STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss.

STATE OF NEW HAMPSHIRE

v.

ALEXANDER R. CAIN

218-2015-CR-680

ORDER

Defendant Alexander R. Cain is accused of Class B felony forgery. The indictment alleges Cain either altered a Superior Court return/mittimus or purposely uttered such a forgery with the intent to defraud. Cain has moved to dismiss the indictment on the ground that RSA 638:1,III and IV classify forgery of a return/mittimus as a Class B misdemeanor. With great reluctance, the court agrees with Cain's statutory analysis and therefore rules that the indictment alleges a Class B misdemeanor. However, the court stops short of dismissing the indictment. Cain's motion is GRANTED IN PART AS FOLLOWS:

1. The court rules that, as a matter of law, the conduct alleged in the indictment is a Class B misdemeanor;

2. This case shall proceed to trial or other disposition in Superior Court as a Class B misdemeanor;

3. This case shall be scheduled for a bench trial as the docket permits. Counsel shall notify the court within ten days of the clerk's notice of this order if they believe that the bench trial will last more than one day.

I. Orientation

Under New Hampshire's forgery statute, RSA 638:1, the grade of the offense depends entirely on the nature of the forged writing. Paragraphs III and IV of the statute provide as follows:

> III. Forgery is a class B felony if the writing is or purports to be:
>
> (a) A security, revenue stamp, or any other instrument issued by a government, or any agency thereof; or
>
> (b) A check, an issue of stocks, bonds, or any other instrument representing an interest in or a claim against property, or a pecuniary interest in or claim against any person or enterprise.
>
> IV. All other forgery is a class B misdemeanor.

The alleged writing in this case is a Superior Court return/mittimus. Tracking paragraph III of the statute, the indictment recites that the return/mittimus was "an instrument issued by the government." Thus, the indictment purports to be for a Class B felony.

Cain argues that, as a matter of law, a Superior Court return/mittimus is not "any other instrument issued by the government" within the meaning of RSA 638:1,III(a). Because no other statutory aggravator even arguably applies, Cain argues that the alleged offense is a Class B misdemeanor.

The resolution of Cain's argument requires the court to interpret the statutory text. This is, of course, a question of law. State v. Etienne, 163 N.H. 57, 71-72 (2011); State v. Breed, 159 N.H. 61, 64-65 (2009). The court's responsibility is to determine the intent of the legislature as expressed in the words of the statute considered as a whole. Etienne, 163 N.H. at 71-72; Breed, 159 N.H. at 64-65. In doing so, the court does not read statutory phrases and provisions in isolation, but rather "interpret[s] a statute in the

context of the overall statutory scheme." State v. Kousounadis, 159 N.H. 413, 423 (2009).

The court must first look exclusively at the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. Etienne, 163 N.H. at 71-72; Breed, 159 N.H. at 64-65. The court's inquiry is limited to "the statute as written and [the court] will not consider what the legislature might have said or add language it did not see fit to include." Kousounadis, 159 N.H. at 423; see also, State v. Jennings, 159 N.H. 1, 3 (2009); State v. Hynes, 159 N.H. 187, 193 (2009); State v. Bernard, 158 N.H. 43, 44 (2008). As explained below, when the grammar or syntax of a statute allow for more than one reasonable interpretation, the court may employ one or more common law cannons of statutory construction to help break the log jam.

If the plain meaning of the statutory language can be determined from the black letter text, the analysis stops there. See, Etienne, 163 N.H. at 71-72 ("Absent an ambiguity we will not look beyond the language of the statute to discern legislative intent."). If, however, the statutory language is ambiguous, then—and only then—the court may consider the statute's legislative history. See, Matter of Lyon, 166 N.H. 315, 318 (2014) ("When the language of a statute is plain and unambiguous, we do not look beyond it for further indications of legislative intent. However, we review legislative history to aid our analysis when the statutory language is ambiguous or subject to more than one reasonable interpretation."); State v. Spade, 161 N.H. 248, 251 (2010) ("If a statute is ambiguous . . . we consider legislative history to aid our analysis. [citation omitted]. Our goal is to apply statutes in light of the legislature's intent in enacting them,

and in light of the policy sought to be advanced by the entire statutory scheme."); Smith v. City of Franklin, 159 N.H. 585, 588 (2010); State v. Dansereau, 157 N.H. 596, 598 (2008);; State v. Lamy, 158 N.H. 511, 515 (2009); State v. Whittey, 149 N.H. 463, 467 (2003).

In construing provisions of the Criminal Code, the court is mindful that "[t]he rule that penal statutes are to be strictly construed does not apply[,]" . . . [and] [a]ll provisions of this code shall be construed according to the fair import of their terms and to promote justice." RSA 625:3. See, Breed, 159 N.H. at 64-65; State v. Lukas, 164 N.H. 693, 694 (2013); State v. Moran, 158 N.H. 318, 321 (2009); In re Petition of State of New Hampshire, 152 N.H. 185, 187, (2005). That said, the New Hampshire Supreme Court has nonetheless held that the common law rule of lenity has some continuing vitality if a Code provision remains ambiguous after all other efforts at statutory construction have failed. The rule of lenity holds that the court should resolve such stubborn ambiguities against a construction that would increase a statutory penalty. See e.g., Sate v. Dansereau, 157 N.H. 596, 602, (2008), applying the rule of lenity when the legislature's intent could not be determined by looking at the statutory language and legislative history, and holding that:

> The rule of lenity serves as a guide for interpreting criminal statutes where the legislature failed to articulate its intent unambiguously. [citation omitted]. This rule of statutory construction generally holds that ambiguity in a criminal statute should be resolved against an interpretation which would increase the penalties or punishments imposed on a defendant. [citation omitted]. It is rooted in the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should. [citation omitted]. By applying the rule of lenity, we reject the impulse to speculate regarding a dubious legislative intent, and avoid playing the part of a mind reader.

(internal citations, quotation marks and bracketing omitted); See also, State v. Brooks, 164 N.H. 272, 292 (2012); In re Alex C., 161 N.H. 231, 239 (2010); State v. MacLeod, 141 N.H. 427, 434 (1996).

II. The Writing

The writing alleged in the indictment is a Superior Court return/mittimus. This is a document typically prepared by the clerk. When a defendant is sentenced to confinement, the mittimus instructs the warden of the state prison or the superintendent of a house of correction to safely keep the defendant according to the terms of the court's sentence. The sentence is either restated in the mittimus or incorporated via an attached copy of sentencing order.

The mittimus travels with the sentenced defendant to the prison or house of correction. The officer who transports the defendant certifies on the face of the mittimus that he or she has done so and then files a return copy with the court. Thus, when a defendant is sentenced to a committed term of confinement, a mittimus is the court's written instruction or command to the warden or jailer and a return is a copy of the mittimus signed by the officer who transported the defendant to the place of confinement.

The court issues a separate mittimus for each charge. Additionally, if a defendant is sentenced to confinement upon revocation of a suspended or deferred sentence or for a violation of probation, a new mittimus is issued and a new return is filed.

In other cases, where there is no committed term of confinement, the Superior Court often uses a document captioned as a "return/mittimus" (or "mittimus/return") to

serve as the clerk's notice of the final disposition of a criminal charge. The document will indicate whether the charge was resolved by nol pros, dismissal, acquittal or conviction and, if the latter, the terms of the sentence (or it will reference copies of the sentencing orders that may be attached to the mittimus).

The Superior Court provides copies of each return/mittimus to the parties and, as may be applicable, to the Department of Corrections, Division of Field Services (i.e. 'probation'), the State Police Criminal Record Bureau and others. A return/mittimus is a public record available from the clerk's office upon request.

The New Hampshire Supreme Court has used the term "mittimus," consistent with the Superior Court's present day practice, to connote both an order of commitment and a description of a defendant's sentence. See e.g., State v. Ingerson, 130 N.H. 112, 116 (1987) (noting earlier cases in which a conditionally stayed sentence was brought forward without judicial involvement when the prosecutor "called for the mittimus"); State v. Pandelena, 161 N.H. 326, 332 (2010) (discussing the standard language used in a defendant's mittimus to describe the sentence); State v. Merrill, 160 N.H. 467, 472 (2010) (same). This usage is fairly close to the first two definitions of "mittimus" in Black's Law Dictionary:

> 1. A court order or warrant directing a jailer to detain a person until ordered otherwise;
>
> 2. A certified transcript of a prisoner's conviction or sentencing proceedings.

So understood, in a case involving a committed term of confinement a mittimus has some of the attributes of judicial process. It commands the warden or superintendent to keep the defendant confined and it is the document relied on by

correctional authorities for their authority over the defendant. However, even in such cases the mittimus is merely a way of providing notice of the underlying judicial sentence. The mittimus does not independently determine the defendant's legal status. See e.g., 21A Am. Jur. 2d Criminal Law § 865:

> The authority to hold a prisoner is the sentence or judgment of the court, and the warrant of commitment is only evidence of that judgment. A commitment paper is not a judgment, rather, the validity of a commitment depends on the judgment behind it.

(footnotes omitted).

The same is true, with even greater force, with respect to a mittimus in a case in which the defendant was not sentenced to a committed term of confinement. In such cases the mittimus is simply the clerk's notice of the disposition of the case.

Although the indictment in this case incorporates the allegedly altered return/mittimus, neither party has submitted the document to the court. The indictment is silent with respect to whether the mittimus in this case reflected a committed term of confinement or some other disposition.

III. What Is An Instrument

The question presented in this case is whether a Superior Court return/mittimus is "any other instrument issued by the government" within the meaning for RSA 638:1,III(a). Both the word "instrument" and the phrase "any other instrument issued by the government" are ambiguous. Several relevant definitions of the word instrument can be found in general purpose dictionaries, including:

-"A formal legal document (as a deed, bond, or agreement)," Merriam-Webster Online Dictionary, Definition 4;

-"A formal document, especially a legal one," Oxford Dictionary Online, Definition 4;

-“ A legal document, especially one that represents a right of payment or conveys an interest, such as a check, promissory note, deed, or will,” The American Heritage Online Dictionary, Definition 6.

-“A formal legal document, as a draft or bond,” Dictionary.Com, Definition 6.

-In law, “a formal document, as a deed, contract, etc[;]” and in finance “a written order or promise to pay a sum of money.” Collins American English Dictionary Online, Definition 5 (identical to Webster’s New World College Dictionary Online, Definitions 5 and 6);

None of the general purpose dictionaries cited above has a separate entry for the phrase “government instrument.” Thus, in common parlance the terms “instrument” or “government instrument,” as applied to a writing, could mean either:

A. Any sort of “formal” document;

B. Only “formal” “legal” documents; or

C. Only “formal” “legal” documents that (i) create a payment obligation (such as notes and bonds); and/or (ii) convey property (such as deeds and wills) and/or (iii) constitute agreements.

The term “instrument” also has several additional definitions when used as a technical term in legal circles. See, RSA 21:2 (“Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed and understood according to such peculiar and appropriate meaning.”) Black’s Law Dictionary defines an “instrument” as:

> A written legal document that defines rights, duties, entitlements, or liabilities, such as a statute, contract, will, promissory note, or share certificate. — Also termed *legal instrument.*

> "An 'instrument' seems to embrace contracts, deeds, statutes, wills, Orders in Council, orders, warrants, schemes, letters patent, rules, regulations, bye-laws, whether in writing or in print, or partly in both; in fact, any written or printed document that may have to be interpreted by the Courts." Edward Beal, Cardinal Rules of Legal Interpretation 55 (A.E. Randall ed., 3d ed. 1924).

Black's also defines the "instrument" alternatively for commercial law purposes, consistent with the Uniform Commercial Code, as a promise to pay a fixed amount of money. Black's definition of "instrument" then goes on to list thirteen overlapping types of instruments including "false instruments," "financing instruments," "inchoate instruments," "incomplete instruments," "indispensable instruments," "instruments under hand," "instruments under seal," "investment instruments," "perfect instruments," "statutory instruments," "testamentary instruments," and "unconscious instruments." Beyond these definitions, Black's has separate entries for "trust instrument," "risk-assessment instrument," "order instrument," "negotiable instrument," "instrument of ratification," "instrument of appeal," "instrument of accession," "accusatory instrument," "bearer instrument," "charging instrument," "derivative instrument," "debt instrument," and "public instrument."

Black's does not include a definition for "government instrument." However, as noted above, Black's defines the term "public instrument," as a "public writing." Black's defines the term "public writing as follows:

> 1. The written acts or records of a government (or its constituent units) that are not constitutionally or statutorily protected from disclosure.
>
> Laws and judicial records, for example, are public writings.
>
> A private writing that becomes part of a public record may be a public writing in some circumstances.

> 2. Rare. A document prepared by a notary public in the presence of the parties who sign it before witnesses. — Also termed (in both senses) public instrument . . .

Black's thus provides a broad and plastic definition of the term "instrument." When used in certain contexts, the term refers to notes, checks, commercial paper and bonds. In other contexts, the term refers to private documents that define legal rights. In still other contexts, an "instrument" is something generated or maintained by the government that establishes legal rights and obligations. When used in the phrase "public document," the term "instrument" refers to virtually any public record.

The word "instrument," has the same Zelig-like quality in the New Hampshire Revised Statutes, where it is used to mean somewhat different things in different contexts. Compare e.g., RSA Chapter 356-B (Condominium Act, discussing "condominium instruments"); RSA Chapter 382-A (U.C.C. discussing "negotiable instruments"); RSA Chapter 455 (Notaries Public, discussing notarization of instruments); RSA Chapter 478 (Registers of Deeds, discussing recordable instruments); RSA Chapter 564-b (Uniform Trust Code discussing "trust instruments"); RSA 137:16 (describing an advanced health care directive as an "instrument"); RSA 408:16 (discussing "instruments" containing statements of life insurance policyholders); RSA 607-A:5 (discussing "instruments of discharge" given to criminally convicted persons upon their release from confinement, probation or parole).

If all of the foregoing connotations—from general purpose dictionaries, Black's Law Dictionary and the Revised Statutes—were placed on an graph, the result would be a tall, narrow bell curve signifying that, for the most part, the word instrument refers to a formal, legal document that, once properly executed or issued, changes the legal rights

and obligations of at least one person. A return/mittimus is one degree of separation distant from these types of document. It is the clerk's formal recitation and description of a judge's criminal sentence, which, in turn is the document that changes the defendant's legal rights and obligations.

Nonetheless, the term instrument is certainly used more broadly in certain circles and for certain purposes. Therefore, the court cannot say that the common and legal usage of the term necessarily excludes a return/mittimus from its coverage.

IV. Construction Of The Statute

A. Ejusdem Generis

As noted above, the court does not read statutory words and phrases in isolation, but rather looks at the statute as whole. When the looks at RSA 638:1 as a whole, certain syntactical choices are immediately apparent. First, in RSA 638:1,III(a) the legislature used the phrase "any other instrument issued by the government" as a catch-all residual following two specific examples, i.e. revenue stamps and securities:

> III. Forgery is a class B felony if the writing is or purports to be:
>
> (a) A security, revenue stamp, or any other instrument issued by a government, or any agency thereof;

(emphasis added).

Indulging the presumption that the legislature does not waste words and that it intends for every word in a statute to be given effect, Garand v. Town of Exeter, 159 N.H. 136, 140–41 (2009), In re Guardianship of Williams, 159 N.H. 318, 323 (2009); State v. Yates, 152 N.H. 245, 256 (2005), the court must read the statute in such a way that the terms "security" and "revenue stamp" are not pure surplusage. Yet, if the catchall "any other instrument issued by a government" is read broadly enough, the two

isolated examples would add nothing to the statute. It would be as if the legislature defined a category consisting of "cavier, kumquats, chateaubriand and every other type of food whatsoever." Thus, the syntax of the statute suggests that the two examples were intended, and should be read as guide posts that inform the meaning of the general category of "any other instrument issued by a government."

This common sense reasoning is reflected in an oft-used canon of statutory construction known as *ejusdem generis* (Latin for "of the same kind"). "This doctrine provides that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same kind or class as those specifically mentioned." State v. Beckett, 144 N.H. 315, 318-19 (1999). See also, Breed, 159 N.H. at 65; Dolbeare v. City of Laconia, ___ N.H. ___, 120 A.3d 146, (2015); State v. Beauchemin, 161 N.H. 654, 658 (2011); In re Hennessey-Martin, 151 N.H. 207, 211 (2004); State v. Wilson, 140 N.H. 44, 45 (1995); State v. Meaney, 134 N.H. 741, 744 (1991); State v. Small, 99 N.H. 349, 350-52 (1955); see generally, CSX Transp., Inc. v. Alabama Dep't of Revenue, 562 U.S. 277, 295, 131 S. Ct. 1101, 1113 (2011) ("We typically use *ejusdem generis* to ensure that a general word will not render specific words meaningless."); Yates v. United States, 135 S. Ct. 1074, 1086 (2015) (same); 2A Sutherland Statutory Construction §47:17 (7th ed.):

> The doctrine of *ejusdem generis* seeks to reconcile an incompatibility between specific and general words in light of other rules of construction that all words in a statute and other legal instruments are to be given effect, if possible, that all parts of a statute are to be construed together, and that a legislature is presumed not to have used superfluous language. If the general words are given their full and natural abstract meaning, they would include the objects designated by the specific words, making the latter superfluous. If, on the other hand, the series of specific words is

> given its full and natural meaning, the general words are partially redundant. The rule accomplishes the purpose of giving effect to both the particular and the general words, by treating the particular words as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words. The resolution of this conflict by ascribing to the series its natural meaning and by restricting the meaning of the general words to things *ejusdem generis* with the series is justified on the ground that, had a legislature intended the general words to be used in their unrestricted sense, it would have made no mention of the particular words, but would have used only one compendious expression.
>
> *Ejusdem generis* is a common drafting technique designed to save a legislature from spelling out in advance every contingency in which a statute could apply. When foreseeable circumstances are too numerous or varied for particular enumeration, a legislature may employ *ejusdem generis* principles and permissibly rely on courts to give content to a general statutory phrase. Consequently, courts may use *ejusdem generis* to avoid a finding of unconstitutional vagueness where an enumeration of unlawful conduct clarifies a subsequent general term enough to provide guidance to a person of reasonable intelligence, and the general term encompasses conduct a legislature intended to prevent.

The Breed case is particularly instructive because it deals with somewhat similar language in the same chapter of the Criminal Code. The defendant in Breed was accused of fraudulent handling of recordable writings in violation of RSA 638:2. The writings at issue were medical certificates of cremation. The statute under which the defendant was accused applied to "any will, deed, mortgage, security instrument or other writing for which the law provides public recording." Applying *ejusdem generis,* the Supreme Court held that the general catchall, "other writing for which the law provides public recording" did not include cremation certificates:

> In RSA 638:2, the general phrase "other writing for which the law provides public recording" follows an enumerated list that includes wills, deeds, mortgages and security instruments. . . . All of the enumerated documents are documents that affect property interests. The law provides for recording of these documents so as to give notice to all persons regarding the status of title to the property at issue. . . . Cremation certificates, on the other hand, do not concern property interests and do

> not involve a similar need for public notice. Therefore, they are not similar in nature to the enumerated documents, and are not "writing[s] for which the law provides public recording."

Breed, 159 N.H. at 65.

In this case, the doctrine of *ejusdem generis* suggests that the phrase "any other instrument issued by a government" should be read to include only writings that are similar to securities and revenue stamps. This begs the question of how broadly to read the general class that is formed by these two specific examples. Put another way, the court must consider what common attributes of revenue stamps and securities should become elements of "any other instrument issued by a government."

Government issued securities and revenue stamps are:

A. Used to finance the government;

B. Sold or given by the government in return for money;

C. Inherently valuable, produced in bulk and typically bearer documents;

D. Typically, difficult to counterfeit without the use of special equipment and expertise; and

E. The source of new rights (because, for example, a revenue stamp permits a wholesaler to sell a carton of cigarettes, RSA 78:9 and 78:12, and government securities create a right to receive payment).

Additionally, because of these attributes, forgeries of government securities or revenue stamps could cause widespread financial harm, if not catastrophe. A trove of counterfeit cigarette stamps, for example, could deprive the State of millions of dollars. A stack of counterfeit government bonds and notes would threaten the financial wellbeing of prospective purchasers as well as the liquidity of the actual notes.

It is not necessary to consider which of these attributes of securities and revenue stamps are essential, and which are merely incidental, because none are also attributes of a court return/mittimus. A return/mittimus has nothing to do with financing the government, is not sold or transferred for consideration, has no inherent value, is not produced in bulk, requires no special equipment or skill to counterfeit, is personalized to the defendant and not a bearer document, and, as explained above, does not in and of itself create or alter any legal right or obligation. Further, while a forged mittimus can result in great injustice for the person named in the mittimus, and for the State and victim, it does not threaten the sort of widespread harm that may result from forged revenue stamps and securities.

Thus, the canon of *ejusdem generis* militates strongly against reading the statutory phrase "any other instrument issued a government" to include Superior Court returns/mittimuses. See e.g., Commonwealth v. Ryan, 909 A.2d 839, 842 (Pa. Super. 2006):

> …[W]e conclude that a forged building permit is not the type of document the legislature intended to comprise a felony of the second degree. Although the permit purports to be issued by . . . a government agency, it is different in kind and class from the documents enumerated in [Pennsylvania's forgery statute] as qualifying for a felony two designation. Unlike money, securities, postage, revenue stamps, stocks, and bonds, a permit has no intrinsic value. Rather, it is a license to do something, in this case, build or alter a structure. Further, under the statutory construction doctrine of *ejusdem generis*, the reference in the statute to "other instruments issued by the government" must be limited to instruments of the same general nature or class as those preceding the phrase—that is, instruments with intrinsic value. Again, a permit has no intrinsic value.

(footnote omitted); See also, Eagle v. State, 213 S.W.3d 661, 666 (Ark. Ct. App. 2005) (a release of judgment issued by a court held not to be an "other instrument issued by a government" for the purpose of enhancing the offense level of forgery under a statute

making forgery of " "money, a security, a postage or revenue stamp, or other instrument issued by a government" a first degree felony); State v. Tarrence, 985 P.2d 225 (Ore. Ct. App. 1999) (the enhancement for committing forgery of a writing that is "[p]art of an issue of money, securities, postage or revenue stamps, or other valuable instruments issued by a government or governmental agency" does not apply to government issued checks).

However, *ejusdem generis* is not the last word. As the Supreme Court explained in State v. Beckert, 144 N.H. 315, 319 (1999):

> [I]t is well established that the rule of *ejusdem generis* is neither final nor exclusive and is always subject to the qualification that general words will not be used in a restricted sense if the act as a whole indicates a different legislative purpose in view of the objectives to be attained. As a general rule the use of Latin phrases to solve problems of statutory construction has not been a marked success.... The crux of the matter is that the rule of *ejusdem generis* is only a constructionary crutch and not a judicial ukase in the ascertainment of legislative intention.

quoting State v. Small, 99 N.H. 349, 351 (1955). See also, In re Regan, 164 N.H. 1, 9 (2012); Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 89, 55 S. Ct. 50, 52 (1934) (*ejusdem generis* is "only an aid to the ascertainment of the true meaning of the statute); Sutherland §47:22 ("General words are not restricted in meaning to objects *ejusdem generis* if there is a clear manifestation of a contrary intent or purpose."). Therefore, the court must also consider other indicia of legislative purpose.

B. Expressio Unius Est Exclusio Alterius

It is noteworthy that RSA 638:1,III(b) contains words of limitation that are not included in RSA 638:1,III(a):

Forgery is a class B felony if the writing is or purports to be:

> (a) A security, revenue stamp, or any other instrument issued by a government, or any agency thereof; or
>
> (b) A check, an issue of stocks, bonds, or any other instrument representing an interest in or a claim against property, or a pecuniary interest in or claim against any person or enterprise.

RSA 638:1,III (emphasis added). It is clear from both the grammar and the formatting of the statute that the underlined words of limitation apply only to those instruments described in RSA 638:1,III(b), and therefore do not apply to the phrase "any other instrument issued by a government" in RSA 638:1,III(a). See e.g., General Insulation Co. v. Eckman Construction, 159 N.H. 601, 610 (2010) (explaining the last antecedent rule).

When the legislature includes words of limitation in one provision of a statute, but omits those words in another provision of the same statute, the maxim *expressio unius est exclusio alterius* (Latin for "the expression of one thing is the exclusion of another") suggests that the omission was intentional. City of Manchester v. Secretary of State, 161 N.H. 127, 134 (2010); State v. Mayo, 167 N.H. 443, 452 (2015). Thus, the court concludes that the legislature did not intend to limit the class of felony level forged government instruments to those "representing an interest in or a claim against property, or a pecuniary interest in or claim against any person or enterprise."

However, this much is apparent from the inclusion of revenue stamps in RSA 638:1,III(a). Revenue stamps do not represent any sort of property interest. Yet, they still have all of the other attributes described above. Accordingly, even a full-throated application of *expressio unius est exclusio alterius* sheds little additional light on how RSA 638:1,III(a) should be construed.

C. Derivation And Legislative History

1. Derivation And Drafting

The New Hampshire forgery statute, RSA 638:1, was enacted in 1971 as part of the Criminal Code. 1971 Laws 518:1. Since that time the statute has only been amended once. That was in 1992, when the legislature amended the word "misdemeanor" to read "Class B misdemeanor." 1992 Laws 269:15.

The New Hampshire forgery statute is derived from §224.1 of the Model Penal Code ("MPC"). The New Hampshire Supreme Court "looks to the Model Penal Code Commentaries for guidance when interpreting analogous New Hampshire Statutes." State v. Donohue, 150 N.H. 180, 183 (2003); State v. Robidoux, 125 N.H. 169, 172 (1984);

The MPC differs most significantly from the New Hampshire statute with respect to the grading of the offense. As explained above at length, RSA 638:1,III and IV establish only two grades of forgery. Forgery is either a Class B felony or a Class B misdemeanor based on the nature of the forged document. In contrast, the MPC provides for three grades of forgery, identified as second degree felony, third degree felony and misdemeanor:

> Grading. **Forgery is a felony of the second degree if the writing is or purports to be part of an issue of money, securities, postage or revenue stamps, or other instruments issued by the government**, or Part of an Issue of stock, bonds or other instruments representing interests in or claims against any property or enterprise.
>
> *Forgery is a felony of the third degree if the writing is or purports to be a will, deed, contract, release, commercial instrument, or other document evidencing, creating, transferring, altering, terminating, or otherwise affecting legal relations.*
>
> Otherwise forgery is a misdemeanor.

MPC §224.1(2) (**bold** and *italicized* font added)

Thus RSA 638:1,III(a) is close to a carbon copy of the first clause of MPC §224.1(2), highlighted in bold font, except that the New Hampshire statute does not include “an issue of money” or “postage.” The Explanatory Note following MPC §224.1 indicates the first clause of MPC 224.1(2), and by extension RSA 638:1,III(a) is designed to reach only “documents which require special expertise to execute, which can readily be the means of perpetrating widespread fraud, and the forgery of which can undermine confidence in widely circulating instruments representing wealth.” This description clearly does not include case-specific court issued documents such as a Superior Court return/mittimus.

Equally important, RSA 638:1,III(a) does not include any of the language in the second paragraph of MPC §224.1(2), highlighted in italicized font. That italicized language likely includes documents such as a mittimus/return. The Explanatory Note provides that “[f]orgery of documents affecting legal relations is a felony of the third degree[,]” and the text of MPC §224.1(2) includes not only documents that create new legal rights or obligations, but also documents that evidence such rights or obligations.

The Commentaries to the Model Penal Code expand on the Explanatory Note:

> Under Subsection (2), forgery is a second-degree felony where the thing forged is or purports to be "part of an issue of money, securities, postage or revenue stamps, or other instruments issued by the government, or part of an issue of stock, bonds or other instruments representing interests in or claims against any property or enterprise." In such cases, the special dangers of forgery are most likely to be present. Fraud is likely to be perpetrated on a considerable scale; it takes special expertise in the main to reproduce these types of documents; and confidence in the authenticity of widely circulating instruments representing wealth will be undermined. There is no case today for distinguishing forgery of corporate securities in

> this respect from government bonds or bank notes, and Subsection (2) accordingly treats them in the same manner. . . .
>
> On the other hand, the forging of an isolated government contract, private deed, or corporate mortgage presents no special case for penalties more severe than those of a third-degree felony. [footnote omitted]. Accordingly, the second sentence of Subsection (2) treats as a felony of the third degree cases where the writing is or purports to be a "will, deed, contract, release, commercial Instrument, or other document evidencing, creating, transferring, altering, terminating, or otherwise affecting legal relations." . . .
>
> Finally, the misdemeanor category is reserved for forgery of documents that do not purport to affect legal relations, such as manuscripts, diplomas, and other similar items included in the broad notion of "writing" on which Section 224.1 is based.

Model Penal Code Commentaries, Part II, §224.1 (1980).

The drafters of New Hampshire's Criminal Code thus made two seemingly deliberate choices. First, as noted above, they opted for two offense levels rather than three. Second, having made this decision they opted against enhancing the offense level for forgery of government issued documents evidencing or affecting legal relations.

2. New Hampshire Legislative History

The New Hampshire legislative history is both sparse and cryptic. The 1969 commission charged with codifying New Hampshire's criminal laws (see, 1967 Laws Ch. 451) said that:

> This offense is graded on the basis of the type of writing that is involved. If it is or purports to be an act of the government or concerns property or a pecuniary interest, it is a class B felony. In regard to government writings, paragraph III-a does not include money on the ground that counterfeiting of money has become so exclusively a matter of law enforcement by federal officials that there is no reason for the state's substantive law to continue an offense which it is not likely state enforcement authorities will become involved in.

Report of Commission to Recommend Codification of Criminal Laws §583:1, comment at p. 72 (1969). These comments are self-contradictory and inconsistent with the text that the Commission proposed and the legislature subsequently enacted. If the enhancement for forgery of government instruments applies to any writing that is or purports to be "an act of the government," then it necessarily applies to counterfeiting government issued currency.

The court places little weight on the Commissions brief comments. See e.g., State v. Daoud, 141 N.H. 142, 145-46 (1996) (declining to adopt the Commission's comment and holding that "[a]lthough the comments of the commission may be useful in interpreting the Criminal Code, [citation omitted], they are not law."). It is not clear whether the Commission wished for the language to be read more broadly, more narrowly or exactly the same as the underlying MPC language.

The court has looked at the legislative history of the Criminal Code, subsequent to the Commission's report and found nothing in any House or Senate hearing that pertains to the construction of RSA 638:1,III(a).

3. Prior Law

The court is mindful that until the Criminal Code was enacted, New Hampshire had long classified forgery of court documents as a serious felony. This history goes back to 1828 Laws 91:18, which established a felony punishable by up to seven years in prison for forgery of any

> writ, process or proceeding in any court of justice in this state; any certificate or attestation of a justice of the peace, notary public, clerk of any court, town clerk or other public officer, in any matter wherein such certificate or attestation may be received as legal proof[.]

The same language was eventually codified as R.S. 216:1 (1842) (although by that time the phrase “court of justice” was amended to “court) and remained intact and in effect until it was finally repealed when the Criminal Code became effective. See, RSA 581:1 (1972). The legislature should not be lightly presumed to have intended to alter this policy. Nonetheless, the court must construe the statute that the legislature actually enacted, not some hypothetical statute that it could have enacted.

D. Conclusion As To Statutory Construction

To the extent that RSA 638:1,III(a) is ambiguous, the application of *ejusdem generis* strongly favors a reading that excludes a Superior Court return/mittimus from the class of felony level writings. This reading is supported by the (a) statute’s MPC provenance and the differences between the statute and the analogous MPC provision, (b) the MPC Commentaries and (c) the case law from other jurisdictions, cited above at pages 15-16. The codification Commission’s report, and the lack of a legislative history recognizing a sharp break with prior law gives the court pause. Nonetheless, the court concludes that, as a matter of law, the indictment alleges a Class B misdemeanor.

V. Dismissal Is An Inappropriate Remedy

Cain asks for dismissal even though he concedes that the indictment properly alleges all of the elements of Class B misdemeanor forgery. This court has subject matter jurisdiction over Class B misdemeanors. RSA 592-A:1. There is no statutory or common law prohibition on bringing a Class B misdemeanor by indictment. Therefore, there are no grounds to dismiss the indictment.

This precise issue was conclusively decided by the New Hampshire Supreme Court in State v. Allegra, 129 N.H. 720, 725 (1987). The indictment in Allegra purported

to be for felony level forgery. The writing alleged in the indictment was a business letter the defendant had received from PSNH. The defendant backdated the letter and then gave it to his insurance carrier in order to support a fraudulent insurance claim. The defendant argued that (a) the conduct alleged in the indictment was misdemeanor forgery and (b) his attorney was ineffective for failing to seek dismissal of the indictment. The Supreme Court agreed that the offense was a misdemeanor but held that:

> It does not follow, however, that the indictment was invalid or that counsel should have moved for its dismissal. Although RSA 601:1 provides that felonies must be charged by indictment, there is no statutory prohibition against indicting for a misdemeanor. Despite the virtually universal practice of charging misdemeanors by complaint or information, the common-law practice, which is regarded as constitutionally permissible, allowed misdemeanor charges beyond the jurisdiction of a justice of the peace to be brought by indictment or information. [citation omitted]. Therefore, although the instant forgery charge could have been commenced by complaint in a district court, no statutory or constitutional right of the defendant was infringed by indicting him in the superior court.

Allegra, 129 N.H. at 725.

Both this court and the Circuit Court have concurrent original jurisdiction over violations and misdemeanors. See, RSA 592-A:1 (Superior Court) and RSA 502-A:11 (Circuit Court). This court has discretion to decline, or alternatively retain, original jurisdiction over any criminal case that could also be brought in the Circuit Court. See, RSA 592-A:1; Allegra, 129 N.H. at 725; State v. Blouin, 110 N.H. 202 (1970). In this case, even if the court agreed with defendant Cain's reading of the forgery statute, it would retain jurisdiction over the case for prudential reasons:

-The case was brought by direct indictment, meaning that there was never any Circuit Court involvement with the case;

-The Rockingham County Attorney is prosecuting the case and would presumably continue to prosecute the case regardless of where it is venued;

-The Superior Court is neither an inconvenient nor a distant forum for the parties;

-Both parties can, of course, obtain a fair, impartial and speedy determination of this case in Superior Court;

-The case is not a burden on the Superior Court's docket.

Accordingly, the court declines to dismiss the indictment.

November 19, 2015

_____
Andrew R. Schulman,
Presiding Justice