

# Mandel Decision Will Stand

## *Another Tie Vote Marks Latest Circuit Ruling*

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The U.S. Fourth Circuit Court of Appeals yesterday refused to rehear the government's arguments for reinstating the mail fraud convictions of former Maryland Gov. Marvin Mandel and five other men.

Ironically, the denial of the government's petition came on a 5-5 vote, marking the third time in the 12-year history of the case that the Fourth Circuit has been evenly divided over Mandel's 1977 conviction for taking cash and property in exchange for political favors.

Yesterday's tie vote among all active members of the Fourth Circuit had the effect of leaving intact last year's 2-1 panel decision upholding a 1987 district court ruling vacating the conviction.

U.S. District Judge Frederic Smalkin overturned the conviction in the wake of a U.S. Supreme Court decision that changed the way crimes are interpreted under the federal mail fraud statute.

### Weiner 'gratified'

Mandel's lawyer, Arnold M. Weiner, said he was "gratified" that five judges had decided the *Mandel* case should not be reheard by the entire court.

"Now that the Fourth Circuit has affirmed Judge Smalkin's order, it looks like after more than a decade, the Mandel case now appears to be over," said Weiner, a partner in Baltimore's Melnicove, Kaufman, Weiner & Smouse.

But Maryland U.S. Attorney Breckinridge L. Willcox yesterday said he will contact the U.S. Solicitor General's Office about the possibility of asking the Supreme Court to review the panel decision vacating Mandel's conviction.

"As I've said before, this is the most impor-

tant case this office has ever prosecuted, and we will explore the last possible avenue of appeal on it," Willcox told *The Daily Record*. "The citizens of this state expect that and deserve that."

Willcox added that the focus of any appeal in the *Mandel* case will be on the effect the Fourth Circuit's decision will have on the finality of criminal convictions.

"Marvin Mandel aside, I think the Fourth Circuit opinion is unfortunate because it indicates that criminal convictions are not final at all," the federal prosecutor complained. "They [convictions] can be challenged 10 or 20 years down the road, and the same rules apply as if they were on direct appeal."

### \$350,000 in cash and property

The Mandel case has been bouncing around the federal courts since 1977, when the former governor, now 67, was convicted of racketeering and mail fraud.

Prosecutors claimed Mandel, who was governor from 1968 to 1977, received \$350,000 in cash and property from the owners of a Prince George's County racetrack in return for helping secure more racing days.

Also convicted in the case were Irvin Kovens, a Mandel fund raiser, W. Dale Hess, Harry Rodgers III, William Rodgers and Ernest Cory Sr.

In 1979, a three-judge panel of the Fourth Circuit voted 2-1 to overturn the convictions, ~~along problems with jury instructions in the case.~~

The entire Fourth Circuit voted in July 1979 to reinstate the convictions on a 3-3 vote. Four months later, the entire court, acting on a motion similar to the one it resolved yesterday, refused to rehear the case on a 4-4 vote. The U.S. Supreme Court later declined to review the case.

See *Mandel*, page 5

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# Mandel

(Continued from page 1)

But in November 1987, Smalkin overturned the convictions of the six men, citing the Supreme Court's decision in *McNally v. U.S.*

In *McNally*, the high court held that the conduct of a Kentucky official convicted of mail fraud for defrauding the citizens of Kentucky out of their right to "good government" did not amount to a federal crime.

Based on *McNally*, Smalkin threw out the Mandel defendants' convictions, reasoning that they had been convicted under the same theory as the Kentucky official.

## Sentence commuted

Long before Smalkin acted, former President Ronald Reagan commuted Mandel's sentence. The former governor had served 19 months of a four-year sentence. The other defendants also had completed their jail terms.

The U.S. Justice Department decided to allow an appeal of Smalkin's ruling to the Fourth Circuit, arguing that the defendants'

conduct was still criminal despite the high court's more narrow interpretation of the federal mail fraud statute.

A three-judge panel of the appeals court — including two judges who had previously voted to throw out the convictions — voted 2-1 in December 1988 to uphold Smalkin's decision.

The government then asked the entire Fourth Circuit to review the panel's decision.

But under its procedural rules, the court will not rehear the case due to yesterday's tie vote.

The five circuit judges who voted not to rehear the case were Donald S. Russell and Robert F. Chapman, of South Carolina; H. Emory Widener Jr. and J. Harvie Wilkinson III, of Virginia; and newly-appointed Chief Judge Sam J. Ervin III, of North Carolina.

The judges who voted in favor of rehearing the case were Francis D. Murnaghan Jr., of Maryland; K. K. Hall and James M. Sprouse, of West Virginia; James D. Phillips Jr., of North Carolina; and William W. Wilkins, of South Carolina.

Former Chief Judge Harrison L. Winter did not participate in the case.