

Eva Reich, ND.

**United States Court of Appeals
FOR THE FIRST CIRCUIT**

No. 5160

THE WILHELM REICH FOUNDATION, a Maine Corporation, WILHELM REICH, and MICHAEL SILVERT,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

**BRIEF FOR APPELLANT
THE WILHELM REICH FOUNDATION**

CHARLES HAYDON
Attorney for Appellant
The Wilhelm Reich Foundation
52 Broadway
New York 4, New York

INDEX

	PAGE
Statement of Questions Involved	1
Statement of the Case	2
The Contempt Proceeding	2
The Charge of Fraud	3
The Federal Rule of Criminal Procedure	5
Point I—The District Court erred in preventing appellants from showing that the injunction was obtained by a fraud committed on the Court.....	6
Conclusion	11

Table of Cases

Commonwealth of Pennsylvania ex rel. Herman v. Claudy, 350 U. S. 116, 76 S. Ct. 223	6
Howat v. Kansas, 258 U. S. 181, 42 S. Ct. 277.....	10
Kvos v. Assoc. Press, 299 U. S. 269	10
Mooney v. Holohan, 294 U. S. 103	6
Petroleum Exploration Co. v. Public Service Comm. of Kentucky, 58 S. Ct. 834, 304 U. S. 209, 1938....	7
Robinson v. Anderson, 121 U. S. 522	9
United States v. Ragen, 86 F. Supp. 382 (D. C. Ill.)....	8
United States v. Saunders, 124 F. 124 (8th Cir.).....	9
U. S. ex rel. Thomas v. Keokuk, 6 Wall 518, 18 L. Ed. 918	10
U. S. v. U. M. W. A. 330 U. S. 258, 67 S. Ct. 677.....	10

Statutes

	PAGE
Federal Rules of Criminal Procedure	5
Rule 12(b)(2)	5
(b)(4)	5
Rule 55(b)(2)	7
21 United States Code Sect. 332	8
Sect. 331	8
Food, Drug and Cosmetics Law	12

Other Authorities

Esquire Magazine, October, 1956, p. 127—Aldous Huxley	11
The History of a Crime Against the Food Law, Harvey Wiley	12

United States Court of Appeals FOR THE FIRST CIRCUIT

No. 5160

THE WILHELM REICH FOUNDATION, a Maine Cor-
poration, WILHELM REICH, and MICHAEL SILVERT,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT THE WILHELM REICH FOUNDATION

Statement of Questions Involved

1. Whether a default decree of injunction, obtained through the fraud of public officials committed upon a U. S. District Court, may be enforced by contempt proceedings.

2. Whether a contemnor may attack a default decree in contempt proceedings for violation of the decree by showing it was obtained through the fraud of public officials as plaintiffs.

3. Whether fraudulent concealment and suppression of evidence from a District Court by public officials vitiate a default decree of injunction in a civil suit brought by those officials in their official capacity.

Statement of the Case

This is an appeal from a judgment of conviction of contempt of court entered on May 25, 1956 in the U. S. District Court for the District of Maine, Southern Division. The appellants were found guilty of contempt of court and the Wilhelm Reich Foundation, the appellant herein, was ordered to pay a fine of \$10,000. Execution has been stayed pending the appeal.

The Contempt Proceeding

The amended information upon which the proceeding was based contains two main categories of charges: (1) That the named defendants failed to comply with an injunction entered in the District Court on March 19, 1954; (2) that the three appellants acted in concert and violated the injunction.

The injunction itself was entered when the Court declared the defendants named therein in default, and when it was made to appear to the Court

"* * * that the defendant, (sic), unless enjoined therefrom, will continue to introduce or cause to be introduced or deliver or cause to be delivered into interstate commerce orgone energy accumulators, devices within the meaning of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. 301 et seq. which are misbranded and adulterated, and in violation of 21 U. S. C. 331 (a) and (k); and the Court having been fully advised in the premises; * * *." (Rec. App. Vol. IV, page 67a)

The appellants have charged and presently claim that the advice which the Court received was fraudulent.

As a result of the fraudulent advice received by the District Court, it entered an injunction which ordered the

defendants to return accumulators, to destroy them, to destroy books, to withhold other books, and it prevented the defendants from giving out any information concerning orgone energy accumulators or their use. It required further that the affirmative acts of the defendants be done under the supervision of representatives of the Food and Drug Administration.

The first charge of contempt is based upon these decretal paragraphs which go far beyond the complaint. The second is also defective in that there was no proof that what was shipped was either misbranded or adulterated.

The Charge of Fraud

The appellant Wilhelm Reich Foundation has elected to confine the arguments in this brief to the proposition that when public officials commit fraud upon a District Court in the obtaining of a default decree in a civil action, that fraud vitiates the decree, and all proceedings thereafter based upon the decree are a nullity.

The appellants claim that Judge Clifford, who signed and entered the default decree, was "fully advised" either by way of the allegations of the complaint or by independent proof. The record of proceedings below is barren of any independent proof or investigation, and the Court below must, therefore, have relied solely upon the allegations of the complaint.

The appellants claim that the complaint is based upon allegations which are false and were known by the prosecuting officials to be false when filed by them and when they knew that Judge Clifford was going to rely upon them. As Judge Clifford saw it,

"The complaint alleged in general that the said defendants were manufacturing and introducing into interstate commerce certain devices referred to by them as orgone energy accumulators, and were repre-

senting in their labelling that such devices were therapeutic agents which were beneficial in the cure, mitigation, treatment, and prevention of innumerable diseases and conditions, including such serious and chronic ailments as cancer, anemia, arteriosclerosis, brain tumors, diabetes, gastric ulcers, Buerger's Disease, and leukemia. It was further alleged that such devices were not effective in the treatment of such diseases and conditions and that, therefore, they were misbranded within the meaning of 21 U. S. C. 352 (a); it was also alleged that they were adulterated within the meaning of 21 U. S. C. 351 (c) in that their strength differed from, and their quality fell below, that which they were purported and represented to possess." (17 F. R. D. 96)

The "representations" which the complaint contained were purportedly encompassed within the various books, articles and other written material therein mentioned. The prosecution has also stated in releases to newspapers that experiments were conducted which proved the "representations" to be false.

The appellants have charged, and have been prevented from proving, that the prosecution deliberately suppressed evidence, took matter out of context to change its meaning, and fraudulently concealed from the Court evidence in the possession of the prosecution, all of which would have demonstrated to the District Court that there was no foundation for the complaint.

The record of proceedings shows that on October 18, 1955, the appellants moved the District Court, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, to dismiss the citation for contempt on the ground that the prosecution had fraudulently suppressed evidence which would have proved that the "representations" were matters of legitimate scientific inquiry and opinion and that the District Court had no jurisdiction of the subject matter of the action.

Judge Clifford refused to take testimony at which the appellants could have proved their charges and denied the motion to dismiss.

Again, at the trial itself, the Court prevented the development of such evidence by the appellants when it ruled at virtually the outset of the trial:

"I am not interested in anything that took place prior to the issuance of the injunction." (*T. R. p. 7)

When the witness Berman was asked what kind of effect the accumulator had upon him the court struck his answer that it had a good effect (T. R. p. 45). Later, when the witness Bowker was asked whether the accumulator worked, the court ruled:

"We are not interested in that." (T. R. p. 66)

The appellants urge that the denial of a hearing on their motion to dismiss and the rulings of the Court below deprived them of the opportunity to show that the entire decree was part of a fraudulent conspiracy, and that they were thus deprived of substantial rights and convicted thereby without due process of law.

The Federal Rule of Criminal Procedure

The pertinent portions of Rule 12 of the Federal Rules of Criminal Procedure follow:

subdivision (b) (2): "Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

subdivision (b) (4): "A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred

* Trial Record. Record Appendix, Vol. II.

for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct."

POINT I

The District Court erred in preventing appellants from showing that the injunction was obtained by a fraud committed on the Court.

Where a judgment or a conviction has been obtained by the suppression or falsification of evidence by public officials, it has been the universal rule that such a judgment or conviction is a nullity and will be set aside. Such suppression or falsification nullifies the ensuing judicial process, and that process becomes a lack of due process. In a long series of decisions from *Mooney v. Holohan*, 294 U. S. 103, to *Commonwealth of Pennsylvania ex rel. Herman v. Claudy*, 350 U. S. 116, 76 S. Ct. 223, decided January 9, 1956, the Supreme Court has consistently reaffirmed the principle that judgments and sentences which rest upon a violation of fundamental constitutional rights by fraud or suppression of evidence are subject to collateral attack. In *Mooney v. Holohan*, *supra*, at page 112, the court held:

"That requirement [due process of law], in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. *Herbert v. Louisiana*, 272 U. S. 312, 316, 317, 47 S. Ct. 103, 71 L.Ed.

270, 48 A.L.R. 1102. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."

The injunction itself was obtained in an action in which a default judgment could have been entered only by the court, and not by application to the Clerk (*Fed. Rule of Civil Procedure* 55 (b) (2)). The reason for the rule requiring application to the court is that whether or not equitable relief, such as was sought here, will be granted in any case always rests in the sound, judicial discretion of the court (*Petroleum Exploration Co. v. Public Service Comm. of Kentucky*, 58 S. Ct. 834, 304 U. S. 209, 1938).

Judge Clifford recognized these requirements when he signed the decree only after he said the court had been fully advised. Whether the court relied for its advice upon the allegations of the complaint alone or upon independent proof, of which the record is barren, the appellants contend that the court was deliberately and willfully misled by the prosecution.

In the case of the complaint, evidence was deliberately withheld which would have shown the allegations to be false; if it were independent proof, the appellants claim it was manufactured. For appellants contend that in none of the literature, read in context, do there appear any of the so-called false claims of adulteration or misbranding. Such misleading by the prosecution of the court nullifies the very decree the appellants were found guilty of vio-

lating, and the appellants were erroneously denied the opportunity to prove their charges. Had they been given the opportunity and substantiated their charges, the entire matter would have been dismissed. In *United States v. Ragen*, 86 F. Supp. 382 (D.C. Ill.), District Judge Igoe held:

"A prosecutor is supposed to be an impartial representative of public justice. * * * A society cannot suppress lawlessness by an accused through the means of lawlessness of the prosecution. A society cannot inspire respect for the law by withholding its protection from those accused of crimes. It was and is the prosecuting attorney's duty to assist in giving a fair trial to a defendant. *Read v. United States*, 8 Cir., 42 Fed. 636; *Berger v. United States*, 295 U. S. 78, 55 S. Ct. 629, 79 L.Ed. 1314. A prosecutor must, to be fair, not only use the evidence against the criminal, but must not willingly ignore that which is in an accused's favor. It is repugnant to the concept of due process that a prosecutor introduce everything in his favor and ignore anything which may excuse the accused for the crime with which he is charged."

* * *

"Corruption is an act of an official or fiduciary person who wrongfully acts contrary to duty and to the rights of others. *State v. Shipman*, 202 N. C. 518, 163 S. E. 657, 669. Its effect vitiates the basic integrity and purity negating that which is vital to the due course of justice."

The District Court had the power, under 21 U. S. C. section 332, to enjoin only such activity as fell within the prohibitions of 21 U. S. C. section 331, except paragraphs (e), (f) and (h) - (j). If the allegations were not true and there was no falsity, adulteration or misbranding on the part of the appellants, the court had no power or juris-

diction to enter the decree. Therefore, when it was apprised of appellants' charges, the District Court should have ordered testimony to determine whether " * * * they (the jurisdictional allegations) were evidently made 'for the purpose of creating a case' cognizable by the Circuit Court, when none in fact existed" (Chief Justice Waite in *Robinson v. Anderson*, 121 U. S. 522, 527).

It is no defense on the part of the prosecution to the charge of suppression of evidence and fraud that the defendants did not appear to contest the entry of the decree. Such an argument might be made by a private litigant, but certainly cannot be set up by public officials. In *United States v. Saunders*, 124 F. 124 (8th Cir.), Circuit Judge Sanborn stated at page 126:

"Whatever public officials are empowered to do for the benefit of private citizens, the law makes it their duty to perform whenever public interest or individual rights call for the performance of that duty. *Supervisors v. United States*, 4 Wall 435, 446, 18 L. Ed. 419; *City of Little Rock v. United States*, 103 Fed. 418, 424."

The public officials who prosecuted the action for a civil injunction were required not to impose upon the court by suppression of evidence and bad faith.

This rule of adhering to fair dealing and lack of fraud on the part of public officials has been applied mainly in criminal cases. But we have been able to find no rule which prevents prosecuting officials from committing fraud in criminal cases but permits them to defraud a District Court in the prosecution of a civil cause. Quite the contrary is true, especially in a proceeding which interferes, as this one does, with the pursuit of their profession by physicians.

"A person's business, profession or occupation is at the same time 'property' within the meaning of the

constitutional provision as to due process of law, and is also included in the right to liberty and the pursuit of happiness (*Butcher's Union Slaughterhouse Co. v. Crescent City Stock Landing Co.*, 4 S. Ct. 652)." (*People v. Love*, 298 Ill. 304, 310)

The appellants in the case at bar and the defendants in the main action had the absolute right to rely on their respect for American institutions and their knowledge that the prosecutors could not honestly prove the allegations of the complaint. They had the absolute right to rely on the cloak of purity which surrounds public officials and the presumption they will perform their duty honestly.

When that cloak has been used to defraud a court for the purpose of making it seem it has jurisdiction in a case where none exists, the court should set the entire proceeding aside under Federal Rule of Criminal Procedure 12.

It has been established by an unbroken line of authority starting with *U. S. ex rel. Thomas v. Keokuk*, 6 Wall 518, 18 L. Ed. 918, that the only types of orders which may not be so attacked for lack of jurisdiction are temporary restraining orders such as appeared in the famous United Mine Workers case (*U. S. v. U. M. W. A.*, 330 U. S. 258, 67 S. Ct. 677) where the court sought to maintain the status quo while investigating the constitutionality of an act of the legislature; and orders made pursuant to an unconstitutional statute prior to the declaration of its unconstitutionality, such as appeared in *Howat v. Kansas*, 258 U. S. 181, 42 S. Ct. 277.

The rationale of these cases rests on the presumption of constitutionality that attends the solemn and awful acts of the representatives of the people in passing laws. No such presumption exists with respect to federal courts where the burden rests upon the party alleging jurisdiction to prove it (*Kvos v. Assoc. Press*, 299 U. S. 269). In the first instance, the court whose jurisdiction is attacked for fraud upon it or for any other cause, must, itself, make

the inquiry and determination. The question is not whether the Court decided rightly or wrongly, but whether it ever became the duty of the court to decide at all, and the opportunity to demonstrate that it never became the duty of the court to decide was denied to the appellants.

Conclusion

An investigation of the reason for the fraud that was committed upon the court would require analysis of sociological and psychological factors that may not properly fall within the province of a brief. However, in addition to the existence of any willful desire to accomplish unmentioned ends on the part of the prosecution, as good an explanation as may be found anywhere has been expressed by Aldous Huxley, well-known author, in the magazine, *Esquire*, October, 1956, at pages 127 and 128:

"As Hobbes has well observed, if it were for the profit of a governing body that the three angles of a triangle should not be equal to two right angles, the doctrine that they were would, by that body, inevitably be denounced as false and pernicious. The most curious examples of this truth have been found in the history of medicine. This, on the one hand, is nothing more than a history of variations and, on the other, a still more wonderful history of how every successive variation has, by medical bodies, been first furiously denounced and then bigotedly adopted.' So wrote an older contemporary of the persecuted mesmerists, the Scottish philosopher and essayist, Sir William Hamilton (who, like every intelligent man of the period outside the medical profession, took a lively interest in a phenomena of hypnotism). It should be added that the 'profit' of a professional body is not to be measured exclusively in terms of money and power, or even of prestige. There are vested interests not only in the

fields of economics and social position, but also in the field of pure ideas. That a beautiful and genuinely antique theory should be ruined by some new, coarse, essentially vulgar fact of mere observation seems quite intolerable to a mind brought up in a proper reverence for words and consecrated notions. And it goes without saying that, if the threat to a beloved theory should at the same time be a threat to personal reputation, this resentment will be raised to the pitch of outraged disapproval and a burning, righteous indignation. This was clearly recognized by one of the early historians of science, John Playfair, who noted that new ideas, new observations and new methods 'must often change the relative place of men engaged in scientific pursuits, and must oblige many, after descending from the stations they formerly occupied, to take a lower place in the scale of intellectual improvement. The enmity of such men, if they be not animated by a spirit of real candor and the love of truth, is likely to be directed against the methods, observations and ideas by which their vanity is mortified and their importance lessened.' "

It is no wonder then that the history of the administration of the Food, Drug and Cosmetics Law has been filled with perversions of its purpose (*The History of a Crime Against the Food Law*, Harvey Wiley, M.D., former Chief of the Bureau of Chemistry of the F. D. A., reprinted by The Lee Foundation for Nutritional Research, Milwaukee, Wisconsin).

The judgment of conviction should be reversed, the sentence vacated and the decree of injunction vacated.

Respectfully submitted,

CHARLES HAYDON
Attorney for Appellant
The Wilhelm Reich Foundation
52 Broadway
New York 4, New York