

# Supreme Court Ruling Causes Mandel Reversal

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Former Maryland Gov. Marvin Mandel, 10 years after he was convicted of mail fraud and racketeering charges, has been vindicated. Yesterday a federal judge in Baltimore, relying on a recent Supreme Court decision, overturned the convictions of Mandel and five co-defendants.

The ruling, issued by U.S. District Judge Frederic N. Smalkin, has little practical impact on Mandel and his five co-defendants — W. Dale Hess, Harry W. Rodgers III, William A. Rodgers, Irvin Kovens and Ernest N. Corey — all of whom (except Corey) served their prison terms years ago. Hess, both Rodgers brothers and Kovens may be entitled to the return of their respective \$40,000 fines, plus interest. The decision likely will boost Mandel's chances of being readmitted to the Maryland bar.

U.S. Attorney for the District of Maryland Breckinridge Willcox said yesterday he would seek the Justice Department's permission to appeal the decision to the U.S. Court of Appeals for the Fourth Circuit, in Richmond, Va. "I have every reason to believe" that permission will be granted, he said.

## *Narrowing mail fraud*

The Supreme Court's recent decision in *McNally v. United States*, 107 S. Ct. 2875 (1987) narrowed the interpretation of the federal mail fraud and racketeering statutes under which the six were convicted in 1977. As a result, according to yesterday's 33-page opinion, Mandel and the others did not violate the statutes.

Smalkin did point out, however, that "[t]he evidence of . . . Mandel's secret financial arrangements certainly showed that something fishy, and perhaps dishonest, involving

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Maryland's governor and some of those personally and politically closest to him was going on."

On August 23, 1977, Mandel and the others were convicted of mail fraud and of violating the federal Racketeer Influenced and Corrupt Organizations (RICO) Act. Mandel's RICO conviction was based on the mail fraud charge and on more than \$350,000 worth of money and jewelry he admitted accepting from Kovens and the other co-defendants. In return Mandel allegedly influenced legislation that would have benefited a race track which Kovens and the others secretly owned. The defendants consistently denied that the money and jewelry were bribes.

The government said the defendants committed mail fraud by depriving the citizens of Maryland of their right to "the conscientious, loyal, faithful, disinterested and unbiased services, and actions and performance of official duties . . ."

The convictions were overturned by a three-judge panel of the Fourth Circuit on Jan. 11, 1979, allowing Mandel to serve the final two days of his term as governor. But on July 20 that year, in a controversial tie vote, the full appeals court reinstated the convictions. The U.S. Supreme Court later denied the petitioners a writ of certiorari.

## Only property rights

The Supreme Court's *McNally* decision, issued on June 24 this year, excluded from the coverage of the mail fraud statute the kind of conduct for which the Mandel defendants were convicted. "The mail fraud statute clearly protects property rights," wrote Justice Byron White, "but does not refer to the intangible right of the citizenry to good government."

"Mandel might well have been bribed," Smalkin wrote. "His co-defendants might well have bribed him. But, however strong the evidence of dishonesty or bribery, the jury was told it could convict for something that did not amount to a federal crime."

Based on *McNally*, Smalkin continued, "it is indisputably settled that the federal mail fraud statute does not now make criminal, nor has it ever made criminal, the use of the mails in furtherance of schemes or artifices to defraud persons of non-property rights."

Mandel, at a press conference in his attorneys' offices yesterday, said "I feel fully vindicated now." Denying any bitter feelings over the conviction, for which he spent 19 months at the Eglin minimum security prison in Pennsylvania, Mandel said, "I never did anything to hurt the people of Maryland [or to] deprive them of anything."

## Reinstatement to the bar?

He said the ruling "puts some additional strength to our petition" to be reinstated to the bar. The Maryland Court of Appeals disbarred Mandel on Oct. 28, 1982.

"I'm not sure that this opinion is going to change that prognosis very much," Willcox said, referring to Mandel's chance of being readmitted to the bar. "The conduct hasn't changed — the conduct is still reprehensible to the extreme, I submit. And I would hope that's what" he was disbarred for.

But attorney Arnold Weiner, who defended Mandel in the case, said the disbarment was based "solely on the conviction." With the mail fraud conviction overturned, he said, Mandel likely will be readmitted.

## RICO rests on bribery

Mandel's racketeering charge also must be vacated, according to Smalkin, because it was based on a combination of the mail fraud charge and two bribery charges. Because the mail fraud charge is invalidated, the RICO charge "must have been satisfied exclusively and independently by the two alleged violations of the Maryland bribery statute."

But Smalkin said the two bribery charges, even if proved, do not satisfy the "pattern of racketeering activity" requirement of a RICO violation. And even if they did, he continued, the conviction cannot be upheld because it is impossible to tell whether the jury based its RICO conviction on mail fraud or bribery. (According to a 1931 Supreme Court case, *Stromberg v. California*, 283, U.S. 359, where a verdict is supportable on one ground but not on another, and it is impossible to tell which ground the jury selected, the conviction must be overturned.)

Willcox pointed out that "the government took the position 10 years ago that they didn't have to prove the bribes in order to convict" under the mail fraud and RICO statutes. But, he added, "I think that you can read in the record that the government *did* prove a bribery case, whether they intended to or not."

The question of whether the defendants defrauded the citizens of Maryland of tangible property never came up in the jury deliberations. At the trial, Judge Robert L. Taylor (now deceased) told the jury: "A citizen's right to have his Government conducted honestly and impartially . . . are things of value whose fraudulent deprivation may fall within the meaning of scheme to defraud as used in the mail fraud statute."

Taylor declined the defendants' request to include in the jury instructions a narrower definition of mail fraud that required the infliction of "some definable pecuniary, financial, or economic harm . . ."

## 20-20 hindsight

In a footnote to his opinion, Smalkin pointed out that by disavowing the relevance of the bribery charges to the mail fraud statute, the prosecution "put all their mail fraud eggs in the 'good government' basket."

Noting that hindsight is "always 20-20," Willcox said that at the time, deprivation of the right to honest government "was a very viable ground" for a mail fraud conviction.

But Weiner said yesterday that the government specifically avoided the bribery charges. "They begged the judge not to ask [the jury] for a finding of bribery."

"The government ran away from bribery because they couldn't prove it," said Weiner. "I think that [Smalkin's ruling is] a bullet-proof opinion."

Willcox argued that regardless of the Mandel case, the *McNally* opinion is "outrageous. It gets the government out of the business" of pursuing mail fraud perpetrators "absent a bribery charge."

"If we're out of the corruption business, unless we can find some property right or a bribe," then who will pursue those cases, he asked.

Smalkin noted near the end of his opinion, "it must be remembered that this Court's action on these petitions has nothing to do with the petitioners' guilt or innocence, in any moral sense." The jury, he said, found that the defendants had deprived the citizens of Maryland of the right to good government.

"A final answer to the question of petitioners' guilt or innocence, in any broader sense than that, must await the judgment of history."