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VIII. CRIMINAL LAW

Mail Fraud

In *United States v. Mandel*,¹ the Fourth Circuit considered whether the federal mail fraud statute may be used to prosecute political bribery and corruption in the absence of any state or federal laws governing disclosure of a public official's interest.² The Fourth Circuit heard the *Mandel* case twice.³ In *Mandel I*⁴ a Fourth Circuit panel court decided that the mail fraud statute was a proper prosecutorial vehicle for convicting the defendants of a scheme to defraud the people of Maryland of their right to conscientious and honest government.⁵ The court determined, however, that remand and reversal of *Mandel I* were necessary because of trial court error in refusing to give certain jury instructions.⁶ In *Mandel II*,⁷ the Fourth Circuit *en banc* affirmed the

¹ 602 F.2d 653 (4th Cir. 1979) (en banc); 591 F.2d 1347 (4th Cir. 1979).

² 602 F.2d at 653; 591 F.2d at 1357; see 18 U.S.C. § 1341 (1976). The defendants were also charged with violating the Organized Crime Control Act of 1970, see 591 F.2d at 1352. See also S. REP. NO. 30, 91st Cong., 2d Sess. 922, reprinted in [1970] U.S. CODE CONG. & AD. NEWS 1073, 1073. The Act prohibits the use of funds obtained from a pattern of racketeering activity such as political bribery for the purpose of acquiring an interest in any enterprise affecting interstate commerce. 18 U.S.C. § 1962(a) (1977). The district court determined that an alleged gift of stock to Mandel by Mandel's co-defendant did not constitute an acquisition of control sufficient for the purposes of the racketeering act. *United States v. Mandel*, 415 F. Supp. 997, 1020-22 (D. Md. 1976). The Fourth Circuit affirmed the racketeering acquittals. See 602 F.2d at 653; 591 F.2d at 1374-76. The *Mandel* panel decision also determined that the district court did not commit error in denying one defendant's severance motion because the defendant failed to make the requisite strong showing of prejudice. 591 F.2d at 1371.

³ 602 F.2d 653 (4th Cir. 1979); 591 F.2d 1347 (4th Cir. 1979). The Fourth Circuit sitting *en banc* considered only those defense claims discussed in the first hearing of the *Mandel* case by the Fourth Circuit panel court. 602 F.2d at 657 (Widener, J., dissenting). The panel court omitted discussion of many appellants' claims because the case was reversed and remanded for trial error. See 602 F.2d at 657 (Widener, J., dissenting); 591 F.2d at 1357.

⁴ 591 F.2d 1347 (4th Cir. 1979).

⁵ See *id.* at 1361, 1364.

⁶ *Id.* at 1357, 1365-66. The *Mandel I* court also considered whether certain prosecutorial evidence was erroneously admitted at trial. *Id.* at 1367. The evidence, obtained from Maryland state senators' testimony, concerned the question whether Mandel had influenced the Maryland legislature's disposition of certain horse-racing bills. See 591 F.2d at 1367. The evidence included statements of persons other than Mandel or his agents, and was admissible, if at all, only under the general residuary exception to the hearsay rule, Rule 803(24), Federal Rules of Evidence. The *Mandel I* court determined that the trial court erred in admitting the senators' testimony under Rule 803(24) because the statements were the product of senatorial rumor and exaggeration. 591 F.2d at 1367, 1369. The rule against hearsay was formulated to exclude clear examples of untrustworthy statements from factual determinations. *Id.* The Fourth Circuit held that the senators' testimony concerning Mandel's alleged promotion of the two horse-racing bills was hearsay and therefore improperly admitted by the trial court into evidence. *Id.*

⁷ 602 F.2d 653 (4th Cir. 1979).

defendants' convictions without discussion.⁸

Both *Mandel I* and *II* involved the former governor of Maryland, Marvin Mandel.⁹ Governor Mandel was found guilty of violating the mail fraud statute by using the mails in furtherance of a scheme to defraud.¹⁰ The purpose of the alleged scheme was to use Mandel's influence as governor to obtain legislation which would increase the number of racing days for the benefit of a horse-racing track owned by Mandel's co-defendants.¹¹ The defendant-trackowners allegedly provided Mandel with financial and material benefits in return for Mandel's promotion of two

⁸ *Id.* at 653.

⁹ *See* 602 F.2d at 653; 591 F.2d at 1352.

¹⁰ 591 F.2d at 1352. The federal mail fraud statute, 18 U.S.C. § 1341 (1976), provides in part:

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 . . . for the purpose of executing such scheme . . . or attempting so to do, places in any post office . . . 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 any such matter or thing . . . shall be fined . . . or imprisoned . . . or both.

The fraud element of § 1341 is not limited to common-law fraud which requires a false or fraudulent representation as to some past or present event. *See, e.g.,* *Badders v. United States*, 240 U.S. 391, 393 (1916); *Durland v. United States*, 161 U.S. 306, 313-14 (1896); *United States v. Brewer*, 528 F.2d 492, 496 (4th Cir. 1975). Fraud for the purposes of § 1341 is defined as statements made with knowledge of their falsity and their likelihood to deceive or mislead persons of ordinary prudence. *See United States v. Mandel*, 415 F. Supp. 997, 1006 (D. Md. 1976). *See generally* Comment, *Survey of the Law of Mail Fraud*, 1975 U. ILL. L. F. 237, 238 [hereinafter cited as *Survey*].

The defendant's actual use of the mails is not required by § 1341 if the defendant has caused the mails to be used in furtherance of a fraudulent scheme. *See Pereira v. United States*, 347 U.S. 1, 8-9 (1954); *United States v. Perkal*, 530 F.2d 604, 606 (4th Cir.), *cert. denied*, 429 U.S. 821 (1976). The mailing must be made in furtherance of the scheme to defraud. *United States v. Maze*, 414 U.S. 395, 402, 405 (1974). Mailings which are tangential to the fraudulent scheme, or which occur merely as a by-product of the scheme, do not violate the mail fraud statute. *See Parr v. United States*, 363 U.S. 370, 391 (1960); *United States v. Nance*, 502 F.2d 615, 618-19 (8th Cir. 1974).

¹¹ 591 F.2d at 1353. The original owners of the Marlboro racetrack had attempted to obtain additional racing-day authorization from the Maryland legislature. *Id.* at 1354. The number of racing days permitted at each track is a valuable consideration for racetrack owners in terms of both daily revenue and possible racing fees. Brief for Appellants at 23. Permanent transfer of racing days from one licensed track to another requires approval of the Maryland General Assembly. MD. ANN. CODE. art 78B §§ 7(a-c) (repl. 1975). Governor Mandel vetoed the proposed house bill authorizing an increase of racing days at the Marlboro track. 591 F.2d at 1354. A few months after Mandel's veto of the bill, Mandel's co-defendants purchased the Marlboro track. *Id.* The figure-head president and purported owner of the track successfully petitioned the Maryland House of Delegates to override Mandel's veto and to transfer the increased number of racing days to the Marlboro track. *Id.* Mandel also lobbied unsuccessfully in favor of another house bill which would have increased the statutorily restricted number of racing days for all racetracks, and doubled the permitted racing days at Marlboro. *Id.* at 1355.

horse-racing bills favorable to the defendant-owners' track.¹² Neither Mandel nor his co-defendants disclosed the financial benefits to Mandel or the co-defendants' ownership of the track.¹³ Mandel claimed that application of the mail fraud statute to his acts was an improper extension of the statute's scope because the defendants' failure to reveal Mandel's benefits did not violate existing state or federal law.¹⁴

The *Mandel I* court was concerned that the use of the federal mail fraud statute to prosecute bribery of state officials was an overextension of the statute's scope.¹⁵ The court concluded that the lack of any state law regarding political bribery did not determine the propriety of applying the mail fraud statute to Mandel's actions.¹⁶ The court based its conclusion on an inquiry into the purpose of the mail fraud statute.¹⁷ In concert with other circuits and the Fourth Circuit's own precedent, the *Mandel I* court stated that Congress enacted the mail fraud statute not to monitor the substance of a fraudulent scheme but rather to prevent use of the federal mails in furtherance of a scheme to defraud.¹⁸ The *Mandel*

¹² 591 F.2d at 1356. The alleged material benefits to Mandel consisted of stock in two companies and various "gifts" of clothing and jewelry. *Id.* Mandel alleged that the stock in one company was payment for legal services rendered to one of Mandel's co-defendants. *Id.* Mandel paid one dollar per share for the stock in the second company, which was listed improperly as belonging to another of Mandel's co-defendants. *Id.*

¹³ 591 F.2d at 1356, 1357.

¹⁴ *Id.* at 1357. At the time the indictments of Mandel and his co-defendants were issued, owners of stock in Maryland horseracing tracks were not required to identify themselves if they were beneficial rather than outright owners. Brief for Appellants at 46-47; see MD. ANN. CODE art 78B § 13(c) (repl. 1975). Maryland statutes did not require disclosure of a public official's interest in any matter under that official's consideration. See *United States v. Mandel*, 591 F.2d 1347, 1354 (4th Cir. 1979); *United States v. Mandel*, 415 F. Supp. 997, 1009 (D. Md. 1976); Brief for Appellants at 46-47. *But see* MD. ANN. CODE art 40A §§ 3-101 to 3-108 (Cum. Supp. 1979) (new regulations requiring disclosure).

¹⁵ 591 F.2d at 1357-58.

¹⁶ *Id.* The necessary elements of mail fraud are a use of the mails and a scheme to defraud. 18 U.S.C. § 1341 (1976); see note 10 *supra*. Violation of any law, therefore, is not necessary for a mail fraud indictment. See *Badders v. United States*, 240 U.S. 391, 393 (1916).

¹⁷ See 591 F.2d at 1358, 1360. The court in *Mandel I* inquired into the purpose of the mail fraud statute to avoid expansion of the statute beyond congressionally intended limits by strictly construing the terms of the statute. See *id.* at 1357. Other circuits have inquired into the purpose of the statute to determine whether a mail fraud indictment is sufficient and whether there is any infringement of the constitutional protection against unwarranted extensions of federal law under the tenth amendment to the United States Constitution. See, e.g., *United States v. Feinberg*, 535 F.2d 1004, 1005-06, 1010 (7th Cir.), *cert. denied*, 429 U.S. 929 (1976) (defendant convicted for mail fraud in supplying improper real estate tax information); *United States v. States*, 488 F.2d 761, 767 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974) (mail fraud involving improper election procedures). Inquiry into the statute's purpose is also proper in determining the meaning of the statutory phrase "scheme to defraud". See *Durland v. United States*, 161 U.S. 306, 314 (1896).

¹⁸ 591 F.2d at 1358; see *Parr v. United States*, 363 U.S. 370, 389 (1960); *United States v. Brewer*, 528 F.2d 492, 498 (4th Cir. 1975) (purpose of § 1341 to prevent misuse of mail as

I court emphasized that the proper inquiry in determining the applicability of the mail fraud statute to any fraudulent scheme furthered by a use of the mail is whether the scheme satisfies the statute's fraud elements.¹⁹ The object of an actionable fraudulent scheme need not be monetary gain, but may be to deprive individuals of intangible rights.²⁰ The Fourth Circuit determined that any infringement of the right of citizens to the unbiased judgment of a public official could be an object of a fraudulent scheme within the scope of the mail fraud statute.²¹ When a public official undermines his impartiality by accepting a bribe, that official defrauds the public of its right to his disinterested service.²² The *Mandel I* court concluded that bribery of a public official is fraud sufficient for the purposes of the mail fraud statute.²³

Impartiality is not the only duty which a public official owes to the electorate.²⁴ A public official must act in matters of public concern in

criminal tool); *United States v. States*, 488 F.2d 761, 767 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974) (§ 1341 created to prevent illegal use of mails).

¹⁹ 591 F.2d at 1362. Congress has never defined the elements of a scheme to defraud for the purposes of the mail fraud statute. *See United States v. McNeive*, 536 F.2d 1245, 1248 (8th Cir. 1976). Courts have broadly construed "scheme to defraud" to include schemes involving deceptions contrary to public policy. *See Parr v. United States*, 363 U.S. 370, 389 (1960). Other courts have used a more general fraud standard including violations of honesty and fair play as part of "scheme to defraud". *See United States v. Keane*, 522 F.2d 534, 545 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976); *Blachly v. United States*, 380 F.2d 665, 671 (5th Cir. 1967).

Fraud sufficient for a mail fraud indictment may consist of outright intentional deceptions. *United States v. New South Farm & Home Co.*, 241 U.S. 64, 71 (1916). Fraud may also be found in instances of knowing and deliberate concealments of material facts. *See Durland v. United States*, 161 U.S. 306, 313 (1896); *United States v. Mandel*, 415 F. Supp. 997, 1006-07 (D. Md. 1976). *See also Ogren, The Ineffectiveness of the Criminal Sanction in Fraud and Corruption Cases: Losing the Battle Against White Collar Crime*, 11 AM. CRIM. L. REV. 959, 960 (1973).

²⁰ 591 F.2d at 1361. The language of § 1341 indicates three possible objects of a fraudulent scheme: a mere defrauding, obtaining money, or receiving property. 18 U.S.C. § 1341 (1976). *See also Survey*, note 10 *supra* at 245-46; *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941) (*overruled on other grounds*, *United States v. Cruz*, 478 F.2d 408, 412 n. 8 (5th Cir.), *cert. denied*, 414 U.S. 910 (1973); *United States v. Mandel*, 415 F. Supp. 997, 1007-08 (D. Md. 1976).

²¹ 591 F.2d at 1362, 1363.

²² *See id.* at 1363. Bribery of a public official involves the fraudulent exercise of influence over his judgment in his official actions. *See United States v. Brown*, 540 F.2d 364, 374 (8th Cir. 1976). Even in the absence of a state prohibition against bribery of public officials, courts will infer that bribery is a proper element of mail fraud in situations involving a breach of duty of loyalty or disinterested service. *Survey*, note 10 *supra*, at 245; *see, e.g. Perrin v. United States*, 100 S.Ct. 311, 313 (1979) (Travel Act "bribery" includes bribery of private persons to disseminate private corporations' business records); *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941) (*overruled on other grounds*, *United States v. Cruz*, 478 F.2d 408, 412 n. 8 (5th Cir.), *cert. denied*, 414 U.S. 910 (1973) (government official has most sacred duty of any type of trustee).

²³ 591 F.2d at 1362.

²⁴ *See id.* at 1363.

compliance with an official's duties of honesty and loyalty.²⁵ An elected official stands as a fiduciary trustee for the citizens' interests, and must therefore reveal any personal interest or concern which might divide that official's sense of loyalty between public and private concerns.²⁶ An elected official may also have a duty to disclose personal interests to the legislature, especially when that official possesses political influence in matters under legislative consideration.²⁷ The *Mandel I* court emphasized that a breach of a public official's duty to reveal or disclose any personal interests must be coupled with a fraudulent act to come within the ambit of the mail fraud statute.²⁸ In order to constitute actionable fraud, an official's deliberate omission or misstatement of information about his personal interests must be accompanied by evidence of that official's knowledge of the information.²⁹ The panel court held in *Mandel I* that Mandel's failure to inform the Maryland legislature of his personal interest in obtaining enactment of two horse-racing bills was a breach of Mandel's fiduciary duty of honesty and loyalty to Maryland citizens.³⁰ Breach of Mandel's duty constituted fraud under the mail fraud statute.³¹

Since the mail fraud indictments could have been submitted on alternate theories of bribery, non-disclosure, or both, the panel court determined that the defendants' challenge to the jury instructions merited close consideration.³² The Fourth Circuit stated that the trial

²⁵ *Id.* Officials' duties of honesty arise because of the relationship between that official and the public. See *United States v. Brown*, 540 F.2d 364, 374 (8th Cir. 1976); *United States v. Bush*, 522 F.2d 641, 652 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976).

²⁶ 591 F.2d at 1363. The Governor of the State of Maryland is a trustee for the citizens and the state. MD. CONST. CODE ANN. art. 6 (1977). The failure of a governmental trustee to disclose a personal interest in decisions affecting the state violates the public's right to honest and disinterested government. See *Shushan v. United States*, 117 F.2d 110, 114-15 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941) (*overruled on other grounds*, *United States v. Cruz*, 478 F.2d 408, 412 n. 8 (5th Cir.), *cert. denied*, 414 U.S. 910 (1973)).

²⁷ 591 F.2d at 1363-64.

²⁸ *Id.* at 1363.

²⁹ *Id.*; see note 10 *supra*. An omission is classified as a fraudulent act under the statute. See *Durland v. United States*, 161 U.S. 306, 313 (1896). The court must find that an official's breach of fiduciary duties by omitting information is accompanied by fraudulent intent. See *United States v. Keane*, 522 F.2d 534, 544 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976); *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958); *United States v. Mandel*, 415 F. Supp. 997, 1007-08 (D. Md. 1976).

³⁰ 591 F.2d at 1363. Fraud is a specific intent crime which requires evidence that the defrauder consciously and with full knowledge of the fraud deliberately misrepresented or did not disclose material information. *Id.* at 1363 n. 11; *United States v. Mandel*, 415 F. Supp. 997, 1007-08 (D. Md. 1976). Mandel therefore had to have knowledge of the true identities of the race-track owners in order to be able to conceal that information from the legislature in an intentionally deceptive manner. 591 F.2d at 1365.

³¹ 591 F.2d at 1364; see *Survey*, note 10 *supra*, at 241-42. See also note 30 *supra*.

³² See 591 F.2d at 1364. An appellate court will reverse a case because of trial error concerning jury instructions when the instructions are incorrect as a matter of law or are so insufficiently phrased that the jury would necessarily be confused as to the proper elements

court should have instructed the jury on the nature of bribery because bribery was a possible foundation for the fraud element of the mail fraud statute.³³ The *Mandel I* court determined that the absence of any instruction on the law of bribery for the mail fraud charges permitted the jury to convict Mandel for mail fraud without comprehending the essential difference between bribes and goodwill expenditures.³⁴ Bribery requires a finding that an object was given with the specific intent by the giver to receive some benefit in return.³⁵ A goodwill expenditure, on the other hand, is given without any thought of political or other benefit.³⁶ In the absence of any bribery instruction, the panel court reasoned that the jury was incapable of determining the proper basis for one of the two possible theories of mail fraud.³⁷ Thus the trial court's refusal to give a mail fraud bribery instruction was reversible error.³⁸

The Fourth Circuit also found reversible error in the trial court's refusal to give Mandel's proffered jury instruction on the specific need to find that Mandel knew the identities of the racetrack owners.³⁹ The court emphasized that Mandel's knowledge was a prerequisite to any finding that he had concealed information from the legislature of Maryland with requisite fraudulent intent.⁴⁰ The court concluded that the jury may have found Mandel guilty without recognizing that intent to defraud requires knowledge and concealment of material information.⁴¹ A conviction which is not clearly based on findings by the jury of all the necessary elements

of each alleged crime. See *Trusty, The Value of Clear Instructions*, 15 U. KAN. CITY L. REV. 9, 10-11 (1942) [hereinafter cited as *Trusty*].

³³ 591 F.2d at 1364-65. The trial court refused to give a bribery instruction for the mail fraud counts, but fully defined bribery for the racketeering counts. *Id.* at 1379 (Butzner, J., dissenting). A defendant is entitled to jury instructions on any defense theory of law. See C. WRIGHT AND J. MILLER, FEDERAL PRACTICE AND PROCEDURE, CRIMINAL § 485 at 292 n. 53 [hereinafter cited as C. WRIGHT AND J. MILLER]; Bowmer, Jones & Miller, *The Charge in Criminal Cases*, 12 BAYLOR L. REV. 261, 265 (1960).

³⁴ 591 F.2d at 1365.

³⁵ *Id.* at 1365-66. For the proper definition of bribery, the *Mandel I* court relied on a Fourth Circuit decision, *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976). See 591 F.2d at 1365. Under *Arthur*, not every gift presented to a public official constitutes bribery. Instead, a distinction must be made between gifts given out of good will and gifts given with an intent to receive something in return. 544 F.2d at 735.

³⁶ 591 F.2d at 1365. See also *Perrin v. United States*, 100 S. Ct. 311, 314-15 (1979) (history of the law of bribery).

³⁷ 591 F.2d at 1365.

³⁸ See *id.*

³⁹ *Id.* The dissent in *Mandel I* noted that the trial court accepted Mandel's instruction regarding knowledge, but chose to express the instruction in a more colloquial fashion. See *id.* at 1379 (Butzner, J., dissenting). While a defendant has no right to have his particular instruction read to the jury, a court must give correct instructions. Winslow, *The Instruction Ritual*, 13 HASTINGS L. REV. 456, 456, 458 (1962). Although trial judges have discretion in phrasing jury instructions, that discretion does not extend to creating a jury charge which fails to inform the jury of every element of every crime. See Note, 28 ARK. L. REV. 406, 409 (1974); 5A MOORE'S FEDERAL PRACTICE ¶ 51.04 n.5 at 2518, 2521; Supp. at 34-35 (1979).

⁴⁰ 591 F.2d at 1365-66; see text accompanying notes 29-33 *supra*.

⁴¹ 591 F.2d at 1365-66.

must be reversed if the error were the result of improper trial court instructions.⁴² The Fourth Circuit held that reversible error was committed by the trial court when that court failed to give a proper instruction defining the necessity of Mandel's knowledge for mail fraud.⁴³

The dissent in *Mandel I* relied on a careful reading of the jury charges as a whole, concluding that the trial court fully and properly instructed the jury on the elements of bribery and nondisclosure in light of Mandel's knowledge.⁴⁴ The dissent reasoned that no bribery instruction for the purposes of the mail fraud statute was necessary because the trial court later gave an instruction on the law of bribery for the purposes of a different indictment of Mandel's co-defendants.⁴⁵ The dissent emphasized that dual instructions on bribery would needlessly prolong the trial and possibly confuse the jury.⁴⁶ The *Mandel I* dissent's position apparently was based on a belief that the trial court economized trial time and fully informed the jury on the bribery element of the mail fraud indictment by giving the single bribery charge for another indictment.⁴⁷ The dissent's approach, however, failed to recognize the fundamental rule regarding jury instructions which requires a definition of each element of every alleged crime.⁴⁸ The jury instructions were given over a period of days with each instruction pertaining only to the specific crime alleged. This suggests that the trial court possibly separated the definition of bribery from the bribery element required for a mail fraud conviction.⁴⁹ As a result, the jury may have convicted Mandel for mail fraud on the basis of financial benefits which were not clearly distinguished as bribes from mere goodwill benefits.⁵⁰ The trial court's general knowledge instruction was given without reference to any particular element of the alleged crimes at the very end of the instruction period.⁵¹ Thus the jury could

⁴² See *id.* See also C. WRIGHT AND J. MILLER *supra* note 33, § 485 at 292-93 (1969).

⁴³ 591 F.2d at 1365-66.

⁴⁴ 591 F.2d at 1378 (Butzner, J. dissenting).

⁴⁵ *Id.* at 1379 (Butzner, J., dissenting).

⁴⁶ See *id.* at 1377, 1378 (Butzner, J., dissenting).

⁴⁷ *Id.* There is some conflict between the dissenting opinions in *Mandel I* and *II* concerning the basis for the trial court's refusal to give the proffered bribery instructions for the mail fraud counts. 602 F.2d at 655 (Widener, J., dissenting); 591 F.2d at 1379 (Butzner, J., dissenting). According to the *Mandel II* dissent, the government insisted that the trial court omit the bribery instruction because bribery was not an element of the mail fraud indictment under the government's interpretation. 602 F.2d at 654-55. At the time the trial court prepared to instruct the jury in *Mandel*, the Fourth Circuit decided *United States v. Arthur*, 544 F.2d 730 (4th Cir. 1976), which defined the law of bribery in terms of proper jury instructions. Perhaps the government realized that under the *Arthur* instructions the *Mandel* jury might not find that financial benefits to Mandel were clearly bribes as opposed to goodwill benefits. Therefore the government may have decided to remove any consideration of the nature of the alleged bribery from the jury in order to prevent part of the mail fraud indictment from failing.

⁴⁸ See *Trusty*, *supra* note 32 at 11-12. See also note 32 *supra*.

⁴⁹ Brief for Appellants at 39-43.

⁵⁰ See text accompanying notes 33-37 *supra*.

⁵¹ 602 F.2d at 655 (Widener, J., dissenting).

have convicted Mandel for violating the mail fraud statute without finding that he fraudulently intended to conceal material information from the Maryland legislature.⁵² The *Mandel I* dissent's opinion on jury instruction apparently was accepted by half of the *en banc* court in *Mandel II*.⁵³ In *Mandel II* the equal split of the *en banc* court left the controversy surrounding the jury instructions unresolved.⁵⁴

The *Mandel II* court, however, did not divide on the issue of the use of the federal mail fraud statute in bribery prosecutions.⁵⁵ Other circuits have determined that the scope of the fraud element of the mail fraud statute must be broadly construed.⁵⁶ In the absence of congressional mandates to the contrary, courts must examine the elements of the scheme to defraud to determine the propriety of mail fraud prosecutions for fraudulent acts traditionally within the purview of state regulation.⁵⁷ The Supreme Court, in *United States v. Maze*,⁵⁸ noted that any fraud which deprives an individual of an acknowledged possession, whether physical, monetary, or ephemeral, is an actionable fraud when coupled with use of the federal mails in furtherance of the scheme to defraud.⁵⁹ The Fourth Circuit in *Mandel I* and *II* furthered Congress' desire to prevent fraudulent misuse of the mail without expanding the scope of the mail fraud statute.⁶⁰ As the Supreme Court stated, fraud of any type is an offense against public policy, but fraud which involves the use of the mail is an offense against federal law designed to create a system of valid interpersonal communication upon which societal and business interactions depend.⁶¹ While federal law enforcement agents cannot prosecute fraud in areas which are the proper concern of the states under the Constitution, those officials may combat fraud in any area which is under the control of Congress, including the federal mails.⁶²

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⁵² See text accompanying notes 39-42 *supra*.

⁵³ 602 F.2d at 653; *id.* at 657 (Widener, J., dissenting).

⁵⁴ See *id.* at 653; see *United States v. Mandel*, 609 F.2d 1076, 1076 (4th Cir. 1979) (Widener, J., dissenting) (order denying rehearing).

⁵⁵ 602 F.2d at 653; see 591 F.2d at 1357-58.

⁵⁶ See 591 F.2d at 1361 and cases cited therein.

⁵⁷ See note 19 *supra*.

⁵⁸ 414 U.S. 395 (1974).

⁵⁹ *Id.* at 405; see *Pereira v. United States*, 347 U.S. 1, 10-11 (1954); *Durland v. United States*, 161 U.S. 306, 314 (1896).

⁶⁰ See 602 F.2d at 653; 591 F.2d at 1361.

⁶¹ *Parr v. United States*, 363 U.S. 370, 389 (1960); see *Badders v. United States*, 240 U.S. 391, 393 (1916).

⁶² *United States v. Brewer*, 528 F.2d 492, 498 (4th Cir. 1975); *Gouled v. United States* 273 F. 506, 508 (2d Cir.), *aff'd*, 255 U.S. 298 (1921).