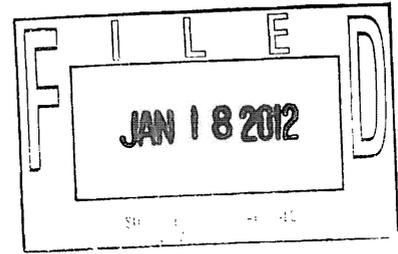


IN THE SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

DOCKET NO. 11-1306



STATE OF WEST VIRGINIA, Plaintiff Below,
Respondent,

v.

Appeal from a final order of
Case No. 11- F-18
Ohio County Circuit Court

JOHN J. MOFFIT, Defendant Below,
Appellant.

Appellant's Brief

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ASSIGNMENT OF ERROR

THE LOWER COURT COMMITTED ERROR IN THE INTREPRETATION OF WEST VIRGINIA CODE § 61-4-3 IN FINDING THAT IT PROSCRIBED THE COUNTERFEITING OF UNITED STATES PAPER CURRENCY.

STATEMENT OF THE CASE

Introduction. Although some facts and rulings by the lower court were in dispute at trial, the most important arguments that can be made in this case concern the outdated statutes in West Virginia for counterfeiting and possessing counterfeit notes. The statutes under which Appellant was charged are only valid as to counterfeiting coin and not United States paper currency. The statute in question relates to “any note or bill of a banking institution” and it is clear this reference is not to United States paper currency.

A. State's presentation of facts. Kara C. Reasbeck was working the window at Kentucky Fried Chicken on Wheeling Island January 18, 2010. (Vol. II, JT 87). At about twelve noon on that day a Chevy Impala drove up to her window. (Vol. II, JT 88). There was a male on the passenger side of the vehicle and a female was driving. (Vol. II, JT 88). Ms. Reasbeck does not remember the total for the order but the order was not costly. (Vol. II, JT 89). The male passenger pulled out a \$20.00 bill, handed it to the female and the female handed the money to Ms. Reasbeck. Ms. Reasbeck then testifies: “I took it. I knew it was fake when she handed it to me. I still marked it like I’m supposed to, then I got the manager and she took over from there.” (Vol. II, JT 91). The

mark was with a "counterfeit pen" used to determine the validity of the bill. (Vol. II, JT 93). The mark on the bill turned black confirming the bill was counterfeit. (Vol. II, JT 93). A call was made to the police. (Vol. II, JT 93).

Kevin Kettler testified that he was a police officer for the City of Wheeling and assisted in the investigation by obtaining information from the driver of the car, a Ms. Kelli Hupp. (Vol. II, JT 112). Ms. Hupp was not charged. (Vol. II, JT 115).

Jeffrey Griffith, a detective with the City of Wheeling Police Department, was on duty nearby and responded within minutes. (Vol. II, JT 26 and 93). He pulled in front of the Chevy Impala blocking it. (Vol. II, JT 26). An investigation began. (Vol. II, JT 26). Detective Griffith approached the vehicle and identified himself as a Wheeling Police Detective. (Vol. II, JT 27). He asked the driver, Ms. Kelli Hupp, to pull the vehicle into a parking spot to further discuss why he was approaching them. (Vol. II, JT 27). The detective determined that the vehicle belonged to the Appellant. (Vol. II, JT 28). Appellant was the passenger in the vehicle that Ms. Hupp was driving. (Vol. II, JT 29). Appellant was asked if he had "any other currency" on his person. (Vol. II, JT 31). Appellant responded affirmatively and produced all of his currency, which proved to be valid. (Vol. II, JT 31). A WesBanco bank envelope was later retrieved from Appellant's glove compartment, however, and it contained eight counterfeit bills. (Vol. II, JT 32). The money seized from Appellant included thirteen \$20 bills. One of the valid bills taken from Appellant's person matched the serial number on the counterfeit bill tendered to Kentucky Fried Chicken. (Vol. II, JT 34). The counterfeit bill tendered

and the bills in the WesBanco envelope all had the same serial number. (Vol. II, JT 38).

Appellant was arrested for possession of counterfeit bills. (Vol. II, JT 41).

A later search of Appellant's vehicle resulted in the seizure of a book bag belonging to Ms. Kelli Hupp. (Vol. II, JT 54). The book bag contained 21 MasterCard gift cards. (Vol. II, JT 54). Detective Griffith investigated the cards and determined that they were not stolen and that "some had been used, some had not." (Vol. II, JT 56). The reason that the cards were seized was that they could be "possible evidence of a method of laundering the counterfeit money." The detective further explained: "if you buy a hundred dollar MasterCard gift card and you make all your purchases with it, but you purchased the card with counterfeit money, you only have to spend the money in one place, and then you use this as cash. Less chance of getting caught." (Vol. II, JT 56 to 57).

The cross-examination of the detective included questions about the Federal Reserve banking system and that each bill of paper money says at the top "Federal Reserve" and that the Federal Reserve is "still in existence today." (Vol. II, JT 62). State's Counsel re-crossed on this point by pointing out that the Federal Reserve is not a local banking institution like "WesBanco or United Bank or Progressive" where people can make deposits and receive money back. State's Counsel further points out through testimony of the detective that the Treasury Department prints money. (Vol. II, JT 78).

B. The Defense. The Defense called one witness, James Spencer, who is the jail administrator for the Northern Regional Jail in Moundsville. (Vol. II, JT 137). The purpose of this testimony was to show that Appellant did not have a wallet. (Vol. II, JT 141). This testimony contradicted the statement from Ms. Reasbeck that she saw the “passenger had like ...a wallet in his hand...” (Vol. II, JT 90).

SUMMARY OF ARGUMENT

Reading the provision in W. Va. Code, § 61-4-3 (West 2011) that proscribes forging a note or bill of a banking institution that does not exist leaves the modern day reader scratching his or her head. The absence of any reference directly or indirectly to United States paper currency is also odd in a counterfeiting statute. In fact, the only reference to “money” in the counterfeit statute is the indirect reference to “coin, current by law or usage.”

These strange provisions all have an explanation when viewed in their historical context. The West Virginia counterfeit statute was originally drafted by the General Assembly of the Commonwealth of Virginia and included in the Code of Virginia of 1849. There was no valid Federal (national) paper currency in the United States after President Andrew Jackson refused to charter the Second Bank of the United States in 1832.

In 1849 the value of currency was based upon the precious metal (gold or silver) contained in the coin. Bills and notes of various state and private banks were

redeemable in coin. Statutes referring to such state and private bank notes and bills recognize that they are not money, legal tender or United States paper currency.

Unlike the Commonwealth of Virginia, West Virginia never amended its counterfeiting statute to cover United States paper currency that is current by law or usage, legal tender or money. In the present case Appellant was charged with uttering one counterfeit Federal Reserve Note twenty dollar bill and possessing eight others. He was not charged with anything having to do with state or private bank notes. Because W. Va. Code, § 61-4-3 (West 2011) does not make any provision for money in the form of United States paper currency either directly or indirectly, Appellant must be acquitted of the charges.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Appellant submits that the arguments in this case are straight forward, the facts of the case are not complicated and that the criteria of subsection (a) Rule 19, of the *Rev. R.A.P.*, are applicable.

ARGUMENT

THE LOWER COURT COMMITTED ERROR IN THE INTERPRETATION OF WEST VIRGINIA CODE § 61-4-3 IN FINDING THAT IT PROSCRIBED THE COUNTERFEITING OF UNITED STATES PAPER CURRENCY.

A. How Presented in the Court Below. At the close of the State's case Defense Counsel moved the lower court for a Rule 29, W.Va. R. Crim. P., acquittal on both counts. (Vol. II, JT 116 to 117). The basis for this motion was that the statute is archaic

and only pertains to bank notes that were issued by State banks and makes no mention of United States paper currency. The basis for this argument is there was no paper United States Currency when the original statute was enacted. Appellate Counsel notes as a matter of candor that no motion was made pretrial addressing this issue.

Highlights of Defense Counsel's argument are as follows:

...[I]f you look at when the statute was enacted, it's back in 1849. And I got on the U.S. Department of Treasury's website here and...at this time; banking institutions were popping up and folding all over the country. We didn't have a unified currency like we do today. So you had the State of Ohio having banks issuing money. You had the State of West Virginia (sic) issuing money. And if you look at the language of the law, that's what it's trying to protect, that type of counterfeiting....[I]f you put the statute in that historical context...it makes sense in regards to the banking institution language.

(Vol. II, JT 117 to 118). (Excerpts of argument. Also note: West Virginia did not exist in 1849 and the reference to issuing money would have been to the Commonwealth of Virginia.)

The lower court then inquired of Defense Counsel: "[I]f someone has a printing press in their basement and is printing counterfeit money... they could never be prosecuted for that because they printed the money as opposed to them obtaining it from a lending institution that ... no longer exists?" (Vol. II, JT 119).

Defense Counsel answers the lower court's question as follows:

...If they are printing money of a bank that no longer exists, Your Honor, under the language of the statute. That's why the federal system deals with this. That's why the Secret Service handles this and the federal laws handle that.

(Vol. II, JT 119).

...[I]f you look at 61-4-3, ...you go on to 61-4-5, that's forgery and uttering of other writings, which gives credence to my argument of - that the Code he's

indicted under is narrowly tailored. It's protecting a narrowly-defined counterfeit note or bank.

(Vol. II, JT 120).

...And then if you go on, 61-4-7 is entitled "Unauthorized currency."
...[T]he language of that law...[pertains to]...a circulating medium. So giving (sic) the hypothetical you gave me, he could be prosecuted under 61-4-7. And if you go on to 61-4-8, passing or receiving unauthorized currency. And, potentially, he could be prosecuted under that.

(Vol. II, JT 120).

The lower court then calls upon State's Counsel to respond. State's Counsel indicates that the argument is creative but notes that the statute is stated in the disjunctive and Defense Counsel's argument does not apply to the indictment in this case:

...[Appellant] is charged with uttering, employing as true a counterfeit \$20 bill at the KFC on January 18, 2010. All of this stuff about a banking institution, I don't - I don't even know if I can respond, but in terms of its validity, I mean, that's just ...[Defense Counsel's]...theory, or whatever, but that's not what the charge is. And I think Your Honor's question to ...[Defense Counsel]... about so anyone can just go print it and pass it and that's not a crime, that's - absurd. That tortured analysis would be absurd.

(Vol. II, JT 122 to 123).

Defense Counsel responds that he is aware that the statute has two parts, the first part being the act of forging or counterfeiting the false note or bill, and the second part pertaining to the uttering of the same. (Vol. II, JT 124). The argument is that the second part refers exclusively to the first part by the language "any such false, forged, note or bill." (Vol. II, JT 124).

The lower court takes a recess, reviews the matter and returns to the bench. The lower court then states:

...I have carefully considered the motion, read the applicable statute, that being 61-4-3, as well as 61-4-6, both of which were implicated in the defendant's motion.

...It was a good, novel argument, that you raise, but after carefully reading the statute, I have to respectfully disagree with your interpretation of it. I believe that under the charging statute, what you've cited in your argument is indeed one way that the State can obtain a conviction, that being proof that the alleged forged or writing or instrument came from the writing institution that's no longer in existence. But I disagree with you that that is the only way under 61-4-3, that the State can obtain a conviction pursuant to that statute. In other words, I don't believe that is exclusively related to obtaining the instrument from a lending institution that is no long in existence, as you interpret the statute. (Vol. II, JT 126).

...
So for those reasons, the motions would be denied. Of course, all exceptions and objection will be noted and preserved for the record. (Vol. II, JT 127).

B. Standard of Review. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Mace v. Mylan Pharmaceuticals, Inc.*, 227 W.Va. 666, 714 S.E.2d 223, 228 (2011) quoting syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

C. Factual Basis for Error. Appellant refers to this Brief "Statement of Case" and "How Presented in Court Below." The indictment in the present case charges in pertinent part:

COUNT ONE: ...That on or about January 18, 2010, in Ohio County, West Virginia, JOHN J. MOFFIT, committed the felony offense of "Uttering a Counterfeit Bill" in that the said John J. Moffit did unlawfully, willfully, intentionally, and feloniously utter or attempt to employ as true false, forged or base coin, note or bill knowing it to be so and with the intent to defraud, to-wit: John J. Moffit did utter a counterfeit twenty dollar bill at the Kentucky Fried Chicken restaurant at or near Zane Street, City of Wheeling, Ohio County, West Virginia, against the peace and dignity of the State of West Virginia and in violation of West Virginia Code § 61-4-3.

(Vol. I, AR 6).

...

COUNT TWO:...That on or about January 18, 2010, in Ohio County, West Virginia, JOHN J. MOFFIT, committed the misdemeanor offense of "Possession of Counterfeit with Intent to Utter" in that the said John J. Moffit did unlawfully, but not feloniously have in his possession forged bank notes or pieces of forged or base coin, knowing the same to be forged or base, with the intent to utter or employ them as true, against the peace and dignity of the State of West Virginia and in violation of West Virginia Code §61-4-6.

(Vol. I, AR 6 to 7).

D. Points of Law and Argument.

1. Points of Law.

a. Interpretation of Statutes – Relevant Syllabi.

A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent

therewith. Syl. Pt. 6, *Mace v. Mylan Pharmaceuticals, Inc.*, 227 W.Va. 666, 714 S.E.2d 223, 225 (2011), Syl. Pt. 2, *State v. McClain*, 211 W.Va. 61, 561 S.E.2d 783 (2002), Syl. Pt. 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908). (Quotation marks omitted.)

“‘Ambiguous penal statutes must be strictly construed against the State and in favor of the defendant.’” Syl. Pt. 3, *State v. McClain*, 211 W.Va. 61, 561 S.E.2d 783 (2002), quoting syllabus point 1, *Myers v. Murensky*, 162 W.Va. 5, 245 S.E.2d 920 (1978).

“When a defendant is charged with a crime in an indictment, but the State convicts the defendant of a charge not included in the indictment, then *per se* error has occurred, and the conviction cannot stand and must be reversed.” Syl. Pt. 7, *State v. Corra*, 223 W.Va. 573, 575-76, 678 S.E.2d 306, 308-09 (2009).

“Current money,” according to Black’s Law dictionary means: “The currency of the country; whatever is intended to and does actually circulate as currency; every species of coin or currency. In this phrase the adjective ‘current’ is not synonymous with ‘convertible’. It is employed to describe money which passes from hand to hand, from person to person, and circulates through the community, and is generally received. Money is current which is received as money in the common business transactions, and is the common medium in barter and trade...” Black’s Law Dictionary, Fifth Edition, at page 345 (West 1979).

b. Statutes in question.

§ 61-4-3. Counterfeiting; penalty: If any person forge any coin, current by law or usage in this State, or any note or bill of a banking institution, or fraudulently make any base coin, or a note or bill purporting to be the

note or bill of a banking institution, when such banking institution does not exist; or utter or attempt to employ as true, or sell, exchange or deliver, or offer to sell, exchange or deliver, or receive on sale, exchange, or delivery, with intent to utter or employ or to have the same uttered or employed as true, any such false, forged, or base coin, note or bill, knowing it to be so, he shall be deemed guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than two nor more than ten years.

W.Va. Code Ann. § 61-4-3 (West 2011).

§ 61-4-6. Possession of counterfeit with intent to utter; penalty: If any person have in his possession forged bank notes, or pieces of forged or base coin, such as are mentioned in the third section of this article, knowing the same to be forged or base, with intent to utter or employ the same as true, or to sell, exchange, or deliver them, so as to enable any other person to utter or employ them as true, he shall, if the number of such notes or pieces of coin in his possession, at the same time, be ten or more, be deemed guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than one nor more than five years, and if the number thereof be less than ten, he shall be deemed guilty of a misdemeanor, and, upon conviction, shall be confined in jail not less than six months nor more than one year and be fined not exceeding five hundred dollars.

W.Va. Code Ann. § 61-4-3 (West 2011).

c. Related Statutes, Virginia.

Chapter 193, Title 54, § 3.

If a free person forge any coin, current by law or usage in this state, or any note or bill of a banking company, or fraudulently make any base coin, or note or bill, purporting to be the note or bill of a banking company, when such company does not exist, or utter or attempt to employ as true such false, forged or base coin, note or bill, knowing it to be so, he shall be confined in the penitentiary not less than two, nor more than ten years.

Original 1849 Statute, (Vol. I, AR 190). (Superseded.)

§ 18.2-170. Forging coin or bank notes: If any person (1) forge any coin, note or bill current by law or usage in this Commonwealth or any note or bill of a banking company, (2) fraudulently make any base coin, or a note or bill purporting to be the note or bill of a banking company, when such company does not exist, or (3) utter, or attempt to employ as true, or sell, exchange, or deliver, or offer to sell, exchange, or deliver, or receive on sale, exchange, or delivery, with intent to utter or employ, or to have the same uttered or employed as true, any such false, forged, or base coin, note or bill, knowing it to be so, he shall be guilty of a Class 4 felony.

Va. Code Ann. § 18.2-170 (West 2011).

2. *Argument.* The lower court in denying Appellant's Rule 29, W.Va. Rule Crim. Pro., motion essentially ruled that the statutes under which Appellant was charged are not ambiguous. The lower court ruled that W. Va. Code, § 61-4-3 and § 61-4-6 do apply to the uttering of a counterfeit twenty dollar Federal Reserve Note bill as well as possession of the same. Because the analysis in this case involves the interpretation of statute, this Court need not give deference to that finding. Appellant contends that the statutes in question are at best ambiguous and that the better argument is that they don't apply at all to the facts of the present case.

a. *The Statute is ambiguous.* As noted in Section C. of this brief "Factual Basis for Error," Appellant was charged in Count One of the indictment with: "...utter or attempt to employ as true false, forged or base coin, note or bill knowing it to be so and with intent to defraud..." Count Two charges that he had in his possession: "...forged bank notes or pieces of forged or base coin, knowing the same to be forged or base..."

Count One relies upon W.Va. Code, § 61-4-3 and Count Two upon § 61-4-6. The latter code provision refers to the definition of: "...forged bank notes, or pieces of forged or base coin..." defined in W.Va. Code, § 61-4-3. The critical analysis thus pertains to West Virginia Code, § 61-4-3. (The current West Virginia Code, § 61-4-3 is also referred to as the "Statute.")

(1) The first inquiry is what is meant by "...utter...any such false, forged or base coin, note or bill..." in the Statute. The Statute begins with a string of three distinct counterfeiting options: First Option is: "...any coin, current by law or usage in this State..."; Second Option is: "...any note or bill of a banking institution..."; and, Third Option is: "...or fraudulently make any base coin, or note of a banking institution, when such banking institution does not exist..." Defense Counsel interpreted "any such" to refer the Third Option just noted and argued that the State did not and could not prove the qualifying phrase: "...when such banking institution does not exist..." as it pertained to the twenty dollar Federal Reserve note set forth in the indictment.

In order for the State to prevail the "any such" must pertain to the Second Option: "...any note or bill or bill of a banking institution..." Under this construction, the "any such" would apply to all three options. The question arises in the modern context of what is meant by "when such banking institution does not exist." What does this phrase mean and what, if any, of the preceding options does it qualify? Appellant argues this red flagged phrase invites further inspection because it is ambiguous.

(2) The second inquiry is to look at the spirit, purpose and object of the general system of law the Statute was integrated with. *See, Syl. Pt. 6, Mace v. Mylan Pharmaceuticals, supra.* This involves a very pleasant historical journey back in time.

The Statute began as a law of the Commonwealth of Virginia and is found in the *Report of Revisions of the Code of Virginia made to the General Assembly* in July 1849. (Vol. I, AR 181 to 191). The 1849 version and forbearer to the Statute, then codified as Chapter 193, Title 54, § 3, reads as follows:

If a free person forge any coin, current by law or usage in this state, or any note or bill of a banking company, or fraudulently make any base coin, or note or bill, purporting to be the note or bill of a banking company, when such company does not exist, or utter or attempt to employ as true such false, forged or base coin, note or bill, knowing it to be so, he shall be confined in the penitentiary not less than two, nor more than ten years. (Vol. I, AR 190).

The forbearer to the Statute shows there has not been a significant change to the key phrases in question now in the present case since original adoption. It is appropriate to look at the meaning of these key phrases when the forbearer to the Statute was drafted.

In 1849 there was no paper currency of the type known today. Value was based upon the precious metal contained in the coin. As noted in an article: *A lesson from the Free Banking Era*, Federal Reserve Bank of St. Louis – Regional Economist, April 1996:

...After the demise of the Second Bank of the United States, which President Andrew Jackson refused to recharter in 1832, the country entered a period known as the “Free Banking Era.” From 1837 to 1863, states that enacted free banking laws allowed free entry in the banking industry. This meant that banks could issue notes on the condition that

designated securities, placed on deposit with state regulatory authorities, backed them. In general, state authorities directed the printing and registering of bank notes and issued them to banks in amounts equal to the securities deposited. Free banks had to redeem their notes at par (face value) for specie (coins minted by the U.S. Treasury) on demand, otherwise the state would close the bank.

During this era, many different bank notes were circulating, making the ability to determine which notes were valid and sound, and which were risky, necessary for transactions to occur. As a result, bank note reporters - - newspapers that, like today's financial pages, listed which bank notes were valid and what their market values were - were published and used as guides for bank note acceptance. *Id.*, (Vol. I, AR 203).

Another commentator in tracing the history of United States paper money reports with regard to State bank notes: "With minimum regulation, a proliferation of 1,600 local state-chartered, private banks now issued paper money. State bank notes, with over 30,000 varieties of color and design, were easily counterfeited. That, along with bank failures, caused confusion and circulation problems." *Ron's Currency, Stocks & Bonds, The History of U.S. Paper Money*. (Vol. I, AR 205).

The Commonwealth of Virginia authorized banks to issue "bank notes or bills, payable to bearer on demand." (Vol. I, AR 183, - see, § 8). Report of *The Revisors of the Civil Code of Virginia*, December Session 1846 (hereinafter "Report of Revisors, 1846"), Chapter 58, § 8. The said Civil Code also required said bank bills or notes to: "...be paid in gold of the United States coinage if required by the bearer." *Id.*, at § 14. (Vol. I, AR 183, -see, § 14).

Reference to bank notes is also made in the *Report of The Revisors, 1846*, with regard to executions of judgment. Chapter 187, § 12, states:

If the levy be upon gold or silver coin, the same shall be accounted for at its par value as so much money made under the execution. If it be upon bank notes, and the creditor will not take them at their nominal value, they shall be sold and accounted for as any other property taken under execution.

Id., (Vol. I, AR 186, - *see*, §12).

This is further reflected in the West Virginia Code provision dealing with executions:

If the levy be upon gold or silver coin or other currency which is legal tender in the United States, the same shall be accounted for at its par value as so much money made under the execution. If it be upon bank notes or currency which are not legal tender in the United States, and the creditor will not take them at their nominal value, they shall be sold and accounted for as any other property taken under execution.

W.Va. Code Ann. § 38-4-7 (West 2011).

The current West Virginia Code section pertaining to executions reflects the amendment of "...other currency which is legal tender in the United States..." and distinguishes: "...bank notes or currency which are not legal tender..." This distinction is also made in the current West Virginia embezzlement statute - W.Va. Code Ann. § 62-2-5 (West 2011: "In a prosecution against a person accused of embezzling, or fraudulently converting to his own use, bullion, money, bank notes, or other security for money..." - said statute thus noting that bank notes are not "money." The embezzlement statute goes on to describe "money" as:

And in any indictment, warrant or information in which it is necessary to describe money current in this State, a description of such money as "United States currency" will be sufficient without specifying the number and denomination thereof, and such description shall be construed to mean national bank notes, United States treasury notes, federal reserve notes, certificates for either gold or silver coin, fractional coin, currency, or

any other form of money issued by the United States government and current as money in this State.

Id.,

The critical point shown in the embezzlement statute is that “bank notes” are not considered to be legal tender in the same fashion as “money.” The Statute refers to “bank notes” in the historical sense and as a currency that, unlike the twenty dollar Federal Reserve Note bill in the present case, has a specific and distinct meaning, albeit historic and with reference to the present case perhaps archaic.

State’s Counsel at argument in the lower court called Defense Counsel’s argument “tortured.” (Vol. II, JT 122 to 123). In fact, it is the State’s assertion that “any note or bill of a banking institution” is equivalent to “money” that is tortured. Because “ambiguous penal statutes must be strictly construed against the State and in favor of the defendant,” the obvious distinction between “bank note” and “money” should be preserved in Appellant’s favor. *See, Syl. Pt. 3, State v. McClain*, 211 W.Va. 61, 561 S.E.2d 783 (2002).

b. The Statute does not apply in the present case. Appellant argues that, unless and until amended, the Statute does not apply to the counterfeiting of a twenty dollar Federal Reserve Note. The only “money” that is set forth in the Statute is “coin, current by law or usage in this State.” This is very obvious by reference to the related statute in the Commonwealth of Virginia that has been amended to reflect a national paper currency that is legal tender:

Forging coin or bank notes: If any person (1) forge any coin, note or bill current by law or usage in this Commonwealth or any note or bill of a banking company, (2) fraudulently make any base coin, or a note or bill purporting to be the note or bill of a banking company, when such company does not exist, or (3) utter, or attempt to employ as true, or sell, exchange, or deliver, or offer to sell, exchange, or deliver, or receive on sale, exchange, or delivery, with intent to utter or employ, or to have the same uttered or employed as true, any such false, forged, or base coin, note or bill, knowing it to be so, he shall be guilty of a Class 4 felony.

Va. Code Ann. § 18.2-170 (West 2011).

Again the Virginia Code provision keeps separate and distinct “a note or bill current by law or usage in this Commonwealth” from “any note or bill of a banking company.” The Virginia Practice Series guide notes as to the related Virginia Code section:

V Counterfeiting – Making False Money

Section 18.2-170(1) criminalizes the forging of coins, notes or bills current in the state, or the note or bill of a bank. Section 18.2-170(2) criminalizes making base coins, or the note or bill of a banking company which does not exist. The essence of these crimes is counterfeiting – making false money. The counterfeiting of United States money is punishable under § 18.2-170(1) even though that is also a federal crime. It is also a violation to counterfeit foreign money current in the state.

Those parts dealing with notes of banks are primarily historical. They refer to a time when state (and private) banks issued notes which passed as currency. Those portions of the statute should have no modern meaning.

...

Va. Prac. Vol. 7, Criminal Offenses & Defenses, F39 (West 2011). (Emphasis added.)

In the present case Appellant was charged with uttering one (1) counterfeit Federal Reserve Note twenty dollar bill (Count One), and possessing an additional eight (8) counterfeit Federal Reserve Note twenty dollar bills (Count Two). There was no allegation or proof as to any counterfeit or forged coin. Because the Statute has not

been amended to include notes or bills current by law or usage in this State, it does not proscribe the counterfeiting of Federal Reserve Note twenty dollar bills. The Statute only proscribes the counterfeiting of notes and bills of banking institutions that are not legal tender and are separate and distinct from modern paper money.

CONCLUSION

Appellant's convictions cannot stand because he was convicted of offences that were not properly subject of the West Virginia Code provisions for which he was charged. Similar to the result in *State v. Corra*, 223 W.Va. 573, 678 S.E.2d 306, (2009), Appellant should be acquitted of the charge and released from confinement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard H. Lorensen, counsel of record for *John J. Moffit*, hereby certify that on this **18th day of January, 2012**, served true and accurate copies of the foregoing **Appellant's Brief and Appendix Record** on counsel and all other parties to this appeal in the manner noted below:

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