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TABLE OF ABBREVIATIONS

"Br. Sup. Mn. New Tr." -- Brief in Support of Sanders' Motion for New Trial

"Br. Sup. Rule 29 Mn." -- Brief in Support of Rule 29 Motion

"Def. Req. Jury Instr. No. ____" -- Defendant's Requested Jury Instruction No. ___

"Find. Mn. New Tr." -- Findings of Fact, Conclusions of Law and Order on Motion for New Trial, at 3).

"Mem. L. Num. One" -- Memorandum of Law Number One in Support of Motion to Dismiss Counts One and Two

"Mem. L. Num. Two" -- Memoranum of Law NUmber Two in Support of Motion to Dismiss Indictment for Violations of the TEPA by the Commissioner of Revenue & His Delegates

"Mem. L. Num. Three" -- Memorandum of Law Number Three on Motion to Dismiss Counts One and Two of the Indictment for Vagueness and Violation of Due Process

"Mem. L. Num. Four" -- Memorandum of Law Number Four in Support of Motion to Dismiss Counts One and Two of the Indictment

"Mn. Ds." -- Motion to Dismiss

"Post-Trial Mn." -- Post-Trial Motion

"R. at ___ " -- Record at ___

"R., Vol. ___, at ___" -- Record, Volume ___, at ___

"Rsp." -- Response

"T.C.A." -- Tennessee Code Annotated

"Tr. Mn. New Tr. -- Transcript of Defendant's Motion for New Trial

"Tr. Ev., Vol. ___" -- Transcript of the Evidence, Volume ___

"Tr. Mn. Proceed." -- Transcript of Motion Proceedings [of date]

"Tr. Sent. Hear." -- Transcript of the Sentencing Hearing

"U.S.C.A." -- United States Code Annotated

Cause No. 02C01-9305-CR-00102

IN THE
COURT OF CRIMINAL APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

STATE OF TENNESSEE, Appellee,	*	
vs.	*	Case No. 89-06883
FRANKLIN SANDERS, d/b/a MONEYCHANGER, S.P., Appellant.	*	

On appeal from the Criminal Court of Tennessee at Memphis, the Thirteenth Judicial District (The Honorable John P. Colton, J.)

APPELLANT'S BRIEF

INTRODUCTION

Pursuant to Tennessee Rule of Appellate procedure 27(a), appellant C. Franklin Sanders submits this brief in support of his appeal.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

ISSUE No. I. Did the Criminal Court err in denying Sanders' motions to dismiss the indictment, for judgment of acquittal under Tennessee Rule of Criminal Procedure 29, and for a new trial under Tennessee Rule of Criminal Procedure 33, and therefore should Sanders' convictions under Tennessee Code § 67-1-1440(d) for feloniously failing to file sales-tax returns be reversed and the indict-

ment dismissed, because prior to the indictment:

A. Sanders was a "moneychanger", exchanging Federal Reserve Notes ("FRNs") for domestic and foreign legal-tender silver and gold coins and for silver bullion;

B. Sanders had a nonfrivolous legal theory that (i) FRNs, domestic and foreign legal-tender silver and gold coins and silver bullion are all "money" under the laws of the United States and of the State of Tennessee, and (ii) exchanges of money for money are not subject to sales tax;

C. no civil, administrative, or criminal precedent in Tennessee had previously established that exchanges of FRNs for domestic or foreign legal-tender silver or gold coins, or for silver bullion, are taxable; and, therefore,

D. his indictment and conviction in this case of first impression deprived Sanders of due process of law, under the doctrine of United States v. Mallas, 762 F.2d 316 (4th Cir. 1985), and cognate cases?

ISSUE No. II. Did the Criminal Court err in denying Sanders' motions for judgment of acquittal and for a new trial under Tennessee Rules of Criminal Procedure 29 and 33, and therefore should his convictions under Tennessee Code § 67-1-1440(d) for feloniously failing to file sales-tax returns as to exchanges of FRNs for United States legal-tender silver or gold coins, for gold Krugerrands that are legal tender in their country of origin, and for silver bullion be reversed and judgment of acquittal entered, because:

A. exchanges of money for money are not taxable; and

B. exchanges of FRNs for United States legal-tender gold or silver coins, gold Krugerrands that are legal tender in their country of origin, and silver bullion are exchanges of money for money, which the State of Tennessee is required to treat as such under the Constitution, laws, and judicial precedents of the United States and the State of Tennessee?

ISSUE No. III. Did the Criminal Court err in denying Sanders' motions for judgment of acquittal and for a new trial under Tennessee Rules of Criminal Procedure 29 and 33, and therefore should his convictions under Tennessee Code § 67-1-1440(d) for feloniously failing to file sales-tax returns as to exchanges of FRNs for United States legal-tender silver or gold coins, for gold Krugerrands that are legal tender in their country of origin, and for silver bullion be reversed and judgment of acquittal entered, because, even if silver bullion is not money under the Constitution, laws, and judicial precedents of the United States and the State of Tennessee:

A. 1. United States legal-tender silver and gold coins and legal-tender gold Krugerrands are money as a matter of law; and

2. the total value of exchanges involving silver bullion was only $22,608.00 in FRNs, which would not have generated a "sales tax revenue * * * exceeding five thousand dollars", as alleged in the indictment? And,

B. 1. The State contended that exchanges of silver and gold coins are taxable if the coins are acquired for "investment";

2. only one of Sanders' customers testified that he had any "investment" intent in exchanging FRNs for silver and gold coins;

3. the value of this customer's exchanges involving silver and gold coins totalled $13,020.33 in FRNs; and

4. these exchanges ($13,020.33) and all Sanders' exchanges of silver bullion ($22,608.00) totalled only $35,628.33 in FRNs, which would not have generated a "sales tax revenue * * * exceeding five thousand dollars", as alleged in the indictment?

ISSUE No IV. Did the Criminal Court err in denying Sanders' motions for judgment of acquittal and for a new trial under Tennessee Rules of Criminal Procedure 29 and 33, and therefore should his convictions under Tennessee Code § 67-1-1440(d) for feloniously failing to file sales-tax returns be reversed and judgment of acquittal entered, or a new trial ordered, because:

A. 1. Sanders asserted the defense that he believed in good faith that exchanges of FRNs for United States legal-tender silver or gold coins, for gold Krugerrands that are legal tender in their country of origin, and for silver bullion were not taxable, inasmuch as he was "selling" one kind of money (silver or gold coins or bullion) and "buying" another kind (FRNs);

2. over Sanders' objection, three customers testified that they had not intended to sell to Sanders the FRNs with which they had purchased silver or gold coins or silver bullion from him;

3. in violation of the parole-evidence rule, this testimony contradicted the explicit terms of the printed contracts that memorialized the exchanges;

4. none of the customers had communicated his supposed intent to Sanders;

5. the State relied on this testimony to impute to Sanders an intent to deceive, thereby negating his defense of good faith;

6. the testimony was incompetent, irrelevant, misleading and confusing to the jury, and unfairly prejudicial to Sanders, adversely affecting his substantial rights; and, therefore,

7. the Criminal Court's allowance of the testimony over objection was error under Tennessee Rules of Evidence 103, 401, 402, and 403 and Tennessee Code § 47-2-202 and judicial decisions; or (in the alternative) the State's use of the testimony denied Sanders due process of law?

B. 1. Sanders testified that he relied on various legal and other materials to arrive at his conclusion that moneychanging is not taxable; but

2. the Criminal Court refused to admit those materials into evidence, although (i) they were relevant to the jury's determination of what Sanders thought the law was, and thereby to the jury's determination of whether Sanders acted "feloniously", and (ii) their exclusion unfairly prejudiced Sanders' ability to present his defense of good faith; and, therefore,

3. the Criminal Court erred under Tennessee Rules of Evidence 103, 401, and 402, denying Sanders a substantial right, or (in the alternative) denied him due process of law?

C. 1. A violation of Tennessee Code § 1-67-1440(d) requires "felonious" (that is, "willfull") intent;

2. the indictment charged Sanders with acting "feloniously";

3. Sanders requested jury-instructions on the definitions of the terms "feloniously" and "willfully", and on his defense of good faith;

4. the Criminal Court denied these instructions, giving only instructions on the definitions of "intentionally", "knowingly", and "design", which failed to inform the jury that, to convict, it must find that Sanders engaged in a voluntary violation of a known legal duty; and, therefore,

5. The Criminal Court erred, or (in the alternative) denied Sanders due process of law?

ISSUE No V. Did the Criminal Court err in denying Sanders' motions to dismiss the indictment, for judgment of acquittal under Tennessee Rule of Criminal Procedure 29, and for a new trial under Tennessee Rule of Criminal Procedure 33, and therefore should his convictions under Tennessee Code § 67-1-1440(d) for feloniously failing to file sales-tax returns be reversed and the indictment dismissed, because prior to the indictment the State never followed the Tax Enforcement Procedures Act to collect any revenue Sanders allegedly owed, or even to determine whether it was lawfully entitled to any revenue?

ISSUE No. VI. Did the Criminal Court err in denying Sanders' motions for judgment of acquittal and for a new trial under Tennessee Rules of Criminal Procedure 29 and 33, and therefore should his conviction under Tennessee Code § 67-1-1440(d) for feloniously failing to file sales-tax returns be reversed as to the

first count in the indictment, and that count dismissed, because:

A. the indictment contained two separate counts under § 67-1-1440(d), one for "feloniously delay[ing] the State of Tennessee in the collection of its lawful revenue" and the other for "feloniously depriv[ing] the State of Tennessee of the realization of such revenue";

B. for each count, the State adduced the selfsame evidence to prove the selfsame conduct, to wit, that Sanders had neither filed sales-tax returns nor paid over any tax monies allegedly owed with respect to certain exchanges; and, therefore,

C. Sanders' convictions on both counts constitute multiple convictions and punishments for the same offence ("multiplicity" or "double jeopardy"), in violation of the Fifth Amendment and § 1 of the Fourteenth Amendment to the Constitution of the United States, and of Article I, § 10 of the Constitution of the State of Tennessee?

ISSUE No. VII. Did the Criminal Court err in imposing restitution of more than $5001.00, where the only rational inference from the jury's general verdict was that Sanders owed more than $5,000.00 in sales tax, how much more being indeterminate?

STATEMENT OF THE CASE

This is an appeal of C. Franklin Sanders' convictions by a jury in the Criminal Court for the Thirteenth Judicial District at Memphis (John P. Colton, Jr., Presiding Judge) under an indictment

charging violations of Tennessee Code § 67-1-1440(d),[1] as follows:

> First Count: "that FRANKLIN SANDERS d/b/a F. SANDERS, MONEYCHANGER, S.P. during a period between December 1, 1983 and November 1, 1986 * * * did unlawfully and feloniously delay the State of Tennessee in the collection of its lawful revenue, to-wit, sales tax revenue, of an amount exceeding five thousand dollars ($5,000.00) by design in that he, FRANKLIN SANDERS, failed to file monthly sales tax returns required by law * * * ."
>
> Second Count: "that FRANKLIN SANDERS d/b/a F. SANDERS, MONEYCHANGER, S.P. during a period between December 1, 1983 and November 1, 1986 * * * did unlawfully and feloniously deprive the State of Tennessee in the collection of its lawful revenue, to-wit, sales tax revenue, of an amount exceeding five thousand dollars ($5,000.00) by design in that he, FRANKLIN SANDERS, failed to file monthly sales tax returns required by law * * * ."[2]

The jury found Sanders guilty on both counts "in failing to file monthly sales tax returns as charged".[3]

The Criminal Court sentenced Sanders to one year of imprisonment on each count, the sentences to be served concurrently but "suspended except for * * * thirty days confinement". The Court also ordered restitution of $73,000.00, "paid out at $1000.00 per month with a probation of six years", and "1000 hours community

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[1] Section 67-1-1440(d) provides that "It is a class E felony for any person to delay, hamper, hinder, impede, obstruct or thwart the state of Tennessee in the collection of any of its lawful revenue, or to deprive the state of the realization of such revenue at the time it is lawfully entitled thereto by any artifice, design, false weight or measure, stategem, or by the falsification of any record, report or return required by law."

[2] Record at 3-5. (Hereinafter, Sanders shall cite the record as follows: "R. at ___", "R., Vol. ___, at ___".)

[3] R., Vol. 17, at 35 (Tr. Ev., Vol. 8, at 35); 255. (Abbreviations of materials in the record are defined in the TABLE OF ABBREVIATIONS, ante, at xiv.)

service".[4]

Sanders now appeals, raising the issues set out in the STATEMENT OF THE ISSUES PRESENTED FOR REVIEW, ante.

STATEMENT OF THE FACTS

I. During the period charged in the indictment, Sanders was a "moneychanger" in Memphis, Tennessee, "exchang[ing] gold and silver for paper money and vice versa".[5] To Sanders -- and to the State and the Criminal Court as well, which never challenged his definition -- a "moneychanger" is "'one whose occupation is the exchanging of kinds or denominations of currency'".[6] As the case-law upon which Sanders relied explained,

> [t]he common meaning of the term pertained to those who in early history engaged in the business of foreign exchange. * * * [A]fter bullion was superseded by coin and each nation or peoples had a coin of its own, merchants dealing with these various nations or peoples would, necessarily, in the course of their business or trade, receive coins belonging to different nations and hence would be applied to by strangers who wished to exchange their own money for the money of the country in which they sojourned.
>
> It appears that merchants attending foreign markets brought with them gold in bars and quantities of fine silver, which they exchanged on the spot for the currency or coin of the place where their business was to be transacted. Charges were made for these exchanges and the business of money changing became very lucrative. This we deem to be the commonly accepted understanding of the meaning of the term "money changers."
>
> * * * "A money-changer is defined * * * to be 'a broker who deals in money or exchanges.' The word has passed out of common use, but when used, we understand it in [that] sense * * * . Thus defined, it is certainly included in the business of a banker, and constitutes, indeed, the greater part

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[4] R., Vol. 20, at 36-37 (Tr. Sent. Hear., at 36-37).

[5] R., Vol. 14, at 8 (Tr. Ev., Vol. 5, at 8).

[6] Arnold v. City of Chicago, 56 N.E.2d 795, 796 (Ill. 1944), first cited by Sanders in R. at 23 (Mn. Ds. of 22 Aug. 1990, at 3).

> of it. So, also, the buying and selling of uncurrent funds, and the exchanging of one kind of money for another, are equally the practice of the money-changer and the banker."[7]

The State "denie[d] that [Sanders] was * * * a 'money changer'", insisting that he "was a dealer in precious metals, subject to * * * sales tax" -- but recognized it had "to prove * * * whether or not [Sanders'] activities [were] exempt from * * * returns and taxes".[8] The Criminal Court conceded that "[i]t was shown [at the hearing on Sanders' motion to dismiss the indictment] that [Sanders] * * * is a money changer", but nevertheless held that "proof must be submitted during a trial concerning money changing or any other occupation wherein [Sanders] might be required to pay sales tax".[9] However, the Court later instructed the jury (in line with Sanders' definition) that

> a money changer is one whose occupation is the exchanging of kinds of denominations of currency, and the common meaning of the term pertaining to those persons who, in early history, engaged in the business of foreign exchange and it includes the business of a banker and buying and selling of uncurrent funds and the exchanging of one kind of money for another.[10]

Sanders never denied that he had filed no sales-tax returns.[11]

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[7] Arnold, 56 N.E.2d at 796.

[8] R. at 26 (Rsp. to Mn. Ds. of 2 Oct. 1990, at 1).

[9] R. at 30 (Order on Mn. Ds. of 9 Nov. 1990); 33 (Amended Order on Mn. Ds. of 25 Mar. 1991).

[10] R., Vol. 16, at 166 (Tr. Ev., Vol. 7, at 166); Vol. 19, at 8.

[11] See, e.g., R., Vol. 14, at 22 (Tr. Ev., Vol. 5, at 22).

However, he raised numerous other defenses.[12]

A. Moneychanging is not taxable, because it involves exchanges of one form of money for another.[13] In particular, Sanders contended that:[14]

- He exchanged Federal Reserve Notes ("FRNs") for domestic or foreign legal-tender silver or gold coins, or silver bullion.
- His "trade confirmations" defined his contracts with customers as exchanges in which he bought, and they sold, FRNs for silver or gold money.[15]
- Contracts specifying payments in particular coins or currencies (i.e., "gold-clause contracts") are lawful.[16]

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[12] Sanders will detail these defenses, because the existence of a nonfrivolous theory supporting his innocence is critical to the due-process analysis of United States v. Mallas, 762 F.2d 361 (4th Cir. 1985), and related cases on which he principally relies. See post, at 49-61. However, Sanders does not ask this Court to treat the description of these defenses in this STATEMENT OF THE FACTS as an argument that any of them is necessarily valid, only to recognize what they entail and that he raised them at appropriate times. The ultimate validity of the defenses is not controlling in any event. E.g., Mallas, 762 F.2d at 363, 364.

[13] See Smith v. Department of Revenue, State of Florida, 378 So.2d 421 (Fla. App. 1979), cited in R. at 21 (Mn. Ds. of 22 Aug. 1990).

[14] See R. at 21-24 (Mn. Ds. of 22 Aug. 1990, at 1-4); Vol. 6, at 1 (Mn. Ds. Hearing of 2 Nov. 1990, at 2); Vol. 17, at 20 (Tr. Ev., Vol. 8, at 20); 287-88 (Post-Trial Mn., at 1-2); Vol. 17, at 17 (Tr. Ev., Vol. 8, at 17); 368 (Mn. for Release on Bond Pend. App.); Vol. 21, at 3-9 (Tr. Mn. New Tr., at 3-9).

[15] Copies of the trade confirmations and related documents appear in R., Vol. 18, Exhibits 9, 11, 12, 17, 18, 29.

[16] 31 U.S.C.A. § 5118(d)(2) (1983). A "'gold clause' means a provision in or related to an obligation" that "gives the obligee a right to require payment in * * * gold; * * * a particular United States coin or currency; or * * * United States money measured in gold or in a particular United States coin or currency". 31 U.S.

♦ All domestic silver and gold coins, and FRNs, are legal tender within the United States.[17]

♦ Gold Krugerrands are legal tender in their country of origin (the Republic of South Africa).[18]

♦ Bullion of the precious metals is also money.[19]

♦ FRNs are "notes" and "obligations of the United States".[20]

♦ Under Tennessee law, "'[m]oney' means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency".[21]

C.A. § 5118(a)(1) (1983). Compare Willis v. Allison, 51 Tenn. 385, 394 (1871), with Bronson v. Rodes, 74 U.S. (7 Wall.) 229, 250 (1869), and Butler v. Horowitz, 74 U.S. (7 Wall.) 258, 260 (1869), cited in R., Vol. 19, at 36 (Def. Req. Jury Instr. No. 12).

[17] E.g., 31 U.S.C.A. §§ 5103 (1983). The Criminal Court so charged the jury. R., Vol. 16, at 165-66 (Tr. Ev., Vol. 7, at 165-66).

[18] See the exhibits attached to Sander's motion for release on bond pending appeal. R. at 371-422, received into the record at the argument on Sanders' motion for a new trial, R., Vol. 21, at 4-7, (Tr. Mn. New Tr., at 4-7). The Criminal Court judicially noticed these foreign laws under Tennessee Rule of Evidence 202(b)-(5). R. at 292 (Post-Trial Mn., at 7); Vol. 21, at 3-6 (Tr. Mn. New Tr., at 3-6).

[19] The Criminal Court erroneously refused Sanders' requested jury-instruction that "gold and silver * * * bullion are money". R., Vol. 19, at 36 (Def. Req. Jury Instr. No. 12); Vol. 16, at 149 (Tr. Ev., Vol. 7, at 149); Vol. 17, at 3,6, 22 (Tr. Ev., Vol. 8, at 3, 6, 22). Later Sanders reiterated this argument, citing federal monetary statutes. R., Vol. 21, at 8 (Tr. Mn. New Tr., at 8).

[20] 12 U.S.C.A. § 411 (1989).

[21] T.C.A. § 47-1-201(24) (1992). The Criminal Court so charged the jury. See R., Vol. 17, at 20 (Tr. Ev., Vol. 8, at 20). See also Crutchfield v. Robins, Tingley & Co., 24 Tenn. 15, 17 (1844) ("[m]oney is a generic term, and covers everything which by consent is made to represent property, and passes as such currently from hand to hand, whether it be * * * the gold and silver of the world, or the paper of modern Europe and America").

♦ Also under Tennessee law, a "dealer" is a person who "[s]ells at retail * * * tangible personal property"; but "'[tangible personal property' does not include * * * notes * * * or other obligations".[22] And,

♦ Exchanges of money are not taxable.[23]

♦ Therefore, Sanders claimed, he was not subject to sales tax when he bought FRNs for silver or gold, because he was exchanging one kind of money for another or was purchasing "notes" or "obligations" (FRNs) for gold or silver money.

♦ By indicting him for failure to file sales-tax returns on moneychanging, Sanders argued, the State was attempting to declare that only FRNs are money within the United States, in violation: (i) of the Constitution of the United States;[24] (ii) of the monetary statutes of Congress (as construed by the Supreme Court)[25] and the Supremacy Clause of the Constitution[26]; and (iii) of the law

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[22] T.C.A. § 67-6-102(6, 26) (1989 & 1992 Supp.).

[23] The State's witnesses agreed that money-for-money exchanges are not taxable. R., Vol. 12, at 133-34 (Tr. Ev., Vol. 3, at 133-34); Vol. 13, at 58-59 (Tr. Ev., Vol. 4, at 58-59).

[24] U.S. Const. art. I, § 8, cl. 5 (Congress shall have the power "To coin Money, [and] regulate the Value thereof"); art. I, § 10, cl. 1 ("No State shall * * * make any Thing but gold and silver Coin a Tender in Payment of Debts").

[25] E.g., 31 U.S.C.A. § 5103 (1983). See Thompson v. Butler, 95 U.S. 694, 696 (1878); Bronson v. Rodes, 74 U.S. (7 Wall.) 229, 252 (1869), cited in R., Vol. 19, at 36 (Def. Req. Jury Instr. No. 12).

[26] U.S. Const. art. VI, cl. 2.

of Tennessee[27]. And when Sanders' moneychanging of domestic and foreign coins are excluded from the State's proof on these grounds, the exchanges of silver bullion (assuming arguendo they were taxable) sum to a value from which a tax in excess of the $5,000.00 charged in the indictment could not be due. For those reasons, he should have been acquitted.[28]

B. Even were moneychanging taxable, Sanders contended, the heretofore unprecedented application of § 67-1-1440(d) denied him due process of law under United States v. Mallas and related cases.[29] In particular, Sanders argued --

♦ He had a nonfrivolous theory of monetary law that moneychanging is not taxable.[30]

♦ He found neither any pre-indictment reported cases of prosecutions of moneychangers under § 67-1-1440(d), nor any applicable civil cases or administrative sales-tax decisions, and therefore lacked notice that those laws supposedly applied to him.[31]

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[27] See ante note 21 & accompanying text.

[28] R. at 389-91 (Post-Trial Mn., at 5-7); 291-93 (Br. Sup. Rule 29 Mn., at 5-7); Vol. 21, at 3-9 (Tr. Mn. New Tr., at 3-9).

[29] E.g., United States v. Mallas, 762 F.2d 361 (4th Cir. 1985); United States v. Critzer, 498 F.2d 1160 (4th Cir. 1974); United States v. Dahlstrom, 713 F.2d 1423 (9th Cir. 1983). See R. at 87 (Mem. L. Num. Four); 100 (Mem. L. Num. Three, at 4); 286 (Post-Trial Mn., at 2); 295-99 (Br. Sup. Rule 29 Mn., at 10-14); Vol. 21, at 11-14, 20, 32-34 (Tr. Mn. New Tr., at 11-14, 20, 32-34).

[30] See post, at 50-51, 61-73.

[31] R., Vol. 9, at 27 (Tr. Mn. Proceed. of 21 Feb. 1992, at 27); 183-84 (Declaration of Franklin Sanders of 16 Mar. 1992). After Sanders' conviction, the State submitted "a memorandum" dealing with the unreported case of one Charles Powell, who entered a guilty plea in the Criminal District Court to an indictment under

Moreover, on its face § 67-1-1440(d) provides no notice that a moneychanger's failure to file sales-tax returns is criminal.[32]

♦ By not following the Tax Enforcement Procedures Act,[33] the State denied Sanders any pre-indictment notice of, or opportunity to respond to, its theory that moneychanging is taxable.[34]

♦ In short, Sanders received no notice of a purported requirement to pay sales taxes[35] -- until the State's criminal investigation and indictment.

♦ Conversely, from the inception of its investigation, the State knew Sanders believed he was not subject to tax, "because he was buying * * * [FRNs] and paying for them in silver" or gold.[36] From 31 July 1986 (when State undercover agent Wade Smith first made an exchange with Sanders during which the latter stated he was not subject to tax), through 17 September 1986 (when Smith prepared an affidavit in support of a search warrant reciting Sanders' posi-

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§ 67-1-1440(d) "[o]n May the 18th of 1990" -- three and one-half years after the period charged in the indictment. R., Vol. 21, at 22 (Tr. Mn. New Tr., at 22); 268-70.

[32] R. at 94 (Mn. Ds. Counts One and Two of the Indictment for Vagueness and Violation of Due Process, at 1).

[33] T.C.A. §§ 67-1-1401 et seq. (1989). See also T.C.A. § 67-6-517 (1989).

[34] R., Vol. 9, at 24-26 (Tr. Mn. Proceed. of 21 Feb. 1992, at 24-26).

[35] See R. at 55 (Declaration of Franklin Sanders of 23 Dec. 1991); 183-84 (Declaration of Franklin Sanders of 16 Mar. 1992); Vol. 15, at 44-45 (Tr. Ev., Vol. 6, at 44-45).

[36] R., Vol. 18, Exhibit 19, at 2 (Affidavit of Wade Smith for Search Warrant, at 2); Vol. 12, at 15, 90, 95-96 (Tr. Ev., Vol. 3, at 15, 90, 95-96). On the effectiveness of this notice as to the State, see T.C.A. § 47-1-201(25-28) (1992).

tion on the sales-tax issue), to 19 September 1989 (the date of the indictment),[37] the State knew that Sanders disputed the application of the sales tax to moneychanging, and (through Smith) engaged in exchanges with Sanders on that basis, yet never warned him of the State's contention that his position was supposedly not only wrong as a matter of tax-law but also criminal.

♦ Although § 67-1-1440(d) reaches only felonious acts that "delay * * * the state * * * in the collection of any of its lawful revenue" and that "deprive the state of the realization of such revenue at the time it is lawfully entitled thereto",[38] prior to the indictment the State never established by means of any civil or administrative mechanism that it was "lawfully entitled" to any "revenue" from Sanders.[39] Indeed, no one ever established when (if it ever did) the State became "lawfully entitled" to tax "revenue" from him.[40]

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[37] See R., Vol. 12, at 7-16, 90, 95-96, 124-30 (Tr. Ev., Vol. 3, at 7-16, 90, 95-96, 124-30); Vol. 18, Exhibit 19.

[38] Emphasis supplied.

[39] R. at 73-75 (Mn. Ds. Counts One and Two of the Indictment, 23 Dec. 1991, at 1-3); 107 (Mn. to Ds. Counts One and Two of the Indictment for Violations of the Tennessee Tax Enforcement Procedures Act by the Commissioner of Revenue and His Delegates, 16 Jan. 1992); Vol. 9, at 3, 7-11 (Tr. Mn. Proceed. of 21 Feb. 1992, at 3, 7-11); 79-82 (Mem. L. Num. One, at 3-7); 113-20 (Mem. L. Num. Two, at 1-8); Vol. 19, at 38-47 (Def. Req. Jury Instr. Nos. 14-23), denied, Vol. 16, at 149-54 (Tr. Ev., Vol. 7, at 149-54); Vol. 17, at 4 (Tr. Ev., Vol. 8, at 4); 285 (Post-Trial Mn., at 1); 288-91 (Br. Sup. Rule 29 Mn., at 2-4); 311-14, 316-17 (Mn. New Tr., at 2-4, 7-8); 322-26 (Br. Sup. Mn. New Tr., at 4-8).

[40] E.g., at one pre-trial hearing, Sanders asked: "Could the state explain to me how we determine lawful entitlement?" The Criminal Court answered: "Well, we're not to get into that at this point. You certainly have a right to bring up anything you want

♦ And therefore, Sanders contended, the indictment should have been dismissed or his conviction set aside as a denial of due process under Mallas and related decisions, because "where the law is vague the defendant lacks the requisite intent to violate it", and "the state is required to proceed civilly in pioneering interpretations of any statute".[41]

♦ Revealingly, the State produced no reported precedents of application of the sales tax to moneychangers.[42] Instead, the State claimed that it was "under no duty to proceed civilly in the presence of a criminal violation" of § 67-1-1440-(d),[43] that "notice

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to about that * * * or bring anything into the record on that that you would like and also to argue it to the jury." R., Vol. 9, at 17 (Tr. Mn. Proceed. of 21 Feb. 1992, at 17). Thus, although the Court allowed Sanders to attempt to disprove "lawful entitlement", it never imposed on the State any burden to prove that element of its case. The closest the Court came to grappling with this problem was its instruction to the jury on when "dealers" must file sales-tax returns. See R., Vol. 16, at 161 (Tr. Ev., Vol. 7, at 161).

[41] R. at 86 (Mn. Ds. of 23 Jan. 1992, at 2); 87 (Mem. L. Num. Four); Vol. 9, at 3, 7, 19-20 (Tr. Mn. Proceed. of 21 Feb. 1992, at 3, 7, 19-20); 126 (Mn. Ds. Counts 1 and 2 of the Indictment for Malicious and Selective Prosecution, at 5); 296-99 (Br. Sup. Rule 29 Mn., at 10-14); Vol. 21, at 11-14 (Tr. Mn. New Tr., at 11-14).

[42] After Sanders' conviction, the State submitted "a memorandum" dealing with the unreported case of one Charles Powell, who entered a guilty plea in the Criminal District Court to an indictment under § 67-1-1440(d) "[o]n May the 18th of 1990" -- three and one-half years after the period charged in Sanders' indictment. R., Vol. 21, at 22 (Tr. Mn. New Tr., at 22); 268-70.

[43] R. at 121 (Rsp. Mn. Ds. Counts One and Two of the Indictment for Violations of the Tennessee Tax Enforcement Procedures Act by the Commissioner of Revenues and His Delegates). See also R. at 122 (Rsp. Mn. Ds. Counts 1 and 2 of the Indictment for Malicious and Selective Prosecution)("[t]here is no entitlement in the face of a criminal violation for [Sanders] to be processed under the civil procedures").

is not required under the criminal statute", and that Sanders "certainly has plenty of notice in the indictment".[44]

♦ The Criminal Court, however, expressed concern about lack of notice (although it allowed the case to go to the jury).[45]

C. Even if moneychanging were taxable, and if prosecution under § 67-1-1440(d) were proper absent any pre-indictment precedent, Sanders contended, a mere failure to file returns does not amount to feloniously "delay[ing] * * * the collection of * * * lawful revenue" or "depriv[ing] the state of the realization of such revenue at the time it is lawfully entitled thereto by any artifice, design * * * [or] stategem".[46] And, Sanders argued, the State neither alleged nor proved any other overt act.[47]

D. As applied in this case, Sanders contended, § 67-1-1440(d)

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[44] R., Vol. 13, at 70 (Tr. Ev., Vol. 4, at 70); Vol.9, at 26 (Tr. Mn. Proceed. of 21 Feb. 1992, at 26).

[45] R., Vol. 13, at 70-75 (Tr. Ev., Vol. 4, at 70-75); Vol. 14, at 2 (Tr. Ev., Vol. 5, at 2). This highlights the nonfrivolous nature of Sanders' position. See post, at 50-51.

[46] R. at 73 (Mn. Ds. Counts One and Two of the Indictment, 23 Dec. 1991, at 1); Vol. 9, at 3-4 (Tr. Mn. Proceed. of 21 Feb. 1992, at 3-4); 285 (Post-Trial Mn., at 1).

The Criminal Court agreed, instructing the jury that "[t]he crime charged is not proven by showing [Sanders] failed to file sales tax returns." R., Vol. 16, at 155-56, 167 (Tr. Ev., Vol. 7, at 155-56, 167); Vol. 19, at 14. However, denying Sanders' motion for a new trial, the Court said that "the evidence is abundant that [Sanders] had a clear purpose in avoiding the payment of taxes", and that the jury apparently determined that he "did more than 'merely' fail to file". R. at 362 (Find. Mn. New Tr., at 3).

[47] R. at 85 (Mn. Ds. Counts One and Two of the Indictment, 23 Jan. 1992, at 1); 88-89 (Mem. L. Num. Four, at 2-3); Vol 9, at 18 (Tr. Mn. Proceed. of 21 Feb. 1992, at 18); 285 (Post-Trial Mn., at 1); 290-91 (Br. Sup. Rule 29 Mn., at 4-5); 317 (Mn. New Tr., at 8); 308 (Motion for Arrest of Judgment).

is unconstitutionally vague, because (among other fatal defects) it does not define "delay" and "deprive", sets no ascertainable standards for inclusion and exclusion of persons or allegedly criminal conduct, and establishes no guidelines to prevent arbitrary or discriminatory enforcement.[48] The State denied in general that the statute is vague "in violation of Article I, Section 9 or 10, of the Constitution of the State of Tennessee or the Fifth or the Fourteenth Amendments to the United States Constitution",[49] but answered in particular none of Sander's charges.

E. The indictment, Sanders contended, was also fatally flawed by "multiplicity" -- that is, charging the same crime under the two linguistically separate, but factually identical heads of "delay[ing] the State * * * in the collection of its lawful revenue" and "depriv[ing] the State * * * of the realization of such revenue". His conviction on both counts for the selfsame acts, Sanders argued, constituted double jeopardy.[50]

II. At the trial, Sanders and the State put forward evidence

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[48] R. at 94 (Mn. Ds. Counts One and Two of the Indictment for Vagueness and Violation of Due Process); 85 (Mn. Ds. Counts One and Two of the Indictment, 23 Jan. 1992); Vol. 9, at 12-14, 17 (Tr. Mn. Proceed. of 21 Feb. 1992, at 12-14, 17); 97-105 (Mem. L. Num. Three, at 1-9); 286 (Post-Trial Mn., at 2); 296-97 (Br. Sup. Rule 29 Mn., at 10-11); 310-11 (Mn. New Tr., at 1-2); 326 (Br. Sup. Mn. New Tr., at 8).

[49] R. at 129 (Response of the State of Tennessee to Defendant's Motions to Dismiss Counts One and Two of the Indictment).

[50] R. at 243; Vol. 19, at 33 (Def. Req. Jury Instr. No. 9), denied, Vol. 16, at 148 (Tr. Ev., Vol. 7 at 148); Vol. 16, at 162 (Criminal Court's instruction on "delay" and "deprive", Tr. Ev., Vol. 7, at 162); 311 (Mn. New Tr., at 2); 327 (Br. Sup. Mn. New Tr., at 9); Vol. 21, at 15-16 (Tr. Mn. New Tr., at 15-16).

that, rather than being diametrically opposed, was in major particulars identical or complementary.

A. Sanders' Evidence.

1. Sanders testified that he did not become a moneychanger to amass wealth, but actually suffered large losses.[51] Rather, by about 1980 Sanders had

> bec[o]me convinced that unless there was a change in * * * the United States monetary system, a change to some intrinsic value standard, * * * the monetary system, that is, the paper money system, would be destroyed. The banking and financial system would be destroyed, and I wanted to have something to do with reforming that.
>
> And so it was an interesting business to me to provide a service to people to exchange out of paper money and into gold and silver money, because at that time * * * the inflation was building very, very heavily. * * *
>
> Now the problems with the banks began to surface in the early '80s, the savings and loans, and as it became worse and worse, all I could see was the facts confirming what I knew from economic theory, that the country was heading for monetary and financial break up.[52]

So, idealistically, Sanders

> saw the exchange into gold and silver [from paper currency] as a way for people to get out from under * * * an approaching monetary catastrophe, and I saw that we had in our hands legally the means to reform the money system. * * * I wanted to encourage that. I wanted to be part of that.[53]

Sanders filed no sales-tax returns in Tennessee.[54] However, he asserted a good-faith belief and lack of any contrary notice that, as a moneychanger, he was not subject to sales tax. He recounted extensive research on economics, money, and law; reliance

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[51] R., Vol. 15, at 55-56 (Tr. Ev., Vol. 6, at 50-55).

[52] R., Vol. 14, at 12-13 (Tr. Ev., Vol. 5, at 12-13).

[53] R., Vol. 15, at 55-56 (Tr. Ev., Vol. 6, at 55-56).

[54] R., Vol. 14, at 22 (Tr. Ev., Vol. 5, at 22).

on experts; and inquiry into sales-tax law -- and how these convinced him that moneychanging is not taxable.[55]

♦ Sanders explained his conclusion that, in addition to FRNs, "gold and silver coin is money under the laws of the State of Tennessee and the United States"; that

> legally in the United States we have a multiple monetary system, and that * * * both [FRNs] and gold and silver are money of the United States. Not only that, it's not just gold and silver coin, but gold and silver bullion, too, are money in the United States[;]

and that

> from an economic standpoint, it's just unquestionable that gold and silver are money. The central banks of the world hold them * * * as reserves; they're carried on the books of the banks as monetary assets. Debts are settled internationally in them.[56]

♦ Sanders also recounted his beliefs that "[y]ou're free to contract in the United States for anything you want in any form of money you want" and that "a contract to pay gold and silver is a contract to pay money".[57] He testified that his trade confirmations provided

> all the explanation that I would normally have to make to a customer and what the terms and conditions of the exchange were. * * * I wanted the people I was dealing with to know exactly what we were doing with this trade. * * * My intent was to buy [FRNs] and pay for them in lawful gold and silver money, just like it says in Item No. 4 here [in the "trade

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[55] R., Vol. 14, at 25-30, 35-57, 69-101 (Tr. Ev., Vol. 5, at 25-30, 35-57, 69-101); Vol. 15, at 9-14 (Tr. Ev., Vol. 6, at 9-14).

[56] R., Vol. 14, at 54, 90-91, 27 (Tr. Ev., Vol. 5, at 54, 90-91, 27).

[57] R., Vol. 15, at 42, 41 (Tr. Ev., Vol. 6, at 42, 41).

confirmation"].[58]

The trade confirmations recite under "Terms & Conditions" that:

> • "[t]his writing is confirmation of our oral contract with you [i.e., the customer]";
>
> • "[i]n any dispute the laws of the state of Tennessee shall govern"; and
>
> • "[r]egardless of whatever informal or customary language is used in trade, our business legally is buying notes and paying for them in gold and silver. Our acceptance of [FRNs] * * * in exchange for gold and silver money is a function of our common law 'moneychanging' * * *. We will exchange any form of money substitute such as [FRNs] or various foreign paper currencies, or other debt evidences or obligations for gold and silver money in its various forms".[59]

More specifically, Sanders testified that his intent in the trades that constituted the State's case -- namely, with Charles Batey, Don Webb, Jon Thompson, Bernard Verhaeghe, and Wade Smith -- was to conduct money-for-money exchanges, buying FRNs with silver or gold coins or bullion.[60]

♦ Sanders explained his "understanding that what [he] was doing was not taxable * * * -- there's no tax imposed on the exchange of money for money".

> I had studied the law * * * intensively for about two years, and I had become convinced from my study of the law and of economics that gold and silver were money, that these were money for money transactions and that no sales tax was due on

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[58] R., Vol. 15, at 18 (Tr. Ev., Vol. 6, at 18).

[59] R., Vol. 18, Exhibit 29.

[60] R., Vol. 15, at 22-43 & Vol. 18, Exhibits 9, 11-12, 17-18 (Tr. Ev., Vol. 6, at 22-43 & Exhibits 9, 11-12, 17-18). See also R., Vol. 15, at 96-98, 124 (Tr. Ev., Vol. 6, at 96-98, 124).

any of these transactions.[61]

He did not apply for a Tennessee "dealer's" license, Sanders testified, "[b]ecause I concluded from my study that I was not a person required to make that application. I was not going to be a dealer under the definitions of the law. * * * I would be a moneychanger, changing money"; and that is "not an activity * * * subject to the sales tax".[62]

Specifically, Sanders said, "my conclusion, after all the study of the law I had done, was that gold and silver bullion, gold and silver coins are not tangible personal property. They're money, and the sales tax * * * is not levied on money." "My conclusion from reading the law", Sanders explained,

> was that [the trade confirmations] were all contracts for the delivery of money. They were exchanges of money for money, whether they were bullion or whether they were coin; * * * and I concluded that since they were exchanges of money for money, they were not subject to the sales tax.

Elaborating on this point, Sanders described how,

> in studying Article I, Section 10 of the Constitution [of the United States], and Article I, Section 8, which deals with the monetary powers of the United States Congress, I concluded that whatever the federal Congress had to say about money would supersede what Tennessee had to say, except that if Tennessee said anything about money, it was bound by Article I, Section 10, which said "No state shall make anything but gold or silver coin a tender in payment of debt."
>
> * * * I read and concluded that 12 United States Code, Section 152 said the terms "lawful money" and "lawful money of the United States" shall be held to mean and include gold and silver coin.

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[61] R., Vol. 14, at 20-22 (Tr. Ev., Vol. 5, at 20-22). See also R., Vol. 15, at 42, 43 (Tr. Ev., Vol. 6, at 42, 43)("the sales tax is a tax that is not levied on money"; "the sales tax is not a tax on money").

[62] R., Vol. 15, at 15 (Tr. Ev., Vol. 6, at 15).

> I read that in 12 United States Code, Section 411, that [FRNs] were to be redeemable in lawful money, * * * which I concluded from 12 United States Code, 152, meant gold and silver coin * * * .
>
> I read what is now 31 United States Code, 5103, which says that all coins and currencies of the United States, including [FRNs], shall be a legal tender, * * * that meant that any coin the United States government had ever issued was legal tender.
>
> Then, * * * what I found from the United States Supreme Court cases and * * * the Tennessee Supreme Court cases was that uniformly, * * * whenever Article I, Section 10 had been applied by the courts, * * * they had always said that bank notes could not be a legal tender in Tennessee, that gold and silver coin was the money of Tennessee, and that Article I, Section 10 prevented the State of Tennessee from making anything but gold and silver coin a tender.
>
> Therefore, I concluded * * * that the [sales] tax statute applied to sales of tangible personal property valued in money, and that in Tennessee, that [i.e., money] had to mean and include gold and silver coin.
>
> Then the other section of the [sales] tax statute defined tangible personal property and specifically excluded those [i.e., FRNs]. And the notes were not the money of the transaction. That's what I understood all the cases held. That's what I understood Article I, Section 10 required. So, legally, I concluded that * * * I was buying [FRNs] and paying for them in gold and silver money.[63]

Relying on United States v. Powell[64], Sanders sought to introduce legal materials from which he had concluded that moneychanging is not taxable. But the Criminal Court excluded these materials.[65]

Sanders acknowledged a 1981 opinion of the Attorney General of Tennessee that "sales tax is applicable to the sale of of gold and silver bullion and coins", but disputed its effect: "it's just

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[63] R., Vol. 15, at 42 (Tr. Ev., Vol. 6, at 42); Vol. 15, at 98 (Tr. Ev., Vol. 6, at 98); Vol. 14, at 45-47 (Tr. Ev., Vol. 5, at 45-47). See also R., Vol. 14, at 55 (Tr. Ev., Vol. 5, at 55).

[64] 955 F.2d 1206, 1213 (9th Cir. 1991), applying Cheek v. United States, 111 S. Ct. 604 (1991).

[65] R., Vol. 14, at 49-54, 89-92 (Tr. Ev., Vol. 5, at 49-54, 89-92); Vol. 15, at 9-13 (Tr. Ev., Vol. 6, at 9-13).

that, an opinion. It's not the law. It's not a regulation. It certainly can't override the statutes and the opinion of the Tennessee Supreme Court or the United States Supreme Court".[66] Moreover, he did not even see the opinion until after the operative time-period in the indictment.[67]

Sanders also acknowledged that, before working as a money-changer in Tennessee in late 1983, he did business in Arkansas, where he had "applied for a[] * * * sales tax permit" and "filed returns", and a civil judgment for taxes had been entered against him. He explained, however, that the returns filed there "showed all the transactions involving gold and silver as being exempt", "[b]ecause I thought and still think they were exchanges of money for money" and "weren't subject to * * * tax".[68]

After moving his moneychanging business to Tennessee, Sanders "never received any notice or letter" from that State informing him he "was required to file * * * returns", "no notification of any

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[66] The Criminal Court agreed, charging the jury that "[a] legal opinion by the Attorney General of Tennessee * * * is not law" and "is not binding on * * * [Sanders]". R., Vol. 16, at 169 (Tr. Ev., Vol. 7, at 169); Vol. 19, at 15.

[67] R., Vol. 15, at 62-63, 98, 90 (Tr. Ev., Vol. 6, at 62-63, 98, 90).

[68] R., Vol. 15, at 63 (Tr. Ev., Vol. 6, at 63); Vol. 14, at 102-04 (Tr. Ev., Vol. 5, at 102-04). Sanders sought an opinion from the Attorney General of Arkansas, and from that State's Department of Finance and Administration, that moneychanging was exempt from sales tax -- but received no answer. R., Vol. 15, at 108-10 (Tr. Ev., Vol. 6, at 108-10). Arkansas then used its administrative procedures to assess an alleged tax against him. R., Vol. 15, at 110-21 (Tr. Ev., Vol. 6, at 110-21).

assessment", and "no lien" arising out of unpaid taxes.[69]

♦ Finally, Sanders denied any intention to delay the collection of revenue or to deprive the State of the realization of revenue by not filing returns on moneychanging, because they were "not subject to the sales tax".[70]

2. Sanders also offered the testimony of Dr. Edwin Vieira, Jr., whom the Criminal Court accepted as an expert on money.[71]

♦ Vieira testified that in today's economy "money" includes

• "paper [currency] that has been created by a central bank or by a government treasury, such as * * * the [FRN]"; and

• silver and gold, which "may appear as monies as coin or as ingots or bars, sometimes called bullion", the form being insignificant as to the character of the metals as money. Indeed, "the bars [of gold and silver] are the ultimate form of money, the highest form of money in the system". Moreover, any differentiation between domestic and foreign coins or bars

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[69] R., Vol. 15, at 44-45 (Tr. Ev., Vol. 6, at 44-45). See also R., Vol. 15, at 120 (Tr. Ev., Vol. 6, at 120 (during the timeframe of the indictment, the State never informed Sanders that his position on the sales tax was allegedly wrong).

[70] R., Vol. 15, at 100, 124-25 (Tr. Ev., Vol. 6, at 100, 124-25).

[71] R., Vol. 16, at 75-76 (Tr. Ev., Vol. 7, at 75-76). Sanders testified that Vieira was one of the experts on whom he relied in formulating his own conclusions on the character of gold and silver as money. R., Vol. 14, at 28-30, 89-96 (Tr. Ev., Vol. 5, at 28-30, 89-96).

is unwarranted, as both are money in the State of Tennessee.[72] Vieira explained that a "dollar" is a coin containing 371.25 grains (troy) of fine silver, and that therefore silver bullion has a value of 1.2929 dollars per ounce.[73]

Vieira also pointed out that the present-day disparity in purchasing power between FRNs, on the one hand, and silver and gold coin or bullion, on the other hand, results from the irredeemability of FRNs in silver or gold and the overissue of FRNs by the Federal Reserve System. But, Vieira said,

> that doesn't mean that the paper [i.e., FRNs] isn't money anymore. It's still money. And it doesn't mean that the silver coins are not money. It just means that one of these monies is better than another.

As Gresham's Law predicts, he explained, people hold the more valuable of the two monies (gold and silver) and spend the less valuable (FRNs) -- "and that's why when you go down to the supermarket you don't see people spending gold coins or silver coins".[74]

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[72] R., Vol. 16, at 78-82, 103-04, 111-12 (Tr. Ev., Vol. 7, at 78-82, 103-04, 111-12). Vieira discussed with Sanders how foreign gold and silver coins could be employed as money in the United States. R., Vol. 16, at 112-13 (Tr. Ev., Vol. 7, at 112-13).

[73] R., Vol. 16, at 82-85 (Tr. Ev., Vol. 7, at 82-85). Again, Vieira recalled discussing this matter with Sanders. R., Vol. 16, at 110-11 (Tr. Ev., Vol. 7, at 110-11). Sanders' trade confirmations used this definition of the "dollar". E.g., R., Vol. 18, Exhibit 29.

[74] R., Vol. 16, at 85-90 (Tr. Ev., Vol. 7, at 85-90). When, for example, more than "$1" in FRNs must be exchanged for a "$1" silver coin in the marketplace (rather than "$1" for "$1"),

> [t]he reason the * * * nominal value, the number that's stamped on the coin or the number that's printed on the paper, is not the same is because the paper has depreciated. * * * That doesn't mean that the two things aren't money. They're both money. It just means that one of those monies is worth

♦ As to "gold-clause contracts", Vieira testified that

• a gold-clause contract is "a contract in which you specify a particular kind of money to be used", such as "silver dollars" or "gold coin of the standard of 1900";

• *gold-clause contracts* are legitimate; and

• a contract for a hypothetical exchange of 1000 FRNs for a 100-ounce bar of silver "would specify that one party is exchanging or paying so many [FRNs] for so many ounces of silver. The other party is paying or exchanging so many ounces of silver for that amount of [FRNs], and if you look at it from one direction it would be a monetary transaction. *If you looked at it from the other direction*, it would be a monetary transaction, because there are monies on both sides. * * * It would be a double gold-clause contract, because it would specify both sides as money."[75]

♦ Vieira testified that Sanders' trade confirmation is

designed to specify the kind of money that will be used in these * * * trades. He's got a whole specification on the back here of different types of coin, and on the front for the silver transactions * * * specifies that the standard will be the silver dollar of 371 and a quarter grains, and for the gold transactions, the standard will be the 23.22 grains of gold.

So this is a gold clause type instrument * * * . It deals with a gold-clause type trade, depending on whether the trade is done in silver or gold. He has two standards here, depending on whether silver or gold is involved in the transaction. And he has a standard, too, for paper money * * * . There are three standards built into this, the gold, the sil-

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less than the other money.

R., Vol. 16, at 97 (Tr. Ev., Vol. 7, at 97).

[75] R., Vol. 16, at 91-92, 98-99 (Tr. Ev., Vol. 7, at 91-92, 98-99).

ver, and the paper money standards.

Vieira concluded that all the trade confirmations were gold-clause contracts for exchanges of money -- including silver bars, United States silver coins, and gold Krugerrands for FRNs.[76]

Vieira also made clear that, even if one of Sanders' customers confusedly thought that he was purchasing gold or silver from, but not simultaneously selling FRNs to, Sanders, that exchange would nevertheless be "an exchange of money for money, no matter what [the customer] said".[77]

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[76] R., Vol. 17, at 94-95, 100-02, 143 (Tr. Ev., Vol. 7, at 94-95, 100-02, 143).

[77] R., Vol. 16, at 130-33 (Tr. Ev., Vol. 7, at 130-33):

> Q [by Mr. Wilson, Assistant District Attorney General, on cross-examination] * * * Mr. Batey testified that he * * * purchased silver from [Sanders], and [Sanders] testified that Mr. Batey had sold him Federal Reserve Notes. Do we have a meeting of the minds?
>
> A Did Mr. Batey say that he didn't sell Federal Reserve notes?
>
> Q No. He said he purchased silver.
>
> A Right. But did he say that he didn't sell Federal Reserve Notes? See, you're leaving something out. If I purchase gold for Federal Reserve notes, at the same time I'm selling you the Federal Reserve note, every transaction, I am both the purchaser and the seller. What comes to me, I purchase; what I give to you, I sell.
>
> So only if Mr. Batey had said -- and it would have been, I think, a silly thing to say -- I'm purchasing gold but I'm not selling Federal Reserve notes, would I be able to go along with what you're asking me, and I doubt that he'd say that. As I say, that doesn't make any sense.
>
> * * * * *
>
> Q You can give your opinions about the sale of money. You've been doing that. This is about money.
>
> A All right. Okay. If you ask me on the face if that transaction was an exchange of money for money, no matter what Mr. Batey said, it was.
>
> * * * * *
>
> What he said didn't change the substance of the transaction. Calling a horse a cow does not make it a cow.

B. The State's Evidence. The State's case largely supported Sanders, but advanced a different interpretation of the facts.

1. On four key points, the testimony of the State's witnesses was consistent with Sanders' evidence.

♦ First, revenue agent Wade Smith conceded that exchanges of FRNs for FRNs, and of FRNs for United States base-metallic coins, are not taxable.[78] And agent Owen Wheeler conceded that gold and silver coins "used as money" are not "tangible personal property", although "if you hold it for an investment or for collection purposes, it is tangible personal property".[79]

♦ Second, Smith conceded that the trade confirmations for his exchanges with Sanders recite that he sold FRNs to Sanders for silver bars. Moreover, Smith admitted that, while posing as a customer, he never objected to the terms of the confirmations. In addition, asked whether he "agree[d] * * * that [Sanders'] intent was to buy" FRNs, he answered: "His Confirmation says that he's

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* * * * *

Things are as they are, not as you imagine them to be. The world in not in your head, it's actually out there. It's a real thing. If the transaction is a money for money transaction, no matter what the man says, it was * * * .

[78] R., Vol. 12, at 133-34 (Tr. Ev., Vol. 3, at 133-34).

[79] R., Vol. 13, at 58-59 (Tr. Ev., Vol. 4, at 58-59). Wheeler provided no legal authority for his opinion. Neither did he explain why United States gold and silver coins are not always "used as money" or deemed to be "money", perforce of the legal-tender law. See 31 U.S.C.A. §§ 5103, 5112(h) (1983 & 1993 Supp.). Nor did he explain why legal-tender Krugerrands are not always used as or deemed to be "money" under Tennessee law. See T.C.A. § 47-1-201(24) (1992).

buying [FRNs]".[80]

♦ Third, Smith also admitted that, while he posed as a customer, Sanders had explained to him that "there was no sales tax due [on the exchanges] because he [Sanders] was buying my [FRNs], and there would be no tax due on that", and "because he was buying my [FRNs] and paying for them in silver, which he claims is a legal tender * * * for the transaction".[81] Although Smith tried to put an inculpatory gloss on Sanders' theory,[82] the State introduced no evidence that Sanders had ever expressed a contrary intent.

♦ Fourth, its witnesses also admitted that the State gave Sanders no pre-indictment notice that it objected to the terms of his trade confirmations as allegedly inconsistent with supposed sales-tax obligations, that Sanders was subject to sales tax as a moneychanger, that he was being assessed for sales taxes, that he had an alleged tax deficiency, or in any other way.[83]

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[80] R., Vol. 12, at 11-12, 50-56, 85, 87, 89-90, 95, 125-31 (Tr. Ev., Vol. 3, at 11-12, 50-56, 85, 87, 89-90, 95, 125-31). The only other witness (besides Sanders himself) who testified with respect to Sanders' intent was bona fide customer Charles Batey. Asked whether he (Batey) had "ask[ed Sanders] * * * if he had an intent otherwise than what was expressed in the written agreement", Batey responded: "No. Because I didn't pay any attention to the way it was written up." R., Vol. 11, at 171 (Tr. Ev., Vol. 2, at 171).

[81] R., Vol. 12, at 15, 90 (Tr. Ev., Vol. 3, at 15, 90). Smith reiterated this in his affidavit in support of a warrant for a search of Sanders' office. R., Vol. 12, at 95-96 (Tr. Ev., Vol. 3, at 95-96); Vol. 18, Exhibit 19.

[82] See post, note 84 & accompanying text.

[83] Wade Smith: R., Vol. 12, at 53-56, 70, 128, 130-31, 135-36, 138 (Tr. Ev., Vol. 3, at 53-56, 70, 128, 130-31, 135-36, 138). J.A. Horne: R., Vol. 13, at 38-39 (Tr. Ev., Vol. 4, at 38-39). Owen Wheeler: R., Vol. 13, at 54 (Tr. Ev., Vol. 4, at 54).

2. The State's case diverged from Sanders' in three particulars.

♦ First, the State tried to impugn as simply an "artifice, design, * * * [or] strategem" prohibited by § 67-1-1440(d) Sanders' claim that he bought FRNs for gold or silver money. Quoting a letter in which Sanders had written that,

> [a]s to the good sales tax people in Tennessee, I am no longer selling anything. Relying on the definition of [FRNs] at 12 USC 411, I am buying "obligations" and paying for them in lawful gold and silver money. This makes my invoices a bit hard to explain to my customers, but I think it will keep the State of Tennessee at bay[,]

agent Smith attempted to "interpret" Sanders' thoughts: "In reading the whole letter, we felt that kind of set up the fact that he was aware that sales tax was due; that sales tax was owing." But the Criminal Court sustained Sanders' objection to this psychologizing (although it allowed the letter to be introduced into evidence).[84] And nowhere else did the State proffer any purported evidence that Sanders was not honestly "[r]elying on the definition of [FRNs] at 12 USC 411".[85]

♦ Second, the State tried to show that Sanders had no intent to buy FRNs, because (notwithstanding the trade confirmations and unknown to him) his customers supposedly had no intent to sell FRNs. The Criminal Court limited the State to exchanges with five

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[84] R., Vol. 12, at 102-09 (Tr. Ev., Vol. 3, at 102-09).

[85] As a matter of law, no such "evidence" would be probative, because FRNs "shall be obligations of the United States" and "shall be redeemed in lawful money on demand at the Treasury Department * * * or at any Federal Reserve bank". 12 U.S.C.A. § 411 (1989).

customers:[86]

Customer	Customer received[87]	Customer exchanged
Batey	U.S. 40% silver coins	$5000.33 in FRNs
Batey	South African Krugerrands	$8020.00 in FRNs
Batey	1-oz silver rounds	$510.00 in FRNs
Batey	100-oz silver bars	$2430.00 in FRNs
Batey	100-oz silver bars	$2322.00 in FRNs
Webb	U.S. "Olympic" gold coins	$11562.80 in FRNs
Webb	U.S. "Olympic" gold coins	$7904.00 in FRNs
Webb	U.S. "Olympic" gold coins	$26437.50 in FRNs
Thompson	100-oz silver bars	$6000.00 in FRNs
Thompson	100-oz silver bars	$6000.00 in FRNs
Verhaeghe	South African Krugerrands	$864078.06 in FRNs
Smith	100-oz silver bars	$3432.00 in FRNs
Smith	100-oz silver bars	$1914.00 in FRNs

Three customers testified over Sanders' objection that they supposedly had not intended to sell FRNs to Sanders when they exchanged those FRNs with him for gold or silver from him.[88]

• Charles Batey was asked whether "there was any discussion about trading [FRNs] for the coins" or whether "that ever [was his] intent", and answered that "it certainly wasn't", "I was there to

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[86] R., Vol. 13, at 12-33 (Tr. Ev., Vol. 4, at 12-33). See R., Vol. 13, at 46-51 (Tr. Ev., Vol. 4, at 46-51).

[87] Coins in shadow typeface are legal tender in their countries of origin. United States 40% silver coins are legal tender under 31 U.S.C.A. § 5103 (1983). United States "Olympic" gold coins are legal tender under § 2(d) of the Act of 22 July 1982, Pub.L. 97-220, 96 Stat. 222, 222. Krugerrands are legal tender under the laws of South Africa. See R. at 371-422 (attachments to Sanders' motion for release on bond pending appeal), received into the record in Vol. 21, at 3-6 (Tr. Mn. New Tr., at 3-6).

[88] Bernard Verhaeghe did not testify. And the Criminal Court sustained Sanders' objection to the "intent" testimony of Wade Smith. R., Vol. 12, at 87 (Tr. Ev., Vol. 3, at 87).

buy silver or gold". But Batey explained neither how he "bought" coins without trading FRNs for them, nor why it was not his intent to do what in fact he did. Again, asked if it was "ever [his] intention * * * to sell [FRNs] to [Sanders]", Batey responded: "I couldn't sell them to him if I was buying silver". Batey did not deny, however, that he exchanged FRNs for the silver he "was buying". Pressed on cross-examination if he "ask[ed Sanders] * * * if [Sanders] had an intent otherwise than what was expressed in the written agreement", Batey conceded: "No. Because I didn't pay any attention to the way it was written up."[89]

- Don Webb simply answered "[n]o" when asked whether he "plan[ned] on selling [Sanders] anything" -- but acknowledged that he paid for the coins he acquired.[90]

- Jon Thompson also simply said "[n]o" when asked whether "there [was] ever any intent on [his] part * * * to sell" his FRNs to Sanders, although he too paid for the bullion he received.[91]

- With the first question the State posed to Batey as to Batey's intent, Sanders objected that the parole-evidence rule[92] precluded the State from "attempting to offer testimony to impeach the expressed written terms of the contract". The State responded that

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[89] R., Vol. 11, at 138, 150-51, 171 (Tr. Ev., Vol. 2, at 138, 150-51, 171).

[90] R., Vol. 11, at 181, 174-75 (Tr. Ev., Vol. 2, at 181, 174-75).

[91] R., Vol. 11, at 187 (Tr. Ev., Vol. 2, at 187).

[92] See T.C.A. §§ 47-2-201 and 47-2-202 (1992).

> this directly goes to show [Sanders'] deceptiveness in that he is putting on a voucher with a customer that, "You have sold five thousand dollars and thirty-three cents worth of [FRNs]."
>
> Mr. Batey's intent of going in there to buy silver * * * is very important. [Sanders] says that he was making exchanges, paper money for coin. You've got to have the other side. The other side is saying, no, we didn't. That goes to [Sanders'] intent and what we submit is subterfuge.
>
> * * * * *
>
> What [Mr. Batey] intended to do is very, very important, and obviously he did not intend this [i.e., to sell FRNs]. * * * Mr. Batey went in to buy silver * * * . This [i.e., a trade confirmation] is what he was given. This isn't what he agreed to do. * * * What they make out of this is up to the jury * * * . But they need to hear what was in the mind of the customer when he went in there * * * .

The Criminal Court allowed the questioning, because "the jury's already looked at" the trade confirmation, but granted Sanders an "[o]ngoing standard objection".[93] The State introduced no evidence that any customer ever communicated to Sanders an intent different from what the trade confirmations indicated.

Later, Sanders requested jury-instructions on the parole-evidence rule, which the Criminal Court denied (erroneously, Sanders submits).[94] Sanders also moved for judgment of acquittal, on the ground that, had his customers not intended to sell FRNs to him, the trade confirmations "were not contracts"; and "there's no sales tax due if there wasn't a meeting of the minds". The Criminal

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[93] R., Vol. 11, at 141-45 (Tr. Ev., Vol. 2, at 141-45).

[94] R., Vol. 19, at 48-49 (Def. Req. Jury Instr. Nos. 24 and 25); Vol. 16, at 154 (Tr. Ev., Vol. 7, at 154); Vol. 17, at 4, 6 (Tr. Ev., Vol. 8, at 4, 6). Sanders renewed his objection, too. R. at 313 (Mn. New Tr., at 4); 332-35 (Br. Sup. Mn. New Tr., at 14-17); Vol. 21, at 16-18 (Tr. Mn. New Tr., at 16-18).

Court denied this motion (again, erroneously, Sanders submits).[95] These denials were highlighted when the Court denied Sanders' motion for a new trial, saying that "the jury apparently determined that [Sanders] was not exchanging money as he claimed but was buying and selling collectors coins for the purpose of investment and profit".[96] Thus, the Court licensed the jury to impute to Sanders his customers' secret intent in contradiction of the trade confirmations.

♦ Third, as noted above, revenue agent Wheeler opined that exchanges of FRNs for silver and gold coins are taxable "if you hold it for an investment";[97] and the Criminal Court, denying Sanders' motion for a new trial, speculated that the jury had accepted the State's theory that Sanders was selling coins "for the purpose of investment and profit".[98] The State, however, introduced next to no testimony that Sanders' customers had an "investment" intent.

• Charles Batey simply answered "Yes" when asked whether he was "involved in investing in gold coins, silver coins, bullion" -- and nothing more was said on that subject.[99] Batey never stated that he had an "investment" intent with respect to any of his five specific transactions.

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[95] R., Vol. 17, at 17-18 (Tr. Ev., Vol. 8, at 17-18). See R. at 316-17 (Mn. New Tr., at 7-8); Vol. 21, at 20 (Tr. Mn. New Tr., at 20).

[96] R. at 361 (Find. Mn. New Tr., at 2).

[97] Ante note 79 & accompanying text.

[98] Ante note 96 & accompanying text.

[99] R., Vol. 11, at 136 (Tr. Ev., Vol. 2, at 136).

• Don Webb testified that the coins he acquired were to be used as "promotional gifts" for company personnel.[100] Thus, his exchanges had no possible "investment" motive.

• Jon Thompson was not asked why he had acquired silver bullion.[101]

• Bernard Verhaeghe did not testify. Sanders testified that, to his knowledge, the purpose of Verhaeghe's exchanges was to "bring[] money back into the [United States from Switzerland]" for some third party for whom Verhaeghe was interceding.[102] Thus, no "investment" intent was suggested; rather, the exchanges were purely monetary: moving purchasing-power across national borders.

• Undercover agent Wade Smith's intent was only to discover if Sanders was paying sales tax; and, after acquiring the bullion, Smith "sold [it] to someone in that business that replenished the money that I'd gotten from the State to make that buy".[103]

III. At the close of the evidence, the Criminal Court instructed the jury on the terms "intentionally",[104] "knowingly",[105]

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[100] R., Vol. 11, at 173-74, 181, 182 (Tr. Ev., Vol. 2, at 173-74, 181, 182).

[101] Apparently, Thompson gave some of the silver to his children. See R., Vol. 11, at 187, 192 (Tr. Ev., Vol. 2, at 187, 192). But he did not explain his purpose in doing so.

[102] R., Vol. 15, at 31-38 (Tr. Ev., Vol. 6, at 31-38).

[103] R., Vol. 12, at 82-91 (Tr. Ev., Vol. 3, at 82-91).

[104] "Intentionally means doing an act by design or purpose, a determination to act in a certain way or to do a certain thing." R., Vol. 16, at 162 (Tr. Ev., Vol. 7, at 162); Vol. 19, at 7.

and "design".[106] But the Court gave no instruction on the term "feloniously", and denied Sanders' requested instructions on the terms "felonious intent"[107] and "wilfully",[108] on the ground that "a general instruction" would cover these matters.[109] The Court also denied Sanders' instructions on his defense of good faith.[110] And the Court's instructions did not explain that purposeful violation of the law was an element under § 67-1-1440(d).[111]

On these instructions and the evidence described ante, the jury convicted Sanders on both counts of "failing to file monthly

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[105] "Knowingly means with knowledge; and in a criminal proceeding means that the defendant knew what he was about to do, and, with such knowledge, proceeded to do the act charged." R., Vol. 16, at 162-63 (Tr. Ev., Vol. 7, at 162-63); Vol. 19, at 7.

[106] "Design means to form plan or scheme of, conceive and arrange in mind, originate mentally, plan out, contrive. Also, the plan or scheme conceived in mind and intended for subsequent execution, preliminary conception of idea to be carried into effect by action, contrivance in accordance with preconceived plan." R., Vol. 16, at 165 (Tr. Ev., Vol. 7, at 165); Vol. 19, at 8.

[107] "[F]elonious intent" means "that intent on the part of the Defendant which is meant to be a deliberate and wilfull attempt to violate the law, with knowledge of the duties imposed upon him by law". R., Vol. 19, at 51 (Def. Req. Jury Instr. No. 28).

[108] "An act is done 'wilfully' if done voluntarily and intentionally, and with the specific intent to do[] something the law forbids * * * ." R., Vol. 19, at 52 (Def. Req. Jury Instr. No. 29).

[109] R., Vol. 16, at 155 (Tr. Ev., Vol. 7, at 155).

[110] R., Vol. 16, at 155 (Tr. Ev., Vol. 7, at 155).

[111] See Cheek v. United States, 111 S. Ct. 604, 610 (1991): "Willfullness" in the context of criminal tax cases is usually defined as a "voluntary, intentional violation of a known legal duty".

sales tax returns as charged", but assessed no fine.[112] The jury was not instructed to and did not determine the amount of tax Sanders owed, other than (implicitly) that it was more than five thousand dollars, as the indictment alleged.

Upon Sanders' conviction, the Criminal Court sentenced him to one year of imprisonment on each count, the sentences to be served concurrently but "suspended except for * * * thirty days confinement". The Court also ordered restitution of $73,000.00, "paid out at $1000.00 per month with a probation of six years", together with "1000 hours community service".[113] The restitution reflected what the State argued was "[t]he proof * * * in the record as to the amount of taxes owed".[114] This "proof" consisted of revenue agent Wheeler's calculation of taxes owed on all the exchanges between Sanders and Batey, Webb, Thompson, Verhaeghe, and Smith.[115]

IV. After Sanders' conviction, the Criminal Court received into the record documents establishing that Krugerrands are legal tender in South Africa.[116] Then, on his motions under Tennessee Rules of Criminal Procedure 29 and 33, Sanders and the State focussed on the issues raised in this appeal:

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[112] R., Vol. 17, at 35 (Tr. Ev., Vol. 8, at 35).

[113] R., Vol. 20, at 36-37 (Tr. Sent. Hear., at 36-37).

[114] R., Vol. 20, at 33 (Tr. Sent. Hear., at 33).

[115] R., Vol. 13, at 47-51 (Tr. Ev., Vol. 4, at 47-51).

[116] R. at 317-422 (attachments to Sanders' motion for release on bond pending appeal), received into the record in Vol. 21, at 3-6 (Tr. Mn. New Tr., at 3-6). This was proper under Tennessee Rule of Evidence 202(b)(5).

A. 1. Due process of law. Sanders argued that this case is "one of first impression in * * * Tennessee", "involv[ing] the very unique issue of whether [his moneychanging] transactions * * * were in fact taxable". Because there are at least three reasonable constructions of the law -- Sanders', the State's, and the Criminal Court's, "there's an inherent due process violation" in prosecuting Sanders.[117] The State disagreed.[118]

2. Money-for-money exchanges. Sanders argued that, as a matter of law, silver and gold coins and bullion are money; and that exchanges of FRNs for them are nontaxable money-for-money trades.[119] The State disagreed.[120]

Sanders also argued that the Criminal Court erred in denying his requested jury-instruction that the "sales tax law does not tax money itself and gold and silver coin and bullion are money".[121]

3. State's failure to prove $5,000.00 in tax owed. Sanders further argued that, even "[i]f the silver bullion could be taxed,

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[117] R., Vol. 21, at 4, 11-13 (Tr. Mn. New Tr., at 4, 11-13). See also R. at 310-11, 317 (Mn. New Tr., at 1-2, 8); 326 (Br. Sup. Mn. New Tr., at 8); 286 (Post-Trial Mn., at 2); 296-300 (Br. Sup. Rule 29 Mn., at 10-14, incorporating by reference earlier motions and briefs).

[118] R., Vol. 21, at 21-22, 29, 32 (Tr. Mn. New Tr, at 21-22, 29, 32).

[119] R., Vol. 21, at 4-9, 34-35 (Tr. Mn. New Tr., at 4-9, 34-35); 335-53 (Br. Sup. Mn. New Tr., at 17-35); 285-86 (Post-Trial Mn., at 1-2); 291-96 (Br. Sup. Rule 29 Mn., at 5-10).

[120] R., Vol. 21, at 29 (Tr. Mn. New Tr., at 29).

[121] R. at 311, 317 (Mn. New Tr., at 2, 8); 332-35 (Br. Sup. Mn. New Tr., at 14-17). See R., Vol. 16, at 149 (Tr. Ev., Vol. 7, at 149)(denial of instruction).

there wouldn't be five thousand dollars * * * due and payable. So * * * the prosecution * * * failed in their proof".[122] Once more, the State disagreed:

> With regard to all of the bullion, the silver, the Krugerrands, the gold that was sold, * * * every one of [the witnesses] who testified said that they bought it for investment purposes. They were not using it * * * as a medium of exchange in any way. * * * It's not a medium of exchange. * * * [T]he jury did not buy it * * * .[123]

4. Sanders' defense of good faith. (a) Sanders again objected to the Criminal Court's denial of jury-instructions on the parole-evidence rule.[124] The State reiterated its theory that Sanders

> had the receipts [i.e., the trade confirmations] that the witnesses testified that they didn't know what these things were. They were all backwards. * * * And we submit that, as the jury found, this was how [Sanders] intended to do it, to so bamboozle the ordinary state tax people * * * that they wouldn't catch him in his business.[125]

(b) Sanders further argued that the Criminal Court erred in excluding the documentary materials on which he had relied in form-

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[122] R., Vol. 21, at 4-9 (Tr. Mn. New Tr., at 4-9). See also R. at 293 (Br. Sup. Rule 29 Mn., at 7); 317 (Mn. New Tr., at 8).

[123] R., Vol. 21, at 29 (Tr. Mn. New Tr., at 29). This was hyperbole; for not "every one of [the witnesses]" -- but only, perhaps, Batey -- so testified. See ante notes 97-103 & accompanying text.

[124] R. at 313 (Mn. New Tr., at 4); 332-35 (Br. Sup. Mn. New Tr., at 14-17). See R., Vol. 16, at 154 (Tr. Ev., Vol. 7, at 154) (denial of instruction).

[125] R., Vol. 21, at 27-28 (Tr. Mn. New Tr., at 27-28). See also R., Vol. 13, at 69-70 (Tr. Ev., Vol. 4, at 69-70): "The proof also shows that * * * he then came up with the scheme or strategem * * * : Changing his invoices so that they would show that the person was selling money to him. * * * [A]ll of those are clearly questions for the jury."

ing his belief that moneychanging is not taxable.[126]

(c) Sanders also objected to the Criminal Court's denial of his requested jury-instructions on "willfulness" and his defense of good faith: "[W]e've argued from the outset that there has to be that evil mens rea, * * * some critical intent that's involved in this case".[127] The State agreed that "[t]his is an intentional crime dealing with willful and intentional, a felonious intent"; "[t]he criminal intent was unlawfully, willfully and feloniously" -- but simultaneously argued that "[u]nder [§ 67-1-144(d)] there is no 'good faith' escape hatch".[128]

5. Absence of an assessment. Sanders asked that the indictment be dismissed because the State "failed to comply with * * * the Tax Exforcement Procedures Act * * * which provide[s] the statutory authority for the collection of * * * revenue".[129] In essence, he contended that he could not "delay" the State in "the collection" of revenue in violation of § 67-1-1440(d) until the State commenced collection, which it never did. And he could not "de-

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[126] R., Vol. 21, at 17-18 (Tr. Mn. New Tr., at 17-18). See also R. at 320 (Mn. New Tr., at 2); 327-32 (Br. Sup. Mn. New Tr., at 9-14).

[127] R. at 313-15 (Mn. New Tr., at 4-6); 332-35 (Br. Sup. Mn. New Tr., at 14-17); Vol. 21, at 16-17 (Tr. Mn. New Tr., at 16-17).

[128] R., Vol. 21, at 27, 31, 26 (Tr. Mn. New Tr., at 27, 31, 26).

[129] R. at 310, 317-18 (Mn. New Tr., at 1, 7-8). Sanders also objected to the Criminal Court's refusal to give jury-instructions on the procedural requirements for tax-collections. R. at 311-13 (Mn. New Tr., at 2-4); 322-26 (Br. Sup. Mn. New Tr., at 4-8, 14-17). See R., Vol. 16, at 149-54 (Tr. Ev., Vol. 7, at 149-54)(denial of instructions).

prive" the State of revenue "at the time it is lawfully entitled thereto" until the administrative process established "lawful entitle[ment]", which never occurred. The State countered that § 67-1-1440(d) "does not deal with * * * issuing notice and * * * an assessment and * * * a civil procedure".[130]

6. Double jeopardy (multiplicity). "[T]he problem here", Sanders contended,

> is that the prosecution framed this indictment covering the exact same periods of time * * * [for both counts]. The proof * * * on one count was indistinguishable from the proof * * * for the other count. * * * [O]ne crime was committed, if a crime was committed at all, yet it was charged twice. That's what the principles of multiplicity condemn.[131]

The State argued that the counts involved "different elements".[132]

7. Restitution. Finally, objecting to the Criminal Court's conditioning of probation on payment of restitution of $73,000.00 of tax alleged owed, Sanders pointed out that

> there is but one official in this State that can assess taxes. And we have * * * proof * * * that there were no assessments * * * made. * * * [T]he Court * * * has ordered that * * * this amount of taxes, which have not been assessed be paid as restitution. * * * [T]hat part of the order * * * can't be valid.[133]

The State countered that restitution had been ordered in the C.P. Powell case in 1990, that restitution could be in addition to "the entire amount of civil liability" discovered, and that "the Crimi-

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[130] R., Vol. 21, at 24 (Tr. Mn. New Tr., at 24).

[131] R., Vol. 21, at 16 (Tr. Mn. New Tr., at 16). See also R. at 311 (Mn. New Tr., at 2); 326 (Br. Sup. Mn. New Tr., at 9).

[132] R., Vol. 21, 25 (Tr. Mn. New Tr., at 25).

[133] R., Vol. 21, at 19 (Tr. Mn. New Tr., at 19); Vol. 20, at 29-32 (Tr. Sent. Hear., at 29-32).

nal Court can impose restitution, as much, in any way the Court wants to".[134]

B. The Criminal Court denied Sanders' Rule 29 and 33 motions.

(1) On the issue of due process, the Court said nothing.

(2) On the issue of money-for-money exchanges, the Court opined that

> it does not matter whether England, Canada, or South Africa recognize the Krugerrand as money, legal tender, or currency. The only defense along these lines is that the United States of America recognizes the Krugerrand and other coins involved in this case as legal tender.[135]

The Court did not explain how the sales tax can reach Krugerrands when Tennessee law recognizes them as money, because they have been "authorized or adopted by a domestic or foreign government as a part of its currency". Neither did the Court explain how exchanges of legal-tender United States gold and silver coins can be taxable, when the Court itself acknowledged as a defense that "the United States * * * recognizes * * * [those] coins * * * as legal tender".

(3) On the issue of the State's failure to prove more than $5,000.00 in taxes allegedly owed, the Court said nothing.

(4) On the issue of Sanders' defense of good faith, the Court agreed that "merely failure to file is not a crime", but concluded that Sanders "had a clear purpose in avoiding the payment of taxes", and that "[t]he jury was correct in its apparent determina-

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[134] R., Vol. 21, at 22-23, 23, 31 (Tr. Mn. New Tr., at 22-23, 23, 31).

[135] R. at 361 (Find. Mn. New Tr., at 2).

tion that [Sanders] did more than 'merely' fail to file".[136]

(5) On the issue of assessment, the Court held that § 67-1-1440(d) is "not effected by * * * failure to follow" the Tax Enforcement Procedures Act, but "could be applied even where the defendant has paid his taxes as a result of efforts by the Department of Revenue".[137]

(6) On the issue of multiplicity, the Court ruled that "[t]here are clearly two distinct offenses in the present case, one offense requires proof of delaying the State * * * in collection of its lawful revenue while the other requires actual deprivation of lawful revenue".[138]

(7) On the issue of restitution, the Court noted that "the Charles P. Powell case * * * seems to indicate restitution is proper". "The State * * * is the victim * * * and restitution is clearly proper since the damage caused to the state was the delay and deprivation of lawful revenue."[139] The Court did not explain why the amount of restitution it ordered was proper.

And the Court overruled all of Sanders' objections to its denial of his requested jury-instructions, on the ground that "the instructions given the jury were accurate and covered all issues

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[136] R. at 361 (Find. Mn. New Tr., at 2).

[137] R. at 363 (Find. Mn. New Tr., at 4).

[138] R. at 362 (Find. Mn. New Tr., at 3).

[139] R. at 363 (Find. Mn. New Tr., at 4).

material to the finding of guilt or innocence".[140]

This appeal followed.

SUMMARY OF THE ARGUMENT

I. Sanders' convictions should be reversed and the indictment dismissed under United States v. Mallas, 762 F.2d 316 (4th Cir. 1985), and cognate cases, because

A. Sanders had a nonfrivolous legal theory that (i) FRNs, domestic and foreign legal-tender silver and gold coins, and silver bullion are all "money" under the laws of the United States and of the State of Tennessee, and (ii) exchanges of money for money are not subject to sales tax;

B. no civil, administrative, or criminal precedent in Tennessee had established, prior to the operative dates in the indictment, that exchanges of FRNs for domestic or foreign legal-tender silver or gold coins, or for silver bullion, are taxable; and, therefore,

C. his indictment and conviction in this case of first impression deprived Sanders of due process of law.

II. Sanders' convictions should be reversed and a judgment of acquittal entered, because Sanders' position is, not merely nonfrivolous under Mallas, but also correct. In particular,

A. exchanges of money for money are not taxable; and

B. exchanges of FRNs for United States legal-tender gold or silver coins, gold Krugerrands that are legal tender in their country of origin, and silver bullion are exchanges of money for

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[140] R. at 362 (Find. Mn. New Tr., at 3).

money, which the State of Tennessee is required to treat as such under the Constitution, laws, and judicial precedents of the United States and the State of Tennessee.

III. Even if Mallas does not apply here, and Sanders is in part incorrect as to what constitutes money, his convictions nevertheless should be reversed and a judgment of acquittal entered, for two reasons.

A. Even if silver bullion is not money, Sanders' exchanges involving bullion would not have generated a "sales tax revenue * * * exceeding five thousand dollars", as alleged in the indictment. And,

B. Even if silver and gold coins acquired as an "investment" are also not money, Sanders' exchanges involving silver bullion and such coins would not have generated a "sales tax revenue * * * exceeding five thousand dollars", as alleged in the indictment.

IV. Even if Mallas does not apply here, and silver bullion and all silver and gold coins are not money, Sanders' convictions nevertheless should be reversed and judgment of acquittal entered, or a new trial ordered, for three reasons.

A. The Criminal Court erroneously allowed Sanders' customers to testify that, unknown to him and in contradiction of the terms of their trade confirmations, they had not intended to sell him the FRNs they exchanged for silver or gold coins or bullion; and the State used this testimony nonrationally to impute to Sanders a "felonious" intent to violate the law.

B. The Criminal Court erroneously refused to admit into evidence documentary materials on which Sanders had relied in arriving at his belief that moneychanging is not taxable, thereby prejudicing his ability to present his defense that he made a good-faith mistake of law. And,

C. The Criminal Court erroneously failed to instruct the jury that, to convict, it must find that Sanders acted "willfully", by voluntarily violating a known legal duty.

V. Even if Mallas does not apply here, silver bullion and all silver and gold coins are not money, and Sanders may not assert a defense of good-faith mistake of law and absence of willfullness, his convictions nevertheless should be reversed and judgment of acquittal entered, because prior to the indictment the State never followed the Tax Enforcement Procedures Act to collect any revenue Sanders allegedly owed, or even to determine whether it was lawfully entitled to any revenue.

VI. Even if Mallas does not apply here, silver bullion and all silver and gold coins are not money, and the State's failure to follow the Tax Enforcement Procedures Act is irrelevant, Sanders' conviction on the first count should be reversed, and that count dismissed, because convictions on both counts constitute unconstitutional "multiplicity" or "double jeopardy". And finally,

VII. Even if one or both of Sanders' convictions must stand, nevertheless the amount of restitution should be reduced to $5,001.00.

ARGUMENT

I. Sanders' convictions must be reversed and the indictment dismissed, because criminal prosecution in this case of first impression denied him due process of law, under United States v. Mallas, 762 F.2d 316 (4th Cir. 1985), and cognate cases.

Criminal prosecution in this case of first impression denied Sanders due process of law, because he lacked pre-indictment notice that the sales-tax law and § 67-1-1440(d) applied to moneychanging. The uncertainties in application of those laws prior to the indictment rendered them vague as to him, precluding the State's use of a criminal prosecution as "the appropriate vehicle to decide [a] pioneering interpretation" of the statutes.[141]

A. The Due Process Clauses of the United States and Tennessee Constitutions require that criminal statutes give prior notice of proscribed conduct.[142] Fundamental fairness requires that persons not have to guess the meaning of criminal laws.[143] Standards are imperative to protect against arbitrary, discriminatory, and selective prosecutions.[144] For, unless the statute or a prior judicial gloss prescribes standards, policy-decisions are impermiss-

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[141] United States v. Critzer, 498 F.2d 1160, 1164 (4th Cir. 1974). Accord, United States v. Mallas, 762 F.2d 361, 365 (4th Cir. 1985); United States v. Harris, 942 F.2d 1125, 1135 (7th Cir. 1991).

[142] U.S. Const. amend. XIV, § 1; Tenn. Const. art. I, § 8. E.g., Colautti v. Franklin, 439 U.S. 379, 390-91 (1979); City of Clarksville v. Moore, 688 S.W.2d 428, 429-30 (Tenn. 1985).

[143] E.g., United States v. Batchelder, 442 U.S. 114, 123 (1979); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). Accord, Underwood v. State, 529 S.W.2d 45, 47-48 (Tenn. 1975).

[144] E.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

ibly delegated to prosecutors, trial judges, and jurors.[145]

Because the adequacy of notice is an issue of federal law, federal precedents control; and the federal courts, on direct review or collateral attack of a conviction, have power to "decide for [themselves] the true construction of the statute"[146] and the sufficiency of the evidence.[147]

B. The facts controlling the issue of inadequate notice in this case are not subject to dispute. **Prior to the indictment:**

1. Sanders exchanged FRNs for domestic and foreign legal-tender silver and gold coins and for silver bullion.

2. Sanders had a "reasonable and well-supported", "plausible", and not "frivolous"[148] legal theory that (i) FRNs, domestic and foreign legal-tender silver and gold coins, and silver bullion are all "money" under the laws of the United States and the State of Tennessee, and (ii) exchanges of money for money are not taxable. In federal law, the adjective "frivolous" (or its synonym, "insubstantial") imports a claim "so attenuated * * * as to be ab-

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[145] E.g., Kolender v. Lawson, 461 U.S. 352, 357-58 (1983); Smith v. Goguen, 415 U.S. 566, 575 (1974).

[146] E.g., Scott v. McNeal, 154 U.S. 34, 45 (1893).

[147] E.g., In re Primus, 436 U.S. 412, 434 (1978); New York Times Co. v. Sullivan, 376 U.S. 254, 285 & n.26 (1964); Haynes v. Washington, 373 U.S. 503, 515-16 (1963); Edwards v. South Carolina, 372 U.S. 229, 235 (1963); Napue v. Illinois, 360 U.S. 264, 271 (1958); Niemotko v. Maryland, 340 U.S. 268, 271 (1951); Feiner v. New York, 340 U.S. 315, 316 (1951); Craig v. Harney, 331 U.S. 367, 373-74 (1947); Ashcraft v. Tennessee, 322 U.S. 143, 147-48 (1944); Chambers v. Florida, 309 U.S. 227, 228-29 (1940).

[148] United States v. Mallas, 762 F.2d 361, 364 (4th Cir. 1985); United States v. Critzer, 498 F.2d 1160, 1161 (4th Cir. 1974).

solutely devoid of merit".[149] This, however, is not a case in which Sanders' position "lacks an arguable basis" in law or fact, or "describ[es] fantastic or delusional scenarios"; in which none of his "legal points [is] arguable on their merits"; in which the issues require "no analysis and exposition for [their] decision" and are "so wanting in substance as not to need further argument"; or in which the "unsoundness" of his claims "so clearly results from the previous decisions of [the Supreme Court of the United States] as to foreclose the subject and leave no room for * * * controversy".[150] In short, Sanders' position is simply not "frivolous".

That being so, Sanders' position need not be more cogent than the State's (although it is[151]). For even if both sides have non-frivolous positions, Sanders prevails on the due-process issue.[152]

3. No reported civil, administrative, or criminal precedent in Tennessee had held taxable exchanges of FRNs for legal-tender silver or gold coins, or for silver bullion.

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[149] Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579 (1904), quoted in Baker v. Carr, 369 U.S. 186, 199 (1962), and Hagans v. Levine, 415 U.S. 528, 536-37 (1974).

[150] Neitzke v. Williams, 109 S. Ct. 1827, 1831, 1833 (1989); Anders v. California, 386 U.S. 738, 744 (1967); Milheim v. Moffat Tunnel Improvement District, 262 U.S. 710, 716-17 (1923); and Ex parte Poresky, 290 U.S. 30, 32 (1933), quoted in Goosby v. Osser, 409 U.S. 512, 518 (1973), and Hagans v. Levine, 415 U.S. 528, 537-38 (1974). Accord, e.g., Oneida Indian Nation of New York State v. County of Oneida, 414 U.S. 661, 666-67 (1974); Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 68-72 (1978).

[151] See post, at 61-73.

[152] United States v. Mallas, 762 F.2d 361, 364-65 (4th Cir. 1985); United States v. Harris, 942 F.2d 1125, 1131 (7th Cir. 1991).

4. Through its undercover agent Wade Smith, the State exchanged FRNs for silver bullion on Sanders' terms (as set out in his trade confirmations), without objection, and on notice that Sanders believed he was not subject to sales tax, because he was buying FRNs for silver. Indeed, until the search of Sanders' office preceding the indictment, the State

- never challenged the trade confirmations as "[written] confirmation of [Sanders'] oral contract with [Smith]";[153]
- never challenged the confirmations' statement that Sanders' "business legally is buying notes and paying for them in gold and silver" or his similar oral statements to Smith;
- never challenged the confirmations' reference to "gold and silver money" or the implicit representation that, because "[i]n any dispute the laws of the state of Tennessee shall govern", gold and silver are money under the laws of Tennessee;[154]
- never warned Sanders that he was required to file returns or pay taxes on moneychanging;
- never warned Sanders that his monetary and tax theories were illegal "design[s]" under § 67-1-1440(d); and
- never followed the administrative or civil procedures in any statute to establish Sanders' supposed liability for taxes.[155]

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[153] See T.C.A. § 47-2-201(1, 2) (1992).

[154] See T.C.A. § 47-1-201(24) (1992).

[155] After Sanders' trial, the Tennessee Department of Revenue began the administrative process for collection of taxes allegedly owed. Notice of Assessment, Audit No. 77-061692-001 (23 March 1993).

In short, Sanders notified the State of his actions and their legal basis; but the State withheld from him until the search any notice that he was supposedly violating the law -- and then indicted him for exchanges ante-dating the search.

C. In this context, Mallas and cognate cases control.[156]

1. The Mallas defendants were convicted for an alleged "scheme to evade * * * taxes".[157] The court reversed, holding that

> [the defendants'] contested business practices raise novel questions of tax liability to which governing law offers no clear guidance. Because the defendants therefore could not have ascertained the legal standards applicable to their conduct, criminal proceedings may not be used to define and punish an alleged failure to conform to those standards.[158]

"Grave penalties rest in this case on an unsubstantiated theory of tax law", the court explained.

> Whatever eventual success this proposition [advanced by the government] may enjoy as an interpretation of tax law -- a destiny we do not influence here -- present authority in support of the theory is far too tenuous and competing interpretations of the applicable law far too reasonable to justify

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[156] United States v. Mallas, 762 F.2d 361 (4th Cir. 1985)("Mallas"); United States v. Critzer, 498 F.2d 1160 (4th Cir. 1974)("Critzer"); United States v. Harris, 942 F.2d 1125 (7th Cir. 1991)("Harris"); United States v. Dahlstrom, 713 F.2d 1423 (9th Cir. 1983)("Dahlstrom"). See United States v. McClain, 593 F.2d 658, 665-71 (5th Cir. 1979); United States v. Garber, 607 F.2d 92 (5th Cir. 1979)(following Critzer, but holding that the uncertainty of tax law is an issue of fact)(disapproved on the latter point in Mallas, 762 F.2d at 364 n.4). See also United States v. Thompson/Center Arms Co., 112 S. Ct. 2102, 2109-10 (1992)(ambiguous tax law with criminal applications should be construed in defendant's favor even in civil litigation). Cf. Ridenour v. State, 9 S.W.2d 699, 700 (Tenn. 1928) ("[g]ood-faith differences [on boundary rights], however ill advised and unsupported in law or fact * * * , are not proper subjects for the criminal forum").

[157] 762 F.2d at 362-63.

[158] Id. at 361 (emphasis supplied).

these convictions.[159]

The legality of the defendants' actions "is a point of law that is 'vague or highly debatable'", the court went on.

> In the absence of explicit language in the [tax] regulation, potential liability might alternatively be announced by "authoritative constructions illuminating the contours of an otherwise vague prohibition" * * * . But the government has failed to suggest any other regulation, judicial decision, or even revenue ruling that sheds such light * * *. Nor have we found any. The traditional sources of notice for potential defendants are simply silent --- and hence ambiguous -- on this subject.[160]

Furthermore, although

> the prosecution and defense can in this situation both offer plausible support for their positions * * * a determination that the prosecution theory * * * is "reasonable and well-supported" does not prove that "defendants' claim that they could not have known what the law required is frivolous." Defendants, too, advance a "reasonable and well-supported" reading [of the law].[161]

"Nothing here is meant to imply that one of these solutions is not a better construction of tax law, or that civil liability -- with appropriate civil penalties -- may not be imposed on these defendants", the court concluded.

> We merely find that there has been no "fair warning...given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." * * * But without that fair warning, the government may not institute criminal proceedings. * * * "[T]he appropriate vehicle to decide this pioneering interpretation of tax liability is the civil procedure of administrative assess-

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[159] Id. at 363.

[160] Id. at 364 (footnotes omitted)(emphasis supplied). The court's repeated use of "potential" shows that "authoritative constructions" must precede the conduct the government prosecutes.

[161] Id. at 364.

ment," not a criminal prosecution.[162]

The reasoning of Mallas applies word-for-word here:

♦ This case involves "novel questions of * * * liability to which governing law offers no clear guidance".

♦ Whether exchanges of FRNs for silver and gold coins or bullion are taxable was at the time of the indictment, and remains today, "an unsubstantiated theory" based on "a point of law that is 'vague or highly debatable'" and was "unsettled during th[e relevant] period".

♦ "The traditional sources of notice for potential defendants are simply silent -- and hence ambiguous -- on this subject."

♦ True, "the prosecution and the defense can * * * both offer plausible support for their positions". But even "a determination that the prosecution theory * * * is 'reasonable and well-supported' does not prove that '[Sanders'] claim * * * is frivolous.' [Sanders], too, advance[s] a 'reasonable and well-supported'" position.[163]

♦ Even if "one of these solutions is * * * a better con-

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[162] Id. at 364-65 (emphasis in the original). Significantly, Mallas and the cases following it involved constitutional challenges to tax-prosecutions. Constitutional review of tax-matters, however, has traditionally been narrow. See, e.g., Austin v. New Hampshire, 420 U.S. 656, 661-62 (1975). For that reason, Mallas fairly represents the minimum due-process scrutiny allowable in criminal tax-cases.

[163] Importantly, as shown post, Sanders relies on the monetary statutes of the United States and decisions of monetary law by the Supreme Court of the United States. Surely he cannot have employed a "design" amounting to fraud by doing what he believed those laws allowed him to do, and by relying on those decisions. See Tindal v. Wesley, 167 U.S. 204, 209 (1897); United States v. Mason, 412 U.S. 391, 399-400 (1973).

struction of [the sales-tax] law", and "civil liability -- with appropriate civil penalities -- may * * * be imposed on [Sanders]", "present authority in support of the [State's] position is far too tenuous and competing interpretations of the applicable law far too reasonable to justify th[is] conviction". "'[T]he appropriate vehicle to decide this pioneering interpretation of * * * liability is the civil procedure * * * ,' not a criminal prosecution."

2. In United States v. Critzer[164], Critzer had been convicted of tax evasion, because her "underreporting was intentional". But "whether defendant's omitted income was taxable", the court noted, "is a nice [question], and one which we do not decide".

> The government asserts vigorously that it was, although the government freely concedes that the question is as yet undecided and there is no direct authority pointing to a ready answer. Conversely, defendant presents a nonfrivolous argument that the income was exempt, although we stress that we express no view on the ultimate merit of either side.

Instead, the court held

> that defendant must be exonerated from the charges lodged against her. As a matter of law, defendant cannot be guilty of willfully evading * * * taxes on income, the taxability of which is so uncertain that even co-ordinate branches of the [government] plausibly reach opposing conclusions. As a matter of law, the requisite intent * * * is missing. The obligation to pay is so problematical that defendant's actual intent is irrelevant. Even if she had consulted the law and sought to guide herself accordingly, she could have no certainty as to what the law required.
>
> It is well-settled that when the law is vague or highly debatable, a defendant -- actually or imputedly -- lacks the requisite intent to violate it.
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> * * * * *
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> We do not question that defendant may eventually be liable for the tax. * * * But, * * * the appropriate vehicle to decide this pioneering interpretation of tax liability is the civil procedure of administrative assessment, with judi-

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[164] 498 F.2d 1160 (4th Cir. 1974).

cial review * * * not the prosecution [of defendant].[165]

Self-evidently, Critzer too applies word-for-word here:

♦ Whether exchanges of FRNs for silver and gold coin or bullion are taxable was, at the time of the indictment, "as yet undecided" in Tennessee and without any "direct authority pointing to a ready answer". If anything, "the law [on this subject was] vague and highly debatable" at best, and "so uncertain that even co-ordinate branches of the [same government] plausibly reach[ed] opposing conclusions".[166]

♦ Sanders "presents a non-frivolous argument" that such exchanges are not taxable.

♦ Thus, even if Sanders could be held liable now in a civil action, prior to the indictment he "actually or imputedly" "lack-[ed] the requisite [criminal] intent to violate [the law]".[167] And his "actual intent is irrelevant"; for "had [he] consulted the law and sought to guide [himself] accordingly, [he] could have had no

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[165] Id. at 1160, 1161, 1162, 1164 (emphasis in the original).

[166] As Sanders pointed out at trial, the prosecution and the Criminal Court -- co-ordinate branches of the same government -- arrived at different constructions of the law in this case. Ante note 117 & accompanying text.

[167] The indictment defines the level of criminal intent as "feloniously". R. at 3, 4. "Feloniously" imports committing an act "intentionally or willfully, and without legal justification or excuse". State v. Smith, 119 Tenn. 521, 525-26, 105 S.W. 68, 70 (1907). The State conceded that "[t]his is an intentional crime dealing with willful and intentional, a felonious intent"; "[t]he criminal intent was unlawfully, willfully and feloniously". R., Vol. 20, at 27, 31 (Tr. Sent. Hear. at 27, 31)(emphasis supplied).

certainty as to what the law required".[168]

♦ Therefore, Sanders must be "exonerat[e]d from criminal liability".[169]

3. United States v. Harris[170] involved tax evasion as to certain payments. "No regulations cover the subject", the court noted; "and we have found no * * * cases on the issue." Because "[r]easonable inquiry does not yield a clear answer to the taxability of such payments", "[u]ntil contrary authority emerges, no taxpayer could form a willful, criminal intent to violate the tax laws by failing to report [such] payments". Rather, "[i]f the obligation to pay a tax is sufficiently in doubt, willfulness is impossible as a matter of law, and the 'defendant's intent is irrelevant'". The court "d[id] not necessarily agree with those authorities [supporting Harris]", and left the government "free to urge departure from them in a noncriminal context. But new points of tax law may not be the basis of criminal convictions." Because "criminal prosecutions are no place for the government to try out 'pioneering interpretations of tax law'", the court reversed the conviction and dismissed the indictment.[171]

Here, just as in Harris --

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[168] Consulting decisions of the Supreme Court of the United States on monetary law cemented Sanders' defense. For "[t]he requirement of an offense committed 'willfully' is not met * * * if a taxpayer has relied in good faith on a prior decision of th[at] Court." United States v. Bishop, 412 U.S. 346, 361 (1973).

[169] Critzer, 498 F.2d at 1161.

[170] 942 F.2d 1125 (7th Cir. 1991).

[171] Id. at 1132, 1133, 1132, 1131, 1135.

♦ The State produced no pre-indictment reported judicial precedents or administrative regulations supporting its position.

♦ "Reasonable inquiry does not yield a clear answer to the taxability of" moneychanging in Tennessee.

♦ Strong authorities support Sanders' position that silver and gold coin and bullion are money, not subject to tax.[172]

♦ If the State "urge[s] departure" from these authorities, it must do so "in a noncriminal context", and not use a criminal prosecution "to try out 'pioneering interpretations of tax law'".

♦ Meanwhile, in the uncertain state of the law, Sanders "could [not have] form[ed] a willful, criminal intent to violate [§ 67-1-1440(d)]"; his "willfulness is impossible as a matter of law"; and his "intent is irrelevant".

4. United States v. Dahlstrom[173] involved tax shelters "the government assert[ed] * * * were * * * blatant shams". "[H]owever", the court ruled,

> [t]he government * * * has not pointed to any cases which invalidated the [tax shelters] * * * .
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> * * * * *
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> * * * [T]he legality of the tax shelter program * * * was completely unsettled by any clearly relevant precedent on the dates alleged in the indictment. "It is settled that when the law...is highly debatable, a defendant -- actually or imputedly -- lacks the requisite intent to violate it."[174]

Here, as in Dahlstrom, the controlling legal issues were "completely unsettled by any clearly relevant [Tennessee] precedent on

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[172] See post, at 61-73.

[173] 713 F.2d 1423 (9th Cir. 1983).

[174] Id. at 1427, 1428.

the dates alleged in the indictment".

5. Significantly, the jury found in Mallas that the tax shelter was a "scheme to evade * * * taxes"; in Critzer that evasion of tax was "intentional"; in Harris that the defendant evaded tax on the monies in issue (as well as being "a thief" who had "evaded her tax obligations regarding other money"); and in Dahlstrom that the tax shelters were "blatant shams".[175] Yet, in each case, the court reversed the convictions because of the uncertain state of the law.[176] Thus, that the jury convicted Sanders of employing a "design" illegal under § 67-1-1440(d) is irrelevant.

A fortiori, Sanders' intent (as well as his customers') is equally irrelevant.[177]

Also irrelevant is whether Sanders' or the State's theory of the (non)taxability of the exchanges is correct.[178]

In sum, under Mallas and cognate cases, Sanders' convictions must be reversed, and the indictment dismissed, because -- whatever the taxability of the exchanges or Sanders' intent -- "criminal prosecutions are no place * * * to try out 'pioneering interpreta-

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[175] 762 F.2d at 362; 498 F.2d at 1160; 942 F.2d at 1134; 713 F.2d at 1427.

[176] Accord, United States v. McClain, 593 F.2d 658, 665-71 (5th Cir. 1979)(where foreign law does not give adequate notice that artifacts brought from abroad are "stolen", conviction for dealing in stolen goods must be reversed, even though "evidence of guilt * * * is near overwhelming").

[177] Harris, 942 F.2d at 1132; Critzer, 498 F.2d at 1162. See also Dahlstrom, 713 F.2d at 1428.

[178] Mallas, 762 F.2d at 363; Critzer, 498 F.2d at 1161; Harris, 924 F.2d at 1131.

tions of tax law'".

II. Sanders' convictions must be reversed and judgment of acquittal entered, because exchanges of one kind of money for another are not taxable; and exchanges of Federal Reserve Notes for legal-tender silver and gold coins, and for silver bullion, are exchanges of money for money.

The convictions also must be reversed because the State's "pioneering interpretation[] of tax law" is wrong: Exchanges of one kind of money for another are not taxable; and, as a matter of law, exchanges of FRNs for legal-tender silver and gold coins, and for silver bullion, are exchanges of money for money.

A. The State conceded that exchanges of money for money are not taxable -- for example, exchanges of FRNs for United States base-metallic coinage or for gold and silver coins not held "for an investment or for collection purposes".[179] Thus, controlling here is that domestic and foreign legal-tender silver and gold coins, and silver bullion, are "money" in the same legal sense as FRNs and United States base-metallic coinage, notwithstanding any "investment" purpose Sanders' customers had in acquiring them.[180]

B. Congress has created a multi-currency monetary system, consisting of (i) irredeemable FRNs and base-metallic coinage with essentially no intrinsic value, and (ii) silver and gold coins -- all of which are equally money as a matter of law for two reasons:

- First, they are all denominated in "dollars". And

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[179] R., Vol. 12, at 133-34 (Tr. Ev., Vol. 3, at 133-34); Vol. 13, at 58-59 (Tr. Ev., Vol. 4, at 58-59).

[180] The State introduced no evidence that any of Sanders' customers acquired rare coins for "collection purposes".

"United States money is expressed in dollars".[181] Ergo they are all "United States money", as must be recognized as such.[182]

♦ Second, FRNs and United States base-metallic coins are legal tender perforce of federal statute.[183] United States silver and gold coins -- including those in Sanders' exchanges[184] -- are also legal tender perforce of both the same federal statute[185] and the Constitution itself[186]. Moreover, under Tennessee law, gold Krugerrands that are legal tender within their country of origin are money.[187] Therefore, Sanders' trade confirmations for exchanges of FRNs for United States silver and gold coins, and for Krugerrands, were moneychanging contracts, as a matter of law.

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[181] 31 U.S.C.A. § 5101 (1983).

[182] See Bronson v. Rodes, 74 U.S. (7 Wall.) 229, 254 (1869) ("[w]hen * * * two descriptions of money are sanctioned by law, both expressed in dollars and both made current in payments," courts must specifically enforce contracts calling for payments in silver or gold coin as money).

[183] FRNs: "United States coins and currency (including Federal reserve notes * * *) are legal tender * * * ." 31 U.S.C.A. § 5103 (1983). Base-metallic coins: 31 U.S.C.A. §§ 5103, 5112(a)(1-6), 5112(b) (1983 & 1993 Supp.).

[184] See ante, at 33.

[185] 31 U.S.C.A. §§ 5103, 5112(a)(7-10), 5112(e), 5112(h), 5112(i) (1983 & 1993 Supp.); Act of 22 July 1982, Pub. L. 97-220, 96 Stat. 222, 222. They are also "lawful money". See 12 U.S.C.A. § 152 (1989).

[186] U.S. Const. art. I, § 8, cl. 5; art. I, § 10, cl.1.

[187] "'Money' means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency". T.C.A. § 47-1-201(24) (1992) (emphasis supplied).

Silver bullion, too, is money in and of itself,[188] and certainly when used in the same manner as silver coins.[189] Therefore, a

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[188] See, e.g., Bronson v. Rodes, 74 U.S. (7 Wall.) 229, 249 (1869) (coinage-laws of the United States "give a sure guarantee to the people that the coins * * * contain the precise weight of gold or silver", and "recognize[] the fact accepted by all men throughout the world, that value is inherent in the precious metals; that gold and silver are in themselves values, and being such * * * are the only proper measures of value; that these values are determined by weight and purity; and that form and impress [of coins] are simply certificates of value"). Accord, e.g., Black's Law Dictionary (rev'd 4th ed. 1968), at 245 ("bullion" is "[g]old and silver intended to be coined"); Words and Phrases, Vol. 5A, at 520 ("The precious metals are adopted as the general medium of exchange, because they have in themselves an intrinsic value, * * * and they have this value, coined or uncoined; for the stamp which government impresses upon the coin is simply a guarantee of its weight and fineness. 'Bullion,' when the word is used in a financial sense, * * * imports uncoined gold and silver, * * * and has thus from the earliest period been associated with or employed as a term denoting money.").

When Congress compelled residents of the United States to deliver to the Treasury all gold bullion in their possession in 1933, the Supreme Court presumed Congress' authority so to act under the monetary powers of the Constitution. See Nortz v. United States, 294 U.S. 317, 328 (1935)(dictum). Self-evidently, a monetary power could not reach bullion, unless bullion were monetary in character.

For examples of contemporary statutory recognition of the monetary nature of bullion, see 31 U.S.C.A. §§ 5119(a) ("[w]hen redemption [of United States currency] in gold is authorized, the redemption may be made only in gold bullion"); 5122(a, c, d) (United States Treasury may pay for deposits of gold or silver either with money or with "bars of the same species of bullion as that deposited"); 5152 (value of "holdings of United States money" in certain foreign institutions shall be maintained "in terms of gold") (1983).

[189] See Bronson v. Rodes, 74 U.S. (7 Wall.) 229, 250 (1869): "A contract to pay a certain number of dollars in gold or silver coins is, * * * in legal import, noting else than an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight. It is not distinguishable, * * * in principle, from a contract to deliver an equal weight of bullion of equal fineness. It is distinguishable, in circumstances, only, by the fact that the sufficiency of the amount to be tendered must be ascertained, in the case of bullion, by assay and the scales, while, in the case of coin, it must be ascertained by count."

trade confirmation "to deliver [some] weight of [silver] bullion" in exchange for FRNs "is not distinguishable * * * in principle" from a contract to deliver coins containing that much silver. Both contracts involve money on both sides.[190]

That the purchasing-power of some nominal face value of FRNs is less than that of the same nominal face value of United States silver or gold coins is irrelevant to the equal monetary character of both the notes and the coins:

> One owing a debt may pay it in gold coin or legal-tender notes of the United States, as he chooses, unless there is something to the contrary in the obligation out of which the debt arises. A coin dollar is worth no more for the purposes of tender in payment of an ordinary debt than a note dollar. The law has not made the note a standard of value any more than coin. It is true that in the market, as an article of merchandise, one is of greater value than the other; but as money, that is to say, as a medium of exchange, **the law knows no difference between them**.[191]

The trade confirmations specified the moneys to be used as "tender in payment of" the debt -- FRNs on one side, silver or gold coins or silver bullion on the other; and the confirmations adopted standards of value in FRNs and in gold and silver "dollars".[192] The confirmations were "double gold-clause contracts", the media of ex-

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[190] Sanders' trade confirmations treated silver bullion as money, valued at 1.2929 "dollars" per ounce. R., Vol. 18, Exhibit 29, ¶ 6.

[191] Thompson v. Butler, 95 U.S. 694, 696 (1878) (emphasis supplied).

[192] See R., Vol. 18, Exhibit 29, ¶¶ 5-6 (371.25 grains of coined silver per "dollar", 23.22 grains of coined gold per "dollar", 1.2929 "dollars" per ounce of silver bullion).

change on both sides being money.[193] Therefore, because the confirmations implemented the principle that "[t]he law has not made the note a standard of value any more than coin", the law can "know[] no difference between" the monies exchanged pursuant to those contracts.

C. Tennessee cannot "demonetize" United States legal-tender silver and gold coins, silver bullion, and gold Krugerrands in order to tax exchanges of those monies for FRNs.

1. Because United States silver and gold coins are money and legal tender pursuant to federal statute[194] and the Constitution[195], Tennessee is **constitutionally** required to recognize them as such.[196]

♦ Congress has plenary power over the monetary system of the United States, to the exclusion of the States.[197] And Congress has always exercised this power to coin silver and gold as money.[198]

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[193] See ante note 75-77 & accompanying text.

[194] 31 U.S.C.A. §§ 5103, 5112(a)(7-10), 5112(e), 5112(h), 5112(i) (1983 & 1993 Supp).

[195] U.S. Const. art. I, § 8, cl. 5; art. I, § 10, cl. 1.

[196] U.S. Const. art. VI, cl. 2.

[197] Compare U.S. Const. art. I, § 8, cl. 5 with art. I, § 10, cl. 1; and Norman v. Baltimore & O.R.R., 294 U.S. 240, 303 (1935).

[198] E.g., Act of 2 April 1792, ch. 16, 1 Stat. 246; Act of 9 February 1793, ch. 5, 1 Stat. 300; Act of 28 June 1834, ch. 45, 4 Stat. 699; Act of 18 January 1837, ch. 3, 5 Stat. 136; Act of 3 March 1849, ch. 109, 9 Stat. 397; Act of 21 February 1853, ch. 74, 10 Stat. 160; Act of 21 February 1857, ch. 56, 11 Stat. 163; Act of 12 February 1873, ch. 131, 17 Stat. 424; Act of 28 February 1878, ch. 20, 20 Stat. 25; Act of 9 June 1879, ch. 12, 21 Stat. 7; Act of 14 July 1890, ch. 708, 26 Stat. 289; Act of 1 November 1893, ch. 8, 28 Stat. 4; Act of 14 March 1900, ch. 41, 31 Stat. 45; Act of 12 May 1933, ch. 25, Title III, § 43(b)(2), 48 Stat. 51, 52; Act of 19 June 1934, ch. 674, 48 Stat. 1178; Act of 6 July 1939, ch.

♦ Congress has also mandated an absolutely free market in monetary silver and gold.[199]

♦ In addition, Congress has created a multi-currency monetary system of (i) irredeemable FRNs and base-metallic coinage and (ii) silver and gold coins -- all of which are denominated in "dollars" and declared to be legal tender, and therefore are equally money as a matter of law.[200]

♦ Congress' authorization of this multi-currency system and free market in silver and gold pre-empts the field of monetary law -- necessarily disapproving all State regulations that burden the free exchange of one form of money for another.[201]

♦ Tennessee sales tax on exchanges of FRNs for United

260, 53 Stat. 998; Act of 31 July 1946, ch. 718, 60 Stat. 750; Act of 22 July 1982, Pub. L. 97-220, § 2, 96 Stat. 222, 222; Act of 9 July 1985, Pub. L. 99-61, §§ 102, 202, 99 Stat. 113, 113, 115-16; Act of 17 December 1985, Pub. L. 99-185, § 2, 99 Stat. 1177, 1177-78; Act of 28 October 1987, Pub. L. 100-141, § 2, 101 Stat. 832, 832; Act of 6 October 1992, Pub. L. 102-390, § 102(a, b, d), 106 Stat. 1620, 1620-21.

[199] See Act of 21 September 1973, Pub. L. 93-110, § 3(a, b), 87 Stat. 352, as amended by Act of 14 August 1974, Pub. L. 93-373, § 2, 88 Stat. 445, 445 (no law "may be construed to prohibit any person from purchasing, holding, selling, or otherwise dealing with gold in the United States"). This provision repealed §§ 3 and 4 of the Act of 30 January 1934, ch. 6, 48 Stat. 337, 340, under which the President had restricted private ownership of gold. Although restrictions on the private ownership of silver were enacted at the same time, they were never put into effect. See Act of 19 June 1934, ch. 674, §§ 6-7, 48 Stat. 1178, 1178-79.

[200] See ante notes 181-86 & accompanying text.

[201] Compare, e.g. Campbell v. Hussey, 368 U.S. 297, 300-01 (1961)(congressional regulation "pre-empt[s] the field and [leaves] no room for any supplementary state regulation" of the subject-matter), with Mid-Fla Coin Exchange, Inc. v. Griffin, 529 F. Supp. 1006, 1013-18 (M.D. Fla. 1981)(State's regulations of dealers in gold unconstitutionally burden interstate commerce).

States legal-tender silver and gold coins impermissibly interferes with the exercise of Congress' monetary power in three ways:

(i) It is a direct tax on silver and gold as money,[202] and thereby a direct -- and necessarily unconstitutional -- tax on key instrumentalities of federal monetary policy.[203]

(ii) Furthermore, it is a discriminatory tax, because it burdens exchanges of FRNs for silver or gold money, but not exchanges of FRNs for other FRNs or FRNs for base-metallic money. Thus, it selectively discourages the use of silver and gold as money on an equal basis with FRNs and base-metallic coinage, by imposing a cost on the transfer of equal amounts of purchasing power from one kind of money to the other, in contravention of Congress' mandate that the monetary system of the United States shall consist of both FRNs and base-metallic coins and silver and gold coins, all of which are uniformly legal tender. And, worst of all,

(iii) By its discriminatory burden, the sales tax treats FRNs and base-metallic coins as the unique forms of United States money, and the exclusive standard of value for exchange, in Tennessee. For example, the State treats an exchange of $5,000.33 in FRNs for $1,653.00 in legal-tender silver coins[204] as a "sale" of "tangible

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[202] See, e.g., Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 444 (1827)("a tax on the sale of an article * * * is a tax on the article itself").

[203] See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 425-36 (1819); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 690-92 (1965).

[204] An exchange between Sanders and Batey. See R., Vol. 11, at 137, 145-47 (Tr. Ev., Vol. 2, at 137, 145-47).

personal property"[205], in which the "sales price" -- the "amount for which [the] * * * tangible personal property is sold, * * * valued in money"[206] -- is $5,000.33. This implicitly treats the FRNs as the only "money", and the silver coins as "nonmonetary" commodities -- thereby demonetizing the silver, in violation of federal statute and Supreme-Court precedent.[207]

Because "[t]he power to tax involves the power to destroy", any tax on exchanges of FRNs for United States legal-tender silver and gold coins implies a power in the State to "defeat and render useless" the superior power of Congress to coin silver and gold money and to declare them a legal tender -- a self-contradiction.[208]

In short, taxation of Sanders' exchanges cannot be rationalized on the State's theory that silver and gold coins are "nonmonetary" property. Rather, such taxation is invalid because any tax incrementally destroys the coins' monetary character, in derogation of controlling federal law. So, the State's construction of the tax-law is unconstitutional under the Supremacy Clause[209].

2. As a matter of Supreme-Court precedent, contracts to exchange FRNs for silver bullion are indistinguishable from contracts

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[205] T.C.A. § 67-6-102(26) (1989 & 1992 Supp.).

[206] T.C.A § 67-6-102(24) (1989 & 1992 Supp.).

[207] Thompson, 95 U.S. at 696, quoted ante note 191 & accompanying text.

[208] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).

[209] U.S. Const. art. VI, cl. 2.

to exchange FRNs for United States legal-tender silver coins.[210] Therefore, the Tennessee courts lack authority to refuse to recognize silver bullion as money.[211]

Similarly, foreign "bullion" coins such as Krugerrands (minted without denominations but only with specifications of their weight in gold) by definition come within the doctrine that bullion is money. Indeed, the character of foreign "bullion" coins as money is stronger than that of uncoined bullion, because in the former case the amount of precious metal can be ascertained "by a count of coins", as well as by assay.[212]

3. Foreign legal-tender coins are also recognized as money in Tennessee Code § 47-1-201(24).[213] Thus, Krugerrands are money for purposes of sales tax.

4. The State's application of question-begging and deceptive labels to Sanders' exchanges cannot insulate the sales-tax law from the operation of superior federal statutory, let alone constitutional, law.[214] Because United States legal-tender silver and gold

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[210] Bronson v. Rodes, 74 U.S. (7 Wall.) 229, 250 (1869), quoted ante note 189.

[211] See Hutto v. Davis, 454 U.S. 370, 375 (1982)(lower courts must follow Supreme-Court precedent "no matter how misguided the judges of those courts may think it to be").

[212] See Bronson, 74 U.S. (7 Wall.) at 250.

[213] "'Money' means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency."

[214] See Riley v. National Fed'n of the Blind, 487 U.S. 781, 795-96 (1988); City of Madison, Joint School Dist. No. 8 v. WERC, 429 U.S. 167, 173-74 & n.5 (1976); Bigelow v. Virginia, 421 U.S. 809, 826 (1975); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964); NAACP v. Button, 371 U.S. 415, 429 (1963).

coins, Krugerrands, and silver bullion are money under that law, the State may not pretend otherwise by semantic legerdemain.

(a) Although silver and gold coins and bullion fit the definition of "tangible personal property",[215] Tennessee cannot reduce them to "nonmonetary", taxable commodities, because their character as money derives from the "impress of sovereign power" of a superior legislature (Congress) and the ultimate expression of popular sovereignty, the Constitution.[216] And Tennessee lacks competence to demonetize what the Constitution and Congress have authorized as money.[217] Therefore, the monetary character of silver and gold coins and bullion under federal law overrides their supposed status as "tangible personal property" under Tennessee law.

(b) That silver and gold coins and bullion have limited circulation as "currency" (i.e., as media of exchange in common day-to-day transactions) might be true -- but is nonetheless irrelevant to their character as money.[218] For the classic example in American history, in the 1870s the United States' monetary system

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[215] T.C.A. § 67-6-102(26) (1989 & 1992 Supp.).

[216] See Ling Su Fan v. United States, 218 U.S. 302, 311 (1910).

[217] Norman v. Baltimore & O.R.R., 294 U.S. 240, 303 (1934).

[218] The State introduced no evidence of the extent of circulation of silver coins, gold coins, or silver bullion as media of exchange in Tennessee or the United States. Conversely, Sanders introduced unchallenged evidence that gold bullion is the ultimate monetary reserve of governmental treasuries and central banks throughout the world. Ante notes 56 and 72 & accompanying text. If the State is correct that a sufficiently "low" level of circulation reduces silver and gold coins and bullion from money to a mere taxable "commodity" (which Sanders contests), nevertheless in the Criminal Court the State did not show what that "low" level is.

consisted of silver and gold coins and irredeemable United States Notes, which were worth less in the marketplace "dollar for dollar" than coin (just as today's irredeemable FRNs are worth less in the marketplace than silver or gold coins of the same nominal face values).[219] This disparity of purchasing-power made United States Notes circulate in the economy more widely than silver or gold coins, perforce of Gresham's Law (just as do FRNs today[220]). Notwithstanding, Thompson v. Butler refused to hold that paper currency had supplanted silver and gold coinage as the standard of value, or that one was money to the exclusion of the other:

> The law has not made the note a standard of value any more than coin. It is true that in the market, as an article of merchandise, one is of greater value than the other; but as money, that is to say, as a medium of exchange, **the law knows no difference between them**.[221]

Thus, relative levels of circulation of different monies are immaterial to their character as money, which derives from formal legal status only. Because federal law declares silver and gold coins to be money ("a medium of exchange"), they are such, even if they circulate less freely than FRNs -- and "the law knows no difference between" those coins and FRNs "as money".

This also follows under Tennessee law defining "money" as "a medium of exchange authorized or adopted by a domestic or foreign

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[219] I.e., a "one-dollar" United States Note was worth less than a silver or gold "dollar" coin, just as a contemporary "one-dollar" FRN is worth less than a silver or gold "dollar" coin.

[220] See ante note 74 & accompanying text.

[221] 95 U.S. 694, 696 (1878) (emphasis supplied).

government as a part of its currency".[222] For the "authoriz[ation] or adopt[ion] by [the United States] government" of gold and silver coins "as a part of its currency" includes decisions of the Supreme Court construing federal monetary statutes.[223]

Moreover, the Criminal Court itself recognized in a jury-instruction that moneychanging "includes * * * buying and selling of uncurrent funds".[224]

(c) Finally, that Sanders' customer Batey had an "investment" intent in acquiring silver and gold coins and silver bullion cannot detract from their monetary character, which is a consequence of their objective legal status, not Batey's subjective purpose in acquiring them. Indeed, an "investment" purpose imports only Batey's hope that (in the words of Thompson), "in the market, as * * * article[s] of merchandise", the coins and bullion would appreciate in value relative to FRNs. Yet, when he acquired the coins and bullion, they already were "of greater value than" FRNs.[225]

Under Thompson, that one kind of money is, "in the market, as an article of merchandise, * * * of greater value than the other"

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[222] T.C.A. § 47-1-201(24)(1992). The Criminal Court so charged the jury. See R., Vol. 17, at 20 (Tr. Ev., Vol. 8, at 20). See also Crutchfield v. Robins, Tingley & Co., 24 Tenn. 15, 17 (1844) ("[m]oney is a generic term, and covers everything which by consent is made to represent property, and passes as such currently from hand to hand, whether it be * * * the gold and silver of the world, or the paper of modern Europe and America").

[223] See Francis v. Southern Pac. Co., 333 U.S. 445, 450 (1948).

[224] Ante note 10 & accompanying text (emphasis supplied).

[225] E.g., a "dollar" in silver was worth more than a "one-dollar" FRN.

is irrelevant; rather, "as money, that is to say, as a medium of exchange, the law knows no difference between them". Therefore, that the one of greater value today may increase in relative value tomorrow is also irrelevant to its monetary character. If "the law knows no difference between them" when one is worth X% more than the other, the law must equally "know[] no difference between them" when that disparity in value increases to X+Y% (or decreases to X-Z%).[226]

For these reasons, Sanders' convictions must be reversed, and a judgment of acquittal entered.

III. Sanders' convictions must be reversed and judgment of acquittal entered because, even were silver bullion not "money", all the exchanges involving bullion would not have generated a sales tax in excess of $5,000.00 in Federal Reserve Notes. Moreover, the exchanges involving Charles Batey, the sole witness who claimed an "investment" intent in acquiring silver and gold coins, together with all the exchanges involving silver bullion, would not have generated a sales tax in excess of $5,000.00 in Federal Reserve Notes.

The State theorizes that: (i) silver bullion is not money, under any circumstances; and (ii) silver and gold coins are not money if acquired "for an investment".[227] Under Thompson v. Butler[228] this notion is wrong, because the monetary character of silver and gold

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[226] The State's "investment" theory assumes that increases in the value of silver and gold relative to FRNs proves the allegedly "nonmonetary" character of the precious metals. Presumably, then, decreases in value relative to FRNs would indicate their monetary character. The evidence in the Criminal Court, however, indicates decreases in the value of silver during the relevant time-period. R., Vol. 11, at 147 (Tr. Ev., Vol. 2, at 147); Vol. 11, at 193 (Tr. Ev., Vol. 2, at 193).

[227] See ante notes 97-98 & accompanying text.

[228] 95 U.S. 694 (1878), quoted ante notes 191 & accompanying text.

coins and silver bullion derives from their objective legal status, not the subjective purpose for which an individual acquires them. Even assuming arguendo that the monetary character of the silver and gold coins involved here derives from their designation as legal tender in the United States or South Africa, and that silver bullion is not money because not legal tender, the State's case collapses, because the State failed to prove "sales tax revenue * * * exceeding five thousand dollars".[229]

A. The State introduced evidence of seven transactions involving silver bullion, of a total value of $22,608.00 in FRNs.[230] For tax of $5,000.00 to have been owable on this sum, the rate would have had to have been 22.12% [5,000.00 divided by 22,608.00], far above the rates applicable at any time relevant to this case.[231]

Therefore, even were silver bullion "nonmonetary" property, the State failed to meet its burden of proof. And Sanders' convictions must be reversed, and judgment of acquittal entered.

B. Even were the State's theory correct in all particulars, Sanders' convictions must nonetheless be reversed, because the State failed to prove "sales tax revenue * * * exceeding five thousand dollars".[232]

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[229] R. at 3, 4 (Indictment).

[230] Batey ($510.00, $2,430.00, and $2,322.00), Thompson ($6,000.00 and $6,000.00), and Smith ($3,432.00 and $1,914.00). See ante, p. 33.

[231] The tax-rates were 6.75% prior to 1 April 1984 and 7.75% thereafter. R., Vol. 13, at 48 (Tr. Ev., Vol. 4, at 48).

[232] R. at 3, 4 (Indictment).

Again, the State's theory is that: (i) silver bullion is not money, under any circumstances; and (ii) silver and gold coins are not money if acquired "for an investment". The Criminal Court upheld the jury's verdict on the basis of this theory.[233]

The seven exchanges involving silver bullion had a total value of $22,608.00 in FRNs.[234] Only two exchanges involved coins purchased with a supposed "investment" intent, with a total value of $13,020.33 in FRNs.[235] The allegedly taxable value of all these exchanges was $35,628.33 in FRNs. For $5,000.00 in tax to have been owable on this, the rate would have had to have been 14.03% [5,000.00 divided by 35,628.33], far above the applicable rates.

Therefore, the State having failed in its proof, Sanders' convictions must be reversed and judgment of acquittal entered.

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[233] Ante notes 97-98 & accompanying text.

[234] Batey ($510.00, $2,430.00, and $2,322.00), Thompson ($6,000.00 and $6,000.00), and Smith ($3,432.00 and $1,914.00). See ante, at 33.

[235] Batey ($5,000.33 and $8,020.00). See ante, at 36-37. Sanders denies that Batey's testimony was sufficient to establish an "investment" intent with respect to any of the specific exchanges sub judice. But Sanders will assume the sufficiency of that testimony arguendo, as the State's case fails in either event.

In the Criminal Court, the State claimed that "[w]e are over the $5,000 threshold with Charles Batey, Jon Thompson, Wade Smith, and Don Webb. Verhagy is icing on the cake." R., Vol. 13, at 20 (Tr. Ev., Vol. 4, at 20)(emphasis supplied). However --

- Webb's testimony proves his exchanges had no conceivable "investment" intent. Ante note 100 & accompanying text. Indeed, an award of a gold coin is economically indistinguishable from an award of FRNs. And,
- Sanders' testimony indicates that, to his knowledge, the purpose of Verhaeghe's exchanges was to transfer money internationally, with no apparent "investment" motive. Ante note 102 & accompanying text. A transfer of money is, by definition, a pure monetary exchange.

IV. Sanders' convictions must be reversed and judgment of acquittal entered, or a new trial ordered, because the Criminal Court erroneously (i) allowed three of Sanders' customers to testify that, unbeknownst to him and in contradiction of the explicit terms of his trade confirmations, they had not intended to sell Federal Reserve Notes to him, (ii) withheld from the jury legal materials on which Sanders had relied, and (iii) denied key jury instructions -- all of which unfairly prejudiced Sanders' defense that he believed in good faith he was buying Federal Reserve Notes with silver and gold coins and bullion and therefore was not subject to sales tax.

Even were all Sanders' assertions set out ante incorrect, he would retain the defense that he did not act "feloniously",[236] because he believed in good faith that he was buying FRNs with coins and bullion, and therefore was not subject to sales tax. For "feloniously" imports "intentionally" and "willfully"[237] -- and the State cannot prove that Sanders willfully failed to file returns without negating his claim that he honestly misunderstood the law.

> If [Sanders] had a subjective good faith belief, no matter how unreasonable, that he was not required to file a tax return, the government cannot establish that [he] acted willfully. * * * [A] person cannot be convicted of willful failure to file a tax return if he subjectively believes that the tax laws do not apply to him. The test does not focus on the knowledge of the reasonable person, but rather on the knowledge of [Sanders].[238]

A. Sanders' trade confirmations were "[written] confirmation[s] of [his] oral contract[s] with [his customers]", which

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[236] R. at 3, 4 (Indictment).

[237] State v. Smith, 119 Tenn. 521, 525-26, 105 S.W. 68, 70 (1907). The State conceded that "[t]his is an intentional crime dealing with willful and intentional, a felonious intent"; "[t]he criminal intent was unlawfully, willfully and feloniously". R., Vol. 20, at 27, 31 (Tr. Sent. Hear., at 27, 31) (emphasis supplied).

[238] United States v. Powell, 955 F.2d 1206, 1211 (9th Cir. 1991), applying Cheek v. United States, 111 S. Ct. 604 (1991).

expressly evidenced his intent:

> United States law at 12 USC 411 defines [FRNs] as "obligations". At common law, debts can only be paid by money, which constitutionally (US Const. art. I, Sec. 10) and at common law can only mean gold and silver. Regardless of whatever informal or customary language is used in trade, our business legally is buying notes and paying for them in gold and silver. Our acceptance of [FRNs] * * * in exchange for gold and silver money is a function of our common law "money-changing" * * * .[239]

Sanders testified that legal research and reliance on experts convinced him he was "legally * * * buying notes and paying for them in gold and silver", and that therefore his moneychanging was not taxable.[240] "[N]o matter how unreasonable" Sanders' subjective belief may be, it constitutes a perfect defense.[241]

B. 1. To impugn his beliefs, the State had three customers testify that their intent -- never communicated to Sanders -- was not to "sell" FRNs to, but to "buy" silver or gold from, him.[242] The State then imputed their **secret** intent to Sanders, by leapfrogging illogic:

- If the customers did not intend to "sell" FRNs to San-

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[239] R., Vol. 18, Exhibit 29.

[240] Ante, at 20-24.

[241] E.g., United States v. Powell, 955 F.2d 1206, 1211 (9th Cir. 1991), applying Cheek v. United States, 111 S. Ct. 604 (1991). Of course, as shown ante, far from being "unreasonable", Sanders' beliefs are firmly grounded in law.

[242] Ante, at 33-36. Only Charles Batey was asked what he thought Sanders' intent was. But the State conceded that Batey "can [not] say what was in Mr. Sanders' mind at that time". And Batey admitted he did not ask Sanders "if he [Sanders] had an intent otherwise than what was expressed in the written agreement [the trade confirmation]": "No. Because I didn't pay any attention to the way it was written up." R., Vol. 11, at 170-71 (Tr. Ev., Vol. 2, at 170-71).

ders, he did not intend to "buy" FRNs from them.

- If Sanders did not intend to "buy" FRNs, he lied when he claimed otherwise.

- If Sanders lied, he did not subjectively believe that the sales tax did not apply to him. And, therefore,

- Sanders' falsehood evidences a "design" to violate § 67-1-1440(d), which satisfies the requirement that he acted "feloniously" (willfully) in failing to file tax returns.[243]

Similarly, the State illogically imputed to Sanders his customer Batey's secret intent to "invest" in silver and gold, in order to convince the jury that Sanders "was not exchanging money as he claimed but was buying and selling collectors coins for the purpose of investment".[244]

2. Many fallacies lurk in this skein of twisted reasoning:

♦ First, the customers' testimony is nonsensical. If they intended to "buy" silver or gold with FRNs, they necessarily "sold" the FRNs they exchanged for the coins or bullion.[245] And an "investment" purpose is not incompatible with moneychanging.[246]

♦ Second, the testimony was incompetent, because it violated the parole-evidence rule by contradicting the express statements in the trade confirmations the customers received but never chal-

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[243] See ante, at 32-36.

[244] R. at 361 (Find. Mn. New Tr. at 2).

[245] Logically, in every transaction in which party A exchanges item X with party B for item Y, A "buys" Y from B and "sells" X to B; and B "buys" X from A and "sells" Y to A.

[246] See ante notes 225-26 & accompanying text.

lenged.[247]

The trade confirmations were (as they state) "[written] confirmation[s] of [Sanders'] oral contract[s] with [his customers]", which explained that his "business legally is buying notes and paying for them in gold and silver", and that he dealt in "gold and silver money". Thus, the customers' secret "intent" not to "sell" FRNs, or to "invest" in silver or gold, is beside the point: "In the formation of contracts, * * * secret intent is immaterial, so that mutual assent is to be judged only by overt acts and words rather than by the hidden or secret intention of the parties."[248] That the customers did not sign the trade confirmations is also irrelevant, inasmuch as Sanders or his agents did.[249]

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[247] See Tenn. Code §§ 47-2-202, 47-2-201(1, 2) (1992). The record contains trade confirmations for the exchanges with Batey, Thompson, and Smith. Webb did not recall whether he had received any trade confirmations. R., Vol. 11, at 182 (Tr. Ev., Vol. 2, at 182). However, the checks his company drew all show, in the upper left-hand corner, hand-written alphanumeric notations of the form used as trade numbers and typed in the upper right-hand corners of the trade confirmations. See R., Vol. 11, at 174 (Tr. Ev., Vol. 2, at 174); Vol. 18, Exhibit 11. Thus, Webb or his company clearly received trade confirmations, and therefore was on notice of their terms. See Tenn. Code § 47-1-201(25-28) (1992).

As there was no "latent" (or, indeed, any) ambiguity in the language of the trade confirmations, no extrinsic evidence was admissible; rather, the parties' intent had to be gleaned from the "four corners of the agreement". Coble Systems, Inc. v. Gifford Co., 627 S.W.2d 359, 362-63 (Tenn. App. 1981).

[248] S. Williston, A Treatise on the Law of Contracts (4th ed. by R.A. Lord, 1990), Vol. 1, § 4.1, at 237 (footnote omitted). Accord, 17A Am. Jur. 2d, "Contracts", §§ 27-28, 30.

[249] E.g., in the Criminal Court, the State contended that Batey's trade confirmations "are not signed by Mr. Batey. Those are receipts to him. He didn't sign any contract. This is not a contract which he signed." R., Vol. 11, at 144 (Tr. Ev., Vol. 2, at 144). However, "[t]he acceptance of a paper which purports to be a contract ordinarily is sufficient to indicate an assent to

♦ Third, were the customers' testimony admissible to show no "meeting of the minds" (as the State contended in the Criminal Court[250]), it would prove only that "the entire [trade confirmation] is a nullity, as to all its clauses"[251] -- and that "there is no contract", and "as to the terms of [the] contract, neither party is obligated in law or equity".[252] But were there no "meeting of the minds" sufficient to create any "obligat[ions] in law or equity", the customers' testimony could not rationally support criminal convictions of Sanders, because: (i) were there no "meeting of the minds" the customers' intent would necessarily be different from Sanders' intent; (ii) if their intent was not to "sell" FRNs, or to "invest", then his different intent was to "buy" FRNs and to exchange monies; and, therefore, (iii) the customers' testimony would validate Sanders' position! Thus, the State's argument is two-faced: it denies an open "meeting of the minds", yet nevertheless imputes criminal intent to Sanders based on a recondite "meeting of the minds" arbitrarily reflecting the customers' secret ideas.

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its terms whatever they may be * * * ." "In general, any writing signed by one party and orally assented to by the other will bind both parties * * * . Indeed, any written contract, though signed by only one party, will bind the other if he accepts the writing." S. Williston, A Treatise on the Law of Contracts (4th ed. by R.A. Lord, 1991), Vol. 2, § 6.43, at 465, 467-68 (footnotes omitted).

[250] See ante note 77.

[251] Compania Bilbaina de Navagacion de Bilbao v. Spanish-American Light & Power Co., 146 U.S. 483, 497 (1892).

[252] 17A Am. Jur. 2d, "Contracts", § 31, at 59 (footnotes omitted).

♦ Fourth, the customers' secret intent is not probative of Sanders' intent, because they never communicated their intent to him. Had they done so, and had he acquiesced in their view that they were not "selling" FRNs to him, or were "investing", the State could perhaps identify his intent with theirs.[253] Given their silence, however, Sanders had neither occasion nor opportunity to challenge their view of the exchanges, or to refuse to deal with them if they persisted in that view. Therefore, his failure to act on information unknown to him proves nothing.

♦ Fifth, although confused, misleading, irrelevant, and without probative value, the customers' testimony unfairly prejudiced Sanders. The State's theory misled the jury into thinking that Sanders intended what his customers did -- and that, therefore, he did not believe he was "buying" FRNs or exchanging monies, but merely pretended so as part of a felonious "design".[254] Thus, the testimony struck at the heart of Sanders' good-faith defense, and its introduction was plain error under Tennessee Rules of Evidence 103, 401, 402, and 403.

3. If the Tennessee Rules license such testimony, their application deprived Sanders of due process of law. The customers'

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[253] Sanders emphasizes "perhaps", because the State would also have to show: (i) Sanders' then-contemporary knowledge of the customers' intent; and (ii) Sanders' belief that their intent changed the nature of the transaction from a money-for-money exchange to a taxable "sale", notwithstanding the inherent monetary character of the items exchanged and Sanders' contrary intent as expressed in the trade confirmations. Of course, the State never attempted such proof.

[254] Indeed, this is precisely what the State argued below. Ante notes 88-96 & accompanying text.

secret thoughts form no rational basis on which to impute any (let alone criminal) intent to Sanders. A factual inference

> must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.[255]

No rational assurance exists that, because his customers secretly believed something contradictory of the plain terms of the trade confirmations, therefore so did Sanders.[256] Quite the contrary: The parole-evidence rule embodies the legal assurance that a written contract expresses the intent of the parties, to the exclusion of their secret ideas. Because Sanders had a right to rely upon the parole-evidence rule, he cannot be deemed to have had a "felonious" intent in doing so.[257]

4. Assuming arguendo the jury might have disbelieved Sanders' good-faith defense on grounds other than his customers' testimony, the jurors' general verdict makes it equally possible that they convicted Sanders on that testimony -- thereby denying him due process. But "when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires

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[255] Leary v. United States, 395 U.S. 6, 36 (1969)(applying this principle to a statutory presumption).

[256] The customers' testimony is a classic example of evidence "insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt". Tenn. R. App. P. 13(e).

[257] See Tindal v. Wesley, 167 U.S. 204, 209 (1897)(cannot be "a fraud to do what the law allow[s] to be done").

that the conviction be set aside".[258]

C. Also plain error was the Criminal Court's refusal to allow into evidence legal materials on which Sanders had actually relied in arriving at his belief that moneychanging is not taxable. The materials were admissible to disprove "felonious" intent (willfullness) under § 67-1-1440(d).[259] Their exclusion deprived the jury of objective proofs from which to assess Sanders' subjective beliefs, self-evidently denying him "a substantial right" and "more probably than not affect[ing] the judgment".[260]

D. 1. Finally, the Criminal Court's denial of jury-instructions on willfullness and good faith also "more probably than not affected the judgment". The Court's instructions on the terms "intentionally", "knowingly", and "design" did not adequately inform the jury that, to convict, it must find that Sanders acted "feloniously" ("willfully"), by committing "a voluntary, intentional viol-

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[258] Leary v. United States, 395 U.S. 6, 31-32 (1969). Accord, Mills v. Maryland, 486 U.S. 367, 376 (1988); Yates v. United States, 354 U.S. 298, 311-12 (1957).

[259] See United States v. Powell, 955 F.2d 1206, 1214 (9th Cir. 1992), applying Cheek v. United States, 111 S. Ct. 604, 611 (1991), holding that forbidding the jury to consider documentary evidence on willfullness "would raise a serious question under the Sixth Amendment's jury trial provision".

[260] Tenn. R. App. P. 36(b). "The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt", and requires "evidence necessary to convince a [jury] beyond a reasonable doubt of the existence of every element of the offense". Jackson v. Virginia, 443 U.S. 307, 309, 316 (1979). Mutatis mutandis, the Constitution guarantees a defendant the opportunity to adduce evidence creating a reasonable doubt. To the extent § 67-1-1440(d) or Rules 401 and 402 treat such reliance-materials as irrelevant, they violate due process as applied here.

ation of a known legal duty",[261] and not because of an honest misunderstanding of the law. Generally in criminal tax cases, "willfulness means committed voluntarily and with the purpose of violating the law, and not * * * in good faith."[262] Under the Court's instructions, however, the jury could have concluded that Sanders was guilty if he simply knew, as a matter of fact, what he was doing, and intended so to act -- regardless of his good-faith misunderstanding of the law applicable to those facts. For, to say (with the Court's instructions) that Sanders "d[id] an act by design or purpose" ("intentionally"), "knew what he was about to do, and, with such knowledge, proceeded to do the act charged" ("knowingly"), and "form[ed a] plan or scheme" ("design")[263] says nothing about whether Sanders "acted", "proceeded", or "planned" **with the purpose of violating the law** (i.e., feloniously or willfully) -- without which purpose he could not be convicted.

The issues of willfullness and good faith were raised by the indictment itself ("feloniously") and by the evidence, and were fundamental to Sanders' defense. Therefore, the Criminal Court erred in refusing to instruct the jury on those issues.[264]

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[261] United States v. Bishop, 412 U.S. 346, 361 (1973) (emphasis supplied).

[262] United States v. Wells, 766 F.2d 12, 20 (1st Cir. 1985) (emphasis supplied).

[263] Ante notes 104-06 & accompanying text.

[264] E.g., Sanders v. State, 218 Tenn. 527, 533-35, 404 S.W.2d 506, 509-10 (1966)(where "intent to commit an illegal act" is element of offense, court must submit instruction that accused is innocent if jury does not find he had purpose to commit such act). See also Poe v. State, 212 Tenn. 413, 416, 370 S.W.2d 488, 489

2. Untenable is the State's notion that § 67-1-1440(d) contains "no 'good faith' escape hatch"[265] for which a jury-instruction on "willfullness" is mandatory. Because "[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence",[266] there is "an interpretative presumption that mens rea is required" such that "far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement".[267] This is particularly true in tax cases:

> [I]n view of [the judiciary's] traditional aversion to imprisonment for debt, [courts s]hould not without the clearest manifestation of [legislative] intent assume that mere knowing and intentional default in payment of a tax, where there has been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree.[268]

Here, "the availability of a range of nonpenal alternatives to the criminal sanctions" of § 67-1-1440(d) to enforce compliance with the sales-tax law "negates the imputation" that the legislature dispensed with the requirement that a willfull violation be

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(1963); Sneed v. State, 498 S.W.2d 626, 629 (Tenn. Cr. App. 1973); Casey v. State, 491 S.W.2d 90, 94-95 (Tenn. Cr. App. 1972).

[265] Ante note 128 & accompanying text.

[266] Dennis v. United States, 341 U.S. 494, 500 (1951).

[267] United States v. United States Gypsum Co., 438 U.S. 422, 437, 438 (1978).

[268] Spies v. United States, 317 U.S. 492, 498 (1943). Indeed, that imprisonment is the penalty for violation of a statute supports the conclusion that willfulness is an element. United States v. United States Gypsum Co., 438 U.S. 422, 443 n.18 (1978).

proven.[269] Moreover, the tax code empowers the Commissioner of Revenue (i) to waive penalties for a tax deficiency or delinquency where the taxpayer's failure is the result of a "good and reasonable cause[] * * * and is not a result of gross negligence or willful disregard of the law", and (ii) to impose penalties where a delinquency results from "any deceitful practice or willful device resorted to with intent to evade the tax".[270] Strange indeed would be a legislative purpose to allow an absence of mens rea as a defense to an administrative penalty, yet to disallow that defense to a serious criminal charge for the exact same conduct! Unconstitutional as well: For the State's theory countenances leaving to the arbitrary discretion of a prosecutor whether the same tax "deficiency" or "delinquency" be subject to administrative and civil sanctions as such, or to criminal penalties as a "delay" or a "deprivation" under § 67-1-1440(d).[271]

Therefore, Sanders' convictions must be reversed and judgment of acquittal entered.[272] (At a minimum, he must be retried.)

V. Sanders' convictions must be reversed and the indictment dismissed, because the State failed to follow the Tax Enforcement Procedures Act prior to indicting him.

A. Section 67-1-1440(d) is part of the Tax Enforcement Pro-

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[269] United States v. United States Gypsum Co., 438 U.S. 422, 443 (1978).

[270] T.C.A. §§ 67-1-803(a), 67-1-804(c)(2) (emphasis supplied).

[271] See ante notes 142-45 & accompanying text.

[272] Having failed in its proof, the State is not entitled to retry Sanders. Greene v. Massey, 437 U.S. 19, 24 (1978), followed in Overturf v. State, 571 S.W.2d 837, 839-40 (Tenn. 1978).

cedures Act ("TEPA")[273], which made "systematic procedures for the collection of state taxes".[274] Thus, when § 67-1-1440(d) refers to "collection of * * * lawful revenue" and "realization of such revenue at the time [the State] is lawfully entitled thereto", it must import "collection" and "realization" obtained through, and "lawful[] entitle[ment]" determined by, the procedures of the TEPA or other laws the TEPA supplements.[275] Three reasons compel this conclusion:

First, as part of the TEPA, § 67-1-1440(d) must be construed in pari materia with the rest of that act.[276]

Second, an "assessment is the foundation of the claim of the government [for taxes]";[277] an "assessment must precede taxation, and is an indispensable condition of the right to collect a tax";[278] "[t]here can be no suit for taxes * * * without an assessment" as "a necessary preliminary step";[279] and notice and hearing are re-

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[273] T.C.A. §§ 67-1-1401 et seq. (1989).

[274] Barrow v. Tennessee Dep't of Revenue, 647 S.W.2d 232 (Tenn. 1983). See T.C.A. § 67-1-1402(b) (1989)(act "compile[s] * * * principal enforcement procedures previously enacted and codified in numerous other" tax laws).

[275] Compare T.C.A. § 67-1-1402(b) with § 67-6-517 (1989).

[276] See Art Pancake's United Rent-All v. Ferguson, 601 S.W.2d 926, 930 (Tenn. App. 1979).

[277] Malone v. Williams, 118 Tenn. 390, 431, 103 S.W. 798, 808 (1907).

[278] Union Planters' Bank v. City of Memphis, 101 Tenn. 154, 158, 46 S.W. 557, 558 (1898).

[279] East Tennessee, V. & G. Ry. v. Mayor of Morristown, 35 S.W. 771, 773 (Tenn. 1895).

quired for a constitutionally valid assessment.[280] If the very "claim" for taxes, "right to collect", and right to seek civil enforcement depend upon prior notice, hearing, and assessment, logic denies a license for pre-assessment criminal penalties predicated on alleged "delay" in "collection" and "deprivation" of tax-monies to which the State merely claims (and that for the first time only post-indictment) to be "lawfully entitled".

Third, criminal statutes must be strictly construed.[281] It is the antithesis of strict construction to say: (i) that Sanders could "delay" collection of taxes before collection began, or could "deprive" the State of revenue to which it is "lawfully entitled" before entitlement was even claimed, let alone determined; or (ii) that the Criminal Court and jury may rationalize ex post facto by a criminal conviction the claim that Sanders owed taxes that were not even fairly in issue prior to the indictment.[282]

B. None of the procedures the TEPA mandates was followed. Sanders was charged with "delay[ing] * * * Tennessee in the collection of any of its lawful revenue". But, prior to the indictment, no determination had been made that any "lawful revenue" was owed -- indeed, Sanders had a contrary good-faith belief the State never challenged. And no "collection" had been attempted. Sanders

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[280] E.g., Central of Georgia R.R. v. Wright, 207 U.S. 127, 142 (1907); Turner v. Wade, 254 U.S. 64, 68 (1920).

[281] E.g., Key v. State, 563 S.W.2d 184, 188 (Tenn. 1978).

[282] See U.S. Const. art. I, § 10, cl. 1; Tenn. Const. art. I, § 20. Indeed, although the State was on notice that Sanders disputed the taxability of moneychanging, it pursued no administrative remedy.

was also charged with "depriv[ing] the state of the realization of such revenue at the time it is **lawfully entitled** thereto". But, again, no determination had been made that the State was "lawfully entitled" to any "revenue".

Therefore, Sanders' convictions must be reversed and the indictment dismissed.

VI. Sanders' conviction on the first count of the indictment must be reversed and that count dismissed, because the indictment and prosecution imposed double jeopardy on him.

Convicting Sanders for both "delay[ing] * * * Tennessee in the collection of any of its lawful revenue" and "depriv[ing] the state of the realization of such revenue" under § 67-1-1440(d) imposed double jeopardy on him, because the State proved exactly the same conduct for both alleged offenses.

A. The Constitution "protects against multiple punishments for the same offense".[283] Under Blockburger, which controls where "'multiple punishments [are] imposed in a single prosecution'",[284]

> where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.[285]

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[283] North Carolina v. Pearce, 395 U.S. 711, 717 (1969). See U.S. Const. amend. V, applied to the States through U.S. Const. amend. 14, § 1; Tenn. Const. art. I, § 10. Improperly charging a single offense in several counts of an indictment is termed "multiplicity", and violates the guarantee against double jeopardy. E.g., Launius v. United States, 575 F.2d 770, 771 (9th Cir. 1978).

[284] Grady v. Corbin, 110 S. Ct. 2084, 2090-91 (1990).

[285] Blockburger v. United States, 284 U.S. 299, 304 (1932).

"The critical inquiry is what conduct the State * * * prove[s]".[286]

B. Sanders was convicted twice for the same conduct: failing to file returns and pay tax during a designated period.

Perforce of logical statutory construction, Sanders cannot be guilty of "delaying" collection, because prior to the indictment the State attempted no collection; and Sanders voluntarily paid no taxes. "Delay" means "to put off to a future time" or to "hinder for a time"[287] -- implying that the event "delayed" actually occurs, albeit later than it otherwise would. Conversely, "deprive" means "to take away from forcibly" or "to keep from having"[288] -- implying that the person "deprived" of a thing permanently loses, or never obtains, it.[289] Section 67-1-1440(d) thus creates two functionally distinct crimes: "delaying" collection of revenue which nevertheless has been collected prior to the indictment; and "depriving" the State of revenue which has not been collected. If anything, Sanders did the latter, not the former.

The State disregards the functional difference between "delaying" and "depriving": Because the State never received any taxes Sanders allegedly owed, it argues, it was both "deprived" and "delayed" (that is, contrary to lexicographers and common sense, in

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[286] Grady v. Corbin, 110 S. Ct. 2084, 2093 (1990).

[287] Webster's New Twentieth Century Dictionary of the English Language (unabrgd. 2d ed. 1971), at 479.

[288] Id. at 490.

[289] The Criminal Court recognized this definitional distinction in its charge to the jury. See R., Vol. 16, at 162 (Tr. Ev., Vol. 7, at 162).

§ 67-1-1440(d) to "deprive" means to "delay"; and the statutory distinction between "to delay * * * or to deprive" is meaningless). However, because this theory conflates "deprivation" with "delay", conviction for "deprivation" necessarily entails conviction for "delay" -- and, thus, convictions for both impose double jeopardy. So, the State's theory must be rejected, because it renders § 67-1-1440(d) unconstitutional.[290]

Because the evidence shows at most that Sanders "deprived" the State of revenue, his conviction for "delay" must be reversed, and the first count of the indictment dismissed.[291]

VII. The Criminal Court lacked a basis for ordering restitution of more than $5,001.00.

Finally, the Criminal Court ordered restitution of $73,000.00, based on the State's calculation of sales tax on all the exchanges between Sanders and Batey, Webb, Thompson, Verhaeghe, and Smith.[292] This was plain error.[293]

A. On general principles, the Criminal Court lacked authority to condition Sanders' probation on restitution "[u]ntil there

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[290] This Court should construe that section to avoid constitutional difficulties. Sutherland Statutory Construction (N.J. Singer ed., 5th ed., 1992 rev.), Vol. 2A, § 45.11, at 48-49. See also Bell v. United States, 349 U.S. 81, 84 (1955)(presumption is against construing penal statutes so as to impose multiple punishment).

[291] In the alternative, if § 67-1-1440(d) must be construed as a matter of Tennessee law as the State contends, then that section is unconstitutional under the Double Jeopardy Clauses of the Constitutions of the United States and the State of Tennessee.

[292] Ante notes 113-15 & accompanying text.

[293] This Court may review Sanders' sentence de novo without a presumption of correctness. State v. Bolling, 806 S.W.2d 202, 204 (Tenn. Cr. App. 1990).

ha[d] been a definitive determination or adjudication of the amount of taxes [Sanders] owes"[294] -- and no such determination existed:

- The indictment alleged an indeterminate amount of tax owed that simply "exceed[ed] five thousand dollars";
- Sanders conceded no amount of tax owed;
- the jury was not asked to and did not find any amount of tax owed, other than the indeterminate "more than $5,000.00" necessary to meet the jurisdictional predicate of the indictment; and
- no administrative or civil proceeding was held prior to sentencing which determined any amount of tax owed.[295]

B. More particularly, the State's calculation of the tax owed from all the exchanges assumed, without proof, that the jury convicted Sanders on that basis. Had the indictment contained separate counts for each exchange, and had the jury convicted on all counts, this assumption would have been logical. A fortiori had the jury been specifically instructed to determine the State's damages.[296] But here the jury entered a general verdict without mention of damages. Certainly the jury could have considered only some exchanges taxable, and convicted because the tax owed on those

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[294] United States v. Touchet, 658 F.2d 1074, 1076 (5th Cir. 1981). See United States v. Franks, 723 F.2d 1482, 1487 (10th Cir. 1983); United States v. White, 417 F.2d 89, 94 (2d Cir. 1969); United States v. Taylor, 305 F.2d 183, 187-88 (4th Cir. 1962); United States v. Stoehr, 196 F.2d 276, 284 (3rd Cir. 1952). See also United States v. Weir, 861 F.2d 542, 546 (9th Cir. 1988); United States v. Whitney, 838 F.2d 404, 404-05 (9th Cir. 1988).

[295] See R. at 260 (Presentence Report, at 4).

[296] See T.C.A. § 40-20-116(a, b) (1990), applied in State v. Bryant, 775 S.W.2d 1, 4-5 (Tenn. Cr. App. 1988).

exchanges alone summed to more than $5,000.00.

This is highly plausible. For example, the jury could easily have concluded that the Verhaeghe exchanges involved "money" perforce of Tennessee law;[297] that the purpose of the exchanges was purely monetary -- transferring money from Switzerland to the United States;[298] and that therefore, according to the State's own concession that exchanges of monies with no "investment" intent are not taxable,[299] those exchanges could not be within § 67-1-1440(d), even if all the other customers' exchanges were. As the other exchanges produced a total tax owed of $6,153.17, the jury could have convicted Sanders, even excluding Verhaeghe's exchanges. (And, of course, other permutations and combinations are possible which would have allowed the jury to find "more than $5,000", but less than $73,000.00, in tax owed.)

Under these circumstances, "special damages" of $73,000.00 were not "substantiated by the evidence" or "agreed to by the defendant".[300] Rather, the only rational conclusion the Criminal Court could have drawn was that (as a consequence of convicting Sanders) the jury found "more than $5,000.00" in tax was owed -- how much more being unknown and unknowable. Therefore, the Court could rationally have ordered restitution of only $5,001.00 -- more than $5,000.00 for jurisdictional purposes, but only nominally so

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[297] Ante note 21 & accompanying text.

[298] Ante note 102 & accompanying text.

[299] Ante note 79 & accompanying text.

[300] T.C.A. § 40-35-304(e)(1) (1990).

for purposes of substantive due process.

Therefore, the sentence of restitution must be reversed to the extent of $67,999.00.

CONCLUSION

In the uncertain state of the law regarding the taxability of moneychanging in Tennessee, this prosecution should never have been brought. Having been brought, it must now be set aside.

For the foregoing reasons, Sanders prays that this Court enter the following relief under Tennessee Rule of Appellate Procedure 36(a):

As to Issue No. I, reverse Sanders' convictions and remand this cause for dismissal of the indictment.

As to Issue No. II, reverse Sanders' convictions and remand this cause for entry of judgment of acquittal.

As to Issue No. III, reverse Sanders' convictions and remand this cause for entry of judgment of acquittal.

As to Issue No. IV, reverse Sanders' convictions and remand this cause for entry of judgment of acquittal; or, in the alternative, remand for a new trial.

As to Issue No. V, reverse Sanders' convictions and remand this cause for dismissal of the indictment.

As to Issue No. VI, reverse Sanders' conviction on the first count of the indictment, and remand this cause for dismissal of that count.

As to Issue No. VII (all other issues failing), as to the portion dealing with restitution vacate Sanders' sentence and remand

this cause for resentencing, with instructions that restitution not exceed $5,001.00.

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