

Race track fraud ruling 'vacated' by federal judge

By Karen E. Warmkessel

A federal judge in Baltimore yesterday threw out the mail fraud and racketeering convictions that sent former Gov. Marvin Mandel and several of his closest associates to prison seven years ago in one of Maryland's greatest political scandals.

Acting in light of a recent Supreme Court decision restricting the scope of the mail fraud law under which Mr. Mandel and five of his associates were convicted in 1977, U.S. District Judge Frederic N. Smalkin ordered "vacated" all convictions against the six men involved in the scandal.

"I feel fully vindicated now," said the 67-year-old former Democratic governor, who served 19 months of a 3-year sentence. Federal prosecutors, saying they were "distressed," vowed to appeal the decision to the 4th U.S. Circuit Court of Appeals in Richmond, Va.

Barnet D. Skolnik, the former chief prosecutor who tried the government's case against Mr. Mandel and his co-defendants, said: "This doesn't change — nothing will ever change — what Mr. Mandel did. He sold his office. All the courts are doing now, 10 years later, is deciding whether it should technically still be considered a federal crime when a state governor sells his office.

"It was a federal crime when he did it, it may or may not still be. Either way, he sold out the people of Maryland and that is never going to change."

Judge Smalkin ruled that Mr. Mandel and his co-defendants were convicted of using the mails to defraud citizens of their "intangible right" to good and honest government, which the Supreme Court ruled in June is not a crime under federal law.

Deciding a Kentucky corruption case, *McNally vs. United States*, the Supreme Court held that the 115-year-old mail fraud law applies only to frauds conducted through the mail in which the government or cit-

MANDEL CONVICTION UPSET

Federal judge vacates 1977 judgments against Mandel, 5 others

MANDEL, from 1A

citizens actually lose money or property.

Ruling that the decision applied retroactively in the Mandel case, Judge Smalkin said he had "no choice" but to vacate the convictions of Mr. Mandel and his co-defendants, W. Dale Hess, Harry W. Rodgers III, William A. Rodgers, Irvin Kovens and Ernest N. Cory Sr. He set aside the racketeering charges because he said they flowed from the mail fraud scheme.

Judge Smalkin made it clear that his decision had "nothing to do" with the guilt or innocence of Mr. Mandel and his associates "in any moral sense."

"The people of Maryland, as a matter of natural law, have and have always had an inalienable right to good government," Judge Smalkin wrote in his 33-page opinion. "A jury of 12 citizens found beyond a reasonable doubt that the petitioners had deprived all the citizens of Maryland of that right."

"This conduct, however... cannot sustain a judgment that the defendants were guilty of federal crimes. A final answer to the question of petitioners' guilt or innocence, in any broader sense than that, must await the judgment of history."

Mr. Mandel was convicted of 17 counts of mail fraud and two counts of racketeering for allegedly accepting between \$350,000 and \$400,000 in gifts and bribes from his co-defendants for using his influence to push legislation that helped his associates obtain extra racing days for Marlboro Race Track, a track the friends had bought secretly in 1971. At sentencing, Judge Robert L. Taylor dropped two counts of mail fraud and one racketeering charge against each defendant.

No direct link between the gifts and help on the racing dates was proven.

The former governor and his co-defendants have already served their sentences. But, under Judge Smalkin's ruling, Mr. Kovens, the Rodgers brothers and Mr. Hess will get back \$160,000 in fines they paid to the government.

Mr. Hess, 57, served 18 months of his 3-year sentence, while Mr. Kovens, 68, served six months of his 3-year term, having been released early because of ill health. Harry Rodgers, 60, served 15 months of his 3-year sentence, while William Rodgers, 61, served 8 months of his year-and-a-day sentence. Mr. Cory's 18-month term was suspended, and he was placed on probation.

Arnold M. Weiner, one of Mr. Mandel's lawyers, said he will ask the Maryland Court of Appeals to restore the former governor's right to practice law in the state. Mr. Mandel was disbarred in 1982.

"We're elated," said a beaming Mr. Weiner as he stood in his office, smoking a cigar and accepting congratulatory telephone calls.

Judge Smalkin "correctly held that Marvin Mandel was convicted of conduct which was never a crime. This judgment will go a long way



Marvin Mandel sits with his wife, Jeanne.

toward correcting a longstanding injustice," said the lawyer who once was a federal prosecutor.

But Mr. Weiner, who had made this argument during two trials and through the tortuous legal appeal process, admitted that the victory was bittersweet.

"If only we could get Marvin Mandel his 19 months [in prison] back," he said.

Noting that the Supreme Court had refused to hear the Mandel appeal in 1980, Mr. Weiner complained: "Unfortunately there is a pattern in which the Supreme Court tends to tackle these sorts of difficult issues in obscure cases [like McNally] and to avoid coming to grips with the issues in the highly publicized cases," he said.

Breckinridge L. Wilcox, the U.S. attorney for Maryland, said yesterday: "Obviously we are distressed with Judge Smalkin's decision. I can't say it's totally unexpected, but we disagree with it and intend to appeal."

Mr. Weiner said he was confident Judge Smalkin's decision would stand up on appeal.

"Judge Smalkin's decision is very carefully written and very well reasoned. I expect that if the government would appeal, the 4th Circuit would have no difficulty in affirming him," the lawyer said.

The Supreme Court's McNally ruling in June offered an excellent opportunity for Mr. Mandel and his co-defendants to press ahead in their persistent mission for vindication even though all of them had already served their time in prison. They petitioned the U.S. District Court in August to set aside their convictions.

Defense lawyers argued that the District Court judge erred when he allowed the jury to consider what the defense called an "overextension" of the mail fraud statute. They said the "intangible rights" concept was the "essence" of the government's case, and prosecutors never showed any economic loss to citizens or the government.

The mistake, the lawyers said, "amounts to a complete miscarriage of justice."

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In his decision, however, Judge Smalkin disagreed with the government's view of the case. He said that the jury was instructed under the theory that they could convict the defendants if they became convinced that they had "subverted the process of honest government in Maryland."

He said the evidence "certainly showed that something fishy, and perhaps dishonest, involving Maryland's governor and some of those personally and politically closest to him was going on. Mandel might well have been bribed. 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."

Yesterday's development was the latest in a saga that has gripped Maryland politics since it was first announced that Mr. Mandel was under investigation while he was still governor in 1975. The drama of the case was also fed by Mr. Mandel's highly publicized divorce from his first wife, Barbara, and a love affair with his present wife, who stood by his side throughout the ordeal.

After a first trial which ended in a mistrial, the defendants were convicted in a second trial in 1977.

The convictions were overturned the next year by a three-judge federal appeals court panel, which found that the trial judge had allowed hearsay testimony and had erred in his instructions to the jury.

Mr. Mandel returned in triumph to the State House, announcing, "I am governor." He resumed the office — after a 15-month suspension — just two days before the swearing-in of Harry R. Hughes in January 1979.

In another dramatic twist in Mr. Mandel's criminal case, however, the convictions were reinstated on a controversial 3-3 split decision by the full 4th Circuit Court of Appeals

in July 1979. Mr. Mandel and his associates then asked for another hearing before the appeals court on grounds that a tie vote should not decide the issue.

With two more members added to the panel, the court again split evenly, 4-4, in November 1979.

The Supreme Court refused to hear the case in April 1980, and the defendants — except for Mr. Cory, 73, whose sentence was changed to probation — went to prison.

Mr. Mandel was released from the federal prison camp at Eglin Air Force Base in Florida in 1981. President Reagan commuted his sentence five months early after a well-orchestrated campaign by supporters of Mr. Mandel.

Shortly after his release, Mr. Mandel and his wife set up their own consulting firm in Arnold. More recently, the former governor has worked as a fiscal and planning consultant for Triangle General Contractors in Howard County.

He also has hosted "Morning Magazine," a talk show on WNAV radio in Annapolis.

In the McNally case, the Supreme Court concluded that Congress had always intended the mail fraud law to stop the use of the U.S. mails for crimes that involve someone's property rights and thus that it did not make it a crime to interfere with such "intangible" rights as the right of citizens that government affairs be conducted honestly.

"The mail fraud statute," Justice Byron R. White wrote for the majority, "clearly protects property rights; but does not refer to the intangible right of the citizenry to good government."

The court thus overturned convictions of a former state official in Kentucky, James E. Gray, and a Louisville businessman, Charles McNally, for their roles in an alleged kickback scheme involving state insurance contracts.

Reporter Robert A. Erlanson contributed to this article.

The Mandel case: a chronology

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April 5, 1974: W. Dale Hess and Harry W. Rodgers III, two friends of Mr. Mandel, are formally notified by the U.S. attorney's office that they are under investigation by a federal grand jury.
Sept. 25, 1975: Mr. Mandel says he is the target of the federal probe.

Nov. 24, 1975: The federal grand jury indicts Mr. Mandel, Mr. Hess, Harry Rodgers, William A. Rodgers, Irvin Kovens and Ernest N. Cory Jr. on charges they engaged in a scheme to defraud. The indictment alleges that Mr. Mandel used his power to push legislation that benefited his friends, who gave him hundreds of thousands of dollars in bribes and gifts.

Sept. 8, 1978: After two postponements, a change of judges and the removal of one defendant (Mr. Kovens) because of illness, a trial gets under way in federal court in Baltimore.

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December 1977: The former governor is suspended from practicing law.
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William Rodgers is reduced to one year and a day.

May 19, 1980: Mr. Mandel begins prison term at federal prison facility at Eglin Air Force Base, Fla.

July 2, 1980: After six weeks in prison, Mr. Mandel and two co-defendants go before a U.S. Parole Commission panel at Eglin seeking early release.

July 19, 1980: A federal judge dismisses a civil damage suit against Mr. Mandel brought by three stockholders in the Marlboro Race Track. A simultaneous state suit is held in abeyance.

Oct. 2, 1980: The Parole Commission rules that Mr. Mandel must serve two years of his sentence and that he not be freed before May 14, 1982.

Nov. 19, 1980: Mr. Mandel, Harry Rodgers and Mr. Hess petition full U.S. Parole Commission to review decision denying them early parole.

Nov. 21, 1980: Mr. Kovens is first of co-defendants released from prison, because of poor health.

Dec. 12, 1980: Full U.S. Parole Commission upholds decision by parole panel.

Feb. 27, 1981: Mr. Mandel seeks transfer from Eglin prison to work-release center in Anne Arundel County.

March 5, 1981: U.S. Bureau of Prisons rejects Mr. Mandel's work-release plan.

Aug. 28, 1981: U.S. Magistrate Robert L. Croninger Jr., of Pensacola, Fla., issues writ of habeas corpus freeing Harry Rodgers from federal prison.

Oct. 14, 1981: Mandel lawyers seek presidential commutation, file papers with U.S. Department of Justice.
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Excerpts from Mandel opinion

Following are excerpts from the opinion issued yesterday by U.S. District Judge Frederic N. Smalkin in the case involving former Gov. Marvin Mandel and five co-defendants:

In *McNally v. United States*, the Supreme Court interpreted the federal mail fraud statute as not making punishable schemes to defraud citizens of the intangible right to honest and impartial state government.

Based on *McNally*... 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. In plain

stand up on appeal.

"Judge Smalkin's decision is very carefully written and very well reasoned. I expect that if the government would appeal, the 4th Circuit would have no difficulty in affirming him," the lawyer said.

The Supreme Court's McNally ruling in June offered an excellent opportunity for Mr. Mandel and his co-defendants to press ahead in their persistent mission for vindication even though all of them had already served their time in prison. They petitioned the U.S. District Court in August to set aside their convictions.

Defense lawyers argued that the District Court judge erred when he allowed the jury to consider what the defense called an "overextension" of the mail fraud statute. They said the "intangible rights" concept was the "essence" of the government's case, and prosecutors never showed any economic loss to citizens or the government.

The mistake, the lawyers said, amounts to a complete miscarriage of justice.

Mandel opinion

In the opinion issued yesterday by Judge Smalkin in the case involving former co-defendants:

The Supreme Court interpreted the law not making punishable schemes that deprive the public right to honest and impartial government.

It is indisputably settled that the federal government may make criminal, nor has it ever made it so in furtherance of schemes or activities of non-property rights. . . . In plain language, it was not prohibited . . . it was not a crime.

It is the effect that a Supreme Court decision interpreting a mail fraud statute as not reaching a particular activity is fully retroactive.

It is to good and honest government that a criminal scheme to defraud under the mail statute is similarly clear that the jury conviction for mail fraud premised on the right of a state's citizens to honest government, explicitly disapproved in the McNally decision, explicitly disapproved in McNally.

It is the use of the mails to defraud in intangible, non-monetary rights — made criminal by federal statute.

It is the requisite "intangible right" obviously could not be established fraud. . . .

It is the ownership of Marlboro shares and the arrangements certainly showed that the defendants were dishonest, involving Maryland's personal and politically closest to the defendants. But, however strong the evidence, the jury was told it could convict a defendant to a federal crime.

It is that there is nothing to do with the penalty in any moral sense. The people of Maryland have and have always had a government. A jury of 12 citizens doubt that the petitioners had denied that right. This conduct, however reprehensible, cannot sustain a judgment of guilty of federal crimes. A finding of petitioners' guilt or innocence, . . . must

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Sept. 17, 1979: U.S. prosecutors urge the appeals court to reject Mr. Mandel's motions for another appellate review.

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Aug. 28, 1981: U.S. Magistrate Robert L. Crongey Jr., of Pensacola, Fla., issues writ of habeas corpus freeing Harry Rodgers from federal prison.

Oct. 14, 1981: Mandel lawyers seek presidential commutation, file papers with U.S. Department of Justice.

Oct. 20, 1981: Mandel lawyers file habeas corpus petition with Florida magistrate, raising the same arguments as did petition of Harry Rodgers.

Nov. 30, 1981: Mr. Hess is released from federal prison camp, Montgomery, Ala., to Baltimore halfway house.

Dec. 3, 1981: President Reagan commutes Mandel and Hess sentences.

Dec. 4, 1981: Mr. Mandel is released from Eglin.

Oct. 28, 1982: Mr. Mandel is disbarred by the Maryland Court of Appeals.

October 1983: Judge Elsbeth L. Bothe, in Baltimore Circuit Court, dismisses \$15 million suit by heirs of the owners of Marlboro Race Track charging Mr. Mandel and seven others with fraud in the 1971 sale of the defunct track.

Feb. 3, 1986: Court of Appeals orders new hearing in suit by Marlboro Race Track heirs. No trial has yet been scheduled.

January 1987: Mr. Mandel petitions the Court of Appeals for reinstatement to the bar and applies to the Justice Department for a full pardon.

June 24, 1987: Supreme Court's McNally decision holds that the federal mail fraud statute does not make punishable schemes to defraud citizens of the intangible right to honest and impartial state government.

July 11, 1987: Judge Robert Love Taylor, 88, Mandel trial judge, dies in a Knoxville, Tenn., nursing home.

Aug. 13, 1987: Mr. Mandel and co-defendants cite the McNally decision in appealing to overturn their convictions.

Nov. 12, 1987: U.S. District Judge Frederic N. Smalkin orders the verdicts and sentences vacated for Mr. Mandel and his five co-defendants based on the McNally decision. Gives the U.S. government 90 days to return their fines. U.S. Attorney Breckinridge L. Wilcox says he will appeal to the 4th U.S. Circuit Court of Appeals.

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There is persuasive authority to the effect that a Supreme Court decision construing the mail fraud statute as not reaching a particular scheme to defraud is fully retroactive.

It is clear that intangible rights to good and honest government may not be the target of a criminal scheme to defraud under the federal mail fraud statute. . . . It is similarly clear that the jury charge in *Mandel* permitted conviction for mail fraud premised on a deprivation of intangible rights, i.e., the right of a state's citizens to honest and faithful government, explicitly disapproved in *McNally*, and the right of public officials to receive accurate information material to a decision, implicitly disapproved in *McNally*.

Petitioners thus were convicted of using the mails to defraud citizens and public officials of intangible, non-monetary rights — conduct which has never been made criminal by federal statute.

Because there was no punishable mail fraud, the requisite RICO "pattern of racketeering activity" obviously could not be established by the alleged acts of mail fraud. . . .

The evidence of concealment of ownership of Marlboro shares and of Mandel's secret financial arrangements certainly showed that something fishy, and perhaps dishonest, involving Maryland's governor and some of those personally and politically closest to him was going on. Mandel might well have been bribed. 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.

Court's action on these petitions has nothing to do with the petitioners' guilt or innocence, in any moral sense. The people of Maryland, as a matter of natural law, have and have always had an inalienable right to good government. A jury of 12 citizens found beyond a reasonable doubt that the petitioners had deprived all the citizens of Maryland of that right. This conduct, however, for reasons amply set forth above, cannot sustain a judgment that the defendants were guilty of federal crimes. A final answer to the question of petitioners' guilt or innocence. . . . must await the judgment of history.

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July 2, 1980: After Mandel and two co-defendants are released from the Parole Commission release.

July 19, 1980: A federal damage suit against three stockholders in a simultaneous state trial.

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Nov. 19, 1980: Mr. Mandel's petition for full review decision denied.

Nov. 21, 1980: Mr. Mandel is released from health.

Dec. 12, 1980: Full U.S. Supreme Court decision by per curiam.

Feb. 27, 1981: Mr. Mandel is sent to work in Arundel County.

March 5, 1981: U.S. Supreme Court denies Mr. Mandel's work release petition.

Aug. 28, 1981: U.S. Supreme Court denies Mr. Mandel's habeas corpus petition.

Oct. 14, 1981: Mandel receives commutation, file pending in the Department of Justice.

Oct. 20, 1981: Mandel's petition with Federal Circuit Court of Appeals same arguments as before.

Nov. 30, 1981: Mr. Mandel is sent to prison camp, Moliere, halfway house.

Dec. 3, 1981: President Reagan commutes Mandel and Hess sentences.

Dec. 4, 1981: Mr. Mandel is released from prison.

Oct. 28, 1982: Mr. Mandel's appeal to the Maryland Court of Appeals is denied.

October 1983: Judge Taylor's decision is affirmed by the 4th Circuit Court of Appeals.

Feb. 3, 1986: Court of Appeals hearing in suit by Mandel for \$1 million. No trial has yet been held.

January 1987: Mr. Mandel's appeal to the Justice Department is denied.

June 24, 1987: Supreme Court decision holds that the government does not make punishment of the intangible right to honest and impartial state government.

July 11, 1987: Judge Taylor trial judge, sentenced to nursing home.

Aug. 13, 1987: Mr. Mandel's appeal to the Supreme Court is denied.

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Nov. 12, 1987: U.S. Supreme Court orders the government to pay \$1 million to Mr. Mandel. Attorney Breckinridge appeals to the 4th U.S. Circuit Court of Appeals.