Mail Fraud and the Good Faith Defense

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INTRODUCTION

Fraud is one of the most serious problems facing America today. Federal prosecutors often utilize the mail fraud statute, 18 U.S.C. § 1341, to combat the crime of fraud. Government prosecutors use this statute because it may be broadly

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2 See 18 U.S.C. 1341 (1998) states: Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Id.

3 See Elkan Abramowitz, ‘Intent to Harm’ in the Federal Statute on Mail Fraud May 5, 1998 N.Y.L.J 3 (col. 1) (stating that statute “remains one of the most potent and flexible weapons in the federal prosecutors arsenal . . .”); see also James J. Graham, Mischarging: A Contract Cost Dispute or a Criminal Fraud?, 15 PUB. CONT. L.J. 208, 222-23 (1985) (discussing how broad interpretation of definition of fraud has justified federal prosecution in various situations); Gregory Howard Williams, Good Government By Prosecutorial Decree: The Use and Abuse of Mail Fraud, 32 ARIZ. L. REV. 137, 147 (1990) (stating how Justice Winter’s dissent in United States v. Margiotta underscores concern about ambiguous language of mail fraud statute which allows broad government discretion).
interpreted. To convict a defendant of mail fraud, the prosecution must prove "(1) the existence of a scheme to defraud that (2) involved use of the mails for the purpose of executing the scheme. The evidence must demonstrate (3) the defendant had the specific intent to commit fraud." 

Historically, courts struggled with the interpretation of the statute. Throughout its 100-year history, both Congress and the courts have subjected the mail fraud statute to various interpretations. Yet despite this uncertainty, the courts continue to give federal prosecutors wide prosecutorial power under this statute. Although this prosecutorial power is seemingly

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4 See United States v. Curry, 681 F. 137, 147 (1990) (holding that language of mail fraud statute is flexible enough to encompass any conduct failing to reflect honesty and fair play in business world); Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967) (holding that crime of mail fraud is broad in scope and condemns any conduct which fails to reflect "moral uprightness, of fundamental honesty, fair play, and right dealing in general business life of members in society (quoting Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958); see also Williams, supra note 3, at 137 (stating that mail fraud statute is government's weapon in fight against crime); James Bucci, Comment, Criminal Law-Liberal Interpretation of the Causation of Mail Fraud Statute- United States v. Bartnovsky, 879 F.2d 30 (2d Cir. 1989), 63 TEMP. L. REV. 893, 893 (1990) (stating courts have applied mail fraud statute expansively).

5 See United v. Fagan, 821 F.2d 1002, 1008 (5th Cir. 1987); United States v. Goss, 650 F.2d 1336, 1341 (5th Cir. 1981); United States v. Freeman, 619 F.2d 1112, 1117 (5th Cir. 1980); see also United States v. Moser, 123 F.3d 813, 819 (5th Cir. 1997) (holding that government must prove beyond reasonable doubt scheme to defraud specific intent to defraud, and use of mails in furtherance of scheme); United States v. Kent, 608 F.2d 542, 546 (5th Cir. 1979) (holding that scheme to defraud involves use of mails which is for purpose of executing scheme and that specific intent to defraud is implicit in mail fraud statute).

6 See United States v. Kenoskey, 243 U.S. 440, 442 (1917) (finding that use of mails prior to and one step toward receipt of fruits of fraud violate statute under broad interpretation of words "cause to be placed"); United States v. Durland, 161 U.S. 306, 313 (1896) (increasing power of mail fraud statute). But see Parr v. United States, 363 U.S. 370, 389, 390 (1960) (holding that mailing has to be essential part of the scheme); Kann v. United States, 323 U.S. 88, 94 (1949) (restricting power of mail fraud statute by holding that mailing was too remote).

7 See Act of March 2, 1889, ch., 393, § 1, 25 Stat. 873 (stating specific examples of which instances court used to explain mail fraud); see also United States v. Edwards, 458 F.2d 875, 880 (5th Cir. 1972) (holding "[s]tatutes like the federal mail fraud statute involved here must be strictly construed in order to avoid extension beyond the limits intended by Congress"). But see 18 U.S.C. § 1346 (1998) (stating that mail fraud statute can be used for deprivation of an intangible property right); Ryan v. Ohio Edison Co., 611 F.2d 1170, 1178 (6th Cir. 1979) (stating that mail fraud statute has been interpreted more broadly since Act of March 2, 1889, ch. 393, 25 Stat. 873); United States v. Serlin, 538 F.2d 737, 744 (7th Cir. 1976) (holding that mail fraud statute "is a broad proscription of behavior for purposes of protecting society").

8 See 18 U.S.C. § 1346 (requiring only that deprivation be only of intangible property); see also McNally v. United States, 483 U.S. 350, 364-66 (1987) (Stevens, J. dissenting) (stating that elements of mail fraud statute should be read independently because Congress enacted mail fraud statute to protect misuse of Postal Service); Williams, supra note 3, at 147 (detailing broad government interpretation under mail fraud statute).
limitless, defendants can assert a good faith defense to a mail fraud charge, which acts as a complete defense to mail fraud prosecution. A good faith defense does not impose a burden of persuasion on the part of the defendant because, theoretically, it negates the charge of a specific intent to defraud. In spite of the integral role the good faith defense plays in a defendant's case, the circuits are split as to whether a defendant is entitled to a separate good faith jury instruction.

Part I of this note will give a brief history of the origins of the mail fraud statute and review the various statutory interpretations the Supreme Court has given the mail fraud statute. Part II will examine the Supreme Court's inability to articulate a consistent rule regarding the connection between the elements of a scheme to defraud and the use of the mail. Part III examines the recent developments concerning the application and interpretation of the mail fraud statute. Part IV will demonstrate the need for a separate good faith jury charge in light of the broad power given to prosecutors.

9 See United States v. Rossomado, 144 F.3d 197, 201 (2d Cir. 1997) (holding that good faith defense is appropriate defense); see also United States v. Wall, 130 F.3d 739, 746 (6th Cir. 1997) (holding that since mail fraud is specific intent crime, good faith defense is complete defense); United States v. Alkins, 925 F.2d 541, 549 (2d Cir. 1991) (recognizing that good faith defense is complete defense to mail fraud charge); Steiger v. United States, 373 U.S. 133 (10th Cir. 1967) (holding that good faith defense is complete defense); Coleman v. United States, 167 F.2d 837, 839 (5th Cir. 1948) (holding that question of intent is paramount because good faith defense is complete defense).

10 See United States v. Bakker, 925 F.2d 728, 738 (4th Cir. 1991) (holding that burden of proof is not on defendant to prove his good faith); United States v. Read, 658 F.2d 1225, 1239 (7th Cir. 1981) (holding that although defendant put forth some evidence of good faith, burden of proof is always on defendant); see also Adam H. Kurland, Prosecuting O' Man River: The Fifth Amendment, the Good Faith Defense, and the Non-Testifying Defendant, 51 U. PITT L. REV. 841, 856 (1990) (stating that good faith defense does not impose burden of persuasion on defendant).

11 See Rossomado, 144 F.3d at 201 (stating that absent intent to defraud, there is no crime); Wall, 130 F.3d at 746 (holding that defendant is entitled to good faith instruction when evidence warrants it); Alkins, 925 F.2d at 549 (holding that good faith defense is complete defense to mail fraud charge); Coleman, 167 F.2d at 839 (holding that question of intent is "a paramount issue").

12 See United States v. Dockray, 943 F.2d 152, 155 (1st Cir. 1991) (holding that defendant is not entitled to separate good faith instruction); United States v. Rochester, 898 F.2d 971, 978 (5th Cir. 1990) (holding that failure to instruct on good faith is not fatal when jury is given detailed instruction on specific intent and defendant has had opportunity to argue good faith to jury). But see United States v. Hopkins, 744 F.2d 716, 718 (10th Cir. 1984) (holding that when defense of good faith has been interposed, defendant is entitled to instruction directly on issue provided there is sufficient evidence).
I. HISTORICAL BACKGROUND OF THE MAIL FRAUD STATUTE

In 1868, Congress enacted legislation that prohibited using the mail to send letters or circulars for lotteries. The legislation made it a misdemeanor for "any person having devised or intending to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person . . . by means of the post-office establishment of the United States . . . ." In *Ex Parte Jackson*, the Supreme Court determined the extent of Congress' power to regulate the mail. The Court held, pursuant to Article I, §8 of the Constitution, that Congress acted within its right to create a criminal statute to protect the postal system. Although

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15 Act of June 8, 1872, ch. 335 §301, 17 Stat. 283, 323.

16 96 U.S. 727 (1878).


18 See *Ex Parte Jackson*, 96 U.S. at 736-37 (holding that Congress' act imposing fines on violators of lottery law was constitutional); see also Henning, *supra* note 17, at 443 (stating that Supreme Court had no problem allowing government to regulate mail pursuant to Article I § 8 of the Constitution); see also Rakoff, *supra* note 13, at 787 (stating that Supreme Court decision left "no doubt as to the constitutionality of the mail fraud statute").
Ex Parte Jackson gave Congress the power to regulate the mail, some courts attempted to limit the scope of activities encompassed by statute.\textsuperscript{19}

Other courts held that for the mail fraud statute to apply there must be a relationship between the mailing and the scheme.\textsuperscript{20} These cases demonstrated that the mail fraud statute was applicable when there was a clear link between the scheme to defraud and the use of the mails.\textsuperscript{21} The necessity to demonstrate a link between the scheme to defraud and the use of the mail severely limited a prosecutor's ability to pursue crimes involving mail fraud.\textsuperscript{22} As a result of the inconsistent decisions among various courts, Congress amended the statute in 1889 and gave specific examples of schemes to defraud.\textsuperscript{23} Courts, however, were

\textsuperscript{19} See United States v. Clark, 121 F. 190, 190-91 (M.D. Pa 1903) (holding that “not every fraudulent scheme that use the mails are against federal law”); United States v. Smith, 45 F. 561, 562 (E.D. Wis. 1891) (holding that making false representations through newspapers is insufficient to form element of intent for mail fraud); United States v. Mitchell, 36 F. 492, 493 (W.D. Pa 1888) (holding that scheme to defraud insurance company through mailing of premium after accident altering date of postage stamp not covered under statute); see also Henning, supra note 17, at 443 (stating that after Ex Parte Jackson, defendants still challenged mail fraud statute claiming that acts alleged in indictments were outside scope of statute because of their “attenuated relation to the post office”).

\textsuperscript{20} See United States v. Watson, 35 F. 358, 359 (D.C.E.D. N.C. 1888) (holding that placing of any letter in post-office in execution of scheme to defraud clearly fails under statute); United States v. Loring, 91 F. 881, 885 (N.D. Ill. 1884) (holding that scheme to defraud and use of mails to do so “is all which the rules of good pleading require”); United States v. Jones, 10 F.469, 470 (C.C.S.D.N.Y 1882) (holding that mailing of letter in furtherance of scheme was sufficient evidence to prove mail fraud); see also Henning, supra note 17, at 445 (stating that clear link between scheme and misuse of post office is necessary).

\textsuperscript{21} See Watson, 35 F. at 359 (holding that placing mail in post-office helped execute scheme); Loring, 91 F. at 885 (holding that use of mails was necessary to defraud citizens); Jones, 10 F. at 470 (holding that defendants used mail to help circulate counterfeit money).

\textsuperscript{22} See Henning, supra note 17, at 445 (stating that “insistence on a relationship between the scheme and the misuse of the post office constituted a substantive limitation on the Federal Government’s power to prosecute crimes”); Geraldine Szot Moohr, Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us, 31 HARV. J. LEGIS. 153, 159-60 (1993) (noting “[t]he original statute was grounded in the federal interest in protecting the integrity of the mail, and this interest potentially limited the use of the statute”).

\textsuperscript{23} See Act of March 2, 1889, ch. 393, § 1, 25 Stat. 873. The Act held that it was unlawful to be involved in any schemes of:

[A]ny counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any State, Territory, municipality, company, corporation, or person . . . or any scheme or artifice to obtain money by or through correspondence, by what is commonly called “saw dust swindle,” or “counterfeit money fraud,” or by dealing or pretending to deal in what is commonly called “green articles,” “green coin,” “bills,” “paper goods,” “spurious Treasury notes,” “United States goods,” “green cigars,” or any other names or terms intended to be understood
split in their interpretation of the amendment. While some courts held that the amendment merely provided examples of schemes to defraud, other courts held that the amendment limited the use of the statute to those acts specifically mentioned in its text.

II. INCONSISTENT JUDICIAL PRECEDENCES

Despite the language of the amendment and lower court precedent, the Supreme Court in Stokes v. United States rejected the restrictive interpretation of the amendment, and held that the evidence necessary to be convicted of mail fraud boiled down to three elements:

1. That the persons charged must have devised a scheme or artifice to defraud.
2. That they must have intended to effect this scheme, by opening or intending to open correspondence with some other person through the post office establishment, or by inciting such other person to open communication with them.
3. And that, in carrying out such scheme, such person must have either deposited a letter or packet in the post office, or taken or received therefrom.

In Durland v. United States, the Court expanded the mail fraud statute. It held that the statute must be read to include as relating to such counterfeit or spurious articles.

Id. See Miller v. United States, 133 F. 337, 346 (8th Cir. 1904) (holding that 1889 amendment to mail fraud statute "retained the original denunciation against every scheme or artifice to defraud"); Culp v. United States, 82 F. 980, 991 (3d Cir. 1897) (stating that "the purpose of the amendment was not to restrict but to extend the operation of the statute"). See United States v. Beach, 71 F. 160, 161 (D. Colo. 1895) (stating that "general language of the act must be limited to such schemes and artifices as are ejusdem generis with those named"); see also Henning, supra note 17, at 446 (stating that district court in Beach "noted that the term 'scheme to defraud' might have covered the acts for which the defendant was indicted, but because they were not similar to those described in the amended mail fraud statute the indictment had to be dismissed").


161 U.S. 306 (1896).

See id. at 188-89; see also Rumble v. United States, 143 F. 772, 776 (9th Cir. 1906) (reprinting and following Stokes test); Miller v. United States, 133 F. 337, 345 (8th Cir. 1904) (applying Stokes test).

See id. at 313 (holding that mail fraud statute is broad and should be read to include various types of frauds); see also United States v. Coyle, 943 F.2d 424, 427 (4th Cir. 1991) (relying on Durland, court rejected restrictive reading); United States v. Farmer, 218 F. 929, 931 (D.C.S.D.N.Y. 1914) (holding that government can prosecute individual who has developed general features of scheme to defraud provided it can be shown that
"everything designed to defraud by representation as to the past or present, or suggestions and promises as to the future." The Court's interpretation enlarged the scope of what was a scheme to defraud.

In 1909, Congress further amended the mail fraud statute. The amendment incorporated the language of Durland and made punishable conduct that was performed for the purpose of "obtaining money or property by means of false or fraudulent pretenses, representations, or promises." In addition, Congress eliminated language stating that a scheme "effected by either opening or intending to open correspondence or communication with any person . . . by means of the post office establishment of the United States.”

In its place, Congress stated that the mails had to be used "for the purpose of executing such scheme or artifice or attempting so to do.” Debate over the new amendment and the Supreme Court decision focused on whether use of the mail in furtherance of a scheme was a substantial limitation on the use of the mail fraud statute or merely a jurisdictional requirement.

In 1914, the Supreme Court, in United States v. Young, did little to settle the dispute concerning the extent to which the other elements of fraud would have been developed in execution of scheme); Henning, supra note 17, at 446 (stating that fraudulent scheme element of statute should be read broadly).

Durland, 161 U.S. at 313.


See Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323; Moohr, supra note 22, at 59 (discussing evolution of mail fraud statute); see also Stacy Jaye Kanter, The Second Circuit Review-1981-1982 Term: Criminal Law: Mail Fraud and the De Facto Public Official: The Second Circuit Projects Citizens' Rights to Honest Government, United States v. Margiotta, 49 BROOKLYN L. REV. 933, 936 (1983) (stating "Congress eliminated from the original statute language that premised a violation on the requirement that the defendant devise the fraudulent scheme with the specific intent that it be carried out by the use of the postal system").

See Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130; see also Kanter, supra note 33, at 937 (stating new language stressed necessity of detecting fraudulent schemes).

See Henning, supra note 17, at 448 (noting that commentators have disagreed as to whether 1909 amendment has jurisdictional requirement or substantial limitation); Rakoff, supra note 13, at 817 (stating minimal use of mails would "trigger" mail fraud statute).

232 U.S. 155, 161 (1914) (overruling demurrer and remanding case for further review).
scheme to defraud had to involve the mail.37 The court merely stated that the district court was wrong when it held that the indictment did not establish a scheme to defraud.38 Throughout the early to mid-twentieth century, federal courts failed to articulate the interdependence required between the scheme to defraud and the mailing itself to be guilty of mail fraud.39 This inconsistency seemed to imply that the use of the mails did not have to be an essential part of the crime.40

In Kann v. United States,41 the Supreme Court, for the first time, reversed a mail fraud conviction on grounds that the use of the mails was too remote.42 The Court held that "[t]he federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of execution of the fraud, leaving all other cases to be dealt with by appropriate state law."43 Consequently, the Court held that the

37 See Henning, supra note 17, at 449 (stating that court did little to clarify "the degree of interdependence required between the scheme to defraud and the use of the mails"). But see Rakoff, supra note 13, at 817 (stating that Young was "simple unqualified extension of federal jurisdiction").

38 See Young, 232 U.S. at 161-62 (stating necessity to also charge intent to open correspondence via post office).

39 See Pereira v. United States, 347 U.S. 1, 8 (1954) (holding that mailing does not have to be "essential part of the scheme" to defraud); Badders v. United States, 240 U.S. 391, 394 (1916) (stating that mail fraud only had to be step in plot); United States v. States, 488 F.2d 761, 764 (8th Cir. 1973) (holding that statute does not prohibit scheme concerned about money or property because concept of fraud should be broadly construed). But see United States v. Clark, 121 F. 190, 190-191 (M.D. Pa. 1903) (stating that not all fraudulent schemes are covered by mail fraud statute, only those where mailing is essential part of scheme).

40 See Pereira, 347 U.S. at 8 (holding that fraud conviction supported even where use of mails not essential part of scheme); see also Durland v. United States, 161 U.S. 306, 314 (1896) (stating that to constitute offense, it was sufficient if actor mailed letters he believed would assist in effecting scheme); United States v. Seigel, 717 F.2d 9, 14 (2d Cir. 1983) (describing application of mail fraud statute as "seemingly limitless"); United States v. Haynes, 620 F. Supp. 474, 481 (M.D. Tenn. 1985) (stating that it is not necessary for mailings to be an essential part of contemplated scheme). See generally Henning, supra note 17, at 441 (discussing evolution of mail fraud statute).

41 323 U.S. 88 (1944).

42 See id. at 94 (holding that "it can not be said that the mailings in question were for the purpose of executing the scheme, as the statute requires"); see also Dyhre v. Hudspeth, 106 F.2d 286, 288 (10th Cir. 1939) (holding that mail fraud statute could not have been used to execute scheme because defendant had already induced parties into scheme); McNear v. United States, 60 F.2d 861, 863 (10th Cir. 1932) (holding that use of mails did not violate mail fraud statute); Henning, supra note 17, at 451 (stating that Kann was first time Supreme Court overturned mail fraud conviction based on remoteness).

43 See Kann, 323 U.S. at 95 (interpreting meaning of "in furtherance" element of mail fraud statute); see also United States v. Otto, 742 F.2d 104, 108 (3d Cir. 1984) (stating that scheme's completion depended in some way on charged mailings); United States v. McNeill, 728 F.2d 5, 14-15 (1st Cir. 1984) (holding that "receipt of pension checks were
mailing element for the purpose of executing the fraud is “lacking in the present case.” 44

Ten years later, however, the Court changed its reasoning in Pereira v. United States. 45 In Pereira, the defendants engaged in a scheme to fraudulently obtain money from the wife of one of the defendants and acquired the money by a check drawn from the wife’s California bank and mailed to a Texas bank. 46 The Court held that regardless of whether the defendant considered the mailing between banks vital to his scheme “it was not necessary that the scheme contemplate the use of the mails as an essential element.” 47 The Court reasoned that, even though the defendant may not have intended use of the mails, if the defendant had “knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen . . . [defendant] causes the mails to be used.” 48

Several years later, in Parr v. United States, 49 the Court again attempted to determine the relationship between the scheme to defraud and the use of the mails. The defendants, who were

proceeds of fraudulent scheme, and as such, were clearly essential to the success of the scheme”); United States v. Martin, 694 F.2d 885, 890 (1st Cir. 1982) (holding interception and conversion of insurance refund checks was closely enough related to ongoing fraudulent scheme); Henning, supra note 17, at 437 (stating that mail fraud statute has become primary provision to extend federal jurisdiction to crimes traditionally prosecuted only at state and local level).

44 See Kann, 323 U.S. at 95; see also United States v. Tencer, 107 F.3d 1120, 1126-27 (5th Cir. 1997) (holding that government evidence was insufficient to support conviction for mail fraud where it was not clearly established that checks were payments of fraudulent claims used to execute scheme); United States v. Frost, 125 F.3d 346, 359 (6th Cir. 1997) (stating that there needs to be at least showing that mailing is “incident to an essential part of the scheme”); United States v. Altman, 48 F.3d 96, 103 (2d Cir. 1995) (holding that use of mails was too remote to sustain conviction for mail fraud); United States v. Brown, 583 F.2d 659, 664 (3d Cir. 1978) (reversing mail fraud conviction on grounds that mailings were not sufficiently related to scheme).

45 347 U.S. 1 (1953).

46 See id. at 5 (providing detail of fraudulent activity).

47 See id. at 8; see also Schmuck v. United States, 489 U.S. 705, 710-11 (1989) (holding that use of mail need not be essential element of scheme to be part of execution of fraud); United States v. Turley, 891 F.2d 57, 59-60 (3d Cir. 1989) (stating that specific intent to use mails need not exist as essential element of scheme); United States v. Reed, 721 F.2d 1059, 1060-61 (6th Cir. 1983) (holding that showing of specific intent to use mails not required for conviction under mail fraud statute).

48 See Pereira, 347 U.S. at 9; see also United States v. Kenosfkey, 243 U.S. 440, 443 (1917) (holding that, although defendant did not mail letter himself, he effectively caused it to be mailed); United States v. Edwards, 1999 U.S. App. LEXIS 18656, at 8 (4th Cir. 1999) (affirming conviction for conspiracy to commit mail fraud where use of mails by third party in furtherance of scheme was “objectively, reasonably foreseeable”); United States v. Tannenbaum, 327 F.2d 210, 211-12 (7th Cir. 1964) (stating that there is no need to prove intent to use mails to adequately prove mail fraud).

public officials, diverted to themselves money mailed by taxpayers. The Court held that since the mailings were legal they cannot be seen as to have been "unlawful 'step[s] in a plot.'" \(^{51}\)

In *United States v. Sampson*,\(^ {52}\) the defendants deceived victims into believing that they could obtain loans or sell their businesses.\(^ {53}\) The victims sent money as an advance fee and the defendants then mailed an acceptance letter to the victims to lull them into believing that their applications had been accepted.\(^ {54}\) The Court held that "such a deliberate and planned use of the United States mails... to be 'for the purpose of executing' a scheme within the meaning of the mail fraud statute."\(^ {55}\) The Court distinguished the case from *Kann* and *Parr* from by stating that "[w]e are unable to find anything in either the *Kann* or the *Parr* case which suggests that the Court was laying down an automatic rule that a deliberate, planned use of mails after the victim's' money had been obtained can never be 'for the purpose of executing' the defendants' scheme."\(^ {56}\)

The Court returned to its restrictive reading of the mail fraud statute in *United States v. Maze*.\(^ {57}\) In *Maze*, the defendant stole his roommate's credit card to obtain goods and services.\(^ {58}\) The government alleged that his act constituted mail fraud because the defendant knew that the invoices would be mailed to the victim's bank and later to the victim himself.\(^ {59}\) However, the Court held that this type of mailing was not the type that was an

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\(^{50}\) See id. at 374-75 (requiring detailed examination of indictment, evidence, and issues of fact); see also United States v. Brickey, 296 F. Supp. 742, 751 (E.D. Ark. 1969) (citing Parr in holding that mailings made in usual course of business did not violate mail fraud statute).


\(^{52}\) 371 U.S. 75 (1962).

\(^{53}\) See id. at 77 (finding defendant never intended to perform promised services).

\(^{54}\) See id. at 77-78 (showing other fraudulent acts by defendant to lull victims into false sense of security).

\(^{55}\) Id. at 81 (stating precisely what defendant purchased with stolen card).

\(^{56}\) Id. at 80 (finding defendant knew such delay mailing would allow him to continue using card).


\(^{58}\) See id. at 396.

\(^{59}\) See id. at 397.
element of mail fraud.60

The Court further redefined the type of mailing required for mail fraud in Schmuck v. United States.61 Schmuck dealt with auto dealers who bought used cars and rolled back the odometers. The dealers then resold the cars to retail dealers in Wisconsin.62 The retail dealers would then resell these cars to customers. In order to complete the sale, the dealer would submit a title application form on behalf of the customer to the Wisconsin Department of Motor Vehicles.63 Mailing these title applications was the basis of the mailing element of the crime.64 The Court held that a jury could find that "the title registration mailings were part of the execution of the fraudulent scheme."65 The Court reasoned that this mailing was incident to a vital part of the scheme, which "satisfies the mailing element of mail fraud offense."66

The Supreme Court has given little guidance in determining mail fraud cases.67 As the cases above suggest, the relationship required between the mailing element and the scheme to defraud is difficult to determine. This relationship, however, is critical in deciding whether a mail fraud offense should be prosecuted.

60 See id. at 405 (holding that mailings in this case were not for purpose of defrauding).
61 489 U.S. 705, 707 (1989); see also United States v. Locklear, 829 F.2d 1314, 1319 (4th Cir. 1987) (obtaining documents through mail furthers execution of wholesaler's odometer tampering scheme); Todd E. Molz, Comment, The Mail Fraud Statute: An Argument for Repeal by Implication, 64 U. CHI. L. REV. 983, 990 (1997) (discussing how Schmuck replaced Maze with more lax requirement).
62 See Schmuck, 489 U.S. at 707.
63 See id.
64 See id. (discussing essential element of mail fraud); see also Pereira v. United States, 347 U.S. 1, 8 (1954) (executing of fraud does not require use of mails to be essential element of scheme); Badders v. United States, 240 U.S. 391, 394 (1916) (mailing has to be "incidental" to essential part of scheme).
65 See Schmuck, 489 U.S. at 712; see also Ohrynowicz v. United States, 715, 718 (7th Cir. 1976) (mailing of personalized checks furthered scheme even though checks never used). But see United States v. Galloway, 664 F.2d 161, 163-65 (7th Cir. 1981).
66 See Schmuck, 489 U.S. at 712.
67 See Henning, supra note 17, at 459 (stating that Court has failed to "provide any real guidance as to the degree or the nature for the interrelationship between the two elements required for a conviction"); see also Molz, supra, note 61 at 990 (stating that "[b]ecause the Court rarely provides definitive guidance, prosecutors and defendants can cite multiple cases supporting their view of what satisfies the mailing elements of the mail fraud statute"); Podgor, supra note 14, at 268 (detailing Supreme Court's inability to come to decisive decision in interpreting mail fraud statute).
III. RECENT DEVELOPMENTS

While lower courts have consistently attempted to limit use of the mail fraud statute, Congress and the Supreme Court have consistently given the mail fraud statute broad interpretation.\(^6\) Expansion of the mail fraud statute began in *McNally v. United States*.\(^6\) In *McNally*, the government attempted to prosecute corrupt public officials claiming that the mail fraud statute applied because the defendants had deprived the citizens of the intangible right to good government.\(^7\) The Supreme Court held, relying on its decision in *United States v. Durland*\(^7\) and the 1909 amendment to the mail fraud statute\(^7\), that the statute does not include intangible non-property rights, but only covers schemes to defraud money or property.\(^7\) Shortly after *McNally*, in *Carpenter v. United States*,\(^7\) the Court held that confidential information was property and the mail fraud statute was applicable.\(^7\)

In reaction to these two Supreme Court decisions, Congress amended the mail fraud statute by adding § 1346 of Title 18 as part of the Anti-Drug Abuse Act of 1988.\(^7\) The amendment

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\(^6\) See 18 U.S.C. § 1346 (requiring only that deprivation be only of intangible property); see also *McNally v. United States*, 483 U.S. 350, 364-66 (1987) (Stevens, J. dissenting) (stating that elements of mail fraud statute should be read independently because Congress enacted mail fraud statute to protect misuse of Postal Service); *Williams*, supra note 3, at 147 (detailing broad government interpretation under mail fraud statute).

\(^7\) 483 U.S. 350 (1987).

\(^7\) See id. at 354-55 (stating that mail fraud proscribes schemes to defined citizens of intangible rights).

\(^7\) 161 U.S. 306, 313 (1896) (giving mail fraud broad interpretation).


\(^7\) See *McNally*, 483 U.S. at 356-60 (stating that "money or property" language does not limit claims as to which money or property was deprived).

\(^7\) 484 U.S. 19 (1987).

\(^7\) See id. at 25-26 (holding that confidential information has always been considered property); see also *Rackelshans v. Monstano Co.*, 467 U.S. 986, 1001-1004 (1984) (recognizing that trade secrets as property is constant with notion of property); *Dirks v. SEC*, 463 U.S. 646, 653 n. 10 (1983) (stating that insiders have duty not divulge inside information).

\(^7\) See Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346) (West 1998); see also John E. Gagliardi, Comment, *Back to the Future: Federal Mail Fraud and Wire Fraud Under 18 U.S.C. § 1346*, 68 WASH. L. REV. 901, 903 (1993) (stating that Congressional modification "blurs the scope" of mail and wire fraud statutes); *Podgor*, supra note 14, at 235-36 (stating that amendment to 18 U.S.C. § 1346 was to include "intangible right of honest services").
stated that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." The addition of this language enlarged the scope of the mail fraud statute dramatically; consequently, many organized crime and political corruption activities now fell within its reach.

Even though Congress and the Supreme Court increased the power of federal prosecutors under the mail fraud statute, a number of lower courts have moved to limit the power of the mail fraud statute. For example, although § 1346 broadens the power of the prosecutor with respect to intangible property rights, some courts attempt to limit the application of other provisions of the mail fraud statute. Courts have also denied prosecutions based on insufficient evidence of a scheme to defraud, and other courts have limited what a scheme to defraud entails. Lower courts have also narrowed the intent

78 See United States v. Hicky, 16 F. Supp. 2d 223, 231 (E.D.N.Y. 1998) (stating that § 1346 was created to protect citizens right to honest public service by public officials); see also Henning, supra note 17, at 464 (stating this statute would allow federal government jurisdiction over political corruption that was once controlled by state). But see United States v. Mandel, 672 F. Supp. 864, 875 (D. Md. 1987) (holding that intangible right to good and honest service by public officials not part of mail fraud statute).
79 See 18 U.S.C. § 1346 (West 1998) (stating that there could be intangible property rights); see also Schmuck v. United States, 489 U.S. 705, 712 (1989) (holding that mailing element of crime is not essential); United States v. Alkins, 925 F.2d 541, 548 (2d Cir. 1991) (holding that defendants mail fraud conviction did not violate ex post facto clause of United States Constitution); United States v. Hickey, 16 F. Supp. 2d at 231 (stating that "scheme or artifice to defraud" includes deprivation of "intangible right of honest service").
80 See McElvoy Travel Bureau v. Heritage Travel Inc., 904 F.2d 786, 788, 791, 793 (1st Cir. 1990) (holding scheme to defraud does not include breach of contract); United States v. Mangiardi, 962 F. Supp 49, 51-53 (M.D. Pa. 1997) (holding that superseding indictment does not support charge of mail fraud); see also Podgor, supra note 51, at 560 (stating that although mail fraud has been used in many situations, judiciary has set limits on it).
81 See United States v. Czubinski, 106 F.3d 1069, 1076-1077 (1st Cir. 1997) (holding that federal employee looking through people's records is not considered "deprivation of intangible property" in wire fraud conviction); see also Podgor, supra note 51, at 561-62 (stating that cases based not on § 1346 still need deprivation of money or property).
82 See United States v. Sawyer, 85 F.3d 713, 730 (1st Cir. 1997) (holding that violation of gift statute is legally sufficient basis to allege scheme to defraud); United States v. Frost, 125 F.3d 346, 352 (6th Cir. 1997) (holding there is insufficient evidence to uphold scheme to defraud); United States v. Yoakam, 116 F.3d 1346, 1349-50 (10th Cir. 1997) (holding not enough evidence to prove arson); see also Podgor, supra note 51, at 562-63 (citing examples where insufficient evidence to convict on mail fraud. But see United States v. Stavroulakis, 952 F.2d 686, 695 (2d Cir. 1992) (holding that there was sufficient evidence to support charge of bank fraud insufficient evidence to convict on mail fraud).
83 See United States v. Brown, 79 F.3d 1550, 1562 (11th Cir.1996) (stating that Congress has not made criminal all questionable transactions); United States v.
element, and now hold that intent to deceive is not enough to trigger the mail fraud statute.\textsuperscript{84} By requiring the government to comply with a strict standard on the intent or \textit{mens rea} element of the crime, "courts have limited the application of the statute."\textsuperscript{85} Furthermore, while actual harm is not required, courts do require that the government prove that the defendant contemplated harm or injury.\textsuperscript{86}

IV. GOOD FAITH DEFENSE

A good faith defense is directly related to the \textit{mens rea} of crimes that involve fraud.\textsuperscript{87} Mail fraud is a specific intent crime and, therefore, a good faith defense is vital in mail fraud cases because it provides a complete defense for the defendant.\textsuperscript{88} By permitting use of the good faith defense, defendants have been afforded necessary protection against one of the greatest weapons in the federal arsenal, the mail fraud statute.\textsuperscript{89} A pivotal

 Goodman, 984 F.2d 235, 339 (8th Cir 1993) (holding that not all promotional schemes are illegal and to prove promotion illegal government must have "objective evidence" of a scheme to defraud); United States v. Starr, 816 F.2d 94, 100 (2d. Cir. 1987) (indicating that not all scheme are authorized); see also Podgor, supra note 50, at 564-65 (stating that "[c]ourts have also limited what will constitute a scheme to defraud").

\textsuperscript{84} See United States v. Sawyer, 85 F.3d 713, 732-33 (1st Cir. 1996) (holding that there was no intent to deceive established); Starr, 816 F.2d at 98 (holding intent to deceive, absent intent to harm, is not fraudulent intent under mail fraud statute); United States v. Regent Office Supply Co., 431 F.2d 1174, 1180-81 (2d Cir. 1970) (holding that intent to deceive, without more, does not constitute mail fraud); see also Podgor, supra note 51, at 566 (stating that "[c]ourts have also reversed mail fraud convictions premised upon an insufficient showing of an intent to defraud").

\textsuperscript{85} See Podgor, supra note 51, at 568; see also McNally v. United States, 483 U.S. 350, 360 (1986) (stating § 1341 would be read as limited in scope to protection of property rights). \textit{But see} Peter Henning, \textit{Maybe It Should Just Be Called 'Federal Fraud'}, 19 CHAMPION 6, 7 (1995) (stating limited mail fraud statute has become more unlimited because of congressional action).

\textsuperscript{86} See United States v. D'Amato, 39 F.3d 1249, 1257 (2d Cir. 1994) (holding that intent to harm has to have been contemplated); United States v. McNiece, 536 F.2d 1245, 1246-48 (8th Cir. 1976) (holding that there was no scheme to defraud or harm contemplated); United States v. Andreadis, 366 F.2d 423, 431 (2d Cir. 1966) (holding that no actual harm has to have occurred); see also Podgor, supra note 51, at 567 (stating that in order to be convicted of mail fraud, there must be evidence of contemplation of harm).

\textsuperscript{87} See United States v. Grissom, 44 F.3d 1507, 1512 (10th Cir. 1995) (holding "good faith" negates requisite element of intent); United States v. Lawton, 995 F.2d 290, 294 n.4 (D.C. Cir 1993) (holding that good faith belief negates fraudulent intent); United States v. Hohn, 963 F.2d 380, 380 (9th Cir. 1992) (holding that good faith belief in truth negates intent to defraud).

\textsuperscript{88} See supra note 9 and the accompanying text; see also United States v. Gole, 21 F.Supp.2d 161, 166 (E.D.N.Y. 1997) (stating it is 'axiomatic' that good faith is complete defense to mail fraud); United States v. Sorstein, 971 F. Supp. 736, 741 (E.D.N.Y. 1997) (stating that good faith defense is complete defense to mail fraud).

\textsuperscript{89} See Christopher G. Green, Christopher P. Hain, \textit{Mail and Wire Fraud}, 35 AM.
question that continues to divide the federal circuits is whether a defendant is entitled to a separate good faith jury instruction.  

A. Status of the Good Faith Jury Instruction

At the conclusion of a trial, a defendant is entitled to submit jury instructions. The defendant is permitted to submit the desired jury instructions only when he or she conforms to Federal Criminal Procedure Rule 30. Although a defendant may be entitled to a particular instruction, the defendant is not entitled to a specifically worded instruction.

See United States v. Camuti, 78 F.3d 738, 744 (1st Cir. 1996) (stating that good faith instruction is not required when court gives adequate instructions on intent to defraud); United States v. Dorotich, 900 F.2d 191, 192-94 (9th Cir. 1990) (stating that defendant was not entitled to good faith instruction because trial judge adequately instructed jury on law); United States v. Casperson, 773 F.2d 216, 224 (8th Cir. 1985) (holding that failure to give good faith instructions was error); New England Enterprises v. United States, 400 F.2d 58, 71 (1st Cir. 1968) (holding that definitions of specific intent adequately covered good faith defense); see also Daniel J. Jonas, The Circuit Split Over Instructing the Jury Specifically on the Good Faith Defense: A Consequence of Superlegislature by Courts or the Standards of the Appellate Review, 61 SYR. L. REV. 83-84 (1995) (stating that circuits are divided as to whether defendant is entitled to separate good faith instruction).

See United States v. Envangelista, 122 F.3d 112, 116 (2d Cir. 1997) (stating defendants only entitled to have instructions presented that adequately apprised jury of elements of crime and their defense); United States v. LaMorte, 950 F.2d 80, 84 (2d Cir. 1991) (stating that criminal defendant was entitled to jury instruction regarding withdrawal from conspiracy); Cole-Layer-Trumble Company v. Board of County Commissioner, 1991 WL 74251 *1, **3 (D. Kan 1991) (holding that parties are free to submit jury instructions); United States v. Durham, 825 F.2d 716, 718-19 (2d Cir. 1987) (recognizing criminal defendant's right to specific jury charge which reflects defense theory).

FED. R. CRIM. P. 30 (stating "[a]t the close of the evidence or at such time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law set forth in the request"); see also United States v. McQuarry, 726. F.2d 401, 402 (8th Cir. 1984) (stating that defendant has right to submit jury instructions pursuant to Federal Rule of Criminal Procedure 30 provided that request is timely, there is evidence to support instruction and instruction correctly states law); United States v. Lewis, 718 F.2d 883, 885 (8th Cir. 1983) (stating that defendant has the right to "theory of defense" instruction provided request made timely and there is evidence to support it); United States v. Salinas, 601 F.2d 1279, 1282 (5th Cir. 1979) (holding that at close of evidence or when court directs, any party can submit jury instructions on law).

See United States v. Townsend, 796 F.2d 158, 163 (8th Cir. 1986) (holding that district court has broad discretion in determining appropriate jury instructions and defendant is not entitled to particularly worded instruction where instructions given adequately and correctly cover substance of requested instructions); McQuarry, 726 F.2d at 402 (holding that district court has "wide discretion" in formulating jury instructions);
Several circuits, namely the First, Second, Third, Ninth, and the District of Columbia, hold that a defendant is not entitled to a separate good faith instruction. These circuits have held that if a defendant is found guilty of a specific intent crime, the defendant is excluded from utilizing a good faith defense.

* Lewis, 718 F.2d at 885 (stating that it is "well-established... that a defendant is not entitled to particularly-worded instruction when instructions actually given by trial court adequately and correctly cover substance of the requested instruction); see also United States v. Uder, 98 F.3d 1039, 1044 (8th Cir. 1996) (holding that district court did not abuse discretion by refusing to modify instructions according to defendant's request).

* See United States v. Joselyn, 99 F.3d 1182, 1194 (1st Cir. 1996) (holding district court's instruction fairly summarized defendant's defense theory); United States v. Dockary, 943 F.2d 152, 155 (1st Cir. 1991) (stating that First Circuit's stance on no good faith instruction is "doctrine of vitality"); United States v. Nivica, 887 F.2d 1110, 1124 (1st Cir. 1989) (holding that jury charges, despite not specifically mentioning good faith, communicated substance of defendant's request); New England Enterprises v. United States, 400 F.2d 58, 71 (1st Cir. 1968) (holding that there is nothing so important about good faith instruction that meaning cannot be otherwise conveyed).

* See United States v. Spoko, 1995 WL 722539 *1, **3 (2d Cir. 1995) (holding that court's instruction of good faith was adequate); United States v. Paccione, 949 F.2d 1183, 1200-01 (1991) (holding that "there is no basis for reversal when the court's instructions have properly explained the thrust of defendant's argument"); United States v. McElroy, 910 F.2d 1016, 1026 (2d Cir. 1990) (holding that district court's instructions "conveyed the essence of a 'good faith defense' instruction"); United States v. Bronstein, 658 F.2d 920, 930 (2d Cir. 1981) (holding that court adequately charged jury that good faith complete defense to mail fraud).

* See United States v. Gross, 961 F.2d 1097, 1103 (3d Cir. 1992) (failing to give good faith instruction not abuse of discretion); see also United States v. Zeherbach, 47 F.3d 1252, 1260 (3d Cir. 1995) (holding that defendant not entitled to good faith jury instruction in bankruptcy fraud case); United States v. Smith, 789 F.2d 196, 204 (3d Cir. 1986) (stating that error in refusing instructions will only be found "if instruction was correct, not substantially covered by other instructions and its omission prejudiced defendant"); United States v. Corcoran, 872 F. Supp. 175, 187 (M.D. Pa. 1993) (holding that in Medicare fraud case, defendant not entitled to good faith jury charge).

* See United States v. Dorotich, 900 F.2d 192, 193-94 (9th Cir. 1990) (holding that district judge adequately instructed jury on defendant's theory of defense even though no specific good faith instruction); United States v. Bonanno, 852 F.2d 434, 439-40 (9th Cir. 1988) (holding that instruction on specific intent preclude instruction of good faith); United States v. Alcantar, 832 F.2d 1175, 1179 (9th Cir. 1987) (holding that defendant not entitled to good faith defense); United States v. Solomon, 825 F.2d 1292, 1297 (9th Cir. 1987) (holding that "failure to give an instruction on a 'good faith defense' is not fatal"); United States v. Green, 745 F.2d 1205, 1209 (9th Cir. 1984) (holding that defendant not entitled to good faith instruction because instructions adequately included specific intent element).

* See United States v. Fowler, 932 F.2d 306, 371 (4th Cir. 1991); United States v. Butler, 822 F.2d 1191, 1197 (D.C. Cir. 1987) (holding that instructions stating government must prove defendant acted with specific intent were adequate and did not call for instruction on good faith defense); United States v. Gambler, 662 F.2d 834, 837 (D.C. Cir. 1981) (holding that instructions covered good faith defense request). But see United States v. Garner, 529 F.2d 962, 970 (6th Cir. 1984) (holding that there was some evidence supporting defendant's theory, therefore, defendant was entitled to instruction on theory); Tatum v. United States, 190 F.2d 612, 617 (D.C. Cir. 1957) (holding in criminal cases, even when weak, inconsistent or doubtful credibility, its presence requires instruction on theory of defense).

* See United States v. Lavergne, 805 F.2d 517, 523 (5th Cir. 1986) (holding that finding of "specific intent to deceive categorically excludes finding of good faith"); see also
Normally, in these circuits, the courts will define specific intent, without using a good faith instruction.\textsuperscript{100} Although the court will provide these definitions, the prosecution must still prove the defendant was guilty beyond a reasonable doubt.\textsuperscript{101} Throughout the trial, the defendant will be given a full opportunity to testify and produce evidence concerning good faith, which will be presented to the jury.\textsuperscript{102} To convict a defendant of mail fraud, the jury must find that the defendant had the specific intent to commit the crime of mail fraud.\textsuperscript{103} In these circuits, the defendant is not entitled to a separately worded instruction if it spells out the theory of the defendant's defense.\textsuperscript{104}

United States v. Dockray, 943 F.2d 152, 155 (1st Cir. 1991) (holding that specific jury instruction on good faith is not "mandated"); United States v. Rochester, 898 F.2d 971, 978-79 (5th Cir. 1990) (holding that defendant was not entitled to good faith instruction); United States v. McElroy, 910 F.2d 1016, 1025 (2d Cir. 1990) (holding that defendant is not entitled to good faith defense instruction because trial court instructions covered essence of good faith defense); United States v. Chenault, 844 F.2d 1124, 1130 (5th Cir. 1988) (stating that court was not prevented from considering good faith defense and omission of specific good faith defense was not error).

\textsuperscript{100} See Rochester, 898 F.2d at 978-79 (defining specific intent in which "the [defendant in question knowingly did an act which the law forbids, purposely intending to violate the law"); United States v. Judd, 889 F.2d 1410, 1413 (5th Cir. 1989) (defining specific intent as acting willfully and knowingly and court further describes that as "acting 'voluntarily and purposely with the specific intent to do something the law forbids'"); Chenault, 844 F.2d at 1130 (defining knowingly as "voluntary and intentionally and not because of mistake and accident" and willfully as "voluntary and purposefully with the specific intent to do something the law forbids... with bad purpose either to disobey or disregard the law."); see also United States v. St. Gelias, 952 F.2d 90, 94 (5th Cir. 1992) (stating court's instruction on specific intent required showing of "bad purpose" for conviction).

\textsuperscript{101} See United States v. Starr, 816 F.2d 94, 106 (2d Cir. 1987) (stating that government must prove defendant guilty beyond reasonable doubt); United States v. Huls, 1987 WL 15949 *1, *1 (M.D. La. 1987) (holding that there was adequate evidence to prove defendant guilty of mail fraud beyond reasonable doubt); United States v. Murr, 681 F.2d 246, 249 (4th Cir. 1982) (holding that government presented sufficient evidence to support mail fraud conviction); United States v. Craig, 573 F.2d 455, 492 (7th Cir 1977) (holding that government proved mail fraud conviction guilty beyond reasonable doubt).

\textsuperscript{102} See United States v. Frost, 125 F.3d 346, 372 (6th Cir. 1997) (holding court was not in error when it did not relate defendant's factual jury charge to jury); United States v. Hively, 61 F.3d 1358, 1361 (8th Cir. 1995) (holding modification of instruction not error because instructions properly set forth applicable law and evidence on subject); United States v. Costanzo, 4. F.3d 658, 66 (8th Cir. 1993) (holding that jury had right to reject defendant's good faith argument); United States v. Rochester, 898 F.2d, 971, 979 (5th Cir. 1990) (stating defendant was given opportunity to testify).

\textsuperscript{103} See United States v. Gole, 158 F.3d 166, 167 (2d Cir. 1998) (holding that defendant had specific intent to defraud); United States v. Smith, 133 F.3d 737, 742 (10th Cir. 1997) (holding that government must prove specific intent to defraud); United States v. Goldbraith, 20 F.3d 1054, 1056 (10th Cir. 1994) (stating elements including intent to defraud); United States v. Klein, 515 F.2d 751, 754 (3d Cir. 1975) (holding government must prove specific intent to defraud).

\textsuperscript{104} See United States v. Cheatham, 899 F.2d 747, 751 (8th Cir. 1990) (holding that jury charge is valid if it correctly states law and covers requested instruction); United States v. Barta, 888 F.2d 1220, 1225 (8th Cir. 1989) (holding that instruction given fairly
Only the Eighth\textsuperscript{105} and Tenth\textsuperscript{106} Circuits hold that a defendant is entitled to a separate good faith defense. These circuits hold that a general specific intent instruction may not clearly communicate to the jury that the defendant's good faith is a viable defense.\textsuperscript{107} In addition, these circuits hold that a defendant is entitled to an "instruction as to any recognizable defense for which there exists evidence sufficient for a reasonable jury to find in his favor."\textsuperscript{108} Although a defendant is entitled to a good faith jury instruction, the defendant must meet certain evidentiary requirements to have the instruction read to the jury.\textsuperscript{109}

described applicable law and gave full instruction of elements of law); United States v. Ammon, 464 F.2d 414, 417 (8th Cir. 1972)(stating that although district court did not give specific good faith instruction, instructions must be taken as whole and if instructions fully express legal principles of defense, than there is no reversible error); United States v. Bessesen, 445 F.2d 463, 469 (7th Cir. 1971) (stating instructions fully express legal principles).

\textsuperscript{105} See United States v. Casperson, 773 F.2d 216, 222-23 (8th Cir. 1985) (holding that district court should have given separate good faith instructions).

\textsuperscript{106} See United States v. Haddock, 956 F.2d 1534, 1547 (10th Cir. 1992) rehearing 961 F.2d 716, 717-18 (10th Cir. 1984) (holding that defendant is entitled to defense of good faith if there is evidence to support it); United States v. Beitscher, 467 F.2d 269, 273 (10th Cir. 1972) (holding that "an instruction on good faith in a prosecution of mail fraud must adequately and sufficiently appraise the jury of the defendant's theory of defense"); Mesch v. United States, 407 F.2d 1286, 1289 (10th Cir. 1969) (holding that instruction with respect to good faith defense "must be clear and complete"); Steiger v. United States, 373 F.2d 133, 135 (10th Cir. 1967) (stating that as long as there is evidence to support good faith defense, it does not matter how visionary or outrageous conduct of defendant seems, defendant is still entitled to good faith defense).

\textsuperscript{107} See United States v. Casperson, 773 F.2d 216, 223 (8th Cir. 1985) (holding that defendant is entitled to instruction describing circumstances); see also Jonas, supra note 90, at 88 (stating that defendant is entitled to good faith instruction because specific intent instruction may not clearly show jury that good faith defense is viable defense); Kurkland, supra note 10, at 859 (stating that jury instructions are very influential in deliberations).

\textsuperscript{108} See Casperson, 773 F.2d at 223-24 (8th Cir. 1985); see also United States v. Prieskorn, 658 F.2d 631, 636 (8th Cir. 1981) (holding that defendant is entitled to jury instruction if request is made timely, and there is evidence to support it and instruction correctly states law); United States v. Creamer, 555 F.2d 612, 616 (7th Cir. 1977) (holding that defendant is entitled to instruction on defense theory no matter how weak, inconsistent or doubtful evidence is); Jonas, supra note 90, at 88 (stating that defendant is entitled to defense where there is evidence to support it).

\textsuperscript{109} See United States v. Morris, 20 F.3d 1111, 1116 (11th Cir. 1994) (holding that to receive requested instruction, defendant support instruction with both law and evidence); United States v. Prieskorn, 658 F.2d at 636 (holding that defendant is entitled to jury charge if there is evidence to support it); United States v. Creamer, 555 F.2d at 616 (holding that defendant is entitled to jury charge provided that there is evidence, no matter how weak, to support it).
B. Reversible Error for Jury Instructions

Reversible error, with respect to jury charges, occurs when the court fails to present a defendant's theory of a defense in a full statement of the law.\textsuperscript{110} The majority of circuits hold that a district court has not committed reversible error, when, in instructing the jury, good faith is not mentioned in mail fraud cases.\textsuperscript{111} In United States v. Hunt,\textsuperscript{112} the Fifth Circuit held that a court commits reversible error when:

(1) the instruction is substantively correct; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs the defendant's ability to present a given defense effectively.\textsuperscript{113}

A plurality of circuits, however, hold that it is not reversible error when the district court fails to offer a good faith instruction because it is the jury's duty to consider good faith evidence when determining whether the defendant had the specific intent to commit the crime.\textsuperscript{114}

The Eighth Circuit utilizes a similar standard when reviewing jury instructions.\textsuperscript{115} This Circuit evaluates the jury instructions

\textsuperscript{110} See United States v. Gonzalez-Soberal, 109 F.3d 64, 70 (1st Cir. 1997) (holding that jury instructions are reversible error if instructions that were requests and denied by party were correct, was not covered in actual instructions and it concerns important point in trial); Trademark Research Corp. v. Maxwell Online, 995 F.2d 326, 339 (2d Cir. 1994) (holding that jury instruction are reversible when they mislead jury or give misunderstanding of law); United States v. Dandy, 998 F.2d 1344, 1358 (6th Cir. 1993) (stating it is reversible error not to present defendant's theory in full statement of law).

\textsuperscript{111} See United States v. Hicks, 164 F.3d 389, 394 (7th Cir. 1999) (holding that defendant is not entitled to specific good faith instruction as long as instructions, as whole, instruct jury on his defense theory); United States v. Storm, 36 F.3d 1289, 1294 (5th Cir. 1994) (holding that good faith defense adequately covered in jury charge); United States v. Rotham, 567 F.2d 744, 751-52 (7th Cir. 1977) (indicating defendant not entitled to good faith instruction).

\textsuperscript{112} 794 F.2d 1095, 1097 (5th Cir. 1986).

\textsuperscript{113} Id.

\textsuperscript{114} See supra note 95 and accompanying text; see also United States v. Orsinger, 428 F.2d 1105, 1114 (D.C. Cir 1970) (indicating good faith need not be included in jury instructions).

\textsuperscript{115} See United States v. Sherer, 635 F.2d 334, 337 (8th Cir. 1981) (holding that in evaluating jury instructions, see if instructions advise jury of elements of offense); see also United States v. Brown, 540 F.2d 364, 380-81 (8th Cir. 1976) (holding that jury charge must "adequately and correctly" cover the substance of the requested instruction); United States v. Wixom, 529 F.2d 217, 219-20 (8th Cir. 1976) (holding that court properly instructed jury on elements of offense); United States v. Nance, 502 F.2d 615, 617 (8th Cir. 1974) (stating that it is sufficient for jury charge to cover substance of offense).
by viewing them in their entirety and determining if the jury was adequately advised of the essential elements of the offenses charged. As stated earlier, a defendant is not automatically entitled to a good faith jury instruction. The defendant must first request a good faith defense instruction and then establish the same through the use of evidence. If the defendant can fulfill these requirements, then the failure of the court to give a specific good faith jury instruction could result in reversible error.

The Tenth Circuit reviews jury instructions in a similar fashion. The Tenth Circuit, like the Eighth Circuit, will allow

116 See Sherer, 635 F.2d at 337 (indicating that court should see if jury advise of the elements of offense); Brown, 540 F.2d at 380-81 (holding that jury charge must adequately cover the substance of the requested instruction); Wixom, 529 F.2d at 219-20 (holding that court properly instructed jury on elements of offense).

117 See United States v. Haddock, 956 F.2d 1534, 1547 (10th Cir. 1992) rehearing 961 F.2d 933 (10th Cir. 1992) (holding that in Tenth Circuit "general instructions on willfulness and intent are insufficient to fully and clearly convey a defendant's good faith defense to the jury"); United States v. Hopkins, 744 F.2d 716, 717-18 (10th Cir. 1984) (holding that defendant is entitled to defense of good faith if there is evidence to support it); United States v. Beitscher, 467 F.2d 269, 273 (10th Cir. 1972) (holding that "an instruction on good faith in a prosecution of mail fraud must adequately and sufficiently appraise the jury of the defendant's theory of defense"); Mesch v. United States, 407 F.2d 1286, 1289 (10th Cir. 1969) (holding that instruction with respect to good faith defense "must be clear and complete"); Steiger v. United States, 373 F.2d 133, 135 (10th Cir. 1967) (stating that as long as there is evidence to support good faith defense, it does not matter how visionary or outrageous conduct of defendant seems, defendant is still entitled to good faith defense); see also United States v. Fuentes, 967 F.2d 593, 604 (9th Cir. 1992) (stating defendant is entitled to jury instructions presenting his defense if supported by evidence); United States v. Caperson, 777 F.2d 216, 223 (8th Cir. 1985) (stating defendants are entitled to good faith defense); United States v. Williams, 728 F.2d 1402, 1405 (11th Cir. 1984) (noting instructions on good faith should be given if supported by evidence).

118 See United States v. Casperson, 773 F.2d 216, 223 (8th Cir. 1985) (holding that defendants timely requested good faith instruction and provided evidence to support it); United States v. McQuarry, 726 F.2d 401, 402 (8th Cir. 1984) (indicating that defendant entitled to instruction if evidence allows it); Sherer, 653 F.2d at 337 (holding that doctor did not establish good faith defense).

119 See Casperson, 773 F.2d at 223 (holding that district court's instruction, which did not include good faith instruction, was reversible error because it did not direct the jury's attention to the defense of good faith with sufficient specificity to avoid error); United States v. Hopkins, 744 F.2d 716, 718 (10th Cir. 1984) (holding that it was error not to give good faith instructions); United States v. Priestkorn, 658 F.2d 631, 636 (8th Cir. 1981) (holding that district court erred in failing to give good faith instructions).

120 See Curtis v. Oklahoma, 147 F.3d 1200, 1219 (10th Cir. 1998) (holding that circuit court will review district courts instructions to determine whether, on whole, instructions correctly state governing law and provide jury with adequate understanding of issues and applicable standards); United States v. Johnston, 146 F.3d 785, 792 (10th Cir. 1998) (recognizing that district court's jury instructions are not erroneous provided that they fairly state governing law and provide jury with understanding of issues and applicable standards); United States v. Oderle, 136 F.3d 1414, 1422 (10th Cir. 1998) (holding that appellate court will review jury instructions in light of instructions as whole).
a good faith jury instruction if the defendant has provided sufficient evidence to establish such a defense.\textsuperscript{121} The defendant's evidence must prove that the defendant believed: "(1) that the plan, however so visionary and impractical would succeed, (2) that promises made would be kept and (3) that representations made would be fulfilled."\textsuperscript{122} The Tenth Circuit holds that, with respect to mail fraud cases, "instructions of willfulness, on aspects of intent, on untruth of representations or fraudulent statements are not sufficient" for a good faith instruction,\textsuperscript{123} there must be a "full and clear submission of the good faith defense."\textsuperscript{124} Upon establishing such a defense, the denial of a good faith instruction constitutes reversible error.\textsuperscript{125}

\textbf{C. Importance of Good Faith Instruction}

Complex fraud theories and multiple defendants, which are common aspects of mail fraud cases, necessitate the need for a good faith jury instruction.\textsuperscript{126} These aspects can confuse the jury

\textsuperscript{121} See United States v. Merchant, 992 F.2d 1091, 1096 (10th Cir. 1993) (holding that defendant is entitled to jury instruction on any theory of defense fairly supported in evidence and law, and failure to so instruct is reversible error); Dursfngler v. Artilles, 727 F.2d 888, 895 (10th Cir. 1984) (holding no reversible error occurred because district court correctly stated law); Beck v. United States, 305 F.2d 595, 599 (10th Cir. 1962) (holding that defendant is entitled to adequate jury instruction provided that there is evidence to support it).

\textsuperscript{122} See United States v. Smith, 13 F.3d 1421, 1426 (10th Cir. 1994); see also United States v. Hopkins, 744 F.2d 716, 718 (10th Cir. 1984) (holding that although plan seemed impractical in retrospect, makes no difference to defendant's good faith belief in its success); United States v. Roylance, 690 F.2d 164, 168 (10th Cir. 1982) (holding that defendant's good faith belief in plan is complete defense); Steiger v. United States, 373 F.2d 133, 135 (10th Cir. 1967) (holding that even though plan seems visionary in retrospect, defendants had good faith belief it would succeed).

\textsuperscript{123} See Hopkins, 744 F.2d at 718 (demonstrating difficulty involved in getting good faith jury instructions).

\textsuperscript{124} See id. (discussing need for specificity with good faith instruction).

\textsuperscript{125} See United States v. Cronic, 839 F.2d 1401, 1403 (10th Cir. 1988) (holding that good faith instructions should have been given on testimony of government witness); United States v. Hopkins, 744 F.2d 716, 717-18 (10th Cir. 1984) (remanding case to district court for failure to include good faith jury charge). \textit{But see} United States v. Smith, 13 F.3d 1412, 1425 (10th Cir. 1994) (holding that there is no reversible error in refusing good faith instructions if not adequate evidence).

\textsuperscript{126} See United States v. Garcia, 77 F.3d 471, 471 (4th Cir. 1996) (stating that appellants must prove presence of multiple defendants confused jury); United States v. Casperson, 773 F.2d 216, 223-24 (8th Cir 1985) (holding that in this case there were multiple defendants and was very complex); Johnson v. Bryant, 671 F.2d 1276, 1280 (11th Cir. 1982) (holding that a court should find jury instructions are reversible error when court is "left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations"). \textit{But see} United States v. Coy, 19 F.3d 629, 634 (11th Cir. 1994) (holding that this case does not present complicated scenario with multiple
and result in a lack of understanding concerning the good faith defense.127 Furthermore, a jury is more likely to bestow greater deference to the words of a judge rather than those of a defense attorney.128 Having courts include a separate good faith defense, is consistent with the view of holding the government to a strict standard of intent.129 The good faith jury instruction holds the government to a strict standard of intent because the government’s evidence must overcome a jury instruction of good faith by the judge and not just allow the government to prove the elements of the crime.130

CONCLUSION

In light of the broad power that courts have given to prosecutors under the mail fraud statute, it is only fair, considering the American tradition of equality in the adversarial system, that defendants be entitled to a good faith jury instruction. Applying the good faith jury instruction will aid in restoring balance to our criminal justice system.

Michael McDonough

defendants that would confuse a jury).

127 See United States v. Garcia, 77 F.3d at 471 (stating that appellants must prove multiple defendants confused jury); United States v. Caperson, 773 F.2d at 223-24 (holding that the case involved multiple defendants and complex legal issues); Johnson v. Bryant, 671 F.2d at 1280 (holding that court should find that instructions are faulty when it is apparent that jury was confused).

128 See Kurland, supra note 10, at 858 (stating that jurors give judge’s instructions special deference). But see Walter W. Steele Jr., Elizabeth G. Thornburg, Jury Instructions: A Persistent Failure to Communicate, 67 N.C. L. REV. 77, 82 (stating that jurors often misunderstand instructions).

129 See United States v. Gonzalez-Montoya, 161 F.3d 643, 651 (10th Cir. 1998) (holding that jury instructions demonstrated that government must prove knowledge or intent); United States v. Mann, 161 F.3d 840, 848 (5th Cir. 1998) (holding that government had to prove intent to injure or defraud); see also Podgor, supra note 51, at 568 (stating that “[b]y holding the government to strict standard of proof on the mens rea of element of the crime of mail fraud, courts have limited application of the statute”).

130 See United States v. Judd, 889 F.2d 1410, 1413 (5th Cir. 1989) (defining the elements of mail fraud); United States v. Casperson, 773 F.2d 216, 223-224 (8th Cir. 1985) (holding that defendant is entitled to specific instruction if evidence is there to support it); United States v. Creamer, 555 F.2d 612, 616, (7th Cir. 1977) (holding that defendants are entitled to instruction, no matter how weak or evidence is to support it).