

Mandel Case Prosecutors Ask Selves: Now What?

By Sandra Saperstein
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Now that the political corruption conviction of Maryland Gov. Marvin Mandel has been overturned, the complex and sensitive decision of what to do next rests with a large number of legal minds in a long Justice Department chain of command.

First in the chain are Russell T. Baker Jr., the U.S. attorney for Maryland, and two of the lawyers who actually prosecuted the Mandel case, Barnett D. Skolnik and Daniel J. Hurson, who must decide what course to take following last Thursday's decision by a 4th U.S. Circuit Court of Appeals panel.

Though all three have refused to comment on what options they are pursuing, a rehearing before the full 4th Circuit Court is considered the most likely avenue to fight the reversal.

If Baker were to formally recommend seeking such an *en banc* (full court) hearing, several lawyers from the Justice Department's criminal division and its appellate section would then study the majority decision of the three-judge panel and the dissenting opinion written by Judge John D. Butzner.

Both Baker's and the criminal division's recommendations would then go to the office of the solicitor general, which is part of the Justice Department. Two lawyers there would study the case and make a recommendation to Solicitor General Wade H. McCree Jr., who would have the final say, according to Deputy Solicitor General Andrew Frey.

"It sounds like a lot of red tape, but we find that it is a desirable and useful process," Frey said in describing the routine chain that such decisions follow.

The solicitor general, whose office supervises all government litigation before the U.S. Supreme Court, becomes involved partly because "we do not want to ask an *en banc* court to take a position we couldn't ultimately

defend in the Supreme Court," according to Frey.

Many of the attorneys who ultimately will be involved in the decision have not yet read the 123-page opinion in which the 4th Circuit panel ruled that errors by trial judge Robert L. Taylor of Knoxville in the Mandel case were serious enough to invalidate the mail fraud and racketeering convictions of the governor and five codefendants.

Among the other options open to the government include asking the U.S. Supreme court to hear an appeal, seeking a retrial, or dropping the charges entirely.

But lawyers familiar with the decision-making process say that, as a rule, prosecutors would fully pursue the first option of seeking a 4th Circuit rehearing before considering the other avenues.

One important factor in their decision is likely to be consideration of the persuasiveness of the dissenting opinion of Judge Butzner, who disagreed with H. Emory Widener Jr. and Donald Stuart Russell, the two judges who voted to overturn the convictions.

The government has "a leg up if it's a strong dissent," said one lawyer familiar with the appeals process. "A strong dissent suggests that the majority [opinion] could be at odds with prevailing decisions of the 4th Circuit, but . . . it is by no means a sure thing," this lawyer said.

One judge on the 4th Circuit has disqualified himself from considering the Mandel case, so any government petition for a rehearing by the full court would require a favorable vote by four of the remaining six judges.

Attorneys familiar with the court said it accepts few petitions for rehearing by the full court.

The Justice Department currently is facing a Jan. 25 deadline for seeking a rehearing, but several lawyers said the court is liberal in granting extensions, particularly in cases of such complexity.