No. _____

IN THESUPREME COURT OF THE UNITED STATES

MARK AVERY, Petitioner,

vs.

UNITED STATES, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Where the defendant, trustee of a private trust charged with wire fraud and money laundering based on his non-disclosure and misspending involving trust funds, denied acting with a specific intent to defraud, was he denied his due process right to a fair trial when the district court refused his request to instruct the jury, either separately or in the context of the instruction on specific intent, that his good-faith belief that his actions were permissible under the terms of the trust was a defense to the charge, because such good faith is inconsistent with the element of specific intent?

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

Mark Avery petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

## I. OPINIONS BELOW

The unpublished memorandum decision by the United States Court of Appeal for the Ninth Circuit, and the order denying a petition for review, are attached as Appendix 1 and Appendix 2 respectively.

## II. JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 27, 2018. (App 1:1) A timely petition for review was denied on September 28, 2018. (App. 2) The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

## III. STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. V. (emphasis added):

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without *due process of law*; nor shall private property be taken for public use, without just compensation.

Title 18, United States Code, § 1343 (2005):

> Fraud by wire, radio, or television - 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, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 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.

## IV. STATEMENT OF THE CASE

### A. JURISDICTION IN THE COURTS BELOW.

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

### B. FACTS MATERIAL TO CONSIDERATION OF QUESTION PRESENTED.

Mark Avery asks for certiorari to review his convictions on three counts of wire fraud, six counts of money laundering, for which the wire fraud counts were predicates, and two counts of bank fraud. *See* 18 U.S.C. §§1343, 1344, 1956. His case presents this Court with an opportunity to resolve lingering confusion in the circuits on whether and when a fraud defendant's right to present a defense requires either a separate good-faith instruction or the inclusion of language regarding good faith as part of the instruction on the element of specific intent to defraud.

Mr. Avery was one of three trustees of the May Smith Trust ("MST"). The MST, created by its namesake, provided for her financial support and sought to keep her assets under unified management with minimized tax liability. (App. 3:2) After her death the assets were to go to another trust that had been previously set up by Mrs. Smith and her husband. Both Smiths were deceased

by the time of trial. (App. 3:2, 10) The MST compensated the three trustees for their services, which included the power to manage and invest trust assets. Another trust provision allowed the trustees to hire businesses in which they themselves had financial interests to perform services for the MST, and to approve compensation to their businesses for those services. (App. 3:2)

The MST and the Smiths other trusts had offices in San Francisco, and its trustees were California residents with different areas of expertise. John Collins, Jr., a broker, operated an investment company took commissions on management of various Smith trusts, its biggest clients. Dale Matheny, an accountant, oversaw the trust financials. Collins had a cardiac condition, and Matheny had had cancer; both were in their 70s. Mr. Avery was the third, becoming a trustee in 2001 after the death of his father, who was a respected tax attorney, and who as a trustee had handled the MST's legal affairs. Mr. Avery himself had been a paramedic before becoming an attorney, and had practiced law for about 11 years, primarily as a state-court criminal prosecutor in California and Alaska, though he did occasionally work for his father and familiarize himself with various Smith family trusts in anticipation of becoming a trustee. Once he became a trustee, he remained in Anchorage, operating a business, Regional Protective Services ("RPS"), to electronically monitor persons who were under bail supervision in the Alaska courts. (App. 3:3)

By late 2004 Mrs. Smith was suffering from dementia and unresponsive to others; her caregivers at her home on the isle of Guernsey, were retiring; and the other two trustees assigned Mr. Avery to make new living arrangements for her. (App. 3:4) He found trustworthy caregivers and chose a new residence in the Bahamas. This was also the corporate location of a company, AVENCO, whose stockholders were the trustees themselves. AVENCO held the MST's assets at the Royal Bank of Canada ("RBC"), then consisting of about $100 million in treasury bonds with varying maturity dates. (App. 3:2, 4) It was undisputed that Mrs. Smith was well cared for in the Bahamas until her death in 2006. (App. 3:10)

One of Mr. Avery's employees at RPS was Robert Kane, a former federal confidential informant, who, the government conceded, lacked credibility. (App. 3:4, 57) He suggested investment strategies for the trust. (App. 3 3:4) Kane provided Mr. Avery with advice on coordinating Mrs. Smith's move, during which Mr. Avery met Doug Gilliland, an Alaska air charter operator contracted to provide medical evacuation services from remote areas. Gilliland wanted to expand, and he, Kane, and Mr. Avery discussed working together. (App. 3:4-5) In 2005 Mr. Avery presented a plan to his other two trustees to invest in aircraft and Gilliland's air charter company. At that time, the MST's assets consisted of $100 million in United States treasury bonds, held by AVENCO. (App. 3:2)

The trustees, as stockholders of AVENCO, approved of making $50 million in trust assets "available" for the air charter project, with Mr. Avery directed to make "correct arrangements." (App. 3:5) The MST's participation, the minutes said, would offer the trustees needed air service and a share of the air charter business profits without tax exposure. Specifically, it would permit the three trustees to travel on trust business at a lower cost and, for the elderly trustees, in relatively greater comfort, including trips to visit Mrs. Smith and conduct trust business as needed in the Bahamas. (App. 3:4-5, 50) For Mr. Avery, it lessened the possible tax vulnerabilities to the MST about which he had learned from consulting with a tax and trust specialist. (App. 3:50)

Mr. Avery drafted two agreements, including one that contemplated placing the funds into an account controlled by an attorney he met through Kane, Mike Farrell, but neither was used. (App. 3:4-5) Ultimately, Collins' investment company arranged for AVENCO to open an interest-bearing margin loan account with RBC's investment arm, Dain Rauscher. (App. 3:5) Mr. Avery would request funds from the account via email to Collins' company and they went to bank accounts he controlled. The trustees were always notified of the wires, but never attempted to stop them. (App. 3:5) Eventually, the entire amount of the margin loan was spent, wired either to Mr. Avery's law office accounts or to an account in the name of RPS. Some of the funds went to purchase aircraft

through Gilliland, but the relationship ended after Mr. Avery learned Gilliland was forced to surrender an FAA certificate under which he was operating his Alaska charters. (App. 3:6-7) RPS ultimately bought a long-established air company called Security Aviation, based in Anchorage, which was operated with margin loan funds. (App. 3:6, 51) A few weeks after the sale was final, the trustees' meeting minutes reported the changeover from Gilliland to Security Aviation, noting an expectation that Mr. Avery would repay the margin loan, and "undetermined interest," within about six months. (App. 3:7)

The other two trustees had both died by the time of trial. (App. 3:10) At trial there was no evidence from anyone of a routine practice of accounting between the trustees, or to the MST, for their use of the money they received for serving as trustees, or payment for their own business services rendered to the MST. (App. 3:34) Mr. Avery thus understood the MST to permit him the use of the margin loan for the air charter project operating expenditures without requiring him to account for them. He thus did not give the other trustees notice about the progress of his business operations. (App. 3:4) Nor did he notify them that he spent the margin loan money to pay various of his personal debts, to buy two watercraft, two vintage aircraft, a home (in which Kane lived), and assorted vehicles and recreational equipment, most in the name of RPS. (App. 3:6:8 However, Collins visited Alaska about four or five months after the trustees'

meeting approving the project. He saw one of the vintage planes, and his photo album from the trust included a picture of a jet that had been bought to develop the pilot training program. (App. 3:34) Some of the purchases were used by him, some by Kane, and some by RPS or Security Aviation employees. (App. 3:6-8, 33-34)

The full amount of the margin loan was spent, but Mr. Avery never repaid it, and after its default MST lost the full amount. Mr. Avery never drafted an agreement spelling out that he would repay the trust for the margin loan, as Matheny directed him to. (App. 3:6) Initially, he was charged with and pleaded guilty to honest-services fraud, acknowledging that his actions with the margin loan funds failed to benefit or protect the MST, and were a breach of his fiduciary duty to the MST. However, after he had been sentenced, he moved under 28 U.S.C. §2255 to vacate his guilty pleas after this Court's decision in *Skilling v. United States*, 561 U.S. 358, 365 (2005), which narrowed the scope of honest-services fraud to its "core" function of prosecuting the taking or giving of kickbacks or bribes. In so doing, it made clear that the scope of honest-services fraud does not extend to the very conduct for which he is liable – "undisclosed self-dealing by a…private employee." *United States v. Avery*, 719 F.3d 1080 (9th Cir. 2013). The government was permitted to re-indict him on the charges, and also added two counts of bank fraud. (App. 3:12-14)

At trial, Mr. Avery sought a jury instruction based on good faith with proposed language from a Third Circuit pattern instruction:

> A person acts in good faith when he or she has an honestly held belief, opinion, or understanding that (*describe the belief or opinion that is inconsistent with the required mental state, e.g., honest belief about the existence of a fact, honest belief in the truth of statements, honest opinion that acts were not unlawful)*, even though the belief, opinion, or understanding turns out to be inaccurate or incorrect. …
>
> [Name] did not act in "good faith," however, if, even though (he) (she) honestly held a certain opinion or belief or understanding, (he) (she) also knowingly made false statements, representations, or promises to others.]
>
> [Name] does not have the burden of proving "good faith." Good faith is a defense because it is inconsistent with the requirement of the offense*(s)* charged, that *(name)* acted *(describe the required mental state)*. As I have told you, it is the government's burden to prove beyond a reasonable doubt each element of the offense, including the mental state element. In deciding whether the government proved that *(name)* acted *(describe the required mental state)* or, instead, whether *(name)* acted in good faith, you should consider all of the evidence presented in the case that may bear on

*(name's)* state of mind. If you find from the evidence that *(name)* acted in good faith, as I have defined it, or if you find for any other reason that the government has not proved beyond a reasonable doubt that *(name)* acted *(describe the required mental state)*, you must find *(name)* not guilty of the offense of *(state the offense)*.

(App. 4:1-2) Counsel contended that the MST permitted trustees to do business with the MST; that the trustees had made a loan to Mr. Avery's business, as the trust provisions permitted; and that he had made misguided business decisions, in which Kane had played a part. Nonetheless, all of his actions were "within the scope of what a trustee is supposed to do[.]" He concluded, "It's a theory of the defense instruction. It directly states what we need the jury to hear to understand how he could make all these bad decisions and be innocent." (App. 3:31-32)

The district court did not agree to give the instruction at that time. Later, during a discussion on the instruction that "an intent to defraud is an intent to deceive or cheat," counsel suggested that this was a "good place" for the good faith instruction. (App. 3:32 ) The district court did not agree to it then, either. It ultimately gave Ninth Circuit Model Criminal Jury Instruction 3.16, which contains no reference to good faith. (App. 5:27)

Mr. Avery challenged the denial of his request for a good-faith instruction on appeal. The United States Court of Appeals for the Ninth Circuit held, in accordance with circuit precedent, that:

> Although Avery claims entitlement to a good-faith instruction, the specific-intent instruction sufficed. *See United States v. Green*, 745 F.2d 1205, 1209 (9th Cir. 1984) (defendant not entitled to separate good faith instruction when an adequate instruction on specific intent is given (citing *United States v. Cusino*, 694 F.2d 185, 188 (9th Cir. 1982))).

(App.1:3).

## V. REASONS FOR GRANTING THE WRIT

### A. Background

In the case the Ninth Circuit cited as support for its ruling, *United States v. Green*, 745 F.2d 1205 (1985), Justice White dissented from this Court's decision to decline a grant of certiorari:

> This case presents the question whether, in a prosecution for mail fraud under 18 U.S.C. § 1341, a defendant who makes out an adequately supported defense of good faith is entitled to a separate jury instruction on that issue when the court gives a sufficient instruction on specific intent. Here, the United States Court of Appeals for the Ninth Circuit held that if

> a specific intent instruction adequately covers the issue of good faith, that is sufficient to present the defense to the jury, and the defendant is not entitled to a separate good-faith instruction. 745 F. 2d 1205 (1984). Three other Courts of Appeals have reached the same conclusion. *United States v. Gambler*, 213 U.S.App. D.C. 278, 281, 662 F. 2d 834, 837 (1981); *United States v. Bronston*, 658 F. 2d 920, 930 (CA2 1981), cert. denied, 456 U.S. 915 (1982); *United States v. Sherer*, 653 F. 2d 334, 337-338 (CA8), cert. denied, 454 U.S. 1034 (1981). Both the Fifth Circuit in *United States v. Fowler*, 735 F. 2d 823, 828 (1984), and the Tenth Circuit in *United States v. Hopkins*, 744 F. 2d 716, 718 (1984) (en banc), however, have reached the opposite conclusion. Both of these courts have held that when the defendant presents evidentiary support for his good-faith defense, the trial court must give a separate instruction to the jury on this issue. See also *United States v. McGuire*, 744 F. 2d 1197, 1201 (CA6 1984). Given this square conflict among the Courts of Appeals, I would grant certiorari in this case.

*Green v. United States*, 474 U.S. 925 (1985).

The panel here, and the Ninth Circuit decision in *Green* itself, cited *United States v. Cusino*, 694 F.2d 185, 187 (9th Cir. 1982). *Cusino* reasoned that "good faith is the obverse of intent to defraud,… the district court's instruction that the

jury had to find that Cusino acted with a specific intent to defraud can be deemed an instruction on good faith." Over thirty years later, a conflict between the circuits remains in a different form, even though the circuits have moved toward a consensus that is roughly represented by the Ninth Circuit's holding in *Green*. *See United States v. Dockray*, 943 F.2d 152, 154-156 (1st Cir. 1991) (taking the view that "[a]lthough good faith is an absolute defense to a charge of mail or wire fraud, the court need only convey the substance of the theory to the jury," recognizing it as "the majority position," and observing that the "discernible trend on this issue…seems to be moving against" the idea of a stand-alone good-faith instruction); *United States v. Bowling*, 619 F.3d 1175, 1183-1184 (10th Cir. 2010) (noting the Tenth Circuit's decision to "join[ ] the majority of courts that hold a separate good faith instruction is no longer necessary where a district court properly instructs the jury on the element of intent[.]").

The issue this case presents is the problem that has arisen while the circuits came to the majority view. As the law has developed, the courts of appeals, to widely varying degrees, have – where good faith is concerned – effectively bypassed the usual rule that a defendant is entitled to have the court instruct on his theory of defense as long as it is supported by law and has foundation in the evidence. *See United States v. Sarno*, 73 F.3d 1470, 1487 (9th Cir. 1995); *United States v. Willson*, 708 F.3d 47, 54 (1st Cir. 2013) (citation

omitted); *United States v. Doyle*, 130 F.3d 523, 540 (2d Cir. 1997); *United States v. McGuire*, 744 F.2d 1197, 1201 (6th Cir. 1984); *United States v. Mutuc*, 349 F.3d 930, 935 (7th Cir. 2003); *Bowling*, *supra*, 619 F.3d at 1183-1184. Because the consensus is that no separate theory-of-the-defense instruction is required, yet there is no uniformity on what language is sufficient to render a specific-intent instruction "adequate" on the issue of good faith, clarification is urgently needed.

The courts of appeals currently give troublingly short shrift to the task of incorporating a good-faith theory of defense into the instruction on the element of specific intent. The resulting jurisprudence on such instructions is a hodgepodge. A criminal defendant bears no burden to establish good faith; it is not an affirmative defense; the government bears the burden of establishing a specific intent to defraud beyond a reasonable doubt. Yet the specific-intent instruction given in Mr. Avery's case was the sparsest of the sparse, giving the jury no clue that his good faith could or should enter into their deliberations, and failing utterly to propound his defense, to his prejudice. Certiorari is needed to clarify how lower courts must incorporate the concept of good faith into their elements instructions consistent with due process.

### B. The sparse specific-intent language used the Ninth Circuit, violates defendants' fair trial rights by failing to adequately and consistently instruct juries on the consideration they must give to a good-faith defense.

The Ninth Circuit's jurisprudence on the good-faith defense, by comparison to that of other circuits, is distinctly lacking in guidance on how a district court must instruct a jury on a good-faith defense. To begin with, the Third, Sixth, Eighth, and Eleventh Circuits still retain stand-alone instructions on the topic. *See* Third Circuit Model Jury Instructions, *available at* https://www.ca3.uscourts.gov/model-criminal-jury-table-contents-and-instructions, Ch.5, No. 5.07, at 30-34 (last visited December 19, 2018); Sixth Circuit Pattern Jury Instructions, Ch. 10, No. 10.04, at 31-32 (last visited December 19, 2018); Eighth Circuit Model Jury Instructions, No. 9.08A - Good Faith, http://juryinstructions.ca8.uscourts.gov/criminal_instructions.htm (last visited Dec. 19, 2018); Eleventh Circuit Pattern Jury Instructions, Criminal Cases, No. S17, at 93 http://www.ca11.uscourts.gov/pattern-jury-instructions (last visited December 19, 2018). The Third Circuit has approved language incorporating the three critical elements Mr. Avery sought from its form instruction, explaining that (1) good faith is a complete defense on the element of specific intent, (2) the defendant does not bear the burden of establishing it, and that, instead, (3) the government must establish specific intent. *United States v.*

*Jimenez*, 513 F.3d 62, 75 (3d Cir. 2008). The Sixth, Eighth, and Eleventh Circuits have approved specific intent instructions that lacked the words "good faith," but in each case those courts found the language sufficient in context: the district courts incorporated language that essentially reminded the jury, in each case, that it would have to eliminate good faith to convict. *See United States v. McGuire*, 744 F.2d 1197, 1200-1201 (6th Cir. 1984), n. 2 (in a false bank-entry prosecution, the jury was told specific intent meant the defendants had to make the entries "purposely intending to violate the law," and was reminded that "[t]he defendants, however, presented evidence that they believed that they had a right to act as they did, and that they acted in the belief that they were within their legal rights…"); *United States v. Brown*, 478 F.3d 926, 927-928 (8th Cir. 2007) (in a wire fraud prosecution involving the submission of fraudulent mortgage applications, the specific intent instruction made clear to the jury it had to find the defendants either" knowingly adopted the fabricated material or prepared it themselves."); *United States v. Walker*, 26 F.3d 108, 110 (11th Cir. 1994) ("the district court gave the jury a detailed explanation of what 'intent' means in the context of the charges against defendants.").

The Second Circuit has no model instruction, but has deemed sufficient very similar language to that the of the Third Circuit as part of the instruction on

specific intent:

> Since an essential element of the crime charged is intent to defraud, it follows that good faith on the part of a defendant is a complete defense to a charge of fraud. A defendant has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt.

*United States v. Alkins*, 925 F.2d 541, 550 (2d Cir. 1991); *United States v. Dupre*, 462 F.3d 131, 139 (2d Cir. 2006). By contrast, in Mr. Avery's case, the instruction given about specific intent was spare:

> An intent to defraud is an intent to deceive or cheat.

(App. 5:27) Separate instructions told the jury Mr. Avery had to act "knowingly," and explained:

> An act is done knowingly if the Defendant is aware of the act and does not act or fail to act through ignorance, mistake, or accident. The government is not required to prove that the Defendant knew that his acts or omissions were unlawful. You may consider evidence of the Defendant's words,

acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.[1]

(App. 5:21, 30)

The Ninth Circuit's commentary to the specific-intent instruction explicitly cites two cases in which the Ninth Circuit approved this one-sentence instruction. In the first, *United States v. Shipsey*, 363 F.3d 962, 967-968 (9th Cir. 2004), language is quoted indicating that such an instruction would mean "no good faith instruction was necessary at all. In the second, *United States v. Crandall*, 525 F.3d 907, 911-912 (9th Cir. 2008), the Commentary noted that the Ninth Circuit did not equate specific intent with language regarding "consciousness of wrongdoing" drawn from this Court's decision in *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704-705 (2005). *See* Manual of Model Criminal Jury Instructions for the Ninth Circuit, No. 5.12,[2] Commentary, http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_2018_9-2.pdf, at 96 (last visited December 19, 2018).

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[1] The "knowingly" instruction the jury received in Mr. Avery's case contrasts sharply with the specific intent instruction in *McGuire*, *supra*, 744 F.2d at 1201, which told the jury specific intent encompassed "purposely intending to violate the law." *See also United States v. Gray*, 751 F.3d 733, 736 (5th Cir. 1985),

[2] At the time of Mr. Avery's trial, this instruction was numbered 3.16.

However, the commentary no more than nods to the availability of a good-faith instruction, citing the following instruction from *United States v. Molinaro*, 11 F.3d 853, 863 (9th Cir.1993), a bank fraud case: that the jury could consider a defendant's "honest, good faith belief in the truth of the specific misrepresentations alleged in the indictment in determining whether or not the defendant acted with intent to defraud," but that any intent to repay, or to cause no loss, was not a defense. *See* Manual of Model Criminal Jury Instructions for the Ninth Circuit, No. 5.12,[3] Commentary, http://www3.ce9. uscourts.gov/jury-instructions/sites/default/files/WPD/ Criminal_Instructions_2018_9-2.pdf, at 96 (last visited December 19, 2018). The commentary does nothing to clarify when such language might be necessary, and its language fails to make clear – as does the Third Circuit instruction Mr. Avery sought – that a defendant would not, in any case, bear a burden of establishing good faith. *Id*.

In short, the Ninth Circuit's precedents requiring proof of knowledge, but not knowledge of *unlawfulness*, and an intent to do an act, but not an intent to break the law, effectively preclude a defendant from arguing good faith to the jury. Its jurisprudence on the good-faith defense is out of step with that of other circuits.

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[3] At the time of Mr. Avery's trial, this instruction was numbered 3.16.

### C. This case is an appropriate vehicle for a grant of certiorari.

This Court reviews error in a jury instruction defining an element of an offense for harmless error under Fed. R. Crim.. Proc. 52(a). *United States v. Neder*, 527 U.S. 1, 9-10 (1999), *citing, inter alia, Pope* v. *Illinois*, 481 U.S. 497, 95 L. Ed. 2d 439, 107 S. Ct. 1918 (1987) (harmless error standard applied where, in obscenity case, trial court instructed jury to evaluate the material in question under a community, rather than a reasonable-person, standard). Mr. Avery's case is particularly suitable for a grant of certiorari because he presents a clear example of how the divergence between the Ninth Circuit and others has harmed him. He has never denied knowledge of the charged transactions; he only denies that he lacked the specific intent to wrongfully obtain money from the MST. He first suffered the singular experience of being prosecuted for depriving the MST of his honest services, based on a failure of his fiduciary duty – *not* a specific intent to cheat the trust for his own undeserved benefit. In defending his prosecution at this trial, he asserted a good-faith belief that his acts in managing and spending the margin loan funds – including his non-disclosures to the other trustees – were permitted under the terms of a trust, as well as ingrained trustee practices, that sanctioned his self-dealing. In cases like his, in which a defendant asserts that his knowing and voluntary conduct in obtaining the money or

property of another was permissible under the terms of their relationship, his defense is that he did not "purposely intend to violate the law." The Ninth Circuit's formulation fails to make this distinction, and in so doing violated Mr. Avery's right to a fair trial.

Here, the standard for the giving of the instruction was not high – Mr. Avery had only to "show that there [was] evidence upon which the jury could rationally find" for him. *United States v. Thomas*, 612 F.3d 1107, 1121 (9th Cir. 2010). There was. The most important was that the trust instrument, in black and white, permitted trustees to conduct business with the MST, the trustees were empowered to make investments in, and render payments to, trustee businesses. Indeed, the mixed verdicts show that the jury was attuned to the issue of whether he may have been acting in good faith. It hung on three of the money laundering counts said to be transactions using proceeds of fraud: loan proceeds going toward payments of Mr. Avery's own debts and a car Kane used to drive to work, and the purchase of a company-owned motor home in which one of Mr. Avery's employees lived to be closer to his work site.

The jury's first note after it started deliberations asked the district court for additional information on "legal plans" and "escrow agreements." This suggests that they wondered how they should evaluate Mr. Avery's belief that the margin loan, and his company's use of it, complied with the terms of the MST

trust instrument. As it was, even without the help that good-faith language would have provided on these issues, the jury hung on Count 1, the earliest-dated wire fraud counts, a transaction that took place closest in time to when any scheme would presumably have been formed. The failure to reach verdicts on money laundering allegations involving Mr. Avery's payment of personal debts, Counts 6 and 7, and Count 8, involving one of the motor homes, reflected a similar struggle on whether those transactions involved fraud proceeds or a permissible use of loan money under the trust. That the jury equated such a use with innocence, based on a lack of fraudulent intent, is reflected in its outright acquittal of Mr. Avery on Count 4, a wire transaction that was followed promptly by purchase of a plane, and payment of repair bills – all in line with the project's purposes.

A good faith instruction would, similarly, have directed the jury to evidence supporting Mr. Avery's honest belief in the propriety of other transactions that would otherwise have seemed extravagant -- the Kane home, the water vessels, and the vintage planes. Security Aviation, his replacement for Gilliland's company, was a well-established air charter business in Anchorage. Former employees generally testified to their efforts to build on this by improving Security Aviation's medical-evacuation capability, and also about a contemplated military pilot training program. In the process, they corroborated

Mr. Avery about the plan for use of the water vessels – that air charter service "VIP" customers would be able to use them, with one available for pleasure cruising and the other, called a Moose Boat, for their security. The Moose Boat's seller verified its usefulness for any of these purposes, noting Mr. Avery ordered gun mounts for it, consistent with its intended use for the protection of high-end air-charter customers. (App. 3:33)

Similarly, the witnesses with whom Mr. Avery dealt to buy the company-owned vintage planes, purchases that were much derided by the government, also supported their business purpose. He did not fly himself; he expressly told one dealer that the plane he was buying was "an advertising thing" for customers. (App. 3:33-34 ) Mr. Avery had it modified in way supporting this purpose -- adding a second seat and a set of partial controls so the pilot, while maintaining control, could let a customer have the feeling of flying the plane. He also wanted this done to the second plane, but that was unfeasible. He did get a paint job on it to make it look "as it would have…in Korea or World War II." Restored planes of this kind tended to increase in value. (App. 3:33-34 )

Evidence about trustee recordkeeping practices also supported that Mr. Avery's conduct adequately disclosed important operations to the other trustees. There was no evidence of any routine pattern of trustee accounting to the trust, or to each other, for billings on services rendered by businesses they operated. The

changeover from Gilliland to Security Aviation was not recorded until after it occurred, but the trustees often discussed business between meetings, and their minutes did not always reflect this. Finally, as to Security Aviation's ongoing operations, Mr. Avery's testimony that nothing was hidden was corroborated by his interactions with Collins, during a vacation trip to Alaska. Collins visited Security Aviation, saw one of the vintage planes, and his photo album from the trip included a picture of an L-39 jet, an Eastern European military plane bought to develop the pilot training program.

The government, for its part, offered no affirmatively false, or even misleading, statements from Mr. Avery to the other trustees. The other trustees were fully aware that Mr. Avery was receiving wired payments from the margin loan account. Given that the government prosecuted Mr. Avery based on its claim of a pattern of non-disclosure amounting to intentional omission, the lack of a good-faith instruction – either on its own, or as an adjunct to the specific intent instruction – was not harmless error.

As these circumstances suggest, the district court's denial of *any* instruction capturing the essence of Mr. Avery's good faith in the context of determining whether he lacked specific intent would be reversible under the harmless-error standard. the lack of *any* reference to Mr. Avery's good faith

mattered. This case offers an unusually appropriate vehicle for clarifying the standard for the giving of a good-faith instruction.

## VI. CONCLUSION

For the above reasons, Mr. Avery respectfully asks that this Court grant certiorari on the question presented.

Respectfully submitted,

Dated: December __, 2018

_____
MYRA SUN
Attorney for Petitioner

No._____

IN THE SUPREME COURT OF THE UNITED STATES

**MARK AVERY, PETITIONER,**

vs.

UNITED STATES, RESPONDENT.

**CERTIFICATE OF SERVICE**

I, Myra Sun, hereby certify that on this ___ day of December , 2018, a copy of the Petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5616, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Dated: December 26 2018

/S/ Myra Sun

MYRA SUN
Attorney for Petitioner

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# A P P E N D I X 4

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