23, ch I, § 200, <https://www.nysenate.gov/legislation/laws/FIS>.

⁵⁶ N.Y. Fin. Services Law, tit. 23, ch I, § 200.3(a), <https://www.nysenate.gov/legislation/laws/FIS>.

⁵⁷ Transactions undertaken for non-financial purposes that do not involve the transfer of more than a nominal amount of Virtual Currency are exempted. N.Y. Fin. Services Law, tit. 23, ch I, § 200.2(q)(1), <https://www.nysenate.gov/legislation/laws/FIS>.

⁵⁸ N.Y. Fin. Services Law, tit. 23, ch I, § 200.2(q)(1-5), <https://www.nysenate.gov/legislation/laws/FIS>.

⁵⁹ N.Y. Fin. Services Law, tit. 23, ch I, § 200.2(o), <https://www.nysenate.gov/legislation/laws/FIS>.

⁶⁰ N.Y. Fin. Services Law, tit. 23, ch I, § 200.15, <https://www.nysenate.gov/legislation/laws/FIS>.

⁶¹ N.H. Rev. Stat. tit. XXXVI, § 399-G:1(XV) (Jan. 1, 2016), <http://gencourt.state.nh.us/rsa/html/XXXVI/399-G/399-G-1.htm>.

⁶² North Carolina Commissioner of Banks, *Money Transmitter Frequently Asked Questions*, <https://www.nccob.org/Public/financialinstitutions/mt/mtfaq.aspx> (last visited Dec. 2, 2016); N.C. Gen. Stat., Ch. 53, §§ 53-208.3(a), 53-208.2(a)(11)(b), and 53-208.2(a)(12) (2015).

PART III: FLORIDA V. ESPINOZA: THE LITTLE CASE THAT SHOULDN'T

The state of Florida had issued no guidance, either regulatory or legislative, with respect to virtual currency when, in December 2013, Detective Ricardo Arias of the Miami Electronic Crimes Task Force first made contact with a bitcoin seller on the website LocalBitcoins.com.⁶³ The seller, later identified as Michell Espinoza, identified himself on the website only as "michelhack."⁶⁴ Detective Arias purported to be interested in buying bitcoin.⁶⁵

Operating undercover, Detective Arias met Espinoza in person at a local coffee shop to purchase bitcoin on December 5, 2013.⁶⁶ The detective paid Espinoza \$500, for which he received from Espinoza an amount of bitcoin equal to only \$416.12.⁶⁷

On January 10, 2014, Detective Arias met again with Espinoza, this time at an ice cream store.⁶⁸ During this meeting, Detective Arias paid Espinoza \$1000 in exchange for bitcoin.⁶⁹ Espinoza charged Detective Arias \$167.56 for the transaction.⁷⁰ During this meeting, Detective Arias told Espinoza 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."⁷¹

Almost three weeks later, on January 30, 2014, Detective Arias and Espinoza negotiated via text message their third bitcoin exchange.⁷² Detective Arias paid Espinoza \$500; Espinoza charged Detective Arias \$65.74 for the transaction.⁷³ At this time, Detective Arias also told Espinoza he was interested in purchasing \$30,000 worth of bitcoin in the future.⁷⁴

The future arrived quickly. On February 6, 2014, Detective Arias met Espinoza in a hotel room in Miami Beach for the dual purpose of effecting a \$30,000 bitcoin transaction and arresting Espinoza.⁷⁵ In that room, Detective Arias offered Espinoza \$30,000 in

⁶³ The website LocalBitcoins.com, <https://localbitcoins.com>, last accessed on October 13, 2016, allows users to narrow their search geographically (for example, by narrowing the search to "Miami, FL," a buyer can locate sellers of bitcoin in the Miami area).

⁶⁴ Miami Field Office, U.S. Secret Service Investigative Report: "Operation Bitcoin Exchange" (on file with authors).

⁶⁵ *Id.*

⁶⁶ *Id.*, Espinoza, *supra* note 6.

⁶⁷ Espinoza, *supra* note 6; Investigative Report, *supra* note 64.

⁶⁸ Espinoza, *supra* note 6; Investigative Report, *supra* note 64.

⁶⁹ Espinoza, *supra* note 6.

⁷⁰ The U.S. Secret Service Investigative Report notes that there was a "BlockChain fee (0.0001 BTC)" added to this transaction. Investigative Report, *supra* note 64. Detective Arias paid Espinoza \$1,000.00 for the bitcoin. The specific profit amounts for each bitcoin exchange between the parties is supported by Espinoza. Def. Br. at 1. According to the report of this transaction, Espinoza received bitcoin worth \$832.26 in exchange. Investigative Report, *supra* note 64. A simple calculation reveals that the BlockChain fee of 0.0001 BTC was worth less than \$.25 in U.S. currency and amounted to less than a quarter of one percent of Espinoza's profit.

⁷¹ Espinoza, *supra* note 6.

⁷² Espinoza, *supra* note 6; Investigative Report, *supra* note 64.

⁷³ Investigative Report, *supra* note 64; Def. Br. at 1.

⁷⁴ Espinoza, *supra* note 6.

⁷⁵ Espinoza, *supra* note 6; Investigative Report, *supra* note 64.

purported U.S. currency for a bitcoin transaction. Espinoza declined to take the money, apparently suspecting (correctly) that it was counterfeit.⁷⁶ He was placed under arrest.⁷⁷

Espinoza proceeded to waive his rights and informed the officers that he had sold bitcoin over the internet to approximately 30-40 people and met approximately 20 people in person to sell bitcoin.⁷⁸ Espinoza said that he “does not really know any of the people that he exchanges money with.”⁷⁹

Espinoza was subsequently charged with one count of unlawfully engaging in business as an MSB in violation of § 560.125(5)(a) Fla. Stat. and two counts of money laundering in violation of § 896.101(5)(a). On September 17, 2015, Espinoza moved to dismiss the information.⁸⁰ The subsequent cross-filing of motions by the parties resulted in a memorandum of law filed by each party in June 2016.⁸¹

On July 22, 2016, Judge Teresa Pooler of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, issued an order granting Espinoza’s motion to dismiss the information. In the seven-page order,⁸² the court found that Espinoza was not a “money transmitter” for the purposes of Florida’s MSB statute,⁸³ and that Espinoza’s transactions with the undercover detective did not reflect an “intent to promote” illegal behavior for the purposes of Florida’s money laundering statute.⁸⁴ But the *Espinoza* court’s opinion is relevant not only for what the court did, but for what the court did *not* do. As set forth below, the *Espinoza* court first took several crucial missteps in its analysis of Florida’s MSB statute, and then neglected to acknowledge a key aspect of the money laundering statute.

The Espinoza court’s analysis is flawed with respect to both the money services business and anti-money laundering sections of the opinion.

The *Espinoza* court dismissed all three counts against the defendant. As explained in detail below, the court’s analysis of Espinoza’s money services business violation resulted from faulty reasoning and a failure to acknowledge relevant persuasive authority. The court’s analysis of Espinoza’s money laundering violations turned on an unrelated prong of the statute, but suffers from the same issues as the court’s reasoning on the first charge, resulting in problematic dicta that misconstrues key parts of the statute as they relate to bitcoin.

Count I – money services business violation

The court’s holding that the defendant did not qualify under Florida law as an MSB was based on three faulty lines of reasoning. First, the court held that Espinoza was not a “money transmitter” within the meaning of Florida’s MSB statute because it found that

⁷⁶ *Id.*

⁷⁷ Investigative Report, *supra* note 64.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Florida’s procedural method of dismissing criminal charges, Fla. Rule Crim. Pro. 3.190(c)(4).

⁸¹ *Espinoza*, *supra* note 6.

⁸² *Espinoza*, *supra* note 6.

⁸³ *Id.*

⁸⁴ *Id.*

Espinoza's sale of bitcoin to the undercover agent did not "meet the definition of transmit."⁸⁵ Second, the court held that Espinoza could not be considered a money transmitter because it concluded that the defendant did not charge a fee when he exchanged his bitcoin for cash.⁸⁶ Third, the court held that the defendant did not qualify as a "payment instrument seller" because it found that bitcoin is not money.⁸⁷

Florida proscribes engaging in an MSB without a license.⁸⁸ Any person who "acts as a payment instrument seller" or "money transmitter" is deemed to be an MSB under the law.⁸⁹ Payment instrument sellers include anyone who sells "money" or "monetary value"⁹⁰ and money transmitters are defined as those that "receive[] 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"⁹¹ Monetary value is explicitly defined in the statute as "a medium of exchange, whether or not redeemable in currency."⁹² "Transmit," however, is not defined.

The *Espinoza* court began its analysis of whether the defendant was an unlicensed MSB by analyzing whether he was a "money transmitter" under the statute.⁹³ To do so, the court focused on the word "transmit."⁹⁴ According to the court, to meet the definition of "transmit," Espinoza would have had to act as a middleman, taking money from person A and transferring it to person B.⁹⁵ If Espinoza did not send the undercover agent's money to a third party, according to the court, he did not engage in the act of "transmission."⁹⁶

Rather than cite legal authority to support its position that "transmit" within the meaning of the Florida statute requires the passing of money to a third party, the court looked to Black's Law Dictionary ("Black's"); Black's defines transmit as "to send or transfer (a thing) from one person or place to another."⁹⁷ Citing this definition and nothing else, the court concluded that because Espinoza was not a middleman, he did not qualify as a transmitter.⁹⁸

This analysis is deeply flawed. To begin with, the court's chosen definition does not support the court's holding. The court misconstrued the definition in Black's by seemingly focusing only on the language "to send or transfer ... from ... one person ... to another."⁹⁹ Under such a definition, a middleman requirement would perhaps be reasonable. But the definition is not so narrow. It explicitly includes sending something from *one place to*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Fla. Stat., tit. XXXIII, § 560.125.

⁸⁹ Fla. Stat., tit. XXXIII, § 560.103(18).

⁹⁰ Fla. Stat., tit. XXXIII, § 560.103(25), (26).

⁹¹ Fla. Stat., tit. XXXIII, § 560.103(19).

⁹² Fla. Stat., tit. XXXIII, § 560.103(17).

⁹³ *Espinoza*, *supra* note 6.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* (defining *Transmit*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

⁹⁸ *Id.*

⁹⁹ *Id.*

another. Under the full definition, an individual sending something from place A to place B is “transmitting.” He need not be a middleman. Indeed, no dictionary definition of transmit of which the authors of this article are aware includes a middleman requirement.¹⁰⁰

Although the court cited no authority or reasoning for adopting the middleman requirement (beyond reliance on the definition in Black’s), the argument appears to have been first made by the defense in its memorandum of law in support of its motion to dismiss.¹⁰¹ To the extent, if any, that the court relied on the supposed authority cited in the defense’s brief as a basis for adopting a middleman requirement, the court’s reliance was misplaced. Citing *United States v. Velastegui*, 199 F.3d 590, 592 (2d Cir. 1999), Espinoza falsely claimed that the “Second Circuit has construed the statute to require direction of the funds from a customer to a third party identified by the customer.”¹⁰²

First, the *Velastegui* court did not analyze Florida law. The statutes in question in *Velastegui* were 18 U.S.C. § 1960(a), which makes it a federal crime to knowingly operate a money transmitting business in violation of state law where the state requires a license, and New York’s MSB statute.¹⁰³ Florida’s statute was not at issue and, indeed, was not mentioned in the opinion. Second, and more significantly, the *Velastegui* court never addressed the meaning of “transmit”; the case simply does not stand for the proposition claimed by the defense.¹⁰⁴ The issue in *Velastegui* was whether an unlicensed agent of a licensed money transmitter who transmits money is operating a money transmitting business without a license as prohibited under New York law.¹⁰⁵

The *Espinoza* court also based its holding that Espinoza was not a money transmitter on its finding that he did not charge the undercover agent a fee when he sold him bitcoin.¹⁰⁶ The court erred here with respect both to its factual findings and to its legal analysis. Relying on *Velastegui* only, the court stated, “case law requires that a fee must be charged to meet all the elements of being a money transmitting business.”¹⁰⁷ It does not. As a mere dictum, the *Velastegui* court explained how money transmission businesses generally worked in 1999, the time the opinion was written. It explained, “A money transmitting business receives money

¹⁰⁰ Although the authors of this article do not believe that Black’s definition of transmit differs significantly from non-legal dictionaries, the court’s reliance on Black’s to define “transmit” ignores the rule as pronounced by the United States Supreme Court that an undefined term in a statute is given its “ordinary meaning.” *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S.Ct. 1997, 2002 (2012). The legal dictionary definition of “transmit” “would only be relevant if the legislature intended the term be given special meaning as a legal term of art.” See *United States v. Faiella*, 39 F. Supp. 3d 544 (S.D.N.Y. 2014). There is no evidence that the Florida legislature intended such a specialized meaning here.

¹⁰¹ Memorandum of Law in Support of Defendant’s Second Amended Motion to Dismiss Information Pursuant to Florida Rule of Criminal Procedure 3.190(c)(4) at 10.

¹⁰² *Id.* (emphasis added).

¹⁰³ *U.S. v. Velastegui*, 199 F.3d 590, (2d Cir. 1999).

¹⁰⁴ *Id.* at 592. As dicta, in the “Background” portion of its opinion the court noted, “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.” See *infra* note 108.

¹⁰⁵ *Velastegui*, 199 F.3d at 592. The authors acknowledge that the court did not expressly rely on *Velastegui* when it adopted the middleman requirement. However, the court does rely on *Velastegui* to support its finding that one must receive fees from customers to qualify as a money transmitter, see *infra* note 108. Additionally, when the case is reviewed by a Florida appellate court, one can expect the defense to again rely on *Velastegui* to advance the middleman requirement.

¹⁰⁶ *Espinoza*, *supra* note 6.

¹⁰⁷ *Id.* (emphasis added).

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.”¹⁰⁸ This statement no more creates a new element requiring that to be deemed a money transmitter one must collect a fee, than it creates an element that the money must be transferred to a foreign country.

Nor was the court correct when it concluded that Espinoza did not charge fees when he sold the bitcoin. The court explained that the defendant “purchases Bitcoin for ten percent under market value and sells them for five percent over market value.”¹⁰⁹ But then the court improperly concluded that this made the defendant “the equivalent of a day trader,” “purchas[ing] Bitcoin low and sell[ing] them high.”¹¹⁰ The scheme by which the defendant earned his fee and the fee itself, however, are significantly different from how a day trader earns a profit. A day trader seeks to buy stock when the market value of the stock is low and then seeks to sell the stock when the market value of the stock increases. The day trader’s profit is tied directly to the market value of the stock; the trader only makes a profit if he can successfully sell the stock when the stock reaches a higher price than the price at which it was initially bought. If the price of the stock does not rise, the day trader does not make a profit.

Espinoza, though, would collect a fee regardless of whether at the time of the sale the price of bitcoin had increased from the price at which it was initially bought. If, for example, Espinoza bought one bitcoin when the market value of the bitcoin was \$500 and sold the bitcoin when the market value of the bitcoin was still \$500, Espinoza would nevertheless make a profit—he would still charge five percent over the market value of the bitcoin.

A review of the discovery shows that on December 5, 2013, January 10, 2014, and January 30, 2014, Espinoza charged the undercover agent \$83.67, \$167.56, and \$83.67, respectively, to exchange his U.S. dollars for bitcoin.¹¹¹ These fees were separate and apart from any profit Espinoza would gain from having initially bought bitcoin at a lower market price than the price at which he sold it to the agent. For example, the December 5, 2013, transaction involved Espinoza transferring 0.40322580 bitcoin to the undercover agent in exchange for the agent paying Espinoza \$500. But the market value of 0.40322580 bitcoin at the time was only \$416.12, not \$500. Espinoza retained \$83.67.

The court ignored these facts, however. Instead, it stated that when the agent was deposed he referred to the \$83.67 as Espinoza’s “profit,” thereby, according to the court, acknowledging that the defendant did not receive a fee.¹¹²

A Florida appellate court who reviews *Espinoza* will likely consider FinCEN’s guidance and rulings in determining whether Espinoza was a money transmitter. Espinoza fits squarely within FinCEN’s definition of an exchanger because he engaged as a business¹¹³

¹⁰⁸ *Velastegui*, 199 F.3d at 592.

¹⁰⁹ *Espinoza*, *supra* note 6.

¹¹⁰ *Espinoza*, *supra* note 6.

¹¹¹ Investigative Report, *supra* note 64.

¹¹² *Espinoza*, *supra* note 6.

¹¹³ According to the U.S. Secret Service Investigative Report, *supra* note 64, Espinoza told the arresting agents that he had sold bitcoin to approximately 30-40 different people over the internet and met with approximately 20 people in Miami for the purposes of buying and selling bitcoin. Application of FinCEN’s Regulations to Persons Administering, Exchanging or Using Virtual Currencies, *supra* note 41.

in the exchange of virtual currency for real currency.¹¹⁴ FinCEN has provided that a bitcoin exchanger who sells convertible virtual currency in exchange for currency of legal tender or another convertible virtual currency *for any reason* is a money transmitter.¹¹⁵ Although not referenced in the trial court's opinion, the Espinoza facts are covered under FinCEN's Oct. 27, 2014 ruling in which it specifically held a bitcoin exchanger acting as a dealer transacting from his own bitcoin reserve is acting as a money transmitter.¹¹⁶

The Espinoza court's third error with respect to its finding that the defendant was not an MSB was that it improperly concluded with nearly no analysis that the defendant did not qualify as a "payment instrument seller."¹¹⁷ The court spent all of three sentences explaining why Espinoza did not satisfy this prong of the statute:

[T]he 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. "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.¹¹⁸

The glaring flaw with this conclusory assertion is that in declaring that bitcoin does not fit under any of the "defined categories" of a payment instrument, the court failed to acknowledge that "monetary value" is included among those defined categories. The court provided no analysis as to whether bitcoin is monetary value. Indeed, reading the court's opinion, one would not even know that the words "monetary value" appear in the MSB statute.

Florida is not alone in regulating the transfer of "monetary value," nor is its definition of the term inconsistent with the definition typically ascribed to it.¹¹⁹ "Monetary value" is defined in the Florida code as "a medium of exchange, whether or not redeemable in

¹¹⁴ Espinoza does not fit the definition of a mere user converting his bitcoins to currency: the additional five percent he charged his customers illustrates that he was engaging in a "business service performed for the benefit of another." See Dep't of the Treasury, Application of FinCEN's Regulations to Virtual Currency Software Development and Certain Investment Activity, <https://www.fincen.gov/sites/default/files/shared/FIN-2014-R001.pdf>.

¹¹⁵ Application of FinCEN's Regulations to Virtual Currency Mining Operations, *supra* note 44 (emphasis added).

¹¹⁶ Request for Administrative Ruling on the Application of FinCEN's Regulations to a Virtual Currency Payment System, *supra* note 46.

¹¹⁷ *Espinoza*, *supra* note 6, at 5.

¹¹⁸ *Id.* (internal citation omitted).

¹¹⁹ The defense's reliance upon the Texas Department of Banking's guidance to support its position that Espinoza's actions did not qualify as a money transmitter is misplaced. Texas's guidance is inapposite because of the unique definition Texas assigns to the term "monetary value," placing it outside Texas's MSB and money transmission laws. Texas Finance Code §151.301(b)(3) provides that "'money' or 'monetary value' means currency or a claim that can be converted into currency through a financial institution, electronic payments network, or other formal or informal payment system." See *supra* note 50. The authors acknowledge that the Espinoza court does not expressly state that it relied on the Texas guidance to define "transmit." However, when the case is reviewed on appeal, one can expect the defense to again rely on the guidance to support its position that Espinoza is not a money transmitter.

currency.”¹²⁰ This definition is consistent with that of the federal government and approximately twenty states, and nearly identical to that proposed by the Uniform Law Commission (the “ULC”) in the Uniform Money Services Act (the “UMSA”).¹²¹ As explained in the comments to the UMSA, monetary value was purposely defined with a degree of flexibility to allow regulators to deal with emerging forms of technology.¹²²

Although Florida has not defined virtual currency, FinCEN and the Conference of State Bank Supervisors (“CSBS”), a voluntary organization of financial regulators, have both defined it, in part, as a “medium of exchange” that is not legal tender.¹²³ As such, virtual currency, including bitcoin, fits within the definition of monetary value, thus making it a payment instrument. The sale of bitcoin is, therefore, the sale of a payment instrument, making the bitcoin seller a “payment instrument seller.”

The *Espinoza* court, though, chose to ignore these definitions, indeed failing to even consider whether bitcoin was “monetary value.” Instead, while at the same time acknowledging its own inability to “accurately define or describe Bitcoin,” and admitting not to be an expert in economics, the court opined that bitcoin is not money.¹²⁴ In deciding that bitcoin did not meet the statutory definition of a payment instrument, the court cited the irrelevant decision by the Internal Revenue Service (“IRS”) to treat bitcoin as property for tax purposes.¹²⁵ The court offered no reason why an IRS decision would be relevant to the issue.

The *Espinoza* court’s proclamation that “[t]he Florida Legislature may choose to adopt statutes regulating virtual currency in the future, [but] attempting to fit the sale of Bitcoin into a statutory scheme regulating money services business is like fitting a square peg in a round hole,”¹²⁶ ignores the broad language the legislature chose to use when it first adopted its MSB laws. Rather than limiting the state’s money transmission laws to “money” or “currency,” the legislature explicitly included the term “monetary value.” The purpose of including such broad language in the definition is to cover more than fiat currency, without having to name every prospective medium of exchange. To force the legislature to name every unit it anticipates may be used in the future is counterproductive and leaves the

¹²⁰ Fla. Stat., tit. XXXIII, § 560.103(21).

¹²¹ Uniform Money Services Act (2004) § 102 (defining monetary value as “a medium of exchange, whether or not redeemable in money”).

¹²² Uniform Money Services Act (2004) § 102 cm. 10 (“The definition of monetary value, to some extent, must remain flexible to allow regulators to deal with emerging forms of monetary value . . . on a case-by-case basis.”).

¹²³ Application of FinCEN’s Regulations to Persons Administering, Exchanging or Using Virtual Currencies (Mar. 18, 2013), *supra* note 41; CSBS, State Regulatory Requirements for Virtual Currency Activities CSBS Model Regulatory Framework 2 (Sept. 15, 2015), [https://www.csbs.org/regulatory/ep/Documents/CSBS-Model-Regulatory-Framework\(September%2015%202015\).pdf](https://www.csbs.org/regulatory/ep/Documents/CSBS-Model-Regulatory-Framework(September%2015%202015).pdf); The ULC has not adopted a final definition of “virtual currency.” The last draft definition defined virtual currency, in part, as a “medium of exchange” that is not legal tender. National Conference of Commissioners on Uniform State Laws, *Draft Regulation of Virtual Currency Business Act* 4-5 (June 3, 2016), http://www.uniformlaws.org/shared/docs/regulation%20of%20virtual%20currencies/2016AM_VirtualCurrencyBusinesses_Draft.pdf.

¹²⁴ *Espinoza*, *supra* note 6, at 5-6. The court reasoned that bitcoin is not money because it is not backed by any central authority, is not accepted by all merchants, and has a volatile value.

¹²⁵ See I.R.S. Notice 2014-21, 2014-16 I.R.B., <http://www.irs.gov/pub/irs-drop/n-14-21.pdf> (discussing the I.R.S. guidance on Virtual Currency).

¹²⁶ *Espinoza*, *supra* note 6, at 6.

legislature in the untenable position of having to predict the technological advances of the future.

Money laundering charges

Just as the *Espinoza* court failed to consider whether bitcoin is monetary value under Florida's MSB laws, the court also failed to consider whether bitcoin is "funds" under Florida's anti-money laundering statute. The portion of Florida's anti-money laundering statute under which *Espinoza* was charged makes it a crime, in relevant part, to "conduct or attempt to conduct a financial transaction" when the person's conduct or attempted conduct is undertaken with the intent "[t]o promote the carrying on of specified unlawful activity."¹²⁷

The statute defines "financial transaction" as "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...."¹²⁸ "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."¹²⁹ The statute does not define the term "funds."¹³⁰

Notwithstanding its finding that *Espinoza* conducted a financial transaction, the *Espinoza* court dismissed the money laundering charges on its determination that the defendant did not "inten[d] to promote" a specified unlawful activity.¹³¹ The court's finding that the parties engaged in a "financial transaction"¹³² was therefore not dispositive; however, the court's reasoning with respect to the "financial transaction" requirement must be addressed because it leaves a misimpression as to how bitcoin might fit into Florida's anti-money laundering framework.¹³³ Specifically, the court failed either to (1) acknowledge that a "financial transaction" includes the movement of *either funds or monetary instruments*; or (2) analyze whether bitcoin constitutes "funds" for the purposes of the statute.

The court found that while bitcoin is not a monetary instrument, *Espinoza* conducted a "financial transaction" because the undercover officer's use of U.S. currency sufficed as "one or more monetary instruments."¹³⁴ The authors of this article agree with the court that bitcoin is not a "monetary instrument" as defined by the Florida legislature. It is what the court said next that we find troubling. The court said: "If the [money laundering] statute is read to mean that in the transaction, the defendant must be the party who uses the monetary

¹²⁷ Fla. Stat. § 896.101(2)(d); (2)(d)(1).

¹²⁸ Fla. Stat. § 896.101(2)(d) (emphasis added).

¹²⁹ Fla. Stat. § 896.101(2)(e).

¹³⁰ *Id.*

¹³¹ *Espinoza*, *supra* note 6, at 7.

¹³² *Espinoza*, *supra* note 6, at 6-7.

¹³³ An analysis of the Defendant's potential liability as a promoter for the purposes of Florida's anti-money laundering statute is beyond the scope of this article. However, assuming the case is reviewed *de novo* by a Florida appellate court, one can expect the promoter issue to be revisited, in which case the issue of how bitcoin fits into the definition of "financial transaction" under Florida law may become dispositive.

¹³⁴ *Espinoza*, *supra* note 6, at 6-7.

instruments then the money laundering statute would not apply in this case, because Bitcoins, as previously discussed, are not monetary instruments.”¹³⁵

The court’s assertion that “the money laundering statute would not apply” if not for the undercover officer’s U.S. currency is misleading.¹³⁶ It ignores that a transaction involving the movement of funds is a “financial transaction,” regardless of whether a monetary instrument is used. In other words, if bitcoin is “funds,” then the money laundering statute applies even if the transaction does not involve U.S. currency.¹³⁷

Is bitcoin “funds” for the purposes of Florida’s money laundering statute?

In the absence of Florida law on point, and especially in the evolving area of Bitcoin, one expects a Florida appellate court who reviews *Espinoza* to consider non-binding authorities who have addressed the issue of whether bitcoin is “funds” in parallel statutes. Although the *Espinoza* court ignored this question, the parties in *Espinoza* did attempt to address it.¹³⁸

In support of its argument that bitcoin is “funds,” the State cited a widely known case from the Southern District of New York analyzing whether bitcoin is “funds” under the federal money laundering statute.¹³⁹

The federal money laundering statute’s definition of “financial transaction” is substantively identical to Florida’s money laundering statute. It provides that a financial transaction is “...a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments....”¹⁴⁰ In both the federal and the Florida money laundering statutes, the term “funds” is undefined. Acknowledging that “funds” is not defined in the federal statute, the *Ulbricht* court found that the term “funds” must be given its ordinary meaning¹⁴¹ and held that bitcoin falls within the ordinary meaning of “funds.”¹⁴²

To determine the ordinary meaning of “funds,” the *Ulbricht* court looked to an online English dictionary, which defined “funds” as “money, often money for a specific purpose,” and concluded: “The money laundering statute is broad enough to encompass use

¹³⁵ *Id.*

¹³⁶ Not only did the *Espinoza* court ignore the question of whether bitcoin is “funds,” but the court accordingly removed “funds” entirely from its definition of “financial transaction.” The court defined “financial transaction” as a “transaction ... involving one or more monetary instruments, which in any way or degree affects commerce” *Espinoza*, *supra* note 6, at 6-7 (truncation in original).

¹³⁷ It is not the intent of this paper to suggest the *Espinoza* court erred in finding the undercover officer’s use of U.S. currency sufficient to meet the requirement of “one or more monetary instruments” under the *second prong* of the “financial transaction” definition, but rather to explore the absence of any analysis of bitcoin as “funds” under the *first prong*—a prong ignored by the court in its iteration of the statutory definition of “financial transaction.” Indeed, the court could have raised and disregarded the argument that bitcoin is “funds,” relying solely on the officer’s U.S. currency as “one or more monetary instruments,” without ignoring and truncating the statutory definition.

¹³⁸ Def.’s Memorandum of Law in Support of Motion to Dismiss (June 14, 2014), at 5, 12; State’s Memorandum of Law in Opposition to Def.’s Motion to Dismiss (June 16, 2014), at 6-7.

¹³⁹ *U.S. v. Ulbricht*, 31 F. Supp. 3d 540, 569-70 (S.D.N.Y. 2014).

¹⁴⁰ 18 U.S.C. § 1956(c)(4).

¹⁴¹ *Ulbricht*, 31 F. Supp. 3d at 556.

¹⁴² *Id.* at 570.

of Bitcoins in financial transactions. Any other reading would—in light of Bitcoins' sole *raison d'être*—be nonsensical.”¹⁴³

While *Ulbricht* was not binding on the *Espinoza* court, its analysis of whether bitcoin is “funds” for the purposes of forming a “financial transaction” should have been—if not persuasive—at least addressed. The *Ulbricht* court's reasoning has since been adopted in other cases, including a very recent case that analyzed the definition of “funds” in the federal anti-money laundering context.¹⁴⁴ In that case, the Southern District of New York held that bitcoin is “funds” for the purposes of the federal statute prohibiting unlicensed MSBs.¹⁴⁵

While this new case was unavailable to the *Espinoza* court during its review, it will be available to an appellate court reviewing the *Espinoza* decision. The Florida appellate court considering this question on appeal will, therefore, have new persuasive authority to consider.

In *U.S. v. Murgio*, the S.D.N.Y. specifically rejected the same definition of “funds” asserted by *Espinoza*.¹⁴⁶ *Murgio*, which dealt with § 1960, the federal money services business statute, concluded that bitcoins are “funds” under the statute.¹⁴⁷ Like the court in *Ulbricht*, the *Murgio* court consulted a standard dictionary, rather than a legal dictionary,¹⁴⁸ to define “funds” as “available pecuniary resources,” defining “pecuniary” as “taking the form or consisting of money,” and “money” as “something generally accepted as a medium of exchange, a measure of value, or a means of payment.”¹⁴⁹ The *Murgio* court, applying the “plain meaning of” “funds,” held that bitcoin is “funds” because it can be accepted as payment for goods and services or bought from an exchange and, therefore, “function[s] as pecuniary resources” and is “used as a medium of exchange” and a “means of payment.”¹⁵⁰

Crucially, the *Murgio* court rejected *Murgio*'s definition of “funds”—the same definition proffered by *Espinoza*—because it is in fact the definition of the word “fund,” as in, for example, “trust fund.”¹⁵¹ Black's Law Dictionary provides that “fund” means “[a] sum of

¹⁴³ *Id.* at 569-70. The *Ulbricht* court was presented with a defendant who attempted to “wash the proceeds of criminal activity,” 31 F. Supp. 3d at 570. *Espinoza* was charged with violating the “sting provision” of Florida's money laundering statute; the undercover officer represented to the Defendant that he intended to use the bitcoin he purchased from Defendant in a future illegal activity (purchasing stolen credit cards for the presumed intention of identity theft). The factual differences here (also noted by the *Murgio* court, *supra* note 9) are not irrelevant, and the *Espinoza* court's discomfort with penalizing the Defendant under these specific facts is not irrational. However, these facts need not have interfered with the *Espinoza* court's analysis of bitcoin as a “financial transaction”—especially when any decision in this growing area of law receives so much attention.

¹⁴⁴ *U.S. v. Murgio*, 2016 WL 5107128, (S.D.N.Y. Sept. 19, 2016).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at *4. Once again relying on Black's, *Espinoza* asserted that “funds” should be defined as “[a] sum of money or other liquid assets established for a specific purpose.” Def. Br. at 5 (alteration in original).

¹⁴⁷ The *Murgio* court explicitly acknowledged that the definition of “funds” under § 1960 and analysis of “funds” under § 1956 constituted “the same analysis.” *Murgio*, 2016 WL 5107128 at *3.

¹⁴⁸ The *Murgio* court disagreed that Black's, as a legal dictionary, should be the “starting point for defining ‘funds,’” as this “ignores the rule that an undefined term in a statute is given its ‘ordinary’ meaning,” not as a legal term of art. *Murgio*, 2016 WL 5107128 at *4; accord *Ulbricht*, 31 F. Supp. 3d at 570 (citing standard dictionary).

¹⁴⁹ *Id.* at *4-5, citing *Ulbricht*, 31 F. Supp. 3d at 570 (funds are “defined as ‘money, often money for a specific purpose,’” and “money is an object used to buy things”).

¹⁵⁰ *Id.* at *4.

¹⁵¹ *Id.*

money or other liquid assets established for a specific purpose.”¹⁵² To illustrate the meaning of this word, Black’s provides the example, “a fund reserved for unanticipated expenses.”¹⁵³ Black’s then provides a separate definition for the plural form of the word, “funds.” As defined by Black’s, “funds” means “[m]oney or other assets, such as stocks, bonds, or working capital, available to pay debts, expenses, and the like.”¹⁵⁴ To illustrate the definition of funds, it provides the example, “Sue invested her funds in her sister’s business.”¹⁵⁵ The *Murgio* court found that Murgio had ignored that Black’s actual definition of “funds,” which includes “other assets,” is “clearly broader than just currency.”¹⁵⁶ Espinoza’s reliance on the definition of “fund” in Black’s rather than “funds” must fail for the same reasons.

Espinoza must be overturned on appeal and, in the interim, no court should rely on the misleading dicta or incorrect holdings.

The *Miami Herald*’s description of the then-pending *Espinoza* case in May 2016, before the court issued its order, is no less accurate today: the case against Espinoza remains a “Miami money-laundering case that is being closely watched around the world.”¹⁵⁷ Yet it is noteworthy that that article was published in the *Miami Herald*’s “local/crime” section. It is this juxtaposition of the small (one local bitcoin seller, one state court order) and the gargantuan (the *Espinoza* case “may define whether Bitcoin is really money,” shouts the headline of the *Miami Herald* article) that characterizes the *Espinoza* problem.¹⁵⁸ And while *Florida v. Espinoza* has already been criticized by the S.D.N.Y.,¹⁵⁹ the seemingly tiny Florida state court case has the potential to remain gargantuan if the court’s missteps are not swiftly corrected on appeal.

Although no Florida trial court opinion is binding, we must not forget that in this nascent area of law, “ev’ry American experiment sets a precedent.”¹⁶⁰ The law of Bitcoin is only just starting to take form. Prior to *Espinoza*, no state court had addressed Bitcoin within the context of MSB or anti-money laundering laws. If the *Espinoza* holdings are allowed to remain intact, there can be no doubt that future courts addressing these issues will feel the need to address—and perhaps rely on—the *Espinoza* court’s reasoning. Reasoning that is deeply flawed. Reasoning that is based on fundamental misunderstandings of what Bitcoin is and how it works. Reasoning that ultimately limits the government’s ability to guard against the dangers that come along with the power to transfer value globally within minutes while maintaining partial anonymity.

The answers to whether bitcoin is monetary value or funds and, therefore, subject to MSB and anti-money laundering laws, are of massive consequence. Conclusory opinions such as *Espinoza*, which fail to answer these questions yet at the same time assert that the

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Ovalle, *supra* note 5.

¹⁵⁸ *Id.*

¹⁵⁹ *Murgio*, *supra* note 144.

¹⁶⁰ Lin-Manuel Miranda et al., *supra* note 1.

government cannot use its existing laws to regulate Bitcoin, must not be allowed to stand and must not be relied on while awaiting appeal. The whole world was watching the *Espinoza* court's decision. Act II is in many hands: now a Florida appellate court needs to minimize the damage of *Espinoza*, while both the legal and financial communities must avoid relying on *Espinoza*'s mistakes until the decision is overturned.