QUESTIONS PRESENTED

1. Did the trial court err in its response to a jury question, by incorrectly defining the mental state element of the crime, and by refusing to give the response proffered by the defense?

Issue preserved by hearing on the jury's question, T 96-105,* the court's response, App. A6, Stewart's motion to provide the jury instruction, App. A1, and the court's order declining to give the instruction. T 104-105.

2. Did the trial court err in denying the defendant's motion to dismiss the charges for lack of sufficient evidence?

Issue preserved by motion to dismiss, T 63, and the court's denial of the motion. T 65-66.

*References to the record are as follows:
"T" refers to the trial transcript;
"App." refers to the Appendix to this brief.

STATEMENT OF THE CASE

A Rockingham County Grand Jury charged John Reed Stewart with two felony counts of issuing bad checks based on two $25,000 checks he provided to a builder, Benjamin Auger, in November of 2002. T 4-5. One of the checks was dated November 14, 2002, and the other was dated November 20, 2002. T 4-5. After trial, the jury convicted Stewart on the first check, and acquitted him on the second. T 106. The court (Nadeau, J.) sentenced Stewart to a conditional discharge, and restitution. T 113.

STATEMENT OF FACTS

Benjamin Auger, owner of Auger Building Company, testified that he entered into a contract with John Reed Stewart in October 2001, to undertake extensive renovations on Stewart's home. T 14, 24. The parties agreed on an "event payment schedule" for the project, with Stewart making a series of payments upon completion of each phase of the project. T 14. The cost of the project would ultimately total over one million dollars. T 14.

At some point in 2002, Stewart did not make timely payment following completion of a phase of the project. T 15-16. Auger testified that as of that point, Stewart had paid over nine hundred thousand dollars, and the job was 98-99% complete. T 29, 37.

Auger and Stewart discussed the late payment on several occasions, and sometime in November of 2002, Auger met Stewart at his home. T 16. Auger testified that at this meeting, Stewart signed two checks drawn on Fleet Bank and made out to Auger Building Company, each for $25,000, and gave them to Auger.
T 16-17, 26. One of the checks was dated November 14, 2002, and the other check was dated November 20, 2002. T 17.

Auger testified that Stewart told him not to deposit the checks immediately, and further informed him that there were insufficient funds in the account to pay the checks at that time. T 18, 27-28. On the basis of this conversation, Auger did not immediately deposit the checks. T 28. Auger's recollection of their understanding as to when sufficient funds would become available was imperfect. Asked why he did not deposit the checks immediately, Auger testified:

> Well this was a long time ago, so I know that these were given to us and – or at least one of them was given to us and Reed said,

> you know, it will be good next week or something like that. I don't know exactly.

T 18. Auger further testified that Stewart gave him the name and phone number of an agent at his bank branch. T 18. Subsequently, Auger's firm made a series of calls to the bank, T 18, 28, and learned each time that the account still held insufficient funds to pay the checks. T 18.

Auger further testified that after being given the checks, he spoke to Stewart numerous times. T 18-19. Again, Auger's recollection of these conversations was limited:

> Well, you know, there were – we all wanted the checks to be good and there were several things, I suppose. You know, they'll be good; I'm waiting for a transfer; I'm sorry, there was a mistake.... I can't recall anything specifically.

T 19. Thus, Auger agreed he knew the checks would not clear until Stewart transferred or acquired funds and placed them in that bank account. T 19, 28.

Auger testified that in the ordinary course of business, he would not hold a check for months before depositing it. T 27. In this case, however, Auger held the checks until March of 2003, more than three months after the date on the checks, before attempting to deposit them. T 19, 31. The bank returned the checks, indicating non-sufficient funds, and Auger was assessed a service fee of ten dollars. T 20. Aided by a lawyer, Auger then sent out a fourteen-day demand letter on March 20, 2003. T 20-21, 23. After receiving no response, Auger placed a lien on Stewart's property. T 23. In April of 2003, Auger filed a civil suit against Stewart. T 32-33.

In August of 2003, Stewart contested the suit, claiming that Auger had not completed the project and disputing the amount owed. T 33, 39. The next month, Auger went to the Portsmouth Police, T 33-34, and initiated a criminal complaint against Stewart. Detective Christopher Roth testified that he investigated the case and obtained Stewart's bank records. T 40, 46. Roth also testified that ordinarily, police protocol dictated that the department would not prosecute a bad check case where the complainant had, at the request of the check writer, held the checks for a period of time before cashing them. T 49.

Nathaniel Chapman, a Banking Center Manager for Bank of America (which had merged with Fleet Bank), testified regarding bank records showing that from October, 2002, until May, 2003, the balances in Stewart's account were not sufficient to pay the checks in question, and the account was frequently overdrawn.
T 51, 54-58.

Stewart's testimony was consistent in most respects with the testimony of the State's witnesses. Stewart admitted filling out and signing the two checks, and testified that he wrote them either on November 13 or November 14. T 68. He testified, consistent with Auger's testimony, that when he gave Auger the checks, both parties knew there were insufficient funds in the account. T 69, 75. Stewart explained that he had applied for a mortgage refinance through Wells Fargo, that the proceeds from the refinance would have covered the checks, and that he had not believed at the time there was any chance the refinance would not go through. T 69-70, 76.

Stewart further testified that he provided the checks to Auger because he was going to Europe, and that he expected the refinance to close while he was gone, as he had hired a lawyer and given him power of attorney. T 69-71. Stewart testified that while he was away, the mortgage fell through, and he so informed Auger in December. T 71. At that time, according to Stewart, he informed Auger that he would apply for another mortgage. T 71. Stewart testified that he asked Auger to return the checks, but Auger told him he was going to keep them. T 71. Subsequently, Stewart testified, he applied for a mortgage refinance through Citizens Bank, which was declined, and he was not able to get a loan. T 72.

SUMMARY OF THE ARGUMENT

During deliberations, the jury asked the court to instruct it regarding the law concerning the mental state element of the crime. Specifically, the jury asked the court if that element allowed consideration of Stewart's belief at the time of issuance that a pending mortgage refinance would enable the bank to pay the checks. The court's answer misled the jury regarding the applicable law, because in the context of the question asked, the court's answer directed the jury to only consider Stewart's knowledge of his bank balance on the date of issuance. The court should have given an instruction consistent with that proffered by the defense, and consistent with governing provisions of the UCC, indicating that if Stewart issued the check subject to a condition and Auger accepted the check subject to that condition, that Stewart could not be criminally liable unless he believed that the bank would not pay the checks at the time of presentation.

The court erred in denying Stewart's motion to dismiss based on insufficient evidence. Where the defendant issued a check subject to the condition that the payee hold the check until sufficient funds become available, the payee held the check based on that condition, and no evidence supported an inference that the defendant acted in bad faith, the defendant is not guilty of issuing bad check as a matter of law.

I. THE TRIAL COURT ERRED WHEN, IN RESPONSE TO THE JURY'S QUESTION DURING DELIBERATIONS, IT MISSTATED THE LAW GOVERNING THE MENTAL STATE ELEMENT OF THE CRIME.

The central issues in this trial concerned the mental state element of the bad checks statute. RSA 638:4. The statute requires the State to prove that the issuer of the check knew or believed that the bank would not honor the check. RSA 638:4-IV(b). Stewart argued he was not guilty because he issued the checks subject to a condition he reasonably believed would be fulfilled such that the bank would honor the checks. T 11-12, 79-80. When the jury asked a question regarding the mental state element, however, the trial court provided a response that misstated the law governing the mental state element, and refused to give an instruction proffered by Stewart that accurately stated the law. The instruction given by the Court prejudiced Stewart, and he is entitled to a new trial.

During its general instruction, the court gave the following instruction concerning the elements of the crime.

> [T]he state must prove the following beyond a reasonable doubt:
>
> 1. That the defendant issued a check for the payment of money;
> 2. That payment was refused by the bank on which the check was drawn;
> 3. That the defendant knew or believed that the check would not be paid by the bank at the time he issued the check.
> 4. That the face amount of the check exceeded $1,000.00.

> 5. That the defendant acted knowingly. To prove the defendant acted knowingly requires the state to prove that the defendant was aware of and knew that when he issued the check, there were insufficient funds to cover it and that the bank would not honor it.

App. A13.

During the first day of deliberations, the jury asked several questions. In the second question, the jury asked regarding the mental state element: "(2) Clarify 'at that time' - what period of time? That moment the check was written?" App. A3. The third question was "(3) please define criminal intent." App. A6. In response to both of these questions, the trial court directed the jury back to the definition of the mental state element quoted in paragraph (5) above. App. A4. Subsequently, the jury sent out another question, as follows:

> #3) Does this statement mean that Mr. Stuart (sic) believed on November 14th that the check would not be paid by the bank. (Eventually, possibly after his refinance).
> - OR –
> that Mr. Stuart (sic) believed that the check would not be paid by the bank on November 14th when he knew the funds were not in the account.

App. A5; see T 102. The jury's questions revealed it was grappling with the very heart of the matter, as expressed in defense counsel's opening and closing statements, T 11-12, 79-81, which was whether the State had to prove that Stewart believed on November 14th that the bank would never honor the check, or, alternatively, whether Stewart's knowledge that the funds were insufficient on the day that he actually wrote the check made him guilty regardless of his good faith belief that Auger would hold the check until the mortgage refinance went through.

The next morning, the court conducted a hearing regarding the appropriate answer to this question. T 97-105. Defense counsel submitted a proposed jury instruction to answer the question, as follows:

> If you find that the Defendant conditionally issued the checks and [Auger] accepted the same subject to that condition, then the State must prove beyond a reasonable doubt that the Defendant knew or believed the checks would not be honored by the drawee bank <u>at the time of presenting those checks to the bank</u>.

App. A1 (Emphasis added). In support, defense counsel cited the pertinent section of the Uniform Commercial Code. App A1 (citing RSA 382-A:3-105(b)). Additionally, defense counsel argued that if Auger brought a civil claim under the UCC on the check against Stewart, that Stewart could present a defense consistent with his testimony that the check was conditionally issued. T 97. Counsel further explained that "[t]hese checks were conditionally tendered – in [sic, on] condition that ... expected refinancing was going to occur, that it was going to be paid into the account in Mr. Stewart's absence, and that Mr. Auger was holding these checks conditioned upon that fact." T 99. Defense counsel noted that the jury's question expressly referred to the condition, mortgage refinancing. T 98.

Defense counsel argued that in a case of conditional issuance, no culpable mental state exists unless the defendant knows or believes that the bank will not honor the checks even if the condition occurs. T 99. Counsel concluded, "I suggest that any other instruction would just totally be inappropriate in that the UCC they recognize instruments, checks being given based upon a condition. And if the condition or special purposes is not fulfilled ..., that's a defense under the UCC." T 99-100.

The State disagreed, arguing that a check is payable on demand on or after the date on the check, T 101, and that, accordingly, the jury should be instructed not to consider the first possibility it suggested, whether Stewart "believed on November 14th that the check would not be paid by the bank eventually, possibly after his refinance." T 102. Instead, the State argued that the requisite mental state is whether Stewart knew that as of the date of the check, November 14, there were insufficient funds in the account. T 102.

The trial judge held that the law required her to instruct the jury consistent with the State's position. T 104. The court expressed: "Let me say at the outset that, you know, I have my own concerns about prosecuting somebody criminally for a civil dispute but it is not my job to change the law on a case by case basis." T 104. Subsequently, the court instructed the jury in response to its question as follows:

> The State does not have the burden to prove the defendant never intended to pay the amount owed. Rather, the State has the burden to prove beyond a reasonable doubt that at the time the defendant issued the check to Mr. Auger, the defendant knew there were insufficient funds to cover the check, and that the bank would not honor the check.

App. A6. Fifteen minutes later, the jury returned with a guilty verdict. T 105-106.

A. <u>The trial court's response to the jury's question misstated the law and prejudiced Stewart's defense.</u>

This Court reviews the trial court's "refusal to answer a jury question in language requested by the defendant in the context of the entire charge and all the evidence." <u>State v.</u>

Seymour, 140 N.H. 736, 746 (1996)(quotations omitted). The issuing bad checks statute reads in relevant part as follows:

> A person is guilty of issuing a bad check if he issues or passes a check for the payment of money and payment is refused by the drawee, except in cases where a legal stop payment order has been issued or where the drawee refuses payment for any other reason through no fault of the person who issued or passed the check.

R.A. 638:4. The statute sets forth the applicable mens rea in a felony prosecution as follows:

> [T]he prosecutor shall prove that the person issued or passed the check knowing or believing that the check would not be paid by the drawee.

R.A. 638:4-II(b). Nothing in this statutory language suggests, as argued by the prosecutor, that the trier of fact may only consider Stewart's knowledge of his bank balance on the date of the checks, rather than his belief that the checks would be held pending his mortgage refinance and thus would not be deposited or negotiated absent sufficient funds. In fact, nothing in the statutory language references the defendant's knowledge or belief regarding the existence of sufficient funds as of the date of the check. Rather, by referencing only the issuer's belief that the payee would honor the check, this statute directs the finder of fact to consider the issuer's belief as to the status of his bank account as of the date of negotiation of the check, not the date the check is tendered to the payee. Thus, even without consideration of applicable provisions of the UCC, the trial court erred in directing the jury to consider Stewart's belief as to his account balance on the date of the check rather than the date of presentation following an anticipated mortgage refinance.

Based on several provisions of the UCC, the instruction proffered by Stewart accurately stated the law governing the issue raised in the jury's question, and the trial court's response misled the jury regarding the law. New Hampshire has adopted the Uniform Commercial Code, which sets forth a comprehensive framework governing checks, promissory notes, and other financial instruments. This Court has construed RSA 638:4 such that it exists in harmony with, not in conflict with, provisions of the UCC. State v. Fitanides, 141 N.H. 352, 354 (1996)(Allowing prosecution based on postdated checks because UCC provisions uphold validity of postdated checks).

The UCC expressly contemplates that a maker may conditionally issue an instrument. RSA 382-A:3-105. That statute reads in pertinent part:

> An unissued instrument, or an unissued incomplete instrument that is completed, is binding on the maker or drawer, but nonissuance is a defense. An instrument that is conditionally issued or is issued for a special purpose is binding on the maker or drawer, but failure of the condition or special purpose to be fulfilled is a defense.

RSA 382-A:3-105(b). The Official Comment explains that under this provision, defenses such as "nonissuance, conditional issuance or issuance for a special purpose can be asserted against a person other than a holder in due course...." RSA 382-A:3-105(b), Official Comment.

Moreover, the original contracting parties can make the obligation to pay an instrument, such as a check, conditioned on a separate agreement if entered into as part of "the same transaction giving rise to the agreement." RSA 382-A:3-117. "For example, a person

may be induced to sign an instrument under an agreement that the signer will not be liable on the instrument unless certain conditions are met." RSA 382-A:3-117, Official Comment. Thus, this Court has recognized that the maker of the instrument may assert, against a holder who is not a holder in due course, "'all defenses ... available in an action on a simple contract... including non-performance on any condition precedent.'" Briand v. Wild, 110 N.H. 373, 375 (1970)(quoting former version of RSA 382-A:3-306). While many provisions of the UCC have been substantially amended and altered since the time of the Briand decision, including the quoted statutory provision, the fundamental principles remain the same. See RSA 382-A:3-105(b), 302(2)-vi, 305(2), 117.

Here, the builder knew at the time the check was tendered that there were insufficient funds in the account to pay the check. T 19, 28. Auger further testified that he agreed to periodically call the bank branch manager to determine if an anticipated "transfer" had occurred so that the check could be deposited. T 18-19, 28. Auger further agreed that he held the check for over three months, against his usual business practices. T 27. Based on these facts alone, Auger was not a holder in due course, as he obtained the check with full knowledge of the potential defenses of nonissuance, conditional issuance, issuance for a special purpose, and/or conditional delivery. See Lary Lawrence, Anderson on the Uniform Commercial Code, § 3-105:13 (2005); Briand, 110 N.H. at 375 ("[A] purchaser of a postdated instrument who knows at the time of his purchase of an asserted defense or of facts or circumstances which may create a defense, is precluded from being a holder in due course."); Rogers v. Jackson, 804 A.2d 379 (Me. 2002); In re Roth, 56 B.R. 876, 883 (N.D. Ill 1986) (where promissory note was subject

to condition precedent of construction loan opening, and loan never opened, lender could not recover on note).

In Rogers, a suit upon a promissory note, the maker of the note claimed the defense that despite the note's unconditional promise to pay, the parties entered into an oral agreement at the time of the original transaction conditioning the holder's right to recover on the note on the maker's financial ability to pay. Id. at 380. The Court stated that although the note constituted a negotiable instrument, the drawer could assert the defense against the holder because the holder, being a party to the alleged oral agreement, did not receive the note as a holder in due course. Id. at 382. The court then ruled that the defense should be allowed:

> This conclusion is consistent with Article 3 of the Uniform Commercial Code. The promissory note here is a negotiable instrument. 11 M.R.S.A. § 3-1104(1) (1995). Article 3 provides that, as between the maker and original holder, a negotiable instrument may be delivered conditionally, id. § 3-1105(2), and, subject to non-Code parol evidence law, may be supplemented by a separate agreement, id. § 3-1117. Many courts have been especially willing to allow parol evidence of an agreement collateral to a negotiable instrument because including such an agreement in the writing would destroy its negotiability.

Id. (citing 11 Richard A. Lord, Williston on Contracts, § 33:34, at 740-41 (4th Ed. 1999)).

It is important to note that none of these principles have any bearing on Stewart's obligations, and the builder's obligations, on the underlying contract. This discussion is relevant only to whether Stewart would have a defense if sued civilly on the check, not whether he

would have a defense on the underlying issue of whether he owed the builder money for work performed on his home.

The jury appears to have intuitively recognized these fundamental principles of commercial law, when it asked if the State needed to prove that Stewart knew the bank would not honor his check "[e]ventually, possibly after his refinance," or alternatively, whether the State merely needed to prove that Stewart knew the bank would not honor his check on the date shown on the check "on November 14 when he knew the funds were not in his account." App. A5. The trial court, in turn, should have provided an instruction pointing the jury towards the former – that the requisite mental state is not proven if Stewart believed his refinance would go through and believed Auger would hold the checks until that condition was fulfilled. Instead, the trial court provided an instruction pointing the jury towards the latter, and in so doing, defined the mental state element of the issuing bad check statute in a manner that would criminalize routine commercial transactions expressly contemplated by the UCC.

The trial court appears to have erred based on a mis-application of the Fitanides case, which it cited in its decision. T 105. Fitanides is, however, distinguishable. In Fitanides, the defendant purchased Christmas trees from Vrusho with a postdated check for $2500. Id. at 353. On the back of the check, was typed "[p]lease call before depositing." Id. Nothing in the opinion suggests, however, that the payee, Vrusho, accepted this check with knowledge of that inscription, or that the payee agreed to hold the check. Instead, the payee deposited the check the day after its date, and it was dishonored for insufficient funds. Id. This Court first rejected Fitanides's claim that a postdated check falls outside the scope of the criminal statute, relying

on provisions of the UCC. Id. at 354 (citing RSA 382-A:3-104(a) and RSA 382-A:3-113(a)). The second issue in Fitanides concerned the jury's question during deliberations, which was imperfectly preserved but essentially inquired whether it "could consider the defendant's intent ever to pay Vrusho the amount owed." Id. at 354. This Court upheld the trial court's response in the negative.

In Fitanides, unlike in this case, there was no evidence of an agreement to hold a check pending fulfillment of a condition precedent, no evidence that the payee actually did hold the check in accordance with such an agreement, and no evidence that the payee was even aware of the inscription on the back of the check. Under those circumstances, Fitanides had no defense, either civilly or criminally, to his liability on the check. Here, however, the context of the court's instruction was that Stewart had presented a defense consistent with the duties and obligations of a maker of a negotiable instrument as set forth in the UCC, and the jury asked a question both directly referencing that defense and requesting the law applicable to that defense.

Thus, while the court's instruction followed the language of Fitanides, the instruction misled the jury regarding the applicable law in the context in which it was given. The jury asked the right question in this case -- could it consider Stewart's belief that his check would be honored by the bank upon deposit of the mortgage proceeds, or was it limited to Stewart's belief as to his account balance on the date of the check. In the context of that question, the court's answer told the jury it was limited to Stewart's belief as to his account balance on the date of the check.

Where statutory language is ambiguous, this Court will not construe it in a manner that leads to absurd results. Soraghan v. Cranmore Ski Resort, Inc., 152 N.H. 399, 801 A.2d 693, 695 (2005). The trial court's construction of RSA 638:4 to effectively rule out mental state defenses based on conditional issuance, however, would lead to absurd results by criminalizing routine commercial transactions that are expressly authorized by the UCC. For example, it cannot be the case that when a check is issued for a real estate transaction but the transaction is delayed and the check held by agreement of the parties until funds are transferred into the account from the sale of other property, that the check issuer commits a felony if the other sale falls through. Otherwise, as defense counsel argued, "you're going to indict probably half the real estate attorneys in this State...." T 100. People and organizations structure their financial and commercial dealings around the UCC. The integrity of its provisions would be undermined, and ordinary, routine commercial transactions frustrated, if RSA 638:4 were to be construed in a manner that criminalizes conduct expressly authorized by the UCC.

During trial, the court opined that "this law needs to be changed," T 100, and during the sentencing hearing, the court commented that "there are very few occasions, and this is one of them, ... where I believe that the law and justice part company...." T 112. For that reason, the court sentenced Stewart to a conditional discharge. T 112-13. The law and justice do not, however, part company in this case. A properly instructed jury could have acquitted Stewart if it found, consistent with the uncontested testimony at trial, that Auger held the check awaiting fulfillment of a condition anticipated by the parties but never fulfilled. Accordingly, this Court must reverse Stewart's conviction.

B. The trial court should have provided Stewart's proposed instruction.

Alternatively, the trial court erred by failing to instruct the jury regarding the UCC law governing Stewart's theory of defense. The trial court has a duty to instruct the jury on a defendant's theory of defense if there is an evidentiary basis to support it. State v. Bruneau, 131 N.H. 104, 117 (1988). In Bruneau, this Court, however, distinguished a 'theory of defense' from a 'theory of the case.'

> The latter is simply the defendant's position on how the evidence should be evaluated and interpreted, whereas a 'theory of defense' has been described as akin to a civil plea of confession and avoidance, by which the defendant admits the substance of the allegation but points to facts that excuse, exonerate or justify his actions such that he thereby escapes liability. That is, a theory of defense is a proposition about the legal significance of claimed facts, and it thus falls within the scope of a judge's responsibility to instruct the jury on the law.

Id. at 117-18 (quotations and citations omitted).

Here, Stewart admitted to most of the elements of the crime, but denied a culpable mental state, claiming he conditionally issued the check, believing that the condition would be fulfilled and the bank would honor the check. As discussed above, his claim would constitute a defense against a civil suit by Auger on the check under RSA 382-A:3-105(2). His proffered instruction provided the jury the relevant law so that it could consider whether the State had proven a culpable mens rea given the existence of the civil defense. Accordingly, his instruction concerned a theory of defense, not a theory of the case, and the trial court had no discretion to

refuse to instruct the jury on his theory of defense. Id.; State v. Aubert, 120 N.H. 634, 635 (1980)(reversing conviction for attempted first-degree murder where trial court declined to instruct jury on Aubert's theory of defense that the shooting was accidental).

In this particular case, the failure of the trial court to instruct the jury consistent with Stewart's request was particularly prejudicial, for several reasons. First, for the reasons stated in subsection (A) above, Stewart's proposed instruction accurately stated the law applicable to the charged crime. Second, in a trial during which few facts were in dispute, and the parties generally agreed about the circumstances under which the checks were transferred, the outcome of the trial hinged on whether the jury was accurately instructed regarding the law. Third, here the jury's question specifically referenced Stewart's testimony regarding his attempt to obtain funds through a mortgage refinance, revealing the importance of the governing principles of law to the jury's deliberations. Accordingly, this Court must reverse.

II. THE TRIAL COURT ERRED IN DENYING STEWART'S MOTION TO DISMISS BASED ON INSUFFICIENT EVIDENCE.

After the State rested its case, Stewart moved to dismiss, arguing that, as a matter of law, when a payee knows at the time of issuance that the check is not supported by sufficient funds, and the payee holds the check in accordance with the issuer's instructions to wait until notified that sufficient funds have become available, the offense of issuing bad check is not committed. T 64-65. The State objected, and the court denied the motion. On appeal, Stewart carries the burden of showing that, viewing the evidence in the light most favorable to the State, no rational trier of fact could have found guilt beyond a reasonable doubt. State v. Emery, __ N.H. __, 887 A.2d 123, 127 (2005).

The court erred in denying the motion, because Auger testified that he knew when he received the checks that the account held insufficient funds, that he held the checks awaiting notification that funds had become available, and that he held the checks over four months prior to attempting to deposit them without ever being led to believe that sufficient funds had become available. Under these circumstances, the State did not prove a criminally culpable mens rea, and the charges should have been dismissed.

> Where it is understood by the victim that a check is not to be cashed until the defendant calls and advises it is good, the requisite intent to convict the defendant of issuing a bad check is lacking. Thus, if the payee or holder of the check has knowledge, or an understanding, at the time the check is drawn or uttered that it is not then collectible, as where he or she is given a promise that a deposit will be made to meet it, the offense is generally not committed, because the fraudulent intent is lacking, the transaction being in its essential nature an extension of credit to the drawer.

Sonja Larson, 35 C.J.S. False Pretenses § 16 Worthless Checks, Orders and Bank Bills (2005)(footnotes omitted); accord People v. Reynolds, 147 A.D.2d 961, 537 N.Y.S.2d 716 (N.Y.A.D. 4 Dept. 1989); State v. Jones, 400 So.2d 658, 661 (La. 1981); People v. Poyet, 492 P.2d 1150, 1153 (Cal. 1972); State v. Philips, 430 S.W.2d 635, 637 (Mo. App. 1968); cf. Hartgers v. Town of Plaistow, 141 N.H. 253, 255 (1996) (noting that under nearly identical circumstances to this case, district court dismissed issuing bad check charge for lack of probable cause).

It must be noted that in all of these foreign jurisdictions, the statutory mens rea was "intent to defraud," which is different than the mens rea of RSA 638:4 ("believing that the check will not be paid by the drawee"). When this State enacted the Criminal Code, it repealed a former issuing bad check statute that required proof of intent to defraud, Laws 1957, 137:1, (enacted as RSA 582:12), replacing it with the current statute. Laws 1971, 518:1.

The Comments to the Commission Report recommending enactment of the revised statute indicate, however, that the changes were not intended to eliminate the concept of bad faith from the issuing bad checks statute.

> One of the changes is the substitution of knowledge or belief that the check will not be paid for the current requirement of an intent to defraud. By using this mens rea element... this section comes closer to a description of the dishonest state of mind than does the more vague 'intent to defraud.'

Keefe, Russ & Kenison, Report of Commission to Recommend Codification of Criminal Laws, Comments, at 73. Here, however, the State failed to show a dishonest state of mind, because the undisputed evidence demonstrated that Stewart fully disclosed the infirmity of the check at the time of issuance. Moreover, the conduct of the parties, particularly the fact that Auger held

the check for over four months against his ordinary business practices, inexorably shows that the parties treated this instrument as a promissory note, not as a payable-on-demand instrument. As the preeminent treatise on the UCC reveals, such treatment of checks as notes is a frequent business practice. "Although bankers blanch at the process, parties have long used checks as notes. To do this a drawer gives a check to a payee and postdates the check." James J. White and Robert S. Summers, Uniform Commercial Code § 18-3 at 660 (5th Ed. 2000). While the check underlying Stewart's conviction was not postdated, it was agreed to be held, which is viewed as having the same effect - converting the check, in practice, into a promissory note. For example, an appellate court in New York reasoned:

> Defendant was also convicted of issuing two bad checks to Bucher Drilling.... At the time of issuance, it was understood by Bucher that the checks were not to be cashed until defendant called and advised that they were good. This agreement negates the requisite intent element of this offense and turns the checks into mere promissory instruments.

Reynolds, 537 N.Y.S.2d at 717; see Howells, Inc. v. Nelson, 565 P.2d 1147, 1149 (Utah 1977); Gibbs v. Commonwealth, 273 S.W.2d 583, 585 (Ky. 1954).

There are two purposes of an issuing bad check statute: To deter and punish fraud and/or theft by check, and to prevent worthless paper from entering the stream of commerce, one of the fundamental objectives of Article 3 of the UCC. Neither purpose was served by criminal prosecution in this case. With respect to the first goal, Stewart obtained no value in exchange for his check, as the underlying services had already been rendered. The availability of criminal prosecution has no bearing on his underlying obligations on the home renovations,

which are the subject of a pending civil suit. With respect to the second goal, when the payee takes a check with full knowledge that it is unsupported by insufficient funds and agrees to hold it until notification that funds have become available, no worthless check will enter the stream of commerce as long as the payee abides by the terms of the agreement. While the possibility exists that the payee may disregard the agreement as occurred in this case, no purpose is served by criminally prosecuting and punishing the issuer based on the payee's unexpected failure to abide by the civil agreement.

Here, the parties treated the paper issued by Stewart as a promissory note, which was not supposed to enter the stream of commerce until supported by sufficient funds. The State introduced no evidence from which the jury could draw a reasonable inference that Stewart acted in bad faith, or that Stewart believed Auger would attempt to negotiate the checks without first confirming that sufficient funds had been deposited. Accordingly, under the unique circumstances of this case, the State failed to establish a prima facie case in support of the mens rea element of RSA 638:4. Accordingly, this Court must vacate Stewart's conviction.

CONCLUSION

WHEREFORE, Mr. Stewart requests this Court reverse his conviction.

Oral argument is requested.

Respectfully submitted,

By_____

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CERTIFICATE OF SERVICE

I, hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to the Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301, this 27th day of February, 2006.

_____
Theodore Lothstein

DATED: February 27, 2006